

The Debate over Parody in Copyright Law: An Experiment in Cultural Critique

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When the cast of Saturday Night Live sang "I Love Sodom" to the tune of "I Love New York," Elsmere Music, Inc., the copyright proprietor of the tune, "did not see the humor of the sketch."¹ It took NBC to court for copyright infringement. This was not a unique case. Motion picture companies had gone after Jack Benny for his parody of *Gaslight* and Sid Caesar for his of *From Here to Eternity*. Walt Disney sued the publishers of counterculture comic books and the makers of pornographic films for the parodic use of characters like Donald Duck and Mickey Mouse.² The proprietor of the copyright of "Boogie Woogie Bugle Boy" charged that its copyright was infringed by the composers of "Cunnilingus Champion of Company C."³ The opinions in these cases, and a few others like them, shape a contemporary legal debate about the nature of parody. When does parody constitute a valid defense to a charge of copyright infringement? The responses in judicial opinions and scholarly papers present a curious paradox. The cases are transparently mundane and the impetus for the claims is obviously commercial. Indeed, one commentator noted, "The impact of commercial motivation is heightened by the fact that in our modern society, the commercial motivation is virtually universal."⁴ Yet, this recognition appears on the margins of commentary that is usually couched in language more appropriate to discussions of "high culture" works of artistic creation.

In assessing the challenging relationship of parody to the idea of copyright, judges and academic commentators consider the high-minded purposes of copyright law in the United States, set out in Article I, section 8 of the Constitution—"to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Moreover, they adopt a rhet-

1. Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 745 (S.D.N.Y.), *aff'd* 623 F.2d 252 (2d Cir. 1980).

2. Walt Disney Productions v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975).

3. MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).

4. R.T. Nimmer, "Reflections on the Problem of Parody-Infringement," in *ASCAP Copyright Law Symposium* no. 17 (1969), 160.

oric consistent with this grounding principle that focuses on a mythical Anglo-American ideal—the virtuous individual author who carries out acts of independent creative genius and who is motivated, like all self-interested persons, by the hope of material or financial reward. The classic humanist view of the artist is only less entrepreneurial. What are we to make of this gap between a rhetoric of copyright that embraces the majesty of the artistic creation and the obvious commercial contexts that have defined case law? Potential answers are located in the realm of mass consumer culture and the relations between copyright law, commercial motivation, and the endowment of cultural legitimacy on the products of mass culture.

To an ethnographer whose project is to represent the style, logic, and ideological salience of different kinds of cultural discourses in modern societies, the scope of the legal debate about parody and, in turn, about the nature of copyright in its historic and social context is disappointing. For, far from regarding parody as only a traditional category or subgenre of literature, contemporary cultural theorists conceive of it as a self-conscious aesthetic of everyday life and a major mode or style of communication that is particularly suited to the “postmodernist” conditions of western societies in the late twentieth century.⁵ American legal discourse, by favoring authorial privilege over a rigid control of ideas or their expression, does take a liberal view of parody and copyright. Nonetheless, it retains a reverent conception of authorship that treats it as a timeless and natural category of social identity. But in fact, the law’s sense of what constitutes an author reflects eighteenth, nineteenth, and early twentieth century bourgeois notions of artistic production.

This anachronism is not surprising. Spheres of the law like copyright tend toward conservatism. They build upon a tradition that is relatively insulated from and insensitive to changes in social trends, and operate within the confines of their particular cumulative textual pasts. Legal discourse translates the social world into a language that serves its own purposes of resolving conflict and of flexibly providing solutions to problems that have traditionally been framed in its terms. When it undertakes this translation, copyright addresses communicational processes that are pervasive and offers privileges that can be claimed and to which the law will respond. For example, great contemporary challenges to the conservation of legal discourse in copyright concern computer software and satellite communications. Parody, as a mode of common or more specialized communication in different domains of social life, has little or no relevance for legal discourse until it is invoked as a defense against a charge of copyright infringement. It so happens that all of the cases concern the contem-

5. See, for instance, Margaret A. Rose, *Parody/Meta-Fiction* (1979) and “Parody/Post-Modernism,” *Poetics* 17 (1988): 49.

porary culture industry, where parody, if not piracy, is perceived as a direct affront to the market value of a particular copyrighted expression of an idea.

Notwithstanding the narrowness of its textual tradition, the principled discourse that accompanies the resolution of particular parody cases often attempts to take a broader view. But even as it does so, the discourse constricts itself by adopting idealized and decontextualized conceptions of the artist and the work of art. The law cannot capture emergent forms, but tries to manage the new by making old concepts encompass broader categories—eventually drawing in improvised music and photographs, for instance—which will still provide leeway for social policy considerations in judicial opinions and scholarly commentary. The problem is that, where parody and the opinions and scholarship that cover it are concerned, legal discourse has failed to go beyond a very limited vision of the artist and work of art.

This essay is an attempt to elaborate on legal discourse concerning the parody defense by juxtaposing it to readings from two diverse domains of cultural analysis. In this manner, I hope to illuminate some themes and problems that legal discourse has understated or left unstated. I do not intend, however, to resolve the question of the relation of parody and copyright in a manner that will be of practical interest to lawyers, in the sense of offering legal solutions to legal questions. Rather, by working outside the traditional frame of reference of legal discussions about copyright, I feel free to encompass the legal within the social rather than vice versa. Imaginative readings of the purpose of copyright and the parody defense are, for me, exercises in ideology critique that are worthwhile in themselves. This essay suggests an approach to ideology critique from the perspective of recent reexaminations of ethnography. I have been developing a critique which brings together disseminated and disseminating cultural ideologies across a diversity of social contexts. For example, there are a number of ways that the formation of intellectual property law can and should be read outside its own frame of reference. By a strategy of “reading against” (against the so-called “primitive” and “postmodern” in this essay), copyright becomes a subject of sustained defamiliarization that engages the assumptions or aspects of a particular discourse that are usually masked or submerged. This strategy leads to a form of critical essay that plays on juxtaposed cross readings, the confrontations of diverse contexts, while maintaining an ethnographic sensitivity for the integrity of context.⁶ Thus, while this essay may not resolve the problems that the

6. I and several other colleagues have been engaged recently in a critique of ethnographic method and writing within anthropology. See James Clifford and George E. Marcus, eds., *Writing Culture: The Politics and Poetics of Ethnography* (1986), and George E. Marcus and Michael M. J. Fischer, *Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences* (1986). In this effort, there has been a search for new uses and different objects for ethnographic inquiry. The essen-

parody defense raises for judges and lawyers, it might make the principled legal discourse more richly evocative of the broader context of cultural predicament with which this discourse, in fact, deals.

