

3-1-1987

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### Recommended Citation

Kenneth J. Nunnenkamp, *Musical Parody: Derivative Use or Fair Use?*, 7 Loy. L.A. Ent. L. Rev. 299 (1987).  
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# MUSICAL PARODY: DERIVATIVE USE OR FAIR USE?

*Kenneth J. Nunnenkamp\**

Authors' legal rights have escaped exact definition for most of history, despite early recognition that an author has some economic rights in his work.<sup>1</sup> Nonetheless, a fundamental assumption, embodied in the Constitution,<sup>2</sup> exists that guarantees an author that the fruits of his labor will serve to promote "science and [the] useful arts."<sup>3</sup> The assumption is effectuated by the protection afforded authors through the copyright laws.<sup>4</sup> This protection has covered musical compositions for over a century and a half<sup>5</sup> and continues to embrace "musical works, including any accompanying words."<sup>6</sup> In addition to the music and the lyrics, the law equally protects derivative works.<sup>7</sup>

Unfortunately, the protection accorded such works can never be absolute since, as one commentator has suggested, "[o]ne of the principal circumstances of our condition is that we are at times compelled by events, need or our weak nature to borrow from the expression of others."<sup>8</sup> Thus, the longstanding judicial doctrine of fair use,<sup>9</sup> recently

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1. An early history of copyright can be found in BOWKER, COPYRIGHT, ITS HISTORY AND LAW, 8-28 (1912).

2. U.S. CONST. art. I, § 8.

3. Copyright law in America is antedated by the English Tradition of Copyright. See Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 586 (1956). The American colonies, save Delaware, each enacted copyright legislation before the Constitution was enacted. U.S. Copyright Off. Bull. No. 3, Copyright Enactments of the United States, 1783-1900 (1906). It is interesting to note that the copyright clause was approved at the Constitutional Convention without debate. See Fenning, *The Origin of the Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 111 (1929).

4. 17 U.S.C. § 101 *et seq.* (1982).

5. Act of Feb. 3, 1831, c.16, § 1, 4 Stat. 436.

6. 17 U.S.C. § 102(a)(2) (1982).

7. 17 U.S.C. § 103 (1977). A derivative work has been defined as one which is substantially copied from the prior work. See *Reyher v. Children's Television Workshop*, 387 F. Supp. 869 (D.C.N.Y. 1975), *aff'd*, 533 F.2d 87 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1977).

8. Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defining Copyright Infringement*, 44 LAW & CONTEMP. PROBS. 3 (1981).

9. The first intimation of a fair use defense occurred in *Folson v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). The actual use of the term "fair use" first occurred in *Laurence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869).

incorporated into the Copyright Act of 1976,<sup>10</sup> has served to limit the monopoly which the copyright laws provide.

The Copyright Act of 1976 includes as fair use "criticism" and "comment."<sup>11</sup> Parody has been placed within these terms. The inclusion of parody within these broad and ambiguous words has decreased greatly the ability of some authors and composers to enjoy fully the benefits of their work, causing some professional frustration, embarrassment, and lost revenues.

The detriment done to the music industry from parodists who tend to use most, if not all, of a popular song to ridicule a particular social condition, character or the song itself results in more harm than good to the arts.<sup>12</sup> By merely copying large parts of, or the entire musical score to, a song the parodist no more engages in artistic creativity than does the plagiarist. More often than not, the parodist merely changes the words.<sup>13</sup> The contribution such efforts make to the "useful arts" is questionable. The damage it does, in the form of lost revenues and product disparagement,<sup>14</sup> to the song parodied is not.

This essay will explore the contradiction between permitting musical parody and the goal of the copyright laws of promoting the "useful arts." After briefly reviewing the purposes of the copyright laws, the concept of fair use and its treatment in court decisions will be discussed. The essay then argues that the true goals of the copyright laws are not served, but actually subverted, when musical parody is permitted as a fair use. A parody of a copyrighted song which utilizes most or all of the music of the original song has a greater likelihood of causing more harm than good, both economically and artistically. Such wholesale copying should be viewed with great skepticism by the courts, and should be permitted only when the values or ideas under attack are clearly recognizable *and* where there is a concerted effort to minimize the amount of the

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10. 17 U.S.C. § 107 (1982).

11. *Id.*

12. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976) (hereinafter "H. Rep. at \_\_").

13. *E.g.*, *Elsmere Music, Inc. v. National Broadcasting, Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980) (the "I Love New York" theme was changed to "I Love Sodom," using the same melody).

14. Product disparagement occurs where the product's quality or characteristics are denigrated by false or misleading statements which influence or tend to influence the public not to buy that product. BLACK'S LAW DICTIONARY 556 (rev. 4th ed. 1968). Since the "effect of the use upon the potential market for or value of the copyrighted work" is one of the four stated factors to consider in determining whether or not a use is "fair" (17 U.S.C. § 107(4)), it would appear that disparagement was intended to be a consideration. *See D.C. Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110, 118 (N.D. Ga. 1984).

composition actually taken.<sup>15</sup>

### COPYRIGHT LAW

The constitutional purpose of copyright protection is the promotion of the literary, scientific, and musical arts.<sup>16</sup> These arts are encouraged by "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>17</sup> The unarticulated assumption is that guaranteeing "Authors" a monopoly in their work will result in a utilization of their talents for monetary gain.<sup>18</sup> The protection afforded authors is the ability to sue, for injunction and for damages, those who infringe their copyrights.<sup>19</sup> Most infringement actions involve the copying of particular parts or pieces, rather than verbatim copying of an entire work.<sup>20</sup> Often, this fact and the failure of copyright to protect the idea or information involved<sup>21</sup> result in difficult factual determinations in infringement cases.<sup>22</sup>

Musical compositions came within the purview of copyright protection in 1831.<sup>23</sup> When courts have reviewed copyright infringement claims of composers the murky waters traversed closely resemble similar

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15. This essay does not consider the issue of impersonators whose humor is generally in imitating the voice of the person in question, and whose use of copyrighted music may more clearly be an incidental one. See *Green v. Minzensheimer*, 177 F. 286 (C.C.N.Y. 1909); *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C. Pa. 1903). In the same vein is *Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978), holding that a song played on a band float and broadcast in a news story featuring the parade was a fair use, incidental to the primary feature. Where, however, the use in background is intentionally designed to have an effect the outcome may be different. See, e.g., *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).

16. U.S. CONST. art. I, § 8.

17. *Id.*

18. Society's interest in providing copyright protection is not the pecuniary gain of authors but rather to place in the public domain "the general benefits derived . . . from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). This is best accomplished by providing authors with sufficient economic incentive. The author's personal gain will act to advance society's interest. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Universal City Studios v. Sony Corp.*, 659 F.2d 963, 965 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 1.03[A] at 1-31 to -32.1 (1986). But see Light, *Parody, Burlesque and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615, 618-21 (1979).

