THE USE OF AN ALTERED SONG IN AMATEUR MUSICAL PRODUCTIONS AS COPYRIGHT INFRINGEMENT

CYNTHIA B. SOMERVILL*

I. INTRODUCTION

Nearly everyone has participated in amateur skits and musical productions—whether as performer, producer, stagehand, or simply as a member of the audience—in which songs are performed with slightly altered lyrics to fit the setting and to comment upon certain events or circumstances. The setting might be a children's camp, a school or university, a club, or some civic organization. The object of the entertainment might be to poke fun at or draw attention to recent events or to customs and circumstances of being involved with such an organization or institution. The songs performed must of necessity be popular; the humor and entertainment result from hearing a recognizable song that has been made more identifiable by a slight change in lyrics to reflect local color.[1] One's enjoyment is further heightened when the songs are acted out, that is, performed with costumes and scenery related to the particular setting.

Whether or not an admission fee is charged, and despite their noncommercial character, such performances may infringe the song owners' copyrights unless the performances are licensed or are exempt from copyright law. Section 106 of the 1976 Copyright Act (the Act) invests the copyright holder of a musical or dramatic work with the exclusive right to perform the work publicly.[2] "To perform . . . a work 'publicly' " means "to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered. . . ."[3] This far-

* Associate at Ragsdale, Beals, Hooper & Seigler in Atlanta, Georgia; B.A., 1980, Rice University; J.D., 1983, University of Texas School of Law.

[1] *See, e.g.*, Salver, *Satire Crunches Politicians at Annual Cracker Crumble*, The Atlanta Journal and Constitution, Nov. 4, 1984, § D, at 2, Col. 4 ("The tune—'Ghostbusters'—was familiar, but the words sure weren't.")

[2] 17 U.S.C. § 106 (1982) [hereinafter cited as the Act].

[3] *Id.* § 101(1). "One of the principal purposes of [this] definition was to make clear that . . . performances in 'semipublic' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control." H.R. REP. NO. 1476, 94th Cong. 2d Sess. 64, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5677–78 [hereinafter cited as HOUSE REPORT].

reaching definition[4] of a public performance means that almost every musical performance must be licensed in order for one to publicly perform it. Depending on the nature of the work and the character of the performance, someone wishing to perform a song would apply to a performing rights society or to the composer or publisher of the song for a license. Nondramatic performances are licensed by performing rights societies, such as the American Society of Composers, Authors & Publishers (ASCAP),[5] under a blanket license permitting unlimited nondramatic performances of the covered repertoire. The right to perform a work dramatically is reserved to the composer, author, or publisher and is not covered by blanket licenses.

Given the pervasiveness of nondramatic performances, most organizations and institutions have obtained blanket licenses from a performing rights society. If the amateur performances described above can be characterized as nondramatic, they are probably already covered under the sponsoring organization's blanket license agreement. On the other hand, if the performances are considered dramatic, and the copyright holder has not licensed them, a finding of infringement may be found unless a defense exists. The defense most appropriate under the hypotheticals discussed in this Article is that of fair use. Section 107 of the Act exempts the fair use of copyrighted material, including the use in a parody, from penalties for infringement.[6] This Article will examine the use of an altered song in these generally-known amateur productions to determine whether the performances are considered nondramatic and thereby permitted under a blanket license or whether, if such performances are considered dramatic, they are nevertheless exempt as parody under the fair use defense.

---

[4] Any unlicensed, live, or recorded performance in a public place may infringe on the copyrighted work. Live performances at clubs, restaurants and dance halls may infringe even though no admission is charged for hearing the music. *See, e.g.*, Herbert v. Shanley Co., 242 U.S. 591 (1917); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929). Likewise, broadcasting radio music over a loudspeaker at a restaurant or disco or playing music over an intercom in an elevator or department store may constitute an infringing performance. *See* Finklestein, *Public Performance Rights in Music and Performance Rights Societies*, 7 COPYRIGHT PROBLEMS ANALYZED 69, 74–79 (1952).

[5] Other performing rights societies are Broadcast Music, Inc. (BMI) and Society of European Stage Authors & Composers (SESAC, Inc.). Each regulates a different repertoire. Finklestein, *supra* note 4, at 75; S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 157–72 (4th ed. 1979).

[6] 17 U.S.C. § 107.

II. Dramatic and Nondramatic Performances

A blanket license from a performing rights society covers only nondramatic performance rights, sometimes called "small rights," which must be distinguished from dramatic performance rights, or "grand rights," that are licensed by the composer, writer, publisher, or other agent.[7] The distinction between nondramatic and dramatic performing rights can only be understood by examining the performance; whether the work is of dramatic or nondramatic character is not determinative. In other words, while a song from a nondramatic work, such as *Lawyers in Love*, could be acted out and performed with costumes and scenery in such a way that the performance was dramatic and unlicensable by ASCAP or BMI, a song from a dramatic musical, such as *Evita*, when sung by a nightclub performer might be nondramatic. Blanket licenses cover only nondramatic rights because the members of performing rights societies, *i.e.* authors, composers, and publishers, grant only their nondramatic performing rights to the society.

Several reasons exist for the limitation.[8] The first, and most important, is economic. Nondramatic musical performances, performed, for example, by a singer in the local tavern, are widespread and difficult to detect. Organizing a performing rights society is a practical way of licensing such performances and collecting royalties. Although the efforts to collect a royalty from one such performance might not be worth the individual composer's while, royalties for nondramatic performances collectively amount to a large revenue.[9] However, royalties for a dramatic performance, such as the staging of the musical *Hello Dolly*, are potentially larger than those involved in the nondramatic performance of the nightclub singer and thus worth the composer's, author's, or publisher's individual efforts to negotiate.

The second reason for the limitation is that the writer or publisher wants to retain control over the quality of a dramatic performance of his work, as opposed to a nondramatic performance, because the dramatic performance has a greater impact on the artistic value of the particular work as well as on his works as a whole. For example, if a songwriter thought that the dramatic

---

[7] *See supra* text accompanying note 5.

[8] The discussion of the economic and artistic rationales that follows is largely derived from a telephone interview with ASCAP senior attorney I. Fred Koenigsberg (Nov. 8, 1984).

