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The Importance of Preserving Copyright*

Edward Samuels**

I have just a few brief comments to put today's topic into perspective. There is a major battle going on in the field of copyright, between those who want to expand rights and those who want to limit the rights of copyright. Four major books have been published recently attempting to explain copyright to a general audience. There is mine, which is generally pro-copyright; and then there are three others, which are all basically anti-copyright. For copyright, this is something of a public relations disaster. The anti-copyright authors look at technology, and they think that technology changes everything. They fear that copyright is being used by the giant corporations in ways that raise real threats. Much of that discussion really bothers me. I take issue with the idea that the Internet changes everything.

But the topic for today is parody, fair use, *The Wind Done Gone*, *Lolita*, and other fair use cases; and the question is, whether there is a new wind blowing? In one sense, the answer is no. Fair use analysis is about what copyright has been doing for over a hundred years. Of course there's a balance. We have some tough cases that raise some very interesting public policy concerns. But this isn't like the new threats to copyright being raised by technology. I will confess that with the *Lolita* and *The Wind Done Gone* cases, I had a sort of knee-jerk reaction that, if you take somebody's characters and their story, that is an infringement. The more I looked into it, though, the more I appreciated that there is a transformative use here. There is a public interest in having another point of view. And this doesn't bother me at all. This is within the range of what copyright does, and what it has been doing over the years.

Fair use cases go every which way. We have the *Koons*¹ case that decided against a fair use defense. One of the classic examples to illustrate the dividing line is the difference between two cases that were decided at the same time, by the same judge; the Jack Benny² and Sid Caesar³ cases. One of them was a 15-minute spoof,

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¹ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

² *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956).

³ *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D.Cal. 1955).

and the other a 30-minute spoof. The judge decided that the 15-minute spoof was a fair use, and the 30-minute spoof took too much, and was not a fair use. Quite frankly, I think that the two cases might very well be decided the same way today. So, in the broader sense, nothing has really changed.

In another sense, there has been a discernable expansion of the fair use doctrine, at least marginally. What really changed the landscape was the *2 Live Crew*⁴ case. When the Supreme Court decided that case, they didn't actually hold in favor of fair use. What they did was reverse the appellate court and send the case back for further proceedings not inconsistent with the opinion.

While they didn't technically find in favor of fair use, after the Supreme Court's singing the praises of parody and criticizing the appellate court for not taking adequate account of parody, you can pretty well see which way it's going. And I think that case has shifted some of the parody analysis. I don't think the *Lolita* case or the *Leibovitz*⁵ case would have turned out the same way before the Supreme Court handed down the *2 Live Crew* decision. And I'm not sure that the *Suntrust* case or some other recent cases would have come out the same. However, again, no new major principle has come to light that we've never seen before. Copyright is doing what it has been doing for years, and what it hopefully will be doing for many years to come—balancing the rights of copyright owners and copyright users, using the traditional tools of copyright law; in this case, fair use.

⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).