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As Unoriginal as They Wanna Be: Upholding Musical Parody in *Campbell v. Acuff-Rose Music, Inc.*

I. INTRODUCTION

How come you're always such a fussy young man?
Don't want no captain crunch
Don't want no raisin bran
Well don't you know that other kids are
Starving in Japan
So eat it, just eat it!

Singer-songwriter "Weird Al" Yankovic shot to fame in the 1980s and 1990s with his inspired parodies of Top 40 pop songs.² Weird Al's reworked versions were irreverent, clever, and catchy.³ Those little ditties sold millions of records, prompting one commentator to dub Weird Al a "startling commercial success."⁴ Always ready to cash in on a hot trend, the American music industry followed Weird Al's lead and "reawaken[ed] to the reality of just how lucrative music parody can be."⁵

1. MICHAEL JACKSON & AL YANKOVIC, *Eat It*, on THE FOOD ALBUM (Rock 'n' Roll Records/Scotti Bros. Records 1993).

2. Charles J. Sanders & Steven R. Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 11, 11 (1990). Yankovic gained notoriety parodying such songs as Michael Jackson's "Beat It" with "Eat It" and Madonna's "Like A Virgin" with the blatantly unerotic "Like A Surgeon." See MICHAEL JACKSON & AL YANKOVIC, *Eat It*, on THE FOOD ALBUM (Rock 'n' Roll Records/Scotti Bros. Records 1993); AL YANKOVIC, *Like A Surgeon*, on DARE TO BE STUPID (Scotti Bros. Tapes, Compact Discs & Records 1990).

3. Yankovic's parody of The Knack's "My Sharona" is an ode to lunch meat: "Oooh, my little hungry one, hungry one/Open up a package of my bologna/Oooh, I think the toast is done, the toast is done/Top it with a little of my bologna." D. FIEGER, B. AVERRE, A. YANKOVIC, *My Bologna*, on THE FOOD ALBUM (Rock 'n' Roll Records/Scotti Bros. Records 1993). Other Yankovic titles include "Living With A Hernia" ("Living in America") and "I Lost On Jeopardy" ("Our Love's In Jeopardy"). See Sanders & Gordon, *supra* note 2, at 11.

4. Sanders & Gordon, *supra* note 2, at 11. Yankovic has sold more than three million copies of his records. *Id.*

5. *Id.*

Who should profit from these chart-topping charlatans? The original artist who copyrighted the song, or the parodist? With the heightened popularity of musical parody, the issue arises whether highly marketable song parodies are "fair uses" of copyrighted material and thus exempt from the infringement provisions of the Copyright Act of 1976.⁶

Musical parody⁷ is certainly not new. For centuries, people have used this form of satire as art, criticism, and humor.⁸ More than thirty years ago, one circuit judge noted that "parody and satire are deserving of substantial freedom—both as entertainment and a form of social and literary criticism."⁹

To this day, parody enjoys special protection. The current Copyright Act of 1976 allows parody to sidestep infringement liability if the parody is deemed a fair use of copyrighted material.¹⁰ The Act's doctrine of fair use has been described as "one of the most important and well-established limitations on the exclusive right of copyright owners."¹¹

Despite parody's existence through the ages and this country's development of the doctrine of fair use for well over a century, by late 1993

6. 17 U.S.C. § 107 provides that a work made for the purposes of criticism or comment constitutes a "fair use" and "is not an infringement of copyright." 17 U.S.C. § 107 (1989 & Supp. 1993) The Copyright Act states:

In determining whether the use made of a work in any particular case is a fair use the 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
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

7. Parody has been defined as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule, often with certain peculiarities greatly heightened or exaggerated." 11 THE OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989). Musical parody is "an imitation of a musical composition in which the original text or music has been altered usu[ally] in a comical manner." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (1986).

8. Sanders & Gordon, *supra* note 2, at 11; see also Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 1, 1 (1987) (crediting the ancient Greeks with the creation of parody).

9. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964).

10. See 17 U.S.C. § 107 (1989 & Supp. 1993); *supra* note 6.

11. CRAIG JOYCE ET AL., COPYRIGHT LAW 779 (3d ed. 1994); see also *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 (1994) (citing *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901) (discussing what would ultimately be labeled the fair use doctrine)).

the issue of fair use in the troubled context¹² of musical parody had yet to reach the United States Supreme Court. The case of *Campbell v. Acuff-Rose Music, Inc.*¹³ marked the Court's first examination of the fair use doctrine in the complex area of musical parody.¹⁴

The Supreme Court's holding in *Campbell* enhances the ability of artists to use copyrighted musical works in such a manner as to avoid penalty for copyright infringement.¹⁵ As a result, the decision increases the protection of a musical artist's fundamental right to free speech, which ultimately benefits society through broader exposure to information and ideas.¹⁶

This Note takes the position that, while critics of the "fair use" doctrine abound, the Supreme Court properly upheld the use of the doctrine, correctly applied the four-factor test embodying "fair use," and clarified the doctrine as well.

When determining the legitimacy of parodies, courts must take into account two counterbalancing rationales that underlie two distinct yet interdependent constitutional provisions¹⁷—the interest of authors in commercially exploiting their work under the Copyright Clause¹⁸ and the public's interest in the free flow of ideas and the broadest dissemination of information under the First Amendment.¹⁹ With these important con-

12. The doctrine of fair use has developed a reputation as "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). Further, Judge Nelson described parody as "the most troublesome fair use issue." *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992) (Nelson, J., dissenting), *rev'd*, 114 S. Ct. 1164 (1994).

13. 114 S. Ct. 1164 (1994).

14. The Court discussed fair use in the parody context only once previously, but did not render an opinion because of an equally divided court. *Id.* at 1171 (citing *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* *Columbia Broadcasting Sys. Inc. v. Loew's Inc.*, 356 U.S. 43 (1958) (per curiam)).

15. See *Campbell*, 114 S. Ct. at 1167-79 (upholding the fair use doctrine and holding that a "commercial parody . . . may be a fair use within the meaning of . . . 17 U.S.C. § 107").

16. See *id.*

17. See Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 991 (1970) (stating that "reconciliation of copyright with the first amendment requires the striking of a similar balance between the property interest of the copyright holder and the public interest" in information and ideas).

18. U.S. CONST. art. I, § 8, cl. 8. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors . . . the exclusive Right to their respective Writings . . ." *Id.*

19. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*

siderations in mind, the current fair use doctrine is the appropriate test to implement because it strikes an optimal balance between these two opposing factors. To hold otherwise, by favoring a modified version or a completely new creation, would abrogate the most meaningful, definitive, and workable standard courts have in adjudicating parody claims. Further, a contrary holding would severely diminish the importance of an individual's fundamental right to free speech, eradicate society's incentive to create "useful arts," and impede the public's access to new ideas and information.

This Note provides recommendations to further clarify the fair use doctrine for more consistent application.²⁰ This Note suggests that an additional factor be added to the fair use test. By more effectively promoting the rationale behind the Copyright Clause, this new factor will provide equilibrium between the Copyright Clause and the First Amendment.²¹

Overall, this Note presents an in-depth discussion and analysis of *Campbell v. Acuff-Rose Music, Inc.*,²² and examines its result and ramifications. Part II discusses the historical background of copyright, parody, and the fair use doctrine.²³ Part III explains the facts of *Campbell* and the issues that arise within the scope of this case.²⁴ Part IV analyzes the Supreme Court's unanimous decision.²⁵ Part V discusses the impact of the decision and recommends an additional provision for increased adherence to the constitutional goals underlying the fair use doctrine.²⁶ Finally, Part VI provides a brief conclusion.²⁷

II. HISTORICAL BACKGROUND

A. *Constitutional Foundation and Statutory Codification of Copyright Law*

The Constitution preserves the right of authors, inventors, and artists to exploit their own works.²⁸ The framers gave Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited

20. See *infra* notes 272-74 and accompanying text.

21. See *infra* notes 272-74 and accompanying text.

22. 114 S. Ct. 1164 (1994).

23. See *infra* notes 28-117 and accompanying text.

24. See *infra* notes 118-28 and accompanying text.

25. See *infra* notes 129-251 and accompanying text.

26. See *infra* notes 252-73 and accompanying text.

27. See *infra* notes 275-81 and accompanying text.

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

Times, to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²⁹

Although the precise purpose behind that clause is unclear, the constitutional language, which does not employ the term "copyright," suggests that the framers' aim was to encourage the creation and dissemination of knowledge "so as to increase social welfare."³⁰ This aim is to be achieved by means of an economic incentive, by granting authors the exclusive and therefore monopolistic right to exploit their work for a limited time.³¹

Pursuant to this constitutional delegation, Congress passed the first federal copyright act in 1790, thereby protecting authors'³² rights in their artistic creations.³³ Federal copyright law has been revised several times since 1791; the most recent revision was the Copyright Act of 1976, which took effect on January 1, 1978.³⁴ The 1976 Act has itself been amended several times in response to our society's rapidly changing technology.³⁵

Among the exclusive rights granted to a copyright owner in the Copyright Act of 1976 are the rights to reproduce a work, to prepare derivative works, to distribute copies to the public, and to perform or display a work publicly.³⁶ Penalties for infringement of these rights can be severe:

29. *Id.*

30. JOYCE ET AL., *supra* note 11, at 9-10. In fact, since the middle of the nineteenth century, the United States Supreme Court has consistently reiterated that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Similarly, legislative history strongly advances this same notion. *See* H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909) (stating that a copyright is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public").

31. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (A copyright "grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

32. This Note uses the terms "author" and "copyright owner" or "copyright holder" interchangeably, although the creator of a work may, of course, transfer the copyright to another. *See* 17 U.S.C. § 201(d) (1988).

33. *See* JOYCE ET AL., *supra* note 11, at 10.

34. *See* 17 U.S.C. §§ 101-801 (1988).

35. *See, e.g.*, 17 U.S.C. § 117 (1988) (dealing with computer programs).

36. *See* 17 U.S.C. § 106 (1988).

a court can issue an injunction,³⁷ can impound allegedly infringing works during a legal action,³⁸ and can award substantial damages to the copyright owner.³⁹ The most pervasive type of infringement is the duplication of an author's work.⁴⁰ While copyright law generally prohibits duplication, it also provides exceptions where it is more beneficial to society to allow the copying.

B. *The Fair Use Doctrine*

Because every idea, to some extent, owes its origins to those ideas that came before it, granting authors absolute monopolies over their work may deny a subsequent author the creative opportunity to build upon it.⁴¹ Such overprotection works counter to the underlying premise of copyright law by impeding the free flow of ideas and the broadest dissemination of information for the public good.⁴² In an effort to mitigate the effects of overprotection, copyright law sanctions the fair use doctrine, permitting courts to excuse copyright infringement in particular situations.⁴³

The fair use doctrine attempts to harmonize two potentially conflicting clauses of the Constitution: the First Amendment, which guarantees freedom of speech and of the press,⁴⁴ and the Copyright Clause, which grants to authors the "exclusive Right to their Writings."⁴⁵ "[W]hen the demands of public access to information are at odds with the copyright holder's claim to exclusivity," the First Amendment is implicated.⁴⁶ The

37. See 17 U.S.C. § 502 (1988).

38. See 17 U.S.C. § 503(a) (1988).

39. See 17 U.S.C. § 504 (1988).

40. See *JOYCE ET AL.*, *supra* note 11, at 21 (noting that modern reproductive technology allows virtually anyone to be a "publisher").

41. See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

42. The Supreme Court observed that "[t]here are situations . . . in which strict enforcement of this monopoly would inhibit the very 'Progress of Science and useful Arts' that copyright is intended to promote." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting); see also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (explaining that the author's interest is subordinate to the advancement of the public welfare).

43. The fair use doctrine developed in common law because there were circumstances where the benefit to society in allowing use outweighed the artists' exclusive rights in their work. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985). Fair use is defined as "[a] privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the monopoly granted to the owner." *BLACK'S LAW DICTIONARY* 598 (6th ed. 1990).

44. U.S. CONST. amend. I.

45. U.S. CONST. art. I, § 8, cl. 8.

46. Deborah A. Hartnett, *A New Era for Copyright Law: Reconstituting the Fair*

fair use doctrine is the means by which these two concerns are reconciled.⁴⁷ *Folsom v. Marsh*⁴⁸ first intimated the doctrine in 1841 and the term "fair use" first appeared twenty-eight years later in *Lawrence v. Dana*.⁴⁹

While the fair use doctrine has been applied in common law for over 150 years, it was not codified until the Copyright Act of 1976.⁵⁰ This codification is essentially a restatement premised on the existing judicial precedent set out in *Marsh*.⁵¹ Section 107 of the act enumerates four factors to be considered when making a fair use determination: (1) the purpose and character of the infringing use, including whether it is commercial or nonprofit;⁵² (2) the nature of the copyrighted work;⁵³ (3) the amount and substantiality of the elements of the original used;⁵⁴ and (4) the effect on the value and potential market for the original.⁵⁵ Section 107 further states that the fair use exception may be applied in cases where the copyrighted material is used for "criticism, comment, news

Use Doctrine, 39 COPYRIGHT L. SYMP. (ASCAP) 167, 169-70 (1992). Free speech interests are implicitly involved in every copyright infringement case because overprotection of a copyright counters the underlying premise of copyright law by impeding the free flow of ideas and the broadest dissemination of information for the public good. See *supra* note 19, and *infra* notes 269-70 and accompanying text.

47. Hartnett, *supra* note 46, at 167. Because the fair use doctrine already incorporates First Amendment considerations into its balancing test, courts have consistently rejected a pure free speech defense in copyright infringement actions. See, e.g., *Roy Export Co. v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1169-71 (9th Cir. 1977); *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

48. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). In this case, Justice Story distilled the methodology of the fair use doctrine: "[L]ook 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." *Id.* at 348.

49. 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136).

50. See 17 U.S.C. § 107 (1988).

51. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1169-70 (1994). See generally *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (introducing the theory of the fair use doctrine).

52. 17 U.S.C. § 107(1) (1988).

53. 17 U.S.C. § 107(2) (1988).

54. 17 U.S.C. § 107(3) (1988).

55. 17 U.S.C. § 107(4) (1988).

reporting, teaching (including multiple copies for classroom use), scholarship, or research."⁵⁶

1. Relationship to Parody

Although parody is not specifically designated as one of the favored uses under § 107, the legislative history of the statute lists parody as one of the activities that might be accorded fair use status.⁵⁷ An effective parody requires that the audience be able to identify both the subject of the parody and the parodist's mocking distortions. "To achieve this, a parodist often must mirror or directly copy portions of the original."⁵⁸ A parodist may either appropriate the actual words of a text or lyrics or may appropriate the structure or general expression of the original.⁵⁹ In fact, parody's perplexing nature stems from the law's dual demands. On one hand, the law insists that distinct features of the original be copied in order to achieve a strong identification with the original work. On the other hand, the law requires that the copying be tethered so as to not infringe on the author's copyright. Given this conundrum, the fair use doctrine has been inconsistently applied in parody cases over the years.

2. Survey of Relevant Cases and the Inconsistent Application of the Fair Use Doctrine

A multitude of cases have analyzed parody using the fair use doctrine to determine whether the parody constitutes copyright infringement.⁶⁰ In applying the fair use analysis, however, courts have been widely inconsistent.⁶¹ The majority of decisions involving fair use in parody focus on the amount and substantiality of the taking.⁶² Recently however, the commercial use evaluation has gained prominence.⁶³ Still other decisions turn narrowly on the content of the parody and the bad faith conduct of the parodist.⁶⁴ A brief survey of various courts' rationales shows the immediate need for clarification of the parameters of the fair use doctrine in order to produce more consistent application.⁶⁵

56. 17 U.S.C. § 107 (1988).

57. See H.R. REP. No. 1476, 94th Cong., 2d Sess. 65 (1976).

58. Beth Warnken Van Hecke, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 466 (1992).

59. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 [C] (1992).

60. See *infra* notes 66-117 and accompanying text.

61. See *infra* notes 66-117 and accompanying text.

62. See *infra* notes 95-97 and accompanying text.

63. See *infra* notes 69-81 and accompanying text.

64. See *infra* notes 109-13 and accompanying text.

65. See *infra* notes 66-116 and accompanying text.

a. *The purpose and character of use*

In evaluating the first of the fair use factors in the context of music parody, courts have directed their attention to two distinct views: (1) whether the work is for a commercial use; or (2) whether the parody targets the original work as the object of its humor or ridicule, or uses the original merely as a vehicle for broader comment.⁶⁶ In fair use, but not in the context of parody, the Supreme Court has explored a third notion: whether the work demonstrates a broader social value.⁶⁷ These theories have been applied both independently and in conjunction with one another, some with considerable emphasis and some with cursory reference.⁶⁸

i. *The commercial use presumption*

The first fair use factor directs courts to consider the "purpose and character of the use" relative to "whether the use is of a commercial nature or is for nonprofit educational purposes."⁶⁹ The Supreme Court has indicated that the commercial nature of the use tends to weigh against a finding of fair use since "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."⁷⁰ Following this precedent, music parody decisions have adopted the presumption with much differentiation. Some have given the presumption significant weight, as did the court of appeals in *Acuff-Rose Music, Inc. v. Campbell*,⁷¹ while others have assigned it little value.

In *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*,⁷² the copyright owner of the movie "A Nightmare on Elm Street" brought an infringement action against the creators of a music video entitled "A Nightmare on My Street."⁷³ The court's evaluation of the purpose and

66. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *infra* notes 69-87 and accompanying text.

67. See *infra* notes 88-91 and accompanying text.

68. See *infra* notes 69-91 and accompanying text.

69. 17 U.S.C. § 107(1) (1988).

70. *Sony*, 464 U.S. at 451. In this case, Universal, owner of copyrights on some of the television programs that are broadcast on the public airwaves, claimed infringement of their copyrights when the public recorded these programs at home on video tape recorders manufactured by Sony. *Id.* at 420-21.

71. 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

72. 693 F. Supp. 1517 (S.D.N.Y. 1988).