19. 17 U.S.C. §§ 501-510 (1982). Section 501(a) defines infringement as the violation of "any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602 . . ."

20. There are, of course, cases where verbatim copying of entire works was at issue. E.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

21. See, e.g., S. Rep. No. 983, 93d Cong., 2d Sess. 107-08 (1974) (hereinafter "S. Rep. at \_\_\_"); H. Rep. at 56-57.

22. See *Mazer v. Stein*, 347 U.S. at 217; *Baker v. Selden*, 101 U.S. 99 (1879).

23. 17 U.S.C. § 101 *et seq.* (1982). Unauthorized public performance of copyrighted musical material was barred by the Act of Jan., 1897, ch. 4, § 4966, 29 Stat. 481.

infringement claims raised by authors.<sup>24</sup> As with all other copyrights, musical copyrights grant a variety of exclusive rights, including rights of reproduction, distribution, performance, display, and adaptation.<sup>25</sup> Adaptation, as used in the Act, includes derivative works.<sup>26</sup>

The inclusion of derivative works in the list of exclusive rights should allow an author to control parodies as well as non-parodies, because both "recast, transform, or adapt" the original work.<sup>27</sup> In musical parody this is even more appropriate, since such parodies tend to use the entire musical score, parodying only the lyrics.<sup>28</sup> The derivative nature of musical parody seems self-evident;<sup>29</sup> since the purpose of parody is to conjure up the original work in the audience's mind the parodist must appropriate a sufficient amount of the work to achieve recognition by the audience. Often, courts considering parodies quickly brush over the question of infringement altogether, merely assuming that without fair use, infringement exists.<sup>30</sup> A musical parody which changes only the lyrics is clearly based upon a preexisting work, and thus need only meet the standard that the original *may* be "recast, transformed or adapted" in that manner to fall within the derivative use definition.

No matter what may happen in the appellate opinions, at the trial level, before the fair use defense can be considered in any case in which infringement is claimed, the plaintiff must prove that the defendant's work actually infringed upon his copyrighted original. Only then may the defendant proceed to assert the statutory defense of fair use.

The *prima facie* case in an infringement claim requires a showing by

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24. See, e.g., *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. at 1397; *Associated Music Publishers v. Debs Memorial Radio Fund*, 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944).

25. 17 U.S.C. § 106 (1982).

26. The Copyright Act defines a derivative work as "a work based upon one or more preexisting works, such as a . . . musical arrangement . . . , sound record . . . , or any other form in which a work may be recast, transformed or adapted." 17 U.S.C. § 101.

27. Comment, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163, 166 (1981).

28. *Walt Disney Prods. v. Air Pirates*, 389 F. Supp. 1397 (1975); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741. One need only listen to the records recorded by Weird Al Yankowitch (Yankovich), such as "Like a Surgeon" parodying Madonna's "Like a Virgin" to realize the extent to which some musical parodists copy the score of the original work. It should be noted, however, that Mr. Yankovich apparently obtains permission from the original recording artist before plying his trade.

29. *Fisher v. Dees*, 794 F.2d 432, 434-35 n.2 (9th Cir. 1986). This court also noted that "[a]s an analytical matter . . . it would seem contradictory to assert that copying for parodic purposes could be *de minimis*." *Id.*

30. *Id.*

the plaintiff that she possesses a valid copyright for the original work,<sup>31</sup> and that an unauthorized copying of the copyrighted work by the defendant has occurred.<sup>32</sup> Copying is generally proven by showing access to the copyrighted work—defined by one court as “the opportunity that an alleged infringer has to see or hear the copyrighted work”<sup>33</sup>—and a substantial similarity to the original—“whether an average lay observer would recognize one work as having been appropriated from another.”<sup>34</sup>

Once the plaintiff has established a *prima facie* case for infringement the defendant may raise the fair use defense. As noted earlier, proving infringement in a parody case is rarely difficult.<sup>35</sup> A defendant usually copies the original as part of the scheme of his criticism or comedy. Often the defendant will admit copying. Thus, parody cases usually turn on whether defendant's use of the original was a fair one within the meaning of Section 107 of the Copyright Act.

### FAIR USE

While the copyright laws grant a wide range of protection to authors, the monopoly is far from complete.<sup>36</sup> The courts have curtailed authors' monopolies by limiting the protection to the expressions, but not the ideas.<sup>37</sup> Additionally, an infringement occurs only where the second work is substantially similar to the original.<sup>38</sup> Generally, substantial similarity is determined on the basis of the ordinary observer—whether the average individual would conclude that the two works were substantially similar.<sup>39</sup> Neither of these exceptions would permit parody, especially musical parody, since parody, in order to achieve its ostensible critical

31. Copyright registration constitutes *prima facie* evidence of copyright validity. 17 U.S.C. § 410(c) (1982).

32. See *Warner Bros. v. American Broadcasting Co.*, 654 F.2d 204, 207 (2d Cir. 1981); *Silverman v. CBS*, 632 F. Supp. 1344, 1351 (S.D.N.Y. 1986).

33. *Selle v. Gibb*, 567 F. Supp. 1173, 1181 (N.D. Ill. 1983), *aff'd* 741 F.2d 896 (7th Cir. 1984) (claim for copyright infringement against the Bee Gees denied where plaintiff failed to show affirmatively, or rebut defendants' evidence to the contrary, that defendants had ever seen the score to plaintiff's song or heard plaintiff's song played).

34. *Silverman*, 632 F. Supp. at 1351-52; *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

35. *Dees*, 794 F.2d at 434-35.

36. In addition to the fair use exception, the duration of the copyright, for example, is limited by Section 302 of the 1976 Act to the life of the author plus fifty years. 17 U.S.C. § 302(a) (1982).

37. *E.g.*, *Mazer*, 347 U.S. at 217-18; *Baker v. Selden*, 101 U.S. 99 (1879).

38. 17 U.S.C. § 501 (1982). See, *e.g.*, *L & L White Metal Casting Corp. v. Joseph*, 387 F. Supp. 1349 (E.D.N.Y. 1975); *Fristot v. First Am. Natural Ferns Co.*, 251 F. Supp. 886 (S.D.N.Y. 1966); 1 M. NIMMER, § 13.03[A].

