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THE POTENTIAL HARM OF MUSICAL PARODY: TOWARD AN ENLIGHTENED FAIR USE CALCULUS*

F. CASEY DEL CASINO**

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I. INTRODUCTION: MUSICAL PARODY AS A DISTINCT GENRE

This Article examines the fair use defense¹ under the Copy-

* This Article is a revised version of a paper entitled *The Potential Harm to an Original Author's Copyrighted Musical Expression Engendered By Musical Parody* which was awarded First Place in the 1988 Nathan Burkan Memorial Competition at Vanderbilt University School of Law.

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1. 17 U.S.C. § 107 (1982). Section 107 reads in full as follows:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of the 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.

Id.

right Act of 1976² as applied to musical parody³ in light of the evolving copyright infringement calculus which emphasizes the effect of the infringement upon the market for the original work that is the subject of the parody. Specifically, this Article will examine the resulting harm to the market for the copyright of the original author⁴ engendered by the musical parodist's use of the original author's copyrighted melody. Particular attention will be focused on the harm to the original author's broadcast performance right,⁵ as well as the potential harm to the original author's exclusive right to prepare derivative works.⁶

Part II of this Article begins with an examination and analysis of the various fair use cases that have promulgated the standards by which it is determined whether a given musical parody is within the scope of fair use. Fair use is a defense that a parodist may offer to a claim of copyright infringement. This Article suggests, however, that while many of the cases have enunciated and applied standards consistent with section 107⁷ of the Copyright Act of 1976, most have failed to take into account the unique nature of musical parody, as distinguished from other forms of parody, in determining whether the musical parody is within the scope of fair use. As this Article demonstrates, this is inconsistent with the modern doctrine of fair use as refined in *Sony Corp. of America v. Universal City Studios, Inc.*⁸ and *Harper & Row, Publishers, Inc. v. Nation Enterprises.*⁹ The doctrine would seem to demand examination of the injury to the underlying musical composition, which

2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-914 (1982 & Supp. V 1987)).

3. For the purposes of this Article, no distinction is made between parody and burlesque; the terms are used interchangeably. For a detailed discussion of the differences between parody, burlesque, and travesty, see Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CANADIAN BAR REV. 1130 (1955).

4. For the purposes of this Article, the terms "original author," "author," "original composer," and "composer" are used interchangeably to denote the creator of the original work being parodied.

The Copyright Act also provides:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title [17 U.S.C. §§ 101-914 (1982 & Supp. V 1987)], and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b) (1982).

5. 17 U.S.C. § 106(4) (1982).

6. *Id.* § 106(2).

7. *Id.* § 107. The full text of § 107 is set forth at *supra* note 1.

8. 464 U.S. 417 (1984).

9. 471 U.S. 539 (1985).

is not parodied.

Part III discusses a few forms of musical parody which frequently are overlooked by the courts. Specifically, the Section examines the copyright holder's potential loss of the television broadcast performance fee; the possible foreclosure of the parody market to the original composers themselves; the possible inability of original composers to sell synchronization licenses for the use of their melody as background music for motion pictures and television; and finally, the potential dilution of the original copyright due to overexposure of the melody from parody.

Traditionally, the parodist takes material from the original work of authorship being parodied in order to identify that work as the object of his or her own creative work.¹⁰ The parodist then adds new material to the underlying work through his or her own individual creative effort to effectuate the parody.¹¹ What distinguishes traditional parody¹² from musical parody, however, is the difference in the underlying copyrighted work that is the object of, or vehicle for, the parody. Whereas the copyright in a traditional literary work involves only the author's written or literary expression, the copyright in a traditional musical work pertains to the author's own written or literary expression, in combination with the author's musical expression. This difference naturally is carried over when the works are parodied. While the traditional literary parodist effectuates his or her parody by adding new words to the underlying work, the musical parodist usually adds new lyrics to the composition to effectuate the parody, but seldom adds any element of parody to the melody of the composition itself.¹³ Most courts deem this addition of new lyric material to the original musical work sufficient to bring the parody within the scope of fair use;¹⁴ but this reasoning ignores the potential harm to the original

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

11. *Id.*

12. The term "traditional parody" is used only to distinguish the parodying of poems, books, essays, and plays, which are works that involve only the element of the author's written or literary expression, from musical parody, which also includes, in addition to the element of the author's written or literary expression, the element of the author's musical expression. Similarly, a parody of a cartoon may be more akin to a musical parody in that, in addition to the element of the author's written or literary expression, the parody also targets the author's artistic expression of drawing and painting.

13. See *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).

14. See *Fisher*, 794 F.2d at 439; *Elsmere*, 482 F. Supp. 741.

composer's copyrighted melody, which has not been parodied, and it particularly ignores the harm to the original composer's market interest despite the teachings of *Sony Corporation of America v. Universal City Studios, Inc.*¹⁵ and *Harper & Row, Publishers, Inc. v. Nation Enterprises*.¹⁶

Sony and *Harper & Row* have refined the general fair use standard and have given it a new and more limited thrust. They place particular emphasis on the market for, or value of, the original copyrighted work, as well as on the potential harm to the derivative markets for that original work. As applied to musical parody, both of these cases evince a need to examine the potential harm to the original author's copyright, especially in light of the unique nature of musical works and musical parody as distinct from traditional literary works and literary parody.

II. WITHOUT RHYME OR REASON: AMBIGUITIES IN THE MUSICAL PARODY DECISIONS

A. *Early Assimilation of Musical Parody to the Fair Use Standards*

1. To "Recall or Conjure Up"

One of the earliest cases determining whether a parody came within the scope of fair use was *Columbia Pictures Corp. v. National Broadcasting Co.*¹⁷ Comedian Sid Caesar parodied the motion picture *From Here To Eternity*¹⁸ in an NBC television skit entitled "From Here To Obscurity." The court found that although the parody used material appearing in the motion picture, the parody was a new, original, and different literary work as compared with the motion picture¹⁹ and there was no substantial similarity between the parody and the motion picture.²⁰

The case is of paramount importance for two reasons. First, the case signaled a retreat by the District Court for the Southern District of California from its earlier holding in *Loew's Inc. v. Co-*

15. 464 U.S. 417 (1984). See *infra* notes 116-126 and accompanying text.

