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FOREWORD: FAIR USE IN THE DIGITAL AGE, AND *CAMPBELL V. ACUFF-ROSE* AT 21

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Most students who study intellectual property in law school read *Campbell v. Acuff-Rose Music, Inc.*,[1] and I would guess that those who read it probably remember it, even years after the fact. It features not just pop culture, but an outré attention-seeking band with a lack of nuance, the Kardashians of the 1990s hip-hop scene. The case revolved around "Pretty Woman," a not-very-good, probably unfamiliar-to-students rap parody of Roy Orbison's well-loved and almost certainly familiar-to-students song, "Oh, Pretty Woman."[2] The larger-than-life rap group, 2 Live Crew, had faced legal battles of various sorts for years, and had earned great notoriety in connection with public debates over obscenity.[3] Many cities in America found 2 Live Crew "unacceptable," if not illegal, and actual charges of obscenity were raised in Florida and Louisiana for sales to minors and also for sales outright.[4] In 1990, a Florida court had made legal history by being the first federal court to find a piece of music obscene when it ruled on 2 Live Crew's album, *As Nasty as They Wanna Be*.[5] In so doing, it led the way for prosecutors to go after record stores distributing the album as well as to arrest the group itself for performing "obscene" music.[6] These well-publicized legal skirmishes

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1. 510 U.S. 569 (1994).

2. *See generally id.*

3. *See, e.g.*, Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 596 (S.D. Fla. 1990) (finding 2 Live Crew's album, *As Nasty As They Wanna Be*, obscene under the *Miller* test); Tom Wicker, *In the Nation: Lyrics and the Law*, N.Y. TIMES, Feb. 1, 1990, at A23.

4. William E. Brigman, *Pornography, Obscenity and the Humanities: Mapplethrope, 2 Live Crew and the Elitist Definition of Art*, *in* RAY B. BROWNE AND MARSHALL W. FISHWICK, REJUVENATING THE HUMANITIES 55, 57 (1992).

5. David Browne, *The State of Obscenity in Rap*, ENT. WKLY. (Jan. 17, 2015, 6:16 AM), http://www.ew.com/article/1990/06/29/state-obscenity-rap.

6. *Judge in Louisiana Bars Sale of 2 Live Crew Album*, ORLANDO SENTINEL (Dec. 16, 1990), http://articles.orlandosentinel.com/1990-12-16/news/9012160361_1_harvest-records-james-morris-

made the members of 2 Live Crew well-known figures, to say nothing of vividly memorable defendants. If law students were inclined to forget the case, subsequent courts cite to *Campbell* so dutifully that forgetting it seems impossible.[7] Of course, with the litigants' hit singles including the embarrassingly successful song,[8] "Me So Horny," and others with titles and lyrics so lewd I would prefer not to cite them in a law review article, such a lapse in student memory seems unlikely.[9] While it seems remarkable to many, *Campbell* is now, anthropomorphically speaking, not only old enough to buy the 2 Live Crew albums once deemed obscene,[10] but also old enough to consume a beer legally while listening to them.

If *Campbell* had remained a narrow pop-culture case—a doctrinal one-hit wonder—it would not have possessed the capacity to generate so much enthusiasm, and such heated debate, among scholars and practitioners of high caliber. Yet gathered at the University of Washington School of Law for two days in April 2015 were forty of the leading and emerging experts in copyright law in the United States, to discuss the impact the case has had and to speculate about the directions fair use law will take in light of this watershed opinion. It remains, by many accounts, one of the three most important fair use opinions in American law.[11] Reflecting on *Campbell*'s wide and deep footprint in the case law over the twenty-one years since the case was handed down forms the purpose for our Symposium and for this collection of excellent scholarly papers in the *Washington Law Review*.

To assess how and why the case has seemed to have so great an impact on copyright case law, the *Washington Law Review* has turned to

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crew-album. 2 Live Crew was brought up on misdemeanor obscenity charges but later acquitted. Sara Rimer, *Rap Band Members Found Not Guilty in Obscenity Trial*, NY TIMES, Oct. 21, 1990, at A1.

7. A Westlaw search as of May 10, 2015, reveals that 495 cases have cited to *Campbell v. Acuff-Rose*, and three of those citations are in international courts. Roughly a fifth of the total citations (105) occurred in the past three years, demonstrating not only that *Campbell* remains important case law, but potentially suggesting that contemporary courts find it even more important now, eighteen to twenty-one years after its original decision, than it was then.

8. The group's album sold over two million copies in days, and catapulted twenty-nine spots up the Billboard chart in the days after the obscenity ruling in Florida in 1990. Browne, *supra* note 5.

9. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 830 (1992) (discussing some of the group's extremely vulgar lyrics).

10. Wicker, *supra* note 3 (describing, in 1990, the charges against an Alabama salesman who was the first person in this country to be "found guilty of selling recorded obscenity").

