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## THE LAW OF PARODY—INFRINGEMENT†

Raymond T. Nimmer\*

### INTRODUCTION

An interesting but infrequently litigated copyright law question is presented in situations involving an unauthorized parody of a copyrighted work. The few court decisions on this subject offer uncertain and unsatisfactory rationales and solutions to the problem. Likewise, the various articles appearing in legal journals fail to advance a satisfactory resolution. It is suggested that these shortcomings result from an initial failure to fully take into account the intrinsic character of the work that is described as a parody and the nature of the exclusive right that is sought to be enforced against it. This paper seeks to suggest the factors and issues that become relevant when these characteristics are recognized.

### PARODIES

In order to fully understand the problem it is necessary both to recognize the common definition of “parody” and to become acquainted with the manner in which parodies are created in our modern society.

Webster defines “parody” as a “writing in which the language and style of the author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated.”<sup>1</sup> Legal authorities dealing with the parody-infringement problem have preferred, however, to include within the scope of their consideration those parody-like efforts that do not involve a written work.<sup>2</sup> Thus, they have appropriately included those activities that are technically classifiable as burlesque.<sup>3</sup> This paper adopts a similar approach.

Parody has produced a number of notable and memorable works. For example, recognized masterpieces such as Chaucer’s *Ryme of Sir*

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1. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1643 (1961).

2. See, e.g., Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130 (1955); and Crossland, *Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S. CAR. L. REV. 153 (1968).

3. Burlesque is also defined as including literary compositions. The primary distinction between the two “art” forms seems to be that burlesque involves “grotesque exaggeration or comic imitation” whereas parody merely involves exaggeration of certain peculiarities. See WEBSTER’S THIRD INTERNATIONAL DICTIONARY 299 (1961).

*Thopas* and Gay's *Beggar's Opera* were actually parodies that have enjoyed far greater recognition than the originals.<sup>4</sup> Clearly, in this traditional guise, parody commands recognition as a distinct art form.

However, in our modern society, works alleged to be parodies may be produced in situations bearing little relationship to the traditional form. This modern phenomenon may be illustrated by reference to the following hypothetical fact situation. Assume that Mr. A. A. Writer is the author of a financially successful novel entitled, "Apocalypes." Critics acclaim this novel as the supreme literary achievement of the contemporary age.

One year after the publication of Mr. Writer's novel, Mr. B. G. Clown, a television comedian, decides to base his weekly television show on Mr. Writer's story. To this end, Mr. Clown develops an hour-long comical sketch, borrowing substantially from Mr. Writer's novel. The sketch is videotaped and scheduled for national showing. Mr. Writer, however, learns of Mr. Clown's activity and brings an action to enjoin the use of material from his novel. Mr. Clown asserts as a defense that he is entitled to use portions of the novel because his sketch is a parody of the novel.

As Mr. Clown prepared his sketch, Mr. Writer's novel received attention from a second source. Mr. I. M. Paradee, a well-known literary critic, began preparation of his first novel entitled "A Pack of Lips." Mr. Paradee abhors the state of contemporary literature. He wishes to express, through parody, his displeasure with contemporary literary styles and trends. To this end, Mr. Paradee has taken a substantial portion of Mr. Writer's novel and so twisted the events and characters as to call attention to the absurdities of modern writing styles. Mr. Writer learns of Mr. Paradee's novel and brings an action to prevent its publication. Mr. Paradee defends the action by claiming that his novel is merely a parody of Mr. Writer's novel.

The inherently different characteristics of the parody-like works that precipitated these two hypothetical lawsuits is clear. Mr. Paradee's novel closely resembles the traditional art form of parody and might be described as "true parody." Mr. Clown's sketch, on the other hand, takes the form of merely another product of the mass entertainment business. For our purposes it might be labeled as an illustration of a "comic adaptation for profit." Recognition of the factual differences between these two polar positions as well as among the various efforts falling

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4. See Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1131 (1955). See generally KITCHEN, *SURVEY OF BURLESQUE AND PARODY IN ENGLISH* (1931).

between these extremes is essential to a proper analysis of the parody-infringement problem.

#### COPYRIGHT LAW IN GENERAL

At this point the reader may reasonably inquire why examples of even "true parody" should not be treated in the same manner as other examples of borrowing under the copyright law. Indeed, this issue has proved to be a basic controversy in this area.<sup>5</sup> The argument for a more favorable position for parody is based upon the Constitutional mandate for the creation of a copyright law. Congressional power to enact such a law is granted for the express purpose of promoting the Arts and Sciences.<sup>6</sup> The familiar monopoly that has been granted to authors is merely a means chosen to accomplish this end.<sup>7</sup> However, to be effective, the parodist must be free to copy a substantial amount of the original and to adapt this copied material to a comical treatment.<sup>8</sup> Thus, the argument concludes, to bar the parodist from copying substantially would be a perversion of the Constitutional mandate in that it would work to deter rather than to promote a recognized art form.

However, it should be recognized that, even in situations involving ordinary copying, the statutory monopoly granted to an author has not been construed as being absolute.<sup>9</sup> The courts have added a number of conditions and qualifications upon the author's exclusive right. Among these qualifications are the doctrines of substantial appropriation and fair use.

#### *The Doctrine of Substantial Appropriation*

Chafee attributes the development of the substantial appropriation concept to the Constitutional mandate.<sup>10</sup> The doctrine is apparently a recognition of the fact that the development of the Arts and Sciences would be substantially impeded if all copying were held to be an infringement.<sup>11</sup>

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5. *But see* Leo Feist, Inc. v. Song Parodies, Inc., 146 F.2d 400 (2d Cir. 1944) (written compositions that parodied the lyrics of the original, infringement found, issue of parody as fair use unlitigated).

6. U.S. CONST. art. I, § 8.

7. 17 U.S.C. §§ 1-215 (1964).

8. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1131 (1955).

9. *See generally* H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY (1944) and KAPLAN & BROWN, COPYRIGHT (1960).

10. Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).

11. *Id.* It has been suggested that the doctrine developed from the equity practice of denying relief under the *de minimis* doctrine. *See* Rossett, *Burlesque as Copyright Infringement*, 9 A.S.C.A.P. 1, 9 (1958). *See also* Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125 (1951).

A detailed exposition of the factors included in the concept of substantial appropriation is beyond the scope of this paper. The effect of the doctrine is that there is no infringement unless the copying constitutes what the court considers to be a substantial amount of the original.<sup>12</sup>

The tests used to determine if a particular appropriation is substantial can be best summarized by saying that the final determination rests upon a pragmatic analysis of the facts in each case. However, in view of the importance of this doctrine in relation to the problem of parody-infringement, a summary of the tests is appropriate.<sup>13</sup>

The term "substantial" connotes a weighing of the amount used. This is the approach used by the courts applying the "quantity" test. In effect, the court determines the percentage of the original that has been copied. Once the court determines this percentage, it decides whether this percentage constitutes a substantial portion of the original.<sup>14</sup> The inadequacies of this test are apparent. No account is taken of the over-all effect of the portion copied. No provision is made for the situation in which the portion copied, though small, is enough to effectively reproduce the original.<sup>15</sup>

In contrast to this rigid test are two tests involving a greater degree of subjective determination. The first purports to base the finding of substantiality upon the "quality" of the section copied.<sup>16</sup> Courts applying this test apparently attempt to determine whether the copied sections are *vital* to the total effect of the copyrighted work.

The second "subjective" test may be called the "impartial observer test."<sup>17</sup> Application of this test varies depending upon the individual judge's conceptualization of an impartial observer. The court must determine whether, upon first reading the alleged copy, an impartial observer would immediately associate the reproduction with the original.

There are numerous other tests of substantiality, including: 1) the taking is substantial if the taker intended to copy the original;<sup>18</sup> 2) the taking is not substantial if the taker has imparted a high degree

12. H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 334 (1944). See also Chafee, *supra* note 10, at 511.

13. As illustrated in the summary of the case law, the courts have placed great emphasis upon this issue in dealing with the parody-infringement problem. See notes 48-73 *infra* and accompanying text.

14. *Green v. Luby*, 177 F. 287, 288 (C.C. N.Y. 1909).

15. H. BALL, *supra* note 12, at 334-35. Rossett states that this test originated in the equity-law dichotomy and should no longer be valid since a court now may order either damages or an injunction. Rossett, *supra* note 11, at 12.

16. *Ansehl v. Puritan Co.*, 61 F.2d 131 (8th Cir. 1937); *Toksvig v. Bruce Publ. Co.*, 181 F.2d 664 (7th Cir. 1950).

17. See *Funhauser v. Loew's*, 208 F.2d 185 (8th Cir. 1954); *Universal Pictures, Inc. v. Harold Lloyd Co.*, 162 F.2d 354 (9th Cir. 1947).

18. *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D. N.Y. 1914).

of originality to his final product;<sup>19</sup> 3) a finding of substantial appropriation is made if the reproduction materially reduces the demand for the original work;<sup>20</sup> and 4) the court views the appropriation in a stricter manner if it were made with profit motives.<sup>21</sup>

### *The Doctrine of Fair Use*

Another qualification of an author's right to control reproduction of his work is the doctrine of fair use. Fair use is codified in the English copyright statute under the title "fair dealing,"<sup>22</sup> but it is solely judge-made law in the United States. The doctrine of fair use allows copying from a copyrighted work if such appropriation is "customary and reasonably expected."<sup>23</sup> This definition is misleadingly simple, for the doctrine of fair use is the most troublesome issue in copyright law.<sup>24</sup> No easily-applied criteria exist. The determination of fair use is purely a case-by-case exercise in pragmatics.<sup>25</sup>

The doctrine of fair use is applied to protect limited copying of scientific works and methods.<sup>26</sup> In this area, the reasons for the doctrine are similar to those which dictated the adoption of the substantial appropriation requirement—allowance for the rapid development of the sciences through limited copying.<sup>27</sup>

The doctrine of fair use also applies to reviews and literary criticisms.<sup>28</sup> Traditionally, the courts have held that the reviewer has a right to quote material from the original to illustrate the comments that he makes. He is not, however, allowed to quote so extensively as to supersede the original or to substitute for it.<sup>29</sup>

The doctrine of fair use involves too many complex issues to permit detailed discussion in this paper. It must suffice to re-emphasize that the determination of fair use is a pragmatic decision. There are, however, certain suggested guidelines such as: the value of the parts appropriated; the value in relation to the works in controversy; the purpose served by each work; and the extent of interference with the sale of the original.<sup>30</sup>

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19. *Glyn v. Weston Feature Film Co.*, 1 Ch. 261, 268 (1916).

20. *Sheldon v. Metro-Goldwyn Pictures Co.*, 81 F.2d 49 (2d Cir. 1936).

21. *Witmark & Sons v. Passtime Amusement Co.*, 2 F.2d 1020 (4th Cir. 1924).

22. Copyright Act of 1911, 1 & 2 Geo. V, c. 46, § 2(1) (i).

23. *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841).

24. See Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203 (1954). For a comprehensive discussion of the fair use doctrine see Crossland, *supra* note 2. See also *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

25. *Carr v. National Capital Press*, 71 F.2d 220 (D.C. Cir. 1934).

26. *Baker v. Seldon*, 101 U.S. 99 (1879).

27. *Id.* at 103.

28. *Lawrence v. Dana*, 15 F. Cas. 26 (No. 8136) (C.C.D. Mass. 1869).

29. *Id.* at 30.