THE WORK OF ART AS GIFT IN THE AGE OF COPYRIGHT

Since the enactment of the first English Copyright Act, the Statute of Anne of 1709, the basic tension in Anglo-American copyright law has pitted the author's interest, embodied in the grant of an "exclusive right" to authors as an economic incentive to share their work, against a broader social interest in the promotion of free competition, freedom of speech and freedom of expression.⁷ Both the Statute of Anne and the first United States federal copyright act, enacted in 1791, included sections that stated the purpose of the legislation. However, when the statutes governing copyright were revised in 1831, the statement of "purpose" was removed. Since then, the purpose of copyright has been a constant issue in judicial opinions and in scholarly commentary, subject to varied constructions in the fashioning of legislation.⁸

While one might expect comment on the purpose of copyright to evoke a deeply American cultural view of the processes of artistic (or scientific) creation, or perhaps an awareness of how the product of artistic labor has been alienated, contemporary legal discourse is descriptively thin in its hallowing of the artist or author. Rarely since the antebellum era, when an intimate connection between law and letters existed,⁹ have writers of

tial milieu for this project has been the emergent interdisciplinary space of cultural studies; its motivation stems from a renewed interest in the critique of social practices and discourses, and blurring of the boundaries of disciplines such as anthropology, sociology, literary studies, history, and philosophy. My special interest in the law began in graduate school with a once-lively arena of anthropological research on cross-cultural conflict management. It then moved to critical legal studies, which seemed attractive since its concern with ideology critique, while classically focused on texts, seemed to be grounded in a sensitivity to the social contexts of legal practice and discourse that resembled an ethnographer's concern. This movement has produced some stirring theoretical insights, a compelling vision of what significant research into the law might be, and some excellent history. But the quality of the actual critiques of contemporary legal institutions, especially in relation to society, has been mixed. This essay emerges from this context. Ironically, my strategy of critique through cross-reading plays with the practices of imitation and parody-for-critical-effect that copyright law never seems to recognize explicitly as a major habit or fashion of contemporary communication. Rather, copyright law merely defines "the social" as background for the cases and policies which it considers. But the law is an inherent part of this "social" in that it plays some of the same language games, however irrelevant or obstructive to its purposes a recognition of this might be.

7. Leon E. Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act* (1978).

8. Five states passed copyright statutes between 1783 and 1786, on the urging of the Continental Congress. Property in copyright was eventually created by federal statute in the power that the Constitution vested in Congress (Article I, section 8). In the twentieth century, the act of 1909 governed copyright until the revision of 1976, which was striking in its explicit and detailed treatment of exemptions from copyright control that had previously been developed in case law only. There was something patrician about the privilege granted the author that had always rankled the balancing democratic side of copyright. Finally, in 1976, this side came into its own in the detailed statutory concerns with fair use and exemption.

9. Robert A. Ferguson, *Law and Letters in American Culture* (1984).

legal opinion or scholarship in the United States felt free to indulge their cultural imaginations (or class interests). Indeed, in the late twentieth century, legal discourse about copyright has come to be constrained by a formulaic language of economic justice and liberal social policy standards that are typically stated in vague pronouncements about the rights of individuals in relation to the broader social good. Modern copyright law has left the determination of infringement to judges who make their decisions on a case by case basis and use an intentionally vague rhetoric of balancing the author's versus society's interest in their framing of copyright's purpose. Moreover, there has been a distinct trend in the twentieth century of recognizing and expanding exemptions to copyright. This can be read as a certain realism on the judge's part regarding the monopoly implications of copyright in an economy where it is widely understood that the rights and privileges extending from the copyright are most consequentially corporate, rather than the individual artist's. I will address this shortly. This section presents an elaboration of the ideology of copyright that passes through an important literature in anthropology (carrying its own ideological implication) with the aim of restating the basic tension in copyright law in a more densely imagined, cultural context.

Of course, the vague rhetorical framework within which lawyers discuss the purposes of copyright does not license just any cultural reading. There are a number of different conceptualizations of copyright's purposes within legal discourse. One of these will serve as my starting point. In an excellent, but now little cited compendium on American copyright law, Ralph Shaw provides a suggestive account of the nature and purpose of copyright.¹⁰ Under the common law, an author has an automatic right to control the use and reproduction of his or her unpublished work. It is absolute personal property. With regard to published work, statutory schemes give authors the same kind of right but limit its duration. Furthermore, they require that a copyright be formally applied for or declared. Shaw argues that statutory copyright is less a right than a privilege or franchise granted in return for, and to induce, some social or public act by the author or artist. As Shaw paraphrases legal opinion:

There is an important distinction between copyrights and patents. Letters patent give a monopoly to make, vend, and use, while copyright does not give an exclusive right to use. Copyright protection is extended to authors mainly *with a view to inducing them to give their ideas to the public* so that they may be added to the intellectual store, accessible to the people, and that they may be used for the intellectual advancement of mankind. . . . [C]opyright is a franchise

10. Ralph R. Shaw, *Literary Property in the United States* (1950), 29-32. Shaw's treatise focuses on literary property and is primarily concerned with cases decided under the Copyright Act, ch. 320, 35 Stat. 1075 (1909).

granted in the public interest, and the object is to advance the arts and sciences *by encouraging the dissemination of materials which might otherwise be withheld*.¹¹

In other words, Shaw's interpretation of the purpose of copyright is not as an economic incentive to get artists to produce, as some have argued, but rather as an inducement to get them to give their work to society in general, that is, to make a *gift*.¹²

The idea of the work of art as gift is a recurrent one in romantic, high cultural discourse. It has most recently been reiterated in Lewis Hyde's *The Gift: Imagination and the Erotic Life of Property*. Through much of his book, Hyde ignores the commercial or exchange element of gift-giving so that he can sharply distinguish gifts from commodities. He briefly confronts it only in his conclusion where he resigns himself to the need for artists as gift-givers to reconcile themselves to participation in a thoroughly market society and the inevitable commodification of their creations. In other words, Hyde is concerned almost exclusively with the artist's act of giving and not with the return or expectation of return that completes and makes social the act of giving. The following provides a sense of Hyde's sacralizing tone—the gift is that part of the object which makes it true art, which makes it resist engulfment by market exchange:

