HEARTBREAK HOTEL IN B-FLAT BROKE: MUSIC, MONEY AND (UN)FAIR USE

Fair use, an attempt to limit the scope of copyright's inherent monopoly, can overexpose artists to uses that damage both their profits and reputations. The remedy is an adoption of the moral rights theory, already accepted in Europe.

INTRODUCTION

"No man but a blockhead ever wrote except for money."
—Dr. Samuel Johnson[1]

There may be some who would sing just for the love of it, but if good music depended on love alone, there would be fewer tunes to fill our lives. Like all valuable commodities, even products of the soul require economic motivation.

But the successful artist, walking through the magic looking-glass of a platinum record, soon discovers that Alice's world is fraught with hazards. Through digitization, virtually any performance can readily be reduced to a form that allows unlimited reproduction with no generational degradation.[2] Once digitized, the performance can easily be modified to produce seemingly authentic variations of the original. Such manipulation can range from mild parody to scandalous misuse; it can rob the owner of expected profits or subject her to undeserved ridicule, and the perpetrator of such theft has a waiting getaway car in the form of the Internet, which can whisk stolen ideas away at the speed of light into jurisdictions where copyright laws are non-existent or underenforced.[3]

Such a result catapults us uncomfortably close to creating the mechanism for the perfect crime – or, at least, to a climate in which holders of musical property rights have little incentive for creative effort.

Ironically, however, the greatest threat to musical property may come not from the Internet, but from a legal doctrine fully

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[1] JAMES BOSWELL, THE LIFE OF JOHNSON (Christopher Hibbert ed., Penguin Books 1979).

[2] *See* Paul Torremans, Moral Rights in the Digital Age, 8 COPYRIGHT IN THE NEW DIGITAL ENVIRONMENT: THE NEED TO REDESIGN COPYRIGHT 99 (Irini A. Stamatoudi, et al. eds., 2000).

[3] Symposium, *Digital Technology and Copyright: A Threat or a Promise?* 39 J.L. & TECH. 291 (1999).

capable of leaving both penniless artists and major music companies singing *Heartbreak Hotel* – in B-flat broke.

I. VERSE 1: HISTORICAL BACKDROP

> "Having refused the poor what is necessary, they give the rich what is superfluous."
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> —Jules Dupuit[4]

Since England's Statute of Anne in 1710, the law has recognized a protectable right in intellectual property.[5] America quickly codified this in our own copyright act.[6] But therein lies a problem: the grant of a copyright is a legally sanctioned monopoly. In economic terms, a monopoly imposes a "deadweight loss," causing artificially high prices through restricted supply.[7] While normally anathema in our free market system, this privilege has long been allowed as a stimulant for creation of intellectual property. Cases dating back to Lord Mansfield held that "it is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary product of another man's work."[8]

Yet some critics urge that monopolistic output restriction is counter-productive, and that intellectual property should be in the public domain.[9] In criticizing such monopolies, one commentator has offered the colorful analogy of Victorian railroad companies that did not provide upholstered seats for third class passengers – not for the purpose of hurting the poor, but to frighten the rich into spending more: "Having refused the poor what is necessary, they give the rich what is superfluous."[10]

Arguments such as this have a strong populist appeal, and digitized copying has turned this arcane argument into a musician's real-world nightmare. The challenge is in part psychological: "the easier it is to copy . . . the stronger the perception of entitlement becomes."[11] Because digital technology can create copies virtually free of charge and transmit them to an unlimited audience, new

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4 JULES DUPUIT, ON TOLLS AND TRANSPORT CHARGES 23 (International Economic Papers No. 11, Elizabeth Henderson trans., 1962).

5 *See* Lyman R. Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223 (1966).

6 *See* 17 U.S.C. §§ 106-107 (2001).

7 *See* James Boyle, *Taking Stock: The Law and Economics of Intellectual Property Rights: Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination, and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2032 (2000).

8 Millar v. Taylor, per Lord Mansfield, 98 Eng. Rep. 201 (K.B. 1769).

9 *See* Boyle, *supra* note 7, at 2007.

