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THREE YEARS AFTER *CAMPBELL V. ACUFF-ROSE MUSIC, INC.*: WHAT IS FAIR GAME FOR PARODISTS?

*Kathryn D. Piele**

“All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.”¹

I. INTRODUCTION

Parody is defined as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.”² Parodies are an accepted form of comedy that range from the hysterically funny to the blatantly offensive. Arguably, parodies, despite how funny or offensive, do not normally turn thoughts to copyright law. Copyright law, however, has found its way into the comedic land of parodies—and what the courts have done is no laughing matter.

In *Campbell v. Acuff-Rose Music, Inc.*³ the Supreme Court held that parodies with a commercial purpose are presumptively not unfair uses of a copyrighted work. In *Campbell*, the Court ended the misplaced emphasis lower courts had placed on the commercial purpose of a parody when evaluating whether the parody was a fair use of a copyrighted work. While solving one problem, however, the Court created another by making a distinction between parodies, which can claim fair use, and satires, which

* Judicial Clerk, Justice Allen T. Compton, Alaska Supreme Court, 1997–98. B.A., *magna cum laude*, 1993, University of Arizona; J.D., 1997, University of Oregon School of Law, Order of the Coif. This Article is dedicated to my Grandma, whose love and life are both motivating and inspiring, and to my parents, to whom I owe it all. Thank you Shari Del Carlo for your friendship; without it law school would have been unbearable. Thank you so very much Professor Keith Aoki for sharing with me your vast knowledge of copyright law and for your many words of support and encouragement. Thanks also to the editors and staff of the *Loyola of Los Angeles Entertainment Law Journal*.

1. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting).

2. WEBSTER'S NEW COLLEGIATE DICTIONARY 613 (7th ed. 1967).

3. 510 U.S. 569 (1994).

must “stand on [their] own two feet.”⁴ Since *Campbell*, courts no longer have to struggle with how to apply the four factors of the fair use analysis to commercial parodies; courts are, however, left to decide whether the fair use exception is even applicable to the parody before them. Thus, the Court, instead of creating a bright-line analysis for evaluating parodies, granted judges broad discretion to “critique the artistic meaning of the particular parody in order to determine whether it merits fair-use protection.”⁵ This Article will attempt to answer the question: How have judges used their discretion to limit the comedic arena of parody in the three years following *Campbell*?

In Part I, this Article discusses the fair use doctrine and how parodies fall within its protection. Part II describes how courts applied the four factors of the fair use doctrine to parodies prior to *Campbell*. Part III provides the holding in *Campbell* and how it changed the application of the fair use doctrine to parodies, and Part IV depicts how cases subsequent to *Campbell* have treated parodies. Finally, this Article summarizes the problem with how copyright law treats parodies and recommends how courts should change the current law.

II. INFRINGEMENT, THE FAIR USE DOCTRINE, AND ITS APPLICATION TO PARODIES

A. Parodies: Are They Copyright Infringements?

To prove a prima facie case of copyright infringement against a defendant-parodist, a plaintiff must prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁶ The second element can be satisfied in one of two ways: by showing through direct evidence that the defendant copied the copyrighted material, or by proving both that the defendant had “access to the plaintiff’s copyrighted work” and that “defendant’s work is substantially similar to the plaintiff’s copyrightable material.”⁷

4. *Id.* at 581.

5. Paul Tager Lehr, Note, *The Fair-Use Doctrine Before and After “Pretty Woman’s” Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 46 FLA. L. REV. 443, 447 (1994) (“Due to the practically unfettered discretion that the current fair-use framework permits, judges inappropriately are permitted and, in fact, required to critique the artistic meaning of the particular parody in order to determine whether it merits fair-use protection.”) (footnotes omitted).

6. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

7. *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1218 (S.D.N.Y. 1996) (quoting *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992)).

Considering the two-part test described above, the determination of whether a parody is a copyright infringement is case specific. Consequently, courts usually have a very easy task deciding whether a parody is a technical infringement of a copyright. Parodies, by their very nature, are arguably copyright infringements because parodying another work consists of taking part of a copyrighted work and manipulating it in a humorous manner. Courts have recognized that parodies necessarily draw on copyrighted works for their parodic effect.⁸ After comparing the parodied work with the copyrighted work, many courts found that the parody was, but for any defense, a copyright infringement.⁹ Still other courts have quickly dismissed the requirements for a copyright infringement by flatly stating the parody before them infringed the copyrighted work, unless the defendant-parodist could articulate an appropriate exception.¹⁰

Consequently, parodists, who utilize others' work for comedic effect, will almost certainly fail in arguing to the court that the parody is not technically a copyright infringement.¹¹ Rather, a parodist's strength lies in persuading the court that regardless of a technical violation of the Copyright Act of 1976,¹² the parody is a fair use of the original work.

B. So, Your Parody Infringes on Someone's Copyright—Now What?

If a plaintiff can prove the two requirements necessary to make out a prima facie case of infringement, the defendant-parodist's parody is in violation of the Copyright Act of 1976 unless the parodist can establish a

8. See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 868 F. Supp. 1266, 1267 (N.D. Okla. 1994), *aff'd*, 95 F.3d 959 (10th Cir. 1996) ("It has been acknowledged that parody must, to some extent, copy its subject matter.").

9. See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991); *Elsmere Music, Inc. v. National Broad. Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980).

10. See *Campbell*, 510 U.S. at 574 ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in 'Oh, Pretty Woman,' under the Copyright Act of 1976 . . . but for a finding of fair use through parody."); *Leibovitz*, 948 F. Supp. at 1218 ("The within case is that rare case where there is direct evidence—in fact, a frank admission by the defendant—that the allegedly infringing work is modelled [sic] on the copyrighted work.").

11. See Joseph E. Sullivan, *Campbell v. Acuff-Rose Music, Inc., and the Economic Approach to Parody: An Appeal to the Supreme Court*, 11 U. MIAMI ENT. & SPORTS L. REV. 105, 112 (1993) ("[S]ince parodies draw attention to the original works that they are ridiculing, it is unlikely that any copyright infringement claim brought against a parodist will fail to meet this primary burden.").