If a work of art is the emanation of its maker's gift and if it is received by its audience as a gift, then is it, too, a gift? I have framed the question to imply an affirmative answer, but I doubt we can be so categorical. Any object, any item of commerce, becomes one kind of property or another depending on how we use it. . . . For example, religions often prohibit the sale of sacred objects, the implication being that their sanctity is lost if they are bought and sold. A work of art seems to be a hardier breed; it can be sold in the market and still emerge a work of art. But if it is true that in the essential commerce of art a gift is carried by the work from the artist to his audience, if I am right to say where there is no gift there is no art, then it may be possible to destroy a work of art by converting it into a pure commodity. Such, at any rate, is my position. I do not maintain that art cannot be bought and sold; I do maintain that the gift portion of the work places a constraint upon our merchandising.¹³

The lofty heights of Hyde's haute bourgeoisie nostalgia for the aura of the work of art appear to be quite distant from the mundane, dull, and

11. Shaw, *Literary Property in the United States*, 34-35. Italics mine.

12. That this may seem a sociologically simplistic notion about what motivates authors to publish their work as well as a cynical idea about the state of gift-giving in modern society may just be a function of the limited cultural vocabulary that decontextualizing, principle-seeking legal discourse has imposed on itself. For in legal discourse, financial gain, which stands for the complexity of motivation, is the universal motor of individual behavior under a market regime.

13. Lewis Hyde, *The Gift: Imagination and the Erotic Life of Property* (1983), xii-xiii.

crass provisions of copyright law. Nothing of the gift dimension of artistic activity seems to be retained as these provisions become merely the means by which the artist's gift devolves into a commodity. Perhaps, but the attempt to lend cultural substance to the ideology of copyright is an interesting arena for exploring the ambiguous survival of a pure high cultural ideology of gift exchange that acts authoritatively as law upon the operations of a clearly dominant regime of commodification. The high cultural ideology within the law of copyright is as resolute as Hyde's. It is only more hesitant in expressing itself. The veiled issue with which parody confronts copyright law concerns the fate of an ideology of artistic property defined through gift-giving in a world that is dominated by exchange of commodities.

For my purposes, it is particularly interesting that Hyde's formulation of artistic endeavor as gift-giving draws on the important anthropological literature that has grown out of Marcel Mauss's classic comparative study, *The Gift: Forms and Functions of Exchange in Archaic Societies*. In anthropology, Mauss's essay has been of seminal importance in providing a framework for describing social relations and cultural structures that ethnographers encounter in the so-called "primitive" or tribal societies that they have traditionally studied. In this essay, I am less interested in the development of this literature toward more complex and sophisticated understandings of systems of reciprocity and exchange in (non-capitalist) market societies than in its ideological import for certain arguments within Western, particularly American, society.

Although Mauss himself mentions a number of contexts in industrial, market societies in which a regime of gift exchange survives,¹⁴ in their studies of non-Western peoples, anthropologists have almost exclusively emphasized the contrasting, difference-marking functions of the "moral economy" of the gift in opposition to the "soul-less," commodifying economies of the market societies from which they come.¹⁵ Regimes of exchange grounded in the moral economy of the gift show that alternatives to commodity exchange exist. This demonstration and its potential critique of Western Market Man constitute a significant subtext of the anthropological literature, sometimes brought to the surface by different writers. Within the realm of diverse Western discourses, then, anthropology provides an explicit, semi-utopian ideological statement, based on its authori-

14. Mauss numbered intellectual property law among the contexts in which the gift regime survived. M. Mauss, *The Gift* (1967), 64-65. But the French copyright law to which Mauss may have referred is very different from Anglo-American copyright law. It appears to be more expressive of cultural values and aesthetic debates. Artists' reactions to copyright statutes in late-nineteenth and early-twentieth century France are discussed in an interesting paper by Molly Nesbit, "What Was an Author?" *Yale French Studies* 73 (1987): 229-257.

15. Sociologists have generally been more interested than anthropologists in locating and discussing the fate of gift regimes in modern societies. See especially the highly regarded comparative study of blood donorship systems by Richard M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (1971).

tative contemplation of distinctly other human worlds, that makes common cause with a variety of critiques of life in the West. In this sense, Hyde uses the anthropological literature as an authority and grand metaphor to give cultural body to his own nostalgic ideas about the sacredness of the work of art as gift in modernity.

I will treat the same literature but try to extract from it a framework that helps pose questions about the view of art as gift in the context of legal discourse on copyright. Unlike Hyde, I do not assume that this literature is authoritative or that it transparently represents the social practices of the societies with which it is concerned. It is a discourse which is as much a product of Western culture as Hyde's exercise in aesthetics or the law of copyright. In fact, the gradual development of a self-conscious recognition of their own interpretive biases among anthropologists who have produced this literature has been responsible for much of the progress that they have made in working with a long history of fieldwork observations and indigenous commentaries on gift exchange.

The accumulated corpus of anthropological commentary on key indigenous testimonies about the meaning of gift exchange in particular "primitive" societies offers an illuminating surrogate discourse that makes explicit an essentially parallel conception in copyright that legal discourse has not really articulated. I want to recast the gift rationale of copyright in terms borrowed from a non-Western text to which anthropologists from Mauss to the present have returned in their attempts to construct a theory or ideology of gift exchange, a statement by the Maori, Tamati Ranapiri:

I will carefully explain to you. Suppose you possess a certain article, and you give that article to me without price. We make no bargain over it. Now, I give that article to a third person, who, after some time has elapsed, decides to make some return for it, and so he makes me a present of some article. Now, that article that he gives me is the *hau* of the article I first received from you and then gave to him. The goods that I received for that item I must hand over to you. It would not be right for me to keep such goods for myself, whether they be desirable items or otherwise. I must hand them over to you, because they are a *hau* of the article you gave me. Were I to keep such an equivalent for myself, then some serious evil would befall me, even death.¹⁶

At first sight it might seem exotic to conceptualize American law in terms of the words and thoughts of a commentator apparently so distant in cultural time and space from ourselves. The rationale of Western copyright in Maori terms may not seem to be so exotic, however, when one appreciates the line of connections among the mediating representations,

16. Translation of a response by Tamati Ranapiri to the ethnographer Elsdon Best in 1909; quoted in Marshall Sahlins, "The Spirit of the Gift," in *Stone Age Economics* (1972), 151.

from the anthropologist in the field in search of "authentic" indigenous texts to the generations of theoretical commentary and scholarly debate about the nature of the "Other" that such texts are made to reveal, to aesthetic theorists who take this "real" provided by anthropology to further their own representations of an "ideal," and finally, to the incorporation of such ideas of the "ideal" into the rationales and ideologies of operating, authoritative institutions like law that subsume social and cultural spheres.

