Parody Protection Under the Fair Use Doctrine--The Eveready Standard: It Keeps Going, and Going, and Going . . .

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The federal government promulgated the first copyright statute in 1790, and since that time, the law in this area has had a turbulent and confusing history. Federal statutes enacted pursuant to the Copyright Clause in article 1, section 8 of the United States Constitution aim to promote science and the useful arts by affording a limited monopoly to the author of a copyrighted work. The fair use doctrine is one limitation on the exclusive control an

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1 See Act of May 31, 1790, 1 Stat. 124. Passed by the First Congress and entitled “An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies, during the Times Therein Mentioned,” this statute gave an author “the sole right and liberty of printing, reprinting, publishing and vending” his work for a period of fourteen years. Id.


4 U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause empowers Congress “[t]o 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.” Id.

5 See Sony, 464 U.S. at 429. Not only is a copyright owner’s monopoly power limited, but it is not primarily designed to provide him with a benefit. Id. Although the copyright owner’s limited monopoly provides him with an economic incentive to create, as he is assured a fair monetary return for his labor, its main goal is to assure that the public will have access to his creation after the limited time of exclusive control has expired. Id.; Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring monopoly lie in the general benefits derived by the public from the labors of authors.”).
author has over her copyrighted work and entitles a copier to an "allowable" infringement of the copyright in furtherance of the assumed public good that will result from such a taking.

The fair use doctrine is commonly invoked in the defense of a parody, which is defined as a "writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated." Due to the nature of a parody, an obvious tension emerges between the rights of the original author and the parodist. Courts have attempted to alleviate this tension, but have been notably unsuccessful and inconsistent. Early conflicts in this area were most often resolved in favor of the author in decisions that maintained that usage of the original work could only be mini-

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6 See 17 U.S.C.A. § 107. Fair use allows one to utilize another's copyrighted work for "criticism, comment, news reporting, teaching, . . . scholarship, or research." Id. The idea of fair use first appeared in Folsom v. Marsh, in which Justice Story observed that "copyrights approach nearer than any other class of cases . . . to what may be called the metaphysics of the law, where the distinctions are, or at least may be very subtle [sic] and refined, and sometimes, almost evanescent." Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841). The precise term "fair use," however, did not appear until nearly thirty years later. See Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869).

7 See Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980). The doctrine of fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Id.

8 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (1986). The term "parody" is used broadly in this article to encompass a literary imitation of a written work, a song whose words mock another's verse, or a television skit that mimics a motion picture. Technically, some of the works herein mentioned may be more precisely classified as either travesty or burlesque. A travesty places characters from serious works in ridiculous situations and derives its comic effect from this ludicrousness. See Light, supra note 2, at 616 n.6. Burlesque imitates the actual style of the original author by applying that style to a new subject in a humorous way. Id. Regardless, all three types utilize an original work to produce their own derivation. Id.

9 Compare Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 448 (N.D. Ill. 1991) (holding parody of commercial advertisement fair use), and Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F. Supp. 429, 441 (W.D.N.Y. 1978) (although commercials were similar, still fair use), with Dr. Pepper Co. v. Sambo's Restaurant, Inc., 517 F. Supp. 1202, 1208 (N.D. Tex. 1981) (parody advertisement held to diminish value of original therefore not fair use), and MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (holding parody of song merely substituting dirty lyrics fulfilled demand for original and was thus not fair use). See Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 (2d Cir. 1980) (taking was not substantial, even though lyrics were distasteful, still fair use); Benny v. Loew's, Inc. 239 F.2d 532, 537 (9th Cir. 1956), aff'd per curiam sub nom, Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43 (1958) (burlesqued television version of movie unfair use); Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955) (holding burlesque television version fair use).
Prompted by criticism from commentators and dissenting justices who advocated the importance of parody as a literary genre, courts began to embrace parody and expanded the fair use standard to allow parodists greater freedom of appropriation. The continual liberalization of this standard culminated in the recent district court case of Eveready Battery Co. v. Adolph Coors Co., in which the court held that the creation of the "best" parody was a fair use.

This Note will demonstrate that through the inconsistent application of the statutory fair use factors, courts have continually muddied the morass of law encompassing fair use parody. Further, it will note that the Eveready court has only added to this uncertainty and placed the law in a state clearly antithetical not only to established case law, but to the policies underlying the Copyright Act itself. Parts One and Two will review the history and purpose behind the fair use factors, and detail their inconsistent application and interpretation to demonstrate their ineffectiveness in governing fair use parodies today. Part Three will propose the strict adherence to a refined definition of parody and advocate a judicial refocusing upon the fourth and most relevant factor to modern fair use parodies—the economic impact of the parody on the market of

10 See Benny, 239 F.2d at 536; Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914) (parody can not take important and striking direct quotes); Green v. Luby, 177 F. 287, 288 (C.C.S.D.N.Y. 1909). The Benny court stated that under the fair use doctrine "a writer may be guided" by the copyrighted works of another in supporting his own text, but did not say to what extent the guidance became unfair exploitation. See Benny, 239 F.2d at 536.

11 See Robert J. Kapelke, Piracy or Parody: Never the Twain, 38 U. Colo. L. Rev. 550, 556 (1966) (quantitative fair use test is unrealistic restraint on parodists); Comment, Parody of Copyrighted Works: Death of an Art Form?, 4 WAYNE L. Rev. 49, 65 (1957) ("To limit burlesque to only a few incidents of the original and to deny its right to take details and sequence of events is indeed an artificial standard."); see also Wilson, 677 F.2d at 191 (Mansfield, J., dissenting) (parody "is the price an artist pays for success").

12 See 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[D] (1992); see also Elsmere, 623 F.2d at 253 (court recognized entertainment value of parody in modern "solemn" world), Berlin, 329 F.2d at 545, (parody has "thrived from time of Chaucer to . . . Allen Sherman"); see also Columbia Pictures, 137 F. Supp. at 354 (author entitled to more extensive use of copyrighted work in creating parody than other fictional works). But see Benny, 239 F.2d at 537 (parody would not be given special treatment). The Benny court felt that "[o]therwise, any individual or corporation could appropriate, in its entirety, a serious and famous dramatic work, protected by copyright, merely by introducing comic devices [into it]." Id. at 537.


14 See id. Despite the overwhelming similarities between the two television commercials involved in the case, the court held that the Coors commercial constituted a fair use and therefore was not an infringement on Eveready's copyright. Id.
the original work. Finally, Part Four will detail the numerous policy concerns surrounding fair use parodies, and note their optimal satisfaction under the economic impact standard.

