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PERSPECTIVE

The 'Twiharder' Saga: criticism or copying?

By Allen B. Grodsky

A recent lawsuit filed by the producers of the parody film "Twiharder" against the producers of the hugely successful "The Twilight Saga" film franchise brings public attention to the issue of parody and how parody applies in copyright infringement cases.

The plaintiff, Between the Lines Productions LLC (BTLP), is the copyright owner of a feature length film called "Twiharder," which — according to the allegations of the complaint — is a sociopolitical commentary parodying the highly enthusiastic fan base and pop culture phenomenon surrounding "The Twilight Saga." Defendants are Lionsgate Entertainment and Summit Entertainment, owners of the copyright in and to the "Twilight" movies, who contend that "Twiharder" is simply an infringement of the copyright to their movies.

Based on the allegations of the complaint, it appears that the defendants sent cease-and-desist letters which caused BTLP's insurer to refuse to issue errors and omissions coverage and caused BTLP's distributor to back out of distributing "Twiharder." BTLP then filed this lawsuit to obtain, among other things, declaratory relief that "Twiharder" was protected by the fair use doctrine and the First Amendment.

This case provides an interesting backdrop to review the fair use doctrine which provides, given certain situations and purposes, that it is perfectly fine for someone who is not an owner or licensee of a copyrighted work to copy that work. Courts use a four-pronged test to determine whether the use of a copyrighted work is a fair use. When a parody is involved, certain prongs take on more importance.

The first factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." The critical element here is whether the new work is "transformative," i.e., adds something new, with a new purpose or character, creating a new expression, meaning or message.

Parody can be a transformative use when it provides social benefit by shedding light on an earlier work, creating a new one in the process. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994). A parody under copyright law must use "some elements of a prior author's composition to create a new one that, at least in part, comments on the author's works." But if the alleged parody has "no critical bearing on the substance or style of the original composition" and if it the copying of the original is merely used

Courtesy of Between the Lines Productions

"to get attention or to avoid the drudgery in working up something fresh," a fair use defense is less likely.

Subsequent cases have found that a work can be a parody if it comments *on the author himself or herself.* See *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp.2d 962 (C.D. Cal. 2007); *Henley v. DeVore*, 733 F. Supp.2d 1144 (C.D. Cal. 2010).

The 11th U.S. Circuit Court of Appeals found "The Wind Done Gone," a fictional book using characters, famous scenes and dialogue from "Gone With the Wind" to be a parody for fair use purposes because its copying of portions of "Gone With the Wind" was intended to make a critical statement seeking to "rebut and destroy the perspective, judgments, and mythology of ['Gone With the Wind']," and thus sufficiently transformative. *Suntrust Bank v. Houghton Miffin Co.,* 268 F.3d 1257 (11th Cir. 2001).

The 9th U.S. Circuit Court of Appeals came to a different conclusion in *Dr. Seuss Enterprises LP v. Penguin Books USA Inc.,* 109 F.3d 1394 (9th Cir. 1997), in which the defendant published a book titled "The Cat Not in the Hat! A Parody by Dr. Juice," which used the style of, and images from, Dr. Seuss books to make fun of the O.J. Simpson double-murder trial. The court held that the book was *not* parody because it was not criticizing or commenting on Dr. Seuss but instead using copyrighted material to comment on O.J. Simpson and his trial.

In the "Twiharder" case, this issue will revolve around the factual determination of whether "Twiharder" (1) is in fact criticizing "The Twilight Saga," its author and its fans and, therefore, is more like "The Wind Done Gone," or (2) is simply using the characters and plot of "The Twilight Saga" to poke fun at something else entirely and is, therefore, more like "The Cat Not in the Hat!"

The second fair use factor is the nature of the use. It is more difficult to establish fair use of creative works than it is of informational or functional works. However, this factor is of little use in parody cases "since parodies almost invariably copy publicly-known expressive works." *Campbell*, 510 U.S. at 586.

The third fair use factor is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This factor is applied in a special way where a parody is concerned. The U.S. Supreme Court noted in Campbell, "[w]hen parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable." And once enough has been taken to make sure the audience will know the work to which the parodist is referring, "how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original."

For example, in "The Wind Done Gone" case, the court noted that "[a] use does not necessarily become infringing simply because it does more than simply conjure up another work." The court went on to hold: "any material we suspect is 'extraneous' to the parody is unlawful only if it negatively effects the potential market for or value of the original copyright." Thus, despite the fact that "The Wind Done Gone" appropriated "a substantial portion of the protected elements of "Gone With the Wind," the 11th Circuit overturned the granting of an injunction, finding that it could not conclude that the quantity and value of the materials copied were unreasonable in relation to the purpose of the copying.

How this third factor will apply in the "Twiharder" case will require a factually intensive comparison of the films and an analysis of what specific characters, scenes and dialogue were copied and whether that copying is important to the criticism of "The Twilight Saga" and its fans or whether it has no relation to that criticism and then, if so, whether those extraneous scenes affect the potential market for or value of "The Twilight Saga."

The fourth fair use factor is the effect of the use on the potential market for the value of the copyrighted work; the critical issue being whether the new work will supplant or substitute for the original work or its derivatives, i.e. if consumers are likely to buy the new work *as a substitute* for the copyrighted work, the use is likely not a fair use. The burden is on the party asserting fair use to prove that potential markets will not be harmed.

The 9th Circuit has made clear that in assessing the economic effect of a parody, the parody's critical impact must be excluded. *Fisher v. Dees*, 794 F.2d 432, (9th Cir. 1986). Courts do not inquire whether the parody's potential to destroy or diminish the market for the original (any bad review could have that effect) but whether the parody fulfills the demand for the original. As the 9th Circuit noted: "[b]iting criticism suppresses demand; copyright infringement usurps it."

This fourth factor will be important in the "Twiharder" case. It will be up to BLTP to produce evidence that its parody does not usurp the market for "The Twilight Saga." This is often an expert witness intensive factor.

Application of these fair use factors to the "Twiharder" case will play out as the facts develop in discovery. The case will surely hinge on whether BLTP can convince the trier of fact that "Twiharder" is designed to criticize "The Twilight Saga" and its fans and is not simply an easy way to get laughs without having to think up a fresh idea.

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