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# Copyright Law

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# COPYRIGHT LAW

## IN DEFENSE OF PARODY

### I. INTRODUCTION

In *Fisher v. Dees*,[1] the Ninth Circuit held that the song "When Sunny Sniffs Glue" is a parody deserving fair use protection[2] as a matter of law.[3] The Ninth Circuit thus adopted the Second Circuit's test in *Elsmere Music, Inc. v. National Broadcasting Co.*,[4] which held that a parody may go beyond merely "conjuring up" the original, provided that it takes no more from the original than necessary to accomplish its purpose.[5]

The Ninth Circuit affirmed the district court's grant of a summary judgment in favor of the defendants Rick Dees, Atlantic Recording Corporation, and Warner Brothers, Incorporated.[6]

### II. FACTS

Plaintiffs, Marvin Fisher and Jack Segal, composed and own the copyright to the 1950's song "When Sunny Gets Blue."[7] In late 1984, a law firm representing the defendant Dees contacted Fisher to get permission to use part or all of the plaintiffs' music in a comedy album Dees was recording.[8] Fisher refused the request. A few months later, Dees released an album called *Put It*

1. 794 F.2d 432 (9th Cir. 1986) (per Sneed, J.; other panel members were Wallace, J., and Kozinski, J.).
2. *Id.* at 440.
3. *Id.*
4. 623 F.2d 252 (2nd Cir. 1980).
5. *Elsmere*, 623 F.2d at 253 n.1.
6. *Fisher*, 794 F.2d at 440. For purposes of convenience, all defendants-appellants shall be referred to as Rick Dees.
7. *Id.* The original song was sung by Johnny Mathis. *Id.*
8. *Id.*

*Where The Moon Don't Shine.*[9] One of the songs on the album is called "When Sunny Sniffs Glue" and is a parody of the Fisher-Segal song.[10] The parody copies the first six of the song's thirty eight bars of music, and changes the original's opening lyrics from "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" *to* "When Sunny sniffs glue, her eyes get red and bulgy, then her hair begins to fall."[11]

Fisher and Segal brought an action in the federal district court based on the theories of copyright infringement, unfair competition, and product disparagement.[12] Both parties filed motions for summary judgment. The district court granted summary judgment in favor of Dees on all of Fisher's claims.[13] Plaintiffs then appealed to the Ninth Circuit Court of Appeals.

## III. BACKGROUND

"Fair use" is a judicially created doctrine that has become a widely used defense in copyright infringement actions, and an extremely important limitation on the exclusive rights of copyright holders.[14] The doctrine was originally created by the courts in order to foster creative work that is dependent on other people's copyrighted material.[15] A frequently quoted definition of fair use is "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."[16] The Second Circuit decision in *Elsmere*

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9. *Id.*

10. *Id.* The parody runs for 29 seconds on the forty minute album. *Id.*

11. *Id.*

12. *Id.* The court disposed of the unfair competition claim concluding that the defendant was not guilty of "passing off" his product as the plaintiffs. *Id.* at 440. In addition, the court held that such a state action is preempted by federal law. *Id. See* Sears, Roebuck & Co. v. Day-Bright Lighting, Inc., 376 U.S. 234 (1964). The court also dismissed the product disparagement claim because Dees' parody could not be understood in a defamatory sense. Fisher v. Dees, 794 F.2d 432, 440. *See* Polygram Records, Inc. v. Superior Court, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985).

13. *Fisher*, 794 F.2d at 434.

14. N. BOORSTYN, COPYRIGHT LAW, § 10:27 (1981).

15. *See* Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc. 621 F.2d 57 (2nd Cir. 1980).

16. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549 (1985) (citing BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

*Music, Inc. v. National Broadcasting Company*[17] illustrates its application.

*Elsmere* involved a 1977 ad campaign to improve the public image of New York City. Television advertisements appeared across America with a top hatted Broadway showgirl backed by a group of dancers chanting, "I-I-I-I-I-I Love New Yo-o-o-o-o-o-rk!"[18] In 1978, a comedy sketch was performed on the National Broadcasting Company's weekly variety program *Saturday Night Live* portraying a group of city officials discussing the fate of the biblical city of Sodom. To improve the unfavorable image of the city, they started an ad campaign centered around the song "I Love Sodom" that was sung *a cappella* to the tune of "I Love New York." Elsmere Music, Inc., copyright owner of the jingle "I Love New York," brought an action for copyright infringement against the National Broadcasting Company.[19] The Second Circuit affirmed the district court's opinion and held that the defendant's use of the plaintiff's copyrighted jingle was a fair use and thus did not infringe on the owner's copyright.[20] The court emphasized that parodies are an important art form that deserve fair use protection.[21]

After being recognized by courts for a number of years, the fair use doctrine finally received statutory recognition and was codified in section 107 of the Copyright Act of 1976. The statute provides that the fair use of copyrighted material for the purposes of criticism, comment, news reporting, teaching, scholarships or research is not copyright infringement.[22] The statute

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17. 623 F.2d 252 (2nd Cir. 1980). *See also* Hustler Magazine, Inc. V. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986). HUSTLER MAGAZINE published a parody featuring Jerry Falwell. Falwell subsequently used the publication during a nation wide telecast to raise money for the moral majority. *Id.* at 1150. HUSTLER immediately sued Falwell and the *Old Time Gospel Hour* for copyright infringement. *Id.* The Ninth Circuit held that the district court did not err in granting a summary judgment in favor of the defendant, Falwell, finding that his use of the HUSTLER parody was a fair use. *Id.* at 1156.

