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Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc. 109 F.3d 1394 (9th Cir. 1997)

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CASE SUMMARIES

DR. SEUSS ENTERPRISES, L.P.
v.
PENGUIN BOOKS USA, INC.
109 F.3D 1394 (9TH CIR. 1997)

INTRODUCTION

Dr. Seuss Enterprises, L.P. ("Seuss") filed an application for a temporary restraining order and a preliminary injunction alleging copyright and trademark infringement against Penguin Books USA, Inc. ("Penguin") and Dove Audio, Inc. ("Dove"), the respective publishers and distributors of a poetic account of the O.J. Simpson double murder trial entitled *The Cat NOT in the Hat!* The district court denied the request for a temporary restraining order and subsequently granted Seuss' request for a preliminary injunction. The lower court held that Seuss had proven a strong likelihood that the authors of the work had taken substantial protected expression from Seuss' works.[1] The United States Court of Appeals for the Ninth Circuit affirmed the district court's order granting a preliminary injunction against the publication and distribution of the infringing work.[2]

FACTS

Seuss owns most of the copyrights and trademarks for the works of the late Theodore S. Geisel, the author and illustrator of the famous children's educational books written under the pseudonym

1. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1397 (9th Cir. 1997).
2. *Id.* at 1406.

Published by Via Sapientiae, 2016

"Dr. Seuss."[3] Between 1931 and 1991, Geisel wrote, illustrated and published at least 47 books, resulting in approximately 35 million copies currently in print worldwide.[4] He authored the books in simple, rhyming, and repetitive language.[5] The books were illustrated with characters, often animals, with human-like characteristics, recognizable by and appealing to children.[6]

One of Geisel's most famous and well-recognized characters remains the "Cat" from his work, *The Cat in the Hat.*[7] Initially published in 1957, the Cat, a well-meaning but mischievous character, is almost always depicted with his distinctive scrunched and somewhat shabby red and white stove-pipe hat.[8] Seuss owns the common law trademark rights to the words "Dr. Seuss" and "Cat in the Hat," as well as the character illustration of the Cat's stove-pipe hat.[9] Seuss owns the copyright registrations for several books featuring the Cat, including *The Cat in the Hat, The Cat in the Hat Comes Back, The Cat in the Hat Beginner Book Dictionary, The Cat in the Hat Songbook* and *The Cat's Quizzer.*[10] Seuss has trademark registrations for the marks currently pending with the United States Trademark Office.[11] Finally, Seuss has licensed the Dr. Seuss marks, including *The Cat in the Hat* character, for use on clothing, in interactive software and in a theme park.[12]

In 1995, Alan Katz and Chris Wrinn wrote and illustrated *The Cat NOT in the Hat!* satirizing the O.J. Simpson double murder trial.[13] The work recounts the events surrounding the famous trial as narrated by "Dr. Juice."[14] The Cat's image appears on both front and back covers as well as numerous times in the text.[15] The work's publishers, Penguin and Dove, were not licensed or

3. *Id.* at 1396.
4. *Id.*
5. *Dr. Seuss,* 109 F.3d at 1396.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Dr. Seuss*, 109 F.3d at 1396.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Dr. Seuss*, 109 F.3d at 1396.

authorized to use any of the works, characters or illustrations owned by Seuss.[16] Furthermore, Penguin and Dove did not seek Seuss' permission to use these works.[17]

Seuss filed a complaint for copyright and trademark infringement, an application for a temporary restraining order and a preliminary injunction after an advertisement appeared promoting *The Cat NOT in the Hat.*[18] The plaintiffs relied upon the enforcement provisions of the Copyright Code, 17 U.S.C. §§ 501-02; the Lanham Act, 15 U.S.C. § 1125(a); the Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125(c)(1); and the California Unfair Competition Statute, § 17200 et seq. and § 14330.[19] Seuss alleged that *The Cat NOT in the Hat!* misappropriated substantial protected elements of his copyrighted works, used Seuss trademarks (six unregistered and one registered) and diluted the distinctive quality of Seuss' famous marks.[20] Katz subsequently filed a declaration stating that *The Cat in the Hat* was the "object for his parody."[21] Further, portions of his book derive from *The Cat in the Hat* only as is "necessary to conjure up the original."[22]

