

RIDICULING THE 'WHITE BREAD ORIGINAL'

The politics of parody and preservation of greatness in *Luther Campbell a.k.a. Luke Skyywalker et al. v. Acuff-Rose Music, Inc.*

The 1994 US Supreme Court decision in Luther Campbell et al. v. Acuff-Rose Music, Inc., written by Justice David Souter, reversed a lower court decision and argued in favor of the rap group 2 Live Crew's playful critique of Roy Orbison's 'Oh Pretty Woman' by its function as parody. This essay seeks to contextualize that decision by showing the roots of 2 Live Crew's recording in the practice of 'covering' – the re-recording of an existent popular composition – and thus the possibilities for redefining authorship that arose with the advent of digital technology. The compositional techniques allowed by computer programs led to the proliferation of sampling in the hip-hop community, thereby liberating sounds from the original content and reconfiguring them in new songs. The technique allowed a critical, and in some cases adversarial, stance to be taken towards long-standing Western definitions of authorship and ownership. 2 Live Crew added to this rich stew of possibilities the familiar and time-tested genre of parody. Their piece took what one judge referred to as the 'white bread original' of the Roy Orbison record and twisted about the implicit point of view with regard to gender and sexuality. Discussion of the legal complications that followed upon the suing of the group by the holder of the copyright in the Orbison song, Acuff-Rose Music, Inc., includes the apparently sanctioned use of the song in the Disney-produced film Pretty Woman as well as the use of other Orbison material in director David Lynch's Blue Velvet. The essay concludes with suggestions as to how the language of Justice Souter's decision allows not only for future parodies but also a reinvigoration of speech, one which calls into question power relationships codified in US copyright statutes.

Keywords copyright; hip-hop; whiteness; parody; appropriation
2 Live Crew

[W]hy is it some things are taken for granted to be intellectual property and other categories of intellectual property are more recipes for struggle than clear guidelines for artists?

(Joel Schalit and Jonathan Sterne 1998, n.p.)

You can't judge a song by listening to its cover

One of the most resonant narrative motifs in the history of the US culture wars is the appropriation and emasculation of rock 'n' roll by interests representing the major power brokers as the genre began to kick up its heels in the 1950s. The rerecording – or 'covering' as the process was known in the industrial vernacular – of material performed by African Americans by Caucasian artists endeavored to eviscerate not only the commercial potential but also the creative vitality of some of the most spirited music of the era. It is easy to fall prey to attaching Machiavellian intentions to those engaged in the record business, but hard to avoid imagining that insightful executives recognized a potential goldmine in the repertoire of commercial black music.

A particularly savvy entrepreneur engaged in the process was Randy Wood, owner of Dot Records. Ironically, he grubstaked his entry into production through the mail order merchandising of black commercial records and gained considerable knowledge of the genre's repertoire in the process. The enterprise became the sponsor of 'Randy's Record Shop' hosted by DJ Gene Nobles and broadcast on Nashville's 50,000 watt WLAC. One of the most popular stations throughout the South, it was capable of being picked up as far north as Canada and as far south as Mexico. Dot went on to initiate the career of the white-bucked wonder Pat Boone, whose tepid renditions of Fats Domino's 'Ain't It A Shame', Little Richard's 'Tutti Frutti', and Ivory Joe Hunter's 'I Almost Lost My Mind' unfathomably sold as many and sometimes more copies than their sources. So successful was Dot that Wood eventually sold the concern to Paramount Pictures for \$5 million, a considerable sum at the time.

A lamentable motivation for the covering agenda was to dilute the sexually evocative dimension of much black music. Fevered denunciations of the purported 'leer-ics' contained in certain said-to-be salacious rhythm and blues songs of the day dominated the music industry press. Two of the most targeted compositions were the Dominoes' 'Sixty Minute Man' (a number one R&B hit in 1951) and the even more scandalous 1954 Hank Ballard & the Midnighters' 'Work With Me Annie' (another R&B number one, which remained on the charts for six months). The public apoplexy often did not mention the recurrent phenomenon of double entendre lyrics in popular music, regardless of the race of the writer or performer. Ironies abound here, too. The author of one of the enduring items in the subgenre of the

taboo-breaking hokum blues, Tampa Red's 'It's Tight Like That' (1929), was the gospel pioneer Thomas Dorsey, who penned 'Precious Lord'.

Jimmie Davis, the two time Governor of Louisiana who clinched his musical renown with 'You Are My Sunshine', rarely brought up on the campaign trail the presence in his catalog of such items as 'High Behind Blues' or 'Tom Cat and Pussy Blues' (1932), both accompanied by black guitarist Oscar Woods. Hindsight draws attention to the equal opportunity attraction of what some view as smut, others chuckle over as simple-minded salaciousness. To heighten the complexities of the matter, even those canonized for their role in liberalizing the depiction of human appetites can be appalled by what some people sing. D. H. Lawrence is said to have been so enraged by his lover Freida von Richthofen's copy of Bessie Smith's 'Empty Bed Blues' that he smashed it into pieces on the wall of Harry Crosby's Paris apartment.

Many black performers believed that covering undermined the longevity of their careers and even claimed unlawful appropriation of their very personalities. Vocalist LaVern Baker pursued an unsuccessful lawsuit that argued just such an abrogation of her creative identity. On the other hand, many black songwriters welcomed the financial remuneration from disks they might have abhorred aesthetically, as were Dorothy LaBostrie in the case of 'Tutti Fruitti' or Dave Bartholomew and Fats Domino with 'Ain't It A Shame'. In some instances, successful black songwriters of the day bypassed the notion of racial exclusion altogether and wrote directly for white performers, as did the late Otis Blackwell, who penned 'Don't Be Cruel', 'All Shook Up', and 'Return to Sender' for Elvis Presley and 'Great Balls of Fire' and 'Breathless' for Jerry Lee Lewis.

