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Wormser? Lovett!


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

- Best Speaker and Competition Winner—Stephen Lovett
- Writers of the Best Brief—Lindsey Lankford and Thomas Koger
- Finalists—Maura McInerney, Louis Craco and Stephen Fitzgerald
- Semifinalists—Virginia Ampe, Tom Koger, Kevin Galvin, Mark Schirmer and Barbara Flynn.

The quarterfinalists (top 16) grades ranged from 84.248 to 90.875. Average brief grade before penalties—82.41 (with penalties—81.61). Average overall grade—81.89.

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

The Moot Court Board wishes to express its gratitude to the 62 judges and the negotiating table. The grades were particularly close with over 40 students within 3 points of the top 16 cutoff.

Fordham JD/MBA

by Brian Dignan

Law and business are inextricably bound. Much of what lawyers do involves business, and business must always operate within the confines of the law. From forming a corporation to filing under Chapter 11, law and business go hand in hand. A consequence of this symbiosis is the demand for individuals proficient in both fields. In recent years the concept of a dual or joint degree has gained increasingly in popularity among both the legal community and the business profession. For this reason, and to meet the demand for these individuals, last year Fordham inaugurated its J.D./M.B.A. program.

As a participant in the program, I am happy to report that it has met with resounding success. While some continue to doubt the efficacy of a joint degree, the

majority of the feedback has been overwhelmingly positive. For example, last year the firm of Cravath, Swaine and Moore offered a $10,000 bonus for incoming associates with an M.B.A. Other firms have followed.

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

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

Some students consider the additional credentials superfluous. “I don’t need that. I’m going into litigation,” is the skeptic’s reply. My rejoinder is that much litigation is corporate, and on the issue of damages alone a familiarity with stock valuation models or the mathematics of net present value could prove invaluable. Of course, you would still need to bring in expert witnesses, but think how much more cogent you would present the case.

The consequence of this symbiosis is a dual or joint degree has gained increasingly in popularity among both the legal community and the business profession. For this reason, and to meet the demand for individuals proficient in both fields, a degree in finance will better prepare you for courses where accounting, tax, and financial considerations play an integral role in understanding substantive issues.

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

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

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

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

see p.11

IN THIS ISSUE... 

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

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

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

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

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

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

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

Pro Bono

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

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

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

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

Sympathies

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

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

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

Job Guide

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

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

Each Guide entry lists the following program information:

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Support Fordham Pro Bono

Paris Clinicals

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

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

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

The Paris program is one of 6 summer programs offered by USD. The others are Dublin on international human rights, London on international business, Mexico on law of the Americas, Oxford on non-business Anglo-American comparative law, and Russia-Poland on east-west trade and socialist law. For further information, write Mrs. Sue Coursey, USD Law School, Alcala Park, San Diego, CA 92110.

ABA/LSD

PUBLICATION GUIDELINES

1. All copy must be TYPED and DOUBLE-SPACED.
2. Deadlines will be approximately the FIFTEENTH of each month. Specifications will be posted.
3. Submission does not guarantee immediate publication. The editors reserve the right to reject or edit copy at their discretion.
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The Third Circuit Court of Appeals has upheld the theory that random drug tests on jockeys do not represent an invasion of their privacy. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

The ruling supported regulations adopted by the New Jersey Racing Commission that permit the State Racing Stewards to require jockeys, trainers, or groom to submit to breathalyzer and urine testing to detect alcohol or drug consumption.

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

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

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

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### Beatles

by Renee Hill

Last summer the California Superior Court awarded the Beatles' record and holding company, Apple Corps. Ltd., nearly eight million dollars for the "massive appropriation" of the Beatles' right of publicity by the creators and producers of the stage and show film "Beatlemania". *Apple Corps. Ltd. v. Leber*, 32 F.R.D, 656 (S.D. Cal. 1986). The right of publicity involves the right of celebrities to control and profit from the exploitation of their names, likenesses, and fame. *See Huelin Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953). Beatlemania was a stage show created by defendant Steve Leber consisting of Beatles' impersonators performing the group's songs to a mixed media background and a foreground of slides and movies depicting the sixties. A Beatlemania film was also produced. *Apple Corps. Ltd. v. Leber*, was initiated in 1979 for invasion of the Beatles' right of publicity and unfair competition.

