

"MESSING WITH THE MOUSE": COPYRIGHT, PARODY AND THE  
COUNTERCULTURAL WARS IN WALT DISNEY V. THE AIR PIRATES

by

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(Under the Direction of Peter Hoffer)

ABSTRACT

In 1971, Disney sued a group of underground comic artists calling themselves the Air Pirates, who published two comics portraying Walt Disney characters in sex and drug-related situations. The resulting case lasted 8 years and ended in a settlement where both sides claimed victory. This thesis uses the case to examine the development of the law of copyright and parody as a defense and demonstrate that the court tends to rule against the parodist if the work is offensive or obscene, although these are irrelevant concerns. It also examines the case itself and the cultural and personal forces motivating the parody.

INDEX WORDS: Walt Disney, Air Pirates, Dan O'Neill, counterculture, copyright infringement, parody, fair use, underground comics

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## DEDICATION

To my family, both blood and chosen, for their love, faith and support.

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## INTRODUCTION

In 1968, science fiction and television screenwriter Harlan Ellison was told by his agent that he had been hired by the Walt Disney Company. He initially found this incredible, as he was well known for being an irascible, anti-establishment figure, even in the science fiction establishment. However, he was assured by his agent that it was true – Disney believed that Ellison's brand of writing was suitable for a science fiction movie they were planning on producing. He arrived at the studios the next morning to find his own personal parking space, his own office complete with secretary and a set of number two pencils. Happily orienting himself to his new workplace, he and a group of other writers went for lunch at the studio commissary.

Ellison decided to ingratiate himself with his new colleagues by performing an improvised "schtick" for them. Doing what he says was a perfect imitation of the voice of Mickey Mouse, he suggested, "at the top of his voice," that they do a pornographic Disney movie. He began to describe the filming of this hypothetical flick in a variety of other imitated voices, all the while wondering why the faces of his fellow diners were frozen "like when they see the monster creeping up behind the hero in a horror flick." What Ellison did not realize was that the Writer's Table was just behind the Producers' Banquette, which was occupied by Roy Disney and the other heads of the studio. He was oblivious to this until he returned to his office, only to find the name on his parking space

whited-out, his secretary gone, and a pink slip next to the sharpened number two panels. His career as a Disney writer had lasted approximately four hours.

Writing ten years later, Ellison imparted the two lessons he had gained from this experience. Firstly, big business was humorless, and secondly, "at Disney, nobody fucks with The Mouse."<sup>1</sup>

Ellison's termination by Disney is not surprising, but it opens up a set of questions for us to examine, the most obvious of which is this: why do we not find it surprising? After all, it was said in jest, in the confines of the studio, and nobody would have thought that Ellison was being serious in the slightest. And yet, reading the story, we find the response of the studio executives predictable, since we expect this attitude of zero tolerance where Disney is concerned. So what is it about Mickey Mouse or Walt Disney in general that produces such an expectation as compared to parodies of other characters or genres? Why shouldn't we, in Ellison's vernacular, fuck with The Mouse? What is right – or wrong – in doing so? And why does Disney make a difference? An incident a few years later may help us understand the answers to these questions.

Sometime in 1971, two comic books were published with a collective print run of about 15,000-20,000 copies.<sup>2</sup> Each book consisted of thirty-two pages of comic art, appearing about six weeks apart and selling for fifty cents. If you picked up a copy of the first issue, the first thing that struck you would have been the instantly recognizable figure of Mickey Mouse, in the cockpit of a mail plane, firing a mounted machine gun at

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<sup>1</sup> Harlan Ellison, "Scenes from the Real World I: The 3 Most Important Things in Life", *Stalking the Nightmare* (West Bloomfield, MI: Phantasia Press, 1982), online at <<http://harlanellison.com/iwrite/mostimp.htm>>.

<sup>2</sup> *Air Pirates Funnies* #1 and #2 carried cover dates of July and August 1971, respectively, but best guesses place their actual publication and distribution in August and October 1971. Disney's lawyers filed suit on October 21, 1971. Backdating is standard practice in the magazine business, where cover dates and

some unseen foe in the clouds. Upon close examination, you might have noticed that the bags strapped to the tail of the plane did not read "MAIL", but rather "DOPE".<sup>3</sup>

Closer examination still would reveal further details – the imprint was not Walt Disney, but "Hell Comics". Under the banner, "Mickey Mouse Meets the Air Pirates Funnies" was the disclaimer, "Nix Kids – Adults Only!" Reading the comic would demonstrate the accuracy of the disclaimer. *Air Pirates Funnies* contained stories that involved drug use, lust, political satire, and most outrageously, Disney cartoon characters having explicit sex.

The books were the product of a group calling itself the Air Pirates, a collective of underground comic book artists, deeply enmeshed with the counterculture, who lived together in San Francisco. The leader of the Air Pirates was Dan O'Neill, a former cartoonist for the *San Francisco Chronicle*, who had created the comic strip *Odd Bodkins*. He would claim that the paper had fired him for, among other things, inserting copyrighted characters like the Disney characters as well as political content into the strip.

O'Neill wanted to force a confrontation with Walt Disney Productions, viewed in the popular culture as a bastion of conservatism and squeaky-clean values, and together with fellow artists Bobby London, Gary Hallgren and Ted Richards, put together the two *Air Pirates Funnies* comics. To make sure that Disney would take notice, O'Neill even arranged for the "son of the chairman of Disney's board of directors" to distribute the comic books at a board meeting. As O'Neill commented, "I mean, why have a fight if no

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distribution dates differ, sometimes by as much as three months, to ensure a longer shelf display life, but usually cover dates are later rather than earlier. The underground nature of the comic may account for this.

<sup>3</sup> Dan O'Neill, et al., *Air Pirates Funnies* #1 (Hell Comics, July 1971).

one comes."<sup>4</sup> The company obliged. *Walt Disney Productions v. The Air Pirates* would drag on for 8 years, cost Disney millions of dollars, turn O'Neill into a *cause célèbre* of the comic book community, and finally result in a settlement that allowed both sides to claim victory.<sup>5</sup>

*Walt Disney v. The Air Pirates* is significant for its place in the history of the legal defense of parody in cases of copyright infringement. This was not the first time that Walt Disney's trademarked characters were used on unauthorized merchandise, nor was it the first time that Walt Disney had taken action against a parodist. However, it was the first time that a defendant had fought the case in court, and the course of the litigation not only highlighted the vagueness of the criteria applied to parody as fair use, but also illuminated the type of image that Disney held in the public consciousness as well as the image the company was trying to project. The case stands as a landmark in the law of parody as a defense against copyright infringement, but it also stands as part of a larger pattern in which the court rules against a parody, not because it does not meet the legal criteria for protection, but because it is offensive to the court's moral sensibilities. Morality, of course, is irrelevant in determining infringement, but if the violation involves sex, it appears to have a tremendous influence on the case. As we examine the history of parody as fair use, we will also look at cases where the court both ruled for and against the respective plaintiffs, and see the emergence of a pattern.<sup>6</sup>

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<sup>4</sup> Bob Levin, *The Pirates and the Mouse: Disney's War against the Counterculture* (Seattle, WA: Fantagraphics Books, 2003), 66.

<sup>5</sup> *Walt Disney Productions v. The Air Pirates et al.*, 345 F. Supp. 108 (N.D. Cal 1972); 581 F.2d 751 (9<sup>th</sup> Cir. 1978); *cert. denied*, 439 U.S. 1132 (1979).

<sup>6</sup> Discussed briefly in Paul Tager Lehr, "The Fair-Use Doctrine before and after 'Pretty Woman's' Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody", *Florida Law Review* 46 (July 1994), 443.

The *Air Pirates* case is also significant for its cultural context. To understand where Dan O'Neill was coming from when he formed the Air Pirates and published the comics, one has to understand the origins of the underground comics, in both the counterculture of the 1960s and the history of comic books themselves. We will discover that the origins and cultural impulses behind underground comics go much further back than the counterculture they were a part of, to much older movements in art and literature. Although the perception of comic books as a children's medium undoubtedly played a part in the court's attitude towards the *Air Pirates* case, we will also see that from the beginning, the lines between children and adult content in comic books were never as clear. The skirmish between Disney and O'Neill, though remarkably one-sided, was simply another round in a broader cultural struggle between established values and those who sought to challenge (and ridicule) them, as well as between commercially mainstream and underground popular culture.

The battle between highbrow and lowbrow literature was never more apparent than in the arguments over comic books, and the arguments often centered around sex, violence, and its effects on children. The publication of Frederic Wertham's book *Seduction of the Innocent* in 1954, which blamed juvenile delinquency on comic books, would trigger off a backlash that led to the formation of the Comics Code Authority. The generation that grew up on E.C. and the controversy surrounding it would be further influenced by the counterculture, ultimately producing the underground comics. I will also touch on comic books as a platform for political propaganda and how the

counterculture used this platform to push its own political messages. All this would set the stage on which the *Air Pirates* case would take place.<sup>7</sup>

I will begin this thesis by giving a biographical sketch of O'Neill, his early influences and the circumstances that led him to being fired from *Odd Bodkins* and the formation of the Air Pirates in San Francisco. I will also talk about the other Air Pirates, how they came together under the leadership of O'Neill and how they followed his lead in creating *Air Pirates Funnies*. The second thread we will examine is the history of comic books up to the 1950s, how the battles over youth culture set the stage for the coming of the underground comics. The third thread we will look into is Walt Disney – the man, the myth and the corporation – and how it came to represent all that the counterculture was rebelling against.

Chapter Two will go into the history and state of the law of copyright and the doctrine of fair use up to the point when *Air Pirates* took place. It will also examine the initial legal history of the case itself – from the first volleys by Disney's attorneys and the arguments from both sides up to the granting of the preliminary injunction by the district court.

Chapter Three will discuss the changes in the underground comics industry over the course of the 1970s while *Air Pirates* was playing itself out in court. It will cover the summary judgment and permanent injunction granted by the district court, and go on to the appeal before the Ninth Circuit and the appeal court's judgment.

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<sup>7</sup> Savage, *Commies*; Jean Chesnaux, *The People's Comic Book: Red Women's Detachment, Hot on the Trail and other Chinese comics*, Endymion Wilkinson, trans. (Garden City, NY: Anchor Press, 1973); Beth Bailey, "Sex as a Weapon: Underground Comix and the Paradox of Liberation", *Imagine Nation: The American Counterculture of the 1960s and '70s*, Peter Braunstein and Michael William Boyle, eds. (New York: Routledge, 2002), 305-324.

Chapter Four discusses the cultural roots of the underground comics and its connection to the Dada and Surrealist movements briefly, then continues the story of the history of the parody defense in copyright infringement to the present day, and how the trend appears to be leaning against defendants if the parody is offensive. I will also discuss any seeming exceptions to the trend.

Chapter Five will continue the story of O'Neill, the Air Pirates and the grassroots support from the comic book community coming together around him. It will conclude the story of O'Neill, talking about the aftermath of the *Air Pirates* case and its impact on the law of copyright.



## CHAPTER ONE

### *1: "If there's any art, it's accidental."*

Dan O'Neill was born on April 21, 1942. He started drawing cartoons at the age of four, citing as his formative influences Walt Kelly's *Pogo* and the Donald Duck comics drawn by Carl Barks, although he says he "didn't look like any of them." He was in college before he tried his hand at doing a comic strip. To him, the art was simply the means to an end, to tell the story – "If there's any art, it's accidental."<sup>8</sup>

In 1961, after he and his family moved to Nevada City, California, he began the daily comic strip *Odd Bodkins* in the local newspaper, the Nevada County *Nugget*. Almost immediately, he caused controversy. In his second strip he depicted a man in a bottle declaring that he was "tremendously virile", and therefore women kept him locked up in the bottle. Unfortunately, they neglected to "make sure the cork was tight". The next panels showed an empty bottle accompanied by off-panel sexual mayhem (with speech balloons of "Stop him!" "Catch him!" "Rape!"), before a woman's arm jams him back into the bottle. According to O'Neill, he was "denounced from the pulpit" after the all-Catholic staff of the newspaper complained to their priest, but the newspaper's printer threatened to stop printing unless O'Neill was kept on, and so he stayed. At the age of

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<sup>8</sup> Dan O'Neill telephone interview, February 25, 2005.

twenty-one, "about to be married, his future wife pregnant," he moved *Odd Bodkins* to a syndicate operated by the *San Francisco Chronicle*.<sup>9</sup>

*Odd Bodkins* was a humor strip, but rapidly developed into something more. The strip referred to current events, like the Watts riot, Vietnam, and anti-Communism. The backgrounds of the panels "careen(ed) in constant flux. The sky shifts from white to black and back again... Craggy mountain ranges mutate into pyramids or cones." As Bob Levin notes in *The Pirates and the Mouse*, these landscapes were "closer to 'Krazy Kat' than the Hudson River school." Even at this stage, O'Neill was making full use of metaphor, using characters to symbolize the issues he wanted to tackle. Anti-Communism became the 100% American Dog. The Gross National Product was depicted as a "Stars-and-Stripes-clad, belching pig". Superman is shown smoking dope.<sup>10</sup>

By the time of O'Neill's final year producing *Odd Bodkins* for the *Chronicle's* syndicate, there was little doubt as to his political leanings. He was anti-war, anti-establishment, and pro-drug. The use of the comic strip as a soapbox as well as the increasingly bizarre storylines that he was producing eventually began to cost him readers. In the seven years that O'Neill drew *Odd Bodkins* for the syndicate, he was in a constant fight with his editors over the content of the strip. By signing up with the syndicate, an artist assigned the rights to his strip to them. In theory, if pressed, the syndicate could even fire the artist and bring in someone else to replace him, although it

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<sup>9</sup> Levin, *Pirates*, 13-14. O'Neill had originally offered the strip directly to newspapers, but was told that they could get them cheaper from a syndicate, and so O'Neill took his to the *Chronicle*.

<sup>10</sup> Ibid, 18-21. *Krazy Kat* was a surrealistic comic strip of the early 20<sup>th</sup> Century created by George Herriman, drawn from 1910 until his death in 1948 and has often been cited as a major influence on underground comics. Herriman was also one of O'Neill's major artistic influences. The comparison is significant, and we will return to it later.

is unlikely that this would have been done with *Odd Bodkins*, because it was so distinctively O'Neill's work.<sup>11</sup>

However, that did not mean the syndicate could not simply end *Odd Bodkins*. According to O'Neill, he was fired several times by the *Chronicle*, only to be reinstated due to reader protest. The penultimate termination came in November 1969, when he was fired for what he says was the "continued expression of his political views". The *Chronicle* claimed otherwise, that it was merely removing an "obscure strip" to make way for something more famous. O'Neill claimed that the *Chronicle* began to receive thousands of phone calls and letters each day demanding that the strip be reinstated. While this may be an exaggeration, it is documented in contemporaneous press accounts that a flood of letters and protests did force the *Chronicle* to change its mind.<sup>12</sup> The *Chronicle* even went as far as to promote the strip using the protest letters that were received during its attempted cancellation.<sup>13</sup>

Given this, the axing of *Odd Bodkins* a year later needs some explanation. According to the *Chronicle*, O'Neill was missing deadlines, and eventually even his supporters fell away from the content of his strip. O'Neill tells a different story – according to him, he received word that President Nixon had ordered the publisher of the *Chronicle* to fire O'Neill. Not wanting to lose the comic strip, he took pre-emptive action, contacting John Reynolds, a lawyer, asking him who was responsible for a copyright

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<sup>11</sup> E-mail from Bob Levin, February 15, 2005. Levin recollects his source at the *Chronicle* telling him this was the case.

<sup>12</sup> Unknown, "Pickets Protest Dropping of Chronicle Comic", *San Francisco Chronicle*, December 1, 1969. Unknown, "Deluge brings Bodkins back", *Editor and Publisher*, December 13, 1969.

<sup>13</sup> Levin, *Pirates*, 24. The flyer used by the *Chronicle* is reproduced on the Dan O'Neill's Comics.Com web site at < [http://www.danoneillcomics.com/oddbodkins/archive/2005\\_02\\_13\\_archive.html](http://www.danoneillcomics.com/oddbodkins/archive/2005_02_13_archive.html)>.

violation in a comic strip, the syndicate or the artist. Reynolds told him that it was the syndicate, the copyright owner, who was responsible.

Armed with this knowledge, O'Neill began to insert Disney characters into the strip, including the Big Bad Wolf, Practical Pig and Grandpa Beetle. The last straw was apparently a strip about George Jackson, the African-American radical and member of the Black Panther organization who wrote two books while incarcerated in San Quentin prison, which voiced the opinion that Jackson was going to be lynched. *Odd Bodkins* was terminated, for the final time, in November 1970. No further protests followed.<sup>14</sup>

To believe O'Neill now, his last confrontation with the *Chronicle* was merely the first step in a master plan to regain control of *Odd Bodkins* – that was why he had consulted Reynolds before he had made his move by inserting various copyrighted characters into the strip. In this way, he hoped to make the syndicate relinquish ownership of the strips to him to avoid liability. The soundness of this legal position is dubious, however – if the *Chronicle* was indeed liable for O'Neill's violations of copyright, transferring that to O'Neill would not absolve them for acts of infringement already committed. In any case, the *Chronicle*, at this point did not relinquish its ownership of *Odd Bodkins*; that only came in 1972, after the lawsuit had commenced.

While the insertion of copyrighted characters into *Odd Bodkins* was certainly provocative, it is unlikely that this was the cause for O'Neill's termination. There is no evidence that Disney even noticed the use of their characters, and in any case, O'Neill had done this before. In an earlier series of strips, he had used Mickey Mouse's dog Pluto in a double entendre by making him the ruler of the Underworld, and advised by "Virgo the

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<sup>14</sup> Ibid., 25.

Rat", a stand-in for Mickey Mouse. He had even used Bucky Bug, who would later appear again in *Air Pirates Funnies*. None of this drew any attention at the time.

Prior to the publication of *Air Pirates Funnies* in 1971, O'Neill reprinted his *Odd Bodkins* strips in three issues of *Dan O'Neill's Comics and Stories* (with faux-Disney covers). At this point, the copyright for the strips clearly rested in the hands of the *Chronicle*, but they took no action, either because they were unaware of the publication or were unconcerned about the copyright in the strips themselves.<sup>15</sup> Disney also took no action, quite possibly because they were not aware of it at all.

The *Chronicle's* version of events is therefore more likely: that it was O'Neill's missing of deadlines and repeated refusals to tone down the political content of his strip that both cost him his readership and led to the dropping of *Odd Bodkins* by the syndicate. It is indicative of O'Neill's character, however, that when faced with a problem, his reaction is to push for confrontation and push it even further rather than attempt a compromise. This would be the same attitude that would carry him through the eight years of the *Air Pirates* case.

*Odd Bodkins*, for O'Neill, had always been a solitary piece of work, and his constant conflicts with his editors at the *Chronicle* had always made him feel "isolated – a freak, even." He wanted to seek the company of others like himself, and while he had previously never warmed to the underground comics community or its producers, he decided to enter the field and form a "co-operatively owned, counterculture publishing

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<sup>15</sup> O'Neill telephone interview. O'Neill is clear about *Dan O'Neill's Comics and Stories* being published while the *Chronicle* still owned the copyright. He claims that he went down and showed them the comics but "they didn't want anything to do with me."

empire." To do this, however, he would need help, and he got it by forming the Air Pirates.<sup>16</sup>

The seeds of the Air Pirates were sown when O'Neill met Bobby London, Gary Hallgren, Ted Richards, and Shary Flenniken at the Sky River Rock Festival and Lighter Than Air Fair in 1970. The fair had started two years earlier, being advertised as "America's first multi-day, outdoor rock concert." Running from August 28 to September 8, it attracted an audience of 20,000 young people to its venue, a 160-acre farm near the Skykomish River in Tenino, Washington. Its main sponsor was the Hydra Collective of the anti-war Seattle Liberation Front and the music was provided by bands like Red Bone, Country Joe and the Fish, and the Youngbloods. Concession stands sold hot dogs, soup as well as LSD, mescaline and marijuana. Neighbors complained of public sex acts. All in all, it was fairly typical of the sex, drugs and rock-and-roll festivals of the period.

All the future Air Pirates were already involved in the underground culture of the 1960s at the time they met. Richards had written articles and drawn cartoons for the Ohio underground newspaper *Independent Eye*, and had moved to the Bay Area in June 1970, finding work with the Berkeley *Tribe*. Bobby London, like O'Neill, had been drawing cartoons since the age of four and had created a Krazy Kat-inspired strip titled *Dirty Duck*, "a cigar-smoking, pornography-smitten, sixty-nine year old" anthropomorphic duck, which he was trying to shop to the underground comic publishers. Gary Hallgren was producing psychedelic art signs in Seattle. Shary Flenniken was also based in Seattle, working for the underground paper *Sabot*, which was producing a daily edition at the Fair. The young, "dark-haired, blue-eyed Flenniken proved quite the draw" at the fair,

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<sup>16</sup> Ibid., 49.

and O'Neill, Hallgren, Richards and London wound up crashing at her geodesic dome at the fair and offering to draw pieces for *Sabot*.<sup>17</sup>

O'Neill drove London back from the fair to the Bay Area, and proposed that they and the others form a comic book company. O'Neill, having had what he considered real-world experience as a syndicated cartoonist, wanted to break away from the haphazard model of the publish-as-convenient underground paper mentality that still characterized the distribution model of the underground comics. He envisioned a "co-operatively owned, counterculture publishing empire", turning out books on a regular, monthly basis, with each artist expected to turn out a page a day. Some books would be produced collectively, and the company would also put out the artists' individual works that would represent their "individual vision... without outside editorial influence." London at first declined, wanting to move back to New York and patch up his relationship with his girlfriend, but when that did not work out he found himself back in California, and O'Neill approached him again.

London wanted to do his *Dirty Duck* strip, which O'Neill gave him space for under the *Odd Bodkins* banner until it was axed from the *Chronicle*, unsigned and lettered by O'Neill so that the editors would not know that someone else was drawing that portion of the strip. According to London, "The idea sort of was that I would be (O'Neill's) assistant, whatever that meant. Actually, I did my own little 'Dirty Duck' strips under his and we talked about this comic book company, and there wasn't much mention, or any mention at all, actually, of Walt Disney characters or anything like that." O'Neill also suggested the idea of the Air Pirates, and that he wanted to use Flenniken, Hallgren and

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<sup>17</sup> Ibid., 43-48; Robert Boyd, "Shary Flenniken Interview", *The Comics Journal* No. 146 (Seattle, WA: Fantagraphics Books, November 1991), 54-85.

Richards. Despite liking the idea of the co-operative, London was perturbed by O'Neill's intent to use Disney characters in the monthly book, something that London had noticed O'Neill had a penchant for while working on *Odd Bodkins*. London was hesitant because he did not want to commit any infringement of copyright, but O'Neill told him his lawyers had assured him that Disney's characters were now in the public domain. Believing O'Neill, London acquiesced. O'Neill says that copyright infringement was not his intention – what they were trying to do in *Air Pirates* funnies was parody, not "steal characters" and that they "didn't know parody was against the law."<sup>18</sup>

The Pirates moved first into the second floor of a warehouse at 740 Harrison Street in San Francisco, and then a few months later into bigger premises at 560 Fourth Street, which was a former firehouse that Francis Ford Coppola's American Zoetrope pictures was using as a storehouse. By O'Neill's count, at one point there were "seventeen people (living) in the warehouse", a circulating population that included such eventual underground comics and animation legends as Vaughn Bodé, Bill Plympton and Gary King. The two issues of *Air Pirates Funnies* were produced while living at both places, with O'Neill recalling that the issues came out "pretty rapid(ly)" one after the other. The issues were published and distributed under the Hell Comics imprint, through Ron Turner's Last Gasp Comix publications company.

The output – nine comic books in total, including individual and collaborative issues – was also quite prodigious by underground comics standards, given that they were together for only seven months. London claims that when O'Neill showed them the early panels of "The Mouse", the story in *Air Pirates* #1 that featured Mickey, this led to "a

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<sup>18</sup> O'Neill telephone interview; S.C. Ringgenberg, "Bobby London and the Air Pirates Follies", *Gauntlet: Exploring the Limits of Free Expression*, No. 8 (Colorado Springs, CO: Gauntlet Press, 1994), 126-139.;



real row" over copyright and the potential litigation that Disney could visit upon them that divided the group. Flenniken, on the other hand, denies that anyone had reservations about anything. "Dan would say it; Bobby'd interpret it; Gary'd swallow it; and Ted'd buy it – because it was the best party in town."<sup>19</sup>

By October of 1971, the second issue of *Air Pirates Funnies* had been printed and distributed, and still there was no reaction from Disney. O'Neill attended a dinner party given by his attorney Michael Kennedy at the restaurant Narsai's for a number of his clients, which included such luminaries as Abbie Hoffman and the Mitchell Brothers. O'Neill found himself sitting next to the gay son of "the chairman of (Disney's) board". On O'Neill's request, this friend took copies of *Air Pirates Funnies* and "laid them around the swimming pool and at a board meeting." When asked why, O'Neill says that he had to get Disney to sue him – "I had to get nine to nothing at the Supreme Court. I had to lose all the way to the Supreme Court." O'Neill told Levin, "We called them out... I mean, why have a fight if no one comes."<sup>20</sup>

This statement casts some doubt on O'Neill's earlier assertion that he had no idea parody was against the law. If his intent was pure parody, why risk provoking Disney by drawing their attention to it? After all, he had already gotten away with his parodies in *Odd Bodkins*, and had even reprinted them in *Dan O'Neill's Comics and Stories*. On the other hand, if he wanted litigation as part of his plan to get the copyright of *Odd Bodkins* back, why not simply use *Comics and Stories*? Why produce *Air Pirates Funnies* at all?

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Levin, *Pirates*, 48-50.

<sup>19</sup> Ringgenberg, "Bobby London"; Levin, *Pirates*, 57-58.

<sup>20</sup> O'Neill telephone interview; Levin, *Pirates*, 66. O'Neill does not remember if this friend distributed copies of *Air Pirates Funnies* #2, but Disney submitted that in evidence when they filed suit, so either they did or they had managed to obtain copies somehow. The timeline is tight for the former to be true, as Disney first tried sending notice to O'Neill by mail on October 28, 1971, but still possible.

The answer may lie in the level of outrage he was attempting to provoke, and the intensity of the retribution he was hoping to instigate. *Odd Bodkins'* parodies and metaphorical use of the Disney characters were mild in comparison to what he had Mickey and Minnie doing in *Air Pirates Funnies*.

The first issue of *Air Pirates Funnies* is a collection of several different comic strips, drawn in different styles. Bobby London's *Dirty Duck* takes up the first 10 pages of the comic. The next story is O'Neill's – *Silly Sympathies* (a play on Walt Disney's *Silly Symphonies* series of animated shorts), starring Bucky Bug. While also a copyright violation and mentioned in Disney's subsequent action, the strip that drew the bulk of Disney's ire was the second O'Neill story *Silly Sympathies Presents The Mouse*. This not only featured a character identical to the way Mickey Mouse was drawn in the 1930s, but is also called Mickey Mouse by name. Mickey starts by lamenting, "The whole world thinks I'm *cute*...! So *why* won't Minnie fuck me? Why won't *Daisy* fuck me? Why won't *anybody* fuck me?!?" (Figure 1)

Sylvester Shyster, a villain from the original Disney comic books, captures Mickey and takes him to a dirigible, where he becomes the captive of a "collective" of his old enemies who have banded together as the Air Pirates. Minnie Mouse soon joins him in his captivity, and berates him for infecting her previously with a venereal disease Mickey picked up from "that dumb bitch Daisy". Goofy informs Chief O'Hara of the kidnap and the latter puts Agent F-310 (Horace Horsecollar, summoned from having intercourse with Clarabelle Cow) on the case. Mickey persuades Minnie, since "this may be our last time together," to engage in mutual oral sex while, unknown to them, the Air Pirates are watching. The Pirates open a trap door, interrupting the act, and dump the

naked couple into open space. A pterodactyl snatches Minnie away and Mickey encounters a piano-wielding gorilla on the last page, the chapter ending on a cliffhanger.<sup>21</sup>

In the second issue, the story continues. In Part Two of *Silly Sympathies Presents The Mouse*, Mickey escapes from the gorilla and runs through the jungle pursued first by crocodiles, then elephants. The pterodactyl dumps Minnie into a bat-filled cave where she encounters Don Jollio, the Bat Bandit. While Horace attacks the Air Pirates' dirigible in a spectacular air battle, Mickey leads the herd of elephants into the cave, and both mice flee on horseback, only for Don Jollio to stop them at gunpoint. He then insists they take "these peels" (LSD, from a bag of dope), and the chapter ends. The story was supposed to continue in the never-published third issue of *Air Pirates Funnies*.<sup>22</sup>

On their own, the parodies in *Odd Bodkins*, political though they may have been, would probably have not attracted litigation. However, the sight of Mickey and Minnie engaging in oral sex, and with the issues of *Air Pirates Funnies* being distributed (if O'Neill is to be believed) in airport newsstands and stores as well for people to "buy them accidentally", would have prompted Disney into action when it had no incentive to do so before. If O'Neill truly believed, however erroneously, that only the threat of litigation would make the *Chronicle* revert the copyright of *Odd Bodkins* to him, then he had to get Disney "to react big." According to him, "The *Chronicle* stole from me, so I hijacked Mickey Mouse to get my comic strip back." Also, if O'Neill wanted to make a stand on the right to parody, then he had to make sure he attracted enough attention while doing it.

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<sup>21</sup> O'Neill, "Silly Sympathies Presents The Mouse", *Ibid.*, 24-33.

<sup>22</sup> O'Neill, "Silly Sympathies Presents The Mouse, Part II", *Ibid.*, 32-41. Whether *Air Pirates Funnies* #2 was distributed at that infamous board meeting is uncertain, but by the time the lawsuit was filed, Disney's lawyers had that issue in their possession and exhibited as part of their arguments at the District Court.

Why precisely the O'Neill and the Air Pirates chose Disney as a target, as opposed to other public figures like Bugs Bunny, for instance, now becomes clearer. Certainly, the early comic books that featured the Walt Disney characters were a formative artistic influence and inspiration for O'Neill in his younger years. To help the other Air Pirates in improving their drafting skills, he got them to reference and duplicate classic comics like *Uncle Scrooge*, *Little Lulu* and *Felix the Cat*, as well as watch "classic comedies" on a 16mm projector to learn how to construct stories. The Air Pirates name comes from the original Mickey Mouse comic strips, a loose conglomeration of the Mouse's enemies, and in his improvisational storytelling games O'Neill would have each member of the Air Pirates assume the role of one of those villains, each drawing a page with the assigned character then handing off to the next artist. O'Neill himself was fond of dressing up like the Phantom Blot and terrifying the neighborhood, "with an Indian buddy... firing arrows with paint-filled light bulbs as tips at billboards."<sup>23</sup>

Also, Disney was also an obvious target. By the 1960s, it had grown to exemplify the middle-American values that the growing counterculture was rallying against. In 1967, the *Realist*, a "savagely satirical, virulently anti-establishment" magazine edited by Paul Krassner, who would later be one of the founders of the Youth International Party, or the Yippies, commissioned comic book artist Wally Wood to produce a "magnificently degenerate montage" titled the "Walt Disney Memorial Orgy", which we will look at later. In 1970, the Yippies themselves invaded Disneyland, chanting pro-Ho Chi Minh chants, hanging Viet Cong and New Nations flags on buildings, and "smoking dope in Indian Village". The park was evacuated and riot police called in, and after the dust

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<sup>23</sup> Ibid., 55-56.

settled, twenty-three people had been arrested. It was only the second time the park had been closed – the first was when John F. Kennedy was assassinated.<sup>24</sup>

O'Neill may also have been influenced by Richard Schickel's 1969 anti-Disney biography, *The Disney Version*, as well as these incidents. However, Levin also notes in *The Pirates and the Mouse* that O'Neill's politics at this point were vague, despite his characterizing the birth of the Air Pirates as arising out of the "revolutionary fervor" of the 1960s. None of the Air Pirates can quite agree on exactly how political or apolitical they were, and even O'Neill switches between claiming the group was "very political" and saying that "None of us had a political thought..." in different interviews.

