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STRANGER IN PARODIES: WEIRD AL AND THE LAW OF MUSICAL SATIRE

Charles J. Sanders*
and Steven R. Gordon**

Musical parody, both as folk art and high satire, has existed as a form of critical and humorous expression for centuries. Its popularity is evidenced by the humorous indulgences of musical giants the likes of Mozart, Gilbert and Sullivan, Spike Jones, and Allan Sherman. Not, however, until recording artist Weird Al Yankovic began making records and music videos like "Living With A Hernia" (sung to the tune of the hit "Living in America") and "I Lost On Jeopardy" (sung to the melody of "Our Love's in Jeopardy"), did the American music industry finally reawaken to the reality of just how lucrative music parody can be.

In light of Mr. Yankovic's startling commercial success (well over three million copies of his records have been sold), the issue arises whether such highly marketable song parodies represent "fair uses" of the lampooned underlying musical works, or whether the U.S. Copyright Act¹ requires Weird Al and other aspiring musical parodists to secure licenses from the copyright owners of such works prior to plying their trade. This article will consider that question in light of the recent Ninth Circuit Court of Appeals decision in *Fisher v. Dees*,² and the most recent rulings of the Second Circuit Court of Appeals, which have substantially clarified the fair use doctrine's application to musical parodies.³

A WORKING DEFINITION

Parody has been defined as "writing in which the language and style of [another] author or work is closely imitated for comic effect or ridicule, often with certain peculiarities greatly heightened or ex-

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1. 17 U.S.C. (1988).

2. 794 F.2d 432 (9th Cir. 1986). See *infra*, notes 66-77.

3. Cases involving parody in other circuits, which are sparse, generally follow the law developed in the second and ninth. See, e.g. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum*, 642 F. Supp. 1031 (N.D. Ga. 1986); *D.C. Comics v. Unlimited Monkey Business, Inc.* 598 F.Supp. 110 (N.D. Ga. 1984); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.* 479 F.Supp. 351, 355-56 (N.D. Ga. 1979).

aggerated."⁴ In order to be effective, therefore, a parody must draw upon elements of the original work. It has been said that "the parodist utterly fails in his task if his audience does not realize that his work has as its source another author's work."⁵

Thus, there is an inherent tension between copyright law (which seeks to protect original works of authorship from infringement) and parody, the legal resolution of which historically rested on a judicial determination of the relative artistic merit and literary value of parody. This would seemingly have placed musical parodists in a particularly unfavorable position, since even a judge sensitive to the value of literary parody might view song parodies as frivolous and deserving of little protection. Interestingly, such has not been the case. To the contrary, musical copyright cases have formed the bedrock of the judicially authored doctrine of parody as "fair use" in the United States, and have served as the basis for that doctrine's recent judicial expansion.⁶

Therefore, rather than turning directly to a specific application of the laws governing parody today to the works of contemporary musical parodists like Weird Al Yankovic, it is important to review the U.S. judicial history of musical parody and parody in general to gain a greater perspective about the development of this important body of entertainment law. Because an overwhelming majority of reported parody cases have been decided by courts in the Second and Ninth Circuits, and each of those two Circuits applied its own distinct approach to the parody issue prior to the most recent cases, this article will detail the chronology of decisions in the two Circuits separately.

4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (1986).

5. Bernstein, *Parody and Fair Use in Copyright Law*, 31 COPYRIGHT L. SYMP. II ASCAP (1984).

6. In determining whether given conduct constitutes copyright infringement, the courts have long recognized that certain acts of copying are defensible as "fair use." Section 107 of the Copyright Act (17 U.S.C.) lists the factors to be considered for the purpose of "determining whether the use made of work in any particular case is a fair use." 17 U.S.C. § 107 (1988). It does not, and does not purport, to provide a rule which may automatically be applied in deciding whether any particular use is "fair." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 [A] at 13-64 (rev. ed. 1990). These factors are: "(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." 17 U.S.C. § 107 (1988). "These four factors, for the most part, were culled from the prior case law discussions of fair use," M. NIMMER, *supra*, at 13-65. Their codification in the 1976 Act was intended merely to restate the then-existing judicial doctrine of fair use. M. NIMMER, *supra*, at 13-62.43. "Therefore, in determining the scope and limits of fair use, reference must be made to pre-, as well as post-1978 cases." M. NIMMER ON COPYRIGHT, *supra* § 13.05, at 13-62.44.

I. U.S. PARODY DECISIONS

The first American case in which the issue of parody arose was *Bloom and Hamlin v. Nixon*.⁷ In that case, the defendant publicly performed portions of the plaintiff's copyrighted song without license, as part of her impersonation of a popular actress currently performing the same song in the stage version of *The Wizard of Oz*. The court ruled in favor of the defendant under the "fair use" doctrine, noting that she acted in good faith by singing just the chorus of the song as an incidental aspect to her mimicry of the actress, and did not attempt to usurp the plaintiff's market for his copyrighted song through such performances.⁸ Thus was the precedent established in the United States that parody is an art form deserving of protection, under certain circumstances, from zealous copyright owners seeking absolute control over the uses of their works.

A. The Second Circuit "New York" View

The Second Circuit view of parody has developed through a series of cases dating from the early part of this century, nearly all of which have involved musical satire. Within six years following the *Nixon* decision, district courts in the Second Circuit ruled on two cases with fact patterns nearly identical to it.

In *Green v. Minzenheimer*⁹ (S.D.N.Y. 1909), the defendant prevailed against a copyright owner portions of whose song the defendant had sung incidental to his impersonation of a popular singer. Consistently, it was ruled in *Green v. Luby*¹⁰ (C.C.N.Y. 1909) that the defendant's use of an entire copyrighted song as part of an impersonation did constitute copyright infringement, since the taking of the whole song was "hardly required"¹¹ for an effective impersonation.

The next important parody decision in the Second Circuit did not occur until 1963, with the Court of Appeals decision in *Berlin v. E.C. Publications Inc. (The Mad Magazine Case)*.¹² That case involved a suit by copyright owner Irving Berlin against Mad Magazine, which had published a book of parody lyrics to popular, copyrighted songs, many owned by the plaintiff. Mad Magazine did not reproduce the music or lyrics to any of the underlying copyrights, but simply noted next to each of the parodies the legend "to be sung to the tune of . . ." followed by the title of the particular song involved in the lampoon. Examples of the Mad Magazine

7. 125 F. 977 (E.D. Pa. 1903).

8. *Id.* at 978.

9. 177 F. 286 (C.C. S.D.N.Y. 1909).

10. 177 F. 287 (C.C. S.D.N.Y. 1909).

11. *Id.* at 288.

12. 329 F.2d 541 (1964).

brand of humor included the parody "Louella Schwartz Describes Her Malady," adapted to the tune of Berlin's "A Pretty Girl Is Like A Melody."

In affirming the district court's ruling in favor of the defendant Mad Magazine, Circuit Judge Irving Kaufman stated "we believe that parody and satire are deserving of substantial freedom - both as entertainment and as a form of social and literary criticism."¹³ The court then adopted the two-tiered parody test first set forth in *Nixon*,¹⁴ focusing on the economic harm to the plaintiff and the substantiality of the defendant's taking. Judge Kaufman wrote, "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."¹⁵

The Mad Magazine Case was followed by *Walt Disney Productions v. Mature Pictures Corp.*¹⁶ (The Mouseketeer Case). In that case, the defendants had used the "Mickey Mouse March," the theme from the Mickey Mouse Club television program, as background music in their pornographic film. The particular scene involved women performing sexual acts "on or near a pool table" with three men wearing nothing but "Mouseketeer" hats, the background music under which consisted of continuous, repetitive use of the entire Mouse March.

Relying mainly on the Mad Magazine Case, Judge Duffy ruled in favor of the plaintiffs, stating that the defendants had taken far more of the musical composition than was necessary to "recall or conjure up" the object of the satire.¹⁷ Adding a new wrinkle to the Second Circuit parody test, however, he added that "[w]hile defendants may have been seeking in their display of bestiality to parody life, they did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material."¹⁸ Thus, Judge Duffy ruled that a parodist has less latitude in utilizing copyrighted music as a mere

13. *Id.* at 545.

14. *See* note 7 *supra*.

15. 329 F.2d 541, 545 (2d Cir. 1964). As a parting shot at Irving Berlin, whom Judge Kaufman appeared to evaluate as a "spoiled sport," the Judge stated "the fact that defendants' parodies were written in the same meter as the plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter." *Id.*

16. 389 F. Supp. 1397 (S.D.N.Y. 1975).

17. *Id.* at 1398 (citing *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964)).

18. *Id.* at 1398.

element of a larger parody than if the music itself was the object of the satire.

The *Elsmere* and *Wilson* Cases

In 1980, the Second Circuit Court of Appeals ruled on the seminal case of *Elsmere Music, Inc. v. NBC*,¹⁹ which concerned a parody of the New York State advertising theme "I Love New York" by the cast of the television show "Saturday Night Live" as "I Love Sodom." The district court held that even though the defendants' substantial taking consisted of the very heart of the plaintiff's musical composition, it was still permissible as fair use since the bona-fide social parody did not usurp the market of the original, or make more extensive use of the song than was necessary to conjure it up. Thus, the trial court recognized that song parodies, in particular, often require a substantial taking from the original in order to simply "conjure it up."²⁰

The Court of Appeals (Circuit Judges Feinberg, Newman and Kearse) affirmed, taking the opportunity to further expand the fair use doctrine regarding parody. Stating that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody," the court commented on the "substantiality" issue as follows:

[The] [c]oncept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point [A] parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provid[ed] [the] parody builds upon the original, using [the] original as [a] known element of modern culture and contributing something new for humorous effect or commentary.²¹

This ruling represented a high water mark in the Second Circuit's liberalization of parody as a fair use defense to copyright infringement. To what extent, however, the principles set forth in *Elsmere* have been altered by the subsequent decisions of the Second Circuit Court of Appeals in *MCA Music, Inc. v. Wilson*, *Tin Pan Apple, Inc. v. Miller Brewing Company, Inc.*, and *New Line Cinema Corp. v. Bertelsmann Music Group, Inc.* remains a somewhat open question.