[9] S. Shemel & M. Krasilovsky, *supra* note 5, at 157.

performance of his song on a Las Vegas cabaret stage, amid partially nude showgirls, would harm the artistic value of the song, the songwriter could negotiate for a larger royalty fee to compensate him for that harm.[10] The royalty under a blanket license would not otherwise fully compensate the writer.

One final rationale for limiting a blanket license to nondramatic performance rights is to preserve for the writer or publisher of the nondramatic work the right to create or authorize derivative works[11] based on or incorporating the nondramatic song. Preservation of this right would have been especially significant to the creators of *Jesus Christ Superstar*, a rock opera, which evolved from a single nondramatic song by the same name.[12] Had the dramatic performances of the original nondramatic song been permitted under a blanket ASCAP license, such performances might have had an effect on the success of the subsequently-created opera.

In practice distinguishing between dramatic and nondramatic performances is difficult.[13] The form of license agreements developed by ASCAP and the courts' subsequent interpretation of them are the major references for distinguishing dramatic from nondramatic performances.

A. *ASCAP Agreements*

The ASCAP standard membership agreement, in which the copyright holder grants his nondramatic rights[14] to the Society, states that those rights granted shall include:

> (b) The non-exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and

---

10 Koenigsberg interview, *supra* note 8.

11 "A 'derivative work' is a work based upon one or more preexisting works. . . ." 17 U.S.C. § 101. Section 106 of the Act grants the owner of a copyright the exclusive right "to prepare derivative works based upon the copyrighted work. . . ." *Id.* § 106(2).

12 Note, *Small and Grand Performing Rights?*, 20 BULL. COPYRIGHT SOC'Y 19, 19 n.2 (1972–73).

13 S. SHEMEL & M. KRASILOVSKY, *supra* note 5, at 170–71.

14 The copyright holder, who may be the originator of the work, *i.e.*, the writer or composer, or a music publisher, regulates dramatic, or grand, performing rights.

If the *work* itself is nondramatic, the performance of it may be exempt from copyright infringement under section 110 of the Act. *See generally* Edwards, *Usages of Copyrighted Musical Works Permissible Without Acquiring a Copyright License, Assignment, or Release*, 6 J. COLLEGE & UNIV. L. 363, 374–78 (1979); Hartnick, *Performances at Schools and Colleges under the 1976 Copyright Act*, 8 SETON HALL L. REV. 667 (1978); Siegel, *Non-Profit Musical Performance Societies And The 1976 Copyright Act: Selected Problems And Possible Solutions*, 2 N. ILL. U.L. REV. 449, 461–65 (1982). These sources discuss exempt performances under section 110.

> dramatico-musical compositions, the *Owner* reserving and excepting from this grant the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.[15]

Under this definition, ASCAP cannot license the performance of an entire musical or the performance of even one song from a musical on the "legitimate stage." The term legitimate stage is not defined within the agreement but would certainly include Broadway, off-Broadway, and similar productions. Though one would not presume the performance of a school play, for example, to be on the legitimate stage, the proper inquiry is apparently not how legitimate the theatrical production is, but whether the performance has the trappings of a stage production.[16]

Once the copyright holder has granted his nondramatic rights to the Society, ASCAP in turn licenses such rights under one of its standard agreements, such as the General License Agreement for Restaurants, Taverns, Nightclubs, and Similar Establishments, which license

> does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:
>
> (i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;
>
> (ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;
>
> (iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;
>
> (iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).
>
> The term "dramatico-musical work" as used in this agreement, shall include, but not be limited to, a musical comedy, oratorio, choral work, opera, play with music, revue, or ballet.[17]

---

[15] AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AGREEMENT ¶ 1(b) (1976–1985) (hereinafter cited as GENERAL AGREEMENT).

[16] Koenigsberg, interview, *supra* note 8.

[17] AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, GENERAL LICENSE AGREEMENT—RESTAURANTS, TAVERNS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS ¶ 2(d)

Similarly, with regard to television broadcasting, the ASCAP license specifically delineates those performances that are and are not licensed by ASCAP.[18] The television license

> does not extend to or include the public performance by television broadcasting or otherwise of any rendition or performance of (a) any opera, operetta, musical comedy, play or like production, as such, in whole or in part, or (b) any composition from any opera, operetta, musical comedy, play or like production . . . in a manner which recreates the performance of such composition with substantially such distinctive scenery or costumes as was used in a presentation of such opera, operetta, musical comedy, play or like production. . . .[19]

A subsequent provision spells out a definition[20] of "dramatic" and "non-dramatic" performances:

> Any performance of a separate musical composition which is not a dramatic performance, as defined herein, shall be deemed to be a non-dramatic performance. For the purposes of this agreement, a dramatic performance shall mean a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action.[21]

Thus, the following TV broadcasts would be considered dramatic performances and not covered by the ASCAP license: an actual performance, in whole or in part, of a musical; the performance of any composition from a musical in which the scenery and costumes used are substantially the same as those used in an actual presentation; and, the performance of a separate, musical composition in a TV program in which the composition contributes to and "carries forward" the plot.

Under either license, if any musical composition is performed in a manner that tells a story or furthers a story, the performance will be considered dramatic. If the composition is from a dramatico-

---

(hereinafter cited as RESTAURANT LICENSE). The same language appears in AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, COLLEGES AND UNIVERSITIES EXPERIMENTAL LICENSE AGREEMENT ¶ 4(d) (hereinafter cited as COLLEGES AND UNIVERSITIES LICENSE).

18 S. SHEMEL & M. KRASILOVSKY, *supra* note 5, at 171.

19 ASCAP TELEVISION LICENSE, *quoted in* S. SHEMEL & M. KRASILOVKSY, *supra* note 5, at 171.

20 "The ASCAP television license represents the best efforts of music industry and broadcast industry representatives toward reaching a definition of dramatic performance rights." S. SHEMEL & M. KRASILOVSKY, *supra* note 5, at 170.