On the other hand, Flenniken says that they all believed Disney was a front for "the military-industrial complex; and there was this incredible disillusionment with – and outrage at – '50s America, which the Mouse represented." Hallgren saw Disney as "too powerful and all-encompassing culturally," and Richards wanted to help "the people regain access to their own stories," Disney having "appropriated, emasculated and sugar-coated not only American's folklore, but the world's fairy tales and myths." In the end, though, it may be just as simple as O'Neill claims, that they went after Disney because "he was the biggest." Ultimately, the reasons may be a combination of both the political and the mercenary. A big reaction was what O'Neill wanted so as to frighten the *Chronicle*, and Disney was already known to "vigorously protect its property through litigation." In other words, if he was betting on getting sued, Disney was a sure thing.<sup>25</sup>

As to the strength of Disney's reaction, Levin suggests that "simply living and working as UG (underground comics) cartoonists was a political statement," and later

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<sup>24</sup> Ibid., 79-81.

writes that "by focusing on Mickey Mouse, the Air Pirates had attacked the company's symbolic heart and soul." However, the Air Pirates were not just playing corporate games. Given the extent to which Mickey Mouse and the other Walt Disney characters had penetrated the popular cultural consciousness in their forty-odd years of existence, the Air Pirates were attacking more than the company. To be precise, they were attacking Americana as exemplified by Disney itself, with their weapon being another American icon, the comic book.<sup>26</sup>

## *2: The Rise and Fall of the Comic Book*

While the single-panel cartoon dates back to at least the 1840s and the English satirical magazine, *Punch*, we can trace the origins of the comic book to the 1930s, when they started out as compilations of comic strips previously published in newspapers, as suggested by titles such as *Funnies on Parade* (1933) and *Famous Funnies* (1934). What we have to note is that comic books did not start out as being exclusively for children – they were a way to cash in further on newspaper comic strips; strips that were read by adults as well. Even when, by the end of the 1930s, however, comics like *Detective Comics* (1937) began to offer more and more original material, and the demand for this material grew. The contents of these comics were adventure-strip fare similar to what one would read in Buck Rogers, Flash Gordon or Dick Tracy, and did not shy away from violence. The very first Batman story (where the character was named the Bat-man) shows the villain of the piece getting his just deserts by falling into a vat of acid. In many

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<sup>25</sup> Ibid., 57-58; O'Neill telephone interview. However, as we will see later, Disney may not have been that sure a thing.

of the early Batman stories, the vigilante hero carries a gun, and violent deaths are commonplace.<sup>27</sup>

Traditionally, the "golden age" of comic books began in the summer of 1938 with the debut of Superman in the first issue of *Action Comics*.<sup>28</sup> Up to that point, comic strips and comic books had served as a minor form of escapism from the realities of the Great Depression<sup>29</sup>, but Superman's entry upon the scene had a tremendous impact. The first costumed superhero, the character soon graduated from the pages of *Action* into his own title and was selling on the order of 1.4 million copies a month (comparatively speaking, *Time* magazine sold 700,000 copies an issue). More superheroes followed in his footsteps – Batman, Wonder Woman, Green Lantern, the Flash, Captain America, the Human Torch, the Sub-Mariner – all still being featured in comic books today, and many others – the Destroyer, Captain Triumph, Madam Fatal, Lady Luck – that are only remembered by comic book fans.

Even as collections of reprints were hitting the newsstands, the first books with original content were not for children. Known as "Tijuana Bibles" or "Eight-Pagers" because of their format, these anonymously produced "under-the-counter pamphlets" featured not just fictional comic characters drawn from the strips, but contemporary movie stars, politicians, and other celebrities in unabashed, joyously pornographic stories.<sup>30</sup> One Eight-Pager showed Mickey Mouse having sex with Minnie Mouse.

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<sup>26</sup> Levin, *Pirates*, 57, 67.

<sup>27</sup> Bob Kane and Bill Finger, "The Case of the Chemical Syndicate!", *Detective Comics* #27 (New York: National Periodical Publications, 1937).

<sup>28</sup> William W. Savage, Jr., *Commies, Cowboys, and Jungle Queens: Comic Books and America, 1945-1954* (Hanover, NH: Wesleyan University Press, 1998), 5.

<sup>29</sup> William H. Young, Jr. "The Serious Funnies: Adventure Comics During the Depression, 1929-38" *Journal of Popular Culture* 3:3 (Winter, 1969), 404-427.

<sup>30</sup> Bob Adelman, *Tijuana Bibles: Art and Wit in America's Forbidden Funnies, 1930s-1950s* (New York: Simon & Shuster, 1997), 5-6; Dez Skinn, *Comix: The Underground Revolution* (New York: Thunder's

Donald Duck interrupts them, and Minnie invites him to also have sex with her.<sup>31</sup> Tijuana Bibles were never widely distributed for obvious reasons, but they continued quiet production until at least the early 1960s.

What makes such depictions of popular figures so appealing? It cannot simply be sex, although it is undeniable that it is a large part of the experience. While some Tijuana Bibles showed original or anonymous characters (often racial and class stereotypes) engaged in sexual activity, it is significant that the producers of the Eight-Pagers focused to a larger degree on cultural icons – Betty Boop, Clara Bow, Clark Gable, Greta Garbo. Bob Adelman in his study of Tijuana Bibles suggests that it was a "populist way to rebel against the mass media and advertising designed to titillate and manipulate." While movie starlets like Garbo and Bow and even cartoon ones like Betty Boop exuded sexuality on screen, they "never quite [delivered] what they promised". He goes on to suggest that in "the thirties it was simply a tremendous relief to find out *exactly* what Blondie and Dagwood did between their daily stints in the newspaper and led to the birth of their Baby Dumpling." In other words, that reality could intrude onto the perfectly bounded worlds and constructed worlds of the comics.<sup>32</sup>

But this was, of course, illicit and underground. The mainstream comic book companies soon became aware that a large part of their demographic was children and adolescents and the content adjusted to reflect their tastes. While Robin the Boy Wonder was not the first boy sidekick, he was certainly the most famous, and his debut in

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Mouth Press, 2004), 12. The Tijuana Bibles were probably not produced in Tijuana, and they were definitely not Bibles. Adelman suggests that they might have been called Tijuana Bibles as a racial slur against Mexicans, or to obscure where they were really produced. Other nicknames cited by Adelman included Two-By-Fours, Gray-Backs, Jo-Jo Books, Jiggs-and-Maggie Books (after the characters in the comic strip *Bringing Up Father*), or simply Fuck Books.

<sup>31</sup> Anonymous, "Mickey Mouse and Donald Duck" (date unknown, although the style places it in the 1930s), reprinted in Adelman, *Tijuana Bibles*, 41.



*Detective Comics* #38 (1940) led to a whole slew of imitators within a matter of months, as various heroes all acquired teenage assistants – Green Arrow had his Speedy, Captain America got Bucky, and so on. The introduction of the sidekick was to introduce a point of view character for the children reading the books. They could never hope to be as heroic or as strong as the adult hero, but they could certainly imagine themselves sharing his adventures.

The coming of World War II saw a huge expansion in the comic book market, as superheroes were depicted in battle with the Axis powers and hundreds of thousands of books distributed to soldiers overseas. As real-world international tensions grew, so did the stature of superheroes, with the specter of fascism providing a larger-than-life enemy that needed larger-than-life heroes to battle it. The realities of war made superhero comics popular among soldiers, showing them a world where their side always won and usually without a scratch. By 1943, 15 to 25 million comic books were being sold each month.<sup>33</sup> Earlier, in 1940, Sterling North wrote an article condemning comics in the *Chicago Daily News* that was distributed to forty other papers and disseminated to churches and schools. North argued that comic books prevented children from being interested in "fine literature".<sup>34</sup>

"Badly drawn, badly written, and badly printed - a strain on the young eyes and young nervous systems - the effects of these pulp-paper nightmares is that of a violent stimulant. Their crude blacks and reds spoils a child's natural sense of colour; their hypodermic injection of sex and murder make the child impatient with better, though quieter, stories. Unless we want a coming generation even

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<sup>32</sup> Adelman, *Tijuana Bibles*, 8-9.

<sup>33</sup> Levin, *Pirates*, 30; Savage, *Commies*, 11.

<sup>34</sup> Levin, *Pirates*, 32.

more ferocious than the present one, parents and teachers throughout America must band together to break the 'comic' magazine."<sup>35</sup>

Perhaps partly to defuse this criticism, *Classics Illustrated* – adaptations of great literature that became "virtually an institution on the comic book rack" for decades – was launched in October 1941 as *Classic Comics*, initially by Eliot Publishing and thereafter by Gilberton Publications. However, the condensed and simplified versions of the stories attracted more criticism as children used it as a "handy tool to avoid learning about great literature at all."<sup>36</sup> The debate was suspended when the comic book became a propaganda weapon during World War II, although the perception of the comic book as lowbrow culture and aimed at children persisted. By the end of the war, however, the superhero comic began to decline in favor of other genres. This development is not surprising. When 1945 came around and post-war affluence set in, such escapism was no longer required, and the public directed its attention to more "realistic" themes, like true crime, war and romance comics. The superhero comic went on, but never again reached the popular heights it had between 1940 and 1945.

Comic books, like any popular medium, are a reflection of the ideological concerns of their particular time. This is not to say that the creators of the comics necessarily or consciously directed their efforts toward creating such a mirror. However, that those that managed to do so were the ones that succeeded with the public, and once they discovered a winning formula, they repeated it and it became popularized in a self-reinforcing cycle. Comic books are a business like any other, and the financially

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<sup>35</sup> Sterling North, "A National Disgrace", *Chicago Daily News*, May 8, 1940, reprinted in *Parents' Magazine*, March 1941, 26, excerpted in Bradford W. Wright, *Comic Book Nation: The Transformation of Youth Culture in America* (Baltimore, MD: John Hopkins University Press, 2003), 27.

<sup>36</sup> Don Markstein, "Classics Illustrated", *Toonpedia* <<http://www.toonpedia.com/classics.htm>>

successful ones will produce what the public appears to like, artistic motives claimed by their creators notwithstanding. Comic books during the 1930s reflected the era of the "common man", with New Deal liberalism being celebrated. The federal government and national political leaders were "rarely, if ever, questioned," while the real corruption was found in local politics and the machines of the big cities. In the 1940s the focus shifted to that of national unity in the face of a fascist enemy, presenting America as "a great melting pot free of racial, ethnic, and class conflict... an image... that was far more united and integrated than (it) really was", while at the same time portraying the outside world as hostile and in need of American taming.<sup>37</sup> The growing social tensions in post-war American society, between the new age of consumerist prosperity and the place of Americans in that vision, gave rise to a new, more socially aware, breed of comic books among the more triumphalist visions.

In 1950, E.C. Comics publisher William M. Gaines released the *Crypt of Terror* (later to be renamed *Tales from the Crypt*), which was followed by similar titles such as *The Vault of Horror*, *The Haunt of Fear*, *Weird Science*, *Shock SuspenStories*, quickly dominating the horror comic genre. The stories in E.C.'s stable of titles were shock stories on their surface, but had incredibly sophisticated themes for their time; morality tales dealing with issues such as racial discrimination, questioning the rightness of war and even the new Red Scare that had replaced the Axis as the cultural boogeyman. The things that made these comics stand out, however, were not the quality of the stories but the presentation. The horrific imagery in them – zombies, decapitated heads, and the dispatching of people in various imaginative ways – made them immensely popular among adolescents. To be fair, there was little explicit gore, with most of the action

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<sup>37</sup> Wright, *Comic Book Nation*, 24, 35.

taking place off-stage, or off-panel, as it were, leaving the reader to fill in the gaps with his imagination.

Sex and violence in comics were not innovations of E.C.'s, although they took it to the next logical level. During the course of World War II, comic book covers and stories routinely showed the heroes strangling enemy soldiers, and the vigilantism inherent in the superhero concept practically guaranteed fisticuffs. The skin-tight outfits that heroes and heroines both wore emphasized their physical attributes, especially the women's costumes. Near the end of the war, images of women in peril to be rescued took on a distinctly sexual tone, and it was common to see depictions of (invariably full-bosomed) women tied down and menaced by the villains. By the time of the Korean War, war comics were depicting scenes of the mass slaughter of soldiers in battle, although some with less propagandistic enthusiasm than others.<sup>38</sup>

E.C., however, was not publishing its stories for propaganda purposes, but making social comment in addition to maintaining sales. During the McCarthy era, the combination of non-conformist attitudes and sensationalistic violence would provide a "convenient point of attack for a variety of censors, vested interests, and just-plain-nuts".<sup>39</sup> The backlash was only a matter of time, and once more it would focus on the effect of comic books on children, as "influence over young people became hotly contested terrain" in the battle for "cultural power in postwar America."<sup>40</sup>

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<sup>38</sup> Contrast "The Slaughter on Suicide Hill!" *Battlefield* #1 (Animirth Comics, April 1952), which grimly depicts the relentless slog of infantry combat and its psychological toll, with the almost science fantasy depiction of a righteous war fought against the Communists with personal atomic weapons in "Assault on Target UR-238" *Atom-Age Combat* #3 (St. John Publishing Company, November 1952), both reprinted in Savage, *Commies*.

<sup>39</sup> Mark James Estren, *A History of Underground Comics* (San Francisco, CA: Straight Arrow Books, 1974), 35.

<sup>40</sup> Wright, *Comic Book Nation*, 87.

The debate resumed with rising public concern over juvenile delinquency, and the publication of a book in 1954 by psychiatrist Frederic Wertham, provocatively titled *Seduction of the Innocent*. Wertham's basic thesis was simple: juvenile delinquents read comic books, and they grew up to be criminals based on their bad influence.<sup>41</sup> Wertham attacked all comics, even Superman and Batman, but the E.C. titles were singled out, as they were the most directly graphic. *Seduction of the Innocent* was influential enough for the Senate Subcommittee on Juvenile Delinquency to investigate the comics industry, and for Wertham to be called as an expert witness. Gaines was also summoned before the Senate, but despite his testimony (and editorials in the E.C. books asking for public support) the Subcommittee seemed to have made up its mind. On top of this, the publicity surrounding the hearings and the attention brought to bear on the content of the E.C. books caused many retailers and wholesalers to stop carrying the offending comics, causing E.C. severe financial harm and forcing them to end their horror/science-fiction line. Eventually, E.C.'s stable would be reduced to one title – the iconoclastic humor comic *MAD* (1952), which had many of the same creators that worked on the other E.C. comics.<sup>42</sup>

While the Subcommittee did not go so far as to recommend legislation to regulate comic books, they did recommend the industry police itself before the federal government did it for them. Consequently, comic book publishers, taking the fate of E.C. as an object lesson, established an oversight organization: the Comics Code Authority of

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<sup>41</sup> Frederic Wertham, *Seduction of the Innocent* (New York: Reinhart, 1954). Wertham changed his mind about comic books in his later years, but he is still remembered mainly for his anti-comics crusade.

<sup>42</sup> Estren, *Underground Comics*, 37. A plaintive editorial published in *Tales from the Crypt* read, in part, "Magazines that do not get on the newsstands do not sell. We are forced to capitulate. *We give up. WE'VE HAD IT!*"

America. The Authority not only issued guidelines as to what was or was not permissible content but also reviewed the content before publication. If approved, the Authority would then allow publishers to place its seal of approval on the covers, as an assurance to "concerned parents about the wholesome nature of the fare inside."<sup>43</sup> No comic intended for a mainstream audience would be published without the Authority's seal of approval until 1971 and mainstream comics moved back to the time-tested, morally brighter and more acceptable superhero genre.<sup>44</sup> *MAD*, in turn, changed from its standard four-color comic format to the black and white magazine more familiar to today's readers. This achieved the "benefits of better newsstand display and a higher cover price with only monochrome production costs."<sup>45</sup>

Not everyone had to adjust. Throughout the 1930s and 1940s, one genre that was content to remain directed towards children were the funny-animal comics, many which featured characters from Walt Disney's and Warner Brothers' animated films. Despite the fact that Wertham did not spare even these anthropomorphic characters from criticism, nobody examined them as deeply as they did the other genres, and they were considered harmless.<sup>46</sup> Also escaping any controversy were newspaper comic strips, which were still mostly humorous in focus and had tighter editorial control by the comic strip syndicates as well as the newspapers that published them. (It is tempting to think that the syndicates

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<sup>43</sup> Savage, *Cowboys*, 99. For a fuller account of the history and origins of the Comics Code, see Amy Kiste Nyberg, *Seal of Approval: The History of the Comics Code* (Jackson, MS: University Press of Mississippi, 1998).

<sup>44</sup> The mainstream comic that defied the Code was *The Amazing Spider-Man* #97 (Marvel Comics: June, 1971). The story, featuring Peter Parker's (Spider-Man's alter ego) roommate Harry Osborn under the influence of drugs, was actually an anti-drug story, but the Code prohibited any depiction of drugs, anti- or otherwise. Stan Lee, the writer and editor of the comic, persuaded Martin Goodman, Marvel's publisher, to give the go ahead to print without the seal, and there were no negative effects on sales. The Authority subsequently amended its guidelines to allow negative depictions of drug use.

<sup>45</sup> Skinn, *Comix*, 15.

<sup>46</sup> Savage, *Cowboys*, 101.

or Disney had enough economic clout to fend off the Comics Code Authority, but the truth is that their content was simply inoffensive enough to stay within the guidelines.) The generation of kids that remembered the E.C. books and saw them snatched away by the mainstream, leaving them with watered-down versions, however, would remember what had happened, and they were the generation that produced the underground comics.

The underground comics took all of the things that E.C. had been accused of – sex, violence and politics, but especially sex – much further, in a way not seen since the heyday of the Tijuana Bibles. Outrageous portrayals of sex and the questioning of standards of morality were a hallmark of underground comics and counterculture literature of the 1960s and 1970s. In the underground literature, sex served two purposes. First was to use "graphic or otherwise 'offensive' representations of sex" to confront and offend mainstream society. Sex was a symbol of "freedom and liberation," transcending the "strictures of a repressive society."<sup>47</sup> In the Vietnam era, it was also a question: "is it obscene to fuck, or is it obscene to kill?"<sup>48</sup>

In addition, it was the easiest and most direct way to get the message out, and not just preaching to the choir. Sex "would sell itself. No great depth, no hidden meaning, no angry voices screaming defiance. All it took was a salacious cover and an outrageous title for an instant sell-out." The title of Robert Crumb's *Snatch Comics* left little to the imagination, as did the titles of the stories inside, including *The Grand Opening of the*

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<sup>47</sup> Beth Bailey, "Sex as a Weapon: Underground Comix and the Paradox of Liberation", *Imagine Nation: The American Counterculture of the 1960s and '70s*, Peter Braunstein and Michael William Boyle, eds. (New York: Routledge, 2002), 308.

<sup>48</sup> Excerpt from poem by John Siedler, in *Asterisk* (8 January 1969), quoted in Bailey, "Sex", 311.

*Great Intercontinental Fuck-In and Orgy-Riot or The Family that Lays together Stays together.*<sup>49</sup>

Crumb would become the preeminent underground comics artist, especially following the publication of *Zap Comix* #4, whose content led to the conviction of two New York booksellers for distribution obscene materials.<sup>50</sup> The commercial successes of sex-based comics over other themes meant that that genre was soon "dominating anthologies."<sup>51</sup> On the surface, the underground comics reveled in anarchism, and "unleashed upon their pages unbridled imagination and uninhibited ids." To confront the orthodoxy, there was "no better way" than to pervert "the once disturbance free, innocence-protected world of... children's entertainment – in order to expose its lies and hypocrisy – to eliminate it as a force for the stifling of dissenting impulses – to extinguish its ability to mold impressionable minds into obedient cogs serving the corporate state."<sup>52</sup> That hypocritical children's world, according to the Air Pirates, was Walt Disney's.

### *3: It All Started With A Mouse*

When we talk about the story of Walt Disney, we need to distinguish between Walter Elias Disney the man, Walt Disney the myth, and the Walt Disney Company. The histories that have grown up around all three blur into each other, and have reached the point of an almost "pseudo-religious aura which has come to surround his name before

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<sup>49</sup> Skinn, *Comix*, 60.; Robert Crumb, *Snatch Comics* #1 and #2 (Apex, 1968) .

<sup>50</sup> *New York v. Charles Kirkpatrick and Peter Dargis*, 32 N.Y.2d 17; 295 N.E.2d 753 (1973).

<sup>51</sup> Skinn, *Comix*, 67.

<sup>52</sup> Levin, *Pirates*, 42.



and since his death."<sup>53</sup> Schickle observes in *The Disney Version* that "Walt Disney's greatest creation was Walt Disney."<sup>54</sup>

Walter Elias Disney was born in Chicago in 1901, his family moving to a Missouri farm in 1906 and then back to Chicago in 1917. Near the end of World War I, he lied about his age and joined the Red Cross Ambulance Corps, serving as a driver in France as the war ended. He returned to the United States in 1919 and joined a commercial art firm in Kansas City, forming his own animation company in 1922 – Laugh-O-Gram films, which produced several short films, the *Alice's Wonderland* series, combining animation with live-action (something he would experiment with again in later years). There, Disney met Ub Iwerks, an artist that would prove instrumental in the early success of Disney's future company. Disney joined his brother Roy in Los Angeles in 1923, and together they formed the Walt Disney Studio. Together, they produced 56 more *Alice* shorts and in 1927 created Oswald the Lucky Rabbit for Universal Pictures.

Disney soon discovered, however, that the copyright to Oswald belonged to their distributor and go-between with Universal, Charles Mintz. When Disney tried to renegotiate his contract, Mintz lured several animators from the studio over to work for him instead, and within a year, Disney had been replaced entirely on *Oswald* by Walter Lantz (more famous for being the creator of Woody Woodpecker).<sup>55</sup> This event, repeated in several biographies of Disney, taught him a deeply important lesson – that he should never lose control of his own actions. As Wasko points out, this story explains any

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<sup>53</sup> William Irvin McReynolds, "Walt Disney in the American Grain" (Ph.D. dissertation, University of Minnesota, 1971), quoted in Janet Wasko, *Understanding Disney: The Manufacture of Fantasy* (Cambridge, UK: Polity Press, 2001), 6.

<sup>54</sup> Richard Schickle, *The Disney Version: The Life, Times, Art and Commerce of Walt Disney* (New York: Avon Books, 1969).

<sup>55</sup> Schickle, *The Disney Version*, 90-91.

number of events in Disney's life and in the history of the company.<sup>56</sup> One might note the parallel between Disney and O'Neill – both created works that eventually were controlled by someone else. While Disney decided to move on to create something else that he could control, O'Neill decided to take back his creation by appropriating someone else's.

Mickey Mouse was the product of collaboration between Disney and Iwerks, but Disney took the public credit, stamping his name on the cartoons to make sure there was no mistake as to who was in charge and presenting the character and the film to the public. The first Mickey Mouse short presented to the public was actually the third produced. *Steamboat Willie* was released on November 18, 1928, and it was the first animated film with synchronized sound. *Steamboat Willie*'s plot has Mickey serving on a steamboat under Captain Pete, whistling as he does so. Minnie Mouse eventually shows up and drops the sheet music to "Turkey in the Straw", which is then eaten by a goat. Minnie and Mickey turn the goat's tail to make it produce the tune like a phonograph, and go on to use various farm animals as musical instruments. Eventually, Captain Pete is disturbed by all the noise and puts Mickey to work peeling potatoes.

Earlier in the year, silent movie comedian Buster Keaton had released the movie *Steamboat Bill, Jr.* Law professor Lawrence Lessig argues in his book *Free Culture* that *Steamboat Willie* is a parody of the earlier Keaton film. He notes, "The coincidence of titles is not coincidental. *Steamboat Willie* is a direct cartoon parody of *Steamboat Bill*, and both are built upon a common song as a source. It is not just from the invention of synchronized sound in *The Jazz Singer* that we get *Steamboat Willie*. It is also from

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<sup>56</sup> Wasko, *Understanding Disney*, 9.

Buster Keaton's invention of *Steamboat Bill, Jr.*, itself inspired by the song "Steamboat Bill," that we get *Steamboat Willie*, and then from *Steamboat Willie*, Mickey Mouse."<sup>57</sup>

While it would certainly be delicious irony when we are dealing with a case of parody if Disney's most famous animated character first debuted in a film that was itself an appropriation, the lines of similarity are tenuous. Lessig's argument is based on the fact that Disney's film licensed the use of "Steamboat Bill" (1910), the tune Mickey whistles at the start of *Willie*, and he cites that song as inspiration for *Steamboat Bill, Jr.*<sup>58</sup> While it is suggestive that two such similarly-titled and themed films would come out one after another, and it might very well be likely that Disney hoped to capitalize on Keaton's fame, the use of the song, and the setting on a steamboat, the title and the setting are essentially the extent of the similarities between the two. *Steamboat Bill, Jr.* is the story of a young man who goes to work on his father's steamboat and falls in love with the daughter of his father's business rival. No animals are used as musical instruments, no burly captain punishes Keaton by making him peel potatoes, and the love interest does not show up as a passenger on the steam boat.<sup>59</sup> Lessig certainly overstates his argument here, which is that there is a history of creative works building on other creative works, but there is another point to be made.

While the similarities between the two films are minimal, both draw their inspiration from a popular song, and *Steamboat Bill, Jr.* was certainly fresh in the public's mind when *Steamboat Willie* debuted. *Willie* is not a parody, but that does not mean it

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<sup>57</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004), 23.

<sup>58</sup> It is also interesting to note that "Steamboat Bill" itself bears remarkable similarities to the 1909 "Casey Jones", switching the hero from a train trying to beat a speed record to a steamboat doing the same thing. See David Gerstein's *The Cartoon Pop Music Page* <<http://wso.williams.edu/~dgerstei/cartoonmusic/>> with the lyrics to "Steamboat Bill" at <<http://wso.williams.edu/~dgerstei/cartoonmusic/steamboatbill.txt>>.

<sup>59</sup> A synopsis of the movie can be found at *The Greatest Films* <<http://www.filmsite.org/stea.html>>

does not allude to the earlier film, and the level of coincidence probably points to the probability that Disney did intend to evoke *Bill, Jr.* The use of popular music and the allusion to a popular film must also have drawn the audience into the animated world he was presenting much more effectively than if he had created a completely different milieu altogether. As I will mention again later, successful parody conjures the familiar, and the use of established images saves the artist the trouble of explaining their meaning and allows them – and the audience – to concentrate on other areas of the work. In this way, both O'Neill and Disney were drawing on the same methodology.

*Steamboat Willie* was a runaway success, and more cartoons followed. However, the Disney studios did not make that much money off its distribution contracts with the studios. In fact, most of the money had to be poured back into producing the cartoons themselves, and the cost of producing them also increased nearly twofold between 1928 and 1931. The Disney brothers had to look elsewhere to gain revenue.<sup>60</sup> It is in merchandizing that we see the clearest indications that, although the Disney studios certainly constructed their output to appeal to a family audience, its main constituency has always been children. The first pieces of merchandise that featured The Mouse were writing tablets in 1929, but the licensing of Mickey's image soon expanded to other items, including toys, dolls, clocks, watches, newspaper comic strips and comic books. More characters made their way onto merchandizing, including Minnie Mouse, Pluto and Goofy. Disney also established Mickey Mouse Clubs "around the country and the world, organized around Saturday movie matinees for children" and to promote Disney

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<sup>60</sup> Schickel, *The Disney Version*, 135.

merchandise. By the year of Donald Duck's debut, films and merchandise were bringing in annual profits of over \$600,000.<sup>61</sup>

Walt Disney saw the marketing possibilities of comic strips quite early. Slightly over a year after *Steamboat Willie*, Disney began writing a newspaper comic strip featuring the cartoon mouse with Iwerks. The strip was so popular that, in the same year, Disney created a comic strip department within the studio. Floyd Gottfredson, who created numerous original characters for the comic strip, headed the department.<sup>62</sup> *Mickey Mouse Magazine* followed in 1935, reprinting the newspaper strips, and when the newspaper strip ended, both *Mickey Mouse Magazine* and *Walt Disney's Comics & Stories* (1940), started publishing original stories.

Apparently, Disney himself eventually lost interest in the comic books that used his characters, because they were not as profitable as the other merchandising arms of his empire, but they were and continue to be popular, especially in international markets.<sup>63</sup> However, we should note that the Disney Company's foray into comic books is not an end in itself, but as a part of a larger effort to spread consciousness of the characters in popular culture. As such, although Disney may have been not too concerned about the creative process in producing the comic books that were put out under his name, historically the company has been very aggressive about protecting the images of the characters they license to create merchandise.<sup>64</sup>

And marketing was something that Walt Disney did very, very well.

Mythologizing himself as a self-made man, the "Horatio Alger of the cinema" (as the

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<sup>61</sup> Wasko, *Understanding Disney*, 10-11, 49.

<sup>62</sup> David Geirstein, "It All Started With A Mouse", *DCML: Disney comics web site* <<http://stp.ling.uu.se/~starback/dcml/history.html>>.

<sup>63</sup> Wasko, *Understanding Disney*, 145.

contemporary press put it), Disney created an image of himself that he could market as well as any other type of entertainment that he produced. "Above all," Wasko writes, "Disney was committed to mass culture." The art historian Steve Watts, in *The Magic Kingdom*, notes Disney's "great passions of his life: he was in love with his work and in love with the idea of entertaining a mass audience."<sup>65</sup> One of the most powerful cultural influences on children growing up in post-war society was Walt Disney, and his reach and influence cannot be underestimated.

In 1954, the same year that *Seduction of the Innocent* was published, Walt Disney began *Disneyland*, a television program where families could "partake" of the Disney experience "without leaving the material and moral comforts of their suburban home." Among the family fare that was broadcast included Disney's own unique visions of nature in the form of his *True-Life Adventures*. This humanized vision that Disney provided permeated into the American home and family, providing a view nature as separate, remote and pristine, and most of all as a frontier experience. In movies like *Nature's Half-Acre* (1951) and *The Vanishing Prairie* (1954), middle-American values are overlaid on top of images of the natural world. The narrator of *Nature's Half-Acre* lays a heavy judgmental tone on the cowbird, who "lays her egg's in another's nest and then flies away, never to return," in contrast with shots of other bird species who attentively care of their young. The lesson is twofold: Nature is good where it reflects traditional

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<sup>64</sup> Although not, perhaps, as aggressive before 1967 as they were thought to be. See Chapter Two.

<sup>65</sup> Ibid., 13; Steven Watts, *The Magic Kingdom: Walt Disney and the American Way of Life* (New York: Houghton Mifflin, 1997), 59.

family values, and disapproved of where it does not. In addition, such values, insofar as the natural world reflects them, are the way things should be.<sup>66</sup>

*Davy Crockett: King of the Wild Frontier* (1954) and its two sequels, also aired on the first season of *Disneyland*, are the epitome of the Frederick Jackson Turner frontier thesis of the American West. Like Turner, Disney believed that "both his own life and that of the nation had been affected, even forged, by the frontier experience."<sup>67</sup> The *Davy Crockett* television movies mythologized Crockett into the "prototypical nineteenth-century American: Indian fighter, political reformer and conqueror of the continent" and as "someone whose (populist) democratic values and ideas come from his experiences in the wilderness." Other movies like *Swiss Family Robinson* (1960) showed "Protestant work ethic and solid kinship" helping a family overcoming the problems of being stranded on a tropical island.<sup>68</sup> The opening of Disneyland itself in Orange County, California in 1955 made this experience concrete, with its Frontierland creating a combination travelogue and "cyclorama... a sweeping panoptic vision of American expansion," albeit one tinged with stereotyped images of the American frontiersman as tamer of the West and Native Americans characterized as violent "redskins".<sup>69</sup>

The counterculture of the 1960s was rebelling against the vision of America that they were supposed to inherit, a country based on consumptive excess, capitalism run amuck, and increasing alienation. They saw the greed and materialism of American society as a product of American individualism, and the artificial, controlled environment

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<sup>66</sup> Greg Mitman, *Reel Nature: America's Romance with Wildlife on Film* (Cambridge, MA: Harvard University Press, 1999), 127.

<sup>67</sup> Richard Francaviglia, "Walt Disney's Frontierland as an Allegorical Map of the American West", *The Western Historical Quarterly*, 30:2 (Summer, 1999), 167.

