THE CRITICAL EFFECT TEST: TOWARD THE PROTECTION OF PARODY AS FAIR USE

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There is something in the Filipino psyche which prods him to spoof well-known literary and artistic creations. His irreverent ingenuity produces comic re-incarnations of Rizal's Maria Clara flirting with aghast suitors or Sisa searching for her lost sons. He "overhauls" lyrics of current tunes, transforming them into commentaries on Philippine life. In addition, he creates adaptations of popular motion pictures, giving birth to Filipino counterparts of screen heroes like Rocky and Rambo. While this boundless creative imagination may afford the Filipino audience a significant dose of amusement, many of those responsible for such entertainment do not realize that there is a possibility that they are breaching laws affording rights to authors, composers and artists for their books, musical compositions, motion pictures and other writings.

Presidential Decree No. 49, otherwise known as the "Decree on Intellectual Property," pursuant to the Constitution,[1] affords protection to inventors, authors, and artists by giving them the exclusive right to their inventions, writings and artistic creations for a limited period. Such protection includes the exclusive right to make any translation or other version or extracts or arrangements or adaptations thereof[2] and to exhibit, perform, represent, produce or reproduce the work in any manner whatever, for profit or otherwise.[3]

Copyrighting of a work invests the author with a monopoly over the physical expression of ideas. Hence, anyone who copies the work without the proprietor's permission becomes an infringer. On the other hand, parody is an independent art form of ancient lineage, stretching as far back as the Greek dramatists. There is evidence that parody existed in the seventh or eighth century before Christ. "Don Quixote" by Miguel de Cervantes began as a parody. Chaucer, Shakespear, and Swift wrote parodies.[4] 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.[5] Critical parody has been defined as the exaggerated imitation of a work of art. Like caricatures, it is based on distortion, bringing into

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[1]CONST., Art. XIV, Sec. 4.

[2]Pres. Decree No. 49, Art. I, Sec. 5 doctrine (1972).

[3]*Ibid.*

[4]McClaren, *Copyright: Burlesque and the Doctrine of Fair Use*, 12 OKL. L. REV. 276 at 277 (1959).

[5]Faaland, *Parody and Fair Use: The Critical Question* 57 WASH. L. REV. 163, 164 (1981).

bolder relief, the features of a writer's style or habit of mind. It belongs to the genius of satire and thus performs the double-edged task of reform and ridicule.[6]

Clearly, parody may collide with the copyright claims of the author of the original work. The question, therefore, is: When the two art forms, both with their value to society, collide in the copyright arena, which should prevail?

In the United States, after the 1955 decision in *Loew's Inc. vs. Columbia Broadcasting System, Inc.*,[7] courts have recognized that works using parodies deserve, at least, some special treatment because of their special value to society. However, under prevailing law and jurisprudence, a parody which substantially copies its original infringes the copyright of that original, unless there is some affirmative defense.

To this end, the notion of "fair use " which allows some unlicensed borrowing of otherwise copyright-protected material is useful in giving the parodists the freedom to copy.

The problem, however, has been deciding how much freedom to allow. Under the Intellectual Property Law, the fair use principle is provided thus:

> To the extent compatible with fair practice and justified by the scientific, critical, informatory or educational purpose, it shall be permissible to make quotations or excerpts from a work already lawfully made accessible to the public. Such quotations may be used in their original form or in translation.[8]

If parody should be accorded the special status of fair use, it should be due to the fact that it serves purposes so important to society, so as to justify incursion into the author's rights. It must be noted that copyright protection was intended to strike a balance between the need to encourage literary creativity by the grant of monopoly and the ultimate interest of the public in unrestricted freedom to copy the works of others after the authors have harvested their rewards.[9] The primary purpose of this protection is not to reward the copyright proprietor, but in the general benefits derived by the public from the labor of authors.

A test for parody should focus on whether its making is necessary to accomplish its purpose. Some courts have noted the humor of parody as its value.[10] While parody is funny, not all funny adaptations of a work are parody. The real value of parody lies not in its humor, but in its criticism. It is this critical effect which sets parody apart from mere comic adaptations and which fulfills an important social function independent of its humor.

This paper shall examine the scope of copyright protection for parody in relation to the fair use defense against the charges of infringement. It shall examine how courts in the United States have dealt with the parody-defense as fair use; and shall point out a possible test for protecting valid parody, based on the work's critical effect. This method may be useful in arriving at an equitable balance between the needs of two art forms when they collide, as they inevitably must collide when one work parodies another.

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[6]"Parody", PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS.

[7](1955, DC Cal) 131 F. Supp. 165, affd. *Benny vs. Loew's Inc.* (CA9 1956) 239 F. 2d 532, affd. per curiam by an equally divided court 356 U.S. 43, reh. den. 356 U.S. 934 (1958).

[8]Pres. Decree No. 49, Art. II, Sec. 11.