21 ASCAP TELEVISION LICENSE, *quoted in* S. SHEMEL & M. KRASILOVKSY, *supra* note 5, at 482 app. I.

musical work, merely performing it with any of the trappings that might call to mind the work from which the composition was taken will constitute a dramatic performance. If the composition is not from a musical or similar work, but is performed in the context of a drama, whereby it contributes to a plot or story, then the performance may also be dramatic and unlicensed.

B. *Case Law*

Few cases have considered the difference between a dramatic and nondramatic performance. When the issue has arisen, the alleged infringer usually possesses a nondramatic performing rights license and has been accused of putting on a dramatic performance. The court must then determine the type of performance in terms of the rights granted by the license.

In *April Productions, Inc. v. Strand Enterprises*,[22] plaintiff, copyright owner of a musical, claimed defendant's nightclub show infringed its copyright. The show consisted of ten scenes, one of which included the singing of a medley of songs from plaintiff's musical. Although defendant had an ASCAP license, and plaintiff's songs were among the ASCAP repertoire, plaintiff contended that the singing of its songs was an unlicensed dramatic performance and thus an infringement. Finding the plaintiff's songs did not contribute to the main theme of the nightclub act, the court held that the performance was not dramatic, but was merely an *entr'acte*.[23] Under the ASCAP license,[24] as interpreted by the court, the performance of a noninstrumental musical composition, consisting of both lyrics and music, would be dramatic only if accompanied by words, pantomime, dance, or visual representation from the dramatico-musical work from which the composition was taken. Thus, a licensee would need to obtain

---

[22] 221 F.2d 292 (2d Cir. 1955).

[23] "Even if [the nightclub] put on a dramatic performance, the [plaintiff's] selections were not part of it." *Id.* at 296.

[24] The ASCAP agreement at issue was a standard license form that is no longer in use. The paragraph at issue was as follows:

> This license shall not extend to or be deemed to include:
> (a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments of instrumental selections from such works may be instrumentally rendered without words, dialogue, costume accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

April Productions, 221 F.2d at 293 n.*.

dramatic rights only when he wanted to perform the composition accompanied by any material from the same dramatico-musical work. Professor Nimmer has criticized *April Productions* for its overly broad definition of the rights granted a licensee pursuant to an ASCAP license.[25] He believes the decision implies that with an ASCAP license one could legitimately perform all the musical compositions from a musical play provided the performance did not include dialogue, scenery, or costumes from that play.[26]

Rice v. American Program Bureau,[27] one of the many disputes[28] over the performance of the rock opera *Jesus Christ Superstar*, also concerned the scope of nondramatic rights granted by an ASCAP license. In *Rice*, as in *April Productions*, the court analyzed the same paragraph of the ASCAP license to determine whether the defendants' performance exceeded the license granted and thus infringed plaintiff's copyright; the resulting interpretations, however, were somewhat different. The *Rice* court found that "ASCAP only licenses the presentation of the separate songs in its repertoire. This includes the lyrics of the particular song . . . but does not permit the use of words, dance, pantomime, or visual representation that might aid in telling the plot of the overall play or opera."[29] Defendants were enjoined from performing the opera in its entirety and from performing songs or excerpts accompanied by "words, pantomime, dance, costumes, or scenery that will lend a visual representation of the work from which the music is taken."[30] Whereas the *April Productions* court forbade a song's performance when accompanied by the words and pantomime from the original work, the *Rice* court prohibited a song's performance when the accompaniment might merely "lend a visual representation of the work."[31] The latter is a more restrictive interpretation.[32] Under *Rice*, the performance of a single song from a musical may be dramatic even if the song is accompanied

---

[25] "This decision, if followed, could mean the virtual extinction of dramatic (or grand) performing rights with respect to noninstrumental musical compositions." 3 M. NIMMER, NIMMER ON COPYRIGHT § 10.10[E] (1982). *See also* Note, *supra* note 12, at 26–27.

[26] 3 M. NIMMER, *supra* note 25.

[27] 446 F.2d 685 (2d Cir. 1971).

[28] See cases cited in Robert Stigwood Group, Ltd. v. Sperber, 457 F.2d 50, 51 n. 1 (2d Cir. 1972).

[29] 446 F.2d at 689 (citation omitted).

[30] *Id.*

[31] *Id.*

[32] Note, *supra* note 12, at 31.

by words or dance not taken from the original musical from which the song was taken.

In *Robert Stigwood Group Ltd. v. Sperber*,[33] also a copyright infringement action, the Second Circuit again considered whether certain performances of songs from *Jesus Christ Superstar* were nondramatic and thus within the rights granted by an ASCAP license. Defendants were presenting concerts of the rock opera in which twenty of the twenty-three songs were performed, essentially in sequence, albeit without costumes, scenery, or dialogue. Finding the performances to be dramatic, the court did not consider important the presence or absence of scenery and costumes, but focused instead on the story line and sequential presentation of defendant's performances: "There can be no question that [defendant's] concerts, . . . in which the story line of the original play is preserved by the songs which are sung in almost perfect sequence using 78 of the 87 minutes of the original copyrighted score, is dramatic."[34] Sequential presentation of the copyrighted songs from the rock opera, by which the story line was retold, especially concerned the court:

> The sequence of the songs seems to be the linchpin in this case. If the songs are not sung in sequence, i.e., no song follows another song in [defendant's] concert in the same order as the original opera, and there are no costumes, scenery, or intervening dialogue, we are confident that the resulting performance could not tell the story of *Jesus Christ Superstar*.[35]

Defendants were enjoined from, *inter alia*, performing any two songs in the same order as in the original and performing *any* songs accompanied by dramatic action, scenery, or costumes. The injunction seems most restrictive, but it was necessary in view of the type of musical composition with which the court was dealing, that is, an opera. As the court recognized, even "radio performances of operas are considered dramatic, because the story is told by music and lyrics."[36]

Gershwin v. The Whole Thing Co.,[37] a more recent case, was brought to enjoin the performance of a musical play, *Let's Call the Whole Thing Gershwin*. The musical was composed of forty Gershwin songs, dance routines, some scenery, and limited dialogue.

---

[33] 457 F.2d 50 (2d Cir. 1972).
[34] *Id.* at 55.
[35] *Id.* at 55–56.
[36] *Id.* at 55.
[37] 208 U.S.P.Q. (BNA) 557 (C.D. Cal. 1980).

