



The Tennessee Bar Association's special joint
newsletter for the Entertainment & Sports Law Section
and the Intellectual Property Section
December 2009 · Volume 2 · No. 1



Copyright Lessons from *Family Guy* Add Insult to Injury to Support Your Fair-Use Defense

By Andy I. Corea

The Fox Television animated comedy *Family Guy* regularly makes pop-culture references as part of its humor. In doing so, the program has attracted its share of copyright litigation. Two recent cases concerning *Family Guy* have illustrated clearly the difference between parody and satire in the context of a fair-use defense to copyright infringement. These cases make clear that in order to sustain a fair-use defense of parody, the defendant must use the borrowed material to comment on the original rather than satirizing an unrelated target.

PARODY AND SATIRE

Parody and satire are related but distinct artistic devices, each used to provide artistic and/or social criticism. These concepts are significant in copyright infringement because the satirist and the parodist often borrow from an original text for the purpose of criticism. Although often used together, the principal difference between these devices is the target of their criticism. Parody targets the text on which it is based; its focus is intramural.¹ In contrast, satire is extramural; it criticizes ideas and concepts beyond the referenced text.² To support a claim of fair use based on parody, the new work must target the original. When it fails to do so, courts will view the new work as satire and are less likely to apply the fair-use shield.

GENERAL FAIR-USE CONCEPTS

In order to fulfill its purpose “to promote the Progress of Science and useful Arts,” copyright protection in the United States has from the very beginning left open some opportunity for use of otherwise protected works.³ The concept of fair use is now explicitly codified in Section 107 of the 1976 Copyright Act, which sets out the following factors to determine fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit commercial purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as whole; and
4. the effect of the use on the potential market for or value of the copyrighted work.⁴

The fair-use test is applied on a case-by-case basis without reliance on bright-line rules to prevent stifling of creativity by the rigid application of copyright protection.⁵

THE FAMILY GUY LITIGATION

Family Guy — I Need a Jew

In *Bourne Co. v. Twentieth Century Fox*,⁶ the owner of

the copyright to the song “When You Wish upon a Star” sued the creators, producers and broadcasters of the television series *Family Guy*. In the episode titled “When You Wish upon a Weinstein,”⁷ the series protagonist, Peter Griffin, believes he can improve his disastrous finances by finding a Jew to handle his money. His beliefs, while earnest, are based completely on his ethnic stereotypes. During the episode, Peter gazes into the night sky and sings a song titled “I Need a Jew.” The song and appearance of the scene is intentionally similar to the song “When You Wish upon a Star” and its appearance in the Walt Disney movie *Pinocchio*.

The court granted the defendants’ motion for summary judgment, finding, among other things, that:

- The *Family Guy* song ridiculed the simple and naïve approach to life promoted by the song and the scene in *Pinocchio*;⁸ and
- The original song is closely associated with Walt Disney, and the *Family Guy* song made a secondary joke about Disney in light of Walt Disney’s alleged anti-Semitism.⁹

The plaintiff argued the song was satirical and that its target was bigotry and anti-Semitism in general. Ultimately, the court was convinced that *Family Guy*’s humor was directed at the song itself and, by extension, Disney. On that basis, the fair-use defense as defined in *Campbell* protected the usage.¹⁰

Family Guy — The Amazing Metrano

In contrast to *Bourne*, *Family Guy*’s fair-use defense failed in *Metrano v. Twentieth Century Fox*.¹¹ The plaintiff in *Metrano* is a comedian who performs an act titled “The Amazing Metrano” in which he portrays an underwhelming magician, humming music and making hand gestures such as bringing his hands together and apart, pretending this constitutes magic. In the DVD release “Stewie Griffin: The Untold Story,”¹² a future version of the character Stewie Griffin describes his time-traveling experiences, including visiting Jesus Christ. The screen then cuts away to a scene of Jesus performing a weak magic act to a bemused crowd, using hand gestures and humming music almost identical to those the plaintiff used in his “*Amazing Metrano*” routine. Stewie remarks that Jesus’ abilities “may have been exaggerated a bit.”

The court denied the defendants’ Motion to Dismiss, which asserted a fair-use defense. The court held that the reference made light of Jesus and his followers — not Metrano or his act. The court specifically found the following:

- “the butt of the joke ... is not Plaintiff: it is Jesus and his followers.”¹³

continued on page 4

- “It does not criticize or comment upon Plaintiff’s routine or lampoon Plaintiff by depicting him in a new or different way ... it does not hold Plaintiff’s routine up to ridicule.”¹⁴

The court determined that since the target of the humor was Christianity, there was no basis for a fair-use parody defense.

