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NOTES

Copyright: Same Song, Different Verse: Parody as Fair Use After *Campbell v. Acuff-Rose Music, Inc.**

Satire is the sort of glass, wherein beholders do generally discover everybody's face but their own.

— Jonathan Swift¹

I. Introduction

Suppose that an artist sees another person's copyrighted work as rich in potential for some pointed social criticism or a wry humorous twist. Suppose further that the artist creates a satirical or parodic variation of that work. Can the artist now show his work to others or market and sell this parody² of the original? Does it matter what the artist's motivations were — whether they were a social critique or a comical twist? Should we consider whether the criticism is aimed at the original work or at some other target? Most importantly, does parody deserve an exclusion from copyright infringement?

Artists sometimes use parody to generate a raised social awareness and sometimes merely to amuse.³ Some artists have made an entire career of creating parodies of other artists' work.⁴ The depth of the parody may vary widely. Sometimes the parodist will direct his or her derision at the original work itself. On other occasions, a pointed social commentary on an entirely different subject is swathed in a seemingly mirthful ridicule of the original work. A work that directs its commentary or criticism at someone or something other than the original work is called a satire.⁵

* This note won the first place prize in the 1995 ASCAP Nathan Burken Memorial Competition.

1. *Preface*, in JONATHAN SWIFT, *THE BATTLE OF THE BOOKS* 397 (Miriam K. Starkman ed., 1962) (1704).

2. Parody is defined as a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule. *AMERICAN HERITAGE DICTIONARY* 954 (stand. ed. 1993).

3. See generally DWIGHT MACDONALD, *PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM — AND AFTER* (1960).

4. Artists who work primarily in the genre of parody will usually obtain the copyright owners permission before creating the parody. Fair use under section 107 of the Copyright Act of 1976 is not implicated where the artist obtains the copyright owner's permission. See, e.g., *WEIRD AL YANKOVIC, IN 3D* (Scotti Bros. Records 1984) (record album containing exclusively musical parodies).

5. Satire is defined as the use of derisive wit in any context to attack folly or wickedness. *AMERICAN HERITAGE DICTIONARY* 1154 (stand. ed. 1993).

When the work focuses its commentary or criticism primarily on the original subject matter itself as a parody, the artist may borrow liberally from the original work and compose something trenchant and goading. On the other hand, the artist might merely hint at the original, creating something lilted and humorous. Whatever the parodist's style or depth of borrowing, he or she must imitate, to some degree, a known work to achieve the desired effect. This borrowing is the very nature of parody. This nature, however, puts the interests of the copyright owner squarely in conflict with those of the parodist.⁶

This note examines how the law deals with the various interests involved in music parody cases and how the Supreme Court chose to delimit the rights of the parodist relative to those of the original artist. First, this note discusses the Copyright Act of 1976 and the fair use doctrine. Next, this note examines the application of section 107 of the Act as an exception to copyright. Further, this note evaluates how the defendant used the fair use doctrine as an exception to copyright in *Campbell v. Acuff-Rose Music, Inc.*⁷ Finally, this note considers the application of the fair use doctrine to satire and addresses the concerns that a lenient application of the doctrine could lead to abuses of this exception to copyright.

II. The Fair Use Exception

A. The Copyright Act of 1976

In the United States, authors⁸ of all types of works — writings, paintings, musical recordings, movies — enjoy protection from unauthorized use of their work by others. This protection stems from early English common law.⁹ The First Continental Congress recognized a critical need to protect authors' works.¹⁰ The Congress adopted a form of copyright protection based on English law to serve this need.¹¹ Copyright underwent several dramatic changes from its beginnings in

6. Plaintiffs have litigated the parody issue in other areas of intellectual property, especially trademark law. In *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987), the owner of a trademark for women's designer jeans sued claiming that the defendant's use of the mark "Lardashe" for its size extra-large jeans infringed their mark "Jordache." The court held that defendant's use of the mark would not cause a likelihood of confusion about the source. Another court, in a rather surprising opinion, found that a defendant infringed with their mark "Enjoy Cocaine" which was similar in color and style to the Coca-Cola Company's mark, "Enjoy Coca-Cola." The court stated that "some persons of apparently average intelligence did attribute sponsorship to plaintiff and discontinued their use of Coca-Cola as an expression of resentment." See *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972).

7. 114 S. Ct. 1164 (1994).

8. This note will use the terms "author" and "artist" synonymously, except where otherwise specified, as the person or persons whose creative efforts resulted in the copyrightable material.

9. See PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 537 (3d ed. 1993).

10. *Id.*

11. The American Colonies adopted a copyright system similar to the one practiced under the first English copyright act, the Statute of Anne, 1709, 8 Anne, ch. 19 (Eng.). This statute provided printers with protection for their work for 14 years as well as remedies for infringement. See generally BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* (1967); BENJAMIN KAPLAN, AN

colonial America and eventually evolved into its present form.¹² One of the first major changes was the statutory codification of the rights and necessities of copyright in the Copyright Act of 1909.¹³ The Copyright Act of 1909 outlined the requirements, extent, and duration of copyright.¹⁴ The current law of copyright is controlled by the Copyright Act of 1976¹⁵ (the Act). The 1976 version of the Act modified slightly the 1909 version.¹⁶ These modifications of the 1909 version included the changes in the length of copyright protection.¹⁷ The 1976 version of the act also removed the requirement that a work be published before receiving protection.¹⁸ Under the 1976 version of the Act, works need only be fixed in a tangible medium.¹⁹

A work must meet the requirements listed under section 102 of the Act to enjoy the protection of copyright.²⁰ One requirement for protection is that a work be more than a mere idea. The work must involve some creative effort on the part of the author to be copyrightable.²¹ Protection will only begin when the idea is fixed in a tangible medium.²² Once an artist meets these requirements, he or she receives a limited monopoly on his or her work for the life of the author plus fifty years.²³

The Act assures artists the exclusive right to reproduce their works, prepare derivative²⁴ works, distribute copies, perform the works, and display the works

UNHURRIED VIEW OF COPYRIGHT 4 (1967).

12. See GOLDSTEIN, *supra* note 9, at 537-38.

13. *Id.* at 598.

14. *Id.* at 537-38.

15. Copyright Act of 1976, 17 U.S.C.A. §§ 101-810, 1001-1010 (West 1977 & Supp. 1995).

16. See GOLDSTEIN, *supra* note 9, at 551-54.

17. Under the 1909 act, protection lasted 28 years with a possible additional 28-year extension. *Id.* at 551.

18. *Id.* at 551-54.