In *Wilson*, the plaintiffs, owners of the copyright in the song "Boogie Woogie Bugle Boy of Company B" (a song made famous by the Andrews Sisters in the 1940's and later covered by Bette Midler)

19. 623 F.2d 252 (2d Cir. 1980).

20. 482 F. Supp. 741, 747 (S.D.N.Y. 1980).

21. 623 F.2d 252, 253 (2d Cir. 1980).

sued the defendants for their performance of a takeoff entitled "Cunnilingus Champion of Company C" as part of the show "Let My People Come." Although the defendants insisted that they had taken very little from the plaintiff's song, and that they had engaged in parody of both the song and the contrast of sexual mores between the 1940's and the present, the district court ruled that the use was infringing.

Claiming to follow the *Mouseketeer* case, the lower court erroneously stated that a legally permissible parody must be confined to directly lampooning the underlying song itself. As the facts indicated that this was not such a case, the court applied a general copyright infringement test resulting in a holding of substantial similarity and infringement.²²

On appeal before Circuit Judges Lombard, Van Graafeiland and Mansfield, the Court voted 2-1 to affirm, with Mansfield dissenting. In a confused opinion, the majority first rejected Judge Cooper's finding below that a parodist must confine his satire to the song being parodied. The majority also, however, rejected the dictum in *Elsmere* that a parody need not have anything to do with the copied song,²³ and seeking to find a middle ground ruled that "a permissible parody need not be directed *solely* to the copyrighted song . . . [and] may also reflect on life in general . . . [but] if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up." (emphasis added).²⁴

After purporting to apply to the facts in the case the four factors established in section 107 of the 1976 U.S. Copyright Act as guidelines for the determination of fair use questions, the majority eventually arrived at the conclusion that the district court had correctly found that the defendant's parody of sexual mores had no connection with the plaintiff's song, and therefore could not be fair use. Judge Van Graafeiland stated:

The district court held that defendants' song was neither a parody or burlesque of Bugle Boy nor a humorous comment on the music of the '40's (citation omitted). We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism.²⁵

22. 425 F. Supp. 443 (S.D.N.Y. 1976).

23. 677 F.2d 180, 185 (2d Cir. 1981) (citing *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741, at 747. "[E]ven if it were found that . . . [defendants' song] did not parody the plaintiff's song itself, that finding would not preclude a finding of fair use." 482 F. Supp. 741, at 746).

24. *Id.*

25. *Id.*

Judge Van Graafeiland concluded his discussion of the case's copyright issues by noting that although the district court had found the defendant's use of "Boogie Woogie Bugle Boy" was so substantial as to be unfairly excessive, that he "might have reached a different conclusion on the same facts."²⁶ The judge continued, however, that since the district court's finding was not "clearly erroneous" on the substantiality issue, he was inclined to accept their finding as binding.²⁷

In his well reasoned dissent in *Wilson*, Judge Mansfield lambasted District Judge Cooper for the errors of fact and law in his lower court opinion, and criticized the majority's analysis of the facts under the fair use doctrine on appeal.²⁸ His dissent stated that the defendants clearly were engaged in parody, not only of contemporary sexual mores but of the innocent style of the plaintiff's song and of the Andrews Sisters' performance of it. As such, he argued, a fair use analysis was necessarily determinative.

In this regard, Judge Mansfield stated that the defendant had used only enough of "Bugle Boy" to conjure up a recollection of the original in the mind of the listener, and that the majority had failed to focus clearly on the fourth fair use factor, economic harm to the plaintiff. He asserted that contrary to the majority's conclusions, there was no evidence that the parody caused any damage to the plaintiff, or that the defendant's parody, though it was released on phonorecord as part of a "cast album" from the show, threatened to usurp the market for the plaintiff's song. On balance, argued the dissent, the defendant's use of "Bugle Boy" was indeed fair use.

In closing, Judge Mansfield made clear his belief that the majority opinion was based not so much on legal precedent as it was on the majority's distaste for the "dirty" nature of the parody. He stated:

In my view the defendants' use of "dirty lyrics" or of language and allusions that I might personally find distasteful or even offensive is wholly irrelevant to the issue before us, which is whether the defendants' use, obscene or not, is permissible under the fair use doctrine as it has evolved over the years. We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success²⁹

26. *Id.*

27. *Id.*

28. *Id.* at 188-91 (Mansfield, J. dissenting).

29. *Id.* at 191. In defense of the majority's decision, it may be pointed out that it is established that "obscenity" is not protected speech under the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957), *Miller v. California*, 413 U.S. 15 (1973). However, the *Wilson* majority did not engage in analysis of whether the lyrics of the defendants' songs were obscene.

In regard to the general question of whether "distasteful" or "dirty" parodies

The New Line Cinema and Tin Pan Apple Cases

*New Line Cinema Cinema Corp. v. Bertelsmann Music Group*³⁰ (S.D.N.Y. 1988) involved a suit brought by the owners of the copyrights in the series of horror films known as *Nightmare on Elm Street*, featuring the murderous villain Freddy Krueger. During the latter part of 1987, the plaintiffs decided to authorize the production of a music video based on the Nightmare series in anticipation of the release of "Nightmare IV," and began soliciting the interest of rap music groups to appear in the video.

Rappers "D.J. Jazzy Jeff and the Fresh Prince" composed a song based upon the film series entitled "Nightmare On My Street," which the record/music publishing company to whom they were under contract - the defendant Bertelsmann - submitted to the plaintiffs. After protracted negotiations, no agreement was reached between the parties. Thereafter, Bertelsmann released a D.J. Jazzy Jeff record album containing the song "Nightmare On My Street." Subsequently, the plaintiff hired another rap group to produce the "Nightmare IV" music video. When the plaintiff learned that Bertelsmann had produced and was attempting to have broadcast a music video based upon the Jazzy Jeff tune which liberally incorporated elements of the Nightmare series and the Freddy Krueger character, it moved successfully for a temporary restraining order. In a well reasoned opinion, District Judge Robert Ward ruled in favor of the plaintiff on its motion for a preliminary injunction, enjoining the release or broadcast of the Jazzy Jeff music video.

Bertelsmann's central defense was that the Jazzy Jeff video represented a parody of the Nightmare film series and Freddy Krueger and was thus protected by the fair use doctrine. This was rejected by Judge Ward after application of the four fair use criteria set forth

have been accorded protection by the courts, it is important to take note of the decision by the U.S. Supreme Court in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). In that case, the nationally renowned minister and political commentator Jerry Falwell sued *Hustler Magazine* to recover damages for libel and intentional infliction of emotional distress stemming from an advertisement parody published by the magazine which depicted Falwell as having had a drunken, incestuous rendezvous with his mother in an outhouse.

The Court ruled unanimously that the state's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive, even if intended to inflict emotional injury, when such speech is clearly satirical in nature and cannot reasonably be interpreted as stating actual facts about the public figure involved.

It is difficult to ascertain what effect, if any, this decision will have in regard to the parodying of copyrighted works. The case undoubtedly will be raised, however, by future parodists defending against accusations that "dirty" satire is presumptively unfair.

30. *New Line Cinema Corp. v. Bertelsmann Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

in section 107 of the Copyright Act.³¹

After noting initially that Congress had not classified parody as a "presumptively fair use,"³² Judge Ward turned to the threshold question of whether the Jazzy Jeff video constituted parody at all.

Citing the definition of parody set forth in *Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd.* (S.D.N.Y. 1979)³³ - that "a parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule"³⁴ - Judge Ward also adopted the caveat added to the definition by the court in *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.* (N.D. Ga., 1979):

[I]n order to constitute the type of parody eligible for fair use protection, parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist - thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected, removing the "fair" aspect of the "fair use" doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others.³⁵

Unlike the decision of the Appeals Court in *Wilson*, however, Judge Ward was unwilling to decide, at least for the purposes of the preliminary injunction motion, that the defendant's work was not classifiable as "parody."³⁶ Recognizing that it was "undisputed that the [defendant's] music video contains some comic elements and 'pokes fun' at Freddy,"³⁷ Judge Ward found it necessary to apply the four fair use criteria.

As to the "purpose and character of the use," the court concluded that the Jazzy Jeff video existed solely as a vehicle to promote the defendant's song and was "purely commercial." The "nature of the copyrighted work" - a work of fiction and fantasy as opposed to one of fact - was also found by the court to mitigate against a finding of fair use.

Regarding the "amount and substantiality of the use," Judge Ward adopted a three prong test first announced in *Fisher v. Dees* (9th Cir. 1986), discussed *infra*, to be applied in conjunction with the "liberal" principle set forth in *Elsmere* that the parodist may - at

31. 17 U.S.C. § 107.

32. 693 F. Supp. at 1525.

33. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366 (S.D.N.Y. 1979), *aff'd*, 604 F.2d 200 (2d Cir. 1979).

34. 693 F. Supp. at 1525 (quoting *Dallas Cowboys Cheerleaders*, 467 F. Supp. at 376).

35. *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979).

36. 693 F. Supp. at 1525.

