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Margaret E. Watson

ARTICLE

UNAUTHORIZED DIGITAL SAMPLING IN MUSICAL PARODY: A HAVEN IN THE FAIR USE DOCTRINE?*

MARGARET E. WATSON**

INTRODUCTION

. . . I don't believe you,
You're not the truth,
No one could look as good as you.[1]

The advent of digital technology[2] is a double-edged sword for the music industry. While sound can now be produced and recorded with great precision, the same technology also enables others, without authorization from the copyright owner, to reproduce or "digitally sample" a sound recording[3] and then incorporate the copied material into a new sound recording. The unauthorized reproduction of previously recorded sound constitutes copyright infringement under the Copyright Act of 1976.[4] In some

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** Associate, Shapiro, Israel & Weiner, P.C., Boston, Massachusetts; J.D., 1997 Western New England College School of Law; B.A., 1990 Bates College. The author gratefully acknowledges the assistance and patience of Rick Watson and Christine Wall, as well as the inspiration of Professor Amy Cohen.

1. Lyrics from the song *Oh, Pretty Woman* by Roy Orbison and William Dees. This song was parodied by the group 2 Live Crew in their song *Pretty Woman.* These songs were the focus of the United States Supreme Court's discussion of parody of musical works in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). See *infra* Part VI.C for a discussion of *Campbell.*

2. Digital technology in this Article involves the conversion of sound into numeric form. *See* discussion *infra* Part I.A.

3. Sound recordings, for the purposes of this Article, include compact discs, tapes, and phonorecords. *See* discussion *infra* Part II.A.

4. PUB. L. No. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101 (1994)).

circumstances, however, unauthorized use of a copyrighted sound recording may be considered "fair use"[5] and relieve the unauthorized user from a claim of copyright infringement.[6] To date, United States' courts have failed to consider unauthorized[7] digital sampling of a sound recording to be eligible for this "fair use" exception to a claim of copyright infringement.

A haven for digital samplers may exist, however, in the form of parody. Parody, by definition, imitates the style of another author or work for comic effect or ridicule[8] and has been an accepted art form for centuries.[9] If a copyrighted work is used for the purpose of creating a parody, any unauthorized use may be excepted from infringement under the fair use doctrine.[10] The fair use doctrine provides a basis for courts to allow liberal copying of musical works[11] if the unauthorized use was for a recognized purpose, such as parody.[12] Indeed, courts have expanded the allowance of unauthorized copying for use in parody, from *no more than necessary* to "conjure up" the original[13] to an amount that "'conjure[s] up' *at least enough* of [the] original to make the object of its critical wit recognizable."[14]

In contrast, the few decisions discussing the legitimacy of digital sampling of sound recordings have strictly opposed the prac-

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5. The doctrine of "fair use" as a defense to copyright infringement is codified under 17 U.S.C. § 107 (1994). *See* discussion *infra* Part IV.A.

6. Infringement of a copyright owner's exclusive right of reproduction of sound recordings is governed by 17 U.S.C. § 501 (1994). *See* discussion *infra* Part II.B.

7. For the purposes of this Article, "digital sampling" signifies unauthorized use of a previously recorded sound recording, except where indicated.

8. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 857 (1991); *see also* 14 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 239 (Stanley Sadie ed., 1980) (defining "parody" as "[a] composition generally of humorous or satirical intent in which turns of phrase or other features characteristic of another composer or type of composition are employed and made to appear ridiculous, especially through their application to ludicrously inappropriate subjects").

9. *See* Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 923 (1985) (noting examples of satire include Horace, Voltaire, Rabelais, Swift, Shakespeare, Mencken, Orwell, Woody Allen, and the writers of *Mad Magazine*).

10. The fair use doctrine is codified in 17 U.S.C. § 107 (1994). *See* discussion *infra* Part IV.A.

11. "Musical works" includes the lyrics and arrangement of a musical composition. *See* discussion *infra* Part II.A.

12. *See* discussion *infra* Part IV.B.

13. *See* Columbia Pictures Corp. v. National Broad. Co., 137 F. Supp. 348, 350-51 (S.D. Cal. 1955) (emphasis added).

14. Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 588 (1994) (emphasis added).

tice,[15] despite the fact that the Copyright Act does not explicitly prohibit "digital sampling."[16] Indeed, it has been argued that the case law on digital sampling "'hasn't resolved any of the issues that everybody's been waiting for,' like fair use, parody, or the use of an indistinct sample."[17] Tension therefore exists between the liberal application of the fair use doctrine to musical works of parody and the strict prohibition on digital sampling of sound recordings.

In the first United States Supreme Court case to examine a parody of a sound recording, *Campbell v. Acuff-Rose Music, Inc.*,[18] the Supreme Court considered the unauthorized use of the first line of the lyrics from the copyrighted Roy Orbison song *Oh, Pretty Woman*[19] by the musical group 2 Live Crew to be fair use.[20] Unfortunately, the Supreme Court expressed no opinion on whether the alleged copying of the musical arrangement or the speculated digital sampling of the sound recording constituted fair use.[21] The failure of the United States Supreme Court to directly address the lawfulness of digital sampling of sound recordings, especially where the sample was used in parody, has left parodists without a bright line as to what constitutes "allowable" infringement of sound recordings.

The basis of both parody and digital sampling is the recognition of one work within another work. It is this reliance of both parody and digital sampling on association with other works which lends support to the argument that digital sampling should be afforded the same legal treatment as works of parody.[22] If the liberal

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15. *See, e.g.*, Jarvis v. A&M Records, 827 F. Supp. 282 (D.N.J. 1993); Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991); *see also* Damiano v. Sony Music Entertainment, Inc., 975 F. Supp. 623 (D.N.J. 1996) (involving, but not discussing, the court's position on digital sampling).

16. *See* Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet? Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 234 (1993) (stating that the Copyright Act is "ill-equipped to deal effectively with digital sampling").

17. Michael L. Baroni, Comment, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 90 (1993) (quoting John Leland, *The Moper vs. The Rapper; At Lawsuit, Naturally*, NEWSWEEK, Jan. 6, 1992, at 55).

18. 510 U.S. 569 (1994).

19. 2 LIVE CREW, *Pretty Woman, on* AS CLEAN AS THEY WANNA BE (Skyywalker Records 1989).

20. *See Campbell*, 510 U.S. at 589.

21. *See id.* The Supreme Court remanded for evaluation the amount of music taken. *See infra* Part VI.C for further discussion.

22. *See* Kravis, *supra* note 16, at 255 (quoting entertainment lawyer Ken Anderson). Anderson stated:

copying of musical works in parody allowed under the fair use doctrine is extended to allow digital sampling in parody, then the tension between fair use and infringement of sound recordings used for parody may be reduced. However, until the courts either acknowledge or specifically prohibit digital sampling in musical parody, musical parodists may be at a loss for music.

Part I of this Article introduces the mechanics of the digital sampling process and explains the growth of unauthorized digital sampling in the music industry. Part II outlines copyright law with regard to musical works and sound recordings and describes the vagueness in the language of the Copyright Act with regard to sound recordings and digital sampling. Part III examines the harsh treatment of digital sampling by the courts. Part IV outlines the fair use exception to infringement as well as the application of fair use to works of parody. Part V analyzes the treatment of works of parody prior to the fair use doctrine as well as examines the courts' treatment of musical works of parody. Part VI discusses the United States Supreme Court's decision in *Campbell* and the impact of this decision on the future of musical parody. Finally, Part VII argues that digital sampling for the limited use of parody is an appropriate application of the fair use doctrine.

I. INTRODUCTION TO DIGITAL SAMPLING

A. *The Digital Sampling Process*

Digital sampling is a process whereby one can record, store, and manipulate any sound from a previous recording of the sound in digital form.[23] In the music industry, digital sampling is used primarily to isolate unique vocal and instrumental sounds in an existing sound recording for use, either lawfully or unlawfully, in another sound recording.[24]

> A comedian parodying something pre-existing—a book, a movie or someone's life—has got to make a reference to it for the parody to work. If copyright law prevented that, it would be destroying a form of creative art and that would not be in keeping with the purpose of the copyright law. The same principle applies to the way certain rap composers intentionally refer to prior recordings.

Id. at 255 n.151 (citing Sheila Rule, *Record Companies Are Challenging 'Sampling' in Rap*, N.Y. TIMES, Apr. 21, 1992, at C18).

23. *See* Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 147; *see also* Baroni, *supra* note 17, at 65.

24. *See* Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 880 (1992).

Natural sound is created by variations in air pressure.[25] These variations are represented in graphic form in a waveform based on the rate of vibration of the sound (frequency) and the intensity of the vibration (amplitude).[26] A sound wave is thus the graphic representation of changes in amplitude over the length of the frequency.[27] Until recently, sound recordings were made only in waveform or "analog" form,[28] where sound was captured through a microphone and recorded directly into the recording medium.[29] In contrast, digital recording[30] translates the analog sound into evenly spaced intervals or samples, which are given a binary code and recorded directly into a sampling keyboard or digital sampler.[31] Once recorded on digital tape, the binary code can be exactly reproduced in whole or in part through the use of a digital-to-analog converter.[32] As there is virtually no distinction to the human ear between the original and the digitally sampled copy, sampling has been deemed "exact copying."[33] The digitally recorded sound can also be altered by rearranging the binary code in order to change the pitch, duration or sequence of the sound, or combining the sample with other recorded sounds.[34] It is this process of alteration of previously recorded music that has been the focus of the majority of digital sampling disputes.

When a digital sample of a copyrighted sound recording is made, two copyrightable works may be copied: 1) the underlying musical composition, consisting of the lyrics and musical arrangement (the "musical work"), and 2) the sound recording (the re-

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25. See Thomas D. Arn, *Digital Sampling and Signature Sound: Protection Under Copyright and Non-Copyright Law*, 6 U. MIAMI ENT. & SPORTS L. REV. 61, 64 (1989).

26. *See* McGraw, *supra* note 23, at 148.

27. *See id.*; *see also* A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 138 (1993).

28. Analog represents a variable property of electricity including voltage, current, and amplitude or frequency of waves or pulses. *See* G. MCWHORTER, UNDERSTANDING DIGITAL ELECTRONICS 241 (2d ed. 1984).

29. Digital samples may also be made from live recorded sessions, although such use of these samples is primarily for authorized use. *See id.*

30. Digital information is represented in binary unity or "bits." *See id.*

31. *See* Baroni, *supra* note 17, at 68; *see also* Ronald M. Wells, Comment, *You Can't Always Get What You Want, But Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691, 699 (1989).

32. *See* McGraw, *supra* note 23, at 149.

33. Baroni, *supra* note 17, at 69.

34. *See* Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y.L.J., May 22, 1992, at 5.

corded performance of the musical work).[35] Therefore, when a digital sample is made without the authorization of the owner of these copyrights, both the underlying musical work and the sound recording may be infringed.[36]

B. *The Growth of Unauthorized Digital Sampling*

Digital sampling began in the 1960's when disc jockeys in Jamaica mixed Jamaican and non-Jamaican records into a single musical work or "dub."[37] Disc jockeys in the United States began sampling in the Bronx, New York in the 1980's by piecing together different sounds in rap[38] music to enhance dance music.[39] The use of samples of previously recorded sound enabled these disc jockeys to enhance a sound recording without having to pay studio musicians to lawfully imitate the desired sound.[40] Indeed, it is argued that digital sampling reproduces "commercially successful sound" better than studio musicians.[41] Today, with or without authorization from the copyright owner, digital sampling is common in both rap and pop music, and disc jockeys and recording artists alike use

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35. *See* 17 U.S.C. § 102 (1994).

36. *See id.* § 501. See *infra* Part II.B for a discussion of infringement of exclusive rights of copyrighted works and sound recordings. Not only may infringement be found for reproduction of the musical work and the sound recording, but also for preparation of "derivative works" (*see infra* note 53) based on the underlying musical work and/or sound recording. *See* 17 U.S.C. § 106(2) (1994).