18. *Elsmere*, 482 F. Supp. at 743.

19. *Id.* at 743-44.

20. *Id.* at 747.

21. *Elsmere*, 623 F.2d at 253. *See* Note, *Light, Parody, Burlesque, and The Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979) (The article advocates a broader license for parodists). *See also Elsmere*, 623 F.2d at 253, "Copyright law should be hospitable to the humor of parody, and thus deserve fair use protection." *Id.*

22. 17 U.S.C. § 107 (1976) provides: "Notwithstanding the provisions of § 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,

also enumerates four factors for the courts to consider in deciding whether the use made of the work is a fair use:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount of work taken from the original;

(4) the effect on the potential market of the original work.[23]

The Ninth Circuit initially did not permit the defense of fair use for parodied work.[24] At first, in *Benny v. Loew's, Inc.*,[25] the court held that parodies should be treated no differently than any other copyright appropriation.[26] Loew's, Inc., owned the exclusive motion picture rights to the screenplay *Gaslight* that starred Charles Boyer, Ingrid Bergman, and Joseph Cotton.[27] In January of 1952, Jack Benny, without the consent of Loew's, Inc., broadcast a burlesqued television version of *Gaslight* titled *Autolight*.[28] Loew's, Inc. immediately filed an action for copyright infringement.[29] The Ninth Circuit upheld the district court's finding of infringement, and did not accept Benny's defense of fair use, holding that "if it is determined that there

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comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*

23. *Id.*

> 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 conmmerical nature or is for nonprofit education purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the protion 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.*

24. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[C] at 13-90.4 (1986) *See* 11 CONN. L. REV. 615 and Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984). (The author advocates relaxing copyright laws in favor of the parodist. The note examines the origin and development of the parody defense to copyright infringement, and proposes a new approach to the fair use doctrine that is similar to Nimmer's functional test).

25. 239 F.2d 532 (9th Cir. 1956).

26. *Id.* at 537.

27. *Id.* at 533.

28. *Id.*

29. *Id.* at 534.

was a substantial taking, infringement exists."[30] This led many commentators to interpret *Benny* as rejecting fair use as a defense in parody cases.[31]

The Second Circuit took the opposite view in *Berlin v. E.C. Publications*,[32] where copyright owners of twenty five songs sued *Mad Magazine*, alleging that *Mad*'s publication of a parody of the plaintiffs' lyrics constituted an infringement.[33] The Second Circuit accepted the defendant's application of the fair use defense, thereby recognizing that parodies deserve fair use protection.[34] Since *Berlin*, the Second Circuit has consistently taken the position that parodies are an art form that should be encouraged, and therefore a parodist should be entitled to use an even greater portion of the copyrighted work than usual.[35]

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30. *Id.* at 537. *Compare* Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D.Cal. 1955) where Judge Carter, who also wrote the opinion in *Benny*, held that the burlesque *From Here to Obscurity* was a fair use. *See supra* note 52.

31. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[C] at 13-90.4-13-90.5 (1986).

32. 329 F.2d 541 (2nd Cir. 1964).

33. *Id.* at 542. For example, one parody changed the nostalgic ballad, "The Last Time I Saw Paris," to "The First Time I Saw Maris." *Id.* at 543.

34. *Id.* "We believe that parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." *Cf.* Leo Feist, Inc. v. Song Parodies, 146 F.2d 400 (2nd Cir. 1944), where the court held that the defendant's parodied lyrics that appeared in a song sheet magazine infringed on the plaintiff's copyright. *Id.* at 401. *Song Parodies* can be distinguished from *Berlin*, in that both the plaintiff's and defendant's work in *Song Parodies* appeared in song magazines, and therefore competed with each other.

35. *See Elsmere*, 623 F.2d at 253. "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." *Id.* at 253 n. 1. *See also* Warner Bros., Inc. v. American Broadcasting Co., 654 F.2d 204 (2nd Cir. 1981). Warner, owner of the exclusive rights to the character Superman, brought a copyright infringement action against the American Broadcasting Company (ABC) claiming that ABC's television series *The Greatest American Hero* was an infringement on its copyright. The television version was a parody of Superman. *Id.* at 206-07. While the court held that the defendant's use was a fair use, the Second Circuit drew back somewhat from its extremely liberal approach by questioning whether "the [parody] defense could be used to shield an entire work that is substantially similar to and in competition with the copyrighted work." *Id.* at 211. *See also* Pillsbury Co. v. Milkyway Productions, 215 U.S.P.Q. 124, 132, "The fact that the defendants used more than was necessary to accomplish the desired effect does not foreclose a finding of fair use." *Id. But cf.* MCA, Inc. v. Wilson, 677 F.2d 180 (2nd Cir. 1981). From January of 1974 until July of 1976 a musical entitled *Let My People Come* was performed Off-Broadway. One of the songs in the show called "Cunnilingus Champion of Company C" is a parody of the song "Boogie Woogie Bugle Boy of Company B." *Id.* at 181-82. Wilson, copyright owner of the song, brought a copyright infringement action. The court held that the defendants infringed on the plaintiff's copyright, and refused to accept their fair use defense. It reasoned that the defendant's

In 1978, the Ninth Circuit in *Walt Disney Productions v. Air Pirates*[36] finally acknowledged that parodies deserve fair use protection and are subject to the analysis in section 107.[37] *Air Pirates* involved an underground magazine that parodied Disney characters, Mickey Mouse, Goofy, Donald Duck, and others.[38]

