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Casenote

THE "FAIR USE" DOCTRINE AND CAMPBELL V. ACUFF-ROSE: COPYRIGHT WATERS REMAIN MUDDY

I. INTRODUCTION

Parody\(^1\) is a historic and time-honored form of expression which has been utilized for centuries by many authors of classic works.\(^2\) This form of expression is "an independent art form of ancient lineage"\(^3\) that realizes its satiric purpose by closely paralleling another author's work.\(^4\) "A parody must convey two simultaneous — and contradictory — messages: that it is the original, but also that it is not the original and is instead a parody."\(^5\) As such, parody has been the subject of controversy in the entertainment field since the turn of the century, when various federal courts decided early cases on the issue of whether parody constituted copyright infringement.\(^6\)

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1. Webster's Dictionary defines parody as "an imitation of a musical composition in which the original text or music has been altered usually in a comical manner." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (16th ed. 1971). Webster's further defines parody as "a writing in which the language or style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated." Id.

2. Charles C. Goetsch, Parody as Free Speech — The Replacement of the Fair Use Doctrine by First Amendment Protection, 3 W. NEW ENG. L. REV. 39, 40 (1980). Parody originated in Greek literature around 500 years B.C. Id. Aristotle, an ancient Greek playwright, was well-known for his parodic efforts, such as his play, The Frogs. Id. at n.4. Parody is also present in the works of classical authors such as Cervantes, Chaucer, Shakespeare and Twain. Id. at 41. Although parody as a form of expression dates back to ancient times, litigation involving parodists and owners of copyrights are a product of the last century. Susan Lineham Faaland, Comment, Parody and Fair Use: The Critical Question, 57 WASH. L. REV. 163 (1981).

3. Faaland, supra note 2, at 163.

4. Id. In this form of satire, the parodist achieves the intended effect by mimicking the structure or wording of the original work. Id.

5. Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 494 (2d Cir. 1989). While the parody is a source of humor, it is also a source of criticism for the original work, which makes its inherent contradiction more profound. Faaland, supra note 2, at 164.

Federal courts developed the Fair Use Doctrine\(^7\) as an equitable defense to a claim of copyright infringement.\(^8\) Prior to the major parody cases, fair use of copyrighted material was defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright."\(^9\) Congress attempted to solidify the Fair Use Doctrine when it passed the Copyright Act of 1976 ("the Act").\(^10\) Section 107 of the Act lists four factors for courts to consider in determining whether the use of a copyrighted work is a fair use.\(^11\) The most current fair use issue considered by the courts and to which the four factors are applied is musical parody.\(^12\)

The only parody case to be heard by the United States Supreme Court since Jack Benny's "Gaslight" parody case\(^13\) in the 1950's is *Campbell v. Acuff-Rose Music, Inc.*\(^14\) In *Acuff-Rose*, the Court,

*sheimer, 177 F. 286 (C.C.S.D.N.Y. 1909); Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903).*

The courts in these early parody cases focused on the effect upon the commercial market for the original work, and whether the parody harmed this market. *Parody Defense, supra* at 1401. Later, some courts recognized that the parody's impact on the commercial market was the most important determinant of whether a parody violated copyright law. These courts found that when there was not direct competition between the parody and the original work, parody was socially valuable. Therefore the courts did not restrict use of the original works in parody. *Id.*

7. "Fair use is a doctrine that allows copying from a copyrighted work so long as the appropriation is reasonably expected and not harmful to the rights of the copyright owner." Goetsch, *supra* note 2, at 45.

8. Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986). For a discussion of the case, see *infra* notes 75-86 and accompanying text.


11. *Id.* Section 107 of the Copyright Act reads, in pertinent part:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.*


in applying the section 107 four-factor test, decided that the rap group 2 Live Crew's parody of Roy Orbison's song "Oh Pretty Woman" could be a fair use of the original copyrighted song.\textsuperscript{15} The Court held that the commercial nature of the parody did not create a presumption that would preclude a finding of fair use.\textsuperscript{16}

This Note will explore the history and development of the Fair Use Doctrine in the courts and will discuss the Copyright Act of 1976. Additionally, this Note will appraise the Court's analysis of the issue and contemplate the impact that the \textit{Acuff-Rose} decision will have on parodists and other entertainers.

\section*{II. BACKGROUND}

Copyright is the protection of an "author... or artist's right in the work he or she has created ...."\textsuperscript{17} Copyright protection extends to "original works of authorship" as defined by the Copyright Act of 1976.\textsuperscript{18} Copyright owners have the presumably exclusive right to the content of their original works and exclusive control over the authorization for others to use those works.\textsuperscript{19} However, various exceptions in current copyright law limit this right.\textsuperscript{20} To use an original copyrighted work without permission from the copyright owner constitutes a violation of copyright law and principles. However, in the case of certain uses, like parody, it is unclear whether a copyright owner's rights have been violated.

Parodies walk a fine line between copyright infringement and fair use of the original work they parody. In order to achieve the desired effect of parody, the artist often must use considerable por-

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.} at 1179.
  \item \textsuperscript{16} \textit{Id.} at 1171-79.
  \item \textsuperscript{18} 17 U.S.C. \textsection 102 (1988 & Supp. V 1993). Section 102 of the Copyright Act states that protected works of authorship protected by copyright include:
    \begin{enumerate}
      \item literary works;
      \item musical works, including any accompanying words;
      \item dramatic works, including any accompanying music;
      \item pantomimes and choreographic works;
      \item pictorial, graphic, and sculptural works;
      \item motion pictures and other audiovisual works; and
      \item sound recordings.
    \end{enumerate}
\end{itemize}
tions of the original product. As a result, parodists and their products have periodically found themselves at odds with copyright law. However, the judicially created Fair Use Doctrine was finally codified in section 107 of the Copyright Act of 1976.

A. Development of the Fair Use Doctrine

Soon after the concept of “copyright” was recognized and codified in the 1700s, courts acknowledged that not all uses of copyrighted material violate copyright law. In 1841, Justice Story outlined various factors to be considered in determining fair use issues. The term “fair use” was first used in a 1869 case. The Fair Use Doctrine continued as a judicially created rule until it was codified in the 1976 Act. In the 1976 Copyright Act, Congress adopted Justice Story’s outline to determine fair use questions.

The Fair Use Doctrine as applied to parody began to take form in cases concerning dramatic parody. The first major dramatic parody case was Loew’s, Inc. v. CBS, Inc. The court in this “progenitor

21. Parody Defense, supra note 6, at 1995. For a parody to be effective, it must “conjure up” the original work in the mind of the listener or reader. Id. at 1403. In order to effectively conjure up the original work, it is often necessary to use a considerable portion of the original work in the parody. Id. at 1395. For example, in a musical parody, it may be necessary to copy exactly the original melody in order for the song to be recognizable as a parody of an original well-known song.

22. Id. at 1395. Parodists’ interests often conflict with the seemingly absolute right of copyright owners to their “intellectual property.” Id. at 1395-96.

23. For background on the development of the Fair Use Doctrine and parody law, see infra notes 25-107 and accompanying text.


25. Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990) (citing Act for Encouragement of Learning, 1709, 8 Anne, ch. 19; This Act created copyright.).

26. Id. (citing Gyles v. Wilcox, 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130)). Courts first described a use of copyrighted material that does not violate copyright law as a “fair abridgment;” they were later labelled “fair uses.” Id.

27. Id. (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901)). In his opinion, Justice Story outlined the appropriate method for analyzing fair use issues. Id. An analysis of fair use required exploration into such things as the “nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Id. (citing Folsom, 9 F. Cas. at 348).


30. Leval, supra note 25, at 1105.

31. 131 F. Supp. 165 (S.D. Cal. 1955), aff’d sub nom. Benny v. Loew’s, Inc., 239 F.2d 532 (9th Cir. 1956), aff’d sub nom. by an equally divided court, CBS, Inc. v. Loew’s, Inc., 356 U.S. 43 (1958). In 1942, Loew’s Inc. obtained the exclusive motion picture rights to the original play “Gaslight” by Patrick Hamilton. Id. at 168.
of the major parody cases” entered into “virgin territory.” In Loew’s, the comedian Jack Benny “caused to be written, produced, performed, and broadcast over a national radio network,” a spoof of the dramatic movie “Gaslight.” In 1952, Jack Benny and Barbara Stanwyck performed a similar spoof of “Gaslight” on a half hour television program. At trial, the district court found that Benny had used substantial portions of “Gaslight” to create his spoof, and that the TV show was an infringement of Loew’s copyright.

On appeal, Benny contended that the spoof was protected by the concept of “fair use.” The United States Court of Appeals for the Ninth Circuit observed that without the substantial material copied from the original copyrighted work, all that would remain in the spoof were “a few gags, and some disconnected and incoherent

Loew’s then spent considerable sums of money to produce and distribute the original motion picture; the production of the film took almost two and a half years. “Gaslight” was released nationally and internationally on May 5, 1944, and Loew’s subsequently copyrighted the movie. In November, 1946, the movie was “withdrawn from domestic release,” but was still distributed internationally at the time of trial. At the time, it was customary for film companies to re-release films which enjoyed a great deal of success, after a five year period following the original release. At the time of trial, Loew’s had not, however, followed this custom; the film was viewed by the court.


Loew’s, 131 F. Supp. at 168. Ingrid Bergman, who starred in the original film, performed the leading role opposite Jack Benny in the spoof of “Gaslight.” Bergman furnished her copy of the original copyrighted script to Benny without notifying Loew’s. Loew’s, as owner of the copyright, gave consent to neither the show nor Bergman’s actions. Loew’s, however, made no claim of copyright infringement concerning the spoof performed on the radio.

Id. at 169.

The television program aired on January 27, 1952. Loew’s wrote a letter to CBS on January 30, 1952, implying that Loew’s considered the television spoof to be an infringement of their copyright in the movie “Gaslight.” CBS denied that their actions constituted an infringement and claimed a defense of “fair use” and the “right to parody literary properties.” In May 1953, preparations were made to produce a television movie which parodied “Gaslight,” starring Benny and Stanwyck. Again, Loew’s communicated that they considered the previous television spoof and the proposed television movie copyright to be an infringement of its copyright, and commenced action against CBS in June, 1953.

Benny v. Loew’s, Inc., 239 F.2d 532, 534 (9th Cir. 1956), aff’d sub nom. by an equally divided court, CBS, Inc. v. Loew’s, Inc., 356 U.S. 43 (1958). In conjunction with its finding of copyright infringement, the district court granted an injunction restraining CBS from airing the television movie of “Gaslight.”

Loew’s countered Benny’s “fair use” defense, stating that there was no such doctrine and that the Copyright Act “insures to the copyright owners the exclusive right to any lawful use of their property . . . .” (emphasis added).
dialogue."³⁷ The Ninth Circuit recognized that it was breaking new ground, stating that before Loew's, "no federal court . . . ha[d] sup-[posed there was a doctrine of fair use applicable to copying the substance of a dramatic work."³⁸ Although the Ninth Circuit recognized that there will always be substantial similarities between the two works because of the nature of parody,³⁹ it held that the spoof could not be considered a fair use of the copyrighted work because the taking was too substantial.⁴⁰ The Ninth Circuit recognized that there was an argument that parody was exempt from copyright infringement actions because of its critical nature.⁴¹ However, the Loew's court limited its analysis to the amount of the original work used in the parody.⁴²

While Loew's was on appeal, the United States District Court for the Southern District of California decided a similar case, Columbia Pictures Corp. v. National Broadcasting Co.⁴³ In September, 1953, NBC, without the consent or knowledge of Columbia Pictures, aired a skit which parodied the movie "From Here to Eternity."⁴⁴

³⁷. Id. at 536. The Ninth Circuit noted that without Loew's contributions from the original work, the television show's "plot, story, principal incidents, and . . . sequence of events" would remain the same. Id.

³⁸. Id. Before Loew's, application of the fair use doctrine was limited to cases involving copyrights in literary works. Id. Fair use cases involved the use of "prior compilations, listings, and digests." Id. The general rule evolving from these cases was that the original text could be consulted for research purposes, without constituting a violation of copyright law. Id. However, the writer violated the author's copyright in the original work if there was no independent contribution by the writer modifying the original work. Id.

³⁹. Id. The ultimate issue in Loew's was whether the writer made independent contributions to the original work in producing the final product. Id. (quoting Chautauqua Sch. of Nursing v. National Sch. of Nursing, 238 F. 151, 153 (2d Cir. 1916)).

⁴⁰. Loew's, 239 F.2d at 536-37. The Ninth Circuit stated that "[t]he fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright." Id. at 536.

⁴¹. Id. at 537.

⁴². Id. The Ninth Circuit stated that there was "only a single decisive point in the case: One cannot copy the substance of another's work without infringing his copyright." Id.

⁴³. 137 F. Supp. 348 (S.D. Cal. 1955). The district court recognized that Columbia Pictures was similar to Loew's in that both "represent[ed] . . . collusion[s] between the economic interests of the motion picture industry and the youthful and growing television industry." Id. at 349.

⁴⁴. Id. at 352. James Jones wrote a novel entitled "From Here to Eternity" prior to February, 1951, and owned a copyright in the novel. Id. at 351. In March of the same year, Jones gave written consent to Columbia Pictures Corporation ("Columbia") to produce a motion picture based upon the novel. Id. Jones also agreed that Columbia retain the copyright interest in the movie. Id. Columbia produced the movie in 1953 and released it in September of that year; Columbia retained the exclusive copyright in the movie. Id.
The parody was entitled “From Here To Obscurity.” Columbia Pictures brought suit against NBC, claiming copyright infringement. The district court stated that copyright law allows those engaged in parody greater license in using copyrighted material than those engaged in other “fictional or dramatic works.” The court reasoned that a parodist must “make a sufficient use of the original to recall or conjure up the subject matter being [parodied],” in order to accomplish the desired satirical effect. Therefore, parodists should be afforded latitude. However, like the Loew’s court, the district court in Columbia Pictures focused on the amount of material copied from the original work, and held that the taking may not be substantial. The district court concluded that if the parodist does not intend to deceive the public as to the copyrighted work’s origin, then there is no cause of action.