16. 471 U.S. 539 (1985). See *infra* notes 116-126 and accompanying text.

17. 137 F. Supp. 348 (S.D. Cal. 1955).

18. (Columbia 1953).

19. *Columbia Pictures Corp.*, 137 F. Supp. at 352.

20. *Id.* There were, in fact, some similarities between the parody and the motion picture, including: the settings, some of the situations and some of the principal characters. There also were similarities in the development of the plot. However, the court did not characterize these as substantial; hence, there was no copyright infringement.

lumbia Broadcasting Systems, Inc.,²¹ where it held that copying for the purpose of parody or burlesque should be treated no differently from any other appropriation.²² Second, the *Columbia Pictures* court launched what has become the standard for the amount of subject matter a parodist may appropriate from the original author:

Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectable portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.²³

This has come to be known as the “recall or conjure up” standard, and expressly was adopted by the Second Circuit in *Berlin v. E. C. Publications, Inc.*²⁴

In *Berlin*, defendants’ magazine *Mad* published a collection of lyric parodies satirizing modern life. While the publication did not supply any music and injected only brief phrases of the original lyrics into the parodies, the magazine directed the readers to sing the parodies to the tune of several well-known standard songs, including several standards by composer Irving Berlin. Plaintiffs claimed that defendants’ directions to sing the parodies to the tune of plaintiffs’ copyrighted music constituted infringement.

The district court held that the defendants had created “original, ingenious lyrics on subjects completely dissimilar from those of plaintiffs’ songs.”²⁵ Plaintiffs then claimed that defendants’ directions to sing the parodies to the tune of plaintiffs’ copyrighted music constituted infringement. The court responded: “It is difficult to see how music can be copied when it is not reproduced.”²⁶

On appeal, the Second Circuit found that the defendants’ work was not substantially similar to, and therefore did not infringe the copyright in, the plaintiffs’ work.²⁷ This finding ordina-

21. 131 F. Supp. 165 (S.D. Cal. 1955), *aff’d sub nom. Benny v. Loew’s Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff’d per curiam sub nom. Columbia Broadcasting Systems, Inc. v. Loew’s Inc.*, 356 U.S. 43 (1958) (equally divided court).

22. *Loew’s*, 131 F. Supp. at 177.

23. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955).

24. 329 F.2d 541, 542-43 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

25. *Berlin v. E. C. Publications, Inc.*, 219 F. Supp. 911, 913 (S.D.N.Y. 1963), 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

26. *Id.* at 914.

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

rily would preclude discussion of fair use, for fair use is a *defense* to a finding of infringement.²⁸ Nonetheless, Judge Irving R. Kaufman, writing for the Second Circuit and echoing the Ninth Circuit's decision in *Loew's*, stated:

Where, as here, it is clear that parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire a finding of infringement would be improper.²⁹

This is the standard adopted by the Second Circuit Court of Appeals for fair use determination in parody cases.³⁰

The plaintiffs in *Berlin* premised a significant portion of their infringement claim on the fact that the defendants instructed readers to sing the parodies to the tune of the copyrighted, standard songs. As defendants did not reproduce any of the music, it was certainly not an infringement,³¹ and the plaintiffs' premise was completely erroneous. The Court of Appeals acknowledged this, stating: "[P]laintiffs appear to seek redress upon a theory of copyright relief, closely resembling that behind recovery for unjust en-

28. Cf. W. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 161 (1985) ("On appeal, the Second Circuit explored the question of parody at great length. This exploration, though valuable, was nevertheless dictum since the court found that defendant's work was not substantially similar to plaintiffs' works, and hence no question of fair use was decided.")

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

30. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 184 (2d Cir. 1981); *Elsmere Music, Inc. v. National Broadcasting Company*, 482 F. Supp. 741, 745 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980). The Second Circuit stopped short of deciding "whether a substantial taking, one far beyond that necessary to conjure up the original, would be permissible." W. PATRY, *supra* note 28, at 161. The court eventually did decide this question, see *infra* note 62 and accompanying text, and later retreated from this position. See *infra* notes 76-85 and accompanying text.

31. 17 U.S.C. § 501(a) (1982). § 501(a) states: "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright."

In this respect, *Berlin* foreshadowed the result in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, producers of films and television programs sued the manufacturers of the Betamax home videocassette taping system. The producers claimed that Sony infringed their rights in their copyrighted televised films and programs when owners of Betamax equipment taped the television broadcasts. *Id.* at 420. *Berlin* and *Sony* are similar in that, in both cases, defendants did not reproduce the plaintiff's material; rather, it was the consumer, who purchased the defendant's product (Betamax or *Mad*), who was reproducing the work. The consumer did so, however, only for his own personal use in his home, not for profit which the copyright law specifically permits under § 110(5). Not surprisingly, then, the Court found for Sony, holding that whether someone used Sony's equipment to infringe plaintiff's copyrights was not relevant as the defendants themselves did not actually reproduce any of the plaintiff's copyrighted material.

richment.”³² Plaintiffs, in essence, were seeking relief for defendant’s instruction to its readers rather than for any real damages, as defendants had not reproduced the work.

The Second Circuit’s use of the “recall or conjure up” standard in *Berlin* was imprudent for the facts of the case did not warrant its application. As one author has suggested, “[B]erlin . . . would be seen . . . to be not a fair use case at all. Perhaps, indeed, [it is] not even a copyright case, for there is on the face of things no copying of either word or theme.”³³ Since only brief phrases of the original lyrics were used³⁴ and none of the author’s original music was reproduced,³⁵ the court did not need to apply the “recall or conjure up” standard to such an insignificant amount which, by all rights, cannot be viewed as an appropriation of the copyrighted expression.

Furthermore, the application of the “recall or conjure up” standard in *Berlin* was especially unfortunate because it has become the standard by which most fair use determinations in parody are measured.³⁶ Much of the confusion surrounding the fair use determination in musical parody may be attributed directly to later courts’ labeling *Berlin* a fair use musical parody case when it probably was not a fair use case at all.³⁷ Similarly, the tendency of present day courts to neglect the potential harm to the original author’s musical expression may be attributed directly to *Berlin*. While *Berlin* addressed the de minimis appropriation of the original author’s literary expression (for example, the lyrics), it did not address the appropriation of the original author’s musical expression because it did not have to—the defendants did not reproduce any of the musical expression. Accordingly, the *Berlin* court did not examine the potential harm to the original author’s musical expression engendered by musical parody.³⁸ Although the result in *Berlin* was correct, subsequent cases relying upon *Berlin* and the “recall or conjure up” standard, invariably fail to take into account

32. *Berlin*, 329 F.2d at 543.

33. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 43 (1978).

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

35. See *supra* text accompanying notes 25 & 30-31.

36. See, e.g., *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 523 F. Supp. 611 (S.D.N.Y.), *aff’d*, 654 F.2d 204 (2d Cir. 1981), *on final hearing*, 530 F. Supp. 1187 (S.D.N.Y. 1982), *aff’d*, 720 F.2d 231 (2d Cir. 1983); *Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F. Supp. 741 (S.D.N.Y.), *aff’d*, 623 F.2d 252 (2d Cir. 1980); *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff’d as modified*, 677 F.2d 180 (2d Cir. 1981).

37. See *supra* notes 27-29 and accompanying text.

38. See *infra* text accompanying notes 121-135.

the potential harm to the original author's musical expression.

2. The "Best Parody" Limitation

The United States Court of Appeals for the Ninth Circuit took the opportunity to examine the *Berlin* "recall or conjure up" standard in *Walt Disney Productions v. Air Pirates*.³⁹ The case involved the defendants' counterculture comic books in which the defendants portrayed such Disney cartoon characters as Mickey Mouse and Donald Duck engaging in promiscuous sexual acts and taking illicit drugs. Although this was not a musical parody case, it is of critical importance to the music parody issue because the court points to the distinction between the physical aspects of the work and its conceptual aspects, in this case the distinction between the artistic expression of drawing and the literary expression.⁴⁰

Just as cartoon characters are a combination of two distinct elements, the author's artistic expression and the author's literary expression, so popular songs combine the songwriter's musical expression with his or her literary expression. Yet, most of the musical parody cases fail to recognize this distinction.⁴¹ This defective analysis often leads to the result that a musical parodist who has appropriated a significant portion of the original author's musical expression, is nonetheless permitted to assert the fair use defense.⁴²

Air Pirates is noted primarily for the limitation that it placed on the *Berlin* "recall or conjure up" test. Given the widespread recognition of the Disney characters depicted in comparison with other characters, the court observed that "very little would have been necessary to place Mickey Mouse and his image in the minds

39. 345 F. Supp. 108 (N.D. Cal. 1972), *aff'd in part and rev'd in part*, 581 F.2d 751 (9th Cir.), *cert. denied*, 439 U.S. 1132 (1978).

40. 581 F.2d at 757.

In order to facilitate application of . . . the *Berlin* test, it is important to determine what are the relevant parts of each work that are compared in analyzing similarity. Plaintiff assumes in its brief that the graphic depiction, or pictorial illustration, is separately copyrightable as a component part Defendants proceed on the assumption that comparing their characters with plaintiff's involves a comparison not only of the physical image but also of the character's personality, pattern of speech, abilities and other traits. Apparently this issue has not been addressed previously, and neither position is without merit.

Id. On the facts of *Air Pirates*, the courts found it unnecessary to explore this distinction. In its view, the defendants took more than was allowed under the *Berlin* test as it applied to both the conceptual and physical aspects of the characters. *Id.*

41. See *supra* text accompanying note 20.

42. See *infra* notes 56-60.

of the readers.”⁴³ The court further stated: “[W]hen the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied.”⁴⁴ Here the court found that the exact reproduction of the character was not necessary to effectuate the parody. Defendants asserted that they copied no more than necessary and claimed that “the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, and upon closer examination is discovered to be quite something else.”⁴⁵ The court recognized that to accept this assertion would be to justify substantially verbatim copying; it therefore rejected the right of the defendants to make the “best parody”:

[W]hen persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take as much of a *component part* as they need to make the “best parody.” Instead, their desire to make the “best parody” is balanced against the rights of the copyright owner in his original expressions. That balance has been struck at giving the parodist what is necessary to conjure up the original, and in the absence of a special need for accuracy . . . that standard was exceeded here. By copying the images in their entirety, defendants took more than was necessary to place firmly in the reader’s mind the parodied work and those specific attributes that are to be satirized.⁴⁶

This was the first important limitation on the “recall or conjure up” standard. Of particular significance was the court’s reference to limiting the amount taken of a “component part” because it recognized the two distinct elements of artistic and literary expression that merge in cartoon characters.⁴⁷ In *Air Pirates* the defendants did not *parody* the artistic expression of the Disney characters; rather, they *appropriated* the artistic expression and placed the characters in situations antithetical to the innocent image that the Disney characters represent. The court noted that had the defendants parodied the characters themselves, greater license might have been necessary in copying the graphic images⁴⁸ such as the artistic expression. Instead the court found that the defendants’

43. 581 F.2d at 757-58.

44. *Id.* at 758.

45. *Id.*

46. *Id.* (citations omitted)(emphasis added).

47. See *supra* notes 40-41 and accompanying text.

48. 581 F.2d at 758.

only purpose was “to track Disney’s work as a whole,”⁴⁹ and implied that the defendants thus had attempted to capitalize on the widespread recognition of the Disney characters.

Because musical parodies lend themselves to a similar analysis based on the union of the author’s musical expression and his or her literary expression, it seems logical to apply the same limitation on fair use in this context. Query then, in light of *Air Pirates*, does the parodying of an author’s lyrics warrant the appropriation of a significant portion of the author’s musical expression when that is neither parodied nor altered in any way? Is there a special need for accuracy in musical parody that justifies the appropriation of the author’s musical expression, or is it merely the parodist’s desire to achieve the “best parody”?

As the court noted in *Air Pirates*, the desire to achieve the best parody must be “balanced against the rights of the copyright owner in his original expression and that balance has been struck at giving the parodist what is necessary to conjure up the original.”⁵⁰ To allow the verbatim copying of the author’s musical expression would seem to exceed the “recall or conjure up” standard and would allow the parodist to create the “best parody,” contrary to Judge Cummings’s admonition in *Air Pirates*. Moreover, courts that tolerate a verbatim copying of the original author’s musical expression overlook the potential effect of that use upon the market for or value of the copyrighted work, contrary to section 107 of the Copyright Act of 1976.⁵¹ The emerging modern fair use standard derived from the Supreme Court’s decisions in both *Sony Corporation of America v. Universal City Studios*⁵² and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵³ emphasizes that courts must view the potential effects on the market for the copyright owner’s work as part of infringement. In light of this, there must be some limitations upon the parodist’s verbatim copying of the original author’s musical expression.

