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THE WHITE HOUSE

WASHINGTON

November 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Suggestion that Retired Supreme Court Justices be Eligible to Fill Vacant Seats on the Supreme Court (Article From Baltimore's "Daily Record")

Jay L. Spiegel has written, enclosing a copy of an article he wrote for Baltimore's Daily Record. The article points out the danger that the Supreme Court, with several aging members, may find itself short-handed for an extended period of time in the near future. With recusals, this could result in the absence of a quorum of six Justices (see 28 U.S.C. § 1) for numerous cases. Spiegel proposes a statute be enacted authorizing retired Justices to "fill in" until an ailing member of the Supreme Court is well or a vacancy filled.

There is already a fascinating but little-known statutory procedure for dealing with the problem of the absence of a quorum of the Supreme Court. Under 28 U.S.C. § 2109, cases brought to the Supreme Court by direct appeal from a district court that cannot be heard due to the absence of a quorum are to be remitted, by order of the Chief Justice, to the court of appeals for the circuit containing the district court. That court shall hear and finally decide the case either en banc or by a panel consisting of the three most senior circuit judges, as the order directs. In all other cases brought before the Supreme Court that cannot be heard due to the absence of a quorum, if a majority of the Justices qualified to sit determine that the case cannot be heard in the next ensuing term, the case shall be affirmed by order of the Supreme Court, and the affirmance shall have the same effect as affirmance by an equally divided court.

This latter procedure is the answer to the riddle of how a case can be affirmed by the Supreme Court when five qualified Justices believe it should be reversed: if the five wanting to reverse the case are the only ones qualified to sit, and they determine a quorum will not be available in the next term, then the case will be affirmed by order of the Supreme Court (albeit without precedential value).

The remittal procedure of 28 U.S.C. § 2109 has been used only once in the history of the Supreme Court, in the landmark antitrust case United States v. Alcoa, 322 U.S. 716 (1944), finally decided by the three most senior Second

Circuit judges, Learned Hand, Augustus Hand, and Thomas Swan, see 148 F.2d 416 (2 Cir. 1945). The affirmance procedure has been used twice, see Prichard v. United States, 339 U.S. 974 (1950); Sloan v. Nixon, 419 U.S. 958 (1974).

I have drafted a reply to Spiegel, noting that we have referred his suggestion to Justice's OLP (for want of any other idea) and also calling 28 U.S.C. § 2109 to his attention. The reply also notes Spiegel's error in considering Arthur Goldberg a retired Justice. Goldberg resigned; he did not retire.

Attachment

THE WHITE HOUSE

WASHINGTON

November 16, 1983

Dear Mr. Spiegel:

Thank you for your letter of November 4, and the accompanying copy of your article in the Baltimore Daily Record. That article proposed enactment of a federal statute permitting a retired Supreme Court justice to fill temporarily a vacant seat on the Supreme Court.

Current law does make provision for the absence of a quorum of the Supreme Court. Under 28 U.S.C. § 2109, cases brought to the Supreme Court on direct appeal from a district court are remitted to the court of appeals for the circuit in which the district court is located; other cases, if it is determined that they cannot be decided at the next ensuing term, are affirmed by an order that has the same effect as affirmance by an equally divided Court. The former procedure was used in United States v. Alcoa, 322 U.S. 716 (1944); the latter in Prichard v. United States, 339 U.S. 974 (1950) and Sloan v. Nixon, 419 U.S. 958 (1974). Your article, however, raises interesting concerns, and I have taken the liberty of forwarding it to the Department of Justice, Office of Legal Policy and Office of Legal Counsel, for whatever review these offices consider appropriate.

As a point of fact, in further response to your letter, I would point out that former Justice Arthur Goldberg, unlike Justice Potter Stewart, resigned from the Court; he did not retire.

Thank you again for sharing your interesting article with us.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Mr. Jay L. Spiegel
110 W. 39 Street, #1315
Baltimore, Maryland 21210

FFF:JGR:aea 11/16/83

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

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I would point out that former Justice Arthur Goldberg, unlike Justice Potter Stewart, resigned from the Court; he did not retire. Thank you again for sharing your interesting article with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Jay L. Spiegel
110 W. 39 Street, #1315
Baltimore, Maryland 21210

FFF:JGR:aea 11/15/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Suggestion that Retired Supreme Court
Justices be Eligible to Fill Vacant
Seats on the Supreme Court (Article
From Baltimore's "Daily Record")

The attached letter from and article by Jay L. Spiegel,
together with a copy of my reply, are submitted for whatever
review, if any, you consider appropriate.

Attachments

FFF:JGR:aea 11/16/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE
WASHINGTON

November 15, 1983

MEMORANDUM FOR JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

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COUNSEL TO THE PRESIDENT

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Seats on the Supreme Court (Article
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together with a copy of my reply, are submitted for whatever
review, if any, you consider appropriate.

Attachment

FFF:JGR:aea 11/15/83

cc: FFFielding/JGRoberts/Subj/Chron

JV

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

F6051

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 1 1

Name of Correspondent: Jay L. Spiegel

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: Suggests that retired Supreme Court Justices
be eligible to fill vacant seats on the
Supreme Court
(attaches article from Baltimore's 'Daily Record')

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
OWH	ORIGINATOR	83/11/15			1 1
OWATIS	Referral Note:	2 83/11/15		S	83/11/25
	Referral Note:	1 1			1 1
	Referral Note:	1 1			1 1
	Referral Note:	1 1			1 1
	Referral Note:	1 1			1 1

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered C - Completed
B - Non-Special Referral S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

JAY L. SPIEGEL

JR

184414 *u*

110 W. 39 St. #1315
Baltimore, MD 21210
4 November 1983

Hon. Fred Fielding, Esq.
White House Counsel
White House
Washington, DC

Dear Mr. Fielding:

The attached reproduction of an article in Baltimore's Daily Record proposes that the relevant federal statutes be amended to permit a retired Supreme Court Justice to temporarily fill a vacant seat on the Supreme Court.

I hope that this receives some consideration and would appreciate your comments.

Sincerely,

Jay L Spiegel
Jay L. Spiegel

Law

Opinion

Keeping the Supreme Court full

By JAY L. SPIEGEL
Special to The Daily Record

The philosophical differences between the members of the United States Supreme Court is often a subject of commentary, as is the health and advanced ages of the Justices. Five of the current Justices are currently 75 years old or older, and consequently, absences from the bench due to illness are increasingly likely. Moreover, as Justices leave the bench, one or more seats may be vacant during arguments until replacements are nominated and confirmed by the Senate. Because the absence of even one vote due to death, retirement or illness could change the way cases are decided, a Court with less than nine members is not a bench "happily filled."

A 1971 situation illustrates the problem. Justices Black and Harlan retired on September 17 and 23 respectively. Since their successors, Justices Powell and Rehnquist, did not take their oaths of office until January 7, 1972, the Court sat for three full months with only seven Justices. A quick perusal of 404 U.S. demonstrates how many cases were decided by less than the full complement of Justices. A quorum of the Court, according to 28 U.S.C. § 1, is six Justices. A severe flu bug or recusals during the winter of 1971 could have shut down one branch of our government.

To prevent such an unfortunate event from afflicting the Court as its current members leave the

scene, I propose the solution used by state courts, including the Maryland Court of Appeals: designating retired Justices to serve until an ailing member is healthy or a vacancy is filled. Nothing in the Constitution would prohibit this. 28 U.S.C. § 294 empowers the Chief Justice of the Supreme Court to designate a retired Justice to serve as a Circuit Court Judge. This section need only be amended to include language similar to that found in Md. Const. art. IV, § 18A, which permits the Chief Judge of the Court of Appeals, "in case of a vacancy, or of the illness, disqualification or other absence of a judge", to designate another judge to temporarily fill the empty seat.

Such a statute should be drafted so as to block the Supreme Court Chief Justice from designating only retired Justices he finds ideologically compatible. This could be done by mandating that the most recently retired Justice be designated first. Only if he refuses or is disqualified would the Justice who immediately preceded him into retirement be designated. A set order of designation would render the ideology of the Justice who fills a vacancy a fortuity. I suggest that the last retired Justice be designated first because he would likely be younger than those who retired earlier, and probably would have served with the current members of the Court and be accustomed to working with them.

Currently, only two retired Jus-



DAILY RECORD file photo

Until Justice Rehnquist (pictured here) and Justice Powell took their seats on the U.S. Supreme Court, it sat for three months with only seven Justices.

ties, Arthur Goldberg and Potter Stewart, survive. Other Justices, particularly Justice Clark, served repeatedly as Circuit Court Judges and could have rendered great service to the Court during 1971 or at other times when seats were empty.

At best, this is a band-aid ap-

proach to a problem that today may not seem too significant. However, in a few years or even months, it may prove critical to the smooth running of the Court to have a mechanism in place keeping the bench full while the President and Senate move replacements along. The time to debate proposals such as this is now.

