Wormser?
Lovett!


This year's Wormser problem involved a first amendment defense to a religious fraud action and a plaintiff's attempt to pierce the corporate veil of a series of parents and subsidiaries engaged in the instruction and sale of materials for a religious ceremony. The following students were selected to receive competition honors by the judges and brief graders (friends and alumni of the school):

Best Speaker and Competition Winner—Stephen Lovett

Writers of the Best Brief—Lindsay Lankford and Tom Koger

Finalists—Maura McInerney, Lou Crico and Stephen Fitzgerald

Semifinalists—Virginia Ampe, Tom Koger, Kevin Galvin, Mark Schirmer and Barbara Flynn.

The quarterfinalists (top 16) grades ranged from 84.24 to 90.875. Average brief grade before penalties—82.41 (with penalties—81.61). Average overall grade—81.99.

The Board would like to congratulate all 96 students who completed the competition. The grades were particularly close with over 40 students within 3 points of the top 16 cutoff.

The Moot Court Board wishes to express its gratitude to the 62 judges and brief graders.

Wormser to the nation's business community and the business profession. For this reason, and to meet the demand for these individuals, last year Fordham inaugurated its J.D./M.B.A. program.

As participant in the program, I am happy to report that it has met with resounding success. While some continue to doubt the efficacy of a joint degree, the majority of the feedback has been overwhelmingly positive. For example, last year the firm of Cravath, Swaine and Moore offered a $10,000 bonus for incoming associates with an M.B.A. Other firms have followed.

What does one do with a combined degree? It is really up to the individual. Depending on your likes and interests, you can tailor your degrees (I say degrees because you are actually awarded two separate diplomas, one from each school) to meet any need. If you major in finance in the business school, you could easily pursue any of the finance courses offered in law school: Corporate Finance, Commercial Financing, Real Estate Financing. Moreover, a degree in finance will better prepare you for courses where accounting, tax, and financial considerations play an integral role in understanding substantive issues.

But you are not limited to finance. If you choose marketing, there is a whole body of copyright and trademark law that complements it. The point is that the combinations are surprising, and it is amazing how well one school complements the other.

Some students consider the additional credentials superfluous. "I don't need that, I'm going into litigation," is the skeptics reply. My rejoinder is that much litigation is corporate, and on the issue of damages alone a familiarity with stock valuation models or the mathematics of net present value could prove invaluable. Of course, you would still need to bring in expert witnesses, but think how much more cogent would be your presentation to the court. Moreover, one trained in the mathematics of business is much more likely to catch statistical discrepancies or flawed analyses than one who is not. Finally, the individual trained in business has a definite advantage at the negotiating table. Because much of litigation is spend in negotiation, these people should make better litigators.

I have related something about how a business degree can aid you in your legal career, but there is a flip side to the coin. A degree from Fordham Law School is not resume-filler. It is viewed as a highly respected accomplishment by the business community. Ask Ned Doyle, founder of The Doyle, Dane and Bernbach advertising agency. Also, based on a Fortune survey of the nations 500 largest industrial and 300 non-industrial corporations (including banks, insurance firms, retailers, etc.,), the main career emphasis of corporate chief executives breaks down as follows:

- Marketing 28%
- Finance 26%
- Legal 14%


Of course, a joint degree does not assure your ascent of the corporate ladder, but combining degrees does improve your marketability.

How do you obtain a joint degree? The J.D./M.B.A. program is designed for full-time students and enables a student to complete the requirements for both degrees in four years rather than five. You must apply to, and be accepted by, each school independently. That means you must take the GMAT. But once admitted your requirements for both schools change. The law school will allow 14 business credits towards its 83 credit degree. The business school will allow 122 law credits to the 54 required for its degree. But you must complete all core requirements for both schools.

Normally, you complete your first year at the law school. Second year is spent wholly at the business school. Year three involves both schools, and your final year is at the law school.

Two corollary issues deserve comment: 1) The math requirement. 2) The quality of Fordham's business school. Mathematics, the law student's bane. Most law students admit to a strong aversion for mathematics; they prefer averages to averages. And business school does require some mathematical background. Basic statistics and calculus are requirements for degree conferment. But you are not required to be a statistician or mathematician. Much of the work merely requires interpretation of results. You need to know some algebra, but nothing advanced; if you can understand graphs and work with ratios, you should have no problem.

Finally, perhaps most importantly, I am impressed with the people at Fordham's Martino Graduate School of Business. The professors are excellent. I highly recommend Dr. Frank Wener for Finance. Professor Wener's pedagogy titillates the mind; his classes are always invigorating and challenging. He is always there for the student, ready to explain anything that is unclear. Professor James A.F. Stoner's class on Management is also excellent. Dr Stoner invites class participation. His in-class simulations prepare the student for the politics of business. The reading is

IN THIS ISSUE. . .

ENTERTAINMENT LAW SPECIAL
IT'S NOT TOO LATE TO SWITCH TO PIEPER WITHOUT LOSS OF DEPOSIT.

So, you've made a mistake. If you were lured into another bar review course by a sales pitch in your first or second year, and now want to SWITCH TO PIEPER, then your deposit with that other bar review course will not be lost.

Simply register for PIEPER and send proof of your payment to the other bar review course (copy of your check with an affirmation that you have not and do not anticipate receiving a refund). You will receive a dollar for dollar credit for up to $150 toward your tuition in the PIEPER BAR REVIEW.

For more information see your Pieper Representatives or telephone

(516) 747-4311

PIEPER NEW YORK-MULTISTATE BAR REVIEW, LTD.

90 Willis Avenue, Mineola, New York 11501

ELIZABETH GITLIN
RANDI LOWITT
RICHARD DEVITA

LAWRENCE KEANE
HOWARD MANDELL

TIMOTHY COLEMAN
MICHAEL HELMER
SHERYL ZELIGSON
The Advocate
FORDHAM UNIVERSITY SCHOOL OF LAW

The Advocate is the official newspaper of Fordham Law School, published by the students of the school. The purpose of the Advocate is to report news concerning the Fordham Law School Community and developments in the legal profession, and to provide students with a medium for communication and expression of opinion.

