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## "If That's The Way It Must Be, Okay": Campbell v. Acuff-Rose On Rewind

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## "If That's The Way It Must Be, Okay": Campbell v. Acuff-Rose On Rewind

### Cover Page Footnote

J.D., Case Western Reserve University School of Law, 2007; B.A, University of Nebraska–Lincoln, 2004. The author would like to thank professors Raymond Ku and Jonathan Entin at Case Western Reserve University School of Law for their assistance, and Dr. Laura Hengehold at Case Western Reserve University, department of Philosophy, for her insight into Dadaist art.

## **“IF THAT’S THE WAY IT MUST BE, OKAY”<sup>1</sup>: CAMPBELL V. ACUFF-ROSE ON REWIND**

THOMAS IRVIN\*

The 1994 Supreme Court case *Campbell v. Acuff-Rose* established broad protections for parody in U.S. copyright law. While the case is well known, the facts behind the case are not. None of the three courts that heard the case were told that the alleged parody by 2 Live Crew appeared only on a “sanitized” version of the group’s controversial album. Thus the work had a heightened commercial purpose: filling up a meager album so that album could serve as a market stopgap for its controversial cousin. Although commercial purpose is a key factor in the fair use calculus, no court heard this argument.

The case is also ironic because Acuff-Rose maintained that 2 Live Crew’s song was by definition not a parody in the first place, but was unable to argue this due to procedural maneuvers in the district court and due to the Sixth Circuit’s desire to address fair use in a music context. Furthermore, 2 Live Crew’s expert Oscar Brand demonstrated a deep misunderstanding of the rap genre, and his analysis essentially relegates rap artists to participants in a minstrel show. Ironically, that was the winning argument for a black rap artist. In short, *Campbell v. Acuff-Rose* is a case that came out wrong—wonderfully wrong.

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\*J.D., Case Western Reserve University School of Law, 2007; B.A., University of Nebraska–Lincoln, 2004. The author would like to thank professors Raymond Ku and Jonathan Entin at Case Western Reserve University School of Law for their assistance, and Dr. Laura Hengehold at Case Western Reserve University, department of Philosophy, for her insight into Dadaist art.

1. ROY ORBISON, OH, PRETTY WOMAN (Monument Records 1964).

## I. INTRODUCTION

Songs are gifts, you know; they're blessings that just sort of drop in your lap.

—Roy Orbison, Singer-Songwriter and Musician<sup>2</sup>

The Supreme Court's 1994 decision in *Campbell v. Acuff-Rose Music, Inc.*<sup>3</sup> was hailed as a "major victory" for free speech and those who make their living from commercial parodies.<sup>4</sup> The acclaim for the outcome of the case is well-deserved. But, remarkably, that outcome is not supported by the facts of the case and the songs in question.

*Campbell v. Acuff-Rose* is a parody case that, as this article argues, does not involve parody, and a case about commerciality in which the courts (and likely the plaintiff) underappreciated the commerciality of the work at issue. Resolution of the issues in *Campbell* should not have required a decision by the district court, let alone a trip to the Supreme Court. But it is a case that illustrates the legal system's difficulty in grappling with new forms of art, and a case that demonstrates that the race of the artist affects people's perceptions of art.

It is a case that prompted 2 Live Crew's attorney to remark, "it is easy to see why many people believe that Luther Campbell and 2 Live Crew make better law than music,"<sup>5</sup> and a case that Acuff-Rose's attorney called "probably the first copyright case that can be decided on the doctrine of *res ipsa loquitur*."<sup>6</sup> Indeed, this should have been a case that speaks for itself. But few of the judges who presided over the hearings (save perhaps Justice Kennedy, who concurred with the Supreme Court's unanimous decision but felt the work had limited parodic content) understood what was really

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2. ROY ORBISON, INTERVIEW CD WITH Q&A (Orbison Records 1997).

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

4. Aaron Epstein, *A Rap Ruling: Parody is Protected*, PHILA. INQUIRER, Mar. 8, 1994, at A1.

5. Bruce Rogow, *The Art of Making Law from Other People's Art*, 14 CARDOZO ARTS & ENT. L.J. 127, 127 (1996).

6. Transcript of Oral Argument at 49, *Campbell III*, 510 U.S. 569 (No. 92-1292).

underlying the arguments. In short, it is a landmark case that came out wrong—wonderfully wrong.

The odd chain of circumstances that led to the Supreme Court began simply enough. Acuff-Rose Music, Inc. (“Acuff-Rose”), owner of the copyright to the Roy Orbison classic “Oh, Pretty Woman,” sued the rap band 2 Live Crew, their leader Luther Campbell, and Campbell’s self-owned record label for copyright infringement.<sup>7</sup> 2 Live Crew had sampled the classic guitar riff from the Orbison original<sup>8</sup> (although the case was not about sampling) and built a new song, dropping the “Oh” and calling theirs simply “Pretty Woman.”

After being sued for copyright infringement in the Middle District of Tennessee, 2 Live Crew argued the affirmative defense of fair use, claiming their work was a parody, and moved for summary judgment.<sup>9</sup> The district court granted 2 Live Crew’s motion (finding their work was both a parody and a fair use), and Acuff-Rose appealed to the Court of Appeals for the Sixth Circuit.<sup>10</sup> In a 2-1 decision, the Sixth Circuit accepted the district court’s finding that the work was a parody, but held that its “blatantly commercial purpose” precluded a finding of fair use.<sup>11</sup>

The basis of the Sixth Circuit’s decision was that commercial parodies are presumptively unfair. Because this was in conflict with rulings from other circuits, the Supreme Court granted certiorari to determine whether a commercial parody could be a fair use under copyright law.<sup>12</sup> Justice Souter wrote for a unanimous court that parody in general could be protected under the fair use doctrine, and overturned the Sixth Circuit’s ruling that the commercial nature of “Pretty Woman” made it presumptively unfair.<sup>13</sup> However, the Court stopped short of declaring that

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7. Complaint, *Acuff-Rose Music, Inc. v. Campbell* (*Campbell I*), 754 F. Supp. 1150 (M.D. Tenn. 1991) (No. 3:90-0524).

8. STAN SOOCHER, *THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT* 216 (Schirmer Books 1999).

9. *See Campbell III*, 510 U.S. at 573.

10. *Id.*

11. *Acuff-Rose Music, Inc. v. Campbell* (*Campbell II*), 972 F.2d 1429, 1439 (6th Cir. 1992).

12. *Campbell III*, 510 U.S. at 575, 579–80 (1994).

13. *Id.* at 579–81, 590–94.

this instance was a fair use, instead remanding to the district court for a fuller determination of facts on the third and fourth statutory fair use factors.<sup>14</sup> Yet before further court actions could take place, the parties agreed that 2 Live Crew would pay for a retroactive license to use the Orbison song.<sup>15</sup>

Admittedly, it is easy to play Monday morning quarterback with a case that has received as much attention as *Campbell v. Acuff-Rose*, and it should be noted that the briefs submitted by both sides in every court that heard the case were excellent overall.<sup>16</sup> But important details relating to the music itself and how it was marketed have been absent from the briefs, the opinions, and the post-decision analyses, making it a fascinating case for a postmortem musical forensic analysis.<sup>17</sup>

Part II of this article provides a biographical background of the parties. Part III argues that “Pretty Woman” was more commercial than the plaintiff or the courts realized at the time, and as such should have received less deference in a fair use analysis. Part IV examines Acuff-Rose’s attempts to convince the courts that the work was not a parody in the first place and suggests some explanations for why the courts had difficulty grasping this idea. Part V demonstrates the considerable weight given by all three courts to the affidavit of well-known folk singer Oscar Brand, despite Brand’s profound misunderstanding of the rock and rap genres. Part V also examines how the races of the participants may have influenced the fair use calculus. Part VI concludes.

For purposes of this article, the Middle District of Tennessee case will be referred to as *Campbell I*, the Court of Appeals for the Sixth Circuit case as *Campbell II*, and the Supreme Court case as *Campbell III*.<sup>18</sup>

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14. *Id.* at 599–600 (Kennedy, J., concurring).

15. SOOCHER, *supra* note 8, at 189–90.

16. *See generally* Brief on the Merits for Respondent, *Campbell III*, 510 U.S. 569 (No. 92-1292); Brief on the Merits for Petitioners, *Campbell III*, 510 U.S. 569 (No. 92-1292); Brief for Appellant, *Campbell II*, 972 F.2d 1429 (No. 91-6225); Appellees’ Brief at 40, *Campbell II*, 972 F.2d 1429 (No. 91-6225).

17. *See, e.g.*, Rogow, *supra* note 5; Nels Jacobson, Note, *Faith, Hope & Parody: Campbell v. Acuff-Rose, “Oh, Pretty Woman,” and Parodists’ Rights*, 31 HOUS. L. REV. 955 (1994); Matthew H. Schwartz, *On Target with the Parody Defense to Copyright Infringement*, 26 BEVERLY HILLS BAR ASS’N J. 57 (1992); Robert B. O’Connor, Comment, *Rap Parodies?: An In-depth Look at Acuff-Rose Music, Inc. v. Campbell*, 2 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 239 (1992).

18. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev’d*,

## II. BIOGRAPHICAL BACKGROUND OF THE PARTIES

Name me a song that everybody knows  
And I'll bet you it belongs to Acuff-Rose

–Uncle Tupelo, “Acuff-Rose”<sup>19</sup>

## A. Roy Orbison

Roy Orbison, lionized in death by Paul McCartney as “one of the greats of Rock 'n' Roll,”<sup>20</sup> was born in Vernon, Texas in 1936, and was given his first guitar at the age of six.<sup>21</sup> By the age of twenty he was recording for legendary Sun Records impresario Sam Phillips (who launched the careers of Elvis Presley, Jerry Lee Lewis, and Carl Perkins), but aside from one hit, his Sun Records years yielded little success.<sup>22</sup>

In 1960, Orbison signed with Monument Records, and from 1960 to 1964 his recordings “brought a new splendor to rock” with their sophisticated production, blending “a little bit of everything: Latin rhythms, martial beats, reminiscences of classical music, [and] keening steel guitars.”<sup>23</sup> Orbison’s biggest hits are from this period and include “Only

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972 F.2d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994). Many references to the briefs submitted by the parties in the three courts appear in this article. Citations are to the sources most likely to be found by the casual reader; therefore references to briefs from the parties in *Campbell III* are to the original page numbers, which are available on Westlaw. Briefs from *Campbell II* are to the original page numbers, however these briefs (as of this writing) are only available on request (with a fee) from the Sixth Circuit. References to briefs in *Campbell I* are to the page numbers in the Joint Appendix accompanying the Supreme Court case (which is widely available on microfilm), the page numbers of which are followed by an *a*, such as 32a. Other disparate documents, such as affidavits from *Campbell I* and the denial of rehearing en banc from the Sixth Circuit, are also part of this Joint Appendix, therefore references to these documents are also to their page number in the Joint Appendix. Briefs for the *amici* in *Campbell II* are also available on microfilm but are not part of the Joint Appendix; each of these briefs are numbered independently and references to these are by name of *amici* party and original page number.

19. UNCLE TUPELO, *Acuff-Rose, on ANODYNE* (Sire Records 1993).

20. David Zimmerman, *Roy Orbison: He Struck a Chord with the Lonely*, U.S.A. TODAY, Dec. 8, 1988, at D1.

21. Ken Emerson, *Roy Orbison*, in THE ROLLING STONE ILLUSTRATED HISTORY OF ROCK & ROLL 129, 129 (Jim Miller ed., Rolling Stone Press 1980) (1976).

22. *Id.* at 129–30.

23. *Id.* at 130.

the Lonely” (#2 in 1960), “Running Scared” (#1 in 1961), and “Crying” (#2 in 1961).<sup>24</sup> In 1964, he had his final #1 hit with “Oh, Pretty Woman,” co-written with his friend William “Bill” Dees.<sup>25</sup>

After 1964, Orbison’s string of hit singles dried up. But he continued to record and perform, even after losing his wife to a motorcycle accident in 1966 and two of his three children to a house fire in 1968.<sup>26</sup> Orbison enjoyed a late-career resurgence with his involvement in the supergroup the Traveling Wilburys, featuring Orbison, Bob Dylan, George Harrison, Tom Petty, and Jeff Lynne. Unfortunately it was short-lived. He died of a heart attack on December 6, 1988—just six months before the release of 2 Live Crew’s version of his biggest hit.<sup>27</sup>

### B. Acuff-Rose

Acuff-Rose Music, Inc. (“Acuff-Rose”) is a music publishing company that began in 1942 as an outlet for “King of Country Music” Roy Acuff’s growing career as a songwriter.<sup>28</sup> Formed in Nashville with \$25,000 in seed money from Acuff (and his song catalog), the company was run primarily by Acuff’s business partner Fred Rose and then by Rose’s son Wesley Rose after his death in 1954.<sup>29</sup> The company was the first music publisher dedicated to country music, scoring major country hits with “I’m So Lonesome I Could Cry,” “Big Bad John,” “Tennessee Waltz,” “Release Me,” and “I Can’t Stop Loving You.”<sup>30</sup> In the late 1950s Acuff-Rose also achieved success in the nascent rock ‘n’ roll market with the songs of the Everly Brothers (“Cathy’s Clown”) and Felice and Boudleaux Bryant, the husband-wife duo who wrote many of the Everlys’ hits: “Bye Bye Love,” “All I Have To Do Is Dream,” and “Wake Up Little

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24. *Id.* at 130–31. All chart positions are from the *Billboard* Pop chart.

25. *Id.* at 131; ROY ORBISON, OH, PRETTY WOMAN (Monument Records 1964).

26. THE ROLLING STONE ENCYCLOPEDIA OF ROCK & ROLL 407–08 (Jon Pareles & Patricia Romanowski eds., 1st ed. Rolling Stone Press 1983).

27. Zimmerman, *supra* note 20.

28. See BARRY MCCLLOUD, DEFINITIVE COUNTRY: THE ULTIMATE ENCYCLOPEDIA OF COUNTRY MUSIC AND ITS PERFORMERS 3 (Perigee 1995).

29. *Id.* at 3–4.

30. *Id.* at 4.



Susie.”<sup>31</sup> Despite these early Rock ‘n’ Roll successes (and the songs of Roy Orbison), the company was largely dedicated to country music, and Opryland USA acquired its 20,000 copyrights in 1985.<sup>32</sup>

### C. 2 Live Crew

2 Live Crew is a four-man rap ensemble from the Liberty City neighborhood of Miami, which first rose to fame in the late 1980s on the strength of raunchy tunes and the do-it-yourself business savvy of band leader and label head Luther Campbell, also known as Luke Skywalker.<sup>33</sup> Campbell founded Skywalker Records<sup>34</sup> (“Skywalker”) to distribute the group’s material and sold 200,000 copies of the group’s first single, “Throw the D.”<sup>35</sup> Other successes followed with the albums *The 2 Live Crew Is What We Are* (1986) and *Move Somethin’* (1987),<sup>36</sup> and so too did the legal attention for the group’s vulgar songs.<sup>37</sup> In 1987, a Florida record store clerk was arrested for selling a copy of the 2 Live Crew’s debut album to a minor, though those charges were later dropped.<sup>38</sup> In 1988, in what lawyers called the first obscenity conviction for recorded music, an Alabama record storeowner was convicted for selling *Move Somethin’* to an undercover police officer.<sup>39</sup> Despite the negative attention (or perhaps

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31. *Id.*; THE NEW ROLLING STONE ALBUM GUIDE 287 (Nathan Brackett & Christian Hoard eds., 4th ed. Simon & Schuster 2004) (1979).

32. MCCLOUD, *supra* note 28, at 4.

33. THE NEW ROLLING STONE ALBUM GUIDE, *supra* note 31, at 829.

34. See Maya Bell, *‘I’m Here to Make Money’ Raunch = Profits for 2 Live Crew’s Luke Skywalker*, ORLANDO SENTINEL, Mar. 8, 1990, at E1. Campbell derived his stage name Luke Skywalker from the famous Star Wars character and added an extra “y” in an effort to avoid legal hassles from Star Wars creator George Lucas. Bruce Rogow, *The Art of Making Law from Other People’s Art*, 14 CARDOZO ARTS & ENT. L.J. 127, 128 n.4 (1996). For the purposes of this article, all references to Luke Skywalker the person will be by his given name, Luther Campbell, and the name Skywalker will be reserved for the record company.

35. See Bell, *supra* note 34.

36. THE NEW ROLLING STONE ALBUM GUIDE, *supra* note 31, at 829.

37. See Eric Snider, *A “Nasty” Situation Critics Seem Intent on Cleaning Up 2 Live Crew*, ST. PETERSBURG TIMES (Fla.), Mar. 23, 1990, at 1D.

38. *Id.*

39. *Id.*

because of it), a July 1989 article in the weekly trade publication and record industry bible *Billboard* called Campbell “probably the most successful independent record maker in recent memory.”<sup>40</sup> The article was published just as 2 Live Crew released the companion albums *As Nasty As They Wanna Be* (“Nasty”) and *As Clean As They Wanna Be* (“Clean”), which would bring Campbell and the group both their greatest success and enormous legal hassles.<sup>41</sup>

### III. NASTY AND CLEAN: ACUFF-ROSE’S BEST ARGUMENT THAT NOBODY HEARD

I’m here to make money. The Lord didn’t put me here for no other reason in the world.

–Luther Campbell<sup>42</sup>

In *Campbell III*, Justice Souter opined that if the claimed fair use work was used “to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.”<sup>43</sup> Although a fair statement in the abstract, it is not in harmony with the music of 2 Live Crew’s “Pretty Woman,” which owes its very existence to commerciality and “avoid[ing] the drudgery in working up something fresh.”<sup>44</sup>

#### A. Contextualizing 2 Live Crew’s Use of the Orbison Original

##### 1. Commerciality of the Work

To appreciate just how commercial “Pretty Woman” is, one must look to the context of 2 Live Crew’s companion albums *Nasty* and *Clean*. *Nasty* features eighteen tracks, nearly all of which manage to be simultaneously

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40. Thom Duffy, *Seminar Faces Up to Rock’N’Roll Sexism; Stones Roll; Poco Picks Up the Pieces*, BILLBOARD, July 22, 1989, at 34.

41. *See id.*

42. Maya Bell, *‘I’m Here to Make Money’ Raunch = Profits for 2 Live Crew’s Luke Skywalker*, ORLANDO SENTINEL, Mar. 8, 1990, at E1.