THE WHITE HOUSE

WASHINGTON

November 28, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: Letter from U.S. Attorney Hinton Pierce

U.S. Attorney Hinton R. Pierce (S.D. GA) has written to pass along a clipping of a newspaper article in which he explained the decision to dismiss federal charges against Charles R. Harris, the individual who disrupted the President's golf match in Augusta. The federal charges were, as you know, dismissed without prejudice to permit prosecution of the more substantial state charges to proceed.

Since this was widely known before receipt of Pierce's letter, I assume his real purpose in writing was to share the joke in the last paragraph. The attached draft acknowledgment lacks a witty rejoinder because I have been unable to think of one. Alternatively, it is probably not necessary to respond to Pierce's letter at all.

Attachment

THE WHITE HOUSE

WASHINGTON

November 28, 1983

Dear Mr. Pierce:

Thank you for your letter and the accompanying newspaper clipping, which explained why federal charges against Charles R. Harris were dismissed without prejudice.

I also appreciate your sharing with me the "real reason" Harris did what he did. I had thought he was just teed off about something.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Hinton R. Pierce
United States Attorney for the
Southern District of Georgia
Post Office Box 2017
Augusta, Georgia 30903

FFF:JGR:aea 11/28/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 28, 1983

Dear Mr. Pierce:

Thank you for your letter and the accompanying newspaper clipping, which explained why federal charges against Charles R. Harris were dismissed without prejudice.

I also appreciate your sharing with me the "real reason" Harris did what he did. I had thought he was just teed off about something.

Sincerely,

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The Honorable Hinton R. Pierce
United States Attorney for the
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Post Office Box 2017
Augusta, Georgia 30903

FFF:JGR:aea 11/28/83
bcc: FFFielding/JGRoberts/Subj/Chron



U.S. Department of Justice

United States Attorney
Southern District of Georgia

*Response
from F-to
Pierce*

Post Office Box 2017

Augusta, Ga. 30903

October 27, 1983

Fred F. Fielding, Esquire
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Fielding:

The White House might have some interest in why we deferred to state prosecution in the "gate crasher" case at the Augusta National. The enclosed newspaper article is accurate.

If you have a chance, you might mention to the President the real reason the guy did what he did. He wanted to see if he could shoot a 38 on the front nine.

Sincerely,

Hinton R. Pierce
United States Attorney

HRP:jmc

Enclosure

Harris

State to Prosecute Accused Man First

Ken Denney
Lead Staff Writer

A federal judge Tuesday dismissed federal charges against Charles R. Harris, accused of ramming a gate at the Augusta National Golf Club and taking five hostages, following a government request that state charges stemming from the same incident be prosecuted first.

Harris, 44, of Augusta faced three federal charges, including one of making threats against the president, in the Saturday incident which interrupted a weekend of golf for visiting President Reagan.

He also faced charges of assaulting or resisting a federal officer and possession of a weapon during the commission of a felony.

The motion, granted by U.S. District Judge Dudley H. Bowen Jr., leaves the door open for the federal government to prosecute Harris at a future date.

Augusta Judicial Circuit District Attorney Sam B. Sibley on Tuesday said the state may seek charges of false imprisonment in addition to the kidnapping charge.

A preliminary hearing on the kidnapping charge is set for July 2 before Chief Magistrate J. Bacheller Flythe.

Harris was transported to the federal courthouse under heavy security at 1 p.m. and remained in the building's lock-up until the 4 p.m. hearing. Bowen presided during the initial appearance hearing due to the absence of U.S. Magistrate John W. Dunsmore.

Wearing a white shirt with blue trim, Harris sat quietly through the hearing, which lasted approximately five minutes.

See HARRIS, Page 8A



Charles R. Harris (L) Is Led From Tuesday's Court Hearing by Law Enforcement Official

Staff Photo by Lannis Waters

Continued from Page 11
utes. Harris' attorneys, Jim Blanchard Jr. and John Fleming also made no comment during the proceeding.

U.S. Attorney Hinton R. Pierce told the court the government "feels that at least three and possibly four federal criminal statutes" were violated in the Saturday incident.

"On the other hand," Pierce said, "The government is aware of possible violations of very substantial state criminal statutes."

He said the government "defers to state prosecution" of its charges since the alleged state violations "are of a more substantial nature."

Pierce asked the federal charges against Harris be dismissed "without prejudice," meaning they could be brought again at a future time.

After signing the order, Bowen said the dismissal of federal charges "does not detract from the seriousness of anyone's conduct."

Bowen added that the prosecution of cases was up to the executive branch of the government and that the court could intervene only if it felt a "manifest injustice" was being done.

He said he did not feel that to be the case in regard to the government's motion allowing the state charge to be prosecuted first.

Following the hearing Harris was returned to the Richmond County Jail under escort by federal officers and Richmond County sheriff's investigators.

Harris is accused of ramming a pickup truck through a gate at the exclusive golf club and taking five hostages at gunpoint in the club's pro shop. Two other people locked themselves inside the building and authorities say the gunman apparently did not know they were there.

According to investigators, the gunman wanted to talk about "foreigners taking over American jobs" with the president, who was on the 16th green at the time of the incident.

After 2½ hours of negotiations, the hostages were released and Harris was taken into custody.

During the seige, the president and Secretary of State George Shultz — Reagan's host during the weekend — were briefly removed from the golf course by a heavily-armed contingent of U.S. Secret Service agents.

THE WHITE HOUSE

WASHINGTON

November 30, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*
SUBJECT: "Queen Nancy" Postcard

As you directed, I have prepared a draft objecting to this postcard. The draft was not easy to prepare because, as I indicated in my original memorandum, I do not believe we have any legal recourse to stop publication of the postcard. There is case law that would prevent use of a photograph of Mrs. Reagan for advertising purposes, but that is not what is involved here. There is no doubt that postcards of Mrs. Reagan can be produced without her permission; a parody -- as this obviously is -- would seem to enjoy the same protection. For these reasons my draft stops short of explicitly questioning the legality of the postcard.

New drafts to Cathy Fenton and Mrs. Maggs are also attached.

Attachment

THE WHITE HOUSE

WASHINGTON

December 1, 1983

Dear Ms. Maggs:

Thank you for your letter of November 11 to the First Lady's Office. Along with that letter you enclosed a copy of a postcard depicting the First Lady as "Queen Nancy." You noted that you found the postcard distasteful, and suggested that a letter from the White House to the company responsible for producing the postcard would cause the company to cease issuing it.

It goes without saying that we share your view of the postcard. Enclosed for your information is a copy of a letter I wrote to the President of the American Postcard Company, Inc., which published the offending postcard. I do not know if this letter will produce the desired result, but at least the company will not be in doubt as to our views on this subject.

Thank you for calling this unfortunate matter to our attention. We appreciate your concern.

Best wishes,

Sincerely,

Orig. signed by FFE

Fred F. Fielding
Counsel to the President

Ms. Julia Maggs
10873 Galvin Street
Culver City, CA 90230

Enclosure
FFF:JGR:aea 12/1/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 1, 1983

Dear Mr. Dudley:

A citizen complaint has alerted us to the existence of your postcard entitled "Queen Nancy." This postcard is a montage of the First Lady's face pasted onto a body of a queen, with a crown. Needless to say, we share the view of the citizen who complained to us that the postcard is in extremely poor taste.

Quite apart from questions of taste, your knowing publication, distribution, and sale of a false representation of the First Lady raise serious concerns. Creating and publishing such a false representation exceeds the appropriate bounds of even the broadest conception of "humor" or commentary. Certainly Mrs. Reagan's activities in such areas as promoting the Foster Grandparents Program or combatting drug abuse among our Nation's youth have subjected her to some publicity, but her prominence hardly confers a license for the deliberate doctoring of photographs to present her as she has never appeared in reality.

We are deeply offended by the postcard and disappointed that your company would include such an item among its products.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Mr. George Dudley
President, American
Postcard Company, Inc.
285 Lafayette Street
New York, New York 10012

FFF:JGR:aea 12/1/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE
WASHINGTON

November 22, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*
SUBJECT: "Queen Nancy" Postcard

Julia Maggs of Culver City, California has written the First Lady's Office to note her objection to a postcard issued by the American Postcard Company, depicting Mrs. Reagan be-decked as a monarch, complete with crown. Maggs suggests that a letter from the White House to the company will cause them to cease producing the distasteful postcard.

Ms. Maggs is new to this country, which may explain her naive assumption concerning the reaction of the American Postcard Company to a letter of complaint from the White House. A company that would produce such a postcard in the first instance is far more likely to double its production after such a complaint and advertise for additional sales of "The Postcard that Shocked the White House." The card itself is probably protected from any legal challenge as parody, and I doubt that we would want to call attention to it by mounting a challenge in any event. In this sensitive area in particular we do not want to be accused of protesting too much. I have drafted a reply to Maggs, and a memorandum to Cathy Fenton advising her of our disposition.

Attachments

I disagree
↓
write & print

THE WHITE HOUSE

WASHINGTON

November 30, 1983

MEMORANDUM FOR CATHY FENTON
OFFICE OF THE FIRST LADY

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: "Queen Nancy" Postcard

You referred to this office a letter from Julia Maggs, complaining about a tasteless postcard depicting the First Lady as "Queen Nancy." Attached is a copy of my reply to Ms. Maggs as well as a copy of a letter I wrote to the President of the American Postcard Company, Inc., which published the postcard.