MICHAEL B. MANGINI
EDITOR-IN-CHIEF

DEXTER C. WADSWORTH
MANAGING EDITOR

GINA.A. RADUAZZO
SENIOR EDITOR

ROBERT A. GLICKMAN
GRAPHICS EDITOR

DINA STERN
LAYOUT EDITOR

Unless otherwise noted, all contents copyright © The Advocate.

EDITORIAL

The ADVOCATE congratulates the SBA for producing a copy of the constitution. We urge SBA to place several copies on reserve in the library, make copies available to students upon request and include it as an appendix in future student handbooks.

With these few measures can begin the re-enfranchisement of a student body hitherto accused of apathy. Perhaps the apparent lack of interest demonstrated by some students is better described as inaction due to disorganization. SBA has taken a first step toward the fulfillment of the potential of Fordham Law students.

We urge all students to get a copy of their constitution and familiarize yourselves with it. Use it to better our scholastic community, increase our involvement in the profession and make our elected representatives, officers and organizations accountable to the students they represent.

But...

The manner in which SBA chose to perform this task is unfortunate. The personal attack on Mr. Cherone accompanying publication of the document is uncalled for and constitutes conduct unbefitting the elected representatives of our student body.

Mr. Cherone explicitly stated in his article published in the November ADVOCATE that he asked SBA officers for a copy of the document. Other representatives of the ADVOCATE also requested copies on many occasions during the first half of this semester. All of our requests were met with empty promises.

The motives for SBA procrastination on this matter are unclear, but SBA should clarify any insinuations that Mr. Cherone acted negligently or with disregard for the truth and be prepared to substantiate any accusations.

The ADVOCATE hopes that we may all set our differences aside and kindle a spirit of cooperation among members of the student body. We again invite SBA, organizations and students to use our pages to apprise our community of their functions and aspirations.

Pro Bono

The November ADVOCATE carried several articles about the need for lawyers and law students to provide pro bono legal services to the poor elderly and handicapped. While Congress cuts funding, many less fortunate people go without adequate representation. Aid to the needy may take many forms. The practicing attorney may join the Legal Aid Society or donate a portion of his time or money. Students might donate time to help public interest groups.

Unfortunately, public interest organizations do not pay their full-time personnel very well, and students are usually volunteers. The costs of law school and living in New York often make volunteer work impracticable.

Last year, then SBA Pres. Stephen Mitchell tried to organize an income sharing program here at Fordham. The idea was to convince students to donate a portion of their salaries to a fund out of which students donating time to public interest groups would be awarded weekly stipends to defray travelling and meal costs.

The proposal was defeated. Unfortunately Mr. Mitchell attempted to create a mandatory program. The ADVOCATE supports a voluntary system whereby students and alumni may donate if they so desire. Such a program is an opportunity for students to fulfill our professional responsibility to society. Please consider the proposal.

Sympathies

We are sorry to report the death of Dr. Norman Higginbotham, the father of Dean Linda Young, on November 12, 1986. Our sympathies to Dean Young and her family.

Professor Robert A. Kessler, at Fordham since 1957, suffered a stroke in November. His condition is stable. We wish Professor Kessler a speedy recovery.

Professor Kessler has authored numerous works on Corporations and has taught Agency, Partnerships and Corporations, Small Business Planning, and Securities Regulation. He graduated from Yale University in 1949, received his J.D. from Columbia in 1952 and was awarded a LL.M. by New York University in 1959.

Job Guide

The editors of the National and Federal Legal Employment Report announce the publication of the 1987 Summer Legal Employment Guide.

This seventh annual edition of the Guide contains detailed information about hundreds of legal positions for law students available in Summer, 1987 with 65 Federal departments and agencies, plus international organizations and Legal Services Corporation Grantee Programs and National Support Centers.

Each Guide entry lists the following program information:
- Application address
- Salary or stipend
- Eligibility requirements
- Number of positions
- Application deadline
- Program description
- Application forms

Order the 1987 Guide now so that you will be able to apply early for these highly competitive positions.

Single copies of the 1987 Guide are $12.00, including postage and handling. Orders of 10 or more copies are $10.00 each.

Copies may be ordered from Federal Reports, Inc., 1010 Vermont Avenue, N.W., Suite 408, Washington, D.C. 20005. Visa/Master Card accepted, call 202/293-3311.

ABA/LSD

PUBLICATION GUIDELINES

1. All copy must be TYPED and DOUBLE-SPACED.
2. Deadlines will be approximately the FIFTEENTH of each month. Specifics will be posted.
3. Submission does not guarantee immediate publication. The editors reserve the right to reject or edit copy at their discretion.

Support Fordham Pro Bono

The University of San Diego Law School will add a clinical placement in international business law to its Paris summer program this year. This program gives second-year students the opportunity to work in Paris law firms and corporate counsel's offices specializing in EEC law, international financial law, and international business law in general. Most of the placements will last for six weeks and carry academic credit.

The student's work will depend on the kind of legal problems available in the office assigned. Students can expect to do research and draft contracts, opinion letters, and memos. They may participate in client interviews, negotiating sessions, and firm strategy planning meetings.

Current first year students who wish to participate summer 1988 should contact USD this year for counseling.

The Paris program is one of 6 summer programs offered by USD. The others are Dublin on international human rights, London on international business, Mexico on law of the Americas, Oxford on non-business Anglo-American comparative law, and Russia-Poland on east-west trade and socialist law. For further information, write Mrs. Sue Coursey, USD Law School, Alcala Park, San Diego, CA 92110.
SIGN UP EARLY
FOR THE
JOSEPHSON® KLUWER
BAR REVIEW COURSE
AND RECEIVE:

1. OUTLINES to help you study for Law School Exams!
2. DISCOUNT on all Kluwer Legal Study Aids!
3. FREE MPRE Workshop and Book!
4. FREE Bookbag!