A key problem in anthropology has been how to talk about the "spirit of the gift," the Maori *hau*, which motivates the return and keeps the moral economy of exchange going. Tamati Ranapiri's explanation has served as textual source through which a number of analysts, including Mauss, have attempted to explain the mystical force that surrounds gift exchange and ensures a return to the giver. Like most members of secularized Western societies, anthropologists do not have much of a vocabulary for elaborating this sacred or mystical force. Thus, the character of this force remains merely attributed or intractably mystified. Unfortunately, it is precisely this aspect of the gift literature that Hyde draws on to lend substance and authority to his attempt to rescue the aura of works of art in late capitalism. As a result, Hyde offers an earnest imputation of the sacredness of art as gift, but little in-depth analysis.

As I am concerned with the very rational and secular discourse of copyright, it seems only appropriate to draw on anthropological commentary that takes a more pragmatic, materialist view of gift exchange in traditional societies. Marshall Sahlins' essay, "The Spirit of the Gift," is perhaps the most famous interpretation in this vein.¹⁷ In fact, Hyde made extensive use of Sahlins' work. However, this essay places less emphasis on what is, in Western terms, the "unspeakable" side of gift exchange—its mystical force—than on its pragmatic, easily recognizable economic logic. Criticizing Mauss's interpretation of Tamati Ranapiri's explanation of gift exchange, Sahlins writes:

Still, to adopt the current structuralist incantation, "everything happens as if" the Maori was trying to explain a religious concept by an economic principle, which Mauss promptly understood the other way around and thereupon proceeded to develop the economic principle by the religious concept. . . .¹⁸

For Sahlins, the key to understanding the *hau* of the gift, the compulsion to make a return on the original gift, involves a three-party model (as in the Maori sage's testimony): A gives to B, B passes on to C, C makes a return prestation to B, and B must give back to A, the originator of the

17. Sahlins, "The Spirit of the Gift," in *Stone Age Economics* (1972).

18. *Ibid.*, 157.

gift, what C gave to him. In this illustration, there is a defining moral principle that distinguishes such gift regimes from Western economic logic. Sahlins explains:

The meaning of *hau* one disengages from the exchange of *taonga* is as secular as the exchange itself. If the second gift is the *hau* of the first, then the *hau* of a good is its yield, just as the *hau* of a forest is its productiveness. Actually, to suppose Tamati Ranapiri meant to say the gift has a spirit which forces repayment seems to slight the old gentleman's obvious intelligence. To illustrate, such a spirit needs only a game of two persons: you give something to me, your spirit (*hau*) in the thing obliges me to reciprocate. Simple enough. The introduction of a third party could only unduly complicate and obscure the point. But if the point is neither spiritual nor reciprocity as such, if it is *rather that one man's gift should not be another man's capital*, and therefore the fruits of a gift ought to be passed back to the original holder, then the introduction of a third party is necessary. It is necessary precisely to show a *turnover*; the gift has had issue; the recipient has used it to advantage. . . .¹⁹

Sahlins goes on to absorb more "exotic" practices like sorcery and hunting/fertility rituals into this model. While the model, derived from Tamati Ranapiri's authoritative explanation, claims to represent a more general indigenous logic of socio-economic relationships that differ from that in the West, the terms are still ours. They are essentially individualistic and describe what would otherwise be a self-interested economic transaction. But they also give it a moral twist that is in line with the ethic of virtue anthropologists impute to societies that antedate or exist outside of the market regime. If Sahlins' description, that of the West, is merely an elaboration of Tamati Ranapiri's, that of the Other, how are we to take the latter's? In the specific ethnographic setting, the sage was trying to make Elsdon Best (the anthropologist who recorded the comment) understand gift exchange in *Best's* terms, and not necessarily in his own terms. The year was 1909, nearly a century after Europeans had become firmly established in New Zealand. There is little doubt that Tamati Ranapiri was being a good instructor and cultural translator, couching Maori knowledge in the idiom of the Other, the European, to whom he was addressing his explanation in the role of "anthropological informant" and in response to elicitation. Sahlins perhaps takes Ranapiri's explanation too closely as the voice of the Maori point of view unmediated by the intercultural situation in which it occurred.²⁰

19. Ibid., 160. My italics.

20. In yet another brilliant and very recent reinterpretation of the famous explanation by Tamati Ranapiri, Annette Weiner, "Inalienable Wealth," *American Ethnologist* 12 (No. 2, 1985): 210-227, constructs a completely different context for understanding Maori (and more generally, traditional) exchange by focusing on the rich and complex cultural associations of the goods exchanged themselves,

Sahlins' essay, nonetheless, is one of the clearest and most usable statements of the counter-ideology of the gift since Mauss. It criticizes the Western market mentality by elaborating a substantive alternative that is certainly *of* the Other, but that is not so different that the economic frame of reference and target of the critique is lost. It exemplifies the subtextual dimension of anthropological writing which in contemplation of the Other has the purpose of offering a commentary on ourselves. Sahlins' (and Tamati Ranapiri's) explanation of the *hau* is thus eminently usable by Hyde for his purposes and me for mine. I use it as a way to extend further a cultural reading of copyright's constricted expression of its high culture ideology which regards works of art as a special sort of property in Western market economies and which gives copyright its purpose. That is, copyright is in some sense the *hau* of works of art. But in what sense?

Instead of person-to-person exchange and the compulsion to return sacred property, we have the artist making a gift of his or her work to society at large, or more specifically, to a world of business and commerce. The *hau* of the work of art is what copyright guarantees the artist or original donor in an anonymous world of apparently autonomous markets and processes of mass production. But while it subscribes to the idea that "one man's gift should not be another man's capital," copyright ideology is undermined when it confronts the overwhelming number of situations in contemporary society where a corporation acquires an author's copyright in return for a salary or royalties. The term "author" in the copyright literature is blurred and stands for either the individual author *or* the owner of the copyright (usually a corporation or publisher in the parody defense context). This permits a principled, high-toned ideology of purpose—that of the morality of the *hau* transmogrified for modernity—to be sustained in the face of contradictory practice, where indeed one man's gift regularly becomes another man's capital.²¹

One might see in this a different, more socially and culturally embedded statement of the basic tension within copyright law. It is not merely

that is the *taonga* such as greenstone, cloth, etc., rather than on the *hau*, or return yield, of giving, which is a much more Western concern in terms of the framework that Sahlins and others have employed. She thus reveals a very different world and set of terms of references in which gift exchange must be understood. The framework of understanding seems very alien indeed to ours, especially to the economic frame of reference that we privilege to pose and solve so many contemporary social problems, in contrast to the one Sahlins uses, and it is generally less assimilable than his to the idea of the gift as an inherently economic transaction.

