

# NEWSLETTER

An Entertainment Industry Organization



## OH PRETTY PARODY (LOOK WHAT THEY DONE TO ROY'S SONG)

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### The President's Corner

Dan Butler

Our April panel, "TV or Not TV? 'What' is the Question," hosted by our remarkably good-looking past CCC President, Steve Winogradsky, proved to be a lively discussion of one of the hottest topics affecting the music and entertainment business. Scott Holtzman of Disney, Ron Broitman of Sony/ATV music publishing, Matt Burrows of iTunes and Frank Chindamo of Fun Little Movies each spoke with great insight as to how new delivery methods for audiovisual programming via the Internet, iPods and personal communication devices will affect the way music is used and licensed in the future. I particularly enjoyed Ron's sage advice to the crowd that if licensors and licensees realize what a small world the music community is and reasonably work together to clear music for new technologies, everyone will benefit.

Many of you will remember an excellent "Pops to Broadway" panel we had several years ago featuring Brenda Russell, Ali Willis and Steven Bray, who shared with us their creative process in attempting to bring "The Color Purple" to the Broadway stage as a musical. We are most pleased to report that their efforts were successful and the show is a hit. On top of that, Brenda, Ali and Steven have all just been nominated for a Tony Award for Best Original Score (Music and Lyrics), and the show for a total of eleven nominations including Best Musical. Congrats!

Tonight's "Evening With" panel should be a most memorable night. The multi-talented actor/musician/satirist Harry Shearer ("This Is Spinal Tap," "The Simpsons," "Le Show") and his lovely singer/songwriter spouse Judith Owen will be joined by their newly-formed record label Courgette Records' partner Bambi Moe, along with LA Times music critic Steve Hochman and CCC President-elect David Hirshland of Bug Music, who will share career tales as well as insights on the music business and the recovery efforts in New Orleans. It promises to be a diverse and fascinating discussion.

Special thanks to CCC Past President Michael Morris for writing this month's scholarly article on musical parody. All the best!

1. Introduction. In 1964, the great Roy Orbison co-wrote one of rock's most beloved songs, "Oh Pretty Woman," in which he implored his Venus on Earth not to walk on by and not make him cry. And damned if the seemingly untouchable object of Orbison's desire didn't do an abrupt about-face by the song's last verse: "What do I see? Is she walking back to me? Yeah, she's walking back to me! Oh Pretty Woman." The song was hardly Shakespearian prose, and not surprisingly, someone - specifically Luther Campbell of the rap group 2 Live Crew - chose to poke fun at "Oh Pretty Woman" by writing "Pretty Woman" in 1989. What Campbell couldn't predict was that by melding rap with the grand tradition of parody, he would end up a litigant in the seminal 1994 decision, *Campbell v. Acuff-Rose Music, Inc.*, in which the Supreme Court offered clear guidance on what constituted a valid defense of fair use (of which parody is one form) to a claim of copyright infringement. This article will discuss both the Supreme Court's decision in *Campbell* and the more recent U.S. 11th Circuit Court of Appeals 2001 decision in *Suntrust Bank v. Houghton Mifflin Co.*, in which the copyright owner of that cherished antebellum epic *Gone With the Wind* ("GWTW") sought to enjoin publication of Alice Randall's *The Wind Done Gone* ("TWDG"). When the dust settled in that litigation, the South failed to rise again as the 11th Circuit held that Randall's biting parody was most likely a protected form of fair use and refused

to prevent its publication. However, before jumping into the *Campbell* and *Suntrust Bank* cases, let's first take a look at parody's origins and the legal history of fair use.