37. *Id.*

minimum - 'conjure up' the parodied work. The three factors to be considered in determining whether a taking is excessive are: "(1) the degree of public recognition of the original work; (2) the ease of conjuring up the original work in the chosen medium; and (3) the focus of the parody."³⁸

Judge Ward concluded that because Freddy is a widely recognized character in the Nightmare series, far less than the amount taken by the defendants, would have sufficed to conjure him up. Moreover, he added, since both the parody and the parodied work were produced in the same "audio-visual" medium, there was no mitigating circumstance requiring the excessive taking. Finally, even assuming the purpose of the parody was to poke fun at Freddy, Judge Ward found the defendants took much more "from the original than [was] necessary to accomplish reasonably [their] parodic purpose."³⁹

Turning to the fourth and most important factor - the effect of the use upon the potential market of the underlying work - Judge Ward determined unequivocally that the Jazzy Jeff video, if released, would harm the value of the derivative use of the Nightmare series in the music video market, "a market in which Nightmare has reasonable potential to become commercially valuable."⁴⁰ This fourth factor served to distinguish the instant case from the holding in *Elsmere*, wherein the appeals court ruled that the "I Love Sodom" parody "has not affected the value of the copyrighted work. Neither has it - nor could it have - the 'effect of fulfilling the demand of the original'."⁴¹ As such, Judge Ward issued an injunction.

*Tin Pan Apple, Inc. v. Miller Brewing Co.*⁴² arose after the broadcast of a television commercial advertisement for the defendant's beer in which comedian Joe Piscopo allegedly parodied the physical attributes as well as the performing style, recordings, and copyrighted songs of the musical group known as "The Fat Boys." The defendants had previously attempted to hire the group to appear in the commercial, but the rappers had refused. Thereafter, Piscopo was hired to perform the parody, in which he was depicted as a rotund rapper supported by obese background vocalists.

The group asserted several claims against the defendants, including copyright infringement of its songs and sound recordings, false

38. *Id.* at 1527.

39. *Id.* (quoting *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986)).

40. *Id.* at 1528.

41. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (S.D.N.Y. 1980) (quoting *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).

42. *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990).

advertising, unfair competition, unfair business practices, violation of privacy and publicity rights, and libel. In analyzing the Fat Boys case, it is of central importance to note that the opinion addressed a motion to dismiss the complaint for the failure to state a claim. As such, Judge Haight was obliged to construe all facts in favor of the plaintiffs, including the extreme allegation that by "rapping" the words of the commercial, Piscopo had copied the plaintiff's songs, which admittedly consist mainly of percussion and lyrics devoid of melody.⁴³

Judge Haight first applied a threshold test in order to determine if the defendant's work constituted a "valid parody." Quoting language in the *Elsmere* opinion which provided that in order to gain more leeway than the right to merely conjure up a protected work a parodist must "[build] upon the original . . . contributing something new for humorous effect of commentary," (emphasis omitted),⁴⁴ Judge Haight concluded restrictively that "building upon the original" is a threshold criterium which must be satisfied in order for a parody to qualify as "valid." Unless such criteria is satisfied, he wrote, the parody "[does not] qualify even for consideration as an example of fair use under 107."⁴⁵

In *D.C. Comics, Inc. v. Crazy Eddie, Inc.*, the district court held, upon a threshold inquiry, that the defendant's unauthorized use of the copyrighted "Superman" introduction ("Look . . . up in the sky . . . it's a bird . . . it's a plane . . . it's Crazy Eddie!") in its commercials was not parody but merely "unjustifiable appropriation of copyrighted material for personal profit."⁴⁶ Citing to that case, Judge Haight concluded flatly that the use of appropriated copyrighted material to promote the sale of commercial products "simply [does] not qualify as parody."⁴⁷

Judge Haight, however, expressed second thoughts about drawing such a conclusion on a threshold inquiry without application of the section 107 criteria, especially in light of the Supreme Court's consideration of the "commerciality" issue as part of its fair use analysis in both its *Betamax* (1984) and *Nation* (1985) opinions.⁴⁸

Without reaching a conclusion on the issue, Judge Haight wrote:

I do not think it makes any difference here, since in either event defendants' commercial does not qualify as parody. The commer-

43. *Id.* at 827.

44. 737 F. Supp. at 830 (quoting *Elsmere*, 623 F.2d at 253).

45. 737 F. Supp. at 830.

46. *Id.* at 831 (quoting *D.C. Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979)).

47. *Id.* at 831.

48. *Id.* at 832 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) and *Harper and Row v. Nation Enterprises*, 471 U.S. 539, 562 (1985)).

cial's use is entirely for profit: to sell beer. Even if the concept of parody is impermissibly stretched to include this commercial, it does not qualify as fair use, since accepting the pertinent allegations of the complaint as true, the commercial in no manner 'builds upon the original,' nor does it contain elements 'contributing something new for humourous effect or commentary.'⁴⁹

Clearly, the meandering opinion of the district court in *Tin Pan Apple* will not alter the methods of analysis in parody cases established by the Second Circuit Court of Appeals in *Elsmere* and *Wilson*, and refined by Judge Ward's insightful opinion in *New Line Cinema*. Confined to their facts, the *Tin Pan Apple* and *Crazy Eddie* cases merely establish that in the Second Circuit, the parodying of copyrighted works in a commercial advertising context raises a nearly irrebuttable presumption against fair use.

The Issue of "Good Faith"

There is one issue of note raised in both the *New Line Cinema* and *Tin Pan Apple* cases which on the surface appears to distinguish parody law in the Second and Ninth Circuits: the issue of "good faith." In each of the two cases, the fact that the defendants had been denied permission to parody the allegedly infringed works by the plaintiffs was held to be a factor mitigating against fair use.

That is to be contrasted by the Ninth Circuit in *Fisher v. Dees* (9th Cir. 1986),⁵⁰ discussed *infra*, wherein it was held that prior application by the defendant to the plaintiff for a license to parody would not be construed as an indication of the defendant's bad faith. "The parody defense to copyright infringement," wrote Judge Sneed in *Dees*, "exists precisely to make possible a use that generally cannot be bought."⁵¹

The *Dees* case, however, involved a defendant who had made a mere twenty-nine second parodic use of the plaintiff's song on his record album. Judge Ward, in ruling on the *New Line Cinema* case, indicated that such a use was far less intrusive than the intent established by Bertelsmann in attempting to release a music video it knew would supplant the market for the plaintiff's planned project. "Although normally being refused permission to make a parody would not be bad faith because parodists, due to the very nature of their work, are seldom able to get permission from those whose works are parodied . . ." wrote Judge Ward, "in this case, [the plaintiff's] refusal's [sic] was not due to a concern over being parodied, but rather due to the fact it had chosen another group to make the rap video. [The defendant's] decision to make the rap video

49. *Id.* (quoting *Elsmere*, 623 F.2d at 253).

50. *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

51. *Id.*

notwithstanding the fact that it was aware that [the plaintiff] was making its own video demonstrates bad faith."⁵²

In the *Tin Pan Apple* case, Judge Haight placed great weight on the fact that the defendants - once having been refused cooperation by the plaintiffs - had used "Look-a-Likes" in its advertisement in a possible attempt to deceive the public for purely commercial advantage. That situation, he concluded, had to be viewed as bad faith.⁵³

The two distinct court opinions in the Second Circuit, upon closer review, seem more to be factual exceptions to the good faith parody rule set down in *Dees* than a divergent school of thought. As in all decisions based upon equitable doctrines such as "good faith," the inquiry must be fact intensive. Thus, the decision by a parodist whether to request permission to parody - and in the process risk establishment of a bad faith motive - must be weighed with the other facts and circumstances of his activities in mind.

B. The Ninth Circuit "California" View

The judicial history of parody in the Ninth Circuit has followed a confused route, with no cases involving musical satire having been decided until the 1986 ruling in *Fisher v. Dees*.⁵⁴

The Ninth Circuit view of parody had its genesis in two cases decided by District Judge James M. Carter months apart in 1955 - *Loew's v. Columbia Broadcasting System, Inc.* (the Jack Benny Case)⁵⁵ and *Columbia Pictures v. National Broadcasting Co.* (the Sid Caesar Case)⁵⁶ - with incongruous results.

In the Jack Benny case, decided first, Benny was found guilty of copyright infringement for parodying the film *Gaslight* on his television show. Judge Carter was extremely hostile to the idea that parody should be treated any differently than any other unauthorized taking, and ruled that because Benny took "substantial" portions of the underlying work, he had committed copyright infringement.

The Ninth Circuit Court of Appeals affirmed the lower court's ruling based solely on the "substantiality" issue, stating "[t]he fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or other grotesqueries, does not avoid infringement"⁵⁷ In conclusion, the Appeals Court stated that "[o]ne cannot copy the substance of another's work without infringing his copyright. A burlesque presentation of such a copy is no defense to an action for infringement"⁵⁸

52. 693 F. Supp. at 1530 n.11 (citing *Fisher* at 437).

53. 737 F. Supp. at 832-33.

54. 794 F.2d 432 (9th Cir. 1986). See *infra*, notes 65-77.

55. 131 F. Supp. 165 (S.D. Ca. 1955).

56. 137 F. Supp. 348 (S.D. Ca. 1955).

57. 239 F.2d 532, 536 (9th Cir. 1956).

58. *Id.* at 537.

Some months later, bowing to extreme criticism of his holding in *Benny*, Judge Carter announced a completely different parody test in the *Sid Caesar* case. Presented with nearly identical facts as in *Benny* (Caesar had parodied the film *From Here To Eternity* on his own "Your Show of Shows" television program), the Judge ruled that "[i]n historical burlesque a part of the content is used to conjure up, at least the general image, of the original. Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original."⁵⁹

Judge Carter did attempt to square the decision in the *Caesar* case with his opinion in *Benny*. He stated that "[u]nlike [the *Benny* case], here there was a taking of only sufficient [sic] to cause the viewer to recall and conjure up the original."⁶⁰ Clearly, however, he was relying on the Court of Appeals to announce a firm rule for the Ninth Circuit, and went as far as apologizing for the brevity of his opinion due to his desire to "speed this case on its way to the Appellate Court."