10 *Id.*

11 *See* Symposium, *supra* note 3, at 293.

media such as the Internet arguably make intellectual property a "public good" – a non-excludable, non-depletable commodity which can be used by anyone without compensating its creator.[12]

Thus, the monopoly inherent in copyright protection has engendered criticism grounded in economic argument and public policy,[13] and the common law soon found a solution to this problem through the doctrine of fair use.[14]

II. VERSE 2: CURRENT LAW

"What is Truth?"

—Pontius Pilate[15]

What happens when a musician's creative genius is reduced to binary code and then improperly resold – or worse, digitally altered to express something the original artist never intended? At best, the musician is subject to economic loss; at worst, misrepresentation or ridicule. Yet when seeking to protect her rights, she may encounter the defense of "fair use."

Fair use is the right to use the copyrighted property of another. Conceived as an equitable exception to the monopoly a copyright holder enjoys, it has been recognized in American case law since 1839,[16] and is embodied in section 107 of the current Copyright Act: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright."[17]

Section 107 then lists some broadly defined purposes, such as criticism, comment, news reporting, or teaching, any one of which may be asserted as a defense to infringement. Assuming the use meets one of these broad purposes, four factors are considered in determining whether the use is "fair." These are:

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

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12 *See* Boyle, *supra* note 7, at 2012.

13 *See* Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L.J. 535, 542 (2001).

14 WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-17 (1st ed. 1985).

15 *John* 18:37-38.

16 *See* Gray v. Russell, 10 F.Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728).

17 17 U.S.C. § 107 (2001).

of the copyrighted work.[18]

Unfortunately, these neatly phrased elements are anything but well-defined, and rely on a highly subjective case-by-case analysis – an "equitable rule of reason" which "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[19] To make it harder, section 107's exceptions are explicitly non-exclusive, leaving room for the user of copyrighted material to invent creative excuses for the taking.

Pontius Pilate is said to have once asked, "What is truth?" In searching for the parameters of fair use, one could well ask the same.

III. CHORUS: HEARTBREAK HOTEL – HOW FAIR USE CAN ROB THE UNWARY

> "I once asked this literary agent what writing paid the best, and he said 'ransom notes.'"
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> —Gene Hackman as Harry Zimm, GET SHORTY[20]

Assume Jane, a respected musician, writes a song entitled "Walk Among the Clouds." It goes platinum. Joe, a starving satirist, writes a ribald parody entitled "Lost Among the Clouds," where a notorious criminal, awaiting execution, fantasizes the afterlife. Snippets of the melody evoke Jane's musical theme. But the words are sexually explicit, and Jane – a convert to conservative Islam – is humiliated. Does she have a remedy under current copyright law?

Perhaps not. One of the uses the law may deem to be "fair" is protected parody – defined as "a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule and in which some critical comment or statement about the original work is made. . . . "[21] This is said to give parody "social value beyond its entertainment function," because the purpose and character of the use is to make social and artistic commentary.[22] Even parodies which are obviously commercial in nature can be held fair use, since social and literary criticism are

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[18] *Id.* These tests are not co-equal. The fourth test, measuring the economic detriment to the infringed work, is the most significant of all. Failure to meet this test can result in denying fair use, even where the other section 107 factors are met. *See* Stewart v. Abend, 495 U.S. 207, 238 (1990).

[19] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

[20] GET SHORTY (MGM 1995).

[21] 18 AM. JUR. 2D *Copyright and Literary Property* § 84 (1985).

[22] *Id.*

accorded "substantial freedom."[23] One case even held that evidence of competing commercial use cannot be used as presumptive evidence against fair use where parody is involved.[24] Thus, Joe may pass the statutory hurdle of permissible purpose by claiming his song is both "criticism" and "commentary."

But more is at stake here than monetary loss from infringement. Jane's dignitary rights are also at issue, since her song has been altered to a form she never intended and a genre she would never have employed. This could harm her reputation, and thus her future economic marketability. And here the fair use doctrine may fail her totally.