39. *Silverman*, 632 F. Supp. at 1351-52.

purpose, is *intended* to be substantially similar in some fashion.<sup>40</sup> Therefore, parody<sup>41</sup> requires some other defense if it is to survive. That defense is the doctrine of fair use.<sup>42</sup>

The fair use defense is a judicially created doctrine, equitable in nature.<sup>43</sup> It was codified in the Copyright Act of 1976,<sup>44</sup> whose drafters intended that the courts remain "free to adapt the doctrine to particular situations on a case-by-case basis."<sup>45</sup> Thus, section 107 of the Copyright Act was not an attempt to "freeze" the law, but merely to "restate the [then] present judicial doctrine of fair use."<sup>46</sup> The doctrine has a long, rocky history<sup>47</sup> and has been applied for a multitude of reasons. Most courts agree, however, that the doctrine is fundamentally equitable, and must therefore be enforced according to the dictates of public policy.<sup>48</sup>

The codification of the fair use doctrine permits use, without consent, "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."<sup>49</sup> Section 107 provides four "factors to be considered" by courts faced with the fair use defense:

- (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.<sup>50</sup>

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40. See Comment, *supra* note 27, at 167 n.28 for a discussion of whether parody falls within the purview of satire. See also Comment, *Beyond Fair Use: Putting Satire In Its Proper Place*, 33 U.C.L.A. L. REV. 518 (1985) (using parody and satire interchangeably).

41. Comment, *supra* note 27 at 164-66.

42. It is generally easier to perceive the concept of fair use as an affirmative defense rather than a non-infringing activity. See H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROBLEMS* 260 (1944); M. NIMMER, *supra* note 18, at § 13.05. This is because the fair use defense generally arises when infringement is either admitted, or a *prima facie* case of infringement has been shown. See, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975); *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Cal. 1963).

43. *Sony Corp.*, 464 U.S. at 448-49.

44. 17 U.S.C. § 107 (1982).

45. See *supra* note 21, at 62.

46. See *supra* note 12.

47. See Leavens, *supra* note 8. One court has called it "the most troublesome issue in the law of copyright." *Dallas v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

48. See, e.g., Leavens, *supra* note 8, at 6; M. NIMMER, *supra* note 18, § 13.03.

49. 17 U.S.C. § 107 (1982).

50. *Id.*

The list is not conclusive.<sup>51</sup>

The doctrine's purpose is to achieve a balance between the monopoly rights of the author and the actual goal of copyright law, stimulation of the arts. "[C]ourts[,] in passing upon particular claims of infringement[,] must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."<sup>52</sup> Thus, where the copied work would not result in a retardation in the development of the arts by discouraging creativity (as a result of lessened economic return) or would be neutral in its effects, the parodist's right to copy the original in a quantity sufficient to achieve her goal should be permissible. This is recognized in section 107 by the emphasis placed on market factors and the requirement of substantiality. The strong connection between creative incentive and economic reward acts as the yardstick against which promotion of the arts is measured. One can foresee then, that allowing a "fair use," where the end result would be to discourage the *original* author by allowing a later user to steal his profits, would necessarily stifle the development of the arts. There can be no second use if there is no first. Under the copyright law, the only fair use is one which does not unnecessarily steal the benefits of the original author's labors.

The fair use defense has been the subject of two recent Supreme Court cases. The first, *Sony Corporation of America v. Universal City Studios, Inc.*<sup>53</sup> considered whether the use of home video recording devices to record copyrighted motion pictures and audiovisual works should render the manufacturer of those machines, Sony, liable to the copyright holders. Although the focus in *Sony* was on the vicarious liability of the manufacturers for infringement by the purchasers of home video recorders,<sup>54</sup> a substantial portion of the opinion addressed the fair use doctrine.<sup>55</sup> The significance of fair use to the *Sony* case was the possibility for noninfringing as well as infringing uses. In remarking on this possibility the Court focused primarily on the fourth factor in section 107 of the Act, "the effect of the use upon the potential market for or value of the copyrighted work."<sup>56</sup>

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51. See *supra* note 12, at 61.

52. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). See also H. BALL, *supra* note 32, § 125, at 260; *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

53. 464 U.S. 417 (1984).

54. *Id.* at 434-46.

55. *Id.* at 447-57. The dissenters also discussed the fair use doctrine at great length. *Id.* at 475-86.

56. 17 U.S.C. § 107(4) (1982).



Justice Stevens, who delivered the majority opinion, discussed the impact of copying an entire work on the original work's market, pointing out that, under subsection one, where the copying is for a "commercial or profitmaking purpose, such use [is] presumptively . . . unfair."<sup>57</sup> Although copying for commercial use was not the case in *Sony*,<sup>58</sup> Justice Stevens' opinion considered subsection four of section 107 extremely important because "[e]ven copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have."<sup>59</sup> In determining whether a use, commercial or not, infringed an existing copyright, there must be a "demonstrable effect upon the potential market for, or the value of, the copyrighted work."<sup>60</sup> Where the use is commercial, this effect would be presumed, and the burden would shift to the defendant to show that his use did not adversely affect the copyright holder's existing or potential market.<sup>61</sup> The protection includes present and future effects as well as derivative uses.<sup>62</sup> "What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed."<sup>63</sup> In *Sony*, the plaintiffs failed to show, as is their burden when the use in question is noncommercial, that home video recording would sufficiently harm their copyrights to warrant a finding of infringement.<sup>64</sup>

One year later the Supreme Court faced the fair use doctrine squarely in *Harper & Row Publishers, Inc. v. Nation Enterprises*,<sup>65</sup> when it considered the validity of *The Nation's* printing of an article containing excerpts from President Ford's memoirs, the rights to which had been previously licensed to *Time* magazine. This time the Court, in an opin-

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57. *Sony Corp.*, 464 U.S. at 449. (These "rewards" are the profits generated through sales of the original by its producer.)

58. *Id.* at 448-49. The real issue was whether non-commercial home use should render VCR/VHS manufacturers liable.

59. *Id.* at 450.

60. *Id.*

61. *See generally id.* at 450-52.

62. *Id.* at 451.

63. *Id.*

64. *Sony Corp.*, 464 U.S. at 456. (The dissent in *Sony*, written by Justice Blackmun, emphasized that a finding of fair use depended on "whether, under the circumstances, it is reasonable to expect the user to bargain with the copyright owner for use of the work." *Id.* at 479. Blackmun concluded that an infringement could be shown by proving only that "a potential for harm" to the market value of the original existed, *id.* at 482, and that a rebuttal of this showing would require the infringer to "demonstrate that he had not impaired the copyright holder's ability to demand compensation" for the work. *Id.* at 485. Blackmun finished by asserting that the fact that a market would not have been open to the copyright holder without the infringer's activities does not justify exploitation of the market without compensation.) *Id.*

65. 471 U.S. 539 (1985).

ion written by Justice O'Connor, refused to hold the unauthorized use a fair one.<sup>66</sup> In *Harper & Row*, as in *Sony*, the Court's emphasis was decidedly placed on the effect that the use had on the marketability of the original work. Thus, Justice O'Connor wrote that "[t]he crux of the [matter] is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the price."<sup>67</sup> The copyright holder need only establish "a causal connection between the infringement and a loss of revenue" to fulfill his burden of proof.<sup>68</sup> The infringer may then rebut this by fulfilling the difficult task of proving that the damage to the copyright holder's market would have occurred without the infringement.<sup>69</sup>

Justice O'Connor's statements show a strong tendency to afford greater consideration to the market effects of infringement. The *Harper & Row* decision went even further than did *Sony*. In stressing the impact of an infringement on the original work's market, Justice O'Connor included in the calculation the harm that an infringing use would have on nonexistent, but *potential*, markets for the copyrighted work.<sup>70</sup> Thus, she stressed that the "inquiry must take account not only of harm to the original but also of harm to the market for derivative works."<sup>71</sup> The opinion, relying on the Senate Report, suggested that a "use that supplants *any* part of the normal market for a copyrighted work [is] an infringement."<sup>72</sup> The Court held *The Nation's* prepublication infringement to be outside the scope of fair use and thus held the defendants liable.