73. *Id.* at 1520. Both the movie and the video featured a character named

character of the use focused primarily on the commercial motivation behind the making of the video.⁷⁴ The court held that because the making of the video was strictly economically motivated, the parody represented an overt commercial purpose, which weighed heavily against a finding of fair use.⁷⁵

The court in *Fisher v. Dees*,⁷⁶ however, demonstrated greater flexibility in its application of the commercial use presumption to a musical parody.⁷⁷ In this case, Rick Dees parodied Johnny Mathis' song "When Sunny Gets Blue" with Dees' version entitled "When Sonny Sniffs Glue."⁷⁸ The court recognized that a significant purpose of some parodies may be social commentary.⁷⁹ In such cases, capitalizing on the original and benefiting financially from its use is not the sole purpose of the parody.⁸⁰ In such an instance, the commercial use presumption is merely rebuttable because the parody does not unfairly diminish the economic value of the underlying work, which is the concern of the fourth factor.⁸¹

ii. The essence of the parody

Another component courts consider in determining fair use under the first factor examines whether a parody must target the original work as the object of comment or criticism, or whether the original work can be used merely as a vehicle to contribute to a heightened social awareness. The two leading cases have disagreed sharply in this determination.

In *Fisher v. Dees*,⁸² the court required that the parody target the original in order for it to be a fair use.⁸³ The court reasoned that unless the copied work is the target of the parody to some extent, no justification

"Freddy" who had a burnt face, a low, raspy voice, and gloved hand with sharp implements protruding from his fingers, and contained similar dream imagery. *Id.* at 1522.

74. *Id.* at 1526.

75. *Id.*

76. 794 F.2d 432 (9th Cir. 1986).

77. *Id.* at 437-38.

78. *Id.* at 434. The parody mimics the first six of the song's thirty-eight bars of music, which is the "heart" of the song. *Id.* Moreover, the parody alters the original's opening lyrics: "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" is changed to "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.*

79. *Id.* at 437.

80. *Id.*

81. *Id.*

82. 794 F.2d 432 (9th Cir. 1986).

83. *Id.* at 436.

exists for borrowing from the original.⁸⁴ In contrast, the court in *Elsmere Music, Inc. v. National Broadcasting Co.*⁸⁵ held that the pivotal question in determining whether the parody is a fair use is not whether it is a parody of the copied work, but whether it is a parody at all.⁸⁶ The court concluded that even if the "Saturday Night Live" skit song "I Love Sodom" did not directly parody the plaintiff's "I Love New York" tourism campaign jingle, this would not preclude a finding of fair use.⁸⁷

iii. The social value of the parody

In deciphering the first factor of the fair use doctrine, the Supreme Court drew a distinction in both *Sony Corp. of America v. Universal City Studios, Inc.*⁸⁸ and *Harper & Row, Publishers, Inc. v. Nation Enterprises*.⁸⁹ The Court's distinction focused on whether the appropriated material was employed for "productive" or "unproductive" uses. The Court stated that a "productive" use incorporates the original material in order to create a new and socially useful work for purposes such as comment, teaching, or scholarship.⁹⁰ In both cases, the Court essentially concluded that the productiveness of a work is simply one consideration in a fair use analysis.⁹¹

b. *The nature of the copyrighted work*

Courts have permitted a finding of fair use more frequently in cases involving factual or informational works than in cases involving creative works or works of entertainment.⁹² The Supreme Court observed that a

84. *Id.*

85. 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

86. *Id.* at 746.

87. *Id.* The court indicated that the parody was "an attempt . . . to satirize the way in which New York City has attempted to improve its somewhat tarnished image through the use of a slick advertising campaign . . . [and] it had nothing to do with . . . the song itself." *Id.* at 745.

88. 464 U.S. 417 (1984).

89. 471 U.S. 539 (1985). In this case, Nation Enterprises copied verbatim former President Ford's unpublished memoirs shortly before *Time* magazine, which had a contract to publish the memoirs. *Id.*

90. *Sony*, 464 U.S. at 455 n.40 (1984).

91. *Id.*; *Harper & Row*, 471 U.S. at 561.

92. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 417, 455 n.40 (1984); see also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964).

parody is more likely to be a fair use when it constitutes a factual work because “the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”⁹³ This observation may explain why few cases invoke the second factor. Most parodies target creative, not factual, works.⁹⁴

c. Amount and substantiality of the taking

Many courts have relied on this third factor, amount and substantiality of taking, to determine whether a parody constitutes a fair use. There is general agreement that a nearly verbatim copying of an original work is a taking that exceeds the permissible scope of fair use.⁹⁵ However, parody, by its very nature, demands at least some copying. Therefore, courts have devised the “conjure up” test, where using only as much of the original as is necessary to conjure up or to evoke recognition of the original is considered fair use.⁹⁶ Nevertheless, the line between using merely enough to conjure up the original and substantial copying is blurred.⁹⁷

d. Market effect

Under the fourth factor, market effect, courts consider the effect of the alleged infringing use upon the market for the original.⁹⁸ Courts have established market harm to the original by either: (1) a presumption of

93. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563-64 (1985).

94. *Bertin*, 329 F.2d at 545. A parody of a legal textbook would be an unusual attempt at humor. *Id.*

95. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981); *Warner Bros., Inc. v. American Broadcasting Co.*, 654 F.2d 204, 207-09 (2d Cir. 1981); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756-57 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.* 439 U.S. 1132 (1979).

96. See *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955) (introducing the “conjure up” test).

97. The quantitative evaluation requires the actual amount copied to be measured. However, there is no precise definition for the “right” amount. See *Harper & Row*, 471 U.S. at 569 (finding that the defendant’s taking of approximately 300 words of President Ford’s 200,000 word manuscript was not a fair use). *But see Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (finding that verbatim video tape copying was a fair use).

The qualitative evaluation requires an inquiry into the extent that one copies the meaning and substance of the original. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1178 (5th Cir. 1980) (finding a fair use where defendant did not copy the essence or content of plaintiff’s magazine, even though defendant copied the entire cover).

98. 17 U.S.C. § 107(4) (1988).

harm when the parody's use is commercial;⁹⁹ or (2) proof that the parody has the "effect of fulfilling the demand for the original."¹⁰⁰

In *Tin Pan Apple, Inc. v. Miller Brewing Co.*,¹⁰¹ the court evaluated a commercial for Miller Beer in which comedian Joe Piscopo imitated a rap group called The Fat Boys.¹⁰² The court found that the appropriation of material "to promote the sale of commercial products" automatically constitutes an unfair use.¹⁰³ The court relied in part on *Sony*, which presumed market harm when the intended use of the parody is commercial gain.¹⁰⁴

In contrast, the court in *Fisher v. Dees*¹⁰⁵ argued that the market harm to the original is not derived from the parody's "potential to destroy or diminish the market for the original—any bad review can have that effect."¹⁰⁶ Rather, the court asserted that attention should be directed to whether the parody "fulfills the demand for the original;" that is, whether consumers will be equally satisfied purchasing the parody over the original work.¹⁰⁷ If not, both works may co-exist without market harm to the original.¹⁰⁸

e. Alternative factors in the parody algorithm

Courts have also implemented factors outside the prescribed fair use statute.

i. Bad faith

The Supreme Court has indicated that bad faith conduct by a defendant has severe implications in a fair use determination.¹⁰⁹ For instance,

99. *Sony*, 464 U.S. at 451.

100. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964).

101. 737 F. Supp. 826 (S.D.N.Y. 1990).

102. *Id.* at 827-28.

103. *Id.* at 829-31 (quoting *Warner Bros., Inc. v. American Broadcasting Co.*, 720 F.2d 231, 242 (2d Cir. 1983)).

104. *Id.* at 832; *see Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

105. 794 F.2d 432 (9th Cir. 1986).

106. *Id.* at 438.

107. *Id.*

108. *Id.*

109. Because "fair use presupposes 'good faith' and 'fair dealing,'" courts have woven "the propriety of the defendant's conduct" into the fair use equation. *See, e.g.*,

in *Harper & Row*, the Court found that the defendant pilfered a forthcoming publication, and that such conduct was in bad faith.¹¹⁰ This conduct weighed against a finding of fair use.¹¹¹ In *Fisher*, the court analyzed the defendant's conduct in creating a parody of plaintiff's song after plaintiff had refused to grant him permission.¹¹² The court found that such conduct was not in bad faith since the defendant had asked for permission, and that "[p]arodists will seldom get permission from those whose works are parodied."¹¹³

ii. Moral implications

On occasion, courts have equated a parody's morally reprehensible content with a direct finding of unfair use. In *MCA, Inc. v. Wilson*,¹¹⁴ the court reasoned that an off-color music parody was an unfair use because it harmed the market for the original.¹¹⁵ However, the *MCA* decision centered on the court's disapproval of the parody's content, which it found to be nothing more than a blatant substitution of "dirty lyrics."¹¹⁶

f. Summation of case law

It should be obvious from the preceding survey of divergent court holdings that current fair use parody analysis requires some fine-tuning—one can scarcely imagine greater havoc among the lower courts.

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (quoting 3 NIMMER, *supra* note 59, at § 13.05 [A]).

110. *Id.*

111. *Id.* at 563.

112. *Fisher*, 794 F.2d at 437.

113. *Id.*

114. 677 F.2d 180 (2d Cir. 1981).

115. *Id.* at 184-85. In this case, copyright owner MCA sued the defendant for parodying the Andrews Sisters' 1940 classic "Boogie Woogie Bugle Boy" with an alliterative "Cunnilingus Champion of Company C." *Id.* at 182.

116. *Id.* at 185; see also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979) (stating that parodying the cartoon characters' "wholesomeness" and "innocence" could not be justified as fair use). In this case, *Air Pirates* was an adult underground comic book

"which had placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings." It centered around a "rather bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture."