In 1964, the Second Circuit considered the fair use doctrine in light of musical parodies, in Berlin v. E. C. Publications, Inc. “Mad Magazine” (“Mad”) published a series of parody lyrics to Irving Berlin’s songs in its Fourth Annual Edition. The district court found that the theme and content of the parodies were substantially different from those of the original copyrighted songs, and held that the parodies did not violate copyright law. On appeal, the United States Court of Appeals for the Second Circuit noted that “the ex-

45. Id.
46. Id.
47. Id. at 354. In holding that parodists have greater license in using copyrighted material, the district court stated that a “burlesquer” needs to recall enough of the original work in order for the parody to be recognizable. Id. at 354.
49. Id. The district court stated that the parodist is given special license in using incidents in the story, characters, and unsubstantial portions of the story development and dialogue. Id. The district court specifically excluded the use of the “general or entire story line” from the fair use exception. Id. (citations omitted).
50. Id. at 350. The district court also concluded that burlesque is not a per se defense to copyright infringement actions. Id.
51. Id. at 354. A cause of action for copyright infringement may not be based solely on evidence that one author “capitalized on the efforts of another . . . .” Id. There must also be an intent to deceive the public. Id.
52. 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).
53. Id. at 542. The cover of “Mad Magazine” described the material contained within as “More Trash From Mad — A Sickening Collection of Humor and Satire From Past Issues.” Id. at 542-43. The particular group of parody lyrics were written in the same meter as the original songs and were characterized as “a collection of parody lyrics to 57 old standards which reflect the idiotic world we live in today.” Id. at 543.
54. Id. at 543. For example, the song “A Pretty Girl Is Like A Melody” became in parody, “Louella Schwartz Describes Her Malady.” Id.
ent to which a parodist may borrow from the work he attempts to [parody] is largely unsettled." Thus, the court established the "conjure up" test for determining whether the parodies constituted copyright infringement. Applying the "conjure up" test, the Second Circuit held for the parodist. Under the "conjure up" test, a parody does not constitute a copyright infringement if it lacks the intent and the effect of satisfying the demand for the original copyrighted work, and if the parodist does not commandeer a larger portion of the original work than is necessary to "recall or conjure up" the original work.

B. Codification of the Fair Use Doctrine

Prior to federal legislation in 1976, courts applied the Fair Use Doctrine without any bright line rules to follow. The Copyright Act of 1976 is the most recent attempt by Congress to codify judicially established guidelines for determining fair use issues. The Act codified the Fair Use Doctrine, intending to preserve the doctrine's historical purpose: the promotion of creativity. However, the Act has been ineffective as a concrete guideline for courts, as evidenced by the lack of uniform application among courts on the issue of fair use.

55. Id. at 544. However, the Second Circuit declared that "parody and satire are deserving of substantial freedom" as forms of entertainment and as "social and literary criticism." Id. at 545.

56. Id.

57. Berlin, 329 F.2d at 545. The Second Circuit clarified the "substantiality" test set forth in Loew's by developing the "conjure up" test. The Second Circuit stated that what parodists traditionally used to achieve the intended purpose was hardly enough to be a substantial taking from the original work. Id. For example, the court held that the musical parodies at issue did not cross the bounds of acceptable use of the original work even though they used the same musical meter. Id. In fact, the court stated that using the same musical meter was inevitable if the parody was to conjure up the original. Id.

58. O'Connor, supra note 17, at 240. The 1976 Copyright Act also ended the dual system of copyright law which existed in the United States between the state legislatures and Congress. Id. Congress allotted itself sole legislative power in this domain. Id.


60. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994) (citations omitted). Under the common law rule, an original work was the absolute property of its creator until the creator agreed to relinquish such right. Stewart, 495 U.S. at 236 (citing American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907)). The Fair Use Doctrine was a judicially created response to the common law rule, and "permit[ted] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Id. (quoting Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980)).
The ineffectiveness of the Act as a concrete test for courts to apply is manifest in two cases decided by the United States Court of Appeals for the Second Circuit. In *Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, the cast of the television show “Saturday Night Live” performed a musical parody of the “I Love New York” campaign song. The parody was called “I Love Sodom.” The district court applied the four factors outlined in section 107 and held that the parody was a fair use, even though the parody used the “heart of the composition.” The district court determined that the purpose and nature of the use of “I Love New York” was satire and did not breach the bounds of the “conjure up” test. Finally, the court concluded that the parody did not affect the marketability of the original song because it did not affect the value of the copyrighted material. The Second Circuit agreed with the district court that the parody used in the sketch was a fair use of the original song.

One year later, the Second Circuit decided *MCA, Inc. v. Wilson* under very similar factual circumstances. In *MCA*, the Second Circuit applied the four factors outlined by section 107 to a parody.

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61. 482 F. Supp. 741 (S.D.N.Y.), aff'd per curiam, 623 F.2d 252 (2d Cir. 1980).
62. Id. at 743. On May 20, 1978, the cast of “Saturday Night Live” (“SNL”) performed a comedy sketch on the NBC network involving a portrayal of the Chamber of Commerce as the biblical city of Sodom. In the sketch, the city officials discussed the poor image the city had in the eyes of tourists; they decided to try a new advertising campaign to bolster the city’s tourist trade. The focal point of the campaign was the parody “I Love Sodom,” sung to the tune of the New York Chamber of Commerce advertising campaign song, “I Love New York.”

Elsmere Music, Inc. (“Elsmere”) owned the copyright for the “I Love New York” song and sued NBC for copyright infringement. Id. at 743-44. NBC contended that the use was limited to the extent “necessary to create an effective parody.” Id. at 744. Plaintiff countered by saying that the use overstepped the bounds of the “conjure up” test. Id.

63. Id.
64. Id. at 744. The district court stated that the use of the heart of the composition in the skit was significant and, therefore, more than de minimis. Id. However, the district court noted that the use was less than extensive. Id.
65. Id. at 747. Although a substantial portion of the original song was used in the parody, the district court held that the nature of the advertising campaign made the song an “appropriate target” for satire. Id. at 746.
66. Elsmere, 482 F. Supp. at 747. The district court noted that parody is an acknowledgment of the parodied work’s significance and concluded that the SNL jingle did not compete with or detract from the New York Chamber of Commerce’s jingle. Id.
68. 677 F.2d 180 (2d Cir. 1981).
of the song "Boogie Woogie Bugle Boy." The Second Circuit, agreeing with the district court, held that the parody was not a fair use of the original song. The Second Circuit determined that the nature and purpose of Wilson's song was not to criticize or parody the original song. Also, the court refused to overturn the district court's findings that the new song was unfairly extensive. The Second Circuit asserted that the factors listed in the Act were the codification of the common law pertaining to copyright infringement.

