

No. 08-55443

PANEL OPINION ISSUED AUGUST 31, 2009
O'SCANNLAIN, GRABER & NOONAN

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PARIS HILTON,
Plaintiff/Appellee,

v.

HALLMARK CARDS
Defendant/Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
CENTRAL DISTRICT, WESTERN DIVISION
HON. PERCY ANDERSON, JUDGE
CASE NO. CV-07818 PA (AJWX)

**PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

[F.R.A.P. 26.1]

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for appellant Hallmark Cards, Incorporated (erroneously sued as “Hallmark Cards”) (“Hallmark”) hereby states that (1) Hallmark is a privately-held Missouri corporation with no parent company, and no publicly-held company owns more than ten percent (10%) of Hallmark’s stock; and (2) Hallmark owns no publicly-traded subsidiaries; however, Hallmark does own a controlling interest, through a wholly-owned subsidiary, in Crown Media Holdings, Inc., which is publicly-traded.

Dated: September 18, 2009.



Lincoln D. Bandlow
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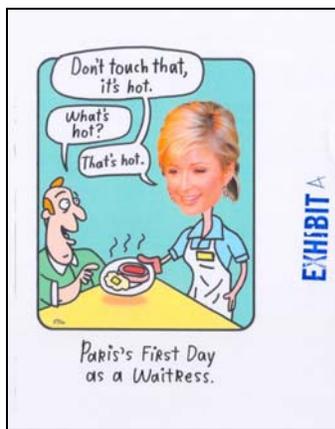
Defendant/Appellant Hallmark Cards, Incorporated (“Hallmark”) respectfully petitions this Court for a rehearing of its August 31, 2009 Opinion (“Opinion” or “Op.”), and also suggests that a rehearing *en banc* is appropriate and necessary. Fed. R. App. Proc. 35 and 40; Ninth Circuit Rule 35-1.

I. INTRODUCTION AND SPECIFICATION OF GROUNDS

In *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183 (9th Cir. 2001), this Court held that the following use of a celebrity’s name and likeness was transformative as a matter of law and protected by the First Amendment:



The Panel’s Opinion, however, holds that the following use of a celebrity’s name and likeness is *not* transformative as a matter of law or so protected:



The Panel concludes that the above greeting card (the “Card”) is noncommercial speech that spoofs a controversial celebrity and her catchphrase, which are both matters of widespread public interest, and that the Card contains a stylized message and its own creative content. Despite these findings, the Panel concludes that the Card is not, as a matter of law, transformative or otherwise protected by the First Amendment. The Panel’s Opinion irreconcilably conflicts with *Hoffman* and numerous other decisions of this Court, other circuit courts and California courts and thus this Petition must be granted to ensure and maintain uniformity of the Court’s decisions. In particular:

(1) The Opinion incorrectly applies the transformative use test and holds that a jury must determine whether the Card is transformative, in conflict with decisions of this Court in *Hoffman*, 255 F.3d at 1184 n.2, *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (“MCA”), *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (“WMP”) and *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008); the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); the Sixth Circuit in *ETW Corp v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003); the California Supreme Court in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001) and *Winter v. DC Comics*, 30 Cal. 4th 881 (2003) and the California Court of Appeals in *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47 (2006); and

(2) The Opinion fails to hold that the Card's use of Hilton's name and likeness was protected by the First Amendment, in direct conflict with decisions by this Court in *Hoffman*, 255 F.3d 1180, *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988) and *Cher v. Forum Intern., Ltd.*, 692 F.2d 634 (9th Cir. 1982); the Tenth Circuit in *Cardtoons, L.C. v. MLB Players Ass'n.*, 95 F.3d 959 (10th Cir. 1996); and numerous other courts which have applied broad First Amendment protection to bar right of publicity claims asserted against expressive works.

Speakers regularly parody or spoof celebrities, along with the phrases or works commonly associated with those celebrities, as a means of communicating a variety of messages. *See e.g., Cardtoons*, 95 F.3d at 972 (works that spoof celebrities are "a valuable communicative resource" because celebrities "are an important part of our public vocabulary"); *World Wrestling Federation v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 445 (W.D. Penn. 2003) (works that "poke fun at celebrities and societal icons [are] an important form of entertainment and expressive commentary"). The Panel's unprecedented finding that the publicity rights of an iconic celebrity may trump the First Amendment in the context of fully-protected speech that spoofs that celebrity, however, creates uncertain and unreliable legal standards that will drastically chill speech if allowed to stand. Thus, *en banc* review is appropriate and necessary, both to reconcile the conflict in the decisions and to address First Amendment issues of exceptional importance.

