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Laura Terwilliger  
*Seton Hall Law*

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# **No Laughing Matter: An Argument in Favor of Allowing Satire Under Fair Use**

**Laura Terwilliger**

## **Part I: Introduction**

Copyrights grant their holders exclusive rights over a copyrighted work. However, fair use limitations permit individuals other than the copyright holder to use the work under a variety of circumstances. 17 U.S.C.A. § 107 offers a list of uses falling under fair use exceptions as well as a balancing test to be applied in cases where fair use is at issue. Unfortunately, this has failed to be especially clear in practical application.

This has been particularly important in cases dealing with satire and parody. Copyright holders who have found their work skewered by humor writers, comedians, and musicians have filed suit many times, claiming that satirical or parodic works amount to copyright infringement, with varying degrees of success. In the ensuing case law, parody and satire were separated, with the former being generally granted the fair use exception and the latter characterized as an infringing use. Attempts to nail down the rather nebulous distinction between these very-similar forms of mockery have turned on whether the copyrighted work being utilized is a target of the new piece. Parodies focus jokes and mockery—at least in part—on the work being referenced, while satires use the work to facilitate commentary on some other topic. The rationale behind permitting the former and not the latter is that a parody necessarily requires use of the work while a satire could conceivably stand on its own. However, this is problematic for a variety of reasons.

Part II of this paper examines the purpose of copyright protection and intellectual property protections on the whole. In the interest of encouraging the creation of diverse works, laws establishing copyright protection allow copyright holders to reap the benefits of their efforts without fear of others unjustly appropriating the work for their own benefit. Under this rationale, copyright protection incentivizes creation by guaranteeing the creators of copyrighted works a say in how the work is used. This serves to promote profitability of the work and to protect the reputation of both the work and its creator, which, arguably, will cause an increase in the creation of copyrightable works.

However, while this is commonly understood as the reasoning behind copyright protection, it stops a step short of the laws' motivation. Protecting the creator of copyrighted works is not the intended end in and of itself, though that is the usual focus of copyright issues. This paper discusses the public interest behind copyright protection and the role this interest plays in fair use. Creative works are encouraged because they benefit the public; copyright protections that would burden the public's benefit in the interest of the copyright holder work counter to this principle. This motivates the inclusion of fair use exceptions in copyright law.

Part III of this paper examines the purpose and function of these fair use exceptions generally. The listed fair use exceptions included under 17 U.S.C.A. § 107 provide a context for examining parodic and satirical uses of copyrighted works but do not make a bright-line rule regarding these types of uses. As a result, cases involving these issues have been decided in opposing and contradictory ways. Still, a trend has been established allowing a fair use exception for parody but not for satire.

Part IV explores how the distinction between parody and satire depending on target has arisen in the case law over the past 60 years. Generally, the rationale presented for not allowing

satire under fair use is that while parody comments on or criticizes a work, a satire speaks to some other topic entirely, making its use of the copyrighted work unnecessary. However, this reasoning is problematic. It is important to understand the gradual way in which this distinction has been created in order to see its motivations and drawbacks.

Part V explains why fair use should be expanded to incorporate satire, discussing a wide variety of benefits. In terms of the traditional rationale for copyright protection, including satire under fair use would not have a detrimental effect on the production of creative works. In order for a satire to be effective, it must target successful and well-known works, meaning that the creators of satirized works will have already reaped the benefit of their creative efforts by the time a satire even comes into being. Further, a satire's efficacy relies on the juxtaposition of the original work with the satirical one, so the copyright holder and the satirist both have an interest in the continued success of the original copyrighted work.

The greater rationale for including satire under fair use is that it is the natural result of the motivation underlying copyright protection on the whole. Copyright protection is intended to encourage creative works, not for the benefit of the creator, but for the benefit of the public. Creative works are desirable because they aggregately comprise our culture; these works become a part of public discourse, experience, and understanding. Overprotecting works is counter to the very basis of that protection because encouraging creative works is without benefit if those works remain valuable only to their creators. Satire is a widely-accessible form of communication due to its reliance on common cultural and social vernacular to convey its message and is exactly the type of communication which would be expected if the rationale behind copyright protection were expanded to its logical conclusion.

Part VI concludes and offers possible benefits of allowing satire under fair use.

## **Part II: The Purpose of Copyright Protection**

Traditionally, copyright protection—and intellectual property protection generally—is justified in the interest of encouraging the creation of diverse works. There is some merit to the argument that artists need no external incentive to create their artistic works; creation as a form of self-expression cannot be quashed by merely being unprofitable. However, creation quickly becomes costly in terms of labor hours and monetary investment, rendering the ability of many artists to create works impractical if not impossible. Facilitating the recoupment of costs aids in encouraging the development of a diversity of artistic works and viewpoints. Artists who would otherwise be financially unable to invest in creative endeavors can obtain the opportunity to put their work in front of the public.

