

Parodies of “Oppa Gangnam Style” and “Call Me Maybe” are fun – but are they legal?

Call it the “summer of parodies” – after reaching the top of most viewed YouTube videos of all time, Carly Rae Jepsen’s “Call Me Maybe” and Korean rap artist Psy’s “Oppa Gangnam Style” have spawned hundreds of video parodies littering the Internet landscape. Many commentators attribute the original songs’ success to the many parodies that fuel further interest in the originals. These remakes are hilarious (some of them, at least), but are they legal?

Under copyright law, public use of someone else’s creative work without the owner’s permission generally constitutes an infringement of the owner’s rights. You may be surprised to know that the song “Happy Birthday” is actually copyrighted and a license is required for all public uses of it. Even though the original tune was written in 1893 by two Louisville kindergarten teachers (and the lyrics sometime later), Summy-Birchard Music--now part of music publisher Warner Music Group--claims ownership of the song’s copyright. While the validity of this copyright is suspect due to lack of historical evidence, Warner Music will probably continue to collect an estimated \$2 million in annual royalties from all commercial uses of the song until someone with a deep enough pocket contests the claim in court, or until the copyright expires in 2030.

Fortunately, private use of other people’s copyrighted works—i.e., use within a normal circle of family and social acquaintances—does not constitute copyright infringement. So, singing Happy Birthday at your kids’ parties won’t get you sued, and neither will singing Gangnam Style in your shower. However, releasing a video on the Internet is certainly a public use. Therefore, posting a video of yourself performing Happy Birthday or Gangnam Style online without the owners’ permission technically constitutes an infringement.

Furthermore, even if you are not copying or performing a copyrighted work, but are producing a work based on someone else’s work, you still generally need permission. Creating a new work based on someone else’s prior work (called a “derivative work”) is another example of an infringement that copyright law protects against. So how is it that the hundreds of Gangnam Style remake creators have not gotten into trouble?

Many of these remakes may qualify as parodies, which are generally protected under the “fair use” doctrine. Under the U.S. Copyright Act, fair use is determined by analyzing: (1) the purpose and character of the use, including whether the use is commercial or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount used in relation to the work as a whole; and (4) the effect of the use on the potential market or value of the work.

Thanks to another rapper two decades ago, parodies are generally considered to be fair use. In 1989, rap group 2 Live Crew recorded the song “Pretty Woman,” a parody of singer Roy Orbison’s earlier rock ballad “Oh, Pretty Woman.” The publisher of Orbison’s song sued for infringement and took the case up to the U.S. Supreme Court. After carefully analyzing the four-factor fair use test, the Supreme Court decided in *Campbell v. Acuff-Rose Music, Inc.* (1994) that 2 Live Crew’s parody of Orbison’s song was fair use. Key to the Court’s decision was that 2 Live Crew transformed Orbison’s song into something new that ridiculed the original.

The Court was careful to note the difference between a parody, which is usually fair use, and a satire, which is generally not fair use. A parody is a work that imitates the characteristic style of another artist or his work for comic effect or ridicule. Many of the video remakes of Gangnam Style are true parodies in that they poke fun of the original, such as the ones that change the lyrics to “Oppa Klingon style” or “I got no style” or the ones that mimic Psy’s original scenes in a comical way. However, many of the remakes are not true parodies. A bunch of Navy midshipmen dancing to the original Gangnam Style song does not poke fun of it. They are using the original song for the value of the song itself, rather than transforming it in such a way as to jab at it. These remakes may be funny because the guys can’t dance, but they are not parodies.

Satire, on the other hand, is a work which criticizes some kind of societal vice or folly through irony, derision, or wit. Satire might borrow another work to make its social criticism, but the point of the satire is not to make fun of the work it borrows. For example, the Gangnam Style song itself is satire – it is a humorous commentary on the lifestyle of people in the ultra-wealthy Gangnam district of Seoul, Korea. Many artists believe they are making parodies when they borrow someone else’s work to make fun of something, but they are actually only making satirical use of the other work. And it is this act of “borrowing” another work that is infringing. The Supreme Court essentially stated that borrowing another work for the purpose of satire is lazy -- it avoids “the drudgery in working up something fresh.”

Unfortunately, the line between parody and satire is fine and hard to distinguish, as demonstrated by the fact that each court in the 2 Live Crew case – the district court, the appeals court, and the Supreme Court – had a different conclusion. But the distinction between parody and satire could be the difference between free fair use and millions of dollars in monetary damages.

The fact that it is so difficult to determine when a work is actually a parody means that parody writers will always bear some risk in creating their works. The fair use doctrine can be quite unfair because there is never a sure way to determine if a use is actually fair until a judge says it is -- generally after much expensive litigation. This may be why famous parody creator Weird Al Yankovic always requests permission from the artists whose songs he parodies – which he finally obtained from Lady Gaga before parodying her song “Born This Way” in 2011. When it comes to copyright infringements, asking for permission is usually much cheaper than asking for forgiveness.

A version of this article was previously published on Forbes.com. For more information on creating derivative works or making other fair use of other people’s copyrighted works, contact Kenneth Liu at kel@gg-law.com.

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