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A Dangerous Undertaking Indeed:
Juvenile Humor, Raunchy Jokes, Obscene Materials
and Bad Taste in Copyright

David E. Shipley

INTRODUCTION

I am in my late 50s and have been a law professor for over thirty years.\(^2\) I hold a named professorship and I have served as dean at three well-regarded public law schools over a thirteen-year period in my academic career. I have chaired many ABA accreditation site inspections. I spend a great deal of time preparing for class, and I started writing articles again in 2003 after my most recent tour as dean ended. I am a fairly serious guy, but I have this statement taped to my office wall: “You can only be young once, but you can be immature forever.”\(^3\) I love this saying for a couple of reasons.

First, I have an academic interest in this proposition because there are some good copyright cases on whether short phrases like “Repeat Threepeat” and “You’ve Got to Stand for Something” can be protected by copyright.\(^4\) Is the phrase \textit{de minimis} in terms of the requisite originality? Are there only a few ways to express this particular idea about getting old but remaining young at heart (my spin on it) so that the merger doctrine applies

\footnotetext[1]{Thomas R.R. Cobb Professor, University of Georgia School of Law, B.A. 1972, Oberlin College; J.D. 1975, University of Chicago Law School, Dean, University of Mississippi School of Law, 1990-1993, Dean, University of Kentucky College of Law, 1993-1998, Dean, University of Georgia School of Law, 1998-2003.}

\footnotetext[2]{I started teaching as a Visiting Assistant Professor at the University of South Carolina two years out of law school at the ripe old age of twenty-six, and turned twenty-seven during my first semester in the classroom. I doubt I would be hired today with such minimal experience.}

\footnotetext[3]{Anderson’s Axiom, Murphy’s Law 2008 Calendar, Wednesday, January 30 (on file with author).}

to deny or severely limit protection? This maxim inspired a short question on my spring 2008 Copyright exam: in essence, is it copyrightable?

Another reason I like this axiom is because it describes me. You can ask my wife of twenty-nine years or our daughter, a lawyer practicing in Atlanta. They will say I have an immature, juvenile sense of humor. I still laugh at the same kinds of jokes and gags that I loved to share with my late mother when I was ten years old! My mom had four brothers, so she heard plenty of bad jokes growing up, but she still would say to me, “Oh David! That was just awful.” That rebuke never stopped me, because she often laughed when she scolded me about telling a terrible joke.

Given my juvenile sense of humor, you can imagine my pleasure and laughter when I read the opinion in *JCW Investments, Inc. v. Novelty, Inc.* by the Honorable Diane Wood, U.S. Court of Appeals for the Seventh Circuit. Writing for a unanimous three-judge panel she states, “Somewhat to our surprise, it turns out that there is a niche market for farting dolls, and it is quite lucrative.” Upon reading this statement my reaction was “Tickle Me Elmo” is one thing, but a farting doll—that is something else! The case, a copyright infringement suit between the plaintiff’s plush toy with sound, named “Pull My Finger Fred,” and the defendant’s plush doll with sound, called “Fartman,” evidences the profound influence that Justice Oliver Wendell Holmes still has on American copyright law. I am not kidding.

You might be asking, how can a plush doll named Fred, who says things like “Did somebody step on a duck?” or “Silent but deadly,” while simultaneously making a sound resembling flatulence when you press a red sticker on the protruding finger on his right hand, have any sort of connection with the revered Justice Holmes? Here is how. Some of the most important statements in our nation’s rich copyright jurisprudence were written by Justice Holmes over a century ago in *Bleistein v. Donaldson Lithographing Co.*, a case holding that circus posters were entitled to

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5 *See Craig Joyce et al., Copyright Law 123 (7th ed. 2006) (discussing Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967), where the plaintiff’s sweepstakes rule was not copyrightable because its “expression was tied too closely to the underlying idea”).

6 *JCW Invs., Inc. v. Novelty, Inc., 482 F.3d 910 (7th Cir. 2007).

7 *Id. at 913. Also, a blog was the source of inspiration for this Article. See Jokes and Copyright, http://williampatry.blogspot.com/2008/01/jokes-and-copyright.html (Jan. 29, 2008, 09:48 EST).

8 *See JCW Invs., Inc. v. Novelty, Inc., 289 F. Supp. 2d 1023, 1028 (N.D. Ill. 2003), aff’d, 482 F.3d 910 (7th Cir. 2007) (“Fred is a plush toy figure of a smiling, black haired, balding, Caucasian man in a white tank top, blue pants, and brown shoes with black bottoms, sitting in a green chair. When Fred is activated by pinching a red sticker marked ‘Press Here’ on the protruding finger of his right hand, Fred emits flatulence-like sounds, his chair vibrates, and he jokes about the sound he just made.”).

9 *Id.*

copyright protection.

In Bleistein, Justice Holmes stated that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [writings, illustrations, music and other forms of expression] outside of the narrowest and most obvious limits.” This announced what has been called the principle of “aesthetic non-discrimination.”

The vitality of this principle is acknowledged in the legislative history of the Copyright Act of 1976. The House Report states, “The phrase ‘original works of authorship’ in section 102(a) of the Copyright Act was “intended to incorporate without change the standard of originality established by the courts under the [1909 Act]. This standard does not include requirements of novelty, ingenuity, or [a]esthetic merit . . . .” In other words, a velvet portrait of Elvis, purchased at a flea market, is as much entitled to copyright protection as a numbered and signed photograph by Annie Leibovitz purchased at a high-end gallery.

Justice Holmes also stated in Bleistein that “[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.” This statement from Bleistein established the standard for copyrightability. The law requires only “a low degree of originality and artistic or literary merit’ to obtain copyright protection.

The Supreme Court’s extended discussion of the originality requirement in Feist Publications, Inc v. Rural Telephone Services Co., Inc., decided almost ninety years after Bleistein, while putting to rest the “sweat-of-the-brow” theory of protection, may have raised the threshold for protection ever so slightly. The Court said that it was not enough for a work to be created independently; it also has to evidence “at least some minimal degree of creativity.” Still, the originality requirement is not a particularly stringent

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11 Id. at 251.
12 Joyce et al., supra note 4, at 97 n.4.
16 Bleistein, 188 U.S. at 250.
19 Id. at 352-54.
20 Id. at 345.
standard.\textsuperscript{21} It is easy to satisfy.

“Pull My Finger Fred,” and many other decisions involving bad jokes, sick parodies, and subject matter that could be regarded as in bad taste, disgusting or even obscene, show that the Holmes’ principle of aesthetic non-discrimination has, for the most part, been taken seriously by the courts.\textsuperscript{22} This principle is often tested in cases where a defendant uses a popular copyrighted work without permission in a way that is disgusting or offensive to the copyright owner. For example, a photographer posed nude Barbie dolls in suggestive positions with common kitchen appliances and marketed his photographs as art.\textsuperscript{23} Mattel sued for infringement and the photographer was successful in arguing that his photographs were fair use parodies of Barbie.\textsuperscript{24} The judges who decided this case did not let their opinions on whether the defendant’s photos of Barbie were in bad taste color their fair use analysis.\textsuperscript{25} Not all courts, however, have been able to maintain this kind of objectivity, so Holmes’ principle is sometimes at risk when courts have to decide whether an offensive or disgusting use of a protected work is a parody and fair use.\textsuperscript{26}

The cases reviewed in Section I of this Article show that subject matter one might label as offensive or repulsive is ordinarily copyrightable. It is rare for an offensive work to fall within those “narrow[] and most obvious limits” and be held unprotectable. Moreover, as discussed in Section II, many a defendant’s use of another’s protected work in an offensive or even disgusting manner has been permitted as a parody by application of our robust fair use defense.\textsuperscript{27} For the most part, courts have applied the fair use doctrine in accordance with Holmes’ warning about not judging the worth of particular works.\textsuperscript{28} Although most federal courts heed his

\textsuperscript{21} See id. at 358; Zimmerman, supra note 17, at 105-08 (discussing the Feist decision’s impact on \textit{Bleistein}); see also David E. Shipley, \textit{Thin But Not Anorexic: Copyright Protection of Compilations and Other Fact Works}, 15 J. Intell. Prop. L. 91, 98-99 (2007).

\textsuperscript{22} Cf. Joyce et al., supra note 4, at 97 n.4 (asking whether it is possible to observe this prescription faithfully).

\textsuperscript{23} Mattel Inc. v. Walking Mountain Prods., No. CV998543RSWL, 2001 WL 929923 (C.D. Cal. 2001), aff’d, 353 F.3d 792, 812 (9th Cir. 2003); see infra text and notes at notes 253 to 263.

\textsuperscript{24} Mattel Inc. v. Walking Mountain Prods., No. CV998543RSWL, 2001 WL 929923 (C.D. Cal. 2001), aff’d, 353 F.3d 792, 812 (9th Cir. 2003); see infra text and notes at notes 253 to 263.

\textsuperscript{25} See Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003).

\textsuperscript{26} See infra notes 297–324 and accompanying text.


\textsuperscript{28} Cf. Paul Tager Lehr, Note, \textit{The Fair-Use Doctrine Before and After “Pretty Woman’s” Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody}, 46 Fla. L. Rev. 443, 460 (1994) (the flexibility of fair use analysis enables courts to censor parodies found to be obscene and distasteful). Many of the cases discussed in this Article also raise issues of trademark and trade dress infringement. This Article is not, however, addressing arguably immoral, obscene, and distasteful materials in the context of trademark law. The questions are much the same. Can a word, name, symbol, etc., be protected as a trademark if it is obscene or immoral? What rights do the owners of trademarks have against parodies of their
admonition, the discussion in Section III explains that there is still a risk that a court’s perception of the worth or merit of an infringing work will affect the ultimate decision. In particular, there is risk of a court failing to heed Holmes’ warning when it has to decide, in accordance with the framework for fair use analysis announced by the Supreme Court in *Campbell v. Acuff-Rose Music*,[29] whether a challenged spoof or take-off on a copyrighted work qualifies as a parody by targeting or by commenting on that protected work.[30] Like several other commentators, I am troubled by the comment on the original or target requirement,[31] and I conclude in Section IV by contending that courts should be more willing to recognize satire as fair use. Criticism and comment are listed as acceptable uses in the preamble to the Copyright Act’s fair use provision,[32] and there is no doubt that a writer’s or an artist’s use of another author’s familiar copyrighted material to make a satirical comment or critique about society can present a forceful message.[33] Those satiric messages should not be suppressed out


30 Id. at 580. Justice Kennedy called this the “targeting” requirement in his concurrence. *Id. at 508* (Kennedy, J., concurring); cf. Julie Bisciglia, *Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act*, 34 Copyright L. Symp. (ASCAP) 1, 6 (1987) (noting that “[i]t is probably impossible to rule in these cases . . . without assuming some literary values”).


32 17 U.S.C. § 107 (2006) (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright.”); see Arthur, supra note 28, at 129-30.

of fear of liability for copyright infringement. If sued for infringement, a satirist should be entitled to a thorough analysis of his or her fair use defense even though the satiric critique or comment is not directed at the plaintiff's familiar work but at society's follies and foibles.

I. COPYRIGHT PROTECTION FOR BAD JOKES AND OTHER QUESTIONABLE SUBJECT MATTER

Before considering the copyrightability of both good and bad jokes and other materials people might find offensive or repulsive, it is important to set forth the basics of copyright protection. The statute provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The key words are "original works of authorship," and this is where the Supreme Court's decision in Feist becomes so important.

The facts of Feist were simple. Rural Telephone published a standard white pages telephone directory with names, numbers and addresses listed in alphabetical order and Feist, a publisher of competing directories, copied about 1300 of Rural's names and numbers. The trial court found infringement and the Tenth Circuit Court of Appeals affirmed, but the Supreme Court reversed, holding that Rural's copyright did not protect the alphabetically-listed names and numbers Feist copied. Most importantly, the Court declared that originality is a constitutional requirement for copyright.

The Court defined originality as independent creation and a modest degree of creativity. The requisite level of creativity is low, and most works will satisfy this standard, since they will possess some creative spark. It does not matter that a work is crude or humble or obvious. Novelty is not required. The Court defined creativity by negative example, explaining that a work might not pass muster if it was mechanical, routine,

36 Id. at 363.
37 Id. at 346.
38 Id. (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879)).
39 Id. at 345. Feist's requirements are consistent with the requirements of the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property. Both use the term "intellectual creation" as a requirement. This demands more than a work simply originate with the author. It includes, if not creativity, then at least some intellectual effort. Daniel Gervais, Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law, 49 J. Copyright Soc'y USA 949, 971 n.150 (2002); Shipley, supra note 21, at 95-96.
commonplace, typical, garden-variety, obvious, inevitable, or dictated by law.\footnote{Howard B. Abrams, \textit{Originality and Creativity in Copyright Law}, 55 \textit{Law \\
& Contemp. Probs.} 3, 16 (1992).}

What does this mean in practice for jokes and gags? Copyright Office regulations provide that “[w]ords and short phrases, such as names, titles and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listings of ingredients or contents” are not registrable.\footnote{37 C.F.R. § 202.1(a) (2008); \textit{see}, e.g., Douglas v. Osteen, 560 F. Supp. 2d 362, 367 (E.D. Pa. 2008) (plaintiff alleged that defendant’s book of Bible stories and motivational prayers and anecdotes infringed his book but the court granted defendant’s motion to dismiss, noting that there is no copyright protection for the titles of books, short phrases or biblical stories which are in the public domain or use the same literary style citing, among other things, this Copyright Office regulation).} Courts have not, however, always followed this regulation to the letter and sometimes have found relatively short phrases to be copyrightable.\footnote{See \textit{William F. Patry, Copyright Law and Practice} 333-35 (1994); \textit{see also} Richard Stimm, \textit{I May Not Be Totally Perfect but Parts of Me Are Excellent: Copyright Protection for Short Phrases}, \textit{Stanford Copyright and Fair Use}, http://fairuse.stanford.edu/commentary_and_analysis/2003_09_stim.html (last visited Jan. 15, 2010).} Predicting outcomes is difficult. A section in Compendium II of Copyright Practices addresses comedy sketches and states that “[j]okes and other comedy routines may be registered if they contain at least a certain minimum amount of original expression in tangible form. Short quips and slang expressions consisting of no more than short phrases are not registrable.”\footnote{II \textit{Compendium, supra note} 3, § 20.02.} When these two statements from the Copyright Office are combined, it is reasonable to conclude that the copyrightability of gags and jokes should be judged according to the originality standard just like any other material.\footnote{\textit{See Jokes and Copyright, supra note} 6; \textit{1 Melville B. Nimmer \\
& David Nimmer, Nimmer On Copyright} § 2.13 (2009).} Some jokes are old and in the public domain, or stock situations, or too simple and obvious. Moreover, the idea/expression dichotomy, the merger doctrine and \textit{scenes a faire} limit protection.\footnote{See \textit{Allen D. Madison, The Uncopyrightability of Jokes}, 35 \textit{San Diego L. Rev.} 111, 116 (1998). This author uses “knock, knock” jokes and “how many ___ does it take” jokes as examples of the merger of ideas and expressions in the context of jokes. \textit{Id.} at 118.} Still, many jokes have no difficulty satisfying the originality standard.\footnote{\textit{See 1 Nimmer \\
& Nimmer, supra note} 44, at § 2.13. \textit{But see Madison, supra note} 45, at 133-34.} Case law is, however, sparse even though joke stealing occurs and is a concern among comedians. Commentators explain that comedians do not regard copyright as an effective way to protect their works and that there is an informal system of norms for self-regulation.\footnote{\textit{See Gayle Herman, The Copyrightability of Jokes: “Take My Registration Deposit . . . Please!”} 6 \textit{Hastings Comm. \\
& Ent. L.J.} 391, 393, 400 (1983) (asserting that self-imposed good faith
In *Hoffman v. LeTraunik*, decided in 1913, a New York federal district court suggested that original jokes and monologues could be protected by copyright while ruling against the plaintiff’s infringement claim because his material was not original. In 1947, the Ninth Circuit Court of Appeals ruled in the comedian Harold Lloyd’s favor when it found that fifty-seven comedy scenes from one of his movies had been copied and infringed. The court held that Lloyd’s scenes were copyrightable but simultaneously stressed the substantiality of the taking. Twenty percent of the plaintiff’s movie was appropriated, and the scenes were critical to the story and not merely “‘comedic accretion,’ isolated ‘gags,’ or ‘stage business.’” These decisions are old but both suggest that some jokes might be copyrightable.