*Harper & Row* and *Sony* illustrate the Court's focus on the market impact of a potentially infringing work. While the amount taken, the nature of the use and the purpose of the use are not abandoned, fair use, as it relates to uses which are not claimed as educational but which may be commercial or noncommercial, turns primarily on the harm that the use has on the original's existing or potential markets.<sup>73</sup> After *Harper & Row* and *Sony* it is clear that where a use noticeably impacts on the mar-

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66. *Id.* at 569. (The copying in question concerned an article of approximately 2250 words, of which 300 to 400 words were from the original work.)

67. *Id.* at 562.

68. *Id.* at 567.

69. *Id.*

70. 471 U.S. at 568.

71. *Id.*

72. *Id.* (quoting S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975), (emphasis added).

73. This factor has been referred to as "the most important, and indeed, central fair use factor." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[B], at 13-89 (1986). The importance of this factor has also been recognized by several circuit courts. *Horgan v. MacMillan*,

ket or potential market of the original—including derivative uses—infringement has occurred. This analysis would, of necessity, include musical parodies which tend to use substantial amounts of the original work and compete directly (or indirectly) with the original in the market.

The importance of the work's marketability has been recognized generally,<sup>74</sup> although courts are not always precise in their handling of the question.<sup>75</sup> Generally, though, where a subsequent use has had or is likely to have a significant effect on the market of the original, the fair use defense will not be successful.<sup>76</sup>

The Supreme Court's recent emphasis on the effect of the latter work on the original's potential market should not be mistaken for a deemphasis on section 107's other factors. As several recent fair use cases illustrate, a court may rely on any or all factors, and may even consider additional factors.<sup>77</sup>

The first factor listed in section 107 for consideration by the courts is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>78</sup> This actually requires a court to consider two things; the overall purpose of the work—educational, critical, news etc.—and the commercial or profit-making purpose. Generally, courts focus on whether the purpose was for profit or nonprofit (or a combination thereof) before confronting the more general purpose and character of the work.<sup>79</sup>

Where a defendant's use is "of a commercial nature" there is a presumption that the use is "an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."<sup>80</sup> This does not mean that finding that a use is commercial in nature requires a court to reject

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Inc., 789 F.2d 157 (2d Cir. 1986); *Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592, 594 (6th Cir. 1986).

74. See *M. NIMMER*, *supra* note 18, § 13.05[A][4]; *Leavens*, *supra* note 8, at 7-8. See also S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

75. See, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1973); *Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978). See also *Leavens*, *supra* note 8, at 7-12.

76. See *supra* note 52.

77. See, e.g., *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *D.C. Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110 (N.D. Ga. 1984).

78. 17 U.S.C. § 107 (1) (1982).

79. See, e.g., *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1152-53 (9th Cir. 1986); *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 496 U.S. 823 (1984).

80. *Sony Corp.*, 464 U.S. at 451. (At least one court has stated, however, that the business activities of non-profit groups should be "treated more liberally than the business of profit making corporations." *Hustler Magazine v. Moral Majority*, 606 F. Supp. 1526, 1534 n.1 (C.D. Cal. 1985)).

the fair use defense. Rather, it is a relevant factor to be weighed in the overall determination, albeit a factor which weighs against a fair use defense.<sup>81</sup> The same relative conclusion applies to non-commercial uses. A non-commercial use does not necessitate a finding of fair use.<sup>82</sup> The discussion in fair use cases dedicated to the commercial/nonprofit question demonstrates the important role subsection one continues to play where the fair use defense is raised.

Section 107(1) also requires the court to consider the overall "purpose and character of the use."<sup>83</sup> Courts have interpreted this to permit an inquiry into the equitable circumstances surrounding the defendant's use.<sup>84</sup> Thus, where excerpts from a plaintiff's book were published verbatim in defendant's newspaper and where the defendants admitted that they knew permission to copy the copyrighted material was required, subsection one was properly relied upon by a district court in finding that the fair use defense was not applicable.<sup>85</sup> Defendant's good faith remains a proper issue for consideration by courts faced with a fair use defense.<sup>86</sup>

The second fair use factor which the court must consider is "the nature of the copyrighted work."<sup>87</sup> This factor has generally focused on the creative versus factual function of the work. When dealing with copyrighted works which are primarily factual (historical, educational, etc.) the law "generally recognizes a greater need to disseminate" the information.<sup>88</sup> On the other hand, works which can be categorized as

81. See the dissenting opinion of Justice Brennan in *Harper & Row*, 471 U.S. at 579; *Hustler Magazine*, 606 F. Supp. at 1534 n.1 (C.D. Cal. 1985) ("Commercial motivation does not in and of itself preclude a finding of fair use"); see also 3 NIMMER, *supra* note 73, § 13.05[A] at 13-70 n.24.

82. See, e.g., *Hustler Magazine*, 606 F. Supp. at 1534 n.1; *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983).

83. 17 U.S.C. § 107 (1) (1982).

84. See generally *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983).

85. *Radji v. Khakbaz*, 607 F. Supp. 1296, 1300-01 (D.D.C. 1985); see also *Marcus*, 695 F.2d at 1175-76; *Iowa State University Research Found. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980).

86. The morality of the content of defendant's work is not generally considered in determining defendant's motive. E.g., *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

87. 17 U.S.C. § 107 (2) (1982). One court has called this factor "the least important and the most unclear . . . ." *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113, 120 (S.D.N.Y. 1982).

