COPYRIGHT LAW—FAIR USE PRIVILEGE—IN AN ACTION FOR COPYRIGHT INFRINGEMENT, THE COMMERCIAL NATURE OF A SONG PARODY DOES NOT INVOKE A PRESUMPTION AGAINST A FINDING OF FAIR USE—*Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

Copyright law permits authors to obtain equitable emolument for the creation of original works of authorship.[1] Deriving its power from Article I of the Constitution, Congress has conferred upon authors a temporary monopoly so that authors may benefit financially from their creations.[2] This approbation of authors'

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[1] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."). *Black's Law Dictionary* defines "copyright" as:

> [t]he right of literary property as recognized and sanctioned by positive law. . . . An intangible, incorporeal right granted . . . to the author or originator of certain literary or artistic productions, whereby he is invested, for a specified period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

BLACK'S LAW DICTIONARY 336 (6th ed. 1990).

[2] *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) ("[M]onopoly-exploitation benefits [are given] for a limited duration . . . in order [for the creator] to obtain for itself the intellectual and practical enrichment that results from creative endeavors."). Courts have recognized common law copyright since antiquity. *See* RICHARD WINCOR & IRVING MANDELL, COPYRIGHTS, PATENTS AND TRADEMARKS: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY 2-3 (1980) (recounting King Diarmud's legendary proclamation made in the Halls of Tara that recognized literary property as a conceptual verity: "To every cow her calf"). Common law copyright constituted the perpetual right of authors to exclude all others from copying their unpublished works. *See* MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.23, at 8-387 to 8-388 (1994) (citations omitted). Upon publication of the work, however, common law copyright was extinguished, and absent statutory protection, the work entered the public domain and was available to be freely copied. 1 *id.* § 2.02 at 2-18.1; 2 *id.* § 8.23 at 8-389.

Prior to 1976, legislatures implemented copyright statutes that coexisted with common law copyright protections. *See* 1 *id.* § 2.02 at 2-18.1. These statutes furnished limited safeguards where protections would have otherwise been revoked at common law after publication. *See id.* American copyright statutes adopted utilitarian aims akin to those sought by the English Parliament ancillary to its 1710 promulgation of the Statute of Anne. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 9 n.29 (1994) (citation omitted) (stating that the English statute was originally entitled "An Act for the Encouragement of Learning"). The Statute of Anne attempted to hinder the proliferation of literary piracy by extending an author's exclusive right to print his works for fourteen years after initial publication of the work. *Id.* (citations omitted).

The United States Constitution grants to Congress the power "[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 . . . ." U.S. CONST. art. I, § 8, cl. 8. According to colloquial usage and sentence structure, the Framers' reference to "Science" most likely meant works by authors, and their men-

tion of "useful Arts" was probably referring to inventions. Karl B. Lutz, *Patents and Science—A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH. L. REV. 50, 51 (1949-50). Nevertheless, this constitutional grant of power applies to both types of expression. *See id.* at 51-53 (interpreting congressional actions as indicative of an intent to protect both scientific inventions and works of authorship).

This constitutional provision bestows upon Congress the power to enact legislation granting copyrights and patents of finite duration. Morley Music Co. v. Cafe Continental, Inc., 777 F. Supp. 1579, 1582 (S.D. Fla. 1991) (citation omitted). Exercising this power, the first Congress enacted the first American copyright statute on May 31, 1790. *See* Act of May 31, 1790, ch. XV, §§ 1-7, 1 Stat. 124 (repealed 1831); Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994). This law, as with any other federal law enacted pursuant to constitutional authority, was the supreme law of the land under the Supremacy Clause and, thus, preempted any inconsistent common law or state law on the issue. *See* U.S. CONST. art. VI, cl. 2. The statute extended copyright protection to citizens or residents for a fourteen year period. Act of May 31, 1790, ch. XV, § 1, 1 Stat. 124 (repealed 1831). If the author was still alive at the expiration of the fourteen year term, he could renew the copyright for an additional fourteen years. *Id.*

In 1831, when musical publication was becoming an increasingly feasible and commonly accepted business endeavor, Congress construed "authors" and "writings" to include composers and compositions of music. *See* Act of Feb. 3, 1831, ch. XVI, § 1, 4 Stat. 436 (current version at 17 U.S.C. § 102(a)(2) (1988)). In addition, this act extended the duration of copyright protection to 28 years and gave an author the right to renew protection. *See id.* §§ 1-2.

Congress enacted another copyright act in 1909 that amended previous legislation involving copyright and explicitly preserved common law copyright protections in unpublished works. *See* Act of Mar. 4, 1909, ch. 320, § 2, 35 Stat. 1075 (current version at 17 U.S.C. §§ 101-1010) (1988 & Supp. V 1994)). To be protected, a published work had to be registered in the Copyright Office with proper notice of the copyright affixed to each copy, as specified by the act. *See id.* §§ 1, 9. If the author published a work without affixing acceptable notice, he permanently forfeited copyright protection. *See id.* §§ 9, 20; WINCOR & MANDELL, *supra*, app. A at 85.

On October 19, 1976, the United States Congress enacted the Copyright Act of 1976, which applies to works created after January 1, 1978. *See* 17 U.S.C. app. §§ 101-810 (1976) (amended in 17 U.S.C. §§ 101-1010 (1988 & Supp. V 1994)). Under this statute, as amended, copyright protection takes effect as soon as the author fixes the expression into tangible form, irrespective of registration, thus eliminating the necessity to apply common law copyright. *See* 17 U.S.C. § 102 (1988 & Supp. V 1994) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated . . . .").

The 1976 Act permits an author to release her work in whatever form she chooses, by preserving her right to reproduce and distribute copies and control derivative works. *See id.* § 106(2); *see also id.* § 102(a)(2) (extending copyright protection to musical works and "any accompanying works"). *See generally* Netanel, *supra*, at 42-45 (discussing the substance of an author's right in controlling works derived from an original, copyrighted work). A derivative work, as defined in the Act, is:

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

rights to benefit from their creative efforts serves the ultimate goal of encouraging artistic innovation to enhance societal welfare.[3]

Occasionally, however, governmental authorization of copying, while generating a disincentive for creativity, promotes the arts more effectively than does a policy of rigidly protecting authors' monopolies over their creations.[4] The 1976 Copyright Act, creating immunity for the fair use of material protected by copyright from an action for infringement, signifies congressional acceptance of this compromise between protection and promotion.[5] Courts have agreed that such concessions are necessary, noting that the protections afforded authors by copyright law must yield when authors' powers unduly impede Congress's objective of encouraging the broad dissemination of ideas.[6]

Originating from the common law, the doctrine of fair use

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17 U.S.C. § 101 (1988). Consequently, an author can prevent others from creating works that recast, transform, or adapt his copyrighted work. *See id.*

The Copyright Act specifies the duration of copyright protection as well as its transferability. *See id.* §§ 201(d)(1)-(2), 302(a)-(c) (1988). Specifically, the act affords copyright protection for fifty years after the death of the last surviving author. *Id.* § 302(a), (b). Also, the copyright, or any part of it, is completely divisible and assignable. *Id.* § 201(d)(1)-(2).

[3] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *Twentieth Century Music*, 422 U.S. at 156 ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("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.").

[4] *See* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In such instances, courts recognize greater utilitarian societal gain in the promotion of arts and creativity than in allowing a copyright holder to maximize profits resulting from a single creation. *See id.*

[5] *See* 17 U.S.C. § 107 (1988 & Supp. V 1994) (listing the four statutory requirements for fair use of copyrighted materials); H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-80 (setting forth the background and scope of the 1976 fair use statute). The fair use doctrine grants immunity to certain uses of copyrighted works from infringement claims, akin to the protection afforded to easements through private property for society's benefit. WINCOR & MANDELL, *supra* note 2, at 23.

[6] *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) (citation omitted) ("It is precisely [the] growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote."); Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., Inc., 621 F.2d 57, 60 (2d Cir. 1980) (stating that the doctrine of fair use permits courts to avoid strict application of the Copyright Act when such application would stifle the creativity that the law was designed to foster); Leval, *supra* note 2, at 1109 (arguing that although monopoly protection is

permits persons to use portions of copyrighted work in certain circumstances without obtaining the copyright holder's permission or paying the holder for the use.[7] The precept, as encoded by the 1976 Copyright Act, imposes limitations upon a copyright holder's monopoly, thereby striking a balance between the exclusive right of an author to control his creation and the unabashed piracy of his material by others.[8]

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necessary to maintain authors' creative stimuli, excessively broad copyright protection would stifle creativity in derogation of copyright law's objective).

The Supreme Court has emphasized that fair use is an "equitable rule of reason" that should be applied to better serve the Copyright Act's purpose of creating a public benefit. *See Sony*, 464 U.S. at 448 & n.31 (quoting H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679). Lower courts have expressed a similar concern with the public's interest in the wide dissemination of information. *See, e.g., Sega Enters.*, 977 F.2d at 1523 (citation omitted) (explaining that it is proper for a court to examine public benefit in a fair use inquiry); Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992) (citation omitted) (stating that the fair use doctrine helps to better serve Congress's aim of encouraging creative works); Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (acknowledging the public's interest in having access to "information affecting areas of universal concern, such as art, science and industry"), *cert. denied*, 434 U.S. 1014 (1978); *Berlin*, 329 F.2d at 544 (citation omitted) ("[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.").

[7] *See, e.g.*, Wright v. Warner Books, Inc., 953 F.2d 731, 737 (2d Cir. 1991) (noting that if fair use doctrine is applicable, the work may be used without the copyright holder's permission). Before its codification in the 1976 Copyright Act, fair use was a purely judicial doctrine. *See* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994) (citation omitted) ("[A]lthough the First Congress enacted our initial copyright statute . . . without any explicit reference to 'fair use' . . . the doctrine was recognized by the American courts nonetheless."); PAUL GOLDSTEIN, II COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 10.1, at 188 n.5 (1989). Nineteenth century judicial decisions helped define the scope and substance of the doctrine. *Id.*; *see* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901); *see also* Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8136); Emerson v. Davies, 8 F. Cas. 615, 624 (C.C.D. Mass. 1845) (No. 4436). In *Folsom v. Marsh*, Judge Story stated that courts must frequently "look to the nature and objects of the selections [borrowed], the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Folsom*, 9 F. Cas. at 348. This pronouncement represents the first formal acceptance of the fair use doctrine in the United States. *See* GOLDSTEIN, *supra*, § 10.1, at 188 n.5. Also, in *Emerson v. Davies*, Judge Story announced a test to exonerate would-be infringers whose uses are fair: "whether the defendant's [work] is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources." *Emerson*, 8 F. Cas. at 624. Nearly twenty-five years later, the same court, in *Lawrence v. Dana*, noted that subsequent writers enjoy the privilege to create a fair use of previously published work. *Lawrence*, 15 F. Cas. at 61. The *Lawrence* court proffered, however, that this privilege did not extend so far as to allow the copy to become a substitute for the original work. *Id.* (citation omitted).

[8] *See* Warner Bros. Inc. v. ABC, 720 F.2d 231, 242 (2d Cir. 1983) ("[The fair use doctrine] balances the public interest in the free flow of ideas with the copyright

Through the promulgation of § 107 of the 1976 Copyright Act, Congress provided four factors to guide courts in ascertaining whether a particular reproduction qualifies as a fair use:[9] the

holder's interest in the exclusive use of his work."); MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) (citations omitted) ("[A] balance must sometimes be struck between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."); H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976) ("[T]he doctrine of fair use . . . has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation."), *aff'd sub nom.* Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); 1 NIMMER & NIMMER, *supra* note 2, § 1.10[A], at 1-63 to 1-71 (describing reconciliation of copyright law with the First Amendment of the Constitution); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 719 (1993) (noting that fair use serves the "function of calibrating the optimal balance of public interests on both sides of the copyright scale"); A. Hunter Farrell, Note, *Fair Use of Copyrighted Material in Advertisement Parodies*, 92 COLUM. L. REV. 1550, 1580 (1992) ("An important goal of the fair-use doctrine is to balance the copyright holder's right to profit from his work against the interest of society in having wide exposure to ideas and information.").

Fair use functions as an affirmative defense because the assertor acknowledges that he has infringed upon the author's copyright, but claims that such infringement is reasonable and should nevertheless be excused as a matter of policy. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549, 561 (1985). Accordingly, the party asserting the privilege bears the burden of showing that the doctrine applies. *See id.* (explaining that Congress structured the fair use provision of the 1976 Copyright Act as an affirmative defense).