Id. at 753 (quoting Kevin W. Wheelwright, Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571, 582 (1976)).

The flexible and fact-sensitive approach envisioned by Congress has produced widely varying and conflicting notions of fair use. There is inadequate treatment of, or overemphasis on, some factors, and inappropriate utilization of other factors outside of the statutory framework. This not only illustrates the multifarious nature of the fair use analysis, but also underscores the immediate need for the amelioration of the fair use doctrine in order to achieve a consistent and predictable standard by which to review parodies. Fine-tuning of fair use also is needed to ensure that the interests of both the parodist and the author are adequately balanced. However, a complete overhaul of the system is not justified. There is an abundance of analysis of fair use in case law; the Supreme Court must simply set forth a concise and logical clarification of the proper factors to be used and the manner in which they should be implemented. The case of *Campbell v. Acuff-Rose Music, Inc.*¹¹⁷ provided the Supreme Court with a prime opportunity to reorient judicial thinking and realign the fair use analysis with the doctrine's long-standing and explicit fundamental premises.

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In 1964, Roy Orbison and William Dees¹¹⁸ wrote the ballad "Oh, Pretty Woman" and assigned their rights in the song to Acuff-Rose Music, Inc., which then registered the song for copyright protection.¹¹⁹

Luther R. Campbell, in conjunction with Christopher Wongwon, Mark Ross, and David Hobbs, constitute the popular rap music group known as 2 Live Crew. In 1989, Campbell wrote a song entitled "Pretty Woman," which he intended as a satire of Orbison's song.¹²⁰ On July 5, 1989, 2 Live Crew's manager requested permission from Acuff-Rose to make use of Orbison's song, indicating that they were willing to pay a fee for such use, in addition to affording the proper credit for ownership and authorship to Acuff-Rose and Orbison. Acuff-Rose denied 2 Live Crew's request.¹²¹

117. 114 S. Ct. 1164 (1994).

118. In this Note, Roy Orbison and William Dees are referred to simply as "Orbison."

119. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1168 (1994); see *infra* Appendix A for the words to the song.

120. *Campbell*, 114 S. Ct. at 1168.

121. *Id.* 2 Live Crew's manager enclosed a copy of the lyrics to their song along with their request. *Id.*; see *infra* Appendix B for the lyrics to 2 Live Crew's "Pretty Woman."

Nevertheless, after permission was denied, 2 Live Crew released "Pretty Woman" on record, cassette and compact disc as part of their album entitled "As Clean As They Wanna Be."¹²² Acuff-Rose subsequently brought suit against 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement.¹²³

After weighing the fair use factors, the district court granted summary judgment for 2 Live Crew, indicating that its song "made fair use of Orbison's original."¹²⁴ The Sixth Circuit Court of Appeals reversed the district court, concluding that the song's "blatantly commercial purpose . . . prevents this parody from being a fair use."¹²⁵ The Supreme Court granted certiorari to ascertain whether the commercial purpose behind 2 Live Crew's song rendered it an unfair use.¹²⁶ The Court held unanimously that the commercial character of a song parody does not automatically create a presumption against a finding of fair use.¹²⁷ Accordingly, the Court reversed the judgment of the court of appeals and remanded for further proceedings consistent with its opinion.¹²⁸

122. *Campbell*, 114 S. Ct. at 1168. The albums identified both Orbison and Dees as the authors and Acuff-Rose as the publisher of "Pretty Woman." *Id.*

123. *Id.* Nearly a quarter of a million copies of the recordings had already been sold. *Id.* A copyright infringer is someone who "violates any of the exclusive rights of the copyright owner." 17 U.S.C. § 501(a) (1988). The owner of a copyright holds the following exclusive rights: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership . . ." 17 U.S.C. § 106 (1988). A derivative work is "[one] based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1988).

2 Live Crew's "Pretty Woman" constitutes either a reproduction under § 106(1) or derivative work under § 106(2), and would therefore be a copyright infringement, but for a finding of fair use through the parody exception. Because the work "re-cast[s]" Roy Orbison's original song, it is most likely a derivative work, the exclusive right of which is vested in the copyright owner, Acuff-Rose.

124. *Campbell*, 114 S. Ct. at 1168. The district court reasoned that the commercial use of 2 Live Crew's song did not preclude a fair use; that 2 Live Crew's version was a parody, replacing the normal lyrics with "shocking ones;" that 2 Live Crew implanted no more than was necessary to "conjure up the original in order to parody it;" and that 2 Live Crew's ditty could not remotely affect the market for the original. *Id.*

125. *Id.* at 1169; *see Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (holding that there is a presumption of unfair use when it is commercial).

126. *Campbell*, 114 S. Ct. at 1169. The case was argued on November 9, 1993, and decided on March 7, 1994. *Id.* at 1164.

127. *Id.* at 1179.

128. *Id.*

IV. ANALYSIS

A. *Unanimous Opinion*

The unanimous opinion examined a multitude of issues in *Campbell v. Acuff-Rose Music, Inc.*¹²⁹ Despite the presence of all four factors of the fair use analysis, the Court focused on the first factor—the purpose and character of the use—scrutinizing its commercial aspect in particular.¹³⁰

Although the Court did not explain the basis for its grant of certiorari, it can be inferred that the Court wished to clarify its previous statement in *Sony* regarding the presumption that the use is unfair when it is for a “commercial purpose.”¹³¹ The Court began by stating that but for a finding of fair use through parody, 2 Live Crew’s song would undoubtedly be an infringement of Acuff-Rose’s rights in “Oh, Pretty Woman” under the Copyright Act of 1976.¹³² The Court then discussed the underlying history and rationale of fair use.¹³³ The Court recognized that “some opportunity for fair use” is “necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’”¹³⁴

The Court then examined the development of the fair use doctrine and the justifications for such a privilege.¹³⁵ Next, the Court declared that the fair use doctrine has been accepted and utilized in the United States for well over a century,¹³⁶ beginning with *Folsom v. Marsh*.¹³⁷ The main justification for the doctrine was to prevent the suffocation of art.¹³⁸

129. 114 S. Ct. 1164, 1179 (1994). Justice Souter authored the unanimous opinion, and Justice Kennedy filed a concurring opinion. *Id.* at 1167.

130. *Id.* at 1171.

131. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *see supra* note 125 and accompanying text.

132. *Campbell*, 114 S. Ct. at 1169.

133. *Id.*

134. *Id.*; *see supra* notes 28-35 and accompanying text.

135. *Campbell*, 114 S. Ct. at 1169-71.

136. *Id.* at 1169-70.

137. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901); *see supra* note 48.

138. *Campbell*, 114 S. Ct. at 1169. In support of its position, the Court introduced some pertinent historical quotes. *Id.* For instance, the Court presented Lord Ellenborough’s warning that overprotection of copyrights would shackle the arts and sciences. *Id.* (quoting *Carey v. Kearsley*, 170 Eng. Rep. 679, 681, 4 Esp. 168, 170, (1803)). The Court added Justice Story’s famous quote:

[I]n 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.

Thereafter, the Court approached the current codification of the common-law fair use doctrine under § 107 of the 1976 Copyright Act.¹³⁹ Before its application of the four-factor test, the Court set the requisite parameters for the application of § 107. First, the Court explained that Congress' intent was to not alter the common-law tradition of fair use adjudication.¹⁴⁰ In addition, the Court warned that in order to foster creativity, the four factors cannot be rigidly applied.¹⁴¹ The Court reinforced this warning by reiterating its assertion from *Harper & Row*,¹⁴² calling for a case-by-case fair use analysis.¹⁴³

The Court proceeded to apply the four factors of the fair use doctrine, emphasizing the commercial aspect of the first factor. In applying the fair use test, the Court found that, although the case needed to be remanded for further fact findings, a commercial parody may be a fair use within the meaning of § 107.¹⁴⁴ This was the first time that the Court reached a decision on whether parody may be a fair use.¹⁴⁵

The first factor, the one discussed most extensively by the Court was "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."¹⁴⁶ The Court divided the first factor into two parts, first analyzing the extent to which the work is a parody and then questioning the commerciality of the work.¹⁴⁷ The preamble to § 107, which indicates that the use should be for "criticism or comment,"¹⁴⁸ aided the Court in its inquiry into the parodic purpose and character of 2 Live Crew's song. Within this inquiry, the Court analyzed the extent to which the work was "trans-

Id. at 1169 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)). From this, it can be ascertained that overprotection of a copyrighted work would chill creativity and therefore stifle the public's exposure to new ideas and information because every work of art is necessarily based on a previous work. *See supra* notes 41-43 and accompanying text.

139. *Campbell*, 114 S. Ct. at 1170; *see also supra* note 6.

140. *Campbell*, 114 S. Ct. at 1170 (citing H.R. REP. No. 94-1476, 94th Cong., 2d Sess., 66 (1976)).

141. *Id.* at 1170 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

142. 471 U.S. 539, 547 (1985).

143. *Campbell*, 114 S. Ct. at 1170. The Court further explained that the four fair use factors are not to "be treated in isolation"; rather "[a]ll are to be explored and the results weighed together, in light of the purposes of copyright." *Id.* at 1170-71 (quoting William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 685-87 (1993)).

144. *Id.* at 1164.

145. *Id.* at 1171. Indeed, the Court considered this issue once before in *Columbia Broadcasting Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958), but failed to issue an opinion at that time. *Campbell*, 114 S. Ct. at 1171.