The leading decision on the protection of jokes involves Jeff Foxworthy, a comedian known for his redneck humor, especially his “you might be a redneck if . . .” jokes. For example, “You might be a redneck if . . . you’ve ever financed a tattoo,” and “You might be a redneck if . . . your dad walks you to school because you’re in the same grade.” He learned in 1994 that Custom Tees was selling T-shirts bearing his jokes in a slightly different format. For example, the copy on one shirt read, “If you’ve ever financed a tattoo . . . you might be a redneck.” Foxworthy’s representatives told Custom Tees that the phrases on the shirts violated Foxworthy’s copyrights and/or trademarks, so Custom Tees altered the copy to read as follows: “When you learn to drive in a car where you were conceived . . . you ain’t nothin’ but a redneck.” Foxworthy eventually sued and one of Custom Tees’ defenses to the copyright infringement claim was that the jokes were not original to Foxworthy and he could not claim authorship in them.

Foxworthy had acknowledged in the Foreword of his book, *Red Ain’t...*
Dead, that he gets new examples of ‘redneckisms’ from many sources, but he testified that most of his joke ideas were original to him. The court stated, “More important . . . even when he receives an idea from another person, it is plaintiff who takes the idea and gives it expression in the form it appears in his books.”

After explaining that facts and ideas are not protected by copyright, and that copyright inheres in the expression used by an author, the court said, “[T]wo entertainers can tell the same joke, but neither entertainer can use the other’s combination of words.” As for Foxworthy’s creativity, the court turned to his testimony:

[W]e all have the same bowl of words to work with, and the whole trick is to take the smallest amount of words and put them in the proper order. You know, I’ve sat backstage with Jay Leno or Gary Shandling and sometimes for ten or fifteen minutes argued about a particular one line in a joke, which word should go where, should you delete this, which word should go to the end of the joke, and so that’s why it changes. I mean, it’s to get the maximum laugh from, you know, the shortest amount of material.

Q. How important is the particular expression of the joke versus the underlying idea of the joke?

....

A. Well, I mean the idea is key in coming up with the wording. You need—the idea comes first and then you play with it to get the wording correct.

The court concluded that the jokes copied by Custom Tees were Foxworthy’s own expression, and that his jokes evidenced the requisite modicum of intellectual labor so as to be protected by copyright. Foxworthy established likelihood of success on the merits of his copyright infringement claim. The opinion did not mention the Copyright Office’s regulation that states short phrases are not registrable, nor did the court discuss the Compendium II statement that simple jokes and quips are not registrable. I doubt the court would have been troubled or felt restricted

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56 Id. at 1218 (referencing Foxworthy’s testimony).
57 Id. at 1219 (‘As the Feist Court put it, ‘others may copy the underlying facts from the publication, but not the precise words used to present them.’” (quoting Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991))).
58 Id.
59 Id.
60 Id.
61 Id.; Oliar & Sprigman, supra note 47, at 1806 (noting that Foxworthy did not claim copyright protection for the first part of his jokes—“You might be a redneck if . . .” and in holding that he was likely to prevail on his infringement claim, the court implicitly found that defendant’s reordering of Foxworthy’s jokes did not change his protected expression enough to escape liability).
62 See supra notes 41–44 and accompanying text.
by either policy given its explanation as to why Foxworthy’s redneck jokes were original to him and evidenced sufficient creativity so as to be protected by copyright. If most “You might be a redneck if . . .” jokes are copyrightable, then what does not pass muster under Bleistein and Feist? What about statements like, “Silent but deadly” or “Pull my finger” followed by a flatulence-like sound? My gut response is that both are in the public domain. With regard to the former, how else can that inaudible breaking of wind be described, and as for the latter, it is an old joke that has been around for years as explained by the trial judge in the Pull My Finger Fred case. He stated that the gag “did not originate with the plaintiff or the defendant. Neither did the sayings ‘did somebody step on a duck’ nor ‘silent but deadly.’” In fact, according to the judge:

[R]ecorded history of the “pull-my-finger” joke appeared as early as 1887 in Emile Zola’s book The Earth. A reference to a doll performing the “pull my finger” gag surfaced in 1997 when radio personalities Bob and Tom released an album “FUNHOUSE,” which contained a previously broadcast comedy sketch entitled “Pull My Finger Charlie.”

The defendant, whose doll uttered the same lines as plaintiff’s doll, tried to extrapolate on the principle that these flatulence gags were in the public domain by making a scenes a faire argument, asserting it is “‘standard’ to stereotype a character that finds humor in farting and makes joking about farting as having a low socioeconomic status” and citing authority for the proposition that fart jokes have long been popular “‘among the lower classes’ and ‘poor people.’” The defendant was arguing, in essence, that all the elements it took from the plaintiff’s doll, both the flatulence jokes, as well as the overall appearance, were not protected because of the scenes a faire doctrine.

63 But see Oliar & Sprigman, supra note 47, at 1807 n.51 (“Perhaps the . . . court should have taken the Copyright Office’s advice and refused to recognize Foxworthy’s copyright claim in his punchlines—each of which is a short phrase.”); Madison, supra note 45, at 126-28 (criticizing the analysis in Foxworthy). See generally Greengrass, supra note 47, at 274-75 (arguing that a comedian’s material should be protected in order to provide an incentive to promote the useful art of comedy).

64 JCW Invs., Inc. v. Novelty, Inc., 289 F. Supp. 2d 1023, 1030 (2003), aff’d, 482 F.3d 910 (7th Cir. 2007).

65 Id.

66 Scenes a faire are defined as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp. 672 F.2d 607, 616 (7th Cir. 1982) (quoting Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

The trial court and the Seventh Circuit Court of Appeals disagreed with defendant’s contentions. The trial court said that some of defendant’s arguments were “more than a bit insulting and condescending,” and that the attempt to narrow the scope of the protected expression in the appearance of the plaintiff’s doll was without merit. The Seventh Circuit, in affirming the grant of summary judgment for the plaintiff said, “[N]o objective person would find these dolls to be more than minimally distinguishable. To the contrary, they are substantially similar. . . . Indeed, the dolls are so similar that an inference of copying could be drawn even without the evidence of access.” The court continued:

It is not the idea of a farting, crude man that is protected, but this particular embodiment of that concept. Novelty [the defendant] could have created another plush doll of a middle-aged farting man that would seem nothing like Fred. He could, for example, have a blond mullet and wear flannel, have a nose that is drawn on rather than protruding substantially from the rest of the head, be standing rather than ensconced in an armchair, and be wearing shorts rather than blue pants.

In the end, it did not matter whether the short phrases spoken by the plaintiff’s doll might have been unprotectible. The validity of the copyright on the plaintiff’s Pull My Finger Fred doll was not questioned, and the Fartman doll was substantially similar to it.

In contrast, a copyright infringement claim by the makers of a novelty device called “Cajun in Your Pocket” was thwarted by the originality requirement. The plaintiff’s device was a hand-held, play-back toy that performed one of six Cajun phrases when a particular button was pushed. Two of these phrases—“You gotta suck da head on dem der crawfish,” and “Oo, cher, look like you gotta Cajun in you pocket”—were included in a rap song called “Shake Ya Ass” which was recorded by the rap artist Mystikal and distributed by Zomba Recording. The defendants argued that the copied phrases were “oe, cher, look like you gotta Cajun in you pocket”—were included in a rap song called “Shake Ya Ass” which was recorded by the rap artist Mystikal and distributed by Zomba Recording.

68 Id. at 1038.
69 Id. at 1037.
70 JGW Invs., Inc. v. Novelty, Inc., 482 F.3d 910, 916 (7th Cir. 2007).
71 Id. at 917. Fartman was more like Fred than the plaintiff’s other farting dolls resembled Fred. For example, plaintiff’s Frankie doll—Fred’s blonde, motorcycle riding cousin—was considerably different from Fred. Id. at 913, 917.
72 Id. at 915. Defendant did not argue that plaintiff lacked a valid copyright. “Indeed, Fred is a far cry from a noncreative compilation of facts such as the telephone book in Feist. Here, we have a creative doll. . . . There is no doubt that there is a valid copyright.” Id.
73 Emanation Inc. v. Zomba Recording, Inc., 72 F. App’x 187, 187-88 (5th Cir. 2003) (per curiam) (unpublished decision); see Trivial Changes to Common Cajun Phrases Fail to Satisfy Originality Requirement, 66 Pat. Trademark & Copyright J. (BNA) 515, 515-16 (Aug. 29, 2003) (discussing Emanation). The four other phrases were “AIEEE,” “We gon pass a good time, yeah, cher,” “Oo, I love you like a pig loves corn,” and “Laissez les bons temps rouler.”
phrases were not sufficiently original for copyright protection, and the trial court agreed, granting summary judgment for the defendants.\textsuperscript{74} The Fifth Circuit affirmed.\textsuperscript{75} The trivial changes plaintiff made to these common Cajun sayings were not sufficient for copyright protection.\textsuperscript{76} Adding a word like “yeah” and recording the common phrases in a typical Cajun dialect did not meet \textit{Feist}'s requirement that there be at least a minimal degree of creativity.\textsuperscript{77}

The rapper Lil’ Joe Wein encountered similar problems when he claimed that the song “In Da Club” by the rapper 50 Cent infringed his rap song, “It’s Your Birthday.”\textsuperscript{78} The trial court determined, after extracting the non-protectible elements from the two songs, that there were no similarities but for the specific phrase, “Go ____ it’s your birthday.”\textsuperscript{79} The composer of plaintiff’s song admitted that he had not created this phrase on his own, but had borrowed it from popular hip-hop chants.\textsuperscript{80} Moreover, there was considerable evidence that: 1) the phrase was used many years earlier in a song by the rapper Luther Campbell; 2) that the chant “Go ____ it’s your birthday” was used and heard at clubs before Campbell composed his song; 3) that the phrase was used in the movie \textit{Who’s the Man} starring Dr. Dre and Ed Lover (MTV personalities at the time); and 4) that the lyrics “go, go, go” and “Go [name],” and “it’s your birthday” were used in a song called “Bounce” by the Incredible Crew.\textsuperscript{81} The trial court concluded that the “birthday” chant “was a common, unoriginal, and noncopyrightable element of the song” and, since there were no other similarities between the two works, it granted summary judgment for the defendants.\textsuperscript{82} The Eleventh Circuit affirmed in a per curiam opinion.\textsuperscript{83}

The trial court’s opinion in the Lil’ Joe Wein/50 Cent litigation included the following quote from an expert’s report:

\textit{Emanation,} 72 F. App’x at 187.
\textsuperscript{74} \textit{Emanation,} 72 F. App’x at 188.
\textsuperscript{75} \textit{Id.} at 187.
\textsuperscript{76} \textit{Id.} at 191.
\textsuperscript{77} \textit{Id.} The plaintiff’s president argued that the district court erred in ruling that the two sayings were unprotected facts since they made creative changes to the Cajun sayings to satisfy the originality requirement. \textit{Id.} at 191. In ruling against the plaintiff, the court relied on its decision in \textit{Norma Ribbon & Trimming, Inc. v. Little,} 51 F.3d 45 (5th Cir. 1995). \textit{Emanation,} 72 F. App’x at 191.

\textsuperscript{78} Lil’ Joe Wein Music, Inc. v. Jackson, 245 F. App’x 873, 876, 879 (11th Cir. 2007) (per curiam) (unpublished decision).
\textsuperscript{79} \textit{Id.} at 875-76.
\textsuperscript{80} \textit{Id.} at 879.
\textsuperscript{81} \textit{Id.} at 878.
\textsuperscript{82} \textit{Id.} at 879-80.
\textsuperscript{83} \textit{Id.} at 874 (affirming based on the trial court’s “well reasoned and comprehensive opinion”); see Robert W. Clarida & Thomas Kjellberg, \textit{Recent Developments in Copyright,} 56 J. Copyright Soc’y U.S.A. 67, 101 (2008).
A signature and long-standing feature of live performance rap music is the hip hop chant. The chant is a form of audience engagement staged by the performer (mc, dj or rapper) who provides a familiar phrase or saying, often in call and response format, designed to energize, include, affirm and engage the audience.84

In view of this statement, the Copyright Office regulation against registration of short phrases, the creativity requirement, the widespread use of hip-hop chants and similar simple phrases like “Clap your hands now, people clap now”85 and “go, go, go shawty,” it is difficult to make a persuasive argument that simple chants and repetitive short phrases satisfy the originality standard. It does not matter whether or not they are in bad taste, offensive, or obscene. Most can be freely borrowed and readily used by other artists.

For example, even though the plaintiff’s evidence of defendant’s access to his R&B, hip-hop song “She Can’t Stand It,” precluded summary judgment on the issue of unauthorized copying, the court concluded that defendants’ R&B, hip hop song “On Our Own” was not substantially similar to plaintiff’s song in large part because:

Each of [defendant] MCA’s experts attributed any similarities between the songs as a result of their being from the same “R & B/hip-hop” genre... [The first expert explained], “[T]he “features [of the two songs] are musical ideas common to the R & B/hip-hop genre or relate to ‘timbres’ or ‘sounds’ (and not the composition of the songs) and do not indicate original musical expression.” [The second expert found that] "[w]hatever common general elements do exist between the two songs stem from the currently popular genre of R & B/hip-hop music to which both compositions belong...”86

Still, there are cases like Takeall v. Pepsico, Inc., in which the court

84 Lit’l Joe Wein Music, Inc., 245 F. App’x at 878 (Tricia Rose was the expert).
85 In Jean v. Bug Music, Inc., No. 00 CIV 4022(DC), 2002 WL 287786 (S.D.N.Y. 2002) (mem.), the plaintiffs sought a declaratory judgment that their song, “My Love Is Your Love,” made popular in a recording by Whitney Houston, did not infringe the copyright on defendants “The Hand Clapping Song.” The only similarity between the works involved the short phrase “clap your hands now people,” and the court concluded that the phrase was unprotected because it used common musical and lyrical phrases found in other recordings. Id. at *5-6. It lacked originality. Id. at *6. The prior art included the biblical phrase “O clap your hand all ye people” in Psalm 7:1 of the Old Testament and many church anthems. Id. at *3 (citations omitted). Even if the phrase was copyrightable, the taking was de minimis. Id. at *7.
86 Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 946 (8th Cir. 1992). The court quoted from one of the defendants’ experts. Id. The plaintiff’s expert admitted it was possible that the defendants’ song was not copied from plaintiff’s song and that he had not investigated hip-hop music. Id.
assumed that the pedestrian, but catchy, jingle “You got the right one, Baby, uh–huh!” was copyrightable. Although it might be seen as being ordinary or in common parlance today, at the time of the litigation it was “not commonly heard . . . among either cultured or uncultured speakers of the American Dialect of the English language.” Nevertheless, the plaintiff lost on summary judgment because he could not prove that Pepsi, which used a remarkably similar jingle in a very successful advertising campaign, had access to his slogan and copied it.

