

# **“Speech” Use of Trademarks: A View from the United States\***

Ronald S. Rosen  
Troy & Gould  
Los Angeles, California

## **I. INTRODUCTION**

Although the trend in the United States – and indeed throughout most of the world – is toward greater protection of intellectual property rights there still remain safe harbors where otherwise protected trademarks and copyrighted works may be used without liability by persons other than their owners. These areas of refuge revolve around the protections afforded speech and the unimpeded communication of the ideas embodied within that speech. In those nations where such freedoms are highly valued, protection for such unauthorized uses is afforded by tradition, statutory and case law and, in the United States by constitutional mandate, which also grants limited monopolies to provided authors and inventors with incentive to pursue creative activities for their own gain and the benefit of society. It is this balancing act – protection of intellectual property rights against society’s right to the free flow of ideas – that is placed in sharp relief where trademarks or copyrighted works are used for the purposes of criticism, comment, news reporting, parody and satire.

Although there are many reported appellate opinions involving circumstances where the rights of copyright and trademark proprietors collide with those of others who make use of those rights for purposes of protected speech (constitutionally or otherwise), a case which embodies all these issues involves a famous Dr. Seuss children’s book, *The Cat in the Hat*, which was used as the basis for a claimed “parody” entitled *The Cat Not in The Hat* by Dr. Juice. In fact, “Dr. Juice” is a reference to O.J. Simpson<sup>1</sup> and *The Cat Not in The Hat* is a commentary on the infamous criminal prosecution, *People of the State of California vs. Orenthal James Simpson*. What the Court of Appeals for the Ninth Circuit did in affirming an injunction prohibiting distribution of 12,000 copies and further publication of *The Cat Not in The Hat* is illustrative of the difficulties created when an individual or entity uses a trademark or copyrighted work for purposes of communicating ideas, opinions and points of views. When compared with decisions of federal courts in other parts of the United States, it also demonstrates the differences in approach among the federal appellate circuits (the “Circuits”). Although there is near unanimity among the Circuits that the rights of trademark and copyright owners must yield to the public’s right to free expression and the free exchange of ideas embodied in that expression, there is no unified approach as to when and under what circumstances the public’s right will trump the rights of trademark owners. This split among the Circuits is dramatically exemplified by the approaches of the Eight and Ninth Circuits at one end of the spectrum and the First, Second and Tenth Circuits at the other end. Prior to analyzing selected opinions from the Circuits, and in order to understand the public policy issues faced by courts in determining whether rights of free expression or those rights of trademark owners are to prevail, it is necessary to consider not only applicable statutes and constitutional provisions, but also the elements and purposes of parody and satire.

- **The Constitutional Mandates:**

The United States Constitution, Amendment I, states:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the

\*Included in Adjuncts and Alternatives to Copyright, International Literary and Artistic Association Congress (June 13-17, 2001), published by Kernochan Center for Law Media and the Arts, Columbia University School of Law (2002).

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

United States Constitution, Article 1, Section 8, Clause 8, states:

“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

- **The Governing Statutes**

The Copyright Act of 1976, 17 U.S.C. section 107 provides:

“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 any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use of the factors to be considered shall include:

“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

“(2) the nature of the copyrighted work;

“(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and

“(4) the effect of the use upon the potential market for or value of the copyrighted work.”

The Copyright Act of 1976, 17 U.S.C. Section 106 provides:

“Subject to sections 107 through 120, the owner of copyright under his title has the exclusive rights to do and to authorize any of the following:

“(1) to reproduce the copyrighted work in copies or phonorecords;

“(2) to prepare derivative works based on the copyrighted work.”

The Lanham Act, Section 43(a)(1), 15 U.S.C. Section 1125(a)(1) provides:

“(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

“(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another per-

son, or as to the origin, sponsorship or approval of his or her goods, services, or commercial activities by another person.”

The Lanham Act, section 43(c)(4), 15 U.S.C. § 1125(c)(4) (emphasis added) provides:

“(c) Remedies for dilution of famous marks....

“(4) The following shall not be actionable under this section:

“(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.

“(B) Noncommercial use of a mark.

“(C) All forms of news reporting and news commentary.”

