

The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody

I. INTRODUCTION

The purpose of granting copyrights in the United States is to further society's interest in maximizing authors' creativity. Granting property rights to authors creates a financial incentive for them to develop ideas and produce works of science or art.¹ In order to ensure that such intellectual achievements are eventually made available to the public, the property rights given to authors are of limited duration; after the copyright of a work expires, the work falls into the public domain and is thus available for public use without restriction. Until the copyright expires, however, authors have the sole right to exploit the fruits of their endeavors.

This fundamental policy of rewarding authors for their achievements in order to maximize the production of creative or intellectual works is theoretically simple and comports with general notions of fairness. A significant degree of complexity quickly arises in the application of this policy, *i.e.*, when a court attempts to decide whether one particular work is protected by the copyright laws ("copyrightable") or whether such a work has been copied. However, even more significant difficulties appear when one author utilizes portions of a prior author's work in a new work. Creative works are not conceived in a vacuum; all authors draw on their predecessors and contemporaries to some degree. This is especially true when they discuss or criticize the traditions and society surrounding them. Enforcing the earlier author's copyright in a work without exception and preventing subsequent use of any elements of that work would actually stifle rather than foster intellectual growth. Therefore, the crucial problem, which is the subject of this Comment, is determining which author should be protected.

The doctrine of fair use arose under common law to resolve the dilemma posed when society's interest in protecting authors conflicts with its interest in allowing certain persons to make a productive and/or harmless use of an author's work. Unlike the factual issue of determining whether a defendant has copied from a protected work, the issue of judging whether such a copying should be allowed is an issue of policy. Consequently, courts are required to conduct an extremely delicate balancing of interests based on the particular facts of a copyright infringement case in order to truly further the objective of maximizing the creation of literary works.

¹ See *infra* notes 5-8 and accompanying text.

Application of the fair use doctrine has led to confusion in many contexts, particularly in the field of parody. Two recent district court cases, both involving the parody of musical works, illustrate this lack of uniformity present in fair use jurisprudence. In *Tin Pan Apple, Inc. v. Miller Brewing Co.*,² the defendant Miller used look-alikes of the rap group Fat Boys to perform snippets of Fat Boys recordings in a television commercial; the District Court for the Southern District of New York denied Miller's fair use defense. In contrast, the District Court for the Middle District of Tennessee held in *Acuff-Rose Music, Inc. v. Campbell*³ that the rap group 2 Live Crew's unauthorized version of plaintiff's song, "Oh, Pretty Woman," was a fair use, even though the most identifiable parts of the original were used in a full length parody. The tension between these two similar cases was disturbing, but expected, given the history of the application of the fair use doctrine.

Recently, the Court of Appeals for the Sixth Circuit was presented with the *Acuff-Rose* case on appeal. In a 2-1 decision, the Sixth Circuit reversed the district court's holding, finding 2 Live Crew liable for its use of "Oh, Pretty Woman."⁴ Although this may have appeared to bring more certainty into fair use jurisprudence by reaching the same result as the *Tin Pan Apple* court, the decision was actually a marked step backward into the chaos that has permeated the application of the fair use doctrine to parody cases during the last four decades.

This Comment seeks to clear up some of the confusion present in the area of parody. Parts II, III and IV describe the purpose of copyright, fair use, and the application of these principles in parody cases this century. The *Tin Pan Apple* and *Acuff-Rose* cases are summarized and criticized within the traditional fair use framework in Part V. Part VI criticizes the web comprising traditional fair use analysis and simplifies it into its two supporting strands. In Part VII, these strands are integrated with an economic approach to the fair use problem and a common-sense definition of parody so as to develop a new theory for resolving fair use issues. Finally, in Part VIII, the *Tin Pan Apple* and *Acuff-Rose* cases are resolved under the scheme developed in Parts VI and VII.

² 737 F. Supp. 826 (S.D.N.Y. 1990).

³ 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F. 2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3545 (U.S. Mar. 29, 1993) (No. 92-1292).

⁴ *Acuff-Rose*, 972 F.2d at 1429. This case will ultimately be resolved by the U.S. Supreme Court. *Cambell v. Acuff-Rose Music, Inc.*, 61 U.S.L.W. 3545 (U.S. Mar. 29, 1993) (No. 92-1292) (granting certiorari).

II. THE PURPOSE OF COPYRIGHT

The Copyright Clause of the Constitution provides that Congress has the power “[t]o promote the Progress of Science and useful Arts” by granting authors exclusive rights over their works for a limited time.⁵ Since the middle of the nineteenth century, the United States Supreme Court has consistently held that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful Arts.’”⁶ Likewise, legislative history strongly suggests that Congress agrees with the Court’s assessment of the Copyright Clause’s purpose. A grant of copyright is “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.”⁷ It is a means to the growth of learning and culture.⁸

⁵ U.S. CONST. art. I, § 8, cl. 8. This constitutional “grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, *reh’g denied*, 465 U.S. 1112 (1984).

⁶ *Mazer v. Stein*, 347 U.S. 201, 219, *reh’g denied*, 347 U.S. 949 (1954). The Supreme Court first rejected the concept of a common-law copyright in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁷ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).

⁸ Some commentators have convincingly argued that this economic justification for copyright does not adequately explain every contour of copyright law. For example, Alfred Yen points out that a student who is required to produce a paper for credit at school, or a government official who is required by law to produce a document, are granted copyright protection even though the incentive to produce the work is not the hope of economic gain. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 537 (1990); *see also* Gary Kauffman, *Exposing the Suspicious Foundation of Society’s Primacy in Copyright Law: Five Accidents*, 10 COLUM. —VLA J.L. & ARTS 381 (1986) (tracing the history of copyright from its roots in England to demonstrate that much of the basis for a solely economic justification for copyright is based, in part, on a misinterpretation of case law, and an undue emphasis on particular language in the U.S. Constitution and early legislation). *But see* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

III. THE FAIR USE DOCTRINE

A. *Judicial Development*

Although “[t]he public good [often] fully coincides . . . with the claims of individuals,” this is not always the case.⁹ When an artist does not merely copy the copyrighted work, but alters the work by adding something creative (e.g., criticism, humor, abridgment), society’s interest in stimulating creativity favors both authors. The doctrine of fair use arose under common law to resolve this conflict, determining when it is in the public interest to allow one to make use of a copyrighted work without compensating, or obtaining permission from, the original author.¹⁰ This delicate balancing of private and public interests, and the lack of hard and fast rules to guide the use of the doctrine, has caused many courts and commentators to declare the fair use doctrine “the most troublesome in the whole law of copyright.”¹¹

For example, the copying of medical journal articles by a government library for use by medical researchers has been held to be a fair use because it furthers society’s special interest in medical research.¹² Likewise, society’s interest in public debate over the Kennedy assassination provided a justification for allowing the use of frames from the famous Zapruder film of the tragedy in a book criticizing the Warren Commission’s findings.¹³ In the parody context, television commercials made for the Coors Brewing Company, which satirized a copyrighted character used in Eveready Battery commercials by featuring actor Leslie Nielson in an “Energizer Bunny” costume, were found to further the public interest in criticism and entertainment.¹⁴

⁹ THE FEDERALIST NO. 43, at 186 (James Madison) (C. Beard ed., 1948).

¹⁰ The doctrine is considered to have arisen in the United States in the case of *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). For a complete history of the doctrine, see generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985); Abrams, *supra* note 8. For a succinct background see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1602–05 (1982).

¹¹ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) *quoted in*, 3 MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 1305 (1992).

¹² *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).

¹³ *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

¹⁴ *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991).

In contrast, using an abundance of copyrighted personal letters in a biography of Stravinsky,¹⁵ assembling excerpts from books into coursepacks for use by college students,¹⁶ and using clips from a student film on an Olympic wrestler by a television network¹⁷ have all been held not to be fair uses, despite the public interest in scholarship, education, and dissemination of information. With regard to parody, a discount electronic chain's use of the Superman character in a television commercial, although arguably humorous, was not found to serve society's interest in criticism or entertainment.¹⁸

It should be noted that fair use does not require that the use be creative or productive. Verbatim copying, by photocopying or videotaping, is often allowed when it is *de minimis*. For example, in *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁹ the United States Supreme Court held that private videotaping of television programs, solely for the purpose of viewing the program once later, is a fair use. Although the bulk of this Comment analyzes fair use in the parody setting where a productive/creative use has been made of the original, this should not be taken to suggest that unproductive uses should not be considered fair; many of the ideas expounded herein may be applicable to the unproductive use.²⁰

B. Codification

The fair use doctrine is codified in the Copyright Act of 1976.²¹

§ 107. Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or

¹⁵ *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987).

