

COMMENTS

GoldieBlox and the Three Beastie Boys: The Emerging Trend of Fair Use Appropriation of Protected Material as a Business Marketing Strategy

Caroline Hewitt Fischer*

I.	INTRODUCTION	255
II.	COPYRIGHT INFRINGEMENT AND THE FAIR USE DOCTRINE	259
III.	THE PROTECTION OF PARODY IN A COMMERCIAL CONTEXT	262
	A. <i>What Is Parody?</i>	262
	B. <i>Commercial Use</i>	264
	C. <i>The Second Circuit Standard</i>	265
IV.	FREE RIDING: COMPETING THEORIES IN THE REALM OF COPYRIGHT	267
V.	<i>GOLDIEBLOX, INC. V. ISLAND DEF JAM MUSIC GROUP</i>	268
VI.	CONCLUSION	272

Beastie’s lawyers say
“Beastie never said you may
Commercial use is not OK
If Goldie said, ‘Please’ we’d say ‘no way!’”

Goldie says “Hey!
Fair use and parody’s OK
Goldie’s market’s different all the way
Women are needed in technology!”¹

I. INTRODUCTION

In November 2013, the company GoldieBlox, Inc. (GoldieBlox) uploaded a video advertisement to YouTube that went viral, gaining over

* © 2014 Caroline Hewitt Fischer. Editor in Chief, Volume 17, *Tulane Journal of Technology and Intellectual Property*. J.D. candidate 2015, Tulane University Law School; B.A. 2007, Wellesley College. The author would like to thank her family and friends for all their love, support, and encouragement in writing this Comment. The author would also like to thank all the members of Volume 17 for all their hard work and dedication to the *Journal*.

1. Sarah Feingold, *GoldieBlox v. Beastie Boys: Something Here Doesn’t Rhyme*, JDSUPRA PERSPECTIVES (Nov. 26, 2013), <http://www.jdsupra.com/legalnews/goldiblox-v-beastie-boys-something-her-69739/>.

eight million hits in one week and launching its creator, Debbie Sterling, and her company into the latest example of the power of the Internet.² The short video, entitled “GoldieBlox, Rube Goldberg, & Beastie Boys Princess Machine,” depicts three girls inventing an intricate Rube Goldberg³ machine using toys and other items corresponding to traditionally female domestic roles throughout multiple rooms of a house and backyard.⁴ In the background, young girls sing an anthem set to the tune of the song “Girls,” a 1987 hit by the hip-hop band the Beastie Boys, but with a different recording and different lyrics that celebrate female capabilities and reject the misogynistic views of women espoused in the original song.⁵ The final seconds of the video end with a brief depiction of the GoldieBlox’s children’s toy “GoldieBlox and the Spinning Machine” and the tagline “Toys for Future Engineers,” followed by the GoldieBlox company logo and their website.⁶

Over the course of the next two months, the video received a large amount of publicity, including praise for its positive message of female empowerment and for GoldieBlox’s goal of “disrupt[ing] the pink aisle” with toys for girls that encourage them to take interest in STEM (science, technology, engineering, and mathematics) fields.⁷ However, the video also sparked controversy over the possibility that GoldieBlox had illegally appropriated material from the Beastie Boys’ song “Girls” by using an identical tune and similar lyrics without the Beastie Boys’ permission, and outside the parameters of parody as it is protected under

2. Aaron Taube, *A Small Girls’ Toy Company Claims the Beastie Boys Want To Ban This Video*, BUS. INSIDER (Nov. 25, 2013, 11:12 AM), <http://www.businessinsider.com/goldie-blox-is-suing-the-beastie-boys-2013-11>.

3. “[A]ccomplishing by complex means what seemingly could be done simply.” *Rube Goldberg Definition*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, <http://www.merriam-webster.com/dictionary/rube%20goldberg> (last visited Sept. 19, 2014). A Rube Goldberg machine is a mechanism that accomplishes a simple task using a very complex method.

4. Complaint for Declaratory Judgment and Injunctive Relief, *GoldieBlox, Inc. v. Island Def Jam Music Group*, No. 13-5428 (N.D. Cal. filed Nov. 21, 2013); Taube, *supra* note 2.

5. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 4, at 1-2, 17-18.

6. Taube, *supra* note 2. Due to this controversy, a permanent citation to the original video is unavailable. The original video has been removed, and third-party attempts to post the video are continuously removed.

7. *About Us*, GOLDIEBLOX, <http://www.goldieblox.com/pages/about> (last visited Mar. 24, 2014); see also Jena McGregor, *The Brains Behind the Viral GoldieBlox Video*, ON LEADERSHIP, WASH. POST (Nov. 21, 2013, 2:05 PM), <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/11/21/the-brains-behind-the-viral-goldieblox-video/>; Alyson Shontell, *A Stanford Engineer Figured Out a Real Reason Fewer Women Code, and a Video She Created About It Has Gone Viral*, BUS. INSIDER (Nov. 20, 2013, 8:15 AM), <http://www.businessinsider.com/goldieblox-girls-video-2013-11>.

the fair use doctrine.⁸ At the time of the release of the video, GoldieBlox was a quarter-finalist in Intuit, Inc.'s Small Business Big Game Challenge, an online contest offering small businesses the chance to enter to win a thirty-second commercial during Super Bowl XLVIII.⁹ Largely due to the publicity it received surrounding the video controversy, the public cast their votes, and GoldieBlox won the contest and the prize valued at \$4 million.¹⁰ GoldieBlox's product also became one of the top-selling toys on Amazon.¹¹

