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# *Campbell V. Acuff-Rose Music, Inc.*, and the Economic Approach to Parody: An Appeal to The Supreme Court

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# **CAMPBELL v. ACUFF-ROSE MUSIC, INC., AND THE ECONOMIC APPROACH TO PARODY: AN APPEAL TO THE SUPREME COURT**

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## **I. INTRODUCTION**

On March 29, 1993, the Supreme Court granted certiorari to hear the case of *Campbell v. Acuff-Rose Music, Inc.*<sup>1</sup> In *Campbell*, the Supreme Court will decide whether the commercial sale of a musical parody which pokes fun at a popular song may be restricted by the copyright holder of the original song under the Copyright Act of 1976.<sup>2</sup> In granting certiorari, the Court limited its consideration to a specific question: "Whether petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. section 107."<sup>3</sup> While most courts have recognized that under Section 107 certain parodies may not be subject to the restrictions of the Copyright Act, there is no consensus regarding the standard to apply in determining whether a parody is exempt.<sup>4</sup> Many courts, including the Sixth Circuit in *Acuff-Rose*, draw the line at com-

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\* B.A., Providence College, 1990; J.D., University of Miami School of Law, 1993. This Comment won first prize in the regional Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors, and Publishers, and is being considered in the national competition.

1. 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993).

2. Hereinafter referred to as "the Act" or "the Copyright Act," 17 U.S.C. §§ 101-810 (1976).

3. 61 U.S.L.W. 3667 (1993).

4. "Section 102(a) of the Copyright Act, adopted under the express authority of Article I, Section 8 of the United States Constitution granting Congress the power to give authors exclusive rights to their writings, protects musical works, including accompanying words." *Acuff-Rose*, 972 F.2d at 1434 (citing 17 U.S.C. § 102(a)(2)). 17 U.S.C. § 107, which provides for "fair uses," is the section through which most courts have found parodies exempt from copyright restrictions.

mercial use, prohibiting parodists from creating parodies of copyrighted material for profit.<sup>5</sup> As a result, the Court's decision in *Campbell* undoubtedly will have a significant impact in the entertainment industry where parodies play a popular role.<sup>6</sup>

How should the competing interests of original artists and parodists be balanced under copyright law? This question has plagued courts since the drafters of the Copyright Act failed to expressly provide an answer.<sup>7</sup> *Campbell* presents the Supreme Court with the opportunity to either adopt the economic approach favored by many, reject the economic approach in favor of traditional fair use standards, or create a whole new standard particular to parody cases. This Comment addresses the options before the Court in *Campbell* by analyzing the role of parody and looking at standards applied by prior courts and proposed by critics.

Section II provides an overview of parody and copyright law, beginning with a look at copyright protection in general and the fair use exception in particular. This section covers the Supreme Court cases addressing fair use, as well as all recent cases addressing parody under Section 107 of the Copyright Act. Section III focuses on *Campbell* and the particular issues before the Supreme Court. Section IV reaches the conclusion that there are two key issues in parody cases: whether the work is in fact a parody and whether parodies are entitled to greater freedom than mere commercial copying. Section IV also urges the Supreme Court to recognize that parodies present a number of interests that do not exist in copying cases and that they should be entitled to the fair use exemption from copyright protection.

## II. BACKGROUND

*Campbell* comes at a time when confusion and criticism about the application of the principles of copyright law to parodies are at a peak.<sup>8</sup> Since the Supreme Court has not addressed parody under

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5. The Sixth Circuit made it perfectly clear where they were drew the line: "It is likely, for example, that an identical use of the copyrighted work in this case at a private gathering on a not-for-profit basis would be a fair use. It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." *Acuff-Rose*, 972 F.2d at 1439. (Because different parties petitioned to the Sixth Circuit and the Supreme Court, the lower court decisions will be referred to as *Acuff-Rose*, and the Supreme Court case as *Campbell*).

6. Parodies play a popular role in many television shows as well as provide a livelihood for many artists.

7. In fact, no copyright law enacted by Congress has ever directly addressed parodies.

8. Compare *Acuff-Rose with Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490 (2d Cir. 1989); *Eveready Battery Co., Inc. v. Adolph Coors Co.*, 765 F. Supp.

the Copyright Act, the Court's previous decisions applying copyright principles in other contexts provide limited direction in how to proceed in a parody case.<sup>9</sup> As a result, lower courts have had little desire to recognize and develop the competing interests unique to parody. Instead, courts have limited their analysis to traditional factors found in copyright law, focusing particularly on economic interests. Typically, commercial use has been the deciding factor. The commercial use dichotomy is at the root of the Supreme Court's decision to grant certiorari, and it is essential to the future of parody. By denying a fair use for a rap group who parodied a traditional pop music standard solely upon economic reasons, the Sixth Circuit reaffirmed the commitment many courts have made to placing the economic rights of copyright holders above all other competing interests.<sup>10</sup>

### A. *The Role of Parody*

The Supreme Court's decision in *Campbell* will greatly affect the role parody will play in the future. Therefore, before making a decision, it is important for the Court to consider the role parody now has in our society and to determine whether that is in fact its optimal role. Since this is the first time the Court is addressing parody, it presents a unique opportunity for the Court to establish a standard for the future.

To understand what parody is, is to understand the problems the Court will face in deciding parody's place in society. "Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of the original."<sup>11</sup> It has been considered an independent art form since ancient times.<sup>12</sup>

By changing the words of the original artist, the parodist comments humorously and critically on the existing work through imi-

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440 (N.D. Ill. 1991); *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826 (S.D.N.Y. 1990); *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1989).

9. See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984) and *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) for the two most recent Supreme Court cases discussing fair use, discussed *infra* notes 74-108 and accompanying text.

10. *Acuff-Rose*, 972 F.2d at 1429.

11. *Id.* at 1441 (Nelson, J., dissenting)(citing Note, *The Parody Defense to Copyright Infringement: Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984)).

12. For an overview of the history of parody, see Yankewich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1133-37 (1955).

tation that exposes the original's flaws.<sup>13</sup> An essential element of parody is the taking of ideas from another work. To be a successful parody, that taking must be to such an extent that the original can be recognized in the parody by its audience. Otherwise, the parody fails. Thus, by definition, parody immediately comes into conflict with the copyright laws which protect the use of original works.

Addressing this conflict, courts have traditionally classified parody as "comment" or "criticism."<sup>14</sup> This determination has been based on the principles of "fair use."<sup>15</sup> The concept of fair use is codified in Section 107 of the Copyright Act, which creates certain exceptions to copyright protection.<sup>16</sup> While Section 107 does not directly address the term "parody," it does state that "the fair use of a copyrighted work . . . for purposes such as criticism, [and] comment . . . is not an infringement of copyright."<sup>17</sup> Courts have had little difficulty in concluding that parodies fall under the rubric of "criticism" or "comment" as set forth in Section 107.<sup>18</sup> Conflict, however, has arisen over exactly how the standards of Section 107 should be applied to parody in order to determine which parodies qualify for a fair use exception. In contrast to areas such as literary criticism or news reporting that fit neatly within a fair use analysis as "comment" or "criticism," certain competing interests arise which are unique to parody.<sup>19</sup> One area in particular that has posed a dilemma for courts is the commercial nature of most parodies.<sup>20</sup>

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

14. See discussion of traditional fair use standard *infra* at notes 38-72 and accompanying text.

15. See *Acuff-Rose*, 972 F.2d at 1434.

16. 17 U.S.C. § 107 (1976).

17. Section 107 of the Copyright Act provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Section 107 also lists four factors to be considered in the fair use determination:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount of work taken from the original;
- (4) the effect on the potential market of the original work.

*Id.*

18. See *infra* notes 53-72 and accompanying text for a discussion of the development of the fair use analysis in parody cases.

19. Elliott M. Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMP. L. REV. 154 (1988).

20. Other competing interests that arise in parody are principles of defamation, free

While all parodies are in substance "criticism" or "comment," most are executed in a commercial context. This stems from the fact that art possesses an economic value. Simply stated, an artist must make a living. While this sentiment may be unduly contemptuous of aesthetic and ideological impulses, as one court noted, "almost all newspapers, books and magazines are published by commercial enterprises that seek to make a profit."<sup>21</sup> The same can also be said of musical recordings.

Many courts have focused on the negative implications of a commercial use on the market for the original work.<sup>22</sup> The courts do not address, however, the reality that if parodists are denied the right to enter commercial markets, the art of parody might die. Not only are commercial markets a source of income for both the original and derivative artists, they are also the main access to the public ear.

Imagine the musical parodist who is not allowed to sell his song to the record industry. Not only is the parodist shut off from profits from the sale of the work, but also from the distribution of the work. Since it is expensive to produce, promote, and distribute music, removal of the commercial incentive takes away the work as well. Without distribution, who will hear the parody? Without an audience, what parodist will write? Moreover, should the commercial motive of the writer have any bearing on whether public benefit is derived from the work?<sup>23</sup> These questions present the Supreme Court with a difficult decision on how to balance the interests of original artists under the Copyright Act and the rights of parodists under the fair use doctrine.

### B. *The Development of Parody in Copyright Law*

In the United States, recognition of the right of artists to pro-

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speech and obscenity. In any parody decision, each of these factors must be considered. However, because the Supreme Court limited the issue to whether a commercial parody is a fair use under Section 107 of the Copyright Act, these factors will not be considered herein. It has been suggested that these factors might provide a solution to the dilemma about commercial parodies outside the Act itself. For a further discussion on this point, see Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

21. Abramson, *supra* note 19, at 155 (citing *Consumer's Union v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983) *cert. denied*, 469 U.S. 823 (1984) (holding that use of copyrighted material for commercial purpose does not by itself defeat fair use)).