¹⁶ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

¹⁷ *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980).

¹⁸ *D.C. Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177 (S.D.N.Y. 1979).

¹⁹ 464 U.S. 417, *reh'g denied*, 465 U.S. 1112 (1984). Note that this is not a distinct branch of fair use doctrine, but a way in which many results of applying the doctrine can be categorized.

²⁰ For instance, much of Part VI of this Comment, which collapses the four factors into their core concepts, would apply to unproductive uses. Under the balancing test proposed, an unproductive use would be less likely to be fair, because such a use would probably be reproductive and would substitute for the original in the marketplace. *See infra* text accompanying notes 104-18.

²¹ 17 U.S.C. § 107 (1988 & Supp. 1990).

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

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

The codification was solely intended to recognize the development of the doctrine in the courts, not "to freeze the doctrine in the statute [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis."²² Despite declaring the intent to leave the doctrine in its common-law state, section 107 can be read to clarify four points about the doctrine. First, fair use is a complete defense to an infringement action. Second, by offering a *nonexclusive* list of examples of potential fair uses, Congress did not intend to require that a use fall into one of the stated categories in order to qualify for fair use analysis. By the same token, a use for one of the stated purposes does not automatically qualify as a fair use. Third, by stating that a fair use analysis "shall include" consideration of four factors, the statute does not preclude courts from considering others. Fourth, the term "shall include" implies that courts must explicitly consider the four factors, in order to bring more certainty into fair use cases.²³

IV. THE PARODY CASES

A. *The Early Cases*

The first parody cases arose during the Vaudeville days, when performers would often mimic other singers. In *Bloom & Hamlin v. Nixon*,²⁴ the

²² H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976); S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975). Note that although § 107 does not include parody as an example of a potential fair use, the House Report specifically mentions parody in this respect. H.R. REP. NO. 1476, at 65.

²³ William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1669-86 (1988).

²⁴ 125 F. 977 (C.C.E.D. Pa. 1903).

defendant had sung the chorus of plaintiff's song, without musical accompaniment, in order to mimic another actress' performance of the song. *Green v. Minzensheimer*²⁵ was similar, except that defendant had sung the chorus and one verse of plaintiff's song. In *Green v. Luby*,²⁶ defendant had sung the entire copyrighted song with musical accompaniment. The courts in these cases took the defendants' goal, to mimic the original performer, into consideration; they focused on whether the amount of the song appropriated was "a mere vehicle for carrying the imitation along."²⁷ Only in *Luby* was the defendant found to have used too much of the copyrighted song to warrant protection; the court found that using the entire song was not necessary to achieve the mimicry.²⁸ Thus, the predominant factor in these three cases was the amount of the copyrighted work used.

In *Hill v. Whalen & Martell, Inc.*,²⁹ the defendant had produced a show entitled "In Cartoonland" which featured two characters called "Nutt" and "Giff" who were obviously based on the plaintiff's copyrighted cartoon characters, Mutt and Jeff. The court recognized that "[a] copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it."³⁰ The court attempted to draw the line between fair and excessive amounts of copying by looking at "whether or not so much of the original has been reproduced as will materially reduce the demand for the original."³¹ *Hill* made it clear that such reduction must result from consumer substitution of the defendant's product for the plaintiff's, not from negative reaction to weaknesses of the original pointed out by the defendant. The court found that the show in question would hurt plaintiff's potential to market its own play featuring Mutt and Jeff. Thus, an analysis of market effect served as a surrogate for determining whether the defendant's taking was excessive.³²

²⁵ 177 F. 286 (C.C.S.D.N.Y. 1909).

²⁶ 177 F. 287 (C.C.S.D.N.Y. 1909).

²⁷ *Bloom*, 125 F. at 978.

²⁸ *Luby*, 177 F. at 288.

²⁹ 220 F. 359 (S.D.N.Y. 1914).

³⁰ *Id.* at 360.

³¹ *Id.* Note that three out of four of the fair use factors which are codified at 17 U.S.C. § 107 are mentioned by these courts. *See supra* text accompanying note 21. Only the second factor, the "nature of the copyrighted work," is omitted.

³² *Hill*, 220 F. at 360. Either determination could be used as a surrogate for the other. Very often in fair use cases, the amount reproduced is used as an indicator of whether substitution in the market is likely to occur. Also, the amount used is taken into consideration in light of the first factor, the purpose of the use. In Part VI, this confusion is

B. *The Ninth Circuit*

The Ninth Circuit generated a great deal of confusion when it decided *Benny v. Loew's Inc.*,³³ its first modern parody case. Jack Benny performed a take-off on the motion picture "Gaslight" entitled "Autolight" which followed the original storyline but added gags, puns, mimicry, slapstick, and distortion for comic effect. In deciding against Benny, the court held that "parodized or burlesque taking is to be treated no differently from any appropriation."³⁴

In *Columbia Pictures Corp. v. National Broadcasting Co.*,³⁵ the district court that decided *Benny* encountered a similar fact pattern: Sid Caesar had parodied "From Here to Eternity" with "From Here to Obscurity." The court distinguished *Benny* because the "theme, characterizations, general story line, detailed sequence of incidents, dialogue, points of suspense, sub-climax [and] climax" of Caesar's skit were different from the original.³⁶ But the court did not decide in Caesar's favor on fair use grounds, rather it held that the numerous differences between the works rendered Caesar's work not "substantially similar"; thus, it found a lack of infringement. However, in dicta the court disagreed with its own *Benny* decision by stating that an infringing parodist qualifies for the fair use defense if using an amount of copied material which "conjures up" the original.³⁷ Thus, the only guidance these two cases lend to parodists is that the amount of the original used will be determinative, but judged by a vague standard of "conjuring up."

*Walt Disney Productions v. Air Pirates*³⁸ involved a cartoon magazine which featured Disney characters engaging in drug use and sex. In rejecting the defendant's fair use defense, the court once again focused on the amount of the original taken and *Columbia's* "conjure up" test. The court interpreted the test narrowly, treating the "conjure up" level as the maximum permissible level of copying rather than the minimum amount necessary to create a parody. Because the defendant's purpose was to parody not only the Disney

avoided by removing the amount of the original used as an independent factor. *See infra* text accompanying note 113.

³³ 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub nom. Columbia Broadcasting Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

³⁴ *Id.* at 536-37.

³⁵ 137 F. Supp. 348 (S.D. Cal. 1955).

³⁶ *Id.* at 352.

³⁷ *Id.* at 354.

³⁸ 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

characters but also society at large, and because Mickey Mouse and Donald Duck were widely recognizable by the public, the appellate court concluded that copying the graphic images virtually verbatim was unnecessary to achieve the defendant's purpose.³⁹

C. *The Second Circuit*

The Second Circuit's first modern parody case was *Berlin v. E.C. Publications, Inc.*⁴⁰ Mad Magazine had published humorous lyrics in the same meter as the original songs written by the plaintiff, Irving Berlin. Although intended to be sung to the same tune as the original, the lyrics were not published with any music. Unlike the Ninth Circuit in *Benny*, the court recognized that parody was "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism."⁴¹ The "conjure up" standard, which under *Columbia* was the maximum allowable amount of the original a parody was allowed to utilize, was held under *Berlin* to be the minimum amount of copying to which the defendant, as a parodist, was entitled. This liberal standard was qualified, however, because it was to apply only where the parody was not likely to fulfill the demand for the original.⁴²

In *Elsmere Music, Inc. v. National Broadcasting Co.*,⁴³ the subject of the suit was a Saturday Night Live skit in which the song "I Love New York," which had been used in an advertising campaign for New York City, was performed as "I Love Sodom," with lyrics suitably changed for humorous effect. In affirming the lower court's opinion, the Second Circuit implicitly held that a work which satirized society in general, rather than the work copied, would be treated just as a parody aimed at a particular work.⁴⁴ To begin with, the court stated that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody."⁴⁵ In addition, the court reaffirmed the "conjure up" test as a minimum allowable amount of copying, with more copying allowed as the parody "builds upon the original [by] contributing something new for humorous effect or

³⁹ 581 F.2d at 757-58.

