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Legal Perils of Parody and Burlesque

Thomas Paul Demeter*

PARODY¹ AND BURLESQUE² as art forms, and their conflicts with the rights of the holder of the original copyrighted work, are subjects of interest to both the layman and the lawyer. To analyze the status of this conflict, several areas must be explored. The following discussion includes a consideration of the current copyright law as it applies to parody and burlesque, a history of parody and burlesque as a literary form, and significant United States cases dealing with the problems of the conflict.

Statutory and Common Law Rights of an Author

All copyright rights in the United States arise from the Constitution.³ Congress, based upon this warrant of authority, has established statutory regulations of postpublication rights.⁴ However, prepublication rights of the author remain controlled by the common law.

At common law the ownership of property in literary or intellectual productions accrues to those who create them.⁵ The common law property right in literary or intellectual productions exists independent of and notwithstanding the copyright statutes, and entitles the author or proprietor to the exclusive use of the production before publication.⁶

The Federal Copyright Act provides that the copyright statute is not to be construed to annul or limit the common law or equity right of the author or proprietor of an unpublished work to prevent the copying, publication, or use of his unpublished work without his consent, and to obtain relief from the invasion of that right.⁷ Therefore, as long as literary and artistic rights do not fall within the scope of the copyright

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¹ Parody—A writing or rendition in which the language and style of an author or work is closely imitated for comic effect or in ridicule, often with certain peculiarities greatly heightened or exaggerated. See, Webster's New World Dictionary (College ed., 1962), p. 1064.

² Burlesque—A literary composition or dramatic representation that ridicules something, usually the serious and dignified but sometimes the trivial and commonplace by means of grotesque exaggeration or comic imitation. See, *Ibid.*

A technical difference exists between parody and burlesque, with parody more closely following the original work, and burlesque using greater exaggeration. The terms will, however be used interchangeably in this paper.

³ U.S. Const. art. I, § 8.

⁴ 17 U. S. C. (1958).

⁵ 18 Am. Jur. 2d, Copyright and Literary Property, §§8, 310 (1965).

⁶ *Frohman v. Ferris*, 238 Ill. 430, 87 N.E. 327 (1909), *aff'd* 223 U.S. 424, 32 S. Ct. 263, 56 L. Ed. 492 (1911).

⁷ 17 U.S.C. § 2 (1958).

statute they are not affected thereby.⁸ In passing, we note that the Congress currently is studying proposals to revise the Act.^{8a}

A copyright is of statutory origin, and the rights secured to the author or the copyright proprietor are those defined in the statute.⁹ Upon receipt of the copyright, the author or proprietor has the exclusive right, for the specific period of the copyright protection, to print, reprint, publish, copy, and vend his copyrighted work.¹⁰

All statutory actions for copyright infringement are based on Section 1 of the Federal Copyright Act which define the rights of the proprietor of the copyright.¹¹ Literary infringement actions arise out of Section 1 (a) which gives the copyright holder the exclusive right to “. . . print, reprint, publish, copy, and vend the copyrighted work; . . .”¹²

Most infringement actions involve the adopting of an idea, sequence, or story line rather than verbatim copying. Rarely is the appropriator so crude as to lift the plaintiff's words outright. The question of what constitutes infringement becomes more difficult as the works of the author and the appropriator become increasingly dissimilar or the context in which the borrowed material is used grows less like the original.

Courts have generally resolved the problem by holding that substantial copying of the physical expression of the copyrighted work is an essential element of a cause of action.¹³ The courts have held that a copyright does not protect ideas expressed in the work, but only the physical expression of the idea.¹⁴ Justice Story, in one of the earliest copyright cases, gave an excellent and comprehensive criteria of what constitutes infringement. He said,

. . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the material of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot be fairly treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the

⁸ *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 A. 631 (1937).

^{8a} Senate Bill #597 (1967), 3 parts (hearings before subcommittee). Govt. Printing Office.