11. Stephen McJohn, *The Case of the Missing Case:* Stewart v. Abend *and Fair Use*, 53 IDEA 323, 324 (2013).

eight authors to explore various issues associated with the opinion, from its arguments' internal justifications and origins to its effect on lower courts' decision-making. In this Foreword, I will offer a few thoughts to explain *Campbell*'s importance and to situate it historically, and I will touch briefly on the far-ranging contributions made by the very accomplished Articles in this Symposium issue.

When the Supreme Court decided *Campbell v. Acuff-Rose* in 1994, it seemed perhaps straightforward enough: parody, however tasteless or offensive, had gotten a pass; other uses appeared to be—perhaps—less clearly favored.[12] Yet the Court's reasoning in *Campbell* also seemed as though it could be read to clear the way for a range of unauthorized cultural appropriation practices beyond parody, at least those practices whose purpose in using the underlying work was "transformative."[13] Less clear was what sorts of practices would count as transformative.[14]

The Court had relied on Judge Pierre N. Leval's seminal *Harvard Law Review* article, *Toward a Fair Use Standard*,[15] to articulate a framework for assessing the reason for a defendant's use of plaintiff's work.[16] Judge Leval had been a judge for the Southern District of New York, and he had happened to receive a considerable number of copyright cases on his docket, thus developing particular expertise and insight into this area of law.[17] With twenty-one years of hindsight, it is beyond cavil that Judge Leval's article has—to transplant the word transformative—transformed the fair use landscape. Whether one believes it is the only factor that seems to matter, or perhaps the only factor that should truly matter, the transformative use question has almost certainly become the central analysis in most contemporary fair use cases.[18] Boiled down, Judge Leval's argument was that factor one,

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12. Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 872 (2015) (describing the contemporary reception of *Campbell*).

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

14. Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 825–26 (2015).

15. In 1977, after a distinguished record of practice in both the private and public sectors, Judge Leval was appointed to the U.S. District Court for the Southern District of New York. He was then appointed to the Second Circuit Court of Appeals in 1993, and assumed Senior Judge status in 2002. *See Pierre N. Leval*, U.S. CT. OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/judges/bios/pnl.html (last visited May 5, 2015).

16. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

17. *Id.* at 1105, 1112–15 (describing, in particular, his experience in *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987), and *New Era Publ'ns Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989)).

18. Compare *Kienitz v. Sconnie Nation, LLC*, a rare example of a case in which a judge takes issue with the dominance of transformative use analysis, and resolves the case under factor three

which looks at the purpose and character of defendant's unauthorized use of the work, could determine whether a use was justified, in terms of copyright's larger purposes.[19] He has referred to the factor one analysis as "the soul of fair use."[20] Other commentators have concurred, noting that courts rarely look to the second and third factors as determinants,[21] though at least one scholar has proposed acknowledging that emphasis on factor one by explicitly adopting a two-factor test.[22]

Campbell contained a number of doctrinal developments, some minor and some more major.[23] It also reversed the momentum created by two key presumptions in prior case law, namely that commercial uses were presumptively unfair, and that plaintiffs were allowed to presume harm when defendants' uses were commercial.[24] In clarifying that transformative use *could* weigh heavily in favor of fair use, even when uses were commercial,[25] the court may have put a great deal of pressure on whether a use was transformative. Indeed, some feared that the term might be so malleable as to be unhelpful.[26] The term was considered capable of endless manipulation.[27] While there remains debate over whether the transformative use analysis actually plays as important a role as many have asserted, by and large, transformative use remains a crucial aspect of fair use litigation.[28]

(the amount of the borrowing) rather than factor one (the purpose and character of the use). 766 F.3d 756, 759 (7th Cir. 2014).

19. Leval, *supra* note 16, at 1111.

20. *Id.* at 1116.

21. *See, e.g.*, June Besek's testimony before Congress, in which she stated that "a finding that a use is 'transformative' now tends to sweep all before it, reducing the statutory multifactor assessment to a single inquiry." *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 17 (2014) (statement of June M. Besek, Executive Director, Kernochan Center for Law, Media and the Arts and Lecturer-in-Law, Columbia Law School); *see also* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 743 (2011).

22. Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 572 (2008).

23. Samuelson, *supra* note 14, at 818.

24. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583–84, 594 (1994).

25. *Id.* at 579.

26. Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 252 (1998).

27. Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 447–48 (2008) ("The malleable nature of the term has not escaped the notice of commentators; Diane Zimmerman has called it 'a nice try at avoiding the fair use mess, but no cigar.'" (quoting Zimmerman, *supra* note 26, at 268)).

28. In *Making Sense of Fair Use*, Neil Netanel has argued that transformative use analysis has decisively shaped the doctrine, whether or not courts use the phrase "transformative use." Netanel, *supra* note 21. *But cf.* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*,

The inquiry into whether a work is transformative does not take place in a doctrinal vacuum, and should not be tackled in isolation. Many scholars have explored the cultural meanings of fair use, and Michael Madison has suggested that fair use is less a doctrine to be applied rigidly and more "an analytic tool that focuses on social and cultural patterns."[29] The emphasis on transformation contains historical aspects—because of the explosion of digital technologies that make transformation quick, easy, and ubiquitous—and it contains cultural dimensions, because of changes in music, art, and other cultural developments.[30] Indeed, *Campbell* takes on special importance in light of what Aram Sinnreich has dubbed "configurable culture," a set of beliefs and practices that point to a "larger cultural shift" in our relationship to media and the arts.[31] This cultural shift reflects the coevolution of technology and culture in a way that, per Sinnreich, has redefined the relationship between media production and consumption.[32] *Campbell*, if understood in light of copyright law alone, makes less sense than it does when considered in a broader, more historically attuned context.