22. See *Acuff-Rose*, 972 F.2d at 1436-37.

23. Abramson, *supra* note 19, at 155; *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307-08 (2d Cir. 1966), *cert. denied*, 185 U.S. 1009 (1967) (commercial motive of author has no bearing on whether public benefit derived from work).

protect their works from unpermitted uses dates back to the foundation of the country. The U.S. Constitution grants Congress the authority to "promote the Progress of Science and the Useful Arts . . . by securing for limited Times to Authors . . . the exclusive right to their . . . writings."<sup>24</sup> Since 1790, the Congress has passed a succession of statutes designed to establish and protect copyrights pursuant to this authority.<sup>25</sup> While the overriding effect of these statutory enactments was to establish individual copyrights, the driving purpose remained the advancement of the public good.<sup>26</sup> Over time, Congress expanded the coverage of these statutes until they included all "original works of authorship fixed in any tangible medium of expression."<sup>27</sup> By protecting authors' rights, Congress hoped to ensure that the public benefitted from the author's creative energy.<sup>28</sup>

While the constitutional purpose of copyright protection is the promotion of the literary, scientific, and musical arts, "[t]he unarticulated assumption is that guaranteeing authors a monopoly in their work will result in a utilization of their talents for monetary gain."<sup>29</sup> In particular, when an author obtains copyright protection for a work, the author has a number of exclusive rights, "including rights of reproduction, distribution, performance, display, and adaptation."<sup>30</sup> It is important to note that the term "adaptation," as

24. U.S. CONST. art. I, § 8, cl. 8.

25. Michael A. Chagares, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies*, 12 COLUM.-VLA J.L. & ARTS 229, 231 (1988).

26. The Judiciary Committee of the House of Representatives explained this balance in its Report accompanying the revision of the Copyright Act in 1909:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . . In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of temporary monopoly.

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

27. 17 U.S.C. § 102 (1982). Musical compositions came within the purview of copyright protection in 1831. See Kenneth J. Nunnenkamp, *Musical Parody: Derivative Use or Fair Use?*, 7 LOY. ENT. L.J. 299, 301 (1987).

28. Richard A. Bernstein, *Parody and Fair Use in Copyright Law*, 31 ASCAP SYMPOSIUM 1 (1984).

29. Nunnenkamp, *supra* note 27, at 301.

30. *Id.* at 302 (citing 17 U.S.C. § 106 (1982)).

used in the Act, has been interpreted to include derivative works such as parodies.<sup>31</sup> As such, a holder can look to the Copyright Act for protection against any parodist who borrows from the original work in a substantial manner.<sup>32</sup>

In the case of musical parodies, it is not difficult to establish a *prima facie* case of copyright infringement.<sup>33</sup> "The *prima facie* case in an infringement claim requires a showing by the plaintiff that she possesses a valid copyright for the original work, and that an unauthorized copying of the work by the defendant has occurred."<sup>34</sup> In order to meet her burden, a copyright holder must only demonstrate that the alleged infringer had an opportunity to copy the copyrighted work and that there is a substantial similarity between the two works.<sup>35</sup>

Traditionally, and with parody cases, the measure of comparison that courts employ to determine whether a copyrighted work has been infringed by a subsequent work is whether the later work is "substantially similar" to the original.<sup>36</sup> What constitutes substantial similarity is often hard to measure:

[T]he determination of the extent of similarity which will constitute a *substantial* and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations. It is

31. Comment, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163, 166 (1981).

32. One limit on copyright protection that deserves mentioning is the idea-expression dichotomy. "A central tenet of copyright law is that an idea may not be copyrighted, but a particular expression of that idea is subject to protection." Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1569 (1984). This principle is set forth in the Copyright Act: "In no case does copyright protection for an original work of authorship extend to any idea, . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b). See also *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("Copyright gives no exclusive right to the art disclosed; protection is given only to the expression of an idea—not the idea itself"). This dichotomy between idea and expression serves two essential purposes in copyright law; "[f]irst, it prevents copyright law from restricting the free flow of information necessary in a free society, and thereby avoids a conflict with first amendment values. Second, it preserves the distinction between patents and copyrights." Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 240-41 (1988).

33. "The derivative nature of parodies [is] self-evident; since the purpose of parody is to conjure up the original work in the audience's mind the parodist must appropriate a sufficient amount of the work to achieve recognition by the audience." Nunnencamp, *supra* note 27, at 302 (citing *Fisher v. Dees*, 794 F.2d 432, 434-35 n.2 (9th Cir. 1986)).

34. *Id.* at 303.

35. *Id.*

36. See, e.g., *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989) (no substantial similarity between works when only copying factual and historical information); *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711 (S.D.N.Y. 1987).



clear that slight or trivial similarities are not substantial and are therefore non-infringing. But it is equally clear that the works may not be literally identical and yet be found substantially similar for purposes of copyright infringement. The problem, then, is one of line drawing. Somewhere between the one extreme of no similarity and the other of complete and literal similarity lies the line marking off the boundaries of 'substantial similarity.'<sup>37</sup>

However, since parodies draw attention to the original works that they are ridiculing, it is unlikely that any copyright infringement claim brought against a parodist will fail to meet this primary burden.

### C. Fair Use and Parody

In most cases, since a musical parodist is trying to poke fun at a particular song, anyone who listens to the parody will recognize similarities to the original.<sup>38</sup> Thus, parody cases usually turn on whether the defendant's use of the original was fair within the meaning of Section 107.<sup>39</sup> A fair use is "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."<sup>40</sup> The principle of fair use has been in existence almost as long as the principle of

37. 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (1987)(emphasis in original).

38. This section sets out the fair use principles applied in all derivative works cases, and in particular, parody cases. While this is generally the approach that courts take to determine whether a parody is a copyright infringement, it should be noted that a number of courts, including the Sixth Circuit in *Acuff-Rose*, have first addressed the issue of whether the derivative work really is a "parody." For example, in *MCA v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), and *Walt Disney Pictures Corp. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975) the courts found a copyright violation because, while the derivative works were parodying something, they did not attempt to parody or comment ludicrously on the original works themselves. In *MCA*, the song "Cunninglingus Champion of Company C" infringed upon the copyright of the song "Boogie Woogie Bugle Boy of Company B," because while it "may have sought to parody life, or more particularly sexual mores and taboos," it did not parody the original song. 425 F. Supp. at 453-54. The *Walt Disney* court used the same rationale to find that a display of bestiality was a copyright infringement. 389 F. Supp. at 1398. In contrast to these cases is *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), where the court found that the song "I Love Sodom" was a parody of the song "I Love New York," because it "clearly was an attempt by the writers and cast of SNL [Saturday Night Live] 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." *Id.* at 745.

39. Nunnencamp, *supra* note 27, at 303.

40. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985)(citing *Ball, THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

copyright. While copyright originally created an exclusive right to a work, over time, courts found a number of reasons to limit this protection:

[A] fundamental conflict in the application of the laws became evident—these laws which give an artist exclusive control over the created product could actually contradict rather than serve the law's chief underlying purpose: to encourage creative endeavors and their dissemination throughout society.<sup>41</sup>

In order to achieve this underlying purpose, limits had to be placed upon the protection granted to copyright holders.<sup>42</sup> Thus, the doctrine of fair use was created as an equitable doctrine to protect and foster creative work that is dependent on other people's copyrighted material.<sup>43</sup> The fair use doctrine permits courts to avoid rigid application of the copyright statute when it would stifle the very creativity which the law was designed to protect.<sup>44</sup>

After application by courts for many years, the fair use doctrine received statutory recognition in Section 107 of the Copyright Act.<sup>45</sup> Section 107 provides:

Fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [Section 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.<sup>46</sup>

The codification of the fair use doctrine reflects the fact that the underlying goal of copyright law is not the protection of individual property rights, but the promotion of creativity and expression for all people.<sup>47</sup>

Under Section 107, the Copyright Act provides four considerations when determining whether a fair use exists:

- (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;

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41. Chagares, *supra* note 25, at 232-33.

42. *Id.* at 233. It has been accepted by courts that the principle of fair use encompasses all first amendment concerns present in copyright law. See *New Era Publications Intern v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989).

43. Note, *In Defense of Parody*, 17 GOLDEN GATE U. L. REV. 57, 58 (1987).

44. *Abramson, supra* note 19, at 150 (citing *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980)).

45. Note, *supra* note 43, at 59.

46. 17 U.S.C. § 107 (1976).

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

- (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.<sup>48</sup>

None of these factors is conclusive and each must be weighed in any fair use decision.<sup>49</sup> The determination of how they should be balanced is crucial because in many cases the emphasis of one factor over another could tip the scales.<sup>50</sup> In codifying the doctrine of fair use, Congress made clear that it in no way intended to depart from judicially-created principles or to short circuit further judicial development:

The bill endorses the purposes and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.<sup>51</sup>

By preserving the judiciary's ability to change its considerations in different cases, Congress recognized the equitable nature of the doctrine.<sup>52</sup>

Prior to the adoption of Section 107, courts did not always apply fair use in parody cases. The issue was first addressed in 1958 in *Benny v. Loew's, Inc.*,<sup>53</sup> where the Ninth Circuit affirmed a decision of the Southern District of California which held that a parody was not entitled to protection under the fair use doctrine. In *Loew's*, Jack Benny broadcast a burlesque television version of the

48. 17 U.S.C. § 107 (1976).