[9]*Note: Copyright*, 108 PENN. L. REV. 699 (1960).

[10]Berlin v. E.C. Publications, Inc. 329 F. 2d 541 (1964).

'FAIR USE' AS LIMITATION TO COPYRIGHT PROTECTION

The monopoly privilege granted to copyright holders for their respective works by the Decree on Intellectual Property is not absolute. The Decree has incorporated certain provisions,[11] to carry out the objective of protecting the public's right to general information and which are deemed necessary for the advancement, dissemination and conservation of knowledge and culture and for the promotion of educational, charitable and religious purposes.[12] One of these limitations to copyright is the aforementioned provision of section 11 of the Decree, regarded as an expression of the concept of *fair use* in this jurisdiction. Resort to American law and cases is both instructive and necessary in understanding this concept.

The issue of fair use arises where it is found or admitted that the claimed infringer has had access to the copyrighted work and, without first obtaining the consent of the copyright proprietor, has used the copyrighted work in some way, often in the production or preparation of a new work of the user. In this situation, the copyright proprietor has contended that the use made of the copyrighted work invaded rights secured to the copyright proprietor, while, on the other hand, the alleged infringer has contended that the use which he made of the copyrighted work was allowable or "fair" and did not invade, infringe, or violate the copyright or proprietor's rights.[13]

Several reasons or justifications for the fair use principle appear. Most prominent, perhaps, is the justification based upon the public interest and constitutional desirability of advancing the progress of science and the useful arts.[14] Giving authors the reward due them for their contribution to society and compensating them for their labors were deemed to be only important secondary purposes of copyright.[15]

Closely related to the theory of constitutional desirability of subordinating the copyright owner's interest is the theory or reasoning of some cases to the effect that in the interest of progress, or for the advancement of the arts and sciences, or the like, the law allows one to make fair use of another's copyrighted work where the use is "reasonable" or "customary," or, in some instances, "necessary" or "required."[16]

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[11] Pres. Decree No. 49, Sec. 10 - 14.

[12] *See* Bautista, *Salient Features of the New Philippine Law on Intellectual Property*, 1 PHILAJUR 495 (1975).

[13] *See* for e.g., Dellar v. Samuel Goldwyn, Inc. (1939, CA2 NY) 104 F. 2d 661, Mac Donald v. Du Maurier (1944, CA2 NY) 144 F. 2d 696, subsequently dismissed upon the merits 75 F. Supp. 655.

[14] Bautista, *supra* at Note 11, at 504.

[15] Berlin v. E.C. Publications, Inc., 329 F. 2d 541 at 545.

[16] *See* for e.g., Sampson & Murdock Co. v. Seaver-Radford Co. (1905, CA1 Mass) 149 F. 539; Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc. (1952, DC NY) 105 F. Supp. 325; Mura v. Columbia Broadcasting System, Inc. (1965, DC NY) 245 F. Supp. 587; Mathews Conveyer Co. v. Palmer-Bee Co. (1943, CA6 Mich) 135 F. 2d 73; Holdredge v. Knight Publishing Corp. (1963, DC Cal) 214 F. Suppl. 921.

Another theory or justification for allowing fair use of copyrighted work is that the copyright owner has impliedly consented to certain uses of his copyrighted work[17] which another may avail. This may take place when authors customarily use earlier works and build upon the works of their predecessors.

For quite a time, the judicially-developed concept of *fair use* has been taken to mean as "a privilege in others than the owners of a copyright to use the copyrighted material in a reasonable manner without his consent notwithstanding the monopoly granted to the owner."[18]

However, in 1976, the American Congress attempted to define fair use in the following language:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include——
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.[19]

Despite the nebulous character of the doctrine, previous case law and the general copyright scheme offer considerable guidance. As the first sentence of section 107 indicates, fair use has traditionally involved what might be termed the "productive use" of copyrighted materials. The purposes listed in this section are simply illustrative and not exhaustive, but they do give some idea of the general orientation of the doctrine.[20] Parodists have endeavored to classify their works under the critical purposes of fair use.

It is interesting to note that, in this jurisdiction, for a defense of fair use to prosper, the taking or copying must be limited to quoting or taking of excerpts only, never the entire work. Undoubtedly, this rule is more strict than that prevailing in the U.S.[21]

The four factors to be considered in fair use deserve some amplification.

The first factor: the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. In the *Sony* case[22] the Court of Appeals had occasion to remark that the fact that

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[17] *See* for e.g., American Institute of Architects v. Fenichel (1941, DC NY) 41 F. Supp. 146; Greenbie v. Noble (1957, DC NY) 151 F. Supp. 45, Henry Holt & Co. v. Liggett & M. Tobacco Co (1938, DC Pa) 23 F. Supp. 302'

[18] Rosemont Enterprises' Inc. v. Random House, Inc. (1966. CA NY) 366 F. 2d 303, cert den 385 U.S. 1009 (1967).

[19] 17 U.S.C.A. § 107 (1976).