Without making a claim that *Campbell* changed the world—a claim that might actually be defensible, but which I do not take pains to defend here—it is no exaggeration to say that since *Campbell* was decided, the world has fundamentally changed, in ways that may well matter for copyright law. Historically, *Campbell* feels more august than its age of twenty-one years old. To put *Campbell* in historical context, when it was decided, the North American Free Trade Agreement was only three months old. The murder of Nicole Brown Simpson and Ronald Goldman would take place a few months after *Campbell*, in June 1994. And later

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1978–2005, 156 U. PA. L. REV. 549, 588 (2008) (arguing that empirical analysis reflects concerted focus on factor one for a time, but positing that a return to judicial discussion of market harm has taken place). Netanel revisits Beebe's excellent empirical work, but draws different conclusions. Netanel, *supra* note 21, at 720–25.

29. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1645 (2004).

30. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460, 1499–1508 (2008) (situating the rise of a new form of creative expression, user-generated content, in a broader context of technological evolution, and exploring the legal dimensions of these often unauthorized transformations of works authored or owned by others).

31. ARAM SINNREICH, MASHED UP: MUSIC, TECHNOLOGY, AND THE RISE OF CONFIGURABLE CULTURE, at xv (2010).

32. *Id.* While Sinnreich's analysis focuses on music, copyright case law makes clear that the configurations Sinnreich describes in his book take place—and are litigated—in copyright law beyond music, as well. *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2002); Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

still would come: the cloning of Dolly the sheep (1995); the introduction of the Euro (1999); and, for lack of a more nuanced way to put it, the internet as we now know it, with webmail and Google search (roughly 1995–1998).[33] The seeds of the digital revolution had been planted, but had not yet borne fruit, at least not in any way that the mass population experienced in their daily lives.[34] iTunes, a consumer staple in 2015, had not yet come close to being created.[35] In 1994, the "worldwide web" was (depending on whose account and definition one selects) about three years old, and although Mosaic, a user-friendly browser, had just been created, to be followed the next year by Netscape Navigator, few in the general population had internet access, let alone email accounts and other digital technologies.[36] It would not be until 1995 that the "world wide web" became commercialized for the general public.[37] There was a futuristic, breathless quality to accounts of what the internet might one day do, as this hybrid piece of journalism-slash-science-fiction reveals:

> Today, even privately owned desktop computers can become Internet nodes. You can carry one under your arm. Soon, perhaps, on your wrist.
>
> But what does one *do* with the Internet? Four things, basically: mail, discussion groups, long-distance computing, and file transfers.
>
> Internet mail is "e-mail," electronic mail, faster by several orders of magnitude than the US Mail, which is scornfully known by Internet regulars as "snailmail." Internet mail is somewhat like fax. It's electronic text. But you don't have to pay for it (at least not directly), and it's global in scope. E-mail can also send software and certain forms of compressed digital imagery. New forms of mail are in the works.
>
> . . . .
>
> How does one get access to the Internet? Well — if you don't have a computer and a modem, get one. Your computer can act as a terminal, and you can use an ordinary telephone line to

33. *See, e.g.*, Cameron Chapman, *The History of the Internet in a Nutshell*, SIX REVISIONS (Nov. 15, 2009), http://sixrevisions.com/resources/the-history-of-the-internet-in-a-nutshell/; Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOC'Y, http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet (last visited May 5, 2015).

34. Leiner et al., *supra* note 33.

35. *Apple Fast Facts*, CNN.COM (Jan. 29, 2015, 2:02 PM), http://www.cnn.com/2014/07/01/business/apple-fast-facts/ (noting iTunes, Apple's digital music service, did not appear until 2001).

36. Mosaic was the name of that browser. Chapman, *supra* note 33; Leiner et al., *supra* note 33.

37. Chapman, *supra* note 33.

> connect to an Internet-linked machine. These slower and simpler adjuncts to the Internet can provide you with the netnews discussion groups and your own e-mail address. These are services worth having — though if you only have mail and news, you're not actually "on the Internet" proper.[38]

These historic touchpoints could theoretically be distinctions without meaningful difference, but, in fact, it is difficult to overstate the import of the technological and cultural changes that have occurred in the twenty-one years since *Campbell*. The macro historical and cultural changes have surely contributed to judicial willingness to find in *Campbell* the infrastructure for doctrinal change and growth. Digital technologies and concomitant changes in consumer behavior have led to numerous—perhaps unforeseeable but insistent—pressures on copyright doctrine. Copyright owners have had to decide as a part of their broader business strategies whether to embrace creative consumer uses of their intellectual property, or resist them and fight an uphill battle.[39]