141 Cong. Rec. S19310 (daily ed. Dec. 29, 1995) (excerpt from legislative history of The Lanham Act, Section 43(c)(4)(B), 15 U.S.C. Section 1125(c)(4)(B)):

“Parody, satire, editorial and other forms of expression that are not part of a commercial transaction” are entitled to First Amendment protection.

– Statement of Senator Orrin Hatch

- **Definitions and Distinctions**

In approaching their tasks, the courts must also consider and understand the core concepts of parody and satire, defined as follows:

- \* Parody

“literary or musical composition imitating the characteristic style of some other work or of a writer or composer, but treating a serious subject in a nonsensical manner in an attempt at humor or ridicule; and to turn into a parody; to write a parody upon; to imitate, as a poem or song, in a ludicrous manner.”

- \* Satire

“a literary work in which vices, follies, stupidities, abuses, etc. are held up to ridicule and contempt; such literary works collectively, or the art of writing them; and the use of ridicule, sarcasm, irony, etc. to expose, attack, or deride vices, follies, etc.”<sup>2</sup>

In substance this conflict may be summarized as follows:

- **The Trademark Perspective.**

- \* The Eighth and Ninth Circuits rely on the premise that trademark rights are property rights akin to interests in real property and need not yield to the exercise of First Amendment rights under circumstances where “alternative avenues of communication exist.” See *Mutual of Omaha v. Novack*, 648 F.Supp. 905, 910 (D.Neb. 1986) and *Dr. Seuss Enterprises v. Penguin Books et al.*, 109 F.3d 1394 (9<sup>th</sup> Cir. 1997).<sup>3</sup>

- \* The First, Second and Tenth Circuits have rejected this approach and have begun with the premise that trademarks rights are not like real estate and therefore do not entitle trademark owners to suppress an unauthorized use of a trademark designed and intended to communicate ideas whether as comment, criticism, news reporting, parody or satire. See *L.L. Bean v. Straight Publishers*, 811 F.2d 26 (1st Cir. 1987); *Rogers v. Grimaldi*, 875 F.2d 994, 999-1000 (2d Cir. 1989); *Cartoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959, 971 (10<sup>th</sup> Cir. 1996).<sup>4</sup>

- **The Copyright Perspective.**

- \* *Campbell in Acuff-Rose Music, Inc.* 510 U.S. 569, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994)

- a. The Majority Opinion: The majority held that an unauthorized use of the original work did not necessarily have to target the original work to be a fair use under the copyright law. Rather than placing its focus upon the “targeting” analysis, the court focused on whether the unauthorized use met the “transformative/superceding” analysis. The majority opinion distinguished between copying that supercedes the market for the original work and a transformative use. In so doing, the majority carefully enunciated a sliding scale in which greater justification was required to establish fair use in the context of satiric works that did not target the original, but specifically rejected any categorical denial of the fair use defense to purely satiric works:

“[W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work’s minimum distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may *satire* with lesser justification for the borrowing than would otherwise be required.” 510 U.S. at 580 n.14. See, 4 *Nimmer*, § 13.05[C][2] at 13-218, n. 387 (citing *Campbell*, n.14).

- b. The Concurring Opinion. Justice Kennedy in his concurring opinion, distinguished parodic from satiric uses and while joining in the result searched by the majority would have held that parody would qualify as fair use because it targeted the original, whereas satire could never qualify as a fair use because it did not.

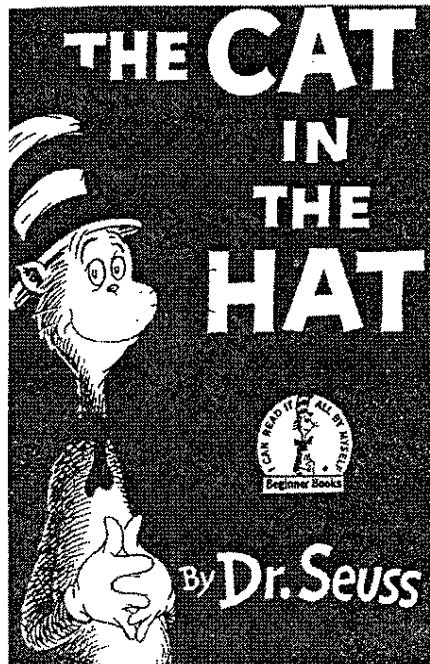
- \* *Dr. Seuss Enterprises vs. Penguin Books, et al*, 109 F 3d 1394 (9<sup>th</sup> Cir. 1997)