During this time, GoldieBlox filed suit against the Beastie Boys in the United States District Court for the Northern District of California for a declaratory judgment, asserting their video as a parody protected by the fair use doctrine, and for an order enjoining the Beastie Boys from taking further action to protect their copyright against the video.¹² The parties exchanged open letters to each other, and GoldieBlox subsequently took the video down.¹³ Although the Beastie Boys filed an answer and counterclaims to the suit, the two parties settled within four months of the initial filing.¹⁴

This case is an excellent example of how the use of protected material, particularly in the form of parody, is becoming a trend in marketing within modern technology. With the help of successful viral

8. See Taube, *supra* note 2; Scott Timberg, *David Lowery: Silicon Valley Must Be Stopped, or Creativity Will Be Destroyed*, SALON (Dec. 3, 2013, 6:00 PM), http://www.salon.com/2013/12/04/david_lowery_silicon_valley_must_be_stopped_or_creativity_will_be_destroyed/; Richard Feloni, *The Beastie Boys Have Countersued Pro-Girl Toy Maker GoldieBlox over the Song "Girls"*, BUS. INSIDER (Dec. 12, 2013, 9:12 AM), <http://www.businessinsider.com/the-beastie-boys-countersue-goldieblox-2013-12>; Gwynne Watkins, *Ask a Lawyer: Who Has the Better Case, the Beastie Boys or GoldieBlox?*, VULTURE (Dec. 14, 2013, 10:00 AM), <http://www.vulture.com/2013/12/beastie-boys-goldieblox-lawsuit-who-will-win.html>.

9. Press Release, *Intuit Celebrates Small Business Passion with Multi-Million Dollar Campaign Around Football's Biggest Game*, INTUIT (July 31, 2013), http://about.intuit.com/about_intuit/press_room/press_release/articles/2013/smallbusinessbiggame.html.

10. Kaye Toal, *Holy Axles, We Won!*, GOLDIEBLOX (Jan. 31, 2014), <http://blog.goldieblox.com/2014/01/holy-axles-we-won/>; Paul Farhi, *The Rules of the Super Bowl Ad Game*, WASH. POST (Jan. 31, 2014), http://www.washingtonpost.com/lifestyle/style/the-rules-of-the-super-bowl-ad-game/2014/01/31/6333b7fe-89f3-11e3-a5bd-844629433ba3_story.html.

11. McGregor, *supra* note 7.

12. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 4, at (a)-(c).

13. Dave Itzkoff, *Beastie Boys Fight Online Video Parody of 'Girls'*, ARTS BEAT, N.Y. TIMES (Nov. 25, 2013, 9:00 AM), http://artsbeat.blogs.nytimes.com/2013/11/25/the-beastie-boys-fight-online-video-parody-of-girls/?_php=true&_type=blogs&_r=0.

14. Court Docket, *GoldieBlox, Inc. v. Island Def Jam Music Group*, No. 13-5428 (N.D. Cal. filed Nov. 21, 2013). The Beastie Boys filed answers and counterclaims asserting copyright infringement, trademark infringement, false advertising, unfair competition, misappropriation of right of publicity, and requesting damages for actual and lost profits. Answer, First Amended Counterclaims, and Demand for Jury Trial at 30-78, *GoldieBlox, Inc. v. Island Def Jam Music Grp.*, No. 13-5428 (N.D. Cal. Nov. 21, 2013).

marketing campaigns, small companies can gain wide notoriety within a short period of time using very limited resources.

Courts have addressed the issue of commercial advertisements as fair use parodies, and the United States Court of Appeals for the Second Circuit articulated a standard whereby commercial advertisements are protected as fair use as long as there exists sufficient comment or critique on the protected work to constitute a parody.¹⁵ However, these cases are limited in scope to television commercials and print advertisements. The distribution of these forms of commercial use can be controlled by centralizing distribution to specific manufacturers or distributors and limiting, or even eliminating, certain target areas by region, country, or other market.¹⁶

Courts have not addressed commercial use on such a large scale as commercial use in digital form.¹⁷ Unlike television or print media, digital media is very difficult to control and is almost impossible to eliminate after a user uploads it to the Internet. Distribution cannot be centralized because each individual Internet user has the independent ability to take control of and to redistribute a copy of the media.¹⁸ Furthermore, the Internet offers a far wider target range: the entire world.¹⁹

Given this loss of control paired with a growth in target audience, can commercial use on this level still be considered fair use? In the case of GoldieBlox, a relatively small amount of effort and energy resulted in profits well in excess of \$4 million, factoring in the prized Super Bowl commercial, the large jump in sales on Amazon, and the extensive

15. See *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990); *Steinberg v. Columbia Pictures Indus., Inc.*, 633 F. Supp. 706 (S.D.N.Y. 1987); *D.C. Comics Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177 (S.D.N.Y. 1979).

16. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1373-78 (2004).

17. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (addressing cases of commercial use within the context of fair use in various pre-digital-age forms); *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (same); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991) (same); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990) (same); *Steinberg v. Columbia Pictures Indus., Inc.* 663 F. Supp. 706 (S.D.N.Y. 1987) (same); *D.C. Comics Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177 (S.D.N.Y. 1979) (same).

18. For a thorough analysis of the difficulties surrounding controlling the distribution of digital media, see generally Lemley & Reese, *supra* note 16. It is also important to note that technology has progressed such that broadcast television can now be streamed on the Internet. For an excellent analysis of the current legal issues surrounding online subscriptions to network television broadcasts, see Sebastian Wyatt Novak, "A Million Little Antennas:" *The Second Circuit's Decision in WNet, Thirteen v. Aereo, Inc., and the Next Great United States Supreme Court Copyright Battle*, 16 TUL. J. TECH. & INTELL. PROP. 287 (2013).

