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Intellectual Property, E-Commerce and Entertainment Law

Selected Legal Info, News And Trends

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PARODIES AND SATIRES:

One of the most frequently-asked questions we receive concerns parodies of a pre-existing work: is the permission of the owner of the pre-existing work required? The question arises in a variety of contexts: musical parodies, illustrations, comics, films, TV etc.

The issue is important is because a true parody doesn't require the prior permission of (and perhaps more importantly – payment to) the owner of the pre-existing work. And yet, determining what is a true parody is often very difficult and subject to varying opinions.

[From a legal perspective, the reason a parodist isn't required to obtain the permission of or pay the owner of the pre-existing work is because the U.S. Copyright Act considers a parody a "fair use" of the underlying work].

A good place to start to try to understand what the law considers to be a true parody is the U.S. Supreme Court's

decision in the Two Live Crew/"Pretty Woman" case. That case draws a fairly clear distinction between "parody" and "satire". This distinction is enormously important from legal, business and financial perspectives.

The issue in the "Pretty Woman" case was whether Two Live Crew needed permission to record an updated and revised version of the Roy Orbison standard which they called "Big Hairy Woman". The owners of the "Pretty Woman" copyright refused to give permission to Two Live Crew but the group went ahead and recorded and released the song anyway. After a lawsuit was filed, the Court found in favor of Two Live Crew.

A "parody" makes fun of the underlying work which is being parodied. Best examples: Mad Magazine and Saturday Night Live spoofs of TV shows and movies. A good music example was the Youngbloods' sendup of the old Merle Haggard right-wing anthem "Okie From Muskogee" which the Youngbloods parodied as "Hippie From Olema". [The Youngbloods even used the word

"haggard" as an adjective in a line in their version to help drive the point home]. As noted above, parodies are considered a "fair use" and thus don't require permission from the owner of the work that is being made fun of.

A "satire" on the other hand does NOT make fun of the underlying work, but uses the underlying work as a basis to take off from and make fun of or comment upon something else. Best example: Rick Dees' version of the old standard "When Sunny Gets Blue" which Dees' recast as "When Sunny Sniffs Glue". Another example: several years ago a Green Bay Packers fan wanted to put out an album of "parodies" such as "Packin'" (a version of "Truckin'" by the Grateful Dead) and "Cheesehead in Paradise" (a version of Jimmy Buffett's "Cheeseburger in Paradise"). It was a tough call but the conclusion was that these were satires which required permission (and payment to the copyright owners) and not parodies which didn't.

THE NEED FOR PHOTO RELEASES:

Why is it so important to obtain written releases from anyone who appears in any of your advertising and promotional materials such as brochures, websites, annual reports, and TV ads? This is the question Nestle USA probably should have asked before getting socked with a \$15.6 million jury verdict awarded to a former model when Nestle used his face without permission on Taster's Choice coffee jars.

In 1986 Russell Christoff – the former model - was photographed as "The Taster". He was paid \$250 for the photo shoot and the parties agreed that he would receive an additional \$2,000 if his image was used to market Taster's Choice in Canada.

Nestle's in Canada began to use the photo shortly after the photos were taken and

Nestle USA began using the photo in a 1997 redesign of its label. The photo appeared on the redesigned label for coffee jars for about six years until Nestle started using another image.

Christoff discovered the coffee jars bearing his image in 2002. He sued Nestle and argued that Nestle did not have the releases necessary under a California law (Civil Code section 3344) which prohibits the unauthorized use of a person's image, voice, signature, etc. for commercial purposes.

Although it is not entirely clear how the jury came up with the \$15.6 million figure - (a confidentiality agreement prevents disclosure of the jury's methodology) - a national newspaper reported that the award includes 5 percent of Nestle's profit from Taster's Choice sales during the six years Christoff's photo was used. Nestle reportedly sold eight varieties of Taster's Choice in more than a dozen countries with Christoff's photo on the labels.

The jury estimated that if Nestle had negotiated for Christoff's permission to use the photo, it would have paid him approximately \$330,000. The two sides tried to reach a settlement before trial but were unable to do so. According to some reports, Nestle offered Christoff \$100,000 but Christoff demanded \$8.5 million.

The amount of this jury verdict is one of the largest for these types of claims in recent memory. Aside from the pure size of the award, what makes the verdict especially interesting is the reported method by which the jury arrived at its award: a percentage (similar to a royalty) of the unauthorized user's net profits arising from sales of the products using the image.

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