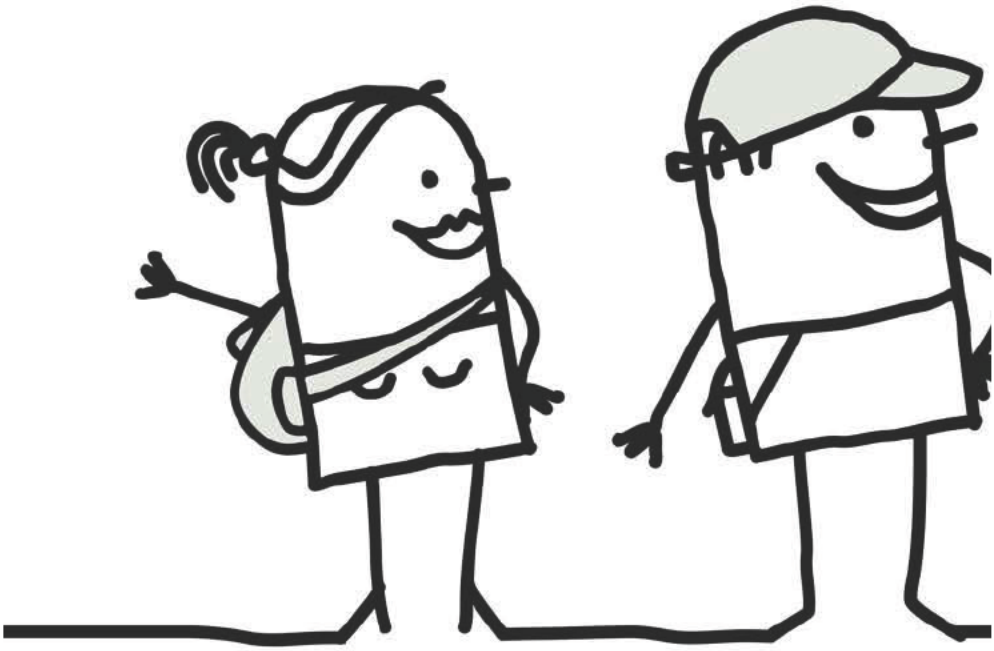
Fun with Trademarks and Copyrights: Parody, Satire and Lampoon

By David Gurnick

There are distinct differences between parody, satire and lampoon. Intellectual property attorneys should be able to recognize these differences and understand the respective case law to best protect their clients' trademarks and copyrights—or to best argue their clients' fair use of other people's work.



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PEOPLE KNOW THAT GENERALLY THEY ARE NOT allowed to use other people's trademarks and copyrights. Copying someone else's work or using someone else's trademark in a way that causes confusion is unlawful. But poking fun at someone's trademark, or using someone else's work or brand as social criticism or commentary on the work itself is often permitted if it is parody, satire or lampoon. These combination literary-legal concepts are part of the doctrine of "fair use" which is a defense to a claim of copyright or trademark infringement.

What Are Parody, Satire and Lampoon?

Parody has been defined as "a composition burlesquing or imitating another, usually serious, piece of work." It is "designed to ridicule in nonsensical fashion, or to criticize by brilliant treatment, an original piece of work or its author."[1] Usually, parody requires borrowing from the work being parodied. Otherwise, the viewer or reader or listener would not be aware of the burlesque or imitation, or criticism. Popular examples of parody include *Saturday Night Live*'s comic sketches that mock popular celebrities, or *The Simpsons*, *Family Guy*[2] or *South Park*[3] parodies of popular culture.

The U.S. Supreme Court stated that for copyright law purposes, "the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[4] The Supreme Court added, "parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination."[5]

Satire has been defined as "a work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly."[6] The Supreme Court, indicating a less favored status for satire than for parody, stated that satire, "can stand on its own two feet and so requires justification for the very act of borrowing."[7] The meaning of satire was also illuminated by the Texas Supreme Court, which stated:

> [s]atire, particularly realistic satire, is a distortion of the familiar with the pretense of reality in order to convey an underlying critical message. Satire deals with actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very fresh deposit of corruption whose stench is still in the satirist's curling nostrils. . . . Perhaps the most famous example of satire is Jonathan Swift's 1729 essay, "A Modest Proposal," in which he advocated that the children of the Irish poor be sold and slaughtered for meat. The article was intended to criticize English landlords and political economists, but Swift was widely criticized by those who misunderstood the satire.[8]

The Texas Court noted that the United States has a long and storied "tradition of satiric comment" and that public figures and judges often bear the brunt of satire.[9]

Lampoon "is a form of satire, often political or personal, characterized by the malice or virulence of its attack;"[10] it is a writing that ridicules and satirizes the character or personal appearance of a person in a bitter, scurrilous manner.[11] Or it is criticism of someone or something by using ridicule, irony, or sarcasm.[12] Many people will recall *Mad Magazine* as well as *National Lampoon* as publications that ridiculed and criticized many institutions and aspects of American culture. These publications could fairly be called lampoons.

Satire, Lampoon and Parody Applied in Trademark Cases

Trademarks might be used in a parody or satirical manner. This is illustrated in several court decisions. In one case, a manufacturer of a chewy dog toy parodied the famous Louis Vuitton trademark.[13]

Louis Vuitton

Chewy Vuiton

Many people may recall the Jordache Jeans brand that was popular in the 1970s and '80s. The brand conducted widespread advertising featuring thin women, viewed at the time as having sex appeal due to their wearing tight fitting Jordache denim jeans. A company decided to parody the brand with a product identified as Lardashe Jeans.[14] The product was "blue jeans for larger women with a smiling pig and the word "Lardashe" on the seat of the pants."[15] The court found that the respective marks were not confusingly similar. The court also noted that when a party "chooses a mark as a parody of an existing mark, the intent is not

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necessarily to confuse the public but rather to amuse."[16] With regard to the original trademark owner's objection to being parodied, the Ninth Circuit, quoting the famous parodist Will Rogers, stated:

> "Now everything is funny as long as it is happening to somebody Else, but when it happens to you, why it seems to lose some of its Humor, and if it keeps on happening, why the entire laughter kinder Fades out of it."[17]

The court added that the same principle is true in trademark law, noting that "no one likes to be the butt of a joke, not even a trademark. But the requirement of trademark law is that a likely confusion of source, sponsorship or affiliation must be proven, which is not the same thing as a 'right' not to be made fun of."[18]

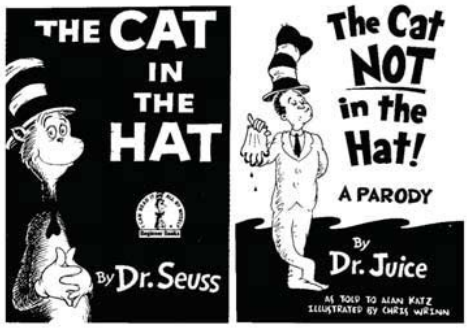
The case of *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*[19] concerned a manufacturer of perfumes designed for pets. The manufacturer created brand names that parodied famous high fashion perfumes for people, such as Timmy Holedigger (parodying the Tommy Hilfiger brand), CK–9 (parodying Calvin Klein's CK–1), Pucci (parodying Gucci), Bono Sports (parodying Ralph Lauren's Polo Sports), Miss Claybone (parodying Liz Claiborne), and White Dalmatians (parodying Elizabeth Taylor's White Diamonds). A District Court noted:

> where the unauthorized use of a trademark is part of an expressive work, such as a parody, the Lanham Act must be construed narrowly... Specifically, it has held that the public interest in avoiding consumer confusion must be balanced against the public interest in free speech. Cases finding that First Amendment interests prevail involve nontrademark uses of mark—that is, where the trademark is not being used to indicate the source or origin of consumer products, but rather is being used only to comment upon and, in the case of parody, to ridicule, the trademark owner. In such cases, the parodist is not trading on the good will of the trademark owner to market its own goods; rather, the parodist's sole purpose for using the mark is the parody itself, and precisely for that reason, the risk of consumer confusion is at its lowest.[20]

In another case, *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*,[21] the Second Circuit ruled that "Spy Notes" was a parody of "Cliff's Notes." The publisher of Spy Notes intentionally used some of the identical colors and aspects of Cliffs Notes' well-known cover design. But the slight risk of consumer confusion from this usage was outweighed by the public interest in free expression.