Infringement occurs when someone, without authorization, encroaches upon the rights reserved exclusively for the copyright holder. 17 U.S.C. § 501(a) (1988 & Supp. V 1994) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright . . . ."). Section 106 delineates these specific exclusive protections, including the right "to reproduce the copyrighted work in copies or phonorecords[,] . . . to prepare derivative works based upon the copyrighted work[,] . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer[,] . . . to perform the copyrighted work publicly[,] and . . . to display the copyrighted work publicly." *Id.* § 106. Other sections of the act provide for additional rights specific to particular kinds of work. *See id.* §§ 113-118 (specifically listing rights in, inter alia, pictorial works, graphic works, sculptural creations, sound recordings, and computer programs).

9 17 U.S.C. § 107 (1988 & Supp. V 1994). The statute provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include——
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

character and purpose of the use;[10] the nature of the material copyrighted;[11] the substantiality and amount of the portion borrowed as compared to the whole copyrighted work;[12] and, the ef-

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[10] *Id.* § 107(1). Courts have traditionally held that the factor of the purpose and character of the use weighed in favor of the borrower if the use was educational or nonprofit in character. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448-49 (1984) (finding that the noncommercial nature of private home use of videotape recorders weighed in favor of fair use); National Rifle Ass'n of Am. v. Handgun Control Fed'n, 15 F.3d 559, 562 (6th Cir.) (stating that the defendant's noncommercial and educational use of the plaintiff's legislator list supported a finding of fair use), *cert. denied*, 115 S. Ct. 71 (1994); Wright v. Warner Books, Inc., 953 F.2d 731, 736 (2d Cir. 1991) (citations omitted) (declaring that the biographical and research-oriented purpose of publishing copyrighted letters and journal entries favored the copier in a fair use analysis); *see also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 295 (1988) ("'Fair use' focuses on personal use or use which is *not* directly for profit."). Conversely, commercial uses have traditionally tipped the balance in favor of the plaintiff copyright owner. *See, e.g.*, Stewart v. Abend, 495 U.S. 207, 238 (1990) (quotation omitted) (characterizing "'a commercial use of a fictional story that adversely affects the story owner's adaptation rights'" as an unfair use); *Harper & Row*, 471 U.S. at 562 (proffering that a copier's commercial motives weigh against a fair use finding); Los Angeles News Serv. v. Tullo, 973 F.2d 791, 797-98 (9th Cir. 1992) (quoting *Sony*, 464 U.S. at 449) (other quotation omitted) (holding that the defendant's unabashedly commercial purposes weighed against a claim of fair use); Rogers v. Koons, 960 F.2d 301, 309 (2d Cir.) ("Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use."), *cert. denied*, 113 S. Ct. 365 (1992).

Furthermore, the Second Circuit acknowledged as relevant the degree to which the use serves an educational or noncommercial purpose. Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1374 (2d Cir. 1993) ("The weight ascribed the 'purpose' factor involves a more refined assessment than the initial, fairly easy decision that a work serves a purpose illustrated by the categories listed in section 107."); *see* 17 U.S.C. § 107 (1988 & Supp. V 1994). Accordingly, the Second Circuit has found fair use in works clearly designed for commercial purposes. *See, e.g.*, Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (noting that the defendant's commercial use served "the important function of educating the public" about the reliability of particular consumer goods), *cert. denied*, 469 U.S. 823 (1984). The United States Supreme Court adopted this sentiment in *Harper & Row*: "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." *Harper & Row*, 471 U.S. at 562 (citations omitted).

[11] 17 U.S.C. § 107(2) (1988). If the work is primarily informational, such as a news report or statistical compilation, it is generally assumed to deserve less protection than a work resulting principally from creative efforts. *Compare* Dow Jones & Co., Inc. v. Board of Trade, 546 F. Supp. 113, 120, 122 (S.D.N.Y. 1982) (citations omitted) (stating that copying and dissemination of stock market index compilations strongly supported a claim of fair use) *with* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757-58 (9th Cir. 1978) (holding that defendant's copying of plaintiff's cartoon characters was more exact than necessary and, thus, was not fair use), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979).

[12] 17 U.S.C. § 107(3) (1988). This third statutory factor concerns both quantitative measurement and qualitative assessment of the use in its context. *See id.* The Second Circuit has endorsed a quantitative weighing of this factor, upholding a deci-

fect that the use has on the value of or potential market for the copyrighted material.[13] Congress explicitly proffered these four factors for consideration, but simultaneously recognized that the mélange of possible factual situations rendered impractical any adherence to immutable rules.[14] Thus, statutory fair use, like the common law doctrine from which it originated, mandates a fact-sensitive analysis.[15]

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sion that four notes out of a 100-measure musical composition was not an excessive taking. *See* Elsmere Music, Inc. v. NBC, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252, 253 (2d Cir. 1980). The Supreme Court has weighed this factor qualitatively where the copied portions' significance to the overall character of the original precluded a finding of fair use. *See Harper & Row*, 471 U.S. at 564-66.

[13] 17 U.S.C. § 107(4) (1988). The Supreme Court has dubbed this factor "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566 (citation omitted); *accord*, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980) (citations omitted) (stating that courts generally place the greatest emphasis on the effect of the defendant's use on the value of or potential market for the original work). Courts often factor into this equation both the potential harm that the use would cause to the value of the original and the encroachment of the copier into the original author's potential derivative markets. *See* Patry & Perlmutter, *supra* note 8, at 687; *see also, supra*, note 2 (defining "derivative works").

Diminishing economic value, however, is not dispositive. *See* Fisher v. Dees, 794 F.2d 432, 437-438 (9th Cir. 1986) (citation omitted) (noting that even "destructive" parodies are important to society as literary and social criticism and thus deserve protection). The Ninth Circuit asserted that "[a]ccordingly, 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." *Id.* at 438. Thus, a major focus of the fourth factor is whether the copy potentially serves as a substitute for the original in the marketplace. Patry & Perlmutter, *supra* note 8, at 691-92 (citations omitted).

[14] H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680. Designing § 107 to be simply a restatement of the judicial doctrine that had developed over a long period, Congress did not intend for the statute to alter the doctrine of fair use in any respect. *Id.* Congress also expressed its willingness to encourage the fair use doctrine's continuing evolution. *Id.*

Note also that Congress did not intend for 17 U.S.C. § 107 to comprise all possible fair use factors, stating only that "the factors to be considered *shall include*" the four enumerated factors. *See* 17 U.S.C. § 107 (1988 & Supp. V 1994) (emphasis added). An admonition by § 101 that the term "including" is "illustrative and not limitative" suggests that Congress did not intend for the enumerated factors to exclude other relevant factors. *See id.* § 101; *see also Harper & Row*, 471 U.S. at 561 ("This listing was not intended to be exhaustive . . . ."). *But see* Leval, *supra* note 2, at 1125, 1126-30 (positing that the factors named in the statute are the only factors in a proper fair use inquiry and stating that good faith, artistic integrity, and privacy protection are "false factors" that may have authority on determining an appropriate remedy or alternative cause of action, but should not bear on the fair use analysis).

[15] *Harper & Row*, 471 U.S. at 549, 561 (citations omitted); H.R. REP. No. 94-1476, 94th Cong., 2d Sess. at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5680 ("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.").

Generally, courts have not applied the First Amendment to copyright infringement cases, but application of the fair use doctrine has resolved tension between a copier's freedom of expression and the rights of a copyright holder.[16] Congress regards "criticism" and "comment" as acceptable purposes for the unauthorized use of copyrighted materials.[17] One type of "criticism" and "comment" is parody, a form of creative expression that has historically confounded courts.[18] Parody, by its very nature, must

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16 Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977) (citations omitted), *cert. denied*, 434 U.S. 1014 (1978); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 960 (D.N.H. 1978); *see, e.g.*, *Harper & Row*, 471 U.S. at 560 (refusing, in the context of journalism and news reporting, to expand the doctrine of fair use past the First Amendment protections already embodied in the Copyright Act); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979) (citations omitted) (rejecting freedom of speech defense to infringement, stating that "[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property"); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 754, 758-59 (9th Cir. 1978) (noting that both the fair use doctrine and the First Amendment may protect a copier, but holding that application of the First Amendment was unnecessary because the idea-expression dichotomy of copyright law sufficiently differentiates protected speech from unprotected speech), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979); H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976) (stating that "[t]he tension between the First Amendment and the copyright statute . . . does not exist because the doctrine of fair use . . . has been precisely contoured by the courts" to balance the relevant competing interests), *rev'd sub nom.* Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415, 422 (S.D.N.Y. 1971) (declaring that defendant's First Amendment argument to support the copying of an economics textbook could be dismissed as "flying in the face of established [copyright] law").

Federal copyright law protects the expression of ideas rather than the ideas themselves. *See* 1 NIMMER & NIMMER, *supra* note 2, § 1.10[B][2], at 1-76. Copyright law is, therefore, not an abridgment of First Amendment freedom of speech rights if it serves merely to restrain particular modes of expression rather than to prevent an individual from using certain ideas altogether. *See id. But cf.* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding that a Kennedy assassination film was too important to be restricted by copyright claims).

17 17 U.S.C. § 107 (1988 & Supp. V 1994). Other enumerated purposes for which a copy would not infringing include news reporting, teaching, research, and scholarship. *Id.*

18 *See Walt Disney*, 581 F.2d at 756 (noting that since the Ninth Circuit's 1956 decision in *Benny v. Loew's*, the standards for applying fair use to parody have been in dispute) (citation omitted); Patry & Perlmutter, *supra* note 8, at 689 ("Judicial response to parody has been inconsistent, with courts struggling with issues of what is a legitimate parody, how closely a parodist can imitate the original, and whether distasteful or obscene parodies can be fair use.").

Early parody cases in the United States, arising in the early twentieth century in the context of Vaudeville singers mimicking others' works, considered each copier's imitative purpose. *See, e.g.*, Green v. Luby, 177 F. 287, 288 (C.C.S.D.N.Y. 1909) ("The mimicry is said to be the important thing; the particular song, the mere incident"); Green v. Minzensheimer, 177 F. 286, 286 (C.C.S.D.N.Y. 1909) (finding no infringe-

mimic a specific previously published work and must necessarily borrow elements of that work.[19] If courts' rigid interpretations of copyright laws stifle the production of parodies, the broad dissemination of ideas that is possible through criticism and comment would likewise be impeded, encumbering an important goal of copyright law.[20]

Courts, therefore, have regularly treated parody as a special

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ment because the imitation derived its popularity from the "mimicry and cleverness" in which the alleged infringer reproduced the mannerisms of popular performers); Bloom & Hamlin v. Nixon, 125 F. 977, 978-79 (C.C.E.D. Pa. 1903) (finding that defendant imitated plaintiff in good faith and noting that the degree of interest in defendant's parody was caused by the excellent imitation rather than by the copyrighted song itself); *see also* Melanie A. Clemmons, *Author v. Parodist: Striking a Compromise*, 33 COPYRIGHT L. SYMP. (ASCAP) 85, 87 n.15 (1987) (listing both early and later case law that helped to shape judicial treatment of parodic works).

The term "parody" comes from the Greek *parodeia*, which means "'a song sung alongside another.'" Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1440 (6th Cir. 1992) (Nelson, J., dissenting) (quotation omitted), *rev'd*, 114 S. Ct. 1164 (1994). "A defining characteristic of parody as a genre is its distortional imitation of [another's work] for the purpose of criticism and humorous effect." Farrell, *supra* note 8, at 1555. Parody's roots extend back at least to Ancient Greece, when Aristophanes wrote parodies of works by Aeschylus and Euripides. Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CANADIAN BAR REV. 1130, 1133 (1955) (suggesting that parody "came to full and recognized fruition in Aristophanes," who used parody to mock the styles of Aeschylus and Euripides); James J. Kilpatrick, *From Aristophanes to 2 Live Crew*, SAN DIEGO UNION-TRIBUNE, Oct. 16, 1993, at B14 ("Aristophanes did it. . . . Did what? [He] wrote parodies of someone else's work."); *see* Beth Warnken Van Hecke, Note, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 465 n.2 (1992) (citation omitted) (noting that Aristophanes's play, *The Frogs*, mimicked Euripides's style of verse). Influential authors, from Chaucer and Shakespeare to Hemingway and Faulkner, have also used parody. L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir.) (noting also that, because parody often ridicules what has come to be accepted in a society, parody often offends others), *cert. denied*, 483 U.S. 1013 (1987).