[20] Universal City Studios v. Sony Corp. of America, 659 F. 2d 963 (1981), rev Sony Corp. of America, et al, v. Universal City Studios, Inc. No. 81-1687 (US S.Ct., Jan. 17, 1984).

[21] Williams & Wilkins Co. v. U.S., 487 F. 2d 1345 (1973) aff'd by an equally divided court 420 U.S. 376 (1975).

[22] 659 F. 2d 963, at 972.

the use involved does not further a traditionally accepted purpose clearly weighs against fair use. However, the statute involved does not merely draw a simple commercial/non-commercial distinction.[23] The statute contrasts commercial and non-profit educational purposes.

The second factor: the nature of the copyrighted work. Under this factor, the courts inquire into whether the nature of the material is such that additional access "would serve the public interest in the free dissemination of information."[24] If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted.[25]

The third factor: the amount and substantiality of portions used in relation to the copyrighted work as a whole.[26] At this juncture, it suffices to state that in the fair use calculus, "the mere absence of competition or injurious effect upon the copyrighted work will not make a fair use. The right of the copyright proprietor to exclude others is absolute and if it has been violated (through excessive copying) the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial "[27]

The fourth factor: the effect of the use upon the potential market for or value of the copyrighted work. This factor is closely related to the preceding one. Nimmer suggested that "the central question in the determination of fair use is whether the infringing work tends to diminish or prejudice the potential sale of plaintiff's work."[28] As mentioned earlier, a negative answer would not make a fair use. But apparently, a positive finding negates fair use.

PARODY: FAIR USE OR INFRINGEMENT

Cases on parody, more often than not, have been decided based on the particular facts obtaining in the individual cases. The courts have refused and failed to establish a definitive test on the defense of parody. A review of the case law is enlightening.

If the copying is substantial, the parody is frequently held to be an infringement. Apparently, the test often centers on the determination of what is meant by "substantial" rather than the statutory term "copying."

In *Green v. Luby*,[29] plaintiffs' copyright was held infringed, since the

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[23] In *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, (1980, CA5) 626 F. 2D 1171, the court declared that "commercial use tends to cut against a fair use defense."

[24] Rosemont Enterprises, Inc. v. Random House, Inc. 366 F. 2d 303, at 307; also Time, Inc. v. Bernard Geis Associates, 293 (1968, SD NY) 293 F. Supp. 130.

[25] *Rohaeur v. Killiam Shows, Inc.*, (1974, SD NY) 379 F. Supp. 723, rev'd on other grounds, (1977, CA2) 55L F. 2D 484, cert den 431 U.S. 949.

[26] Invariably, most of the decisions on parody cases center their inquiry under this factor, as will be shown later.

[27] Loew's Inc. v. CBS, 131 F. Supp. 165 at 184. *See* also Walt Disney v. Air Pirates, 581 F. 2d 751, cert den 439 U.S. 1132 (1979).

[28] 3 NIMMER ON COPYRIGHT § 1305 (1981).

[29] 177 F. 287 (1909).

entire copyrighted song was pirated by the defendant, the court concluded that the taking was substantial. The application for preliminary injunction to restrain defendant from publicly singing the song as part of a copyrighted dramatic sketch was granted. The case was distinguished from both *Bloom & Hamlin v. Nixon*,[30] where the defendant had sung only the chorus of the original composition, and *Green v. Minzesheimen*,[31] where the defendant merely imitated the singer without any musical accompaniment. Holding that if it were necessary for the effectiveness that an entire song be parodied, the performer should avoid the use of the copyrighted song. The court rejected the defendant's arguments that the singing of the song was merely incidental to her impersonation of various singers and was, therefore, a mimicry. The court opined that mannerisms may be shown without words, but if words are necessary, a whole song should not be taken.

Another test calls for an inquiry as to whether or not so much has been produced as will materially reduce the demand for the original. In a leading case[32] where the defendant arranged a dramatic performance in which the two most prominent characters were costumed and intended to represent certain copyrighted cartoons to which the plaintiff was the exclusive licensee of the dramatic rights, the court held that there was infringement. The court noted that the language used by the defendant's characters contained important direct quotations from the catchwords made familiar by the plaintiff's original cartoon characters. The court was of the opinion that defendant's production was calculated to injuriously affect, to a substantial degree, the value of complainant's copyright. Those who saw "Nutt and Gitt" (the defendant's version), echoing the court, would more likely to spend the next dime or quarter available for the purpose on a show other than an authorized dramatization of the "Mutt and Jeff," the plaintiff's original cartoon character.