The *Sid Caesar* case never reached the Appellate Court, however, and so for twenty-three years, until *Walt Disney Productions v. The Air Pirates*⁶¹ was decided by the Ninth Circuit Court of Appeals in 1979, the law of parody in that Circuit was at best vague.

In the *Air Pirates* case, the defendants had manufactured comic books which depicted accurately drawn Walt Disney cartoon characters such as Mickey Mouse, Minnie Mouse and Donald Duck engaging in sexual activities and using recreational drugs. Far from denying their "verbatim" copying, the defendants asserted that "the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, and upon closer examination is discovered to be quite something else." (cite omitted).⁶²

District Judge Wollenberg flatly rejected the defendants' argument, and ignoring Judge Carter's repentance in the *Sid Caesar* case, relied on the Ninth Circuit opinion in *Benny* to hold that any substantial taking, regardless of its satirical nature, constitutes infringement.⁶³ On appeal, the Ninth Circuit affirmed judgement against the defendants, but limited the *Benny* case to a "threshold test" which forbids near verbatim copying (a test which the defendants failed).⁶⁴ The *Air Pirates* Court also went on to adopt as a sec-

59. 137 F. Supp. 348, 350 (S.D. Ca. 1955).

60. *Id.* at 351.

61. 581 F.2d 751 (9th Cir. 1978).

62. *Id.* at 758.

63. 345 F. Supp. 108 (N.D. Ca. 1972).

64. 581 F.2d 751, at 757 (9th Cir. 1978).

ondary test the two-tiered conjure up/market usurpation test announced by the Second Circuit in the *Mad Magazine* case.

Ninth Circuit law on parody was less confused after the *Air Pirates* decision, but the *Benny* test had retained substantial validity as the Circuit's parody litmus test. The *Fisher v. Dees*⁶⁵ decision in 1986 finally established a comprehensive parody test for the Ninth Circuit, placing *Benny* in its proper context.

The Rick Dees Case

In the *Rick Dees* case, disc jockey Rick Dees recorded and released a comedy record album containing a parody of the copyrighted song "When Sunny Gets Blue" which he lampooned as "When Sonny Sniffs Glue." The parody consisted of the first six bars of the original song (basically one half of the well known first verse), and ran for about twenty-nine seconds. Dees changed the lyrics from "When Sunny Gets Blue, her eyes get grey and cloudy, then the rain begins to fall" to "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." The parody was also sung in a style mimicking the distinctive voice of Johnny Mathis, whose version of the original is the best known. At the conclusion of twenty-nine seconds, Dees's recorded performance degenerates into laughter.

Prior to recording the album, Dees had applied to the plaintiff copyright owner for a license to do the parody, but was vehemently refused permission. The songwriters Marvin Fisher and Jack Segal sued Dees for infringement upon the recording's release, but the district court granted summary judgment in favor of the defendants without opinion. In a comprehensive and thoughtful appellate opinion, Judge Sneed, speaking for Judges Wallace and Kozinski, affirmed the district court's decision.

The *Dees* opinion first affirmed the Circuit's view that Congress, in enacting section 107 of the U.S. Copyright Act⁶⁶ had in the legislative notes accompanying the section specifically enumerated "parody" as one of the examples of an activity subject to fair use. Thus, the court ruled, the four factors set forth as criteria for determining fair use in section 107 are to be applied in parody cases.⁶⁷

Prior to commencing its fair use analysis, however, the court turned its attention to three allegations by the plaintiffs which asserted that the fair use defense was not available to the defendants. First, Judge Sneed considered the plaintiff's claim that since the parody was not directed at least in part at the plaintiff's song, the fair use defense should be denied. Without rejecting the principle set

65. 794 F.2d 432 (9th Cir. 1986).

66. See *supra*, note 6 at 12.

67. 794 F.2d 432, 435 (9th Cir. 1986).

forth in the Second Circuit's decision in *Wilson* (adopted by the Ninth Circuit in *Air Pirates*) that there is no justification for conjuring up an original if it is not at least partly the target of the parody, Judge Sneed ruled that Dees' parody was intended to poke fun at the song and Johnny Mathis' singing style, and was not unrelated "to the song, its place and time."⁶⁸

In their second allegation, plaintiffs asserted that Dees was barred from resorting to the fair use doctrine, which "presupposes good faith," because he acted in bad faith by going ahead with the parody after the plaintiffs had denied him permission to do so. In response, Judge Sneed ruled, as previously noted that:

[t]he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought Moreover, to consider Dees blameworthy because he asked permission would penalize him for this modest show of consideration . . . [which] we refuse to discourage⁶⁹

Finally, the court considered the plaintiff's allegation that because Dees' parody was "immoral," it could not be protected by fair use. While refusing to decide whether or not an "obscene" or "immoral" parody could be a fair use, the court ruled that although Dees' parody was "silly" and "innocuous," it was not obscene.⁷⁰

The Dees Fair Use Analysis

In its analysis of the first fair use factor, "the purpose and character of the use," the court acknowledged the 1984 ruling by the U.S. Supreme Court in the *Betamax* case that "every commercial use of copyrighted material is presumptively . . . unfair."⁷¹ Judge Sneed noted, however, that when the parody is "more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work,"⁷² the presumption may be overcome by the defendant if the parody does not unfairly diminish the economic value of the original.

The court, therefore, turned to analysis of the fourth fair use factor ("the effect of the use upon the potential market for or value of the copyrighted work"), taking note of the 1985 U.S. Supreme Court ruling in the *Nation* case that the fourth factor "is undoubtedly the

68. *Id.* at 436. See *supra*, at 22 for discussion of the "Issue of 'Good Faith'" in text.

69. *Id.* at 437.

70. *Id.*

71. *Id.* (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), which held that the sale of home videotape recorders was not a contributory infringement of television program copyrights).

72. *Id.* (citing *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)).

single most important element of fair use."⁷³ Pointing out that this economic inquiry regards only whether the parody supplants and fills the demand of the original, not whether it diminishes the original's market potential ("any bad review can have that effect"), Judge Sneed ruled that Dees' twenty-nine second parody could not possibly be considered a threat to supplant the plaintiff's famous love song.⁷⁴ Consequently, the court ruled that factors one and four supported a finding of fair use.

The court then considered factor three - "the amount and substantiality of the taking" - which it noted had been the central focus of the Ninth Circuit in parody cases since *Benny*. After affirming that the Circuit still recognized that *near-verbatim* copying could not be fair use, Judge Sneed clarified that *substantial* copying is not necessarily unfair in all circumstances. As such, he reformulated the "conjure up" standard announced in the *Sid Caesar* case to include the Second Circuit's holding in *Elsmere* that conjuring up was the *minimum* measure of freedom extended to parodists.⁷⁵

Judge Sneed then devised a three prong test based on the holding in *Air Pirates* to judge whether a particular satirical taking is excessive. These three criteria, which incorporate the Copyright Act's second fair use factor - "the nature of the copyrighted work," are (1) the degree of public recognition of the work, (2) the ease of conjuring up the original work in the parodist's chosen medium, and (3) the focus of the parody.⁷⁶ In ruling that defendant Dees had not exceeded the fair use standard, Judge Sneed wrote:

Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This 'special need for accuracy' provides some license for 'closer' parody.⁷⁷

In essence, therefore, Judge Sneed's statement limits application of *Benny* in musical parody cases to only the most excessive examples of verbatim copying. Since application of all four fair use factors yielded a balance in favor of the defendant, the court ruled in favor of Dees.

73. *Id.* (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985), holding that a magazine's unauthorized publication of quotations from a former president's unpublished memoirs did infringe the copyright therein, and was not a fair use permitted under 17 U.S.C. § 107).

74. *Id.* at 438.

75. *Id.* at 438-39.

76. *Id.* at 439.

77. *Id.*

C. *A Final Summary of Current Law in the Second and Ninth Circuits*

With the Second Circuit's rulings in *Elsmere*, *Wilson*, *New Line Cinema*, and *Tin Pan Apple*, and the Ninth Circuit's decision in *Dees*, the rules applying to music parody (and to parody in general) in each circuit seem to have finally merged into a nearly identical body of law. This is best illustrated through reference to and comparison of the three basic elements of parody analysis which both Circuits have adopted:

1. The Two-Tiered Validity/Nexus Threshold Test

As established in the Ninth Circuit by *Dees* and in the Second Circuit by the *Mouseketeer* case, *Wilson*, *New Line Cinema*, *Tin Pan Apple* and *Crazy Eddie*, the parody defense is subject to a two-tiered threshold determination of "validity" and "nexus." Firstly, the defendant must have made at least *some* critical comment or statement reflecting his original perspective "giving the [derivative work] social value beyond its entertainment function."⁷⁸ Secondly, although parody need not be directed solely at the original underlying work, the original must at least in part be an object of the parody (establishing a "nexus" between the parody and the allegedly infringed copyright).

Thus, absent cursory proof that the defendant has engaged in a valid attempt to parody, and that the plaintiff's copyrighted work is at least in part an object of such parody, the court may determine that a full fair use analysis is unnecessary and that a strict copyright infringement test is the proper standard.

2. The Verbatim-Copying Threshold Test

The Ninth Circuit still recognizes the *Benny* threshold test that substantial, near-verbatim copying precludes the necessity for application of a fair use test. The holding in *Dees*, however, indicates that at least in cases of musical parody, the parodist will fail to satisfy the threshold standard in only the most egregious cases of verbatim copying.