Although the court was not required to decide the issue,[38] it did consider whether the performances infringed the grand rights in the songs, some of which were taken from Gershwin musicals. The court set forth two basic tests for dramatic performances: a performance is dramatic when "a song is used to tell a story"[39] or when "a song is performed with dialogue, scenery, or costumes. . . ."[40] These tests, however, are deceptive for they represent two entirely different viewpoints. Professor Nimmer suggested the former definition after rejecting the latter definition as both too broad and too narrow: the definition is too broad because it includes performances without dialogue, scenery, or costumes which are dramatic; it is too narrow for it includes performances with such trappings that are nevertheless nondramatic.[41] Under this analysis, the *Gershwin* court's statement of two alternative tests for determining dramatic performances would probably be invalid.

C. *School Skits, Revues, and Other Amateur Productions*

Given the above indications of what dramatic and nondramatic performances are, this Article will now focus on the amateur skit or revue in which songs are performed with lyrics slightly altered to comment on and poke fun at the organization or institution sponsoring the production. The performance may or may not be dramatic depending on the nature of the performance and the wording of the organization's small rights license, if any.

As an example, a school might produce a comedy revue including skits written by students complete with appropriate costumes and scenery. One or more of the skits may involve singing a song from a well-known musical. The skit might poke fun at teachers or customs of the school, and the song, the lyrics of which have been altered, "fits in" with the skit. Under one definition of the general ASCAP license agreement, the performance would appear to be nondramatic because the song is not accompanied by dialogue, scenery, or costumes "*of the work* from which

---

[38] The court only needed to determine whether serious questions were raised "sufficient to require litigation" and whether "the balance of hardships tips sharply in favor of the plaintiff." *Id.* at 560. The court's choice of definitions, however, suggests that defendants would lose on the issue if it were decided.

[39] *Id.* (citing 3 M. NIMMER, *supra* note 25).

[40] *Id.* (citing Finklestein, *The Composer and the Public Interest—Regulation or Performing*, 19 LAW & CONTEMP. PROBS. 275, 283 n. 32 (1954) (Herman Finklestein was General Counsel for ASCAP).

[41] 3 M. NIMMER, *supra* note 25.

the music is taken,"[42] nor would the accompaniment "lend a visual representation *of the work* from which the music [was] taken."[43] Rather, the song is performed in a new context, unrelated to the work from which the original song was taken. It could be argued, however, that the song is an integral part of the skit's plot development and is thus "woven into and carries forward the plot and its accompanying action,"[44] which would constitute a dramatic performance under the ASCAP television license. Moreover, under another definition in the restaurant license, it could be easily shown that the song is performed "as *part of* a story or plot whether accompanied or unaccompanied by dialogue, pantomime, dance, stage, action, or visual representation,"[45] and is therefore a dramatic performance.

If the school in the above example did not have a small rights license, other definitions of a dramatic performance might be relevant. Herman Finklestein, ASCAP's former general counsel, claimed a performance would be dramatic if any dialogue, scenery, or costumes existed.[46] Professor Nimmer's test, similar to that in the ASCAP general license agreement, inquires whether the performance "aids in telling a story"[47] or whether the continuity of the skit would be impeded or obscured by deleting the song's performance.[48] Applying this test would depend, of course, on the skit. A skit that calls for a performer suddenly to burst into song without warning may not rely heavily on the song for its plot development, whereas a skit in which the action leads up to the song does. Another approach suggests the application of the "ordinary observer" test: "If to an audience a story is being depicted by the use of the musical compositions, such use would result in a dramatic performance."[49]

In contrast to the above example is the performance of a song with slightly altered lyrics sung between skits. The skits might portray separate and distinct incidents, and the song reflects the general theme of the production, or comments on an aspect of the theme that is unrelated to the skits. Even if the song is performed with costumes and scenery, the performance is

---

[42] RESTAURANT LICENSE, *supra* note 17, at ¶ 2(d)(ii) (emphasis added).
[43] *Rice*, 446 F.2d at 689 (emphasis added).
[44] ASCAP TELEVISION LICENSE, *quoted in* S. SHEMEL & M. KRASILOVSKY, *supra* note 5, at 171.
[45] RESTAURANT LICENSE, *supra* note 17, at ¶ 2(d)(iii) (emphasis added).
[46] Finklestein, *supra* note 40.
[47] 3 M. NIMMER, *supra* note 25.
[48] *Id.*
[49] Note, *supra* note 12, at 39.

really an *entr'acte* as in *April Productions*[50] and not a dramatic rendition, for it stands alone and contributes to no story or plot. On the other hand, a court might be persuaded that this kind of performance is dramatic under Mr. Finklestein's definition because of the existence of costumes and scenery.

Yet another example of a possible dramatic performance is a "take-off" on an entire musical. For instance, the Broadway musical *A Chorus Line* lends itself to a take-off in many contexts, one of which might be job interviews at law school. Instead of performing the various compositions in the context of dancers in a chorus line, the lyrics, dance routines, and costumes might easily be altered to portray the experiences of law students. As in the first example, the costumes and scenery would not be from *A Chorus Line*, nor would they "lend a visual representation"[51] of *A Chorus Line*: the result would be a wholly different musical play. Nevertheless, the musical performances would tell a story and be part of a story, albeit that of law students not dancers, by the sequential presentation of the compositions. This would be a dramatic performance under the rule of *Robert Stigwood Group, Ltd. v. Sperber*[52] as well as under the definitions in the ASCAP licenses. This type of performance, moreover, is similar to what Professor Nimmer had in mind when he criticized the decision in *April Productions* for its broad interpretation of nondramatic rights.[53]

As the above examples indicate, dramatic performances are prevalent in amateur productions. Such performances are not licensed by the commonly-held ASCAP agreements, and it is unlikely that permission from the copyright holder has been requested or granted. These performances may, however, be exempt from copyright infringement as parody.

