Copyright Implications of Collage Works

Carla Passero
COPYRIGHT IMPLICATIONS OF
COLLAGE WORKS

Carla Passero†

I. INTRODUCTION AND ISSUES

Advancing computer technology enables the user to manipulate images so that he can take one image from a video tape, film, or any other media source, manipulate it, and superimpose it on to the backdrop of another image creating a new “collage” of images. Millions have seen the results of Industrial, Light, & Magic’s (“ILM”) computer manipulation of images in the movie, “Forrest Gump.” Industrial, Light, & Magic blended their footage of actor Tom Hanks with historical footage so that it appeared that Tom Hanks’ character, Forrest Gump, was present at occasions in history that were recorded on film. For example, Forrest Gump was depicted as shaking President Lyndon Johnson’s hand. Film makers and advertisers who work in television are likely to follow ILM’s lead in this creative and whimsical contrast of old and new film footage.

Undoubtedly, ILM followed the prudent course of action and obtained licenses to use what old film footage had not fallen within the public domain. These licenses were obtained to avoid liability to the copyright holders of such footage for copyright infringement. However, a somewhat radical question comes to mind as to the need for such licenses in cases of significant creative changes to pre-existing copyrighted works. Is the goal of the copyright protection met by requiring creative film makers to obtain licenses to use what is merely a tool in creating their own copyrightable film? The old footage in ‘Forrest Gump’ can be seen as a palate of paint or a canvas used by ILM to create the artistic image of the character ‘Forrest Gump’ shaking hands with Former President Johnson. The creativity with which the film makers blend old footage with new lies mostly in the fact that the old footage was copied in the first place.

An analysis of current copyright laws will illustrate the legal classifications the current law will give to collage films and whether

Copyright © 1995 by Carla Passero
† B.A., University of California, Santa Barbara; J.D., Santa Clara University School of Law, 1995.

319
creation of such a collage constitutes copyright infringement. Depending on the specific collage at issue, it may be labeled as either a compilation or a derivative work. As will be discussed further in the text, a compilation is a collection of source material assembled with little alteration of the source material, while a derivative work is an altered version of the source material. In either case, the collage will infringe the copyright holder of the source works' copyrights unless the collage falls within a fair use exception. However, the propriety of this result, in light of the creativity involved in producing such a collage in light of the purposes behind the copyright law, is questionable and perhaps a new standard should be considered.

II. ANALYSIS

A. Copyright Infringement

The Code of the Laws of the United States of America, Title 17 — Copyrights protects the creator of original works by granting him exclusive rights:

Subject to sections 107 through 118 [17 U.S.C. §§ 107-118], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies...;
(2) to prepare derivative works based on the copyrighted work.

Copying film images without prior permission from the copyright holder would, according to § 116, be infringement. It is the reproduction of a copyrighted work. In order to prove infringement, the plaintiff must show that he has a copyright in a work, and that the defendant copied it. If the plaintiff has difficulty in showing that defendant copied the work, then copying will be inferred if the plaintiff can demonstrate that the defendant had access to the work and that there is a substantial similarity between the original and the "copied" work. The quantity and quality of the portion of the work the defendant copied will impact the ease with which copyright holder can

1. See infra discussion part II.A.
2. See infra discussion part II.B.
4. Plaintiff must first meet the test for infringement. See infra note 14.
6. Hereinafter the Act or the Copyright Act.
8. Id.
9. See infra note 14 & accompanying text.
10. The following are the requirements a plaintiff must show to bring a cause of action:
prove the substantial similarity between the original and the “copied” work. If the quantity of the portion copied is so small that the only recognizable qualities subconsciously harken the viewer back to a familiar movie image, without bringing to mind a particular movie character, then the plaintiff will probably be unable to prove substantial similarity and, therefore, infringement. It would also be unlikely that the creator of the collage film would want to risk copying such a small part of a film, considering its minimal effect on the viewer.

B. Compilation and Derivative Work Status

The subject matter of copyright as specified by § 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

The compilation or derivative work in the form of a film collage cartoon may be copyrighted; however that copyright will be limited. The film maker’s use of unoriginal sources will not be copyrighted to the collage artist.

The difference between a compilation and a derivative work is that a compilation is a “work formed by the collection and assembling of pre-existing materials,” while a derivative work is “a work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship.” With a compilation the source works are essentially unchanged and the creative element is the selection and assembly. In a derivative

(1) Ownership of a valid copyright in its work and (2) the accused work . . . deemed to be ‘substantially similar’ to the copyrighted work . . . Because direct evidence of ‘copying’ is often unavailable, courts will infer copying where defendant: (1) has access to the copyrighted work, and (2) where the accused work is deemed to be ‘substantially similar’ to the copyrighted work . . . The ‘substantial similarity’ analysis, in turn concerns ‘whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression by taking material of substance and value. Eveready Battery Company Inc. v. Adolph Coors Company, 765 F.Supp. 440, 444 (N.D.Ill. 1991).

11. “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated . . . Works of authorship include the following categories: . . . (5) pictorial, graphic, and sculptural works.” 17 U.S.C. § 102 (1993).
13. Id.
15. Id.
16. Id.
work,17 the creative element stems from the author's changes in the original work.18 The film maker who may, through the help of such computer programs as 'Photoshop' combine either two preexisting copyrighted films or one preexisting copyrighted film and his own original film footage, has created either a compilation or a derivative work. If the film maker made a new film entirely out of assembling old film footage, then the film maker is more likely to have created a compilation. If, as in 'Forrest Gump,' the film maker exchanged one person's image in the original film for a new character then the film maker has made a modification which represents an original work of authorship, and is therefore a derivative work.