49. *Sony Corp. v. Universal City Studios*, 464 U.S. 416 (1984). However, the courts consider each of these in different levels of importance. The principal contention of this Comment is that the first and fourth factors under Section 107, which focus on the effect upon the commercial market, have been overemphasized by courts and commentators alike in the parody context, to the detriment of other considerations.

50. See, e.g., *New Era Publications v. Carol Pub. Group*, 904 F.2d 152 (2d Cir. 1990).

51. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S.C.C.A.N., 5659, 5680; See also S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

52. See, e.g., *Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1036 (N.D. Ga. 1986) (incorporating the element of good faith into the fair use analysis); *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980) (considering the bad faith conduct of ABC in its decision to refuse to allow its fair use defense).

53. 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court*, 356 U.S. 43 (1958).

motion picture "Gaslight" entitled "Autolight."<sup>54</sup> The court determined that a substantial taking existed and refused to consider the defense of fair use.<sup>55</sup> In finding a copyright violation, the Ninth Circuit affirmed the trial court's conclusion that parody was not among the "established" areas of fair use, thus, it should not be entitled to special treatment.<sup>56</sup>

While the *Loew's* decision was still pending on appeal, the Southern District of California again addressed the issue of parody.<sup>57</sup> This time, however, the court took a different stance. In *Columbia Pictures v. National Broadcasting Co.*,<sup>58</sup> the court held that parodies could borrow from original copyrighted works to the extent necessary for an audience to be able to "conjure up" the original in their minds.<sup>59</sup> Since a television broadcast on NBC called "From Here To Obscurity" borrowed characters and storyline from the movie "From Here To Eternity" only as much as was necessary to parody the original to the audience, the court determined that a fair use existed.<sup>60</sup> The court acknowledged the nature and social value of parody and recognized that parodists have a right to some degree of freedom in their creativity.<sup>61</sup> In its decision, the court considered the character of the two works, the nature and object of the selections made, the purpose of the use, and the amount of material used.<sup>62</sup>

Shortly thereafter, a similar approach was adopted by the Second Circuit in *Berlin v. E.C. Publications, Inc.*<sup>63</sup> In *Berlin*, the defendants, who were publishers of "Mad" magazine published a collection of songs that parodied the lyrics to several of Irving Berlin's songs.<sup>64</sup> After recognizing that *Loew's* and *Columbia Pictures* were the only modern decisions that had dealt with the conflict between parody and copyright, the Second Circuit followed

54. Note, *supra* note 45, at 60.

55. 239 F.2d at 537.

56. *Id.* *Loew's, Inc., v. Colombia Broadcasting Sys.*, 131 F. Supp. 165, 183 (S.D. Cal. 1955).

57. Note, *supra* note 11, at 1402.

58. 137 F. Supp. 348 (S.D. Cal. 1955).

59. *Id.* at 350.

60. *Id.*

61. One commentator believes that this decision is different from *Loew's* for that reason. He points out that in this case, the Court indicates a number of factors that should be considered when considering the fair use defense in parody cases. Chagares, *supra* note 25, at 238.

62. 137 F. Supp. at 354.

63. 219 F. Supp 911 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 541 (2d Cir. 1963), *cert. denied*, 379 U.S. 822 (1964).

64. 219 F. Supp at 912.

the latter, limiting the protection afforded to copyright holders.<sup>65</sup> In doing so, the *Berlin* court established two factors to consider: Did the parodist use more of the original work than necessary to "recall or conjure up" the original; and, did the parody attempt to fill the demand for the original?<sup>66</sup> Under the circumstances of this case, the court found that the weight of these factors required a decision in favor of the parodist.<sup>67</sup>

Once it was established that parody qualified as a fair use, the next problem was how to apply fair use principles to parody. Since the fair use doctrine is equitable in nature, each case involves a balancing of interests between the parties involved.<sup>68</sup> Prior to the enactment of the Copyright Act, cases examined different considerations and cited different factors to be weighed in their decisions.

In some areas, the determination of whether a fair use exists is easy to make. For example, a quotation in a book review or scholarly article is traditionally a fair use.<sup>69</sup> However, in other areas, such as parody, the determination is not so clear. While the equitable approach of fair use is an appropriate means to balance the competing interests of original artists and parodists, in the area of parody, courts have been unable to draw a clear distinction between what is and what is not a fair use.<sup>70</sup> Adding to the complexity, courts have not consistently explained the doctrine: "Since the doctrine has developed through case-by-case accretion, a particular rationale may work well for one set of facts but be insufficient to explain another set."<sup>71</sup> As a result of this variety of criteria used by the courts "and their application to the facts of the small number of published opinions dealing with the issue of copyright infringement and parody, decisions have been inconsistent and irreconcilable."<sup>72</sup>

#### D. The Supreme Court Cases

To help decide whether a particular parody constitutes a fair

65. Chagares, *supra* note 25, at 239 (citing *Berlin*, 329 F.2d at 543-44).

66. 329 F.2d at 545. The "conjure up" test is still an important part of the fair use test, and has been codified as the third factor listed in Section 107 of the Act. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

67. In *Berlin*, there was no music accompanying the lyrics, and further, there was little similarity between the lyrics of the originals and the parodies. 219 F. Supp. at 912.

68. Chagares, *supra* note 25, at 234.

69. Susan Linehan Faaland, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163, 168 (1981).

70. *Id.*

71. *Id.* at 168-69.

72. Chagares, *supra* note 25, at 235.

use, the lower courts have relied heavily upon two recent decisions of the U.S. Supreme Court which interpret the principles of fair use. While these cases did not deal with the issue of parody, they still have provided the basis for all recent parody/fair use decisions. They have had particular impact in parody cases because of their approach to economic and commercial uses.

In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>73</sup> the Supreme Court first addressed the issue of fair use. *Sony* was a copyright infringement action by the holder of copyrights of several television programs against a manufacturer of home video tape recorders (VCRs).<sup>74</sup> Universal, the copyright holder, sought money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of VCRs based upon the claim that use of the machines infringed upon their copyright and as such, Sony, as the manufacturer, should be held liable as a contributory infringer.<sup>75</sup>

Turning its attention to the copyright issue, the Court immediately addressed the limited nature of copyright protection for individual copyright holders: "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."<sup>76</sup> While the copyright holder obtains "exclusive" rights to use and authorize the use of his work, this protection does not include all possible uses of his work.<sup>77</sup> One limitation on the rights of a copyright holder that the Court recognized was the fair use defense.<sup>78</sup> However, because of the nature of the infringement action, the Court did not have an opportunity to address each of the fair use factors set out in Section 107.<sup>79</sup>

The manner in which the Court distinguished between commercial and non-commercial uses established the foundation for the current dispute regarding the effect of commercial use on fair use. Finding that home taping was protected under fair use, the *Sony* Court noted that videotape recorders are used primarily by consumers for time-shifting of television programming for more

73. 464 U.S. 416 (1984).

74. *Id.* at 417.

75. *Id.*

76. *Id.* at 429 (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

77. *Id.* at 433-34.

78. *Id.* at 428. Some authors have applied the analysis in *Sony* to the field of parody. See Note, *supra* note 11, at 1407-12, where the author states that the focus is on the commercial nature of the use and the degree of economic harm to the original creator.

79. The ultimate determination to be made was whether Sony was liable for infringements by other people, namely, those who purchased VCRs made by Sony. 464 U.S. at 432.

convenient viewing.<sup>80</sup> The Court observed that time-shifting constitutes a non-profit, rather than commercial, use of the recorded programs, since these recordings are typically erased and not sold after viewing.<sup>81</sup> Drawing a distinction between this and other types of uses, the Court noted, "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."<sup>82</sup>

One year later, in *Harper & Row, Publishers v. Nation Enterprises*,<sup>83</sup> the Supreme Court applied each of the fair use factors to a copyright case. In *Harper & Row*, *The Nation* magazine had published copyrighted materials from the autobiography of Gerald Ford without permission from the publisher, Harper & Row.<sup>84</sup> Harper & Row had made a deal with another magazine for the sale of excerpts from the autobiography, but once *The Nation* published certain sections, the other magazine withdrew its bid.<sup>85</sup> In response, Harper & Row brought an action against *The Nation* for infringement under the Copyright Act.<sup>86</sup>

*The Nation's* publishers defended on the ground that their publication of the material was a fair use. While the district court rejected this argument, the Court of Appeals for the Second Circuit agreed that a fair use existed.<sup>87</sup> The appellate court found that "the purpose of the article was 'news reporting,' the original work was essentially factual in nature, the 300 words appropriated were insubstantial in relation to the 2,250-word piece, and the impact on the market for the original was minimal."<sup>88</sup> The court was also particularly swayed by the "politically significant" nature of the material and the importance of using it to educate the public.<sup>89</sup>

The Supreme Court agreed that the purpose of copyright law is to increase the harvest of knowledge rather than impede it. The Court felt, however, that the Second Circuit gave insufficient defer-

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80. Alan Corn, *Renaming That Tune*, 22 GOLDEN GATE U. L. REV. 321, 348 (1992); See *Sony*, 464 U.S. at 451.

81. 464 U.S. at 451.

82. *Id.*

83. 471 U.S. 539 (1985).