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

44. *See infra* Part III.A.

puerile, misogynistic, and generally vulgar.<sup>45</sup> The Southern District of Florida went so far as to declare the album legally obscene in June of 1990,<sup>46</sup> but the Eleventh Circuit reversed this ruling in May of 1992.<sup>47</sup> Of *Nasty*'s eighteen tracks, seven were "cleaned up" enough to appear on the companion album *Clean*.<sup>48</sup> Presumably the other eleven tracks, with titles such as "Dick Almighty," "The Fuck Shop," "Bad Ass Bitch," and "Get The Fuck Out Of My House," were so fundamentally unredeemable that they could not be cleaned up; hence, three additional non-vulgar songs were added to bring *Clean* to a total of ten songs.<sup>49</sup> "Pretty Woman" was among these three.<sup>50</sup> The other nine songs on *Clean* are credited to "Luke Skywalker and the 2 Live Crew," while "Pretty Woman" gives songwriting credit to Orbison and Dees and publishing credit to Acuff-Rose.<sup>51</sup>

Around the time of the albums' release, and in response to community pressures, retail outlets had been objecting to product with controversial lyrics, titles, and/or artwork.<sup>52</sup> With retail concerns about objectionable content in mind, Skywalker Records sought input in selecting the cover art and showed its distributors three possible cover pictures for the companion albums to determine what would be acceptable to retailers.<sup>53</sup> The ultimate solution was for both albums to have nearly identical cover art, but on *Clean*, the four nearly-nude women pictured have their thong bikini bottoms covered by an opaque bar reading, "THIS ALBUM DOES NOT CONTAIN EXPLICIT LYRICS."<sup>54</sup>

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45. See generally *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd* *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

46. *Id.*

47. *Id.*

48. 2 LIVE CREW, AS CLEAN AS THEY WANNA BE (Skywalker Records 1989) [hereinafter 2 LIVE CREW, CLEAN].

49. *Id.*; 2 LIVE CREW, AS NASTY AS THEY WANNA BE (Skywalker Records 1989) [hereinafter 2 LIVE CREW, NASTY].

50. 2 LIVE CREW, CLEAN, *supra* note 48.

51. *Id.*

52. Bruce Haring, *It's An Artist's Affair, Say Labels On Censorship Pressures*, BILLBOARD, July 8, 1989, at 79.

53. *Id.*

54. 2 LIVE CREW, CLEAN, *supra* note 48.

Skywalker's concerns about accommodating retail proved prescient. In March of 1990, approximately nine months after the albums' release, publicity surrounding the legal obscenity of *Nasty* caused retailers to react.<sup>55</sup> The *St. Petersburg Times* reported, "Most major [record store] chains . . . have pulled [*Nasty*] from the shelves,"<sup>56</sup> and the *Los Angeles Times* reported that Musicland/Sam Goody (the nation's largest chain at the time, with 752 stores) had ordered all its outlets to stop selling *Nasty*—but not *Clean*.<sup>57</sup> A Skywalker spokesperson stated, "Obviously we're not pleased, but we can understand where they're coming from. No retailers want to take too much heat over this and we don't want them to."<sup>58</sup> *Clean*, containing "Pretty Woman," remained on sale, and three months later (almost a year after the albums were released and after approximately 250,000 copies of *Clean* had been sold),<sup>59</sup> Acuff-Rose sued the members of 2 Live Crew and Skywalker Records for copyright infringement of "Oh, Pretty Woman."<sup>60</sup> In response, the defendants argued its "Pretty Woman" is a parody of the original that constitutes fair use under section 107 of the Copyright Act of 1976.<sup>61</sup>

"From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts.'"<sup>62</sup> The fair use exception, codified in section 107, limits the exclusive rights of a copyright owner and provides that the fair use of a

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55. See *Skywalker Records*, 739 F. Supp. at 598 (finding "a direct relationship between the sheriffs' visits and the surrounding publicity on the one hand, and the store operators' decision to remove *Nasty* from their shelves on the other"). The *Skywalker Records* case arose after south Florida music retailers received warnings of a judicial order in which the county circuit court had found probable cause that the *Nasty* recording was legally obscene. *Id.* at 583 ("The Sheriff's office warnings [that future sales would result in arrest] were very effective.").

56. Eric Snider, *A "Nasty" Situation Critics Seem Intent on Cleaning Up 2 Live Crew*, ST. PETERSBURG TIMES (Fla.), Mar. 23, 1990, at 1D.

57. Steve Hochman, *Record Chain Clears Shelves Of Rap Album*, L.A. TIMES, Mar. 23, 1990, at F1.

58. *Id.* at F21.

59. *Skywalker Records*, 739 F. Supp. at 582.

60. *Acuff-Rose Music, Inc. v. Campbell (Campbell I)*, 754 F. Supp. 1150, 1151–52 (M.D. Tenn. 1991).

61. *Id.* at 1152 (citing 17 U.S.C. § 107 (1982)).

62. *Campbell III*, 510 U.S. at 575 (citing U.S. CONST. art. I, § 8, cl. 8).

copyrighted work for purposes such as criticism or comment is not an infringement of copyright.<sup>63</sup> While section 107 does not directly address parody, “courts have readily applied the fair use defense to parodies by finding that parodies constitute a criticism of or comment on a copyrighted work.”<sup>64</sup> In determining whether a given use of a copyrighted work is fair, section 107 instructs courts to balance at least four factors:

- (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.<sup>65</sup>

## 2. Commerciality of the Work as Argued Before the Courts

As outlined in the introduction, the district court concluded 2 Live Crew’s “Pretty Woman” to be a parody that constitutes protected fair use; the Sixth Circuit disagreed with the fair use finding and reversed the grant of summary judgment; and the Supreme Court reversed and remanded, but the parties settled on a license before the district court could revisit the issue.<sup>66</sup> All three courts gave considerable space to discussions of the importance of the commerciality of the work, which is part of the first statutory fair use factor, “purpose and character of the use.”<sup>67</sup> One would expect Acuff-Rose to point out that “Pretty Woman” was recorded for an album whose purpose and character was to fill the market niche cast by the shadow of its nastier cousin, given that 2 Live Crew had a history of having problems at retail. This would have established an even more “blatantly commercial purpose” than any other musical work on the market. But no

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63. See 17 U.S.C. § 107 (2012).

64. Kathryn D. Piele, *Three Years After Campbell v. Acuff-Rose Music, Inc.: What is Fair Game for Parodists?*, 18 LOY. L.A. ENT. L.J. 75, 78 (1997).

65. 17 U.S.C. § 107 (2012).

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

67. *Id.*; 17 U.S.C. § 107(1) (2012).

mention of this is made in any of the three *Campbell* opinions, despite the fact that the hoopla surrounding the *Nasty* album predated the initial suit by Acuff-Rose.<sup>68</sup>

Indeed, even with all the attention paid to the Supreme Court's decision by legal scholars and to 2 Live Crew in the popular press, very few in the legal world have more than a passing familiarity with the musical output of 2 Live Crew. A March 2016 search of Westlaw revealed only four law review articles that mention both *Clean* and *Nasty* in the context of "Pretty Woman," one of which was written by Bruce Rogow, who was 2 Live Crew's attorney.<sup>69</sup> Two other law review articles incorrectly state that "Pretty Woman" appears on the more popular, and more infamous, *Nasty*.<sup>70</sup>

In sum, the heightened commerciality of "Pretty Woman" on *Clean* is evinced when properly contextualizing the album as a dual release with—and only because of—*Nasty*. Although surveyed executives at the time said there was "no discernible trend toward dual releases on controversial product," separate artwork and edited versions of controversial songs had been issued by record labels on several occasions, no doubt wary of accommodating retail proprietors.<sup>71</sup> 2 Live Crew's use of the Orbison song was a mere shortcut to get sellable product into a market sympathetic to the concerns of its prude audiences.

### B. Procedural History and What Could Have Been

Acuff-Rose's initial complaint in the district court does mention the fact that *Nasty* and *Clean* were released on the same date, and that *Clean*

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68. See *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994); see also 2 LIVE CREW, *NASTY*, *supra* note 49.

69. Wayne M. Cox, Note, *Rhyming and Stealing? The History of Sampling in the Hip-Hop and Dance Music Worlds and How U.S. Copyright Law and Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L. J. 219, 230 & n.65 (2015); Bruce Rogow, *The Art of Making Law From Other People's Art*, 14 CARDOZO ARTS & ENT. L. J. 127, 128 (1996); Nels Jacobson, *Faith, Hope & Parody: Campbell v. Acuff-Rose Music, Inc., 'Oh, Pretty Woman,' and Parodists' Rights*, 31 HOUS. L. REV. 955, 981 (1994); Alan Korn, Comment, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 359 n.214 (1992).

70. Matthew H. Schwartz, *On Target with the Parody Defense to Copyright Infringement*, 26 BEVERLY HILLS BAR ASS'N J. 57, 66 n.107 (1992); Robert B. O'Connor, Comment, *Rap Parodies?: An In-depth Look at Acuff-Rose Music, Inc. v. Campbell*, 2 FORDHAM ENT. MEDIA & INTEL. PROP. L.J. 239, 239 (1992).