30. *Carr v. National Capital Press*, 71 F.2d 220, 225 (D.C. Cir. 1934). Crossland suggests and discusses nine elements to the doctrine. Crossland, *supra* note 2, at 183.

It is apparent, upon comparing the tests and the guidelines mentioned above, that substantiality and fair use are closely related theories. Each doctrine is applied through flexible case-by-case determinations. There is no need to be bound by rigid classifications or rules in determining whether a specific work infringes a copyright.

## CONFLICT BETWEEN PARODY AND COPYRIGHT

### *Introduction*

The rights of the holder of a copyright conflict with the practice of the art of parody. The copyright holder is entitled to the exclusive right to control reproduction of his material, but the parodist must use a large amount of the original in order to develop an effective parody.<sup>31</sup> This conflict is not resolved by the present copyright statute.<sup>32</sup> Resolution of the problem is, therefore, the responsibility of the courts.

The few reported cases considering the parody-infringement problem fail to reach the underlying issues.<sup>33</sup> There is no recognition that the problem requires a complex balancing of the proper interests. Further, the functional distinction between true parody and "comic adaptation" is not observed. Instead, the courts indiscriminately apply the theories of general copyright law to all works that nominally fall within the dictionary definition of "parody." The result is that "true parody" is made subject to the unpredictable tests of copyright law.<sup>34</sup> On the other hand, comic adaptation is afforded the benefit of association with an ancient form of art. This benefit is clearly unwarranted in view of the commercial nature of "comic adaptation."

### *Decisional Law*

#### English Cases

English copyright law is generally similar to American law.<sup>35</sup> The primary English copyright statute, however, points up one difference: the doctrine of "fair use" is given express legislative sanction under the name "fair dealing."<sup>36</sup>

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31. This has been recognized in some of the cases considering the parody-infringement problem. These courts permit the parodist to copy enough material to conjure up the original in the mind of the viewer. See note 68 *infra* and accompanying text.

32. 17 U.S.C. §§ 1-215 (1964).

33. See notes 37-74 *supra* and accompanying text.

34. As is emphasized lately, not only are these tests unpredictable but, more importantly, they involve irrelevant considerations. See notes 73-74 *infra* and accompanying text.

35. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1138 (1955).

36. 1 & 2 Geo. V, c. 46, § 2(1) (i).

One of the leading English cases connected with the problem of parody-infringement is *Hanfstaengl v. Empire Palace Ltd.*<sup>37</sup> This case does not specifically consider the parody-infringement problem, but deals with rough illustrative sketches of works of art. The plaintiff held the copyright to certain pictures which were being presented in the form of *tableaux vivant*. During a public exhibition of these works newspaper reporters made rough sketches of the original pictures. The sketches were used solely for illustrative purposes in connection with articles concerning the *tableaux*.

The Chancery court found that this did not constitute an actionable infringement.<sup>38</sup> The several opinions indicate that the court believed there could be no infringement because the nature of the sketches was different from the original. The opinion of Lopes, L.J., is representative: "[T]he sketches may be described as rough, rude drawings, devoid of artistic merit; there is no attempt to reproduce the merits of the original—no attempt at art. . . . It is a work of a different class, intended for a different purpose. . . ."<sup>39</sup>

In *Francis, Day & Hunter v. Feldman*,<sup>40</sup> the Chancery court dealt with a situation somewhat more analogous to that of parody-infringement. Here the alleged infringement took the form of a satirical answer to a popular song. The infringement claim was summarily disposed of by holding that the reply song was not a colorable imitation of the original.

*Carlton v. Mortimer*<sup>41</sup> dealt with an alleged infringement of the copyright to a Tarzan novel. The defendant was a member of an acrobatic team that operated under the name of "Warzan and His Apes." The acrobats used two situations from the novel in their performances. The court found no infringement because the two situations were taken merely as a burlesque of the original novel. While not exonerating all burlesque from the restrictions of the copyright act, the court felt that, since there had been a complete inversion of moods in the two copied situations, there was no infringement in this situation.

Perhaps the most liberal treatment of parody under the copyright laws can be found in *Glyn v. Weston Feature Film Co.*<sup>42</sup> In this case, the court dealt with a copyright of a vulgar, best-selling English novel entitled "Three Weeks." The alleged infringement occurred in a movie,

37. 3 Ch. 109 (1894).

38. *Id.* at 132.

39. *Id.*

40. 2 Ch. 728 (1914).

41. MAGGILLIVRAY, COPYRIGHT CASES 194 (1917-23), as quoted in Yankwich, *supra* note 35, at 1132.

42. 1 Ch. 261 (1916).



equally vulgar, albeit farcical, and admittedly based upon the novel.

In the arguments of counsel, each side treated the issue of the desirability of applying an exemption to the copyright laws in the case of a parody or burlesque. The court did not reach this issue, however, having found that the novel was too vulgar to be entitled to protection under the copyright laws.<sup>43</sup>

After deciding the case on the vulgarity issue, the court stated that the copyright holder would not have prevailed even if the novel were not vulgar. After discussing the lack of decisions dealing with the parody-infringement problem, the court stated its allegiance to the principle that no infringement takes place when the defendant uses "such mental labor on what he has taken and has made such revision and alteration as would produce an original result."<sup>44</sup> As indicated in a later case, the court felt that there could never be an infringement in the case of a parody.<sup>45</sup>

Except for the dicta of the *Glyn* case, no English case specifically treats the parody-infringement problem. Some writers find, however, a basis from which there could be implied a doctrine whereby parody would be treated with a special form of leniency.<sup>46</sup>

#### Early American Decisions

American precedent considering the parody-infringement problem may be divided into two time periods. Early cases dealt with situations in which the copying was motivated solely in order to profit financially from the work, style or mannerisms of another person. Later decisions, however, have expressed doubt as to the efficacy of the early decisions as precedent for the parody-infringement problem<sup>47</sup> in the context in which the problem is presented in this paper.