⁹ *Banks v. Manchester*, 128 U.S. 244, 9 S. Ct. 36, 32 L. Ed. 405 (1888).

¹⁰ 17 U.S.C., § 1(a) (1958).

¹¹ 17 U.S.C., § 1 (1958).

¹² 17 U.S.C., § 1(a) (1958).

¹³ Rossett, *Burlesque as Copyright Infringement*, ASCAP Copyright Law Symposium Nos. 9, 11 (1958).

¹⁴ *Mazer v. Stein*, 347 U.S. 201, 217-218, 74 S. Ct. 460, 98 L. Ed. 630 (1954).

second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. . . .¹⁵

This quotation and subsequent case law have developed the rule that the taking of a substantial portion of protected material, either in quantitative or qualitative terms, constitutes copyright infringement.¹⁶

Tests of Infringement

In order to determine whether there has been substantial copying or appropriation, the courts have developed various tests. The *audience* or *ordinary observer test* seems to be the one most used by the courts.¹⁷ In *Harold Lloyd Corp. v. Witwer*¹⁸ the court defines this test as follows,

if an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis of others. The reaction of the public to the matter should be spontaneous and immediate.¹⁹

Under this test there is no infringement unless the appropriation is enough to be obvious to the observer.

The *economic detriment test* is used also by the courts, although financial reward to the copyright holder is only an incident of the objective of the Constitutional copyright protection.²⁰ Used alone, this test denies recovery to a plaintiff who is unable to prove an economic injury, even though there may have been appropriation. Under this test, infringement occurs when the taking substantially diminishes the value of the original, or when the labors of the author are substantially appropriated by another, causing extensive injury.²¹

A *critical analysis test*, which involves literary classification, dissection and analysis of the works, is sometimes used by the courts.²² This test requires an expert, rather than an ordinary observer. It is used to show that substantial appropriation may be qualitative, rather than quantitative.

The final test is the *quantitative test* which arose in the equity courts.²³ Here courts are required to dismiss the suit, if the amount ap-

¹⁵ *Folsom v. Marsh*, 2 F. Cas. 342 (No. 4901) (Mass. 1841).

¹⁶ *West Publishing Co. v. Thompson Co.*, 169 F. 833 (E.D.N.Y. 1909); *Harold Lloyd Corp. v. Witwer*, 85 F.2d 1 (9th Cir. 1933) *cert. denied*, 296 U.S. 669 (1933).

¹⁷ Note, *Parody and Burlesque—Fair Use a Copyright Infringement?*, 12 Vand. L. Rev. 465 (1959).

¹⁸ *Harold Lloyd Corp. v. Witwer*, *supra* note 16.

¹⁹ *Ibid.*

²⁰ *Berlin v. E. C. Publications Inc.*, 219 F. Supp. 911 (S.D.N.Y. 1963), 329 F. 2d 541 (2d Cir. 1964).

²¹ *West Publishing Co. v. Thompson Co.*, *supra* note 16.

²² *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir. 1930).

²³ *Salomon v. RKO Radio Pictures, Inc.*, 44 F. Supp. 780 (S.D.N.Y. 1940).

propriated is not sufficient to issue an injunction against the entire work. If the idea alone is taken, there is no infringement. A substantial portion of the work must be taken before infringement occurs.