Before getting into salacious parodies and scatological humor being treated as fair use, it is important to consider whether immoral, obscene, or pornographic material can be protected by copyright. The prevailing view, consistent with Bleistein’s principle of aesthetic non-discrimination, is yes. After all, the defendants in Bleistein had argued that one of the plaintiff’s circus posters, depicting ballet dancers in tights, was immoral, but the Supreme Court still held that the posters were copyrightable. Of course, this decision was rendered in 1903, and I am not sure how Justice Holmes would react today to an infringement claim by producers of a triple–X rated, hard-core porn film, available online, alleging that the copyright in the film had been infringed by unauthorized reproductions and/or public performances. Would he have concluded that the obscene material could not be protected because it did not promote the progress of science? I leave that question to historians and note that Bleistein was

88 Id. at 21. Defendant Pepsi said its creators of the jingle derived it as an act of artistic creativity. See id.
89 Id. at 22-24. The striking similarities did not offset the lack of evidence on the issue of access. Id. at 21-24.
90 See 1 Paul Goldstein, Copyright § 2.5.1, at 85 (1989); Marshall Leaffer, Understanding Copyright Law 91 (3rd ed. 1999); 1 Patry, supra note 3, at 126-27; see also Ann Bartow, Pornography, Coercion, and Copyright Law 2.0, 10 Vand. J. Ent. & Tech. L. 799, 830-34 (2008) (discussing the history of copyright law and pornography and noting that until 1979 copyright protection was effectively unavailable for pornographic photographs and audio-visual works).
91 Zimmerman, supra note 17, at 87 n.49.
92 See 1 Patry, supra note 42, at 126-27 n.26 (lengthy footnote discussing cases, most of them decided in the nineteenth century before Bleistein was decided in 1903, that denied protection to works perceived as obscene); Zimmerman, supra note 17, at 100 (noting that prior to Bleistein, obscene or sexually explicit works were denied protection because they did not promote the progress of science). The decision in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), and others arguably rendered the clause’s preamble irrelevant. See Eldred v. Ashcroft, 537 U.S. 186, 204 (2003) (upholding term extension notwithstanding the argument that adding 20 years to the life of existing copyrights did not promote the progress of science); Lee v. Runge, 404 U.S. 887, 887-91 (1971) (Douglas J., dissenting) (denial of certiorari); Zimmerman, supra note 17, at 100-01; David E. Shipley, Congressional Authority Over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain, 70 ALB. L. REV. 1255, 1260 (2007).
cited and quoted extensively by the Fifth Circuit Court of Appeals that while ruling that obscenity is not a defense to a copyright infringement claim.³³

*Mitchell Brothers Film Group v. Cinema Adult Theater*⁴ is the key case. The facts were simple: the plaintiffs owned the copyright on the pornographic movie *Behind the Green Door*; they sued for infringement because defendants obtained copies of the film without permission and showed it in theaters.⁵ Defendants raised obscenity as an affirmative defense—the plaintiffs had unclean hands and were therefore barred from relief.⁶ The Fifth Circuit ruled that the district court erred in permitting the assertion of this affirmative defense.⁷ It stated that there was “not even a hint in the language [of the 1909 Copyright Act] that the obscene nature of a work renders it any less a copyrightable ‘writing.’ There is no other statutory language from which it can be inferred that Congress intended that obscene materials could not be copyrighted.”⁸ The court added that the legislative history of the 1976 Act showed that Congress intended “to continue the policy of the 1909 Act of avoiding content restrictions on copyrightability,” and it appeared to the court that Congress has concluded that the constitutional purpose of its copyright power, “[t]o promote the Progress of Science and useful Arts,” is best served by allowing all creative works (in a copyrightable format) to be accorded copyright protection regardless of subject matter or content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward.⁹

The *Mitchell Brothers* opinion includes a lengthy quote from *Bleistein*, as well as discussions of First Amendment problems with content based restrictions on speech, the constitutionality of the Copyright Act, and older cases that had denied redress for holders of copyright on works found to be immoral or obscene.¹⁰

A variation on this issue was litigated in *Pillsbury Co. v. Milky Way*...
This case involved claims against the pornographic adaptation of well-recognized works: Pillsbury’s familiar jingle, “Nothin’ says lovin’ like something from the oven, and Pillsbury says it best” (a.k.a. the “Pillsbury Baking Song”), and Pillsbury’s characters “Poppin’ Fresh” and “Poppie Fresh.” The copyrightability of these works was not questioned. Defendant admitted using the words from the jingle in a picture of figures closely resembling the two characters engaged in sexual intercourse and fellatio. Did the fact that defendant Milky Way’s use of these familiar works was pornographic bolster Pillsbury’s infringement claim? As discussed later in this Article, this infringement of Pillsbury’s copyrights was held to be a fair use.

In reaching this decision the court stated:

The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court’s judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.

_Jartech, Inc. v. Clancy_, decided by the Ninth Circuit in 1982, relied on _Mitchell Brothers_ and reached the same conclusion: obscenity is not a defense to a copyright infringement claim. Plaintiffs were producers, distributors, and displayers of adult films, and the defendants allegedly infringed on the copyrights of five of plaintiffs’ movies by taking photographs of screen images every few seconds while a film was being shown in a theater and simultaneously tape recording the movies’ sound tracks. The Ninth Circuit ruled that obscenity was not a defense to an infringement claim. The court further noted that it had held fraudulent materials copyrightable

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102 Id. at 125-26.
103 Id. at 129 (the defendants stipulated the validity of plaintiff’s copyright).
104 Id. at 126, 129.
105 See infra text and notes at notes 176–81.
106 Pillsbury, 215 U.S.P.Q. (BNA) at 131. The court later said that it did not “condone the manner in which Milky Way chose to assault the corporate citadel, but value judgments have no place in this analysis.” Id. at 132.
107 Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982).
108 Id. at 405. The defendants, an attorney and members of the Santa Anna City Council, had drafted an ordinance aimed at ridding the city of adult movie theaters, and a resolution, declaring the plaintiffs’ theater to be a nuisance, was adopted. Id. at 404-05. The photos and the recording were made before this resolution was adopted and were used to show the Council that the theater was showing pornography. Id. at 405.
in Belcher v. Tarbox, and that the Fifth Circuit’s decision in Mitchell Brothers relied heavily on Belcher in ruling that obscenity was not a defense to copyright infringement. Additionally, the court pointed out that that Nimmer’s treatise endorsed Mitchell Brothers and that the 1976 Act should be interpreted the same way as the 1909 Act. The court concluded, however, that the defendants had made fair use of the plaintiffs’ copyrighted works.

What is the end result of these decisions? The prevailing view is that a work of authorship many might regard as pornographic, obscene, or immoral is copyrightable, assuming it owes its origin to its author and exhibits sufficient creativity. As noted earlier, these are not substantial hurdles. It should not matter whether the author’s creation is obscene, pornographic, in bad taste, offensive, repulsive, or simply bad, crummy, lousy, juvenile, terrible etc., so long as the work owes its origin to the author and satisfies the modest level of creativity standard. If the work meets these standards, then it is entitled to copyright protection. Based on this, I am sure that the late George Carlin’s best–known routine, “Seven Words You Can Never Say on Television,” recorded in 1972 on an album called Class Clown is copyrightable. Those seven words that he selected from the English language should be protectible, too, but the copyright would be thin.

On the other hand, even though the court in Pillsbury stated that the pornographic use of a particular work did not militate against a finding of fair use, several of the decisions discussed in the next section show that some courts are not completely neutral or objective in determining whether an obscene or pornographic use is a fair use. They seem to make value judgments that go against Justice Holmes’ principle of aesthetic

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109 Id. at 406.
110 Id.
111 Id. at 408; see Guccione v. Flynt, No. 83 Civ. 8020 (RWS), 1984 WL 18 (S.D.N.Y. 1984) (Hustler Magazine’s reproduction of a copyrighted photo from Penthouse Magazine in connection with an article critical of Penthouse’s publisher for posing fully clothed with his nude models held to be fair use); Joyce et al., supra note 4, at 98-99 n.8.
112 See supra notes 31–44 and accompanying text.
114 See Shipley, supra note 21, at 130-32. The seven are the commonly used, but crude, English language words for excrement, urine, sexual intercourse, the vagina, a person who performs fellatio, a person who has intercourse with his or her mother, and breasts. See FCC v. Pacifica Found., 438 U.S. 726, 751 (1978) (Appendix to the Opinion of the Court). In addition, Carlin later referred to three additional “auxiliary” commonly used terms for flatulence, excrement, and the vagina. Id. at 755. How would this ad slogan be treated? “You would have to be a rooster to get a better piece of chicken!” It might be offensive to some people, but assuming it is original to the restaurant, I am confident that it meets the “creativity” requirement.
nondiscrimination.

II. Bad Taste, Offensive Works, Porn and Fair use—Is It Really Parody?

Many of my favorite bad taste, bad joke, and raunchy humor cases involve alleged parodies of popular movies, songs, television shows, and cartoon characters, many of which almost beg to be mocked and ridiculed. Some of these cases date from the late 1970s and 1980s and a few follow the Supreme Court’s 1994 landmark decision in *Campbell v. Acuff-Rose Music, Inc.* (the *Pretty Woman* decision). It concerned what many music fans might regard as a truly offensive parody of the classic Roy Orbison recording of the song, “Oh, Pretty Woman.” Part of me thinks this section should start with a discussion of the *Pretty Woman* decision because *Pretty Woman* “accorded parody its own place at the table of fair comment and criticism.” On the other hand, part of me feels I should cover my favorite cases in chronological order so readers can get a better understanding of the impact of the *Pretty Woman* decision on how courts now evaluate parodies that might be regarded as in bad taste, offensive and/or pornographic. I have opted for the chronological treatment. But first, a general primer on fair use is necessary.

A. Fair Use Fundamentals

Fair use is an established limitation on copyright, codified at 17 U.S.C. § 107, which recognizes that a variety of unauthorized uses of protected material do not infringe copyright. The doctrine, developed in the mid-nineteenth century, enables courts to escape literal application of copyright restrictions. This allows courts to avoid harsh consequences of literal application.
while reaching laudable results that promote the creativity that copyright is intended to encourage. It is a privilege to use copyrighted material in a reasonable manner without the copyright owner’s consent. Although the courts have considered a variety of factors in determining fair use, fixed criteria have never been established because the doctrine is an “equitable rule of reason.” When Congress endorsed the doctrine in §107 of the 1976 Act, it intended to restate fair use, not to freeze it or change it any way. There is no rigid, bright-line approach to fair use. Each case must be decided on its own merits.

Section 107 lists several activities in its preamble that might be regarded as fair use, including criticism and comment. It then identifies four factors which the courts “shall” consider in determining whether a particular use is fair: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used; and 4) the effect of the use on the potential market for or value of the copyrighted work. The statute, its legislative history, and case law establish that no single factor is necessarily determinative. The section’s listed activities and factors are not intended to be exhaustive. Additionally, Congress did not assign weights to the factors, and did not prescribe a particular order in which to evaluate them. The factors are for “balancing the equities,” and courts are free to adapt the doctrine to particular situations on a case–by–case basis.
B. Cases Prior to the Pretty Woman Decision

In considering raunchy and offensive parodies, I am not talking about the famous Jack Benny spoof of the movie *Gas Light* that starred Ingrid Bergman, Charles Boyer and Joseph Cotten. Benny’s parody, called *Autolight*, was shown nationally by CBS. Nor am I concerned with the Sid Caesar skit shown nationally on NBC, called *From Here to Obscurity*. This playlet poked fun at several scenes from the award winning movie, *From Here to Eternity*, including the often parodied scene of Burt Lancaster romancing Deborah Kerr on the beach as the surf rolled over them. In the televised version Caesar and Imogene Coca played the key roles on the sand.

I love those two old cases, but their facts are pretty tame. After all, the parodies were shown on national television in the early 1950s. Similarly, the song parodies at issue in the Second Circuit’s influential decision, *Berlin v. E.C. Publications* (the *Mad Magazine* decision),

The court held that *Mad Magazine*’s satiric parody lyrics, written in the same meter as the original lyrics for a substantial number of popular songs, did not infringe. *Mad Magazine* did not reproduce the actual music because the tunes were so popular that readers would know their familiar melodies. “A Pretty Girl Is Like a Melody” became “Louella Schwartz Describes Her Malady,” and “The Last Time I Saw Paris” became “The First Time I Saw Maris.” The court noted that the targets of *Mad Magazine*’s satire were not the plaintiffs’ songs, but what

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Rev. 983, 992-94 (1986) (discussing the freedom to adapt the fair use doctrine on a case-by-case basis).

133 *Loew’s, Inc. v. CBS*, 131 F. Supp. 165, 167-70 (C.D. Cal. 1955), aff’d, *Benny v. Loew’s, Inc.*, 239 F.2d 532 (9th Cir. 1956) aff’d by an equally divided Supreme Court, 356 U.S. 3 (1958). The trial court ruled that Jack Benny’s burlesque of the movie was infringement, and the Court of Appeals affirmed, noting that if “the material taken by appellants from ‘Gas Light’ is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue.” *Benny*, 239 F.2d at 536. The late Benjamin Kalplan wrote that the decision was wrong, possibly unconstitutional. *Benjamin Kaplan, An Unhurried View of Copyright* 69 (1967). Incidentally, Benny burlesqued the role Charles Boyer played, and his special guest on the show was Ingrid Bergman who, in the words of the trial court, “performed a travesty upon her original screen role.” *Loew’s*, 131 F. Supp. at 169. See generally *Ochoa*, supra note 28, at 571-73 (discussing criticisms of the *Loew’s* decision).

134 *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 358-59 (S.D. Cal. 1955) (holding that Caesar’s burlesque of the movie did not infringe). There are several cases dating from the first part of the twentieth century in which parodies were held to infringe, but in each the copying was substantial and the courts felt that the parody could fulfill demand for the original. See, e.g., *Green v. Luby*, 177 F. 287, 287-88 (S.D.N.Y. 1909) (parody of a performer’s style while singing an entire song); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 359-60 (S.D.N.Y. 1914) (parody of the comic strip “Mutt and Jeff”); *Zissu*, supra note 31, at 400.


136 *Id.* at 543.
the magazine called “the idiotic world we live in today.”

I was thirteen and an avid reader of *Mad Magazine* at the time of the *Mad Magazine* decision. Once I started teaching Copyright many years later, I came to appreciate the following statement from the court:

> While the social interest in encouraging the broad-gauged burlesques of *Mad Magazine* is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. *Cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 3 (1903). For, as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.

The cases that push the fair use/parody defense into the domain of the raunchy and lewd test this statement. Will a court allow a raunchy or obscene parody as a fair use or just pay lip service to its value as a form of criticism?

Some of the cases that push the envelope involve Walt Disney Productions and uses of Disney’s popular and very valuable properties in ways that Disney never intended. Let us start with pornography and a movie titled *The Life and Times of the Happy Hooker*. Disney was upset because at one point in the film three male actors, wearing nothing but Mouseketeer hats, sang some of the words to the “Mickey Mouse March,” and then the familiar march was played as background music while the female protagonist of the film appears to simultaneously gratify the sexual drive of the three other actors while the group of them is located on or near a billiards table. The gratification is apparently done orally, anally and vaginally. Supposedly, according to the story line of the film, the three male actors were teenagers “whose father had arranged for her (the female protagonist) to be present as a birthday surprise for them.”