In distinguishing between an exploitative imitation and a parody, a federal district court provided a comprehensive definition of parody. *See* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979). Specifically, the court declared, "[a] parody is a work in which the language or style o[f] another work is closely imitated or mimicked for comic effect or ridicule." *Id.* The court further distinguished parody from satire, the latter being "a work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly." *Id.*

Again, in *Yankee Publishing Inc. v. News America Publishing Inc.*, the United States District Court for the Southern District of New York offered three dictionary definitions of parody. Yankee Publishing Inc. v. News Am. Publishing Inc., 809 F. Supp. 267, 279 n.11 (S.D.N.Y. 1992). Among the cited definitions of parody were: "[a] literary or artistic work that broadly mimics an author's characteristic style and holds it up to ridicule. . . . An imitation of a work more or less closely modelled on the original, but turned so as to produce a ridiculous effect." *Id.* (citations omitted).

19 *See* Van Hecke, *supra* note 18, at 465-66 & n.3.

20 *See L.L. Bean*, 811 F.2d at 33, 34 ("Denying parodists the opportunity to poke

case.[21] To prevent the copyright owner from using her monopoly to censor a parodist's unflattering characterizations, the fair use doctrine grants to the parodist the license that the copyright owner may have refused to give of her own volition.[22] Not wanting to give a parodist excessive liberty to appropriate copyrighted material, however, courts have permitted parodists to borrow only as much as is needed to "conjure up" the original copyrighted work.[23] A parodist's taking beyond this threshold constitutes copyright infringement.[24]

In a recent case, *Campbell v. Acuff Rose Music, Inc.*,[25] the Supreme Court addressed both the nature of protection afforded a

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fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.").

21 *See, e.g.*, Fisher v. Dees, 794 F.2d 432, 439 (9th Cir. 1986) (stating that viable alternatives requiring less copying are generally unavailable in the context of song parodies because "a song is difficult to parody effectively without exact or near-exact copying"); Hill v. Whalen & Martell, Inc., 220 F. 359, 360 (S.D.N.Y. 1914) (acknowledging that parody requires a unique analysis, but rejecting defendant's assertion of a parody defense partly because defendant copied with the intent to injure the original's copyright); *see also* Brian R. Landy, Comment, *The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody*, 54 OHIO ST. L.J. 227, 247 (1993) (asserting that parody has "special social value"); Van Hecke, *supra* note 18, at 474-76 & n.45 (outlining three prevalent judicial approaches in parody cases); *but see Yankee Publishing*, 809 F. Supp. at 279 (arguing that parody deserves no "special latitudes" because it is simply *one example* of expression favored under a fair use analysis).

22 *See* Julie J. Bisceglia, *Parody and Fair Use: 2 Live Crew Meets the Supremes*, 15 ENT. L. REP. 13, 14 (1994) ("[P]arodists need to imitate their sources closely . . . . Under other circumstances, this would almost certainly be infringing, unless the copyright owner gave permission: with a parodic purpose, however, it might be fair use.").

23 *See* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). The "conjure up" test is articulated in *Berlin v. E.C. Publications. See id.* The *Berlin* court considered whether the defendant infringed upon the plaintiff's copyright when the defendant printed, in *Mad Magazine*, certain humorous lyrics designed to be sung to the melodies of the plaintiff's songs. *Id.* at 542, 543. The court deemed parodists deserving of considerable latitude in evading infringement claims, determining that a parodist may borrow the necessary elements from the original work to "conjure up" that work in the minds of consumers. *Id.* at 544.

To "conjure up" enough of the original, the parodist "must appropriate a substantial enough portion of [the original] to evoke recognition." *Fisher*, 794 F.2d at 435 n.2, 440 (holding that the fair use doctrine protected defendant's song, *When Sonny Sniffs Glue*, which parodied *When Sunny Gets Blue*); *see* Elsmere Music, Inc. v. NBC, 482 F. Supp. 741, 747 (S.D.N.Y.) (finding that "repetition of the phrase ['I love Sodom'] . . . cannot be said to be clearly more than was necessary to 'conjure up' the original [*I Love New York*]."), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). Because the *Berlin* court found that the respondent's use was not "substantially similar" to Berlin's original, however, the court's in-depth exploration of parody in the fair use context is mere dictum. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 161 (1985) (citing *Berlin*, 329 F.2d at 545).

24 *See Berlin*, 329 F.2d at 544. The *Berlin* court adopted the view that a parodist must not appropriate more than is necessary to "conjure up" the original. *See id.*

25 114 S. Ct. 1164 (1994).

parodist and the proper treatment of commerciality in a fair use analysis.[26] The Court concluded that an author's use of copyrighted material for a parodic purpose lends support to a finding of fair use.[27] Moreover, the Supreme Court held that the commerciality of a parody does not preclude such a finding.[28]

In the mid-1960s, William Dees and Roy Orbison co-authored the rock ballad, *Oh, Pretty Woman*, and they assigned the rights to their work to Acuff-Rose Music, Inc.[29] Acuff-Rose registered *Oh, Pretty Woman* for copyright protection.[30] Subsequently, petitioners Luther Campbell and the other members of a rap group, known as 2 Live Crew, wrote and commercially released a song entitled *Pretty Woman*, which copied the Orbison song's first line of lyrics and borrowed its prominent guitar phrase.[31] Acuff-Rose sued Campbell

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26 *See id.* at 1167-68.

27 *Id.* at 1171 (citations omitted).

28 *Id.* at 1179.

29 *Id.* at 1168.

30 *Id.* Because the Orbison song was written in 1964, *id.*, the 1909 Copyright Act, rather than the 1976 Copyright Act, governed Acuff-Rose's copyright. *See* Act of Mar. 4, 1909, ch. 320, § 64, 35 Stat. 1075 (codified as amended in 17 U.S.C. §§ 101-1010 (1988 & Supp. V 1994)) (applying to works created after July 1, 1909); *see also* 17 U.S.C. §§ 101-1010 (1988 & Supp. V 1994) (applying to works created after January 1, 1978).

31 *Campbell*, 114 S. Ct. at 1168, 1176. A portion of the lyrics from the original work, as quoted by the Supreme Court, follows:

> Pretty Woman, walking down the street,
> Pretty Woman, the kind I like to meet,
> Pretty Woman, I don't believe you, you're not the truth,
> No one could look as good as you . . . .

Id. app. A at 1179.

The 2 Live Crew song copied verbatim the Orbison song's first line of lyrics, then "quickly degenerate[d] into a play on words, substituting predictable lyrics with shocking ones." Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994). An excerpt from the 2 Live Crew song follows:

> Big hairy woman you need to shave that stuff
> Big hairy woman you know I bet it's tough
> Big hairy woman all that hair it ain't legit
> 'Cause you look like 'Cousin It' . . . [.]

Campbell, 114 S. Ct. app. B at 1179.

The appellate court mentioned that 2 Live Crew gave credit on its recordings to Orbison and Dees as the authors of *Pretty Woman*. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1432 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994). The court also observed that the group offered to pay Acuff-Rose the statutory rate in exchange for express permission to use the work, but Acuff-Rose refused this offer. *Id.* The court acknowledged, however, that Campbell argued that his song was a parody, and as such, a fair use of the copyrighted work. *Id.* at 1432, 1434. Importantly, if a use is deemed "fair," neither permission, acknowledgment, nor payment is required. *See* 3 NIMMER & NIMMER, *supra* note 2, § 13.05[C], at 13-209 to 13-210 (stating that one important justification for the fair use doctrine is that with many serious works,

and 2 Live Crew for copyright infringement in the Federal District Court for the Middle District of Tennessee.[32] Campbell responded by moving for summary judgment, arguing that his song, as parody, constituted fair use of the original *Oh, Pretty Woman*.[33]

Initially, the district court found that Campbell's *Pretty Woman* parodied *Oh, Pretty Woman*.[34] Accordingly, the district court resolved the fair use inquiry in Campbell's favor, holding that 2 Live Crew's use of selected elements from the original composition constituted fair use as set forth in § 107 of the 1976 Copyright Act.[35] Because the doctrine of fair use excused Campbell's borrowing from a claim of copyright infringement, the court granted Campbell's motion for summary judgment.[36]

Acuff-Rose appealed to the United States Court of Appeals for the Sixth Circuit, challenging the district court's decision.[37] The Sixth Circuit employed the same four statutory factors that the trial court used below, but a divided appellate panel reached a contrary resolution of the fair use question.[38] The majority interpreted two

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licenses will simply not be granted to prospective parodists; fair use is the only way to "reap the benefit of this socially useful literary genre").

32 *See Acuff-Rose*, 754 F. Supp. at 1151.

33 *Id.* at 1152.

34 *Id.* at 1154 ("It is apparent that 2 Live Crew has created a comic parody of 'Oh, Pretty Woman.'"). The court stated that the song derisively demonstrated how 2 Live Crew, an anti-establishment rap group, found the Orbison song to be bland and banal. *Id.* at 1155.

35 *Id.* at 1160. Because the 2 Live Crew's song was a parody of the Orbison-Dees original, the district court found that the first fair use factor—the purpose and character of the work—weighed in favor of Campbell. *Id.* at 1154-55. Reasoning that the Orbison-Dees song was a creative, published work, the court determined that the second factor—the nature of the copyrighted work—weighed in favor of Acuff-Rose. *Id.* at 1155-56. Chief Judge Weisman next stated that the third factor—the amount and substantiality of the portion used—weighed in favor of Campbell because his taking fell far short of near-verbatim copying and borrowed no more than necessary to fulfill Campbell's parodic purpose by "conjuring up" the original. *Id.* at 1156, 1157 (citations omitted). Finally, examining the fourth factor—the effect on the market for and value of the original work—the court emphasized the diverse audiences at which the two songs were targeted. *Id.* at 1157, 1158. Thus, the court found no harm to existing or potential markets for Acuff-Rose's derivative works and disallowed Acuff-Rose's alleged attempt to suppress criticism by claiming economic harm. *Id.* at 1158.

36 *Id.* at 1160.

37 *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1431 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

38 *See id.* at 1435-39. The appellate court initially questioned whether 2 Live Crew's *Pretty Woman* was a parody attempting to deliver social commentary through humor, or whether the song was merely a "comic" effort that borrowed excessively from the original. *Id.* at 1432 n.3. Doubting that Campbell had formed a parodic intent prior to releasing the song, the court emphasized that Campbell's payment of mechanical royalties was inconsistent with the creation of a parodic work, as parodies need neither permission nor remuneration. *Id.* at 1432 & n.3. Nevertheless, the Sixth Cir-

Supreme Court cases, *Sony Corp. of America v. Universal City Studios, Inc.*[39] and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[40] to suggest that the blatantly commercial purpose of Campbell's borrowing invoked a presumption against the applicability of the fair use doctrine.[41] Therefore, the Sixth Circuit held that Campbell's borrowing did not, as a matter of law, constitute fair use.[42] The court thus reversed the decision of the district court and remanded the case for further proceedings.[43]

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cuit reluctantly accepted the trial court's finding that the song contained parody. *Id.* at 1435 & n.8.

39 464 U.S. 417 (1984); *see infra* notes 79-88 and accompanying text (discussing *Sony* in detail).

40 471 U.S. 539 (1985); *see infra* notes 89-94 and accompanying text (discussing the opinion in *Harper & Row*).

41 *Acuff-Rose*, 972 F.2d at 1436-1437. The majority emphasized that 2 Live Crew commercially distributed *Pretty Woman* to make a profit. *Id.* at 1436 (quoting Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1154 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429, (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994)). The court proffered that the district court did not attach sufficient significance to the Supreme Court's statements in *Harper & Row* that "'[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'" *Id.* at 1437 (quoting *Harper & Row*, 471 U.S. at 562 (quoting *Sony*, 464 U.S. at 451)) (alteration in original). Thus, the Sixth Circuit stated that the parodic purpose of the song, if any, was outweighed by its commercial nature. *Id.* (citing *Sony*, 464 U.S. at 449).

Judge Nelson registered a forceful dissent from the Sixth Circuit's opinion. *See id.* at 1439-1446 (Nelson, J., dissenting). First, the judge maintained that Campbell's composition was a parody under any acceptable definition. *Id.* at 1441 (Nelson, J., dissenting). After exploring a variety of definitions of parody, the dissent endorsed the following characterization:

> "A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic [or, I would add, for satiric] effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable."

Id. (quoting Clemmons, *supra* note 18, at 101) (alteration in original). Disagreeing with the majority, the dissenting judge argued that comment and criticism are such significant means of expression that a commercial parody should never invoke a presumption against fair use. *Id.* at 1443-44 (Nelson, J., dissenting). Judge Nelson observed that copyright serves the ultimate aim of "'stimulat[ing] artistic creativity for the general public good.'" *Id.* at 1443 (Nelson, J., dissenting) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)). Thus, the judge opined that copyright policy prohibited such a presumption as that adopted by the majority. *Id.* at 1443-44 (Nelson, J., dissenting).