The first issue which a court must consider in applying section 107 is whether a commercial use of a copyrighted work can nonetheless be considered a fair use.[39] This question was addressed by the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*[40] where producers of television programs brought a copyright infringement action against manufacturers of home video tape recorders.[41] The Supreme Court noted in dicta that "every commercial use of copyrighted work is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[42] The Court held that the defendant's use was not commercial and therefore a presumption of unfairness did not follow.[43] *Consumer Union of United States v. General Signal Corp.*[44] explained that a commercial use can still be a fair use.[45] In *Pillsbury Co. v. Milky Way Productions, Inc.*,[46]

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song was neither a parody of "Boogie Woogie Bugle Boy," nor a humorous commentary on the music of the 1940's. *Id.* at 185.

36. 581 F.2d 751 (9th Cir. 1978).

37. *Id.* at 756.

38. *Id.* at 753 n.5. The court found that the publisher's of AIR PIRATES FUNNIES had infringed the copyright of the plaintiff's since the work took more than was necessary to "conjure up" the satire. *Id.* at 758.

39. 17 U.S.C. § 107(1).

40. 464 U.S. 417 (1984).

41. *Id.* at 419-20.

42. *Id.* at 451. *See also Harper & Row, Publishers, Inc.*, 471 U.S. 539 (1985). The fact that the work is of a commercial nature "tends to weigh against a finding of fair use." *Id.* at 562. *See supra* note 62.

43. *Sony Corp.*, 464 U.S. at 419.

44. 724 F.2d 1044 (2nd Cir. 1983). The Second Circuit held that the district court erred in enjoining the defendant from broadcasting two television commercials that contained copyrighted material from the plaintiff's magazine CONSUMER REPORTS. *Id.* at 1046. The court held that the defendant's references to the plaintiff's magazine was a fair use. *Id.* at 1051.

45. *Id.* at 1049. *See also* Triangle Publications v. Knight Ridder Newspapers, 626 F.2d 1171 (5th Cir. 1980). Plaintiff, Triangle, was the publisher of TV GUIDE, a magazine with a listing of the week's television programs. The defendants were the publishers of the MIAMI HERALD newspaper. In order to promote a newly developed television section in the HERALD, the defendants published an advertisement with a cover of TV GUIDE next to a copy of the HERALD's new television section. *Id.* at 1172. Triangle sued the defendants claiming that their use of the TV GUIDE cover was an unauthorized use. *Id.* at 1173. The court disagreed with the plaintiffs and held that the defendant's use was a

the court held that a defendant can rebut the presumption against fair use by showing that the work is more in the nature of a social commentary, and that it does not unfairly diminish the economic value of the original.[47]

The second factor the courts must consider under section 107 is the nature of the copyrighted work.[48] If the work is considered a factual or informational work, then the scope of the fair use defense is much broader.[49] On the other hand, if the work is considered a creative piece, the scope of the fair use doctrine is narrowed.[50] In other words, courts are more likely to uphold the fair use defense when the copyrighted work is informational rather than creative.[51] The rationale is based on a policy of permitting biographers and historians to utilize copyrighted material in order to create historical works that the public can benefit from.[52]

The "conjure up" test was developed in *Columbia Pictures Corp. v. National Broadcasting Co.*[53] to address the third factor in section 107, the amount of the copyrighted work being utilized.[54] Eleven days after Columbia Pictures released a motion

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fair use, and thereby affirmed the district court's decision of denying Triangle's motion for an injunction. *Id.* at 1178. The court also made it clear that commercial motive is relevant but not decisive. *Id.* at 1175. *See also* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2nd Cir. 1966). Rosemont brought suit alleging that their copyright to an article they owned entitled *The Howard Hughes Story* was infringed upon by the defendant's book, HOWARD HUGHES-A BIOGRAPHY BY JOHN KRATS. *Id.* at 304. The Second Circuit held that the district court erred in granting a preliminary injunction in favor of the plaintiff. *Id.* at 311. The court stated that whether an author or publisher has a commercial motive is irrelevant to a determination of whether a particular use of copyrighted material constitutes a fair use. *Id.* at 307.

46. 215 U.S.P.Q. 124. Defendant Milky Way Productions, Inc. published a picture of figures resembling the plaintiff's trade characters, "Poppin Fresh" and "Poppie Fresh," engaged in sexual activities. *Id.* at 125-26. The court held that the defendant's unauthorized use of the material was protected by the fair use doctrine. *Id.* at 136.

47. *Id.* at 131. *See also* Harper & Row, Publishers, Inc., 471 U.S. at 592 (Brennan, J., dissenting), and 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A] at 13-70 (1986), "the fact that a given use is of a commercial nature does not necessarily negate a fair use determination." *Id.*

48. 17 U.S.C. § 107(2).

49. N. BOORSTYN, COPYRIGHT LAW, § 5:2(1981).

50. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A] at 13-77 (1986).

51. *Id.*

52. N. BOORSTYN, COPYRIGHT LAW, § 5:2(1981).

53. 137 F. Supp. 348 (S.D. Cal. 1955).