12. Pub. L. No. 94-553, 90 Stat 2541 (codified as amended in 17 U.S.C. §§ 101-1010 (1994)).

defense to the infringement. A defendant-parodist's best defense to copyright infringement is to argue that the parody was a fair use of the copyrighted work.¹³ The fair use exception, which limits the exclusive rights of copyright owners, is codified in section 107 of the Copyright Act of 1976 (hereinafter section 107). This defense provides parodists the opportunity to prove that, rather than infringing on the plaintiff's copyright, the parody was a fair use of the plaintiff's copyrighted work.¹⁴

The fair use exception provides, in part, that "the fair use of a copyrighted work . . . for purposes such as criticism [or] comment . . . is not an infringement of copyright."¹⁵ Courts have readily applied the fair use defense to parodies by finding that parodies constitute a criticism of or comment on a copyrighted work.¹⁶ Additionally, courts point to the legislative history surrounding the adoption of section 107.¹⁷ In a 1961 report, Congress listed parodies as one potential application of the fair use exception.¹⁸ Most recently, the Supreme Court validated lower courts' findings that parodies may claim fair use protection by stating that "[w]e thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under [section] 107."¹⁹ In sum, the combination of these authorities warrants affording the fair use defense to parodies.

The evaluation of an infringing parody, however, does not end with the finding that section 107 is germane to parodies. Rather, section 107 sets out a four-pronged analysis for courts to use when deciding whether the fair use defense is applicable in each specific case:

13. Sullivan, *supra* note 11, at 112 ("[P]arody cases usually turn on whether the defendant's use of the original was fair within the meaning of section 107.") (footnote omitted).

14. 17 U.S.C. § 107 (1994).

15. *Id.*

16. Sullivan, *supra* note 11, at 108 ("While section 107 does not directly address the term 'parody' . . . [c]ourts have had little difficulty in concluding that parodies fall under the rubric of 'criticism' or 'comment' as set forth in section 107.") (footnotes omitted).

17. *See, e.g.,* Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986) ("Congress listed examples 'of the sort of activities the courts might regard as fair use under the circumstances.' Congress named parody as one of these activities.") (citation omitted); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 829 (S.D.N.Y. 1990) ("A list of examples of fair use which the Committee derived from the Register's 1961 Report includes 'use in a parody of some of the content of the work parodied . . .'" (alteration in original)).

18. H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 ("[T]he [Copyright] Register's 1961 Report, while by no means exhaustive, gives some idea of the sort of activities the courts might regard as fair use under the circumstances: . . . [the list includes] 'use in a parody of some of the content of the work parodied . . .'").

19. *Campbell*, 510 U.S. at 579.

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 works as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁰

Courts have repeatedly stated that application of the four-pronged analysis set out in section 107 is case specific and flexible—leaving no bright-line rules for courts to use when evaluating the fair use defense.²¹ The four individual prongs of the fair use analysis should be weighed together to determine whether a parody is fair use of a copyrighted work or an infringement. Specifically, the Court in *Campbell* stated that the four fair use factors should not be treated in isolation from each other. Rather, “[a]ll are to be explored, and the results weighted together, in light of the purposes of copyright.”²² The four-pronged fair use analysis requires courts to look at every case individually and apply the factors in a way that “avoid[s] rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²³

III. COURTS’ APPLICATION OF THE FAIR USE DOCTRINE PRE-*CAMPBELL*

Following the codification of the fair use defense, courts failed to uniformly agree on how to apply the four-pronged analysis set out in section 107 to parodies. For example, parody cases often contained conflicting opinions with respect to the importance of commercial use.²⁴ Some circuits, such as the Second Circuit, simply presumed that commercial exploitation was an unfair use.²⁵ In *Fisher v. Dees*,²⁶

20. 17 U.S.C. § 107.

21. *See, e.g., Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1219 (S.D.N.Y. 1996) (“[W]ithin each case, courts are not to apply the four-part test as a rigid formula; the factors listed are nonexclusive and must be considered as integrated parts of a flexible examination.”).

22. *Campbell*, 510 U.S. at 578.

23. *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

24. Sullivan, *supra* note 11, at 121.

25. *Id.* at 128.

26. 794 F.2d 432 (9th Cir. 1986).

however, the Ninth Circuit held the presumption that a commercial parody is unfair use of a copyrighted work can be rebutted where the defendant convinces the court the parody does not “unfairly diminish the economic value of the original.”²⁷

While most courts struggled over whether the commercial aspect of the parody would render the parody an unfair use of the copyrighted work, other courts grappled with whether the parody before them was even a parody at all. If a court concluded that the defendant’s work was not a parody, the defendant’s claim of fair use was void. For example, in *Tin Pan Apple, Inc. v. Miller Brewing Co.*,²⁸ the District Court for the Southern District of New York concluded that a beer commercial, with actors imitating the rap group “The Fat Boys,” did not qualify as a parody because it did not “buil[d] upon the original,” nor did it contribute “something new for humorous effect or commentary.”²⁹ Finally, courts were in disagreement over whether the parody had to comment or criticize the actual copyrighted work itself to be considered fair use, or whether using a copyrighted work to parody life and society could be considered fair use. Some courts held that a parody must specifically comment or criticize the copyrighted work to be considered fair use. The District Court for the Southern District of New York in *Elsmere Music, Inc. v. National Broadcasting Co.*,³⁰ however, held that it is possible to find fair use even if the defendant’s work did not specifically parody the plaintiff’s song.³¹ The district court stated that “[t]o the extent that [other courts] can be read to require that there be an identity between the song copied and the subject of the parody, this Court disagrees.”³²

In the fifteen years following the codification of the fair use defense, courts were obviously in conflict with each other regarding the application of the four-pronged fair use analysis to parodies.³³ Consequently, whether a court would hold a parody to be fair use of a copyrighted work was unpredictable. The stage was set for the Supreme Court to step in and clear up the many ambiguities left by the lower courts’ decisions. What the Court did, however, was anything but clear.

27. *Id.* at 437.

28. 737 F. Supp. 826 (S.D.N.Y. 1990).

29. *Id.* at 832 (quoting *Elsmere Music, Inc. v. National Broad. Co.*, 623 F.2d 252, 252 (2d Cir. 1980)).

30. 482 F. Supp. 741 (S.D.N.Y. 1980).

31. *Id.* at 746.

32. *Id.*

33. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978) (“[T]he standards for applying the fair use defense in parody cases, like the standards for applying the fair use in other contexts, have been a source of considerable attention and dispute.”).

IV. THE CASE: *CAMPBELL v. ACUFF-ROSE MUSIC, INC.*A. *The Facts*

Plaintiff, Acuff-Rose Music, held the copyrights to the song *Oh, Pretty Woman*, written by Roy Orbison and William Dees in 1964.³⁴ In 1989, Luther R. Campbell, a member of the group 2 Live Crew, wrote a song entitled *Pretty Woman*.³⁵ According to Campbell, the song was “intended, ‘through comical lyrics, to satirize the original work.’”³⁶ Acuff-Rose refused to grant 2 Live Crew permission to use *Oh, Pretty Woman* for their parody, even though 2 Live Crew offered to give Orbison and Dees credit for the original, as well as pay Acuff-Rose a fee for using the song.³⁷ In spite of Acuff-Rose’s refusal to grant 2 Live Crew permission to use the song, “2 Live Crew released records, cassette tapes, and compact discs of ‘Pretty Woman’ in a collection of songs entitled ‘As Clean As They Wanna Be.’”³⁸ 2 Live Crew gave Orbison, Dees, and Acuff-Rose credit for authoring and publishing the original version.³⁹ Approximately one year after 2 Live Crew released *As Clean As They Wanna Be*, Acuff-Rose sued 2 Live Crew and the group’s record company for copyright infringement.⁴⁰

B. *The Lower Court’s Disposition of the Case*

The district court ruled in favor of defendant 2 Live Crew, granting their motion for summary judgment.⁴¹ The district court reached its decision by weighing a number of factors. First, the district court held that the commercial nature of the parody did not render it a presumptively unfair use of the copyrighted work.⁴² Second, the district court found 2 Live Crew’s song *Pretty Woman* to be a parody of *Oh, Pretty Woman*.⁴³ Third, the district court held that 2 Live Crew “appropriat[ed] no more from the original than [was] necessary to accomplish reasonably its

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

35. *Id.*

36. *Id.* (quoting App. to Pet. for Cert. 80a).

37. *Id.* at 572–73.

38. *Id.* at 573.

39. *Id.*

40. *Campbell*, 510 U.S. at 573.

41. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev’d*, 792 F.2d 1429 (6th Cir. 1992).

42. *Id.* at 1154.

43. *Id.* at 1154–55.

parodic purpose.⁴⁴ Finally, the district court found that the 2 Live Crew song would not likely have a negative impact on the market for Orbison and Dees' song.⁴⁵

The Sixth Circuit Court of Appeals reversed the district court's decision and held that "[t]he four factors set forth in section 107 of the [Copyright] Act support the conclusion that 2 Live Crew's use of Acuff-Rose's copyrighted song was not a fair use."⁴⁶ While the court of appeals accepted the district court's finding that 2 Live Crew's *Pretty Woman* was a parody of Orbison and Dees' song, the agreement between the two courts ended there.⁴⁷ The Sixth Circuit found that the district court failed to sufficiently emphasize the commercial nature of 2 Live Crew's parody and that a commercial parody was a presumptively unfair use of a copyrighted work.⁴⁸ The Sixth Circuit then turned to the question of whether 2 Live Crew was able to successfully rebut the presumption of unfair use by showing that the parody did not "diminish the economic value of the original."⁴⁹ The court held that in light of the commercial nature of the parody, 2 Live Crew's song was an unfair use of *Oh, Pretty Woman*.⁵⁰

C. *The Supreme Court's Holding and Rationale*

The Supreme Court granted certiorari for the sole purpose of deciding if 2 Live Crew's commercial parody could be a fair use.⁵¹ The Court recognized that but for a finding of fair use, 2 Live Crew's song *Pretty Woman* was an infringement on Acuff-Rose's copyrighted song.⁵²

The Court's opinion opened with a brief history of the fair use doctrine, which included setting out the four-pronged fair use analysis, as codified in section 107.⁵³ The Court noted that the fair use doctrine required a flexible case-by-case analysis because bright-line rules were inappropriate

44. *Id.* at 1157.

45. *Id.* at 1158.

46. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994).

47. *Id.* at 1435 ("We accept the district court's conclusion that the purpose of the use was to parody the original.").

48. *Id.* at 1437.

49. *Id.* (quoting *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986)).

50. *Id.* at 1439.

51. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994).

52. *Id.*

53. *Id.* at 576-77.

when determining fair use.⁵⁴ The Court then evaluated 2 Live Crew's song under the four-prong analysis of section 107.

1. Purpose and Character of the Use

The primary concern for a court deciding if the first factor weighs in the parodist's favor is whether the parody is transformative of the original work. According to the Court, the aim of the first factor is to ascertain "whether the new work merely 'supersede[s] the objects' of the original creation or instead adds something new, with a further purpose or different character . . . it asks, in other words, whether and to what extent the new work is 'transformative.'"⁵⁵ To what extent the secondary work is transformative of the copyrighted work is important to decipher because the "more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."⁵⁶ The Court found that parodies have a transformative value, and, in fact, "provide social benefit."⁵⁷ Thus, the Court concluded parodies may claim fair use protection from copyright infringement liability under section 107.⁵⁸

Next, the Court distinguished parodies from satires and held that only parodies may claim fair use.⁵⁹ The heart of a parodist's claim of fair use, the Court stated, is that parodists use copyrighted work to criticize or comment on another author's original work.⁶⁰ If a parody fails to comment or criticize the "substance or style of the original composition," and only uses the original work to "avoid the drudgery in working up something fresh," the parodist's fair use argument will be greatly diminished. In that situation, other factors, such as the parody's commercial purpose, will be given greater weight.⁶¹ In sum, for a secondary work to be considered a parody, and afforded the full protection of the fair use defense, it must "mimic an original to make its point, and [have] some claim to use the creation of its victim's . . . imagination . . ."⁶² However, a satire "can stand on its own two feet and so requires

54. *Id.* at 577.

55. *Id.* at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)) (citations omitted) (alteration in original).

56. *Id.*

57. *Campbell*, 510 U.S. at 579.

58. *Id.*

59. *Id.* at 580-81.

60. *Id.* at 580.

61. *Id.*

62. *Id.* at 580-81.

justification for the very act of borrowing.”⁶³ The Court concluded that a secondary work is only a parody deserving of fair use protection if the “parodic character may reasonably be perceived.”⁶⁴ The Court found that 2 Live Crew’s song was a parody of *Oh, Pretty Woman*, and not a satire, because the secondary work could “reasonably . . . be perceived as commenting on the original or criticizing it, to some degree.”⁶⁵

Finally, the Court addressed the emphasis the Sixth Circuit placed on the parody’s commercial nature. The Court pointed out that section 107 makes the commercial nature of a secondary work only one of many factors to be considered when determining fair use.⁶⁶ According to the Court, lower courts that found commercial parodies to be a presumptively unfair use of a copyrighted work were not fulfilling Congress’ purpose of preserving the fair use tradition.⁶⁷ Consequently, the weight the Sixth Circuit gave to the commercial nature of 2 Live Crew’s parody was contrary to the congressional purpose behind section 107.⁶⁸

2. Nature of Copyrighted Work

The Court held that Orbison and Dees’ song was an original creative expression and “[fell] within the core of the copyright’s protective purposes.”⁶⁹ Finding that the original work was quintessentially protected by copyright law, however, was unhelpful in the Court’s analysis of parodies and fair use because parodies typically copy an expressive work.⁷⁰

3. Amount and Substantiality of the Copyrighted Work Used by the Parodist

The third factor, which looks at the amount of the copyrighted work used by the parodist, is related to both the first and the fourth factors of the fair use doctrine. Specifically, the permissible amount a parodist may copy from a copyrighted work is tied to both the purpose and character of

63. *Campbell*, 510 U.S. at 581; see also *Lehr*, *supra* note 5, at 470 (“If, however, the secondary work merely uses the original to criticize or comment on society (or on anything other than the original work), then the secondary work is not a parody and, thus, does not merit the fair-use protection articulated in *Acuff-Rose*.”).

64. *Id.* at 582.

65. *Id.* at 583.

66. *Id.* at 584.

67. *Id.*

68. *Id.* at 583–85.

69. *Campbell*, 510 U.S. at 586.

70. *Id.*

the parody, as well as the market effect the parody will have on the original work.⁷¹ If a large portion of the original work is copied verbatim, it points toward a finding that the parody lacks transformative value and that the market value of the original is more likely to be affected.⁷² Additionally, this factor requires courts to look not only at the amount of copying done by the parodist but at the substance of the copying as well.⁷³

The Court, seemingly, disagreed with the Sixth Circuit's holding that 2 Live Crew copied more from the original song than was necessary to conjure up enough of the original for a humorous effect. The Court stated that a parody necessarily uses a recognizable work for comedic effect.⁷⁴ When a parodist "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."⁷⁵ Once enough of the original is copied to make it recognizable, the permissibility of any excess copying depends on the weight of the other three factors.⁷⁶ 2 Live Crew's parody struck "at the heart" of the original song, yet this fact did not dictate that the third fair-use factor weigh in Campbell's favor because it was the heart of the song that 2 Live Crew was seeking to parody.⁷⁷

The Court did not ultimately reach a final decision on whether 2 Live Crew's song inappropriately copied the original song. Even in light of the belief that taking the heart of an original work is not necessarily impermissible copying, the Court stated that a "parodist [may not] skim the cream and get away scot free."⁷⁸ 2 Live Crew copied the first line of *Oh, Pretty Woman* as well as the bass riff and other distinctive sounds heard throughout the original song.⁷⁹ The Court found that 2 Live Crew's song was not a verbatim copy of the original song and held that 2 Live Crew copied no more than necessary of the copyrighted lyrics. The Court, however, remanded to the lower court the issue of whether 2 Live Crew's use of the music was excessive copying.⁸⁰

71. *Id.* at 586-87.

72. *Id.* at 587-88 ("[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.").

73. *Id.* at 588.

74. *Id.*

75. *Campbell*, 510 U.S. at 588.

76. *Id.*

77. *Id.*

78. *Id.* at 589.

79. *Id.*

80. *Id.* at 594.

4. Effect on Original Work's Potential Market or Value

The fourth factor requires courts to look, not only at the harm to the market caused by the infringer, but also at whether the infringing work will adversely affect the original work.⁸¹ The Court held that the appellate court inappropriately made a presumption about commercial parodies and incorrectly resolved the fourth factor in favor of Acuff-Rose.⁸² The court of appeals should have looked at the transformative nature of the parody, instead of the commercial nature of the parody, when evaluating whether the parody was likely to cause market harm.⁸³ If a parody is largely transformative, the potential harm to the market is less likely because there is a greater difference between the parody and the original.⁸⁴ This is because "the parody and the original usually serve different market functions."⁸⁵ Furthermore, while it cannot be said that a parody does not harm the market at all, the harm caused by a parody is not meant to be remedied by the Copyright Act.⁸⁶ While copyrighted works are protected against parodies that displace the original work, they are not protected against parodies that merely disparage the original.⁸⁷ This notion is "reflected in the rule that there is no protectable derivative market for criticism."⁸⁸

In sum, the Court concluded that it was impossible to decide whether 2 Live Crew's song impermissibly harmed the market because of the inadequacies in the court record.⁸⁹ Specifically, the record was void of any evidence on the potential harm of the rap market by 2 Live Crew's parody.⁹⁰

5. Final Holding

After weighing all of the factors enumerated in section 107, the Court concluded that the court of appeals erred in holding that 2 Live Crew's commercial parody was presumptively an unfair use of Acuff-Rose's

81. *Campbell*, 510 U.S. at 590.

82. *Id.* at 591.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 591-92.

87. *Campbell*, 510 U.S. at 592.

88. *Id.*

89. *Id.* at 594.

90. *Id.* at 593.

copyrighted song.⁹¹ The appellate court incorrectly assumed a presumption against commercial parodies when evaluating both the first and the fourth factors of the fair use analysis. As a result, the case was remanded to the court of appeals for further findings in light of the Court's opinion.

V. DISTRICT COURT ATTEMPTS TO INTERPRET *CAMPBELL v. ACUFF-ROSE*

Soon after the Court's decision in *Campbell*, three different U.S. District Courts were called upon to interpret its affect on the fair use analysis. *Campbell* arguably introduced an additional step in the analysis before reaching the section 107 factors, a step that vests a substantial amount of interpretive discretion in the lower courts. After *Campbell*, courts must first determine whether the challenged use is a parody or a satire. In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*,⁹² *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,⁹³ and *Leibovitz v. Paramount Pictures Corp.*,⁹⁴ each district court was faced with determining the extent of this new-found discretion.

A. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*⁹⁵

1. The Facts

Cardtoons, L.C. is the maker of baseball cards, called "Cardtoons," which depict cartoon caricatures of Major League Baseball players. The Major League Baseball Players Association (the "Association"), the exclusive bargaining agent of major league baseball players, claimed that the cards infringed upon the Association's right of publicity as protected by Oklahoma law,⁹⁶ and ordered *Cardtoons* to cease and desist from

91. *Id.* at 594.

92. 868 F. Supp. 1266 (N.D. Okla. 1994), *aff'd*, 95 F.3d 959 (10th Cir. 1996).

93. 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997).

94. 948 F. Supp. 1214 (S.D.N.Y. 1996).

95. 868 F. Supp. 1266 (N.D. Okla. 1994), *aff'd*, 95 F.3d 959 (10th Cir. 1996).

96. Oklahoma's right of publicity statute reads:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account when computing the actual damages.

OKLA. STAT. tit. 12, § 1449(A)(1985).

publishing its cards. Cardtoons brought an action seeking a declaratory judgment that its cards did not violate the Association's publicity rights. A magistrate judge originally held in favor of the Association, finding that the cards violated Oklahoma's right of publicity.⁹⁷ Cardtoons appealed the magistrate's decision to the district court, arguing that its cards were a parody of "widely-known individuals and institutions."⁹⁸ While the Association did not assert a copyright claim against Cardtoons, the district court held that copyright law was applicable to the right of publicity by analogy.⁹⁹ After weighing the fair use factors, the district court held that Cardtoons' trading cards were a "fair use" of the Association's publicity rights.¹⁰⁰

2. To Be An Effective Parody

The district court rejected the Association's claim that because the cards copied traditional baseball cards licensed by the Association, the cards infringed on the players' rights of publicity.¹⁰¹ The district court found instead that the individual's image on the cards was essential to create an effective parody, and without the "visual identification with the parody's target" the parody would be wholly unsuccessful.¹⁰² The court held that in order for "Cardtoons" to effectively parody baseball cards, they must imitate the look of baseball cards.¹⁰³ Based on *Campbell*, the district court found that a parody must copy some of the original work to achieve the desired comedic effect.¹⁰⁴ Furthermore, the court held that if "Cardtoons" were not published in the baseball card form, the attempt to parody the traditional baseball card by evoking the baseball card image would be largely unsuccessful.¹⁰⁵

After extensive discussion concerning the definition of a parody, the court concluded that "Cardtoons" fit that definition.¹⁰⁶ While the form of

97. *Cardtoons*, 868 F. Supp. at 1268 (holding that the Oklahoma statute was meant to "protect individuals, celebrities or otherwise, from having distinguishing characteristics of their persona exploited, to the commercial benefit of another").

98. *Id.* at 1267.

99. *Id.* at 1271.

100. *Id.* at 1274.

101. *Id.* at 1267.

102. *Id.* at 1268.

103. *Cardtoons*, 868 F. Supp. at 1267.

104. *Id.*

105. *Id.* at 1268.

106. *Id.* ("A parodist takes a person, exaggerates and distorts facets of the person until hilarity ensues, and markets the result [T]he parodist has studied the original and modified it until it is something that could never be mistaken for its progenitor.").

baseball cards was imitated, the image of the baseball players and the statistical information on the back of the card were extremely exaggerated.¹⁰⁷ As discussed above, the district court analogized copyright law to the Oklahoma statute granting publicity rights; thus, “under the standard applicable to parody under copyright law, *Cardtoons* would be eligible for a fair use analysis.”¹⁰⁸

a. Purpose and Character of the Parody

The district court, referencing the Court’s decision in *Campbell*, dismissed the three cases cited by the magistrate as standing for the proposition that commercial parodies are presumptively unfair use.¹⁰⁹ Pursuant to *Campbell*, the commercial nature of a parody should only be considered as one factor among many and should not be determinative when deciding fair use.¹¹⁰ Further, the court held that commercial parodies sold for a profit may claim greater First Amendment protection than those which merely advertise other products.¹¹¹ Therefore, “*Cardtoons*,” being of the former category, should be afforded First Amendment protection.¹¹²

b. Nature of Copyrighted Work

The district court considered the facial images of baseball players to be factual; hence, the baseball players’ images were afforded less protection from fair use.¹¹³ The court explained that a person’s facial image is not a result of creativity and should not be entitled to the same protection as an original creative work.¹¹⁴

c. Amount and Substantiality of Original Work Used by Parodist

The district court held the amount and substantiality of original work used by parodists weighed in favor of *Cardtoons* because the cards copied no more than necessary to achieve its parodic effect.¹¹⁵ *Cardtoons* depicted the images of the baseball players on the “*Cardtoons*” by using

107. *Id.*

108. *Cardtoons*, 868 F. Supp. at 1271.

109. *Id.* at 1271–72.

110. *Id.* at 1272.

111. *Id.* at 1273.

112. *Id.*

113. *Id.*

114. *Cardtoons*, 868 F. Supp. at 1273.

115. *Id.* at 1273–74.

drawn caricatures, not photographs. The caricatures of the baseball players were enough to conjure up the image of the parody's target—any less copying would have defeated the parody's purpose.¹¹⁶

d. Effect on the Potential Market or Value of Copyrighted Work

The potential for *Cardtoons'* cards to usurp the Association's market of licensed cards would increase if the "Cardtoons" were virtual copies of the licensed baseball cards. Thus, this factor would weigh in favor of finding unfair use. The court found, however, that it was unlikely that the caricatures on the "Cardtoons" would misplace the market for the real baseball cards licensed by the Association.¹¹⁷ While the traditional baseball cards licensed by the Association gave an accurate depiction of the baseball player and accurate statistics, the "Cardtoons" featured only a caricature of the player and gave humorous statistics.¹¹⁸ Based on the vast market for baseball cards and the differences between *Cardtoons'* cards and the traditional baseball cards, the court concluded that "Cardtoons trading cards [were] not a substitute product, and [could not] fulfill demand for the original."¹¹⁹

3. The Effect of *Campbell* on the District Court's Decision

Campbell provided the district court in *Cardtoons* with clear guidelines on how to evaluate the commercial nature of the trading cards. The district court definitively reversed the magistrate's holding that the commercial nature of the parody was a key factor in deciding fair use. Instead, the court followed *Campbell* and only considered the commercial nature of a parody as one factor among many.¹²⁰

A substantial amount of the district court's opinion discussed the definition of parody and the determination of whether "Cardtoons" fit that definition. The court, however, did not grapple with the question of whether "Cardtoons" commented on or criticized the original work, or commented on or criticized society as a whole. Arguably, the nature of the cards, which parodied the images and statistics of baseball players as seen

116. *Id.* at 1274.

117. *Id.*

118. *Id.*

119. *Id.*

120. In 1996, the Tenth Circuit affirmed the district court's decision in *Cardtoons*. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) ("The cards . . . are an important form of entertainment and social commentary that deserve First Amendment protection. Accordingly, we affirm.").

on licensed, traditional baseball cards, allowed the court to avoid the difficult task of distinguishing between parodies and satires.

*B. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*¹²¹

1. The Facts

Dr. Seuss Enterprises, L.P. (“Dr. Seuss”) sought a preliminary injunction from the District Court for the Southern District of California to enjoin the Penguin Books USA, Inc. (“Penguin Books”) from publishing the book *The Cat NOT in the Hat!*, a spoof on the O.J. Simpson criminal trial set to the distinctive Dr. Seuss rhyming style.¹²² The book, however, put a twist on selective illustrations and rhymes to tell the story of the O.J. Simpson trial.¹²³ Dr. Seuss alleged that the book infringed on the copyrights in the original Dr. Seuss books by taking a substantial portion of the copyrighted works.¹²⁴ While Penguin Books did not deny that it “relied upon Dr. Seuss’s [sic] book in putting together [its] own,” it argued that their book was not an infringement on Dr. Seuss’ copyrights but was instead a “fair use.”¹²⁵

The court granted Dr. Seuss’ request for a preliminary injunction, finding that the Dr. Seuss would likely prevail against Penguin Books’ fair use defense.¹²⁶ Penguin Books, however, requested reconsideration of the ruling in light of newly discovered evidence. The discussion below is based on the court’s reconsideration of the order granting the plaintiff’s request for a preliminary injunction, wherein the district court modified the preliminary injunction, keeping the bulk of the earlier judgment intact.

2. Requirements For a Preliminary Injunction

To be granted a preliminary injunction, a plaintiff must prove a

121. 924 F. Supp. 1559 (S.D. Cal. 1996), *aff’d*, 109 F.3d 1394 (9th Cir. 1997).

122. *Id.* at 1561. It was undisputed that the book’s rhymes, illustrations, and packaging “mimic the distinctive style of the family of works created by Theodore S. Geisel, better known as Dr. Seuss.” *Id.* (footnote omitted).

123. *Id.*

124. *Id.*

125. *Id.* at 1562.

126. *Id.* For a court to grant a preliminary injunction, the plaintiff must prove either: (a) likely success on the merits of the case and the possibility that they will suffer irreparable injury if the injunction is not granted, or, (b) the plaintiff must prove that serious hardship will be suffered. The plaintiff’s burden of proving that they will succeed on the merits of the case “includes the burden of showing a likelihood that it would prevail against any affirmative defenses raised by the defendant.” *Id.*

likelihood of success on the merits of the case. Thus, Dr. Seuss was required to prove the two elements of a prima facie case of copyright infringement.¹²⁷ Dr. Seuss also had to prove that it would prevail against any affirmative defenses raised by Penguin Books, such as the defense of fair use. After substantial discussion regarding the elements of copyright infringement, the district court concluded that Penguin Books, barring any affirmative defense, infringed the copyrights of *Horton Hatches the Egg* and *The Cat in the Hat*.¹²⁸ Thus, the first requirement for obtaining a preliminary injunction was met. Finally, the district court evaluated Penguin Book's work under the four-pronged fair use analysis to decide whether Dr. Seuss could prove likely success against Penguin Books' affirmative defense of fair use.

3. Parody or Satire?

Dr. Seuss argued that only parodies are afforded the protection of the fair use defense and that Penguin Books' work was not a parody because it did not comment on or criticize the copyrighted work. Penguin Books, however, asserted that both parodies and satires are equally allowed to claim fair use.¹²⁹ The district court stated that while Justice Kennedy's concurrence in *Campbell*, as well as the Second and Ninth Circuits, found that only parodies may claim fair use, the *Campbell* majority did not clearly support either position.¹³⁰ Seemingly, the district court ignored the majority in *Campbell*, which stated that a satire must "stand on its own two feet," and only because parodies "mimic an original to make [their] point [do they] have some claim to use the creation of its victim's . . . imagination"¹³¹ The district court, however, chose to follow the precedent of both the Second and Ninth Circuits and extended fair use protection only to parodies, not satires.¹³²

Satirists, the court held, have many alternatives when choosing what works to draw from when commenting on social conditions.¹³³ A satirist can easily take from copyrighted work, as well as unprotected work, to

127. See *supra* Part II.A.

128. *Penguin Books*, 924 F. Supp. at 1563-65. While the defendant's book also contained illustrations similar to other Dr. Seuss books, some of the illustrations had fallen into the public domain. Thus, Dr. Seuss was barred from claiming infringement. *Id.* at 1565.

129. *Id.* at 1567.

130. *Id.*

131. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

132. *Penguin Books*, 924 F. Supp. at 1567.

133. *Id.*

achieve their satiric goal.¹³⁴ It is only when a satirist chooses to parody a copyrighted work itself “does the taking of protected expression from the work become permissible, and even then, only in such amounts as is required to fulfill the parodic purpose.”¹³⁵ According to the district court, the most important factor in deciding fair use is whether there is an effect on the market, which significantly weighs against the finding that satires should be afforded fair use protection. An unlicensed satire, the court held, “deprives the author of potential license fees for derivative works, [while] the parodist is presumed to operate within a market imperfection.”¹³⁶ In sum, it is only when a parody is directed at the original work itself that a parodist can claim there was no alternative but to copy some aspects of the original copyrighted work.¹³⁷

Reaching an arguably tortured outcome, the court concluded that part of the book was a parody, while another part was a satire and could not be considered a fair use. The court concluded that the book failed to comment on the text and themes of *The Cat in the Hat*. Penguin Books did, however, have a claim of parody concerning its use of *Horton Hatches the Egg*.¹³⁸ Thus, Dr. Seuss only demonstrated a likelihood of success on the merits as to *The Cat in the Hat* infringement claim. It did not prove a likelihood of success with regard to *Horton Hatches the Egg*.¹³⁹ The district court modified the preliminary injunction accordingly.¹⁴⁰

4. The Apparent Effect of *Campbell* on the District Court’s Decision

What can be said about the district court’s interpretation of *Campbell*? Confused? Incorrect? The *Campbell* Court made it very clear that only parodies that comment on the original work were afforded the full protection of the fair use claim. Regardless of how one chooses to classify the district court’s interpretation—or rather misinterpretation—of

134. *Id.* at 1568.

135. *Id.*

136. *Id.* at 1569.

137. *Id.*

138. *Penguin Books*, 924 F. Supp. at 1570.

139. *Id.*

140. In 1997, the Ninth Circuit affirmed the district court’s decision in *Penguin*. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997). The Ninth Circuit recognized that there is a difference between parodies and satires and noted that if the plaintiff’s copyrighted work is not a direct target of the defendant’s work, the defendant’s work is not a “parody” in the legal sense. *Id.* at 1400–01. The appellate court concluded that while “*The Cat NOT in the Hat!* does broadly mimic Dr. Seuss’ characteristic style, it does not hold *his style* up to ridicule.” *Id.* at 1401 (emphasis in original). After applying the four fair use factors, the appellate court held that the district court’s findings were not clearly erroneous. *Id.* at 1403.

Campbell, Dr. Suess v. Penguin Books clearly illustrates the incongruous results a court can reach when attempting to distinguish between a satire and a parody. The court found, within the same book, both a satiric and parodic work, holding that only part of the book could claim fair use while the other part of the book was an unlawful infringement. It is doubtful whether a reader of *The Cat NOT in the Hat!* would recognize a difference between the author's treatment of *The Cat in the Hat* and *Horton Hatches the Egg*.

Instead of reaching the logical conclusion that *The Cat NOT in the Hat!* parodied Dr. Seuss themes to comment and criticize the O.J. Simpson trial, the court analyzed the work to determine whether it was a satire or a parody and afforded protection accordingly. Thus, while the district court did not take direction for its action from *Campbell*, the court did precisely what *Campbell* requires courts to do—differentiate between satires and parodies and only allow parodies the right to claim fair use. It is not clear what the outcome in *Dr. Suess v. Penguin Books* reveals about the discretion given by *Campbell* to judges deciding what deserves protection and what does not. At least one district court, however, made a distinction between a satire and a parody that appears to directly contradict common sense.

C. Leibovitz v. Paramount Pictures Corp.¹⁴¹

1. The Facts

Annie Leibovitz, the photographer of the *Vanity Fair* cover featuring a naked and pregnant Demi Moore, sued Paramount Pictures Corp. for copyright infringement over Paramount's spoof of the Leibovitz picture, an advertisement for the movie *Naked Gun 33 1/3: The Final Insult*, featuring the head of Leslie Nielsen superimposed on a naked and pregnant body.¹⁴² Paramount defended its advertisement by arguing that the photograph was a parody and that the advertisement was a fair use of Leibovitz's work.¹⁴³ The district court, after weighing the four prongs of the fair use analysis, held that the Nielsen photograph was a parody and, therefore, a fair use of Leibovitz's copyrighted work.¹⁴⁴

141. 948 F. Supp. 1214 (S.D.N.Y. 1996).

142. *Id.* at 1215.

143. *Id.*

144. *Id.* at 1226 ("Three of the four fair use factors in the present case militate in favor of a finding of fair use, largely because the defendant's transformation of the plaintiff's photograph has resulted in public access to two distinct works . . .").

2. The Fair Use Factors

a. Purpose and Character of the Parody

The court began its discussion of the first prong of the fair use analysis by noting that the Court in *Campbell* refuted the notion that commercial parodies were presumptively an unfair use of a copyrighted work.¹⁴⁵ The district court stated that the important issue when discerning in whose favor the first fair use factor should fall is the transformative extent of the parody.¹⁴⁶ If the parody is found to be largely transformative of the original work, the other factors, such as the commercial nature of the parody, will be less important.¹⁴⁷

The parody must first qualify as a parody deserving of the fair use defense. Based on the Court's holding in *Campbell*, the district court stated that "[t]o qualify as a parody . . . the second work must comment upon or criticize the original copyrighted work."¹⁴⁸ The district court discussed the *Campbell* Court's distinction between parodies and satires, emphasizing that if a derivative work lacks direct references to the copyrighted work, it is not a parody, and will not fall under the fair use exception.¹⁴⁹ The district court held that the Nielsen photograph clearly parodied the Leibovitz photograph, illustrating the broad discretion granted by the *Campbell* Court to decide whether a secondary work is a parody or a satire—and subsequently unfair use.¹⁵⁰

The district court concluded that the Nielsen photograph was meant to mock the image of Moore, which had become a "cultural icon."¹⁵¹ It is the comparison between Moore's beauty and Nielsen's ridiculousness, the court stated, that made the parody funny.¹⁵² Furthermore, the pregnant Moore provided the necessary image for the Nielsen photograph to highlight the movie's plot.¹⁵³ It was what the Moore photo came to represent to the public, "pregnancy as a source of pride and a particular

145. *Id.* at 1219.

146. *Id.* at 1220.

147. *Leibovitz*, 948 F. Supp. at 1220.

148. *Id.*

149. *Id.*

150. *Id.* at 1222–23. Leibovitz supported the district court's finding that the photograph of Nielsen was a parody by stating in her deposition that she thought the Nielsen picture was a parody of her own. *Id.*

151. *Id.* at 1221–22 (citation omitted).

152. *Id.* at 1222.

153. *Leibovitz*, 948 F. Supp. at 1222.

form of beauty," that the Nielsen photograph was juxtaposing against the movie's theme of fear of fatherhood.¹⁵⁴

The district court then continued its analysis of the first prong by turning to both the character and the purpose of the parody. The district court found the Nielsen picture to be transformative in character, yet also commercial in nature.¹⁵⁵ As noted earlier, the commercial nature of the photograph did not preclude a finding of fair use. *Campbell*, however, did state that a commercial parody used solely to advertise another product deserved less protection than a parody that is sold for its own value.¹⁵⁶ In making the final determination of whom the first factor should favor, the district court turned to the purpose behind copyright law to encourage the dissemination of creative works.¹⁵⁷ The court held that the first fair use factor must be decided in favor of Paramount.¹⁵⁸

b. Nature of Copyrighted Work

The district court had little difficulty in deciding that Leibovitz's picture was a highly creative work.¹⁵⁹ The court, however, followed the Supreme Court's precedent in finding that this factor was of less importance in parody cases.¹⁶⁰

c. Amount and Substantiality of Copyrighted Work Used by Parodist

In the court's resolution of the third factor, it considered whether Paramount "took more than was reasonably required to 'conjure up' the Moore photograph in creating the Nielsen ad."¹⁶¹ The court decided that, while the Nielsen ad took some of the distinctive features of the Leibovitz picture, that fact did not dictate a finding against Paramount on the third factor.¹⁶² Accordingly, the court followed the *Campbell* decision, and held that even if the defendant took the heart of an original work, the defense of fair use could still be asserted. The district court noted the heart of the original work is what will likely "conjure up" the work being parodied.¹⁶³

154. *Id.*

155. *Id.* at 1223.

156. *Id.*

157. *Id.* at 1223.

158. *Id.*

159. *Leibovitz*, 948 F. Supp. at 1223.

160. *Id.* at 1224.

161. *Id.*

162. *Id.* at 1225.

163. *Id.* at 1224.

The court then turned to the issue of whether the Nielsen ad borrowed too much from the Leibovitz picture. While the court found that the Nielsen photograph was similar in many respects to Leibovitz's picture, the court noted that the Nielsen photograph was of a different pregnant woman, and Nielsen's head was superimposed on the woman's body.¹⁶⁴ The court concluded that in light of the parodic purpose of the Nielsen photograph, the photograph took no more than necessary from the Leibovitz picture than needed to "conjure up" the Moore picture and achieve Paramount's desired effect.¹⁶⁵

d. Effect on Potential Market

The district court began its analysis of the last fair use factor by agreeing with the Supreme Court's recognition in *Campbell* that "there is no protectable derivative market for criticism."¹⁶⁶ The court noted that because parody is transformative of an original work, it is unlikely to displace or harm the original work in its market.¹⁶⁷ In fact, Leibovitz admitted in her deposition that she was unaware of any adverse effects that the Nielsen photograph had on the marketing of her Moore photograph.¹⁶⁸ In sum, the court concluded that the Nielsen photograph did not serve as a market substitution for the Moore photograph, the only type of harm remedied by the Copyright Act. Thus, the court determined that the fourth fair use factor weighed in favor of Paramount.¹⁶⁹

3. The Influence of *Campbell* on the District Court's Decision

In concluding that the Nielsen photograph was a fair use of Leibovitz's picture, the district court relied heavily on the precedent set in *Campbell*. First, the court read *Campbell* as requiring a parody to criticize or comment on an original copyrighted work in order to qualify as a parody, and thus a fair use.¹⁷⁰ Second, the district court used the discretion granted by the *Campbell* Court and analyzed the Nielsen photograph to determine whether it was meant to parody society and life or whether the Nielsen photograph intended to parody the beauty of Moore's pregnant

164. *Id.* at 1225.

165. *Leibovitz*, 948 F. Supp. at 1225.

166. *Id.* at 1226.

167. *Id.*

168. *Id.*

169. *Id.* at 1226.

170. *Id.* at 1220.

body.¹⁷¹ The court went a step further, determining that the Moore photograph represented a beautiful woman taking pride in her pregnant body and that the Nielsen photograph took direct aim at that notion. Thus, the district court decided both what the original work represented and what the parody was saying about the original work. As a result of *Campbell*, the court's critique of the two works stood as a gatekeeper to fair use protection. Thus, the *Leibovitz* opinion represents parody's nebulous position when a court is granted sole discretion to interpret a secondary work as a parody or a satire, and grant fair use protection accordingly. While the conclusion this court reached was not irrational, the decision represents the broad discretion trial courts have when a parody case is before them.

VI. CRITICISM OF THE CURRENT LAW AND SUGGESTIONS FOR REFORM

A. *What the Court Did Wrong*

After *Campbell*, courts have broad discretion to assess secondary works and decide which are parodies and which are satires. Furthermore, as seen in the cases discussed above, the distinction between the two has become quite important. If a court finds that a secondary work is merely a satire because it does not criticize or comment on the original copyrighted work, the secondary work may not be afforded the fair use defense.

At best, the differentiation between parodies and satires is strained. Courts should not have the discretion to make a subjective determination about what an original work represents or what a secondary work is attempting to say about it. Paul Tager Lehr correctly stated, "Judges surely are not equipped to determine what a work of art means, nor are they equipped to distinguish a parody that comments on the original work from a satire that uses the original work to comment on society, or on any thing other than the original work."¹⁷²

Additionally, why shouldn't a secondary work that used a copyrighted work to parody society, or something other than the copyrighted work itself, get to claim fair use? As the Court in *Campbell* stated, parody has a comedic place in our society. Is a parody that comments on society rather than another work less beneficial to society? Arguably, it is not. To claim that only a secondary work that criticizes or comments on the original is deserving of the fair use defense is ludicrous.

171. *Leibovitz*, 948 F. Supp. at 1222-24.

172. Lehr, *supra* note 5, at 474-75.

If the purpose of copyright law is to encourage creativity and increase dissemination of creative works, it is illogical to stifle one parodist while encouraging another.

B. A Better Alternative

Instead of leaving it to the court to decide whether the secondary work criticizes or comments on the original copyrighted work, all parodists should be able to argue their work is a fair use of a copyrighted work. While parodists will still have to prove the four fair use factors weigh in their favor, the threshold question should not be whether the secondary work is a parody or a satire. Rather, it should be presumed that if the secondary work uses an original copyrighted work to comedically criticize or comment on anything the author of the secondary work may argue it falls under the protection of section 107.

The satire/parody distinction is unnecessary because the four-pronged fair use analysis will ferret out secondary works that merely highjack a copyrighted work for no purpose other than to avoid creativity. For example, the first fair use prong requires a court to look at whether the parody is transformative of the original work, which results in the creation of a new work. Through this analysis, a court can lean toward disallowing fair use protection for a parody that, instead of adding and building on the original work, merely uses the copyrighted work to “avoid the drudgery in working up something fresh.”¹⁷³ Section 107 requires courts to do a case-by-case analysis of every parody claiming to be fair use of a copyrighted work. The four-prong case-by-case analysis, alone, is enough to ensure the exclusive rights of copyright holders are protected. The added requirement that the parody comment on the copyrighted work itself over-protects original works and seemingly cuts against the core purpose of copyright law—to encourage creativity. The notion that secondary works that build upon others’ works are a vital part of furthering the dissemination of creativity was voiced by Ninth Circuit Justice Alex Kozinski in his dissent from that circuit’s refusal to rehear *White v. Samsung Electronics America, Inc.*¹⁷⁴ He stated:

Intellectual property law assures authors the rights to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors

173. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

174. 989 F.2d 1512 (9th Cir. 1993).

certain exclusive rights, but in exchange we get a richer public domain.¹⁷⁵

VII. CONCLUSION

As recent district court cases demonstrate, the Supreme Court's holding in *Campbell* resulted in three steps forward and two steps backward for parodists. While *Campbell* helped parodists achieve fair use protection by holding that commercial parodies were not presumptively unfair uses, the decision made commenting on or criticizing an original work a threshold requirement to fair use protection. In doing so, the Court gave district courts broad discretion to determine the subject value of both the original work and the parody. *Campbell* has failed to provide the expanded protection for parody necessary to further the goals of the Copyright Act. The Court surely erred by not taking advantage of an opportunity to extend fair use protection and limit the discretion courts have in deciding what should be considered fair use of a copyrighted work.

175. *Id.* at 1517 (Kozinski, J., dissenting).