Judge Nelson concluded by denouncing as inappropriate the majority's failure to analyze Campbell's parody argument. *See id.* at 1446 (Nelson, J., dissenting). The judge suggested that the court's perception of Campbell's song as vulgar clouded the court's receptivity to Campbell's subtlety in demonstrating the naiveté and vulgarity of Orbison's song. *Id.* (explaining that "here the vulgarity . . . *is* the message").

42 *Id.* at 1439.

43 *Id.*

The United States Supreme Court granted certiorari[44] to determine whether Campbell's commercial parody was protected under the fair use privilege or, conversely, whether the commercial nature of the song rendered this use presumptively unfair.[45] In the first Supreme Court opinion on the subject of parody,[46] the Court held that the commercial nature of a use does not generate a presumption against a copier invoking the fair use doctrine.[47]

Various modern disputes over copyright and fair use issues supplied the framework within which the Supreme Court decided *Campbell v. Acuff-Rose Music.*[48] In 1955, a federal district court attempted to resolve a dispute between comedian Jack Benny and the Loew's film company in *Loew's Inc. v. CBS.*[49] Loew's, owner of the motion picture rights to the play *Gaslight*, sued CBS when the company attempted to convert a Jack Benny parody of *Gaslight* into a television movie.[50] Deciding the issue of infringement, the court acknowledged the important function of artistic criticism in society,[51] but nevertheless refused to treat parody differently than any other form of taking.[52] Accordingly, the court held that Benny's

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44 Campbell v. Acuff-Rose Music, Inc., 113 S. Ct. 1642, 1642 (1994).

45 *Id.*; Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1167-68 (1994).

46 Charles S. Sims & Peter J.W. Sherwin, *The Parody Case: 2 Versions*, NAT'L L.J., May 16, 1994, at C1, C5.

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

48 *See* Bisceglia, *supra* note 22 at 13 ("The Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.* puts its stamp of approval on a method of evaluating parody for copyright purposes that has been evolving over several decades.").

49 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court sub nom.* CBS v. Loew's Inc., 356 U.S. 43 (1958) (mem.). Judge James M. Carter presided over the case for the district court. *See id.* at 167. For an insightful analysis of this "premiere parody case," see PATRY, *supra* note 23, at 153-58.

50 *Loew's*, 131 F. Supp. at 167. In 1944, Loew's released and distributed a film version of *Gaslight*. *Id.* at 168. One year later, Jack Benny performed a radio parody of *Gaslight*, called *Autolight*. *Id.* at 168, 170. Because *Autolight* used the same setting, locale, and period as *Gaslight*, and copied the characters, storyline, and dialogue in sufficient detail, the court found that Benny's use effected a "substantial taking." *Id.* at 171. In 1953, when CBS began to make a television movie of Benny's *Gaslight* parody, Loew's sued to enjoin CBS from further production, claiming that CBS was infringing upon its copyright. *Id.* at 169.

51 *Id.* at 175 (citation omitted) (acknowledging that "[r]eviews by so-called critics may quote extensively for the purpose of illustration and comment"). Recognizing the importance of the taking, the court indicated that it would afford broader protection to scientific and artistic takings than to commercially motivated appropriations. *Id.*

52 *Id.* at 177 (stating that "a parodized or burlesqued taking is treated no differently from any other appropriation"). The court cited, among others, two early twentieth century cases as emphasizing that the substantiality of the appropriation is of paramount importance. *Id.* (citing Hill v. Whalen & Martell, Inc., 220 F. 359, 359-60 (D.C.N.Y. 1914) (asserting that defendant's dramatization of plaintiff's copyrighted

copying amounted to infringement, regardless of any parodic features, because Benny's material embodied a substantial copy of the original.[53]

On appeal in *Benny v. Loew's Inc.*,[54] the Ninth Circuit affirmed the district court's decision solely because Benny had taken a substantial part of the original work, implying that the parodic nature of Benny's material did not render it a fair use.[55] After Benny ap-

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cartoon characters was substantial enough to be labeled infringement regardless of defendant's parodic intent); Bloom & Hamlin v. Nixon, 125 F. 977, 978 (C.C.E.D. Pa. 1903) (holding that a good faith parodic imitation of a song's chorus is not a sufficient taking to justify a finding of infringement)).

53 *Id.* at 183 ("[W]e conclude that plaintiff's have a property right . . . which defendant may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking . . . ."). The court reiterated that parody "is to be treated no differently from any other appropriation" and that the substantiality of the taking should be a sole determinant of copyright infringement. *Id.* The court remarked that the line between permissible taking and impermissible taking is simply a factual test of substantiality. *Id.* (stating that a parodist may make an "extensive use of the copyrighted material so long as a substantial part is not taken").

This bright-line rejection of parody as fair use raised the protests of commentators. *See* PATRY, *supra* note 23, at 156. For example, Leon Yankwich, the Chief Judge of Judge Carter's division, *id.*, indicated that under the *Loew's* rule of treating parody as any other taking, parody would routinely infringe. Yankwich, *supra* note 18, at 1151. Yankwich explained that categorically denying applicability of the fair use doctrine to parodic works was unwise because such works are part of "a distinct literary *genre*." *Id.* at 1151-52.

In the same year as the *Loew's* decision, when Judge Carter again had an opportunity to adjudicate a similar issue, the judge espoused an altered viewpoint. *See* Columbia Pictures Corp. v. NBC, 137 F. Supp. 348, 354 (S.D. Cal. 1955) (stating that "the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works"). In *Columbia Pictures*, the defendant produced a parody of the classic movie *From Here to Eternity* as *From Here to Obscurity*. *Id.* at 352. The court found no substantial similarity between the movie and the parody. *Id.* at 352. In dicta, however, the court listed elements of a dramatic work that are incapable of ownership and thus can be innocently taken from the original: the title, theme, locale and settings, situations, characters, ideas, and bare basic plots. *Id.* at 353.

54 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court sub nom.* CBS v. Loew's Inc., 356 U.S. 43 (1958) (mem.).

55 *Id.* at 537 ("One cannot copy the substance of another's work without infringing his copyright. A burlesque presentation of such a copy is no defense to an action for copyright infringement."). The Ninth Circuit introduced the "so-called doctrine of fair use" as a privilege limited primarily to copies of materials such as factual compilations, digests, and listings. *Id.* at 536. The court pointed out that no federal court had ever found that the fair use doctrine allowed a copier to produce a humorous incarnation of a serious work. *Id.* Fair use, the court concluded, cannot be established by showing that the copier's use is parodic; the fact that a use is parodic does not even minimally affect the fair use question. *Id.* at 537 (quoting *Loew's*, 131 F. Supp. at 183 ("[A] parodized . . . taking is to be treated no differently from any other appropriation . . . .")). The Ninth Circuit explicitly stated that, as long as a substantial amount of the original work is taken, it is irrelevant "[w]hether the audience is gripped with tense emotion in viewing the original drama" or "laughs at the bur-

pealed from the Ninth Circuit decision, the Supreme Court heard arguments on whether the parodic nature of a work should influence a fair use determination.[56] After deliberation, an equally divided Court[57] affirmed the judgment below without an opinion, thereby preserving by default the Ninth Circuit's legal conclusion that the parodic nature of a work does not influence a fair use analysis.[58] Thus, it remained that no concrete Supreme Court guidance existed concerning parody as fair use, and lower courts continued to disagree on the matter.[59]

In a later case also decided by the Ninth Circuit, *Walt Disney Productions v. Air Pirates*,[60] the court clarified the matter by declaring that its holding in *Benny* was limited to near-verbatim copying.[61] Addressing the role of parody in the fair use equation, the court concluded that when the reproduction is not near-verbatim copying, it is appropriate to examine the use in its proper context.[62] Accordingly, the court declared that the proper resolution of the fair use question hinged upon whether the copying was ex-

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lesque." *Id.* at 536-37. The court maintained that otherwise, any individual could lawfully appropriate a protected work "merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as burlesque." *Id.* at 537. The court also read the applicable copyright statute very narrowly, construing the statutory right of a copyright holder to "exhibit, perform, represent, produce, or reproduce" a work as including the right to create a parody of one's own work. *See id.*

56 *See* CBS v. Loew's Inc., 356 U.S. 43, 43 (1958).

57 *Id.* ("Mr. Justice Douglas took no part in the consideration or decision of this case.").

58 *See id.*

59 *See supra* notes 49-58 and accompanying text and *infra* notes 60-77 and accompanying text (discussing differing formulations in Ninth and Second Circuit opinions on parody and fair use).

60 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979). In this case, an adult comic book publisher's alleged infringement upon plaintiff's copyrights consisted of the publisher's copying of plaintiff's cartoon characters—including Mickey and Minnie Mouse, Goofy, Donald Duck, and the Three Little Pigs. *Id.* at 752, 753 & n.5. The publisher's work showed "'a rather bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture.'" *Id.* at 753 (quoting Kevin W. Wheelwright, Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 582 (1976)). The publisher contested the plaintiff's allegations of infringement by claiming that the fair use doctrine rendered its parody exempt from such claims. *Id.* at 756.

61 *Id.* at 757. The Ninth Circuit distinguished *Benny* from *Walt Disney* by emphasizing that Jack Benny's parody copied virtually every important aspect of the original *Gaslight* and that the *Benny* Court gave merely a "threshold test" that applied only to near-verbatim copying. *Id.* at 756-57.

62 *Id.* at 757. The court opined that the proper test for parody cases outside the threshold of near-verbatim copying is the "conjure-up test" articulated in *Berlin v. E.C. Publications*. *Id.* (citing Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir.),

cessive in light of its parodic nature, recognizing that parody legitimately and necessarily may borrow various elements from an original composition.[63]

Questions about the fair use doctrine's applicability to parodic works also arose in the Second Circuit.[64] In *Leo Feist, Inc. v. Song Parodies, Inc.*,[65] the United States Court of Appeals for the Second Circuit rendered a decision involving the effect of commerciality on a musical parodist's attempt to invoke the fair use doctrine.[66] In *Leo Feist*, the defendant's magazine used the plaintiff's song titles alongside contrived comical lyrics, which defendant invited its readers to sing to the tunes of the named songs.[67] Because the defendant used the plaintiff's song titles in expectation of commercial gain, the court perceived the use as an effort to evade the plaintiff's copyright.[68] The court, therefore, decided that the defendant's commercial use constituted infringement.[69]

Subsequently, in 1980, the United States District Court for the Southern District of New York affirmed parody as a proper foundation on which to establish a finding of fair use.[70] In *Elsmere Music,*

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cert. denied, 379 U.S. 822 (1964)) (other citation omitted); *see supra* note 23 (tracing the origins of the test and delineating its characteristics).

63 *Walt Disney*, 581 F.2d at 757. The court maintained, however, that the parodist's desire to create the "best parody" must be balanced against the copyright owner's interest in protecting his original expression from unwanted copying. *Id.* at 758. Because the publisher copied more than was necessary to "conjure up" the original work, the court affirmed the grant of summary judgment. *Id.* at 758.

The *Walt Disney* court also rejected the parodist's First Amendment arguments. *See id.* at 758-59. The Ninth Circuit stated: "Because defendants here could have expressed their theme without copying Disney's protected expression, *Sid & Marty Krofft* requires that their First Amendment challenge be dismissed." *Id.* at 759; *see also* Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) (holding that "the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment"); *supra* note 16 (discussing the interplay between copyright law and First Amendment jurisprudence).

64 *See infra* notes 65-77 and accompanying text (discussing relevant Second Circuit decisions).

65 146 F.2d 400 (2d Cir. 1944).

66 *See id.* at 400-01.

67 *See id.* at 401 & n.1.

68 *See id.* at 400-01 & n.1.

69 *Id.* The court places such strong emphasis on the defendant's commercial motives that the court finds infringement even where the defendant did not copy any of the plaintiff's protectable property. PATRY, *supra* note 23, at 160.

70 Elsmere Music, Inc. v. NBC, 482 F. Supp. 741, 745 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). The district court quoted *Berlin v. E.C. Publications*, stating that "'parody and satire *are* deserving of substantial freedom.'" *Id.* (quoting Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)) (other citations omitted). After examining the market effect of the plaintiff's use on the defendant's copyrighted work, the court granted the defendant's motion for summary judgment. *Id.* at 747.