19. See Lemley & Reese, *supra* note 16.

amount of additional free publicity that surrounded both the controversy and the contest.²⁰ Although the case settled out of court, the issues surrounding the case still remain.²¹ Our society is becoming increasingly comfortable with the idea of appropriating protected material in the form of parody and distributing it on the Internet, leading to a similar comfort with using this material for the business goal of receiving publicity.²² It is important that courts address this issue and clarify a standard for fair use that includes commercial use on this scale and ensures that our current intellectual property regime properly addresses new issues arising from developments in technology. Otherwise, we risk allowing individuals to appropriate increasing amounts of protected material in the name of marketing, pushing the boundaries of fair use and inching closer to illegal conduct.

This Comment will discuss the development of the fair use affirmative defense in copyright law, focusing on the realm of parody and commercial use, and the benefits and drawbacks of applying the current intellectual property regime to recent advances in technology. First, this Comment will discuss the legal precedent behind the development of fair use as an affirmative defense of copyright infringement. Next, this Comment will take a closer look at parody and commercial use in the context of fair use, highlighting important cases that have dealt with parody in a commercial context. This Comment will then present competing theories surrounding the benefits and drawbacks of free riding in the field of intellectual property.²³ Finally, this Comment will discuss *GoldieBlox v. Island Def Jam Music Group* in detail and will offer an analysis of what the court may have found had the case gone to trial.

II. COPYRIGHT INFRINGEMENT AND THE FAIR USE DOCTRINE

The Copyright Act of 1976 (Copyright Act) provides protection for cultural works, including musical works and accompanying lyrics.²⁴ A

20. McGregor, *supra* note 7; Farhi, *supra* note 10.

21. Stipulation for Dismissal of Action Pursuant to Fed. R. Civ. P. 41(a), *GoldieBlox, Inc. v. Island Def Jam Music Grp.*, No. 13-5428 (N.D. Cal. filed Nov. 21, 2013).

22. Parody videos have become so popular that *People Magazine* released a list of the top ten parody videos of 2013, noting the desire for some of these creators to “rid[e the protected work’s] coattails for a brief shot at viral fame.” Nate Jones, *They Couldn’t Stop: Watch YouTube’s Top Parody Videos of 2013*, PEOPLE (Dec. 11, 2013, 1:00 PM), http://www.people.com/people/package/article/0,20755963_20765171,00.html.

23. “Free riding” is the economic concept whereby one entity receives a benefit from another entity’s investment without repaying the original entity for that benefit. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1040 (2005).

24. 17 U.S.C. § 102(a)(2) (2012).

work must satisfy three requirements in order to receive protection: (1) the work must be original, (2) the work must have an identifiable author, and (3) the work must be fixed in a tangible medium of expression.²⁵ Once these requirements have been met, the owner of the work receives exclusive rights, including the right to reproduction, the right to both physical and digital public performance, and the right to prepare derivative works.²⁶ For works created on or after January 1, 1978, these rights subsist for seventy years after the death of the author.²⁷ In the case of sound recordings, rights are separately available for both the recordings and their underlying compositions.²⁸

To prove copyright infringement, plaintiffs must show the existence of two elements: ownership and copying of original elements of the work.²⁹ If a work is formally registered with the Copyright Office, this registration constitutes prima facie evidence in favor of valid ownership.³⁰ Proof of access and substantial similarity, both in qualitative and quantitative terms, are additional requirements for actionable copyright infringement.³¹

Not all cases of copyright infringement are indefensible. Section 107 of the Copyright Act outlines the affirmative defense of fair use, which serves as an exception to infringement.³² Types of infringing uses that qualify for this exception include infringement “for purposes such as criticism [and] comment,” including parodies.³³ Courts tackling the fair use exception must do so on a case-by-case basis, analyzing four nondeterminative factors to determine whether the infringing use qualifies.³⁴ These factors are found in section 107 and include (1) the infringing work’s character and nature, “including whether such use is of a commercial nature”; (2) the nature of the original work; (3) the amount and substantiality of the original work utilized in the infringing work, in relation to the original work as a whole; and (4) the effect of the

25. *Id.* § 102(a).

26. *Id.* § 106.

27. *Id.* § 302.

28. *Id.* § 102(a)(2), (7).

29. “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 547 (1985)).

30. 17 U.S.C. § 410.

31. *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2003); *see* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01(B) (2008).

32. 17 U.S.C. § 107.

33. *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

34. *Harper & Row*, 471 U.S. at 549.

infringing work on both the real and potential market for the original work.³⁵ These four factors must be analyzed together, “in light of the purposes of copyright,” to determine whether the infringing use at issue should be protected under the fair use doctrine.³⁶

The purpose of fair use in copyright infringement is to codify the common law defense already in place at the time the Copyright Act was passed.³⁷ However, Congress explicitly stated that codifying the fair use defense was not meant to solidify it in a solid state, noting that the legislature did not desire “to freeze the doctrine in the statute, especially during a period of rapid technological change.”³⁸ Rather, the doctrine should be applied on a case-by-case basis, avoiding the possibility that “[the doctrine] would stifle the very creativity which that law [was] designed to foster.”³⁹

The Beastie Boys themselves are not newcomers to copyright infringement suits involving fair use appropriation. In *Newton v. Diamond*, band members Michael Diamond, Adam Horowitz, and Adam Yauch were sued for copyright infringement for sampling a small amount of music of James Newton’s song “Choir” in their song “Pass the Mic.”⁴⁰ The Beastie Boys had acquired a license for the recording of the song, but not for the composition.⁴¹ The district court found that the Beastie Boys’ use was de minimis and therefore did not constitute actionable infringement.⁴² The district court granted summary judgment, and the United States Court of Appeals for the Ninth Circuit affirmed.⁴³

35. 17 U.S.C. § 107.

