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# Dr. Seuss, The Juice and Fair Use Revisited: Two Decades of Parody and Satire in Copyright Law

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**DR. SEUSS, THE JUICE AND FAIR USE  
REVISITED:  
TWO DECADES OF PARODY AND SATIRE IN  
COPYRIGHT LAW<sup>1</sup>**

TYLER T. OCHOA<sup>2</sup>

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**I. INTRODUCTION**

For the IP Redux Conference, I chose to revisit my article *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*.<sup>3</sup> I chose this article for three reasons: it was my first published article as a sole author; it was my first published article on a topic related to intellectual property; and 2018 marks the 20th anniversary of the article's

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<sup>2</sup> Professor, High Tech Law Institute, Santa Clara University School of Law. A.B. 1983, J.D. 1987, Stanford University. I would like to thank Ann Bartow of the University of New Hampshire School of Law for her invitation to participate in the IP Redux Conference, and all of the participants in the Conference for their helpful comments.

<sup>3</sup> See Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT. SOC'Y 546 (2008).

publication, so it seemed like an opportune time to revisit the article and opine on what has happened to the law of parody and satire during the last two decades.

Part II of this essay will summarize some of the salient features and arguments made in the article. Part III will analyze copyright infringement cases in the last 20 years applying the fair use doctrine to parody and satire. Part IV concludes.

## **II. A LOOK BACK AT THE ARTICLE**

I wrote the article in response to the decision in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*<sup>4</sup> In that case, the Ninth Circuit affirmed a preliminary injunction barring publication of a book titled *The Cat NOT in the Hat!*, labeled “A Parody by Dr. Juice.”<sup>5</sup> The book was “a satirical account of the O.J. Simpson trial written in the style of Dr. Seuss.”<sup>6</sup> Despite the clear principle that an author’s style is not supposed to be protected by copyright,<sup>7</sup> the Ninth Circuit

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<sup>4</sup> *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

<sup>5</sup> “As Told to Alan Katz [and] Illustrated by Chris Wrinn.” The book was scheduled to be published by Penguin Books in 1997, prior to the injunction.

<sup>6</sup> *See* Ochoa, *supra* note 3, at 547.

<sup>7</sup> *See* *Williams v. Gaye*, 885 F.3d 1150, 1182 (9th Cir. 2018) (“Our decision does not grant license to copyright a musical style or ‘groove.’”); *Hayuk v. Starbucks Corp.*, 157 F. Supp. 3d 285, 291 (S.D.N.Y. 2016) (“Defendants have copied her style or elements of her ideas, neither of which are protected by copyright law.”); *Trek Leasing, Inc. v. U.S.*, 66 Fed. Cl. 8, 13 (2005) (“The hallmarks of a popular architectural style, as such, are not protectable”); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35 (1st Cir. 2001) (“copyright does not provide protection for the particular style of photography chosen by Yankee”). *But see* *Salinger v. Colting*, 641 F. Supp. 2d 250, 266–67 (S.D.N.Y. 2009) (citing “Colting’s adoption of Plaintiff’s characteristic style” as part of infringement analysis), *rev’d on other grounds*, 607 F.3d 68, 74 (2d Cir. 2010) (approving district court’s finding that defendant copied more “in both substance and style, than

found the alleged parody infringed the copyright in the Dr. Seuss book *The Cat in the Hat*, based primarily on the appearance of the Cat's red-and-white stovepipe hat on the front and back cover (and 13 times in the text) of the work.<sup>8</sup> The article is, essentially, an eighty-eight-page rebuttal to the Ninth Circuit's opinion.

