PARODY AS FREE SPEECH—THE REPLACEMENT OF THE FAIR USE DOCTRINE BY FIRST AMENDMENT PROTECTION

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difficile est saturam non scribere
Juvenal

CHARLES C. GOETSCH**

From time to time courts are confronted with conflicts be­
tween the rights of parodists and the rights of copyright holders. Parody-infringement problems arise when the copyright holder of a parodied work charges the parodist with infringement on the grounds of copying or substantial appropriation of the work.¹ The root of the problem can be traced to the unique characteristics of parody. Parody is a distinct literary form that achieves its ends by imitating the expression and ideas of serious works in a satiric man­ner. In order to develop an effective parody, the parodist must copy or appropriate various elements of the serious work. Conflicts arise when the parodist and the copyright holder disagree as to whether such copying exceeds the allowable “fair use” of the original work.²

There are no statutory provisions, old or new, which address the parody-infringement problem. Resolution of the conflict has been left to the courts, and their rulings, cast almost exclusively in the context of the fair use doctrine, have been inconsistent. The

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1. The substantial appropriation doctrine, which is a corollary to fair use, holds that there is no copyright infringement unless the unauthorized taking constitutes a substantial amount of the original. See note 27 infra and accompanying text.

2. The fair use statute allows copying from a copyrighted work as long as the appropriation is reasonably expected and not harmful to the rights of the copyright owner. Copyright Act of 1976, 17 U.S.C. § 107 (1976). See notes 23-26 infra and accompanying text.
results have muddled the relationship between parody and copyright and have placed the parodist in doubt as to the legal consequences of publishing his creations. This article suggests a more satisfactory approach for courts to use in order to resolve the recurring conflict between parody and copyright. The approach is based on a distinction between legal parody, which would not be subject to copyright law, and nonlegal parody, which would be subject to copyright sanctions. This will be done by establishing the definition and scope of legal parody and then by demonstrating that legal parody is a form of free speech that should be removed from the restrictive control of the copyright laws and placed under the protection of the first amendment.

I. PARODY IN PERSPECTIVE

A few general observations on the means and ends of parody will serve to distinguish it from other literary forms. A parody is basically a criticism of the ideas and expression of another work. The essence of a parody is its comic or satiric contrast to the serious work. A parodist must copy and appropriate material from the serious work in order to establish the identity of the other work, to recall its characteristics, and to produce satiric effects which are often created by the ludicrous juxtaposition of serious and comic material. In order to create a contrasting work that conveys his criticism, the parodist must imitate the material of the serious work in an exaggerated, distorted, or perverted manner rather than merely copy it. Of necessity, then, the intent, expression, and effect of a parody are recognizably different from that of the other work.

Parody is one of the oldest forms of literary expression. The originator of the genre is generally regarded to be Hipponax of Ephesus, who wrote verse parodies circa 530 B.C. Aristophanes and Lucian are two of the better known practitioners of parody in classical times, and the popularity of parody has continued undiminished to the present day. One of the greatest works in all literature, Cervantes’ Don Quixote, began as a parody of the

3. The parody epic Margites, however, was generally attributed to Homer in antiquity, and was mentioned by Archilochus in the 8th century B.C. THE OXFORD CLASSICAL DICTIONARY 783 (1970). For a brief historical discussion of parody, see Yankwich, Parody and Burlesque in the Law of Copyright, 33 CAN. B. REV. 1130, 1133-37 (1955); ENCYCLOPEDIA OF POETRY AND POETICS 600-02 (1965). See generally G. KITCHIN, SURVEY OF BURLESQUES AND PARODY IN ENGLISH (1931).

4. See, e.g., Aristophanes’s play, The Frogs, first performed in 405 B.C.; Lucian’s parodies, written circa 150 A.D., may be found in P. TURNER, LUCIAN: SATIRICAL SKETCHES (1961).
Spanish novel of chivalry. Paul Scarron’s works are perhaps the most notable product of the long tradition of parody in French literature dating from the eleventh century.\textsuperscript{5} Parody has had a constant presence in English literature as well, with such authors as Chaucer, Shakespeare, Swift, Pope, and Fielding writing transcendent and enduring parodies.\textsuperscript{6} Parody has played a lively role in American literature due to the comic genius of such authors as Mark Twain, James Thurber, and S.J. Perelman.\textsuperscript{7}

From this quick historical sketch, the ubiquity of parody in the literature of the Western world is apparent. Indeed, it is safe to say that where there is literature, there is parody. The reason for the universal appeal of parody is twofold: Its high potential as a form of entertainment and its high potential as a vehicle for social and literary criticism. The ideal parody employs laughter to deliver its message. It merges entertainment with instruction, simultaneously amusing and enlightening its audience. Concomitant with the parodist’s desire to entertain and instruct goes his hunger for material gain and artistic recognition. His motivation to write is a meld of these four elements. Naturally, the emphasis placed on each of the four elements varies considerably from work to work and author to author. Any attempt to divorce one from the others is both unrealistic and misleading.

Regardless of how individual parodists may differ on their emphasis of these four motivating elements, literary scholars agree that parody as a genre fulfills an extremely important function.\textsuperscript{8} By

\textsuperscript{5} See, e.g., Scarron’s Virgile Travestie (1648-52). See generally V. Grannis, Dramatic Parody in Eighteenth Century France 11-12 (1931).

\textsuperscript{6} See, e.g., The Rhyme of Sir Thopas and The Nun’s Priest’s Tale in Chaucer’s Canterbury Tales (1386-1400), Bottom’s play of Pyramus and Thisbe in Shakespeare’s Midsummer Night’s Dream Act V, scene one (circa 1594), and Swift’s Gulliver’s Travels (1726). One of the classic works of English literature, Alexander Pope’s The Rape of the Lock (1712), is cast as a parody of the epic; additionally, Henry Fielding’s novels, Shameela (1741) and Joseph Andrews (1742), which parodied the feminine novels of Samuel Richardson, are considered a major source of the modern novel. See generally G. Kitchin, supra note 3; D. MacDonald, Parodies: An Anthology (1960).