II. FACTUAL BACKGROUND

Hallmark created and published the Card (a copy is attached to the Appendix). Plaintiff/Appellee Paris Hilton (“Hilton”), who has said “every decade has an iconic blonde – like Marilyn Monroe or Princess Diana – and right now, I’m that icon,” brought right of publicity and Lanham Act claims based on its contents.

The District Court denied Hallmark’s Motion to Dismiss Hilton’s Lanham Act and right of publicity claims and Hallmark’s anti-SLAPP Motion to Strike Hilton’s right of publicity claim. On appeal, acknowledging that Hilton is “a controversial celebrity” and “flamboyant heiress” whose image, career, “privileged lifestyle” and catchphrase are “something of concern to a substantial number of people,” the Opinion held that the anti-SLAPP statute’s first prong applied because the Card was speech relating to an issue of public interest. Op. 12130-32. The Opinion also recognized that the Card was noncommercial speech (Op. 12126 n.7) and was a “spoof” of “Hilton’s persona” and catchphrase – “the very things that interest people about her.” Op.12130-31. The Opinion concluded, however, that the Card’s expressive content was not as a matter of law transformative and as a result, Hilton had “at least some probability of prevailing on the merits” under the second prong. Op. 12138. The Opinion warrants rehearing.

III. THE PANEL’S OPINION IRRECONCILABLY CONFLICTS WITH THIS COURT’S DECISION IN *HOFFMAN* AND OTHER DECISIONS BY INCORRECTLY LIMITING AND FAILING TO PROPERLY APPLY THE TRANSFORMATIVE USE TEST

The Opinion purports to apply the transformative use test, which it acknowledges is “based on the First Amendment” (Op. 12133), but its interpretation and application of that test conflicts with the decisions the Opinion cites (*Hoffman*, *Comedy III* and *Winter*) as well as decisions from other courts which the Opinion fails to address (*Kirby* and *ETW*). In doing so, the Opinion concludes that whether an expressive work is transformative, and thus immune from a right of publicity claim, will virtually always be a question for a jury. *See* Op. 12137 (stating that “[w]e need not decide whether these differences” between the Card and Hilton’s appearance render the Card transformative, leaving that decision to the “trier of fact”).

The Opinion incorrectly envisions a transformative use “spectrum” on which only uses at opposite ends can be determined as a matter of law. Op. 12135-36. At one end is an unprotected “literal, conventional” depiction like that of the Three Stooges in *Comedy III*; at the other end is the protected cartoon “half human, half worm” and “total, phantasmagoric conversion” of the Winter brothers in *Winter*. Everything between those two ends of the spectrum, according to the Opinion, is “neither legally transformative nor legally not transformative.” Op. 12135-38.

Thus, the Panel concluded it could not decide as a matter of law that the Card is transformative, despite recognizing that: (a) the “potential reach of the transformative use defense is broad” and protects parody, “fictionalized portrayal ... heavy-handed lampooning ... [and] subtle social criticism”; (b) courts cannot be “concerned with the quality of the artistic contribution” and it is “irrelevant whether Hallmark's card qualifies as parody or high-brow art” under the test; (c) works that contain “expression of something other than the likeness of the celebrity” and that go beyond a “conventional portrait of a celebrity” are protected by the test; and (d) the Card “spoofed” Hilton and her catchphrase and added its own expressive content beyond Hilton’s identity. Op. 12134-37.

The Opinion’s failure to recognize the Card as transformative conflicts with *Hoffman*, and its inaccurate and abbreviated treatment of *Hoffman* fails to distinguish the two cases. *Hoffman* involved claims by Dustin Hoffman stemming from an image that recreated a “memorable still photograph” from Tootsie by “retain[ing] Hoffman’s head and the American flag background from the ‘Tootsie’ still, but graft[ing] onto it a body dressed in different clothing” and standing in the same pose as Hoffman in the film. *Hoffman*, 255 F.3d at 1182.