1. Compilations

The collage may be considered a "compilation." The Act defines a compilation as: "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."19

Section 103 of the Copyright Act permits copyright protection of compilations:

(a) . . . protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.
(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.20

Essentially, if the collage artist does not get a license to use the source material, the portion of his project that he appropriated from other sources without the copyright holder's permission will not be protected.21 The copyright holder of the source material may then take legal action against the collage artist.22 Difficulties may arise in separating out the preexisting material from the material contributed by the author of the compilation. Making this distinction is helpful in determining the quantity of the compilation for which the collage artist may obtain a copyright.23

17. Id.
19. Id.
21. Id.
22. Id.
23. Id.
a. *Key Publications Inc. v. Chinatown Today Publishing*

*Key Publications Inc. v. Chinatown Today Publishing* (Key Publications)\(^{24}\) involves the compilation of preexisting data. Plaintiff, Key, published an annual classified business directory for New York's Chinese-American Community.\(^{25}\) The 1989-90 Key Directory was sorted by type of business, with approximately 260 different categories.\(^{26}\)

Each listing consisted of an English and a Chinese name, address, and a telephone number.\(^{27}\) Defendant, Chinatown Today Publishing Enterprises, Inc., later published the Galore directory which contained yellow page listings separated among 28 different categories.\(^{28}\) "Like the 1989-90 Key Directory, business establishments of interest to the New York Chinese-American community were listed in the Galore Directory. About seventy-five percent, or 1500, of the businesses listed in the Galore Directory (were) also listed in the 1989-90 Key Directory."\(^{29}\) Key Publications brought a copyright infringement action against Chinatown Today Publishing charging that the Galore Directory infringed Key's copyright in its 1989-90 directory.\(^{30}\)

A major issue in the case was the distinction between the material contributed by the compiler and the preexisting material.\(^{31}\) The court found no copyright infringement since although there was some overlap in arrangement of the facts, the court recognized substantial differences.\(^{32}\) The Copyright Act does not protect facts,\(^{33}\) therefore the only copyright focus of the case was the compilation.\(^{34}\) This case emphasized § 103(b) of the Act which provides "that the copyright in a compilation...extends only to the material contributed by the author of such work, as distinguished from the preexisting material."\(^{35}\) The copyright which Key owned in its compilation protected their specific arrangement of the facts and did not extend to anyone else's arrangement of them.\(^{36}\)

\(^{24}\) 945 F.2d 509 (2d Cir. 1991).
\(^{25}\) *Key Publications*, 945 F.2d at 511.
\(^{26}\) *Id.*
\(^{27}\) *Id.*
\(^{28}\) *Id.*
\(^{29}\) *Id.*
\(^{30}\) 945 F.2d at 511.
\(^{31}\) 945 F.2d at 515.
\(^{32}\) *Id.*
\(^{33}\) 945 F.2d at 512.
\(^{34}\) *Id.*
\(^{35}\) 945 F.2d at 515.
\(^{36}\) 945 F.2d at 516.
The court in *Key Publications* separated preexisting material from material contributed by the author.\(^{37}\) This involved listing and separating facts from embellishment. Similarly, it is essential to distinguish the unique material contributed by the author of a film collage from the preexisting source footage. The unique material contributed by the author of the collage is largely the way the collage film maker has juxtaposed the sources of film footage. Film, unlike facts, can be protected by copyrights,\(^{38}\) therefore the separation of material contributed by the author from preexisting material will probably be more difficult in a film collage than it was in *Key Publications*.


*Roy Export Company Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting System, Inc.*\(^{39}\) discusses copyright rights of the compiler.\(^ {40}\) In 1977 Columbia Broadcasting System, Inc. (CBS) broadcast a film biography of Charlie Chaplin\(^ {41}\) which, "included a collection of film clips from six of Chaplin’s motion pictures in which the plaintiffs hold exclusive rights."\(^ {42}\) Plaintiffs claimed the network’s use of the Chaplin film clips infringed their copyrights in the films.\(^ {43}\) The court held that CBS infringed upon the plaintiff’s valid copyright in the compilation.\(^ {44}\) The court carefully distinguished the compiler’s copyright in the compilation from the copyright holder of the source work’s copyright in the preexisting works:

> Without an assignment from the proprietor of a component the compiler of a collective work cannot secure copyright protection for preexisting components that he did not create; protection is available only for that part of his product that is original with him — for what he has added to the component works, for his skill and creativity in selecting and assembling an original arrangement of those works, even if no new material is added.\(^ {45}\)

\(^{37}\) 945 F.2d at 515.

\(^{38}\) See supra note 13.

\(^{39}\) 672 F.2d 1095 (2d Cir. 1982).

\(^{40}\) Id. at 1103.

\(^{41}\) The biography was an edited version from a compilation CBS obtained from the National Broadcasting Company (NBC). Id.

\(^{42}\) 672 F.2d at 1097.

\(^{43}\) Id. at 1098.

\(^{44}\) Id. at 1104.

\(^{45}\) Id. at 1103.
As long as the plaintiff is able to meet the test for determining infringement, the film collage, a compilation of copyrighted images, is a copyright infringement. Any protection the compiler can get from the Copyright Act for his own creation only extends to his skill in the arrangement of the new film. The film maker who combines footage from various copyrighted films can copyright his creative contribution in assembling the preexisting works. However, it may be possible for others to obtain the licenses to use the same films and combine them in a different way.

2. Derivative Works

A film collage may be considered a “derivative work” as defined by the Copyright Act. The Act defines a derivative work as a “work based upon one or more preexisting works, such as an . . . art reproduction. . . or any other form in which a work may be recast, transformed, or adapted.”

a. Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.

In Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. (Galoob Toys), a video game device, the Game Genie allows the player to alter up to three features of a Nintendo game. For example, the Game Genie can increase the number of lives of the player’s character, increase the speed at which the character moves, and allow the character to float above obstacles . . . the Game Genie does not alter the data that is stored in the game cartridge, its effects are temporary.

The marketing of the “Game Genie” was not considered itself to be sufficiently fixed to produce a derivative work.

The Court of Appeals did not consider the creation of the “Game Genie” a derivative work. Additionally, the court did not consider Galoob to have authorized the video game user to infringe Nintendo’s

46. See supra note 14.
48. Id.
50. Id.
51. 964 F.2d 965 (9th Cir. 1992).
52. Id. at 967.
53. Id. at 968-9.
54. Id. at 969.
copyright by altering Nintendo games in using the "Game Genie".\textsuperscript{55} The court's reasoning was that:

a party [Galoob] cannot authorize another party [consumer] to infringe a copyright unless the authorized conduct [ex. increasing the number of lives of a player] would itself be unlawful \ldots [and since] Game Genie users are engaged in a non-profit activity\textsuperscript{56}, their use of the Game Genie to create derivative works \ldots is presumptively fair.\textsuperscript{57}

As a consequence of the at home use not being commercial\textsuperscript{58}, the court did not presume the likelihood of further harm.\textsuperscript{59} Nintendo had to show "by a preponderance of the evidence that some meaningful likelihood of future harm exist[ed]."\textsuperscript{60} Nintendo failed to meet this burden.\textsuperscript{61}

The holding in \textit{Galoob Toys} can be applied to the issue of whether the creator of the computer program which enables the collage film editor to create his new collage film should be held liable for creating a derivative work. To be a derivative work, the changes that can be or are made to preexisting material through use of high technology systems must be "fixed."\textsuperscript{62}

The Copyright Act defines a work as "fixed" if "its embodiment in a copy \ldots is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."\textsuperscript{63} Computer equipment that enables the user to digitize and manipulate preexisting images also enables the user to print out the changed image on paper or save it on a computer disk or hard drive. Therefore, unlike the "Game Genie" from \textit{Galoob Toys}, the computer equipment\textsuperscript{64} can fix the changes and, therefore, could possibly be a derivative work.

Courts may consider creators of such high technology tools as authorizing their consumers to infringe copyrights.\textsuperscript{65} While Nintendo games altered by "Game Genie" cannot be repackaged by the at home player and sold for a profit, the artistic product of a computer image

\begin{itemize}
  \item\textsuperscript{55} 964 F.2d at 970. Infringement by authorization is a form of direct infringement. \textit{Id}.
  \item\textsuperscript{56} The altered Nintendo Games could not be sold as new games since once the game was turned off the changes were erased. \textit{Id} at 967.
  \item\textsuperscript{57} \textit{Id} at 970. \textit{See infra}, discussion, part II.C.
  \item\textsuperscript{58} 964 F.2d at 971.
  \item\textsuperscript{59} \textit{Id}.
  \item\textsuperscript{60} \textit{Id}.
  \item\textsuperscript{61} \textit{Id}.
  \item\textsuperscript{62} 17 U.S.C. § 102 (1993).
  \item\textsuperscript{63} 17 U.S.C. § 101 (1993).
  \item\textsuperscript{64} "Computer equipment" means hard drive, software, disks, printer, etc.
  \item\textsuperscript{65} \textit{See supra} note 55.
\end{itemize}
manipulator can be and often is, used commercially. It is clear that according to Galoob Toys, the likelihood of future harm can be presumed if the use is commercial. However, should the collage fall within a fair use exception, the computer software manufacturer would not be held to have authorized the user to infringe copyrights.

The court did not directly address the issue of whether or not a Nintendo game altered by "Game Genie" in Galoob Toys constituted a derivative work. The issue was probably ignored because Nintendo brought suit against Lewis Galoob Toys, Inc. and not common consumers of both products. However, through the language regarding defendant's authorization of another party "to infringe a copyright," and Nintendo's burden of showing future harm, it can be inferred that the users infringed the copyright. However, there were no appreciable damages from the users' (at home) infringement nor from Lewis Galoob Toy's authorization and therefore Nintendo was unable to recover.

The burden of proving damages established by the court in Galoob Toys can be applied to the copyright holder of a preexisting work subsequently incorporated in a collage film. Nintendo had to show "by a preponderance of the evidence that some meaningful likelihood of future harm exist[ed]". The copyright holder's success in proving a meaningful likelihood of future harm will largely depend on the purpose for which the film maker uses the collage. If the defendant uses his creation solely for his own amusement, the case will parallel Galoob Toys; hence no appreciable damages. If, however, the defendant uses the collage for commercial purposes, as discussed in Galoob Toys, the court will probably presume the damages. The plaintiff could prove future damages by demonstrating that he has a copyright and as a consequence, a right to license the use of the source images. Without an affirmative defense, the court would likely hold

66. "Desk top" computer publishing is an advertising tool that is flourishing in the 1990's.
67. Lewis Galoob, 964 F.2d at 971.
68. See infra, discussion, part II.C.
69. Lewis Galoob, 964 F.2d 965.
70. Id. at 970.
71. Id. at 971.
72. Considering the fact that the at home user of the "game Genie" had to have already purchased a Nintendo game it can be successfully argued that the "Game Genie" in fact increased the attractiveness of the Nintendo product. If a computer game consumer wanted to use a "Game Genie" he had to first buy a Nintendo game. Id. at 967.
73. Lewis Galoob, 964 F.2d at 961.
74. Id. at 971.
75. Id.
76. Id.
the film maker liable for money damages, and enjoin him from further use of the collage.

