NOTE

FAITH, HOPE & PARODY: *CAMPBELL V. ACUFF-ROSE*, "OH, PRETTY WOMAN," AND PARODISTS' RIGHTS*

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> When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.
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> For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.
>
> And now abideth faith, hope, [and parody], these three; but the greatest of these *is* [parody].[1]

I. INTRODUCTION

Parody law is confusing and inconsistent.[2] There are few generally accepted and clearly defined standards for the permissible parody use of a copyrighted work.[3] Contemporary trends in the music business, moreover, have resulted in a further muddying of the waters.[4] Digital sampling[5] and rap music in

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1. Adaptation of 1 *Corinthians* 13:11-13 (King James). The original text contrasts "charity," i.e., love, with impermanent spiritual gifts such as prophecy. *See* MERRILL F. UNGER, UNGER'S BIBLE HANDBOOK 640 (1967).

2. *See* 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, 234-37 (1993); Alan Korn, Comment, *Renaming that Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 322 (1992); Dan Shaked, *Indies, Cable Benefit from Syndication Changes*, N.Y. L.J., June 14, 1991, at 7, 7.

3. Irv Lichtman, *Rap Gives Parody High Court Test*, BILLBOARD, Apr. 10, 1993, at 1, 84; *see* Landy, *supra* note 2, at 237 (noting that district and circuit courts in the Second, Sixth and Ninth Circuits disagree regarding the applicability of statutory analysis in parody cases).

4. *See* Stan Soocher, *As Sampling Suits Proliferate, Legal Guidelines Are Emerging*, N.Y. L.J., May 1, 1992, at 5 (explaining that the practice of sampling, using prerecorded sounds, is widespread in rap and dance music and has created litigation initiated by the owner of the sampled sound recordings).

5. Sampling is a computer-based technique whereby musicians and studio

particular raise serious new copyright questions.[6] The United States Supreme Court recently answered some of these questions in *Campbell v. Acuff-Rose Music, Inc.*[7]

Campbell involved both rap music and parody.[8] The respondent, a music publisher, brought suit against the rap group 2 Live Crew for alleged copyright infringement.[9] Petitioners, 2 Live Crew, had been refused permission to parody the song *Oh, Pretty Woman,*[10] but nevertheless released a parody version of the song.[11] The United States District Court for the Middle District of Tennessee found 2 Live Crew's recording to be a fair use.[12] The Court of Appeals for the Sixth Circuit reversed,[13] applying dicta arguing against commercial purpose fair use from *Sony Corp. v. Universal City Studios, Inc.*[14] In the absence of a previously enunciated, definitive policy regarding parody, the United States Supreme Court granted certiorari and ultimately reversed the judgment of the Court of Appeals.[15]

Artists, copyright owners, and jurists have followed *Campbell* with great interest.[16] Parody cases rarely go to trial,[17] and the last time the Supreme Court heard a parody case, little was clarified.[18] Therefore the Supreme Court's decision in this

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engineers can record, recreate, and manipulate any sound. Jon Pareles, *Digital Technology Changing Music: Who's the Owner of a Tune 'Cloned' from a Single Note?*, N.Y. TIMES, Oct. 16, 1986, at C23. Refer to notes 88-106 *infra* and accompanying text.

6. *See* Soocher, *supra* note 4, at 5.

7. 114 S. Ct. 1164 (1994).

8. *Id.* at 1166.

9. *Id.* at 1168.

10. ROY ORBISON, *Oh, Pretty Woman* (Monument Records 1964).

11. THE 2 LIVE CREW, *Pretty Woman, on* AS CLEAN AS THEY WANNA BE (Luke Records 1989).

12. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1160 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

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

14. *Id.* at 1437; *see also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449, 451 (1984) (holding that videotaping of television programs for private viewing is fair use, though in the case of commercial use of plaintiff's work there is a presumption against fair use).

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

16. *See, e.g.*, Lichtman, *supra* note 3, at 1 (quoting former BMI president Ed Cramer, who points out that the music industry must be provided with an objective standard for judging fair use protection of commercial parody).

17. *See* Soocher, *supra* note 4, at 5.

18. *See* CBS v. Loew's Inc., 356 U.S. 43 (1958) (per curiam), *aff'g by an equally divided Court* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'g* Loew's Inc. v. CBS, 131 F. Supp. 165 (S.D. Cal. 1955). CBS and comedian Jack Benny had been sued over Benny's takeoff of the film classic *Gaslight*, starring Charles Boyer and Ingrid Bergman. *Loew's*, 131 F. Supp. 167-69. The district court held that the Benny

case has caused repercussions throughout the legal community and the entertainment world.[19] In addition, *Campbell* involved some of today's most troublesome fair use issues. As anticipated, the high court primarily focused on the extent to which commercial purpose might rule out a fair use defense against infringement.[20] Nonetheless, the Supreme Court did not address two issues commonly implicated in parody cases: cultural bias[21] and First Amendment free speech guarantees.[22]

Using *Campbell* as a reference point, this Note will discuss and analyze the current state of musical parody law. In Part II, the Note will introduce the subject of parody[23] and examine the cultural heritage of the African-American people, out of

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parody was an infringement. *Id.* at 186. The Ninth Circuit affirmed and after Justice William O. Douglas disqualified himself, the Supreme Court deadlocked at four to four and drafted no written opinion. *Loew's*, 356 U.S. at 43. It is notable that soon after the *Loew's* decision, which held that a parody was no defense against an infringement action, the same district court found no infringement in a parody case with a strikingly similar fact pattern. *See* Columbia Pictures Corp. v. NBC, 137 F. Supp. 348 (S.D. Cal. 1955). The court distinguished *Loew's* from a Sid Caesar parody of *From Here To Eternity* entitled "From Here To Obscurity" because Caesar's sketch differed from the movie in "theme, characterizations, general story line, detailed sequence of incidents, dialogue, points of suspense, sub-climax [and] climax." *Id.* at 352. The court, moreover, did not ground its decision in the fair use doctrine but rather found that Caesar's work lacked substantial similarity to the original because of the enumerated differences between them. *Id.* at 353-54. Nonetheless, in dicta, counter to its decision in *Loew's*, the district court asserted that a parodist may invoke the fair use defense if the copied material is appropriated to "conjure up" the original. *Id.* at 354.

19. *See, e.g.*, Bill Holland, *Court's Parody Decision Reverberates: Fair Use Can Be Tested in Lower Fed Courts*, BILLBOARD, Mar. 9, 1994, at 6, 6 (reporting that reactions within music industry were mixed); Howard B. Abrams, Parody on the High C's: First Impressions of Campbell v. Acuff-Rose Music, Inc., in Selected Recent Developments in Copyright Law, prepared for the State Bar of Texas Seminar on Entertainment Law, Mar. 19, 1994, at 1, 1 (noting that *Campbell* signaled a major change of direction in fair use analysis).

20. David Goldberg & Robert J. Bernstein, *A 'Peak' at the Fall*, N.Y. L.J., July 16, 1993, at 3, 3; Holland, *supra* note 19, at 6.

21. This Note uses the expression "cultural bias" to refer to any prejudice held by a person against some manifestation of a foreign culture. It may include aesthetic, ethnocentric, political, moral, or other bias.

22. *See* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994). "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. Copyright law limits free speech by allocating to copyright owners the power to prohibit the works of others. Refer to notes 317-28 *infra*. Therefore, there is a tension between the First Amendment and copyright law. Although free speech guarantees will be mentioned briefly, a thorough analysis of the interaction between the First Amendment and the Copyright Act is beyond the scope of this Note. For a more detailed treatment of parody in light of the First Amendment see Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980-81); Robert J. Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 77 TRADEMARK REP. 177 (1987).

23. Refer to notes 38-69 *infra* and accompanying text.

which rap music, and its attendant sampling, has evolved.[24] The author of "Oh, Pretty Woman," Roy Orbison,[25] and his publishing company, Acuff-Rose,[26] will be introduced in Part III. Luther Campbell, 2 Live Crew, and the specific circumstances that resulted in the *Campbell* copyright infringement action will be examined in Part III as well.[27] Part IV will follow *Campbell* through the lower courts.[28] The Supreme Court decision will be presented in Part V.[29] Finally, Part VI will explore two of the primary issues at stake in *Campbell*: commercial purpose as a limit on parody fair use;[30] and the danger of cultural bias in determining the legitimacy of a work of parody.[31]

After a brief introduction to copyright law and fair use, this Note will analyze the circumstances of *Campbell* using copyright principles. Consistent with the holding of the Supreme Court this Note will agree that the commercial purpose standard is an inappropriate criterion against which a work of parody may be examined.[32] Additionally, however, this Note will argue that some courts may be susceptible to subtle cultural biases that would obscure the legitimate social worth or political commentary inherent in a challenged parody. The free speech rights of parodists are particularly vulnerable to violation by culturally hostile arbiters operating under the guise of copyright. It is the contention of this Note that in parodying Roy Orbison's version of "Oh, Pretty Woman," 2 Live Crew is making a statement about the cultural gulf that separates two distinctly different segments of society. Therefore, as an example of legitimate social comment, the 2 Live Crew parody and kindred works must be protected and encouraged.

Campbell presents each of the relevant issues in sharp relief. Roy Orbison is remembered as a gentle and inoffensive performer. His song "Oh, Pretty Woman," relates a story of Sixties era romance, full of yearning and promise.[33] 2 Live Crew, on the other hand, has built a successful recording career on sophomoric misogyny and obscenity. In stark contrast to

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24. Refer to notes 70-120 *infra* and accompanying text.
25. Refer to notes 122-31 *infra* and accompanying text.
26. Refer to notes 132-41 *infra* and accompanying text.
27. Refer to notes 142-82 *infra* and accompanying text.
28. Refer to notes 184-235 *infra* and accompanying text.
29. Refer to notes 237-99 *infra* and accompanying text.
30. Refer to notes 301-481 *infra* and accompanying text.
31. Refer to notes 482-544 *infra* and accompanying text.
32. *See* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1173-74 (1994).
33. *See* ROY ORBISON, "Oh, Pretty Woman" (Monument Records 1964). Refer to note 164 *infra*.

Orbison's plaintive entreaties to the woman of his dreams, the rap group's concededly commercial song ridicules three women with unattractive characteristics.[34] Luther Campbell of 2 Live Crew defended his work, however, as social commentary.[35] In mocking the sentimental simplicity of Orbison's middle American ballad, 2 Live Crew derides some of the majoritarian society's most cherished notions.[36] But that, in itself, notwithstanding the commercial purpose of the group's work, should not exclude their song from protected parody status.

II. BACKGROUND: IT'S LIKE A JUNGLE SOMETIMES

> Don't push me. Cause I'm close to the edge.
> I'm tryin' not to lose my head.
> It's like a jungle sometimes.
> It makes me wonder how I keep from going under.[37]

A. *Parody*

Parody is an ancient form of artistic expression.[38] Courts have acknowledged that the roots of parody reach back to classical Greece[39] and that throughout history many of our most

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34. THE 2 LIVE CREW, "Pretty Woman," *on* AS CLEAN AS THEY WANNA BE (Luke Records 1989), *quoted in Campbell* 114 S.Ct. at 1179-80 app. B.

35. Campbell stated by affidavit that his intention was "'through comical lyrics, to satirize the original work. . . .'" Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1432 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994). Whether or not Campbell's characterization of the song is more than a convenient hook on which to hang a fair use defense, it would be only prudent to accept his explanation.

36. *See* THE 2 LIVE CREW, *Pretty Woman*, *on* AS CLEAN AS THEY WANNA BE (Luke Records 1989) *quoted in Campbell*, 114 S. Ct. at 1179-80 app. B. Refer to note 171 *supra*.

37. GRAND MASTER FLASH AND THE FURIOUS FIVE, *The Message* (Sugar Hill Records 1982) (describing the desperation of life in the inner city). This early rap recording was praised as social protest by rock critics. Telephone Interview with Ed Ward, music critic and columnist (Sept. 18, 1993). *But see* Howard Reich, *No Rapprochement! 'Anyone with a Couple Turntables and a Few Records to Gouge Can Be a Rapper,'* CHI. TRIB., July 26, 1992, Arts, at 4, 4 (suggesting such commentary by rappers is motivated by no higher social purpose than greed).

38. Hipponax of Ephesus, the author of verse parodies *circa* 530 B.C., is generally regarded as the originator of the genre. Goetsch, *supra* note 22, at 40. Aristophanes and Lucian authored parodies, and Homer is credited with composing the epic parody *Magrites*, mentioned in the eighth century B.C. by Archilochus. *Id.* at 40 & n.3.

39. *See, e.g.*, L.L. Bean Inc. v. Drake Publishers Inc., 811 F.2d 26, 34 (1st Cir.) (finding prurient parody of L.L. Bean catalogue protected under First Amendment despite lack of explicit political content), *appeal dismissed and cert. denied*, 483 U.S. 1013 (1987). "Parody is a humorous form of social commentary and literary criticism that dates back as far as Greek antiquity. 'The rhapsodists who strolled from town

revered literary artists have authored parodies.[40] Works of parody have been woven throughout the fabric of western civilization for millennia.[41] Literary authorities[42] and legal scholars[43] agree that the genre of parody fulfills a function of vital importance. As a form of satire, parody allows authors to pointedly criticize a culture's foibles and failings.[44] It is the unforgiving mirror in which society is able to see itself most honestly reflected—warts and all.[45] By lampooning political, social, or religious subjects, parodists generate healthy discourse and cultural self-examination.[46] They skewer our most

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to town to chant the poems of Homer,' wrote Isaac D'Israeli, 'were immediately followed by another set of strollers—buffoons who made the audiences merry by the burlesque turn which they gave to the solemn strains.'" *Id.* at 28.

40. Judge Bownes notes that many respected authors have written parodies, including Chaucer, Shakespeare, Pope, Voltaire, Fielding, Hemingway, and Faulkner. *Id.*

41. *See* Goetsch *supra* note 22, at 40-41 (explaining that Cervantes' DON QUIXOTE, Paul Scarron's *Virgile Travestie*, Bottom's play of Pyramus and Thisbe in Shakespeare's *Midsummer Night's Dream*, Mark Twain's humorous sketches and tales, and the works of James Thurber and S.J. Perelman are examples of parody in the classic tradition of Homer and Hipponax).

42. *See, e.g.*, ENCYCLOPEDIA OF POETRY AND POETICS 600-02 (Alex Preminger ed., 1965). In this source it is argued,

> [A]lthough a parasitic art and written at times with malice, p[arody] is as fundamental to literature as is laughter to health. . . .
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> There are as many different motives for p[arody] as there are parodists. . . . [O]ften the parodist employ[s] the style of his original to poke fun at current follies or vices. He might have a social axe to grind or he might wish to expose a certain literary school or mannerism which has hardened into conventionality. . . .
>
> . . . With a history of twenty-five centuries behind it, p[arody], it seems, is here to stay. Like all literature it has had its ups and downs, but at its best it is more than a parasitic art. It has attracted men and women of major stature and at times has shown the capacity to outlive the serious work which has inspired it.

Id.

43. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[C], at 13-102.26 to .27 (1992) (characterizing parody as useful to society and therefore justifying the application of fair use defense in parody cases).

44. Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 924 & n.5 (1985) (noting that many cases deal "with a particular kind of satire called parody" and justifying the use of taboo words as necessary to shock and disturb the reader); *see* ALVIN B. KERNAN, MODERN SATIRE, at iv (1962). A satire ridicules popular notions and revered icons by exposing their inherent absurdity. *Id.* Shocking, and as such effective, satire is often viewed as unkind, even savage. *Id.* In answer to comparisons between satire and the less cruel arts of comedy and tragedy, Kernan explains that satirists justify the savagery of their art as necessary to combat the perpetual threat to society posed by vulgarity and pride. *See id.*

45. Kernan, *supra* note 44, at iv. "Whenever nonsense has threatened to overwhelm sense, a satirist has appeared to strip away the solemn pretenses of dignity and worth with which the vulgar and foolish cover themselves, and to make clear the chaos toward which the world is tending." *Id.*

46. *See* Goetsch, *supra* note 22, at 42 (noting that parody exposes mediocrity

sacred cows, often using current popular works to symbolize the targets of their criticism.[47] In so doing, the parodist can at once both catch the attention of the public and deftly impale the object of her ridicule.

In *Campbell*, the Supreme Court defined a parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule."[48] Because a parody builds on a previous work, some degree of copying and appropriation from that work is necessary.[49] To be effective, a parody must suggest the original to the audience. Yet, in order to communicate his message of criticism or serious comment, the parodist must produce a work that contrasts with the original.[50] A parody, therefore, must be both an original creation and an imitation of something else.

If the parodist appropriates material without permission, he may be infringing on the rights of the author of the underlying work.[51] Copyright law grants the copyright owner of a work exclusive control over certain uses of his creation.[52] The doctrine of fair use, however, provides for copying without permission under certain circumstances.[53] If a work is copied in

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and pretentiousness).

47. Steven R. Gordon & Charles J. Sanders, *When Parodies Use Musical Allusion to Copyrighted Works*, N.Y. L.J., Feb. 8, 1991, at 5.

48. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1172 (1994) (quoting THE AMERICAN HERITAGE DICTIONARY 1317 (3d ed. 1992)). The Court also offered an alternative definition: "[Parody is a] composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous." *Id.* (quoting THE OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989)). In his concurrence, Justice Kennedy evinced a more restrictive definition of parody than the second version quoted by the full Court. *Id.* at 1180 (Kennedy, J., concurring). Refer to notes 291-95 & 389-85 *infra* and accompanying text.

49. *See, e.g.*, White v. Samsung Elects. Am., 989 F.2d 1512, 1515 n.15 (9th Cir.) (Kozinski, J., dissenting) (recalling the words of Sir Isaac Newton in a letter to Robert Hooke, *circa* 1675, "[i]f I have seen further it is by standing on [the shoulders] of Giants") (brackets in original), *cert. denied*, 113 S. Ct. 2443 (1993). In his dissent from the Second Circuit's denial for rehearing, Judge Kozinski points out that Newton probably appropriated this phrase from the sixth century grammarian Prician via Bernard of Chartres, who voiced a similar sentiment in the early twelfth century. *Id.*

50. Goetsch, *supra* note 22, at 40.

51. Refer to notes 326-31 *infra* and accompanying text.

52. 17 U.S.C. § 106 (1988 & Supp. V 1993). The first U.S. copyright act was passed by Congress in 1790. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed); Beth Warnken Van Hecke, Note, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 467 n.7 (1992).

53. Landy, *supra* note 2, at 230. The doctrine of fair use arose under common law as a means of encouraging creative works based on preexisting creations. *Id.* Courts realized that when something original, such as humor or criticism, is added to a copyrighted work, the creativity of the second author is just as deserving of encouragement and protection as that of the author of the underlying work. *Id.* Refer

order to create a new work that performs a substantially different function than the original, the copying may qualify as a fair use.[54] Because the function of a parody differs from that of most underlying works, parody ordinarily qualifies as a fair use.[55]

In the three earliest parody cases, courts looked to the amount of the copyrighted work that had been used by the parodist.[56] These cases involved lampooning a particular performing artist's style rather than parodying a copyrighted work itself.[57] As long as the parody did not copy more of the underlying work than was necessary to effectively mimic the performer, the courts found no infringement of copyright.[58] Sometimes excessive copying is determined by considering "whether or not so much [of the original] has been reproduced as will materially reduce the demand for the original."[59] Because a parody, by definition, must bring to mind a preexisting work, it is generally agreed that parodists may use as much of a copyrighted work as necessary to "conjure up" that work.[60]

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to notes 339-44 *infra* and accompanying text.

54. 3 NIMMER & NIMMER, *supra* note 43, § 13.05[B], at 13-102.12.

55. *Id.* § 13.05[C], at 13-102.20 (noting that "[i]n general . . . a functional differentiation has been recognized [in satire, burlesque and parody] and found to support a fair use defense").

56. *See, e.g.*, Green v. Luby, 177 F. 287, 288 (C.C.S.D.N.Y. 1909) (holding that singing entire song with musical accompaniment to mimic original performer was not fair use); Green v. Minzensheimer, 177 F. 286, 286 (C.C.S.D.N.Y. 1909) (holding that performing one verse and chorus of copyrighted song, to mimic another performer, was reasonable amount of copying); Bloom & Hamlin v. Nixon, 125 F. 977, 979 (C.C.E.D. Pa. 1903) (holding that singing chorus of plaintiff's song *a cappella* to mimic another performer was not using too much of copyrighted work).

57. Richard A. Bernstein, *Parody and Fair Use in Copyright Law*, *in* ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 31, at 1, 15 (1984).

58. Landy, *supra* note 2, at 233.

59. Hill v. Whalen & Martell, Inc., 220 F. 359, 360 (S.D.N.Y. 1914) (holding that show featuring characters "Nutt" and "Giff" made excessive use of underlying work because it hurt potential market for play which featured plaintiff's copyrighted characters "Mutt" and "Jeff"). This factor was codified in the Copyright Act of 1976 as one of four recommended for determining fair use. Refer to note 176 *infra*. "Amount and substantiality of the portion used" was included as another of the factors. *Id.*

60. *See, e.g.*, Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (applying "conjure up" standard to establish minimum amount of copying allowable and holding that Saturday Night Live performance of "I Love Sodom" was fair use parody of "I Love New York"); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) (applying "conjure up" test to determine the maximum amount of copying allowable and holding cartoon magazine featuring Disney characters engaging in drug use and sex not fair use), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.) (holding humorous lyrics published in Mad Magazine were parody and expressly adopting the "conjure up" test as determinative), *cert. denied*, 379 U.S. 822 (1964); Columbia Pictures Corp. v. NBC, 137 F. Supp. 348, 354 (S.D. Cal. 1955) (holding

Until now, the most significant circuit court decisions concerning parody have been rendered by the Second and Ninth Circuits.[61] Though historically the two circuits had approached the "conjure up" parody analysis differently,[62] the *Fisher v. Dees*[63] decision substantially aligned the two circuits.[64] In *Fisher*, after reaffirming that, by its very nature, a parody must necessarily borrow from the original, the Ninth Circuit held that borrowing need not be limited to the amount necessary to "conjure up" the copyrighted work.[65] Because the Second Circuit had followed this reasoning since *Berlin v. E.C. Publications, Inc.*,[66] the *Fisher* decision brought the Ninth Circuit roughly in conformity with the Second Circuit.[67] Despite this area of agreement, no consistent judicial standard for evaluating fair use parody was recognized prior to *Campbell*.[68] It is

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that "[s]ince a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, 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 not intended as a burlesque of the original"). "A parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." *Elsmere*, 623 F.2d at 253 n.1.

61. *See, e.g.*, MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (holding that "Cunnilingus Champion of Company C" was not a parody because it didn't satirize "Boogie Woogie Bugle Boy of Company B" or society in general); *Elsmere*, 623 F.2d at 252; *Disney*, 581 F.2d at 751; *Berlin*, 329 F.2d at 541; Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd sub. nom.* CBS, Inc. v. Loew's Inc., 356 U.S. 43 (1958) (per curiam).

62. Refer to note 60 *supra*.

63. 794 F.2d 432 (9th Cir. 1986).

64. *Id.* at 440 (holding 29 second parody version of song "When Sunny Gets Blue," entitled "When Sonny Sniffs Glue," was a fair use).

65. *Id.* at 438-39. After *Columbia Pictures* the Ninth Circuit had acknowledged a parodist's need to "conjure up" the original but, prior to *Fisher*, the amount needed to "conjure up" was held to be the maximum permissible level of copying. *See Disney*, 581 F.2d at 757-58.

66. 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In contrast to the Ninth Circuit approach to "conjuring up" as exemplified in *Columbia Pictures* and *Disney*, the Second Circuit held that the parodist was entitled to copy at least as much as necessary to "conjure up" the original work. *Id.* at 545. The parodist would not prevail against a claim of infringement, however, if the parody was likely to fulfill the demand for the original. *See id.*

67. 3 NIMMER & NIMMER, *supra* note 43, § 13.05[C], at 13-102.25.

68. Melanie A. Clemmons, *Author v. Parodist: Striking a Compromise*, 46 OHIO ST. L.J. 3, 4 (1985) (noting that, as codified, the fair use doctrine has not been interpreted with the requisite flexibility to protect parody sufficiently); Van Hecke, *supra* note 45, at 474. "Judicial analyses of the parody defense are often conclusory, serving merely to confirm decisions judges had already instinctively reached. As a result, the parody defense has careened from one dispositive factor to another, leaving the courts, commentators and, presumably, would-be parodists, in considerable confusion." *Id.*

understandable, therefore, that one commentator proclaims *Campbell*, "the starting point for all discussions of parody in future litigation."[69]

B. Rap Music and African-American Culture

Rap music has become a phenomenon of undeniable proportion and power in contemporary culture.[70] It is one of the dominant forces currently driving the music industry.[71] Embraced by young people regardless of race,[72] rap has been called "the black people's CNN."[73] Yet, as often happens in a majoritarian society, this manifestation of minority culture is misunderstood and denigrated.[74] According to Village Voice essayist Nelson George, "[t]here has been no form of culture, with the exception of pornography, that has drawn as much attention and has been attacked more than rap."[75] Just as rock and roll was once dismissed as an unwholesome aberration,[76] rap

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69. Julie J. Bisceglia, *Parody and Fair Use: 2 Live Crew Meets the Supremes*, 15 ENT. L. REP. 13, 13 (1994).

70. *See* David Hinckley, *A Scorned Form of Music is Overcoming a Bad Rap*, CHI. TRIB., July 17, 1987, Tempo, at 3; David Mills, *Rappers to Watch, Simply Kickin' It!*, WASH. POST, Feb. 3, 1991, at G5. To the chagrin of some rappers, even the Pillsbury Doughboy is rappin'; they would prefer to see a real rapper in the commercials. Moira McCormick, *Mainstream vs. Mean Streets*, BILLBOARD, Nov. 23, 1991, at R4.

71. *Showbiz Today: Rappers Defend Sampling as Art Form* (CNN television broadcast, Mar. 31, 1993).

72. Melinda Henneberger & Michel Marriot, *For Some, Rituals of Abuse Replace Youthful Courtship*, N.Y. TIMES, July 11, 1993, at 1, 33; Hinkley, *supra* note 70, at 3 (noting that because of rap's mainstream success in some markets it is easier to get rap played on top 40 stations than on black stations); Linda Sanders, *Public Enemy's Rap War: Preaching the Politics of Paranoia, the Masters of Rap Jolt the Nation With a Video About Violence and Revenge*, ENT. WKLY., Jan. 24, 1992, at 28, 31 (reporting that whites compose an estimated 40% of the audience of militant rap group Public Enemy).

73. Sonia Murray, *Rap's Success Brings Challenge of Responsibility: As Music Goes Mainstream, Singers Wrestle with Status as Spokesmen for Black Youth*, THE ATLANTA J. & CONST., Feb. 22, 1993, at C1 (quoting Chuck D. of the group Public Enemy).

74. Tony Van Der Meer, *Introduction* to DAVID TOOP, THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP HOP 4 (South End Press 1984).

75. Murray, *supra* note 73, at C1 (quoting Nelson George, author of BUPPIES, B-BOYS, BAPS & BOHOS (NOTES ON POST-SOUL BLACK CULTURE), during Third Annual Hip Hop Conference at Howard University).

76. *See, e.g.*, IRWIN STAMBLER, ENCYCLOPEDIA OF POP, ROCK & SOUL 12 (1974) (noting that in the Fifties, many adults were alarmed by the hold rock and roll seemed to have on young people, and in the Sixties, the establishment found the social protest inherent in many rock songs particularly disconcerting); Jann S. Wenner, *Introduction* to ED WARD ET AL., ROCK OF AGES: THE ROLLING STONE HISTORY OF ROCK & ROLL 12-13 (1986) (recounting how rock and roll has regularly regenerated and renewed itself despite unrelenting establishment hostility).

has been characterized as hoodlum music unworthy of serious consideration.[77] Rap, however, is only the latest manifestation of the interaction between Western values and the evolution of time-honored African traditions.[78] Rappers such as 2 Live Crew are acting out a part of their musical heritage and culture.[79]

In contrast to European culture, traditional African music has more than a merely aesthetic significance; it is functional.[80] "We might be called a people of dancers, musicians and poets, since important events such as a triumphant return from war or any other reason for popular rejoicing, are celebrated by dancing accompanied by appropriate music and singing," writes Olaudah Equiano, a slave taken to Virginia in 1756.[81] The Negro spiritual is the product of a musical syncretism that incorporates elements of African and European origins.[82] The blues and jazz also have evolved out of this tradition.[83] Rhyming contests, such as "the dozens"—also called "mother-rhyming"[84]—and signifying[85] are modern variations

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77. Hinckley, *supra* note 70, at 3.

78. *See* IAIN CHAMBERS, URBAN RHYTHMS: POP MUSIC AND POPULAR CULTURE 186 (1985) (detailing the fact that disco, reggae, white soul, funk, ska, and avant-garde pop music all were influenced by Afro-American and Afro-Caribbean cultures); DAVID TOOP, THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP HOP 29-31 (South End Press 1984) (explaining that the rhymed boasts and taunts of Muhammad Ali and a good portion of African-American musical tradition can be traced back to Africa and caste musicians such as the griots); Etienne Bours & Alberto Nogueira, *The Birth of the Blues*, UNESCO COURIER, Mar. 1991, at 12, 13 (noting that cultural cross-fertilization has diluted African musical traditions to varying degrees).

79. Francesca Spero, *Sample Greed is Hurting Hip-Hop Business*, BILLBOARD, Dec. 5, 1992, at 7, 7.

80. *See* JAMES H. CONE, THE SPIRITUALS & THE BLUES: AN INTERPRETATION 109 (1972) (noting that "[b]lack music . . . is not an artistic creation for its own sake; rather it tells us about the *feeling* and *thinking* of African people"); LEROI JONES, BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA 28 (1963).

81. Bours & Nogueira, *supra* note 78, at 13.

82. GILBERT CHASE, AMERICA'S MUSIC: FROM THE PILGRIMS TO THE PRESENT 254-56 (2d ed. 1966).

83. Chambers, *supra* note 78, at 10. In his study of pop music and popular culture, Iain Chambers finds that much of today's popular music is a manifestation of black African culture as filtered through American institutions and European musics. *Id.*

> Throughout this encounter a persistent tension has been maintained, first by slavery and then racism and social marginalization, preserving much of the autonomous sense of black American music: 'soul is survival', as James Brown rightly reminds us. It was out of this history, out of the blues and gospel, and their subsequent meshings in jazz, R & B and soul music, that a diverse musical syntax, quite distinct from European-derived 'popular song', developed.

Id.

84. Roger D. Abrahams, *Joking: The Training of the Man of Words in Talking Broad*, *in* RAPPIN' AND STYLIN' OUT: COMMUNICATION IN URBAN BLACK AMERICA 215,

on traditional African recrimination songs. African-American men and women entertain and communicate with each other through these contests.[86] The similarities between these traditional African word games and contemporary rapping are obvious.[87]

Just as rock and roll has given voice to the angst, rebellion, and joy of youth since the Fifties, rap emerged in the Eighties as the authentic rock genre of American minority culture.[88] Rap can be uplifting and celebratory, but more often it articulates the hopelessness and rage pervasive among the dispossessed young, from the rural South to our inner city ghettos.[89] Rappers see themselves as spokespeople for the

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216-17 (Thomas Kochman ed., 1972). "The dozens" are currently played in African-American communities as well as among the Yoruba, Efik, Dogon, and Bantu tribes in Africa. *Id.* The supreme test of camaraderie among young people is an exchanging of pornographic insults aimed at the other's mother. *Id.*; *see also* JONES, *supra* note 80, at 27 (explaining "the dozens" as an adaptation of a traditional African game); TOOP, *supra* note 78, at 32-33 (identifying the mechanics of the "the dozens" and its place in black culture).

85. H. Rap Brown, *Street Talk*, *in* RAPPIN' AND STYLIN' OUT: COMMUNICATION IN URBAN BLACK AMERICA 205, 206-207 (Thomas Kochman ed., 1972) (explaining that signifying is more humane because insults are hurled directly at a person as opposed to "the dozens," in which a person's family is targeted). He provides a 36 line example of a typical rap of his own:

> Man, you must don't know who I am.
> I'm sweet peeter jeeter the womb beater
> The baby maker the cradle shaker
> The deerslayer the buckbinder the women finder
> Known from the Gold Coast to the rocky shores of Maine
> Rap is my name and love is my game.
> I'm the bed tucker the cock plucker the motherfucker
> The milkshaker the record breaker the population maker
> The gun-slinger the baby bringer
> The hum-dinger the pussy ringer
> The man with the terrible middle finger. . . .

Id. Insult contests are not unique to the African culture. ENCYCLOPEDIA OF POETRY AND POETICS, *supra* note 42, at 739. An Eskimo "drum-match, in which two enemies alternately hurl verses of ridicule and abuse at each other" may end in the exile or death of the loser. *Id.*

86. Abrahams, *supra* note 84, at 216; Interview with Dr. Linda Reed, Director of the African-American Studies Program at the University of Houston, in Houston, Tex. (July 27, 1994) (recounting that, according to her experience growing up in rural Alabama, both young men and women played "the dozens").

87. Rhythm and rhyme, sexual themes, humor and ridicule; both genres share these characteristics.

88. Refer to notes 70-73 *supra* and accompanying text.

89. David Browne, *Militant Rap: Fighting the Power*, ENT. WKLY., Jan. 24, 1992, at 35, 35 (quoting Village Voice music critic Robert Christgau as explaining that decay in the quality of life suffered by African-Americans has caused many to turn their backs on society: "Rap clearly reflects, rather than causes, this rage"); Robin Kelley, *Straight from Underground*, THE NATION, June 8, 1992, at 793, 794. Rapper Ice T, whose song "Cop Killer" created a furor, asks in "Squeeze the Trigger," "What is crime and what is not? What is justice? I think I forgot." *Id.* In

community.[90] Because life in the inner city is violent, rap music is often populated by tough guys, gang bangers, and repressive police.[91] Because our society is obsessed with sex,[92] and because sex has always been a theme of African rhyming games,[93] rap music often deals explicitly with sex.[94] No doubt it is the predominance of the violent and sexual themes in rap music that white middle class America finds most offensive, and which the younger generation living in our cities' ghettos and elsewhere find most honest and endearing. At its best, rap is timely and trenchant social commentary, and rap artists who

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their song "Niggaz4Life," the group N.W.A. (Niggers With Attitude) raps,

> Why I call myself a nigger, you ask me,
> It's because motherfuckers wanna blast me,
> And run me out of my neighborhood
> And label me as a dope dealer, yo, and say that I'm no good. . . .
> Why do I call myself a nigger you ask me,
> 'Cause police always want to harass me,
> Everytime that I'm rollin'
> They swear up and down that the car was stolen,
> Make me get face down on the street
> And throw the shit out of my car on the concrete . . . .

Id.

90. Murray, *supra* note 73, at C1. Heavy D., of Heavy D. and the Boyz, feels rappers who speak unabashedly of violence in their work have been vindicated by the outpouring of community rage that followed the first Rodney King verdict. "Ever since the L.A. riots . . . . [a]ll of a sudden people think we know what we're talking about and want to listen to what we're saying. But the kids knew that we were speaking truth all along." *Id.*

91. *See* Kelley, *supra* note 89, at 793-94.

92. *See, e.g.*, Michael Castleman, *Libidos in Overdrive: Millions of Americans Are Addicted to Sex*, CHI. TRIB., Jan. 30, 1991, Style, at 5 (noting that Colorado psychotherapist Anne Wilson Schaef, in an article about sex addiction, has asserted that "[i]n our society, everything is sexualized. Sex is used to sell so many products. Men are socialized to have as much sex as possible. Women are brought up to feel obsessed about looking attractive."); Craig Macinnis, *Coppola*, THE TORONTO STAR, Nov. 13, 1992, at C1 (quoting director Francis Ford Coppola, commenting on AIDS and the death of novelist Bram Stoker from syphilis in 1912, as evidencing that Western society has always been obsessed with sex and has viewed disease as punishment for sex); Larry Witham, *Gebbie's Remarks Fuel for Pro-Family Groups*, THE WASHINGTON TIMES, Oct. 23, 1993, at A3 (quoting Paul Hetrich, vice president of the conservative Christian group Focus on the Family, reacting to a statement by national AIDS policy director Kristine Gebbie: "Anybody who would say that the sex-obsessed United States is a 'Victorian society' has got his head in the sand somewhere").

93. *See* Abrahams, *supra* note 84, at 224. In his study of West Indian speech contests, Abrahams, director of the African and Afro-American Research Institute at the University of Texas, gives several examples of the fascination with fornication and female genitalia expressed in adolescent and adult rhyming. *Id.*

94. *See, e.g.*, N.W.A., *Parental Discretion Iz Advised*, *on* STRAIGHT OUTTA COMPTON (Priority Records 1988) (disdaining foreplay and boasting about his "size"); THE 2 LIVE CREW, *We Want Some P---y!!*, *on* THE 2 LIVE CREW IS WHAT WE ARE (Luke Skyywalker Records 1986) (extolling the virtues of group sex, oral sex, and various other sex acts).

create it are the poets and prophets of a generation.[95]

Sampling, like rap, is an integral component of modern hip hop culture.[96] Every record in the Top 40 has taken advantage of digital sampling technology.[97] But whereas the roots of rapping are ancient and primitive, sampling has a more recent genesis. Sampling has been called both an art form[98] and outright theft.[99] Critics ridicule the suggestion that sampling is

95. *See, e.g.*, ARRESTED DEVELOPMENT, 3 YEARS, 5 MONTHS AND 2 DAYS IN THE LIFE OF . . . (Chrysalis Records 1992) (encouraging secular spirituality, responsibility, charity, and political purpose, and condemning senseless violence). Refer to note 30 *supra*. While many music critics consider rap music a legitimate and valuable expression of the minority community, this is not a universally held point of view. *See, e.g.*, Michelle Shocked & Bart Bull, *L.A. Riots: Cartoons vs. Reality; Gangster Rappers Preserve White Myths*, BILLBOARD, June 20, 1992, at 6, 6. White singer and song writer Michelle Shocked asserts that many rappers, in a thoughtless quest for riches, are pandering to young white audiences and fostering the negative image of blacks traditionally held by whites. *Id.* She writes,

> [R]ock critics the world over are clueless when it comes to telling the difference between social criticism and show business. . . .
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> . . . .
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> . . . What white folks have always believed about black men is just what the work of Ice Cube, N.W.A., [popular but hard-edged rappers] and other gangster rappers confirms today. The chicken-thieving, razor-toting 'coon' of the 1890s is the drug-dealing, Uzi-toting 'nigga' of today.

Id. Another commentator writes,

> [T]he rap devotees try desperately to legitimize the idiom by alleging it has roots in jazz, gospel and blues, all light years ahead of rap in musical complexity and intellectual rigor. And yet, the rap apologists may be on to something.
>
> There is indeed a tradition of music from which rap draws: the 19th Century minstrel shows, in which a parody of a black man dances and hollers for a white audience that revels in the show.

Reich, *supra* note 37, at 4.

96. Korn, *supra* note 2, at 324 n.14. "Hip hop" is an expression embracing many of the stylistic trappings of contemporary African-American culture. *Id.* Rap music, graffiti art, and breakdancing are manifestations of hip hop but "hip hop music is a distinct, rhythmic, urban sound commonly incorporating a variety of collage techniques." *Id.* Though the terms "hip hop" and "rap" are often used interchangeably, they describe different, albeit related, concepts. NELSON GEORGE, *Grandmaster Flash: Flash is Bad*, *in* BUPPIES, B-BOYS, BAPS & BOHOS: NOTES ON POST-SOUL BLACK CULTURE 75, 75 (1992).

> A rap record is a hip hop record. A hip hop record is not necessarily a rap record. . . . Rap records are dominated by the tone and/or words of the rapper, while the music, basically variations of current hot street rhythms, can be in balance with the rapper's voice or may highlight it. However, if the music overwhelms the words it's probably not a rap record but a hip hop record.

Id.

97. Howard Reich, *Send in the Clones: The Brave New Art of Stealing Musical Sounds*, CHI. TRIB., Feb. 15, 1987, Arts, at 8, 8 (quoting Keyboard Magazine editor Dominic Milano, "Sampling has become indispensable in the music industry; it's used on every record in the Top 40").

98. David Browne, *No Free Samples?*, ENT. WKLY., Jan. 14, 1992, at 54, 54, 56 (characterizing sampling as "a vibrant, bratty art form. . . . —folk art for a new generation"); Spero, *supra* note 79, at 7.

99. *See, e.g.*, J.C. Thom, *Digital Sampling: Old-Fashioned Piracy Dressed Up In*

an art form and charge that it is unvarnished piracy. Lester Sill, president of Jobete Music says, "I don't recognize [sampling] as an art form. Bullshit! Art form? Goddamnit, it's plagiarism!"[100] Frederic Silber of EMI Music Publishing counters that

> Rap is a subculture within R&B, it's an art form. [Sampling] is not malicious . . . . The rappers say we're borrowing, paying tribute . . . These guys are technologically trying to compose with what's out there, and they are not trying to disguise it. [Hip-hop is] an outlaw culture, and that's part of its romance, vibrancy, and appeal.[101]

Rap artists who sample see popular music as a legacy that belongs to the people.[102] Samplers reanimate the past by quoting from their shared cultural experience.[103] For the rapper, "[h]iphop is ancestor worship."[104]

Sampling is a technique of reproducing preexisting sounds via computer hardware.[105] It gives musicians and audio engineers limitless creative flexibility[106] by enabling them to

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Sleek New Technology, 8 LOY. ENT. L.J. 297, 336 (1988) (likening digital sampling to piracy); Ronald Mark Wells, *You Can't Always Get What You Want But Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691, 705 (1989); Reich, *supra* note 97, at 9 (quoting record producer as saying that sampling is "open highway thievery"); *see also* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (invoking the admonition "Thou shalt not steal" in finding that sampling substantial portions of prerecorded music constituted copyright infringement).

100. Jeffrey Ressner, *Sampling Amok? New Technology Has Given Musicians the Power to Make Old Pop Sizzle. But Does It Pay?*, ROLLING STONE, June 14, 1990, at 103, 105 [brackets in original] (quoting Sill who is accused of refusing to license samples in an effort to "hold back a new wave of black music"). Jobete Music controls the Motown catalogue. *Id.*

101. Janine McAdams, *Clearing House: EMI Music Uses Sampling Committee*, BILLBOARD, Jan. 30, 1993, at 1, 1 (quoting Silber, EMI's vice president of business affairs, and chairman of an interdepartmental sample clearance committee).

102. Greg Tate, *Diary of a Bug*, VILLAGE VOICE, Nov. 22, 1988, at 73, 73.

103. *Id.*

104. *Id.*

105. *See* David Goldberg & Robert J. Bernstein, *Reflections on Sampling*, N.Y. L.J., Jan. 15, 1993, at 3, 3. In the process of digital sound sampling, analog sound waves are converted into a digital code composed of "bits," the most basic unit of information recognizable to a computer. *Id.* This code is saved in the memory of the digital sampler and may be reproduced at the whim of the copying musician or engineer. *Id.* The sounds may be reproduced in their original form or altered in an infinite variety of ways. *Id.* Specific mistakes can be corrected, sounds can be fashioned to mimic another musician, or an entirely new synthetic sound can be created. *Id.*; *see also* Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1723-24 (1987) (providing a basic introduction to sampling technology and maintaining that copyright owners have a viable argument for compensation against samplers).

106. *See* Pareles, *supra* note 5, at C23 (noting that sampling "puts virtually any

transplant the distinctive sound of a voice or instrument from one musical context to another.[107] Sampling was used in the earliest rap productions.[108] During the Eighties high fidelity sampling equipment became affordable and easy to use, and consequently digital sampling gained widespread acceptance.[109] Electronic sampling, however, is not a new phenomenon. Among the precursors of today's digital sampler are the Optigan, the Mellotron, and the photoelectric "singing keyboard" created in 1936 by Frederick Sammis.[110] Stylistically, the roots of sampling may be traced most directly to the reggae genre called "dub."[111] By manipulating previously recorded rhythm tracks in the studio, Jamaican producers created a novel variation on reggae that had a profound influence on New York rap musicians.[112] But artists and musicians have been experimenting with sampling, in one form or another, since the advent of sound recording.[113] From the audio collage experiments of the early twentieth century and the post-World War II *musique concrete* composers to Spike Jones and the novelty "flying saucer" recordings of the Fifties, innovators have been manipulating preexisting sound recordings.[114]

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sound—live or recorded, natural or synthetic—at a performer's finger tips").

107. McGiverin, *supra* note 105, at 1724.

108. *See* CHAMBERS, *supra* note 78, at 190; Richard Harrington, *The Groove Robbers' Judgment: Order on 'Sampling' Songs May Be Rap Landmark*, WASH. POST, Dec. 25, 1991, at D1.

109. Korn, *supra* note 2, at 333.

110. *Id.*

111. CHAMBERS, *supra* note 78, at 174. "Essentially, the 'hip-hop' tradition of rap music originated in Jamaica in the 1960s, where locals were 'toasting' or speaking over the sound of records. By the '70s, New York deejays and other musical visionaries had picked up the idea . . . ." Reich, *supra* note 37, at 4.

112. *See* CHAMBERS, *supra* note 78, at 173-74. Popularized by Jamaican producers like King Tubby and Lee Perry, "dub" effects typically were achieved by means of echo and reverb units, phasers, mixers, and revox two-track tape recorders. Korn, *supra* note 2, at 328-29.

> [King] Tubby was fond of using a dub machine to eliminate the vocals from test cuts of a two-track single, getting a private charge out of the way the rhythms—in the space of a microsecond—seemed to snap, crackle and then pop like a champagne cork when they had no vocal track to soften them. Equally exciting to him was the abrupt reintroduction of the complete mix—'Jus' like a volcano in yuh head!'

TIMOTHY WHITE, CATCH A FIRE: THE LIFE OF BOB MARLEY 230 (1983).

113. *See* Korn, *supra* note 2, at 326-331. *See generally* Sherri Carl Hampel, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559.

114. Korn, *supra* note 2, at 326-331. In 1913 Luigi Russolo published a Futurist tract about audio collage entitled ART OF NOISES. *Id.* at 327 n.23. Pierre Schaeffer and other *musique concrete* composers created new types of music primarily by the manipulation of magnetic audiotape. *Id.* Spike Jones specialized in slapstick recordings of popular music peppered with humorous sound effects. *Id.* Buchanon and Goodman's "flying saucer" recordings consisted of brief excerpts of hit records from

Many commentators have addressed the issue of sampling vis-à-vis copyright law.[115] The majority of sampling cases, however, are settled out of court or dismissed.[116] To date, there has been only one reported case in which a court has explicitly ruled on the copyright implications of digital sampling.[117] As a technique pervasive in popular music, and one especially important in the production of rap music, sampling is an unavoidable phenomenon.[118] As such, it is inevitable that courts will be called upon to resolve copyright disputes spawned by musical sampling. Sampling per se, however, was not an issue in *Campbell*. There are two possible sets of copyrights in any work of music: the underlying musical composition may be copyrighted and a particular performance of the composition may be copyrighted.[119] Because Campbell and 2 Live Crew were charged with infringing Acuff-Rose's copyright in the musical work and not the copyright in the sound recording, the issue of sampling was not relevant to the case.[120]

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the period interspersed with questions from a fictional newscaster. *Id.* at 330.

115. Refer to notes 98-105 *supra*. *See also* Hampel, *supra* note 113, at 585-86 (arguing that often digital sampling is not copyright infringement); Korn, *supra* note 2, at 368-70 (arguing for copyright protection that balances traditional rights against the value of technology-based art forms such as audio collage); McGiverin, *supra* note 105, at 1723-24 (urging that copyright owners have a legitimate claim for compensation from samplers); Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y. L.J., May 22, 1992, at 5 (explaining that many of the traditional tests applied in a claim of copyright infringement are not appropriate when sampling is at issue); Goldberg & Bernstein, *supra* note 105, at 31 (tracing the development of legal response to the complex issues surrounding sampling); Don Snowden, *Sampling: A Creative Tool or License to Steal?; The Controversy*, L.A. TIMES, Aug. 6, 1989, Calendar, at 61 (reviewing the recent history of sampling and pointing out the issues at stake).

116. Randy Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 236 n.26 (1993).

117. This case involved rap recording artist Biz Markie who released a record entitled "I Need a Haircut," which included an unlicensed sample of Gilbert O'Sullivan's tune "Alone Again (Naturally)." *See* Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183 (S.D.N.Y. 1991). The copyright owner of the composition and O'Sullivan's recording brought suit for copyright infringement; Judge Kevin Duffy issued a strongly worded opinion granting a preliminary injunction against Biz Markie. *Id.* at 185.

118. Refer to notes 70-74 & 96-114 *supra* and accompanying text.

119. 17 U.S.C. § § 106 & 114(b) (1988 & Supp. V 1993). Refer to notes 326-27 *infra* and accompanying text.

120. By definition, sampling is the appropriation of sounds, and as such the holder of a copyright to only the original underlying musical composition has no claim against a sampler who has taken portions of a recorded performance. Nonetheless, in deciding *Campbell*, the Sixth Circuit curiously seemed to find it significant that a portion of the defendants' version had been sampled from Roy Orbison's original recording. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992) (noting that portions were sampled or, in other words, copied verbatim), *rev'd*,

III. FACTS OF THE CASE: BE MINE TONIGHT

Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight[121]

A. *Roy Orbison*

Roy Orbison was one of the most beloved performers in rock and roll.[122] Luther Campbell, along with his group 2 Live Crew, is one of the most reviled performers in rock today.[123] It is hard to imagine two more dissimilar public personas. Nonetheless, they are both players in this copyright drama: Orbison, because, though not a party to the suit, he is inextricably linked with "Oh, Pretty Woman" through his authorship and definitive recording of the song; Campbell, obviously, because he is the defendant. With such well-defined "good guy"

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114 S. Ct. 1164 (1994). Most likely, according to common industry practice, the record company, Monument Records, retained the copyright in the sound recording. A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 163 (1993). Although, musicians, commentators, and copyright holders anxiously await a definitive resolution of the sampling question, on the basis of the facts in *Campbell* it was proper for the Supreme Court to eschew any sampling pronouncement. A realistic suggestion regarding sampling analysis was offered by Judge Nelson of the Sixth Circuit. *E.g., Campbell*, 972 F.2d at 1444 n.5. In his dissent, he suggests that "a 'sampling' of no more than a few notes should be governed by the maxim *de minimis non curat lex* [the law does not bother with trifles]." *Id.*

121. ROY ORBISON, "Oh, Pretty Woman" (Monument Records 1964), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1179 app. A (1994).

122. Jim Jerome, *Bard of the Lonely: Roy Orbison, Rock Original, Dies at 52*, PEOPLE WKLY., Dec. 19, 1988, at 60, 62. Sun Records founder Sam Phillips, who initiated the careers of Elvis Presley, Jerry Lee Lewis, Carl Perkins, Johnny Cash, Roy Orbison, and many others, after hearing of Orbison's death, remembered Orbison as "probably the tamest man I've known in rock. He was very sensitive to people, to tragedy, to hurt. He wouldn't hurt a pissant if it was biting him. . . . What a wonderful, sweet man." *Id.* Introducing Orbison at the Rock and Roll Hall of Fame ceremony in 1988, Bruce Springsteen said,

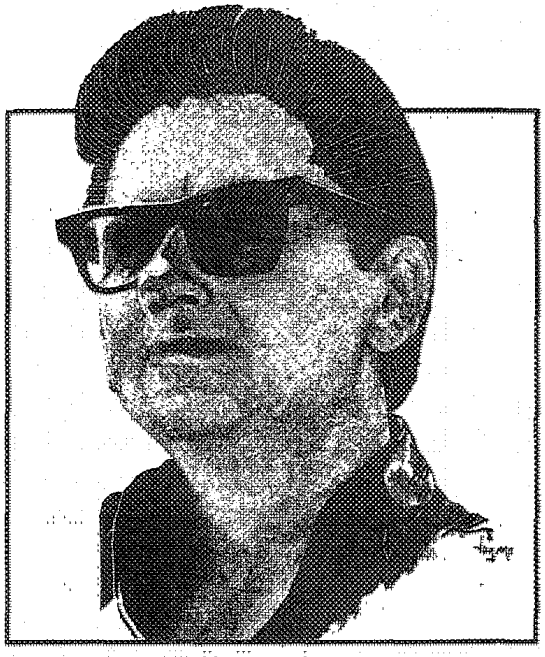
> "His arrangements were complex and operatic, they had rhythm and movement, and they addressed the underside of pop romance. They were scary. His voice was unearthly. Roy had the ability, like all great rock and rollers, to sound like he had dropped in from another planet. . . . In 1975, when I went in to make *Born to Run* [the critically acclaimed LP that catapulted Springsteen to stardom] . . . I wanted most of all to sing like Roy Orbison. Now everybody knows that nobody sings like Roy Orbison."

Id. at 62-63 (ellipses in original).

123. *See, e.g.*, Ned Zeman, *A Rap Album in the Dock*, NEWSWEEK, Oct. 16, 1989, at 72, 72. Luther Campbell and 2 Live Crew have been characterized as "dirty, rank and mean" and "foul-mouthed and minimally talented." *E.g., id.*; Mills, *supra* note 70, at G5.

and "bad guy" characters as protagonists, courts and commentators must guard against a loss of objectivity.

Born in 1936, Orbison grew up on the flatlands of west



Roy Orbison

Texas in the tiny town of Wink.[124] He played guitar and harmonica since childhood,[125] and after attending North Texas State, where he was befriended by singer Pat Boone, Orbison headed to Memphis to record for Sam Phillips and Sun Records.[126] During the late Fifties he began writing songs for the Nashville publishing firm of Acuff-Rose.[127] As a recording artist he tasted moderate chart success in 1956, but it was in the early Sixties that Orbison put together a formidable string of major chart hits.[128] Despite both a singing style and looks

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* Illustration by the author. 1990 © Nels Jacobson, Jagmo.

124. NORM N. NITE, ROCK ON: THE ILLUSTRATED ENCYCLOPEDIA OF ROCK N' ROLL, THE SOLID GOLD YEARS 461 (1974).

125. *Id.*

126. Jerome, *supra* note 122, at 63.

127. THE ROLLING STONE ENCYCLOPEDIA OF ROCK & ROLL 407 (Jon Pareles & Patricia Romanowski eds., 1983) [hereinafter THE ROLLING STONE ENCYCLOPEDIA].

128. *See* STAMBLER, *supra* note 76, at 384-85. Orbison's first big hit was the hard-rocking, if somewhat silly, "Ooby Dooby." *Id.* Though he was more interested in recording ballads, at Johnny Cash's urging Orbison sent a demo of the tune to Sam Phillips at Sun Studios. *Id.* The tune was typical of what Sun was releasing at the time. *Id.* Phillips liked the tape and made a single of the song. *Id.* It became a major rock and roll hit, selling 300,000 copies. *Id.* In 1960 Orbison had a #2 chart hit with "Only the Lonely." THE ROLLING STONE ENCYCLOPEDIA, *supra* note 127 at 407. This was followed by "Blue Angel," which reached #9 on the charts in 1960, and by

that were atypical in early rock and roll, Orbison earned a place for himself among rock's pantheon of founding fathers. "His was a voice like no other ever heard in rock—silky, soaring, tender, gritty, haunted with pain."[129] Orbison's plaintive voice and operatic style were well suited to the pain and loneliness that was a recurring theme in his lyrics. In the wake of a pair of tragic accidents in the Sixties and his inability for two decades to resuscitate his career, Orbison's personal life seemed to echo the heartache of his songs.[130] The Traveling Wilburys, however, a late Eighties collaboration with Bob Dylan, George Harrison, Tom Petty, and Jeff Lynne, helped catapult him back onto the charts and into the spotlight. After his death in 1988, the quintet's album went to #1 on the charts.[131]

B. Acuff-Rose

Acuff-Rose Publications was founded in 1942 by legendary country artist Roy Acuff and composer and performer Fred Rose.[132] Acuff, known as the "King of Country Music," was raised on a Smoky Mountain tenant farm.[133] As a young man Acuff traveled with a medicine show in which he regularly performed in black face.[134] He began his recording career in

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"Running Scared" in 1961, Orbison's first #1 hit. *Id.* "Crying," "I'm Hurtin'," and "Candy Man" reached #2, #27, and #25, respectively, in 1961. *Id.* In 1962, "Dream Baby" reached #4, "The Crowd" reached #26, and "Leah" reached #25. *Id.* "In Dreams," "Falling," "Mean Woman Blues," "Blue Bayou"—later recorded by Linda Ronstadt—and Orbison's recording of "Pretty Paper" by Willie Nelson, reached #7, #22, #5, #29, and #15, respectively, in 1963. *Id.* In 1964 Orbison achieved his second #1 hit with "Oh, Pretty Woman;" that same year he reached #9 on the charts with "It's Over." *Id.* The next year "Goodnight" reached #21 and "Ride Away" reached #25. *Id.*

129. Jerome, *supra* note 122, at 60.

130. *Id.* at 63. Orbison's wife, Claudette, was killed in a motorcycle accident in 1966 as Roy rode on another motorcycle just ahead. *Id.* Two of his three children, 10 year-old Roy Dwayne and 6 year-old Anthony, died in a fire that destroyed his Nashville home while Orbison was on tour in 1968. *Id.*; *see also* THE ROLLING STONE ENCYCLOPEDIA, *supra* note 127, at 407.

131. Jan DeKnock, *'Wilburys,' 'Mystery Girl' Extend Orbison Legacy*, CHI. TRIB., Mar. 17, 1989, § 7, at J.

132. Elizabeth Schlappi, *Roy Acuff*, *in* STARS OF COUNTRY MUSIC: UNCLE DAVE MACON TO JOHNNY RODRIGUEZ 179, 196 (Bill C. Malone & Judith McCulloh eds., 1975).

133. Laurence Staig, *Obituary: Roy Acuff*, THE INDEPENDENT, Nov. 24, 1992, at 29, 29. Acuff taught himself to play the fiddle by listening to records owned by his father—a Baptist minister and country lawyer. *Id.*; Sean Piccoli, *Roy Acuff's Country was Far beyond the Opry*, THE WASH. TIMES, Nov. 24, 1992, at E1.

134. Schlappi, *supra* note 132, at 183-85; Staig, *supra* note 133, at 29.

1936.[135] A conservative in both business and politics,[136] Acuff enjoyed widespread popularity from the Thirties until his death in 1992.[137] He entered the music publishing business in an effort to protect his own compositions from piracy.[138] At the outset the two partners agreed that Acuff-Rose would operate honestly and would nurture deserving talent.[139] Over the years Acuff-Rose has fostered the careers of many gifted performers, including Hank Williams.[140] Today the firm is one of the world's largest publishers of country music.[141]

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135. Schlappi, *supra* note 132, at 187. Acuff recorded his two best-known numbers that year: "Great Speckled Bird" and "Wabash Cannonball." *Id.* at 188.

136. *Id.* at 196-97.

137. John Anderson, *Country Music's Roy Acuff Dies*, NEWSDAY, Nov. 24, 1992, at 7; *see* THE ROLLING STONE ENCYCLOPEDIA, *supra* note 127, at 3. During World War II, owing to his wartime hit "Cowards Over Pearl Harbor," Acuff was considerably more popular with GIs than Japanese soldiers who reportedly taunted the U.S. troops with the battle cry "To hell with Roosevelt! To hell with Babe Ruth! To hell with Roy Acuff!" Staig, *supra* note 133, at 29. Later, Acuff not only became the first living performer elected to the Country Music Hall of Fame, he ran as the Republican candidate for governor of Tennessee three times, almost winning in 1948. THE ROLLING STONE ENCYCLOPEDIA, *supra* note 127, at 3.

138. Schlappi, *supra* note 132, at 195-96.

139. *Id.* at 196.

140. *Id.* A Hank Williams tune became the basis for a parody in 1979. The Uranium Savages, a parody band from Austin, Texas, was denied permission to record a tongue-in-cheek version of Hank Williams' classic "Jambalaya (On the Bayou)." Telephone Interviews with Uranium Savages drummer Pat Hargadon (June 21, 1994) and Savages "Shrovinover" John "Artly Snuff" Fox (June 20, 1994). The reaction of Acuff-Rose in that situation, indicative of their conservative values, paralleled their reaction to 2 Live Crew's version of "Oh, Pretty Woman." *Id.* Presumably Acuff-Rose refused to license the song because the Uranium Savages version irreverently recalled the drowning death of prisoner Joe Campos Torres while in the custody of the Houston Police Department. The Hank Williams song began:

> C'mon Joe, me gotta go me-oh-my-oh,
> Me gotta go for the piroque down the bayou.
> My-ee one, the sweetest one, me-oh-my-oh,
> Son of a gun, we'll have big fun on the bayou.
> Jambalaya, crawfish pie, file' gumbo,
> Son of a gun, we'll have big fun on the bayou.

HANK WILLIAMS, "Jambalaya (On the Bayou)," *on* 24 OF HANK WILLIAMS' GREATEST HITS (PolyGram Records, Inc. 1976). The lyrics to the Uranium Savages parody version began:

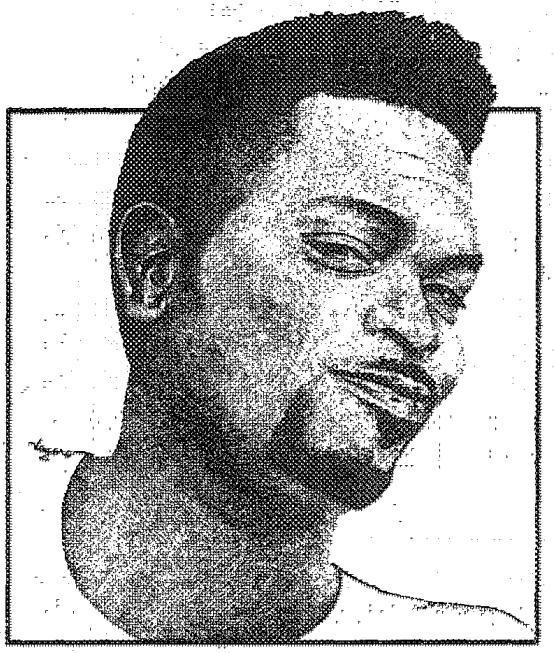
> Well hello, we'd like to know who you are-o
> We got the clues by the shoes you are Chicano.
> Get out of that car, it ain't far to el arroyo
> So come on Joe, you gotta go to the bayou.
> Well goodbye Joe, you gotta go for a swim-o
> It'll be rough with the cuffs, me-oh-my-o
> We'll stand around, watch you drown, then be gone-o
> With a badge and a gun we gonna have big fun on the bayou.

URANIUM SAVAGES, "On the Bayou," *on* TRUST US (Roy Records 1979).

141. THE ROLLING STONE ENCYCLOPEDIA, *supra* note 127, at 3.

C. *Luther Campbell*

Soft-spoken and serene when he's not on stage with 2 Live Crew, Luther Campbell is better known to his fans by his



Luther Campbell*

professional name, Luke Skyywalker.[142] He grew up in Liberty City, Florida, a Miami ghetto.[143] His father was a janitor, and his mother worked as a hairdresser.[144] With four older brothers, Campbell grew up feisty and headstrong.[145] "I stayed in trouble[,]" he remembers. "I fought all the time; I was a real John Wayne type."[146] In high school he began organizing dances and rap shows, including performances by then-fledgling rappers Run-D.M.C., Whodini, and the Fat Boys.[147] About this time, Campbell formed his own group, the Ghetto Style DJs, to entertain at neighborhood parties.[148]

After high school and a brief, unprofitable stint as a

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* Illustration by the author. 1994 © Nels Jacobson, Jagmo.

142. Scott Bernarde, *Much More than Nasty: Luke Skyywalker, the Impresario of X-Rated Rap, Takes a Risk with Griff*, ROLLING STONE, Mar. 8, 1990, at 62, 62.

143. Lisa Russell, *2 Live Crew's Luke Campbell Is Keen for Green, Not the Obscene*, PEOPLE WKLY., Nov. 5, 1990, at 71, 72.

144. *Id.*

145. *Id.*

146. *Id.*

147. Bernarde, *supra* note 142, at 62.

148. Russell, *supra* note 143, at 72.

cook,[149] Campbell asked 2 Live Crew[150] to help him record a song he had written.[151] Paying for the recording, pressing, and distributing himself, he eventually sold 250,000 copies of the record.[152] In 1985 Campbell founded Luke Skyywalker Records, and during the next four years he recorded three albums with 2 Live Crew.[153] On the strength of 2 Live Crew's reputation for delivering extremely X-rated material, the third album, AS NASTY AS THEY WANNA BE, sold well over a million copies.[154]

His penchant for obscenity has garnered Campbell fame and fortune, but it has also produced a great deal of controversy.[155] The lyrics on AS NASTY AS THEY WANNA BE spawned legal action in at least five states.[156]

In stark contrast to the lewd hooligan image suggested by his stage persona, Campbell is a family man who enjoys a quiet suburban lifestyle.[157] Despite the lascivious nature of his music, he uses the popularity of 2 Live Crew to promote safe sex.[158] The only child in his family not to go to college,[159]

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149. *Id.* Though Campbell's tenure as a cook was unprofitable monetarily, it was rewarding in other ways. "I still make a good chicken Florentine," he notes. *Id.*

150. 2 Live Crew was founded in California by deejay David Hobbs and rapper Chris Wong Won. *Id.*

151. Bernarde, *supra* note 142, at 62.

152. *Id.* The song recorded by Campbell and 2 Live Crew in their first collaboration was entitled "T'row the D." *Id.* It also appears under the title "Throw the 'D'" on the LP THE 2 LIVE CREW IS WHAT WE ARE. THE 2 LIVE CREW, THE 2 LIVE CREW IS WHAT WE ARE (Luke Skyywalker Records 1986).

153. Russell, *supra* note 143, at 72. The first two albums, THE 2 LIVE CREW IS WHAT WE ARE and MOVE SOMETHIN', were certified gold and platinum respectively. Bernarde, *supra* note 142, at 62. If an album released after 1976 sells at least 500,000 units and the manufacturer's dollar volume exceeds $1 million, it is certified gold. THE ROLLING STONE ENCYCLOPEDIA, *supra* note 119, at 220. To qualify as platinum an album must sell at least one million units with a dollar volume of no less than $2 million. *Id.*

154. Bernarde, *supra* note 142, at 62. It is worth noting that a clean version of this album, entitled AS CLEAN AS THEY WANNA BE, sold only 200,000 copies. *Id.* "Pretty Woman" appeared on this album. THE 2 LIVE CREW, *Pretty Woman*, *on* AS CLEAN AS THEY WANNA BE (Luke Records 1989).

155. *See* Russell, *supra* note 143, at 71. Campbell was arrested on obscenity charges after a performance before an adults-only audience in Hollywood, Florida, in June of 1989. *See id.* The jury that acquitted him of all charges "included a 76-year-old woman—who said the cuss words weren't anything new to her." *Id.* In 1987, after a Florida Panhandle record store customer bought a copy of 2 Live Crew's "We Want Some Pussy," the store owner was charged with selling pornography to a minor. Bernarde, *supra* note 142, at 62. In prosecuting a local record store owner for selling 2 Live Crew cassette tapes in 1988, City Attorney Daniel Brown of Alexander City, Alabama contended that the album MOVE SOMETHIN' violates community standards of decency and is devoid of redeeming social value. Zeman, *supra* note 115, at 72.

156. Russell, *supra* note 143, at 71.

157. *See id.* at 72.

158. *See* Bernarde, *supra* note 142, at 62. Campbell and the group have endorsed

Campbell devotes considerable time and money to improving education for blacks.[160] He is convinced that "'[e]ducation is the key,' . . . 'because then everybody will be equal. Right now, everybody's not equal.'"[161]

D. Oh, Pretty Woman

The story line to Roy Orbison's "Oh, Pretty Woman" presents a natural and inviting target for parody,[162] especially to a group like 2 Live Crew that thrives on salaciousness, unabashed sexism, and the ridicule of middle American sentimentality. An example of Orbison's stock in trade, "the romantic/paranoiac ballad with crescendoing falsetto,"[163] the song might tempt any contemporary parodist. To a hard-boiled kid from the inner city, the story line might seem particularly ludicrous. The singer is "wowed" by a beautiful woman he notices walking down the street.[164] Lonely and overwhelmed by her

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a brand of condoms marketed specifically to inner city youth, Homeboy Condoms, "The freshest wrap in town." *Id.*

159. Russell, *supra* note 143, at 72.

160. Bernarde, *supra* note 142, at 62. Campbell has funded college scholarships for promising black high school seniors and established a scholarship for business students at Florida International University. *Id.* He contributes to the United Negro College Fund and supports the Bethume-Cookman University football program. *Id.* To record and tour, teenage performers among the fifteen rap and R&B acts on his roster, must maintain a B average. *Id.*

161. *Id.* (quoting Campbell).

162. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting) (noting that the story was probably intended to be "sort of sweet"), *rev'd*, 114 S. Ct. 1164 (1994). Arguing that the 2 Live Crew song is a parody that targets the original, one commentator points out that the rap group's song would be unremarkable without Orbison's "Oh, Pretty Woman" to compare it to. Landy, *supra* note 2, at 242 n.83. "It is likely that the song would be considered to be silly and annoyingly repetitive. It is the association of the riff of the original with its sappy, romantic lyrics that make the 2 Live Crew version outrageous and attention grabbing." *Id.*

163. THE ROLLING STONE ENCYCLOPEDIA, *supra* note 127, at 407.

164. Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you
Mercy
Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me? [grrrrrrrrrr]
Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me

loveliness, he pleads with her to spend the evening with him.[165] She passes him by and meekly he resigns himself to being ignored.[166] The story ends on a hopeful note however, when she turns around and walks back in his direction.[167]

Roy Orbison wrote "Oh, Pretty Woman" in 1964 with William Dees.[168] In August of 1964 it became a #1 national hit.[169] That same year the authors assigned their rights in the song to Acuff-Rose Music.[170] Twenty-five years later 2 Live Crew recorded a parody version of the tune. Titled "Pretty Woman," the new version addressed alternately a pretty woman, a "big hairy woman," a "bald headed woman," and a "two timin' woman."[171]

'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight
Pretty Woman, don't walk on by,
Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,
Hey, O.K.
If that's the way it must be, O.K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

ROY ORBISON, *Oh, Pretty Woman* (Monument Records 1964), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1179 app. A (1994).

165. *Id.*

166. *Id.*

167. *Id.*

168. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

169. NITE, *supra* note 124, at 461.

170. *Campbell*, 754 F. Supp. at 1152.

171. Pretty woman [haha!] walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It' [ha!]
Big hairy woman
Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice.
Bald headed woman here, let me get this hunk of biz for ya
Ya know what I'm saying you look better than rice a roni [Hahaha]
Oh bald headed woman
Big hairy woman come on in
And don't forget your bald headed friend

There is some dispute as to what happened next. The song was released on Luke Records as one of ten numbers on an album entitled AS CLEAN AS THEY WANNA BE.[172] The district court found that the album was released on July 15, 1989;[173] the Sixth Circuit determined that it was released in June.[174] Both courts agreed that through its manager, Linda Fine, 2 Live Crew notified Acuff-Rose in early July 1989 that it was going to parody "Oh, Pretty Woman."[175] In a letter to Gary Tiefer of Opryland Music Group, of which Acuff-Rose was a member, Fine offered to pay statutory rates,[176] and expressed the rap group's intention to credit the writer and publisher.[177] Including a cassette tape of the parody and a lyric sheet, she wrote, "Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes."[178] Acuff-Rose responded that they would not license "Oh, Pretty Woman" to 2 Live Crew.[179] 2 Live Crew continued to sell the album, AS CLEAN AS THEY WANNA BE.[180] On July 18, 1990 Acuff-Rose filed suit for copyright infringement, *inter alia*, in the United States District Court for the Middle District of Tennessee,

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Hey pretty woman let the boys
Jump in
Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind
Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

THE 2 LIVE CREW, "Pretty Woman," *on* AS CLEAN AS THEY WANNA BE (Luke Records 1989), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1179-80 app. B (1994).

172. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1168 (1994). Orbison and Dees were credited on the album as the authors of "Pretty Woman," and Acuff-Rose was credited as publisher. THE 2 LIVE CREW, AS CLEAN AS THEY WANNA BE (Luke Records 1989).

173. *Campbell*, 754 F. Supp. at 1152.

174. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1432 n.2 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994). A July 15, 1989 release date was suggested by a comment in Acuff-Rose's response to the motion for dismissal. *Id.* The circuit court felt that this date was contradicted by Campbell's affidavit. *Id.*

175. *Id.* at 1432.

176. Refer to note 328 *infra* and accompanying text.

177. *Campbell*, 972 F.2d at 1432.

178. *Id.*

179. *Id.* In rejecting the overtures of 2 Live Crew, Tiefer wrote, "'I am aware of the success enjoyed by 'The 2 Live Crews' [sic], but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman'.'" *Id.* (quoting Gerald Tiefer of Opryland Music Group).

180. *Id.*

Nashville Division.[181] The district court granted the defendants' motion for summary judgment, the Sixth Circuit Court of Appeals reversed, and subsequently the Supreme Court reversed the circuit court and remanded the case.[182]

IV. THE SIXTH CIRCUIT HOLDING: GIRL YOU KNOW YOU AIN'T RIGHT

> Two timin' woman girl you know you ain't right
> Two timin' woman you's out with my boy last night
> Two timin' woman that takes a load off my mind
> Two timin' woman now I know the baby ain't mine[183]

A. District Court

In the district court, Chief Judge Wiseman found that 2 Live Crew's version, "Pretty Woman," was a parody and a fair use.[184] Consequently, he granted the defendants' motion for summary judgment.[185] In reaching this conclusion the court analyzed 2 Live Crew's song according to the four determinative factors set forth in the 1976 Copyright Act[186] and

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181. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

182. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1167-68 (1994).

183. THE 2 LIVE CREW, "Pretty Woman," *on* AS CLEAN AS THEY WANNA BE (Luke Records 1989), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1180 app. B (1994).

184. *Campbell*, 754 F. Supp. at 1154. Fair use is an affirmative defense to an infringement action. 17 U.S.C. § 107 (1988 & Supp. V 1993). Refer to notes 53-55 *supra*, 339-49 *infra* and accompanying text.

185. *Campbell*, 754 F. Supp. at 1160.

186. 17 U.S.C. § 107. The 1976 Copyright Act, which went into effect January 1, 1978, codified the fair use doctrine:

> § 107. Limitations on exclusive rights: Fair Use
>
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of

examined affidavits of music professionals regarding the relationship of the parody to the original.[187]

The first factor in a fair use analysis is the purpose and character of the use.[188] Chief Judge Wiseman acknowledged that when a work is created for a commercial purpose there is a presumption against fair use.[189] This premise came from the Supreme Court decisions in *Harper & Row Publishers, Inc. v. Nation Enterprises*[190] and *Sony Corp. v. Universal City Studios, Inc.*[191] However, following the approach taken in *Fisher v. Dees*,[192] the court allowed the defendant to overcome the commercial presumption. Recognizing that some parodies "distributed commercially may be 'more in the nature of an

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fair use if such finding is made upon consideration of all the above factors. *Id.*

187. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1433 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994). Recording artist Oscar Brand asserted that 2 Live Crew's music, lyrics, and performance were parodies consistent with a long tradition of American social commentary. According to the court, he explained that

> African-American rap music . . . uses parody as a form of protest, and often substitutes new words to "make fun of the 'white-bread' originals and the establishment. . . ." In "Pretty Woman," . . . "this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to 'white-centered' popular music."

Id. (one omission in original) (quoting Oscar Brand). Acuff-Rose witness, Ph.D. musicologist Earl V. Speilman, pointed out five specific similarities between the two songs and suggested that a portion of the original "'may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by the 2 Live Crew.'" *Id.* (quoting Earl V. Speilman). In an affidavit presented at trial, William Krasilovsky maintained that the two songs are aimed at entirely different audiences and therefore it is unlikely that 2 Live Crew's song would adversely affect the market for Orbison's "Oh, Pretty Woman." *Campbell*, 754 F. Supp. at 1158.

188. 17 U.S.C. § 107(1). Refer to note 186 *supra*.

189. *See Campbell*, 754 F. Supp. at 1154 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

190. 471 U.S. 539 (1985) (holding that The Nation magazine's use of unpublished copyrighted memoirs of President Ford was not fair use because of impact on potential market, despite public's interest in the subject matter). In contrast to Sony Corp. v. Universal City Studios, Inc., in which commercial use was characterized as appropriation motivated by financial considerations, the Court in *Harper & Row* defined a commercial use taking as one in which "the user stands to profit from exploitation of the copyrighted material without paying the customary price." 471 U.S. at 562.

191. 464 U.S. 417, 451 (1984). In *Sony*, the Supreme Court held that videotaping a television broadcast for later personal viewing was fair use. *Id.* at 449-56. The opinion introduced in dicta two presumptions that proved to be troublesome outside the narrow facts of the case: "[i]f the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair," and "[i]f the intended use is for commercial gain . . . likelihood [of future market harm] may be presumed." *Id.* at 449, 451. It is noteworthy that the Sixth Circuit cited *Sony* as authority for the commercial purpose presumption against fair use whereas Judge Wiseman referred to *Sony* only in a different context. *See Campbell*, 754 F. Supp. at 1153.

192. 794 F.2d 432 (9th Cir. 1986).

editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work,'"[193] Chief Judge Wiseman found the presumption to be rebutted by the satirical character of the defendants' version and the unlikelihood that the new version would either profit from or impair the marketability of the original work.[194]

On balance, the next three factors were determined to favor the defendants as well. The second fair use factor, the nature of the copyrighted work,[195] was found by the district court to favor the plaintiff because "Oh, Pretty Woman" was "'creative, imaginative, and original.'"[196] But the court reached the opposite conclusion with regard to factors three and four. Factor three looks to the amount and substantiality of the copyrighted work used in the copy.[197] Applying the "conjure up" standard as followed in *Elsmere Music, Inc. v. NBC*[198] and *Fisher*,[199] the Chief Judge felt that "2 Live Crew had not mimicked so much of 'Oh, Pretty Woman'" that its version violated the substantiality factor.[200] The final factor addresses "the effect of the use upon the potential market for or value of the copyrighted work."[201] Taking into consideration the testimony of the defendants' expert witnesses,[202] the district court found no possible harm to the plaintiff.[203]

B. Court of Appeals for the Sixth Circuit

The opinion of the Sixth Circuit Court of Appeals, as that of the district court, was based on an analysis of the relationship between "Oh, Pretty Woman" and "Pretty Woman" according to the four statutory fair use factors.[204] Nonetheless, the two courts came to significantly different conclusions. Their

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193. *Campbell*, 754 F. Supp. at 1154 (quoting *Fisher*, 794 F.2d at 437).
194. *See id.* at 1154, 1158.
195. 17 U.S.C. § 107(2). Refer to note 186 *supra.*
196. *Campbell*, 754 F. Supp. at 1155-56 (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981)).
197. 17 U.S.C. § 107(3). Refer to note 186 *supra.*
198. Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 n.1 (2d Cir. 1980).
199. Fisher v. Dees, 794 F.2d 432, 438-39 (9th Cir. 1986). In addition to endorsing the "conjure up" standard, the court recognized in *Fisher* that musical parody, by its nature, needs to approximate more closely the original work. *Id.* "If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience." *Id.* at 439.
200. *Campbell*, 754 F. Supp. at 1157.
201. 17 U.S.C. § 107(4). Refer to note 186 *supra.*
202. Refer to note 187 *supra.*
203. *Campbell*, 754 F. Supp. at 1157-58.
204. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1434-39 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

principal disagreement revolved around the commercial purpose presumption and the extent to which this presumption controls.[205] While the district court found that the defendants' version was a socially beneficial use and sufficiently different from the original to qualify as a fair use,[206] the Sixth Circuit applied a much stricter test and thereby determined that 2 Live Crew could not rebut the presumption against fair use.[207]

The Sixth Circuit accepted the district court's classification of the defendants' song as a parody, but only grudgingly.[208] In an affidavit, Campbell assured the court that his intention had been to make a parody, "'through comical lyrics, to satirize the original work.'"[209] The Sixth Circuit, however, explained in a lengthy footnote that only with "considerable reservation" was it conceding that the defendants' version was a parody.[210] In fact, the court claimed it could discern no parody of the original in the second version and that the only thematic similarity between the two was that they both talked about a woman.[211] Nonetheless, the Sixth Circuit accepted the district court's finding that "Pretty Woman" was a parody, and proceeded to examine it against the statutory criteria of § 107 of the Copyright Act.[212]

The Sixth Circuit agreed with the district court's finding that the primary goal of 2 Live Crew was to sell music and make money.[213] The circuit court, however, found that Chief Judge Wiseman had placed too little emphasis on the

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205. Refer to notes 189-94 *supra* and accompanying text.
206. *Campbell*, 754 F. Supp. at 1158-59.
207. *Campbell*, 972 F.2d at 1435-37.
208. *Id.* at 1435 & n.8.
209. *Id.* at 1432.
210. *Id.* at 1435-36 n.8.
211. *Id.* Both the district and circuit courts subscribed to the following rule: in order to be valid, a parody must target the original work and not simply society at large. *Id.* Therefore, because it had difficulty accepting "Pretty Woman" as a parody of "Oh, Pretty Woman," the Sixth Circuit was reluctant to grant that the defendants' song was a parody at all. *Id.* In dissent, Judge Nelson had no such trouble. *Id.* at 1441-42 (Nelson, J., dissenting). The judge confessed that he was baffled by the majority's reluctance to accept "Pretty Woman" as a parody. Acknowledging that he is not a musical expert, Judge Nelson continued,

> I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original—and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernible.

Id. at 1441.
212. 17 U.S.C. § 107. Refer to note 186 *supra*.
213. *Campbell*, 972 F.2d at 1436.

commercial presumption delineated in *Harper & Row* and *Sony*.[214] In *Harper & Row* the Supreme Court reasserted the rule, earlier expressed in *Sony*, that commercial purpose weighs presumptively against a finding of fair use.[215] Starting from the position that the use was unfair, the Sixth Circuit required 2 Live Crew, in defense of its use, to bear the burden of proof by showing that the economic value of the original was not diminished.[216] Conceding that the work was a parody, but pointing out that the purpose of the derivative work was just as important as its character, the Sixth Circuit found that the commercial nature of 2 Live Crew's song was dispositive.[217] The Appellate Court, therefore, determined that the first weight factor militated against a finding of fair use.[218]

The second statutory factor also weighed against the defendants because the court found that "Oh, Pretty Woman" was clearly a creative work.[219] Quoting *MCA, Inc. v. Wilson*, the Sixth Circuit emphasized that it was significant that the original work "'represented a substantial investment of time and labor made in anticipation of financial return.'"[220]

Factor three, the amount and substantiality of the portion of the original work that was used in the parody, did not provide support for the defendants' position. The Sixth Circuit found that, even if not weighing against a finding of fair use, the third weight factor in this instance was at best neutral.[221] The court was concerned that the parody closely followed the music and the meter of the original.[222] 2 Live Crew may not have appropriated too much quantitatively, but building their tune around the original work's eminently recognizable drum and bass guitar riff was seen as substantial qualitative copying.[223] Invoking the "conjure up" test applied by the Ninth Circuit in *Walt Disney Products v. Air Pirates*,[224] the court

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214. *Id.* at 1436-37.

215. Harper & Row, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). Refer to notes 189-91 *supra* and accompanying text.

216. *Campbell*, 972 F.2d at 1437 (quoting Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986)).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981)).

221. *See id.* at 1437-38.

222. *Id.* at 1438 (noting that an Acuff-Rose expert witness believed that 2 Live Crew probably had sampled "Oh, Pretty Woman").

223. *Id.*

224. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979).

found that 2 Live Crew had appropriated more of the original than necessary.[225] The Sixth Circuit acknowledged, as had the *Elsmere* court,[226] that generally, in order to make a humorous point, parodies are allowed to use more of a copyrighted work than other types of fair use.[227] In this case, however, the majority felt that the defendants had taken "the heart of the original" and "purloin[ed] a substantial portion of the essence" of the copyrighted work.[228]

The fourth and final statutory criterion was also held to weigh against a finding of fair use. In determining the effect of the parody on the potential market for the copyrighted work, the Sixth Circuit attempted to balance the competing needs of the copyright owner and society at large.[229] Having had trouble even finding that 2 Live Crew's song was a parody, the court seemed unable to apprehend any meaningful message or public benefit in it at all.[230] As such, despite the testimony of the defendants' expert witnesses that the two songs were aimed at entirely different audiences, the Sixth Circuit found that, because the use of the copyrighted work was clearly commercial, the likelihood of future harm to the plaintiff's market could be presumed.[231] In so finding, the court pointed out that the market for derivative works must also be taken into account.[232] In other words, whereas the works at issue in this case appeal to different audiences, it should be the prerogative of the copyright owner to license his song to the rap group of his choice.

Finding that the lower court erred in placing insufficient emphasis on the mandate of *Harper & Row* and *Sony*, the circuit court reversed the district court's decision.[233] "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use," explained the Sixth Circuit.[234] Had the copyrighted work been used in exactly the same way, but at a private gathering, and without any profit

225. *Campbell*, 972 F.2d at 1437-38.
226. Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 n.1 (2d Cir. 1980).
227. *Campbell*, 972 F.2d at 1437.
228. *Id.* at 1438.
229. *Id.* The court recalled a Second Circuit decision stating that a balance must be struck "'between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair.'" *Id.* (quoting Rogers v. Koons, 960 F.2d 301, 311 (2d Cir.)), *cert. denied*, 113 S. Ct. 365 (1992).
230. *Id.* at 1438-39.
231. *Id.* at 1438.
232. *Id.* at 1438-39.
233. *Id.* at 1439.
234. *Id.*

motive, chances are the use would be fair.[235]

V. THE SUPREME COURT DECISION: IF THAT'S THE WAY IT MUST BE, O.K.

> Pretty Woman, don't walk on by,
> Pretty Woman, don't make me cry,
> Pretty Woman, don't walk away,
> Hey, O.K.
> If that's the way it must be, O.K.[236]

A. The Opinion of the Court

The Supreme Court reversed the judgment of the Sixth Circuit in a unanimous decision delivered by Justice Souter.[237] The Court acknowledged that a parody may qualify as fair use.[238] Parodic works, however, must be examined on a case-by-case basis according to the purposes of copyright law.[239] The nature of the fair use analysis renders rigid rules inappropriate.[240] Therefore, the Supreme Court rejected the Sixth Circuit's mechanical application of a commercial presumption against fair use.[241] In the appropriate fair use enquiry, commercial purpose is relevant but not dispositive.[242] The Sixth Circuit erred by overemphasizing the significance of the commercial nature of the rap recording.[243] It was also error for the lower court to hold that 2 Live Crew had necessarily copied excessively from "Oh, Pretty Woman."[244] The Supreme Court embraced the doctrine that a parody must copy enough of an underlying target work to conjure up that work and the Court determined that 2 Live Crew did not take more of the lyrics of "Oh, Pretty Woman" than necessary.[245] Nonetheless, the case was remanded to determine whether repetition of the original song's classic bass line was excessive copying.[246] The district

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235. *Id.*
236. ROY ORBISON, "Oh, Pretty Woman" (Monument Records 1964), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1179 app. A (1994).
237. *Campbell* 114 S. Ct. at 1179.
238. *Id.* at 1171.
239. *Id.* at 1172.
240. *Id.* at 1170.
241. *Id.* at 1173-74.
242. *Id.*
243. *Id.*
244. *Id.* at 1176.
245. *See id.*
246. *Id.* at 1176-77.

court was also charged on remand with determining whether 2 Live Crew's rap parody harmed the potential market for a nonparody rap version of "Oh, Pretty Woman."[247]

The Court emphasized the necessity of case-by-case analysis.[248] After briefly recounting the history and purposes of the fair use doctrine, Justice Souter explained that the nature of fair use precludes the application of bright-line rules.[249] He noted that §§ 101 and 107 of the 1976 Copyright Act indicate that the statutory language employed to define fair use is merely "illustrative and not limitative."[250] Moreover, the four enumerated factors must be addressed collectively and not weighed in isolation.[251] "[P]arody, 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."[252]

The Supreme Court held that the first fair use factor, the purpose and character of the use, focuses on the extent to which the accused work is transformative.[253] Parody may qualify as a transformative fair use.[254] In this respect, the Court endorsed *Fisher*[255] and *Elsmere*[256] to the extent that these decisions likened parody to other varieties of comment or criticism.[257] By definition, parody comments or criticizes. So for a finding of parody fair use, as stated by the Supreme Court, "[t]he threshold question . . . is whether a parodic character may reasonably be perceived."[258] Subjective judgments about aesthetics and "good taste" are inapposite.[259]

However, the Supreme Court pointed out that not every parody of a previous work qualifies as a fair use.[260] The Court suggested that in the fair use context, a parody must target the underlying work itself and not merely use that work as a vehicle.[261] "For the purposes of copyright law, the nub of the

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247. *Id.* at 1178-79.
248. *Id.* at 1170. "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 1170-71.
252. *Id.* at 1172.
253. *Id.* at 1171.
254. *Id.* at 1171-72.
255. Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).
256. Elsmere Music v. NBC, 623 F.2d 252 (2d Cir. 1980).
257. *Campbell*, 114 S. Ct. at 1171.
258. *Id.* 1173.
259. *Id.*
260. *Id.* at 1172.
261. *Id.* Where the commentary has no critical bearing on the substance or style of the original, the claim of fairness is diminished and the extent of commerciality is more significant. *Id.*

definitions, and the heart of any parodist's claim to quote from existing material, is 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."[262] The Court concluded, as the district and appellate courts had, that 2 Live Crew's version of "Oh, Pretty Woman" satisfied that criterion.[263]

The opinion then criticized the Sixth Circuit for inflating the importance of the commercial nature of the parody.[264] By applying the *Sony* presumption against commercial fair use, the Court of Appeals prematurely terminated the first factor enquiry.[265] The Supreme Court pointed out that the language of the Copyright Act clearly indicates that the commercial or nonprofit nature of a work is only one element of the necessary enquiry.[266] Few activities, including the examples listed and endorsed in the preamble of § 107, are conducted on a nonprofit basis.[267] The Sixth Circuit's "elevation of one sentence from *Sony* to a *per se* rule" was inappropriate.[268] Nevertheless, the commercial nature of a work must be taken into account.[269] The Court noted that a parody advertisement, for example, is less worthy of fair use status than a parody marketed for its own sake.[270]

The Court found that the second fair use factor, the nature of the copyrighted work, is less significant in a parody context than in other fair use analyses.[271] Agreeing with the lower courts, the Supreme Court found that "Oh, Pretty Woman" is the kind of expressive work that copyright is designed to protect.[272] But because almost all parodies copy this kind of recognizable creative work, the second factor is of questionable utility in sorting out parody fair use.[273]

The third fair use factor is related to both the first factor

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262. *Id.*
263. *Id.* at 1173.
264. *Id.* at 1173-74.
265. *Id.* at 1173 (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
266. *Id.* at 1174.
267. *Id.* The preamble paragraph of § 107 lists "criticism, comment, news reporting, teaching, . . . scholarship, [and] research" as potential fair uses. 17 U.S.C. § 107. Refer to note 186 *supra.*
268. *Campbell*, 114 S. Ct. at 1174.
269. *Id.*
270. *Id.* The Court's example illustrates the importance of context in the analysis. Context determines the weight to be given to a work's commercial element. *Id.*
271. *Id.* at 1175.
272. *Id.*
273. *Id.*

and the fourth.[274] The Court explained that the amount and substantiality of the portion used "may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth."[275] Relative to the underlying work, the quantity copied and the importance of the portion copied must be taken into account.[276] The Supreme Court acknowledged, however, that the unique nature of parody necessitates affording the parodist substantial latitude in the amount of copying that is sanctioned.[277] A parody must quote "the original's most distinctive or memorable features" to insure that the object of the parodist's ridicule is recognizable.[278] Therefore, copying may not be excessive even if the parodist takes the heart of the underlying work.[279] Although finding that parodic purpose justified the degree to which 2 Live Crew copied the lyrics of "Oh, Pretty Woman," the Court expressed no opinion about whether the rap group excessively copied from the original by repeating its distinctive bass line throughout their parody.[280] Instead, the case was remanded to the district court for evaluation of this fair use issue.[281]

With regard to the fourth factor, the effect of the use upon the market for the underlying work, the Supreme Court again held as error the Sixth Circuit's presumption against commercial fair use.[282] Justice Souter asserted that "[n]o 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes."[283] To the extent that a copying work is transformative, market substitution and harm are less likely.[284]

The Court found that typically, the fourth factor should not weigh against a pure parody fair use because copyright holders will rarely want to participate in a market for creations that ridicule their own work.[285] The 2 Live Crew parody cannot usurp a nonexistent derivative market for works that ridicule

274. *Id.*
275. *Id.* at 1176.
276. *Id.* at 1175.
277. *Id.* at 1176.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 1176-77.
282. *Id.* at 1177.
283. *Id.*
284. *Id.*
285. *Id.* at 1178.

"Oh, Pretty Woman."[286] Nonetheless, there is a protectible market for derivative works that possess characteristics beyond mere parodic criticism.[287] The Court noted that 2 Live Crew presented uncontested evidence that their song presented no threat of market harm to the original.[288] However, because the rap group submitted no affidavits addressing the possibility of market harm for nonparody rap versions of the original, the Supreme Court charged the district court with exploring this issue on remand.[289]

B. Justice Kennedy's Concurrence

Justice Kennedy expressed agreement with the opinion of the Court and then briefly recounted the four fair use factors vis-à-vis parody.[290] Concerned that the Court's definition of parody might prove overly inclusive, Justice Kennedy offered two further observations. First, he placed added emphasis on the prerequisite that a parody target the original work.[291] Second, he cautioned against allowing copiers to claim parody status as an afterthought.[292]

Justice Kennedy stressed that a parody must comment about or criticize the work on which it draws.[293] Regardless of how humorous or creative the second work is, it cannot qualify as a parody unless it targets the original work.[294] Moreover, ridiculing the style of the underlying work is not enough. "The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole . . . ."[295] Not convinced that 2 Live Crew's "Pretty Woman" was a legitimate parody, Justice Kennedy agreed that the district court could properly make such a determination by applying all the fair use factors.[296] Nonetheless, he proposed that a copying work should exhibit more than the possibility of parodic content to qualify as parody fair use.[297] Justice

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286. *Id.*
287. *Id.*
288. *Id.* 2 Live Crew had submitted uncontroverted affidavits on the issue of market harm to the original. *Id.*
289. *Id.* at 1178-79.
290. *Id.* at 1180-81 (Kennedy, J., concurring).
291. *Id.* at 1180.
292. *Id.* at 1181-82.
293. *Id.* at 1180.
294. *Id.*
295. *Id.*
296. *Id.* at 1181-82.
297. *Id.* at 1181.

Kennedy pointed out that "[a]lmost any revamped modern version of a familiar composition can be construed as a 'comment on the naivete of the original.'"[298] He warned future courts, therefore, to avoid granting parody status and protection to "just any commercial take-off [that] is rationalized *post hoc* as a parody."[299]

VI. ANALYSIS: WHAT DO I SEE

> I guess I'll go on home, it's late
> There'll be tomorrow night, but wait!
> What do I see
> Is she walking back to me?[300]

In *Campbell*, the Supreme Court addressed important questions about parody and its relationship to copyright law. The Court certified that parody qualifies as a legitimate fair use under certain circumstances.[301] Additionally, the opinion settled several issues that are crucial to fair use analysis in general. The Court pointed out that bright-line rules are inappropriate in a fair use enquiry and that accused works must be judged on a case-by-case basis according to all four of the statutory factors.[302] *Campbell* emphatically rejected the presumption that a commercial parody cannot succeed under factors one and four, and can never be a fair use.[303] Rather, the Court explained that "transformative" value should govern the first factor examination.[304]

Each of the other three factors also must be considered.[305] However, Justice Souter noted that the second factor is of little help in the typical parody case.[306] Addressing factor three, the Court acknowledged that, to conjure up the original, a parodist is justified in copying more of an underlying work than a nonparody copier.[307] As explored in factor four, a parody is

298. *Id.* Justice Kennedy was quoting Justice Souter's opinion which explained that one could reasonably perceive that 2 Live Crew's song was commenting on "Oh, Pretty Woman." *Id.* (quoting *id.* at 1173).

299. *Id.* at 1182.

300. ROY ORBISON, "Oh, Pretty Woman" (Monument Records 1964), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1179 app. A (1994).

301. *Campbell*, 114 S. Ct. at 1171.

302. *Id.* at 1170-71.

303. *Id.* at 1179.

304. *Id.* at 1171.

305. *Id.* at 1170-71.

306. *Id.* at 1175.

307. *See id.* at 1176 (stating that a parodist is entitled to copy as much of a song as necessary to "conjure up" the original, including segments that may be

rarely a threat to the potential market of the original work,[308] and there is no derivative market for simple parody.[309] But the Court cautioned that a complex parody may threaten the derivative market for similar nonparody works.[310]

Unfortunately, although *Campbell* presented a clear-cut clash of cultures and values, the Supreme Court did not explore the potential for cultural bias inherent in parody litigation. The Court noted that identifying a work as a parody is important but that aesthetic evaluation is improper.[311] From *Bleistein v. Donaldson Lithographing Co.*,[312] Justice Holmes' principle of aesthetic nondiscrimination was recalled.[313] However, the opinion did not explicitly address the cultural tensions contending beneath the surface of the instant case. Nor did the opinion examine the First Amendment implications of the parody fair use defense.

A. Fair Use and the Commercial Presumption

The purpose of copyright law is to benefit the public by promoting creativity.[314] Enhanced cultural achievement and the advancement of knowledge is the ultimate goal.[315] By guaranteeing artists and authors a fair return for their labor, copyright protection is intended to stimulate experimentation and further creative endeavor.[316] Therefore, copyright law gives artists a property right in their creation.[317] "It is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ."[318] An elaboration of

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considered the "heart" of the original work).

308. *Id.* at 1177-78.

309. *Id.* at 1178.

310. *Id.*

311. *Id.* at 1173.

312. 188 U.S. 239, 251 (1903) (holding that posters advertising a circus qualified for copyright protection).

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

314. *See, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) (explaining that public access to valuable creative works may be achieved by according rights to authors and inventors).

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

316. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954) (stating that the economic philosophy behind copyright law is the belief that the best way to encourage authors and inventors to use their talents to advance public welfare is by a reward of personal gain).

317. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 1.6[A], at 10 (1989).

318. *Sony*, 464 U.S. at 429.

Article I of the U.S. Constitution,[319] the Copyright Act has been substantively revised and expanded four times since Congress passed the first such act in 1790.[320] Musical works and accompanying lyrics, including sound recordings, are accorded statutory protection in the 1976 Copyright Act.[321] The fair use doctrine, which sanctions socially beneficial copyright infringement, is also codified in the 1976 act.[322] Though the act does not specifically mention parody,[323] courts and commentators generally acknowledge that works of parody fall within the ambit of sanctioned fair use purposes.[324] "[P]arody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law."[325]

The Copyright Act grants to copyright owners two distinct categories of rights pertaining to music and musical compositions. These categories distinguish the rights of a copyright owner of a musical composition from those of a copyright owner of a sound recording. There is a formidable array of rights which accrue to the copyright owner of a musical composition.[326] The copyright owner of a sound recording, however, has a more limited bundle of rights. Under the Copyright Act, she is denied both performing rights and the right to recordings that sound like hers but are based on "an independent fixation of other sounds."[327] Therefore, a parodist may exactly imitate

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319. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. CONST. art. I, § 8, cl. 1, 8.

320. Van Hecke, *supra* note 52, at 467.

321. *See* 17 U.S.C. § 102(a) (1988 & Supp. V 1993).

322. *See* 17 U.S.C. § 107. Refer to note 186 *supra*.

323. *See* 17 U.S.C. § 107.

324. Refer to note 349 *infra*. Parody is usually characterized as "criticism" or "comment" for purposes of fair use analysis. *E.g.*, Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir. 1964) (declaring that parody should be accorded substantial freedom because it is more than entertainment; it is "a form of social and literary criticism"); 3 NIMMER & NIMMER, *supra* note 43, § 13.05[C], at 13-102.20, 13-102.26 to 13-102.27 (quoting *Berlin*, 329 F.2d at 545).

325. Rogers v. Koons, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992). However, the court held that parody art work modeled after plaintiff's photograph was not fair use because defendant produced parody for profit and therefore future harm to plaintiff's market was presumed. *Id.*

326. *See* 17 U.S.C. § 106 (listing generally the rights accorded to a copyright owner). The copyright owner of a musical composition has the exclusive right to do and authorize the following: reproduction of the copyrighted work in copies or phonorecords; preparation of derivative works; the distribution of copies or phonorecords of the copyrighted work to the public; performance of the work publicly; and display of the work publicly. *Id.*

327. 17 U.S.C. § 114(a), (b) (1988 & Supp. V 1993).

a recording without risk of infringing the copyright of the sound recording owner. Musical composition copyright owners are subject to the provisions of § 115 of the Copyright Act, which provides for compulsory licensing of musical compositions.[328] However, because a licensed arrangement must be faithful to the basic melody and fundamental character of the copyrighted work, parodists generally would be unable to take advantage of the compulsory licensing provision.[329] A parody, by definition, must change the basic character of a work.[330] Therefore, some musical parodists license all the musical compositions they parody directly from the copyright owners.[331]

A finding of copyright infringement requires a showing of copying and improper appropriation. A plaintiff must prove two things: first, that she owns the copyright at issue; and second that the defendant copied from the original work.[332] As prima facie evidence of ownership, a copyright registration certificate

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328. 17 U.S.C. § 115 (1988 & Supp. V 1993). After recording and release to the public in the United States, a nondramatic musical composition may be licensed, recorded, and released by anyone who follows the procedures set forth in the act and pays the owner the applicable royalty rates. *Id.* § 115(a)(1). Until recently, the Copyright Royalty Tribunal set the current compulsory royalty rate for each copy of a song manufactured and sold at 5.7¢ or 1.1¢ per minute, whichever is greater. Steven R. Gordon & Charles J. Sanders, *How Copyright Law Applies to Musical Parody*, N.Y. L.J., Jan. 25, 1991, at 5, 7; *see* 37 C.F.R. 307.3(e) (1993). The royalty rates have since been increased to 6.60¢ per copy or 1.25¢ per minute, whichever is greater. 58 Fed. Reg. 60,787 (1993) (correcting the previous amendment of 37 C.F.R. § 307.3(f) published in 58 Fed. Reg. 58,282 (1993)).

329. 17 U.S.C. § 115(a)(2). It is typical for a record company to control the master use rights, while a commercial publisher controls the publishing rights. Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, N.Y. L.J., March 16, 1992, at 1, 5. Both enterprises welcome cover versions of a copyrighted work because they are anxious to license the work for the revenue generated. *Id.*

330. Refer to notes 48-50 *supra* and accompanying text.

331. *E.g.*, Steven R. Gordon & Charles J. Sanders, *Copyright Law Applications In Musical Parody Instances*, N.Y. L.J., Feb. 1, 1991, at 5, 7 (explaining that parodist Weird Al Yankovich takes this approach). The authors suggest that Yankovich could not justify a claim of fair use because "[h]is taking of the full chord structure, melody and portions of the lyrics of the original underlying musical compositions . . . is clearly substantial enough to pre-empt a finding of fair use as a matter of law, regardless of any number of 'mitigating' circumstances which might exist." *Id.* Moreover, Yankovich's parodies are generally devoid of social or political comment and, therefore, they would probably not qualify for an expansion of permissible use grounded in the First Amendment. *Id.*

332. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991) (holding that original telephone directory publisher had no protectable right because alphabetical compilation of white pages in telephone directory not copyrightable—minimum standard of originality not met); 3 NIMMER & NIMMER, *supra* note 43, § 13.01, at 13-4 to 13-5. To show infringement, the Supreme Court requires that "two elements . . . be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications*, 499 U.S. at 361.

is generally sufficient.[333] Copying is typically shown by establishing that the defendant had access to the copyrighted work and that there is "substantial similarity" between the two creations.[334] Negligible copying is considered de minimis and is not actionable.[335] But there is no definable minimum measure of substantiality.[336] A common, but erroneous, bit of musician's folk wisdom is that copying no more than three bars from a musical work cannot be considered infringement.[337] In reality, the test for determining a violation cannot be reduced to a formula based on a musical timing.[338]

An exception to the exclusive right of authors to control their works is the doctrine of fair use.[339] Because occasionally it is in society's interest for one artist to create something new from the work of another, courts traditionally have found unauthorized copying defensible under certain circumstances.[340] Articulated in case law for the first time in 1841 in *Folsom v. Marsh*,[341] the fair use doctrine focuses on whether use of a copyrighted work is justifiable enough to preclude a finding of infringement.[342] As explained by the Supreme Court in *Harper & Row*, fair use is "'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'"[343] At common law the balancing of

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333. 3 NIMMER & NIMMER, *supra* note 43, § 13.01[A], at 13-6.

334. *Id.* § 13.01[B], at 13-10.1.

335. 3 NIMMER & NIMMER, *supra* note 43, § 13.03[A], at 13-23; Van Hecke, *supra* note 52, at 469.

336. *See* 3 NIMMER & NIMMER, *supra* note 43, § 13.03[A], at 13-24 (quoting Judge Learned Hand in Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d Cir. 1930)), *cert. denied*, 282 U.S. 902 (1931).

337. 3 NIMMER & NIMMER, *supra* note 43, § 13.03[A] [2], at 13-48.

338. Snowden, *supra* note 115, at 62, 71 (quoting New York music attorney Richard Grabel, who continues, "[t]he basic legal standard is substantial similarity—there's a threshold and if you cross it, bang, you're guilty. If you stay just shy of that threshold, you're using the common language of pop music").

339. Refer to notes 53-54 *supra* and accompanying text.

340. 3 NIMMER & NIMMER, *supra* note 43, § 13.05, at 13-85.

341. William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 667 (1993) (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4,901)).

342. *Folsom*, 9 F. Cas. at 348 (holding that use of correspondence taken from copyrighted biography of George Washington was infringement). In *Folsom*, Justice Story introduced various criteria to be weighed in a fair use evaluation: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.* These criteria are reflected in § 107 of the 1976 Copyright Act, 17 U.S.C. § 107, and quoted in Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994). Refer to note 186 *supra*.

343. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

the public interests with those of the original author was a confusing and inexact process. Understandably, the fair use issue has been called "the most troublesome in the whole law of copyright."[344]

In response to the historical confusion and inconsistency that has plagued fair use decisions, Congress codified the fair use doctrine in the 1976 Copyright Act at § 107.[345] Four factors are enumerated to help determine whether the use made of a copyrighted work may be considered fair use.[346] These factors, however, are intended to represent only some of the criteria applicable to a fair use analysis and should not be seen as wholly definitive or all-encompassing.[347] As framed by Congress these four factors are: the purpose and character of the use; the nature of the copyrighted work; how much of the protected work is used; and the effect of the use upon the protected work's potential market.[348] Parody is not explicitly mentioned among the examples of fair use listed in § 107 but it is specifically mentioned as a possible fair use in the House Report.[349]

Appropriately, therefore, the Supreme Court based the *Campbell* decision on a parody analysis governed by § 107 and the four fair use criteria.[350] After an abbreviated recollection of the purpose and common law history of the doctrine, Justice Souter emphasized the necessity for flexibility in any fair use analysis.[351] The Court explicitly rejected bright-line rules in

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

345. *See* 17 U.S.C. § 107. Refer to note 186 *supra*.

346. *Id.*

347. *Id.* The congressional intent underlying the codification of the fair use doctrine is apparent from the text of the House Report.

> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. . . .
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> . . . The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute . . . .

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679-80.

348. *See* 17 U.S.C. § 107. Refer to note 186 *supra*.

349. *See* H.R. REP. NO. 1476, *supra* note 347, at 65, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (listing examples, including parody, of activities which may be, and have been, considered fair use). Refer to note 324 *supra*.

350. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1172 (1994).

351. *Id.* at 1170.

favor of a case-by-case approach.[352] This repudiation of the Sixth Circuit's simplified analysis has been hailed by both commentators and music industry executives.[353] Formulaic rules of decision are inappropriate to fair use according to the legislative history,[354] past decisions,[355] and legal scholarship.[356] Despite any resulting inconvenience for decision makers, fair use must remain sensitive to the facts of each individual case.[357] In addition, the Court confirmed that the four factors enumerated in § 107 must be considered together.[358] "All are to be explored, and the results weighed together, in the light of the purposes of copyright."[359]

1. Purpose and Character of the Use. Arguably, in *Campbell*, the Court's analysis of the first fair use factor contained many of the most significant pronouncements of the case. This is appropriate because, as Judge Pierre Leval has written, "Factor One is the soul of fair use."[360] The Court's unequivocal rejection of the commercial presumption is introduced in reference to the first factor.[361] This clarification of *Sony*'s presumption against commercial fair use[362] is the principal legacy of the *Campbell* opinion. Professor Howard Abrams contends that, even in the context of a fourth factor market harm analysis, it is the most important aspect of the decision for purposes of lower court fair use decisions.[363] The Court pointed out that,

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352. *Id.*

353. *See, e.g.*, Holland, *supra* note 19, at 6 (noting the approval of Edward Murphy, president of the National Music Publishers Association and Harry Fox Agency); L. Ray Patterson, *Back From The Dead, in The Law of Intellectual Property: Changes, and Complexities*, LEGAL TIMES, May 2, 1994, at 16, 16, 22 (suggesting that the Supreme Court revived the original spirit of the fair use doctrine by correcting "[t]he lower courts' misinterpretation of the commercial-use presumption").

354. Refer to note 347 *supra* and accompanying text.

355. *See, e.g.*, Stewart v. Abend, 495 U.S. 207, 236 (1990). As quoted in *Campbell*, the fair use doctrine "'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" 114 S. Ct. at 1170 (quoting *Stewart* in which the Court quoted Iowa State University Research Found., Inc. v. ABC, 621 F.2d 57, 60 (2d Cir. 1980)).

356. *See, e.g.*, Patry & Perlmutter, *supra* note 341, at 719 (noting that the fair use doctrine must remain sensitive and that its traditional nature is devoid of presumptions, formulas, and rigid rules).

357. *Id.*

358. *Campbell*, 114 S. Ct. at 1171.

359. *Id.*

360. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

361. *Campbell*, 114 S. Ct. at 1173-74.

362. *Id.* at 1174. Refer to notes 189-91 *supra* and accompanying text.

363. Abrams, *supra* note 19, at 7.

instead of necessarily claiming nonprofit status, a use must evince a purpose different from the underlying work to prevail in a factor one enquiry.[364] In a helpful characterization of the appropriate test, the Supreme Court said that a copying use should be "transformative."[365] And after defining parody, the Court, for the first time, explicitly acknowledged that parody may qualify as a fair use.[366]

"We granted certiorari," wrote Justice Souter, "to determine whether 2 Live Crew's commercial parody could be a fair use."[367] The Court found that such a use could be fair and therefore reversed the judgment of the Court of Appeals.[368] In the opinion of the Court, by misreading § 107 and *Sony* the Sixth Circuit had exaggerated the significance of the parody's commercial nature.[369] The Sixth Circuit properly considered that 2 Live Crew recorded its parody as a commercial venture but overemphasized the importance of this fact. In *Campbell*, the Supreme Court made clear that, as one of a number of relevant factors, commercial nature merely "'tends to weigh against a finding of fair use.'"[370] The construction of a per se rule based on a line of dictum from *Sony* was inappropriate.[371]

The copyright statute states that consideration of "whether [a] use is of a commercial nature or is for nonprofit educational purposes" is relevant to a first factor analysis.[372] Nonetheless, this passage is prefaced by the term "including," which is defined by the statute itself as meaning "illustrative and not limitative."[373] The Supreme Court appropriately found in *Campbell* that, although specifically mentioned in § 107, the commercial or nonprofit nature of a copying use is only one of the relevant considerations.[374] As Judge Leval noted in a recent fair use decision, the *Sony* commercial presumption "is easily

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364. *Campbell*, 114 S. Ct. at 1171.
365. *Id.*
366. *Id.*
367. *Id.* at 1169 (citation omitted). The grant of certiorari was welcomed by commentators such as Professors Patry and Perlmutter, who cite the Sixth Circuit's decision in *Campbell* as "an extreme example of a misreading of the statute and the Supreme Court fair use decisions . . . [that] provides the Court with an excellent vehicle to clarify the meaning of its own statements on the issue of commercial use." Patry & Perlmutter, *supra* note 341, at 671.
368. *Campbell*, 114 S. Ct. at 1179.
369. *Id.* at 1173-74.
370. *Id.* at 1174 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).
371. *Id.*
372. 17 U.S.C. § 107. Refer to note 186 *supra*.
373. 17 U.S.C. § 101.
374. *Campbell*, 114 S. Ct. at 1174.

overcome by a transformative, nonsuperseding use."[375]

The Supreme Court embraced Judge Leval's emphasis on the transformative nature of the use.[376] The "transformative" test was presented as a reiteration of Justice Story's seminal formulation of the fair use analysis in *Folsom*.[377] The key factor on enquiry is "whether the new work . . . alter[s] the first with new expression, meaning, or message."[378] It focuses on whether the copier is genuinely contributing something worthwhile to society or merely taking a free ride on the creativity of another. In the words of Judge Leval:

> If . . . the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[379]

Clearly, as the *Campbell* Court insisted,[380] a use that advances the arts by transforming a previous work serves the purpose for which copyright was created.[381] A parody is by the court's definition a transformative use.[382]

To qualify as a parody in the fair use context, however, the second work must to some extent target the underlying work.[383] Distinguishing parody from satire, which does not need to mimic another work to make its point,[384] Justice Souter noted that the parodist has a legitimate claim to use at least a portion of the targeted creation.[385] Therefore, to the

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375. American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 13 (S.D.N.Y. 1992). Continuing, Judge Leval quotes from a Second Circuit decision, " 'Only an unduly narrow reading of the language of *Sony Corp.* and an inattention to the context could lead to the conclusion that the Court intended to attach heightened significance to the element of commerciality.' " *Id.* (quoting Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2nd Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987)).

376. *See Campbell*, 114 S. Ct. at 1171. Professor William Fisher uses "transformative" in a different sense. In his article exploring how the fair use doctrine might be most beneficially recast, Professor Fisher considers a use transformative to the extent that it facilitates public interaction or creative engagement. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1768 (1988).

377. *Campbell*, 114 S. Ct. at 1171 (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (No. 4,901)).

378. *Id.* at 1171.

379. Leval, *supra* note 360, at 1111.

380. *Campbell*, 114 S. Ct. at 1171.

381. Refer to notes 314-18 *supra* and accompanying text.

382. *Campbell*, 114 S. Ct. at 1171.

383. *Id.* at 1172 (noting that the heart of any parodist's claim is the use of some elements of the original to create a new work that comments on the original).

384. Refer to notes 39-46 *supra* and accompanying text.

385. *Campbell*, 114 S. Ct. at 1172 (noting that satire requires justification for the

degree that a parody comments on the original work and not simply some general target, a finding of fair use is more likely and factors such as commerciality and market substitution are less important.[386] As Professor Abrams explains, "The more the parody is tightly aimed at ridiculing the original, the greater latitude the parodist is allowed to use elements of the original."[387] Alternatively, when there is minimal risk of harming the market for the original work, "taking parodic aim at an original is a less critical factor in the analysis."[388]

Justice Kennedy asserted a stronger rule in his concurrence.[389] To qualify for fair use consideration, he demanded that a parody target more than the general style of the underlying work or the genre to which it belongs.[390] This would appear to be an overly restrictive qualification. By explaining that copyright holders are unlikely to license works that are critical of the copyrighted work, Justice Kennedy justified protecting parody that targets the original work.[391] The implication is that approval for a parody is easier to secure from a copyright holder when the parody does not ridicule specifically her own creation.[392] To the contrary, a parody criticising a style or genre through the use of a representative work is as unlikely to be licensed by the creator of the representative work as if the work had been targeted directly. If a parodist wishes to lampoon a general style, conjuring up one of the most recognizable examples of that style is an effective technique that should not be disapproved per se. Likewise, when a parody ridicules the audience of a copied work the copyright holder of the copied work is unlikely to license the parody. Typically, the copyright holder would identify with her audience or not wish to alienate them.[393] Under such circumstances a parodist should be

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very act of borrowing).

386. *Id.* (noting, however, that if the alleged infringer uses the material merely to avoid the drudgery of creation, then the claim of fairness may vanish).

387. Abrams, *supra* note 19, at 6.

388. *Campbell*, 114 S. Ct. at 1172 n.14. The Court suggests that in such a case even satire and parodies aimed at wider targets may be found fair. *Id.*

389. *Id.* at 1180 (Kennedy, J., concurring) (restricting fair use for parody to works whose subject is the original composition).

390. *Id.* (noting, however, that if the parody targets the original, it may target these features as well).

391. *Id.*

392. *See* Gordon, *supra* note 315, at 1633 (suggesting that even if he were offered money, the owner of a work would be unlikely to license a hostile review or parody of his own creation).

393. The Capitol Steps, a political parody group, set clever new lyrics to popular tunes. Bisceglia, *supra* note 69, at 15. It is likely that Tammy Wynette, who wrote and recorded "Stand by Your Man," would be less than enthusiastic about licensing "Stand by Your Klan," the Capitol Steps' lampoon of David Duke and his loyal

accorded the protection of the fair use doctrine. Clearly, targeting a style or "'class of authors'"[394] would satisfy the requirement expressed in the *Campbell* opinion—commenting "at least in part" on the original author's work.[395]

The Supreme Court, unlike the Sixth Circuit, discerned an element of social commentary in the 2 Live Crew song and granted that to some degree the song "could be perceived as commenting on the original."[396] After confronting these threshold challenges to parody fair use, the *Campbell* Court continued to examine the rap song according to its purpose and character.[397] Significantly, the Court did not discount altogether the importance of a commercial purpose enquiry, but rather merely disapproved of the mechanical application of the commercial presumption introduced in *Sony*.[398] Commercial purpose must be considered, but in such an analysis the unique characteristics of parody must not be ignored. *Sony* dealt with the reproduction of television broadcasts, a use which produced no new beneficial work.[399] Parody, as a species of transformative fair use, produces a new work of social and artistic worth.[400] In his dissent in *Campbell*, Judge Nelson of the Sixth Circuit pointed out that both of the cases relied on by the majority, *Harper & Row* and *Sony*, "involved mechanical copying, literally or figuratively, without alteration of the copied material."[401] These cases had little in common with *Campbell* and the parody scenario.

Indicating that commerciality cannot be considered dispositive, particularly in the parody context, the Supreme Court

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supporters. *Id.* It is unclear whether Bob Dylan would want to license "Like a Suburban Drone," a gibe by the Capitol Steps at many of the individuals who identified in the Sixties with the lyrics of "Like a Rolling Stone." *See* Patry & Perlmutter, *supra* note 341, at 715 n.211. "This type of use should be considered a parody for fair use purposes." *Id.*

394. *Campbell*, 114 S. Ct. at 1172 (quoting the definition of parody from THE OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989)).

395. *Id.* "A parody that more loosely targets an original than the [2 Live Crew song does] may still be sufficiently aimed at an original work to come within our analysis of parody." *Id.* at 1172 n.14.

396. *Campbell*, 114 S. Ct. at 1173 (noting, however, that a high rank would not be assigned to the parodic element in 2 Live Crew's song).

397. *Id.* at 1174.

398. *Id.* (quoting from Harper & Row Publishers Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) to illustrate commerciality as one factor).

399. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984) (noting that a rigid application of the rule to nonproductive uses would stifle any use).

400. Refer to notes 38-55 *supra* and accompanying text.

401. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1443 (6th Cir. 1992) (Nelson, J., dissenting), *rev'd*, 114 S. Ct. 1164 (1994).

disdained a rote revisiting of the *Sony* commercial presumption.[402] As one commentator notes, "Reason says that if such use is always unfair, then 'always' is superfluous. Therefore, the presumption must be rebuttable."[403] In *Fisher*, the Ninth Circuit invoked the mandate of commercial presumption but allowed the defendant to offset the presumption against fair use by showing that the parody would not adversely affect the market for the original.[404] The Ninth Circuit explained that if the purpose behind the parody is social commentary rather than an attempt to profit from the copyrighted work, the "defendant can rebut the presumption by convincing the court that the parody does not unfairly diminish the economic value of the original."[405] Clearly, commercial motive is only one factor among many to consider in a parody fair use analysis, but it should be considered.

The importance of commerciality, however, will vary with the context of the use.[406] In a passage which one commentator characterizes as ominous,[407] the Supreme Court warned that parodies used as advertisements warrant less indulgence in a fair use enquiry.[408] This caution notwithstanding, Justice Souter noted that "nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research . . . 'are generally conducted for profit in this country.'"[409] Certainly few parodies are generated for strictly educational purposes and without regard to profit.[410] One commentator points out that of necessity authors are governed by both commercial and artistic considerations.[411] All artists, even parodists, have to eat.

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402. *Campbell*, 114 S. Ct. at 1174 (adding that Congress urged the courts to preserve the breadth of their view of relevant evidence).

403. Patterson, *supra* note 353, at 16.

404. Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986). The Supreme Court aligned itself with the *Fisher* court regarding its holding that parody could qualify as fair use. *Campbell*, 114 S. Ct. at 1171.

405. *Fisher*, 794 F.2d at 437 (noting that the initial presumption of unfair exploitation need not be fatal to the defendant's cause).

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

407. Bisceglia, *supra* note 69, at 16.

408. *Campbell*, 114 S. Ct. at 1174; *see, e.g.*, Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 832 (S.D.N.Y. 1990) (holding that, after the rap group the Fat Boys declined to perform in a commercial for Miller Beer and the company produced a commercial which featured Joe Piscopo imitating the distinctive look and style of the Fat Boys, the television commercial was not parody because its "use [was] entirely for profit").

409. *Campbell*, 114 S. Ct. at 1174 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985)).

410. Goldberg & Bernstein, *supra* note 20, at 3, 29 (asserting that a commercial purpose does not mean that the parodist should lose on factor one).

411. *See* Goetsch, *supra* note 22, at 44 (giving examples of artists who produced

To require that every parody be undertaken with no thought of financial gain is unrealistic, and counterproductive. Such a rule would frustrate, rather than foster, imaginative social criticism and comment.[412]

> [M]erely because parodies are more often than not written for commercial purposes does not mean that the parodist should lose on factor one. On the contrary, commercial parodies are protectable as long as they comment, criticize or contribute some original element for humorous effect or commentary. Parodists should therefore usually win on factor one.[413]

This is consistent with the Supreme Court holding in *Campbell.*

2. *Nature of the Copyrighted Work.* This factor was all but ignored in *Campbell.*[414] In a typical fair use analysis, the copyright owner prevails on factor two if her work is creative and not merely factual.[415] Accordingly, in rap and sampling cases, consideration of the nature of the copyrighted work "will generally be found to favor a plaintiff owner of a musical copyright."[416] Agreeing with the lower courts, the Supreme Court found that Orbison's "Oh, Pretty Woman" is a creative work, the kind of expression that copyright was designed to

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work for commercial as well as artistic purposes). Justice Souter quotes Samuel Johnson as saying that "'[n]o man but a blockhead ever wrote, except for money.'" *Campbell,* 114 S. Ct. at 1174 (brackets in original) (quoting from 3 BOSWELL'S, LIFE OF JOHNSON 19 (G. Hill ed. 1934)).

412. Dan Shaked, *Application of Copyright Act of 1976 to Parody,* N.Y. L.J., June 7, 1991, at 5, 7. In the second installment of a three part piece on parody and § 107, Dan Shaked notes that the narrow reading of the *Sony* commercial presumption has been widely criticized. *Id.* He suggests that social commentators, especially parodists, would be deterred if they were unable to reap commercial benefit from their work. *Id.*

413. Goldberg & Bernstein, *supra* note 20, at 29.

414. *See* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1175 (1994) (stating that the nature of the copyrighted work is not helpful in resolving parody cases). It essentially was ignored by the Supreme Court in *Sony* as well. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984) (considering only very briefly the nature of televised copyrighted audiovisual work).

415. *Campbell,* 114 S. Ct. at 1175. Generally, informational works are allowed a wider scope of fair use than works created strictly for entertainment. *See, e.g.,* Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963, 972 (9th Cir. 1981) (stating that a fair use claim is more likely to be accepted if the underlying work is characterized as informational and not entertainment), *rev'd,* 464 U.S. 417 (1984). In their treatise on Copyright, Nimmer and Nimmer point out that in reversing the Ninth Circuit, the Supreme Court nonetheless acknowledged that "'copying a news broadcast may have a stronger claim to fair use than copying a motion picture.'" 3 NIMMER & NIMMER, supra note 43, § 13.05[A] [2], at 13-102.2 n.29.3 (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984)).

416. Goldberg & Bernstein, *supra* note 105, at 31 (discussing the implications of digital sampling).

protect.[417] However, the Court cautioned that this enquiry is of little practical use where parody is concerned.[418] Because "parodies almost invariably copy publicly known, expressive works," distinctions between expressive and factual underlying works usually are unprofitable.[419] It is not clear if Justice Souter merely is acknowledging that factor two will almost always weigh against a parodist, or suggesting that future courts should discount the importance of this factor in parody cases. A parodist might conceivably target a little known, factual work. Therefore, arguably, despite the preponderance of parodies based on creative works, factor two should remain a crucial test in every fair use analysis. Alternatively, it would be improper to penalize a work simply for possessing a characteristic that is all but essential to its nature, in this case the targeting of a recognizable creation. Surely, the court did not intend to suggest that, by definition, a parody must invariably lose on one of four equally weighted statutory factors. Therefore, whereas no one factor may be valued over all the others, in parody cases the second factor most likely should be discounted relative to the remaining three factors.[420]

In finding that factor two favored Acuff-Rose, the district court and the Sixth Circuit both attached substantial importance to the fact that effort was expended in creating the copyrighted work.[421] In explaining their approach to this factor, the two courts quoted from *MCA, Inc. v. Wilson*.[422] The Second Circuit stated in *MCA* that, among other things, a court should consider whether the original work "represented a substantial investment of time and labor made in anticipation of financial return."[423] However, although not commenting on this issue in *Campbell*, the Supreme Court previously has rejected the "sweat of the brow" theory of copyright protection.[424] In *Feist*, the Court explained that the law of copyright

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

418. *Id.*

419. *Id.*

420. This Note argues *infra* that, especially in parody cases, elevating factor four in importance is inappropriate. Refer to note 447 *infra* and accompanying text.

421. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155-56 (M.D. Tenn., 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994); Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1437 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

422. *See Campbell*, 972 F.2d at 1437 (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981)); *Campbell*, 754 F. Supp. at 1155.

423. *MCA*, 677 F.2d at 182.

424. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353 (1991). "Known alternatively as 'sweat of the brow' or 'industrious collection,' the underlying notion was that copyright was a reward for the hard work that went into compiling

was not fashioned to force authors to duplicate factual findings already compiled by someone else.[425] Needless effort and expense are of no benefit to society. By analogy, it is likely that the "sweat of the brow" theory should no more apply to parody cases than to compilation cases. In providing social commentary, a parodist may use preexisting works as facts and ideas, as representative targets, symbols of society or some facet of it. Clearly, despite the district and circuit courts' findings in *Campbell*, the amount of effort expended in creating a work is inapposite in a fair use analysis. Even if it were relevant, the author of a parody, in creating her work, may strain and "sweat" just as much or more than the original author did in creating the copyrighted work. Surely, therefore, it would be unjust to accord per se greater weight to the labor of one than the other.[426] To the extent that, relative to the other three factors, factor two is considered at all in a parody fair use analysis, the amount of work expended in creating the underlying work is irrelevant.

3. How Much of the Protected Work is Used. The Supreme Court held that, with regard to the third fair use factor, "'the amount and substantiality of the portion used in relation to the copyrighted work as a whole,'" parody merits considerable indulgence.[427] The Court noted that the amount of copying that is justified depends on the purpose and character of the use, the factor one analysis.[428] Additionally, the Court

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facts." *Id.* at 352.

425. *Id.* at 357.

426. Some commentators have noted that there is an inherent, but questionable, bias in copyright law toward the first artist in time. They point to a tradition favoring the original author over authors who build on or add to the first work. This phenomenon is a manifestation of the romantic notion of authorship, which can be traced to eighteenth century Europe and the belief that an author creates original works *ex nihilo*. *See, e.g.*, BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 78 (1967) (concluding that "when copyright has gone wrong in recent times, it has been by taking itself too seriously, by foolish assumptions about the amount of originality open to man as an artificer, by sanctimonious pretensions about the iniquities of imitation"); James A. Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1423 (1992) (arguing that emphasis on original, solitary authorship is inappropriate for the regulation of information); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 304 (1992) (comparing the realities of contemporary authorship with "authorship" as defined by current copyright law); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship,"* 1991 DUKE L.J. 455, 462-63 (suggesting that unexamined adherence to the romantic notion of authorship has resulted in copyright inconsistencies).

427. *Campbell*, 114 S. Ct. at 1175 (quoting 17 U.S.C. § 107 (1988 & Supp. V 1993)).

428. *Id.* (applying a reasonableness standard to the quantity and value of the

acknowledged that a factor three enquiry should focus on the quality as well as the quantity of the portion used, and that verbatim copying generally tends to weigh against a finding of fair use.[429] However, because a parody, by definition, must bring to mind the work it targets, a parodist is afforded greater latitude than other copiers.[430] In the words of Justice Souter, "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."[431] It is hard to imagine how any song could ever be parodied if a musical parodist could not make use of a recognizable riff from a copyrighted work.

The Sixth Circuit acknowledged that for parody cases, factor three traditionally involved the "conjure up" test, but decided that this test did not support a fair use finding in favor of 2 Live Crew.[432] At the suggestion of Acuff-Rose's expert witness, the court found that the most familiar riff of "Oh, Pretty Woman" had probably been sampled directly from the copyrighted work.[433] The Sixth Circuit likened this to "taking the heart of the original."[434] In reversing the lower panel, the Supreme Court appropriately held that parody necessarily must copy the portion of a work that most readily conjures up that work.[435] Justice Souter explained that "[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."[436] Clearly, at a minimum a parodist is permitted to copy enough to conjure up the targeted work.

The Court did not explicitly state any general rule, however, about how much more should be permitted beyond the minimum needed for recognition. Rather, this must be decided case-by-case, taking into account all of the other fair use factors.[437]

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materials used).

429. *Id.* at 1175-76 (agreeing with the Sixth Circuit on this point).

430. *Id.* at 1176.

431. *Id.* Refer to note 60 *supra* and accompanying text.

432. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1437-38 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

433. *Id.* Refer to notes 120, 222-28 *supra*.

434. *Campbell*, 972 F.2d at 1438. It is interesting to note that, for purposes of this weight factor, the Sixth Circuit stressed the similarities between the two versions and ignored the extreme differences in the lyrics of the two songs. *See id.* at 1437-38. Yet, in explaining their reservations about categorizing the defendants' song as a parody, only the differences were acknowledged. *Id.* at 1435-36 n.8. Refer to notes 210-11 *supra* and accompanying text.

435. *Campbell*, 114 S. Ct. at 1176 (noting that 2 Live Crew had copied both the characteristic bass riff and the words in the first line of "Oh, Pretty Woman").

436. *Id.*

437. *Id.* (noting that if 2 Live Crew had copied a less memorable part of the

Noting the fact-driven nature of the fair use analysis, Professors Patry and Perlmutter suggest that beyond a minimum needed for conjuring up, general questions about how much parodists should be permitted to copy are essentially unanswerable.[438] Another commentator finds that "for practical purposes the Court seems to have simply thrown out th[e] third element. If the parodist can take the 'heart,' it hardly seems possible to take too much of a copyrighted work or that the owner would care about anything else."[439] As for *Campbell*, the Supreme Court found that the lyrics had not been excessively copied, but expressed no opinion regarding the repetition of the bass line.[440] Noting that 2 Live Crew added other sounds to the bass riff and altered the drum beat, the Court remanded the case to permit the district court to determine whether this copying was excessive.[441]

Of necessity, musical parody should be granted even more leeway to copy from a targeted work than other forms of parody. As explained in *Fisher*, "a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience."[442] Absent the distinctive bass riff of the original, any parody of "Oh, Pretty Woman" would be seriously handicapped. By remanding *Campbell*, the Court has left unresolved the issue of whether a parody that sets entirely new lyrics to music copied verbatim may be fair use.[443] Given a favorable showing vis-à-vis the other statutory factors, there may be no reason that such a parody could not qualify as a fair use.

4. The Effect of the Use Upon the Protected Work's Potential Market. In *Harper & Row* the Supreme Court called the fourth factor, "undoubtedly the single most important element of fair use,"[444] and the Sixth Circuit treated it as such in *Campbell*.

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song, the parodic nature of the work would not come through).

438. Patry & Perlmutter, *supra* note 341, at 713. The professors recall Judge Learned Hand's observation about separating idea from expression, " 'Nobody has ever been able to fix that boundary, and nobody ever can.' " *Id.* at n.204 (quoting Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931)).

439. Bisceglia, *supra* note 69, at 14.

440. *See Campbell*, 114 S. Ct. at 1176.

441. *Id.* at 1176-77.

442. Fisher v. Dees, 794 F.2d 432, 439 (9th Cir. 1986).

443. Refer to note 393 *supra* and accompanying text.

444. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). Some economists endorse the fair use exception only in those situations in which the market fails or the price demanded by the copyright holder is near zero. *Id.* at n.9.

Indulging in a second commercial presumption, the circuit court held that "the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists."[445] The Supreme Court held that such a presumption was no more appropriate in a fourth factor enquiry than it was in a first factor enquiry.[446]

Although the *Campbell* Court never explicitly addressed the issue, it reasonably may be inferred that in the parody context no one statutory factor should be given inordinate precedence over the others.[447] The typical parody case is distinguishable from the unique fact pattern of *Harper & Row*, where market harm was substantial and easily discernible. More generally, the legislative history and the explicit language of § 107 suggest that Congress did not intend to ascribe more weight to one factor than another.[448] In *American Geophysical*, Judge Leval argues that, especially in a parody case, it is improper to attach undue importance to the fourth statutory factor.[449] To hold otherwise "may mean a parody that flops is a fair use, but a commercially successful parody infringes."[450]

Beyond inflating the importance of factor four in *Campbell*, the circuit court erred with regard to this final factor by presuming that 2 Live Crew's parody inevitably would wreak havoc on the market for the original. Basing its decision on the premise that in the marketplace the copying work always competes with the underlying work, the Sixth Circuit merely echoed mechanically the mantra against commerciality introduced in factor one. Aside from the fact that most parodies are of necessity commercial,[451] unless it helps in determining whether a parody may tend to replace the original in the marketplace, any test of commerciality is irrelevant.[452] The Supreme

445. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

446. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1177 (1994) (limiting the *Sony* dicta to a verbatim copying of the original for commercial use).

447. *Id.* at 1170-71. The Court held that the results of all of the factors must be weighed together according to the purposes of copyright. *Id.* Notwithstanding the necessity of discounting factor two in parody cases, refer to note 420 *supra* and accompanying text, no one of the remaining factors should be valued over the others. Otherwise, although it is a beneficial art form that promotes the progress of science and the arts, any parody would begin a § 107 analysis with a serious handicap.

448. *See* Patry & Perlmutter, *supra* note 341, at 693-96. Refer to notes 186 & 347 *supra* and accompanying text.

449. American Geophysical Union v. Texaco, 802 F. Supp. 1, 20-21 (S.D.N.Y. 1992).

450. *Id.* at 21.

451. Refer to notes 407-11 *supra* and accompanying text.

452. Van Hecke, *supra* note 52, at 489.

Court properly held that no such presumption was justified.[453] Application of the *Sony* rule was inappropriate with regard to both factor one and factor four.[454] *Sony* involved the verbatim copying of a work in its entirety and consequently, if commercially marketed, the copy could supersede the original in the marketplace.[455] In the words of Justice Souter, "No 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes."[456] A parody is a transformative use and, therefore, not likely to usurp the market of its target.[457]

The Supreme Court identified three distinct markets that were implicated in *Campbell*.[458] The market for "Oh, Pretty Woman" itself, the market for pure parody rap versions, and the market for nonparody rap versions.[459] The first two markets were held not to be susceptible to actionable interference from a parody.[460] But the Court determined that the market for nonparody rap versions was protectable under copyright law.[461] Because 2 Live Crew had not introduced evidence to show an unlikelihood of harm to this market, the case was remanded for further proceedings.[462] Justice Souter's explanation in *Campbell* provides important insight into the fourth factor analysis generally appropriate for parodic works.

A parody cannot threaten the market for the original version of Roy Orbison's "Oh, Pretty Woman" because the two works would serve different audiences.[463] "As a result, in most parody cases, the fourth factor will tend to weigh in favor of fair use."[464] In *Fisher*, the Ninth Circuit found that the

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453. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1177 (1994).
454. *Id.* at 1179.
455. *Id.* at 1177.
456. *Id.*
457. *Id.*
458. *Id.* at 1177-78.
459. *Id.*
460. *Id.*
461. *Id.* at 1178.
462. *Id.* at 1178-79.
463. *Id.*
464. Patry & Perlmutter, *supra* note 341, at 693; *see also* Twin Peaks Prods. v. Publications Int'l, 996 F.2d 1366, 1377 (2d Cir. 1993) (noting that copyright owners rarely want to parody their own works and that therefore, typically, the fourth factor is found to favor parodists because their work satisfies an otherwise unoccupied market niche). Parodies make their point by reconfiguring the underlying work. Refer to notes 46-50 *supra* and accompanying text. Therefore, they are especially unlikely to satisfy audience demand for the original. In *Elsmere*, the defendants' parody appropriated the heart of the plaintiff's song, but the court found fair use because the parody could not fulfill demand for the original. Elsmere Music, Inc. v. NBC, 482 F. Supp.

defendant's parody had no effect on the market of the original because the songs were aimed at distinctly different audiences.[465] 2 Live Crew's expert witness testified in *Campbell* that the two songs' intended audiences were different, and that, rather than diminishing the market for the copyrighted work, the parody could generate new interest in the original.[466] In fact, there is evidence that the 2 Live Crew parody had a positive, rather than adverse effect on the potential market for the Acuff-Rose song.[467] "[Parody] often serves to promote rather than diminish the economic interests of the copyright owner."[468] Nevertheless, because it criticizes the copied work, a parody may sometimes harm the market for the original. The Supreme Court recognized that such harm is not a bar to fair use when it is produced solely by sharp criticism "[b]ecause 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.'"[469]

A copyright owner has the exclusive right to authorize derivative works,[470] and therefore an examination of potential market harm must take into account both the original work and possible derivative works.[471] A copyright owner should not have the potential market for derivative works eroded by unlicensed competitors. But this doctrine only makes sense if there is a likelihood that the copyright owner actually intends to

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741, 744, 747 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

465. Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986). The original song was a "romantic and nostalgic ballad," and the court did not believe that consumers looking for that kind of song would be satisfied with the parody. *Id.* The opening lyrics of the original, "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall," had been changed by the parodist to "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434.

466. 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*, 114 S. Ct. 1164 (1994). Remarking in his affidavit about the 2 Live Crew song, Krasilovsky stated, "'The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.'" *Id.*

467. Petitioners' Reply Brief on the Merits at 13, Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) (No. 92-1292). After 2 Live Crew's version of "Oh, Pretty Woman" was released, another rap group became interested in including the original version in one of their rap songs and attempted to license the original song from Acuff-Rose. *Campbell*, 114 S. Ct. 1164 at 1178-79. Acuff-Rose pointed to this request as evidence of a derivative rap market for "Oh, Pretty Woman," but the Supreme Court noted the absence of any evidence of harm. *Id.*

468. John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 119 (1988).

469. *Campbell*, 114 S. Ct. at 1178 (quoting BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)).

470. Refer to note 326 *supra*.

471. *Campbell*, 114 S. Ct. at 1178 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985)).

license derivative works.[472] If there is no chance that the copyright owner would license derivative works, public access to potentially beneficial works could be foreclosed. This would frustrate the purposes of copyright law and the doctrine of fair use. Copyright owners are unlikely to license at any price, derivative works that criticize their original creation.[473] Accordingly, the Supreme Court held that "there is no protectable derivative market for criticism."[474] To the extent that a parody is pure criticism it may invoke this powerful talisman in a fair use affirmative defense.[475] The parody created by 2 Live Crew has a more complex character, however. Rather than closely mimicking the style of the original song, 2 Live Crew incorporated rap into their parody. Therefore, Justice Souter declared that, parody considerations aside, "the derivative market for rap music is a proper focus of enquiry."[476] Consequently, in the absence of evidence bearing on this issue, the Court remanded the case.[477] Consistent with this approach, a rap parody was held to be an unfair use in *New Line Cinema Corp. v. Bertlesman Music Group, Inc.* because it directly competed with an authorized derivative work performed by another rap group.[478]

Despite the propriety of granting remand in *Campbell*, Acuff-Rose may stand little chance of establishing market harm for derivative rap versions of "Oh, Pretty Woman." One pair of commentators cautions that for Acuff-Rose to prevail in a fourth factor enquiry, the copyright holders must not only assert that a derivative market exists for rap versions, they must also show that the 2 Live Crew version makes other rap artists less likely to attempt to license the song.[479] Questioning the

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472. *See Campbell*, 114 S. Ct. at 1178.

473. Patry & Perlmutter, *supra* note 341, at 688-89. According to Professor Nimmer, "One justification for the fair use defense as applied to satire, parody and burlesque is that a satire, etc., of the work itself by its very nature is unlikely to be the subject of a license from the author of a serious work." 3 NIMMER & NIMMER, *supra* note 43, § 13.05[C], at 13-102.26 (footnote omitted).

474. *Campbell*, 114 S. Ct. at 1178.

475. *See id.* at 1178 n.24.

476. *Id.* at 1178.

477. *Id.* at 1179.

478. 693 F. Supp. 1517, 1531 (S.D.N.Y. 1988). During negotiations between the rap group, the Fat Boys, and the producer and distributor of *A Nightmare on Elm Street*, New Line Cinema, over authorization of a music video based on the film, another group, D.J. Jazzy Jeff and the Fresh Prince, released a rap song and video titled "A Nightmare on My Street." *Id.* at 1519-20.

479. Patry & Perlmutter, *supra* note 341, at 693. Whereas one other rap group has already sought to license "Oh, Pretty Woman," apparently after hearing the 2 Live Crew version, this may be difficult. Refer to note 467 *supra*. Additionally, one cannot help but wonder what chance there is that Acuff-Rose would ever endorse a

utility of the fourth factor, another commentator suggests that a finding of fair use is probable even if the district court is presented with irrefutable proof of market harm.[480] She notes that as long as "[d]estruction of markets is a common, even expected, byproduct of criticism . . . . [t]o say that 2 Live Crew's parody cannot be fair use because it destroyed Acuff-Rose's markets . . . . is an unlikely result."[481] In defense of the fourth factor's utility, however, it may be argued that the Court's sanction of destructive criticism did not necessarily encompass the destruction of markets for derivative works. Regardless, clearly the correct enquiry is whether Acuff-Rose's rap market was harmed, not by the criticism inherent in the 2 Live Crew parody but by the employment of rap music as a vehicle for that criticism.

In *Campbell,* through a lucid and methodical elaboration of the appropriate four factor analysis, the Supreme Court clarified a number of troublesome fair use issues. Parody was defined and recognized as a benefit to the public. The Court acknowledged that works of parody could satisfy the fair use criteria. Moreover, it was noted that, because of its nature, parody must be granted greater indulgence than other challenged uses. The Court emphasized that the transformative value of a use is central to any fair use examination. Section 107 of the Copyright Act was characterized as a statute that is flexible by design, providing only general guidance. Finally, in the most important holding of the case, the Supreme Court pointedly disabused future courts of the notion that fair use and commercial purpose are presumptively incompatible.

B. Cultural Bias

Campbell was a case bristling with cross-cultural confrontation. Marshaled on one side of the cultural divide was a revered and recently deceased white, pop music legend,[482] his charmingly Sixties hit song,[483] and a conservative publishing company founded by a beloved country and western icon.[484] On the other side was a brash, young black performer,[485] his

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rap version of "Oh, Pretty Woman."

480. *See* Bisceglia, *supra* note 69, at 14.
481. *Id.*
482. Refer to notes 122-31 *supra* and accompanying text.
483. Refer to notes 164-69 *supra* and accompanying text.
484. Refer to notes 132-41 *supra* and accompanying text.
485. Refer to notes 142-53 *supra* and accompanying text.

tasteless parody of the pop legend's Sixties ditty,[486] and the band that he fronts—a controversial African-American rap group notorious for sexism and sexually explicit lyrics.[487] Despite this yawning social schism and the temptation for lower courts to substitute inappropriate subjectivity for judicial circumspection in such a case, the Supreme Court provided no more than a few lines of dicta relevant to the issue of cultural bias.[488] Justice Souter reiterated the rule of aesthetic nondiscrimination that Justice Holmes introduced in *Bleistein v. Donaldson Lithographing Co.*[489] The Supreme Court, however, offered future courts little more guidance for dealing with culturally charged disputes. The omission of explicit direction is unfortunate but some guidance is discernible, nonetheless, from underlying copyright policy and the tenor of the *Campbell* opinion.

The First Amendment guarantees freedom of speech.[490] The opportunity to produce works of social comment and criticism is an important element of this freedom.[491] It follows

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486. Refer to note 171 *supra* and accompanying text.

487. Refer to notes 154-56 *supra* and accompanying text.

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

489. *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)). In characterizing the doctrine of "aesthetic nondiscrimination," Professor Craig Joyce explained Justice Holmes' position as follows: "[J]udges evaluating issues of copyrightability should not take into account the *quality* of the works under consideration." CRAIG JOYCE ET AL., COPYRIGHT LAW § 2.02[B], at 83 (1991).

490. Refer to note 22 *supra*. Only governmental restraints on expression are proscribed by the First Amendment. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 513 (1976). In New York Times Co. v. Sullivan, 376 U.S. 254, 282-83 (1964), however, the Supreme Court held that free speech protection was proper when a party sought to restrict freedom of speech through enforcement of a state-created right of action. The First Amendment is not restricted to political, informational, or "G"-rated speech. The Supreme Court has held that the First Amendment affords entertainment the same protection as news reporting, and that vulgar expressions must be granted the same protection as wholesome ones. *See, e.g.*, Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that criminalizing "dial-a-porn" messages to adults on grounds of indecency is improper); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981) (holding that nude dancing is protected by First Amendment); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that a jacket bearing the words "Fuck the Draft" is a constitutionally protected form of expression).

491. Goetsch, *supra* note 22, at 62. Biting satire, as employed by American writers such as Philip Freneau, was a popular and effective weapon in the years surrounding the American Revolution. *See, e.g.*, JACOB AXELRAD, PHILIP FRENEAU: CHAMPION OF DEMOCRACY 257-58 (1967) (noting that in 1793, for his anti-federalist satires, Freneau simultaneously was praised by Thomas Jefferson as having "saved our Constitution" and criticized by George Washington as a "rascal"); SAMUEL E. FORMAN, THE POLITICAL ACTIVITIES OF PHILIP FRENEAU 16-19 (Arno Press Inc. 1970) (1902) (noting that the caustic satire of young patriots such as Freneau "made the tories wince and . . . inspired the whigs with hope and courage"); LEWIS LEARY, THAT RASCAL FRENEAU: A STUDY IN LITERARY FAILURE 31-32, 59-60 (1941) (asserting that works such as Freneau's "A Voyage to Boston," "General Gage's Confession," and

that criticism in the form of an artist's creative expression is entitled to free speech protection.[492] Yet criticism, by its very nature, is often unappreciated, and the critics of society are often misunderstood, reviled, and repressed.[493] Pointing out that artists especially have a predisposition toward dissatisfaction with the status quo, H.L. Mencken wrote that great artists like Dante, Tolstoy, Shakespeare, and Mark Twain were "all bitter critics of their time and nation, most of them piously hated by the contemporary 100 percenters, some of them actually fugitives from rage and reprisal."[494] Parodists particularly may be the objects of public scorn and resentment because, in addition to delivering an unappreciated message, often they defile a beloved original work. Although several lower courts have addressed parody and fair use in the speech rights context,[495] the Supreme Court has not yet definitively dealt with the First Amendment in regard to parody. Because it is a species of commentary that often takes the form of scathing criticism, parody may incite anger and outrage. Noting that the First Amendment protects a wide range of statements that may offend some persons, the First Circuit definitively included parody under the free speech umbrella in *L.L. Bean, Inc. v. Drake Publishers, Inc.*[496] The *Campbell* opinion does not, however,

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"Satires against the Tories," written in collaboration with fellow Princeton student James Madison, must have aroused a sense of patriotic defiance in readers previously predisposed to reconciliation); PHILIP M. MARSH, THE WORKS OF PHILIP FRENEAU: A CRITICAL STUDY 109 (1968) (quoting from "PARODY: On the attempt to Force the British Treaty on the People of the United States" published in 1796 and credited to Freneau).

492. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (asserting that Supreme Court decisions "have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection").

493. H.L. MENCKEN, *The Artist, in* THE VINTAGE MENCKEN 146-47 (Alistair Cooke ed., 1955).

494. *Id.*

495. *See, e.g.*, Sid and Marty Krofft Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) (holding that there is no conflict between the First Amendment and copyright because "the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the [F]irst [A]mendment. The 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of expression"); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 116 (N.D. Cal. 1972) (suggesting that under some circumstances, free speech interests could outweigh copyright concerns: "Assuming, without deciding, that the First Amendment does mark out some boundary for the protection that may be afforded a creator under the copyright laws, that boundary has not been reached here"), *aff'd*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979).

496. 811 F.2d 26, 28, 33-34 (1st Cir.) (reversing district court which had enjoined defendant's publication of a parody sex catalogue, stating that the issue before it was "whether enjoining the publication of [defendant's] parody violates the [F]irst

provide any explicit new insights for parodists in this regard.

Regarding copyright generally, the Supreme Court in *Harper & Row* rejected an argument that the bounds of fair use were expanded by the First Amendment.[497] The Court focused on the conflict between the public's interest in learning news about matters of public importance with a minimum of delay and the right of the author to delay first publication of that news.[498] Whereas the Court in *Harper & Row* refused "to create what amounts to a public figure exception to copyright,"[499] the free speech issue in *Campbell* is distinguishable because in *Campbell*, the issue is the extent to which a copyright owner may foreclose completely the use of his work for criticism or comment on that work. A fundamental First Amendment concern is implicated in this enquiry—not merely who has the right to initially release information, but whether a form of speech can be totally prohibited.

The version of "Oh, Pretty Woman" created by 2 Live Crew is an example of parody speech which is at risk of being stifled. It is the kind of expression the First Amendment was designed to protect. Commercial or not, such parodies must be accorded protection as vehicles for facilitating healthy political and social intercourse. By its nature, parody is more susceptible to restriction than other art forms. Because a parody must borrow from something else, it is a variety of expression inordinately vulnerable to suppression. Clearly, undue deference to the property rights of copyright holders will have a chilling effect on parody. This would be a grave loss to society.

As suggested by the First Circuit in *L.L. Bean*, parody is liable to offend the sensibilities of those who identify with the object of its ridicule.[500] This is especially likely when there is a cultural gulf separating the maker and the object of the parody. Differences in cultural perspective may render a parody inscrutable and unfunny.[501] Courts are no less susceptible to

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[A]mendment guarantees of freedom of expression"), *appeal dismissed and cert. denied*, 483 U.S. 1013 (1987).

497. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985). "In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use . . . ." *Id.*; 3 NIMMER & NIMMER, *supra* note 43, § 13.05[A], at 13-89 to 13-90.

498. *Harper & Row*, 471 U.S. at 558-60.

499. *Id.* at 560.

500. L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 33-34 (1st Cir.), *appeal dismissed and cert. denied*, 483 U.S. 1013 (1987).

501. It is tempting to speculate whether Roy Orbison himself would find "Pretty Woman" humorous. Though he was reserved and unassuming, there are indications

inadvertent cultural bias than the rest of the population. Although theoretically, a court's personal aesthetic preferences will not affect its judgment, in practice this may not be so clear.[502] It is quite likely that the Sixth Circuit, in *Campbell*, was baffled and even offended by 2 Live Crew's version of "Oh, Pretty Woman." The court probably had little appreciation for the African tradition of rhyming and insults, and little first-hand knowledge of ghetto life and ghetto language. The merits of the rap music genre itself may have eluded the panel. Jazz pianist Cecil Taylor has stated that rhythm is one thing "the West will never understand about African culture."[503] Alarmingly, it is quite possible that an ethnocentric bias colored the circuit court's decision.[504] While this may be understandable, it is unacceptable.

In *Campbell*, Justice Souter asserted for the Court that pronouncements about value and taste are out of place in a fair use analysis.[505] Reacting to the Sixth Circuit's confessed difficulty in recognizing the 2 Live Crew song as parody, the Supreme Court emphasized that the pivotal determination is whether there exists a reasonable possibility of parodic

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that he possessed a healthy sense of humor. Steve Hochman, *Roy Orbison Tribute to Benefit the Homeless*, L.A. TIMES, Feb. 23, 1990, at F16. In reference to the B movie *The Fastest Guitar Alive*, in which Orbison appeared armed with a hybrid guitar-rifle, his widow recounts, "Roy and I watched it two years ago. It was really funny watching it with him and our sons. He had a great ability to laugh at himself, and we all kidded him about the movie unmercifully." *Id.* The Traveling Wilburys were something of a parody themselves. Calling themselves "Lucky" (Bob Dylan), "Otis" (Jeff Lynne), "Charlie T." (Tom Petty), "Nelson" (George Harrison), and "Lefty Wilbury" (Orbison), the liner notes to their first album begin: "The original Wilburys were a stationary people who, realizing that their civilization could not stand still for ever, began to go for short walks—not the 'traveling' as we now know it, but certainly as far as the corner and back." TRAVELING WILBURYS, VOLUME ONE (Warner Bros. Records 1988). 2 Live Crew has been the object of parody themselves. A group called "2 Live Jews" has released an album of songs from "Fiddler on the Roof" entitled FIDDLING WITH TRADITION. Irv Lichtman ed., *Inside Track*, BILLBOARD, May 18, 1991, at 100. An earlier effort, AS KOSHER AS THEY WANNA BE, garnered the best-selling comedy award at the NARM Indie Awards in 1991. Deborah Russell, *Priority Takes Precedence at Indie Awards*, BILLBOARD, Oct. 26, 1991, at 45.

502. *See* Goldberg & Bernstein, *supra* note 20, at 29.

503. Tate, *supra* note 102, at 73.

504. Goldberg & Bernstein, *supra* note 20, at 29. The authors suggest as much in asking,

> Could it be that a cultural or ethnocentric bias clouded the court's ability to discern a parodic purpose (or social commentary) in 2 Live Crew's lyrics? Was the Court of Appeals offended by bawdy or irreverent lyrics and therefore disinclined to credit the defendants with a parodic purpose that the district court had no trouble finding?

Id.

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

character.[506] Subjective evaluation regarding the quality of a challenged work is unnecessary. The Court quoted Justice Holmes explicit warning from *Bleistein* about the danger of making aesthetic judgments from the bench:

> "[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."[507]

The issue in *Bleistein* involved the copyrightability of illustrated posters designed to advertise a circus.[508] Reversing a 1900 Sixth Circuit finding of no "merit or value" in the pictorial illustrations,[509] the Supreme Court held that advertisements could be copyrighted.[510] The case is most often cited for the principle underlying this particular application, the general injunction against judges injecting their personal views of artistic merit into copyright controversies.[511] It is for this reason that Justice Souter invoked *Bleistein* in *Campbell.*

Clearly, the Court does not denounce all subjective determinations in copyright. If *Campbell* stands for anything, it is that fair use must be decided by a flexible weighing process and without the aid of mechanical rules. Each of the four suggested fair use factors requires some subjective analysis and a balancing of competing viewpoints. As copyright commentator Julie Bisceglia points out with regard to the third factor, "Whether a parodist criticising a copyrighted work has taken enough to 'conjure it up' is at bottom an aesthetic judgment, not a legal one."[512] What the Supreme Court proscribes in a fair use exploration is the kind of aesthetic judgment that is based solely

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506. *Id.*

507. *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (brackets in original)).

508. *Bleistein*, 188 U.S. at 242.

509. *Id.* at 253 (Harlan, J., dissenting) (quoting Courier Lithographing Co. v. Donaldson Lithographing Co., 104 F. 993, 996 (6th. Cir. 1900)), *rev'd sub nom.*, Bleinstein v. Donald Lithographing Co., 188 U.S. 239 (1903).

510. *Id.* at 251.

511. JOYCE, *supra* note 489, § 2.02[B], at 83. Since *Bleistein*, both the Copyright Office and the courts have honored Justice Holmes judicious admonition. LEAFFER, *supra* note 317, § 2.7[C], at 38. One apparent exception to this principle was included by Congress in the Visual Artists Rights Act of 1990. 17 U.S.C. § 106A (1988 & Supp. V 1993). Certain protections are accorded to a work of visual art only if it is a "work of recognized stature." *Id.* This requirement easily might lend itself to distortion and abuse.

512. Bisceglia, *supra* note 69, at 14.

on the perceived artistic or cultural value of a challenged work. It becomes improper, however, for a decision maker to employ copyright law to suppress works that offend his personal sensibilities. Nonetheless, as a general rule, parodies that do not transgress accepted norms of "taste" and "decency" are more likely to acquire fair use protection.[513]

Parodies that may be considered obscene are most vulnerable to biased appraisal and most likely to be victimized by a loss of judicial objectivity. In fair use decisions, courts have regularly penalized parties for producing works adjudged indecent or obscene.[514] "There is a noticeable judicial trend that parodists who engage in the use of 'obscene,' 'immoral' or 'dirty' elements in their parodies are often given less leeway to take from original works."[515] In *MCA* the Second Circuit apparently found the bawdy version of "Boogie Woogie Bugle Boy of Company B" particularly offensive because the original work it ridiculed was a celebrated World War II number.[516] Dissenting from the *MCA* opinion, Judge Mansfield charged that the majority was influenced impermissibly by personal feelings about the distastefulness of the defendants' work.[517] He stated, "We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances."[518] One legal analyst noted that "'when "Mark Russell"-type gentle political scoffing is involved, courts favor the parodist,'" and when the parody involves sex or violence they favor the copyright

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513. Korn, *supra* note 2, at 358-59.

514. *See, e.g.*, MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (holding that an obscene takeoff on "Boogie Woogie Bugle Boy of Company B" was not fair use); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) (holding that parody depicting Disney characters as sex-crazed drug users was infringement of copyright), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979). This decision has been characterized as a politically biased attempt to save from the clutches of the counter-culture a "cherished American icon which also happened to be an extremely valuable corporate asset." Carlin, *supra* note 468, at 121; *see also* Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397, 1398-99 (S.D.N.Y. 1975) (holding that an injunction was justified to stop the use of "Mickey Mouse March" in a porn movie, *The Life and Times of the Happy Hooker*).

515. Steven R. Gordon & Charles J. Sanders, *Stranger in Parodies: Law of Musical Satire*, N.Y. L.J., Jan. 18, 1991, at 7.

516. *MCA v. Wilson*, 677 F.2d at 184 n.1. Reacting to the defendants' claim that the copyrighted work was used to humorously depict cunnilingus by recalling a "joyous" period in American history, the Second Circuit included the following, in one of only two footnotes to the case: "Boogie Woogie Bugle Boy was copyrighted and published in 1941, and achieved its greatest popularity during the tragic and unhappy years of World War II, in which 292,131 Americans lost their lives." *Id.*

517. *See id.* at 191 (Mansfield, J., dissenting) (asserting that the majority was implying that the defendants labeled their work a parody merely to avoid liability for "dirty lyrics").

518. *Id.*

owner.[519]

In *Campbell*, beyond having little understanding of the cultural context out of which the parody of "Oh, Pretty Woman" had arisen, the Sixth Circuit may have been offended by 2 Live Crew's lewd reputation.[520] In this case the rap group's song is not explicit or obscene.[521] Nonetheless the Sixth Circuit might have found distasteful the crude lyrics, the reference to unfaithfulness, or uncertainty over just who is "the baby['s]" father.[522] To the extent that it may have been influenced by considerations of this sort, the circuit court decision in *Campbell* was in error. As quoted parenthetically by the Supreme Court, "'First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.'"[523]

It might be argued that a first factor enquiry into the "character" of a work should take into account content that is obscene.[524] Plainly, however, such an understanding of the fair use evaluation process would involve a court in impermissible aesthetic judgments. Moreover, one commentator has suggested that obscenity is especially appropriate to parody's purpose, the deflation of human pretension.[525] As Judge Mansfield asserted

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519. Lichtman, *supra* note 3, at 84 (quoting Washington attorney Joshua Kaufman, who argued on behalf of respondent in the 1989 copyright case of Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)). Political satirist Mark Russell, and the Washington D.C. based parody group, the Capitol Steps, submitted a brief in support of 2 Live Crew to the Supreme Court. Paul M. Barrett, *High Court To Decide Whether Parodies of Music Works Violate Copyright Laws*, WALL ST. J., Mar. 30, 1993, at A5. In their Motion for Leave to File Brief Amicus Curiae in Support of Petitioners, Mark Russell and Capitol Steps Productions, Inc., explained that because copyright owners are unlikely to welcome a parody of their copyrighted work, few political parodists seek or obtain permission to copy from the works they parody. Petitioners' Brief on the Merits at 16, Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1992) (No. 92-1292).

520. *See* Bernarde, *supra* note 142, at 62. Commenting on 2 Live Crew's penchant for obscenity, Campbell makes a telling observation: "'We never had no problem when we were selling records just to blacks . . . .'"). *Id.*

521. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 n.4 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

522. THE 2 LIVE CREW, "Pretty Woman," *on* AS CLEAN AS THEY WANNA BE (Luke Records 1989), *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1179-80 app. B (1994). Refer to note 171 *supra*. "It is arguable that the Sixth Circuit was influenced by [the vulgar "character" of the work] in examining the undeniably crude lyrics in [*Campbell*], despite the district court's finding that '2 Live Crew's version is neither obscene or pornographic.'" Patry & Perlmutter, *supra* note 341, at 718 n.224 (quoting *Campbell*, 754 F. Supp. at 1155 n.4).

523. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1173 (1994) (quoting Yankee Publishing Inc. v. News America Publishing Inc., 809 F. Supp. 267, 280 (S.D.N.Y. 1992)).

524. *See* Patry & Perlmutter, *supra* note 341, at 718.

525. Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act*

in *MCA*, considerations extraneous to copyright law and copyright principles should play no part in a fair use enquiry.[526] Especially where noncopyright values may be protected by bodies of law other than copyright, obscenity, or defamation laws for example, it is wrong to import these values into the fair use analysis.[527] In *Pillsbury Co. v. Milky Way Productions, Inc.*,[528] one of the few cases in which the temptation to inject subjective considerations into a copyright analysis was actually resisted, the court stated that it is inappropriate to take into account the morality of the parody use.[529] Whatever the bias, whether aesthetic, moral, ethnocentric, or cultural in nature, it has no place in copyright analysis. "Courts must be alert to the risk of permitting subjective judgments about quality to tilt the scales on which the fair use balance is made."[530]

In *Campbell*, by lampooning "Oh, Pretty Woman," 2 Live Crew is partaking in a centuries-old tradition.[531] In reaction to feelings of frustration and hopelessness, African-American musicians resort to boasts and ridicule.[532] "Musicians have always responded to the oppression of the Negro people."[533]

Into a Juggling Act, *in* ASCAP COPYRIGHT LAW SYMPOSIUM, No. 34, at 36 n.130 (1987). "[P]arody is sometimes obscene: how better to counteract man's tendency to aggrandize himself than to force him to consider, as graphically as possible, what he shares with the animals." *Id.*

526. MCA, Inc. v. Wilson, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

527. Patry & Perlmutter, *supra* note 341, at 718-19.

528. 215 U.S.P.Q. 124 (N.D. Ga. 1981).

529. *See id.* at 131. The plaintiff, complaining about Screw magazine's pornographic depiction of "Poppin Fresh," the Pillsbury doughboy, urged the court to factor into its deliberations the licentious content of Screw magazine. *Id.* The court refused, explaining that "[t]he Copyright Act . . . does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection." *Id.*

530. Twin Peaks Prods. v. Publications Int'l, 996 F.2d 1366, 1374 (2d Cir. 1993). In emphasizing the irrelevance of a court's appraisal of a work's quality, Judge Newman admitted that the defendant's book was not a work of scholarship. He insisted, however, that the appropriate enquiry was "whether the comment, in borrowing the protected expression of the original work, does so for purposes that advance the interests sought to be promoted by the copyright law" and not "whether the comment makes some erudite point appreciated mainly by students of literature or a more prosaic point of interest to average television viewers." *Id.*

531. Refer to notes 78-95 *supra* and accompanying text.

532. Refer to notes 89-91 *supra* and accompanying text.

533. *See* ROB BACKUS, FIRE MUSIC: A POLITICAL HISTORY OF JAZZ 89 (1976). In reaction to Ku Klux Klan lynchings during the Thirties, Billie Holliday wrote,

> Southern trees,
> bear Strange Fruit,
> Blood on the leaves
> and blood at the root.
> Black bodies swinging in the southern breeze
> Strange Fruit hanging

Icons of the majority culture are natural targets of their ridicule. Yet, traditionally, songs do not explicitly enunciate grievances but assert them only indirectly.[534] Because its criticism is indirect and punctuated by street humor, 2 Live Crew's message might seem obscure to the uninitiated. According to Luther Campbell, "'Many people—mainly white people—don't understand black slang and misinterpret our music . . . .'"[535] Proponents of rap believe that much of the criticism directed at the genre is based on racial prejudice.[536] The aesthetic merit of the *Campbell* parody may be debatable but that is irrelevant in a copyright examination. According to the testimony of expert witnesses[537] and the chronicled history of the African people,[538] "Pretty Woman" deserves protection as legitimate social commentary, albeit commentary based on an underlying copyrighted work.

Contemporary popular music is a powerful vehicle for social comment. Criticism of the entrenched culture through parody is an especially effective means of communicating dissatisfaction and disaffection. "The aesthetics of alienation have been common fodder for contemporary art and for pop music since the 1960s."[539] Musical parody, as facilitated by sampling, affords those with meager means an opportunity to air their commentary.[540] Luther Campbell and 2 Live Crew insisted that they

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from the poplar trees.

Id.

534. *See* CONE, *supra* note 80, at 146-47 n.5. Most slaves did not dare challenge their masters openly. *Id.* To disclose to her family and friends that she was planning to escape North, Harriet Tubman sang:

When dat ar ole chariot comes,
I'm gwine to lebe you,
I'm boun' for de promised land,
Frien's I'm gwine to lebe you.

Id. at 88-89. Speaking about the blues, James Cone explains that they "do not *openly* condemn white society, and there is little *direct* complaint *to* white people about the injustice of segregation. . . . [B]lues men and women would have to be very naïve to couch the blues in white categories of protest." *Id.* at 133.

535. Russell, *supra* note 143, at 71.

536. Browne, *supra* note 98, at 54, 56; Ressner, *supra* note 100, at 105 (quoting engineer and producer Bilal Bashir, who maintains that representatives of the majority culture suppress rap music because it is a black art form).

537. Refer to note 187 *supra* and accompanying text.

538. Refer to notes 78-95 *supra* and accompanying text.

539. Hunter Drohojowska, *Going to A-Gogh-Gogh*, L.A. TIMES, Mar. 1, 1992, Arts, at 3.

540. *See* Browne, *supra* note 536, at 54-56; Goldberg & Bernstein, *supra* note 105, at 3. In explaining that ghetto musicians began to make use of sampled portions of preexisting songs out of necessity, Goldberg and Bernstein state: "Necessity was the mother of this invention. Many new music groups in the inner city, primarily rap and hip hop musicians, could not afford instruments, let alone a band." *Id.*

copied "Oh, Pretty Woman" to parody the song itself, the establishment, and "white-bread" culture in general.[541] Like many rap songs, the message of the new work ridiculed a segment of society that is insulated from the ugliness of life on the street. In addition, Roy Orbison himself, a beloved figure, was ridiculed. Free speech protection should not be denied, however, simply because the message is unpleasant, or the object of a parody is revered. No parody artist should have to renounce his cultural heritage to qualify for fair use protection. In his sarcastic dissent from the Second Circuit denial for rehearing in *White*, Judge Kozinski criticized the circuit court majority for allowing public figures the power to restrain others from mocking them.[542] As the First Circuit asserted in *L.L. Bean*, "Denying parodists the opportunity to poke 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."[543]

Our culture is richer because of parodies, even parodies of the popular and powerful. Such criticism is truly aimed at all of us. It should prompt collective self-examination and reappraisal, not censorship and denial. Therefore, courts must guard against any tendency to devalue a parody simply because it is culturally foreign or personally distasteful to them. Doubtless, it would have been helpful for the Supreme Court to have explored the issue more fully in *Campbell*. Nonetheless, the Court clearly barred aesthetic considerations from copyright analyses; "Whether . . . parody is in good taste or bad does not and should not matter to fair use."[544] Absent such an enlightened approach the socially beneficial comic relief, criticism, and comment of parody will be woefully stifled.

VII. CONCLUSION

A century ago Mark Twain complained: "'Only one thing is

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541. Refer to notes 35 & 187 *supra*.

542. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1519 (9th Cir.) (Kozinski, J., dissenting) (noting that "[t]he First Amendment isn't just about religion or politics—it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas"), *cert. denied*, 113 S. Ct. 2443 (1993).

543. L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir.), *appeal dismissed and cert. denied*, 483 U.S. 1013 (1987); *see also* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982) (holding that the First Amendment protects the defendant's bawdy "spoof" and "ridicule" of Miss America pageant), *cert. denied*, 462 U.S. 1132 (1983).

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

impossible to God, to find any sense in any copyright law on this planet.'"[545] Today, despite the best efforts of Congress and the courts, copyright remains confusing and contradictory. Fair use analysis especially has been plagued by uncertainty and ambiguity since its inception. Thankfully, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court clarified some of the issues critical to fair use and in so doing added a generous measure of good sense to copyright law. Although it was the Court's first opinion on the subject of parody, *Campbell* established a solid foundation for subsequent judgments based on this affirmative defense to infringement. And beyond articulating a long awaited validation of parody, the Court rendered an opinion with important implications for fair use examinations in general, one that "signalled a significant shift in emphasis."[546]

In the most important holding of the opinion, the Supreme Court sharply curtailed the perceived scope of the commercial presumption against fair use that had been enunciated in *Sony* and *Harper & Row*. Despite the widespread desire for bright-line rules, *Campbell* made clear that formulaic determinations, including those based on an overly restrictive reading of § 107, are inappropriate in a fair use enquiry. In all but the narrowest of circumstances, the commercial purpose of a work cannot be determinative. Rather, works must be evaluated on a case-by-case basis according to the underlying principles of copyright and fair use—promoting "the progress of science and useful arts" for the public benefit.

In *Campbell*, the Supreme Court acknowledged that parody, by its nature, is transformative and confers a benefit on society. Moreover, because a parody is based necessarily on a previous work, it must be afforded considerable latitude to copy the first work. Nonetheless, although a parody may be fair use under the appropriate circumstances, no parody is automatically a fair use. Therefore, the inherently flexible nature of the fair use doctrine and a succession of contradictory parody decisions have vested an inordinate amount of power in the individual lower courts.

Unfortunately, some courts are improperly swayed by their subjective personal reaction to a challenged parody. A decision might be made on an instinctive level and then justified by manipulating the fair use analysis. This may have happened at

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545. Robert J. Kapelke, Comment, *Piracy or Parody: Never the Twain*, 38 U. COLO. L. REV. 550, 550 (1966) (quoting MARK TWAIN, NOTEBOOK 381 (1935 ed.)).

546. Abrams, *supra* note 19, at 1.

the circuit court level in *Campbell.* Arguably, because it felt that the rap song was in bad taste, the Sixth Circuit embraced the commercial presumption of *Sony* without sufficient reflection. In so doing, the circuit court not only ignored fundamental copyright principles but overlooked the fact that 2 Live Crew's parody was grounded in legitimate cultural and historical verities.

All too often, social criticism is suppressed in the name of copyright. As Judge Kozinski cautions in his dissent to *White*:

> Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. . . .
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> . . . Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[547]

In deference to its celebrated place in art and literature, and its character as social commentary, parody deserves special protection. The members of 2 Live Crew, and parodists like them who challenge the status quo, perform a valuable public function.

Whatever middle America thinks of them as performers, however their parodies are judged as art, groups such as 2 Live Crew must be accorded the freedom to make fun of cherished personalities, beliefs, and institutions. The faith of our nation's founders in the cleansing nature of free expression, and the unspoken hope of unborn generations in creativity unfettered by prejudice, rest in part on a genuine appreciation of parody. Only through the uninhibited exchange of creative thought and candid criticism can we progress. A free and advancing society can tolerate no less.

Nels Jacobson

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