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Copyright Law: A Work of Parody as a "Fair Use"

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SUMMARY

The United States Supreme Court recently held that a rap music group's parody of the copyrighted popular song--*Oh, Pretty Woman*--may be a fair use of the copyrighted work.[1] In its unanimous ruling, the Court reversed the decision of the U.S. Court of Appeals for the Sixth Circuit that had found that the unauthorized commercial use of the work was presumptively an unfair use of the copyrighted work. In reversing this holding, the Court determined that the appellate court had focused too intently on the unauthorized commercial use of the copyrighted work and had not adequately considered the other elements of the fair use exception. The Court reversed and remanded the case back to the appellate court for further consideration of the issue of fair use.

THE FAIR USE EXCEPTION IN COPYRIGHT LAW

The Copyright Act of 1976 ("Act")[2] sets out the exclusive rights of the copyright owner, along with certain exceptions to these rights. Among the exclusive rights of the copyright owner is the right to create a derivative work based upon his/her copyrighted work.[3] The term or concept of parody is not specifically defined by the copyright statute or by regulations; rather, it has been judicially defined.[4]

One of the most important exceptions to the copyright owner's exclusive rights in the copyrighted work is the fair use exception which allows the

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1 *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164 (1994).

2 Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2541, codified at 17 U.S.C. §§ 101, *et seq.* (1988).

3 17 U.S.C. § 103. A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement,...in which a work may be recast, transformed, or adapted.... 17 U.S.C. § 101. *See also* § 106.

4 Discussed *infra*.

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unauthorized use of a copyrighted work under certain circumstances.[5] The fair use exception is frequently utilized as a defense against claims of copyright infringement. In enacting the fair use exception, Congress did not create a specific test for determining whether a particular unauthorized use was to be construed as a fair use. Rather, Congress took statutory recognition of a list of four factors or variables to which the courts are to look in making their fair use determinations:

> 1) the purpose and character of the use, including whether such use is of a commerical nature or is for non-profit educational purposes;
> 2) the nature of the copyrighted work;
> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4) the effect of the use upon the potential market and value of the copyrighted work.[6]

Congress apparently realized that these factors were "in no case definitive or determinative" but rather "provided some guage [sic] for balancing equities."[7]

In examining infringement actions and the fair use exception or defense, courts usually apply each of the four fair use factors to the situation under scrutiny, and then make their determination of whether the use was a "fair use" at the conclusion of their analysis.[8] Through the years, the courts have grappled with the application of the fair use exception in various circumstances, and have given varying weight to the fair use factors in different judicial determinations.[9] Several examples demonstrate how some courts have interpreted the fair use factors. In considering the first factor, the purpose and

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[5] Prior to the codification of the "fair use" exception in the 1976 copyright act, the fair use concept was upheld in a common law copyright action in *Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 270 N.Y.S.2d 51 (Sup.Ct. 1967), *aff'd on other grounds* 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968).

[6] 17 U.S.C. § 107.

[7] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976).

[8] One who violates the rights of the copyright owner is considered to be an infringer (17 U.S.C. § 501(a)(1988)). The copyright owner may institute an infringement action against the alleged infringer (17 U.S.C. § 501(b)(1988)). A court may issue an injunction against the infringer (17 U.S.C. § 502(1988)). An infringer may have to pay actual damages and profits (17 U.S.C. § 504(b)(1988)); or the copyright owner may elect statutory damages (17 U.S.C. § 504(c)(1988)). Legal fees and other expenses may be recovered by the owner (17 U.S.C. § 505 (1988)).

[9] *See* CRS Report No. 89-30A, *Videocassette Recorders: Legal Analysis of Home Use*, and CRS Report No. 90-304A, *Copyright Law: Fair Use of Unpublished Material*.

character of the work, courts have not always held that use "of a commerical nature" negates a fair use finding,[10] nor does a "nonprofit educational" purpose mandate a finding of fair use.[11] A defense of fair use on the basis of the first criteria will more often be recognized where the work of the defendant is for educational, scientific, or historical purposes.[12] Evaluation of the second factor, the nature of the copyrighted work, must be based upon the facts and circumstances of each particular case. Courts have interpreted the scope of the fair use doctrine narrowly regarding unpublished works which are held confidential by their authors.[13] In consideration of the amount and the substantiality of the portion of the work used, courts have looked at the quantitative factor, how much of the work is used,[14] and also the qualitative factor, e.g., the "heart" or essence of the work which is used.[15] The fair use doctrine is usually not considered applicable when the copying is nearly a complete copy of the copyrighted work, or almost verbatim.[16] Courts have examined the defendant's alleged conduct to see whether it poses a substantially adverse effect on the potential market for, or the value of the plaintiff's work.[17]

JUDICIAL BACKGROUND

In 1964 Roy Orbison wrote the hit song, *Oh, Pretty Woman*. Acuff-Rose, Inc. currently owns the copyright to this work and receives income from the licensing of derivative works. 2 Live Crew, a rap music group, wrote and recorded a satirical version of the song entitled *Pretty Woman* and endeavored to obtain a license from Acuff-Rose. Acuff-Rose declined to issue a license and brought an infringement action against group member Luther Campbell and

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10 *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 593 (1985)(Brennan, J. dissenting); *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

11 *Marcus v. Crowley*, 695 F.2d 2272 (9th Cir. 1983).