The film collage created through use of computer equipment would be sufficiently fixed to be a derivative work. Unlike the infringement in Galoob Toys, the creation of a film collage out of preexisting copyrighted material is likely to be used for commercial purposes. Therefore, should the film maker of the collage film be sued, the court will likely presumed damages.

C. Fair Use Exceptions

"Fair Use" is discussed in 17 U.S.C. § 107 of the Copyright Act. This section delineates exceptions to what would otherwise be copyright infringing, unlicensed use under § 103 (derivative works and compilations). Fair use is a defense to a copyright claim when the end product is used for purposes of "criticism, comment, news reporting, teaching..., scholarship, or research". Courts will consider the following factors in determining whether a § 107 fair use defense will be granted:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Whether the film collage falls within an exception to infringement, as defined by fair use, is largely dependent on the particular judge's impression of the artist's end product. "Fair use is applied on a case specific basis and extinguishes infringement liability for certain unauthorized uses of a copyrighted work, usually only those which fulfill educational, news reporting, or literary purposes such as parody or satire." Since the determination is made on an ad hoc basis, it is helpful to look at cases in which parts of copyrighted source material

78. Support for conclusion is found in Lewis Galoob, 964 F.2d at 968-9.
81. Id.
82. Nancy L. McCulloch, Note, Making the Case Against Illicit Sampling, BEVERLY HILLS BAR J., Summer 1992, 130, 133.
83. Id.
were used without permission from the copyright holder, and the user claimed a fair use defense.

1. News Reporting


   Harper & Row Publishers v. Nation Enterprises (Harper & Row)\(^8\) is a case in which an unauthorized source provided The Nation Magazine with an unpublished manuscript of President Ford’s memoirs and from this the editor of The Nation produced an article with at least 300-400 words of verbatim quotes of copyrighted expression taken from the manuscript.\(^85\) Time Magazine, who had an agreement with Harper & Row, the copyright holders, to write a similar article, canceled their article and refused to pay the copyright holders a remaining $12,500.\(^86\) Harper & Row sued Nation alleging violations of the Copyright Act.\(^87\) The court denied Nation’s assertion of a fair use defense of news reporting or comment and held for the plaintiffs.\(^88\)

   The court in Harper & Row applied the four factors enumerated in 17 U.S.C. § 107.\(^89\) The first factor, purpose and character of use,\(^90\) weighed against fair use since although reporting was the general purpose, the active exploitation of the value of the headline went beyond this purpose.\(^91\)

   The second factor, the nature of the copyrighted work,\(^92\) weighed against fair use because The Nation took more of the original work than necessary to convey the facts and appropriated the copyright holders’ rights of control over first publication.\(^93\) The third factor,

---

85. Id. at 539.
86. Id.
87. Id.
88. Id.
89. 471 F.2d at 541.
91. “(i) The fact that new reporting was the general purpose of The Nation’s use is simply one factor. While The Nation had every right to be the first to publish the information, it went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a “news event” out of its unauthorized first publication. The fact that the publication was commercial as opposed to nonprofit is a separate factor tending to weigh against the finding of fair use.” Harper & Row, 471 U.S. at 541.
93. “(ii) While there may be a greater need to disseminate works of fact than works of fiction, The Nation’s taking of copyrighted expression exceeded that necessary to disseminate the facts and infringed the copyright holders’ interests in confidentiality and creative control over the first public appearance of the work.” Harper & Row, 471 U.S. at 541.
amount and substantiality of the portion used,94 weighed against fair use because the quotes used were qualitatively substantial.95 The fourth factor, effect upon the potential market for the original,96 weighed against fair use because the infringement directly resulted in a monetary loss to the copyright holder since, as a result, Time canceled its projected article and refused to pay Harper & Row.97

Considering Harper & Row, the collage film maker who constructs his product from already disseminated source material, has a public interest or otherwise noncommercial purpose, and uses portions of the source material which are not considered "qualitatively important"98 is more likely to have a fair use defense than the collage artist who does not so limit himself.99 If the source material is recently created and undissemintated, the original creator has the right to first expression and the financial return that such first expression may yield.100 A commercial use of the collage will weigh against fair use,101 the collage film maker's fair use defense. Also, the qualitative importance of the parts of the films copied may weigh against the defendant's fair use defense.

The court in Harper & Row also faced the problem of differentiating between fact and the compiler's arrangement of fact but came to no real conclusions:

Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression. Compare Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F. 2d 91 (CA2 1977)(protection accorded author's analysis, structuring of material and marshalling of facts),

95. "(iii) Although the verbatim quotes in question were an insubstantial portion of the Ford manuscript, they qualitatively embodied Mr. Ford's distinctive expression and played a key role in the infringing article;" Harper & Row, 471 U.S. at 541.
97. "(iv) As to the effect of The Nation's article on the market for the copyrighted work, Time's cancellation of its projected article and its refusal to pay $12,500 were the direct effect of the infringing publication. Once a copyright holder establishes a causal connection between the infringement and loss of revenue, the burden shifts to the infringer to show that the damages would have occurred had there been no taking of copyrighted expression. Petitioners established a prima facie case of actual damage that respondents failed to rebut." Harper & Row, 471 U.S. at 541.
98. An example of purposely avoiding qualitatively important portions is the artist not using Mickey Mouse's ears, but rather choosing a less distinctive characteristic of Mickey Mouse.
100. See supra note 82.
101. Id.
with Hoehling v. Universal City Studios, Inc., 618 F. 2d 972 (CA2, 1980) (limiting protection to ordering and choice of words).102

