

# Family Guy Creators' Fair Use Wish Comes True

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Recently, the U.S. Federal Court in the Southern District of New York dismissed a copyright infringement case brought against the creators, broadcasters, and distributors of the *Family Guy* television show by the owner of the copyright in the Academy Award-winning song "When You Wish Upon a Star."<sup>1</sup> Plaintiff Bourne Co. sued the defendants for copyright infringement, alleging that the song "I Need a Jew" was a "thinly-veiled copy" of the music from the world-famous "When You Wish Upon a Star," coupled with new anti-Semitic lyrics. The matter was before the court on the parties' cross motions for summary judgment. In granting the defendants' motion for summary judgment and dismissing the complaint, the court held that the song "I Need a Jew" was a parody of "When You Wish Upon a Star" and exempt from liability under the fair use doctrine of the U.S. Copyright Act.<sup>2</sup>

## THE HISTORY

The facts leading up to this case date back several years to the second season of the then soon-to-be canceled *Family Guy* television show when the episode "When You Wish Upon a Weinstein" was developed and produced. The episode was not actually aired during that season because of concerns about its religious content. However, it aired some years later on the Cartoon Network, and eventually Fox, and also was sold on DVD compilations of season three as a "bonus un-aired episode."

The episode is about the cartoon father, Peter, and his inability to manage his family's finances. It begins with Peter being swindled by a traveling salesman, which puts his family's finances into disarray. Peter is convinced to use the family's rainy day fund to purchase volcano insurance

(despite a lack of volcanoes in the fictional Rhode Island city in which he resides). After being chastised by his wife for depleting the rainy day fund, Peter heads to the local bar to commiserate with his friends. Peter then hears his friends talking about how men with Jewish-sounding last names helped each of his friends with their respective finances. So, Peter decides that he "needs a Jew" to help resolve his own financial mess.

In an almost exact replica of a scene from the Walt Disney movie *Pinocchio*, Peter gazes longingly out his bedroom window up at a starry sky with one bright star and sings the song entitled "I Need a Jew." The first four notes mimic those of "When You Wish Upon a Star." During Peter's song, a spaceship magically appears and Peter hops onto it and flies to outer space. During this fantasy shot, the spaceship magically turns into a flying dreidel and a menorah (both Jewish instruments). Peter finally falls asleep while gazing out the window. As if by "magic," a knock at the front door awakens him. It's a Jewish man, Mr. Weinstein, who needs to use Peter's phone because his car has broken down. Peter believes that his wish has come true, as here is the Jewish man that he wished for. Mr. Weinstein quickly gets Peter's money back from the scamming salesman. Peter and his family then attend temple with Mr. Weinstein, with the brides of Christ (nuns) being activated to come after Peter for attend-

ing temple (Peter, being raised Catholic). Peter then decides that his son, Chris, should become a Jew so that Chris will grow up smart (the episode repeatedly pokes fun at Chris' lack of "smarts"). Peter and Chris head to Las Vegas to get a quickie Bar Mitzvah, which is quickly stopped (in a scene mimicking the movie *The Graduate*) by his wife. At the end of the episode, Peter learns that Jews are just like any other people and that his racial stereotyping was wrong.

Thus, the overall theme of the episode is Peter's childlike belief based on an inappropriate racial stereotype. The creators wrote the song in a manner that was intended to evoke the classic Disney song. A license was initially sought from the plaintiff, Bourne Co., the copyright holder of the original song. The license, however, was refused. The creators proceeded anyway under the apparent belief that a license was not required because the use was a parody.

The history of "When You Wish Upon a Star" is fairly well known. The song was introduced to the public in the 1940 version of the Disney movie *Pinocchio*. The film depicts Jiminy Cricket singing the song while Gepetto looks out upon a starry sky with one bright star and wishes for a real boy. The song became an instant hit and won the 1940 Academy Award for Best Original Song. Since 1940, the song has been recorded by over 100 different artists, has been included in

## THE SONGS

### "I Need a Jew"

Nothing else has worked so far,  
So I'll wish upon a star,  
Wondrous dancing speck of light,  
I need a Jew.

Lois makes me take the rap,  
'Cause our checkbook looks like crap,  
Since I can't give her a slap,  
I need a Jew.

Where to find  
a Baum or Steen or Stein  
To teach me how to whine and do  
my taaaaaaaaxes?

Though by many they're abhorred,  
Hebrew people I've adored.  
Even though they killed my Lord,  
I need a Jew.

### "When You Wish Upon a Star"

When you wish upon a star,  
Makes no difference who you are,  
Anything your heart desires  
Will come to you.

If your heart is in your dream,  
No request is too extreme,  
When you wish upon a star,  
As dreamers do.

