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Parody and the Law of Copyright

time within which an action to impose a constructive trust may be commenced. Laches may also be a bar.[63] The statute begins to run when the grantee breaches the oral agreement to reconvey, and his wrongful retention is, or should be, reasonably known to the plaintiff.[64]

Conclusion

The constructive trust founded upon an abuse of confidence provides equity with far greater latitude in determining whether or not to intervene than it has when confronted with constructive trusts based upon actual fraud, duress, or the other bases of constructive trusts. The elasticity which the court possesses when deciding whether or not a confidential relationship exists is both the strength and the weakness of the doctrine. It permits the court to intervene and prevent injustice in many cases which could not fall within the other exceptions to the Statute of Frauds. Conversely, a willingness to deem every association between friends, business acquaintances, or advisors a confidential relationship could very well result in a resurgence of many of the evils which the Statute of Frauds has suppressed. The requisite relationship of confidence should be found, therefore, only in those situations in which it can be said that there is a degree of trust, confidence, superiority of position, and duty of fair dealing equivalent to that of the true fiduciary. A restrictive rather than liberal application of the constructive trust doctrine is to be preferred. A rigid adherence to the established requirements will still permit protection to the individual in a proper case without compromising the protection which the Statute of Frauds provides.

PARODY AND THE LAW OF COPYRIGHT

An author who obtains a copyright on a novel, play, song, or other eligible material is entitled to the exclusive right, for a limited period, to print, reprint, publish, copy, vend, translate, and dramatize his productions.[1] This privilege also permits him to deliver, perform, exhibit, produce, and reproduce them in public by any and all means.[2] The primary intent behind this protection is not to reward the copyright owner, but rather to benefit the public.[3] As Mr. Chief Justice Hughes has stated, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[4] The courts, however, have taken a

tions is without support, either in authority, in logic or in policy." Scheuer v. Scheuer, 308 N.Y. 447, 452, 126 N.E.2d 555, 558 (1955).

63. Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506 (1910); Bogert § 472.

64. Cohn v. Goodday, 191 Cal. 615 217 Pac. 756 (1923); Carr v. Craig, 138 Iowa 526, 116 N.W. 720 (1908); Bates v. Bates, 182 Ky. 566, 206 S.W. 800 (1918); Laughlin v. Laughlin, 291 Mo. 472, 237 S.W. 1024 (1922); Wiseman v. Guernsey, 107 Neb. 647, 187 N.W. 55 (1922).

1. 17 U.S.C. § 1(a)-(b) (1958).
2. 17 U.S.C. § 1(c)-(d) (1958).
3. Fox Film Corp. v. Doyal, 286 U.S. 123 (1932).
4. Id. at 127.

broad view of copyright protection in order to give the copyright proprietor the exclusive right to any lawful use of his property from which he may reasonably be expected to derive a profit.[5]

The wording of the copyright statute which entitles the author to reproduce his works by any and all means would seem to imply that this is an absolute right which can in no way be infringed. This "absolute" right has been modified in the United States and in England, however, by the doctrine of "fair use." *Folsom v. Marsh*[6] established "fair use" as a taking which was reasonable and customary. Professor Ball defines it as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."[7]

The circumstances under which "fair use" can arise are varied. Reviews and criticisms may quote extensively from the work reviewed for purposes of illustration.[8] Liberal copying from previous works is also permitted when dealing with science and the arts.[9] Further applications are found in cases involving legal digests, statistical yearbooks, directories, gazettes, business catalogues, and social registers.[10]

On the other hand, the doctrine will not extend to a film, play, or novel which has taken the "entire story line and development of the original with its expression, points of suspense and build up to climax."[11]

It has been proposed by some writers that parody and burlesque be construed as liberally as the arts and sciences.[12] They argue that since parody is a criticism of some degree, it should be extended the protection of literary review.[13]

5. King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924).

6. 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841).

7. Ball, Copyright and Literary Property 260 (1944). Ball has also described "fair use" in the following terms: "The right of subsequent authors, publishers and the general public to use the works of others to a limited extent has always been universally recognized as consistent with the object of publication and the policy of encouraging the dissemination of knowledge, learning and culture. . . ." Id. at 259.

8. Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 175 (S.D. Cal. 1955) (dictum), aff'd sub nom. Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), aff'd per curiam by an equally divided Court, 356 U.S. 43 (1958).

9. Thompson v. Gernsback, 94 F. Supp. 453, 454 (S.D.N.Y. 1950) (dictum).

10. Colliery Engineer Co. v. Ewald, 126 Fed. 843 (C.C.S.D.N.Y. 1903) (dictum).

11. Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955).