The defendant film producers argued that their use of the march was fair use, claiming that its parody emphasized the “transition of such

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137 *Id.*; Zissu, *supra* note 31, at 401. Does this mean that the *Mad* spoofs would not have satisfied the “target of the parody” test announced in the *Pretty Woman* decision? *See infra*, notes 214-37 and accompanying text.

138 *Mad Magazine*, 329 F.2d at 545.

139 *See generally* Lehr, *supra* note 28 (analyzing several of the cases discussed in this Article and arguing that the fair use doctrine, before and after the decision in *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569 (1984), is too flexible in allowing courts to impermissibly censor parodies).

teenagers from childhood to manhood . . . in a highly comical setting,’ and as such is merely a ‘humorous take–off’ on the music.”11 The court did not buy the argument. The original song lasts two minutes, yet the defendants used it over and over, far more than necessary. This use was, according to the court, far from parody. Although they “may have been seeking in their display of bestiality to parody life, they did not parody the “Mickey Mouse March” but sought only to improperly use the copyrighted material.”112 Put another way, the defendants failed to comment on or target the copyrighted work; the march itself was not the target of their so–called parody. Instead, they used it to get attention or perhaps to avoid the drudgery of doing something fresh.113 Moreover, the movie was pornographic.

Walt Disney Productions v. The Air Pirates114 also illustrates the risk of impugning the honor and reputation of Disney’s intellectual property. The defendants used seventeen of Disney’s most popular and well–recognized cartoon characters, including Mickey Mouse, Minnie Mouse and Goofy, and put them in “adult ‘counter-culture’ comic books.”115 The defendants’ graphic depictions of the characters were markedly similar to Disney’s graphics, and their names for the characters were the same as Disney’s, but the theme of defendants’ publication was markedly different from the Disney image of “innocent delightfulness.”116 The Air Pirates was an underground comic book that placed the Disney characters “in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world.”117 The comic “centered around ‘a rather bawdy

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11 Id. at 1398.
112 Id. at 1398; cf. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 202-03 (2d Cir. 1979). In Dallas Cowboys Cheerleaders: the defendants were enjoined from distributing the X-rated movie “Debbie Does Dallas” in which several characters performed sex acts while clad in cheerleader uniforms confusingly similar to plaintiff’s uniform. Dallas Cowboys Cheerleaders, 604 F.2d at 204. The defendants argued, among other things, “fair use” and parody in response to what were trademark/trade dress infringement claims. Id. at 205-06. The court said it was unlikely the fair use was applicable to trademark infringement but ultimately said it did not have to reach that issue because defendants’ use of the uniform did not qualify as parody or any form of “fair use.” Id. Whether or not a spoof or take-off had to comment on the original in order to be treated as a parody and fair use was a bone of contention until the Supreme Court’s Pretty Woman decision. See Pretty Woman, 510 U.S. at 580 (1994).

113 See Pretty Woman, 510 U.S. at 587-88. The defendant in Mature Pictures appropriated far more than necessary to conjure up the original, even under the generous standard announced by the Second Circuit in Mad Magazine, 329 F.2d 541 (2d Cir. 1964). See Mature Pictures, 389 F.Supp. at 1398; see also 4 Nimmer & Nimmer, supra note 123, § 13.05[C][1] n.351. But see Bisceglia, supra note 30, at 29-32; Richard A. Bernstein, Parody and Fair Use in Copyright Law, 31 Copyright L. Symp. (ASCAP) 1, 39 (1984).

114 Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 752, 745 (9th Cir. 1978).
116 Id. at 752-53.
118 Id. at 753.
117 Id. at 753 (quoting Kevin W. Wheelwright, Comment, Parody, Copyrights and the First Amendment, 10 U.S.F. L. Rev. 564, 571, 582 (1976)).
depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture.”

After extended discussions of copyright protection for the characters, the fundamentals of copyright infringement, fair use, parody as fair use, decisions like Jack Benny’s litigation in *Gas Light* versus *Autolight* and the *Mad Magazine* song parodies case, the Ninth Circuit concluded that the defendants had taken “more than [is] allowed even under the [*Mad Magazine*] test as applied to both the conceptual and physical aspects of the characters.” Since the copying was excessive, summary judgment for Disney was affirmed. The court also indicated in a footnote that copying a protected work to satirize society generally instead of poking fun at or ridiculing the copied work in some way made it more difficult to justify fair use. I regard this footnote as sort of a gratuitous statement because it seemed rather obvious that the *Air Pirates* comics were targeting the appearances and the personalities of the very familiar and popular Disney characters while challenging widely held conceptions about life in America. In doing so, they took far more than necessary to recall and conjure up those attributes.

The Fifth Circuit cited and discussed the *Air Pirates* decision in affirming the grant of a preliminary injunction blocking the distribution of a poster that infringed a popular poster featuring five Dallas Cowboys Cheerleaders. The defendant’s poster had five former Cowboys Cheerleaders wearing uniforms nearly identical to the official uniforms. They were positioned like the cheerleaders in the plaintiff’s poster with a similar backdrop. The major differences were the large script “The Ex–Dallas Cowboys Cheerleaders” at the bottom of the defendant’s poster and, most importantly, the ex–cheerleaders’ halter–tops were unbuttoned, leaving their breasts exposed. The offending poster was an obvious imitation of the plaintiff’s popular poster, so the defendant argued “the partial nudity of the women in their poster is a parody of the original” and, thus, is a fair use.

The Court of Appeals said that not all parodies and satires are protected

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148 *Id.*
149 *Air Pirates*, 581 F.2d at 757.
150 *Id.* at 758.
151 *Id.* at 758 n.15; see Netanel, *supra* note 33, at 1910 (explaining how the use of the Disney characters added force to the defendants’ satirical statement about American life); Ochoa, *supra* note 28, at 577; Zissu, *supra* note 31, at 403 (noting that the 9th Circuit did not evaluate the impact of the comics on the market for or value of Disney’s works).
153 Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979).
154 *Id.* at 1186.
155 *Id.* at 1188.
as fair use. The court also discussed the *Gaslight* and *Air Pirates* cases, acknowledged that the line between fair use and infringement is often hard to divine, and faulted the defendant for not developing proof on this defense.\textsuperscript{156} The court said that the “simple allusion to the concept of parody” was insufficient to prove fair use and shift the balance in the defendant’s favor.\textsuperscript{157} Given the “unelaborated invocation of the term ‘parody,’” it was not an abuse of discretion for the trial judge to grant injunctive relief.\textsuperscript{158} This decision should not, however, be regarded as an outright rejection of fair use for this bare-breasted spoof of the copyrighted poster. The court stated that the defense “might have prevailed” had the proof been developed.\textsuperscript{159}

Explicit reference to sexual acts has caused substantial problems for raunchy spoofs that are defended as being parodies. “Boogie Woogie Bugle Boy of Company B” is a copyrighted song first made popular in the early 1940s through a recording by the Andrews Sisters and again in the 1970s in a recording by Bette Midler. This catchy tune was the subject of a “take-off” in a show called *Let My People Come* that was performed many times in New York City between January 1974 and July 1976.\textsuperscript{160} This play was an “erotic nude show” that had “sexual content raunchy enough to satisfy the most jaded porno palate.”\textsuperscript{161} Based on the *Mature Pictures* decision regarding the use of the “Mickey Mouse Club March” in a pornographic movie, discussed above, simply playing the Bette Midler or Andrews Sisters renditions of “Boogie Woogie Bugle Boy” might have caused substantial problems for the producers of *Let My People Come.*\textsuperscript{162} However, they did considerably more than perform the song during their musical. They took the alliterative description of a soldier in Company B and changed the lyrics to describe alliteratively the “Cunnilingus Champion of Company C.”\textsuperscript{163} In *MCA, Inc. v. Wilson*, the Second Circuit agreed with the trial court’s finding that the songs were substantially similar. Contrary to rulings by other courts, the court conceded that a fair use parody need not be directed toward the copyrighted work.\textsuperscript{164}

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 1188-89.
\textsuperscript{159} Id. at 1188. The plaintiff’s poster had sold over three quarter of a million copies at $2.50 each. Id. at 1186.
\textsuperscript{160} MCA, Inc. v. Wilson, 677 F.2d 180, 181-82 (2d Cir. 1981).
\textsuperscript{161} Id. at 181. The play was not concerned with fornication but “fellatio and cunnilingus.”
\textsuperscript{162} See supra notes 139-43 and accompanying text.
\textsuperscript{163} MCA, 677 F.2d at 182.
\textsuperscript{164} Id. at 185, 188-89 (Mansfield, J., dissenting). Even though the Second Circuit’s decision in Berlin v. E.C. Publ’ns, Inc. (*Mad Magazine*), 329 F.2d 541 (2d Cir. 1964), did not seem to require the defendant’s spoof to target the plaintiff’s work, the trial court’s ruling on this point was confusing. Zissu, supra note 31 at 405. The Supreme Court later addressed this issue—whether the parody had to comment in some way on the plaintiff’s copyrighted.
Nevertheless, the court concluded that the defendants’ use of the song in the play was not a fair use:

The district court held that defendants’ song was neither a parody or burlesque of Bugle Boy nor a humorous comment on the music of the ‘40s. We are not prepared to hold that a commercial composer can plagiarize a competitor’s copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire of the mores of society. Such a holding would be an open-ended invitation to musical plagiarism. We conclude that the defendants did not make fair use of plaintiff’s song.\(^{165}\)

Judge Mansfield wrote a strong dissent in \(MCA v. Wilson\), asserting that the defendants produced “what amounts to a sexual satire or burlesque of contemporary mores by putting a comic or humorous twist on the conventional Bugle Boy [song] and by parodying the Andrews Sisters’ style, which depended heavily on ‘boogie–woogie’ music. This entitled the defendants to the protection of the ‘fair use’ doctrine . . . .”\(^{166}\) He also made a powerful statement regarding the offensive and obscene nature of defendants’ lyrics that built on the Second Circuit’s earlier pro-parody statement in the \(Mad Magazine\) case: \(^{167}\)

In my view the defendants’ use of “dirty lyrics” or of language and allusions that I might personally find distasteful or even offensive is wholly irrelevant to the issue before us, which is whether the defendants’ use, obscene or not, is permissible under the fair use doctrine as it has evolved over the years. We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average private citizen.\(^{168}\)

\(^{165}\) \(MCA, 677 F.2d at 185\) (majority opinion) (internal citation omitted).

\(^{166}\) \(Id\.) at 188 (Mansfield, J., dissenting).

\(^{167}\) See supra notes 134-39.

\(^{168}\) \(MCA, 677 F.2d at 190\). “\(MCA\) may be viewed as influenced primarily by the majority’s perception of defendants’ use as distasteful and offensive.” Zissu, supra note 31, at 405. Realistically, the defendants’ parody was not a substitute for \(Bugle Boy\). \(Id\.) at 406.
Both the majority and the dissent in *MCA v. Wilson* discussed the impact of *Elsmere Music, Inc. v. NBC*.169 This case did not involve sodomy, but it did have references to that city in the Old Testament known for sin, bestiality and debauchery: Sodom.170 The cast of Saturday Night Live (SNL) did a skit that poked fun at New York City’s public relations campaign that featured the Rockettes and a catchy theme song with the lyrics “I Love New York.” The four–minute SNL skit had the city fathers of Sodom trying to figure out how to improve the city’s image and ended with the cast doing a chorus line and singing “I Love Sodom” to the tune of “I Love New York.”171 Even though the skit attempted to parody the song and the advertising campaign, the trial court rejected the requirement that the parody had to satirize the work it conjured up,172 and held this was a fair use. The court of appeals affirmed and made the following statement: “Believing that, in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody, and that the District Court correctly applied the doctrine of fair use, we affirm on Judge Goettel’s thorough opinion.”173

I love that statement. It is a way of telling the plaintiff/copyright owner to “Lighten up!” or asking “Can’t you take a joke?” I also like the trial court’s statement that “the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied [work] itself.”174 As will be discussed later, this expansive approach to parody and satire was subsequently modified by the Supreme Court.175

About the same time that the Second Circuit was ruling against the alleged parody of “Boogie Woogie Bugle Boy” in the erotic musical *Let My People Come*, a trial court in Georgia ruled that a picture depicting Pillsbury’s familiar characters “Poppin’ Fresh” and “Poppie Fresh” engaged in sexual intercourse and fellatio was a fair use. This parody ad, published in *Screw...*
magazine, also featured Pillsbury’s jingle, “Nothin Says Lovin”—called the “Pillsbury Baking Song.”

Although Judge O’Kelley declined the defendant’s request to characterize its portrayal as a satire or parody, his discussion of the purpose and character of the use factor states:

After reviewing Milky Way’s presentation, the court concludes that it is more in the nature of an editorial or social commentary than it is an attempt to capitalize financially on the plaintiff’s original work. Although the portrayal is offensive to the court, the court has no doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters.

The court might as well have said that the defendant’s picture was a parody.

Pillsbury also argued that the court should have considered the salacious content of Screw magazine. The court’s response to this argument was consistent with Judge Mansfield’s dissent in the Boogie Woogie Bugle Boy decision:

The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but . . . the fact this use is pornographic in nature does not militate against a finding of fair use.

Notwithstanding this strong statement, there was still uncertainty in the

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177 Id. at 129-30. The court said that Milky Way had not furnished the court with any basis for making this determination and noted that the terms satire and parody did not have a fixed definition among literary critics. Id. The court cited MGM v. Showcase Atlanta Coop. Prods., 479 F. Supp. 351 (N.D. Ga. 1979), involving a three-hour long musical called Scarlett Fever based on the movie Gone With the Wind. The trial court held that this musical was neither a satire or a parody, and even if it was a parody the defendants had copied more than the law allowed. Summary judgment was eventually granted for the MGM on defendant’s fair use defense. MGM v. Showcase Atlanta Coop. Prods., 215 U.S.P.Q. (BNA) 685 (N.D. Ga. 1981). The musical was neither salacious nor obscene. See also Bernstein, supra note 3, at 25-26.


180 Id. at 131. The court discussed the impact of Mitchell Brothers Film in a footnote. Id. at 131 n. 10; see supra notes 94–100.
early 1980s about whether the fair use defense narrowed when a parody took the form of scatological humor.\footnote{181}

Other familiar comic book and cartoon characters have been used in raunchy settings. DC Comics holds the copyrights and trademarks to Superman and Wonder Woman. In 1984, DC Comics sued several defendants who were engaged in the singing telegram business. Two of the defendants’ skits featured characters named Super Stud and Wonder Wench.\footnote{182} The cast of the Super Stud skit included a reporter from the \textit{Daily News} named Dark Dent accompanied by a monkey named Jimmy Olson. The basics of the skit were that Dent, who concludes he is too “mild mannered” to perform a singing telegram, announces, “This must be a job for Super Stud,” strips off his clothes to reveal a Superman–like outfit, and recites lines sounding much like the famous comment, “It’s a bird! It’s a plane! It’s Superman!”\footnote{183}

The court had no difficulty granting summary judgment for DC Comics, concluding that the defendants had infringed its trademarks and copyrights.\footnote{184} The defendants’ fair use defense failed. The court found that the “[d]efendants do not engage in critical comment that constitutes part of the ‘free flow of ideas’ underlying the doctrine of fair use. Instead, they seek to augment the commercial value of their own property by creating new, and detrimental, associations with plaintiff’s property.”\footnote{185} In addition, the character delivers the message by retrieving it from inside his pants.\footnote{186} “Here both of the challenged skits have been sold on the strength of their associations with plaintiff’s originals, not on the strength of defendants’ imagination and originality. Trading upon the imagination and originality of another is not fair use.”\footnote{187} In our post-\textit{Pretty Woman} world, the court might have said that the defendants’ use of DC Comics’ characters was not transformative and failed to comment on the original. It was neither a parody nor a satire.

