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RAP PARODIES?: AN IN-DEPTH LOOK AT *ACUFF-ROSE MUSIC, INC. v.* *CAMPBELL*¹

INTRODUCTION

The Middle District of Tennessee last year ruled on a case in which the rap music group 2 Live Crew copied portions of Roy Orbison's song, "Oh, Pretty Woman."² The owners of the song, Acuff-Rose Music, Inc., complained that this constituted infringement of their copyright.³ The defendants, 2 Live Crew and their record company, claimed that their version was a parody and was excepted from copyright infringement claims under the fair use doctrine.⁴ The court applied the four factor test enumerated in section 107 of the Copyright Act of 1976⁵ ("Act") and held in favor of the defendants.⁶ The cases the court relied on in its application of those factors, however, all involved parodies which appeared in comical settings.⁷ In each of those cases, the courts found fair use.⁸ In cases where the parodies were produced in non-comical settings, however, courts have found against fair use.⁹ 2 Live Crew's parody appeared on "As Nasty As They Wanna Be," a musical album.

This Comment will argue that the Middle District of Tennessee incorrectly applied the common law and statutory provisions in determining that the 2 Live Crew version of "Oh, Pretty Woman," was a parody and qualified as fair use.¹⁰ Part I will present an overview of copyright and discuss the background and history of the Fair Use Doctrine and how it has been applied to parodies. Part II will detail the facts and holding of *Acuff-Rose v. Campbell*.¹¹ Part III will examine each of the four factors enumerated in the Fair Use Provision of the Copyright Act of 1976,¹² analyze how they have been applied in the past, and compare how they were applied by the Middle District of Tennessee. Part IV will suggest a fifth factor which future

1. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn.), appeal dismissed, 929 F.2d 700 (6th Cir. 1991).

2. *Id.*

3. *Id.*

4. *Id.* at 1152.

5. 17 U.S.C.A. §§ 101-914 (West 1977 & West Supp. 1991).

6. *Acuff-Rose*, 754 F. Supp. 1150.

7. See *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 820 (1964); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980).

8. See *Fisher*, 794 F.2d 432; *Berlin*, 329 F.2d 541; *Elsmere*, 623 F.2d 252.

9. See *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

10. *Acuff-Rose*, 754 F. Supp. 1150.

11. *Id.*

12. 17 U.S.C.A. § 107 (West 1977 & West Supp. 1991).

courts may apply to clarify the determination of fair use parodies. This Comment will conclude that Judge Wiseman incorrectly relied on cases which were factually different from *Acuff-Rose* to hold that the defendants' version was a fair use parody.

I. COPYRIGHT OVERVIEW

The idea of protecting an author, inventor or artist's right in the work he or she has created was addressed in the United States Constitution.¹³ The founding fathers gave Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁴ In 1790, Congress invoked this power and passed the first copyright statute, thereby beginning federal copyright protection.¹⁵ Federal copyright law has been revised several times since 1790. The most recent major revision is the Copyright Act of 1976, which took effect January 1, 1978.¹⁶ Before 1978, the individual state legislatures, in addition to Congress, had issued their own copyright laws.¹⁷ The Copyright Act of 1976 put an end to this parallel system of copyright laws, giving Congress the sole right to legislate in this area.¹⁸ Given the rapidly changing nature of copyright law, there have been numerous amendments to the Copyright Act of 1976.¹⁹

The purpose of providing legislative copyright protection is not so much to protect the author but to ensure that authors' labors are rewarded so that other artists will continue to create works.²⁰ If there were no law preventing subsequent authors from copying prior works and taking profits from the original author, then new artists would be discouraged from creating original work and the growth of the arts would be retarded.²¹ By creating property rights in artistic works, Congress has prevented others from reaping the benefits of the artist's labors.²²

13. U.S. CONST. art. I, § 8, cl. 8.

14. *Id.*

15. See 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT, OV* [hereinafter *NIMMER*]; Michael A. Chagares, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parody*, 12 *COLUM.-VLA J.L. & ARTS* 229, 231 (1988).

16. 17 U.S.C.A. §§ 101-914 (West 1977 & West Supp. 1991).