In Wainwright Securities Inc. v. Wall Street Transcript Corp. (Wainright),103 defendants (The Wall Street Transcript Corporation) were publishing abstracts of the plaintiff’s (Wainwright’s) financial research reports in the portion of their weekly newspaper entitled the “Wall Street Roundup.”104 The court held:

In considering the copyright protection due to a report of new events or factual developments, it is important to differentiate between the substance of the information contained in the report, i.e., the event itself, and “the particular form or collocation of words in which the writer has communicated it” (citations omitted)[]. What is protected is the manner of expression, the author’s analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments[]. Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the “particular expression through similarities of treatment, details, scenes, events and characterization[]” (citations omitted).105

In A. A. Hoehling v. Universal City Studios, Inc. (Hoehling),106 Mr. Hoehling published a book based on his research of the destruction of the Hindenburg.107 Michael MacDonald Mooney also published a book on the Hindenburg and used Hoehling’s book as a source.108 Universal City Studios bought the motion picture rights to Mooney’s book109 and Hoehling sued Universal for copyright infringement.110 The court held that:

Such an historical interpretation, whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors. . . By factoring out similarities based on noncopyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author’s expression[]. A verbatim reproduction of another work, of course, even in the realm of non-fiction, is actionable as copyright infringement.111

103. 558 F.2d 91 (2d Cir. 1977).
104. Id. at 94.
105. Id. at 95-6.
106. 618 F.2d 972 (2d Cir. 1980).
107. Id. at 975.
108. Id. at 977.
109. Id. at 976.
110. Id. at 977.
111. 618 F.2d at 979-80.
Using *Wainwright*, the collage film maker would be copyright protected in his choice of which film images to combine. However if *Hoehling* were the test, only the collage artists sequencing or arrangement of the copied portions would be protected and, arguably, someone else could combine the same sources in a different manner without infringing the original collage film maker’s copyright.

2. Parody

   a. *Eveready Battery Company Inc. v. Adoph Coors Company*

In *Eveready Battery Company Inc. v. Adoph Coors Company* (*Eveready*), Coors spoofed, in a commercial of their own, the popular series of *Eveready Battery* commercials featuring a pink mechanical toy bunny (“The Energizer Bunny”). In the Coors commercial, actor Leslie Nielsen wore fake white rabbit ears, tail, and feet, and carried a bass drum.

The following are the requirements a plaintiff must show to bring a cause of action, as expressed in *Eveready*:

(1) Ownership of a valid copyright in its work and (2) the accused work . . . deemed to be ‘substantially similar’ to the copyrighted work . . . Because direct evidence of ‘copying’ is often unavailable, courts will infer copying where defendant: (1) has access to the copyrighted work, and (2) where the accused work is deemed to be ‘substantially similar’ to the copyrighted work . . . The ‘substantial similarity’ analysis, in turn concerns ‘whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression by taking material of substance and value.

*Eveready* was not held to have met their burden of proof.

Coors contended they were parodying the Energizer Bunny commercials and so had a fair use exception under § 107 of the Copyright Act. The first factor of § 107, “purpose and character of use,” was the only one held to be in *Eveready’s* favor since the television

---

113.  *A. A. Hoehling*, 618 F.2d at 979-80.
115.  Id. at 441-2.
116.  Id. at 443.
117.  Id. at 444.
118.  Id. at 448.
119.  765 F. Supp. at 448.
120.  17 U.S.C. § 107(1).
commercial had a commercial purpose. The court refused to believe, as Eveready asserted, that just because the first prong of the § 107 factors weighed in Eveready’s favor, that the use could not constitute a parody. All four of the § 107 factors had to be considered. “Although the primary purpose of most television commercials (like other works of a ‘commercial nature’) 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.”

As to the portion used in relation to the copyrighted work as a whole, factor 3 of § 117, the Eveready case looked at Walt Disney Productions v. Air Pirates, which will be discussed further below. Walt Disney Productions v. Air Pirates held that “one may lawfully parody copyrighted work only if he takes no more than is necessary to ‘recall or conjure up the object of his satire.’” However, as the Eveready case also noted, “in Fisher v. Debs, the 9th Circuit expressly stated that the ‘conjure up’ test articulated in its Air Pirates opinion, was not meant to be interpreted rigidly ‘to limit the amount of permissible copying to that amount necessary to evoke only initial recognition in the viewer’ (citations omitted).”

If the plaintiff, the film copyright holder, successfully applies the Eveready test for infringement, the collage film maker may assert a fair use defense by discussing the four factors of 17 U.S.C. § 107. If the plaintiff successfully rebuts the defendant’s assertion of the four factors, the court will deny the defendant a fair use defense. In Eveready, the plaintiff’s rebuttal of only the first element (purpose of use including commercial nature) of § 107 was held to be insufficient to thwart the defendant’s fair use defense. In the collage hypothetical, the second (nature of copyrighted work) and/or fourth (effect on potential market for the original) factors could weigh in favor of the plaintiff or the defendant. Eveready did not establish who should

122. Id. at 446.
123. Id.
124. Id. at 447.
126. 581 F.2d 751 (9th Cir. 1978).
127. See infra discussion, part II.C.b.ii.
129. Id.
130. See supra, note 114 and accompanying text.
133. Id. at 447.
134. These possibilities will be further developed in the paragraphs that follow.
prevail in the case of a tie of the factors from § 107. However, as was discussed in the beginning of this section in reference to the McCulloch article, judicial discretion is a major component with fair use.135

When the defendant is arguing a fair use because the collage is a parody or satire, his proof of substantiality (factor 3 of § 107) is less burdensome.136 As Eveready emphasized in relation to a fair use defense, if used for satire, the user can take more than the minimum required for the viewer to recognize the original.137 Using Eveready as precedent, factor 3 weighs in favor of the defendant collage artist.139 Factor 2 also can be said to weigh in favor of the defendant;140 however further inquiry is required of factors 1 and 4.