2. Parody - A Short History. Now for the history lesson. The word "parody" is derived from the Latin *parodia*, which itself comes from the Greek *parOidia*. As explained in Wikipedia, in ancient Greek literature a parody was a type of poem that imitated another poem's style - what the Greeks called a "mock poem." The Romans assimilated the Greek concept of parody (probably about the time Rome conquered Greece), defining it as an imitation of one poet by another for humorous effect - thus, Roman parodists predated Campbell's reworking of the Orbison classic by a few thousand years! The first English use of the word *parody* is attributed in the Oxford English Dictionary to Ben Jonson, whose 1598 classic *Every Man in His Humor* contained the immortal phrase: "A Parodie, a parodie! to make it absurder than it was." Throughout history, parody has fueled many creative imaginations. Some of the countless examples include the *Airplane!* pictures that parodied classic disaster movies, the *Scary Movie* quadrilogy which smirked at horror films like *Scream*, *The Ring*, and *The Exorcist* and nearly all of "Weird Al" Yankovic's unforgettable song parodies (who could forget "Like a Surgeon" and "Eat It?"). Of course, any crash course in the history of parody must pay homage to Rob Reiner's heavy metal spoof *This Is Spinal Tap* (whose slightly over-the-hill rock stars included an unforgettable performance by our featured guest tonight, Harry Shearer).

Thus, parody has a rich tradition dating back thousands of years during which sharp-minded - and frequently acerbic - writers have imitated and borrowed from existing literary, musical and cinematic works for comic and often, critical purposes. And the Copyright Act recognizes that parody can be a protected form of expression.

3. Parody, Fair Use, the Copyright Act and Free Speech. The term "parody" will not be found in the Constitution's Copyright Clause. It is a form of "fair use," one exception to the otherwise exclusive rights of the copyright owners to exploit their works. The relationship between the Copyright Clause and the First Amendment is instrumental in appreciating the origins of the protection afforded fair use expression. The Copyright Clause can be traced back to jolly old England where, in 1710, the Statute of Anne "was designed to destroy the booksellers' monopoly of the book trade and to prevent its recurrence." L. Ray Patterson, Understanding the Copyright Clause, 47 J. Copyright Soc'y USA 365, 379 (2000). This Parliamentary statute assigned copyright in books to authors, added a requirement that only a new work could be copyrighted, and limited the duration, which had been perpetual, to two fourteen year terms. 8 Anne, C.19 (1710), reprinted in 8 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §7-5 (2001). It is clear that the goal of the Statute of Anne was to encourage creativity and ensure that the public would have free access to information by putting an end to "the continued use of copyright as a device of censorship." Patterson at 379. Our founding fathers incorporated the principles of the Statute of Anne by enacting the Copyright Clause of Constitution (Art. 1, §8; cl. 8); which in part provides:

"The Congress shall have Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ."

In *Suntrust Bank*, the 11th Circuit emphasized that copyright laws were designed to achieve three

main goals: the promotion of learning, the protection of the public domain and the granting of an exclusive right to the author. To promote learning and guard against censorship, the Copyright Act provides an economic incentive for authors to publish books and disseminate ideas to the public. As the Supreme Court observed in its 1985 decision of *Harper & Row Publishers, Inc. v. Nation Enterprises*: "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." The Supreme Court further recognized that "[t]he monopoly created by copyright thus rewards the individual author in order to benefit the public." Absent this limited monopoly, Congress reasoned that authors would lack an economic incentive. By enabling authors to monetize their works, the Copyright Act promotes public access to a continuing flow of new thoughts and concepts.

Conversely, the Copyright Act's second objective is to insure that works enter the public domain after the author's rights expire. Since 1998, the length of most copyrights were enlarged to last from date of creation until 70 years after an author's death (for works made for hire, the term was extended to the shorter of 95 years from publication or 120 years after creation). Consequently, copyright owners enjoy a robust period to exploit new works, but constitutional safeguards ensure that such works ultimately become public domain.

The Copyright Clause and the First Amendment were intended to work together by preventing censorship - prevention of private censorship through the copyright laws, and prevention of public censorship by the First Amendment. Significantly, the Copyright Act does not protect ideas, only the expression of ideas. This reflects the First Amendment's goals of encouraging debate and the free exchange of ideas. This "idea/ expression" dichotomy is critical in understanding the concept of "fair use," which enables authors to fairly use existing ideas, but only by their own original expressions.