19. The Copyright Act of 1976, 17 U.S.C.A. § 101 (West 1977), states that a work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission. *Id.*

20. Copyright Act of 1976, 17 U.S.C.A. § 102 (West 1977 & Supp. 1995).

21. *Id.* A work must contain some modicum of creativity to receive protection under copyright. A new work that is essentially the same as an existing work, with only superficial differences, will not enjoy copyright protection. See *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

22. Copyright Act of 1976, 17 U.S.C.A. § 102(a) (West 1977 & Supp. 1995); see *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

23. Copyright Act of 1976, 17 U.S.C.A. § 302(a) (West 1977 & Supp. 1995). Works created before Jan. 1, 1978 are protected for 28 years beyond the copyright date. 17 U.S.C.A. §§ 302-304 (West 1977 & Supp. 1995).

24. A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or another form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work." Copyright Act of 1976, 17 U.S.C.A. § 101 (West 1977 & Supp. 1995). This note will apply the term "derivative" to both parodies and satires when referring to works that use a portion of an earlier copyrighted work.

publicly.²⁵ If an infringer uses the artist's work in one of the proscribed fashions, the Act provides the artist with redress.²⁶ Redress might include an injunction,²⁷ impoundment,²⁸ and/or damages and profits.²⁹

B. Exceptions to Copyright Under Section 107

The Copyright Act of 1976 does not prohibit another artist from using the original copyrighted work in every circumstance.³⁰ A work is not an impermissible infringement of a preexisting copyright if that work meets the requirements set forth in section 107.³¹ Section 107 of the Act permits an artist to copy the original if the artist's use is "fair." Congress tailored this doctrine of fair use in a manner that preserved its elastic nature from its beginnings as a judicial construct as an exception to copyright.³² The Act recognizes specific exceptions in the preamble; however, it also provides a flexible guide which allows courts to extend the exception to other works not specifically mentioned in the preamble. The preamble contains a nonexclusive list of examples of fair use, including criticism, comment, news reporting, teaching, and scholarship or research.³³ Fair use, within the purview of section 107, depends on consideration of four factors listed in the Act: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁴

Currently, an artist who wishes to create a variation of another's work may look only to section 107 for an exception to copyright.³⁵ In the past, some defendants have attempted to use a First Amendment argument that their personal expression, albeit similar to a copyrighted work, is protected as free speech under the Constitution.³⁶ The law is well settled in this area; the courts have effectively eliminated any freedom of speech argument as a defense to copyright infringe-

25. *Id.* § 106(1)-(5).

26. *Id.* § 501(b).

27. *Id.* § 502.

28. *Id.* § 503(a).

29. *Id.* § 504.

30. *Id.* § 107.

31. *Id.*; see also *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 560-61 (1985); *Sony Corp. v. Universal City Studios Inc.*, 464 U.S. 417, 433 (1984); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978); see GOLDSTEIN, *supra* note 9, at 672-76.

32. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976) (seeking to preserve the adaptable nature of the fair use doctrine because of its history of effectiveness as a judicial construct in previous cases).

33. Copyright Act of 1976, 17 U.S.C.A. § 107 (West 1977 & Supp. 1995).

34. *Id.*

35. See *Harper & Row*, 471 U.S. at 546; *Sony*, 464 U.S. at 429.

36. U.S. CONST. amend. I.

ment.³⁷ Therefore, in a copyright infringement case, a defendant's sole source for an exception is section 107.³⁸

C. Application of Section 107 to Parody

Artists who create a parody must rely on section 107 as a defense to infringement.³⁹ Parodists may avoid infringement if a court determines that their work is a "criticism" or a "comment."⁴⁰ Criticism and comment are two of the exceptions listed as examples of fair use in the preamble to section 107.⁴¹ However, if a work does not clearly fit within one of these exceptions, the court must apply the four factors listed in section 107 to determine whether the work is fair use.⁴²

Aside from the difficulty of determining if a parody falls within one of these categories, courts must determine how much relative weight to give to the four test factors the Act proposes. The courts have struggled with these problems, resulting in some ambiguity as to where parody fits in copyright law.⁴³

Some courts' interpretations of the fair use doctrine would effectively chill musical parody and squelch the creative efforts of the artists who choose to market their wares.⁴⁴ This is because courts have adopted the premise that a parody that has a commercial purpose is presumptively unfair based on the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*⁴⁵

In *Sony*, the plaintiffs, who owned copyrights to television programs, sued the manufacturer of Betamax video tape recorders.⁴⁶ The plaintiffs maintained that the defendant manufacturer was liable for copyright infringement allegedly committed by consumers of the recorders who used them to tape broadcasted television programs.

The Supreme Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."⁴⁷ The Court found that the defendants were not liable for

37. See GOLDSTEIN, *supra* note 9, at 679-80; see also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (concluding that defendant could have expressed their theme without copying the plaintiffs' protected expression); *Harper & Row*, 471 U.S. at 558-60 (recognizing that the framers of the Constitution intended copyright itself to be the engine of free expression).

38. See *Harper & Row*, 471 U.S. at 546; *Sony*, 464 U.S. at 429.

39. See *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (holding that parody may qualify as fair use, but that parody is not presumptively fair use).

40. Copyright Act of 1976, 17 U.S.C.A. § 107 (West Supp. 1995).

41. *Id.*

42. See GOLDSTEIN, *supra* note 9, at 679-80.

43. See William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 668-70 (1993); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1132 (1990).

44. See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 183-85 (2d Cir. 1981); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).

45. 464 U.S. 417 (1984).

46. *Id.*

47. *Id.* at 451.

infringement because consumers could use the recorder's video recording capability for some other purpose than copying the protected broadcasts.⁴⁸

After the *Sony* decision, courts began assuming that a parody that had any commercial purpose at all was presumptively an unfair use.⁴⁹ Courts, however, applied this rule to varying degrees.⁵⁰ Thus, the law regarding parodies remained somewhat unsettled until the Supreme Court revisited the question in *Campbell v. Acuff-Rose Music, Inc.*⁵¹

III. Decisions under *Campbell v. Acuff-Rose Music, Inc.*⁵²

A. Facts of the Case

In July 1989, the rap group 2 Live Crew released a version of the song "Oh, Pretty Woman." Roy Orbison and William Dees had written and recorded the original song and assigned the rights to Acuff-Rose Music, Inc.⁵³ Acuff-Rose registered a copyright in 1964. The 2 Live Crew group wrote a rap derivative of the song and included their version on their commercially released album *As Clean As They Wanna Be*.⁵⁴ They titled their song "Pretty Woman."⁵⁵

Before 2 Live Crew released their version of the song, their manager informed Acuff-Rose that 2 Live Crew was going to release a parody of the song and would pay the statutorily required rate for its use.⁵⁶ Shortly after 2 Live Crew released the song, Acuff-Rose responded, denying the license request and informing 2 Live Crew that they would not permit the use of a parody of "Oh, Pretty Woman."⁵⁷

Almost one year later, Acuff-Rose sued 2 Live Crew, claiming that they had infringed Acuff-Rose's copyright under the Act. Acuff-Rose also claimed that 2 Live Crew interfered with their business relations. Additionally, Acuff-Rose claimed that 2 Live Crew interfered with prospective business advantages for the performance and distribution of the original song.⁵⁸

48. The plaintiffs did not bring suit against the consumers who actually recorded the copyrighted programs. *Id.* at 420.