Of course, fair use may well be the way courts in copyright cases respond when doctrines bear the weight of enormous change in the practices of copyright owners, competitors, and end-users. The difficulty in determining whether fair use applies to new uses and technologies may be a feature of the 1976 Copyright Act,[40] one that has arisen often since the landmark case of *Sony Corp. of America v. Universal City Studios, Inc.*,[41] and that seems destined to recur.[42] *Sony* held that video-recording devices used to make copies of copyrighted works by consumers for "time shifting," or watching television at a later time, was a fair use.[43] It was significant in part because it created a safe harbor for distributors of devices capable of copyright infringement, so long as they were capable of "substantial noninfringing uses" as well, and the purposes of these uses were of a particular kind (non-commercial, for

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38. Bruce Sterling, *Science: Internet*, 84 MAG. OF FANTASY & SCI. FICTION 99, 104, 106 (1993) (emphasis in original).

39. Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 634–35 (2015) (discussing Disney's change of strategy with respect to unauthorized uses by fans).

40. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 101 *et seq.*).

41. 464 U.S. 417 (1984).

42. Jessica Litman, Campbell *at 21/*Sony *at 31*, 90 WASH. L. REV. 651, 673 (2015) ("As the 1976 Act aged, . . . [c]ourts have struggled to figure out how fair use applies to new uses and new technologies."). It is thus fitting to note that as *Campbell* comes of age at twenty-one, *Sony* too deserves a retrospective look. *See generally* Fromer, *supra* note 39, at 623–24; Litman, *supra* note 42.

43. *Sony Corp. of Am.*, 464 U.S. at 455.

one thing).[44] The Court went so far as to state a presumption that a use was unfair if it was commercial, and further that a plaintiff could presume market harm when defendant's uses were commercial.[45]

In addition to the broader historical context, the *Campbell* decision arose at a particular cultural moment worth recalling. 2 Live Crew had encountered legal challenges before, standing trial on obscenity charges as discussed above.[46] The group's vulgar lyrics and defiant stance won many fans, and its first album was certified gold.[47] The group's aim appeared to be to generate controversy, while thumbing its nose at social and artistic convention. Few other hip-hop or rap artists were as consistently associated with controversy or as instrumental in generating moral condemnation.[48] In America at the time, there was a general view that the arts were "under attack," and certain artists, in particular, seemed like lightning rods for the battles over moral values that were being waged along political and class lines.[49] For example, the photographers Robert Mapplethorpe and Andes Serrano, along with 2 Live Crew, came under heavy fire.[50] The pop star Madonna, dubbed the "queen of obscene," was another source of constant moral critique.[51] In 1992 alone, she released both an album called "Erotica," containing explicit lyrics and accompanied by racy music videos, and a coffee table book called "Sex," filled with nude photos that could be considered pornographic.[52] In March of 1994, the same month in which *Campbell* was decided, Madonna famously scandalized television audiences by saying the "f-word" on network TV fourteen times, and handing the late-

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44. *Id.* at 456.

45. *Id.* at 451.

46. *See supra* notes 3–6 and accompanying text.

47. *2 Live Crew Is What We Are*, THE 2 LIVE CREW, http://2livecrew.info/2-live-crew-is-what-we-are (last visited May 17, 2015).

48. Steve Huey, *Biography*, ALLMUSIC.COM, http://www.allmusic.com/artist/2-live-crew-mn0000027116/biography (last visited May 5, 2015) ("No rap group (save, perhaps, N.W.A) has stirred more controversy or provoked more heated debate than the 2 Live Crew. The furor over the graphic sexual content of their X-rated party rhymes—specifically their 1989 album As Nasty as They Wanna Be—was a major catalyst in making rap music a flash point for controversy and an easily visible target for self-appointed moral guardians.").

49. Brigman, *supra* note 4, at 55.

50. Blanchard, *supra* note 9, at 742–43 (characterizing critiques of these and other artists as "campaigns" and "crusades" against them); Brigman, *supra* note 4, at 55–65.

51. KIRK D. DAVIDSON, SELLING SIN: THE MARKETING OF SOCIALLY UNACCEPTABLE PRODUCTS 100 (2003).

52. Robbie Daw, *Madonna's 'Sex' Book Still the Most Sought-After Out-of-Print Title*, IDOLATOR.COM (Sept. 1, 2011), http://www.idolator.com/5995622/madonna-sex-book-most-sought-after-title.

night talk show host David Letterman a pair of her underpants and instructing him several times to smell them.[53] Other artists like Ice-T and Snoop Doggie Dogg were also singled out for political invective by conservative America for their rebellious, violent, graphic, or explicit works of art.[54] 2 Live Crew's notoriety should thus be considered against the backdrop of larger social movements for and against freedom of expression, and evaluated with an eye to their place in the greater countercultural revolt.

