



Puppet Law

Parker B. Potter, Jr.

WHILE RESEARCHING an article on kangaroo courts,¹ I learned that Hearing Officer West of the Wabash Valley (Indiana) Correctional Institution Conduct Adjustment Board sometimes “referred to his court as a ‘kangaroo court’ and to himself as ‘Captain Kangaroo.’”²

For those of us of a certain age, it is tempting to picture Mr. Green Jeans as Captain Kangaroo’s bailiff and, perhaps, the ever-silent Dancing Bear as the Captain’s court

reporter. Bunny Rabbit and Mr. Moose are more difficult to place in a courtroom setting, although Mr. Moose is no stranger to litigation,³ and three hand puppets who once appeared on Captain Kangaroo’s program, a mouse, a pig, and a rooster, were once the subjects of a copyright infringement action.⁴ In any event, the appearance of Mr. Moose in a judicial opinion got me to wondering about how many other television puppets have ended up in court. As it turns out, Mr. Moose is hardly the only television star with a hand up

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- 1 Parker B. Potter, Jr., *Antipodal Invective: A Field Guide to Kangaroos in American Courtrooms*, 39 AKRON L. REV. ____ (2006).
- 2 *Higgason v. Hanks*, 134 F.3d 374 (unpublished table decision), Nos. 97–1687 & 97–1688, 1998 WL 4741, at **3 (7th Cir. Jan. 7, 1998). An example of partial self-identification with the iconic television personality comes from *United States v. Eisner*, 59 Fed. Appx. 379, 381 (2d Cir. 2003), in which the defendant in a tax fraud case conceded that several loan applications he made “were so obviously fake that it must have been the case that the banks would have approved a loan to ‘Captain Kangaroo.’” *Eisner*, however, provides no basis for concluding that the Captain was not creditworthy.
- 3 See *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 212 n.10 (2d Cir. 1976) (reporting, in false advertising case, conversation between Captain Kangaroo and Mr. Moose in which the Captain extolled the virtues of Wonder Bread).
- 4 See *Mura v. Columbia Broad. Sys., Inc.* 245 F. Supp. 587, 590 (S.D.N.Y. 1965) (holding that “[t]he evanescent reproduction of a hand puppet on a television screen or on the projected kinescope recording of it is so different in nature from the copyrighted hand puppet that ... it is not a copy”). Judge Levett also concluded that under the circumstances – the puppets appeared on screen only briefly and in supporting roles – the fair use defense applied. *Id.*

his backside (or strings holding him up) to appear in a published judicial opinion.

Howdy Doody, for example, has been involved in a custody dispute,⁵ an insurance subrogation action arising out of a fire in the studio/garage where he/it had been stored,⁶ and a conspiracy claim.⁷ Ollie the dragon came up in Judge Duffy's opinion in a copyright infringement case in which he explained: "Clearly there is some similarity between the friendly dragon of 'A Dragon's Tale' and MTVN's Magellan of 'Eureeka's Castle.' They are both dragons and, to my untrained eye, the representations of each perhaps has a common source in the humorous old dragon character Ollie, from 'Kookla, Fran and Ollie.'"⁸ On the other hand, Topo Gigio, Triumph the Insult Comic Dog, the entire cast of "Crank Yankers," and Shari Lewis's Lamb Chop have all managed to avoid appearing in any judicial opinions I was able to locate.⁹

Ventriloquists and their dummies have also ended up in court. In *Takeall v. Pepsico, Inc.*, the Fourth Circuit affirmed summary judgment for Pepsico in a copyright infringement action brought by ventriloquist

Arthur Takeall, whose dummy Scooter was often heard to say "you got the right one, uh-huh."¹⁰ Takeall sued Pepsico for airing television commercials in which Ray Charles sang "you got the right one, baby, uh-huh," but was unable to overcome Pepsico's lack-of-access defense.¹¹ Jerry Mahoney, Walter Winchell's dummy, got into court in a different way. In *April Enterprises, Inc. v. KTTV*,¹² the producer of the "Winchell-Mahoney Time" television program sued KTTV and Metromedia, Inc. for erasing tapes of the program, and in *Taub v. First State Insurance Co.*,¹³ Winchell's ex-wife sued her divorce attorney for malpractice based, in part, on his alleged failure to properly value, as a marital asset, the syndication rights to "Winchell-Mahoney Time." While Jerry Mahoney has been a real courtroom presence, his somewhat more famous fellow dummy, Edgar Bergen's Charlie McCarthy, has been only an indirect presence, invoked from time to time for metaphorical purposes.¹⁴

While Scooter, Jerry Mahoney, and Charlie McCarthy are all famous and accomplished dummies, the prize for best per-

5 See *Detroit Inst. of Arts Founders Soc'y v. Rose*, 127 F. Supp. 2d 117 (D. Conn. 2001) (ordering puppeteer Rufus Rose to surrender Howdy Doody to museum, as third-party beneficiary of contract between puppeteer and television network).

