

# **Copyright and Related Rights Law**

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**WEEK - 11**

**LECTURE – 51**

**Fair Use**

Welcome back to this course on copyright and related rights law. From this session onward until a few sessions later, we will be discussing exceptions to copyright. These exceptions are necessary in order to maintain a balance, between the private right of copyright and the public interest in access to rights. Fair use, along with fair dealing and permitted acts—two issues that we will discuss in the next session—are defenses that are available against the claim of infringement. Please note that I am deliberately choosing to explain defenses before we discuss infringement in detail. It is my belief that infringement can be better understood once we understand these defenses, and not the other way around.

The first kind of exception that we are going to discuss is termed "fair use." The use of this terminology of fair use is connected to US copyright jurisprudence, and that is why in this particular session we are going to focus on the US copyright statute. And a very important case decided by the US Supreme Court, which will help us understand this particular type of exception. Take a look at this set of lyrics.

The first set reads, "Pretty woman, stop a while." Pretty woman, talk for a while. Pretty woman, give your smile to me. Pretty woman, look my way. In contrast, the other set is a bald-headed woman; your hair won't grow.

Bald headed woman, you got a teeny weeny afro. Bald-headed woman, you know your hair could look nice. Bald-headed woman, first you got to roll it with rice. You can see that the second set of lyrics seems to be aimed at poking fun at the original set of lyrics. What we are going to understand is whether such usage of an original work, wherein a connection is drawn to the original in a certain kind of expression, can be considered fair use.

In terms of what fairness would mean as a general application, fairness is considered to be something that is without cheating or trying to achieve an unjust advantage. Is such a

connection, which is being brought by a person making an expression to the original work, an unfair advantage? In that background, we will consider a very important case decided by the US Supreme Court: this case is Campbell versus Acuff-Rose. The set of lyrics that we had considered earlier forms part of the longer set of lyrics that forms the cause of dispute in this particular case. Roy Orbison and William Dees had written a rock ballad called Oh Pretty Woman and had assigned their rights in it to Acuff-Rose Music. Luther Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as a group called Two Live Crew, and the genre of music they create is rap music.

Campbell of 2 Live Crew wrote a song titled "Pretty Woman." And this particular song was intended to be a parody version of the original song made by Roy Orbison and Bill Dees. What do we understand by parody? 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 ridicule. In this basic understanding itself, there are two important facets that I am sure we can all link. The first is that a parody is clearly linked to the original work in terms of the connection between their expressions.

It is, after all, a derivative. The purpose of a parody is different from that of the original expression. 2 Live Crew, through their agent, had informed Acuff-Rose that they were intending to release such a parodied version. They stated that they would give credit to the original creators, and they also said that they would provide a fee for any such usage of the work. They also included a copy of the lyrics to be considered by Acuff Rose.

But this intention to use the original expression for the purpose of parody was something that was rejected by Acuff Rose. They stated that they knew about 2 Live Crew, but they did not want a parody version made by 2 Live Crew. Despite such a rejection of permission, 2 Live Crew went ahead and released its song. They called it "Pretty Woman," and it was part of a collection of songs entitled "As Clean As They Wanna Be." After this particular song was released to the market, it attained a lot of popularity.

There was a commercial success. And then there came a copyright suit. The question that the court was considering, was whether Two Live Crew's commercial parody amounted to fair use or not. The Supreme Court considered *Folsom v. Marsh*, an earlier judgment in which Justice Story, had distilled the essence of law and methodology from a catena of earlier cases that discussed fair use.

According to Justice Story, consideration of whether a usage is fair use or not must be seen from the perspective of the nature and objects of the selection made. The quantity and value of the materials used, and the degree to which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work. Let us understand what Justice Story says. Where the purpose of a particular expression in terms of the use it is making of the original work is the same or similar, Then there is a high possibility that it

can, in fact, supersede the very object of the original expression. In doing so, it can seriously impede the commercial interests of the original copyright holder.

The distinct facets that are noted, within this particular passage form the foundation for what the court has considered fair use over many years. The Copyright Amendment Act of 1976 to the US Copyright Act introduced four factors into the fair use consideration. These four factors must be applied on a case-by-case basis. Let us see Section 107 of the Copyright Act of the U.S. And what it is saying with respect to fair use. Section 107 reads, notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by such other means specified by that section, For purposes such as criticism, comment, news reporting, teaching, scholarship, or research, it is not an infringement of copyright. This preamble to the fair use four factors provides a certain purpose of usage that would not amount to infringement of copyright. At the same time, such a purposive consideration is dependent on these four factors. What are these four factors? It is stated in section 107 that in determining whether the use made of a work in any particular case is a fair use, The factors to be considered shall include one - The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.