The title of the article has several layers of meaning. It conveys that the article concerns the works of Dr. Seuss, O.J. Simpson (nicknamed "The Juice"),<sup>9</sup> the fair use doctrine, and parody; and it does so with a triple rhyme reminiscent of Dr. Seuss's works.<sup>10</sup> The triple rhyme makes it memorable, as shown by its inclusion in a compilation of memorable law review article titles.<sup>11</sup> The title also compares the plaintiff, Dr. Seuss Enterprises, with one of Dr. Seuss's best-known characters, the Grinch.<sup>12</sup> On the downside, the title does not include the word "copyright," so

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[was] necessary for the alleged transformative purpose"). To be fair to the *Dr. Seuss* court, the pre-1998 case law was less settled. Compare *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (citing "the striking stylistic relationship" between the works, because "style is one ingredient of 'expression'"), with *Judith Ripka Designs, Ltd. v. Preville*, 935 F. Supp. 237, 248 (S.D.N.Y. 1996) ("The copyright laws do not protect styles, but only particular original designs.").

<sup>8</sup> See Ochoa, *supra* note 3, at 587 n.242, 589–590 n.259–260, 600 n.313, 603–604 n.327–339.

<sup>9</sup> *O.J. Simpson*, WIKIPEDIA, [https://en.wikipedia.org/wiki/O.\\_J.\\_Simpson](https://en.wikipedia.org/wiki/O._J._Simpson) ("Simpson acquired the nickname 'Juice' as a play on 'O.J.', a common abbreviation for 'orange juice.'").

<sup>10</sup> In retrospect, however, I am appalled that I omitted the "Oxford comma" in the tripartite title.

<sup>11</sup> See Stephanie J. Willbanks, *What's in a Name? Would a Rose by Any Other Name Really Smell as Sweet?*, 63 J. LEGAL EDUC. 647, 662 (2014).

<sup>12</sup> See DR. SEUSS, *HOW THE GRINCH STOLE CHRISTMAS!* (1957). The comparison is imperfect, however, because the lawsuit lacks the happy ending in which the Grinch learns to share in the joy of others, rather than trying to take things away from them.

it doesn't show up in a simple word search for titles about copyright law.<sup>13</sup>

The Introduction of the article begins with a parody of the opening stanzas of *How the Grinch Stole Christmas!*<sup>14</sup> This time, however, the Grinch is compared to the three judges of the Ninth Circuit panel that decided the case, rather than to the plaintiff.<sup>15</sup> Opening an article about parody with a parody was very meta; although, in retrospect, it seems I relied on my memory of the original, rather than going back to the original to mimic it more closely.<sup>16</sup> For example, I could have copied the line spacing, italics, and capitalizations more closely, and I could have retained the original order of the fifth and sixth sentences:

Every *Who*  
Down in *Who*-ville  
Liked parody a lot ...  
But the Ninth Circuit Grinches,  
With jurisdiction over *Who*-ville,  
Did NOT!  
The Grinches *hated* parody, whatever the season!

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<sup>13</sup> Eugene Volokh also advised me to change the second part of the title (after the near-obligatory colon), because in his opinion it suggests that the article is merely a case note on the *Dr. Seuss* case, rather than a thorough examination of how the fair use doctrine historically has been applied to parodies. He probably was correct, but I stubbornly kept the title unchanged because I liked how it scanned and the Grinch analogy.

<sup>14</sup> See Ochoa, *supra* note 3, at 546–47.

<sup>15</sup> Yes, I was inconsistent in my use of the Grinch analogy. So, sue me.

<sup>16</sup> “[T]he truest parodies are those that tamper least with the material they are spoofing. Just enough to blow them sky-high. That’s all.” Charles Poore, *Ardent Plea for the Art of Parody*, N.Y. TIMES MAG., March 9, 1958, at 33; see also C. HUGH HOLMAN & WILLIAM HARMON, A HANDBOOK TO LITERATURE 344 (6th ed. 1992) (“Note that the craft of parody prizes minimal tampering.”); Robert J. Kapelke, Comment, *Parody or Piracy: Never the Twain*, 38 U. COLO. L. REV. 550, 565 (1966) (“To make his parody complete and effective the parodist has always tended to stick very closely to the script of the original.”).