Attachment

FFF:JGR:aea 11/30/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 1, 1983

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We are deeply offended by the postcard and disappointed that your company would include such an item among its products.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. George Dudley
President, American
Postcard Company, Inc.
285 Lafayette Street
New York, New York 10012

FFF:JGR:aea 12/1/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 1, 1983

Dear Ms. Maggs:

Thank you for your letter of November 11 to the First Lady's Office. Along with that letter you enclosed a copy of a postcard depicting the First Lady as "Queen Nancy." You noted that you found the postcard distasteful, and suggested that a letter from the White House to the company responsible for producing the postcard would cause the company to cease issuing it.

It goes without saying that we share your view of the postcard. Enclosed for your information is a copy of a letter I wrote to the President of the American Postcard Company, Inc., which published the offending postcard. I do not know if this letter will produce the desired result, but at least the company will not be in doubt as to our views on this subject.

Thank you for calling this unfortunate matter to our attention. We appreciate your concern.

Best wishes,

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Julia Maggs
10873 Galvin Street
Culver City, CA 90230

FFF:JGR:aea 12/1/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 22, 1983

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Attachments

THE WHITE HOUSE

WASHINGTON

November 22, 1983

MEMORANDUM FOR CATHY FENTON
OFFICE OF THE FIRST LADY

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: "Queen Nancy" Postcard

Attached is a copy of my reply to Julia Maggs, who wrote to object to a tasteless postcard depiction of the First Lady.

FFF:JGR:aea 11/22/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 22, 1983

Dear Ms. Maggs:

Thank you for your letter of November 11 to the First Lady's Office. Along with that letter you enclosed a copy of a postcard depicting the First Lady as "Queen Nancy." You noted that you found the postcard distasteful, and suggested that a letter from the White House to the company responsible for producing the postcard would cause the company to cease issuing it.

It goes without saying that we share your view of the postcard. It is our judgment, however, that complaining to the company involved could well be counterproductive, since any such complaint could be used by the company to publicize its product. Our experience with tasteless endeavors such as this is that it is generally best to ignore them, and trust to the sound judgment and sensibilities of the American people to do the same. We think that the selfless devotion of the First Lady to causes such as the eradication of drug abuse among our Nation's children so easily overshadows the tawdry impressions sought to be conveyed by the postcard that most citizens will share your reaction to it.

Thank you for calling this unfortunate matter to our attention. We appreciate your concern.

Best wishes,

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Julia Maggs
10873 Galvin Street
Culver City, CA 90230

FFF:JGR:aea 11/22/83
cc: FFFielding/JGRoberts/Subj/Chron

**WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

ID # 184721 **CU**

PP005-01

☐ **O - OUTGOING**

☐ **H - INTERNAL**

☐ **I - INCOMING**

Date Correspondence
Received (YY/MM/DD) 1 / 1

Name of Correspondent: Julia Maggs

☐ **MI Mail Report**

User Codes: (A) _____ (B) _____ (C) _____

Subject: Forwards a post card of the First Lady
pictured as "Queen Nancy" for information
and appropriate action

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>WHOLE</u>	ORIGINATOR	<u>831117</u>			<u>1 / 1</u>
	Referral Note:				
<u>CUAT 18</u>	<u>D</u>	<u>831117</u>		<u>5</u>	<u>831118</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				

ACTION CODES:

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11/11/83

The Press Secretary for
Mrs. Nancy Reagan
The White House
WASHINGTON, D.C.

Sir:

As a British subject, who proudly became an American citizen in 1977, I am a supporter of the Freedom of the Press in this country, but I really think that the enclosed postcard [depicting the First Lady as "Queen Nancy"] is in very poor taste.

I am sure neither you nor Mrs. Reagan is aware of this postcard and no doubt have the same opinion of it as mine. If so, perhaps a letter from you to The American Postcard Co. Inc., New York, will result in no further copies of this distasteful postcard being issued.

I await hearing from you on any action you take.

Sincerely,

Julia Maggs
JULIA MAGGS

THE WHITE HOUSE
WASHINGTON

11/30/83

TO: John
FROM: Steven
RE: "Queen Nancy"

file w/ letter

I couldn't find anything, *further.* It looks like you're right--probably protected as parody, which in the cases I've read is defined to include social commentary in a humorous vein.

The only way I see to claim invasion of privacy would be to say that Mrs. Reagan, though a public figure, is not, after all, the President or even a policymaker and, thus, is entitled to some privacy in the use of her picture based on the holdings in the commercial exploitation cases involving the actors, ball players, etc.

Go get 'em.

of time has elapsed since the consent was given, or where the plaintiff formally revokes such consent.

Thus, in *McAndrews v Roy* (1961, La App) 131 So 2d 256, the court held that even if the plaintiff gave his consent to have his picture made in "before" and "after" poses to show his physical improvement as a result of taking a course in defendant's health studio, plaintiff's privacy was invaded where the defendant used the picture in a newspaper advertisement some 10 years later without obtaining a renewal of the consent. The court felt that it was reasonable for plaintiff to assume that since the pictures were not used shortly after they were taken, the defendant had decided not to use them, and the court further pointed out that it would be placing an unreasonable burden on the plaintiff to hold that he was under a duty to revoke a gratuitous authorization given many years before.

It has been held that a written consent to the use of a person's name for the purposes of advertising or trade is revocable at any time, notwithstanding the expenditure by the licensee of money in exploiting the name. *Garden v Parfumerie Rigaud* (1933) 151 Misc 692, 271 NYS 187. In this case the plaintiff gave her written consent to the use of her name and portrait in connection with a perfume originated and manufactured by the defendant, and the latter secured a trademark for the article and

invested considerable money to popularize it. The court stated: "It is the well-settled law of this state that a gratuitous license—and that is the best that can be said of the permission granted by plaintiff—to use name and portrait is revocable at any time, even though action has been taken upon it. The court cannot lend itself to defendant's claim that, having trademarked their article and invested considerable money to popularize it, no revocation is possible. It may well be that by revocation serious impairment of business result. But that is a danger and risk assumed in accepting a consent unlimited as to time and against which in the beginning, guard could easily be had. Regardless of plaintiff's reason for her refusal to continue permission to use her name, and even admitting that her reason is ulterior and mercenary, it cannot be denied that her name and her portrait are her own and during life solely at her disposal."

§ 12. Special rules as to public personages

[a] Right of privacy held waived

In a number of cases it has been held that a person who seeks public acclaim or who has become a public personage has waived his right of privacy to such an extent that even the unauthorized use of his name or picture for advertising purposes does not constitute an actionable tort.¹⁴

14. This rule is apparently limited to truly public personages, and does not give a publisher *carte blanche* to use, for advertising purposes, the name of one who has only briefly come to public attention through his involvement in a newsworthy incident. But attention is called to *Time, Inc. v Hill* (1967) 385 US 374, 17 L Ed 2d 456, 87 S Ct 534, wherein it was indicated that the names of persons involved in a news event can be used for advertising purposes without incurring liability. It was held that the New York statute, which proscribes appro-

priation and use, for commercial purposes, of a person's name or likeness without his consent, is precluded by the constitutional protection of free speech and press from being applied to redress false reports of matters of public interest (which reports, the New York courts had found, were for the purposes of advertising a play and increasing the circulation of a magazine) in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

§ 12[a]

23 ALR3d 865

A professional and former college All-American football player, who had deliberately sought and received wide publicity as a player and had posed for photographs for general publication and public distribution, was held to have no right of privacy which would enable him to recover for the publication by a brewing company of a football schedule calendar advertising its beer and containing the name and likeness of the plaintiff. *O'Brien v Pabst Sales Co.* (1941, CA5 Tex) 124 F2d 167, cert den 315 US 823, 86 L Ed 1220, 62 S Ct 917.

In *Paramount Pictures, Inc. v Leader Press, Inc.* (1938, DC Okla) 24 F Supp 1004, in which a motion-picture producer and distributor sought an injunction against certain advertising matter which the defendant printed and distributed to theaters showing the plaintiff's pictures, on the ground that, because of the inadequate and inartistic nature of the advertising, it brought discredit upon the pictures of the plaintiff and injured and jeopardized its business and good will, it was contended, among other things, that the use by the defendant of the names and pictures of motion-picture actors constituted an invasion of their legally protected right of privacy. In overruling this contention, the court said: "There is little merit in this contention, because common observation teaches us that the greatest asset to a star is constant publicity. . . . Neither the stars nor the plaintiffs are in a position to claim the right of privacy for the stars, because their production, faces, and names are sold to the public." This decision was reversed in (CA10) 106 F2d 229, on the ground that the advertising printed and distributed by the defendant tended to impair the intangible property rights of the plaintiffs and to depreciate the value of their good will.

