

MEMORANDUM

TO: Professor Sampson
FR: PID 003117278, LR&W Section 4
DA: Monday, November 24, 2008
RE: Literary Pastiche; Parody and Fair Use

Statement of Facts

Martha Stewart (Stewart), in association with Martha Stewart Omnimedia, Inc., is a commercial sensation who enjoys the success of her sprawling commercial enterprise which includes the marketing of catalogs, recipes, magazines and videos. Among her many successful endeavors, Stewart routinely publishes a magazine series entitled *Martha Stewart Living*, of which *Martha Stewart Living: Weddings (Weddings)*, an annual wedding issue, is a part. The publication offers generic information regarding how to plan an extravagant wedding, including both a wedding planner and a menu.

Literary Pastiche (LP) is a small group of writers who create publications for commercial distribution that are intended to provide social and political commentary and critique for what the writers consider the wasteful and destructive aspects of consumer society. In particular, they have published a parody of Stewart's publication, *Weddings*, to further this purpose. The parody, *Martha Stuart's Excruciatingly Perfect Weddings (EP Weddings)*, incorporates a significant amount of the copyrighted elements seen in *Weddings*, including its overall style, its choice of sections, and its individual sections' format. For example, *EP Weddings'* cover mirrors that of *Weddings'*, except for the title and a banner that reads "parody". Furthermore, the table of contents mirrors the one found in *Weddings* by incorporating its placement of wedding pictures in relation to the section headings; other sections invariably mimic its eloquent writing style. In addition

to format appropriation, *EP Weddings* uses each of the sections found in *Weddings* in an effort to ridicule every aspect of its proposed process, including the extreme extravagance advanced by many of its sections. To achieve its purpose, LP's flatware section proposes the use of some extreme utensils, the menu section offers ridiculous wedding recipes and the wedding planner offers an unrealistic twenty year wedding plan. *EP Weddings* was published in June of 2008 and has since become a commercial success.

Having recently become aware of LP's publication, in August of 2008, Stewart filed a copyright infringement lawsuit in federal district court against the small group of writers. The complaint alleges that they infringed on her copyrighted publication under the Federal Copyright Act of 1976 (FCA) by incorporating a substantial amount of its elements into their publication, which was inevitably marketed for commercial profit. In addition, Stewart alleges that LP, after having refused to stop selling *EP Weddings*, has caused irreparable market harm to her magazine series due to their publication's commercial success. As a result, Stewart seeks damages resulting from LP's infringing actions along with a court order to prevent any further episodes of infringement.

In answering the complaint, LP concedes that their publication has substantially made use of many of the copyrighted elements found in *Weddings*. However, they claim the use of the elements is protected under fair use because the publication is a parody that is primarily meant to humorously criticize the extravagant lifestyle that Stewart's magazine endorses. Moreover, LP maintains that their publication, although commercial in nature, falls short of detrimentally affecting Stewart's magazine series. As a result, LP wishes to continue marketing *EP Weddings*, which they claim is protected under fair use.

The purpose of this memo is to determine whether LP's publication, *EP Weddings*, will be protected under "fair use" pursuant to the FCA.

Question Presented

Can an alleged copyright infringer successfully claim "fair use" protection for the parodic use of an original copyrighted work under § 107 of the FCA when, although the use is marketed commercially and could possibly have a detrimental market impact on the work, the purpose for using the copyrighted work, as well as any of its relevant elements, is to provide a unique social critique of the work's seeming endorsement of the wasteful and destructive aspects of consumer culture?

Brief Answer

An alleged copyright infringer will be able to successfully claim "fair use" protection for the parodic use of a copyrighted work as long as the use falls within the uses sanctioned by § 107 of the FCA. In order to determine when a specific parodic use is sanctioned and thus protected, it must be weighed against four statutory fair use factors: (i) the purpose of the use; (ii) the nature of the copyrighted work used; (iii) the substantiality of the amount used; and (iv) the effect of the use on the copyrighted work.

When weighed in light of the four factors, LP's use of *Weddings* in creating *EP Weddings* will likely constitute fair use under the FCA. First, LP's use of *Weddings* is highly transformative, thus mitigating its commercial marketability. *EP Weddings* appropriates many of *Weddings*' elements, including its various sections, with the aim of providing a unique social critique of the work, thus creating a new artistic work. As a result, the first factor weighs in favor of fair use. In addition, the second factor, which

offers more protection to creative fictional works, likely weighs in favor of fair use because *Weddings* appears to closely resemble a factual “how-to” guide. The fourth fair use factor also tips in favor of fair use because there is likely no evidence that *EP Weddings* provides a market substitute for the original. The two works are simply aimed at different audiences; one is aimed at potential wedding planners while the other is aimed at consumers who enjoy a good comedic critique. Lastly, the third fair use factor, although it may initially seem to favor infringement because the use of the original’s style is substantial, is of little consequence considering that the first and fourth factors strongly weigh in favor of fair use. Thus, *EP Weddings* will likely qualify for fair use protection.

