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Beth Warnken Van Hecke

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## Note

### But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use

Beth Warnken Van Hecke

#### INTRODUCTION

Parody<sup>1</sup> is an ancient literary form with roots reaching back to classical Greece.<sup>2</sup> It is a satirical art in which the parodist comments humorously and critically on an existing work through an imitation that exposes the original's flaws. An ef-

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1. Parody is defined as an "imitation of a work more or less closely modeled on the original, but so turned as to produce a ridiculous effect." 11 OXFORD ENGLISH DICTIONARY 257 (2d ed. 1989). Literary critics and scholars distinguish parody from the related forms of burlesque (which more broadly caricatures the manner or spirit of serious works), satire (which holds up to ridicule or derision the vices or shortcomings of an individual or an institution), travesty, pastiche, and irony. See MARGARET A. ROSE, *PARODY//META-FICTION: AN ANALYSIS OF PARODY AS A CRITICAL MIRROR TO THE WRITING AND RECEPTION OF FICTION* 39-55 (1979); Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1131 (1955). Scholars consider parody the highest of these forms because, at its best, it cleverly imitates a work, thereby calling attention to the original's flaws. PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 601 (Alex Preminger ed., 1974) ("The best parody surpasses mere imitation."); ROSE, *supra*, at 45. Following the practice of courts and most commentators, this note will use the term parody to describe all of these forms.

2. The most famous ancient parodist is probably Aristophanes, whose play *The Frogs* parodies the verse of rival playwright Euripides. ROSE, *supra* note 1, at 18-19. Cervantes's *Don Quixote* and Chaucer's "The Rhyme of Sir Thopas" from *Canterbury Tales* are two well-known works that parody medieval chivalric tales. Shakespeare in *A Midsummer Night's Dream*, Swift in *Gulliver's Travels*, Pope in *The Rape of the Lock* and Fielding in *Shamela* all parodied works of their day. Well-known American parodists include Beer-bohm and Thurber. As this brief survey indicates, parody can rise to the level of the best literature, at times outliving the works it parodies. For a historical discussion of parody see PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS, *supra* note 1, at 601-02; Charles C. Goetsch, *Parody as Free Speech: The Replacement of Fair Use by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39, 40-41 (1980); Yankwich, *supra* note 1, at 1133-37. See generally 1 WALTER HAMILTON, *PARODIES OF THE WORKS OF ENGLISH AND AMERICAN AUTHORS* (1884); DWIGHT MACDONALD, *PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM—AND AFTER* (1985).

fective parody requires the audience recognize both the subject of the parody and the parodist's mocking distortions. To achieve this, a parodist often must mirror or directly copy portions of the original.<sup>3</sup>

When a parodist imitates<sup>4</sup> a copyrighted work, however, she may run afoul of copyright law, which grants authors<sup>5</sup> control over duplication, performance and distribution of their creations.<sup>6</sup> Moreover, because parody ridicules its subject, often harshly, an irate author may bring an infringement suit to soothe her wounded pride.

At times, courts excuse otherwise-infringing parodies under the doctrine of "fair use"; but their inconsistent decisions make the line separating "fair" parodies from infringing ones difficult, if not impossible, to draw. As a result, parodists may be unsure about what they safely may borrow. This confusion chills parodists' art and stifles the creativity copyright is meant to encourage.

This Note proposes a framework for analyzing parody cases. Part I describes the theoretical basis for copyright and the fair use doctrine and examines two recent Supreme Court decisions involving fair use. Part II examines the case law concerning parodies. Part III suggests that courts evaluate parody cases by examining the alleged infringement in terms of the purpose behind copyright, focusing largely on whether the parody is capable of serving as a substitute for the original.

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3. This is the central feature of parody. If the reader does not recognize the original work, parody's function—critical commentary through imitation—and its unique societal value are lost.

4. This imitation can take two different forms. Without plagiarizing the work, a parodist may either appropriate the actual words of a text or lyrics or else appropriate the structure or general expression of the original. See 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.01[B] (1992).

5. This Note will use the terms "author" and "copyright holder" interchangeably, although the creator of a work may, of course, transfer the copyright to another.

6. 17 U.S.C. § 102 (1988).

A parodist is free to seek permission to use a work. Because parody is often critical of its subject, however, authors are unlikely to grant permission. See *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ("Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee."); Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 960 (1985); Note, *Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395, 1397 (1984).

## I. COPYRIGHT AND FAIR USE

## A. THE MECHANICS OF COPYRIGHT LAW

The Constitution authorizes Congress to "promote the Progress" of literature and the arts "by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."<sup>7</sup> At first limited to books, maps and charts, copyright protection now extends to original works fixed in any "tangible medium of expression" from the moment of creation.<sup>8</sup> An author has a limited monopoly to sell, reproduce, perform and create derivative works based on the original.<sup>9</sup> To preserve the monopoly, an author may sue to enjoin infringing uses or may bring an action for damages.<sup>10</sup>

## B. THE UTILITARIAN NATURE OF COPYRIGHT

Copyright helps to ensure authors a fair return for their labors, but this is not its primary goal. The Supreme Court has long acknowledged that copyright, a wholly statutory creation,<sup>11</sup> exists because of its social utility.<sup>12</sup> Thus, granting pro-

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7. U.S. CONST. art. I, § 8, cl. 8. Congress passed the first copyright act in 1790. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed). It was based on the original British copyright act. An Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19 (Eng.). For information on the history of British and American copyright law, see BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1-26 (1967).

8. 17 U.S.C. § 102 (1988). The Copyright Law has undergone four major revisions, each expanding the scope of protection. The most recent substantive revision occurred in 1976. The Act now covers musical and dramatic compositions, photos and negatives, and fine arts.

9. 17 U.S.C. § 106 (1988).

10. 17 U.S.C. §§ 501-511 (1988). Anyone who violates the rights reserved to the copyright holder infringes upon the copyright. § 501. The copyright holder faced with an infringing use has several options. First, she may seek an injunction preventing the use. § 502. Second, she may sue to recover damages and any profits of the infringer. § 504. Third, she may opt for statutory damages. § 504(c). Finally, if the infringement involves copies or recordings, she may ask the court to impound and destroy the offending items. § 503. If the infringement is willful, criminal sanctions may ensue. § 506.

11. It is well settled that copyright is wholly statutory. See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 431 (1984) (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661-62 (1834)).

12. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 545 (1985) (stating that "copyright is intended to increase and not to impede the harvest of knowledge"); *Sony Corp.*, 464 U.S. at 429 ("[T]he limited grant is a means by which an important public purpose may be achieved."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind . . . copyrights is the conviction that en-

prietary<sup>13</sup> rights to authors will result in general benefits to society, by encouraging and increasing public dissemination of informative and creative works.<sup>14</sup>

Absolute protection for every original work, however, would decrease, rather than increase, the free flow of knowledge. Because every idea is to some extent derivative, such protection would lead to duplication of effort, impeding scientific and artistic progress.<sup>15</sup> To mitigate such evils, the Copyright Law limits an owner's control over her work in several significant ways. First, copyright protection exists only for a limited period of time.<sup>16</sup> Second, protection extends only to the "expression" of the ideas embodied in a work; anyone may use the

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couragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . ."); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (stating that "copyright law . . . makes reward to the owner a secondary consideration"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

13. A copyright is a property right. Because a copyright is intellectual property rather than tangible property, however, anyone can use the copyrighted work without loss of any of the work's intrinsic value. Use by others, however, may preclude the copyright owner from profiting from expanded use of the work. For example, an infringer who adapts a novel into a motion picture deprives the author of a substantial benefit from the work. The novel itself loses no value, but the author has lost the option of adapting it herself. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 290 (1970); Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615, 618 (1979).

14. In this sense copyright is related to the First Amendment. While it often has been argued that the First Amendment precludes application of copyright law when the free flow of ideas would be impeded, only one court has accepted this argument. *Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875, 881-84 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980). Several other cases have implicitly weighed First Amendment considerations in determining fair use. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

15. By refusing to authorize use of the ideas in her work, for example, an author could deny scholars the building blocks of their disciplines. See Zachariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945); see also *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting).

16. 17 U.S.C. §§ 301-305 (1988). For works created on or after January 1, 1978, and works created but not published or copyrighted before that date, copyright generally extends for the author's life plus 50 years. §§ 302-303. This is the longest period of protection Congress has granted. Works copyrighted before January 1, 1978, generally are protected for twenty-eight years beyond the copyright date. § 304.

ideas.<sup>17</sup> Third, infringement requires substantial similarity between the original and the allegedly infringing work;<sup>18</sup> negligible copying is not actionable.<sup>19</sup> Fourth, copyright does not protect the integrity of the creation or of the author as creator.<sup>20</sup> Finally, the doctrine of fair use excuses infringing uses of

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17. The idea/expression dichotomy is best expressed in *Mazer v. Stein*, 347 U.S. 201, 217 (1954). See also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

A corollary to the idea/expression dichotomy is that works that are completely utilitarian in function cannot be copyrighted. *Mazer*, 347 U.S. at 215-16; *Esquire, Inc. v. Ringer*, 591 F.2d 796, 801-04 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

18. The issue of whether the allegedly infringing work is substantially similar to the original is often a perplexing one, particularly when there has been no literal copying. Courts have developed a variety of tests to define substantial similarity. See *Nichols*, 45 F.2d at 121-22 (presenting Judge Learned Hand's well known "abstractions" test); *Mazer*, 347 U.S. at 271 (discussing the idea/expression dichotomy); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (judging infringement by "total concept and feel").