21. The bias, of course, in the anthropological literature has been to reinforce those who have wanted to contrast, for purposes of critique, gift systems with commodity ones, despite Mauss himself recognizing the survival of gift regimes in capitalist societies (but as survivals, he seems to be indicating that the gift regime is residual, marginal, and essentially alien to modernity). Recently, there has been a sophisticated and therapeutic blurring of this habit of contrast in the collection of essays edited by Arjun Appadurai, *The Social Life of Things* (1986). The commodity and gift are different stages or identities of objects as they circulate in *all* kinds of societies, and to see this clearly, it is the politics of valuation that must be understood as objects pass through diverse regimes where they acquire use and exchange value of different sorts.

the author's interest in financial gain opposed to society's interest in freedom of speech and expression. Rather, the alternative modes of exchange or dissemination of the work of art are in tension. What copyright ideologically conceptualizes as a gift, the author's control over reproduction of his creation (replacing the *hau*) and ensuring a financial return on all authorized uses (or givings) of the work, becomes in corporate hands a commodity, an exclusive object whose value resides in its marketability, and restricted in its dissemination to enhance its value. The gift-becoming-commodity is the crucial tension that copyright ideology fails to address.

This restatement in anthropological terms of the rationale of copyright sets the stage for a discussion of the specific problem of parody, first in the legal terms in which it has been debated, and then read against alternative views of the status of parody in contemporary aesthetic theory and cultural criticism. In the final section we will draw together these two culturally elaborated restatements of copyright law: (1) copyright as rooted in a high culture rationale linked to a notion of the work of art as gift; and (2) parody on a broader canvas as a major and pervasive mode of social communication.

THE LEGAL TERMS OF DEBATE OVER PARODY AS A DEFENSE AGAINST COPYRIGHT INFRINGEMENT

I now want to review how the problem of parody has been defined and debated in legal discourse.²² Parody, offered as a defense against a charge of copyright infringement, has depended on claiming an exemption based on "fair use." Fair use is a familiar concept as old as copyright itself that only became a matter of statutory law with the enactment of the revised Copyright Act of 1976.²³ The act explicitly set out four criteria for analyzing fair use which had emerged previously in the case law:²⁴

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;

22. I see no need to rehearse here what has been extensively discussed before: the inconsistencies and confusions in the corpus of parody cases since the 1950s. There is a medium-sized law journal literature that does this. The three most recent and synoptic sources, Richard A. Bernstein, "Parody and Fair Use," in *ASCAP Copyright Law Symposium* no. 31 (1984), Julie Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into the Juggling Act," in *ASCAP Copyright Law Symposium* no. 34 (1987), and Melanie A. Clemmons, "Author v. Parodist: Striking a Compromise," in *ASCAP Copyright Law Symposium* no. 33 (1987), on which I will be focusing in this article, exhaustively list and treat this literature, and they should be consulted for full references (e.g., see Clemmons, 91 nn. 28, 29).

23. This indicates perhaps that with its general emphasis on exemptions, see Seltzer, *Exemptions and Fair Use in Copyright*, the law was leaning in the traditional balance more toward the social good, e.g., the value on freedom of information, than toward the author's benefit. (The "author" is, in fact, usually the corporate owner of intellectual property.)

24. Bernstein, "Parody and Fair Use," 10.

- (3) the amount of 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.

The third and fourth criteria have been most important in deciding the parody cases. Substantiality, a common criterion in the early cases of the 1950s, is a very literal means of handling the question of parody, especially when it is only the quantity rather than the quality of borrowing that has been considered. The economic consequence criterion establishes a broad boundary principle that avoids having to otherwise specify or define the relation of the parody to the original, and tends to be the criterion used by those who want to construct fair use more liberally. The first two criteria have revealed more open attitudes about parody as a form of expression. Opinion on parody ranges from its association with burlesque (thus giving a low value to its social importance) to its standing as a major form of social criticism (in which it has a high culture association as art). Each of these criteria implies that parody is secondary to or derivative of an original work, that is, a copy.

Recent attempts to order the morass of inconsistencies in copyright law reveal the inhibition that the purposes and traditions of legal writing place on our understanding of the problem of copyright and parody. This is most striking in three prize winning papers from the annual Nathan Burkan Memorial Competition, sponsored by ASCAP (the American Society of Composers, Authors, and Publishers) and published in the annual *Copyright Law Symposium*. All three concern the parody defense and make ambitious proposals to put this body of law in order; two of the three do so by definitional exercises that rely on a statement of the nature of parody carefully designed to avoid the problems of the past; the third sees the wisdom of not trying to distinguish parody at all in relation to a work parodied. Finally, all the papers would like legal discourse to incorporate a culturally richer notion of parody as a style of communication in the arts and society. The three papers attempt in their own ways to provide this type of analysis, but they remain limited by traditions of legal writing, which in these instances seem to be to solve specific problems of the legal construction of principle from case law.

I want to extend the discussion of the three papers beyond their own unfulfilled inclination, which is to relate the legal consideration of parody to how it is practiced and thought about in society as a special form of communication. To do so, I will briefly characterize the main arguments of the papers and then place them against two alternative understandings of parody that view it as a distinguishing feature of the conditions that define postmodernism in contemporary mass media, consumer society.

Richard Bernstein's scheme envisions a quite lenient general theory of

fair use, to be applied to all secondary uses of original works, even when the use is substantial. He recognizes that in past cases the secondary work's economic effect on the original has been either decisive or very significant. He objects, however, that not enough attention has been paid to the independent value of promoting parody or other kinds of secondary work. He finally outlines a proposed fair use standard in which, even if the defendant's copy does decrease the demand for a plaintiff's work, it would still be permitted if the benefit that the secondary use gives to the promotion of artistic achievement outweighs the damage done to the original author's monopoly interest. Bernstein also seeks to leap over the literal-minded substantiality criterion (the so called "conjuring up" principle, permitting the parodist only enough copying necessary to recall or conjure up the original). Instead, he advocates permitting any use that can be seen to promote the arts. If there is any originality at all in the secondary work, then it should be permitted as a fair use, even if it is to the economic detriment of the original work limited to some threshold. Finally, Bernstein would do away with the distinction between original and secondary works based on assumptions of relative artistic value.