Discussion of Authority

LP’s publication, *EP Weddings*, will likely constitute a parody of Stewart’s copyrighted publication, *Weddings*, that is protected under “fair use” pursuant to 17 U.S.C.A. § 107 (West 2005). By enacting § 107 of the FCA, Congress intended to formalize common law fair use while leaving intact traditional common law fair use adjudication, stemming from Folsom v. Marsh, F. Cas. 342, (C.C. D. Mass. 1841) and its progeny. H. R. Rep. No. 94-1476, at 66 (1976). Thus, courts must inevitably look to a combination of federal common law and equitable policy in assessing whether, on a case-by-case basis, the facts surrounding a particular use constitute fair use in light of the factors presented in section 107. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (adopting language from H. R. Rep. No. 94-1476, at 66 (1976)).

The FCA provides that the use of a copyrighted work is generally considered fair when it is used to criticize or comment on the particular copyrighted work being used. §

107. Courts have generally viewed parodies as a potential form of criticism or comment. Campbell, 510 U.S. at 579. Although parodies often borrow significant elements from the original copyrighted work, they may be afforded protection under § 107, as long as criticism or comment is directed at the original work. Id. at 579-80; see SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268-69 (11th Cir. 2001); Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986). The protection of parodies under fair use stems from the very nature of parody itself—i.e. parody requires borrowing from the original work in order to create a new artistic work that effectively criticizes or comments on the original. Campbell, 510 U.S. at 580; see Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351, 357 (N.D. Ga. 1979). Given the facts of the LP case, *EP Weddings* will likely constitute a parody because its aim is to provide a social critique of *Weddings* by utilizing its elements in an effort to create a new artistic work. For example, *EP Weddings* uses *Weddings*' menu section to suggest ridiculous wedding meals in an effort to ridicule the wasteful extravagance advanced in the original copyrighted work.

In determining whether a parody of a copyrighted work, in fact, constitutes fair use, a court must weigh the use in light of the following statutory factors: (i) the purpose of the use; (ii) the nature of the copyrighted work used; (iii) the substantiality of the amount used; and (iv) the effect of the use on the copyrighted work. § 107; see Campbell, 510 U.S. at 577-78 (providing a statutory analysis of the factors).

The first “fair use” factor focuses on the author’s purpose for using a copyrighted work. § 107 (1). In light of this factor, a court must initially determine whether the use of a copyrighted work serves either a commercial purpose or an educational, non-profit

purpose. Campbell, 510 U.S. at 578; SunTrust, 268 F.3d at 1268. When the use of a copyrighted work serves a commercial purpose, the commercial purpose weighs heavily against a finding of fair use. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). However, the transformative nature of the use, especially with regard to parodies, strongly mitigates the commercial nature of the use in relation to fair use protection because the law seeks to encourage the creation of new ideas, expressions, and other forms of creativity. Campbell, 510 U.S. at 579; SunTrust, 268 F.3d at 1269. Thus, because the nature of parody requires the employment of elements from an original work in order to transform the work into something over and above the original through commentary or criticism, “the more transformative the [parody], the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” Campbell, 510 U.S. at 579; SunTrust, 268 F.3d at 1269.

Given the importance of transformation in the finding of fair use with regard to copyrighted works, federal courts generally refuse to grant protection under fair use when the use of a copyrighted work is solely commercial in nature. See, e.g., Harper & Row, Publ’rs., Inc. v. Nation Enters., 471 U.S. 539, 562-63 (1985) (declining protection because the sole purpose of defendant’s publication was to scoop the news, and thus supplant the marketability of plaintiff’s copyrighted manuscript, in order to make a profit). Likewise, when the use of a copyrighted work is both transformative as well as commercial in nature, courts typically refuse to grant protection under fair use when the transformative nature lacks sufficient transformative value over and above the original. See, e.g., MCA, Inc. v. Wilson, 677 F.2d 180, 184-85 (2d Cir. 1981) (declining

protection to the defendant's song because the defendant simply changed the words of the original copyrighted song without providing any commentary or critique aimed at the original that would have aided in the transformation toward a new creative work); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (declining protection because the defendant's book incorporated the characteristic style of the original copyrighted book without directing any criticism toward the style, resulting in the failure to add something new to the copyrighted original through critique).