This Court held that the First Amendment barred Hoffman’s claims. The

Court rejected the contention that the work was not transformative.¹ The Opinion attempts to distinguish *Hoffman* by stating that it rested on Hoffman's "allegation that the photograph is not a 'true' or 'literal' depiction of him, but a false portrayal" whereas Hilton "asserts that the card's depiction copies too closely a scene that she made famous on her television show." Op. 12138-30. Thus, the allegedly false speech in *Hoffman* received protection but the allegedly truthful speech in the Card does not. That stands First Amendment jurisprudence on its head: it is false speech that potentially receives less First Amendment protection, not truthful speech. The Opinion's conclusion is also contrary to well-established law under which parodies or spoofs of other works are regularly deemed transformative and protected by the First Amendment.

¹ Although the Opinion states that *Hoffman* was decided "on grounds having nothing to do with the transformative use defense" (Op. 12138), *Hoffman* clearly held the use was transformative. *Hoffman*, 255 F.3d at 1184 n.3. Indeed, the Opinion states that it was "clear to this court that the composite photograph in *Hoffman* contained transformative elements" and that there was "no question" that the work contained "significant transformative elements" because "'Hoffman's body was eliminated and a new differently clothed body was substituted in its place.'" Op. 12138 (quoting *Hoffman*, 255 F.3d at 1184 n.3). That is more than a description of "significant transformative elements" – it is a description of the Card: Hilton's body was eliminated and a new, differently clothed body was substituted in its place (indeed, a cartoon body which is much more easily differentiated from the original than was the photographed, identically-posed body in *Hoffman*). Moreover, unlike in *Hoffman* where the image of Hoffman's face was lifted from Tootsie, the perfectly-coiffed glamour shot image of Hilton's face was not taken from The Simple Life (the "Show") (a copy of the Show was in the record, *see* Op. 12138). Indeed, in the Show, when Hilton worked at a fast food joint, her hair was in a ponytail and she wore a baseball cap. *See* page 1 *supra*.

Finally, the Opinion contends that in *Hoffman* “the composite person looked very different and was not doing or saying anything that one would have attributed to Hoffman himself” – which is simply incorrect – whereas the image of Hilton in the Card “more closely resembles Hilton's previous work.” Op. 12139. In reality, the use in *Hoffman* was much closer to Hoffman’s previous work than is the use in the Card to Hilton’s previous work. In *Hoffman*, the picture of Hoffman’s head was the exact image lifted from the film *Tootsie*. In addition, Hoffman’s body-double was posed in the identical position as the pose Hoffman had struck for the movie and its poster. Indeed, duplicating Hoffman’s prior work was defendant’s objective: the point was to illustrate how Hoffman would have appeared in *Tootsie* had he worn an updated dress and shoes. In contrast, the Card is very different from how Hilton appeared in the Show: (a) the photo of Hilton’s head is not from the Show; (b) Hilton did not have a cartoon body in the Show; (c) Hilton never wore a waitress outfit with apron, name tag and oven mitt in the Show; (d) Hilton never served a cartoon plate of steaming steak and eggs to a cartoon patron in the Show; (e) Hilton never warned a cartoon patron about a hot plate in the Show; and (f) Hilton never wished anyone a “smokin’ hot birthday” in the Show.

Thus, the defendant in *Hoffman* used a celebrity’s image in an imitation of the celebrity’s prior work to an extent far greater than did the Card. Accordingly, since the use in *Hoffman* was transformative, the use here must be as well. Indeed,

the use in *Hoffman* was transformative even though it did not directly comment on Hoffman, whereas the Opinion acknowledges that the Card is a direct “spoof” of Hilton and her catchphrase. Out of *stare decisis* and the need for consistent First Amendment jurisprudence, the Ninth Circuit must apply *Hoffman* and hold that the use in the Card is transformative.

The Opinion also conflicts with *Comedy III* and *Winter*. Under *Comedy III*, for a work to be transformative, “an artist depicting a celebrity must contribute something more than a ‘merely trivial’ variation, [but must create] something recognizably ‘his own.’” 25 Cal. 4th at 408 (citation omitted). The Opinion acknowledges that the Card contains a unique “stylized” message (Op. 12124 n.6) and depicts Hilton with an “over-sized head” and a “cartoon drawing” for a body. Moreover, in contrast to Hilton’s appearance in the Show, in the Card “Hilton’s uniform is different” (indeed, it is a cartoon uniform); “the style of the restaurant is different”; “the food is different” and the Card uses Hilton’s catchphrase in its “familiar, idiomatic meaning” rather than how Hilton utters it when “she finds something interesting or amusing.” Op. 12137, 12116. These are more than “merely trivial” variations of Hilton’s likeness, how she appeared on the Show and on her catchphrase, and they add things that are “recognizably [Hallmark’s] own.”

