FAIR USE AND PARODY

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

KAUFMAN, Circuit Judge:

Through depression and boom, war and peace, Tin Pan Alley has light-heartedly insisted that 'the whole world laughs' with a laugher, and that 'the best things in life are free.' In an apparent departure from these delightful sentiments, the owners of the copyrights upon some twenty-five popular songs instituted this action against the publishers, employees and distributors of 'Mad Magazine,' alleging that Mad's publication of satiric parody lyrics to plaintiffs' songs infringed the copyrighted originals, despite Mad's failure to reproduce the music of plaintiffs' compositions in any form whatsoever. Twenty-five causes of action were alleged, each representing a particular song copyrighted by the plaintiffs and parodied by the defendants.

. . . [T]he District Court awarded summary judgment to the defendants as to twenty-three of the claims, finding no similarities in mood, content, or purpose between the original lyrics and the parodies; concluding that the two remaining causes of action presented closer questions, the court denied summary relief to both parties as to these two claims. Asserting that the District Court decision constituted an invitation to plagiarism, the plaintiffs appealed.

The validity of plaintiffs' copyrights has never been challenged, and we need concern ourselves here only with the nature, purpose and effect of the alleged infringements. The parodies were published as a 'special bonus' to the Fourth Annual Edition of Mad, whose cover characterized its contents as 'More Trash From Mad—A Sickening Collection of Humor and Satire From Past Issues,' and almost prophetically carried this admonition for its readers: 'For Solo or Group Participation (Followed by Arrest).' Defendants' efforts were billed as 'a collection of parody lyrics to 57 old standards which reflect the idiotic world we live in today.' Divided into nine categories, ranging from 'Songs of Space & The Atom' to 'Songs of Sports,' they were accompanied by the notation that they were to be 'Sung to' or 'Sung to the tune of' a well-known popular song—in twenty-five cases, the plaintiffs' copyrighted compositions. So that this musical direction might feasibly be obeyed, the parodies were written in the same meter as the original lyrics.

The District Court observed that the theme and content of the parodies differed markedly from those of the originals. Thus, 'The Last Time I Saw Paris,' originally written as a nostalgic ballad which tenderly recalled pre-war France, became in defendants' hands 'The First Time I Saw Maris,' a caustic commentary upon the tendency of a baseball hero to become a television pitchman, more prone to tempt injury with the razor blade which he advertises than with the hazards of the game which he plays. Similarly, defendants transformed the plaintiffs' 'A Pretty Girl Is Like a Melody,' into 'Louella Schwartz Describes Her Malady'; what was originally a tribute to feminine beauty became a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight. As might be inferred from the range of categories presented and the foregoing examples of defendants' works, the parodies were as diverse in their targets for satire as they were broad in their humor.

While the plaintiffs have resolutely insisted that the defendants' use of the original songs as a vehicle for the parodies was wrongful, and have alleged, in general terms, that the claimed infringements 'caused substantial and irreparable damage,' they have not indicated with any degree of particularity the manner in which injury might have been inflicted. There is no allegation akin to 'passing-off'; with considerable reason, the plaintiffs have not asserted that the music-buying public could have had any difficulty in differentiating between the works of plaintiffs and defendants. Neither is there a claim that defendants' parodies might satisfy or even partially fulfill the demand for plaintiffs' originals; quite soundly, it is not suggested that 'Louella Schwartz Describes Her Malady' might be an acceptable substitute for a potential patron of 'A Pretty Girl Is Like a Melody.'

Rather, plaintiffs appear to seek redress upon a theory of copyright relief, closely resembling that behind recovery for unjust enrichment. Pointing to the use of the titles, the meter, and an occasional phrase from the original lyrics in an occasional song, the plaintiffs insist that their copyrighted efforts were improperly appropriated by the defendants for their own financial gain. Asserting that the copyright laws restrict the economic benefits of copyrighted works to the copyright holders, they reject the notion that a parody or burlesque version of the original may ever be justified as the sort of 'fair use' which traditionally has permitted a literary critic to employ limited quotations from the copyrighted work under review. Indeed the plaintiffs broadly maintain, 'copying for commercial gain may never be fair use' and thus, in effect, they refuse to recognize parody and burlesque as independent forms of creative effort possessing distinctive literary qualities worthy of judicial protection in the public interest.

While indeed broad, the area in which a copyright proprietor is permitted the exclusive commercial benefits of his copyrighted work is clearly not without limit. In the words of Article I, Section 8, of the Constitution, copyright protection is designed 'To promote the Progress of Science and useful Arts,' and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself. As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry. See Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569 (1963).

Turning to the specific question before us, we find that the extent to which a parodist may borrow from the work he attempts to burlesque is largely unsettled. The earlier American cases, although generally cited in most discussions of the question, are of little assistance. Such decisions as *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D.Pa.1903); *Green v. Minzensheimer*, 177 F. 286 (C.C.S.D.N.Y.1909); and *Green v. Luby*, 177 F. 287 (C.C.S.D.N.Y.1909), did not deal with the parody of a copyrighted work, but with imitations of a particular artist's style of performing, in which portions of a copyrighted song were incidentally employed. Alternatively, in *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y.1914), the defense of 'parody' or 'burlesque' was clearly invoked in bad faith, as an attempt to justify a taking designed substantially to satisfy the demand for the copyrighted original.

Most contemporary discussions of the treatment to be afforded parody were stimulated by two related cases which arose in the Southern District of California. See Loew's, Inc. v. Columbia Broadcasting System, 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); Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D.Cal.1955). In the Loew's case, television comedian Jack Benny was alleged to have infringed the copyright upon 'Gaslight,' a motion picture which he satirized in a televised sketch entitled 'Autolight'; in the Columbia litigation, 'From Here to Obscurity,' a television burlesque by comedian Sid Caesar upon the screen version of 'From Here to Eternity,' was at issue. Although the same District Judge wrote the opinions in both cases, the plaintiffs were permitted to recover for the Benny parody, but were denied relief in the Caesar case.

The distinction between the two situations, Judge Carter reasoned, turned on the relative significance of 'substantiality'—in terms of both quality and quantity—of the material taken from the original motion pictures. In both cases, the Court recognized in painstaking and scholarly opinions the historic importance and social value of parody and burlesque; in both, it conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to 'recall or conjure up' the original work if the parody is to be successful. But in Benny's case, the Court concluded, this license had been grossly exceeded. Not only had the parody followed the general plot of the original motion picture, but specific incidents and details had been copied and extensive portions of the dialogue had been reproduced verbatim. It was this borrowing from the original to a far greater degree than that required if the parody is to 'recall or conjure up' that original, which caused the court to reject the defense of 'burlesque'; and, it was in this context that the Court of Appeals for the Ninth Circuit affirmed Judge Carter's determination.

