



## The Technology Trade

By Jason Allen Cody

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### You Can't Say "Parody" / That Really Scares Me

*Preface: Since writing this article, Jib Jab and Ludlow Music settled.<sup>1</sup> Nevertheless, this Article addresses parodic fair use issues central to the Jib Jab dispute and copyright law in general.*

#### Ah, This Land . . .

Undoubtedly, the whole Internet world is now aware of Jib Jab. In July, it released its hilarious animated political short showing President Bush (a right-wing nut job) and Senator Kerry (a liberal sissy) battling for votes to the unorthodox tune of This Land. The Jib Jab work uses the words "this land is your land, this land is my land," as well as "from California, to the New York Island," which originate from This Land is Your Land--a song written by folk legend Woody Guthrie and owned by Ludlow Music, Inc. Click on the following link to play Jib Jab's This Land: <http://jibjab.com/default.asp>.

The original work has been described as "an iconic portrait of the beauty of the American landscape and the disenfranchisement of the underclass,"<sup>2</sup> which expresses the ideal of national unity.<sup>3</sup> In stark contrast, Jib Jab's piece focuses on, inter alia, the lack of national unity manifested in the 2004 presidential campaign--i.e., it pokes fun at and exacerbates American ideals and culture.

Though pundits and peons from both sides of the aisle have had a big laugh, Ludlow Music believes that the amusement has been at the expense of its copyright. After an exchange of letters between Jib Jab and Ludlow Music arguing whether the Jib Jab piece constitutes a parodic fair use or copyright infringement--Jib Jab went on the offensive. On July 29, 2004 the Electronic Frontier Foundation, litigation counsel for Jib Jab, filed a complaint seeking a declaration of non-infringement of Ludlow Music's copyright and alleging that Ludlow Music is misusing its copyright. In short, Jib Jab is saying to Ludlow Music:

You can't say [parody] / that really scares me /  
sometimes a [lawyer] can / come in quite handy.

#### Parodic Law for You and Me

In analyzing a parody defense, courts must first determine whether the claimed parody is indeed a parody. To be considered a parody under copyright law, the new work must simultaneously convey two contradictory messages: (1) it is the original; and (2) it is a parody, and not the original. To convey that it is the original, the parody is permitted to use the copyrighted work to "conjure up" the image of the original work. Although a parody may comment on or criticize other subject matter, to show that that it

is not the original, it must comment on or criticize the original work to at least some degree.<sup>4</sup>

Once a court determines that a parody exists, it analyzes the parody within the context of relevant fair use factors:

1. the purpose and character of the use;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Regarding the first factor, courts previously focused mostly on whether the parody was commercial. A commercial use was presumptively not a fair use. That all changed in the seminal copyright parody case, *Acuff-Rose Music, Inc. v. Campbell*, 114 S. Ct. 1164 (1994), where the U.S. Supreme Court held that the question is not whether a parody is commercial, but whether it is "transformative." By transformative, the Court meant that the parody must alter the original work so as to give it "new expression, meaning, and message." The more transformative a work, the more likely the use is fair.

Under the third factor,<sup>5</sup> courts compare the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Analyzing the substantiality of the use is somewhat superfluous since courts permit a parodist to borrow the heart of an original work to more quickly bring it to mind. Nevertheless, courts look at how far the parody departs from the original once the parody has "conjured up" the original. The third fair use factor is probably the most subjective, and the Supreme Court remanded the issue of excessive copying to the lower court in *Acuff-Rose*. In somewhat circular fashion, and invoking other fair use factors, the Court noted that whether copying is excessive "will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original."

Finally, the fourth factor examines whether the parody replaces the demand for the original work. It should not matter if the parody's criticism is so sharp as to cause consumers to no longer be interested in the original work. Rather, the issue involves whether consumers will purchase the parody *instead of* purchasing the original work--i.e., whether the parody steals away potential consumers.

### **Ludlow Music's Position: You're a Liberal Infringer**

In a cease and desist letter, Ludlow Music stated that Jib Jab used without permission "the entire melody, harmony, rhythm and structure of the [sic] Mr. Guthrie's song" and engaged in "blatant and willful copyright infringement." Ludlow Music further asserted that Jib Jab's movie did not constitute a parody because it commented on partisan politics of the current presidential campaign, rather than commenting specifically on the original song itself--i.e., it's a satire instead of a parody.

Regarding fair use, Ludlow Music argued only two of the four fair use factors. First, Ludlow Music said that Jib Jab's piece excessively copied from Woody Guthrie's original song (fair use factor 3). The copyright owner stated that "Jib Jab appropriates the identical melody, harmony, rhythm and structure of the original song," and it "fail[s] to add any distinctive elements that might set it apart from the original." Second, Ludlow Music contended that the Jib Jab work negatively impacts the market for the copyright protected work and derivative works (fair use factor 4). It claimed that its market for adaptations of the lyrics by licensees "has been substantially compromised" since millions of Internet and television viewers have seen the Jib Jab piece.

Ludlow Music's opposition to the so-called parody is best summarized in the following stanza:

I'm a [music industry] tiger / you're a liberal [infringer] /  
I'm a [copyright] crusader / you're a [copyright monster].

### **Jib Jab's Position: You're a Copyright Nut Job**

Jib Jab came to a different conclusion, reasoning that its work is a political parody protected by the fair use doctrine. Regarding parody, Jib Jab's piece "explores *exactly* the same themes as the Guthrie original, using the parodic device of contrast and juxtaposition to comment on the original." Importantly, says Jib Jab, the parody is readily and objectively perceptible to those who view it.