In that case of *Loew's Inc. vs. Columbia Broadcasting System*,[33] comedian Jack Benny and Ingrid Bergman performed a fifteen-minute radio burlesque of the motion picture "Gaslight," having previously obtained the consent of Loew's Inc., the owner of the exclusive motion-picture rights to the play. Six years later, a similar "Gaslight" burlesque was televised over the CBS television network under the name of "Autolight" featuring Jack Benny and Barbara Stanwyck. The show was kinescoped for rebroadcast over network stations which could not carry the live show. Loew's Inc. brought suit. The CBS argued that the television show was a "fair use" of the play and that such doctrine includes the right to parody literary properties. The District Court found that a substantial part of the copyrighted material in the motion picture had been copied in the television program, and granted the injunctive relief. The Court of Appeals, in affirming the lower court's decision, held that presenting verbatim a serious dramatic work as burlesque does not avoid infringement of copyright. In the Court's opinion, wholesale copying can never be fair use.

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[30] 125 F. 977 (1903).

[31] 177 F. 286 (1909).

[32] Hill v. Whalen and Martel (1914, DC NY) 220 F. 359.

[33] 131 F. Supp. 165 (1955), affd. Benny v. Loew's, Inc. (CA9 1956) 239 F. 2d 532, affd per curiam by an equally divided court 356 U.S. 43, reh den 356 U.S. 934 (1958).

No Infringement Found

The parodist, as one case would prescribe, must be permitted sufficient latitude to cause his audience to recall or conjure up the original work, if the parodist is to be successful.[34]

The first case dealing directly with an alleged infringement by parody and burlesque was *Bloom & Hamlin v. Nixon.*[35] The owners and producers of a copyrighted song, "Sammy," originally rendered by singer Lotta Faust during the stage performance of "The Wizard of Oz," brought an action to enjoin the use of the song by one Fay Templeton, who employed it as part of her act in "The Runaways," by imitating the peculiarities and characteristics of several actresses, among them Faust, singing the chorus of "Sammy." Her performance was preceded by an announcement that she would imitate Faust and would sing only the chorus of "Sammy." The court refused to grant the injunction, finding that Templeton was presenting not the copyrighted song but the peculiar actions, gestures, and tones of plaintiffs' performer, the chorus of the song being merely used as vehicle for carrying the imitation along. The representation of the chorus of "Sammy" was merely incidental to, and inseperably connected with, the imitation, the court concluded. In addition, Templeton had acted in good faith, which was pointed out as essential to the defense in an infringement action. The court declared the parody to be a distinct and different variety of the histrionic art, holding that a parody would not infringe the copyright of the work parodied merely because a few lines of the original might be textually reproduced.

A ground usually employed to declare a parody an infringement is the effect of the parody on the demand for the original work. But as correctly pointed out by an English court,[36] this element has no place in burlesque. A true burlesque has the effect of increasing, if anything, the demand for the original. Any work which tends to decrease the demand for the original would not be a true burlesque and would not come under an exception for burlesque.[37]

Thus, there is merit in the contention that there can be no infringement in cases where the defendant has bestowed such mental labor upon what he has taken, and has subjected it to such revision and alteration as to produce an original result.[38] Corollary to this, a taking is not within fair use if the original has only been copied.[39]

While the appeal from *Loew's Inc. vs. CBS* was pending, the case of *Colum-*

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[34] Berlin v. E.C. Publications, Inc. 329 F. 2d 541 (1964).

[35] 125 F. 977 (1903). The importance of intent or good faith is illustrated in this case. *See* also *Green v. Minzesheimen,* where the court, in denying the injunction, refused to distinguish the *Bloom and Hamlin* case.

[36] Glyn v. Weston Feature Film Co., 1 Ch. 216 (1916).

[37] Apparently, the court in *Hill v. Whalen and Martel,* did not full appreciate this holding.

[38] Glyn v. weston Feature Film Co.

[39] "The whole picture need not be copied to constitute infringement. The mere copying of a major sequence is sufficient. *"Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354 (1947). See also *Warner Bros. Pictures v. CBS,* 216 F. 2d 945 (1954).

bia Pictures Corp. vs. National Broadcasting Corporation,[40] came before the same district court in California, but in this case, the court held for the defendant. In the instant case, James Jones, author of the copyrighted novel, "From Here to Eternity," gave written consent to the Columbia Pictures Corporation in 1951 for the making of a motion picture based on the novel. After the picture was produced and shown to the public, the National Broadcasting Corporation, without the consent of Columbia Pictures, telecasted over nationwide network, a playlet entitled "From Here to Obscurity" intended to be a burlesque of "From Here to Eternity," to which Columbia Pictures had exclusive motion picture rights. Although the opinion does not make it clear, the case seems to be distinquished from *Loew's case* on the ground that the copying from the original was not to the extent of infringing by substantial appropration. The court found that the telecast in question was not intended to and did not deceive the general public into believing that the program was a telecast of the motion picture, and did not disparage or detract from it, and that the public was not in any way confused or misinformed by the telecast, either as to the origin of the burlesque or the true nature or origin of the motion picture.