Yet, while creators like Blackwell could have a role in the interpretation of their work, the law does not permit writers, or their publishers, to control wholesale who records their repertoire or how they might interpret it for all time. In the lengthy duration of a song's existence in the commercial arena before it achieves a kind of ubiquitous afterlife in the public domain, creators and copyright holders might lament the form their works take, but, by and large, their consternation must remain cut off from active intervention into the realm of interpretation or artistic recreation.

If the process of covering preexistent material acquired a dubious connotation in the 1950s, that perspective altered virtually altogether following the introduction of digital technology some forty years later. Innovations such as the MIDI synthesizer permitted one to translate any body of sound, and particularly that to be found on analog recordings, into a form of code that could be inserted into a newly created composition. This allowed the entire recorded repertoire to be thought of as a kind of repository of ingredients that might be metamorphosed into something altogether novel and distinct from its constituent elements. African American musicians in hip hop particularly relished the opportunity to cut and mix the work of their

predecessors. In some cases, the process led to a kind of ancestor worship that lauded the achievements of members of their own community. In others, the integrated material was the object of some manner of comic or critical perspective, calling attention to questionable qualities in the original artists' achievements. One might say, by contrast, that such recordings, rather than simply covering another composition, instead *uncovered* qualities that heretofore were overlooked or inadvertently concealed.

The recording of Roy Orbison's 'Oh Pretty Woman' by the black rap ensemble 2 Live Crew constitutes just such a critical commentary on the work of an earlier artist. In this case, the group's transformation of the singer's rampant romanticism into a deliberately over-the-top and sexually explicit ode to ogling an objectified woman underscored the overly idealized dimensions of what the singer and music historian Oscar Brand dubbed Orbison's 'white bread original'. The song's publisher, Acuff-Rose, did not take that process of (un)covering lightly and accused the group of copyright violation. A lower court's decision in favor of the publisher, and the eventual clearance of the rap group and the acceptance of their use of the Orbison material as the vehicle of parody by the US Supreme Court, thus provide a fascinating, if at times labyrinthine, odyssey that illustrates the unlikely collision between the processes of (un)covering and the color-coding of both repertoire and performance in the public mind and the higher courts. While the examples listed above would appear to indicate that the covering process was both racially motivated and largely conducted by white artists at the expense of their black counterparts, the reverse also has occurred... albeit to different ends and effects.

Examples are rife of the ransacking of what has come to be referred to as the Great American Songbook associated with the Broadway stage and of a body of largely Eastern European, Jewish composers by African Americans. Where, for example, did much of the core of the material that constitutes the bebop repertoire take its point of departure, as Charlie Parker, Dizzy Gillespie and others disassembled the constituent melodic, harmonic and rhythmic elements of composers like Kern or Gershwin to come up with their own concoctions? In other cases, artists crossed over from one genre to another, as when Ray Charles released two LPs of country songs in the early 1960s to the consternation of those who did not recognize that while racial boundaries in our country often remain inflexible, artistic realms possess porous outer parameters.

The case of 2 Live Crew v. Acuff-Rose complicates this already unstable stew of interrelationships, however, in three important ways. First, the group engaged in covering the Orbison material with the deliberate aim of parody in mind, thereby calling attention to what it seemed they believed to be the emotionally attenuated nature of the original song. Admittedly, some might ask whether this rationale existed before or after the accusation of copyright violation, yet the force of the explanation remains. Second, one can think of what 2 Live Crew did in the context of Michael de Certeau's distinction

between a 'strategy' and a 'tactic'. It began as the latter, it would seem: the conscious manipulation of an event – the existence of the Orbison recording and the attendant public perceptions attached to it – into an opportunity for oppositional speech on the part of the rappers. I must assume that, at first, the group acted without a larger plan in mind, engaging in a process that de Certeau poetically describes as 'seized 'on the wing'' (1984, p. xix).

However, once Acuff-Rose threatened and took legal action, the seemingly haphazard, momentary gesture took on the qualities de Certeau attaches to a 'strategy'. The 'calculus' of a 'force-relationship' arose whereby 2 Live Crew found themselves defendants against 'a subject of will and power', and thereafter their rendition of 'Oh Pretty Woman' derived its meanings and its legal status primarily from the conditions established by that 'force-relationship' (p. xix). Third, and finally, the decision made by the US Supreme Court in 2 Live Crew's favor not only sanctions their strategy but implicitly ratifies future action on the part of other artists to employ similar tactics after recognizing the falsehood of the assumption that the owner of a form of speech simultaneously dictates its sole and unequivocal meaning.

Can I get a version?

One of the consistent ironies of technological innovation is that while an inventor may designate a specific use for any given apparatus, how the public at large employs his or her efforts often bears little or no resemblance to the assumed intentions. In this regard, all of us retain throughout our lives a child's imaginative grasp of metamorphosis, in that the manner with which a storage case can at a moment's notice become a castle translates over the course of time, and with the acquisition of some technological acumen, into the adaptation of existing computer code as a tool for transmitting information from peer-to-peer. (So many opportunities for modification; so little time.) Ironically, we owe the very existence of at least one element of the sound recording medium to innovations pioneered by military scientists employed by the Nazis (Sanjek and Sanjek 1996, pp. 221, 229–30). Little did the leaders of the party imagine that what they meant as a tool in the struggle for global domination eventually would fill the coffers of crooner Bing Crosby, one of the principal investors in the Ampex Corporation that marketed plastic recording tape on the home front.