The Second Circuit has adopted a similar rule stemming from the *Mouseketeer* case: that the need to apply a full fair use analysis to a parody is eliminated when copying is so obviously excessive as to negate the possibility of a finding of fair use regardless of other circumstances.⁷⁹

78. *New Line Cinema Corp. v. Bertelsmann Music Group, Inc.*, 693 F. Supp. 1517-25 (S.D.N.Y. 1988) (quoting *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979)).

79. 389 F. Supp. 1397 (S.D.N.Y. 1975).

3. The Fair Use Test

Unless the parodist has failed to pass one or more of the above threshold tests, both Circuits recognize that the proper method to be used in determining the permissibility of a parody is analysis pursuant to the four fair use factors set forth in section 107 of the U.S. Copyright Act.

a. *The "Commerciality" Presumption and the "Nature of the Use"*

In regard to the first fair use factor - "the nature of the use" - the U.S. Supreme Court ruled in *Betamax* that any commercial use creates a rebuttable presumption of unfairness.⁸⁰ As such, each of the two Circuits is bound to accept this precedent in analyzing fair use defenses to infringement. Relying in part on *Betamax*, the Second Circuit district court ruling in the *Tin Pan Apple* case established that parody of a copyrighted work in a commercial advertising context will almost never constitute fair use.

Neither Circuit has ruled specifically as to whether the "immoral" or "obscene" nature of a parody either pre-empts a finding of fair use or creates a presumption against it. It should be noted, however, that in each of the modern parody cases involving allegedly "immoral" or "dirty" uses (the *Mouseketeer* case, *Air Pirates*, and *Wilson*), the plaintiff has prevailed decisively. These results are more than mere coincidences, and should be seriously noted by parodists.

b. *The "Market Usurpation" Test*

Both Circuits must recognize, pursuant to the U.S. Supreme Court's holding in the *Nation* case,⁸¹ that the fourth fair use factor - market usurpation - is the most important fair use inquiry.

c. *Substantiality and the Expanded "Conjure-Up" Standard*

Finally, both Circuits recognize that in judging the substantiality of a parodist's use of an underlying work (the third fair use factor), the parodist may, at a minimum, use enough to "conjure-up" the original, but may use more in cases in which a special need to do so can be proven. In both Circuits (*Elsmere*, *New Line Cinema*, *Dees*) it has been recognized that musical parody often requires substantial use of the original musical work to conjure it up in the mind of the listener. The scope of such substantial use will be determined by such factors as the popularity or familiarity to the public of the original, whether the original is a central focus of the parody itself, and the nature of the parody (i.e., political commen-

80. See *supra*, note 71 at 26.

81. See *supra*, note 73 at 27.

tary). This test incorporates the second fair use factor set forth in section 107 of the Act, "the nature of the copyrighted work."⁸²

Thus, a restatement of the current law as it exists today in both Circuits can be formulated to facilitate analysis of the various forms of musical parody:

1. So long as the parodist does not engage in excessive, near verbatim copying, and as long as there is at least some nexus between the subject of the parody and the copyrighted work utilized by the parodist, the parody is subject to a fair use analysis under section 107 of the U.S. Copyright Act.

2. In such fair use analysis, the court must presume that commercial uses - especially in the advertising of products - are unfair. But such presumptions may in some cases be overcome by proof that the parody does not supplant or fill the demand in the marketplace of the original, and that the parodist did not intend that it do so (illustrating good faith).

The Court must also consider, but accord less importance to, the substantiality of the parodist's taking. A parodist may utilize enough of an original to, at minimum, conjure it up. Somewhat greater leeway is afforded musical parodists who often have a special need for accuracy, the amount depending upon the familiarity of the public with the original, the extent to which the original work is itself the subject of the parody and the nature of the parody in relation to First Amendment considerations.

3. There is a noticeable judicial trend that parodists who engage in the use of "obscene," "immoral," or "dirty" elements in their parodies are often given less leeway to take from original works.

II. MUSICAL WORKS AND THE COPYRIGHT LAW

In applying the laws of parody and fair use to specific instances of musical satire, it is also important to distinguish between the types of copyrighted musical works which may be subject to parody, and the differing rights bestowed by the U.S. Copyright Act upon the copyright owners of each respective type of work. The principal distinction in this regard is the differing rights granted by the Act to owners of copyrights in sound recordings, as opposed to those granted to copyright owners of musical compositions or audio visual works such as music videos.

A. *Sound Recordings*

Section 106 of the Copyright Act grants to authors of copyrightable works several distinct rights, including the right to reproduce and distribute the work in copies or phonorecords, the right to prepare derivative works, and the right to publicly perform the work.⁸³

82. 17 U.S.C. § 107(2) (1990).

83. 17 U.S.C. § 106 (1990).

Section 114 of the Act, however, places limitations on these rights in regard to sound recordings: the copyright owner is denied both performing rights, and the right to limit "sound alike" recordings.⁸⁴

Thus, unless the parodist duplicates portions of the original sound recording by converting the actual recorded sounds embodied on the original to his own use, there can be no infringement under the Copyright Act of the rights in the original sound recording. A parodist may therefore imitate a sound recording "note for note," exactly mimicking a performer associated with it in "sound alike" fashion, and perform such a parody or sell a recording of it, without infringing the original sound recording copyright. This is not to say, however, that such actions by the parodist do not violate the rights of the lampooned performer under both unfair competition laws (which basically protect against false designation as to goods and services) and right of publicity statutes.⁸⁵ Naturally, the rights of the copyright owner in the underlying musical composition embodied in the sound recording might also be infringed.

It does mean, however, that a parodist could take a copyrighted sound recording of a musical composition in the public domain, such as Jimi Hendrix's recording of "The Star Spangled Banner," and perform or re-record the composition in full in any medium exactly as it sounds on the record, supplying any type of satirical lyrics or commentary, without the risk of infringing the rights of any copyright owners.

B. *Musical Compositions*

The rights of the copyright owner of a musical composition established in section 106 of the Act do extend to performance, reproduction, and distribution rights and the right to prepare derivative works, but are subject to the compulsory mechanical licensing pro-

84. 17 U.S.C. § 114(b) (1990).

§ 114(b) reads in relevant part as follows:

The exclusive right of the owner of copyright in a sound recording . . . do[es] not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

85. See *Midler v. Ford Motor Co.*, 849 F. 2d 460 (9th Cir. 1988). The defendant advertisers had used a vocal impersonator to imitate Midler's voice and perform one of her best known songs for a commercial. Midler's tort claim was based in part on California's right of privacy statute. The Ninth Circuit held that Midler had a common law property right in her voice, and that the defendants had consciously misappropriated that property right. "A voice is as distinctive and personal as a face." *Id.* at 463.

The various right of publicity and unfair competition claims that a performer may raise in such a sound alike case are beyond the scope of this article. See generally Comment, *Whose Voice Is It Anyway? Midler v. Ford Motor Co.*, 8 CARDOZO ARTS & ENTERTAINMENT L. J. 201 (1989).

visions of section 115.⁸⁶ The compulsory license provisions were originally established in the 1909 U.S. Copyright Act to ensure the widest dissemination and availability of musical works to the public.⁸⁷

Section 115 of the Act provides that once a non-dramatic musical composition⁸⁸ has been recorded and released to the public in the U.S., any person may legally record a version of the composition and release it to the public on phonorecords by following the licensing provisions provided in the Act and paying the applicable royalty rates to the copyright owner.⁸⁹ The current compulsory royalty rate set by the Copyright Royalty Tribunal is 5.7 cents (or 1.1 cent per minute, whichever is larger) per song for each copy manufactured and sold.⁹⁰

Naturally, the question arises whether a parodist may secure a compulsory mechanical license to cover his use of a musical composition as part of a parody. Section 115(a)(2) provides that "a compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work . . ."⁹¹

The House of Representative's Report on the Copyright Act explains that this clause is to prevent the musical work from being "perverted, distorted or travestied" by the compulsory mechanical licensee.⁹² Thus, although minor lyrical changes (such as those based on gender) are permitted under the compulsory license, extensive parody of the music or lyrics would likely not be permissible.⁹³

86. 17 U.S.C. § 115 (1990).

87. Congress sought to prevent the possible development of a strong music monopoly. 2 M. NIMMER, *NIMMER ON COPYRIGHT* § 8.04[C], at 8-56 (rev. ed. 1990).

88. A non-dramatic musical composition is a musical composition which is not an integrated part of a dramatic work. 1 M. NIMMER § 2.06[A, B, C, D], at 59-66 (rev. ed. 1990).

89. 17 U.S.C. § 115 (1990).

90. 37 C.F.R. § 307.3. The royalty rate is revised biennially, in direct proportion to changes in the Consumer Price Index. *Id.*

91. 17 U.S.C. § 115(a)(2) (1990).

92. H.R. REP. NO. 1476, 94th Cong., 2d Sess., at 109 (1976).

93. Occasionally, a recording artist will utilize the music of a copyrighted song without significantly changing it as the basis for a new, generally non-satirical version with particularly expanded or substituted lyrics. This is most common in the folk genre, where verses concerning current social or political events are inserted into new versions of classic folk songs. The author of the new version is generally not given authorship rights, but if the underlying tune is in the public domain the author of the new lyrics may be entitled to protection and certain songwriter royalties based on his creative contribution to the "new" work.

Perhaps the best pop music example was the use by The Beach Boys' Brian Wilson of the music to the Chuck Berry song "Sweet Little Sixteen" as the basis for the

Using the facts in the *Dees* case as an example, the extensive lyric changes in the twenty-nine second parody done by the defendant on the song "When Sunny Gets Blue" removed it from the scope of the compulsory license provisions. Rick Dees could not, even if he so desired, have secured a compulsory license for his use (thereby circumventing the plaintiff copyright owners' cause of action against him). He was limited to requesting a mechanical recording license directly from the copyright owners, and that having been denied, to rely upon the fair use doctrine.