In Fisher v. Dees, the United States Court of Appeals for the Ninth Circuit acknowledged that the Copyright Act of 1976 did not, in fact, provide a definitive test for courts to follow in deciding fair use issues. The Ninth Circuit also noted that Congress intended that the section 107 factors be used on a case-by-case basis. For example, the Ninth Circuit stated that a finding under the first stat-

69. Id. at 182-83. From January 1974 until July 1976, columnists described the variety show at the Village Gate in New York City as erotic and raunchy, among other things. Id. at 181. Reporters characterized one of the show's songs as a "take-off" on the Andrews Sisters' and Bette Midler's renditions of the song "Boogie Woogie Bugle Boy." Id. at 182. The original song was about a soldier in Company B, and the parody was titled "Cunnilingus Champion of Company C." Id. When the defendant Wilson, composer of the song, played it for the cast, there was immediate concern over the similarity between the two songs.

70. The district court held that the parody was unfairly extensive and constituted a violation of copyright law. Thus, the district court awarded damages to the copyright owner. Id. at 182.

71. Id. at 185.

72. Id.

73. MCA, 677 F.2d at 185. The Second Circuit also stated that "[w]e are not prepared to hold that a commercial composer can plagiarize a song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." Id.

74. Id. at 182.

75. 794 F.2d 432 (9th Cir. 1986). Marvin Fisher and Jack Segal, plaintiff/appellants, owned the copyright to the 1950's song "When Sunny Gets Blue," which they jointly composed. Id. at 434. In 1984, representatives of the defendants/appellees, disc jockey Rick Dees, Atlantic Recording Corp. and Warner Communications, Inc., requested Fisher's permission to parody the copyrighted song and assured them that the parody would be inoffensive. Id. Fisher refused, but Dees, one of the defendants, released an album entitled "Put It Where The Moon Don't Shine," containing a parody of the copyrighted song. Id. The parody contained the same initial six bars of music as the copyrighted song. Id. The district court granted summary judgment in favor of defendants. Id.

76. Id. at 435. Since the four factors for determining fair use are nonexclusive, the courts must modify the doctrine to accommodate the various fact patterns that they will hear. However, courts must modify the doctrine in a way that allows the fair use doctrine to retain its vitality. See id.

77. Id. By intending a case-by-case analysis of fair use, Congress "preserve[d] the doctrine's common law character . . . ." Id.
utory factor that the use has a commercial nature does not necessarily lead to a finding that the use is unfair.\textsuperscript{78}

In addressing whether the amount used by the parody was substantial, the Ninth Circuit rejected the characterization of a parodic use as \textit{de minimis}, stating that in order for parodists to accomplish their satiric goals, the use must be at least substantial enough to "conjure up" the original song in the mind of the listener.\textsuperscript{79} While the boundaries of what constituted substantial use are not clearly defined, "copying that is virtually complete or almost verbatim" is not fair use.\textsuperscript{80} In \textit{Fisher}, the Ninth Circuit held that the parody at issue was a fair use of the original song because it took from the original song only what was intrinsic to its life as parody.\textsuperscript{81}

The Ninth Circuit stated that the most important factor in fair use determinations was the fourth factor, the effect upon the potential market or value of the copyrighted work.\textsuperscript{82} Applying the fourth factor, the Ninth Circuit examined whether the parody fulfilled the demand for the original work, as this would constitute copyright infringement.\textsuperscript{83} According to the Ninth Circuit, an infringement occurs when the parody replaces the original work within the market the original work is intended to fulfill.\textsuperscript{84} In \textit{Fisher}, the Ninth Circuit determined that the parody and the original work were not aimed at the same audiences, and therefore a substitution of the parody for the original work was not probable.\textsuperscript{85} The \textit{Fisher} court

\begin{itemize}
\item \textsuperscript{78} Id. at 437. The parties in \textit{Fisher} agreed that the parody at issue was a commercial use of the original work. \textit{Id.} The court recognized that some commercial parodies are for social commentary or critical purposes and are not an attempt to financially exploit the original. \textit{Id.} (citation omitted). The court determined that the parody at issue was such an instance. \textit{Id.}
\item \textsuperscript{79} Id. at 435 n.2. In order to fit the definition of parody, a song must be at least a \textit{de minimis}, or meager and fragmentary, use of the original. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1437 (6th Cir. 1992). \textit{See also} Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980).
\item \textsuperscript{81} \textit{Fisher}, 794 F.2d at 439-40. The Ninth Circuit acknowledged that this parody took from the original song only what was necessary to fulfill its "parodic purpose." \textit{Id.} at 439. The Ninth Circuit also noted that when a song is parodied, it is often necessary to copy the music exactly in order for the listener to recognize the original song. \textit{Id.}
\item \textsuperscript{82} \textit{Id.} at 437.
\item \textsuperscript{83} \textit{Id.} at 438.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\end{itemize}
concluded that the balancing between the parodist's attempts to create a good parody and the copyright owner's rights tipped in favor of the parodist.86

Other courts have similarly emphasized the significance of the fourth statutory factor in analyzing fair use cases. In Rogers v. Koons,87 the Second Circuit considered the issue of whether a sculpture was protected by the fair use doctrine when the inspiration for the sculpture came from a copyrighted photograph.88 In an effort to clarify the parodist's fair use defense, the Second Circuit offered its own definition of parody.89 Applying the four statutory factors to the particular facts of the case, the Second Circuit held that the sculpture was not a fair use of the original photograph;90 all of the statutory factors weighed against a finding of fair use.91 In its analysis, the Second Circuit asserted that the fourth statutory factor was the most significant in determining fair use,92 and created a balancing test applicable to the fourth factor. The balancing test weighed the effect of the use on the market value of the original.93 The Second Circuit stated that under the fourth factor, a "balance must be struck between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair."94 Additionally, the Second Circuit presumed that there would be future harm to the original photograph because of the harm to the market for the photograph and derivative works.95

The fourth statutory factor also played a significant role in Sony Corp. v. Universal City Studios, Inc.96 In Sony, Universal City Studios ("Universal City") claimed that Sony Corporation ("Sony") was lia-

86. Fisher, 794 F.2d at 439.
88. Id. at 304. In 1980, an acquaintance commissioned Rogers to photograph his puppies. Id. Rogers spent substantial creative effort on the project and licensed the finished product, "Puppies," and other works to Museum Graphics in 1984. Id. Jeff Koons, an artist and sculptor, created a sculpture entitled "String of Puppies." Id. at 305. Koons admitted that the source for his work was the picture postcard of Rogers' licensed photograph that he purchased. Id.
89. Id. at 309. The Second Circuit stated that: "Parody . . . is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original." Id. at 309-10.
90. Id. at 314.
91. Id. at 309-12.
92. Rogers, 960 F.2d at 311.
93. Id.
94. Id.
95. Id. at 312.
ble for “contributory infringement” on Universal’s copyright of various television programs. The United States Supreme Court held it is not necessary to show an actual present harm in order to demonstrate the effect the use has on the copyrighted work’s market value. Instead, it was necessary to show, “by a preponderance of the evidence,” that there is a profound likelihood that future harm will occur. The Court held that the sale of the video tape recorders to the public did not represent such a harm to the market for the television programs and therefore did not infringe upon Universal City’s copyrights. The Court also stated that the law does not give a copyright owner “complete control over all possible uses of his work.” Specifically, the Court explained that copyright owners do not hold an absolutely exclusive right to the use of their works.