84. *Id.* at 542-43.

85. *Id.* at 543.

86. 557 F. Supp. 1067 (S.D.N.Y. 1980).

87. The district court rejected the fair use argument because, while billed as "hot news," the article contained no new facts, the magazine had been published for profit, the article took the heart of a "soon to be published" work, and it caused a deal with *Time* to be aborted, thus diminishing the value of *The Nation's* copyright. 471 U.S. at 544.

88. *Id.* at 545.

89. *Id.*

ence to the scheme established by the Copyright Act aimed at fostering such knowledge.<sup>90</sup> The Court applied the factors enumerated in Section 107 and determined that a fair use of the copyrighted work did not exist.<sup>91</sup>

The first factor the Court considered was the purpose of the use.<sup>92</sup> While the trial court had determined that the purpose of the publication was “news,” a factor in favor of a finding of a fair use, the Supreme Court did not believe this was the issue. Rather, the issue was “whether a claim of news reporting is a valid fair use defense to an infringement of *copyrightable expression*.”<sup>93</sup> The Court felt that it could not ignore that *The Nation’s* admitted purpose was to scoop other publications of the copyrighted material.<sup>94</sup> Therefore, the purpose of the use was not a factor weighing in favor of a finding of fair use.

The Court also addressed the commercial nature of the use as a separate factor in its consideration of the purpose of the use.<sup>95</sup> Focusing on the commercial impact of the infringing work, the Court noted that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the ordinary price.”<sup>96</sup>

Second, the Court considered the nature of the copyrighted work. Under this factor, the law recognizes a greater need to disseminate factual works than works of fiction or fantasy.<sup>97</sup> In *Harper & Row*, while the Court found that the original work, as an autobiography, was in essence a factual work, the Court determined that the unauthorized use by *The Nation* was of quotes and excerpts concerning subjective descriptions and portraits of public figures rather than the conveyance of facts.<sup>98</sup>

Next, the Court analyzed the amount and substantiality of the portion of the original that was used in the infringing work.<sup>99</sup> The

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90. *Id.* at 545-46.

91. *Id.* at 549.

92. *Id.* at 561.

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

94. *Id.*

95. *Id.* at 562.

96. *Id.* See also *Roy Export Co. Establishment v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980); 3 NIMMER, *supra* note 37, at § 13.05[A][1] 13-71, n.25.3.

97. 471 U.S. at 563 (citing Gorman, *Fact or Fantasy? The Implications for Copyright*, 29 J. COPYRIGHT Soc. 560, 561 (1982)).

98. *Id.*

99. *Id.* at 564.



Court explained that under this factor, while the exact amount of infringing is important, it is more important to consider the qualitative nature of the infringement.<sup>100</sup> The court of appeals had determined that this factor weighed in favor of a fair use due to the fact that *The Nation* had only taken fifteen percent of the original work.<sup>101</sup> The Supreme Court noted that although it was a small percentage quantitatively, in reality, the parts taken were the heart and soul of the original.<sup>102</sup> "In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit" that the magazine took a meager amount of the original language.<sup>103</sup>

Finally, the Court addressed the effect of the use upon the potential market for, or value of, the copyrighted work. Explaining the tremendous weight accorded this factor, the Court stated that "[t]his last factor is undoubtedly the single most important element of fair use."<sup>104</sup> Once a copyright holder establishes the existence of a causal connection between the infringement and a loss of revenue, the burden shifts to the infringer to show that the damage would have occurred had there been no taking of copyrighted expression.<sup>105</sup> In *Harper & Row*, the trial court found that there had been an actual effect on the market.<sup>106</sup> *The Nation* was unable to rebut this conclusion and the Supreme Court determined that this factor compelled a finding against fair use.<sup>107</sup>

In *Harper & Row*, the Supreme Court gave some indication to the lower courts on how the Section 107 fair use factors were to be applied. However, because these factors were applied specifically to one case, there is still a great deal of uncertainty over their application. Lower courts surely will face difficulty in construing the factors in factually dissimilar situations. In particular, fair use precedent is difficult to analogize to parody decisions, which involve a number of concerns not present in other copyright areas. Although the Supreme Court has recognized that the overriding concern of copyright law is the advancement of the arts for all of society, the

100. *Id.* at 565.

101. *Nation Enters. v. Harper & Row, Publishers, Inc.*, 723 F.2d 195, 209 (2d Cir. 1984).

102. 471 U.S. at 566.

103. *Id.*

104. *Id.*

105. *Id.* at 567 (citing 3 NIMMER § 14.02, *supra* note 37, at 14-7-14-8.1).

106. *Id.*

107. *Id.* at 568. The emphasis that the Court placed on this fourth fair use factor, combined with the analysis of commercial use under the first factor work together to create what many courts have treated as almost a complete ban on commercial fair uses.

emphasis in *Harper & Row* seemed to be on the economic interest of the copyright holder.<sup>108</sup>

### *E. Precedent Within Parody*

Applying the principles in these Supreme Court decisions to cases involving parody and the fair use defense, the lower courts have continued to apply each of the Section 107 factors. However, in many of these cases there is conflicting opinion regarding the impact of commercial use.<sup>109</sup> A number of courts, including the Sixth Circuit in *Acuff-Rose*, have followed the Supreme Court's decision in *Harper & Row* by declaring a use unfair whenever it involves commercial gain. Other courts, however, have regarded commercial use as only one of a number of factors to be considered in a fair use decision.<sup>110</sup>

In *Elsmere Music v. National Broadcasting Co.*,<sup>111</sup> the Second Circuit addressed the question of whether a parody of the song "I Love New York," which appeared as a skit on *Saturday Night Live* and ended with the singing of "I Love Sodom" to the same musical score, was a fair use.<sup>112</sup> The court, in a brief written opinion, affirmed the opinion of the district court below, noting that "copyright law should be hospitable to the humor of parody."<sup>113</sup> On this basis, the court concluded that the "I Love Sodom" parody was a fair use.<sup>114</sup>

108. The emphasis placed on economic interests may be due to the fact that the interests presented in *Harper & Row* were limited to the rights of the copyright holder and the economic interests of the infringer. There was no concern about the other issues present in parody, such as the nature of the work as "criticism," the creativity of the derivative work, its own worth, and its importance to society as dissenting commentary. Rather, *Harper & Row* presented a direct economic taking of a copyrighted work. In such a situation, a fair use should not exist, and the most important factor in determining the outcome should be the economic interests of the parties. Abramson, *supra* note 19, at 159.

109. The recent emphasis on economic interests in copyright infringement cases is not limited to parody cases. See, e.g., *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992) (holding a profit-seeking company may not make unauthorized copies of copyrighted articles published in scientific and technical journals for use by the company's scientists employed in scientific research).

110. The following discussion concerns several recent decisions which have been decided on the basis of the commercial nature of the derivative work, in particular through the first and fourth of the fair use factors as set out in Section 107. This is not to discount the importance of the second and third statutory fair use factors, but to focus on the manner in which the courts have stressed the commercial nature of parodies. This is precisely the issue before the Supreme Court in *Campbell*.

111. 623 F.2d 252 (2d Cir. 1980).

112. *Id.* at 253.

113. *Id.*

114. *Id.*

The district court, in considering whether the parody was a fair use, analyzed the four factors set forth in Section 107. The District Court for the Southern District of New York did not consider the fact that the parody was part of a commercial television program.<sup>115</sup> Rather, the court devoted the majority of its opinion to determining that the derivative work was indeed a parody and that the parody had no impact on the original work's market.<sup>116</sup> After determining that "the defendant's version of the jingle has not in the least competed with or detracted from plaintiff's work," the court dismissed the case.<sup>117</sup>

More recently, in *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*,<sup>118</sup> the District Court for the Southern District of New York was presented with another opportunity to consider fair use in a commercial context. Because this case involved an appropriation for the purpose of promoting the sale of commercial products, the court found a copyright infringement.<sup>119</sup> In *Tin Pan Apple*, a rap music group, the "Fat Boys," brought an action against a beer brewing company for its production and distribution of a commercial which used sound-alikes and look-alikes of the rap group. The look-alikes performed in a style distinct to the group in order to promote the brewer's products.<sup>120</sup> The court determined that because the lyrics of the derivative work did not attempt to satirize the "Fat Boys" or their work, but instead copied their image "to promote the sale of commercial products," it was not even a parody, and therefore did not merit consideration of the Section 107 factors.<sup>121</sup> Based on a long line of precedent, the court concluded

115. 482 F. Supp. 741 (S.D.N.Y. 1980). This may be due to the fact that the Supreme Court decisions, discussed *supra* notes 73 to 109 and accompanying text, which declared a commercial use presumptively unfair, had not yet been decided.

116. 482 F. Supp. at 746-47.

117. *Id.* at 747.

118. 737 F. Supp. 826 (S.D.N.Y. 1990).

119. *Id.* at 832. See also *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987), where the court stated:

In analyzing the commercial or noncommercial nature . . . it is useful to distinguish between two conceptually different situations: advertising material that promotes a parody of a copyrighted work, and advertising material that itself infringes a copyright. In the first case, the fact that the advertisement uses elements of the copyrighted work does not necessarily mean that it infringes the copyright, if the product that it advertises constitutes a fair use of the copyrighted work.

See also, *Warner Bros. v. American Broadcasting Co.*, 720 F.2d 231, 242-44 (2d Cir. 1983)(holding that promotional broadcasts for television series legally parodying the Superman comic strip character did not infringe copyright of Superman character).

