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Parody and Fair Use: The Critical Question

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PARODY AND FAIR USE: THE CRITICAL QUESTION*

Parody is an independent art form of ancient lineage, stretching back beyond Aristophanes.[1] It is a form of satire which achieves its effects by mimicking the work or style of another author, often closely paralleling the structure or even the wording of the original.[2] Hence, parody may collide with the copyright claims of the author of the original work.[3] When two art forms, both with their own value to society, collide in the copyright arena, which should win?

Suits against parodists for copyright infringement are a relatively recent phenomenon.[4] After a 1955 decision which held that parody was infringement,[5] courts have tended to espouse the view that parody deserves at least some special treatment, a recognition of its special value to society.[6] Most courts, however, have taken the social contribution of parody on faith and have not analyzed precisely wherein its value lies.[7]

A parody which substantially copies its original infringes the copyright

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1. For a brief overview of the history of parody, see Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1133–37 (1955). Another condensed history is found in the PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 601–02 (enlarged ed. A. Peminger 1974) [hereinafter cited as PRINCETON ENCYCLOPEDIA].

2. Critical parody has been defined as the exaggerated imitation of a work of art. Like caricature, it is based on distortion, bringing into bolder relief the salient features of a writer's style or habit of mind. It belongs to the genus *satire* and thus performs the double-edged task of reform and ridicule. PRINCETON ENCYCLOPEDIA, *supra* note 1, at 600.

3. Not all parody depends on copying which is substantial enough to raise a copyright cause of action. *See* note 28 *infra*.

4. There was a small flurry of "parody" cases in the first two decades of this century. Three of these actually involved impersonation of one actress by another, using a copyrighted song in the process. Green v. Luby, 177 F. 287 (C.C.S.D.N.Y. 1909); Green v. Mitzenheimer, 177 F. 286 (C.C.S.D.N.Y. 1909); Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903). Only one involved a real attempt at parody of a work. Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914) (play based on "Mutt and Jeff" comic strip).

5. Loew's Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

6. *E.g.*, Berlin v. E.C. Publications, Inc., Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir.), *cert. denied*, 439 U.S. 1132 (1980); 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955).

7. The court in Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 350 (S.D. Cal. 1955), briefly considered parody's historical role. The Second Circuit in Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964), and Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 n.1 (2d Cir.), *cert. denied*, 439 U.S. 1132 (1980), noted, without analysis, parody's role as criticism and humor.

in that original[8] absent some affirmative defense. Thus courts have used the broad notion of "fair use," which allows some unlicensed borrowing of otherwise copyright-protected material,[9] to give parodists some freedom to copy. The problem has been in deciding how much freedom to allow. The courts' solution has been to recognize that parody depends on mimicry. Thus they have allowed parodists to take only as much as is necessary to make the audience aware that the original is being mimicked. This is the "conjure up" doctrine, the main test used in deciding parody cases today.[10]

The mere need to mimic, however, is not a sound rationale for allowing fair use.[11] A test for parody cases which merely recognizes that parody must copy to achieve its purposes says nothing about what those purposes in fact are. Yet parody should be accorded the special status of fair use only if its purposes are so important to society that incursion on the original author's rights is justified.[12] Thus, a test for parody should focus on whether its taking is necessary to accomplish its purpose. This requires defining the purpose, something the courts have not done with sufficient sophistication. Some courts have noted the humor of parody as its value.[13] True, parody usually is funny. But not all funny adaptations of a work are parody. "My Fair Lady" is not a parody either of Shaw's *Pygmalion* or of the underlying myth; it is a musical comedy version of both.

The real value of parody to society lies not in its humor but in its criticism, for "at its best, [parody] is a critical instrument of telling force because it approaches the subject from within rather than from without . . . ."[14] This critical effect is what distinguishes parody from a comic adaptation. As criticism, parody fulfills an important social func-

8. Infringement is not well defined in the Copyrights Act. *See* Copyrights Act § 101, 17 U.S.C. app. § 501 (1976). The elements of a cause of action have been developed by the courts. Briefly, to prove a prima facie case of infringement, plaintiff must show that defendant copied her work by showing that defendant had access to her work and that his work is "substantially similar." *See* note 27 *infra*. For a more complete discussion of proof of infringement, see 3 M. NIMMER, NIMMER ON COPYRIGHT §§ 13.01–.03 (1979). The penalties for infringement may be civil, 17 U.S.C. app. §§ 502–505 (1976), or criminal, 17 U.S.C. app. § 506 (1976).

9. *See* parts I. *B & C infra*.

10. *See* part II. *A infra*.

11. Copyright protects against both verbatim copying and paraphrasing; one cannot evade the author's rights by changing his wording while retaining the basic structure of his expression. *E.g.*, West Publishing Co. v. Edward Thompson Co., 169 F. 833, 852–53 (E.D.N.Y. 1909). If the need to evoke the novel it is based on justified a film's reliance on a book, the "conjure up" analysis would entitle movie versions of novels to fair use.

12. *See* parts I and III *infra*.

13. *E.g.*, Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 n.1 (2d Cir.), *cert. denied*, 439 U.S. 132 (1980); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 882 (1964).

14. PRINCETON ENCYCLOPEDIA, *supra* note 1, at 600.

tion independent of its humor. Thus parody's critical effect should be central to any affirmative defense against prima facie copyright infringement.

Criticism has long been grounds for fair use status.[15] This comment argues that parody's value, and its qualification for fair use status, should be defined by its critical effect. It follows then, that the amount which the parody should be able to borrow should be measured in terms of this critical effect: the parodist should be able to borrow the amount necessary to achieve effectively her work's critical purpose, which is the only reason for allowing fair use in the first place.

This comment begins with an examination of the fair use doctrine and its application to parody by courts and commentators. The comment then shows how most courts have failed to recognize the special place of criticism in parody. It argues that this failure has led courts to inept definitions of parody which distort its function and obscure its value. The comment then proposes a test for protecting valid parody, based on the work's critical effect, and suggests a method which will lead to an equitable balance between the needs of two art forms when they collide, as they inevitably must when one work parodies another.

I. THE PURPOSES AND LIMITATIONS OF COPYRIGHT

A. Rights and Purposes

United States copyright law gives authors[16] a "bundle" of exclusive rights, including the right to reproduce, distribute and adapt their copyrighted works.[17] The adaptation right, called in the Copyrights Act the right to prepare derivative works,[18] is especially far-reaching. An author controls, for example, the right to translations, movie versions, abridgments, "or any other form in which a work may be recast, transformed, or adapted."[19] This statutory language arguably allows an author to con-

15. *See, e.g.*, Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376, 385 (D. Conn. 1972), *aff'd in part, rev'd in part*, 520 F.2d 1096 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914); Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869). The statements in these cases are all dicta, but the lack of litigation involving truly critical uses is an indication that such uses are widely accepted as fair use. *See* Comment, *Copyright Fair Use—Case Law & Legislation*, 1969 DUKE L.J. 63, 98 n.142.

16. For simplicity, this comment will refer to the original author as the "author" and the alleged infringer as the "user," although of course a parodist is also an author. Note also that the author may have assigned his copyright. But for purposes of this comment, "author" and "copyright holder" are used interchangeably.

17. 17 U.S.C. app. § 106 (1976).

18. *Id.*

19. *Id.* § 101.

trol parodies of a work, since parodists usually do recast, transform, or adapt their victims' works.[20]

The purpose of this control, however, is not to protect an author's "natural right" to all the fruits of his intellectual labor.[21] Rather, the constitutionally stated aim is "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."[22] The monopoly is based on public policy and is a means, not an end: the means is an economic incentive to create; the end is the "Progress of Science."[23] Thus the monopoly should give way when the economic incentive given to authors becomes counterproductive, retarding rather than promoting progress in the arts and sciences.[24]

B. Judicial Limitations on Copyright

The author's monopoly is far from absolute.[25] Courts have limited the potentially retarding effects of copyright, accommodating the tensions between the author's economic incentive and the user's progress-promoting borrowings. First, copyright protection covers only the expression of the author, not his underlying ideas, precluding monopolization of entire

20. Parody's status as a derivative work means that several rationales that courts and commentators have advanced to justify calling it fair use are insufficient. *See* Part II. *B infra*.

21. *See generally* Light, *Parody, Burlesque and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615, 618–21 (1979).

22. U.S. CONST. art. I, § 8, cl. 8. "Science," as used in the copyright clause, refers to what we now call the arts. Copyright originally developed in England as a protection for printers. The idea that the author's rights were to be protected developed slowly and was the focus of the state copyright laws existing before 1787. But the Constitutional provision is aimed more at protecting learning than at the natural rights of authors. *See generally* Comment, *Copyright: Limitations on Exclusive Rights, Fair Use*, 13 HOUSTON L. REV. 1041, 1042–46 (1976). For an entertaining discussion of the development of copyright in England, see B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1976).

23. *See* Mazer v. Stein, 347 U.S. 201 (1954).

24. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (value of photocopying to medical research outweighed detriment to journals thus copied); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543–44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). For a first amendment approach to this proposition, see Comment, *First Amendment & Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158, 1180–81. One commentator believes that "Congress may not grant, and the courts may not enforce, copyright protection which would impede the progress which is the purpose of copyright." Light, *supra* note 21, at 622. Surely this goes too far: Congress has granted, and the courts have enforced, the right of the copyright holder to withhold his creation from the public. *See also* note 45 and accompanying text *infra*.

