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All's Fair in Love and Parody: Especially When a Pretty Woman Is at Stake - Campbell v. Acuff-Rose Music, Inc.

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ALL'S FAIR IN LOVE AND PARODY: ESPECIALLY WHEN A "PRETTY WOMAN" IS AT STAKE!

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

Sharon G. Plunkett

I. INTRODUCTION

Fair use is an affirmative defense to copyright infringement, which courts and legal scholars alike call the most troublesome doctrine in all of copyright law.[1] For almost a century, the judicial system grappled with analyzing fair use cases.[2] Works which parody an original are especially difficult for the courts to analyze as a possible fair use. Parodies criticize the original work and are therefore seldom licensed, but their benefit to the public as a critical comment necessitates their inclusion in the fair use defense to copyright infringement.

In the wake of two fairly recent, and somewhat controversial, Supreme Court opinions in areas other than parody involving the fair use defense,[3] the Court granted certiorari to review a fair use case involving parody, *Campbell v. Acuff-Rose Music, Inc.*[4] Parody cases had been causing problems in the courts below, due in part, to the Court's recent fair use opinions, *Sony Corp. of America v. Universal City Studios, Inc.*[5] and *Harper & Row, Publishers, Inc. v. Nation Enterprises*.[6] Even though neither one of these cases involved a parody, the courts below were employing the language of the two opinions to parody cases.

In *Sony*, the Court noted that a commercial use was presumptively unfair,[7] and the lower courts snapped up the dicta. Courts began to place little emphasis on the standard "four-factor test" and limited the use of parody by emphasizing its commercially exploitative nature and holding it presumptively unfair.[8]

The Supreme Court's decision to review *Campbell* drew widespread attention. This would be the first opinion ever issued by the Court on parody,[9] and the subject matter was all but ordinary. The notorious rap group "2 Live Crew" had outrageously parodied the 1960's hit "Oh, Pretty Woman."[10] Acuff-Rose Music, Inc., who owned the copyright to the song, sued the rap group and its production

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1. *See* Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).
2. *See* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).
3. Harper & Row, Publishers., Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. of Am., v. Universal City Studios, Inc., 464 U.S. 417 (1984).
4. 114 S. Ct. 1164 (1994).
5. 464 U.S. 417 (1984).
6. 471 U.S. 539 (1985).
7. *Sony*, 464 U.S. at 451.
8. *See, e.g.*, Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990).
9. On the only other occasion in which the Supreme Court reviewed a parody case, no opinion was written due to a split decision on the bench. *See* Columbia Broadcasting System, Inc. v. Loew's Inc., 356 U.S. 43 (1958) (per curiam) (*aff'g* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956)).
10. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1168 (1994).

company for copyright infringement, but 2 Live Crew claimed protection for their version, employing the defense of fair use.[11]

While entertainment and intellectual property lawyers hailed the coming of Supreme Court guidelines for future parody cases, the entertainment industry anxiously awaited the outcome. The industry was split, with some viewing parody as an infringement of their private property rights; on the other side, there were the various artists and producers who derived a substantial income from parody.[12] If the Court put a commercial limit on parody, would this be the end of "Saturday Night Live"?

In addressing *Campbell v. Acuff-Rose Music, Inc.*,[13] this Note will briefly discuss the fair use defense and its related history. An overview of the history of parody in the judicial system will be given, culminating in a discussion of the recent case, *Campbell v. Acuff-Rose Music, Inc.* This Note will examine the relative extent to which *Campbell* articulated useful guidelines for the courts below, and what issues, if any, with which the lower courts will continue to struggle.

II. FACTS

In 1964, the original, smash-hit rock ballad "Oh, Pretty Woman" was written and recorded by the late Roy Orbison along with William Dees.[14] It was that very same year when Acuff-Rose Music, Inc. obtained the rights to this "pop

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11. *Id.*
12. *High Court Unanimous for 2 Live Crew*, Chi. Trib., March 7, 1994, at 1.
13. 114 S. Ct. 1164 (1994).
14. *Campbell*, 114 S. Ct. at 1168. "Oh, Pretty Woman" as written by Roy Orbison and William Dees:

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you Mercy
Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?
Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty Woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight
Pretty Woman, don't walk on by,
Pretty Woman don't make me cry,
Pretty Woman, don't walk away,
Hey, O.K.
If that's the way it must be, O.K.
I guess I'll go home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

Id. at 1179, app. A.

music standard"[15] and subsequently registered for copyright protection.[16] Acuff-Rose's right to "Oh, Pretty Woman" has been a continual source of significant income, from both the original tune and profitable licensing.[17]

In 1989, Luther R. Campbell, a member of the rap group 2 Live Crew, wrote a parody of "Oh, Pretty Woman" through the medium of song.[18] 2 Live Crew was willing to pay the statutory rate to Acuff-Rose for this derivative use of the original, but Acuff-Rose adamantly denied the rap group's request for permission to use Campbell's parody.[19] However, 2 Live Crew believed its parody was a permissible use, and went ahead as planned with the inclusion of "Pretty Woman" on their new release "As Clean as They Wanna Be."[20]

The 2 Live Crew version properly credited the authors, Orbison and Dees, and the publisher, Acuff-Rose, on the compact disc itself along with the cover of the release.[21] "As Clean as They Wanna Be" achieved instant success, selling over 250,000 copies before Acuff-Rose expressed its displeasure by bringing a copyright infringement suit in federal court.[22] The suit was not initiated until 1990, almost a year after the initial release, and it named both the rap group and its recording company, Luke Skyywalker Records, as defendants.[23] It was Acuff-