The district court denied the request for the temporary restraining order, but set a hearing date for the preliminary injunction.[23] In the meantime, Penguin and Dove proceeded with their production schedule.[24] In its request for injunctive relief, Seuss incorporated additional infringement claims from two of its other texts, *Horton Hatches the Egg* and *One Fish Two Fish Red Fish Blue Fish.*[25] On March 21, 1996, the district court granted Seuss' request for a preliminary injunction.[26] At that point,

16. *Id.*
17. *Id.*
18. *Id.* at 1397. The advertisement declared: "Wickedly clever author 'Dr. Juice' gives the O.J. Simpson trial a very fresh look. From Brentwood to the Los Angeles County Courthouse to Marcia Clark and the Dream Team. *The Cat NOT in the Hat* tells the whole story in rhyming verse and sketches as witty as Theodore [sic] Geisel's best. This is one parody that really packs a punch!" *Id.*
19. *Id.*
20. *Dr. Seuss,* 109 F.3d at 1397.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Dr. Seuss,* 109 F.3d at 1397.
26. *Id.*

approximately 12,000 *The Cat NOT in the Hat* books, at an expense of approximately $35,500, had been printed.[27] As a result of the court's decision, they were now enjoined from distribution.[28] Penguin and Dove brought a motion for reconsideration and Katz filed a second declaration admitting use of *Horton Hatches the Egg* and *One Fish Two Fish Red Fish Blue Fish*.[29] In response, Seuss withdrew his claim regarding an illustration from *Horton Hatches the Egg* for purposes of its motion for injunctive relief.[30]

The district court modified its order reconsidering these new claims.[31] However, it did not dissolve the preliminary injunction prohibiting the publication and distribution of *The Cat NOT in the Hat!*[32] The court found that Seuss had demonstrated: (1) a strong likelihood that Katz and Wrinn had taken substantial protected expression from *The Cat in the Hat* but not from *Horton Hatches the Egg* or *One Fish Two Fish Red Fish Blue Fish*; (2) a strong likelihood of success on the copyright claim raising a presumption of irreparable harm; (3) a strong likelihood of success on the parody as fair use issue; (4) serious questions for litigation and a balance of hardships favoring Seuss on the trademark violations; and (5) a minimal likelihood of success on the federal dilution claim.[33] Penguin and Dove timely appealed the court's ruling.[34]

LEGAL ANALYSIS

The Court of Appeals analyzed four separate issues in its opinion. Initially, the court addressed whether *The Cat NOT in the Hat!* infringed Seuss' rights under the Copyright Act of 1976.[35] Next, the court determined whether the taking could be excused as a parody under the fair use doctrine. Additionally, the court considered whether serious questions for litigation and a balance of

27. *Id.*
28. *Id.*
29. *Id.*
30. *Dr. Seuss,* 109 F.3d at 1397, (citing 17 U.S.C. § 106 (1976)).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Dr. Seuss,* 109 F.3d at 1397, (citing 17 U.S.C. § 106 (1976)).

hardships favoring Seuss existed with respect to the federal trademark and unfair competition claims. Finally, the court concluded whether the injunction constituted an abuse of discretion by the district court for being overbroad.

Copyright Infringement Claim

The Court of Appeals first examined the issue of whether *The Cat NOT in the Hat!* infringed Seuss' rights under the Copyright Act of 1976.[36] To prove a case for copyright infringement, Seuss must prove both ownership of a valid copyright and infringement of that copyright by invasion of one of the following exclusive rights as copyright owner:

> "(1) the right to reproduce the copyrighted work; (2) the right to prepare derivative works based on the copyrighted work; (3) the right to distribute copies or phonorecords of the copyrighted work to the public; (4) the right to perform the work publicly; and (5) the right to display the copyrighted work publicly."[37]

To satisfy the copyright infringement test, Seuss must also demonstrate "substantial similarity" between the copyrighted work and the allegedly infringing work.[38]

"Substantial similarity" refers to similarity of expression, not merely similarity of ideas or concepts.[39] The court relied on the Ninth Circuit's two-part test initially developed in *Sid & Marty Krofft Television Prods., Inc.* v. *McDonald's Corp.*[40] The test's first part, or the "extrinsic test," determines whether there is a similarity of ideas in the two works.[41] Analytical dissection is

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36. *Id.*, (citing 17 U.S.C. § 106 (1976)).