49. See generally *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

50. See Deveny A. Deek, Comment, *Fine Tuning Fair Use Music Parody: A Proposal for Reform in Acuff-Rose, Inc. v. Campbell*, 71 U. DET. MERCY L. REV. 59, 70-72 (1993) (discussing how courts have differed in the application of the presumptively unfair rule).

51. 114 S. Ct. 1164 (1994).

52. *Id.*

53. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1152, *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993).

54. *Id.*

55. Titles to songs are not copyrightable. 37 C.F.R. § 202.1 (1994).

56. *Acuff-Rose*, 754 F. Supp. at 1152.

57. *Id.*

58. *Id.* This note will not discuss the interference issues.

B. District Court's Analysis

The United States District Court for the Middle District of Tennessee, Nashville Division, addressed the threshold question of whether parodies fall under the exemption of fair use in section 107 of the Act.⁵⁹ The district court recognized that courts have included parody under the fair use doctrine.⁶⁰ The court stated, "Including parody within the fair use doctrine has been recognized as 'a means of fostering the creativity protected by the copyright law.'"⁶¹

The district court applied the four factors listed in section 107 to determine whether 2 Live Crew's version of "Oh, Pretty Woman" was a parody, thereby deserving protection under the fair use exemption to copyright.⁶² Under the first factor, the purpose and character of the use, the district court found simply that the purpose of the 2 Live Crew version was to parody the original.⁶³ The court observed that the 2 Live Crew version begins similar to the original but quickly degenerates into a "play on words, substituting predictable lyrics with shocking ones."⁶⁴ The parody borrows the drum beat and bass riff of the original, but the parody uses a "scraper" effect and off key vocals which result in significant disparity in style.⁶⁵

The district court found that the second factor, the nature of the copyrighted work, weighed against fair use and in favor of Acuff-Rose.⁶⁶ The court followed the presumption against fair use standard laid down by the United States Supreme Court in *Sony*.⁶⁷ The court reasoned that since Acuff-Rose had published "Oh, Pretty Woman," this indicated that they anticipated some financial gain and the song had "creative roots."⁶⁸ Because of this anticipated financial gain, the court presumed that the use was unfair.⁶⁹ Therefore, the second factor weighed against fair use.⁷⁰

Under the third factor, the amount of quotation 2 Live Crew used in their parody did not "run afoul of the substantial factor" test in the court's analysis.⁷¹ The test

59. *Id.* at 1153.

60. *Id.* at 1154.

61. *Id.* (quoting *Warner Bros., Inc. v. American Broadcasting Co.*, 720 F.2d 231, 242 (2d Cir. 1983)).

62. *Acuff-Rose*, 754 F. Supp. at 1154.

63. *Id.*

64. The district court observed that the laughter heard on the parody is later explained in the song when the ensuing choruses depict "a big, hairy woman, a bald-headed woman, and a 'two-timin' woman." *Id.* at 1155.

65. *Id.*

66. *Id.* at 1155-56.

67. *Id.*

68. The court used a test stated in *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981), which stated that "the court may consider, among other things, whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of financial return." *Acuff-Rose*, 754 F. Supp. at 1154.

69. *Id.*

70. *Id.*

71. *Id.* at 1157.

to which the court referred was developed in *Berlin v. E.C. Publications, Inc.*⁷² In *Berlin*, the owners of songs composed by Irving Berlin sued *Mad Magazine* for publishing parodies of the lyrics to those songs.⁷³ The Second Circuit's oft-quoted test from *Berlin* states that, where "the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper."⁷⁴ The *Campbell* court considered the fact that since the medium involved was a song, its purpose was parody.⁷⁵ Because the copying was relatively brief, the Court found that 2 Live Crew did not appropriate more of the original than was necessary.⁷⁶

The district court found that the fourth factor, the effect on the market, weighed in favor of 2 Live Crew.⁷⁷ The court stated that it was extremely unlikely that 2 Live Crew's song could adversely affect the market of the original because the two songs were aimed at different markets.⁷⁸

The district court concluded that the factors under section 107 weighed in 2 Live Crew's favor.⁷⁹ The district court stated, "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original,⁸⁰ but, nonetheless, the facts convincingly demonstrate that it is a parody."⁸¹ Based on this holding, the court found that 2 Live Crew's version of the song was exempted from infringement under the fair use exception.⁸² The court granted 2 Live Crew summary judgment.⁸³

C. The Sixth Circuit Court's Analysis

1. The Majority Opinion

The Sixth Circuit reversed the district court's holding.⁸⁴ Judge Joiner, writing for the majority, considered each of the factors in section 107 in determining that the derivative work was not fair use.⁸⁵ He viewed it as important to focus on what he

72. 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

73. *Id.* at 542.

74. *Id.* at 545.

75. *Acuff-Rose*, 754 F. Supp. at 1157.

76. *Id.*

77. *Id.* at 1158.

78. *Id.*

79. *Id.*

80. Courts will generally not inquire into the quality of a copyrighted work. Even if a work contains pornographic references, this does not necessarily preclude a finding of fair use. See *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. (BNA) 124, 131 (N.D. Ga. 1981). In *Pillsbury Co.*, the defendant publication was sued for infringement for indecently portraying plaintiffs' characters "Poppin' Fresh" and "Poppie Fresh" in various sexual activities, including an act which is a crime against nature. *Acuff-Rose*, 754 F. Supp. at 1155.

81. *Id.*

82. *Id.* at 1159.

83. *Id.* at 1160.

84. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992), cert. granted, 113 S. Ct. 1642 (1993).

85. *Id.* at 1434.

called the "plain language" of the statute to make this determination.⁸⁶ He found that parody is not subsumed under the statutory terms "criticism" or "comment" listed in the preamble to section 107 of the Act.⁸⁷ As the district court had done, he found that the court must apply the four factors under section 107 of the Act to determine if the parody was fair use.⁸⁸

Under the first factor of section 107, the nature of the copyrighted work, the Sixth Circuit considered whether the copyrighted work represented a substantial investment of time and labor made in anticipation of financial return.⁸⁹ The parties did not contest the fact that "Oh, Pretty Woman" was a creative work.⁹⁰ Thus, the original work deserved the copyright protection.⁹¹ Therefore, the court held that the first factor favored Acuff-Rose.⁹²

Under the second factor of section 107, the purpose and character of the use, Judge Joiner found that no parody existed because 2 Live Crew's song did not directly comment on the original. He stated that the derivative, 2 Live Crew's version of the original song, was not "at least in part an object of the parody"⁹³ In the most important part of the decision, the court held that every commercial use of copyrighted material is presumptively unfair exploitation and, thus, not fair use.⁹⁴ The Sixth Circuit placed a great deal of emphasis on this factor in determining whether the use of the song was fair.⁹⁵

The Sixth Circuit agreed with the district court in that the second factor weighed in favor of Acuff-Rose.⁹⁶ The Sixth Circuit observed that "As a general rule — literary works of fiction or artistic works — are afforded greater protection from the fair use determination than are works of fact."⁹⁷ The appellate court, much as the district court did, gave deference to the original artist and found that this factor favored the original work.⁹⁸

For the third factor, the Sixth Circuit looked to the "conjure up" test⁹⁹ first outlined in *Berlin*¹⁰⁰ and later employed in *Walt Disney Productions v. Air Pirates*.¹⁰¹ In *Air Pirates*, the Ninth Circuit applied the conjure up test to determine if the defendants' use of some famous Disney cartoon characters, such as Mickey

86. *Id.*

87. *Id.*

88. *Id.* at 1435.