71. Haring, *supra* note 52.

contains six of the eighteen songs on *Nasty*.<sup>72</sup> However, there was no need for Acuff-Rose to draw inferences of 2 Live Crew's commercial purpose from this fact. At that time, 2 Live Crew had not yet replied to the complaint with their affirmative defense of parody. Acuff-Rose's initial complaint merely claimed that the melody and lyrics, and not necessarily the sound recording since the case wasn't about sampling, of 2 Live Crew's "Pretty Woman" were substantially similar to those of Orbison's "Oh, Pretty Woman," and thus infringed their copyright.<sup>73</sup> 2 Live Crew defended its use on the basis of parody and filed a motion to dismiss, which was later converted to a motion for summary judgment.<sup>74</sup> Acuff-Rose filed a response, addressing 2 Live Crew's parody defense, but making no mention of *Nasty* or the heightened commercial purpose of "Pretty Woman," and no further mention of *Nasty* was made in briefs from either party in any of the subsequent appeals (including amici in the Supreme Court).<sup>75</sup>

Had Acuff-Rose briefed this issue, the Sixth Circuit still could have found for Acuff-Rose, but on different grounds. This would have resulted in no circuit split and no trip to the Supreme Court. The Supreme Court's opinion stressed that there was no *presumption* that a commercial purpose required the parodist to lose on the first and fourth fair use factors, and it was on that ground that the Court overturned the Sixth Circuit.<sup>76</sup> Had the Sixth Circuit heard the argument that "Pretty Woman" existed only to fill a market niche, the court likely would have found that its commercial use in

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72. Complaint at 18a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524). The number of songs from *Nasty* that also appear on *Clean* is listed as being six, however an examination of the two albums shows seven tracks common to both: "C'mon Babe," "Get Loose Now," "Coolin'," "Break It On Down," "Me So Horny," "My Seven Bizzos," and "Mega Mixx III." Compare 2 LIVE CREW, *NASTY*, *supra* note 49, with 2 LIVE CREW, *CLEAN*, *supra* note 48.

73. *Campbell I*, 754 F. Supp. at 1152. Acuff-Rose also alleged two state law tort claims of interference with prospective business advantage and interference with business relations, which the court found on summary judgment to be preempted by federal copyright law under 17 U.S.C. § 301. *Id.* at 1159–60. Acuff-Rose did not challenge the preemption determination on appeal. *Acuff-Rose Music, Inc. v. Campbell (Campbell II)*, 972 F.2d 1429, 1433 n.5 (6th Cir. 1992).

74. See Motion to Dismiss at 29a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524); Motion to Convert Defendants' Motion to Dismiss to Motion for Summary Judgment at 99a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524).

75. See *Campbell III*, 510 U.S. 569; *Campbell II*, 972 F.2d at 1432–33; Plaintiff's Response to the Motion to Dismiss at 105a, 109a–113a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524).

76. *Campbell III*, 510 U.S. at 594.

fact harmed the market, on the weight of the evidence, rather than applying a mere *presumption*. Such a finding would have caused no inconsistencies with the other circuits and the Supreme Court would have likely not granted certiorari.

In oral argument before the Supreme Court, Acuff-Rose's counsel, Sidney Rosdeitcher,<sup>77</sup> sounded as if he *wanted* to argue that 2 Live Crew's use of the Orbison record on *Clean* was merely a shortcut to get sellable product into the market: "They profited here, in addition, because they needed music and they needed dazzling, good music, and they took one of the great rock and roll classics."<sup>78</sup> But Rosdeitcher may have in fact been unaware of the existence of *Nasty*, as he also mentioned that he purchased his copy of *Clean* at Sam Goody—where *Nasty* had already been pulled from the shelves.<sup>79</sup> Rosdeitcher explained, "I originally bought this record when I was in the running for coming onto this case. I went into Sam Goody and I went to the rap section and I pulled this off the shelf next to 2 Live Crew's other rap songs."<sup>80</sup>

It is hard to imagine a creative work with a more commercial purpose than filling out an otherwise meager "sanitized" album that serves as a market stopgap. Yet, in finding that the use seen in *Campbell* is not presumptively unfair merely because it is a commercial use, the Supreme Court indicated that use of parody to advertise *something else* would be more commercial and "entitled to less indulgence under the first factor of the fair use inquiry than the sale of a parody for its own sake."<sup>81</sup> Given that *Nasty* outsold *Clean* ten to one,<sup>82</sup> what is "Pretty Woman" doing on the *Clean* album but serving as a component in the marketing of the much more popular *Nasty*?

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77. *Id.* at 571. When the case came before the Supreme Court, Acuff-Rose was represented by the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison, rather than King & Ballou of Nashville, who had handled the district court & Sixth Circuit cases.

78. Transcript of Oral Argument at 29, *Campbell III*, 510 U.S. 569 (No. 92-1292).

79. Transcript of Oral Argument, *supra* note 78., at 41.

80. *Id.*

81. *Campbell III*, 510 U.S. at 585.

82. Eric Snider, *supra* note 56.



*C. Parody for Profit is Protected Fair Use, Probably*

While commercial parodies used in advertising are somewhat rare, at least one such case has gone to trial.<sup>83</sup> In *Leibovitz v. Paramount Pictures Corp.*, renowned photographer Annie Leibovitz sued the makers of the movie *Naked Gun 33 1/3: The Final Insult* over a promotional poster that featured the head of actor Leslie Nielsen over a naked, pregnant body.<sup>84</sup> The body was very similar to a famous photo shot by Leibovitz of actress Demi Moore that appeared on the cover of *Vanity Fair* magazine.<sup>85</sup> The district court held it was a fair use, and the Second Circuit affirmed, despite the statement in *Campbell III* that such a use—advertising another product—is entitled to less deference under the first fair use factor.<sup>86</sup>

The *Leibovitz* case demonstrates just how powerful a finding of parody is to the fair use calculus after *Campbell*. Although the *Campbell III* Court stressed that parody may or may not constitute fair use,<sup>87</sup> in practice, a parody is almost certain to be found to be a fair use.<sup>88</sup> In fact, since *Campbell III*, in every case in which the potentially infringing work was explicitly declared by the court to be a parody, that party has ultimately won (or at least prevented attempts by the other party to obtain an injunction) on a fair use defense, at either the district court or appellate levels.<sup>89</sup> As one court pointed out in a post-*Campbell* case, because of the nature of parody, “once a work is determined to be a parody, the second,

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83. See *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (S.D.N.Y. 1996), *aff'd*, 137 F.3d 109 (2d Cir. 1998).

84. *Id.* at 1215.

85. *Id.*

86. *Id.* at 1226.

87. *Campbell III*, 510 U.S. at 581.

88. See *e.g.*, *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *CCA and B, LLC v. F + W Media Inc.*, 819 F. Supp. 2d 1310 (N.D. Ga. 2011); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007); *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ. 6068(GBD), 2004 WL 434404 (S.D.N.Y. Mar. 8, 2004); *Abilene Music, Inc. v. Sony Music Entm’t, Inc.*, 320 F. Supp. 2d 84 (S.D.N.Y. 2003); *World Wrestling Fed’n Entm’t, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413 (W.D. Pa. 2003); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002); *Lyons P’shp, L.P. v. Giannoulas*, 14 F. Supp. 2d 947 (N.D. Tex. 1998).

89. See cases cited *supra* note 88.

third, and fourth factors are unlikely to militate against a finding of fair use.”<sup>90</sup>

#### IV: PROCEDURE, PURPOSE, AND APPROPRIATION: ACUFF-ROSE’S SECOND-BEST ARGUMENT THAT NOBODY HEARD

I rhyme like an artist, such as DaVinci  
Like the Mona Lisa, I’m a sight to see

–2 Live Crew, “Break It On Down”<sup>91</sup>

A careful reading of the three *Campbell* decisions appears to indicate that Acuff-Rose challenged the status of “Pretty Woman” as a parody only at the district court level, then accepted the finding of parody and merely argued to the Sixth Circuit and Supreme Court that the parody was not a fair use.<sup>92</sup> Examining the briefs, however, reveals otherwise.<sup>93</sup> Acuff-Rose vigorously challenged both the rap song’s status as a parody to the district court and the manner in which it was found a parody to the Sixth Circuit,<sup>94</sup> but was prevented from arguing this to the Supreme Court due to the language limiting the scope of the question before the Court in its grant of

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90. *See Abilene Music*, 320 F. Supp. 2d at 89.

91. 2 LIVE CREW, *Break It On Down*, on AS NASTY AS THEY WANNA BE (Skywalker Records 1989).

92. *Campbell v. Acuff-Rose Music, Inc. (Campbell III)*, 510 U.S. 569 (1994); *Acuff-Rose Music, Inc. v. Campbell (Campbell II)*, 972 F.2d 1429 (6th Cir. 1992); *Acuff-Rose Music, Inc. v. Campbell (Campbell I)*, 754 F. Supp. 1150 (M.D. Tenn. 1991).

93. *See Memorandum of Law in Support of Motion to Compel at 184a, Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524) (requesting discovery relating to defendants’ use of “Oh, Pretty Woman” to create a derivative work, the willfulness of defendants’ infringement of plaintiff’s music and lyrics, and profits from the infringement); Plaintiff’s Response to the Motion to Dismiss at 109a–113a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524) (arguing 2 Live Crew’s assertion of parody is a conclusory afterthought that, moreover, does not comment on the copyrighted work).