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

The defendant argued that "Beatlemania" offended an historical overview of the 1960's by including multi-media presentations which contained social and political events. The Copyright Act of 1976, 17 U.S.C. Sec. 106, to authorize the public performance of the works and claimed that the video store infringed on this right.

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

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### Parody and Fair Use

by Michael R. Graham

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

It has never been simple to predict when a court will hold a parody immune from attacks of irate authors whose work is lampooned or made the source of parody. On the one hand, even Woody Allen's included in the package was a "work of art... that some people may find shocking, repulsive, or offensive. Life can sometimes be that way." The work of art was a 24-inch poster created by H.R. Giger called "Penis Landscape." Offended yet? Good. The painting depicted genitalia in sexual contact. How about now, are you offended yet?

Mary Sierra was so offended that she sent the poster, along with a complaint to the State Attorney General's office. The material was forwarded to the Los Angeles plainclothes police searched the apartment of lead singer Jello Biafra (name used to protect the innocent; real name: Eric Boucher). Biafra is also the owner of Alternative Tentacles Records, which is the Dead Kennedys' label.

Biafra, Michael Bonnano (former label general manager), Debra Ruth Schwartz (general manager of Mordam Records, a regional subdistributor), Steve Boudreau (president of Greenworld Distributors, an independent label distributor), and Salvatore Alberti (of Alberti Record Manufacturers, the firm that assembled the album package) were all charged on June 3 with one count of misdemeanor violation of Section 313.1 of the California Penal Code forbidding distribution of "harmful material" to minors. If convicted the defendants face a maximum penalty of a year in jail and a $2,000 fine.

In an interview with *Billboard* magazine Biafra said, "The beauty of the [Giger] painting is its depiction of the putrefaction [sic] of our consumer culture. If we thought it was harmful or exploitative we never would have used it to begin with."

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### Video

by Wallace E.J. Collins III

The Third Circuit Court of Appeals has held that videocassette stores may not rent private screening rooms to customers. *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986). The practice infringes on the exclusive right of motion picture studios to "authorize" the public performance of copyrighted motion pictures.

This case originated in 1984 when ten major motion picture companies filed suit for lost royalties against Aveco, Inc. and John Leonard, owner of Nickelodeon Video Showcase, a video store that included video viewing parlors. The studios, as owners of the copyrights in the motion pictures, possess the exclusive right under the Copyright Act of 1976, 17 U.S.C. Sec. 106, to authorize the public performance of the works and claimed that the video store infringed on this right.

The Court held that watching the videotapes in a rented room—ranging in size from a one-person booth to a small lounge—constituted a public showing.
Thus, American copyright law encourages limited constitutional grant focuses upon in order to realize financial gain. The lic economic philosophy these rights create only a limited reproduction, derivative use, distribution, Authors .. . the exclusive Right to their Congress to the Arts by making . . . the monopoly granted by copyright. As Professor Chafee put it, "A dwarf standing on the shoulders of a giant can see farther than those of himself." ("Copyright Law") The result was the development of a "fair use" defense to infringement. Certain types of works were considered to advance the arts despite or through their use of portions of original works. These included criticism, commentary, and news reporting. However, since every fair use inquiry is fact-specific, determining whether a specific use is "fair" is one of the most difficult inquiries of copyright law.

The fair use doctrine is a rule of reason fashioned by Judges to balance the competing interests of the author's right to compensation for his creative endeavors and the public's interest in the widest possible dissemination of ideas and information.

Although no single definition of fair use has been accepted by the courts, the most frequently quoted definition is that fair use is that it is "a privilege in others than the owner of a copyright . . . a copyrightable material in a reasonable manner without his consent, notwithstanding the monopoly granted to the [copyright] owner." Thus, it "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." However, fair use has been characterized as stopping short of allowing the copyright Owner of a copyrighted work as a whole; and (1) the purpose and character of the use, including whether such use is of a commercial nature or 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 or value of the copyrighted work.