146. *Campbell*, 114 S. Ct. 1171 (quoting 17 U.S.C. § 107(1) (1988)).

147. *Id.* at 1171-74.

148. *Id.*

formative.¹⁴⁹ A work is transformative if it alters the nature of or adds something novel to the original, thereby creating a wholly new expression.¹⁵⁰ The Court reasoned that parody, like other comment and criticism, can be transformative because the parodist can add variations to or present a different take on the original. In doing so, the author can claim fair use under § 107. The Court relied on previous decisions, all holding that parody may be fair use, to reach this conclusion.¹⁵¹

Applying the modern definitions of "parody,"¹⁵² the Court indicated that the parodic version must still comment on, or criticize, the original. Only in so doing may the parody incorporate elements of the prior work.¹⁵³ However, if the work uses the elements merely out of laziness or for shock value, rather than for comment or criticism, a fair use defense is severely weakened.¹⁵⁴ Consequently, the other element of the first factor, commerciality, weighs more heavily in the fair use determination.¹⁵⁵

The Court then applied the first factor to determine if 2 Live Crew's track did in fact comment on Orbison's song. The Court framed the threshold inquiry in assessing a fair use defense of a parody as being "whether a parodic character may reasonably be perceived."¹⁵⁶ The Court was not willing to evaluate the effectiveness of the parody.¹⁵⁷

149. *Id.*

150. *Id.* The Court sought this "transformative" character because this metamorphosis keeps the work from infringing upon the original, thus maintaining the goal of the Copyright Clause. *Id.* However, the Court noted that transformation, or lack thereof, is not determinative on the issue of fair use, but if present, weighs strongly in favor of fair use. *Id.*

151. *Id.* at 1171; *see, e.g.*, *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (holding that the parody "When Sunny Sniffs Glue" of the song "When Sunny Gets Blue" is a fair use); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (holding that the parody "I Love Sodom" of the song "I Love New York" is a fair use).

152. *See supra* note 7.

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

154. *Id.*

155. *Id.*

156. *Id.* at 1173.

157. *Id.* The Court stated that this inquiry is irrelevant to a fair use evaluation. *Id.* After all, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of" a work. *Id.* (quoting Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)); *see also* *Yankee Publishing, Inc. v. News Am. Publishing, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.").

However, the Court determined that 2 Live Crew's version could reasonably be perceived as commenting on the original:

2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of the sentiment that ignores the ugliness of the street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.¹⁵⁸

The Court's analysis subsequently turned to the second component of the first factor, the commercial nature of the use. This was the Court's primary emphasis in this case. The Court ruled that the court of appeals erred in assigning undue weight and essentially confining its treatment to the fact that 2 Live Crew's song was made for a commercial purpose.¹⁵⁹ This misapplication was based on the erroneous proclamation in *Sony*¹⁶⁰ that "every commercial use of copyrighted material is presumptively . . . unfair."¹⁶¹ According to the Court, the commercial or non-profit educational nature of a work is only one element in assessing the fair use factors.¹⁶² Consequently, the Court reasoned that a commercial use alone does not bar a finding of fair use any more than a nonprofit educational use requires a finding of fair use.¹⁶³

The Court reiterated its assertion that *Sony* does not stand for the proposition that commerciality creates a presumption against a fair use.¹⁶⁴ The Court did not give any justification for its anomalous statement in *Sony*; it merely cited many examples from *Sony* indicating an express rejection of any per se rule. For instance, in *Sony*, the Court called for a "sensitive balancing" of all pertinent facts, noted that Congress had rejected any "bright-line" rules, and stated that the commerciality, or lack thereof, is "not conclusive" and should be bal-

158. *Campbell*, 114 S. Ct. at 1173.

159. *Id.* at 1174.

160. 464 U.S. 417, 451 (1984).

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

162. *Id.* The Court based this contention on the language of the Copyright Act and previous Supreme Court cases. For example, the Court interpreted the main clause of § 107 as mandating a broader investigation into purpose and character. Moreover, in *Harper & Row*, the Court indicated that the congressional intent behind § 107 was to maintain a complete and total analysis of all of the relevant facts rather than to adopt per se rules. *Id.* (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985)). The Court then explained the consequence of a presumption of unfair use for commercial works: the statute would be obliterated since nearly all of the illustrative uses listed in § 107, including news reporting, comment, criticism, teaching, scholarship, and research, are carried on for profit. *Id.*

163. *Id.*

164. *Id.*

anced with the other factors.¹⁶⁶ The Court ultimately concluded that *Sony* requires consideration of all of the factors and nothing less, and that the commerciality of a work merely tips the scale in the direction of unfair use.¹⁶⁶

The Court then proceeded to the second factor, the nature of the copyrighted work.¹⁶⁷ In considering this factor, the Court acknowledged that some works fall more neatly under the scope of the Copyright Clause and therefore are more stringently protected.¹⁶⁸ The Court agreed with both the district court and court of appeals in finding that Orbison's "Oh, Pretty Woman" was one such work.¹⁶⁹ Nonetheless, the Court dismissed the second factor as indeterminative in any parody case, "since parodies almost invariably copy publicly known, expressive works."¹⁷⁰

The Court found the third factor more dispositive on the issue of fair use. The third factor applies when attempting to determine whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole' . . . are reasonable in relation to the purpose of the copying."¹⁷¹ This factor is thus connected to the first factor because

165. *Id.*

166. *Id.* The Court was aware that, when considering whether use is commercial or not, it may be difficult to distinguish between commercial and noncommercial use. The Court provided a vivid example: The creation of a parody for the sole purpose of promoting a product weighs more heavily against fair use "than the sale of a parody for its own sake, let alone one performed a single time by students in school." *Id.*

167. *Id.*

168. *Id.* at 1175. The Court had difficulty explaining why some works are more deserving of protection than others, although the Court did provide examples of where a distinction between "core" and "copied" work exists. *Id.* It appears from these examples that works requiring a great deal of creative and intellectual input are less likely to be subject to a fair use defense than mere factual compilations. *See id.*

169. *Id.* Once again, the Court gave no rationale for this conclusion, but it can be easily seen that writing and recording a song would clearly be a more creative endeavor than merely collecting facts and recording them in a book. Nevertheless, this analysis is suspect if the Court is implying that, by virtue of its creativity, a song is more closely aligned with the goals of the Copyright Clause than is a factual compilation. After all, a song cannot be considered more useful than an encyclopedia full of knowledge. *See supra* notes 95-97 and accompanying text.

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

171. *Id.* (quoting 17 U.S.C. § 107(3) (1988)); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (stating that extensive quoting may be fair use in a review of a published work or a news account of a speech, but not in a news story on an unpublished book); *see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (finding that home videotaping of television programs,

the degree to which a particular copying is valid hinges on the purpose and character of the use.¹⁷² Moreover, this factor is linked to the fourth factor because the same facts will expose the extent “to which the parody may serve as a market substitute for the original.”¹⁷³ The Court illustrated the relationship among the factors in the following manner: If a party copies verbatim a “substantial portion” of the original, the copied work is less likely to be transformative.¹⁷⁴ Since the copy does not significantly alter the original, it is likely to fulfill the market demand for the original.¹⁷⁵

The Court agreed with the court of appeals’ evaluation that the third factor requires consideration of both the quantity and quality of the materials used.¹⁷⁶ The Court illustrated the relationship between quantity and quality with a discussion of its *Harper & Row* decision.¹⁷⁷ In *Harper & Row*, even though only 300 words from President Ford’s memoirs were copied, the Court found unfair use.¹⁷⁸ The Court reasoned that the particular quotes “amount[ed] to the ‘heart of the book,’” the part that will most likely sell the book.¹⁷⁹ However, the Court disagreed with the lower court’s application of these guidelines.¹⁸⁰

Before explaining its decision, the Court offered a general characterization of parody. The Court forewarned that “[p]arody presents a difficult case” since its effectiveness necessarily depends upon an audience recognizing the original within the new work.¹⁸¹ Including the “original’s most distinctive features” is an important aid in recognizing the original within the copy.¹⁸² It is reasonable for a parodist to use as much of the original as is necessary to “conjure up” the original.¹⁸³ However, assessing reasonable use is not an easy process.¹⁸⁴

although it involves the reproduction of an entire work is not necessarily indicative of unfair use).

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

173. *Id.*

174. *Id.* at 1175-76.

175. *Id.*

176. *Id.* at 1175; see *Fisher v. Dees*, 794 F. 2d 432, 438-39 (9th Cir. 1986).

177. *Campbell*, 114 S. Ct. at 1175; see *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 564-66 (1985).

178. *Harper & Row*, 471 U.S. at 564-66.

179. *Campbell*, 114 S. Ct. at 1175-76 (quoting *Harper & Row*, 471 U.S. at 564-66).