The point of origin for that metamorphosis of plastic recording tape from a military to a commercial context possesses any number of possibilities. One can point to the episode in September 1945 when the head of the then Russian-run Radio Berlin showed a group of visiting American broadcasting executives the fourteen-inch reels associated with the German Magnetophon system. Or consider instead the less easily designated occasion when members of the Army

Signal Corps smuggled home every element connected to these machines that they could lay their hands on.

Either episode might be labeled a tipping point in the transformation of recorded sound. It had a particular effect on the studio environment, for what was once simply a sphere for documentation now treated what occurred before a microphone as little more than raw data to be reconfigured through the acumen of an engineer. As Evan Eisenberg remarks, 'The word 'record' is misleading. Only live recordings record an event; studio recordings, which are the great majority, record nothing. Pieced together from bits of actual events, they construct an ideal event. They are like the composite photograph of a minotaur' (1987, p. 109).

Perhaps nowhere can one find such an undiluted expression of this aspiration than in the pages of Dick Hebdige's *Cut 'N' Mix*, published in the far more innocent time of 1987, where his encomiums to the operation of 'versioning' resonate with an unvarnished belief in the erosion of authorship and the elevation of truly communal expression. His focus on this Jamaican-specific practice also implicitly brought back into discourse attached to popular music the phenomenon of 'covering', but without the previous weighted language of racial suppression. Hebdige pioneered the argument that 'versioning' acts as 'a democratic principle because it implies that no one has the final say. Everybody has a chance to make a contribution. And no one's version is treated as a Holy Writ' (1987, p. 14) It remained conceivable if not *au courant* at the time to celebrate how, when DJs recycled riffs and rhythms wrought by others, they were 'setting up a direct line to their culture heroes. They were cutting out the middlemen. And anyway, who invented music in the first place? Who ever *owned* sound and speech' (p. 141)?

Even if I share some of the sentiments in Hebdige's formulations, time has not treated the rhetoric associated with 'versioning' in too gentle a manner. The overabundant faith in technology that lay behind it rested too often on an insupportable assumption that the restrictions of courts and custom could be circumvented through a kind of mediated sleight-of-hand. Ricky Vincent's 1990 comments in that late, and by some lamented, bastion of techno-Utopianism *Mondo 2000* typify this perspective. He observes, 'Most Americans are cursed to suffer in submission to the technology of their environment, but the Hip-Hoppers control many of the tools of the technological revolution. They are making millions of dollars, and dragging American culture kicking and screaming in the twenty-first century' (1990, p. 110). Furthermore: 'Sampling is the auditory form of hacking through a database. A certain functional anarchy is involved which one might argue is good for the soul' (p. 111).

This kind of wishful thinking collides with the accumulating record of legal actions that samplers, hackers, and the designers of systems like Napster and Gnutella faced as the twentieth century drew to a close. Rather

than the emergence of creative anarchy that Vincent forecast, the aggressive behavior of institutions pledged to the protection of intellectual property offered the impression of the gates being battened down as the barbarians gathered on the perimeter. Time and again, the courts have embodied the inflexibility of the law. The persons who suffer the most in this process are not the owners of intellectual property, necessarily. As Joel Schalit and Jonathan Sterne observe, 'Where property rights are an issue, they are not an issue in relation to the rights of cultural producers' (1998, n.p.). Those who make the artifacts can become, sadly, little more than intermediaries in the rush to litigation, small fry compared to the persons or corporations who mount the legal challenges.

Luke Skywalker assaults the corporate death star

While the transgressive potential of sampling has been diminished if not potentially erased over the course of the last decade, the practice has not altogether lost its impish shellacking of many of our most treasured, and zealously guarded, cultural codes, much less its capacity to cast doubt on our most entrenched shibboleths about authorship or ownership. The seemingly vanished critical edge reemerged in the case of *Luther R. Campbell a.k.a. Luke Skywalker, et al. v. Acuff-Rose, Inc.* which, in turn, led to the 7 March 1994 Supreme Court decision in which Justice David Souter confirmed the rap group's right to parody Roy Orbison's song 'Oh, Pretty Woman'. Admittedly, the case revolved not around the issue of sampling per se, but it should be kept in mind that the kind of artistic practice 2 Live Crew engaged in would not have come into existence without this digitally-aided enterprise. Any number of commentators have dissected the Court's defense of parody and the application of its language to the discourse of fair use, but few have drawn attention to the implicit assertions about meaning offered between the dry lines of Souter's text: (1) how ownership of an artifact does not permit one to dictate how it can be read; and (2) how diverse audiences consume material in many, many different ways.

Drawing attention to this portion of Souter's thinking can inform the analysis of what continues to be certain unquestioned assumptions about creators and consumers as well as the act of music making. Those assumptions embody a variety of seemingly inflexible determinations as to 'originality', 'authenticity', and 'text'. Some have argued that excessive attention to untidy abstractions deviates from the down-to-earth matter of who gains and who loses in property disputes, but I would counter that if we do not continue to dislodge the manner in which these ideas inhabit everyday discourse, then any scholarly, activist, or legal agenda exists on a flimsy conceptual foundation.