Federal courts generally do, however, extend fair use protection to the use of copyrighted works when the use, though commercial in nature, is highly transformative. See, e.g., SunTrust, 268 F.3d at 1271 (extending protection to the defendant's parodic book because it constituted something new, over and above, the original by providing a social critique specifically aimed at critiquing the societal views of the original work, rather than simply using the original to facilitate a general social critique); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114-15 (2d Cir. 1998) (extending protection to the defendant's advertisement because the use of a slightly modified version of the plaintiff's photograph transformed the original into a new work that could reasonably be perceived to comment on what someone would reasonably expect the original to espouse).

In relating the first fair use factor to the facts in the LP case, it is likely that *EP Weddings* will be viewed as a highly transformative parody of *Weddings* for, although it is commercial in nature, the publication provides a unique social critique of the original resulting in a new creative work. LP concedes in their answer that their publication has significant commercial value; however, it also transforms the content presented in the

original work into an “over-the-top” parodic spectacle of the wedding process designed to engender critical commentary aimed at the original work. *EP Weddings*, for example, transforms the original work’s flatware section, which seems to contain every piece of flatware imaginable, into a parodic spectacle by presenting an “over the top” flatware arrangement consisting, in part, of a drool recovery spoon, a sperm serving spoon, and a lard spreader in order to comment on the original’s unreasonably lavish flatware arrangement. As a result, the highly transformative nature of LP’s publication will strongly mitigate its commercial nature, especially since each of the elements used contribute to the furtherance of its intended purpose. That is, *EP Weddings* presents a social critique aimed at the original work over and above the mere transformation of its elements, thus propelling it into the category of a new creative and artistic work.

The second “fair use” factor focuses on the nature of the copyrighted work. § 107 (2). In essence, the factor espouses the idea that some works should be afforded more protection under copyright law than other works, resulting in an increased burden on potential infringers in gaining protection under fair use with regard to these more heavily protected works. Campbell, 510 U.S. at 586. Works that are highly creative and artistic should be afforded more protection than works consisting of mere factual compilations because the purpose of copyright law is to engender and protect works that foster the creation of new expressions and other forms of novel creativity. SunTrust, 268 F.3d at 1271; compare Dr. Seuss, 109 F.3d at 1402 (refusing protection to the defendant’s use of the plaintiff’s book because of the extraordinary “creativity, imagination and originality embodied in [it] and its central character”) with Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.,

499 U.S. 340, 363-64 (1991) (granting protection to the defendant's appropriation of the factual elements compiled within the plaintiff's publication because the elements were not arranged or presented in a creative way) and Gulfstream Aero. Corp. v. Camp Sys. Int'l, 428 F. Supp. 2d 1369, 1378 (S.D. Ga. 2006) (extending protection to defendant's use of plaintiff's manual because it mainly consisted of factual information including procedures, lists of systems, and detailed methods of operations). However, when the use of the copyrighted work involves a parody, focusing on the nature of the copyrighted work is of little help in determining whether to extend protection to the use under the FCA because the nature of parody requires that the use borrow copyrighted elements from the original work, even if it is highly creative. Campbell, 510 U.S. at 586.

In light of the second fair use factor, it is likely that *Weddings* more closely resembles a factual "how-to" guide than a creative fictional work. For example, the various sections, including the planner and the menu, are ones that would be found in any wedding magazine. Moreover, the planner offers a generic timeline that any wedding planner should follow, including rehearsals and confirmations. As a result, *Weddings* should not be afforded the degree of protection under copyright law that would be expected in cases involving a highly creative fictional work. Moreover, even if one were to assume that *Weddings* is highly creative, the protection enjoyed from copyright law is mitigated in cases of parodic use because the nature of a parody, a creative work in itself, requires the borrowing of certain elements from the original work that it aims to parody.

