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Allen Jung Legal Issues in Online Communities

User-Generated Parody Videos on YouTube: Do They Have a Successful Fair Use Defense under Copyright Law?

I. Introduction

There is a South Korean song – called “Gangnam Style” – that migrated into the United States across the globe, and held on to the No. 2 spot of U.S. Billboard Hot 100 chart for seven consecutive weeks.¹ While no one has ever seen a song from the Asian market reach the top of this chart since 1963², what adds to the shock is that the original artist of the song, Psy, has never had an intention to launch this song in the United States.³ The initial spark that “unintentionally” placed Psy onto this throne of popularity in North America can be attributed to his record-breaking official music video on YouTube.⁴ That may not be a huge surprise, considering the roles that official music videos and YouTube play in the digital age. However, there was a world-wide phenomenon that helped Psy involuntarily “maintain” this popularity for several

¹ See Billboard.biz, “Chart Moves: Hunter Hayes Is A 'Wanted' Man On Hot 100” at <http://www.billboard.biz/bbbiz/industry/record-labels/chart-moves-hunter-hayes-is-a-wanted-man-1008008422.story> (Nov. 8, 2012)(noting that “holding off PSY’s ‘Gangnam Style,’ which remains at No. 2 for a seventh frame”).

² See Oh KPop, “Psy’s ‘Gangnam Style’ Stays #2 on Billboard Hot 100” at <http://www.ohkpop.com/72339/psys-gangnam-style-stays-at-2-on-billboard-hot-100-2> (Oct. 9, 2012) (explaining that the song is aiming to be “the second song by an Asian artist since Sakamoto Kyu’s ‘Sukiyaki’ in 1963 to reach the top on the U.S. chart”).

³ See Prefix, “PSY’s ‘Gangnam Style’ Given Guinness World Record Certificate” at <http://www.prefixmag.com/news/psys-gangnam-style-given-guinness-world-record/69460/> (Sept. 21, 2012) (noting that Psy’s repeated statements that original intention was “just for the South Korean market,” and embedding the original YouTube music video).

⁴ *Id.*

months in the United States: countless number of user-generated parodies of Psy's official music video that flooded into the YouTube community.⁵

Psy's "Gangnam Style" and its YouTube parody video demonstrate a paradigmatic example of how the role of YouTube has expanded in the online communities, certainly including those of the United States. The domain of parody creators and distributors has grown beyond a group of professional producers, such as producers of *South Park*⁶ or 2 Live Crew⁷. Examples of "Gangnam Style" user-generated parodies include choreographed flash mobs performed by college students, adaptation of the music video for particular demographics, and even satirical versions having political figures replacing the characters. This article will return to the specific types of parodies that recently became popular, in part V.

These movements demonstrate a cultural trend of the YouTube era: creating and distributing parody works have evolved from carefully planned commercial productions, to casual and spontaneous social behaviors disseminated throughout the general public. It would not a big surprise today if one neighbor walks by and boasts that he filmed himself doing a parody of a movie scene with his smart phone, uploaded it instantly on YouTube, and got views from 1,000 random people from different parts of the world. Most likely, that neighbor would not have had an in-house counsel to take care of the copyright licenses behind the scenes or lawyers to prepare for responding to infringement claims. But didn't this hypothetical neighbor just "copy" some movie producer's original expression unlawfully and distribute a substantially

⁵ See YouTube Trends, "'Gangnam Style' is Your International Hit of the Month" at <http://youtube-trends.blogspot.jp/2012/08/gangnam-style-is-your-international-hit.html> (Aug. 7, 2012) (noting on parodies and homages that "nearly 1,000 videos has been posted with 'gangnam' in the title").

⁶ See, e.g., *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 1001 (E.D. Wis. 2011) (describing "viral YouTube clips" of a *South Park* episode).

⁷ See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

similar work without permission? How forgiving is the U.S. copyright law on these parody-making ordinary users, who are actually deemed heroes in the online communities for energizing the crowd world-wide? Do these ordinary users have a legal defense to any copyright infringement claims, and does the defense apply to every parodic use of copyrighted works? This article addresses these questions, beginning with how the statutes and the courts have been treating modern day “parodies,” as well as the parodists’ affirmative defense under the fair use doctrine.

II. The Fair Use Provisions in the Copyright Act of 1976.

The fair use doctrine is a commonly raised affirmative defense to copyright infringement, even if the claim of “infringement” is established. This doctrine, which is “one of the most important and well-established limitations on the exclusive right of copyright owners,” was given its first “express statutory recognition” in the section 107 of the Copyright Act of 1976.⁸ In order to establish a fair use defense, the statute provided four elements to be considered and applied to an infringing work: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁹

⁸ CRAIG JOYCE ET AL., COPYRIGHT LAW 798 (8th ed. 2010).

⁹ See 17 U.S.C. § 107

First, the legislative intent behind these fair use factors' codification is worthy of note, as the codification of the 1976 Copyright Act itself was purported to provide a legal source for uniform, up-to-date, and effective federal protection on copyrights. The House Report corresponding to the Copyright Act includes a section specifically entitled "General Intention behind the Provision" on the fair use segment, which states that while the bill "endorses the purpose and general scope" of the fair use doctrine, "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."¹⁰ Thus, with rapid technological changes in mind, the Report leaves the rest of fair use analysis to the discretion to the courts, to freely adapt the doctrine "to particular situations on a case-by-case basis."¹¹

Even within the fair use doctrine, the realm of "parodies" was one of the spheres for which the courts struggled to construe a binding analysis, under this open-to-interpretation codification. In 1994, the Supreme Court of the United States finally confronted the specific issue of parodies in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).¹² The analysis provided by the *Campbell* Court became the focal point, or at least a good starting point, for the subsequent parody suits in various courts.¹³ Thus, the *Campbell* case warrants a separate discussion on how the Supreme Court construed the fair use provisions as they are applied to parody works; further discussion on later parody cases will follow, as this article unfolds the courts' responses to the technological changes after *Campbell v. Acuff-Rose*.

¹⁰ H.R. REP. NO. 94-1476, at 66 (1976).

¹¹ *Id.*

¹² CRAIG JOYCE ET AL., *supra* note 8, at 803.

¹³ CRAIG JOYCE ET AL., *supra* note 8, at 819-820.