Fate is kind,  
She brings to those who love  
The sweet fulfillment of  
Their secret longing.

Like a bolt out of the blue,  
Fate steps in and sees you through,  
When you wish upon a star,  
Your dreams come true.

numerous films and television programs, and was ranked the seventh greatest song in film history by the American Film Institute. The defendants argued that the song has been extensively used by Disney and is generally associated with Walt Disney and his company. This is important because part of the parody argument relies on the fact that Walt Disney was purported to be anti-Semitic.

## THE LEGAL ACTION

The major facts in the case were not in dispute. The parties both agreed that the defendants' use of the song "When You Wish Upon a Star" would be an infringement of Bourne's rights under the Copyright Act, but for a finding of fair use. The parties agreed that the new song incorporated musical elements of the original song in a manner "intended to evoke" the original song. The parties further agreed that at least one purpose of the new song was to "hold bigotry and people like Peter . . . up to ridicule."

## IS "I NEED A JEW" A PARODY OR SATIRE?

Because the fair use defense is applied differently to parodies and to satires, the court first looked at whether "I Need a Jew" is a parody, a satire, or neither. A parody is defined as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule," and a satire is defined as "a literary work holding up human vices and follies to ridicule or scorn."<sup>3</sup> Thus, the distinction between a parody and a satire turns on the object of the "comment" made by the allegedly infringing work. A parody typically uses or refers to the original to make its point, while a satire does not necessarily or usually do so. Therefore, parodies and satires have different tests under the fair use doctrine.

To be a parody, the law requires that the new song must be reasonably perceived to comment on the original or criticize or ridicule it in some way.<sup>4</sup> That is, when an author uses some elements of a prior author's work to create a new one, the new work must comment on the original work in a way that has some "critical bearing on the substance or style of the original" work.<sup>5</sup>

The defendants argued that the new song was a parody in two ways: (1) because it was a comment on the "saccharine sweet," "innocent," and

"wholesome" worldview presented in and represented by the original song; and (2) because it evoked the song most associated with Walt Disney and his company and commented on the song while at the same time pointing out Walt Disney's purported anti-Semitism. The defendants argued that the song turned the innocence and sweetness of the idyllic Disney message on its head by ignorantly con-

## WHILE PARODY AND SATIRE SERVE AN IMPORTANT FUNCTION BY SHEDDING LIGHT ON EARLIER WORKS, NOT ALL HUMOROUS COMMENTARIES ARE PERMISSIBLE UNDER COPYRIGHT LAW.

taining lyrics about inappropriate racial stereotypes as well as lyrics that earnestly wished for a Jew to appear and magically solve the financial problems at issue.

Bourne argued that there was no proof that Walt Disney was anti-Semitic, nor that the song was iconic for Disney. Bourne also argued that the song did not comment on or criticize in any way the original song, but rather simply ridiculed racial stereotypes and anti-Semitism. Bourne argued that nothing in the new song commented on or criticized the "subject matter, quality or style" of the original song.

The court agreed with the defendants, finding that the new song does more than just comment on ignorant stereotypes. The court found that the new song specifically calls to mind the idyllic Disney world, that of a false world in which wishes upon stars come true. In making this finding, it noted that the creators purposefully visually replicated the wishful and innocent scene in *Pinocchio* in which the original song is sung.

The court viewed one layer of commentary to be that "any categorical view of a race of people is childish and simplistic, just like wishing on a star."

The court noted that the visual reference to *Pinocchio* by the creators makes clear "that this is not a case in which the creators simply substituted new lyrics for a known song 'to get attention or to avoid the drudgery in working up something fresh,'" but, rather, that the creators were "clearly attempting to comment in some way on the wishful, hopeful scene" in *Pinocchio* with which the original song is associated. Additionally, the court found that even if the new song did not speak as clearly as it did, and even if the jokes contained therein were not funny, the First Amendment would still protect the new song as a parody.

The court also found support for its finding of a parody in the inside joke about the purported anti-Semitism of Walt Disney. The court agreed that the creators specifically used the song because of its association with Walt Disney's name and had the character wish for a Jew, which an anti-Semite would clearly never do. In fact, it noted that this inside joke is particularly relevant because the creators made an additional joke as to Disney's purported anti-Semitism years later in a different *Family Guy* episode, but well prior to the instigation of this lawsuit. For these reasons, the new song was held to be a parody. That finding alone, however, was not sufficient to find fair use.