⁴⁰ 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

⁴¹ *Id.* at 545.

⁴² *Id.*

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

⁴⁴ *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980).

⁴⁵ *Id.*

commentary."⁴⁶ Moreover, the court ignored the qualification used in *Berlin*, merely utilizing market effect on plaintiff's work as a factor.

Soon after *Elsmere*, confusion was created in *MCA, Inc. v. Wilson*.⁴⁷ The song "Cunnilingus Champion of Company C," from the defendant's musical called "Let My People Come—A Sexual Comedy," used the music from the song "Boogie Woogie Bugle Boy of Company B" as its accompaniment. There was evidence that defendant only used the original in order to generate publicity for the show. According to the court, there was no intent to satirize either the original song or society in general, thus the song was not a parody at all. The court, following *Elsmere*, rejected the district court's ruling that a parody must specifically satirize the original song. Nonetheless, the court then effectively contradicted this statement: "However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up."⁴⁸ No case has given the Second Circuit an opportunity to resolve this inconsistency; this issue remains problematic in that circuit.

D. Reconciliation

It is clear that for a number of years the Second and Ninth Circuits took very different approaches and attitudes toward parody, most noticeably in their treatment of the "conjure up" standard. Recently, in *Fisher v. Dees*,⁴⁹ the Ninth Circuit mended much of the split by retreating from its strict stance in *Air Pirates*. The defendant in *Fisher* included on his comedy album a twenty-nine second version of plaintiff's song "When Sunny Gets Blue," substituting humorous lyrics and calling it "When Sonny Sniffs Glue." The parody contained six of the song's thirty-eight bars of music (its main theme).⁵⁰ In finding fair use, the court established that the parody was aimed solely at the original, implying that this was a condition of allowing the parody to be considered for fair use treatment.⁵¹

The *Fisher* court then used the section 107 factors in its analysis, but like many courts, ignored the second factor, the nature of the copyrighted work. Under the first factor, the purpose and character of the use, the court followed the Supreme Court's mandate in *Sony* that defendant's commercial use of plaintiff's work would operate as a presumption against finding fair

⁴⁶ *Id.* at 253 n.1.

⁴⁷ 677 F.2d 180 (2d Cir. 1981).

⁴⁸ *Id.* at 185.

⁴⁹ 794 F.2d 432 (9th Cir. 1986).

⁵⁰ *Id.* at 434.

⁵¹ *Id.* at 436.

use. However, the Ninth Circuit allowed the defendant to use the fourth statutory factor, the effect on the market of the original, to offset the presumption by showing that the economic value of the plaintiff's copyright was not reduced. Because a comedy album with a twenty-nine second parody would not satisfy a consumer desiring the original ballad, the court found the commercial presumption to be rebutted.⁵² Finally, in analyzing the third factor, the amount of the original taken, the court retreated from its strict view of the "conjure up" test in *Air Pirates*. It agreed with the Second Circuit's recognition that a parody, due to its very nature, must be allowed to *at least* conjure up the original, which the court believed the defendant had accomplished.⁵³

Thus after *Fisher*, the Second and Ninth Circuits seemed resolved to take the statutory factors (except the nature of the copyrighted work) into consideration in parody cases. Although the common ground shared by the two circuits could have provided more certainty in the area of parody, Part V of this Comment shows that this respite from the confusion did not last long; a district court in the Second Circuit would throw much of the statutory analysis out the window, while soon afterward a court in the Sixth Circuit would embrace the statutory analysis.

V. THE RECENT CONFLICT

A. Tin Pan Apple, Inc. v. Miller Brewing Co.⁵⁴

The dispute in *Tin Pan Apple* concerned a television commercial aired by defendant Miller Brewing which allegedly infringed the plaintiffs' copyrights by copying short excerpts from various songs recorded by the rap group Fat Boys, who were also plaintiffs. Defendants had contacted the Fat Boys about performing in the commercial, but the Fat Boys declined on the ground that they were not of drinking age and did not want to endorse alcoholic beverages.⁵⁵ In the nationally televised commercial, the excerpts were allegedly performed in the distinctive style and manner of the Fat Boys by performers who were alleged to be remarkably similar to the Fat Boys in their appearance and dress.⁵⁶ Because the opinion addressed defendants' 12(b)(6) motion, for purposes of the motion, defendants conceded copying but claimed that the

⁵² *Id.* at 437-38.

⁵³ *Id.* at 438-39.

⁵⁴ 737 F. Supp. 826 (S.D.N.Y. 1990).

⁵⁵ *Id.* at 828, 838.

⁵⁶ *Id.* at 828.

commercial was a parody of rap music, and therefore qualified as a fair use of the copyrighted materials.⁵⁷ Judge Haight held that the commercial was not a fair use, and denied the 12(b)(6) motion.⁵⁸

Relying on Second Circuit cases, Judge Haight did not find it necessary to consider all four of the statutory factors prescribed in section 107 unless the work at issue is determined to be a parody.⁵⁹ He simply found that the commercial did not qualify as parody because "its use is entirely for profit" and alternatively, because the commercial does not contribute humor or commentary.⁶⁰ Moreover, in the court's opinion, bad faith was exercised by the defendants because they originally had been rejected by the Fat Boys but nevertheless produced the commercial with Fat Boys look-alikes. Therefore, because the commercial was not a parody and was not produced in good faith, it could not be a fair use.⁶¹

Although a resolution of *Tin Pan Apple* will be proposed under a new test later in this Comment, it is useful to point out problems with Judge Haight's traditional fair use analysis. Because Judge Haight did not explicitly balance the statutory factors and used loosely defined shortcuts to reach his conclusion, other courts will have difficulty applying his unstated analysis to new facts. First, the commercial nature of defendants' use should not determine whether the use is a parody. In *Harper & Row, Inc. v. Nation Enterprises*,⁶² the Supreme Court held that finding a use to be "commercial" creates a presumption that the first section 107 factor weighs in the plaintiff's favor. The definition of a "commercial" use outlined in *Nation*, favorably cited by Judge Haight, is whether the user stands to profit from the use (*not* whether the user's sole motive is commercial).⁶³ However, Judge Haight used this "presumption"

⁵⁷ *Id.* at 828-29.

⁵⁸ *Id.* at 833.

⁵⁹ *Id.* at 832.

⁶⁰ *Id.*

⁶¹ *Id.* at 832-33.

⁶² 471 U.S. 539 (1984). "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." *Id.* at 562.

⁶³ *Id.* Most "parodists" stand to profit from their work; thus, when using the *Nation* definition as a determinative test of fair use, most "parodists" are presumed not to have created legal parody. For example, the defendant in *Fisher v. Dees* would have been found liable under this analysis, although three of the four fair use factors favored the defendant, because that defendant stood to profit from his record album. See *supra* text accompanying notes 49-53.

In fact, it is reasonable to assume that most writers, and artists generally, "stand to profit" from their work. Thus, it is difficult to conceive of a case in which the "commercial" presumption against fair use would not apply. Although recognizing that we

as a conclusion of no fair use because he found that the Miller commercial was produced "entirely for profit"; that the commercial was not intended to satirize the Fat Boys, rap music, or society in general.⁶⁴ One could guess that Judge Haight really engaged in balancing other factors when he reached this conclusion, but believed that it was unnecessary to go through the motions because whenever there is a commercial use, the other factors will not help the defendant. Thus, the "purpose of the use" factor becomes determinative.⁶⁵ By confusing a work's availability for sale with the defendants' nonparody profit motives and by not making his assumptions clear, Judge Haight ensures that another court with slightly different facts before it will have considerable difficulty analyzing Haight's opinion, thus contributing to the confusion in fair use law.

Second, previous courts used the fair use factors to determine whether the work at issue was a *valid* parody—a fair use.⁶⁶ The determination of whether a work is a parody was never treated as a qualifying test to be passed before the conventional fair use analysis was commenced. Judge Haight claimed to glean from *Elsmere* the rule that a copied work "must be a valid parody if it is to qualify even for consideration as an example of fair use under § 107."⁶⁷ But the court in *Elsmere* was clearly involved in the traditional fair use analysis when it determined the "validity" of the parody.⁶⁸ Judge Haight was probably

live in a society in which much entertainment and art for the masses is often judged by critics to be of inferior quality because it is geared to the marketplace (*e.g.*, an artist "sells out"), the author finds it ridiculous to assume that one who makes money from one's art does not attempt to convey anything of social importance.