37. *See* David Sanjek, *Don't Have to DJ No More: Sampling and the Autonomous Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 610-11 (1992) (stating that mobile discotheques encouraged competition and dubbing); *see also* Kravis, *supra* note 16, at 238 n.40.

38. Rap has been defined as a "style of black popular music consisting of improvised rhymes performed to a rhythmic accompaniment." 4 THE NEW GROVE DICTIONARY OF AMERICAN MUSIC 10 (H. Wiley Hitchcock & Stanley Sadie eds., 1986).

39. *See* Baroni, *supra* note 17, at 70. Digital sampling was first made possible through the use of the Musical Instrument Digital Interface ("MIDI") synthesizer, introduced in 1981. As prices of synthesizers decreased in the mid-1980's, the price of sampling equipment decreased. *See* Kravis, *supra* note 16, at 239.

40. Under the Copyright Act, duplication of sound by imitation (as opposed to direct or indirect copying) is not considered infringement. *See* 17 U.S.C. § 114(b) (1994). The issue of keyboard-generated sounds replacing studio musicians is not new, as Mellotrons (machine containing tape loop of recorded sound, activated by a key) and synthesizers began replacing musicians in the 1960's. *See* E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273, 274 (1987); *see also* Johnson, *supra* note 27, at 140 (arguing that musicians have not been replaced by samples because samplers cannot replicate the style and technique of a musician).

41. *See* Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1726 (1987).

unauthorized digital samples to enhance music.[42]

Conflicts over unauthorized use of digital samples are usually prevented through a license agreement between the owner of the copyrighted sound recording and the person(s) desiring to use the sample.[43] As licensing agreements are the preferred method of handling digital samples in the music industry,[44] few conflicts arise between copyright owners and samplers.[45] However, the licensing process may be lengthy, as a list of samples to be included in a sound recording must be compiled, the owner of the copyright to the sound recording and/or composition must be determined, and then permission to use the samples must be negotiated with the copyright owners.[46] Moreover, the economics of obtaining an authorized sample may also prevent a recording artist from obtaining a license. Since digital sample licenses range from $250 up to $10,000,[47] the potentially high cost of licensing samples makes unauthorized sampling attractive. As copyright owners have the right to refuse to grant a license,[48] thwarted samplers may proceed to use the sample without authorization and risk suit. In order to use the desired sound, but avoid recognition that it was copied, the sample may be further altered from its original version.[49]

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42. *See* John Leland, *The Moper vs. The Rapper; At Lawsuit, Naturally*, NEWSWEEK, Jan. 6, 1992, at 55.

43. *See* Jeffrey H. Brown, Comment, *"They Don't Make Music the Way They Used To": The Legal Implications of "Sampling" in Contemporary Music*, 1992 WIS. L. REV. 1941, 1956 (1992). Licensing compositions can take the form of three types of agreements: 1) "flat-fee buyout" agreement; 2) adjusted mechanical license fee, where a sum is paid for each record sold; and 3) co-publishing, where the owner shares a legal/financial interest in the copyright of the new work. *See id.*; *see also* Ruth E. Bernstein, *Negotiating Sampling Licenses*, ENT. L. & FIN., Nov. 1991, at 1.

44. The alternative to a license is the sharing of writing credits with the authors of the composition. However, where writing credits are given when the copyright owner has not given authorization for the use, infringement suits may still occur. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).

45. *See* Johnson, *supra* note 27, at 164 (stating that the music industry has a system of pro forma licensing prior to use in a new work).

46. *See* Carl A. Falstrom, Note, *Thou Shalt Not Steal:* Grand Upright Music, Ltd. v. Warner Bros. Records, Inc. *and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 361 (1994).

47. *See* Robert G. Sugarman & Joseph P. Salvo, *Sampling Gives Law a New Mix; Whose Rights?*, NAT'L L.J., Nov. 11, 1991, at 21, 22.

48. Copyright owners may refuse to grant a license for use of part of a sound recording, in contrast to a compulsory license, which is simply another interpretation of the original. *See* discussion *infra* Part II.A.

49. *See* Charisse Jones, *Haven't I Heard that "Whoop" (or "Hoop") Somewhere Before?*, N.Y. TIMES, Dec. 22, 1996, at H44. Whether or not such substantial alteration to a copyrighted sound recording constitutes infringement is an issue of debate. *See* United States v. Taxe, 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd in part, vacated in part*,

II. THE COPYRIGHT ACT AND DIGITAL SAMPLING

A. *Exclusive Rights in Musical Works and Sound Recordings*

Copyright protection for musical works and sound recordings stems from the power given to Congress "[t]o promote the Progress of Science and useful Arts."[50] The protection envisioned in the Constitution for these works was subsequently incorporated by Congress into law under the Copyright Act.[51] Today, both musical works and sound recordings receive some protection under § 102(a) of the Copyright Act of 1976.[52] However, the problems created by the introduction of digital sampling of sound recordings have no obvious solution in the language of the Copyright Act.

Under § 106 of the Copyright Act, copyright owners have certain exclusive rights including the right "to reproduce the copyrighted work in copies or phonorecords" and the right "to prepare derivative works[53] based upon the copyrighted work."[54] Violation of either of these exclusive rights constitutes copyright infringement under § 501(a) of the Copyright Act.[55] However, if the copyrighted work is a sound recording,[56] the exclusive right to reproduce the

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540 F.2d 961 (9th Cir. 1976); *see also* Gregory Albright, *Digital Sound Sampling and the Copyright Act of 1976: Are Isolated Sounds Protected?*, 38 COPYRIGHT L. SYMP. (ASCAP) 47 (1992).

50. U.S. CONST. art. I, § 8, cl. 8.

51. *See* 17 U.S.C. §§ 101-1101 (1994). The first Congressional Act regarding copyright was in 1790 (enacted May 31, 1790, chapter 15, 1 Stat. 124). In 1909, Congress enacted chapter 320, 35 Stat. 1075, known as the Copyright Act. The last major revision of the Copyright Act was in 1976. *See supra* note 4.

52. 17 U.S.C. § 102(a) (1994) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories . . . musical works, including any accompanying words, [and] . . . sound recordings."); *see also* H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stating that Congress did "not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent").

53. A derivative work is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, sound recording . . . or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1994).

54. *Id.* § 106.

55. *See id.* § 501(a). The remedies for infringement include injunctions, impounding and disposal of infringing materials, recovery of damages and profits, recovery of costs and attorneys fees, as well as possible criminal penalties. *See id.* §§ 502-06.

56. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material ob-

work and to prepare derivative works are limited to use of *actual* sound, as opposed to imitated sound.[57]

Under § 114(b) of the Copyright Act, the right to reproduce the work under § 106 is limited to "the right to duplicate the sound recording in the form of phonorecords . . . that directly or indirectly recapture the *actual* sounds fixed[58] in the recording."[59] The right to prepare derivative works under § 106 is also limited under § 114(b) to "the right to prepare a derivative work in which the *actual* sounds fixed in the sound recording are rearranged, mixed, or otherwise altered in sequence or quality."[60] As digital sampling involves the copying of pre-recorded or "actual" sound, unauthorized digital sampling is considered a violation of the right of reproduction of sound recordings under § 114(b). In addition, digital sampling may also alter the pre-recorded sound for placement in another sound recording, thereby constituting a violation of the right to prepare derivative works of sound recordings under § 114(b). The focus of much of the controversy over digital sampling is where sound is so altered that it can hardly be considered the "actual" sound recaptured from the original sound recording.[61]

The limitation of § 114(b) to the reproduction of actual sound in a sound recording does not prevent the *imitation* of the recording by other artists.[62] Imitation of a sound recording, known as a "cover version," is an allowable use of the copyrighted work, provided that the cover version does "not change the basic melody or fundamental character of the work"[63] and complies with the statutory notice and royalty provisions[64] under the compulsory license

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jects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.* § 101.

57. *See id.* § 114(b).

58. A work is "fixed" when its embodiment in a sound recording "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* § 101.

59. *Id.* § 114(b) (emphasis added).

60. *Id.* (emphasis added).

61. *See* Kravis, *supra* note 16, at 250-51; *see also* Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 573-74 (1992) (arguing that digital sampler machines can create unique interpretations of sound, but does not constitute actual sound from the original recording).

62. *See* H.R. Rep. No. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (stating that statutory protection for sound recordings extends only to recorded sounds and does not prevent the recording of a separate performance in which sounds are imitated).

63. 17 U.S.C. § 115(a)(2) (1994); *see also* Falstrom, *supra* note 46, at 376 n.4.

64. The statutory fee for re-recording rights is established by the Royalty Tribunal

provisions of § 115(b) and (c).[65] The compulsory licensing provisions of § 115 were created by Congress in order to reach a compromise between the competing interests of copyright owners and those desiring to imitate a musical composition that has previously been reproduced in phonorecords.[66] While Congress has determined that imitation of a song is allowable use under § 115, reproduction of actual sound from the sound recording has not been subject to the same compulsory licensing provision.[67]

B. *Infringement of Exclusive Rights*

In order to make out a prima facie case of copyright infringement for violation of the exclusive rights under § 106 (for all copyrighted works) or § 114 (for sound recordings) of the Copyright Act, a plaintiff must prove: 1) ownership of a valid copyright in an original work; and, 2) unauthorized reproduction of the original elements of the copyrighted work.[68] Unauthorized reproduction may be shown by evidence that the defendant had access to the work and that the works are substantially similar.[69] Copying also may be shown by direct evidence.[70] In infringement of musical compositions and arrangements, the test of substantial similarity examines similarities between copyrightable elements in songs, namely words, lyrical structures, and music.[71]

The issue of substantial similarity is of central importance in

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and revised biannually in relationship to the Consumer Price Index. *See* 37 C.F.R. § 201.19 (1998) (establishing the current rate of 5.7 cents per song or 1.1 cents per minute, whichever is greater); *see also* Brown, *supra* note 43, at 1951 n.49.

65. *See* 17 U.S.C. § 115(b), (c) (1994 & Supp. III 1997).

66. *See* Kravis, *supra* note 16, at 243.

67. *See id.* at 273 (arguing that Congress should institute a similar compulsory licensing provision for digital sampling).

68. *See* Twin Peaks Prods., Inc. v. Publications Int'l., Ltd., 996 F.2d 1366, 1372 (2d Cir. 1993).

69. Substantial similarity has not been specifically defined in the Copyright Act. Substantial similarity uses the "ordinary observer" test to determine whether the allegedly infringing work is so similar to the original work that the ordinary reasonable person would conclude that the defendant unlawfully appropriated material of substance and value from the plaintiff's protectable expression. *See* National Risk Management, Inc. v. Bramwell, 819 F. Supp. 417, 427-29 (E.D. Pa. 1993).

70. *See* Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280 (10th Cir. 1996); *see also* Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 184 (finding that evidence of direct copying existed in the form of a letter admitting actual copying of a musical composition).