Prior to 1976, fair use was a judge-made right designed to harmonize the limited monopoly of

copyright law with the free speech cornerstone of the First Amendment. The "fair use" doctrine has its roots in cases brought under England's 1710 Statute of Anne, in which English courts held that in appropriate cases, "fair abridgements" weren't unlawful infringements. Section 107 of the 1976 Copyright Act codified the common law judicial doctrine of fair use as follows:

"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

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

The fair use exceptions to the copyright owner's rights of exclusivity incorporate First Amendment principles into the Copyright Act by enabling authors to draw upon existing works to introduce new ideas and concepts. But how much of an existing work can an author incorporate into a new work and still be considered a fair user rather than an

infringer? There are no "bright-line" rules, and both before and after the 1976 Copyright Act, a case-by-case analysis was required. However, the 1994 "Oh Pretty Woman" holding by the Supreme Court in *Campbell* and the subsequent 2001 "The Wind Done Gone" analysis by the 11th Circuit in *Suntrust* provide detailed guidance on when parody/fair use may trump copyright exclusivity.

4. The *Campbell* and *Suntrust* Decisions. Parody, like other comment and criticism, may claim fair use protection. In *Campbell*, the District Court granted summary judgment for 2 Live Crew, having no difficulty concluding that 2 Live Crew's commercial purpose of lifting elements of "Oh Pretty Woman" was not a bar to fair use. The District Court noted that 2 Live Crew's version was a parody, which "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song" is; that 2 Live Crew had taken no more than was necessary to "conjure up" the original in order to parody it; and that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." The 6th Circuit Court of Appeals thought otherwise and reversed the District Court, essentially holding that the "blatantly commercial purpose" of the 2 Live Crew parody prevented it from being a fair use. The Supreme Court reversed and remanded the case, finding that the Court of Appeals erred in concluding that the commercial nature of the 2 Live Crew song presumptively amounted to an impermissible harm to the potential market for or value to Orbison's original song. Likewise in *Suntrust*, the 11th Circuit reversed and remanded a District Court decision enjoining publication of "The Wind Done Gone," concluding that a viable defense of fair use was probably available, and that issuance of an injunction was "at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech." In both *Campbell* and *Suntrust*, the Supreme Court and the 11th Circuit focused on the four "fair use" factors in §107 of the Copyright Act as applied to each case. Let's take a look at how these

courts applied these factors.

(1) The Purpose and Character of the Use. In *Campbell*, the Supreme Court's inquiry began with whether the new work merely superseded the objects of the original work, or rather added a new creative element, so as to be considered "transformative." The Supreme Court emphasized that the goal of copyright - to promote science and the arts - was generally furthered by creation of transformative works. Such works, reasoned the High Court, lay at the heart of the fair use doctrine "of breathing space into the confines of copyright." For purposes of copyright law - and a parodist's right to quote from existing material - the parody must incorporate "some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work." If a new work "lacks critical bearing on the preexisting work," and the borrowed material is merely "a way to avoid the drudgery of creating something fresh," then the claim to fair use protection is severely undermined.

In *Campbell*, the Supreme Court found that 2 Live Crew's juxtaposition of the romantic musings of a man whose fantasy comes true with degrading taunts, a bawdy demand for sex, and a sign of relief from paternal responsibility "could be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies." Accordingly, this joinder of reference and ridicule was the essence of parody's claim to fair use as a transformative work, notwithstanding the overtly commercial nature of the 2 Live Crew song.