⁶⁴ Judge Haight relied on *D.C. Comics* for the proposition that "appropriation of copyrighted material *solely* for personal profit, unrelieved by any creative purpose, cannot constitute parody as a matter of law." 737 F. Supp. at 831 (emphasis added). It is not easy to conclude that Miller's goal was solely profit; if it was, other effective advertising could have been used without reference to the Fat Boys.

⁶⁵ However, it would seem that the other three factors favor the defendant. Because the nature of plaintiff's work is creative rather than factual, the second statutory factor does not favor the plaintiff. The portions of the Fat Boys songs appropriated are only seconds in length. Finally, no consumer of Fat Boys recordings would find their desires for the music satisfied by Miller's collage of Fat Boys snippets.

⁶⁶ See discussion *supra* part IV.

⁶⁷ *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 637 F. Supp. 826, 830 (S.D.N.Y. 1990). If a defendant with an arguable parody had to qualify as legal parody before reaching the fair use analysis, no defendant would plead the work as a "parody." For the court to step in and monitor which allegedly infringing works are parodies in order to enforce the qualifying test of "parodiness" would be circular.

⁶⁸ *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 745-47 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

misled because *Elsmere*, like all other parody cases, treated the amount of the appropriation as the most important factor. But in many of the cases, the "amount taken" factor was either explicitly balanced against the other factors, or implicitly balanced. For example, the "conjure up" test took into account the first factor (the purpose of the use) and the effect on the market for plaintiff's work was often a surrogate determination of whether the amount taken was appropriate.⁶⁹ In Part VI, this sort of logical problem created by the interplay of the statutory factors will be resolved.

B. Acuff-Rose Music, Inc. v. Campbell⁷⁰

Plaintiff Acuff-Rose Music, a music publisher, brought suit against defendants 2 Live Crew, a rap group, for alleged infringement of the plaintiff's copyright in the song "Oh, Pretty Woman." 2 Live Crew's manager had contacted the plaintiff's representative to notify it of the defendants' intention to parody the song and had offered to pay the plaintiff the statutorily required license fee for the use of the song. The plaintiff responded, "we cannot permit the use of a parody of 'Oh, Pretty Woman.'"⁷¹ The defendants released their song "Pretty Woman" on an album which acknowledged plaintiff as the publisher of the song and Roy Orbison and William Dees as the authors.⁷² Defendants admittedly copied the name of the song and key lyrics, but added other lyrics with a considerably different theme. Musically, defendants admitted using the same opening drum beat, guitar riff, melody, and chorus as the original, but they also added additional sounds (laughter and "scraper" sounds), altered the key, and frequently repeated musical devices.⁷³ Plaintiff sued for infringement, and defendants claimed that their recording was a parody and thus was fair use of the copyrighted material. Chief Judge Wiseman of the district court found that defendants' recording was a fair use.⁷⁴ The Court of Appeals for the Sixth Circuit reversed, finding no fair use.⁷⁵ The United States Supreme Court has granted certiorari in this case.⁷⁶

⁶⁹ See *supra* text accompanying notes 31-32, 40-46.

⁷⁰ 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3545 (U.S. Mar. 29, 1993) (No. 92-1292).

⁷¹ 972 F.2d at 1432.

⁷² *Id.*

⁷³ *Id.* at 1433.

⁷⁴ *Id.* at 1439.

⁷⁵ *Id.*

⁷⁶ *Campbell v. Acuff-Rose Music, Inc.*, 61 U.S.L.W. 3545 (U.S. Mar. 29, 1993) (No. 92-1292).

Both the district and circuit courts' opinions are exclusively based on the four statutory factors; however, their application of most of these factors differ in crucial respects. In assessing the effect of the first factor, the purpose and character of the use, both courts observed the presumption against fair use when the use serves a commercial purpose,⁷⁷ as dictated by the Supreme Court in *Nation* and *Sony*.⁷⁸ However, the courts disagreed over the extent to which the presumption controls. The district court tipped the first factor back in the defendants' favor by finding that 2 Live Crew's song is a parody, a socially beneficial use, because "[t]he theme, content, and style of the new version are different than the original."⁷⁹ The district court found that the purpose of 2 Live Crew's song was to parody the plaintiff's original.

The circuit court accepted, with reservations, the district court's finding that the defendants' song was a parody, but required a much stronger showing that the work had a character so valuable as to outweigh the presumption.⁸⁰ In a footnote, the circuit court explained that it would have found that 2 Live Crew's song was not a parody at all because it was not "expressly and unambiguously directed at the message of the original work."⁸¹ In coming to this conclusion, the circuit court majority analyzed the lyrics of both songs, finding that "[t]he mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original."⁸²

Interestingly, the circuit court majority ignored any musical similarities between the songs in finding against the defendants on the parody issue. However, when discussing the third fair use factor, the portion of the original taken, the majority emphasized the musical similarities in order to find against the defendants on that issue. In contrast, the dissent had no trouble finding a close connection between the songs because both involve the singer encountering a strange woman on the street, although in the 2 Live Crew song the woman turns out to be ugly and the singer decides he is better off without

⁷⁷ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. (U.S. Mar. 29, 1993) (No. 92-1292).

⁷⁸ *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, *reh'g denied*, 465 U.S. 1112 (1984).

⁷⁹ *Acuff-Rose*, 754 F. Supp. at 1154. The court accepted the rule that a parody must be aimed at the original rather than at society at large. *Id.* at 1155.

⁸⁰ *Acuff-Rose*, 972 F.2d at 1436-37.

⁸¹ *Id.* at 1436 n.8.

⁸² *Id.*

her.⁸³ Thus, the two courts purported to apply the same presumption in analyzing the first factor, but came to opposite conclusions as to whether the value of the alleged parody should negate such a presumption. This disagreement was based on subjective assessments of the value of a putative parody. The existence of a wide variety of juristic preference toward art demonstrates that it is dangerous for the courts to be assessing the value of artistic works; such a practice borders on censorship.

The circuit court majority, as well as the district court, accepted the rule that for a work to be a parody, it must be aimed at criticizing the original.⁸⁴ The court adopted the argument that when a parodist wishes to criticize some aspect of society, there are many works in the public domain which could be used as the vehicle for such expression.⁸⁵ There are two problems with this rule. First, to require this of a parodist would place a substantial harness on creative expression.⁸⁶ The best way to criticize contemporary society is to make light of a work identified with that era. Too often, the owners of such contemporary works are not willing to allow their work to be criticized for any price: a prime example being Acuff-Rose and the rights to "Oh, Pretty Woman."⁸⁷ Second, as evidenced by the split between the majority and dissent in *Acuff-Rose*, a distinction between works using elements of another work to criticize the original from works aimed at society is entirely unworkable and subject to being dictated by the court's personal reaction to the parody.

As an additional matter, the district court followed the approach taken in *Fisher v. Dees* allowing the defendant to overcome the commercial presumption by showing that the parody does not unfairly diminish the economic value of the original; that court found the presumption to be rebutted.⁸⁸ The circuit

⁸³ *Id.* at 1442 (Nelson, J., dissenting). To support the argument that the song is a parody aimed at the original, imagine hearing the 2 Live Crew song in a world where Orbison's "Oh, Pretty Woman" did not exist. It is likely that the song would be considered to be silly and annoyingly repetitive. It is the association of the riff of the original with its sappy, romantic lyrics that make the 2 Live Crew version outrageous and attention grabbing.

⁸⁴ *Id.* at 1436 n.3.

⁸⁵ *Id.* (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981)).

⁸⁶ This could be considered a violation of the First Amendment, an issue which is outside the scope of this paper. See generally Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987).

⁸⁷ See *supra* note 71 and accompanying text.

⁸⁸ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154, 1157 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3545 (U.S. Mar.

court also seemed to accept such an approach. However, given its conclusion as to the unfair effect on the plaintiff's market for licensing derivative works of the original, it would not have found the commercial presumption to be rebutted anyway.