54. 17 U.S.C. § 107(3), "the amount and substantiality of the portion used in relation to the copyrighted work as a whole; . . . ."

picture entitled *From Here to Eternity* the National Broadcasting Company (NBC), without the consent of Columbia, televised a burlesqued version called *From Here to Obscurity*.[55] Columbia Pictures immediately brought suit for copyright infringement. The court held that NBC's use of *From Here to Eternity* was a fair use, and thus not an infringement of Columbia's copyright.[56] Additionally, the court held that "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."[57]

The Second Circuit utilized the "conjure up" test in *Berlin*, holding that a parodist may use as much of the original work as is necessary to "recall or conjure up" the object of his or her satire.[58] The Ninth Circuit adopted the "conjure up" test in *Air Pirates* allowing the taking of only enough material to "conjure up" the object of the satire.[59] In affirming the district court's finding of copyright infringement, *Air Pirates* held that a parodist will be denied the defense of fair use only if he or she has appropriated a greater amount of the original work than is necessary to recall the object of the satire.[60] Additionally, the court held that verbatim copying precludes fair use as a defense.[61] The Second Circuit in *Elsmere* took a slightly different view in holding that a parodist may take as much from the original as is necessary to achieve the parody's purpose including the "heart

55. 137 F. Supp. at 351-52.

56. *Id.* at 354.

57. *Id.* The court held that a burlesquer is entitled to a more extensive use of the original than in the creation of a drama. "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." *Id. Compare Benny*, 239 F.2d 532, where the Ninth Circuit held that Benny's burlesqued skit was not a fair use. *Benny* can be distinguished, since Benny took more of of the original than was necessary to "conjure up" the original. *See Berlin*, 329 F.2d at 544.

58. *Berlin*, 329 F.2d at 545. "[W]here 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." *Id.*

59. *Air Pirates*, 581 F.2d at 758.

60. *Id.* The court developed a balancing test weighing the rights of a copyright owner and the rights of others to use that material to make the best parody possible. The court stated that the "balance has been struck at giving the parodist what is necessary to conjure up the original," and no more. *Id.*

61. *Id.*

of the original composition."[62] The court made it clear that parodies deserve great leeway and protection,[63] because they constitute a unique form of social commentary and criticism.[64]

The economic impact on the original, the final consideration in section 107, has become the most important element in the fair use analysis.[65] Courts have developed a substitution test to analyze this factor and have generally found copyright infringement when the parody substitutes for the original and competes with it. A mere detrimental economic effect on the original is insufficient.[66] *Berlin* stated that as long as the defendant's work performs a different function from that of the original, the defense of fair use may be invoked.[67] On the other hand, when a parody commercially harms the original by performing a similar function in the same market, the social value of the use is probably outweighed by the economic detriment to the original, and therefore copyright infringement should be found.[68] In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[69] the Supreme Court found that *The Nation* magazine had infringed on Harper & Row's copyright by publishing an article on President Ford's memoirs[70] that Harper & Row had the exclusive rights to license.[71] The Supreme Court found that *The Nation* purposely

62. *Elsmere*, 623 F.2d at 253. "A parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use." *Id.*

63. *Id.* "Copyright law should be hospitable to the humor of parody." *Id.* "A parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." *Id.* at 253 n.1.

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

65. 17 U.S.C. § 107(4). *See Harper & Row, Publishers, Inc.*, 471 U.S. at 566, "This last factor is undoubtedly the single most important element of fair use." *Id. See* 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.05[A], at 13-79 (1986), "this emerges as the most important, and indeed central fair use factor." *Id. See* Triangle Publications v. Knight Ridder Newspapers, 626 F.2d 1171, 1175, "Courts have generally placed the most emphasis on the fourth factor."

66. *Triangle Publications*, 626 F.2d at 1175. "Clearly § 107 makes commercial motive relevant to fair use analysis. But it certainly is not decisive." *Id.*

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

68. 97 HARV. L. REV. at 1412. *See also Song Parodies*, 146 F.2d 400, where a commercial substitution prevented the fair use defense.

69. *Harper & Row Publishers, Inc.*, 471 U.S. 539 (1985).

70. *Id.* at 569.

71. *Id.* at 542. President Gerald Ford's unpublished memoirs were titled A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD. *Id.* THE NATION article was called *The Ford Memories - Behind The Nixon Pardon*. *Id.* The article was timed to be released shortly before TIME was supposed to release its article. *Id.* at 543. TIME had agreed to purchase from Harper & Row the exclusive right to print pre-publication excerpts from

intended to compete with the unpublished original[72] and thus denied *The Nation's* defense of fair use.[73]

## IV. THE COURT'S ANALYSIS

In *Fisher v. Dees*,[74] plaintiffs argued that Dees' parody did not deserve fair use protection for four reasons: They contended that the parody was not a parody of the composer's song;[75] that Dees acted in bad faith;[76] that the commercial use of the taking barred the fair use defense;[77] and the use was substantially more than necessary to "conjure up" the original.[78]

In arguing that the alleged parody was not actually a parody, or at least was not a parody of the original song,[79] the plaintiffs relied on *MCA, Inc. v. Wilson*,[80] where the court refused to allow the fair use defense because the alleged parody was not aimed at the original itself but was simply a parody of life in general.[81] After listening to both Dees' version and the original

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the books. *Id.* at 542.

72. *Id.* at 562.

73. *Id.* at 567-68.

74. 794 F.2d 432 (9th Cir. 1986).

75. *Id.* at 436.

76. *Id.* at 436-37.

77. *Id.* at 437.