<sup>68</sup> Steven Watts, "Walt Disney: Art and Politics in the American Century", *The Journal of American History*, 82:1 (June, 1995), 107; Mitman, *Reel Nature*, 125.

of Disneyland provided a convenient, all-in-one package to direct that rebellion. In a similar vein to the sentiments that the Air Pirates were voicing, Watts writes, "A growing oppositional culture of leftist intellectuals and students held up Disney's work as illustrative of the barriers that impeded the wholesale reform of American values – unquestioning patriotism, bourgeois moral nostrums, gauche middle-class taste, racist elitism, corporate profit-mongering, bland standards of social conformity."<sup>70</sup>

"Think of the children," is a common refrain, and offers another clue as to why *Air Pirates Funnies* was so offensive, and why the outcome of the case was a foregone conclusion no matter how they argued it. Even though salaciousness was not, technically, a factor to be considered in copyright infringement, it mattered much more in this case because of the object of parody and the means by which they accomplished it. When arguing Disney's case against O'Neill and the Air Pirates, the company's attorneys submitted that Disney sought to project "an image of innocent delightfulness", and that *Air Pirates Funnies* would irreparably harm that image.<sup>71</sup>

The Air Pirates would, in turn, argue that "the Mouse, in the hands of the Air Pirates, is a useful symbol of the nation. Walt Disney Productions has always kept the Mouse's devotion to Establishment values impeccable. He has championed small-town America countless times against anyone who would alter it in any way: all outsiders are villains, and usually foreign-looking villains at that. His reaction to opposition, even to variance, is immediate: conquest and imprisonment. The Mouse has been an enthusiastic promoter of such causes as capitalism, identification with the police, vigilante justice, the

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<sup>69</sup> Francaviglia, "Walt Disney's Frontierland", 165; Henry A. Giroux, Henry A. Giroux, *The Mouse That Roared: Disney and the End of Innocence* (Lanham, MD: Rowman & Littlefield, 1999), 103.

<sup>70</sup> Watts, *Magic Kingdom*, quoted in Levin, *Pirates*, 79.



automobile, unrestrained violence, and witless adoration of movie stars... Where the country went wrong, the Mouse went wrong."<sup>72</sup>

Ironically, it was the very precision of Disney's careful cultivation of that image that made it such an efficient object of attack, but at the same time it would also be both what compelled it to and empowered it in defending itself against the Air Pirates.

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<sup>71</sup> *Walt Disney Productions v. The Air Pirates, et al.* 345 F. Supp. 108 (S.D. Cal. 1972), 110; Levin *Pirates*, 10

<sup>72</sup> *Walt Disney Productions v. The Air Pirates*, Defendants' Dan O'Neill and Bobby London Memorandum in Opposition to Plaintiff's Memorandum for Preliminary Injunction, Civil Action No. C-71-2021 ACW, February 4, 1972, 42.

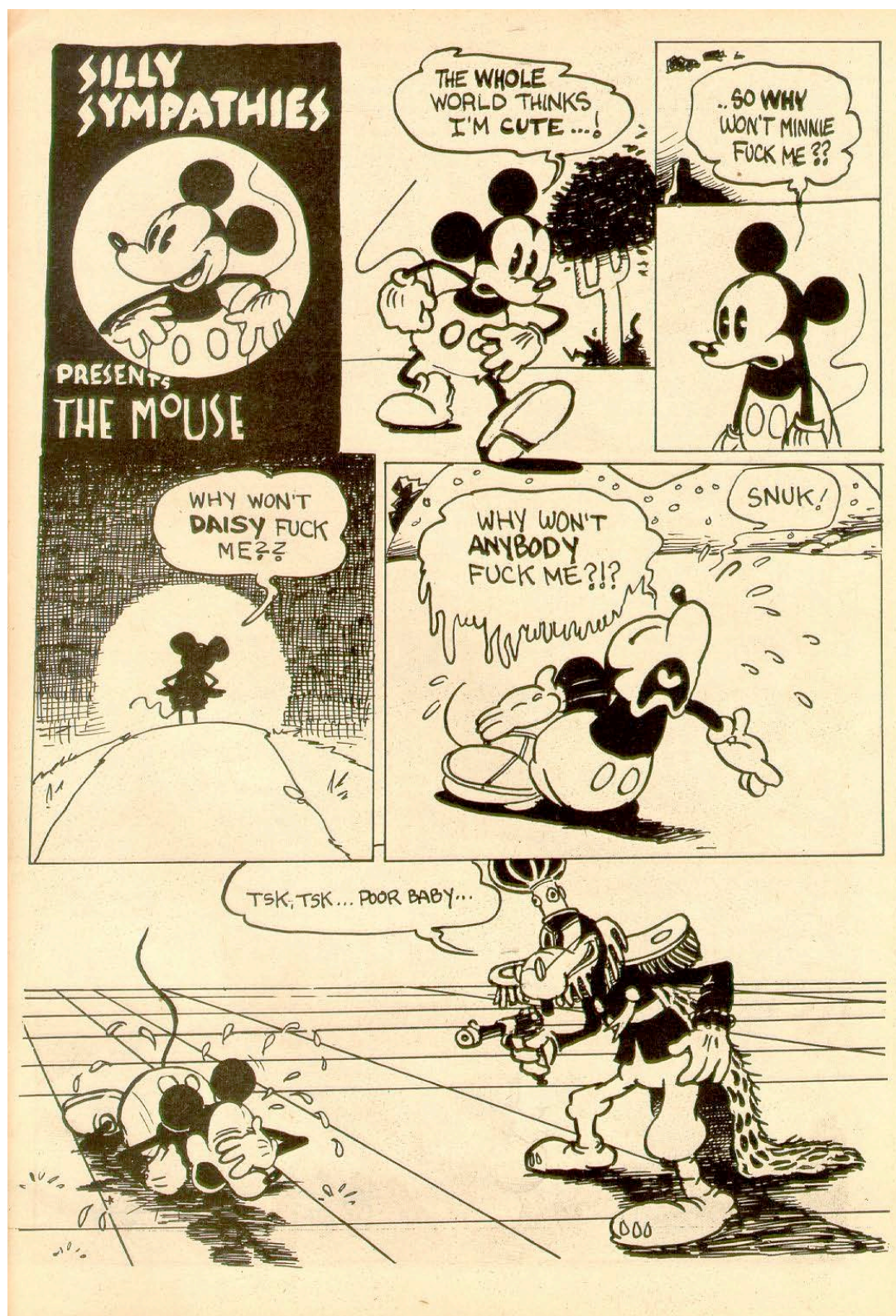


Figure 1: Page from "Silly Sympathies Presents the Mouse", *Air Pirates Funnies* #1 (July 1971)

## CHAPTER TWO

### *1: The Disneyland Memorial Orgy*

O'Neill likes to tell the story that, although the San Francisco telephone book held a listing for "Air Pirates Secret Hideout", Disney was unable to serve its notice of suit for four months. However, as Levin points out, considering that they moved into the Fourth Street warehouse in August and had split up by November, it is doubtful that they had a phone book listing in October when this was supposed to have taken place. According to Disney's lawyers, they first tried to mail notice to O'Neill at his address in Jenner but were told that O'Neill had changed his address to General Delivery at Sausalito. They sent notice there on October 28, but there was no response, so a process server was hired. The memories of the other Air Pirates are somewhat muddled. Flenniken states that she remembers a "commotion when a process server arrived", Richards recalls someone throwing papers on the floor and running away after shouting, "You're served." London claims that only Hallgren was present, and Hallgren himself now believes they only learned of the service from O'Neill after the fact. A temporary restraining order was issued on November 5, 1971, prohibiting the Pirates from distributing the enjoined material.<sup>73</sup>

Disney's motion in Civil Action No. C-71-2021 ACW, *Walt Disney Productions v. The Air Pirates, Hell Comics, Dan O'Neill, Ted Richards, Gary Hallgren, Bobby London, Does One to Fifty*, asking for a preliminary injunction and impounding of the

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<sup>73</sup> Levin, *Pirates*, 91-92.

offensive items is dated November 8, 1971. The response by the defendants' lawyers opposing the motion was filed on February 3, 1972, but dated January 14, with the supporting affidavits marked with dates ranging from January 12 to January 31. Taking the various dates into account leads me to believe that service was probably affected some time in November, but no later than December. This would have to be the case to give at least a reasonable amount of time for O'Neill to contact his lawyers, for them to do the initial getting up on the case and to organize the writing of the affidavits within a two week period before filing in early February.<sup>74</sup>

O'Neill's lawyers were Kennedy and Rhine, who were just as countercultural as he was. Michael Kennedy was an ex-New York lawyer who had built a reputation for defending "draft resisters, Timothy Leary, and one of the alleged cop-killers in Los Sieta de la Raza, a group of young Mission District Hispanics." Kennedy's attitude was that the legal system was corrupt, but that the more aggressively he fought the better deals he could get for his clients. Kennedy represented O'Neill, and passed some of the papers to David F. Phillips, a junior member of the firm. Phillips would become London's attorney in the case. To avoid the appearance of a conflict of interest, Kennedy referred the case also to the law firm of Rohan and Stepanian. Michael Stepanian, who had previous experience in defending underground comics art against obscenity charges, became Richard's lawyer. Albert Morse, who out of all of them had the most experience in copyright law, as he had represented, among others, underground comics artist Robert Crumb in a suit against people who had infringed his famous "Keep on Truckin'" logo,

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<sup>74</sup> Plaintiff's Memorandum In Support of Motion for Preliminary Injunction and Order Impounding Infringing Matter Pending Action, dated November 8, 1971; Defendant Richards and Hallgren's Memorandum in Opposition, dated January 14, 1972.

took Hallgren's brief. The hearing for the preliminary injunction was set for March 10, 1972, before Judge Wollenberg.<sup>75</sup>

The initial filing of suit on October 21, 1971, according to Levin was an impressive "near-half-pound of legal documents," along with an eighteen-page document outlining ten causes of action including copyright infringement, trademark infringement, unfair competition, intentional interference with business and trade disparagement through the wrongful use of the copyrighted characters. It asked for preliminary and permanent injunctions against the published comics and any future ones plus all of the profits, \$5,000 for each infringement, triple damages for the trademark infringement, punitive damages against each defendant in the sum of \$100,000 each, the surrender of the infringing comics and attorney's fees and costs. While looking impressive, this barrage of charges and demands is standard in litigation, in an attempt to intimidate the other party and nudge them towards the negotiating table.

A better indication of how seriously Disney were taking the Air Pirates' resolve in fighting the case is their actual five-page motion asking for a preliminary injunction – which is to say, not very. To obtain a preliminary injunction, a plaintiff must show firstly that they have a likelihood of success on the merits of the case, and secondly that irreparable harm would result if they did not obtain the injunction.<sup>76</sup> The motion trotted out their copyright certificates as evidence that Disney owned the copyrights on the characters infringed on and, arguing that in cases of copyright infringement, irreparable

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<sup>75</sup> Levin, *Pirates*, 94.

<sup>76</sup> *Continental Baking Co. v. William Katz* 68 Cal.2d 512 (1968) at 528: "In making that determination (for granting a preliminary injunction) the court will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. (See *Lagunitas Water Co. v. Marin County Water Co.*, *supra*, 163 Cal. 332, 336-337; 1 Witkin, *op. cit. supra*, p. 867; 1 High, *op. cit. supra*, §

harm was presumed upon showing infringement, and even if they were supposed to prove irreparable injury, it was "amply" shown by the alleged causes of action in the writ.

There is a certain smugness apparent in the casual and broad strokes of the five-page motion. Perhaps Disney honestly felt that it was an open and shut case and that would be sufficient, or that the Air Pirates, faced with the corporate monolith that was the Walt Disney Company, would cave under the pressure. Certainly, Disney had no reason to believe this would not be the case. *Air Pirates Funnies*, as outrageous as it was, was not the first time in the 1960s that Disney characters had been lampooned and put into sexual situations.

As mentioned in Chapter One, Paul Krassner, who ran the underground paper *The Realist*, decided after Walt Disney's death, to show the Disney characters celebrating by going "on a binge." He commissioned Wallace "Wally" Wood, an artist who had gained fame on the late E.C. line of horror and science fiction comics in the 1950s and subsequently went to do humor strips for *MAD*. Since the heyday of the E.C. line, Wood had gone on to even greater acclaim in the comic book industry, doing early work on *Daredevil*, *The Avengers* and *The X-Men* for Marvel Comics, war and horror strips for Warren Publishing and most famously, helping to create the *T.H.U.N.D.E.R. Agents* for Tower Comics.<sup>77</sup> Wood was known for his dynamic, realistic art, his rendition of beautiful women as well as a wicked sense of comic composition. He would go on to do several erotic comic strips in the 1970s, but in 1967, he drew Krassner's "Disneyland

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5; 1 Joyce, *op. cit. supra*, §§ 109-110; 1 Spelling, *op. cit. supra*, § 25; Rest. Torts, § 936, subd. (2).) See also California Code of Civil Procedure § 526.

<sup>77</sup> Michael T. Gilbert, "Total Control: A Brief Biography of Wally Wood", *Alter Ego* 3:8 (TwoMorrows Publishing, Spring 2001), 4-21.

Memorial Orgy", which appeared as a centerfold spread in the May 1967 issue of *The Realist*.<sup>78</sup>

As orgy scenes go, the "Disneyland Memorial Orgy" is not particularly explicit. Several characters are engaged in sexual relations but no genitalia are seen. In one corner we have Goofy mounting Minnie Mouse on a giant mousetrap while Mickey's nephews watch. Mickey himself, unshaven and slovenly dressed, is rather indifferent to the scene, since he is injecting himself with, presumably, some kind of narcotic. Pluto is seen urinating on a portrait of Mickey, an evil grin on his face. Tinkerbell lifts her dress to flash several other characters; Donald Duck rants at a flying Dumbo who has defecated on him, while Donald's nephews peek under Daisy Duck's skirt. In another part of the picture, the Prince is putting a slipper onto a panty-less Cinderella. In fact, the only one aside from Donald who does not seem to be enjoying the experience is Snow White who is being molested by the Seven Dwarves. The political point of the piece is seen in the background, where the sunlight behind Sleeping Beauty's castle is streaming upward in the shape of dollar signs. Krassner even released the centerfold in poster form. (Figure 2)

The interesting thing to note here is that despite Disney's litigious reputation, which the Air Pirates and particularly O'Neill seemed to be counting on, is that Disney did not sue either Krassner or Wood, and in fact ignored *The Realist* entirely. According to Krassner, a Disney insider told him that Disney "chose not to sue to avoid drawing attention to what could ultimately be a losing battle."<sup>79</sup> Disney did ultimately sue, not because of Krassner, but because an entrepreneur named Sam Ridge, who part owned a

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<sup>78</sup> Levin, *Pirates*, 79.

<sup>79</sup> Caption to Wally Wood, "Disney Memorial Orgy", Poster, 1967, displayed at the *Illegal Art: Freedom of Expression in the Corporate Age* website <<http://www.illegal-art.org/print/popups/orgy.html>>. Levin adds

company that produced psychedelic posters, pirated Wood's piece into a "colorized, bootleg edition." Disney's suit against Ridge never went to court – he went out of business as a result.<sup>80</sup>

In fact, Disney's suit against the *Air Pirates* is the first instance of Disney actually needing to go to court and obtain a judgment against a defendant who was parodying their work. Aside from its action against Ridge, the *Air Pirates* case is the only instance I have been able to uncover of Disney actually bothering to sue any artist for infringement prior to 1971. As mentioned, Disney did not go after Krassner or Wood. *Zap Comix* #3, with its centerfold of Daisy and Donald Duck having oral sex, also did not get any attention from Disney – probably because the cover did not draw attention to it. Neither did Disney sue Robert Armstrong for his "Mickey Rat" character (Figure 3), which started on T-shirts but soon branched out into his own underground comic in early 1971. Although "Mickey Rat" did not really resemble Mickey Mouse, the satire was obvious and never hidden. The reasons for Disney not suing are speculative, but they may have realized the danger of opening the floodgates if they lost a case, as well as the possibility of bad publicity (as Krassner claims he was told). The law on parody as fair use, even at the time, was dangerously vague when it came to what the courts would allow and what the courts would not, and Mickey Mouse was probably too valuable a property to risk in the face of a small-time underground operation.<sup>81</sup>

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that Disney "knew (Krassner) was judgment-proof and didn't want to give him free publicity." (Levin, *Pirates*, 79).

<sup>80</sup> Ibid., 80. I tried to contact Ridge, but discovered that he had unfortunately passed away in 1997 in Chico, CA. (E-mail from Paul Olsen, February 23, 2005.)

<sup>81</sup> *Zap Comix* #3 (Apex Novelties, 1968); Mickey Rat first appeared in *LA Comics* #1 (Los Angeles Comic Book Company, December 1971).



Disney did not file a lawsuit when *MAD Magazine* did its parody of Mickey Mouse – complete with five o'clock shadow – in 1956 or even when Pop Artist Roy Lichtenstein produced his non-offensive painting "Look Mickey" in 1961 (which, according to Lichtenstein was taken from a bubble-gum wrapper and therefore clearly licensed property; Figure 4).<sup>82</sup> Holly Crawford, in her unpublished dissertation *Picasso Seizes Donald Duck*, argues that Disney may have signed a contract with Lichtenstein (as they did with Andy Warhol some years later) to curb the extent to which he could exploit the painting. Crawford points out that Lichtenstein's use of the painting was limited and he did not sell it. When Lichtenstein gave "Look Mickey" to the National Gallery of Art in 1990, the Gallery was prohibited from selling postcards of the painting by agreement with Disney.<sup>83</sup> Her argument, if true, suggests that Disney was very aware of the publicity involved in litigation – especially in the case of a famous painter like Lichtenstein – and its possible legal consequences. They were therefore willing to negotiate rather than leap onto a lawsuit at first opportunity, or, in the case of a limited distributed market like *The Realist* or *Zap Comix*, ignore it. Why Disney sued Sam Ridge may be because his posters, unlike Krassner's, were in color, and could be bought by people mistakenly thinking it was an actual Disney poster if the buyer didn't look closely enough at the artwork to see what was actually being depicted, potentially leading to complaints and bad publicity.

Given all this, the reason why O'Neill and the others waited so long (between August and October) for the axe to fall after the publication of *Air Pirates Funnies* #1

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<sup>82</sup> Harvey Kurtzman and Bill Elder, "Mickey Rodent!", *MAD Magazine* #19 (E.C. Comics, January 1956); Roy Lichtenstein, exhibition catalogue, (The Tate Gallery, 1968): 47, quoted in Holly Crawford, *Picasso Seizes Donald Duck* (unpublished Ph.D. dissertation, University of Essex, 2003), 127.

<sup>83</sup> Crawford, *Picasso*, 134.

was probably because the axe was never going to fall – at least, not until O'Neill had copies distributed at a Disney board meeting and in airport lounges as he claims, leaving Disney no choice but to take notice, especially given the similarities of the cover of *Air Pirates Funnies*, at first glance, with traditional Mickey Mouse comics. According to Disney's lawyer Frank Tatum, "The *Funnies* had received a fair amount of exposure, and Disney regarded it as a very serious problem." Levin suggests that this is likely because Disney did not know if the Pirates would be publishing more parodies or what "further outrages they would attempt if not quashed."<sup>84</sup> However, given the way underground comics were distributed, it is unlikely that Disney would have been that afraid to begin with until O'Neill had shown how determined he was to throw it in their face.

Even at this point, it is probable that Disney felt after their victory over Ridge that they had a sure-fire method of resolving matters. Disney may have believed that simply filing suit and asking for harsh penalties would make the Air Pirates throw in the towel in the same way that Ridge had folded. Unfortunately for Disney, they soon discovered how wrong they were. In the same way that O'Neill overestimated Disney's eagerness to sue and had to push them into doing so, Disney underestimated O'Neill's determination in wanting to take the case as far up as he could possibly take it.

## 2: "To recall or conjure..." - Copyright law and fair use

Copyright law in the United States traces its ancestry from the English law of copyright, and has its roots in the invention of the printing press by Johann Gutenberg in 1440, which was in turn introduced to England by William Caxton in 1476. Prior to

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<sup>84</sup> Levin, *Pirates*, 101.

Gutenberg's invention, books had to be laboriously copied out by hand – by slaves during Greek and Roman times and in the middle ages by the church and then the first universities. The printing press made efficient mass production of books possible for the first time.<sup>85</sup> The first government restrictions of printing came when Queen Mary in 1556 incorporated the Stationers Company in London following the explosion of potentially seditious tracts. The Company, comprised of booksellers and printers, was given the authority to decide which manuscripts deserved publication, enforcing their edicts through the Star Chamber which sought out, arrested and jailed the producer of any unauthorized publication. This did not just regulate content, but "protected the investment of the first company to publish a given book by effectively eliminating piracy." Authors could also petition the Crown for exclusive rights to their books for a set period of years.<sup>86</sup>

Intellectual property law developed as a tension between two interests – the interests of the author in being able to exploit and profit from their work and the interests of the public in making sure the work – and associated knowledge – is made available to all. By granting the author the protection against piracy by guaranteeing their exclusive rights, the government then ensures and encourages other authors to make their work available and therefore add to the public body of knowledge. The balancing of these interests underlies all intellectual property law from copyright to patents and to a lesser extent trademarks and industrial designs.

The first statute to make this balancing act explicit was the 1710 Statute of Anne, which gave authors ownership of their words for fourteen years and the possibility of

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<sup>85</sup> Edward Samuels, *The Illustrated History of Copyright* (New York: St. Martin's Press, 2000), 11.

<sup>86</sup> Levin, *Pirates*, 85; Samuels, *Copyright*, 11-12.

another fourteen years if they were still alive at the end of the first period. The title of the statute said it all: "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchases of such Copies, during the Times therein mentioned."<sup>87</sup> On the other side, the authors had to register their copyright as well as donate copies for storage and use in libraries, or else be fined for each copy not delivered. The first Copyright Act in the United States was enacted in 1790, and like the Statute of Anne, was for the "encouragement of learning" and protected the rights of the author for twenty-eight years. The author also had to deliver one copy to the clerk of the local district court and one copy to the federal Secretary of State. The penalty for violating copyright was that the offender would have to give up all infringing copies and be fined for each copy in their possession as well as compensate the author for any damages sustained. In 1891, the International Copyright Act extended this protection to works printed outside the United States.

As Edward Samuels puts it in his *Illustrated History of Copyright*, "The First Amendment, almost contemporaneous with the U.S. Constitution and the first copyright act, specifically affirmed freedom of speech and of the press as basic tenets of the new government. And yet, the same lawmakers also saw that freedom of speech didn't mean freedom to 'steal' someone else's speech." However, the point is this: from the beginning, there was never any intent for a copyright holder to hold on to their rights for perpetuity. After a period of time, their work passed into the public domain and was free for everyone's benefit. This makes sense because, after all, if one could create one work and exploit it forever, then the public would not benefit from the free use of the work, there

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<sup>87</sup> Statute of Anne, 8 Anne C. 19 (1710).

would be no incentive to continue producing more creative pieces of work and the "encouragement of learning" would be defeated.

And yet, over the centuries since the first acts were established, and particularly in the United States, intellectual property law has slanted more in favor of the rights of the property owner rather than the public weal, extending the period of protection in copyright from twenty-eight, to forty-two and then fifty-six years. The 1998 Sonny Bono Copyright Extension Act placed United States copyright law in line with the European Union's extension to the life of the author plus fifty years protection period of the Berne Convention, putting the limit of copyright protection for a given work at life plus seventy years.<sup>88</sup> In addition, over the years, the Copyright Act has been refined and revised to deal with changing technology as well as other forms of creative expression – sculpture, paintings, musical compositions both in printed form and performed, motion pictures and "all copyrightable component parts of the thing copyrighted," which meant that elements within media could also attract protection.<sup>89</sup>

At the same time, the law determining exactly what constituted a violation of copyright also developed. It would be ludicrous to suppose, of course, that a single sentence in a larger work that is similar to another's would be copyright infringement. It would be similarly absurd to suppose that one could copyright the way a hand or an eye was drawn, or even a plot point. One general difficulty with law is that it is supposed to foster certainty, and as a result, it aims to be as precise as possible. However, language –

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<sup>88</sup> 17 USC § 302. However, it should be noted that this did not provide retroactive protection, unlike the European Union legislation.

<sup>89</sup> Section 3 of the Copyright Act 1909 states: "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

particularly English – is not a precise tool, and in any case, if the law is too precise, the probability of lacunae becomes more certain. As a result, rather than draw a firm line, the law settled on the test of "substantial similarity" as the benchmark by which copyright violations would be measured.

"Substantial similarity" gives a name to a doctrine that can be frustratingly vague and subjective, and there are cases that can appear one way and yet be decided in the other by a court of law. Edwards cites as examples Judge Learned Hand's decisions in *Nichols v. Universal Pictures* where he found no substantial similarity between the movie *The Cohens and the Kellys* and Anne Nichols' 1922 play *Abie's Irish Rose*, although both involved the conflicts happening between an Irish and a Jewish family when their offspring decide to marry. Hand, however, did find substantial similarity in *Sheldon v. Metro-Goldwyn Pictures* between the movie *Letty Lytton* and Edward Sheldon's play *Dishonored Lady*, despite different dialogue and the fact that both were based on a real 1857 murder case.<sup>90</sup>

Hand, in a later decision, wrote:

The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore inevitably be ad hoc.<sup>91</sup>

The idea-expression dichotomy echoes throughout copyright law, but vagueness of the test has always been troubling, and has led to substantial litigation. Although most

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<sup>90</sup> Samuels, *Copyright*, 153-154; *Nichols v. Universal Pictures* 45 F.2d 119 (2<sup>nd</sup> Cir. 1930); *Sheldon v. Metro-Goldwyn Pictures* 81 F.2d 49 (2<sup>nd</sup> Cir. 1936).

<sup>91</sup> *Peter Pan Fabrics v. Martin Weiner Corp.* 274 F.2d 487 (2<sup>nd</sup> Cir.1960).

cases can be quite easily distinguished as to what is infringement and what is not, situations like *Nichols* and *Sheldon* reveal a very fine line that is not as clear as to what constitutes an idea and what constitutes expression of the idea. While it is perhaps not disputed that an idea cannot be copyrighted, the same is not as clear when the item in question is a character (apart from the work it appears in). *Detective Comics v. Bruns Publications* (1940) dealt with DC Comics suing Bruns for publishing books with a character named "Wonderman" (basically Superman in a red suit instead of a blue one). The court, referring to *Nichols*, stated that while DC Comics was "not entitled to a monopoly of the mere character of a 'Superman' who is a blessing to mankind," the similar poses and feats that both characters did in their respective comic books showed that "the defendants have used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant's copyrights."<sup>92</sup>

DC Comics sued Bruns (which changed its name to Fox) two years later in *Detective Comics, Inc. v. Fox Publications, Inc.*, which involved "The Lynx" and "Blackie the Mystery Boy" as compared to Batman and Robin. The court did not analyze that case further than by saying that a comparison convinced it that there had been a "substantial copying". An earlier case, *King Features Syndicate v. Fleischer* (1924), which involved the making of a toy horse based on the character "Spark Plug" from the comic strip "Barney Google", stated that creating a toy version of a copyrighted character was just as much as an infringement.<sup>93</sup>

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<sup>92</sup> *Detective Comics, Inc. v. Bruns Publications, Inc.* 111 F.2d 432 (2<sup>nd</sup> Cir. 1940), 433-434.

<sup>93</sup> *Detective Comics, Inc. v. Fox Publications, Inc.* 46 F. Supp. 872 (S.D.N.Y. 1942); *King Features Syndicate v. Fleischer* 299 F. 533 (2<sup>nd</sup> Cir. 1924). Betty Boop was the subject of a similar suit in *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.* 73 F.2d 276 (2<sup>nd</sup> Cir. 1934).

The problem with these decisions, however, is that they never explicitly say that a character can be copyrighted. The test applied in all these cases is the "substantial similarity" test, based on a pictorial representation of the character in various poses. None of these cases say that it is not permissible for a person to take a character *like* Superman, with similar powers and similar characteristics, but put him in stories and art substantially different from the Superman strips and books. This was exactly the situation that was fought over between DC Comics and Fawcett Publications over the 1940s Captain Marvel – a superhuman figure who could fly, perform feats of strength and wore tights and a cape, but in all other respects was very different. That case, however, was never adjudicated, as Fawcett eventually surrendered after over a decade of wrangling, in 1953 following the bust in superhero comic book sales after the war, and promising not to publish Captain Marvel again. The character was eventually purchased by DC Comics, which publishes it today.<sup>94</sup>

In *Warner Bros. Pictures Inc. v. Columbia Broadcasting System*, Warner Brothers sued over the character of Sam Spade, the hardboiled detective created by Dashiell Hammett in *The Maltese Falcon*. Hammett had sold Warner Brothers the right to use *The Maltese Falcon*, but had also subsequently sold the rights to the Sam Spade character and other characters not associated with *Falcon* to others for radio plays and other performances. Warner alleged infringement and unfair competition. The court reasoned:

If Congress had intended that the sale of the right to publish a copyrighted story would foreclose the author's use of its characters in subsequent works for the life of the copyright, it would seem Congress would have made specific provision... The characters of an author's imagination and the art of his descriptive talent, like a painter's or like a person with his penmanship, are always limited and always

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<sup>94</sup> Don Markstein, "Captain Marvel", *Toonopedia* <<http://www.toonopedia.com/capmarv1.htm>>; Wright, *Comic Book Nation*, 18-19.



fall into limited patterns. The restriction argued for is unreasonable, and would effect the very opposite of the statute's purpose... [W]hen a study of the two writings is made and it is plain from the study that one of them is not in fact the creation of the putative author, but instead has been copied in substantial part exactly or in transparent re-phrasing to produce essentially the story of the other writing, it infringes. It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.<sup>95</sup>

The question of whether a cartoon character, as opposed to a literary one, could be copyrighted was examined by the Ninth Circuit in the *Air Pirates* appeal. It appeared from *Columbia Broadcasting*, however, that as long as the story itself was not substantially similar, the characters were fair game. However, even if the "substantial similarity" test is passed, the law recognizes that under some circumstances, even if the use of copyrighted material is unauthorized, it may still be permitted. This is the "fair use" privilege in copyright law, and the exact boundaries of what is "fair use" can be even murkier than that surrounding "substantial similarity".

The first case to raise the issue of the doctrine of fair use is usually recognized as *Folsom v. Marsh*, but as William Patry points out in his textbook *The Fair Use Privilege in Copyright Law*, many points in *Folsom* were anticipated two years earlier by Justice Story in *Gray v. Russell*.<sup>96</sup> In *Gray*, Story discussed what might constitute fair use:

The question, in such a case (of abridgement), must be compounded by various considerations; whether it be a bona fide abridgement, or only an evasion by the omission of some unimportant parts; whether it will, in the present from, prejudice or supersede the original work; whether it will be adapted to the same class of readers' and many other considerations of the same sort... not so much of the quantity, as of the value of the selected material... The quintessence of a work

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<sup>95</sup> *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System* 216 F.2d 945 (9<sup>th</sup> Cir. 1954) at 950.

<sup>96</sup> *Folsom v. Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901); *Gray v. Russell* 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728); William Patry, *The Fair Use Privilege in Copyright Law* (Washington DC: Bureau of National Affairs, 1995), 19.

may be piratically extracted, so as to leave a mere caput mortuum, by a selection of all the most important passages in a comparatively moderate space.<sup>97</sup>

Here Story comes up with the essence of "substantial similarity" – it's not how much you appropriate but whether you appropriate what is important about the work, the part that gives it value. In *Folsom*, Story expanded this by examining what constitutes a substantial similarity and what does not. Involving a biography of George Washington (including private letters and papers) by Jared Sparks, portions of which were copied by Rev. Charles Upham in his own biography of Washington, the oft-quoted passage in *Folsom* is that to decide on substantial similarity, the court must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or superseded the objects, of the original work."<sup>98</sup> Patry rightly points out, however, that this passage, taken "in vacuo", is not the full story. By focusing on quantitative measures and commercial impact, one misses the point that Story was trying to make, that infringement of copyright was not just an infringement of profit-making, but an infringement of the creative work itself.<sup>99</sup>

But even if there was an infringement, was it a "fair" one? In *Folsom*, Story found that what was appropriated was the "most interesting and valuable" portion of the plaintiff's work. In addition, the value of the defendant's work "rested on plaintiff's letters without which defendant's work 'must fall to the ground.'" Story did recognize that there was a public interest and value in the defendant's work, but that was not the point of "fair use". The question was whether there had been "intellectual labor and judgment

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<sup>97</sup> 10 F. Cas. at 1038-39.

<sup>98</sup> 9 F. Cas at 348.

bestowed?" In other words, consideration had to be given to, not just whether or not the defendant's work was original, but whether or not "the use he makes of *plaintiff's* work is the result of a fair exercise of a mental operation." Basically, what proved fatal to Upham's case was not the amount he appropriated – in numerical terms it was about 4.5 percent of Sparks's work – but that he was intellectually lazy. Upham had simply copied wholesale without putting his mind and judgment to the materials copied, and thus it was not a bona fide abridgement.<sup>100</sup> Unanswered, however, is the question of whether the converse is true – does it matter if it is a substantial copying as long as "fair exercise of a mental operation" is present? Here we come back to the idea/expression dichotomy, but what happens if the proper expression of the idea itself requires the original expression to be copied, as in parody?