The Ninth Circuit had two important fair use rulings in 1986 touching on subject matter that might be considered immoral or in bad taste. One of them, \textit{Fisher v. Dees}.\footnote{188} is a traditional fair use case in which the music,

\footnotesize{
\begin{itemize}
\item \footnotemark[181] See Warner Bros., Inc. v. ABC, 720 F.2d 231, 243 n.8 (2d Cir. 1983) (paraphrasing dicta in decision holding that ABC’s television show \textit{The Greatest American Hero} did not infringe \textit{Superman}).
\item \textit{Id.} at 114 (“[F]aster than a speeding tortoise, more powerful than an armpit, able to leap tall broads in a single bound . . . .”).
\item \textit{Id.} at 116-17, 119.
\item Id. at 118.
\item \textit{Id.} at 118 n.1. The court noted that the script included “references to aphrodisiacs, ‘clap,’ being ‘horny,’ vaginal deodorant and ‘leaping tall broads.’” \textit{Id.}
\item \textit{Id.} at 119.
\item Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).
\end{itemize}
}
lyrics and style of a popular recording of a familiar song were parodied. The other decision, *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 189 had the creator of a parody advertisement suing the person targeted by the parody for reproducing the parody print ad and distributing copies of it in a fund-raising effort. Both are interesting and fun cases.

The musical work at issue in *Fisher v. Dees* was the 1950s standard, “When Sunny Gets Blue,” as performed by Johnny Mathis—a singer with a very recognizable voice and style.190 The defendant, a disc jockey named Rick Dees, recorded a comedy album titled *Put It Where the Moon Don’t Shine* and one of the cuts on this album was *When Sunny Sniffs Glue*.191 The parody copied the first six of the song’s thirty-eight bars (the main theme) and changed the opening lyrics as follows: Fisher’s version was—“When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall,” while Dees’ version was—“When Sunny sniffs glue, her eyes get red and bulgy, then her hair begins to fall.”192 This parody, which sounds just like Johnny Mathis, runs for just twenty-nine seconds,193 and it seems pretty tame compared to what *Screw* magazine had Poppin’ and Poppie Fresh doing and the lyrics in the “Boogie Woogie Bugle Boy” parody. Still, the plaintiffs argued that this parody was immoral and thus unprotected by fair use. The court, in ruling for Dees on fair use, responded to this argument in stating, “Assuming without deciding that an obscene use is not a fair use . . . we conclude, after listening to it, that the parody is innocuous—silly perhaps, but surely not obscene or immoral.”194 However, this response included a *but see* citation to the *Pillsbury v. Milky Way* opinion’s statements that an obscene use could be a fair use.195 Perhaps the Ninth Circuit was not prepared to agree fully with Judge Mansfield on the Second Circuit and Judge O’Kelley on the U.S. District Court for the Northern District of Georgia that obscenity and immorality do not play a role in fair use analysis. At least the court acknowledged the argument.

Any litigation involving *Hustler Magazine* and the late, nationally-known, fundamentalist preacher Jerry Falwell and his Moral Majority is bound to be fascinating, and there is no doubt that the highly-charged dispute at issue in *Hustler Magazine v. Moral Majority* was not, by any means, a typical copyright infringement case. *Hustler* published a parody of a familiar (at that time) Campari liquor advertisement in its November 1983 and March 1984 editions.196 The legitimate ads had interviews with famous people.

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189 Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986).
190 Fisher, 794 F.2d at 434.
191 Id.
192 Id.
193 Id. at 434, 436 (noting the imitation of Mathis’s “rather singular vocal range”).
194 Id. at 437.
195 See supra notes 175-81 and accompanying text.
196 Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1149 (9th Cir. 1986).
about the “first time” they enjoyed Campari. These recollections were full of double entendres about the subject’s “first time” with sex. The Hustler parody had Reverend Falwell as the celebrity with his “first time” being “with his mother in an outhouse, and saying that he always gets ‘sloshed’ before giving his sermons.” The pages in Hustler with this parody ad had a disclaimer saying that it was a parody and should not be taken seriously.

Neither Campari nor its ad agency complained about this parody advertisement. Instead, it was Jerry Falwell and the Moral Majority who responded. They sent out mailings to hundreds of thousands of supporters and donors that included a copy of the parody ad with some of the words redacted. This mailing was to raise money to support Reverend Falwell’s suit against Hustler Magazine, publisher Larry Flynt and others, alleging libel, invasion of privacy, and intentional infliction of emotional distress. Reverend Falwell also displayed the parody ad on his television show. In response to this, Hustler sued Falwell and others for copyright infringement—reproducing the parody ad from Flynt’s magazine to raise money to support the Reverend’s suit against the evil pornographer and others.

The district court ruled that Hustler’s ad was infringed but granted summary judgment for Falwell, holding that the mailings and the television displays were permissible under fair use. The Ninth Circuit affirmed in a 2–1 decision. The critical factors in the analysis were the purpose and character of Falwell’s use and the impact of this use on the

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197 Id.
198 Id. at 1149–50.
199 Id. at 1150.
200 Id.
201 If they had complained, one would think that some courts would have ruled in Hustler’s favor, saying the ad was a parody within the fair use doctrine. See, e.g., Pro Arts, Inc. v. Hustler Magazine, Inc., No. 85-3022, No. 85-3041, 1986 WL 16647 (6th Cir. 1986) (unpublished opinion). In Pro Arts, the plaintiff’s famous poster of Farah Fawcett was visible in a single–page advertisement soliciting subscriptions for Slam Magazine that appeared in both Slam and Hustler. Id. at *1. The theme of the ad was “Save This Child From the Seventies,” and the reproduction of the poster in the ad was about the size of a postage stamp and the ad also contained, among other things, the poster of John Travolta dancing in Saturday Night Fever. Id. at 50, n...
market for the ad. The majority determined that even though the Moral Majority conceded that their use of copies of the ad was to raise money, it also was a form of criticism and comment; an individual’s effort to rebut a copyrighted work that contained derogatory comments. “The court noted that ‘the public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness.’” The majority also agreed with the trial court “that the effect on the marketability of back issues of the entire magazine is de minimis because it is only one page of a publication which would be purchased for its other attractions.” Also, Falwell’s supporters in the Moral Majority and viewers of the Old Time Gospel Hour were not likely Hustler readers.

In contrast, the dissenting judge wrote that Falwell went beyond commenting on the parody advertisement and

actively sought to exploit the emotional impact of the work to raise money. . . . The defendants published Hustler’s parody in the hope of milking the possible indignation it would arouse for their own personal monetary benefit. This purpose weighs strongly against a conclusion that the defendants’ use of the parody was a fair use.

The dissent also argued that if this kind of use became widespread, it would have an adverse impact on the potential market for Hustler’s ad parody.

What are some safe generalizations about the parody as fair use decisions rendered between the mid-1950s and the late 1980s? First, most courts were willing to recognize that parody, as a form of comment and criticism, was worthy of protection under fair use. Second, there was disagreement on whether the defendant’s use of the plaintiff’s copyrighted work had to target or comment on that work in order to qualify as a parody. In addition, there was uncertainty whether parody should be distinguished as satire. Third, there seemed to be some disagreement on how much of a protected

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207 Id. at 1151-52.
208 Id. at 1153.
210 Hustler Magazine, 796 F.2d at 1156.
211 Id.
212 Id. at 1158 (Poole, J., dissenting).
213 Id. at 1158-59 (explaining that distributing the copies of the entire parody to the public would fulfill the demand of the original). See generally William F. Patry, The Fair Use Privilege in Copyright Law 187 (2d ed. 1995) (saying that the Ninth Circuit’s opinion in Fisher v. Dees was outstanding, but arguing that a different panel got it wrong in the Hustler v. Moral Majority and permitted as a fair use “an opportunistic, blatantly commercial exploitation of a tasteless parody advertisement”).
work the defendant parodist was able to borrow in order to recall or conjure up that protected work. Fourth, it could be argued that some courts had ignored Justice Holmes’ warning about the judging of the merit of a work in ruling against parodies that were obscene, pornographic or offensive.

**C. The Pretty Woman Decision**

The Supreme Court finally addressed parody as a fair use in 1994 in *Campbell v. Acuff-Rose Music, Inc.*, the *Pretty Woman* decision, thirty-six years after it had affirmed, by an equally divided vote, the Ninth Circuit’s decision that Jack Benny’s satire *Autolight* infringed the copyright on the movie *Gas Light*. “Pretty Woman” involved a rap version of the 1964 rock ballad by Roy Orbison and William Dees called “Oh, Pretty Woman.” The rap version, called “Pretty Woman,” was written by Luther Campbell, performed and recorded by his group, 2 Live Crew, and released in an album entitled *As Clean As They Wanna Be*. Campbell and his group sought permission from the copyright owner, Acuff-Rose Music, to do the parody version of “Oh, Pretty Woman,” but the request was refused. Nevertheless, the recording went on sale, almost a quarter of a million copies of it were sold within the first year, and then Acuff-Rose sued Campbell, 2 Live Crew and their record company for copyright infringement.

The defendants not only copied the characteristic opening bass riff of the original and “repeated it, but also produced otherwise distinctive sounds, interposing ‘scraper’ noise, overlaying the music with solos in different keys, and altering the drum beat.” They also copied the opening line from Orbison’s song but then their own words which “quickly degenerate[d] into a play on words, substituting predictable lyrics with shocking ones.” Here are some of the lyrics from both the original and the 2 Live Crew parody:

<table>
<thead>
<tr>
<th>Original</th>
<th>Parody</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Oh, Pretty Woman&quot;</td>
<td>&quot;Pretty Woman&quot;</td>
</tr>
<tr>
<td>by Roy Orbison and William Dees</td>
<td>by 2 Live Crew</td>
</tr>
</tbody>
</table>

Pretty Woman, walking down       Pretty woman walkin’ down

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215 Benny v. Loew’s Inc., 239 F.2d 532 (9th Cir. 1956), aff’d sub nom. CBS v. Loew’s, Inc., 356 U.S. 3 (1958); see supra notes 132-34 and accompanying text.
216 *Pretty Woman*, 510 U.S. at 571-73.
217 *Id.* at 572.
218 *Id.* at 572-73.
219 *Id.* at 573.
220 *Id.* at 589.
221 *Id.* at 573 (quoting Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1154-55 (M.D. Tenn. 1991)).
the street,
Pretty Woman, the kind I
like to meet,
Pretty Woman, I don’t believe you,
you’re not the truth,
No one could look as
good as you
Mercy
Pretty Woman, won’t you
pardon me,
Pretty Woman, I couldn’t help
but see,
Pretty Woman, that you look
lovely as can be
Are you lonely just like me?

There are, of course, many more lines to both songs. The district court granted summary judgment for 2 Live Crew, saying that their song was a parody that showed the blandness and banality of the Orbison song, that it took no more than necessary to conjure up the original, and that it was unlikely to affect the market for the original; in other words, it was a fair use. However, the Court of Appeals for the Sixth Circuit, while assuming the 2 Live Crew song was a parody of Orbison’s classic, reversed because the district court did not put enough emphasis on the fact that commercial uses are presumptively unfair and that harm to the market for the original could be presumed as well. Moreover, the parody had taken too much from the original.

The Supreme Court reversed, holding that the Sixth Circuit erred in presuming this commercial use was unfair and that market harm could be presumed as well. “No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one.” The Court also said that the Sixth Circuit erred in holding that 2 Live Crew had copied excessively “considering the parodic purpose of the use.” The case was remanded for consideration of whether

222 Id. at 594-96.
223 Id. at 573 (citing and quoting Acuff-Rose Music, Inc. v. Campbell 754 F. Supp. 1150, 1154-55, 1157-58 (M.D. Tenn. 1991)).
224 Id. at 573-74 (quoting Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1435, 1437-39 (6th Cir. 1992)).
225 Id.
226 Id. at 594.
227 Id.
“repetition of the bass riff is excessive copying, and ... to permit evaluation
of the amount taken, in light of the song’s parodic purpose and character,
its transformative elements, and considerations of the potential for market
substitution.”

The Pretty Woman decision is important for many reasons, and I want to
emphasize those parts of Justice Souter’s opinion that relate directly to this
Article. First, the Supreme Court aligned itself with all the other “courts
that have held that parody, like other comment or criticism, may claim fair
use under § 107.”

Second, the Court said, for purposes of copyright law, that “the heart
of any parodist’s claim to quote from existing material, is the use of some
element of a prior author’s composition to create a new one that, at least in
part, comments on that author’s work.” In contrast, the claim to fairness
diminishes (perhaps vanishes) when the alleged infringer’s taking from
another work has “no critical bearing on the substance or style” of that
work. In other words, the Court agreed with those courts who had said,
“Parody needs to mimic an original to make its point, and so has some
claim to use the creation of its victim’s ... imagination, whereas satire can
stand on its own two feet and so requires justification for the very act of
borrowing.” These statements should not, however, be taken to mean
that satire cannot be a fair use. The Court acknowledged in a footnote that
there may be situations where “taking parodic aim at an original is a less
critical factor in the analysis, and looser forms of parody may be found to be
fair use, as may satire with lesser justification for the borrowing than would
otherwise be required.”

Justice Kennedy, in a concurring opinion, however, expressed strong
reservations about allowing the parody defense to “weaken the protection
of copyright.” He emphasized that to prevent this from happening the
“definition of parody [must be kept] within proper limits. More than
arguable parodic content should be required to deem a would-be parody a
fair use.” To him, this meant that “[t]he parody must target the original,

228 Id. at 589.
229 The Court was unanimous. Id. at 571. Justice Kennedy filed a concurring opinion. Id.
230 Id. at 579. The Court acknowledged that it first considered whether parody could be
a fair use in Benny v. Loew's, 239 F.2d 532, but had not issued an opinion. Id.
231 Id. 510 U.S. at 580.
232 Id. “If, on the contrary, the commentary has no critical bearing on 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 ... another's work dimin-
ishes accordingly...” Id.
233 Id. at 580-81.
234 Id. at 580-81 n.14: see Ochoa, supra note 28, at 581-82.
235 Pretty Woman, 510 U.S. at 599 (Kennedy, J., concurring).
236 Id.
and not just its general style, the genre of art to which it belongs, or society as a whole.” In other words, Justice Kennedy had more demanding requirements for parody than the other members of the Court. He might not be as tolerant of an appropriation that functioned as satire—a comment on society—that did not also comment on the protected work.

As for the 2 Live Crew rendition of “Pretty Woman,” the Supreme Court aligned itself with the district court and Judge Nelson, the dissenting judge in the Sixth Circuit, in saying that the 2 Live Crew song “was clearly intended to ridicule the white–bread original” and that it

reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers . . . have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.

The Court also said that the song

juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.