Berlin vs. E. C. Publications, Inc.[41] was a copyright infringement action based on the publication of a collection of parody lyrics in "Mad" magazine, in which the defendants were granted summary judgement. After the title of each lyric were words "Sung to the tune of: x x x," or "To the tune of x x x," and inserted was the title of one of the old songs, twenty-five of which plaintiffs owned the copyright. It was argued that the direction had the same effect and force as if the music of plaintiffs' respective compositions had actually been printed with the defendants' parody lyrics thereto. The District Court found it difficult to understand how music could be copied when it was not reproduced, holding defendants had not parodied plaintiffs' lyrics but had satirized, in original words and thought, several aspects of modern life.

The extent to which a parodist may borrow from the work he attempts that it was unnecessary, however, to apply the "substantiality test," on which the decision in the *Loew's case* was anchored because of the great disparity here in theme, content and style between the plaintiff's original lyrics and the alleged infringement. While the brief phrases of the lyrics were occasionally quoted into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up" the originals. The humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounted to a "substantial" taking, if that standard was not to be woodenly applied.[42]

FAIR USE: PARODY AS CRITICSM

Among the exclusive rights of the copyright holder is that of making any version, extract, arrangement or adaptation of his original work. This is also known as the right to prepare derivative works.[43] By virtue of this right, the author is

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[40] 137 F. Supp. 348. (1955).

[41] 329 F. 2d 541 (1964).

[42] *Ibid.*

[43] 17 U.S.C.A. § 106 (1976).

allowed to control parodies of his work, as the parodists usually recast, transform or adapt their "victim's" works. But since the purpose of this control is to benefit the community as a whole, by giving authors an economic incentive to create, the monopoly should give way when the re-inforcement of the author retards, rather than promotes, progress in human knowledge.[44] The doctrine of *fair use* has evolved and has been recognized as a "bundle" of privileges in the user aimed at ameliorating the monopolistic effects of copyright, which can impede growth.[45]

Under the U.S. Federal Copyright Act, two factors which shall be considered in deciding whether the work is fair use or an actionable infringement are of particular significance to the issue of parody.

The first is "the effect of the use upon the potential market for the value of the copyrighted work."[46] Otherwise known as the "substitution effect," the impact on the market must arise from the competition of the copier's work with the original author's, and not from the adverse criticism which may decrease the public's desire for the original. It has been noted that:

> [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.[47]

Thus, courts have turned more often to the second factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[48] Courts have ruled that if "too much" is taken, fair use may be denied no matter what social function is being fulfilled by the use.[49] To insist on denying fair use on such grounds is to say that the aim of providing incentives to authors must predominated over the interests of society in the progress of arts and sciences.

Emphasis on the Amount

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. Using this standard, the American courts have arrived at opposite results in the *Loew's* case and the *Columbia Pictures Corporation* case. Both cases were decided by the same court and with the same presiding judge. However, while the former case resulted in a finding of infringement, the latter was held as not to contain enough similarity to constitute prima facie infringement. The court said that the amount taken must be "small" and the parody can only go "somewhat further," which was interpreted to mean that the parodist might take " [an] incident of the copyrighted story, a developed character, at title . . . possibly some amount of dialogue."[50] The test,

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[44] Faaland, *supra* Note 5, at 166.

[45] *Id.*, at 168.

[46] 17 U S.C.A. § 107 (1976).

[47] KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1976), cited by Faaland, *supra* Note 5, at 171.

[48] 17 U.S.C.A. § 107 (1976).

[49] Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (1955).

[50] *Ibid.*

however, is not exclusive, for if the copying is not "small" but *in toto*, then the parodist runs the risk of being found as having made a substantial taking.

The rule was finally stated in *Berlin v. E. C. Publications, Inc.*[51] where it was declared:

> 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 than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

Though the courts now had this formula, they lacked a rationale for applying it beyond a vague sense of goodwill towards a recognized and respected art form. But when the parody becomes less socially acceptable that Mad Magazines' jibes against baseball heroes, the conjure-up test betrays its weaknesses. Thus, in *Walt Disney Productions v. Air Pirates*,[52] where a comic book was published portraying Mickey Mouse and other Disney characters as free-loving, drug-taking hippies, the court stated that very little was needed to "conjure-up" Mickey Mouse. By copying the images in their entirety, the defendants took more than was necessary to place firmly in the reader's mind the parodied work.