Parody is a subcategory of criticism, which is a recognized form of fair use. Satire and parody are age-old forms of art, dating back to classical Greece and the verse parodies of Hipponax of Ephesus. Other notable parodists included Aristophanes and Lucian, and even Homer tried his hand at it, composing the epic parody *Magrites*. The word parody comes from the Greek *para odia* – "beside," or "counter," and "song". The etymology implies the need for the juxtaposition of the parody with the original so it can stand beside or counter to it. There is a distinction between parody and satire, however – one imitates for humorous effect, and the other belittles, but does not necessarily imitate. Merriam-Webster's defines satire as, "a literary work holding up human vices and follies

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<sup>99</sup> Patry, *Fair Use*, 20-21.

<sup>100</sup> Ibid., 22-24; 9 F. Cas. at 345.

to ridicule or scorn," and parody as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule."<sup>101</sup>

Even so, the two are used almost interchangeably in present day English, and parody is often seen as a form of satire. Nels Jacobson wrote, "As a form of satire, parody allows authors to pointedly criticize a culture's foibles and failings... By lampooning political, social or religious subjects, parodists generate healthy discourse and cultural self-examination. They skewer our most sacred cows, often using current popular works to symbolize the targets of their criticism," catching the public's attention and "defly impale" the target of their ridicule.<sup>102</sup> There is no reason to suppose that a work of parody cannot ridicule the imitated subject and, at the same time, satirize society as a whole in the process.

Parody was recognized as a category of criticism in the 1914 case of *Hill v. Whalen*. Hill, who held the dramatic rights to Bud Fisher's famous comic strip "Mutt and Jeff", sued the defendants, who had put on a dramatic performance titled "In Cartoonland" which featured two characters named "Nutt" and "Giff", very obviously based on "Mutt and Jeff" and even using some of the same catchphrases. The defendants argued that it was a parody of the characters and should therefore be permitted under fair use. The court accepted that parody was a fair use, saying, "A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations,

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<sup>101</sup> The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994) made their own distinction between satire and parody for copyright purposes at 1172: "Parody needs to mimic an original to make its point... whereas satire can stand on its own two feet." I will examine this statement further when we discuss Acuff-Rose further on.

<sup>102</sup> Nels Jacobson, "Faith, Hope & Parody: *Campbell v. Acuff-Rose*, 'Oh, Pretty Woman,' and Parodist's Rights", *Houston Law Review* 31 (1994), 960-962.

pictures, or suggestions. It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden."

However, the court went on to say, in answer to the question of how far such appropriation could go, was that "one test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced as will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected... The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright." In other words, there was a distinction between competition and criticism. Although criticism might dissuade people from purchasing the work, it did not give rise to a claim of infringement – that could only come if the infringing work was designed to substitute for the original in the same marketplace as opposed to merely commenting on it.<sup>103</sup>

The seminal case of parody in United States copyright law (and cited by the lawyers in the *Air Pirates* case) is *Loew's Inc. v. Columbia Broadcasting Systems, Inc.*, where comedian Jack Benny parodied the 1945 motion picture *Gaslight* (itself based on an earlier successful Broadway play) in a skit he titled *Autolight*. Benny originally broadcast the spoof over national radio, timing it with the release of the motion picture that starred Charles Boyer, playing a man who was trying to drive his wife, played by Ingrid Bergman, insane. Loew's, who produced the film, even supplied Benny with a print of the film that Benny screened to the audience the skit was to be performed before so that they could appreciate the finer points of the parody. Loew's did not file suit when

the parody broadcast over radio, but it protested, claiming infringement, when Benny performed *Autolight* as a visual spoof several years later as part of his television comedy show. CBS asserted that it was fair use because it was a parody. Loew's did not take its complaint further until CBS started work on a television movie version of the sketch, at which point Loew's finally filed suit and obtained a temporary restraining order. CBS successfully negotiated, however, for them to be allowed to film it but not broadcast it pending determination by the court.<sup>104</sup>

The defendants did concede that the taking was substantial, so the question before the court was whether or not the fact that *Autolight* was a parody or burlesque excused copyright infringement. It should be noted that this "substantial taking" is not the same as the substantial similarities of say, the *Nichols* or *Sheldon* cases, but was "bodily appropriation", that is a wholesale copying. The defendants tried to argue that the test would be if to ask if the parody would compete with the original and reduce the demand for it. However, as far as Judge James Carter was concerned, the taking was "for commercial gain for use in a competing entertainment field." He went on to say that the "mere absence of competition or injurious effect upon the copyrighted work will not make a use fair... On the other hand, the fact that the infringing work competes with the copyrighted one or has been issued for commercial gain, rather than in the advancement of learning is a factor... in determining the extent of fair use, and determining whether the taking was substantial."<sup>105</sup> Carter did not stop there, however. He commented:

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<sup>103</sup> *Hill v. Whalen & Martell, Inc.* 220 F. 359 (S.D.N.Y. 1914) at 360.

<sup>104</sup> *Loew's v. Columbia Broadcasting Systems, Inc.* 131 F. Supp 165 (S.D. Cal 1955), affirmed *Benny v. Loew's Inc.* 239 F.2d 532 (9<sup>th</sup> Cir. 1956), affirmed *Benny v. Loew's Inc.* 356 U.S. 43 (1958).

<sup>105</sup> 131 F. Supp at 184-185.

The serious, near tragic vein of the original, "Gaslight" was converted into the broad, low comic vein of the burlesque. Benny, using gags, puns, exaggerated mimicry, slapstick and distortion, all matter within the common fund of the public domain, has taken a substantial part of plaintiff's property, "Gaslight," and inverted the mood from serious to humorous... Defendants have transposed the work, from the serious to the comic vein... no case can be found holding that "wholesale copying and publication of copyrighted material can ever be fair use."<sup>106</sup>

Carter ultimately ruled against Benny, who appealed to the Ninth Circuit. His decision was "roundly criticized by many commentators" who felt that equating parody with other forms of appropriation was going too far. After all, what *was* parody if it was not allowed to appropriate – substantially or otherwise – in the first place?<sup>107</sup> Carter seemed to take this criticism on board, and in the slightly later *Columbia Pictures Corp v. National Broadcasting Co.* case took some of it back. However, that change of mind did not stop the Ninth Circuit from affirming Carter's decision in *Loew's*.<sup>108</sup> The Ninth Circuit's attitude echoed that of *Folsom*, finding that Benny had not just taken too much, but that the spoof was pretty much comprised of the appropriated material. "If the material taken by appellants from 'Gas Light' is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue."<sup>109</sup>

As in Upham's case, Benny's sketch could not stand on its own. As Patry puts it, although "parody should be allowed to at least conjure up the original... if a purported parodist is incapable of making a creative use of copyrighted material, his infringement may not be excused... Fair use is not a cover for the unimaginative. There is not and

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<sup>106</sup> Ibid., 183

<sup>107</sup> "Comment, Parody and the Law of Copyright", 29 Fordham L.Rev. 570 (1961); "Note, Parody and Burlesque-- Fair Use or Copyright Infringement?", 12 Vand.L.Rev. 459 (1959); "Note, Parody and [\*545] Copyright Infringement", 56 Colum.L.Rev. 585 (1956), among others, cited in *Irving Berlin v. E.C. Publications, Inc.* 329 F.2d 541 (2d Cir.) at 544.

<sup>108</sup> *Columbia Pictures Corp. v. National Broadcasting Co.* 137 F. Supp. 348 (S.D. Cal. 1955); 239 F.2d 532

<sup>109</sup> 239 F.2d at 536.

never has been a parody *exemption*, for which Benny was arguing."<sup>110</sup> However, both Carter and the Ninth Circuit were treading dangerously close, (if not actually crossing the line) to commenting on taste rather than legal standards. Terms like "incoherent dialogue" and "broad, low comic vein" are highly subjective and personal, and this is more apparent when compared to Carter's decision in the *Columbia Pictures* case.

*Columbia Pictures* involved a parody of the motion picture *From Here to Eternity* by comedian Sid Caesar, which he titled "From Here to Obscurity". Unlike *Loew's*, however, the court determined – through a thorough summary of both the original and the parody in the judgment itself – that although "Obscurity" is a take-off of *Eternity*, the two works were not so similar as to constitute infringement. Looking at the two pieces objectively, although Caesar's sketch did take the locations and military situations of the original, with the exception of a few gags (for example, the parody of the famous Burt Lancaster-Deborah Kerr beach scene), it could very well have been an unrelated sketch. Carter departed from *Loew's*, however, by stating now that parody, or burlesque, had to be given more leeway when determining how much is too much to be appropriated from the original. He noted that, "The test as to whether a taking of protectible property is a substantial taking is not primarily a quantitative one. The question is one of quality rather than quantity, and is to be determined by the character of the work and the relative value of the material taken." He went to say that:

Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original. Such right extends to the use by the burlesquer for such purposes of, among other things, an incident or some incidents of the copyrighted

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<sup>110</sup> Patry, *Fair Use*, 167.



story, a developed character, some small and unsubstantial part of the development of the story, and some small and unsubstantial amount of the dialogue, but not to the use of the general or entire story line and development of the original with its expression, points of suspense and build up to climax.<sup>111</sup>

Carter was very careful this time, following the criticism of his decision in *Loew's*, to keep the judgment short and to the point, but the lines here are still blurry. Carter acknowledged that a parody is different – that the very nature of parody requires some kind of taking, and he drew the line at whether or not the taking was sufficient to "conjure" up the original. But who was to say how much was needed to do this effectively? Also, by using such loaded phrases as "relative value", the exact criteria become even more obscure. We may ask – value in what sense? Is it artistic value, economic value, value in terms of knowledge or something else? We should note that even Benny's initial "conjuring" was not enough – he had to screen a print of the original for the audience before they experienced the parody so they could appreciate it. So what if a parody is attacking an unknown subject – does that mean that it is allowed to hew to the original more closely? It may come down to this: Carter simply found Benny's sketch unfunny and preferred Caesar's approach, as can be inferred from the way he talks about it in *Loew's*. Sense of humor aside, *Loew's* and *Columbia* give us a hint of how the court's personal tastes may shape their attitude towards a given case of parody.

In 1964, the Second Circuit dealt with the use of parody lyrics in *Irving Berlin v. E.C. Publications, Inc.*, dealing with the publication of altered lyrics "to the tune of" old standards in *MAD Magazine*.<sup>112</sup> The case was brought by Berlin and the other composers

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<sup>111</sup> 137 F. Supp. at 353-354. Carter also noted that one of the things "not protectible" in a work was "ordinarily the characters," citing, among others, *Warner Bros. v. Columbia Broadcasting*.

<sup>112</sup> *Irving Berlin v. E.C. Publications, Inc.* 219 F. Supp. 911 (S.D.N.Y. 1963), affirmed 329 F.2d 541 (2d Cir.), cert. denied 379 U.S. 822 (1964).

of Tin Pan Alley, alleging infringement. *MAD* did not publish any of the original lyrics or music, merely substituted its own words and let the readers put it to the music that they, presumably, already knew. The plaintiffs argued that directing the reader to sing the lyrics to those particular tunes constituted infringement, an extremely dubious claim that the district court rejected. It stated that it found it "difficult to see how music can be copied when it is not reproduced. Furthermore, if the reader is familiar with the music, it can only be the result of plaintiff's efforts."<sup>113</sup>

The Second Circuit affirmed the decision of the district court, and in fact found that there was not even substantial similarity, since the lyrics were not directed at the plaintiffs, but at areas of everyday life that the *MAD* article was lampooning. The question of fair use and parody, therefore, was not decided, although the Second Circuit did go on in some detail as to what parody was, and so *Berlin* was subsequently used by the appeals court in the *Air Pirates* judgment. *Berlin* cited extensively from Carter's decisions and used the "conjuring" language of *Columbia Pictures*, declaring that:

While the social interest in encouraging the broad-gauged burlesques of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here... For, as a general proposition, we believe that parody and satire are deserving of substantial freedom – both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels," or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper.<sup>114</sup>

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<sup>113</sup> 219 F. Supp. at 914.

<sup>114</sup> 329 F.2d at 545.

Once again, the court acknowledged, through dicta, that parody required some kind of appropriation to be effective and thus needed to be give some leeway – but no guidelines were given to help answer the question of exactly how much was too much, leaving the idea of how much was needed to "conjure or recall" the object of parody a subjective test on the part of the court or jury. To be fair, perhaps no real guidelines could be given, and the question had to be decided on a case-by-case basis, as the Supreme Court would state years later. *Lowe's*, *Columbia Pictures* and *Berlin* were how the law stood when Disney went toe to toe with the Air Pirates.

### 3: "Who makes the rules on laughing?"

Morse and Stepanian, representing Richards and Hallgren, opened their written submissions to the court by denying that there was no substantial taking and whatever taking there was fell under the ambit of fair use. They began with a historical overview of parody and burlesque, arguing that it had a long and distinguished pedigree dating back to Chaucer, Shakespeare and other literary parodists. They threw in names like Gilbert and Sullivan, E.B. White, Ogden Nash and many others, and that works by Longfellow, Hemmingway, Henry James and so on had been the subject of parody. They also pointed out that *MAD* had also, in its own parodies, lampooned Walt Disney's style. They then went on a survey of the decisions in *Loew's* and *Columbia Pictures*, mostly paraphrasing the Ninth Circuit's judgment in *Berlin* to establish the courts' recognition that parody and burlesque were justifications. They also argued that copyright could not reside in a character, and even if it were, the law permitted parody. They submitted that "so long as

the parodied figure is 'only a chessman of the game' of telling a non-infringing story and is not passed off as the original, there should be no infringement," citing the court's statement in the "Mutt and Jeff" case that even a copyrighted cartoon is subject to criticism. They denied any trademark infringement or unfair competition, submitting that there would be no confusion in the public mind that the characters in *Air Pirates Funnies* originated from Disney, and that there was no interference or intent to interfere with Disney's business.<sup>115</sup>

Kennedy and Phillip's own submission was an impressive fifty-four page one, which went on a detailed analysis of what the story in *Air Pirates Funnies* was all about, talking about it as if it were the epitome of the highest art. "The Mouse" was the "story of the awakening within Mickey Mouse of an awareness of his sins, and his subsequent transfiguration and redemption." The capture of Mickey by his old enemies is so that they can stop his wrongful persecution of them by working on his mind and "seeking his soul". Kidnapping him, putting him with a Minnie "unfettered by the pretense of sexlessness which Disney had compelled the Mice to assume" and dropping both mice from the airship were all part of the plan, as was the confrontation between them and Don Jollio, who was, at the end of the second part, about to force the mice to ingest LSD. The submission argued that it was the third episode which had never seen print because of the lawsuit that was key. The hallucinations induced by the LSD reveal Mickey's deepest sins – that his "nephews" are really the children he had with Minnie, that he had betrayed other cartoon characters and edged them out of the way on his trip to the top – and then places him on trial before the Phantom Blot and an audience composed of "all the

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<sup>115</sup> *Walt Disney Productions v. The Air Pirates*, Defendant's Memorandum in Opposition to Motion for Preliminary Injunction, Civil Action No. C-71-2021 ACW, 14 January 1972.

important figures in the history of the American cartoon." Found guilty, the Blot sentences Mickey to pass through the Doors of Doom, but the "punishment" is to marry Minnie and acknowledge his children and beginning a new life. The story would have ended with Mickey seeing Donald Duck musing, "The whole world thinks I'm cute..." implying that the ordeal would begin again, and this time with Donald. The submission also examined the other stories in *Air Pirates Funnies*, including Richards' "Three Little Pigs" parody and O'Neill's "Silly Sympathies" piece with Bucky Bug.<sup>116</sup>

The substance of the *Air Pirates Funnies* dealt with, Kennedy and Phillips went on to examine the legal aspect of it. They pointed out that the "plots (of *Air Pirates Funnies*) were entirely original. The artwork is entirely original. The dialogue is entirely original. The entire conception of the work is original."<sup>117</sup> So in order to sustain their claim, Disney had to assert their characters were copyrightable. Kennedy and Phillips submitted this was not so, and even if they were, the use of them by the *Air Pirates* fell under fair use provisions. They cited the "Sam Spade" case, noting that Judge Carter also followed it in the Sid Caesar case. Once again, they pointed out that there was no similar usage of the characters like in the "Mutt and Jeff" case or in the "Wonderman" and "Lynx" cases. Only one panel used elements from an old Disney comic book – a flashback by Don Jollio which was redrawn from a different perspective.<sup>118</sup> The *Air Pirates* were not, unlike Bruns or Fox Publications, trying to "save themselves labor" by switching colors or having the characters do exactly the same thing.<sup>119</sup> In effect, they

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<sup>116</sup> *Walt Disney Productions v. The Air Pirates*, Defendants' Dan O'Neill and Bobby London Memorandum in Opposition to Plaintiff's Memorandum for Preliminary Injunction, Civil Action No. C-71-2021 ACW, February 4, 1972, 2-11.

<sup>117</sup> *Ibid.*, 16.

<sup>118</sup> Levin, *Pirates*, 98.

<sup>119</sup> O'Neill and London Memorandum in Opposition, 24-25.

were arguing the "intellectual labor and judgment bestowed" principle of *Folsom*, saying that this was not just a simple case of plagiarism. Like Morse and Stepanian, they submitted that there was no interference and competition with Disney's business and that Disney would not suffer any losses because of the Air Pirates. As to how much the Air Pirates were appropriating, they argued that if a parodist wanted to "conjure up" Mickey Mouse, "if his parody of Mickey Mouse doesn't look like Mickey Mouse, no one will understand... and his parody cannot succeed." The use of the characters, therefore, was necessary for the purpose of the parody but did not go further than that (unlike *Loew's*) and therefore within the bounds of fair use.<sup>120</sup>

Kennedy and Phillips also argued that the Pirates were protected by the First Amendment. "The Mouse," they submitted, "is known by everyone, everywhere... (as) a product and symbol of American culture." Although Disney was claiming that Mickey projected "an image of innocent delightfulness," the Pirates had a right to express a contrary view in the form of parody. As noted in Chapter One, the Mouse had become a symbol of American establishment values, and Disney's "worldwide success and importance should make it more, rather than less, available for criticism."<sup>121</sup> They also dismissed the trademark infringement charges with the same lack of confusion arguments that Morse and Stepanian advanced.

In addition to depositions by the defendants, both submissions were backed up by affidavits from various friends of the Air Pirates – William Loughsbrough, the director of the satirical revue, *The Committee*; Gary Arlington, the owner of the San Francisco Comic Book Company; Grover Sales, an historian and film critic who taught a course on

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<sup>120</sup> Ibid., 26.

<sup>121</sup> Ibid., 40-43, Levin, *Pirates*, 39.

satire at the University of California, and even Paul Krassner. All of them supported the idea that the Air Pirates were perpetrating parody, and that the right to parody was a freedom to be protected.

Each Air Pirate also submitted his own statement of purpose. Richards justified his use of the Three Little Pigs in *Air Pirates Funnies* by arguing that the story by Disney had attained the status of a "modern folk tale" and was itself based on an older folk tale anyway, and that he was commenting on the portrayal of a pig as a positive character where for the longest time in folklore the pig was the "dirtiest, most repulsive of all people". London denied any intent to compete with Disney, stating that "it is very clear from the beginning that this is not, and never intended to be, Walt Disney's Mickey Mouse," and that "if that messed up, unhappy, paranoid, little mouse can be mistaken for the always victorious hero of American mythology, then the laughter evoked by our Air Pirates satire is contraband." Hallgren echoed the intent to comment and criticize, not compete: "I have no wish to replace Walt Disney. I merely wish to have the right to offer my views to the public for its examination."

O'Neill's affidavit was positively lyrical in justifying the artistic reasons behind *Air Pirates Funnies*, but it contained language that ultimately proved damaging to the Air Pirates' arguments. O'Neill stated that he drew cartoons to "relieve a basic human anxiety pattern, hysteria," by means of laughter. Mickey Mouse, he deposed, had started as a positive image, but as people grew older, it became a "non-positive adjective." To investigate why it had degenerated, O'Neill said he "chose to parody exactly the style of drawing and characters to evoke the response created by Disney (*emphasis in original*)."

He even mentioned that he had placed Mickey Mouse in *Odd Bodkins* and that he had

"heard nothing at the time from the Disney Corporations, and assumed that... Disney had not noticed or simply did not care."<sup>122</sup>

#### 4: "The critical intangible."

Disney's lawyers replied on March 3, 1972. Frank Tatum, Disney's attorney, was a partner at the law firm of Cooley, Crowley, Gaither, Godward, Castro and Huddleston, specializing in commercial law, and the brother of Donn Tatum, the chairman of Disney's board of directors. Tatum started by showing the extent of Disney's exploitation of its characters and just how valuable they were. He attached affidavits averring to over 130 products licensed by Disney with character likenesses, saying that, "Millions of dollars in income is involved... public recognition, which follows from maintaining the integrity and wholesomeness of these characters, is important in maintaining the critical intangible of the linking of the Disney image to that of the characters; an intangible important to both Disney and to the public recognition of the characters."<sup>123</sup>

Despite having provided his own affidavits, Tatum asked the court to reject those that the Pirates had attached in support of the artistic intent of *Air Pirates Funnies*. He cited *Nichols*, where Learned Hand had stated that, "The testimony of experts upon such issues... ought not be allowed at all... It encumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship the less likely it is

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<sup>122</sup> *Walt Disney Productions v. The Air Pirates*, Affidavit of Dan O'Neill Opposing Motions for Preliminary Injunction and Order Impounding Infringing Matter During Pendency of Action, Civil Action No. C-71-2021 ACW, January 13, 1972. 1-2.

<sup>123</sup> *Walt Disney Productions v. The Air Pirates*, Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, Civil Action No. C-81-2021 ACW, March 3, 1972, 2-3.



to stand upon the firmer... ground of the court's considered impressions."<sup>124</sup> However, Tatum, went on to say, from reading the affidavits, the purpose of the Pirates was clear – to "drastically alter" the public image of the characters that Disney created, and make money from it. One by one, he took the Air Pirates' arguments and tossed them aside, and he began with O'Neill's most damaging statement: "I chose to parody exactly the style of drawings and the characters to evoke the response created by Disney."

As far as Tatum was concerned, the Pirates had hoisted themselves by their own petards. The Pirates freely admitted that Disney's characters were recognized all over the world, and that this recognition derived from the way Disney had crafted these characters. "Obviously," Tatum argued, "these cartoon characters have achieved identification independent of the cartoon strips, books and pictures in which they have appeared." He distinguished the "Sam Spade" line of cases as applying to literary works only and that the Pirates were confusing the two. In this case, what the Pirates were copying was not a literary representation of the character, it was the "drawings of these characters which are the expressions of Disney's ideas," and it was the drawings which were protectible. He argued that every case that had dealt with cartoon characters recognized that they were protectible component parts of the larger copyrighted work they appeared in.<sup>125</sup>

Tatum also dismissed the Pirates' claims of fair use and in fact criticized the law of fair use as "a pot-pourri of so-called principles many of which are contradictory and

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<sup>124</sup> 45 F.2d at 123.

<sup>125</sup> Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, 7-10. As I have noted earlier in this chapter, however, this is not the same as saying that characters are copyrightable. In the cases Tatum cites – the "Wonderman", "The Lynx", "Spark Plug" and "Betty Boop" cases – the defendants copied substantially the drawings of the original characters and put them in similar situations, and in the "Spark Plug" and "Betty Boop" cases, the copying was exact.

most of which are virtually meaningless in the abstract." Tatum submitted that fair use could not be applicable to "cover obscene nonsense," focusing on the salacious nature of the parody rather than how much it appropriated. Fair use involved the purpose of the use, and the Pirates by copying Disney's characters for commercial gain and to "destroy the public recognition of those characters as having wholesome integrity" could in no sense be considered "fair". Neither would parody avail the Pirates of a defense, insofar as it was a part of fair use.<sup>126</sup>

In any case, Tatum argued that there was a "serious question" of whether this was parody in the first place – the copying of Disney's drawings were "exactly copied," as were the names. The cases stated that parody only worked as a defense if the copying was not substantial, and this was not the case here. The Pirates' brief had stated, "nothing was taken from the original work... but the characters." Tatum's position was that this again confused the literary work – the surrounding story – and the drawings of the characters, the latter of which all were appropriated. For "Dell" comics they had substituted "Hell", and "the drawings, figures and attitudes on each cover of defendants' comic books obviously are designed to identify as closely as possible with Disney." (Figure 5)<sup>127</sup> As far as the First Amendment was concerned, it had no relevance. The Pirates were free to "express whatever ideas they may have about sexual morality or the Disney characters... (but not) to use Disney's means of expressing his ideas... as the vehicles". He also argued

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<sup>126</sup> Ibid., 10-13.

<sup>127</sup> A cursory look at the cover of *Air Pirates Funnies* #1 (drawn by Bobby London) makes it obvious that the cover is styled after that of Disney comic books. Edward Samuel's *Illustrated History of Copyright* even shows the exact work London modeled the cover of *Air Pirates Funnies* #1 on, a "Big Little Book" titled "Mickey Mouse the Mail Pilot", published in 1933 (Samuels, *Illustrated History*, 198). A reader would only notice the small "Adults Only" and "Nix Kids" disclaimers under the larger title of "Mickey Mouse Meets The Air Pirates Funnies" when they looked closer at the cover, and a casual buyer might not even notice at all – until they read it.

that "unwholesome association of ideas and connotations" the Air Pirates were evoking were causing trademark dilution.<sup>128</sup>

### 5: *The Wollenberg decision*

Judge Wollenberg heard the case for the preliminary injunction on March 10, 1972. After hearing the arguments, he took the matter under submission. The Pirates' attorneys were not optimistic. Both Phillips and Kennedy believed that the judge had already made his mind up. Levin quotes Kennedy as saying, "If he wasn't a fan of Disney's at the start, he was by the end. We may've driven him there by being so obnoxious and the work so profane. Jonathan Swift, he did not think we were." Tatum also agreed that "the salaciousness of the use was an absolutely fundamental factor in the outcome." Wollenberg asked both sides to submit their own proposed findings of fact and law in case he ruled in their favor.<sup>129</sup>

Before Wollenberg could rule, however, on April 7, Disney filed a motion to reopen the hearing based on additional evidence, as in between the initial hearing and Disney's filing, the Last Gasp catalog had announced the impending publication of *The Tortoise and the Hare* #1, which advertised material "originally intended for *Mickey Mouse Meets the Air Pirates* #3" and a tabloid-sized, eight-page version of *Air Pirates Funnies* #1. Despite its name, it did not involve Disney's characters or any material from the previously published *Air Pirates Funnies* #1. *Tortoise*, however, contained Zeke Wolf, as well as reprinted material from *Air Pirates Funnies* #2 drawn by Hallgren,

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<sup>128</sup> Ibid., 21-24.

<sup>129</sup> Levin, *Pirates*, 104.

which was part of the material prohibited from being distributed by the temporary restraining order. Tatum's point was that this proved that the Pirates would continue to infringe upon Disney's copyrights unless the injunction was granted.<sup>130</sup>

In Levin's book, O'Neill says that *Tortoise* was an act of defiance. They "put it out, telling them to take their injunction and put it where the sun doesn't shine." O'Neill claims that this was part of his master plan. His story is that *Tortoise* had prompted Disney into increasing the damages it was asking for to \$400,000, he says he went to the *Chronicle* and told them of the potential litigation. "In ten minutes, I had my copyright (on *Odd Bodkins*) back." However, as mentioned in Chapter One and noted by Levin, this does not make sense legally – the *Chronicle* could not absolve itself for blame for infringing items already published. If O'Neill did manage to convince them in this manner, the *Chronicle* either had very bad legal advice or did not consult lawyers at all. Levin also points out other factual problems with O'Neill's story – Disney did not include *Tortoise* in its complaint until 1975, and it did not increase its prayer for damages.<sup>131</sup>

According to Levin's source at the *Chronicle*, the reason they gave O'Neill back the copyrights on *Odd Bodkins* was because they could not have gotten anyone to replace him on the strip, and despite what O'Neill claims, the staff of the *Chronicle* "genuinely liked him and wanted to help him out."<sup>132</sup> O'Neill does say that he had several friends on the *Chronicle*'s staff, along with those that hated him, and he acknowledges that the *Chronicle* did help him out in the case by providing newspaper coverage on what was going on. He still maintains, however, that the damages increased and that was how he

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<sup>130</sup> *Walt Disney Productions v. The Air Pirates*, Memorandum in Support of Motion to Reopen Hearing for Submission of Additional Evidence, Civil Action No. C-71-2012 ACW, April 7, 1972.

<sup>131</sup> Levin, *Pirates*, 107-108.

<sup>132</sup> E-mail from Bob Levin, February 15, 2005.

got the copyrights for *Odd Bodkins* back.<sup>133</sup> The likelihood is, however, that O'Neill's memory is faulty here and this is another example of his self-mythologizing. He also claims that his "winning" of the copyrights back prompted other comic strip creators to demand the same from the syndicates, "stripping them of their power." Cartoon historian and cartoonist R.C. Harvey, quoted in *Pirates*, points out that Milton Caniff (of *Terry and the Pirates*) and Roy Crane (*Wash Tubs* and *Captain Easy*) both owned their strips, and credits the founding of the Creators Syndicate as the one that "routinely gave cartoonists the rights to their own work, forcing other syndicates to follow."<sup>134</sup>

On July 7, 1972, Wollenberg issued his judgment in Disney's favor. The issues, as he saw it, were twofold – were Disney's characters protectible, and if they were, was the defense of fair use available to the Pirates? At first, he appeared persuaded by the "Wonderman", "Mutt and Jeff", "Betty Boop" and "Spark Plug" cases which held that those "drawings, or graphic depictions, were sufficiently distinctive and defined to be protectible."<sup>135</sup> However, the fly in the ointment was *Columbia Broadcasting*, the "Sam Spade" case, which, having been decided by the Ninth Circuit court of appeals, was binding on Wollenberg's court. Tatum had argued that *Columbia Broadcasting* applied to literary characters and that the present case dealt with drawings, but Wollenberg was not so sure:

That proposition is by no means as self-evident as plaintiff would suggest. Plaintiff has cited no Ninth Circuit law on the issue of cartoon characters' protectibility by copyright, and the decisions from other Circuits, noted above, were not distinguished in the Warner Bros. decision. An analysis of the cases from all circuits would certainly lead one to the conclusion that courts have tended to deal with cartoon characters rather differently than they have with

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<sup>133</sup> O'Neill telephone interview.

<sup>134</sup> Levin, *Pirates*, 108 note 106.

<sup>135</sup> *Walt Disney Productions v. Air Pirates* 345 F. Supp. 108 (1972) at 111.

literary characters, but the cases have not really explained the basis of the distinction.<sup>136</sup>

However, Wollenberg found a "narrow gap" left open by the Ninth Circuit, namely its statement that "if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright."<sup>137</sup> Wollenberg found that the converse was true in the case of Disney characters, which were so distinctive that the stories they participated in were "subordinated to its characters... The principal appeal of each of the plaintiff's works to the primary audience of children for which they were intended lies with the character and nothing else."<sup>138</sup> That being the case, Wollenberg concluded that Disney's characters were protectible by copyright. The rather obvious flaw in this reasoning, which the Ninth Circuit would point out later during the appeal, was that this would imply that if a literary work was nothing but the description of a character, then that character would be copyrightable, a clearly absurd proposition.

The next question was whether or not the fair use defense was available to the Pirates. In this, the current law was still *Loew's* (the Ninth Circuit had not heard *Columbia Pictures*). Wollenberg phrased the test as he saw it in *Loew's*, that "a claim of infringement is made out when it is shown that the defendants have copied the substantial part of the protected work and that the part so copied was a substantial part of the defendants' work." Wollenberg then answered his own question – the fact that Disney's characters were protectible as component parts of the larger work meant that a substantial appropriation existed.

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<sup>136</sup> Ibid. at 112.

<sup>137</sup> 216 F.2d at 950.

It is difficult not to view this as an example of a judge constructing an argument backwards, by looking at the criteria handed down by the higher court and then finding a way past the Ninth Circuit's judgment in *Columbia Broadcasting* rather than just following it. Wollenberg practically admitted as much by calling it a "narrow gap", as if he only just managed to squeeze through the Ninth Circuit's reasoning. Of course, Wollenberg felt that he was bound by the Ninth Circuit's decision in *Columbia Broadcasting* and so had to try to a workaround, but it would have been much simpler to distinguish the case by saying that it applied only to literary, not graphic works. The fact that Wollenberg did not do so shows how uncomfortable he was with the proposition that characters of any kind could be copyrighted, and yet, something inside was telling him also that what the Pirates had done was not correct, either. If the Pirates were to be decided against, a way had to be found to express it, while still paying some lip service to the appellate court decision.