The Court of Appeals for the Ninth Circuit chose not to follow the majority opinion in *Acuff-Rose*, but instead applied the Eighth Circuit “no alternative avenues of expression test” (for trademark) and the more restrictive analysis of fair use employed by Justice Kennedy in his concurring opinion: to wit, that the *Cat Not in the Hat* was not a parody, but rather a satire which could not qualify as a fair use under the Copyright Act.

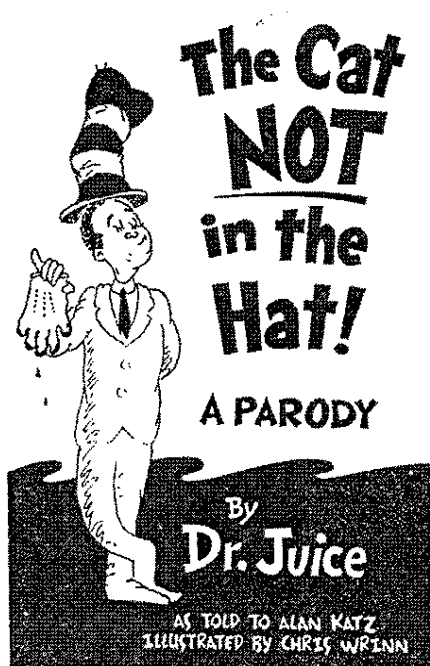
## II. THE UNAUTHORIZED USE OF TRADEMARKS FOR THE COMMUNICATION OF PROTECTED SPEECH AND IDEAS: THE CIRCUIT SPLIT ILLUSTRATED AND ANALYZED

### B. The No Alternative Avenues of Expression Test

*The Cat in the Hat* was created by Theodore Geisel under the pseudonym of Dr. Seuss. In his sixty-year career Geisel authored (both text and illustrations) forty-seven books with approximately 35 million copies sold worldwide as of 1997. *The Cat in the Hat* is a whimsical creature who wears a red and white striped stovepipe hat. The Cat, the stovepipe hat, "Dr. Seuss" and "The Cat in the Hat" were, at the time the litigation commenced, common law trademarks. The front cover of *The Cat in the Hat* includes all of these trademark elements:



The front cover of the *The Cat Not in The Hat* was illustrated as follows:



*The Cat Not in The Hat*, claimed to be a “parody” by its creators, was a whimsical and often discomfiting critique of the criminal justice system and law enforcement agencies, particularly the Los Angeles Police Department. The targeted markets for the two works were quite different: *The Cat in The Hat* was written for children while *The Cat Not in The Hat* was targeted for adult readership. The following comparison of selected illustrations and text from the two works is illustrative of the comparisons confronting the Court of Appeals and raises questions regarding its reasoning and perhaps its decision.