To this end, copyright protection serves to insulate the copyright holder from those who would unfairly enrich themselves on another's investment. Copyright protection increases the likelihood that the monetary benefit of the work goes to the most deserving recipient: the creator. Others who would themselves reap the benefits of the artist's labor are said to be "free riding" in that they allow someone else to risk the investment only to come in once the product is finished to collect on the benefit. There is almost a visceral reaction to this sort of action as clearly unfair; if someone puts in the investment—be it in terms of money, time, or effort—then that individual should be the one to benefit. Without this very basic system of incentives and rewards, there is little benefit to be found in bothering with business at all. A 1918 case summed it up in exactly this way, saying that such actions interfere with the creator's business "precisely at the point

where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not.”<sup>1</sup>

Naturally, copyright holders are free to expressly allow others to utilize their work, often through licensing. Licensing allows the copyright holder to determine who may use the work, how much of the work, or for what purpose. This demonstrates that the copyright protection does not exist for the prevention of any works involving copying, but rather only those copies which would be unfair or unjust toward the original creator. Since the creator in possession of the copyright is in the best position to determine what would be unjust or unfair toward them, it is only sensible to leave this latitude in their hands as a part of the benefits of copyright protection. However, this is not to say that artists maintain universal control over the use or copying of their work.

### **III. The Purpose of Fair Use Exceptions**

Fair use exceptions to copyright protection are codified in federal law under 17 U.S.C.A. § 107. While copyright protection on the whole concerns the practical difficulties in the development of creative works, fair use speaks more to the public and governmental interests in providing copyright protection in the first place. While no exhaustive or detailed list is provided in the statute, the section provides in what has become known as the “preamble” a list of fair use applications that generally provides a sense of what is to be allowed: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>23</sup> These suggest two broad categories of use in the public interest which validly fall under fair use.

The first is public assessment of the work’s value. The inclusion of “criticism [and] comment” makes clear that the public has a legitimate interest in analyzing and judging the

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<sup>1</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

<sup>2</sup> 17 U.S.C.A. § 107 (West).

<sup>3</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1597 (2004).

creative work. In this way, creative works are not protected solely for the benefit of their creator; certainly a scathing review or negative analysis could have a deleterious impact upon a copyright holder's ability to profit from the work. Still, artists seeking to put out their work for public consumption cannot expect their work to be insulated from criticism or an undesirable reaction. Reaping the benefits of publicity requires acceptance of possible negative consequences as a cost. The ideological interest implicated here is the support of a free marketplace of ideas. The public is free to evaluate the work and define its place in the greater cultural landscape. Critiques and comments directly function to help people judge the work's merits and value.

The second category is the application of the work itself for purposes in the public interest. Section 107's inclusion of "news reporting, teaching [...], scholarship, [and] research" may appear to throw together a group of loosely-related uses, but the greater purpose of each item is the same: valid utilization of the work itself. In this sense, the use may not directly analyze or comment upon the work at all, critically or otherwise, but copying falls under fair use in furtherance of these other purposes.

This second category of uses speaks to the public interest in access to the copyrighted work outside the consumption of the work itself. While even negative criticism focuses on the work's content, news reports or scholarly research may use the work in a variety of other contexts. A news report may need to publish or air a portion of a work in order to explain a controversy; research may analyze the work from different angles or perspectives, or in relation to other works. In this sense, the copyrighted work does not stand alone, but is considered in light of a wide variety of factors and fields.

In such contexts, the interests of the copyright holder bear little weight. A negatively-spun news report or unflattering study results could certainly impact the profitability of the work,

but would be considered fair use. In these situations, upholding copyright protection would serve to hinder open and free communication and study. Again, this shows that works are not granted copyright protection for their own sake, but rather to allow them to enter the public forum; teachers, students, researchers, and even news reporters serve the public in digesting the work for wider consumption.

#### **IV. The Parody/Satire Distinction**

Under these fair use purposes, courts have established through case law a distinction between parody and satire, allowing the former under fair use but not the latter.

While the terms “parody” and “satire” are currently at the crux of this distinction, they were previously used interchangeably in fair use challenges.<sup>4</sup> Without a set legal definition, the words were considered important as terms of art but virtually identical from a legal standpoint.<sup>5</sup> A number of cases have served to create the distinction seen today.<sup>6</sup>

In 1958, the United States Supreme Court decided for the first time on the issue of parody as a fair use defense to copyright infringement. In *Benny v. Loews (Benny)*, without writing an opinion, the Supreme Court affirmed the Ninth Circuit’s finding of copyright infringement in the production and airing of a burlesque program aired on Columbia Broadcasting System (CBS).<sup>7</sup> Comedian Jack Benny and CBS borrowed substantially from a copyrighted play in the creation

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<sup>4</sup> Annemarie Bridy, *Sheep in Goats' Clothing: Satire and Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 51 J. COPYRIGHT SOC'Y U.S.A. 257, 261 (2004), quoting *Loew's Inc. v. Columbia Broad. Sys.*, 131 F. Supp. 165, *aff'd sub nom*, 239 F.2d 532 (Ninth Cir. 1956), *aff'd sub nom*, 356 U.S. 43 (1958).