In any case, the Pirates had not helped matters by admitting that they had copied the characters "exactly", and it was Wollenberg's view that "Abstraction of the characters and, of course, their graphic depiction, would leave the work of both parties with very little."<sup>139</sup> The Pirates had argued that they had only appropriated the minimum necessary to parody the Mouse, but as far as Wollenberg was concerned, this was not something he had to deal with. Taking the Pirates' own words on the value of Disney's characters on board, it was clear that they could not "copy the substance of the work without infringing his copyright."<sup>140</sup>

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<sup>138</sup> 345 F. Supp at 113.

<sup>139</sup> Ibid. at 114.

<sup>140</sup> 239 F.2d at 537.

Wollenberg also dismissed the First Amendment argument out of hand, agreeing with Tatum that to apply it would "obliterate copyright protection anytime anyone asserted their infringement conveyed an idea." It was either fair use, or nothing. Levin notes that Wollenberg "let slip an aside" which may point to his real feelings, that he had "some difficulty in discovering the significant content of the ideas which the defendants (were) expressing." In effect, he was saying that there were other ways for the Pirates to have made their point about Mickey's "sins" – a point they never got to make since the concluding episode of *The Mouse* never saw print. However, Wollenberg did not suggest what other ways the Pirates could have done that. The "slip" that Levin alludes to suggests that Wollenberg simply did not get the point of *Air Pirates Funnies*, or found the offensiveness of the work overshadowing any objective assessment of First Amendment issues.<sup>141</sup>

The question of copyright infringement being dealt with, Wollenberg did not find it necessary adjudicate on the trademark infringement and unfair competition allegations. He issued the preliminary injunction and ordered the surrender of all the offending books and materials for making copies. The Pirates' attorneys were divided on the proper response – Morse and Stepanian wanted to appeal the injunction, while Kennedy and Phillips wanted to leave it alone and then fight the real case out at trial. Eventually, only Kennedy filed a notice of appeal on O'Neill's behalf. He did not take it any further, however, and the case went dormant until the next year.<sup>142</sup>

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<sup>141</sup> 345 F. Supp at 115.

<sup>142</sup> Levin, *Pirates*, 111.





Figure 2: Wally Wood, "Disney Memorial Orgy", Poster, (1967), displayed at the *Illegal Art: Freedom of Expression in the Corporate Age* website <<http://www.illegal-art.org/print/popup/orgy.html>>

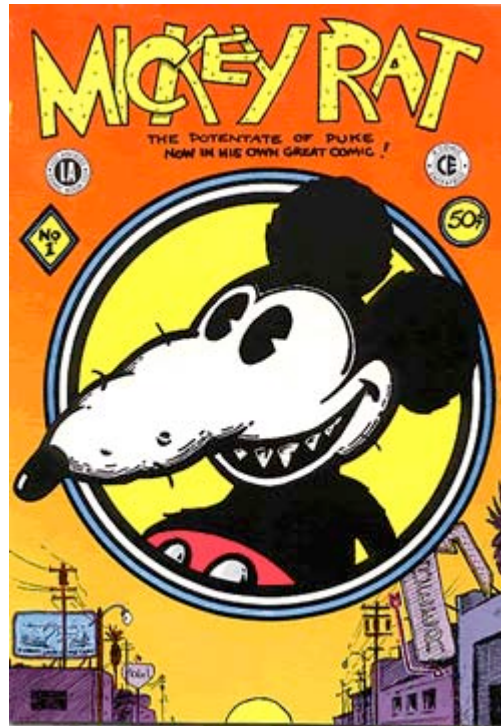


Fig. 3: Robert Armstrong's *Mickey Rat*



Figure 4: Roy Lichtenstein, "Look Mickey", 1961



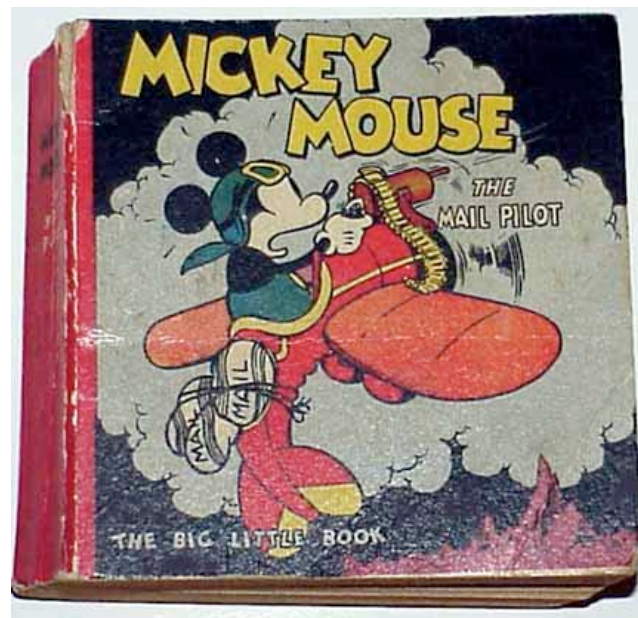


Fig. 5: Above, the cover to *Air Pirates Funnies* #1 (July 1971). Below, the cover to *Mickey Mouse the Mail Pilot* (1933)

## CHAPTER THREE

### *1: The times were a changin'*

While comic strips in the same iconoclastic and political vein that would characterize the underground did appear in counterculture newspapers of the time, and there were a few small-run books (Dez Skinn cites Foolbert Sturgeon's *The Adventures of J* as the first underground comic in 1964, with a total print run of 50 copies), most histories point to the 1968 debut of Robert Crumb's *Zap Comix* #1 as the start of the underground comics boom. Published by Don Donahue and Charlie Plymell's Apex Novelties, *Zap* #1 had a print run of 5,000 copies, although Plymell estimates that with printing errors, "the final count was 1,500 or less." Crumb famously strolled down Haight Street, complete with pregnant wife and a baby carriage containing copies of the comic, settling them to the crowds that were forming a street party. *Zap* was so successful that it had to be reprinted within a couple of months.<sup>143</sup>

*Zap* convinced artists like Gilbert Shelton, who had been unsuccessful in selling his own comics featuring "Wonder Wart-Hog", a Superman parody, on the newsstands that underground distribution was the way to go. Shelton contributed a Wonder Wart-Hog strip to *Zap* #3. The Los Angeles Comic Book Company founded by Michael Moore came out with *Mickey Rat*, *Weird Fantasies*, *LA Comics* and *Mutants of the Metropolis*, with mixed success. Don Schenker, who owned the Print Mint in Berkeley, offered a

cooperative deal with underground artists – he would pay for printing, while copyright remained with the artists, and any profits following paying out of expenses would be shared. Schenker eventually sold the Print Mint to Bob and Peggy Rita, who, while "less sympathetic to comix than Schenker had been," liked the money enough to keep the business going. The Print Mint was the one who began to distribute the underground comics in poster and head shops, where they became "an affordable impulse buy." This became the pattern for underground comics distribution throughout the country. The Print Mint was followed by Rip Off Press and Kitchen Sink Press in 1969, and Ron Turner's Last Gasp in 1970. Although there were as many failures as successes, those who did succeed did so phenomenally well. Levin notes, "Print runs of 15-20-30,000 copies sold out; a half-dozen companies were selling 100,000 comics a month each; some *books* sold 100,000 copies; some series sold in the millions."<sup>144</sup>

But by the time *Air Pirates Funnies* hit the streets in 1971, the euphoria of the summer of '69 was fading. By 1973, while Disney and the Pirates were trading their first shots in the courts, a shortage of newsprint had increased the price of printing books. Stagflation and the oil embargo had created a recession and the sales on comic books – underground or otherwise – plummeted. The price of a newsstand comic book increased between 1961 and 1974 from ten to twenty-five cents, and by 1981 it would be fifty cents. The direness of the situation could be seen when Marvel Comics in 1974 persuaded Dennis Kitchen of Kitchen Sink Press to produce the magazine-sized *Comix Book*, trying to capitalize on the "cutting-edge style" of the undergrounds as part of its effort to branch out into more adult-oriented fare.

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<sup>143</sup> Skinn, *Comix*, 22; Levin, *Pirates*, 36-40.

<sup>144</sup> Skinn, *Comix*, 128-141.

Unfortunately, by 1974, it was already far too late to jump on the bandwagon of the undergrounds, and in any case, *Comix Book* was a mishmash of styles; too "wholesome" for an underground comic, but too "whacky" for a mainstream one, succeeding in neither. It also confused retailers and distributors, who did not understand how to pitch it to the reading audience. It lasted for five issues, as did Warren Publishing's *Comix International*.<sup>145</sup> The mainstream comic industry eventually pulled itself out of the slump by a combination of licensing deals for toys, the emergence of the direct sales market and specialty comic shops in the early 1980s. However, the first option was unavailable to the underground comics, and compared to the giants like DC and Marvel, most could not afford to ride through the slump. The more successful underground comic companies did manage to survive, but it was never the same.

The writing was on the wall in other ways as well. The Vietnam War was winding down, with President Nixon bowing to domestic pressure by unilaterally withdrawing troops and United States involvement officially ending with the signing of the Paris Peace Accords on January 27, 1973. The sex, drugs and rock 'n' roll philosophy that was so radical in the 1960s was being absorbed into the "vast and powerful peer culture." While that was a victory of sorts, those rebel values did not seem that rebellious anymore, and the youth audience began to look elsewhere for themes to define themselves.<sup>146</sup>

The success of the sex-based underground comics, and the subsequent glut of such titles, also worked against the industry. From the start, the sex-based undergrounds had been crossing the lines between social comment and outright pornography, and in 1973, a divided Supreme Court ruled 5-4 in *Miller v. California* that local standards were

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<sup>145</sup> Wright, *Comic Book Nation*, 258; Levin, *Pirates*, 129; Skinn, *Comix*, 150-152.

<sup>146</sup> Peter Braunstein and Michael William Doyle, "Introduction", *Imagine Nation*, 11.

the defining criteria for what was to be considered obscene, leading to even more raids and arrests on obscenity charges.<sup>147</sup>

"Local standards" is not as subjective as it sounds – Chief Justice Warren Burger, delivering the Supreme Court majority decision, made it clear in *Miller* that what the Court was doing was referring the matter back to the states to legislate what was going to be offensive rather than make a federal standard, and even suggested a few guidelines. However, what *Miller* did make a point of is that the First Amendment did not protect obscene material, and that the law had the constitutional capacity to make a determination of what was obscene or offensive as opposed to leaving it in the taste of consumers. The dissenting justices disagreed with this latter proposition. Justice William O. Douglas, "The Great Dissenter", opined:

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.<sup>148</sup>

As mentioned in Chapter One, Crumb's *Zap Comix* #4 led to the conviction of two New York booksellers on obscenity charges, even though Lawrence Ferlinghetti, the owner of the City Lights bookstore in San Francisco, just paid a fine doing the same thing and continued distributing "that and subsequent issues, without incident." Following *Miller*, however, the title of *Tits & Clits* proved too controversial for retailers. Even

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<sup>147</sup> *Miller v. California* 413 U.S. 15 (1973).

<sup>148</sup> *Ibid.*, at 46.



though the District Attorney eventually dropped the charges against the owners of the Fahrenheit 451 bookstore for carrying copies of the book, the word of that and similar raids led to understandable reluctance by other bookstores to carry the undergrounds. O'Neill says, "We *were* making money... the only thing that stopped everybody from making money was that they shut down the distribution system."<sup>149</sup>

The underground comic bust was also due to both the people running the industry and the way it was structured. Despite the popularity of the comics at the height of the countercultural revolution, it was always a niche market. Underground comics were never respectable, and in fact traded on their disreputable nature as a selling point. That very nature meant that distribution channels were also limited. It also did not help that the producers of the comics were torn between a "let it all hang out", "it'll be out when we get it out" type of attitude and the need to make money. Comic book publishing is a capitalist venture, and while the underground comic publishers were trying to make a capitalist go of it, the anti-capitalist attitudes pervading the rest of the counterculture pushed the artists and writers the publishers relied on in another direction. Cooperative profit-sharing or creative ventures, like Don Schenker's Print Mint or the Air Pirates, eventually self-destructed when the promised comics did not come out on time, or creative or personal tensions (exacerbated by drug use and political differences) pushed people apart. Erratic schedules, lack of exposure and finally the closure of outlets for sale – all these are kisses of death for any publishing venture. The latest issue of *Zap Comix*, published in 2005, is only No. 15.

It was against this backdrop of the declining prominence of the counterculture, the backlash against the distribution of offensive materials in bookstores and the slumping of

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<sup>149</sup> Skinn, *Comix*, 142-145; Telephone interview with O'Neill.

the comic book industry that the battle between Disney and the Pirates continued to be fought. As much as the underground comics were losing steam, however, O'Neill was still determined to "lose all the way to the Supreme Court, lose there – and do it again."<sup>150</sup>

## *2: Summary Judgment*

On January 4, 1973, Kennedy withdrew O'Neill's notice of appeal against Wollenberg's decision allowing the preliminary injunction. In the meantime, Tatum gave the Air Pirates file over to Paul J. Laveroni, a junior member of the firm who had a background in the military defending courts martial. If the Pirates believed that Disney, having gained its injunction would let matters lie, they were wrong. It appeared that the plaintiffs were set on getting their pound of flesh. Laveroni issued a series of interrogatories – part of the discovery process – to the Pirates on August 22, asking them to provide written answers within thirty days.

The discovery process in litigation has several uses. Its main purpose is to compel parties to reveal the full circumstances and details of their case, in particular their strengths and witnesses, in hopes that this will prompt a settlement rather than going to an expensive and possibly unnecessary trial. Interrogatories can also be used as an intelligence-gathering tool, to obtain information that could be favorable to the party issuing the questions or as a means to uncover the economic circumstances of the party being sued to see what rewards, or lack thereof, that successful litigation will yield.

Laveroni's questions seemed to be focused toward this latter purpose, asking among other things what the legal business status of the Air Pirates was, who the

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<sup>150</sup> Levin, *Pirates*, 203.

principals and employees were, where the issues were sold and what were the earnings and profits derived from those issues. He also wanted to know what records, in the form of correspondence, internal memos, or accounting documents they possessed. Even with three extensions of time given them, no reply was forthcoming from any of the Air Pirates. On November 20, Laveroni petitioned the court for the Pirates to pay damages and costs for failing to answer. On December 20, Morse and Stepanian filed Hallgren and Richard's answers. They were not illuminating, "equally replete with 'Unknown's and 'Not applicable's." They denied any knowledge of the business side of the Air Pirates and said all they did "was draw cartoons", with Last Gasp being their "publisher, promoter and distributor." They also had no bank, no documents, and Hallgren disclosed his earnings from the enterprise as \$350 and Richards stated he had earned \$20. London was at that point married to Flenniken and living in Seattle, and O'Neill's whereabouts were "unknown." Wollenberg ordered O'Neill and London to furnish answers by January 20, 1974, or he would enter judgment against them.<sup>151</sup>

A short while after the hearing on the preliminary injunction, O'Neill had left the country to go to Ireland. He had gone to Belfast on the invitation of Bernadette Devlin's Northern Ireland Civil Rights Association, following the events of Bloody Sunday on January 30, 1972, when British paratroopers opened fire on a group of unarmed demonstrators in the Northern Irish city of Derry, killing thirteen. Devlin asked O'Neill over to observe the situation and "report to Americans about it in his cartoons." O'Neill stayed there for seven months, drawing a strip for Devlin's association newspaper and filed taped reports that eventually earned him a Peabody Award nomination.

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<sup>151</sup> Levin, *Pirates*, 119-120.

When O'Neill returned to America, he was briefly involved with a new studio that Richards had set up with Willy Murphy, and then got involved with the February 27, 1973 seizure of the Pine Ridge Reservation near the village of Wounded Knee, South Dakota, by 200 members of the American Indian movement. The Federal Bureau of Investigation instituted a blockade to stop supplies and reinforcements from reaching the militants, and O'Neill joined the relief efforts, smuggling food and armaments into the village. According to O'Neill, he was there for "forty-five out of the sixty-five" (it actually lasted 71 days) days of the standoff, which ended with the surrender of the militants on May 8, 1973. During this period, O'Neill also produced *The Penny-Ante Republican*, a four-page, single sheet comic strip that sold for one cent. In it, O'Neill drew strips detailing his experiences with both the Irish Republican Army and the American Indian movement. This would earn him the Yellow Kid Award in 1976, presented by the International Congress of Cartoonists and Animators.<sup>152</sup>

On January 16, 1974, Kennedy filed "nearly identical sets of answers" from London and O'Neill, both also denying any knowledge of the business end of things, referring them to Ron Turner's Last Gasp. They once again asserted that the comics had not harmed Disney nor confused the public, and in fact, they had been the ones damaged when their work was suppressed. Their earnings, they asserted, were fifty cents. Laveroni moved swiftly – within five hours, he filed a motion for judgment to be entered against O'Neill and London. Their answers had not been signed under oath according to the

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<sup>152</sup> Ibid., 115-117. *The Yellow Kid* was the first color comic strip, published in both Joseph Pulitzer's *New York World* and William Randolph Hearst's *New York Journal American* in the late 19<sup>th</sup> Century, and is popularly credited with giving the name "yellow journalism" to the brand of sensationalistic reporting associated with Hearst.

Federal Rules of Civil Procedure, and he argued that they were "joint answers" (prohibited by the rules) due to their similar nature.

Kennedy replied on February 27, explaining that he believed that once the Pirates dropped the appeal, Disney would leave the case dormant. When the interrogatories arrived, O'Neill's location was still unknown. Fortunately, O'Neill did contact Kennedy and provided the answers for himself and London. The answers were signed by Kennedy himself because the deadline was approaching and neither O'Neill nor London was on hand to sign them. O'Neill also filed supplemental answers at the same time which, although did not contain much new information, proved enough to have Laveroni's motion dropped.<sup>153</sup>

Disney also deposed Ron Turner, who claimed ignorance of many details, blaming the lack of memory on the fact that he "was doing a lot of psychedelics in that period" and did not "remember too much of what was going on then." All he did, he said, was to provide advice to the Pirates on technical matters, and had no marketing or editorial control over their books. The Pirates "were their own publishers." Turner says that he wanted to project the image of this burnt-out hippie, designing his answers to "convince Disney that the cost of pursuing a case against him would far exceed any judgment they could hope to collect." If this was the plan, it unfortunately had the opposite effect – Disney added Turner's name to the lawsuit.<sup>154</sup>

Why did Disney pursue the matter to trial? After all, they already had their injunction against the Pirates. We do not have any insight into what instructions Disney gave Laveroni, but it is not difficult to imagine the reasons. The Pirates had already

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<sup>153</sup> Ibid., 120-121.

<sup>154</sup> Ibid., 122-124.

proved defiant once, by publishing *The Tortoise and the Hare* despite the temporary restraining order. Why would a preliminary injunction prove any different? Even if the Pirates were to obey the court order, the reality of the situation was that a preliminary injunction was just that – preliminary. If the case was held in limbo, without a proper settlement or final decision from the court, then the Pirates could, after a time, apply to have the case struck off; dismissed for delay in prosecution. In that case, the Pirates could do what they wanted and Disney would be back at square one. Given this, Kennedy's claim that he believed the case would remain dormant after the injunction seems disingenuous, if not naive.<sup>155</sup>

Settlement talks began in December 1974, with Wollenberg presiding over the first informal conference on December 3, and ordering the defendants to provide financial information for negotiation purposes. By April of 1975, Turner had settled, followed by Hallgren. The agreement was to stop printing, making, distributing and in every way stop publishing or making any money from the offending comics, to turn over any prints or plates used to make them and agree not to infringe Disney's copyrights in future. Judgment was entered for \$85,000, but the understanding was that as long as the parties kept to the rest of the agreement, Disney would not enforce the judgment.

O'Neill says that Richards and Turner were supposed to settle, that the idea was for him to go it alone: "It was my idea, and they weren't supposed to take the rap." O'Neill had suggested that the remaining Pirates settle as well, but for the moment, Richards felt that he owed it to O'Neill to stick it out, and London was persuaded by

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<sup>155</sup> California Code of Civil Procedure, Title 8 Chapter 1.5: Dismissal for Delay in Prosecution, specifically Section 583.310 to 583.360. The difference with Sam Ridge (see Chapter One), of course, was that in that case they had obtained a settlement.

Flenniken to remain loyal to O'Neill and the First Amendment. The three-day court trial before Wollenberg was scheduled for June 23, 1975.<sup>156</sup>

Wollenberg, who by now at seventy-five years of age was a senior judge and entitled to a lighter workload, subsequently postponed the trial to August 11. In the interim, both sides filed their pretrial statements. Parties prepare pretrial statements not as arguments, but to tell the court what issues they intend to raise and the remedies they are seeking so that the court can prepare and apply its mind to their consideration. The statements also declare how many witnesses the parties will be calling and how many days they estimate the testimony will take, to aid the court in blocking out the required number of days in the calendar.

Disney identified their issues – copyright infringement, trademark infringement, unfair competition due to trade disparagement and interference with business, alleging that the Pirates "threatened its profits from more than 100 licensees who used it characters to market over 600 products." Disney was asking for damages of \$5,000 per infringement, all of the profits made by the Pirates, triple damages for the trademark infringement, compensatory damages for unfair competition, and punitive damages of \$100,000 from each defendant and costs. It also submitted a list of possible witnesses and estimated the trial would last one or two days. The Pirates also identified the issues as they saw it in their statement. Firstly, the question of whether Disney still had copyrights in their characters or whether they were in the public domain. Second, the question of whether the *Air Pirates Funnies* had caused any market or consumer confusion. Third, the question of whether there even had been infringement of Disney's copyrights or trademarks, unfair competition or interference with business – and if there were, whether

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<sup>156</sup> Levin, *Pirates*, 124-125; Telephone interview with O'Neill.

this had been intentional, or harmed Disney at all. They were asking the court to lift the injunction and costs, submitting their own list of witnesses and estimating the trial at two or three days.<sup>157</sup>

On July 3, Laveroni filed a motion for summary judgment, citing Rule 56 of the Federal Rules of Civil Procedure, that there was no "genuine issue" of material fact and that Disney was entitled to judgment as a "matter of law".<sup>158</sup> He argued, in a written submission supporting the motion, that the following facts were not in dispute: that the Pirates had created and produced *Air Pirates Funnies*, that Disney owned copyrights on the characters parodied in *Air Pirates Funnies*, that *Air Pirates Funnies* infringed on those copyrights and that the defendants not only knew that but were continuing to infringe those copyrights. The Pirates' denial to the infringement, he submitted, presented "strictly legal questions which were argued and decided at the hearing of plaintiff's motion for preliminary injunction," and were discussed at length in the submissions and decision of the court at that stage. "The law on the subject stands where this court concluded it to be in its preliminary injunction order."<sup>159</sup>

Laveroni not only quoted the court's earlier decision back at it, but also noted O'Neill's admission that he had parodied the characters "exactly", as well as the Pirates' statements of the recognizable nature of Mickey Mouse, putting lie to the Pirates' denial that they had copied Disney's characters. "Defendant's entire argument," Laveroni wrote,

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<sup>157</sup> Levin, *Pirates*, 183-184.

<sup>158</sup> Rule 56 states: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

<sup>159</sup> *Walt Disney Productions v. The Air Pirates*, Memorandum of Points and Authorities in Support of Motion of Walt Disney Productions For Summary Judgment, Civil Action No. C-71-2021 ACW, July 3, 1975, 12.



"...is premised on the fact that they did copy Disney characters and used them in several thousand publications." According to Turner, *Air Pirates Funnies* #1 and #2 had a print run of 15,000 to 20,000 copies, and *Tortoise and the Hare* #1 had a run of 20,000 copies. The test of whether there was confusion was not based on an "expert in cartoons or comic books", but whether an "average member of the public... is likely to be misled." In any case, the court need not find that there was actual confusion, merely the likelihood of it. Intent was irrelevant.<sup>160</sup>

Laveroni also pointed out that in this case, the "average purchaser" might be the "average child", driving the point about protecting the children home once more. If Tatum had only raised the idea of "innocent delightfulness", Laveroni pushed it to the fore, presenting Disney as the bastion of middle-class virtue that the Pirates accused of it being and expressing righteous outrage that these depraved countercultural rebels would dare to soil that image. It was not just about copyright infringement or market confusion – it was an attack on American decency, and the Pirates' own evidence admitted this. He described the Pirates as taking "what belonged to Disney and used it for their own perverted purposes..." and, later on, "It would be difficult to conceive of works which could present Disney's characters in a more perverted and offensive manner than the books published by defendants. It would be equally difficult to conceive of works which are more antithetical to the image of wholesome family entertainment which the name Disney and its individual characters represents. No argument is required to support such a conclusion."<sup>161</sup>

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<sup>160</sup> Ibid., 15-17; *Plough, Inc. v. Kreis Laboratories* 314 F.2d 635 (9<sup>th</sup> Circuit, 1963) at 639.

<sup>161</sup> Memorandum of Points and Authorities in Support of Motion of Walt Disney Productions For Summary Judgment, 22.

The reply from the Pirates, due within ten days, did not arrive because of a communications snafu. O'Neill had mentioned over lunch to his friend George Gilmour that Kennedy was too busy to attend to the reply to the motion for summary judgment. A newly minted lawyer less than a year in practice, Gilmour offered his help. Stepanian, in the meantime, had gone to Hawaii believing that Kennedy would be handling the reply for both of them, and Kennedy himself thought that Gilmour "had everything under control." By the time Gilmour realized that he had sole responsibility for the brief, it was long overdue. A frenzied "non-stop, for two days" effort produced a slim brief that they brought to the federal court building on the morning of the hearing on August 1. Stepanian tried to get Wollenberg to accept Gilmour's "hot-from-the-photocopier" brief, but Laveroni used this fiasco to note that this failure was typical of the defendant's conduct and objected to Gilmour's brief being considered. Wollenberg was irritated, dismissing Gilmour as he was not on the record as representing the defendants and accusing Stepanian of being "completely unprepared." Wollenberg allowed Gilmour's brief to be "lodged" but not "filed", and the trial was postponed yet again to November 3 while he considered the motion.<sup>162</sup>

Gilmour submitted that Wollenberg should grant summary judgment only if he was convinced that there was no genuine issue of material fact and that the Pirates would definitely lose at trial. He should not rely on his earlier decision, as the standard of proof was different. The preliminary injunction was granted based on the "probability" of Disney prevailing at trial and now he was supposed to decide matters of fact as an "actuality". That distinction was an important one, and needed a full hearing to establish the facts of the case. Gilmour also argued that whether parody was fair use was a

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<sup>162</sup> Levin, *Pirates*, 185-186.

question of fact, and that the Pirate's admissions of parody should not be taken as, *ipso facto*, admissions of infringement.<sup>163</sup>

On August 6, Wollenberg granted Disney's motion for summary judgment. His decision, despite Gilmour's urgings in his brief, drew heavily from his reasoning in his earlier judgment granting the preliminary injunction. In one respect, it was even stronger – Wollenberg stated that Disney's ownership of the copyrights on their characters gave them the "sole right to decide how they were to be portrayed." He also rejected, as in the earlier decision, the Pirates' arguments that the characters were not copyrightable component works as well as their First Amendment arguments. While he acknowledged that "fair use" was normally a question of fact, he felt that there was no material dispute here: the Pirates had "admitted copying Disney's characters... as closely as they could." Therefore, although the Air Pirates were using these characters in a very different way to how Disney would have used them, the exact copying fell foul of the test of substantial similarity set out in *Loew's*.

Wollenberg found for Disney in the case of trademark infringement and the "derogatory manner" of the infringement also meant there was trade disparagement. He also cited, in a footnote, Professor Melville B. Nimmer's standard text *Nimmer on Copyright*, where Nimmer suggested that the proper test was "whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work." Wollenberg interpreted the Pirates' goal of "undermining the public image of Disney characters" as damaging or prejudicing the sale of Disney's work and therefore under this test would mean that they could not avail themselves of fair use.

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<sup>163</sup> *Walt Disney Productions v. The Air Pirates*, Response to Plaintiff's Motion for Summary Judgment, Civil Action No. C-71-2021 ACW, lodged August 4, 1975.

Ultimately, it was *Loew's* substantiality standard that Wollenberg relied on. He made the injunction permanent and ordered an assessment for damages hearing before a federal magistrate, Owen E. Woodruff, Jr. On September 15, Stepanian filed a notice of appeal to the Ninth Circuit Court of Appeals on Richards' behalf, followed by Kennedy on O'Neill and London's behalf two days later. Kennedy tried to get Wollenberg to postpone the assessment hearing until after the Ninth Circuit decision, but Laveroni objected. At the hearing on December 11, Woodruff found that *in lieu* damages (as opposed to actual assessed damages) were appropriate and awarded Disney the full sum they asked for.<sup>164</sup>

### 3: "Uninhibited marketplace of ideas."

Kennedy wrote the Pirates' appellate brief to the Ninth Circuit, filing it on January 19, 1976. In the first section, he raised the now familiar arguments of how parody was a "legitimate and honorable" literary art form, citing the *Loew's* and *Columbia Pictures* cases as well as citing *Don Quixote*, "perhaps the most famous and successful of literary parodies," as an example. In the second section, while admitting that the Pirates "made use of the physical depiction of characters first drawn by the Walt Disney Studios," he argued once again that the portions of Disney's material utilized by the Pirates were not protectible by copyright – the "Sam Spade" case. He criticized Wollenberg's use of the "narrow gap" in *Columbia Broadcasting*, saying that it can "scarcely be argued that the character 'really constitutes the story being told'... Indeed, the very name 'mickeymouse' has come to be associated with shallowness and lack of substance, trite and commercially

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<sup>164</sup> Levin, *Pirates*, 188, 191.

slick." If Sam Spade, a character "more deeply drawn" than Mickey Mouse, was not protectible by copyright, how could Disney's characters be? In the *Bruns* and *Fox* cases, more than just the characters had been taken. Here, the Pirates did not imitate any plot or development – aside from the depiction, everything else was original.<sup>165</sup>

His treatment of the fair use argument, however, was different from the earlier briefs, and this was because now, in front of the appeals court, he had another avenue open to him. While Wollenberg, being at the District Court level, was bound by the Ninth Circuit's decision in *Loew's*, the Ninth Circuit judges could overrule their own decision in that case, and this is exactly what Kennedy submitted they should do. As discussed in Chapter Two, Judge Carter in *Loew's* made no distinction between parodies or any other form of appropriation when it came to the substantial similarity test, and the Ninth Circuit affirmed that decision on appeal, agreeing with Carter that a "parodized or burlesque (*sic*) taking is to be treated no differently from any other appropriation."<sup>166</sup> Carter's decision was also roundly criticized, and he backed away from that in the Sid Caesar case, but as that case did not go to appeal, *Loew's* was still good law. Kennedy submitted that this denied "any application at all to the doctrine of fair use for the purpose of parody." A couple of pages later, he argued, "To constrain parody to the amount of 'taking' allowed in all other copyright infringement actions is basically to disembowel parody as an art form." Wollenberg should have been allowed to follow *Columbia Pictures*, but was required to follow *Loew's* instead.<sup>167</sup>

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<sup>165</sup> *The Air Pirates v. Walt Disney Productions*, Appellant's Brief On Appeal from the United States District Court for the Northern District of California, CA 75-3116, January 15, 1976, 8, 10-15.

<sup>166</sup> 131 F. Supp 183; 239 F. 2d at 537

<sup>167</sup> Appellant's Brief On Appeal from the United States District Court, 18-21

Kennedy argued that Wollenberg had misinterpreted Nimmer. What Nimmer was proposing as a test was "whether the two works perform the same function in terms of actual or potential consumer demand." In other words, if the Pirates' work performed a different function, then fair use could be used as a defense.<sup>168</sup> Nimmer's test of "diminishing or prejudice sales", Kennedy submitted, was not in terms of lowering the reputation and thus lowering sales, but was a matter of competition, that is would such infringement make people buy the infringing copy rather than the original. "Clearly," Kennedy wrote, "what the court is doing here is finding prejudice to Disney based on the criticism of his characters by the Air Pirates," and that violated the First Amendment. *Air Pirates Funnies* was not going to act as a substitute for Disney in any market, nor would it stop Disney from entering new markets, and Wollenberg even said so.<sup>169</sup>

The comics were plainly labeled as "Adults Only" and "Nix Kids", and Disney portrayed "innocent delightfulness" while the *Funnies* showed "the pathos and disillusionment following the fall of each of us from that world of innocence." Disney sold its comics in groceries, drug stores and magazine stores, while the Pirates sold theirs in head shops. Disney had never shown the desire to parody its own work, so the Pirates' comics could not interfere with that right. *Berlin's* case was an example of this more functional test.<sup>170</sup> *Berlin*, Kennedy submitted, was the right approach to parody – whether the parodist has appropriated more than is enough to "recall or conjure up" the original work. The Pirates had done no more than was needed. Kennedy repeated the same

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<sup>168</sup> *Nimmer on Copyright*, Vol. 2, s145, 649, 647.