Indeed, parody may be a legal sanctuary in which secondary users can find considerable protection,[25] and when they do, the most significant theft is not the artist's immediate profits, but her dignity.

In 1964, Roy Orbison and William Dees penned into immortality "Oh, Pretty Woman," still beloved on classic rock stations. In 1989, Luther Campbell of 2 Live Crew penned the rap "Pretty Woman" and wrote Orbison and Dees' successor in interest, Acuff-Rose Music, Inc., offering to accord dignitary rights and pay a use fee for the right to use portions of the original song.

In a decision they probably came to regret, Acuff-Rose declined. 2 Live Crew released the song anyway, and a quarter million copies later, Acuff-Rose sued for copyright infringement. In this case, the Supreme Court drastically expanded the fair use defense, finding that commercial use and economic detriment – traditionally two of the strongest factors weighing against fair use –were less persuasive when parody was the issue.[26]

Applying the first section 107 factor, nature and character of the use, the Court held the standard to be "whether a parodic character may reasonably be perceived."[27] The Court declined to inquire beyond that threshold, citing Justice Holmes: "[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits."[28] The threshold for get-

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[23] Berlin v. E.C. Publ'ns, Inc., 329 F.2d 541, 545 (2d Cir. 1964).

[24] Campbell v. Acuff-Rose, 510 U.S. 569, 579 (1994).

[25] *See id.* at 579 (holding the determinative factor in parody cases is the nature of the parody, not economic detriment to the copyright holder or the commercial nature of the use – the most important factors in other fair use cases) (citing Stewart v. Abend, 495 U.S. 207, 238 (1990)).

[26] *See id.* at 572.

[27] *Id.* at 582.

[28] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

ting work within the parody safe harbor is thus both highly subjective and easily met.

The Court found the second section 107 factor, the nature of the copyrighted work, to be of little use in parodies, since they derive from popular expressive works.[29]

The third factor, amount and substantiality of use, considers the degree to which the parody is a market substitute for the original.[30] Enough copying is allowed so the listener can recognize the original, and thereby understand the humor of the parody.[31] This often requires use of the most distinctive features of the original, even the "heart of the work," if necessary, to identify what is being parodied.[32] Beyond that, reasonableness of use depends on whether the "overriding purpose and character" is to parody the original, weighed against the likelihood the parody will be a market substitute for the original.[33]

The fourth factor, the effect on the original's market, depends on whether the use will substantially and adversely affect the original's market and any reasonably foreseeable derivatives of the original.[34] But with parody, the Court declined to apply the normal presumption of harm[35] where there is commercial use beyond exact duplication.[36] Indeed, the Court says parody will seldom affect the original's market in a cognizable way, as the two markets are usually quite different. It also drew a distinction between "potentially remediable displacement [by the parody of the original's market], and un-remediable disparagement [such as a scathing review]."[37] In so doing, the Court narrowly circumscribed the derivatives market to those areas in which creators of the original work might reasonably develop the original, or license it to be developed.[38]

Thus, purely critical works are protected by fair use, while works which could lead to market substitution are not. Simple impairment of the original or derivative market is not, however, sufficient to defeat the fair use defense. The Court found that 2 Live

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29 *See Campbell*, 510 U.S. at 586.
30 *See id.* at 586-87.
31 *See id.* at 588.
32 *See id.*
33 *See id.*
34 *See id.* at 590.
35 *See, e.g.*, Sony Corp. of America, 464 U.S. at 451 ("[E]very [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.").
36 *See* Campbell, 510 U.S. at 591.
37 *Id.* at 592.
38 *See id.*

Crew had not provided sufficient evidence on this issue, and remanded for a factual determination whether 2 Live Crew's "Pretty Woman" infringed the rap derivative market of Orbison's "Oh, Pretty Woman."[39]

In *Acuff-Rose*, 2 Live Crew's raunchy rap about a cheating behemoth of a "hairy woman" bears an offensive contrast to Roy Orbison's poignant ballad about the One That Almost Got Away. Orbison's classic probably faced little commercial danger from 2 Live Crew's rap, since rap and classic rock target-markets are often mutually exclusive. One senses the real damage in *Acuff-Rose* was to Orbison's artistic sensibilities and his dignitary rights in the original song.