Now, please don't ask why. No one quite knows the reason.  
It *could* be their heads weren't screwed on just right.  
It *could* be, perhaps, that their ties were too tight.  
But I think that the most likely reason of all  
May have been that their sense of humor was two sizes  
too small.

That is perhaps an even better parody, although I think my first effort got the point across.<sup>17</sup>

Part II of the article is a sixteen-page analysis of the importance of parody and satire in literature and popular culture.<sup>18</sup> This section was added at the suggestion of my frequent co-author Andrew Wistrich,<sup>19</sup> who remarked that my first draft assumed that readers would share my views on the importance of parody and satire, and that I needed to demonstrate its importance instead. Summarizing and synthesizing the non-legal academic literature on parody and satire was difficult and time-consuming, but the added section became (in my opinion) one of the most important and effective pieces of the article.

Part III of the article contains five subsections. Part III-A summarized the basic principles of fair use,<sup>20</sup> as elaborated in the first two of a trio of post-1976 Supreme Court cases.<sup>21</sup> Part III-B examined the development of fair

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<sup>17</sup> There is a balance between mimicking the original more closely and making the desired analogy. I changed "Grinch" to "Grinches" because an appellate panel consists of three judges; but leaving the parody in the singular would have avoided the grammar problem in the last sentence, which in plural form should be: "May have been that their senses of humor were two sizes too small." But that would have thrown the meter off even more. As it was, I changed "may have been" to "was" in part to compensate for changing "heart" to "sense of humor."

<sup>18</sup> See Ochoa, *supra* note 3, at 548–64.

<sup>19</sup> U.S. Magistrate Judge, Central District of California (retired 2018).

<sup>20</sup> See Ochoa, *supra* note 3, at 564–71.

<sup>21</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). For reasons to be explained, the third case, *Campbell v.*

use as applied to parody from the mid-1950s to the Copyright Act of 1976.<sup>22</sup> Part III-C continued the story of parody as a fair use after fair use was codified in section 107 of the 1976 Act.<sup>23</sup> Part III-D summarized the then-recent decision in *Campbell v. Acuff-Rose Music, Inc.*,<sup>24</sup> in which a unanimous Supreme Court held that a rap parody of the song *Pretty Woman* could qualify as a fair use.<sup>25</sup> Part III-E briefly summarized what was then the only other post-*Campbell* appellate opinion involving parody.<sup>26</sup> The core of this section (Parts III-A to III-C) was written as a seminar paper in my Advanced Copyright course at Stanford Law School.<sup>27</sup> One decade later, it was relatively easy to add the last two subsections to bring the paper up to date.

Part IV of the article recounts the facts and the District Court and Ninth Circuit opinions in the *Dr. Seuss* case.<sup>28</sup> Part V of the article, “A Critical Analysis of the Ninth Circuit’s Opinion,” is essentially a forty-four-page dissenting opinion, explaining why the Ninth Circuit should have held that the parody was a fair use under copyright law,<sup>29</sup> and should have rejected the preliminary injunction under trademark law as well.<sup>30</sup> The major points were that the Ninth Circuit erred: 1) in holding that the book was not a “parody” as defined by the Supreme Court;<sup>31</sup> 2) in holding

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Acuff-Rose Music, Inc., 510 U.S. 569 (1994), was left for a later subsection.

<sup>22</sup> See Ochoa, *supra* note 3, at 571–74.

<sup>23</sup> 17 U.S.C. § 107 (2012); see Ochoa, *supra* note 3, at 574–80.

<sup>24</sup> *Campbell*, 510 U.S. at 569.

<sup>25</sup> See Ochoa, *supra* note 3, at 580–84.

<sup>26</sup> *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); see Ochoa, *supra* note 3, at 584–85.

<sup>27</sup> With thanks to my teacher, Professor Paul Goldstein.

<sup>28</sup> See Ochoa, *supra* note 3, at 584–89.

<sup>29</sup> *Id.* at 589–620.

<sup>30</sup> *Id.* at 620–33.