<sup>169</sup> Appellant's Brief On Appeal from the United States District Court, 22.

<sup>170</sup> *Ibid*, 24-27. The difficulty with Kennedy's argument here was noted back in Chapter Two, footnote 124. *Air Pirates Funnies* #1 is a near-verbatim reproduction of "The Mail Pilot" Big Little Book cover. This would not be a problem if *Air Pirates Funnies* were indeed only distributed at head shops and other underground venues as Kennedy asserted, but there was no guarantee that this would be the only venue

arguments he used with Wollenberg regarding the First Amendment, applying Nimmer's test to that as well.<sup>171</sup>

Laveroni replied with his usual mix of dismissiveness and righteous rage, describing the Pirates' appropriation as "wanton" and "glorying in the apt name they have chosen for themselves... like modern buccaneers, are free to seize what is not theirs and to turn the property of Disney into gain for themselves." Pre-empting any mention of the "Sam Spade" case, he immediately distinguished that as referring to literary and not cartoon characters, which the other cases clearly treated as copyrightable. He cited *Nichols*, and Learned Hand's opinion that characters could be copied closely enough for infringement to occur. As Disney had asserted all along, Laveroni emphasized that the Pirates had, by their own admission, copied Disney's characters "exactly". And if the characters were copyrightable, the next question of fair use by the Pirates would be answered, by any standard, in the negative. There was no parody – just exact copying, and thus the First Amendment would not help them either.<sup>172</sup>

Tom Steel, an attorney on Kennedy's staff, gave the rebuttal, directing his reply solely on the issues of fair use and the First Amendment. Disney's assertion that the Pirates' parody was not "fair use" because Disney would never have consented to such use was outrageous, Steel wrote – there was "virtually no support for the application of such a standard." The Air Pirates' purpose was not commercial gain, but to be critical of Disney – in fact, they lost money on the venture. In addition, even if characters were copyrightable component parts, that did not mean the plaintiffs could take a work and

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these comics would be distributed in except at the Pirates' and possibly the distributor or retailers' discretion.

<sup>171</sup> Ibid., 28-37.

break it up into as many component parts as they liked. If that were the case, then a title of a book, or a couplet, or a verse could become copyrightable, and yet such appropriation had never adjudged as infringement.

A proper test, he submitted, would be to look at the totality of what had been appropriated to see whether there had been a substantial similarity between the works – "the characters... but also the plot, theme, dialogue and ultimate purpose." Disney's copyrights covered all of these, so their assertion that the Pirates had appropriated the "whole" of the copyright was erroneous. Steel finally accused Disney of trying to suppress free speech. The way Laveroni had described the Pirates' work, as "perverted", "offensive", "degrading, disparaging, defamatory and cancerous," showed their true colors. Disney did not like what the Pirates had to say, and was therefore trying to "limit criticism by accusations of 'perversion'" and suppress an "uninhibited marketplace of ideas."<sup>173</sup>

The Ninth Circuit scheduled oral arguments for February 17, 1978.

#### *4: Waiting for the Man*

O'Neill had left his lawyers "largely uncompensated." Part of the reason that Kennedy kept asking for extensions was because he was working on other cases that actually paid, and therefore the Air Pirates' cause, though important, was on a lower priority. As the case made its way through the court system, the Pirates were trying to

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<sup>172</sup> *Walt Disney Productions v. The Air Pirates*, Appellee's Brief on Appeal from the United States District Court for the Northern District of California, No. CA 75-3116, February 17, 1976.



drum up popular support – and donations – through publicity. The *San Francisco Chronicle* had provided some of this coverage from the start, casting O'Neill as an underdog put upon by a bullying Disney.<sup>174</sup> Most of it, however, was done by the Pirates themselves, setting up a Defense Fund, handing out flyers and press releases and selling original works to art galleries. They also made use of the comic book fan community, which in the 1960s was gathering at comic book conventions.

The fan community, or fandom, had grown out of the letter columns at the back of the comic books. Editors soon realized that feedback from the readers could help them gauge which stories were successful and which were not just as well, if not better, than sales figures, and unlike sales figures, these criticisms were specific. The addresses of these fans were also printed, and soon they began to communicate with one another, forming a network of letter writing. By the 1950s, these fans began to publish their own "fanzines", either independently or through "amateur press associations" – essentially, each of them would mail their own contribution to a central person who would staple them together and run off enough copies to send them to everyone else. These magazines contained articles on the characters, writers, artists and editors of the comic books. Some had interviews; some had amateur artwork, industry gossip, and "assorted comics-related esoterica of incalculable – or zero, depending on your point of view – value." Over 200 fanzines existed by the mid-1960s, and by 1971, over 600, with circulations in the thousands. The first convention devoted to comic books took place in New York City in 1964. Soon, more conventions were springing up all around the country – putting fans

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<sup>173</sup> *The Air Pirates v. Walt Disney Productions*, Appellants' Reply Brief on Appeal from the United States District Court for the Northern District of California, No. CA 75-3116, March 2, 1976, 7-9. The phrase "uninhibited marketplace of ideas" is from *Red Lion Broadcasting Co. v. FCC* 395 U.S. 367 (1969).

and creators, and collectors and dealers in touch with each other, a lucrative proposition all around. Phil Seuling, who the industry remembers today for being the man who invented the direct sales market for comic books, ran a convention in New York on the July 4 weekend. He invited the Pirates to "make a formal presentation about their case," along with free lodging and free table spaces to sell their material.<sup>175</sup>

The Pirates appeared at more conventions, distributing pamphlets, and defying the injunctions by selling what they called "federal crime drawings", each numbered so that they could keep track of how many times they had violated the court order. Other artists, underground and otherwise, gave their support. According to O'Neill, each appearance earned the Pirates about \$5000, but the money did not go to the lawyers. Flenniken states in Levin's book, "The money paid for meals, the trips, supplies. It wasn't intended for the lawyers. It was to help the cartoonists survive while fighting the case."<sup>176</sup>

In the meantime, the Copyright Act of 1976 revised Title 17 of the United States Code concerning copyright. The amendments to United States copyright law were to bring it in line with its eventual compliance with the Berne Convention for the Protection of Literary and Artistic Works had established since its inception in 1883. The purpose of the Berne Convention was to create an international and reciprocal standard for copyright protection, allowing works to be protected between countries party to the convention and without the need for registration or a copyright notice, as was required under United States law. The United States had resisted becoming a party to the Berne Convention because it would have entailed major revisions to legislation, providing protection to

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<sup>174</sup>Unknown, "A 50-Ton Mouse is Stepping on My Fingers", *San Francisco Chronicle*, (March 10, 1972), 5.

<sup>175</sup>Levin, *Pirates*, 195.

<sup>176</sup>Ibid., 196.

foreign authors only by the means of the International Copyright Treaty of 1891. By the 1970s, the feeling was that it was time for the United States to harmonize its intellectual property law with Berne. Although the law was amended, the United States would not become a signatory to the Berne Convention until 1988.

One of the problems that Congress had to deal with in the 1976 Act was fair use. Up to this point, there had been no legislative guidance as to what constituted fair use. Kennedy had argued before Wollenberg that fair use was a judge-made concept, and Laveroni had described it as an equitable doctrine in arguing that the Pirates' use was *not* equitable. The House Report on the Copyright Act of 1976 explained, "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities."<sup>177</sup>

Congress adopted these criteria – largely derived from Nimmer's synthesis of the fair use doctrine as expressed in the case law – as follows:

In determining whether the use made of a work in any particular case is a fair use 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

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<sup>177</sup> The Copyright Act of 1976, House Report No. 94-1476, Chapter One, § 107.

(4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>178</sup>

However, the House Report on the Act makes it clear that the legislative intent behind 17 USC §107 was not to create law, but simply restate the judicial criteria explicitly. "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it," the Report states, "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." The four criteria are inclusive as well, meaning that the court is free to look into other factors as well. The last criterion was exactly what Kennedy was trying to argue before the Ninth Circuit, that the Pirates had no effect at all on the market for Disney's characters, even if they were copyrightable.

### *5: The Ninth Circuit*

At the oral arguments before the Ninth Circuit on February 17, 1978, A. Kirk McKenzie, who was a specialist in anti-trust and securities cases, substituted for Kennedy in representing O'Neill and London, while Tatum was back representing Disney and Stepanian was representing Richards. McKenzie based his arguments before the appeals court on the 1976 amendments to the Copyright Act as well as First Amendment considerations. Unfortunately, the strongest point of Section 107, the market impact criterion, was not helpful because the 1976 Act had no retroactive application. McKenzie recalls his arguments having a frosty reception by the court, and Laveroni (who was there

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<sup>178</sup> 17 USC § 107.

to witness the proceedings) recalled, "Once you say you copied directly, you have a problem."<sup>179</sup>

The Ninth Circuit delivered its 15-page decision on September 5, 1978, ruling three to zero against the Air Pirates on the charges of copyright infringement. Judge Walter J. Cummings, a sixty-year-old former Assistant United States Solicitor General and former partner in a Chicago-based law firm appointed to the bench by Johnson, penned the judgment. It first disposed of McKenzie's 1976 Act arguments, noting that the new provisions explicitly excluded causes of action before its implementation. Next, it considered the Ninth Circuit's own decision in the "Sam Spade" case that characters were not ordinarily copyrightable. Unlike Wollenberg, who had to find that "narrow gap", Cummings cut to the chase, and distinguished between literary and cartoon characters. "While many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression. Because comic book characters therefore are distinguishable from literary characters, the *Warner Brothers* language does not preclude protection of Disney's characters." The Ninth Circuit did not bother with Wollenberg's "mere chessman" test, saying that it may have been based on the "incorrect assumption" that Disney's characters were protectible if they constituted the whole story.<sup>180</sup>

Cummings then considered fair use as a defense. He noted that the Pirates were not saying that the copying was not substantial enough to be infringing, merely that the infringement was defensible as an example of parody and thus fair use. Noting that

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<sup>179</sup> Levin, *Pirates*, 199.

<sup>180</sup> *Walt Disney Productions v. The Air Pirates*, 581 F.2d 751 (9<sup>th</sup> Cir., 1978) at 755.

*Loew's* case was the legal standard, the court found that Wollenberg's test of "substantial copying, combined with the fact that the portion copied constituted a substantial part of the defendant's work" that "automatically precluded the fair use doctrine" was unjustified. Such a reading would make any defense of fair use untenable, and would lead to a gap where a substantial amount was taken but not a substantial part of the defendant's work. *Loew's* was more properly read as "setting a threshold that eliminates from the fair use doctrine copying that is virtually verbatim," as in Jack Benny's burlesque of *Gaslight*. *Loew's*, in other words, was the upper limit to tell what was definitely not fair use. In the absence of "near-verbatim copying", the test would be *Berlin's*, as in whether the parodist had taken up more than was needed to "recall or conjure" the original.<sup>181</sup>

The Ninth Circuit decided that the Pirates had done more than was needed. Ironically, the ubiquitous presence of Disney's characters in popular culture that made them such attractive targets was precisely why the Pirates had gone too far. Cummings wrote, "Given the widespread public recognition of the major characters involved here... very little would have been necessary to place Mickey Mouse and his image in the minds of the readers." He noted that Pirates did not parody how the characters looked, but their "personalities, their wholesomeness and their innocence." The Pirates would therefore have had a better argument if they had "paralleled... Disney characters and their actions in a manner that conjured up the particular elements of the innocence of the characters to be satirized... Here, the copying of the graphic image appears to have no other purpose than to track Disney's work... as closely as possible." Cummings dismissed the Pirates' arguments that they had to copy Disney exactly to make their point effectively. They were entitled to parody, but they were not entitled to the "best parody" they could make –

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<sup>181</sup> Ibid., at 757.

that consideration had to be balanced with the rights of the copyright owner, and the Pirates had exceeded what was "necessary to place firmly in the reader's mind the parodied work and those specific attributes that are to be satirized." Because of this, Wollenberg's granting of summary judgment on copyright infringement was proper.<sup>182</sup>

Cummings disposed of the rest of the charges in short order. Because Disney had not produced any evidence to show market confusion, there was no trademark infringement, unfair competition or trade disparagement. He wrote that Wollenberg "did not consider that the defendants' imitation appeared only in the middle of the comic books and that defendants' books were sold in adult, counter-culture stores... when it is therefore recognized that the imitation would be seen by an adult... who in all probability before seeing the imitation would already have been struck by the incompatibility of the defendants' work with Disney's, as well as defendants' proper attribution of source in front of each book, the likelihood that the use of 'Silly Sympathies' would be confusing is markedly diminished." The summary judgment on these being improper, the Ninth Circuit reversed and remanded on those charges.<sup>183</sup>

Although the Pirates had beaten all but the copyright infringement charges, that was still enough to leave the injunction standing and them still liable for damages and costs. Kennedy and McKenzie petitioned the United States Supreme Court for a writ of certiorari on behalf of O'Neill and London, but the Supreme Court denied certiorari on January 22, 1979, without comment. O'Neill was sitting in the bathtub, "in a tiny house with no foundation," when his neighbor shouted the news through the window. Saddled

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<sup>182</sup> Ibid., at 758.

<sup>183</sup> Ibid., at 759. However, Cummings' analysis here seems at odds with the actual comic, as the imitated portion was not just in the middle of *Air Pirates Funnies*, but also on the cover of #1 itself – see footnote

with \$190,000 in damages and costs, divorced for the second time and owing alimony as well as child support, O'Neill's attitude was simply this – "Doing something stupid once is just plain stupid. Doing something stupid twice is a philosophy." Denied his day in front of the Supreme Court, O'Neill was going to up the ante once again.<sup>184</sup>

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157. Obviously, the Pirates would not complain of this. As for Disney, they probably felt they should leave well enough alone considering the improbability of recovering more damages.

<sup>184</sup> Levin, *Pirates*, 203.



## CHAPTER FOUR

### *1: Semiotic warfare*

The Pirates' argument for selecting Disney as their target, and indeed the reason why they had to copy it so closely to be able to parody it was because of the ubiquity of Disney's characters – and in particular Mickey Mouse in the popular culture. Kennedy wrote in the appellate brief to the Ninth Circuit, "In parody, the expectation is provided by reference to a known existing work, usually (but not always) a work of literature, or a known existing style of expression. Once the reference is clear, the contradiction is presented by proceeding not with the expected original, but with something else. It is obvious, therefore that for the form to succeed the reference to the original must be clear and kept clear and that some significant element of the original must be presented in the parody. Without such an element of the original the reference is lost and the work ceases to be a parody."<sup>185</sup>

Simply put, when one conducts semiotic warfare, one needs to use semiotic shorthand.<sup>186</sup> Robert Darnton, in his article on "The Great Cat Massacre", relates how journeymen in an eighteenth century French printing shop organized a massive slaughter of cats as a joke. To get the joke, one has to understand that the cats were proxies for the

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<sup>185</sup> *Walt Disney v. The Air Pirates*, Appellee's Brief to the Ninth Circuit, 4-5.

<sup>186</sup> "Semiotic warfare" is a term used in modern art to denote the use of symbols to create art with politically radical interpretations. I have appropriated the term from the title of Martina Koeppel-Yang's

master printers who loved them. By killing the cats, Nicolas Contat and his fellow journeymen were acting out their aggression and resentment against the masters. This combined several different levels of symbolism, from the sexual nature of cat jokes, the association of cats with witches (both of which served as a means to attack the master printer's wife as well), and the conduct of the massacre in a trial-like way.<sup>187</sup>

The appropriation of popular images in comic books, as we have seen, goes all the way back to the Tijuana Bibles of the 1930s. While the outrageous sex and humor in Tijuana Bibles and the underground comics would remain outrageous even if they did not use popular icons, the impact increases once they do. Such use brings along with them their associated cultural baggage, adding new and more complex layers of meaning. In addition, the use of established and recognizable symbols saves the artist the trouble of explaining their meaning and allows them to concentrate on other areas of the work. Harvey Kurtzman, who wrote the previously mentioned "Mickey Rodent" parody in *MAD Magazine* #19 (January, 1956) stated, "Will (Elder, the artist) understood parody. Of course what it is, is mimicry. Willy was just so good at it. He understood that you had to have an exact duplicate of what you're parodying."<sup>188</sup>

An example from the Dada school of art is Hannah Hoch's photo-collages – in particular *Cut with the Kitchen Knife Through the First Epoch of the Weimar Beer-Belly Culture* (1919) – where she uses photographs of public figures and juxtaposes them with violent images – in effect performing such violence on them. The direct appropriation of

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book, *Semiotic Warfare: A Semiotic Analysis of the Chinese Avant-Garde, 1979-1989* (Hong Kong: Timezone 8, 2003).

<sup>187</sup> Robert Darnton, "Workers Revolt: The Great Cat Massacre of the Rue Saint-Séverin", *Rethinking Popular Culture: Contemporary Perspectives in Cultural Studies*, Chandra Mukerji and Michael Schudson, eds. (Berkeley, CA: University of California Press, 1991), 97-120.

real figures makes her point within the limited confines of the canvas with less effort than if she had to create metaphorical stand-ins for them.<sup>189</sup>

How does Dada connect with O'Neill? Many underground comics artists cite the E.C. horror and science fiction comics of the 1950s as influences, and also the off-the-wall humor and biting satire that those same artists and writers went on to produce in *Mad Magazine*. Another oft-cited influence that O'Neill also claims is the absurdist comic strip *Krazy Kat*, drawn by George Herriman (1880-1944).<sup>190</sup>

The strip is about an androgynous anthropomorphic feline that inhabits a surreal, dream-like landscape. The conversations that Krazy has with its supporting characters – like Ignatz Mouse, who is in love with Krazy, and shows his love by frequently throwing a brick at the cat's head – are reminiscent of the deliberately illogical discourses of the Dada and Surrealist movements. Herriman also played with comic strip conventions, sometimes reminding the reader of the artificiality of the characters by leaving panels unfinished, or making the characters draw each other. This self-referential "awareness of the materials and conventions of the art practiced," is an important contribution of Dada, and sees its parallels in parody as well. In the same way as parody punctures pretension, the artistic parody plays with the audience's expectations and reminds them of the

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<sup>188</sup> Samuels, *Illustrated History*, 198. Kurtzman used to write and draw for the horror and war comics that E.C. used to publish. He would go on to become famous for creating the multi-page strip *Little Annie Fanny* for *Playboy*, a sexy and hilarious parody of *Little Orphan Annie*, in 1962.

<sup>189</sup> Hannah Hoch, *Cut with the Kitchen Knife Through the First Epoch of the Weimar Beer-Belly Culture* (1919).

<sup>190</sup> Indeed, Bobby London's *Dirty Duck*, which was featured in *Air Pirates Funnies*, is a direct homage to the *Krazy Kat* style and format.

artificiality and ephemeral nature of the piece. The artist or audience can alter and twist meaning and content into any form desired.<sup>191</sup>

Herriman's "violation of conventions", like in Dada, "becomes a technique itself," blurring the boundaries between audience and art, as well as challenging basic assumptions like the stability of language, as well as the nature of reality. Both Dada and Surrealism practiced this "disorientation of the viewer through the transmutation of figures, landscape and objects" and it features heavily in *Krazy Kat*.<sup>192</sup> This is the same kind of environment in the demonic landscapes of O'Neill's *Bucky Goes West* and the rapid changes of scene in *The Mouse* (Figure 6).

There is no evidence that Dada or Surrealism influenced Herriman. Dadaism officially began in 1916 (or 1913, when Marcel Duchamp jammed a bicycle wheel upside down through a footstool), and André Breton wrote his *Manifesto of Surrealism* in 1924. Herriman's first depictions of Krazy and Ignatz were in 1910. However, *Krazy Kat* was definitely accepted by the Dadaists as "pure American Dada humor", and as M. Thomas Inge notes in *Comics as Culture*, the "similarities in their work demonstrate that cultural forces at both the avant-garde and popular levels have a way of achieving the same ends."<sup>193</sup> Herriman and Duchamp were tapping into the same anti-rational response to social and political unrest in the opening decades of the 20<sup>th</sup> Century, a response that would intensify following the trauma of World War I.

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<sup>191</sup> Robert Darnton, citing Michael Herzfeld, suggests that symbols convey multiple meanings and "meaning is construed in different ways by different people." See Robert Darnton, "The Symbolic Element in History", *Journal of Modern History* 158:1 (March, 1986), 219.

<sup>192</sup> M. Thomas Inge, *Comics as Culture* (Jackson, MS: University Press of Mississippi), 49-51.

<sup>193</sup> Matthew Josephson, *Life Among The Surrealists: A Memoir* (New York: Holt, Rinehart and Winston, 1962), 124; Inge, *Culture*, 51.

No one creates in a vacuum. When examining influences, one must take into account not just direct influences but also the indirect cultural milieu that surrounds and gives rise to the particular creative impulse. While underground comics artists disclaimed any influences by Tijuana Bibles (which they said they never saw as children and were therefore unaware of until later), we cannot discount the similarity of work between them and the anonymous artists of the Eight-Pagers. It is not that the artists are being untruthful in their assertions, but merely that both the underground and Tijuana Bible artists were inspired by an older and broader anti-authoritarian tradition of semiotic play that has always existed.

By choosing Mickey Mouse as his target, O'Neill was able to comment not just on the seeming asexuality of the Disney character, but also imported all the meanings the Mickey Mouse character implied to the reader: innocence, childhood and fun, and put those to the sword. At the same time, Mickey Mouse was a proxy for Walt Disney Productions itself, which represented the conservative attitudes that the counterculture opposed. O'Neill counted on Disney protecting its copyrights and was deliberately spoiling for a fight. Disney's retaliation – and perhaps this is what O'Neill also intended to provoke – would reveal Disney's darker side as a symbol of corporate America despite the happy front it put forward that was so ubiquitous in the public consciousness. It would highlight both the extent of control Disney held over its characters and the lengths it would go to in order to retain that control.

And yet, the Ninth Circuit felt that the Pirates had gone too far in what they had done to "recall or conjure" up the specter of Mickey Mouse. Looking at how expertly and exactly O'Neill managed to mimic Floyd Gottfredson's style (and regardless of what else

people might think, it *is* a very good imitation) it is hard to fault the Ninth Circuit's opinion on this. However, we have also noted other parodies before *Air Pirates Funnies* that did not attract Disney's wrath, even when they depict the characters in an uncomplimentary fashion. The previously mentioned Kurtzman-Elder spoof, "Mickey Rodent" starts with a large panel of Mickey Rodent, drawn in the post-*Fantasia* style he still retains to this day, walking along the street, a mousetrap each attached to his nose and hand. In the background, two policemen are dragging "Horace Horseneck" away because he has gone against "Walt Dizzy's" edict of always appearing with white gloves. Edward Samuels writes, "It's all in the setting" – that *MAD Magazine*, "for all its pretensions at being outrageous, is fairly gentle in its style."<sup>194</sup> However, surely the setting is not relevant when it comes to cases of copyright infringement, merely the substantiality of the taking. The cases since *Air Pirates* suggest, however, that the courts *are* considering this. To put it bluntly: if your parody is offensive to the court, and the likelihood of this is high if it puts the characters in explicitly sexual situations – then it will be disallowed, regardless of other factors.

## 2: *Obscene or not*

While the *Air Pirates* case was winding its way through the courts, Disney filed suit against another defendant, Mature Pictures, a production company that had produced the 1974 pornographic motion picture *The Life and Times of the Happy Hooker*, based on the experiences of Xaviera Hollander, who also starred in the movie. What Disney objected to was that the whole of the "Mickey Mouse March" (the theme to the Disney

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<sup>194</sup> Samuels, *Illustrated History*, 197-199.

television series "The Mickey Mouse Club") was played repeatedly over a scene of three actors wearing "Mouseketeer" hats having sexual intercourse with Hollander. The defendants argued that the use of the theme was "a humorous take-off" intended to "highlight and emphasize the transition... from childhood to manhood... in a highly comical setting." The district court, on the other hand, applied the *Columbia* and *Berlin* "recall or conjure" test and found that the "permissible parody... is not a complete copy of the original", and granted a preliminary injunction.<sup>195</sup>

While the "Happy Hooker" case is relatively straightforward, the next one is not, and as a result deserves looking into more closely. In the 1976 case of *MCA, Inc. v. Wilson*, the defendants put on a musical titled, *Let My People Come – A Sexual Musical*, described as an "erotic nude show" with "sex content raunchy enough to satisfy the most jaded porno palate", a show whose "main concern is not fornication but fellatio and cunnilingus."<sup>196</sup> MCA, who owned the rights to the song "Boogie Woogie Bugle Boy", objected to the parody of it that the defendants had included in the musical, "The Cunnilingus Champion of Company C". The similarity was deliberate. At the trial, an actress in the musical testified that they had discussed at rehearsals that it would be funny if they "could get Cunnilingus Champion to sound similar to Boogie Woogie Bugle Boy just to create some publicity," and the song was reworked to make it sound more similar.<sup>197</sup>

At the district court level, the court identified several issues for determination. Whether "Bugle Boy" had been copied by the defendants was easily disposed of, as the

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<sup>195</sup> Patry, *Fair Use*, 172; *Walt Disney Productions v. Mature Pictures Corp.* 389 F. Supp 1397, 1398 (S.D.N.Y. 1975).

<sup>196</sup> *MCA v. Wilson* 425 F. Supp 443 (S.D.N.Y. 1976), affirmed as modified, 677 F. 2d 180 (2d Cir. 1981).

<sup>197</sup> 425 F. Supp at 448.

defendants did not deny it. Substantial similarity between "Champion" and "Bugle Boy" was trickier, because the defendants had based their parody on the version of "Bugle Boy" that had been popularized by the Andrews Sisters and Bette Midler, and those versions contained several additions that MCA could not sue on. Nevertheless, the court came to the conclusion that the defendants had infringed based on a comparison of the parody to the Midler and Andrews Sisters versions, rather than the original.<sup>198</sup> The court also stated that, "Champion is not a parody or burlesque of Bugle Boy. Champion, as well as MUSICAL in its entirety, attempts to burlesque life, more particularly sexual mores. This purpose does not justify the unwarranted use and abuse of Bugle Boy," using that to support its holding that it need not look into fair use requirements. This was an erroneous reading of *Berlin*, which simply required that the parody not do more than conjure up the "object" of the satire, not necessarily the original copyrighted work. *MAD Magazine*, after all, in its parody lyrics, was satirizing life, not the original songs; if that had really been the requirement, *Berlin* would never have considered the "recall and conjure" test.<sup>199</sup>

While *MCA, Inc. v. Wilson* waited for the Second Circuit to hear the appeal, Elsmere Music sued the NBC network's *Saturday Night Live* program for performing a skit satirizing New York's campaign to clean up its image. The skit parodied the lyrics of

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<sup>198</sup> 425 F. Supp at 450. Despite comparing the wrong versions, at 454, the court stated: "Champion was copied in large part from Bugle Boy; Champion is substantially similar to Bugle Boy; the similarities are not attributable to the use of common musical forms; Champion is not parody or burlesque of Bugle Boy and therefore defendants are not entitled to the defense of fair use; even if fair use were available to them, the amount and nature of their taking is clearly excessive. Accordingly, we are constrained to, and do, hold that 'Cunnilingus Champion of Co. C' infringes the statutory copyrights of 'Boogie Woogie Bugle Boy.' ... Many courts have adopted the "ordinary observer" or "audience" test as the ultimate determining factor in copyright infringement actions, assuming access and substantial similarity. See *Fleischer Studios v. Ralph A. Freundlich*... In that case, the Second Circuit stated, '[What] the appellant constructed is recognizable by an ordinary observer as having been taken from the copyrighted source. Such is an infringement.'" This is



the song "I Love New York" as "I Love Sodom", but unlike *Berlin*, four musical notes – the main motif of "I Love New York", were also performed by a chorus of dancing girls. While the defendants admitted the resemblance was deliberate, they argued that they did no more than was necessary to parody, and it was thus fair use.<sup>200</sup> The plaintiff, on the other hand, argued that parody was not available as a defense because the object of the parody was New York, not the song. While the district court found that the taking was more than *de minimis* and that they had taken the "heart" of the song, the court still ruled that the defendants had not taken more than necessary to "conjure" up the original. Therefore, despite the similarity, the taking was not substantial enough to take the defendants out of fair use, and neither did it interfere with the marketability of or compete with the original song, as per the factors listed in the 1976 Copyright Act. The court also rejected the district court's holding in the first instance decision of *MCA v. Wilson* that the subject of the parody must be the original. The Second Circuit affirmed this decision. In a footnote to that decision, the Second Circuit commented:

"The concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point... A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."<sup>201</sup>

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particularly curious and is an obvious and reversible error, since at 455 the court rejected the plaintiff's common law claims to the additions by the Andrews Sisters and Midler.

<sup>199</sup> 677 F.2d at 185.

<sup>200</sup> *Elsmere Music, Inc. v. National Broadcasting Co.* 482 F. Supp 741 (S.D.N.Y.) at 744, affirmed 623 F.2d 252 (2d Cir. 1980).

<sup>201</sup> 623 F.2d at 253.

The last part of that note echoes Judge Story's attitude in *Folsom*, that some "intellectual labor and judgment" be exhibited, or as Lord Eldon said, "the fair exercise of a mental operation" be exercised by the party doing the appropriating.<sup>202</sup> This idea, however, is countered by the Ninth Circuit's attitude that even though more extensive use could be fair use if it builds on the original, the parodist is still not entitled to verbatim copying – the "best parody" – even if it makes the parody more effective. The Second Circuit also seemed to realize this, because in the later case of *Warner Bros. Inc. v. American Broadcasting Co.*, it stated, "we question whether the defense could be used to shield an entire work that is substantially similar to and in comparison with the copyrighted work."<sup>203</sup> It should also be noted that "I Love Sodom", despite its provocative name, was tame enough to be broadcast on prime-time television without any complaint, unlike "Champion".

In the December 19, 1977 issue of the pornographic *Screw* magazine, Milky Way Productions published a picture of Pillsbury's mascots, the male Poppin' Fresh and the female Poppie Fresh, "engaged in sexual intercourse and fellatio". Milky Way defended the picture as fair use.<sup>204</sup> Pillsbury brought suit in Georgia, and the District Court there made some rather curious findings. Pillsbury had alleged that Milky way had violated its copyrights in the Poppin' Fresh and Poppie Fresh dolls it had created, the portrayal of those figures on the label for its cinnamon rolls, its jingle as well as trademark infringement. The district court found that Milky Way had infringed Pillsbury's copyrights on the cinnamon roll label and the jingle, but that its infringements were

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<sup>202</sup> *Wilkins v. Aikin* 17 Ves. (Ch.) 422 (1810) at 426.

<sup>203</sup> *Warner Bros. Inc. v. American Broadcasting Co.* 654 F.2d 204 (2d Cir. 1981) at 211. This was a case involving Warner, who owned DC Comics and the Superman character, suing ABC for the series "The Greatest American Hero". The court found that there was no substantial similarity.

protected by the doctrine of fair use. It stated, "After reviewing Milky Way's presentation, the court concludes that is more in the nature of an editorial or social commentary than it is an attempt to capitalize financially on the plaintiff's original work. Although the portrayal is offensive to the court, the court had no doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters."<sup>205</sup> The court answered Pillsbury's argument that the "salacious" nature of the portrayal should preclude fair use in rather strong terms and is worth quoting in full:

The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use. In *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852, 203 U.S.P.Q. (BNA) 1041 (5th Cir. 1979), cert. denied, 445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1277 (1980), the Fifth Circuit addressed the question of whether an obscene work is entitled to protection under the Copyright Act. Concluding that the statute contained no explicit or implicit bar to copyrighting obscene materials, the court construed the statute as providing for the copyright of all creative works, obscene or non-obscene. After holding that the Copyright Act, so construed, did not violate the Constitution, the court declined to create an obscenity defense to infringement actions involving immoral or obscene works, stating that it is "inappropriate for a court, in the absence of some guidance or authorization from the legislature, to interpose its moral views between an author and his willing audience." *Id.* at 861. If one assumes that Milky Way's portrayal containing Pillsbury's copyrights was immoral and/or obscene, this case presents the flip-side of the question presented in *Mitchell*: whether there is an "obscenity" exception to the fair use defense contained in the Copyright Act. For the reasons stated in *Mitchell*, the court concludes that there is not. Because the definition of obscenity varies from community to community and the applicability of the Copyright Act (including the fair use defense) does not, an obscenity exception to the fair use defense could fragment the uniform national standards of the Copyright Act.<sup>206</sup>

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<sup>204</sup> *The Pillsbury Company v. Milky Way Productions, Inc.* 8 Media L. Rep. 1016 (N.D. Ga. 1981).