I. Fair Use Generally

The fair use defense "is the most troublesome [issue] in the whole law of copyright." The fair use of a work is best defined as the "privilege in [those] other[] than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent." The purpose of the doctrine is to prevent the strict enforcement of the copyright owner's virtual monopoly power over her work, for this would inhibit the progression of ideas. The paradigmatic illustration is the scholar who must refer to and quote the work of prior scholars to preface her own research. In light of the value to society of such use of another's work, courts have attempted to balance the rights of both parties, the

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18 Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).
19 Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966)(quoting H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY, 260 (1944)), cert. denied, 385 U.S. 1009 (1967); see Wihtol v. Crow, 199 F. Supp. 682, 684 (S.D Iowa 1961), rev'd on other grounds, 309 F.2d 777 (8th Cir. 1962); see also Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205 (2d Cir. 1979). Thus, although the second work may technically be considered an infringement upon the copyright, if the distribution of the materials will better serve the public in the free dissemination of information, the use will be allowed. See Rosemont Enters., 366 F.2d at 307.
17 See Zecharia Chafee, Jr., Reflections on the Law of Copyright: I, 45 COLUM. L. REV. 503, 511 (1945). "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Id.
16 See Sony, 464 U.S. at 477 (Blackmun, J., dissenting) (scholar's own work can depend on ability to refer to and quote prior scholars).
15 See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (monopoly created by copyright rewards individual author in order to benefit public), Wendy J. Gordon, Fair Use as Market Failure: A Structural Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1630 (1982) (fair use permits second author to use first author's work for public good).
20 See 17 U.S.C.A. § 106. This section is entitled "Exclusive rights in copyrighted works," and provides in relevant part:
Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies . . . ;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale . . . ;
(4) in the case of literary, musical, dramatic, and choreographic works,
law guarantees the sovereignty of the original creation while simultaneously encouraging its use to proffer new ones.\footnote{21} Although the courts have enumerated common law factors to be considered when determining the fairness of a particular use,\footnote{22} the absence of a clear and definitive test has resulted in inconsistent application of the fair use doctrine.\footnote{23}

In 1976, in an attempt to delineate a clear standard, Congress codified the fair use doctrine in section 107 of title 17 of the United States Code.\footnote{24} Congress’s stated intent was to create a framework upon which courts could base their decisions, however, section 107 provided little guidance for the courts because its stated purpose was to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in anyway.”\footnote{25} The doctrine itself was defined as an equitable one, to be reasonably applied on an ad hoc basis.\footnote{26} The four relevant factors\footnote{27} to be considered are:


\footnote{21 See Sony, 464 U.S. at 479 (Blackmun, J., dissenting). This compromise must “take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the . . . community, may not be deprived of their just merits, . . . ; [and] the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.” Sayre v. Moore, as set forth in Cary v. Longman, 1 East 358, 361 n.(b), 102 Eng. Rep. 138, 140 n.(b) (K.B. 1785).

\footnote{22 See, e.g., Orgel v. Clark Boardman Co., 301 F.2d 119, 120 (2d Cir.) (infringement found where derivative work was merely colorful variation of prior work on same subject), cert. denied, 371 U.S. 817 (1962); West Publishing Co. v. Edward Thompson Co., 176 F. 833, 838 (2d Cir. 1910) (“extensive copying or paraphrasing of the language” not fair use). See generally Saul Cohen, Fair Use in the Law of Copyright, in ASCAP Copyright Law Symposium 53-69 (1955) (an in-depth history of fair use factors utilized by courts).

\footnote{23 See Melanie A. Clemmons, Author v. Parodist: Striking a Compromise, 46 OHio St. L.J. 3, 5 n.26 (1985); supra note 9 and accompanying text. Part of the inconsistency stems from the nature of the fair use doctrine itself. See Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984) (fair use is mixture of law and fact), cert. denied, 471 U.S. 1004 (1985); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (“test for infringement of a copyright is of necessity vague”).

\footnote{24 17 U.S.C.A. § 107.}


\footnote{26 See H.R. Rep. No. 1476, supra note 2, at 66, reprinted in 1976 U.S.C.C.A.N. at 5680 (“[b]eyond 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”); see also Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977) (determination of whether use is fair requires examination of circumstances in each case), cert. denied, 434 U.S. 1013 (1978); Nimmer & Nimmer, supra note 12, § 13-05[A] (statute does
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 the value of the copyrighted work. 28

II. FAIR USE FACTORS

A. Purpose and Character of the Work

The initial fair use factor to be considered under section 107 is the purpose and character of the infringing work. 29 Although the fair uses traditionally allowed by courts were for literary criticism, and scientific and scholarly purposes, 30 the legislature specifically

not provide rule to determine if use is fair).


The court in the DC Comics case embraced this notion of non-exclusiveness and created a fifth factor to be considered, the good faith of the parodist in appropriating the work. DC Comics Inc. v. Unlimited Monkey Bus., 598 F. Supp. 110, 119 (N.D. Ga. 1984)

28 17 U.S.C.A. § 107. The statute is entitled “Limitations on exclusive rights: Fair Use,” and the paragraph preceding the four enumerated elements reads:

Notwithstanding the provisions of section 106, ... 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 (four factors are to be considered).

Id. The courts are to use these four factors as they wish, emphasizing those which are most relevant to the case at bar. See Light, supra note 2, at 624.


noted that a parody could constitute a fair use. Under the “purpose and character of the work” factor a court may consider whether the “use is of a commercial nature or is for non-profit educational purposes.” Although the Supreme Court has ruled that a commercial use creates a presumption of unfair copyright exploitation, the legislative history of section 107 specifically states that the commercial character of an activity should be considered in conjunction with the other enumerated factors. Despite this clear instruction, many courts have used the commerciality of a work to definitively preclude the fair use defense. Alternatively, other

31 H.R. Rep. No. 1476, supra note 2, at 66, reprinted in 1976 U.S.C.C.A.N. at 5678. The legislature commented that an appropriate consideration for fair use would be the “use in a parody of some of the content of the work parodied.” Id. (emphasis added). Use of the term “some” has caused much confusion among the courts. See infra notes 45-60 and accompanying text.

A parody however, is not presumed to be a fair use. See Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986). Once a work is determined to be a parody, the four factors are considered to determine whether it constitutes a fair use. Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 829 (S.D.N.Y. 1990).

32 See H.R. Rep. No. 1476, supra note 2, at 66, reprinted in 1976 U.S.C.C.A.N. at 5679. This statement was expressly defined as not mandating a “not-for-profit limitation on educational uses of copyrighted works,” but rather was an “express recognition” that the commercial nature of an activity should have some bearing on the fair use issue. Id.; Note, Parody and Copyright Infringement, 56 COLUM. L. REV. 585, 597 (1956) (commercial and artistic elements in almost every work create problematic distinction rendering “commerciality” pertinent “insofar as determinable”). But see Rosemont Enters. Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (author’s commercial motive or lack thereof is irrelevant to determination of fair use), cert. denied, 385 U.S. 1009 (1967).


34 See H.R. Rep. No. 1476, supra note 2, at 66, reprinted in 1976 U.S.C.C.A.N. at 5679. The legislative history of § 107 states that “the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.” Id.; see also Harper & Row, 471 U.S. at 593 (Brennan, J., dissenting) (commercial use alone does not preclude fair use determination). Many courts have recognized that the commercial nature of a use does not necessarily negate a fair use determination. See Consumers Union of U.S., Inc. v. New Regina Corp., 664 F. Supp. 753, 761 (S.D.N.Y. 1987); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980); see also Rosemont, 366 F.2d at 308 (protection extends to commercial works motivated by commercial gain).