17. See 1 *NIMMER, OV*, *supra* note 15.

18. *Id.*

19. *Id.*

20. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

21. Kenneth J. Nunnenkamp, *Musical Parody: Derivative Use or Fair Use?*, 7 *LOY. ENT. L.J.* 299, 305 (1987).

22. Chagares, *supra* note 15, at 232.

A. Fair Use Doctrine

While copyright law generally prohibits unauthorized duplication of an author's works, it also provides for exceptions where society benefits more by allowing the copying.²³ One exception is known as the fair use doctrine, "[a] privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the monopoly granted to the owner."²⁴ The doctrine was first intimated in *Folsom v. Marsh*²⁵ in 1841 and the term "fair use" first appeared twenty-eight years later in *Lawrence v. Dana*.²⁶ The fair use doctrine developed in common law because there were circumstances where the benefit to society of exposure to the copyrighted works was greater than the artists' exclusive rights in their work. The courts presumed that authors consented to reasonable use of their work to further science and the arts.²⁷ The authors would still be protected from unreasonable uses of their work.²⁸ While the doctrine has been applied in common law for over one hundred and fifty years, it was not codified until the Copyright Act of 1976.²⁹ Section 107 of the Act states that the fair use exception may be applied in cases where the copyrighted material is used for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."³⁰ Section 107 also enumerates four factors to be considered when making a determination of fair use. They include: 1) the purpose and character of the infringing use, including whether it is commercial or nonprofit;³¹ 2) the nature of the copyrighted work;³² 3) the amount and substantiality of the taking;³³ and 4) the effect on the value and potential market of the original.³⁴ The general purpose of the doctrine is to differentiate between those who are trying to profit from the work of others and those who have a legitimate purpose in copying the material.³⁵ Other possible uses

23. 17 U.S.C.A. §§ 106-07 (West 1977 & West Supp. 1991).

24. BLACK'S LAW DICTIONARY 598 (6th ed. 1990); H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

25. 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901); Nunnenkamp, *supra* note 21, at 299.

26. 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136); Nunnenkamp, *supra* note 21, at 299.

27. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

28. *Id.*

29. 17 U.S.C. § 107 (1988).

30. *Id.*

31. 17 U.S.C. § 107(1) (1988).

32. 17 U.S.C. § 107(2) (1988).

33. 17 U.S.C. § 107(3) (1988).

34. 17 U.S.C. § 107(4) (1988).

35. New Line Cinema Corp. v. Bertlesman Music Group, Inc., 693 F. Supp. 1517, 1525-26 (S.D.N.Y. 1988).

are discussed in the legislative history of the Act.³⁶ As it is an equitable doctrine, fair use must be applied on a case by case basis.³⁷

B. Parody

The legislative history of 17 U.S.C.A. § 107 lists parody as one of the activities that might be allowed under the fair use exception.³⁸ Parody is "a literary style characterized by the reproduction of stylistic peculiarities of an author or work for comic effect or in ridicule."³⁹ More specifically as to musical parody, it is "an imitation of a musical composition in which the original text or music has been altered usu. [sic] in a comical manner."⁴⁰ Over the years, courts, and since 1978, Congress, have allowed parodists to copy other author's works.⁴¹ The benefits to society of parody, in the form of social and literary criticism, outweigh most authors' dislike at being parodied and therefore make parody acceptable as a fair use exception.⁴² The Second and Ninth Circuits have most frequently examined this issue.⁴³

In *Benny v. Loew's, Inc.*,⁴⁴ an early parody case, the Ninth Circuit rejected the contention that the defense of fair use applied to dramatic works. *Loew's* involved a parody of the motion picture *Gas Light* performed on television by Jack Benny. The court held that the amount of the motion picture copied was so substantial that it constituted copyright infringement.⁴⁵

In the 1978 case *Walt Disney Productions v. The Air Pirates*, the Ninth Circuit found that a comic book reproduction of Mickey Mouse, Minnie Mouse and Donald Duck performing sexual activities and using drugs was a substantial taking and constituted copyright infringement.⁴⁶ The court in *Air Pirates* relied ultimately on the "conjure up" test. Defendants had copied more than what was necessary to "conjure up" or recall the original characters.⁴⁷

36. See H.R. REP. No. 1476, 94th Cong., 2d Sess., 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

37. Chagares, *supra* note 15, at 234.

38. See H.R. REP. No. 1476, *supra* note 36, at 65, reprinted in 1976 U.S.C.C.A.N. 5659, 5678.

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

40. *Id.*

41. 17 U.S.C. § 107.