In *Suntrust*, the 11th Circuit compared *GWTW* to *TWDG* and found that *TWDG* had appropriated numerous characters, settings and plot twists from *GWTW*. Among many examples, Scarlett O'Hara reappeared as "Other," Rhett Butler became "R.B.," Melanie Wilkes was renamed "Mealy Mouth," Tara became "Tata" and Twelve Oaks Plantation became "Twelve Slaves Strong as Trees." In fact, the 11th Circuit concluded that *TWDG*, and especially its first half, was largely

an encapsulation of *GWTW* that exploited "copyrighted characters, story lines and settings as the palette for the new story."

Despite such wholesale borrowing by *TWDG* from *GWTW*, the 11th Circuit found that while *TWDG* was undoubtedly a commercial product, its "for-profit" status was strongly overshadowed by its highly transformative use of *GWTW*'s copyrighted elements. To quote the 11th Circuit:

"[a] work's transformative value is of special import in the realm of parody, since a parody's aim is, by nature, to transform an earlier work."

*TWDG* was not merely a fictional work. The 11th Circuit emphasized that *TWDG* "was principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*. Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."

Margaret Mitchell's *GWTW* described both blacks and whites as better off under a pre-Civil War regime where white characters comprised a noble aristocracy, while free blacks were referred to as "creatures of small intelligence." Conversely, Alice Randall's *TWDG* scathingly inverted *GWTW*'s traditional race roles by portraying "powerful whites as stupid or feckless" and generally stripping "the romanticism from Mitchell's specific account of this period of our history."

It was Randall's very dependence on copyrighted elements of *GWTW* that enabled her to criticize Mitchell's earlier work. The 11th Circuit emphasized that Randall's conscripting elements from Mitchell's book was necessary "to make war against it." This highly transformational use by Randall of *GWTW*, reasoned the 11th Circuit, strongly favored a finding of fair use. It also influenced the 11th Circuit's analysis of the other three "fair use" factors. Let's look at how the *Campbell* and *Suntrust* courts considered these remaining factors.

(ii) The Nature of the Copyrighted Work. This second statutory factor was not of much help to the Supreme Court in *Campbell*. This factor acknowledges that some works are "closer to the core of intended

copyright protection than others" (i.e., there is a hierarchy of copyright protection favoring original works over derivative ones), making fair use more difficult to establish when an earlier work is copied. Although Orbison's original song was intended for public dissemination and fell within the protective purposes of copyright law, the Supreme Court noted that fact was never "likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works." Likewise in *Suntrust*, the 11th Circuit paid scant attention to this second factor. Noting that original creative works such as GWTW are entitled to the greatest degree of protection, the 11th Circuit discounted this factor, "since parodies almost invariably copy publicly known, expressive works" (quoting the *Campbell* decision).

(iii) Amount and Substantiality of the Portion Used. The extent of permitted copying depends upon the purpose and character of the use. In *Campbell*, the Supreme Court stressed the uniqueness of parody and the challenges of applying this third factor to it:

"Parody presents a difficult case. 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. When parody takes aim at a particular original work, the parody must be able to conjure up at least enough of that original to make the object of its critical wit recognizable."

The Supreme Court further observed that

"[o]nce enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided."

In *Campbell*, 2 Live Crew copied note-for-note the opening bass line of

"Oh Pretty Woman" and lifted verbatim the first line of Orbison's lyrics. However, such parroting went to both the "heart" of the original and the "soul" of parody - without listener recognition of "Oh Pretty Woman." 2 Live Crew's "Pretty Woman" would not be a parody. The Supreme Court concluded that the use of the Orbison lyrics by 2 Live Crew was not excessive in relation to its parodic purpose. However, the Supreme Court refrained from opining on whether the repetitive use of the bass line was excessive copying (and since the case subsequently settled, we'll never know).