6 See *Nat'l Broad. Co. v. Rose*, 215 A.2d 123 (Conn. 1965) (affirming trial court's decision that puppeteer Rose was, at most, gratuitous bailee and, therefore, not liable under the law of bailment for damage to Howdy Doody).

7 See *Paris v. Smith*, 135 N.Y.S.2d 146 (N.Y. Sup. Ct. 1954) (granting in part and denying in part defendants' motion to strike certain allegations in complaint charging them with conspiracy to deprive plaintiff of property interest in Howdy Doody). The order in *Paris* does not identify Paris or Smith, nor does it indicate their relationship to Howdy Doody.

8 *Cholakian v. MTV Network, Inc.*, 725 F. Supp. 754, 758 (S.D.N.Y. 1989) (denying plaintiff's application for a preliminary injunction after "conclud[ing] that, there are enough dissimilarities between 'A Dragon's Tale' and 'Eureeka's Castle' to find that these two productions derive from independent efforts").

9 I am presuming, of course, that Charles "Lamb Chop" San Filippo, a defendant in *United States v. Zuber*, 528 F.2d 981 (9th Cir. 1976), was named for the entrée, not the entertainer.

10 14 F.3d 596 (unpublished table decision), No. 93-1237, 1993 WL 509876, at **1 (4th Cir. Dec. 8, 1993).

11 *Id.* at **5-**6.

12 195 Cal. Rptr. 421 (Cal. Ct. App. 1993).

13 52 Cal. Rptr. 2d 1 (Cal. Ct. App. 1995).

14 See, e.g., *Johnson v. Sullivan*, 714 F. Supp. 1476, 1479 (N.D. Ill. 1989) ("With all due respect, the court has no intention of playing Charlie McCarthy to plaintiffs' Edgar Bergen."); *In re Distrigas Corp.*, 75 B.R. 770, 773 (Bankr. D. Mass. 1987) ("In fact, except as holder of FERC import license, the debtor

formance by a dummy in a judicial opinion must be awarded to San Francisco Police Officer Robert Geary's wooden sidekick, Officer Brendan O'Smarty.¹⁵ As his contribution to a community policing initiative, Officer Geary began taking Officer O'Smarty on patrol with him. All was well until Geary's superiors told Geary that his dummy was no longer welcome on patrol. In response, Geary formed a "Committee to Save Puppet Officer Brendan O'Smarty," and collected enough signatures to have a proposition in support of Officer O'Smarty placed on the ballot. The proposition passed, and subsequently, Geary attempted to claim the costs of the ballot initiative as a business expense on his federal income tax return.¹⁶ Geary was more successful in the court of public opinion than he was in the Tax Court, which disallowed the deduction.¹⁷

Arguably the most famous puppet liti-

gants, and, by a large margin, the most litigious puppets, are Jim Henson's Muppets.¹⁸ In their first two court appearances, the Muppets were plaintiffs. *Children's Television Workshop @ Muppets, Inc. v. Royal Mold, Inc.* was a copyright and trademark infringement action arising from the defendants' "production and sale of cookie jar molds fashioned in the likenesses of plaintiffs' puppet figures, the muppets – 'Bigbird,' 'Oscar the Grouch,' 'Cookie Monster,' and 'Ernie.'" ¹⁹ The record is silent as to why Royal Mold chose to make an infringing Ernie mold but no infringing Bert mold.²⁰ In *Children's Television Workshop @ Muppets, Inc. v. Mary Maxim, Inc.*, another copyright and trademark case, the allegedly infringing mode of expression was a knitting pattern which depicted various Muppets including Big Bird, Cookie Monster, and Oscar the Grouch.²¹ In a later case that involved two Muppets of an earlier vintage, Jim Hen-

performs no real business function separate from DOMAC, which provides all the employees and services. Unless the left hand is independent of the right hand, there is no arms-length negotiating. Or, for that matter, any negotiating at all unless Charlie McCarthy is independent of Edgar Bergen."); *Commonwealth v. Williams*, 41 Pa. D. @ C. 2d 516, 520 (Pa. Ct. Com. Pl. (Wash. Cty.) 1966) ("From all this I draw the conclusion that the relation between the Secretary of Revenue and the common pleas judge need not be that of Edgar Bergen and Charlie McCarthy").