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

43. Each of the cases cited below will be discussed further in subsequent sections of this Comment.

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

45. *Benny*, 239 F.2d 532.

46. 581 F.2d 751 (9th Cir. 1978).

47. *Id.* at 758.

In *Fisher v. Dees*, the Ninth Circuit held that a Rick Dees' parody of the song, "When Sunny Gets Blue," entitled "When Sonny Sniffs Glue," constituted fair use.⁴⁸ In reaching this conclusion the court granted parodists greater latitude in the substantiality of taking allowed.⁴⁹ They viewed the conjure up test as a minimum, not a maximum allowance.⁵⁰ A parodist "is entitled to at least 'conjure up' the original."⁵¹

In *Berlin v. E.C. Publications, Inc.*, the Second Circuit held that publication in *Mad Magazine* of parody lyrics of a number of songs, including several written by Irving Berlin, constituted fair use.⁵² The court concentrated on the substantiality of the taking and the market value effect. The court stated that "parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."⁵³ Therefore, the court granted the parodist great latitude in the amount he could copy. The court also held that there was no adverse effect on the marketability of the original since parodies can not fulfill the demand for the original.⁵⁴

In *Elsmere Music, Inc. v. National Broadcasting Co.*, the Second Circuit found that a skit on NBC's "Saturday Night Live" television show was a parody and constituted fair use.⁵⁵ The skit featured some of the Not Ready For Prime Time Players⁵⁶ posing as the town fathers of the biblical city of Sodom. The scene ended with the cast singing "I Love Sodom" to the tune of "I Love New York," the New York State advertising campaign jingle.⁵⁷ The court affirmed the decision of the Southern District of New York, which found that the skit was a valid parody and then concentrated on its economic effect and the extent of the use.⁵⁸ The district court had held that there was no interference with the marketability of the original and that the amount used was no greater than that needed to "conjure up" the original.⁵⁹

In *MCA v. Wilson, Inc.*, the Second Circuit did not find fair use.⁶⁰ In that case, the defendants performed a take-off of the famous song, "Boogie Woogie Bugle Boy of Company B," entitled "Cunnilingus

48. 794 F.2d 432 (9th Cir. 1986).

49. *Id.* at 439 (quoting *Elsmere Music*, 623 F.2d at 253).

50. *Id.*

51. *Id.*

52. 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

53. *Id.* at 545.

54. *Id.*

55. 623 F.2d 252 (2d Cir. 1980).

56. This was the name given to the show's regular cast, who were joined in skits by each week's guest host.

57. *Elsmere*, 623 F.2d at 253.

58. *Id.*

59. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, *aff'd*, 623 F.2d 252 (2d Cir. 1980).

60. 677 F.2d 180 (2d Cir. 1981).

Champion of Company C" in an erotic nude cabaret show called *Let My People Come*.⁶¹ In reaching its conclusion, the court concentrated on the "economic effect on market" factor.⁶² The court held that since both plaintiffs and defendants were in the entertainment industry and since both versions were performed on stage and sold as recordings and in printed copies the two versions were in competition.⁶³ Thus, the defendants' version adversely effected the marketability of plaintiff's original.⁶⁴

II. *ACUFF-ROSE MUSIC, INC. v. CAMPBELL*⁶⁵

Acuff-Rose Music, the plaintiff in this case, is the publisher of, and owns the copyright to, the song "Oh, Pretty Woman." The song was originally written by Roy Orbison and William Dees in 1964 and was copyrighted by Acuff-Rose the same year. In 1989 the manager of the rap music group 2 Live Crew contacted Acuff-Rose and told them that 2 Live Crew was making a parody of "Oh, Pretty Woman." The authors would receive full credit and Acuff-Rose would be paid the statutorily required rate for use of the song.