88. *Harper & Row*, 471 U.S. at 562. This may not apply to unpublished works because, as the Supreme Court has indicated, "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use." *Id.* at 556. The broad use of the term "public appearance" indicates that this rule would apply equally to musical expressions. But see 3 M. NIMMER, *supra* note 73 § 13.05 [A], at 13-75 n.28.1e ("A categorical presumption against prepublication fair use cannot harmonize with the statutory scheme").

primarily "creative"—those whose main purpose is entertainment<sup>89</sup>—do not present this social need for broad dissemination. Thus, cases opining on this factor hold that the fair use defense more readily applies to factual than creative works.<sup>90</sup>

In addition to the creative/factual distinction, courts also look at the natural distribution limitations of the original work. For instance, works of limited circulation may be accorded greater protection than works designed for mass distribution.<sup>91</sup> Although this is not often an issue in parody cases, it remains a concern for most fair use cases. In recent times, largely due to the Supreme Court's *Harper & Row* opinion, the focus of debate has shifted to questions of prepublication use.<sup>92</sup> However, the question remains a required one under section 107, and therefore courts continue to give weight to the distribution channels of the original.

The fact that some courts are concerned with distribution channels when they consider the nature and purpose of the work indicates either a lack of understanding in the application of the fair use doctrine, or an inevitable shading of the lines between the four factors which must be considered. In either event, concern for distribution and circulation are more appropriately discussed under the fourth element, the effect of the use on the copyright holder's potential market, since means and extent of circulation are more market concerns and less related to whether the work is factual or creative (although the particular facts or impressions may affect the market as well).

Before reaching the focal question of effect on potential market, the court must also consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>93</sup> This requires the court to "weigh the significance of the copying both in terms of the quantity and quality of the alleged infringement."<sup>94</sup> In so doing a court will look at whether the portion used was an essential element of the original work as well as the substantial similarity of the works.

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89. *Sony Corp.*, 464 U.S. at 455 n.40.

90. See, e.g., *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1497 (11th Cir. 1984) ("The importance to society of . . . news could affect the definition of fair use . . ."); *Dow Jones & Co.*, 546 F. Supp. at 120 ("Authors of compilations . . . must be held to grant broader licenses for subsequent use than persons whose work is truly creative"); *Hustler Magazine*, 796 F.2d at 1154 ("[t]he creative nature of the parody means that the scope of fair use in this case is less than the scope of fair use for informational works").

91. See, e.g., *supra* note 12 at 73 and *supra* note 21 at 64.

92. See 3 M. NIMMER, *supra* note 73, § 1305[A], at 13-74 to -75.

93. 17 U.S.C. § 107(3) (1982).

94. *Hustler Magazine*, 606 F. Supp. at 1537. See 3 M. NIMMER, *supra* note 73, § 13.05[A], at 13-78 and cases cited.

At least one court, the Ninth Circuit, has "consistently focused" on the inquiry of amount and substantiality of the taking.<sup>95</sup> When considering a fair use defense, that court is not as likely to protect "'copying that is virtually complete or almost verbatim,'"<sup>96</sup> but there is no "fixed limit" on copying. Rather, the fair user may only use as much as is necessary to accomplish her goal. In the case of parody, this means that the parodist may only use what is "necessary to place firmly in the reader's mind the parodied work and those specific attributes that [were] to be satirized."<sup>97</sup>

The Ninth Circuit developed a three part test to determine whether a taking was excessive under the circumstances. The three elements "singled out" by the court are: 1) "the degree of public recognition of the original work in the chosen work;" 2) "the ease of conjuring up the original work in the chosen medium;" and 3) "the focus of the parody."<sup>98</sup> The test is adaptable to most circumstances where the amount and substantiality of the taking are of importance. Thus, the Second Circuit, when considering a case which asked whether a published series of photographs of the Nutcracker Ballet violated the choreographer's copyright, rejected the notion that infringement requires that an amount sufficient to "recreate" the original be copied.<sup>99</sup> Instead, the Second Circuit reiterated Judge Hand's test: whether "the ordinary observer [public recognition in the Ninth Circuit's words], unless he set out to detect the disparities, would be disposed to overlook them [the ease of conjuring up the original], and regard their aesthetic appeal as the same [focus of the work]."<sup>100</sup> Both "tests" recognize that the medium used for the copy will affect the similarity required, and, as such, may also determine the amount needed to be copied.<sup>101</sup> Thus, "[e]ven a small amount of the original, if it is *qualitatively significant*, may be sufficient to be an infringement . . . ."<sup>102</sup>

For the parodist, the focus is properly shifted to whether the parody "could easily have been accomplished through more restricted

95. See *Fisher*, 794 F.2d at 438.

96. *Id.* (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). *Accord* *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam). For a contrasting view, see *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

97. *Air Pirates*, 581 F.2d at 758. *Cf.* *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986) (Copying "[e]ven a small amount of the original . . . may be sufficient to be an infringement . . . .").

98. *Fisher*, 794 F.2d at 439.

99. *Horgan*, 789 F.2d at 162.

100. *Id.* (quoting *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

101. *Horgan*, 789 F.2d at 162; *Fisher*, 794 F.2d at 439.

102. *Horgan*, 789 F.2d at 162 (emphasis added).

means."<sup>103</sup> Here, the second prong of the Ninth Circuit's test weighs heavily. If the parody is presented in the same medium as the original, the court will look to see if an effective parody requires "exact or near-exact copying."<sup>104</sup> The court will then balance the parodist's desire to make the *best* parody against the constitutionally guaranteed rights of the copyright holder. The fair use test does not guarantee the best parody—or even a good parody. It only permits sufficient taking for an "effective" parody. Unfortunately, this necessitates some sort of qualitative judgment as to the parody's effectiveness,<sup>105</sup> an extremely subjective and elusive process.

### PARODY

Parody, considered to be a form of comment or criticism, has often been claimed as a fair use.<sup>106</sup> The legislative history of the Copyright Act of 1976 also indicates that "comment" and "criticism" as used in section 107 were intended to encompass parody.<sup>107</sup> Whether a particular parody is a fair use will, of course, depend on the particular circumstances.<sup>108</sup>

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103. *Fisher*, 794 F.2d at 439. The Ninth Circuit has opened a large can of worms by use of the word "easily" in this context. Arguably, it waters down the test to the point where it cannot be effective. If a parodist need only prove it would have been "difficult" for him to use a more restricted means of accomplishing his goal, the burden is minimal. Instead, an enlightened court should interpret this as either a judicial slip, or a tip that while the parodist must make a concerted effort to use the least restrictive means, the court will not entertain unforeseeable possibilities as arguments from the copyright holder. A reasonableness test could readily be applied to the parodist's efforts in this area.

104. *Id.* See also *Air Pirates*, 581 F.2d at 758 ("[W]hen the medium involved is a comic book, a recognizable caricature is not difficult to draw . . .").

105. While courts try to shy away from deciding on the subjective quality of the work (is it good or bad), one district court judge has devised a fifth factor for determining fair use and minimizing subjectivity: whether the work "incidentally parod[ies] other works while creating a genuinely distinct product" or whether it "comprise[s] little more than an adaptation of another's original work." *D.C. Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984) (Shoob, J.). This factor is consistent with an earlier statement from that district that a parody must "make some critical comment or statement about the original work which reflects the original perspective of the parodist—thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected . . ." *MGM, Inc. v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979). These opinions have at least attempted to come to grips with the question of effectiveness.