In Harper & Row, Publishers, Inc. v. Nation Enterprises, the United States Supreme Court applied the Fair Use Doctrine to an unauthorized version of copyrighted memoirs. The Court applied the statutory factors and held that the use of copyrighted material in an unauthorized article did not constitute a fair use. As in Sony, the Court focused on the fourth statutory factor, and held

97. Id. at 420. Sony Corporation manufactured video tape recorders (VTR’s).

98. Id. at 422. Universal City Studios (Universal City) owned the copyrights to various programs aired on television. Id. at 421. Universal City alleged that their copyrights were violated when individuals used the VTR’s to record the copyrighted programs. Universal City alleged that Sony Corporation was liable for contributory infringement of its copyright. Id. at 420.

99. Id. at 451.

100. Id. at 428-56.

101. Id. at 432. The Court noted that copyright law has never guaranteed an owner absolute rights to his work. Id. at n.13. However, the “natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopo[y] of the copyright . . . .” Id.

102. Id. at 433. The Copyright Act does not provide the copyright holder with exclusive control over reproductions of works that are in the public domain. Id. See also Copyright Act, 17 U.S.C. § 106 (1988 & Supp. V 1993).


104. Id. at 542-43. In 1977, former President Ford authorized Harper & Row Publishers and Reader’s Digest to publish his memoirs, which were unwritten at that time. Id. at 542. The agreement gave petitioners the exclusive right to license excerpts prior to publication. Id. at 542. Harper & Row negotiated an agreement with Time Magazine for these excerpts, but an unauthorized version containing a large portion of the copyrighted material was published in another magazine, The Nation, before the scheduled release in Time. Id. at 543.

105. Id. at 569. The Nation conceded that but for a finding of fair use, the verbatim copying would be a copyright infringement. Id.
that interpreting the Fair Use Doctrine to allow the publication of extensive quotations from a yet unreleased manuscript without consent poses "substantial potential for damage to . . . marketability . . . ."\textsuperscript{106} The Court opined that the final factor was the "single most important element of fair use."\textsuperscript{107}

### III. \textit{Campbell v. Acuff-Rose Music, Inc.}

Roy Orbison and William Dees co-authored the song "Oh, Pretty Woman" in 1964.\textsuperscript{108} Acuff-Rose Music, Inc. (Acuff-Rose) obtained the rights to the song that same year and registered it for copyright protection.\textsuperscript{109} On July 5, 1989, Linda Fine, general manager of Luke Records, wrote a letter to Gerald Tiefer of Opryland Music, Acuff-Rose's parent company, informing him that the rap group, 2 Live Crew,\textsuperscript{110} wanted permission to parody "Oh, Pretty Woman."\textsuperscript{111} Tiefer replied with a letter stating that he would not

\textsuperscript{106} Id. at 566. In \textit{Harper & Row}, the unpublished nature of the original work was critical to the Court's analysis and application of the fourth factor, because \textit{Time} refused to pay Harper & Row the remaining fee due on their contract. \textit{Id.} at 567. See also Daniel E. Wanat, Fair Use and the 1992 Amendment to Section 107 of the 1976 Copyright Act: Its History and an Analysis of Its Effect, 1 Vill. Sports & Ent. L.F. 47, 53 (1994).

\textsuperscript{107} \textit{Harper & Row}, 471 U.S. at 566. The Court noted that economists who have commented on the issue contend that the fair use exception is only applicable when there is no market for the original work or when the copyright owner would request only a nominal amount for the use of the copyrighted material. \textit{Id.} at n.9.


\textsuperscript{109} \textit{Acuff-Rose}, 114 S. Ct. at 1168. Since the song has become a "pop music standard," Acuff-Rose has profited substantially from the licensing of various "derivative" works. \textit{Acuff-Rose}, 972 F.2d at 1432. These derivative works include remakes of the song by other artists, commonly known as "cover" recordings. \textit{Id.}

\textsuperscript{110} Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross and David Hobbs comprise 2 Live Crew, which is a well-known rap music group. \textit{Acuff-Rose}, 114 S. Ct. at 1168. The Court noted that rap music is a "style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment." \textit{Id.} at n.1 (quoting \textit{The Norton/Grove Concise Encyclopedia of Music} 613 (1988)).

\textsuperscript{111} \textit{Acuff-Rose}, 972 F.2d at 1432. The district court found that Fine's letter was written before the release of 2 Live Crew's album "As Clean As They Wanna Be," which contained a parody of "Oh, Pretty Woman." \textit{Id.} at n.2. Although the parties disagree on the sequence of events concerning the letter and the album release, the Court stated that the timing was irrelevant to the Court's analysis. \textit{Acuff-Rose}, 114 S. Ct. at 1168 n.2. Ms. Fine stressed that 2 Live Crew intended the song to be a parody, and that all credits were to be given to Acuff-Rose. \textit{Acuff-Rose}, 972 F.2d at 1432.
grant permission for the parody. On July 15, 1989, 2 Live Crew released "Pretty Woman," a parody of the original song, on its album "As Clean As They Wanna Be." In the album credits, 2 Live Crew acknowledged Orbison and Dees as the composers of the original song. Luther Campbell, the lead vocalist and song writer for the group, authored the 2 Live Crew parody. He stated in an affidavit that he intended to satirize "Oh, Pretty Woman" by using "comical lyrics." When Acuff-Rose brought suit against 2 Live Crew in 1990 for copyright infringement, nearly a quarter of a million copies of the 2 Live Crew recording had been sold. The suit named both 2 Live Crew and its recording company, Luke Skyywalker Records as defendants. Defendants countered with a motion to dismiss on the grounds that the parody constituted a fair use. The district court applied the section 107 factors to the facts.

112. Id. at 1432. Although Acuff-Rose refused to authorize the parody, 2 Live Crew continued to sell "As Clean As They Wanna Be." Id.

113. Acuff-Rose, 114 S. Ct. at 1168. The record was released by Luke Records, Luther Campbell's record company. Acuff-Rose, 972 F.2d at 1432. The district court found that the album was released on July 15, 1989, following the letter from Ms. Fine. Id. at n.2. The original song, "Oh, Pretty Woman," was the singer's reflections on a beautiful woman seen on the street. Id. at 1436 n.8. After initially rebuking the singer, the woman changes her mind. Id. The parody contained lyrics that are initially identical to the original song, but "quickly degenerate[ ] into a play on words, substituting predictable lyrics with shocking ones." Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991), rev'd, 972 F.2d 1429 (6th Cir. 1992), rev'd, 114 S. Ct. 1164 (1994). The song makes references to "two-timin" women, ugly women who are compared to a character from "The Addams Family" and illegitimate children. Id.

114. Acuff-Rose, 114 S. Ct. at 1168. In the album credits, Acuff-Rose Music, Inc. was acknowledged as the publisher of the original song. Id.

115. Acuff-Rose, 972 F.2d at 1432.

116. Id.

117. Id. at 1436. The suit was brought by Acuff-Rose Music, Inc. in the United States District Court for the Middle District of Tennessee, Nashville Division, for "copyright infringement, interference with business relations, and interference with prospective business advantage for the performance and distribution of a copy of 'Oh, Pretty Woman.'" Acuff-Rose, 754 F. Supp. at 1152.