Under *Winter*, a work is transformative if defendant contributes “distinctive

and expressive content” beyond the celebrity’s image. 30 Cal. 4th at 891-92.² In applying that principle, *Kirby* (which the Opinion does not address) held that courts need only examine defendant’s work and compare it with the plaintiff – “[i]f distinctions exist,” the use is transformative. *Kirby*, 144 Cal. App. 4th at 61. Here, a cursory glance reveals such distinctions: Hilton does not have a cartoon body or live in a cartoon world. Finally, works can be transformative by context without transforming the celebrity’s likeness. *See ETW*, 332 F.3d at 938 (literal depiction deemed transformative because it conveyed a message about the celebrity).

Thus, a use is transformative as a matter of law if defendant makes creative contributions beyond “merely trivial” variations, creates a work that is more than a “literal, conventional” depiction of a celebrity such that “distinctions exist” between the celebrity and the work, or transforms the celebrity’s identity by adding creative context. The Card not only does one of these things – which would be sufficient – it does all of them.

The Opinion, however, erroneously signals that a use must reach a

² The Opinion distinguishes the Card from *Winter* by stating that the comic book characters there “did things that the actual musicians did not do.” Op. 12137. The Card, however, depicts Hilton doing things she did not do in the Show. While the *Winter* characters “engage[d] in wanton acts of violence, murder, and bestiality for pleasure” (*Id.*) which may be *more* transformative than the Card, a use need not reach the pinnacle of transformation: it just needs to add distinctive and expressive content to be protected. Moreover, the Card need not depict Hilton “doing something she did not do” to be transformative. *See ETW*, 332 F.3d at 938 (work transformative that depicted Woods doing exactly what he does: golfing).

heightened level of creativity to be transformative as a matter of law, stating that as long as a use “is not in the same category as the comic book in *Winter*” then it is not necessarily transformative and must go to a jury. Op. 12136. Despite having noted that it must not be “concerned with the quality of the artistic contribution” (Op. 12135), the Opinion disregards that admonition, stating that “[t]here is no larger story” to the Card and that “Hilton’s cartoon body is that of a generic woman” rather than the “worm-like versions” in *Winter*. Op. 12137.³

³ The Opinion’s heightened standard also conflicts with this Court’s First Amendment jurisprudence in *MCA*, 296 F.3d 894, *WMP*, 353 F.3d 792 and *E.S.S.*, 547 F.3d 1095 and the Second Circuit in *Rogers* (adopted by this Court). *Rogers* held that the First Amendment barred Ginger Rogers’ right of publicity claim and applied a test akin to the transformative use test. The Court held that because Rogers’ claims were asserted against an expressive work, the use of Rogers’ name was protected by the First Amendment as long as it was “artistically relevant” and not “wholly unrelated” to the work. *Rogers*, 875 F.2d at 1004. Since the use met the “appropriately low threshold of minimal artistic relevance” it was protected by the First Amendment. *Rogers*, 875 F.2d at 999, 1001 (holding that “minimum threshold of artistic relevance” was met because film was a fictional work about two dancers nicknamed “Ginger” and “Fred” and thus calling to mind a famous dancer such as Rogers was sufficiently relevant). This Court adopted and then expanded on *Rogers*, holding that the “artistic relevance” test applies to uses not only in titles but also in the contents of a work. *MCA*, 296 F.3d at 901-02; *WMP*, 353 F.3d at 807; *E.S.S.*, 547 F.3d at 1099. Indeed, this Court recently held that the threshold to satisfy this test is extremely low: the artistic relevance “merely must be above zero.” *Id.* at 1100. Thus, applying First Amendment principles, this Court applies a minimal artistic relevance requirement when evaluating claims based on the use of a “mark” in an expressive work. The Opinion, however, applies a heightened creativity requirement when the “mark” used in an expressive work is the persona of a celebrity. The level of First Amendment protection for expressive works that use icons of our society does not and should not hinge on the nature of the claim or whether the claimant is Hilton or “Barbie.”