3. The Near Evisceration of the Standard

The most significant, and arguably detrimental, expansion of the “recall or conjure up” standard occurred in *Elsmere Music*,

49. *Id.*

50. *Id.*

51. *See supra* note 1.

52. 464 U.S. 417 (1984).

53. 471 U.S. 539 (1985). *See infra* text accompanying notes 116-126.

Inc. v. National Broadcasting Company.⁵⁴ There, defendant NBC's television program "Saturday Night Live" presented a skit satirizing New York state's advertising campaign to attract tourists. The defendant portrayed the Chamber of Commerce of the biblical city of Sodom, discussing Sodom's poor public image with out-of-towners and the effect this image was having on its tourist trade. To combat a negative image, the members decided upon a new advertising campaign to highlight the less sensational aspects of Sodom's night life. As the skit closed, three Saturday Night Live cast members sang "I Love Sodom" to the identical four note melody of "I Love New York," the memorable song which had been used so effectively in New York's advertising campaign. Defendant repeated the melody four times.⁵⁵

Defendant claimed that its use of plaintiff's melody was no more than was necessary to create an effective parody. This was at worst a *de minimis* infringement, which is permitted as a fair use under the Copyright Act.⁵⁶ In contrast, the plaintiff contended that the use was not *de minimis* and was far more extensive than necessary to conjure up the original.

The district court found that, although the actual taking involved was relatively slight, "on closer examination it becomes apparent that this portion of the piece, the musical phrase that the lyrics 'I Love New York' accompany, is the heart of the composition."⁵⁷ The court acknowledged that use of such a significant portion was not a *de minimis* taking and in fact constituted a taking of a substantial nature.⁵⁸ At the same time, the court recognized that defendant had neither interfered with the marketability nor

54. 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

55. 482 F. Supp. at 744.

56. *Id.*

57. *Id.* "It is this musical phrase, for example, that is constantly repeated during the course of most of the 'I Love New York' campaign's television commercials and serves as the musical theme for such commercials." *Id.* at 744, n.6. See also *Harper & Row*, 471 U.S. 539. Plaintiffs Harper & Row were the copyright holders of a book of the presidential memoirs of former President Gerald R. Ford. Plaintiffs entered into an agreement with *Time Magazine* to publish a brief excerpt of the book, which was to run one week before they shipped the book to bookstores. *Id.* at 542-43. By clandestine means, defendants obtained an advance copy of the book and published 300-400 words from the book in their magazine *The Nation* in a deliberate effort to scoop *Time*. *Id.* at 562. The passages quoted were Ford's recollection of the circumstances leading to his pardon of former President Richard M. Nixon. Arguably, these were the ones most likely to appeal to the reading audience. The Court found, "In absolute terms, the words actually quoted were an insubstantial portion of [the book] 'A Time to Heal.' The District Court, however, found that '[t]he Nation took what was essentially the heart of the book.'" *Id.* at 564-65 (emphasis added)(citing the opinion of the district court, 557 F. Supp 1067, 1072 (S.D.N.Y. 1983)).

58. 482 F. Supp. at 744.

affected the value of the copyrighted work. Moreover, the defendant's use did not "have . . . the 'effect of fulfilling the demand for the original.'"⁵⁹ As a result, the court held that defendant had not taken more than was necessary to conjure up the original.⁶⁰

The Court of Appeals for the Second Circuit affirmed the district court in a per curiam opinion stating: "[I]n today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody . . ."⁶¹ In a footnote, the court nearly eviscerated the *Berlin* "recall or conjure up" standard by expanding the scope of permissible taking in parody cases:

The District Court concluded, among other things, that the parody did not make more extensive use of appellant's song than was necessary "to conjure up" the original. While we agree with this conclusion, we note that the concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbia Pictures Corp. v. National Broadcasting Co.* A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.⁶²

Elsmere Music has met with marked criticism from commentators.⁶³ One author, reaching a very different conclusion from the one reached by the *Elsmere Music* court, suggested that:

while a parodist might take more than was necessary to conjure up the original, he did so at the risk that the trier of fact would find the taking to have been substantial, i.e., a 'bodily appropriation,' and therefore an infringing and not a fair use.⁶⁴

The late Professor Melville Nimmer also thought that the Second Circuit went too far in *Elsmere Music* by "suggesting an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only that

59. *Id.* at 747.

60. *Id.*

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

62. *Id.* at 253 n.1 (construing *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955)) (citation omitted).

63. See, e.g., W. PATRY, *supra* note 28, at 165.

64. *Id.*

elements of humor are added."⁶⁵

These criticisms are well placed, and in fact the Second Circuit later retreated from the *Elsmere Music* footnote.⁶⁶ However, the criticisms do not address the hidden and more pernicious danger of the decision: its failure to take into account the potential harm to the underlying musical copyright.⁶⁷ Although the district court acknowledged that the musical phrase accompanying the lyrics "I Love New York" was the "heart of the composition,"⁶⁸ it erroneously concluded that defendant had not taken more than was necessary to conjure up the underlying work. What the court failed to assess was that these four notes constituted the portion of the plaintiff's work upon which its popular appeal, and hence its commercial success, depended.⁶⁹ The repetition of those four notes and the words "I Love New York" constituted the entire television commercial advertisement. Similarly, to the average listener, that melodic refrain constituted the whole musical composition "I Love New York." Yet, in one unsubstantiated blanket statement the court decided that the parodist's appropriation of the original author's musical expression did not interfere with either the marketability of the copyrighted work or its value.⁷⁰

B. *In Search of a Modern Fair Use Standard: The Market Analysis*

1. A Borderline Case

Although *MCA, Inc. v. Wilson*⁷¹ is generally assimilated with the musical parody cases,⁷² it was not decided as a musical parody case. The district court rejected the defendants' attempt to invoke the fair use defense.⁷³ The case involved the transformation of the plaintiff's copyrighted song, "Boogie Woogie Bugle Boy of Company B," into "Cunnilingus Champion of Company C." The court's

65. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[C] at 13-90.6 (1987).