Despite the rejection of this licensing request 2 Live Crew included their version of "Oh, Pretty Woman" on their album "As Nasty As They Wanna Be." The beautiful image of the woman created in Roy Orbison's original quickly degenerated into a "big, hairy woman, a bald-headed woman, and a 'two-timin' woman,"⁶⁶ in the 2 Live Crew version. Judge Wiseman compared the 2 Live Crew "Pretty Woman" to "Cousin It," the little, hairy creature from the television series "The Addams Family."⁶⁷

Acuff-Rose filed suit almost one year later for copyright infringement, interference with business relations, and interference with prospective business advantage. This Comment concerns only the copyright infringement claim. Defendants moved for summary judgment, claiming that their version, entitled "Pretty Woman," was a parody of the copyrighted original and therefore came within the fair use doctrine.⁶⁸ In determining whether defendants' version constituted fair use of the copyrighted original, Judge Wiseman considered the four factors enumerated in the fair use provision of the Copyright Act of 1976.⁶⁹ Those four factors are: 1) the purpose and character of the allegedly infringing use; 2) the nature of the copy-

61. *Id.* at 181-82.

62. *Id.* at 184-85.

63. *Id.* at 185.

64. *Id.*

65. 754 F. Supp. 1150 (M.D. Tenn. 1991).

66. *Id.* at 1155.

67. *Id.*

68. 17 U.S.C. § 107.

69. *Acuff-Rose*, 754 F. Supp. at 1153.

righted work; 3) the amount and substantiality of the amount taken; and 4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁰ Judge Wiseman concluded that the defendants' version was a parody and that it constituted fair use within the meaning of that doctrine.⁷¹

III. THE FOUR FACTORS

A. Purpose and Character of Use

The first factor to be considered is the purpose and character of the allegedly infringing use, including whether that use is commercial or for nonprofit educational purposes.⁷² The United States Supreme Court has held that every commercial use of copyrighted material is presumptively an unfair use.⁷³ The Court subsequently stated that a commercial use "tends to weigh against a finding of fair use."⁷⁴ When the infringing use is in the nature of an editorial or social commentary, however, the presumption against fair use can be rebutted.⁷⁵ The mere fact that the main purpose of an infringing use is to financially profit does not preclude the possibility of a finding of fair use.⁷⁶ The Supreme Court held that the determinative factor as to purpose of the use is not whether the user seeks to make money, but rather whether he is trying to profit from the labors of the original author without paying the customary price.⁷⁷ Since the defendants' goal of producing "As Nasty As They Wanna Be" was to make a profit, a rebuttable presumption against fair use arose.⁷⁸ The issue then became whether the 2 Live Crew version of the song qualified as a use that would rebut that presumption.

The legislative history of the Act lists parody as one of the activities that would qualify as a fair use exception.⁷⁹ The Second Circuit has held that parody, along with satire, deserves "substantial freedom—both as entertainment and as a form of social and literary crit-

70. See *supra* note 3. Each of these factors are examined in greater detail and Judge Wiseman's application of each is closely analyzed in subsequent sections of this Comment.

71. *Acuff-Rose*, 754 F. Supp. at 1160.

72. 17 U.S.C. § 107(1).

73. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

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

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

76. 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05 [A] [1] (1991).

77. *Harper & Row*, 471 U.S. at 562.

78. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154 (M.D. Tenn.), *appeal dismissed*, 929 F.2d 700 (6th Cir. 1991).

79. H.R. REP. No. 1476, *supra* note 36, at 65, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

icism."⁸⁰ The courts have differed on the definition of parody. The Second Circuit has held that a parody need not focus on the original exactly but may reflect on life in general.⁸¹ The Ninth Circuit, however, seems to believe that a parody must be directed^o at least partially at the work that it is parodying.⁸² In *Acuff-Rose*, the District Court for the Middle District of Tennessee compared the lyrics in the two versions and concluded that the play on words in defendants' version was demonstrative of a parody.⁸³ The pretty woman depicted in Roy Orbison's original becomes "a big, hairy woman," "a bald-headed woman" and "a two-timin' woman."⁸⁴ The court considered the following factors in determining that the 2 Live Crew song was a parody: 1) the presence of laughter; 2) the use of a heavily distorted scraping sound; 3) an off-key solo; and 4) repetitive bass riffs.⁸⁵ Although Judge Wiseman recognized that the presumption against fair use could be rebutted by showing that the parody did not affect the economic value of the original,⁸⁶ he did not make that determination until he determined that the 2 Live Crew version had not adversely affected the marketability of the original (the fourth factor under the fair use doctrine).⁸⁷