<sup>205</sup> *Ibid.*, at 23-24.

<sup>206</sup> *Ibid.*, at 25.

Pillsbury cited *Air Pirates*, arguing that Milky Way had taken more than was necessary, but the court found that there was no harm to the Pillsbury's potential market. Remarkably rejecting the "recall and conjure" threshold, the court held that "the fact that the defendants used more than was necessary to accomplish the desired effect does not foreclose a finding of fair use," and that all four factors under the 1976 Copyright Act had to be considered. The court went on to say that it "does not condone the manner in which Milky Way chose to assault the corporate citadel, but value judgments have no place in this analysis."<sup>207</sup> But although it found that there could be no market confusion and thus no trademark infringement, the court did hold that Milky Way was in violation of Georgia's "anti-dilution" statute, because "there is a likelihood that the defendants' presentation could injure the business reputation of the plaintiff or dilute the distinctive quality of its trademarks."<sup>208</sup> The district court remanded the case for a hearing on final relief and it does not seem to have been appealed. One wonders what the Eleventh Circuit would have made of it, but on its face, the reasoning is sound, and is the only reported case where an offensive parody has been allowed, even though in the end Milky Way fell foul of another law. A more cynical interpretation of the decision is that the court was hiding the ball, so to speak. Having found a reason to penalize Milky Way, it found no reason (and little room) to dance around fair use doctrine as explicitly laid down by the 1976 Act and went for the more obvious "out" instead, both absolving and penalizing Milky Way at the same time.

*MCA, Inc. v. Wilson* finally reached the Second Circuit in 1981. Despite the Second Circuit's finding in *Elsmere*, the majority of the panel affirmed the district court's

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<sup>207</sup> Ibid., at 28.

<sup>208</sup> Ibid., at 40-41.

opinion, modifying only the finding for liability and damages. Patry opines that this was "based on a reluctance to find that the district court's findings of fact were clearly erroneous," noting that the majority observed that it "might have reached a different conclusion on the same facts."<sup>209</sup> The Second Circuit also rejected the district court's requirement that the parody specifically satirize about the original, but that being said, "If the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up." This was also an observation made by the Ninth Circuit in *Air Pirates* and later on by the Second Circuit in *Warner Bros., Inc. v. American Broadcasting Co.* In other words, if there is not even an oblique reference to the original, then the taking is unnecessary and therefore may not be fair use. (This Supreme Court took this view up later in *Campbell v. Acuff-Rose Music, Inc.*, which I will discuss further on.) The Second Circuit majority opinion concluded in a revealing statement that, "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism. We conclude that defendants did not make fair use of plaintiff's song."<sup>210</sup>

It was this last statement that Judge Mansfield, the writer of the dissenting opinion in *MCA, Inc. v. Wilson*, seized on, articulating what he believed was the real reason behind the holding – that the court simply found the lyrics offensive. In addition to finding that the defendants had only appropriated enough as was needed to conjure up "Bugle Boy" and that there was no market interference, he stated:

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<sup>209</sup> 677 F. 2d at 185.

<sup>210</sup> *Ibid.*, at 185.

The majority implies that to "substitute dirty lyrics" should not permit a person to "escape liability by calling the end result a parody or satire on the mores of society." In my view the defendants' use of "dirty lyrics" or of language and allusions that I might personally find distasteful or even offensive is wholly irrelevant to the issue before us, which is whether the defendants' use, obscene or not, is permissible under the fair use doctrine as it has evolved over the years. We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average private citizen... As we pointed out in *Berlin* parody "has thrived from the time of Chaucer." Even the *Canterbury Tales* indulged largely in sexual satire.<sup>211</sup>

A comparison of the two songs shows a number of duplications in lyrics as well as in the music, but what seems to be appropriated is more the style of the Andrew Sisters' performance, and the tune of the parody, while reminiscent of the original and close in tone, is actually slightly different in terms of the melody used. Even granting that there is an admission of the reworking of the song by the defendants to resemble the original, the finding of a substantial similarity is hard to see, especially since the taking – a style – is of a type that is not protectible. Even if it were, the plaintiffs had no interest in it and therefore no basis for complaint.<sup>212</sup>

Mansfield's opinion puts its finger on the real basis of the decision, namely that the court does not want to endorse what it feels is offensive or obscene, no matter what. The characterization by the Second Circuit of "dirty lyrics" is very telling. Patry, however, believes that the court's rejection of the parody defense is justified even if the district court's findings were flawed, as the defendants admittedly were duplicating

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<sup>211</sup> 677 F.2d at 191.

<sup>212</sup> Portions of the score and music from both "Bugle Boy" and "Champion" can be read and listened to at the Columbia Law School Arthur W. Diamond Law Library Music Plagiarism Project's *MCA, Inc. v. Wilson* page <[http://www.ccnmtl.columbia.edu/projects/law/library/cases/case\\_mcawilson.html](http://www.ccnmtl.columbia.edu/projects/law/library/cases/case_mcawilson.html)>.

"Bugle Boy" for commercial gain and, towards that goal, had deliberately altered their own song to better fit "Bugle Boy" – "Such a commercial purpose cannot be deemed a fair use."<sup>213</sup> The difficulty with this view is that the same commercial purpose was present in *Elsmere*, as well as in *Berlin*, and in many other fair use cases. The existence of a commercial purpose may be a presumption against fair use, but it does not, *per se*, make the use an unfair one, as was seen in *Hustler Magazine, Inc. v. Moral Majority, Inc.*<sup>214</sup>

The adult magazine Hustler published in its November 1983 and March 1984 issues a parody of the Campari liquor advertisements. The original advertisements featured interviews with celebrities about the first time they had imbibed Campari. The Hustler parody used *double entendres* to suggest this "first time" referred to their first sexual experience instead. In the parodies, Hustler created a fictitious interview with Jerry Falwell, the leader of the Christian organization Moral Majority, and used it to imply that his first sexual experience was an incestuous one with his mother. At the bottom of the advertisement was a disclaimer that labeled it as a parody. When Falwell discovered this, he sent out 450,000 mailings to his members asking for \$50 contributions towards a possible libel suit. He followed this up with another mailing to 29,000 "major donors", and this time included the advertisement (with offending words blocked out), which earned \$45,000. A third mailing to 725,000 "followers" which also used the

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<sup>213</sup> Patry, *Fair Use*, 176.

<sup>214</sup> *Hustler Magazine, Inc. v. Moral Majority, Inc.* 796 F.2d 1148 (9<sup>th</sup> Cir. 1986); the presumption that commercial gain equals possibility of actual harm done to the plaintiff and thus being unfair use comes from the Supreme Court decision in *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417 (1984) at 451, a case not involving parody but whether videotape recording infringed on the copyrights of broadcast television programs.

advertisement brought in \$672,000 to keep Falwell's radio network on the air. He used the advertisement twice on his television show, also making appeals for donations.

Hustler filed suit for copyright infringement. Falwell disingenuously responded that he was merely replying to a personal attack and that the monetary appeals were "ancillary". Both the district court and the Ninth Circuit found that Falwell had used the parody for a commercial purpose but he had rebutted the presumption because he was responding to a personal attack.<sup>215</sup> Hustler pointed out that it was not necessary to show the advertisement, since Falwell had sent out his first mailing without it, but this did not sway the court. Judge Poole, dissenting at the Ninth Circuit, disagreed, saying that, "Quite clearly, the only reason for copying the entire parody would be to increase the chances that the parody would arouse such moral indignation that the members would be more likely to send in financial contributions... This purpose weights strongly against... fair use."<sup>216</sup>

Putting the fact that Hustler's work was a parody aside, what is remarkable about the decision is that Falwell had copied the entire work over a million times. He had not just reproduced what was necessary to get his point across, that he was the victim of a libelous attack, but he sent out the whole advertisement to his members for a commercial purpose. And yet, both courts found that was fair use, whereas in *Air Pirates* they had not. The Ninth Circuit even said explicitly that Falwell had "copied an entire work."<sup>217</sup> While Hustler's parody was not sexually explicit, it did form part of a magazine that contained pornography. It is difficult not to conclude that, between the nature of Hustler's business and the economic and political influence wielded by Jerry Falwell as a

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<sup>215</sup> 794 F.2d at 1152.

<sup>216</sup> 786 F.2d at 1157, 1158.



representative of the evangelical Christian Right, the decision was more influenced by these factors than any legal standard of fair use.

The Supreme Court finally weighed in on parody with its 1994 decision in *Campbell v. Acuff-Rose Music, Inc.* The plaintiff, Acuff-Rose Music, was the copyright owner of the song "Oh, Pretty Woman," recorded by the late Roy Orbison. The defendants were the rap group 2 Live Crew, who had recorded a parody of the song titled "Pretty Woman" on their album "As Clean As They Wanna Be," which contained music from the original as well as some of the lyrics. Ten days before the album's release in 1989, 2 Live Crew had informed Acuff-Rose of the parody and offered to give credit and pay a mechanical reproduction license fee. Acuff-Rose's refusal only came two days after the release, and a year later, it filed suit for infringement.<sup>218</sup> The district court in Tennessee granted 2 Live Crew summary judgment based on fair use in 1991. Judge Wiseman observed that they published the song for commercial profit, but that this did not preclude fair use. The purpose of the recording was deemed important, with Wiseman quoting *Fisher v. Dees* in stating, "Many parodies distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.'"<sup>219</sup>

Wiseman also gave a detailed analysis on why the 2 Live Crew song was a parody (rejected plaintiff's arguments that it was not), finding that, "2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the

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<sup>217</sup> Ibid., at 1154.

<sup>218</sup> *Campbell v. Acuff-Rose Music, Inc.*, 506 U.S. 569 (1994).

<sup>219</sup> *Acuff-Rose Music, Inc. v. Campbell* 754 F. Supp 1150 (M.D. Tenn. 1991) at 1154, citing *Fisher v. Dees* 794 F.2d 432 (9<sup>th</sup> Cir. 1986) at 437, which in turn was quoting *Pillsbury v. Milky Way* (see above). *Fisher* involved a parody of the song "When Sunny was Blue", titled "When Sunny Sniffs Glue". The parody was adjudged fair use.

Orbison song seems to them."<sup>220</sup> As to the amount appropriated, despite Acuff-Rose arguing, like the court in *Disney*, that since "Oh, Pretty Woman" was so famous, that the defendants had taken more than was needed to conjure up the original, Wiseman found otherwise.<sup>221</sup> Wiseman also found no market impact, and although Acuff-Rose submitted that it prevented them from releasing a rap version of the original, Wiseman pointed out that it did not preclude them from doing a non-parody version of the song.

On appeal, the Sixth Circuit reversed and granted summary judgment to Acuff-Rose, even though Acuff-Rose had not asked for summary judgment. The Sixth Circuit's decision was based on a very unbalanced reading of the *Sony* presumption. While accepting the district court's assessment that the 2 Live Crew song was a parody, the Sixth Circuit reverted back to the old idea that parody is no different from any ordinary use, and that the mere commercial nature of a parody is a strike against the parodist. The Supreme Court unanimously reversed the Sixth Circuit's opinion.

### *3: "Illustrative but not limitative."*

The Court's opinion in *Acuff-Rose* is wide-ranging on several aspects of fair use, including parody. The Supreme Court first recognized that a parody might qualify as fair use, but that parodies have to be examined on a case-by-case basis. Justice Souter, presenting the opinion, noted that "the task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis... The text...

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<sup>220</sup> 754 F. Supp at 1155.

<sup>221</sup> *Ibid.*, at 1157. Patry calls this "a questionable conclusion given the repetitive nature of the appropriation."

(is) "illustrative and not limitative." The four factors had to be weighed as a whole and not "treated in isolation."<sup>222</sup>

The first factor, which involved the purpose of the use, harkens back to *Folsom* in asking if defendant has merely appropriated the work, or whether the use is "transformative". Since the goal of copyright was to encourage creativity in the arts and sciences, "the more transformative the new work," the less other factors, like commercialism might count against it for unfair use.<sup>223</sup> Parody as in *Fisher* and *Elsmere*, was a subcategory of criticism, and "the threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use."<sup>224</sup> However, although the parody may comment on society in general, to qualify as a parody it must at least target or comment on the original in some form, rather than use the original as a means to "get attention or to avoid the drudgery in working up something fresh."<sup>225</sup> If the parody did not refer back to the original, it was mere satire, "which can stand on its own two feet and so requires justification for the very act of borrowing."<sup>226</sup>

The second factor concerning the nature of the work "added little" to the analysis of the case because, by definition, a parody "almost invariably" copies other's works.<sup>227</sup> The Sixth Circuit's "mechanical" application of the commercial presumption against fair use was in error, as well as its overemphasis on the commercial nature of the 2 Live Crew

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<sup>222</sup> 506 U.S. at 577-578.

<sup>223</sup> Ibid., at 579.

<sup>224</sup> Ibid., at 582.

<sup>225</sup> Ibid., at 580.

<sup>226</sup> Ibid., at 581.

<sup>227</sup> Ibid., at 586.

recording. Commercial use, *per se*, does not automatically mean unfairness, and in any case, many activities have profit as a goal, including those mentioned in § 107.<sup>228</sup>

The third factor, how substantial the appropriation was, could impact on the first or fourth factors, namely a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth."<sup>229</sup> Like the "Sid Caesar" case, the Court acknowledged that parody required more leeway in the amount of copying allowed than other works. Although, obviously, that did not extend to near-verbatim copying, after enough was appropriated to conjure up the original, "how much more is reasonable 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." That is, the fourth factor.<sup>230</sup>

The Court did not agree that 2 Live Crew had taken more than needed to be taken for the purposes of conjuring up the original, but remanded the case to the district court for a determination if the repetition of the original's bass line was excessive. The Supreme Court also asked the district court to determine if the parody damaged any potential market for a rap version of the original, which Wiseman had mentioned but had not held on as the parties had not submitted any evidence either way.

*Acuff-Rose* was a synthesis of all of the fair use law that went before. It encapsulated everything, and at the same time, it said nothing that we did not already know. Parody was a criticism; parody could be fair use; parody should be given latitude to appropriate; parody cannot appropriate more than necessary to "conjure up" the original, and the more it does, the less it will be considered fair; and fair use has to be

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<sup>228</sup> *Ibid.*, at 584.

<sup>229</sup> *Ibid.*, at 587.

decided on a case-by-case basis. Its most significant finding was its strong repudiation of a mechanical application of the commercial presumption in *Sony* – profit was only one factor and not the be all and end all of fair use as the Sixth Circuit seemed to believe.

And yet, all this analysis of fair use misses a more basic point: the infringing work in question must be defined as a parody before it is allowed this greater fair use protection, or else the question becomes moot. In this respect, the Court's distinction between parody and satire – the latter being something that can "stand on its own" without reference to the original – is horribly subjective and very debatable. *The Mouse of Air Pirates Funnies* could arguably be a parody because it refers directly to the original, and yet it could be a satire because it comments on the seamy underside that lurks beneath childhood icons in general and for that it does not need to use Mickey. The distinction is an artificial one, and it leaves cases like *Berlin* completely out in the cold, where the lyrics of the parody made absolutely no reference to the original tunes on which they were "to the tune of". In allowing the lower courts to determine if a particular work is parody or not, Justice Kennedy even seemed to think that on remand, the district court might find that the 2 Live Crew song was not a parody and thus not fair use.<sup>231</sup>

In its 18 pages, *Acuff-Rose* only mentioned the *Air Pirates* case once – in a dismissive manner in relation to the substantiality factor. Justice Kennedy in a concurring opinion lumped it along with a singing telegram company that DC Comics successfully sued for their "Super Stud" and "Wonder Wench" characters. Justice Kennedy cited *Air Pirates* and *DC Comics, Inc. v. Unlimited Monkey Business, Inc.* in support of the

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<sup>230</sup> Ibid., at 588.

<sup>231</sup> Ibid., at 599-600: "The Court decides it is 'fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree.' ...While I am not so assured that

proposition that "courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses."<sup>232</sup> This seems, however, a poor description for what O'Neill did, which was more than just "a few silly words" or placing the characters in "novel or eccentric poses."

Would the outcome *Air Pirates* have been different in light of *Acuff-Rose*? From a strict legal analysis, it is difficult to say. Even if the court accepts that the *Air Pirates* could be a parody, the four-factor test of § 107 is just as wooly. The third factor, namely how much is too much now also becomes a Scylla and Charibdis scenario – appropriate too little, and you run the risk of the parody being satire and thus unfair use. Appropriate too much, and then you become accused of copying verbatim. The fourth factor – that of market impact, and whether the parody would substitute for the original, would seem to weigh heavily in favor of the *Air Pirates*, as it cannot be seriously be argued that *Air Pirates Funnies* would be able to substitute for or damage any of Disney's markets, potential or otherwise. Its underground nature practically precluded that, and as the Pirates pointed out, Disney was hardly going to parody itself, and especially not in such an offensive manner.

However, the Court made it clear in *Acuff-Rose* that all four factors would have to be weighed in totality, although the more "transformative" it was, the less commercialism would weight against fair use. The Supreme Court did go against the "conjure up" test by saying that a parodist could go beyond that, limited by the purpose of the parody (commercial or not) and how much of a market substitution impact that had on the

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<sup>2</sup> Live Crew's song is a legitimate parody, the Court's treatment of the remaining factors leaves room for the District Court to determine on remand that the song is not a fair use."

original. While one could argue that the market impact on Disney was negligible, one still runs up against the verbatim copying of the character designs. This is the biggest strike against the Pirates – they copied the design of Mickey and the other Disney characters exactly, and speaking of near-verbatim, right down to the cover of *Air Pirates Funnies* #1 being a duplication of the 1933 "Mail Pilot" Big Little Book. How precisely transformative of that duplication the story was, and whether that would sway the court, is a very subjective test – and the 1976 Copyright Act actually codifies this subjectivity rather than trying to make it less so.

Ultimately, one suspects that the way the Pirates portrayed Mickey would have played an important part in any court's reasoning. Commentators agree that "as a general rule, parodies that do not transgress accepted norms of 'taste' and 'decency' are more likely to acquire fair use protection," despite these being irrelevant considerations. The ability of a court to decide whether an infringing work is parody or satire makes this even easier for them to put works that are offensive to them out of the stronger protections that fair use offers parody.<sup>233</sup>

#### *4: After "Pretty Woman"*

Since *Acuff-Rose*, two cases of offensive parody have arisen that have arisen that show that the courts still have trouble with offensive parody. In 1997, Thomas Forsythe, a photographer who created works with "social and political overtones" created a series

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<sup>232</sup> Ibid., at 598.; *DC Comics, Inc. v. Unlimited Monkey Business, Inc.* 598 F. Supp. 110 (N.D. Ga. 1984).

<sup>233</sup> Jacobson, "Faith, Hope & Parody", 1021; see also Lehr, "The Fair-Use Doctrine Before and After 'Pretty Woman's' Unworkable Framework", 460ff. My view is that Lehr is incorrect when he says that the Pirates

of 78 photographs titled "Food Chain Barbie", showing Mattel, Inc.'s Barbie doll in "various absurd and sexualized positions." These photographs juxtaposed Barbie with various kitchen appliances – one, "Malted Barbie", showed a naked doll placed on a "vintage Hamilton Beach malt machine." Another, "Fondue a la Barbie", showed Barbie heads floating in a fondue pot. "Barbie Enchiladas" is exactly what it sounds like – three Barbie dolls wrapped up in tortillas, covered with salsa and placed in a casserole dish.<sup>234</sup> Forsythe's purpose, as he stated in his motion to the district court for summary judgment (which the court granted), was to "critique... the objectification of women associated with [Barbie], and... [to] lambast... the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies." Forsythe admitted chose Barbie as this object because she embodied the insecurities of beauty and the "perfection-obsessed consumer culture."<sup>235</sup> He displayed the works at two art festivals and on his website, but the actual distribution of the works were limited to several hundred copies and only earned him \$3,659.

The district court found, and the Ninth Circuit affirmed, that Forsythe's parody was fair use. They based this decision on the "case-by-case" holding of *Acuff-Rose*, determining first that Forsythe's work was indeed a parody. They rejected Mattel's evidence of using surveys, holding that the question of whether the work was a parody was a matter of law, not public opinion.<sup>236</sup> "As to substantiality, they found that Forsythe did not copy the "whole" of the work: "A verbatim copy of Barbie would be an exact three dimensional reproduction of the doll. Forsythe did not display the entire Barbie

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took less than in *Elsmere* and *Fisher*, however, which goes to show how subjective the substantiality test can be.

<sup>234</sup> *Mattel, Inc. v. Walking Mountain Productions* 353 F.3d 792 (9<sup>th</sup> Cir. 2003).

<sup>235</sup> *Ibid.*, at 796.



head and body in his photographs. Parts of the Barbie figure are obscured or omitted depending on the angle at which the photos were taken and whether other objects obstructed a view of the Barbie figure."<sup>237</sup>

The Ninth Circuit also seemed to find that the nature of the work, a photographic display, persuasive. Here, the original work was a doll, and the allegedly infringing work a photograph of that doll. Forsythe had to create a context around that doll and thus was adding to it in the same way 2 Live Crew did in *Acuff-Rose*, and was thus not more than was necessary to conjure up the original. Besides, *Acuff-Rose* made it clear that taking more was not necessarily fatal to the parodist's case.<sup>238</sup> Finally, they found no market harm, particularly since Mattel was unlike to create a line of "adult" dolls or photographs of their dolls in sexualized positions.<sup>239</sup> Curiously, although Forsythe did try to sell copies of his photographs and display his work at art shows, the Ninth Circuit ruled no trademark dilution because it considered the work "noncommercial speech."<sup>240</sup>

It should be noted, however, that despite the use of nude Barbies, the dolls themselves have barely any secondary sexual characteristics and despite sexualized situations, the photographs themselves cannot be considered sexually explicit or even use explicit language – and definitely not on the level of *Air Pirates* or *Wilson*. This probably made it easier for the district court and the Ninth Circuit to decide in favor of Forsythe,

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<sup>236</sup> Ibid., at 801.

<sup>237</sup> Ibid., at 803-804.

<sup>238</sup> Ibid., at 804.

<sup>239</sup> Ibid., at 806. Reference was also made to *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002), involving the sale by artist Susan Pitt of "Dungeon Dolls", altered Barbies in sadomasochistic gear. No market harm was found in that case.

<sup>240</sup> Ibid., at 812.

particularly since the commercial element was minimal (though not, as the decision implies, absent).<sup>241</sup>

In 1998, comic book artist Kieron Dwyer created a parody of the Starbuck's Coffee mermaid logo, portraying the mermaid as bare-breasted, holding a cellular phone and a cup of coffee, with "prominent nipples and a navel ring." In place of the "Starbucks Coffee" legend with stars, it had "Consumer Whore" and dollar signs. The "Consumer Whore" parody was only one of a number of parodies that Dwyer had done, including Pokemon, ("Tokemon"), Evian water ("Elian", after the Cuban *cause célèbre*) and a Microsoft hand icon with the middle finger raised.<sup>242</sup> Dwyer sold T-shirts and stickers with the parody logo through his web site, justifying it by saying that it captured the "crass, rampant commercialism in this country." (Figure 7)<sup>243</sup>

Starbuck filed suit in April 1999, getting a temporary restraining order and moving for a preliminary injunction and demanding all T-shirt profits plus damages. Dwyer commented that it was like "carpet-bombing an anthill." Starbucks claimed copyright infringement, trademark infringement and unfair competition. Dwyer's parody made Starbuck's corporate logo "sexually offensive to a substantial portion of the public" and associated it with "conduct that many consumers will find lewd, immoral and unacceptable." It was *Air Pirates* all over again.<sup>244</sup>

Judge Maxine M. Chesney of the California District Court heard Starbucks' counsel John C. Rawls cite a long line of cases involving "tarnishment" of trademarks,

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<sup>241</sup> Examples of the Forsythe photographs can be seen on the web at  
<[http://www.pdonline.com/photodistrictnews/headlines/gallery.jsp?vnu\\_content\\_id=1000589628&no=1](http://www.pdonline.com/photodistrictnews/headlines/gallery.jsp?vnu_content_id=1000589628&no=1)>

<sup>242</sup> Victoria Slind-Flor, "Starbucks Unamused by Parody", National Law Journal, May 30, 2000  
<<http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZW0AIIQ8C>>.

<sup>243</sup> Paul Brandus, "Hot Water: Starbuck sues a citizen", *Salon.com*, June 1, 2000  
<<http://dir.salon.com/business/feature/2000/06/01/starbuckssuit/index.html>>.

<sup>244</sup> *Starbucks v. Dwyer*, Case No. C00-1499 (2000), unreported.

including "Genital Electric", "Buttweiser" and "Gucci Goo" diaper bags, all which were ruled to have degraded the trade marks of the respective companies. On the strength of this, Chesney granted the preliminary injunction, and in June after hearing oral arguments from both sides, made the injunction permanent. However, this order was not made on the basis of unfair use – Chesney found both fair use for Dwyer's parody and lack of market confusion ruling out trademark infringement. However (echoes of *Pillsbury*), she found that Dwyer's commercial use of the parody by selling T-shirts and stickers violated California's trademark dilution laws. Dwyer was therefore in the strange position of having a legitimate parody but not allowed to display it. Both sides considered it a victory – something that the parties in the *Air Pirates* case also ultimately did.<sup>245</sup>

Forsythe was decided after Dwyer, but as pointed out, Forsythe's parody was of a level of offensiveness below that of the earlier cases – and the Ninth Circuit did not even come down on whether his works were offensive (at worst, they declined to decide if his work was "powerful or banal"). I have my doubts that the Ninth Circuit would be as generous if the dolls had been anatomically correct.

At their strongest, the cases I have discussed, from *Mature Pictures* to *Starbucks*, show that if the parody involves strong language or explicit sexual content, the courts will rule against the parodist. Even if Forsythe's case signals a swing towards the parodist, at their weakest, the cases still suggest that there is no consistent framework for determining whether a commercial work involving sexual content is parody and thus fair use, leaving the parodist's freedom to create works of editorial comment in doubt. Either

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<sup>245</sup> John Woods, "Judge Considers Starbucks' Restraining Order", *ALM*, June 5, 2000 <<http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZRWUCS49C>>.

way, the parodist is limited in the scope of what he can portray in his work, and proceeds outside the bounds of taste or decency at his own risk.

Unlike O'Neill, Dwyer did not appeal the case up to the Ninth Circuit, but settled with Starbucks soon after. According to Dwyer, "In our private meetings with the judge, she agreed that Starbucks was overreaching, but she clarified things for me. In essence, she confirmed that the legal system is tilted in favor of Starbucks and every company like it. They can and will tie you up in litigation as long as they want, she said, and maybe you'll win in the end, but it will cost you a lot of time and money to find out. You may be right, but how much does it matter to you to be the fly in Starbucks' ointment? Can you walk away from it?"<sup>246</sup> Dwyer took Chesney's advice and walked away, settling for undisclosed terms. One of those terms, however, was definitely not to display the logo again, as it appears nowhere on Dwyer's site.<sup>247</sup>

Nearly three decades separated O'Neill and Dwyer's works, and the counter-revolutionary spirit obviously was not what it used to be. Back in 1979, however, the Supreme Court having denied him his day in court, and the judgment of the Ninth Circuit against him, O'Neill was just getting started.

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<sup>246</sup> Kieron Dwyer, "Sued by Starbucks, Concluded", *Too Much Coffee Man* #11, reproduced at <[http://www.tmcn.com/pages/mag\\_content/tm11/sued\\_pt2.html](http://www.tmcn.com/pages/mag_content/tm11/sued_pt2.html)>.

<sup>247</sup> The logo can still be seen, however, on the Comic Book Legal Defense Fund's web page on the Dwyer-Starbucks lawsuit, at <<http://www.cbldf.org/pr/001130-starbucks.shtml>>.

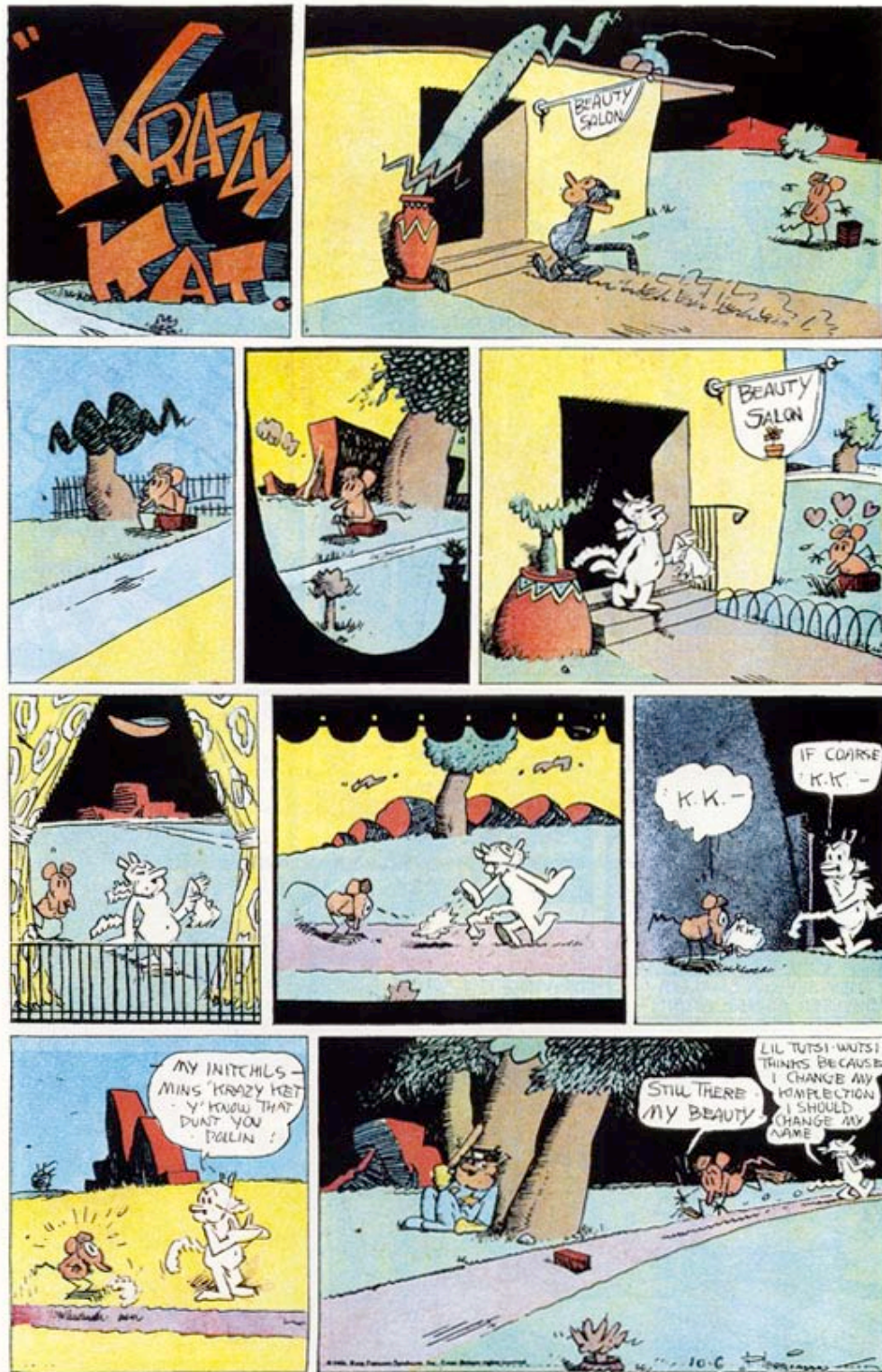


Fig 6: A page from George Herriman's *Krazy Kat* (compare with Fig. 1)





Fig 7: Kieron Dwyer's "Consumer Whore" Starbucks parody (1998)

## CHAPTER FIVE

*I: "Doing something stupid twice is a philosophy."*

In the motion picture comedy *Monty Python and the Holy Grail*, there is a scene where King Arthur fights an adversary called the Black Knight. In a very mismatched battle, Arthur first slices the Black Knight's left arm off. The Knight insists that it is just a scratch and goads Arthur on. Arthur slices the Knight's right arm off and declares victory. The Knight starts to kick Arthur, continuing to taunt him. The Knight responds to Arthur's observation that he has no arms by dismissing it as a flesh wound, calling Arthur "Chicken." Arthur cuts one of the Knight's legs off, and the Knight declares he is invincible. The other leg comes off and the Knight proposes they call it a draw. Arthur walks away disgusted and the Knight shouts after him, "I'll bite your legs off!"<sup>248</sup>

To an outsider observing O'Neill's actions at this point, he might have seemed like the Black Knight. O'Neill states that his intention had always been to "lose all the way to the Supreme Court." Now that had been denied him, he was facing over two hundred thousand dollars in combined damages and lawyer's fees. His response was to defy the injunction; force Disney to have him held in contempt of court and put him in jail. O'Neill said to Levin, "And then they (the court) have to put you in jail. For drawing a mouse? In the land of the free? No way. And any storm that came down would force

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<sup>248</sup> Terry Gilliam and Terry Jones, dirs, *Monty Python and the Holy Grail*, (Python (Monty) Pictures Limited, 1975).

them to change their interpretation."<sup>249</sup> The idea, O'Neill told me in our telephone interview, was to make them look stupid, and the American people would not abide stupidity. To these ends, he contacted Steward Brand, the publisher of *Co-Evolution Quarterly*, a magazine that put out articles on Appropriate Technology and published through POINT, Brand's non-profit corporation.<sup>250</sup> O'Neill had been a regular contributor to the *Quarterly* for a number of years, and Brand was aware of the *Air Pirates* case. Brand agreed to let O'Neill put in a piece in issue 29 (Spring 1979), titled "Communiqué #1 from the M.L.F." (Mouse Liberation Front). A beautifully drawn 4-page story, with O'Neill's mimicry of the Floyd Gottfredson style at its most impeccable, it uses Mickey and Minnie Mouse again and takes up the unfinished story of *The Mouse* several years after. Mickey and Minnie are now married. They explain to the reader that their "nephews" (really their children whom they were not allowed to acknowledge during their "Hollywood" years) planned their kidnapping by the Air Pirates just to bring the couple closer together (Figure 8).