36. *Id.*; *Campbell*, 510 U.S. at 578.

37. *Harper & Row*, 471 U.S. at 549.

38. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”).

39. *Campbell*, 510 U.S. at 577 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

40. 388 F.3d 1189, 1190 (9th Cir. 2003).

41. *Id.*

42. *Id.* For an extensive analysis of de minimis copyright infringement, see Caroline Hewitt Fischer, *It’s De Minimis, But Wait! It’s Also Fair Use: Faulkner v. Sony Pictures and Why Courts Should Focus on Developing the De Minimis Doctrine To Streamline Copyright Infringement Analysis*, 16 TUL. J. TECH. & INTELL. PROP. 301 (2013).

43. *Newton*, 388 F.3d at 1197-98.

III. THE PROTECTION OF PARODY IN A COMMERCIAL CONTEXT

A. *What Is Parody?*

Parody is generally defined by *Merriam Webster's Collegiate Dictionary* as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.”⁴⁴ Parody has played an important role in our society, both in history as well as in the modern world, because it provides an artistic, often humorous avenue for comment or critique. Justice O'Connor eloquently stated, “[Parody] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁴⁵ Shakespeare harnessed its power through sonnets,⁴⁶ while modern-day iterations include the *Saturday Night Live* television series⁴⁷ and the humorous news website *The Onion*.⁴⁸ Parody is often intertwined with satire, a similar concept defined as “a way of using humor to show that someone or something is foolish, weak, bad, etc.: humor that shows the weaknesses or bad qualities of a person, government, society, etc.”⁴⁹

However, parody and satire are separate and distinct concepts in a legal sense. Parody is afforded more protection under fair use than satire. A parody targets a specific cultural work for its critique and therefore must “conjure up” a certain amount of the original material in order to deliver its critique.⁵⁰ A satire, on the other hand, “can stand on its own

44. *Parody Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/parody> (last visited Sept. 19, 2014).

45. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

46.

My mistress' eyes are nothing like the sun;
Coral is far more red than her lips' red;
. . . And yet, by heaven, I think my love as rare
As any she belied with false compare.

William Shakespeare, *Sonnet CXXX*, MIT, <http://shakespeare.mit.edu/Poetry/sonnet.CXXX.html> (last visited Mar. 20, 2014). Here, Shakespeare pairs the same form and verse as traditional love poems with lyrics that describe the object of his affection as considerably less beautiful than the objects to which he compares her, in order to make fun of the exaggerated and often ridiculous comparisons of beauty that were typically found in traditional love poems of his day. See Amanda Mabillard, *Analysis of Shakespeare's Sonnet 130—My Mistress's Eyes*, SHAKESPEARE ONLINE, <http://www.shakespeare-online.com/sonnets/130detail.html> (last visited Mar. 20, 2014).

47. *About the Show: Saturday Night Live*, NBC, <http://www.nbc.com/saturday-night-live/about> (last visited Mar. 20, 2014).

48. *Frequently Asked Questions*, ONION, <http://www.theonion.com/faq/> (last visited Mar. 20, 2014).

49. *Satire Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/satire> (last visited Sept. 19, 2014).

50. “For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.”

two feet and so requires justification for the very act of borrowing,” and it is therefore rarely afforded protection in isolation under the fair use doctrine.⁵¹ Thus, the public must be able to identify the parody in order for it to be eligible for protection under fair use.⁵²

A preeminent case on parody as fair use in the musical context is *Campbell v. Acuff-Rose Music, Inc.* There, the United States Supreme Court utilized the fair use doctrine to determine that defendant 2 Live Crew’s unlicensed use of lyrics and music from plaintiff Roy Orbison’s song “Oh Pretty Woman” in their commercially successful parody of the song was fair use and therefore did not infringe upon Orbison’s copyright.⁵³ The Court first analyzed the purpose and character of the defendant’s song, concluding that its lyrical play on words similar to the original song’s lyrics was transformative in a way that commented and criticized the plaintiff’s original song.⁵⁴ The Court further noted that the commercial success of the infringing song did not preclude a finding of fair use, because it was a nondeterminative element of the first factor.⁵⁵

The Court next analyzed the nature of the plaintiff’s song, concluding that it was protected under copyright law, but that this was not ultimately significant because “[the fact that a work is protected will never be] likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”⁵⁶

The Court then moved to the third factor of the analysis, concluding that the defendant’s infringing work did incorporate a qualitatively and quantitatively significant portion of the original work by incorporating the most meaningful lyrics of the original song into its own infringing lyrics.⁵⁷ Here, the Court noted the inherent difficulties in analyzing parodic works, because their humorous nature necessarily draws from appropriation of enough of the original work to allow the public to recognize the subject of its comment or critique.⁵⁸ Thus, the Court’s task

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580, 588 (1994) (citing *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981)).

51. *Campbell*, 510 U.S. at 581.

52. *Id.* at 582 n.16 (clarifying that the relevant inquiry for determining a parody to be fair use involves “whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely ‘supersede the objects’ of the original”).

53. *Id.* at 572.

54. *Id.* at 569, 581-84.