The first American case to consider the parody-infringement problem is *Bloom & Hamlin v. Nixon*.<sup>48</sup> The defendant toured the country with an act in which she impersonated public figures. The alleged infringement occurred when, in the course of her act, the defendant sang a chorus of a copyrighted song in the style of a named singer.

The court found that this did not constitute an infringement of the copyrighted song.<sup>49</sup> The defendant did not actually perform the song but merely used it as a vehicle for her imitations. The court stressed

43. *Id.* at 269.

44. *Id.* at 268.

45. MAGGILLIVRAY, *supra* note 41, at 194.

46. See Note, 12 VAND. L. REV. 459 (1959). Rossett notes, however, that the English text, COPINGER & SKONE-JONES, LAW OF COPYRIGHT (8th ed. 1948), treats parody "with the same rules as all other uses." Rossett, *supra* note 15, at 24 n.74.

47. Berlin v. E.C. Publ., 329 F.2d 541, 544 (2d Cir. 1964).

48. 125 F. 977 (E.D. Pa. 1903).

49. *Id.* at 978.

that the defendant sang the song in good faith and with no intent to copy. It should be noted that the *Nixon* court did not state that the defendant's acts constituted a parody of the copyrighted work. Thus, later courts using this decision as precedent in disposing of the parody-infringement problem have necessarily formulated their own conception of what constitutes a parody.<sup>50</sup> It is not surprising, therefore, that a contemporary decision has asserted that the *Nixon* case does not even concern a parody. The reason for this confusion is that *Nixon* deals with a peculiarly modern phenomenon of non-original, mass entertainment in which a portion of the original work is taken, not to criticize the original nor to create an entirely new work, but simply to give a paying audience the entertainment for which the actor receives his compensation. As such, the activity considered in *Nixon* more resembles an ordinary commercial endeavor than an independent art form.

The *Nixon* case was followed six years later by *Green v. Minzenheimer*.<sup>51</sup> The defendant in *Minzenheimer* was also a professional impersonator. The copyrighted song was delivered without accompaniment. The court found that there was no infringement since the song was merely a vehicle for the impersonation.

The test used in *Nixon* and *Minzenheimer* was clarified in *Green v. Luby*.<sup>52</sup> In this case, the defendant used the entire song as part of a dramatic sketch. He claimed that he sang the song only for mimicry value, stating that "the mimicry is the important thing; the particular song, the mere incident."<sup>53</sup>

The court distinguished *Minzenheimer* and *Nixon* saying that the appropriation in those cases was far less than the entire song. The court could not believe that it was necessary to sing the entire song to mimic a singer and held that there had been an infringement.<sup>54</sup>

The *Luby* case uses a test analogous to the general test of substantial appropriation. It is to be noted that the defendant in *Luby* was a professional entertainer. His activities, as were those of the defendants in *Nixon* and *Minzenheimer*, are properly included within the category of "comic adaptation for profit." This series of cases, therefore, supports the idea of applying the substantial appropriation test to situations in which the defendant appropriates for commercial use, regardless of the nominal categorization of the appropriation as a "parody."

One other early case merits discussion. In *Hill v. Whalen &*

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50. 329 F.2d at 544.

51. 177 F. 286 (S.D. N.Y. 1907).

52. 177 F. 287 (S.D.N.Y. 1909).

53. *Id.* at 288.

54. *Id.*

*Martel, Inc.*,<sup>55</sup> the court considered an alleged reproduction of the cartoon characters, "Mutt" and "Jeff." The "parody" took the form of a dramatic performance in which characters named "Nutt" and "Griff," who closely resembled the copyrighted characters, appeared. The defendant claimed that the copying was justified because it was a parody of the original.

In finding an infringement, the court based its reasoning upon two factors. Initially, it emphasized that there had been a substantial reduction in demand for the original. The court also mentioned that the defendants had copied in bad faith. The court said that "'In Cartoonland' was calculated to injuriously affect . . . the value of the complainant's copyright."<sup>56</sup>

In holding that "bad faith" defeated defendant's asserted defense, the court implicitly held that good faith was essential to the defense of parody. Good faith requires that the "parodist" does not intend to reduce the value of the original.

In sum, the early American cases make no express distinction between a "comic adaptation" for monetary gain and a "true parody." It is to be noted, however, that, with the possible exception of the *Hill* case, all of the early cases dealt with commercial rather than artistically oriented work. This confined nature of the subject matter may explain the failure to recognize the suggested distinction.

#### Contemporary American Cases

Three contemporary cases consider the parody-infringement problem. They may be divided into two categories—the first dealing with the relatively modern mass entertainment medium of television and the second with the problem through the comparatively old medium of satirical journalism.

*Loew's Inc. v. Columbia Broadcasting Systems Inc.*,<sup>57</sup> involved a burlesque of the copyrighted motion picture "Gaslight." Shortly after the release of the motion picture, comedian Jack Benny performed a burlesque of the movie on radio. Six years later he repeated the burlesque on television. The holders of the copyright to the motion picture objected to the latter performance. Upon learning that Benny contemplated filming a full-length burlesque of the movie, the copyright owners sued for an injunction.

In comparing the contemplated television copy and the original,

55. 220 F. 359 (S.D. N.Y. 1914).

56. *Id.* at 360. See Note, *The Protection Afforded Literary and Cartoon Characters*, 68 HARV. L. REV. 349 (1954).

57. 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956).

the trial court found that the locale, setting, characters, points of suspense and treatment were all almost identical. The issue, therefore, was whether "a burlesque, which takes a substantial part of a copyrighted motion picture, is a fair use."<sup>58</sup> Thus viewed, the "Gaslight" case presented, for the first time, the question of whether parody would be accorded a position of favor under the copyright laws.