The purpose of a satirical collage film originating from copyrighted film sources may be to make the viewer reflect on the human condition in some manner. This is a nonprofit purpose, therefore, the first component of § 107 could weigh in favor of the defendant. The commercial nature of the collage film depends on whether the creator of the collage also uses his work for commercial ends. This element could favor either the plaintiff or the defendant, depending on the facts of the particular case.

The nature of the copyrighted original work, as fact or fiction, may make fair use either easier or more difficult for a judge to grant. This is because a fair use commentary or parody on a work of fiction, such as F. Scott Fitzgerald's "The Great Gatsby", is more plausible than a commentary or parody of a book of facts, such as an encyclopedia. Fact does not so easily lend itself to comment or satire.146

In the collage hypothetical, the fourth factor of § 107, "effect of the use on the potential market for or value of the copyrighted

---

135. See supra note 82.
137. Id.
140. In Eveready the court determined that, "[t]he nature of the copyrighted work, like the nature of the challenged work, is commercial. Thus Eveready cannot argue that its work is deserving of particularly strong protection. Thus the second factor is at best neutral but certainly doesn't weigh in favor of Eveready." Eveready Battery, 765 F.Supp. at 447.
143. The purpose is not only to make money. Eveready did not consider a commercial purpose that was paired with a noncommercial purpose to disallow a fair use defense. Eveready Battery, 765 F.Supp. at 447.
144. 17 U.S.C. § 107(1).
145. See infra note 185 and accompanying text.
146. Id.
work."147 may be a strong element for the plaintiff. The effect on the value of the copyrighted work, is measured in terms of whether the collage fulfills the demand for the original.148 The collage film fulfills the demand for the original if marketed in similar ways as the original. But, the collage film could instead be used as a public service announcement. More facts as to the particular use of the collage are required before the success of a "fair use" defense can be accurately predicted. For example, "use" with the purpose to parody the original is likely to yield a fair use defense. However, creating such parodies involves consideration of the amount which is permitted to be copied to create the parody, the effect of the parody having a commercial purpose, and the success of the attempted parody itself in parodying the original work.

b. Walt Disney Productions v. The Air Pirates

In Walt Disney Productions v. The Air Pirates149 (Walt Disney), seventeen Disney characters were graphically depicted, two as insects and the others endowed with human qualities, in a satirical comic book depicting them as active members of "a free thinking, promiscuous counterculture."150 Defendant’s assertion that the work was a parody, qualifying as fair use was denied because "the parodist ha[d] appropriated a greater amount of the original work than [was] necessary to 'recall or conjure up' the object of his satire."151 As enumerated above in the discussion of Eveready Battery Company Inc. v. Adoph Coors Company,152 this test was later modified and loosened by Fisher v. Dees.153

The relevance of Walt Disney is that the court recognized the user’s ability to parody a copyrighted character by use of part of that character, with the only dispute being how much could be used:

in comparison with other characters, very little would have been necessary to place Mickey Mouse and his image in the minds of the readers[.] Second, when the medium involved is a comic book, a recognizable character is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied.154

149. Walt Disney Prod., 581 F.2d 751.
150. Id. at 753.
151. Id. at 757. The object of the satire was the Disney cartoon characters. Id.
152. See supra note 114.
153. 794 F.2d 432 (9th Cir. 1986).
154. Walt Disney Prod., 581 F.2d at 757-8.
Walt Disney's decision affirms that a copyright protected parody of a cartoon can exist. This reinforces the possibility for a collage film maker to compile film from unoriginal sources, thereby creating a new potentially copyrightable original. The plaintiff whose copyrighted image was used in small quantities, only to the degree necessary to place his image in the mind of viewers, would have difficulty proving substantial similarity. The collage film maker defendant, in using such a small portion, conversely may have difficulty proving that he/she used the preexisting work to create a parody. This puts both the Plaintiff and the Defendant in positions from which it is difficult to prove their cases.

c. Fisher v. Dees

In Fisher v. Dees, (Fisher) Rick Dees, Atlantic Recording Co., and Warner Communications (defendants) contacted Fisher (copyright holder plaintiff) requesting permission to use part or all of the music to “When Sunny Gets Blue” in order to create a comic version. Fisher, however, refused to grant permission. A few months later Dees released a comedy record album which included a parody version of “When Sunny Gets Blue” entitled “When Sonny Sniffs Glue.” The plaintiffs sued for copyright infringement. The court granted Debs a fair use defense. 

Fisher discussed the public policy factors behind the defendants granting a fair use defense. “Fair use presupposes ‘good faith’ and ‘fair dealing’ [citations omitted]. . . courts may weigh ‘the propriety of the defendant’s conduct in the equitable balance of a fair use determination [citations omitted].’ Utilizing these standards, the Fisher court decided that “the composers have failed to identify any conduct of Dees that is sufficiently blameworthy. . . the parody defense to copyright infringement exists precisely to make possible a use that cannot be bought.”