But despite Benny's 'borrowing' of substantially more material from the copyrighted original than was necessary for a successful burlesque, the Benny holding and its accompanying dictum

suggesting that parody could not be justified as 'fair use' was roundly criticized by many commentators. Several scholars believed that the decisions of both the District Court and the Court of Appeals were unduly restrictive; the fear was expressed that the art of parody, which has thrived from the time of Chaucer to, on a somewhat different level, the current vogue for the lyrics of Allen Sherman, would be stifled if its propriety were tested entirely by the precise amount appropriated from the original.

In the present case, it is not necessary to determine whether parody and satire require a greater freedom than that afforded by the 'substantiality' test outlined in Benny. We believe in any event that the parody lyrics involved in this appeal would be permissible under the most rigorous application of the 'substantiality' requirement. The disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater. In the vast majority of cases, the rhyme scheme of the parodies bears no relationship whatsoever to that of the originals. While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to 'recall or conjure up' the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a 'substantial' taking, if that standard is not to be woodenly applied. Similarly, the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.

In short, we believe that whatever use was made of the plaintiffs' works in this case fell far short of the 'substantial' takings which were involved in Benny, even if we were to find the rationale of that opinion persuasive. While the social interest in encouraging the broad-gauged burlesques of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. For, as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' 'Don Quixote' and Swift's 'Gulliver's Travels,' or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper.

Judgment affirmed.

Elsmere Music, Inc. v. NBC, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)

GOETTEL, District Judge:

In the dark days of 1977, when the City of New York teetered on the brink of bankruptcy and its name had become synonymous with sin, there came forth upon the land a message of hope. On the television screens of America there appeared the image of a top-hatted Broadway showgirl, backed by an advancing phalanx of dancers, chanting:

"I-I-I-I-I-I Love New Yo-o-o-o-o-o-rk!"

Repeated again and again (to musical accompaniment), with increasing intensity throughout the commercial, this slogan was to become the theme for an extensive series of advertisements that were to bring the nation assurances from the stars of Broadway, ranging from Dracula to the Cowardly Lion, that all was well, and that they too Loved New York.

As an ad campaign for an ailing city, it was an unparalleled success. Crucial to the campaign was the brief but exhilarating musical theme written by Steve Karmen who had previously authored a number of highly successful commercial jingles, including "You Can Take Salem Out of the Country" and

"Weekends Were Made for Michelob." While the "I Love New York" song was written for the New York State Department of Commerce, its initial use and identity focused on New York City.

The success of this campaign did not go unnoticed in the entertainment world. On May 20, 1978, the popular weekly variety program "Saturday Night Live" ("SNL") performed a comedy sketch over defendant National Broadcasting Company's network. In this sketch the cast of SNL, portraying the mayor and the members of the Chamber of Commerce of the biblical city of Sodom, are seen discussing Sodom's poor public image with out of towners, and the effect this was having on the tourist trade. In an attempt to recast the City's image in a more positive light, a new advertising campaign emphasizing the less sensational aspects of Sodom nightlife is unveiled. As the highlight of this campaign the song "I Love Sodom" is sung *a cappella* by a chorus line of three SNL regulars to the tune of "I Love New York," with the words "I Love Sodom" repeated three times.

The plaintiff, Elsmere Music, Inc., the copyright proprietor of "I Love New York," did not see the humor of the sketch. It sued for copyright infringement.

. . . .

The defendant admits that its sketch and song were intended to resemble the original "I Love New York" advertising campaign and jingle. It claims, however, that the use made of the plaintiff's melody was no more than was necessary to create an effective parody, and that as such was, at worst, a *de minimis* infringement. Alternatively, the defendant asserts that, even if the infringement was more than *de minimis*, it still did not constitute an actionable copyright violation since such use was permitted as a fair use under section 101 of the 1976 Copyright Act, 17 U.S.C. § 107.

The plaintiff contests these assertions. It contends that the use made was not *de minimis*, and in fact was far more extensive than was necessary to conjure up the original. In addition, it claims that the singing of "I Love Sodom" did not constitute a fair use since it was part of a sketch that parodied New York City and the problems it was having, rather than one parodying New York State, its advertising campaign, or the song "I Love New York" itself.

In its entirety, the original song "I Love New York" is composed of a 45 word lyric and 100 measures. Of this only four notes, D C D E (in that sequence), and the words "I Love" were taken and used in the SNL sketch (although they were repeated 3 or 4 times). As a result, the defendant now argues that the use it made was insufficient to constitute copyright infringement.

This Court does not agree. Although it is clear that, on its face, the taking involved in this action is relatively slight, on closer examination it becomes apparent that this portion of the piece, the musical phrase that the lyrics "I Love New York" accompany, is the heart of the composition.[6] Use of such a significant (albeit less than extensive) portion of the composition is far more than merely a *de minimis* taking. The tune of "I Love Sodom" is easily recognizable as "having been appropriated from the copyrighted work," and is a taking of a substantial nature. Accordingly, such taking is capable of rising to the level of a copyright infringement.

Having so determined, the Court must next address the question of whether the defendant's copying of the plaintiff's jingle constituted a fair use which would exempt it from liability under the Copyright Act. Fair use has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright." The determination of whether a use constitutes a fair use or is a copyright infringement requires an examination of the facts in each case. To assist in making this determination, section 101 of the 1976 Copyright Act, 17 U.S.C. § 107, sets forth several criteria to be considered: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the

[6] It is this musical phrase, for example, that is constantly repeated during the course of most of the "I Love New York" campaign's television commercials and serves as the musical theme for such commercials.

amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

The defendant asserts that the purpose and nature of its copying of "I Love New York" was parody, and that its copying was thus a fair use of the song. It has been held that an author is entitled to more extensive use of another's copyrighted work in creating a parody than in creating other fictional or dramatic works, since "short of . . . (a) complete identity of content, the disparity of functions between a serious work, and a satire based upon it, may justify the defense of fair use even where substantial similarity exists." 3 M. Nimmer, Nimmer on Copyright § 13.05(C), at 13-60-61 (1979).

In the leading case of *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), the court was faced with deciding whether certain parody lyrics printed in Mad Magazine, intended to comment humorously upon the "idiotic" world of that time, and designed to be sung to the tunes of various popular songs, infringed upon the copyrights of those songs. Noting that "as a general proposition, . . . parody and satire *are* deserving of substantial freedom," the court held that, as the defendants had taken no more of the original songs than was necessary to "recall or 'conjure up' the object of his satire," and as the parody had "neither the intent nor the effect of fulfilling the demand for the original," no infringement had taken place.

The song "I Love Sodom," as well as the sketch of which it was a part, was clearly an attempt by the writers and cast of SNL to satirize the way in which New York City has attempted to improve its somewhat tarnished image through the use of a slick advertising campaign. As such, the defendant's copying of the song "I Love New York" seems to come within the definition of parody. The plaintiff, however, relying upon *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y.1976), and *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y.1975), contends that, while the sketch may have parodied New York City and its problems, it had nothing to do with, and did not parody, either New York State and its "I Love New York" advertising campaign or the song "I Love New York" itself. As a result, the plaintiff asserts that the copying of its song constituted an infringement upon it and not a fair use.