Fair Use

No copyright protection will be afforded, even when substantial appropriation occurs, if the appropriation falls within the range of fair use.²⁴ Fair use has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."²⁵ This fair use principle has long been recognized, but no criteria have been established to define it. It has been said to be "one of the most difficult questions which can arise for judicial consideration."²⁶ The uncertainties involved in fair use have led the courts to determine fair use in a particular case as a pragmatic question to be considered in light of the facts of that case solely.²⁷ The doctrine of fair use applies only to copyrighted works, and not to unpublished uncopyrighted material.²⁸

Certain general guidelines have been suggested to limit fair use. These criteria include the value of the part appropriated, its relative value to each of the works in controversy, the purpose it serves in each, and how far the copied matter will tend to supersede the original, or interfere with its sale.²⁹

The problem of fair use arises in connection with scientific, legal, and historical subject matters where it is to be expected that there will be similarity of treatment.³⁰ A writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text. However, it is generally held that if he appropriates the fruits of another's labors without alteration and without independent research he violates the rights of the copyright owner.³¹ Copying cannot be regarded as fair use, even in cases where the infringer had no intent to infringe.³²

The most common subject matter involving the actual appropriation of portions of the work of an author using his words without modifica-

²⁴ Yankwich, *What is Fair Use?*, 22 U. Chi. L. Rev. 203 (1954).

²⁵ Ball, *The Law of Copyright and Literary Property* 260 (1944).

²⁶ *Lawrence v. Dana*, 15 F. Cas. 26 (No. 8136) (C.C.D. Mass. 1869).

²⁷ Note, *supra* note 17.

²⁸ *MacDonald v. DuMaurier*, 144 F. 2d 696 (2d Cir. 1944).

²⁹ *Carr v. National Press*, 71 F. 2d 220 (D.C. Cir. 1934).

³⁰ 18 Am. Jur. 2d—*Copyright and Literary Property* § 109 (1965).

³¹ *Ibid.*

³² *Wihtol v. Crow*, 309 F. 2d 777 (8th Cir. 1962).

tion are reviews, criticisms, and commentaries.³³ This use is in keeping with the constitutional grant of copyright to promote the progress of science and the useful arts. The author of a copyrighted work invites reviews, criticisms, and comments; they are instrumental to the success of his work. No limit is placed on the extent of appropriation in a review, but the reviewer may not copy so much as to reduce the demand for the original.³⁴ The review may not become a substitute for the work reviewed.³⁵

Basically the test for fair use contains eight elements, any one of which may be decisive in a particular case. These elements are: "(1) the type of use involved; (2) the intent with which it was made; (3) its effect on the original work; (4) the amount of the user's labor involved; (5) the benefit gained by him; (6) the nature of the work involved; (7) the amount of the material used; and (8) its relative value."³⁶

Parody and Burlesque Infringement

Parody and *burlesque* have been recognized as forms of artistic creation since the beginning of literature.³⁷ The form was used by the Greeks and Romans, coming to full fruition in Aristophanes, who used it to mock Aeschylus and Euripides.³⁸ Don Quixote began as a parody on the Spanish novel of chivalry and became a classic by creating two of the greatest characters in literature, Don Quixote and Sancho Panza. In England, all the great poets from Chaucer onward wrote parodies as did the novelists, particularly Fielding, Thackeray, and Beerbohm. Burlesque was strong in the nineteenth century British theater, with practically every important play bringing forth a corresponding burlesque. In the United States parody has been written by such authors as Bret Harte, Ogden Nash, James Thurber, J. P. Perelman, and others, down to the present day lyrics of Allen Sherman. Parody and burlesque have been practiced and recognized everywhere.³⁹

The extent to which a parodist may borrow from a copyrighted work which he attempts to burlesque has not been conclusively defined.⁴⁰ Courts recognize that parody is the result of independent creative effort but hold that infringement occurs if the parody covers the entire original work.

³³ Yankwich, *op. cit. supra* note 24.

³⁴ Hill v. Whalen & Martell Inc., 220 F. 359 (S.D.N.Y. 1914).

³⁵ Lawrence v. Dana, *supra* note 26.

³⁶ Cohen, Fair Use in the Law of Copyright, ASCAP Copyright Law Symposium No. 6, at 53 (1955).

³⁷ Yankwich, Parody and Burlesque in the Law of Copyright, 33 Can. B. Rev. 1130 (1955).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ 18 Am. Jur. 2d, Copyright and Literary Property, § 105 (1965).