37. *Id.* at 1397-98.

38. *Id.* at 1398 (citing Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1472 (9th Cir.), *cert. denied*, 506 U.S. 869 (1992)).

39. *Id. See also* 17 U.S.C. § 102(b).

40. *Dr. Seuss*, 109 F. 3d at 1398. *See also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

41. *Dr. Seuss*, 109 F.3d at 1398.

allowed.[42] In the wake of criticism, the Ninth Circuit modified its extrinsic test to allow objective consideration of whether there are substantial similarities in both ideas and expression.[43] This was done in order to "objectively consider whether there are substantial similarities in both ideas and expression."[44] The second part, or the "intrinsic test," determines whether an "ordinarily reasonable person" would perceive a substantial taking of protected expression.[45]

Seuss alleged that Penguin and Dove, in *The Cat NOT in the Hat!* made an unauthorized derivative work of Seuss' copyrighted works *The Cat in the Hat, The Cat in the Hat Comes Back, The Cat's Quizzer, The Cat in the Hat Beginner Books Dictionary*, and *The Cat in the Hat's Song Book* in violation of §§ 106 and 501 of the Copyright Act.[46] Further, Katz admitted that the style of the illustrations and lettering used in his and Wrinn's work was inspired by Seuss' *The Cat in the Hat.*[47] The court noted that the Cat in *The Cat in the Hat* is the central character of the original work, appearing in nearly every page for a total of 26 times.[48] Penguin and Dove appropriated the Cat's image and copied the Cat's hat on the front and back covers as well as 13 times in the body of the work.[49] Consequently, the court concluded the two-part test was fully satisfied since substantial similarity existed on both an objective and subjective level.[50]

The court rejected the defendants' argument that they had not infringed on any of Seuss' exclusive rights as copyright owner because *The Cat NOT in the Hat!* employed elements of the copyrighted work that were either uncopyrightable or had fallen

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42. *Id.* Analytic dissection focuses on isolated elements of each work to the exclusion of the other elements, combination of elements, and expressions therein. *Id.*

43. *Id.*

44. *Id.* (citing Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442-43 (9th Cir. 1994)).

45. *Id.*

46. *Dr. Seuss,* 109 F.3d at 1397.

47. *Id.* at 1398.

48. *Id.*

49. *Id.*

50. *Id.*

into the public domain.[51] First, defendants argued copyright infringement could not be based on the title of their parody because, as a matter of statutory construction by the courts, titles may not claim statutory copyright.[52] Second, defendants argued their design of the words' letters could not be an infringement because Congress did not intend to award protection to design elements of letters.[53] Third, defendants argued that the poetic meter or anapestic tetrameter used in *The Cat in the Hat* is no more capable of exclusive ownership than its counterpart, iambic pentameter.[54] Fourth, Seuss could not claim ownership of his whimsical poetic style employing neologisms and onomatopoeia.[55] Fifth, and finally, Seuss' visual style of illustration using line drawing, coloring and shading techniques are not copyrightable.[56] The court summarily rejected all five arguments on the basis that defendants' analytic dissection was not appropriate when conducting the substantial similarity intrinsic test which determines whether an ordinary reasonable person would perceive a substantial taking of protected expression.[57] The court reasoned that the preliminary injunction was correctly granted based upon the back cover illustration and the Cat's hat in *The Cat NOT in the Hat!* instead of the typeface, poetic meter, whimsical style or visual style of the work.[58]