<sup>31</sup> *Id.* at 590–94.

that, as a “satire,”<sup>32</sup> it could not qualify as a “transformative” use,<sup>33</sup> even though the Supreme Court did not draw any such bright line;<sup>34</sup> 3) in holding that the copying was excessive in relation to the purpose, when the parody used only the Cat’s red-and-white stovepipe hat, about as minimal a use as could be imagined to “conjure up” the original;<sup>35</sup> 4) in applying a presumption of market harm that the Supreme Court had expressly disavowed in *Campbell*;<sup>36</sup> 5) in giving greater protection against criticism to the fictional characters of Dr. Seuss than actual person would enjoy;<sup>37</sup> and 6) in also enjoining the parody on trademark grounds, despite the lower court’s finding that there was *no* likelihood of confusion.<sup>38</sup>

The article has been cited 40 times in the academic literature,<sup>39</sup> including once by Judge Alex Kozinski,<sup>40</sup> and

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<sup>32</sup> The difference, according to the Supreme Court, is that a parody comments, at least in part, on the work being copied; whereas a satire uses the work being copied to comment solely on something else. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–581 n.15 (1994). This distinction was made most forcefully in Justice Kennedy’s concurring opinion, *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring), which no other Justice joined.

<sup>33</sup> See Ochoa, *supra* note 3, at 594–99.

<sup>34</sup> To the contrary, the Supreme Court clearly indicated that a satire *could* qualify as a transformative use and as a fair use. See *Campbell*, 510 U.S. at 580–81 n.14.

<sup>35</sup> See Ochoa, *supra* note 3, at 600–04; *Campbell*, 510 U.S. at 588 (“the parody must be able to ‘conjure up’ *at least* enough of that original to make the object of its critical wit recognizable”) (emphasis added).

<sup>36</sup> See Ochoa, *supra* note 3, at 604–14; *Campbell*, 510 U.S. at 591.

<sup>37</sup> See Ochoa, *supra* note 3, at 615–20.

<sup>38</sup> *Id.* at 620–33.

<sup>39</sup> That figure does not include 10 self-citations.

<sup>40</sup> See Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYR. SOC’Y USA 513, 514 & n.4 (1999). That was a more highly-ranked citation before Judge Kozinski retired in the wake of a #MeToo movement-inspired scandal. See Matt Zapposky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017),



several times by leading scholars such as Mark Lemley,<sup>41</sup> David Nimmer,<sup>42</sup> Pam Samuelson,<sup>43</sup> Rebecca Tushnet,<sup>44</sup> Eugene Volokh,<sup>45</sup> Tom Cotter,<sup>46</sup> Stacey Dogan,<sup>47</sup> and Christine Farley.<sup>48</sup> It has not yet, unfortunately, been cited by any court.

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[https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e\\_story.html?utm\\_term=.809ebf53ec15](https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.809ebf53ec15).

<sup>41</sup> See Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185, 193–94 n.62 (2007); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1707 n.102, 1712 n.130 (1999); see also notes 43 & 45, *infra*, for co-authored articles.

<sup>42</sup> See David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1242 n.66 (2004).

<sup>43</sup> See Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 821 n.35 (2015).

<sup>44</sup> See Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 985 n.26, 988 n.42, 998–99 n.99, 100 (2004).

<sup>45</sup> See Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 917 n.63 (2003); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 194 n.219 (1998).

<sup>46</sup> See Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 393 n. 267, 269 (2005); Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 137 n.180 (2003).

<sup>47</sup> See Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 498 n.110, 502 n.126 (2013), reprinted at 105 Trademark Rep. 1177, 1200 n.110, 1203 n.126 (2015); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accomplishment?*, 54 EMORY L.J. 461, 486 n.183 (2005).

<sup>48</sup> See Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 443 n.224 (2004).