71. *See* Black v. Gosdin, 740 F. Supp. 1288 (M.D. Tenn. 1990) (finding no substantial similarity where songs used different words and lyrical structures); Broadcast Music Inc. v. Moor-law, Inc., 484 F. Supp. 357, 363 (D.C. Del. 1980) (finding the focus in substantial similarity should be placed on music and lyrics taken together).

digital sampling cases as the resulting new sound recording, after alteration of the sample, may no longer be considered substantially similar to the original.[72] Indeed, a violation of exclusive rights under § 114(b) may be harder to prove where the original may no longer be recognizable.[73] Infringement in digital sampling cases is therefore shown by closely examining elements of the original sound recording and the allegedly infringing sound recording and comparing tempo, pitch, key, and instrumentation.[74]

C. *The Digital Sampling Controversy: How Much is Used?*

One controversial issue of digital sampling involves how much of a copyrighted sound recording is used. Congress noted that a violation of the exclusive rights in sound recordings would occur "whenever *all or a substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method . . . ."[75] It may be argued, therefore, that when a copyrighted sound recording is unlawfully duplicated, but not "all or a substantial portion" is taken, no violation of exclusive rights has occurred.[76] The legislative history of § 114 and its predecessor, the Sound Recording Act of 1971,[77] indicates that Congress intended to control widespread record piracy, where an *entire* sound recording was copied without authorization from the copyright owner and then mass-produced.[78] The ultimate issue with record

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72. *See* Johnson, *supra* note 40, at 292 (stating that courts have conceded that a defendant may avoid infringement by "intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of the plaintiffs"); *see also* Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 501 (2d Cir. 1982); Warner Bros., Inc. v. American Broad. Cos., 654 F.2d 204, 210 (2d Cir. 1981), *aff'd,* 720 F.2d 231, 241 (2d Cir. 1983); Durham Indus. Inc., Inv. v. Tomy Corp., 630 F.2d 905, 913 n.11 (2d Cir. 1980); Original Appalachian Artworks, Inc. v. Blue Box Factory, Ltd., 577 F. Supp. 625, 631 (S.D.N.Y. 1983).

73. Duplication of actual sound is not per se a violation of § 114(b); the allegedly infringing work must still be found to be substantially similar to the original. *See* Johnson, *supra* note 40, at 289; *see also* McGiverin, *supra* note 41, at 1734 ("To prove substantial similarity, the plaintiff must at the very least show that the sampled sounds as used in the defendant's recording are 'recognizable as the same performance' . . . .").

74. *See* Finell, *supra* note 34, at 5.

75. H.R. REP. NO. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added).

76. *See* Kravis, *supra* note 16, at 251 (stating that the substantial similarity test suggests that some actual unauthorized use of a copyrighted song may not constitute infringement).

77. Pub. L. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 114 (1994)).

78. *See* H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1577; *see also* Agee v. Paramount Communications, 853 F. Supp 778 (S.D.N.Y. 1994), *aff'd in*

piracy was that profits were being diverted from the copyright owner.[79]

In contrast, digital sampling usually only incorporates *part* of one sound recording into another sound recording.[80] As Congress seemingly only envisioned unauthorized copying of entire sound recordings, as opposed to copying of only part of a recording, it may be argued that § 114(b) does not apply to digital sampling if the two works are not competing and therefore profits from the original copyrighted work are not diverted from the copyright owner.[81]

D. *The Copyright Act and Re-Recording of Sound*

Before the proliferation of digital sampling of part of a sound recording, unauthorized re-recordings of *entire* sound recordings created issues analogous to digital sampling.[82] In *United States v. Taxe,*[83] the defendants re-recorded entire eight-track stereo tape recordings of major record labels, mechanically altered them, and compiled the altered music into a new work.[84] *Taxe* was the first criminal prosecution to reach a jury[85] under the 1971 Sound Recording Amendment to the Copyright Act.[86] The decision in *Taxe*, which outlined the jury instructions given at trial, revealed the failure of the Copyright Act to address such issues as the legal effect of alteration of a copyrighted work as well as the re-recording of only part of a copyrighted work.

In its opinion, the United States District Court for the Central District of California first considered whether trivial re-recording (one or two notes) is considered infringement.[87] On this issue, the

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part, rev'd in part, 59 F.3d 317 (2d Cir. 1995); United States v. Taxe, 380 F. Supp. 1010, 1014 (C.D. Cal. 1974), *aff'd*, 540 F.2d 961 (9th Cir. 1976).

79. *See* Falstrom, *supra* note 46, at 370-71.

80. *See id.* at 371.

81. *See* Johnson, *supra* note 40, at 294 ("[I]t is unlikely that there will be enough musical similarity between defendant's work and the original work to fulfill the marketplace demand for the original.").

82. *See* Jarvis v. A&M Records, 827 F. Supp. 282, 286 (D.N.J. 1993) ("[D]igital sampling is similar to taping the original composition and reusing it in another context.").

83. 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd*, 540 F.2d 961 (9th Cir. 1976).

84. *See id.* at 1012. Alterations to the original tapes included "speeding up, slowing down, deletion of certain frequencies or tones, and addition of echoes or mood synthesizers." *See id.*

85. *See id.* at 1013. The defendants were convicted of conspiracy to violate the Copyright Act, copyright infringement, and mail fraud. *See id.* at 1012.

86. The court noted that the intent of this Amendment was to put record "pirates," who simply re-record works, out of business. *See Taxe*, 380 F. Supp at 1014.

87. *See id.* at 1014. While the court stated that in a civil case no further finding

court decided that such insubstantial taking was not considered infringement and instructed the jury that to constitute infringement, the re-recording must have copied "more than a trivial part of the copyrighted record."[88] Thus, *Taxe* has been interpreted as allowing de minimis copying of sound recordings.[89]

The second issue raised by the defendants concerned whether alterations to the re-recorded works, which are so comprehensive that the work is no longer recognizable, constitute infringement.[90] In response, the court instructed that in order to constitute infringement, the altered re-recordings must be "recognizable as the same performance" as in the originals.[91] The court noted the lack of guidance on this issue in the Copyright Act, but stated that such alteration might be "so far from what Congress intended to prohibit as to not constitute an infringement."[92] It may also be argued, therefore, that *Taxe* opened the door for unauthorized digital sampling where the original sound recording is so altered in the new recording that the original is no longer recognizable.

III. THE REACTION OF THE COURTS TO DIGITAL SAMPLING

The only two cases discussing digital sampling at length have not been considered beyond the United States district court level.[93] While these decisions admonished digital sampling, they did not involve digital sampling for a specific purpose, such as parody.

A. *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*

In December of 1991, the United States District Court for the

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beyond re-recording would be necessary, the court construed the statutes narrowly, due to the criminal nature of the case. *See id.*

88. *Id.* at 1014-15.

89. *See* Kravis, *supra* note 16, at 253; Jason H. Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 777 (1991).

90. *See* Taxe, 380 F. Supp. at 1014.

91. *See id.* at 1015. It has been suggested that this is the wrong standard, as copyright law does not protect the "performance" but the "musical, spoken, or other sounds fixed in the sound recording." Albright, *supra* note 49, at 84.

92. *Taxe*, 380 F. Supp. at 1014. The court initially stated that "as long as the allegedly infringing work is a product of re-recording, rather than an independent production, an infringement exists" regardless of alterations to the re-recording. *Id.*

93. *See, e.g.*, Jarvis v. A&M Records, 827 F. Supp. 282 (D.N.J. 1993); Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991); *see also* Damiano v. Sony Music Entertainment, Inc., 975 F. Supp. 623 (D.N.J. 1996) (granting defendants' motion for summary judgment on infringement of musical composition and sound recording claims, but not discussing the court's position on digital sampling).

Southern District of New York decided the first case of infringement involving digital sampling, *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*[94] This case dealt with the copyright to the musical composition and 1972 pop hit *Alone Again (Naturally)*,[95] composed by Raymond "Gilbert" O'Sullivan, and owned by plaintiff music publisher Grand Upright Music, Ltd.[96] Counsel for rap artist Biz Markie wrote to O'Sullivan's agent and requested consent to use the copyrighted song on his new album, but no consent to use the copyrighted song was ever obtained.[97] Nonetheless, Biz Markie recorded the album *I Need a Haircut* on the Warner Brothers label, which included a track entitled *Alone Again*.[98] The Biz Markie track used variations of the lyric refrain "alone again, naturally" from the original musical composition.[99]

More importantly, Biz Markie digitally sampled eight bars of music comprising approximately ten minutes, which was repeated throughout his song.[100] The only other music that was used was a single repeated drum beat that was added to the rap lyrics.[101] As neither Biz Markie nor Warner Brothers obtained a license for use of the original work prior to its use in the track *Alone Again,* Grand Upright sued for a preliminary injunction based on the infringement of its musical composition and sound recording.[102]

With its admonition from the Seventh Commandment, "Thou Shalt Not Steal,"[103] the United States District Court for the Southern District of New York established that digital sampling consti-

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94. 780 F. Supp. 182 (S.D.N.Y. 1991).

95. GILBERT O'SULLIVAN, *Alone Again, on* NATURALLY (MAM Music 1972).

96. *See Grand Upright Music, Ltd.*, 780 F. Supp. at 183.

97. *See id.* at 184.

98. BIZ MARKIE, *Alone Again*, *on* I NEED A HAIRCUT (Cold Chillin'/Warner Bros. Records 1991).

99. *See Grand Upright Music, Ltd.*, 780 F. Supp at 183.

100. *See id.*; *see also* Sugarman & Salvo, *supra* note 47, at 34.

101. *See* Falstrom, *supra* note 46, at 369 ("Without use of the sample, there would have been no music at all.").

102. *See Grand Upright Music, Ltd.*, 780 F. Supp. at 183. Since defendants admitted to the copying, the opinion focused primarily on the question of whether the plaintiff owned the copyright to the musical composition. As evidence of ownership, the court noted defendants' counsel's request to the plaintiff for consent to use the work, indicating that the defendants knew they had an obligation to obtain a license from the plaintiff before using the copyrighted work. *See id.* at 185. It has been argued that consideration of such evidence will "discourage artists from sending consent letters to copyright owners," lest they serve as "smoking guns." *See* Johnson, *supra* note 27, at 162.

103. *See Grand Upright Music, Ltd.*, 780 F. Supp at 183 (quoting *Exodus* 20:15).

tutes a "callous disregard for the law."[104] In contrast, the defendants argued that they should be excused from liability in this case because others in the rap music business also used copyrighted material without first gaining consent.[105] The district court found this argument to be "totally specious"[106] and stated that the only aim of the defendants in using the copyrighted material was "to sell thousands upon thousands of records."[107] Moreover, the district court referred the case to the United States Attorney for the Southern District of New York for consideration of further prosecution.[108]

The arguably harsh opinion of the court in *Grand Upright* may be due to the fact that the sample used by the defendants in their song, *Alone Again,* was instantly recognizable as the O'Sullivan song and constituted almost the *entire* musical accompaniment to the Biz Markie song.[109] As such, the court considered the taking to be tantamount to stealing,[110] and thus echoed the sentiment of the court in *Taxe* that re-recording of sounds constitutes piracy.

B. *Jarvis v. A&M Records*

Two years after *Grand Upright*, the United States District Court for the District of New Jersey stated its opposition to digital sampling in *Jarvis v. A&M Records*.[111] In this case, Boyd Jarvis wrote a musical composition entitled *The Music's Got Me*,[112] which he subsequently copyrighted with the arrangement.[113] In 1989, Robert Clivilles and David Cole wrote and recorded the song *Get Dumb! (Free Your Body)*,[114] released in three formats on A&M

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104. *See id.* at 185.

105. *See id.* at 185 n.2.

106. *See id.* at 185.

107. *Id.* It has been argued that the court gave no deference to the use of samples in rap music as being the basis of rap music. *See* Falstrom, *supra* note 46, at 372 ("To argue substantial similarity of a rap recording to the recordings from which its samples come is to argue that rap music has no independent artistic value."). If indeed the court was making its own determination as to the value of rap music, it did so in violation of the Supreme Court's prohibition on such determinations. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903) (stating that when determining questions of copyrightability, courts are not to judge artistic merit).

108. *See Grand Upright Music, Ltd.*, 780 F. Supp. at 185.

109. *See* Falstrom, *supra* note 46, at 369.

110. *See Grand Upright Music, Ltd.*, 780 F. Supp. at 183.

111. 827 F. Supp. 282 (D.N.J. 1993).