Judge Nelson, dissenting from the circuit court reversal, made a crucial point regarding the commercial presumption of *Sony* as applied to the parody cases. *Sony* involved the verbatim reproduction of television broadcasts, while the music parody cases are concerned with a transformative use which has artistic as well as social value. "The cause that is ultimately to be served . . . is 'the cause of promoting broad public availability of literature, music and other arts.'"⁸⁹ In *Sony* the television programs were already available to the public; in the parody cases, an entirely new form of expression is being introduced to the public. Thus, Judge Nelson found that applying the commercial presumption of *Sony* to *Acuff-Rose*, a case entirely different in its facts, was unreasonable because the policies implicated in the two cases were significantly dissimilar.

Both the district court and the circuit court succinctly found that the second factor, the nature of the copyrighted work, favored the plaintiff because the original "represented a substantial investment of time and labor made in anticipation of financial return," and because it was a creative work.⁹⁰ Such a ground is baseless. The United States Supreme Court has held that the investment of labor in a work is not relevant to the question of whether a work is copyrightable.⁹¹ Thus, it would be paradoxical to believe that the Court could simultaneously believe that the investment of effort, in and of itself, could increase the protection a copyrightable work receives under a fair use analysis. Finally, a parodist may have expended a great deal of effort as well; it would be unfair to only give the original author credit for his or her labor.

As pointed out by the dissent in the circuit court, the only underlying consideration under the second factor which rationally related to the fair use problem was whether the work was published or unpublished⁹² and whether

29, 1993) (No. 92-1292). An "unfair" effect on the market for the original would presumably include only the effect due to consumer substitution of the defendant's work.

⁸⁹ *Acuff-Rose*, 972 F. 2d at 1443 (Nelson, J., dissenting) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

⁹⁰ *Id.* at 1436-37 (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981)). If American copyright law does not recognize a natural right to own the product of one's labor, this should not matter. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991) (rejecting the "sweat of the brow" theory of copyright protection).

⁹¹ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

⁹² See *Harper & Row Pub., Inc. v. Nation Enter.*, 471 U.S. 539 (1985).

the work was creative or factual.⁹³ In *Acuff-Rose*, “Oh, Pretty Woman” had been published for quite some time; this clearly weighed in 2 Live Crew’s favor because the original author was not deprived of his right of first publication. Also, the fact that the song was a creative work arguably might shift the second factor to a neutral position, or possibly in favor of the plaintiff. However, as discussed below, to do so would perpetually prejudice parody in the fair use analysis because parody has always been aimed at creative works.⁹⁴ Moreover, these distinctions made under the aegis of the second fair use factor irrationally give weight to the original author’s selfish wishes.⁹⁵

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, was found by the district court to favor defendants even though they copied the most notable aspects of the original, many of them verbatim. This is because Chief Judge Wiseman followed *Elsmere* and *Fisher* by using the “conjure up” standard as the minimum allowable amount of a parody (thus tying this third factor of fair use to the first factor, the purpose of the use).⁹⁶ Moreover, he recognized the intrinsic needs of musical parody to track the original more closely.⁹⁷ Thus, the third factor weighed in the defendants’ favor.

The circuit court majority reached the opposite conclusion with regard to the third fair use factor. The majority based its conclusion entirely on the fact that 2 Live Crew took the familiar riff from “Oh, Pretty Woman” verbatim, possibly by sampling (recording) it directly from the original. The court reasoned that this riff constituted the “heart” of the original and taking it was excessive. The differences between the two songs (“2 Live Crew’s additions”) were only mentioned by the majority once, in passing. Notably, the extreme differences in the lyrics were completely ignored.⁹⁸ Under this analysis, one may wonder whether a parody of the song “Oh, Pretty Woman” or of any song dependent on one musical idea could ever be parodied. It would certainly seem that using the core riff identified with the original is “necessary” in “conjuring up” that original. As Judge Nelson pointed out in dissent, “parody cannot be

⁹³ *Acuff-Rose*, 972 F.2d at 1443–44 (Nelson, J., dissenting).

⁹⁴ See *infra* notes 104–05 and accompanying text.

⁹⁵ See *infra* notes 106–13 and accompanying text.

⁹⁶ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1156–57 (M.D. Tenn. 1991), *rev’d*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3545 (U.S. Mar. 29, 1993) (No. 92-1292).

⁹⁷ *Id.* This was also recognized in *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986).

⁹⁸ *Acuff-Rose*, 972 F. 2d at 1437–38.

parody unless it allows the original work to shine through in a form which, while distorted, is recognizable."⁹⁹

In assessing the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," the district judge recognized the need for a broad definition of such harm to the copyright holder, because such harm most directly impacts the incentive of the author. Despite this recognition, the district court found no possible harm to plaintiff, who remains free to market its own rap version of "Oh, Pretty Woman" as well as any additional parody of the song. Moreover, he agreed with the expert testimony offered by defendants that the 2 Live Crew version of the song was most unlikely to affect the sales of the original song.¹⁰⁰ Thus, the fourth factor was determined by the district court to weigh in the defendants' favor. Because Chief Judge Wiseman did not consider any other factors outside of section 107, and three out of those four factors favored the defendants, he found 2 Live Crew's parody to be a fair use.

The circuit court majority's application of the fourth statutory factor was straightforward, and misguided. First, the court indulged in a second, unprecedented commercial presumption. The court held that the defendants' intent to profit from the parody made it very likely that the market for the plaintiff's original would be harmed; thus, the court presumed that the fourth factor favored the plaintiff.¹⁰¹ Second, the court ignored expert testimony which the district court found to be convincing: that the parody would not substitute for the original in the marketplace.¹⁰²

Furthermore, the court correctly considered the effect on the plaintiff's ability to market derivative works, including parodies; however, without any analysis or factual support whatsoever, it concluded that such a market would be disrupted.¹⁰³ This is circular reasoning because the very issue of this case is whether the plaintiff's property interest in the original song has been violated, *i.e.*, whether plaintiff has any right at all to control the creation of parodies of its original. Instead, the court presumed the very conclusion it sought to deduce—that a market for parodies exists.

While it is conceivable that the existence of an effective parody may reduce the ability to market nonparody derivatives of the original (such as abridgments, sequels, films, etc.), that detriment would probably result from the parody's criticism of the original, not its substitution for the original.

⁹⁹ *Id.* at 1444 (Nelson, J., dissenting).

¹⁰⁰ *Acuff-Rose*, 754 F. Supp. at 1157-58.

¹⁰¹ *Acuff-Rose*, 972 F.2d at 1438-39.

¹⁰² *Id.* at 1439.

¹⁰³ *Id.*

Acuff-Rose, as a plaintiff, should be required to furnish some minimal quantum of proof to support the assertion that its market has been harmed. Without such proof, the court should not have ignored the finding of the district court that detriment to the plaintiff's market, through consumer substitution of the parody for the original, was unlikely.

VI. REDUCING THE WEB OF STATUTORY FACTORS TO TWO STRANDS

Although both of the *Acuff-Rose* courts based their analyses on the statutory fair use factors, they arrived at shockingly different conclusions. This results from the statutory factors themselves; they are redundant, interdependent, and to some extent, irrelevant. In determining whether a parody should be considered a fair use, the author suggests that only two factors should be balanced: the social value of the particular parody (the purpose and character of the use), and the economic harm to the plaintiff from consumer substitution of the defendant's products (the effect of the use on the potential market for plaintiff's work). This reduces the fair use determination to its logical essence, thus removing some of the mystery and uncertainty found in the fair use cases.

A. *The First Factor*

The first factor, "the purpose and character of the use,"¹⁰⁴ is quite important because certain productive uses, such as parody, are socially beneficial and should be encouraged. However, the "commercial" presumption derived from the *Sony* case, which involved literal reproduction of works, is misplaced in cases of productive use.¹⁰⁵ Most creative endeavors, including productive use of an earlier work, are made in anticipation of economic benefit. To presume that these works are not fair uses is to contradict the purpose of copyright: to promote creativity. Also, the Supreme Court was probably creating the presumption because the effect on the market for the original (the fourth factor) would automatically be injured when an exact reproduction of the original was at issue; by definition, exact copies compete in the same market. A parody rarely, if ever, competes in the market with the original, therefore, it should not be assumed that the Court intended the presumption to carry over into productive use cases, which vary a great deal from the facts in *Sony*. The

¹⁰⁴ 17 U.S.C. § 107(1) (1988); see *supra* text accompanying note 21.

¹⁰⁵ See Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 289-94 (1988).

first factor, therefore, should always be considered, without the taint of a commercial presumption, in a fair use analysis. Moreover, due to the special social value of parody, this factor will always favor the parodist, particularly when the parodist contributes criticism to the marketplace of ideas.