The war on 2 Live Crew was partisan; conservatives went after the group while liberals tended to shrug and decouple moral judgment from the assessment of whether the group was worth its while.[55] There was something indisputably low-brow or mass-market about 2 Live Crew, something that seemed to differentiate it from the erotic art that could be defended if it were aimed at a mass market.[56] There was, of course, something racially very different: 2 Live Crew, and rap in general, aimed at a young black market.[57] Whereas, to borrow Professor Henry Louis Gates Jr.'s point, there was little legal clamor over the comedian Andrew Dice Clay's vulgar routines, the vulgarity of 2 Live Crew was deemed worse and more threatening because of its insubordination, its racial defiance.[58] Professor Gates situated 2 Live Crew's work in a historic tradition of African-American artistic expression known as "signifying," which he had described in his critically acclaimed book, *The Signifyin' Monkey*.[59] The pattern of speaking back to power was one that had a long history in slave rebellion and cultural subversion.[60] The

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53. Alex Heigil, *The Most Censored Interview Ever: Madonna's 1994 Letterman Appearance Turns 20*, PEOPLE (Mar. 31, 2014, 5:15 PM), http://www.people.com/people/article/0,,20801703,00.html.

54. DAVIDSON, *supra* note 51, at 100.

55. ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 171–72 (2015).

56. *Id.* at 57–58.

57. Blanchard, *supra* note 9, at 828–29.

58. Henry Louis Gates Jr., *2 Live Crew, Decoded*, N.Y. TIMES, June 19, 1990, at A23 ("2 Live Crew is engaged in heavy-handed parody, turning the stereotypes of black and white American culture on their heads.").

59. *Id.*

60. Zahr Said Stauffer, *'Po-Mo Karaoke' or Postcolonial Pastiche? What Fair Use Could Draw from Literary Criticism*, 31 COLUM. J.L. & ARTS 43, 67 (2007) (describing the need to create room for fair uses in the context of postcolonial rewritings precisely because of artistic traditions by subordinated groups to "write back" against power: "It is valuable to understand, from a literary perspective, how postcolonial rewritings seek to cast history in a new light, in order to reorient an historical narrative or dominant cultural myth."); *id.* at 79 (citing JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 1–16 (1990)).

challenge 2 Live Crew faced was translating its subversive creative practices into a form of expression the law would protect, rather than ban. This tension played out in 2 Live Crew's obscenity trial. The group's attorney, Bruce Rogow (who also represented the group in *Campbell*), argued that their music had to be understood in context.[61] Opposing counsel, Assistant State Attorney Pedro Dijols, stated in his closing remarks: "I submit to you ladies and gentlemen, if you take an orange and put it in a sewer, it doesn't make it a fruit salad."[62] The characterization of art as detritus unworthy of context-sensitive consideration sums up the way the debates on art and value tended to occur in that era.

Thus the doctrinal discussion of transformation in copyright law took place in the context of highly charged, broader debates about the meaning of cultural appropriation and power, and the proper role of law in shaping art, more generally. This makes the Court's language about parody all the more powerful:

> 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this *joinder of reference and ridicule* that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.[63]

The Court's eyes were, of course, on the doctrinal ball. Yet the awareness of "reference and ridicule" as forms of cultural expression signal attunement to the aesthetic wars taking place, laden with judgments about morality, and structured by hierarchies of privilege.[64] *Campbell* is a rich opinion indeed, doctrinally, historically, and culturally.

This Symposium gives scholars, practitioners, and judges an

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61. Sara Rimer, *Obscenity or Art? Trial on Rap Lyrics Opens*, NY TIMES, Oct. 7, 1990, http://www.nytimes.com/1990/10/17/us/obscenity-or-art-trial-on-rap-lyrics-opens.html ("Bruce Rogow, the lead lawyer for the 2 Live Crew, said the group's performance had to be understood in the context of hip hop, a form of black popular music that arose in the last few years. Some of the four-letter words, he said, 'reflect exaggeration, parody, humor, even about delicate subjects,' like sexual practices.").

62. Rimer, *supra* note 6.

63. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583 (1994) (emphasis added).

64. *Id.*

opportunity to situate *Campbell* in the past and present, and to make guesses about its—about our—copyright future. In proposing that we revisit *Campbell*, we at the University of Washington were excited not only by retrospectively assessing how far it had come, but also in casting our sights forward, to try to imagine and predict how far it will go. It is our hope that this Symposium provides the opportunity to consider the many ways in which *Campbell* remains relevant in spite of the technological and cultural changes that have risen in the two decades since the decision. This conference also provides us the time and space to reflect on the reasons for *Campbell*'s continued salience and, to borrow a phrase from Professor Pamela Samuelson's title, to imagine its "possible futures."