Some Risks in Using Parodied Marks

Not every claimed parody or satire will be found to be fair use. And labeling a work as parody will not necessarily be effective. After the infamous murder trial of O.J. Simpson, Penguin Books and Dove Audio sought to publish and distribute "The Cat NOT in the Hat! A Parody by Dr. Juice." Their work was a "rhyming summary of highlights from the O.J. Simpson double murder trial."[22] Here are the covers of the two books:



The defendants' title was obviously similar to *The Cat in the Hat* and included a character, named "Dr. Juice," similar in name, and appearance to the title character of Dr. Seuss's book. In the following image, from the court decision, Dr. Seuss' title character is on the left, and a character from the defendant's work is on the right[23]:

The publisher of Dr. Seuss books claimed trademark and copyright infringement and was granted a preliminary injunction. Affirming, the Ninth Circuit stated:

> In several cases, the courts have held, in effect, that poking fun at a trademark is no joke and have issued injunctions. Examples include: a diaper bag with green and red bands and the wording "Gucchi Goo," allegedly poking fun at the well-known Gucci name and the design mark, the use of a competing meat sauce of the trademark "A 2" as a "pun" on the famous "A.1" trademark. Stating that, whereas a true parody will be so obvious that a clear distinction is preserved between the source of the target and the source of the parody, a court found that the "Hard Rain" logo was an infringement of the "Hard Rock" logo. In such a case, the claim of parody is no defense "where the purpose of the similarity is to capitalize on a famous mark's popularity for the defendant's own commercial use."[24]

In *Wendy's International, Inc. v. Big Bite, Inc.*[25] a small, new chain of sandwich restaurants sought to compete with national chains. Defendant's TV commercials parodied ad campaigns of other fast food chains. In one commercial, a cute, pigtailed, freckle faced little girl, apparently recognizable as Wendy's trademarked character, ordered a Big Bite

sandwich and said, “Ain’t no reason to go any place but Big Bite.”[26] That statement parodied a phrase trademarked by Wendy’s (“Ain’t no need to go anyplace else.”).

Big Bite 1983 TV Commercial


Wendy’s Registered Trademark
(U.S. Trademark Reg. 936803)

Wendy’s claimed the commercial gave the false impression that Wendy’s own character endorsed or sponsored Big Bite.[27]

A U.S. District Court in Ohio noted “it is fairly well established that an advertiser such as Big Bite may lawfully use a competitor’s trademark for the purpose of comparing its wares directly to those of the competitor,” and added, “no uniform rule exists where, as here, the advertiser compares his goods to those of another implicitly or indirectly by using the other’s mark in a satirical or humorous manner.” The court noted “courts facing this issue have reached widely different results for widely different reasons.”[28]

The court found that Big Bite’s commercials were inoffensive, entertaining and light—hearted spoofs that did not misrepresent or make false statements about Wendy’s products. But the court issued a preliminary injunction anyway, because evidence showed there was some confusion between the marks among the buying public.[29]

Thus, one’s belief that his or her conduct is lawful fair use may turn out to be incorrect. A trademark owner’s claim may thus result in a finding of infringement.[30]

Court decisions on whether a trademark usage was parody or satire thus have an element of subjectivity. There is risk that a court may find confusion between usages, and that a use does not qualify as a parody, satire or lampoon, and thus was not a permitted fair use. Potentially serious consequences can follow. The federal trademark law (the Lanham Act)[31] authorizes a court to order preliminary and permanent injunctive relief, and various measures of damages. A successful plaintiff can recover actual damages, and potentially triple damages. A victim of infringement can require an infringer to disgorge profits attributable to the infringement. Court costs are also recoverable.[32] In a case found to be exceptional, the court can also award reasonable attorneys fees to the prevailing party.[33]

Parody, Satire and Lampoon in Copyright Cases

Parody, satire, and lampoon have their roots in literature. As such, they are defenses to claims of copyright infringement by works of literature. Establishing that a literary work is a true parody, satire or lampoon can help establish the defense of fair use.[34]