112. *See id.* at 286. Jarvis recorded the song with his group, Visual. *See id.*

113. *See id.*

114. The versions included a version by SEDUCTION, *Get Dumb! Free Your Body*,

Records and Vendetta Records.[115] Jarvis brought infringement claims on the musical composition as well as the sound recording, arguing that a keyboard riff was digitally sampled and the words from the original recording, including the part of a bridge section "ooh . . . move . . . free your body," were copied.[116]

In its decision denying the defendants' motion for summary judgment on infringement of the musical composition, the district court considered this case, like *Grand Upright*, to be one of "fragmented literal similarity,"[117] due to digital sampling of actual sound from the original copyrighted song.[118] Where fragmented literal similarity exists between two works, infringement is found when "the value of the original work is substantially diminished by the copying."[119] As it was not clear whether the portions copied from Jarvis' song were significantly similar enough to the original song in order to diminish its value, the court denied the defendants' motion for summary judgment as to liability on the musical composition.[120]

The court did, however, grant summary judgment for the defendants on the sound recording claim.[121] Since Jarvis failed to prove ownership of the sound recording,[122] it could not make out a prima facie case of infringement in the sound recording.[123] Despite the lack of a direct analysis regarding digital sampling in this case, the court revealed its attitude towards digital sampling by stating, "there can be no more brazen stealing of music than digital sampling . . . ."[124]

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on HEARTBEAT; THE CREW, *Get Dumb! Free Your Body*; and the single *Get Dumb! See id.*

115. *See id.*

116. *See id.* at 289. The court noted that the riff was played "over and over again" and was used not just for background, but for melodic and rhythmic purposes. *See id.*

117. Fragmented literal similarity is found where literal verbatim copying of only a portion of the plaintiff's work occurs. *See* MELVILLE B. NIMMER & DONALD NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2], at 13-46 (1998).

118. *See Jarvis*, 827 F. Supp. at 289.

119. *Id.* at 291; *see also* Werlin v. Reader's Digest Assoc., 528 F. Supp. 451, 463 (S.D.N.Y. 1981) ("[T]he value of a work may be substantially diminished even when only a part of it is copied, if the part that is copied is of great qualitative importance to the work as a whole.").

120. *See Jarvis*, 827 F. Supp. at 299.

121. *See id.* at 293.

122. While Jarvis claimed ownership of the sound recording, the evidence showed that the record label Prelude Records actually owned the sound recording. *See id.* at 292-93.

123. *See id.* In order to prove a case of infringement, one must prove ownership of the copyright. *See supra* Part II.B.

124. *Jarvis*, 827 F. Supp. at 295.

The position against unauthorized digital sampling taken by the New Jersey district court in *Jarvis*, along with that of the District Court for the Southern District of New York in *Grand Upright*, indicates that digital sampling used only for the purpose of reproducing actual sound constitutes "stealing." As neither case involved use of the composition or sound recording for a purpose other than pure sampling, the posture of the courts may change if digital sampling in a different context is considered fair use.

IV. THE DEFENSE OF FAIR USE IN THE FORM OF PARODY

A. *The Fair Use Exception to Infringement*

While the unlawful use of another's copyrighted work generally constitutes a violation of the exclusive rights of the copyright holder, some uses are "fair," and thus do not constitute infringement.[125] Fair use in copyright law has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable matter without his consent."[126] Therefore, while a copyright owner has brought and proved a case of copyright infringement, a defendant may assert the fair use defense and avoid liability.[127] The judge-made notion of "fair borrowing" has been codified under § 107 of the Copyright Act as a limitation on the exclusive rights of copyright owners, including the right of reproduction of the work.[128] Under § 107, reproduction in copies or phonorecords of copyrighted works "for purposes such as criticism . . . [and] comment . . . is not an infringement of copyright."[129] While "criticism" and "comment" are permissible statutory purposes, other non-statutory purposes have also been allowed, such as parody.[130] These statutory and non-statutory purposes were exempted from infringement because they represent a productive use of the

125. Judge Story stated that "[E]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

126. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

127. *See* Johnson, *supra* note 27, at 142-43.

128. *See* 17 U.S.C. § 107 (1994) ("Notwithstanding the provisions of Section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords [including criticism and comment] is not an infringement of copyright.").

129. *Id.*; *see also* H.R. REP. No. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79 (stating that this list was not intended to be exhaustive).

130. *See* H.R. REP. No. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5678-79 (stating that this list was not intended to be exhaustive).

copyrighted work beyond the mere copying of another work.[131]

The determination of whether or not unauthorized use is fair involves a balancing of the benefit gained by the public if the use is permitted against the gain to the copyright owner if the use is prevented.[132] As copyright law was intended to encourage creativity and original authorship, the fair use doctrine recognizes that these goals are better served by allowing unauthorized use of a copyrighted work in certain situations rather than prohibiting the unauthorized use.[133]

The creation of a parody may involve the unauthorized reproduction of another's copyrighted work and thus be considered either an unauthorized reproduction or an unauthorized derivative work of the original it mocks.[134] By drawing on one work to create another, parody may "stimulate the creation and publication of edifying matter" and thus achieve the goal of copyright law.[135] Moreover, use of a copyrighted work in parody provides a "social benefit" through simultaneous comment on an original work and creation of a new work.[136] Thus, as the author of a parody essentially *takes* the basis for his parody from another work, the dichotomy exists that parody both aides the creator of a new, but unauthorized work, yet injures the exclusive rights of the owner of the original copyrighted work.

B. *Application of The Fair Use Defense to Parody*

Classification of a work as parody does not guarantee protection from infringement; instead, parody must be considered in

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131. *See* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 674-75 ("There is a common thread to most of these examples: they represent productive uses—uses that produce some benefit to the public beyond the value of the copyrighted work.").

132. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975).

133. *See* Robinson v. Random House, Inc., 877 F. Supp. 830, 839 (S.D.N.Y. 1995); *see also* Stewart v. Abend, 495 U.S. 207, 236 (1990) (holding that the fair use doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster") (internal quotation marks and citation omitted).

134. *See* Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 69 (1992); *see also* Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and* Campbell v. Acuff-Rose Music, Inc., 69 S. CAL. L. REV. 767, 799 (1996) (stating that the failure of voluntary exchange in parody cases can be analogized to no-consent cases).

135. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1134 (1990).

136. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

terms of the four factors of the fair use doctrine outlined in § 107 of the Copyright Act:

> 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.[137]

Courts are allowed to adapt the fair use doctrine on a case-by-case basis.[138] While each of the fair use factors under § 107 is considered individually,[139] determination as to whether fair use was made of a copyrighted work depends on the result of all four fair use factors weighed together.[140]

The first fair use factor of § 107 considers "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[141] Consideration of the "purpose" of the use of the copyrighted work may involve querying whether the use is a valid satire or parody and not merely a copy that is being called a parody in order to avoid infringement.[142] Not all parodies are protected under the doctrine of fair use,[143] but fair use protection is more likely if the parody contains "some critical comment or statement about the original work . . . reflect[ing] the original perspective of the parodist thereby giving the parody social value beyond its entertainment function."[144] In order to be considered a parody, however, the copyrighted work must be in part an object of the parody in order to conjure it up.[145]

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137. 17 U.S.C. § 107 (1994).

138. *See* H.R. Rep. No. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5680.

139. *See* Leval, *supra* note 135, at 1110-11.

140. *See Campbell*, 510 U.S. at 578 (stating that the results of the fair use factors are to be weighed together in light of the purposes of copyright law); *see also* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113 (2d Cir. 1998) (stating that the fair use factors are weighed in aggregate); Leval, *supra* note 135, at 1110-11; Patry & Perlmutter, *supra* note 131, at 685-87.

141. 17 U.S.C. § 107 (1994).

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

143. *See, e.g.*, Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc. 600 F.2d 1184, 1188 (5th Cir. 1979); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc. 479 F. Supp. 351, 357 (N.D. Ga. 1979).

144. *Metro-Goldwyn-Mayer, Inc.*, 479 F. Supp. at 357.

145. *See* MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).

The "character" of the use includes consideration of whether the use is for non-profit or commercial purposes. At one time, a finding of commercial use meant presumptive exploitation of the copyright, and therefore, weighed against fair use.[146] A finding of commercial use is no longer as significant, and is simply weighed along with the other purposes of factor one, which is in turn weighed along with the other fair use factors.

The second factor of fair use considers the nature of the copyrighted work itself,[147] as opposed to the allegedly infringing work. Where a copyrighted work is considered to be creative as opposed to merely informational, unauthorized use of that work is less likely to be considered fair use.[148] As parodies are usually based on creative works, this second factor receives little consideration in a fair use analysis.[149]

The third factor, the amount and substantiality of the portion used from a copyrighted work, is highly controversial for works of parody. The amount and substantiality of material used from the copyrighted work is considered in relation to the copyrighted work as a whole, not the allegedly infringing work.[150] Historically, this analysis has involved a quantitative and/or qualitative review of how much of the original work was used.[151] Under the fair use doctrine, quantitative analysis considers the percentage of the work appropriated, while a qualitative analysis considers whether the "heart" of the original was copied.[152] As a parody may require a

146. *See* Patry & Perlmutter, *supra* note 131, at 677 (stating that "[t]he context of the 'commercial nature' phrase as merely a subsidiary part of the first factor indicates that the commercial or nonprofit educational element of a given use is but one aspect of its more general purpose and character"). While commercial use of a copyrighted work was initially found to be a presumptively unfair exploitation of the exclusive rights of the copyright owner, that tends to weigh against a finding of fair use. *See* Harper & Row Publishers, Inc., v. Nation Enters., 471 U.S. 539, 562 (1985); Sony Corp. v. Universal City Studios, Inc. 464 U.S. 417, 451 (1984). This position has been abandoned by the United States Supreme Court in favor of the aggregate weighing of the factors. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994); *see also* notes 141-70 and accompanying text for a description of the fair use factors.

147. *See* 17 U.S.C. § 107(2) (1994).

148. *See* Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 635 (S.D. Cal. 1993); *see also* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153-54 (9th Cir. 1986).

149. *See Campbell*, 510 U.S. at 586.

150. *See* New Era Publications Int'l Aps v. Carol Pub. Group, 904 F.2d 152 (2d Cir. 1990).

151. *See e.g., id.* at 158; *Hustler Magazine, Inc.*, 796 F.2d at 1154-55; Robinson v. Random House, Inc., 877 F. Supp. 830, 841 (S.D.N.Y. 1995); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

152. *See New Era Publications Int'l Aps*, 904 F.2d at 158.

substantial amount from the original, or far less, the qualitative method of measuring the third factor is more appropriate.[153]

A parody must be identified with its target in order to be considered a parody,[154] and thus some appropriation from another work is required.[155] Use of a copyrighted work in parody is considered fair use where "some of the content of the work" is parodied.[156] Such use may constitute a taking of the "heart" of the copyrighted work, and in some circumstances, be considered excessive copying.[157] For example, a parodist of a musical work may need to "either appropriate the actual words of a text or lyrics or else appropriate the structure or general expression of the original."[158] As the very purpose of a parody may be to parody the heart of the original work, such use may not, in those circumstances, be considered excessive.[159] Since no bright line for copying in parody exists, parodists may still be at risk for infringement.[160]

There is an overlap between fair use and the legal doctrine of *de minimis*, where the copyright owner suffers no demonstrable harm from the unauthorized use of the work.[161] While the *de minimis* rule allows literal copying of a small and usually insignificant portion of a work, the fair use doctrine allows for more extensive copying when adapted for a statutory or recognized non-statutory use, including parody.[162]

The fourth factor of § 107 considers "the effect of the use upon the potential market for or value of the copyrighted work."[163] If an infringing work has a minimum effect on the potential market, then a more substantial use of the copyrighted work may be allowed.[164]

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153. *See Campbell*, 510 U.S. at 586-87.

154. *See* Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 114 (1993); *see also* Michael C. Albin, *Beyond Fair Use: Putting Satire in its Proper Place*, 33 UCLA L. REV. 518, 529 (1985).

155. *See* Beth Warnken Van Hecke, Note, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 466 (1992).

156. *See* H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

157. *See* Harper & Row Publishers, Inc. v. National Enters., 471 U.S. 539, 565 (1985).