Inc. v. NBC,[71] the owners of the copyright to the New York Department of Commerce's advertising jingle, *I Love New York*, complained of copyright infringement when cast members of the television comedy, *Saturday Night Live*, sang the words "I love Sodom" to the tune of the plaintiff's song.[72] Besides ridiculing *I Love New York*, the performers desired to satirize New York City's superficial attempt at improving its image through a flamboyant advertising campaign.[73] The defendant argued, inter alia, that its work was a parody protected under the fair use doctrine.[74]

The court agreed, holding that the fair use privilege protected

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[71] 482 F. Supp 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).

[72] *Id.* at 743. Because both parties stipulated to all material facts, the court adjudicated each party's cross motion for summary judgment. *Id.* at 744.

Defendant NBC owned the network over which the television program was broadcast. *Id.* at 743. The defendant's song was similar to the original in that it borrowed the original's melodic first four notes and the preface "I love" followed by the name of a geographical location. *Id.* at 744.

[73] *Id.* at 745. Although the plaintiff argued to the contrary, the court found that the performers' song was a parody because it targeted the original work as well as the overall advertising campaign. *Id.* at 746 (indicating that *I Love Sodom* was intended to ridicule the "catchy, upbeat" and euphemistic character of *I Love New York*); *see also supra*, note 18 (explaining the definition of parody). The district court admitted that while the defendant's song may have only subtly targeted the original, the song certainly had some distinguishable relation to the object of the defendant's derision. *Elsmere Music*, 482 F. Supp. at 745-46 (distinguishing *MCA, Inc. v. Wilson* and *Walt Disney Prods. v. Mature Pictures Corp.* from the present case as situations involving the use of copyrighted material that did not relate to the subjects allegedly being parodied) (citing MCA, Inc. v. Wilson, 425 F. Supp. 443, 453-54 (S.D.N.Y. 1976), *aff'd*, 677 F.2d 180 (2d Cir. 1981); Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975)). Furthermore, the court stated that, even if the song did not parody the original work itself, the defendant could not have been automatically precluded from availing itself of the fair use privilege. *Id.* at 746. Thus, the district court expressly disagreed with any characterization of the *MCA* or *Disney* holdings that suggested that there must be a connection between the copyrighted work and the subject of parody. *See id.*

[74] *Id.* at 745. Although NBC conceded that its song was taken from the plaintiff's copyrighted work, NBC first argued that its de minimis taking of only four notes and two words from the original should not be actionable as infringement. *Id.* at 744. The district judge disposed of this argument, stating that the copy's easily detectable similarity to the original indicated that the taking by defendant was substantial. *Id.* (citations omitted).

NBC further argued that even if the amount taken rose to the level of infringement, the fair use doctrine served to insulate NBC from liability. *Id.* at 745. The court recognized authority that gave greater leeway to parodic works than other works of fiction. *Id.* at 745 (citing Columbia Pictures Corp. v. NBC, 137 F. Supp. 348, 354 (S.D. Cal. 1955)) (other citations omitted).

The district judge then remarked that the defendant's appropriation had not affected the marketability of the original in any way. *Id.* at 747. The district court noted that the parody did not compete with or "'fulfill[ ] the demand for the original'" work. *Id.* (quoting Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)).

the defendant's parody, thereby sanctioning the use as a vehicle for the circulation of the defendant's social and political commentary.[75] The court recognized that the defendant took the "heart of the composition,"[76] but nevertheless ruled that its taking was a fair use because the new work did not supersede the original.[77]

While there had not been Supreme Court precedent delineating the extent to which parodists can claim fair use, the Supreme Court had addressed the issue of how the commercial nature of a work affects the fair use balance.[78] In *Sony Corp. of America v. Universal Studios, Inc.*,[79] the Supreme Court explored the issue of whether the private taping of television shows with a videocassette recorder was protected by the fair use privilege.[80] Universal Studios, owner of the rights to numerous television shows, sued the Sony Corporation for infringing its copyrights by selling the videotape recorders that made the copying possible.[81] The Supreme Court declared that Universal was not required to show either ac-

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75 *Id.* at 747.

76 *Id.* at 744. The court, in dismissing the defendant's argument that its taking was de minimis, put aside any notions that because the taking was quantitatively minute, there was no infringement. *Id.* (citations omitted). The judge examined the taking in the context of the particular song parodied, noting that infringement was possible because the defendant took the easily recognizable tune. *Id.* (citations omitted).

77 *Id.* at 747. The judge stated that the *Saturday Night Live* taking "ha[d] not in the least competed with or detracted from plaintiff's work." *Id.*

One year later, in *MCA v. Wilson*, the Second Circuit ruled against the parodist in a similar case mainly because of the copier's commercial motives and the court's perception that appellee's copy lacked originality. MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (holding that appellee's *Cunnilingus Champion of Company C* was not a parody and thus not fair use of the song *Boogie Woogie Bugle Boy of Company B*). In *MCA*, the court announced that it was "not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *Id.*

78 *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561-62 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448-51 (1984). For a discussion of *Sony* and *Harper & Row* see, respectively, notes 79-88, 89-94, and accompanying text.

79 464 U.S. 417 (1984).

80 *Id.* at 420-21.

81 *Id.* at 420. Universal brought an infringement suit against Sony, the distributor of the Betamax videotape recorder. *Id.* Arguing that the home taping of its copyrighted material constituted infringement, Universal sued Sony for contributory infringement. *Id.* Petitioner Sony Corporation was in the business of distributing the video-recording equipment used for the copying in question. *Id.* at 419-20. Universal sought money damages, an accounting of Sony's profits, and an injunction against the manufacture of Sony's Betamax recorders. *Id.* at 420. Universal's claim was predicated on the theory that the users of Sony's Betamax recorders had infringed upon Universal's copyright, and that Sony, the recorder's manufacturer, was responsible for the infringement. *Id.*

tual present harm or certain future harm,[82] but needed only to demonstrate that some distinct likelihood of future harm existed.[83] Such likelihood, the Court stated, may be presumed if the use was for the defendant's own commercial gain.[84]

Justice Stevens, writing for the Court, focused on the purpose of the use, examining whether the use was commercial in character.[85] Because the copying was noncommercial in this case, the Court declared that there was not a presumption against fair use.[86] The Justice rejected Universal's argument that the market for its product suffered when unauthorized videotaping occurred.[87] Asserting that Universal did not succeed in demonstrating that the noncommercial nature of private videotaping was harmful or damaging to the copyrighted work, the Court held that such videotaping did not constitute remediable infringement.[88]

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82 *Id.* at 451.

83 *Id.*

84 *Id.*

85 *Id.* at 448-49. The Court pointed out that the district court deemed noncommercial the "time shifting" engaged in by users of the Sony Betamax videotape recorder. *Id.* at 449. Furthermore, the Court recognized that "time shifting" was merely to allow a viewer to watch a television program—an activity that was free of charge to the consumer—at a more convenient time. *Id.*

86 *Id.* at 449-50. The Court recognized that if the Betamax machine characteristically made copies for profit-making purposes, a presumption against fair use would attach. *Id.* at 449.

87 *Id.* at 453 n.37, 456 (quotation omitted). The Court discredited the suggestion that attendance at theater or film exhibitions would decline and thereby produce market harm to Universal. *Id.* at 453 n.37 (quotation omitted).

88 *Id.* at 456. The Court noted that typical users of Sony's videotaping equipment merely recorded television programs with the intent to view them at more convenient times. *Id.* at 421. Because respondents failed to prove that such "time-shifting" did them any cognizable economic harm, the Court held that the sale of videotape recorders by petitioner did not constitute contributory copyright infringement. *Id.* at 451, 456. Because Sony's Betamax recorder was "capable of substantial noninfringing uses," the Court did not enjoin Sony from marketing and selling the recorder. *Id.* at 456.

Conversely, in *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*, a district court in Texas suggested that use for "commercial purposes" weighs in favor of a finding of copyright infringement. Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202, 1208 (N.D. Tex. 1981) (finding infringement where restaurant chain attempted to parody plaintiff's *Be a Pepper* commercial in its own advertisement). The court quoted and relied upon *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*. *Id.* at 1208 ("'[A]ny commercial use tends to cut against a fair use defense.'") (quoting Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980)). The *Dr. Pepper* court stated that, in *Triangle*, the publishers of *TV Guide* brought an infringement suit against a newspaper publisher who used images of *TV Guide* to promote its own product through comparative advertising. *Id.* The court then explained that while Knight-Ridder's use of *TV Guide*'s characteristics had only a de minimis effect on the copyright holder's market interests, the plaintiff in *Dr. Pepper* was actually injured by the defendant's *Dancing Seniors* commercial. *Id.* For example,

Similarly, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[89] the Supreme Court identified commerciality as an important, if not deciding, fair use factor.[90] In its magazine, *The Nation*, Nation Enterprises published without authorization verbatim quotes from President Ford's memoirs.[91] *Time Magazine*, which agreed to purchase from copyright holder Harper & Row the rights to use the quotes, refused to pay for these rights once the article was published.[92] The majority opinion, written by Justice O'Connor, identified several issues of commerciality that weighed heavily against Nation Enterprises, including the borrowing's ability to nullify *Time Magazine's* valuable right of first publication.[93] Recognizing that Harper & Row stood to lose potential revenue because of *The Nation*'s publication of the Ford memoirs, the Justice rejected the defendant's fair use claim.[94]

With this background of scattered thought on various adjacent issues, the United States Supreme Court delivered a unanimous opinion, in *Campbell v. Acuff-Rose Music, Inc.*,[95] concerning the impact of a work's commerciality on a parodist's ability to invoke the fair use doctrine.[96] In *Campbell*, the Court held that the commercial nature of a parody does not invoke a presumption against a finding of fair use.[97]

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the court indicated that Dr. Pepper spent an extraordinary amount of money and effort on advertising and goodwill. *Id.* Additionally, the court remarked, despite the defendant's assertions that its commercial was a parody of the original, defendant's use was a distraction from the originality and uniqueness of the original, and thus was an infringement by virtue of seriously diminishing the value of the plaintiff's copyright. *Id.*

89 471 U.S. 539 (1985).

90 *Id.* at 562-63.

91 *Id.* at 542.

92 *Id.*

93 *Id.* at 566-69. The Court pointed out, however, that the right of first publication, as enumerated in 17 U.S.C. § 106, is subject to the fair use doctrine. *Id.* at 552; *see* 17 U.S.C. §§ 106, 107 (1988 & Supp. V 1994). On the other hand, the Court stated, the right to control first public appearance will normally outweigh a fair use claim. *See Harper & Row*, 471 U.S. at 555 (noting that the "first public distribution [right] implicates not only . . . [an author's] personal interest in creative control, but his property interest in exploitation of prepublication rights"). Accordingly, the Court found that the equities suggested that the defendant's use be deemed unfair. *Id.* at 569.

94 *Harper & Row*, 471 U.S. at 568-69. The Court announced that the plaintiff needed to show only that, if the defendant's use became widespread, there would be harm to the copyrighted work's potential market. *Id.* at 568 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

95 114 S. Ct. 1164 (1994).

96 *Id.* at 1167-68.

97 *Id.* at 1179.

Justice Souter, writing for the Court, first observed that 2 Live Crew's use of Orbison's song would certainly violate federal copyright laws if not exempted by the fair use doctrine.[98] The Justice recognized a tension between simultaneously promoting the progress of the arts and sciences[99] and protecting the value of an author's published work.[100] Rather than formulate a bright-line rule favoring either parodist or copyright holder, the Court insisted that a fact-specific inquiry would be the fairest manner in which to analyze assertions of fair use.[101] Justice Souter indicated that courts must examine each parody through the interrelated guidelines of the four fair use factors of the 1976 Copyright Act while simultaneously considering the purposes of copyright law.[102]

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98 *Id.* at 1169 (citation omitted) ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in 'Oh, Pretty Woman,'under the Copyright Act of 1976, but for a finding of fair use through parody.").

99 *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the authority "To promote the Progress of Science and the Useful Arts").