<sup>5</sup> *Id.*

<sup>6</sup> *Benny v. Loew's Inc. (Benny)*, 239 F.2d 532 (Ninth Cir. 1956) *aff'd sub nom*, *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975); *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976) *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981); *Elsmere Music, Inc. v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd sub nom*, 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432 (Ninth Cir. 1986); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>7</sup> *Benny*, *supra* note 5, at 537.

of the burlesque (which the court refers to alternatively as “the parody”<sup>8</sup>). The parody borrowed extensively from the play “Gas Light,” closely following many of its story elements but performing it in physically absurd ways, such as having the actors walk on their hands.<sup>9</sup> The district court listed a variety of borrowed elements that supported the finding of infringement<sup>10</sup> and the Ninth Circuit summarized it by saying, “A comparison of the photoplay and the television play indicates how much was copied. If the material taken by appellants from ‘Gas Light’ is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue. If the television play were presented without appellants' contribution, there would be left the plot, story, principal incidents, and same sequence of events as in the photoplay.”<sup>11</sup>

The Benny case established the “substantiality test,” holding that where a parodist “cop[ies] the substance of another’s work,” the fact that the result is a parody is not a defense to claims of copyright infringement.<sup>12</sup> Under this standard, a substantial borrowing will constitute copyright infringement, and Benny further suggests that little is required for a finding that a taking is “substantial.” While the court does acknowledge that fair use should be applied to parodic works in some cases, it refers to these allowable forms of borrowing with the phrase, “isolated incident, character, event, theme or setting.”<sup>13</sup> Such phrasing implies that the taking by a parody permissible under fair use is minimal, and suggests that the case may have turned out differently had Benny not lifted “Gas Light” virtually wholesale. However, because the courts in Benny did not establish any clear test for these issues, the status of parodic works and fair use remained difficult to define.

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<sup>8</sup> *Id.* at 533.

<sup>9</sup> *Id.* at 536.

<sup>10</sup> *Id.* at 535-6.

<sup>11</sup> *Id.* at 536.

<sup>12</sup> *Id.* at 537.

<sup>13</sup> *Id.*

While the Supreme Court would not see another parody-as-fair use case for nearly 40 years, other jurisdictions saw these cases arise time and again.

Soon after *Benny*—even before its affirmance by the Ninth Circuit—a California District Court made the first attempt at creating a test for reconciling parody and fair use in *Columbia Pictures v. National Broadcasting Corporation*.<sup>14</sup> The case involved a Sid Caesar skit aired on NBC entitled, “From Here to Obscurity,” a parody of the 1953 film, “From Here to Eternity.”<sup>15</sup> The court found no copyright infringement, instead finding that burlesque was entitled to a greater ability to borrow from other copyrighted works than were works that did not rely on borrowing.<sup>16</sup> Significantly, the court recognizes that parodic types of works require the use of borrowing and attempts to draw the line between fair use and infringement with its “conjure up” standard, but fails to establish a definitive test. The explanation is fairly confusing, with “more extensive use” being called for in one sentence, but examples of “small and insubstantial” permissible borrowing in the next.<sup>17</sup> The new “conjure up” test seems to be at odds with the “substantiality” test in *Benny*, which is relied upon in the court’s opinion.<sup>18</sup> Where *Benny* referred to allowing only isolated pieces to be taken and to the worries about parodists’ lifting of substantial portions of the original, the standard under *Columbia Pictures* appeared to offer greater latitude for parodists and more understanding of the requirements of the genre. The effect was a rather nebulous distinction between how much of a copyrighted work may be borrowed for parody under fair use, falling somewhere between more than the minimum and less than the maximum.

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<sup>14</sup> *Columbia Pictures Corp. v. Nat'l Broad. Co.*, 137 F. Supp. 348 (S.D. Cal. 1955).

<sup>15</sup> *Id.* at 351-2; *Berlin*, 329 F.2d at 544.

<sup>16</sup> “Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.” *Id.* at 354.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

While courts were dealing with *Benny* and *Columbia Pictures*, there was little care taken in differentiating between parody, burlesque, and satire, and the terms were often used interchangeably.<sup>19</sup> Indeed, the word “satire” rarely appears at all until the case of *Berlin v. E.C. Publications*, which uses it repeatedly in conjunction with parody.<sup>20</sup> The case involved more than two dozen copyright infringement claims filed against *Mad Magazine* by singer Irving Berlin.<sup>21</sup> *Mad Magazine* had published a collection of humorous lyrics to be “sung to the tune of” a number of songs, including Berlin’s.<sup>22</sup> Berlin argued that the parodying of titles (often rhyming or substituting words of the original), use of meter, and the infrequent borrowing of phrases amounted to infringement as the borrowing of these elements unjustly enriched the magazine.<sup>23</sup> The court did not find this persuasive, finding in favor of the defendants.<sup>24</sup> Additionally, the court found that *Mad Magazine* should not even have to make an argument justifying the use of the borrowed meter because Berlin had no claim to it in the first place, sardonically explaining, “We doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.”<sup>25</sup>

It is not the ultimate holding that makes this case important for the later distinction between satire and parody, however, but the lower court holding which had resulted in that appeal. The District Court originally hearing the case found *Benny* entirely inapplicable because *Mad* had not produced a parody at all, but rather “satirized, in original words and thought, several aspects of modern life.”<sup>26</sup> Later, the Second Circuit would conclude that *Mad Magazine*’s

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<sup>19</sup> *Bridy*, *supra* at note 3, at 261.