The third "fair use" factor focuses on the amount and substantiality of the copyrighted work used in relation to the work as a whole. § 107 (3). The amount and

substantiality of the copyrighted work that can be used fairly invariably depends on the purpose for which the work is being used. Campbell, 510 U.S. at 586-87. When a copyrighted work is being used as the target of a parody, it is fair to use as much of the original as is required to “conjure up” the copyrighted work even if the elements used are substantial, for a parody must be able to effectively identify its target in order to successfully achieve its creative and artistic purpose. Id. at 588; see, e.g., Berlin v. E. C. Publ’ns, Inc., 329 F.2d 541, 545 (2d Cir. 1964) (holding that the defendant’s parodic publication fairly used the plaintiff’s copyrighted songs because it only employed brief lyrical phrases from the songs in an effort to simply “conjure them up” without making use of their themes, contents, or styles); Abilene Music, Inc. v. Sony Music Entm’t, Inc., 320 F. Supp. 2d 84, 93 (S.D. N.Y. 2003) (holding that defendant’s parodic song was fairly used because, even though it quoted the original song’s signature phrase, it took no more of the phrase than was needed to “evoke the message” of the original song including the phrase’s melody or style).

Additionally, any appropriation over and above that which is required to “conjure up” the original work will not necessarily weigh against fair use. Campbell, 510 U.S. at 588; see Elsmere Music, Inc. v. Nat’l Broad. Co., 623 F.2d 252, 253 n. 1 (2d Cir. 1980). In order for excessive parodic use of a copyrighted work to qualify for fair use protection, the excessive use of the elements over and above those needed to “conjure up” the original must (i) serve an added creative purpose in furtherance of the parody and (ii) avoid serving as a market substitute for the original. Campbell, 510 U.S. at 588; see, e.g., Leibovitz, 137 F.3d at 116 (holding that, since the first and fourth fair use factors favored

the parodist, the defendant's parodic advertisement fairly used the plaintiff's photograph, even though the use of its elements, including the pose, lighting, and angle, was excessive); World Wrestling Fed'n Entm't, Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413, 429 (W.D. Pa. 2003) (holding that the defendant's graphics fairly used the noticeable characteristics at the heart of the plaintiff's characters; in fact, the defendant could have fairly taken all of them as long as the first and fourth fair use factors weighed in his favor).

When the elements of a copyrighted work are used excessively in creating a parody without (i) serving an added parodic purpose or (ii) avoiding potential market substitution, federal courts have generally refused to protect the parody under fair use. See, e.g., Dr. Seuss, 109 F.3d at 1402-03 (refusing to extend protection to defendant's book because it mimicked the overall style and excessively used the central character of the plaintiff's book without any justifiable purpose in furtherance of the parody); Metro, 479 F. Supp. at 360 (refusing to extend protection to defendant's parodic play because it appropriated a significant amount of elements from the plaintiff's movie, including the movie's major episode sequences, scenes, and general dialogue, without adequately parodying the majority of those excessively used elements).

In light of the third fair use factor, *EP Weddings*, will likely be deemed to have taken over and above what was needed to "conjure up" *Weddings* for the purpose of effecting a parody. For example, LP's imitation of *Weddings*' cover, including the carefully crafted title, is arguably sufficient to "conjure up" the publication for the purpose of creating a parody. In effect, LP's mimicking of the style components

contained *Weddings*, which include both the writing style and the layout of the various sections, will likely be considered over and above that which is needed to conjure it up.

However, this finding alone is insufficient in determining whether the use of the additional elements is excessive in terms of warranting a copyright violation. For example, *EP Weddings*' use of *Weddings*' table of contents, specifically the placement of the pictures in relation to the text, may constitute fair use even though the use is more than is needed to "conjure up" *Weddings*. Because the use of the publication surpasses that which is needed to simply "conjure up" it up, courts must look to (i) the purpose of the additional elements used and (ii) the effect of using these elements on the copyrighted work's marketability in determining whether the publication excessively used elements of the copyrighted publication to the extent of warranting a copyright violation. As a result, LP's use of *Weddings* will only be deemed "grossly" excessive if (i) the additional use of elements does not add anything new to the furtherance of the parody or (ii) the additional use of elements creates a marketable substitute for the copyrighted work.

The fourth "fair use" factor focuses on the effect that the use of a copyrighted work has on the market value of the original work. § 107 (4). When assessing the affects of use on the market value of a copyrighted work, a court must consider the actual, as well as the potential, market impact on both the original and derivative works. Campbell, 510 U.S. at 590; SunTrust, 268 F.3d at 1274. A use that detrimentally affects the market value of a copyrighted work, or its derivative works, weighs heavily against a finding of fair use. Campbell, 510 U.S. at 593. However, market substitution is the only relevant detrimental effect on the original work, and its derivatives, that should be considered in

cases that involve parodies because the detrimental market impact caused by the effectiveness of a successful critique is irrelevant with regard to a finding of copyright infringement. Id.; SunTrust, 268 F.3d at 1274. In effect, courts must distinguish between uses that suppress demand through an effective critique and those which usurp demand through market substitution. Fisher, 794 F.2d at 438.