### III. PARODY AND SATIRE AS FAIR USE

In the past twenty years, the Ninth Circuit has addressed only one copyright case raising a fair use defense based on parody. That case, *Mattel v. Walking Mountain Productions*,<sup>49</sup> involved a series of seventy-eight photographs of Barbie dolls “in various absurd and often sexualized positions.”<sup>50</sup> For example, “‘Barbie Enchiladas’ depicts four Barbie dolls wrapped in tortillas and covered with salsa in a casserole dish in a lit oven”;<sup>51</sup> and in several other photos, “Barbie is about to be destroyed or harmed by ... kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament.”<sup>52</sup> The Ninth Circuit held that whether the series was a parody was a question of law for the court;<sup>53</sup> and it concluded that “[Forsythe’s] photographs parody Barbie and everything Mattel’s doll has come to signify.”<sup>54</sup> It also correctly held that “[w]e do not require parodic works to take the absolute minimum amount of the copyrighted work possible,”<sup>55</sup> without noting that the *Dr. Seuss* case held exactly the opposite.<sup>56</sup> Finally, it held there was no market harm

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<sup>49</sup> *Mattel v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

<sup>50</sup> *Id.* at 796. The series was titled “Food Chain Barbie.” *Id.* A Google search for that phrase will bring up many of the photos.

<sup>51</sup> *Id.* at 796.

<sup>52</sup> *Id.* at 802.

<sup>53</sup> *Id.* at 801.

<sup>54</sup> *Id.* at 802. The court also correctly rejected an argument that Forsythe “could have made his statements about consumerism, gender roles, and sexuality without using Barbie,” *Id.* at 802 n.7, a variation on the restrictive “reasonable alternative avenues of communication” standard that occasionally succeeds, but is more frequently rejected, in applying the First Amendment to intellectual property law. *See* Ochoa, *supra* note 3, at 626–27 & n.447.

<sup>55</sup> *Mattel*, 353 F.3d at 805.

<sup>56</sup> *Dr. Seuss Enters.*, 109 F.3d at 1400 (a “parodist is permitted a fair use of a copyrighted work [only] if it takes no more than is necessary to

because there was no reasonable likelihood that Mattel would license uses such as Forsythe’s,<sup>57</sup> a conclusion that should have been reached in the *Dr. Seuss* case.<sup>58</sup> The Ninth Circuit’s opinion in *Walking Mountain* is consistent with its rejection of Mattel’s claims in a trademark case involving the parody song “Barbie Girl,”<sup>59</sup> and with a lower court’s treatment of another sexual parody of Barbie.<sup>60</sup>

Some observers may have had difficulty in accepting Forsythe’s photographs as parody because they viewed the photographs as absurd or disturbing, rather than humorous or funny.<sup>61</sup> But as the article pointed out, parody and satire may combine varying degrees of “aggression or attack, play (both wordplay and game-playing), laughter, and judgment or criticism.”<sup>62</sup> An example of a parody in which attack and criticism are paramount is Alice Randall’s *The Wind Done Gone*, a re-telling of Margaret Mitchell’s *Gone With the Wind* from the perspective of Cynara, a mulatto half-sister to

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‘recall’ or ‘conjure up’ the object of his parody”). Judge Posner also has expressed this view in *dicta*. See *Ty, Inc. v. Publ’ns Int’l, Inc.*, 292 F.3d 512, 518 (7th Cir. 2002) (“the parodist must not take more from the original than is necessary to conjure it up”). This restrictive view was expressly rejected in *Campbell*. See Ochoa, *supra* note 3, at 601-02.

<sup>57</sup> *Mattel*, 353 F.3d at 805–06.

<sup>58</sup> See Ochoa, *supra* note 3, at 601–02.

<sup>58</sup> *Mattel*, 353 F.3d at 805–06.

<sup>58</sup> See Ochoa, *supra* note 3, at 609–12.

<sup>59</sup> See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) (opinion by Kozinski, J.) (“The song does not rely on the Barbie mark to poke fun at another subject but targets Barbie herself.”).