\textsuperscript{8} Although parody is a parasitic art and written at times with malice, it is as fundamental to literature as laughter is to health... The best parody surpasses mere imitation. It stands on its own feet, containing enough inde-
the vigorous criticism of serious works, by exposing the mediocre and the pretentious, and by calling attention to the decay of literary mannerisms and techniques, parody influences the development of a society’s literature. To the extent that literature is a reflection of society, parody is a commentary on society. Throughout history, Western civilization has acknowledged this vital role of parody by recognizing it as an independent form of literature. Clearly, a literary genre that has consistently appealed to authors and audiences down through the ages and that has inspired such classics as *Don Quixote*, *Gulliver’s Travels*, *The Rape of the Lock*, and *Joseph Andrews* has great potential and should be accorded substantial encouragement and protection. 9

II. LEGAL PARODY

Much of the confusion surrounding the law’s treatment of parody has resulted from the use of a far too general and inexact definition of parody by the courts and legal scholars. By relying on the loose interpretation of broad dictionary definitions, 10 courts at times have mistakenly classified disputed works as parodies and then have proceeded to apply the fair use doctrine to them. As will

pendent humor to be funny beyond aping the original. . . . There are as many different motives for parody as there are parodists. Sometimes . . . it is personal spite. More often, the parodist employs the style of the original to poke fun at current follies or vices. He might have a social axe to grind or he might wish to expose a certain literary school or mannerism which has hardened into conventionality. . . . With a history of 25 centuries behind it, parody is here to stay. Like all literature, it has had its ups and downs, but at its best it is more than a parasitic art. It has attracted men and women of major stature and at times has shown the capacity to outlive the serious work which has inspired it.

ENCYCLOPEDIA OF POETRY AND POETICS 600-02 (1965). Legal scholars have also recognized the value of parody. “Throughout history, parody has been a vital and recognized part of literature. Many important works of art are parodies of long-forgotten originals. Historically, it is clear that parody qualifies as an independent art form.” Nimmer, Reflections on the Problem of Parody-Infringement, 17 ASCAP COPYRIGHT L. SYMP. 133, 152 (1969). M.B. Nimmer speaks of parody as a “socially useful literary genre” providing important benefits to society. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[c] (1979).


10. Webster’s, for instance, defines parody as:
   (a) a writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated; (b) a literary style characterized by the reproduction of stylistic peculiarities of an author or works for comic effect or in ridicule.

be seen, the result has been an unfortunate one for the opposing parties and for parody as a whole. Establishing the definition and scope of legal parody is the first step toward clarifying the proper relationship between parody and the law.

A legal parody may be defined as any work which imitates in a satiric manner the ideas and expression of an identifiable previously published work. A legal parody may exist in the form of a novel, story, poem, musical composition, dramatization, film, or visual caricature. It is not a mere copy of the serious work, nor a mere impersonation or mimicry of any character or person. It is not a general humorous commentary concerning people, events, or things. For a parodist to have produced a legal parody, it must be clear that he took an identifiable previously published work and, through the creative use of satiric imitation and invention, metamorphosed the work's ideas and expression into a recognizably distinct work. Any disputed work which satisfies this standard, whether or not it arguably contains substantial appropriation or copying under the fair use doctrine, is a legal parody and, as will be seen, is entitled to protection as free speech under the first amendment. Parodies which satirize entire genres or literary techniques, rather than a specific previously published work, also

11. See notes 30-47 infra and accompanying text.
12. "As a true burlesque is not an imitation but a criticism of an original work, ordinarily it cannot be an imitation of or be 'passed off' as the original work." Yankwich, supra note 3, at 1154.
13. For the definition of fair use and substantial appropriation, see notes 1 & 2 supra; notes 23-28 infra and accompanying text.
14. See notes 83-111 infra and accompanying text.
15. A footnote in a recent Second Circuit per curiam opinion indicates that virtually the same result may be achieved by an expansive application of the fair use test:

[We] note that the concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.

Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), aff'd, 623 F.2d 252 n.1 (2d Cir. 1980) (citation omitted). Nevertheless, the tangled history of parody and copyright law demonstrates that the application of the fair use test should be avoided in favor of a more consistent and objective approach. See discussion of fair use's inapplicability to parody at notes 48-82 infra and accompanying text.
16. See, e.g., Chaucer's The Rhyme of Sir Thopas, supra note 6 and Cervantes' DON QUIXOTE (1615).
qualify as legal parodies. Any disputed work which fails to meet
the standard of legal parody may be classified as nonlegal parody
and subjected to the scrutiny of the copyright laws.17

A few courts and scholars have drawn a distinction between
"true" and "commercial" parody, arguing that parodies written
more for financial considerations than for artistic reasons do not
merit preferred treatment.18 This distinction is pointless because it
ignores the basic nature of literature and the actual practice of au-
thors. It is obvious that the vast majority of authors combine both
commercial and artistic motives in all their works. An author natu-
rally wants to support himself and to convey his message, and to
accomplish both it is in his interest to sell as many copies or tickets
as possible. Who, then, can fairly condemn one work as commer-
cial and laud another as true when both motives go hand in
glove?19 The great Samuel Johnson remarked that "No man but a
blockhead ever wrote, except for money."20 It was only the pros-
pect of ameliorating his oppressive poverty that prompted
Cervantes to begin writing Don Quixote.21 Henry Fielding wrote
Shamela and Joseph Andrews in a desperate attempt to support his
family after the Licensing Act of 1737 cut off his income by closing
down his theatre.22 Neither Cervantes nor Fielding would have
denied that a major factor in his motivation to write was the com-
mercial potential of his novels. By using the commercial versus
true ploy, it would have been all too easy to rationalize the en-
joining of Cervantes's or Fielding's parodies. The concept of legal
parody recognizes that the financial motive and the artistic intent

17. See generally Copyright Act of 1976, 17 U.S.C. § 107 (1976); M. NIMMER,
supra note 8.

(S.D. Cal. 1955), aff'd sub nom. Benny v. Loew's, 239 F.2d 532 (9th Cir. 1956), aff'd
sub nom. Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43 (1958); and
Nimmer, supra note 8.

19. In the words of one scholar, "The trouble with this commercial-non-
commercial distinction is that both commercial and artistic elements are involved
in almost every use." Rossett, Burlesque as Copyright Infringement, 9 ASCAP COPY-
RIGHT L. SYMP. 1, 18 (1958). See also Netterville, Copyright and Tort Aspects of
Parody, Mimicry and Humorous Commentary, 35 S. CAL. L. REV. 225, 238 (1962);


21. "And it was, no doubt, the need of money that led [Cervantes] to undertake
the composition of a tale destined to become one of the world's greatest fictional

22. See 1 W. CROSS, THE HISTORY OF HENRY FIELDING, 205-37, 282-359
(1918).
of the parodist cannot be fairly separated, and thus the degree of the parodist's commercial motivation is immaterial.

For a parodist to have written a legal parody, then, it must be clear that he took the ideas and expression of a previously published work and, through the creative use of satiric imitation and invention, metamorphized them into a recognizably distinct work. If a disputed work satisfies this standard, it is a legal parody. Legal parody, as will be shown, should be entitled to first amendment protection whether or not its appropriation or copying violates fair use. The commercial motivation of the parodist is irrelevant to a determination of whether a work is a legal parody. Mere copying, impersonation, or humorous commentary is nonlegal parody. Parodies of genres or literary techniques, however, may qualify as legal parody.