## THE FAIR USE OF "WHEN YOU WISH UPON A STAR"

Fair use is a statutory doctrine that requires the balancing of four factors in light of the purpose of copyright law—to promote the progress of science and the arts. As mentioned in the case, the fair use doctrine permits courts to avoid the rigid application of copyright law if "it would stifle the very creativity which that law is designed to foster." A court must analyze all four fair use factors to come to such a conclusion. Fair use is enumerated in section 107 of the U.S. Copyright Act and sets forth the following four factors to determine whether the defense should apply: (1) the purpose and character of the use, including whether the use is of a commercial nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the work used in relation

to the work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>6</sup>

In reviewing the first factor, the court determined that the new song was transformative. The court found that the lyrics of the two songs were “almost entirely different” and that the tone and message of the two songs were “strikingly different.” The court also noted that the wishes of the cartoon characters themselves (Peter vs. Gepetto) are entirely different, one wishing for a Jew to fix his financial woes and one wishing for a real boy so that he could have a family. Additionally, the court found that the tune itself was similar, as indicated by the first four notes, but also somewhat different, as set forth in the remainder of the tune. As the new song was found to be transformative, this factor weighed in favor of a finding of fair use.

In reviewing the second factor, the court found that there was no question that the original song was a creative expression that fell within the “core of the copyright’s protective purposes.” However, the court noted that the nature of the work has little impact on the parody analysis, because a parody must use the creative work to create the parody. Thus, the court afforded little weight to the second factor.

In reviewing the third factor, the court determined that the amount of the original song that was used was no more than was necessary to conjure up the original work in order to make the object of the criticism recognizable. The court noted that the creators made the new song more like the original to ensure the audience’s recognition, and that one of the creators even had reservations about making the changes because his contract required him to create unique songs. Nonetheless, according to the defendants, the first four notes were changed to specifically make reference to the original song more apparent to the audience. The court noted that the defendants could have borrowed substantially all of the original song if that amount of borrowing was necessary “to allow the parodic character of their work to come through.” Accordingly, the court found that this factor weighed in favor of a finding of fair use.

In reviewing the fourth and final factor, the court determined that the new song had no effect on the value of or potential market for the original song. Bourne argued that (1) it was deprived of substantial licensing revenue because widespread,

similar unlicensed works would substitute for and compete with licensed comedic programs; and (2) the value of the original song was harmed because the new song is highly offensive to a significant number of people. The court rejected both arguments as misconceptions of the analysis required, finding that when the new use is transformative, there is less of a likelihood of market substitution, and market harm may not be so readily inferred. The court noted that parody does not typically affect the market in a way that is cognizable under the fourth factor. Also, Bourne failed to produce any evidence that its market for or the value of the original song was harmed, nor did it even argue that the new song could in any way be a substitute for the original.

As to its lost licensing revenue, the court opined that all uses of copyrighted work under a fair use rationale deprive the owner of licensing fees. If a parody of the original would usurp the market for licensing other comedic uses, then all parodies would fail under such an analysis. According to the court, this was not what was meant or intended by the fair use doctrine. The court went on to note that parodists seldom are able to obtain permission from the owner of the work that they wish to parody, as the self-esteem of the copyright holder may not be strong enough to permit the granting of permission for such a parody in exchange for a reasonable fee. Hence, the parody defense to copyright infringement exists precisely to make possible a use that cannot generally be purchased via a license. The court thus found that any harm inuring to the original song by association with the new song was the exact use of the original song that the law is supposed to protect. Therefore, the court found that the fourth factor also weighed in favor of a finding of fair use.

Accordingly, the court found that factors one, three, and four each weighed heavily in support of the defendants, and that the second factor was relatively meaningless in the overall determination. Thus, the court held that “I Need a Jew” was a parody of “When You Wish Upon a Star,” protected by the fair use doctrine, and dismissed the lawsuit.

## CONCLUSION

While parody and satire serve an important function by shedding light on earlier works, not all humorous commentaries are permissible under copyright law. As this case shows, transformative works such

as “I Need a Jew” “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” Yet, fair use requires a balancing between the goal of copyright law to promote the creation of new works and the monopoly to the creator that is granted by the Copyright Act. One must always traverse the four fair use factors in order to create a successful parody argument. ❖

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## ENDNOTES

1. *Bourne Co. v. Twentieth Century Fox Film Corp., et al.*, Case No. 07 Civ. 8580 (DAB) (S.D.N.Y. Mar. 16, 2009).
2. The Fair Use Doctrine of the Copyright Act is set forth in 17 U.S.C. § 107.
3. *Merriam-Webster’s Online Dictionary*, <http://www.merriam-webster.com/dictionary/parody> (last visited Apr. 30, 2009).
4. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).
5. See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998) (quoting *Campbell*, 510 U.S. at 582).
6. See 17 U.S.C. § 107.