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15. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1432 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).
16. *Id.*
17. *Id.*
18. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1168 (1994). "Pretty Woman" as recorded by 2 Live Crew:

> Pretty Woman, walking down the street,
> Pretty woman girl you look so sweet
> Pretty woman you bring me down to that knee
> Pretty woman you make me wanna be please
> Oh, pretty woman
> Big hairy woman you need to shave that stuff
> Big hairy woman you know I bet it's tough
> Big hairy woman all that hair it ain't legit
> 'cause you look like 'Cousin It'
> Big hairy woman
> Bald headed woman girl your hair won't grow
> Bald headed woman you got a teeny weeny afro
> Bald headed woman you know your hair could look nice
> Bald headed woman first you got to roll it with rice
> Bald headed woman here, let me get this hunk of biz for ya
> Ya know what I'm saying you look better than rice a roni
> Oh bald headed woman
> Big hairy woman come on in
> And don't forget your bald headed friend
> Hey pretty woman let the boys
> Jump in
> Two timin' woman girl you know you ain't right
> Two timin' woman you's out with my boy last night
> Two timin' woman that takes a load off my mind
> Two timin' woman now I know the baby ain't mine
> Oh, two timin' woman
> Oh pretty woman

Id. at 1179-80, app. B.
19. *Id.* at 1168.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1151 (1991), *rev'd*, 972 F.2d 1429 (6th Cir.

Rose's contention that the rap group was "unfairly . . . trying to cash in on the popularity of 'Oh, Pretty Woman.' "[24] In response, 2 Live Crew and Luke Skyywalker Records filed a motion for summary judgment on the premise that their "Pretty Woman" was a parody of the original and thus, a fair use according to 17 U.S.C. § 107 of the Copyright Act.[25]

III. BACKGROUND AND HISTORY

A. Purpose of Copyright Law

The roots of copyright law are buried deep in the traditions of our legal system. Our society has long recognized that it has a legitimate interest in the arts and in promoting creativity among individuals. The Constitution, in Article I, Section 8, states "[t]he Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[26] In 1790, Congress used this authority to pass the first copyright laws.[27] In seeking to "promote the Progress of Science and useful Arts," the purpose of these statutes was to grant broad incentives for creative works by giving authors financial incentives and a redress in the courts.[28]

Although seemingly individualistic, the copyright laws in theory foster the public good by allowing for private gain.[29] "[T]he limited grant is a means by which an important public purpose may be achieved" and therefore, the creators gain is a secondary reflection.[30] The creation of new and original works of authorship significantly shape society and its culture, with copyright laws being developed for public rather than private benefit.[31] Further proof of the public good theory is that as early as 1790 there were limits on the monopoly given to authors; after fourteen years, the works fell into the public domain for all to copy and use as they saw fit.[32]

The current policy of the copyright laws is to grant primary and derivative market protection to "original works of authorship fixed in any tangible medium of expression."[33] To prove copyright infringement, the owner of a copyright sim-

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1992), *rev'd and remanded*, 114 S. Ct. 1164 (1994).

25. *Id.* at 1152 (citations omitted).

26. U.S. CONST. art. I, § 8, cl. 8.

27. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1848) (current version at 17 U.S.C. §§ 101-1010 (1992)).

28. Wendy J. Gordon, *Fair Use as a Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1982).

29. Brian R. Landy, Comment, *The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody*, 54 OHIO ST. L.J. 227, 229 (1993).

30. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

31. H.R. REP. No. 2222, 60th Cong., 2d Sess. at 7 (1909).

32. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1848) (current version at 17 U.S.C. §§ 101-1010 (1992)).

33. *See* 17 U.S.C. §§ 102, 106 (1992).

34. Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1372 (2d Cir. 1993).

ply has to establish: (1) she is the valid owner of a copyright and (2) another has substantially copied the original aspects of the copyrighted work.[34] However, the right to solely use one's own copyrighted material is not exclusive.[35] This seemingly broad grant of protection has limitations, one of the most important being the often confusing and troublesome affirmative defense of fair use.[36]

B. The Doctrine of Fair Use

The fair use defense is often asserted by those who partially copy another's work, in essence claiming they are entitled to a "limited privilege . . . to use the copyrighted material in a reasonable manner without the owner's consent."[37] Naturally, conflicts arise when others use copyrighted material without consent, even though it may actually create a new and socially useful work, or the new work may be harmless to the original and its derivatives.

The judicial system, early in our nation's history, recognized a need for the balancing of the legitimate users' interests with the rights of the original creator. In 1841, the Massachusetts Supreme Court articulated the common law doctrine of fair use in the landmark case, *Folsom v. Marsh*.[38] The court in *Folsom* held that the proper analysis of the affirmative defense of fair use was to "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[39] This common law doctrine has played an important role in the fair use defense for over a century.