III. FAIR USE AND PARODY

Fair use is a doctrine that allows copying from a copyrighted work so long as the appropriation is reasonably expected and not harmful to the rights of the copyright owner. Fair use has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent . . . . [It is] technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary." The Copyright Act of 1976 merely restates the definition of fair use fashioned by the courts over the years without narrowing or enlarging the four elements of commercial use, nature of work, amount copied, and market effect. Uses of a copyrighted work for the customary purposes of criticism, comment, news reporting, teaching, scholarship, and research are specifically


24. Section 107 of the new Act reads:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

excluded from the Act’s fair use section.\textsuperscript{25} Whether or not copying in a parody goes beyond the boundaries of fair use is a pragmatic question to be determined by the courts after taking into consideration the circumstances of each case.\textsuperscript{26} The concept of substantial appropriation is essentially a corollary branch of the fair use doctrine. Under the substantial appropriation doctrine, there is no infringement unless the copying or taking constitutes what the court finds to be a substantial amount of the original.\textsuperscript{27}

Since the early twentieth century, when courts first began to speak of parody exclusively in the terms of fair use,\textsuperscript{28} judges attempting to resolve parody-infringement conflicts have applied the fair use and substantial appropriation doctrines in order to determine whether the copying in a particular parody indeed constituted an infringement. As the following discussion indicates, the results of these cases have been inconsistent and generally unsatisfactory for two reasons: The courts either failed to apply a proper definition of parody and thus mistakenly treated some disputed works as parodies, or they failed to recognize that the fair use and substantial appropriation doctrines should not be applicable to valid legal parodies.

The slim body of American cases dealing with the conflict between parody and copyright can be divided into two classes: Those concerned with nonlegal parody and those concerned with legal parody.\textsuperscript{29} The nonlegal parody cases deal with disputed works which cannot properly be considered parodies at all, and they illustrate the confusion caused by an over-inclusive definition of parody. The legal parody cases illustrate why the application of the fair use test to actual parodies is unsatisfactory and inappropriate.

\textbf{A. The Nonlegal Parody Cases}

The first three nonlegal parody cases, \textit{Bloom \& Hamlin v. Nixon},\textsuperscript{30} \textit{Green v. Minzensheimer},\textsuperscript{31} and \textit{Green v. Luby},\textsuperscript{32} all arose

\begin{itemize}
\item \textsuperscript{25} 17 U.S.C. § 107 (1976).
\item \textsuperscript{27} See \textit{H. Ball, supra} note 23, at 334; \textit{Nimmer, supra} note 8, at 136-37.
\item \textsuperscript{28} See notes 30-39 infra and accompanying text.
\item \textsuperscript{29} The few English cases dealing with the parody-infringement problem are of little relevance here. They do establish, however, that visual caricatures or rough sketches of a whole work and parodies of incidents in a novel or of scenes from a play are both forms of fair use which do not constitute copyright infringement. For an excellent discussion of the English cases, see \textit{Yankwich, supra} note 3, at 1137-45.
\item \textsuperscript{30} 125 F. 977 (C.C.E.D. Pa. 1903).
\item \textsuperscript{31} 177 F. 286 (C.C.N.Y. 1909).
\item \textsuperscript{32} 177 F. 287 (C.C.N.Y. 1909).
\end{itemize}
in the early 1900's from the singing of copyrighted songs by professional mimics imitating the style of a particular performer. In *Nixon*, the district court found no infringement since the mimic did not actually perform the song but merely used a portion of it as a vehicle for the imitation. The court did not classify the performance as parody, but rather emphasized that it was mimicry.  

Similarly, in *Minzensheimer*, the circuit judge held that the defendant's rendition of only a part of a copyrighted song while imitating a popular actress was not an infringement since the song was merely a vehicle for the mimicry. *Luby* also concerned a professional mimic singing a copyrighted song while imitating the mannerisms of a well-known performer, except that the defendant sang the whole song verbatim. The circuit judge held there was an infringement because the defendant could have found a way to mimic the popular singer without performing a complete copyrighted song.

These three cases have been identified by courts and legal scholars as the beginning of American case law on the parody-infringement problem, and are usually cited as precedent for the rule that a parody using an entire work constitutes an infringement. Condemning parodies solely because they reproduce entire works is an example of the mischief caused by an exceedingly broad definition of parody. In no way can the disputed performance in any of these cases be considered even a dictionary-definition parody, much less a legal parody. In a 1964 parody-

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33. 125 F. at 977. *Nixon* involved an actress with unusual powers of mimicry who imitated the peculiarities and characteristics of another actress singing the chorus to the song “Sammy.” The performance was preceded by an announcement identifying the actress and song imitated. The actress only sang a few lines of the original, and concentrated on mimicking the well-known actions, gestures, and tones of the other actress.

34. 177 F. at 286. *Minzensheimer* involved an actress who imitated the voice, posture, and mannerisms of the plaintiff popular singer singing one verse and the chorus of the song “Redhead.” The actress sang without any musical accompaniment, and prefaced her performance by announcing she would give “a suggestion” of the popular singer.

35. 177 F. at 287. *Luby* involved an actress who imitated the plaintiff popular singer by singing the song “I'm A Bringing Up The Family” in its entirety. The actress contended that her goal was impersonation, and thus she mimicked the plaintiff's mannerisms as closely as possible while singing the complete song to musical accompaniment.

infringement case, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit pointed out that Nixon, Minzensheimer, and Luby "did not deal with the parody of a copyrighted work, but with imitations of a particular artist's style of performing, in which portions of a copyrighted song were incidentally employed."\(^{37}\) Mere impersonation is not parody. There was no attempt to create a distinct work which criticized the original. On the contrary, the defendants tried to reproduce the words and style of the plaintiffs as closely as possible. To divine the presence of parody in these three cases is to grossly misinterpret their facts and holdings. As precedent, they relate more to misappropriation of characters and substantial appropriation than to parody.

The next case after Luby that purported to address the parody-infringement problem, Hill v. Whalen & Martell, Inc.,\(^ {38}\) arose in 1914 and illustrates the confusion which continued to surround the law's treatment of parody. The defendant was charged with reproducing the cartoon characters "Mutt" and "Jeff" in a dramatic performance. The performance contained two personages named "Nutt" and "Giff" whose costumes, manner, and catchwords were identical to those of the familiar original cartoon characters. The defendant claimed that his representation was a parody and thus was allowable in spite of direct quotations from, and impersonation of, the original characters. The district court, however, held there was an infringement. Hill exemplifies a disputed work which claims to be a parody when in fact it does not satisfy the requirements of a parody at all. In the words of Circuit Court Judge Kaufman, in Hill "the defense of 'parody' or 'burlesque' was clearly invoked in bad faith, as an attempt to justify a taking designed substantially to satisfy the demand for the copyrighted original."\(^ {39}\) The performance related more to misappropriation of characters and substantial appropriation than to parody; clearly it was open to attack under the fair use test, but not in the capacity of a parody. Although the court did not actually classify the performance as parody, neither did it explicitly reject the defendant's improper claim for protection. As in the first three cases, the court failed to recognize the differences between the disputed work and valid parody.