To that end, the University of Washington School of Law is incredibly honored to host Judge Pierre N. Leval, who has graciously agreed to present, and publish here in the *Washington Law Review*, his view of *Campbell* from the bench in 2015. Judge Leval opens with a review of the state of fair use before *Campbell*, which he characterizes as hampered by "a number of unhelpful, distracting, counterproductive propositions. . . ."[65] When *Campbell* was decided, it "brought to an end fair use's odyssey of bad piloting and aimless drift."[66] Judge Leval summarizes the contributions of *Campbell*, and lays weight on the Court's rejection of bright-line rules. He describes the "symbiotic" nature of the four factors, and argues that they can be reduced to two fundamental questions: "1. Does the secondary work copy from the original in pursuit of a different objective—a 'transformative' purpose? 2. Does the secondary work compete significantly with the original, by offering itself as a significant substitute in markets that the copyright law reserves to the original author?"[67] He characterizes the two as interdependent in *Campbell*'s formulation. However, subsequent courts have not been as sensitive to the factors' interrelation as might have been desired. Judge Leval reviews salient critiques of *Campbell* and its progeny, but he stresses that many of the criticisms of *Campbell*'s progeny reflect courts' misinterpretations of *Campbell* rather than rejections of the case's reasoning.[68] Nonetheless, he acknowledges that *Campbell*'s transformative use test does leave open a difficult determination: When are subsequent works infringing derivative works

65. Pierre N. Leval, Campbell *as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 598 (2015).

66. *Id.* at 600.

67. *Id.* at 602.

68. *Id.* at 605.

versus being noninfringing fair uses?[69] Yet he displays his characteristically measured analysis in assessing the term "transformative," and concludes that it is not an inappropriate word, stating with appealing humility: "I don't think I have heard a better one."[70] In giving the term meaning, Judge Leval would see the term effectuated in terms of the larger purposes of copyright law.[71] Finally, Judge Leval ends with an entreaty to copyright scholars, but also aimed more broadly at the Supreme Court, calling for express disavowal of the argument that fair use requires good faith.[72]

Professor Pam Samuelson's Article, *Possible Futures of Fair Use*, does a magisterial job of planting the stakes for the discussion of *Campbell* throughout this volume. She enumerates over a dozen contributions the case has made. Samuelson highlights the emphasis on, and the "expansive definition" of, transformative use, and ranks those as the biggest two contributions.[73] But many more follow, including *Campbell*'s repudiation of the dual presumptions found in the Court's prior copyright cases.[74] The list of contributions ranges from doctrinal issues (how courts should proceed through the four factors) to larger issues with business implications ("how courts in fair use cases [should] think about licensing").[75] An element she alights upon in passing is the Court's insistence on finding a fair use in spite of the vulgarity of the content at issue; the Court properly steered clear of passing aesthetic judgment on the work in the course of determining its legal status.[76] Samuelson's focus is ultimately on the larger legal context and the role *Campbell* played in subsequent legal battles. Samuelson deftly summarizes several key cases and categorizes them by type of transformativeness: transformation of expression in a preexisting work (as with parody); "conventional productive uses" (such as those associated with scholarship or biography); and different-purpose transformation cases.[77] Samuelson reviews *Bill Graham Archives v. Dorling Kindersley Ltd.*,[78] *Cariou v. Prince*,[79] and *Kelly v. Arriba Soft*

69. *Id.* at 609–10.

70. *Id.* at 608.

71. *Id.* at 611.

72. *Id.* at 612–14.

73. Samuelson, *supra* note 14, at 818.

74. *Id.*

75. *Id.* at 823.

76. *Id.* at 824.

77. *Id.* at 826.

78. 448 F.3d 605 (2d Cir. 2006).

Corp.[80] and its progeny.[81] Samuelson focuses particularly on *Authors Guild, Inc. v. HathiTrust*,[82] and shows how it both leaned heavily on *Campbell* and extended it.[83] Samuelson concludes that *Campbell*'s influence has been both considerable and salutary. She walks through the existing critiques of *Campbell*'s legacy, and then rebuts those arguments. In her final section, Samuelson concludes on a creative, prescriptive note, offering possible changes to improve fair use. A doctrinal tour-de-force, her Article brings an observer up to speed about the state of the law, delineates its current problems, and offers some ways to address those.

Professor Jeanne C. Fromer, in *Market Effects Bearing on Fair Use*, excavates *Campbell*'s market-oriented reasoning and looks at it closely, with fresh eyes. She argues persuasively that *Campbell*'s reasoning has been insufficiently well read, thus failing to exercise the opening it created for defendants to argue that their unauthorized uses actually create market *benefits* as well as *harms*.[84] Fromer's Article is a well-balanced analysis that seeks to reintroduce benefits, or a "full-bodied" approach to analyzing the harm to the plaintiff's market.[85] She argues that *Campbell* can be read to require consideration of all of the market effects on a plaintiff's work, not just the negative ones, and that *Campbell* suggests that while some market effects are relevant, those that are not should not enter the analysis.[86] Fromer's careful, even exegetical, approach offers a revisionist reading that could improve copyright's fair use analysis and potentially curb baseless claims. She offers a vivid example in the story of Disney, a company known for its aggression in policing its intellectual property rights. In its huge hit animated movie, *Frozen*, the company faced the dilemma of whether to embrace or alienate fans once they began to appropriate aspects of the intellectual property from *Frozen* for creative reuse. Reflecting a corporate about-face of sorts, Disney blessed these new, unauthorized uses, and seems to have conceded that they are either fair or beneficial in

79. 714 F.3d 694 (2d Cir. 2013).

80. 336 F.3d 811 (9th Cir. 2003).

81. Samuelson, *supra* note 14, at 833–35.

82. 755 F.3d 87 (2d Cir. 2014).

