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Fair Use With Dr. Seuss

By **Tal Dickstein**
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Tal Dickstein

A client calls in a panic and sweat
It's a copyright problem, I bet!
I've borrowed from an existing work, they say
A book, a film and even a Broadway play!
But I'm not stealing their market share
No, I've created a new message out of nowhere.
And to avoid being tagged as an infringer
I've called a lawyer I know is a ringer.
Is there a defense that might get me off the hook?
Surely you read about one in your law book?
Aha, you shout! This might be fair use!
But to know for sure, let's look at some cases involving Dr. Seuss.

The famous children's books by Theodor S. Geisel, better known as Dr. Seuss, feature rhyming couplets, colorful lettering and fanciful characters. Because of their unique style and wide appeal, elements of Dr. Seuss' books have been borrowed by other authors who claim their works are a parody and therefore protected fair use. A review of these cases provides helpful guidance on how the fair use defense applies to parodies.

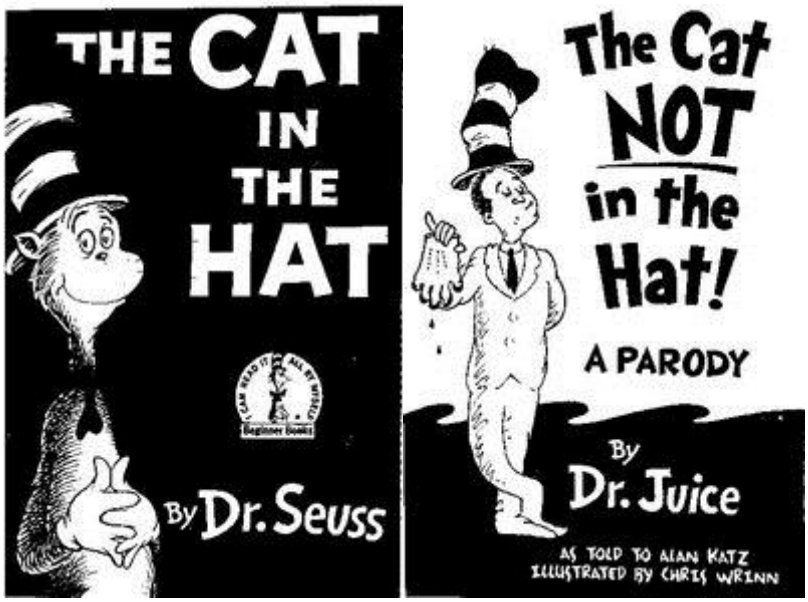
But first, some background. The fair use doctrine limits the exclusive rights of copyright owners in an effort to foster new forms of creative expression. Rather than provide a generally applicable definition, the Copyright Act lists six nonexclusive categories of fair use — criticism, comment, news reporting, teaching, scholarship and research.[1] Though parody is not one of those categories, it is recognized as a form of criticism or comment.

To help courts determine whether a particular use falls into one of those categories or should otherwise qualify as fair use, Congress set out four factors to be considered — (1) the purpose and character of the use, including whether it's a commercial use (copying from an existing work for a transformative purpose, such as commentary or criticism, weighs in favor of fair use); (2) the nature of the copyrighted work (copying from a creative work weighs against fair use); (3) the amount and substantiality of the portion used (the more of the original is used, the less likely the use will be considered fair); and (4) the effect of the use on the potential market or value of the original (usurping the existing or potential market for the original weighs against fair use).[2] In practice, however, the second and third fair use

factors are often given little weight, and the outcome frequently turns on the first and fourth factors.

The Cat NOT in the Hat!

The first Dr. Seuss case to address a fair use defense involved a book titled "The Cat NOT in the Hat! A Parody by Dr. Juice," which told the story of the O.J. Simpson double murder trial using rhymes, lettering and illustrations that mimicked Dr. Seuss' books.[3] The "Dr. Juice" book included illustrations of Simpson wearing a red and white striped stove-pipe hat and other attire reminiscent of the cat character in Dr. Seuss' "The Cat in the Hat," as well as a depiction of Simpson's friend and trial witness Kato Kaelin as the loyal elephant from Dr. Seuss' "Horton Hatches the Egg." Just as Dr. Seuss' Horton character exclaimed "And I said what I meant / An elephant's faithful one hundred per cent," the Dr. Juice book stated of Kaelin, "He said what he meant / A houseguest is faithful one hundred percent."[4]



Addressing the fair use defense, the district court first drew a distinction between parody, on the one hand, which borrows from an existing work in order to comment on that same work, and satire, on the other hand, which borrows from an existing work to comment on some other target. While both are "transformative" uses, parodies are more likely to be protected as fair use, the court explained, because the owner of an original work is unlikely to permit a use that makes fun of or ridicules his own work.[5] Moreover, the nature of parody requires that the author borrow from a particular work, while a satire can borrow from any number of existing works. Thus, without the fair use defense, most parodies would not be possible.