B. *Nature of the Original*

The second factor to be considered under the fair use doctrine is the nature of the copyrighted work.⁸⁸ Here it is important to determine whether a work is creative, imaginative and original.⁸⁹ The nature of a work directly affects the extent of its potential protection. The United States Supreme Court has allowed broader dissemination of factual works than creative ones because the public benefit in gaining access to factual information is more important than the harm done to the author.⁹⁰ The purpose of this factor is to further creativity and originality. If courts were to allow a subsequent author to copy a work on which an original author had spent a great deal of time and effort, future authors would be hesitant to create

80. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

81. *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

82. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (Parody was aimed directly at copyrighted song.).

83. *Acuff-Rose*, 754 F. Supp. 1150.

84. *Id.* at 1155.

85. *Id.*

86. *Id.* at 1154.

87. *Id.* at 1158. See *infra* text accompanying notes 110-31.

88. 17 U.S.C. § 107(2) (1988).

89. *New York Times, Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977).

90. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985). This, however, does not extend to unpublished factual works. The right to first publication has been held to be greater than the public's right to know. *Id.* at 564.

new works.⁹¹

Judge Wiseman correctly determined that this factor weighed in the plaintiff's favor in *Acuff-Rose* since the copyrighted work at issue was creative.⁹² Applying the "nature of the copyrighted use" factor, "Oh, Pretty Woman" should be given broad copyright protection.

C. Substantiality of Taking

The third factor to be considered is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."⁹³ The Act reflects the legislators' realization that a certain amount of taking must be allowed if the parodist is to be successful. The question is whether the parodist could have accomplished the desired result by using less of the original.⁹⁴ To that end, the Southern District of California in *Columbia Pictures Corp. v. National Broadcasting Co.* developed the "conjure up" test, in which the court looks at the amount of copying required to recall or "conjure up" the copyrighted work that is the subject of the parody.⁹⁵ This decision represented a 180 degree turn by Judge Carter of the Southern District of California, who had just months earlier held that any substantial taking, including parody, constituted copyright infringement.⁹⁶ In *Acuff-Rose*, the defendants copied the name of the song, the key lyrics, the guitar refrain, the opening drum beat, the melody, and the chorus.⁹⁷

In the Second Circuit, a parodist can take more than the minimum amount needed to "conjure up" the original, as long as something is added to create a humorous or satirical result.⁹⁸ In the Ninth Circuit, the "conjure up" test does not limit how much of the original can be taken, but allows that a certain portion be used to recall the work being parodied.⁹⁹ That the copied material constitutes a fraction of the infringing work is not, of itself, a defense or exception to copyright infringement.¹⁰⁰

In *Fisher*, the court stated three factors that must be considered in determining whether the portion of the original used was exces-

91. Nunnenkamp, *supra* note 21, at 305.

92. *Acuff-Rose*, 754 F. Supp. at 1155-56.

93. 17 U.S.C. § 107(3).

94. Nunnenkamp, *supra* note 21, at 311-12.

95. 137 F. Supp. 348, 354 (S.D. Cal. 1955).

96. *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 177 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958).

97. *Acuff-Rose*, 754 F. Supp. at 1156.

98. *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

99. *Fisher v. Dees*, 794 F.2d 432, 438-39 (9th Cir. 1986).