1. The purpose and character of the use.

This factor first focuses upon the purpose for which the work is being used. If the purpose falls within one of the traditionally protected areas of news reporting, education, or criticism, then the use is presumed to be fair.

If it is not, focus is directed to whether the new work is "productive use" in the sense that the copier has engaged in "creating a work of authorship whereby he adds his own original contribution to that which is copied." Many courts have granted more weight to the use made of a copyright work is commercial in nature or for profit. Every commercial use of copyrighted material is presumption that the monopoly privilege that belongs to the owner of the copyright.

However, where the purpose of a work is both to make money and to facilitate access by the public to information or to create an independently creative work, the fact that there may be some profit motive does not preclude there being fair use.

2. The nature of the copyrighted work.

This factor focuses upon whether the copyrighted work is one entitled to broad or narrow copyright protection. Considerations of the degree of protection to be afforded a specific work include the amount of original effort that went into the work and the degree to which the author should have expected his writings to be copied in lesser works. The courts consider whether any copy was likely to have fair use claims where the infringing work is in the same medium as the original.

3. The amount and substantiality of use.

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

4. The effect of the use on the potential market for or value of the copyrighted work.

This factor raises more than merely the question of the extent of direct damages an author may suffer because of the activities of the use. In determining the effect the user's work may have upon the potential market or value of the original work, the courts consider whether a subsequent use would adversely affect the value of the rights an author enjoys in the copyrighted work. If, so, the use is not considered fair even if these rights have not been exercised by the original's author. Thus, if a work impairs an author's right to control or exclusive control over the derivative works, sell movie or ancillary rights, or otherwise profit from his work, it would not be a fair use.

Another consideration is whether the subsequent work would have the effect of supplanting the original by "fulfilling the demand for the original." In Berlin v. E.C. Publications, Inc., the Second Circuit held that references to the music of Irving Berlin in Mad magazine constituted a possible infringement. However, it held that this was fair use insofar as the lyrics included in the magazine were satirical versions which did not fulfill the demands of the originals.

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

B. The Parody Fair Use Analysis

The real difficulty in determining whether a specific use of a copyrighted work is a fair use lies in determining the weight to be given to the various fair use factors. Since copyright is an equitable action, and fair use under either the Copyright Act or common law copyright is founded on fact-specific and action are fact-specific and judges have applied these factors on an ad hoc basis. Thus, there has traditionally been very little predictability in such defenses. It appears, however, that emphasis in all fair use cases must now be put on the effect of the challenged use upon the value of the potential market for the copyrighted work. In addition, parodies may assimilate at least enough of the source work to constitute even utilize verbatim passages. This predictability has developed in only the last three years, however, and may still be subject to judicial fiat.

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

The "conjure up" or "substantially of taking" test limited the amount of work which could be appropriated for parody to that which was necessary to recall the original work. Thus, the Ninth Circuit in Walt Disney Productions v. Air Pirates declared that the fair use defense would not be applied to permit "copying that is virtually complete or almost verbatim." A parody could not take more than a
necessary and was not entitled to create "the best parody possible."\footnote{This is a direct quote from the text.} Thus, the use of recognizable Disney characters in a bawdy, obscene poster was held to be an infringement.

The Second Circuit adopted the "con- jure-up" test and held that parodies and satires are "reserved for the benefit of the intellect... and not a limitation:... this purpose is necessarily and was not entitled to create "the best parody possible."