<sup>20</sup> *Berlin*, 329 F.2d at 545.

<sup>21</sup> *Id.* at 542.

<sup>22</sup> *Id.* at 543.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 545.

<sup>25</sup> *Id.*

<sup>26</sup> *Berlin*, 219 F. Supp. at 914.

songs indeed passed Benny when applied, but the distinction between parody and satire had been made.

This distinction quickly led to contradictory rulings. While *Mad Magazine* prevailed in Berlin by *not* having produced a parody, two cases in the New York District Courts would create the opposite result. In *Walt Disney Productions v. Mature Pictures Corp.*, a pornographic film played the “Mickey Mouse March” for several minutes during a scene depicting group sex.<sup>27</sup> *Mature Pictures* argued that the film aimed to make a humorous commentary on the transition of such teenagers from “childhood to manhood.”<sup>28</sup> The court found that the repeated and unaltered copying of the song could not legitimately be understood to be fair use, and did not in fact qualify as a parody based on the fact that *Mature Pictures* did not parody the song at all, even if their attempt was to “parody life.”<sup>29</sup> This was only one element of the case, but would become primarily important later on.

The strengthening of the notion that parody was defined by its target came a year after *Mature Pictures* in *MCA, Inc. v. Wilson*, in which the copyright infringement claims arose from a parody of the Andrews Sisters’ classic, “The Boogie-Woogie Bugle Boy of Company B.”<sup>30</sup> *Wilson* defended his song (“The Cunnilingus Champion of Company C”) as burlesque.<sup>31</sup> Relying on *Mature Pictures*, the court held that because the song did not target “Boogie-Woogie Bugle Boy” directly, it was not validly considered a parody or burlesque.<sup>32</sup> In this way, what had been only one of many considerations and not dispositive in any prior case had now become the

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<sup>27</sup> *Mature Pictures*, 389 F. Supp. at 1397.

<sup>28</sup> *Id.* at 1398.

<sup>29</sup> *Id.*

<sup>30</sup> *Wilson*, 425 F. Supp. at 448.

<sup>31</sup> *Id.* at 453.

<sup>32</sup> *Id.*

defining factor in determining whether a copying work could even be defined as a parody and raise the defense of fair use.

This created a clear conflict in the case law on parody and fair use. According to the Second Circuit, parodic works were subject to a full fair use analysis. According to the New York District Courts, parody was indeed entitled to such analysis, but was so narrowly defined as to trigger such analysis only in a minority of cases, saying as much in *Wilson*: “Since we believe that *Champion* is not a burlesque or parody of *Bugle Boy*, we need not reach the question of whether defendants' copying of *Bugle Boy* exceeds the fair use applicable to those art forms.”<sup>33</sup>

This incongruity between standards continued for years, resulting in incompatible rules and case holdings. In *Elsmere Music v. National Broadcasting Corporation*, the court found that a Saturday Night Live sketch entitled “I Love Sodom,” which mimicked the popular “I Love New York” ad campaign—copying its simple jingle and including dancers reminiscent of those in the ads—was a parody qualifying for a fair use exception.<sup>34</sup> Similarly, in *Fisher v. Dees*, the court found that a song entitled, “When Sonny Sniffs Glue” did not infringe upon the original, “When Sonny Gets Blue” due to its parodic nature.<sup>35</sup> However, the same jurisdiction found later in *Rogers v. Koons* that a three-dimensional rendering of a copyrighted photograph was not subject to a fair use exception—despite being legitimately satirical in nature—due to the fact that the photograph copied was not the target of the derivative work.<sup>36</sup>

The rule would finally be established by the Supreme Court of the United States in *Campbell v. Acuff-Rose Music*.<sup>37</sup> The conflict in the case arose from a take-off of Roy Orbison’s

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<sup>33</sup> *Id.*

<sup>34</sup> *Elsmere Music, Inc. v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741 (S.D.N.Y. 1980) *aff'd sub nom.* *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252 (2d Cir. 1980).

<sup>35</sup> *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).

<sup>36</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

<sup>37</sup> *Acuff-Rose*, 510 U.S. 569 (1994).