19. Courts refer to negligible copying as "de minimus," a term of art describing a taking so small that an average person would not recognize the appropriation. See *Fisher v. Dees*, 794 F.2d 432, 434-35 n.2 (9th Cir. 1986); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

20. With the limited exception of the visual arts, American copyright law does not vindicate the so-called "moral rights" (*droits moral*) of an author. The moral rights theory of copyright has two major components. First, a literary or artistic creation is the property of the creator and natural law dictates that no one should be permitted to use the work without the author's approval. See Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 311 (Peter Laslett ed., 2d prtg. 1963) (3d ed. 1698)). Second, the author as creator should have the right to prevent her work from being disparaged or deformed by use, or attributed to another. The author also should be permitted the privilege of preventing distribution of her work. See 17 U.S.C. § 106 (1988) (granting limited rights—subject to fair use—to visual artists during their lifetimes); 2 NIMMER & NIMMER, *supra* note 4, § 8.21[A]; Breyer, *supra* note 13, at 289-90 (citing 1 IMMANUEL KANT, *Of the Unjustness of Counterfeiting Books*, in ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS 225, 229-30 (W. Richardson trans., 1798)).

Because its function is to preserve economic incentives, the Copyright Law does not protect an author's moral rights. *But cf.* Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1515 (1979) (inferring limited moral rights under the Copyright Law). Despite the absence of any such protection, however, the outcome of many parody cases most logically can be explained as a vindication of the plaintiff's moral rights. See 2 NIMMER & NIMMER, *supra* note 4, § 8.21[B] (noting that an increasing number of cases seem to vindicate moral rights under copyright law and other causes of action). For example, courts often protect an author against parodies that are detrimental to the author's reputation, or which deform the original in some way that the plaintiff (and often the court) finds distasteful. See *DC Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110 (N.D. Ga. 1984);

a copyrighted work that do not subvert the aim of copyright.

## B. THE FAIR USE DOCTRINE

The fair use doctrine, called "the most troublesome [issue] in the whole law of copyright,"<sup>21</sup> allows a court to excuse a use that technically infringes upon the owner's copyright if the use is socially beneficial.<sup>22</sup> The Copyright Law does not define fair use.<sup>23</sup> The Law does, however, list several socially valuable categories of use that are presumptively fair, including criticism, comment, teaching and research.<sup>24</sup> It then directs courts to

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Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1978). *But see* Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1158 (M.D. Tenn. 1991) (rejecting the argument that off-color parody of the song "Oh Pretty Woman" "tarnished" the plaintiff's copyright); Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981) (finding an obscene parody fair use).

21. *Dellar v. Samuel Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939). Courts also have complained that fair use is "so flexible as virtually to defy definition." *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968); *see also* Weinreb, *supra* note 20, at 1137.

22. Because it is an affirmative defense, a court need only consider a claim of fair use if all the requirements for infringement have been met. 3 NIMMER & NIMMER, *supra* note 4, at § 13.05. Fair use is a mixed question of fact and law. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 560 (1985) (Brennan, J., dissenting).

Fair use is based on the British common law doctrine of fair dealing. The first widely-used American statement of fair use appeared in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), in which Justice Story explained that fair use "depend[s] upon a nice balance of the comparative use made in one of the materials of the other," including the "nature, extent, and value" of the materials used. *Id.* at 344. For the development of the fair dealing and fair use doctrines see KAPLAN, *supra* note 7, at 25-37.

Congress first codified fair use in 1976. Desiring that it be adaptable in a time of "rapid technological change," Congress restated the common law fair use doctrine, emphasizing that codification was not intended to "change, narrow or enlarge" it in any way. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

23. 17 U.S.C. § 107 (1988).

The statute provides little assistance in demarcating the fair use doctrine. Moreover, there is little judicial consensus concerning fair use. It has been alternatively defined as *de minimus* taking, *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 603-04 (7th Cir. 1957), *cert. denied*, 355 U.S. 907 (1957); as privileged use of copyrighted materials that is "reasonable," H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944); and as a way to prevent rigid, information-depriving applications of copyright law, *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044, 1048 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984). Perhaps the best way to describe fair use is as an infringing use that is excused because it furthers the aims of copyright law.

24. 17 U.S.C. § 107 (1988).

Courts hold that parody is not a presumptively fair use. *Fisher v. Dees*,

consider four unweighted factors to determine whether the questioned use of a copyrighted work is fair: the purpose and character of the use, the nature of the copyrighted work, the amount copied, and the economic effect of the copying.<sup>25</sup>

The first factor, the purpose and character of the use, concerns whether the use is for nonprofit, educational purposes.<sup>26</sup> Because the fair use doctrine protects socially beneficial uses, such appropriations are presumptively fair.<sup>27</sup> Under this factor, courts may also consider the nature of the parodist's conduct, including whether she acted in good faith.<sup>28</sup>

The second factor is the nature of the copyrighted work.<sup>29</sup> Because copyright exists to increase the flow of knowledge, courts under the fair use doctrine may treat the appropriation of factual works more leniently than the appropriation of creative works.<sup>30</sup>

The third factor, the amount and substantiality of the portion used,<sup>31</sup> requires comparison with the copyrighted work as a whole. Courts consider the substantiality of the taking qualitatively as well as quantitatively. If a parodist appropriates the "heart" of a work, even if she uses only a small fraction of the original, the fair use defense may fail.<sup>32</sup> Finally, and most

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794 F.2d 432, 435 (9th Cir. 1986). Because parody comments both humorously and caustically on the original work, however, it could logically fit either in the presumptively fair criticism or comment categories. The legislative history of § 107 indicates that Congress considered parody as an example of a possible fair use. H.R. REP. NO. 1476, *supra* note 22, at 65, *reprinted in* 1976 U.S.C.C.A.N. at 5678.

25. 17 U.S.C. § 107. The statute states that the factors for consideration "shall include" the four listed, leaving open the possibility of more factors for consideration. § 107 (emphasis added). This is consistent with congressional intent to restate fair use, not to define it. H.R. REP. NO. 1476, *supra* note 22, at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5680. Courts thus are free to consider other unnamed factors or even to eliminate the statutory framework altogether. The judiciary's continued reliance on the traditional four-prong fair use test, however, indicates reluctance to stray from the dictates of § 107.

26. 17 U.S.C. § 107.

27. *Sony Corp. of Am. v. Universal City Studios*, 465 U.S. 417, 451 (1984).

28. 3 NIMMER & NIMMER, *supra* note 4, at § 13.05[A].

29. 17 U.S.C. § 107.

30. This factor tends to weigh against parodies because they are usually directed at creative works. Because most parodies are themselves creative works, however, courts often treat this factor neutrally; the nature of the parody and of the original cancel each other out. *See, e.g.,* *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440, 447 (N.D. Ill. 1991).

31. 17 U.S.C. § 107.

32. *See Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985), in which the Supreme Court held that use of approximately 300 words from a 200,000 word manuscript infringed the owner's copyright. But compare *Sony*



importantly, the fourth factor directs courts to consider the effect of the use upon the "potential market for or value of the copyrighted work."<sup>33</sup> As "the single most important element" in fair use,<sup>34</sup> market effect receives considerable judicial scrutiny.

Because the purpose of copyright is to provide authors with economic incentives to disseminate their works, courts' analytical focal point should be whether an unauthorized use is a disincentive to dissemination.<sup>35</sup> Nonetheless, application of the fair use doctrine is inconsistent, often hinging on some unstated calculus of the equities. Thus, despite judicial recognition of copyright's social function, fair use analysis remains unpredictable.

### C. RECENT SUPREME COURT RULINGS ON FAIR USE

Twice within the last decade the Supreme Court examined the fair use doctrine as codified in 17 U.S.C. § 107. Neither of these cases concerned parodies; nonetheless, these decisions indicate the Supreme Court's approaches toward fair use and suggest methods for analyzing parody.

These two cases exemplify the Court's inconsistent approach to fair use.<sup>36</sup> In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>37</sup> the Court strongly endorsed a utilitarian theory of copyright, emphasizing that economic harm to the copyright holder should be the primary fair use test. *Sony* involved time-shifting—videotaping television programs for later, private viewing—which the Court held to be fair use.<sup>38</sup> Express-

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*Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984) and *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), in which each court held that total appropriation of copyrighted works was fair use.