158. NIMMER & NIMMER, *supra* note 117, § 13.01[B].

159. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994).

160. *See* 17 U.S.C. § 501(a) (1994).

161. *See* Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044, 1047 (S.D.N.Y. 1994).

162. *See* Warner Bros. Inc. v. American Broad. Co., 720 F.2d 231 (2d Cir. 1983).

163. 17 U.S.C. § 107(4) (1994).

164. *See* Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977).

The infringing work affects the market of the original if the existence of the infringing work tends to diminish sales of the original, interfere with its marketability, or fulfill the demand for the original.[165] Often the markets for the parody and the original are different[166] and therefore, this factor does not always favor the copyright owner.[167]

The fourth factor is closely related to the first factor, which considers whether or not the use of the infringing work is commercial. Prior to *Campbell*, courts had tied the two factors together, which greatly reduced the likelihood that fair use would be found. If under the first fair use factor commercial use was presumptively unfair, commercial use was presumed to create a likelihood of future harm under the fourth factor.[168] However, not all commercial use of a parody affects the market of the original copyrighted work. Moreover, parodies that are distributed commercially may qualify as editorial or social commentary, and thus are not regarded as merely capitalizing on a copyrighted work.[169] In essence, if the allegedly infringing work has little effect on the copyright owner's anticipated return, then the justification of the unauthorized use is easier to find.[170]

V. THE LIBERAL TREATMENT OF WORKS OF PARODY

A. *Treatment of Parody Prior to the Fair Use Doctrine*

Decisions involving parody and infringement were not an issue in United States courts until the mid-1950's. As the unauthorized

165. *See, e.g.,* Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1985).

166. With works of parody, not only the market for the original may be affected, but also the market for derivative works. However, it is unlikely that the author of an original work would also create a parody of the original. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

167. *See id. But cf.* Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287, 1300 (C.D. Cal. 1995) (holding that television commercial containing elements similar to James Bond films would threaten the value of future upscale licenses); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351 (N.D. Ga. 1979) (holding that the play was likely to interfere with the potential market of the copyrighted novel and film).

168. *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986).

169. *See* Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986); Pillsbury Co. v. Milky Way Prods., Inc., No. C78-679A, 1981 WL 1402 (N.D. Ga. Dec. 24, 1981); *cf.* Original Appalachian Artworks v. Topps Chewing Gum, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (holding that primary purpose behind defendant's parody was an attempt to make money).

170. *See* MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981).

use of a copyrighted work in the form of parody increased, courts were faced with the issue of whether such use constituted infringement. Although the fair use doctrine was not codified in § 107 until 1976, several courts faced with cases involving parody prior to 1976 addressed the common law issue of fair use in their decisions.[171]

In 1955, the District Court for the Southern District of California heard the first case in which parody was claimed as fair use, *Loew's, Inc. v. Columbia Broadcasting System, Inc.*[172] In *Loew's*, comedian Jack Benny performed a half-hour parody/burlesque of the classic film *Gaslight*[173] for television.[174] Loew's held the copyright to the film and sued Columbia Broadcasting System ("CBS") and others for infringement.[175] The district court found that there was a substantial taking by CBS in terms of setting, characters, story points, story development, and dialogue.[176] The court noted that without the defense of burlesque as a fair use, such taking would constitute a clear case of infringement.[177]

In determining whether such substantial taking was considered fair use, the district court stated that "[i]t is well settled law that the owner of a copyright is entitled to be protected against the taking of a substantial portion of his protectable material."[178] The court noted that historically, attempts by alleged infringers to defend their use of a copyrighted work by claiming that their work was "merely a parody or burlesque" was not resolved by considering whether the work was indeed a parody or burlesque, but by considering whether the use amounted to "a taking of substantial, copyrightable material."[179]

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171. *See, e.g.,* Loew's, Inc. v. Columbia Broad. Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom*, Benny's v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); Columbia Pictures Corp. v. National Broad. Co., 137 F. Supp. 348 (S.D. Cal. 1955). The fair use doctrine at this time, derived from Justice Story's decision in *Folsom v. Marsh*, suggested that courts "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

172. 131 F. Supp. 165, 167 (S.D. Cal. 1955).

173. GASLIGHT (Loew's Inc. 1944).

174. *See Loew's*, 131 F. Supp. at 167-70 (stating that the television parody was entitled "Autolight").

175. *See id.* at 167.

176. *See id.* at 171.

177. *See id.* at 172.

178. *Id.* (citing Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 361 (9th Cir. 1947)).

179. *Id.* at 177.

The district court held that using another's copyrighted work for a parody or burlesque was no different than any other appropriation where substantial taking constitutes infringement.[180] The only issue, therefore, was whether there was a substantial taking.[181] The court did not forbid the right of another to take a character, theme, or bare plot and create a parody, so long as a substantial taking did not occur.[182] In finding for Loew's, the court acknowledged that the line between "the permissible and the forbidden" is difficult to draw and anyone who uses another's copyrighted work does so at his peril.[183]

While *Loew's* was pending on appeal, the same district court heard *Columbia Pictures Corp. v. National Broadcasting Co.*,[184] which established the standard for unauthorized use of a copyrighted work in a parody. *Columbia Pictures* concerned a television parody of the classic film, *From Here to Eternity*.[185] The National Broadcasting Company aired Sid Caesar's parody of the classic film in a skit entitled, *From Here to Obscurity*.[186] Columbia Pictures held the copyright to the film and sued to enjoin the showing of the parody.

In its opinion, the district court echoed the sentiment in *Loew's* that a burlesque may take the unprotectable elements of a copyrighted work, including the locale, theme, setting, situation, and basic plot without infringement.[187] However, the court stated that the doctrine of fair use "permits burlesque to go somewhat farther so long as the taking is not substantial."[188] In sharp contrast to *Loew's*, where fair use depended on whether or not the taking was substantial, the court in *Columbia Pictures* found that the test for determining whether the taking was substantial was "not primarily [a] quantitative one. The question is one of quality rather than quantity, and is to be determined by the character of the work and the relative value of the material taken."[189]

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180. *See id.* at 183.
181. *See id.*
182. *See id.*
183. *See id.*
184. 137 F. Supp. 348 (S.D. Cal. 1955).
185. FROM HERE TO ETERNITY (Columbia Pictures Corp. 1953).
186. (NBC television broadcast, Sept. 12, 1953).
187. *See Columbia Pictures*, 137 F. Supp. at 350.
188. *Id.* Allowable taking suggested by the court included an incident of the story, a character, a title, a small part of the story development, and a small part of the dialogue. *See id.*
189. *Id.* at 353.

The District Court for the Southern District of California held that the parody was not infringing, as the material used from the film was only enough to "conjure up" the motion picture in the mind of the viewer.[190] Therefore, *Columbia Pictures* established that the unauthorized use of another's copyrighted work for a parody may be considered fair use if the parody takes no more from the original than necessary to "conjure up" the original.[191] The court, however, failed to establish criteria as to how much copyrighted material constitutes enough to "conjure up" the original without constituting infringement.[192] Indeed, the "conjure up" standard itself has been criticized as being so imprecise that courts must impose their own personal judgments when faced with this issue.[193]

Applying this rationale, the District Court for the Northern District of California found that the "conjure up" standard for parody was violated in *Walt Disney Productions v. Air Pirates.*[194] In *Air Pirates*, Disney moved for a preliminary injunction against the distribution of an Air Pirates comic book for unlawfully copying Disney characters, giving the re-drawn[195] characters the same names as the Disney characters, and using them in "a rather bawdy depiction."[196] As the United States Supreme Court had not heard a case on fair use and parody, nor had either party argued that the Ninth Circuit's decision in *Loew's*, which affirmed the District Court for the Southern District of California's opinion, was not binding on its decision, the court stated that it must follow the test established in *Loew's* that "a claim of infringement is made out when it is shown that the defendants have copied the substantial part of the protected work and that the part so copied was a substantial part of the defendants' work."[197] In granting the preliminary injunction, the court determined that the defendants borrowed

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190. *See id.* at 354.

191. *See id.* at 350.

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

193. *See* Van Hecke, *supra* note 155, at 479 ("[T]he vague conjure up test may allow courts to mold the outcome of parody cases to fit their preconceived notions about what is humorous and what is reasonable.").

194. 345 F. Supp. 108 (N.D. Cal. 1972), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

195. The characters were not photographically reproduced but were re-drawn nearly like the Walt Disney characters. *See id.* at 110.

196. *See Walt Disney Prods.*, 581 F.2d at 753; *see also* Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571, 582 (1976).

197. *Walt Disney Prods.*, 345 F. Supp. at 114.

a substantial portion of Disney's works, and stated that it had no obligation to determine whether the infringing work was a parody.[198] The court held that the defendants "crossed the line . . . separating fair use and infringement."[199]

Three years later, the district court granted summary judgment for Disney and Air Pirates appealed.[200] Affirming the district court's decision, the Ninth Circuit stated that by copying the Disney images in their entirety, Air Pirates "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."[201] The Ninth Circuit concluded that the need of the parodist to make the "best parody possible" through substantial taking of the original was outweighed by the interest of the copyright holder in protecting its exclusive rights.[202]

The treatment of parody in *Loews, Columbia Pictures*, and *Air Pirates* illustrates the development of parody decisions by the courts. The "conjure up" standard for parody developed from the disregard for the parody defense in *Loew's*, to the acknowledgment in *Columbia Pictures* that parody requires a limited taking. While the *Air Pirates* decision served a blow to parodists, since the more liberal "conjure up" standard from *Columbia Pictures* was not binding on the Ninth Circuit, it established that unauthorized use of a copyrighted work does have limits, even in parody.

B. *Use of Musical Composition And Arrangement in Parody*

The liberal "conjure up" standard of parody from *Columbia Pictures* has been applied specifically to parodies of musical compositions and arrangements. In general, courts have favored parodies involving musical compositions and arrangements, even where a substantial amount of the copyrighted work was taken.[203] While these decisions only involve alleged infringement of musical compo-

198. *See id.* at 115.

199. *Id.*

200. *See Walt Disney Prods.*, 581 F.2d at 754.

201. *Id.* at 758; *see also* Victor S. Netterville, *Parody, Mimicry and Humorous Commentary*, 35 So. CAL. L. REV. 225, 238 (1962).

202. *See Walt Disney Prods.*, 581 F.2d at 758.

203. *See, e.g.*, Fisher v. Dees, 794 F.2d. 432 (9th Cir. 1986); Elsmere Music, Inc. v. National Broad. Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980); Berlin v. E.C. Publications, Inc., 219 F. Supp. 911 (S.D.N.Y.), *aff'd*, 329 F.2d 541 (2d Cir. 1963); *cf.* MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981).

sitions and arrangements, as opposed to sound recordings, they provide support for the use of digital sampling for use in parody.

In the first case concerning musical parody, *Berlin v. E.C. Publications, Inc.*,[204] E.C. Publications, owner of *Mad Magazine,* published humorous lyrics and added the direction that they be sung to tunes of well-known songs.[205] Irving Berlin and other authors of these songs sued for copyright infringement of the musical compositions.[206] On cross motions for summary judgment, the District Court for the Southern District of New York denied the plaintiffs' motion, but granted summary judgment for the majority of claims in the defendants' motion.[207]

On appeal, the Second Circuit, without the guidance of § 107 of the Copyright Act, discussed the "unsettled" question of parody/burlesque and allowable copying.[208] The court found that whether the test for allowable copying in parody was either the "substantiality" test of *Loew's* or the "conjure up" test of *Columbia Pictures*, the appropriation in this case did not constitute infringement.[209] The court noted that a finding of infringement would be improper where "the parody has neither the intent nor the effect of fulfilling the [market] 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."[210] Relying on the standard set in *Columbia Pictures*, the Second Circuit held that even though brief phrases of the original lyrics were used by *Mad Magazine*, such practice was necessary in order to "conjure up" the originals.[211] In defense of its decision, the Second Circuit stated that "the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a 'substantial' taking . . . ."[212]

After codification of the fair use doctrine in § 107 of the Copy-

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204. 219 F. Supp. 911 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 541 (2d Cir. 1964).