Two: the nature of the copyrighted work. Three, the amount and substantiality of the portion used in relation to the copyrighted work as a whole are important factors. And four, the effect of the use on the potential market for or value of the copyrighted work. The section further states that the fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors. One thing is clear: from a bare reading of section 107, it is clear that what is expected of the courts is to continue the tradition of using fair use on a case-by-case basis, and not the requirement of an objective application of a rigid test.

What is stated then by the Supreme Court is that the fair use doctrine does permit and requires courts to avoid rigid application of the copyright statute, when on occasion it would stifle the very creativity which that law is designed to foster. According to the Supreme Court, it is relevant to consider that new expressions are possible even though these new expressions may not be authorized. For instance, if the purpose of a particular expression is different from that of the original expression, then is it not possible for there to be a distinction in the market? This foundational understanding will help us in breaking down these four factors and considering whether the new expression that is emanating from the use of an original work can be considered fair use or not. Let us look at the first factor. The first factor talks about the purpose and character of the use.

You can see that in this first factor, something that is stated is that a facet that can be considered by the court is whether the use is for commercial purposes or not. But you

would see that this is not a necessary consideration. Therefore, what is of necessary consideration is just the first portion, which talks about the purpose and character of the use. The US Supreme Court is saying that this first factor draws on Justice Story's formulation of the nature and objects of the selection made. How do we understand the purpose and character of using a particular expression? According to the Supreme Court, guidance can be seen in the preamble to section 107, in which distinct purposes have been identified.

We saw that under Section 107, purposes such as teaching, research, or criticism have been clearly highlighted. According to the court, the central purpose of this investigation is to see, in Justice Story's words, whether the new work merely supersedes the objects of the original creation. If it does, in fact, do that, then the purposes are aligned. And if the purposes are aligned, then this is not something that can be considered fair. Instead, what the US Supreme Court explains is that upon investigation, if it is found that the use is, in fact, in an expression that has brought in some new meaning; There is some new purpose.

According to the US Supreme Court, this change of meaning brought to a work is something that can be termed the transformative nature of that expression. Logically speaking, what this will mean is that upon the addition of something new, if a new meaning emerges for that work or if the purpose can be considered to have shifted, the more transformative a work is, the less likely it is to hold infringement. The court says that where such is the case, the first factor itself will bear a heavy burden of defense for the party who is claiming fair use. In fact, such would be the consideration for such a purposive transformation that factors such as the commerciality of usage would not play a big role. Specifically, with respect to parody, what the Supreme Court is saying is that a parody seems to obviously have transformative value. Why is that? We would realize that the creator of *Pretty Woman* would surely not intend to ridicule their own work, and therefore an expression that is, in fact, ridiculing the original work is transformative.

There is a new meaning to that expression, despite the fact that it is heavily connected to the original. According to the court, like less ostensibly humorous forms of criticism, it can provide social benefit by shedding light on an earlier work and, in the process, creating a new one. Parody may or may not be considered fair use. The petitioner's suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair. A word of caution that the Supreme Court places is that, despite the fact that a parody can be transformative in nature, it does not mean that just because a work is intended to be a parody of another work, it is immediately fair use.

Any such claim would necessarily have to pass the four-factor fair use test. What the Court says is that the threshold question when fair use is raised in defense of parody is whether a parodic character can reasonably be perceived. On the question of whether

lyrics like these, as you can see, are in bad taste. And because they are in bad taste, they should not be considered to be something which is fair use. According to the court, all that the court needs to consider with respect to a parody work is whether there is a parodic character that can be reasonably perceived.

In other words, is the work meant to ridicule the original expression? If so, then there is such a reasonable character. What the court is not interested in looking at, then, is the quality of such a parody; whether it is in good taste or in bad taste is irrelevant. The court explains, "While we might not assign a high rank to the parodic element here," We think it is fair to say that 2 Live Crew's song could reasonably be perceived as commenting on the original or criticizing it to some degree. In explaining the purpose of 2 Live Crew's usage, the court says that 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true with degrading taunts. A bawdy demand for sex and a sigh of relief from paternal responsibility.