83. Samuelson, *supra* note 14, at 836–39 ("The Second Circuit called upon *Campbell* numerous times in the *HathiTrust* opinion, but took fair use in some new directions in that ruling." (footnote omitted)).

84. Fromer, *supra* note 39.

85. *Id.* at 629.

86. *Id.* at 617.

some way for its own franchise's goodwill.[87]

Professor Jessica Litman's Article, Campbell *at 21*/Sony *at 31*, begins by describing the normative schism in copyright law, and the tension between copyright's critics and champions.[88] Litman argues that because there has indisputably been an expansion in owners' rights, it would follow that fair use has expanded, and should have done so. In characteristically impassioned language, she writes that "[t]he idea . . . that copyright owners' rights could be greatly inflated without inspiring a comparable expansion in fair use seems delusive."[89] To put flesh on the bones of this expansion, she situates *Campbell* in the broader copyright context by looking at *Sony Corp. of America v. Universal City Studios, Inc.*[90] and both what preceded it and what followed it.[91] Litman thus situates *Sony* in relationship to the 1909 and 1976 Copyright Acts, whose opposite treatments of copyright's proper scope created significant uncertainty.[92] The facts in *Sony* represented a "surprising example of a situation in which Congress had failed to imagine copyright infringement liability and therefore failed to include express limitations or define boundaries to divide infringing from non-infringing actions."[93] Through careful dissection of the *Sony* opinion, including an early draft of it, Litman shows that Justice Stevens believed that there ought to be a categorical exemption for consumer home copying, but failed to get a majority of Justices to sign off on that full-throated articulation of personal use's fairness. The Court's compromise was then enshrined in the *Harper & Row, Publishers, Inc. v. Nation Enterprises*[94] case, in the form of dual presumptions that would stand until *Campbell* repudiated them.[95] Litman pivots to digital technologies and similar concerns in the context of the Digital Millennium Copyright Act ("DMCA"), and she manages to draw a line back to the very problems that may have engendered some of the reasoning in *Campbell*: the pressure the Copyright Act of 1976 put on fair use.[96] While *Campbell* had the welcome effect of correcting some of the excesses (or

87. *Id.* at 634–35.

88. Litman, *supra* note 42.

89. *Id.* at 653.

90. 464 U.S. 17 (1984).

91. Litman, *supra* note 42, at 657–61, 663−71.

92. *Id.* at 654–55, 663–65.

93. *Id.* at 665.

94. 471 U.S. 539 (1985).

95. Litman, *supra* note 42, at 672.

96. *Id.* at 675–76.

errors) in *Sony*, it left open other important questions pertaining to secondary liability and consumer personal uses.[97]

Professor Lydia Loren's piece, *Fair Use: An Affirmative Defense?*, explores the implications of treating fair use as an affirmative defense.[98] Prior to *Sony*, the procedural status of fair use had not been completely clear, but in *Sony*'s wake, as a descriptive matter, the burden clearly lay with the defendant on all the factors, including market harm.[99] *Campbell* cemented that allocation.[100] Loren's piece explores whether Congress intended for fair use to be an affirmative defense—as opposed to a right or a privilege a defendant could exercise rather than be forced to prove—and she concludes that fair use should not be considered *not* an affirmative defense, but rather should be considered "part of what shapes the scope of a copyright owner's rights."[101] While it may be that, empirically, cases have historically not been determined one way or the other by this improper burden allocation, Loren is certainly right to express concern over the allocation as it stands, because it *could* matter a great deal to outcomes.[102]

In *The Imaginary Trademark Parody Crisis (and the Real One)*, Professor William McGeveran provides trademark-oriented analysis of *Campbell*, and shows how protecting parody in copyright appears to have informed—or evolved alongside—a robust parody jurisprudence in trademark law.[103] The cases tend, either in reliance on or in correlation with *Campbell*, to be consistent wins for defendants. McGeveran thus helpfully tees up the distinction between copyright and trademark purposes, and uses the differences in doctrines to highlight *Campbell*'s importance in an occasionally overlapping, substantially related field outside copyright law. McGeveran mounts a tenacious defense of a thesis he has advanced in prior work: true parody cases are rare in contemporary, post-*Campbell* case law, and when they arise, they tend to resolve in favor of defendants.[104] As a practical matter, however, the

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97. *Id.* at 681–82.

98. Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015).

99. *Id.* at 695–96.

100. *Id.* at 692.

101. *Id.* at 696.

102. *Id.* at 687.

103. William McGeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 WASH. L. REV. 713 (2015).

104. McGeveran, *supra* note 103, at 715; *see also* William McGeveran, *Four Free Speech Goals for Trademark Law*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205 (2008); William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008).

practice in the marketplace is not usually litigation but chilling effects in the form of "unmeritorious demand letters" on the basis of activity that, if litigated, would almost certainly be deemed non-infringing.[105] In the spirit of clear-sighted restatement, McGeveran also productively revisits the troublesome parody/satire distinction that subsequent courts seized upon in *Campbell*. Even though the opinion itself contains a much more nuanced discussion, subsequent courts have tended to apply the distinction without much nuance. In *Campbell*, parody (which, according to the Court's definition, takes aim at the underlying work to make a point about that work) is likely a fair use but satire (which uses the work without seeking to make a point about that work) is less likely to be a fair use, although it still might be.[106] McGeveran's analysis also offers context for just how influential *Campbell* has been, even beyond the doctrinal walls of copyright law.

