Michigan Law Review

Volume 56 | Issue 8

1958

Copyright - Infringement - Parody of Dramatic Production Held Not to Be Fair Use

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COPYRIGHT—INFRINGEMENT—PARODY OF DRAMATIC PRODUCTION HELD NOT TO BE FAIR USE—Prior to December 1938, Patrick Hamilton wrote an original play entitled "Gaslight" which subsequently was published, performed and protected by copyright in both England and the United States. Loew's acquired exclusive motion picture rights to the play on October 7, 1942, and produced an original feature-length motion picture photoplay of the drama, also entitled "Gaslight." In 1945 Jack Benny sought and received permission to produce a 15-minute parody of the motion picture for his radio program. In 1953, without securing Loew's permission, Benny produced a 15-minute filmed parody of the motion picture for his television program. It was entitled "Autolight" and the locale, setting, characters, story points, development of the story and dialogue were practically identical with "Gaslight." Loew's sued to enjoin performance of the Benny program. The district court granted the injunction, holding that there had been a substantial taking of the copyrighted material and

that there was no defense of fair use in this instance.[1] The court of appeals affirmed with language which could be interpreted as never allowing a fair use defense to infringement for parody or burlesque.[2] On certiorari to the United States Supreme Court, *held,* affirmed without opinion by an equally divided court. *Columbia Broadcasting System, Inc., v. Loew's,* 356 U.S. 43 (1958), reh. den. 356 U.S. 934 (1958).

The copyright laws[3] were enacted under a constitutional provision which permits Congress to enact laws ". . . To promote the Progress of Science and useful Arts. . . ."[4] Since furtherance of the arts rather than economic gain to the copyright owner is the primary purpose of the statute,[5] courts have refused to allow an individual, by copyrighting a story, to remove all of its component parts from the public domain.[6] Thus he has no cause of action for a mere appropriation of ideas,[7] bare plot,[8] theme,[9] title,[10] locale and setting,[11] or basic incidents and situations.[12] Moreover, the judicially developed doctrine of fair use has given authors the right of reasonable use of certain protected material.[13] In general, whether the appropriation of protected material is a "fair use" depends on the factual situation in each case.[14] Nevertheless, courts have applied certain tests to determine the question of infringement when the

1 Loew's, Inc. v. Columbia Broadcasting System, Inc., (S.D. Cal. 1955) 131 F. Supp. 165 at 183. ". . . Defendant may not legally appropriate [plaintiff's property right in 'Gaslight'] under the pretense that burlesque as a fair use justifies a substantial taking; [we conclude] that parodized or burlesque taking is to be treated no differently from any other appropriation; . . . the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists."

2 Benny v. Loew's, Inc., (9th Cir. 1956) 239 F. (2d) 532 at 536-537. ". . . no federal court . . . has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work, and presenting it, with few variations, as a burlesque. . . . Otherwise, any individual . . . could appropriate, in its entirety, a serious and famous dramatic work, protected by copyright, merely by introducing comic devices. . . . One person has the sole right to do this—the copyright owner. . . ."

3 17 U.S.C. (1952) §1 et seq.

4 U.S. CONST., art. I, §8.

5 Mazer v. Stein, 347 U.S. 201 at 219 (1954).

6 Becker v. Loew's, Inc., (7th Cir. 1943) 133 F. (2d) 889 at 891.

7 Mazer v. Stein, note 5 supra, at 217.

8 Dymow v. Bolton, (2d Cir. 1926) 11 F. (2d) 690.

9 Dellar v. Samuel Goldwyn, Inc., (2d Cir. 1945) 150 F. (2d) 612.

10 Becker v. Loew's, Inc., note 6 supra. But an action for unfair competition may lie. Warner Bros. Pictures, Inc. v. Majestic Pictures Corp., (2d Cir. 1934) 70 F. (2d) 310.

11 Caruthers v. R.K.O. Radio Pictures, Inc., (S.D. N.Y. 1937) 20 F. Supp. 906.

12 Harold Lloyd Corp. v. Witwer, (9th Cir. 1933) 65 F. (2d) 1.

13 The origin of the doctrine in the United States is ordinarily attributed to Justice Story in Folsom v. Marsh, (C.C. Mass. 1841) 9 Fed. Cas. 342, No. 4,901. For a modern application of the doctrine see, e.g., Broadway Music Corp. v. F-R Publishing Corp., (S.D. N.Y. 1940) 31 F. Supp. 817; Karll v. Curtis Publishing Co., (E.D. Wis. 1941) 39 F. Supp. 836, noted in 15 SO. CAL. L. REV. 249 (1942). See also the comprehensive article by Judge Yankwich, "What Is Fair Use," 22 UNIV. CHI. L. REV. 203 (1954).