33. 17 U.S.C. § 107.

34. *Harper & Row*, 471 U.S. at 566.

35. Because copyright exists to encourage authors to disseminate their work, there is no reason to penalize a use which does not harm the copyright holder.

36. Commentators have criticized *Sony* and *Harper & Row*. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 *passim* (1988); Weinreb, *supra* note 20, at 1158.

37. 464 U.S. 417 (1984).

38. *Id.* at 456. In *Sony*, Walt Disney Studios and other copyright owners brought suit against Sony, the manufacturer of Betamax home-videotaping machines, alleging contributory copyright infringement. *Id.* at 420. To determine whether Sony was liable for the actions of Betamax purchasers, the Court examined whether consumer uses of Betamax infringed upon the plaintiffs' copyrights. *Id.* at 434. Because it characterized time-shifting as a fair use,

sing the statutory fair use factors as a balancing test, the Court weighed the social value of time-shifting against the harm it caused. It noted that Betamax purchasers recorded programs to watch at home, a non-commercial use militating against a finding of infringement.<sup>39</sup> In addition, the Court noted that Universal City Studios could not demonstrate convincingly that home recording caused significant economic harm,<sup>40</sup> and it identified a host of socially valuable uses for time-shifting.<sup>41</sup>

In *Harper & Row, Publishers v. Nation Enterprises*,<sup>42</sup> the Court again emphasized the utilitarian nature of copyright and the importance of the economic harm prong of the fair use test. In finding *Nation's* use not to be fair, however, it focused primarily on the qualitative significance of the excerpts copied and *Nation's* bad faith in "knowingly exploit[ing] a purloined manuscript."<sup>43</sup> Citing 17 U.S.C. § 107, the Court stressed that the commercial nature of a use is significant. It defined commercial use, however, not as financially motivated appropriation, as had the *Sony* court, but as a taking in which "the user stands to profit from exploitation of the copyrighted material without paying the customary price."<sup>44</sup> This broad definition of commerciality, if applied to parody, which has an element of expression akin to that the First Amendment protects, could have startling ramifications.

*Sony* and *Harper & Row* demonstrate the difficulty courts encounter when evaluating fair use claims. A review of parody

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the Court found no contributory infringement. *Id.* at 456. In holding that time-shifting was fair use, the Court explicitly rejected the long-held assumption that a use must be "productive," or involve some secondary creative effort, to be fair. *Id.* at 455 n.40.

39. *Id.* at 449. The majority emphasized the non-commercial nature of time-shifting, mentioning that studies had shown that people who tape programs intend to watch them privately at their own convenience. The Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation" of the owner's copyright. *Id.* at 451. While this is logical in normal business settings, where competition between the copyright holder and the alleged infringer is likely to exist, presumptions of infringement in commercially-marketed parodies are inappropriate. See *infra* Part III.C.2.

40. *Sony*, 464 U.S. at 451-54.

41. *Id.* at 444-46. Commentators have criticized the quality of the Court's balancing and analysis. Justice Stevens, writing for the majority, may have underestimated the possibility of market harm. See Weinreb, *supra* note 20, at 1154-55.

42. 471 U.S. 539 (1985). *Harper & Row* arose out of the unauthorized publication by the *Nation* magazine of excerpts from President Gerald Ford's memoirs.

43. *Id.* at 562-63.

44. *Id.* at 562.

cases from lower courts reveals that while courts recognize that parody's special nature requires some accommodation to thrive, courts also face difficulties in evaluating parodists' fair use claims.

## II. THE SPECIAL PROBLEM OF PARODY

Much of the confusion regarding parody cases is the result of courts' inconsistent approaches in fair use cases. Judicial analyses of the parody defense are often conclusory, serving merely to confirm decisions judges had already instinctively reached. As a result, the parody defense has careened from one dispositive factor to another, leaving the courts, commentators and, presumably, would-be parodists, in considerable confusion.<sup>45</sup>

Three major problems underlie present judicial approaches

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45. There has been much comment about the tension between parody and copyright law. Two of the earliest parody cases, *Loew's, Inc. v. Columbia Broadcasting System*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's Inc.*, 239 F.2d 32 (9th Cir. 1956), *aff'd per curiam by an equally divided Court*, 356 U.S. 43 (1958), and *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955), resulted in a flurry of legal scholarship. See Victor S. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962) (arguing tort and copyright law should provide particular freedom to parodists and humorists); Arthur Rossett, *Burlesque as Copyright Infringement*, 9 COPYRIGHT L. SYMP. (ASCAP) 1 (1958) (advocating taking the speed of technological advancement into account in applying copyright principles); Herman F. Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 BULL. COPYRIGHT SOC. 53 (1958) (distinguishing creative, artful parody from "carbon copy" parody for purpose of fair use); Yankwich, *supra* note 1; Note, 56 COLUM. L. REV. 585 (1956) (proposing test for "fair use" based on promotion of progress in the arts); David M. Dixon, Note, *Parody and Burlesque—Fair Use or Copyright Infringement?*, 12 VAND. L. REV. 459 (1959) (calling for expansion of fair use to include parody and burlesque); Gerald A. Gafford, Comment, *Substantial Borrowing v. Fair Use, or Spoof with Caution*, 30 MISS. L. J. 175 (1959) (advocating purpose of use as the focus of analysis); Ashley Gorman, Comment, *Parody of Copyrighted Works: Death of an Art Form?*, 4 WAYNE L. REV. 49 (1957) (criticizing then existing law as providing no clear standard for artists); Samuel C. McClaren, Comment, *Copyright: Burlesque and the Doctrine of Fair Use*, 12 OKLA. L. REV. 276 (1959) (arguing that intent of parodist should factor into analysis); Norman H. McNeil, Note, *Burlesque of Literary Property as Infringement of Copyright*, 31 NOTRE DAME L. REV. 46 (1955) (recommending legal protection for owners of material parodied); Comment, 31 N.Y.U. L. REV. 606 (1956) (arguing that the focus of judicial inquiry should be whether the parody replaces the original); Comment, *Parody and the Law of Copyright*, 29 FORDHAM L. REVIEW 570 (1961) (agreeing with the holding in *Loew's*); Note, 28 ROCKY MTN. L. REV. 134 (1955) (upholding *Loew's* as a movement in the right direction); Decision, 10 SW. L.J. 68 (1956) (suggesting that the commercial motive of the parody be the focus of judicial inquiry); William

to parody. First, courts pay excessive attention to the substantiality of the parodist's taking, without considering whether it caused the author any significant economic harm.<sup>46</sup> Second, courts, with little concrete analysis, often deny the fair use defense where they deem the parody "commercial."<sup>47</sup> Finally,

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J. Wise, Recent Decision, 56 MICH. L. REV. 1355 (1958) (arguing parody deserves more protection than was accorded by *Loew's*).

Subsequent cases renewed commentators' interest. See Robert D. Hadl, *Parody Lyrics—The "Mad" Magazine Case*, 11 BULL. COPYRIGHT SOC. 319 (1964) (supporting stronger protection for copyright owners); John Mummery, *Parody and Plagiarism*, 116 NEW L.J. 1651 (1966) (proposing defense of fair dealing for the purpose of parody); Raymond T. Nimmer, *The Law of Parody—Infringement*, 3 VAL. U. L. REV. 34 (1968) (advocating case-by-case approach); Comment, *A Copyright Quandary: Parody, Burlesque and the Fair Use Doctrine*, 29 ALB. L. REV. 312 (1965) (arguing that parodist infringes only when using substantial part of original not incidental to parody); Thomas P. Demeter, Note, *Legal Perils of Parody and Burlesque*, 17 CLEV.-MARSHALL L. REV. 242 (1968) (agreeing with *Columbia Pictures* in protecting parody as a valid art form); William C. Nugent II, Comment, *Parody or Piracy: Never the Twain*, 38 U. COLO. L. REV. 550 (1966) (suggesting a need for greater freedom for parodists).

Recent attempts to resolve the tension between parody and copyright law fall into three rough categories. Some commentators have advocated applying the First Amendment to parodies. Goetsch, *supra* note 2; Kevin W. Wheelwright, Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564 (1976); see also Dorsen, *supra* note 6, at 923 (criticizing courts for creating an unacknowledged tort of "satiric appropriation" at the expense of First Amendment freedom).

Other commentators have attempted to develop a legal definition of parody. See Richard A. Bernstein, *Parody and Fair Use in Copyright Law*, 31 COPYRIGHT L. SYMP. (ASCAP) 1 (1984) (arguing that the social value of the parody should be measured against the original in determining whether the parody promotes "the progress of the arts"); Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 1 (1987) (asserting that a satire must comment on the source text to meet the proposed legal definition of parody); Melanie A. Clemmons, *Author v. Parodist: Striking a Compromise*, 33 COPYRIGHT L. SYMP. (ASCAP) 85 (1987) (advocating requirement that the parodist's efforts be independent and recognizable); Susan L. Faaland, Comment, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163 (1981) (arguing that parody is fair use if it comments critically upon the original work).