100 *Campbell*, 114 S. Ct. at 1169 (mentioning Lord Ellenborough's statement in *Carey v. Kearsley*, 170 Eng. Rep. 679, 681 (K.B. 1803): "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science."). Justice Souter acknowledged that the selective loosening of the monopoly created under copyright law sometimes promotes the goal of copyright law. *Id.* Courts' authorization of the fair use of copyrighted works, the Court recognized, helps promote this goal. *Id.* at 1169-70. The Court noted that very rarely, if ever, is an entire work a purely original piece of workmanship. *Id.* at 1169 (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436)). Because artists and authors frequently build upon that which has already been created, the Court underscored that fair use makes practical sense. *See id.* By excluding ideas and facts, Justice Souter stressed that § 102(b) of the 1976 Copyright Act helps to encourage artists to use others' ideas in creative ways, without fear of negative repercussions, through building upon previous works to create new and better works. *See id.* at 1169 & n.5 (citing 17 U.S.C. § 102(b) (1988); Feist Publications v. Rural Telephone Serv. Co., 499 U.S. 340, 359 (1991); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985)). The Court suggested that if society chooses not to allow an author the opportunity to reap appropriate rewards for producing art, creativity may be stifled and a great motivating factor may be extinguished, thereby generating a disincentive for artists and authors to produce creative works. *See id.*

101 *Id.* at 1170 (citations omitted). The Justice emphasized that the statute, which is a codification of the changing common law, requires a fact-specific, case-by-case examination. *Id.* (citations omitted).

102 *Id.* at 1170-71 (citing Leval, *supra* note 2, at 1110-11; Patry & Perlmutter, *supra* note 8, at 685-687). The Justice noted that a court is not required to issue an injunction against the use of an author's work in a commercial endeavor upon a finding that a parodist's copying exceeded the bounds of fair use. *Id.* at 1171 n.10 (quoting 17 U.S.C. § 502(a) (1988) ("'[A court] *may* . . . grant . . . injunctions on such terms as it may deem reasonable to prevent or restrain infringement . . . .'") (alteration in original). The Court noted that the public interest may not always be served by granting an injunction against a use that does not fare favorably under the four factor test. *Id.* (quotation and citations omitted). Where there is no plain piracy, the Court proffered, instead of an injunction, a damage award, or even no remedy at all, may ade-

The Court began this examination by discussing the initial fair use factor, the character and purpose of the use.[103] Justice Souter suggested that the significance of this factor in each case is determined by asking whether the work is a mere reproduction of the original, or is instead "transformative."[104] The Justice explained that for a work to be transformative, its character or purpose must be different from that of the original composition.[105]

Justice Souter noted that although a finding of transformativism does not complete the fair use inquiry, borrowing from a work for transformative purposes generally furthers the fair use doctrine's objective of fostering creativity.[106] The Justice explained that as the transformative nature of the work increases, the other factors, including commerciality, become less important.[107] Parody contains this transformative element, the Court remarked, because it provides important commentary on previous works while existing, itself, as a new work.[108] Resolving disagreement among the lower courts, the Court declared emphatically that parodists can successfully invoke the fair use defense under 17 U.S.C. § 107.[109]

The Court next offered a definition of parody for the purposes of copyright law: the use of elements of a prior composition to produce a new composition that comments, at least in part, on that author's works.[110] Justice Souter distinguished parody from

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quately protect the copyright owner's interest without causing public injury. *Id.* (quoting Leval, *supra* note 2, at 1132.).

103 *Id.* at 1171 (quoting 17 U.S.C. § 107(1) (1988) ("[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . .")).

104 *Id.* (citing Leval, *supra* note 2, at 1111) (other citations omitted).

105 *Id.*

106 *Id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n. 40). Explaining that transformity is in no way dispositive, Justice Souter noted that a court may find fair use without finding transformity, as where a user photocopies material for educational purposes. *Id.* at 1171 & n.11.

107 *Id.* at 1171.

108 *Id.* The Court stated that even Acuff-Rose did not deny that parody is considered a transformative work. *Id.* Parody's characteristic of "shedding light on an earlier work" through comment or criticism, the Court noted, provides a benefit to society. *Id.*

109 *Id.* at 1171-72 (registering the Supreme Court's agreement with the Ninth Circuit's opinion in *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986), and the formulation approved by the Second Circuit in *Elsmere Music, Inc. v. NBC*, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam), *aff'g* 623 F. Supp. 741 (S.D.N.Y. 1980)).

110 *Id.* at 1172 (citing, as examples of cases using this formulation, *Fisher*, 794 F.2d at 437; *MCA v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981)). The Court explained that a work that merely uses elements of an original copyrighted work to get an audience's attention, without the purpose of commenting on the style or substance of the original, cannot properly be called parody. *Id.*

satire, recognizing that parody's criticism is specifically directed toward a previous work, while satire mocks a more general aspect of society.[111] The Justice noted that every parody, by its very nature, must take elements from a previously published composition.[112] As such, the Justice reiterated that a court should use the four-factor fair use test to determine the extent to which such borrowing is permissible.[113]

The Supreme Court, noting that the Sixth Circuit doubted whether 2 Live Crew's *Pretty Woman* was a parody, disagreed with the appellate court's appraisal, postulating that the song obviously possessed parodic properties.[114] Acknowledging the trial court's finding that the song criticized Orbison's original work, the Court accepted that a parodic character of 2 Live Crew's song could reasonably be perceived.[115] Justice Souter cautioned that it is not the province of a court to evaluate the quality or social value of a parody, but rather to question whether the work manifests criticism of another specific work by caricature.[116] Thus, stressing that the work need only contain parody, the Court registered its agreement

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111 *Id.* at 1172 & n.15 (citing Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 1, 25 (1987)) (other citations omitted). The Court explained that a satirical work uses "'irony, derision, or wit'" to ridicule "'prevalent follies or vices.'" *Id.* at 1172 n.15 (quotation omitted). The Court observed that satire, by its nature, does not target an original work. *Id.* at 1172. Therefore, the Court suggested, one who borrows from an original work for satirical purposes must offer a more extensive justification for such borrowing. *Id.*

112 *Id.* ("Parody needs to mimic an original to make its point . . . .").

113 *Id.* Because a work may contain both parodic and non-parodic elements, and because the line between parody and satire may often be blurred, Justice Souter asserted that a parody must be examined using the four factors set forth in the 1976 Copyright Act. *Id.*

114 *Id.* at 1173. The Court recognized 2 Live Crew's song as portraying a realistically ugly characterization of Orbison's protagonist in *Oh, Pretty Woman*. *Id.* The Court indicated that ridicule by reference to a previously published work is what made Campbell's use a parody. *Id.*

The Court condemned the argument that 2 Live Crew did not intend to parody the Orbison song because *Oh, Pretty Woman* was not so labeled, and also regarded as irrelevant that 2 Live Crew had not previously produced any parodies. *Id.* at 1173 n.17 (citation omitted). The Court proposed that 2 Live Crew should not be penalized for not having previously created parodies, declaring that a novice parodist should be protected in the same manner as one who has produced an array of parodies. *Id.*

115 *Id.* at 1173. Beyond inquiring whether parody "may reasonably be perceived," the Court acknowledged that it must further examine whether the amount copied in relation to the extent of the parody supports a decision that the copy "'supersede[s] the objects'" of the original. *Id.* at 1173 & n.16 (quotation omitted).

116 *Id.* at 1173. To emphasize that the judiciary should not appraise the qualitative worth of artistic creations, the Court quoted Judge Leval in *Yankee Publishing Inc. v. News Am. Publishing, Inc.*: "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed[.]" *Id.* (quot-

with the district court's decision.[117]

Justice Souter next posited that the court of appeals read *Sony* too broadly in holding that a commercial use created a presumption of infringement.[118] The Justice declared that the Sixth Circuit erred in its analysis by overemphasizing the commercial nature of the use, neglecting additional ingredients in purpose and character, and ignoring the other three fair use factors.[119] The Court dispelled the notion of attaching a presumption against fair use to a finding of commerciality, explaining that neither the common law of fair use nor *Sony* compel such a pronouncement.[120]

Justice Souter clarified the *Sony* holding as emphasizing a need for balancing other relevant factors and as stressing that commerciality is not conclusive.[121] The Justice submitted that the character of a work is not dispositive because most writing, even if considered art, is done with at least underlying commercial motives.[122] While recognizing that a parody's commerciality may weigh against the parodist, the Justice advised that the contextual framework of a parody should also play a major role in the analysis.[123]

Next, the Court explored the second fair use component, which concerns the nature of the work under copyright.[124] Analyz-

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ing Yankee Publishing Inc. v. News Am. Publishing, Inc., 809 F. Supp. 267, 280 (S.D.N.Y. 1992)).

117 *See id.* The Court intimated that a parody can be either entirely or partially parodic. *See id.*

118 *Id.* at 1173-74.

119 *Id.*

120 *Id.* at 1174. The Court maintained that *Sony Corp. of Am. v. Universal City Studios, Inc.* called for a "'sensitive balancing of interests,'" rather than a presumption based upon evidence of commerciality. *Id.* (quotation omitted) (stating that "[t]he Court of Appeals's elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication.").

121 *Id.* at 1174 (citation omitted). The unanimous opinion reiterated that Congress rejected a bright-line approach to the fair use question. *Id.* (quotation omitted). The Court stated that Congress's intent was not for commerciality to be a potentially conclusive factor, but for commerciality to be merely one of four factors to be weighed. *Id.* (quotation omitted).

122 *Id.* (quotation omitted) (recalling Samuel Johnson's famous statement, "'[n]o man but a blockhead ever wrote, except for money.'" The Court indicated that copyright holders' use of the argument that the parodist's primary purpose was financial gain would be inconclusive. *Id.*

123 *Id.* The Court suggested that the outcome of the first factor depends upon the degree of commerciality implicated. *Id.* The Court offered three examples, ranging from least favorable to most favorable: the use of a copyrighted work to advertise a product, the sale of parody for its own sake, and a parody performed once by students in school. *Id.* (citing Patry & Perlmutter, *supra* note 8, at 679-680) (other citations omitted).

124 *Id.* at 1175 (quoting 17 U.S.C. § 107(2) (1988). The Court drew a parallel be-

ing this factor, Justice Souter recognized that some forms of innovation warrant more copyright protection than others and thus merit greater immunity from borrowers' claims of fair use.[125] Although the Court noted that a musical composition such as Orbison's was certainly deserving of copyright protection, the Justice contended that the nature of the copyrighted work seldom changes from case to case because it is customary for parodists to target well-known expressive compositions.[126] Therefore, the Court admitted that the second factor will rarely be helpful in resolving controversies involving parody.[127]

Justice Souter then examined the third factor, the analysis of the amount taken in relation to the original work in its entirety.[128] The Justice recognized that the excessiveness of a taking is gauged by reference to the other fair use factors.[129] Justice Souter observed, for example, that the purpose and character of the use helps to determine the threshold amount of permissible copying.[130] In addition, the Justice stated, the substantiality of the portion copied aids in determining the effect on the original's potential market.[131]

Justice Souter applauded the court of appeals's examination of the portion claimed to be fair use in light of its importance to the original work.[132] The Justice indicated, however, that this pos-

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tween this statutory factor and Justice Story's urging in *Folsom v. Marsh* that the "'value of the materials used'" is an issue for inspection. *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

125 *Id.* (citations omitted). The Justice approved of the lower courts' finding that Orbison's original fit within the scope of federal copyright law, and reiterated that the purposes of federal copyright law were advanced by protecting works such as the one in question. *Id.* (citation omitted).

126 *Id.*

127 *Id.*

128 *Id.* (citing 17 U.S.C. § 107(3) (1988)). The Justice reiterated the phrase from Justice Story in *Folsom v. Marsh*: "'the quantity and value of the materials used.'" *Id.* (quoting *Folsom*, 9 F. Cas. at 348).

129 *Id.* The Court recognized that the "amount and substantiality" of the work taken depends upon the "purpose and character" of the use. *Id.* (citation omitted).

130 *Id.* (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984)).

131 *Id.* at 1175 (citing Leval, *supra* note 2, at 1123). According to the Court, both the first and fourth factors serve to limit the bounds of copying once the original has been "conjured up." *See id.* at 1176 (citations omitted). More specifically, Justice Souter proffered that one who makes a parody must copy enough of the original to satisfy the parody's overriding purpose and character, but less than will cause the newer work to become a market substitute for, or diminish the value of, the original. *Id.*

132 *Id.* at 1175. The Court deemed significant not only the quantity of the original materials used, but also the quality and importance of those materials to the original.

tulate is weakened when parody is the subject of inquiry.[133] Reasoning that an author may need to quote extensively from the original work to create a parody,[134] the Court concluded that parody's special need to be recognizable as a criticism of a specific original work mandates a different standard.[135] The uniqueness of parody, the Court recognized, makes it quite possible, and indeed permissible, for a work to borrow even "the heart" of an original for ridicule.[136] Accordingly, Justice Souter censured the court of appeals for finding Campbell's use an infringement under the facts presented.[137]

The Justice stressed that the context of the copying is of paramount concern.[138] Acknowledging the Sixth Circuit's assessment that Campbell took no more than a "necessary" amount of lyrics from the original, the Court averred that Campbell did not borrow excessively in light of his parodic purpose.[139] Because Campbell appropriated an arguably excessive portion of the musical content of *Oh, Pretty Woman*, the Supreme Court remanded the case for determination based upon a proper analysis of all four fair use

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Id. As an example, the Court recounted *Harper & Row*, where the quotations taken were the most important selections from "'the heart of the book.'" *Id.* (quoting *Harper & Row*, 471 U.S. at 564-65). Agreeing with the appellate court, the Supreme Court also found it important to consider whether verbatim copying occurred. *Id.* at 1175-76 (citing *Harper & Row*, 471 U.S. at 565).