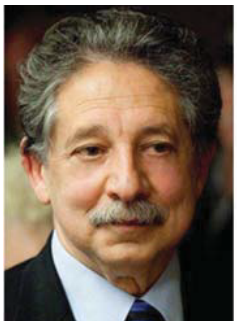
Campbell v. Acuff Rose Music involved a parody, by a rock music group 2 Live Crew, of an earlier Roy Orbison song, *Oh Pretty Woman*. The Supreme Court analyzed fair use, applying a

statutory four factor test set forth in the Copyright Act.[35] The Supreme Court gave reduced significance to the statute's first factor, which is the purpose and character of the use, whether commercial or nonprofit.[36] The statute's second factor, or the nature of the original work, was found by the court to be "not much help . . . or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."[37]

With regard to the third factor in fair use analysis (amount and substantiality of the portion of the original used), the Supreme Court found in favor of the defendant, noting that a parody "must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable."[38] *2 Live Crew* had copied the key opening bass riff (musical phrase) of the original, and words of the first line, comprising the "heart" of the original.[39] But the Supreme Court was satisfied this was not "a substantial portion" of the parody itself or "verbatim" copying of the original; it was not a case "where the parody is so insubstantial, as compared to the copying," as to resolve the third factor against the parodist. The Supreme Court was satisfied that "no more was taken than necessary."[40]

Regarding the fourth fair use factor, "effect of the use upon the potential market for or value of the copyrighted work," the Supreme Court noted this factor does not concern injury to the market for the original that results from the parody's critique or disparagement of the original. In other words, a work that critiques another, may well reduce using public's esteem for the work that is the subject of the parody. That result is not relevant to the test's fourth factor. Rather, this factor concerns whether the new work affects the market by acting as a substitute for the original.[41]

In a recent case, *Kienitz v. Sconnie Nation LLC*,[42] a federal court and Court of Appeals upheld a fair use defense by a defendant clothing manufacturer. The defendant used a professional photographer's photo of a mayor, shown below, taken at the mayor's inauguration, as the basis for an image on t-shirts. The defendant had downloaded the photo from the city's website. The defendant then made t-shirts with the phrase "Sorry for Partying," which was a response to the mayor's effort to close down an annual block-party event. The original photo and image that appeared on the t-shirts are shown here:



Original Photo of Madison, Wisconsin Mayor Michael Paul Soglin by Photographer Michael Kleinitz

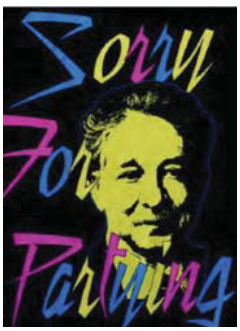


Image on T-Shirt Made by Sconnie Nation, LLC

The Seventh Circuit commented that there was no good reason why the defendant should be allowed to appropriate someone else's copyrighted efforts as the starting point for their lampoon, when so many noncopyrighted alternatives, such as snapshots that they could make themselves, were available. The court added that the fair-use defense is not designed to protect lazy appropriators but is to facilitate uses that would not be possible if users had to negotiate with copyright owners. The court also noted that the usage could hurt the photographer's commercial opportunities. But all these considerations did not overcome the fact, in the court's view, that "by the time defendants were done, almost none of the copyrighted work remained."[43]

But in copyright cases as well, the parody, satire, lampoon defense often does not succeed. In the *Cat in the Hat* case discussed above, the court quoted some content of the defendant's work:

> *A plea went out to Rob Shapiro*
> *Can you save the fallen hero?*
> *And Marcia Clark, hooray, hooray*
> *Was called in with a justice play.*
> *A man this famous*
> *Never hires*
> *Lawyers like*
> *Jacoby–Meyers.*
> *When you're accused of a killing scheme*
> *You need to build a real Dream Team.*
> *Cochran! Cochran!*
> *Doodle-doo*
> *Johnnie, won't you join the crew?*
> *Cochran! Cochran!*
> *Deedle-dee*
> *The Dream Team needs a victory*[44]

The Ninth Circuit noted that while these stanzas retell the O.J. Simpson tale, mimicking Dr. Seuss' style, they did not hold his style up to ridicule.[45] In other words, the defendant used Dr. Seuss' style not to parody or ridicule Dr. Suess, but to tell their own other story. The fair use defense was therefore rejected, and the preliminary injunction was upheld.