Turning to the works at hand, the court found that the Dr. Juice book commented directly on Dr. Seuss' "Horton Hatches the Egg," as it analogized Kato Kaelin's trial testimony in support of Simpson to Horton's act of babysitting a bird's egg, in order to criticize Dr. Seuss' "endorsement of unquestioning faithfulness" in Horton.[6] The defendants' use of Horton therefore qualified as fair use without the need to engage in an extended analysis of the four fair use factors.

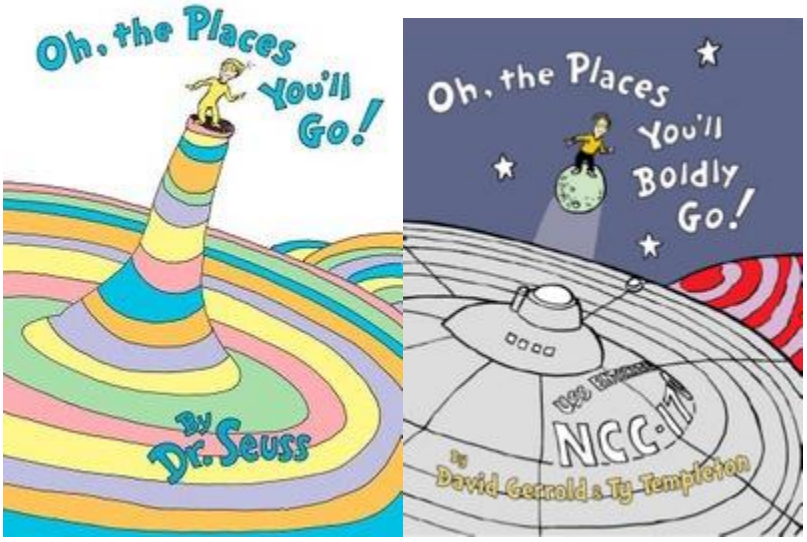
The defendants' borrowing from "The Cat in the Hat," however, was found to be satire rather than a parody, as it did not directly comment on Dr. Seuss' work. The court rejected defendants' argument that they told the story of the Simpson trial by borrowing from Dr. Seuss' cat character in order to demonstrate the limits of the "Seussian imagination."[7] While defendants' book commented on and

critiqued the Simpson trial, it did not comment on or criticize any aspect of Dr. Seuss' work. The court therefore rejected defendants' fair use defense as to their copying from "The Cat in the Hat."

On appeal, the Ninth Circuit took issue with the district court's singular focus on whether the defendants' book qualified as a parody.[8] But even applying the four fair use factors, the result was the same. The second factor was "not terribly significant," and the first, third and fourth factors were all heavily influenced by the fact that the Dr. Juice book did not comment on or criticize "The Cat in the Hat." The Ninth Circuit also faulted the defendants for not submitting evidence of the markets for each work, as fair use is an affirmative defense on which the defendants bear the burden of proof. [9]

Oh, the Places You'll Boldly Go!

More recently, elements of Dr. Seuss' "Oh, the Places You'll Go!" — which tells the story of a boy's adventure and encounters with strange characters — were combined with characters and imagery from the "Star Trek" science-fiction franchise to create a "mashup" book titled "Oh, the Places You'll Boldly Go!"[10] Even the title of "Boldly" combined the title of Dr. Seuss' book with the opening line from the original "Star Trek" television series — "to boldly go where no man has gone before."



On defendants' motion to dismiss, the court found that the first factor weighed in favor of fair use, because "Boldly" transformed Dr. Seuss' book by combining its rhyming style and striking images with elements from the "Star Trek" universe as well as other original writing and illustrations. "Boldly" did not qualify as a parody, however, because it used Dr. Seuss' illustration style and story format to convey "Star Trek" stories and tropes, not to poke fun at or ridicule Dr. Seuss' work.

The fourth factor weighed somewhat against fair use, as the court credited plaintiff's allegation that a market existed for licensing Dr. Seuss works for collaborations with other properties. But "Boldly" was unlikely to harm any such market, the court found, because it targeted people who were already familiar with both Dr. Seuss' books and the "Star Trek" universe.

With the first and fourth fair use factors pointing in opposite directions, the court rejected defendants' fair use argument, at least at the pleading stage.[11]

Who's Holiday!