133 *Id.* at 1176. The Court conceded that "[p]arody presents a difficult case." *Id.*

134 *Id.* (citing Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam) (declaring that parody must be able to "conjure up" the original)) (other citation omitted). Once enough has been taken to "conjure up" the original, the Court added, fair use factors one and four will determine how much more of the original may be copied. *Id.*

135 *Id.* ("Parody's . . . comment necessarily springs from recognizable allusion to its object through distorted imitation."). Parody's success, the Court noted, hinges upon its ability to be easily recognized as corresponding with, or commenting on, an original work. *Id.* Thus, the Court intimated that parody should be subjected to a standard that allows the parody to use memorable features of the original to "conjure up" the original. *Id.*

136 *Id.* The Court expressed its disappointment with the Sixth Circuit for not adequately considering parody's need to be recognized as coming from another work. *Id.* The Justice stated that even if the amount taken by Campbell was the "heart" of the original, the "heart" was what made this particular work most readily recognizable. *Id.*

137 *Id.*

138 *Id.* (citation omitted) ("In parody . . . context is everything . . . ."). What the copier did in addition to taking the original work, the Court stated, is important as well. *See id.* The Court found that by adding his own lyrics, substituting sounds, and singing in a different style, Campbell could not be said to have copied the Orbison song verbatim. *Id.*

139 *Id.* (quotation omitted). Because the Court agreed with the court of appeals that lyrically, "no more was taken than necessary," it found contradictory the lower court's assessment that the taking was excessive. *Id.* (quotation omitted).

components.[140]

Introducing the fourth factor, the effect of the use on the value of or potential market for the copyrighted work,[141] Justice Souter emphasized that a major concern of the Court should be the economic impact the copying has upon the copyrighted work.[142] The Court cautioned, however, that market harm to the original caused by parody does not necessarily create a remedy under the 1976 Copyright Act.[143] Because Campbell's use was not a substitute for the original, but contained parody and was thus transformative, the Court instructed that a presumption of market harm did not apply.[144]

The Justice indicated that reference in *Sony Corp. of Am. v. Universal City Studios, Inc.* to commerciality as creating a presumption against fair use,[145] in its proper context, was an attempt to distinguish verbatim copying for commercial purposes from the noncommercial use that occurred in *Sony*.[146] Justice Souter explained that an author may not elude a decreased demand for his work caused by effective parodic criticism simply by invoking federal copyright laws.[147] Accordingly, the Court maintained that a shift in demand for the original is not necessarily a significant determinant of remediability.[148] The Court endorsed the Ninth Circuit's view

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140 *Id.* at 1176-77. Justice Souter stated that upon remand, the amount of musical taking should be analyzed "in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution . . . ." *Id.*

141 *See* 17 U.S.C. § 107(4) (1988).

142 *Campbell*, 114 S. Ct. at 1177. The Court noted that, besides addressing the actual market harm caused, a proper inquiry must question whether the copying, if done on a widespread basis, would adversely affect the market for the original work. *Id.* (quoting 3 NIMMER & NIMMER, *supra* note 2, § 13.05[A][4], at 13-182) (other citations omitted)).

143 *Id.* at 1178.

144 *See id.* at 1177.

145 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984); *supra* notes 79-88 and accompanying text (discussing *Sony* in detail).

146 *Campbell*, 114 S. Ct. at 1177. Because Justice Stevens's discussion of commerciality in *Sony* was in conjunction with the Court's appraisal of market harm stemming from unauthorized duplication, Justice Souter claimed that the commerciality factor was not dispositive. *Id.* The Court maintained that the *Sony* statement in question was nothing more than the common sense notion that when a verbatim duplication is used for commercial purposes, it can be presumed that market harm exists. *Id.* at 1177 (citing *Sony*, 464 U.S. at 451). When a parody does not take verbatim from the original, however, the Court indicated that the parody will not likely compete directly with the market for the original. *Id.*

147 *Id.* at 1178.

148 *Id.* The Court suggested that a parody may destroy the market for the original through acrimonious criticism. *Id.* The Court advised, "when a lethal parody, like a

that remediable market harm occurs only when the work usurps the demand for the original as a market substitute.[149]

Recognizing that the fourth factor also encompassed Acuff-Rose's right to publish adaptations of its copyrighted work, the Justice explained that this right did not include a derivative market interest in criticism or comment of the copyright holder's own composition.[150] Thus, the Justice advised that Acuff-Rose lacked legal authority to prevent the publication of criticism of its work and had absolutely no protectable market interest in releasing a parody version of the original.[151]

The Court noted, however, that Acuff-Rose may have the power to protect other potential derivative markets.[152] Justice Souter left open the possibility of Acuff-Rose's right to preserve its ability to create an economically viable rap version of *Oh, Pretty Woman*.[153] The Justice stated that because neither party addressed this issue at the trial or appellate level, the court of appeals should

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scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act." *Id.*

149 *Id.* (quoting Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986)). Courts have ruled that if the use is intended for the same purpose or function as the original, the fair use balance is tipped toward infringement. *See, e.g.*, Twin Peaks Prods. v. Publication Int'l, 996 F.2d 1366, 1377 (2d Cir. 1993) ("[W]e . . . conclude that the Book competes in markets which [plaintiff] has a legitimate interest, and that the fourth factor at least slightly favors [plaintiff]."); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1178 (5th Cir. 1980) ("[T]he use . . . could not serve as a substitute for plaintiff's product. . . . There was no economic detriment . . . and defendant's fair use defense should have prevailed."). This can be true even when there are absolutely no financial motives underlying the use. *See, e.g.*, Marcus v. Rowley, 695 F.2d 1171, 1173, 1178-79 (9th Cir. 1983) (finding copyright infringement where a school teacher included "substantial" copies of copyrighted educational materials in her own educational booklet). The *Campbell* Court announced that the standard should be that given by Justice Story in *Folsom v. Marsh*, namely, whether the copy "'supersede[s] the objects'" of the original. *Campbell*, 114 S. Ct. at 1177 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)) (alteration in original).

150 *Campbell*, 114 S. Ct. at 1178. The Court explained that while there is a protectable market for copies of one's own work, "there is no protectable derivative market for criticism." *Id.* The Justice opined that, because derivative uses include those uses the authors of original works will want to develop themselves, protectable rights should not include criticism of one's own work. *Id.*

151 *Id.*

152 *See id.* The Court submitted that the element of criticism did not preclude the existence of other derivative uses protectable under copyright law. *Id.* The Court maintained that 2 Live Crew's song was more than solely a parodic work. *Id.* ("[W]e have . . . been speaking of the later work . . . as if it had nothing but a critical aspect . . . ."). The Court indicated that 2 Live Crew's *Pretty Woman* could also be categorized as a rap song. *Id.*

153 *Id.* The Court noted, however, that the evidence did not suggest that any harm was done to Acuff-Rose's potential to enter into the rap market. *Id.* at 1178-79.

consider this issue on remand.[154]

Thus, the Supreme Court concluded that the commercial nature of a parody does not preclude a finding of fair use.[155] Moreover, the Court resolved, courts should consider the parodic purpose of the copying in making a determination under the fair use doctrine.[156] Therefore, the Court reversed the judgment of the court of appeals and remanded the case for reevaluation in light of all four fair use factors.[157]

Justice Kennedy, joining the Court's opinion, wrote separately to express concerns about possible interpretations of the Court's language in subsequent disputes.[158] The Justice emphasized that the most important determinant in the fair use equation is the degree of inclusiveness attributed to the definition of parody.[159] Attempting to clarify the terminology, the concurrence stressed that parody must comment on the original work itself, not merely on the style of the work or on society as a whole.[160] Justice Kennedy maintained that this definitional limitation is manifest because there is no need for a parodist to copy and "conjure up" a work that is not the subject of ridicule.[161]

Justice Kennedy explained that if the meaning of parody is restricted in this manner, the first two factors of the fair use inquiry become subsumed as part of parody's definition.[162] The Justice remarked that all parodies have essentially the same purpose and character, while the copyrighted work is generally publicly known and expressive in nature.[163] Justice Kennedy insisted that because these basic ingredients are satisfied, factors one and two will elicit the same analysis each time.[164] The concurrence added that the

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154 *Id.*

155 *Id.* at 1179

156 *See id.*

157 *Id.* at 1179.

158 *See id.* at 1180-82 (Kennedy, J., concurring).

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

160 *Id.* The Justice cited both Ninth Circuit and Second Circuit cases standing for the proposition that the parody must, at least in part, target the original work. *Id.* (citing Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992); Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986)).

161 *Id.* (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (other quotation omitted). The Justice also maintained that the doctrine allows artists to borrow from authors who would selectively grant licenses to those who would use their works in line with the authors' own self-interest. *Id.* (citing *Fisher v. Dees*, 794 F.2d at 437). The Justice maintained that the fair use doctrine allows such copying because it would be detrimental to society to otherwise stifle this creativity. *See id.* (citations omitted).

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

163 *Id.*

164 *Id.*

proper dissection of the remaining factors simply inquires whether the author borrowed excessively and whether the use usurps market demand for the original through a substitutive effect.[165] Justice Kennedy thus highlighted the importance of subscribing to a consistently narrow interpretation of parody.[166]

Emphasizing that fair use is an affirmative defense, the concurring Justice opined that presumptions should favor the copyright holder.[167] Moreover, the concurrence indicated that there is a danger of underprotecting a work.[168] If the courts subscribe to an unnecessarily broad definition of parody, Justice Kennedy warned, a self-proclaimed parodist would be permitted to exploit original compositions for personal gain without restriction.[169]

Finally, Justice Kennedy expressed reservations about hastily labeling the 2 Live Crew version a parody.[170] The concurrence expressed the hope that courts will be able to distinguish true commercial parodies from the profit-driven, exploitative songs that are post-hoc explained in such a way as to fit the commonly accepted definition of parody.[171]

The Court's decision in *Campbell* properly validated parody as a viable form of creative expression and recognized that a definition of parody that comprises a broad range of expression is neces-

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165 *Id.* at 1181 (Kennedy, J., concurring). Justice Kennedy contrasted two parodies, the *I Love Sodom* parody in *Elsmere Music* and Lewis Carroll's *You Are Old, Father William*, to demonstrate that different parodies require different amounts of copying. *Id.* (citing Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam)) (determining that *I Love Sodom*, by its nature, required substantial copying, while Lewis Carroll's parody only needed to take parts of the original composition to be an effective parody). The Justice agreed with the Court that, while fair use should not be available to exploitative users, each case must be examined on its own facts. *Id.*

The Justice further noted that the fourth fair use factor may be irrelevant because a parody becomes a new creative work that may legitimately compete in the same market with other creative works. *Id.* The key to this factor, the Justice assured, is that the parody be an "independent creative work." *Id.*

166 *See id.* at 1180-81 (Kennedy, J., concurring).

167 *Id.* at 1181 (Kennedy, J., concurring) ("Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist.").

168 *Id.*

169 *Id.* The Justice expressed that it is dangerously easy to perform a newly-styled version of an older work and call it a "'comment on the naivete of the original.'" *Id.* (quoting *id.* at 1173). Thus, the Justice cautioned that the courts should not "allow any weak transformation to qualify as parody." *Id.*

170 *See id.* The Justice expressed that the Court's argument that Campbell's song was a legitimate parody was not totally convincing, but also stated that the District Court has been left with enough leeway to determine that the song was not fair use for other reasons. *Id.* at 1181-82 (Kennedy, J., concurring).