B. *The Second Factor*

The second factor, "the nature of the copyrighted work" is rarely used in parody cases.¹⁰⁶ In *MCA, Inc. v. Wilson*,¹⁰⁷ the court considered three characteristics of the original in assessing the impact of the second factor: whether a work was creative, as opposed to factual; whether substantial time and effort had been invested in the original; and whether the original author anticipated financial return.¹⁰⁸ Because these characteristics are either irrelevant to copyright law or derived from other fair use factors, the second factor should be considered a nullity.

First, the factual nature of a copyrighted work was considered relevant in *Nation* because the public has an interest in the dissemination of information;¹⁰⁹ such considerations are really directed to the purpose of the use, which is considered under the first fair use factor. Second, the labor an author invests in a work, in and of itself, does not create a property interest in a work; the work must satisfy minimal standards of originality and creativity to be copyrightable.¹¹⁰ Third, the corresponding expectation of being financially rewarded for such labor is protected under the fourth factor, which takes into consideration economic detriment to the author.

The second factor appears to test whether the author's consent to the use could be implied from the nature of the work; for example, when an author publishes form books.¹¹¹ This idea clearly permeates the unpublished/published

¹⁰⁶ See *supra* notes 24–32 and accompanying text. Even in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), in which the court purported to engage in an explicit analysis of the statutory factors, it did not even pay lip service to the nature of the copyrighted work.

¹⁰⁷ 677 F.2d 180 (2d Cir. 1981).

¹⁰⁸ *Id.* at 182.

¹⁰⁹ See *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555–60 (1985) (recognizing the public interest in dissemination as relevant, but not at all determinative, in the fair use analysis).

¹¹⁰ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991) (rejecting the "sweat of the brow" theory of copyright protection, and holding that creativity and originality are constitutional prerequisites for copyrightability).

¹¹¹ *E.g.*, *American Inst. of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941) (finding the defendant's copies of architectural forms printed in plaintiff's book a fair use);

distinction which has appeared in a few cases.¹¹² It would appear that the creative/factual distinction which is often recognized under the second factor is also aimed at protecting an author's work from unauthorized use.

However, the whole concept of fair use is that some nonconsensual uses should be permitted. The primary beneficiaries of copyright law are the public, not authors. Copyright law only recognizes the economic interests of authors; in most cases, American copyright law does not provide authors with the right to protect the moral integrity of their works.¹¹³

When parody is concerned, it is not likely that the author of the original work could be presumed to have consented to being criticized; thus, as long as consent is considered, parody will always be subjected to an inherent bias in the fair use determination. The creation of this valuable art form and effective tool for contemporary commentary should not be prejudiced. Thus, the second factor, whose very function seems to undermine the purpose of the doctrine of fair use, should not be considered relevant, at least in the parody context.

C. *The Third Factor*

The third factor, the amount of the original used, is subsumed in the first and fourth factors; considering it again by itself gives it undue weight.¹¹⁴ The purpose of the use is taken into consideration when measuring whether the defendant had taken more of plaintiff's work than necessary. A parodist generally must use a large portion of the original in order to satirize the original. Also, the amount of the original used is given inordinate importance because it is often used as a major determinant for assessing potential harm under the fourth factor; the effect on the market for the original is roughly proportional to the amount of the original that is copied. Thus, the third factor should be eliminated as an independent factor under the balancing.

see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1641-45 (1982).

¹¹² *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1984).

¹¹³ See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1688-91 (1988). However, note that § 106A of the Copyright Act, adopted in 1990, provides some "moral rights" for visual artists. These rights are inapplicable to literature or music.

¹¹⁴ 17 U.S.C. § 107(3) (1988); see *supra* note 32.

D. *The Fourth Factor*

The fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work,"¹¹⁵ has always been considered crucial. The purpose of copyright is to maximize creativity by giving authors an economic incentive.¹¹⁶ Thus, disruption of the incentive mechanism should clearly be of weight in the determination. However, harm caused to the plaintiff from criticism is not considered in the fourth factor; only harm created by the market substitution of defendant's work for plaintiff's work is considered. Thus, where a critical parody is at issue, this factor will usually be of little weight; a critical parody, as defined below,¹¹⁷ is distinguishable from the original by an ordinary observer, and consequently will not compete in the plaintiff's market. Moreover, the success of a critical parody is more likely to depend on the consumer's familiarity with the original work; thus, the parody may actually boost demand for the original.

However, when a parody merely acts as entertainment, and does not serve as a vehicle for criticism, it cannot be said for certain that no substitution of the works will occur. For instance, there is a greater risk that consumers will find their desires for the original work satisfied, or at least sufficiently reduced, when the two works are in the same medium because a noncritical parody is more likely than a critical parody to be funny whether or not the consumer is familiar with the original. Therefore, because a noncritical parodist is moderately favored by the first factor, and potentially hurt by the fourth factor, a delicate balancing of the two factors must be conducted in light of the specific facts of the case.¹¹⁸ Although this will not remove all of the uncertainty and subjectivity of the fair use determination, it will at least strip the statutory factors of surplusage and expose judicial policy balancing more clearly.

VII. A PRACTICAL APPROACH TO PARODY AS FAIR USE: ENCOURAGING COMPROMISE

The conclusion reached in Part VI is useful for clarifying the policies which underlie the fair use analysis and should be explicitly considered by courts. There is more that can be done, however, to solve fair use controversies. The rules expounded below would force potential litigants of a

¹¹⁵ 17 U.S.C. § 107(4) (1988).

¹¹⁶ See *supra* text accompanying notes 5-8.

¹¹⁷ See *infra* text accompanying notes 133-34, 142-43.

¹¹⁸ See *infra* text accompanying notes 137-39.

fair use issue to negotiate in good faith, or suffer almost certain defeat in court. This would hopefully keep some controversies out of court altogether. Thus, before balancing the two fair use factors, the court should apply certain standards that ensure that the litigants, in the eyes of copyright law, have a good faith dispute.

A. *Market Failure*

Professor Wendy Gordon has suggested a useful test that must be satisfied before the court begins its analysis: a defendant must demonstrate that one "could not appropriately purchase the desired use through the market."¹¹⁹ Gordon's rationale is that if a work is socially more valuable in defendant's hands, the defendant should be able to pay for the use, and the plaintiff should not be deprived of the copyright without compensation. In a properly functioning market, this transfer should occur voluntarily.¹²⁰ Because this reasoning seems to suggest that market transfers (compromise) should be encouraged, market failure should be demonstrated before the condensed fair use analysis is reached.

Gordon points out three conditions which frustrate any market: externalities (when a nonmonetizable interest is not taken into consideration during the parties' negotiations), lack of perfect knowledge (the identity and location of the author, and the possible harm to the author's market), and transaction costs (preliminary costs which are necessarily incurred before the negotiation begins).¹²¹ Considering that the type of knowledge necessary for a defendant in copyright negotiations is usually obtainable with varying degrees of effort and expense, it is useful to treat the knowledge problem as a subset of transaction costs.

Gordon recognizes the "anti-dissemination motives" of plaintiffs in parody cases as a common cause of market failure.¹²² This term is used to describe those interests that the plaintiff seeks to protect, by refusing to grant permission to the defendant, which do *not* stem from a legitimate disagreement over the economic value of the copyright to the plaintiff. In parody cases, a plaintiff

¹¹⁹ "Where (1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed, . . . defendant's use [is] fair." Gordon, *supra* note 111, at 1601 (citations omitted).

¹²⁰ *Id.* at 1615.

¹²¹ *Id.* at 1627-32.

¹²² *Id.* at 1632-45.

usually will refuse to grant permission, no matter what the price, simply because the plaintiff has an interest which is opposed to that of society: not to allow criticism of the plaintiff's work. Such "moral rights" to control one's work do not exist in American law;¹²³ control over one's work is only granted to benefit society.¹²⁴ Therefore, a list of valid causes of market failure, any of which must be proved by the defendant, would include transaction costs, externalities, and an anti-dissemination motive of the plaintiff.