12 *See Italian Book Corp. v. American Broadcasting Cos.*, 458 F.Supp. 65 (S.D.N.Y. 1978).

13 *Salinger v. Random House, Inc.*, 822 F.2d 90 (2d Cir. 1987), *reh'g denied*, 818 F.2d (2d Cir. 1987).

14 *Consumers Union v. U.S., Inc. v. General Signal Corps.*, 724 F.2d 1044 (2d Cir. 1983).

15 *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

16 *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1987).

17 *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

others.[18] Acuff-Rose charged 2 Live Crew with copying portions of the song. 2 Live Crew's motion for summary judgment was granted by the district court on the ground that the rap version was a fair use of the copyrighted work.[19]

On appeal, the Sixth Circuit Court of Appeals reversed the finding of fair use.[20] After applying the fair use factors to the instant situation, the court determined that the commercial nature of the use precluded a finding of fair use in these circumstances. In essence, the court concluded that the unauthorized use of a copyrighted work chiefly for commercial purposes was presumptively an unfair use and hence, an infringement. The Sixth Circuit based most of its holding on the *Sony*[21] and the *Harper and Row*[22] decisions. 2 Live Crew appealed the decision. The Supreme Court granted review, which was limited to the following issue: whether the petitioners' commerical parody was a "fair use" within the meaning of 17 U.S.C. Section 107.

SUPREME COURT DETERMINATION

The Court's unanimous opinion was authored by Justice Souter.[23] Turning to the copyright law background, Justice Souter scrutinized the fair use defense, beginning at the constitutionally mandated purpose of copyright to promote learning.[24] He next examined the legislative background and the specific text of the fair use statute, emphasizing that the "task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[25] The opinion gives specific guidance for the application of the four fair use factors to particular situations.

> Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.[26]

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[18] Referred to by the Court, the lower courts, and in this report collectively as "2 Live Crew."

[19] 754 F.Supp. 1150 (M.D. Tenn. 1991).

[20] 972 F.2d 1429 (6th Cir. 1992).

[21] *Sony Corp. of America v. Universal City Studios*, 464 U.S. 17 (1984). *See* note 9.

[22] 471 U.S. 539 (1985). *See* note 9.

[23] A concurring opinion was written by Justice Kennedy.

[24] 114 S.Ct. 1164, 1169 (1994).

[25] *Id.* at 1170.

[26] *Id.* at 1170-1171.

Following this model, the Court turned its attention to the factors, focusing the majority of its inquiry on the first factor in the fair use inquiry: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. In effect, the Court determined that the central issue of the investigation was to determine whether the new work superseded the original work, or whether the new work added new material so as to change the original work with new expression, meaning, or message.[27] Further developing this analysis, the Court examined the issue of what extent the work is "transformative." While it is not absolutely necessary for a work to be "transformative" in order to have a fair use finding, the Court determined that the more transformative the new work is, the less weight will be given to the other fair use factors--such as commercialism--that would impede a finding of fair use.

The Court examined the judicial precedents concerning the concept of parody and observed that parody may be a transformative use and could qualify as a fair use.[28] In its analysis, the Court examined the elements that constitute parody and concluded that: "parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."[29] As determined by the Court, the threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. The Court determined that in the instant case, the parodic character of the song in question was recognizable.

Considering whether the use of the work was of a commercial nature, the Court observed that the appellate court erred in giving nearly dispositive weight to the commercial nature of the parody. The Court made clear that Congress intended this element to be only one of several elements which should be considered in the evaluation of a fair use case. In dismissing the appellate court's finding, the Court stated:

> If, indeed, *commerciality carried presumptive force against a finding* of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research....[30]

Examining the second fair use factor--the nature of the copyrighted work, the Court concluded that the "core" or essence of the copyrighted work had been

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27 *Id.* at 1171.

28 *Id.* at 1172-1173.

29 *Id.* at 1172.

30 *Id.* at 1174.

used. However, the Court reasoned that this factor was not necessarily dispositive, since parodies by their very nature copy publicly known works.[31]

The Court considered the third fair use factor--the amount and substantiality of the work used--in the parodied work. It observed that the humor of parody derives from the recognizable allusion to its object through distorted imitation.[32] The Court determined that the appellate court did not appreciate the need of parody to create a recognizable sight and sound. "Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."[33]

The effect of the use upon the potential market for or value of the copyrighted work was the final fair use element examined by the Court which concluded that the appellate court had erred.[34] The appellate court applied the presumption that unauthorized commerical use was presumptively an unfair use. The Court rejected this conclusion and examined other effects that a parody might have on the market for the original work. The commerical effect of the rap parody on a future non-parody rap version of the work was not considered by the court.

CONCLUSION

The Supreme Court, in its most recent analysis of the application of the fair use doctrine, considered various aspects of parody. The Court specifically reversed the appellate ruling which had in effect created a presumption that the unauthorized commercial use of a copyrighted work precluded the application of the fair use exception. The case was remanded back to the Sixth Circuit for a reapplication of the four fair use factors to the factual situation. The importance of the Court's decision is that the fair use exemption is apparently broadened, in that the unauthorized commercial use of a copyrighted work does not necessarily preclude its determination as a fair use. Congress continues to maintain a legislative interest in the fair use exception.[35]

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31 *Id.* at 1175.

32 *Id.* at 1176.

33 *Id.*

34 *Id.* at 1177.

35 *See* S. 23, 103d Cong., 1st Sess. (1993)(news monitoring as "fair use").