89. *Id.* at 1437.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1436 (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992) (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981)).

94. *Id.* at 1437.

95. *See id.* at 1435-37.

96. *Id.* at 1437.

97. *Id.*

98. *Id.*

99. *Id.*

100. 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964).

101. 581 F.2d 751, 757-59 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

Mouse, was fair as a parody.¹⁰² The defendants' use of the characters in its comic book depicted the characters as promiscuous drug users, which was somewhat antithetical to the image of innocent wholesomeness projected by the originals.¹⁰³

The Ninth Circuit held that because of the widespread recognition of the famous Disney characters, very little of the original conceptual and physical characteristics of the characters need be portrayed to place their images in the minds of the reader.¹⁰⁴ Thus, the defendants went too far in their copying of the original, well beyond the threshold necessary to conjure up an image of the original characters.¹⁰⁵

The Sixth Circuit took an approach different from that used by the district court in applying the conjure up test utilized in *Air Pirates*.¹⁰⁶ The Sixth Circuit saw this issue as one of law based primarily on *Fisher v. Dees*,¹⁰⁷ as opposed to the fact driven inquiry employed by the district court.¹⁰⁸ In *Fisher*, disk jockey Rick Dees created a parody of a Johnny Mathis song called "When Sonny Gets Blue."¹⁰⁹ Dees called his song "When Sonny Sniffs Glue."¹¹⁰ Dees raised a fair use defense against the plaintiff's infringement suit for the use of the Mathis song.¹¹¹ The Ninth Circuit in *Fisher* considered arguments regarding the amount of copying, as advanced by the plaintiff's and the defendant's experts, and found that both were irrelevant.¹¹² The plaintiff argued that the original could have been conjured up using only five notes of the original song. The defendant responded that "we took the smallest amount possible from 'When Sunny Gets Blue.'" The Ninth Circuit found that "[a]lthough the actual amount taken is a factual issue susceptible of proof, it is a question of law whether the taking is excessive under the circumstances."¹¹³ The Sixth Circuit considered the 2 Live Crew version an excessive taking as a matter of law because of what they called a "[n]ear verbatim taking of a music and meter of the copyrighted work."¹¹⁴

The Sixth Circuit observed that other courts have considered the fourth factor, the effect on the potential market, as "undoubtedly the single most important element of fair use."¹¹⁵ The court construed this factor in favor of Acuff-Rose because, as the Supreme Court observed in *Sony*,¹¹⁶ a plaintiff need not show actual present

102. *Id.*

103. *Id.* at 753.

104. *Id.* at 757.

105. *Id.*

106. 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

107. 794 F.2d 432 (9th Cir. 1986).

108. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437-38 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993).

109. *Fisher*, 794 F.2d at 434.

110. *Id.*

111. *Id.*

112. *Id.* at 438 n.4.

113. *Id.*

114. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993).

115. *Id.* (quoting *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

116. 464 U.S. 417, 451 (1984).

harm.¹¹⁷ The plaintiff need only show that a "meaningful likelihood of future harm exists."¹¹⁸

The Sixth Circuit applied the presumptively unfair standard that the Supreme Court had set out in *Sony*.¹¹⁹ Although Judge Joiner stated that this standard was not dispositive as to the issue of fair use,¹²⁰ he did give this factor a good deal of weight in deciding that issue. Despite his qualification of nondispositiveness, Judge Joiner put near sole emphasis on this factor as the test for fair use.¹²¹

The Sixth Circuit ruled in favor of Acuff-Rose and reversed and remanded the case.¹²² The court stated that most of the factors under section 107 weighed in favor of the plaintiff.¹²³ The court seemed to regard the last factor as decisive on the issue of fair use finding, "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use."¹²⁴

2. *The Dissenting Opinion*

Judge Nelson, writing the dissenting opinion, found that the 2 Live Crew version was fair use.¹²⁵ He recognized the difficulties that fair use cases give courts, stating that "[t]he parody cases appear to be in hopeless conflict"¹²⁶ and calling the fair use issue "the most troublesome in the whole law of copyright."¹²⁷

Judge Nelson saw the 2 Live Crew version as a readily recognizable parody of the original.¹²⁸ He wrote, in a somewhat pointed manner, that the parody was "readily recognizable"¹²⁹ because it "clearly intended to ridicule the white-bread original."¹³⁰

Judge Nelson applied a public policy consideration that the world is better off when the law allows parodists to practice their art.¹³¹ Social criticism is essential for our society and parody is a potent medium for such essential commentary.¹³²

Judge Nelson saw the presumption of unfairness in cases of commercial exploitation as unnecessary.¹³³ He seemed convinced that courts could reasonably differentiate between outright infringement and derivative works created for social

117. *Acuff-Rose*, 972 F.2d at 1438.

118. *Id.* (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

119. 464 U.S. 417, 451 (1984).

120. *Acuff-Rose*, 972 F.2d at 1437.

121. *See id.*

122. *Id.* at 1439.

123. *Id.*

124. *Id.*

125. *Id.* (Nelson, J., dissenting).

126. *Id.*

127. *Id.* (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)).

128. *Id.* at 1441.

129. *Id.* at 1442.

130. *Id.* at 1443.