12. "As a true burlesque is not an imitation but a criticism of an original work, ordinarily it cannot be an imitation of or be 'passed off' as the original work." Yankwich, Parody and Burlesque in the Law of Copyright, 33 Can. B. Rev. 1130, 1154 (1955). "Parody, as criticism, is itself a socially desirable form of artistic creation and hence worthy of constitutional protection." Note, 56 Colum. L. Rev. 585, 603 (1956). "[B]urlesque is a form of criticism which inevitably copies some of the original work in order to carry out its purpose." The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77, 147 (1958).

13. It has also been suggested that to apply the doctrine of "fair use" strictly would be to violate the individual's constitutional right of free expression. See, e.g., The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77, 147 (1958). "Public criticism is generally acknowl-

Centuries ago parody was a very real part of the system of literary review. However, with the evolution of vaudeville and mass entertainment as "big business," this type of critical review has passed from the scene. Comedians today are certainly not thought of as literary critics. There would be no justification for extending liberal privileges to parody and burlesque while barring them from other profit-making endeavors.

Within the field of parody and burlesque then, how can we distinguish between usage which is fair and that which infringes? In 1955, Jack Benny burlesqued the movie *Gaslight*.[14] Later that year Sid Caesar did the same with *From Here to Eternity*.[15] An injunction was issued against Benny for his "infringement" of a copyright, while Caesar's skit was pronounced a fair usage. It is the purpose of this comment to explore the case history of this problem with the intention of evolving therefrom a workable and practical rule of law.

Early Case Law

The first United States case dealing directly with an alleged infringement of a copyright by parody and burlesque was *Bloom & Hamlin v. Nixon*.[16] Here the defendant, while imitating the actress Lotta Faust, sang the chorus of a copyrighted song, "Sammy," which Miss Faust had made famous. Plaintiffs, the owners of the copyright, brought an action to enjoin defendant from further performances of this act. In denying the injunction the court held that what was being represented were the peculiar actions, gestures, and tones of Miss Faust, and that the chorus of the song was used as a mere vehicle for carrying along the imitation.[17] The court stated that the person imitated and the copyrighted song were inseparable for purposes of parody, and that textual reproduction of merely the chorus would not constitute infringement.[18] The court added, however, that good faith was of the essence, and if the mimicry had been merely an attempt to evade the copyright law, an injunction would have been granted.[19]

The next case to arise, *Green v. Minzensheimer*,[20] was almost identical in its statement of facts. In this case the defendant used the chorus plus one verse while mimicking a singer who was also the owner of the copyright. Citing its previous decision, the court denied the injunction and held that

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edged to be a desirable social force and is within the realm of constitutionally protected free expression. . . . When the allegedly infringing work is a burlesque, it seems that courts should also consider in the balance the importance of protecting public comment and criticism." It is true that the Constitution guarantees freedom of speech, but it nowhere states that in the exercise of that right one may pilfer the property of another. In fact, one has the right to own and enjoy private property without fear of appropriation by another.

14. Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955).

15. Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955).

16. 125 Fed. 977 (C.C.E.D. Pa. 1903).

17. Id. at 978.

18. Ibid.

19. Ibid.

20. 177 Fed. 286 (C.C.S.D.N.Y. 1909).

defendant derived her popularity from her own cleverness, and furthermore, there was not sufficient infringement by her for an injunction to issue.[21] Immediately following this decision, the same court was presented with the case of *Green v. Luby*.[22] Again the facts were similar, but here the defendant sang the entire song. The court held that in order to imitate a singer it is not necessary to sing the entire song and, to do so, is an infringement of the copyright.[23] They carefully distinguished this decision from *Bloom & Hamlin v. Nixon*, where only the chorus had been utilized, and from *Green v. Minzenshcimer*, where there had been no musical accompaniment and where much less than the entire song had been sung.

About this same time, the first case in point arose in England.[24] The defendant had made a motion picture which in some respects resembled a novel which plaintiff had written. The court, in holding there was no infringement, found that the incidents of the film to which even remote resemblances to the novel could be found were exceedingly few in number or importance. Furthermore, the film was a farce which had changed all settings and dialogue. The court pointed out that to date there were no cases on record in England where burlesque of a play or novel had ever been held to be an infringement. It reasoned that this was probably true because: (1) parody is usually the best possible advertisement of the original and has often made an obscure work famous; and (2) no infringement takes place where a defendant has bestowed such mental labor upon what he has taken, and has subjected it to such a revision and alteration as to produce an original result.[25]

This decision was followed in the United States by the case of *Hill v. Whalen & Martell, Inc.*[26] There plaintiff was the owner of the copyrighted cartoon characters "Mutt" and "Jeff." Defendant devised two characters called "Nutt" and "Giff," who looked like, dressed like, and spoke like Mutt and Jeff, and incorporated them into a show called "In Cartoonland." The court, in granting an injunction, observed that one test, when applicable, is ordinarily decisive, *i.e.*, whether or not the reproduction has materially reduced the demand for the original.[27] It found that in this case the demand for the original was no doubt reduced by the presentation of defendant's show.[28]

With the background of the early parody and burlesque cases established, attention is now turned to the only two cases of recent vintage.