118. Id. 972 F.2d at 1432-33. Defendants filed the affidavit of Oscar Brand which stated that there were musical similarities between the two songs, such as the drum beat and "bass riff." There were also differences such as the key the songs were sung/rapped in and additions to the bass riff. Id. at 1433. Brand stated that the 2 Live Crew song was "consistent with a long tradition . . . of making social commentary through music." Id. In addition, he stated that the 2 Live Crew parody was one of many African-American attempts to use rap music to poke fun at "white" popular music. Id.

Acuff-Rose introduced the affidavit of Earl V. Speilman, a Ph.D musicologist, who determined that the similarities between the two songs were significant and that even a nascent listener would "readily discern that 'Pretty Woman' was modelled after 'Oh, Pretty Woman.'" Id.
of the case and concluded that summary judgment for defendant 2 Live Crew was appropriate because there were no facts in dispute concerning the fair use issue.\textsuperscript{120}

The United States Court of Appeals for the Sixth Circuit reversed the district court's grant of summary judgment in favor of Campbell and 2 Live Crew.\textsuperscript{121} The Sixth Circuit applied the factors set out in section 107 of the Copyright Act and determined that the factors weighed against a finding of fair use.\textsuperscript{122} In its analysis, the Sixth Circuit emphasized the commercial nature of 2 Live Crew's use of the original song in reversing the district court.\textsuperscript{123} Specifically, the Sixth Circuit held that any commercial use of a copyrighted work is presumed to be unfair.\textsuperscript{124}

In a unanimous opinion, the Supreme Court reversed the Sixth Circuit's decision,\textsuperscript{125} holding that the Sixth Circuit erred by placing too much weight on the first statutory factor in determining the fair use issue.\textsuperscript{126}

IV. DISCUSSION

A. Narrative Analysis

In \textit{Acuff-Rose}, there was no dispute that the 2 Live Crew rap version would constitute a violation of the Copyright Act "but for a finding of fair use through parody."\textsuperscript{127} Thus, the Court was faced

\begin{itemize}
\item \textsuperscript{120} \textit{Acuff-Rose}, 754 F. Supp. at 1153.
\item \textsuperscript{121} \textit{Acuff-Rose}, 972 F.2d at 1439.
\item \textsuperscript{122} \textit{Id.} at 1435-39. Although the Sixth Circuit held that 2 Live Crew's song was not a fair use of "Oh, Pretty Woman," it recognized that the 2 Live Crew song was parody in nature. \textit{Id.} at 1435.
\item \textsuperscript{123} \textit{Id.} at 1436-37. The court stated that the district court failed to put enough emphasis on the commercial nature of the use. \textit{Id.} The Sixth Circuit held that the "blatantly commercial purpose of the derivative work . . . prevents this parody from being a fair use." \textit{Id.} at 1439.
\item \textsuperscript{124} \textit{Id.} at 1174. The Court, per Justice Souter, held that the Sixth Circuit gave "insufficient consideration" to the other factors in its finding of no fair use. \textit{Id.} at 1168. The four statutory factors must be considered as a whole. \textit{Id.} at 1171. The nature of parody is such that it warrants a closer scrutiny than the Sixth Circuit gave. \textit{Id.}
\item \textsuperscript{125} \textit{Campbell v. Acuff-Rose Music, Inc.}, 114 S. Ct. 1164, 1179 (1994).
\item \textsuperscript{126} \textit{Id.} at 1174. The Court, per Justice Souter, held that the Sixth Circuit gave "insufficient consideration" to the other factors in its finding of no fair use. \textit{Id.} at 1168. The four statutory factors must be considered as a whole. \textit{Id.} at 1171. The nature of parody is such that it warrants a closer scrutiny than the Sixth Circuit gave. \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 1169. The 1976 Copyright Act states that the owner of a copyright has the exclusive right to such things as reproducing the original copyrighted work, creating derivative works and distributing the original work. 17 U.S.C. \textsection{} 106 (1988 & Supp. V 1993). The statute defines "derivative work" as: [A] work based upon one or more preexisting works, such as a . . . musical arrangement, . . . sound recording . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."
\end{itemize}
with the issue of whether the 2 Live Crew parody of the song "Oh, Pretty Woman" was a fair use within the meaning of the section 107 of the Copyright Act. In its analysis of 2 Live Crew's fair use defense, the Court applied the four fair use factors enumerated in section 107 of the Copyright Act. The Court stressed that these factors are to be "explored" and "weighed together in light of the purpose of copyright," rather than be considered in isolation from one another.

1. **Purpose and Character of the Use**

Under the first statutory factor listed in the Act, the Court considered the purpose and character of 2 Live Crew's use of "Oh, Pretty Woman." Analyzing the nature of the use, the Court examined whether the use was "transformative." In order for the use to be transformative, the copyrighted material must be used for a purpose different from the purpose in the original work or must be used in a different manner. The Court recognized that true parody certainly has transformative value, and may, therefore, claim fair use. According to the Court, the transformative value of par-

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128. Id. at 1167.

129. *Acuff-Rose*, 114 S. Ct. at 1171-78. Although the Court relied on the four statutory factors in its analysis, it recognized that there is no bright-line rule in fair use cases. Id. at 1170 (citations omitted). The Court cited parts of the statutory language as examples of the open-ended nature of the factors. Id. These factors provide courts with "general guidance" as to what uses past courts determined to be fair. Id. Because there are no bright-line rules, all types of uses, including parody, must be judged on a case by case basis. Id.

130. Id. at 1171. The Sixth Circuit's "insufficient consideration" of the factors as a whole was one reason stated by the Court for reversing the opinion. Id. at 1168. "Each factor directs attention to a different facet of the problem." Leval, *supra* note 25, at 1110.

131. *Acuff-Rose*, 114 S. Ct. at 1171. The Act states, in pertinent part: "In determining whether the use made of a work in any particular case is a fair use, [a] factor[ ] to be considered . . . [is] the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . ." 17 U.S.C. § 107(1) (1988).


133. Leval, *supra* note 25, at 1111. A use can be transformative if it criticizes the original, as in a parody. Id. The key to being transformative lies in the value added to the original work. Id. This is because the purpose of the Fair Use Doctrine is to encourage endeavors which use an original work as the basis for new and creative ventures. Id. Although a transformative characterization is not necessary for a finding of fair use, it could diminish the weight of other factors, such as commercialism. *Acuff-Rose*, 114 S. Ct. at 1171 (citations omitted).

