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## INSIGHT: The Happytime Murders Lawsuit



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Our favorite childhood books and TV shows present sunny, idealized views of the world—the worst-case scenario is that someone skins a knee or refuses to share, and everyone learns a valuable lesson in the end. These days, it is easy to imagine someone writing a story or creating a film where Cinderella gets a divorce from Prince Charming because he had an affair with Snow White. A new movie shows Muppets-like characters doing all sorts of unsavory acts (more on that later). While many of these takeoffs may feel like they cross the line of propriety, if not outright copycatting, overall these salacious parodies have been protected as fair use and legitimate parody.

There's often heated controversy among the creators of these childhood fixtures about whether an offbeat or blasphemous parody is good-natured fun or unlawful corruption of intellectual property. To some, it seems unfair to let people blaspheme well-known characters and profit from it. Copyright and trademark owners have looked to the law for help, but their efforts have not had a fairytale ending.

Several recent court decisions have confirmed children's entertainment brands and their classic characters are not always immune from the scandalous whims of pop culture. No matter how close to the heartstrings these jokes strike, the courts have said that the most important consideration is whether consumers can distinguish their wholesome origins from their lewd comedic imitations. And there is always a tenor to protect the First Amendment and to have an "oh please, really?" judicial eye roll. These protections are important because parody and commentary are fundamental First Amendment rights that the constitution protects.

Putting a "dirty" spin on a classic work is not a new phenomenon. Lucasfilm, makers of "Star Wars," unsuccessfully sued the makers of "Starballz," a commer-

cial pornographic animated film, for copyright and trademark infringement. The court found that "Starballz" was a parody, and that because "Star Wars" is so recognizable and delivered through very different distribution channels, it was extremely unlikely for consumers to confuse the works. This decision, some say, started an entire ecosystem of pornographic parodies of well-known and successful films.

More recently, these sorts of parodies have moved outside of the adult film realm. As previously mentioned, Sesame Workshop, the creators of the iconic children's television show "Sesame Street," recently fought to defend their "G"-rated reputation against an "R"-rated storyline. It sued film production company STX over a trailer for their upcoming film, "The Happytime Murders," which uses the tagline "NO SESAME. ALL STREET." "The Happytime Murders" depicts the shockingly sordid, secret lives of Muppets-like characters living in a gritty area of Los Angeles. According to the trailer, the film intends to reveal "what goes down when kids aren't around," and the gratuitous sexual and violent activities it shows would certainly make Big Bird blush.

Sesame Workshop didn't like the tag line and wanted STX to stop using it. To be clear, the lawsuit did not challenge the use of the Muppets-like characters, but instead argued that use of the phrase "NO SESAME. ALL STREET" infringed their trademark "Sesame Street" or, at the very least, tarnished Sesame Street's good name. Sesame Workshop even had examples of social media postings demonstrating the confusion it was worried about.

This is where the judicial eye roll occurred. The court took a look at the facts and ruled against Sesame Workshop. The court found that the use of the word "no" before "Sesame" explicitly disclaimed any connection between the film and "Sesame Street". The court also

found that because Sesame Workshop is extremely unlikely to enter the R-rated movie space, Sesame Street's viewers would understand the two works are unconnected. The court also found that the small sample of potentially-confused viewers was insignificant compared to the millions of moviegoers who had viewed the trailer.

In another recent case, *The Grinch* did not fare better than his curmudgeonly green counterpart, Oscar the Grouch. Dr. Seuss Enterprises, L.P., whose heart appeared to be two sizes too small to appreciate a parody of its flagship work, lost a decision to Matt Lombardo. Lombardo created the play "Who's Holiday!". It tells the not-so-uplifting story of the later years of Seuss character Cindy-Lou Who from "How the Grinch Stole Christmas!". In "Who's Holiday!", Cindy-Lou Who has had a tough life. She was released from prison, smoked a pipe filled with "Who Hash," and lived in a trailer. The play includes other salacious takes of a deeply troubled Cindy-Lou Who.

The Seuss estate argued that the play operated as a sequel to the original Grinch story, making it an infringement of the Copyright Act. Lombardo contended that the play was a parody of the original work, making it a "fair use" of the protected material for which no compensation was due.

The Court eye rolled again. Like the *Sesame Workshop* decision, the Court's finding of Lombardo's fair use turned primarily on the drastic contrast between the original Grinch story and Lombardo's R-rated ren-

dition inspired by "How the Grinch Stole Christmas!". The judge found that viewers of "Who's Holiday!" would likely understand that Seuss would never make a sequel so inappropriate and contrary to the spirit of the original Grinch work. In turn, the allegedly infringing use would therefore not impact Dr. Seuss' potential market, and instead demonstrated the parodic nature of the work.

Whether you may be a fan of these X-rated updates or not, they are good examples of our constitutional protections at work. The cases hinged more on notions of economic impact than the potentially offensive nature of the content. The underlying legal analysis always fell back upon whether people would be confused and whether the offensive imitator was taking away market share. In the end, the distasteful nature of the work actually worked in the defendant's favor. And therein lies the rub—the law functions as a protector of our common rights, not an arbiter of artistic merit. After all, a lawyer is just a person in your neighborhood.

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