The court found an infringement on the ground that Benny's "parody" constituted a substantial taking in a manner which was not a fair use. The court cited numerous authorities on the definition of "fair use" in an attempt to break the doctrine into component parts. Application of the doctrine of fair use to the partial appropriation of scientific works was also discussed. The court stated that this type of copying is allowed in order to promote the Arts and Sciences. Applying this facet of the fair use doctrine to the facts, the court mentioned that, although consent to limited copying is implied in order to aid the development of the Arts, the word "art" does not include a television program produced for commercial gain.<sup>59</sup>

The court then addressed itself to criticism, a second facet of the fair use doctrine. Equating parody to criticism is a familiar argument to support preferential treatment for parody. The court recognized that reviewers and critics are allowed to quote extensively from the original for illustrative purposes; however, the court did not believe that the activities of a television comedian could properly be called criticism.<sup>60</sup>

Having found that Benny's "parody" was neither a scientific work nor a criticism, the court next considered the claim that parody is exempted under still another facet of the fair use doctrine. The defendant urged the court to adopt the concept that parody itself was a defense. He asserted that the application of ordinary copyright tests to parody would sound the "death knell" for comedy. The court, however, citing the old American cases, found that, although the defense of parody has been raised in similar cases, no court had ever rested its decision solely upon a finding that the appropriation was permissible because it was a parody. Instead, the court found that "a parodized or burlesqued taking is treated no differently from any other appropriation."<sup>61</sup>

The court used two arguments to dispose of the defendant's contention that it should recognize the defense of parody. Initially, the court emphasized that the scope of fair use narrows as one moves

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58. 131 F. Supp. 171.

59. *Id.* at 175. This conclusion appears to be more a result of personal judgment than a result of objective analysis.

60. *Id.*

61. *Id.* at 177.

farther away from the Arts and enters commercial areas.<sup>62</sup> The purpose behind the use is important. The permissive scope is narrow when the purpose for copying is commercial gain and broad when the secondary work is intended for further learning. In the *Loew's* case the purpose for copying was clearly commercial.<sup>63</sup>

With respect to the argument that the application of ordinary copyright tests would sound the "death knell" for parody, the court could not foresee such far-reaching effects of the decision. An ample amount of material in the public domain, it said, could serve as the basis for the "art." Also, the court did not consider its holding an assault on literary freedom, stating that it had "difficulty in visualizing the loss of the freedom if Benny's activities are curtailed by this decision."<sup>64</sup>

On appeal, the *Loew's* case was affirmed by the Ninth Circuit Court of Appeals.<sup>65</sup> Once again the defense of "parody" was rejected. The court did not elaborate on the doctrine of fair use. It did mention, however, that there was no precedent supporting a doctrine of fair use specifically applicable to situations in which the substance of a dramatic work was copied and reproduced as a parody.<sup>66</sup>

The Federal District Court for the Southern District of California considered a second parody-infringement case.<sup>67</sup> Once again, the alleged infringement was a television "parody" of a popular motion picture. In this case, the parody was entitled "From Here to Obscurity" and it featured comedian Sid Caesar. The court held that there had been no infringement. If found that the defendants' use of portions of the motion picture, "From Here to Eternity," was limited to the amount necessary to cause the viewer to "conjure up" the original.<sup>68</sup>

The court gave no formal opinion but did mention certain principles applicable to the parody-infringement problem. Two of these are pertinent. Since parody historically involved use of part of the original for recall purposes, the court felt that some limited taking should be permitted under the doctrine of fair use. Furthermore, the doctrine of fair use would permit the parodist considerable freedom to copy so long as the appropriation is not substantial.<sup>69</sup>

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62. *Id.* at 176.

63. Whether this commercial motivation, alone, is a sufficient basis upon which to reject the parodist's defense is considered at notes 90-91 *infra* and accompanying text.

64. 131 F. Supp. at 185.

65. 239 F.2d 532 (9th Cir. 1956).

66. *Id.* at 536.

67. *Columbia Pictures v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

68. *Id.* at 350.

69. *Id.* at 352. Compare the decisive effect of these rules to the balancing approach of the suggested guidelines at notes 80-91 *infra* and accompanying text.

In sum, the contemporary cases dealing with television parody clearly establish that the claim of parody is not, *per se*, a defense. The cases do illustrate, however, a reluctance to restrict parody to the level of other copying. This reluctance takes the form of a concession which allows the parodist to copy enough to "conjure up" the original.

The latest case to consider the problem of parody-infringement is *Berlin v. E. C. Publications*,<sup>70</sup> the "Mad Magazine" case. The magazine, noted for its satirical treatment of familiar subjects, printed the lyrics to a number of satirical songs. Each song was accompanied by a notation instructing the reader to sing the song to the tune of a popular composition. In twenty-five instances the composition referred to was one of the plaintiff's copyrighted works. Other than the reference to plaintiff's songs and the fact that the parodies were written in the same meter, there was little correlation between the content of the compositions.

Noting the extreme disparities in content and theme, the court expressed difficulty in ascertaining the manner in which the plaintiff had been injured. Also, there appeared to be no threat of a reduction in demand for plaintiff's originals and there was little difficulty in differentiating between the original and the parody. In view of this disparity and the lack of threatened injury, the court found it unnecessary to review the applicability of the "substantiality" test used in *Loew's*. The parodies involved in the *Berlin* case, the court felt, would not constitute an infringement under even the most rigorous application of the "substantiality" test.<sup>71</sup>

Although its finding that the taking was insubstantial obviated the necessity to consider the parody-infringement issue, the court briefly expressed its thoughts on the subject. The *Berlin* court clearly recognized the historical significance of the art of parody. It stated its belief that, "As a general proposition . . . parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."<sup>72</sup> Further, the court felt that a finding of infringement would be especially improper where the parodist does not use any more of the original than is necessary to "recall or conjure up" the original.

### Summary of the Parody-Infringement Cases

None of the cases considered above faced the problem of parody-infringement in the context of "true parody." The defendant in the

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70. 329 F.2d 541 (2d Cir. 1964).