To that end, in the rest of this article I will examine, in order, the contrasting lyrical strategies in 2 Live Crew and Roy Orbison's respective performances; the rhetoric about audiences contained in the copyright infringement case; the seemingly acceptable uses of Orbison's material in the films *Pretty Woman* (1990) and *Blue Velvet* (1986); and, finally, the implications of Justice Souter's decision and its significant relationship to the frustrating persistence within the US copyright regime of the notion of 'fixed form'. Before turning to these points, however, let me last observe that on the occasion of the Who's induction into the Rock 'n' Roll Hall of Fame in 1990, guitarist Pete Townshend remarked of rap and hip hop culture: 'it's not up to us to understand it. It's not even up to us to buy it. We just have to get the fuck out of the way'. My conviction is that unless or until the current laws of copyright recognize, respect, and protect the kind of music-making that permits that very culture to 'version' away, a considerable set of legal, practical, and creative obstacles remain very much in the way of all cultural producers.

Dicked around

Conflict often creates unexpected company. As Groucho Marx once quipped, he never would join a club that accepted him as a member. A similar sentiment must have crossed the mind of Luther Campbell, a.k.a. Luke Skywalker, the leader and chief creative force behind the rap ensemble 2 Live Crew, when he found himself embroiled in two court actions. The first involved the accusation of public acts of obscenity, and the second the accusation of copyright infringement. Both brought him into the company of members of the legal and academic communities that heretofore must have been the farthest associations from his mind.

The Broward County, Florida obscenity trial occurred in 1990 when Sheriff Nick Navarro proclaimed that if a single song from 2 Live Crew's album *As Nasty As They Wanna Be* was played within the district limits, the group would be arrested and charged with violating state obscenity laws. Skywalker and his cronies taunted the official by name and continued to perform their material at a club in the district, only to be arrested. As is the case with many obscenity trials, the jury did not get the chance to hear the purportedly offensive material in its original form or context, but through recapitulation by the prosecution. As such, in an effort to introduce both the cultural dynamics at work in the raps themselves as well as to explain the use of such language within African American culture, Skywalker and his legal team availed themselves of a world class academic interpreter. One of the key witnesses the defense called on his behalf was the eminent African American scholar from Harvard University, Henry Louis Gates. In his testimony as to the relationship between the group's purportedly obscene lyrics (and public

behavior) and the African American practice of signifying, Dr. Gates employed the figure of a pond full of fish. From a distance, he stated, 'if you see mosquitoes floating or lily pads floating, etc, etc, it appears to be the contents of the pond. But once you get up to the pond and maybe jump in it, you realize there is a lot of life below the surface. That's the way art is' (quoted in Campbell and Miller 1992, p. 153). In the mind of the prosecution, however, Gates's figure of a placid pond was replaced by that of a cesspool. For them, the figure contained in one of 2 Live Crew's raps, that of licking another person's rectum until 'your tongue turns doodoo brown', could not be excused as indulging in verbal extremity for the sake of parody but, instead, evidenced the outright display of obscenity.

Campbell recoiled from the prosecution's attributing these sentiments to him personally, for he considers their speaker, Luke Skywalker, to be a character that he plays: 'Luke is my job. He pays my bills. But I am not Luke. I am Luther Campbell' (p. 208). He furthermore regards this kind of discourse as an expression of his African American heritage, which, he claims, his audience can choose to appreciate or ignore altogether. Still, the police who arrested him and his Crew apparently possessed no understanding of or sympathy for the artist's performative assumptions about his public role as Luke Skywalker, any more than did the critics of Randy Newman's evidently sardonic song 'Short People' (which many assumed to convey hatred of midgets) or critics of Ice T's 'Cop Killer' (which some believed to condone the indiscriminate homicide of law enforcement). 'See', Campbell asserts, 'that's a cultural thing that doesn't cross over. We are laughing and y'all are crying. But you can ignore the lyrics and dance. People who don't speak English are in bliss at our concerts because the music is solid' (p. 233).

However, if the Broward County law enforcement officials wished that Luther Campbell and the other members of 2 Live Crew would keep discussion of their own genitalia, and others' body parts, to themselves, then the publishing firm of Acuff-Rose Music, Inc. pressed a more complex and potentially influential point as to the use of language when they sued the group for copyright infringement in 1991. It concerned the group's 'versioning' of a song administered by their company, 'Oh, Pretty Woman', performed by the late Roy Orbison and written by him in collaboration with William Dees. 2 Live Crew's release did not hide the authorship of the material behind a veil of secrecy. They credited Orbison and Dees with the appropriated material and meant to compensate them and their publishers for its use. However, what transpired in the 'versioning' amounts to something much more than replacement of rampant romanticism with abject realism. Having conjured for the listener the defining riff of Orbison's song, 2 Live Crew takes leave of the original material's melancholic admiration of a woman from afar and renders explicit all that the original lyrics makes allusive and evocative. In the process, the three lines

Pretty woman, say you'll stay with me
 'Cause I need you, I'll treat you right
 Come to me baby, be mine tonight

become

Hey pretty woman let the boys
 Jump in

If the original song constructs a narrative in which the speaker presumes himself insufficient for so superlative an individual, then the response by 2 Live Crew amounts to bringing both the paramour and the admirer down to the basest level. It does not so much to evacuate romance of all its substance but to sidestep the sentiment altogether. How, in fact, could one speak in elevated terms of a woman who, the lyrics emphasize earlier, is so unattractive as to resemble the oddly androgynous yet hirsute figure of Cousin It in the 1960s US television series *The Addams Family*? While Orbison appears virtually to transcend his own physicality by making the attraction he feels almost spiritual – does not the growl he utters at one point sound like a kind of sham, the subsequent 'Mercy' almost an apology for launching into such a rash remark – 2 Live Crew dives into the pool of which Gates speaks and comes up drenched and debauched.