For more details, contact a campus representative or call

JOSEPHSON® KLUWER
LEGAL EDUCATIONAL CENTERS, INC.
10 East 21st Street, Suite 1206-7, New York, NY 10010
(212) 505-2060 or (800) 421-4577

©1986, Josephson/Kluwer Legal Educational Centers, Inc.
Casenotes

Drug Tests

The Third Circuit Court of Appeals has upheld the theory that random drug tests on jockeys do not represent an invasion of their privacy. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

The ruling supported regulations adopted by the New Jersey Racing Commission that permit the State Racing Steward to demand urine tests from jockeys, trainers, or groom to submit to breathalizer and urine testing to detect alcohol or drug consumption.

The New Jersey Racing Commission argued that the tests were needed in order to protect the jockey's safety on the track. While the safety of the participants may be protected by pre-event testing, the results of urine tests are not known before the event. Nevertheless, the Third Circuit held that urine tests of jockeys were justified to protect the appearance of integrity in the racing industry because of the public wagering on the outcome of the races.

The Court noted that the Copyright Act speaks of performances at a place open to the public, it does not require that the public place be actually crowded with people. Simply because the videos can be viewed in private does not mitigate the essential fact that the parlor is unquestionably open to the public: "[a] telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public' even though they are usually occupied only by one party at a time."

The defendant argued that his viewing parlor did not violate the Copyright Act because the video store did not actually screen the movies; customers had complete control over the VCRs placed there for their use. The Court disagreed with that defense, saying that video parlors indistinguishably "the showing of the movies by knowingly renting the rooms for that purpose.

Beatles

by Renee Hill

Last summer the California Superior Court awarded the Beatles' record and holding company, Apple Corps Ltd., nearly eight million dollars for the "massive appropriation" of the Beatles' right of publicity by the creators and producers of the stage show and film "Beatlemania". Apple Corps Ltd. v. Leber, 32 Pat. Copyright Journal 141 (BNA). The right of publicity involves the right of celebrities to control and profit from the exploitation of their names, likenesses, and fame. See *Hoevel Laboratories v. Topps Chewing Gum*, Inc., 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

Beatlemania was a stage show created by defendant Steve Leber consisting of Beatles' imitators performing the group's songs to a mixed media background and a foreground of slides and movies depicting the sixties. A Beatlemania film was also produced.

Apple Corps Ltd. v. Leber, was initiated in 1979 for invasion of the Beatles' right of publicity and unfair competition.

The court applied New York Civil Rights Laws Sections 50 and 51 which prohibit the unauthorized use of a person's name, portrait or picture for trade or advertising purposes. Unauthorized use is permissible if the use involves newsworthy events or matters of public interest.

Unauthorized use is permissible, if the use involves newsworthy events or matters of public interest.

The defendants argued that "Beatlemania" offered an historical overview of the 1960's by including multi-media presentations which contained social and political commentary. The court found that the Copyright Act speaks of performances at a place open to the public, it does not require that the public place be actually crowded with people. Simply because the videos can be viewed in private does not mitigate the essential fact that the parlor is unquestionably open to the public: "[a] telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public' even though they are usually occupied only by one party at a time."

The defendant argued that his viewing parlor did not violate the Copyright Act because the video store did not actually screen the movies; customers had complete control over the VCRs placed there for their use. The Court disagreed with that defense, saying that video parlors indistinguishably "the showing of the movies by knowingly renting the rooms for that purpose."

Parody and Fair Use

by Michael R. Graham

Entertainment, media and advertising executives, attorneys, and creative workers have cause for cautious celebration. It appears that the federal courts have called a truce in the war between various fair use and parody analyses, and agreed that the benchmark is economic analysis of the potential effects of works which utilize elements of one work to create parody.

It has never been simple to predict when a court will hold a parody immune from attacks of irate authors whose work is lampooned or made the source of parody. On the one hand, even Woody Allen's little-understood piece "Love and Death" could be held to infringe on the works of Tolstoy and Dostoievsky, since it is an obvious burlesque of parts of several of their works. On the other hand, one district court held the verbatim use of 300 words from President Ford's memoirs was not an infringement. Because until recently there has been little predictability in the courts' decisions, important creative works have been forced into oblivion, or never created at all.

Parody One case in point is that of the Wooster Group's tour de force, "L.S.D. (... Just The High Points ...)"). In that work, one of America's pre-eminent experimental theatre groups reconstructed Arthur Miller's "The Crucible" as part of an unflinching and hilarious examination of the Sixties' drug culture, Timothy Leary, and artistic responsibility. Miller objected, threatened a lawsuit for infringement, and the group closed the production. The Wooster Group's attorney had an idea that the work should be protected as an independently creative work. But the play did not fit nicely into the definition of a parody, and even if it did, some courts have held that even that time-honored literary form is subject to strict rules against verbatim copying.

Since literary and artistic works often borrow from earlier works to create new works and to contrast forms or shock through juxtaposition, this problem is latent in many more works than become the center of cases in parody law. It is even more a problem for the many new colleges...
Parody

from p. 5

forms of literary and visual art. It appears, however, that two Supreme Court decisions have clarified and made more predictable this area of law, and this interpretation is borne out by recent cases in the Second and Ninth Circuits. At the same time, tension remains between those who believe that the rights afforded by copyright should be more or less absolute and those who believe that the constitution mandates limited protection based on a policy encouraging creation and the development of the arts.

While the question of an author's moral rights in his works is of growing interest and puts in doubt the traditional interpretation of the constitution's copyright clause as protecting society's interest in artistic development at the expense of individual monopolies of creative works, the present "state of the art" of parody defense appears to offer broader protection than it has in the past. To understand the scope of this protection, and be able to apply it for clients in the creative arts, it is important to understand the constitutional basis of copyright law, the role of the courts in construing the role of copyright law, the Supreme Court's decisions in specific cases, and the affect of the current case law on future parody and fair use defense. This article attempts to present a brief survey of these topics, and offers reference to some of the many interesting and insightful works dealing with the

A. American Copyright Law and Fair Use

American copyright law embodies a unique paradox of constitutional law. On the one hand, the Constitution empowers Congress to "promote the Progress of the Arts by securing for limited Times to Authors their exclusive Right to their respective Writings." On the other hand, the First Amendment proscribes Congress from making any law "abridging the freedom of speech." This paradox can be understood as creating two types of writings: those protected by the First Amendment, and those not protected.