In *MCA, Inc. v. Wilson*, *supra*, the court was presented with the question of whether the song "Cunnilingus Champion of Company C" as used in the play "Let My People Come A Sexual Musical" infringed upon the copyright of the song "Boogie Woogie Bugle Boy of Company B." Finding that the defendant's song, although it "may have sought to parody life, or more particularly sexual mores and taboos," did not attempt to parody or "comment ludicrously upon Bugle Boy" itself, the court held that there had been no fair use and that as a result the plaintiff's copyright had been infringed. Similarly, in *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. at 1398, the court held that, while the defendants may have been seeking in their display of bestiality to parody life, they did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material. In neither of these cases did the infringed upon musical piece relate, in any respect, to the subject that was being parodied.

The plaintiff asserts that, as the defendants did not attempt to parody the song "I Love New York" itself, the singing of "I Love Sodom" did not, under *MCA* or *Walt Disney*, constitute a fair use. We cannot agree. The song "I Love Sodom" in the sketch was intended to symbolize a catchy, upbeat tune that would divert a potential tourist's attention from the town's reputation for gambling, gluttony, idol worshipping, and, of course, sodomy. The song was as much a parody of the song "I Love New York," a catchy, upbeat tune intended to alter a potential tourist's perceptions of New York as it was of the overall "I Love New York" advertising campaign.

In addition, even if it were found that "I Love Sodom" did not parody the plaintiff's song itself, that finding would not preclude a finding of fair use. Under the holding of *Berlin v. E.C. Publications, Inc.*, *supra*, and the criteria set down in section 101 of the 1976 Copyright Act, 17 U.S.C. § 107, the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself. To the extent that either *MCA* or *Walt Disney* can be read to require that there be an identity between the song copied and the subject of the parody, this Court disagrees.

Similarly, the Court does not accept the plaintiff's contention that, because "I Love Sodom" and the sketch of which it was a part related to the city and not the state of New York, they did not constitute a valid parody of the "I Love New York" advertising campaign. Although "I Love New York" may originally have been commissioned by the state, and may continue to be utilized as the theme for the state advertising campaign, the manner in which the song has been used has also served to create a strong identification between the song and the City of New York. The extensive use of the "I Love New York" jingle and theme in connection with many advertisements (in both the print and electronic media) relating exclusively to New York City, has made the song as much the anthem of the city as of the state. As a result, the Court believes that this campaign and song, which have been used, at least in substantial part, to sell the city, are an appropriate target of parody with regard to the City of New York.

Having found that the SNL sketch and song validly parodied the plaintiff's jingle and the "I Love New York" advertising campaign in general, the Court next turns to the important question of whether such use has tended to interfere with the marketability of the copyrighted work. In this regard, it is clear to the Court that the defendant's playing of the song "I Love Sodom" has not so interfered. The song has not affected the value of the copyrighted work. Neither has it had nor could it have the "effect of fulfilling the demand for the original." Just as imitation may be the sincerest form of flattery, parody is an acknowledgment of the importance of the thing parodied. In short, the defendant's version of the jingle has not in the least competed with or detracted from plaintiff's work.

We turn finally to the extent of the use. The plaintiff argues that, as a result of the multiple repetition of the phrase "I Love Sodom" at the end of the SNL sketch, the defendant has appropriated more of the plaintiff's work than was necessary to "conjure up" the original. The Court does not agree. In the "I Love New York" television advertisements, and particularly in the "show tour" commercials, which relate specifically to the city, the phrase "I Love New York" is repeated to musical accompaniment continuously throughout. Thus, while a single recital of "I Love Sodom" might have alerted a viewer of the sketch as to the target of the parody, the repetition of the phrase served not only to insure that its viewers were so alerted, but also to parody the form of these frequently broadcast advertisements themselves. As a result, the repetition furthered the overall satirical effect. In addition, the Court believes that the repetition of the phrase, sung *a capella* and lasting for only eighteen seconds, cannot be said to be clearly more than was necessary to "conjure up" the original. Nor was it so substantial a taking as to preclude this use from being a fair one.

Basing its decision on undisputed facts presented by the parties, as well as on a videotaped viewing of the television sketch containing the alleged infringement, the Court finds that the defendant's use of the plaintiff's jingle in the SNL sketch was a fair use, and that as a result no copyright violation occurred. Accordingly, the plaintiff's motion for summary judgment is denied, and the defendant's motion for summary judgment is granted. This action is hereby dismissed.

SO ORDERED.

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

GRAAFEILAND, Circuit Judge:

From January 1974 until July 1976, a show called "Let My People Come" was performed at the Village Gate, a cabaret in the Greenwich Village section of New York City. Thereafter, it had short runs in several other cabarets and legitimate theaters. The producers, perhaps wisely, refrained from seeking reviews by established theater critics. However, columnists who viewed the production described it, among other things, as an "erotic nude show" with "sex content raunchy enough to satisfy the most jaded porno palate", a show whose "main concern is not fornication but fellatio and cunnilingus."

The music in the show was said by one columnist to sound "like something we've heard before but definitely not with these words." One of the songs, described by reporters as a "take-off" on the Andrew Sisters' and Bette Midler's renditions of a copyrighted song called "Boogie Woogie Bugle Boy" is the subject of this litigation. Following a non-jury trial before Judge Cooper in the United States District Court for the Southern District of New York, MCA, Inc., the copyright owner, was awarded a total of $324,955.00 against various participants in the theatrical venture for infringement of the copyright on this song. . . .

Boogie Woogie Bugle Boy is the alliterative description of a soldier in "Company B" who hailed from Chicago. During early rehearsals for Let My People Come, defendant Wilson played for the cast a rough version of a song he had composed which alliteratively described the "Cunnilingus Champion of Company C" who came from Memphis or maybe St. Joe. As Judge Cooper found, cast members immediately commented concerning the similarities between the two songs. Because it was felt that the similarities would create publicity, they were not eliminated; indeed, to some extent, they appear to have been fostered. Our review of the testimony, lay and expert, and the visual and aural impressions we have gained from the songs themselves satisfy us that the district court's factual finding of substantial similarity was not clearly erroneous. Unless, therefore, defendants' incorporation of the song into their show constituted fair use under the copyright law, plaintiff has established its claim of copyright infringement.

In asserting the defense of fair use, defendants contend that they were using plaintiff's copyrighted song in a reasonable manner and that therefore they were not required to secure plaintiff's consent. When weighing the merits of a defense such as this, a court does not have the benefit of either a statutory or judicial definition of what is reasonable and fair. It has instead certain suggested criteria to which it may look in making this determination.

Section 101 of the 1976 Copyright Act Revisions, 17 U.S.C. § 107, which, although not controlling herein, is intended to be a codification of preexisting law, provides in part that the "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright." The statute then sets forth four factors to be considered in determining whether a particular use is fair.

The court should, for example, look at the nature of the copyrighted work. In so doing, the court may consider, among other things, whether the work was creative, imaginative, and original, and whether it represented a substantial investment of time and labor made in anticipation of a financial return.