35 See, e.g., D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (commercial use was exploitation for personal profit, not parody); Tin Pan Apple, 737 F. Supp. at 831 (fair use defense failed because defendant’s use of copyrighted material to promote sale of commercial products did not qualify as parody); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, 642 F. Supp. 1031, 1034-36 (N.D. Ga. 1986) (fair use defense rejected when primary purpose behind parody is attempt to make money).
courts have adopted a "productive use" test, and noted that unless the derivative work performs a productive function, it constitutes copyright infringement. 6 Although the inclusion of this factor was originally justified by the "long controversy over the . . . problems of fair use . . . of copyrighted material for educational and scholarly purposes," 7 and as such may seem inapplicable to fair use parodies, the purpose and commercial nature of a parody is especially relevant to the issue of fair use today. 8

B. The Nature of the Copyrighted Work

The second fair use factor, the nature of the copyrighted work, 9 differentiates between published and unpublished works, with the latter enjoying a higher level of protection. 10 This disparate treatment is justified by an author’s unchallenged right to control the first use of her copyrighted material. 11 In considering

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6 See Jartech, Inc. v. Clancy, 666 F.2d 403, 406-07 (9th Cir.), cert. denied, 459 U.S. 879 (1982); Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 970 (9th Cir. 1981), rev’d on other grounds, 464 U.S. 417 (1984); see also Dow Jones & Co. v. Board of Trade, 546 F. Supp. 113, 119 (S.D.N.Y. 1982). These courts utilized the theory that stated ‘‘mere reproduction of a work in order to use it for its intrinsic purpose’ may not be considered fair use.” NIMMER & NIMMER, supra note 12, § 13-92 (quoting Universal City Studios, 659 F.2d at 970) (footnote omitted).

7 See infra notes 89-91, and accompanying text.

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this factor, courts must determine if the work is “creative, imaginative, and original, . . . and whether it represent[s] a substantial investment of time and labor made in anticipation of a financial return.”42 Works that are informational or factual in nature are afforded less copyright protection than fictional works, in order to encourage their rapid dissemination into the realm of public knowledge.43 Since a work must be published and widely known for a parodist to create a successful parody, this second factor is, for the most part, irrelevant in parody cases.44

C. Substantiality of Material Used

The third fair use factor addresses the substantiality of the taking, or the extent to which the defendant copied the original work.46 This factor has been the most problematic for the courts. For instance, the taking of as little as three sentences has been

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43 Nimmer & Nimmer, supra note 12, §§ 13-88.8 to -88.9; see Harper & Row, 471 U.S. at 563; Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983), cert. denied, 469 U.S. 823 (1984). The distinction between fact and fantasy will vary, for “even within the field of fact works, there are gradations as to the relative proportion of fact and fancy . . . . The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case.” Harper & Row, 471 U.S. at 563, (quoting Robert A. Gorman, Fact or Fancy? The Implications for Copyright, 29 J. Copyright Soc’v. 560, 561 (1982)).

44 See Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 447 (N.D. Ill. 1991); Elliott M. Abramson, How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies, 61 Temp. L. Rev. 133, 157-68 (1988). Most courts find at least some artistic merit in derivative works utilizing the fair use defense, regardless of their purpose. See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903) (court rejected notion advertisements should be denied copyright protection on ground lack artistic merit); see also Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1176 (5th Cir. 1980) (fact work was commercial publication neither supports nor hurts fair use claim under second factor).

The reason for this disregard of the second factor stems primarily from the fact that the work need not be new, but merely “original.” Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970). To be an original idea, “[n]o large measure of novelty is necessary . . . . All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation,” no matter how poor that variation is. Alfred Bell Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-03 (2d Cir. 1951).

held an infringement,\textsuperscript{46} while the reproduction of an entire work has been ruled fair.\textsuperscript{47} Many courts have focused their analyses on this third fair use factor in evaluating parodies,\textsuperscript{48} yet the propriety of this focus is questionable at best.\textsuperscript{49} A successful parody necessarily invokes rec-

\textsuperscript{46} See Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 303 (E.D. Pa. 1938). \textit{But see} Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992). In the \textit{Acuff-Rose} case, copyright holders of the song “Oh Pretty Woman” brought suit against the rap group known as 2 Live Crew for its song entitled “Pretty Woman.” \textit{Id.} at 1431. After determining that 2 Live Crew’s song was in fact a parody, the Sixth Circuit stated that the first three fair use factors weighed against a finding of fair use, and the fourth one was “at best, neutral.” \textit{Id.} at 1439. The court, focusing on the first factor alone, held that the fact that the rappers were selling the parody made it an unfair use. \textit{Id.} “It is likely, for example, that an identical use of the copyright work in this case at a private gathering on a not-for-profit basis would be a fair use.” \textit{Id.}

\textsuperscript{47} See Williams & Wilkins Co. v. U.S., 487 F.2d 1345, 1361-63, (Ct. Cl. 1973), aff’d, 420 U.S. 376 (1975). Courts have continually differed on whether the appropriation of an entire work can be fair. \textit{Compare Williams}, 487 F.2d at 1353 (court renounced idea that entire copyrighted work could never be copied as “overbroad generalization, unsupported by the decisions and rejected by years of accepted practice”), \textit{with} Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (extensive verbatim copying or paraphrasing not fair use), \textit{cert. denied}, 385 U.S. 1009 (1967), and Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937) (no authority supports proposition “wholesale copying” of “copyrighted material can ever be fair use”).

A purely quantitative approach is not acceptable in considering the substantiality of the material used. See Maxtone-Graham v. Burtchell, 803 F.2d 1253, 1263 (2d Cir. 1986), \textit{cert. denied}, 481 U.S. 1059 (1987); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 222 (D.N.J. 1977); Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 353 (S.D. Cal. 1955). Rather, the quantity of borrowed material must be weighed against the quality of the appropriation. See Nimmer & Nimmer, \textit{supra} note 12, §§ 13-88.10 - 13-88.11. Copyright infringement may be found where only a small portion of the work is copied if the part usurped is material. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565-66 (1985). The quantum of material used must be interrelated with other factors such as the quality of the material used and the need of the defendant to use the appropriated material in his work. \textit{New York Times}, 434 F. Supp. at 222. The quality of material used can be determined by the character of the original work and the relative value of the material taken. Universal Pictures Co. v. Harold Lloyd Corp. 162 F.2d 354, 361 (9th Cir. 1947).