III. The Supreme Court Established the Framework for Fair Use Defense for Parody Works, in *Campbell v. Acuff-Rose Music, Inc.*

A. Background of *Campbell v. Acuff-Rose Music, Inc.*

Plaintiff Acuff-Rose was the assignee of the copyright for the song “Oh, Pretty Woman,” a popular rock ballad written by Roy Orbison and William Dees.¹⁴ The song was written in 1964, and it was subsequently registered for copyright protection.¹⁵ In 1989, Defendant Campbell (member of 2 Live Crew) wrote another song, entitled “Pretty Woman,” which was a derivative work with lyrics comically modified from the original piece “Oh, Pretty Woman.”¹⁶ The Court describes this alteration as juxtaposing the original lyric’s “romantic musings of a man whose fantasy comes true” with “degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.”¹⁷ After the creating this parody work and before releasing it, 2 Live Crew’s manager promptly informed the plaintiff about this parody, as well as 2 Live Crew’s willingness to go through proper licensing procedures with Acuff-Rose.¹⁸ However, the response from plaintiff Acuff-Rose was a firm refusal to give any permission: “we cannot permit the use of a parody of ‘Oh, Pretty Woman.’”¹⁹ Nonetheless, 2 Live Crew proceeded to release the parody song, with the plaintiff writers and publishers credited on its album covers.²⁰

Almost a year later, “after nearly a quarter of a million copies of the recording” of the parody song has been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke

¹⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 583.

¹⁸ *Id.* at 572.

¹⁹ *Id.* at 573.

²⁰ *Id.*

Skywalker Records, for copyright infringement.”²¹ After the district court sided with defendant’s fair use and the Court of Appeal for the Sixth Circuit reversed to rule in favor of infringement without fair use, the Supreme Court granted certiorari to decide on the issue of whether 2 Live Crew’s commercial parody is, in fact, in the realm of fair use.²² As for the lower courts’ views, more details will follow, within the discussion of the four factors.

As an introductory matter, the Supreme Court defined the concept of parody as “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”²³ Consequently, the Court found some general legitimacy in finding some – and not all – parody works as fair use, based on the observation that a “parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.”²⁴ At the same time, the Court confirmed its rejection of bright line rules such as a presumption that any parodic use is fair.²⁵ In essence, the view of the Court was that “parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.”²⁶ This initial perspective led the Court to analyze the parody with four factors listed in 17 U.S.C. § 107, one factor at a time. While the following sections review the factor-by-factor analysis of the Supreme Court, the sections will also briefly introduce the lower courts’ reasoning for the corresponding factors, in order to depict how the analysis evolved its way up to the Supreme Court’s views.

B. The First Factor: The Purpose and Character of the Use

²¹ *Id.*

²² *Id.* at 573-574.

²³ *Id.* at 580.

²⁴ *Id.* at 580-581.

²⁵ *Id.* at 581.

²⁶ *Id.*

The United States District Court for Middle District of Tennessee, the trial court that first heard this case, found that the first factor weighs in favor of fair use.²⁷ Here, the District Court noted that commercial parodies are generally “editorial” or “social commentary” in nature,²⁸ and consequently, the test should be merely finding whether the “character” of 2 Live Crew’s work was, indeed, a nature of a parody.²⁹ Mainly because of deviations of “theme, content, and style,” the District Court saw “Pretty Woman” as a “comic parody,” holding that the first factor points to the direction of fair use. However, the Court of Appeals for the Sixth Circuit disagreed with this finding, because the Sixth Circuit sought to place more emphasis on the commercial or non-commercial “purpose” of the work; consequently, the Sixth Circuit thought it was appropriate to “start from the position that the use is unfair,” with this firm presumption simply rooted on “commercial” purpose of 2 Live Crew’s work.³⁰ Hence, at the final appeal, it was the Supreme Court’s mission to establish a good, binding test that balances the emphasis on “parodic character,” and the emphasis on “commercial purpose,” for the analysis under this first factor.

In response, the Supreme Court introduced a key word to use as the focal point that helps on this balancing of character and commercial purpose: “transformative.”³¹ The Court explained that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”³² In finding overall fair use in “purpose and character” of particular parody works, the “transformative” purpose and nature of parody would be a feature that is so crucial that “the more transformative the new work, the less will be the significance of other

²⁷ *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*, 510 U.S. 569 (1994)

²⁸ *Id.* at 1154.

²⁹ *Id.* at 1155.

³⁰ *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992) *rev'd*, 510 U.S. 569 (1994)

³¹ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)

³² *Id.* at 579.

factors” in the entire analysis of determining whether or not there is a fair use.³³ In the midst of formulating this test, the Court criticized the reasoning of the Sixth Circuit, for “confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use,” and stressed that the interpretation of Section 107(1) should be “a broader investigation” that goes beyond the confinement of for-profit or not-for-profit inquiry.³⁴ The message was that commercial purpose of a work of art could be a possible disadvantage, but not a presumptive “no,” to the defendant’s fair use defense.

The Supreme Court went further: in the realm of parody, gauging “transformative” nature is not about evaluating the subjective quality of the parodic elements, but is rather about the seeing the objective presence of a parodic message that could be reasonably perceived.³⁵ It seems that the Court wanted to show its continuing respect for *Bleistein* non-discrimination principle³⁶ even in the realm of parodies, so that it is not the discretion of the Court to see the subjective quality of the parody’s “taste.”³⁷ As an example, the Court admitted that the Justices themselves “might not assign a high rank” to the parodic element presented in the 2 Live Crew’s song,³⁸ suggesting that the degrading theme embedded in this parody did not exactly suit the Justices’ aesthetic tastes. But that did not make a difference to Justice Souter, and this dictum renders a noteworthy implication: the degree of how “nasty” or “daunting” the public finds a parody work to be is irrelevant for the purpose of fair use analysis. Instead, what the Court arrived at “the threshold question” for drawing a line on what is “transformative” enough in parody cases:

³³ *Id.* at 579.

³⁴ *Id.* at 583-584.

³⁵ *Id.* at 582.

³⁶ See CRAIG JOYCE ET AL., *supra* note 8, at 102.

³⁷ *Campbell*, 510 U.S. at 582.

³⁸ *Id.* at 583.