The plaintiff in *Cabaniss v Hipsley* (1966) 114 Ga App 367, 151 SE2d 496, had authorized the taking of a revealing photograph of herself for the purpose of advertising her "exotic dance" act. When, through some mistake, this photograph was used in an advertisement for a "Playboy Club" (where she had never appeared) to identify another dancer, plaintiff sued for invasion of privacy on the ground, among others, that there had been a public disclosure of embarrassing private facts about her. In disposing of that contention, the court, noting that plaintiff was what is commonly called a "striptease" so that by the very nature of her occupation the facts disclosed were neither private nor embarrassing to her, held that to whatever degree a man's life has ceased to be private, to that extent the protection of the right of privacy is to be withdrawn.

It was held in *Pallas v Crowley-Milner & Co.* (1952) 334 Mich 282, 54 NW2d 595, that a jury could properly find that plaintiff's right of privacy was not unreasonably or seriously interfered with so as to entitle her to damages where it appeared that she had consented to have her picture taken by a photographer with whom she had registered as a model at a time when she was a showgirl. Although this picture was used without her consent in a newspaper advertisement for certain cosmetics, the court held that whether a claimed interference with the right of privacy is in fact unreasonable or serious may well depend on whether a plaintiff has in any particular or degree abandoned her strictly private character and waived to any extent the right to absolute privacy. In the instant case, the court found that the jury could properly find that plaintiff had cast aside the cloak of privacy of the ordinary private person when she embraced a public or professional role as showgirl or model and had thereby

waived her rights to be free from an invasion of privacy.

Recovery was denied to an actress in *Martin v F.I.Y. Theatre Co.* (1938, CP) 10 Ohio Ops 338, 26 Ohio L Abs 67, an action against the owner of a theater dedicated to "burlesque shows," where it was alleged that the plaintiff was an actress of high reputation for character, morals, ability, and talent in her profession, and that defendants for the purpose of advertising, and without the consent of the plaintiff, exhibited an enlarged photograph of her on his theater for many months among pictures of nude and lewd burlesque actresses. The court took the view that the nature of plaintiff's career, together with her admission of her quest for publicity, deprived her of any right of privacy that might exist in favor of a private individual, the court stating that persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding, stay-at-home citizen, and held that any person following the theatrical business is estopped from a right to be heard to complain that his personal right of privacy has been invaded.

See *Jansen v Hilo Packing Co.* (1952, Sup) 116 NYS2d 251, holding that well-known professional baseball players were not entitled to have the use of their pictures by the defendant enjoined where the pictures were placed on cards in bags of popcorn without any advertising appearing thereon or any indication that pictures would be found in the bags.¹⁵

See also *Hanna Mfg. Co. v Hillerich & B. Co.* (1935, CA5 Ga) 78 F2d 763, 101 ALR 484, cert den 296 US 645, 80 L Ed 458, 56 S Ct 248, holding that the name and likeness of a famous baseball player were not vendible in gross, unconnected with any trade or

business, since "fame is not merchandise," the court further stating that, aside from questions of trademark, unfair competition, and libel, such a person "might have difficulty in keeping his name and likeness from respectful use by others, by virtue of any right of privacy."

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The following cases, although involving plaintiffs who were found not to be public personages, recognized that public personages waive their right of privacy.

In holding that an artist was not necessarily a "public character," whose very position or status constituted a waiver of the right of privacy, the court in *Pavesich v New England Mut. L. Ins. Co.* (1905) 122 Ga 190, 50 SE 68, 69 LRA 101, said that the mere fact that he is an artist does not of itself establish a waiver of this right, so that his picture might be used for advertising purposes.

The fact that the plaintiff's photograph which was used in the defendant's advertising had been taken by the United States Army during his enlistment therein, and had been published by the Army in furtherance of its war information policy, was held in *Continental Optical Co. v Reed* (1949) 119 Ind App 643, 86 NE2d 306, 14 ALR2d 743, reh den 119 Ind App 653, 88 NE2d 55, 14 ALR2d 750, not to constitute a waiver of the plaintiff's right of privacy which would entitle the defendant to an unauthorized use of the photograph. Although stating that when the plaintiff entered the Army he lost his right of privacy in connection with all legitimate use of his person by the military authorities for the furtherance of the war effort, including the right to take his picture while engaged in his army duties and publication of the same in news-

15. For later proceedings in this case, see *Jansen v Hilo Packing Co.* (1952) 202 Misc

900, 118 NYS2d 162, affd 282 App Div 935, 125 NYS2d 648, *infra* § 12[b].

papers, the court added that he lost his right of privacy against the use of the picture involved only to that extent and when the plaintiff became a member of the Armed Forces he did not thereby become, ipso facto, a public personage in the sense that his individual likeness and activities became a matter of general interest and concern so as to justify the use of his picture, since the complaint described no hero or famous personality whose doings were items of legitimate news and general interest.

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And see *Harris v H. W. Gossard Co.* (1921) 194 App Div 688, 185 NYS 861, and *Sidney v A. S. Beck Shoe Corp.* (1934) 153 Misc 166, 274 NYS 559, both infra § 12[b], wherein the courts, although not recognizing a waiver of the right of privacy, permitted the fact that plaintiff was a public personage to be pleaded in mitigation of damages.

[b] Right of privacy held not waived

In the following cases the courts, while generally recognizing that a public personage does not have a cause of action for every reference made to him in the news media, hold that one who commercially exploits the name or likeness of a well-known person without the latter's consent is liable for invasion of privacy.

In *Sharman v C. Schmidt & Sons, Inc.* (1963, DC Pa) 216 F Supp 401, it was said that a public personage such as a prominent sports figure can complain when his name or likeness is used to advertise a product if he has not consented to such use or if the advertising exceeds the consent granted.

It was held in *Birmingham Broadcasting Co. v Bell* (1953) 259 Ala 656, 68 So 2d 314, that while a picture of a public personage may be published where it is incidental to an occurrence of legitimate news value, the privacy of a public personage may not be lawfully

invaded by the use of his name or picture for commercial purposes.

While an actress and concert singer is subject to some sorts of publicity which would not be warranted in the case of a person leading a more private life, she may recover, in an action based on violation of her right of privacy, for an unauthorized use of her name in an advertising scheme in such manner as to embarrass her and injure her feelings and to cast doubt upon her moral character. *Kerby v Hal Roach Studios* (1942) 53 Cal App 2d 207, 127 P2d 577.

In *Palmer v Schonhorn Enterprises, Inc.* (1967) 96 NJ Super 72, 232 A2d 458, an action by well-known professional golfers against a firm which sold a game containing "profiles and playing charts" giving data on 23 prominent golfers, including plaintiffs, it was held that although the publication of biographical data of a well-known figure does not per se constitute invasion of privacy, the use of the same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies constitutes such an invasion.

In *Booth v Curtis Publishing Co.* (1962) 15 App Div 2d 343, 223 NYS 2d 737, affd 11 NY2d 907, 228 NYS 2d 468, 182 NE2d 812, the court rejected the contention that a public figure has no right of privacy and held that while she may occasionally surrender her privacy voluntarily, for a price or gratuitously, she does not forever forfeit for anyone's commercial profit so much of her privacy as she has not relinquished.

Although an actor is in public life and the subject of fair comment, his choice of profession does not entail the foreswearing of his civil rights and he may insist on so conducting himself in presenting his work to the public so as to preserve the attribute of dignity.

Soc commentary - NR not th Res

Sinclair v Postal Tel. & Cable Co. (1935, Sup) 72 NYS2d 841, holding that where plaintiff had agreed to the use of his picture, such consent did not necessarily extend to the use of a "composite" picture.

The doctrine that a public figure enjoys only a limited right of privacy and that the publication of his picture which takes place in connection with his professional entertainment performance is not an invasion of privacy was held in *Jansen v Hilo Packing Co.* (1952) 202 Misc 900, 118 NYS2d 162, aff'd 282 App Div 935, 125 NYS2d 648, to have no application to an action under the New York statute, the court refusing to dismiss an action under the statute by major league baseball players whose pictures had been inserted in containers of popcorn and chewing gum without their consent.

In *Giesecking v Urania Records, Inc.* (1956) 17 Misc 2d 1034, 155 NYS2d 171, the court rejected defendant's contention that plaintiff, a renowned pianist, was a public figure and therefore did not desire "to be let alone" so as to give him a right of privacy, the court holding that a performer has a property right in his performance to the extent that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his service.

In *Wilk v Andrea Radio Corp.* (1960, Sup) 200 NYS2d 522, mod 13 App Div 2d 745, 216 NYS2d 662, it was held that plaintiffs could recover for the use of their pictures which appeared in advertisements for television sets manufactured by the defendant. The court rejected defendant's contention that since plaintiffs were world-renowned concert musicians, they had waived their right to privacy in connection with the field of music, the court holding that such waiver applies only to newsworthy stories

and not to instances where plaintiffs' pictures have obviously been used for advertising purposes.

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The following cases, while supporting the view that a public personage does not waive his right of privacy for commercial purposes, take into account, in assessing damages, plaintiff's desire for publicity.

In *Sidney v A. S. Beck Shoe Corp.* (1934) 153 Misc 166, 274 NYS 559, it was held that in an actress' action under the New York statute, the custom of the theatrical profession to permit and encourage the use of pictures in advertisements without compensation or written consent was held properly pleaded in mitigation of damages.