Parody, satire and lampoon can be fun. They are literary tools seeking to poke fun at the expense of the work that is their subject. The result may not be fun for their target.[46] But in many cases, the courts have ruled that the use of these tools to mock trademarks and copyrighted works is fair game.

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[1] Holman, *A Handbook to Literature*, Third Ed. (Odyssey Press 1972) 380.
[2] See e.g. *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d 962 (C.D. Cal. 2007) (Dismissing based on defense of parody, claim by Twentieth Century Fox and celebrity Carol Burnett that television show *Family Guy* infringed copyright and violated California's right of publicity. "The episode at issue put a cartoon version of Carol Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd situation in order to lampoon and parody her as a public figure.").
[3] *See e.g., Brownmark Films, LLC v. Comedy Partners* 682 F.3d 687 (7th Cir. 2012) (dismissing, on ground of parody, claim that television show South Park infringed copyright).
[4] *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 580 (1994).
[5] *Id.*
[6] *Metro-Goldwyn-Mayer v. Showcase Atlanta Co-Op Productions, Inc.* 479 F.Supp.

351, 357 (N.D. Ga. 1979).
[7] *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 581 (1994).
[8] *New Times, Inc. v. Isaacks* 146 S.W.3d 144, 151 (Tex., 2004) (some internal punctuation and citations omitted).
[9] *Id.* at 151.
[10] *Garvelink v. Detroit News* 522 N.W.2d 883, 886 (Mich. App. 1994).
[11] Holman, *A Handbook to Literature*, Third Ed. (Odyssey Press 1972) 286.
[12] Lampoon definition, OxfordDic ionaries.com, available at http://www.oxforddictionaries.com/us/definition/american_english/lampoon (last visited July 17, 2015).
[13] *Louis Vuitton Malletier S.A. v. Haute Diggity Dog., LLC*, 507 F.3d 252 (4th Cir.2007).
[14] *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir.1987).
[15] *Id.* at 1483.
[16] *Id.* at 1486.
[17] *Id.* (quoting Will Rogers, Warning to Jokers: Lay Off the Prince, in The Illiterate Digest, I–3 The Writings of Will Rogers 75 (1974)).
[18] *Id.*
[19] 221 F. Supp.2d 410 (S.D.N.Y. 2002).
[20] *Id.* at 414 (citations omitted).
[21] 886 F.2d 490 (2d Cir. 1989).
[22] *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.* 109 F 3d 1394 (9th Cir. 1997).
[23] *Id.* at 1394.
[24] *Id.* at 1405-1406 (internal cita ions omitted, citing *Gucci Shops, Inc. v. R.H. Macy & Co.*, 446 F.Supp. 838 (S.D.N.Y.1977); *Nabisco Brands, Inc. v. Kaye*, 760 F.Supp. 25 (D.Conn.1991); *Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc.*, 776 F.Supp. 1454, 1462 (W.D.Wash.1991)).
[25] 576 F. Supp. 816 (S.D. Ohio 1983).
[26] 576 F. Supp. at 818. Versions of McDonald's Ronald McDonald character and KFC's Colonel Sanders also appear in the 1983 Big Bite commercial. The commercial can be viewed on the internet at www.youtube.com/watch?v=Dq225QxI_Us.
[27] 576 F. Supp. at 820.
[28] *Id.* at 823.
[29] *Id.* at 822.
[30] If there is doubt about whether a proposed mark may infringe, the potential user could seek declaratory relief. Quality Inns adopted this approach when it sought to establish a chain of economy hotels to be called McSleep Inn. *Quality Inns Int'l. v. McDonalds Corp* 695 F. Supp. 198 (D.Md. 1988). A District Court in Maryland ruled that the proposed brand would infringe the McDonald's trademark, refused to grant Quality Inns the declaration it requested, and enjoined Quality Inns from using he McSleep mark.
[31] 15 U.S.C. Secs.1051 et seq.
[32] 15 U.S.C. Sec. 1117(a).
[33] *Id.*
[34] *Campbell v. Acuff Rose Music Co.* 510 U.S. 569, 579 (1994) ("We thus line up with the courts hat have held that parody, like other comment or criticism, may claim fair use."). But the defense is not certain. Id. at 581 ("The fact that parody can claim legitimacy for some appropria ion does not, of course, tell either parodist or judge much about where to draw he line. Like a book review quoting the copyrighted material cri icized, parody may or may not be fair use. . . ").
[35] 17 U.S.C. Sec. 107.
[36] *Campbell, supra* 510 U.S. at 584. ("The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these ac ivities "are generally conducted for profit in this country."").
[37] *Id.* at 586. In *Campbell* the original work was a song, which the court found to be at the core of the types of works copyright law protects. Some other types of work, such as copyrighted functional works of a business competitor, could receive even less deference under the second factor.
[38] *Id.* at 588.
[39] *Id.* at 588.
[40] *Id.* at 589.
[41] *Id.* at 591.
[42] 766 F.3d 756 (7th Cir. 2014).
[43] 766 F.3d at 760.
[44] *Dr. Seuss Enterprises*, supra, 109 F.3d at 1401.
[45] *Id.* at 1402.
[46] *See e.g., Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d 499, 507 (S.D.N.Y.2009) (tune and lyrics of defendants' song I Need a Jew resembled Disney's *When You Wish Upon a Star*. Defendants claimed their song poked fun at Walt Disney's purported anti-Semitism. Though Disney did not write the song or own the copyright, he court accepted this argument as supporting a parodic character and granted summary judgment for the defendant).