<sup>60</sup> See *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002) (holding a reasonable jury could find that “Dungeon Doll,” “a repainted and recostumed Barbie doll” in a dominatrix outfit, could be a fair use).

<sup>61</sup> The Ninth Circuit itself used the words “absurd” and “disturbing” in describing the photos. See *Mattel*, 353 F.3d at 796 (“absurd”), 802 (“disturbingly oblivious”). The only reference to “humor” was in describing Forsythe’s own declaration. *Id.* at 796 (“Forsythe *claims* that ... he attempts to communicate ... his serious message with an element of humor.”) (emphasis added).

<sup>62</sup> See Ochoa, *supra* note 3, at 556.

Scarlett O'Hara.<sup>63</sup> While Randall avoided referring to any of Mitchell's characters by name, her allusions to them were clear enough.<sup>64</sup> The district court held that Randall's novel was a sequel to *Gone With the Wind*, rather than a parody, in part because it had very little humor.<sup>65</sup> The Eleventh Circuit vacated the preliminary injunction as "an unlawful prior restraint in violation of the First Amendment,"<sup>66</sup> finding that Randall's novel "seeks to comment upon or criticize [*Gone With the Wind*] by appropriating elements of the original,"<sup>67</sup> and noting that "our approach to 'parody' . . . requires no assessment of whether or not a work is humorous."<sup>68</sup>

One of the major points of the article was that the Ninth Circuit erred in holding that "satire," in which elements of a prior work are used to comment on or criticize something else, could not qualify as a fair use.<sup>69</sup> The Second Circuit has gone the furthest in holding that satires can be "transformative" and therefore fair uses. In *Blanch v. Koons*,<sup>70</sup> appropriation artist Jeff Koons, who had already thrice lost copyright infringement actions,<sup>71</sup> scanned a number of photos from advertisements and incorporated parts of them into billboard-sized painted collages.<sup>72</sup>

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<sup>63</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1364 (N.D. Ga.), *vacated*, 252 F.3d 1165 (11th Cir.), *and opinion issued*, 268 F.3d 1257 (11th Cir. 2001).

<sup>64</sup> *Suntrust Bank*, 268 F.3d at 1267.

<sup>65</sup> *Suntrust Bank*, 136 F. Supp. 2d at 1372–78; *see also* Carolyn See, *Scarlett Fever*, Wash. Post, June 24, 2001 ("the book is far from satire or parody. *The Wind Done Gone* doesn't make fun of anything.").

<sup>66</sup> *Suntrust Bank*, 252 F.3d at 1166; *see also* Lemley & Volokh, *supra* note 45.

<sup>67</sup> *Suntrust Bank*, 268 F.3d at 1271; *see also id.* at 1268–69, 1270–71.

<sup>68</sup> *Id.* at 1269 n.23.

<sup>69</sup> *See supra* notes 32–34 and accompanying text.

<sup>70</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

<sup>71</sup> *See* *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).

<sup>72</sup> *Blanch*, 467 F.3d at 247.

Blanch, a professional fashion photographer whose photo was used in the collage “Niagara,” sued for copyright infringement.<sup>73</sup> Koons did not claim that “Niagara” was a parody of her photo; instead, he claimed “he intended to ‘comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images.’”<sup>74</sup> Thus, “‘Niagara’ . . . may be better characterized for these purposes as satire—its message appears to target the genre of which ‘Silk Sandals’ is typical, rather than the individual photograph itself.”<sup>75</sup> Nonetheless, the Second Circuit expressly held (contrary to the *Dr. Seuss* court) that “the broad principles of *Campbell* are not limited to cases involving parody,”<sup>76</sup> and asked “whether Koons had a genuine creative rationale for borrowing Blanch’s image.”<sup>77</sup> In his affidavit, Koons said:

The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. . . . By using a fragment of the *Allure* photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in *Allure* Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary — it is the difference between quoting and paraphrasing.<sup>78</sup>

Consequently, the court held that the use was “transformative,” because “[Koons’] purposes in using Blanch’s image are sharply different from Blanch’s goals in creating it.”<sup>79</sup>

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<sup>73</sup> *Id.* at 247–48.