“Oh, Pretty Woman” in which defendants 2 Live Crew produced a version of the song with new lyrics giving a decidedly different perspective on the song’s subject than found in the original. 2 Live Crew claimed fair use because their song was a parody, and the court agreed. The Supreme Court explained further that parody was entitled to a fair use exception generally while satire was not: “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.”<sup>38</sup> While the Court stopped short of prohibiting satire from ever receiving a fair use exception, it raised the hurdle satire must overcome, making it substantially more difficult for satire to pass fair use analysis than parody.<sup>39</sup>

If ... 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.<sup>40</sup>

This view characterizes satire as parasitical, merely using another’s established success for the satirist’s unfair gain, and thus undeserving of application of a fair use exception. However, the Court acknowledged that a hardline distinction was nigh impossible since parody often “shades into satire,” and that these cases require a step-by-step fair use analysis on the details of each case.<sup>41</sup>

## V. Reasons to Include Satire in Fair Use

The exclusion of satire from fair use does not serve the purposes of copyright protection. The well-established reasoning for copyright based on incentivizing creation does not provide a

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<sup>38</sup> *Id.* at 580-1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

strong basis for excluding satire from fair use. Further, the greater purpose of intellectual property protection on the whole is diminished rather than reinforced by the rationale for excluding satire. Finally, the exclusion of satire from fair use on this reasoning implicates serious concerns in areas of law other than intellectual property.

The traditional rationale for copyright protection—encouraging creative works—simply does not provide a strong reason to exclude satire from fair use because satire does not serve as a serious disincentive to the creation of original artistic works. Satire necessarily relies on popular works to be effective. Satire’s use of the original work as a vehicle for another message requires that consumers of the satirical work can easily recognize the reference. Satire relying on obscure, unsuccessful, or unpopular works is unlikely to garner much of an audience simply because it will not be widely understood. In this way, creators of works ripe for satire will not be significantly harmed by the satirical usage, if at all. By the time a satirical use of the work even becomes a possibility, the original creator will have already reaped the benefits of his efforts. Even if the satire were to diminish market interest in the original work, this disincentive is unlikely to outweigh the powerful incentives found in creating an exceptionally-popular and well-known work. It is also difficult to determine how a satire would diminish the value of the original in the first place.

Indeed, a negative effect upon the market for the original work is an important consideration in fair use analysis, though it is only one of four. Application of each factor strongly supports the argument for including satire under fair use exceptions.

The first fair use factor under 17 U.S.C.A. §101 §107 considers “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit

educational purposes.”<sup>42</sup> Facially, the distinction between commercial and nonprofit uses appears to be key in the consideration of this factor. However, courts have repeatedly held that a work’s commercial nature is not dispositive in its characterization as fair use.<sup>43</sup> While a commercial nature is presumed to weigh against a finding of fair use, the greater consideration is the degree to which the copying work is transformative.<sup>44</sup> This goes to the heart of copyright protection: “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”<sup>45</sup> Generally, the more transformative the work, the less important is its intended commercial use in determining whether it may be considered fair use.<sup>46</sup> In this way, the first fair use factor must be taken relative to the others in order to determine its weight.

The latter three factors generally must also be considered in tandem, as each affects the others. The second factor is very vague in its plain language, considering only “the nature of the copyrighted work.”<sup>47</sup> This has proven to be perhaps the least useful factor, often receiving little attention and only cursory discussion in courts’ fair use analyses.<sup>48</sup> In his article, “Is That All There Is? Reflections on the Nature of the Second Fair Use Factor,” Robert Kasunic looks to the originator of the fair use factors, Justice Joseph Story, and finds that the likely intended meaning behind the second factor is whether the portion taken from the copyrighted work “appropriates ‘the heart of’” the work.<sup>49</sup>

This makes sense when taken in conjunction with the remaining two factors: “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and “the effect

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<sup>42</sup> 17 U.S.C.A. §107.

<sup>43</sup> *Acuff-Rose*, 510 U.S. at 579; *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 803 (Ninth Cir. 2003); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

<sup>44</sup> *Acuff-Rose*, 510 U.S. at 579.

<sup>45</sup> *Id.*

<sup>46</sup> *Walking Mountain*, 353 F.3d at 803.

<sup>47</sup> 17 U.S.C.A. §107.

<sup>48</sup> Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529 (2008).

<sup>49</sup> *Id.* at 535, quoting *Harper & Row*.

of the use upon the potential market for or value of the copyrighted work.”<sup>50</sup> In terms of the parody and satire cases, the third factor has been largely dependent on the “conjure up” test.<sup>51</sup> Under the “conjure up” analysis, it is accepted that the parodist *must* borrow, but the extent of the borrowing is limited to only that necessary to “conjure up” the original in the mind of the audience such that the parody is understood and thus capable of communicating its message.<sup>52</sup> Taking of substantial portions of the copyrighted work beyond what is necessary weighs against a finding of fair use. The fourth factor assists in determining whether the extent of the borrowing should be considered compatible with fair use through consideration of the effect on the market for the original copyrighted work. If a satire borrows to an extremely heavy degree from the original work, it is conceivable that it could usurp the market for the original or otherwise prevent the copyright holder from reaping the benefits of their work. This is the sort of appropriation of the “heart of the work” that Kasunic argues the second fair use factor is intended to target.<sup>53</sup> If a satire borrows from an original in such a way that it serves to replace the original—rather than merely reference it—then there is more likely harm incompatible with a proper finding of fair use.