78. *Id.* at 438. In addition, the plaintiffs asserted that the question of fair use was a jury question. The court disposed of this argument by citing *Harper & Row, Publishers, Inc.* v. Nation Enterprises, 471 U. S. 539, where the Supreme Court held that fair use was a mixed question of law and fact, and where the district court has enough facts to analyze the fair use factors, the appellate court may rule as a matter of law that the use is or is not a fair use. *Id.* at 560.

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

80. 677 F.2d 180 (2nd. Cir. 1981).

81. *Id.* at 185. *See also* Walt Disney Productions v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975), where the owners of the copyright to the "Mickey Mouse March" brought suit to prevent the use of their music in a film entitled *The Life & Times of The Happy Hooker. Id.* at 1397. The court held that the use of the original material was not protected by the fair use defense since the work was not a parody of the original. *Id. See also* Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc., 479 F. Supp. 351 (N.D.Ga. 1979). The owner of the copyright to Margaret Mitchell's GONE WITH THE WIND brought an infringement action against the owners, producers, and creators of *Scarlet Fever*, a musical production that parodied GONE WITH THE WIND. *Id.* at 354. The court refused to allow the fair use defense because the work was not a critical commentary of the original. *Id.* at 357. *Compare* Elsmere Music, Inc. v. National Broadcasting Company, 482 F. Supp. 741, 746, which stated that the issue was whether the use was a parody and not whether it was a parody of the original. *See also Wilson*, 677 F.2d 180. The dissent argued that the majority, under the guise of deciding a

as sung by Johnny Mathis, the *Fisher* court concluded that Dees' version was intended to poke fun at Johnny Mathis' voice, and therefore was a parody of the composer's song.[82] The plaintiffs also claimed that the parody was immoral, since it made reference to drug addiction, and therefore was unprotected by the fair use doctrine.[83] The court stated that though the parody may be silly, it surely was not immoral.[84]

The plaintiffs also asserted that Dees acted in bad faith, and therefore should not have been able to assert fair use as a defense.[85] Plaintiffs relied on *Time v. Bernard Geis Associates*[86] where the court stated that "fair use presupposes good faith and fair dealing."[87] Courts may weigh the "propriety of the defendant's conduct" in the equitable balance of a fair use determination.[88] The plaintiffs based their bad faith argument on the fact that Dees released the parody after Fisher had refused him permission to do so.[89] The court stated that this clearly did not constitute bad faith sufficient to negate the fair use defense.[90] Judge Sneed explained that parodists will rarely get permission from

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copyright issue, was acting as a censor and simply did not allow the fair use defense because the parody was of a pornographic nature. The dissent felt the fact that the defendant used obscene lyrics should be irrelevant. *Id.* at 191. *Compare* Pillsbury Co. v. Milkyway Productions, 215 U.S.P.Q. 124, 131, where the court stated that an obscene use may still be considered a fair use.

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

83. *Id.* at 437. Plaintiff's argument was based on the parody's opening lyrics: "When Sunny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434. Plaintiffs apparently were relying on Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Production, Inc., 479 F. Supp. 351 and *Wilson*, 677 F.2d 180 which held that the defendant's obscene uses were not a fair use.

84. *Fisher*, 794 F.2d at 437. Judge Sneed stated, "Assuming, without deciding, that an obscene use is not a fair use . . . we conclude, after listening to it, that the parody is innocuous-silly perhaps, but surely not obscene or immoral."

85. *Id.* at 436.

86. 293 F. Supp. 130 (S.D.N.Y. 1968). A complaint was filed by Time, Inc. claiming that the defendant had stolen a certain part of the plaintiff's film and used it in his book about the assassination of President Kennedy. The court held that the defendant's use was protected by the fair use doctrine. *Id.* at 146.

87. *Id.*

88. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A] at 13, 72-73 (1986). *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 562-63. *See also* Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc., 621 F.2d at 61, "The fair use defense is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public performance." *Id.* at 61.

89. *Fisher*, 794 F.2d at 437.

90. *Id.*

the original authors, since self-esteem is seldom so strong that an author will permit his work to be parodied, even in exchange for a reasonable fee.[91] The parody branch of the fair use doctrine exists precisely to make possible a use that cannot generally be purchased.[92]

Plaintiffs also contended that the commercial nature of "When Sunny Sniffs Glue" precluded a finding of fair use, based on 17 U.S.C. section 107(1).[93] The court agreed that this was a commercial use of the plaintiff's song and that a presumption against fair use must follow.[94] However, the court observed that defendants could rebut this by proving to the court that the parody did not diminish the economic value of the original.[95]

To determine whether Dees had rebutted this presumption, the court turned its attention to the fourth factor of the fair use analysis, the effect of the use upon the potential market for or value of the copyrighted work.[96] The court stated that in analyzing the economic effect of the parody, the parody's critical impact must be excluded.[97] However, if the parody fulfills the demand for the original, a finding of fair use would be improper.[98] In analyzing Dees' version the court declared that the parody did not unfairly diminish the economic value of the original.[99] It reasoned that since the two works are different, *i.e.*, the original, a romantic love song describing a woman's lost love, whereas

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91. Note *Parody Defense*, 97 HARV. L. REV. at 1397 n.12.

92. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[C] at 13-90.8 (1986). Nimmer observes that one of the justifications for the parody branch of the fair use defense, is the general impossibility of obtaining permission from an author to parody his work. "[T]he work itself by its very nature is unlikely to be the subject of a license from the author of a serious work." *Id.*

93. *Fisher*, 794 F.2d at 437.