“whether a parodic character may be reasonably be perceived” in the derivative work.³⁹

Specifically, the Court saw a “parodic character” as “[creating] a new one that, at least in part, comments on that author’s works.”⁴⁰

Applying this threshold question to 2 Live Crew’s song, the Court found it fair to say that this parody song “reasonably could be perceived” as “commenting on the original or criticizing [the original], to some degree.”⁴¹ The juxtaposing of the original lyrics with “degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility,” did demonstrate sufficient presence of reasonably perceived parodic character; according to the Court, these lyrics “can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment of its sentiment that ignores the ugliness of street life and the debasement that it signifies.”⁴² In other words, the parodic message was reasonably perceived to be a sufficient “joinder of reference and ridicule” towards the original work.⁴³

C. The Second Factor: the Nature of the Copyrighted Work.

The second factor directs to the original work of the derivative work in question, and asks whether the original work’s copyrightable element was thick enough to protect against any alleged “fair use.” Both the District Court and the Court of Appeals for the Sixth Circuit found this factor weighing against fair use.⁴⁴ But interestingly, the Supreme Court responded by dismissing this factor as a whole.⁴⁵ In this case, the second factor would consider the protected element of Roy Orbison’s original song. The Supreme Court does recognize Orbison’s original

³⁹ *Id.* at 582.

⁴⁰ *Id.* at 580.

⁴¹ *Id.* at 583.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992) *rev’d*, 510 U.S. 569 (1994)

⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 586.

song worthy to “[fall] within the core of the copyright’s protective purposes.”⁴⁶ However, no matter how protected the original piece was in this regard, the Court said this is “not much help” in a parody analysis, because “parodies almost invariably copy publicly known, expressive works.”⁴⁷ Hence, it was the position of the Court that this second factor is an irrelevant factor for the purposes of parody analysis, given that the answer on this factor would likely to be the same for every parody case: to be an object of a successful parody, the original work had to be publicly well-known and expressive work to begin with.⁴⁸

D. The Third Factor: the Amount and Substantiality of the Portion used in Relation to the Copyrighted Work as a Whole

The third factor asks whether “the amount and substantiality” of the taken portion are “reasonable in relation to the purpose of the copying.”⁴⁹ On this point, the District Court “considered the song’s parodic purpose in finding that 2 Live Crew had not helped themselves overmuch.”⁵⁰ The Court of Appeals disagreed, finding that although quantity taken by 2 Live Crew may be justified, “the copying was qualitatively substantial.”⁵¹

The Supreme Court actually gave the Court of Appeals deference, toward the principle upon which the Court of Appeals framed its findings. The principle was that both the quality and the quantity of the portion taken out of the original work provide important clues on “dearth of transformative character” or “likelihood of market harm.”⁵² By infringement of quality, the courts sought whether the portion taken from the original work is “the heart” of the original work,

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 587.

⁵¹ *Id.*

⁵² *Id.*

even if the portion is short in length.⁵³ By infringement of quantity, the courts were to scrutinize the works to test if the infringing work is “composed primarily of an original,” resulting in a “superseding” use that fulfills the demand for the original.⁵⁴

While these general principles were agreed upon, the Supreme Court rejected the notion that these principles could equally apply to the special genre of parody. That is where the Supreme Court had to “part company with the court below.”⁵⁵ The Court noted that parody’s messages or humors “necessarily springs from recognizable allusion to its object through distorted imitation.”⁵⁶ Because the art of parody lies “in the tension between a known original and its parodic twin,” the Court said, “the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”⁵⁷ The Supreme Court acknowledged that, in a parodist’s point of view, it is critical to make sure that the audience is able to recall the original work’s distinctive features.⁵⁸ Based on this special acknowledgement for the particular genre of parody, the Court made a bold exception on “taking the heart of the original” accusation brought up by the Court of Appeals, and defended 2 Live Crew’s fair use defense on the grounds that “the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim.”⁵⁹ In essence, the Supreme Court provided an analysis that combines the qualitative and quantitative aspects, to allow parodies to retrieve the “heart of the original” only to the extent that taking of this heart justifiably “conjures up” the necessary parts of the original to make the parodic points recognizable.

⁵³ *Id.*

⁵⁴ *Id.* at 587-588.

⁵⁵ *Id.* at 588.

⁵⁶ *Id.* at 588.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

This parody-specific “heart” analysis is not without restriction, however. Noting that “context is everything,” the Court emphasized the need to subsequently look at “what else the parodist did besides go to the heart of the original.”⁶⁰ An expressive work would not have a free pass to steal the “heart of the original” and simply be free from infringement claims, just because it carries a label “parody.” For instance, the Court found that what 2 Live Crew did in the parody is permissible under the third factor of the fair use analysis, because after copying the necessary parts, the lyrics “departed markedly from the Orbison lyrics for its own ends.”⁶¹

E. The Fourth Factor: the Effect of the Use upon the Potential Market for or Value of the Copyrighted Work.

The fourth factor the Supreme Court considered was “the effect of the use upon the potential market for or value of the copyrighted work.”⁶² Specifically, the Supreme Court noted two important inquiries: (i) harm to the market of the original work and (ii) harm to the market for derivative works of the original.⁶³

Those two questions were not an invention of the Supreme Court in *Campbell*, since both lower courts actually employed the same inquiries. With respect to the markets of the original work itself, or the first inquiry, the District Court found in favor of fair use because “the intended audience is entirely different.”⁶⁴ The District Court also found fair use for the second inquiry as well, because markets for other derivative parody works would not even be likely to exist, given

⁶⁰ *Id.* at 589.

⁶¹ *Id.*

⁶² See 17 U.S.C. § 107

⁶³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 at 590 (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985)).

⁶⁴ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1158 (M.D. Tenn. 1991) *rev'd*, 972 F.2d 1429 (6th Cir. 1992) *rev'd*, 510 U.S. 569 (1994)

that other parody works “would be unlikely ever to be approved by the original author.”⁶⁵ On the other hand, the Court of Appeals reached completely different finding, primarily on the first inquiry. Under the first inquiry, the Court of Appeals took the fact that 2 Live Crew’s “use of the copyrighted work is wholly commercial” and consequently “[presumed] that the likelihood of future harm to Acuff-Rose exists.”⁶⁶ To the Court of Appeals, this commercial-use presumption of market harm under the first inquiry was sufficiently powerful to find against fair use under the fourth factor as a whole, only giving the second inquiry a brief recognition as an alternative possibility without further analysis.⁶⁷

The Supreme Court held the Court of Appeals erred in making such a presumption, because the presumption was a misapplication of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).⁶⁸ The context of *Sony* was the discussion of “commercial use” that “amounts to mere duplication of the entirety of original,” which clearly serves as a market replacement for it and causes harm to the market of the original.⁶⁹ But in the context of parody, like the one by 2 Live Crew, the work would be a “transformative” use, so that “market substitution is at least less certain,” and consequently, “market harm may not be so readily inferred.”⁷⁰ As such, the Supreme Court dismissed the “presumption” of the direct market harm stemming from a commercial parody, by asserting that “transformative” works such as parodies

⁶⁵ *Id.*

⁶⁶ *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992) *rev'd*, 510 U.S. 569 (1994)

⁶⁷ *Id.* at 1439.

⁶⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 591.

⁶⁹ *Id.*

⁷⁰ *Id.*

would “not affect the market for the original in a way cognizable under this factor.”⁷¹ That was the Court’s position on the first inquiry of the fourth factor.

As for the second inquiry about the effect on derivative markets, the Supreme Court provided further analysis which sided with – and expanded on – the District Court’s views in this criterion. The Supreme Court recognized that the market for potential derivative uses are geared toward derivative works that the “creators of original works would in general develop or license others to develop”; accordingly, the Court found it unlikely that “critical review or lampoons of their own productions” would even exist as owner-approved and licensed products.⁷² But there was a caveat to this analysis. The non-existence of licensing market would apply only to parody works with “nothing but a critical aspect.”⁷³ Parody work, however, “may have a more complex character, with effects not only in the arena of criticism but also in protectable markets for derivative works, too.”⁷⁴ Even in the instant case, 2 Live Crew’s parody song had other elements beyond the “critical,” or parodic, elements. Specifically, 2 Live Crew’s song encompasses an element of “rap music,” which may be an element distinct from the element of parody; as such, the derivative market for rap music may be “a proper focus of enquiry,” in which an “evidence of substantial harm to it would weigh against a finding of fair use.”⁷⁵ On this specific inquiry, the Supreme Court found lack of evidentiary support from both parties, and this evidentiary hole was the basis for remand.⁷⁶

F. How the Supreme Court Specially Distinguished “Satires” from Parodies.

⁷¹ *Id.*

⁷² *Id.* at 592.

⁷³ *Id.* at 592.

⁷⁴ *Id.*

⁷⁵ *Id.* at 592-593.

⁷⁶ *Id.* at 593-594.

Before leaving the Supreme Court decision on *Campbell*, a dictum placed in the middle of the *first factor* analysis warrants a separate recognition, mainly because of the critical roles and implications that this principle, alone, played in later parody-type copyright infringement cases. The statement was that parody and satire could be two distinct spheres that could actually form a dichotomy in deciding whether or not something is fair use, so that a “parody” would likely be held to be fair use while a “satire” would not.⁷⁷ In making this statement, the Court drew a boundary between the respective definitions of parody and satire: while parodies comment on the original authors’ works, the Court noted, satires purport to make a commentary that “has no critical bearing on the substance or style of the original composition.”⁷⁸ Because satires are thus made to comment on something other than the original work, “satire can stand on its own feet and so requires justification for the very act of borrowing.”⁷⁹ Using a well-known copyrighted work for the purpose of conveying a political or social message to the public is a repeated prototype of these “satires” which are not within the boundaries of fair use. In section (IV)(A) below, this article will visit specific examples of later court cases that further evolved this principle.

IV. Courts Building onto the *Campbell* Analysis: Applying *Campbell* Framework to Various Parodies Embedded in Newer Technological Means.

When the issue comes down to parodies and their fair uses defenses, the *Campbell* decision is a route that cannot be bypassed. Perhaps the most fundamental reason for this

⁷⁷ *Id.* at 581-582.

⁷⁸ *Id.* at 580.

⁷⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 580 (quoting Bisceglia, Parody and Copyright Protection: Turning Balance Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, p. 25 (1987)).

necessity to start from *Campbell* is the decision did come from the Supreme Court, along with a judicially binding analysis on the specific genre of parodies. Thus, when federal courts faced parodic works' fair use defenses in various technological contexts, the *Campbell* analysis was a natural starting point, as one could see in the discussions to follow.

Nonetheless, eighteen years have passed since *Campbell*, and the rapid technological advances in the means to convey the parodic works warrants a careful observation on federal courts' handling of more "modern" circumstances. After all, the legislative intent behind fair use provision was clearly in favor of a technology-sensitive and dynamic use of the law, in that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."⁸⁰ Therefore, as the modern copyright law faces parody works in YouTube video forms, *Campbell* analysis should certainly not be the end point, and various federal courts' subsequent narrowing of the *Campbell* interpretations would be provide a helpful guide.

A. Building on the First Factor, including the Parody/Satire Dichotomy.

The Supreme Court in *Campbell* dealt with plaintiff's exclusive right on the musical work embodied in the song "Oh, Pretty Woman." However, modern day parodies could easily extend above and beyond "solely musical" works. While the *Campbell* Court focused mostly on the parody song's lyrics for determining the "transformative" use under the first factor, various federal courts, in post-*Campbell* era, had to deal with more technologically advanced parody works that utilized motion pictures, dramatic works, or graphically generated characters to express the parodic effects. Works of authorship found in motion pictures, dramatic works, or

⁸⁰ H.R. REP. NO. 94-1476, at 66 (1976).

graphically generated characters are among the protectable elements under the Copyright Act⁸¹, and without a successfully established defense, plaintiffs could establish copyright infringements.⁸²

One common denominator in these video-type parodies was the act of manipulating the characters, styles, and themes of the original audiovisual works, to make “transformative” audiovisual works of “reasonably perceived” parodic nature. For example, in 2007, the United States District Court in the Southern District of California, in *Burnett v. Twentieth Century Fox Film Corp.*, faced a situation in which Family Guy producers took the public figure Carol Burnett from Carol Burnett Show and made an audiovisual parody version of Carol Burnett figure “in awkward, ridiculous, crude, and absurd situation in order to lampoon and parody her as a public figure.”⁸³ On this parody, the Court held in favor of fair use under the first factor, because this Court sensed that parodic element was “reasonably perceived” through the Family Guy’s character recreation which “broadly [mimicked] an author’s characteristic style and [held] it up to ridicule.”⁸⁴ It was an application of the *Campbell* Court’s “reasonable perception” test, taken beyond the context of mere song lyrics. In the midst of acknowledging this reasonable perception, the court in *Burnett* also maintained the *Bleistein* non-discrimination principle raised by the *Campbell* Court, specifically repeating that “whether ... parody is in good taste or bad taste does not and should not matter to fair use” in this “transformative” work analysis.⁸⁵

In 2012, the United States Court of Appeals for the Seventh Circuit made a similar evaluation on a *music video* parody, which was made by South Park and directed to the

⁸¹ See 17 U.S.C. § 102

⁸² See 17 U.S.C. § 501

⁸³ *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007).

⁸⁴ *Id.*

⁸⁵ *Id.* at 968.

plaintiff's "What What (In the Butt)" music video.⁸⁶ The parody was South Park's re-creation of the music video by copying of the stylistic elements (e.g., singing of the same song and using similar imagery), although South Park's own character figure replaced the original work's character figure.⁸⁷ The Seventh Circuit held that under the first factor of fair use, "[South Park's] parodic use has obvious transformative value," because the parody music video "[added] something new with a further purpose or of a different character" through its act of "lamprooning" of the original music video's stylistic elements.⁸⁸

Another exemplary finding of this reasonable perception of transformative quality in video contexts was back in year 2002, in which United States District Court for the Northern District of California found a "pornographic parody" video based on Star Wars to be a sufficiently transformative fair use because its animated characters were deemed to hold the "characteristic style of Star Wars" up to ridicule.⁸⁹

Thus, the post-*Campbell* cases show that whichever element is tweaked – whether the tweaked element is the story, character figure, style, genre, or theme – "transformative" use can be established as long as there is a reasonable perception that those tweaks comment on some quality of the original work.

This forgiving trend on the "transformative" feature was not a boundless one, however. It seems that the courts had to draw a line somewhere, to be able to say that not all works with seemingly "ridiculing" or "lamprooning" features are conclusively deemed to be

⁸⁶ See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012).

⁸⁷ See *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 998-99 (E.D. Wis. 2011) aff'd, 682 F.3d 687 (7th Cir. 2012)

⁸⁸ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012).

⁸⁹ *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 901 (N.D. Cal. 2002).

“transformative.” The tool employed to draw this boundary was the *Campbell* Court’s parody versus satire dichotomy. As already mentioned during the discussion of *Campbell* framework, the Supreme Court in *Campbell* made a special point that a “satire” – the objective of which is to make fun of something *other than* the original work itself – “can stand on its own feet and so requires justification for the very act of borrowing.”⁹⁰ This principle came alive to rule out some popular derivative works.

For instance, the United States Court of Appeals for the Ninth Circuit, in 1997, handled a literary and graphic work entitled “*The Cat NOT in the Hat!*”, a derivative work of the Dr. Seuss tale “*The Cat in the Hat!*”⁹¹ The Ninth Circuit boldly found that “although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold *his style* up to ridicule.”⁹² The rationale was that this particular derivative work focused on retelling the story of O.J. Simpson trial, rather than commenting on the Dr. Seuss tale itself; such a diverted focus does not constitute an “effort to create a transformative work with ‘new expression, meaning, or message’” on the plaintiff’s original work.⁹³ Thus, the Ninth Circuit demonstrated that “broad mimicking of the characteristic style” is not enough to be a transformative use, if its purpose is to hold *something other than the original author’s style* up to ridicule. The principle here mirrors that used by *Campbell* Court to distinguish “satires” from parodies for the purpose of fair use analysis.

In deciding *Henley v. DeVore*, the United States District Court for the Central District of California also joined in with this position in year 2010, as it handled a derivative audiovisual

⁹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 580 (quoting Bisceglia, Parody and Copyright Protection: Turning Balance Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, p. 25 (1987)).

⁹¹ See *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997)

⁹² *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997)

⁹³ *Id.*

work having a strong political message.⁹⁴ This Court specifically referenced the statements of the *Campbell* Court to find that “satire faces a higher bar for fair use because it requires greater justification for appropriating the original work.”⁹⁵ What made this particular derivative work a non-transformative satire was the court’s characterization that “[defendant’s work ‘November’] uses those themes and devices to pock [sic] a separate subject entirely, namely Obama and his supporters.”⁹⁶ The original song was about the politics in the 60’s, but this derivative work “merely echoed” that original theme, rather than critiquing or ridiculing it; the derivative work’s main objective was an expression of disappointment on President Obama’s performance, which was a subject matter completely irrelevant to the original work.⁹⁷ So the inquiry on determining whether a work is categorically satirical is on what the main objective of that derivative work is reasonably perceived to be.

Lastly, this particular political work was weighed against fair use for another reason under the first factor: commercial purpose. Pointing to the fact that the defendants “stood to gain publicity and campaign donations from their use of Henley’s music” by incorporating links to campaign donation websites in their videos, the District Court here found that the defendants “profited from their use by gaining an advantage without having to pay customary licensing fees to the plaintiffs.”⁹⁸ This particular finding needs to bear a careful treatment, because the Supreme Court in *Campbell* specifically rebutted the presumption that commercial use is an unfair use. However, the *Henley* case does serve as a reminder that commercial purpose can be a

⁹⁴ See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1158 (C.D. Cal. 2010)

⁹⁵ *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1158 (C.D. Cal. 2010)

⁹⁶ *Id.* at 1156.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1159.

disadvantage toward fair use determination, for reasons such as potential misappropriation of profits.

B. Building on the Second Factor.

As previously discussed in the *Campbell* analysis section, the Supreme Court in *Campbell* did not find the second factor particularly suitable for a fair use parody analysis, since all works subject to be basis for public parodies were most likely be “within the core of the copyright’s protective purposes.”⁹⁹ In fact, this dismissal of the factor was a principle that lived on, as courts in parody cases followed the *Campbell* precedent to generally consider the second factor insignificant.¹⁰⁰

C. Building on the Third Factor.

Recall from the *Campbell* analysis that the Supreme Court in *Campbell* gave a favorable finding on fair use under this factor, reasoning that taking of substantial qualitative and quantitative portions is sometimes necessary or justifiable for “parody artists” in particular – for whom the audience’s recognition of the original work is important.¹⁰¹ This was not exactly a clear line that gave a specific threshold. On the third factor, *Campbell* Court’s take on the lyrics of “Pretty Woman” could merely provide a debatable area for courts to figure out how much is really enough. As for an element other than lyrics, even the *Campbell* Court itself chose to

⁹⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 586.

¹⁰⁰ See, e.g., *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 1001 (E.D. Wis. 2011) *aff’d*, 682 F.3d 687 (7th Cir. 2012); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007); *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

¹⁰¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 588.

remand that other element – the “bass riff” in the musical aspect of “Oh, Pretty Woman” – for further fair use determination under the third factor.¹⁰²

On the third factor, another Supreme Court decision worthy of note is actually a copyright infringement decision rendered earlier than *Campbell*, known for its protection-friendly approach on the third factor of fair use. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court held that a magazine article having a verbatim quote from President Ford’s memoirs was, in fact, unfair under the third factor; even though the quote took only about 13% of the infringing work, the Court found this small portion really as the heart of the original work, and found it unfair “in view of the expressive value of the excerpts and their key role in the infringing work.”¹⁰³

Thus, it is apparent that the lower federal courts received an ambiguous guideline from *Campbell*, on top of a protection-friendly approach from *Harper & Row*. Naturally, when it came to audiovisual parodies that used original works’ elements *throughout the duration of the parody work* – which are works that most closely resemble the YouTube parody videos – the courts tended to be more protection-friendly of the original authors. For example, in *Henley v. DeVore*, the Central District of California handled online videos for which “the defendants used karaoke tracks of each song as background,” the parodist “provided [the] vocals,” and the melodies, rhyme scheme, and syntax remained the same as the original work.¹⁰⁴ The *Henley* Court found

¹⁰² *Id.* at 589.

¹⁰³ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565-566 (1985).

¹⁰⁴ *Henley v. DeVore*, 733 F. Supp. 2d at 1160.

that this was *not* justified, because the extent of portion used here “goes far beyond anything that has been found to be fair use in the parody context.”¹⁰⁵

Another example of protection-friendly approach is found in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, where the defendants substantially changed the language of the literal elements but copied visual character elements and the rhyme scheme from “The Cat in the Hat” series.¹⁰⁶ The Ninth Circuit found this taking entirely unconvincing and unjustified.¹⁰⁷

Nonetheless, distinguishing circumstances do exist, and such a distinction is actually a principle taken from *Campbell* and revisited in the *Dr. Seuss* decision. The courts need to inquire the defendants on justification for the taking that much portion, before coming to a conclusion; one justification that the *Campbell* Court emphasized was that enough “transformative” nature of the parodies could weaken the protectionist stance and justify the fair use stance, since the taking might have been the extent necessary for audience recognition of the “transformative” purpose. Another item in the check list of justifications may be the proper compliance with 17 U.S.C. § 115, under which the uses of musical works are “immunized from liability” if mere “cover” versions of already released work are made in compliance with compulsory licensing procedures.¹⁰⁸ Thus, musical work employed in a parody video could have this justification. Lastly, federal courts in some post-*Campbell* cases were able justify fair use under this factor,

¹⁰⁵ *Id.* at 1161.

¹⁰⁶ *See Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d at 1401.

¹⁰⁷ *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d at 1403.

¹⁰⁸ CRAIG JOYCE ET AL., COPYRIGHT LAW 171-172 (8th ed. 2010).

particularly where only brief, minimal, or clipped portions of original works were used to evoke the original theme to the audience.¹⁰⁹

D. Building on the Fourth Factor.

On the direct market of the original work, the *Campbell* Court took a position leaning toward fair use, reasoning that it is very unlikely for a transformative and superseding works of parody to act as market substitutes of the object of the parody.¹¹⁰ On the derivative works market of the original work, the *Campbell* Court made two statements: for one, derivative works market would not be likely to exist since there copyright owners would not be willing to “license” the works that lampoon on their original work, and secondly, courts still need to see if there is a derivative market for non-critical aspect of the parody work.¹¹¹ In *Campbell*, the ultimate verdict on this factor was a remand for further evidence, and the case never came back because the parties settled.

Modern federal courts on audiovisual parodies generally showed continuing respect to *Campbell* Court’s assertions on both the original and the derivative markets, that transformative and lampooning parodies add enough of critical aspect to be deemed irrelevant to the market or licensing effects.¹¹² Hence, one common approach was categorically deeming the genre of

¹⁰⁹ See, e.g., *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F.Supp.2d at 509-10 (new melody meant to evoke rather than copy original, with parodic lyrics); *Burnett*, 491 F.Supp.2d at 970 (18-second scene of Carol Burnett); *Abilene Music*, 320 F.Supp.2d at 93 (only three lines from original, which were altered in word, melody, and style); *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp.2d 991 at 1001 (2011) (repeating just enough lines of the original music video to conjure up the original work).

¹¹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 591-592.

¹¹¹ *Id.* at 592-593.

¹¹² See, e.g., *Brownmark Films, LLC.*, 800 F. Supp.2d at 1001 (little risk that derivative work here would usurp the market of the original); *Burnett*, 491 F.Supp.2d at 971 (the parody is garroting the original, destroying it commercially as well as artistically).

parody to be harmless under this factor, as long as transformative aspects are found in the parodies.

However, the District Court for the Central District of California, in *Henley v. DeVore*, made an unprecedented point on the derivative market inquiry of the fourth factor, based on an expert testimony that persuaded this court.¹¹³ The Court in *Henley* said that because of the presence of the parody version, “advertisers would be deterred from using the Plaintiffs' music *because it has been used before*, not because of the particular association with [the plaintiff’s] message.”¹¹⁴ This Court found that “this injury is the very essence of market substitution.”¹¹⁵ Since *Henley v. Devore* was decided in 2010, we do not know how the courts will treat this finding of the nexus between the release of a parody and the demand of advertisers. What is important, for now, is that *Henley* was a case specifically dealing with parody videos on YouTube, and *Henley* Court found a rationale for finding market harm which may or may not be applicable in future cases.

V. Emerging Trends Found in YouTube Parodies, and their Prospects of Success in Raising Fair Use Defenses.

So far, this article has been establishing a mechanism for determining the legal consequences of user-generated parody videos. Because of the “non-exhaustive” nature of the 17 U.S.C. §107 factors, the lack of concrete boundary within each of the §107 factors, the various legal interpretations that arose after *Campbell* decision, and the rapid, innovative changes in the

¹¹³ *Henley v. DeVore*, 733 F. Supp. 2d at 1163.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

art of parody making itself, it is difficult to make any definitive statement on whether courts would grant fair use in the currently “hot” parody types. As a *Forbes* article puts it, “the fact that it is so difficult to determine when a work is actually a parody, means that parody writers will always bear some risk in creating their works.”¹¹⁶ Hence, the most plausible way to “predict” the legal consequences would be to observe the *degree of risk* in each of the emerging parody types. The legal framework in the foregoing sections will be the basis for these determinations, and “Gangnam Style” parodies of 2012 will serve as the prototypes for the purpose of this discussion. Also, this article will presume that the fourth factor is fixed in a neutral position, since market effects in actual litigations would need fact-specific evidentiary support.¹¹⁷

A. Insertion of Political Figures, with a Political Message:

In November 2012, the United States held a presidential election. It was a year filled with political campaigns and criticisms, and what better way is there for an ordinary person to express and disseminate these thoughts than to post and share a YouTube video free of charge? Some people managed to use Psy’s “Gangnam Style” as a means to do so, and these so-called parodies received a huge number of views: “Mitt Romney Style,” with at least 28 million hits, was a popular one, and “Obama Style,” with at least 6 million hits, was another variation.¹¹⁸

The videos of this type would typically have either a human actor or an animated figure play out something similar to what the actor of the original video did, using similar scenes and

¹¹⁶ Kenneth Liu, *Parodies Of Rap Artist Psy’s Gangnam Style Are Fun. But Are They Legal?* *Forbes*, Oct. 9, 2012, <http://www.forbes.com/sites/deborahljacobs/2012/10/09/parodies-of-rap-artist-psys-gangnam-style-are-fun-but-are-they-legal-2/print/>.

¹¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 590.

¹¹⁸ Compare “PSY-GANGNAM STYLE M/V”, <http://www.youtube.com/watch?v=9bZkp7q19f0> (last visited Dec. 17, 2012), with “Mitt Romney Style (Gangnam Style Parody)”, http://www.youtube.com/watch?v=yTCRwi71_ns (last visited Dec. 17, 2012), and “Obama Style (Psy Gangnam Style Parody) Feat. Smooth-E and Alphacat”, <http://www.youtube.com/watch?v=Xwh8kWuire8> (last visited Dec. 17, 2012).

imageries in the background. In the examples of “Mitt Romney Style” and “Obama Style,” the theme was to ridicule the traits of Mitt Romney and President Obama; in order to achieve this theme in substance, lyrics were completely changed to embody those messages, scenes and props were modified to support the conveyance of those messages, and the parodist’s vocals sung the modified song in the background, while the general flow, general choreography, and the melodies remained the same as the music video of “Gangnam Style.”

Among the emerging parody types on YouTube, this type of “parodies” would bear the highest risk of failure in their fair use defense. In fact, the Court in *Campbell* would not even label them as transformative parodies, but distinguish them as “satires.” While parodies comment on the original authors’ works, the *Campbell* Court clearly noted, satires purport to make a commentary that “has no critical bearing on the substance or style of the original composition.”¹¹⁹ As a part of the analysis on the first factor of 17 U.S.C. § 107, this Court asserted that satires are really made to comment on something other than the original work, in such a way that “satire can stand on its own feet and so requires justification for the very act of borrowing.”¹²⁰ Even after 16 years, in 2010, the District Court for the Central District of California, in *Henley v. Devore*, went to the audiovisual context, dealt with defendant’s internet-posted videos, and used the “satire” distinction rationale of *Campbell* to reject the defendant’s fair use defense.¹²¹ Here, the defendant’s video “November” had new vocals singing modified lyrics that talk about political points on President Obama and Nancy Pelosi, and this was

¹¹⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 580.

¹²⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 580 (quoting Bisceglia, Parody and Copyright Protection: Turning Balance Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, p. 25 (1987)).

¹²¹ See *Henley v. DeVore*, 733 F. Supp. 2d at 1161.

emphasized in both the first factor and the third factor to arrive at an overall finding that the video was satire with a non-transformative message.¹²²

If the *Henley* court sees “Mitt Romney Style” or “Obama Style,” this court would be able to use the same reasoning to reject the fair use defense. Under the first factor, changing of the lyrics here would not be a transformative change, because there may be a reasonable perception of *ridicule*, but there cannot be a reasonable perception that the original work “Gangnam Style” is the object of ridicule. Under the third factor, the use of the entire melody and choreography throughout the whole duration of the song would need some strong justification for doing so, and *Campbell* specifically preempted “satires” from being used as a justification. Because the main objective of this type of parody is to convey a message in a topic that is completely irrelevant to Psy’s “Gangnam Style,” it seems that there is virtually no way to escape the characterization that those derivative works do not have a “joinder of reference and ridicule” toward the original work “Gangnam Style.” Therefore, this type of parody videos are deemed to have the highest risk on failing the fair use defense.

B. Adaptation to Particular Demographics, Without Any Specific Message.

Another major parody type that emerged as an aftermath of “Gangnam Style” wave was adaptation of the original work in the context of particular demographics. Geographic area was a popular demographic basis for doing so; for example, “Chicago Style,” among others, received at least five million views.¹²³ Campus was another basis, such as the “West Point Style” with at

¹²² *Henley v. DeVore*, 733 F. Supp. 2d at 1161.

¹²³ Compare “PSY-GANGNAM STYLE M/V”, <http://www.youtube.com/watch?v=9bZkp7q19f0> (last visited Dec. 17, 2012), with “Gangnam Style Parody (Oppa Chicago Style)”, <http://www.youtube.com/watch?v=2ik9N1a9A1E> (last visited Dec. 17, 2012).

least one million views.¹²⁴ Occupations were used as well, such as “Lifeguard Style” that received at least two million views.¹²⁵ These parody videos adapted “Gangnam Style” into the context of its own demographics. In order to do that, some visual elements were transformed. For “Chicago Style,” the background scenes were Chicago, and the word “Gangnam” in the lyrics was replaced with the word “Chicago,” and actors dressed in Chicago-specific clothes such as the Chicago Bulls basketball jersey. For “West Point Style,” the scenes were taken at the West Point campus, the actors were in their uniforms, and the dance moves and formations were undoubtedly reflective of the army feel. Similarly, for “Lifeguard Style,” the background pools, the actors’ attires, and scenes where actors dance while submerged in the water were examples that reflected the lifeguard adaptation.

What is important to note for this type is that unlike the political satire versions, there was no specific message being conveyed. Other than simply substituting “Chicago” for “Gangnam,” there was no change in lyrics that departs away from the “critical bearing with the substance or style” of “Gangnam Style.” Moreover, there was no insertion of public figures, or any other visual element that diverts the audience’s attention to a message that is unrelated to the original work.

If there is no specific message, then what would be the reasonably perceived *purpose* and *nature* of these audiovisual works? Based on the parodic elements, and the way that these videos came out in a competitive manner during 2012, the purpose really seems to be shouting out to the

¹²⁴ Compare “PSY-GANGNAM STYLE M/V”, <http://www.youtube.com/watch?v=9bZkp7q19f0> (last visited Dec. 17, 2012), with “Gangnam Style-West Point”, <http://www.youtube.com/watch?v=Aa4RLoG9234> (last visited Dec. 17, 2012).