However, the fourth factor has a particular importance in the context of satire. A number of cases have found fair use as to satires that occupy a market or niche that the original copyright holder is very unlikely to develop or license.<sup>54</sup> Commonly in these cases, the copyright holder is unlikely to license use of the work to satirists for fear of a negative reaction. Satires, especially

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<sup>50</sup> 17 U.S.C.A. §107.

<sup>51</sup> *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Elsmere Music, Inc. v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd sub nom*, 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432 (Ninth Cir. 1986).

<sup>52</sup> *Columbia Pictures Corp. v. Nat'l Broad. Co.*, 137 F. Supp. 348 (S.D. Cal. 1955). *See also Berlin, Elsmere, Fisher, supra* at note 53.

<sup>53</sup> *Id.*

<sup>54</sup> *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (Ninth Cir. 2003), *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002).

those that are particularly vulgar or offensive, have clearly been a point of contention for copyright holders. Requiring satirists to compensate copyright holders would effectively quash the ability of satirists to produce their own work, as they could simply be priced out of the market, rendered incapable of recouping their own costs of production. This is counter to the very aim of the copyright protection at issue and would render unworkable the very rationale copyright holders rely on in bringing copyright infringement claims against satirists utilizing their work.

In *Mattel, Inc. v. Walking Mountain Productions*, an artist produced a series of photographs depicting Barbie dolls in “various absurd and often sexualized positions.”<sup>55</sup> The court found that the photographs met the fair use standards, in large part because there was likely little or no effect on the market for Mattel’s Barbie dolls.<sup>56</sup> Mattel would be very unlikely to produce or license photographs like the ones at issue in the case; the court stated that it was not in the public interest to allow “complete control over the kinds of artistic works that use Barbie as a reference for criticism and comment.”<sup>57</sup>

In a nearly-identical case, Mattel brought a copyright infringement case against an artist who produced modified Barbie dolls dressed in sadomasochistic fetish garb and set in suggestive positions associated with sadomasochistic sex.<sup>58</sup> The court reasoned that the “Dungeon Dolls” would have little, if any, negative impact on Mattel’s Barbie doll market; the adult-themed dolls did not occupy the same children’s toy market as Barbie dolls.<sup>59</sup>

Both Mattel cases relied on language from *Acuff-Rose* in which the Court discussed the application of the fourth fair use factor, finding “the market for potential derivative uses includes

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<sup>55</sup> *Walking Mountain*, 353 F.3d at 796.

<sup>56</sup> *Id.* at 585.

<sup>57</sup> *Id.*

<sup>58</sup> *Pitt*, 229 F. Supp. 2d at

<sup>59</sup> *Id.*

only those that creators of original works would in general develop or license others to develop.”<sup>60</sup> For a satire seeking a fair use exception, this is a particularly important point. While copyright law expressly grants to copyright holders the ability “to prepare derivative works based upon the copyrighted work,” it is clearly established in these cases that this is not an unqualified right.<sup>61</sup> The exclusive right to prepare derivative works extends only to those derivative works that copyright holders are likely to develop or license themselves. This is strong enough to overcome even instances where a copyright holder expressly denies a satirist use of the work and the satirist uses it anyway.<sup>62</sup>

Taken on the whole, the fair use factors support a presumption of inclusion more than one of exclusion when it comes to satire. Whether commercial or not, satires generally do not “appropriate the heart of” the original because satire, by definition, conveys an entirely different meaning than the original. Copyright holders do not have final say over any and all derivative uses of their work, and even satires that seem to present a negative view of an original work are not under the control of the owners of that original work, largely because there is little real threat to the original’s market. The primary consideration, then, comes from the third factor as to the amount borrowed. A sufficiently transformative work should receive the fair use exception.

Additionally, it is also possible that a popular satire would create *greater* demand for the original work rather than harming it or even leaving it alone. Because satire makes no direct commentary about the original work, it relies on members of the audience to be familiar with the original in order to be effective. Further, the lack of negative commentary or criticism would be unlikely to result in a negative reaction toward the original on the part of the satire’s audience. A popular satire could well result in a stimulation of the market for the original work by those

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<sup>60</sup> *Id.* (emphasis added); *Walking Mountain*, 353 F.3d at 805.

<sup>61</sup> 17 U.S.C.A. § 106 (West).

<sup>62</sup> *Fisher v. Dees*, 794 F.2d 432 (Ninth Cir. 1986).

interested in understanding the satire or even nostalgia prompted by the satire serving as a reminder.

In order to fully understand why satire should be included under fair use, we must take a step back from the details of copyright and intellectual property framework and look at the greater purpose of this area of law. While it is uncontroversial that copyright protections are intended to encourage creation, this is not an adequate answer to the problem in and of itself. Encouraging creative works is not the interest here in its own right. Rather, there is a legitimate interest for both the government and the public at large in continually contributing to American culture. This has indeed been acknowledged in the United States from its outset, finding its way into the Constitution's Copyright and Patent Clause: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"<sup>63</sup> The purpose here is the promotion of progress in a larger, philosophical sense, not merely the interest of protecting creators of original works. A diverse variety of artistic works adds to our identity as a society and enriches our collective experience. This worthy goal is hindered by the exclusion of satire from fair use because that exclusion keeps works separate from the common cultural experience.