Fisher clearly explained the effect of the parody being of a commercial nature, recognizing that according to Harper & Row, the
commercial nature of a parody will weigh against a finding of fair use.165 However,

many parodies distributed commercially may be ‘more in the nature of an editorial or social commentary than... an attempt to capitalize financially on the plaintiff’s original work (citations omitted). In such cases, the initial presumption need not be fatal to the defendant’s case[;] The defendant can rebut the presumption by convincing the court that the parody does not unfairly diminish the economic value of the original.166

Therefore, the commercial nature of a parody will not be as damning of a factor as it would be for other kinds of fair use.167

Analysis of the economic impact of the use on the original will not include consideration of the parody’s critical impact since the copyright law is not designed to stifle critics: “The economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it fulfills the demand for the original. Biting criticism suppresses demand; copyright infringement usurps it.”168 The court held that the two works did not fulfill the same demand, one song being romantic and the other comic.169

The standard for the amount and substantiality of the original170 which may be copied in creating a parody is that the parody “takes no more from the original than is necessary to accomplish reasonably its parodic purpose.”171

In applying Fisher to the collage hypothetical, the mere fact that the collage film maker has constructed a parody from unoriginal sources is not enough of a violation of moral turpitude to deny him a fair use exception.172 If the nature of the parody collage is commercial, fair use may still be granted so long as it does not fulfill the demand for the original.

165. Id.
166. 794 F.2d at 437.
167. Id.
168. Id. at 438-9.
169. Id., at 439.
171. Fisher, 794 F.2d at 439.
172. “Fair use presupposes ‘good faith’ and ‘fair dealing’ ” Id. at 436. Fisher found for the defendant who made the parody. Id. at 440.
d. United Feature Syndicate v. Koons

In United Feature Syndicate v. Koons, a sculptor incorporated, without obtaining permission, the popular cartoon character "Odie" in a sculpture, and was not protected by the fair use exception to copyright infringement. The test for infringement that the court in United Feature Syndicate enumerated was: "Plaintiff may prove defendant copied either by direct evidence or, as is most often the case, by showing that (1) The defendant had access to the plaintiff’s copyrighted work and (2) that defendant’s work is substantially similar to the plaintiff’s copyrightable material." Substantial similarity was considered determinable by either "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work" or "whether the ordinary observer, unless he set out to detect the disparities would be disposed to overlook them and regard their aesthetic appeal as the same." The court held that the casual observer would recognize Odie in the sculpture.

In analyzing the first factor of § 107 of the Copyright Act the court considered Koons’ use of the "Odie" character commercial in nature and therefore unexcusable under fair use. "The fair use analysis properly focuses, inter alia, on whether the work is ‘of a commercial nature’ which looks primarily at whether the defendant stands to profit from the use of the copyrighted material without paying for such usage."

The court in United Feature Syndicate differentiated the granting of a fair use defense on whether the use is factual or fictional. Fair use was considered less likely to be found when the original copyrighted work was fictional.

174. Id. at 382.
175. Id. at 376.
176. 817 F. Supp. at 377.
177. Id.
178. Id.
179. Id. at 379.
180. Id.
181. 817 F. Supp. at 380.
182. As the Supreme Court has noted, 'the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.' Harper & Row, 471 U.S. at 563. Thus, fair use, is less likely to be found when the original copyrighted work is fictional, rather than a factual or informational work such as a biography, a telephone directory, a textbook; or a 'how to' book. Id.
Similarly to the way the *Harper & Row* court\(^{183}\) did not find a public figure exception to fair use in *United Feature Syndicate*, "imaginative characters do not lose copyright protection as a result of their incorporation into American culture."\(^{184}\) The popularity of ‘Odie’ did not make his image any less protected than that of a lesser known character.

The fourth factor of fair use, the effect on the market value of the original,\(^{185}\) weighed heavily for the plaintiff in *United Feature Syndicate* since the creator of Odie could decide to create artistic sculptures of his characters for commercial sale and the Koons sculpture could negatively impact James Davis’ ability to market his own sculptures.\(^{186}\)

The court in *United Feature Syndicate* held the parody nature of the sculpture, as explained by the artist, to be insufficient for fair use.\(^{187}\) The artist explained his parody as the

‘Odie’ character ... being used as a parody to symbolize the cynical and empty nature of society... that the Puppy ‘has lost the ability to find beauty in the most simple things; he cannot embrace the love of life’... exposing the emptiness of the Puppy’s scorn and, in so doing, praising the Boy for his sense of freedom.\(^{188}\)

This explanation was considered insufficient because

though the satire need not be only of the copied work and may, as appellants urge... also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work. [citations omitted]... the ‘Wild Boy & Puppy’ sculpture cannot qualify as a parody or satire because... the sculpture is, at best, a parody of society at large, rather than a parody of the copyrighted ‘Odie’ character.\(^{189}\)

Even if the sculpture met the requirements of parody, fair use could not be granted since “the unauthorized use takes... more of the copyrighted work than is necessary for the purpose of parody.”\(^{190}\) Koons did not need to copy “Odie” entirely to evoke his image in the mind of the observer of Koons’ art.\(^{191}\)

\(^{183}\) *Harper & Row*, 471 U.S. at 541.

\(^{184}\) *United Feature Syndicate*, 817 F.Supp. at 380.


\(^{186}\) *United Feature Syndicate*, 817 F.Supp at 382.

\(^{187}\) Id. at 383-4.

\(^{188}\) Id. at 383.

\(^{189}\) Id. at 383-4.

\(^{190}\) 817 F. Supp. at 384.

\(^{191}\) Id.
The rule established in *United Feature Syndicate* is that the parody must be at least in part a commentary on the original source work itself. As in *United Feature Syndicate*, the collage film maker's explanation of his parody may be taken into account as to what he intended to parody, but should it be considered by the court to be a parody on society at large and not the original source film, the parody classification, and the fair use defense will not apply.

IV. SUMMARY OF CURRENT CASE LAW

A collage film can be considered either a compilation or a derivative work, contingent on the specific details of the work in question. The contingencies are whether the film collage is simply a collection of source works assembled but not altered, or whether the source works are changed when they are assembled. If they are not altered, the collage film is a compilation. If they are altered, the collage film is a derivative work. Whether the collage film is considered a compilation or a derivative work, the collage film maker will only be able to obtain copyright protection for what he contributed as original work. For the film maker's use of the copyrighted original source films, he will be liable for copyright infringement. If the collage film falls within a fair use exception, the artist will not be held liable for infringement.