94. *See Brief for Appellant at 16–19, Campbell II*, 972 F.2d 1429 (No. 91-6225) (arguing the trial court gave insufficient attention to the parody issue, resulting in a determination “flawed by its premature resolution of disputed facts and by its commingling of the parody determination with the four statutorily listed factors”); Plaintiff’s Response to the Motion to Dismiss, *supra* note 93 (arguing 2 Live Crew’s assertion of parody is a conclusory afterthought that, moreover, does not comment on the copyrighted work).

certiorari.<sup>95</sup> Acuff-Rose had always maintained that “Pretty Woman” was not parodic.<sup>96</sup> In spite of their arguments however, and as this Part explains, the work’s parody status was sealed due to Acuff-Rose’s own plea for an instructive legal standard on musical parody and fair use.

### A. *The District Court: Summary Judgment of Parody and Fair Use*

To understand how the narrow issue in *Campbell III* affected Acuff-Rose’s litigation strategy, it is important to remember that *Campbell I* was decided on summary judgment.<sup>97</sup> In their reply brief to 2 Live Crew’s motion for summary judgment, which first claimed the affirmative defense of parody, Acuff-Rose insisted that genuine issues of material fact remained as to whether “Pretty Woman” was a parody and a fair use.<sup>98</sup>

Acuff-Rose was frustrated by 2 Live Crew’s meager response to its discovery requests (filed with the initial complaint<sup>99</sup>), so on December 14, 1990 (approximately six months after initially filing suit), Acuff-Rose filed a motion to compel production.<sup>100</sup> Acuff-Rose claimed that it was looking for information relating to willful infringement, profits from the infringement, the use of the Orbison original, and the fair use defense.<sup>101</sup>

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95. *Campbell III*, 510 U.S. at 574 (“We granted certiorari . . . to determine whether 2 Live Crew’s commercial *parody* could be a fair use [within the meaning of 17 U.S.C. § 107].”) (emphasis added).

96. See Brief on the Merits for Respondent, *Campbell III*, 510 U.S. 569 (No. 92-1292) (referring to the lower courts’ parody finding in qualifying language (e.g., “arguably parodied,” “purportedly parodies”), notwithstanding that the new work’s parody status was not at issue before the Court); Brief for Appellant, *supra* note 94; Plaintiff’s Response to the Motion to Dismiss, *supra* note 93, at 110a (No. 3:90-0524) (“Acuff-Rose does not admit and has never admitted that Defendants’ use is a parody under the legal definition.”).

97. *Campbell I*, 754 F. Supp. at 1160.

98. Plaintiff’s Response to the Motion to Dismiss, *supra* note 93, at 109a.

99. Plaintiff’s Response to the Motion to Dismiss, *supra* note 93, at 135a.

100. Memorandum of Law in Support of Motion to Compel, *supra* note 93, at 201a. Previously, Acuff-Rose had written to 2 Live Crew’s counsel on September 25, 1990 to express disappointment with defendants’ scant discovery production—“a total of 14 pages, which represent[ed] documents for only nine of the 85 requests for production.” Memorandum of Law in Support of Motion to Compel, *supra* note 93, at 257a Exhibit E. On October 19, 1990, 2 Live Crew’s attorney Alan Mark Turk retorted, “[T]he defendants, at this time, do not intend to supplement their document production. If you feel it is necessary, then I suggest that you file [a] Motion to Compel.” Memorandum of Law in Support of Motion to Compel, *supra* note 93, at 261a Exhibit F.

101. Memorandum of Law in Support of Motion to Compel, *supra* note 93.

The motion to compel was never decided,<sup>102</sup> since the district court granted 2 Live Crew's motion for summary judgment approximately one month after Acuff-Rose filed its motion to compel, finding "Pretty Woman" was a parody and a fair use.<sup>103</sup>

In its opinion, the district court acknowledged that Acuff-Rose maintained "that a number of material issues of fact remain."<sup>104</sup> Nevertheless, without mentioning a single factual issue raised by the plaintiff, the court declared in the immediate paragraph that no genuine material issues of fact remained.<sup>105</sup> The court arrived at this conclusion based on the fair use standards of *Harper & Row*:<sup>106</sup> "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyright work.'"<sup>107</sup> In other words, the court determined that notwithstanding Acuff-Rose's insistence that outstanding questions of material fact remained, the court would weigh the four statutory fair use factors on summary judgment "[b]ased on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits."<sup>108</sup> The court "construe[d] the evidence and all inferences to be drawn from it in the light most favorable to [Acuff-Rose]."<sup>109</sup>

### *B. The Sixth Circuit: Commercial Parody is Presumptively Unfair*

On appeal, Acuff-Rose asked the Sixth Circuit to review de novo the district court's finding that "neither the facts nor the reasonable inferences to be drawn from them can be disputed."<sup>110</sup> They also challenged the district court's decision to grant summary judgment based on the standards

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102. Brief for Appellant, *supra* note 94, at 5.

103. Brief for Appellant, *supra* note 94, at 5.

104. *Campbell I*, 754 F. Supp. at 1153.

105. *Id.*

106. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560–69 (1985).

107. *Campbell I*, 754 F. Supp. at 1153 (citing *Harper & Row*, 471 U.S. at 560).

108. *Id.*

109. *Id.*

110. Brief for Appellant, *supra* note 94, at 11–12.

in *Harper & Row*, highlighting that, unlike in the instant case, the facts in *Harper & Row* were found after a six-day bench trial.<sup>111</sup> 2 Live Crew countered that summary judgment was appropriate, despite Acuff-Rose's outstanding motion to compel, because "[t]he documents and information sought by the Appellant's Motion to Compel did not relate to the [four statutory factors]" and therefore could not have influenced the trial court's determination of fair use.<sup>112</sup> In its opinion, the Sixth Circuit stated that it was reviewing the grant of summary judgment de novo but agreed with the district court that no further factfinding was necessary, as no material facts were in dispute, pointing to the *Harper & Row* standard.<sup>113</sup>

Again, this ruling was despite Acuff-Rose's insistence that the work was not a parody.<sup>114</sup> This time, instead of concentrating on whether the work "targeted" the Orbison original, as they had argued in the district court,<sup>115</sup> the music publisher stressed that summary judgment had been inappropriate given the outstanding motion to compel discovery, which it believed would reveal information about when 2 Live Crew elected to label the work as a parody.<sup>116</sup> In so doing, Acuff-Rose hoped to show that 2 Live Crew had no parodic intention and merely argued this to evade negotiating a royalty.<sup>117</sup> As before, Acuff-Rose also argued that even if the work was found to be a parody, it was not a fair use.<sup>118</sup>

But then, in the last paragraph of its brief, Acuff-Rose stressed that the Sixth Circuit needed guidance in parody cases.<sup>119</sup> "Acuff-Rose also asks that, in remanding, this Court provide instructions on the proper legal standards to be applied in musical parody cases in this Circuit. Such an opinion would be useful not only to the court and parties in this case but

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111. Brief for Appellant, *supra* note 94, at 26.

112. Appellees' Brief at 40, *Campbell II*, 972 F.2d 1429 (No. 91-6225).

113. *See Campbell II*, 972 F.2d at 1433–34.

114. *See id.* at 1439.

115. *See* Plaintiff's Response to the Motion to Dismiss, *supra* note 93, at 109a–113a.

116. Brief for Appellant, *supra* note 94, at 17–19.

117. Brief for Appellant, *supra* note 94, at 17–19.

118. Brief for Appellant, *supra* note 94, at 21–43.

119. Brief for Appellant, *supra* note 94, at 47.

also to the numerous entities engaged in the music industry in this Circuit.”<sup>120</sup>

Unfortunately for Acuff-Rose, the court took them up on their offer.<sup>121</sup> Because a finding of no parody would end the discussion of fair use before it even began, the Sixth Circuit assumed the district court’s finding that the work was parodic.<sup>122</sup> As the opinion pointed out, the Sixth Circuit (home of Nashville, “Music City USA”) had no fair use cases involving music until this instant case.<sup>123</sup> Therefore, by requesting the court to address parody and fair use, Acuff-Rose ensured that the court would not come to a conclusion that would truly help them—a conclusion that “Pretty Woman” was not a parody to begin with.

Still, the Sixth Circuit accepted the district court’s conclusion that the song’s purpose was to parody the original with “considerable reservation,” expressed in a lengthy footnote: “[W]e cannot discern any parody of the original song. . . . We cannot see any thematic relationship between the copyrighted song and the alleged parody. The mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original.”<sup>124</sup>

As noted previously, the appellate court then went on to find that the “blatantly commercial purpose” of “Pretty Woman” prevented it from being a fair use of “Oh, Pretty Woman.”<sup>125</sup> This blatant commercial purpose was not based on the song’s presence on *Nasty*’s cleaner cousin, as this article posited, but rather simply because it was “on a commercially distributed album sold for the purpose of making a profit.”<sup>126</sup> Thus, Acuff-Rose won on their secondary argument that it was not a fair use, but not on their primary argument that a finding of parody was inappropriate on summary judgment here.<sup>127</sup>

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120. Brief for Appellant, *supra* note 94, at 47–48.

121. *See Campbell II*, 972 F.2d 1429.

122. *Id.* at 1435.

123. *Id.*

124. *Id.* at 1435 & n.8.

125. *Id.* at 1439.

126. *Id.* at 1436 (quoting *Campbell I*, 754 F. Supp. at 1154).

127. *Id.* at 1437.