\textsuperscript{49} See Abramson, \textit{supra} note 44, at 157. The doctrine of fair use assumes a substantial taking, as the defense will only be involved when a court has found an infringement, which occurs when there has been a substantial use. \textit{Id.}; see, e.g., Toksvig v. Bruce Publishing Co., 181 F.2d 664, 667 (7th Cir. 1950) (substantial use of copyrighted work is infringement). Thus, by utilizing this factor, the substantiality of the taking is, in essence, considered twice in the consideration of fair use, first when determining if there has in fact been an infringement and second when determining if the infringement could be considered a fair use. Abramson, \textit{supra} note 44, at 157. Yet the degree of substantiality can not be said to stand for
ognition of the work being parodied; therefore, it is submitted that by labeling a particular use as parody, it is implicit that a substantial amount of the original has been taken.

The traditional standard used to judge the degree of the taking was the "conjure up" test. The "conjure up" test allowed a parodist to appropriate material from another's work to the extent that it brought about the recalling or conjuring up of the general image of the original. As such, the parody was permitted to trigger a recognition of the work being parodied in the mind of the ordinary observer, but was required to have independent development and expression apart from the original and in furtherance of its own creative purpose.

The limits of the conjure up test were extended in *Elsmere Music, Inc. v. National Broadcasting Co.*, in which the court recognized that the conjure up standard merely established a minimal amount of allowable taking, and an "[e]ven more extensive use would still be fair." The court in *Fisher v. Dees* continued to

the same thing in both instances, for if it did, every fair use defense would fail as a matter of law. *Id.* Clearly, this is not the case. *Id.*

See *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989). The court in *Cliff Notes* realized that the "keystone of parody is imitation." *Id.* It noted that "[a] parody must convey two simultaneous--and contradictory--messages: that it is the original, but also that it is not the original and is instead a parody. To the extent that it does only the former but not the latter, it is . . . a poor parody." *Id.*

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The court in *Fisher v. Dees* continued to
expand this test and afforded the parodist the additional freedom to utilize as much of the original work as was “necessary to accomplish [the] parodic purpose.”

Recently, the Eveready court pushed the substantiality test even further, ruling that the creation of the “best” parody, one which utilized even the essence of the original to achieve its parodic effect, was fair use. This ruling is clearly inconsistent with

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354 (S.D. Cal. 1955).

794 F.2d 432 (9th Cir. 1986). The Fisher court decided that a parody of the song “When Sunny Gets Blue”, entitled “When Sunny Sniffs Glue,” was a fair use. Id. at 440.

Id. at 439; accord Elsmere, 623 F.2d at 253. The Fisher court designated three specific factors to use in determining whether the taking was excessive: (1) the degree of public recognition of the original work, (2) the ease of conjuring up the original in the chosen medium, and (3) the focus of the parody. Fisher, 794 F.2d at 439. The court noted that due to the chosen medium, the parodying of a song would be difficult to do without near exact copying, otherwise an ordinary listener would not be able to associate the parody with the original. Id. The court stated that in light of the parody’s medium, purpose (to poke fun at the song) and brevity, (the parody utilized only the first six lines of the song’s 38 bars of music), it took no more than was needed. Id. at 439. It is submitted that by ruling in this manner, the Ninth Circuit adopted the test employed in the Second Circuit in Elsmere, and brought the law into a somewhat harmonious state. See Suheil J. Totah, Note, Copyright Law: In Defense of Parody, 17 Golden Gate U. L. Rev. 57, 69-70 (1987) (Elsmere allowed reasonable copying of work “to achieve the purpose of the parody”).

See Eveready, 765 F. Supp. at 447; Steven P. Durchslag, Courts Split on Parody Standards, Nat’l L.J., Oct. 7, 1991, at 23, 32. Steven Durchslag is the director of the intellectual property department at Winston & Strawn in Chicago, which represented the Eveready Company in the district court case. Id. at 23. At trial, Robert Simon, the creator of “the ‘Beer Rabbit’ commercial” testified that he had taken more than was necessary to conjure up the original commercial and intended to create the “best parody.” Brief for Appellant at 11, Eveready Battery Co. v. Adolph Coors Co., No. 91-2243, (7th Cir. 1991) (case settled before appellate hearing).

The Eveready case involved a Coors beer commercial which parodied Eveready Battery Company’s Energizer Bunny. Eveready, 765 F. Supp. at 443. Eveready had embarked on an extensive advertising campaign in 1989 that centered around a small, pink mechanical bunny wearing sunglasses, beach thongs, and carrying a bass drum with the Energizer logo on it. Id. at 442. This campaign was launched in response to a battery commercial produced by Eveready’s primary competitor, Duracell. Id. In the Eveready commercials, the Energizer Bunny strolls onto the television screen while a voice states “[s]till going. Nothing outlasts the Energizer. They keep going and going and going . . . [voice fades out].” Id. The Energizer Bunny advertisements became extremely successful by utilizing a “commercial within a commercial” format, in which the Bunny would interrupt another fictitious commercial due to the long lasting power of its batteries. Id. Eveready copyrighted two of the interruptive format commercials, and registered the Energizer Bunny as its trademark. Eveready, 765 F. Supp. at 443.

The Adolph Coors Company (“Coors”) decided to “parody” the Energizer Bunny and created a commercial featuring a well known actor, Leslie Nielson. Id. Mr. Nielson was dressed to emulate the Energizer Bunny, wearing a dark business suit, white rabbit ears, white tail and rectangular pink rabbit feet. Acting as the Bunny did, Nielsen beat on a life-sized bass drum with the Coors Light logo on it while interrupting a fictitious beer commercial. Id. There was even a voice at the end of the commercial stating “Coors Light... keeps
established precedent, which required a court to balance the parodist's right to create the "best" parody with the original author's right to protect her copyrighted expressions.\textsuperscript{60}

D. Effect of Appropriation on Potential Market for Original Work

The fourth statutory fair use factor involves evaluating the effect of the use upon the potential market for the original work.\textsuperscript{61} Although it has been recognized that an appropriating work may increase the demand for the copyrighted work,\textsuperscript{62} a contrary argument posits that a parody diminishes the demand for the original and therefore reduces its economic value.\textsuperscript{63} The economic effect of the parody on the original work has been "widely accepted to be the most important" factor,\textsuperscript{64} yet the standards applied to determine this effect have varied.\textsuperscript{65} A recent trend in the judiciary dem-