106. See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters*, 600 F.2d 1184 (5th Cir. 1979) (topless Cowboy Cheerleaders); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (Disney characters in promiscuous presentation); *Elsmere Music, Inc. v. National Broadcasting Cos.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).

107. See 17 U.S.C. § 107 (1982).

108. See *Eisenschiml v. Fawcett Publications*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957); *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1976); *Higgins v. Baker*, 309 F.

Those cases which have held that the charged infringement was not a fair use have recognized that, while borrowing from the original is necessary for parody to succeed,<sup>109</sup> as with any subsequent use, when too much is taken the parodist has, under the guise of comedy or satire, done little more than altered minimal specific attributes and thus infringed on the original.<sup>110</sup> The test used to determine whether too much of the original has been used is based on the "conjure up" theory.<sup>111</sup> The parodist is only permitted to use as much of the work as is necessary to identify it as a parody of that work.<sup>112</sup> This test, while quantitative in nature, recognizes the need for the parodist to borrow substantial amounts of the original if his parody is to be effective.<sup>113</sup>

The "conjure up" doctrine did not appear until a California district court rejected its application in *Loew's, Inc. v. Columbia Broadcasting System, Inc.* ("Gaslight").<sup>114</sup> The fair use defense was raised by comedian Jack Benny in response to a charge of copyright infringement by the makers of the very popular movie "Gaslight." Benny, in a half-hour television comedy called "Autolight," copied the plot and story line, as well as most of the script of "Gaslight." The only ascertainable difference was the actions of the actors, *i.e.*, walking on their hands.<sup>115</sup> The court, relying on prior rationales, denied the defense of fair use, holding that the author of the original would not have consented to such a complete use

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Supp. 635 (S.D.N.Y. 1970); *Holdredge v. Knight Publishing*, 214 F. Supp. 921 (C.D. Cal. 1963).

109. Leavens, *supra* note 8, at 18 ("Without a notion of the thing being lampooned, comprehension of the parodist's point of view is lost, and the parody fails").

110. *D.C. Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110 (N.D. Ga. 1984), ("Superstud" and "Wonderwench" singing telegrams using Superman and Wonderwoman costumes); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters*, 600 F.2d 1184 (5th Cir. 1979) (topless depiction in otherwise full uniform); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (Disney characters doing un-Disneylike things); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351 (N.D. Ga. 1979), (*Scarlet Fever* remake of *Gone With the Wind*); *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 677 F.2d 180 (2d Cir. 1981) (rogue adaptation of *The Boogie Woogie Bugle Boy of Company C*); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975) (Mickey Mouse March as background to sex scene); *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd*, 356 U.S. 43 (1958) (contortions not enough when plot unchanged).

111. See *supra* note 57.

112. *Id.* See also *Fisher*, 794 F.2d at 438, where the plaintiff argued that the test should be interpreted to limit the amount of permissible copying to "that amount necessary to evoke only initial recognition in the listener." The court rejected this "rigid view" and held instead that the conjure up test requires flexible application, which in parody means permitting use of enough of the original to make its humorous point. *Id.* at 438-39.

113. See *supra* notes 90-99 and accompanying text.

114. 131 F. Supp. 165 (S.D. Cal. 1955).

115. *Loew's, Inc.*, 131 F. Supp. at 170.



of his work.<sup>116</sup> The Supreme Court, without opinion, affirmed the decision.<sup>117</sup>

The same trial court, later in the same year, again addressed the parody issue in *Columbia Pictures Corp. v. National Broadcasting Co.*,<sup>118</sup> deciding this time that Sid Caesar's television skit "From Here to Obscurity" was a fair use of the story line of "From Here to Eternity," another popular movie.<sup>119</sup> This time the court stated in *dicta* that parody may use just enough of the original to "conjure up" in the audience's mind that which is the subject of criticism.<sup>120</sup> But, since the defendant's use in that case did not constitute a *prima facie* infringement in the court's mind,<sup>121</sup> the decision merely expresses some general principles which do little to define just how much borrowing is permissible.

About a decade later, in *Berlin v. E.C. Publications*,<sup>122</sup> the Second Circuit approved the "conjure up" test. The court in *Berlin*, holding Mad Magazine's parodies of plaintiff's songs to be a fair use, joined the "conjure up" doctrine with the market effect concept subsequently codified in section 107(4).<sup>123</sup> The court found that "neither the intent nor the effect of fulfilling the demand for the original" had occurred, and therefore the use was permissible.<sup>124</sup> While the amount taken was integral to the decision, the final judgment also depended on the intended or actual effect on the market potential of the original.

Following the Copyright Act of 1976, these factors appear to be controlling.<sup>125</sup> In subsequent parody cases it has become apparent that the integral relationship between these factors has shown that unless both occur, the fair use defense should stand. In *Walt Disney Productions v. Air Pirates*,<sup>126</sup> for instance, the fair use defense was raised in response to

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116. *Id.* at 180.

117. *Benny v. Loew's, Inc.*, 356 U.S. 43 (1958).

118. 137 F. Supp. 348 (S.D. Cal. 1955).

119. *Columbia Pictures*, 137 F. Supp. at 348.

120. *Id.* at 350.

121. *Id.* at 352.

122. 329 F.2d 541 (2d Cir. 1964).

123. *Berlin*, 329 F.2d at 545.

124. *Id.*

125. 17 U.S.C. § 107(b) of the Copyright Act, lists four factors for consideration; only two of those factors apply in parody cases, those recited in *Elsmere*. The first and second factors, the purpose and the nature of the two works, are incorporated within the substantiality and marketability ideas. This occurs as a result of the economic basis of the copyright laws. See *supra* notes 18 and 43 and accompanying text. Since all works are theoretically of economic importance to the author, lost sales are more likely to deter creativity than any other fact. Lost sales are most likely where the copy substitutes for the original in the consumers' minds, or so denegrates the original that the consumer no longer wishes to purchase it. See Leavens, *supra* note 8, at 7-9. But see Comment, *supra* note 27, at 171-72.

126. 581 F.2d 751 (9th Cir. 1978).

infringement charges for publishing a comic book which depicted "Disney characters as active members of a freethinking, promiscuous, drug-ingesting counterculture."<sup>127</sup> The Ninth Circuit rejected the fair use defense because the easily conjured-up concept of Mickey Mouse and friends did not allow for the substantial use which had occurred.<sup>128</sup> The court stressed that "excessive copying precludes fair use," and here the "defendants took more than was necessary to place firmly in the reader's mind the parodied work . . . ."<sup>129</sup> The court tried to separate the substantiality and substitution effect,<sup>130</sup> opting instead to reject the defense solely because of the extensive copying. In so doing, the court failed to realize that substantial copying is not a fair use *because* of the impact it has on the marketability of the original.<sup>131</sup> The discounted factor in *Air Pirates* was the obvious detrimental market effect an identical copy would have.