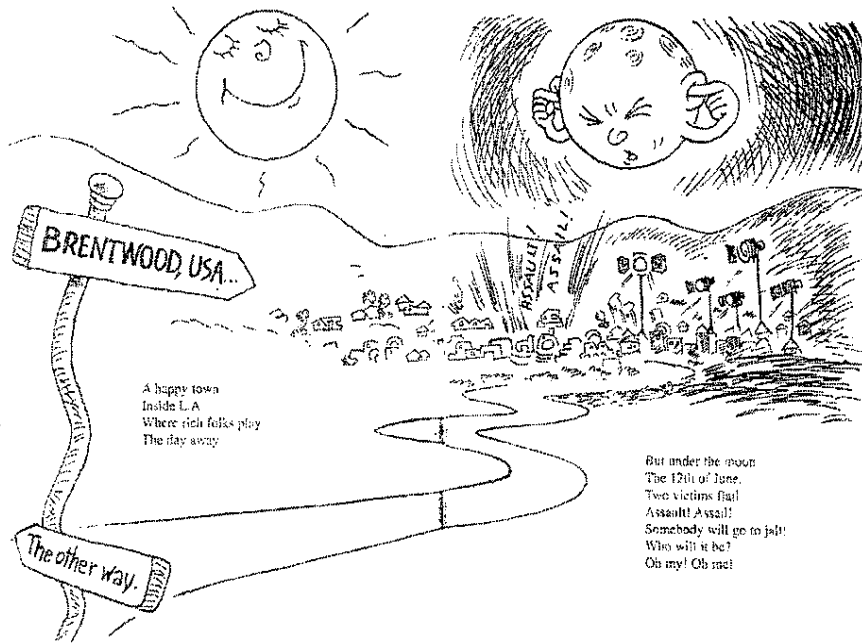


The Cat<sup>5</sup>

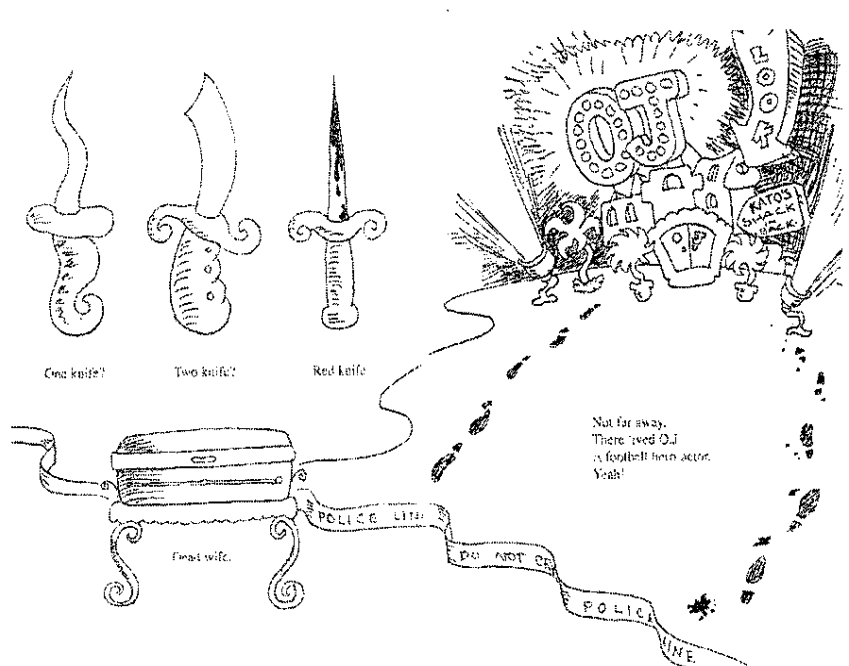


O.J. Simpson





A reference to O.J.'s residence and some doggeral about the night of the Brown/Goldman murders



A not so subtle reference to the knife used and the result of its use in the Brown/Goldman murders

After analyzing the two works, the Ninth Circuit agreed with the district court which found that "... Seuss has demonstrated: (1) a strong likelihood that Katz and Wrinn had taken substantial protected expression from the *Cat in the Hat*, but not from *Horton in One Fish Two Fish*; (2) a strong likelihood of success on the copyright claim raising a presumption of irreparable harm; (3) a strong likelihood of success on the parody as fair use issue; (4) serious questions for litigation and a balance of hardships favoring Seuss on the trademark violation; and (5) a minimal likelihood of success on the federal dilution claim." 109 F.3d at 1397. The



Court of Appeals, in affirming the lower court's grant of preliminary injunction on the copyright claims adopted Justice Kennedy's lone concurring opinion (rather than the majority opinion) by supporting its holding that parody was a proper subject for the fair use defense because in targeting the original the reader is made aware of the separate and distinct expression attributed to the original creator. 109 F.2d at 1401. In its trademark analysis the Ninth Circuit used the eight factor *Sleekcraft*<sup>6</sup> test in holding that there was a likelihood of confusion as between *The Cat in the Hat* and *The Cat Not in the Hat* because consumers would likely mistake the claimed "parody" as originating from the same source as the *Dr. Seuss* books. Based on this line of reasoning the court balanced the hardships in favor of Dr. Seuss. Of particular interest is the court's observation in a footnote that "... [i]n a close case amounting to a tie, doubts are resolved in favor of the senior user - Seuss." 109 F.3d at 1404. If one puts the court's reliance on the tests it used for trademark (no alternative avenues of communications) and Justice Kennedy's concurring opinion in *Campbell v. Acuff-Rose, supra* (i.e., parody but not satire has the benefit of the fair use defense) perhaps this cryptic observation throws more light on the Ninth Circuit's affirmance of the district court's order granting a preliminary injunction against distribution and further publication of the defendants' work.