131. *Id.*

132. *Id.*

133. *Id.*

comment or criticism. He saw an "obvious" difference between copying and what he called "caricaturizing."¹³⁴

Judge Nelson suggested that the courts must look to the "ultimate aim" of copyright law, which is to "stimulate artistic creativity for the general public good."¹³⁵ This aim is best served when courts do not presumptively assume unfair use when the artist creates a parody for commercial purposes.¹³⁶

IV. The Supreme Court's Application of the Fair Use Doctrine in Acuff-Rose Music, Inc. v. Campbell

A. Analysis Overview

The Supreme Court took up the long awaited task of determining whether parody deserved an exception to copyright as fair use.¹³⁷ Courts had struggled with the question of how to apply the four factors listed in section 107 of the Act.¹³⁸ Some courts were misapplying the factors following the *Sony* decision.¹³⁹ Courts were placing near dispositive emphasis on the fourth factor — if artists used their parody for financial gain, the courts would presumptively assume that the use was unfair.¹⁴⁰ The Supreme Court applied each of the four factors one at a time to the 2 Live Crew song, giving equal weight to each factor.¹⁴¹

Justice Souter, writing for the majority, took a sensible approach to the parody as fair use question. He observed that the application of the fair use doctrine requires a case-by-case analysis, as opposed to "bright-line rules."¹⁴² Such an approach is necessary because section 107 does not define every type of creative work that a court may exempt under the fair use doctrine. Section 107 provides only a partial list of the possible candidates for fair use protection.¹⁴³ Justice

134. *Id.*

135. *Id.* (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

136. *Id.*

137. See Nels Jacobson, Note, *Faith, Hope & Parody: Campbell v. Acuff-Rose, 'Oh, Pretty Woman,' and Parodists' Rights*, 31 HOUS. L. REV. 955, 1014-24 (1994); Patry & Perlmutter, *supra* note 43, at 667-89; Joseph E. Sullivan, *Campbell v. Acuff-Rose Music, Inc., and the Economic Approach to Parody: An Appeal to the Supreme Court*, 11 U. MIAMI ENT. & SPORTS L. REV. 105, 135-37 (1993); Beth Warnken Van Hecke, Note, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 489-94 (1992).

138. See generally Jacobson, *supra* note 137; Patry & Perlmutter, *supra* note 43; Sullivan, *supra* note 137; Van Hecke, *supra* note 137.

139. See generally Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49 (1993); Douglas Reid Weimer, *Digital Audio Recording Technology: Challenges to American Copyright Law*, 22 ST. MARY'S L.J. 455 (1990); J. Wesley Cochran, *Why Can't I Watch This Video Here? Copyright Confusion and Performance of Videocassettes & Videodiscs in Libraries*, 15 HASTINGS COMM. & ENT. L.J. 837 (1993); David H. Kramer, Note, *Who Can Use Yesterday's News?: Video Monitoring and the Fair Use Doctrine*, 81 GEO. L.J. 2345 (1993).

140. See generally *id.*

141. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170-78 (1994).

142. *Id.* at 1170.

143. *Id.*

Souter observed quite rightly that a "bright-line rule" would be of little help in deciding what works are exemptible under fair use that are not mentioned in the preamble of section 107.¹⁴⁴

Avoiding a bright-line test is a sensible approach because works that may potentially fall within the purview of fair use vary widely in their nature and subject matter. A case-by-case approach would allow the courts to consider each alleged infringement, as compared to the copyrighted work, with regard to the particular nature and subject matter of those works. Even works that fall into one of the categories listed in the preamble to section 107 may still infringe the original if the creator of the derivative work went too far in borrowing from the original.¹⁴⁵ Conversely, a work not listed in the preamble may be fair use based on the court's determination after application of the four factors with regard to the nature and subject matter of the works.

Thus, a case-by-case application of the four factors listed in section 107 applied in a uniform way is necessary for all types of derivative works, including parodies. Additionally, this case-by-case approach would serve to uphold the goals of copyright, which are¹⁴⁶ to promote science and the arts¹⁴⁷ through the dissemination of information. By considering how each case performs under the four factors outlined in section 107, a court may further this goal of dissemination of information by allowing works that do not go too far in their borrowing to reach the public. Further, a case-by-case application of these factors considers the interests of the copyright owner as well. If the derivative use does go too far in the borrowing, as measured by the four factors, the interests of the copyright owner will outweigh the goal of dissemination, and the court will refuse to allow the release of the derivative work to the public. Because these competing interests are often very close in relative weight, a broad and general test would, in many cases, unfairly disadvantage one of the parties involved. Thus, as Justice Souter suggests, courts should closely consider the interests of each party in a case-by-case approach.¹⁴⁸

The Supreme Court issued a caveat that any one of the four factors in section 107 is not necessarily dispositive on the question of fair use, even where one of them is particularly strong for or against. The Court stated that each of these factors must

144. *Id.*

145. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985) (holding the use of the plaintiff's information was unfair use, and that although it may fall within the newsreporting exception, the defendant took the heart of the work); see also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (holding that excessive copying resulted when defendant copied too exactly the plaintiff's original work).

146. Justice Souter employed Justice Story's reasoning that some copying is necessary.

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

Campbell, 114 S. Ct. at 1169 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).

147. See U.S. CONST. art. I, § 8, cl. 8.

148. *Campbell*, 114 S. Ct. at 1170.

be considered together and not in isolation.¹⁴⁹ Thus, although one factor may contravene a finding of fair use, the other factors, considered in light of the purpose of copyright, may rescue that work from a finding of infringement.¹⁵⁰

B. Application of Section 107

1. Purpose and Character of Use

Before the Court applied the first factor under section 107, the purpose and character of the derivative work's use, the Court addressed a threshold question of whether the derivative work merely supersedes the original or is somehow transformative.¹⁵¹ The Court defined "transformative" as "add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."¹⁵²

The Court suggested a consideration of the relative degree of the transformation, in relation to the other factors, was necessary to determine the issue of fair use.¹⁵³ The test for fair use, under this factor, was based on the degree of the transformation. The more transformative the new work, the less will be the significance of the other factors.¹⁵⁴ The Court found that parody has a transformative value and therefore parody may claim fair use under section 107.¹⁵⁵

The Court's decision did not extend fair use to every type of transformative work.¹⁵⁶ The Court refused to extend the same generous allowances of exception to copyright to satire as it did to parody.¹⁵⁷ The Court reaffirmed the contention that if an artist uses a copyrighted work to lampoon some target other than the original work and points no criticism at the original, the artist is infringing the original. It reasoned that, "[i]f . . . the commentary has no critical bearing on the substance or style of the original composition . . . the claim to fairness diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger."¹⁵⁸

Acuff-Rose employed a clever, but ineffective, argument that 2 Live Crew proceeded in bad faith when they used Acuff-Rose's song after being denied permission to do so. Acuff-Rose suggested that this bad faith act was not deserving of an exception to copyright.¹⁵⁹ The Court suggested that the state of mind of the alleged infringer is not central in determining fair use.¹⁶⁰ The Court, in effect,

149. *Id.* at 1170-71.

150. *Id.*

151. *Id.* at 1171.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1172.

157. *Id.*

158. *Id.*

159. *Id.* at 1174 n.18.