What the *Air Pirates* court refused to recognize was made abundantly clear in *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions*.<sup>132</sup> A stage musical titled "Scarlet Fever" parodied "Gone With the Wind," using substantial portions of the original. The district court noted that parody was of social value because of "the original perspective of the parodist,"<sup>133</sup> but held that the defendant's use of the original was excessive.<sup>134</sup> Its analysis did not end there. The court went on to note that the defendant's use of plaintiff's work fulfilled a potential *derivative* use.<sup>135</sup> The judge's reasoning was based primarily on the similarity of entertainment functions the two uses served.<sup>136</sup> Thus, the court was willing to include speculative uses in derivative works as well as likely uses. When combined with the reasoning in *Air Pirates*, it is clear that parodies which are substantially similar will be found to infringe not solely because of the amount of the original used in the parody, but because the ultimate effect will be a reduction in current or future sales or marketability, either through degeneration or replacement, of the original. In music, this effect can be even more severe.

Shortly after *Showcase*, the Second Circuit, in *Elsmere Music, Inc. v.*

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127. *Air Pirates*, 581 F.2d at 753.

128. *Id.* at 757-58.

129. *Id.* at 758.

130. *Id.* at 756.

131. See generally 2 M. NIMMER, *supra* note 18, §§ 143.2, 145.

132. 479 F. Supp. 351 (N.D. Ga. 1979). Leavens, *supra* note 8, at 19-20 criticizes the court's method of analysis, but not its result.

133. *Showcase*, 479 F. Supp. at 357.

134. *Id.* at 360.

135. *Id.*

136. *Id.*

*National Broadcasting Co.*,<sup>137</sup> reconsidered the parody defense when the creators of the "I Love New York" advertising song sued NBC for using the tune in a *Saturday Night Live* sketch about the virtues of the biblical city of Sodom. The sketch used the music of the jingle accompanied by "I Love Sodom." This time the Second Circuit upheld a finding of fair use, agreeing with the trial court that the amount used was no more than "necessary to conjure up the original."<sup>138</sup> The Second Circuit's one-paragraph affirmation simply expressed that court's agreement that "copyright law should be hospitable to the humor of parody."<sup>139</sup> In the only footnote to the opinion the court also reaffirmed its view that a parody will be permitted more extensive use where necessary, but only when "the parody builds upon the original."<sup>140</sup>

*Elsmere* is illustrative of a situation where a one-time use of a parody was permitted while a prolonged use may not have been tolerated. Such a use could have little or no commercial impact on the original since its design is not to replace the original. Instead, the parody more closely approaches the kind of fair use contemplated by the statute and its history, one which promotes new and creative uses of the original work.

That *Elsmere* was decided on its facts became abundantly clear soon after when the Second Circuit again considered the parody defense. This time, in *MCA, Inc. v. Wilson*,<sup>141</sup> the defendant's musical comedy included a song entitled "The Cunnilingus Champion of Company C," parodying the popular song "The Boogie Woogie Bugle Boy of Company B." The defendant's purpose in parodying the song was found to include commercial gain, since both were sold as recordings.<sup>142</sup> The effect on marketability became obvious to the court when it noted that plaintiff and defendant were competitors in the entertainment industry.<sup>143</sup> Thus, the work of the parodist would compete directly with, and perhaps displace, the original.

*Wilson* reflects the Second Circuit's continuing recognition that possible derivative uses are entitled to the same protection afforded likely

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137. 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

138. *Elsmere*, 482 F. Supp. at 747. In an important twist on a related issue, the district court rejected prior reasoning which required the parody, to be valid, to criticize the work copied (or something already identified with it). Instead, the court said, a court must decide "whether the use in question is a valid satire or parody." *Id.* at 746.

139. *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980).

140. *Id.* at 253 n.1.

141. 677 F.2d 180 (2d Cir. 1981).

142. *Wilson*, 677 F.2d at 180.

143. *Id.*

derivative uses. The dissent in *Wilson* evidently misses this point.<sup>144</sup> It seems to agree with those who would argue that any parody will enhance rather than diminish the value of the original.<sup>145</sup> It is not hard to imagine the opposite. Properly parodied, any song, no matter how popular, could seem ridiculous. The inevitable degeneration brought to the song, even though the parody may be aimed at social attitudes or norms, could lead to greatly decreased earnings—especially where the parody competes directly with the original on a continuing basis.

A recent case which clearly integrates the issues raised when the fair use defense of parody is asserted is *D.C. Comics, Inc. v. Unlimited Monkey Business*,<sup>146</sup> where the defendant's singing telegram company used the likenesses of Superman and Wonderwoman for its telegram characters, Superstud and Wonderwench. Noting that the similarity of the characters was "striking," Judge Shoob considered the amount taken to be more than was necessary to conjure up the well-known images.<sup>147</sup> More importantly, though, was Judge Shoob's analysis of the *potential* derivative uses which the plaintiff could make of its characters. Despite the unlikelihood of entry by D.C. Comics, Inc., Judge Shoob included the singing telegram market in the plaintiff's potential market.<sup>148</sup> In addition, defendant's use was found to be less criticism and more adaptation.<sup>149</sup> Such adaptations act only to trade "upon the imagination and originality of another" and are not a fair use.<sup>150</sup> What Judge Shoob recognized in rejecting the fair use defense was that the intent of Monkey Business was to create or enhance its own market "on the strength of their association with [the] originals."<sup>151</sup>

Finally, the most recent parody case, which considered musical parody, *Fisher v. Dees*,<sup>152</sup> was decided by the Ninth Circuit in July of 1986. Fisher and Segal, the composers of "When Sunny Gets Blue," had refused to grant permission to Dees to use the music to their song for a

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144. *Id.* at 188 (Mansfield, J., dissenting).

145. See, e.g., Harmon, *Recent Developments in Ninth Circuit Patent and Copyright Law*, 10 GOLDEN GATE L. REV. 453, 464 (1980).

146. 598 F. Supp. 110 (N.D. Ga. 1984).

147. *D.C. Comics*, 598 F. Supp. at 117-18.

148. *Id.* at 118.

149. *Id.* at 118-19. Judge Shoob claimed to have added a fifth factor to his analysis, beyond Section 107's enumerated factors, but in actuality his fifth factor merely restates the substantiality factor as a question of whether a work incidentally parodied the original versus whether the parody amounted to mere adaptation—a derivative use. *Id.*

150. *Id.* at 119.