- *Mutual of Omaha vs. Novack*, 836 F.2d 397 (8<sup>th</sup> Cir. 1987) affg *Mutual of Omaha vs. Novack*, 648 F.Supp 905, 910 (D. Neb. 1986). The famous trademark owned by the insurance company, Mutual of Omaha, and the name of a television series it sponsored look like this:



Mutual of Omaha's  
**WILD KINGDOM**

**Wild Kingdom**

An anti-nuclear group used the Mutual of Omaha trademark and accompanying language in the following manner.



**Mutant of Omaha**  
NUCLEAR HOLOCAUST INSURANCE

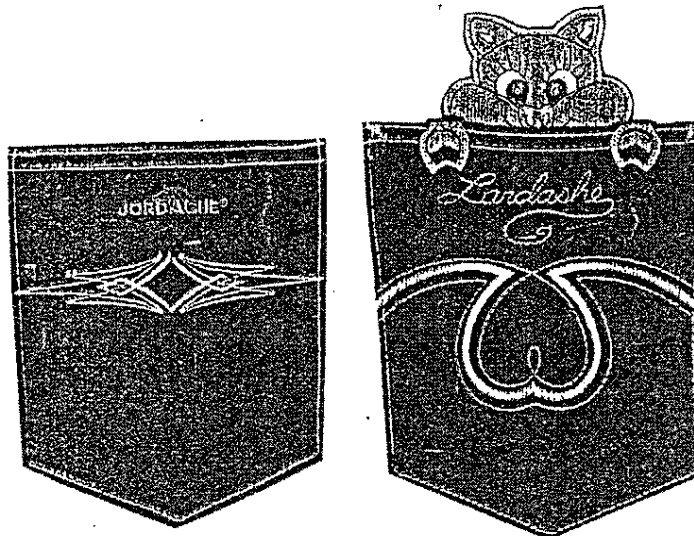


The Court of Appeals for the Eighth Circuit held that the findings of the district court were not clearly erroneous, affirming that trademark rights are property rights which “need not yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist, and affirming that the injunction prohibiting use of the offending logo on tee shirts, coffee mugs and similar articles not necessary to convey protected speech. The court, however, stated that nothing prohibited the defendant from using the “mutant” logos in tracts, films, and other mediums conveying his anti-nuclear message.

C. The Free Speech Approach: Trademark Owners May Not Use Trademark Rights That Suppress The Free Expression Of Ideas.

- *Jordache Enterprises vs. Hogg Wyld*, 828 F.2d 1482 (10<sup>th</sup> Cir. 1987).

Hogg Wyld manufactured jeans for large women, which it branded with the whimsical mark *Lardashe* with a little pig appearing as part of the logo on the pockets attached to the jeans. Jordache, the owner of a famous mark branding its jeans for women, did not see the humor in the *Lardashe* mark and filed an action alleging that there was (1) a likelihood of confusion between the two trademarks; and (2) that Jordache’s famous mark was diluted by tarnishment under New Mexico’s anti-dilution statute. The district court entered judgment for Hogg Wyld. On appeal, the Court of Appeals for the Tenth Circuit affirmed the lower court judgment. In so doing, the court observed that even though the “*Lardashe*” logo was used for commercial purposes<sup>7</sup> it was a parody which tended to increase public identification of the Jordache (the company) with its mark. The court also held that there was no dilution by tarnishment, in that the *Jordache* mark did not give rise to unsavory or degrading associations with Jordache jeans.