The Copyright Act of 1976 ([hereinafter "the Act"] fulfills the constitutional charter, granting creators of original works specific exclusive rights in their works. However, these rights create only a limited monopoly for the creator to control the reproduction, derivative use, distribution, performance, and display of the work. In construing the role of copyright law, the Supreme Court has stated that "[t]he economic philosophy behind the [copyright] clause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare." The intent underlying American copyright law was to create a fair return for an author's creative labors, and the ultimate goal is to stimulate artistic creativity for the general public good. Thus, American copyright law encourages artistic creation by granting authors limited monopolies in their works in order to realize financial gain. The limited constitutional grant focuses upon the good of society, not upon the noneconomic interests of authors. It follows that when an artist utilizes another author's work or words, if the use is productive and furthers artistic or cultural growth, that use should be permitted unless it denies the economic incentive of the other.

Shortly after the enactment of the first copyright law, the courts recognized that the copying of elements of original works might be part of an independent creation deserving immunity from the monopoly granted by copyright. As Professor Chafetz put it, "A dwarf standing on the shoulders of a giant can see farther than the dwarf himself." (Copyright Law) The result was the development of a "fair use" defense to infringement. Certain types of works were considered to advance the arts despite or through their use of portions of original works. These included criticism, commentary, and news reporting. However, since every fair use inquiry is fact-specific, determining whether a specific use is "fair" is one of the most difficult inquiries of copyright law.

The fair use doctrine is a rule of reason fashioned by Judges to balance the competing interests of the author's right to compensation for his creative endeavors and the public's interest in the widest possible dissemination of ideas and information. Although no single definition of fair use has been accepted by the courts, the most frequently quoted definition is that fair use is that it is "a privilege in others than the owner of a copyright to make a fair use of the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the [copyright] owner." Thus, it "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." However, fair use has been characterized as stopping short of allowing copyright copying except in the area of criticism and commentary. This judge-made rule was codified as section 107 of the 1976 Copyright Act. That section provides "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Section 107 then defines four factors to be considered in determining whether use is "fair":

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The conflict recently resolved concerned the weight to be given these elements in a fair use analysis especially in light of the substantial property rights granted under the copyright law on potential market. Thus, a brief overview of these factors is necessary to understand the parody doctrine and fair use.

The purpose and character of the use. This factor first focuses upon the purpose for which the work is being used. If the purpose falls within one of the traditionally protected areas of news reporting, education, or criticism,10 the use is presumed to be fair. If it is not, focus is directed to whether the new work is a "productive use" in the sense that the copier had engaged in "creating a work of authorship whereby he adds his own original contribution to that which is copied." Many courts have granted more weight to whether the use made of a copyrighted work is commercial in nature, nonprofit, or for profit. 11 (Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.) However, where the purpose of a work is both to make money and to facilitate access by the public to information in order to create an independently creative work, the fact that there may be some profit motive does not preclude there being fair use. 12

2. the nature of the copyrighted work. This factor focuses upon whether the copyrighted work is one entitled to broad economic protection or narrow copyright protection. Considerations of the degree of protection to be afforded a specific work include the amount of original effort that went into the work and the degree to which the author should have expected his writings to be copied in the first place. It is necessary to accept fair use claims where the infringing work is in the same medium as the original. 13

3. the amount and substantiality of use. While this third factor is the focus of the Ninth Circuit's "conjure up" test14 it is usually a consideration supplied by the initial determination of whether there has been an infringement, and should not enter into the fair use analysis. 15 The factor requires a determination of both quantitatively and qualitatively. The inquiry is into "whether the similarity relates to manner which constitutes a substantial portion of [the plaintiff's work]." Although very little taking is required for a court to find an infringement, this factor alone should not be dispositive of fair use.

4. the effect of the use on the potential market for or value of the copyrighted work. This factor raises more than merely the question of the extent of direct damage an author may suffer because of the activities of the user. In determining the effect the user's work may have upon the potential market or value of the original work, the courts consider whether a subsequent use would adversely affect the value of the original work. If so, the use is not considered fair even if these rights have not been exercised by the original's author. Thus, if a work impairs an author's potential economic interests, such as the right to license or sell the work, or to prevent dilution of the work's value by offensive secondary uses, the court may find the use not fair. If the user's work is a parody or pastiche, the court must consider whether the new work is a fair use. 16

Another consideration is whether the subsequent work would have the effect of supplanting the original by "fulfilling the demand for the original."

In Berlin v. E.C. Publications, Inc., the Second Circuit held that references to the music of Irving Berlin in Mad magazine constituted a possible infringement. However, it held that this was fair use insofar as the lyrics included in the magazine were satirical versions which did not fulfill the demands of the originals.

Finally, the Supreme Court has stated that the possible economic effect must also be considered in terms of the effect of the challenged use if it should become widespread. 17

B. The Parody Fair Use Analysis

The real difficulty in determining whether a specific use of a copyrighted work is a fair use lies in determining the weight to be given to the various fair use factors. Since copyright is an equitable action, and fair use under either the Copyright Act or common law copyright is founded on equitably determined law, actions are fact-specific and judges have applied these factors on an ad hoc basis. Thus, there has traditionally been very little predictability in such defenses. It appears, however, that emphasis in all fair use cases must now be put on the effect of the challenged use upon the value of the potential market for the copyrighted work. In addition, parodies may assimilate at least enough of the source work to constitute independent works. Courts have been more willing to accept fair use claims where the infringing work is in the same medium as the original. 18

The current Parody defense arose out of a conflict between tests developed by the Ninth and Second circuits, and has been as unpredictable as any area of fair use. In the first modern parody case, Leo's Inc. v. Columbia Broadcasting System, the court held that a district court's holding that since parodies were not among the established areas of fair use, the television parody of the motion picture "Gaslight" was "to be treated no differently from any other appropriation.... [I]f it is determined that there was a substantial taking, infringement exists." In Columbia Pictures Corp. v. National Broadcasting Co., the same district judge determined that parody is a "protected form and [(some limited taking should be permitted] in order to permit the parodist to "conjure up" the original work for humorous effect." However, the court also noted that there was "no substantial similarity" between the burlesque ("From Here to Obscurity") and the source work ("From Here to Eternity."). 19

The "conjure up" or "substantially of taking" test limited the amount of work which could be appropriated for parody to that which was not necessary to recall the original work. Thus, the Ninth Circuit in Walt Disney Productions v. Air Pirates 20 held that the fair use defense would not be applicable to "permitting that which is virtu­ ally complete or almost verbatim." A parody could not take more than absolutely

see p. 7
necessary and was not entitled to create the "best parody possible."44 Thus, the use of recognizable Disney characters in a bawdy, obscene poster was held to be an infringement.