55. *Id.* at 569, 584.

56. *Id.* at 569, 586.

57. *Id.* at 569, 586-89.

58. *Id.* at 569, 588.

is to determine the line between appropriating enough of the original work without taking more than is necessary to do so.⁵⁹

The Court finally addressed the fourth and final factor of the fair use analysis, concluding that the plaintiff's infringing work existed in a different genre and served a different purpose than the original work.⁶⁰ Thus, the infringing work did not adversely affect the current or potential market for the original work that was protected under the Copyright Act.⁶¹

B. Commercial Use

An important element of the first factor of the fair use analysis, the purpose and character of the infringing use, is the element of commercial use.⁶² The Supreme Court has placed emphasis on the importance of commercial use in the analysis, noting that it can aid in determining "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."⁶³ In *Sony Corp. v. Universal City Studios, Inc.*, the Supreme Court declared, "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."⁶⁴ This stance has been mitigated in later cases, shifting the analysis from a concrete determination that essentially brings the analysis to the stance that commercial use is a significant, but ultimately nondeterminative, hurdle in the analysis for the defendant to overcome.⁶⁵ Thus, although a finding of commercial use will be counted against the defendant, a finding of commercial use should not, in isolation, prohibit a finding of fair use.⁶⁶ "The crux of the profit/nonprofit distinction," the Court explained in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,

59. *Id.* at 588-89.

60. *Id.* at 590-94.

61. *Id.* (noting that the Copyright Act does not protect the original work from adverse effects on its market due to critique or criticism).

62. *Id.* at 584.

63. *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 562 (1985).

64. 464 U.S. 417, 451 (1984).

65. NIMMER & NIMMER, *supra* note 31, § 13.05(A)(1)(c) ("Labeling a use as 'commercial,' in other words, should not end the analysis. Because the fact that a given use is commercial does not necessarily negate fair use, any presumption that a commercial use is *ipso facto* unfair should be regarded as 'rebutt[able] by the characteristics of a particular commercial use.'" (citations omitted)).

66. "If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'" *Campbell*, 510 U.S. at 585 (citing *Harper & Row*, 471 U.S. at 592 (Brennan J., dissenting)).

“is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁶⁷

C. *The Second Circuit Standard*

Commercial use has often been at the forefront of copyright infringement cases, and the courts have repeatedly dealt with the element’s often-difficult analysis within fair use. It may seem counterintuitive to allow misappropriated work to remain protected under the fair use affirmative defense, because it is clear that the defendant has made (sometimes significant) monetary gains from this unauthorized use. However, courts have allowed cases in which there has been a significant amount of monetary gain to stand as fair use.⁶⁸

In *Liebovitz v. Paramount Pictures*, the Second Circuit held that an appropriation used for commercial purposes to promote a movie was fair use.⁶⁹ In this case, the famed photographer Annie Liebovitz sued Paramount Pictures over a well-known movie poster for the 1994 comedy *Naked Gun 33 1/3: The Final Insult*.⁷⁰ One of Ms. Liebovitz’s most famous photos was published on the cover of *Vanity Fair* magazine in 1991: a photograph of the profile of Hollywood actress Demi Moore, naked and seven months pregnant, covering her chest with one arm and supporting her pregnant stomach with the other.⁷¹ Paramount Pictures disseminated a movie poster for *Naked Gun*, purposefully modeled after Liebovitz’s photo, depicting the movie’s lead actor Leslie Nielsen’s head photoshopped onto a naked, pregnant, female model’s body arranged in a strikingly similar manner, with the caption reading “Due this March.”⁷² Ms. Liebovitz sued for infringement, arguing that even if Paramount’s poster amounted to a parody, it did not meet the requirements for fair use because its primary purpose was commercial.⁷³ The court disagreed, noting that the presence of commercial use was ultimately nondeterminative and concluded that “the strong parodic nature” of the poster

67. 471 U.S. at 562.

68. See *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991).

69. 137 F.3d at 117.

70. *Id.* at 111; see also *Naked Gun 33 1/3: The Final Insult*, IMDb, <http://www.imdb.com/title/tt0110622/> (last visited Mar. 23, 2014).

71. *Liebovitz*, 137 F.3d at 111.

72. *Id.*

73. *Id.* at 110.

outweighed the commercial use in favor of fair use protection.⁷⁴ The court concluded that the poster constituted a parody and noted that although the element weighed against the defendant in the fair use analysis, the presence of commercial use was ultimately nondeterminative.⁷⁵

Other courts have also held that appropriations of copyrighted material used primarily for commercial purposes are protected as fair use, as long as they are found to be a sufficient comment or critique of the copyrighted material to constitute a parody.⁷⁶ In *Eveready Battery Co. v. Adolph Coors Co.*, the court rejected the plaintiff's argument that commercial use cannot constitute parody as a matter of law.⁷⁷ The court noted, "Although the primary purpose of most television commercials . . . may be to increase product sales and thereby increase income, it is not readily apparent that they are therefore devoid of any artistic merit or entertainment value."⁷⁸ Thus, the court concluded that the defendant's television commercial constituted a parody and was therefore protected as fair use.⁷⁹ On the other hand, in *Steinberg v. Columbia Pictures Industries, Inc.*, a movie poster promoting the 1984 movie *Moscow on the Hudson* was held to infringe on the plaintiff's copyright because the poster copied substantial portions of an illustration published on the cover of *The New Yorker* magazine without providing any comment or critique of the illustration itself.⁸⁰ In *Tin Pan Apple v. Miller Brewing Co.*, the court held that the defendant's commercial infringed on the plaintiff's copyright because its only purpose was commercial and the commercial itself had no creative purpose.⁸¹ In *D.C. Comics v. Crazy Eddie*, the court concluded that a television commercial could not be protected as a fair use parody because it appropriated protected material purely for profit.⁸² It is interesting to note that in *D.C. Comics*, the court never offered an explanation as to why the court did not consider the commercial at issue a valid parody.⁸³

74. *Id.* at 115 ("On balance, the strong parodic nature of the ad tips the first factor significantly toward fair use, even after making some discount for the fact that it promotes a commercial product. '[L]ess indulgence,' [for commercial uses] does not mean no indulgence at all." (citation omitted)).