And see *Harris v H. W. Gossard Co.* (1921) 194 App Div 688, 185 NYS 861, holding that evidence of a custom among prominent actresses to permit their names and photographs to be used for advertising purposes was immaterial, the court holding, however, that where plaintiff admitted she was not adverse to publicity, a verdict of 6 cents for the unauthorized use of her picture was not inadequate.

III. Particular uses of plaintiff's name or likeness as constituting invasion of privacy

§ 13. Purported indorsement of product or services

Defendant's use of plaintiff's name or likeness, without his consent, so as to suggest that plaintiff indorsed defendant's product or services, has been held to constitute an invasion of privacy.

Where the defendant, without plaintiff lawyer's consent, circulated among lawyers an advertisement stating that plaintiff was a satisfied user of its copying machine, when defendant knew that plaintiff had returned the machine he

name in advertisement would justify jury finding that defendant had exceeded scope of plaintiff's consent and had invaded plaintiff's right to privacy. *Barr v Southern Bell Tel. & Tel. Co.* 13 NC App 388, 185 SE2d 714 (citing annotation).

See *Kimbrough v Coca-Cola/USA* (Tex Civ App) 521 SW2d 719, error ref n r e infra § 13.

[b] Consent held not exceeded

Cross motion by defendant for summary judgment should have been given in action brought by singer who contended that he had cause of action for alleged violation of right of privacy under New York statute, in the alleged unauthorized use of his name and picture in manufacture, advertisement, and sale of long-playing record album, where use of name and picture was authorized in plain terms of written "Artist's Agreement" which singer had given to defendants. *Desmond v 20th Century Fox Record Corp.* 36 App Div 2d 925, 321 NYS2d 45.

§ 12 [23 ALR3d 901]

[a] Right of privacy held waived

See *Cohn v National Broadcasting Co.* (1979, 1st Dept) 67 App Div 2d 140, 414 NYS2d 906, § 20[b].

[b] Right of privacy held not waived

Although right of privacy of those who voluntarily or otherwise have become public figures and in whose activities a legitimate public interest exists, is significantly curtailed, public figure does not surrender all right to privacy. Use of successful fashion model's photograph to create and sell poster without her written consent violated model's right to privacy so that she could recover against model agency, its president and publisher and distributor of poster, but not against two retail stores that had no knowledge of any dispute over its distribution; model did not waive her right by performing in television broadcast where photograph used in poster was not a segment or frame of original filmed performance but was instead one that had never before been published. *Brinkley v Casablanca* (1981, 1st Dept) 80 App Div 2d 428, 438 NYS2d 1004.

§ 13 [23 ALR3d 905]

See *Motschenbacher v R.J. Reynolds Tobacco Co.* (CA9 Cal) 498 F2d 821, supra § 6 (citing annotation).

Allegations that plaintiffs purchased land for construction of house, were photographed with house during construction, and their photographs and name used without their consent in vendor's sales brochures, advertisements in publications, and TV commercials, stated cause of action for invasion of privacy. *Ferguson v Hawaiian Ocean View Estates (Hawaii)* 441 P2d 141.

See *Rossi v F.W. Woolworth Co.*, 56 App Div 2d 566, 392 NYS2d 9, infra § 21[b].

Picture of plaintiff with word balloon endorsing product which appeared in newspaper was actionable invasion of property right under "right to privacy" law where plaintiff was well-known television advertiser. *Rosenberg v Lee's Carpet & Furniture Warehouse Outlet, Inc.*, 80 Misc 2d 479, 363 NYS2d 231.

Trial court's finding that there was no credible evidence to support insurance agent's claim for wrongful appropriation of name allegedly arising from insurance company's use of agent's name as "testimonial" in attempts to recruit another agent to sell its insurance products, was not clearly erroneous, where court found, in face of conflicting evidence, that agent had consented to use of name. *American Mut. Life Ins. Co. v Jordan* (1982, ND) 315 NW2d 290.

Former star college football player stated cause of action for invasion of privacy by alleging unauthorized appropriation of his name and likeness in connection with advertisement for sale of carbonated beverage, and material question of fact existed as to extent of consent for use of name where publisher and manufacturer contacted athlete and notified him that he was among those selected to be honored in series of paintings depicting top players, letter of notification suggested contemplated use of paintings in series of "institutional advertisements"; athlete's response to notification permitted inference that he merely agreed to pose for picture, and where athlete testified that he did not contemplate use of his name and picture as presented in subsequent commercial advertisement broadcast during football game. *Kimrough v Coca-Cola/USA* (Tex Civ App) 521 SW2d 719, error ref n r e.

§ 14 [23 ALR3d 908]

In action by exclusive licensee, entertainers, and musical groups against manufacturers of shirts imprinted with names and likenesses of entertainers and musical groups, produced without licenses, brought under right to publicity and Lanham Act, trial court properly issued preliminary injunction against their manufacture, distribution, and sale of shirts, where entertainers and musical groups had right of publicity, as one of species of right of privacy, to have sole right to commercially exploit their names and likenesses and to transfer that right to licensee, where defendants' unauthorized and unprivileged printing on shirts of names, trademarks and/or likenesses of entertainers and groups was violation of such right, and where First Amendment privilege, which is not license to trammel on legally recognized rights in intellectual property, did not extend to dis-

ANNOTATION

PARODY AS INFRINGEMENT OF COPYRIGHT

-
- § 1. Scope and related matters, 620
§ 2. Background and summary, 620
§ 3. Infringement found, 621
§ 4. No infringement found, 623
-

§ 1. Scope and related matters

This annotation covers those cases in which an action for infringement of copyright was based on a production purporting to be a parody or burlesque¹ of the copyrighted work. The question considered is whether a parody can, and if so, under what circumstances it will, be considered an infringement of the copyright of the work parodied. Hence, cases in which an infringement action is based on a parody, but which turn on a factor other than the status of the parody as an infringement, as, for example, the invalidity of the copyright of the original, are not included.

1. The terms are used interchangeably by the courts. See the District Court opinion in *Loew's, Inc. v Columbia Broadcasting System, Inc.* (1955, DC Cal) 131 F Supp 165 at page 176, *affd* *Benny v Loew's, Inc.* (CA9) 239 F2d 532, *affd* *Columbia Broadcasting System, Inc. v Loew's, Inc.* 356 US

Generally, as to literary and artistic rights for purposes of, and their infringement by or in connection with, motion pictures, radio, and television, see the annotation in 23 ALR2d 244. Cases in that annotation which are also in point for the present discussion have been repeated herein.

For scholarly comment on the present subject, see 56 Col L Rev 585, 29 Ford L Rev 570, and 12 Vander L Rev 459.

§ 2. Background and summary

The Copyright Act grants to those complying with its provisions the exclusive right, for a limited period, to print,

43, 2 L ed 2d 583, 78 S Ct 667, reh den 356 US 934, 2 L ed 2d 764, 78 S Ct 770. The terms "parody" and "burlesque" are introduced synonymously in *Berlin v E. C. Publications, Inc.* (1964, CA2 NY) 329 F2d 541, 9 ALR3d 612, cert den 379 US 822, 13 L ed 2d 33, 85 S Ct 46.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

- AM JUR, Literary Property and Copyright (1st ed §§ 67-69, 75, 78-80)
ALR DIGESTS, Copyright §§ 10, 11; Literary and Artistic Property §§ 1, 3
ALR QUICK INDEX, Literary and Artistic Property

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reprint, publish, copy, vend, translate, and dramatize the copyrighted work. This privilege also permits the copyright owner to deliver, perform, exhibit, produce, and reproduce it in public in any manner or by any method whatsoever. He is protected as to all the copyrightable component parts of his work.²

The Copyright Act does not define infringement, but only imposes liability for infringing a copyright. The comparable English act provides that "copyright in any work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this act conferred on the owner of the copyright," and this may be taken to be the American definition.³

Infringement of a copyright involves a copying, in whole or in part, either in haec verba or by colorable variation.⁴

Copying, not defined in the statute, may include, in a general way, any mode of reproduction. An oft-cited definition is "that which comes so near to the original as to give every person seeing it the idea created by the original."⁵

Parody⁶ is recognized as a distinct form of literary or histrionic art.⁷

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While there is some authority in support of the propositions (1) that a parody must involve a "substantial" appropriation of the original work before it will be regarded as an infringement of the copyright of such work,⁸ (2) that the parodist must be granted the right to "recall or conjure up" the original work,⁹ and (3) that the likelihood that the parody will prevent future financial exploitation of the original is a major criterion for deciding whether the parody constitutes a copyright infringement,¹⁰ the matter seems ultimately to be controlled by the facts of the individual cases; in some instances a parody has been found to infringe the copyright of the original,¹¹ and in others it has not.¹²

§ 3. Infringement found

If the copying is substantial, the parody will frequently be held an infringement.¹³ Consequently, the test often seems directly dependent on what is

2. 17 USC §§ 1 et seq.