Describing them in that manner is not meant as some kind of chastisement, for one of the virtues, ironic as it might seem, of 2 Live Crew's material is how it requires listeners to become conscious of our own physicality, our rude appetites and raw desires. Jon Savage admonishes us to remember that any attempt 'to steamroller pop into a purely 'socially useful', adult and caring role is to ignore its roots in base emotions and to impose a purpose on it that doesn't readily coexist with what pop is actually used for. The very refusal of base pleasures has been one of the historical failures of socially concerned pop' (1997, p. 220).

Savage's responses to what one might paradoxically call popular music's function as a brilliant waste of time brings to mind as well Lawrence Grossberg's theoretical discussion about the constitution of the 'rock formation', and more specifically the function within that constituency of a 'postmodern' mode of feeling and its structured deployment of affect. Grossberg points out the increasing fragmentation between the existing 'social languages of signification, representation, and value' and the 'mattering maps' or 'maps of meaning' many of us construct to survive from day to day (1997, p. 111). For him, rock, and one might argue popular music as a whole, operates as an 'affective machine' in that through constructing those 'mattering maps' it offers a means, outside of formal ideological channels, to produce moods and passions and organize acts of will (p. 113). What Savage defines as a refusal to covet 'base pleasures' translates for Grossberg into a 'politics of fun', whereby it produces "'lines of flight' which transform the boredom

of the repetition of everyday life into the energizing possibilities of fun' (p. 114).

The contrast between how Orbison minimizes while 2 Live Crew maximizes the physicality of this potential relationship is further underscored by the distinction between the frail falsetto of the singer's operatic exposition and the guttural exclamations of the rap ensemble. For a musical genre associated with the body and masculinity at its most fervent, rock may well possess one of its most ethereal exponents in Orbison. Ken Emerson draws our attention to his refusal to insinuate himself in our consciousness through rowdiness or rancor by stating, 'The shy Texan never felt entirely at home among the rowdies in Sam Phillips's stable; where they strutted, he tiptoed' (1992, p. 153). Apparently, when Johnny Cash wrote a song for him entitled 'Little Willy Booger', Orbison recoiled at the tenor of the title and transformed it into 'You're My Baby'.

Noted film scholar Peter Lehman has been one of the most astute students of Orbison's physicality. In a study of the visual representation of the male body, he highlights the manner in which the singer withdrew behind his dark glasses and equally somber wardrobe, and in doing so virtually evaporated the kind of masculine swagger most rock singers extol. Lehman also draws attention to the fact that Orbison originally intended 'Oh, Pretty Woman' to conclude without any demonstrable interaction between the female figure and the male protagonist, but his producer convinced him that would unsettle his established audience. Orbison, in response, only went so far as to let the lyrics allude to a potential rapprochement in which the woman remains the aggressor and the man the passive object of desire: 'But wait, what do I see/Is she walking back to me' (Lehman 1993, p. 204).

If Orbison at times appears to engage in physical erasure, while 2 Live Crew ruthlessly pursues bodily self-assertion, the divergence between the two might come down to a matter of degree than of kind. Even though Judge David O. Nelson, the US Sixth Circuit Court official who dissented in a 1992 judgment against 2 Live Crew, distinguishes their approaches as that of a 'lonely Sir Lancelot' as against a crowd of 'randy misogynists', he adds that both figures to a greater or lesser degree possess the same object on their minds. The contrast exists in that the rap performance, in the surprisingly witty comment of Justice Souter in the subsequent Supreme Court decision, admits 'no hint of wine and roses'. The parallels extend even further to their outerwear. Ironically, like the late singer, the ensemble often performs outfitted with dark glasses. However, these accouterments act as a prop in their sexual spectacle, one of the few allusions to *savoir faire* in an otherwise salacious enterprise. Orbison employed his eyeglasses as, among other things, one more means of constructing a mask. For him, they transferred some necessary assurance, for he was 'Running Scared', whereas 2 Live Crew flourishes designer eyewear in order to proclaim, 'Me So Horny'.

Shot through the heart and you're to blame, you give the law a bad name

The core of the legal debate between Acuff-Rose and 2 Live Crew more often than not was represented to the general public as a conflict between divergent interpretations of the fair use provision drawn from the 1976 US Copyright Act: specifically, whether the group's parody of the copyrighted material interfered with the publisher's, and the writers', ability to reap profits from their property. However, the conflict more accurately resulted from a collision over two issues: first, whether the 2 Live Crew recording can be characterized accurately as a parody and, second, if Acuff-Rose possessed the right of refusal for the use of their copyrighted material, particularly if they assumed that the petitioners would abrogate if not abuse the meaning which the publisher hoped to assign to that material.

In a sense, Acuff-Rose comes across in these proceedings as fixated by fixation. Rather than conceiving of the public that purchases the material they publish as diverse and differently minded, and thus capable of interpreting that material multiply, they presume each member to act with as much fixity or uniformity as the notes on a page of sheet music (which any good performer will tell you are open to interpretation). Differences of race, region, gender, musical knowledge or even the simple influence of taste fail to occupy any particular role in the company's explicit or implicit judgments about the act of consumption. It resembles instead a kind of one-way street with the firm as traffic cop and the public as compliant traveler. Acuff-Rose appears to hold (and they are far from alone in this regard) the questionable belief that control over *the interpretation* of a piece of intellectual property constitutes a binding portion of the possession of a copyright and, furthermore, that ownership of that property permits one to decide by whom and under what circumstances it can be employed. They can, in other words, presume to dictate how it will be performed, by whom, and how it will (or should) be understood by any and all parties.