This would appear to be a major gap in copyright protection and, as this paper will conclude, is a reason why the U.S. should strongly consider adopting the "moral rights" theory currently favored in European law.

IV. VERSE 4: ADAPTING FAIR USE TO MUSIC

> "Who steals my purse steals trash . . . But he that filches from me my good name. . . ."
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> —William Shakespeare[40]

Economic loss inhibits creative effort, thwarting the intent of copyright law.[41] But there is another aspect to economic marketability: the artist's reputation. As now articulated, the law of parody blows a huge hole in the already ragged net of copyright protection. In a world where ideas can be instantly and globally broadcast over the Internet, alteration of an artist's work puts her at risk of degrading misrepresentation.

One can hardly imagine a more stifling effect on the creative community. It is, after all, one thing to lose money to literary piracy; it is quite another to suffer damage to one's reputation. Thus, this paper suggests that copyright protection be expanded by recognizing what European jurisdictions have long respected—an artist's personal rights.

"Alongside his pecuniary rights," said French legal theorist André Françon, "an author enjoys moral rights, which are intended to protect his personality as expressed through his work."[42] Moral

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39 *See id.* at 593-94.

40 WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.

41 U.S. CONST. art. I, § 8, cl. 8.

42 André Françon, *Protection of Artists' Moral Rights and the Internet, in* PERSPECTIVES ON INTELLECTUAL PROPERTY SERIES 75 (Frédéric Pollaud-Dulian ed., 1999).

rights, long espoused by the Europeans, are grounded in the personality of the author. The first of these is called the "paternity" right, insuring that the creator of the work is identified as its author.[43]

Nowhere is creative attribution more important than in music, where credit on a released song often opens the door to fee-for-service work. Thus, dignitary incentives strike far deeper than an artist's need to have her "personality" protected through moral rights. These rights are inextricably linked with pecuniary rights as well.

The second moral right, the right to "integrity," protects the author from derogatory treatment and unauthorized change, and allows the author to demand that those using her work maintain its integrity.[44] This protects both the author's economic rewards and her dignity.

In the musical community such a doctrine has obvious limits, since each artist adds her own rubato to any performance. But with parody the doctrine might find broader application. While a valuable societal tool, parody can damage the author's reputation and render her future work less valuable. Her ability to insure some basic level of integrity in her work should be protected.

Indeed, fair use law has already accepted the underlying concept of moral rights through the professional prestige doctrine adopted in *Weissmann v. Freeman.*[45] In *Weissmann*, the court predicated a finding of "economic detriment" on the plaintiff's non-economic loss of professional prestige when the defendant (who had co-authored numerous articles with the plaintiff) changed the title to, and claimed authorship of, the plaintiff's article – all for the purpose of teaching a class on nuclear medicine.[46]

Having adopted the logic underlying the moral rights theory, it seems reasonable to apply it with equal force to songwriters. The challenges posed by digital reproduction and alteration make this necessary if we are to protect an artist's most important asset—her reputation.

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[43] *See* Torremans, *supra* note 2, at 107.
[44] *Id.* at 109-111.
[45] 868 F.2d 1313 (2d Cir. 1989).
[46] *See id.* at 1324.

CODA: CONCLUSION

"Don't it always seem to go That you don't know what you've got
Til it's gone."

—*Joni Mitchell,* Big Yellow Taxi[47]

Incorporating moral rights theory into American copyright law will allow artists and companies alike to meet the challenges of a 21st century marketplace, modernizing a doctrine that traces its roots back to Lord Mansfield. Doing so is consistent with copyright's goal of facilitating the creative flow, which cannot happen unless an artist's purse *and* name are protected.

After all, no one but a blockhead ever wrote except for money.[48]

*L. Richard Walton**

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47 Joni Mitchell, *Big Yellow Taxi, on* LADIES OF THE CANYON (Reprise 1970).
48 *See* BOSWELL, *supra* note 1.
* Georgetown University Law School