15 See *Geary v. Commissioner*, 235 F.3d 1207 (9th Cir. 2000).

16 *Id.* at 1208–09.

17 The Ninth Circuit affirmed the Tax Court's decision not to allow the deduction, but reversed the imposition of a penalty, concluding that "Geary's underpayment was not attributable to negligence but rather amounted to no more than an honest misunderstanding of law that was reasonable in light of all the facts and circumstances." *Id.* at 1211 (citation omitted).

18 Several non-puppet muppets have also been mentioned in judicial opinions, but because of their non-puppet status, they are relegated to appearing here, below the line, in the relative obscurity of a footnote. In *People v. Keisner*, a witness in a murder trial "testified that when she brought [defendant] Bowman home from the crime, he appeared to be hallucinating ... [he] sat on the couch and spoke in 'Muppet talk.'" No. A097252, 2004 WL 206614, at *9 (Cal. Ct. App. Jan. 28, 2004). In *Robinson v. Detella*, "Illinois inmate Floyd Robinson was placed in disciplinary segregation at Statesville Correctional Center in Joliet. There Robinson encountered inmate Milton Muntaner, then known to him only as 'Muppet,' who spit on Robinson and threatened him with severe bodily harm." 202 F.3d 274 (unpublished table decision), No. 97–3284, 1999 WL 994008, at *1 (7th Cir. Oct. 27, 1999). Unlike Charles "Lamb Chop" San Filippo, it is hard to imagine that Milton Muntaner was not named with reference to a puppet, and in Muntaner's reported demeanor, I see more than a hint of Oscar the Grouch.

19 No. 77 Civ. 3890, 1978 WL 949, at *1 (S.D.N.Y. April 26, 1978) (granting plaintiff's motion for a preliminary injunction).

20 While Bert is no Donald Duck, I'll bet he was not pleased with his apparent exclusion.

21 No. 83 Civ. 2448 (RWS), 1984 WL 1349 (S.D.N.Y. March 9, 1984) (denying defendant's motion to dismiss or transfer for lack of venue). I would imagine that Big Bird was doubly pleased with the decision

son Productions prevailed in a copyright infringement action against a food product supply company for which it had created two Muppets, Wilkins and Wontkins, for use in a television advertising campaign.²²

The Muppets made their debut as defendants in *Hormel Foods Corp. v. Jim Henson Productions, Inc.* In that case, the manufacturer of Spam luncheon meat sued Jim Henson Productions over its creation of a new character, "Spa'am ... the high priest of a tribe of wild boars that worships Miss Piggy as its Queen Sha Ka La Ka La."²³ In the words of Judge Van Graafeiland:

The similarity between the name "Spa'am" and Hormel's mark is not accidental. ... Although the name "Spa'am" is mentioned only once in the entire movie, Henson hopes to poke a little fun at Hormel's famous luncheon meat by associating its processed, gelatinous block with a humorously wild beast.

However, the executives at Hormel are not amused. They worry that sales of SPAM will drop off if it is linked with "evil in porcine form." Spa'am, however, is not the boarish Beelzebub that Hormel seems to fear. The district court credited and relied upon the testimony of Anne Devereaux Jordan, an expert in children's literature, to find that Spa'am is a positive figure in the context of the movie as a whole – even if he is not "classically handsome." Indeed, Spa'am is a comic character who "seems childish rather than evil." Although he is humorously threatening in his first appearance, he comes to befriend the Muppets and helps them escape from the film's villain, Long John Silver. By film's end, "Spa'am

is shown sailing away with the other Muppets as good humor and camaraderie reign."