The Second Circuit adopted the "con­juring-up" test developed in its famous publication cases.45 emphasizing that "parodies and satires are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."46 The court reminded that part of the inquiry, however, must be the economic effect of the parody:

"[W]here, 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 inappropriate."47 Since Berlin had failed to "indicate[] with any degree of particularity the manner in which [economic] injury might have been inflicted,"48 no infringement could be found.

This "reasonableness of taking" or "economic effect" test was extended ELMORE MUSIC, INC. v. NATION ENTERPRISES, *5 wherein the Second Circuit held that the "conjuring-up" test was a recognition of the parodist's need to utilize elements of the original, and not a limitation: "Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contribut­ing to the public's understanding of the effect or commentary."49 Thus four uses of music from the "I Love New York" jingle for the Saturday Night Live parody, "I Love Dodom" was held to be fair. Although that court seemed to have taken a back­ward step in MCA, INC. v. WILSON,50 holding that the song "Cunnilus Chamberg Company "C" was not a parody of the Andrews Sisters' "Boogie Woogie Bugle Boy of Company B,"51 i.e., like Air Pirates, can better be understood as judicial reaction to the obscene nature of the parody.52

The Supreme Court finally entered City Studios, Inc. v. THE SHIRT GALLERY, Ltd.53 Judge Sprizzo held that a "Miami Mice" t-shirt was an obvious parody of the television show, "Miami Vice." The obviousness of the parody, wrote Sprizzo, "highlights the differences between the two products," thereby decreasing any likelihood of confusion.54

In Harper & Row Publishers v. Na­tion Enterprises,55 the Supreme Court overturned a Second Circuit decision in which the unauthorized adoption of and reprinting of 300 words from the memoirs of President Gerald Ford was held to be fair use.56 The court noted that the lack of any "substantial connection between the infringement and a loss of revenue" can be established with reasonable probability, "the burden properly shifted to the infringer to show that this damage would have occurred had there been no taking of copyrighted expres­sion."57 Actual damages need not be shown. Instead, it is sufficient to show that if the challenged use "should become widespread," it would adversely affect the "potential market for the copyrighted work."58 Because publication of the material in The Nation resulted in the loss of a contract for first serial rights with Time magazine, the Court held that the plaintiff had met his burden and that his use had not been fair.59 The court noted that the effect a subsequent use has upon the market for the original is "the single most important element of fair use."60 Interestingly, this parallels the earliest American fair use case, Folsom v. Marsh,61 in which the court held that infringement would be found only if "[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the author are not sufficiently compensated for the pur­posely shifts to the infringer to show that there been no taking of copyrighted expres­sion."62 Actual damages need not be shown. Instead, it is sufficient to show that if the challenged use "should become widespread," it would adversely affect the "potential market for the copyrighted work."63 Because publication of the material in The Nation resulted in the loss of a contract for first serial rights with Time magazine, the Court held that the plaintiff had met his burden and that his use had not been fair.64 The court noted that the effect a subsequent use has upon the market for the original is "the single most important element of fair use."65 Interestingly, this parallels the earliest American fair use case, Folsom v. Marsh,66 in which the court held that infringement would be found only if "[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the author are not sufficiently compensated for the pur­pose of the infringing work has the potential to have an adverse economic effect upon the author's source work. Combined with the general policy favoring productive use, this emphasis provides the appropriate constitutional balancing of the copyright owner's eco­nomic interest in his work with society's interest in the progress of the arts.

notes

1 U.S. CONST. ART. I, SEC. 8, CL. 8.
2 U.S. Const. amend. 1.
7 See Z. Chafee, Reflections on the Law of Copy­right, 45 Col. L. Rev. 503 and 718 (1945).
8 Id. at 511.
9 Id. at 51.
11 "[T]he issue of fair use... is the most trouble­some in the whole law of copyright." Diller v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

See p. 10

December, 1986 • THE ADVOCATE • Page 7
The Supreme Court test is satisfied if "the work, taken as a whole, appeals to the prurient interest," whereas in California a work only violates the statute if the "predominant appeal" of the work, taken as a whole, is to the prurient interest. The use of the word "predominant" implies that the statute showing is required because it seems to narrow the category of "obscene" works.

Moreover, the Supreme Court seeks an absence of "serious literary, artistic, political, or scientific value" while California requires that the works be "utterly without social importance for minors." The Supreme Court expressly rejeted the "utterly without redeeming social value" test in World v. Illinois, 431 U.S. 767, 769 (1977). If any value can be shown the California statute cannot consider the work "obscene," while the Supreme Court requires "serious . . . value," presumably something more. The "serious literary, artistic, political, or scientific value" test places on the prosecution and enlarges the scope of "obscene" works to include those with some value, but not "serious" value.

(Justice White, Blackmun, Burger, Powell, and Rehnquist, concurring) (1973). we narrow the category of obscene material to the prurient interest," while the allegedly obscene contents." Paris Adult Theatre I v. Sloan, 413 U.S. 74, 113 (1973.)

Given the uncertainty surrounding these vague definitions and the lack of clarity of these terms, it seems difficult tosay that the work in question was "knowingly distributed." The word "knowingly" simply means being aware of

"Penis Landscape" is a serious painting by a valid artist, H.R. Giger. Giger won the 1980 Academy Award for special effects for the movie "Alien." Obviously, Giger is not a pornographer out to corrupt youth. However, the California court may rule that this painting has no "serious literary, artistic, political, or scientific value" because of the subjectivity of the evaluation and the ambiguity of the phrase.