\begin{itemize}
\item \textsuperscript{60} Walt Disney Prods. v. Air Pirates, 581 F.2d \textsuperscript{751}, \textsuperscript{758} (9th Cir. 1978), cert. denied, \textsuperscript{439} U.S. \textsuperscript{1132} (1979). Such a balance is necessary to protect the original expressions of the copyright owner. \textit{Id.} Although the \textit{Walt Disney} court recognized that in certain situations there might be a "special need for accuracy," the court concluded that given the widespread recognition of the Disney characters, not much taking was needed to evoke their image in the minds of the public. \textit{Id.} at \textsuperscript{757-58}. Applying the standard used in the \textit{Walt Disney} case to the \textit{Eveready} case, it is submitted that the high degree of public recognition surrounding the successful Energizer Bunny commercials would similarly necessitate minimal use of the original to invoke it in the minds of viewers. \textit{See Eveready}, \textsuperscript{765} F. Supp. \textsuperscript{at} \textsuperscript{443} (Energizer Bunny ads were among most popular in country and deemed "break through" in the industry); \textit{Durchslag, supra} note \textsuperscript{59}, at \textsuperscript{32}; \textit{see also Pillsbury Co. v. Milky Way Prods., Inc.}, 215 U.S.P.Q. \textsuperscript{124}, \textsuperscript{132} (N.D. Ga. 1981) (in our media-saturated society, recognition of television jingle is widespread, thus extent to which parody must borrow to conjure up original is minimal).
\item \textsuperscript{61} 17 U.S.C.A. \textsuperscript{§ 107(4)}.
\item \textsuperscript{62} \textit{See Kapelke, supra} note \textsuperscript{11}, at \textsuperscript{567} (discussing rise in demand for original because imitation peaks public's curiosity and serves as advertisement for copyrighted work).
\item \textsuperscript{63} \textit{See Durchslag, supra} note \textsuperscript{59}, at \textsuperscript{32-33} (parody reduced economic value as uniqueness of original commercial was diminished by similar ads).
\item \textsuperscript{64} \textit{See Harper \\ & Row Publishers, Inc. v. Nation Enters.}, \textsuperscript{471} U.S. \textsuperscript{538}, \textsuperscript{566} (1985) (single most important fair use element is "the effect of the use upon the potential market for or value of the copyrighted work"); \textit{Sony Corp. of Am. v. Universal City Studios, Inc.}, \textsuperscript{464} U.S. \textsuperscript{417}, \textsuperscript{450-51} (1984) (effect of appropriation upon potential market is important consideration directed by Congress); \textit{Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.}, \textsuperscript{626} F.2d \textsuperscript{1171}, \textsuperscript{1177} (5th Cir. 1980).
\item \textsuperscript{65} \textit{See, e.g., DC Comics, Inc. v. Unlimited Monkey Business, Inc.}, \textsuperscript{598} F. Supp. \textsuperscript{110}, \textsuperscript{118}
\end{itemize}
onstrates a focus on the function of the appropriated use and whether it serves to displace or usurp the original in its market, rather than on the potential reduction in value of the copyrighted work.66

In applying this “displacement” approach, the Eveready court concluded that a Coors commercial, which parodied Eveready’s “Energizer Bunny” commercials,67 would not adversely affect Eveready’s potential Energizer Bunny market.68 The court noted that consumers would not stop watching the Energizer Bunny on one channel in order to view the Coors advertisement on another.69 This narrow interpretation of the economic impact factor, however, fails to account for the losses Eveready will experience due to this blatant copying of its previously unprecedented television commercial format.70

In recent decades, innovative advertising campaigns have amassed huge royalties for their sponsors.71 Creative formats and subjects are aggressively sought after as consumers frequently recall that “catchy” tune or unique commercial when deciding which

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66 See Eveready, 765 F. Supp. at 448 (quoting Fisher, 794 F.2d at 437-38 and Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)). The standard to be applied when evaluating this factor in relation to parody is “not its potential to destroy or diminish the market for the original . . . but rather whether it fulfills the demand for the original . . . . Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is or has reasonable potential to become, commercially valuable.” Eveready, 765 F. Supp. at 448; see also Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 971 (9th Cir. 1992) (accepting district court’s conclusion that Nintendo failed to show harm to present market).

67 See supra note 59.

68 See Eveready, 765 F. Supp. at 448 (court found no indication “fair use” of commercial would supplant its market demand).

69 Id. The court noted that since the parody did not usurp or supplant the market for the Eveready commercial, the effect of the use upon the potential market was irrelevant to the fair use analysis. Id.

70 See Dr. Pepper Co. v. Sambo’s Restaurants, Inc., 517 F. Supp. 1202, 1208 n.13 (N.D. Tex. 1981). “In advertising, the appropriation of the form and substance of a copyrighted work will cause that copyrighted work to lose its valuable uniqueness and originality . . . .” Id. The Dr. Pepper court noted that “[d]istracting from the uniqueness and originality of the “Be A Pepper” commercials would logically shorten the life of the campaign which would be a loss of the business goodwill of Plaintiff.” Id. at 1208.

71 See Eveready, 765 F. Supp. at 443; Dr. Pepper, 517 F. Supp. at 1208. Eveready’s ads have been deemed “break through” ads in the advertising industry. Eveready, 765 F. Supp. at 443.
product to purchase.\footnote{72} Accordingly, advertising campaigns can endure for considerable periods of time, continually building up goodwill for their sponsors.\footnote{73} To allow either a competitive product or even an unrelated sponsor to appropriate distinctive elements from such a campaign will detract from its uniqueness and novelty, and thereby decrease its commercial life.\footnote{74} Once the original advertisement’s freshness is destroyed, its ability to sell products will concomitantly be diminished.\footnote{75} Therefore, the original author would experience an economic detriment, which will go unrecognized under the Eveready standard.

## III. Refinement of Fair Use Parody

### A. Strict Adherence to Exact Definition

Although the value of parody as literary work is a valid concern, the parody defense has been abused by exploiters looking for a haven under which they may pirate the work of another.\footnote{76} An analysis of the history of parody cases reveals two distinct categories of “parodies”: true parodies that attempt to satirize or com-

\footnote{72} See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1168 (9th Cir. 1977) (popularity of children's television show made characters' images desirable to use on other children's goods); Ideal Toy Corp. v. Fab-Lu, Ltd., 261 F. Supp. 238, 241-42 (S.D.N.Y. 1966). The Ideal case dealt with the marketing of pre-teen dolls whose appeal created a distinct impression in the minds of their juvenile audience. \textit{Id.} at 241-42. The court noted that the dolls created an image in the minds of the “youngsters who, on the basis of this impression, [went] to the stores with their parents . . . after television ha[d] made its impact on them.” \textit{Id.} at 242.


\footnote{74} See \textit{Dr. Pepper}, 517 F. Supp. at 1208; Durchslag, supra note 59, at 33. The elements held to be copyrightable in television commercials include those that are the expressive aspects of the audiovisual medium. C. Blore & D. Richman, Inc. v. 20/20 Advertising, Inc., 674 F. Supp. 671, 676-77 (D. Minn. 1987). Expressive aspects include “particular montage style, camera angle, framing, hairstyle [of actors/actresses], jewelry, decor, makeup and background,” in essence, the “concept behind” the commercial. \textit{Id.} at 677.