66. See *infra* notes 76-85 and accompanying text.

67. See *infra* text accompanying notes 121-135.

68. See *supra* note 57 and accompanying text.

69. See generally *Robertson v. Batten, Barton, Durstine & Osborn, Inc.*, 146 F. Supp. 795 (S.D. Cal. 1956) (two bars in defendant's commercials are identical to two of four bars of plaintiff's key melody, that portion of it upon which its popular appeal, and hence, its commercial success, depends).

70. 482 F. Supp. at 747.

71. 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd as modified*, 677 F.2d 180 (2d Cir. 1981).

72. See, e.g., 3 M. NIMMER, *supra* note 65, at § 13.05[C]; W. PATRY, *supra* note 28, at 165.

73. 425 F. Supp. at 453.

rejection of the parody defense seemed influenced by the defendant's own admission that he did not intend his work to be a burlesque or satire, but rather that he engineered the similarities between the two compositions in an attempt to generate publicity.⁷⁴

On appeal, the Second Circuit concluded that the defendants did not make fair use of the plaintiff's song, but questioned the lower court's emphasis on the substantiality of the taking. The appellate court hinted that, on the same facts it might not have found "that the amount copied was so substantial as to be unfairly excessive."⁷⁵

2. The Second Circuit Retreats to *Berlin*

In *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*⁷⁶ the Second Circuit retreated from its *Elsmere Music* footnote which set forth an open-ended standard of the amount of copyrighted expression that a parodist could appropriate.⁷⁷ *Warner Bros.* involved the ABC television program *The Greatest American Hero*, in which the protagonist was arguably reminiscent of *Superman*. Plaintiffs claimed that *The Greatest American Hero* infringed their copyright in the Superman character by appropriating precisely those attributes that are unique to Superman. Denying the plaintiff's motion for a preliminary injunction, the district court held that, in comparison, the characters and their respective stories were so dissimilar as to preclude a finding of substantial similarity.⁷⁸ The court acknowledged that the defendants took some of the copyrighted *Superman* material, but recognized that the defendants used this material "as a springboard to create an independent intellectual property."⁷⁹ Citing *Berlin*, the district court found that the defendants did not make more extensive use of the original than was necessary to recall or conjure up Superman.⁸⁰ Even if it had, the court cited the troublesome footnote in

74. *Id.* at 448.

75. 677 F.2d at 185. "[W]e have not overlooked the district court's finding that the amount copied [from the plaintiff's song] was so substantial as to be unfairly excessive. Although we might have reached a different conclusion on the same facts, the district court's finding was not clearly erroneous and furnishes further support for its holding of infringement." *Id.*

76. 523 F. Supp. 611 (S.D.N.Y.), *aff'd*, 654 F.2d 204 (2d Cir. 1981), *on final hearing*, 530 F. Supp. 1187 (S.D.N.Y. 1982), *aff'd*, 720 F.2d 231 (2d Cir. 1983).

77. *See supra* notes 61-65 and accompanying text.

78. 523 F. Supp. at 616.

79. *Id.* at 617.

80. *Id.* at 617 (citing *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964)).

Elsmere Music,⁸¹ which had rejected the characterization of the “conjure up” test as a limit on the parodist’s freedom to borrow.

The Second Circuit affirmed the district court’s holding that the two works were not substantially similar.⁸² However, the appellate court disagreed with the district court on the parody issue and specifically sought to retract the open-ended standard suggested in *Elsmere Music*.⁸³ Indeed, the Second Circuit now rediscovered the substantiality limit it had previously eviscerated:

Suffice it to say that while the [parody] defense might be applicable to those isolated instances in which a nearly identical line from the plaintiffs’ script, or express reference to one of the plaintiffs’ characters was made, we question whether the defense could be used to shelter an entire work that is substantially similar [to] and in competition with the copyrighted work.⁸⁴

This represented a significant retreat from *Elsmere Music* and signaled a return to the “recall or conjure up” standard of *Berlin*.⁸⁵

On final hearing, the district court found that what the defendants took from the plaintiffs’ works and incorporated into *The Greatest American Hero* were unprotected ideas.⁸⁶ Finding no illicit appropriation, the court granted the defendants summary judgment. On appeal from the summary judgment, the Second Circuit affirmed the district court, acknowledging that the “parody” branch of the “fair use” doctrine was itself a means of fostering the creativity protected by the copyright law.⁸⁷ The court stated: “It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor.”⁸⁸

Read in conjunction with the court’s retraction of the *Elsmere Music* standard,⁸⁹ this quote also would seem to imply a limitation on the permissible amount of taking of copyrighted expression by the parodist. This follows because the Second Circuit would seem

81. See *supra* note 62 and accompanying text.

82. *Warner Bros. v. American Broadcasting Cos., Inc.*, 654 F.2d 204, 209 (2d Cir. 1981).

83. See *supra* note 62.

84. 654 F.2d at 211.

85. *Accord* W. PATRY, *supra* note 28, at 175.

86. 530 F. Supp. 1187, 1190 (S.D.N.Y. 1982), *aff’d* 720 F.2d 231 (2d Cir. 1983).

87. *Warner Bros. v. American Broadcasting Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983).

88. *Id.*

89. See *supra* notes 83-85 and accompanying text.

to allow the invocation of the parody defense only in "those isolated instances in which a nearly identical line from plaintiffs' [work]"⁹⁰ is used, or where in the interests of creativity a parodist "[takes] well-known phrases and fragments from copyrighted works and add[s] [his or her] own contribution of commentary or humor."⁹¹ This suggests that verbatim copying will not be permitted, and that a parodist may not take more than is necessary to "recall or conjure up."

In the case of musical parody, the parodist who appropriates the "heart of the composition"⁹² would seem to exceed the limitations of *Warner Bros.* By the same token, a parodist's use of a composer's "recognizable main theme"⁹³ also would exceed that limit.