120. 737 F. Supp. at 828.

121. *Id.* at 830-32.

that "there is ample authority for the proposition that appropriation of copyrighted material solely for personal profit, unrelieved by any creative purpose, cannot constitute parody as a matter of law."<sup>122</sup>

In *Original Appalatian Artworks v. Topps Chewing Gum*,<sup>123</sup> the Northern District of Georgia reached the same result, although within the context of the first element of Section 107, namely, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>124</sup> Here, the court rejected the parody defense because "the primary purpose behind [the] defendant's parody [was] not an effort to make a social comment but [was] an attempt to make money."<sup>125</sup> In *Topps*, the holder of a copyright on "Cabbage Patch Kids" brought an action for infringement against Topps, the distributor of "Garbage Pail Kids" stickers and chewing gum cards.<sup>126</sup> Analyzing the type of use under the first factor of section 107, the court determined that:

Neither are the Garbage Pail Kid Stickers merely one of a series of spoofs of various different products, as defendant has produced in the past, nor a single cartoon or editorial in a broader satirical product such as Mad Magazine. The basic concept behind the defendant's sticker is aimed at capitalizing on the Cabbage Patch craze.<sup>127</sup>

Thus, the court concluded that the commercial nature of Topps' use of the copyrighted material precluded a finding of fair use.<sup>128</sup>

The Second Circuit recently addressed the defense of fair use in parody in the context of a commercial use in *Rogers v. Koons*.<sup>129</sup> In *Koons*, a photographer brought an infringement suit against a sculptor who had copied from his copyrighted photograph "Puppies" to create a sculpture known as "String of Puppies."<sup>130</sup> As a defense, Koons, the defendant, raised parody and the privilege of a

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122. *Id.* at 831. See *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, *aff'd* 623 F.2d 252; *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964); *D.C. Comics v. Crazy Eddie*, 205 U.S.Pat.Q. 1177 (S.D.N.Y. 1979).

123. 642 F. Supp. 1031 (N.D. Ga. 1986).

124. *Id.* See also *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988)(finding that a music video entitled "A Nightmare on My Street" was not a parody of "A Nightmare on Elm Street").

125. 642 F. Supp. at 1034.

126. *Id.* at 1032.

127. *Id.* at 1034.

128. *Id.*

129. 960 F.2d 301 (2d Cir. 1992).

130. *Id.* at 304.

fair use.<sup>131</sup> The court first determined that "String of Puppies" was not a satire of the original work, but at best was a parody of modern society.<sup>132</sup> Since it did not parody the original, there was no need to "conjure up" the original at all. Thus, any similarity was an infringement.<sup>133</sup> The Court stated:

By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.<sup>134</sup>

The *Rogers* court also addressed the overriding commercial motive behind Koons' taking, but concluded that "though it is a significant factor, whether the profit element of the fair use calculus affects the ultimate determination of whether there is a fair use depends on the totality of the factors considered; it is not itself controlling."<sup>135</sup> Nevertheless, after applying the statutory fair use factors, the court determined that:

there is simply nothing in the record to support a view that Koons produced 'String of Puppies' for anything other than sale as high-priced art. Hence, the likelihood of future harm to Rogers' photograph is presumed, and Plaintiff's market for his work has been prejudiced.<sup>136</sup>

The court's analysis focused on the effect of the use on the market for the original.<sup>137</sup> As applied, this factor also centers

131. *Id.* at 309.

132. *Id.* at 310.

133. *Id.* See also *MCA, Inc. v. Wilson*, 677 F.2d at 185; 3 *NIMMER*, *supra* note 37, at §. 13.05[C] n.60.9.

134. 960 F.2d at 310.

135. *Id.* at 309.

136. *Id.* at 312. This approach marks a change from the Second Circuit's position in *Elsmere*, and is a far cry from its opinion in *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), where the court stated:

whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e. the average citizen rather than the college professor, has no bearing on whether a public benefit can be derived from such a work. . . . Thus we conclude that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use.

*Id.* at 307.

137. 960 F.2d at 312.

around commercial use. Even though the derivative work did not impact on the market for the original work itself, the court noted that it did interfere with the copyright holder's ability to produce derivative works and adaptations on the original, a right protected by the copyright laws.<sup>138</sup>

The District Court for the Southern District of New York addressed a similar case in *United Feature Syndicate, Inc. v. Koons*.<sup>139</sup> Once again Koons was in court defending one of his sculptures against a copyright infringement claim. This time, United Features Syndicate charged him with infringing upon their copyrights of the "Garfield" comic strip and, in particular, the character of "Odie."<sup>140</sup> Koons had created a sculpture titled "Wild Boy and Puppy," the "Puppy" being based on the character "Odie" from the Garfield comic strip.<sup>141</sup> Although Koons admitted that he did copy the "Odie" caricature, he asserted that the sculpture was privileged under the fair use doctrine as a parody.<sup>142</sup>

The district court stayed its decision pending release of the Second Circuit's decision in the previously discussed case of *Rogers*.<sup>143</sup> After the *Rogers* court found that Koons' "String of Puppies" piece was an infringement on Rogers' copyright, Koons argued that the differences in his two sculptures merited a different outcome in the *United Feature Syndicate* case.<sup>144</sup> After weighing the Section 107 factors, however, the district court concluded that, like the *Rogers* case, "Koons' use of the copyrighted 'Odie' character was 'of a commercial nature' and that Koons stands to profit from his exploitation without paying the customary price."<sup>145</sup> Likewise, under the fourth factor, the commercial nature of the work also had a significant impact on the potential market for the original.<sup>146</sup> Based on these considerations, the court concluded that a fair use did not exist.<sup>147</sup>

In *Fisher v. Dees*,<sup>148</sup> the Ninth Circuit took a more liberal ap-

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138. *Id.*

139. 817 F.Supp. 370 (S.D.N.Y. 1993).

140. *Id.* at 372.

141. *Id.* at 373.

142. *Id.* at 374.

143. *Id.* at 375.

144. *Id.* at 376.

145. *Id.* at 379.

146. *Id.*

147. *Id.*

148. 794 F.2d 432 (9th Cir. 1986). Compare *Fisher with Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978)(holding that a parody was not a fair use because it borrowed more of the original than was necessary for the parodist's purpose).

proach toward the commercial factors analysis. In *Fisher*, the composers and owners of the popular 1950s song, "When Sunny Gets Blue," sued the disc jockey Rick Dees for copyright infringement when he released a song titled "When Sonny Sniffs Glue."<sup>149</sup> The district court granted Dees' motion for summary judgment, dismissing the claim based on the fair use defense.

Affirming the lower court's decision, the Ninth Circuit considered both the first and fourth statutory fair use factors.<sup>150</sup> While recognizing that a commercial use "tends to weigh against a finding of fair use," the court noted that "[t]he defendant can rebut the presumption by convincing the court that the parody does not unfairly diminish the economic value of the original."<sup>151</sup> The court recognized that in such a case, while the parody is distributed commercially, it still may be "more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work."<sup>152</sup> Thus, the court's focus was particularly on the fourth factor.<sup>153</sup>

Initially, the *Fisher* court noted that "[i]n assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a 'parody may legitimately aim at garroting the original, destroying it commercially as well as artistically.'"<sup>154</sup> By this, the court meant that "the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can have that effect—but rather whether it *fulfills the demand* for the original."<sup>155</sup>

After listening to the two songs, the court concluded that "consumers desirous of hearing a romantic and nostalgic ballad such as the composers' song would [not] be satisfied to purchase the parody instead. Nor are those fond of parody likely to consider 'When Sunny Gets Blue' a source of satisfaction."<sup>156</sup> Since the two

149. 794 F.2d at 434.

150. *Id.* at 437.

151. *Id.* (citing *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

152. *Id.* at 437 (citing *Pilsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.Pat.Q. 124, 131 (N.D. Ga. 1981)).

153. See *Lewis Galoob Toys v. Nintendo of America*, 780 F. Supp. 1283, 1294 (N.D. Cal. 1991) (placing the burden of proving the fourth fair use factor, the effect on the market for the original, on the plaintiff asserting a copyright violation).

154. 794 F.2d at 437 (quoting B.Kaplan, AN UNHERALDED VIEW OF COPYRIGHT 69 (1967)) (emphasis added).

155. *Id.* at 431 (emphasis in original). The Second Circuit similarly endorsed this principle in *New Era Publications v. Carol Pub. Group*, 904 F.2d 152, 160 (2d Cir. 1990).