\footnote{75} See \textit{Dr. Pepper}, 517 F. Supp. at 1208 n.13; see also Eveready, 765 F. Supp. at 446-47 (primary purpose of television commercials is to increase product sales and thereby increase income); C. Blore, 674 F. Supp. at 677 (commercials attempt to distinguish “images and sounds from the otherwise infinite universe of commercials” to sell product).

ment on the work being parodied, and parodies that merely appropriate the recognizable aspects of an original work in order to gain public recognition and thereby sell unauthorized derivations. The fair use factors should be applied and utilized to protect only those parodies that present true critical or comical satire. A court should, as a threshold matter, ascertain whether the infringing use is a true parody or a parody used for purely commercial purposes. While all parodies may be said to have some commercial motive, however minor, those with principally commercial goals would not be allowed to utilize the defense of fair use. It is also suggested that the definition of parody should be clarified to constitute a derivative work, which utilizes the ideas of another but adds inde-

77 Compare Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 (2d Cir. 1980) (skit poked fun at New York City's public relations advertising campaign), and Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544-45 (2d Cir.) (Mad Magazine published parody that humorously altered lyrics of twenty-five songs), cert. denied, 379 U.S. 822 (1964), with MCA, 677 F.2d at 182, 184 (defendant parodied song "fostering" similarities to original, in order to create needed publicity and without intent to parody), and DC Comics v. Crazy Eddie, 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (unjustifiable appropriation of copyrighted work existed where defendant's commercial varied from original only by substituting name of sponsor and business purpose).

78 See Crazy Eddie, 205 U.S.P.Q. at 1178. With respect to works that attempt to capitalize on the success of another, the court in Crazy Eddie determined that such copies did not qualify as parodies, and thus were not fair use, but were "unjustifiable appropriation[s]" for personal profit. Id.; see Original Appalachian Artworks v. Topps Chewing Gum, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (parody lacking critical comment not fair use); MCA, 677 F.2d at 182, 184. The fair use doctrine should not be utilized when one plagiarizes the work of another for commercial gain and calls the end result a parody on the mores of society. Id.

79 See Tin Pan Apple, Inc. v. Miller Brewing Co., 787 F. Supp. 1028, 1029 (S.D.N.Y. 1990) (determination of work as parody required prior to considering fair use factors); Clemmons, supra note 23, at 11-14 (discussing various definitions of parody). If not determined a parody, the work is not entitled to invoke the fair use defense. Id. at 14; accord Crazy Eddie, 205 U.S.P.Q. at 1178.

80 See Note, supra note 32, at 597 ("both commercial and artistic elements are involved in almost every [work]"); see also Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) (parodies distributed commercially may be "more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work").

81 See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). In the Harper & Row case, the defendants attempted to reprint copyrighted material that had been licensed to another magazine. Id. at 543. The Court noted that appropriations may have incidental commercial purposes, but if the primary purpose of the defendant was to supplant the commercial success of the first work, a finding of fair use would be erroneous. Id. at 562; see Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686, 690 (S.D.N.Y.), aff'd, 500 F.2d 1221 (2d Cir. 1974) (primary purpose of work was to compete with original so not fair use).

82 17 U.S.C.A. § 101. This section defines a derivative work as being "based upon one or more preexisting works." Id.
dependent and distinct creative input, and functions as a comical or critical commentary whose commercial gain is merely incidental. This definition is consistent with the basic copyright principle that it is not the "idea" but rather the "expression" of the idea that is copyrightable. By adhering to this definition, the law would not impede subsequent creative endeavors from incorporating prior ideas. Further, compliance with this definition would ensure the creation of parodies that are truly comical and critical comments, for parodies with such purposes would not normally be licensed by authors of serious works. Finally, and most importantly, such a definition unequivocally omits works such as the Eveready "parody," which lack creative substance and merely latch onto the success of another's work in order to achieve purely commercial ends.

The definition of parody suggested in this section, through its

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83 Mazer v. Stein, 347 U.S. 201, 217 (1954). The idea-expression dichotomy arose early in the history of copyright cases and afforded protection only to the expression of an idea. See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 502 (1931). In the Nichols case, Judge Learned Hand formulated an "abstractions" test, stating "there is a point in [a] series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended." Id. (emphasis added). Numerous cases have drawn this distinction. See Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F. Supp. 429, 441 (W.D.N.Y. 1978) (commercials parodying originals did not encroach on protected expression); Shipman v. RKO Radio Pictures, 100 F.2d 533, 536-37 (2d Cir. 1938) (copyright protects particular expressions of thematic concepts, not general themes or plots).

Courts have recognized an exception to the idea-expression dichotomy when the idea and the expression are inseparable. See Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 741-42 (9th Cir. 1971). In such an instance, the copying of the expression will not be barred "since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner." Id. at 742.

84 See Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1179 (5th Cir. 1980). The idea-expression dichotomy balances the copyright interest of the owner with the First Amendment right of the public. Id. The original author's ability to control his work is limited to accommodate the public's need for "free access to ideas as part of the democratic dialogue." Id. (citations omitted).

85 See Nummer & Nummer, supra note 12, § 13-87. Few authors would give a parodist a license to mimic their work, as their "'self-esteem' is seldom strong enough." Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986). Therefore, to insure the perpetuation of such works, their consideration under the fair use doctrine should be mandatory. Id. Thus, "the parody defense to copyright infringement exists precisely to make possible a use that generally can not be bought." Gordon, supra note 19, at 1633 n.177.

emphasis on the comical or critical nature of the use and its inquiry into the type of work at issue, comports with the first statutory fair use factor—the character and purpose of the use. Moreover, by excluding uses with primarily commercial purposes from the definition, this approach is consistent with the Supreme Court's ruling that a commercial use is presumed to be an unfair one.

B. The Economic Ramifications of a True Parody

Once deemed a true parody under the aforementioned definition, the work should then be scrutinized under the only other factor in section 107 that is relevant to parodies—the actual and potential economic ramifications of the parody both to the original author and to the parodist. It can generally be stated that an unfavorable parody will affect the marketability of the original work. The fair use doctrine, however, protects and even encourages criticism. The courts, therefore, must be careful to shift their focus from this legitimate diminution in value to the more pertinent issue of whether the parody actually fulfills or diminishes the demand for, or significantly devalues, the original in any way.

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87 See supra notes 29-38 and accompanying text.
89 17 U.S.C. § 107(4); see also Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 361 (9th Cir. 1947) (need not copy substantial portion of work to invade copyright, but where “value of the original is sensibly diminished,” infringement will be found) (quoting West Publishing Co. v. Edward Thompson Co., 169 F. 833, 854 (E.D.N.Y. 1909)).
90 See Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986) (quoting Kaplan, supra note 2, at 69). Impeding the marketability of an original is allowable, because “through its critical function, a ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.’” Id.
91 See Fisher, 794 F.2d at 438 (the focus of the economic effect of the parody is not the “potential to destroy or diminish the market for the original—any bad review can have that effect”); Wainright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (classic fair use is quoting work to criticize it); Gordon, supra note 19, at 1141 (“‘destructive’ parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author”).