180. *Id.* at 1176.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* The Court reasoned that, once recognition is achieved, how much more can be taken without constituting an infringement depends upon the extent to which the artist intended to parody the original and the probability that the parody will replace the original in the marketplace. *Id.*

Unlike the court of appeals, the Supreme Court found that the amount of the original taken by 2 Live Crew was not unreasonable as a matter of law under the third factor of the fair use doctrine, even though 2 Live Crew's version may have purloined the heart of the original.¹⁸⁵ In making this determination, the Court scrutinized "Pretty Woman," evaluating its content, lyrics, and music.¹⁸⁶ The Court indicated that 2 Live Crew did in fact copy both the distinctive opening bass riff and the first line of the original.¹⁸⁷ However, the Court determined that this was reasonable use, considering the parodic purpose of the song.¹⁸⁸ The Court felt that these initial characteristics were the heart of the original and were necessary for "conjuring up" the original.¹⁸⁹ The Court concluded that using a less distinctive portion of the original would not have achieved the work's parodic purpose.¹⁹⁰

The Court's inquiry then focused on the parodist's changes beyond the use of the song's opening.¹⁹¹ Central to the Court's analysis were reasonableness in light of the parody's purpose and ability to replace the original in the market.¹⁹² The Court thought it highly determinative that 2 Live Crew, after copying the original bass riff and lyrics, "departed markedly from the Orbison lyrics for its own ends" and "produced otherwise distinctive sounds, interposing 'scraper' noise, overlaying the music with solos in different keys, and altering the drum beat."¹⁹³ Accordingly, the Court found the parodistic effect of the work outweighed the insignificant amount of copying.¹⁹⁴ Therefore, the third factor, as a matter of law, did not support a claim of copyright infringement against 2 Live Crew.¹⁹⁵

In concluding its analysis of the third factor, the Court ruled that as far as the lyrics were concerned, 2 Live Crew took no more of the original than was necessary to conjure up the original.¹⁹⁶ As such, the Court

185. *Id.*

186. *See id.* at 1172-73, 1176.

187. *Id.* at 1176.

188. *Id.*

189. *Id.*

190. *Id.*; *see Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986).

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

192. *Id.*

193. *Id.* (citing *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991) (subsequent history omitted)).

194. *Id.*

195. *Id.*

196. *Id.*

“fail[ed] to see how” 2 Live Crew’s “copying [could] be excessive in relation to its parodic purpose, even if the portion taken is the original’s ‘heart.’”¹⁹⁷ The Court expressed no opinion on whether the copying of the bass riff was excessive, but instead remanded the case to determine this issue “in light of the song’s parodic purpose” and “the potential for market substitution.”¹⁹⁸

Finally, the Court arrived at the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁹⁹ This factor requires a court to determine not only the market harm caused by the particular work, but also the harm to the potential market for the original that would be caused by an increase in similar harmful conduct by other people.²⁰⁰ Harm to either the original market or the derivative market may satisfy this factor.²⁰¹

In dispensing with the effect caused by 2 Live Crew’s song on the market for the original, the Court once again found error in the court of appeals’ analysis.²⁰² The court of appeals presumed that a commercial use is harmful to the original, thus construing the factor against 2 Live Crew without a showing by Acuff-Rose of any particular harm.²⁰³ The Court finally had to distinguish the facts of *Sony* and further explain its reasoning, in order to retreat from any per se rules or presumptions when a commercial use is involved.²⁰⁴

The Court explicitly reserved the issue of a presumption of market harm for commercial use—an idea supported by *Sony*—for a case involving mere verbatim duplication of the original. In that instance, the work clearly is not transformative, but a mere copy of the original.²⁰⁵ That kind of copy thus eliminates the need for the original in the marketplace and therefore causes harm.²⁰⁶ On the contrary, where the work is

197. *Id.*

198. *Id.* at 1176-77.

199. 17 U.S.C. § 107(4) (1988).

200. 3 NIMMER, *supra* note 59, § 13.05[A][4] (1994).

201. As stated previously, under § 106, one of the exclusive rights of a copyright owner is the right to prepare derivative works based on the owner’s original work. Therefore, the fourth factor requires a consideration of harm to both the original and any derivative works. See *Berline v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 376 U.S. 822 (1964).

202. *Campbell*, 114 S. Ct. at 1177-79.

203. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992), *rev’d*, 114 S. Ct. 1164 (1994). The court of appeals continued to base its reasoning on *Sony*, holding that because “the use of the copyrighted work is wholly commercial . . . we presume a likelihood of future harm to Acuff-Rose exists.” *Id.*

204. *Campbell*, 114 S. Ct. at 1177-78.

205. *Id.* at 1177.

206. *Id.* The Court reiterated the need for a “sensitive balancing of interests” in all other instances. *Id.* at 1177 n.21 (quoting *Sony Corp. of Am. v. Universal City Stu-*

transformative, containing distinguishable or additional elements, it will not necessarily serve as an exact market substitute for the original in every instance.²⁰⁷ Furthermore, when the transformative work is clearly a parody, the requisite market harm will be less recognizable, or even non-existent, because the parody and the original usually play different roles in the market.²⁰⁸

Nevertheless, the Court acknowledged that parodies inevitably cause harm to the originals on which they are based, but they cause a different type of harm.²⁰⁹ Using the example of a theater review, the Court analogized that, because of its inherent critical purpose, a parody, like a negative review, may inhibit demand for the original.²¹⁰ However, the Court noted that mere criticism does not amount to copyright infringement;²¹¹ instead, the parody must wholly displace the market demand for the original by being so similar in context that consumers either like the parody just as well as the original or actually prefer it over the original.²¹² The Court remanded the issue of market harm to the original for more evidence concerning the relevant markets.²¹³ The Court found that, since fair use is an affirmative defense, 2 Live Crew bears the burden of proving that their song did not act as a market substitute for the original.²¹⁴

Next, the Court considered the logical corollary: the potential market harm of 2 Live Crew's song on derivative works, including other parodies, created or licensed to be created by Acuff-Rose.²¹⁵ The Court quickly dismantled any contention that 2 Live Crew's song could cause harm to a derivative parody made by Acuff-Rose.²¹⁶ The Court based its reasoning on the oft-stated rule that "there is no protectable derivative

dios, Inc., 464 U.S. 417, 455 (1984)). The Court stated that "[m]arket harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." *Id.* *Sony* involved noncommercial copying of television programs, and the Court contrasted this with commercial use. *Sony*, 464 U.S. at 451.

207. *Campbell*, 114 S. Ct. at 1177-78.

208. *Bisceglia*, *supra* note 8, at 23.

209. *Campbell*, 114 S. Ct. at 1177-78.

210. *Id.* at 1178.

211. *Id.* (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

212. *Id.*; *see also Fisher*, 794 F.2d at 438.

213. *Campbell*, 114 S. Ct. at 1177, 1179.

214. *Id.*

215. *Id.* at 1178.

216. *Id.*

market for criticism."²¹⁷ In explaining this rule, the Court stated that even though the copyright owner has the exclusive right to prepare, and license rights to others to prepare, derivative works based on the original, the owner will almost never develop or license the right to develop derivative works that are criticisms of his original.²¹⁸ Therefore, logically flowing from this is the rule that the only potential derivative uses are those that the original creator would create or license to create himself.²¹⁹ These uses would not include critical works of the original.²²⁰ The Court concluded that the lower court erred in considering the market harm on potential parodic derivative works created by Acuff-Rose.²²¹

After dispensing with the issue of parodic derivative uses, the Court considered the potential market harm of 2 Live Crew's song on other types of derivative works that are not critical of the original.²²² The Court found that a parody may be more than merely critical of the original; it may encompass other elements that go beyond criticism to become a protectable derivative work.²²³ In application, the Court asserted that 2 Live Crew's song represents not only a parody, but rap music as well. Accordingly, the Court considered the market harm of 2 Live Crew's song on potential rap derivatives of "Oh, Pretty Woman" created by Acuff-Rose.²²⁴

The Court found that there was insufficient evidence to decide the likely effect of 2 Live Crew's parodic rap song on the derivative market for a non-parody, rap version of "Oh, Pretty Woman."²²⁵ The Court resisted Acuff-Rose's contention that 2 Live Crew's recording a rap version of "Oh, Pretty Woman" and another rap group requesting a license to record a rap derivative necessitated a finding that a rap market existed for "Oh, Pretty Woman."²²⁶ The Court stated that it needed more evidence to find that a potential rap market was harmed by 2 Live Crew's parodic rap version and thus remanded the issue for further fact-finding.²²⁷

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1178-79.

223. *Id.* at 1178. In such an instance, the law ignores the critical elements and only considers the other elements of the work. *Id.*

224. *Id.* at 1178-79. Again, the Court was looking for a market substitution effect on rap derivatives of "Oh, Pretty Woman" caused by 2 Live Crew's rap song, rather than the mere harm caused by its critical nature. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

In conclusion, the Supreme Court held that it was error for the court of appeals to rule that "the commercial nature of 2 Live Crew's parody of 'Oh, Pretty Woman' rendered it presumptively unfair."²²⁸ The Court stated that, in ascertaining whether a transformative use such as a parody is fair, there is no presumption of "either the first factor, the character and purpose of the use, or the fourth factor, market harm," when the nature of the work is wholly commercial.²²⁹ Moreover, the Court found that the court of appeals erred in holding that 2 Live Crew incorporated too much of Orbison's original, given the underlying parodic purpose of 2 Live Crew's version.²³⁰ The Court therefore reversed the decision of the court of appeals and remanded for further proceedings consistent with its opinion.²³¹

B. Concurring Opinion

In his concurring opinion, Justice Kennedy agreed with the Court that the case should be remanded, but offered some additional insight and clarification concerning fair use in the context of parody.²³² Justice Kennedy began by agreeing that there is now a fair use defense for parodies.²³³ More specifically, he listed several rules regarding parody and its limits.²³⁴ Most of these rules only rehashed the Court's assertions, but some further clarified them. One of these rules is that a commercial parody may be a fair use.²³⁵ Another is that parody must "target the original" and comment on or criticize the original.²³⁶ Since the subject

228. *Id.* at 1179.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1180-82 (Kennedy, J., concurring).