<sup>74</sup> *Id.* at 247.

<sup>75</sup> *Id.* at 254.

<sup>76</sup> *Id.* at 255.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 252.

In accepting Koons' affidavit without skepticism, the court remarked: "Koons's clear conception of his reasons for using 'Silk Sandals,' and his ability to articulate those reasons, ease our analysis in this case. We do not mean to suggest, however, that either is a *sine qua non* for a finding of fair use—as to satire or more generally."<sup>80</sup> This was amply demonstrated in another case involving appropriation art, *Cariou v. Prince*,<sup>81</sup> in which the plaintiff's photographs of Jamaican Rastafarians were used in defendant's series of 30 paintings and collages titled *Canal Zone*.<sup>82</sup> In holding that 25 of Prince's works were clearly transformative and fair use, (and that the other five presented genuine issues of material fact),<sup>83</sup> the court abandoned any distinction between parody and satire and other types of fair uses:

The district court imposed a requirement that, to qualify for a fair use defense, a secondary use must "comment on, relate to the historical context of, or critically refer back to the original works." Certainly, many types of fair use, such as satire and parody, invariably comment on an original work and/or on popular culture. . . . As even Cariou concedes, however, the district court's legal premise was not correct. The law imposes no requirement that a work comment on

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<sup>80</sup> *Id.* at 255 n.5.

<sup>81</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>82</sup> *Id.* at 698–99, n.2.

<sup>83</sup> The apparent distinction is that Cariou's work was collaged with images from other sources in 25 works, whereas the other five featured only Cariou's work with minimal changes. It is reminiscent of the old joke that "copying one source is plagiarism, copying multiple sources is research." See Garson O'Toole, *If You Steal from One Author, It's Plagiarism; If You Steal from Many, It's Research*, QUOTE INVESTIGATOR (Apr. 5, 2018), <https://quoteinvestigator.com/2010/09/20/plagiarism>.

the original or its author in order to be considered transformative.<sup>84</sup>

The court held that Prince’s works were “transformative” despite the fact that Prince testified that “he ‘do[es]n’t really have a message,’ that he was not ‘trying to create anything with a new meaning or a new message,’ and that he ‘do[es]n’t have any . . . interest in [Cariou’s] original intent.”<sup>85</sup> The court explained: “What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince’s work could be transformative even without commenting on Cariou’s work or on culture, and even without Prince’s stated intention to do so.”<sup>86</sup> This is the complete opposite of the approach taken in the *Dr. Seuss* case, in which the court dismissed the parody author’s proffered explanation as “pure shtick” and a “post-hoc characterization of the work [that] is ‘completely unconvincing.’”<sup>87</sup>

The Seventh Circuit criticized *Cariou*’s heavy reliance on “transformative use,” saying that if applied exclusively it might override the exclusive right to prepare derivative works.<sup>88</sup> Nonetheless, it held that a t-shirt that used a “posterized” version of a mayor’s official portrait to criticize him was a fair use.<sup>89</sup> It also held that *South Park*’s

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<sup>84</sup> *Cariou*, 714 F.3d at 706 (quoting *Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011)).

<sup>85</sup> *Id.* at 707 (quoting *Cariou*, 784 F. Supp. 2d at 349). Prince fared more poorly in a subsequent case, in which his work consisted entirely of a third-party’s Instagram post of the plaintiff’s photo, “along with a cryptic comment written by Prince.” *Graham v. Prince*, 265 F. Supp. 3d 366, 381 (S.D.N.Y. 2017) (denying motion to dismiss).

<sup>86</sup> *Cariou*, 714 F.3d at 707.

<sup>87</sup> *Dr. Seuss Enters.*, 109 F.3d at 1403.