What if Dees had limited his parody of the love song to an outrageous musical treatment, incorporating gunshots, whistles, sirens and screams (much in the way Spike Jones arranged "Some Enchanted Evening"), but without changing the lyrics? There is at least some question as to whether such a satirical performance would constitute a change in the "fundamental character" of the song as prohibited under section 115(a)(2). That issue has not been decided by any court in the years since enactment of the 1976 Copyright Act, and represents a potential cause of action for the paternalistic musical copyright owner wishing to protect the "integrity" of the work in cases of subjectively extreme musical treatments.⁹⁴

C. *Audio Visual Works*

While the scope of this article is generally limited to analysis of aural music parodies, it is important to note certain distinctions concerning the parodying of music videos.

The rights of the copyright owner of an audio-visual work such as a music video extend to performance, reproduction, distribution, derivative and all other rights set forth in Section 106 of the Copyright Act, and are not limited by a compulsory license scheme.⁹⁵ The parodying of audio-visual works, therefore, requires voluntary licensing by the copyright owner unless the use falls within the parameters of the fair use doctrine.

In the case of music videos, the copyright owner of the work is often the record company which advanced the money for its pro-

hit "Surfin USA." Brian Wilson was able to arrange a deal with Arc Music, Inc., owners of "Sweet Little Sixteen," after release of "Surfin' USA," whereby Wilson reportedly shared in mechanical, synchronization and print royalties generated by the new version, but gets no authorship credit and does not share in performance royalties.

94. The United States recently ratified the Berne Convention. Berne does afford special "moral" rights protecting the "integrity" of a work. However, the U.S. specifically adopted language that such rights would not supplant established U.S. law. Some commentators nonetheless maintain that U.S. ratification of Berne may expand "moral rights" in this country.

95. 17 U.S.C. § 106, § 115 (1990).

duction. Thus, when parodist Weird Al Yankovic parodied Michael Jackson's music video of the song "(I'm) Bad" as "(I'm) Fat" by nearly recreating it (replete with Weird Al imitating Jackson's dance steps in a subway environment, dressed up in a "fat suit" as a four hundred pound, leather clad version of the pop star), he licensed such use of the copyright in the "Bad" video from CBS Records, Inc., recognizing that his taking was too broad to qualify as fair use. CBS, in consultation with Michael Jackson, limited Weird Al's use to performance of his parody video on television, declining to permit home video sale. The particular terms of such licensing agreements will depend upon the bargaining power of each of the parties, and the potential profitability of the project.

III. SPECIFIC MUSICAL PARODIES CONSIDERED

Finally, we turn to consideration of the practical applications of the law, and of business customs of the entertainment industry, to specific instances of musical parody. To facilitate this analysis, musical parodies may be divided into five basic categories: (a) lyric parodies; (b) parodies of celebrities and performers utilizing unaltered copyrighted music; (c) parodies utilizing musical allusions to pre-existing copyrighted musical works; (d) sound recording sampling and splicing, and; (e) parodies in commercial advertising. Through analysis of various examples in each of these categories, practical legal and business guidance on the parody issue may be ascertained.

A. *Lyric Parodies*

Lyric parodies generally consist of the wholesale adoption of the instrumental and melodic portions of a copyrighted musical work to which the parodist adds or substitutes his own lyrics. The commercial success of several lyric parodists, such as Allan Sherman and Weird Al Yankovic, indicate that this popular form of parody may be the most commercially viable. It should be noted, however, that lyric parodies almost always fall outside the scope of the fair use doctrine due to the extensive nature of the taking in most cases, and require licensing prior to publication, as discussed below.

1. *Weird Al Yankovic: Licensing With Leverage*

Recording artist Weird Al Yankovic released several parody record albums during the 1980's lampooning then current musical hits. The aural parodies and accompanying music video satires have received extensive air play on radio and television, and over 3 million copies of Weird Al Yankovic's phonorecords have been sold.⁹⁶

96. Telephone interview with Chuck Hurewitz, Esq. (April 16, 1990).

Weird Al's parodies generally consist of independently recorded, painstakingly accurate "sound alike" instrumental tracks of entire hit recordings, over which he records parody lyrics of the underlying musical composition, often sung in a style mimicking the performer which appeared on the hit recording.

As noted above, Mr. Yankovic's "sound alike" re-recordings of the original records do not run afoul of the copyright owner's rights in such original recordings, pursuant to section 114 of the Copyright Act. Likewise, since there is no threat of "confusion" in the marketplace caused by his parodies, lampooned recording artists are unlikely to have a cause of action against Mr. Yankovic based on violation of the various unfair competition statutes.

It is the rights of the copyright owners in the original underlying songs and music videos satirized by Weird Al, however, whose rights stand to be infringed by the performance and sale of his parodies. Moreover, Mr. Yankovic's ability to rely on the fair use doctrine to excuse the unlicensed uses of the songs and music videos he parodies is extremely doubtful.

Application of the "verbatim copying" threshold test would present an insurmountable hurdle to any claim of fair use by Mr. Yankovic.⁹⁷ His taking of the full chord structure, melody, and portions of the lyrics of the original underlying musical compositions which he parodies is clearly substantial enough to pre-empt a finding of fair use as a matter of law, regardless of any number of "mitigating" circumstances which might exist. The same is true of his near-verbatim takings of the accompanying music videos which he sometimes parodies along with the song and sound recording.

Even assuming that Mr. Yankovic could survive application of the verbatim copying threshold test, and taking into account that there is no reason to suspect he would fail the "nexus" threshold test or run afoul of presumptions concerning obscenity, Mr. Yankovic would still not be able to satisfy the burden of proving fair use. Firstly, since his parodies are created for commercial sale, Weird Al would have to overcome the *Betamax* presumption that such uses are unfair.

Further, because Mr. Yankovic's parodies often so closely parallel the original underlying song and video, it cannot be concluded with confidence that the parodies will not at least partially supplant the original in the marketplace. The parody and the original often get airplay on the same radio and television stations, and often cater to the same segment of the record-buying public. Although Mr. Yankovic could claim that his recordings and video parodies actually revive sales of songs which have fallen from the charts by the time his parodies are recorded and released, there remains a strong

97. *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

chance that a court might find his work fails to clear the most important parody hurdle: the market usurpation test.

Finally, as noted, Mr. Yankovic's use of the original underlying songs and music videos substantially exceeds the "conjure-up" standard, bordering closely on near-verbatim copying. The general lack of social or political content of his parodies also limits reliance on First Amendment considerations to expand the scope of permissible use.

Having concluded that his song and video parodies are not legally characterizable as fair uses, Mr. Yankovic licenses all of the musical compositions and music videos he parodies directly from their respective copyright owners. According to his attorney, Chuck Hurewitz of the Beverly Hills law firm of Cooper, Epstein and Hurewitz, Weird Al generally gets a writing credit and a copyright interest in the song parody, which he shares (in varying royalty ratios) with the writers of the original underlying work. The publishing rights in the parody are most often conveyed to the copyright owner of the original song, usually a music publisher, which in turn issues instructions to the applicable rights societies as to division of performance royalties on the parody, issuance of mechanical licenses for sale of the parody to the public in the form of phonorecords, and licensing of synchronization rights in the parody for its use in audio visual works such as music videos. Certain contractual limitations may be placed on the music publisher regarding its right to exploit the parody without the prior consent of Weird Al. As noted above, license to utilize the underlying music video in a parody is done on a negotiated basis with terms of compensation varying from a flat fee buyout to royalty participation.

Mr. Hurewitz asserts that Weird Al's substantial market success is responsible for the willingness of copyright owners to grant him permission to parody their musical compositions, and has made it possible for Yankovic to bargain for a lucrative share in the copyright of the parody version of the song. He further surmises that fledgling parodists and comedians are often denied permission to parody by copyright owners who believe the self-evident risks of damaging the value of their copyright by permitting the parody is not offset by a "guarantee" of financial return which Weird Al can provide.

That view is partially refuted by attorney Stuart Prager of the New York law firm Abeles, Osterberg and Clark, who represents an amateur "yuppie musical parody group" called "The V.P.'s." Mr. Prager reports that the group was able to secure permission to record lyric parodies of full original songs from their respective copyright owners in nearly all cases in which permission was requested. The group has been forced, however, to assign the rights of their parodies to the copyright owners of the original songs in each case, without retaining a royalty participation right in the derivative par-

ody copyrights. Thus, "The V.P.'s" hope to earn artist royalties from the sale of their parody records, but will receive no mechanical, performance or other writer royalties for themselves as a condition of their license to parody the underlying musical compositions.

2. Allan Sherman: Increasing the Parodist's Income

Certainly the forerunner of *Weird Al* in popularity as a lyric parodist was the late humorist Allan Sherman. During the early to mid-nineteen sixties, Sherman's song parody l.p.'s sold millions of copies, and several of his "single" releases - most notably "Hello Mud-dah, Hello Faddah" - spent several weeks on the pop charts.

Sherman's *modus operendi* was to utilize mostly public domain musical material as the basis for his lyric parodies, occasionally licensing "standards" like "Five Foot Two, Eyes of Blue" in the rare instances in which his lampoons were based on protected music. Since the label copy on his albums does not list him as a writer on the parodies of licensed copyrighted compositions, it is assumed that he did not share in publishing royalties on those tunes. Mr. Sherman discovered, however, that he could earn significant mechanical publishing royalties by writing full comedy songs himself and including them on his albums along with the parodies. This shrewd practice is also engaged in by other parodists like *Weird Al*, and by recording artists throughout the record industry.