156. 794 F.2d at 438.

songs did not fulfill the same demand, there was no economic effect on the original's market and the infringement claim could not stand.<sup>157</sup>

In *Eveready Battery Co., Inc. v. Adolph Coors Co.*,<sup>158</sup> the Northern District of Illinois followed the *Fisher* court and recognized the fair use defense in the context of a commercial appropriation. In this case, Eveready sued Coors to enjoin distribution of a television commercial which parodied an Eveready commercial.<sup>159</sup> Eveready had been running an ad campaign featuring the "Energizer Bunny" which depicted a mechanical bunny that continues to beat on a toy drum while other toys using different batteries gradually stop running. The voice-over states: "Nothing outlasts the Energizer. They keep going and going and going. . . ."<sup>160</sup> This provided the basis for several commercials within commercials in which the spot would begin with what appeared to be a typical television advertisement, until a drum beat was heard, distracting the actors in the commercial, and the Energizer Bunny would emerge with the voice-over: "Still going. Nothing outlasts the Energizer, they keep going and going and going. . . ."<sup>161</sup>

To parody the Energizer ads, Coors created a series of commercials in which Leslie Nielsen, a well-known actor, dressed in a dark business suit with fake rabbit ears, a fuzzy white tail, and rabbit feet carries a drum across what appears to be a commercial for another unidentified beer.<sup>162</sup> Eveready sought to enjoin this commercial's distribution before it aired during the spring of 1991.<sup>163</sup>

In support of its claim, Eveready relied upon the *Tin Pan Apple* case and its assertion that "appropriation of copyrighted material solely for personal profit, unrelieved by any creative purpose, cannot constitute parody as a matter of law."<sup>164</sup> Rejecting the *Tin Pan Apple* court's position, the *Eveready* court noted:

It is not apparent to this court what Judge Haight meant by the

157. *Id.* at 440. Compare *Fisher with New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988)(holding that a parody promoting a product in direct competition with a derivative product produced by the owners of a copyrighted work cannot be a fair use).

158. 765 F. Supp. 440 (N.D. Ill. 1991).

159. *Id.* at 444.

160. *Id.* at 442.

161. *Id.*

162. *Id.* at 443.

163. *Id.* at 444.

164. *Id.* at 446 (citing *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 831 (S.D.N.Y. 1990)).



phrase 'solely for personal profit.' To the extent that this phrase may be equated to the phrase 'of a commercial nature,' the quoted proposition in *Tin Pan Apple* is directly contrary to §. 107 of the Copyright Act which expressly states that 'the purpose and character of the use, including whether such use 'is of a commercial nature' is merely one of four factors to consider in the statutory fair use analysis.<sup>165</sup>

While the primary purpose of most television commercials is to increase product sales and thereby increase income, the court stated that "it is not readily apparent that [commercials] are therefore devoid of any artistic merit or entertainment value."<sup>166</sup>

The court proceeded to apply the statutory factors, and concluded that a fair use did exist.<sup>167</sup> Although the first factor, the commercial nature of the use, weighed in favor of Eveready, the court declared the remaining three factors were in Coors' favor.<sup>168</sup> Looking at the economic effect of the parody on the original, the court followed the Ninth Circuit in *Fisher* and excluded any consideration of the critical impact of the parody on the original and its market.<sup>169</sup> Since there was no indication that the "Coors commercial will supplant the market for the Eveready commercial," the fourth factor favored Coors.<sup>170</sup> Thus, the court was able to find no infringement.

The aforementioned case law indicates the different approaches the federal courts have taken to address the impact of commercial exploitation on fair use. There is no consensus on the manner in which to treat commercial parodies. Likewise, each decision is fact specific and difficult to apply to a different set of facts. Nevertheless, there are several recurring themes which run throughout the cases. A number of courts, particularly the Second Circuit, have adopted a presumption that commercial exploitation is not a fair use of the original work.

### III. THE CASE OF *CAMPBELL v. ACUFF-ROSE MUSIC, INC.*

The Sixth Circuit decision in *Acuff-Rose* symbolizes the exten-

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

166. The *Eveready* court concluded its analysis of *Tin Pan Apple* by stating that "to the extent that the *Tin Pan Apple* case is intended to establish a standard different from that established by Congress in § 107(1) of the Copyright Act, this court declines to follow the former." *Id.* at 447.

167. *Id.* at 448.

168. *Id.* at 447.

169. *Id.* at 448. See *supra* notes 148 to 157 and accompanying text.

170. *Id.*

sion of the rights of a copyright holder to a new level.<sup>171</sup> The *Acuff-Rose* court, while going through the traditional fair use litany, based its opinion solely upon the commercial nature of the derivative work.<sup>172</sup> By denying the fair use defense to a rap group that poked fun at a traditional pop music standard, the Sixth Circuit reaffirmed the importance of economic interests in copyright law and overlooked the competing interests inherent in and unique to parody.<sup>173</sup>

### A. Procedural History

In 1990, Acuff-Rose Music, the holders of a copyright of the song "Oh, Pretty Woman" brought suit in U.S. District Court against a rap group and its individual members for copyright infringement.<sup>174</sup> The rap group, 2 Live Crew,<sup>175</sup> had released a version of "Oh, Pretty Woman," titled "Pretty Woman," on their album "As Clean As They Wanna Be." Acuff-Rose claimed "that the lyrics of 'Oh, Pretty Woman' as sung by 2 Live Crew '[were] not consistent with good taste or would disparage the future value of the copyright.'"<sup>176</sup> Further, "Acuff-Rose charge[d] that 2 Live Crew's music [was] substantially similar in melody to 'Oh, Pretty Woman' and the lyrics of the first verse are substantially similar to that of the original version."<sup>177</sup> In response to the charge of copyright infringement, 2 Live Crew moved for summary judgment on the grounds that their song "Pretty Woman" was a parody that constituted a fair use under Section 107 of the Copyright Act.<sup>178</sup>

The District Court for the Middle District of Tennessee found a fair use and granted summary judgment in favor of the defend-

171. 972 F.2d 1429 (6th Cir. 1992).

172. "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." *Id.* at 1439.

173. *Id.*

174. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991). The song was co-authored by Roy Orbison and William Dees, who assigned their rights in the music to Acuff-Rose Music. Acuff-Rose copyrighted the song in 1964, and has continued to generate profits from it ever since. *Id.* at 1152. The action also involved state law charges of interference with business relations and interference with prospective business advantage, but these charges were resolved at the district court level, where the court determined that these charges were preempted by the Copyright Act. *Id.* at 1160.

175. For simplicity's sake, where "2 Live Crew" is referred to throughout this Comment, it incorporates by reference the individual members of the group as well as each of the defendants in the case.

176. *Id.* at 1152.

177. *Id.*

178. *Id.* at 1154.

ants.<sup>179</sup> As the basis for its decision, the district court focused on the four factors of Section 107 and relied on existing case law on parodies and fair use. In particular, the court relied on the case of *Fisher v. Dees*,<sup>180</sup> which the court viewed as analogous in many respects.<sup>181</sup> Like the Ninth Circuit in *Fisher*, the district court determined that a commercial use of a musical parody did not preclude a finding of fair use.<sup>182</sup>

The district court began its analysis by determining that under the first prong of Section 107, the purpose and character of the use was to create a parody of the original work.<sup>183</sup> After deciding that "the facts convincingly demonstrate that it is a parody," the court concluded that the fact that it was distributed commercially did not outweigh the social benefits of parody "both as entertainment and as a form of social and literary criticism."<sup>184</sup> In its analysis, the court stated that "[a]lthough 2 Live Crew's primary goal in releasing 'As Clean As They Wanna Be' is to sell its music, that finding 'does not necessarily negate a fair use determination.'"<sup>185</sup> The court noted that the Supreme Court in *Harper & Row* stated that a commercial purpose merely "tends to weigh against a finding of fair use."<sup>186</sup> Rather, "the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."<sup>187</sup> Since the court believed that the parody was a valid com-

179. *Id.* at 1158-59. "Fair use is a mixed question of law and fact." *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 560 (1985). "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use does] not qualify as a fair use of the copyright work.'"<sup>184</sup> *Id.*

180. 794 F.2d 432, 437 (9th Cir. 1986).

181. 754 F. Supp. at 1154-58.

182. *Id.* at 1154. The court analyzed each of the four statutory factors. Because of this nature of this Comment, only the first and fourth are discussed. After briefly noting that the original work was a creative rather than factual work, the court found that the second factor, the nature of the copyrighted work, weighed in favor of Acuff-Rose. *Id.* at 1155-56. Regarding the third factor, the court determined that since "[i]t is a settled aspect of copyright law that parodists have the right to conjure up the object of the parody," the amount of the original borrowed was not viewed as excessive. *Id.* at 1156.

183. *Id.* at 1154.

184. *Id.* at 1154-55 (citing *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964), cert. denied, 379 U.S. 822 (1964)).

185. *Id.* at 1154 (quoting 3 NIMMER, *supra* note 37, at § 13.05[A] at 13-70).

186. *Id.* (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)). This interpretation is much less restrictive than the view other courts have taken. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 309 (2d. Cir. 1992) ("The Supreme Court has held that copies made for commercial or profit-making purposes are presumptively unfair.").

187. 754 F. Supp. at 1154 (citing *Harper & Row*, 471 U.S. at 562).

mentary rather than just a commercial endeavor, it found the first factor of Section 107 favored 2 Live Crew.<sup>188</sup>

Similarly, when analyzing the fourth factor, the impact on the market for the original, the court decided in favor of the defendants. The court stated that, “[a]s in *Fisher*, it is extremely unlikely that 2 Live Crew’s song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would purchase the 2 Live Crew version are remote.”<sup>189</sup> Since the two markets were disparate, there was no economic impact on Acuff-Rose’s market. Moreover, following the court in *Fisher*, the district court refused to consider the parody’s critical impact on the original in assessing its affect on the market.<sup>190</sup>

The court also addressed Acuff-Rose’s argument that the release of the parody interfered with its right under the fourth prong of section 107 not only to the market for the original, but also to the market for derivative works.<sup>191</sup> To this argument, the court responded that, “[i]n a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author.”<sup>192</sup> The court was unwilling to extend copyright protection to Acuff-Rose if it meant the complete exclusion of parodies.<sup>193</sup> Because it found that 2 Live Crew created a parody of “Oh, Pretty Woman” that, while commercial in nature, did not interfere with the market for the original, the district court granted summary judgment in favor of 2 Live Crew and dismissed Acuff-Rose’s copyright infringement claim.<sup>194</sup>

### B. The Sixth Circuit Decision

In contrast to the district court, the Sixth Circuit had a difficult time believing that the song “Pretty Woman” by 2 Live Crew was even a parody of the original work.<sup>195</sup> The court questioned at great length the district court’s conclusion that the song was a par-

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188. *Id.* at 1155.