94. *Id. See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451, "Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Id.*

95. *Fisher*, 794 F.2d at 437. Judge Sneed cited Pillsbury Co. v. Milkyway Productions,, 215 U.S.P.Q. 124, 131 n.9., where the court found that since there was no evidence that the plaintiff's work interfered with the market of the plaintiff's, the defendant can rebut the presumption that his work is commercially harmful to the original. *Id.* The court concluded that "it is more in the nature of an editorial or social commentary than it is an attempt to capitalize financially on the plaintiff's original work." *Id.*

96. *Fisher*, 794 F.2d at 437.

97. *Id.*

98. *Id.* at 438.

99. *Id.* "[T]he parody has no cognizable economic effect on the original." *Id.*

Dees' recording is a parody about a woman who sniffs glue, commercial substitution would be unlikely.[100] The court stated that it did not believe that a consumer desiring to listen to a romantic and nostalgic ballad such as the composer's song would purchase the parody instead.[101] Nor, concluded the court, were those fond of parody likely to consider "When Sunny Gets Blue" amusing.[102] The court concluded that since the two works do not fulfill the same demand, the parody did not have an unfair economic effect on the original.[103]

Plaintiffs' final argument was that defendants had taken substantially more than was reasonably necessary to "conjure up" the original in the mind of the audience.[104] The court based its analysis on the guidelines that were set forth in *Walt Disney Productions v. Air Pirates*: the degree of public recognition of the original work; the ease of "conjuring up" the original work in the chosen medium; and the focus of the parody.[105] Because a song is difficult to parody without near exact copying, the court declared that there is a special license for closer copying in that medium.[106] The court concluded, that in view of the musical medium, the parody took no more from the composer's song than was reasonably necessary to accomplish its purpose.[107] Even though the original could have been "conjured up" in the listener's mind by using less material from the original, the court held that that was no longer the test the Ninth Circuit would follow.[108] The court thus adopted the Second Circuit's standard in *Elsmere Music, Inc. v. National Broadcasting Company*, allowing a parodist to copy as much of the original as is reasona-

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100. *Id.* "When Sunny Gets Blue" is a "lyrical song concerning or relating to a woman's feelings about lost love and her chance for . . . happiness again." *Id.* "By contrast, the parody is a 29-second recording concerning a woman who sniffs glue, which ends with noise and laughter mixed into the song." *Id.*

101. *Id.* at 438.

102. *Id.*

103. *Id.*

104. *Id.* at 436.

105. *Id.* at 439.

106. *Id. See* Walt Disney Productions v. Air Pirates, 581 F.2d 751, 758.

107. *Fisher*, 794 F.2d at 439. The court utilized the balancing test set forth in *Air Pirates* of weighing the copyright owner's rights, and the parodist's desire to make the best parody possible. *Id.* Judge Sneed concluded, "We think the balance tips in the parodist's favor here." *Id.*

108. *Id.* The court stated that since the parody took no more from the original than was necessary to accomplish its parodic purpose, "When Sunny Sniffs Glue" is a parody deserving fair use protection. *Id.* at 439-40.

bly needed to achieve the purpose of the parody.[109]

## V. CRITIQUE

The decision by the Ninth Circuit that the parody "When Sunny Sniffs Glue" was a fair use of the original song, "When Sunny Gets Blue," is consistent with other cases both in the Ninth and Second Circuits.[110] Recent decisions have upheld the fair use defense, except where the work directly competed with the original,[111] was indecent or obscene,[112] or when the work was a verbatim copy of the original.[113] Even though Dees will benefit financially from the parody, his work clearly performed a different function and cannot be viewed as a substitute for the original. Dees' work was a comedic parody, while the original was a romantic love song. Therefore, most courts would agree that there was no bad faith commercial exploitation by Dees that directly competed with the original.[114]

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109. Elsmere Music, Inc. v. National Broadcasting Company,, 623 F.2d at 253. The *Elsmere* court stated that a "parody is entitled at least to "conjure up" the original." *Id.* at 253 n.1. *Elsmere* held that the parodist's copying and repetition of a four note phrase from the original, which it found to be the heart of the original composition, was not an excessive taking. *Id.*

110. *Elsmere*, 623 F.2d 252 (the use of the "heart of the original composition" was a fair use). Warner Bros., Inc. v. American Broadcasting Co., 654 F.2d 204 (held that the television series *The Greatest American Hero* was a parody deserving fair use protection). Berlin v. E.C. Publications, 329 F.2d 541 (stated that "parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.") *Id.* at 545.

111. *See*, Leo Feist, Inc. v. Song Parodies, 146 F.2d 400. (Defendant published and distributed song magazines that contained parodies of the plaintiff's copyrighted songs, which were also published in magazines. The court refused to allow the defendant to use the fair use defense). *Id.* at 400-01. *See also, Warner Bros., Inc.*, 654 F.2d 204. (The Second Circuit questioned the liberal approach of *Elsmere*. The court raised the question of whether the parody defense could be used to protect a work that competes with the original). *Id.* at 211.

112. *See* MCA. Inc. v. Wilson, 677 F.2d 180 where the court refused to accept the fair use defense to a parody that contained "dirty lyrics." *Id.* at 185. *See Air Pirates*, 581 F.2d 751, that held an adult magazine that parodied Disney characters had infringed on Disney's copyright. *See* Walt Disney Productions v. Mature Pictures Corp., 389 F. Supp. 1397, the parody, *The Life and Times of the Happy Hooker* was not a fair use of the original.