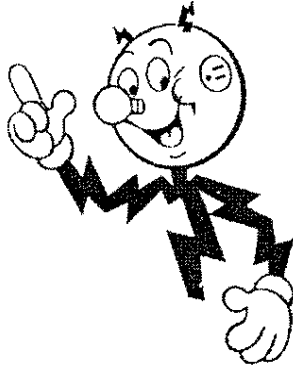
The Jordache Jeans Pocket  
and Trademark

The Lardashe Parody  
Pocket and Trademark

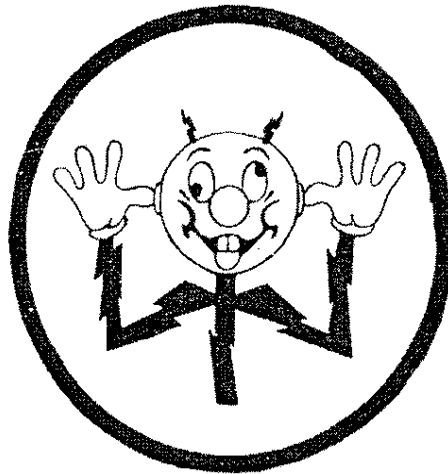
- *Reddy Communications vs. Environmental Action Foundation*, 477 F.Supp. 936 (DDC, 1979).

Plaintiff Reddy Communications is in the business of licensing promotional materials to public utilities. Among those materials is a cartoon character, *Reddy Kilowatt*, which is the subject of a registered and

common law trademarks held by plaintiff. *Reddy Kilowatt* is depicted as a friendly little goodwill ambassador of electric companies.



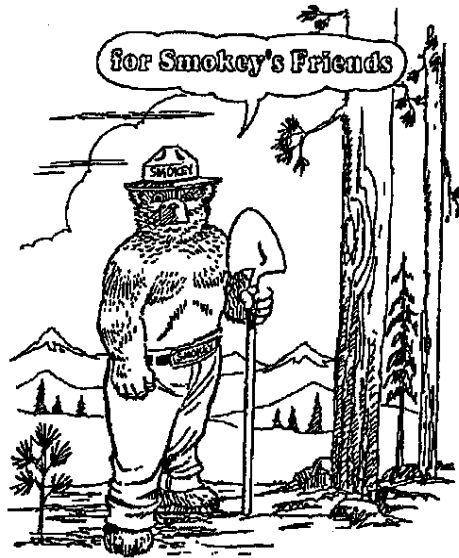
Defendant is a non-profit corporation which publishes environmental material. Among these publications, defendant criticized the electric industry and parodied *Reddy Kilowatt* as follows:



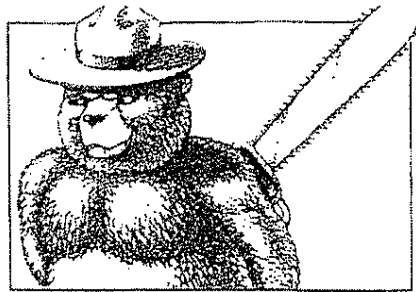
The inevitable action followed in which the plaintiff sought relief enjoining further use of the *Reddy* parody. The court denied injunctive relief, holding that the publication of the *Reddy* parody, which was used for purpose of comment and criticism, was not likely to confuse the segment of the public reading defendant's publications. The court, along with criticizing the methodology employed by the survey company retained by plaintiff, observed that the readership of defendant's publications were not gullible and were sufficiently sophisticated not to be confused.

- *Lighthawk Environmental Air Force vs. Robertson*, 812 F.Supp. 1095 (W.D. Wash. 1993).

The government-owned trademark for *Smokey the Bear* is an iconic presence in America's national parks:



An environmentalist group, disturbed by the United States Parks Service's alleged "sell-out" to logging interests printed and distributed the following critical comment depicting a less than lovable *Smokey Bear*:



## Say it ain't so, Smokey.

### There's a bear in the woods. And he's destroying our heritage.

The U. S. Forest Service is helping big timber companies chop down America's ancient forests in the Pacific Northwest. They say they need the wood. But the truth is, private forest lands can supply all the timber they *now* take from our *public* *natural* forests.

It's crazy. 90% of America's ancient forests have been destroyed. With the help of our own Forest Service, timber companies are hacking away at the *last* 10%—and wiping out thousands of American jobs.