III. PARODY

Fair use has been defined as "a privilege in others than the owner of [the] copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."[54] It is an equitable doctrine that has developed judicially over an extended

---

[50] 221 F.2d at 296.
[51] *Rice*, 446 F.2d at 689.
[52] 457 F.2d 50 (2d Cir. 1971).
[53] *See supra* notes 25 & 26 and accompanying text.
[54] H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) (footnotes omitted).

period of time.[55] Among the uses of copyrighted material considered "fair" are those for criticism and comment, including the "use in a parody of some of the content of the work parodied. . . ."[56]

Section 107 of the Act codifies the judicial doctrine of fair use and requires a court to consider the following four factors, among others, in determining whether a use is fair:

(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.[57]

These four factors summarize the holdings and rationale of definitive case law. The wording of the statute mandates consideration of at least those factors listed. However, the particulars of each case often invite a court to focus on only one or two factors in reaching its decision. The following discussion highlights those factors which have been most decisive.

A. *Amount and Substantiality Of The Taking*

The amount of the copyrighted work appropriated by the parodist has persisted as a major factor in determining whether the parody constitutes fair use of the work in question. As a result, several viewpoints have emerged concerning the amount of permissible taking.

1. Near-Verbatim Copying

As a rule of thumb, near-verbatim copying of an entire copyrighted work will not be considered fair use. An illustration of this threshold test[58] is seen in *Walt Disney Productions v. Mature Pictures Corp.*,[59] a copyright infringement action brought to enjoin

---

[55] HOUSE REPORT, *supra* note 3, at 65.
[56] *Id.*
[57] 17 U.S.C. § 107.
[58] Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978). *Air Pirates* concerned the use of Walt Disney characters in comic books that portrayed the characters as sex and drug-loving. Although the copying was not found to be verbatim, the parody defense was rejected, because little was needed to conjure up or recall the well-known Disney characters. For a discussion of the recall or conjure up test, see *infra* notes 64–68 and accompanying text.
[59] 389 F. Supp. 1397 (S.D.N.Y. 1975).

the use of the *Mickey Mouse March* as background music for a scene in the movie, *The Life and Times of the Happy Hooker*. Though defendants claimed that the music was used to " 'highlight and emphasize the transition of . . . teenagers from childhood to manhood . . . in a highly comical setting,' "[60] the court found that the use was far from a parody. Because the song was completely reproduced in the movie performance without any alterations except for the setting, the court held that the use of the song was outside the scope of permissible parody.[61]

Near-verbatim copying of the characters, dialogue, and plot of the book and movie *Gone With the Wind* was also central to the court's decision in *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions*.[62] Plaintiffs sought to enjoin defendant's three-hour musical play, *Scarlett Fever*, which closely tracked the plot of the original movie but changed the names of the characters, added song-and-dance routines, and injected comedy. The court found that *Scarlett Fever* was in essence a comic stage version of *Gone With the Wind* and based its holding for plaintiffs, in part, on the ground that *Scarlett Fever* was "predominantly a derivative or adaptive use of the copyrighted film and novel"[63] and not a parody.

2. Amount Necessary to Recall or Conjure Up Original

If a parody passes the threshold test for near-verbatim copying, it must then be subjected to the main test of the amount taken; whether the use appropriates more than is necessary to recall or conjure up the original work. *Berlin v. E.C. Publications, Inc.* is often cited for its statement of the conjure up test: "[w]here the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper."[64] Plaintiffs in *Berlin* brought suit for infringement when *Mad Magazine* published parody lyrics of popular songs with in-

---

60 *Id.* at 1398.

61 For criticism of this principle, see Comment, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163, 187–88 (1981).

62 479 F. Supp. 351 (N.D. Ga. 1979) (order granting preliminary injunction), *partial summary judgment granted*, 1981–3 COPYRIGHT L. DEC. (CCH) ¶ 25,313 (N.D. Ga. 1981), *permanently enjoined*, 1981–3 COPYRIGHT L. DEC. (CCH) ¶ 25,314 (N.D. Ga. 1981). The court found enough originality in defendant's production so that it passed the threshold test, *i.e.*, the production was *not* near-verbatim copying of the original, but found that defendants had taken much more of the original than was necessary to recall or conjure it up. 479 F. Supp. at 359.

63 479 F. Supp. at 355.

64 329 F.2d 541, 545 (2d Cir. 1964).

structions that they be sung to the tunes of the originals. Even though the title and meter of the parodies were similar to those of the originals, and the parodies used phrases of the original lyrics, the court held the uses permissible in that the parodies did no more than was necessary to conjure up or recall the original.

In *Walt Disney Productions v. Air Pirates*,[65] the court's application of the recall or conjure up test resulted in an adverse holding for the would-be parodists. Defendants published "counter-culture" comic books in which Mickey Mouse and other Disney characters were portrayed as sex and drug-loving. The court found that defendant's copying was not verbatim but that defendants had taken more than was necessary to conjure up the originals, "given the widespread public recognition of the major characters involved here, such as Mickey Mouse and Donald Duck. . . ."[66]

Yet another example of a court's application of the conjure up test is found in *Elsmere Music, Inc. v. National Broadcasting Co.*[67] A copyright infringement action, *Elsmere* concerned a "Saturday Night Live" skit that parodied a popular New York public relations campaign by comparing it to a campaign for the Biblical city of Sodom. As part of the skit, the Saturady Night Live cast sang *I Love Sodom* to the tune of the advertising jingle, *I Love New York*, repeating the chorus several times. Plaintiff contended that defendant had appropriated more than was necessary to conjure up the original, and defendant countered that taking only four notes of the song and the words "I Love" was *de minimis*. The court disagreed with defendant and found that the parody had taken the heart of the original composition, but nevertheless held, *inter alia*, that the parody passed the conjure up test.[68]

3. More Extensive Use

Some authority exists for the principle that a parody may take *more* than is necessary to conjure up the original. In a per curiam affirmance of *Elsmere*, the Second Circuit noted that the conjure up test is not a limitation on how much a parodist may appropriate, but is merely a starting point: "A parody is entitled at least to 'conjure up' the original. Even more extensive use

---

[65] 581 F.2d 751 (9th Cir. 1978).