Defense of Parody under the Fair Use Doctrine

The court next examined Penguin and Dove's contention that, notwithstanding the merits of Seuss' copyright infringement claim, their use should be excused as a parody under the fair use doctrine.[59] The threshold question for the court on the fair use

51. *Dr. Seuss*, 109 F.3d at 1398-99.
52. *Id.* at 1399 (citing NIMMER ON COPYRIGHT, § 2.6, at 2-185-187).
53. *Id.* (citing NIMMER ON COPYRIGHT, § 2.15, at 2-178.6).
54. *Id.*
55. *Id.* (citing See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983)).
56. *Dr. Seuss*, 109 F.3d at 1399 (citing Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988)).
57. *Id.*
58. *Id.*
59. *Id.*

issue is whether *The Cat NOT in the Hat!* is a parody.[60] This question parallels the first factor of four that Congress enumerated in § 107 of the 1976 Copyright Act.[61] Courts are to consider and weigh these factors in determining whether the defense of fair use exists in a given case.[62] The factors include: (1) the purpose and character of the accused use; (2) the nature of the copyrighted work; (3) the importance of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the accused use on the potential market for or value of the copyrighted work.[63]

In determining whether *The Cat NOT in the Hat!* constitutes parody, the court began its analysis by exploring the definitions of parody.[64] The court focused its attention on the definition delineated by the Supreme Court in *Campbell* v. *Acuff-Rose Music, Inc.* which said parody is ". . . the heart of any parodist's claim to quote from existing material" and "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[65] The court also noted the Ninth Circuit's criteria that "the copied work must be, at least in part, an object of the parody."[66] Finally, the court looked to the American Heritage Dictionary which defines "parody" as a "literary or artistic work that broadly mimics an author's characteristic style and holds it up to ridicule."[67]

In reviewing excerpts from *The Cat is NOT in the Hat!,* the court reasoned that the stanzas and illustrations in the work simply retell the events of O.J. Simpson's trial.[68] Although the work broadly mimics Dr. Seuss' characteristic style, it does not hold that style up to ridicule.[69] Consequently, it does not fit the definition of parody.[70] Instead, the authors merely use the Seuss Cat's stove-

60. *Id.* at 1400.
61. *Dr. Seuss,* 109 F.3d at 1400.
62. *Id.* at 1399.
63. *Id.* (citing 17 U.S.C. § 107).
64. *Id.* at 1400.
65. *Id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994)).
66. *Dr. Seuss,* 109 F.3d at 1401.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

pipe hat, the narrator of Dr. Juice and the title of *The Cat NOT in the Hat!* "to get attention" or maybe even "to avoid the drudgery in working up something fresh."[71] These tactics do not satisfy the first statutory factor of the fair use test.[72] In addition, the statutory inquiry includes whether *The Cat NOT in the Hat!* merely supercedes the Dr. Seuss' creations or whether and to what extent the new work is "transformative," i.e., altering *The Cat in the Hat* with new expression, meaning or message.[73] The court held that because the authors of *The Cat NOT in the Hat!* extended no effort to create a transformative work, they could not prevail on their fair use defense.[74] The work's commercial use further cuts against the fair use defense.[75]

The court determined the district court erred in its ruling that the commerical, profit-making nature of the defendants' exploitation created a presumption against a fair use defense, overshadowing the other statutory factors to be weighed in its analysis.[76] Although the first factor concerns the purpose and character of the use and examines whether such use is of a commercial nature or is for non-profit educational purposes, the district court's problem was not with the commercial nature of the work.[77] Instead, the court reiterated the lower court's finding that *The Cat NOT in the Hat!* was not entitled to a parody fair use defense because it failed to target the original work.[78]

The court also found error in the lower court's determination that Penguin and Dove could not employ the four-factor fair use analysis if the infringing work is not a parody.[79] The court noted that the Supreme Court has thus far eschewed bright line rules in favor of a case-by-case balancing.[80] The court went on to examine the second factor in the fair use test which focuses on the nature of the copyrighted work and recognizes that creative works are