113. *See* Benny v. Loew's, Inc., 239 F.2d 532 (not a fair use since the defendant took more than was necessary to "conjure up" the original). *See Air Pirates*, 581 F.2d at 751 (held it was not a fair use when parody is a near-verbatim copy of the original).

114. *Compare Berlin*, 329 F.2d 541 (was a fair use of plaintiff's songs) with *Song Parodies*, 146 F.2d 400 (not a fair use, since both works were in the same market).

Secondly, although Dees' version copies the first six bars of the song, the Ninth Circuit explained in *Air Pirates*[115] that certain mediums deserve greater leeway allowing a parodist to copy more of the original work than usual.[116] When a parodist is working with music rather than graphics, for example, it is more difficult to revive the original in the minds of the audience without copying a good portion of the copyrighted work.[117] In *Fisher v. Dees,*[118] the court correctly concluded that in order to parody a song one should be allowed closer copying than other mediums.[119] This is consistent with the Second Circuit's decision in *Elsmere*[120] where the court upheld fair use as a defense despite the parodist's copying and repetition of a four note phrase from the original which the court found to be the "heart of the composition."[121]

And finally, though Dees' version may be seen as silly, with lyrics like, "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall," it definitely does not fall within the ambit of obscenity or immorality that will prevent the fair use doctrine from being invoked.[122]

The decision in *Fisher* represents a progressive expansion of the "fair use" doctrine. Though it is clear that Dees will benefit financially from his parody of the Fisher song, and the parody may discourage or discredit the original authors, parodies play an important role in social and literary criticism and thus merit protection.[123] "Parody in its purest form, is the art of creating a

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115. *Air Pirates*, 581 F.2d 751.

116. *Id.* "[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 speech, for instance, is parodied." *Id.*

117. Fisher v. Dees, 794 F.2d 432, 439. "Like speech, a song is difficult to parody effectively without exact or near-exact copying." *Id.* "This special need for accuracy provides some license for "closer" parody." *Id.*

118. *Id.* at 794 F.2d 432.

119. *Id.* "If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience." *Id.*

120. *Elsmere*, 623 F.2d 252.

121. *Id.* at 253. Judge Sneed stated that the facts in *Fisher* are similar to those in *Elsmere*. *Fisher*, 794 F.2d 439 n.5.

122. Though an obscene use can still be considered a fair use, *see Pillsbury*, 215 U.S.P.Q. 124-31, nonetheless, because of the great amount of discretion judges have in this area, most courts have failed to give fair use protection to obscene works. *See Air Pirates*, 581 F.2d 751, *Wilson*, 677 F.2d 180. *See supra* note 128.

123. *Parody Defense, supra* note 24, at 1411. *See* Berlin v. E.C. Publications, 329

new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original."[124] It is one of the oldest forms of literary expression, offering criticism, ridicule, and amusement.[125] A number of famous authors including William Shakespeare, Ernest Hemingway, James Joyce, Mark Twain, and James Thurber often used parody in their work.[126] The Second Circuit explained in *Berlin v. E.C. Publications,* that parodies deserve substantial freedom as a form of entertainment, and social and literary criticism. "As the readers of Cervantes' 'Don Quixote' and Swift's 'Gulliver's Travels,' or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest."[127] At times, parody can be more than just a form of entertainment, as it is often used in programs like *Saturday Night Live*, and syndicated comic strips such as Garry Trudeau's *Doonesbury* to express political views.

A parodist's job is to revive the original work in the minds of the audience. Depending on how the parodist does this will determine whether the fair use doctrine can be invoked. Though the proper decision was made in *Fisher*, a major problem exists with the fair use analysis. Because of the great discretion placed in the hands of the judiciary, courts have become a "board of censors" outlawing parodies that they personally find to be obscene or immoral.[128] The allegedly obscene or distasteful nature

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F.2d 541, 545. "[P]arody and satire are deserving substantial freedom-both as entertainment and as a form of social and literary criticism." *Id.* "Copyright law should be hospitable to the humor of parody." *Elsmere*, 623 F.2d at 253.

124. *Parody Defense, supra* note 91, at 1395.

125. *See* Note, *Requiem For A Parody*, 8 COMM/ENT L. J. 55 (1985) (The note briefs the significant parody cases and questions the great discretion the judiciary has in applying the fair use doctrine).

126. *Id.*

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

128. MCA v. Wilson, 677 F.2d 180, 191. Some examples of the court's censorship include: *Air Pirates*, 581 F.2d 751 (an adult magazine's use of Disney characters was not a fair use); Dallas Cowboys Cheerleaders v. Scoreboard Posters, 600 F.2d 1184 (5th Cir. 1979)(held that a partly nude poster that was a parody of the Dallas Cowboys' cheerleaders was not a fair use); Original Appalachian Artworks v. Topps Chewing Gum, 642 F. Supp. 1031 (N.D.Ga. 1986) (children's stickers that depicted the Cabbage Patch Dolls in a rude and violent setting was not a fair use); *Wilson*, 677 F.2d 180 (the court held that the defendant's parody which contained obscene lyrics was not a fair use); *Walt Disney Productions*, 389 F. Supp. 1397 (use of the "Mickey Mouse March" in a film titled *The Life & Times of The Happy Hooker* was not a fair use). *See also* Note, *Requiem For A Parody*, 8 COMM/ENT L. J. 55 (1985), *and Protection of Obscene Parody As Fair Use*, 4 THE ENTERTAINMENT AND SPORTS LAWYER 3 (1986). (Both articles address the