<sup>88</sup> *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 758 (7th Cir. 2014). Indeed, it apparently disregarded the transformative use standard altogether, despite the Supreme Court’s command in *Campbell*. *Id.*

<sup>89</sup> *Id.* at 758–59.

parody of a viral video titled “What What (In the Butt),” substituting a “naïve nine-year-old” cartoon boy for an adult male but otherwise “recreat[ing] a large portion of the original version, using the same angles, framing, dance moves and visual elements,” was a fair use.<sup>90</sup> This is consistent with a number of cases in which media that are well-known for parody and satire, such as Comedy Central’s *South Park* and *The Daily Show*,<sup>91</sup> and Fox’s *Family Guy*,<sup>92</sup> are given wide latitude to parody and make fun of other works.<sup>93</sup>

As a plaintiff, Dr. Seuss has had mixed success in the past 20 years. In California, it successfully defeated a motion to dismiss by the prospective publishers of a Dr. Seuss/Star Trek “mashup” titled *Oh, the Places You’ll Boldy Go!*,<sup>94</sup> but in New York, the court granted a declaratory judgment of fair use to the author of *Who’s Holiday*, a play that imagines Cindy Lou Who as a 45-year-old alcoholic drug abuser, knocked up by, married, and divorced from the

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<sup>90</sup> *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 689 (7th Cir. 2012). The video is described as “a paean to anal sex.” *Id.*

<sup>91</sup> *See Kane v. Comedy Partners*, 68 U.S.P.Q.2d 1748, 1751 (S.D.N.Y. 2003) (“Virtually any clip appearing on [*The Daily Show*] is implicitly accompanied by a comment on its absurdity.”).

<sup>92</sup> *See Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009) (holding the song “I Need a Jew” is a parody of “When You Wish Upon a Star” and a fair use); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007) (holding a five-second use of Carol Burnett’s “Charwoman” character in a porn shop was a parody and a fair use).

<sup>93</sup> This trend was already apparent, but not expressly identified, in 1998. *See Ochoa*, *supra* note 3, at 574 (Mad Magazine), 577–78 (Saturday Night Live), 585 (film actor Leslie Nielsen); *see also* *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991) (Nielsen).

<sup>94</sup> *See Dr. Seuss Enters., L.P. v. ComicMix, LLC*, 256 F. Supp. 3d 1099, 1106 (S.D. Cal. 2017) (finding the mashup “fails to qualify as a parody [but] it is no doubt transformative.”). The court adhered to its views after an amended complaint. *See Dr. Seuss Enters., L.P. v. ComicMix, LLC*, 300 F. Supp. 3d 1073 (S.D. Cal. 2017).



Grinch, all in comedic rhyming verse.<sup>95</sup> The disparate results suggest the importance of forum-shopping, as the case law regarding parody remains more favorable to defendants in the Second Circuit than in the Ninth Circuit.<sup>96</sup>

#### **IV. CONCLUSION**

There is much more to be said about parody and satire, but too little space in which to say it.<sup>97</sup> Because fair use is a case-by-case determination, there will always be cases that fall outside the mainstream of judicial thought. The *Dr. Seuss* case, however, remains so far outside the mainstream that it deserves all of the scorn I heaped upon it in the article. I can only repeat the conclusion I reached 20 years ago: “The Ninth Circuit . . . should seize the earliest possible opportunity to overturn the *Dr. Seuss* opinion and to conform its approach to parody cases to the more generous standards of the Supreme Court.”<sup>98</sup>

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<sup>95</sup> See *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 503–04 (S.D.N.Y. 2017).

<sup>96</sup> Which is not to say that all parodies succeed in the Second Circuit. See, e.g., *Salinger v. Colting*, 641 F. Supp. 2d 250, 257–61 (S.D.N.Y. 2009) (finding *60 Years Later: Coming Through the Rye* to be a “sequel” rather than a parody of *Catcher in the Rye*), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010).

<sup>97</sup> Because of space limitations, I have not attempted to cover trademark parodies here.

<sup>98</sup> Ochoa, *supra* note 3, at 633.