Although recognizing that there were clear differences between the images and content contained in the Card, on the one hand, and Hilton's actual likeness and how she appeared in the Show, on the other hand, the Opinion refused to deem the Card transformative because it was purportedly "just a spoof on a scene from Hilton's television program." Op. 12137. Even assuming that is true (which it is not), it does not defeat a finding of transformative use. Rather, it supports it. Spoofing how a celebrity appears in a work that the public commonly associates with that celebrity is a standard practice of satirists, parodists and other speakers. *See White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1515 n.18 (9th Cir. 1993) (Kozinski, J., dissenting) ("the things that most reliably remind the public of celebrities are the actions or roles they're famous for"). Such uses are regularly deemed transformative. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) ("parody has an obvious claim to transformative value ... by shedding light on an earlier work, and, in the process, creating a new one"); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (spoof of work protected). Indeed, a spoof must "mimic an original to make its point." *Campbell*, 510 U.S. at 580-81.

Newspaper cartoons, television shows like SATURDAY NIGHT LIVE and films like AIRPLANE all spoof celebrities as they have appeared in prior works, yet this does not render the use non-transformative or otherwise unprotected. Must a right of publicity claim by Tom Cruise over a skit showing him bouncing on Oprah's

couch go to a jury because it “spoofs a scene” from Cruise’s appearance on Oprah’s show? The answer now appears to be different depending on whether a court applies *Hoffman* or the Opinion. Indeed, the work in *Hoffman* was a “spoof” on how actors had appeared in their prior films, yet this was transformative and otherwise protected by the First Amendment.

The Opinion casts a dark shadow over that conclusion in *Hoffman*. Accordingly, the Opinion’s misinterpretation and misapplication of the transformative use standard has far-reaching, speech-prohibitive implications to speakers who look to the “Court of Appeals for the Hollywood Circuit” for guidance on important First Amendment protections. *White*, 989 F.2d at 1521. Moreover, the California Supreme Court has recognized that right of publicity cases that involve First Amendment determinations should be resolved by the Court early to avoid chilling speech. *See Winter*, 30 Cal. 4th at 891-92 (holding that “Court of Appeal erred in finding the existence of triable issues of fact” regarding transformative use, which “courts can often resolve as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person” portrayed, and that “speedy resolution” of such cases is desirable because “unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights”); *Kirby*, 144 Cal. App. 4th at 54 (same); *Dorsey v. Nat. Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992) (same).

IV. THE PANEL’S OPINION IRRECONCIALABLY CONFLICTS WITH HOFFMAN AND NUMEROUS OTHER DECISIONS APPLYING BROAD FIRST AMENDMENT PROTECTION TO EXPRESSIVE WORKS LIKE THE CARD

The Opinion states that the challenge raised by Hallmark to Hilton’s claims was limited to the transformative use and public interest defenses, and thus the Opinion leaves “for another day the question of whether the First Amendment furnishes a defense to misappropriation of publicity that is broader” than these defenses. Op. 12133 n.11. The Opinion, however, is mistaken: Hallmark *did* raise a broad First Amendment challenge beyond the “transformative use” and “public interest” defenses. *See e.g.*, Hallmark’s Opening Brief pgs. 1, 14, 15, 26 & 47; Hallmark’s Reply Brief pgs. 10, 11, 14-19 & 26; Excerpts of Record 309, 331-334. The law cited by Hallmark in support of that challenge is dispositive of Hilton’s claims, even without reference to the transformative use doctrine.

In asserting that Hilton’s right of publicity claim failed as a matter of law, Hallmark relied not only on broad First Amendment protections applied by *Hoffman*, but on the same protections applied by: (a) this Circuit in *Leidholdt*, 860 F.2d 890, *Cher*, 692 F.2d 634 and *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (N.D. Cal. 2002); (b) the Second Circuit in *Rogers*, 875 F.2d 994; (c) the Tenth Circuit in *Cardtoons*, 95 F.3d 959; (d) the Third Circuit in *World Wrestling Federation*, 280 F. Supp. 2d at 445; (e) the California Supreme Court in *Guglielmi*

v. Spelling-Goldberg Prods., 25 Cal. 3d 860 (1979); and (f) the California Court of Appeals in *Polydoros v. Twentieth Century Fox*, 67 Cal. App. 4th 318 (1997).