Congress finally endorsed the common law view by revising the Copyright Act in 1976, which expressly rejected a "natural rights theory as a premise for copyright protection"[40] and based copyright law "on a utilitarian foundation of social benefit."[41] Essentially, the Copyright Act of 1976 was a codification of the fair use defense, with substantial similarities between the common law analysis set out in *Folsom* and the four factors codified in section 107 of the Copyright Act during the 1976 revisions. The statute provides in relevant part:

> [T]he factors to be considered shall include —
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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35. 17 U.S.C. §§ 107-118 (1992).
36. *See* Jay Lee, Note, *Campbell v. Acuff-Rose Music: The Sword of the Parodist is Mightier than the Shield of the Copyright Holder*, 29 U.S.F. L. REV. 279 (1994).
37. Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986) (citations omitted).
38. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).
39. *Id.* at 348.
40. 1 PAUL GOLDSTEIN, COPYRIGHT § 1.1, at 9 (1989).
41. *Id.*
42. 17 U.S.C. § 107 (1992).

(4) the effect of the use upon the potential market for or value of the copyrighted work.[42]

Although it provides some guidance, the statute has "no real definition"[43] but is primarily just a "set of criteria, which though in no case definitive or determinative, provide[s] some gauge for balancing the equities."[44] In codifying the common law doctrine, Congress stated that it merely intended to restate the judicial fair use principles, and thus was not adding or taking away anything.[45] Furthermore, preceding the list of factors in the statute is the language "shall include."[46] This implies that there are other factors which a court may take into consideration besides those enumerated.

Many courts understood Congress' comments and statutory language to mean that the judiciary still has wide discretion to analogize the fair use defense in light of the overall purposes of the copyright laws. It is easy to see why courts consider the vague and ambiguous fair use doctrine to be "the most troublesome in the whole law of copyright."[47]

C. The Supreme Court and the Fair Use Defense

In the 1980's, the Supreme Court issued two opinions on the fair use defense which have been greatly utilized by the lower courts.[48] The first case, *Sony Corp. of America v. Universal City Studios, Inc.*,[49] [hereinafter *Sony*] involved Sony's manufacture and distribution of Betamax recorders for consumer use.[50] Universal Studios, Inc. and Walt Disney Productions sued the Sony Corporation, alleging vicarious liability for copyright infringement due to Betamax purchasers recording the plaintiff's audiovisual works for either repetitive or later use.[51]

The Court employed the standard four-factor statutory analysis but focused primarily on the noncommercial aspect of the copying. The decision held that video recording for noncommercial reasons was a fair use.[52] However, in arriving at this conclusion the Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation"[53] of the rights of the copyright owner.[54] Further, the majority concluded that a meaningful likelihood of future harm to the original's market will be presumed if the use is of a commercial

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43. H.R. REP. No. 1476, 94th Cong., 2d Sess., at 65 (1976).
44. *Id.*
45. H.R. REP. No. 1476, 94th Cong., 2d Sess, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.
46. 17 U.S.C. § 107 (1992).
47. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05 (1993) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939)).
48. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
49. 464 U.S. 417 (1984).
50. *Id.* at 420.
51. *Id.* at 420-22.
52. *Id.* at 455-56.
53. *Id.* at 451.
54. *Id.*
55. *Id.*

nature.[55] *Sony*'s emphasis on the commercial nature of a use began to arise in lower court decisions around the country, especially in parody cases.[56]

In its next term, the Supreme Court issued another opinion on the fair use defense in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.[57] The facts of this case involved a political magazine's unauthorized publication of verbatim excerpts of President Ford's unpublished memoirs.[58] The Court, building on *Sony*, emphasized the commercial aspect of the publication and held that the central issue was "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[59] Furthermore, the *Harper* Court placed substantial emphasis on the likelihood of market harm to the original or its derivatives, finding this factor was "undoubtedly the single most important element of fair use."[60]

These two opinions appeared to be shifting the focus from an emphasis on public benefit to an emphasis on individual gain.

D. Parody as Fair Use

Parody, by definition, comments humorously on the original expression or work and, in addition, reflects on society-at-large.[61] The original work that is the subject of the parody must be quickly and easily recognized by the intended audience in order for the comic effect to be successful. Thus, to achieve the intended effect, the creator of the parody often borrows substantially from the original.

Parodies are seldom licensed due to their critical nature, and therefore have often been the subject of copyright infringement cases. Although some form of a parody case has been adjudicated in almost every circuit, the Second and the Ninth Circuits have traditionally been the two courts with the most law in the area of copyright infringement claims involving parodies.

1. The Ninth Circuit Prior to the *Sony* and *Harper* Decisions

The first major case involving parody and the fair use defense was *Benny v. Loew's Inc.*,[62] decided in 1956. Jack Benny performed a half-hour television burlesque of a popular movie of the times, "Gas Light."[63] Although the routine was obviously a parody, the court held it was a copyright infringement due to the sub-

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56. *See, e.g.*, United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 379 (S.D.N.Y. 1993); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1034 (N.D. Ga. 1986).
57. 471 U.S. 539 (1985).
58. *Id.* at 542.
59. *Id.* at 562.
60. *Id.* at 566.
61. Webster's New World Dictionary 1064 (College ed. 1960).
62. 239 F.2d 532 (9th Cir. 1956).
63. *Id.* at 533.
64. *Id.* at 535-37.

stantial amount of copying.[64] The similarities to the original included the same local setting, general characters, and story line.[65]

In *Benny*, the court declined to view parody as a fair use defense, stating that parody or burlesque was "to be treated no differently from any other appropriation."[66] Therefore, under this analysis, the defendant who parodied an original must overcome a copyright infringement claim by showing no substantial taking, and thus, no infringement claim.[67]