Berlin v. E. C. Publications, Inc.,⁴¹ decided in the Second Circuit Court of Appeals, directly points to the above issue. Plaintiff, composer Irving Berlin, brought suit for infringement against defendants, the publishers and employees of "Mad Magazine." The magazine as a "special bonus" in its fourth annual edition, presented a collection of parody lyrics to fifty-seven old standards, which were divided into categories, such as business, sports, education, doctors and medicine, etc. After the title of each lyric appeared either the words "Sung to the tune of ——" or "To the tune of ——," and inserted in the blanks was the title of one of the old standard songs.⁴² No music was provided in the magazine.

Plaintiff as the owner of the copyrights to twenty-five of the songs parodied, contended that the lyrics infringed upon his copyrighted works. The district court, on cross motion for summary judgment, held that the parody lyrics were original, ingenious lyrics on subjects completely dissimilar from those of plaintiff's songs and, therefore, did not infringe.⁴³ The Second Circuit Court of Appeals affirmed this decision,⁴⁴ stating that the parody lyrics would be permissible under the most rigorous application of the *substantiality* requirement.

The opinion of the court of appeals concludes with the following:

For as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.⁴⁵

In order to fully understand this decision, it is necessary to examine the American cases covering the extent to which the parodist may borrow from the works he attempts to burlesque. The three earliest cases⁴⁶ did not deal directly with the parody of a copyrighted work, but with the parody of a particular artist's style of performing, in which portions of a copyrighted song were incidentally employed. In the fourth case *Hill*

⁴¹ *Berlin v. E. C. Publications Inc.*, *supra* note 20.

⁴² Portions of two of the parodied lyrics were included in the district court opinion, and show the nature of the parody.

⁴³ *Berlin v. E. C. Publications Inc.*, *supra* note 20.

⁴⁴ 329 F. 2d 541 (2d Cir. 1964).

⁴⁵ *Ibid.*

⁴⁶ *Bloom & Hamlin v. Nixon*, 125 F. 977 (E.D. Pa. 1903); *Green v. Minzensheimer*, 177 F. 286 (S.D.N.Y. 1909); *Green v. Luby*, 177 F. 287 (S.D.N.Y. 1909).

*v. Whalen & Martell Inc.*⁴⁷ the defense of parody was invoked in bad faith as an attempt to justify a taking designed substantially to diminish a demand for the original. This case involved a stage presentation entitled "In Cartoonland" in which two characters entitled "Nutt & Giff" imitated the cartoon characters "Mutt and Jeff." The court granted an injunction and stated,

A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden.

One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.⁴⁸

These early cases concede that parody may be an independent creation, but hold it to infringe if it covers the whole work.⁴⁹

Two cases which were decided in the Southern District Court of California, presently state the law of parody and burlesque in the United States. These cases were *Loew's Incorporated v. Columbia Broadcasting System*⁵⁰ and *Columbia Pictures Corp. v. National Broadcasting Co.*⁵¹

The *Loew's* case was an action to enjoin the performance of a humorous sketch "Autolight" burlesquing the motion picture "Gaslight," the literary property of Loew's, Inc. Jack Benny presented the skit on CBS radio with Ingrid Bergman, the star of the original movie. The skit followed the original movie closely using the same locale, setting, characters, sequence of events, points of suspense, climax, and much of the dialogue. The court granted the injunction finding that the appropriation was substantial and could not be justified under the doctrine of fair use. The opinion of the court concluded that the plaintiffs had a property right in "Gaslight" which defendants could not appropriate under the guise of fair use. The court stated "that parodized or burlesqued taking is to be treated no differently from any other appropriation; that as in all

⁴⁷ Hill v. Whalen & Martell Inc., *supra* note 34.

⁴⁸ *Ibid.*

⁴⁹ Yankwich, *op. cit. supra* note 37.

⁵⁰ 131 F. Supp. 165 (S.D. Cal. 1955).