171 *Id.* at 1182 (Kennedy, J., concurring).

sary to fulfill congressional goals.[172] A liberal definition of parody is desirable over a narrow one, given both the intrinsic value to society that humor and parody provide and a judicial tribunal's inability to accurately evaluate the critical elements contained in creative works.[173] The broad dissemination of ideas, however, does not require parody to be defined with such breadth as to encompass all humorous adaptations of a previously published work. The Court properly stated that a parody must comment on or criticize the original work.[174]

Justice Kennedy's concurrence raised a valid concern about whether an author asserting fair use truly had a parodic purpose in

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172 *See id.*

173 The court of appeals in *Acuff-Rose* recognized that the popular meaning of parody may have diverged somewhat from the legal definition. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1435 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994). The appellate court explained that some courts have used the popular definition to extend fair use beyond the permissible scope of § 107 of the Copyright Act. *Id.*

In *Rogers v. Koons*, the Second Circuit limited the definition of "parody" to works that comment on or criticize an original work, at least in part. Rogers v. Koons, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992) (citing MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981)); 3 NIMMER & NIMMER, *supra* note 2, § 13.05[C] & n.60.9, at 13-209)). The fact that parody must necessarily contain an air of derision also limits its definition. Yankee Publishing Inc. v. News Am. Publishing Inc., 809 F. Supp. 267, 279 (S.D.N.Y. 1992) ("Parody implicates an element of ridicule, or at least mockery."). The use, however, must have more than a mere comic effect. *See* Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351, 357 (N.D. Ga. 1979) ("[Parody] must also make some critical comment or statement about the original work which reflects the *original perspective of the parodist* . . . .") (emphasis added). Thus, the new work must add something to the copied work and not merely restate it. *See id.* For example, the *Elsmere* court took into account a song's penchant for social commentary, recognizing that the parodic quality of the song in question was based primarily on its satire of New York City's advertising campaign. *See* Elsmere Music, Inc. v. NBC, 482 F. Supp. 741, 745, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam). The court, however, simultaneously recognized that the parody also targeted the original work, thus satisfying the accepted definition of "parody". *See id.* at 746 (positing that *I Love Sodom* was "as much a parody" of *I Love New York* as it was of the societal context in which the original existed).

174 *See Campbell*, 114 S. Ct. at 1172. Because the scope of the Court's review was limited to parody, the Court left unanswered the question of whether a borrower's assertion that a use of copyrighted material is for *satirical* purposes should have an effect on a court's fair use analysis. *See Campbell*, 114 S. Ct. at 1167, 1172. Because the underlying purpose of copyright law, as propounded by Congress, is the encouragement of creativity and a broad dissemination of ideas, it follows that an author's copying for satirical purposes should weigh in favor of fair use. Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir. 1964). On the other hand, logic would suggest that satire should not carry the same weight as parody. *Campbell*, 114 S. Ct. at 1172. Parody, by definition, requires borrowing from a previously published work. *Id.* (citation omitted). Satire, however, ridicules a general aspect of society rather than a specific work and does not necessitate such a taking. *Id.* (citation omitted). Because the copying of another's work is unnecessary to create a successful satire, satirical purposes should have less influence than parody on a court's fair use inquiry. *See id.*

mind or, rather, decided after the fact to call his work a parody merely to claim fair use.[175] It would be senseless if a copier could mendaciously slant the fair use analysis in his favor simply by calling his work a parody. If the law allowed such an expansive construction, all challenged non-verbatim copiers could declare their uses parodic, making it extremely burdensome for copyright holders to succeed on infringement claims. Therefore, deducing the borrower's intent in his use of copyrighted material facilitates a court's analysis.[176] The consideration of purpose should be limited to whether the borrower initially intended to parody the original. Beyond this, analysis of the purpose and character of the copying no longer helps in the fair use analysis because, as Justice Kennedy observed, purpose and character are invariably the same for all parodic borrowing.[177]

The Supreme Court properly held that a presumption against fair use is not inevitably created when a court finds that a use is commercial in nature.[178] As the Court explained, the mere presence of commercial motives, which are characteristic of an overwhelming majority of works, does not negate the important critical qualities of a work.[179] The extent of a borrower's commercial motives, however, should nevertheless be factored into the balancing process. The doctrine should continue to distinguish between ordinary commercial intent and commercial exploitation of another's work.[180] Courts must still protect copyright holders and

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175 *See Campbell*, 114 S. Ct. at 1181 (Kennedy, J., concurring) (concluding that courts "should not make it easy for [artists] to exploit existing works and then later claim that their rendition was a valuable commentary on the original.").

176 The copier's purpose is relevant as a determinant of whether a work is parodic. *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 310 (2d Cir.) (finding that the first fair use factor was not satisfied where the defendant's copying is done in bad faith for commercial purposes), *cert. denied*, 113 S. Ct. 365 (1992); *see also*, Clemmons, *supra* note 18, at 103 ("'[C]omic effect' [should] be part of the parodist's intended purpose in creating the parody.").

The definition of parody requires that a parodic copy must comment on the original. *See Campbell*, 114 S. Ct. at 1172 (citation omitted). If this result is unintended, however, can the work still properly be called parodic? This, of course, depends upon the perspective the court entertains: whether the parodist subjectively intended to create a parody, or whether the use objectively parodies the original. *See Rogers*, 960 F.2d at 310; Clemmons, *supra* note 18, at 103. A court should not require the parodist to show an actual expressed intent to create a parody. Rather, a general intent to ridicule another work through imitation should suffice.

177 *See Campbell*, 114 S. Ct. at 1180-81 (Kennedy, J., concurring).

178 *See id.* at 1179.

179 *Id.* at 1174.

180 *See* Tin Pan Apple, Inc. v. Miller Brewing Co., Inc., 737 F. Supp. 826, 832 (S.D.N.Y. 1990) (holding that defendant's use of plaintiff's rapping style for a beer commercial was not fair use because "the commercial's use is entirely for profit

discourage free-riders from using protected material for their own exploitative gain. Thus, a presumption may be proper when a court determines that commercial exploitation is involved.[181] This presumption, however, should not be dispositive and should allow an author to assert fair use based on the other three fair use factors.[182]

The substantiality of the borrowing remains important for analyzing the fair use doctrine's application to parodic works. Nevertheless, accurately and consistently gauging the substantiality of a taking seems inherently difficult. The Supreme Court endorses the "conjure up" test for parody,[183] but in practice this calculation ultimately appears more aesthetic than logical. That is, a court, in

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. . . ."). In *Tin Pan Apple*, a rap group alleged, inter alia, copyright infringement when the defendant used sound-alikes and look-alikes of the group for a beer commercial. *Id.* at 827-28. The court stated that even if the defendant's advertisement was a parody, it did not qualify as a fair use because it was solely for commercial gain and did not "'build[ ] upon the original'" with humor or commentary. *Id.* at 832 (quotation omitted). *But see* Eveready Battery Co. v. Adolf Coors Co., 765 F. Supp. 440, 448 (N.D. Ill. 1991) (considering a company's use of another company's motif in its own commercials to be both a parody and a fair use through the four-prong test). In *Eveready*, the Eveready Company, a manufacturer of batteries that had been running numerous commercials featuring a pink mechanical bunny with a drum, sued Coors, a beer producer, when Coors released a television advertisement that contained a famous comedic actor, Leslie Nielsen, wearing pink slippers and rabbit ears, banging on a drum. *Id.* at 442-43. The court noted that although television commercials always are designed with commercial intentions, they can also be aimed at humor and commentary. *Id.* at 446-47. Thus, the court held that creative purpose upon which to base a fair use defense may certainly be found in commercials. *See id.* Both the Second and Eleventh Circuits have acknowledged the involvement of commercial exploitation in their cases. *See, e.g.*, Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 844 (11th Cir. 1990) (quoting Sony Corp. of Am. v. Universial City Studios, Inc. 464 U.S. 417, 448-49 (1984)) ("'[A] commercial or profit-making purpose' is presumptively unfair."); Iowa State Univ. Research Found., Inc. v. ABC, Inc., 621 F.2d 57, 61 (2d Cir. 1980) (quotation omitted) (noting the relevance of the fact that the defendant's use was for commercial purposes); Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (stating that it was relevant, for the purposes of fair use analysis, whether defendant's use was primarily for commercial purposes), *cert. denied*, 434 U.S. 1013 (1978).

181 *See Campbell*, 114 S. Ct. at 1181 (Kennedy, J., concurring). The *Campbell* Court stood by its argument in *Sony* that when verbatim copying is involved, commerciality can bring forth a presumption against fair use. *Id.* at 1177. According to the Court, allowing for a presumption to attach upon the finding of commercial exploitation would merely be an extension of courts' jurisprudence. *See id.*

182 Similarly subsumed is the second fair use factor. *See Campbell*, 114 S. Ct. at 1180-81 (Kennedy, J., concurring). As Justice Kennedy noted, the works from which parodies customarily borrow are of the same basic nature regardless of the actual parody involved. *Id.*

183 *Id.* at 1176 ("When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable.") (citation omitted).

determining substantiality, must make aesthetic judgments about a work and the relative importance of its components. While substantiality of the borrowing is a significant element for a finding of fair use, courts should not attempt to mechanize the deliberation through an unworkable formula.[184]

Likewise, considering the effect of a parodic use on the market value of the original is troublesome with respect to parodic works. Although the Supreme Court has dubbed this factor "undoubtedly the single most important element of fair use,"[185] it is of minimal value in parody cases. Weighing the effect of the copier's use on the value of the copyrighted work is inappropriate when such use is parodic. If the weight of the effect is admitted into the balance, parodies that succeed in lampooning original works will generally be deemed infringements more often than will unsuccessful parodies because the successful parody's negative commentary may make another work seem ridiculous, thereby diminishing the value of the original.[186] Clearly, if society wishes to preserve parody as an art form, successful parodies should receive at least as much protection as ineffective parodies. Because successful parodies further the congressional goal of stimulating criticism and comment, it would be imprudent to prohibit them through such a regressive analysis.

Because a good parody should be expected to diminish the value of the original, a court's primary concern should instead be a copyright holder's protection of legitimate market interests in derivatives. A difference exists between a work diminishing the value of the original and acting as a substitute for the original.[187] Market substitution should be the only relevant consideration within the

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184 The court in *Elsmere*, adjudging the taking of four notes from a 100-measure composition as "substantial," shows that this cannot be done with any mechanical consistency. *See* Elsmere Music, Inc. v. NBC, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1080). There, the court found a small use as taking the 'heart of the original.' *Id.*

185 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

186 *See Campbell*, 114 S. Ct. at 1178. Because the essence of a good parody is to utterly mock and totally ridicule another work, the effect of persuading people of the original's mediocrity should not weigh against the parodist. *See* L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir. 1987); Yankee Publishing Inc. v. News Am. Publishing Inc., 809 F.Supp. 267, 279 (S.D.N.Y. 1992). Of course, a parodic use can have the opposite effect on the market for the original. *See Sony*, 464 U.S. at 453. It is conceivable that a parody could spark an increase in interest of the original by the consuming public, based on the recollective capability of the derivative work. *Id.*

187 *Campbell*, 114 S. Ct. at 1177; Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986); MCA, Inc. v. Wilson, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting) (quotation omitted).

scope of the fourth factor. Consideration of market substitution presents a workable resolution of the fair use question, providing that if a parody is capable of substituting for the original or its derivatives, the use is unfair and further analysis of this factor is unnecessary.[188]

Under this test, the congressional aim of idea dissemination is not unduly hindered and courts are not compelled to decide upon creative works' literary or societal value. The protection of derivative works is demonstrated by the Court's acknowledgement that Acuff-Rose's possible protectable interests may include the release of a rap version of the Orbison song.[189] While it is highly improbable that Acuff-Rose would consider releasing such a derivative work, the probability of such a release should not be a factor in the analysis. Mere nonuse of certain derivative market channels should in no way constitute a waiver of the right to use those channels at any time before copyright protection expires.[190]

In summation, the Supreme Court properly disallowed a presumption against fair use to arise simply because a borrowing work was created for commercial purposes.[191] According parody importance in a fair use analysis reflects a conscious effort to adopt an expansive definition of parody and aids in preserving a socially-desirable mode of expression. While the Court furnishes an organized and simple fair use analysis, Justice Kennedy's concurring opinion focuses on deeper questions about the nature of parody, and therefore provides a helpful framework upon which to base further analyses of the fair use doctrine's applicability to parody. Thus, the concurrence serves as a practicable guide into uncharted areas of the law.

David R. Crittenden

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

189 *See id.* at 1178.

190 Of course, under market substitution theory, a copyright holder would not be precluded from availing himself of remedies under theories of defamation, unfair competition, right of publicity, invasion of privacy, or breach of contract. Van Hecke, *supra* note 18, at 493 n.126.

191 *See Campbell*, 114 S. Ct. at 1179.