205. *See Berlin,* 329 F.2d at 543. Examples of the songs allegedly infringed were "The Last Time I Saw Paris," parodied as "The First Time I Saw (Roger) Maris," and "A Pretty Girl is Like a Melody," parodied as "Lovella Schwartz Describes Her Malady." *Id.*

206. *See id.* at 542.

207. *See id.*

208. *See id.* at 544.

209. *See id.* at 545.

210. *Id.*

211. *See id.*

212. *Id.*; *cf.* Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975). The copyrighted song *The Mickey Mouse March* was played in the background during a sex scene in defendant's film, *The Life and Times of the Happy*

right Act, the Second Circuit again reviewed the unauthorized use of a copyrighted musical arrangement in *Elsmere Music, Inc. v. National Broadcasting Co.*[213] In *Elsmere Music*, the actors on the *Saturday Night Live*[214] television program, aired on the National Broadcasting Company ("NBC"), sang as a parody *I Love Sodom* to the tune of *I Love New York*. The song *I Love New York* was written in 1977 by Steve Karmen, and Elsmere Music, Inc. owned the copyright.[215] The plaintiff sued for copyright infringement, and both parties filed cross-motions for summary judgment.[216]

NBC argued that its use of the melody of the original song constituted a de minimis taking necessary for effective parody.[217] The district court found that the musical melody accompanying the lyrics of the original constituted the "heart" of the original composition and thus constituted more than a de minimis taking.[218] Despite this finding, the district court held that no more than necessary was taken by NBC in order to conjure up the original composition for the parody, and granted NBC's motion for summary judgment.[219] Moreover, the court found that NBC's song did not interfere with the marketability of the original song, it did not affect the value of the copyrighted work, nor could it have the effect of fulfilling the demand for the original.[220] The Second Circuit affirmed, stating that "a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point."[221]

Only one year after *Elsmere Music*, the Second Circuit made a dramatic shift in its interpretation of the permissible scope of parody. In *MCA, Inc. v. Wilson,*[222] the copyright holder of the song *Boogie Woogie Bugle Boy of Company B* sued for copyright infringement, claiming that the defendants copied the bass line, notes

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Hooker. The court ruled that defendant's film was not a parody, but an improper use of copyrighted material. *See id.* at 1398.

213. 623 F.2d 252 (2d Cir. 1980).

214. *Saturday Night Live* (NBC television broadcast, May 20, 1978).

215. *See* Elsmere Music, Inc. v. National Broad. Co., 482 F. Supp. 741, 743 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

216. *See id.* at 744.

217. *See id.*

218. *See id.*

219. *See id.* at 747.

220. *See id.*

221. Elsmere Music, Inc. v. National Broad. Co., 623 F.2d 252, 253 (2d Cir. 1980) (citing Columbia Pictures Corp., v. National Broad. Co., 137 F. Supp 348, 354 (S.D. Cal. 1955).

222. 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd in part and modified in part*, 677 F.2d 180 (2d Cir. 1981).

in succession, and the sentence "He's in the Army Now," for use in a bawdy musical.[223] The district court rejected the defendants' argument that the infringing work was a parody of the original, stating that the allegedly infringing musical review was simply a commentary on "sexual mores" and life in general, rather than a parody.[224] Relying on *Air Pirates*, the court found that since the musical review was not considered a parody, the copying of the original was unwarranted, abusive, and thus constituted infringement.[225]

The Second Circuit affirmed the district court's opinion[226] and noted that, in contrast to *Elsmere Music*, both the plaintiffs and defendants in this case were competitors.[227] The Second Circuit also admonished the unauthorized use of a copyrighted work where one attempts to avoid liability by calling the work a parody, stating "[w]e are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society."[228] In dissent, Judge Mansfield recalled the Second Circuit's decisions in *Berlin* and *Elsmere Music*, stating, "the fact that the parody shares some of the same lyrics and music as the copyrighted work does not itself mean that the taking is too substantial,"[229] and considered the taking of a phrase and a few specific chords and notes to be fair use in parody.[230]

The Ninth Circuit adopted the liberal approach of the decision in *Elsmere Music* in *Fisher v. Dees*.[231] In *Fisher*, the musical composition and 1950's hit *When Sunny Gets Blue*, written by Marvin Fisher and Jack Segal, was parodied by disc jockey Rick Dees in

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223. *See id.* at 449-50.

224. *See id.* at 453.

225. *See id.* The court proceeded to note, *arguendo*, that even if the infringing song was considered a parody, it exceeded the "conjures up" test of *Columbia Pictures* due to the sharing of lyrics and music. *See id.* at 454.

226. *See* MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981). The Second Circuit noted that while it might have reached a different conclusion than the district court as to whether the amount copied was excessive, it did not find the district court's finding of infringement to be clearly erroneous. *See id.*

227. *See id.*

228. *Id.*

229. *Id.* at 190 (Mansfield, J., dissenting). Judge Mansfield acknowledged, however, that verbatim copying of both music and lyrics could not be defended as a parody, but a substantial taking would be permissible. *See id.* at 189 (Mansfield, J., dissenting).

230. *See id.* at 190 (Mansfield, J., dissenting).

231. 794 F.2d 432 (9th Cir. 1986).

When Sonny Sniffs Glue.[232] Counsel for Rick Dees had initially requested permission to use the music, but Fisher refused.[233] Dees' parody changed the opening lyric of the original song and copied the first six bars of the musical arrangement.[234] Fisher and Segal sued for copyright infringement and both sides moved for summary judgment.[235] Without revealing the basis of its decision, the district court granted Dees' motion, and Fisher and Segal appealed.[236]

On appeal, Fisher and Segal argued that the amount of appropriation allowed by the "conjure up" standard from *Columbia Pictures* was limited to "that amount necessary to evoke only *initial* recognition in the listener."[237] The Ninth Circuit disagreed, stating instead that parodies of musical works require "a special need for accuracy."[238] Finding that copying the first six of thirty-eight bars of music was within the permissible scope of parody, the court noted that "a song is difficult to parody effectively without exact or near exact copying."[239]

These early decisions regarding musical parody indicate that taking from a copyrighted musical composition or arrangement is allowable under the fair use doctrine, as long as the taking is either only enough to conjure up the original, or is not substantial. While none of these decisions involved digital sampling in a work of parody, under either standard digital sampling, if not substantial, may be allowed for works of parody.

VI. CAMPBELL V. ACUFF-ROSE AND THE EFFECT ON MUSICAL PARODY

Prior to 1994, the United States Supreme Court had never issued an opinion regarding the issue of parody as fair use.[240] In *Campbell v. Acuff-Rose Music, Inc.*,[241] the Supreme Court decided

232. *See id.* at 434. The parody was part of Dees' comedy record album entitled "Put It Where the Moon Don't Shine." *See id.*

233. *See id.*

234. *See id.*

235. *See id.*

236. *See id.*

237. *Id.* at 438 (emphasis added).

238. *Id.* at 439 (quoting Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978)).

239. *Id.*

240. While the United States Supreme Court considered whether a parody may be fair use in *Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958), it issued no opinion due to the Court's equal division. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

241. 510 U.S. 569 (1994).

for the first time that the use of a copyrighted work for a parody may be fair use.[242] The Supreme Court did not provide guidelines in *Campbell* regarding the amount of allowable copying in a parody, including whether the copying of a sound recording in a parody will be considered fair use.[243] As a result, the rules for musical parody remain uncertain.

In 1964 Roy Orbison and William Dees wrote the musical composition *Oh, Pretty Woman*, which was later recorded by Orbison.[244] The rights to the song were subsequently assigned to a music publishing company, Acuff-Rose, Inc., which registered the composition.[245] In July of 1989 the manager for the rap group 2 Live Crew wrote to Acuff-Rose informing the company that the group intended to parody *Oh, Pretty Woman* and would pay Acuff-Rose the statutory rate for use of the song, as well as give Orbison and Dees credit as authors and owners of the song on 2 Live Crew's new record.[246] The request for a license was denied, but later that month 2 Live Crew released its parody entitled *Pretty Woman*,[247] written by 2 Live Crew member Luther R. Campbell.[248] The rap group released the song on the record *As Clean As They Wanna Be,* giving Orbison and Dees credit.[249] Despite the song credit, Acuff-Rose sued 2 Live Crew, Campbell, the other individual members of 2 Live Crew, and their record company, Luke Skyywalker Records, for infringement, alleging that the melody and lyrics of *Pretty Woman* were substantially similar to *Oh, Pretty Woman*.[250] The group and the record company moved for summary judgment in the United States District Court for the Middle District of Tennessee. The case was eventually appealed to the United States Supreme Court.

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242. *See id.* at 594.

243. *See* Melissa M. Francis, *The "Fair Use" Doctrine and* Campbell v. Acuff-Rose: *Copyright Waters Remain Muddy*, 2 VILL. SPORTS & ENT. L. FORUM 311, 335 (1995) (stating that "[t]he lack of a bright line rule for parodists to follow could open the floodgates of copyright litigation").

244. *See Campbell*, 510 U.S. at 571-72.

245. *See id.*

246. *See id.* It has been argued that giving such credit is merely an attempt to avoid copyright liability. *See* Johnson, *supra* note 27, at 137-38; *see also* Guy Garcia, *Play it Again, Sampler; A Revolutionary Device Turns Pop on Its Ear by Enabling Musicians to Beg, Borrow and Steal Sounds from All Over*, TIME, June 3, 1991, at 69.

247. 2 LIVE CREW, *Pretty Woman, on* AS CLEAN AS THEY WANNA BE (Skyywalker Records 1989).

248. *See Campbell*, 510 U.S. at 572.

249. *See id.*

250. *See id.* at 573.

Acuff-Rose argued that 2 Live Crew used the lyrics from the original, including the opening line "Pretty woman, walking down the street," as well as its arrangement (including its meter, 4/4 drum beat, and bass riff).[251] Moreover, Acuff-Rose submitted an affidavit of a musicologist stating that the riff used by 2 Live Crew may have been digitally sampled into 2 Live Crew's song.[252] However, as 2 Live Crew was only alleged to have infringed the copyright in the musical composition and not the sound recording, a complete analysis of digital sampling and parody was not undertaken.[253] Nonetheless, the discussion in *Acuff-Rose* regarding the requirements for effective parody provides support for the lawful use of a digital sample for use in parody.

A. *The District Court*

The District Court for the Middle District of Tennessee found that 2 Live Crew's version of *Oh, Pretty Woman* was a parody and constituted fair use under § 107 of the Copyright Act.[254] The district court emphasized that the defendants did not engage in verbatim copying, nor was their use of the copyrighted work excessive.[255] The district court found that the four fair use factors favored 2 Live Crew and its record company and granted their motion for summary judgment.[256]

In examining the first fair use factor, the purpose and character of the use, the district court determined that 2 Live Crew's song did not infringe on Acuff-Rose's rights, since the theme, content, and style of 2 Live Crew's song were different from the original song.[257] The court further found that while "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original," the facts demonstrated that 2 Live Crew's song was indeed a par-

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251. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1433 (6th Cir. 1992), *judgment rev'd by* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

252. *See id.*

253. *See* Nels Jacobson, *Faith, Hope & Parody:* Campbell v. Acuff-Rose, *"Oh, Pretty Woman," and Parodists' Rights*, 31 HOUS. L. REV. 955, 972 n.120 (1994) (stating that the holder of a copyright to a musical composition has no claim against a sampler who has appropriated sounds from recorded performances prior to 1972); McGraw, *supra* note 23, at 154 (stating that sound recordings fixed prior to 1972 may remain the subject of common law copyright or other state law protections).

254. *See* Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. at 1150, 1160 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *judgment rev'd by* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

255. *See id.* at 1157.

256. *See id.* at 1158-59.