Test No. 82

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Parody is a work that imitates another work, for comedy, good fun and laughter.
   ❑ True ❑ False

2. The purpose of satire is usually to stimulate change by using wit, irony or sarcasm to reveal or discredit vice or folly.
   ❑ True ❑ False

3. Lampoon is in a category by itself, and is not considered a form of satire.
   ❑ True ❑ False

4. The Supreme Court has ruled that parody need not mimic an original to make a point.
   ❑ True ❑ False

5. A district court noted that when the unauthorized use of a trademark is part of expressive work, the Lanham Act must be applied liberally.
   ❑ True ❑ False

6. Courts can determine that a work of parody is not fair use if the intent is to use another person's work not for ridicule or critique but rather as a means for the infringer to tell their own story.
   ❑ True ❑ False

7. The Copyright Act sets forth a four factor test to assess whether a use is a fair use.
   ❑ True ❑ False

8. The recent case of *Kienitz v. Sconnie Nation LLC*. demonstrates that even a seemingly lazy appropriation of someone else's copyrighted work can be fair use if the final product is a complete transformation of the original work.
   ❑ True ❑ False

9. Parody usually involves borrowing from the work being parodied.
   ❑ True ❑ False

10. The Texas Supreme Court determined that satire "is a distortion of the familiar with the pretense of reality in order to convey an underlying critical message."
    ❑ True ❑ False

11. Publications such as *People Magazine* and *Vanity Fair* are considered examples of lampoon.
    ❑ True ❑ False

12. In the right circumstance someone else's trademark may be used in a parody or satirical manner.
    ❑ True ❑ False

13. Courts have quoted Will Rogers' famous saying, "Now everything is funny as long as it is happening to somebody Else."
    ❑ True ❑ False

14. Courts have ruled that companies have a right not to be ridiculed.
    ❑ True ❑ False

15. The Lanham Act does not allow courts to weigh the public interest in avoiding consumer confusion against the public interest in free speech.
    ❑ True ❑ False

16. Courts have determined that true parody is very subtle so that a clear distinction cannot be made between the source of the target and the source of the parody.
    ❑ True ❑ False

17. Courts have enjoined parody when it is found that the parody can cause confusion among consumers.
    ❑ True ❑ False

18. The consequences of trademark infringement are minimal.
    ❑ True ❑ False

19. Diminished public esteem for a work that is the subject of parody is not a relevant factor in determining the parody's effect on the market.
    ❑ True ❑ False

20. In many cases, the courts have ruled that the use of parody, satire, or lampoon to mock trademarks and copyrighted works is fair game.
    ❑ True ❑ False

MCLE Answer Sheet No. 82

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False