(See Paris Adult Theatre I v. Sloan, 413 U.S. 49, 84 (BRENNAN, J., dissenting)) (1973). The California statute requires that the work, taken as a whole, appeals to the prurient interest.

2) the work "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" and

3) the work, taken as a whole, lacks "serious literary, artistic, political, or scientific value."

Miller v. California, 413 U.S. 15, 24 (1973)

The difference between the Supreme Court's test and the California Penal Code may be significant, but are probably not determinative. In the Miller case the statute, in fact, requires a greater showing, by those seeking to ban the material, than the Supreme Court standard.

While this ambiguity may save the defendants, it will also cause a lengthy and costly trial, for if the defendants intend to demur, a judicial proceeding of indeterminate length will follow. Already the confiscation of company ledgers, along with some albums and miscellaneous materials, has made the carrying on of Alternative Tentacles' (the Dead Kennedys record company) business affairs next to impossible. Jello Biafra already claims this case has had a "chilling effect" because retailers, fearful that they too might become defendants, have refused to stock the album. Furthermore, legal proceedings cost big money and, although the Dead Kennedys are one of the few independent "punk" bands who have made money, a lengthy trial would probably wipe out their savings.

A lengthy trial with several subsequent appeals is a strong likelihood. "They are using our case as a precedent for much bigger fish," Biafra says. The crusade mentality of the prosecution is best evidenced by the indictment of Salvatore Alberti, who owns the firm that assembled the album package and did not participate in "distribution" in the everyday sense of the word. Furthermore, if the prosecution truly sought all involved in "distribution" (statutorily defined as transfer of possession) why wasn't the store owner indicted for the ultimate transfer, the purchase?

How far can the court impose liability, claiming that it was foreseeable that the album would come into the hands of a minor? Can the court deem the distributors reckless for a "failure to exercise reasonable care" when they've taken precautions steps via a warning sticker? Most of all, is this poster really obscene?

Taken with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards have pronounced it so." Paris Adult Theatre I v. Sloan, 413 U.S. 49, 92 (BRENNAN, J., dissenting) (1973). This case may very well reach the Supreme Court, however, in the neoconservative Reaganite '80s, it seems unlikely that five members of the Court, even the California court, will take a liberal view of a poster depicting sex in a rock 'n' roll album.

Special thanks to Chuck Eddy of Spin and Chris Morris of Billboard whose articles were used liberally as sources.

If you support the fight against censosship and would like to donate your time or money, write:

No More Censorship Defense Fund
P.O. Box 11458
San Francisco, CA 94101
An Open Letter From Fr. Bruce Ritter

Dear Friends,

A lady should never get this dirty," she said.

She stood there with a quiet, proud dignity. She was incomparably dirty—her face and hands smeared, her clothes torn and soiled. The lady was eleven.

"My brothers are hungry," she said.

The two little boys she hugged protectively were eight and nine. They were three of the most beautiful children I'd ever seen.

"Our parents beat us a lot," she said.

"We had to leave." The boys nodded mutely. "We had to leave," one of them echoed. The children did not cry. I struggled to manage part of a smile. It didn't come off very well. The little kid looked back at me with a quick, dubious grin. I gave him a surreptitious hug. I was all choked up.

"I would like to take a shower," the lady said.

Seventeen years ago I did not know that there were thousands of runaway, abused and abandoned children like these in this country.

I learned the hard way.

One night, in the winter of 1969, six teenage runaways knocked on the door of my apartment where I was living to serve the poor of New York's Lower East Side. Their junkie pimp had burned them out of the abandoned tenement they called "home." They asked if they could sleep on my floor. I took them in. I didn't have the guts not to.

Word of mouth traveled fast. (It does among streets kids.) The next day four more came. And kids have been coming ever since. These kids—with no place else to go—homeless, hungry, lacking skills, jobs, resources—compelled me to start Covenant House seventeen years ago. Today our crisis centers help tens of thousands of kids from all over the country—and save them from a life of degradation and horror on the streets.

Kids like the eleven-year-old lady and her brave little brother were easy to help: to place in a foster home where beautiful kids are wanted and loved, and made more beautiful precisely because they are wanted and loved.

But sadly, not all of the more than 20,000 kids who will come to Covenant House this year will be that lucky. These kids have very few options. Many of them will have fallen victim to the predators of the sex-for-sale and pornography "industry."

One of them put it to me very simply and very directly:

"Bruce, I've got two choices: I can go with a john (a customer) and do whatever he wants, or I can rip somebody off and go to jail. I'm afraid to go to jail. Bruce, I can't get a job... I've got no skills. I've got no place to live." This child is sixteen. I do not know what I would have done if I were sixteen and faced with that impossible choice.

They are good kids. You shouldn't think they're not good kids. Most of them are simply trying to survive. When you are on the street, and you are cold and hungry and scared and you have nothing to sell except yourself, you sell yourself.

There was time when I was forced to turn these kids away simply because there was no room. I can't do that anymore. I know only too well what the street has in store for a kid all alone. That is why we run Covenant House, and that is why we keep it open 24 hours a day, seven days a week—to give these kids an alternative, an option that leads to life and not death.

These kids come to us in need, from every kind of family background: boys and girls; White, Black and Hispanic; Children—sometimes with children of their own—innocent and streetwise. They are your kids and mine. Their number is increasing at a frightening rate.

We are here for them because of you. Almost all of the money that we need to help these kids comes from people like you.

A lady should never get that dirty. And a good kid should not be allowed to fall victim to the terror of street life. As more good kids come to us, we need more help. We need yours. Won't you send whatever contribution you can? Thanks for my (no, our) kids.