71. *Id.* at 545. Only a few key lines were copied from each song—presumably for recall purposes.

72. *Id.*

*Hill* case acted in bad faith, while in the other cases the parodies were motivated by *commercial* desires. The *Berlin* case involved a parody which closely resembled the traditional form of "true parody,"<sup>73</sup> but the finding that the taking in that case was not substantial precluded full consideration of the problem.

The *Loew's* case approaches full recognition of the impact of commercial motivations upon the question of parody-infringement. The court squarely faced the parody-infringement problem in the context of a "comic adaptation for profit." In rejecting the defendant's contention that parody is its own defense, the court stressed the obvious commercial characteristics of the parody. Recognizing the liberties accorded to other forms of art, the court stated that the commercially-oriented work under consideration could not be called "art." The parody was properly subjected, therefore, to the tests of ordinary copyright law.

In spite of language to the contrary in the *Loew's* case, courts generally do not recognize the impact of commercial motives upon the parody-infringement problem. Instead, they rely upon the general tests of copyright law, tempered by a vague notion that parody deserves protection as an independent art form. This approach neither recognizes the actual issues nor provides a clear indication of the permissible scope within which the parodist may operate. The result is that some commercial efforts receive the benefit of association with true parody while the actual art of parody may, in fact, be retarded by the lack of a precisely defined scope of liability.

#### SUGGESTED SOLUTION

##### *Introduction*

The parody-infringement problem is in need of a clarification of issues. Existing case law lacks uniformity and is replete with acknowledgements of uncertainty as to the proper resolution of the problem.<sup>74</sup> Furthermore, the use of general copyright tests in an attempt to resolve the parody-infringement question increases the confusion. These tests condition the legal status of parody upon the determination of factors having little relevance to the vital policy considerations involved in the problem.

The following analysis is intended to focus attention upon the factors that must be considered if a rational solution to the parody-

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73. Satirical journalism is, perhaps, the oldest form in which parody appears. See generally KITCHEN, SURVEY OF BURLESQUE AND PARODY IN ENGLISH (1931).

74. 329 F.2d at 544.

infringement problem is to be found.<sup>75</sup> The suggested guidelines are, in the final analysis, subject to pragmatic application. Accordingly, their implementation may result in little substantive change from the results achieved through the application of the equally pragmatic general copyright tests. Acceptance of the suggested guidelines will, however, enable courts to make a meaningful assessment of the status of the individual parody. Further, they will enable the parodist to assess the legal effect of his activities without being subjected to the legal process.

### *Arguments Rejecting All Preference*

Throughout history, parody has been a vital and recognized part of literature. Many important works of art are parodies of long-forgotten originals. Thus, it seems clear that parody qualifies as an independent art form.

The advent of mass entertainment as a multi-million dollar business has dramatically altered the nature of modern parody. Comedians such as Jack Benny daily engage in money-making activities that resemble "parody." The resemblance, however, is purely superficial. The modern comedian is primarily interested in completing his contract and makes little effort to contribute to the Arts. His motives are primarily commercial and, accordingly, his activities are properly categorized with other profit-seeking endeavors.<sup>76</sup>

These considerations lead many writers to conclude that modern parody no longer deserves the description "art."<sup>77</sup> Therefore, they argue that *all* modern parodies must, *per se*, be classified as commercial endeavors. This leads to the conclusion that parody should in no case receive preferential treatment.

To the extent that this argument forecloses consideration of the underlying essence of the individual parody, it is unacceptable. It is clear that most, if not all, of the contemporary attempts at parody involve commercial motivations. This, however, does not justify the denial of a preference to those instances in which the "parody" does not involve *dominating* commercial motivations. In the absence of a dominating commercial motive there is no justification, in the Constitutional purpose underlying the copyright laws, to deter advancement of the

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75. Various articles have appeared attempting to suggest the proper resolution of this problem. See, e.g., Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130 (1955); Hadl, *Parody Lyrics—The "Mad" Magazine Case*, 11 BULL. CR. COC. 319 (1964); Mummery, *Parody and Plagerism*, 116 NEW L.J. 1651 (1966); Comment, 39 FORD. L. REV. 570 (1961).

76. See *Columbia Pictures v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

77. See Note, 56 COLUM. L. REV. 585 (1955).



independent art form of parody. Such a deterrent, even if it affects only one "artist" among thousands of "parodists," would be a perversion of the Constitutional mandate.

It is argued that parody does not require free access to copyrighted works. This claim is based upon the assertion that the parodist may fully practice his art within the realm of works in the public domain.<sup>78</sup> This argument fails to recognize the importance of making use of well-known contemporary works. To restrict the parodist to relatively unfamiliar works would be to substantially retard the impact of the parody and affect the value of the parody to the contemporary society.

#### *Arguments Advocating Total Freedom*

Emphasizing the historical prominence of parody, many writers arrive at the conclusion that "parody" should be freed from the restraints of the copyright laws.<sup>79</sup> In arguing for complete freedom, these writers utilize the dictionary definition of "parody" and ignore the impact of commercial motivations. Accordingly, their position is clearly too broad.

A Hollywood scriptwriter or a major television producer is clearly restricted as to the amount of copyrighted material he may use without authorization. This same restriction is applicable to many instances of modern parody. A meaningful distinction cannot be drawn between these individuals and the professional comedian. Each is engaged in a commercial activity. Each, if allowed to copy without restriction, would be using the work of another solely to advance his own financial interests.

Nevertheless, it has been urged that, since the comedian is engaged in activities resembling parody, he should not be restricted by the copyright laws. Clearly, this position is an attempt to extend the historical significance of parody beyond all reasonable bounds. Nominal association with a traditional art form should not conceal the inherent similarities of the comedian's work with other profit-seeking enterprises. Accordingly, insofar as the "total freedom" advocates purport to exempt the activities of professional entertainers, their position is unacceptable as an unwarranted intrusion upon the rights of the copyright holder.