75. *Id.* at 115-17.

76. *See* *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991).

77. *Id.* at 446-47.

78. *Id.*

79. *Id.* at 440, 446-48.

80. 663 F. Supp. 706, 714-15 (S.D.N.Y. 1987).

81. 737 F. Supp. 826 (S.D.N.Y. 1990).

82. 205 U.S.P.Q. 1177 (S.D.N.Y. 1979).

83. *Id.*

IV. FREE RIDING: COMPETING THEORIES IN THE REALM OF COPYRIGHT

Commercial use of an appropriation of copyrighted material generally does not bar a finding of fair use; however, courts across the board have shown a hesitancy to accept commercial use as a standard form of fair use appropriation.⁸⁴ Courts regularly cite a reason for this as the hesitancy to reward those who appear to be utilizing someone else's creativity for personal profit without allowing the owner of the original material to receive a part of that benefit.⁸⁵ In short, it makes us uncomfortable when we allow someone to "free ride" off another's hard work because it undermines the goals of the American intellectual property legal regime.⁸⁶ Intellectual property rights in the United States incentivize artists and inventors to put effort and energy into the creation of new works in exchange for exclusive rights in those creations for a limited period of time.⁸⁷ If others are allowed to profit off of an individual's creations without a price, we lose the incentive to create new things.⁸⁸ Thus, the fair use doctrine is designed to provide a framework for balancing protection with creation.

Not all scholars in the field of intellectual property discourage the idea of free loading, arguing that not all enrichment from the use of protected property is unjust and that intellectual property rights should follow a model that favors free competition. Indeed, the field of intellectual property is uniquely protected in ways that are unlike real property rights and that allow owners to more completely reap the benefit of their works.⁸⁹ The United States Constitution provides the exclusive right for "Limited Times"; however, the duration of exclusive ownership rights in copyright has been extended eleven times, and many believe that exclusive rights may be extended once again, thus implying that "exclusive rights for Limited Times" may not be limited at all.⁹⁰

84. See *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 562 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

85. See *Harper & Row*, 471 U.S. at 562 ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

86. Lemley, *supra* note 23, at 1039.

87. U.S. CONST. art. I, § 8, cl. 8; see also JESSICA LITMAN, *DIGITAL COPYRIGHT* 15, 80 (2001).

88. U.S. CONST. art. I, § 8, cl. 8; see also LITMAN, *supra* note 87, at 15, 80.

89. 35 U.S.C. § 154(a)(2) (2012) (setting exclusive use for patent inventions at twenty years for most cases); 17 U.S.C. § 302(a) (2012) (setting the duration of copyright ownership rights as the life of the author plus seventy years).

90. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827; see also Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV.

Furthermore, many causes of action do not focus on harm to the owner, but rather focus on how the infringer has benefited and whether “that benefit involves taking something that doesn’t belong to them.”⁹¹

Arguments in favor of limiting intellectual property rights and allowing for a certain amount of free riding generally present three points. The first is that owners of intellectual property rights should acquire rights more in line with real property rights, and thus should be limited to recouping the fixed costs associated with their creation or invention plus a reasonable profit.⁹² The second is that the use of another’s ideas or words, unlike finite resources, cannot be depleted and therefore does no substantial harm to the creator.⁹³ The third is that problems such as artificially high markets, lack of incentive to create, pressure to further expand intellectual property rights, expense in protecting those rights, and distortionary overinvestment are caused by allowing owners a full spectrum of exclusive rights.⁹⁴ Although many of these examples apply more completely to the field of patents, these conditions still exist within the realm of copyright.⁹⁵ Ultimately, scholars argue that courts should focus their infringement analyses on recouping reasonable costs and allowing free competition, rather than focus on whether the infringer obtained a benefit without proper due.⁹⁶

V. *GOLDIEBLOX, INC. V. ISLAND DEF JAM MUSIC GROUP*

As technology has progressed, the interplay between commercial use, parody, and the fair use doctrine has also changed. Courts have never addressed commercial parody fair use in relation to the powerful extent to which it is represented in *GoldieBlox*. Unfortunately, the courts have missed a valuable opportunity to test the limits of fair use as it applies to recent developments in the expansion of technology. Therefore, this Comment will attempt to seize upon this opportunity to analyze *GoldieBlox*, suggest how the court would have likely decided the

363, 379-81 (2000); Lemley, *supra* note 23, at 1042 n.38 (“The length of the copyright term was extended 11 times between 1963 and 1998, and now stands at the life of the author plus 70 years. 17 U.S.C. § 203 (2000). Congress also changed the patent term from 17 years from issue to 20 years from filing.”).

91. Lemley, *supra* note 23, at 1045.

92. *Id.* at 1046-58 (further noting that with the advent of digital technology, the cost of dissemination of information has dropped drastically).

93. *Id.* at 1050-54.

94. *Id.* at 1058-65.