3. The Ninth Circuit Departs from *Air Pirates*

In the most recent of the fair use musical parody cases, *Fisher v. Dees*,⁹⁴ the composers of *When Sunny Gets Blue* sued the creators of *When Sunny Sniffs Glue*, a purported parody of the plaintiffs' composition. The defendants copied the first six of the song's thirty-eight bars of music which constituted its recognizable main theme. They also changed the opening lyrics, "When Sunny gets blue, her eyes get gray and cloudy, then rain begins to fall" to "When Sunny sniffs glue, her eyes get red and bulgy, then her hair begins to fall."⁹⁵ The plaintiffs appealed the district court's entry of summary judgment in favor of the defendants.⁹⁶ The plaintiffs advanced five principal reasons why the parody was not a fair use, three of which are pertinent to this Article: (1) defendants' use was commercial in nature; (2) the parody competed in the same market—record albums and tapes—as the plaintiffs' song; (3) the taking of the plaintiffs' musical expression was more substantial than was necessary to "conjure up" the original in the mind of the audience.⁹⁷

90. See *supra* note 84.

91. See *supra* note 88.

92. See *supra* notes 57-59.

93. See *infra* note 94 and accompanying text.

94. 794 F.2d 432 (9th Cir. 1986).

95. *Id.* at 434.

96. "The district court did not reveal the basis for its decision. Nonetheless, we may affirm if the record, viewed in the light most favorable to the composers, discloses no genuine issues of material fact and if Dees was entitled to judgment as a matter of law." 794 F.2d at 434.

97. The other two reasons advanced by the plaintiffs as to why the parody was not a fair use were: (1) The so-called parody was not actually a parody, or at least was not a

The defendants conceded that the parody was a commercial use of the song, which the Ninth Circuit noted “tends to weigh against a finding of fair use.”⁹⁸ The court acknowledged that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright,”⁹⁹ but recognized “that many parodies distributed commercially may be ‘more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff’s original work.’”¹⁰⁰ It followed that the initial presumption of exploitation need not be fatal and that the defendant could rebut the presumption “by convincing the court that the parody does not unfairly diminish the economic value of the original.”¹⁰¹

Accordingly, the court focused its examination on the effect of the use upon the potential market for or value of the copyrighted work.¹⁰² Its test was whether the parody “fulfills the [market] demand” for the original, which occurs “when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable.”¹⁰³ Stressing the difference between the two versions of *Sunny*, the court held that the parodied work did not fulfill the same demand that the parody did and, consequently, the parody had no cognizable effect on the original.¹⁰⁴

The court next focused its examination on the amount and substantiality of the taking.¹⁰⁵ Relying heavily upon *Elsmere Music*’s footnoted expansion of the “recall or conjure up” standard,¹⁰⁶ the court emphasized that a popular song was difficult to parody effectively because any substantial variation would make it un-

parody of the composers’ song; and (2) the defendants’ bad conduct should bar their use of the equitable defense of fair use. The court of appeals disposed of both claims holding that the defendants’ version was intended to poke fun at the plaintiff composer’s song and that the plaintiffs failed to identify any conduct of the defendants that was sufficiently blameworthy. *Id.* at 436-437.

98. *Id.* at 437 (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985)).

99. *Id.* at 437 (quoting *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

100. *Id.* at 437 (quoting *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)).

101. *Id.* at 437.

102. 17 U.S.C. § 107(4) (1982). The full text of § 107 is set forth at *supra* note 1.

103. *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

104. *Id.*

105. 17 U.S.C. § 107(3) (1982). The full text of § 107 is set forth at *supra* note 1.

106. See *supra* notes 62-65 and accompanying text.

recognizable to the general audience.¹⁰⁷ Noting that the parodist's desire to create the "best parody"¹⁰⁸ must be balanced against the rights of the copyright owner in his original expression, the court held that the balance tipped in favor of the parodist who took no more than was reasonably necessary to accomplish reasonably his purpose.¹⁰⁹ Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment and concluded that *When Sunny Sniffs Glue* was a parody deserving of fair use protection as a matter of law.¹¹⁰

While the Ninth Circuit's examination of parody in *Fisher* was thorough and informative, it unwisely relied on the *Elsmere Music* footnote,¹¹¹ which the Second Circuit had essentially repudiated five years earlier in *Warner Bros.*¹¹² The Ninth Circuit's adherence to the *Elsmere Music* footnote is inexplicable, particularly in view of the far more perceptive and equitable standard it enunciated in *Air Pirates*,¹¹³ a standard wholly in accord with the *Berlin* "recall or conjure up" test. Furthermore, the *Air Pirates* standard takes account of the distinction between "traditional parody" and "comic strip parody,"¹¹⁴ and it recognizes the necessary balance between the parodist's desire to make the "best parody" and the copyright owner's interest in the original copyrighted expressions.¹¹⁵ The Ninth Circuit easily could have adapted its *Air Pirates* analysis to *Fisher* and rendered a far more equitable decision.

4. The Modern Fair Use Standard: Protection of the Market Interest

Two major Supreme Court cases, *Sony Corporation of America v. Universal City Studios, Inc.*¹¹⁶ and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹¹⁷ recently have refined the

107. 794 F.2d at 439 ("Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience.").

108. See *supra* notes 39-53 and accompanying text.

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

110. *Id.* at 440.

111. See *supra* note 62.

112. See *supra* notes 76-77.

113. See *supra* notes 39-53 and accompanying text.

114. See *supra* notes 39 & 40 and accompanying text.

115. See *supra* note 46 and accompanying text.

116. 464 U.S. 417 (1984) (home videotaping of television broadcast deemed fair use; hence no action could be maintained against the manufacturer of video-taping equipment).

117. 471 U.S. 539 (1985) (unlicensed quoting of 300-400 words from unpublished pres-

general fair use standards set out in the Copyright Act of 1976 and placed particular emphasis on the potential harm to the market for, or value of, the original copyrighted work engendered by the use claimed to be fair.

In *Sony* the Supreme Court posited that "every commercial use [of copyrighted material] is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . ." ¹¹⁸ If the intended use is for commercial gain, then the likelihood of harm to the copyright also may be presumed. ¹¹⁹ In contrast, where the use is noncommercial, the Supreme Court will require the copyright owner to show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists" when resisting a defense of fair use. ¹²⁰ Accordingly, no matter on which side of the line the musical parody falls, either commercial or noncommercial, the Supreme Court's holding in *Sony* mandates a closer scrutiny of the effect of the claimed fair use upon the potential market for, or value of, the copyrighted work.