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

234. *Id.* (Kennedy, J., concurring).

235. *Id.* (Kennedy, J., concurring). For a discussion on the Court's application of this rule, see *supra* notes 144-230 and accompanying text.

236. *Campbell*, 114 S. Ct. at 1180 (Kennedy, J., concurring). Justice Kennedy stated, "It is not enough that the parody use the original in a humorous fashion 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." *Id.* (Kennedy, J., concurring); see *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (stating that the copied work must be at least in part "an object of the parody"), *cert. denied*, 113 S. Ct. 365 (1992); *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) ("[A] humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the target of the work in question.").

of a parody must be the original version, this necessitates some use of the elements of the original in order to “conjure up” the original in the minds of the viewer or listener.²³⁷ Lastly, Justice Kennedy stated a rule similar to the Court’s holding that the copyright owner’s right to prepare or license derivative works does not include critical works, such as parodies.²³⁸

After defining the general limits of parody and the fair use doctrine, Justice Kennedy continued to restate the Court’s assertions, including its take on the four factors of the fair use test. However, Justice Kennedy attempted to clarify the factors, using them as reinforcement for keeping the definition of parody within its proper limits.²³⁹ The first factor, the purpose and character of use, implicates the definition of parody.²⁴⁰ The second factor, the nature of the copyrighted work, is almost irrelevant to a fair use inquiry “since ‘parodies almost invariably copy publicly known, expressive works.’”²⁴¹ Justice Kennedy then insisted that the third factor, the amount and substantiality of the portion used in relation to the whole, is also contained within his “target the original” definition of parody.²⁴²

The Justice proceeded to weave his definition of parody throughout his in-depth analysis of the fourth factor of the fair use doctrine, the effect of the use on the market for the original and derivative works.²⁴³ Justice Kennedy seemed slightly concerned with the Court’s consideration of this factor, but still reinforced much of the Court’s analysis.²⁴⁴ He did, however, expressly consider the difficulty in determining whether harm to the market results from a parody’s criticism or its substitution of the original.²⁴⁵

237. *Campbell*, 114 S. Ct. at 1180 (Kennedy, J., concurring); see also *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (holding that if the original is not the target of the parody, “there is no need to conjure it up”).

238. *Campbell*, 114 S. Ct. at 1180 (Kennedy, J., concurring).

239. *Id.* at 1180-81 (Kennedy, J., concurring).

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

241. *Id.* (Kennedy, J., concurring). This, again, is merely a restatement of what the majority opinion stated. See *supra* notes 167-70 and accompanying text.

242. *Campbell*, 114 S. Ct. at 1181 (Kennedy, J., concurring). To expound upon this proposition, Justice Kennedy stated that, in order to “target the original” and to receive the desired parodic effect, the amount of copying needed to “conjure up” the original depends upon the object of the parody. *Id.* (Kennedy, J., concurring). Some works that are less popular than others require substantial copying to make the original recognizable in the parody, while other works with a very distinctive element require that only the particular element be copied. *Id.* (Kennedy, J., concurring).

243. *Id.* (Kennedy, J., concurring).

244. See *supra* notes 199-227 and accompanying text for the Court’s statements concerning this factor.

245. *Campbell*, 114 S. Ct. at 1181 (Kennedy, J., concurring).

Nevertheless, Justice Kennedy hammered home the idea that the definitional limits of parody are the "guiding light," and if followed within the appropriate bounds, the inquiry into the fourth factor would be simple.²⁴⁶ What Justice Kennedy implied was that by definition a parody is an original and independent creative work with its own distinctive characteristics. Thus, independent "[c]reative works can compete with other creative works for the same market, even if their appeal is overlapping."²⁴⁷

Despite Justice Kennedy's seemingly inadequate knowledge of copyright law with respect to derivative works, his analysis is still constitutionally indispensable. Although constitutional analysis was not expressly part of the Court's discussion, it was implied in the Court's fair use analysis. Justice Kennedy's discussion focuses on the protection of a copyright owner's exclusive constitutional right to exploit a work:

We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a "comment on the naivete of the original," . . . because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven's Fifth Symphony or "Achy, Breaky Heart" is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright deserves

246. *Id.* (Kennedy, J., concurring).

247. *Id.* (Kennedy, J., concurring). Justice Kennedy's point is not entirely clear, but his discussion appears to skirt the issues when discussing parodies. As stated previously, a parody, because it incorporates many of the elements of the original, would properly be classified as a derivative rather than original work, notwithstanding the fair use exception to infringement. Justice Kennedy defines the parody as a "new creative work," which can "compete with other creative works," including the original, for the same market, "even if their appeal is overlapping." *Id.* at 1181 (Kennedy, J., concurring). By implementing the words "new creative work," Justice Kennedy thus categorizes the parody as an original rather than derivative work. *See id.* Of course, if 2 Live Crew's song were wholly independent and "new[ly] creat[ed]," we would not be discussing the fair use defense and the work could freely compete with the original for the same market. However, 2 Live Crew's work is derivative, which is not wholly independent and newly created, but is based upon and targets another work. In a derivative work, the author must contribute "something more than a merely trivial variation, something recognizably his own." *See L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (internal quotation marks omitted) (quoting *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951)), *cert. denied*, 429 U.S. 857 (1976). However, the central characteristic of a parody is its use of another work's elements, and under the fourth factor, it may not compete with the original for the same market. *See* 17 U.S.C. § 107 (1989 & Supp. 1993).

the goals of copyright just as much as overprotection, by reducing the financial incentive to create.²⁴⁸

Finally, Justice Kennedy expressed his discontent with the Court's finding that 2 Live Crew's song could reasonably be perceived as commenting on or criticizing Roy Orbison's "Oh, Pretty Woman."²⁴⁹ The Justice noted that he was "not so assured" that 2 Live Crew's song qualifies as a parody under the first factor.²⁵⁰ Despite this uncertainty, he agreed with the Court's treatment of the remaining three factors, at least to the extent that its analysis provided sufficient guidance from which the District Court could determine that the song is not a fair use.²⁵¹

V. IMPACT

The fair use doctrine has existed since 1841 when it was bestowed—some say fatally and surreptitiously—upon the judicial consciousness by Justice Story in *Folsom v. Marsh*.²⁵² The doctrine, subsequently codified in the Copyright Act of 1976, has evolved continuously since then, with the courts desperately trying to set forth the proper auxiliaries and factors from which to apply the balancing test.²⁵³

Nevertheless, in the courts' neverending ethereal quest for the alchemist's magical elixir by which to transmute this vile doctrine into a golden and translucent application, they have strayed from and lost sight of both the explicit rationales underlying the doctrine and the express congressional mandate of the four factors. Although the issue remains confusing, courts are not to be blamed for this chaos. After all, this enigmatic doctrine has been called "the most troublesome in the whole law of copyright."²⁵⁴ Fortunately for courts, attorneys, law students, artists, and society as a whole, the Supreme Court in *Campbell v. Acuff-Rose* has deciphered the fair use code. The Court's holding will have a substantial impact in many areas.²⁵⁵

A. Judicial

The *Campbell* decision will impact the judicial system in two ways. First, *Campbell* has provided definition, clarity, and justification to the existing four-prong fair use doctrine without altering Congress' intent.

248. *Campbell*, 114 S. Ct. at 1181 (Kennedy, J., concurring).

249. *Id.* at 1181-82 (Kennedy, J., concurring).

250. *Id.* at 1181 (Kennedy, J., concurring).

251. *Id.* at 1181-82 (Kennedy, J., concurring).

252. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

253. See *supra* notes 61-116 and accompanying text.

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

255. See *infra* notes 256-73 and accompanying text.

Prior to *Campbell*, the task of formulating an efficient and clear application was left to the lower courts, leaving them grasping for the proper standard to apply and resulting in widespread inconsistencies.²⁵⁶ By reaffirming the four factors and clarifying the manner in which they are to be applied, the Court has set forth well-defined, consistent, and predictable standards the lower courts can easily apply. Favoring a new or modified version would abrogate the most meaningful, definitive, and workable standard available for adjudicating parody claims and would again throw the lower courts' decisions into disarray.

Along with the affirmation and elucidation of the four-prong fair use doctrine in *Campbell* the Court provided a well-defined and flexible standard for protecting the rights of both the artist and parodist. Because the facts and circumstances of each case are markedly different, the Court emphasized the folly of trying to formulate a set of restrictive rules for various factual situations involving unfair use of copyrighted material.²⁵⁷ The Court retreated from *Sony* and shunned any per se rules or presumptions, instead calling for a balancing of all the facts and circumstances.²⁵⁸ Ruling that a particular parody, such as one with a purely commercial purpose, is per se unfair use would open a floodgate of cases to create other per se protections.²⁵⁹ The flexible, fact-sensitive approach envisioned by Congress would therefore be destroyed.²⁶⁰

There is little doubt that the creation of a per se approach to fair use would have the consequence of muddying § 107's recently cleared waters. The legal questions it would spawn are legion. For example, if a commercial purpose becomes a per se unfair use, then courts must decide what constitutes a commercial purpose.²⁶¹ Moreover, if vulgarity or

256. See *supra* notes 61-116 and accompanying text.

257. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174-75 (1994).