160. The Court suggested the comparison of *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985) (stating that fair use presupposes good faith and fair dealing) with *Folsom v. Marsh*, 9

turned the bad faith argument in favor of 2 Live Crew. The fact that 2 Live Crew sought permission before using the song may indicate good faith on their part.¹⁶¹ The Court stated that "[i]f the use is otherwise fair, then no permission need be sought or granted."¹⁶²

2. Nature of the Copyright

An analysis of a derivative work under the second factor in section 107 of the Act, the nature of the copyrighted work, considers such factors as whether a work is published or unpublished.¹⁶³ Unpublished works generally favor a finding of fair use because the published work involves an owner's exercising of one of his or her rights guaranteed under section 106.¹⁶⁴ A copyright owner therefore deserves more protection for a work that he or she has disseminated to the public.¹⁶⁵

The second factor under section 107 also considers whether the work is factual or fictional.¹⁶⁶ Factual works generally favor a finding of fair use because the works often involve uncopyrightable fact information.¹⁶⁷ Parodists are free to use factual information in their creations even though their source of that information is a copyrighted work.¹⁶⁸ The owner may still protect, through copyright, their choice of method or format of expressing the facts. Anyone may freely use these facts as long as they do not disseminate them to the public in precisely the same way that the copyright owner has chosen.¹⁶⁹

However, a consideration of whether the copyrighted work is published will not assist a court in making their determination of fair use in parody cases. The second factor offers little insight as to the fairness of the use of the original work because parody, by its very nature, must borrow from a known work. The Court, in *Campbell*, recognized that the second factor will almost always favor the copyright owner and weigh against a finding of fair use because, "parodies almost invariably copy publicly known, expressive works."¹⁷⁰ Because of this, the second factor did not help the Court in determining fair use.¹⁷¹

3. Amount and Substantiality of Portion Used

The third factor under the section 107 test considers the reasonability of the amount and substantiality used in the derivative work in relation to the purpose of

F. Cas. 342, 349 (No. 4,901) (C.C.D. Mass. 1841) (stating that good faith does not bar a finding of infringement). See also Leval, *supra* note 43, at 1126-27 (arguing that good faith is irrelevant to fair uses analysis).

161. *Campbell*, 114 S. Ct. at 1174.

162. *Id.* at 1174 n.18.

163. See *Harper & Row*, 471 U.S. at 564.

164. *Id.*

165. *Id.*

166. *Id.* at 562-64.

167. See GOLDSTEIN, *supra* note 9, at 597-600.

168. *Id.*

169. *Id.*

170. *Campbell*, 114 S. Ct. at 1175.

171. *Id.*

the copying. In *Harper & Row, Publishers v. Nation Enterprises*,¹⁷² the Supreme Court saw this factor as a consideration of whether the alleged infringer took the "heart" of the copyrighted work to use in the derivative work.¹⁷³ In *Harper & Row*, a book publisher sued a magazine which printed a portion of the publisher's pending release of former president Gerald Ford's memoirs.¹⁷⁴ The Court held that the use of the information was infringement even though the information was newsworthy and would otherwise fall under the newsreporting exception.¹⁷⁵ Newsreporting is a fair use exception listed in the preamble of section 107 of the Act.¹⁷⁶ The Court reasoned that the use was not justified as fair use because the defendant went beyond mere news reporting and took the most important part of the original work.¹⁷⁷

The *Campbell* Court agreed with the court of appeals' evaluation of the case which considered both the quantity and the quality of the taking. The Supreme Court considered quality as well as quantity to be relevant questions. This was because a defendant might borrow only a small portion of the plaintiff's copyrighted work, yet that small portion may contain the most significant, useful, or interesting portion of the original. Taking the "heart of the original" would not be fair use because it would rob the plaintiff of the benefits conveyed under copyright.¹⁷⁸

The Supreme Court also agreed with the Sixth Circuit's consideration of how much of the original work was copied verbatim.¹⁷⁹ Justice Souter found this type of evaluation relevant in terms of his transforming/superseding analysis. He said the evaluation was relevant "for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth."¹⁸⁰ He concluded that a work that takes the heart of the original and that adds or changes little of the original is more likely "to be a merely superseding use, fulfilling demand for the original."¹⁸¹

The Court did not agree with the court of appeals' conclusion that, under the "conjure up" test, the amount of 2 Live Crew's use of the Acuff-Rose's song was excessive.¹⁸² Under the conjure up test, a derivative work is not infringement if the parodist took only enough of the original to make the object of the comment or

172. 471 U.S. 539 (1985).

173. *Id.*

174. *Id.* at 564-66.

175. *Id.* at 561.

176. Copyright Act of 1976, 17 U.S.C.A. § 107 (West 1977).

177. *Harper & Row*, 471 U.S. at 561.

178. The Supreme Court cited as an example of one such important benefit, the right of first publication. This was an important benefit which the court had considered in deciding *Harper & Row, Publishers v. Nation Enterprises*, because the plaintiff had sought to serialize the original work out to a news magazine. When the defendant published albeit a small portion of the original work before the plaintiff was able to begin the serialization, the defendant effectively "scooped" the release of the most newsworthy part of the original work. *See id.* at 564.

179. *Campbell*, 114 S. Ct. at 1175-76.

180. *Id.* at 1176.

181. *Id.*

182. *Id.*

criticism recognizable.¹⁸³ The Supreme Court held that 2 Live Crew took the heart of the original version of the song; however, this was necessary under parody to conjure up the original in the mind of the listener.¹⁸⁴

The group took the opening line of the lyrics of the original and the opening bass riff. Thereafter, the parody departs from the original using different lyrics, keys, sounds, and drum beat.¹⁸⁵ Because the parody was not a verbatim copying and took only what was necessary of the original, the Court found that the third factor could not be resolved against the parodist.¹⁸⁶

4. *Effect of the Use on the Potential Market*

Under the fourth factor of section 107, courts must consider, "the effect of the use upon the potential market for or value of the copyrighted work." This factor requires courts to consider how severe the present and future harm the derivative work will cause the original. In addition, the courts must consider any adverse effect the derivative would have on the market if the copyright owner chose to create and sell his or her own derivative of the original.¹⁸⁷

The Court pointed out an obvious problem that defendants in infringement cases will experience in raising fair use as a defense.¹⁸⁸ Defendants carry the burden of proof to show evidence that their derivative will not harm the market of the original.¹⁸⁹ At trial, 2 Live Crew produced affidavits on the question of market harm to the original. However, the Court of Appeals read *Sony* as presuming unfair use when a derivative work is used for commercial purposes and found that the fourth factor weighed against fair use.¹⁹⁰

The Supreme Court found that this presumption was error. The Court distinguished the rule under *Sony* because that case involved a verbatim copying of the original work. In cases where the artist does something more than merely copy the original, no presumption of unfair use is appropriate.¹⁹¹

The Court suggested that in cases where the derivative work is transformative, such as parody, courts may not presume market harm and award this factor to the plaintiff. The Court stated that the parody and the original usually serve different markets, and, therefore, market substitution is unlikely in most cases.¹⁹²

Acuff-Rose could choose to create and market a nonparody rap version of "Oh, Pretty Woman." However unlikely this may be, as owners of the copyright, they

183. See *Fisher v. Dees*, 794 F.2d 432, 438-39 (9th Cir. 1986); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 746 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

184. *Campbell*, 114 S. Ct. at 1176.