Finally, and with greater success, commentators have evaluated the parody defense in terms of economic theory. See Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979) (proposing test of whether the parody interferes with the copyright owner's market interests); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991) (arguing that an economically rational behavioral model collapses when authors are confronted by parodies of their works); Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, *supra* note 6 (examining parody and fair use in light of the *Sony* decision).

46. See *infra* Parts II.A, III.A.

47. See *infra* Part II.B.

and most disturbingly, many cases turn on factors outside the scope of copyright, such as the distasteful nature of the parody and its negative effect on the copyright holder's reputation.<sup>48</sup>

#### A. THE SUBSTANTIALITY OF THE TAKING: "CONJURING UP" THE ORIGINAL

Much of the case law concerning parody focuses on the third prong of the fair use test, the amount and substantiality of the use.<sup>49</sup> Courts have applied various standards to determine when a parodist has copied "too much" of the original. Recognizing that parody requires some copying, courts attempt to balance the competing interests of parodist and copyright holder.<sup>50</sup> Unfortunately, they fail to consider the substantiality of the use in terms of copyright's underlying social purpose. Focusing on whether the amount taken is "too much," an imprecise assessment at best, distracts courts from the real issue of fair use: whether a particular use undermines the copyright incentive system by harming the author.

##### 1. "Conjuring Up" the Original

In one of the earliest parody cases,<sup>51</sup> *Loew's, Inc. v. Columbia Broadcasting System*,<sup>52</sup> the court flatly rejected the suggestion that parody requires any accommodation under the fair use doctrine.<sup>53</sup> Denying comedian Jack Benny the fair use defense,<sup>54</sup> the district court held that Benny's satire of the movie

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48. See *infra* Part II.C.

49. See *supra* notes 31-32 and accompanying text.

50. Although some commentators suggest otherwise, authors and parodists have diverging interests. The parodist is concerned with achieving the greatest possible freedom in which to practice her art. Authors want to control use of their creation, both to maximize profits and to protect the integrity of their work. But see Clemmons, *supra* note 45, at 93 (arguing that it is incorrect to characterize authors' and parodists' interests as competing).

51. Several cases in the early years of this century involved parody or mimicry of performers. See *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914); *Green v. Luby*, 177 F. 287 (S.D.N.Y. 1909); *Green v. Minzenheimer*, 177 F. 286 (S.D.N.Y. 1909); *Bloom & Hamlin v. Nixon*, 125 F. 977 (E.D. Pa. 1903); see also *Leo Feist, Inc. v. Song Parodies, Inc.*, 146 F.2d 400 (2d Cir. 1944) (song parodies).

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 per curiam by an equally divided Court*, 356 U.S. 43 (1958).

53. 131 F. Supp. at 177. The trial court insisted that a "parodized or burlesque taking is treated no differently from any other appropriation." *Id.* at 183. In its decision on the appeal, the Ninth Circuit quoted this language with approval. 239 F.2d at 537.

54. 131 F. Supp. at 183. The court found that Benny's skit, entitled

*Gaslight* infringed upon the original's copyright. In affirming the district court's holding, the Ninth Circuit Court of Appeals rejected the defendant's contention that "Autolight" was a criticism of the movie.<sup>55</sup>

Since *Loew's*, courts uniformly have recognized that the unique, imitative nature of parody minimally requires leeway in recalling the original work. Several months after its decision, the *Loew's* district court, in *Columbia Pictures Corp. v. National Broadcasting Co.*, retreated from its earlier position.<sup>56</sup> Allowing as fair use a *From Here to Eternity* satire performed on Sid Caesar's *Your Show of Shows*, the court acknowledged that parody requires "[s]ome limited taking."<sup>57</sup> Parody, the court held, is fair use if it appropriates no more than necessary to "conjure up" the original.<sup>58</sup>

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"Autolight," tracked the plot, main characters and locale of *Gaslight*, and that the two works were nearly identical "except that [Benny's] treatment is burlesque." *Id.* at 170-71. Curiously, the district court mentioned that "Autolight" was 15 minutes long, *id.* at 169, while the court of appeals describes the skit as a half-hour long. 239 F.2d at 533. *Gaslight* was a full length movie. Even if one assumes "Autolight" was in fact a half-hour long, it is difficult to imagine how the works accurately can be described as "identical."

After finding Benny's taking to be substantial, the court considered the substantiality of taking in determining whether the use was of the non-actionable *de minimus* variety—but mistakenly confused this analysis with the substantiality prong of the fair use test. 131 F. Supp. at 170-83. By confusing these two issues, the court in effect collapsed them into one. Therefore, under the reasoning of *Loew's*, a substantial taking precludes any finding of fair use. The Ninth Circuit explicitly repudiated this reasoning in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

55. 239 F.2d at 537. Many commentators have criticized the trial and appellate court decisions in *Loew's*. See Dixon, *supra* note 45, at 476-81; Note, *Parody and Copyright Infringement*, *supra* note 45, at 600-04; see also KAPLAN, *supra* note 7, at 69 (suggesting the *Loew's* decision is unconstitutional). But see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1640 n.221 (suggesting *Loew's* was properly decided).

56. 37 F. Supp. 348, 350-51 (S.D. Cal. 1955).

57. *Id.* at 350.

58. *Id.* at 351, 354. "From Here to Obscurity," the skit at issue in *Columbia Pictures*, was twenty minutes long. *Id.* at 352. The original was, as in *Loew's*, a full length film. This suggests that the substantiality of the taking, the purported distinguishable element in these two cases, really obscures the court's evaluation of several different factors. Although the infringement alleged in *Loew's* was the one-time broadcast of "Autolight," *Loew's* sued in response to Benny's plans to create a half-hour TV movie of the parody. 131 F. Supp. at 169. Thus the court may have been responding to Benny's future use of *Gaslight* as well as his past use. Alternatively, it may have responded to the fact that Benny's skit gave away the original's dramatic surprise ending.

Several commentators have suggested that *Loew's* and *Columbia Pictures*

Responding to 1964's *Berlin v. E.C. Publications*,<sup>59</sup> a copyright infringement suit leveled against *Mad Magazine* for publishing lyrics parodying well-known songs by Irving Berlin,<sup>60</sup> the Second Circuit adopted the *Columbia Pictures* conjure up test. Noting the parody copied only a few stray lines, the court held that the works were not substantially similar.<sup>61</sup> Although it found the taking insubstantial, and thus non-infringing, the court nevertheless formulated in dictum its own rule regarding parody, combining economic analysis with the *Columbia Pictures* conjure up standard. A parody is fair use, the court stated, when it does not fulfill demand for the original and takes no more than necessary to conjure up the original.<sup>62</sup>

## 2. The Conjure Up Test Today

Two recent circuit court decisions demonstrate both the progress courts have made in dealing with the parody defense and their continued reliance on the conjure up test. In *Elsmere*

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were judicial attempts to regulate competition between the young television industry and the motion picture business. See, e.g., *Netterville*, *supra* note 45, at 233.

59. 329 F.2d 541 (2d Cir. 1964), *aff'g* 219 F. Supp. 911 (S.D.N.Y. 1963) *cert. denied*, 379 U.S. 822 (1964).

60. *Id.* at 542-43. *Mad Magazine's* 25 Berlin parodies included "I Swat You on the Skin," a lampoon about fraternity hazing sung to the tune of "I've Got You Under My Skin," and "Louella Schwartz Describes Her Malady," about a talkative hypochondriac, sung to "A Pretty Girl Is Like a Melody." 219 F. Supp. at 912.

61. 329 F.2d at 545. Because the court concluded that the works were not substantially similar, it did not reach the issue of whether the parodies were fair use. The court, however, discussed the issue of parodies at length. Detailing the avalanche of criticism aimed at the *Loew's* decision, it underscored its own opposition to that approach by declaring that "parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." *Id.*

62. *Id.* Significantly, the *Berlin* court explicitly focused for the first time on whether the use affected the value of the copyright, noting Berlin's inability to point "with any degree of particularity" to economic harm the parodies caused. *Id.* at 543.

The court's standard, whether the parody fulfills demand for the original, potentially is a high one for plaintiffs to meet. The *Berlin* court emphasized that the plaintiffs made no claim of market replacement. This suggests, however, that the requirement might have been satisfied if Berlin had made even a meager showing that the parody fulfilled demand for the original.

If *Mad Magazine* had included song sheets with its satirical lyrics the *Berlin* court may have reversed its decision. Cf. *Leo Feist v. Song Parodies, Inc.*, 146 F.2d 400 (2d Cir. 1944) (finding an infringement where a book of song parodies included lyrics and sheet music). The district court in *Berlin* noted the earlier case with approval. 219 F. Supp. at 914.