This "reasonableness of taking" or "economic effect" test was extended in Eislmer Music, Inc., v. National Broadcasting Co.,\footnote{This is a direct quote from the text.} In which the Second Circuit held that the "conjure-up" test was a recognition of the parodist's need to utilize elements of the original, and not a limitation: "Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing to the economic effect or commentary."\footnote{This is a direct quote from the text.} Use of four bars of music from the "I Love New York" jingle for the Saturday Night Live parody, "I Love Sodom" was held to be fair. Although that court seemed to have taken a back- ward step in MCA, Inc. v. Wilson,\footnote{This is a direct quote from the text.} holding that the song "Cunnilingus Champion of Company C" was not a parody of the Andrews Sisters' "Boogie Woogie Bugle Boy of Company B," it was held that Arabian Nights, like Air Pirates, can better be understood as "recital to the obscene nature of the parody."\footnote{This is a direct quote from the text.}

The Supreme Court finally entered the fray in Sony Corp. of America v. Universal City Stu by considering the fair use doctrine for the first time. The Court held that a fair use analysis must focus primarily on the economic impact of the challenged user. The Ninth Circuit had held that "the real purpose of the copyright scheme is to encourage works of the intellect, and... this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the scheme."\footnote{This is a direct quote from the text.} Balancing the social value of the use of videocassettes recorders to "time shift" with the effect of this substitution for televised motion pictures, the Supreme Court held that the lack of any real threat of economic detriment to the copyright holder or the owner in this case Sony was not a contributory infringement.\footnote{This is a direct quote from the text.} More importantly, the Court noted that the lack of economic harm overcome the presumption that verbatim taking cannot be fair use. While this decision may lack internal consistency, it heralded a return of fair use considerations to the utilitarian basis of copyright law.\footnote{This is a direct quote from the text.}

In Harper & Row Publishers v. Nation Enterprises,\footnote{This is a direct quote from the text.} the Supreme Court overturned a Second Circuit decision in which the unauthorized adoption of and reprinting of 300 words from the memoirs of President Gerald Ford was held to be fair use. The Court held: "This is a case of substitution, not of free flow of ideas under the doctrine of fair use. Instead, they seek to augment the commercial value of their own property by creating new, and detrimental associations..."

The Second Circuit eventually reaffirmed its use of the economic harm model in Warner Brothers v. American Broadcasting Co.\footnote{This is a direct quote from the text.} There, the court denied the plaintiff's claim that the use of parody of Superman in the television program "The Greatest American Hero" was an infringement. While the court found evidence of taking, it had been "use[d] as a springboard to create an independent intellectual property."\footnote{This is a direct quote from the text.} The district court granted summary judgment for the defendant and the Second Circuit affirmed, reiterating the constitutional basis for the parody defense: "This branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law. It also balances the public's interest in the free flow of Ideas with the copyright holders' interest in the use... The use of a copyrighted right material will not, however, be protected when it is merely appropriated to promote the sale of commercial product."

Use of parody to create an independently creative work was therefore held to be protected.

The District Court for the Southern District of New York recently went so far as to apply a parody analysis in an action brought by the late landmark comic book company "Famous in York's unfair competition law, Universal City Studios, Inc. v. T-Shirt Gallery, Ltd.\footnote{This is a direct quote from the text.} Judge Sprizzo held that a "Miami Mike" t-shirt was an obvious parody of the television show, "Miami Vice." The obviousness of the parody, wrote Sprizzo, "highlights the difference between the two products," thereby decreasing any likelihood of confusion.

The conflict between Second Circuit and Ninth Circuit parody analysis appears to have been settled. In two parody cases just out of the Ninth Circuit, that Court of Appeals abandoned the "conjured test". In Fisher v. Dees, the court re- jected the "right view" that the substantial- ity factor requires that no greater amount of a work be appropriated than is necessary to "evoke only initial recognition in the listener."\footnote{This is a direct quote from the text.} Held that the parody "When Sonny Sniffs Gas," did not infringe "When Sonny Gets Blue," the Court af- firmed that the economic factor "is undoubtably the single most important element of fair use."\footnote{This is a direct quote from the text.} It also outlined the meaning for applying this element to parody:

The economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad re- view can have that effect—but rather whether it fulfills the demand for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in the market for the original is aimed at, or in which the original is, has reasonably potential to become, commer- cially valuable.
The Supreme Court test is satisfied if the "work, taken as a whole, appeals to the prurient interest," whereas in California a work only violates the statute if the "predominant appeal" of the work, taken as a whole, is to the prurient interest. The use of the word "predominant" implies that something showing is required because it seems to narrow the category of "obscene" works.