In *Suntrust*, the 11th Circuit recognized many of TWDG's appropriations from GWTW as being clearly transformative for purposes of commentary, but the *Suntrust* plaintiff contended that not all of TWDG's "takings" were clearly justified as commentary. And the 11th Circuit conceded that while TWDG was a parody, "not every parody is a fair use." Appearing conflicted on the point, the 11th Circuit observed that while TWDG clearly appropriated GWTW's idiosyncratic characters, the court's challenge was to determine whether such use was fair. To quote the 11th Circuit:

"In doing so, we are reminded that literary relevance is a highly subjective analysis ill-suited for judicial inquiry. Thus we are presented with conflicting and opposing arguments relative to the amount taken and whether it was too much or a necessary amount."

Like the Supreme Court's remanding of *Campbell* for a factual determination as to whether 2 Live Crew's repetitive use of the bass line was excessive, the 11th Circuit remanded *Suntrust* for a similar lower court determination on the question of "excessive taking." Of course, the 11th Circuit had a very limited record before it, consisting only of declarations supporting and opposing the injunction sought by the GWTW copyright owner. Thus, the 11th Circuit vacated the District Court's for further proceedings on this point and the related, final fair use factor (discussed below). However, as in *Campbell*, the *Suntrust* litigation settled, with continued distribution of TWDG permitted.

(iv) Effect on the Market Value

of the Original. In evaluating the final fair use factor, the *Campbell* court noted that "[i]t requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original" (citing *Nimmer* 13.05[A]4., p. 13-102.6). This appraisal must include not only harm to the original, but also potential harm to the market for derivative works. Since "fair use" is an affirmative defense to infringement, 2 Live Crew bore the burden of proving that their parody would not cause harm to rap derivatives of the Orbison original. 2 Live Crew only submitted uncontroverted evidence that their song would have no likely adverse effect on the original. No evidence was introduced by either 2 Live Crew or Acuff-Rose that the market for licensed, derivative rap versions of the Orbison original would be harmed by 2 Live Crew's parody. The Supreme Court held that the Second Circuit erred by concluding that 2 Live Crew's commercial parody presumptively meant a likelihood of future harm to the Orbison original. However, the record was silent on whether that parody posed any harm of market substitution should Acuff-Rose attempt to exploit the market for derivative works (i.e., by licensing it for new works based on the original). Although highly improbable that 2 Live Crew's parody would undermine the market for licensed non-parodic rap versions of "Oh Pretty Woman," the Supreme Court remanded the case, anticipating that evidentiary hole would "doubtless be plugged on remand." Since *Campbell* and Acuff-Rose subsequently settled, the issue became moot.

In *Suntrust*, the 11th Circuit had no difficulty concluding that where an injunction was sought against TWDG's publication, the evidence fell far short of demonstrating some meaningful likelihood that TWDG would act either as a market substitute for GWTW or significantly harm its derivatives. Here, the severe remedy of injunctive relief constituted a prior restraint on speech,

preventing public access to Randall's ideas and criticisms. Moreover, the limited record in *Suntrust* made it appear that a bonafide defense of fair use was available. Not surprisingly, after the 11th Circuit's remand of the case for further proceedings (i.e., a full blown trial), the case quickly settled. And Randall's book remained available.

5. Conclusion. From its ancient Greek and Roman origins as mock song and poetry through contemporary works like 2 Live Crew's street takeoff on "Oh Pretty Woman" and Alice Randall's "The Wind Done Gone," a scathing rebuke to "Gone With The Wind," parody has served to both entertain and lampoon many sacred cows. Of course, copyright creators deserve the economic incentives afforded them by the Copyright Act's limited monopoly to exploit their works. However, such exclusivity has been judicially and legislatively tempered by the recognition that the healthy exchange of ideas and the uncensored ability to comment and criticize are precious - and hardly ubiquitous - rights. The *Campbell* and *Suntrust* decisions recognized that parody can be an invaluable and protected form of fair use, notwithstanding an overtly commercial purpose. In a concurring opinion, Circuit Judge Marcus deftly replied to the concern that *Suntrust* would prompt endless litigation to test the boundaries of that case by writing:

"This is at least possible, but such a phenomenon is not exactly alien to our common law tradition. And to the extent authors and publishers will be encouraged to experiment with new and different forms of storytelling, copyright's fundamental purpose, "[t]o promote the Progress of Science and useful Arts," will have been served."