Third, after asserting that it could reasonably perceive the parodic character of 2 Live Crew’s song, the Court spoke directly to the whether courts should evaluate the quality of a parody:

Whether, going beyond that, the parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside the narrowest and

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237 Id. at 597. Justice Kennedy added that if the parody targets the original, then it may target those other features as well. Id. Judge Posner has written that the parody defense should be available where the use of the copyrighted work “targets” that work, but not where the use of the copyrighted work is a "weapon" to comment on something else. Richard A. Posner, When is Parody Fair Use?, 21 J. LEGAL STUD. 67, 71 (1992).

238 Pretty Woman, 510 U.S. at 582, (quoting Acuff-Rose Music, Inc, v. Campbell, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting)). Justice Kennedy wrote that he was “not so assured that 2 Live Crew’s song is a legitimate parody,” Id. at 599 (Kennedy, J., concurring).

239 Id. at 583 (majority opinion). This seems a little like Monday morning quarterbacking: post-hoc rationalizations for the parodic aspects of the song. However, this is the U.S. Supreme Court speaking about these attributes of 2 Live Crew’s song. As a guy who likes parody and satire, and who wants people to lighten up and laugh, I will say, “Yes, I can see that too.”

240 Id. at 582, 583.
most obvious limits. At the one extreme some works of genius would be sure
to miss appreciation. Their very novelty would make them repulsive until
the public had learned the new language in which their author spoke.”

This holding means that judgments as to whether a parody is tasteful or
offensive have no place in a court’s determination about where to draw the
line between infringement and fair use. What might have happened fifty
years ago if the Supreme Court had ruled in Jack Benny’s favor in the Gas
Light versus Autolight case, held that his parody of the movie was a fair use,
and repeated the familiar language from Bleistein that judges should not be
evaluating the worth of the works at issue in their cases?

Of course, this is more speculation on my part because the Ninth Circuit
holding that Benny had infringed the copyright was upheld, without
opinion, by an equally divided Supreme Court. Still, it is fun to speculate
as to whether Air Pirates, the Happy Hooker/Mickey Mouse March case, and
Boogie Woogie Bugle Boy would have come out differently had there been
a clear statement that Holmes’ admonition in Bleistein applies to fair use
analysis as well as to deciding whether a particular work is copyrightable.

Did the judges who decided those cases allow their judgments to be
influenced by the fact they regarded the challenged parodies as distasteful
and obscene? It turns out that Judge Mansfield, who dissented in Boogie
Woogie Bugle Boy, and Judge O’Kelley, who decided the Pillsbury/Screw
magazine case, had it right. Both expressed distaste for the offending
parodies, but both said that Bleisten prevented them from allowing their
disgust to cloud their fair use analyses. Well, one can only speculate. The
Pretty Woman decision did not draw a bright line between parody that falls
within fair use and satire/parody that infringes, so there is plenty of room
for advocacy on both sides of the equation.

D. Post-Pretty Woman Decisions

There have been many fair use decisions rendered since Pretty Woman
was decided in 1994, but only a few involve what most people would regard
as offensive or distasteful uses of popular works, at least in my opinion.

Barbie, the iconic fashion doll manufactured by Mattel, Inc., has enjoyed
tremendous commercial success since making her debut in 1959. She also

241 Id. at 582-83 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251
(1903)).
242 See 4 Nimmer & Nimmer, supra note 123, at § 13.05[C][2].
243 “[I]s it even possible to observe the [Holmes] prescription faithfully?” Joyce et al.,
supra note 4, at 97 n.4.
244 See generally 4 Nimmer & Nimmer, supra note 123, at § 13.05[C][2] (discussing the
ramifications of the Supreme Court’s decision to remand the Pretty Woman case to the Sixth
Circuit).
has been subject to many parodies, some not very flattering. For instance, Susanne Pitt sold a repainted and re-costumed Barbie-like doll with the head of Mattel’s “SuperStar” Barbie; her doll was called “Dungeon Doll.” Ms. Pitt also maintained a Web site with images of this repainted and re-costumed “SuperStar” Barbie in a sexually explicit story and offered sexual paraphernalia for sale. The story was titled Lily the Diva Dominatrix. This upset Mattel, so it sued and, after some procedural squabbles, moved for summary judgment. Ms. Pitt, a pro se defendant from the UK, raised fair use as a defense.

The court denied Mattel’s motion, explaining that the “patently transformative character of the accused works and Defendant’s representations concerning their purpose support[ed] . . . the fair use defense.” Pitt asserted that she was “attempting to comment on . . . the sexual nature of Barbie through her use of customized Barbie figurines in sadomasochistic costume and/or storylines.” There did not appear to be any doubt that Pitt’s use commented on the copyrighted work—Barbie.

In ruling against Mattel, the district court relied upon Pretty Woman and other cases, including another unsuccessful infringement action Mattel brought to protect Barbie against Tom Forsythe, a self-taught photographer. Forsythe “developed a series of 78 photographs entitled ‘Food Chain Barbie,’ in which he depicted Barbie in various absurd and often sexualized positions.” In many of these Barbie is nude and “juxtaposed with vintage kitchen appliances.” For instance, “Malted Barbie” features Barbie nude inside a vintage Hamilton Beach malt machine, and “Barbie Enchiladas” has “four Barbie dolls wrapped in tortillas and covered with salsa in a casserole dish in a lit oven.” Forsythe displayed his photos at several festivals and tried to market them in a variety of ways, but he enjoyed little commercial success prior to being sued by Mattel for copyright.

246 Id.
247 Id. at 322. The doll wore a “[l]ederhosen-style’ Bavarian bondage dress and helmet in rubber with PVC-mask and waspie.” Id.
248 Id. at 319.
249 See id. at 319-20.
250 Id. at 322-23.
251 Id. at 322. The court analyzed the other fair use factors as well in concluding that there were serious questions as to whether her use of Barbie was a fair use. Accordingly, summary judgment could not be granted for Mattel. Id. at 323-25.
253 Id. at 321 (discussing Mattel, Inc. v. Walking Mountain Prods., No. CV998543RSWL., 2001 WL 929923 (C.D. Cal. Aug. 13, 2001)).
254 Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003).
255 Id.
256 Id.
trademark and trade dress infringement. Forsythe eventually moved for summary judgment. The district court granted the motion, ruling that his photographs of Barbie were fair use. The Ninth Circuit affirmed.

The court had no difficulty concluding that Forsythe’s work could be reasonably perceived as a parody and noted that whether “a parody is in bad taste is irrelevant to whether it constitutes fair use.” It pointed out that Barbie had become, thanks to Mattel’s marketing, “the ideal American woman’ and a ‘symbol of American girlhood’” associated with “beauty, wealth, and glamour.” Moreover, the image of Mattel’s doll was a target of Forsythe’s parody:

Forsythe turns this image on its head, so to speak, by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations. His lighting, background, props, and camera angles all serve to create a context for Mattel’s copyrighted work that transform Barbie’s meaning. Forsythe presents the viewer with a different set of associations and a different context for this plastic figure. In some of Forsythe’s photos, Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances . . . . In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie’s influence on gender roles and the position of women in society.

If posing Barbie nude in sexually suggestive positions with kitchen appliances and dressing her as a dominatrix in a lederhosen-style bondage dress and a rubber helmet are fair uses, then there is not much Mattel can do to protect her virtue. Things are tough for Barbie and Mattel. Mattel was, however, victorious against a doll called “Claudene” with blonde hair and blue eyes, dressed like a Southern California cheerleader, who infringed Mattel’s rights to “Cool Blue” Barbie, but parody was not an issue.

257 Id. at 797 n.2.
258 Id. at 798. The court also held that his use of Mattel’s trademark and trade dress did not cause “likelihood of confusion.” Id. A dilution claim was dismissed because Forsythe’s use was “noncommercial,” and the state law claims “failed as a matter of law.” Id.
259 Id. at 816.
261 Id. at 802 (quoting Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 898 (9th Cir. 2002)).
262 Id. The photos “parody Barbie and everything Mattel’s doll has come to signify.” Id. The court also concluded that Forsythe’s use of the Barbie mark and trade dress was not infringing or diluting. Id. at 812.
263 See Christian v. Mattel, Inc., 286 F.3d 1118, 1121 (9th Cir. 2003). The maker of Claudene sued Mattel for infringement. Id. Mattel counterclaimed, won on summary judg-
Recently, Mattel was successful in an infringement claim against MGA Entertainment, the maker of the Bratz dolls. A trial court ruled that these “popular, pouty-lipped dolls” infringed Mattel’s copyrights on Barbie. Mattel also had partial success in asserting that Radio City Entertainment’s “Rockettes 2000 Doll” infringed its “Neptune’s Daughter Barbie Doll” and its “CEO Barbie Doll.” The trial court granted summary judgment for the defendant, saying that the similarities between the dolls arose from non-copyrightable elements. “When it comes to something as common as a youthful, female doll, the unprotectible [sic] elements are legion . . . .” The court of appeals did not agree. It explained that even though the doll’s facial features—eyes, nose and mouth—were standard and common, this did not remove Mattel’s portrayal of those features from the realm of copyright protection. Mattel “is entitled by its copyright not to have its design copied by competitors.” The court of appeals vacated and remanded for a determination of whether the defendant copied Barbie’s features. Here, again, parody was not an issue.

Parody was raised in Mattel’s unsuccessful suit against music companies whose song “Barbie Girl,” performed by the Danish band Aqua, lampooned Barbie. The court ruled that the use of the “Barbie” mark in the song did not infringe Mattel’s trademark and that the song itself fell under the non-commercial use exception in the Federal Trademark Dilution Act. The song poked fun at Barbie and the values she represents. Some of the lyrics state: “I’m a blonde bimbo girl, in a fantasy world/Dress me up, make it tight, I’m your dolly.” The court cited Rogers v. Grimaldi, saying that the song targeted Barbie, and concluding that all of this constituted a permitted trademark parody use.

I guess that the price of success for an icon like Barbie is that you will be the subject of parody and satire. As my late mother always said, “People will not poke fun at you unless they really like you.” Mattel should ignore the likes of Tom Forsythe and relish the fact Barbie is still being parodied as she turns fifty. What is next, Cougar Barbie?
An icon of American comedy, Carol Burnett, was the target of a sexually suggestive satire in our post-\textit{Campbell v. Acuff-Rose} world. More specifically, the “Charwoman” character created by Ms. Burnett in the long running \textit{The Carol Burnett Show} was depicted in an episode of \textit{Family Guy}, the animated comedy series aimed at mature audiences. The episode in question, titled “Peterotica,” has the family patriarch, Peter Griffin, entering a porn shop, remarking about the cleanliness of the place, and learning from his friend that “Carol Burnett works part time as a janitor.” The viewer then sees “an animated figure resembling the ‘Charwoman’ from the Carol Burnett Show, mopping the floor next to seven ‘blow-up dolls,’ a rack of ‘XXX’ movies, and a curtained room with a sign above it reading ‘Video Booths.’” During this scene, “a version of Carol’s Theme from the \textit{Carol Burnett Show},” can be heard while Peter and his friends make a suggestive joke about the fact that Ms. Burnett used to tug her ear at the end of the show.

The plaintiffs’ multiple–count complaint included a copyright infringement claim. Defendants raised fair use, and Burnett argued that the \textit{Family Guy} episode was neither transformative nor a parody, but the court concluded otherwise. It found that four factors in 17 U.S.C. § 107 “weigh heavily in favor of a finding of fair use and that plaintiffs’ first claim of relief for copyright infringement should be dismissed without leave to amend.” The court explained:

\begin{quote}
\textit{It is immaterial whether the target of Family Guy’s “crude joke” was Burnett, the Carol Burnett Show, the Charwoman, Carol’s Theme Music or all four. The eighteen-second clip of the animated figure resembling the “Charwoman,” . . . is clearly designed to “imitate [] the characteristic style of an author or a work for comic effort or ridicule” and is executed in such funny. I would not, however, recommend that they sue for infringement. On the other hand, if there is a Barbie knock–off on the market, that arguably takes too much of Mattel’s protected expression and hurts their market share, then Mattel should sue for infringement. This is illustrated by Mattel’s suit against MGA Entertainment, Inc. over their competing doll, Bratz. Mattel alleged that Bratz was conceived while its designer worked for Mattel. Bratz is a key competitor for Barbie, and Barbie is Mattel’s biggest brand. See Edvard Pettersson and Heather Burke, \textit{Mattel Says It Has Proof Bratz Was Born in Barbie’s Family}, \textit{Daily Report} (Fulton County, GA), May, 14, 2008, Business Matters. As pointed out above in \textit{Barbie}, Barbie eventually won against the Bratz dolls. See Keegan, supra note 264.}
\end{quote}

\begin{thebibliography}{9}
\bibitem{274} Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 966 (C.D. Cal. 2007).
\bibitem{275} See Anandashankar Mazumdar, \textit{Cartoon Showing Carol Burnett Character Cleaning in Porn Shop Protected as Fair Use}, 74 Pat., Trademark & Copyright J. 240 (2007).
\bibitem{276} Burnett, 491 F. Supp. 2d at 966.
\bibitem{277} Id.
\bibitem{278} Id. The total clip lasted eighteen seconds. Id. at 970.
\bibitem{279} Id. at 971.
\end{thebibliography}
a manner that “the characteristic turns of thought and phrase of class of authors are imitated in such a way as to make them appear ridiculous.” . . .

Here, Family Guy put a cartoon version of Carol Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd situation in order to lampoon and parody her as a public figure. Therefore, the Court finds that a parodic character may reasonably be perceived in the Family Guy’s use of the Charwoman because it is a “literary or artistic work that broadly mimics an author’s characteristic style and holds it up to ridicule.”

Ms. Burnett’s trademark infringement and dilution claims under the Lanham Act also were dismissed, and the court declined to exercise supplemental jurisdiction over her state law claims. The court stated in conclusion that it

fully appreciates how distasteful and offensive the segment is to Ms. Burnett. Debasing the ‘Charwoman’ and also making Ms. Burnett’s parents participants in a crude joke is understandably disheartening to Ms. Burnett, her family, and many fans. To some extent this dispute is indicative of just how far the “new media” has come from the “old media.” . . . [W]hen crude jokes and insensitive, often mean spirited, programming was perhaps found in live night club performances, but was not present on television. In the new media, any self-imposed restraint essentially has been eliminated. . . . As Ms Burnett well knows, it takes far more creative talent to create a character such as the “Charwoman” than to use such characters in a crude parody. Perhaps Ms. Burnett can take some solace in that fact.

I have laughed at Family Guy, and I have laughed at Carol Burnett. I do not think any less of her talents and the quality of her comedy routines because of a parody like “Peterotica.” Here, the court got it right as this was fair use. Parodies will remain a fertile ground for litigation, and I predict that a true parody spoof will be on the winning side much more often than not because of the Pretty Woman decision, the vitality of the Bleistein principle of aesthetic non-discrimination, and recognition by the courts that “the public benefit in allowing artistic creativity and social criticism to flourish is great.”
There are, however, several troubling post-

Pretty Woman decisions that illustrate difficulties applying the Supreme Court’s definition of parody that requires the defendant parodist, in making use of another author’s copyrighted material, to comment on or target that author’s work.284 “If . . . the commentary has no critical bearing on the substance or style of the original composition . . . the claim to fairness in borrowing from another’s work diminishes accordingly . . . .”285 Deciding whether a defendant’s spoof targets the copyrighted work that he or she used is not as easy as it sounds.286 These troubling post-Pretty Woman decisions are discussed in the next section.