185. *Id.*

186. *Id.*

187. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 568 (1985).

188. *Campbell*, 114 S. Ct. at 1177.

189. *Id.*

190. See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993).

191. *Campbell*, 114 S. Ct. at 1177.

192. *Id.*

may create and market a derivative work of the original whenever they wish to do so.¹⁹³ At trial, neither 2 Live Crew nor Acuff-Rose brought forth any evidence of market harm to a potential nonparody rap version of the original. The Court stated that this evidentiary gap would likely be filled on remand to the trial court.¹⁹⁴ The Court ruled that they would not presume unfair use because of the mere potential of harm to the market a derivative of the original created by the copyright owner might suffer. Such a presumption of unfair use would be inappropriate and the trial court should consider evidence supporting or discounting market harm to a derivative created by Acuff-Rose.¹⁹⁵

C. *The Concurring Opinion*

Justice Kennedy, writing the concurring opinion, emphasized the requirement that if parody is to enjoy a fair use exception, it must focus its criticism or comment on the original work. He wrote, "The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole"¹⁹⁶

Justice Kennedy stated that the parody must target the original work to satisfy the four factors in section 107. He stated that the first factor defines parody. The second factor adds little, because parodies by their very nature copy the original work. The third factor, he argued, prohibits "profiteers" who do little more than add a few silly words to the original work. Finally, the fourth factor allows independent creative works to compete with one another in the same market.¹⁹⁷

Justice Kennedy thus made it very clear that fair use can never apply to satire because satire does not focus its criticism upon the original. He stated that the definition of parody must be kept within its proper limits or musicians could "exploit existing works and then later claim that their rendition was a valuable commentary on the original."¹⁹⁸ He observed that "[j]ust the thought of a rap version of Beethoven's Fifth Symphony or 'Achy Breaky Heart' is bound to make people smile," but he apparently believed that the potential for abuse of the fair use exception was high. Without the strict limitation on parody as fair use, the majority's decision would weaken the protection of fair use.¹⁹⁹

V. *The Problem with Parody — A New Approach*

A. *The Future Implication of Campbell v. Acuff-Rose Music, Inc.*

Courts that hear parody cases must make a threshold determination as to whether the derivative work is in fact a parody. They must consider what comment or criticism the derivative work purports to make. The art of parody demands that the

193. The right to create derivative works of the copyrighted original is one of the rights guaranteed under § 106 of the Act.

194. *Campbell*, 114 S. Ct. at 1179.

195. *Id.*

196. *Id.* at 1180 (Kennedy, J., concurring).

197. *Id.*

198. *Id.* at 1181.

199. *Id.*

courts look to the nature of the work and exercise their artistic expertise to determine whether a true parody is present or merely a trifling knockoff.

The Supreme Court's decision in *Campbell* effectively charges courts with the dual duty of determining the artistic merit of a derivative work and its potential market success. The Court stated, "the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand, [and] copyright infringement [which] usurps it.'"²⁰⁰ This duty is quite difficult on both fronts.

The parody may involve some esoteric artistic critique of the original that, although readily apparent to those learned in that particular medium, is lost upon the court. Courts must guess, therefore, at the likely sophistication of the public and determine if the parody will perform as a market substitute for the original.

Justice Souter recognized that courts may not have the appropriate adeptness to determine the quality of a parody, whether it be in good taste or bad. Other Supreme Court justices had questioned a court's competence to consider such issues. Justice Souter cited Justice Holmes' comments in *Bleistein v. Donaldson Lithographing Co.*:²⁰¹

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.²⁰²

The Act guarantees the copyright owners the sole right to profit from their creation. Copyright bars the infringer from obtaining commercial gain from the original author's cleverness and creativity. Parody would, however, allow an artist to gain commercially from ideas contained in the original. Courts must guess at the commercial success a parody might enjoy to determine the potential likelihood of market substitution. This is a nearly impossible burden because it requires the courts to do what recording industry experts fail at regularly: determining how well a record will sell before its release.

It is possible, and even likely, that the parody will appeal to a different audience than the original work. For example, a rap song of the 1990s is likely to appeal to a different buyer than a pop song of the early 1960s. Here, market substitution is a moot issue because, even if the parody is wildly successful, it will not necessarily reduce sales of the original.²⁰³ Courts may find help in making such a determination (as well as the artistic merit and marketability of a song) from the parties in the infringement case. Fair use is an affirmative defense, and the defendant has the

200. *Id.* at 1178 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th cir. 1986)).

201. 188 U.S. 239 (1903).

202. *Campbell*, 114 S. Ct. at 1173 (quoting *Bleistein*, 188 U.S. at 251 (Holmes, J.) (noting that circus posters have copyright protection)).

203. The Court rejected any notion that a defendant in an infringement case could make use of the argument that the infringing use actually helped the original to become a commercial success. *Id.* at 1177 n.21.

burden of proof to show that no market substitution will occur.²⁰⁴ It is incumbent upon the parties to educate the court on the nature of the particular genre involved in the case.

B. Serving the Goals of Copyright — Broadening the Scope To Include Satire

Courts consider sociopolitical commentary an important enough purpose to nullify the original artist's rights guaranteed under copyright. Assuming this as a premise for fair use, it should make little difference whether the copyrighted work or some other object is the victim of the commentary. Justice Kennedy, writing the concurring opinion, was particularly critical of applying fair use to satire. If fair use is to protect an artist's right to point out some social flaw or make a humorous comment on society, it should do so even if the artist achieves his or purpose by merely using the copyrighted work as vehicle.

The Supreme Court in *Campbell* seemed indifferent to the policy behind fair use that social criticism is necessary and important when addressing satire as an exclusion to copyright. In satire, a derivative work may take aim at some target other than the original work itself to express a comment or criticism of some aspect of our world. For example, an artist may use the music of a copyrighted song, but add lyrics that point to the faults of some political figure.

This type of expression would not fall precisely under the auspices of parody and, hence, the protection of fair use.²⁰⁵ However, the Court should have applied the same rationale to satire, which compelled it to find that parody is a necessary and useful artform. Justice Souter argued that satire is not fair use where "the alleged infringer merely uses [the original work] to get attention or to avoid the drudgery in working up something fresh."²⁰⁶

The purpose of parody is to raise social consciousness on some political or social folly, naiveté, banality, etc. The artist does this by drawing attention to an example of folly, naiveté, banality, etc., by poking fun at the subject matter contained in a copyrighted work. On the other hand, an example of some social or political iniquity may exist elsewhere in society which the artist may wish to address by using a copyrighted work to assist him or her in the task. In both parody and satire, the artist uses a copyrighted work to raise social awareness.

