

MCMILLAN BINCH LLP

The Perils of Parodies

by Sharon Groom

The Perils of Parodies

by Sharon Groom

Imitation may be the sincerest form of flattery, but parodies are imitations with a twist – and not all the parties being imitated feel flattered.

In some cases a parody is merely done to be funny, or as a tribute. In those cases the object of the parody may appreciate the joke. For example, the Star Wars Gangsta Rap video, an animated rap version of the Star Wars trilogy, has actually been endorsed on the starwars.com website.

In other situations the parody is meant as a criticism of its subject and can be met with less enthusiasm. For instance, Buymusic.com did not particularly care for the dontbuymusic.com website that looked very much like its website but directed people to the competing Apple itunes website.

Similarly, people who have depicted well known cartoon characters in various states of debauchery as a social commentary have been contacted by the owners of those characters and asked to stop.

Parodies exist in many media but they abound on the internet, and recent lawsuits over music file sharing have shown that some rights owners are prepared to enforce their rights against individuals, not just commercial enterprises.

So what is the legal situation with parodies?

There's no easy answer partly because so many different areas of law can apply to what is being parodied – including copyright, trade-marks, misappropriation of personality and defamation. In addition, laws vary from country to country and for something on the internet, it's not always clear whose laws apply.

Copyright

In Canada copyright law protects original literary, dramatic, musical and artistic works and gives the copyright owner the sole right to reproduce the work or any substantial part of it.

Copyright protection will apply to cartoon characters, the design of a website, the packaging of a product, a film's theme music and various other elements often found in parodies.

Copyright protects the expression of an idea, not the idea itself. So it's fine to use a cartoon rabbit in a video, but if he is recognizably Bugs Bunny, you could be facing an action for copyright infringement of the artistic work.

The same outcome can occur if the “look and feel” of a website is copied regardless of the domain name used to get there, or if a parody of someone else's literary work reproduces large portions of the original work.

Note, too, when courts decide whether there has been “substantial” copying, they look at the quantity and the quality of what is reproduced.

The “fair dealing” exception under Canada’s *Copyright Act* allows the use of a copyrighted work for the purpose of research or criticism, as long as you acknowledge the source of the work and the author and you are not doing it for commercial gain. However, to date no one in Canada has successfully used this as a defence for copyright infringement in the case of a parody.

The “fair use” exception in the United States is broader than our “fair dealing” exception and in certain circumstances, the courts there have recognized “fair use” as a defence in the case of a parody.

In Canada, there may also be an argument that a parody infringes an author’s moral rights if the author’s work is distorted, mutilated or otherwise modified, or the work is used in association with a product, service, cause or institution without the author’s consent in a way that hurts the author’s reputation.

Trade-marks

A parody may attract a claim for trade-mark infringement, depreciation of goodwill or passing off.

A trade-mark is a mark used to distinguish one person’s wares and services from those of another. It can be a word, acronym, symbol, design or other distinguishing mark, such as “Coca Cola” or “American Express”.

Characters may also be registered as trade-marks, especially if there’s merchandising potential. For example, DC Comics has registered the name and likeness of comic book hero “Batman” as a trade-mark for toys, clothes, towels and pillowcases. The “Care Bears” have also been registered for a variety of wares.

The owner of a registered trade-mark has the right to the exclusive use of that trade-mark throughout Canada in association with the wares and services for which it has been registered.

Therefore, if someone uses that trade-mark, or one that is confusingly similar, to advertise, sell or distribute products or services, they could be guilty of trade-mark infringement.

In addition, the use of the trade-mark or the similar mark that’s likely to depreciate the goodwill associated with the registered trade-mark can also attract a lawsuit, even if there’s no confusion on the part of the public.

Whether a parody infringes a trade-mark depends on how the trade-mark – or the parody of it – is used. For example, the domain name *starbucksucks.com* could infringe the trade-mark “Starbucks” if the website is actually advertising services or selling products (since there must be “use” of the trade-mark in the legal sense), but might not if the website simply contains commentary.

In an Ontario case, someone who used a rabid looking beaver as a logo for shoes along with the trade-mark “Rots” was found guilty of infringing the registered trade-marks of Roots.

However, a picture of Barney the dinosaur in a compromising position on its own might not be trade-mark infringement since the trade-mark is not being “used” to sell or advertise anything. It might, however, be copyright infringement.

Even if you don't copy something exactly, if you use something distinctive of someone else's goods or services, such as the look of a product package, a website, or a well known trade-mark, you could be found guilty of trying to "pass off" your wares and services for those of others.

In a recent BC case, the court found that a union's website critical of an employer constituted a passing off of the employer's website. The court said because the union website copied many elements of the employer's site (including the domain name, colour, size and type of fonts and placement of logos), people might be confused initially and think they were at a site operated by the employer. The union later changed the website enough to have the court decide there was no passing off.

Misappropriation of personality

If a parody includes the name, likeness or personality of a well-known person a claim for misappropriation of personality might arise. In some jurisdictions, the protection extends to after the person's death.

It doesn't apply if you're using a fictional character or aren't using the "personality rights" for commercial gain.

For example, a video showing a well-known person saying something he or she has never said – and likely never would say – won't generally constitute misappropriation of personality if there's no commercial gain. However, depending on what the person is "saying", there could be an action for defamation of character.

Defamation

Defamation (called "libel" when it appears in print or in a fixed medium and "slander" when it is spoken) occurs when false things are said or printed about a person that would hurt his or her reputation in the estimation of ordinary people.

The courts will look at whether the statement will likely subject the person to hatred, contempt or ridicule. It can also be defamatory to make derogatory remarks about a person's reputation in his or her work, business or profession.

There's an exception for fair comment or opinion made honestly and in good faith on a matter of public interest. Also, if something is obviously a joke and it's unlikely anyone would ever take it seriously, there's no defamation.

But the fact it was meant to be humorous is not a defence if the spoof is likely to cause the public to draw some negative conclusion about the person in question. For example, a parody that suggests a well-known politician has a drinking problem might actually be believed by the public and cause them to draw negative conclusions about his or her character and/or ability to do the job.

Risks

The law does not take parodies lightly and the legal protection for the subject of the parody can be multi-faceted.

So why aren't parodies shut down or stopped?

If the parody is likely to hurt something of commercial value, like a trade-mark or a brand name, it's more likely to attract a lawsuit. On the other hand, if the parody isn't likely to do much damage, the subject might decide it's not worth the trouble especially if taking legal action might bring the parody even more attention.

People creating parodies should be aware they're running some serious risks if the parody isn't constructed carefully. It may come down to how much damage the parody can do – and how good the subject's sense of humour is.

Everyone likes a good joke, but for some people, the joke can go too far!