\(^{38}\) 220 F. 359 (D.C.N.Y. 1914).
\(^{39}\) 329 F.2d 541, 544 (2d Cir.), cert. denied, 379 U.S. 822 (1964).
Two United States district court cases brought in the early 1970's, *Walt Disney Productions v. Air Pirates*[^40] and *Walt Disney Productions v. Mature Pictures Corp.*[^41] indicate that defendants' misconception of the scope and definition of parody still leads them to pursue parody unsuccessfully as a defense to infringement claims. In both cases the defendants claimed protection for their works on the ground that they were parodies. In both instances the court held the works to be infringements. That the disputed work was not a parody was most obvious in the *Mature Pictures* case. There, in the defendant's movie "The Life and Times of the Happy Hooker," the plaintiff's copyrighted song "The Mickey Mouse March" was sung and played as background music while an actress and three actors engaged in a variety of sexual activities. The court pointed out that a parody is not defined as a complete copy of the original and unhesitatingly granted an injunction with the comment that the defendants "did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material."

[^42]: Id. at 1398. See also MCA, Inc. v. Wilson, 425 F. Supp. 443, 453-54 (S.D.N.Y. 1976), in which the copyright holder of the song "The Boogie Woogie Bugle Boy" sued the defendant musicians for copyright infringement. The defendants argued that their version of the song was not intended to be a parody of "Bugle Boy" but was rather designed to burlesque the musical style and sexual mores of the 1940's. The court held that the defendants' version was largely copied from "Bugle Boy," that it was not a parody or burlesque, and that it was not entitled to any fair use defense.
[^44]: Id. at 116.
ever the affiant may have meant by his use of ‘parody’ in this con­
text, the Court is able to discern no attempt at caricature of
plaintiff’s drawings of Mickey Mouse.” 45 The court later hinted
that a lesser degree of taking, such as caricature, may have been
permissible. 46 In concluding, the court held that since the defend­
ant’s work was an infringing violation of fair use, he could not
invoke the protection of the first amendment. 47

These two cases aptly illustrate how the inexact legal definition
of parody results in the misuse of the parody defense by infringing
defendants. Both courts were correct in refusing to extend any pro­
tection to the disputed works because they clearly did not qualify
as parodies. In Mature Pictures, there was simply a blatant case of
the unlicensed reproduction of a copyrighted song. In Air Pirates,
the court decided against the defendants because exact copies of the
characters were used rather than caricatures. In essence, there was
reproduction rather than satiric imitation. The defendant in Mature
Pictures could have raised the disputed performance to the level of
parody by using satiric invention to transpose the lyrics and music
of “The Mickey Mouse March” into a recognizably different work.
Similarly, the defendants in Air Pirates could have parodied Walt
Disney’s cartoon characters by exaggerating their graphic depiction
to the point of caricature. In other words, there were alternative
avenues available to the defendants in these two cases that would
have allowed them to convey their message through legitimate
parody rather than mere reproduction. By refusing to further dis­
tort the scope of parody, these two nonlegal parody cases help
clarify the relationship between parody and the law.

B. The Legal Parody Cases

There are three cases which deal with the question of whether
a legal parody infringes copyright: Loew’s Inc. v. Columbia Broad­
casting System, Inc., 48 Columbia Pictures Corp. v. National

45. Id. at 110 n.1.
46. It need not be determined whether parody would, in fact, be possible, by
taking less, for example by caricaturing the plaintiff’s characters, or whether
some degree of such lesser taking would be permissible. The Court is in no po­
position to dictate a mode of literary expression to the defendants, nor to decide
cases not before it.

Id. at 115.

47. Id. at 116. See notes 83-111 infra and accompanying text for a discussion of
the relationship between parody and the first amendment. See also Comment,
48. 131 F. Supp. 165 (S.D. Cal. 1955), aff’d sub nom. Benny v. Loew’s, 239
Broadcasting Co.,\textsuperscript{49} both of which emanated from the Southern District of California in the mid-1950's, and Berlin v. E.C. Publications, Inc.,\textsuperscript{50} which arose in the Southern District of New York in the early 1960's. Of these, \textit{Loew's} is the most glaring example of why the fair use test is so inapplicable to legal parody. In \textit{Loew's}, the plaintiff movie company sought to enjoin comedian Jack Benny and his television network from broadcasting a full length parody of the plaintiff's copyrighted movie "Gaslight."\textsuperscript{51} The district court granted the injunction after finding that Benny's parody constituted a substantial taking.\textsuperscript{52} The court emphasized a number of factors in order to reach this result, the foremost of which was Benny's financial motivation. Referring to the active competition between the television and motion picture industries, the court concluded that Benny's taking from the copyrighted work was predominantly for commercial gain and thus presumptively not a fair use.\textsuperscript{53} The court also found that, in light of the strong profit motive behind Benny's parody, it could not be considered a work of criticism entitled to protection under the fair use doctrine.\textsuperscript{54} Finally, the court relied on the early nonlegal parody cases as support for its holding that "a parodized or burlesqued taking is treated no differently from any other appropriation."\textsuperscript{55}

The reasoning and result of the \textit{Loew's} decision has drawn wide and sustained criticism.\textsuperscript{56} Scholars have criticized the court for treating parody no differently than other forms of appropriation, for its stress upon the commercial motivations of the parodist, and for its chilling effect on the publication of parody. Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court, after arguing that the right to parody a work without permission of the copyright holder is as clear as the right to reproduce excerpts of a work for the purposes of criticism, stated, "I will not conceal my view that it

\begin{itemize}
  \item F.2d 532 (9th Cir. 1956), aff'd sub nom. Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43 (1958).
  \item 137 F. Supp. 348 (S.D. Cal. 1955).
  \item 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).
  \item 131 F. Supp. at 167.
  \item \textit{Id.} at 186.
  \item \textit{Id.} at 174-76.
  \item \textit{Id.}
  \item \textit{Id.} at 177, 183.
\end{itemize}
was wrong—and possibly unconstitutional—to hold Jack Benny for his television parody of the movie ‘Gaslight.’ ”

Another distinguished copyright scholar, Judge Leon R. Yankwich of the United States District Court for the Southern District of California, wrote that the Loew’s opinion stressed unduly the fact that Benny’s burlesque was used as a means of gain. He disputed Loew’s assertion that parody should be judged in the same manner as serious takings. As for the chilling effect of Loew’s, Professor Victor S. Netterville pointed out that the decision “may materially restrict an important and socially desirable form of speech . . . . Taken very literally, the decision . . . may well deprive [the parodist] of the most important and potent source material—contemporary art, literature, music and motion picture materials.” The unfortunate ramifications of Loew’s can be traced back to the court’s misperception of parody’s role in society and to its misguided application of the fair use test to what was, in fact, a legal parody. An application of the legal parody concept to the facts of Loew’s reveals how useful it can be in untangling the confusion that has historically surrounded the law’s treatment of parody.