Similarly, the Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, ¹²¹ adopted Professor Nimmer's broad principle that any adverse effects on the value of any of the rights in the copyrighted work would make the use unfair. ¹²² The Court further expanded the inquiry by mandating that the analysis take account of harm to the market for derivative works. ¹²³ The Su-

identical memoir by news magazine found not to be a fair use).

118. 464 U.S. at 451. *Sony* has been the subject of scholarly comment. See, e.g., Fisher, *Reconstructing The Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988) (discussing the Supreme Court's performance in *Sony* and *Harper & Row*).

119. 464 U.S. at 451.

120. *Id.* The Court summarized the law this way:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.

Id. (emphasis in original).

121. 471 U.S. 539 (1985).

122. 471 U.S. at 568 (quoting 3 M. NIMMER, NIMMER ON COPYRIGHT, *supra* note 65, § 13.05[B], at 13-77-13-78).

123. *Id.* (citing Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57 (2d Cir. 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977); *Roy Export v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1146 (S.D.N.Y. 1980)).

Harper & Row has been the subject of scholarly comment. See, e.g., Francione, *Facing the Nation: The Standards for Copyright Infringement and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986).

preme Court's holdings in both *Sony* and *Harper & Row* clearly reflect an intention to examine any potential harm to the copyrighted work whether the impact be directly on the market for the copyrighted work or upon the market for derivative works.

One of the more significant contributions of *Harper & Row* is the Court's enunciation of the burden of proof in fair use cases: "[O]nce a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression."¹²⁴ Read in conjunction with the dissent's observation in *Sony* that uses having little or no economic impact on the author's rights today can become commercially important later on,¹²⁵ even this formulation may be too narrow.

As applied to musical parody, these cases justify a careful examination of the potential harm to the author's copyrighted work with particular regard to the unique nature of musical copyright and musical parody as distinct from traditional literary copyright and literary parody.¹²⁶ When the market analysis of *Sony* and *Harper & Row* is applied to musical parody, it exposes a number of weaknesses in the prior analysis of musical parody that heretofore have gone undetected. The courts' over-concentration on the original author's written or literary expression and the amount of that expression appropriated by the parodist downplays the potential harm to the market for, or value of, the composer's musical expression. Clearly, the Supreme Court's directive in *Sony* and *Harper & Row* was to focus attention on this aspect of injury to the copyright owner's rights. Moreover, a more refined analysis of musical parody must take into account the potential harm to the author's derivative market for his or her lyrics as well as his or her musical expression.

The market analysis of *Sony* and *Harper & Row* provides a sound basis for determining fair use in the parody cases. When musical parody is analyzed in this light, however, it points to different results from those reached rather uncritically in the past.

III. THE POTENTIAL HARMS ANALYZED UNDER THE CURRENT FAIR USE STANDARD

Because courts have focused almost exclusively on whether the

124. 471 U.S. at 567.

125. 464 U.S. at 482 (Blackmun, J., dissenting).

126. See *supra* notes 10-13 and accompanying text.

parody supplants the original in its primary market,¹²⁷ they have tended to overlook other potential harms. A parody rarely will fulfill the demand for the original; but to conclude, as the Ninth Circuit did in *Fisher v. Dees*,¹²⁸ that the parody will have no other cognizable economic effect on the original work¹²⁹ ignores the palpable damages produced by the unfettered use of the original composer's copyrighted musical expression.¹³⁰ These damages must be factored into the analysis.

A first potential harm to the copyright holder, of special significance in the case of *Elsmere Music, Inc. v. National Broadcasting Company*,¹³¹ is the loss of the television broadcast performance fee. The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the principle collection agencies for broadcast performance royalty fees, employ extensive logging systems to determine the number of performances of any copyrighted musical work. Each television network performance is logged and credited for payment purposes on the basis of a universal count without resort to sampling. The three television networks and the television program producers supply program logs and cue sheets to the performing rights organizations, which enable the organizations to credit the copyright holder for the performance.¹³² On the form that the television producers and networks supply, a parody like "I Love Sodom" will not be credited as "I Love New York," even though the original author's musical expression was utilized unchanged and was not parodied.

This practice, which reflects the laws' indifference to the musical component of parody, virtually insures that the composer will not be credited for the performance of his copyrighted melody. In light of the fact that ASCAP alone collected \$198 million in performance license fees from broadcasters in 1983, and that 46% of that figure was directly attributable to television licensing fees,¹³³ it is apparent that broadcast television performances are a lucrative source of income to the composers. Yet, because the original composer is not credited for the use of his musical expression in

127. See *supra* notes 102-104 and accompanying text.

128. 794 F.2d 432 (9th Cir. 1986).

129. See *supra* notes 102-104 and accompanying text.

130. This generally is due to the courts' failure to recognize the component parts of musical copyright. See *supra* notes 39 & 40 and accompanying text.

131. 482 F. Supp. 741 (S.D.N.Y. 1980).

132. S. SHELME & W. KRASILOVSKY, *THIS BUSINESS OF MUSIC* 186 (1985). ASCAP also makes audio and video tapes of network television performances to verify the accuracy of the information provided by the networks and program producers. *Id.*

133. *Id.* at 182.

the parody, the parodist has managed to broadcast the song on national television, thus depriving the composer of a valuable performance fee and impinging upon the value of his rights in the copyright.

If the musical parodist at least attempts to parody the music itself,¹³⁴ then clearly the parodist should be allowed to conjure up the original to effectuate the parody. But to allow the parodist to copy the "heart of a composition" or its "recognizable main theme" is to ignore the rights of the copyright owner in his or her original expression. Even though parody remains an important form of social commentary, this does not mean that the rights of the original author should be overlooked. As the Supreme Court suggested in *Harper & Row*, to allow—under the guise of fair use—the verbatim copying of a composer's melody for a parody in a television broadcast would be to allow the deprivation of copyright owners' "right in their property precisely when they encounter those users who could afford to pay for it."¹³⁵ Undoubtedly, if television producers are otherwise willing to spend thousands of dollars for a television production, there should be some remuneration for the use of the composer's original musical expression. The test that the Supreme Court applied in *Harper & Row* stressed just this notion that the user stands to profit without paying the customary price:

The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain *but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.*¹³⁶

A second potential harm to the holder of the copyright is the foreclosure of the parody market to the original composer himself. With the recent popular success of such parodies as *Like A Sturgeon*, derived from the hit, *Like A Virgin*, sung by Madonna, and *Eat It*, derived from the Michael Jackson hit *Beat It*, the musical

134. Some parody does, in fact, parody the music itself. See, e.g., T. Lehrer, *An Evening Wasted With Tom Lehrer* (1959) (parody of the folk song *Clementine*, setting similar lyrical theme to parodies of the musical style of a Mozart operetta and a jazz song, among others).