Recent Case Law

In the case of *Loew's Inc. v. Columbia Broadcasting Sys.*,[29] plaintiff sought injunctive relief against defendant to restrain it from further showings of

21. Ibid.
22. 177 Fed. 287 (C.C.S.D.N.Y. 1909).
23. Id. at 288.
24. Glyn v. Weston Feature Film Co., [1916] 1 Ch. 261.
25. Id. at 267-68.
26. 220 Fed. 359 (S.D.N.Y. 1914).
27. Id. at 360.
28. Ibid.
29. 131 F. Supp. 165 (S.D. Cal. 1955).

the Jack Benny television show in which plaintiff's copyrighted movie, *Gaslight*, had been burlesqued. Benny's writers had followed the original script very closely, at times verbatim, relying primarily on his unique method of expression and voice inflection for the comedy element. In fact, at the trial, his attorneys conceded a substantial taking through use of the same or similar locale, main setting, characters, story points, development, treatment of incidents, sequence of events, points of suspense, climax, and dialogue. They relied primarily on the theory that parody and burlesque provide an absolute defense to infringments of copyrights. The court granted the injunction declaring that parody and burlesque cannot be used as a mere device for selling entertainment through outright copying of another's material.[30] The court further mentioned that where the taking is for commercial gain, as in the case at bar, the rules will be applied much more strictly.[31] Furthermore, the material was taken by the television industry from the motion picture industry—highly competitive rivals.[32]

The issue becomes one of fact in each case with regard to the substantiality of the taking. If it is determined that the taking was substantial, then an infringement will exist. Yet, there is nothing wrong with taking an incident, a character, a theme, or even the bare plot. "That this line between the permissible and the forbidden may be hard to draw does not prevent its application."[33] This case is consistent then with the reasoning of *Green v. Luby.*

In the case of *Columbia Pictures Corp. v. National Broadcasting Co.*,[34] the same court which heard the *Benny* case decided that the parody and burlesque by Sid Caesar of *From Here to Eternity* did not constitute an infringement. The court reasoned quite logically that in burlesque, the doctrine of "fair use" must allow a sufficient amount of the original to be taken so that the artist is able to conjure up the original in the mind of the viewer.[35] This is a necessary step for a successful burlesque. The law permits a more extensive use of protectible material in the creation of burlesque than in the creation of other fictional or dramatic works. The skit by Caesar, titled *From Here to Obscurity*, was a new, original, and different work as compared with the motion picture and it possessed a new, original, and different development, treatment, and expression.

The famous beach scene of the movie became pure slapstick in Caesar's skit. He made his entrance wearing a bathing suit and a huge truck tube life preserver. Throughout the scene pails of water were thrown at him from offstage. The climax of the movie scene came when "Warden" got up the courage to ask "Karen" whether or not she had had affairs with men at the base. In the parody, Caesar mustered up enough courage to pop the all important question, "Did you bring the towel?"

30. Id. at 181.

31. Id. at 176.

32. Id. at 182.

33. Id. at 183, citing Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).

34. 137 F. Supp. 348 (S.D. Cal. 1955).

35. Id. at 354.

There was no similarity as to theme, characterizations, general story line, detailed sequence of incidents, dialogue, points of suspense, sub-climax or climax. Hence, the decision would seem to be consistent with the *Benny* case and is a reaffirmation of the old English case of *Glyn v. Weston Feature Film Co.*,[36] which held that a minor taking, coupled with originality of the taker, would not constitute infringement.

Status of the Law

The cases then have turned on the question of substantiality. The tests as to what constitutes a substantial taking have varied, but the issue has remained the same. With the rapid advancement and acceptance of television as a mass entertainment medium, we will no doubt see many more such cases. Thus it would seem that the need for a clear rule as to what constitutes substantiality is imperative.

The "tests" for substantiality which have been mentioned include: quantity,[37] quality,[38] intent of the taker,[39] degree of accompanying originality,[40] degree to which the demand for the original has been reduced,[41] and purpose for which used.[42] In addition to these, there are several other tests which pertain to infringement of copyright in general. These are whether the taking was for profit,[43] whether the value of the original has decreased[44] (a corollary of decreased demand), whether that which was taken was valuable in itself,[45] and the ordinary observer test,[46] *i.e.*, whether or not the average viewer would associate the reproduction with the original immediately upon viewing it. These latter tests, while not specifically mentioned as reasons for the decision in any parody case, were nevertheless discussed in some and were undoubtedly influential.