151. *Id.* See also *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 448 (S.D.N.Y. 1976) (citing a cast member's testimony that "it would be funny if we could get 'Cunnilingus Champion' to sound similar to 'Boogie Woogie Bugle Boy' just to create some publicity").

152. 794 F.2d 432 (9th Cir. 1986).

"comedic and inoffensive version."<sup>153</sup> Dees produced the song anyway, under the title "When Sunny Sniffs Glue." The Ninth Circuit affirmed the lower court's summary judgment decision for Dees. After opining that the song was apparently more than "a vehicle to achieve a comedic objective unrelated to the song, its place and time"<sup>154</sup> (implying that in the Ninth Circuit, also, a parody must also criticize the original work as well as societal values), the court turned to the parody's economic effects. The panel determined that "[i]n assessing the economic effect of the parody, [its] critical impact must be excluded."<sup>155</sup> Rejecting the view that a parody should not aim at disparaging the original, the court legitimized parodies which "'aim at garroting the original, destroying it commercially as well as artistically.'"<sup>156</sup> Instead of concerning itself with the supply side of the economic equation, the court asked "whether [the parody] fulfills the demand for the original."<sup>157</sup> In the case of "When Sunny Sniffs Glue" the court held that because the two works did not fulfill the same demand, "the parody ha[d] no cognizable economic effect on the original."<sup>158</sup>

By dismissing the economic effect factor completely the court left to itself its traditional focal point, the amount and substantiality of the taking. Here, as in *Air Pirates*, the court made its determination that the parody was a fair use based on the fact that it took "no more from the original that [was] necessary to accomplish reasonably its parodic purpose."<sup>159</sup>

*Fisher* leaves the Ninth Circuit in partial agreement with the Second Circuit, but moves it yet further from the Supreme Court's emphasis on market considerations. Viewed in the light of *Harper & Row* and *Sony*, the Ninth Circuit's continued reliance on the amount and substantiality of the taking in determining parodic fair use places its decisions on tenuous grounds. Parody is still a form of fair use, and the Supreme Court has made it clear that a fair use cannot exist where there is a significant impact on the marketability (including the potential derivative uses) of

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153. *Fisher*, 794 F.2d at 436.

154. *Id.*

155. *Id.* at 437.

156. *Id.* (quoting B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)). See also Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395, 1411 (1984) ("'Destructive' parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author").

157. *Fisher*, 794 F.2d at 438.

158. *Id.*

159. *Id.* at 439.

the original.<sup>160</sup> There is nothing in the Court's decisions which suggests that the Ninth Circuit's analysis is appropriate. On the contrary, as *Harper & Row* stated, the infringer's defense, even in a parody case, must include a showing that the copyright holder's market would have been damaged without the infringement.<sup>161</sup> The parodist's task would be to show, in the Ninth Circuit's terms, that without infringing the original the parody would still have "garrotted" the original. This adds a burden far beyond the Ninth Circuit's. It does not imply a wholesale dismissal of the critical effects of the parody, nor does it require that the parody fulfill the demand for the original. Instead, it requires only that the two uses compete in the same (or potentially same) market. For a musical parody this could mean records, tapes, radio coverage, etc.

The current scheme of parody, as it fits within fair use, appears to require of the parodist something more than a claim of criticism by humor. Despite commentators who argue that parody should be privileged because of the unlikelihood that such uses would be authorized,<sup>162</sup> or that parody's critical quality should be the focal point of a court's attention<sup>163</sup> and should thus receive protection where it criticizes *something*,<sup>164</sup> the courts have realized that more is at stake than an author's ego. Although it is important that courts recognize parody as an expressive form,<sup>165</sup> allowing wholesale use of a composition can have troubling and injurious results.

The music industry is no longer a small business. Recorded sales regularly number in the millions. Permitting parody of a song where the net result is an exact duplicate of the score with different lyrics can only serve to dilute the marketability of the original, as the two records compete for much of the same market. It matters not at whom or what the criticism, if any, is directed.<sup>166</sup> If the copyright laws are to succeed in their purpose, the copyright owner must be reasonably sure, before he writes his score, that copies of his work will not be permitted without his consent.

As the cases reveal, it is often questionable whether the true intent of the parody is criticism, or whether opting to use a familiar tune was

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160. See *supra* notes 53-76 and accompanying text.

161. *Harper & Row*, 493 U.S. at 576.

162. E.g., Rosette, *Burlesque as Copyright Infringement*, 9 COPYRIGHT L. SYMP. (ASCAP) 1, 27 (1956).

163. E.g., Comment, *supra* note 27.

164. Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L.J. 73, 106-07 (1969).

165. See *Showcase*, 479 F. Supp. at 357.

166. See Comment, *supra* note 27, at 184-86.

simply a means of benefitting by virtue of association or familiarity.<sup>167</sup> In an effort to promote parody, some zealous commentators have attempted to justify it in terms of its critical effect.<sup>168</sup> But in so doing they have often overlooked the fact that the fair use defense, as it relates to criticism and comment, requires "a new, original and different literary" result.<sup>169</sup> The criticism must not amount to a derivative work. Parody, especially musical parody, will always approach a derivative work unless the parodist is careful to avoid exact or nearly exact duplications. It is because of this fact that musical parody requires close scrutiny. While it may be popular to suggest that criticism should flow freely at all levels,<sup>170</sup> musical parody hardly fulfills such an important function that its critical effect alone justifies overriding the constitutional purposes of the copyright laws. Weird Al Yenkowitch's (Yankovich) humorous remakes of popular songs should hardly be a fair use simply because they criticize something, especially when one considers the possible detriment such a song, if unauthorized, could have on the marketability of the original.<sup>171</sup>

### CONCLUSION

The economic implications of musical parody are increased as a result of the booming music market. Actions which cripple or severely damage the returns a composer may receive should not be permitted under the cloak of criticism. As with other forms of fair use,<sup>172</sup> musical parody amounting to a verbatim copy of the score of a song should not be a fair use. To allow such, based on its critical effect or intent, would only subvert the goals of the copyright law to "promote the useful arts." Often parody advocates overemphasize the relative value of the parody, neglecting the value of the original. Without protecting the original composer's right, however, the incentive to create the original may quickly dissipate, leaving the would-be parodist unemployed.

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167. See *supra* note 123 and accompanying text.

168. See Comment, *supra* note 27, at 182-84. See also M. NIMMER, *supra* note 73, at § 13.05[B].

169. *Columbia Pictures*, 137 F. Supp. at 352.

170. See Comment, *supra* note 27.

171. Judge Shoob recognized this in *D.C. Comics* when he noted that the damage done to plaintiff's character images led defendant's use away from parody, not toward it. 598 F. Supp. at 119.

172. See *Walt Disney Prods.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).