The later words can be taken as a comment on the naivete of the original from an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that have traditionally had a claim of fair use protection as transformative works. The Court clearly highlights the purposive character of fair use with respect to parity. It is then said that the language of the statute makes clear that the commercial or non-profit educational purpose of a work is only one element of the first factor inquiring into its purpose and character. We have seen that 2 Live Crew went ahead even without the permission of the original right holders to publish their work.

The publication and its popularity brought commercial success to this rap group. What the US Supreme Court explained is that just because the usage of an original work is commercial in nature, that in itself cannot make the work and such usage unfair. Please note that in order for a work to be considered fair, the first factor is a consideration of whether there is some transformativeness being brought in on account of such usage. Where do we draw guidance from? According to the Supreme Court, the preamble to Section 107, which talks about certain types of usages such as criticism, teaching, and review, gives us an idea of what kind of purposive transformation can amount to fair use. Let us then come to the second statutory factor.

The second factor talks about the nature of the copyrighted work. The US Supreme Court explains that this draws on Justice Story's expression regarding the value of the materials used. With respect to the nature of the copyrighted work, the question really is whether the work in question, portions of which have been used in the derivative, is that work worthy of copyright protection and does it fall within the objective intended for the grant of copyright? According to the court, this derivative is, in fact, an expression that falls

within the ambit of copyright protection objectives. The court explains, Orbison's original creative expression for public dissemination falls within the core of the copyright's protective purposes. *Pretty Woman* is a creative expression, something that definitely deserves copyright protection.

But according to the court, the nature of this copyrighted work and its assessment are not of much help in determining whether the usage of the work can be considered fair use or not. Because of the fact that parodies are so connected to the original expression, any consideration that may actually be adverse to it is relevant. In other words, just because a work is something that should be protected by copyright on account of the objectives behind the copyright grant. Just because of that, it should not lead to the conclusion that copying by a person, where it is a derivative, should amount to infringement. The third factor then looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole.

According to the U.S. Supreme Court, in Justice Story's words, this relates to the quantity and value of the materials used. We must keep in mind, with respect to amount and substantiality, that in terms of such usage, we must consider whether the copying that has occurred has done so with respect to quantity. And not just quantity with respect to the quality of the expression that has been taken and its importance. What that means is that even though the quantity of what has been taken is less because of its importance in relation to the original work, it could still amount to an infringement. According to the court, attention turns in this factor to the persuasiveness of a parodist's justification for the particular copying done, and the inquiry will harken back to the first of the statutory factors.

What the court explains is that in a case such as parody, the linkage between the usage of the original expression is not something that can be given up. The Parodist must resort to taking comprehensive portions from the original work. Therefore, be it amount or substantiality in terms of quantity or quality. Because a parodist cannot make a parody without taking portions from the original work, this too would not help. The Court explains that using some characteristic features is not something that can be avoided; in which case, we must then go back to the first factor - which talks about the purpose of usage.

What the Court says is that using some characteristic features cannot be avoided. Therefore, once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character are to parody the original, or in contrast, the likelihood that the parody may serve as a market substitute. In considering whether the parody can serve as a market substitute, you must have realized that this is something that will happen only if the purposes are aligned. On that thought, when we look at the fourth factor, which discusses

the effect of the use on the potential market for or value of the copyrighted work, The court is to assess what kind of effect the use of such a derivative will have on the original work in commercial terms. What the court says is that, it requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether the unrestricted ,and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact, on the potential market for the original.

As for parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. What the Court is explaining is something that we referred to earlier as well. Is that the original creator of the work Pretty Woman would not imagine a market in which a derivative is something that they have authorized for the purpose of ridiculing their own work? And therefore, it is clear that a parody version that is poking fun at the original is not going to be considered a substitute. Therefore, in terms of any commercial harm that it can cause in copyright terms, it doesn't emerge. But can we deny that derivatives such as parodies can cause damage to the original? This, too, the court explains, is not correct.

The U.S. Supreme Court explains that a parody can, in fact, have the effect of killing demand. But this consideration is not something that is within the ambit of copyright consideration. Court explains, we do not, of course, suggest that a parody may not harm the market at all. But when a lethal parody, like a scathing theatre review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. The market for potential derivative uses includes only those that creators of original works would, in general, develop or license others to develop.

Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. Therefore, I am sure you have understood what the fair use factors are and how they are applied on a case-by-case basis with this specific reference to how it has been applied by the US Supreme Court in respect to parody. In the next session, we are going to take a look at fair dealing and permitted acts and see how they figure as an exception to copyright. Thank you for joining me. See you all in the next session. Thank you.