The characterization of satire as parasitic and free riding on original works is unfair for two reasons. First, satire is no more lazy or unoriginal than the works it references. It is hardly a new idea that there is "nothing new under the sun." That phrase itself is millennia old at this point and the concept has long been applied to literature and the arts. Despite the perception that satires build on other works merely "to avoid the drudgery in working up something fresh,"<sup>64</sup> it is difficult to find a significant difference between the use of original works by satirists and the

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<sup>63</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>64</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

use of cultural elements by creators of those original works. If satire is derivative, it is derivative in the same way as is any other work. Critics of literature, film, and other art forms often rely on drawing parallels between new works and old standards in order to understand the new piece. Satire relies on common and recognizable elements to communicate its message, just as a poem may follow a particular meter or a story may follow a tried-and-true plotline. The only distinction is that when it comes to satire, someone claims exclusive rights to the utilized elements. It is a fair question to ask whether it is wise to accept this assertion, and the answer would seem to be “no.” The strength of the original creator’s interest in maintaining sole rights to the work on the whole is largely illusory. While the motivation is entirely understandable, it is not legally compelling. Ideas that are introduced for public consumption cannot be expected to remain pure and untouched, nor can they be expected to work only in their creator’s interests. It is no secret that the general public includes both passive and active recipients of any given work; a copyright holder cannot distinguish between those who would only ingest their work and those who might be inspired to create a work of their own, as much as he might like to. This might well be seen as only fair; if the creator of a work wishes to benefit from public consumption of that work, then he must also risk the chance that the work will be poorly received or taken differently than he intended.

The second reason this characterization of satire is unfair is that these works do not exist in a vacuum. Indeed, if works are encouraged in the interest of evolving our culture, they *must* not. Works that gain enough popularity and market saturation become something greater than their form. Even without any infringement or misuse of the protected work, popularity over time will pull apart a work’s popular meaning from its creator’s original intended meaning. When experience of and exposure to a work become ubiquitous, that shared experience becomes an

avenue of communication among the general population. The work comes to be representative rather than literal; its meaning becomes what its audience makes of it. This goes to the very foundation of copyright infringement claims against satire in the first place; the copyright holder fails to recognize that the work has left their control and been absorbed the shared public consciousness. But this is exactly what is meant to happen and speaks to the reason behind incentivizing the creation of copyrighted works in the first place. As the copyrighted work becomes increasingly popular, it becomes not only a work subject to copyright, but a new, intangible element of an ever-evolving common culture and society.

Once copyrighted works become part of the popular culture, the argument for vigilant protection is rendered substantially weaker. By the time a work is popular enough to be ripe for satire, the creator of those works will have already reaped the benefit of their investment. Continuing to benefit the copyright holder at the expense of the public is counter to the entire motivation behind copyright protections in the first place.

It is this integration of original works and popular cultural understanding upon which satire relies. Satire uses the original work to evoke these commonly-understood meanings in an effort to convey its own message. In this way, the public interest is better served by satire's inclusion under fair use rather than its exclusion. Satire is a widely-accessible form of communication by its very makeup. Because satire often presents opinions on various issues in an easily-digestible fashion, it reaches a wider audience than more serious and complex works. Referencing a popular work and evoking certain common reactions is a method of exchanging ideas that is inclusive of those who may not have the education, opportunity, or resources to seek out more detailed or laborious analyses on the topic. Satire speaks to issues of the day in a way that allows laypersons to better understand them, and arguably, its humorous and entertaining

delivery of that message would have greater appeal than would a lengthy and detailed expert analysis. Minimizing the value of satire also minimizes the value of its audience in terms of their contribution to greater discussion. Certainly there is a compelling interest in an informed and critically-thinking public. If satire furthers this interest, it should be given greater latitude, not greater restriction.

Other legal concerns not connected to intellectual property are implicated here. The very foundation of the exclusion of satire—the idea that the work could make the same message in another way<sup>65</sup>—treads into dangerous territory. Satire, by definition, requires the use of another original work to convey its message. Courts disallowing exactly this are arguably stumbling into the territory of First Amendment concerns by this restriction. Contrary to the seemingly-easy appearance of courts’ distinctions relating to the satirical work’s vehicle in this regard, in the field of satire, form is indistinguishable from function and content. It cannot actually “stand on its own” as changing the entire vehicle fundamentally changes the work. Further, virtually *any* creative work could make its point in another way. What makes the work creative, unique, and desirable is *how* the message is conveyed. Courts that dismissively exclude satire under this rationale are walking on thin ice when it comes to content-based restrictions and the implications of such restrictions in terms of free expression.