None of these cases (other than *Hoffman*) applied or relied upon the “transformative use” or “public interest” defenses. Rather, these cases held that right of publicity claims asserted against noncommercial expressive works were barred as a matter of law by broad First Amendment principles – the precise argument made by Hallmark. Thus, Hallmark did raise the question of whether broad First Amendment protection bars Hilton’s claim and once the Opinion’s erroneous conclusion to the contrary is corrected, application of that protection mandates that Hilton’s claim fails.

Based on broad First Amendment principles, this Court in *Hoffman* held that Hoffman’s claims were barred. The Court found that the work at issue was noncommercial expressive speech, which barred Hoffman’s claims unless Hoffman could demonstrate that the speech fell into the narrow category of knowingly false speech, a contention that the Court found Hoffman could not support. *Id.* at 1186-87.⁴

⁴ As discussed above, the Court also summarily rejected Hoffman’s contention that the work was not transformative for reasons that are equally applicable here. The *Hoffman* Court did not, however, limit its analysis to that issue – it applied broad First Amendment principles to bar Hoffman’s claims.

That analysis dictates that Hilton’s claim fails under the First Amendment as well. The Opinion acknowledges that the Card is fully protected speech and that there is no knowingly false speech because the Card was manifestly a “spoof” of Hilton. Indeed, the Opinion points out that Hilton does *not* contend that the Card was false speech, rather, she contends that the Card was purportedly a “true” depiction of her from the Show. Op. 12139. Thus, under *Hoffman*, full First Amendment protection applies and bars Hilton’s claim as a matter of law.

The Opinion also directly conflicts with *Cardtoons*, a case that involved directly analogous facts.⁵ In *Cardtoons*, celebrity baseball players brought right of publicity claims against a company that sold trading cards that spoofed the players. Recognizing that “[p]arodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society,” and that “[r]estricting the use of celebrity identities restricts the communication of ideas,” the Court held that the cards were protected by the First Amendment, barring plaintiffs’ claims. *Cardtoons*, 95 F.3d at 972; *see also Comedy III*, 25 Cal. 4th at 408-09 (agreeing with *Cardtoons*’ “unassailable” holding that “works parodying and caricaturing celebrities are protected by the First Amendment”).

⁵ The Opinion cites *Cardtoons* in concluding the Card is noncommercial speech, but never mentions *Cardtoons* again despite its obvious parallels. This highlights another justification for *en banc* review – the Opinion “conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.” Federal Rule of Appellate Procedure 35.

V. CONCLUSION

The Opinion holds that a right of publicity claim asserted by an iconic celebrity, stemming from an expressive work that “spoofs” that celebrity and her oft-repeated catchphrase, is not transformative or otherwise protected by the First Amendment. In his well-known dissent from denial of *en banc* review in *White v. Samsung*, the Chief Judge of this Court expressed grave concern about courts giving celebrities a “right to keep people from mocking them or their work.” *White*, 975 F.2d at 1516. The Opinion does exactly that, in direct conflict with numerous decisions by this Court and others, and to the detriment of the fundamental right of free speech. Accordingly, the Petition should be granted.

Dated: September 18, 2009.



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CERTIFICATE OF COMPLIANCE

[Circuit Rules 35-4 and 40-1]

I certify that the attached Petition for Rehearing and Suggestion for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 4,188 words.

Dated: September 18, 2008.

A handwritten signature in blue ink, appearing to read 'L. Bandlow', with a long horizontal flourish extending to the right.

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HALLMARK CARDS, INCORPORATED

Appendix

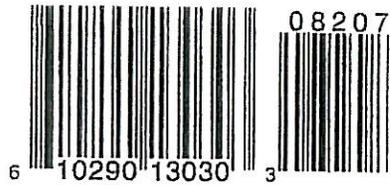


Paris's First Day
as a Waitress.

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Saturdays

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1888 Century Park East, Suite 1000, Los Angeles, CA 90067. On **September 18, 2009**, I served the foregoing document(s) described as: **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** on the interested party below, using the following means:

Brent H. Blakely
 Blakely Law Group
 915 North Citrus Avenue
 Hollywood, CA 90038-2401
 Counsel for Appellee Paris Hilton

BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

(STATE) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **September 18, 2009** at Los Angeles, California.

Shelly Ulaj

[Print Name of Person Executing Proof]

_____/ s /_____
 [Signature]