2 Live Crew appealed to the Sixth Circuit for an en banc hearing, emphasizing that the appellate ruling was inconsistent with rulings from the Second and Ninth Circuits (representing entertainment capitals New York and Los Angeles, respectively).<sup>128</sup> But the petition was denied,<sup>129</sup> setting the stage for petition by writ of certiorari to the Supreme Court.

*C. The Supreme Court: A Parody's Commercial Purpose Does Not Alone Bar Its Fair Use*

The Supreme Court's grant of certiorari expressly limited the question to "[w]hether petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. Section 107."<sup>130</sup> The narrow issue put Acuff-Rose's attorneys in the difficult position of saying that the work "arguably"<sup>131</sup> or "purportedly"<sup>132</sup> parodies the Orbison original while at the same time trying to introduce doubt about its status as a parody.<sup>133</sup> A telling example can be seen in a proffered slippery slope argument: "the definition of 'parody' is malleable and could be applied to virtually every humorous modification of a copyrighted work. The exclusive focus on 'parody' thus could open the door to piracy."<sup>134</sup>

Oral arguments were even trickier. Sidney Rosdeitcher, counsel for Acuff-Rose, had a revealing exchange with one of the Justices:

MR. ROSDEITCHER: They took my client's music, partly for parody, let's assume that. I will—if you want me, I can talk about the definition of parody.

QUESTION: Well, we do have—we do take this case on the assumption on [sic] that there was a parody.

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128. Petition for Rehearing En Banc at 1–2, *Campbell II*, 972 F.2d 1429 (No. 91-6225).

129. Order at 376a app. EE, *Campbell II*, 972 F.2d 1429 (No. 91-6225) (denying petition for rehearing en banc).

130. *Campbell v. Acuff-Rose Music, Inc.*, 507 U.S. 1003 (1993) (granting certiorari).

131. Brief on the Merits for Respondent, *supra* note 96, at i.

132. Brief on the Merits for Respondent, *supra* note 96, at 2.

133. Brief on the Merits for Respondent, *supra* note 96, at 8–10.

134. Brief on the Merits for Respondent, *supra* note 96, at 9.

MR. ROSDEITCHER: And I'm accepting that.

QUESTION: You dispute that. But I think as it comes to us, we're not getting into that. Is that right?

MR. ROSDEITCHER: I want to leave with that, yes, Your Honor.<sup>135</sup>

As this exchange demonstrates, Acuff-Rose would have liked to talk about the definition of parody but was hamstrung by the narrow issue before the Court in its grant of certiorari. Nevertheless, the Court elected to spend considerable space in its decision discussing why “Pretty Woman” was a parody<sup>136</sup>—an issue Acuff-Rose had been prevented from briefing and an issue which they felt had an incomplete factual record, owing to the trial court’s grant of summary judgment while they had a motion to compel still outstanding.<sup>137</sup>

The Court, much like the Sixth Circuit, may itself have been constrained by the fact that it wanted to address the question of fair use in the context of parody, and could not do so if it were to short-circuit the analysis with a finding that “Pretty Woman” was not a parody. Additionally, the Court was also likely motivated by a desire to untangle the legal definitions of parody and satire. As explained by one commentator:

When *Campbell* came before the Supreme Court in 1993, . . . the terms “parody” and “satire” were still being used interchangeably (and somewhat confusedly) in both the Second and Ninth Circuits. . . . No legal distinction between the two terms was recognized in either circuit, and works described under both rubrics were regarded in both circuits as equally deserving of fair use protection.<sup>138</sup>

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135. Transcript of Oral Argument at 27, *Campbell III*, 510 U.S. 569 (No. 92-1292).

136. See *Campbell III*, 510 U.S. at 579–83.

137. Brief for Appellant, *supra* note 94, at 17–18. Acuff-Rose made clear in their appellate briefs that they felt 2 Live Crew’s designation of “Pretty Woman” as a parody occurred after the work had already been completed and offered for sale.

138. Annemarie Bridy, *Sheep in Goats’ Clothing: Satire and Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 51 J. COPYRIGHT SOC’Y U.S.A. 257, 269 (2004).



Even 2 Live Crew conflated the terms in their Supreme Court brief, defining parody as working to “criticize, satirize, and entertain.”<sup>139</sup>

The Court chose to differentiate parody from satire, elucidating that “[p]arody needs to mimic an original to make its point, . . . whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>140</sup> In support of creating this fair use dichotomy, the Court offered two dictionary definitions of parody. Both stressed imitation of the original author’s characteristic style in a way that ridiculed the original.<sup>141</sup> The Court also implied that in the instant case, the parody was clearly directed at the Orbison original: “A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody.”<sup>142</sup>

The Court’s explanation of what makes “Pretty Woman” a parody focused entirely on what they found as ridicule of the original and gave no mention of the necessary dictionary elements of *imitation* of the *characteristic style* of “Oh, Pretty Woman,” likely assuming that borrowing some music and lyrics was enough to imitate style.<sup>143</sup> Yet “Pretty Woman” does *not* imitate the characteristic style of the Orbison original and so, by the Court’s own definition, *is not a parody*—it is merely a version in a different style, or in music industry parlance, a “cover” (albeit one with different lyrics).<sup>144</sup> It certainly imitates the opening lyric, and it samples the guitar riff and other musical elements from the original, but the characteristic style of both its music and lyrics is that of a rap song, not a rock and roll song.<sup>145</sup> Thus, the Court fell trap to the same non sequitur as the district court had when it defined parody with an emphasis on the

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139. Brief on the Merits for Petitioners at 5, *Campbell III*, 510 U.S. 569 (No. 92-1292).

140. *Campbell III*, 510 U.S. at 580–81.

141. *Id.* at 580.

142. *Id.* at 580 n.14.

143. *See id.* at 579–83.

144. Compare 2 LIVE CREW, *Pretty Woman*, on AS CLEAN AS THEY WANNA BE (Skywalker Records 1989), with ROY ORBISON, OH, PRETTY WOMAN (Monument Records 1964).

145. Compare 2 LIVE CREW, *Pretty Woman*, on AS CLEAN AS THEY WANNA BE (Skywalker Records 1989), with ROY ORBISON, OH, PRETTY WOMAN (Monument Records 1964).

*imitation* of the original's *style*,<sup>146</sup> but then wrote, "The theme, content and style of the new version are different from the original."<sup>147</sup>

Justice Kennedy alone on the Court was not convinced the new work was a parody, perhaps for just this reason: "Almost any revamped modern version of a familiar composition can be construed as a 'comment on the naiveté of the original,' because of the *difference in style* and because it will be amusing to hear how the old tune sounds in the new genre."<sup>148</sup> Yet much of Kennedy's concurrence focused on the requirement that the so-called parody target the original, without ever explicitly mentioning the requirement that it imitate the style of the original.<sup>149</sup>

While criticism of the original differentiates parody from satire, it is not *the* defining characteristic of parody.<sup>150</sup> Certainly, the first step in any parody attempt must be to mimic the style of the original in a way that informs the audience as to what is being mocked. For example, Lynyrd Skynyrd's 1974 classic "Sweet Home Alabama" was a direct attack on Neil Young's song "Southern Man."<sup>151</sup> Yet no one would call "Sweet Home Alabama" a *parody* of "Southern Man" since the songs lack a similarity of style in either music or lyrics.

Rap's distinct musicality is the essential difficulty in assessing the parodic content of most any rap song. Rap borrows so heavily from other genres, yet recycles the borrowed material into a completely new style.<sup>152</sup> In so doing, it may comment on another work, it may borrow from another work, or both, but it rarely *imitates the style* of the work.<sup>153</sup> What 2 Live

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146. *Campbell I*, 754 F. Supp. at 1154 n.2.

147. *Id.* at 1154.

148. *Campbell III*, 510 U.S. at 599 (Kennedy, J., concurring) (emphasis added).

149. *See id.* at 597.

150. *See id.* at 588–89 (majority opinion) ("Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted mutilation. Its art lies in the tension between a known original and its parodic twin. . . . This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, . . . context is everything.").

151. *See generally Lynyrd Skynyrd and Neil Young*, THRASHER'S WHEAT, <http://thrasherswheat.org/jammin/lynyrd.htm> [<http://perma.cc/YHQ3-YKAU>] (discussing the controversies surrounding Skynyrd's "Sweet Home Alabama" and Young's "Southern Man").

152. *See Campbell III*, 510 U.S. at 589 ("It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends.").

153. *See id.*

Crew did in borrowing elements from “Oh, Pretty Woman” was actually more akin to appropriationist art, in which the artist *recontextualizes* the source material instead of *imitating* it.<sup>154</sup> This distinction places the two works on equal ground, as appropriationist art does not play second fiddle to its source: “Whereas parody is a degraded version, dependent almost entirely upon its source for significance, Appropriation is, by design, the conceptual equal of its source.”<sup>155</sup>

As one commentator argues, “even though judicially created exceptions for parody exist to allow parodists to borrow a certain amount of an original’s expression, these exceptions fail to protect an appropriationist who must replicate a much larger portion of a copyrighted original to convey a creative message.”<sup>156</sup> 2 Live Crew argued their work was a parody simply because the law had not yet caught up with appropriationist art (and probably still has not caught up today).<sup>157</sup>

Viewed through this lens, 2 Live Crew’s “Pretty Woman” could be seen as the artistic cousin of Marcel Duchamp’s *L.H.O.O.Q.* (1919) which used as its basis another enormously popular pretty woman, Leonardo da Vinci’s *Mona Lisa*.<sup>158</sup> Duchamp painted a moustache and goatee on a pre-existing image of that icon of female beauty, and added the letters L.H.O.O.Q. below, which form a loose French acronym for “elle a chaud au cul” which translates to “she has a hot ass.”<sup>159</sup>

Seventy years later, Luther Campbell would surely approve.