14 Simms v. Stanton, (N.D. Cal. 1896) 75 F. 6.

defense is raised. They generally consider (1) the quantity and importance of the portions taken, (2) their relation to the work of which they are a portion, and (3) the economic effect of the material used.[15] Whether the appropriation is more than that allowed by fair use usually depends on whether, in the light of these tests, the mind of the individual viewing the appropriated material sees it as substantially an embodiment of the original expression.[16] While the doctrine has been extensively developed in some areas,[17] very little authority exists in the area of parody or burlesque of dramatic productions.[18] The novelty and importance of the principal case stems from the economic effect of publication by modern television in comparison with the media involved in prior cases.[19] The parody, if it does infringe, may in one publication destroy the value of the copyrighted work and thus, if permitted, discourage writers' creative efforts. On the other hand, parody has developed into a useful and entertaining art, much akin to criticism in the literary field. Though the language of the district court in the principal case could be construed to preclude the defense of fair use in the setting of parody,[20] in a subsequently rendered opinion the same court recognized that if parody is to survive as an art, there must be some appropriation of the copyrighted work.[21] The court of appeals in the principal case takes a much narrower view, virtually eliminating the defense of fair use in parody cases. Since affirmance by an evenly divided court is not res judicata in a similar fact situation,[22] the question whether the Supreme Court is willing to apply fair use still exists. Although it has been said that the decision sounds the death knell of parody,[23] it may be hoped that the court, on the evidence, felt that the appropriation went beyond the bounds of fair use.

15 Yankwich, "What Is Fair Use," 22 UNIV. CHI. L. REV. 203 at 213 (1954).

16 See Nichols v. Universal Pictures Corp., (2d Cir. 1930) 45 F. (2d) 119; Twentieth Century-Fox Film Corp. v. Stonesifer, (9th Cir. 1944) 140 F. (2d) 579. Compare Green v. Minzenheimer, (S.D. N.Y. 1909) 177 F. 286, with Green v. Luby, (S.D. N.Y. 1909) 177 F. 287, for amount of appropriation which will constitute an infringement.

17 Yankwich, "What Is Fair Use," 22 UNIV. CHI. L. REV. 203 (1954).

18 See Yankwich, "Parody and Burlesque in the Law of Copyright," 33 CAN. B. REV. 1130 at 1137 (1955), for an excellent summary of English and American authority.

19 In Bloom & Hamlin v. Nixon, (E.D. Pa. 1903) 125 F. 977, the claimed infringement was in a musical comedy as was that in Green v. Minzenheimer, note 16 supra, and Green v. Luby, note 16 supra. Hill v. Whalen and Martell, (S.D. N.Y. 1914) 220 F. 359, the case which most clearly applies fair use to a burlesque, involved a dramatic performance.

20 The case has received extensive comment. Articles: Yankwich, "Parody and Burlesque in the Law of Copyright," 33 CAN. B. REV. 1130 (1955); comments: 56 COL. L. REV. 585 (1956); 31 NOTRE DAME LAWYER 46 (1955); 4 WAYNE L. REV. 49 (1958); notes: 28 ROCKY MT. L. REV. 134 (1955); 31 N.Y. UNIV. L. REV. 606 (1956); 10 S.W. L. J. 68 (1956).

21 Columbia Pictures Corp. v. National Broadcasting Co., (S.D. Cal. 1955) 137 F. Supp. 348.

22 Hertz v. Woodman, 218 U.S. 205 at 213 (1910).

23 See N.Y. TIMES, March 18, 1958, §1, p. 1:8.

It is reasonably clear, at least, that there are limits beyond which a parodist may not appropriate.[24] It is unlikely, however, that a minimum taking will be called infringement in light of the strong equities favoring the preservation of parody, an admittedly valuable artistic endeavor.

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[24] Most writers on the subject are in accord. See, e.g., LINDEY, PLAGIARISM AND ORIGINALITY 43 (1952); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 290 to 292 (1944).