3. Am Jur, Literary Property and Copyright (1st ed § 67).

4. Am Jur, Literary Property and Copyright (1st ed § 67).

5. Am Jur, Literary Property and Copyright (1st ed § 67).

6. Defined as "[a] writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule." Webster's New Int Dict 2d ed.

7. See Bloom & Hamlin v Nixon (1903, CC Pa) 125 F 977 at page 979.

8. See Green v Luby (1909, CC NY) 177 F 287, infra § 3; Loew's, Inc. v Columbia Broadcasting System, Inc. (1955, DC Cal) 131 F Supp 165, affd Benny v Loew's, Inc. (CA9) 239 F2d 532, affd Columbia Broadcasting System, Inc. v Loew's, Inc. 356 US 43, 2 L ed 2d 583, 78 S Ct 667, reh den 356 US 934, 2 L ed 2d 764, 78 S Ct 770, infra § 3; Columbia Pictures Corp. v National Broadcasting Co. (1955, DC Cal) 137 F Supp 348, infra § 4.

9. See Berlin v E. C. Publications, Inc. (1964, CA2 NY) 329 F2d 541, 9 ALR3d 612, cert den 379 US 822, 13 L ed 2d 33, 85 S Ct 46; Columbia Pictures Corp. v National Broadcasting Co. (1955, DC Cal) 137 F Supp 348, both infra § 4.

10. See Berlin v E. C. Publications, Inc. (1964, CA2 NY) 329 F2d 541, 9 ALR3d 612, cert den 379 US 822, 13 L ed 2d 33, 85 S Ct 46, infra § 4; Hill v Whalen & Martell (1914, DC NY) 220 F 359, infra § 3; Glyn v Weston Feature Film Co. (Eng) [1916] 1 Ch 261, infra § 4.

11. § 3, infra.

12. § 4, infra.

13. See Green v Luby (1909, CC NY) 177 F 287; Loew's, Inc. v Columbia Broadcasting System, Inc. (1955, DC Cal) 131 F Supp 165, affd Benny v Loew's, Inc. (CA9) 239 F2d 532, affd Columbia Broadcasting System, Inc. v Loew's, Inc. 356 US 43, 2 L ed 2d 583, 78 S Ct 667, reh den 356 US 934, 2 L ed 2d 764, 78 S Ct 770, both infra.

CA3 have extended def. to cases where effect is soc. commentary. See Wds & Phrases

meant by "substantial," rather than by the statutory word "copying."

In *Green v Luby* (1909, CC NY) 177 F 287, plaintiffs' copyright was held infringed, since the entire copyrighted song was parodied by defendant, the court seeming to hold that the taking was substantial. Application for a preliminary injunction to restrain defendant from publicly singing "I'm a-Bringin' Up The Family," the copyrighted song, as part of a copyrighted dramatic sketch entitled "The Queen of the Vaudeville," was granted. The case was distinguished from both *Bloom & Hamlin v Nixon* (1903, CC Pa) 125 F 977, *infra* § 4, where the defendant had sung only the chorus of the original composition, and *Green v Minzenheimer* (1909, CC NY) 177 F 286, *infra* § 4, where defendant merely imitated the singer, without musical accompaniment. Holding that if it were necessary for effectiveness that an entire song be parodied, the performer should avoid the use of a copyrighted song, the court rejected defendant's argument that the singing of songs was merely incidental to her impersonations of various singers and was therefore a mimicry. Mannerisms may be shown without words, said the court, but if words are necessary, a whole song should not be required. The court conceded that there was value in the contention of defendant that her production was a musical composition, although copyrighted as a dramatic sketch, pointing out, however, that the Copyright Act expressly provides that an error in classification should not invalidate or impair a copyright.

In *Hill v Whalen & Martell* (1914, DC NY) 220 F 359, a suit to restrain infringement of a copyright, plaintiff was the exclusive licensee of the dramatic rights in certain copyrighted cartoons dealing with characters named "Mutt" and "Jeff." Defendant ar-

ranged a dramatic performance called "In Cartoonland," in which two of the prominent characters were called "Nutt" and "Giff." They were costumed to represent "Mutt" and "Jeff," and it was intended that they be taken as those characters. The language used by defendant's characters contained important direct quotations from catchwords made familiar by the cartoon characters. Noting defendant's claim that his representation was "a mere parody or burlesque of the original," but not itself so categorizing defendant's production, the court granted the relief sought, observing that a copyrighted work is subject to fair criticism, serious or humorous, but that it is not always easy to say where the use of a copyrighted item for such purposes is permitted and where it is forbidden. One test, the court continued, is whether or not so much has been produced as will materially reduce the demand for the original—if it has, there is infringement, with this qualification: a criticism which lessened the money value of the original by showing that it was not worth seeing or hearing would not base a right of action for infringement. In the present case the court was of the opinion that defendant's production was calculated to injuriously affect to a substantial degree the value of complainant's copyright. Those who saw "Nutt" and "Giff," the court said, would be more likely to spend the next dime or quarter available for the purpose on a show other than an authorized dramatization of "Mutt" and "Jeff."

A television burlesque by comedian Jack Benny, of the motion picture "Gaslight," was involved in *Loew's Inc. v Columbia Broadcasting System, Inc.* (1955, DC Cal) 131 F Supp 165, *affd* *Benny v Loew's, Inc.* (CA9) 239 F2d 532, *affd per curiam* by an equally divided court in *Columbia Broadcasting System v Loew's, Inc.* 356 US 43, 2 L ed

2d 583, 78 S Ct 667, reh den 356 US 934, 2 L ed 2d 764, 78 S Ct 770. In 1945 Jack Benny presented a 15-minute burlesque of "Gaslight" on his radio program, having previously obtained the consent of Loew's, Inc., who had acquired the exclusive motion-picture rights to the play. Six years later the Columbia Broadcasting System presented the burlesque complained of in a television program sponsored by the American Tobacco Company. Loew's informed Columbia that it intended to enforce its rights against infringement, and when Columbia prepared for a similar presentation over several television channels, Loew's brought suit. Columbia argued that the television shows were a "fair use" of the play,¹⁴ and that such doctrine included the right to parody literary properties. The District Court found that a substantial part of the copyrighted material in the motion picture had been copied in the television program, and granted injunctive relief. Noting that no recognition had ever been given to the application of the "fair use" doctrine by a federal court when the substance of a dramatic work was copied and presented in burlesque form, the Court of Appeals affirmed, holding that presenting verbatim a serious dramatic work as a burlesque does not avoid infringement of the copyright. Wholesale copying and publication of copyrighted material can never be fair use, said the court, affirming the District Court's opinion that if the taking is substantial, infringement exists. An apparently alternative contention that the presentation of the burlesque was, in effect, literary or dramatic crit-

icism and therefore not subject to an action for infringement of copyright, was rejected by the court as in itself "a parody upon the meaning of criticism."

§ 4. No infringement found

Although the appropriation is substantial, it may nevertheless be found, under the nonstatutory exception known as "fair use," that the copyright has not been infringed. "Fair use" has been defined as a privilege in persons other than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted the owner by the copyright.¹⁵ However, no general criteria have been found which define what constitutes "fair use," considered by at least one court to be "the most troublesome [issue] in the whole law of copyright."¹⁶ The parodist, it has been held, must be permitted sufficient latitude to cause his audience to "recall or conjure up" the original work, if the parody is to be successful.¹⁷

The first case dealing directly with an alleged infringement by parody and burlesque was *Bloom & Hamlin v Nixon* (1903, CC Pa) 125 F 977, in which the owners and producers of a copyrighted song entitled "Sammy," rendered by Miss Lotta Faust during the stage performance of "The Wizard of Oz," brought an action to enjoin the use of the song by Miss Fay Templeton, who as part of her act in "The Runaways" imitated the peculiarities and characteristics of several actresses, among them Miss Faust, singing the chorus of "Sammy." Her performance was preceded by an announcement that she would imitate Miss Faust and would

14. For a brief discussion of the "fair use" doctrine, see § 4 *infra*.

15. See *Loew's, Inc. v Columbia Broadcasting System, Inc.* (1955, DC Cal) 131 F Supp 165, 174.

16. See *Dellar v Samuel Goldwyn, Inc.* (1939, CA2 NY) 104 F2d 661, 662.

17. See *Berlin v E. C. Publications, Inc.* (1964, CA2 NY) 329 F2d 541, 9 ALR3d 612, cert den 379 US 822, 13 L ed 2d 33, 85 S Ct 46.

Notice also the language in *Columbia Pictures Corp. v National Broadcasting Co.* (1955, DC Cal) 137 F Supp 348, *infra*.

sing only the chorus of "Sammy." The court refused to grant the injunction, finding that Miss Templeton was presenting not the copyrighted song but the peculiar actions, gestures, and tones of plaintiffs' performer, the chorus of the song being used merely as a vehicle for carrying the imitation along. The interest in the parody was based on the excellence of the imitation, not on the copyrighted song, said the court, holding that plaintiffs' right to be protected from the unauthorized public performance or representation of the song was still inviolate, since anyone desiring to hear it sung in public would have to attend "The Wizard of Oz." The repetition of the chorus of "Sammy" was merely incidental to, and inseparably connected with, the imitation, the court found, and in addition, Miss Templeton had acted in good faith, which was pointed out as essential to the defense in an infringement action. The court declared parody to be a distinct and different variety of the histrionic art, holding that a parody would not infringe the copyright of the work parodied merely because a few lines of the original might be textually reproduced.