Hormel also expresses concern that even comic association with an unclean "grotesque" boar will call into question the purity and high quality of its meat product. But the district court found no evidence that Spa'am was unhygienic. At worst, he might be described as "untidy." Moreover, by now Hormel should be inured to any such ridicule. Although SPAM is in fact made from pork shoulder and ham meat, and the name itself supposedly is a portmanteau word for spiced ham, countless jokes have played off the public's unfounded suspicion that SPAM is a product of less than savory ingredients. For example, in one episode of the television cartoon *Duckman*, Duckman is shown discovering "the secret ingredient to SPAM" as he looks on at "Murray's Incontinent Camel Farm." In a recent newspaper column it was noted that "[I]n one little can, Spam contains the five major food groups: Snouts. Ears. Feet. Tails. Brains." Mike Thomas, *Ready? Set? No!*, *The Orlando Sentinel*, June 25, 1995, at 30. In view of the more or less humorous takeoffs such as these, one might think Hormel would welcome the association with a genuine source of pork.²⁴

Jim Henson Productions prevailed at trial, and on appeal. In another case involving Miss Piggy and food, Frito-Lay prevailed on several Lanham Act claims including false implied endorsement and dilution brought by Astrud Oliveira, who had recorded "The Girl from Ipanema."²⁵ The singer was distressed

in *Mary Maxim*; his creator won the case and Judge Sweet got his name right, unlike Judge Pierce in *Royal Mold*, who called him "Bigbird."

22 See *Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*, 16 F. Supp. 2d 259 (S.D.N.Y. 1997).

23 73 F.3d 497, 500 (2d Cir. 1996).

24 *Id.* at 501 (citations to the record and to the decision below omitted).

25 *Oliveira v. Frito-Lay, Inc.*, No. 96 CIV. 9289(LAP), 1999 WL 20849, at *1 (S.D.N.Y. Jan. 15, 1999), *aff'd*



A. The Cavaliers' Drawing



B. Illustration from *Good Night, Ernie*

Cavalier v. Random House, Inc., 297 F.3d 815 (9th Cir. 2002).

over a television commercial “featur[ing] the Muppet character ‘Miss Piggy’ eating Baked Lays and ‘singing’ while the lyrics from ‘The Girl from Ipanema’ play[ed] in the background.”²⁶ The only real blemish on the Muppets’ litigation record came in *Cavalier v. Random House, Inc.*, in which the Ninth Circuit partially reversed summary judgment in favor of the publisher of *Good Night, Ernie*²⁷ and *Good Night, Elmo* in a copyright infringement action brought by the authors of *Nicky Moonbeam: The Man in the Moon* and *Nicky Moonbeam Saves Christmas*.²⁸

Kermit the Frog played a role – but more as subject matter than as a litigant – in *MDB Communications, Inc. v. United States*.²⁹ In

that case, an unsuccessful bidder for a contract to create a marketing campaign for the U.S. Mint’s Fifty States Commemorative Coin Program, better known as the state quarters program, sued the Mint when it rolled out an advertising campaign featuring Kermit.³⁰ The Mint prevailed, partly on the basis of proof that the contacts that led to the hiring of Kermit were initiated by Jim Henson Productions, not by the Mint.³¹

Finally, an unidentified Muppet once even showed up in the unlikely context of a Title VII action asserting claims of discrimination based upon gender, religion, and age.³² In that case, the plaintiff complained that she was required to open sexually offensive

in part, rev’d in part, 251 F.3d 56 (2d Cir. 2001).

26 In Oliveira’s view, “the ‘disconcerting nature of the odd sound’ in the commercial [was] the result of the mixing of [Oliveira’s] original recording with the falsetto voice of Frank Oz ‘squawking the lyrics.’” *Id.* The Southern District of New York seems to be a horbed of muppet litigation, and among the judges on that court, Judge Loretta Preska would appear to be the Muppet Queen, having presided over both Oliveira and the Wilkins/Wontkins case. See *supra* note 25.

27 Again, *Good Night, Ernie* but no *Good Night, Bert*. Bert needs a better agent.

28 See 297 F.3d 815 (9th Cir. 2002) (holding, as a matter of law, that the *Good Night* books and the *Nicky Moonbeam* books were not substantially similar literary works but that triable issues existed regarding substantial similarity of built-in night light features and depictions of stars lounging on clouds).

29 53 Fed. Cl. 245 (Fed. Cl. 2002).

30 While the plaintiff did propose the use of a fictional celebrity spokesperson, his suggestion was cartoon character Doug Funnie. *Id.* at 250.