It turns out that many more jobs (in salmon fishing, recreation, science, pharmaceuticals, etc.) depend on *protecting* intact national forests than on cutting them down.

### To save American jobs— save America's public forests.

The ancient forests are America's heritage—like the Grand Canyon or Old Faithful. Once their *complex* ecology is destroyed, it can't be replaced.

Today, your taxes pay for the destruction of your national forests. Speak out against the madness!



**Lighthawk-The Environmental Air Force**  
For more information about how you can make a difference, contact:  
P.O. Box #163, Santa Fe, New Mexico 87504 (505) 268-2151

In seeking to prohibit the defendant organization from depicting a caricature of Smokey with a chainsaw hidden behind his back, the Parks Service relied upon 16 U.S.C. Section 500 p.4(a) which provides as follows:

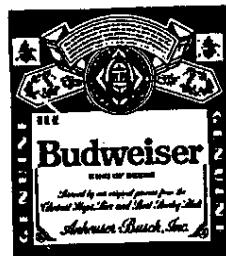
“Whoever, except as provided by rules and regulations issued by the Secretary, manufactures, uses, or reproduces the character ‘Smokey Bear’ or the name ‘Smokey Bear’ or a facsimile or simulation of such character or name in such a manner as suggests ‘Smokey Bear’ may be enjoined from such manufacture, use, or reproduction at the suit of the Attorney General upon complaint by the Secretary.”

In passing the statute, Congress declared the name and character of *Smokey Bear* to be the property of the United States of America to protect Smokey’s value in the Forest Service’s campaign to prevent forest fires. In order to do so, the Secretary of the Interior was given broad powers to prevent uses of *Smokey* which diminished its value as a symbol for preservation of natural parks.

The court granted summary judgment for the defendant environmental group holding that application of the statute would violate the defendant’s First Amendment rights and was therefore unconstitutional.

*Anheuser Busch, Inc., vs. L & L Wings, Inc.* 962 F.2d 316, 22 U.S.P.Q.2d 1502, 1507 (4<sup>th</sup> Cir. 1992), cert denied, 506 U.S. 872, 121 L. Ed. 2d 147, 113 S. Ct. 206 (1992).

The famous Budweiser trademark with its equally famous slogan “This Bud’s For You” was parodied by a manufacturer and distributor of T-shirts advertising and promoting the desirability of a beach in South Carolina. The Budweiser mark and format of beer can label and Myrtle Beach label are as depicted as follows:



**This Beach is for You!**  
Myrtle Beach, S.C.

The jury found no infringement; however, the trial judge granted judgment notwithstanding the verdict for plaintiff, overturning the conclusion of the jury. The Court of Appeals reinstated the jury verdict. "An intent to parody ... is an intent to benefit from the original trademark, but such an intent is not necessarily probative of a likelihood of consumer confusion." The dissent argued that the defendant's logo was not a "parody" at all in that it did not "ridicule Budweiser or offer social commentary on the evils of alcohol."

*Hard Rock Licensing vs. Pacific Supplies, Inc.*, 776 F Supp 1454 (W.D. Wash. 1991)

*Pacific Supplies* engaged in the manufacture and sale of heat transfers of a logo which was closely based upon the ubiquitous *Hard Rock* trademarked logo and design used for the plaintiff's night club/restaurant establishments and merchandise as follows:



SAN FRANCISCO



SEATTLE

The court rejected defendant's claim of parody and entered a preliminary and permanent injunction against further manufacture of the heat transfers.

## II. CONCLUSION

Whether it is labeled fair use, parody and/or satire is just another way of saying that the senior mark used is being used in a manner and form which does not cause confusion as to the source or origin of the comments or ideas being communicated. Stated another way: there is no likelihood of confusion of the junior mark with the senior mark. As Professor McCarthy has aptly put it: "a non-infringing parody is merely amusing – not confusing."<sup>8</sup>

---

## <sup>1</sup>Notes

<sup>1</sup> Author's note: "Dr. Juice" is derived from Simpson's initials as an abbreviation for orange juice. He, in fact, endorsed a brand of orange juice and was frequently referred to by the late Howard Cosell as "Juice" (when addressing Simpson) or "the Juice" (when referring to him in the third person).