100. *Harper & Row, Publishers Inc. v. Nation Enters.*, 471 U.S. at 565.

sive.¹⁰¹ The first factor was the degree of public recognition of the original.¹⁰² The second was the ease of conjuring up the original work in the chosen medium.¹⁰³ The third was the focus of the parody.¹⁰⁴ A song is not an easy thing to parody. Because a song combines music and meter, a parodist needs to copy a song verbatim or nearly verbatim for the parody to recall the original. Therefore, musical parodies are generally granted more freedom in the amount that can be copied.¹⁰⁵ Judge Wiseman must have been applying this broad approach when he determined that 2 Live Crew took the minimum amount needed to conjure up the original.¹⁰⁶ In *New Line Cinema*, however, the Southern District of New York applied the same three factors but found that a less substantial taking is necessary to conjure up the original when both uses are in the same medium.¹⁰⁷ That case involved a parody of the "Nightmare on Elm Street" movie series in a music video.¹⁰⁸ The *New Line Cinema* analysis would not be appropriate here because that case involved music videos, not songs. The substantiality of taking necessary to conjure up the original in music is much greater than in videos.¹⁰⁹

D. Market/Value Effect

The fourth and final factor to be considered is "the effect of the use upon the potential market for or value of the copyrighted work."¹¹⁰ The Supreme Court has held that this is the single most important element in making a determination of fair use.¹¹¹ According to Nimmer, fair use is limited to copying which does not diminish the marketability of the original.¹¹² If the ultimate effect of the infringing work is to encroach upon the marketability of the original, then a finding of fair use can not be made.¹¹³ A finding of fair use requires that the subsequent user did not intend to fulfill the demand for the original.¹¹⁴ The defense of fair use can be negated by showing that should the copying become widespread, it would impair the

101. 794 F.2d at 439.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Acuff-Rose*, 754 F. Supp. at 1157.

107. *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1527 (S.D.N.Y. 1988).

108. *Id.*

109. For example, one picture of Freddy Krueger is better able to conjure up the original movie than any number of song lyrics.

110. 17 U.S.C. § 107(4).

111. *Harper & Row*, 471 U.S. at 566; Nunnenkamp, *supra* note 21, at 318-19.

112. *Harper & Row*, 471 U.S. at 566-67 (quoting 1 NIMMER § 1.10[D], at 1-87).

113. Nunnenkamp, *supra* note 21, at 315.

114. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964).

marketability of the original.¹¹⁵ Judge Wiseman held that the defendants' song did not fulfill the demand for the plaintiff's original.¹¹⁶ The audiences for which the two works were intended were completely different.¹¹⁷ The judge relied on *Fisher v. Dees* in determining market effect.¹¹⁸ In that case, however, the parody was published on a record album that was devoted exclusively to comedy. Judge Wiseman also cited *Elsmere Music v. NBC*, in which the parody was performed on the satirical television show "Saturday Night Live."¹¹⁹ *Berlin v. E.C. Publications, Inc.* involved the printing of parodies in *Mad Magazine*, a satirical magazine.¹²⁰ The fact that these parodies appeared in comical forums strengthened their identity as humorous comments on a copyrighted work. In *Acuff-Rose*, however, the "parody" did not appear in a comical or satirical context but was published on a normal music album.¹²¹ In *MCA, Inc. v. Wilson*, the Second Circuit held against fair use where both versions of a song were performed on stage and both were sold as recordings and in printed copies.¹²² Although the infringing version was pornographic and the original was not, the *Wilson* court found that the two versions were competitors in the entertainment field and that therefore the second use affected the marketability of the first.¹²³

The potential market for derivative uses of the copyrighted work must be considered as well.¹²⁴ If the infringing use would negatively affect the market of any potential derivative use of the original, then it can not be fair use.¹²⁵ Courts have been liberal in determining the extent of potential derivative uses.¹²⁶ Judge Wiseman, however, was not. He held that the defendants' version did not prevent Acuff-Rose from producing their own parody of the copyrighted song.¹²⁷ While this may be true in the legal sense, it would probably not be financially worthwhile to record a second parody of the same song since that market has already been filled. Parody was a potential derivative use for Acuff-Rose of their copyrighted song,

115. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

116. *Acuff-Rose*, 754 F. Supp. at 1158.

117. *Id.*

118. *Acuff-Rose*, 754 F. Supp. at 1154 (citing *Fisher*, 794 F.2d 432).

119. *Id.* at 1156 (citing *Elsmere*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)).

120. 329 F.2d at 542.

121. 754 F. Supp. 1150.

122. *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

123. *Id.*

124. *New Line Cinema*, 693 F. Supp. at 1528.

125. *Id.*

126. See *DC Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984) (singing telegram business was found to be a potential derivative industry for DC Comics).