Peace,
Father Bruce Ritter

COVENANT HOUSE
P.O. Box 731 • Times Square Station • New York, NY 10109

Casenotes

from p.5

commentary on the era, thereby falling under the exception for a use involving newsworthy events or matters of public interest. The defendants also argued that the First Amendment protected the use of a person's name or likeness in stage and film performances. In rejecting defendant's First Amendment claims, the court held that First Amendment protection is not absolute, specifically when dealing with the right of publicity. The court found "entertainment that merely imitates...[and] does not have a creative component of its own...is not protected by the First Amendment." Also, the court reasoned, if an appropriation is "continuous" and "for purposes of trade" with "[s]ome proof of benefit or gain to the defendant" the use will be in violation of the New York Civil Rights Law.

The court also upheld Apple's claim for unfair competition because "[c]ommon sense and reasonable inference from the established facts support the conclusion that there was reasonable likelihood that many viewers of Beatlemania were confused as to whether the Beatles had authorized, consented or approved the Beatlemania production."

In addition, the court was satisfied that the "defendants taking or use amounted to virtually a complete appropriation of the Beatles' 'persona' at least in a qualitative sense." The production of Beatlemania was of such high quality, the court observed, "that the audience...in great part suspended their disbelief and fell prey to the illusion that they were actually viewing the Beatles in performance."

The court noted that evidence established that the demand for and popularity of the Beatles was so great during the mid-70's that Apple could have named it its price for licensing a production such as Beatlemania. Based on this evidence, the court accepted the figure of a royalty rate of 12½% of gross as the fair market value of the right taken by the stage show and $2 million for the right taken by the movie. The final award does not include punitive damages since defendant Leber "did rely, to some extent, upon some questionable advice from reputable law firms in New York."
Notes

from p. 7

15 See 3 Nimmer § 13.05.


17 See The Nation, 105 S. Ct. at 2231.


19 3 Nimmer § 13.05[A], 13-68.

20 The Nation, 105 S. Ct. at 2231. See also 3 Nimmer § 13.05.

21 The Nation, 105 S. Ct. at 2231.


23 3 Nimmer § 13.05[A][2].


25 See notes 149-153, 180-183 infra and accompanying text.

26 3 Nimmer §13.05[A][3].

27 See The Nation, 105 S. Ct. 2218 (1985) (verbatim copying of 300 words out of a total of approximately 200,000 words in plaintiffs' work held not to be fair use); Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (verbatim copying of 20 words out of a total of 2100 words held fair use).

28 Marcus v. Crowley, 695 F.2d 1171 (9th Cir. 1983); Triangle Publications, 626 F.2d 1171 (copying of magazine cover held to be fair use, whereas copying "the essence" of the magazine, i.e. its contents, might not have been so regarded); Roy Export Co. Establishment v. Columbia Broadcasting Sys., Inc., 503 F. Supp. 1137 (S.D.N.Y. 1980), aff'd 672 F.2d 1095 (2d Cir. 1982) (copying of one minute and fifteen seconds from plaintiff's one hour and twelve minute motion picture held qualitatively substantial so as to preclude fair use defense).


30 See 3 Nimmer § 13.03[A], n. 56 at 13-27 for cases holding minimal amounts as substantial takings.

31 3 Nimmer § 13.05[A][4].

32 3 Nimmer § 13.05 [B].


34 See notes 54-66 infra and accompanying text.

35 See M. Simensky's insightful article documenting the development of the parody doctrine Recent Developments in Copyright Law's "Fair Use Doctrine": A Business Approach, N.Y.L.J. 4 (November 29, 1985), 3 (December 6, 1985), and 4 (December 13, 1985); infra Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Col. L. Rev. 1600 (1982).

36 See Simensky, supra.


40 239 F.2d 532 (9th Cir. 1956).

41 1187, 1191 (9th Cir. August 16, 1984).


44 104 S. Ct. at 792-3.

45 See The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax, note 164 supra.


47 723 F.2d 195 (2d Cir. 1983).

48 105 S. Ct. at 2234, quoting 1 Nimmer § 1.10[D], at 1-87.

49 Id.

50 Id. at 2224-5, quoting Betamax, 104 S.Ct. at 810.

51 Id.

52 9 F.Cas 342, 348 (C.C.D. Mass. 1841) (No. 4, 901).


54 Id. at 130.

55 Id. at 132.


57 Whether or not plaintiff now exploits [the singing telegram] market, the effect of defendants' practices upon plaintiff's potential market is clear: they satisfy demand, at least in part, and create competition for plaintiff as a potential entrant.

58 Id. at 118.


60 523 F. Supp. at 617.

61 530 F. Supp. 1191.

62 720 F.2d at 242.

63 Id. at 242.


65 Id. at 28.

66 No. 85-5888, slip op. at 6 (9th Cir. July 10, 1986).

67 Id. at 6, quoting The Nation 105 S. Ct. at 2234.

68 Id. at 8.

69 No. 85-5904, slip op. at 8, 9 (9th Cir. August 16, 1984).

70 Id. at 10.

71 Id. at 11.
VENTILATE THOSE FRUSTRATIONS AWAY

by Michael Goldberger

During my first year, I was one of the few students to use the new top floor of the library, a small, well lit room now known as “S7.” At that time it was simply “the attic.” The white noise generated by the rumbling of the ventilation plant made the attic a particularly pleasant place to work. Like clockwork, though, the noise would cease at 9:37 each weekday night.

The primary advantage of the attic, however, was its proximity to the ventilation systems. As long as the system was on, the room remained comfortable. On weekends, however, no such luxury as adequate ventilation was offered. The system was shut down on Friday and not resumed until Monday.

Most students sought more comfortable places outside the library to study and this appears to be the case this year. Despite the annual complaints from students, the library is still impressively oppressive on weekends.

This is not necessarily a request for air conditioning, although that would alleviate the problem, but the lack of any circulation, whether it comes from an air conditioning unit or an open window, makes it difficult to concentrate on one’s studies.

As the semester ends, the library crowds with students catching up on assignments, researching, footnoting and studying. More bodies generate more heat. The need for ventilation increases.

Although the library is generally comfortable during the week, it is unbearable on weekends. Students, unfortunately, don’t stop working on weekends. If at any time, library use probably peaks on Saturday afternoons. Why can’t the ventilation system work on weekends as well as during the week? This is not a simple matter of comfort. The students at Fordham are entitled to library atmosphere conducive to study.