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154. John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 129 n.106 (1988) (“Appropriation . . . underscores the role of the artist as the manipulator or modifier of existing material, rather than as the inventor or creator of new forms.”).

155. *Id.*

156. Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art’s Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653, 1669 (1995).

157. See *Campbell III*, 510 U.S. at 589 (remanding to evaluate, among other things, the amount “Pretty Woman” takes from the original, in light of the song’s parodic purpose and character and its transformative elements). 2 Live Crew even spawned their own parody. 2 LIVE JEWS, AS KOSHER AS THEY WANNA BE (Kosher Records 1990).

158. See Carlin, *supra* note 154, at 109.

159. Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 102 (1996).

V: RIFFS, ROCK AND ROLL, RAP, AND RACE: THE IRONIC ICING ON THE  
NON-PARODIC CAKE

This song may be dull, but it's certainly clean.

—Oscar Brand, “Clean Song”<sup>160</sup>

In addition to the incomplete factual record owing to summary judgment, the unfamiliarity with the *Clean* album's commercial role as a market filler, and the misapprehension of what constitutes a parody, Acuff-Rose was further hampered by the strength of Oscar Brand's affidavit on behalf of 2 Live Crew, which, despite glaring factual inaccuracies and a reliance on racial stereotypes, was cited heavily by all three *Campbell* courts.<sup>161</sup>

2 Live Crew scored a major coup when it got Brand to submit an affidavit indicating his belief that “Pretty Woman” was a parody.<sup>162</sup> Brand is an accomplished musician and songwriter in his own right and is a founding Board member of the Songwriters Hall of Fame.<sup>163</sup> For over sixty years, Brand had been the host of the WNYC radio show “The Folksong Festival,”<sup>164</sup> and as stated in his affidavit, he frequently devoted entire radio shows to parodies and satires.<sup>165</sup> And although his affidavit does not mention it, Brand has also recorded some “bawdy” songs, the subject matter of which would not be unfamiliar to 2 Live Crew.<sup>166</sup>

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160. OSCAR BRAND, *Clean Song*, on BAWDY SONGS AND BACKROOM BALLADS VOL. 5 (Audio Fidelity 1958).

161. *Campbell v. Acuff-Rose Music, Inc. (Campbell III)*, 510 U.S. 569 (1994); *Acuff-Rose Music, Inc. v. Campbell (Campbell II)*, 972 F.2d 1429 (6th Cir. 1992); *Acuff-Rose Music, Inc. v. Campbell (Campbell I)*, 754 F. Supp. 1150 (M.D. Tenn. 1991).

162. See Affidavit of Oscar Brand at 30a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524).

163. See Affidavit of Oscar Brand, *supra* note 162, at 30a–31a; *Oscar Brand's Folksong Festival Radio Show Celebrates 69 Years*, SONGHALL (Dec. 8 2014), [http://www.songhall.org/news/entry/oscar\\_brands\\_folksong\\_festival\\_radio\\_show\\_celebrates\\_69\\_years](http://www.songhall.org/news/entry/oscar_brands_folksong_festival_radio_show_celebrates_69_years) [<http://perma.cc/FX8G-NL2J>].

164. *Oscar Brand Celebrates 60 Years on the Air*, BMI (Jan. 31, 2006), <http://www.bmi.com/news/entry/334671> [<http://perma.cc/7CRR-BXRJ>].

165. Affidavit of Oscar Brand, *supra* note 162, at 31a.

166. IRWIN STAMBLER & GRELUN LANDON, *THE ENCYCLOPEDIA OF FOLK, COUNTRY & WESTERN MUSIC* 67–68 (St. Martin's Press, 2d ed. 1984) (1969); see, e.g., OSCAR BRAND, *X* (Roulette Records 1976).

Brand's resume was stellar, but key elements of his descriptions of the works in his affidavit show his unfamiliarity with both rock and rap idioms.<sup>167</sup> Perhaps of consequence was his age—Brand was seventy years old at the time of the affidavit.<sup>168</sup> Brand's descriptions formed the basis for much of the discussion by the various courts, indicating that the courts were relying more on his characterizations of the music than their own ears (or more importantly, the ears of their younger law clerks, who presumably had greater familiarity with rock and rap).<sup>169</sup>

#### A. *Brand on Rock*

Brand describes the Orbison work as opening with a drum beat followed by a “bass riff.” This is incorrect; it is not a bass riff, but a guitar riff—the bass comes in three measures later, doubling the guitar riff.<sup>170</sup> Acuff-Rose's expert, Earl v. Spielman, identified the riff as a “guitar lick,”<sup>171</sup> and attorneys for Acuff-Rose correctly identified it as a “guitar riff” in their Supreme Court briefs<sup>172</sup> and oral argument.<sup>173</sup> Nevertheless, the term “bass riff” was adopted by both the district court and Supreme Court,<sup>174</sup> indicating the weight that Brand's testimony carried. The Sixth Circuit majority, the only court to question whether the work was even a parody in the first place, had enough musical sense to clarify this by quoting Brand but then characterizing the sound as a “bass or guitar riff.”<sup>175</sup>

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167. See STAMBLER & LANDON, *supra* note 166, at 68 (“[Brand] made hundreds of recordings in a career that extended from the late 1940s into the 1970s. Most of those were of traditional folk songs . . .”).

168. See *id.* at 67.

169. See *Campbell III*, 510 U.S. at 589 n.19; *Campbell II*, 972 F.2d at 1432–33; *Campbell I*, 754 F. Supp. at 1154–55, 1158.

170. See ROY ORBISON, OH, PRETTY WOMAN (Monument Records 1964).

171. Declaration of Earl V. Spielman at 140a, *Campbell I*, 754 F. Supp. 1150 (No. 3:90-0524).

172. Brief on the Merits for Respondent at 2, *Campbell III*, 510 U.S. 569 (No. 92-1292).

173. Transcript of Oral Argument at 37, *Campbell III*, 510 U.S. 569 (No. 92-1292).

174. *Campbell III*, 510 U.S. at 570, 588–89; *Campbell I*, 754 F. Supp. at 1155.

175. *Campbell II*, 972 F.2d at 1438.

### B. Brand on Rap

Brand's knowledge of rap is even more limited. Discussing the 2 Live Crew recording, he said the introductory drums and riff are "followed by an atypical scraper—a Latin musical device, quite antithetic to the Orbison musical styling."<sup>176</sup> What Brand had heard is in fact turntable scratching, one of the absolute hallmarks of rap music.<sup>177</sup> Brand may be confusing the turntable scratching with a güiro, a Latin percussive instrument played by running a drumstick across a ridged gourd,<sup>178</sup> but the two sound quite dissimilar. Scratching originated in the Bronx house parties that gave birth to rap<sup>179</sup> and, contrary to Brand's assertion, is unrelated to Latin music.<sup>180</sup> But even if it had been a Latin musical element, it would not be foreign to the Orbison oeuvre, combining as he did many disparate influences, including Latin music.<sup>181</sup>

Again, Brand's incorrect characterization of the turntable scratching as a "scraper" is picked up by the Supreme Court,<sup>182</sup> even though Acuff-Rose explains in its brief that this "scraper" is in fact turntable scratching.<sup>183</sup> This ignorance of rap's musical conventions has not seemed to bother many legal scholars—a search of Westlaw reveals only one law review article that correctly identifies the "scraper sounds" as turntable scratching.<sup>184</sup> (It is worth noting, however, that the district court's mention

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176. Affidavit of Oscar Brand, *supra* note 162, at 32a.

177. See Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 227 (2000); Jason H. Marcus, Note, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT L.J. 767, 770 (1991).

178. See generally *Güiro*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Güiro> [<http://perma.cc/M5PA-4DRU>]; *Güiro*, MUSIC OF PUERTO RICO, <http://www.musicofpuertorico.com/index.php/instruments/güiro/> [<http://perma.cc/2CGS-LH3Z>].

179. See Kaplicer, *supra* note 177; Marcus, *supra* note 177, at 769.

180. Affidavit of Oscar Brand, *supra* note 162, at 32a.

181. See Ken Emerson, *Roy Orbison*, in *THE ROLLING STONE ILLUSTRATED HISTORY OF ROCK & ROLL* 129, 130 (Jim Miller ed., Rolling Stone Press 1980) (1976).

182. *Campbell III*, 510 U.S. at 589; *Campbell I*, 754 F. Supp. at 1155.

183. Brief on the Merits for Respondent, *supra* note 172, at 27.

184. Alan Korn, Comment, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 360 n.217 (1992). The Westlaw search was conducted in March 2016.

of the scraper comes in the discussion of the song's parodic elements, and therefore it may amount to a finding of fact—regardless of how musically incorrect it is.