#### SUGGESTED ANALYSIS

##### *Recognition of the Various Contributing Factors*

The suggested dichotomy represented by the terms "comic adapta-

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78. This position was urged by the lower court in the *Loew's* case.

79. See Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130 (1955). A similar, supportable argument is that the parodist should be free so long as he imparts a sufficient degree of originality. See Rossett, *Burlesque as Copyright Infringement*, 9 A.S.C.A.P. 1 (1958).

tion" and "true parody" may be misleading. These terms are not intended to represent the two ultimate categories into which all instances of the parody-infringement problem fall. Rather, the "comic adaptation" label refers to those instances in which the commercial motive factor is dominant. Inasmuch as this factor is dispositive of the majority of instances of the problem, there has been no need to emphasize the additional factors until now.

The parody-infringement problem presents a situation involving a direct confrontation of two distinct rights. On the one hand is the right of the parodist to have material available upon which he may effectively base his artistic endeavors. On the other hand is the right of the copyright holder to control the reproduction of his work.

Each of these rights is composed of numerous factors. Rational resolution of the basic conflict between these rights requires an analysis of the relative weight to be accorded to each of these elements in view of the particular facts of the individual case.<sup>80</sup> Because of its frequent occurrence, analysis of these individual factors will reveal that one of the crucial determinations involves the dominance of the parodist's commercial motives. However, other determinations are important and must also be considered.

The "right" of the parodist to have freely available material is dependent upon numerous factors, but only those that are relevant to the conflict in question will be discussed.

#### Status of the Individual Parody as "Art"

The purpose of the copyright law is to promote advancement of the Arts.<sup>81</sup> This implies that copyright laws should not be construed so as to operate as a deterrent to any art form. Accordingly, the position of the parodist becomes stronger as his work approaches the status of "art."

The definition of "art" is elusive. Webster's dictionary suggests that "art" indicates that there has been an application of taste and talent in order to create beauty.<sup>82</sup> This definition is acceptable only to the extent that it does not purport to base the determination of "art" upon the actual existence of talent. Neither is the definition acceptable if it requires an individual determination as to what constitutes beauty. Clearly, such tests would be improper because they would place too high a premium upon an appeal to popular taste.

The above-mentioned definition, however, does suggest two work-

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80. Note the similarity of many of these factors to the "elements" of fair use as identified by Crossland. See Crossland, *supra* note 2, at 183.

81. U.S. CONST. art. I, § 8.

82. WEBSTER'S COLUMBIA CONCISE DICTIONARY 42 (1939).

able factors upon which the determination of the status of the parody depends. The first of these concerns the intention of the artist. In this context, the intent referred to is an intention to create "beauty."<sup>83</sup> Clearly, this artistic intent is a necessary feature of any artistic endeavor and may be contrasted with a primary intention to realize a monetary benefit. The relative importance of this artistic intent must be considered to be a material factor in the determination of the status of the individual work.

The second factor suggested by the proposed definition is the extent to which the parodist applies his *own* talent and taste to the copied material. In essence, this factor involves a determination of the extent of originality involved in the parody. Clearly, a person who copies the work of another without attempting to make any substantial contribution of his own has little basis on which to claim the status of an artist.<sup>84</sup>

#### Effect on the Arts Generally

Even if the parody is artistic, it may be subjected to the repressive effect of the copyright laws in order to promote the Arts in general. Accordingly, the potential effect of the parody upon the artistic field is an important factor in a resolution of the conflict between the parodist and the copyright holder.

This impact upon the Arts may be viewed as involving two distinct considerations. Initially, the effect of permitting the parodist to circulate his work must be considered. This, in turn, necessitates the consideration of factors involving the impact of the parody upon the reputation of the Arts. This approach also requires inquiry into the potential effect of the parody upon the specific work that is copied and upon other works having the same characteristics. Whether the parody merely defames these works or whether there is an attempt to offer actual criticism or advice is a vital determination. In this connection, however, care must be taken to divorce oneself from a determination as to the soundness of the advice or criticism.<sup>85</sup> Failure to make this distinction would result in a possible repression of unpopular views.

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83. The intangible nature of this intent is recognized. However, formulation of the issue in terms of this concept is necessary because of the intangible characteristics of "art."

84. This factor has been suggested as determinative of the issue. Such a position, however, appears to be an oversimplification of the problem. See Note, 17 CLEV. MAR. L. REV. 242 (1968).

85. The need for an objective determination is clear. Note that the court in the *Berlin* case recognized this need—it held in favor of the parody even though the court expressed little sympathy for the type of humor that was involved. 329 F.2d 541 (2d Cir. 1964).

The second consideration in calculating the impact of the individual parody upon the Arts is the loss that might occur if the work is suppressed. In this connection, factors such as the general appeal of the parody have no relevance. Rather, it must be determined whether the parody has meaning and whether the work will conceivably make a contribution to a spectrum of thought.

#### Intent of the Parodist

Although there is a basic right to pursue one's own goals and ambitions, there is clearly no right to intentionally harm another person. Accordingly, the existence or absence of an intent to injure the copyright holder is a relevant factor in determining the extent to which the parodist's right should be recognized.<sup>86</sup>

This intent to injure the author may take many forms. Each form must be measured according to its acceptability to society and the intent weighed in proportion to this measurement. Accordingly, an intent to harm the author by pointing to basic flaws in his style would resemble pure criticism and involve little negative effect upon the parodist's position. On the other hand, an intention to defame the author's reputation would clearly involve great adverse effect.