The Ninth Circuit gradually pulled away from the *Benny* interpretation of parodies. In *Walt Disney Productions v. Air Pirates*,[68] the court held that an adult cartoonstrip, which parodied Mickey Mouse and other Disney characters, was not a fair use.[69] The court analyzed the parody as an affirmative defense of fair use, stating the fair use defense may be asserted only if the parody comments at least in part on the original.[70]

Congress' express recognition of parody, as a possible fair use defense in the notes of the 1976 Copyright Act, had already negated the *Benny* analysis.[71] However, the *Walt Disney* opinion distinguished *Benny*, without expressly overruling it, stating that it merely stood for a rejection of "near-verbatim copying."[72] The court decided to use the analysis employed by the Second Circuit in parody cases:[73] a parodist may only appropriate from the original work that which is "necessary to 'recall or conjure up' the object of his satire."[74] The court held the parody of the Disney cartoon had gone too far by copying the characters' essential features into the strip.[75]

After *Disney*, the Ninth Circuit was left with a de minimis standard which stifled parody by only allowing the parodist to copy that which was *necessary* to evoke initial recognition from the intended audience. Further, the essential features of the original could not be appropriated. This effectively prohibited the parodist from making the best parody possible.[76]

2. The Ninth Circuit After *Sony* and *Harper*

In 1986, the Ninth Circuit wrote an opinion that closely resembled the future analysis used by the Supreme Court in the yet to be opinion of *Campbell v. Acuff-*

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65. *Id.* at 535-36.
66. *Id.* at 537.
67. *Id.*
68. 581 F.2d 751 (9th Cir. 1978).
69. *Id.*
70. *Id.* at 756.
71. Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986).
72. *Walt Disney Prod.*, 581 F.2d at 757.
73. *See infra* note 88 and accompanying text.
74. *Walt Disney Prod*, 581 F.2d at 757 (quoting Berlin v. E.C. Publications, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)).
75. *Id.* at 757-58.
76. *Id.*
77. 114 S. Ct. 1164 (1994).

Rose Music, Inc.[77] This notable 1986 Ninth Circuit case was *Fisher v. Dees*,[78] which centered around a popular disk jockey's twenty-nine second parody of the song "When Sonny Gets Blue."[79] The disk jockey cut an album that included the parody, "When Sonny Sniffs Glue."[80] The short parody copied the original's first six bars of music, which was its "recognizable main theme,"[81] and the opening lyrics.[82]

The *Fisher* Court held the parody was a fair use of the original.[83] In its analysis of the first fair use factor, "purpose and character of the use," the court employed the *Sony* presumption, but held that a commercial use need not be fatal.[84] The court held that "the defendant [could] rebut the presumption by convincing the court that the parody does not unfairly diminish the economic value of the original."[85] Since the parody did not supplant demand for the original, it did not cause any market harm.[86]

The opinion also disagreed with the *Walt Disney* analysis that the "conjure up" standard was a de minimis standard, and held that parodies of speech and song, to be effective, would often need to copy the essential elements of the original with near-verbatim copying.[87] Thus, the Ninth Circuit was left with a much more lenient standard than before, at least with respect to song and speech parodies, and there was a sharper focus on the market harm, rather than the commercial nature of the use.

3. The Second Circuit Prior to *Sony* and *Harper*

The Second Circuit traditionally approached parody cases in a sympathetic manner. The first major parody case in that circuit was *Berlin v. E.C. Publications*,[88] which involved the notorious "Mad Magazine" and their numerous parodies of various copyrighted songs.[89] The court in *Berlin* recognized that the social usefulness and the entertainment aspects of parody made it "deserving of substantial freedom,"[90] and thus, became the original articulator of the "conjure up"[91] standard, stating parodies may be fair use if they copy the elements needed to "recall or conjure up"[92] the original.[93] The opinion also emphasized

78. 794 F.2d 432 (9th Cir. 1986).
79. *Id.* at 434.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 440.
84. *Id.* at 437.
85. *Id.*
86. *Id.* at 438.
87. *Id.* at 439.
88. 329 F.2d 541 (2d Cir. 1964).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 545.
94. *Id.*

that the parody had neither the purpose nor effect of supplanting market demand for the original.[94]

In *Elsmere Music v. National Broadcasting Co.*,[95] the Second Circuit addressed the issue of parody once again. The appellate court gave a brief opinion without any noteworthy analysis.[96] However, by essentially affirming the district court's analysis it left intact a noteworthy opinion by the Southern District of New York.[97]

The facts evolved around "Saturday Night Live"'s parody of the New York City advertising jingle, "I Love New York."[98] The defendants wrote a short jingle entitled "I Love Sodom" which made fun of New York's sweet jingle for such a sinful city.[99] The district court used the ordinary approach of analyzing the parody by using the four statutory factors in section 107, but the court went further than ever before, articulating a definition of a parody which does not have to comment on the original.[100] Rather, the court opined that a parody could assert the affirmative defense standard of fair use even when it only commented on society in general.[101]

The *Elsmere* holding, that parody does not have to comment on the original to invoke a defense of fair use, was short-lived however. In *MCA, Inc. v. Wilson*,[102] the Second Circuit held that the *Elsmere* dicta was incorrect, and that "the copyrighted song . . . [must be] at least in part an object of the parody, [or] there is no need to conjure it up."[103] *MCA* involved a very lewd, sexual parody of the song "Boogie Woogie Bugle Boy of Company B." The court emphasized the bawdy nature of the song and stated that the mere substitution of dirty lyrics for the original could not constitute a parody.[104] Since they had as a threshold matter determined there was no parody to begin with, the court did not need to analyze the case using the fair use statutory factors.