B. *Offer of Reasonable Royalties*

Melanie Clemmons is among the commentators who, on the surface, appear to take a very different approach from those who utilize economic theory.¹²⁵ She begins with a threshold requirement that the defendant demonstrate good faith by offering the plaintiff reasonable royalties.¹²⁶ Such a prohibition of bad faith on the part of the defendant mirrors the anti-dissemination motive of the plaintiff which Gordon considers to be one cause of market failure. Thus, defendant's bad faith may be added to the list of permissible causes of market failure. Analogizing to Gordon's requirement of the plaintiff, the defendant can only use a legitimate disagreement over the economic value of the right to the use as a reason for not settling with the plaintiff.

In requiring an offer of reasonable royalties by the defendant, Clemmons has clearly recognized a good method for parodists to disprove their own bad faith. In determining what royalties are reasonable, actual or potential harm to the economic value of plaintiff's copyright becomes a valid consideration, as does the potential profit which the defendant expects to make. For example, if the defendant does not make any profit on the use, and thus cannot afford to purchase it, an unwillingness to pay will be considered to be a valid economic reason for not offering monetary payment; however, the defendant must still request permission from the plaintiff in order to demonstrate good faith. Risk forces the plaintiff to think carefully before refusing the defendant's offer of compromise; the plaintiff receives nothing if mistaken in believing that the defendant's work is not a parody, but if the plaintiff correctly determines that the defendant did not produce a parody, damages are awarded (which

¹²³ See *supra* note 113 and accompanying text.

¹²⁴ See *supra* notes 5-8 and accompanying text.

¹²⁵ Melanie A. Clemmons, *Author v. Parodist: Striking a Compromise*, 46 OHIO ST. L.J. 3 (1985).

¹²⁶ Also, if the parodist is unable to find the author after reasonable investigation, the parodist may deposit the payment offered in escrow. *Id.* at 16-19.

presumably will exceed the amount offered by the defendant). Forcing the parties to negotiate thus creates a likelihood that they will share in the benefits of the use without the need for a court to decide absolutely in one party's favor.¹²⁷

C. *Burden of Proof*

The defendant traditionally bears the burden of demonstrating fair use, but some courts shift the burden to the plaintiff in assessing the effect of the use on the plaintiff's market because the plaintiff is presumably more knowledgeable on that issue.¹²⁸ Requiring parodists to offer reasonable royalties forces them to *disprove* the causes of market failure which they can unilaterally generate: their own bad faith and transaction costs (because the plaintiff will have been contacted). By the same token, once this burden is satisfied it would seem equitable to shift the burden of proof to the plaintiff to affirmatively demonstrate a proper economic reason for refusing the defendant's offer (equivalently, the lack of an anti-dissemination motive). Also, a plaintiff should be allowed to rebut the presumption created by the defendant's offer: that the defendant acted in good faith. As will be discussed below, the defendant should bear the initial burden of proving externalities (the remaining cause of market failure), but the burden can be shifted to the plaintiff if the defendant establishes that his work is a parody.¹²⁹

If the defendant does not meet the initial burden by offering reasonable royalties, the defendant should not be foreclosed from demonstrating market failure caused by transaction costs, plaintiff's bad faith, or externalities, because only one of them is necessary to create market failure. The defendant, however, would carry the burden of proof as to all of these possible causes, because the defendant did not shift the burden by proving good faith. Thus, the defendant is given an incentive to act reasonably and fairly, and the possibility of compromise is increased.

¹²⁷ *Id.* at 19-20.

¹²⁸ See Gordon, *supra* note 111, at 1624-26.

¹²⁹ "Parody" is defined *infra* at text accompanying notes 133-43. Because a humorous work is presumed to be critical, thus generating externalities, defendant can shift the burden to the plaintiff by showing humorous effect in the work. Plaintiff then must affirmatively rebut the presumption of critical effect. However, for purposes of the next step of the analysis, the defendant must balance the two fair use factors suggested in Part VI. See *infra* text accompanying notes 136-38.

D. Defining Legal Parody

Like many other commentators, Clemmons reduces the question of fair use to whether a work fits within a legal definition of parody because the statutory factors are considered by Clemmons to be indeterminate; they usually offset one another.¹³⁰ Once again, what she suggests is not very different from Professor Gordon's approach. In finding that parody is very valuable to society and should be allowed under any circumstance, Clemmons is really making a judgment as to whether externalities are always caused by parody. Thus, the existence of parody could be used as a surrogate determination of whether externalities, and thus market failure, are present. In such a case, a parody will simultaneously satisfy the threshold requirement of market failure and automatically pass the collapsed fair use analysis.¹³¹ However, works which do not fall into the parody definition used for market failure purposes (*e.g.*, works that would be parodies except that they do not criticize, but merely entertain) might not pass the fair use analysis, and must be subjected to such analysis whenever market failure is established by other means.¹³²

In constructing a definition of parody, I adjust Clemmons' definition to approximate a common understanding of what comprises a parody. Clemmons defines a parody as "a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable."¹³³ This definition has many strengths. However, for the reasons stated below, the author suggests this alternative definition of parody:

A parody is a critical or comic work that focuses attention, by close imitation or distortion, on the style or substance of a significant part of an original work of authorship, in a manner such that the parody and the original can be differentiated by an ordinary observer.

Clemmons' "significant part of an original work of authorship" phrase is meant to assure that the original is not in the public domain and that the two works at issue are substantially similar in the infringement context; if there is no infringement, there is no reason to raise the fair use defense. The term

¹³⁰ Clemmons uses "parody" as the only test because the fair use factors are always inconclusive when balanced equally. Clemmons, *supra* note 125, at 14-15.

¹³¹ See discussion *supra* Part VII.

¹³² See *infra* text accompanying notes 137-39.

¹³³ Clemmons, *supra* note 125, at 12.

“significant” is nevertheless used because it implies that the similarity need not only be quantitatively sufficient; a small portion taken may be the “heart” of the work.¹³⁴ Because the entire work would always be considered to be a “significant” taking, the term “all” is eliminated in my definition because it is redundant.

The use of the word “transforms” really duplicates the function of “distorting” and “closely imitating” and implies that a substantial quantum of creativity is required. The terms “distorting” and “closely imitating” are retained in the definition because they effectively emphasize the minimal alteration and close duplication of the original which is often necessary to create effective parody.¹³⁵ The suggested definition includes another commentator’s creative phrase to describe what intermediate goal these devices fulfill: “focus[ing] attention on both the style and substance of the original.”¹³⁶

Within her definition, Clemmons does not clearly indicate the ultimate purpose of a parody. In her explanation she recognizes that the function of parody is to criticize,¹³⁷ however, by only using the term “for comic effect,” one may believe that she does not wish to exclude humorous but noncritical works from the definition. Such solely humorous works should be included in the “common understanding” definition of parody for two reasons. First, entertainment has social value in our society; it has a “therapeutic social function.”¹³⁸ A healthy market for entertainment generally provides some incentive for all entertainers, including authors whose work provides social commentary as well. Second, the amorphous nature of criticism through parody suggests that a court should not involve itself in measuring the level of criticism present in a work, or even the existence of criticism in a work. Thus, a work which is intended to be humorous, whether it succeeds or not, should be presumed to be critical.

¹³⁴ *Id.* at 12–13 (preferring “significant” over “substantiality”).

¹³⁵ *Id.* at 13. The special need for the musical parodist to follow the original closely is discussed in *Fisher v. Dees*, 794 F.2d 432, 438–39 (9th Cir. 1986).

¹³⁶ “Parody is a discrete work or passage that, through imitation, focuses attention on both the style and substance of a source text and that uses comic techniques, such as exaggeration and incongruity, to criticize the source text. Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 1, 23 (1987).

¹³⁷ Clemmons, *supra* note 125, at 13.

¹³⁸ See Bisceglia, *supra* note 136, at 35. The Second Circuit recognized this in *Elsmere* when it stated that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody.” *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d. Cir. 1980).

However, if a defendant is seeking to prove market failure by using the definition of parody as a surrogate determination of whether externalities exist, this presumption should not hold. The defendant who cannot establish market failure by any other means must show that the parody does have a critical purpose to pass the threshold test. This is because a work which merely entertains is not likely to generate significant externalities; the benefits of entertainment are more likely to be monetizable and marketable. In addition, such a work will not automatically pass the condensed fair use analysis.¹³⁹ Therefore, the parodist is given a greater incentive to make the offer of reasonable royalties, so that this critical/comic distinction can be avoided, and the fair use analysis can be bypassed.