3. Blowfly: Obscene Uses and Willfull Infringement

"Blowfly" has been an underground cult recording artist and performer for decades, distributing records of his sexually explicit lyric parodies of rock and roll hits mostly through the illegal black market. Several copyright owners have attempted over the years to enjoin his activities. Blowfly, however, has continued to resurface with new records every few years.

Blowfly and other "blue" parodists are generally unable to secure voluntary licenses from copyright owners whose musical compositions they wish to parody, and fair use protections have historically been denied to "dirty" lyric parodies. Thus some parodists are faced with a choice between not publishing at all, or operating outside of the law. In light of the potentially devastating statutory damages for willfull copyright infringement of up to \$100,000 per copyright, the unlicensed parodist who clearly falls outside the scope of the fair use doctrine takes a substantial financial risk by going forward with publication, and could even be subject to criminal prosecution.⁹⁸ The Blowfly-styled parodist is forewarned, therefore, that he may indeed be forced to suffer for his art if and when copyright owners catch up with him.

98. 17 U.S.C. § 504(c)(2) (1990).

4. Radio Station Promo Parodies

During the 1980's many radio stations with popular music formats began widely incorporating humor, including lyric parodies based on pop songs, into their talk segments and musical segues. The parodies proved so popular with radio audiences that soon parody production houses began springing up to provide material to radio stations and syndicated radio networks. Some syndicated radio personalities such as Howard Stern, Rick Dees, and Don Imus hired staffers specifically for their ability to produce lyric parodies.

These parodies are often never released to the public as phonorecords, but are limited in distribution to radio d.j.'s. The owner of the underlying composition will nonetheless retain a cause of action for violation of his right of public performance.⁹⁹ Performing rights licenses issued to the broadcaster by ASCAP, BMI and SESAC¹⁰⁰ do not authorize the performance of such parodies. The licenses granted by those organizations grant only the right to publicly perform the separate musical compositions in the organizations' repertory. These licenses do not authorize licensees to make substantial changes to the individual songs such as the changes required to create a lyric parody. Whether or not such musical parodies are protected under the fair use doctrine depends on the application, on a case by case basis, of the principles set forth above.¹⁰¹

An interesting issue that the performing rights organizations face in this area is, assuming that the creator of the parody did not enter into an agreement with respect to performing royalties with the copyright owner of the original work, should the organization pay the composer and publisher of the original work for performances of the parody?

This issue arose at BMI in connection with Weird Al Yankovic's parody of Michael Jackson's music video of the song "(I'm) Bad" as "(I'm) Fat." BMI represents the performing rights in Jackson's songs including "(I'm) Bad." BMI paid 100% of performing royalties in connection with "(I'm) Fat" to Jackson based on an agreement between Jackson and Weird Al under which the latter agreed to cede

99. 17 U.S.C. § 106(4) (1990).

100. American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); Society of European Stage Authors and Composers (SESAC). These societies license the performing rights for songs in the U.S. to virtually all recorded musical works on behalf of the music copyright owner constituents (songwriters and music publishers). See e.g., ASCAP Local Station Blanket Radio License (1990).

101. It is speculated that many music copyright owners decline to exercise their rights against broadcasters to enjoin the creation and broadcast of unauthorized parodies, for fear that the broadcasters may retaliate by refusing to play the songs owned by such copyright owner during the broadcaster's regular programming.

any performing royalties otherwise due to him from performances of "(I'm) Fat."

B. *Parodies and Impressions of Celebrities Utilizing Unaltered Copyrighted Music*

This second type of musical satire parallels the very first U.S. parody cases, discussed above. They held that musical impressionists need not procure performance licenses for the utilization of copyrighted music in their performances, so long as the parodist acts in "good faith," neither attempting to usurp the market of the original music, nor utilizing more of the original than needed to effectively convey the parody to the audience.

1. Joe Piscopo Parodies Frank Sinatra - The Segmented Taking

In 1982, comedian Joe Piscopo recorded and released an extended-play phonorecord called "The I Love Rock And Roll Medley," which featured his comedic impression of crooner Frank Sinatra singing a medley of popular hard rock tunes rearranged and recorded in the big band style for which Sinatra is famous. Mr. Piscopo utilized musical segments of varying length from each of eight songs including "I Love Rock And Roll" (1:02), "Cold As Ice" (:32), "Under My Thumb" (:33), "Hit Me With Your Best Shot" (:11), "Born To Run" (:53), "I Know What Boys Like" (:12), "Smoke On The Water" (:12) and "Life During Wartime" (:33). Lyric changes were minimal, designed to accommodate Mr. Sinatra's highly stylized singing (for example, the lyrics "I love rock and roll" were at times scatted by Mr. Piscopo as "I love dooby doo").

Although it is possible that under current parody precedents Piscopo's segmented utilization of at least certain of the shorter uses of the eight musical compositions could qualify as fair use, the producers (undoubtedly with the *Air Pirates* and *Wilson* cases in mind) licensed each of the compositions in 1982 from the copyright owners at reduced mechanical royalty rates. Such reduced rates are sometimes granted by copyright owners for medley recordings, usually, as in this case, on a most favored nations basis (e.g. that no other copyright owner receive a more favorable rate in connection with the medley). This licensing arrangement enabled Piscopo's record company to release the parody on a profitable basis, while also permitting protection against exposure to infringement suits by copyright owners who may have disputed Piscopo's claims of fair use protection.

2. Springsteen Meets The Flintstones - The Full Taking

In 1986, a parodist calling himself "Bruce Springstone" recorded the song "(Meet) The Flintstones" in the performing and speaking

style of Bruce Springsteen. According to attorney Steve Winogradsky of Hanna Barbera, copyright owners of the song "(Meet) The Flintstones," the parodists applied retroactively for a mechanical license at the statutory rate which the company granted. Mr. Winogradsky stated his belief that the Springstone parody falls within the compulsory licensing provisions of section 115 of the Copyright Act. In his opinion, although the use is a "reinterpretation" of the song, it does not represent a change in "the basic melody, lyrics or its fundamental character."

Mr. Winogradsky did admit that a more "paternalistic" copyright owner could argue that the parodist's addition of an extensive spoken introduction and embellishment of his arrangement with brief musical quotes from various Springsteen songs took the Springstone use outside the scope of section 115. Argued successfully, these points could enable the owner to prevent a similar use, or to exact a settlement establishing a licensing fee higher than the compulsory mechanical royalty rate. As there was no risk of public confusion as to the source of the parody, it is doubtful that Bruce Springsteen had any legal basis to enjoin its dissemination.

3. Political Satire

In the mid-1980's an unidentified parodist produced and distributed for television broadcast a clay animation music video depicting former New York mayor Ed Koch singing a full rendition of the song "New York, New York" in his distinctive speaking style.

Similarly, the Washington, D.C.-based singing group known as "The Capitol Steps" have become somewhat of an institution in the nation's capitol by performing parodies of popular songs which lampoon political figures and current events. The group sells recordings of their collected parodies, which individually vary in length from a few bars of a song to an entire parody rendition. The underlying works are not licensed.

Although in both these cases the taking of a full song undoubtedly exceeds the established fair use boundaries for parody, the issue is raised whether the lampooning of a political figure expands the scope of permissible unlicensed use of the underlying musical composition. Consideration of the "nature of the parody" as part of the fair use analysis has long been recognized by the courts, reflecting the first of the fair use factors set forth in section 107 of the Copyright Act: "the purpose and character of the use." No reported case has overtly considered this First Amendment issue in the parody context, but several courts have grappled with the question of how much First Amendment freedom of speech rights (protecting and fostering the "free flow of ideas") should impact on the fair use

question.¹⁰²

These cases have ruled that on matters of extreme public importance, the scope of the fair use doctrine is expanded. However, the U.S. Supreme Court made clear in the *Nation* case that even the memoirs of a former U.S. president cannot be substantially utilized (at least prior to their first publication) without license if such use is commercial in nature.¹⁰³

Thus, although there is probably a certain amount of increased latitude extended to parodists by the fair use doctrine in cases in which the object of the parody is political satire, a full taking of the entire underlying original song most likely cannot be justified under any circumstances as permissible fair use.

C. *Parodies Utilizing Musical Allusions to Copyrighted Songs*

Sometimes musical satirists utilize mere elements of music associated with the lampooned subject as a basis for the creation of "new" music for use in the parody. This type of parody is best illustrated by two feature length audio-visual projects, *Eddie and The Cruisers* and *All You Need Is Cash*, each of which utilized musical parody extensively in satirizing the recording artists Bruce Springsteen and The Beatles, respectively. The soundtrack of Mel Brook's film send-up of Alfred Hitchcock movies, *High Anxiety*, is also a good example of musical allusion as a tool of the parodist.

1. "Eddie and The Cruisers"

In the case of "Eddie and The Cruisers," the plot of the film involved the brief musical career of a mythical New Jersey shore band in the early 1960's led by a street-wise songwriter fond of writing about cars, youthful dreams of escape, and the magical qualities of life on the boardwalk near Asbury Park. Many of the songs used in the film, written and performed by the real life band "John Cafferty/Beaver Brown," incorporated short musical quotes from several

102. *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91 (1977) (holding that where defendants copied, almost verbatim, the most creative and original parts of plaintiff's research reports, with intent to profit by filling demand for the original work, defendant could not claim fair use nor use implicating First Amendment interests) ("The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science or industry." *Id.* at 94.); *See e.g., Meeropol v. Nizer*, 560 F.2d 1061 (1977) (holding that a defendant biographer's unauthorized use of copyrighted letters written by plaintiffs' parents may be so substantial that it deprived defendant of the fair use defense) ("For a determination whether the fair use defense is applicable . . . , it is relevant whether or not the [copied materials] were used primarily for scholarly, historical reasons, or predominantly for commercial exploitation." *Id.* at 1069.)

103. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

songs written and recorded in the 1970's by Bruce Springsteen, a street-wise songwriter from the New Jersey shore who had written many songs about cars, youthful dreams of escape, and the magical qualities of life on the boardwalk near Asbury Park.

The actual use of copyrightable material from Springsteen's songs by Beaver Brown, although minimal, was just enough to "conjure up" several of Springsteen's works by adopting short musical phrases to create a general "feel" of the originals. For example, the "Bo Diddley/Not Fade Away" backbeat used by Springsteen in "She's The One" was conjured up in style and substance in the movie's hit song, "On The Dark Side;" likewise, the descending chromatic line in Springsteen's "Born To Run," which occurs just before the pause prior to the last verse, is unmistakably repeated at the conclusion of Cafferty's "Boardwalk Angel."

According to Steve Rubin of Scotti Brothers Records (the soundtrack distributor), the principals involved in the production and release of the film and accompanying soundtrack believed they had the protection of the fair use doctrine, and relied upon it without licensing the Springsteen compositions. No legal actions have arisen since the film's initial release in 1983.

2. The Ruttlles

In 1978, the NBC television network broadcast a television movie in the U.S. entitled "All You Need Is Cash," a parody of the rise and fall of rock's greatest icons, The Beatles (parodied by the producers as "The Ruttlles"). Included in the program were fourteen "Beatlesque" songs written by producer Neil Innes as musical parodies of some of the many famous Beatle hits.

Many of the Innes songs relied on very brief musical quotes from several different Beatles' songs and recordings, seemingly well within the boundaries of the "conjure-up" standard of fair use. At least four of the songs, however, could be viewed as substantially similar in chord structure and melody (and in production technique, which should not be included as part of the similarity test because of the "sound alike" exemption of section 114) to the original Lennon and McCartney songs they parodied: "With A Girl Like You" (parodying "If I Fell"), "Ouch" ("Help"), "Good Times Roll" ("Lucy In The Sky With Diamonds") and "Piggy In The Middle" ("I Am The Walrus").

The audio-visual work "All You Need Is Cash" and the compendium sound track album "The Ruttlles" were released without licenses from the copyright owners of the parodied Lennon and McCartney songs. Under threat of litigation by the copyright owners, however, the producers were said to have relented and retroactively applied for mechanical and synchronization licenses for use of the

underlying original songs in the television program and on the compendium soundtrack.

Again, as in the Joe Piscopo/Frank Sinatra situation, the producers seemed to have learned it was easier and cheaper in the long run to license their uses of pre-existing copyrighted music than to attempt to rely on the fair use doctrine, risking litigation expenses, statutory damages and the devastating effect of an injunction (which could interfere with the program's broadcast and the distribution of the soundtrack album, killing the whole project).

3. Mel Brooks' High Anxiety

In compiling the movie soundtrack for his Alfred Hitchcock parody *High Anxiety*, Mel Brooks incorporated by allusion the most distinctive and cliched music associated with Hitchcock films (i.e., the screeching, repetitive violin part from the infamous shower scene in *Psycho*). While in general the taking of the most distinctive portion of another's copyrighted musical work for use in one's own composition is the very definition of infringement, in the parody context such musical allusions utilized to "conjure up" the original are by definition "fair use."

D. *Sound Recording Splicing and Sampling*

It is beyond the scope of this article to consider the many legal ramifications of "digital sampling," a recording technique popular in "rap" and other forms of popular music which enables a record producer to electronically insert pieces of an original, pre-existing sound recording (usually of a musical composition) into a new sound recording with or without change or manipulation.¹⁰⁴ Suffice it to say that such sampling uses are subject to the same analysis applied in all other copyright infringement cases in which the fair use issue is raised.

Long before development of sampling technology, however, the late parodist Dickie Goodman perfected a comedy genre consisting of splicing very short portions of hit records (in nearly all cases, ten seconds or less) into his parody recordings as answers to questions posed in mock interviews with celebrities and politicians. For example, in one of his records from 1974 Dees feigned asking President Nixon about the Watergate scandal, to which the reply was a brief excerpt of recording artist Helen Reddy singing the words "leave me alone, won't you leave me alone" from her similarly titled hit.

According to Goodman's attorney, Monte Morris, every such use of copyrighted sound recordings and underlying musical compositions was painstakingly licensed in order to satisfy Goodman's rec-

104. See generally Gordon and Sanders, *The Rap on Sampling*, N.Y.L.J., 81 N.Y.L.J. 5 (1989), 86 N.Y.L.J. 5 (1989), 91 N.Y.L.J. 5 (1989), 96 N.Y.L.J. 5 (1989).

ord company which feared exposure for copyright infringement. There is a strong case to be made, however, that this genre of parody falls within the fair use doctrine as it is presently construed.

Such splicing activities would fall on the fair use side of the "near-verbatim taking" threshold test, as only a few seconds of sound and music are utilized from each pre-existing work. The only foreseeable problem could come in satisfying the "nexus" threshold inquiry.

Applying the law as it exists today, the Ninth Circuit ruled that in the *Dees* case Dees' parody of "When Sunny Gets Blue" had sufficient connection to the targets of the parody (drug abuse, love songs and Johnny Mathis) to satisfy the nexus test, taking into account "the song, its place and time." Applying these criteria to the Helen Reddy/Richard Nixon parody described above, the parodist could argue successfully that a sufficient nexus exists between contemporary songs and current events since each could be viewed as a reflection of the other ("life imitating art," etc.).

Moreover, parodists have often relied upon current works to serve as a vehicle for the lampooning of political, social or religious subjects. It could also be argued that an *inverse* of the "expanded conjure-up" test announced in *Elsmere* and adopted in *Dees*, should apply: that the smaller the taking, the less substantial the nexus between the pre-existing work utilized and the subject of the parody may be.

Turning to a fair use analysis, the commercial nature of the Goodman type parody would establish a *Betamax* presumption¹⁰⁵ of unfair use. This presumption, however, could likely be overcome by a combination of the de minimis nature of the takings, the absence of any threat of market usurpation to the works utilized, and the political or "newsworthy" content of the parodies, if any.

In practice, of course, prior to release of a similar project today, a practical balancing test weighing the expense and time consuming nature of obtaining mechanical and master use licenses from the owners of the sound recordings and musical compositions, against the risks of litigation and the likelihood of success in the event of such a suit, would be in order.

E. *Musical Parody in Commercial Advertising*

The final category of music parody to be considered is commercial advertising. The longstanding practice by corporate advertisers of licensing popular songs for the purpose of transforming them into commercial jingles is still very prevalent in the 1990's. As the "rock and roll generation" of baby boomers has grown into a siza-

105. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). See *supra* note 71, at 26 and note 80, at 29.

ble segment of the American consumer market, Madison Avenue has noted the particular receptiveness of this group to advertising which incorporates popular songs from the eras of the late 1950's, the '60's, and the '70's during which the baby boomers were growing up.

Parody in the commercial advertising context generally signifies a change in the lyrics of a popular song to incorporate reference to the product being advertised. A good example is the enormously successful use by the California Raisin Growers Association of the classic 1960's song "Heard It Through The Grapevine" in their television ads. The lyrics of the original, "heard it through the grapevine, not much longer will you be mine," were changed for the commercials to "heard it through the grapevine, in the California sunshine." Likewise, the Sunkist company has utilized Beach Boy Brian Wilson's 1960's milestone composition "Good Vibrations" to advertise orange juice products, incorporating the new lyrics "I'm picking up good vibrations, Sunkist is a taste sensation."

Many songwriters and composers will not permit the licensing of their works for use in commercial advertisements, especially if parody is involved. Some have such restrictions included in their agreements with music publishers or copyright administrators, although generally the publisher or administrator will abide by the writer's wishes in this regard even if there is no contractual prohibition against commercial advertising uses.¹⁰⁶

According to several music publisher sources, there is a basic acceptance by advertisers that the parodying of a song in a commercial advertisement will increase the licensing fee over the amount that would be charged for a "straight" use in the same commercial. The reason for this is a perception that commercial parody increases the risk of damaging the integrity, popularity, and future marketability of the musical work.

It should be noted that in order to utilize a musical work in any commercial advertising context for broadcast or display in any manner, the advertiser or broadcaster must procure a "commercial use" license from the music copyright owner. The performing rights licensed to broadcasters by the American societies ASCAP, BMI, and SESAC do not extend to the licensee the right to prepare "derivative works" (such as advertisements) which incorporate the licensed musical works.¹⁰⁷

Moreover, as it is clear from the *Tin Pan Apple* and *Crazy Eddie* cases, unlicensed parody of a copyrighted work in a commercial advertising context will rarely if ever be construed as fair use.

106. Radio Week Magazine 7 (October 3, 1988).

107. S. Shemel & W. Krasilovsky, *THIS BUSINESS OF MUSIC* 310 (rev. ed., 1977).

SUMMATION

Since the beginning of the 20th Century, musical parody has evolved into a very popular component of American culture. The courts have responded by carving out distinct parameters within which musical parodists may safely operate, outside the reach of music copyright owners. The rights of those same copyright owners, however, are also well delineated, providing them with protection against the unreasonable taking of their musical works.

In a free society, that is the balance which must be struck: the parodist *and* the creator of the parodied work must be afforded protections in order to foster their mutually important and continued contribution to public discourse and national culture.***

*** Research assistance by Randy S. Frisch, a third-year student at Boston University School of Law, and a Notes Editor of the *American Journal of Law and Medicine*.