A legal parody is a distinct work that imitates in a satiric manner the ideas and expression of a previously published work. A parodist is deemed to have written a legal parody if it is clear that he took the previously published work and, through the creative use of satiric imitation and invention, transposed its ideas and expression into a recognizably distinct work. When that standard is applied to the Loew’s court’s own findings of fact, it becomes evident that Benny’s parody of “Gaslight” was indeed a legal parody. The court stated that the characters were generally the same, the story points practically identical, the treatment almost identical, except that the defendant’s treatment was burlesque, and that there was borrowing of much dialogue with some variations in wording. These findings describe subtle yet crucial differences between Benny’s parody and the serious work. The court’s subsequent discussion of the differences between the two works provides further indication that Benny’s work was a legal parody:


58. Yankwich, supra note 3, at 1151.

59. Id. at 1151-52.

60. Netterville, supra note 19, at 237 (emphasis in original).

61. 131 F. Supp. at 171.

62. Id.
The serious, near tragic vein of the original "Gaslight" was converted into the broad, low comic vein of the burlesque. Benny, using gags, puns, exaggerated mimicry, slapstick and distortion, all matters within the common fund of the public domain, has taken a substantial part of plaintiff's property, "Gaslight," and inverted the mood from serious to humorous. Tragedy and comedy, like love and hate are but opposite faces of the same coin. Defendants have transposed the work, from the serious to the comic vein.

The court's description reveals that Benny, through the creative use of satiric imitation and invention, took the ideas and expression of "Gaslight" and produced a parody that was recognizably distinct from the original work.

An application of the legal parody concept to Loew's would have avoided the unfortunate ramifications and confusions of the actual decision. Since the court would have classified Benny's parody as a legal one, the existence of an arguably substantial appropriation would have been irrelevant and the court's analytical task much simpler. Classifying Benny's work as a legal parody would also have rendered the degree of his commercial motivation irrelevant, and would have prevented the court from improperly divorcing the parodist's commercial motivation from his artistic motivation. Treating Benny's version of "Gaslight" as legal parody would be in accord with the feelings of Justice Kaplan, who has pointed out that "we must accept the harsh truth that parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," and with Judge Yankwich, who has stressed that a parodist's receipt of abundant remuneration should not obscure the fact that the primary consideration of English and American copyright law is to advance the progress of arts and sciences. In giving effect to that objective, material gain is secondary. The application of the legal parody concept would insure that immaterial factors, such as the parodist's commercial motivation and the intensity of competition between the parties, would have no effect on the determination of whether a parody infringes a copyright.

The application of the legal parody concept also would have avoided the Loew's court's inexplicable conclusion that all parodies should be judged in the same manner as serious takings. Since

63. Id. at 183 (emphasis in original).
64. B. KAPLAN, supra note 57, at 69.
65. Yankwich, supra note 3, at 1151.
parody, by its very nature, entails considerable amounts of copying and appropriation, under the Loew's theory parodies would almost always constitute impermissible infringements. Such a theory not only ignores the status of parody as a distinct literary genre that has been in existence since the beginning of Western literature, but it also has a chilling effect on the creation and publication of parody. The legal parody concept, on the other hand, respects the value of parody as entertainment and criticism. It encourages the publication of legitimate parodies by protecting them from the inappropriate censorship of the copyright laws. Had Jack Benny's parody been classified as a legal parody, it would have been removed from the restrictive control of the fair use doctrine and placed under the protection of the first amendment, thus upholding the role of parody in society and simplifying the work of the court.

It is evident from this brief discussion that an application of the legal parody concept to Loew's would have avoided the unfortunate rationale of that case. Loew's illustrates that the fair use doctrine is incapable of consistently resolving the legal problems arising when parody contains substantial appropriation from a serious work. Precisely how and why the legal parody concept is capable of resolving this problem will be discussed after an examination of the other two cases involving legal parodies.

Although the second legal parody opinion, Columbia Pictures Corp. v. National Broadcasting Co., arose in the same context as Loew's and was written by the same district court judge, its holding was in favor of the defendant television parodist. Columbia Pictures concerned a suit for infringement brought by the plaintiff motion picture corporation against the comedian Sid Caesar and his television network in response to the broadcast of Caesar's parody of the plaintiff's copyrighted movie, "From Here to Eternity." After acknowledging that Columbia Pictures was a counterpart to Loew's, the court denied the plaintiff relief, pointing out that, unlike Benny's parody, "here there was a taking of only [enough] to cause the viewer to recall and conjure up the original" which is "a necessary element of burlesque." The court stated that a parody may take the title, theme, settings, situations, characters, ideas, basic plots, incidents, and a small amount of the story's develop-

66. Id. at 1151-52.
67. 137 F. Supp. at 348.
68. Id. at 351.
ment and dialogue from a serious work without infringement. The court warned, however, that parody is not a defense to infringement per se, adding that if a parody takes more than the matter not ordinarily protected it runs the risk of being deemed a substantial appropriation. Since the court found Caesar's parody to be an original work substantially different from the motion picture, it held that there was no copyright infringement.

Loew's and Columbia Pictures exemplify the inconsistencies and faulty reasoning that inevitably stem from the application of the fair use test to parodies. Loew's declared that parody should be treated no differently than serious takings, yet Columbia Pictures declared that the law permits parodies a more extensive use of copyrighted material than literary works not intended as parodies. Loew's heavy emphasis on the commercial motivations behind Benny's parody is totally absent in Columbia Pictures, yet surely the commercial impetus behind Sid Caesar's televised parody was at least equal to that of Jack Benny. The district court's application of the fair use test in Columbia Pictures led it to conclude that parody may make use of a story's incidents, characters, plot, and dialogue but not "the general or entire story line and development of the original with its expression, points of suspense and build up to climax." This is at best a clumsy and arbitrary distinction which can only confuse and unduly restrict the boundaries of parody. In applying the fair use test to the legal parodies in Loew's and Columbia Pictures, the court reaped nothing but contradictory results and artificial distinctions. Given the vague standards of fair use and the complex nature and techniques of parody, however, this is not surprising. If the Benny and Caesar parodies had been classified as legal parodies at the outset, the inconsistent rulings of Loew's and Columbia Pictures would have been avoided.