In analyzing the effect of the derivative work, courts should not be limited to a consideration of actual present harm or certain future harm. Sony, 464 U.S. at 451. Instead, the plaintiff must demonstrate by a preponderance of the evidence that “some meaningful likelihood of future harm exists.” Id. This showing could encompass harm to the original work itself, or harm to any future derivations that the author might produce. New Line Cinema
With this caveat in mind, courts should not employ a merely substitutive test, which limits inquiry to usurpation of demand by products within the same market.\textsuperscript{63} Such a test will not account for parodies that impair the market of the original rather than replace it.\textsuperscript{64} Instead, a court should look at the value of a copyrighted work in its entirety, accounting for its goodwill and uniqueness in the marketplace.\textsuperscript{65} Then, the court should determine if the parody attempts to, or inadvertently does, capitalize upon or diminish this uniqueness in any way.\textsuperscript{66}

Some courts have also inquired into the morality of the purported infringing work in assessing the propriety of a fair use defense. The question of morality, however, should not operate as a threshold to a valid claim to fair use,\textsuperscript{97} but merely as another fac-


\textsuperscript{64} See \textit{Alan Latman, The Copyright Law} 215 (6th ed. 1979) (courts should ascertain if “use is capable of serving as a substitute for the original”). This standard as applied to parody is ineffective, however, for as the \textit{Elsmere} court noted, the functional difference between a serious work and a satire based upon it will generally prevent a parody from becoming a substitute good for original. \textit{Elsmere}, 482 F. Supp. at 745. Thus, by exclusively examining whether commercial substitution is likely to determine fair use, parodies that impair but do not replace the market for the original may be allowed. See \textit{Nimmer & Nimmer, supra} note 12, § 13-88 (where work has substantially similar material but different function, fair use may apply).

Clearly that was the case in \textit{Eveready}. See \textit{Eveready Battery Co. v. Adolph Coors Co.}, 765 F. Supp. 440, 445-48 (N.D. Ill. 1991). Notwithstanding the extreme similarity of the Coors parody to the Eveready commercial, which thus undercut the originality of the Energizer commercial, the court noted that the Coors advertisement did not “usurp or replace” demand for the original, and thus was a fair use. \textit{Id.} at 448 (emphasis added). The court further noted that “to the extent that the Coors commercial may have any effect on the market for the Energizer Bunny commercials, that effect would not be relevant to the copyright fair use analysis.” \textit{Id.} It is submitted that this similarity would have an effect on the potential market of the original, so its inclusion in fair use consideration should therefore be mandated.

\textsuperscript{65} See, e.g., DC Comics, Inc. v. Unlimited Monkey Business, Inc., 598 F. Supp. 110, 118 (N.D. Ga. 1984) (singing telegram using comic book character not substitute for original yet “tarnished image” so not fair use); Dr. Pepper Co. v. Sambo’s Restaurant, Inc., 517 F. Supp. 1202, 1204, 1208 (N.D. Tex. 1981) (although restaurant was not competitor in soft drink market, commercial still had detrimental effect on original ad so not fair use).

\textsuperscript{66} See \textit{Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.}, 562 F.2d 1157, 1171 (9th Cir. 1977). The \textit{Krofft} court’s analysis, noted the goodwill value of the Disney characters and stated that “[t]he ‘idea’ of Mickey Mouse is, after all, no more than a mouse. Yet the particular expression of that mouse has phenomenal commercial value and is recognized worldwide,” \textit{Id.}

\textsuperscript{67} See \textit{Dr. Pepper}, 517 F. Supp. at 1208 n.13. The court remarked in a footnote that “[i]n advertising, the appropriation of the form and substance of a copyrighted work will cause that copyrighted work to lose its valuable uniqueness and originality . . . .” \textit{Id.}

tor in the evaluation of a parody. Implicit in the economic consideration is whether the parody places the copyright owner's work in such a "bawdy and disparaging light" that it diminishes its marketable value. The Ninth Circuit effectively summarized this concern when it stated that "[p]arody in its proper role creates something new by drawing from the old; but when it has the effect of refashioning or destroying the old, it is not protected."

The concept employed in evaluating a parody's economic detriment to an original work can be analogized to the dilution theory in trademark law. Under the dilution theory, the owner of a trademark possesses an intangible property right that derives its value principally from its ability to invoke favorable impressions in the minds of the public. The law recognizes that such favorable impressions should not be diminished by unauthorized uses of a trademark, as they may injure or dilute the mark's reputation in the eyes of the public and thus undercut its commercial value.

validity under the fair use defense. Id. The Copyright Act has been scrutinized and determined to protect all creative works, whether obscene or not. See Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854-860 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

See DC Comics, 598 F. Supp. at 118 n.1; see also Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinemas, 604 F.2d 200, 202, 206 n.10 (2d Cir. 1979) (although obscene nature of appropriation was not at issue, court could not overlook its gross and revolting nature).

See DC Comics, 598 F. Supp. at 118. When the defendant's parody serves to tarnish or impede the image the plaintiff has worked diligently to create and perpetuate, then the use cannot be considered fair. Id. The plaintiff, DC Comics, adhered to a strict policy of painstakingly selecting suitable licensees for its characters, based upon their apparent ability to responsibly promote the characters in a commercially useful manner compatible with the characters images. Id. at 113. Thus, the disdainful appropriation of plaintiff's characters "Wonder Woman" and "Superman" into "Wonder Wench" and "Dark Dent/Superstud" was disallowed. Id. at 119.

Defendants have the right to discuss or criticize the plaintiff's work, but they may not alter the plaintiff's property by changing its popular associations. See id. at 118-19.

See Frank I. Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813, 818-825 (1927). Although not expressly recognized in the United States Code, approximately one-half of the states have enacted "anti-dilution" statutes. Robert J. Shaughnessy, Trademark Parody: A Fair Use and First Amendment Analysis, 72 Va. L. Rev. 1079, 1087 (1986); see, e.g., Fla. Stat. Ann. § 495.151 (West 1988) (unauthorized use of trademark will be prohibited if there exists "likelihood of injury to business reputation or of dilution of the distinctive quality of the mark . . . of the prior user, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services").

See Shaughnessy, supra note 101, at 1086; see also Schechter, supra note 101, at 818 (function of trademark is to favorably impress consumers to stimulate further purchases).

Schechter, supra note 101, at 825. Similarly, a parody will not be deemed a fair use if it tends to confuse the public into thinking it is the original, thereby lessening the value of the original. See Cliff Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 494 (2d Cir. 1999). Thus a court must strike a balance between the likelihood of
Therefore, a trademark is protected from uses that are likely to confuse the public, and in turn supplant its product market, and further, from non-confusing uses that nonetheless could diminish its image.104 Similar value to the owner of a copyright should be recognized and subsequently protected.

IV. POLICIES ADVOCATING AN ECONOMIC FOCUS

An economic focus in the treatment of fair use parodies would effectively serve to balance the numerous interests at stake.105 It would alleviate potential First Amendment issues106 by allowing the public to benefit from the social and literary benefits of true parodies.107 Only those parodies that pose an economic threat to an original author, and subsequently act as a disincentive for that author to create, would be deemed infringements.108 Moreover, an economic focus would foster the creation of true parodies and protect the rights of the parodist through the establishment of definitive guidelines within which a parody would strictly be construed in order to qualify as a fair use.109 The clarification of the fair use

confusion and the ability of a parodist to express her sentiment on a particular trademark without commercially exploiting it. Id.