134. *Acuff-Rose*, 114 S. Ct. at 1171. The Court also stated that parody's transformative property gives it a social benefit because parody creates a new work while shedding light on the original work. Id.
ody lies in its critical nature.\textsuperscript{135} Without the element of criticism or comment, a fair use claim loses credibility.\textsuperscript{136} The Court went so far as to say that without criticizing the original, a fair use claim is reduced in merit.\textsuperscript{137}

The Supreme Court agreed with both lower courts that the 2 Live Crew song, "Pretty Woman," contained parody and thereby criticized the original song.\textsuperscript{138} However, the threshold question in determining fair use is whether the parody can be "reasonably perceived" as parody.\textsuperscript{139} The Court held that the 2 Live Crew version was recognizable as the parody it was intended to be but need not be labeled as such.\textsuperscript{140} The Court also commented that parody "serves its goals whether labeled [as parody] or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)."\textsuperscript{141}

The Supreme Court's most significant criticism of the Sixth Circuit concerned the Sixth Circuit's treatment of the commercial nature of 2 Live Crew's use of the original song.\textsuperscript{142} The Sixth Circuit relied on the Court's holding in \textit{Sony} and held that any use of copyrighted material for commercial purposes was presumptively unfair.\textsuperscript{143} The \textit{Acuff-Rose} Court criticized the Sixth Circuit for "con-

\textsuperscript{135} \textit{Id.} at 1172. In its analysis of parody, the Court extracted elements from various definitions of parody and determined that comment on the subject of the parody is critical to its definition. \textit{Id.}

\textsuperscript{136} \textit{Id.} When a commentary on the original work is not of a critical nature, then it is assumed that the use of the original work has less than honorable purposes. \textit{Id.} In this instance, other factors, such as the use's commercial value, increase in significance. \textit{Id.}

\textsuperscript{137} \textit{Acuff-Rose}, 114 S. Ct. at 1172.

\textsuperscript{138} \textit{Id.} at 1172-73. Both the district court and the dissent to the Sixth Circuit's opinion recognized that the rap version ridiculed the original work and its notions of "wine and roses." \textit{Id.} at 1173 (citing Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1442 (6th Cir. 1992)). Similarly, the Sixth Circuit majority reluctantly conceded that the song was critical in nature. \textit{Id.} (citing Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1435-36 (6th Cir. 1992)).

\textsuperscript{139} \textit{Id.} The fair use question is not concerned with whether the parody is in good or bad taste. \textit{Id.} The Court recognized that judicial bodies are not qualified to determine the quality of such works, and refused to comment on the quality of the 2 Live Crew song. \textit{Id.} (citations omitted).

\textsuperscript{140} \textit{Acuff-Rose}, 114 S. Ct. at 1173. The comparison of the original song and the rap version allows its commentary and critical nature to surface. \textit{Id.} The differences between the romance contained in the original song and the bawdiness of the parody identify the parody as the type of transformative work that Congress intended the fair use doctrine to address. \textit{Id.}

\textsuperscript{141} \textit{Id.} at 1173 n.17.

\textsuperscript{142} \textit{Id.} at 1173-74.

\textsuperscript{143} \textit{Id.} at 1174 (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)). Congress did not intend to create any class, such as commercial uses, which would be considered presumptively fair or unfair. \textit{Id.}

http://digitalcommons.law.villanova.edu/mslj/vol2/iss2/6
fining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use.” The Court suggested that the Sixth Circuit’s reliance on one sentence from the Sony decision in holding that there was no fair use was not only inconsistent with Sony, but also contrary to the history of the Fair Use Doctrine. The Court stated that Sony actually stood for the proposition that commercial nature would tend to weigh against a finding of fair use, but did not create a presumption of copyright infringement.

Rejecting the Sixth Circuit’s application of the first factor, the Court stated that the commercial nature of a use does not presume a finding of unfairness, just as an educational use does not indicate an automatic declaration of fair use. If commerciality was dispositive of finding against fair use, then Congress’ preamble to section 107, where certain examples of fair uses are listed, would be rendered meaningless. The Court adopted a sliding scale of sorts in its weighing of the commercial value of a parody. According to the Court, the use of parody in advertising would be given less tolerance than parody sold for its own sake.

2. Nature of the Copyrighted Work

Under section 107 of the Copyright Act, a court must consider the nature of the copyrighted work in making fair use determinations. The second factor acknowledges that certain types of works are “closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to estab-

144. Id. at 1173. The Court admonished the Sixth Circuit’s reliance on the commercial nature of the use, stating that it gave too much significance to that one aspect of the purpose and character of the use, and afforded it “virtually dispositive weight.” Id. at 1174.

145. Acuff-Rose, 114 S. Ct. at 1174. The Sony Court did not create a bright line rule as applied by the Sixth Circuit, but rather called for a “sensitive balancing of interests.” Id. (quoting Sony, 464 U.S. at 455).

146. Id. (citation omitted).

147. Id. Although commercial uses do not mandate a finding of unfair use, a court may consider the profit/nonprofit distinction in making fair use determinations. MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981); see generally Arlen W. Langvardt, Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases, 36 Vill. L. Rev. 1 (1991) (discussing need to distinguish between commercial and noncommercial parodies in trademark parody cases).

148. Id. at 1174.

149. Id.

150. Acuff-Rose, 114 S. Ct. at 1174.

151. Id. at 1175 (citing 17 U.S.C. § 107(2) (1988)). The second factor “implies that certain types of copyrighted material are more amenable to fair use than others.” Leval, supra note 25, at 1116.
lish when the former works are copied." 152 Although the Court declared that the original Orbison song was the type of work that copyright laws were intended to protect, this fact did not have much bearing in this case; parodies inevitably copy well-known works. 153 In fact, the Court speculated that the second factor would not generally affect parody fair use cases because parodies are inevitably directed at creative works that are widely known. 154

3. Amount and Substantiality of Portion Used

Courts deciding fair use issues must also consider the third factor enumerated in section 107: the amount and substantiality of the portion of the copyrighted work used in the parody. 155 In Acuff-Rose, the Court determined that the third factor demands consideration not only of the quantity taken from the original, but the importance, quality and purpose of the use. 156 The Court also acknowledged that the facts relevant to the third factor may be pertinent to the transformative character of the first factor and the likelihood of market substitution under the fourth factor. 157

However, the Court acknowledged that these third factor determinations must be made differently with regard to parody. 158 In order for parody to be effective, it "must be able to 'conjure up' at least enough of th[e] original to make the object of its critical wit recognizable." 159 The art of parody "lies in the tension between a

152. Acuff-Rose, 114 S. Ct. at 1175. The general rule is that "creative works ... are afforded greater protection from the fair use determination than are works of fact." Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1437 (6th Cir. 1992), rev'd, 114 S. Ct. 1164 (1994) (citation omitted).
153. Acuff-Rose, 114 S. Ct. at 1175.
154. Id.
155. Id. Courts must consider the amount and substantiality used of the original work in relation to the copyrighted work as a whole. 17 U.S.C. § 107(3) (1988). The issue is whether the amount used of the original work is reasonable in the context of the purpose for its use. Acuff-Rose, 114 S. Ct. at 1175.
156. Acuff-Rose, 114 S. Ct. at 1175.
157. Id. at 1176. The acceptable degree of material used from the original differs with the purpose of the use. Id. at 1175. Also, the quantity and quality of the material used will affect the market potentiality for the original work and its derivatives. Id. at 1175-76.
158. Id. at 1176. Parody necessitates a special consideration of the third statutory factor because its very nature requires a substantial use of the original work so that the listener can immediately recognize the original work. Id.
159. Id. Once enough of the work is used to make the original work recognizable, the amount of further use depends on the extent to which the predominant purpose is to parody or the "likelihood that the parody may serve as a market substitute for the original." Id. It is impossible, however, to avoid using some characteristic features. Id.
known original and its parodic twin." The Court determined that the amount that 2 Live Crew used from the Orbison original was reasonable, despite the fact that it went to the "heart" of the original. While recognizing that the distinctive bass riff and opening line of the song may be the heart of the song, the Court reasoned that it may have been necessary to use this to conjure up the original. The Court held that although 2 Live Crew used the heart of the original song in their parody, this did not necessarily mean that the amount and substantiality of the use was unreasonable. Although the Court was unwilling to say that the use was unreasonable, it did not make a determination on the musical phrases copied by 2 Live Crew and remanded the case on this factual issue in light of the other factors.