[66] *Id.* at 757. For a general discussion of Walt Disney Productions' thoroughness in administering its copyrights, see Lawrence, *The Administration of Copyrighted Imagery: Walt Disney Productions*, in FAIR USE AND FREE INQUIRY: COPYRIGHT LAW AND THE NEW MEDIA 158 (J. Lawrence & B. Timberg eds. 1980).

[67] 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

[68] 482 F. Supp. at 744–47.

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."[69] Admittedly, the statement appeared in a footnote, but it has been cited approvingly.[70]

Moreover, in *Pillsbury Co. v. Milky Way Productions*,[71] an action for copyright and trademark infringement, the court found that defendants had appropriated more than was necessary to conjure up the originals, yet held that such a taking did not preclude a finding of fair use. Defendant Milky Way had published in its *Screw* magazine a picture of figures resembling Pillsbury's characters Poppin' Fresh and Poppie Fresh engaged in sexual acts, accompanied by the Pillsbury barrelhead trademark and the refrain from the Pillsbury jingle. As in *Air Pirates*,[72] very little copying was needed to suggest the object of the defendants' parody—here, the trade characters Poppin' Fresh and Poppie Fresh. The court nevertheless held that defendants' substantial taking was outweighed by the minimal harm on the demand for the original.[73]

Pillsbury is further bolstered by *Sony Corp. of America v. Universal City Studios, Inc.*[74] (*Betamax*), which held that verbatim copying "does not have its ordinary effect of militating against a finding of fair use" when the copying is noncommercial and has "no demonstrable effect upon the potential market for, or the value of, the copyrighted work. . . ."[75] Although not a parody case, *Betamax* clarifies that the amount and substantiality of the taking is only one of several factors to consider in determining fair use. *Betamax* suggests that near-verbatim copying is no longer the threshold test of permissible parody, if the parody is noncommercial.[76]

---

[69] 623 F.2d at 253 n.1.

[70] MCA, Inc. v. Wilson, 677 F.2d 180, 188–90 (2d Cir. 1981) (Mansfield, J., dissenting). *See also* Pillsbury Co. v. Milky Way Productions, 1982 COPYRIGHT L. DEC. (CCH) ¶ 25,466 at 17,793 (N.D. Ga. 1981) ("the fact that the defendants used more than was necessary to accomplish the desired effect does not foreclose a finding of fair use").

[71] 1981–3 COPYRIGHT L. DEC. (CCH) ¶ 25,466 (N.D. Ga. 1981).

[72] 581 F.2d 751.

[73] 1981–3 COPYRIGHT L. DEC. (CCH) ¶ 25,466 at 17,793.

[74] 104 S.Ct. 774 (1984).

[75] *Id.* at 793. In *Betamax*, the Court held that the defendant had not contributed to infringement of plaintiff's copyrights by selling video recorders and that home videotaping of entire television programs is a fair use.

[76] *See* Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After* Betamax, 97 HARV. L. REV. 1395, 1409–12 (1984) (suggesting a three-part approach to fair use). *But see* Boorstyn, *The Doctrine of Fair Use*, COPYRIGHT L.J., (July 1984) 2, 4 (*Betamax* should be limited to its facts).

B. *Purpose and Character of the Use*

When considering the purpose and character of the use in parody cases, the courts have focused on whether the use is commercial, which "tends to cut against a fair use defense,"[77] and whether, to be valid, the parody comments upon the original.

1. Parodying the Original

Though the court's holding in *Mature Pictures*[78] was based mainly on the ground that defendants' copying was near-verbatim, the court also noted that "[w]hile defendants may have been seeking . . . to parody life, they did not parody the Mickey Mouse March. . . ."[79] The idea that a valid parody must comment on or parody the original has been addressed in several cases. In *Showcase Atlanta*, for example, the court based its holding in part on a finding that *Scarlett Fever* was not a protectible parody because "the type of parody eligible for fair use protection . . . must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist—thereby giving the parody social value beyond its entertainment function."[80]

Happily for parodists, other courts have declined to follow the requirement that a parody must comment upon the original. In *Elsmere*, the court rejected the requirement, relying on *Berlin*: "[T]he issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself."[81]

2. Commercial Character

The more important consideration in determining the purpose and character of the parodist's use is whether the use is commercial, that is, whether "it is an attempt to capitalize financially on the . . . original work."[82] Such use was litigated in *DC*

---

[77] Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980). *Accord*, *Betamax*, 104 S.Ct. at 793.

[78] 389 F. Supp. 1397. *See supra* notes 59-61 and accompanying text.

[79] *Id.* at 1398.

[80] 479 F. Supp. at 357 (footnotes omitted). *See supra* notes 62-63 and accompanying text.

[81] 482 F.Supp. at 746 (footnotes omitted). *See also MCA, Inc.*, 677 F.2d at 190 ("permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general").

[82] *Pillsbury*, 1981-3 COPYRIGHT L. DEC. (CCH) ¶ 25,466 at 17,791-92.

Comics, Inc. v. Crazy Eddie, Inc.,[83] in which defendants had produced a television commercial that was a take-off on well-known aspects of the "Superman" television series and movie. The use was purely commercial and profit-motivated, though humorous, and the court rejected the fair use defense.

Similarly, in *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*,[84] the court held that defendant's television commercial infringed plaintiff's copyright in its "Be A Pepper" commercials. Defendant had attempted to parody plaintiff's commercials with its "Dancing Seniors" ad, but its purpose was to increase its own profits. In addition, defendant's advertising tended to detract from the originality of plaintiff's commercial; thus, the court refused to find fair use.

On the other hand, simply because a parody is offered for sale or is connected with a profit-making activity, it is not precluded by the fair use defense. In *Pillsbury*, the court found that the inclusion of parodied material in a magazine which was offered for sale was not a commercial use of the parody.[85] Likewise, in *Berlin*, the fact that the lyrics of a parody were reprinted in *Mad Magazine* did not affect the viability of fair use as a defense.[86]

C. *Effect on Market or Demand for Original*

Closely related to a consideration of the commercial character of a parody is the determination of the effect a parody has "upon the potential market for or value of the copyrighted work,"[87] that is, whether the parody has "the effect of fulfilling the demand for the original. . . ."[88] This factor has been called the "central fair use factor"[89] and reflects most closely the underlying purpose of copyright law—to encourage artistic expression by giving the artist certain exclusive rights in his creations.[90] A finding that a parody does or does not affect the market for the

---

[83] 205 U.S.P.Q. (BNA) 1177 (S.D.N.Y. 1979).