*Music, Inc. v. National Broadcasting Co.*,<sup>63</sup> the Second Circuit upheld a trial court decision that use of the advertising jingle "I Love New York" in a short television parody was fair.<sup>64</sup> In a brief footnote, the court expanded the conjure up test, stating vaguely that a parody should "at least" be able to conjure up the original so long as the parody "builds upon the original" and "contribute[s] something new for humorous effect or commentary."<sup>65</sup>

The second case, *Fisher v. Dees*, involved an irreverent parody of a popular Johnny Mathis love song.<sup>66</sup> The Ninth Circuit ended what had appeared to be a circuit split by adopting the more lenient *Elsmere* conjure up test. Although the court noted that a parody's commercial nature raises a presumption against a finding of fair use,<sup>67</sup> it nonetheless upheld the defendant's parody, citing the limited taking involved<sup>68</sup> and the lack of economic harm to the copyright holders.<sup>69</sup>

*Elsmere* and *Fisher* have settled that parodists minimally are entitled to conjure up the object of their humorous commentary. But no court has offered a more precise definition of what this loosened standard might mean. Thus for all practical purposes, the conjure up test is undefined, too hazy to provide a coherent decision making structure or to prevent inconsistency. Moreover, the vague conjure up test may allow courts to mold the outcome of parody cases to fit their preconceived notions about what is humorous and what is reasonable.

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63. 623 F.2d 252 (2d Cir.) (per curiam), *aff'g* 482 F. Supp. 741 (S.D.N.Y.), *cert. denied*, 439 U.S. 1132 (1980).

64. The television program *Saturday Night Live* parodied the jingle as "I Love Sodom," humorously depicting the biblical city of Sodom trying to spruce up its image with tourists. The trial court found fair use after declaring that the song did not affect the value of the copyrighted work. 482 F. Supp. at 747. It also stressed that no more than necessary was taken. *Id.*

65. 623 F.2d at 253 n.1. The court maintained the traditional distinction between productive and non-productive use the Supreme Court later rejected in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984). See *supra*, note 38. A parody, however, may effectively criticize the original without "building" on it. Imagine, for instance, an opera singer performing a Wagnerian aria famed for its heroic overtones. Through expressive gestures, voice modulation, and humorous scenery and costumes she could comment critically on the overly-melodramatic original while performing it verbatim.

66. 794 F.2d 432 (9th Cir. 1986). The parody, "When Sonny Sniffs Glue," humorously satirized the 1950's standard "When Sunny Gets Blue." *Id.* at 434.

67. *Id.* at 437.

68. *Id.* at 434 (noting that the parody was only 29 seconds long).

69. *Id.* at 438 (finding that the parody was unlikely to fulfill demand for the original).



## B. THE COMMERCIAL NATURE OF THE USE

A parodist's financial motives have long played a role in determining whether a parody is fair use.<sup>70</sup> Courts, however, have been unable to define with any consistency what constitutes a commercially-motivated parody, or what weight they should afford commercial motives.<sup>71</sup> In addition, courts often equate "commercial" taking with bad faith,<sup>72</sup> treating imaginative, socially valuable work as chiselling for profit.<sup>73</sup>

Several recent cases illustrate continued confusion regarding the commercial/nonprofit distinction. *Original Appalachian Artworks, v. Topps Chewing Gum*<sup>74</sup> involved a Topps parody that profited from the Cabbage Patch Dolls craze. The court held that stickers featuring "The Garbage Pail Kids," Cabbage-Patch-like characters depicted in "rude, violent and frequently noxious settings"<sup>75</sup> were not valid parody.<sup>76</sup> Instead, the court found the stickers a "bad faith" attempt to capitalize

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70. See, e.g., *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 182-83 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court*, 356 U.S. 43 (1958).

71. The *Loew's* trial court, for example, indicated that parody motivated wholly or in part by personal gain cannot be fair use. 131 F. Supp. at 176. Courts have applied this rule sporadically to deny the fair use defense. While such a result may seem instinctively reasonable when the parodist and author are in competition because the parody could harm the original's market, courts largely have failed to evaluate commerciality in light of economic considerations. See, e.g., *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988), where defendants released "Nightmare on My Street," a rap music video based on the popular *Nightmare on Elm Street* movies. The defendants released the video to coincide with the opening of one of the plaintiff's films and to compete directly with the plaintiff's authorized rap song and accompanying promotional video "Are You Ready for Freddy?". *Id.* at 1518-21.

The *New Line Cinema* court was almost certainly correct in concluding that "Nightmare on My Street" and "Are You Ready for Freddy" were in competition. Other courts have reached the same determination with little more than conclusory analysis. See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). Still other courts view commercial parodies harshly, and often deny fair use by refusing to admit that profit-motivated satires are parodies at all. See, e.g., *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).

72. One happy exception is *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). The court refused to find bad faith where the defendants made an admittedly commercial parody without permission after the plaintiffs refused to license the original's use. *Id.* at 436-37.

73. See, e.g., *Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1036 (N.D. Ga. 1986).

74. 642 F. Supp. 1031 (N.D. Ga. 1986).

75. *Id.* at 1032.

76. *Id.* at 1036-37.

off Appalachian Artworks' ideas.<sup>77</sup>

*Tin Pan Apple, Inc. v. Miller Brewing Co.*,<sup>78</sup> concerned a television commercial for Miller Beer in which comedian Joe Piscopo and several others imitated a popular rap group.<sup>79</sup> The court rejected Miller Brewing Company's argument that the advertisement was a parody, and reiterated the reasoning used in *Original Appalachian Artworks*. Holding that the commercial infringed on Tin Pan Apple's copyright, the court declared that appropriation of material "to promote the sale of commercial products" is not parody, and therefore not fair use.<sup>80</sup>

The *Tin Pan Apple* and *Original Appalachian Artworks* courts went further than the Supreme Court did in *Sony* and *Harper & Row*. Instead of stating that there is a presumption against fair use when an appropriation is commercially motivated, the New York and Georgia district courts indicated that a profit motive *precludes* a finding of fair use. This restrictive approach, which in effect equates profit motive with bad faith appropriation, punishes parodists unnecessarily. More importantly, it ignores the important question of whether the parody harmed the author's economic interests.

#### C. JUDICIAL DISAPPROVAL OF CONTENT AS A DETERMINANT OF FAIR USE

The most disturbing factor in parody cases is the tendency of courts to consider a parody's content in determining fair use. In effect, outraged courts punish distasteful or profane parodies without reasoned consideration of the fair use defense or the social goals of copyright. Moreover, courts denying the fair use defense often protect the copyright holder's reputation, an interest outside the scope of copyright law.<sup>81</sup> The overly-flexible

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77. The use was in bad faith, the court declared, because Topps "appropriated plaintiff's copyrighted products for its own commercial gain." *Id.* at 1036. The court indicated that Topps should have purchased the rights to the Cabbage Patch characters. *Id.* Given the plaintiff's efforts to create a wholesome product, *id.* at 1035, it is unlikely that the plaintiff would ever have authorized Topps to sell Garbage Pail Kids.

78. 737 F. Supp. 826 (S.D.N.Y. 1990).

79. *Id.* Piscopo appeared in a costume that made him appear to be a member of The Fat Boys, and performed music in The Fat Boys style. *Id.* at 827.

80. *Id.* at 829-31.

81. The *Loew's* court's palpable disdain for what it termed the "low comic vein" of Benny's parody, for instance, may have significantly affected the outcome of that case. *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 168 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court*, 356 U.S. 43

nature of fair use exacerbates these tendencies. Because the doctrine is amorphous, a court easily can conceal a content-based reason for denying the defense by placing excessive weight on one factor or another, or, as they do when confronted with commercial parodies, by denying that the work is a parody at all.<sup>82</sup>

*MCA, Inc. v. Wilson*<sup>83</sup> and *DC Comics, Inc. v. Unlimited Monkey Business*,<sup>84</sup> both involving off-color parodies, indicate the role that judicial disapproval plays in fair use. *MCA* involved a take-off of the song "Boogie Woogie Bugle Boy" performed in the cabaret show *Let My People Come—A Sexual Musical*.<sup>85</sup> Holding that the song infringed *MCA's* copyright, the court assumed, without more, that, because the works were both in "the entertainment field," they were in direct competition.<sup>86</sup> Because of this competition, the court reasoned, the par-

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(1958). The Ninth Circuit apparently shared the trial court's distaste, dismissing Benny's claim that "Autolight" was a critical comment on the original as "a parody on the meaning of criticism." 239 F.2d at 537.