The most recent case to address an alleged Dr. Seuss parody involved a comedic play titled "Who's Holiday!," which features a grown-up version of Cindy Lou Who, a naïve, kind-hearted 2-year-old character from Dr. Seuss' "How the Grinch Stole Christmas!" Dr. Seuss' work is a heart-warming story of a grumpy, mischievous character who steals Christmas presents and trees from the cheerful residents of Whoville, including Cindy Lou Who. When the Grinch overhears the Whos joyfully celebrating Christmas even without presents, the Grinch has a change of heart. He returns the presents and joins the Whos for a Christmas dinner.

"Who's Holiday!," on the other hand, is an adult-themed profanity-laced story of events that transpired after "Grinch." While waiting for guests to arrive for a holiday party, 45-year-old Cindy Lou tells the audience stories of having a sexual encounter with the Grinch at age 18, serving jail time for murdering him, being forced to put her daughter into foster care, and abusing alcohol and drugs, including a substance known as "Who Hash."[12]

Although "Who's Holiday!" recounts the original events of "Grinch," uses one of its characters, and is told in rhyming couplets reminiscent of Dr. Seuss' works, the court concluded that "Who's Holiday!" was a parody, and therefore transformative under the first fair use factor. "Who's Holiday!" "recontextualizes" Dr. Seuss' endearing, child-friendly story into a vulgar, adult-oriented play, the court explained. In doing so, the play "lampoons the Grinch by making Cindy-Lou's naivete, Who-Ville's needlessly-smiling, problem-free citizens, and Dr. Seuss' rhyming innocence, all appear ridiculous."[13]

Neither the second or third factors weighed against fair use, because a parody is permitted to make substantial use of a creative work in order to make fun of or ridicule that work. The court also noted that "Who's Holiday!" does not copy verbatim from "Grinch," and that the main character in "Grinch" does not actually appear in "Who's Holiday!"

As to the fourth factor, "Who's Holiday!" was not a market substitute for "Grinch," the court found, because Dr. Seuss' book is marketed for children, while the play was intended for adults. There was no evidence the Dr. Seuss rights holders intended to license a vulgar parody of "Grinch" that might compete with "Who's Holiday!"

The court therefore found that "Who's Holiday!" was fair use, and granted the playwright's motion for judgment on the pleadings.

Lessons Learned

The cases addressing alleged Dr. Seuss parodies provide useful guidance for rights holders, content creators and copyright practitioners.

Rights holders should attempt to license a variety of uses, including uses that combine the original content with elements from other creative properties or other original material. Not only will this bring additional licensing revenue, it can help defeat fair use defenses in the future. If a market exists for a particular use — such as a "mashup" or a use geared toward a different demographic — the fourth fair use factor will likely weigh against fair use when a party engages in a similar unauthorized use. Even considering licensing similar uses may be helpful in the fair use analysis.

Content creators who borrow from a copyrighted work and who are either unable or unwilling to obtain a license should consider whether their use will qualify as a parody, as even a substantial amount of copying may be protected as fair use if the use is found to be a parody. Merely labeling a work a parody is not enough, though. Creators must infuse their works with commentary on or criticism of the original, which can be done by poking fun at or ridiculing particular characters, settings or even themes of the original work. Creators should avoid copying verbatim from the original, and borrow only as much as is necessary to effectively parody the original.

Copyright practitioners should focus primarily on the first and fourth fair use factors when the allegedly infringing work is claimed to be a parody. It is often critical to focus on those factors at the outset of a case, as courts have shown a willingness to rule on fair use at the pleading stage. When representing an infringement plaintiff, for example, including allegations in the complaint of similar licensed uses may help avoid dismissal based on a fair use defense. Counsel for the infringement defendant, on the other hand, should point to the works themselves, and demonstrate how the allegedly infringing work comments on or criticizes the original. If the case survives the pleading stage, defense counsel should try to develop evidence that no actual or potential market exists for similar uses, which tilts the fourth factor in favor of fair use.

Tal E. Dickstein is a partner in the New York office of Loeb & Loeb LLP.

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[1] 17 U.S.C. § 107.

[2] Id.

[3] Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559 (S.D. Cal. 1996) aff'd 109 F.3d 1394 (9th Cir. 1997).

[4] Id. at 1563.

[5] Id. at 1568.

[6] Id. at 1570.

[7] Id. at 1569.

[8] Dr. Seuss Enters., L.P., 109 F.3d at 1399-1403.

[9] Id. at 1403.

[10] Dr. Seuss Enters., L.P. v. Comicmix LLC, 2017 U.S. Dist. LEXIS 89205, Case No. 16 Civ. 2779 (S.D. Cal. June 9, 2017).

[11] Id. at *20.

[12] Lombardo v. Dr. Seuss Enters., L.P., 2017 U.S. Dist. LEXIS 150213 (S.D.N.Y. Sep. 15, 2017)

[13] Id. at *17-18.

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