Another controversy over the purpose of parody involves whether the parody must satirize the original work, or can use the original work to satirize society. Some courts have argued that the parodist who wishes to parody society does not need to use any particular work; the parodist can use a work within the public domain to achieve the same effect.¹⁴⁰ This would be an extreme limitation on what copyright is designed to promote: the creativity of authors.¹⁴¹ It would seem that a contemporary, popular work is a particularly effective vehicle for social criticism, because the commentator is usually dissatisfied with the present state of society. Most current works are not likely to be in the public domain. Also, it is not easy to distinguish a critique aimed at a segment of society from a jab directed at a work authored by a product of that society. Once again, a court should not be relied upon to make this fine distinction. Thus, my definition of parody does not limit the subject of any criticism present in the work.

The final requirement in Clemmons' definition is that "both the original work of authorship and the independent effort of the parodist are recognizable."¹⁴² It is intended to mean that "the ordinary observer, comparing

¹³⁹ See *supra* text accompanying note 120.

¹⁴⁰ *E.g.*, *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), discussed *supra* at text accompanying notes 47-48. Clemmons does *not* intend to exclude works critical only of society in general. Clemmons, *supra* note 125, at 13-14.

¹⁴¹ "Suppose a movie wished to satirize the activities of the Department of Interior under the administration of James Watt, and as a part of a satire on that topic contained scenes of strip mining in the Rocky Mountains while in the sound track distorted strains of John Denver's song 'Rocky Mountain High' or Woody Guthrie's 'This Land is Your Land' were performed. Here the film would be legitimately using Denver's or Guthrie's work to give a biting sarcasm to its message of parody. Yet, the song would in no way itself be the object of the parody. Under such circumstances, the parody defense should be allowed." WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 168 (1985).

¹⁴² Clemmons, *supra* note 125, at 12.

the original work or portion of it with the parody, [must be able to] distinguish one from the other."¹⁴³ My definition uses the latter language because it is clearer. This language is useful because it buttresses the requirement that the parodist add something creative to the work (by close imitation or distortion). Also, by assuring that the two works are distinguishable, serious competition between the two works in the marketplace is not likely to exist.

VIII. *TIN PAN APPLE* AND *ACUFF-ROSE* UNDER THE NEW APPROACH

A. *The New Approach Summarized*

The new approach developed in Parts VI and VII requires a parodist to satisfy two tests in order to be declared a fair user. First, the defendant must demonstrate market failure (the existence of externalities, anti-dissemination motive, or transaction costs), but may shift the burden to the plaintiff to disprove market failure if defendant makes an offer of reasonable royalties. Second, the defendant must pass the collapsed fair use analysis by demonstrating that the work furthers a social purpose which is valuable enough to offset any harm to the plaintiff's market created by consumer substitution of the parties' works. Alternatively, a defendant may satisfy both tests by demonstrating that the work in question fits the common sense definition of a legal parody which, by definition, demonstrates that market failure exists (due to externalities) and that the condensed fair use balance favors the defendant.

B. *Resolving Tin Pan Apple, Inc. v. Miller Brewing Co.*

Under this analysis, the *Tin Pan Apple* case is a close one. Although Miller clearly offered the Fat Boys the opportunity to perform the commercial, it appears that once the Fat Boys turned down this chance, Miller did not offer any remuneration for using Fat Boys recordings in the commercial that aired. Thus, Miller shoulders the burden of establishing market failure. Because the two parties were in contact, significant transaction costs were not present. Also, because no offer was made, the Fat Boys' reaction to such an offer must be left to supposition. However, it is implied in the case that the Fat Boys were concerned about their image and principles rather than the economic value of Miller's use; it would seem that they would not have allowed Miller to use

¹⁴³ *Id.* at 13.

their music at any price.¹⁴⁴ Therefore, it is likely that Miller could have established an anti-dissemination motive on the part of the plaintiff, and consequently market failure.¹⁴⁵ Alternatively, Miller could have demonstrated externalities by showing that the commercial was a legal parody.

As for the second step of the analysis, the commercial's intended comic effect is apparent; comedian Joe Piscopo appeared in the commercial and is named as a defendant. Without viewing the actual commercial, one cannot be certain that the rest of the definition of legal parody is fulfilled, but judging by the court's description, Miller's commercial is probably a legal parody. It clearly imitates the style of the Fat Boys, but not so closely as to fool the average viewer into thinking that the commercial is a Fat Boys video, thus satisfying the viewer's demand for the Fat Boys' products. Even so, the fact that the viewer may think that the look-alikes in the commercial are actually the Fat Boys is relevant only in a trademark or right of publicity action.

Thus, the plaintiff then has the burden of proving the absence of a critical effect. Once again this would be very difficult to resolve without viewing the actual commercial, but because the plaintiff bears the burden it is probable that defendant will prevail on this issue. Moreover, it is unlikely that a television commercial would become a substitution for the Fat Boys' records. Thus, under the balancing approach, only a very minimal critical effect is necessary to tip the balance in favor of Miller. Therefore, Miller is likely to prevail, but argument over details of the commercial not discussed in the court's opinion is likely.

C. *Resolving Acuff-Rose Music, Inc. v. Campbell*

Acuff-Rose makes an easier case. 2 Live Crew offered the plaintiff the statutorily required licensing fee (over \$13,000) but plaintiff responded that it could not "permit the use of a parody of 'Oh, Pretty Woman.'"¹⁴⁶ It is

¹⁴⁴ One must keep in mind that the *Tin Pan Apple* opinion was based on a motion for summary judgment. Because the court construed all of the facts in favor of the plaintiff, there may have been more evidence of plaintiff's anti-dissemination motive than was discussed in the opinion. See *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp 826 (S.D.N.Y. 1990).

¹⁴⁵ The Fat Boys' concern with principle is irrelevant to the copyright action. Appropriate relief may be available in federal trademark or defamation law, or state unfair competition, right of privacy, or right of publicity statutes.

¹⁴⁶ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3545 (U.S. Mar. 1, 1993) (No. 92-1292).

apparent that Acuff-Rose did not want their song to be parodied at all, especially by a band with the reputation of 2 Live Crew, and were not interested in negotiating. Such a motive created market failure.

The district court went to great lengths to discuss the critical purpose and effect of 2 Live Crew's "Pretty Woman."¹⁴⁷ Also, the court accepted expert testimony that the two versions of the song were aimed at completely different markets, and that substitution was virtually impossible.¹⁴⁸ Therefore, the fair use balance should favor 2 Live Crew, and their song is considered a fair use under this new approach, as it was under the district court's traditional analysis. This conclusion seems to be more reasonable than that of the circuit court, which seemed insistent on ignoring 2 Live Crew's apparent goal of criticizing the "white bread" song of the plaintiff.

IX. CONCLUSION

The most useful feature of this new approach is that it untangles the overlapping and interdependent web of factors, prescribed by Congress for fair use analyses, by extracting and isolating the two strands that formed that web through mutation and reproduction. Under the new approach, most of the questions one would be required to ask are not laden with the subjective policy overtones that pervade the traditional analysis. The supposed "value" of a work is not directly considered, and should be minimized; only the effect of the work on its audience is relevant to the legal analysis.

Although the added economic analysis and system of burden shifting may, upon first glance, reproduce the complexities of the traditional fair use analysis, the author suggests that this is only due to the vocabulary of economic terms used. For example, it would be much easier for a court to determine whether reasonable royalties have been offered than to engage in assessing whether the purpose of the work is a worthy one. Similarly, it should be simpler to determine whether a plaintiff faced with an offer of reasonable royalties has an anti-dissemination motive than to decide whether the amount taken from the original work is "qualitatively" entitled to protection (*i.e.*, "valuable").

Although the new approach may prove to be imperfect, its adoption, at the very least, would correct most of the confusion currently pervading fair use jurisprudence and allow courts to come to terms with the core values which support the doctrine of fair use. Indeed, results may substantially differ under the new approach, as is apparent from the author's suggested resolution of the

¹⁴⁷ *Id.* at 1154-55.

¹⁴⁸ *Id.* at 1158.

Tin Pan Apple and *Acuff-Rose* cases. The proposed results in these cases appear to be more agreeable; when there is an absence of harmful effects on the plaintiff's markets, an anti-dissemination motive on the part of the plaintiff, and a chance that a consumer will comprehend critical commentary in the defendants' works, a finding of fair use is a just one.

Brian R. Landy