104 See Fla. Stat. Ann. § 495.151. Under federal and state law, the test of trademark infringement is whether the unauthorized use is likely to confuse consumers as to its sponsorship or source, misleading them into believing it was approved by the trademark owner and thus encouraging sales. Shaughnessy, supra note 101, at 1082-83. The dilution theory statutes dispense with the “likelihood of confusion” requirement and include any sort of unauthorized use that may dilute the trademark’s value. See Fla. Stat. Ann. § 495.151.

105 See supra notes 20-21 and accompanying text.

106 See Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinemas, Ltd., 604 F.2d 200 (2d Cir. 1979). The Second Circuit has noted that “[t]he fair use doctrine allows adjustments of conflicts between the first amendment and the copyright laws.” Id. at 206 (citing Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978)).

107 See supra notes 16-17 and accompanying text.

108 See Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 831 (S.D.N.Y. 1990). “It is decidedly in the interests of creativity, not privacy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor.” Id. (quoting Warner Bros. v. American Broadcasting Co., 720 F.2d 231, 242 (2d Cir. 1983)). However, infringers may not hide behind these creative interests protected under the First Amendment. See Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (6th Cir. 1979) (“[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property”); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 593, 599 (1985) (mere claim of benefit to public not “compulsory license” to impermissively use copyrighted material).

109 See Tin Pan Apple, 737 F. Supp. at 829. The parody branch of the fair use doctrine has been recognized as a way to foster the creativity encouraged under the copyright laws. Warner Bros., Inc. v. American Broadcasting, Inc., 720 F.2d 231, 242 (2d Cir. 1983). By
standards would further prevent the courts from legislating in this area, and thus lead to constancy in the application of the section 107 factors. Additionally, this clarification would eradicate the interjection of moral judgment that has often occurred in adjudicating these matters.

Further, such a focus would align the fair use doctrine with the modern commercial marketplace, where “success breeds imitation” and derivative works often assume roles in the public domain far beyond those occupied or even contemplated by the original. In light of this, it should be the original author’s right to both control the production of these derivations and to reap their concomitant rewards. Finally, a purely economic analysis of potential fair use parodies would protect the interests of the owner of a copyrighted television commercial or jingle. Recognizing the tremendous value of a dynamic advertising campaign to a copy-

adhering to a strict definition of parody, the courts will not be bombarded with commercial works attempting to pass themselves off as parodies. See, e.g., Tin Pan Apple, 737 F. Supp. at 830-31 (beer commercial using Joe Piscopo as one of the “Fat Boys”); DC Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (electronics retailer using copyrighted Superman television clips).


See Polygram Records, Inc. v. Superior Ct., 216 Cal. Rptr. 252, 259 (Cal. Ct. App. 1985) (court noted history of fair use cases and harbored suspicion that success of fair use defense depended upon whether parody in question “offend[ed] the mores” of the court); see also supra notes 97-99 and accompanying text.


See DC Comics, Inc. v. Unlimited Monkey Business, Inc., 598 F. Supp. 110, 116-17 (N.D. Ga. 1984); see also New Line Cinema Corp. v. Bertlesman Music Group, 693 F. Supp. at 1517, 1528 (S.D.N.Y. 1988) (consider derivative works which already or potentially exist). Although the Superman and Wonder Woman characters began in comic books, they now grace thousands of other products, “ranging from school bags to Halloween costumes to wallpaper.” DC Comics, 598 F. Supp. at 113. Even the Eveready bunny has enjoyed a rather inconceivable expansion. In a recent political campaign, Michael Dewire ran an ad utilizing a mechanical “bunny” with the same basic characteristics of the Energizer bunny, but with the face of Senator John Glenn. The ad stated that the ex-astronaut just “keeps owing and owing.” See Elizabeth Kolbert, The Nation, New Heights in Political Low Blows, N.Y. Times, Nov. 1, 1992, § 4, at 3.

See 17 U.S.C.A. § 106 (right of original author to control derivative works); see also New Line, 693 F. Supp. at 1528 (if defendant’s work would directly compete with plaintiff’s derivation which has potential to become commercially valuable, not fair use).

See Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp 440, 446 (N.D. Ill. 1991); Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124, 130 (N.D. Ga. 1981). Successful commercials or jingles that are subsequently copyrighted are thereby associated with the copyright owner, and should remain that way. Id.
right owner in the modern marketplace, the copyright law would rightly abolish the utilization of the fair use defense by advertisers who merely wish to "trad[e] upon the imagination and originality of another" to promote their own commercial gain.

CONCLUSION

Although the justification for an ad hoc approach to fair use parody is understandable, application of this method seems to directly conflict with the delegation of constitutional powers in the area of copyright legislation. "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to investors in order to give the public appropriate access to their work product." It is the legislature, not the courts, that should continuously tailor the copyright laws to modern day demands, as business relations between authors and users evolve. The judiciary has repeatedly expressed reluctance to expand copyright protection without explicit legislative guidance, yet it is evident by the expansive nature of the Eveready decision that this is what in fact the court did.

Thus, in the absence of legislative clarification, the courts must singularly establish practical guidelines for authors and paro-

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116 See Dr. Pepper, 517 F. Supp. at 1203, 1208. The court recognized the extensive skills advertisers exert when creating commercials. Id. at 1203. "Frivolity has become a serious business these days. Television commercials which are meant to portray a stylization of the good life are crafted with great care . . . ." Id.; see supra notes 71-75 and accompanying text.

117 DC Comics, 598 F. Supp. at 119.

118 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). The reason the copyright statutes are amended so frequently by the legislature is to assure that Congress defines this balance. See id.

119 See U.S. CONST. art. I, § 8, cl. 8; H.R. REP. No. 1476, supra note 2, at 47, reprinted in 1976 U.S.C.C.A.N. at 5660; see also Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979) ("judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment").

120 Sony 464 U.S. at 431. The Supreme Court, refusing to expand copyright protection, has stated quite adamantly: "[w]e have been invited . . . . to render a compromise decision . . . . [to] accommodate various competing considerations . . . . We decline the invitation. That job is for Congress. We take the Copyright Act . . . as we find it." Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401-02 (1968). Judge Fortas, dissenting in Fortnightly, felt that the objective of the Court was to adjudicate in a manner which would minimally alter traditional copyright principles, for it is the job of Congress to amend the principles if they so desire. Id. at 404 (Fortas, J., dissenting).
dists to follow. By strictly adhering to a universally adopted definition of parody, which focuses on the work’s critical or comical comment and precludes its existence only if it economically hampers the original author, courts will have a more cogent doctrine with which to balance the interests of all concerned. The original author will retain her economic incentive to create both primary works and their derivatives, the parodist will be free to truly parody a work, and the public will receive the benefits of both.

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