257. *See id.* at 1154.

ody.[258] Both the parody and the original began with the same line, but then 2 Live Crew changed the lyrics to "shocking ones," in which the physical description of a woman in the original song was changed to an image of a "bald-headed, hairy, and generally repugnant" woman.[259] Campbell's affidavit acknowledged that he copied the music and lyrics with the purpose of helping listeners identify the parody with the original song.[260]

As is often the case with parody, the second fair use factor, the nature of the copyrighted work, favored Acuff-Rose (due to the creative nature of music). However, the third factor, the amount copied, favored 2 Live Crew.[261] The court stated that with regard to the amount copied, this case was within the parodies described in *Fisher* and *Berlin*, and that 2 Live Crew appropriated "no more from the original than is necessary to accomplish reasonably its parodic purpose."[262]

The district court also analyzed the fourth fair use factor, the effect of 2 Live Crew's song on the market of the original song.[263] While noting that the United States Supreme Court had previously determined in *Sony Corp. of America v. Universal City Studios, Inc.*[264] and *Harper & Row Publishers, Inc. v. Nation Enterprises*[265] that this fourth factor was the most important element of fair use analysis, the district court noted that these cases did not consider fair use in the context of a parody.[266] Instead, the district court looked to *Fisher*, and found that since the audiences for the original song and the parody were so different, it was "extremely unlikely" that 2 Live Crew's version of the copyrighted song would negatively affect the market of the original.[267]

B. *The Sixth Circuit*

The Sixth Circuit agreed with the district court that 2 Live

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258. *See id.* at 1155.
259. *See id.*
260. *See id.*
261. *See id.* at 1156.
262. *Id.* at 1157. This opinion contrasted with *Walt Disney Productions*, which held that the fair use defense cannot apply where the copying is virtually complete or almost verbatim. *See* Walt Disney Prods. v. Air Pirates, 518 F.2d 751, 758 (9th Cir. 1978).
263. *See Acuff-Rose Music, Inc.*, 754 F. Supp. at 1157.
264. 464 U.S. 417, 429 (1984).
265. 471 U.S. 539, 566 (1985).
266. *See Acuff-Rose Music, Inc.*, 754 F. Supp at 1157.
267. *See id.* at 1157-58.

Crew's song was a parody, but reversed and remanded the case.[268] In analyzing the four fair use factors, the Sixth Circuit found that the district court placed "insufficient emphasis" on the commercial purpose of 2 Live Crew's use of the copyrighted work.[269] The Sixth Circuit relied on the Supreme Court's position in *Sony,* which was reaffirmed in *Harper & Row,* that "[e]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[270] The Sixth Circuit continued its analysis of the fair use factors, but found that 2 Live Crew had not overcome the presumption that its commercial use of a copyrighted work was presumptively unfair.[271] Even though the allegedly infringing work was a parody under the first fair use factor, the commercial nature of the parody presumable outweighed the purpose of the infringing work.[272]

Regarding the third fair use factor, the Sixth Circuit disagreed with the district court and found that the amount copied by 2 Live Crew was "qualitatively substantial."[273] To support the claim that the parody conjured up the original song, affidavits were submitted by 2 Live Crew to indicate that 2 Live Crew's song tracked the music and meter of the original.[274] In attacking these affidavits, the Sixth Circuit found that they proved that the amount taken from the original work was more than just enough to conjure up the original and therefore did not constitute fair use.[275]

More importantly, a musicologist for Acuff-Rose stated that the riff alleged to have been copied was probably digitally sampled from the original.[276] In response to this allegation, the court stated that digital sampling of the riff would constitute verbatim copying, thus providing further evidence of the "qualitative value of the copied material."[277]

In dissent, Judge Nelson discussed the etymology of the word

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268. *See* Acuff-Rose Music, Inc., v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992), *judgment rev'd by* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

269. *See id.* at 1436-37.

270. *Id.* at 1437 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 404 U.S. 417, 451 (1984).

271. *See id.* at 1439.

272. *See id.* at 1437-38.

273. *See id.* at 1438.

274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.* at 1438 (quoting Harper & Row Publishers, Inc. v. National Enters., 471 U.S. 539, 565 (1985)).

"parody" as being derived from the Greek word *parodeia*, meaning "a song sung alongside another."[278] Citing the *Berlin* and *Fisher* decisions, the dissent contended that a parody of a musical composition is entitled to fair use protection.[279] The dissent also disagreed with the presumption of unfairness when the allegedly infringing use is commercial and where the facts do not involve verbatim mechanical copying.[280] In addressing the possibility that the riff was sampled, the dissent stated that "sampling of no more than a few notes is *de minimis*."[281] The dissent thus implied that digital sampling may be lawful if the portion sampled is not considered substantial.

C. *The United States Supreme Court*

The United States Supreme Court reversed and remanded the Sixth Circuit's decision, holding that 2 Live Crew's commercial parody may be a fair use.[282] In discussing the four factors of fair use, the Supreme Court initially found that the Sixth Circuit incorrectly relied on *Harper & Row* and *Sony* and inflated the significance of the commercial nature of the parody instead of treating the results of the four statutory factors together.[283]

In discussing the first fair use factor, the Court agreed with the decisions in *Fisher* and *Elsmere Music* that a work of parody may claim fair use under § 107 of the Copyright Act as commentary, and therefore must necessarily use some elements of another's original work in order to perform such commentary.[284] However, the Court stated that if the commentary has "no critical bearing on the substance or style of the original composition," then the other fair use factors carry more weight.[285]

On the third fair use factor, the Supreme Court agreed with the Sixth Circuit's analysis that verbatim copying of a substantial portion of a copyrighted work is relevant to general fair use analysis,

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278. *See id.* at 1440 (Nelson, J., dissenting) (quoting VII ENCYCLOPEDIA BRITANNICA (15th ed. 1975)).

279. *See id.* at 1442 (Nelson, J., dissenting).

280. *See id.* at 1443 (Nelson, J., dissenting); *see also* Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395, 1408 (1984).

281. *See Acuff-Rose Music, Inc.*, 972 F.2d at 1444 n.5 (Nelson, J., dissenting) (citing McGiverin, *supra* note 41, at 1727-28).

282. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994).

283. *See id.* at 577.

284. *See id.* at 580.

285. *See id.*

but disagreed that this analysis applied to parody.[286] As outlined in *Columbia Pictures*, a parody must be able to conjure up the original, which may require copying of the "most distinctive or memorable features" of the copyrighted work.[287] The Court acknowledged that the opening bass riff and the opening line of the musical composition may be considered the "heart" of the original composition, but noted that the "heart" of a work is exactly what is required to be used in a parody in order to conjure up the original.[288] Indeed, the Court stated that "[i]f 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through."[289] According to the Supreme Court, use beyond the "conjure up" standard depends on "the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original."[290]

As to the fourth fair use factor, the Supreme Court found that there was no evidence that 2 Live Crew's parody harmed any potential rap market for the original song, despite the fact that a protectable derivative market for criticism does not exist.[291] Regardless, the Court stated that copyright owners would unlikely create or license a critical review or lampoon of their own productions.[292] In distinguishing the parody, the Court stated,

> [W]here there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use . . . .[293]

While the Supreme Court did not address whether the alleged digital sampling of the bass riff constituted excessive copying, and remanded the case to permit evaluation of the amount taken in relation to its parodic purpose,[294] the Court's finding that the use of

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286. *See id.* at 587-88.
287. *See id.* at 588.
288. *See id.* The Court further stated that because no more was taken from the original work than necessary, even if the "heart" of the original was taken, it would not be considered excessive in relation to its parodic purpose. *See id.* at 589.
289. *Id.* at 588-89.
290. *Id.* at 588.
291. *See id.* at 594.
292. *See id.* at 592.
293. *Id.* at 581 n.14.
294. *See id.* at 589.

the musical composition may be fair use could enhance the likelihood that parodists will be able to defend unauthorized taking of a copyrighted sound recording on the same basis.[295] Indeed, copying of actual sound from a sound recording in order to effectuate a parody of the sound recording should be analyzed under the fair use doctrine just like musical compositions. Moreover, as the taking of the distinctive and memorable features of a musical composition or the "heart" of a copyrighted work has been allowed, so too should digital sampling for the purpose of parody.

VII. DIGITAL SAMPLING SHOULD BE ALLOWED FOR USE IN MUSICAL PARODY

A. *Digital Sampling Is Analogous to the Use of Musical Compositions and Arrangements in Parody*

Musical works, including compositions, arrangements, and sound recordings, are entitled to copyright protection under § 102(a) of the Copyright Act,[296] yet only musical works have been entitled to the benefits of the fair use doctrine.[297] Although the right to reproduce a work or prepare derivative works is an exclusive right of a copyright owner,[298] courts have considered musical works which use unauthorized "actual" material from copyrighted works to be allowable copying under the fair use doctrine for certain statutory and recognized non-statutory purposes. Likewise, digital sampling of actual sound[299] from sound recordings should receive the same legal treatment under these circumstances. The courts of the United States should extend their recognition of unauthorized use of a musical composition or arrangement in parody to include the use of digital sampling in parody.

In the first place, the use of musical compositions or arrangements does not differ substantially from the use of actual sound

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295. *See* Jay Lee, Note, Campbell v. Acuff-Rose Music: *The Sword of the Parodist Is Mightier Than the Shield of the Copyright Holder*, 29 U.S.F. L. REV. 279, 281 (1994) ("The Court's clarification of how to properly apply the statutory fair-use factors has made it significantly more likely that parodists will be able to defend copyright actions by claiming fair use."); *see also* Paul Tager Lehr, Note, *The Fair-Use Doctrine Before and After "Pretty Woman's" Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 46 FLA. L. REV. 443, 465 (1994).

296. 17 U.S.C. § 102(a) (1994).

297. *See supra* note 172 and accompanying text.

298. *See* 17 U.S.C. § 106(1) (1994).

299. The right to reproduce actual sound from sound recordings is an exclusive right of a copyright owner under 17 U.S.C. § 114(b) (1994).

from a sound recording. The use of actual lyrics, as in *Campbell*,[300] or notes from a composition or arrangement, as in *Elsmere Music*[301] and *Fisher*,[302] can be likened to the use of actual sound from a sound recording. As music may be a combination of lyrics, arrangement, and sound, any of these elements should be accessible by the public for a limited purpose, such as parody. For this reason, sound recordings should not be given any more protection, if not used in substantial part, than musical works of parody.

It has been established that copying some material from another work is necessary in order to create a parody.[303] The decisions of *Berlin*,[304] *Elsmere Music*, *Fisher*, and *Campbell*, which involved the unauthorized use of musical compositions and arrangements in parodies, all favored the parodist.[305] In *Berlin* and *Elsmere Music*, the District Court for the Southern District of New York and the Second Circuit, respectively, determined that the "conjure up" standard from *Columbia Pictures*[306] had not been violated, nor did the parodies have the intent of filling the market demand for the original work.[307] Further, in *Fisher*, the Ninth Circuit recognized that effective parody is difficult "without exact or near exact copying."[308] In *Campbell*, the Supreme Court acknowledged that what was copied may be considered the "heart" of the work, but if the "heart" was needed in order to conjure up the original, then the copying is not considered excessive.[309] While each fair use analysis requires an examination of the amount and substantiality of material copied, the principle remains that musical parody, in order to be effective, requires at least some copying.

Recognizing the need for copying in parody, the courts have expanded the amount of allowable copying from "*no more than necessary to 'conjure up'* the original"[310] to an amount to "*conjure*

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300. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

301. *See* Elsmore Music Inc., v. National Broad. Co., 623 F.2d 252 (2d Cir. 1980).

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

303. *See Campbell*, 510 U.S. at 588 ("Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation.").

304. *See* Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d. Cir. 1964).

305. *See id.*; *see also Campbell*, 510 U.S. at 549; *Fisher*, 794 F.2d at 439-40.