71. *Dr. Seuss,* 109 F.3d at 1401.
72. *Id.* (citing *Acuff-Rose,* 510 U.S. at 580).
73. *Id.* at 1400.
74. *Id.*
75. *Id.* at 1401. *See also Acuff-Rose,* 510 U.S. at 580.
76. *Dr. Seuss,* 109 F.3d at 1401.
77. *Id.*
78. *Id.*
79. *Id.* at 1400.
80. *Id.*

"closer to the core of intended copyright protection" than informational and functional works.[81] Consequently, fair use is more difficult to establish when creative works are copied.[82] The court held that the creativity, imagination and originality embodied in *The Cat in the Hat* and its central character tilts the scale against fair use.[83]

The third factor focused on whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole was reasonable to the purpose of the copying.[84] The court believed that this factor, in effect, raised the already-discussed question of substantial similarity rather than whether the use is fair.[85] The court agreed with the lower court's determination that the Cat's image was the expressive core of Dr. Seuss' work.[86] The defendants attempted to justify their particular use of Dr. Seuss' Cat by declaring that they selected *The Cat in the Hat* as the vehicle for their parody because of the similarities between the two stories.[87] For example, Nicole Brown and Ronald Goldman are surprised by a "Cat" (O.J. Simpson) who committed acts contrary to moral and legal authority.[88] The defendants felt that, by evoking the world of *The Cat in the Hat*, they could, among other things, comment on the mix of frivolousness and moral gravity that characterized society's reaction to the events surrounding the Brown/Goldman murders.[89] The court rejected defendants' justifications and agreed with the lower court, ruling Penguin and Dove's assertion of the fair use defense as "pure schtick" with their post-hoc characterization of the work as "completely unconvicing."[90]

The final factor in the fair use test focuses on the effect the use has upon the potential market for or value of the copyrighted

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81. *Dr. Seuss,* 109 F.3d at 1402 (citing *Acuff-Rose,* 510 U.S. at 586).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Dr. Seuss,* 109 F.3d at 1402.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 1403.

work.[91] The court relied on the Second Circuit's characterization of the factor as calling for the striking of a balance "between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."[92] The court noted that the good will and reputation associated with Dr. Seuss' work is substantial.[93] Since, on the facts presented, Penguin and Dove's use of *The Cat in the Hat* original was non-transformative, and admittedly commercial, the court concluded that market substitution is at least more certain and market harm may be more readily inferred. In addition, Penguin and Dove failed to meet their obligation under the affirmative defense of fair use to submit evidence regarding relevant markets.[94] Instead, Penguin and Dove confined themselves to uncontroverted submissions that there was likely to be no effect on the market for the original.[95] The court "held that a silent record on an important factor bearing on fair use disentitles the proponent of the defense" to relief from the preliminary injunction.[96] As a result, the court held that, based on its fair use analysis, the district court's finding that Seuss showed a likelihood of success on the merits of the copyright claim as not clearly erroneous.[97]

Litigation and Balance of Hardships Favoring Seuss in its Federal Trademark and Unfair Competition Claims

The court relied on the Ninth Circuit's eight-factor *Sleekcraft* test to analyze the likelihood of confusion question in competitive and non-competitive trademark infrigement cases.[98] The eight-factor test includes: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7)

91. *Dr. Seuss,* 109 F.3d at 1403.
92. *Id.* (citing MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981)).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Dr. Seuss*, 109 F.3d at 1403 (citing *Acuff-Rose*, 510 U.S. at 590-94).
97. *Id.*
98. *Id.*

defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines.[99] There are at least three types of evidence that can prove a likelihood of confusion: (1) survey evidence; (2) evidence of actual confusion; and (3) an argument based on inference arising from a judicial comparison of the conflicting marks themselves and the context of their use in the marketplace.[100] The court declared that in a close case amounting to a tie, doubts are resolved in favor of the senior user.[101] In the case at bar, Seuss is the senior user.[102]