Proving that a piece of intellectual property constitutes the parody of a preexisting entity rests on an established legal test. Such decisions require the fulfillment of four specific factors contained in Section 107 of the 1976 Act. They are:

- 1 the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes
- 2 the nature of the copyrighted work
- 3 the amount and the substantiality of the portion used in relation to the copyrighted work as a whole
- 4 the effect of the use upon the potential market for or value of the copyrighted work.

While Acuff-Rose argued that 2 Live Crew abrogated each of these factors, examination of the second – the nature of the copyrighted work – holds out the key to the dynamic driving this collision of sensibilities. The publisher asserted that the group absconded with what they referred to as the ‘heart’ of the Orbison-Dees song, which they indicated to be the repeated guitar riff and the initial melodic refrain. In their view, no parody would be possible without highjacking more than is reasonably necessary from the preexisting composition and, therefore, jeopardizing the market value of the Orbison-Dees copyright. Clearly, the publisher believed the fact alone that Campbell stands to gain commercially from the use of someone else’s work amounts to sufficient cause to call the work by 2 Live Crew into question.

The assumptions under which the company operated in making this argument did not arise simply out of fear for its wallet but stood upon legal principle, specifically the 1985 Supreme Court decision in *Harper & Row v. Nation Enterprises* (known more commonly as the Gerald Ford autobiography case). Here the periodical publication, *The Nation*, released more of the former US President’s then-unpublished materials than the publisher, Harper & Row, had desired. The Court’s decision in the case states, ‘Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of that copyright’. That ‘monopoly privilege’ specifically protects the so-called ‘heart’ of any work: that cluster of qualities and characteristics that purportedly makes the piece inextricably what it is and nothing else.

Acuff-Rose went one step further in their brief to the US Supreme Court, however, and argued that not only does every work of intellectual property possess a ‘heart’, but also that every individual who comes into contact with that work comprehends it in an identical manner. To assume that a member of 2 Live Crew’s African American audience might hear something distinctly different than a caucasian one confounds them, for they would then, in effect, be listening to two very different songs. And to that end, Acuff-Rose’s brief to the Court contains the astounding claim that: ‘Music has an appeal that transcends differences of culture, language and class. . . . American popular music is a multicultural blend and arguments, such as petitioners’, that seek to confine the appeal of songs to one ethnic audience or another are wholly unfounded’.

This statement perversely utilizes the claims of multiculturalism by evacuating the core of that concept, transforming a diversity of opinions, experiences and practices into an artificial unity that flies in the face of how most would understand the operations of race, class, gender, or sexuality in daily life. Indeed, as has been well established by cultural studies scholars, each member of the public brings to her or his experience of a particular piece of music a radically different and distinct set of histories, itineraries, knowledge, and ideological baggage. To believe otherwise is to argue for some kind of universalized notion of expression that exists in a kind of antiseptic, essentialist

universe, one which bears little response to the messiness of our shared social world. It is, furthermore, the reduction of musical meaning into something resembling allegory, whereby a single, coded message lies in wait for the listener, and no other message should be expected to exist.

In order to make such a claim, Acuff-Rose has to assume that they are able to divine intuitively the 'heart' or indissoluble core of a given piece of music merely by virtue of an institutional claim to its ownership. (Let us leave aside for the moment the question of whether or not such a 'heart' even exists.) In other words, ownership of a piece of intellectual property validates the right to control, even demand, what that property means and how it must be interpreted. This would seem to make the statutes that underlie intellectual property the legal equivalent of the English enclosure laws of the nineteenth century, and, therefore, any consumer who abrogates this claim a squatter.

Consumption amounts, then, to a wholly passive process in Acuff-Rose's brief to the Court, something like a cow chewing on and regurgitating its cud. It divorces the production of meanings from the multi-faceted manner in which individuals and groups make sense of created forms, and are, in turn, themselves made who they are by those forms. This feedback loop, so to speak, occurs because, as John Fiske asserts, 'The meanings of popular culture exist only in their circulation, not in their texts; the texts, which are crucial in this process, need to be understood not for and by themselves but in their relationships with other texts and with social life, for that is how their circulation is ensured' (1989, p. 4).

If Acuff-Rose's view of the process of interpretation were correct, then all listeners would regard the Orbison-Dees song as innocent and innocuous, the embodiment of a 'white-bread original' and not the invocation of submerged sexual instincts as demonstrated in the 2 Live Crew cover. That compelling expression was used, in fact, by Judge David A. Nelson in his dissent to the Sixth Circuit Court's denial of 2 Live Crew's claim of fair use. In fact, he sampled it from expert testimony offered on behalf of the claimants by the professional musician/radio broadcaster/music historian Oscar Brand. Brand evoked this phrase when speaking specifically of works of parody that substitute words and their meanings in order to 'make fun of the 'white-bread' originals and the establishment'. Nelson's disagreement with his fellow jurists as to the parodic dimension of the 2 Live Crew track rests on his belief that 'the two audiences for the songs are quite different', for the parody 'is aimed at the large black populace which used to buy what was once called 'race' records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song'. To believe otherwise and to assume that any audience would consume a 'white bread original' in an identical fashion puts the public in a position identical to that of the woman in 2 Live Crew's rap: supine and stupefied. Any agency evaporates; only reflex remains.

Searching for Cinder-fuckin'-rella

When Acuff-Rose denied 2 Live Crew access to 'Oh, Pretty Woman', they did not mean to keep the composition in a lockbox from all supplicants. The same year, 1990, in which the group recorded and released their parody, the publisher permitted the appropriation and rearticulation of their property by Touchstone Pictures (a division of the Disney company) in the film *Pretty Woman*, starring Julia Roberts as a Hollywood hooker and Richard Gere as her corporate raider paramour. While the publisher apparently believed in the soundness of the assumption that no use of copyrighted material can be assumed as presumptively fair and above board and, therefore, must be examined on a case-by-case basis, one must conclude that it found nothing to question about the use of the material proposed by Touchstone. 2 Live Crew's rearticulation of the song, on the other hand, raised its temperature considerably.