The first determination to be made in the analysis of any case is the purpose of the infringement. There is no question that a rather liberal taking will be allowed in the arts and sciences.[47] This is so in order " 'that the world may not

36. [1916] 1 Ch. 261.

37. Green v. Luby, 177 Fed. 287 (C.C.S.D.N.Y. 1909); Green v. Minzensheimer, 177 Fed. 286 (C.C.S.D.N.Y. 1909).

38. Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 353 (S.D. Cal. 1955).

39. Bloom & Hamlin v. Nixon, 125 Fed. 977 (C.C.E.D. Pa. 1903).

40. Green v. Minzensheimer, 177 Fed. 286 (S.D.N.Y. 1909); Glyn v. Weston Feature Film Co., [1916] 1 Ch. 261.

41. Hill v. Whalen & Martell, 220 Fed. 359 (S.D.N.Y. 1914).

42. Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955).

43. M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C.), aff'd, 2 F.2d 1020 (4th Cir. 1924).

44. Folsom v. Marsh, 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841).

45. Broadway Music Corp. v. F-R Publishing Corp., 31 F. Supp. 817 (S.D.N.Y. 1940).

46. Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18-19 (9th Cir.), cert. denied, 290 U.S. 669 (1933); King Features Syndicate v. Fleischer, 299 Fed. 533, 535 (2d Cir. 1924).

47. Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955); Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 175-76

be deprived of improvements, nor the progress of the arts be retarded.' "[48] "Arts" in this context is meant to include the classical and cultural arts, not theatrical parody and burlesque.[49]

Once it is established that the purpose of the infringement is parody and burlesque, the doctrine of "fair use" is more strictly applied. To determine whether or not the particular parody in question has exceeded those close limits, it is necessary then to determine whether any of the previously mentioned "tests" of substantiality are applicable.

The ordinary observer test can be eliminated at the outset. By the very definition of parody, an artist must be able to take, at the minimum, enough to conjure up the original in the mind of the viewer. The bare minimum required by a successful parody then, would prove fatal to the artist under such test.

Consideration of the profit purpose of the taking is also inappropriate. The copyright statute omits the words "for profit" in the subdivisions concerning dramatic works.[50] Since present in other sections,[51] it is reasonable enough to conclude that the omission was intentional.[52]

By case law, the degree to which the demand for the original has diminished is no longer a standard. Under this rule it had been necessary to show damages by virtue of the loss of demand. In the case of *Leon v. Pacific Tel. & Tel. Co.*,[53] however, it was ruled that damages were not necessary for an action to lie. The rights granted by the statute are absolute and the very interference with them is an infringement, whether or not damages result. This reasoning, making these statutory rights absolute,[54] would also appear to abolish the tests of intent of the taker, reduction in value of the original, and the value of that which was taken.

(S.D. Cal. 1955); Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (dictum).

48. Loew's Inc. v. Columbia Broadcasting Sys., supra note 47, at 175.

49. Ibid.

50. "To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art . . . ." 17 U.S.C. § 1(b) (1958).

"To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work. . . ." 17 U.S.C. § 1(c) (1958).

51. "To perform or represent the copyrighted work publicly if it be a drama . . . and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever. . . ." 17 U.S.C. § 1(d) (1958). "To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit. . . ." 17 U.S.C. § 1(e) (1958).

52. For cases of statutory construction, see generally Hanover Improvement Soc'y., Inc. v. Gagne, 92 F.2d 888 (1st Cir. 1937); In re Shear, 139 F. Supp. 217, 220-22 (N.D. Cal. 1956).

53. 91 F.2d 484 (9th Cir. 1937).

54. Of course this excludes takings protected by the doctrine of "fair use."

CONCLUSION

It is submitted that the three remaining standards—quantity, quality, and degree of originality—should form the nucleus of a rule of law governing parody and burlesque. These three alone are suited to the unique requisites of such a law. Quality and quantity should be the basis of the first determination in analyzing a case. If, for example, very few lines of an insignificant nature are used or, at the other extreme, if the bulk of the better known segments of a production are taken verbatim, there is no need to argue the point of originality. Undoubtedly, however, most cases would not be decided on the basis of quantity and quality alone. Where the question is a borderline one, the degree of originality utilized by the artist becomes very significant. A taking which could be decided either way on the basis of quantity and quality alone, if tempered and dominated by the originality of the artist, will be brought under the protection of the doctrine of "fair use."

In each case then, to determine whether a taking is substantial, it would be necessary to compare the two works to see if some isolated event, a small proportion of the total number of characters, the basic theme, or other such borrowing has served only as an inspiration or background for the individual unique talents of the artist. If, on the other hand, an artist attempts to be successful by using the labors of another in such a manner as to contribute nothing in the way of originality, this wholesale use—or more properly, misuse —will most certainly be considered substantial, and hence not entitled to the protection of "fair use."[55]

55. Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955)