189. *Id.* at 1158.

190. *Id.*

191. *Id.*

192. *Id.* (citing 3 NIMMER, *supra* note 37, at § 13.05[C], 13-90.12; *Fisher*, 794 F.2d at 437 (“Parodists will seldom get permission from those whose works are parodied. . . . The parody defense to copyright exists precisely to make possible a use that generally cannot be bought.”)).

193. *Id.*

194. *Id.* at 1160.

195. *Acuff-Rose Music, Inc., v. Campbell*, 972 F.2d 1429, 1435 n.8 (6th Cir. 1992).

ody, noting that "even accepting that 'Pretty Woman' is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song."<sup>196</sup> The Sixth Circuit defined the essential elements of parody: "[F]ailing a direct comment on the original, there can be no parody, as the 'copied work must be, at least in part an object of the parody, otherwise there would be no need to conjure up the original work.'"<sup>197</sup>

After concluding that the district court might have erred in deciding that "Pretty Woman" was indeed a parody, the Sixth Circuit nonetheless accepted the district court's conclusion and proceeded to apply the statutory fair use factors.<sup>198</sup> Throughout the opinion, however, it is apparent that the court's reluctance in accepting the song as a parody influenced its determination of the fair use factors, swaying the court to find for the plaintiff.

This influence on the court is particularly evident in its analysis of the second statutory factor, the portion of the original work used. The district court found that this factor weighed in favor of 2 Live Crew because a certain degree of the original was necessary to make the parody effective.<sup>199</sup> In contrast, the Sixth Circuit, after noting that the district court made its analysis based on the presumption that the song was a parody, only examined the substantial degree of taking involved.<sup>200</sup> The court stated that "[n]ear verbatim taking of the music and meter of a copyrighted work without the creation of a parody is excessive taking," and concluded that the degree of taking in this case could not support a finding of fair use.<sup>201</sup> Thus, while purporting to accept the district court's finding that the purpose of the song was to parody the original, the Sixth Circuit's language and its ultimate decision did not reflect this.

When applying the first fair use factor, the purpose of the use, the court regarded the commercial nature of the use of primary importance. The Sixth Circuit determined that the district court did not place enough emphasis on the commercial aspects of the work:

We agree that a commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insuf-

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196. *Id.* at 1436 n.8.

197. *Id.* (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992)).

198. *Id.* at 1435.

199. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1157 (M.D. Tenn. 1991).

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

201. *Id.*

ficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly power that belongs to the owner of the copyright."<sup>202</sup>

Beginning with the presumption that a commercial work was unfair, the court concluded that the defendants could not meet this burden because they could not show that "the parody does not unfairly diminish the economic value of the original."<sup>203</sup> Since the Sixth Circuit considered the commercial nature of the work of equal importance as the purpose of the work itself, the court found that the first factor weighed in favor of Acuff-Rose.<sup>204</sup>

Similarly, when addressing the fourth fair use factor, the court found in favor of Acuff-Rose.<sup>205</sup> The court reached this conclusion based upon the same principle employed under the first factor, the economic impact on the market for the original.<sup>206</sup> The court stated that the plaintiff did not have to demonstrate an existing harm to the original, but only "that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed."<sup>207</sup> Further, the court found that "the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists."<sup>208</sup> Accordingly, the court concluded that "the record on this factor [did] not support a finding of fair use."<sup>209</sup>

In its analysis under both the first and fourth factors, the court was most concerned with the commercial nature of the parody. The court noted that "in dealing with uses popularly termed parodies, the factors involving the commercial nature of the use

202. *Id.* at 1437 (citing *Harper & Row*, 471 U.S. 539, 562 (1985)).

203. *Id.* at 1437 (citing *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986)). This consideration is generally the fourth fair use factor, but in this case, the court uses the same rationale to find in favor of Acuff-Rose on the first fair use factor as it does for the fourth. However, when analyzing it under the first factor, the court does not state exactly how the parody infringes on the original's market.

204. *Id.* ("[T]he admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use.") (emphasis in original) (citing *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 449 (1984)).

205. *Id.* at 1439.

206. *Id.* at 1438.

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

208. *Id.* (citing *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (addressing the question of commercial copying after concluding that a parody did not exist)).

209. *Id.* at 1439.

and the damage to the defendant are of particular significance.”<sup>210</sup> Because the song was released and distributed commercially, the court refused to find a fair use. By its language, the court made it apparent that, but for this commercial use, a fair use would have existed: “[I]t is likely, for example, that an identical use of the copyrighted work in this case at a private gathering on a not-for-profit basis would be a fair use. It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.”<sup>211</sup>

### C. *The Dissent*

In *Acuff-Rose* the Sixth Circuit applied the fair use standards in the case of a parody in the same manner it would have in any other commercial infringement case. As previously noted, this stems from the court’s underlying doubt about the nature of the 2 Live Crew song as a parody in the first place. On the other hand, Judge Nelson, dissenting, recognized that “the statutory factors are likely to have a somewhat different impact on our deliberations than they would in a non-parody situation.”<sup>212</sup> In Judge Nelson’s view, “the 2 Live Crew song is a quintessential parody.”<sup>213</sup> While claiming no “illusions of musical expertise,” he found that after listening to the two songs, “the 2 Live Crew version both imitates and distorts the original work for comic and satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable.”<sup>214</sup>

The different view Judge Nelson had toward the 2 Live Crew song is reflected in the contrast between his analysis of the fair use factors and that of the majority.<sup>215</sup> Considering the first fair use factor, he addressed the issue underlying the court’s decision: “Does the mere fact that the parodist hoped to make money mean that their use is presumptively unfair?”<sup>216</sup> Judge Nelson concluded that it would not.<sup>217</sup> He noted that the two Supreme Court fair use cases, *Sony* and *Harper & Row*, each “involved mechanical copying, literally or figuratively, without alteration of the copied mate-

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210. *Id.*

211. *Id.*

212. *Id.* at 1440 (Nelson, J., dissenting).

213. *Id.*

214. *Id.* at 1442.

215. Recognizing their importance in this case, Judge Nelson only addressed the first and fourth fair use factors. *Id.* at 1445.

216. *Id.* at 1443.

217. *Id.*

rial.”<sup>218</sup> Judge Nelson sought to draw a distinction between copying cases and parody cases:

There is a difference, obviously, between copying and caricaturizing. By calling into being a new and transformed work, the caricaturist exercises a type of creativity that is foreign to the work of the copyist. And the creative work of the caricaturist is surely more valuable than the reproductive work of the copyist.

Since *Acuff-Rose* involved a parody, Judge Nelson determined that there should not be a presumption of unfair use; rather, a presumption should be limited to straightforward cases of commercial copying.<sup>219</sup>

The dissent also addressed the court's concern regarding the protection of the author's right to produce derivative works, as set out in their analysis of the fourth statutory factor.<sup>220</sup> Judge Nelson once again proposed that parody be treated differently from other types of fair uses which involve copying only: “Parody again is different. It transforms as it copies, and it may well savage the original work in the process.”<sup>221</sup> Judge Nelson was concerned that because artists are unwilling to see their works attacked, they will be unwilling to license parodies, resulting in their elimination.<sup>222</sup> Consequently, he expressed concern about putting such a license in the hands of original artists: “I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result.”<sup>223</sup>

In conclusion, Judge Nelson proposed an additional factor which he believed that, although not enumerated in the Copyright Act, merited consideration in the determination of when parody constitutes fair use: *the social value of the parody as criticism*.<sup>224</sup> In his view, the most significant message in the 2 Live Crew Song was its vulgarity and “[w]hether we agree or disagree [with the 2 Live Crew message], this perception is not one we ought to suppress.”<sup>225</sup>

218. *Id.*; See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984); See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

219. 972 F.2d at 1443 (Nelson, J., dissenting).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

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

225. *Id.*



#### IV. CAMPBELL BEFORE THE SUPREME COURT

Based on the case law set out above, as well as the approach set forth by the District Court for the Middle District of Tennessee and the Sixth Circuit in *Acuff-Rose*, there are two important questions in every parody fair use case. The first is simply whether or not the derivative work is a parody. The second is how to apply the fair use factors to parody. As seen in the differences between the district court and the Sixth Circuit decisions, the answer to the first has a significant impact on the outcome of the second. If the Supreme Court determines that the song "Pretty Woman" by 2 Live Crew is a parody, the Court must then decide whether a parody is entitled to more protection as a fair use than mere commercial copying. The answer to this question will be reflected in the manner in which the Court applies the fair use factors.

##### A. *Is it Parody?*

The threshold question presented in *Campbell* is whether the song "Pretty Woman" by 2 Live Crew is a parody as defined by the courts. To find a parody, in the context of fair use, a song must create a new musical work that both mimics and renders ludicrous the style and thought of the original.<sup>226</sup> The district court and the Sixth Circuit grappled with this issue, ultimately reaching different conclusions.<sup>227</sup> On its face, the issue framed by the Supreme Court seems to resolve this dispute: "Whether petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. section 107."<sup>228</sup> However, as part of its analysis, the Court should not overlook the importance of the definition of parody.