What governed Touchstone's choice of the song? Public familiarity with the material most certainly, but also the thematic connection with the thrust of the narrative, Gere's character being in some ways synonymous with the protagonist of the lyrics and Roberts's with the object of the protagonist's infatuation. (We need to leave aside for the moment the fact that the woman ends up being the aggressor in the song, whereas, in certain ways, the opposite is true in the film.) However, the more telling question remains, how could the tawdry if chic narrative contained in the film be considered qualitatively less offensive than the overt and unrefined erotic language contained in 2 Live Crew's performance?

In the case of *Pretty Woman*, the scene in which the song is played gives pause. There, as throughout the narrative, the core of human identity is conflated with money and, in turn, only those who possess a significant amount of money deserve another person's time and attention. This pecuniary perspective possesses a notable consistency, for the very first words spoken in the film by a street performer are, 'No matter what they say, it's all about money'. Vivian (Julia Roberts) confronts the social ramifications of economic, and therefore social, poverty when her millionaire john, Edward (Richard Gere), instructs her to purchase appropriate clothes on Los Angeles' posh Rodeo Drive. Spurned for her ragamuffin attire by the haughty sales staff, Vivian receives a dismissal from the denizens of the upscale neighborhood as though she might well be, in 2 Live Crew's terms, Cousin It. Only when Edward greases the wheels by spending a 'really offensive' amount of money on her behalf does the soundtrack convey to her character the attributes espoused by Orbison and Dees.

The use of the song here implicitly underwrites the kind of commodification of femininity that 2 Live Crew endorses with far less subtlety, even though the looks on the faces of the male pedestrians as Vivian reappears on

Rodeo Drive decked out in designer wares stem from the kind of base sentiments that the Crew's rap (un)covers. The fact that the film transforms Vivian into as elegant a consumer of high fashion as Edward is a purchaser of sexual favors reduces all human behavior to a common calculus. Henry Giroux reinforces this brutal form of emotional arbitrage when he writes, 'the agency of women . . . is reduced to the freedom to buy expensive clothes and to reinvent their identities within the logic and terms of white, middle-class cultural capital' (1994, p. 42).

Apparently, when a wealthy white male transforms an attractive if déclassé woman into the object of his desire, this process acquires social sanction, and ample box office receipts, but when a quartet of African American and Asian men parody that erotic pursuit, it lacks any aesthetic or cultural credibility. As Vivian implies at one point in the film, the practice of prostitution remains a matter of geography, whereby a fine line separates the 'rape' of companies by corporate raiders like Edward from the coupling engaged in by members of the world's oldest profession. So too might the resolution of issues of ownership and fair use. Matters are different on Music Row in Nashville, Tennessee and in the hood of Miami, Florida.

One can potentially excuse the obliviousness of certain parties to the tawdry core of *Pretty Woman*, for its swanky surface often obliterates its sarmy core. A more acute form of blindness would be required to overlook the corrosive and creepy temperament exercised in the films of David Lynch. Again, someone not prone to search for the skull beneath the skin might temporarily overlook the manner in which, as Michael Atkinson observes, *Blue Velvet* (1986) resembles 'a peeled egg in which the yolk is rotten' (1997, p. 20). Those smiling firefighters and other emblems of small town somnolence in the first shots of the film temporarily transfer one's attention from how Lynch interfuses the ultra-mundane and the otherworldly. Once the central protagonist, Jeffrey Beaumont (Kyle MacLachlan), comes upon a severed ear abandoned like loose change in the grass, all bets are off. From that point on, the hallucinatory and the horrific act in tandem to topple any expectations or assumptions that we might bring to the film. We are now embarked on the 'joyride' that the demonic antagonist Frank (Dennis Hopper) promises to Jeffrey. The smooth strains of Bobby Vinton's title song begin to take on the quality of an obsessive leer, for nothing any longer seems to be what we assume.

This mockery of stability comes full circle when, during the ensuing escapade, Frank introduces Jeffrey to his 'fucking suave' associate, Ben (Dean Stockwell), whom Michael Atkinson colorfully describes as 'apparently a drug dealer of some sort, a tanked-up, made-up, gameshow-host-outfitted, pansexual ghoul, sporting a cigarette holder with an unlit cigarette in it, an ear band, and the speech patterns of a Warhol Factory reject' (1997, p. 20). All of a sudden, instigated by Frank's reference to 'The Candy Colored Clown

They Call The Sandman', Ben picks up a mechanic's trouble light and begins to mouth the lyrics of Orbison's 'In Dreams'.

The evocation of fantasy's power to evoke evanescent images of romantic attachment in the original song sourly melts away into some kind of squalid apostrophe to the manner in which our imaginations can descend into the basest kind of fantasy. The life below the surface of the pool, à la the imagination of Henry Louis Gates, takes on here a particularly noxious note, one that makes the accusations of obscenity issued in the Florida courtroom seem trivial in comparison. And yet, Acuff-Rose granted permission for the song's inclusion, and the success of Lynch's film more than likely added to the factors that elevated Roy Orbison's visibility in the final years of his career. Who then would one consider the unlikely bedfellow in that process: the sexually psyched-up 2 Live Crew or the spectacularly surrealistic Ben? Whose impact might be the more deleterious to sensitive constitutions?