135. *Harper & Row*, 471 U.S. at 539 ("[T]o propose that fair use be imposed whenever the 'social value [of dissemination] . . . outweighs any detriment to the artist,' would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.") (quoting Gordon, *Fair Use as Market Failure; A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

136. *Id.* at 562 (emphasis added).

parody is becoming an increasingly lucrative outlet for the derivative exploitation of contemporary hit songs. A parody is clearly a derivative work.¹³⁷ Section 106(2)¹³⁸ of the Copyright Act of 1976 vests in the copyright holder the exclusive right to prepare derivative works. Accordingly, if a parodist utilizes the original author's musical expression to effectuate his or her parody, he may very well "fulfill the demand" for a parody of the original work in a market in which the original has "reasonable potential" to become commercially valuable.¹³⁹ Similarly, other parodists who might be willing to pay the customary price for using the copyrighted musical expression to create a parody would no longer be willing to do so. This curtails the original composers' derivative rights market and derogates from the exclusive rights granted in the section 106(2) exclusive right.

A third potential harm to the original composers in musical parody cases is the inability to sell synchronization licenses for the use of their melody as background music for motion pictures and television. This holds particularly true with respect to old standard songs because producers may justifiably fear that audiences will associate the melody with the parody and the parody's intended meaning, which will clash with the mood that the producer is attempting to achieve. Will anyone who saw the *Saturday Night Live* performance of the parody of *I Love New York* not immediately recall *I Love Sodom* upon hearing *I Love New York*? Similarly, *When Sunny Gets Blue*, a song of lost love, now bears the legacy of a glue-sniffing woman. These two newly associated meanings could deter a producer from utilizing the melodies in a motion picture or television score.

While the courts in both *Elsmere Music* and *Fisher* acknowledged that the parodists had utilized the "heart of the composition"¹⁴⁰ or the "recognizable main theme,"¹⁴¹ they both failed to recognize the economic significance of such use. In popular music it is the catchy and infectious melodic line that sells the work.

137. 17 U.S.C. § 101 (1982). Section 101 defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." *Id.*

138. 17 U.S.C. § 106(2) (1982).

139. See *supra* notes 102-104 and accompanying text.

140. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

141. *Fisher v. Dees*, 794 F.2d 432, 434 (9th Cir. 1986).

The vocal hook is usually in the chorus. It's the whole message of the song wrapped up in a few lines. It's the thing you wake up in the morning singing. It's what pops into your head after you've only heard the song a few times. It's what sells the song.¹⁴²

By utilizing the original composer's melody without parodying it, the parodist in effect appropriates the most saleable component of the composition and then associates a new meaning with the most memorable part of the composition. When a motion picture producer wishes to evoke a certain feeling, setting, or memory, he or she relies upon the background music to set the mood. But if the most memorable part of a song or composition becomes associated with a new meaning, one that the original composer did not intend to convey, the producer will turn to a new composition. This forecloses a potentially lucrative licensing fee to the original composer.

A final potential harm, and possibly the most significant, is the potential dilution of the original copyright due to overexposure of the melody from the parody. If, as in the case of *Fisher v. Dees*, any parodist can utilize the "recognizable main theme" of the original composer in order to effectuate his or her parody, what is there to limit numerous parodists from so doing? The more a melody is subject to multiple uses, the more easily audiences will grow tired of the melody. Even one successful parody, such as *I Love Sodom*, may overexpose the underlying musical theme. If so, there will follow a decrease in the number of performances that the original composition will receive, which reduces the composer's performance income. All five of these arguments present the courts with compelling reasons to reject a characterization of parody as fair use, yet to date they have never been acknowledged by the courts. This Article suggests their time has come.

IV. CONCLUSION

The teachings of *Harper & Row* and *Sony*, that the value of a work in the marketplace is an element worthy of consideration in fair use cases, lead to the conclusion that potentially serious harms are at issue in musical parody cases. If the Supreme Court's holdings in regard to fair use are to have any meaning in this context, then courts must seriously examine the potential harm to the original composer's musical expression. Particularly in light of the Sec-

142. B. MONACO & J. RIORDAN, *THE PLATINUM RAINBOW* 49 (1980).

ond and Ninth Circuits' willingness to allow a parodist to appropriate the "heart of a composition" and the "recognizable main theme" in musical parody cases, such an inquiry must explore potential harm to the derivative markets for the original copyrighted work. Courts must focus particular attention on the original composer's musical expression, which the parodist rarely parodies, but invariably copies to effectuate his parody. When undertaking this examination, the courts must recognize that a composer's musical expression is a distinct element of musical copyright, the component that is the most easily recognizable and hence the most commercially valuable in the musical composition. Viewed as a whole, to allow a parodist to appropriate the expression without assessing the potential harm to it is to devalue the original author's property right in his intellectual creation.

This is not to suggest that musical parody should cease. It does mean that the composer should not be made an innocent victim of the struggle between the lyricist and the parodist. If the parodist is not going to parody the original composer's expression, then ways must be found to protect the financial interest of the composer. Moreover, the composer should be given an opportunity to demonstrate that any proposed parody could sufficiently harm his or her copyrighted expression as to warrant a limit on that use.

There is no easy solution to this issue because of the basic tension between the parodist and the copyright holder. Nevertheless, in drawing a line, the courts at least ought to inquire whose interests really are hurt by parody and take steps to limit the potential damage. The parodist who appropriates the original author's musical expression may or may not be adding to the wealth of musical knowledge, but he or she is most certainly capitalizing on the already-established public recognition of that expression. Takings that devalue one author's musical work to promote musical parodies should be regulated in order to protect the composer from untoward economic harm.