4. The Second Circuit After the *Sony* and *Harper* opinions

In *Rogers v. Koons*,[105] the defendant took a copyrighted photograph and essentially copied the picture verbatim into a pop-art sculpture, for the purpose of commenting on the banality of life.[106] The Second Circuit held that the sculpture was not a parody of the original, and thus under the holding of *MCA* could not be a fair use.[107] The opinion stated that this determination was irrelevant though,

95. 623 F.2d 252 (2d Cir. 1980).
96. *Id.*
97. Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980).
98. *Id.*
99. *Id.*
100. *Id.*. at 746.
101. *Id.*
102. 677 F.2d 180 (2d Cir. 1981).
103. *Id.* at 185.
104. *Id.*
105. 960 F.2d 301 (2d Cir. 1991).
106. *Id.* at 303-06.
107. *Id.* at 310.
108. *Id.* at 309-10.

since under *Sony* the work was presumptively unfair anyway due to its commercial nature.[108] Thus, the *Sony* dicta was at work again.

IV. PROCEDURAL HISTORY

In *Acuff-Rose Music, Inc. v. Campbell*,[109] the summary judgment motion and the issues it raised related to parody had not previously been evaluated in the Sixth Circuit.[110] Thus, the federal district court for the Middle District of Tennessee, in deciding the case, was without controlling case law on the major issues presented.[111] The court decided to evaluate the summary judgment motion by using opinions from the two circuits with the most developed law on the subject of parody, the Second and the Ninth Circuits.[112]

Using these opinions for interpretation and analytical guidance, the court analyzed the motion by applying and balancing the four factors set out in section 107 of the Copyright Act.[113] Based on the substantial evidence presented by both parties during the summary judgment proceedings, the district court determined the " 'facts [were] sufficient to evaluate each of the statutory factors' "[114] and thus the issue of fair use was proper for the court to decide as a question of law.[115]

The district court held the rap song, "Pretty Woman," was a fair use of the original "Oh, Pretty Woman," and granted the defendant's motion, thereby dismissing the case.[116] In reaching their decision, the court heavily weighed the first factor outlined in the fair use statute, "purpose and character of the use."[117] The court held the *purpose* of "Pretty Woman" was to parody the original by comment and critique, thereby demonstrating "how bland and banal the Orbison song seems to them."[118] Furthermore, due to the *nature* of parody and its social usefulness, the court decided "Pretty Woman" was "'deserving of substantial freedom.' "[119]

However, the analysis did not end there. The court also discussed the other three statutory factors and decided the only factor which favored the plaintiff, Acuff-Rose, was the second factor, "nature of the copyrighted work."[120] As a creative, original, and published work, Orbison's "Oh, Pretty Woman," deserved a higher degree of protection than works of non-fiction.[121]

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109. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 1164 (1994).
110. *Id.* at 1153 n.1.
111. *Id.*
112. *Id.*
113. *Id.* at 1154-59.
114. *Id.* at 1153 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (quoting Pacific and S. Co. v. Duncan, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984))).
115. *Id.*
116. *Id.* at 1158-59.
117. *Id.* at 1154-55.
118. *Id.* at 1155.
119. *Id.* at 1154 (quoting Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)).
120. *Id.* at 1155-56.
121. *Id.* at 1155.
122. *Id.* at 1156-58.

The court held the third and fourth factors of the analysis weighed in favor of the defendants.[122] The third factor examined "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[123] The court held that although the two works did have substantial similarities,[124] the appropriation was not excessive "[i]n view of the fact that the medium [was] a song, its purpose [was] parody, and . . . the copying [was relatively brief]."[125] In evaluating the fourth factor, the "effect on the market," the court declined to consider any adverse economic impact to the original's market due to the parody's critical nature, noting that " 'biting criticism [often] suppresses demand.' "[126] Instead, the court focused on whether or not a consumer desiring to listen to the original was likely to purchase the parody instead.[127] The court held that given the intensely different nature of the intended audiences, 2 Live Crew's rap parody "Pretty Woman" was highly unlikely to have any noteworthy effect on either the present or potential market for the original.[128]

The plaintiff, Acuff-Rose, appealed, and the appellate court for the Sixth Circuit reversed the district court's decision and concluded, as a matter of law, that 2 Live Crew's parody was not a fair use of the original copyrighted "Oh, Pretty Woman."[129] The appeals court held that three of the four factors favored the plaintiff, not the defendant as the district court determined.[130]

Although the court briefly analyzed all four factors, the majority's decision rested primarily on excerpts taken from *Sony* and *Harper*. The appeals court reiterated the majority's point, in those two decisions, that " 'every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege belong[ing] to the owner of the copyright.' "[131] The appeals court also differed widely from the district court on its analysis of the quantity of the amount copied. The majority held that the parody erred in taking the heart of the original and thus, copied substantially more than was needed "to conjure up the original."[132] The appeals court summed up its analysis by holding the "blatantly commercial purpose of the derivative work . . . prevents this parody from being a fair use."[133]

The dissent in the appeals court opinion took issue with the emphasis the majority had put on the parody's "commercial nature."[134] The dissent opined that the Supreme Court cases cited by the majority dealt with mechanical commercial