The district court found that many of the factors for analysis of trademark infringement were indeterminate and posed serious questions for litigation.[103] Initially, Penguin and Dove did not dispute that the Cat's stove-pipe hat, the words "Dr. Seuss" and the title "The Cat in the Hat" are widely recognized trademarks owned by Seuss.[104] Moreover, the proximity and similarity of the marks and the infringing items are substantial.[105] The figures appear on the front and back of the infringing work.[106] The infringing work includes the Cat's trademarked stove-pipe hat, the narrator and the title.[107] There was also no evidence of actual confusion since *The Cat NOT in the Hat!* was enjoined from distribution.[108] The marketing channels were indeterminate.[109] Nonetheless, the use of the Cat's stove-pipe hat or the confusingly similar title capture initial consumer attention even though no sales were actually recorded.[110] Penguin and Dove's likely intent in selecting the Seuss marks was to draw consumer attention to what would otherwise be just another book on the O.J. Simpson trial.[111] Finally, the likelihood of expansion of the product lines was

99. *Id.* at 1404. (citing AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979)).
100. *Id.*
101. *Dr. Seuss,* 109 F.3d at 1404.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Dr. Seuss*, 109 F.3d at 1404.
107. *Id.*
108. *Id.* at 1405.
109. *Id.*
110. *Id.*
111. *Dr. Seuss*, 109 F.3d at 1405.

indeterminate.[112] Consequently, the court agreed with the lower court's findings.[113]

The court rejected Penguin and Dove's defense of parody to Seuss' claims of trademark infringement and dilution.[114] According to the court, the defense is merely rephrasing the traditional "likelihood of confusion" response to trademark infringement claims in that consumers are not likely to be confused as to the source, sponsorship or approval.[115] The court then distinguished confusing and non-confusing parodies.[116] A non-infringing parody is merely amusing, not confusing. A "true" parody will be so obvious that a clear distinction is preserved between the source of the target and the source of the parody.[117] Moreover, the claim of parody is not a defense where the purpose of the similarity is to capitalize on a famous mark's popularity for the defendants' own commercial use.[118]

The court upheld the district court's finding of the existing of serious questions for litigation and a balance of hardship favoring Seuss.[119] The lower court properly found that serious questions exist for litigation since many of the factors for analysis of trademark infringement were indeterminate.[120] Further, the good-will and reputation associated with *The Cat in the Hat* character and title, the name "Dr. Seuss" and the Cat's hat outweigh the $35,500 in expenses incurred by Penguin.[121]

Abuse of Discretion Claim Against the Overbroad Injunction

The district court's order enjoined Penguin and Dove from directly or indirectly printing, publishing, delivering, distributing,

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Dr. Seuss,* 109 F.3d at 1405.
117. *Id.* (citing Hard Rock Café Licensing Corp. v. Pacific Graphics, Inc., 776 F. Supp. 1454, 1462 (W.D. Wash. 1991)).
118. *Id.* at 1406.
119. *Id.*
120. *Id.*
121. *Dr. Seuss,* 109 F.3d at 1406.

selling, transferring, advertising or marketing the work.[122] Penguin and Dove argued that the lower court should not have enjoined the entire book since only the back cover illustration and the Cat's stovepipe hat were deemed infringing by that court.[123] The Court of Appeals rejected the argument since, although the book had not been bound when Seuss originated this suit, Penguin and Dove still went forward with their production schedule with completion of the books' stitching and binding resulting in the books' unalterable and infringing status.[124] The court held that the lower court had no choice but to enjoin the entire book.[125]

CONCLUSION

The Court of Appeals affirmed the lower court's order granting a preliminary injunction prohibiting the publication and distribution of defendants' work, *The Cat NOT in the Hat!,* finding copyright infringement and, subsequently, rejecting defendants' argument that the work constituted a parody excused from infringement by the fair use doctrine. The court also balanced hardships in favor of Seuss regarding its federal trademark and unfair competition claims since several factors of the Ninth Circuit's eight-factor test were indeterminate in this case. Finally, the court rejected defendants' parody defense against trademark infringement since the purpose of defendants' work was to capitalize on a famous mark's popularity for the defendants' own commercial use.

Margaret H. Domin

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*