III. Is It a Parody? Risks in Determining the Target of the Spoof

The Supreme Court in Pretty Woman agreed with those courts which had said that “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination.”287 For purposes of copyright law, “the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”288 In contrast, the claim to fairness diminishes (perhaps vanishes) and the other fair use factors “loom larger” when the alleged infringer’s taking from another work has “no critical bearing on the substance or style” of that work, and it is apparent that the alleged infringer used it “to get attention or to avoid the drudgery in working up something fresh.”289

These statements do not mean that a satire that borrows from a protected work without commenting upon it will never be a fair use,290 but the Court also said that a “satire can stand on its own two feet and so requires justification for the very act of borrowing.”291
the original requirement and the distinction between parody and satire present a hurdle of uncertain height for the alleged infringer who is arguing that his or her spoof of the plaintiff’s work is a parody. A rationale for requiring the copied work to be an object of the parody is an insistence that the audience be aware that underlying the parody there is an original and separate expression attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.

It seems that this rationale should work as well for a satire that uses some aspects of a familiar work to make a comment on society.

Notwithstanding the Supreme Court’s quotation of the Holmes warning from *Bleistein* about not judging the worth of a work, and its statement that “whether . . . parody is in good taste or bad does not and should not matter to fair use,” a court can easily make an inappropriate artistic judgment when it has to determine whether a challenged spoof or take-off criticizes or comments on the original. How does one decide whether a spoof or take-off is a true parody or a satire? How easy is it to determine whether or not the original work is the target of the spoof? Even Judge Posner, who has written that the parody defense should be available only where the target of the parody is the copyrighted work, admits that the parody/satire distinction has problems.

Some of the decisions before *Pretty Woman*, where the defendant’s fair use defense ran into problems because the alleged parody was not seen as targeting or commenting on the plaintiff’s copyrighted work, include *Mature Pictures* (the *Happy Hooker*/Mickey Mouse March case), *Air Pirates*, *Pretty Woman*, *Rogers v. Koons*, *Joyce et al.*, *Ochoa*, *Suzor*, *Bisceglia*, *Posner*, *Merges*, *Robert P. Merges, Are You Making Fun of Me: Notes on Market Failure and the Parody Defense in Copyright*, *Joyce et al.*, *Ochoa*, *Suzor*, *Bisceglia*, *Posner*.
Unlimited Monkey Business (Super Stud singing telegrams) and MCA v. Wilson (the Boogie Woogie Bugle Boy case).298 In each of these cases, a reasonable argument can be made that the sexually explicit, obscene or distasteful use of the plaintiff’s work did, in fact, comment on or target the copyrighted work and should have been regarded as a parody.299 After all, if the intent to ridicule the “white–bread original” was so clear in Pretty Woman,300 then Judge Mansfield must have had it right in his Boogie Woogie Bugle Boy dissent when he wrote that the Cunnilingus Champion song put a “humorous twist on the more conventional Bugle Boy and by parodying the Andrews Sisters’ style, which depended heavily on ‘boogie-woogie’ music.”301 The dirty lyrics were irrelevant to him but they seemed to affect the trial court’s and the Second Circuit’s ruling that the “song was neither a parody or burlesque of Bugle Boy nor a humorous comment on the music of the 40s.”302 Most of the judges in these cases let their disgust about dirty lyrics and obscenity color their analysis, and, at best, they seemed to pay lip service to the principle Holmes announced in Bleistein.303

Rogers v. Koons is another example of the impact of the “comment on the original” requirement.304 Art Rogers took a photograph of a husband and wife holding a litter of eight German Shepherd puppies. His photo was exhibited at the San Francisco Museum of Modern Art, prints were sold, and the photo was made into a postcard.305 The appropriation artist Jeff Koons had artisans reproduce this postcard as closely as possible in three-dimensional form as a wooden sculpture. It was copied faithfully306 and the sculpture was painted in bold colors. He exhibited this piece at his “Banality Show,” sold three copies to collectors, and kept one for himself.307

298 Jack Benny’s spoof of the movie Gaslight arguably failed on similar ground; it was not really a parody, but a comic adaptation of the original play. Ochoa, supra note 25, at 572 n.150.

299 See Bisceglia, supra note 30, at 29-32; Bernstein, supra note 143, at 39 (criticizing the result in Mature Pictures).

300 Pretty Woman, 510 U.S. at 582.

301 MCA, Inc. v. Wilson, 677 F.2d 80, 88 (Mansfield, J., dissenting).

302 Id. at 185 (quoting MCA, Inc. v. Wilson, 425 F. Supp. 443, 453 (D.C. N.Y 1976)); see Bisceglia, supra note 31, at 29-32 (discussing the obscenity problem with parody and questioning the results in the Air Pirates, Boogie Woogie Bugle Boy and Mickey Mouse March cases).


307 Rogers, 960 F.2d at 304-05.
All of this was done without the permission of the photographer who sued for infringement and won.\footnote{Id. at 305.}

Koons argued that his work was a fair use because it served as a critique of the mass production of commodities and media images and as a comment on our political and economic system.\footnote{Id. at 309. This is not a far-fetched argument. Koons, like Warhol and Lichtenstein, took something relatively ordinary (the photo of the couple holding the puppies) and presented it in such a way that he calls attention not to the photo, but to the viewers’ attitudes about what is and is not art. These artists “criticize our tendency to imagine that artistic value inheres in objects themselves, rather than in the way we choose to regard them.” Bisceglia, supra note 30, at 8, 32.} Ultimately, these contentions failed, as the trial court did not see the Koons sculpture as making any kind of criticism or comment on Rogers’ photograph. It simply was an unauthorized appropriation to a different medium.\footnote{Koons, 751 F. Supp. at 479.}

The Second Circuit agreed, stating “though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody.”\footnote{Rogers, 960 F.2d at 310.} Koons’ sculpture could be viewed as a satire critiquing “our materialistic society,” but the court did not see any parody of Rogers’ photograph.\footnote{Id. at 310-11; see Koons, 751 F. Supp. at 479 (Koons’ work did not comment on Rogers’ photo, it appropriated the photo).} In a nutshell, perhaps there was a satirical comment in Koons’ sculpture that faithfully copied the plaintiff’s photograph, but the parodic character of it was not readily apparent to the courts and, in all likelihood, it would not have been apparent to the viewing audience.\footnote{Rogers, 960 F.2d at 310 (“By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression attributable to a different artist.”); see Ochoa, supra note 28, at 593; Heymann, supra note 30, at 460.}

The sculpture was not a parody and the satire argument might have been a stretch. The copying of protected expression was very substantial, and the court viewed Koons’ sculpture as an unauthorized derivative work that injured Rogers’ market for three-dimensional versions of his photograph. “[T]he copies [Koons and his artisans] produced bettered the price of the copied work by a thousand to one,” and Koons thought he could get away with this appropriation because he was a major player in the art world while Rogers was not well known.\footnote{Rogers, 960 F.2d at 303.} Thus, the fourth fair use factor also cut against Koons.\footnote{Id. at 312; see Zissu, supra note 31, at 407.} Perhaps the courts disliked appropriation art and this colored their analysis,\footnote{See Arthur, supra note 31, at 116-17.} but the fair use factors weighed against
Parody or satire, I think there is no doubt that he had infringed. O.J. Simpson’s double–murder trial inspired a story written in the distinctive rhyming style of Dr. Seuss with illustrations similar in style to those in a Dr. Seuss book. This illustrated story resulted in a troubling post-

*Pretty Woman* decision from the Ninth Circuit. In doing so, the court quotes the beginning of the story:

A happy town
Inside L.A.
Where rich folks play
The day away.
But under the moon
The 12th of June.
Two victims flail
Assault! Assail!
Somebody will go to jail!
Who will it be?
Oh my! Oh me!

The entire book was written in this style, and it was held not to be a fair use. The defendant’s work, titled *The Cat NOT in the Hat!*, by Dr. Juice, was seen as a creative general satire, but the trial court found that it failed to comment on the text or theme of plaintiff’s famous *The Cat in the Hat*. The court stated, “Only when the satirist wishes to parody the copyrighted work itself does the taking of protected expression from that work become permissible, and even then, only in such amounts as is required to fulfill the parodic purpose.”

The Ninth Circuit affirmed. The court held that the defendant’s book “simply [retold] the Simpson tale” without any “effort to create a [new] transformative work.”

This decision is wrong. The parodic character could be reasonably perceived in both the rhyming “Dr. Seuss” style in which the story was written, and in the creative graphics that mimicked “Dr. Seuss” graphics. Just like the 2 Live Crew rendition of *Pretty Woman*, *The Cat NOT in the Hat!* commented on the “naiveté of the original.” Moreover, a finding

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317 Id. at 125-28.
320 Dr. Seuss, 924 F. Supp. at 1567-69.
321 Id. at 1568.
322 Dr. Seuss, 109 F.3d at 1401. See generally Ochoa, *supra* note 28, at 589-620 (criticizing almost all aspects of the decision).
323 Ochoa, *supra* note 28, at 591; see, Suzor, *supra* note 31, at 240; cf. R. Anthony Reese,
of fair use could have been justified even if the work is treated as a satire because it was transformative in that it built on the distinct Dr. Seuss style of graphics and writing to create something new, and it is difficult to see how the defendant’s work could have hurt the market for or value of the works of Dr. Seuss. Contrary to the lessons of Bleistein and Pretty Woman, the Ninth Circuit “allowed its own views concerning the artistic merits of the work to color its judgment.”

On the other hand, there are several post-Pretty Woman cases in which courts had little difficulty finding spoofs to be fair use parodies. For instance, during Ralph Nader’s 2000 run for the White House, his campaign ran a television ad that mimicked MasterCard’s very successful “Priceless” ads while criticizing his opponents. This fair use of MasterCard’s protected work was seen as “comment[ing] on the craft of the original” and thus a parody. In another case, a line of dog chew toys and beds used the name “Chewy Vuiton” and the C/V logo of high-end fashion designer Louis Vuitton. The court said this was “an obvious wordplay on the name Louis Vuitton, and the superimposed C and V on the logo are intended to ‘conjure up’ enough of the Louis Vuitton logo in order to make the object of its wit—a humorous play on Louis Vuitton’s high-end image in the form of dog toys—recognizable.” The court concluded that this play on the Vuitton name and logo was a parody and fair use.

Similarly, a movie poster for Naked Gun 33-1/3 with the head of Leslie Nielsen superimposed on a photo of a very pregnant nude woman, posed just as Annie Leibovitz posed Demi Moore for the cover of Vanity Fair, was held to be a fair use.

Plainly, the ad adds something new and qualifies as a "transformative" work. Whether it “comments” on the original is a somewhat closer question. Because the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original.

Transformativeness and the Derivative Work Right, 31 Colum. J.L. & Arts 467, 472-73, 492 (2008) (defendant had “altered the content of the original work and offered a different message, but these changes were not transformative because they did not produce a parody”).

Cf. Suzor, supra note 31, at 240-41; Heymann, supra note 304, at 462-63 (“[T]he plain-tiff’s . . . work had indeed been ‘transformed.’”).

Ochoa, supra note 28, at 592.


Louis Vuitton, 464 F. Supp. 2d at 507 (noting that Louis Vuitton does not participate in the market for pet chew toys and beds and offered no evidence of interference with potential markets or control of its copyrights).

Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 111-12 (2d Cir. 1998).
The contrast achieves the effect of ridicule that the Court recognized in *Campbell* would serve as a sufficient “comment” to tip the first factor in a parodist’s favor.\footnote{Id. at 114; see *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 597-600 (1994) (Kennedy, J., concurring).}

The court expressed some “concern about the ease with which every purported parodist could win . . . simply by pointing out” how his or her work differs from the original, and noted that being different does not necessarily comment on the original.\footnote{Leibovitz, 37 F.3d at 114.} Still, the differences between the movie poster and the plaintiff’s magazine cover might be seen as ridiculing the “undue self-importance conveyed by the subject of the Leibovitz photograph” and “as interpreting the . . . photograph to extol the beauty of the pregnant female body, and, rather unchivalrously, to express disagreement with this message.”\footnote{Id. at 114-15. The court also said that a photographer who poses a well known actress in a manner that evokes Botticelli’s “Birth of Venus” should expect to have a parodist ridicule the photo. *Id.* at 111.} The court found a parody—or was it really a satire?\footnote{Id. at 1223 (promoting a movie that was itself a satire).}

Are these statements about the movie poster simply post-hoc rationalizations for justifying fair use? Are they more convincing than the explanation offered by Jeff Koons for his appropriation of the photograph of the couple holding the litter of puppies?\footnote{Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992); see supra notes 304-17 and accompanying text.} Is the movie poster’s parody of Leibovitz’s *Vanity Fair* cover that much more evident than Dr. Juice poking (or not poking) fun at the unique style of a Dr. Seuss book’s verse and illustrations? Was Nader’s spoof of MasterCard’s “Priceless” ad campaign really a comment on the craft and style of the original? The alleged infringers in these cases made plausible arguments that what they did with their several plaintiffs’ works were legitimate parodies that targeted or commented on those plaintiffs’ original works. Whether the targeting or commenting on the original requirement is satisfied, however, depends too much on eyes and ears of the judges.\footnote{See Heymann, *supra* note 304, at 453-57. A persuasive argument has been made that the inquiry should shift to the readers and viewers—do they perceive of interpret the challenged use as adding something new, as being transformative.} Outcomes of cases should not turn on a judge’s determination of whether a challenged spoof or take–off does or does not comment on the original because the parody/satire distinction is squishy\footnote{See supra Part III and infra notes 370-91 and accompanying text.} and because of the considerable risk of contravening *Bleistein’s* principle of aesthetic nondiscrimination.

It is doubtful that the Supreme Court will have the opportunity
to reconsider the wisdom of the “comment on the copyrighted work” requirement or target requirement from *Pretty Woman* unless it were to grant certiorari on some fair use-parody decision that worked its way through the federal courts. That seems unlikely. Nevertheless, the target/comment on the original hurdle may have become, like some scholars regard “transformativeness,” a worthy but failed effort at avoiding careful fair use analysis.\(^{33}\)

### IV. Satire as Fair Use

So what is to be done? Courts could pay lip service to the targeting the original requirement by routinely finding that the challenged spoof or take-off is a parody and then proceed to a traditional four-factor, fair use analysis. This approach might have resulted in a different outcome in the *Dr. Juice* and *Boogie Woogie Bugle Boy* cases but not in *Rogers v. Koons*. Treating every spoof as a parody, however, seems to ignore Justice Kennedy’s concurring opinion from *Pretty Woman* in which he said that copyright protection is harmed if any weak transformation of a work is allowed to qualify as a parody.\(^{338}\) On the other hand, I doubt that there are many who would like to see satirists like Mark Russell or The Capitol Steps held liable for copyright infringement because their comedy routines, changing the lyrics to popular songs to poke fun at politics, politicians, current events and the like, fail to target or comment on those popular songs. These are creative, transformative satires, and it is a stretch to say that they are parodies.\(^{339}\)

Perhaps some composers and lyricists are offended by having entertainers and social/political commentators use their melodies and alter their lyrics for the purpose of poking fun at President Obama or Secretary of State Clinton or Senator Specter or Rush Limbaugh, but I am sure some do not care. Such imitations are a form of flattery, laughter is good for all of us, and, in my opinion, it is difficult to see how these satirists’ versions of popular songs impact the market for or value of those songs.\(^{340}\) Moreover, even though “transformativeness” is a fuzzy concept, it is reasonable to argue that the things The Capitol Steps and Mark Russell do with popular songs

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33. See *Joyce et al.*, supra note 4, at 818 n.2-4 (discussing the difficulties associated with determining whether a particular use is transformative); cf. *Reese*, supra note 323 (discussing judicial confusion with fair use and derivative works resulting from the concept of “transformativeness”—a derivative work is one that transforms the underlying work so does the fair use concept of transformativeness weaken the derivative work right).