Defendants argued that because the parody was of the ideas that Mickey Mouse specifically stood for, the characters had to be clearly Mickey and not some other mouse. The taking required encompasses the comic element itself which is derived from the shock of the unexpected parody elements in the midst of the completely familiar elements of the original. The court ruled against the contention that the permissible copying under the "conjure-up" rule does not allow the parodist to take as much of a component part as is needed to make the "best parody," for otherwise the copyrightholders right will be prejudiced.[53] This implies that parody is to be allowed only if it is a sloppy work. This is very inconsistent with the *raison d'etre* for parody to be fair use — its importance to the progress of the arts. Such progress will not be encouraged by allowing only ineffective parodies.[54] It was only in *Elsmere Music, Inc. v. National Broadcasting Co.*[55] where the American courts veered away from a strict "conjure-up" doctrine. This involved the use of "I Love Sodom," an adaptation of the New York City's advertising campaign song "I Love New York," for 18 seconds. The Second Circuit Court reversed the trial court's finding of infringement stating that although a parody is entitled to at least "conjure-up" the original, even more extensive use would still be fair use, provided that the parody builds upon the original, using it as a known element of modern culture and contributing something new for humorous effect and commentary.[56]

Continuing Lack of a Useful Rationale

In the course of developing and applying the conjure-up doctrine, courts

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[51] 329 F. 2d 541 (1964).

[52] 581 F. 2d 751 (CA 9, 1978) cert den 439 U.S. 1132 (1979).

[53] *Id.*, at 758.

[54] Fasland, *supra* Note 5, at 173.

[55] 482 F. Supp. 741 (1980).

[56] 623 F. 2d 252 at 253.

have referred to, and commentators have developed, several reasons for allowing parodists to take enough to conjure-up their originals.

First, is the suggestion that parody deserves special treatment because of its long history as a separate art form.[57] 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.[58] However, both these views overlook the fact that parody as an adaptation is a derivative work. Other derivative works, such as a translation, have a long history; other types, such as film, are independent art forms requiring effort and originality. Yet it is not tenable to maintain that such makes fair use of what is firmly within the exclusive rights of the original author.[59]

Secondly, parody is often funny and as such offers a welcome relief in today's often inhospitable world.[60] But allowing fair use for merely funny adaptations would clearly encroach on the author's derivative-work rights. In such case, the warning in *Loew's* would be apposite:

> Any 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 [parody].[61]

The third proposition is that parody should be considered fair use because it is unlikely that anyone would buy the parody instead of the original. In *M C A, Inc. v. Wilson*,[62] defendants have produced a musical which included a song entitled "The Cunnilungus Champion of Company C," which was patently a spoof of "Boogie-Woogie Bugle Boy of Company B." The Court emphasized the defendant's commercial intent — that they were competitors in stage entertainment, that both songs were recorded and sold in printed copies — and concluded that the parody was not fair use. The dissent however, stated that such a "raucous and explicitly sexual satire is not a substitute for the innocence of "Bugle Boy" and therefore could not be competing works. Though, factually right, the dissent's reasoning is inconsistent with the parody's character as a derivative work.[63] Related to this point, is the argument that parody will rarely affect the value of a copyright and may even enhance it by stimulating interest in the original.[64]

Lastly, some commentaries have suggested that parody should be privileged because it is the use of a work that the author is unlikely to authorize. Similarly, however, this argument is unsatisfactory because, normally, copyright includes

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[57] *Parody and Burlesque: Fair Use of Copyright Infringement.* 12 VAND L. REV. 459, 461 (1959).

[58] *Piracy or Parody: Never the Twain,* 38 COL. L. REV: 550 at 553.

[59] Faaland, *supra* Note 5, at 179.

[60] Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (1981).

[61] 131 F. 2d 532, at 537.

[62] 211 U.S. PATENTS QRTLY. 577 (1981).

[63] Faaland, *supra* Note 5, at 179.

[64] Harmon, *Recent Developments in Ninth Circuit Patent and Copyright Law,* 10 GOLDEN GATE L. REV. 453, 464, (1980).

the right to withhold a work from the public, which has been recognized in Philippine Intellectual Property Law, as one of the author's moral rights.[65]

The Critical Function of Parody

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 societal purposes served by copyright law.[66] Under this approach, courts would decide what purposes deserve protection because these are more important to society than protecting the borrowed work. As long as borrowing fulfills these purposes, the quantity taken, or even the possibility of a substitute effect, would be irrelevant.

The very statute itself mentions uses which can evoke fair use: when a work has been lawfully made accessible to the public, the author shall not be entitled to prohibit its recitation or performance, if made for strictly charitable or educational purposes or at a religious service by any educational, charitable, or religious institution or society;[67] quotations or excerpts of a copyrighted work for scientific, critical, informatory, or educational purposes are also allowed.[68] These embody societal purposes, i.e., uses which embody social policy judgements to the extent their purposes are valid in intrusions on the copyright monopoly and more valuable than the author's incentive.

Fair use purposes promote two interests important to society. First, an interest in analysis and criticism of society's intellectual store, and second, an interest in the evolutionary growth of thought. These must be treated differently, and Nimmer suggests a functional approach.[69] Fair use should be allowed when the function of the use is different from the source. A work which criticizes another, has a function different from the source, the business of criticism is to analyze and comment upon the thing being criticized. In contrast, a work which promotes the interest in evolutionary growth of thought — called the "informational use" — may well have the same function as the source. Thus when a student uses part of the research previously made by another, he is using his words, at the moment, for the same purpose that the other was: to confer information about the subject of the research.

Thus, an informational use may or may not further a fair use purpose, depending on what more is done with the borrowing. In contrast, a critical use would be fair use *per se* because the criticism itself performs a different function from, and does not substitute for, the original.

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. A critic should be able to quote a poem in its entirety as long as it is necessary to further the critical purpose.[70] Though this may lead to some substitution effect,

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[65] Pres. Decree 49, Art. II, sec. 10 (1972).

[66] Faaland, *supra* Note 5, at 179.

[67] Pres. Decree 49, Art. sec. 10 (1972).

[68] Pres. Decree No. 49, sec. 11 (1972).

[69] Faaland, *supra* Note 5, at 180.

[70] *Id.*, at 182.

as reader may find no need to read the original after reading the critic's work, such should not preclude fair use. Otherwise, the use of copyright would stifle effective criticism and retard social progress.

True parody is satiric and satire is criticism. Thus, the court's first inquiry on considering a parody defense should be to ask whether the work has a critical effect. If it does, the amount taken should be judged in terms of the needs of the parody and its criticism.

In *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*,[71] The court recognized the importance of parody's critical effect. Here, the defendant produced a musical called "Scarlett Fever," based on the movie "Gone With The Wind." The court granted a preliminary injunction and recognized that mere humor was an insufficient ground for allowing fair use. Though some aspects of the musical were satirical, the overall effect was of a musical comedy version of the film — a derivative work firmly within the author's exclusive right. Thus, the court rejected the parody defense, not because of the amount taken, but because the work was not a parody. There was a judicial recognition that parody's privilege depends on a rationale which distinguishes it from other derivative works. Originality of the work or historical tradition are insufficient; criticism provides the necessary, better-grounded, rationale.

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. This question of definition branches to two further issues. First, can a work still be defended as a parody even if its criticism is aimed at society generally and not just at the borrowed work? Second, if the entire work is copied in the parody, can the borrowing work still be defined as parody?

Defining Parody by its Target. In *M C A, Inc. v. Wilson*,[71a] the district court took a narrow definition of parody. It held that the "Champion" song was not intended to be a parody of the original work "Bugle Boy." Defendants' claim that their parody was aimed at sexual mores and taboos was held by the court to be insufficient as a justification for the taking. Only direct parody of the original could be considered fair use, and not that of society's mores generally.[72] On appeal to the second Circuit Court, the ruling was tempered by a recognition that parody may reflect life in general, but held that if the Champion song is not at least in part an object of the parody, there is no need to conjure it up.

The dissent, however, pointed out that defendants might have a logical reason for conjuring up a song without intending to parody the song itself. "Champion" was a sexual satire of contemporary mores by putting a humorous twist on the more conventional "Bugle Boy," which relied on "boogie-woogie" music, and the humorous twist would not exist if the "boogie-woogie" sound of the original were not recalled.[73]

Note, however, that although defendants may have had a logical reason for using the original song — recalling the mood of the forties — it was not necessarily

[71] 479 F. Supp. 351 (1979).

[71a] 211 U.S. PATENTS QRTLY. 571 (1981).

[72] 425 F. Supp. 443, 453 (1976).

[73] *Id.*, at 584.

a legally sound one. The court found the song's value in its humor and originality. But such is not necessarily fair use, even if it barely conjures up the original. The problem lies in the fact evidence fails to establish that defendants borrowed for a truly critical purpose. Thus, although the finding of infringement would be correct, it would be due to the absence of critical effect and not due to substantial taking.[74]

A ruling that only direct spoofs of an original can be considered parody 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 emphasis is placed on the function of the borrowing work, 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.

Verbatim-Taking as Parody. Taken at face value, it is valid to assert that parody cannot be fair use if it copies the whole work. However, a work may be parodied, by context alone, as when the song "Ballad of the Green Berets" is sung by gorillas wearing fatigues. Such would be an effective critical commentary of the values underlying the song.[75]

Verbatim copying can thus result in valid criticism and is misleading to limit the definition of parody to satirical works which take only part of the original. However, in the case *Walt Disney Productions v. Mature Pictures Corp.*,[76] where the "Mickey Mouse March" was played in the film "The Life and Times of the Happy Hooker," in a sequence where three men wearing Mousekeeter hats were sexually gratified by a female protagonist, the court did not address the purpose of the taking, but instead used the "conjure-up test" and held the work was not a parody because the whole copyrighted work was adapted.

Such a ruling confuses issues of definition and allowable quantity, making critical commentary by context impossible no matter how biting. If an author's right to control derivative works can be encroached upon, as in cases of non-verbatim parody, there is not a single reason why the author's right to reproduce or perform an entire work cannot be likewise limited, if such promotes a valid fair use purpose.

In fact, cases where the reproduction of the entire work to create the critical effect are rare, especially if commentary is directed against society as a whole and not to the work itself. Hence, the burden would be upon the defendants to show both that the vehicle is closely connected to the criticism and that the whole work is necessary to achieve the critical effect. But if the defendant can meet this burden, there is no reason to deny the status of fair use.

The Critical Effect Test

A suggested approach to disposition of the fair use defense on parody case, would therefore, focus on the function of parody and would determine the limits of the parodist's freedom to borrow in terms of such function.[77] The basic premise of the method is that parody deserves fair use protection because of its critical

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[74] Faaland, *supra* Note 5, at 186.

[75] *Ibid.*

[76] 389 F. Supp. 1397 (1975).

[77] Faaland, *supra* Note 5, at 189.

function, which promotes society's progress. Courts should, therefore, determine first if the work in question is a true parody; if it has the requisite critical effect, the second step would be to determine whether the defendant has taken more than is necessary to achieve this effect. Anything taken that is unnecessary to the critical effect falls outside the fair use rationale of criticism.

Determining the Critical Effect. This determination requires a distinction between the satiric and the merely comic. Though apparently a question of judgement or literary merit, the court in the *Showcase Atlanta case*,[77a] was able to point out parts of the infringing play which had a satiric effect or where critical commentary was made on the original character; to discern between parody and humor, where an originally comic character was played up for more laughs; and finally, to look at the play as a whole and decide that the non-satiric outweighed the satiric.

The court should look for an overall predominant critical effect.[78] The basic test should be one of reasonableness, such that if a reasonably perceptive viewer would say that the work as a whole is critical commentary, the fair use rationale would be satisfied.[79]

On the other hand, the defendant has the burden of establishing the critical point he attempts to make. If the satiric point is clear, this will be easy to do. However, the defendant's inability to explain the critical effect of his work will tilt the balance against his claim of fair use. Thus, while the defendants in *Air Pirates*, could contend that they were making a critique of the bland world created by Disney, those in *Mature Films*, by alleging that they were emphasizing a comic view of adolescence, raises the suspicion that such claim was merely an afterthought.

Determining the Amount Necessary. This is primarily a question of fact where courts may resort to expert testimony for assistance in making literary judgements. In most cases, an initial finding that there is no overall critical effect resolves the issue. And in cases where there is copious adaptation of extraneous material, the critical effect is diluted. Finally, the burden is on defendant to convince the court that the work's effectiveness would have been lost if he had taken less.

In parodies of works aimed at criticizing society in general, although there is no need for criticism of the work itself, defendants must establish some connection between the claimed parody and the social criticism. Otherwise, the adaptation of the original must be treated like any other derivative work. Hence, in *Wilson*, defendants must not only show that by poking fun at the music of the forties, they were furthering their claimed criticism of sexual taboos, they must, furthermore, show that "Boogie-Woogie Bugle Boy" was a particularly appropriate vehicle to effect this criticism.[80] But, in cases where the parodied work is really just a vehicle of broader social criticism, the defendant has a wide range of works from which to choose his vehicle — some, not copyrighted so he should

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[77a] 479 F. Supp. 351 (1979)

[78] Showcase Atlanta, citing Robert Stigwood Group, Ltd. v. O'Reilly, 346 F. Supp. 376, 385, (1972).

[79] Rosemont Enterprises, Inc. v. Random House, Inc., 366 F. 2d 303, 310, (1966).

[80] Faaland, *supra* Note 5, at 191.

justify the necessity of his particular choice. The same rule holds for the extent of the taking.

CONCLUSION

When a parody victim sues, the question one asks is what really was hurt: his copyright or his pride. Protecting pride is not one of the purposes of the copyright protection extended by the law. Yet, American courts have shown that they are basing their decisons more on sympathy for the battered victim, or distaste for the unsavory form of some of the parodies than on copyright principles. Thus, one cannot,

> [u]nder the guise of deciding a copyright issue act as a board of censors outlawing X-rated performances. Obscenity or pornography plays no part in this case. Moreover, permissible parody, whether or not in good taste, is the price to pay for an artist's success, just as a public figure must tolerate more personal attack than an average private citizen.[81]

The critical effect test forces the court to apply a standard which has a logical relationship to the fair use rationale. While not eliminating judicial prejudices against parodies in "bad taste," the test forces judges to disclose their standards and explain their reasons. On the other hand, quantitative tests like that of ascertaining the amount taken to "conjure-up" the original, afford courts the convenient cliche that "too much" had been appropriated, without need for justifying value judgements made.

Moreover, this test leads to equitable results for the original author and the parodist. The former is shielded from merely humorous use of his copyrighted material. On the other hand, a true critical parody is given recognition as a work of authorship and will not be prohibited because the original may have been 'conjured-up" by a smaller borrowing. As a form of criticism, parody promotes the healthy growth in the field of human knowledge. As such, it mertis protection from the challenges of infringement commensurate to its importance as catalyst of progress.

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[81] Light, *Parody, Burlesque and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 at 635 (1979).