The bland leading the bland

The conflict between 2 Live Crew and Acuff-Rose came to an end on 7 March 1994, when Supreme Court Justice David Souter issued the body's opinion in favor of the rap group, with Justice Kennedy concurring. The Court performed its assigned duty of applying the four factors protecting fair use, enumerated earlier. With regard to the group's defense of its work as a parody, Souter and his colleagues reversed the lower court's denial of that description. Specifically, the opinion takes exception to the publisher's assertion that 2 Live Crew absconded with the 'heart' of the song. Souter points out that no parody could be written without incorporating the most recognizable elements of the appropriated material. The Justice states: 'Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin'. In fact, Souter goes further and specifically draws attention to the rap's function as a kind of implicit critique of the 'white bread original' by stating that it 'shows how bland and banal the Orbison song is'. This quality of ridicule accounts for the accurate description of the rap as a parody, for the very rhetorical mode marks off the literary form from other uses of figurative language.

The fact that Souter draws attention to and implicitly supports the existence of 'tension between a known original and its parodic twin' amounts to one of the more substantial elements of the decision. At the present moment, more than a decade after these words were penned, the governmental attitude towards commercial spheres of communication not only downplays tension but appears to wish to obliterate it altogether. The FCC has throughout the course of the current Bush administration clamped

down on commercial broadcasters and currently threatens to extend its reach from network television to the heretofore relatively sacrosanct domain of viewer-supported cable broadcasting. Minority voices lack the full support of legal sanction, and any gesture that conveys even the appearance of diverting from a narrow definition of acceptable speech vies with anything from the payment of fines to outright censorship. More than one 'white bread original' occupies the center of the public discourse at the present time, thereby calling attention to the power and necessity of rhetorical tools like parody and (un)covering to allow divergent perspectives to speak truth – sometimes vulgarly – to power.

However, the comments in the decision that resonate most strongly occur in the section where Justice Souter addresses the appropriate description of 2 Live Crew's rap as a 'transformative' work, one that 'add(s) something new, with a further purpose or different character, altering the first with new expression, meaning or message'. The very goal of copyright, he emphasizes, is furthered by the creation of such material which, 'lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright'. 'Biting criticism' may suppress demand for the original, but that does not mean it abrogates the rules of copyright. 'There is no protectable derivative market for criticism', yet owners of intellectual property will allow the use of their material in order to accrue the profits to be earned by that exercise, let alone the attention brought to the original in the process. In an unusual insertion, Justice Souter quotes the British writer Somerset Maugham: 'People ask . . . for criticism, but they only want praise', a canny admission that no writer wants a parody or some 'version' thereof to dismiss her or his efforts, yet whatever discomfort that person might feel is not sufficient grounds for infringement. Transformative works such as parodies add both to the public good and to the public awareness of the parodied material. Who loses in that exchange?

One could argue that Acuff-Rose's argument contained an aesthetic exploitation of the questionable legal notion of 'original intent'. The publisher assumed that it, and it alone, remains privy to the meanings contained in this song by Roy Orbison, and his co-writer. The support espoused by the US Supreme Court for derivative works and the admiration of successful works of transformation, however, sanction an important view that Courts are not mind-readers, either of the leading citizens of the early days of the Republic or of the contemporary creators of commercial works of art. A creator's intent need not correspond with either a consumer's or a parodist's understanding of a specific work.

The permission that inheres in Souter's language as to the act of transformation and the critique it raises holds out a range of possible directions to be taken up by other creators. Souter may make no direct reference to critical theory in his decision, yet one cannot help but sense how

it alludes to the polysemic nature of meaning as well as to the practice of poaching advocated by Michel de Certeau (1984) among others. No individual work possesses a unitary meaning, for language, as well as sounds or images or notes, remains incontestably plural in its forms and its uses. Individuals are not passive recipients of predetermined messages, but the co-creators of meanings that can – and often do – go against the grain of the text’s creators. While one cannot presume that Justice Souter has read, or perhaps even has heard of, the French theorist, his decision validates the response of one set of individuals to a ‘force-relationship’ conceived of by de Certeau and sanctions how 2 Live Crew found itself compelled to take on a specific strategy that permitted them to speak in the public, commercial sphere.

The Court’s decision therefore gives credence to John Fiske’s argument as to ‘the seeming paradox that a popular cultural commodity can serve the interests of both its producers and consumers even when these interests contradict one another, as, necessarily, they will’ (1989, p. 134). The complementary activities of creators, copyright holders, and consumers do not, and need not, necessarily conflict, even if, in the process, ‘heart(s)’ may be broken. It seems reasonable to assume, furthermore, that someone who heard 2 Live Crew’s performance of ‘Pretty Woman’ might well comprehend a quite different tone in Orbison’s voice the very next time they heard the song.

In other words, no composition, or any creative artifact altogether, is permanently fixed in place or in meaning. ‘Pretty Woman’ reconfigures itself each time that it is played, whether the auditor hears an encomium to romantic obsession or illicit passion. Putting a piece into the public arena invites, if not demands, that as many meanings emerge as ears can hear or eyes can see. That is particularly true when the work exercises a critical claim upon some other piece. Even when the transformative work amounts to ‘criticism with a vengeance’, in the words of Judge David A. Nelson, the addition of the new material to the public dialogue provides the necessary salve to ameliorate whatever alteration or alleged injury it has inflicted upon the original act of expression. There must be room in the free exchange of ideas for the paean as well as the piss take. Without the liberty to engage in this kind of jostling with one another, we will inexorably find ourselves overwhelmed by a daze of whine and ruses.

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