306. *See* Columbia Pictures Corp. v. National Broad. Co., 137 F. Supp. 348 (S.D. Cal. 1955).

307. *See Berlin*, 329 F.2d at 545; *Elsmere*, 482 F. Supp. at 747.

308. *See Fisher*, 794 F.2d at 439.

309. *See Campbell*, 510 U.S. at 588; *see also supra* note 289 and accompanying text.

310. *Columbia Pictures Corp.*, 137 F. Supp. at 351.

up at least enough of the original to make the object of its critical wit recognizable."[311] In musical parody, the need for copying may not end with the limited use of a musical composition or arrangement if the goal of parody is identification with the subject of the parody. For example, if a musical work is readily identifiable by the unique sounds captured on the sound recording, then verbatim copying of the portion necessary to "conjure up" the original work may include digitally sampling part of the sound recording in order to effectuate the parody. If quotation of the most memorable features constituting the musical composition or arrangement can be considered fair use in parody, as demonstrated in *Campbell*, so should digital sampling of a sound recording that is not excessive for the purpose of creating a parody.[312]

One of the arguments against the use of sound recordings in any form, whether used as copied or copied and subsequently altered, is that sound is *unique*. While musical compositions are merely an arrangement of words and music, sound recordings are a production, where the sound of several musicians is combined and enhanced by a studio producer or technician to create a unique sound recording. If this sound is copied, it may run afoul of the protection given to the unique sound under § 102(a).[313] However, this rationale is more difficult to support when sound is digitally sampled and then altered, because the sound has been so changed from its original form that it is no longer substantially similar.[314] Indeed, the court in *Taxe* recognized that Congress did not consider alteration of works to constitute infringement.[315]

The second argument against the use of a sound recording concerns the lawful right of imitation of sound under the Copyright Act.[316] If a parodist desires a certain sound in order to parody it, that sound could be lawfully duplicated by studio musicians. However, that argument misinterprets the rationale behind the fair use

311. *Campbell*, 510 U.S. at 588.

312. *See* Elsmere Music, Inc., v. National Broad. Co., 623 F.2d 252 (2d Cir. 1980).

313. *See* 17 U.S.C. § 102(a) (1994).

314. *See supra* notes 72 and 73 and accompanying text.

315. *See* United States v. Taxe, 380 F. Supp. 1010, 1014 (C.D. Cal. 1974), *aff'd in part, vacated in part*, 540 F.2d 961 (9th Cir. 1976).

316. *See* 17 U.S.C. § 114(b) (1994) (stating that "[t]he exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording").

doctrine.[317] If a copyrighted work is used for parody, a purpose recognized under the fair use doctrine, then "some of the content" of the copyrighted work is allowed for the purpose of creating a parody.[318] Requiring parodists to hire studio musicians to merely replicate a small portion of a sound recording would unfairly burden parodists and risk stifling a creative work. Licensing fees also can be unduly burdensome on a potential parodist requiring a digital sample. Moreover, it is highly likely that the copyright owner may refuse permission to use a sample for a parody of the original, and instead sue the parodist for infringement.[319]

Courts have continually struggled to find a compromise between providing protection for the copyright owners of musical works while still encouraging creative works. As copyright decisions reveal a trend toward allowing the limited use of a copyrighted work, especially in cases involving musical works, sound recordings should receive the same protection as musical compositions and arrangements for the limited use of parody.

B. *Digital Sampling Does Not Change Fair Use Analysis*

While the few cases addressing the legitimacy of digital sampling have admonished the practice,[320] these cases have not involved use for a statutory or recognized non-statutory purpose. If digital sampling were used for such a purpose, the fair use analysis would be applicable.

A claim of infringement and invocation of the defense of fair use requires a court to perform an analysis of the claim under the fair use doctrine.[321] This requisite analysis diminishes the concerns associated with the unauthorized use of a copyrighted sound re-

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317. The doctrine of fair use permits courts to avoid rigid application of the copyright statute. *See* Iowa State Univ. Research Found., Inc. v. American Broad. Cos., 621 F.2d 57 (2d Cir. 1980).

318. *See supra* note 58.

319. *See supra* note 48 and accompanying text; *see also* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 n.3 (2d Cir. 1998) (stating that theorists have argued that "parody deserves protection precisely because makers of an original work will be unwilling to license derivative uses that damage the public reputation of originals through negative criticism"); Posner, *supra* note 134, at 71, 73-75; Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1632-35 (1982).

320. *See* Jarvis v. A&M Records, 827 F. Supp. 282, 288-92 (D.N.J. 1993); Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991).

321. *See* 17 U.S.C. § 107 (1994).

cording in a parody,[322] including use merely for the sake of avoiding the license fee. The determination as to whether an allegedly infringing work 1) constitutes a parody, and 2) constitutes fair use of the copyrighted work, protects against appropriation that does not serve a societal purpose.[323] Fair use analysis must balance the competing interests of public access to works of art and protection of a copyright owner's right to profit. Digital sampling in the context of parody does not upset this fair use balance.

In order to constitute fair use and be covered under § 107, the new work must first be considered a parody.[324] This initial determination of whether parodic character may reasonably be perceived in the allegedly infringing work is left to the courts.[325] Once the work is determined to be a parody, the court must then analyze the unauthorized use under the four fair use factors.[326] This determination will vary from case to case,[327] but will likely focus on the substantiality of the amount used, as well as the affect of the new work on the market demand for the original.

Under the third fair use factor, amount and substantial use, the court considers whether the amount digitally sampled was excessive in light of the parodic purpose. As in the case of musical compositions and arrangements, the amount taken from a sound recording work must be considered in terms of what is needed to achieve a parody. Since Congress has provided that a violation of rights in sound recordings occurs "whenever all or a substantial portion of the actual sounds"[328] are reproduced, digital sampling of only a

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322. While a copyright owner must necessarily engage in litigation in order to argue a claim of fair use, the requisites of the analysis itself may discourage excessive copying or copying for a purpose rather than a statutory or recognized non-statutory purpose.

323. *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 580 (1994) ("If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly . . . .").

324. *See* MCA, Inc. v. Wilson, 425 F. Supp. 443, 452-54 (S.D.N.Y. 1976), *aff'd in part and modified in part*, 677 F.2d 180 (2d Cir. 1981).

325. *See Campbell*, 510 U.S. at 582. The Supreme Court noted that determination beyond this initial step, whether parody is in good or bad taste, "does not and should not matter to fair use." *Id.*

326. *See* 17 U.S.C. § 107 (1994).

327. *See Campbell*, 510 U.S. at 581 (stating that "parody may or may not be fair use . . . [and] like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law").

328. *See* H.R. REP. No. 94-1476, at 51 (1976), *reprinted in* U.S.C.C.A.N. 5659, 5721.

portion of a sound recording for the purpose of a parody may not be considered excessive or an infringement.[329] If the amount taken from the original sound recording is within the amount necessary to at least conjure up the original, then the parody sound recording should be considered fair use.

Under the fourth fair use factor, a parody may infringe the original work if it affects the market of the copyrighted work.[330] Where a court determines that there is overlap in the markets,[331] and if the fair use factors weighed together determine that fair use was not made, then infringement may be found. This factor distinguishes between commercial use, which involves the mere duplication of the original and "supersedes the [original],"[332] and transformative use, which is where the original work is copied and adjusted and harm to the market of the original is less readily inferred.[333] As parodies are often either critical or a lampoon of the original, and thus tranformative, the original owner's market is unlikely to be harmed.[334] Even where a parody is made of a sound recording by using a different musical style, such as the rap variation of an old standard in *Campbell*, the evidence of market harm still assists in the determination of this factor.[335]

C. *Digital Sampling in Parody Differs From Pure Copying*

As analog technology developed, Congress grew wary that copyright owners would have their entire works pirated by those simply interested in mass-producing an unlawful copy of the sound recording for profit.[336] As the legislative history of § 114(b)[337] indicates, protection of sound recordings was granted to copyright owners in order to combat piracy where *entire* sound recordings were copied and profits were diverted from the copyright owner.[338] However, digital sampling in parody is not analogous to piracy of

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329. *See* Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972).
330. *See* 17 U.S.C. § 107(4) (1994).
331. *See* MCA, Inc., v. Wilson, 677 F.2d 180, 182-85 (2d Cir. 1980).
332. *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).
333. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).
334. *See id.* at 594.
335. *See id.* at 593.
336. *See* Agee v. Paramount Communications, Inc., 853 F. Supp 778, 787 (S.D.N.Y. 1994) (holding that Congress's intention in granting the exclusive right of reproduction was to prevent record piracy), *aff'd in part, rev'd in part*, 59 F.3d 317 (2d Cir. 1995).
337. H.R. REP. NO. 487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566.
338. *See supra* note 76-78.

entire works, since often only part of a sound recording is used. Therefore, the rationale for preventing the copying of an entire work is inapplicable to the limited use of a sound recording, especially in a work of parody. Moreover, since parody and sampling are both creative forms of expression,[339] they should not be equated with mere commercial reproductive copying.

Where the purpose of unauthorized digital sampling is purely economic, it should be treated as such. In *Grand Upright* and *Jarvis*, the creator of the infringing work determined that another's sound was desirable and, in order to avoid either the expense of licensing or duplicating the sound, unlawfully pirated the sound. The exclusive right of reproduction in sound recordings under § 114(b) was codified in order to protect just such "purposeless" copying, which clearly falls outside the protection of the fair use doctrine.[340]

The use of a digital sample in a work of parody is not merely economic. In a parody, digital sampling may be used to comment or criticize a voice or instrument noise. Digital sampling may also be used in a parody to comment on or criticize the musical composition or arrangement. For example, in *Berlin* and *Elsmere Music*, the actual sound merely functioned as support for the parody of the lyrics. In either case, the use of another's work served a specific purpose unrelated to mere copying. Indeed, digital sampling in parody may actually encourage comment and criticism of sound recordings, thereby serving a social purpose.[341]

The promotion of the "useful Arts"[342] is the ultimate objective in copyright law. Parody has been an accepted art form for centuries[343] and new forms of parody, including the addition of digital sampling technology, should not be discouraged if it constitutes fair use.[344] While a court may place limits on parody in terms of what

339. *See* Falstrom, *supra* note 46, at 371 (stating that "[i]n contrast to the pirate, the sampler does not merely duplicate the efforts of the sampled artist; the sampler, by using her creativity, has added something that makes the new song distinct from the original").

340. *See* 17 U.S.C. § 107 (1994).

341. *See* Herman F. Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 BULL. COPYRIGHT SOC'Y 53 (1958).

342. U.S. CONST. art. I, § 8, cl. 8 (stating that "the Congress shall have the power . . . [t]o promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries").

343. *See supra* note 9 and accompanying text.

344. *See* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 (2d. Cir. 1998) ("Because the social good is served by increasing the supply of criticism—and thus,

constitutes fair use, courts should not restrict the types of copyrighted works used to create the parody. Since courts provide copyright protection to musical works and sound recordings, use of both of these works should be eligible for the fair use defense. As copyright law continues to develop and adapt to changes in technology and musical interest, digital sampling should not be equated with illegal piracy, but with the creation of new works and forms of music, including parody.

CONCLUSION

While the Supreme Court has cautioned that fair use analysis "cannot be simplified with bright-line rules," musical parodists remain without guidance as to what constitutes allowable unauthorized copying of sound recordings. Although works of parody generally receive liberal protection under the fair use doctrine, digital sampling in parody remains, for now, outside that possible haven of protection. While court decisions have broadened the protection for parodies of musical compositions and arrangements, the use of actual sound for parody should also be considered lawful. While determinations of fair use would still be made on a case-by-case basis, digital sampling in parody would at least be eligible for the defense. Until digital sampling in parody is directly addressed, the musical parodist who samples for the sake of parody remains at risk for being sued for infringement.

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potentially, of truth—creators of original works cannot be given the power to block the dissemination of critical derivative works.").