An unstated assumption about the conditions of artistic production and communication in modern society lies behind this liberalizing approach. Bernstein seems to favor the relative artistic worth of parody, or the copy, which is usually the underdog, so to speak, in a discourse that uses the high culture notion of individually inspired and created works of art to determine what copyright is designed to privilege and protect.²⁵

Julie Bisceglia's proposed scheme also tries to transcend the literal-minded criteria employed in analyzing parody cases and the resulting history of inconsistencies. Her solution, however, builds on a definition of parody derived from literary authority. She begins with a typology of five distinct kinds of literary parody, and suggests that the determination of liability should turn on identifying the use the parody makes of the source text and the target of criticism. Parody, she argues, "focusses attention on both the style and substance of a source text and uses comic techniques, such as exaggeration and incongruity, to criticize the source text."²⁶ That is, a parody must establish a close relationship, engagement, even dialogue with its source. It cannot loosely evoke or imitate the source expression for some other purpose or target of criticism. Such a work of parody, tightly connected to its source, is protected without recourse to fair use or free speech, Bisceglia claims, but instead is protected by the Constitutional copyright clause (the same absolute authority claimed by Bernstein). Bisceglia, even more than Bernstein, seems to have a very high regard for

25. Bernstein, "Parody and Fair Use."

26. Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act," 48.

parody as a style of communication, and for the creative and progressive value of critical activity generally.

Melanie Clemmons provides a detailed treatment of the competing interests of the original author and the parodist that attempts to define standards of compromise. She recognizes that the courts have been reluctant to treat parody as a copyright infringement, whereas she begins with a position that diminishes a notion that parody is a natural or *a priori* candidate for fair use consideration. The courts, she notes, have tended to ignore altogether the issue of consent to parody, which is part of the copyright privilege. Having framed the question in these terms, Clemmons not surprisingly tends to restore the balance in favor of the author and the privileges that have been granted her. She defines parody as a derivative work that is clearly independent from the original work of authorship:

A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable.²⁷

Clemmons argues that the author of a parodied work should expect financial gains from the parodist, if the latter benefits. Parody, not coming under fair use, should be subject to some sort of licensing, or at least the payment of royalties to the author of the original work. Reasonable royalties are designed to ensure that when commercially successful parodies are created from less profitable original works, the authors of the original works will share in the financial rewards of the parodists. Clearly, Clemmons' scheme in its effort to seek a balance between competing interests is biased in favor of the original work of art and considerably tames the critical power and spontaneity of parody by insisting that "the parodist should be formally obliged to deal with the author before asking the court to provide shelter within the fair use doctrine."²⁸

Even as they attempt to move beyond the inconsistencies of legal opinion in the parody cases and stretch the limits of convention, the papers adhere to established rhetoric of the primacy of high culture in copyright discussions. Before passing on to contextualize these commentaries in modernist debates, we should note the ways that they sustain the high culture ideal despite their best intentions:

(1) None of the papers really focuses on the fact that, whatever the general principles involved might be for future cases, to date, all of the parody cases have developed in the mass media realm of the culture indus-

27. Clemmons, "Author v. Parodist: Striking a Compromise," 87.

28. *Ibid.*, 109.

try. The 1950s cases against Jack Benny and Sid Caesar, for instance, were obviously motivated in part by the movie industry's perception of threat from the rise of television. The issue of parody is thus very much embedded in technologies other than print. Indeed, the fair use reproduction of images, including for the explicit purpose of parody, is so pervasive in mass media and photographic works of art that specific efforts to claim copyright infringement, while sanctioned by law, seem arbitrary.²⁹ Parody is a kind of fair use that, by its critical bite, is more likely to provoke and bring upon itself a charge of infringement. If all the possible charges that could be brought by those who hold copyright were brought, processes of communication would be disrupted on such a scale as to call into question the existence of and rationale for copyright itself. Instead, it would seem that copyright cases are mostly contained by the commercial interest in creative works as commodities, which seems to stimulate most charges of infringement.

(2) The papers follow the standard practice in copyright literature of using the generic term "author" to stand for either the individual author or the usually corporate proprietor of the copyright, but with the former rather than the latter as the main referent. In sociological terms, it makes all the difference to collapse the referents under a single term in this way, although perhaps not for the purposes and problems of legal discourse. Even Clemmons, who focuses on the relationship between the author and parodist, fails to pay attention to the very different kinds of social referents these labels may have in specific instances.

(3) When these commentators try to probe the nature of parody beyond the common sense meanings given to it in opinions and commentaries, they rely exclusively on formal literary treatments and authorities. They thus never get beyond parody in the tradition of (print) "literature" as such. But, as was noted above, this is not where the cases have been developed, and as we will see, it is not where parody has developed as an important contemporary aesthetic.

All the papers thus, through these conformities with established rhetorical practices, adhere to the high culture ideal referent of copyright discussions, even while they are trying to stretch the limits of such practices to move beyond the inconsistencies of legal opinion in the parody cases to a higher, more encompassing level of reason. We must place the schemes offered in the papers against parody conceived as a pervasive style of communication and a vehicle of contemporary modernist aesthetics outside

29. See the collection of essays edited by John Shelton Lawrence and Bernard Timberg, *Fair Use And Free Inquiry: Copyright Law and the New Media* (1980). The authors noted that they had difficulty getting some people to contribute to their collection, and in one case they received the following reason (p. xiv):

I honestly don't believe that I would want to make a public statement. It's not cowardice so much as a belief that if no one says anything about these matters, we can continue to proceed unimpeded for an indefinite period of time.

law and literature before we can appreciate the limits of their own efforts at critique.

TWO POSITIONS ON THE PRACTICE OF PARODY IN LATE (POST?) MODERNIST³⁰ DEBATES

In examining the role of parody in modernist debates, one cannot as easily put one's faith in definitional exercises as in the legal debates which look to the authority of literature to conceptualize parody by classifying it in terms of genre or subgenre. Indeed, modernist views of parody reject and oppose classifying schemes that formally limit the concept to literature. They develop a notion of parody by envisioning a grand problematic of communication, language, and image in late twentieth century society. In this conception, parody is either a distinguishing symptom or an effective critical response. For late and postmodernists, a form of expression like parody spills over the bounds of literature and literary creation into other media and the cognition of everyday life; art and life, high and popular culture, are merged in complex ways.

Perhaps the most influential contemporary statement about parody which concerns its degeneration into pastiche is that of Fredric Jameson.³¹ It is worth quoting at length these essential passages from his 1983 essay "Postmodernism and Consumer Society":

Pastiche is, like parody, the imitation of a peculiar or unique style, the wearing of a stylistic mask, speech in a dead language: but it is a neutral practice of such mimicry, without parody's ulterior motive, without the satirical impulse, without laughter, without that still latent feeling that there exists something normal compared to which what is being imitated is rather comic. Pastiche is blank parody, parody that has lost its sense of humor. . . .