Jib Jab made three points that address fair use. First, its work is clearly transformative and non-commercial in nature (fair use factor 1). The parodist argues that "there is no question that [Jib Jab] created a work that contains both transformative and original expression of creativity the very creativity which copyright law was designed to foster." It also notes that the "parodic comment takes on an additional dimension of irony when viewed in light of the often omitted closing stanzas of Guthrie's original."<sup>6</sup>

Second, regarding the amount of copying (fair use factor 3), Jib Jab argued that the "quantity" of borrowing is not relevant where a parody is transformative and easily perceptible. Even if it were, said Jib Jab, the parody borrowed only a handful of words from the lyrics and "numerous sources note that Guthrie himself borrowed his melody from The Carter Family rendition of the traditional spiritual, 'When the World's On Fire.'"<sup>7</sup>

Finally, Jib Jab asserted that its parody does not harm the market for the original Guthrie work. "Obviously, no one interested in purchasing a recording of the Guthrie original will turn to the 'This Land' animated short as a substitute." Moreover, argued Jib Jab, that a parody is successful is not a legal liability for the parodist: "the fair use doctrine does not protect only ineffective, unpopular, and forgettable parodies."

Beyond legal reasoning, Jib Jab's defense may find fitting the following lyrical premise, which seems to comport with Guthrie-style populism:

Sometimes a [copyright] can / come in quite handy /  
but it's not gonna help you / cuz I won [the people's] hearts.

### **Yes, It's True that Parody Trumps**

Jib Jab has the stronger case, based on the limited nature of Ludlow Music's copyright, the fact that the Jib Jab work is indeed a parody, and the weight of relevant fair use factors. For starters, the validity or scope of Ludlow Music's copyright is at least in question. Assuming that Jib Jab supports its allegation that the Guthrie original work lifted heavily from another composition, Ludlow Music will have the burden of demonstrating ownership of a valid, original work.

Supposing Ludlow Music's original work merits copyright protection, the Jib Jab piece is nevertheless a parody because it sufficiently comments on or criticizes the original work. For instance, This Land mocks the notion that the nation is unified politically, socially, or economically by disjoining the idea that this land (America) was actually made for you *and* me. As the parody suggests, this land is divided: it was meant only for you *or* me (which may be defined on political, social, economic, or other bases). The parody further comments on the original work by making a farce of the democratic process unique

to this republic. Even if the parody was in accord with the original Guthrie premise, it still comments on the original work and its subject matter; it just makes its point by drawing from present day politics and culture. As long as the parody comments on the original, it doesn't matter that it may also comment on other matters.

As an effective parody, the Jib Jab piece also uses the original work fairly. Under the first fair use factor, the Jib Jab piece obviously transforms the original work. Jib Jab's This Land endows the original work with new expression, meaning, and message by comically portraying American politics in a new and original light. Moreover, under the third fair use factor, it took from the original only what was necessary to refer to the original Guthrie work, and then it significantly departed therefrom. The parody builds on the original work by adding new animation and lyrics for humorous effect and commentary. Finally, the fourth fair use factor also favors Jib Jab. Although the parody has been enormously successful and continues to draw popular attention, there is no reason to think that consumers would view the Jib Jab piece rather than purchase the original recording or market adaptations. Surely, Ludlow Music would never have agreed to Jib Jab lampooning its original work, which is primarily why copyright law permits Jib Jab's parody as a fair use.

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<sup>1</sup>For more information about the settlement: Jason Schultz, *Music Publisher Settles Copyright Skirmish Over Guthrie Classic*, Electronic Frontier Foundation (Aug. 24, 2004), at [http://www.eff.org/news/archives/2004\\_08.php#001838](http://www.eff.org/news/archives/2004_08.php#001838); Jason Allen Cody, *Ludlow Music and Jib Jab Settle* Blogbook.org (Aug. 25, 2004), at [http://blogbook.org/tech\\_ip/index.html](http://blogbook.org/tech_ip/index.html).

<sup>2</sup> Letter from counsel for Ludlow Music, Inc. to counsel for Jib Jab Media, Inc. 2 (July 23, 2004).

<sup>3</sup> Letter from counsel for Jib Jab Media, Inc. to counsel for Ludlow Music, Inc. 2 (July 28, 2004).

<sup>4</sup> There is a distinction to be made between a parody and a satire. A satire borrows from an original work to *comment on something other than the original work*. The distinction is important because a parody is protected by the fair use doctrine, whereas a satire generally is not.

<sup>5</sup> In *Acuff-Rose*, the Court indicated that the second factor was not much use "in separating the fair use sheep from the infringing goats in a parody case."

<sup>6</sup> Presumably, Jib Jab refers to the following:

One bright sunny morning / in the shadow of the steeple /  
By the Relief Office / I saw my people /  
As they stood hungry / I stood there wondering if /  
God blessed America for me.

<sup>7</sup> In its Complaint seeking a declaration of non-infringement, Jib Jab alleges:

(1) "that the copyright on the Guthrie Composition has expired or is invalid;" and (2) "that any copyright held in the Guthrie Composition is extremely limited because the majority of the melody of the Guthrie Composition is a derivative work of a song entitled 'When the World's On Fire' recorded by the Carter Family in 1930, ten years before the Guthrie Composition was written."

Jib Jab Complaint, at [http://www.eff.org/IP/20040729\\_JibJab\\_Complaint.pdf](http://www.eff.org/IP/20040729_JibJab_Complaint.pdf).

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