of a parody should be irrelevant to the ultimate question of fair use.[129] Yet, in many parody cases, infringement has been found largely because the parody was considered to be in bad taste.[130] For example, in *Original Appalachian Artworks v. Topps Chewing Gum*,[131] the manufacturers of Cabbage Patch dolls brought a copyright infringement action against Topps Chewing Gum, Inc. for manufacturing Garbage Pail Kids' stickers that depicted the likenesses of Cabbage Patch dolls in rude, violent, and distasteful settings.[132] On plaintiff's motion for a preliminary injunction, the court, under the guise of the four factors of section 107, found that Topps had infringed on the plaintiff's copyright, and that the defendant was not protected by the fair use defense.[133] The court's decision was based primarily on the fact that the defendant's work was of a commercial nature.[134] This seems inconsistent with other parody cases such as *Berlin*,[135] *Elsmere*,[136] and *Fisher*,[137] where the defendant's work was also of a commercial nature, and yet the court in those cases did not hesitate in finding a fair use.

It is time the Ninth Circuit adopted a liberal interpretation of section 107 with an approach similar to M. Nimmer's functional test.[138] The approach is simple: If the defendant's work performs a function different from that of the plaintiff then it is a fair use, regardless of how much of the original work is being used, and without regard to the fact that the parodist is benefiting commercially from the use.[139] In other words, if the parodied

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inconsistency of the courts in the area of parody, and their reluctance to find fair use when the parody is done in bad taste.)

129. *See Wilson*, 677 F.2d at 191 (Mansfield, J., dissenting).

130. Note *supra* note 128, at 55.

131. 642 F. Supp. 1031 (N.D.Ga. 1986).

132. *Id.* at 1032.

133. *Id.* at 1036. The court noted, "Here the primary purpose behind defendant's parody is not an effort to make a social comment but is an attempt to make money." *Id.* at 1034.

134. *Id.* at 1034. The court explained that *Topps* can be distinquished because there was a likelihood of harm to the original work. This argument is very weak since it is not likely that stickers depicting Cabbage Patch dolls will substitute for or hurt the potential market of the dolls.

135. Berlin v. E.C. Publications, 329 F.2d 541.

136. Elsmere Music, Inc. v. National Broadcasting Company, 623 F.2d 252.

137. Fisher v. Dees, 794 F.2d 432.

138. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[B] at 13-84-13-90.3 (1986).

139. *Id.* "But if regardless of medium, the defendant's work, although containing substantially similar material, performs a different function than that of plaintiff's, the

work does not substitute for the original, the defense of fair use may be invoked.[140] The fact that the defendant's work may be in bad taste would be irrelevant to a finding of fair use.

To illustrate the application of this new approach, let us turn our attention to the facts in *Fisher*. Considering that the original work was a romantic love song, and Dees' version was comedic parody, a court applying Nimmer's test would permit the fair use defense, since both works perform different functions. The analysis should end right there. To demonstrate further, in *Air Pirates*, the defendant admitted to copying Disney characters in his underground adult magazine *Air Pirate Funnies*.[141] Disney characters, known for their bright, smiling, innocent personalities were depicted as a rather bawdy, promiscuous group engaged in activities that clearly didn't fit within the innocent Disney image or theme.[142] Nonetheless, the graphic images of the characters were nearly identical to the Disney characters. The Ninth Circuit held that the taking by *Air Pirate Funnies* was more than was necessary to "conjure up" the original, and therefore the fair use defense could not be successfully invoked.[143] If the court in *Air Pirates* had employed a test similar to Nimmer's, the fair use doctrine would have been invoked, and the parody protected because *Air Pirate Funnies* is an adult magazine with a clearly different purpose and audience than Disney's. Someone interested in reading a Disney comic book would not turn to *Air Pirate Funnies* instead, and vice versa. Both publications perform different functions and have different markets. Therefore, the fair use defense should be permitted, even if there is near verbatim copying of the original.[144]

Though it seems unfair to authors of copyrighted work that courts may allow their material to be used without compensation, there is an even stronger public interest in allowing fair use of original material. Since most authors are not going to give permission for their work to be parodied, the fair use doctrine is

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defense of fair use may be invoked. *Id.* at § 13.05[B] at 13-86.

140. *See Berlin*, 329 F.2d 541, "[W]here as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original . . . a finding of infringement would be improper." *Id.*

141. Walt Disney Productions v. Air Pirates, 581 F.2d at 753.

142. *Id.*

143. *Id.* at 758.

144. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[B] at 13-86 (1986).

necessary to preserve parodies, and other types of critical literary work that are based on other people's original creations. Without fair use as a defense we would see a decline in this fine literary genre.

Though the parody branch of the fair use doctrine is considered by many commentators as liberal, I believe the Ninth Circuit should take it one step further. When a parody is not a direct commercial substitute for the original, the net social gain produced by the parody dictates a finding of fair use.[145]

## VI. CONCLUSION

In *Fisher v. Dees*, the Ninth Circuit properly permitted the defendant Dees to assert the fair use defense as a matter of law. This is a step in the right direction, thereby encouraging literary works that are based on other people's original creations. The Ninth Circuit has moved closer to adopting Nimmer's functional test, which would allow fair use as a defense in all cases except those where the parody and the original work perform the same literary function.

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145. Parody Defense. *supra* note 24, at 1412.

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