[84] 517 F.Supp. 1202 (N.D. Tex. 1981).

[85] 1981-3 COPYRIGHT L. DEC. (CCH) ¶ 25,466 at 17,792. *See supra* notes 71-74 and accompanying text.

[86] "[T]he plaintiffs broadly maintain, 'copying for commercial gain may never be fair use' and thus, in effect, they refuse to recognize parody and burlesque as independent forms of creative effort possessing distinctive literary qualities worthy of judicial protection in the public interest." 329 F.2d at 543.

[87] 17 U.S.C. § 107(4).

[88] *Berlin*, 329 F.2d at 545.

[89] 3 M. NIMMER, *supra* note 25, § 13.05[A][4] (footnote omitted).

[90] U.S. CONST. art. I, § 8.

copyrighted work will often determine whether such use is a fair use.

Professor Nimmer asserts that the market-effect factor must be considered in light of a functional test.[91] This test compares not only the media in which the two works appear but also the function of each work. An example of the application of the functional test is *Showcase Atlanta*.[92] Defendants attempted to parody the book and movie, *Gone With The Wind*, by producing a musical take-off to be performed on stage. The parody's stage version probably did not harm the sale of the book or movie, but could have adversely affected the market for the staging of the original. Though defendants argued that a previous, authorized stage version of *Gone With The Wind* had failed and that no such other production was planned, the court properly held that *Scarlett Fever* harmed the potential market for a future authorized stage version.[93]

Recently, in *D C Comics Inc. v. Unlimited Monkey Business, Inc.*,[94] the district court held that the defendants' singing telegram business, which featured costumed characters named "Super Stud" and "Wonder Wench," infringed the plaintiff's copyrights and trademarks in the comic book characters "Superman" and "Wonder Woman." Observing that the parties conducted similar businesses in providing entertainment, the court found that defendants' alleged parodies had the potential of affecting plaintiff's market for its characters. Because defendants advertised their characters in a manner that emphasized the similarities with plaintiff's characters,[95] the court concluded that a market for genuine Superman or Wonder Woman singing telegrams existed. Defendants' practices thus harmed plaintiff's ability to successfully enter that market notwithstanding the fact that defendants' business was much smaller than plaintiff's.[96]

Another example in which the functional test can easily be

---

[91] 3 M. NIMMER, *supra* note 25, § 13.05[B].

[92] 479 F. Supp. at 361.

[93] *Id.* at 360.

[94] No. C82-2264A (N.D. Ga. Oct. 10, 1984).

[95] One advertisement enticed customers to " 'send Superman to pick up your friends at the airport,' " *id.* at 21, and defendants used Superman and Wonder Woman balloons in their skits. *Id.* at 13.

[96] The court also held the defendants' skits harmed the value of plaintiff's copyrighted works because of the "implicit disparagement and bawdy associations undisputably created by some of defendants' adaptations." *Id.* at 21. This holding does little to advance the understanding of fair use and improperly attributes to copyright holders protection from less palatable criticism and comment. *See* Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615, 635-36 (1979); Note, *supra* note 76, at 1406. *See also Pillsbury*, 1981-3 COPYRIGHT L. DEC. (CCH) ¶ 25,466 at 17,792 &

seen to apply is in *Dr. Pepper Co.*[97] The parody and the original work both appeared on television and the function of each was the same—to advertise a product. Given the result of the functional test, it was not difficult for Dr. Pepper Co. to prove its advertising campaign would be harmed by the parody.

That the *Mad Magazine* parodies did not substitute for the original copyrighted works was important to the court's holding in *Berlin*.[98] Plaintiffs could not show that the publication of parodied lyrics harmed their copyrights in any particular manner. In fact, the court would not even have entertained the suggestion that someone wanting the lyrics to *A Pretty Girl Is Like a Melody* would purchase an issue of *Mad Magazine* in which the lyrics to *Louella Schwartz Describes Her Malady* appeared.[99] The parodies, which appeared in a humor magazine, performed an entirely different function than the original Irving Berlin lyrics.

The *Berlin* holding was supported by the court's finding that defendants had taken no more than was necessary to conjure up the original lyrics. In *Pillsbury* and *Elsmere*, however, the respective courts found that the defendants used significant amounts of the original works yet nevertheless held the uses fair because they did not compete with the original works. The district court in *Elsmere* summarily dismissed the idea that performing the song *I Love Sodom* would compete with or detract from the *I Love New York* jingle and advertising campaign.[100] After considering a fuller record than in *Elsmere*, which included testimony from plaintiff's executives, the court in *Pillsbury* concluded that the parodies of the Pillsbury trade characters would cause at most *de minimus* economic harm.[101] The testimony indicated that the company had not suffered any economic harm from similar unauthorized parodies in the past and that the company had not suffered any injury from the Milky Way Publication. The court therefore refused to presume any economic harm despite the "salacious content" of defendants' magazine.[102]

---

n.10 (concluding that the Copyright Act contains no "obscenity" exception to the fair use defense).

97 517 F. Supp. 1202.

98 329 F.2d at 545.

99 *Id.* at 543.

100 482 F. Supp. at 747.

101 1981-3 COPYRIGHT L. DEC. (CCH) ¶ 25,466 at 17,790-91.

102 *Id.* at 17,792. Plaintiff had argued that as a "pornographic adaptation" defendants' parody was less deserving of protection under the fair use doctrine. *Id.* The court noted "the fact that this use is pornographic in nature does not militate against a finding of fair use." *Id.* (footnote omitted).

