

Parody and Satire

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Parody, Satire, and You: A Quick Artist's Guide

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For Philadelphia Volunteer Lawyers for the Arts

Parody and satire are often thought of as interchangeable, but they are quite distinct legally. Parody is direct commentary on a work; satire is indirect commentary. That is, while parody copies from an original work in order to comment on that work, satire (in a legal sense) copies from an original work in order to comment on another work. When an artist copies from another work, it can sometimes land him or her in hot water, but artists are not without protection! This pamphlet will attempt to lay out the legal ideas of parody, satire, and "fair use," and how artists may defend themselves against claims of copyright infringement.

As will be discussed below, parody (but not satire) is considered a subset of "fair use," which is a defense to a claim of copyright infringement that seeks to allow reasonable use of copyrighted work by balancing the interest of the public with the interest of the copyright owner. Within the fair use defense is the parody category. To determine whether a parody is fair use, a court will typically examine four issues:

1. The Purpose and Character of the Use (e.g., Commercial v. Non-Profit)

The purpose of copyright protection is to encourage artistic progress—by giving copyright owners a limited monopoly on their works, they may reap the benefits of their hard work while also ensuring that eventually the work will reach the public domain. Once in the public domain, it will be free for anyone to use without license or fees, thus spurring further artistic creation. For many years, courts generally held that anything commercial could not claim fair use, because it inadequately furthered artistic progress. However, courts

have relaxed this rule over the years, and now even parodic works which primarily seek to make money may invoke a fair use defense.

Parody is generally transformative—it modifies the character or nature of the original work in such a way that the parody is in effect a "new" work. Parody also tends to comment on or criticize a particular work; such criticism has a valued role in our society, dating back to writers of the Revolution like Thomas Paine. Thus, parodies are protected for their contribution to public discourse (i.e., free exchange of ideas in a public setting); however, the parody must specifically refer to and "conjure up" elements of the original work such that they will be recognizable to the public. Parody works must necessarily copy the "heart" of the original work in order for the parody to be recognizable (and protectable). For example, "Weird Al" Yankovic often parodies other songs by mimicking the original's structure and lyrics, then transforming them into something new as a commentary on the original.

Keep in mind: Though "Weird Al" Yankovic's songs are parodies, and would have a fair use defense, he always tries to obtain a license to use the original song. This is because paying a few thousand dollars to obtain a license is much cheaper than the costs of defending against a copyright infringement lawsuit!

2. The Nature of the Copyrighted Work

An original work that is "informational" (like an encyclopedia or a non-fiction book) holds stronger fair use protections than a "creative" work (such as a song or painting). This is likewise true for parody works: "informational" parody works (like criticisms or reviews) hold stronger fair use protections than do purely "creative" parody works, because such

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informational works add more to the public discourse, as discussed above. For example, a parody of a television news program that in fact reports the news may hold more fair use protection than a painting that parodies another painting. Ultimately, courts engage in a three-way balancing act: between (1) the interests of the original copyright owner; (2) the interests of the parodist; and (3) the interests of the general public in having the parody work added to the public discourse.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Next, a parody work must carefully walk the fine line between copying “too much” and “not enough” of the original. For example, a song that takes the opening riffs and lyrics of another song, then changes or distorts them, or even shifts away from them altogether, is more likely to be protected than a work that takes a great deal of the original work and only changes or distorts a little of it. Successful parodies must necessarily take “the heart” of the copied work in order to “conjure up” the original. A parody that insufficiently “conjures up” the original may find itself unprotected!

For example, the famous 1991 photograph of actress Demi Moore by Annie Leibovitz was copied in 1993 by Paramount Pictures for a promotional advertisement for its upcoming movie *Naked Gun 33 1/3: The Final Insult*. The photo of Moore was entirely copied, except that Moore’s head was replaced by that of actor Leslie Nielson. Leibovitz sued for copyright infringement, but the court ruled that Paramount’s ad sufficiently parodied the original. The ad took the “heart” of the original photo, which in this case necessarily meant that nearly the entire original had to be copied in order to “conjure up” the original. Further, the ad was sufficiently transformative because Moore’s stoic mien was replaced by Nielson’s goofy smirk — commenting on the original photo’s seriousness.

Had the ad simply taken the original photo and changed Moore’s stoic expression into a goofy smile (but without actually replacing Moore’s head with Nielson’s), it is likely the court would have instead ruled that the ad took “too much” of the original. Likewise, had the ad changed Moore’s pose, or used Nielson’s body in Moore’s pose, then that might have been “not enough” copying.

Very often use is only “fair” insofar as the parody is effective: if you can make an effective parody of something, you can often get away with copying much more than “just enough” of the original. Because of this fine line, courts have leeway to make subjective determinations, and there is no way to say with certainty whether something in all cases passes the third part of the fair use test.

4. The Effect on the Potential Market for or Value of the Copyrighted Work

When a later work copies from a prior work, and negatively affects the prior work’s actual (or potential) market or value, the use may not be fair. However, parody works can be an exception to this rule, since a parody comments on or criticizes another work. This criticism is valued by society, so if the criticism lessens demand for the original work, then that is generally an acceptable result of the public discourse created by the parody work.

Satire v. Parody

Although satire, like parody, acts as a critique or comment, it is different from parody in an important way: parody is a commentary on a specific work or works, while satire is commentary on society or an institution generally, which may stand on its own without having to copy some other work. Jonathan Swift’s *A Modest Proposal* is a famous example of satire—rather than parody—because the work comments on society as a whole, rather than any person or institution, and does not require reference to any specific work in order for someone to understand it. Parody may use the fair use defense because it requires copying some other work in order to be effective. Satire does not require copying some other work in order to be effective, and so it cannot claim fair use.

For example, after the famous OJ Simpson murder trial in the 1990s, an author calling himself “Dr. Juice” published a book called *The Cat NOT in the Hat*, which documented the Simpson trial by mimicking the distinctive Dr. Seuss writing style. Although the book called itself a parody, the court disagreed and saw it as a satire. Ruling that the book infringed on Dr. Seuss’ copyrights, the court found that *The Cat NOT in the Hat* was not commenting on or criticizing the original work. Since the actual target of the book was the Simpson trial, not Dr. Seuss, taking from Dr. Seuss was unnecessary for the commentary; “Dr. Juice” could have used anyone’s writing style to comment on the trial. Therefore, the use was NOT fair.

Some Words of Warning to Parodists

- Parody is a defense to a claim of copyright infringement. A valid parody is a defense against liability, but unauthorized copying is still copyright infringement.
- When making and marketing a parody work, always be mindful of who may take offense. This does not mean anyone should self-censor, but sometimes it’s better to not pick unnecessary or risky fights!
- Copyright litigation is EXPENSIVE. Copyright can only be litigated in federal court; even a successful defense against a copyright infringement suit can cost parodists thousands of dollars (and attorney’s fees are rarely awarded to the winner).

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Seeking Legal Advice

For questions or concerns about fair use, parody, and satire—or any other legal issue—please feel free to call PVLA at (215) 790-3836, or email us at PVLAlegal@artsandbusinessphila.org. For additional resources, visit

<http://www.artsandbusinessphila.org/pvla/pvlabooks.asp>.

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