A song entitled "You Made Me Love You (I Didn't Want To Do It)" was published simultaneously in New York and London on May 5, 1913. In April, 1913, the owners of the American copyright in the song had sent to the plaintiffs 12 copies of the song, with instructions to copyright it in the United Kingdom on May 5. There was no immediate demand for the song in England, but after it was first sung in London, in July, 1913, it became an overnight success. Plaintiffs in *Francis, Day & Hunter v Feldman & Co.* (Eng) [1914] 2 Ch 728, purchased the copyright for the British Empire and made large sales. Subsequently, the defendants published a song which appeared to be a parody of the copyrighted song,

entitled "You Didn't Want To Do It—But You Did," claimed by plaintiffs to be based upon the words of their song and such a colorable imitation that it infringed their copyright. The Chancery Court, reversing and classifying defendants' song as a "reply song," held that the question was purely one of fact, and on a comparison of the two songs decided that there had been no infringement.

Dramatic rights in the musical composition "Redhead" had been reserved to complainants, it was alleged in *Green v Minzensheimer* (1909, CC NY) 177 F 286, claiming infringement by defendant in imitating the voice, postures, and mannerisms of the complainant Irene Franklin Green, by singing one verse and the chorus of "Redhead," although the owner of the copyright on the musical composition was not a party to the action. Defendant used no musical accompaniment, prefacing her singing by the announcement that she would give "a suggestion of Irene Franklin," the stage name of complainant. The court found it "not easy to see" how the copyright of a musical composition not owned by the complainants could be infringed by a performance in which no music was used, especially since complainants had not specified what actions of defendant constituted the infringement. Since defendant here also imitated several singers, the complainant included, her performance seemed to derive its popularity from the cleverness with which she reproduced the mannerisms of the various singers, said the court, refusing to distinguish the case from *Bloom & Hamlin v Nixon* (1903, CC Pa) 125 F 977, *supra*, and denying the injunction.

In *Glyn v Weston Feature Film Co.* (Eng) [1916] 1 Ch 261, an action for the alleged infringement of plaintiff's copyright in the novel "Three Weeks," by the sale and exhibition of a film

entitled "Pimple's Three Weeks (Without The Option)," substantial parts of which were alleged to be reproductions of the novel, the English court, characterizing the novel as "grossly immoral," refused on that ground to grant plaintiff the protection of the court. Thus, finding it unnecessary to consider defendant's contention that the play was a mere burlesque and therefore not an infringement, the court nevertheless discussed the question, remarking that no cases could be found in which a burlesque, even of a play, had been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, was an ancient art. One of the reasons for this, said the court, is that the older cases insisted upon the necessity of establishing that the alleged piracy had been calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it was well known that a burlesque was usually the best possible advertisement of the original and had often made famous a work which would otherwise have remained in obscurity. The court declared that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labor upon what he has taken, and has subjected it to such revision and alteration as to produce an original result. The court found that if it had been necessary to express an opinion on this aspect of the case, plaintiff's case would have failed on this ground as well.

While the appeal from *Loew's, Inc. v Columbia Broadcasting System, Inc.* (1955, DC Cal) 131 F Supp 165, supra § 3, was pending, the case of *Columbia Pictures Corp. v National Broadcasting Co.* came before the same District Court in California in (1955) 137 F Supp 348, but in this case the court held for the defendant. James Jones, author of the

copyrighted novel "From Here To Eternity," gave written consent to Columbia Pictures Corporation in 1951 for a motion picture to be based on the novel. When produced and presented to the public, the motion picture ran approximately 1 hour and 40 minutes. The next year the National Broadcasting Company broadcast, without the consent of Columbia, over a nationwide network, a televised playlet entitled "From Here To Obscurity," intended to be a burlesque of "From Here To Eternity," with a running time of 20 minutes. The court found the taking to be sufficient only to cause the viewer to "recall and conjure up" the original, calling the latter a necessary element of burlesque, and describing the case as another collision between the economic interests of the motion-picture industry and the youthful and growing television industry. Although the opinion does not make it clear, the case seems to be distinguished from the *Loew's Case* on the ground that the copying from the original was not sufficient to find infringement on the basis of substantial appropriation. At one end of the spectrum, said the court, were situations where clearly the burlesque would be plagiarism, for example, where a defendant took verbatim the dialogue of a copyrighted script and transferred it from a serious vein to a comic one, while at the other end of the spectrum it was equally clear that where the burlesque took a theme, the locale, or a situation, there would be no infringement, because such matters are not ordinarily subject to copyright protection, and in addition, the taking would not be substantial. The court suggested several guiding principles: (1) Consideration should be given to whether the alleged infringing work is of the same character, for instance, a serious work with a taking from another

serious copyrighted work; (2) a limited taking under the doctrine of "fair use" should be permitted in burlesque to bring about the recalling or conjuring up of the original; (3) locale, theme, setting, situation, and even bare basic plots may ordinarily be taken by burlesque without infringement, since such matters are ordinarily not protectible; (4) since the doctrine of "fair use" permits burlesque to go somewhat further as long as the taking is not substantial, it may take an incident of the copyrighted story, a developed character, subject to certain limited rights in the author, a title, subject to the right of protection under unfair competition, and some small part of the development of the story, possibly a small amount of the dialogue; (5) when burlesque takes more than the matter ordinarily not protected, referred to above, it runs a calculated risk that the taking may be found substantial; and (6) the defense, "I only burlesqued" the copyrighted material, is not per se a defense, since unlimited and unrestrained taking by burlesque could destroy the Copyright Act and seriously jeopardize the rights of property in copyrights. The court found that the telecast in question was not intended to and did not deceive the general public into believing that the program was a telecast of the motion picture, and did not disparage or detract from it, and that the public was not in any way confused or misinformed by the telecast, either as to the origin of the burlesque or the true nature or origin of the motion picture.

Berlin v E. C. Publications, Inc. (1964, CA2 NY) 329 F2d 541, 9 ALR3d 612, cert den 379 US 822, 13 L ed 2d 33, 85 S Ct 46, was a copyright infringement action based on the publication of a collection of parody lyrics to 57 old songs in "Mad" magazine, in which defendants were granted summary

judgment. After the title of each lyric were printed the words "Sung to the tune of: _____," or "To the tune of: _____," and inserted was the title of one of the old songs, to 25 of which plaintiffs owned the copyright. It was argued that this direction had the same force and effect as if the music of plaintiffs' respective compositions had actually been printed with defendants' parody lyrics thereto. Although it was stipulated that the "Mad" lyrics had the same meter as plaintiffs' lyrics and could be sung to the music of plaintiffs' songs, no music was provided and the subject matter was completely different. The District Court found it difficult to understand how music could be copied when it was not reproduced, holding defendants had not parodied plaintiffs' lyrics, but had satirized, in original words and thought, several aspects of modern life. The Court of Appeals, noting that plaintiffs had not indicated with any degree of particularity the manner in which they had been damaged, commented that it appeared that redress was being sought upon a theory of copyright relief closely resembling unjust enrichment. The extent to which a parodist may borrow from the work he attempts to burlesque is largely unsettled, the court found, stating that it was unnecessary, however, to apply the "substantiality" test which formed the basis for the decision in *Benny v Loew's, Inc.* (1956, CA9 Cal) 239 F2d 532, affd *Columbia Broadcasting System, Inc. v Loew's, Inc.* 356 US 43, 2 L ed 2d 583, 78 S Ct 667, reh den 356 US 934, 2 L ed 2d 764, 78 S Ct 770, supra § 3, because of the great disparities here in theme, content, and style between plaintiffs' original lyrics and the alleged infringements. While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would

seem necessary if the defendants' efforts were to "recall or conjure up" the originals, said the court, adding that the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounted to a "substantial" taking, if that standard was not to be woodenly applied. The court concluded that as a general proposition, parody and satire are deserving of substantial freedom, both as entertainment and as a form of social and literary criticism, and that the courts must

occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry. Where the parody, as here, had neither the intent nor the effect of fulfilling the demand for the original, and where the parodist did not appropriate a greater amount of the original work than necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper, in the court's opinion.

E. CAMPION.

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§ 5 [9 ALR3d 587]

See *Blanton v United States* (DC Dist Col) 28 F Supp 360, § 4.

Directed verdict for hospital at end of plaintiff's case was proper, since doctrine of *res ipsa loquitur* could not be invoked on facts showing postsurgical application to plaintiff of unknown fluid on part of skin covered by adhesive portion of dressing, a burning sensation, single initial protestation by plaintiff, and subsequent infectious reaction on part of area of application. *Walden v Washington Hospital Center* (DC Dist Col App) 304 A2d 645.

§ 6 [9 ALR3d 588]

Hospital was liable for injuries suffered by minor plaintiff from result of hypodermic intramuscular injection administered by nurse, damaging sciatic nerve. *Honeywell v Rogers* (DC Ala) 251 F Supp 841.