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123. *Id.* at 1156.
124. *Id.* The court noted the parody copied the original by using the original's name, key lyrics, bass guitar refrain, melody, chorus, and opening drum beat. *Id.*
125. *Id.* at 1157.
126. *Id.* at 1158 (quoting Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986) (citations omitted)).
127. *Id.*
128. *Id.*
129. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992).
130. *Id.*
131. *Id.* at 1437 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984))).
132. *Id.*
133. *Id.* at 1439.
134. *Id.* at 1443 (Nelson, J., dissenting).
135. *Id.*

copying, and that the presumption of unfairness in commercial use should not be applied outside of those limits.[135] Thus, the dissent contended that a parody, which is a "new and transformed work,"[136] has a legitimate and substantial beneficial use which the public should not be denied.[137]

V. INSTANT CASE

The defendants, 2 Live Crew and Luke Skyywalker Records, appealed the appellate court's decision, and the Supreme Court granted a writ of certiorari.[138] The petitioners, 2 Live Crew and Luke Skyywalker Records, based their argument to the Supreme Court on the "undue weight [given] to the Sony/Harper & Row comment,"[139] and on the "[in]sufficient weight [given] to 'parody' as a genre which necessarily imitates, copies and borrows in order to criticize, satirize and entertain."[140]

Although the Supreme Court had previously addressed the affirmative defense of fair use in various contexts throughout history, *Campbell v. Acuff-Rose Music, Inc.*[141] was the first occasion on which the Court issued an opinion directly related to parody.[142] The Court spoke unanimously on the issues presented, holding that "a parody's commercial character is only one element to be weighed in a fair use enquiry, and . . . insufficient consideration was given [by the appellate court] to the nature of parody in weighing the degree of copying."[143] The appellate court's decision was reversed and remanded for further consideration in light of the Supreme Court's holding on parody as a fair use.[144]

Prior to analyzing the "Pretty Woman" case by the customary four factor test of section 107 of the Copyright Act, the Supreme Court delved into the history of the fair use doctrine and its common law roots.[145] The conclusion was that Congress, by making the common law doctrine statutory, intended to " 'permi[t] courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster.' "[146] The majority opinion emphasized the need for a case-by-case analysis in all fair use cases, which should be analyzed using the section 107 examples for general guidance and not as limitations.[147] The Court commented on the four statutory factors outlined in section 107, noting that when applying the fair use analysis, those factors should not be "treated in isolation"[148] but balanced together "in light of the purposes of

136. *Id.*
137. *Id.*
138. Campbell v. Acuff-Rose Music, Inc., 113 S. Ct. 1642 (1993).
139. *See* Brief for Petitioner at 5, Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994).
140. *Id.*
141. 114 S. Ct. 1164 (1994).
142. *See supra* note 9.
143. *Campbell*, 114 S. Ct. at 1168.
144. *Id.*
145. *Id.*
146. *Id.* at 1170 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted)).
147. *Id.* at 1170-71.
148. *Id.* at 1171.
149. *Id.*

copyright."[149] Further emphasis was also placed on the congressional intent to merely restate the fair use doctrine, thus courts should "continue the common law tradition"[150] and use historical case law on the matter in addressing the issues on a "case-by-case basis."[151]

The majority opinion included an evaluation of each of the four factors in light of the issues commonly presented with parodies, and more specifically with this particular parody of Orbison's "Oh, Pretty Woman."[152] In discussing how courts should analyze the first factor, "'purpose and character of the use,'" the majority looked to both the section 107 examples of criticism, comment and news reporting, and to the prior case law on fair use.[153] This examination led the court to decide that the purpose of the first factor was to take into consideration how "transformative"[154] the use is, by finding out to what extent it "adds something new, with a further purpose or different character"[155] than the original.[156] The majority concluded that in light of the goals and purposes of copyright law, the "purpose and character" factor should be approached by employing a balancing approach; "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[157]

In further discussing the first factor, the Court, in a somewhat admonishing tone, held that the appellate court erred by "ostensibly cull[ing] from *Sony*"[158] the presumptive unfairness approach to commercial uses.[159] The Court distinguished *Sony* and said the proper focus should be on the context in which the fair use was employed, thus reiterating a balancing approach to the commercial nature.[160]

The Court next applied an analysis of the "purpose and character of the use" to parody in general, then to the 2 Live Crew parody.[161] The finding was that parody is similar in nature to comment and criticism, providing various public benefits, and thus may be considered a fair use.[162] The majority declined however to raise parody to a presumptive fair use status, reasoning that "parody, like any other fair use, has to work its way through the relevant factors, and be judged case-by-case, in light of the ends of the copyright law."[163]

In the examination of parody in general, the Court distinguished parody from satire, which does not really take aim at the original.[164] Parody, unlike satire, has

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150. *Id.* at 1170.
151. *Id.*
152. *Id.* at 1171-78.
153. *Id.* at 1170.
154. *Id.* at 1171.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1173-74.
159. *Id.*
160. *Id.* at 1174.
161. *Id.* at 1171-73.
162. *Id.* at 1171.
163. *Id.* at 1172.
164. *Id.* at 1171.
165. *Id.*

to copy the original in order to be able to comment or criticize.[165] Emphasis should be placed on the parodist's need to "at least in part, commen[t]"[166] on the original work, implying that the more the parody comments, the more transformative it is.[167] However, if the parody only "loosely targets"[168] the original, it was determined that this was not to be dispositive but merely a factor to be balanced with the other three factors of section 107.[169]

The Court then looked to 2 Live Crew's "Pretty Woman," and held that the song was a parody which could reasonably "be perceived as commenting on the original or criticizing it, to some degree."[170] The parody was phrased as one that "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."[171] The Court declined to address any issues presented concerning the vulgar nature of the song, holding it was irrelevant whether or not the parody was performed in good or bad taste.[172]

The majority gave a cursory review of the second factor, the " 'nature of the copyrighted work,' " and decided it was not very helpful in parody cases, "since parodies . . . invariably copy publicly known, expressive works."[173] However, the Court thoroughly analyzed the third and fourth factors, producing more guidelines for courts to go by in their analysis of fair use and parody cases. Most notably, the third and fourth factor guidelines are very important, since they are the factors which the trial court will consider on remand.