95. *Id.*

96. *Id.* at 1068.

case, and determine whether the fair use doctrine is in need of further development in order to accommodate these new parameters.

Modern technology enables us to send huge amounts of information across the world in record time. A single individual can upload information to the Internet, and it can spread worldwide within seconds. Social media further accelerates the process of global dissemination, a phenomenon called “going viral.” For example, on the evening of Sunday, May 1, 2011, a group of Navy SEALs stormed a compound in Pakistan to capture and kill Osama Bin Laden. A man living in the area posted on the social media website Twitter about the commotion he heard outside his home.⁹⁷ Within hours, his number of Twitter followers soared from 751 to more than 32,000.⁹⁸ The first allegation of Bin Laden’s death also came from Twitter, only five hours after the raid.⁹⁹ A few years ago, this information would have taken hours or even days to confirm.

This rapid progress in technology also presents drawbacks. It is practically impossible to remove a piece of information from the Internet because once it is uploaded, anyone with an Internet connection can download and save the information to their personal computer. This presents problems from a copyright perspective because it becomes very difficult to police ownership rights in this type of decentralized environment.¹⁰⁰

GoldieBlox represents an excellent opportunity for the courts to test how well our current fair use analysis applies to commercial use in viral marketing. Compelling arguments exist on both sides, depending not only on the court’s interpretation of the original message of the Beastie Boys song, but also depending on whether the court believes that the GoldieBlox video is commenting on the original song itself, or whether it simply comments on the misogynistic attitudes still prevalent in our society.¹⁰¹

97. “Helicopter hovering above Abbottabad at 1AM (is a rare event).” Doug Gross, *Twitter User Unknowingly Reported Bin Laden Attack*, CNN TECH (May 2, 2011, 10:38 PM), <http://www.cnn.com/2011/TECH/social.media/05/02/osama/twitter.reports/>; Parmy Olson, *Man Inadvertently Live Tweets Osama Bin Laden Raid*, FORBES (May 2, 2011, 5:39 AM), <http://www.forbes.com/sites/parmyolson/2011/05/02/man-inadvertently-live-tweets-osama-bin-laden-raid/>.

98. Olson, *supra* note 97.

99. According to *The Guardian*, news of Bin Laden’s death was first posted on Twitter by Keith Hurbahn, a former chief of staff to Donald Rumsfeld. *Twitter First with News of Osama bin Laden’s Death via Ex-Bush Staffer*, GUARDIAN <http://www.theguardian.com/technology/blog/2011/May/02/twitter-osama-bin-laden-death-leaked> (last visited Oct. 3, 2014). He tweeted at 10:25 EST on Sunday: “So I’m told by a reputable person they have killed Osama Bin Laden. Hot damn.” *Id.*

100. See generally Lemley & Reese, *supra* note 16.

101. Watkins, *supra* note 8.

Hypothetically, the court would look at the first factor of the analysis, the purpose and character of the GoldieBlox video, including the commercial nature of the video.¹⁰² GoldieBlox states in its complaint that it specifically created the video “to comment on the Beastie Boys song, and to further the company’s goal to break down gender stereotypes and to encourage young girls to engage in activities that challenge their intellect, particularly in the fields of science, technology, engineering and math.”¹⁰³ Using the Supreme Court’s analysis in *Campbell* as a guide, the court would likely conclude that the lyrics of the GoldieBlox video directly address and comment upon the views on women expressed in the Beastie Boys’ original song.

It is possible that a reviewing court may view the Beastie Boys’ original song as a parody itself, commenting on the misogyny pervasive in modern-day hip-hop culture.¹⁰⁴ If this were the case, the court would be more likely to find that the misogynistic views espoused in the original work are not “the heart” of the work and therefore undermine the requirement that GoldieBlox’s song be parodying the work itself.¹⁰⁵

Essential in the first factor of the fair use analysis is the element of commercial use. As it stands, it is clear that commercial use is not a bar to a finding of fair use, although it weighs against a finding of fair use.¹⁰⁶ The GoldieBlox video is first and foremost a commercial for a children’s toy. Furthermore, the analysis’s case-by-case application would call for the court to analyze the circumstances surrounding the creation and distribution of this video. Although GoldieBlox asserts that the company created this video for the purpose of commenting on the original song, the court would likely also find the company’s desire to obtain publicity and to win Intuit’s Super Bowl commercial contest to be a strong motivation behind the creation of this video.¹⁰⁷

Next, the court would look at the nature of the Beastie Boys’ original copyrighted work.¹⁰⁸ The parties do not deny that the Beastie Boys hold a valid copyright to their original song “Girls.” It is therefore offered a higher level of protection.¹⁰⁹ However, this second factor is not

102. 17 U.S.C. § 107(1) (2012).

103. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 4, at 2.

104. Watkins, *supra* note 8.

105. *Id.*

106. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994); *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 562 (1985).

107. Watkins, *supra* note 8; Answer, First Amended Counterclaims, and Demand for Jury Trial, *supra* note 14.

108. 17 U.S.C. § 107(2) (2012).

109. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 4, at 6-12; NIMMER & NIMMER, *supra* note 31, § 13.05(2)(A).

likely to be helpful in the court's analysis. As the Supreme Court pointed out in *Campbell*, "[The second factor is never] likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."¹¹⁰

Thereafter, the court would look at the amount and substantiality of the original song that was appropriated in relation to the entire original song.¹¹¹ The court would likely break down this factor into an analysis of the melody and an analysis of the recording, lyrics, and message. GoldieBlox concedes that the melody is identical.¹¹² The court would then turn to look at the recording, a new recording of the same melody, and likely conclude this weighed in favor of fair use.¹¹³

The court would then analyze the lyrics, which maintain the same rhythm and cadence, but with different words projecting different themes.¹¹⁴ Here, the court could analyze the Beastie Boys' song to be misogynistic in its original intent, or it could also analyze the song to be itself a comment on misogyny in hip-hop culture.¹¹⁵ The lyrics to the Beastie Boys' song include misogynistic lyrics describing girls performing domestic tasks and serving as objects for boys, such as "Girls—to do the dishes/Girls—to clean up my room/Girls—to do the laundry."¹¹⁶ The GoldieBlox lyrics, on the other hand, have been revised to criticize the misogynistic views presented in the original song, such as "Girls to build the space ship/Girls to code the new app/Girls to grow up knowing That they can engineer that."¹¹⁷ Although there is a possibility that the court may determine the original intent of the Beastie Boys' song to be a parody itself, it is more likely that the court will conclude these facts weigh in favor of fair use.

Finally, the court would look at the fourth factor of the fair use analysis, the potential market harm the GoldieBlox video has had on the

110. *Campbell*, 510 U.S. at 586.

111. 17 U.S.C. § 107(3).

112. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 4, at 18 (noting that the defendant's work is "set to the tune of Girls by the Beastie Boys but with a new recording of the music and new lyrics").

113. *Id.*

114. *Id.* at 18-19.

115. Watkins, *supra* note 8.

116. "Girls—to do the dishes/Girls—to clean up my room/Girls—to do the laundry/Girls—and in the bathroom/Girls, that's all I really want is girls/Two at a time I want girls/With new wave hairdos I want girls/I ought to whip out my girls, girls, girls, girls!" Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 4, at 18-19.

117. "Girls to build the spaceship/Girls to code the new app/Girls to grow up knowing/That they can engineer that/Girls. That's all we really need is Girls/To bring us up to speed it's Girls/Our opportunity is Girls/Don't underestimate Girls." *Id.*

original Beastie Boys' song.¹¹⁸ It would be unlikely that the court would find that there is actual harm in this case, particularly because it is clear that the GoldieBlox video and the original Beastie Boys' song are products of two entirely different markets: hip-hop music and children's toys. It would be unlikely that the court would find a possibility for market substitution in this situation. The court would also be unlikely to find that the GoldieBlox video deprives the Beastie Boys of a market for commercial advertising because the Beastie Boys do not license their music for commercial purposes.¹¹⁹

Thus, in analyzing the specific facts of *GoldieBlox* in balance with one another, the court would likely find that GoldieBlox's video constitutes a parody and therefore is protected under the fair use doctrine.

VI. CONCLUSION

Less than four months after GoldieBlox sued for declaratory judgment, the parties in the case settled.¹²⁰ Although settlement means the parties were able to come to an agreement on the issue without expending extensive amounts of money and valuable court time, settlement also means that the court lost a valuable opportunity to analyze this case of first impression. *GoldieBlox* represents a developing trend in the field of marketing: the appropriation of protected material in parody form for the purpose of launching a viral marketing campaign on the Internet to gain free publicity and, in this specific case, to win a contest with a \$4 million prize at stake. As this type of marketing becomes more common, it is important that we determine whether the actions involved are protected under the fair use doctrine.

The protection of commercial use has always been an element of the fair use doctrine that courts have been hesitant to expand. The spirit of the fair use doctrine includes allowing for progress through comment and critique; however, the doctrine is ultimately a balancing test between creator's rights and owner's rights. With emerging technology, the balance is beginning to tip towards the creator, and it is up to the courts to determine whether commercial use within the updated parameters of these technological advances still qualifies as fair use.

Can commercial use on this level still be considered fair use? Most likely yes. The very laws we are analyzing were put into place to encourage progress, including progress through comment and criticism.

118. 17 U.S.C. § 107(4) (2012).

119. Itzkoff, *supra* note 13.

120. Stipulation for Dismissal of Action Pursuant to Fed. R. Civ. P. 41(a), *supra* note 21.

No matter how much monetary benefit results from these critiques, they are still essential to our society and should be protected. Thus, the court would have likely found the GoldieBlox video to be a parody, despite its commercial purpose, and therefore protected as fair use.

Unfortunately, until the courts formally analyze this new form of commercial use and clarify how the fair use doctrine applies, we run the risk of allowing others to infringe upon copyright owner's rights in the name of marketing. The public is becoming increasingly comfortable with the idea of appropriation for the purpose of commercial use. The fair use doctrine has always included a complicated analysis; however, the more opportunities the court has to refine its analysis based on multiple situations, the stronger legal regime we will have and the more clear the boundaries for this emerging trend will become.

It is evident that GoldieBlox knew that what it was doing was risky. GoldieBlox took aggressive initiative by uploading the video without permission and then preemptively suing the Beastie Boys for declaratory judgment. Now that the dust has settled and the parties have gone their separate ways, the GoldieBlox website displayed a message apologizing for their actions, promising not to appropriate material in the future without permission, and encouraging other companies to do the same.¹²¹ This is not enough. Courts must look for opportunities to emphasize the boundaries of fair use within the realm of marketing on the Internet because this type of business strategy is here to stay.

121. GOLDIEBLOX, <http://www.goldieblox.com/> (last visited Oct. 1, 2014). As of March 24, 2014, the message on the site read: "We sincerely apologize for any negative impact our actions may have had on the Beastie Boys. . . . From now on, we will secure the proper rights and permissions in advance of any promotions, and we advise any other young company to do the same." *Id.*