



July 28, 2004

Via Facsimile to (212) 768-6800 and U.S. Mail

Paul V. LiCalsi
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020

RE: Jib Jab Media, Inc. and Ludlow Music, Inc.

Dear Mr. LiCalsi:

We are litigation counsel for Jib Jab Media, Inc. (“Jib Jab”). We have reviewed your letter dated July 23, 2004 on behalf of your client, Ludlow Music, Inc. (“Ludlow”).

Your letter, quite frankly, misses the forest for the trees. “[I]n parody, as in news reporting, context is everything.” *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 802 (9th Cir. 2003). In creating its “This Land” animated short in the heat of the election season, Jib Jab is engaging in political speech at the core of the First Amendment. In harnessing the power of new Internet technologies to distribute the political expression, moreover, Jib Jab is making real the Internet’s promise that any person today might become a “town crier” or “pamphleteer.” See *ACLU v. Reno*, 521 U.S. 844, 870 (1997).

Far from treating Jib Jab as an infringer, copyright law recognizes that this kind of transformative, expressive activity is exactly what copyright was meant to encourage. In the words of the Supreme Court, “[T]he fair use doctrine...requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994). This is just such an occasion. There is no question that our clients have created a work that contains both transformative and original expressions of creativity—the very creativity which copyright law was designed to foster.

Nor is this the first such occasion. In the last presidential election cycle, Mastercard sued Ralph Nader for adapting the credit card company’s “priceless” commercial in service of a political message. As you know, a court just a few months ago found that the use was fair. See *Mastercard v. Nader*, 2004 WL 434404 (S.D.N.Y. 2004).

Your client has doubtless made millions of dollars exploiting Guthrie’s music. We do not begrudge you that reward, as part of copyright’s purpose is to provide an incentive for both creation and dissemination of musical works. But neither does copyright begrudge

both creation and dissemination of musical works. But neither does copyright begrudge subsequent creators who “build upon, reinterpret, and reconceive existing works” as permitted by the fair use doctrine. *Mattel v. Walking Mountain*, 353 F.3d at 799.

“This Land” is a Fair Use

“This Land” is exactly the kind of expression that qualifies as fair use. The work is plainly transformative, *see Campbell v. Acuff-Rose*, 510 U.S. at 579 (transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright...”), has a noncommercial character, *see Los Angeles Times v. Free Republic*, 2000 WL 1863566 (C.D. Cal. 2000) (overall noncommercial character of expression supports fair use), and does not supercede Guthrie’s original, *see Campbell v. Acuff-Rose*, 510 U.S. at 591 (parodies generally will not act as a substitute for the original). Your July 23 letter does not dispute that these fair use factors favor Jib Jab.

“This Land” is a Parody

In your July 23 letter, you contend that “This Land” offers no “satirical comment” on the Guthrie original. You are mistaken.

While your view of Guthrie’s “This Land is Your Land” as being predominantly about “the beauty of the American landscape” and “the disenfranchisement of the underclass” is interesting, most Americans think of the song as an iconic expression of the ideal of national unity. Jib Jab’s parody addresses, among other things, the *lack* of national unity that characterizes our current political climate (ending with the optimistic hope that unity might be rediscovered). In short, “This Land” explores *exactly* the same themes as the Guthrie original, using the parodic device of contrast and juxtaposition to comment on the original. *See Abilene Music v. Sony Music Entertainment*, 320 F.Supp.2d 84, 90-91 (S.D.N.Y. 2003) (emphasizing the role of contrast and juxtaposition as parodic devices). The parodic comment takes on an additional dimension of irony when viewed in light of the often omitted closing stanzas of Guthrie’s original.

The question, simply put, is whether the “parodic character may reasonably be perceived.” *Campbell v. Acuff-Rose*, 510 U.S. at 582. The question is not whether Jib Jab intended “This Land” purely as a parody of Guthrie’s original. *See Abilene v. Sony*, 320 F.Supp.2d at 90. Nor is the question whether your client perceived the parodic meaning. *See Mastercard v. Nader*, 2004 WL 434404 at *13 (parody “may be subtle rather than obvious”). It is enough that the parody here is readily and objectively perceptible, as

demonstrated by the fact that a variety of commentators already perceive it clearly.¹ See *Abilene v. Sony*, 320 F.Supp.2d at 91 (music reviewers perceived the parody).

“This Land” Does Not Copy “Excessive Copyrighted Material”

Your suggestion that a parodist may only copy just enough of a work to conjure up the original, and no more, is at odds with established precedent. See *Mattel v. Walking Mountain*, 353 F.3d at 804 (“We do not require parodic works to take the absolute minimum amount of the copyrighted work possible.”). In fact, where transformative works are concerned and a parodical purpose is apparent, “quantity” is not the relevant measure. See *Leibovitz v. Paramount Pictures*, 137 F.3d 109, 116 (2d Cir. 1998) (amount and substantiality taken has little weight where first and fourth fair use factors favor parodist).

In any event, “This Land” does not borrow too much. As to the lyrics, “This Land” borrows only a handful of words. As to the melody, numerous sources note that Guthrie himself borrowed his melody from The Carter Family rendition of the traditional spiritual, “When the World’s on Fire.”

“This Land” Does Not Harm the Market for the Original

Your assertion that “This Land” has a “significant negative impact” on the market for Guthrie’s original song is puzzling. Obviously, no one interested in purchasing a recording of the Guthrie original will turn to the “This Land” animated short as a substitute. Instead, you suggest that Jib Jab’s parody has somehow harmed your client’s ability to license the work for other commercial uses. As your client put it in a press account, “[U]pon hearing the music people would think about the yucks, not Guthrie’s unifying message.”

Of course, the success and popularity of a parody cannot be held against it in the fair use analysis; the fair use doctrine does not protect only ineffective, unpopular, and forgettable parodies, as you seem to suggest. That rap music fans might never again be able to hear Roy Orbison’s “Pretty Woman” without thinking of 2 Live Crew’s parody is simply not a harm cognizable under copyright law. See *Campbell v. Acuff-Rose*, 510 U.S. at 593 (“The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.”).

¹ The Internet community has already been vigorously exploring this issue, with several commentators perceiving the parody of Guthrie’s original clearly. See, e.g., <<http://www.corante.com/importance/archives/005314.php>>, <http://www.blawgchannel.com/2004/07/copyright_my_tw.html>.

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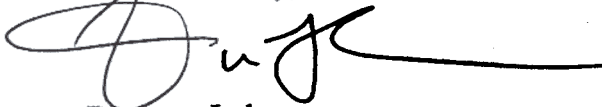
Copyright protects a creator's right to make parodies like "This Land." Your concern that an unforgettable parody may make it harder for your client to license Guthrie's original as a commercial jingle to United Airlines, Nike or some similar commercial entity does not trump the free speech interests of fair users.

Conclusion

For the reasons discussed above, we are confident that the "This Land" animated short constitutes a fair use of Woody Guthrie's original song. We also fail to understand how your client's continuing ownership interest in the song is being harmed by this parody in any way.

We urge you to reconsider your position and recognize "This Land" for what it is—a humorous political commentary on President Bush, Senator Kerry, the condition of democracy in America, *and* Woody Guthrie's classic "This Land is Your Land."

Yours sincerely,

A handwritten signature in black ink, appearing to read "Fred von Lohmann", with a long horizontal flourish extending to the right.

Fred von Lohmann
Senior Intellectual Property Attorney