Justice Kennedy, in his concurring opinion, failed to explain why it is acceptable for an artist to use a copyrighted work in one fashion (parody) to raise social consciousness and it is unacceptable to use a copyrighted work in another fashion (satire) to achieve the same raising of consciousness. In each instance, the goal is the same. It is the methods of achieving the goal that are different.

Justice Kennedy seems to hint that his objection is that the satirist uses the copyrighted work to achieve financial gain by drawing attention to himself. Yet,

204. *Id.* at 1177.

205. Justice Kennedy, writing the concurring opinion, argued that "parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary *about that same composition.*" *Id.* at 1180 (emphasis added).

206. *Id.* at 1172.

this reasoning fails under the weight of the majority's opinion which held that a work borrowing from a copyrighted work is not presumptively unfair even if the second work was created for financial gain.

Justice Kennedy looks to the fourth factor of section 107 as a test to consider what he calls the "substitutive effect" of the parody.²⁰⁷ He seems to distinguish a parody from a satire by observing that a parody "by definition" is a "creative work."²⁰⁸ His argument fails because under his definition both parodies and satires are creative works. Both borrow a portion of the original copyright work which the artist uses in poking fun at some target. Both ultimately create something that is different from the original. Both must contain some significant amount of new creativity; otherwise, they will fail as fair use under the other three factors of section 107. Thus, both are creative works.

Justice Kennedy recognizes that courts will struggle in applying the fourth factor because the courts must determine if the new derivative work serves as a substitute in the market for the original copyrighted work.²⁰⁹ He believes that this struggle may be avoided by refusing to recognize a fair use exception for works that do not direct their criticism in some way to the copyrighted work from which the artist borrowed. Justice Kennedy's argument presupposes that a satire would somehow pose a greater danger of market substitution than a parody. Yet, both the majority²¹⁰ and Justice Kennedy²¹¹ observed that the new work may compete against and even damage the market of the original. However, the parody/satire cannot replace the original in the same market as is prohibited in the fourth factor of section 107.

Therefore, under Justice Kennedy's analysis, a pure satire (one which focuses solely on a subject other than the copyrighted work in question) does not deserve a fair use exception. This is an example of the kind of "bright-line" rule that Justice Souter argued against in the majority opinion. Under Justice Souter's approach, courts must consider all of the factors under section 107 in analyzing a fair use defense and not summarily reject a fair use consideration merely because the work does not focus solely on the original work.

C. Addressing the Potential Misuses of Fair Use in Parody Cases

Justice Kennedy, as well as other courts, have been concerned with the notion that, if strict limitations were not placed on parody as fair use, the ostensible parodist could plunder with impunity the creative cache of others.²¹² This is because crafty composers might simply label their works a "parody" when, in reality, they are shamelessly pilfering from the original to make a few bucks.²¹³

207. *Id.* at 1181.

208. *Id.*

209. *Id.*

210. Justice Souter, in the majority opinion, stated, "We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act." *Id.* at 1178.

211. *Id.* at 1181.

212. *Id.*

213. Courts have found that a parody which would normally be excepted from infringement under

The parody exception, therefore, demands that a derivative work have some other meaningful purpose other than merely a pursuit of commercial gain by taking a free ride on another's creativity.

Justice Souter handled this issue through his transforming/superseding analysis. Justice Souter concluded that a parody was not fair use if it "superseded" the original. That is, a parody is not fair use if it replaces the original in the market.²¹⁴ Yet this analysis, in part, is merely a consideration of the financial effect that a parody would have on the market of the original. Thus, this analysis puts emphasis on the first and fourth factors of section 107 of the Act.

Courts must weigh each of the four factors under section 107 to determine fair use. Yet, two of the factors, the first and the fourth, focus on the harm aspect of the parodist's creation to the market of the original.²¹⁵ Courts should look closely at the fourth factor under the section 107 test. This factor deserves particularly close scrutiny in its application to a fair use defense because it provides the most tangible measure of harm to the plaintiff in a particular case.

A particular parody/satire may or may not serve as a substitute in the market of the original copyrighted work. The potential for market substitution varies with several factors vis-à-vis the original, e.g., the type of subject matter involved, the amount borrowed from the original, the extent to which the original work and the parody/satire will compete in the market, etc. In reality, it is unlikely that the parody/satire and the original will compete for the same buyers.

A buyer who wishes to purchase a copy of a well-known favorite song will not likely be interested in a modified version of that song which contains some social or political commentary. The buyer will seek out the unadulterated original. The converse is true as well; a buyer looking for a good laugh about some social or political subject will not get the sought after entertainment from the original version.

Under Justice Souter's transforming/superseding analysis, a court must look, at least in part, a bit further than the four factors listed under section 107 of the Act while deciding an infringement case. In applying this analysis, courts must also consider the social, political, and artistic intent of the defendant's work. The defendant must do more than merely transform the original work. The defendant must also have in mind some purpose for the derivative work. The alleged infringers can justify the appropriateness of fair use for their derivative work by pointing to the target of their social, political, or artistic comment or criticism. If an artist who created the derivative work did not transform the original for some legitimate purpose other than mere financial gain, the court will find that artist liable for infringement. In such instances, it matters very little what label the alleged infringer gives the derivative work. The alleged infringers may call their derivative

fair use may still infringe if the primary purpose behind a parody is merely an attempt to make money. See *Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986).

214. *Campbell*, 114 S. Ct. at 1172.

215. See *Deck*, *supra* note 50, at 59-60 (arguing that courts should focus on the first and fourth factors of § 107 of the Copyright Act of 1976).

work a "parody," yet if they are not prepared to prove the parodic intent, their label means nothing.

VI. Conclusion

The Supreme Court's decision under *Campbell* provided a long anticipated answer to the question of where parody fits in the area of copyright law. Parodies will no longer be assumed an unfair use of the copyrighted original work merely because the parodist wishes to market the work for financial gain. The parodist, however, must have some purpose for their work that they can prove to the court and that is separate from solely a financial one.

Parody may now qualify as fair use if it meets the four requirements under section 107 as the Court has applied them. Parody which meets the demands of these four factors will thus serve the primary purpose of copyright — the dissemination of information. Justice Souter's transforming/superseding test serves to advance a secondary goal of copyright — to encourage creation of new works. Derivative works which transform the original, not merely supersede it in the marketplace, advance this goal. This is true regardless of whether the derivative work is aimed at the original copyrighted work itself as a parody or whether the derivative is aimed at some other subject matter as satire. In either case, artists must have some social or political comment or criticism in mind when using the copyrighted material. If an artist who creates a derivative work is prepared to meet their burden of proving that their artistic vision was not merely of dollar signs, then parody/satire as fair use is fair, and the goals of copyright are served.

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