Charge stating that hospital would be liable for error in administering medication by its nurse, since nurses had duty to know fatal dosages of "all" drugs and danger of overdose of "any" type of drug and proper way to administer any drug, was reversible error, since duty of nurse was to act as a reasonably prudent, careful, skilled, and diligent nurse would have done under the same or similar circumstances. *Doctors Hospital of Mobile, Inc. v Kirksey*, 290 Ala 220, 275 So 2d 651.

Hospital held liable for nurse's failure to properly administer drug, which infiltrated plaintiff's leg for excessive period of time, causing permanent partial disability. *North Shore Hospital, Inc. v Luzi* (Fla App) 194 So 2d 63.

In action against physician and hospital for injuries caused plaintiff by perivascular extravasation during intravenous administration of drug intended to stop vomiting, directed verdict for hospital was improper since there was sufficient evidence from which inferences could be drawn that defendant hospital was negligent and that its negligence contributed to cause plaintiff's injury where testimony showed that nurse's aide was told of pain and swelling at injection site shortly after 8:30 p.m., but intravenous feeding was not discontinued until 1 p.m., and where nursing supervisor testified that it was duty of nurses to make periodic checks and observe condition of needle and observe whether fluid was flowing, that at hospital orientation programs, problem of infiltration or extravasation is discussed and nurses are warned of dangers accompanying administration of certain intravenous fluids, that if patient complains of pain at injection site, intravenous feeding should be discontinued immediately, and that pain and swelling are symptoms of extravasation. *Ohligschläger v Doctor Community Hospital*, 55 Ill 2d 411, 33 NE2d 392.

Where state hospital injected patient with tranquilizer drug with knowledge of drug's serious side effects, including shock and irregularity of heart beat, and left the patient unattended for one hour and 15 minutes, hospital was guilty of negligence which was proximate cause of patient's death from heart failure and shock. *Brown v State* (App Div) 391 NYS2d 204.

Evidence of physicians' four-hour delay in administering antibiotics to plaintiff with perforated esophagus precluded nonsuit in favor of hospital and physicians. *Brannan v Lankenau Hospital* (1980) 490 Pa 588, 417 A2d 196.

9 ALR3d 600-611

§ 1 [9 ALR3d 601]

[b] Related matters

Right to maintain gate or fence across right of way. 52 ALR3d 9.

What constitutes unity of title or ownership sufficient for creation of an easement by implication or way of necessity. 94 ALR3d 502.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned. 6 ALR4th 1030.

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly. 10 ALR4th 447.

Way of necessity where only part of land is inaccessible. 10 ALR4th 500.

Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents. 18 ALR4th 568.

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§ 2 [9 ALR3d 603]

[a] Generally

In suit by claimants to establish title to property taken by state, in which access to disputed land was severed as result of prior conveyance and only access remaining was over lakes, claimants were not entitled to easement by necessity as of date of taking. Where there is access to property over navigable body of water easement by necessity over land route may not be obtained, except where it is shown that navigable body of water has not been used as highway for commerce and travel for many years, and burden was on claimants to establish that either lakes were not navigable or that exception applied. *Peasley v State* (1980) 102 Misc 2d 982, 424 NYS2d 995.

[b] "Strict" necessity required

Way of necessity must be strictly necessary and where land in question is readily accessible by navigable water to which owners have access, no way of necessity across adjacent real properties would exist. *McQuinn v Tantalio*, 41 App Div 2d 575, 339 NYS2d 541 (citing annotation).

§ 3 [9 ALR3d 608]

Way of necessity would be implied where plaintiff's land was accessible only by navigable water or across defendant's property, in view of liberalization of "strict necessity" rule which recognizes that most people today think in terms of "driving" rather than "rowing" to work or home, and way of necessity would be awarded where original purchaser of lots in question mistakenly believed that adjacent railroad right of way would provide overland access to isolated lot. *Cale v Wanamaker*, 121 NJ Super 142, 296 A2d 329 (citing annotation).

9 ALR3d 620-627

§ 1 [9 ALR3d 620]

18 Am Jur 2d, Copyright and Literary Property § 105.

Extent of doctrine of "fair use" under Federal Copyright Act. 23 ALR3d 139.

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§ 3 [9 ALR3d 621]

Preliminary injunction was granted enjoining defendants from using plaintiff's copyrighted song, "Mickey Mouse Club March," as background music for episode in movie in which three young males wearing Mickey Mouse ears apparently engaged in oral, anal, and vaginal intercourse simultaneously with young female; use of sound, which was reproduced in its entirety, was more than parody of original within "fair use" exception and amounted to complete copy constituting improper use of copyrighted material. *Walt Disney Productions v Mature Pictures Corp.* (DC NY) 389 F Supp 1397, 186 USPQ 48.

Song, "Cunnilingus Champion of Co. C.," which was copied in substantial part from copyrighted song, "Boogie Woogie Bugle Boy," did not constitute parody or burlesque such that similarity between songs was permissible under doctrine of fair use where, although defendants may have sought to parody life, or more particularly sexual mores and taboos, it did not appear that defendants intended to comment

ludicrously upon "Bugle Boy" itself. MCA, Inc. v Wilson (DC NY) 425 F Supp 443.

Three-hour-long three-act play was not such spoof or parody of *Gone With The Wind* as to entitle it to "fair use" defense afforded under copyright act where substantial similarities existed between "Scarlet Fever" and copyrighted work in, inter alia, foundation, settings, characters, story line and dialogue and where work as a whole was neither parody or satire but musical adaptation of film and novel, *Gone With The Wind*, generally in nature of comedy. Metro-Goldwyn-Mayer, Inc. v Showcase Atlanta Cooperative Productions, Inc. (1979, ND Ga) 479 F Supp 351.

Restaurant chain's "Dancing Seniors" television advertisement was copy, and not mere parody, of beverage producer's "Be a Pepper" media campaign, where both advertisements began with appearance of single individual singing and dancing in similar manners while extolling virtues of particular product, where viewers of both advertisements were invited to join special group consuming particular product advertised, and where evidence showed that restaurant chain's advertising agency attempted parody of beverage producer's advertisement. Dr. Pepper Co. v Sambo's Restaurants, Inc. (1981, ND Tex) 517 F Supp 1202.

§ 4 [9 ALR3d 623]

Television series entitled "The Greatest American Hero" was not substantially similar copy of, and thus did not infringe plaintiff's copyright in, popular character "Superman," where former character depicted typical American man with common problems attempting to cope with impact upon his life caused by superhuman powers foisted upon him by unidentified alien beings, and latter character portrayed benevolent superhuman seeking to achieve noble goals through exercise of innate super-powers while simultaneously maintaining secrecy of his true identity in order to occupy position in society as ordinary person. Warner Bros., Inc. v American Broadcasting Cos. (1981, CA2 NY) 654 F2d 204, 211 USPQ 97, on remand (SD NY) 530 F Supp 1187.

Defendant's use of plaintiff's jingle in television sketch poking fun at city's public relations campaign and its theme song, in which satire parodied copyrighted advertising jingle, was protected fair use and, thus, no copyright infringement occurred. Concept of "conjuring up" original came into copyright law not as limitation on how much of original may be used, but as recognition that parody frequently needs to be more than fleeting evocation of original in order to make its humorous point; parody is entitled at least to "conjure up" original and even more extensive use would still be fair use, provided parody builds upon

original, using original as known element of modern culture and contributing something new for humorous effect or commentary. Elsmere Music, Inc. v National Broadcasting Co. (1980, SD NY) 482 F Supp 741, affd (CA2 NY) 623 F2d 252.

9 ALR3d 633-651

New sections and subsections added:

§ 13 Exercise of control

§ 14 Miscellaneous

§ 1 [9 ALR3d 634]

[b] Related matters

Criminal offenses in connection with rental of motor vehicles. 38 ALR3d 949.

Asportation of motor vehicle as necessary element to support charge of larceny. 70 ALR3d 1202.

What constitutes "motor vehicle" within meaning of National Motor Vehicle Theft Act (Dyer Act) (18 USCS §§ 2311-2313). 15 ALR Fed 919.

Construction and application of word "stolen" in National Motor Vehicle Theft Act (Dyer Act) (18 USCS §§ 2311-2313). 45 ALR Fed 370.

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§ 3 [9 ALR3d 636]

[a] General criminal intent required

Also recognizing that a general criminal intent is an element which must be proved in order to support a conviction under the applicable joyride statute:

Iowa—State v Reaves (1977, Iowa) 254 NW2d 488.

See State v Rosewall (Iowa) 239 NW2d 171, infra § 9.

Under prosecution for wilfully and without authority taking possession of and driving away an automobile, intent to steal was not ingredient of offense, and evidence that defendant had been driving car of general description as stolen vehicle and had admitted that car was stolen supported conviction upon joyriding statute. People v Helcher, 14 Mich App 386, 165 NW2d 669.

Specific intent to take possession unlawfully of vehicle was element of joy-riding and defendant was therefore entitled to have jury consider defense of intoxication, where statute specified that it proscribed acts that were "will-