The story has a curious moral. In flashback, we see the Mouse kids holding Mickey and Minnie in captivity, separated by a glass wall, noting, "We wouldn't let them sleep together until they were married." The children hasten to add that they "weren't uptight about pre-marital sex... we just wanted them to be crazy about each other."

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<sup>249</sup> Levin, *Pirates*, 203-204.

<sup>250</sup> Thinkers like Roszak and Charles Reich (*The Greening of America*, 1970) reflected the neo-Luddite perspective that the systems stemming from the technocracy meant, "there was nothing small, nothing simple, nothing remaining on a human scale." However, E. F. Schumacher in his 1973 *Small is Beautiful* proposed that, rather than abandoning technology, the solution to the disconnectedness between nature and technology was to apply the latter to specific local communities and ecosystems – for example, windmills and small water turbines for developing countries – what was termed "appropriate technology", or AT. The AT movement, begun in 1968, edged out the neo-Luddites, particularly in the environmental movement, and their means of protest was not to destroy the machine, but to decentralize it and put it to individualistic use; in other words, to "unplug from the grid". For more on AT, read Andrew Kirk's article, "Machines of Loving Grace: Alternative Technology, Environment, and the Counterculture" in *Imagine Nation*.



Mickey comments that during the captivity, "As Skinner's pigeon feels towards his corn... that's me and Minnie." In other words, abstinence leads to emotional closeness, which is an interesting moral to take away. While this contrasts with the standard counterculture message of unbridled sexual liberation (and may be a consequence of a decade's distance from the Summer of Love), it is actually consistent with O'Neill's moralistic stance on sexuality in the earlier *Air Pirates*.

What is different about O'Neill's stories in *Air Pirates Funnies* is that the sex act is not as central as it is in other underground comics of the time. *The Mouse* is really an adventure story with sex and drugs mixed in, and is about the hypocrisy of the Mouse's innocent image, not about sex in specific. Secondly, beneath the sex, there is an underlying concern about sexual morality in its discussions about temptation, masturbation and the consequences of promiscuity (one being venereal disease – Minnie accuses Mickey of having caught gonorrhea off Daisy – and another being emotional alienation). This divergence from the free love message of other underground comics may be because O'Neill, being an established newspaper cartoonist, came into the underground from a very different place than his fellow artists. Although he was connected with the counterculture life he "never bonded to that Haight-Ashbury scene" in the same way, finding more in common with the Beats than the hippies. His arguments in court were perfectly truthful – he was dealing with deeper issues than just sex and drugs that were not at all evident in the comic strips and books by the rest of the counterculture.<sup>251</sup>

"Communiqué #1" goes on to criticize the Ninth Circuit's decision in the *Air Pirates* case as being too vague. Misidentifying the Ninth Circuit as the "Supreme

Court", O'Neill quotes the court as saying that the Pirates had taken too much of the original when effecting their parody. Although "'some' says the Court, is OK... no one, including the Court, is sure *how much* is 'some'..." O'Neill juxtaposed this with a drawing of Mickey's head on a realistic rat's body, its tail curled around a sign that says, "Is this some?" Minnie also points to her gloved hand – which has five fingers instead of the usual cartoon four – with a caption, "Is this some?" The story ended with the M.L.F.'s "demands", that Disney drop all legal action and in return, the Pirates would stop doing "any more mouse-eating-snot jokes and settle down to making big bucks for Disney doing weird movies to pay off that \$190,000..."<sup>252</sup>

Ironically, Disney had on April 20, 1979, dropped its charges of trademark infringement, unfair competition and trade disparagement against the Pirates, content to keep its permanent injunction, summary judgment and bill of costs and damages. When POINT published *Quarterly*, in response, Disney charged O'Neill with contempt of court for violating the injunction, and included Stewart Brand in the complaint.<sup>253</sup> Brand was expecting this to happen. According to O'Neill, Brand's motivation for publishing "Communiqué #1" was that, "Here I am, forty years old, and all my friends have been sued for a million dollars. They've been in jail, and I haven't. This is my chance." The preparation of "Communiqué #1" was in secret so as not to attract Disney's attention prematurely.<sup>254</sup>

On May 2, Laveroni applied to Wollenberg to have O'Neill, Brand and POINT cited for contempt and fined \$10,000 each plus costs. A day later, they "asked to have the

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<sup>251</sup> Levin, *Pirates*, 49.

<sup>252</sup> Dan O'Neill, "Communiqué #1 from the M.L.F.", *Co-Evolution Quarterly* No. 21 (Spring 1979), 42-45

<sup>253</sup> Stewart Brand, "Disney Sues O'Neill, Brand and POINT", *Co-Evolution Quarterly* No. 22 (Summer 1979), 140.

United States Attorney's office prosecute them criminally." Laveroni argued with his usual vehement flair, submitting that O'Neill had "openly defied the dignity and authority" of the court, shown "utter disdain and disregard for the judicial process," and the court need to stop him lest he "encourage others to emulate his conduct."<sup>255</sup> Kennedy and McKenzie, in the meantime, asked to be discharged as O'Neill and London's attorneys, citing a potential conflict of interest between their client's instructions and several years of non-payment of attorney's fees.<sup>256</sup>

O'Neill found a new lawyer, John Keker, a former Marine who had also clerked for Chief Justice Earl Warren and a former Federal Public Defender, who agreed to defend O'Neill *pro bono* on the contempt charge. Lawrence A. Klein, a corporate tax attorney, represented Brand and POINT. At the hearing before Wollenberg, Keker and Klein pointed out that the injunction only stopped O'Neill from infringing Disney's copyrights – under the 1976 Copyright Act, what O'Neill was doing was fair use. They also raised the First Amendment specter again, as an alternative if the fair use argument was not accepted. Laveroni protested, urging the court not to allow O'Neill to attempt to re-try the *Air Pirates* case – it had already been adjudicated. Besides, Laveroni argued, even under the 1976 Act "Communiqué #1" obviously had a commercial purpose, also appropriated too much (and "toned down" version of the characters, without "obscene actions and scatological speech," made them even *closer* to Disney than before), and Wollenberg had already decided that the Pirates' work posed economic harm to Disney by tarnishing its image.<sup>257</sup> On June 27, O'Neill and Disney tried to settle the contempt

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<sup>254</sup> Levin, *Pirates*, 205; Telephone interview with O'Neill.

<sup>255</sup> Levin, *Pirates*, 205.

<sup>256</sup> Ibid., 207-8.

<sup>257</sup> Ibid., 211-214.

charges with a promise that he would no longer draw Mickey Mouse. O'Neill drew a picture of himself "in a barrel, with no clothes on, saying 'I won't draw Mickey Mouse.'" Laveroni was not amused.<sup>258</sup>

Eventually, what forced Disney's hand in negotiating a settlement was a grassroots uprising by O'Neill's fellow cartoonists, his Mouse Liberation Front made manifest. In the beginning, the M.L.F. was just O'Neill himself. The next member was Robert Beerbohm, who owned a chain of comic stores. After an evening where O'Neill commiserated with him about Disney having taken "everything he earned," Beerbohm asked O'Neill if he had watched the movie *Spartacus*. When O'Neill replied in the affirmative, Beerbohm quipped, "They can't hang everyone."<sup>259</sup> Grassroots movements that fight against larger organizations were not new, of course – the entire Civil Rights movement is representative of that, and as early as the 1920s consumers used their economic, purchasing power in boycotts to fight the rising price of consumer goods. What was unusual about the M.L.F. was that it fought Disney, not with boycotts, but with copyright violations. O'Neill himself organized the support for the M.L.F. in "brigades" along the same lines as the I.R.A. "cells" that he had observed first-hand during his time in Northern Ireland in the early 1970s, so that nobody outside the "brigade" could be identified for prosecution. There were about fifty of these brigades.<sup>260</sup>

Next, with Gary Hallgren in tow, the O'Neill and Beerbohm hit the comic convention circuit. At the 1979 New York Comic Book Convention held during the July

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<sup>258</sup> Ibid., 217.

<sup>259</sup> Ibid., 219. The account in *Pirates* makes it sound as if the M.L.F. was Beerbohm's idea. According to O'Neill, Levin (or possibly Beerbohm) had his facts wrong and O'Neill created the M.L.F. concept, then took Beerbohm on board. It is possible that both versions are true – that O'Neill created the name and idea of the M.L.F. for "Communiqué #1" and Beerbohm came up with the idea to make it an actual movement.

<sup>260</sup> Ibid., 220; Telephone interview with O'Neill.

4 Weekend, they sold T-shirts, buttons, belt buckles and other merchandise to raise money and publicity, not so much to finance O'Neill's defense (which was essentially over) but to embarrass Disney. As Levin notes, quoting Wilt Chamberlain, "No one roots for Goliath." O'Neill also made telephone calls and mobilized the M.L.F. brigades, which got artists to paint pieces featuring Mickey Mouse and associated characters for an art show. These included Mickey Mouse as the Mona Lisa, a "pastel portrait of an actual mouse with Mickey Mouse" cap-and-ears and a photographed of a nude, masked woman with Mickey painted on her breast, her nipple as his nose. O'Neill states that they were moving "thirty tons" of artwork on trains around the country, and getting his friends in the satirical comedy troupe the Committee and the Grateful Dead to perform skits and parody songs on the radio about Disney. The money gained from the sale of this art, according to O'Neill, went to the lawyers.<sup>261</sup>

At the 1979 San Diego Comic-Con, O'Neill appeared at two panels. One was on "Satire and Parody" and included Mort Walker, the creator of *Beetle Bailey*, and Harvey Kurtzman, who were apparently not enthusiastic about O'Neill's actions. Another panel on underground comics allowed O'Neill to claim that Mickey Mouse was in the public domain; the court had found O'Neill "not guilty" and ruled "in favor" of "Communiqué #1"; and that it was fair use as long as you were not commercially exploiting someone else's creations. All this, of course, was wildly inaccurate.<sup>262</sup>

At San Diego, the M.L.F. published "Communiqué #2", which featured "a dozen or so 'anonymouse,' pen-and-ink satiric Miceys," and a series of comic books by individual creators of up to, aptly enough, eight pages, which were "photocopied for

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<sup>261</sup> Telephone interview with O'Neill

<sup>262</sup> Levin, *Pirates*, 220-221.

further distribution." M.L.F. "operatives" delivered copies of these to the Disney studios in Burbank. A janitor who was sympathetic to O'Neill let them into the studios, and "two dozen Disney artists hosted a small party, crowned by O'Neill smoking a joint with his feet up on Walt Disney's desk."<sup>263</sup>

Faced with having to deal with more infringement cases and having apparently spent about \$2,000,000 in fighting the original case with little prospect of recovering those costs from an indigent O'Neill, Disney began settlement talks with the Pirates once more (they had ceased after the publication of "Communiqué #1"). The negotiations continued over the rest of 1979. Eventually, Disney agreed not to collect on the damages as long as the Pirates agreed to abide by the terms of the injunction and "neither draw for publication nor public display any Disney cartoon character." Laveroni filed the final stipulations for entry of judgment against O'Neill, London and Richards on January 18, 1980 – over eight years after the suit began in November 1971. The contempt charges were dropped, and as for Brand, who wanted a chance to be put in jail, found the experience "amusing and depressing" and had spent \$11,000 defending himself.<sup>264</sup>

Both sides claimed victory: Disney, because it had gotten its injunction and judgment as well as a promise from the Pirates, and O'Neill because he did not have to pay any of the damages or lawyer's fees.

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<sup>263</sup> Ibid., 221.

<sup>264</sup> Ibid., 222-223.

2: "They set back parody twenty years."

O'Neill claims to this day that because of *Air Pirates*, the law was changed and parody is allowed, referring to the Supreme Court decision in *Acuff-Rose*. This is somewhat misstating the influence of *Air Pirates* on the law of copyright infringement and fair use, as ultimately the Supreme Court did not rule on *Air Pirates* and it only made passing reference to it in the *Acuff-Rose* decision – and even then in an inaccurate manner. Prior to *Acuff-Rose*, the *Air Pirates* decision was cited, variously, for the propositions that parody is a defense against copyright infringement<sup>265</sup>; cartoon characters could be copyrighted<sup>266</sup>, that verbatim copying is not permitted under fair use<sup>267</sup>, that in the case of famous figures little is needed to "conjure up" the original<sup>268</sup>, that infringements prior to the 1976 amendments were governed under the 1909 Copyright Act<sup>269</sup>, that the First Amendment does not shield defendants where there are "alternative avenues of communication,"<sup>270</sup> and that trademark infringement does not exist where there is no market confusion.<sup>271</sup> Most of the time, therefore, *Air Pirates* is held up as a cautionary tale of what *not* to do.

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<sup>265</sup> *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.* 642 F. Supp. 1031 (N.D. Ga. 1986).

<sup>266</sup> *Woody Allen v. Men's World Outlet, Inc.* 679 F. Supp. 360 (S.D.N.Y. 1988); also characters in a visual medium may be copyrightable, distinguished from the "Sam Spade" case: *Klinger v. Weekly World News, Inc.* 747 F. Supp. 1477 (S.D. Fla. 1990).

<sup>267</sup> *Rogers v. Koons* 960 F.2d 301 (2<sup>nd</sup> Cir. 1992); But even if the copying is small, if it is qualitatively important, it can be unfair: *Baxter v. MCA, Inc.* 812 F.2d 421 (9<sup>th</sup> Cir. 1987).

<sup>268</sup> *New Line Cinema Corp. v. Bertlesman Music Group, Inc.* 693 F. Supp. 1517 (S.D.N.Y. 1988)

<sup>269</sup> *Harvey Publications, Inc. v. Columbia Pictures Inc.* 645 F. Supp. 1564 (S.D.N.Y. 1986); Conversely, infringements after 1976 fell under the new provisions: *Abend v. MCA, Inc.* 863 F.2d 1465 (9<sup>th</sup> Cir. 1988).

<sup>270</sup> *Mutual of Omaha Insurance Company. v. Franklyn Novak* 836 F.2d 397 (2<sup>nd</sup> Cir. 1987); *BMG Music v. Edmundo Perez* 952 F.2d 318 (9<sup>th</sup> Cir. 1991)

<sup>271</sup> *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Inc.* 604 F.2d 200 (2<sup>nd</sup> Cir. 1979); *The United States Jaycees v. Commodities Magazine, Inc.* 661 F. Supp. 1360 (N.D. Iowa 1987); *Ms. World (UK) Limited v. Mrs. America Pageant, Inc.* 856 F.2d 1445 (9<sup>th</sup> Cir. 1988); *Plasticolor Molded Products v. Ford*

And yet, after *Acuff-Rose*, the *Air Pirates* case continues to be cited. Once, as a note that the Supreme Court in *Acuff-Rose* clarified that the amount needed to "conjure up" the original could be exceeded, depending on the purpose of the parody and how much of a market substitution impact the parody had on the original,<sup>272</sup> as a continuing example of how comic book characters can be copyrighted<sup>273</sup>, and as a reminder that fair use does not entitle one to create the "best parody".<sup>274</sup> A check on Westlaw turns up, in total, 625 references, showing its longevity for a case that only made it up to the Ninth Circuit. In the comic book community, the *Air Pirates* case is a legend that gets trotted out time and again when the subject of copyright infringement or parody crops up. Part of this is due to the big splash that O'Neill and the Pirates made in the 1970s during the peak of the underground comics era as they fought Disney through the courts. Part of it is also certainly due to the hold that Disney continues to exert on the public imagination.

In *Air Pirates*, we have the first example of Disney going to court over a parody of its work that could conceivably have been justified under First Amendment or fair use provisions and actually getting a judgment saying that it was not justified. As I have noted, prior to *Air Pirates*, the only legal action Disney ever took against an appropriation of its characters in art (as opposed to people trying to make close copies of Mickey) was Sam Ridge and his copies of the "Disneyland Memorial Orgy", and that case was never adjudicated on in the end. Disney became increasingly bold in the enforcement of its copyrights after the *Air Pirates* case, particularly after Michael Eisner took over as chief executive officer of Walt Disney Productions in 1984, changing its name to the Walt

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*Motor Company* 713 F. Supp. 1329 (C.D. Ca. 1989); *Vanna White v. Samsung Electronics America, Inc.* 971 F.2d 1395 (9<sup>th</sup> Cir. 1992)

<sup>272</sup> *Leibovitz v. Paramount Pictures Corp.* 137 F.3d 109 (2<sup>nd</sup> Cir. 1998).

<sup>273</sup> *Neil Gaiman v. Todd McFarlane* 360 F.3d 644 (7<sup>th</sup> Cir. 2004).



Disney Company in 1986. In 1988, the merchandising department of Disney declared a war on "merchandise pirates."

Once again, it was the children who were at stake. "Our characters are the foundation of our business and project the image of our company, so it's imperative that we control who uses them and how they are used."<sup>275</sup> Between 1986 and 1991, Disney sued more than 1,322 parties. In 1991, they sued 123 companies in California and 99 in Oregon for "unauthorized use of characters in various types of merchandise." The most famous case in recent memory was the 1989 case where Disney threatened suit against three Florida day-care centers for using Disney characters in murals on their walls. Eventually, the centers took the murals down and replaced them with Universal Pictures and Hanna-Barbera cartoon characters, which the two companies provided free of charge, seizing on the chance to create favorable publicity. Disney even sued the Academy Awards in the same year for having actors dressed in *Snow White* costumes at the presentation, although the suit was eventually withdrawn.<sup>276</sup>

Where Disney does not sue outright, it applies pressure to get the results it wants. Wasko mentions how Disney was able to stop a French AIDS organization to pull a campaign that featured characters from *Snow White* and *Cinderella* despite the fact that parodies are permitted under French law. The paranoia of Disney can also be seen in the 1998 report in British newspapers of how the company was "closely watching the

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<sup>274</sup> *Anheuser-Busch, Inc. v. Balducci Publications* 28 F.3d 769 (8<sup>th</sup> Cir. 1994).

<sup>275</sup> "Disney Sues 200 People for Copyright Infringement", UPI Regional News Release, 6 October 1988, cited in Wasko, *Understanding Disney*, 84.

<sup>276</sup> *Ibid.*, 84; "Disney Files Suit against 123 California Cos., 99 Oregon Cos." *The Entertainment Litigation Reporter*, 22 July 1991.

development of the Millennium Dome" after Peter Mandelson, the British Secretary of State for Trade and Industry, had visited Orlando. Levin lists several other examples.<sup>277</sup>

Disney led the lobby that convinced Congress to write the Copyright Extension Act of 1998, better known as the Sony Bono Copyright Term Extension Act after Representative Sony Bono, the former singer and actor, who introduced it to the floor. Fashioned as a means to bring United States copyright law in line with the Berne Convention, it did not just extend copyright protection for individuals to life plus seventy-five years, but to corporations who owned such copyrights for life plus ninety-five years. Critics argued that the bill benefited "large entertainment and publishing corporations" and was not in the public interest. The point of copyright law was not about making money – it was about encouraging creativity, and that would not be possible if copyrights were extended to an unreasonable length just for the purpose of continual exploitation by the companies – or heirs – that owned them long after the original creators had died. In the end, the bill passed.<sup>278</sup> In 1999, Eric Eldred, an on-line publisher of public domain works joined with several other publishing companies whose output was mainly public domain works to challenge the constitutionality of the 1998 Act, appealing all the way to the Supreme Court. In a 7-2 decision delivered in 2003, however, the Supreme Court ruled that the Copyright Term Extension Act was constitutional. Following the decision, the story of the Pirates was raised again, as an example of Disney the monolith stomping on the underdog and the heartlessness of faceless, large corporations.<sup>279</sup>

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<sup>277</sup> Wasko, *Disney*, 84-85; Levin, *Pirates*, 242.

<sup>278</sup> Wasko, *Disney*, 85-86.

<sup>279</sup> *Eldred v. Ashcroft* 537 U.S. 186 (2003); Janet Heer, "Free Mickey!", *Boston Globe* (September 28, 2003), on-line at <[http://www.boston.com/news/globe/ideas/articles/2003/09/28/free\\_mickey/](http://www.boston.com/news/globe/ideas/articles/2003/09/28/free_mickey/)>.

The almost exponential increase in litigation can almost certainly be attributed to the rise of the entertainment industry post-World War II. With television, cable and satellite broadcasting reaching not just local but international audiences, the potential value of copyrights has increased to an incalculable degree. Ironically, Disney has not been immune to accusations of infringement. As I discussed in Chapter One, Lawrence Lessig has propagated the inaccurate story that Mickey Mouse's debut in *Steamboat Willie* was taken from Buster Keaton's *Steamboat Bill, Jr.* During a period when Disney was negotiating with Jim Henson for the rights to the Muppets, it was sued by Henson's estate for unauthorized use. Singers who provided the voice to Disney's movies also sued and got settlements for Disney's continuing use of their voices in video releases of the movies. They were also sued for the unauthorized use of the European cartoon character Marsupilami in their own animated series based on the character in 1997, for which they paid \$10 million. Most recently, Disney successfully defended a lawsuit by Shirley Slesinger Lasswell over alleged royalties owed over Winnie the Pooh. Lasswell is the widow of the literary agent who represented A.A. Milne, the creator of the Pooh character and was suing for what she alleged was over \$200 million in owed royalties, of which she had recovered \$66 million.<sup>280</sup>

### *3: Conclusion: Of Mice and Memory*

The debate over comic books as low or high culture continues today. The comic book industry managed to pull itself out of its slump in the 1980s, thanks to Phil Seuling

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<sup>280</sup> Ibid., 243; Laura M. Holson, "After 13 years, Judge Dismisses Case on Pooh Bear Royalties", *New York Times* (March 30, 2004), C1.

and his creation of the direct sales concept. Previously, comic book companies distributed their comics through newsstand vendors, overprinting their runs (which ran up costs) and accepting unsold returns. With direct sales, the companies would receive specific numbers of orders from distributors, who would in turn get those orders from comic shops, and these were non-returnable. Unsold books were then marketed as "collectibles", and a new speculative market rose which peaked in the mid-1980s to mid-1990s. There are now several thousand comic shops in the United States, and although the big companies like DC Comics and Marvel Comics have not completely eschewed newsstand distribution, they are a small percentage of the market compared to specialty stores. The Comics Code Authority, while continuing its hold on the mainstream industry throughout the 1980s, grew less and less relevant, especially once DC Comics began to publish its own line of "Mature Readers" comics and more recently, when even Marvel instituted its own rating system, from "General" to "Explicit Content". Independent comic book companies, like the earlier undergrounds, never catered to the Comics Code, and sold mainly through the specialty stores. Artists like Frank Miller continued to push the envelope as to what comics were capable of in books like *Sin City*, with its unflinching noir treatment of sex and violence. European comics and Japanese *manga* also began to be more widely distributed in America in the 1980s, some containing far more explicit content than previously seen in this country.

Some underground comic publishers survived the slump of the 1970s, although the publishing schedule has been more sporadic and these days they are categorized together with the independents. The underground comic, in general, no longer exists as a separate genre. The themes and visions that they promulgated, like the rest of the

counterculture, became slowly assimilated into the rest of the popular culture, with glimpses of their influence still present today. Comic books were never exclusively for children, but although they are still perceived as such, there is the growing awareness that they can be so much more, and that is the real legacy of the undergrounds.<sup>281</sup>

O'Neill now lives in Nevada City, California and continues to draw *Odd Bodkins*, which appears in various papers in Berkeley, Virginia City, Nevada and the *Anderson Valley Advertiser*. He is also a director in a gold mine, the Original Sixteen-To-One Gold Mine. He says he is still "at war" with the United States government on "four fronts". One was an allegation of manslaughter made against the mine by the State Attorney's office after an industrial accident that caused the death of a miner. The charges were dropped, but O'Neill and the other directors are suing the state for the loss of business caused by the eight-month shutdown of the mine. O'Neill's rebel nature is still there – he happily violated an earlier gag order given by the Sierra County Superior Court judge who was presiding over the investigation by drawing it into his comic strip. When I asked O'Neill if he would do it the same way again, he was convinced that he would have to, to achieve the results of him retrieving his copyright back from the *Chronicle*.<sup>282</sup>

The story of *Walt Disney v. The Air Pirates* is really the story of Dan O'Neill. It was his scheme, although hatched for what reason – to needle Disney, to make a point about parody, to get his copyright on *Odd Bodkins* back – is not clear, and ultimately, not the important thing. Despite its result now, on hindsight, being a foregone conclusion, it stands as a landmark whose legacy goes far beyond its legal significance. It continues to linger on in popular memory, and the matter of who won or lost continues to be debatable

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<sup>281</sup> Levin, *Pirates*, 236-239.

<sup>282</sup> Telephone interview with O'Neill; Levin, *Pirates*, 251.

and shifts depending on your point of view. From a legal standpoint, Disney won decisively, and there is nothing intrinsically wrong about the decision. From the perspective of the civil libertarian, Disney was being a thug and O'Neill scored a moral victory by using community support to force a settlement.

On one hand, O'Neill was a counterculture rebel and hero for standing up to the corporate giant. On the other hand, Disney was merely protecting what was theirs and O'Neill was being a punk, an *agent provocateur*. From one point of view, O'Neill is using sex to shock and to confront the orthodoxy and promote counterculture values of liberation through sex and drugs. From another, there is a moralistic undertone to his work. The *Air Pirates* case is a fascinating cultural artifact because it is capable of so many different constructions, and exists in all those forms in the popular consciousness.

If not for *Air Pirates* – and if not for O'Neill, Disney would not have pressed the issue to the extent that the Ninth Circuit had to make a definitive statement on exactly what parody did not permit you to do. O'Neill still believes he won, various people trying to tell him the opposite. The *Air Pirates* case saw the removal of First Amendment protection for copyright infringements; the unequivocal declaration that cartoon characters could be copyrighted where literary characters could not; that famous figures, to be parodied, need not be copied as extensively as little known figures; and that fair use does not entitle a parodist to the "best parody" – all these reverberated through the cases involving parody after 1979 and is still good law. Small wonder, then, that Edward Samuels, speaking to Levin, opined that the Pirates "set parody back twenty years." When Samuels talked about the *Air Pirates* to Levin, he stated that he believed that the court made the correct decision. "This wasn't *MAD*. This wasn't Weird Al (Yankovic),"

Samuels said, "They went far beyond the acceptable, and they would have kept going too far until they got the response they wanted." Samuels acknowledges that "going too far" was the attitude of the times, but that they still "went too far."<sup>283</sup>

But what does "too far" really mean, in the end, and is it even relevant? The point of copyright protection from the start, from the Statute of Anne in 1710 and the first United States Copyright Act of 1790 was "the Encouragement of Learning." For one, that protection was not supposed to last forever precisely to continue encourage learning, and surely learning includes questioning the messages we are presented with as well. Somewhere along the way, however, the balance between adding to the public's store of knowledge and the rewarding of the fruits of one's intellectual labor tilted towards an attitude that certain types of criticisms were *verboten*, not because they plagiarized, but because they crossed the line in terms of good taste, decency, offensiveness, or whatever cultural mores you care to mention. And all these factors have little or nothing to do with determining if a copyright has been infringed or not. Infringement may be theft, but parody is both a freedom and a powerful weapon – if one can pick the right target, and more importantly, aim straight.

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<sup>283</sup> Levin, *Pirates*, 226.

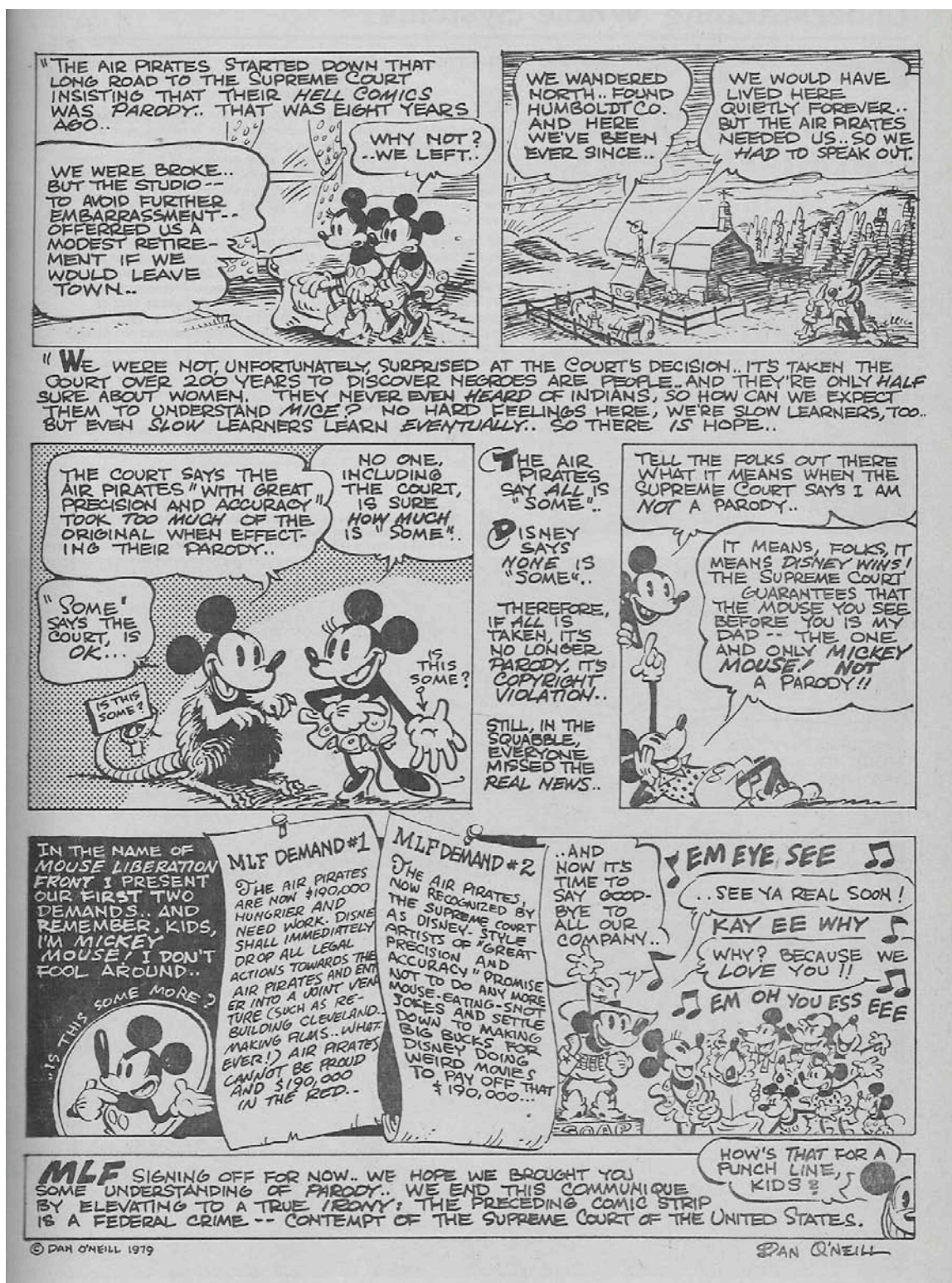


Fig 8: page from "Communiqué #1 from the M.L.F.", *Co-Evolution Quarterly* No. 21 (Spring 1979), 42-45



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