25. This is true even in statutory terms. For example, copyright exists for only a limited time. 17 U.S.C. app. § 302 (1976). A perpetual copyright might increase the economic incentive to authors: the carrot of a perpetual fiefdom for themselves and their posterity. Statutory copyright has never gone this far, though the present term of author's life plus fifty years creates a domain for at least one generation of posterity. Prior to 1976, common-law copyright (which applied to unpublished works) was perpetual. The new Act abolishes common-law copyright and brings all copyright within the statutory term. *Id.* § 301. *See* Comment, *supra* note 24, at 1180 n.155.

realms of thought.[26] Second, a work infringes only when it is "substantially similar" to the original in its mode of expression.[27] Neither of these limitations would allow freedom for a close parody of a particular work, however, since parody usually is substantially similar in form to its original.[28] The limitation important for parody cases is the doctrine of fair use.

The basic idea of fair use is simple: some uses of copyrighted material

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26. If I create, for example, a new method of growing roses, a copyright can prevent others from reproducing my explanation of the system—the words I use to describe it—but not from using the basic concepts or explaining the concepts in a different way. Anyone can try to grow roses by my method; anyone can write a book about my method if he does not use my expression. *See* Mazer v. Stein, 347 U.S. 201, 217 (1954); Baker v. Selden, 101 U.S. 99 (1897); 17 U.S.C. app. § 102(b) (1976).

27. Professor Nimmer has identified two ways in which a work can be substantially similar. M. NIMMER, *supra* note 8, § 13.03[A].

A. Comprehensive Non-Literal Similarity

Here "the fundamental essense or structure of one work is duplicated in another." *Id.* at 13–16. This begins with an inquiry into the level of abstraction of the work's structure. The tale of a princess who flees a wicked stepmother, is sheltered by peasants, and eventually is rescued by a prince can take many forms. These bare bones are not "substantially similar." When we add a magic mirror, a poisoned apple, and seven dwarves, we may have copyrightable expression, especially when the dwarves whistle a particular song on their way to work. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied,* 282 U.S. 902 (1931).

The most common test the courts use to decide when a defendant's work is too close to plaintiff's copyrightable expression is the "audience" or "ordinary observer" test. This test depends on the idea that if the similarities are instantly apparent to the ordinary observer, defendant must have borrowed too much. There is a certain sense to this, considered in the context of protecting the author's incentive. If the public sees the similarity instantly, it might confuse the two works and accept them as interchangeable, leaving the author's economic interest vulnerable and his incentive thereby reduced. But for criticism of the test, see M. NIMMER, *supra* note 8, § 13.03[E].

B. Fragmented Literal Similarity

This occurs when defendant does not copy the general pattern of plaintiff's work but does borrow actual phrasings. Courts here have a more quantitative test: how much has been taken? But there is no formula which will guide a court's decision. A few lines of prose from plaintiff's voluminous work may be considered "insubstantial" when found in defendant's similarly voluminous work. But when the lines are distinctive and go to the core of plaintiff's work, the similarity may be deemed substantial. *See* Flick-Reedy Corp. v. Hydro-line Mfg. Co., 351 F.2d 546, 548–49 (7th Cir. 1965); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 744, *aff'd,* 623 F.2d 252 (2d Cir.), *cert. denied,* 439 U.S. 1132 (1980).

28. Satire as a broad genre does not conflict with copyright because of the basic distinction between idea and expression: satire in general does not depend on borrowing another person's expression. I cannot copyright the basic idea of satirizing a repressive government by a story set in a barnyard, though I can protect the expression "All animals are equal, but some are more equal than others." *See also* note 26 *supra.*

The subgenre of satire known as parody depends for its effect on the similarity to another's work. But not all parodies mimic a particular work, and here the doctrine of substantial similarity prevents a conflict with the law. The level-of-abstraction concept, *see generally* note 27 *supra,* explains how I can write a recognizable parody of Faulkner without actually infringing any of his works: I write a story set in the South, with long sentences and interior monologue about gloom, doom, and incest. Once I start tracking the plot line of *The Sound and the Fury,* however, I approach infringement. Of

are privileged.[29] For example, quoting a work in a book review or scholarly article is traditionally a fair use. Seen in the light of the basic purposes of copyright, the idea of fair use makes sense. Copyright contains a "bundle" of exclusive rights aimed at encouraging an author to create for the benefit of human progress; fair use creates a much more amorphous "bundle" of privileges in the user, aimed at ameliorating the monopolistic effects of copyright which can impede progress.

C. *The Troublesome Doctrine of Fair Use*

This balancing function of fair use is clearly an appropriate approach to the competing artistic claims of parody and its victims. The courts have not, however, always explained the doctrine in these balancing terms.[30] In applying it to diverse borrowings, they have instead created a diversity of rationales.[31] Since the doctrine as a whole has developed through case-by-case accretion, a particular rationale may work well for one set of facts

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course, one of the dangers of the "ordinary observer" test, *see generally* note 27 *supra*, is that an "ordinary" observer, unsophisticated as to the distinction between style and content, could think that "if it sounds like Faulkner it must *be* Faulkner" and could find infringement, though no expression is actually copied. But since most copyright infringement cases are tried to the court, not before a jury, the "ordinary observer" in copyright is more fictional than usual. *See* Comment, *supra* note 15, at 84.

29. H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944). Fair use is generally considered an affirmative defense to a prima facie case of infringement. M. NIMMER, *supra* note 8, § 13.05; Comment, *supra* note 24, at 1165. 17 U.S.C. app. § 107 (1976), which first codified the doctrine, says that fair use is not infringement. But since the predominant concept of fair use today comes into play only when all the other indicia of infringement are met, it is simpler to think of fair use as infringement-in-fact which is not actionable due to the doctrine. *See* Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 47–48 (1955) (pre-codification article). If fair use is an affirmative defense, the burden should be on the defendant to show that his use was fair. *See* part IV *infra*. *But see* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1362 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (plaintiff failed to show defendants' use unfair).

30. Some courts have recognized the relationship between fair use and progress. *E.g.*, Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543–44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), *aff'd in part, rev'd in part*, 520 F.2d 1096 (2d Cir.), *cert. denied*, 429 U.S. 898 (1976). In parody cases, however, this relationship has never been the basis of decision.

31. For example, it has been applied to the use of a fight song in an article about a football team, Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941); to photocopying of articles by a research library, Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975); and to the use of a previous work in a biography of Howard Hughes, Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). For a discussion of several of these rationales, see Cohen, *supra* note 29.

but be insufficient to explain another set. Thus, in application the simple privilege concept has become something of a morass for courts and commentators alike.[32]

A review of three major rationales which have been used in parody cases illustrates the problem. One rationale was simply that some uses are sanctioned by tradition.[33] This works well for the book review, with the weight of centuries behind it, but tradition cannot explain the permissible use of a copyrighted song captured during television coverage of a street fair.[34] A second rationale was that the author impliedly consented to the use.[35] But too often a borrowing has a socially desirable function where it is clear that consent would not be given.[36] Acerbic parody is a case in point.

Third, some courts have approached fair use by concentrating on what they term the "purpose" of the use.[37] This is often seen as the subjective intent of the user: specifically, whether he had a commercial or noncommercial motive for his borrowing.[38] One could presumably quote a noted throat specialist in the course of medical research, but not in a pamphlet aimed at selling cigarettes.[39] This distinction between the commercial and noncommercial purpose of the user is in many cases unworkable. Most users have some commercial motive; even a scholar is likely to hope his

32. One court called fair use "the most troublesome issue in the whole law of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Another has stated: "[T]he doctrine is entirely equitable and is so flexible as virtually to defy definition." Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

33. *E.g.*, Holdredge v. Knight Publishing Corp., 214 F. Supp. 921 (D. Cal. 1963); Shapiro, Bernstein & Co. v. P.F. Collier & Co., 26 U.S.P.Q. (BNA) 40 (S.D.N.Y. 1934). For a critique of this rationale, see Cohen, *supra* note 29, at 51–52.

34. Italian Book Corp. v. American Broadcasting Cos., 458 F. Supp. 65 (S.D.N.Y. 1978). The court used the "effect on the market" rationale. *Id.* at 70. *See generally* notes 42–46 and accompanying text *infra*.

35. *E.g.*, American Inst. of Architects v. Fenichel, 41 F. Supp. 146 (S.D.N.Y. 1941); Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941).

36. Another objection is that implied consent is clearly a fiction. An explicit disclaimer of consent will not preclude fair use. M. NIMMER, *supra* note 8, § 13.05.

37. This is still a factor to be considered under the statute. *See* 17 U.S.C. app. § 107 (1976), *reprinted in part in* text accompanying note 42 *infra*. For an analysis of fair use which rests on the user's purpose, see R. Nimmer, *Reflections on the Problem of Parody Infringement*, 17 ASCAP COPYRIGHT L. SYMP. 133 (1969).

38. Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 880 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980); Loew's Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165, 174–75 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

39. Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938). For an explanation of this case in terms of basic policies of copyright, see Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 109 (1967).

works will sell. On the other hand, courts in recent cases have recognized that some uses with an obvious commercial purpose may still be fair.[40]

It is thus clear that the explanation which one court gives for allowing fair use may be inapplicable in many other fair use situations.[41] When Congress codified the fair use doctrine in 1976, it sought to solve the problem by using a multi-factor approach. Instead of devising a rationale for the doctrine, the statute simply lists some traditional types of fair use and provides four factors the courts "shall" consider in deciding whether a work is a fair use or an actionable infringement:

> (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

40. Fair use has been allowed for works of popular scholarship aimed clearly at a mass market. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307–09 (2d. Cir. 1966), *cert. denied*, 385 U.S. 109 (1967), and even for borrowings whose entire intent was for use in comparative advertising. Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1178 (5th Cir. 1980).

41. Sometimes a court will find a fair use because it is only "incidental" to what the defendant is doing. *E.g.*, Broadway Music Corp. v. F-R Publishing Corp., 31 F. Supp. 817 (S.D.N.Y. 1940). This use, based on a de minimus concept, is not considered more fully here since the copying done by a parodist is usually central to his endeavor, rather than "incidental." A more recent rationale is found in a line of cases which stresses the need for the "public interest in the free dissemination of information." *E.g.*, Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (biography of Howard Hughes); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (use of Zapruder film of John F. Kennedy's assassination in a book on the subject). For a discussion of and criticism of these cases, see Comment, *supra* note 24, at 1167–77.

This inconsistency has caused some commentators to throw up their hands at the unwieldiness of fair use and to eschew it entirely in favor of first amendment arguments for borrower privilege. *E.g.*, Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Comment, *supra* note 24. *See also* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 18 PUBLISHING ENTERTAINMENT ADVERTISING L. Q. 242 (1980) (fair use is an internal accommodation to first amendment concerns, but is sometimes inadequate). But the doctrine need not be abandoned; it is itself one way of accommodating first amendment needs with the requirements of constitutional copyright. H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976), *aff'd sub nom.* Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977); Denicola, *supra*, at 257–59. The root of the question lies in the constitutional purpose of copyright itself: the crux of fair use should be how well the use comports with the underlying aim of advancing progress. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). In any event, the courts have rejected first amendment defenses in copyright cases. *E.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758–59 (9th Cir. 1978), *cert. denied*, 439 U.S. 1138 (1979); Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376, 382–84 (D. Conn. 1972), *aff'd in part, rev'd in part*, 520 F.2d 1096 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976).

(4) the effect of the use upon the potential market for or value of the copyrighted work.[42]

The fourth factor, which may be called the "substitution effect," is generally considered the most important.[43] The weight given this factor is in harmony with the basic rationale of copyright, for if a use is unlikely to affect the potential market, it is unlikely to interfere with the author's basic incentive to create.[44] The substitution effect is limited in its scope, however. The effect on the market must arise from the competition of the copier's work with the original author's, not from adverse criticism which decreases the public's desire for the original.[45] A derogatory review—or a biting parody—may devastate sales, but the copyright itself is hurt only when a work, because of its infringing similarity to the original, tends to replace or supersede the original.[46]

As more of the original is taken, the likelihood of the substitution effect naturally grows stronger. Thus, courts have often used the amount taken—the third factor—to decide the case.[47] This ignores the balancing

42. 17 U.S.C. app. § 107 (1976). In codifying fair use, Congress did not intend to freeze, change, contract, or expand the case law. H.R. REP. No. 94–1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 4680; S. REP. No. 94–473, 94th Cong., 1st Sess. 62 (1975).

43. M. NIMMER, *supra* note 8, § 13.05[b][4]. *But see* Timberg, *A Modern Fair Use Code for the Electronic as Well as the Gutenberg Age*, 75 NW. U.L. REV. 193, 221, 234 (1980). Some commentators try to link all the factors—and other rationales—into an argument based on economic competition. *E.g.*, Denicola, *supra* note 41, at 264–65.

44. *See* Comment, *supra* note 15, at 89. Sometimes a use may even enhance the value of a copyright by increasing the demand for the original, though this enhancement is not necessary to fair use. Italian Book Corp. v. American Broadcasting Cos., 458 F. Supp. 65, 70 (S.D.N.Y. 1978).

45. In addition, it is important to recognize that the effect is on the potential market, not the actual one. An author need not prove actual loss to prove infringement. Comment, *supra* note 15, at 90. The Copyrights Act provides for statutory damages. 17 U.S.C. app. § 504(c) (1976). The potential market includes all those uses which comprise the bundle of exclusive rights, even those which plaintiff has chosen not to exploit. M. NIMMER, *supra* note 8, § 13.05[B].

46. B. KAPLAN, *supra* note 22, at 69; *see* Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 213 (1954). Though the substitution effect is closely related to the underlying rationale of copyright, it does not, by itself, provide a complete answer to the problems of fair use. It is not easy to separate the effect of criticism from the substitution effect, and it is thus difficult to tell when some substitution has occurred. Suppose that in the course of a highly critical movie review, I reveal in detail both the plot and surprise ending of the film. Do audiences stay away because of my criticism or because the synopsis of the plot makes the film itself superfluous? The answer is probably "both." This comment argues that in such a case, my review deserves the fair use defense, but reliance on the substitution effect could lead to the opposite result.

47. Courts consider the amount taken to be a factor in two situations: 1) when the issue is whether the taking was "substantial" enough to be actionable infringement at all, *see* note 27 *supra*; and 2) when the issue is whether, given prima facie infringement, so much has been taken as to preclude fair use. Courts have confused these situations, holding for example that fair use means insubstantial similarity. *E.g.*, Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943). Or they may hold for defendant on both grounds at once, an inherently contradictory ap-

role of fair use. If "too much" is taken, fair use may be denied no matter what social function is being filled by the use.[48] To insist on thus denying fair use is to say that the aim of providing an author's incentive must always predominate over the value to society of other progress-enhanced uses.

This tendency to concentrate on the third factor is a weakness in the parody cases. To turn the quantity taken and the substitution effect into touchstones is to confuse "factors" with a rationale. The factors are to be considered and balanced, it is true, but always in the context of the underlying question: does deference to copyright and author's incentive promote or inhibit progress of the arts?[49] When a court attempts to apply the factors without a rationale for doing so, the correlation between its judgment and copyright policy becomes almost accidental.

II. FAIR USE AND PARODY

Courts today are willing to admit that parody deserves protection. Yet their acceptance of parody as a fair use is more apparent than real. Out of the nine recent parody cases,[50] only one actually decided that the work

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proach. *See, e.g.*, Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955), *discussed in* notes 57–59 and accompanying text *infra*. For a discussion of the uneasy relationship between substantial similarity in the infringement context and in the fair use context, see Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 ASCAP COPYRIGHT L. SYMP. 81, 99–123 (1977). *See also* Comment, *supra* note 15, at 103–07 (using amount taken in both situations results in duplication of the "demand element" when considering the substitution effect).

49. By setting up a group of factors which "shall" be considered, *see* text accompanying note 42 *supra*, the statute seems to require that all factors be considered in each case, whether or not appropriate to the particular facts. This creates a danger of rote application of factors rather than a consideration of the policies behind fair use. *See* Comment, *supra* note 15, at 108. At the very least, it obscures the subtle relationships between the factors.

50. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979) (topless version of Dallas Cowboys Cheerleaders' poster) (fair use merely alleged; insufficient to allow summary judgment); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (no fair use); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (no prima facie infringement); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir.), *cert. denied*, 439 U.S. 1132 (1980) (fair use allowed); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351 (N.D. Ga. 1979) (no parody) (preliminary injunction granted; summary judgment for plaintiff has since been granted, 546 PAT., T.M. & COPYRIGHT J. (BNA), Sept. 17, 1981, at A-1 (N.D. Ga. Aug. 26, 1981 & Sept. 5, 1981)); MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 211 U.S.P.Q. (BNA) 577 (2d Cir. 1981) (no parody); Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975) (no parody); Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955) (basis of holding unclear); Loew's Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (no fair use).

was in fact a parody which deserved fair use protection. But if the courts are reluctant to base their decision on fair use, they are not hesitant to talk about it. The cases are larded with dicta.

The problem with many of the parody cases is an undue emphasis on the amount taken in relation to the copyrighted work. This concern permeates the cases,[51] to the virtual exclusion of any reasoned consideration of why parody should be privileged at all. In fact, most of the cases do not ask the initial question: is the work before the court even a parody? The result has been dependence on a verbal formula—the "conjure up" doctrine—and a concomitant failure to develop a fair use rationale tailored to the particular advantages that parody offers to society. An analysis of the development of this formula reveals both the weaknesses inherent in its application and the way in which reliance on it has hindered development of a truly useful rationale.

A. The Emphasis on the Amount Taken

The rule today is that a parodist can take only as much as is necessary to recall to the audience's mind the subject of the parody. This rule developed in response to the first modern case to raise the parody defense, which held that parody was not a fair use. In *Loew's Inc. v. Columbia Broadcasting System, Inc. (Gaslight)*,[52] comedian Jack Benny was held to have infringed the copyright in the movie "Gaslight" by his half-hour television skit entitled "Autolight." The original film was a suspense drama; the television skit was substantially similar to it in locale, plotline, dialogue, and characters. The major difference was that Benny's version was funny. Defendants therefore claimed that the skit was burlesque (for legal purposes, a type of parody) and thus fair use.[53] The court looked instead to established fair use rationales, primarily the skit's commercial purpose,[54] to hold that parody is to be treated no differently from any other appropriation.[55]

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51. Courts sometimes reject fair use because they decide that the work before them is not a parody. *See* part III.*B infra*. But these courts still go on to consider the amount of the taking in dicta, investigating whether, if the work had been a parody, too much would nonetheless have been taken. *See* note 124 and accompanying text *infra*.

52. 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

53. *Id.* at 172.

54. *Id.* at 183. The court held that an author would not consent to having his work thus used, *id.* at 175; that there was no tradition of allowing fair use to commercial unconsented-to parodies, *id.* at 180; and that the commercial background of the parody (the rivalry between television and the film industry) precluded fair use. *Id.* at 181–83.

55. *Id.* at 183. The Ninth Circuit has expressly repudiated this extreme view. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

The case was affirmed without opinion by the Supreme Court and remains the Court's only holding on the subject of parody. Commentators reacted with instantaneous horror, predicting the death of parody.[56] Yet before the *Gaslight* case had even reached the Ninth Circuit, the same trial court in *Columbia Pictures Corp. v. National Broadcasting Co.*[57] decided that Sid Caesar's television skit "From Here to Obscurity" did not infringe the copyright in *From Here to Eternity*. The opinion is notably unclear.[58] On the one hand, the court obviously thought its holding was consistent with that in *Gaslight*, suggesting that there was not enough similarity to constitute even prima facie infringement.[59] On the other hand, it said that burlesque "historically" used part of the original to "conjure up" its target.[60] How much farther the parodist may go was even less clear.[61] The amount taken must be "small" and the parody can only go "somewhat farther."[62] The opinion does have the virtue of linking the words "fair use" and "parody," which the same court had refused to do in *Gaslight*.[63] Beyond that, it leaves unanswered even the

56. *E.g.*, Yankwich, *supra* note 1, at 1152; Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585 (1956); Comment, *Parody and the Law of Copyright*, 29 FORDHAM L. REV. 570 (1961); Note, *Parody and Burlesque—Fair Use or Copyright Infringement?*, 12 VAND. L. REV. 459 (1959). The defendants in *Gaslight* raised the same fear. 131 F. Supp. at 185.

57 137 F. Supp. 348 (S.D. Cal. 1955).

58. The opinion is unclear partly because the trial court assumed that the decision would be appealed. It thus felt that it was merely making a few admittedly hurried "remarks . . . intended to assist counsel in the preparation of findings of fact, conclusions of law and judgment." *Id.* at 349. In fact, the case was never appealed.

59. The court found this an "excellent companion case for *Loew's*," which "test[ed] [*Loew's*] general principle and . . . dictum." *Id.* at 351. The skit used material from the movie, but "[t]here is no substantial similarity between said burlesque and said motion picture." *Id.* at 352.

60. *Id.* at 350, 352.

61. The court was unclear about what part a "substantial" taking plays in deciding fair use. In places it seemed to revert to the old idea—now generally disregarded—that fair use is simply another term for insubstantial, *i.e.*, non-infringing taking: "The doctrine of fair use permits burlesque to go somewhat farther so long as the taking is not substantial." *Id.* at 350. If fair use is seen as an affirmative defense to otherwise prima facie infringement, it is difficult to see why it is needed if the taking is not substantial in the first place. *See* M. NIMMER, *supra* note 8, § 13.05. In other places, the court actually seemed to mean that a parodist can copy more than a serious borrower; the "line is drawn more strictly" for serious works borrowing from other serious works than for a "farce or comedy or burlesque" taking from "a serious copyrighted work or vice versa." 137 F. Supp. at 350. The "vice versa" is particularly obscure.

62. 137 F. Supp. at 350. At one point, the court suggested that a burlesque might take "an incident of the copyrighted story, a developed character . . . a title . . . some small . . . part of the development of the story, [and] . . . possibly some small amount of the dialogue." *Id.* But parodists cannot depend on this list, for if the amount taken is not, in toto, "small," then the burlesque "runs a calculated risk, that . . . a trier of fact may find the taking substantial." *Id.* Not surprisingly, the list reflects what Caesar had happened to take in this skit, a skit the court simply found inoffensive: "the defendant has taken a small part and then ' "[taken] off into the blue." ' " *Id.* at 351 (quoting Dr. Frank Baxter's testimony in *Gaslight*, 131 F. Supp. at 183).

63. *See* notes 52–55 and accompanying text *supra*.

threshold question: what if a parodist needs more than a "small" taking to accomplish her conjuring up?

Nevertheless, the idea that a parody can "conjure up" its original is now accepted dogma. Ironically, the strongest and most cited statement of the doctrine was purest dictum. In *Berlin v. E.C. Publications, Inc.*,[64] *Mad Magazine* had printed a series of satiric lyrics to be sung to the tunes of popular songs; for example, "The Last Time I Saw Paris" was transmuted to "The Last Time I Saw Maris," a ditty about a then-current baseball hero. The court found that so little had been borrowed—just the "occasional phrase from the original lyrics in the occasional song"[65]—that there was not even prima facie infringement under a strict interpretation of *Gaslight*. But the court respected the parodist's need for freedom, and so it went on to say:

> At the very least, where . . . it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, *and* where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.[66]

Because the amount taken in *Berlin* was so small as not to be even prima facie infringement, the court did not address the question of how much was legitimately "necessary" to conjure up the object of the satire.

The courts now had their formula. But they lacked a rationale for applying it beyond a vague sense of goodwill towards an art form they acknowledged was venerable. When the content of the parody became less socially acceptable than pratfalls and jibes at baseball players, the conjure-up test showed its weakness.

In *Walt Disney Productions v. Air Pirates*,[67] defendants had published a comic book in which Mickey Mouse and other Disney characters were portrayed in a very un-Disney-like way—as free-loving, drug-taking hippies. They argued that this parody would not have the effect of substituting for the original, so that they should be allowed considerable freedom to borrow. The court rejected this argument explicitly, along with any notion that the amount of the taking was irrelevant.[68] Instead, it stated that "very little" was necessary to conjure up Mickey Mouse, since "when the medium involved is a comic book, a recognizable caricature is

64. 329 F. 2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

65. *Id.* at 543. The court also noted that some titles (in twisted form) and the meter had been borrowed. But "we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter." *Id.* at 545.

66. *Id.* at 545 (emphasis added).

67. 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

68. *Id.* at 756.

not difficult to draw. . . . By copying the images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work . . . ."[69] Thus, defendants had infringed.

Defendants argued that they took no more than was necessary to achieve their parodic effect. Because the parody was of the ideas that Mickey specifically stood for, the character had to be clearly Mickey, not just some similar mouse.[70] Defendants further argued that:

> in the context of parody, [the allowable] taking is required not only to "conjure up" the original, but also to provide the comic element itself which is derived largely from the shock of the unexpected parody elements in the midst of the completely familiar elements of the original.[71]

Here the familiar elements of the original lay in the graphic depiction of the characters and their names; in nearly every other aspect, such as plot, personality, or dialogue, the two versions were different.[72]

The court's "short answer"[73] to this argument shows the weakness of the conjure-up test:

> [W]hen persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take as much of a component part as they need to make the "best parody." Instead their desire to make the "best parody" is balanced against the rights of the copyright owner. . . .[74]

This statement amounts to holding that parody is to be allowed only if it is sloppy work. Yet the very reason parody should be fair use lies in its importance to the progress of the arts. Such progress will not be encouraged by allowing only ineffective parody.

In the only case actually holding that a parody is fair use, the Second Circuit seemed to be moving away from the grudging view of conjure up shown in *Air Pirates*. In *Elsmere Music, Inc. v. National Broadcasting Co.*,[75] the cast of "Saturday Night Live" had borrowed two words and four notes from New York's advertising campaign song: "I Love New York" became "I Love Sodom." The trial court found that defendants

69. *Id.* at 757–58.

70. Brief for Appellant at 26. The court replied that all that was necessary was to "parallel" the characters "in a manner that conjured up the particular elements of the innocence of the characters that were to be satirized." 581 F.2d at 758.

71. Brief for Appellant at 20.

72. 581 F.2d at 753.

73. *Id.* at 758.

74. *Id.*

75. 482 F. Supp. 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir.), *cert. denied*, 439 U.S. 1132 (1980).

had taken the "heart of the composition," a prima facie infringement.[76] Still, the phrase lasted only eighteen seconds and "[could] not be said to be clearly more than was necessary to 'conjure up' the original."[77] Thus the taking was fair use.

Plaintiffs argued that repeating the phrase several times went beyond conjure up; viewers could recognize the original after the first time. The trial court replied that this repetition served its own parodic purposes.[78] On appeal, the Second Circuit developed this idea:

> [T]he concept of "conjuring up" an original [did not come] into the copyright law . . . as a limitation on how much of an original may be used . . . . A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.[79]

B. The Continuing Lack of a Useful Rationale

In the course of developing and applying the conjure-up doctine, the courts have alluded to several reasons for allowing parodists to take enough to conjure up their originals and commentators have developed each of these. One suggestion was that parody deserves special treatment simply because of its long history as a separate art form.[80] A related idea was that since parody involves a good deal of independent effort and originality—in addition to its borrowing—it should have independent status.[81]

Neither of these explanations is sufficient in itself: they both ignore the fact that parody, as an adaptation of the original, falls within the statutory definition of a derivative work. Other types of derivative works, such as translation, have a long history; other types, such as film, are independent art forms requiring independent effort and originality. Yet no one could suggest, in the case of film or translation, that this history or originality

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76. *Id.* at 744. For a discussion of courts' approaches to substantiality when faced with a short musical motif, see Sherman, *supra* note 47, at 104–12.

77. 482 F. Supp. at 747.

78. *Id.*

79. 623 F.2d 252, 253 n.1. This is a very weak expansion of the doctrine: a footnote to a one paragraph per curiam opinion. It does, however, recognize the straightjacket put on parody by the conjure-up doctrine.

80. Yankwich, *supra* note 1, at 1133; Note, 12 VAND. L. REV., *supra* note 56, at 461.

81. *E.g.*, R. Nimmer, *supra* note 37, at 135; Comment, *Piracy or Parody: Never the Twain*, 38 U. COLO. L. REV. 550, 553 (1966). British courts have used the idea of an original result flowing from independent effort as a rationale for allowing parody "fair dealing" status. For a discussion of British parody cases, see *id.* at 554–58.

makes fair use out of what is firmly within the rights reserved to the author of a source work.[82]

A third reason lies in the fact that parody is often funny: the Second Circuit in *Elsmere* affirmed the trial court because "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody."[83] Allowing fair use for merely funny adaptations would also encroach severely on the author's derivative work rights. To allow all things funny to fall into the net of protected parody could lead to the result feared by the Ninth Circuit in the *Gaslight* case: "[A]ny individual or corporation could appropriate, in its entirety, a serious and famous dramatic work, protected by copyright, merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as burlesque."[84]

One argument proposed by commentators and gaining some recognition in the courts is that parody deserves fair use because it is unlikely that anyone would buy the parody instead of the original.[85] A panel of the Second Circuit has recently split on this question. In *MCA, Inc. v. Wilson*,[86] defendants had produced a musical which included a song entitled "The Cunnilingus Champion of Company C." This was clearly intended as a take off on "The Boogie Woogie Bugle Boy of Company B."[87] The majority emphasized defendant's commercial intent, harking back to the arguments of the *Gaslight* case. The opinion noted that "plaintiffs and defendants were competitors in the entertainment field. Both Bugle Boy and Cunnilingus Champion were performed on the stage. Both were sold as recordings. Both were sold in printed copies."[88] The court concluded that, in these circumstances, the parody[89] could not be fair use.

The dissent, in contrast, would have allowed fair use because

> [a] raucous and explicitly sexual satire is not a substitute for the innocence of Bugle Boy. I therefore cannot agree with the majority's "premise that the songs were competing works," . . . or that the sale or rendition of defendants' song would interfere with the marketability of plaintiff's song.[90]

82. Films and translations are both specifically mentioned in the statutory definition of derivative works. 17 U.S.C. app. § 101 (1976).

83. 623 F.2d at 253.

84. Benny v. Loew's Inc., 239 F.2d 532, 537 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

85. *E.g.*, Light, *supra* note 21, at 634–35.

86. 211 U.S.P.Q. (BNA) 577 (2d Cir. 1981).

87. A cast member testified "how it would be funny if we could get 'Cunnilingus Champion' to sound similar to 'Boogie Woogie Bugle Boy' just to create some publicity." MCA, Inc. v. Wilson, 425 F. Supp. 443, 448 (1976).

88. 211 U.S.P.Q. (BNA) at 581.

89. The court may actually have decided that "Champion" was not a parody at all. *See* notes 132–39 and accompanying text *infra*.

90. 211 U.S.P.Q. (BNA) at 586 (Mansfield, J.).

The dissent is probably right, factually, but the reasoning is again inconsistent with parody's derivative-work quality. Few potential readers of *The Sound and the Fury* are likely to buy a Finnish version of it, but Faulkner's estate still owns the translation rights and can prosecute unauthorized translators.

The dissent depends on a naive view of the "effect on the market" factor in fair use;[91] thus viewed, this factor is not useful for parody, important as it is for other types of fair use.[92] Courts need to consider a rationale for parody which allows it freedom despite its nature as a derivative work.

Some commentators have suggested that parody should be privileged because it is a use of the work that the author is unlikely to authorize.[93] This argument is unsatisfactory, too, because normally copyright includes the right to withhold a work from the public.[94] Still, this rationale implicitly recognizes the important kernel of truth: parodies are critical.

III. THE CRITICAL FUNCTION OF PARODY

This comment argues that the courts have for the most part ignored the critical quality of parody, either in their evaluation of a parodist's borrowing or, indeed, in their very definition of parody.[95] Yet it is precisely this element that separates parody from other merely humorous adaptations. Furthermore, it is precisely this element which fits parody into fair use in a way that is consistent with the basic policy of copyright. To understand

91. A related argument is that parody will rarely affect the value of a copyright and may enhance it by stimulating interest in the original. *See* note 44 *supra*. Thus, goes the argument, it should be fair use without regard to the amount taken. *See, e.g.*, Harmon, *Recent Developments in Ninth Circuit Patent and Copyright Law*, 10 GOLDEN GATE L. REV. 453, 464 (1980); Light, *supra* note 21, at 634–35. The problem with this approach is that it ignores the derivative-work quality of parody. A film version may stimulate interest in a book, but it is not thereby fair use.

92. The effect on the market may be very important when considering an "incidental" type of fair use. *See* note 41 *supra*. A more sophisticated view of this factor says that when the functions (as opposed to the audiences) of the use and the original are different, there will be minimal effect on the market, and fair use is permissible. *See* M. NIMMER, *supra* note 8, § 13.05[B]. This comment argues that true parody does serve a different function from its target, so to this extent the effect-on-the-market factor has some explanatory power. *See* text accompanying notes 96–111 *infra*.

93. *E.g.*, Light, *supra* note 21; Rosette, *Burlesque as Copyright Infringement*, 9 ASCAP COPYRIGHT L. SYMP. 1, 27 (1956).

94. Loew's Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165, 184–85 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

95. Although many commentators have noted parody's critical function, none has yet made it the center of analysis. *E.g.*, Light, *supra* note 21; R. Nimmer, *supra* note 37; Rosette, *supra* note 93; Yankwich, *supra* note 1; Comment, *supra* note 81; Note, 56 COLUM. L. REV., *supra* note 56. One commentator has actually rejected parody's critical function as important to the analysis. Comment, *supra* note 56, at 572.

the importance of this critical element, it is first necessary to examine fair use more closely from the point of view of the policies behind the whole copyright scheme. This will lead to a clearer understanding of why those courts which have attempted to define parody have in all but one case erred.

A. The Place of Criticism in Fair Use Doctrine

1. A Proposed Fair Use Analysis

Consideration of the fair use doctrine demonstrates that balancing factors need not be the only way of looking at fair use. An alternative method is a purposive analysis, based on the societal purposes served by copyright law.[96] Under this approach, courts would decide what purposes, as a group, deserve protection because they are more important to society than protecting the borrowed work. As long as a borrowing fulfills these purposes, the quantity taken, or even the possibility of a substitution effect, would be irrelevant. Criticism is the best example of such a purpose.

The copyright statute recognizes "purpose of the use" as a factor in determining fair use. Although this may refer to the user's subjective intent in borrowing, the statute also lists examples of the types of uses which can evoke fair use: "criticism, comment, news reporting, teaching . . . , scholarship, or research."[97] This list embodies *societal* purposes, uses which embody societal policy judgments that their purposes are valid intrusions on the copyright monopoly more valuable than the author's incentive.[98] Defined in this sense, these can be called "fair use purposes"[99]

96. This would be analogous to the method of "definitional balancing" suggested in some first amendment cases. *See* Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F.L. REV. 564, 578–79 (1976); Comment, *supra* note 24, at 1185 n.170.

97. 17 U.S.C. app. § 107 (1976). One commentator has suggested that the first factor "would be applied to determine whether the use was one within the scope of the public interest such as specified in the preamble to § 107." Comment, *supra* note 22, at 1053. Since the factor mentions specifically "commercial and noncommercial uses" it is likelier that it reflects the cases which consider commercial use as highly suspect. *See* notes 38–40 and accompanying text *supra*. Although the first factor was gleaned from case law, consideration of purpose in the light of the uses mentioned in the preamble assures that the factor's mention of "commercial purposes" need not freeze the court's consideration in light of this case law.

98. *See* Comment, *supra* note 15, at 91–92.

99. Of course, in one sense this is merely a list of labels. Simply labeling one's borrowing as "news reporting" or "scholarship" should not automatically result in fair use. *See* Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94–95 (2d Cir. 1977). Similarly, mere allegation that one's work is a parody is insufficient to justify the fair use defense. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979). *See* Comment, *supra* note 15, at 98. This commentator also suggests looking at first amendment principles and at case law to determine what uses are, in their nature, fair. *Id.* at 95–96, 99.

and if the effect of a particular work is to further one of them in a bona fide way,[100] the courts should call the use fair.

An examination of the list of these "fair use purposes" shows that they promote two interests important to society: 1) an interest in analysis and criticism of society's intellectual store,[101] and 2) an interest in allowing thinkers to build on what has gone before, an interest in the evolutionary growth of thought.[102] The court, in its process of definitional balancing, should treat these two interests differently.

Professor Nimmer's "functional" approach to fair use helps explain why different treatments are needed.[103] Fair use, he says, should be allowed when the function of a use is different from that of the source.[104] A work which criticizes another—which promotes society's interest in analysis and criticism—has (insofar as it criticizes) by definition a function which is different from that of the source: the point of criticism is to analyze and comment *upon* the thing being criticized. In contrast, a work which promotes the interest in the evolutionary growth of thought—what might be called an informational use—may well have the same function as the source. For example, when a scientist quotes as part of her research the heart of her predecessor's research on microbes, she is using his words, at that moment, for the same purpose that he was: to convey information about microbes. Similarly, a news report of a copyrighted speech quotes it to convey the information conveyed by the speech.

An informational use may or may not further a fair use purpose, depending on what more is done with the borrowing.[105] The courts in these cases must turn to the four fair use factors to determine whether the bor-

100. "Bona fide," of course, suggests a subjective component. But once a fair use purpose is defined, an objective test can be used to determine whether a particular work qualifies: whether a "reasonable person" would perceive the work as fulfilling a fair use purpose. *See* note 153 and accompanying text *infra*. *See also* Yankwich, *supra* note 1, at 1152.

101. *See, e.g.*, Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901). *See also* cases cited in note 15 *supra*.

102. *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); West Publishing Co. v. Edward Thompson Co., 169 F. 833, 866 (E.D.N.Y. 1909), *decree modified*, 176 F. 833 (E.D.N.Y. 1910); H. BALL, *supra* note 29, at 259; Comment, *supra* note 24, at 1179.

103. M. NIMMER, *supra* note 8, § 13.05[B].

104. *Id.*

105. For example, a scientist may illuminate previous microbe research by her discussion of her own contributions or the newspaper may place the quoted speech in the context of the larger issues it raises. But simply using an extract in a case book on microbes would probably not be fair use, since it does nothing to go beyond the informational function of the source. *See* Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 96 (2d Cir. 1977) (court contrasted news report adding commentary to quoted materials with abstract of same materials simply condensing them). *See also* Flick-Reedy Corp. v. Hydro-Line Mfg. Co., 351 F.2d 546 (7th Cir. 1965).

rowing is a bona fide fair use.[106] In contrast, a critical use would be fair use per se; criticism performs a different function from and does not substitute for the original.[107] When a critic quotes a line of poetry to show that a poet has poor control of his meter, the only reason for quoting is to make the criticism.

Thus criticism should be considered *in itself* a fair use purpose. Insofar as the critical aspect dominates the use, the amount taken should be irrelevant.[108] A critic should be able to quote a poem in its entirety as long as this is necessary to further the critical purpose.[109] This may lead to the possibility of some substitution effect; a reader may find his desire for the poem sated by reading it in the critic's work.[110] But using copyright to stifle effective criticism would retard social progress more than enhance it, and so here the author's incentive should give way.

True parody is satiric, and satire is a form of criticism. Thus a court's first inquiry on considering a parody defense should be to ask whether the

106. The danger of making an informational use fair use per se is illustrated in Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). There, the court found a quotation in a biography was fair use despite the commercial nature of the biography. The court distinguished Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938), where a cigarette manufacturer was held liable for quoting a scientist's research because the manufacturer's use was not designed to advance science or art. In *Rosemont*, the commercial use did advance science or art. 366 F.2d at 309. But this approach leads the court into a jungle of value judgments: When is the commercially motivated work "art" and when is it not? It is wiser to consider all the factors, including the amount taken and the substitution effect, when the function of the copied extract is at least initially the same in the user's and the author's work. This approach was taken in Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), where summary judgment for defendant was reversed. Here, defendant had used copyright letters of the Rosenbergs in his book about their trial. The trial court had based its decision on the public interest in full knowledge about the trial. *See* Meeropol v. Nizer, 417 F. Supp. 1201, 1209 (S.D.N.Y. 1976), *rev'd*, 560 F.2d 1061 (2d cir. 1977). The Second Circuit ruled that the plaintiff should have a chance to prove the substitution effect.

107. Criticism is also traditionally protected under the first amendment. Comment, *supra* note 24, at 1185–86.

108. *See* Comment, *supra* note 15, at 106–07.

109. *See* Comment, *supra* note 15, at 102–03; Note, 12 VAND. L. REV., *supra* note 56, at 469–70. Courts have rejected, without really analyzing, the idea that a verbatim copying can be fair use. *E.g.*, Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975). The authority most often cited is Leon v. Pacific Tel. and Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937). *Leon* involved a copying of a telephone directory and hence is cited for its precedential weight, not because its rationale necessarily fits the case before the court. As a rule of thumb, the disfavor of verbatim copying is consistent with the test proposed here. The crucial aspect of this test lies in the necessity of the borrowing to the criticism. Particularly for longer works, it may be impossible to show that verbatim copying of the whole work was really required. Since fair use is an affirmative defense, *see* note 29 *supra*, the burden should be on defendant to show the necessity. *See* part IV *infra*. But the rule should be one of thumb, not an iron glove.

110. *See* Comment, *supra* note 15, at 96.

work has a critical effect. If it does, then the amount taken should be judged in terms of the needs of the parody and its criticism.[111]

2. *Judicial Treatment of Critical Values in Parody Cases*

The suggestion that parody has critical value has not fared well in the courts until recently. The court in the *Gaslight* case recognized that "'[c]riticism is an important and proper exercise of fair use.'"[112] But because it emphasized the testimony of defendant's own expert witness that burlesque is basically lighthearted, a "happy toying with serious things"[113]—the court did not accept the connection between burlesque and criticism. In *Air Pirates,* too, the court assumed that the work before it was a parody,[114] but brushed off arguments that the work's criticism was important with the deprecating comment that defendants "supposedly sought to convey an allegorical message of significance."[115]

In *Columbia Pictures,* the "From Here to Obscurity" case, the court was impressed with the idea that "burlesque is a recognized form of literary art" and that this particular burlesque is a "new, original and different literary work."[116] Yet neither of these is a strong reason for allowing parodists the fair use defense,[117] since neither is a reason for allowing the fair use privilege for other derivative works. At trial there had been expert testimony on parody's critical role.[118] Yet the court remained oblivious to

111. *See* Note, 56 COLUM. L. REV., *supra* note 56, at 594. This view requires looking at the amount taken from the point of view of defendant's work. It should be remembered that we are here considering the amount taken in the context of fair use, not of prima facie infringement. In considering substantial similarities leading to infringement itself, the rule is to consider the amount taken in relation to plaintiff's work, not defendant's. M. NIMMER, *supra* note 8, § 13.03[B]. For the reasons behind this rule, see Sherman, *supra* note 47, at 102–03. However, when parody raises the fair use defense, it has already been decided that its similarity is substantial enough to be actionable.

112. 131 F. Supp. at 175. The court also recognized that more liberal taking was allowable in the arts and sciences, so that progress would not be "retarded," but declined to include parody as an art. *Id.*

113. *Id.* at 181 n.46. It is possible that "Autolight" was in fact merely broad humor and not critical parody. If so, the decision may have been a sound one on its facts. *See* Brief for Appellant, Benny v. Loew's Inc., 356 U.S. 43 (1958). The Ninth Circuit remarked that the contention that the burlesque was literary criticism "would [itself] seem to be a parody upon the meaning of criticism." 239 F.2d at 537.

114. 581 F.2d at 756.

115. *Id.* at 753 (emphasis added).

116. 137 F. Supp. at 352.

117. *See* part II.*B. supra.*

118. Dr. Smith's extended testimony . . . is informative and captivating, but most of it is *beside the point.* Its only impact in the case at bar could be on the question of whether the television showing of "From Here to Obscurity" is a true burlesque. How that determination aids us in a solution in this case is difficult to see.

137 F. Supp. 350 (emphasis added). This comment, of course, argues that whether or not a parody is a "true" one is not "beside" the point; it is the *whole* point.

the importance of the critical function. The decision thus lacks sound policy underpinnings for permitting borrowing by parodists.

Only one court has fully recognized the importance of parody's critical effect. In *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*,[119] defendant had produced a musical called "Scarlett Fever" based on the movie "Gone with the Wind." The court, in granting a preliminary injunction, recognized that mere humor was an insufficient ground for allowing fair use.[120] In response to a parody defense, the court defined parody and satire as "art forms involv[ing] the type of original critical comment meant to be protected by § 107."[121] Though some aspects of the musical were satirical, the overall effect was of a musical comedy version of the film[122]—in fact, a derivative work firmly within the author's exclusive right to "do or authorize."[123] The court thus rejected the parody defense, not because of the amount taken[124] but because the work was not a parody.

The court thus recognized that parody's privilege depends on a rationale which distinguishes it from other forms of derivative work. Originality of effort and historical tradition, both qualities of many derivative works, are insufficient. Criticism provides the necessary, better grounded rationale. Just as a critical use of some verbatim copying is privileged in a book review, so the critical function of parody should allow use of a work which would be merely derivative, absent the criticism.

B. The Problem of Definition

Misled by the concern for the amount taken and by a dependence on the conjure up formula, most courts have ignored the "threshold question of whether the work is a parody or satire."[125] The few that have considered definitions have raised two related issues which they have resolved in un-

119. 479 F. Supp. 351 (N.D. Ga. 1979), *sum. judgment granted*, 546 PAT. T.M. & COPYRIGHT J., (BNA), Sept. 17, 1981, at A-1 (N.D. Ga. Aug. 26, 1981 and Sept. 5, 1981).

120. *Id.* at 357.

121. *Id.*

122. *Id.*

123. *Id.* at 360. *See* 17 U.S.C. app. § 101 (1976).

124. The court went on to consider the "conjure up" issue in dicta. 479 F. Supp. at 358–61. Using the four fair use factors, the court concluded that had the play been a parody, it still would have been denied fair use. *Id.* at 358. In doing so, the court fell back into the restricted "conjure up" analysis, stating that since the plot and characters of "Gone with the Wind" were so well known, very little need have been taken to "conjure up" the film or novel. *Id.* at 359. Had the court found "Scarlett Fever" to be a parody the court might have found itself forced into an *Air Pirates* position; though recognizing the critical value of the work, it would be required by the conjure up doctrine to say that this criticism should have been achieved in a less effective way.

125. *Id.* at 357.

satisfactory ways. First, can a work still be defined as a parody even if its criticism is aimed at society generally and not just at the borrowed work?[126] Second, if the entire work is copied in the parody, can the borrowing work still be defined as parody?[127] The courts have answered "no" to each question, but these refusals depend on assumptions which fall when parody's critical function is recognized.

1. Defining Parody by its Target

In *MCA, Inc. v. Wilson,*[128] the district court took a narrow view of how parody should be defined. It obliquely recognized that parody is critical, but found it decisive that the song "was not intended to be a parody of 'Bugle Boy' [the original work] in the sense of taking 'Bugle Boy' out of context in an attempt to hold it up to ridicule."[129] The criticism, in other words, was not aimed at the original work. Defendants claimed that Champion, their parody, was burlesque, aimed at "sexual mores and taboos," and "meant to project the message that sex is good, clean and wholesome."[130] The court held that this purpose, a criticism of society's mores generally, was not justification for the taking; only a direct parody of the original could be considered a fair use.[131]

In affirming the trial court's finding of infringement,[132] the Second Circuit illustrated once again the narrowing influence of the conjure up doctrine. Modifying slightly the trial court's strict view of parody's targets, the majority admitted that parody may "reflect life in general" as well as skewer its original. "However, if the Champion song is not at least in part an object of the parody, there is no need to conjure it up."[133]

As the dissent pointed out, this reasoning is fallacious. Defendants might have a logical reason for conjuring up a song without intending to parody the song itself. The dissent asserted:

> [I]n my view, the defendants . . . produce[d] what amounts to sexual satire or burlesque of contemporary mores by putting a comic or humorous twist on the more conventional Bugle Boy and by parodying the Andrews Sisters' style, which depended heavily on "boogie-woogie" music . . . . Defen-

126. MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 211 U.S.P.Q. (BNA) 577 (2d Cir. 1981).

127. Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975).

128. 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 211 U.S.P.Q. (BNA) 577 (2d Cir. 1981). *See* notes 87–90 and accompanying text *supra*.

129. *Id.* at 453.

130. *Id.* at 453 & n.18.

131. *Id.*

132. 211 U.S.P.Q. (BNA) 577 (2d Cir. 1981). The damage award was modified.

133. *Id.* at 581.

> dants made limited use of Bugle Boy to create a new and (to many) humorous effect. . . . The humorous twist would not exist if the "boogie woogie" sound of the original . . . were not recalled.[134]

The dissent had a broader view of the permissible aims of parody. Yet though defendants may have had a logical reason for their use of the original song—recalling a mood by the type of music used—it was not necessarily a sound one in this case. Though the dissent called Champion a "satire" it clearly found the song's value in its humor and originality. As has been demonstrated,[135] a work does not deserve the fair use privilege simply because it is new or funny, even if it takes barely enough to conjure up the original.

The problem in *Wilson,* then, was not in the use of the original to recall the forties; rather, the problem was that the evidence fails to show that defendants borrowed for a truly critical purpose.[136] There is little in the opinion, other than the conclusory terms such as "burlesque" and "spoof," to show that Champion had any critical effect. Consequently, the finding of infringement would be correct, although the court's reasoning was wrong.

The majority's opinion is unfortunate because it supports the proposition that only direct spoofs of an original can be considered parody.[137] In

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134. *Id.* at 584, 586 (Mansfield, J.)..

135. *See* text accompanying notes 80–84 *supra*.

136. The majority may have sensed this problem. It noted that:

> Defendants' argument in short is that, because Cunnilingus Champion "deals with the humorous practice of cunnilingus" and Wilson was trying to portray that practice as "joyous", he was entitled to use a competing copyright owner's music that was "immediately identifiable as something happy and joyous and it brought back a certain period in our history when we felt that way."

211 U.S.P.Q. (BNA) at 580.

137. This is simply wrong from a literary point of view: consider the multitudes of parodies of an author's style rather than of a particular work. Of course, this type of parody creates no copyright problem. *See* note 28 *supra*. Furthermore, a parody which does closely track the original's wording and structure can quite legitimately carry social criticism without criticizing the original. For example, a recent political cartoon portrays James Watt playing a guitar and singing:

> This land is your land, this land is my land
> From the off shore oil rigs . . . to the strip mined mountains . . .
> From the redwood saw mills . . . to the toxic land fills . . .
> This land is owned by industry.

Cartoon by Mike Peters, NEW REPUBLIC, Sept. 30, 1981, at 23. The target here is clearly Watt's philosophy and not the original song, since the parody is more in sympathy with the philosophy behind the original than critical of it.

Another district court in the Second Circuit had rejected the strict holding of *Wilson* in dicta. In Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd percuriam*, 623 F.2d 252 (2d Cir.), *cert denied*, 439 U.S. 1132 (1980), plaintiffs claimed that "I Love Sodom" did not directly parody "I Love New York", relying on *Wilson*. The court rejected this argument and went on to say that in any event there need not be "an identity between the song copied and the subject matter of the parody," pointing out that the substance of the songs parodied in Berlin v. E.C.

a decision granting summary judgment for plaintiffs in *Showcase Atlanta*, the court followed *Wilson* in defining parody's social value as critical commentary "upon the work being parodied."[138] These courts' narrow definition cuts off too many potentially privileged uses without allowing full inquiry into whether the use fulfills a bona fide fair use function such as criticism. When the emphasis is placed on the function of the borrowing, it is clear that, whatever the target of the criticism, parody's essential critical ingredient results in a function different from that of the original, making fair use appropriate.[139]

2. *Verbatim Taking as Parody*

It is tempting for a court to find that a parody cannot be fair use if it copies the whole work. After all, even if one looks to the critical effect, one's initial reaction is to say that a parody of a particular work requires some changes from the original or there is nothing which results in the criticism.[140] Closer analysis, however, shows that this need not always be the case. A work may be parodied by context alone. Consider, for example, an anti-war review in which the song "The Ballad of the Green Berets" is performed by suitably attired gorillas. Properly done, the staging could be an effective critical commentary of the values underlying the song.

Verbatim copying can thus result in valid criticism. It is thus misleading to limit the definition of parody to satirical works which take only part of the original. Unfortunately, the court in *Walt Disney Productions v. Mature Pictures Corp.*,[141] another case involving Disney creations, took this limited approach. Defendants in *Mature* used the "Mickey Mouse March" in its entirety in an unusual context—as background music in the film "The Life and Times of the Happy Hooker." While the March played and three actors wearing only Mouseketeer hats sang, "the female protagonist . . . appear[ed] to simultaneously gratify the sexual drive of

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Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964), had nothing to do with *Mad Magazine*'s lyrics. The *Elsmere* court did not, however, elaborate its reasons for rejecting the *Wilson* definition. Now that the Second Circuit has affirmed *Wilson*, there may not need to be "identity" between the original and the subject matter of the parody, but there must be some overlap.

138. Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., 546 PAT. T.M. & COPYRIGHT J. (BNA), Sept. 17, 1981, at A–1 (N.D. Ga. Aug. 26, 1981 and Sept. 5, 1981). The court was relying on the district court opinion in *Wilson*.

139. The burden of proving that a particular taking for general social criticism was necessary to that criticism should be heavier than in the case of direct parody. *See* part IV.*B*. *infra*.

140. This is closely related to the analysis leading to a definition restricted to direct parody of a work. Such analysis requires comment "upon" the work being parodied.

141. 389 F. Supp. 1397 (S.D.N.Y. 1975).

. . . three other actors.''[142] The defendants stressed humor rather than criticism as their aim.[143] Nevertheless the court did not address the purpose of the taking; instead, it called on the conjure up test and held that because more than necessary to conjure up was taken, the work was not a parody.[144]

A court which takes the *Mature* approach, simply rejecting the idea that parody exists if the entire work is appropriated, completely confuses the issues of definition and allowable quantity. This makes impossible critical commentary by context no matter how biting it may be, and rigidly limits society's access to criticism without sound reason. If an author's right to control derivative works can be invaded for critical purposes, as it is when non-verbatim parody is privileged, there seems no good reason why the author's right to reproduce or perform an entire work should not be similarly limited if a valid fair use purpose is furthered.

The cases in which a whole work needs to be taken to create the critical effect will be relatively rare, especially when the use is as a critical comment on society and not on the work itself. To show *both* that the vehicle is closely connected to the criticism *and* that the whole work is necessary to the effect would be a heavy burden for a defendant. But fair use should not be denied if defendants can meet this burden and show that their verbatim taking is a parody and manages to fulfill a critical function.[145]

IV. A PROPOSED CRITICAL EFFECT TEST

This comment has argued that the approaches most courts have taken in parody cases have been narrow and unrelated to the basic idea that the major aim of copyright is to promote the progress of the arts. Resting on the flawed substantiality of taking concept, these approaches ignore the critical purpose of true parody and inhibit the court's inquiry into whether a particular work fulfills that purpose. A better approach would focus on

142. *Id.* at 1397. It seems probable that, given this tri-partite gratification, any critical effect was lost in other effects. The court's result in *Mature* is not necessarily wrong, but its analysis is misleading.

143. The idea was to ''highlight and emphasize the transition of . . . teenagers from childhood to manhood . . . in a highly comical setting.'' *Id.* at 1398.

144. *Id.*

145. The burden should be on defendant. *See* note 29 *supra*. It may be so heavy as to result, practically speaking, in a per se exclusion of extensive use for purposes of parody when the criticism is of society, not the work parodied. *See* notes 151 & 153 and accompanying text *infra*.

the function of parody[146] and would determine the limits of the parodist's freedom to borrow in terms of that function.[147]

The basic premise of the suggested approach is that parody deserves fair use protection because of its critical function, a function which promotes society's progress. Given this premise, the courts should make a two-step inquiry. First, they must decide if the work in question is a true parody. If the work has the requisite critical effect to be true parody, the next step is to determine whether the defendant has taken more than is necessary to achieve this effect. Anything which is taken that is not necessary to the critical effect falls outside the fair use rationale which protects a work of criticism. This creates a limitation on the power of the parodist to copy, but it is a limitation based on the needs of his social function, not (as with the conjure up test) on the unexamined "rights" of the copyright holder.

A. Determining the Critical Effect

This determination requires a distinction between the satiric and the merely comic. While this might seem a literary judgment, beyond the ordinary operations of a court, the court in *Showcase Atlanta* had little trouble in making this distinction.[148] The court pointed out several parts of the infringing play which did have a satiric effect, places where through the character in the play the playwright "critically commented upon a character in the original."[149] The court was also able to distinguish between parody and humor where an originally comic character was being played for even more laughs.[150] Further, it was able to look at the play as a whole and decide that the non-satiric outweighed the satiric, so that the overall effect fell short of parody.[151]

The court should look for an overall or predominant critical effect.[152]

146. This is exemplified in Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., 479 F. Supp. 351 (N.D. Ga. 1979).

147. This is the approach of the Second Circuit in Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 n.1 (2d Cir.), *cert. denied*, 439 U.S. 1132 (1980). The court's problem there is insufficient analysis of parody's function.

148. 479 F. Supp. at 351.

149. For example, the "gentle" Melanie of the film became the "insipid" Melodie of the play. *Id.* at 357–58.

150. *Id.* at 358.

151. *Id.* at 357.

152. *See* Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376, 385 (D. Conn. 1972), *aff'd in part, rev'd in part*, 520 F.2d 1096 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976) (non-parody: nearly verbatim copy of *Jesus Christ Superstar*, with a few variations to make it "better" theology, exceeds needs of criticism).

The basic test should be one of reasonableness;[153] if a reasonably perceptive viewer would say that the work as a whole is critical commentary, the basic rationale for fair use will be met.

Defendant should have the burden of articulating the critical point he was attempting to make.[154] If the satiric effect is clear this will not be an onerous burden. On the other hand, in close cases defendant's inability to explain the critical aspects of a work may alert courts to attempts to use the parody defense as a sham. In *Air Pirates,* defendants made a reasoned argument which supported their claim that they intended criticism of the bland and happy assumptions of Disney's "wonderful world."[155] In contrast, in *Mature* (the Happy Hooker case) the defendants' bare claim that they were emphasizing a comic view of adolescence creates a suspicion that criticism, if any, was an after-the-complaint idea.[156]

B. Determining the Amount Necessary

Deciding whether the parodist took more than necessary for his effect is a question of fact for the court. It may also require some literary judgment, which can be aided by expert testimony. In many cases, an initial determination that there is no strong overall critical effect solves the problem. When defendant has taken much extraneous material, the satiric effect will be necessarily diluted, as happened in *Showcase Theatres.* There, defendant simply took too much of the purely comic and the serious, so that the use of parody was "inconsistent."[157] Again, the burden should be on the defendant to convince the court that his work would have lost effectiveness if he had taken less.

Cases like *Wilson* (the Cunnilingus Champion)[158] which use parody of the work to criticize society in general require further inquiry. Although there need not be criticism of the work itself, defendants should be required to establish some connection between the alleged parody and the

153. *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d. Cir. 1966), *cert denied,* 385 U.S. 1009 (1967) ("The fair use concept is based on the concept of reasonableness"). The court in *Rosemont* goes on to say that verbatim copying cannot meet the "reasonableness" standard. This may not always be true. See part II.*B.2. supra.*

154. This is in accord with the suggestion that the burden of fair use should be on the defendant, while the burden of proving infringement—hence, substantial similarity—should be on plaintiff. Comment, *supra* note 15, at 106. This commentator also suggests that the amount of the taking be considered only at the substantial similarity level.

155. Brief for Appellant at 28–31, Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied,* 439 U.S. 1138 (1979).

156. *See* note 143 and accompanying text *supra.*

157. 479 F. Supp. at 357.

158. *See* notes 128–139 and accompanying text *supra.* The parodies in *Berlin* were similar cases of parody as a vehicle. *See* note 139 *supra.*

social criticism, or else the adaptation of the original has no reason to be treated differently from any other derivative work. In *Wilson,* for example, defendants would have to show that by making fun of the music of the forties, they were furthering criticism of their claimed object, the sexual taboos of today. Further, they would have to show that "Boogie Woogie Bugle Boy" was a particularly appropriate vehicle to make this criticism. This is a more difficult burden than in the direct parody cases. But in cases where the parodied work is really just a vehicle of broader social criticism, the defendant has a broad range of works from which to choose his vehicle—some perhaps not copyrighted—and he should be required to prove the necessity of his particular choice, just as he must prove the necessity of the amount he took.

As a whole, the issue of whether the amount taken was necessary to the effect should be no more difficult than the present task of deciding whether defendant took more than he needed to conjure up the original. Both of these determinations depend ultimately on the individual judgment of the trier of fact. With the conjure up test, however, the court must often decide how well the public is likely to know the original, a decision which seems to be based on judicial notice.[159] The necessity-to-the-effect test avoids the need for such judgments. More important, this test is consistent with the idea that parody is an independent art which should not be required to perform poorly to survive.

V. CONCLUSION

True parody is not usually a threat to the economic value of a copyright; it will rarely result in the substitution effect. When a parody victim sues, one may wonder then what was really hurt: copyright or pride. Protecting pride, or even the "integrity" of a work, is not the aim of United States copyright law. But the record of modern parody cases raises the suspicion that the courts are basing their decisions more on sympathy for the battered victim or on distaste for the unsavory form of some of the parodies than on copyright principles.[160]

159. *See Showcase Atlanta,* 479 F. Supp. at 359. *See also Air Pirates,* 581 F.2d at 757–58. Kaplan notes that parody's "reprise of the original . . . may have to be extensive when the audience is not very knowledgeable." B. KAPLAN, *supra* note 22, at 69. The conjure up test requires a decision by the court on exactly how knowledgeable the audience is.

160. Light, *supra* note 21, at 635. Some judges have recognized this:

> In my view the defendants' use of "dirty lyrics" or of language and allusions that I might personally find distasteful or even offensive is wholly irrelevant to the issue before us, which is whether the defendants' use, obscene or not, is permissible under the fair use doctrine . . . . We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permis-

The critical effect test forces the court to apply a standard which has a logical relationship to the fair use rationale. While not solving the problems of judicial prejudice against parodies in "bad taste," the critical effect test at least will help bring the value judgments into the open, by forcing courts to explain their reasons. In contrast, a court which can rest on some quantitative threshold like the conjure up test can easily decide that defendant took "too much" and never be forced to explain what judgments about the value of defendant's work went into the decision.

Adoption of the critical effect test in parody cases will lead to fairer results for both the author of the original and for the parodist. An author will be protected from merely humorous use of his copyrighted material which might otherwise pass the conjure up test. On the other hand, true critical parody would not be prohibited simply because the original might be recognizable with a smaller borrowing.

Fair use is an exception to the general right of copyright holders to control their work. Defendants should be required to justify their claim to this exception, and the claim should be related to the basic purposes of the whole copyright scheme. As a form of criticism, parody promotes the healthy growth of the arts and sciences; it deserves protection from claims of infringement commensurate with its importance as a force for progress.

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sible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average private citizen.

MCA, Inc. v. Wilson, 211 U.S.P.Q. (BNA) 577, 588 (2d Cir. 1981) (Mansfield, J., dissenting).