

The Grinch loses and protection of parody wins

Someone once said make sure your words are sweet as you may have to eat them. In the attached decision, the Judge finds the play "Who's Holiday" is a parody entitled to fair use. He grants Plaintiffs' motion for judgment on the pleadings.

Plaintiffs had sued the copyright holder of "How the Grinch Stole Christmas!" asking for a declaratory judgment that their play was not infringing. Based on the pleadings, last month [I wrote about the case](#) for LAW360 and concluded:

Predicting judges is a hazardous undertaking. It appears, however, unlikely the judge will grant the playwright's motion for judgment on the pleadings. Seuss has sufficiently alleged there will be harm to the derivative works market for "Grinch." That is, unless the judge is able to clearly find the play a protected parody (and didn't take too much of the "Grinch") or that it was so transformative the play would not likely substitute for the "Grinch" or any derivative market Seuss would reasonably develop. I'm betting on the Grinch winning this round.

The Play is based on the popular Dr. Seuss book "Grinch." The book portrays Who-Ville as a saccharine town where everything is sweetness and light. Cute little Cindy-Lou Who wins the nasty Grinch over by her kindness. The Plaintiffs' Play is just the opposite. A down-and-out, 45-year-old Cindy Lou was impregnated by the Grinch, kills him when he tries to abuse her, struggles with alcohol and substance abuse, and lives in a trailer on Mt. Crumpet. Who-Ville is plagued by unemployment and other modern ills.

The Judge found there was no need for further discovery since comparing the two works was sufficient. The Judge held that under the first fair use factor the play is a parody and "has an obvious claim to [a] transformative value...." Relying primarily on the Supreme Court's *Campbell v. Acuff-Rose Music, Inc.* opinion (where Two Live Crew's rap version of Pretty Woman was held to be a transformative parody), the Judge finds that "the Play comments on *Grinch* by imitating and ridiculing its characteristic style for comic effect..." He notes the contrast between the *Grinch's* sweet little Cindy-Lou Who and the play's embittered, struggling adult Cindy-Lou who pushes the Grinch off a cliff.

He also points out the contrast between the original utopian Who-Ville and the Play's Who-Ville, plagued by modern day ills. The Judge likewise finds the Play to be a transformative use by adding something new and altering the original with new expression, meaning and message. He also finds that for parodies the fact that the work is commercial "is of less importance."

As to the second factor, the Judge concedes *Grinch* is fiction and normally would be entitled to more protection. Quoting the Supreme Court, however, he says: "The second factor is not 'ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since the parodies almost invariably copy publicly known, expressive works." Therefore, the Judge declines to give much weight to the second factor.

He finds that under the third factor, the amount and substantiality taken by the Plaintiffs from the original was "reasonable in relation to the purpose of copying." In a parody the author "must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable." (Quoting the Supreme Court in *Campbell*.)

The Judge found the fourth factor weighed strongly for the Plaintiffs. He found it "virtually" impossible consumers would see the play rather than reading the original book or see the 2000 film based on the book. He found it more likely the play will increase interest in *Grinch*. Also, he doubted that the Play will have any impact on potential licensing for the *Grinch* in defendant's "traditional, reasonable, or likely to be developed markets."

Finally, as a parody, to the extent the Play causes fans of Dr. Seuss to abandon the original work, the concern is irrelevant.

Accordingly, the Judge found that the fourth factor weighed strongly in a finding of fair use. Considering all the factors together, he held the Play constitutes fair use.



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