¹²⁵ Compare “PSY-GANGNAM STYLE M/V”, <http://www.youtube.com/watch?v=9bZkp7q19f0> (last visited Dec. 17, 2012), with “Lifeguard Style (Gangnam Style Remake)”, <http://www.youtube.com/watch?v=fpVmMtUIKQc> (last visited Dec. 17, 2012).

world that “we, the so and so demographics, can dance like ‘Gangnam Style’ too, in our own context.” That is most likely a transformative one under reasonable perception test, because of the perception of what *Campbell* Court calls the joinder of reference and ridicule. By employing the same choreography and similar musical work, there is clearly a *reference* to “Gangnam Style”; at the same time, mimicking the “Gangnam Style” dance moves in their own respective demographic context could serve the purposes of i) ridiculing the comical features of the original work, and ii) commenting on the original work through conveying that “members of our demographics can do this well, too.” Hence, these works would most likely pass the hurdle of the first factor for fair use defense.

With regard to the third factor, the initial assessment on this type may be that there is a large taking, since “Gangnam Style” elements are present all throughout the duration of the parody videos. However, as the Courts in *Campbell* and *Dr. Seuss* cases pointed out, a seemingly large taking could be overcome, depending on how strong the parodists’ justifications are. The Court in *Campbell* said one clear justification would be the dominance of the “transformative” nature.¹²⁶ Because of the “transformative” nature established above, works belonging to this parody type would likely be able to show, that this taking was to “conjure up” at least enough elements of the original to make these “transformative” wits recognizable. Thus, the third factor would be likely to be overcome, as well.

There is a small risk of failing the defense, for this type of parodies. The members of this type may possibly run into a situation similar to *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, if these scripted parody videos try to tell a story that is unrelated to “Gangnam Style.”

¹²⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 579.

There certainly may be a temptation to do so, since demographical pride could arouse an expression of a demographic-specific story, such as the glorious days of Chicago Bulls or a certain drill performed at the West Point campus. Even if there is a story like that, the perception of that story should be so minor that it does not hinder the reasonably perceived transformative wit that comments on the merits of Psy's original work. The fair use defense of *Dr. Seuss* got torn apart when the object being put up to ridicule through the Dr. Seuss characters was deemed to be the tale of O.J. Simpson, rather than the Dr. Seuss characters themselves.¹²⁷ Similarly, if the demographic-based video tries to tell a demographic-specific story by using the characters of "Gangnam Style," the large borrowing of ideas from "Gangnam Style" may be deemed unjustified under the third factor.

C. Choreographed Flash Mobs

Perhaps the type of parodies that involve ordinary users the most is the emerging trend called "flash mobs." Flash mobs are defined as "a public gathering of complete strangers, organized via the Internet or mobile phone, who perform a pointless act and then disperse again."¹²⁸ In the flash mob versions of "Gangnam Style," for example, people would gather in various college campuses or cities for filming choreographed dance moves of Psy.¹²⁹ In summer and fall of 2012, social networks were filled with the proud boasting of these flash mobs.

These flash mobs are very transformative works, with the least amount of risk of failing the fair use defense. These videos show completely different renditions of "Gangnam Style," in

¹²⁷ See *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d at 1403.

¹²⁸ "Definition of flash mob", Oxford Dictionaries, http://oxforddictionaries.com/definition/english/flash%2Bmob#m_en_gb0972977 (last visited Dec. 17, 2012).

¹²⁹ See, e.g., "Cornell University: Flash Mob – Gangnam Style", <http://www.youtube.com/watch?v=kWetGqX9uFc> (last visited Dec. 17, 2012); "Purdue University Gangnam Style Flash Mob", http://www.youtube.com/watch?v=5f8rmrF_mDI (last visited Dec. 17, 2012).

terms of scenery, imagery, story, flow, mechanics, and characters; the background is almost always a fixed public scene, and the actors are random amateurs who have gathered for the simple purpose of dancing Psy's comical moves together. Because of this simple purpose and the spontaneous nature, it is very difficult for a flash mob to have a non-transformative satirical purpose, such as political message or social commentary present in *Dr. Seuss* or *Henley* parody works. As the individuals are mimicking the dance moves, the object of the "commenting" is naturally the source of the dance moves, or Psy's "Gangnam Style." The conclusion that these videos are very transformative, and the observation that these are renditions that hardly overlap with the original music video, easily suggest that the first and the third factor of fair use defense would be met without much trouble.

Risk of failing the fair use defense would only arise if a court makes an unexpected finding, such as a finding that was not suggested by the *Campbell* Court. An example of such an unexpected finding can be what the Central District of California said in *Henley v. DeVore* with regard to the fourth factor: because of the presence of the parodic works, "advertisers would be deterred from using the Plaintiffs' music *because it has been used before*, not because of the particular association with [the plaintiff's] message."¹³⁰ Unless some unexpected findings like this come into play, this type seems to be in the safest territory of fair use.

VI. Conclusion

This article explored the concept of *parodies*, the growth of the genre of parodies in the YouTube era, how these parodies could fall into the realm of fair use defense, and how the

¹³⁰ *Henley v. DeVore*, 733 F. Supp. 2d at 1163.

federal courts of the United States have handled those fair use defenses. The article used “Gangnam Style” music video of Psy as an example, as parody making based on “Gangnam Style” was socially a “big hit” in the year 2012. Fortunately for many, Psy “has not shown any sign of litigiousness,”¹³¹ so that “Gangnam Style” parody makers probably do not need to worry. However, there are many artists out there, as our cases suggested, whose copyright-protected works are sensitively prone to harm in cases of infringements. Therefore, while one may never be completely sure about how a court would construe the not-so-concrete 17 U.S.C. §107 factors, one of the most ideal measures that ordinary YouTube parodists could take is to be educated on the risks of infringement claims and the application of fair use factors. That way, parodists could detect a high risk of liability in certain ventures, and seek the option of getting permission from the original artist; “when it comes to copyright infringements, asking for permission is usually much cheaper than asking for forgiveness.”¹³²

¹³¹ Kenneth Liu, *Parodies Of Rap Artist Psy’s Gangnam Style Are Fun. But Are They Legal?* Forbes, Oct. 9, 2012, <http://www.forbes.com/sites/deborahljacobs/2012/10/09/parodies-of-rap-artist-psys-gangnam-style-are-fun-but-are-they-legal-2/print/>.

¹³² *Id.*