Located between the two suggested extremes are those situations in which the parodist intends to work financial injury to the author. Such situations are distinguished according to the manner in which the parodist attempts to work this financial harm. Clearly, a harsh criticism of the original may involve a desire to limit the circulation of the work. This intent, however, appears to involve few negative implications. On the other hand, an intent to injure financially by fulfilling the demand for the original involves a high degree of unfairness and consequential adverse effects upon the parodist's position.<sup>87</sup>

#### Actual Effect of Enforcing the Copyright

The right to free access to material varies according to the need for that material. Clearly, the parodist will have difficulty in pursuing a claim of free access to material that is unnecessary for his parody. The measurement of this need involves the consideration of two secondary factors.

In many cases, the parody will be directed toward the specific parodized work. In those instances it cannot be denied that the parodist must have access to portions of that work. However, the parody may be directed toward a general writing style or some other methodology

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86. *See Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D. N.Y. 1914).

87. This intention was called "bad faith" by the court in the *Hill* case.

in wide use. In such instances, the existence of readily available, substitute examples of the methodology has a substantial impact upon the parodist's right to use the work in question. The extent of this impact will, in turn, depend upon the equality of the substitutes with the original. Determinations as to the relative acceptance of the two works and their relative importance must be made.<sup>88</sup>

The factor of "need" has a second dimension. This involves a determination of the extent to which the parodist reaches or exceeds the amount of material necessary to create an effective parody. Certainly, the parodist's claim to a right to use the material is substantially affected by the extent to which he has fulfilled this need with other material. In this connection, it should be noted that the parodist must at least be allowed to copy enough material to "conjure up" the original without experiencing negative implications.

#### Copyright Holder's Right

Unlike the parodist's "free access" right, the right of the copyright holder is based upon a statute. Accordingly, the force of this right will vary in proportion to the extent to which the position urged by the holder corresponds to the purposes of the statute.

Briefly, the copyright statute is intended to promote the advancement of the Arts. The chosen method to attain this goal is the creation of an exclusive right to control reproduction of the work. In turn, this exclusive right promotes the Arts by securing a financial reward for the artist and assuring that his work will not be used in a manner that is contrary to his wishes.

The extent to which the position taken by the holder corresponds to the basic purpose of the statute is the crucial determination in assessing the impact of this position. Presumably, the correspondence with this basic purpose will be reflected and may be measured by the correspondence to the full implementation of the means chosen to promote the Arts.

Most of the factors involved in the assessment of the strength of the copyright holder's position are the complements of the factors involved in the assessment of the parodist's position. Accordingly, a repetition of the considerations involved is unnecessary.

An additional factor, however, must be emphasized. The copyright statute is designed and intended to protect and promote the Arts, not to foster commercial or financial interests. Accordingly, where it is neces-

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88. The lower court in the *Benny* case referred to the availability of substitutes. 239 F.2d 532 (9th Cir. 1956). However, the court did not mention the equality factor or the parodist's specific purpose.

sary, a commercial interest must give way to the interest in promoting the Arts. This applies equally to the parodist's right and to the rights of the copyright holder. It should be recognized that the copyright holder's financial interest is not an end in itself. It exists and has meaning only to the extent that it serves the over-all purpose of the copyright law.<sup>89</sup>

### The Impact of Dominant Commercial Motivations

One court, when confronted with the parody-infringement problem in the context of a television parody of a motion picture, categorized its problem as one of balancing the interests of two *industries*.<sup>90</sup> This categorization of the problem illustrates the potential impact of dominant commercial motives.

The above-mentioned categorization was made in the context of a situation involving a dominant commercial motivation in the production of both works. This dual presence of the commercial motive reduced the strength of each side of the issue and, consequently, did nothing to aid the resolution of the basic conflict. However, where only one of the works under consideration was produced with dominating commercial motivations, this factor may have a critical impact upon the final determination.

The dominance of commercial motives is less decisive, perhaps, when it appears as a motivation of the original work. In such situations, this factor calls into question the necessity of full enforcement of the copyright as a factor in the achievement of the ultimate purposes of the copyright laws. The protection of the specific, commercially-oriented work may have little persuasiveness when compared to the beneficial effect upon the parody. It may be argued, however, that the goals of the copyright statute are furthered by protecting the commercial work inasmuch as the distinction between a commercial work and an artistic work may be unrecognizable and protection of both will encourage the work of the artist.

If the parody was motivated by a dominant commercial purpose, the effect is more decisive. The dominance of the commercial factor calls into question the status of the parody as "art." If the commercial goal is primary, there would appear to be difficulty in proving the existence of the requisite "artistic intention." Further, if the parody is not "art," there would appear to be difficulty in proving that the purpose of promoting the Arts would be frustrated by restricting the parody.

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89. This factor was mentioned in passing by the court in the *Berlin* case. 329 F.2d 541 (2d Cir. 1964).

90. *Columbia Pictures v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

The impact of the commercial motivation is heightened by the fact that, in our modern society, the commercial motivation is virtually universal. Further, experience indicates that the parody-infringement problem will most often be presented in the context of copying within the mass entertainment media. It cannot be denied that these media involve a high degree of commercial motivation.

#### CONCLUSION

This paper has not attempted to impose a concrete solution upon a variable problem. That the previous attempts to develop an all-encompassing solution to the parody-infringement problem were inappropriate is indicated by the variable nature of the issues involved in the determination of these questions. This changeable nature indicates that a meaningful solution can be developed only upon a case-by-case consideration.

If the case-by-case approach to the parody-infringement problem is to have any rational basis, it is imperative that the various issues involved be identified and considered. This paper has attempted to isolate and discuss some of the major factors that might have relevance in a consideration of the problem. The relative importance of any of these factors will vary according to the individual facts of the case.<sup>91</sup> The measurement of this importance must, of course, be left for individual analysis and determination.

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91. Note that a number of the factors isolated by this analysis are similar to the "rules" suggested by the courts. The primary distinction, of course, is in the determinative weight accorded to these factors by the courts as compared to the weighing process suggested in this paper.

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