127. 754 F. Supp. at 1158.

and Judge Wiseman failed to recognize, and subsequently, to protect, that use.

The critical effect of a parody may not be considered in determining its economic effect on the original.¹²⁸ The purpose of a parody is to ridicule the work on which it is based.¹²⁹ In achieving that purpose, it might very well destroy the marketability of the original. This does not preclude a fair use defense.¹³⁰ The fourth prong of section 107 is designed to prevent only those uses which fulfill the demand for the original.¹³¹

IV. PROPOSED FIFTH FACTOR

The cases cited by Judge Wiseman, as the basis for his finding that the 2 Live Crew parody was fair use, all involved infringing works which were produced in humorous forums.¹³² In the cases where the infringing works did not appear in humorous forums, the parodies were found not to be fair use.¹³³ There should thus be a fifth factor considered, a combination of the "purpose and character of the infringing use" and the "market/value effect." Parody should only be considered fair use if the primary purpose of the forum in which it appears is comical or satirical. Otherwise, musical artists will be able to copy the work of others with a slight change in style and claim that it is a parody. This presents a special problem with the advent of rap music, and most recently with the concept of sampling.¹³⁴ Rap groups may attempt to avoid paying fees for sampling by claiming the new version is a parody. By requiring that a parody appear in a comical forum to qualify as fair use, the courts would not injure legitimate parodists. This fifth factor would, however, put an end to plagiarists taking cover under the fair use provision.

CONCLUSION

Most courts that have examined the issue of musical parodies have determined that musical parodies constitute fair use and are not copyright infringement. The parodies in those cases, however, were all published or produced in a humorous forum. In *Berlin*, the parodies were printed in *Mad Magazine*, a magazine devoted to sat-

128. *Fisher*, 794 F.2d at 437.

129. Chagares, *supra* note 15.

130. This Comment, therefore, does not address whether the critical impact of the 2 Live Crew version adversely affected the marketability of the original.

131. *Fisher*, 794 F.2d at 438.

132. *Id.* at 432; *Elsmere Music*, 482 F. Supp. 741, *aff'd*, 623 F.2d 252; *Berlin*, 329 F.2d 541, *cert. denied*, 379 U.S. 822.

133. *Wilson*, 677 F.2d 180; *New Line Cinema*, 693 F. Supp. 1517.

134. Sampling involves including recognizable tracks of other musical works within a song.

ire.¹³⁵ *Elsmere* involved a skit on the weekly television comedy show "Saturday Night Live" in which the Not Ready For Prime Time Players sang "I Love Sodom" as a parody of "I Love New York."¹³⁶ In *Fisher*, the parody appeared on a comedy record album.¹³⁷ Where the parodies have not appeared in humorous contexts, courts have found against fair use. In *Wilson*, the court found that defendants' use of the copyrighted song in their erotic nude show was not a parody and did not qualify as fair use.¹³⁸ In *New Line Cinema*, the court found against fair use when the parody appeared on MTV, and would detract from the marketability of plaintiffs' own parody, also to be shown on MTV.¹³⁹ The parody in *Acuff-Rose* appeared on a musical record album.¹⁴⁰

In *Acuff-Rose*, the Middle District of Tennessee incorrectly relied on those cases which found parody to be fair use.¹⁴¹ The situation in *Acuff-Rose* was more similiar to those cases where parody was found not to be fair use. Judge Wiseman determined that defendants' version was a parody and that it did not affect the marketability of the original. He held that defendants took only what was necessary to conjure up the original. He was wrong. Even if this were a parody, all potential derivative uses are protected. If this were found to be an unprotected derivative use, defendants still copied more than what was necessary to conjure up the original. This was not a case of fair use. Requiring that the primary purpose of the forum in which a work appears is comical or satirical would prevent incorrect conclusions such as that of Judge Wiseman in *Acuff-Rose*.

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135. *Berlin*, 329 F.2d at 542.

136. *Elsmere*, 623 F.2d 252.

137. *Fisher*, 794 F.2d at 434.

138. *Wilson*, 677 F.2d at 181.

139. *New Line Cinema*, 693 F. Supp. at 1520.

140. *Acuff-Rose*, 754 F. Supp. at 1152.

141. *Id.*