In the analysis of the third factor, " 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole,' " the opinion emphasized that the first factor was inextricably intertwined with the third factor since the extent to which the use may copy the original was based on the use's purpose and character.[174] The third factor was also related to the fourth, since the degree of copying often has an effect on the market.[175]

In applying the third factor to the facts of the instant case, the Supreme Court held that the appellate court failed to give adequate consideration to the "difficult case"[176] of parody.[177] The reason parody presented difficult issues was because it necessarily had to " 'conjure up' "[178] enough of the original "to make . . . its critical wit recognizable"[179] and thus it often takes "the original's most distinctive or

166. *Id.* at 1172.
167. *Id.*
168. *Id.* at 1172 n.14.
169. *Id.*
170. *Id.* at 1173.
171. *Id.*
172. *Id.*
173. *Id.* at 1167.
174. *Id.* at 1175.
175. *Id.*
176. *Id.* at 1176.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

memorable features."[180] The majority expressly held that by copying the opening line and opening bass riff, the parody had merely done its job of taking aim at the heart of the original.[181] It was suggested that this ruling was primarily based on the fact that not only did the parody copy the heart of the original, but it also significantly departed from it thereafter, using different lyrics, and various rap techniques.[182] However, the opinion left it open for the district court to decide on remand whether or not the music was excessively copied, especially as to the repetition of the bass riff.[183]

In the discussion of the fourth factor, " 'the effect of the use upon the potential market for or value of the copyrighted work,' " the Court held that the proper inquiry must focus on the likelihood of harm to both the original and derivative markets.[184] The opinion repeated the district court's assertion that any harm based on the effect of the parody's criticism on either the original or any derivative is irrelevant, and only when the parody " 'usurps' "[185] the demand for the original or a derivative could there be any recognizable harm.[186] The majority again cited the erroneous analysis of the appellate court decision, and held that no across-the-board presumptions arise due to the commercial nature of the parody.[187] They noted that market harm and the commercial nature of the parody are just factors to consider, and are " 'sensitive [to the] balancing of interests.' "[188]

The Supreme Court even went a step further and asserted that it was unlikely that a parody, in its "pure and simple"[189] form, would have any effect on the market for the *original*.[190] The two versions "usually serve different market functions,"[191] and the theory that it harms the original's ability to market its own parody will not stand due to the substantial unlikelihood that one will market a criticism of its own work.[192]

However, the majority recognized that it was simplifying the situation by this analysis since "2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry."[193] Since neither Acuff-Rose nor 2 Live Crew submitted any evidence on the issue of harm to the derivative market for a "nonparody, rap version of 'Oh, Pretty Woman,' "[194] the Court remanded that issue to the lower court for their further determination.[195]

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181. *Id.*
182. *Id.*
183. *Id.* at 1176-77.
184. *Id.* at 1177.
185. *Id.* at 1178.
186. *Id.*
187. *Id.* at 1177.
188. *Id.* at 1177 n.21.
189. *Id.* at 1177.
190. *Id.*
191. *Id.* at 1178.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 1178-79.
196. H.R. REP. No. 1476, 94th Cong., 2d Sess. at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678. The

VI. ANALYSIS

As the entertainment world awaited the decision in *Campbell*, most people probably felt certain the Supreme Court would hold that parody was deserving of fair use in some instances. There was little doubt as to the resolution of that issue, since Congress had spoken affirmatively on the issue in its committee notes of the Copyright Act of 1976.[196] However, the current trend in parody cases was alarming to those in the entertainment industry, since the growing limitations on parody were somewhat stifling. It would be difficult to compose a great parody if one had to be overly concerned with how much she could appropriate, and further parodies would essentially vanish if the creators were prevented from commercially exhibiting their works. It is obvious that without a financial incentive, people would not be as prolific with parodies.

The Supreme Court decision in *Campbell* eased the minds of many. With the belated demise of the *Sony* presumption that all commercial uses were unfair and the Court's recognition of the parodist's need to copy the essence of the original, those who favored parody breathed a sigh of relief. However, the media's incorrect assertion that the Supreme Court had given parody an exemption from copyright infringement may have caused many to overlook the real meaning of the opinion.[197] This analysis will discuss how the opinion both broadens and limits the protection for those who parody the work of another.

A. What is a Parody?

Prior to *Campbell*, most of the lower courts' decisions did not center on the issue of whether the work was actually a parody.[198] Typically, if the courts were going to give the parody the death-knell, they did so by focusing on either the excessive copying of the original or the commercially exploitative nature of the work.[199] However, the Supreme Court addressed the issue, "what is a parody," in *Campbell*.[200] Since under *Campbell*'s reasoning, the proper focus is on the context in which the fair use was utilized, a proper analysis should be able to define that context.