I strongly suspect that storytellers like Roy Orbison would agree.

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## NEW ORLEANS' LONG ROAD BACK

*David Hirshland*

This year's edition of the New Orleans Jazz and Heritage Festival, or JazzFest as it is more commonly known, was certainly unlike any other in the event's 37 year history. The wrath of Katrina was in full view of all attendees, from the omnipresent water lines and spray paint markings on houses around the racetrack festival site to the dead grass on the infield. Those who ventured further away from the French Quarter and the fairgrounds into neighborhoods like Lakeview and the Ninth Ward were in for an even bigger shock. The utter devastation of block after block is staggering and the fact that it looks much the same as it did when the waters receded is quite simply difficult to fathom.

The heartfelt enthusiastic response to performances by local displaced heroes such as Clarence "Frogman" Henry, Snooks Eaglin, Allen Toussaint and Antoine "Fats" Domino (who appeared but was still too weak to perform) and by superstars like Bob Dylan, Elvis Costello (who shared the stage with Toussaint) and particularly Bruce Springsteen underscored the love people from all over the world hold for this place and its culture. At the close of Springsteen's historic Seeger Sessions set and the first weekend of the Festival the approximately 80,000 attendees heard this announcement: "That concludes the first weekend of the resurrection of New Orleans."

Of course, flushed with hope as we all were hearing those words, no one seriously believes it will take less than a monumental effort to bring this city back to anywhere near its pre-storm condition. Branford Marsalis' moving commentary in the May 6 Billboard compared his beloved hometown to the condition of Europe after World War II, calling for an effort along the lines of the Marshall Plan, not just a "few million dollars thrown at the problem." Unfortunately, a tour of the hardest hit areas reveals just how little response has come from the government, a state of affairs Springsteen referred to as "criminal ineptitude," but peo-

ple have begun to take action on a grass roots level.

Marsalis' piece details his, and Harry Connick Jr.'s, plans, in conjunction with New Orleans Area Habitat for Humanity, to create a musician's village in the Upper Ninth Ward. A less high profile but similar effort is being undertaken by New Orleans resident artists such as John Stirrat of Wilco and John Griffith of Cowboy Mouth who have joined forces to form the New Orleans Musicians Relief Fund to get musicians back into their own homes or relocate if necessary. An organization called Common Ground has set up a tent city in the Lower Ninth, from which they are dispensing aid and building materials.

In addition to the rebuilding efforts, various groups are seeing to the day-to-day needs of the local music community. MusiCares, NARAS' well funded relief arm, was perhaps first on the ground after the disaster, bailing out musicians in need with economic assistance. The famous nightclub Tipitina's, which had established an artist foundation years before, has redoubled its efforts, particularly in getting musical instruments into schools and back into the hands of the artists who lost them to the flood.

Those of us in the music industry must not forget the vital contributions to our culture and livelihood that the artists of New Orleans have made. Much of those contributions have sprung from the residents of the very areas most hard hit by Katrina but the city as a whole needs continuous economic aid as well as "sweat equity" to rebuild and restore it or we may lose something very precious. You can help in many ways, by going to New Orleans or just by staying vigilant. Here are some websites to check out:

Habitat for Humanity:  
[habitat.org/disaster/2005/katrina](http://habitat.org/disaster/2005/katrina)

New Orleans Musicians Relief Fund, Inc.: [NOMRF.org](http://NOMRF.org)

Common Ground:  
[commongroundlower9@gmail](mailto:commongroundlower9@gmail.com)

MusiCares: [musicares.com](http://musicares.com)

Tipitina's: [Tipitinasfoundation.org](http://Tipitinasfoundation.org)  
and [HandsOnNewOrleans.org](http://HandsOnNewOrleans.org)