<sup>2</sup> *Random House Webster's College Dictionary* (2d Ed. 1997).

<sup>3</sup> This approach appears to be a different way of stating the "time, place and manner" test (e.g., though it may be appropriate to use loud speakers to disseminate ideas to the public on a streetcorner, the same speech and means of dissemination underneath the window of a schoolroom when class is in session may not and would be subject to "time, place and manner" regulations by governmental entities.) See *Ward v. Rock Against Racism* 491 U.S. 781, 791, 129 S.Ct. 2746, 105 L.Ed.651 (1989). This approach has been criticized as being incompatible when applied to non-commercial speech used for the communication of ideas, points of view and other protected speech. J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 31:152 and 31:153 at 31:246-252 (2001); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 495 (2d Cir. 1989); *Mutual of Omaha Ins. Co.*, 836 F.2d at 405-06; *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1407-08 (9th Cir.) cert. denied, 508 U.S. 951, 113 S.Ct. 2443, 124 L.Ed.2d 660 (1993); *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1512-23 (9th Cir. 1993) (denial of rehearing en banc); *Tetley, Inc. v. Topps Chewing Gum, Inc.*, 556 F.Supp. 785, 791-794 (E.D.N.Y. 1983); *Eveready Battery Company, Inc. v. Adolph Coors Co.*, 765 F.Supp. 440, 450 (N.D.Ill. 1991); *Girl Scouts of U.S.A. v. Personality Posters Manufacturers*, 304 F.Supp. 1228, 1230-31 (S.D.N.Y. 1969); *Girl Scouts of The United States of America v. Bantam Doubleday Dell Publishing Group*, 808 F.Supp. 1112, 1118 (S.D.N.Y. 1992) *aff'd*, 996 F.2d 1477 (2d Cir. 1993); *Lucasfilm, Ltd. v. High Frontier*, 662 F.Supp. 931, 933-935 (D.D.C. 1985).

<sup>4</sup> See *L.L. Bean*, 811 F.2d at 29 ("The First Amendment issues involved in this case cannot be disposed of by equating the rights of a trademark owner with the rights of an owner of real property"); *Rogers*, 875 F.2d at 998-999 (the "no alternative avenues of communication standard provides insufficient leeway for literary expression . . . [A restriction on the location of a speech is different from a restriction on the words the speaker may use] (emphasis in original); *Cardtoons*, 95 F.3d at 971; ("Intellectual property, unlike real estate, includes the words, images, and sounds that are used to communicate, and we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. [Citations omitted] Restrictions on words or images that may be owned by a speaker, therefore, are quite different than restrictions on the time, place or manner of speech." See also, *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (content based restrictions on speech cannot be properly analyzed under the "no alternative avenues of communication" standard as a form of time, place and manner regulation).

<sup>5</sup> This description and those following are the author's, not part of the original text.

<sup>6</sup> *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 9th Cir. 1979. The court in *Dr. Seuss* enumerated these factors as follows:

"(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; (8) likelihood of expansion of the product lines." 109 F.3d at 1404.

<sup>7</sup> In *Virginia State Board of Pharmacy v. Virginia Citizen's Council* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, (1976) the Supreme Court rejected the argument that only political speech and writings were entitled to First Amendment protections, and held that "commercial speech" also qualified for such protections. In so doing the court reasoned as follows:

"Advertising, however, tasteless and excessive it sometimes may seem is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the ag-

---

gregate, be intelligent and well formed. To this end, the free flow of commercial information is indispensable.”  
427 U.S. at 765

The court in subsequent opinions defined “Commercial speech” as speech which “proposes a commercial transaction.”  
See *Board of Trustees v. Fox* 492 U.S. 469, 106 L.Ed.2d 388, 109 S.Ct. 3028 (1989); *Cincinnati v. Discovery Networks*  
507 U.S. 410, 123 L.Ed. 99, 113 S.Ct. 1505 (1993).

<sup>8</sup> *McCarthy on Trademarks* § 31.153 at 31-251 (2001)

\*Special thanks to Lindsay Harrison, J.D. candidate, Harvard 2003, for her editorial contributions to this article.