On the other hand, in *MCA, Inc. v. Wilson*,[103] the appellate court started from the premise that the works were competing pieces because both were exploited in the same media. MCA, Inc. brought suit for infringement of its copyright in the song *Boogie Woogie Bugle Boy* by the song *Cunnilingus Champion of Company C*, which was part of defendant's musical, *Let My People Come*. Writing for the majority, Judge Van Graafeiland did not even consider whether *Champion* would affect the market for or fulfill the demand for *Bugle Boy* but summarily concluded that plaintiff and defendant were competitors in the entertainment field because both songs were performed on stage and sold as recordings and in printed copies.[104] The opinion exemplifies a misapplication of the market-effect factor because of its exclusive focus on media and illustrates the importance of Professor Nimmer's functional test, which requires an examination of both function and media. Had the court closely compared the function of the two works, it probably would have held for defendants. As the dissent pointed out, *Champion* could not serve as a substitute for *Bugle Boy*: "a customer for one would not buy the other in its place."[105]

D. *Skits, Revues, and Other Amateur Productions As Permissible Parodies*

In light of the above fair use factors and illustrative cases, this Article now returns to the amateur performances described earlier[106] to consider whether they would be exempt from copyright infringement liability.

Applying the threshold test for permissible parody to the three types of amateur performances indicates that none of the songs were copied verbatim from the originals. The lyrics of the songs were creatively altered to comment upon certain events or circumstances, and the songs were not merely performed in a new setting.[107] Rather, the original songs served as starting points for something new.

Whether or not the performances could be said to take more than necessary to conjure up the original requires a considera-

---

[103] 677 F.2d at 180 (2d Cir. 1981), *aff'g*, 425 F. Supp. 443 (S.D.N.Y. 1976).

[104] 677 F.2d at 185. The dissent disagreed with the test used by the majority: "The issue is not whether the parody uses the same media as the copyrighted work—most parodies do—but whether it is 'capable of serving as a *substitute* for the original.'" *Id.* at 191 (quoting A. LATMAN, THE COPYRIGHT LAW 215 (5th ed. 1979)).

[105] 677 F.2d at 191.

[106] *See supra* text accompanying notes 42–54.

[107] *Cf. Mature Pictures*, 389 F. Supp. 1397.

tion of both lyrics and music. The amount of original lyrics needed to create a parody depends on the theme of the original song and the object of the parody. When the disparity between the themes of the original and the parody is great, not much of the lyrics from the original will be needed.[108] It is very likely that the music will remain unchanged in these amateur performances, but such copying appears to be permissible. In *Elsmere*, the altered lyrics were sung to the original music, yet the court held the taking was within the realm of the conjure up test.[109] Much of the humor and entertainment that result from hearing a well-known musical piece translated into a new context by changing the lyrics would be lost if the music were not recognizable. Thus, using the tune of the original song is necessary to conjure it up for these amateur performances. On the other hand, if it were determined that performing the music from the original song in its entirety was more than needed to conjure it up, it could be argued that such an extensive use was permissible, given the holding in *Betamax*.[110]

Amateur performances clearly will not be construed as commercial given their purpose and character. Even if an admission fee were charged, any profit would likely be minimal. What profit would be generated would probably not be for private commercial gain but for the school or civic organization sponsoring the production.

The amateur performances would not be allowed fair use protection if a court were to follow the line of cases which hold that a protectible parody must comment upon the original work.[111] As depicted above, the performances would comment on or poke fun at events, customs, or circumstances surrounding a particular institution or organization. The commentary would have little relevance to the song or musical from which the song is taken. Nevertheless, it is unlikely that this factor alone would preclude fair use protection since other cases seem to invalidate such a definition of a protectible parody.[112]

Turning to the final fair use factor, the market-effect factor, the amateur performances should be classified as permissible parody because they do not substitute for the original songs, and any harm they cause is minimal. First, the parodies would proba-

---

[108] *Berlin*, 329 F.2d at 545.
[109] 482 F. Supp. at 744.
[110] 104 S.Ct. at 774.
[111] *See supra* text accompanying notes 78–80.
[112] *See* cases cited *supra* note 81.

bly be displayed in only one media, the stage. The "stage" as a media for these amateur performances would have little resemblance to the "stage" on which one would find the original works—Broadway. Any amateur production would last for only a short period of time, involving two or three performances, unlike its more professional counterpart. Moreover, it is unlikely the parodies would be exploited in any other media, such as recordings or sheet music.[113]

Second, the function of the amateur performances would be markedly different from that of the original works. Both a parody and its object, in a broad sense, do entertain,[114] but a parody sung in a school skit would not necessarily be in the same style as or have the same content as the original song. The parodies described in this Article have a limited focus and subject matter and would not be appreciated by anyone unfamiliar with the local color. These parodies would therefore not appeal to the same audience as would their objects, the original works.

From the above analyses of media and function, it can be concluded that the amateur performances would not fulfill the demand for the original works. These parodies are not substitutes for originals. An audience wishing to see the Broadway musical *A Chorus Line*, for example, would not leave an amateur performance of a parody of that musical, involving law students rather than dancers, feeling satisfied. The market for such a parody is very narrow, and thus, the effect of the parody on the much broader market for the original is minimal.

IV. Conclusion

Almost any performance of copyrighted music in a public place can evoke a claim of copyright infringement by the copyright holder. Noncommercial and nonprofit amateur performances in which copyrighted songs are performed with slightly altered lyrics by a school, camp, or civic organization are no exception. To avoid infringement, an institution or organization should at least have a license from a performing rights society such as ASCAP. If the performances are to be staged with costumes, scenery, or dance, which may render the performances dramatic and thereby not covered by the ASCAP license, the organization should also consider obtaining permission from the

---

[113] *Cf. MCA, Inc.*, 677 F.2d at 185.

[114] *Showcase Atlanta*, 1981 Copyright L. Dec. (CCH) ¶ 25,313 at 16,777–78.

copyright holder in order to avoid the expense and inconvenience of a possible suit for infringement.

Nevertheless, in the event that the school or other institution does not obtain prior permission to dramatically perform an altered version of a song, this Article has demonstrated that such a performance would be fair use as a parody of the original song and thus exempt from copyright infringement. Although a copyright holder might argue that these amateur performances copy too much of the original and do not parody the originals, he or she would be hardpressed to argue that such performances cause any economic harm to the market for the originals. A high school class or the local junior service league generally will not be considered the competitor of, for instance, Walt Disney Productions.