30. I use the designation Late (Post?) Modern to mark the uncertainty surrounding the current debates that seek to define postmodernism and assign it a genealogy. While there are differences which uniquely distinguish this moment from past modernisms, as explored by such masters of the current debate as Frederic Jameson and Ihab Hassan, there are also definite continuities. In this regard, I perceive such continuities between the later strains of European modernist thought of the 1920s and 1930s (e.g., debates within the Frankfurt School in Germany and debates in and around the surrealist movement in France), and the current efforts to define a *post* modernism. For example, new technologies for reproducing and disseminating works of art as well as claims in aesthetic theory of the "death of the subject" have deepened the relevance of Walter Benjamin's insights about the emergent social context and conditioning of artistic production in the late twentieth century, as developed in his famous 1935 essay, "The Work of Art in the Age of Mechanical Reproduction"; the writings of Frederic Jameson, among others, and specifically, his focus on parody becoming pastiche, explore critically the nature of the postmodernist world such technologies have shaped. At the same time, the autonomous work of art, but without the aura of the high bourgeois concept of the individual artist, as envisioned by Theodor Adorno, has also been developed and identified as symptomatic of postmodernism; one thinks here, for example, of the work *The Critique of Cynical Reason* by Peter Sloterdijk (1983).

31. Frederic Jameson, "Postmodernism and Consumer Society," in *The Anti-Aesthetic: Essays on Postmodern Culture*, ed. Hal Foster (1983) and "Postmodernism, or the Cultural Logic of Late Capitalism," *New Left Review*, no. 146 (July-August 1984): 53-92.

But now we need to introduce a new piece into this puzzle, which may help explain why classical modernism is a thing of the past and why postmodernism should have taken its place. This new component is what is generally called the "death of the subject" or, to say it in more conventional language, the end of individualism as such.

The great modernisms were, as we have said, predicated on the invention of a personal, private style, as unmistakable as your fingerprint, as incomparable as your own body. But this means that the modernist aesthetic is in some way organically linked to the conception of a unique self and private identity, a unique personality and individuality, which can be expected to generate its own unique vision of the world and to forge its own unique, unmistakable style.

Yet today, from any number of distinct perspectives, the social theorists, the psychoanalysts, even the linguists, not to speak of us who work in the area of culture and cultural and formal change, are all exploring the notion that that kind of individualism and personal identity is a thing of the past; that the old individual or individualist "subject" is dead; and that one might even describe the concept of the unique individual and the theoretical basis of individualism as ideological. . . .³²

For Jameson, parody as a stable, artistic practice is very difficult to sustain in contemporary society. Not only self-conscious parodic works, but many forms of social communication, become pastiche. This is a result of the rapidly advancing technologies for the reproduction of all kinds of signs in a capitalist political economy dominated by modes of production, exchange, and consumption of signs.

Despite recent criticism of Jameson's somewhat simplistic notions of parody and pastiche,³³ there is enduring power in his vision of a mass-media society in which once successful parody rarely comes off any more because such basic notions of conventional aesthetics as originality, authenticity, genius, and the author have been seriously challenged. It is certainly pastiche, parody's "dead" form in Jameson's metaphor, that is at stake in the cases that have defined the parody literature in copyright law.

In contrast to Jameson's seemingly dim outlook for the viability of parody as a reflexive and critical practice of communication under postmodern conditions, other writers such as Charles Jencks diminish the importance of pastiche as a contemporary expression of postmodernism.³⁴ They find promise in new uses of modernist, and even more classic, literary practices of parody. Parody is recuperated as a vital practice of artistic creation in the midst of the mass-media world of rapidly reproducing images and signs. The critical efficacy of parody is precisely in its reflexivity and dual coding, Jencks argues. Parody remains a distinct work of

32. Jameson, "Postmodernism and Consumer Society," 114-15.

33. See Rose, "Parody/Post-Modernism."

34. Charles Jencks, *What Is Post-Modernism?* (1986).

art and, some critics suggest, is the “signature” kind of artistic production for postmodernism. Yet, parodic works are neither autonomous—they depend for their critical effect on open-ended engagement and dialogue with other images, texts, and signs—nor do they carry the features of originality, authenticity, and the individual creative author associated with some modernisms and older bourgeois aesthetics.

So, to fill in the portions of the conceptual space concerning parody which the discussion of this form of intellectual production in copyright law does not encompass, we will expand on this distinction between two kinds of postmodern parody and relate it to the venturesome schemes that we reviewed for resolving the problem of parody in copyright law.

THE CHALLENGE OF PARODY TO COPYRIGHT LAW’S IDEOLOGICAL AESTHETIC OF THE GIFT

The two conceptions of parody developed in the lively contemporary debate about postmodernist aesthetics offer an interesting challenge to the object of copyright ideology: the high culture work of art, which we have elaborated as a type of property whose exchange value is defined by a regime of the gift rather than the commodity. Parody, when conceived in terms of either of its postmodernist guises, challenges the key concept of *hau*, or compulsion to make a return prestation. As we have suggested, copyright, in modernity, serves as a residual substitute for such a concept.

However, the two postmodernist modes of envisioning parody are quite different from each other and have very different implications as challenges to high culture copyright ideology, cast in terms of the work of art as gift. One mode I call “living,” after Jencks and others who see a continuing vibrant critical function for parody as a genre that has broken the bounds of literature but still retains its distinctiveness. This “living” mode challenges the prestige of the autonomous work of art that copyright ideology bestows. It does so by emphasizing the primacy of *copying* (in the form of parody) as the richest and most valuable kind of creative, artistic act that is otherwise understood as secondary to the “original.” The other mode, which I call “dead,” after Jameson and others who see parody as devolving into pastiche, a ramifying play of signs without grounding in specific historical or ethical meanings, more radically challenges the very idea that a work of art can be conceived in any stable or substantive sense as a gift. But it does stand the high culture formulation on its head, so to speak, by demystifying the original, the giving of the gift itself, for the sake of a focus on the critical vitality of the recipient, in this sense, the imitator or parody of a supposed original. The other mode sweeps away the high culture conceit of the work of art as gift able to distinguish itself from the pervasive economy of sign commodities in contemporary society, and when presented positively, calls for a new aesthetic based on a total

world of commodities without the nostalgia for the work of art as residual gift we find in Hyde. I want to conclude by examining these differences further.