The last legal parody case, Berlin v. E.C. Publications, Inc., involved a claim of copyright infringement against Mad Magazine by the copyright owners of various popular songs. The defendant humor magazine published what was billed as "a collection of parody lyrics to 57 old standards which reflect the idiotic world we

69. Id. at 350, 353.
70. Id. at 353.
71. Id.
72. 131 F. Supp. at 177, 183.
73. 137 F. Supp. at 354.
74. Id.
75. 329 F.2d at 541.
live in today" with instructions to sing the parodies to the tunes of the plaintiff’s well-known popular songs. The parodies were written in the same meter as the original lyrics, but there was no reproduction of the accompanying music. In a succinct and well-reasoned 1964 opinion, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit examined the nature, purpose, and effect of the parodies and held that, under the substantiality test outlined in *Loew’s*, there was clearly no infringement. Nonetheless, Judge Kaufman embraced the reasoning of *Loew’s* with considerable reluctance and in fact obliquely criticized it at several points. He was careful to state that the disparities in theme, content, and style between the original lyrics and *Mad Magazine*’s parodies made the disputed works fall short of the “substantial” takings in *Loew’s* “even if we were to find the rationale of that opinion persuasive.” He also discounted the significance of a parodist’s commercial motivations by stressing that the dominant constitutional objective of copyright is to “promote the Progress of Science and Useful Arts.” Judge Kaufman asserted that courts must occasionally subordinate copyright holders’ financial interests to the greater public interest in the development of arts and sciences. After rejecting the relevance of the early non-legal parody cases, he concluded by stating that “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.” With its criticism of *Loew’s* decisional grounds and its emphasis on the need to protect parody as a valuable art, *Berlin* goes as far toward disowning *Loew’s* as possible without expressly doing so.

It is clear from the nine cases discussed above that the history of the application of the fair use test to parody has been an unhappy one. The fair use test has produced inconsistent results when applied to the parody-infringement problem because it can-

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76. *Id.* at 543.
77. *Id.* at 545 (emphasis added). See also Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 308 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).
79. 329 F.2d at 544.
80. *Id.* at 545. The Second Circuit recently reaffirmed the importance of protecting parody: “[We believe] that, in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody.” Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), aff’d, 623 F.2d 252 (2d Cir. 1980).
not resolve the basic conflict between the right of the parodist to publish his work and the right of the copyright holder to bar unlicensed copying. In essence, the standards of the fair use test are too vague, its application is too discretionary, and its results are too erratic to successfully govern a literary form as subtle, complex, and changeable as parody. By engendering an inappropriate substantiality test, by unduly emphasizing commercial motivations, and by disregarding the historic role of parody as entertainment and criticism, the fair use test has placed the parodist in doubt as to the extent of his right to publish his works and has thus inhibited the free exercise of an ancient and valuable art. The proposals that have been advanced by scholars to alter the application of the fair use test to parody either have been ignored or were flawed in their approach. Judge Yankwich, for example, has merely proposed an expanded version of the fair use test, while Professor R.T. Nimmer has advanced a discretionary fair use test that relies on the suspect distinction between true and commercial parody.

There is an urgent need for a new approach that can resolve the conflict between parody and copyright and place parody in its proper relationship to the law. The approach that best accomplishes this is to treat legal parody as a form of free speech protected by the first amendment. For this approach to work, it is necessary for the courts to adopt the concept of legal parody and to accept the premise that, in the case of legal parody, the interests of free speech and the promotion of the arts outweigh the interest of copyright holders in obtaining maximum financial return from their copyrighted works. The crucial questions to answer, then, are how and why legal parody should enjoy protection as free speech under the first amendment.

81. In the light of literary history and the purposes of the copyright laws, we should extend rather than constrict the boundaries of “fair use.” The controlling question should be not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person’s intellectual creation. Yankwich, supra note 3, at 1152. Yankwich’s proposal had no discernible effect on the appellate court considering Loew’s, or on a similar case (Paramount Pictures Corp. v. National Broadcasting Co., No. 172-57 (S.D. Cal. 1957), or on the Berlin case. See also Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), aff’d, 623 F.2d 252 n.1 (2d Cir. 1980).

82. R.T. Nimmer’s suggested approach relies too heavily on the false distinction between “true” and “commercial” parody and on an excessively discretionary application of the fair use doctrine by the courts. See Nimmer, supra note 18, at 151-61. See also Light, Parody, Burlesque, and the Economic Rationale for Copyright, 11 Conn. L. Rev. 615 (1979).
IV. THE FIRST AMENDMENT, COPYRIGHT, AND PARODY

There is a paradoxical conflict between the first amendment and copyright: the first amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press," yet article I, section 8 of the Constitution grants to copyright holders, through Congress, the power to prohibit the works of others. Copyright is intended to encourage the exercise of freedom of speech by enabling authors to reap maximum economic return from their works, but copyright inevitably abridges freedom of speech by punishing works which utilize copyrighted material in an unauthorized manner. There are very few cases involving the question of copyright's peculiar relationship to the first amendment, and none dealing with the problem directly. Scholars have only recently begun to explore this uncharted area.

There are several ways to view the paradoxical conflict between the first amendment and copyright. One is to take the absolutist view espoused by United States Supreme Court Justice Black and hold that Congress shall make no law abridging freedom of speech "without any 'ifs' or 'buts' or 'whereas.' " Since copyright undeniably abridges freedom of speech to some degree, this strict construction would render all copyright laws unconstitutional. Copyright might also be viewed as falling within a built-in exception to the first amendment by virtue of the copyright clause. Both of these views have serious flaws. Any reasonable person would admit that there are some forms of speech, such as perjury, fraudulent statements, or agreements in restraint of trade, which are not protected by the first amendment. Treating copyright as a built-in


87. See Nimmer, supra note 84, at 1182-83.
exception to the first amendment fails for the simple reason that
the first amendment supersedes anything inconsistent with it in the
main body of the Constitution.

In light of the drawbacks of the absolutist and exception views,
two other methods for dealing with the first amendment-copyright
conflict may be advanced. The first, known as the "ad hoc balancing
test," has been used by the United States Supreme Court to
resolve free speech cases. The second is a technique labelled the
"definitional balancing test." Courts using the ad hoc balancing
test weigh the free speech and conflicting nonspeech interests in
each case and determine which interest demands the greater pro-
tection. Ad hoc balancing proved to be unsatisfactory since its
unpredictable nature failed to produce a reliable rule to guide par-
ties, and it generally had a chilling effect on free speech. The
definitional balancing test has proved more satisfactory. Under that
test, speech and nonspeech interests are still balanced, but with a
crucial difference: "the balancing is not for the purpose of de-
termining which litigant deserves to prevail in the particular case
before the court, but rather for the purpose of determining which
forms of speech are to be regarded as 'speech' within the meaning
of the first amendment." Defined balancing is thus better
able to create rules for the future guidance of those who wish to
speak. Examples of such rules fashioned by the Supreme Court
may be found in the obscenity, privacy, and libel areas. In
New York Times Co. v. Sullivan, for instance, the Court estab-
lished standards which defamatory speech must meet in order to
warrant protection by the first amendment. The Court thus made it
possible for people to judge what defamatory speech is "speech"
within the meaning of the first amendment.

The definitional balancing test is clearly the best method for

88. See Emerson, Toward a General Theory of the First Amendment, 72 YALE
L.J. 877, 912-14 (1963); Frantz, The First Amendment in the Balance, 71 YALE L.J.
1424 (1962).
89. See Emerson, supra note 88; Frantz, supra note 88; Nimmer, The Right to
Speak From Times to Time: First Amendment Theory Applied to Libel and
90. See Nimmer, supra note 84, at 1183-84.
91. Id. at 1184 (emphasis added).
92. Roth v. United States, 354 U.S. 476 (1957) and its progeny, especially A
Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of
95. Id. See also Gertz v. Welch, 418 U.S. 323 (1974).
resolving conflicts between the first amendment and copyright.\textsuperscript{96} Such a test would allow the courts to draw a line between those forms of speech prohibited by copyright and those forms of speech protected by the first amendment, even though they arguably violate copyright law. Parody is a form of speech which needs the benefit of reclassification under such a definitional balancing approach. The most effective way to resolve the conflict between parody and copyright is for the courts to adopt the concept of legal parody and then to classify legal parody as a form of free speech protected by the first amendment. Such an action would eliminate the undesirable task of applying the fair use test to parody and would establish a definite standard to guide the parodist in the practice of his art.

In the few cases addressing the conflict between the first amendment and copyright, there are hints that the first amendment may indeed have occasion to exert more muscle against copyright interests. A 1966 Second Circuit case, \textit{Rosemont Enterprises, Inc. v. Random House, Inc.},\textsuperscript{97} contained the following dictum by Chief Circuit Judge Lumbard:

\begin{quote}
The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.\textsuperscript{98}
\end{quote}

The federal district court in \textit{Time, Inc. v. Bernard Geis Associates}\textsuperscript{99} and the Supreme Court in \textit{New York Times Co. v. United States}\textsuperscript{99} have hinted that the first amendment may indeed have occasion to exert more muscle against copyright interests.

\textsuperscript{96} See Nimmer, \textit{supra} note 84, at 1184.

\textsuperscript{97} 366 F.2d 303, 311 (2d Cir. 1966), \textit{cert. denied}, 385 U.S. 1009 (1967). \textit{Rosemont} involved an infringement action brought by the owner of the copyright on magazine articles concerning the celebrity, Howard Hughes. \textit{Look} Magazine published a series of articles on Hughes in 1954. When Hughes learned Random House was about to publish an unauthorized biography of him in 1966, he organized Rosemont Enterprises and bought the copyright to the \textit{Look} articles. Rosemont then obtained a preliminary injunction enjoining publication of the biography on the ground that it infringed the copyright on the \textit{Look} articles. The Court of Appeals for the Second Circuit, per Judge Moore, vacated the injunction after holding Random House's use of the \textit{Look} articles fell within the boundaries of fair use. In a concurring opinion, Judge Lumbard stressed that copyright laws should not be allowed to interfere with the public's first amendment interest in being fully informed regarding matters of general concern.

\textsuperscript{98} \textit{Id.} at 311.

States both reached decisions against the copyright holder and the Government, respectively, in part because of a strong conviction that the public has a first amendment interest in receiving as much information as is available regarding matters of general concern. In Walt Disney Productions v. Air Pirates, the defendant asked the district court to balance the competing interests of freedom of expression and copyright protection, but the court found this unnecessary in light of its determination that the disputed work was not parody but was mere reproduction. The court did state, however, that "Assuming, without deciding, that the First Amendment does mark out some boundary for the protection that may be afforded a creator under the copyright laws, that boundary has not been reached here." This suggests that the court believed free speech interests could outweigh copyright interests in some instances.

The argument for the classification of legal parody as a form of protected free speech need not rely on such oblique intimations. The fundamental issue is not whether the unrestrained publication of all forms of free speech should take precedence over the interests of copyright holders, but whether one form of free speech should enjoy such precedence. The specific question is whether parody is a form of free speech whose publication deserves to be protected despite the fact it may contravene traditional copyright

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THOMPSON, SIX SECONDS IN DALLAS (1967), containing illustrations that copied a number of parts of the Zappruder film. Time, Incorporated sued for infringement, but Judge Wyatt of the Southern District of New York held in favor of the defendants on the grounds that the book's illustrations fell within the boundaries of fair use, that there is a public interest in having the fullest information available on the assassination, and that the plaintiffs suffered little, if any, injury.

100. 403 U.S. 713, 714-30 (1971). New York Times Co., more commonly known as "The Pentagon Papers Case," involved the attempt of the government to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The government failed to obtain an injunction on the district court level, and the Supreme Court affirmed the denial of injunctive relief on the ground that the government had failed to meet the heavy burden of showing justification for the imposition of such a prior restraint. The concurring opinions of Justices Black and Douglas are especially concerned with the more general first amendment implications of the case.

101. See Nimmer, supra note 84, at 1200; notes 99 & 100 supra.

102. 345 F. Supp. at 108. For a brief description of the facts of Air Pirates, see notes 45-47 supra and accompanying text. See also Comment, supra note 47, at 573-76, 582-83.

103. 345 F. Supp. at 115-16.

104. Id. at 116.
interests. Pragmatic and constitutional arguments dictate that this question should be answered affirmatively.

Using a definitional balancing test, a court can weigh the interests of protecting parody against the interests of maximizing copyright holders' financial returns. For pragmatic reasons, the scale tips to the side of parody. A decision favoring copyright holders' interests would perpetuate the continued application of the fair use test to parody and also perpetuate that test's inequitable results. The fair use test is too subjective, and parody too complex, for the courts to fashion reliable standards to define the relationship between parodists and copyright holders. As will be discussed, the establishment of legal parody as a form of free speech whose protection takes precedence over copyright interests will clarify the relationship between parodists and copyright holders and thus will simplify the work of the courts.

Most important is the constitutional argument for designating legal parody as a form of protected free speech. The freedom to publish literature and criticism is an important element of free speech. Legal parody is a unique combination of literature and criticism, and the right to publish legal parody is an element of free speech. The copyright holder's power to enjoin or punish the publication of parody is a form of property right. The right of free speech, however, enjoys a preferred position; and restrictions on free speech will be reviewed more closely than those on property rights. 105 Moreover, the primary object of article I, section 8 is to provide for copyright laws which "promote the Progress of Science and the Useful Arts." Providing for the maximum financial benefit of copyright holders is only a secondary consideration. 106 After applying a definitional balancing test, it is evident that free speech and article I, section 8 interests in publishing legal parody outweigh copyright holders' property right interest in enjoining such publication. Since parody is an exercise of free speech which promotes the progress of science and the arts, the Constitution should prevent copyright holders from restraining the publication of legal


106. "[T]he primary consideration of the English copyright law—and of ours... was and is to advance the progress of arts and sciences. In giving effect to this objective, material gain is not... primary, but secondary." Yankwich, supra note 3, at 1151. See also notes 19, 55, 58, 64 & 65 supra and accompanying text.
parody. Using a definitional balancing test, the courts should classify legal parody as a form of free speech protected by the first amendment which is immune from the copyright laws.

It must be stressed that these arguments apply only to legal parody; nonlegal parody is fully subject to the fair use test and all other copyright laws and sanctions. Nor should these arguments be expanded and applied to the publication of every form of speech which promotes the progress of the sciences and the arts. The designation of legal parody as an exception to the copyright laws should not be viewed as a step toward such a slippery slope. The courts, however, have hardly begun to delineate the complex relationship between copyright and free speech, and until future opinions hold to the contrary, traditional copyright interests will probably continue to be held superior to various free speech interests. Legal parody, however, must be treated differently because it is a peculiar form of speech which has been victimized in the past and requires favored treatment to achieve equitable status.\(^\text{107}\)

Whether the concept of legal parody will ultimately be put to use depends upon findings by individual judges that legal parody is indeed a form of free speech worthy of special protection from hostile copyright laws. In addition to the pragmatic and constitutional reasons suggested above, such findings may be motivated by the judge's perception of the need to reaffirm parody's traditional value as social commentary, literary criticism, and sheer entertainment.\(^\text{108}\)

Assuming it is possible for the courts to sanction the classification of legal parody as a protected form of free speech on the basis of the arguments outlined above, the courts must then implement this new approach. The courts can give effect to the principle of legal parody by applying the same type of definitional balancing test that has enabled the Supreme Court to establish rules in the areas of obscenity, privacy, and libel.\(^\text{109}\) The key to any court's application of a definitional balancing test to parody is the concept of legal

\(^{107}\) This parallel to equal protection law is of course meant to be analogical rather than literal. For especially illuminating discussions of evolving equal protection standards, see Gunther, Foreword: The Supreme Court 1971 Term, 86 Harv. L. Rev. 1, 8-20 (1972); Comment, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1076-133 (1969).


\(^{109}\) See notes 92-94 supra.
parody itself. The standards for measuring whether first amendment protection extends to a particular parody can be derived from judicial adoption and articulation of that concept. Thus, the form of free speech protected by the first amendment would not be parody in general, but only those parodies which rise to the standard of legal parody. With legal parody classified as a protected form of speech, the crucial question for the courts to decide in any particular case is whether the disputed work satisfies the standard of legal parody.

It should be recalled that a legal parody is defined as a distinct work that imitates in a satiric manner the ideas and expression of a previously published work. For a court to find that a parodist has written a legal parody, it must be clear that he took the previously published work and, through the creative use of satiric imitation and invention, transposed the ideas and expression of the work into a recognizably distinct work. Once a court determines that a disputed work satisfies this standard, it is then deemed a legal parody and, regardless of whether the artist's appropriation arguably violates fair use, it is entitled to first amendment protection as free speech.

In any application of the definitional balancing test to the class of parody, there should be a rebuttable presumption that all parodies are legal and thus protected as free speech. For a copyright holder to sue a parodist successfully for infringement, the copyright holder would have to carry the burden of proof and establish that the disputed parody is not in fact a legal parody. This would require the copyright holder to prove that the disputed work is not original or recognizably distinct from the copyright holder's own work; there must be no creative use of satiric imitation and invention which metamorphizes the ideas and expression of the serious work. If the copyright holder succeeds in proving this allegation, he has established that the disputed work is not a legal parody; he may then pursue the usual remedies available under the Copyright Act, such as dollar damages or an injunction. The customary fair use exception is still available to the parodist as a defense.

An application of the legal parody concept by the courts can be illustrated by reconsidering the Loew's and Air Pirates cases in light of this new approach. The crucial question in each case becomes whether the disputed work satisfies the standard of legal parody. If so, the work must be protected; if not, it may be subjected to the fair use test or other copyright infringement tests.
The facts must be carefully examined by the court and then compared with the scope and definition of legal parody described above. Given the findings of fact and the description of the evidence in Loew's, a court using the legal parody approach would have to hold that Jack Benny's parody of "Gaslight" did indeed satisfy the standard of legal parody. Consequently, despite the existence of substantial appropriation under the fair use test, the parody was protected by the first amendment and was immune to a claim of copyright infringement. In the Air Pirates case, the court would have concluded that, since the appropriated Disney cartoon characters were not metamorphized into distinct, original creations through the use of satiric imitation, i.e., caricature, but were merely reproduced in an unusual context, the disputed work did not measure up to the standards of legal parody and thus could be subjected to an application of the fair use test.

V. CONCLUSION

It is evident from an examination of the cases involving the parody-infringement problem that the application of the fair use test is an inappropriate method for resolving the conflict between parody and copyright. The inconsistent and unsatisfactory results of the cases can be traced to the clash between the uniquely complex characteristics of parody and the sweeping subjectivity of the fair use test. The recurring conflict between parody and copyright can be resolved only if the courts set aside the fair use test, adopt the concept of legal parody, and utilize a definitional balancing test to establish that legal parody is a form of free speech protected by the first amendment.

The use of the legal parody approach would have a positive effect on the law, the parodist, the public, and the copyright holder. The approach would finally clarify the relationship between parody and the law, and thus replace the current confused and inconsistent treatment with a definite standard. Even more important, however, the legal parody approach would further the constitutional interests in free speech and promotion of the arts. It would also establish guidelines for the parodist to use in judging the legality of his works, thus encouraging creation of and protection of the publication of parody. By facilitating the dissemination of legitimate

110. See notes 61-63 supra and accompanying text.
111. See notes 40, 46 & 47 supra and accompanying text.
parody, the new approach guarantees that the public will receive maximum exposure to the benefits of parody's criticism and entertainment. For copyright holders, the approach would at last provide a reliable standard for predicting the outcome of law suits against parodists.