The court should also look at the purpose and character of the alleged infringing use, including its commercial or non-profit educational motivation or design. While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain. The court may also consider whether the paraphrasing and copying was done in good faith or with evasive motive.

The third factor concerns the extent of the copying. Use of copyrighted material without the owner's consent generally will not be considered reasonable if it extensively copies or paraphrases the original or bodily appropriates the research upon which the original was based.

The final suggested factor concerns the effect of the alleged infringing use upon the potential market for or value of the copyrighted work. The aim of the copyright laws is to stimulate artistic creativity for the benefit of the public, and this is done by providing the artist with the financial motivation for creativity that flows from a limited form of monopoly. However, where a claim of fair use is made, a balance must sometimes be struck between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.

Using the above factors as guideposts, we may now review the evidence to determine whether the district court's rejection of the fair use defense was clearly erroneous. Since the issue of fair use is one of fact, the clearly erroneous standard of review is appropriate.

Among the exhibits introduced below were two phonograph records. One, published by MCA Records, was an Andrews Sisters' recording which included Boogie Woogie Bugle Boy. The other, published by the defendant Libra, was a recording of Let My People Come which included Cunnilingus Champion. The parties stipulated that the sale of these records was a traditional means of exploiting musical works. Other stipulated means were the use of the songs in stage performances and the sale of printed copies. Both of the songs at issue herein were exploited in all three media. In determining, therefore, whether defendants' use of plaintiff's song was unfair, we start from the premise that the songs were competing works.

When this action was commenced in July 1974, defendants did not contend that they were making fair use of plaintiff's song. Instead, they simply denied plaintiff's allegation that Cunnilingus Champion was substantially copied from plaintiff's copyrighted work. It was more than a year later, after plaintiff had amended its complaint to claim common law copyright infringement of the Andrews Sisters' recording of Boogie Woogie Bugle Boy, that defendants first pleaded a fair use defense. The record is not at all clear, however, as to when this claim of fair use came into being.

In their Rule 16 pretrial stipulation of undisputed facts, the parties agreed that, when defendant Wilson played Cunnilingus Champion for the first time at a cast rehearsal in early November 1973, some of the cast members told him they thought it was similar to Bugle Boy. Wilson and defendant Oesterman, the producer-director of the show, then discussed with cast members the possibility of being sued because of the similarity. Wilson and Oesterman decided to proceed with Cunnilingus Champion because they concluded it was not the same as Bugle Boy. The parties further stipulated that, when Cunnilingus Champion was written, it was not intended to make any statement about Bugle Boy or to parody Bugle Boy in the sense of taking it out of context and holding it up to ridicule.

At trial, defendant Wilson testified that, at the time he wrote Cunnilingus Champion, he did not intend it to be either a burlesque or a satire. He stated that, sometime during the rehearsals that followed the song's unveiling, he formed the intent that the song would be a burlesque of the music of the 1940's. It is quite obvious, of course, that the words "Cunnilingus Champion of Company C", as used in the title and throughout the lyrics of Wilson's song, were not a take-off on the music of the "40's but on plaintiff's song alone. It is not surprising, therefore, that Wilson testified that, when his song finally was performed on stage, he then intended it to be a spoof of Bugle Boy. Expanding on this point in his brief, Wilson states:

> The parallelism of titles along makes it obvious that Appellant's work in some way refers to Appellee's work and, as a burlesque, that is precisely its intention.

Defendants' argument in short is that, because Cunnilingus Champion "deals with the humorous practice of cunnilingus" and Wilson was trying to portray that practice as "joyous", he was entitled to use a competing copyright owner's music that was "immediately identifiable as something happy and joyous and it brought back a certain period in our history when we felt that way." Defendants rely principally on two prior decisions of this Court to support this argument, *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 and *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252. This reliance is misplaced.

In *Berlin*, the copyright owners of twenty-five popular songs sued the publishers of "Mad Magazine," a comic publication, for publishing parody lyrics which the magazine's readers might sing to the music of plaintiff's songs. Defendants did not publish the music, and plaintiffs made no claim that the parodies would even partially fulfill the demand for plaintiff's original songs to their damage. Then Chief Judge Kaufman, writing for the court, said that "where as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up' the object of his satire, a finding of infringement would be improper."

In *Elsmere*, the copyrighted song was an advertising jingle entitled "I Love New York," which was used by the New York State Department of Commerce in television commercials, principally to extol the merits of New York City. One of NBC's popular productions is a satirical comedy program entitled "Saturday Night Live". On May 20, 1978, the performers on this show did a take-off on New York City's advertising campaign by plugging for the biblical city of Sodom. As part of this take-off, they sang a song "I Love Sodom" to the tune of "I Love New York". In holding this to be fair use, the district court found that defendants' song did not interfere with the marketability of plaintiff's; that it did not affect the value of the copyrighted work nor could it have the effect of fulfilling the demand for the original. This Court affirmed on the opinion of the district judge.

In the instant case, plaintiffs and defendants were competitors in the entertainment field. Both Bugle Boy and Cunnilingus Champion were performed on the stage. Both were sold as recordings. Both were sold in printed copies. Testimony, accepted as credible by the trial court, indicated that Cunnilingus Champion was made to sound like Bugle Boy to create publicity. Moreover, the district judge specifically rejected as incredible the testimony of the defendant Wilson that he was combining the innocent music of the "40's with words often considered to be taboo to make a very funny point. This state of facts is a far cry from those which existed in *Berlin* and *Elsmere*.

In *Elsmere*, the district court held, and quite correctly so, that the song "I Love Sodom" was as much a parody of "I Love New York" as it was of the overall "I Love New York" advertising campaign. The court then proceeded to state in *dictum* that, even if it were found that defendants' song did not parody plaintiff's, this would not preclude a finding of fair use. The question, said the court, is whether the use is a valid satire or parody, not whether it is a parody of the copied song. Appellants in the instant case contrast this *dictum* with Judge Cooper's apparent requirement that a legally permissible parody must be of the copyrighted song itself, and argue that Judge Cooper erred. We agree with appellants' argument to the extent of holding that a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general. However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up. See Walt Disney Productions v. Air Pirates, 581 F.2d at 758 n.15. Indeed, defendants concede that, without reference to plaintiff's song, there would be no parody.

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

In reaching this conclusion, we have not overlooked the district court's finding that the amount copied from plaintiff's song was so substantial as to be unfairly excessive. Although we might have reached a different conclusion on the same facts, the district court's finding was not clearly erroneous and furnishes further support for its holding of infringement.

MANSFIELD, Circuit Judge (dissenting):

I respectfully dissent for the reason that in my view the defendants made a fair and limited use in a reasonable manner of plaintiff's successful copyrighted work to produce what amounts to a sexual satire or burlesque of contemporary mores by putting a comic or humorous twist on the more conventional Bugle Boy and by parodying the Andrews Sisters' style, which depended heavily on "boogie-woogie" music. This entitled the defendants as to the protection of the "fair use" doctrine as codified in § 101 of the 1976 Copyright Act, 17 U.S.C. § 107. As the majority concedes, a fair use parody need not be directed toward the copyrighted work, *see* Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 746 (S.D.N.Y.1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964). The defendants used only enough of "Bugle Boy" to conjure up a recollection of

that image and thereby make possible a parody with a completely new, mocking, satirical turn to it. There is no evidence that the parody caused any damage to the plaintiff. Although "Boogie Woogie Bugle Boy" (plaintiff's work) and "Cunnilingus Champion of Company C" (defendants' parody) were both produced in record form, there is no evidence that the latter was capable of serving as a substitute for the former. On the contrary, it is readily apparent from the records and the lyrics that the two songs fill completely different demands and that a purchaser desiring plaintiff's work would not accept that of defendants as a substitute.

Under the doctrine of "fair use" defendants were entitled to appropriate so much of the copyrighted work as was reasonably necessary to recall it or conjure it up. Berlin v. E.C. Publications, Inc., 329 F.2d at 545. As we stated in *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980):

> "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 something new for humorous effect or commentary."

This is exactly what was done in the present case. Defendants made limited use of Bugle Boy to create a new and (to many) humorous effect. The lyrics of the two songs are almost entirely different. Indeed only one short phrase ("He's in the Army now") is common to both. The rest are not the same. Moreover, much of the similarity in the music of the two tunes is attributable to the "tom-tom" passages in the Andrews Sisters and Midler recordings, as well as in the defendants' work, which were never copyrighted but were used by Judge Cooper as the basis for his findings. Thus, while I agree with the majority that there is barely sufficient similarity between the music of the two songs to preclude our labelling Judge Cooper's finding of infringement clearly erroneous, the record indicates that for fair use parodying the defendants only appropriated as much of the original work as was reasonably necessary to recall Bugle Boy.

In ruling on the issue of fair use, Judge Cooper held that to qualify as fair use the infringing item must be a burlesque of the copyrighted work itself, not just a use of the copyrighted material to parody something else, stating:

> "defendants concede that Champion was not intended to be a parody of Bugle Boy in the sense of taking Bugle Boy out of context in an attempt to hold it up to ridicule. Defendants may have sought to parody life, or more particularly sexual mores and taboos, but it does not appear that they attempted to comment ludicrously upon Bugle Boy."

As the majority recognizes, this was error. In *Elsmere Music, supra*, we held that the song "I Love Sodom" was a fair parody use of "I Love New York" even though Judge Goettel found that the former was "an attempt . . . to satirize the way in which New York City has attempted to improve its somewhat tarnished image through the use of a slick advertising campaign (and) had nothing to do with . . . the song "I Love New York' itself." The district court further stated:

> "In addition, even if it were found that 'I Love Sodom' did not parody the plaintiff's song itself, that finding would not preclude a finding of fair use. Under the holding of *Berlin v. E.C. Publications, Inc., supra*, and the criteria set down in section 101 of the 1976 Copyright Act, 17 U.S.C. § 107, the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself. To the extent that either *MCA* or *Walt Disney* can be read to require that there be an identity between the song copied and the subject of the parody, this Court disagrees."

In affirming, we agreed with the district court's rejection of Judge Cooper's *MCA* limitation, stating, "Believing that, in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody, and that the District Court correctly applied the doctrine of fair use, we affirm on Judge Goettel's thorough opinion." This broader legal concept of parody has been advocated by copyright scholars who have taken a dim view of Judge Cooper's limitation.

Thus in *Elsmere* we adhered to our views in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), where we held that certain parody lyrics printed in Mad Magazine, intended to comment humorously on the world of that time and designed to be sung to the tunes of various popular Irving Berlin songs, did not infringe Berlin's copyright.

Since defendants' work is clearly a parody or burlesque the next step is to determine whether, in creating Champion, they have taken more of Bugle Boy than is reasonably necessary to "'recall or conjure up' the original()," *Berlin*, *supra*, 329 F.2d at 545. This will vary according to the situation encountered in each case. Clearly a verbatim copy of both music and lyrics could hardly be defended as a parody, since the effect would be to deprive the copyright owner of the fruits of his labors. On the other hand, a substantial taking for parody purposes is permissible where, as here, the parody does not fulfill the demand for the copyrighted work. For instance, in *Elsmere* Judge Goettel observed that

> "it becomes apparent that this portion of the piece, the musical phrase that the lyrics "I Love New York' accompany, is the heart of the (plaintiff's) composition. Use of such a significant (albeit less than extensive) portion of the composition is far more than merely a de minimis taking . . . The tune of "I Love Sodom' is easily recognizable as "having been appropriated from the copyrighted work,' . . . and is a taking of a substantial nature."

However, he correctly concluded that the copying nevertheless amounted to fair use as a parody. As we started in *Berlin*,

> "At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up' the object of his satire, a finding of infringement would be improper."

On the *Elsmere* appeal we observed,

> "we note that the concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955). A parody is entitled at least to "conjure up' the original. 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 something new for humorous effect of commentary."

Judge Cooper, having erroneously limited the scope of permissible use of a copyrighted work for parody purposes, reached this issue only by way of *dictum*, indicating that he would have held the defendants' use to be excessive because "Champion not only conjures up the memory of Bugle Boy, it shares some of the same lyrics and music." This is both a misunderstanding of the "conjure up" test and a misconstruction of the facts. As both *Berlin* and *Elsmere* demonstrate, the fact that the parody shares some of the same lyrics and music as the copyrighted work does not itself mean that the taking is too substantial. Indeed it is exactly by such overlap that the original is recalled or conjured up. In *Elsmere* the repetition of the exact music from the key "I Love New York" section of that song, coupled with use of two of the four original words ("I Love"), was held not to be too substantial a taking to allow the fair use defense. As we stated in *Berlin*,

> "While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up' the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial' taking, if that standard is not to be woodenly applied."

Here, the defendants took only one short phrase from the entire copyrighted lyric. The rest of the thematic conjuring was done by the overall setting and the word play on the title. That word play is the very kind of "conjuring up" that the fair use defense allows. As for the music, the discussion above shows that even in the absence of a fair use question there is some doubt as to whether the taking from the

copyrighted version would be substantial enough to amount to an infringement. The overall musical style is the same, the harmony and melody are similar, and there are a few specific chord and note passages that overlap. None of this, however, is so great as to preclude the parody defense. The humorous twist would not exist if the "boogie woogie" sound of the original (incidentally, not copyrighted) were not recalled. The whole point of the fair use defense is to allow some use of the copyrighted material. Here it was not excessive.

The next question is whether the defendants' use of Bugle Boy resulted in their satisfying the same demand as that song did, which is an important factor because an otherwise fair use might become unfair if it deprives the copyright holder of the market served by him and thus causes him real economic damage, 3 M. Nimmer, Copyright, § 13.05(A)(4), note 3. In *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), we stated:

> "A key issue in fair use cases is whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work."

This issue was not reached by Judge Cooper because of his erroneous ruling that defendants' work did not burlesque plaintiff's copyrighted work itself. Plaintiff-appellee argues that since the two works were exploited through the same media (records, printed copies, live performances) Champion *ipso facto* had the effect of diminishing the demand for Bugle Boy. In my view this reasoning is fatally defective. The issue is not whether the parody uses the same media as the copyrighted work-most parodies do—but whether it is "capable of serving as a substitute for the original," A. Latman, The Copyright Law 215 (5th ed. 1979) (emphasis supplied), which depends on demand and product overlap rather than on the market in which the two products are vended. Applying this correct standard it is eminently clear that the two works respond to wholly differing demands and that a customer for one would not buy the other in its place. A raucous and explicitly sexual satire is not a substitute for the innocence of Bugle Boy. I therefore cannot agree with the majority's "premise that the songs were competing works," or that the sale or rendition of defendants' song would interfere with the marketability of plaintiff's song.

The majority implies that to "substitute dirty lyrics" should not permit a person to "escape liability by calling the end result a parody or satire on the mores of society." In my view the defendants' use of "dirty lyrics" or of language and allusions that I might personally find distasteful or even offensive is wholly irrelevant to the issue before us, which is whether the defendants' use, obscene or not, is permissible under the fair use doctrine as it has evolved over the years. We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play [sic] no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average private citizen. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). As we pointed out in *Berlin* parody "has thrived from the time of Chaucer." Even the Canterbury Tales indulged largely in sexual satire.

. . . .

For these reasons I would reverse the judgment of the district court.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)

SOUTER, Justice:

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. § 107 (1988 ed. and Supp. IV). Although the District Court granted summary judgment for 2 Live Crew, the Court of Appeals reversed, holding the defense of fair use barred by the song's commercial character

and excessive borrowing. Because we hold that a parody's commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand.

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc. *See* Appendix A. Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work . . . ." On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew's song. *See* Appendix B. Acuff-Rose's agent refused permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" Nonetheless, in June or July 1989, 2 Live Crew released records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs entitled "As Clean As They Wanna Be." The albums and compact discs identify the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose.

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement. The District Court granted summary judgment for 2 Live Crew, reasoning that the commercial purpose of 2 Live Crew's song was no bar to fair use; that 2 Live Crew's version was a parody, which "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song" is; that 2 Live Crew had taken no more than was necessary to "conjure up" the original in order to parody it; and that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." The District Court weighed these factors and held that 2 Live Crew's song made fair use of Orbison's original.

The Court of Appeals for the Sixth Circuit reversed and remanded. Although it assumed for the purpose of its opinion that 2 Live Crew's song was a parody of the Orbison original, the Court of Appeals thought the District Court had put too little emphasis on the fact that "every commercial use . . . is presumptively . . . unfair," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and it held that "the admittedly commercial nature" of the parody "requires the conclusion" that the first of four factors relevant under the statute weighs against a finding of fair use. Next, the Court of Appeals determined that, by "taking the heart of the original and making it the heart of a new work," 2 Live Crew had, qualitatively, taken too much. Finally, after noting that the effect on the potential market for the original (and the market for derivative works) is "undoubtedly the single most important element of fair use," *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Court of Appeals faulted the District Court for "refusing to indulge the presumption" that "harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses." In sum, the court concluded that its "blatantly commercial purpose . . . prevents this parody from being a fair use."

We granted certiorari to determine whether 2 Live Crew's commercial parody could be a fair use.

II

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, 17 U.S.C. § 106 (1988 ed. and Supp. IV), but for

a finding of fair use through parody.[4] From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "to promote the Progress of Science and useful Arts . . . ." U.S. Const., Art. I, § 8, cl. 8. For as Justice Story explained, "in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science." *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K.B. 1803). In copyright cases brought under the Statute of Anne of 1710, English courts held that in some instances "fair abridgements" would not infringe an author's rights, see W. Patry, The Fair Use Privilege in Copyright Law 6-17 (1985) (hereinafter Patry); Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990) (hereinafter Leval), and although the First Congress enacted our initial copyright statute, Act of May 31, 1790, 1 Stat. 124, without any explicit reference to "fair use," as it later came to be known, the doctrine was recognized by the American courts nonetheless.

In *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841), Justice Story distilled the essence of law and methodology from the earlier cases: "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible:

> "§ 107. Limitations on exclusive rights: Fair use
>
> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107 (1988 ed. and Supp. IV).

Congress meant § 107 "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" and intended that courts continue the common-law tradition of fair use adjudication. H.R. Rep. No. 94-1476, p. 66 (1976) (hereinafter House Report); S. Rep. No. 94-473, p. 62 (1975) (hereinafter Senate Report). The fair use doctrine thus "permits [and requires] 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." *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. *Harper & Row*, 471 U.S. at 560; *Sony*, 464 U.S. at 448, and

[4] . . . . 2 Live Crew concedes that it is not entitled to a compulsory license under § 115 because its arrangement changes "the basic melody or fundamental character" of the original. § 115(a)(2).

n.31; House Report, pp. 65-66; Senate Report, p. 62. The text employs the terms "including" and "such as" in the preamble paragraph to indicate the "illustrative and not limitative" function of the examples given, § 101; see *Harper & Row, supra,* at 561, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright. See Leval 1110-1111; Patry & Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 Cardozo Arts & Ent. L.J. 667, 685-687 (1993) (hereinafter Patry & Perlmutter).

A

The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). This factor draws on Justice Story's formulation, "the nature and objects of the selections made." *Folsom v. Marsh, supra,* at 348. The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, *Folsom v. Marsh, supra,* at 348; accord, *Harper & Row, supra,* at 562 ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, *Sony, supra,* at 455, n.40, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, *e.g., Sony, supra,* at 478-480 (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

This Court has only once before even considered whether parody may be fair use, and that time issued no opinion because of the Court's equal division. *Benny v. Loew's Inc.*, 239 F.2d 532 (CA9 1956), *aff'd sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958). Suffice it to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107. *See, e.g., Fisher v. Dees*, 794 F.2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (SDNY), *aff'd*, 623 F.2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use); *see also* House Report, p. 65; Senate Report, p. 61 ("Use in a parody of some of the content of the work parodied" may be fair use).

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson's Court of Appeals dissent, as "a song sung alongside another." Modern dictionaries accordingly describe a parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule," or as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous." For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. *See, e.g., Fisher v. Dees, supra,* at 437; *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (CA2 1981). If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's

work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.[14] Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.[15]

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair, see *Harper & Row*, 471 U.S. at 561. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

Here, the District Court held, and the Court of Appeals assumed, that 2 Live Crew's "Pretty Woman" contains parody, commenting on and criticizing the original work, whatever it may have to say about society at large. As the District Court remarked, the words of 2 Live Crew's song copy the original's first line, but then "quickly degenerate into a play on words, substituting predictable lyrics with shocking ones . . . [that] derisively demonstrate how bland and banal the Orbison song seems to them." Judge Nelson, dissenting below, came to the same conclusion, that the 2 Live Crew song "was clearly intended to ridicule the white-bread original" and "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses." Although the majority below had difficulty discerning any criticism of the original in 2 Live Crew's song, it assumed for purposes of its opinion that there was some.

We have less difficulty in finding that critical element in 2 Live Crew's song than the Court of Appeals did, although having found it we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.[16] Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (circus posters have copyright protection).

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with

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[14] A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody. If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives (see *infra*, at 590-594, discussing factor four), it is more incumbent on one claiming fair use to establish the extent of transformation and the parody's critical relationship to the original. By contrast, when there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.

[15] Satire has been defined as a work "in which prevalent follies or vices are assailed with ridicule," 14 Oxford English Dictionary at 500, or are "attacked through irony, derision, or wit," American Heritage Dictionary at 1604.

[16] The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely "supersede the objects" of the original. See *infra*, at 586-594, discussing factors three and four.

degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.[17]

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony*, that "every commercial use of copyrighted material is presumptively . . . unfair . . . ." *Sony*, 464 U.S. at 451. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." *Harper & Row*, *supra*, at 592 (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "no man but a blockhead ever wrote, except for money."

Sony itself called for no hard evidentiary presumption. There, we emphasized the need for a "sensitive balancing of interests," 464 U.S. at 455, n.40, noted that Congress had "eschewed a rigid, bright-line approach to fair use," and stated that the commercial or nonprofit educational character of a work is "not conclusive," but rather a fact to be "weighed along with other[s] in fair use decisions". The Court of Appeals's elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in *Harper & Row*, *Sony* stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school.[18]

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[17] We note in passing that 2 Live Crew need not label their whole album, or even this song, a parody in order to claim fair use protection, nor should 2 Live Crew be penalized for this being its first parodic essay. Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived). See Patry & Perlmutter 716-717.

[18] Finally, regardless of the weight one might place on the alleged infringer's state of mind, compare *Harper & Row*, 471 U.S. at 562 (fair use presupposes good faith and fair dealing) (quotation marks omitted), with *Folsom* v. *Marsh*, 9 F. Cas. 342, 349 (No. 4,901) (CCD Mass. 1841) (good faith does not bar a finding of infringement); Leval 1126-1127 (good faith irrelevant to fair use analysis), we reject Acuff-Rose's argument that 2 Live Crew's request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew's actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use. See *Fisher* v. *Dees*, 794 F.2d 432, 437 (CA9 1986).

The second statutory factor, "the nature of the copyrighted work," § 107(2), draws on Justice Story's expression, the "value of the materials used." *Folsom v. Marsh*, 9 F. Cas. at 348. This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, *e.g.*, *Stewart v. Abend*, 495 U.S. at 237-238 (contrasting fictional short story with factual works); *Harper & Row*, 471 U.S. at 563-564 (contrasting soon-to-be-published memoir with published speech); *Sony*, 464 U.S. at 455, n.40 (contrasting motion pictures with news broadcasts); *Feist*, 499 U.S. at 348-351 (contrasting creative works with bare factual compilations); 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.05[A][2] (1993) (hereinafter Nimmer); Leval 1116. We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. 754 F. Supp. at 1155-1156; 972 F.2d at 1437. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," § 107(3) (or, in Justice Story's words, "the quantity and value of the materials used," *Folsom v. Marsh*, *supra*, at 348) are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. See *Sony*, *supra*, at 449-450 (reproduction of entire work "does not have its ordinary effect of militating against a finding of fair use "as to home videotaping of television programs); *Harper & Row*, *supra*, at 564 ("Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir). The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives. See Leval 1123.

The District Court considered the song's parodic purpose in finding that 2 Live Crew had not helped themselves overmuch. 754 F. Supp. at 1156-1157. The Court of Appeals disagreed, stating that "while it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. . . . We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original."

The Court of Appeals is of course correct that this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In *Harper & Row*, for example, the Nation had taken only some 300 words out of President Ford's memoirs, but we signaled the significance of the quotations in finding them to amount to "the heart of the book," the part most likely to be news-worthy and important in licensing serialization. We also agree with the Court of Appeals that whether "a substantial portion of the infringing work was copied verbatim" from the copyrighted work is a relevant question, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Where we part company with the court below is in applying these guides to parody, and in particular to parody in the song before us. Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. *See, e.g.*, *Elsmere Music*, 623 F.2d at 253, n.1; *Fisher v. Dees*,

794 F.2d at 438-439. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled 2 Live Crew's use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through. See *Fisher v. Dees, supra*, at 439.

This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, see *Harper & Row, supra*, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat. This is not a case, then, where "a substantial portion" of the parody itself is composed of a "verbatim" copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that "no more was taken than necessary," but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's "heart." As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

D

The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original. Nimmer § 13.05[A][4], p. 13-102.61; accord, *Harper & Row*, 471 U.S. at 569; Senate Report, p. 65; *Folsom v. Marsh*, 9 F. Cas. at 349. The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row, supra*, at 568.

Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.[21] In moving for summary

[21] Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair. Leval 1124, n.84. This factor, no less than the other three, may be addressed only through a "sensitive balancing of interests." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 455, n.40 (1984). Market harm

judgment, 2 Live Crew left themselves at just such a disadvantage when they failed to address the effect on the market for rap derivatives, and confined themselves to uncontroverted submissions that there was no likely effect on the market for the original. They did not, however, thereby subject themselves to the evidentiary presumption applied by the Court of Appeals. In assessing the likelihood of significant market harm, the Court of Appeals quoted from language in *Sony* that "'if the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.'" The court reasoned that because "the use of the copyrighted work is wholly commercial, . . . we presume that a likelihood of future harm to Acuff-Rose exists." In so doing, the court resolved the fourth factor against 2 Live Crew, just as it had the first, by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.

No "presumption" or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes. *Sony*'s discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of *Sony* itself (home copying of television programming). In the former circumstances, what *Sony* said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects," *Folsom v. Marsh*, *supra*, at 348, of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. *Sony*, *supra*, at 451. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it ("superseding [its] objects"). See Leval 1125; Patry & Perlmutter 692, 697-698. This is so because the parody and the original usually serve different market functions.

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," B. Kaplan, An Unhurried View of Copyright 69 (1967), the role of the courts is to distinguish between "biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it." *Fisher v. Dees*, 794 F.2d at 438.

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise." Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of "Oh, Pretty Woman," the court erred. Accord, *Fisher v. Dees*, *supra*, at 437; Leval 1125; Patry & Perlmutter 688-691.[22]

In explaining why the law recognizes no derivative market for critical works, including parody, we have, of course, been speaking of the later work as if it had nothing but a critical aspect (*i.e.*, "parody pure and simple," *supra*, at 591). But the later work may have a more complex character, with effects not only in the arena of criticism but also in protectible markets for derivative works, too. In that sort of case, the law looks beyond the criticism to the other elements of the work, as it does here. 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry, see *Harper & Row*, *supra*, at 568; Nimmer § 13.05B. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic

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is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.

[22] We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.

incentive to the creation of originals. See 17 U.S.C. § 106(2) (copyright owner has rights to derivative works). Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.[24]

Although 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff-Rose, introduced evidence or affidavits addressing the likely effect of 2 Live Crew's parodic rap song on the market for a nonparody, rap version of "Oh, Pretty Woman." And while Acuff-Rose would have us find evidence of a rap market in the very facts that 2 Live Crew recorded a rap parody of "Oh, Pretty Woman" and another rap group sought a license to record a rap derivative, there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parody, rap version. The fact that 2 Live Crew's parody sold as part of a collection of rap songs says very little about the parody's effect on a market for a rap version of the original, either of the music alone or of the music with its lyrics. The District Court essentially passed on this issue, observing that Acuff-Rose is free to record "whatever version of the original it desires," the Court of Appeals went the other way by erroneous presumption. Contrary to each treatment, it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense, 2 Live Crew, to summary judgment. The evidentiary hole will doubtless be plugged on remand.

III

It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

KENNEDY, Justice, concurring.

I agree that remand is appropriate and join the opinion of the Court, with these further observations about the fair use analysis of parody.

The common-law method instated by the fair use provision of the copyright statute, 17 U.S.C. § 107 (1988 ed. and Supp. IV), presumes that rules will emerge from the course of decisions. I agree that certain general principles are now discernible to define the fair use exception for parody. One of these rules, as the Court observes, is that parody may qualify as fair use regardless of whether it is published or performed for profit. Another is that parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition. It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well). See *Rogers v. Koons*, 960 F.2d 301, 310 (CA2 1992) ("Though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody"); *Fisher v.*

[24] In some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm. A work whose overriding purpose and character is parodic and whose borrowing is slight in relation to its parody will be far less likely to cause cognizable harm than a work with little parodic content and much copying.

Dees, 794 F.2d 432, 436 (CA9 1986) ("[A] humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the target of the work in question"). This prerequisite confines fair use protection to works whose very subject is the original composition and so necessitates some borrowing from it. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (CA2 1981) ("If the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up"). It also protects works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism. See *Fisher, supra*, at 437 ("Selfesteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee"); Posner, When Is Parody Fair Use?, 21 J. Legal Studies 67, 73 (1992) ("There is an obstruction when the parodied work is a target of the parodist's criticism, for it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work").

If we keep the definition of parody within these limits, we have gone most of the way towards satisfying the four-factor fair use test in § 107. The first factor (the purpose and character of use) itself concerns the definition of parody. The second factor (the nature of the copyrighted work) adds little to the first, since "parodies almost invariably copy publicly known, expressive works." The third factor (the amount and substantiality of the portion used in relation to the whole) is likewise subsumed within the definition of parody. In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry. Some parodies, by their nature, require substantial copying. See *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (CA2 1980) (holding that "I Love Sodom" skit on "Saturday Night Live" is legitimate parody of the "I Love New York" campaign). Other parodies, like Lewis Carroll's "You Are Old, Father William," need only take parts of the original composition. The third factor does reinforce the principle that courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses. See, *e.g., Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (CA9 1978); *DC Comics Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (ND Ga. 1984). But, as I believe the Court acknowledges, it is by no means a test of mechanical application. In my view, it serves in effect to ensure compliance with the targeting requirement.

As to the fourth factor (the effect of the use on the market for the original), the Court acknowledges that it is legitimate for parody to suppress demand for the original by its critical effect. What it may not do is usurp demand by its substitutive effect. It will be difficult, of course, for courts to determine whether harm to the market results from a parody's critical or substitutive effects. But again, if we keep the definition of parody within appropriate bounds, this inquiry may be of little significance. If a work targets another for humorous or ironic effect, it is by definition a new creative work. Creative works can compete with other creative works for the same market, even if their appeal is overlapping. Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work, which is why the parody must "make some critical comment or statement about the original work which reflects the original perspective of the parodist—thereby giving the parody social value beyond its entertainment function."

The fair use factors thus reinforce the importance of keeping the definition of parody within proper limits. More than arguable parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a "comment on the naivete of the original," because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven's Fifth Symphony or "Achy Breaky Heart" is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.

The Court decides it is "fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree." While I am not so assured that 2 Live Crew's song is a legitimate parody, the Court's treatment of the remaining factors leaves room for the District Court to determine on remand that the song is not a fair use. As future courts apply our fair use analysis, they must take care to ensure that not just any commercial takeoff is rationalized *post hoc* as a parody.

With these observations, I join the opinion of the Court.

NOTES AND COMMENTS

1. *Congressional Intent.* In the House and Senate Reports, Congress stated explicitly its intent behind its enactment of the fair use provision:

> *General intention behind the provision.* The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. REP. NO. 94-1476, 94th Cong. 66 (1976); S. REP. NO. 94-473, 94th Cong. 62 (1975).

2. In *Sony Corp. v. Universal City Studios, Inc.*, the United States Supreme Court observed: "The doctrine of fair use has been called, with some justification, 'the most troublesome in the whole law of copyright.'" 464 U.S. 417, 475 (1984) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939)). Two leading music law commentators concurred:

> The application of the doctrine of fair use in any particular case will . . . be largely judgmental, with the best a lawyer can do is review the case books for any cases on point and making an assessment of the risk his client takes by using a work without the permission of the copyright owner. Often those risks are less influenced by what is "right" than by the potential attorney fees that could be incurred in connection with the defense of any action taken, rightly or wrongly, by the copyright owner.

What do you think?

3. *Guidelines for Educational Use of Music.* In a letter dated April 30, 1976, representatives of the music publishing industry and several associations of music schools and teachers submitted to the House Judiciary Subcommittee a set of guidelines addressing the interests of music copyright holders and the needs of users of music in the academic community. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1555 (3d ed. 2002); *see id*. at 1555-57 (reproducing the guidelines).

4. *Should Users Ask for Permission?* In *Fisher v. Dees*, the Ninth Circuit noted that "[p]arodists will seldom get permission from those whose works are parodied." Nevertheless, the court refused to penalize the defendant for asking permission. By contrast, in *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), the United States District Court for the Southern District of New York found the defendants' attempt to obtain a license a strong indication that the plaintiff owned valid copyrights. As the court put it, "One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!" *Id*. at 184. Which court is more convincing? Did the law change after *Grand Upright Music*? What about

Campbell? What would you do if you were to make a parody of a copyrighted song? *See* KOHN & KOHN, *supra*, at 1573-74 (discussing whether users should ask for permission).

5. *Appropriation Art*. Appropriation art is an art form that "borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art." William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000). Would the creation of appropriation art constitute a transformative use? Would the use of copyrighted songs in appropriation art be considered a fair use? For discussion of appropriation art, see generally *id*.; Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1 (1992); Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y U.S.A. 93 (1994); E. Kenly Ames, Note, *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993); Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell V. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653 (1995).