258. *Id.*

259. See H.R. REP. NO. 94-1476, 94th CONG., 2d SESS. 66 (1976) (Congress had "no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

260. See *id.*

261. Many other problems arise with a commercial purpose presumption of unfair use. First, many of the favored uses in § 107 contain profit-seeking elements. Deveny A. Deck, *Fine Tuning Fair Use Music Parody: A Proposal For Reform in Acuff-Rose Music, Inc. v. Campbell*, 71 U. DET. MERCY L. REV. 59, 68 (1993). For example, news reporting is certainly an industry with profit motives. Moreover, many scholars earn a living from publishing their research. See 2 HOWARD B. ABRAMS, LAW OF COPYRIGHT, § 15.04[C][1] (1991). Secondly, by focusing on the commercial nature of a parody, other enumerated § 107 purposes such as criticism and comment are ignored. Deck,

immorality become unfair uses, courts must again determine their definitions. The doctrinal complexities that would confront courts by accepting one per se rule would be byzantine. It would unnecessarily embellish and nullify the flexibility of the four-prong test of § 107.

B. Constitutional

Ascertaining the fairness of a parody of a copyrighted work raises two concerns. At one end of the spectrum, the Constitution specifically promotes the creation of art by granting authors the exclusive right to exploit their own work.²⁶² At the opposite end, a court cannot favor this right to the degree that other works even remotely related to the copyrighted work, in form or content, constitute infringement. This would clearly subvert an individual's right to free speech.²⁶³ With courts having to consider both aforementioned concerns in applying a fair use standard, the current enunciation of the fair use analysis in *Campbell* provides the optimal standard for assessing the fairness of a parody. The *Campbell* standard promotes equilibrium between the two constitutional concerns.

The *Campbell* Court's enunciation of the first fair use prong, the purpose and character of the use, is carefully constructed to reconcile these two opposing concerns. It accomplishes this feat in two ways. First, uses such as criticism, comment, news reporting, scholarship, and research weigh more heavily in favor of fair use than does a purely commercial use.²⁶⁴ Through this distinction, the fair use doctrine subordinates a copyright holder's interest to public interest in the use of valuable information.²⁶⁵ Second, the *Campbell* Court set forth the requirement of transformation under the first factor: the new work must do more than merely repackage the original; it must build upon or alter the purpose and character of the original work.²⁶⁶ In this manner, First Amendment considerations override the copyright holder's interest only when the parody provides new information, insights, and understanding, thereby enriching the public's knowledge.²⁶⁷ Without these two mechanisms, an

supra, at 68. Lastly, a commercial use presumption invalidates the Copyright Clause by discouraging the creation of socially useful art merely because the work produces income. *Id.*

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

263. See U.S. CONST. amend. I. For a discussion of the relationship between the Copyright Clause and First Amendment and the fair use doctrine's reconciliation of these two concerns, see *supra* notes 41-49 and accompanying text.

264. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174 (1994).

265. Hartnett, *supra* note 46, at 199. "The first amendment governs not only the right to speak and publish, but also the right to receive information. The copyright clause is also directed to the furtherance of learning and education." *Id.*

266. See *supra* notes 149-55 and accompanying text.

267. See Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105,

individual copyright owner would be protected to such an extent under the copyright clause that such protection would completely impede the public's access to new information and ideas. Thus, the first prong serves the interest of these two conflicting but equally important considerations.

The construction of the second prong of the fair use doctrine, which focuses on whether the nature of the work is factual or creative, has negligible impact on the balancing of the First Amendment and Copyright Clause since most parodies target creative, not factual, works.²⁶⁸

The design of the third prong, the amount and substantiality of the taking, also harmonizes the concern of an author's exclusive right in their creation with the public's interest in free speech and exposure to information and ideas. In other words, by taking too much of a copyrighted work, a parodist has generated little, if any, original material and thus has no speech to protect. However, if the parodist takes less than this threshold amount, the remainder of the parody obviously comprises new, independent and socially desirable thoughts, which are protected by the First Amendment.

Finally, the *Campbell* Court's validation of the fourth factor, the effect of the use on the market for the copyrighted work, has kept intact the delicate balancing of interests underlying the factor. The rationale behind this fourth factor is based on the premise that copyright laws exist to stimulate artistic creativity for the benefit of the public. Unfair uses would impair financial incentives of authors and, in turn, stifle creative energy.²⁶⁹ However, the *Campbell* Court's requirement of market substitution²⁷⁰ aims, to some degree, to limit the protection of the artist so as to account for the social benefit derived from parodies.²⁷¹ Rather than denying fair use when the copyright holder makes any showing of negative market effect, market substitution analysis requires that the harm be great enough to supplant the economic incentives of the original author. Thus, the fourth factor protects parody's social function under the First Amendment, while promoting the fundamental premise of the

1111 (1990).

268. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U. S. 822 (1964).

269. *Id.*

270. *See supra* note 199-201 and accompanying text.

271. The social benefit derived from a parody is accomplished through First Amendment rights, the protection of which serves to promote the public's interest in the free flow of ideas as well as the broadest dissemination of information. *See infra* notes 275-81.

Copyright Clause. Authors are protected from excessive interference with the financial rewards of their creative efforts.

C. Proposed Additional Factor

The fundamental premise of the Copyright Clause is that protection will promote economic incentive to the author.²⁷² Given this premise, this Note suggests that an additional factor be added to the fair use calculus: Whenever a fair use excuses a parody from copyright infringement, the parodist must pay a fee or royalty to the copyright owner. Congress should determine the amount of this fee or royalty.²⁷³ Without such a reward to the copyright holder, a parodist receives a “free ride” from the copyright system. As a result, artists may have less incentive to create, knowing that someone else can come along and freely use parts of their work.²⁷⁴ Compensating an author supports the goals behind the Copyright Clause and therefore provides equilibrium between it and the First Amendment.

VI. CONCLUSION

“A picture naturally leads our thoughts to the original.”²⁷⁵

The doctrine of fair use has earned a reputation as “the most troublesome in the whole law of copyright.”²⁷⁶ Compounding the “trouble,” parody has been labeled the most “troublesome fair use issue.”²⁷⁷ These sentiments are significantly bolstered by the widespread confusion among the lower courts concerning the enigmatic fair use doctrine in the context of parody.²⁷⁸ Fortunately, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* ended the confusion. By reaffirming the four factors and clarifying the manner in which they are to be applied, the Court set forth well-defined, consistent, and predictable standards lower

272. This Note recognizes that certain types of works are created without monetary motivation. Nevertheless, the Framers of the Constitution “were political and social realists with a broad knowledge of human nature and of the needs of society.” JOHN S. LAWRENCE & BERNARD TIMBERG, *FAIR USE AND FREE INQUIRY: COPYRIGHT LAW AND THE NEW MEDIA* 330 (2d ed. 1989). The framers realized that except in a minority of instances, “the profit system” was the most essential mechanism with which to “stimulate” creative activity. *Id.*

273. This author is aware of only one other author who has proposed such a fee arrangement. See LAWRENCE & TIMBERG, *supra* note 271, at 319.

274. See *id.* at 320.

275. DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 14 (1977).

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

277. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (Nelson, J., dissenting) (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

278. See text accompanying *supra* notes 61-116.

courts can easily and properly apply. In the process, the Court not only validated parody as an art form, but implicated other important considerations as well.

In the Court's most significant analysis, it strongly opposed articulating an infinite set of bright-line rules for every unfair use of copyrighted material. The Court specifically retreated from *Sony's* holding that a commercial use is presumptively unfair. Instead, the Court called for a case-by-case evaluation in light of all the particular facts and circumstances, with no one factor being issue-determinative.²⁷⁹

Throughout its evaluation, the Court balanced two conflicting elements of the Constitution: the Copyright Clause and the First Amendment. In so doing, the Court properly acknowledged that the benefits conferred upon society by the parody's humor, commentary, and criticism of the original work outweigh the copyright holder's monopoly right.

Thomas Kuhn once wrote:

[W]hen paradigms change, the world itself changes with them. Led by a new paradigm, scientists adopt new instruments and look in new places. Even more important, during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before . . . Literally as well as metaphorically, the man accustomed to inverting lenses has undergone a revolutionary transformation of vision.²⁸⁰

Just as in science, inversions of art—the conversion of and building upon past works—lead to “revolutionary transformation[s] of vision.” In turn, new visions spark new ideas, beliefs, and creations. The recycling and transformation of old ideas in order to create new and genuine expressions is vital to the fluid intellectual, educational, and emotional expansion of our society. The Court in *Campbell* recognized parody as such a transformation. To ignore this recognition and to inhibit such creative

279. See *supra* notes 143, 164-66 and accompanying text.

280. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-12 (2d ed. 1970).

thought, comment and criticism would painfully suffocate the flourishing of knowledge and culture, and ultimately, the advancement of society.²⁸¹

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281. This notion has been advanced by Judge Kozinski:

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting) (footnote omitted), *cert. denied*, 113 S. Ct. 2443 (1993).

APPENDIX A

"Oh, Pretty Woman" 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 on home, it's late
There'll be tomorrow night, but wait!
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

APPENDIX B

“Pretty Woman” as Recorded by 2 Live Crew

Pretty woman walkin' 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 beg
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's 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