338 Campbell v. Acuff-Rose Music, Inc. (*Pretty Woman*), 510 U.S. 569, 599 (Kennedy, J., concurring) (expressing the need for commentary on the original and says that “doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist”).


340 See *Suzor*, supra note 31, at 240-41 (doubting that a copyright owner is any more likely to license use of his or her work for a satire than a parody).
are transformative uses. These satirists can make strong fair use arguments even if their renditions of popular songs do not qualify as parodies because they fail to target or comment on those songs. They have strong precedents to support this argument. If the Mad Magazine lyrics in that publication’s “sung to the tune of” versions of popular copyrighted songs were held to be fair uses in 1964, then the lyrics Mark Russell and The Capitol Steps sing today to the tune of popular songs should be fair uses of those songs. The Second Circuit stated in that venerable Mad Magazine decision that “parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.”

The Supreme Court’s decision in Pretty Woman stated, “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.” The Court went with the standard definition of satire as a work “in which prevalent follies or vices are assailed with ridicule or are attacked through irony, derision, or wit.” The Court did not, however, say that a satire could not qualify as fair use. Rather, satire can be a fair use. Like parody, satire is a form of criticism and comment; both are listed in § 107’s preamble as examples of uses of copyrighted works which may be fair.

The use of a photograph as part of a collage was treated as satire and held to be fair use in a decision involving the artist Jeff Koons; the often-sued appropriation artist who had been unsuccessful in asserting parody as a defense in litigation in the early 1990s concerning works displayed in his Banality Show. Koons was commissioned by Deutsche Bank and the Guggenheim Foundation to produce a series of works titled “Easyfun-Ethereal.” One of his works, “Niagara,” was a collage in which he appropriated a fashion photograph by Andrea Blanch titled “Silk Sandals by Gucci.” This photo had been published in the fashion magazine Allure, 343

341 See Heymann, supra note 304, at 461-62 (a defendant satirist’s recontextualizing of an iconic work can be transformative because it allow the reader/viewer to see the old work in a new and different way); cf. Reese, supra note 323, at 492 (the courts in Dr. Seuss seemed to conclude that the changes were not transformative because they did not produce a parody).

342 Id. at 545 (emphasis added).


344 Id. at 581 n.15.

345 Id. at 592 n.22.


347 Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006) (discussing the artist’s previous lawsuits for copyright infringement); see supra notes 304–17 and accompanying text.

348 Blanch, 467 F.3d at 247.

349 Id. at 248.
and it depicted, at close range, “a woman’s lower legs and feet, adorned with bronze nail polish and glittery Gucci sandals, resting on a man’s lap in what appeared to be a first-class airplane cabin.”\footnote{Id. The photographer said it was her idea to use the airplane interior as a backdrop and place the model’s feet on the man’s lap in order to “show some sort of erotic sense[,] . . . to get . . . more of a sexuality to the photographs.” Id.} “Niagara,” like the other collages in Koons’ series, used images from advertisements or his own photographs that he digitally superimposed against pastoral scenes. “Niagara” is made up of four pairs of women’s feet and lower legs dangling over images of sweets—confections like fudge brownies and donuts—with Niagara Falls and a grassy field in the background.\footnote{Id. at 247. The legs are placed side by side, each pair pointing downward and extending from the top of the collage about two-thirds of the way to the bottom. Koons said that this collage was inspired by a billboard he saw in Rome that depicted several sets of women’s legs. Id.} One of those pairs of legs was derived from Blanch’s photograph.\footnote{Id.} Koons scanned the photo’s image but made several changes when he placed it in his collage, including inverting the orientation of the legs, eliminating the airplane cabin and the man’s lap, and modifying the colors.\footnote{Id.} He did this reproduction and modification without permission of Blanch or \textit{Allure}'s publisher.\footnote{Id.}

Blanch’s suit claimed copyright infringement, but the district court concluded that Koons’ use of “Silk Sandals” in “Niagara” was fair use.\footnote{Id. at 27. The legs are placed side by side, each pair pointing downward and extending from the top of the collage about two-thirds of the way to the bottom. Koons said that this collage was inspired by a billboard he saw in Rome that depicted several sets of women’s legs. Id.} It regarded this as a transformative use, worked through all the fair use factors, and concluded that the plaintiff’s photograph could not have captured the market occupied by “Niagara.”\footnote{Id. at 28-9.} The Second Circuit affirmed the decision. It also went through a very thorough, traditional, factor-by-factor, fair use analysis of Jeff Koons’ unauthorized use of Blanch’s “Silk Sandals by Gucci.”\footnote{Id.} After an extended discussion of fair use and the \textit{Pretty Woman} decision,\footnote{Id. at 80-83; see Blanch, 67 F.3d at 29.} the court said it was undisputed that Koons used Blanch’s photograph as “fodder for his commentary on the social and aesthetic consequences of mass media. [Koon’s] . . . objective is thus not to repackage [it], but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.”’\footnote{Blanch v. Koons, 396 F. Supp.2d 476, 482 (S.D.N.Y. 2005), aff’d 467 F.3d 244 (2d Cir. 2006).} It
agreed with the lower court that “Niagara” had transformed “Silk Sandals by Gucci” by “add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”

Citing Bleistein, the court acknowledged that the merits of Koons’ approach to art did not matter, and that what he did enabled “him to satirize life as it appears when seen through the prism of slick fashion photography.” It targeted the genre, rather than the individual photograph. It was satire, not a parody.

It is important to note that the court also stated that it did not have to rely on its “own poorly honed artistic sensibilities.” Rather, it turned to the artist’s explanation of why he included a reproduction of the plaintiff’s photograph in his collage—that he wanted to comment on the culture and attitudes promoted and embodied in Allure—in concluding “that the first fair use factor strongly favor[ed]” Koons.

The trial and appellate courts in Blanch v. Koons did not get hung up on whether Koons’ use of Blanch’s fashion photograph was or was not a parody. It did not seem to matter whether he tried to avoid the drudgery of doing something original by turning to Blanch’s photograph for his collage. The court said it was “given no reason to question [Koons’] statement that the use of an existing image advanced his artistic purposes.”

Perhaps his fair use defense would have been even stronger if “Niagara” was a parody of “Silk Sandals by Gucci,” but not much stronger because his comment on culture embodied in high-end fashion photography—his satire—was apparent. Moreover, the argument in favor of fair use is stronger when the challenged use reasonably can be characterized as being one of the purposes listed in § 107’s preamble: criticism or comment. Blanch’s photograph was fodder for Koons’ social commentary, and his use of the photo was held to be transformative.

The Nimmer on Copyright treatise states, “Blanch v. Koons took the

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361 Id. (quoting Campbell v. Acuff-Rose Music, Inc. (Pretty Woman), 510 U.S. 569, 579 (1994)).
362 Id. at 255.
363 Id. at 254.
364 Id.
365 Id. at 255.
366 Id. at 255-56.
367 Id. at 255.
368 17 U.S.C. § 107 (2006); cf. Lennon v. Premise Media Corp., 556 F. Supp. 2d 310, 322 (S.D.N.Y. 2008) (use of fifteen seconds from John Lennon’s song “Imagine” in a film favoring the intelligent design theory over Darwinian evolution was a fair use because it was readily apparent that the use was transformative for criticism and commentary); see Clarida & Kjellberg, supra note 83, at 146-47.
law in a new direction.”370 That statement might be too strong, but the decision does present a thoughtful and thorough approach to an analysis of the fair use defense when the challenged use is not a parody but instead falls squarely within the definition of satire. The approach is far superior to an almost-automatic ruling against fair use once it is determined that the challenged use is not a parody, as seen in the Dr. Seuss litigation or the Boogie Woogie Bugle Boy case. Parody and satire are both forms of criticism, and as the Supreme Court stated in Pretty Woman:

[T]here is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their productions removes such uses from the very notion of a potential licensing market.371

In other words, a satiric use of another’s copyrighted work that is transformative is not likely to have an impact on the market for or value of that copyrighted work. Thus, the first and fourth factors of § 107 should often weigh in favor of fair use.372 It is reasonable to assume that only well-known works at the core of copyright’s protective purposes373 are likely to be satirized because this will add some heft to the satirist’s commentary. As with parody, this factor does not provide “much help . . . in separating the fair use sheep from the infringing goats . . . since [satires, like parodies,] almost invariably copy publicly known, expressive works.”374 The third fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”375 seems to present a more difficult case with respect to satire than with parody, for three reasons: (1) the Supreme Court’s distinction between satire and parody, (2) parody’s need to mimic the original, and (3) the Court’s statement that satire “can stand on its own two feet and so requires justification for the very act of borrowing.”376 This explains why Koons’ almost verbatim adaptation of the photograph of the couple holding the puppies into a piece of sculpture was held to be an infringement, notwithstanding his social commentary, while his modification of Blanch’s fashion photograph to be included as a part of his collage was a fair use. In any event, satire, “like any other use, has to work

373 Cf. Pretty Woman, 510 U.S. at 586; Netanel, supra note 33, at 1910; Suzor, supra note 31, at 240 (without using the copyrighted work, the message will lose some force).
374 Pretty Woman, 510 U.S. at 586.
376 Pretty Woman, 510 U.S. at 581.
its way through the relevant factors, and be judged case by case, in light of the ends of copyright law.”

I want to use an early example of appropriation art, Marcel Duchamp’s *L.H.O.O.Q.*, in another application of the “satire as fair use” approach. This work is a close copy of Da Vinci’s *Mona Lisa* with the addition of a moustache, goatee and the letters L.H.O.O.Q. Those five letters, pronounced in French, sound like the phrase “she has a hot ass.” This is an excellent example because the painting itself is regarded as a great masterpiece, the copying by Duchamp was substantial (an almost verbatim appropriation), his spoof and word-play is a little off-color, and there were (and still are) plenty of art history scholars and art critics who were offended by Duchamp’s adaptation of *Mona Lisa*.

If Da Vinci’s copyright was still good, would he have a strong claim of infringement? Does Duchamp have a strong fair use defense notwithstanding the substantiality of his taking from Da Vinci’s work? Duchamp can argue parody, but how is *L.H.O.O.Q.* a comment on or critique of *Mona Lisa*? He could make arguments like those Jeff Koons made in response to his appropriation of the Rogers’ photograph of the couple holding a litter of puppies, but those were unsuccessful. On the other hand, his additions do change the nature of *Mona Lisa*—they transform it—and they seem to “provide a biting critique on society’s conception of beauty and the treatment of women.” Moreover, the work “challenged critics to define when existing objects, presented in a new light, could be new art.” The fact that art critics were challenged by Duchamp’s work underscores the principle of aesthetic nondiscrimination from Justice Holmes in *Bleistein*; if art experts are arguing about the meaning and impact of Duchamp’s humorous twist on Da Vinci’s *Mona Lisa*, then it is obvious that judges have no business evaluating the artistic merit of the work or deciding whether it is in good taste or offensive. It seems unlikely that Da Vinci would have licensed this satirical use of one of his greatest works and, at the same time, it is doubtful that Duchamp’s important work of appropriation art would

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377 Id.

378 Using this famous work to illustrate satire and parody in the context of fair use analysis is not original to me. I am borrowing the idea from Nicolas Suzor’s article on parody in Australian copyright law. See Suzor, supra note 31, at 219, 221, 223, 225.

379 Id. at 219 n.6.

380 Cf. Heymann, supra note 304, at 455, 458 (asserting that “[a]ppropriation art changes the meaning of a work (and thus engenders a new discursive community) by presenting the work in a new metaphysical frame,” “lead[ing] us to believe the meaning of the expression has been transformed”).

381 Suzor, supra note 31, at 219.

382 Id. (citing K. Pettigrew, *Portrait of a Commodities Broker as Thieving Artist: Parody, Fair Use and Contemporary Art*, 2 Arts & Entm’t L. Rev. 1, 2 (1993)).

harm Da Vinci’s market for the original. On balance, Duchamp’s satiric (and offensive to some) use of Da Vinci’s *Mona Lisa* should be treated as a fair use under § 107. One can argue that it is a parody, but the spoof’s comment on the original does not seem to be as clear as the 2 Live Crew comment on the song “Pretty Woman” or the *Naked Gun 33 ⅓: The Final Insult* movie poster’s comment on the pregnant Demi Moore *Vanity Fair* cover. Still, whether bad parody or effective satire, it should be treated as a fair use. The public should not be deprived of Duchamp’s art, his creativity and his commentary on society and culture because Da Vinci’s work was used without the master’s permission. Allowing the copyright owner to stifle this kind of creative use of an existing work contravenes one of the fundamental purposes of copyright.

Moreover, the line between parody and satire is arbitrary, and there is a risk of offending the *Bleistein* principle of aesthetic nondiscrimination wherever that line is drawn. It may be that parody should be granted greater latitude than satire, but this proposition arguably relates more to the third fair use factor—“the substantiality of the portion used”—than to any other factor in a thorough fair use analysis. Specifically, how much protected expression, if any, should a critic or commentator be allowed to take from a copyrighted work to comment on that work, which is essential to a parody? By contrast, how much of a protected work should a satirist be allowed to borrow to express his or her critique or comment about society? In any event, there are exceptions to the proposition that satirists cannot take as much as a parodist, as evidenced by the very substantial copying of the *Mona Lisa* by Duchamp and the considerable use of protected expression from Blanche’s photograph by Jeff Koons’ in his “Niagara” collage. Satire, whether in good taste or bad, offensive or innocuous, is a form of comment and criticism that is deserving of a thorough, searching and balanced fair

385 *Id.* at 225.
386 *Id.* at 222.
387 *See id.* at 239. Compare Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (Alice Randall’s *Wind Done Gone*, which re-tells *Gone With the Wind* from the perspective of a mulatto half–sister to Scarlett O’Hara while using the major characters and plot elements of the novel held to be a parody and fair use), with *Salinger* v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (Fredrik Colting’s *60 Years Later: Coming Through the Rye*, depicting Holden Caulfield, the lead character from J.D. Salinger’s *Catcher in the Rye*, sixty years older, cannot reasonable be viewed as parody).
389 Suzor, *supra* note 31, at 239 (“It is unclear why parody should be privileged above these other types of reuse or, more accurately, why other types of expression are not accorded the same protection as parody, particularly since literary theory is not able to easily and reliably separate parody from other forms of expression.”).
use analysis. It is secondary use “that, in the long run, enhances the total production of art.”

CONCLUSION

I want to conclude by paraphrasing two opinions from the Second Circuit and two Supreme Court opinions. “While the social interest in encouraging the broad-gauged burlesques of Mad Magazine or the Family Guy or Dominatrix Barbie “is admittedly not readily apparent,” and even though “our individual tastes may prefer a more subtle brand of humor” than Pull My Finger Fred farting dolls and “You might be a redneck if . . . .” jokes, “this can hardly be dispositive” because of the principles announced by Justice Holmes in Bleistein v. Donaldson Lithographing. Moreover, “as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.” Accordingly, “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody and satire. Whether parody or satire “is in good taste or bad does not and should not matter to fair use” and to determining copyrightability. As Justice Holmes explained, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of [works] outside the narrowest and most obvious limits.”

391 Bernstein, supra note 143, at 41-44 (arguing for a very lenient approach to secondary uses such as parodies and satires; focusing on economic incentives and disincentives to the first artist’s creativity posed by the second artist’s use).
392 Berlin, 329 F.2d at 545.
393 Id. (emphasis added).
394 Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam).