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Copyright -- Burlesque of Literary Property as Infringement of Copyright

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Copyright

BURLESQUE OF LITERARY PROPERTY AS INFRINGEMENT OF COPYRIGHT

Introduction

The form of art known as burlesque is resorted to extensively in the United States and Great Britain as a source of entertainment and criticism. Burlesque and its almost indistinguishable associates, parody and mimicry, form the backbone of comedy as seen and heard on television, radio, and motion pictures. Many of today's comedy programs feature humorous skits based on serious dramatic works, including books, plays and movies. Although details are changed to convert what was written in a serious vein into a humorous farce, the situations and sequences of events are often quite similar. Generally, no attempt is made to disguise the travesty as an independent work. In many instances such use of burlesque approaches infringement of copyright. This writing proposes to investigate the claim frequently made that burlesque enjoys immunity from infringement actions under the doctrine of "fair use," and to estimate the extent of the protection that is afforded. If no special protection is granted by the copyright law, a considerable restriction must necessarily be placed upon creators of comedy.

Burlesque is technically defined as:

> . . . [A] form of the comic in art, consisting broadly in an imitation of a work of art with the object of exciting laughter, by distortion or exaggeration, by turning, for example, the highly rhetorical into bombast, the pathetic into the mock-sentimental, and especially by a ludicrous contrast between the subject and the style. . . .[1]

Under the Copyright Act authors receive the exclusive right "to perform or represent the copyrighted work publicly if it be a drama. . . ."[2] A copyright owner who contends that his rights

[1] 4 ENCYCLOPAEDIA BRITANNICA 423 (14th ed. 1938).

[2] 17 U.S.C. § 1 (d) (1952).

have been infringed must show both the defendant's access to the material and identity of the copyrighted original with the alleged infringing product.[3] Intent to infringe need not be proved,[4] and the test of similarity is not what the defendant intended to represent, but whether the copying would be discernible to the general public.[5] However, under certain conditions depending on the individual case, copyrighted material may lawfully be used. This is the long established doctrine of "fair use," based on the implied consent[6] of the copyright holder to the use of his material by subsequent authors. The policy of "encouraging the dissemination of knowledge, learning and culture" to the general public outweighs the desire to protect the individual author's rights in his literary creation.[7]

Among the many applications of "fair use" is the right of a critic to review a copyrighted work and to include in his review portions of the work.

> . . . [N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purpose of fair and reasonable criticism.[8]

It is certainly true that burlesque, while used chiefly today to create humor, can be and frequently has been a sharp weapon of criticism. However, no critic may quote so much of the book, movie, drama, etc. that he is reviewing as to substitute his review for the original. This would constitute direct competition with the copyrighted material and is universally prohibited.[9] If

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[3] Carew v. R.K.O. Radio Pictures, Inc., 43 F. Supp. 199 (S.D. Cal. 1942); Seltzer v. Sunbrock, 22 F. Supp. 621 (S.D. Cal. 1938).

[4] Chappell & Co. v. Costa, 45 F. Supp. 544 (S.D.N.Y. 1942).

[5] Lewis v. Kroger Co., 109 F. Supp. 484 (S.D.W.Va. 1952); Barbadillo v. Goldwyn, 42 F.2d 881 (S.D. Cal. 1930); Roe-Lawton v. Hal E. Roach Studios, 18 F.2d 126 (S.D. Cal. 1927).

[6] DEWOLF, AN OUTLINE OF COPYRIGHT LAW 142 (1925). For a comprehensive presentation of the application of "fair use," see Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203 (1954). Judge Yankwich mentions twelve different instances in which the "fair use" doctrine permits copying of copyright material. He includes satires and parodies in his list of examples, but the article does not discuss them in detail.

[7] BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 259 (1944). The author further states that the reason underlying the "fair use" doctrine is that it is "a necessary incident of the constitutional policy of promoting the progress of science and the useful arts . . ." See W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82, 89 (6th Cir. 1928).

[8] Folsom v. Marsh, 9 Fed. Cas. 342, 344, No. 4901 (C.C. Mass. 1841); BALL, *op. cit. supra* note 7, at 289.

[9] Folsom v. Marsh, *supra* note 8, at 345; AMDUR, COPYRIGHT LAW AND PRACTICE 757 (1936). The English rule is the same. Wilkins v. Aikin, 17 Ves. Jr. 422, 34 Eng. Rep. 163 (Ch. 1810).

the object of the burlesque is only to present a fair and reasonable criticism, it is presumed that the ordinary rules applied to newspaper reviews prevail.[10] In the great majority of entertainment shows a burlesque is presented not to criticize the book or play or motion picture, but to create humor for the audience. Only well-known copyright works are made the subject of a burlesque. Viewed in that light, burlesque is a compliment to its subject and cannot be classified under the privilege of criticisms.

Burlesque as "Fair Use"

Is there then a separate judicially established "fair use" which protects burlesques? Some of the older cases indicate an affirmative answer. Although no American case definitely states such a proposition, several cases with fact situations closely allied to the problems of burlesque hint at such "fair use."

In *Green v. Minzensheimer*,[11] there was a night club act in which a singer burlesqued the style and voice of several famous singers; but no infringement of copyright was found, although in imitating one singer, portions of a copyrighted song were used. Mimicry of another singer's gestures and postures has been permitted as "fair use," even though the act of imitation involved the singing of the chorus of a copyrighted song.[12] The court reasoned that the mimicry was not a copying of the copyrighted song, but a representation only of that singer's style. The female singer was closely associated with the song in the public's mind, but her actions were not protected by the copyright. The court said:

> Surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced. No doubt, the good faith of such mimicry is an essential element. . . .[13]

But in *Green v. Luby*,[14] decided by the same court that de-

[10] Yankwich, *supra* note 6, at 208, says that the test to determine whether a critic's review infringes the copyrighted work "involves consideration of (a) the value of the quoted portion, and (b) its effect in serving as a substitute for the original work." If the review is so comprehensive as to eliminate the necessity of reading the copyrighted article, the bounds of "fair use" have been exceeded.

[11] 177 Fed. 286 (S.D.N.Y. 1909) (denying motion for preliminary injunction).

[12] Bloom & Hamlin v. Nixon, 125 Fed. 977 (E.D. Pa. 1903).

[13] *Id.* at 978.

[14] 177 Fed. 287 (S.D.N.Y. 1909).

cided *Green v. Minzensheimer*[15] in the same year, infringement was found when an entire copyrighted song was sung during the course of an imitation of another singer. The effect of the defendant's mimicry was not merely to burlesque the style of the original singer but to actually present the copyrighted song, a result definitely opposed to the policy of protection to authors underlying the copyright statute. The courts look at the effect of the copying rather than the intention of the defendant.[16]

Another case which does indicate that burlesque might be a fair use is *Glyn v. Weston Feature Film Co.*,[17] a suit claiming infringement of a novel by the defendant's motion picture burlesque. The court said that a burlesque does not constitute copyright infringement where the author of the burlesque has applied creative thinking to his product. However, this statement is only a dictum inasmuch as the judge decided there was not a sufficient resemblance to warrant a charge of violation of the original author's rights.

Loew's Inc. v. Columbia Broadcasting System

The *Glyn* case[18] was as far as any of the decisions had ever gone in deciding to what extent burlesques could copy a previous author's work.[19] No court was ever called upon to uphold the existence of this employment of "fair use" until it was presented as the chief defense in *Loew's Inc. v. Columbia Broadcasting System,* decided May 6, 1955.[20] The fact situation there is identical with the problem under discussion. The holders of the copyright of the motion picture "Gaslight" sought to enjoin the performance of a burlesque of the picture by Jack

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[15] *Id.* at 286. The court in Green v. Luby, *supra* note 14, distinguished Green v. Minzensheimer by pointing out that in the latter case there was no music accompanying the song.

[16] See note 4 *supra.*

[17] [1916] 1 Ch. 261 (1915).

[18] *Ibid.*

[19] Lowenfels v. Nathan, 2 F. Supp. 73 (S.D.N.Y. 1932), was concerned with the same factual situation in that defendant's musical comedy, described as a burlesque, was claimed to infringe on plaintiff's operatic tragedy. However, the court was not asked to rule that the defense of "fair use" protected burlesques. So the court looked only to see if there was a substantial taking.

[20] 131 F. Supp. 165 (S.D. Cal. 1955).

Benny, a popular television and radio comedian.[21] The defense made no attempt to deny substantial copying of the motion picture; instead it asserted that burlesque itself is a "fair use." The court's opinion exhaustively discussed the latter doctrine, considering all the decisions mentioned above which in any way touched on the permissive use of criticism, abridgment, parody, mimicry and burlesque. The court stated its conclusion:

> Turning now to American cases involving parody or burlesque, we find illuminating early decisions. The attempt to defend against copyright infringement by the claim that the infringing work was "merely a parody or burlesque" is not new. Such an attempt has been the subject of several decisions and has been disposed of, not by determining whether the alleged infringing use was parody or burlesque, but by ascertaining whether it amounted to a taking of substantial, copyrightable material. In other words, *a parodized or burlesqued taking is treated no differently from any other appropriation.*[22] (Emphasis added.)

The effect of the decision is to rule that a burlesque cannot copy a substantial part of a copyrighted work with complete impunity simply because it is a burlesque and not an independent work. Implicit in the holding is a comparison of values as was explained previously in the general discussion of "fair use." The court decided that the entertainment value to the public of a burlesque skit, which copies to a great extent the material in the original, is of less importance than the protection which should be afforded the copyright holder. When considered in this perspective, it is submitted, the case was correctly decided.

The Reduction of Demand Factor

In at least one respect, however, it is difficult to understand why a burlesque which turns a serious drama into a humorous farce is such an unfair use of the original material. Reference is made to the factor of injury to the copyright holder, presumably by the partial or complete satisfaction by the burlesque

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[21] Benny's humorous burlesque, produced for radio and television, was considerably shorter than the picture; but the sequence of events and the principal characters were practically the same. Anyone who had seen the picture would readily observe the close similarity between "Gaslight" and the burlesque. Of course, the movie was a serious drama while the burlesque turned the effect into comedy.

[22] 131 F. Supp. 165, 176-177. (The court's footnotes are omitted). The court cited Bloom & Hamlin v. Nixon, *supra* note 12, for the rule that a parody which uses only a small part of the copyrighted matter does not infringe. The part used of the song in the *Bloom* case was the popular chorus, however, and this was sufficient to make the audience think of the original song.

of the general public's desire to see or hear the serious production. This factor of competition is not present. For example, can it reasonably be contended that anyone who would see Jack Benny's burlesque of a serious motion picture would be less inclined to see the picture afterward? It is extremely doubtful that the type of burlesque under discussion here would diminish the profits of the copyright holder. Admittedly, the plot and the sequence of events are similar,[23] but the whole effect has been changed from serious drama to comedy. Two entirely different types of enjoyment are under consideration. Creation of humor does not satisfy the desire to witness or hear a serious dramatic production.

The answer of the court in *Loew's Inc. v. Columbia Broadcasting System* is a complete denial of the validity of the argument.

> We conclude that it is not incumbent on the copyright holder to show either damage, or a diminuting of the value of his property or a lessening of the demand for the copyrighted work.[24]

Many cases can be cited in support of this proposition which holds that it is not necessary to prove a reduction in demand for the original work in order to establish infringement.[25] However, the importance of this factor must not be overlooked. CORPUS JURIS SECUNDUM, after stating the same rule, continues:

> Nevertheless the cases frequently lay stress on the fact of competition, or the lack of it, in determining whether the amount of matter copied is reasonable in amount and character or is an infringement, and it is safe to say that where the later work differs greatly in nature, scope, and purpose from the original, a larger liberty in making quotations and extracts will be permitted. . . .[26]

If the burlesque is in a different form of art than that which is copied, the court is less likely to find an injury to the copy-

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[23] 131 F. Supp. 165, 170-171.

[24] *Id.* at 184.

[25] Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938); Falk v. Donaldson, 57 Fed. 32, 36-37 (S.D.N.Y. 1893).

[26] 18 C.J.S., *Copyright and Literary Property* §94(c)(3) (1939), which is also quoted in Karll v. Curtis Pub. Co., 39 F. Supp. 836, 837-838, (E.D.Wis. 1941). The text in C.J.S. also states, §94 (c) (2): ". . . [T]he court must look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work." See Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 84-85 (6th Cir. 1943); National Institute, Inc. v. Nutt, 28 F.2d 132, 135 (D. Conn. 1928), *aff'd*, 31 F.2d 236 (2d Cir. 1929); M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470, 476-477 (E.D.S.C. 1924).

right holder.[27]

Reduction in popular demand for the copyrighted work, caused by the competition of the infringing burlesque has several times been the overriding factor in the court's determination of infringement. *Hill v. Whalen & Martell*[28] is a famous example. There the defendant's use of two cartoon characters, "Nutt" and "Giff", was held to infringe the copyright of the more famous "Mutt and Jeff." The court found a decrease in popularity of the plaintiff's comic strip and held that this test, as to whether there has been a material reduction in the demand for the original, is decisive. In most cases, however, this test of diminution of sales is only a factor to be considered in the determination of infringement. "[T]he effect upon distribution and objects of the original work" is one of the elements the court must consider.[29] How important a factor it is will determine to what extent burlesques can make use of copyrighted matter in the future.

Courts also have considered the factor of intent in their determination of infringement. Intent to infringe is not a requisite of proof, but "it goes to fill out the whole picture."[30]

On consideration, it is submitted that the factor of competition is false and misleading and should not be very determinative. The holder of a copyright has the complete right to do with it as he pleases. Even if he does not wish to use it at all, he may prevent others from doing so. With reference to burlesques, the argument that the burlesque would not diminish income for the copyrighted material is defeated if it is remembered that the copyright holder could also, if he so desired, burlesque his creation and hence would be entitled to the profits thereof. His right to do so certainly transcends the right of anyone else. The potential use by the copyright owner would be infringed by the burlesque.

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[27] Shapiro, Bernstein & Co. v. Collier & Son, 26 U.S.P.Q. 40 (S.D.N.Y. 1934). Various quotations from the principal song in a popular musical comedy were interspersed in a serial story appearing in a national magazine. An injunction was denied because no real competition existed.

[28] 220 Fed. 359 (S.D.N.Y. 1914). See also National Institute, Inc. v. Nutt, *supra* note 26. An English case, Hanfstaengl v. W. H. Smith & Sons, [1905] 1 Ch. 519, 528, utilizes the same test. Infringement was found because the imitation "tends directly to prevent the sale of the plaintiff's goods by reason of the familiarity of the public with a base form." *Cf.* Boosey v. Empire Music Co., 224 Fed. 646 (S.D.N.Y. 1915).

[29] New York Tribune, Inc. v. Otis & Co., 39 F. Supp. 67, 68 (S.D.N.Y. 1941).

[30] Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817, 818 (S.D.N.Y. 1940). *Cf.* New York Tribune, Inc. v. Otis & Co., *supra* note 29.

Purpose of the Burlesque — Commercial Benefit

An important consideration in determination of infringement appears to be the purpose for which the copying is made.[31] The cases mentioned heretofore have intimated that if the copy does not reduce the demand for the copyrighted creation there is at least less probability that infringement will be adjudged. However, it has been held that if the purpose of the copying is not primarily the advancement of the arts or sciences, but is to gain commercial benefit for the copier, such use will be held unfair.[32] The argument in favor of unrestricted use of burlesque, which so successfully passes the reduction of demand test, ignominiously falters here. A humorous skit based on a dramatic production provides humor, of course, but ultimately it is staged to commercially benefit the producer. This test was asserted in a case involving the use in an advertisement for cigarettes of the copyrighted statements of a doctor.[33] Judge Yankwich in his discussion of "fair use" endorses this qualification. "If . . . the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, *regardless of quantity,* is unfair."[34]

Another author on copyrights[35] has also approved of the doctrine of infringement where there is a commercial motive. Ball admits the importance of the reduction in demand factor but says that even in a situation in which the original and the copying works are "wholly different in their nature, scope and purpose," if the later use is for a profitable commercial gain, it is unfair usage.[36]

This factor of commercial benefit to the defendant charged with infringement of copyright has not always been so decisive. Many of the decisions already mentioned held that there was no infringement even though the work in which the copying was included was designed to earn financial profit.[37] This fact

[31] Green v. Luby, 177 Fed. 287 (S.D.N.Y. 1909).

[32] Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938).

[33] *Ibid.*

[34] Yankwich, *supra* note 6, at 209. The quoted statement is in reference to reviews and criticisms, which under certain conditions have the protection of the "fair use" doctrine.

[35] BALL, *op. cit. supra* note 7, at 262.

[36] *Ibid.* The author also is speaking here of critical reviews, stating that if the article is published only to gain commercial benefit, instead of for professional motives, it is a violation of the "fair use" protection afforded to such writings.

[37] Karll v. Curtis Pub Co., 39 F. Supp. 836 (E.D. Wis. 1941); Green v. Minzensheimer, 177 Fed. 286 (S.D.N.Y. 1909); Bloom & Hamlin v. Nixon, 125 Fed. 977 (E.D. Pa. 1903).

and the context of the statements endorsing the concept indicate that it applies primarily to the activities which receive judicial protection as "fair use," *i.e.*, criticisms, digests, encyclopedias, imitations of methods and systems, etc.

Conclusion

It is increasingly evident, especially since *Loew's Inc. v. Columbia Broadcasting System,* that entertainment taking the form of a burlesque of serious dramas, novels, etc., has no extraordinary legal armor to defend itself against charges of infringement. "Fair use" does not permit burlesque to appropriate substantial parts of copyrighted material. Thus, in deciding questions of infringement in any future cases, the courts will apply the ordinary tests for infringement. The burlesque may not appropriate a substantial part of the original material.[38] Of course, copyright law does permit the use of the same ideas, provided the first author's expression of his ideas is not appropriated.[39] This will be the problem area for burlesque humor writers. If the burlesque uses a largely similar sequence of details and events, which is "the very web of the author's dramatic expression," the use is unfair.[40] Certainly, in the actual infringement case, if it is not perfectly clear that the taking has been a substantial one, the courts may rule for the defendant on the ground that his burlesque, while somewhat similar, presents the ideas in a different form and causes no reduction in profits to the original. The better reasoning found in the *Holt* case[41] and the textbooks would indicate that this factor should not be given much weight. Copyright is property and should be protected in all its uses, whether actual or potential. The development of the law in this respect affords increased protection to copyright owners at the expense of the creators of comedy. Perhaps it is to be welcomed as a spur to more original and ingenious entertainment.

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[38] W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82 (6th Cir. 1928); Hill v. Whalen & Martell, 220 Fed. 359 (S.D.N.Y. 1914).

[39] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55 (2d Cir. 1936), *aff'd,* 309 U.S. 390 (1939); Seltzer v. Sunbrock, 22 F. Supp. 621, 628 (S.D. Cal. 1938); Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1926).

[40] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55 (2d Cir. 1936), *aff'd,* 309 U.S. 390 (1939); Daly v. Palmer, 6 Fed. Cas. 1132, No. 3552 (S.D.N.Y. 1868).

[41] Henry Holt & Co. v. Liggett & Meyers Tobacco Co., *supra* note 32.