82. Applying an exceedingly narrow definition of "parody" is another way courts express disapproval of the content of a parody. See *Walt Disney Prods. v. Mature Picture Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975). Holding that repetitive use of the "Mickey Mouse March" in *The Life and Times of the Happy Hooker* was not fair, the court noted that the defendants did not attempt to parody the song itself, but life in general. *Id.* at 1398. Placing a work in an incongruous setting that exposes it as flawed or inane is parody, however, and courts should treat it as such.

A Ninth Circuit case, *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979), also demonstrates the unspoken role that content plays in parody cases. Defendant *Air Pirates* published two "counter-culture" comic books depicting familiar Walt Disney characters taking drugs and engaging in promiscuous sex. *Id.* at 752-53. The court held that the comic books infringed Disney's copyright. *Id.* at 758. The *Air Pirates* court, like those before it, devoted considerable attention to the substantiality of the appropriation under the conjure up test. Emphasizing the value of the wholesome Disney image, the court denied the fair use defense even though it admitted that Disney could not show that it had suffered economic harm. *Id.* at 756-58. In fact, the court rejected the suggestion that economic harm to the plaintiff's copyright should even be a factor in decision making. *Id.* at 756.

The *Air Pirates* decision can only be understood as a veiled attempt by the court to punish a parody it found morally reprehensible. Despite no indication that the comic books harmed the originals, the court enjoined their distribution. In doing so, the court vindicated damage to Disney's reputation, protection copyright does not provide.

83. 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 677 F.2d 180 (2d Cir. 1981).

84. 598 F. Supp. 110 (N.D. Ga. 1984).

85. 677 F.2d at 182. The parody, "The Cunnilingus Champion of Company C," clearly evoked the original in its title. Judge Mansfield notes in his vigorous dissent that, beyond this, the lyrics of the songs were almost entirely different. *Id.* at 188.

86. *Id.* at 185.

ody harmed the market for the original.<sup>87</sup> Moreover, it determined that the defendants had appropriated more than permitted under the conjure up test.<sup>88</sup> The real reason for the *MCA* decision, however, almost certainly was the court's intense disapproval of the parody, which it dismissed as "dirty lyrics."<sup>89</sup>

Similarly, *DC Comics* concerned "Super Stud" and "Wonder Wench," off-color parodies of Superman and Wonder Woman used to deliver "adult" singing telegrams.<sup>90</sup> Declaring that courts will protect parody only when it creates something new, not when it "destroy[s] the old," the court granted an injunction preventing the defendants from using or licensing the use of the characters.<sup>91</sup>

Considering potential effect on the copyright's value, the court divided its analysis into two parts. It first found commercial substitution because the defendants' parodies might prevent *DC Comics* from creating or licensing its own singing telegrams.<sup>92</sup> The court then considered "the implicit disparagement and bawdy associations" resulting from the parodies.<sup>93</sup> Emphasizing the all-American nature of the familiar characters, the court concluded that the parodies "tarnished" the

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87. *Id.* The court began with the premise that the two works were in competition. *Id.* It then concluded that, because of the competition, "Cunninglingus Champion" harmed the market for "Boogie Woogie Bugle Boy," emphasizing that both the parody and the original were performed publicly, sold as sheet music and on albums. *Id.*

88. *Id.*

89. *Id.* The full quotation reveals the full depth of the court's ire: "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *Id.*

90. 598 F. Supp. 110 (N.D. Ga. 1984). Performers portrayed the characters while delivering singing telegrams. *Id.* at 114. The defendants themselves licensed use of the characters through singing telegram franchises. *Id.* at 112, 114.

91. *Id.* at 119. The court also found that the parodies borrowed extensively from the comic book characters and thus that the defendants had appropriated more than necessary to conjure up the originals. *Id.*

92. *Id.* at 118. Given the court's elaboration of *DC Comics'* attempts to maintain the good-will and wholesomeness associated with their products, its assumption that *DC Comics* would ever license its own singing telegrams, whether featuring "Super Stud" and "Wonder Wench" or the originals, is questionable. Equally troubling is the court's failure to consider whether the parody fulfilled demand for the original. It seems unlikely that a consumer wanting a Superman singing telegram would be satisfied with one featuring "Super Stud."

93. *Id.*

value of DC Comic's copyright.<sup>94</sup> By considering economic harm flowing from the critical effect, or content, of the parody, the *Unlimited Monkey Business* court vindicated damage to the plaintiff's reputation. This protection, however, is outside the scope of copyright law and should not figure into the determination of fair use.

Courts have yet to develop a suitable framework for analyzing parodies under the fair use doctrine. Although recognizing parody's social worth, they continue to evaluate satires under the traditional four-pronged fair use test, without considering those prongs in light of copyright's underlying social goals. Several recent cases demonstrate that courts are willing to consider the economic effect of a parody on the original in determining fair use. At the same time, however, courts still devote considerable attention to the substantiality of the taking under the conjure up test. They also continue to emphasize such disparate elements as the commercial use of the parody, the good faith or reasonableness of the parodist and, explicitly or not, disapproval of the parody's content. At best, the results are inconsistent. At worst,<sup>95</sup> inconsistency degenerates into judicial censorship.

### III. A FRAMEWORK FOR ANALYZING PARODIES

The Supreme Court decisions in *Sony Corp. of America v. Universal City Studios* and *Harper & Row, Publishers v. Nation Enterprises* demonstrate the Court's conviction that copyright is fundamentally a utilitarian system encouraging the dissemination of knowledge through limited private monopolies.<sup>96</sup> Both cases stand for the proposition that commercial

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94. *Id.* As in many parody cases, DC Comics alleged both copyright and trademark infringement claims in *Unlimited Monkey Business*. *Id.* at 112. Tarnishment is a trademark infringement claim involving use of another's trademark in a setting which "tarnishes" it by creating unwholesome or negative associations in consumers' minds. See *Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1039-40 (N.D. Ga. 1986); *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189-92 (E.D.N.Y. 1972); see also *L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26 (1st Cir. 1987) (stating that First Amendment precludes application of state's trademark tarnishment statute because defendant's obscene parody was a form of social commentary), *appeal dismissed, cert. denied*, 483 U.S. 1013 (1987); Arlen W. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 VILL. L. REV. 1, 35-39 (1991). Tarnishment is merely another form of reputation damage and has no place in copyright law.

95. As in *MCA* and *Unlimited Monkey Business*.

96. See *supra* Part I.C.

uses of copyrighted material are presumptively unfair. The *Sony* Court, however, left "commercial" undefined, and the *Harper & Row* Court broadly defined commercial uses as those in which the user does not pay "the customary price" for exploitation.

*Sony* and *Harper & Row*, however, are not parody cases and they contain dicta that, if applied to parody, would sharply curtail the fair use defense. Read together, these decisions would drastically constrict the borders of the fair use doctrine in the context of parody. Nearly every parody is "commercial" under the Court's *Harper & Row* definition of the term, if for no other reason than that the parodist has not paid the author royalties for use of a work. Yet parody, functioning as humorous criticism and commentary, serves valuable social functions and should be encouraged. *Sony* and *Harper & Row*, therefore, provide an inadequate framework for parody analysis. A more appropriate framework starts with copyright's underlying rationale, acknowledged by the *Sony* and *Harper & Row* courts, but adequately protects the diverging interests of parodists, authors and the public. Such a paradigm balances all parties' interests, while protecting parody's critical function.

#### A. THE EFFECT OF THE USE: THE "SUBSTITUTION TEST"

Copyright fulfills its social purpose through limited monopolies that encourage authors to disseminate their work. Uses that harm an author economically are disincentives that subvert copyright's goals. Fair uses are those which, although technically infringing, do not damage the underlying incentive system. Therefore, in evaluating whether a parody is fair use, courts must look to the potential economic harm it may cause the original author.

A parody that interferes excessively with an author's incentives to create and disseminate her work subverts the copyright system and does not merit the fair use defense. Every fair use, however, necessarily involves some limited loss to the copyright holder. At the very least, the author has lost the opportunity to extract royalties from the parodist.<sup>97</sup> Courts therefore must proceed with caution when evaluating harm to an author. Rather than denying fair use when the plaintiff makes any showing of negative market effect, the actual or po-

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97. She also has lost the opportunity to create and market the parody herself. See *infra* Part III.E.1.

tential harm must be great enough to require the protection of the author and of the incentive system.

### 1. Market Substitution

Courts currently use two standards to evaluate the economic harm a parody causes. While solicitous of authors, neither approach sufficiently protects the parodist. One standard involves an inquiry into competition between the original and the parody. This may be merely a conclusory analysis because the court, consciously or not, inserts its own opinion about the parody's social value. The *MCA* court, for instance, found that vague "competition in the marketplace" was sufficient indication of economic harm to enjoin production of a parody.<sup>98</sup> The other standard focuses on the parody's adverse effect on the original's market value.<sup>99</sup> A test measuring negative effect on the original's market provides a better balance because it goes to copyright's underlying rationale. It is still deficient, however, because it allows courts to consider adverse impact from any and all sources, including economic loss and reputational damage from a biting or unwholesome parody. These types of harm flow from the content of the parody and are not relevant to whether a use is fair.

As with all critical reviews, a caustic parody may decrease demand for the original.<sup>100</sup> Damage to reputation and the negative impact of a critical review, however, are outside the scope of copyright protection.<sup>101</sup> A market effect test based solely on economic harm either must include these losses, or require courts to separate non-actionable harm resulting from critical impact from the harm competition between the works causes. At best, this is a difficult and imprecise task. For these reasons, the proper standard in analyzing market effect is not whether any economic loss at all has occurred; instead, courts should determine whether the parody serves or has the potential to serve as a *substitute* for the original or for its derivative

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98. *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981); see *supra* notes 85-89 and accompanying text.

99. See *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1157-58 (M.D. Tenn. 1991); see also *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977).

100. Parodies, although humorous, fulfill the same critical function as serious reviews. In fact, a parody's critical effect may be its most valuable function.

101. See *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044, 1050-51 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984).

products.<sup>102</sup> This "substitution test," used in conjunction with the traditional four factor analysis in the *Elsmere Music* and *Fisher* cases, requires more-than-negligible economic effect on the original, thereby protecting the parody's valuable social role. It also ensures that courts exclude a parody's critical effect from consideration. At the same time, it advances the aims of copyright by protecting authors from excessive interference with their property.

## 2. Fair Use Analysis Under the Market Substitution Test

If a parody is capable of substituting for the original or its derivatives, the use is unfair. The parodist has appropriated the author's work in a manner that contravenes the copyright incentive system and courts need not engage in further analysis. Although *Sony* may suggest otherwise, courts should not attempt to weigh the social or literary worth of the parody against the harm it causes the original. This type of balancing, if properly done, arguably might further copyright's social aims by classifying a parody as fair if its "value" outweighs the original author's loss.<sup>103</sup> Courts are not qualified, however, to make such artistic and literary evaluations; nor would it be wise for them to do so. Requiring courts to determine the societal value of a parody would only increase the inconsistency already rampant in parody case law. In addition, balancing the merits of the original against those of the parody furnishes courts with too much discretion. Such free-form balancing provides an unsteady analytical framework and permits courts to weigh unspoken "factors" such as their own dislike of a parody.

The truest and most complex form of parodies, those that simultaneously imitate and expose the flaws of the original, will almost always be fair use under a market substitution test because their critical function makes it unlikely that consumers

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102. If the parody fulfills demand for the original, consumers would be equally satisfied purchasing the parody or the original work. In deciding this courts may examine a number of things, including, for instance, the number of times the parody is reproduced. A one-time airing of a parody on a television show would be unlikely to serve as a substitute for the original. See *Elsmere Music, Inc. v. National Broadcasting Corp.* 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); *supra* notes 63-65 and accompanying text. Whether the parody is in the same media as the original may also be relevant.

103. The Supreme Court took this balancing approach in *Sony*, where the majority agreed that the social utility of time-shifting outweighed harm to the plaintiffs. See *supra* notes 36-41 and accompanying text. Some commentators have advocated this approach. See Bernstein, *supra* note 45, at 38-44.



would accept them as substitutes.<sup>104</sup> This result is appropriate, given the great value of such parodies as critical tools. Loosely-based parodies, which borrow an original largely for humorous effect and only obliquely comment on it,<sup>105</sup> often will be found fair, but will run a greater risk of infringing because they are more likely to substitute for the original.

#### B. USING THE CONJURE UP TEST AS A TOOL IN MARKET SUBSTITUTION ANALYSIS

The amount a parodist copies from the original is largely unrelated to the copyright incentive system, yet it continues to receive an inordinate amount of judicial analysis. In focusing on whether the amount copied is "too much," courts fail to consider whether the parody harms the market for the original work. In addition, by emphasizing the extent of the appropriation, courts penalize the very parodists whose work is most valuable as criticism because it is the most thorough.<sup>106</sup>

Rather than affording the vague conjure up test a significant role in their analysis, courts should recognize the test for what it is: a rough rule of thumb that may aid in determining whether a parody is a market substitute. The amount of taking should not be a dispositive factor, yet at times it may be a useful clue about a parody's effect on the original's market. A parody that does no more than conjure up the original is unlikely to be a satisfactory substitute in consumers' eyes; a parody that closely tracks the original may satiate demand for the original.<sup>107</sup> In either case, the amount of the taking is only an indi-

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104. Consider the bitingly satiric performance of the Wagnerian opera, discussed *supra* note 66. A Wagner aficionado would be unlikely to accept that satire as an adequate substitute, even though the lyrics and music were identical. While parodies are unlikely to decrease demand for the original, they might *increase* demand by stimulating interest in the original. See 3 NIMMER & NIMMER, *supra* note 4, at § 13.05[C].

105. Such as the parodies in *Berlin v. E.C. Publications*, which were meant to demonstrate "the idiotic world we live in." 329 F.2d 541, 543 (2d Cir. 1964).

106. The *Air Pirates* court imposed such a penalty. See *supra* note 82. The court recognized that a parody that borrows more extensively from the original may in fact be a more humorous and critical work, but held that there is no right to make the "best" parody. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978). If the ultimate purpose of copyright is to increase the flow of information, however, courts should encourage parodists to create the "best" parodies they can, limited only by the proviso that the parody cannot serve as a substitute for the original and still be a fair use.

107. A satirical version of a mystery novel that reveals a surprise plot twist might, for example, serve as an adequate substitute for the original.

cation of the parody's effect on the original, not conclusive evidence of infringement.

### C. THE COMMERCIALITY/NONPROFIT DISTINCTION IN THE PARODY CONTEXT

The *Harper & Row, Publishers v. Nation Enterprises* and *Sony Corp. of America v. Universal City Studios* definitions of commerciality are unsuitable in the context of parody.<sup>108</sup> Any evaluation of a parody's commerciality is extraneous unless it helps determine whether the parody is a market substitute for the original. As with the conjure up test, the issue of a parody's commercial or nonprofit status may inform the market substitution analysis, but it should not be a determinative factor.

#### 1. The Inapplicability of *Harper & Row*

The Supreme Court indicated in *Harper & Row* that, in the context of fair use, commerciality concerns whether the appropriation allowed the user to avoid paying the customary price for the use.<sup>109</sup> This definition may help to identify unfair uses of copyrighted material in ordinary business settings, but it is inapplicable in the context of parody, where the creation also exposes its subject to ridicule. Since a parody "garrot[s] the original,"<sup>110</sup> copyright holders will seldom permit parodists to use their work.<sup>111</sup> Considering this, a definition of commerciality that equates failure to pay with unfair use would condemn nearly every parody.

#### 2. The Traditional Commerciality/Nonprofit Distinction

The traditional commerciality test used in *Sony* examines whether the appropriation is for profit in the everyday sense.<sup>112</sup> It is, for several reasons, an unsuitable determinant of fair use in parody cases. First, the test unrealistically defines the commerciality/nonprofit distinction in such a way that the two categories appear to be mutually exclusive.<sup>113</sup> The decision to

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108. See *supra* Part I.C.

109. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985).

110. KAPLAN, *supra* note 7, at 69.

111. See Yen, *supra* note 45, at 104-08.

112. See *supra* notes 38-41 and accompanying text.

113. See 3 NIMMER & NIMMER, *supra* note 4, at § 13.05[A]; *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1988).

assign a parody to one or another classification is largely arbitrary; commercial and noncommercial motives are likely to be mixed together.<sup>114</sup>

Second, and more importantly, the test presumes that the author and the parodist are in competition, and that the author suffers an economic loss each time the parodist profits.<sup>115</sup> In many types of infringement cases this might be a reasonable assumption. Because a parody seldom competes directly with the original for customers, however, the parodist's profit motivation is largely irrelevant to fair use.

Rather than attempt to determine whether a parody is commercial, courts should focus on the relevant question: whether the parody is a market substitute. Unless the commercial nature of a particular parody indicates in some way that it is a potential substitute, the parodist's motivations should not concern the court. Like the conjure up test, commerciality at times may be a useful rule of thumb. An aggressively marketed parody, for example, may be a more likely market substitute than one which is performed once for educational purposes. As with the conjure up test, however, judicial consideration of the parodist's motives should be only the first step in determining the likelihood of market substitution.

#### D. TWO MODELS FOR COURTS TO FOLLOW

Two recent cases suggest that courts may be receptive to a market-effect test. In *Eveready Battery Co. v. Adolph Coors Co.*,<sup>116</sup> the District Court for the Northern District of Illinois refused to enjoin Coors from airing a beer commercial parodying the popular "Energizer Bunny" commercials.<sup>117</sup> The adver-

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114. The parodist of a song, for instance, who releases her parody on an album may be motivated both by desire to communicate a message and to make a profit. Courts routinely recognize such mixed motives in the First Amendment context; this reasoning is equally applicable to parodies.

115. This is generally true in many areas of copyright law, including computer software. When a competitor infringes upon the software of another company, customers are in fact likely to choose one program at the expense of another. Copyright infringement by a *competitor* is the paradigm in which the commerciality/nonprofit distinction originated, and in which it continues to perform a valuable function. A parodist is not, however, an author's competitor in the ordinary sense of the word. Instead, a parodist functions more like a critic or a commentator.

116. 765 F. Supp. 440 (N.D. Ill. 1991).

117. The Bunny, a drum-toting wind-up toy, nonchalantly interrupts commercials for fictional products. Interestingly, in this "commercial within a commercial" format, Eveready itself parodies entire genres of television commercials. The fictional commercials conjure up certain types of advertise-

tisement, which starred actor Leslie Nielson sporting rabbit ears and feet, was, the court found, a fair use. The court considered the lack of economic harm to Eveready dispositive, emphasizing that the parody did not satiate viewers' desire for the original commercials.<sup>118</sup> Citing *Sony*, the court noted that Adolph Coors' commercial use actually weighed in Eveready's favor,<sup>119</sup> but refused to define the advertisement as strictly commercial or noncommercial. The court recognized that parody, even that created to sell a product, is rarely devoid of creativity.<sup>120</sup> The *Eveready* decision demonstrates an encouraging judicial willingness to look beyond the commercial/nonprofit classification to a parody's market effect.

Despite the alarming number of cases that have turned on damage to reputation or distasteful use, not all courts focus on a parody's content. *Pillsbury Co. v. Milky Way Productions*<sup>121</sup> involved *Screw Magazine's* pornographic depiction of the familiar Pillsbury doughboy, "Poppin Fresh." The court rejected Pillsbury's argument that the parody's salacious nature entitled it to less protection under the fair use doctrine, stating that it was inappropriate for the court to consider the morality of the use.<sup>122</sup> Because it was unlikely that the parody had affected the market for the original doughboy, the court held that the use was fair.<sup>123</sup> Like *Eveready*, the *Pillsbury* court's emphasis

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ments, including those for long-distance telephone services and sinus medicine. *Id.* at 442 n.3.

118. *Id.* at 448. If Eveready could demonstrate that the Coors commercial made viewers less likely to watch the Energizer Bunny commercials, the use would have been unfair. The Coors parody would have been a market substitute for the original.

119. *Id.* at 447.

120. *Id.* at 446-447 ("Although the primary purpose of most television commercials . . . may be to increase product sales and thereby increase income, it is not readily apparent that they are therefore devoid of any artistic merit or entertainment value.").

121. 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981).

122. *Id.* at 131. Surprisingly, however, the court found that the parody, while protected under the Copyright Law, violated Georgia's trademark anti-dilution statute. *Id.* at 135.

123. *Id.* at 130-32. Compare *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), in which the court rejected the argument that the distasteful nature of the glue-sniffing mentioned humorously in the parody should play a role in determining fair use. *Id.* at 437 (dictum). In *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991), the copyright holders of the popular Roy Orbison song "Oh Pretty Woman" sued rap group Two Live Crew over their raucous parody of the tune. The court found the parody a fair use, rejecting the plaintiffs' claim the parody "tarnished" the copyright. *Id.* at 1158-59.

on economic harm is encouraging, and should prove a model for future decisions.

#### E. CHALLENGES TO A MARKET SUBSTITUTION TEST

The market substitution test faces two challenges. The first of these is protecting an author's ability to exploit the market for derivative works based on the copyrighted original. The second is protecting parodists from liability for reputational damage or tarnishment. In spite of these two hurdles, a fair use test for parodies based on market substitution offers qualities lacking in the current, ad hoc approach.

##### 1. Market Substitution and Derivative Uses

A parody's effect on the market for derivative products such as adaptations will be difficult for courts to evaluate because of the speculative nature of such products.<sup>124</sup> Derivatives and adaptations, however, may be extremely lucrative. Because of the potential for financial gain that adaptations present, they are a valuable part of the copyright incentive system that courts should protect. Courts therefore should be vigilant in preserving an author's opportunity to exploit the market for adaptations and derivative works.

To do so, courts must distinguish between humorous adaptations of works and parodies. Humorous adaptations are derivative works that copyright protects. Parodies, like adaptations, by necessity borrow substantially from the original. The crucial difference, however, is that parodies comment in some fashion on the object of their satire. A parody may be largely directed at lampooning societal mores,<sup>125</sup> but must in some oblique way comment on the original or its special societal value is lost. If no critical function is fulfilled, the would-be

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124. Parody itself is a derivative product, but courts should not find a parody unfair because it might substitute for a potential parody the author could create. To include a parody by the author as a derivative product for purposes of determining market substitution would eviscerate the fair use defense. Authors are entitled to comment critically upon their own works and this criticism conceivably could be in the form of a parody. Because ridicule is one of satire's intrinsic functions, however, it is unlikely that an author would in fact denigrate her own work by parodying it.

125. The *Mad Magazine* lyrics of *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964), are an example of a parody not focused directly on the original work. As the *Berlin* court recognized, the songs parodied "the idiotic world we live in today" and demonstrated the tameness of the original classics. *Id.* at 543.

parodist has usurped the author's right to adapt her work at a profit, with no commensurate gain to society.

## 2. Tarnishment and Reputational Damage

Caustic parodies may wound egos and even diminish an author's reputation. Arguably, fear of derision prevents timid authors from disseminating their works. This, however, is not the type of disincentive courts should consider when evaluating fair use. Copyright deals in economic incentives to create. Wounded pride and reputational damage are not wrongs copyright remedies. Unless the parody is capable of serving as a market substitute, the author must look elsewhere for a remedy.<sup>126</sup>

## 3. Advantages of the Market Substitution Test

Commentators have argued that creating a dispositive factor for fair use disregards the statutory language of 17 U.S.C. § 107.<sup>127</sup> This objection, however, ignores Congressional intent in codifying the fair use doctrine. Congress meant to restate fair use in 17 U.S.C. § 107, not to alter it.<sup>128</sup> Courts are free to adapt the fair use defense to suit their needs. As indicated by the contradictory parody case law, adaptation is overdue. Moreover, courts are qualified to make determinations about market substitution, even in difficult cases involving derivative works and adaptations. Such evaluations are no more speculative than the conjure up test currently used.

Nor does a market substitution test make fair use analysis overly rigid. The flexibility of 17 U.S.C. § 107 is helpful in fields such as computer software, which undergo "rapid technological change[s]."<sup>129</sup> That same flexibility, however, is detrimental in the context of parody, where the media used have remained relatively stable but the case law has not. The "flexi-

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126. Depending on the circumstances, other remedies may be available under theories of defamation, invasion of privacy, unfair competition, the rights of publicity and privacy and breach of contract. Plaintiffs may also employ the Lanham Act and state trademark disparagement and tarnishment statutes to enjoin use of a parody satirizing a trademark as well as copyrighted material. See, e.g., *Pillsbury v. Milky Way Prods.*, 215 U.S.P.Q. (BNA) 24 (N.D. Ga. 1981); *supra* notes 121-23 and accompanying text.

127. See, e.g., *Clemmons*, *supra* note 45.

128. See *supra* note 22 and accompanying text.

129. H.R. REP. NO. 1476, *supra* note 22, at 66, reprinted in 1976 U.S.C.A.N. at 5680.

bility" of fair use in parody cases leads to confusion and a possible stifling of parodists' creative efforts.

A fair use test that turns on market substitution would be an improvement over the present ad hoc approach. First, and perhaps most importantly, relying on one dispositive factor provides consistency, a quality sorely lacking in fair use analysis to date. By relegating the arbitrary conjure up test and commercial/nonprofit considerations to minor roles, courts can concentrate on whether a parody subverts the profit incentives underlying American copyright law. Second, requiring market substitution properly forces courts to disregard non-actionable damage to reputation and wounded egos. Third, because the market substitution test eliminates the amorphous calculus of factors, there is less room for intrusive judicial "discretion" concerning the content of parodies. While it is probably impossible to eliminate completely the influence of personal taste, a sturdier analytical framework forces courts to articulate their reasoning more clearly. They are therefore more accountable.

### CONCLUSION

The current judicial approach to the parody defense is largely unrelated to copyright's policy goals. Rather than evaluate parodies in terms of their effect on copyright's incentive system, courts examine a bewildering assortment of factors, some of which are statutory, others unspoken. Nearly all are subjective. Courts stifle socially valuable parody and subvert the aims of copyright when they allow an author who has suffered no economic harm to prevail. By focusing on the potential for market substitution, courts will be better able to balance the interests of parodists, authors and society. At the same time they will bring much-needed consistency to parody case law.