The five cases discussed above under the fair use exception section all involve an unauthorized use of copyrighted material and a defendant claiming a fair use exception to infringement. The defense fails in *Harper & Row Publishers v. Nation Enterprises*, *Walt Disney Productions v. Air Pirates*, and *United Feature Syndicate v. Koons*. The defense is granted in *Eveready Battery Company, Inc. v. Adolph Coors Company* and *Fisher v. Dees*. The effect of the commercial nature of the use on the fair use defense varies. The judge weighs this factor in different ways based on his impression of the case. If he or she feels fair use is merited, a commercial nature is not fatal to the defense. If however, granting a fair use defense seems unjust, a commercial nature is fatal.

---

192. See supra note 187 and accompanying text.
193. Id.
194. See supra discussion part II.B.
197. See supra discussion part II.C.
199. See supra note 79 and accompanying text.
200. Id.
A less "result oriented" and more practical explanation of the different approaches to commercial nature is found in the cases which grant fair use. Therein, the commercial nature of the commentary or parody does not financially burden the copyright holder, hence the use can be fair. In *Eveready*, the parody of the Energizer Bunny in a beer commercial did not threaten the demand for Energizer batteries.\(^{201}\) Similarly, the parody of a romantic song in *Fisher* did not take away from the market for that romantic original.\(^{202}\) Meanwhile, in *Harper*, where a fair use defense failed, the infringement resulted in a definitive financial loss to the copyright holder from Time magazine's refusal to pay after losing "first crack" at the story of Ford's memoirs.\(^{203}\) In *United Feature Syndicate*, the copyright holder is deprived of at least part of a market for 'Odie' figurines as a result of the defendant's selling a statue decorated with a representation of the entire 'Odie' image.\(^{204}\)

Some other major rules for making a collage film whose genre is that of a parody arose out of the five cases. The measurement of the amount and substantiality of the portion used from the original\(^{205}\) will include the qualitative importance of the portion used.\(^{206}\) A satirist can't use more of the original than is absolutely necessary for him to conjure up the original in the mind of the viewer.\(^{207}\) The effect of the use upon "the potential market for the copyrighted work"\(^{208}\) is measured by the parody's ability to fulfill the demand for the original.\(^{209}\) A parody made from the use of unoriginal sources must parody the sources themselves.\(^{210}\)

V. A Proposed Alternative

A film maker who decides to create a collage out of his own footage and preexisting copyrighted film or entirely out of preexisting copyrighted film has made a creative decision that will require him to face the copyright laws. From the above discussion, it is clear that to avoid lawsuits this collage film maker will have to obtain licenses to use the desired copyrighted film footage and copyright his own com-

\(^{201}\) *Eveready Battery*, 765 F. Supp. at 448.
\(^{202}\) *Fisher*, 794 F.2d at 438.
\(^{203}\) *Harper & Row*, 471 U.S. at 539.
\(^{204}\) *United Feature Syndicate*, 817 F.Supp. at 382.
\(^{205}\) 17 U.S.C. § 107(3).
\(^{206}\) *Harper & Row*, 471 U.S. at 541.
\(^{207}\) See section II(c)(2) supra.
\(^{208}\) *Id.*
\(^{209}\) *Id.*
\(^{210}\) *Id.*
pilation of derivative work. Should he be more daring and fail to obtain licenses to use the preexisting footage, he must be certain that his use falls within the fair use exception, meaning that he would be prudent not to try to make money off of his new film. He should also be cautious in the amount of the source material he uses, especially if he intends his film to be a parody.

All of these precautions are, on a certain level, incompatible with the purposes behind the copyright law. With the advent of computer technology at today's film maker's disposal, a frame of film may be seen by a film maker similar to the way a canvas is seen by a painter. It is a tool which can be added to by superimposing images such as the 'Forrest Gump' image was superimposed onto the old historical footage in the movie, 'Forrest Gump.' When significant changes are made to the original film footage, the end product is truly unique. Rather than facilitating the creativity which copyright law was established to facilitate, it instead hinders the collage film maker. The present copyright law also fails to appropriately reward the creator of the original film, considering the fact that the use of the source films may be considered merely an incidental backdrop for the collage film maker's creativity.

The manipulation of preexisting images is now possible on all the video editing computer systems which are gradually replacing all of the now antiquated methods of film editing. In other words, this technology will likely be at the fingertips of all the major players in the television and movie industries within the next two years.

There is an alternative legal method which would be more efficient and more appropriate in handling creative copying and creation of collage works, than the present copyright law. The legislature could authorize the courts to borrow a standard from the existing patent law. Under patent law, 35 U.S.C. § 101, a person does not get a patent for improvements on existing technology unless he does something new, useful, and creative to change it. Applying such a test to a collage film created from parts of preexisting copyrighted film footage, the collage film maker would only obtain a copyright for his film should he do something new, useful and creative to his source films. In the example discussed above, 'Forrest Gump' appearing in various historical settings is an example of such a new, useful, and creative change to existing film footage.

Use of this test, which is borrowed from patent law, arguably enables the courts to reward the collage film maker with the right to copyright not only the way he has assembled the film footage, but also the source footage has chosen to assemble. The source footage chosen
is an element of his creation’s “new” quality. Additionally, such a standard avoids one of the hazards of moving away from the protection of the copyright law. If the change to existing film footage must be new, useful and creative, the ‘collage film maker’ cannot make a minute change to a preexisting film under the guise of a creative contribution.