In *How Much Is Too Much?*, Professor R. Anthony Reese provides an empirically grounded analysis of the cases since *Campbell* that have applied factor three, which considers the amount and extent of the unauthorized borrowing.[107] In the course of his analysis, he revisits case law in which unauthorized uses were deemed fair even when defendants had used the entirety of plaintiffs' works.[108] Reese demonstrates that in most of these cases, courts engage in evaluation of "the reasonableness of the defendant's copying in light of her purpose."[109] This insight, in turn, can be traced to *Campbell*, in which Justice Souter introduced reasonableness and purpose of the use into the assessment of the amount borrowed.[110] Reese's analysis argues that "new digital technologies have often enabled new uses of copyrighted works that allow or require using the entire work" and litigation often starts but does not typically reach full decision in such situations.[111] Going forward, Reese argues, *Campbell*'s concrete approach could assist courts by introducing reasonable use in light of the purpose.[112]

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105. *Id.* at 716.

106. *Id*. at 722. Many lower courts have been "clumsy" in taking the distinction as though it were a pair of presumptions: Parody? Fair. Satire? Not fair. Yet, as noted throughout this Foreword and indeed, throughout this issue, *Campbell* sought to correct and resist rigid, one-size-fits-all presumptions and did not appear to be trying to create or entrench a new one.

107. R. Anthony Reese, *How Much Is Too Much?:* Campbell *and the* Third *Fair Use Factor*, 90 WASH. L. REV. 755 (2015).

108. *Id.* at 792.

109. *Id.* at 778.

110. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586–87 (1994).

111. Reese, *supra* note 107, at 811.

112. *Id.* at 773.

Professor Rebecca Tushnet approaches the question of *Campbell*'s impact on fair use through the question of what is deemed necessary to transform, the content of the work or the purpose it serves.[113] She explains that purpose-transformativeness depends on the idea that, in some instances, the defendant's purpose is "opposed or orthogonal to the original authors' aims"[114] whereas in some other cases, subsequent authors are using prior-existing works for their own "specifically *authorial* claims" that mark these defendants as creators in their own right.[115] Tushnet describes the success story of transformative purpose in terms of courts' willingness to use it to find for defendants, but she also points to a few exceptions that suggest that the triumphalist account is not quite warranted.[116] She reviews some of the arguments levied by critics of transformative use, and explores the way the critiques may misalign depending on whether a use is content- or purpose-transformative.[117] Finally, she sounds a dystopian note: if fair use contracts in scope, many creative and expressive interests will be compromised, purely in the interest of owner control.[118] She concludes along the same lines as Jessica Litman: that the expansion of copyright protection reasonably calls for the expansion of fair use, too, and transformative use ably serves that purpose.[119]

Campbell is a remarkable case, that rare opinion that, over two decades after its decision, scholars and practitioners continue to interpret and evaluate. Continue, in short, to care so much about that they are willing to drop everything and fly across the country for two days to discuss it. Whether one adopts the view that *Campbell* remains a cause for celebration,[120] or a reason to bemoan the ever-eroding rights of copyright plaintiffs,[121] few deny that *Campbell* remains very influential. That defendants almost always win when courts find a use transformative, citing *Campbell*, speaks to its continued significance.[122] Reflecting on *Campbell* seemed apt, in discussing a year ago the

113. Tushnet, *supra* note 12, at 869, 872.

114. *Id.* at 882.

115. *Id.* (emphasis in original).

116. *Id.* at 872–74.

117. *Id.* at 887.

118. *Id.* at 899.

119. *Id.* at 892.

120. *See*, *e.g.*, Samuelson, *supra* note 14, at 816; Tushnet, *supra* note 12, at 871–72.

121. *See* Litman, *supra* note 42, at 651 n.3, 653 n.13 (citing sources); Samuelson, *supra* note 14, at 840 n.164 (citing sources).

122. Netanel, *supra* note 21, at 754.

possibility of this conference, as a number of high-profile cases were in the pipeline for resolution in 2014 and 2015. Many have since been decided, and a great many of them did rely on *Campbell*'s reasoning to find in favor of defendants' fair use.[123] If this Symposium and this issue of the *Washington Law Review* serve as an opportunity to assess the quality and extent of the evolution of transformative use, I hope they will also offer a snapshot of the views of some of our most prominent minds in copyright law, as they assess the state of the field today. Their observations may help us all look forward and begin to predict what subsequent courts may do as they continue to rely on fair use to respond to technological and cultural changes that stir up trouble for copyright law.

123. Samuelson, *supra* note 14, at 836. ("*Campbell* has understandably had considerable salience in transformative use cases. Yet courts have sometimes relied heavily upon it in non-transformative work cases.").