In its "living" postmodernist guise, parody is a powerful mode of engaged critique that stimulates or extends dialogue with that which it imitates. It is the work of the individual critic, but not in the high culture sense of bourgeois artistic production. There is no platform permitting the artist to stand apart from society in ironic contemplation of the subject of parody, as claimed by earlier modernisms or aesthetics before postmodernism. Instead, the critical power of parody is felt only if it succeeds in stimulating reactions that enmesh it in further communication with the object of its criticism or in passing on the spirit (*hau*) of the original through the responses of other realms of discourse. The critical component of parody can thus be seen as the value added, the yield of the original, the *hau* or spirit of the gift in Sahlins' interpretation. Parody, as a form of quotation, while critical, is indeed an homage to the original. Yet its own power is not in representing the original, but in stimulating further exchange, keeping the gift in circulation, so to speak.

But, what the parody cases indicate, even in their obvious commercial milieu, is that there is no original gift which can respond to the *hau* offered by parody. Copyright is vested in a market-oriented business; the original is dead in terms of the regime of the gift. It is only alive as a commodity whose demand and appeal must be protected by its owners. This interpretation suggests that parody now stands as *the* creative act against an original that has become commodified and completely defined by market interests rather than being a secondary, derived, and by connotation, less creative work than the original. Two papers that we reviewed (Bernstein and Bisceglia) seem to acknowledge this in their efforts to upgrade the artistic import of parody, but they developed no ideological conception of the work of art (e.g. as gift) against which to articulate clearly and support the standing of parody in their schemes.

Therefore, under postmodern conditions, the act of parody, while evoking its dialogic relation to some original, somewhere, sometime, receives no response, except in the occasional charge of copyright infringement. In fact, parody exposes the ideology of copyright, deflating the mythical work of original art that copyright is designed to protect. It shows that the act of copying itself, imbued with critical imagination, takes on more of the character of the individual work of art (but without the aura, since it cannot be perceived apart from the work it imitates) than the original work of art, which under postmodern conditions is already the gift-become-commodity.

An act of parody can also, and usually does, share the fate of commodification too, but not without a complex and powerful expression of the relationships of exchange in artistic production (or the failure of these

relationships as they are idealized in copyright law). Parody always orients itself toward a work of art as a gift to which it pays homage, and part of its critical bite is that it finds the gift wanting. It is not there; it is dead, transformed, its spirit recreated and carried only by its own parodic expression. In practical terms, the parody as creative copy makes a stronger claim, within the framework of the regime of the gift, to an image or expression than the original, imbued with aura in copyright ideology. A copyrighted property (or its lawyers) responds to its parodic appropriation, a reviving act of (re)creation, not with wit or reason in return, but with a lawsuit.

In its "dead" postmodernist guise, parody-becoming-pastiche resists a relation to the original work of art as gift. In fact, it opposes all cultural stories or narratives, including legal versions, that confer authority on objects or persons, and constrict possibilities in the flow of signs and meanings. It thus resists the moral tale of the gift, the use of this tale to define a high culture aesthetics, and by extension, a basic referent for copyright ideology. It does not pay homage, by satire or laughter, but attempts to make off with a free gift—one that has no spirit derivable from an original and thus does not compel a return. Most subversively, then, it does not recognize the originality of the original. Being a copy itself, pastiche is the copy of a copy. In the everyday reception of products of the culture industry, the difference between quotation and stealing becomes indeterminable and infinitely arguable, as the conversation between two moviegoers, recently reported by *New York Times* film critic Vincent Canby, shows:

The waves of the future: kidult auteurs. As I walked up the aisle after the showing of "Die Hard" at the Baronet, I followed two aging young men in deep discussion about the movie.

"That scene," said the first fellow, full of impatience, "was a direct steal from 'Lethal Weapon.'"

Said his friend, "I hear what you're saying. I admit that. McTiernan certainly knows that. It was a quote."

Replied the friend, sneering and saying a vulgar word, "You're out of your mind. It wasn't a quote. McTiernan stole it."

Onwards.³⁵

If the "kidult" viewers of popular movies can't decide, why should the courts be able to? As we've seen, they can merely exercise their own authority in terms of a particular aesthetic ideology of classic bourgeois and early modernist auratic art.

Parody-become-pastiche completely undermines the moral economy of the gift on which the high culture work of art and the notion of authorship are based and to which the purpose of copyright ideology is oriented.

35. *New York Times*, Sunday, 31 July 1988, sec. 2.

Artistic renderings are not to be seen as a type of statutorily protected creative expression, but as the free play of signs, where taking meaning becomes more important than the act of giving it. Unlike the "living" mode of parody in postmodernism, the authentic creative act in reference to an originating gift that has become commodified, the "dead" mode of parody-become-pastiche has little interest in standing alone as a work of art. It locates itself within a world of simulacra, and as such, builds its power not by a seminal imitation of an original, but from the recognition of imitation in a configuration of other imitations. It most radically undermines the whole purpose of copyright, and unlike "living" postmodernist parody, relates less to the print medium of artistic production (where reproduction is relatively controlled) than to the electronic medium of endless and rapid reproduction. This view of parody attempts to make a break with the old morality and aesthetics based on the modern equivalent of the ideal of the gift, and instead recognizes the predominance of the processes of commodification and attempts to construct value on those terms. Pastiche, as contemporary art, embraces commodities in the context of new technologies of production and dissemination, thus leading writers like Jameson and Baudrillard to claim pastiche as the aesthetic most commensurate with late capitalist political economy—the aesthetics of advertising, MTV, etc.

This is clearly the sort of postmodernist view that legal discourse is not prepared to encompass. Even the sympathetic papers that want to enlarge the legal view of parody do not envision the challenge parody poses to copyright when it is in its pastiche mode. The parodist, under all circumstances, is tamed by having to deal procedurally with the author: the status and protection of authorship under copyright deserve first consideration.

Whereas the "living" mode of parody under postmodernism sustains the morality of the gift but calls into question the ability of copyright to relate realistically to authorship and works of art, the dead form of postmodernist parody, pastiche, challenges radically the terms of copyright viewed as rights to authors and original works of art. Living parody requires more realism from copyright law; dead parody sees no purpose in copyright at all—copyright fantasizes relationships, like those of gift exchange, that don't exist in processes of artistic production in contemporary culture, while clearing the way for the routine and expected commodification of the intellectual property. The high culture ideal of the gift, a still powerful and nostalgic ideology of morality in copyright law, keeps such troubling contemporary constructions of parody out of view, leaving legal discourse to deal with it instead as the special and controversial case of fair use that it certainly is.