The Court defined parody as a work which could reasonably be perceived as commenting on or criticizing the original work in some aspect.[201] However, this narrow definition gives courts in future parody cases wide latitude to hold that a use is not even a parody. The Court noted that a satire, which comments on society rather than an artistic work, should not be granted as much wide latitude

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committee notes stated that an example of fair use was when the original was used in a parody. *Id.*

197. Linda Greenhouse, *Ruling on Rap Song, High Court Frees Parody from Copyright Law*, N.Y. Times, March 8, 1994, at A1, A18.

198. *See contra*, MCA v. Wilson, 677 F.2d 180 (2d Cir. 1981).

199. *See supra* notes 73 through 75 and accompanying text; *see also* notes 107 and 108 and accompanying text.

200. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1173 (1994).

201. *Id.*

202. *Id.*

since there is little justification for the copying in those instances.[202] Therefore a satire, unlike a parody will not be able to copy the heart of the original and claim fair use.

The problem with this distinction is its workability.[203] By requiring the parody to comment on the original at least in part, courts will now have to examine the motives behind the parodist and try to determine the purpose of the parody. This gives the judiciary wide latitude to determine that the creator's purpose was to satirize society and not the original work, thus letting the limitations on excessive copying slip back into the analysis.

Further, this may pose a problem by allowing generational or cultural bias to figure into the analysis.[204] Often what one generation or culture may perceive as a comment on the original, another group may view as just a comment on society. Since any given work may have a myriad of meanings to many different people, it would be very difficult for the court to understand just what exactly is being parodied.

B. The Demise of the Sony *Presumption*

The demise of the *Sony* presumption that all commercial uses were unfair is the one aspect of the opinion that gives the parodist great justification to rejoice. The one thing that is now clear is that "commercialization is only one element in the fair use inquiry, and [is] by no means conclusive."[205] Courts may still weigh the commercial aspect of a parody, however, they will no longer be holding that a parody is presumptively unfair due to its commercial nature. In *Campbell*, the Supreme Court correctly focused on the effect of the parody and not the purpose behind its creation. If the parody comments on or criticizes the original, then society is enhanced by this broadening of its perspective. Even if the creator behind the parody did so with the intent to commercially exploit his work, the effect on society is not diminished.

However, the Supreme Court does not leave the owner of the copyright to the original work out in the cold. There will still be limits on the commercial aspect of parodies since the Court placed considerable emphasis on the market harm to the original and its derivatives.[206] Thus, the parodist must be able to prove that his version is unlikely to cause any future harm to the market for the original or its derivatives. The risk of harm to the original market is seldom an issue, since a parody virtually never supplants the demand for the original.[207] The market harm to the original is generally caused by the parody's critical nature, and as the

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203. Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AM. INT'L INTELL. PROP. LAW ASS'N, Q.J. 305, 311 (1993).

204. For a thorough review of the issue of cultural bias, see Nels Jacobson, Note, *Faith, Hope & Parody: Campbell v. Acuff-Rose, "Oh, Pretty Woman" and Parodists' Rights*, 31 HOUS. L. REV. 955 (1994).

205. Bruce P. Keller et al., *As Satiric as They Wanna Be: Parody Lawsuits under Trademark and Copyright Laws*, C962 ALI-ABA 151, 158 (1994).

206. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1177 (1994).

207. *Id.*

208. *Id.*

Supreme Court points out, that type of harm is justified, and therefore irrelevant.[208]

Whether or not the parody effects the market for the derivative, will depend on the nature of the parody. The Supreme Court in *Campbell* remanded the case to the lower court to determine what effect, if any, 2 Live Crew's rap parody would have on the derivative market of the original.[209] Since the parody involves a different form of music, there is a chance that there could be market harm to the copyright owner's ability to market a rap version of the original. The main issue on remand will thus be whether or not the rap parody would supplant or usurp the demand for a regular rap version of the original.

C. Copying the Essence of the Original

The creators of parody will no longer have to be overly concerned with excessive copying of the original. The Supreme Court articulated a standard which essentially allows the parody to copy the essence and heart of the original, as long as the parody has some transformative elements.[210] A parody is rarely a verbatim copy of the original, and thus, the Court's opinion substantially frees the parodist from prior restraints on copying.[211]

Parody is beneficial to society, adding new perspectives to life by displaying various original works in a different light than as portrayed by the initial creator. 2 Live Crew's parody enables society to see the perspective of a different culture on the issue of romance and women on the street. In order for society to gain maximum benefit from this parody, the author needs to be able to create the best parody possible. Thus, it is proper for the courts to allow the taking of the heart of the original. Otherwise, society might not be able to grasp the parodist's critical perspective of the original.

VII. CONCLUSION

The common law fair use defense was designed to balance the interests of those who legitimately copy another's work with the interests of the copyright owner. In keeping this balance, it is important to remember the underlying purpose of copyright law to facilitate the free-flow of ideas, expressions, and various works of art. In Campbell, the Supreme Court vindicated the rights of the parodist, and made a heroic attempt to rescue the realm of copyright law from the individual and place it where it belongs, in the hands of society. The Court gave parodists substantial freedom to copy from the original and successfully buried the *Sony* presumption. In the future, copyright holders will probably think twice before they decide to instigate litigation over a parody which really has no economic effect on their market.

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209. *Id.* at 1178.
210. *Id.* at 1176.
211. Lee, *supra* note 36.