31 *Id.*

32 *Hoffman v. Lincoln Life & Annuity Distribs., Inc.*, 174 F. Supp. 2d 367 (D. Md. 2001).

e-mails but later admitted, at her deposition, that the following e-mail – despite being attached to her complaint – was not offensive to her:

Hoffman Deposition Exhibit No. 6 is a parody of a press release in which the letter “D” announces that it is withdrawing its sponsorship of Sesame Street to protest the introduction of a homosexual muppet character. There is no mention of sexual conduct. The mock press release refers to “religious conservatives,” “right-wing groups like Christian Coalition” and the “extremely vocal minority” who oppose the new muppet character. “D” was withdrawing its sponsorship because these groups are some of its biggest clients frequently using words like “demagoguery, dogma and doctrine.”³³

I suspect that the outcome might have been different if, instead of information concerning a mock Muppet outing, Ms. Hoffman had been e-mailed the libretto from the Krofft brothers’ “Le Puppet de Paris” adult puppet show.³⁴

I conclude my survey of puppet law with the only case I found that pitted puppet against puppet. In *Sid @ Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, the creators of the 1970s Saturday morning television program “H.R. Pufnstuf” successfully sued the fast-food giant for copyright infringement based upon its “McDonaldland” advertising campaign.³⁵ In affirming the district court’s decision in favor of the Kroffts, the court of appeals emphatically rejected

McDonald’s attempt to establish dissimilarity between the infringing and infringed expressions by means of a micro-analysis:

Defendants would have this court ignore that intrinsic quality which they recognized to embark on an extrinsic analysis of the two works. For example, in discussing the principal characters – Pufnstuf and Mayor McCheese – defendants point out:

“Pufnstuf’ wears what can only be described as a yellow and green dragon suit with a blue cummerbund from which hangs a medal which says ‘mayor’. ‘McCheese’ wears a version of pink formal dress ‘tails’ with knicker trousers. He has a typical diplomat’s sash on which is written ‘mayor’, the ‘M’ consisting of the McDonald’s trademark of an ‘M’ made of golden arches.”

So not only do defendants remove the characters from the setting, but dissect further to analyze the clothing, colors, features, and mannerisms of each character. We do not believe that the ordinary reasonable person, let alone a child, viewing these works will even notice that Pufnstuf is wearing a cummerbund while Mayor McCheese is wearing a diplomat’s sash.³⁶

After noting that the panel had “viewed representative samples of both the H.R. Pufnstuf show and McDonaldland commercials,”³⁷ Judge Carter continued in a similar vein:

33 Id. at 376 n.5 (citation to the record omitted).

34 See *infra* note 35.

35 While I am not one hundred percent certain that Mr. Pufnstuf was a puppet, his creators, “[t]he Kroffts[,] are fifth generation puppeteers who have been in the entertainment industry in this country over 40 years.” 562 F.2d 1157, 1161 n.1 (9th Cir. 1977). That’s good enough for me. Moreover, “[t]he evidence showed that [the Kroffts] enjoyed years of success with their puppet shows in cities around the country most notably the Le Puppet de Paris adult puppet show.” Id. Ooh la la.

36 Id. at 1166–67.

37 Id. at 1167.

Even a dissection of the two works reveals their similarities. The “Living Island” locale of Pufnstuf and “McDonaldland” are both imaginary worlds inhabited by anthro[po]morphic plants and animals and other fanciful creatures. The dominant topographical features of the locales are the same: trees, caves, a pond, a road, and a castle. Both works feature a forest with talking trees that have human faces and characteristics.

The characters are also similar. Both lands are governed by mayors who have disproportionately large round heads dominated by long wide mouths. They are assisted by “Keystone cop” characters. Both lands feature strikingly similar crazy

scientists and a multi-armed evil creature. It seems clear that such similarities go beyond merely that of the idea into the area of expression. The use of the basic idea of the works does not inevitably result in such similarities. Certainly a jury applying an intrinsic test could find such similarities of expression substantial.³⁸

With the judicial confirmation process so much in the news over the past year, it would be interesting to know just how the senators on the judiciary committee go about probing a judicial nominee’s ability to perform a sophisticated puppet analysis such as that undertaken by Judge Carter in *Krofft*. *GB*

38 Id. at 1167 n.9.