FAIR-USE ANALYSIS OF PARODY AND SATIRE

Parody and satire are treated differently under the fair-use test. Once parody is established, the entire fair-use test strongly favors the defendant.

The first element of the fair-use test turns on whether the new work merely supersedes the objects of the original creation (e.g. a copy) or instead is transformative — creating a new expression or meaning by reference to the original work.¹⁵ A parody accomplishes this transformative purpose by taking some of the original work to create a new creation that “at least in part comments on [the original] work.”¹⁶

As seen in the *Family Guy* cases, the distinction between parody and satire turns on the subject of the commentary in the new work. Comment or criticism of the original work is at the heart of parody,¹⁷ whereas satire’s target lies outside the original work.¹⁸ Parody must comment in part on the original, and it is the act of commentary on the original work that justifies taking from the original.¹⁹ As demonstrated in the opposite outcome in the two recent *Family Guy* cases, satire is afforded very little protection as fair use.²⁰ Once parody is established, however, the remaining fair-use factors immediately favor the defendant.

The second fair-use factor (nature of copyrighted work) normally favors a plaintiff who has produced a creative expression for public dissemination. This factor, however, is largely ignored in parody cases because parodies “almost invariably copy publicly known, expressive works.”²¹

Likewise, parody use renders the third fair-use factor (amount taken) largely moot. When the use at issue is a parody, the alleged infringer may take as much of the original as necessary to “conjure up at least enough of [the] original to make the object of its critical wit recognizable.”²² In fact, the parodist may take substantially all of the original work as long as it can justify that the borrowing was necessary for parodic effect.²³

Finally, once parody is established, the fourth fair-use factor (effect on market for original) strongly favors the defendant. The parody is unlikely to affect the market for the original in a cognizable way.²⁴

CONCLUSION

There is a somewhat cruel irony in the application of the fair-use defense to parody and satire. The plaintiff whose work is used by a satirist to criticize, comment or ridicule someone else has a strong case for copyright infringement. In contrast, the plaintiff whose creation is used by a parodist who comments (often negatively) on the original work or creator faces an almost insurmountable bar to relief due to the fair-use defense. The parody may be insulting to the original work, but as long as it can reasonably be perceived as providing commentary on the original, the fair-use defense will shield the alleged infringer.²⁵ **EBSIP**

ANDY I. COREA is a member of St. Onge Steward Johnston & Reens LLC in Stamford, Connecticut. His practice focuses on trademark prosecution, enforcement, litigation and licensing for clients in the United States and internationally.

NOTES

1. Linda Hutcheon, “A Theory of Parody,” Methuen (1986), 43.
2. Hutcheon, “A Theory of Parody,” Methuen (1986), 43.
3. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. I § 8 cl. 8).
4. 17 U.S.C. § 107 (1994).
5. *Campbell*, 510 U.S. at 576-77.
6. *Bourne Co. v. Twentieth Century Fox*, 602 F.Supp.2d 499 (S.D.N.Y. 2009).
7. *Family Guy* Season 3, Episode 22.
8. *Bourne*, 602 F.Supp.2d at 506-07.
9. *Id.* at 507-08.
10. See also *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962 (C.D. Cal. 2007).
11. *Metrano v. Twentieth Century Fox et al.* (CV 08-6314), Memorandum & Order 7/16/09 (C.D. Cal.) (“*Metrano*”).
12. *Stewie Griffin: The Untold Story* (DVD release date Sept. 27, 2005).
13. *Metrano* at 5 (emphasis in original).
14. *Id.* (emphasis in original).
15. *Campbell*, 510 U.S. at 579-80.
16. *Id.* at 580.
17. *Id.* at 580-81.
18. *Blanch v. Koons*, 467 F.3d 244, 267 (2d Cir. 2006).
19. *Campbell*, 510 U.S. at 579-80.
20. *Blanch*, 467 F.3d at 267; *Metrano* at 5.
21. *Campbell*, 510 U.S. at 586.
22. *Id.* at 588.
23. *Bourne*, 602 F.Supp.2d at 509-10.
24. *Campbell*, 510 U.S. at 590.
25. *Id.* at 583.