⁵¹ 137 F. Supp. 348 (S.D. Cal. 1955).

other cases of alleged taking, the issue becomes one of fact, i.e., what was taken, and how substantial the taking; and if it is determined that there was a substantial taking, infringement exists."⁵² This case holds that parody and burlesque are to be treated no differently than any other taking. It seems to imply that a parody would be an infringement *per se*, since the amount taken to conjure up the original, must be substantial.

In the second case, *Columbia Pictures Corp. v. National Broadcasting Co.*,⁵³ the plaintiff sued NBC for alleged infringement of the copyrighted motion picture "From Here to Eternity" by a burlesque entitled "From Here to Obscurity" which starred Sid Caesar and Imogene Coca. Judge James M. Carter, who had written the opinion in the *Loew's* case, here found that there was no infringement. The skit in question did not rely upon the original as heavily as the *Loew's* case did, however the setting, general situation, plot, and details of development of the story line were used and were obviously recognizable in the parody. The court held that the test to be applied in determining whether a taking of a protectible property is a substantial taking is one of quality rather than quantity and is to be determined by the character of the work and the relative value of the material taken.⁵⁴ Since the parodist must make a sufficient use of the original to recall or conjure up the subject matter being parodied, the law permits more extensive use of the protected portion of a copyrighted work in the creation of a burlesque than in the creation of other fictional or dramatic works not intended as a burlesque of the original. This right extends to the parodist the use of an incident or some incidents of the copyrighted story, a developed character, some small and unsubstantial parts of the development of the story, and some small and unsubstantial amounts of the dialogue. This right does not permit the use of the general entire story line and development of the original with its expression, points of suspense and build up to a climax.⁵⁵ The court in this case did not stress the material gain aspect that prevailed in the *Loew's* case.

The *Columbia Pictures* case and the *Berlin* case tend to relax, a great deal, the *substantiality* theory set out in the *Loew's* case. However, it must be remembered that because the latter case was affirmed by the Court of Appeals⁵⁶ and the United States Supreme Court,⁵⁷ although by a five to four decision, it is the decision with which parodists must comply.

⁵² *Loew's Incorporated v. Columbia Broadcasting System*, *supra* note 50.

⁵³ *Columbia Pictures Corp. v. National Broadcasting Co.*, *supra* note 51.

⁵⁴ Yankwich, *op. cit. supra* note 37.

⁵⁵ *Ibid.*

⁵⁶ 239 F. 2d 532 (9th Cir. 1956).

⁵⁷ 356 U.S. 43, 78 S. Ct. 667, 2 L. Ed. 2d 583 (1958).

Conclusion

Parody, under an accepted definition, is a type of composition which seeks in good faith to criticize, mock, ridicule, and distort the intellectual product of another, and not to imitate or reproduce it as written.⁵⁸ The decisions in the *Columbia Pictures* and *Berlin* cases in part stem from the growing realization of the courts that parody and burlesque are independent intellectual endeavors, and must be preserved as a valid form of social and literary criticism in our society.

The doctrine of fair use must be expanded to allow the parodist substantial freedom to use the elements of the original work necessary to conjure up the object of his satire. While the property right of the author or composer must be protected, the courts should recognize that parody and burlesque are valid art forms, and as such are also deserving of protection.

The test to determine infringement must be of a qualitative nature. In each case the parody must be examined to determine whether it is an independent intellectual creation or merely an attempt to use the original author's work for the parodist's personal gain.

In the *Berlin* case the court sets forth a proposition which should form the basis for future development of the areas of parody and burlesque in their relation to the copyright holder.

. . . as a general proposition, . . . parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism . . . (and) . . . courts . . . must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry.⁵⁹

⁵⁸ Yankwich, *op. cit. supra* note 37, at 1153.

⁵⁹ *Berlin v. E. C. Publications Inc.*, *supra* note 20.