The question of whether a song is a parody is paramount, because the term parody indicates not only that the song ridicules another, but also that an independent creative and critical force exists in the song. A number of courts have used the question of whether a derivative work is a parody as a preliminary test before considering the fair use factors.<sup>229</sup> For example, in *Tin Pan Apple*, the court, after concluding that the derivative work was not a parody, did not even apply the fair use factors, but concluded that a

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226. 972 F.2d at 1441 (Nelson, J., dissenting).

227. While the Sixth Circuit purports to accept the district court's conclusion that the song is a parody, the court expressed its reservations in a page long footnote, and as argued above, in the end this reservation impacted on the outcome of the case.

228. 61 U.S.L.W. 3667 (1993)(emphasis added).

229. See *MCA v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976); *Walt Disney Pictures Corp. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975), *supra* note 40.

fair use did not exist.<sup>230</sup> Other courts have taken a different approach and subsumed the question of whether a derivative use is a parody into the analysis of the first fair use factor.<sup>231</sup>

By assuming 2 Live Crew's song is a parody in granting certiorari, is the Court recognizing that the song is a "criticism" of another work, or is the Court using the term "parody" in its popular meaning?<sup>232</sup> If it chooses the latter, will the Court address the issue within the fair use analysis? Whichever analysis it chooses, the line between parodies and other uses must be drawn.

This Comment proposes that the Court adopt the parody question as a preliminary test, as the *Tin Pan Apple* court did.<sup>233</sup> When courts simply apply the fair use factors to derivative works which might be parodies and address the question of whether the work is a parody within the fair use analysis, the issues become convoluted.<sup>234</sup> Rather, by establishing the parody test prior to the fair use analysis, the Court can recognize the interests inherent in parody that are not present in mechanical copying cases. Then, once the Court has determined that a parody exists, and that there is an underlying "criticism," the Court can apply the fair use factors in its chosen manner.

### *B. Is There A Distinction Between Parody and Copying?*

Once the Court determines that a parody exists, as the district court did, the question before it becomes as Judge Nelson argued in his dissent in *Acuff-Rose*, whether there is a distinction between parodies and cases of simple copying. In determining whether commercial parodies qualify as fair use under Section 107, the Court has a clear choice. It may rely on its precedent established in *Sony* and *Harper & Row*, extending them to hold all commercial uses presumptively unfair.<sup>235</sup> On the other hand, the Court may declare

230. 737 F. Supp. 826, 830-32 (S.D.N.Y. 1990); *see also* *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980); *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

231. *See* *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988); *Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031 (N.D. Ga. 1986).

232. As the Sixth Circuit noted in *Acuff-Rose*, "the terminology of the fair use analysis has evolved in such a way that the popular definition of what is a parody and the statutory definition of parody as a form of criticism have become somewhat confused." 972 F.2d at 1435.

233. 482 F. Supp. at 830-832.

234. For example, in *Koons*, the fair use analysis would have been much simpler if the question of whether the infringing art was a parody was addressed first. 960 F.2d at 310.

235. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984); *Harper & Row*,

commercial parodies an exception to copyright protection under Section 107.<sup>236</sup> If the Court opts for the latter, this would not free all parodies from regulation; it would simply remove the presumption of an unfair use that the courts have applied whenever a commercial use is involved.

The danger from restricting parodies is great. As suggested earlier in this Comment, the choice to exclude commercial parodies from the fair use exception will have a detrimental effect on the production and dissemination of parodies.<sup>237</sup> The commercial nature of a parody cannot be severed from its other aspects. By taking away the motivation to produce a work, a court which limits commercial use essentially limits parody.

The alternative to barring all commercial parodies is to reverse the presumption of unfairness that accompanies a commercial use in parody cases. Judge Nelson in his dissent in *Acuff-Rose* took this kind of approach. He distinguished *Sony* and *Harper & Row*, the mechanical copying cases, from parody cases. The basis for this distinction is what he calls "the social value of the parody as criticism."<sup>238</sup>

This justification provides sufficient ground to overturn the presumption of unfair use in commercial parody cases. The idea of "the social value of parody as criticism" brings to mind the original goal of copyright law, as set forth in the Constitution: "[T]o promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>239</sup> The goal is the promotion of arts and sciences. The chosen means is the body of law that is known as copyright law. This body of law exists for a good greater than just the protection of individual artist's interests. Copyright law is a means to an end rather than the end itself.<sup>240</sup> Thus, this Comment urges the Court to consider not only the economic rights bestowed

Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

236. By choosing this option, the Court would resolve the issue of commercial parodies, but increase a tension that already exists in the parody cases; the courts interpretations of what is a parody. Rather than attacking the parody as a commercial use, the copyright holders would then argue that it was not a parody at all. As the difference of opinion between the district court and the Sixth Circuit over the conclusion of this issue in *Acuff-Rose* indicates, it is not a settled area of the law. 972 F.2d at 1436; 754 F. Supp. at 1154-55.

237. See *infra* notes 11 to 20 and accompanying text.

238. 972 F.2d at 1446.

239. U.S. CONST. art I, § 8.

240. The Supreme Court has stated that "[t]he economic philosophy behind the copyright clause . . . is the conviction that the encouragement of individual effort by personal gain is the best way to advance public welfare." *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

by copyright law, but also the underlying motivation for copyright law itself.

### C. Parody as Fair Use

This approach is a valid alternative to a presumption of unfair use whenever a parody is commercial in nature. Fair use emerged as an exception to copyright protection for cases when the copyright holder's monopoly defeated rather than encouraged the goals of copyright law. It is an equitable doctrine that calls for a balancing of all the factors involved in the use. In parody, the question boils down to this: Which will greater benefit society, the protection of the economic rights of copyright holders, or freedom for the parodist to criticize others?

Once the presumption of unfair use is withdrawn from the question of fair use for commercial parodies, the entire analysis changes. Parody is now distinguished from simple copying. It is no longer simply a commercial appropriation, but truly a fair use within a commercial context.

The approach the Supreme Court took toward commercial copying in *Sony* and *Harper & Row* and the different approaches other courts have taken toward parody exemplifies this distinction. This Comment suggests that the Court view the district court opinion in *Acuff-Rose* as the appropriate fair use analysis required in a parody case while the Sixth Circuit opinion provides the suitable approach for a mechanical copying case.

As previously noted, when the Supreme Court addresses the *Campbell* case, the decision will be made based on the presumption that the 2 Live Crew song "Pretty Woman" is a parody. That is the key difference between the district court and Sixth Circuit opinions. Since the district court held *Pretty Woman* to be a parody, it thought the song was justified under fair use.<sup>241</sup> The Sixth Circuit, in contrast, questioned this determination of "parody" and found in favor of the copyright holder.<sup>242</sup> Since the Supreme Court in granting certiorari has assumed that the song "Pretty Woman" is a parody, if the Court recognizes the distinction between commercial copying and commercial parodies, it can apply the fair use factors in a manner similar to the district court. On the other hand, if the Court decides to limit the freedom of parodists by presuming an unfair use in commercial parody cases, the Court's

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241. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154 (M.D. Tenn. 1991).

242. *Acuff-Rose*, 972 F.2d at 1436.

decision likely will resemble that of the Sixth Circuit.

In an unauthorized copying case, the commercial nature of the derivative work is most important. By copying, the infringer takes advantage of the limited market for the original maintained by the copyright law and its incentive toward individual creativity. The Supreme Court recognized this in *Sony* and *Harper & Row*.<sup>243</sup> In *Harper & Row*, the Court concluded that a commercial taking was unfair in the context of blatant commercial copying.<sup>244</sup> Lower courts have agreed, but also have recognized that parodies are entitled to a certain degree of deference based on their nature as criticism.<sup>245</sup> In *Acuff-Rose*, however, because the Sixth Circuit disregarded the unique factors presented in parody, the court set a standard that potentially could stifle all future parody which emerges in a commercial context.<sup>246</sup>

The Supreme Court should reject this standard in favor of a more flexible approach that protects and encourages the creativity of the parodist as well as the original artist. By bestowing freedom on the parodist, the Court will also recognize the social value of the parody as criticism and comment. While commercial use should remain a significant factor in the fair use analysis, it simply should not be the only consideration in parody cases. The existence of competing interests important to society demands otherwise.

## V. CONCLUSION

There are two important questions which arise when a defendant in a copyright infringement case involving a commercial appropriation asserts the parody fair use defense. The first is whether the work is in fact a parody by making a comment on the original. The second, which the Supreme Court will address, is whether the work, if a parody, is entitled to a fair use exception from copyright protection. In *Acuff-Rose*, the Court must decide whether derivative works that do more than just copy originals, derivative works that actually provide a benefit to society, are entitled to a higher degree of freedom than mere commercial appropriations.

Because parody presents elements not present in simple copying cases, the Court ought to apply a different standard. *Harper & Row* represented a direct economic taking. In such a situation, a

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243. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, (1984); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

244. 471 U.S. at 568.

245. See, e.g., *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).

246. *Acuff-Rose*, 972 F.2d at 1436.

fair use should not exist and the most important factor in determining the outcome should be the economic interests of the parties. However, in parody cases, the Court must recognize the author's creativity and its importance to society as "criticism." Holding otherwise allows the means by which copyright law exists to overcome its end.