Parodies, even though they may have commercial value, typically do not usurp demand for the original works that they parody because they are aimed at different markets and serve different market functions, both of which diminish the possibility of potential market substitution. Campbell, 510 U.S. at 591. As a result, evidence of actual or potential market harm due to market substitution is crucial in determining whether to extend fair use protection to parodic uses of copyrighted works because there is no presumption of market harm in these cases. Id.; SunTrust, 268 F.3d at 1275. Courts generally extend fair use protection to parodies in the absence of evidence supporting the contention that they offer viable market substitutions for the original copyrighted works. See, e.g., SunTrust, 268 F.3d at 1275-76 (extending protection to the defendant's parodic play because the plaintiff failed to produce any evidence establishing market substitution; in fact, the defendant offered evidence towards the contrary); Leibovitz, 137 F.3d at 116-17 (extending protection to the defendant's advertisement because the plaintiff conceded that it did not provide a market substitute).

In contrast, when there is sufficient evidence showing that the use of a copyrighted work supplants the market value of the original work, or its derivatives, by providing a viable market substitute, courts refuse to protect the use as a fair use. See,

e.g., Metro, 479 F. Supp. at 360-61 (refusing to extend protection to defendant's play because there was evidence that it served the same market function as the original rather than serving as a critique and that it would directly compete with any potential derivatives); New Line Cinema Corp. v. Bertlesman Music Group, Inc., 693 F. Supp. 1517, 1528 (S.D. N.Y. 1988) (refusing to extend protection to defendant's parodic rap video because there was direct testimony confirming that it would directly compete with any derivative use of the original in the rap market).

In relating the fourth fair use factor to the facts in the LP case, it is unlikely that LP's publication, *EP Weddings*, will have any significant detrimental market impact on Stewart's publication, *Weddings*, or its derivatives. It is obvious that *EP Weddings* offers a biting criticism of *Weddings* through, for example, its parodic use of Stewart's wedding planner, which calls for the planning to commence twenty years before the wedding. However, although LP's publication is meant to provide a biting critique of *Weddings*, any detrimental market effects that result from the effectiveness of a critique have no bearing on the assessment of market harm in relation to a fair use determination.

Moreover, it is unlikely that LP's publication will provide a viable market substitute for *Weddings* because the contents of the parodic publication are pushed to the point that no reasonable person would seriously consider using the parody to plan a wedding. For example, the wedding planner in *EP Weddings* entreats the planner to "evaluate classmates for photogenic wedding mates" and to "begin interviewing the wait staff" ten years before the wedding. In addition, one of the recipes in the menus and recipes section calls for using carp, a fish routinely found in stagnant ponds. Thus, it is

clear that the publications are simply intended for different markets, consequently placing a heavy burden on the plaintiff to produce evidence that demonstrates significant market harm to the copyrighted work resulting from market substitution.

In balancing the four fair use factors in tandem with the facts of the LP case, LP's publication, *EP Weddings*, will likely constitute a parody of Stewart's *Weddings* that is protected under "fair use" pursuant to the FCA. First and foremost, it is likely that *EP Weddings* will constitute a parody because its aim is to provide a unique social critique of *Weddings* by utilizing the work's elements, including form and style, in an effort to create a new artistic work. Moreover, each of the four fair use factors appear to, either directly or indirectly, tip in favor of fair use. Factors one and four should certainly tip in favor of LP. That is, LP's publication is likely construed as highly transformative resulting in the mitigation of its commercial marketability. *EP Weddings* uses the various elements found in *Weddings*, including each of its sections, to add something over and above the original, altering it in such a way as to provide a new artistic expression. Likewise, there is little or no evidence supporting the contention that the publication provides a market substitute for the original because the two works are aimed at different audiences. A wedding planner is simply not going to use *EP Weddings* to plan a wedding.

In addition to these two factors, factor two will likely weigh in favor of LP because *Weddings* is likely to be construed as a factual "how-to" guide due to its generic wedding tips rather than a highly creative work of fiction. However, even if *Weddings* is deemed highly creative, the importance of factor two in finding against fair use is limited in cases involving a parody because the nature of parody requires borrowing from highly

creative works. Lastly, even though *EP Weddings* substantially borrowed many of *Weddings*' elements, including the style and layout of the individual sections, the third factor is of little import in this case considering that factors one and four strongly weigh in favor of LP. Thus, *EP Weddings* is a parody that should qualify for fair use protection.