Admittedly, rap was a relative newcomer to the pop music scene when the Court took the case in 1993 (the first rap song to top the *Billboard* singles charts had only occurred in 1990<sup>185</sup>), but the Court demonstrates a profound misunderstanding of the genre. This misunderstanding is most evident when Justice Souter quotes Justice Holmes from a copyright case decided ninety years prior:

[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.<sup>186</sup>

But what the Supreme Court missed here was not the genius, but the conventionality. In finding the work parodic, the Court *was* in fact judging the work's worth, demeaning it by valuing it only to the extent that it was an attack on another work, not as a work that stands on its own.<sup>187</sup> To their ears, the odd percussive elements, the laughter, and the off-key singing likely made it sound like a Spike Jones novelty record from the 1940s.<sup>188</sup>

To their credit, the Supreme Court's opinion managed to steer away from another issue that 2 Live Crew urged, which both informed and distorted the affidavit of Oscar Brand: race.

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185. See JOEL WHITBURN, JOEL WHITBURN PRESENTS THE BILLBOARD HOT 100 CHARTS: THE NINETIES (Record Research Inc. 2000) (listing that Vanilla Ice's "Ice Ice Baby" hit #1 on the *Billboard* Hot 100 Singles chart the week of November 3, 1990).

186. *Campbell III*, 510 U.S. at 582–83 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

187. See *id.*

188. See generally *Spike Jones*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Spike\\_Jones](http://en.wikipedia.org/wiki/Spike_Jones) [<http://perma.cc/7A2D-HWXJ>]; SPIKE JONES, <http://www.spikejones.com/> [<http://perma.cc/676A-FNXXS>].

### C. Brand on Race

Brand's affidavit stressed the importance of race in both appreciating the separate markets for the two recordings and in understanding the parodic nature of the work.<sup>189</sup> Brand stated, "There is no question in my mind that the song 'Oh, Pretty Woman' by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America."<sup>190</sup> But as Orbison's biographer Peter Lehman recounts, when "Oh, Pretty Woman" was released in 1964, "Orbison had no country audience at that time, the song did not place on the country charts, and his records were not stocked in the country racks of music stores."<sup>191</sup> Thus, the terms "country music" and "middle-America" are essentially code for "white."<sup>192</sup>

Brand continued, "On the other hand, 2 Live Crew's version[] . . . is aimed at the large black populace which used to buy what was once called 'race' records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song."<sup>193</sup> Yet Luther Campbell himself had said in 1990 that 2 Live Crew had "crossed over" into the white market: "Nobody gave a (bleep) when we were just selling music in the ghetto, but all of a sudden white people are buying it and everybody goes (bleeping) crazy."<sup>194</sup>

The argument of separate audiences divided by race appeared to carry considerable weight with dissenting Judge Nelson in the Sixth Circuit,<sup>195</sup> so accordingly, 2 Live Crew's briefs to the Supreme Court made it explicit: "The parody created by the Petitioners was intended for a specific audience, young urban blacks. The purpose of the parody was to mock the banality of white centered rock-n-roll music by attacking one of its time

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189. Affidavit of Oscar Brand, *supra* note 162, at 35a.

190. Affidavit of Oscar Brand, *supra* note 162, at 35a.

191. PETER LEHMAN, ROY ORBISON: THE INVENTION OF AN ALTERNATIVE ROCK MASCULINITY 147 (Temple Univ. Press 2003).

192. *Compare id.*, with Affidavit of Oscar Brand, *supra* note 162, at 35a.

193. Affidavit of Oscar Brand, *supra* note 162, at 35a.

194. Maya Bell, 'I'm Here To Make Money' Raunch = Profits for 2 Live Crew's Luke Skywalker, ORLANDO SENTINEL, Mar. 8, 1990, at E1.

195. *Campbell II*, 972 F.2d at 1445 (Nelson, J., dissenting).



honored ballads. The intended market for the parody was as different from that of the copyrighted work as black and white.”<sup>196</sup>

In contrast, Acuff-Rose’s Supreme Court briefs attempted to steer the debate away from race.<sup>197</sup> “The suggestion here, that music is either for ‘whites’ or ‘blacks’ and that petitioners’ recording or respondent’s potential market is confined to only one of these audiences, is simply wrong.”<sup>198</sup> Interestingly, Acuff-Rose did not back up this statement with facts that should have been available to them as Orbison’s publisher. For example, versions of “Oh, Pretty Woman” were recorded by at least two major black artists: the Count Basie Orchestra in 1965 and Al Green in 1972.<sup>199</sup> Nor was Orbison’s music unfamiliar to black audiences: Orbison had five crossover hits on the R&B charts in his peak Monument Records period of 1960 to 1964: “Only the Lonely,” “Blue Angel,” “In Dreams,” “Mean Woman Blues,” and “Blue Bayou.”<sup>200</sup>

Toward the end of their brief, Acuff-Rose attacked 2 Live Crew for their attempt to limit the musical audiences by race:

Moreover, petitioners offer no basis for their stereotyped view of the supposed audiences for the Orbison song or the 2 Live Crew version. American popular music knows no ethnic, cultural, class, or even national boundaries. Indeed, one of the great well springs of creativity in American popular music is the cross-fertilization of music from different cultures, to cite the history of jazz and rock and roll as two obvious examples. Elvis Presley, a southern white, revolutionized “white” musical tastes by drawing on sources that originated in African-American culture. Rap itself has a wide audience among whites as well as blacks. . . . American popular music is a multicultural blend and arguments, such as petitioners’, that seek to confine the appeal of songs to one ethnic audience or another are wholly unfounded.<sup>201</sup>

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196. Brief on the Merits for Petitioners at 34, *Campbell III*, 510 U.S. 569 (No. 92-1292).

197. Brief on the Merits for Respondent, *supra* note 172, at 10.

198. Brief on the Merits for Respondent, *supra* note 172, at 10.

199. LEHMAN, *supra* note 191, at 148.

200. *Id.* at 191–92.

201. Brief on the Merits for Respondent, *supra* note 172, at 41–42.

Brand's affidavit also insisted that the issue of race was important to understanding the parody, because 2 Live Crew was "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."<sup>202</sup> Judge Nelson embraced this view in his Sixth Circuit dissent: "The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original."<sup>203</sup> The phrase "white-bread" comes from Brand's affidavit, describing the historical targets of black musical parody.<sup>204</sup> Justice Souter referred to the phrase in his Supreme Court opinion as well.<sup>205</sup>

Though the rest of the appellate panel did not share Judge Nelson's view of the racial undertones of the case, at least one legal scholar agreed: "The majority's failure to appreciate that defendant's work was poking fun at the original is difficult to understand, and suggests at a minimum severe cultural myopia."<sup>206</sup> But there is only a "cultural myopia" if one believes that moving a work into a different genre instantly "parodizes" it. To the contrary, it is culturally myopic to suggest that it *does* create parody to present it as a rap—to imply that a rap version always mocks the original is to devalue rap as an art form and reserve it for only comic relief. Furthermore, it patronizes rap musicians to imply that their cultural contributions are limited to being jokesters and essentially relegates them to the role of participants in a minstrel show.

The irony, of course, is that this was exactly the rappers' argument in this case.<sup>207</sup> After the Supreme Court's decision, Luther Campbell himself said, "As a black man in this country, I felt that the system never worked for me. Now I really feel it does."<sup>208</sup> Campbell's attorney Bruce Rogow had no illusions about what drove the case: "Money, race, rock and roll,

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202. Affidavit of Oscar Brand, *supra* note 162, at 34a.

203. *Campbell II*, 972 F.2d at 1442.

204. Affidavit of Oscar Brand, *supra* note 162, at 34a.

205. *Campbell III*, 510 U.S. at 582.

206. WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 196 (2d ed. 1995).

207. *See generally* Brief on the Merits for Respondent, *supra* note 172.

208. Aaron Epstein, *A Rap Ruling: Parody is Protected*, PHILA. INQUIRER, Mar. 8, 1994, at A1.

law, and ego were the elements that made *Campbell v. Acuff-Rose* fun to litigate.”<sup>209</sup>

#### VI: IF THAT’S THE WAY IT MUST BE, OKAY: A FAMOUS CASE IS BORN

I think maybe if I made a contribution to the music scene, the music business—some form of a contribution that maybe brought a little happiness to someone or held a few things together—then that would be great.

—Roy Orbison<sup>210</sup>

The greatest irony of *Campbell v. Acuff-Rose*, however, is its very existence as *the* definitive fair use parody case (at least for the time being). That a recording with arguably no parodic purpose—but a heightened commercial purpose—should be at the center of the case that established broad protections for parodic fair use is remarkable, to say the least. When Acuff-Rose launched its simple copyright infringement suit, it likely did not think it was a “hard case.” Yet that is what it became, due to a perfect storm of musical and cultural ignorance on the part of most everyone involved.

As this article has attempted to show, *Campbell v. Acuff-Rose* is a case that probably should have come out very differently in each of the courts that heard it. And yet, contrary to the old legal saying that “hard cases make bad law,” the law announced by *Campbell* is one that protects artistic freedom by recognizing that artists must borrow, and some artists must borrow considerable amounts—ultimately a very good outcome. As Justice Scalia, who was on the Court when it heard the case, once wrote, “Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one.”<sup>211</sup>

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209. Bruce Rogow, *Artistic Parody: The Art of Making Law from Other People’s Art*, 14 CARDOZO ARTS & ENT. L.J. 127, 137 n.40 (1996).

210. ROY ORBISON, INTERVIEW CD WITH Q&A (Orbison Records 1997).

211. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6 (Amy Gutmann ed., 1997).