Students, faculty and administration are sensitive to the economic argument against round-the-clock ventilation, but this issue should not be decided upon efficiency considerations. The library environment effects a student’s ability to perform. For over $9,000 a year, we deserve adequate ventilation.

Hollywood must have produced many back-up cones for the GET SMART series. All the available cones could be rounded up and installed above a carrel in the library. Then, with the push of a button, blissful silence as your own personal cone floats down from above enveloping you in an environment conducive to academic excellence, safe from the rude torture of a library whose acoustic design baffles the mighty.

PARENTS, STUDENTS, FACULTY
24 hr. PARKING
ALLIE GARAGE
425 W. 59th ST.
Any 12 hours—$6.00 tx. incl.
Ticket Must Be Stamped

Joe Gosar
Every area of human endeavor has its apologists. A favorite passtime for military-industrialists is turning the civilian “spin-offs” of their endeavors. Ronald Reagan fairly glows (with Hippocratic pride, of course) while admiring the latest ophthalmologic application of “Star Wars” laser technology.

However, private sector fall out from the billions spent for defense is paltry, when compared to the vast technological wealth waiting to be tapped, waiting for the philosopher king who will apply the advanced resources of the entertainment-industrial-complex (EIC) for human good ‘n plenty. Doubt not that the television/movie business has everything needed to end the trade deficit, the housing shortage, the crises in the classroom, and more.

Think what the mechanical shark from “JAWS” could do for the New York Stock Exchange. London’s big bang would be laughable. My opinion, get that natural born leader out of storage at Paramount and out on the floor with the other sharks where he belongs.

And where is the alien space craft from “Close-Encounters”? That vast vessel is the answer to Mayor Koch’s home-less person problem. There must be room to house several hundred thousand individuals in there. Get Spielberg on the horn and Federal Express that thing out here, pronto.

It is in the educational arena that EIC technology holds the greatest promise. Right here at Fordham Law there are resources crying out for EIC “spin-off” hardware. Who has not remarked on the acoustic qualities of the library, particularly the main floor? I have no doubt the noise level therein is the result of an unfor-

YOURS, Etc.
LEGAL SECRETARIAL SERVICES
(212) 655-4653
• BRIEFS
• RESUMES
• MEMORANDA
• ARTICLES
Pick up and delivery

DEADLINE FOR JANUARY ISSUE JAN. 5

PLEASE SUPPORT COVENANT HOUSE

Fordham-Stein Prize Awarded

(November 13, 1986) Shirley M. Hufstedler, a lawyer practicing in Los Angeles, has been selected as the 1986 Fordham-Stein Prize recipient, an honor given for outstanding standards of professional conduct. Mrs. Hufstedler is the first woman to receive this national award.

In making the announcement Dean Jon D. Feerick noted “Judge Hufstedler has earned a reputation as an articulate, compassionate advocate and public servant and as a brilliant and courageous jurist. She is an exemplar of the best of the American legal profession.”

Mrs. Hufstedler was the first Secretary of the United States Department of Education, appointed by President Jimmy Carter in 1979. Prior to that time she had served as an appellate judge on the California State Court of Appeals and on the United States Court of Appeals for the Ninth Circuit.

The Fordham-Stein Prize is presented each year to an attorney who has displayed outstanding standards of professional conduct and whose career "brings credit to the profession by emphasizing in the public mind the contributions of lawyers to our society." The Prize has been presented each year since 1976 and has been received by such distinguished attorneys as Professor Archibald Cox of Harvard Law School; Warren Christopher, who negotiated the release of the American hostages in Iran; Justice Potter Stewart and former Chief Justice Warren Burger of the U.S. Supreme Court and Edward Bennett Williams, the highly regarded trial lawyer.

Selection is made by a committee of academics, layers, bar officials and judges. Nominations are received for attorneys throughout the country. Over 65 nominations were considered for this year’s Prize.

The Prize includes an honorium and a specially designed crystal sculpture from Tiffany & Co. The presentation was made at a ceremony held at the Hotel Pierre in New York on Monday, November 17, 1986.
BAR/BRI
FIRST YEAR REVIEW
HELPs YOU MAKE THE GRADE

CIVIL PROCEDURE
CONTRACTS
REAL PROPERTY
TORTS
CRIMINAL LAW

FIND OUT HOW GOOD FIRST YEAR CAN BE

BAR/BRI
FIRST YEAR REVIEW
415 SEVENTH AVENUE SUITE 62
NEW YORK, NEW YORK 10001
(212) 594-3696 (201) 623-3363
(516) 542-1030 (914) 684-0807

160 COMMONWEALTH AVENUE
BOSTON, MASSACHUSETTS 02116
(617) 437-1171

Jeff Gold
Theresa Gleason
Marc Futterweit
Sari Alter
Mary Fitzgerald
Rich Hayes
Connie Alexander
John Hart
Rich Fogel
Stacie Young
Jim Kelly
Kathy Albanese
Bob Anderson
Regina Faul
Laurie Gatto
Kathleen Krauter
Stacie Young
Jim Kelly
Laurie Gatto
Kathleen Krauter
Rich Hayes
Regina Faul
Laurie Gatto
Kathleen Krauter
Mary Fitzgerald
Connie Alexander
Kathy Albanese
Stacie Young
Regina Faul
Laurie Gatto
Kathleen Krauter
Rich Hayes
Regina Faul
Laurie Gatto
Kathleen Krauter
Mary Fitzgerald
Connie Alexander
Kathy Albanese
Stacie Young
Regina Faul
Laurie Gatto
Kathleen Krauter
Rich Hayes
Regina Faul
Laurie Gatto
Kathleen Krauter
Mary Fitzgerald
Connie Alexander
Kathy Albanese
Stacie Young
Regina Faul
Laurie Gatto
Kathleen Krauter
Rich Hayes
Regina Faul
Laurie Gatto
Kathleen Krauter
Mary Fitzgerald
Connie Alexander
Kathy Albanese
Stacie Young
Regina Faul
Laurie Gatto
Kathleen Krauter
Jeff Gold
Theresa Gleason
Marc Futterweit
Sari Alter