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

(Justice White, Blackmun, Burger, Powell, and Rehnquist, dissenting) (1973.)

Miller is a serious painting by a valid artist, H.R. Giger. Giger won the 1980 Academy Award for special effects for the movie "Alien." Obviously, Giger is not a pornographic outlaw to corrupt youth. However, the California court may rule that this painting has no "serious social value" for minors because of the subjectivity of the evaluation and the ambiguity of the phrase.

(See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (BRENNAN, J., dissenting) "The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have recognized that obscenity exists and that we "know it when [we] see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (STEWART, J., concurring) (1964), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.")

Miller allows the states to ban only "hard core" sexual conduct. As defined within the Miller case, "hard core" sexual conduct is of two types: A) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and B) Patently offensive representations or descriptions of masturbation, excretory functions and livery exhibition of the genitals. Miller v. California, 413 U.S. 15, 25 (1973). The painting in question might conceivably fall under either type.

An Open Letter From Fr. Bruce Ritter

Dear Friends,

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

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

"My brothers are hungry," she said.

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

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

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

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

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

I learned the hard way.

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

Word of mouth traveled fast. (It does among streets kids.) The next day four more came. And kids have been coming ever since. These kids—with no place else to go—homeless, hungry, lacking skills, jobs, resources—compelled me to start Covenant House seventeen years ago.

Today our crisis centers help tens of thousands of kids from all over the country—and save them from a life of degradation and horror on the streets.

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

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

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

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

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

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

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

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

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

Peace,

Father Bruce Ritter

Covenant House

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

The Entertainment Law Special was conceived and created by the Entertainment and Sports Law Council under the leadership of Randy Finch and Roger Kramer.

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For more information about the Entertainment and Sports Law Council contact Randy Finch or Roger Kramer.

HAPPY HOLIDAYS FROM THE EDITORS AND STAFF OF THE ADVOCATE
Notes

from p. 7

3 See 3 Nimmer § 13.03.


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

See 3 Nimmer § 13.03[A], n. 56 at 13-25 for cases holding minimal amounts as substantial takings.

2 Nimmer § 13.05[A].

See Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202 (N.D. Tex. 1981) (A television commercial may not be copied in another television commercial. But see Triangle Publications, 626 F. 2d 1171 (Photograph of cover of Television Guide used in advertisement for a competing guide to television viewing held to be fair use.).

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

3 See Nimmer § 13.05[A][2].

See The Nation, 105 S. Ct. 2218 (1985) (verbatim copying of 300 words out of a total of approximately 200,000 words in plaintiffs' work held not to be fair use) and Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (verbatim copying of 29 words out of a total of 2,000 words held fair use).

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


See 3 Nimmer § 13.03[A], n. 56 at 13-25 for cases holding minimal amounts as substantial takings.

3 Nimmer § 13.05[A][4].

2 Nimmer § 13.05[B].


See notes 54-66 (infra and accompanying text.

See M. Simensky's insightful article documenting the development of the parody doctrine Recent Developments in Copyright Law's "Fair-Use Doctrine": A Business Approach, N.Y.L.J. 4 (November 29, 1985). See also Triangle Publications, 626 F.2d 1171 (Photograph of cover of Television Guide used in advertisement for a competing guide to television viewing held to be fair use.).

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Ventrill que Those Frustrations Away

by Michael Goldberger

During my first year, I was one of the few students to use the new top floor of the library, a small, well lit room now known as "S7." At that time it was simply "the attic." The white noise generated by the rumbling of the ventilation plant made the attic a particularly pleasant place to work. Like clockwork, though, the noise would cease at 9:37 each weekday night. The primary advantage of the attic, however, was its proximity to the ventilation systems. As long as the system was on, the room remained comfortable. On weekends, however, no such luxury as adequate ventilation was offered. The system was shut down on Friday and not resumed until Monday. Most students sought more comfortable places outside the library to study and this appears to be the case this year. Despite the annual complaints from students, the library is still impressively oppressive on weekends.

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

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

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

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

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

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