The First Amendment to the U.S. Constitution provides, in part, that “Congress shall make no law...abridging the freedom of speech...”.<sup>66</sup> In its clarification and refinement by the U.S. Supreme Court over the years, this has been broken into two categories of speech receiving different levels of judicial scrutiny, content-based and content-neutral restrictions. Content-based restrictions, which prohibit or limit speech based on the content of that speech, are subject to the

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<sup>65</sup> *Id.*

<sup>66</sup> U.S. Const. amend. I.

high hurdle of strict scrutiny.<sup>67</sup> Under this standard, the restriction is only permissible under the Constitution if it serves a compelling governmental interest and is so narrowly tailored as to be the least restrictive means to serve that interest.<sup>68</sup>

As the distinction between satire and parody stands today, there is not a clear First Amendment violation. This is due to the fact that a hardline rule has not been drawn. While it is much more difficult for satire to pass fair use analysis, it is not prohibited from such a finding. However, the reasoning articulated by the Court in *Acuff-Rose* in drawing distinctions between parody and satire is only a step away from creating such a rule.<sup>69</sup> Because a rule based on that rationale would likely violate the First Amendment, it is worth examining the rationale itself in the same light, since that would be the subject of the analysis were a rule at issue.

A rule categorically excluding satire from a finding of fair use would violate the First Amendment because it would be a content-based restriction and would not pass the required strict scrutiny standard. In the case of satire, form and function are inextricably intertwined. Satire relies on the juxtaposition of an original work with the satirist's message; elements of a commonly-known work are utilized to communicate some new meaning about an external topic. Despite the Supreme Court's reasoning that satire could simply communicate that message in another way without referring to the original work at all, changing the entire voice and vehicle of the satire necessitates the creation of an entirely new satirical work. The target of reasoning like that articulated by the Court in *Acuff-Rose* is indeed the very content of the satire.<sup>70</sup> Without the creative use of an original work, a satire is nothing more than a thought about a topic without any communicative aspect at all.

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<sup>67</sup> See *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

<sup>68</sup> See *Sable Comms. of Cal., Inc. v. Federal Comms. Comm'n*, 492 U.S. 115, (1989).

<sup>69</sup> *Acuff-Rose*, *supra* at note 40.

<sup>70</sup> *Id.*

Because such a rule would constitute a content-based restriction, it would need to pass strict scrutiny by serving a compelling governmental interest in the most narrowly-tailored and least-restrictive possible means. It is difficult to determine any compelling governmental interest behind excluding satire from fair use and instead treating it with the presumption of copyright infringement. As argued above, there are powerful governmental interests as to the contrary: encouraging the furtherance and evolution of our culture, and facilitating public discourse on a variety of issues. Even if there were a compelling governmental interest implicated in the creation, publication, or distribution of satire, it is highly unlikely that a flat exclusion of all satire from a finding of fair use would be narrowly tailored to serve such an interest. Such a sweeping regulation would ignore completely the fair use factors under 17 U.S.C.A. §101 §107 in favor of the idea that satires are nothing more than parasitic derivatives without their own value. And while this seems to be a popular view in the eyes of courts deciding satire cases, it ignores the undeniable fact that satires are themselves original creative works.

Fortunately, such a rule has not been put forth. However, the reasoning that would support such a rule is still problematic, even if not subject to First Amendment claims. This reasoning, articulated in *Acuff-Rose*, has since been largely determinative in findings of copyright infringement rather than fair use in subsequent satire cases, so it is still an important consideration.<sup>71</sup>

## **VI. Conclusion**

For the foregoing reasons, satire should be granted the same fair use exceptions as parody. Damage to the copyright holder of the original work is unlikely to occur, and any that might occur is unlikely to outweigh the benefits of producing a popular work in the first place.

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<sup>71</sup> See *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (Ninth Cir. 1997).

On the other hand, permitting satire under fair use supports a wide variety of benefits, to the copyright holder, the satirist, and the public.

Successful satires could stimulate the market for the original work. Those unfamiliar with the original would want to see it in order to understand the satire. Fans of the satire would want to compare it with the original, as would critics or scholars. Admirers of the original might seek it out for nostalgic purposes. In this way, satire benefits—not threatens—copyrighted works.

The inclusion of satire in fair use would also result in a greater body of work overall. Like the original works they lampoon, satires are themselves original creative works. If the creation of diverse original works is desirable at the outset—the very basis of copyright protection—then certainly the creation of satirical works should also be viewed in this light. Indeed, satire serves to synthesize varied works and ideas, adding a valuable component and perspective to the body of works making up our culture. Such a style of communication should be encouraged rather than discouraged.

A perhaps nobler benefit of including satire in fair use is greater access to exchange of ideas. Satire, almost by definition, is a widely-accessible form of communication. It relies on works that are commonly-known, widely-appreciated, and familiar to its audience simply to be understood. This makes a satire particularly effective in reaching a wide variety of people who may have little apparent in common but share the common experience of exposure to a popular copyrighted work.

These concerns speak to the need for and desirability of a comprehensive and diverse cultural foundation. The continued market for satirized works, the facilitation of idea exchange, and the reinforcement of cultural values and ideas all work toward the goal of establishing a

strong body of works in the interest of benefiting society at large, whether the reasons are economic, practical, or philosophical.