4. Effect of the Use Upon the Potential Market

The final statutory factor considered by the Court was the effect of the use on the potential market for, or value of, the original work. Courts must not only consider the market harm to the original work, but also any potential damage to the market for possible derivative works.

The Acuff-Rose Court rejected the notion that the commercial nature of 2 Live Crew's use created a presumption of market harm,

160. Id.
161. Acuff-Rose, 114 S. Ct. at 1176. The Court stated that the heart of the original work was what was being parodied. Id.
162. Id. The Court noted that if 2 Live Crew had not copied the heart of the original song, it would have been difficult for the parodic nature of the song to come through. Id.
163. Id. In its analysis, the Court opined that it was significant that the 2 Live Crew parody departed from Orbison's lyrics after the first line and added its own distinctive sounds and bass riff. Id.
164. Id. at 1176-77.
165. Id. at 1177 (citing 17 U.S.C. § 107(4) (1988)). Under the fourth factor, courts must not only consider the market harm caused by the specific use, but whether similar conduct by others would affect the potential market for the original. Id.
166. Acuff-Rose, 114 S. Ct. at 1177. Section 101 of the Copyright Act defines a "derivative work" as:

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

and held such a presumption to be erroneous.\textsuperscript{167} Thus, the Court rejected the Sixth Circuit's application of the \textit{Sony} opinion, and distinguished \textit{Sony} by limiting it to "mere duplication[s] for commercial purposes."\textsuperscript{168} Conversely, if the use is contained within a parody, there is less likely to be a market harm because parodies are transformative.\textsuperscript{169} The Court reasoned that there was less likely to be any market harm because the two works "serve[d] different market functions."\textsuperscript{170} In addition, the Court emphasized that the only market harm of concern was that of market substitution, and that the Act does not address market harm to the original or derivative works resulting from the parody's effective criticism of the original.\textsuperscript{171} The Court maintained that criticism, no matter how brutal, does not produce the type of market harm that the Copyright Act remedies.\textsuperscript{172} While the market for derivative works is limited to "those [works] that creators of original works would in general develop or license others to develop," it does not include critical reviews or parodies.\textsuperscript{173} The Court would not make a determination as to what type of market harm the 2 Live Crew song would cause for the Orbison original because of sparsity of evidence.\textsuperscript{174}

B. Critical Analysis

Throughout its analysis of parody and the fair use doctrine in \textit{Acuff-Rose}, the Court recognized the inherent social value of parody.\textsuperscript{175} Parody sheds new light on an original copyrighted work by commenting on and criticizing that work.\textsuperscript{176} In rejecting the Sixth Circuit's finding that 2 Live Crew's parody constituted an unfair use of the original Orbison song, the Court wisely aligned itself with

\begin{itemize}
  \item \textsuperscript{167} \textit{Acuff-Rose}, 114 S. Ct. at 1177. The Court assessed the Sixth Circuit's application of the fourth factor and determined that the Sixth Circuit erred in dismissing the fourth factor as hastily as it had the first factor. \textit{Id.} Thus, the Court rejected the Sixth Circuit's reliance on the commercial nature of the use in dismissing both the first and fourth factors. \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} It is less likely that a parody would act as a market substitute for an original than if the use were simply a copy of the original. \textit{Id.} at 1177-78.
  \item \textsuperscript{170} \textit{Id.} at 1178.
  \item \textsuperscript{171} \textit{Id.}
  \item \textsuperscript{172} \textit{Acuff-Rose}, 114 S. Ct. at 1178.
  \item \textsuperscript{173} \textit{Id.} at 1178.
  \item \textsuperscript{174} \textit{Id.} at 1177. Neither party produced evidence as to the effect the rap parody would have on a non-parody rap version of the Orbison song. \textit{Id.} at 1178-79.
  \item \textsuperscript{175} \textit{Id.} at 1171.
  \item \textsuperscript{176} \textit{Id.} The parodist creates a new work through the creative process of parody. \textit{Id.}
\end{itemize}
other courts and commentators, acknowledging parody as a legitimate form of creative endeavor. In transforming one work through parody, the creator generates a new original work with its own social and artistic value. While part of that value comes from recognition of the parodied work, the new creation takes on a value unto itself. In addition, the Court accurately stated that the statutory factors found in section 107 must be considered as a whole test, and not as individual measures of fairness. "These factors do not represent a score card that promises victory to the winner of the majority." 178

The Court categorically rejected the Sixth Circuit’s treatment of the first statutory factor and decisive reliance on the commercial purpose and character of 2 Live Crew’s use. 179 While the Sixth Circuit erred in terminating consideration of the first section 107 factor upon the finding of the parody’s commercial nature, the Supreme Court properly contemplated a broader sense of the purpose and character of the 2 Live Crew parody. 180 The Court focused on parody’s critical nature and stated that in order for parody to have a legitimate fair use claim, it must criticize the original. 181 However, the Court stated that a parody did not necessarily have to be targeted at the original as closely as the 2 Live Crew parody in order to be considered parody by the Court. 182 Where the Court fails is in its omission of a clear standard. The Court never addressed whether a parody which criticizes certain aspects of society, but not the original, can sustain a fair use claim. The Court clearly rejected the view that all parody, by its nature, would constitute a fair use and established the critical element of parody as essential for fair use. 183

Rather than considering the first factor independently, the Court applied all four factors in conjunction with one another, considering the purpose and character in concert with the other sec-

177. *Acuff-Rose*, 114 S. Ct. at 1170-71. All the factors need to be weighed together with the underlying objectives of copyright in mind. *Id.*

178. Leval, *supra* note 25, at 1110. Every factor addresses a different aspect of the fair use issue. *Id.* Taken alone, these factors do not carry enough weight for a finding of fair use or no fair use.


180. *Id.* at 1173.

181. *Id.* at 1172. The Court not only recognized the critical nature of the 2 Live Crew song, but also acknowledged that this criticism is a facet of categorizing a work as a parody. *Id.* at 1173.

182. *Id.* at 1172.

183. *Id.*
Whether the parody is in good taste is not an issue under section 107, and the Court prudently refused to consider this.

The Court's analysis of the third statutory factor recognized that a parodist must "conjure up" the original copyrighted work in the mind of the listener for the parody to be effective. "But if an intended parody reminds the audience of the original too effectively, it may infringe that work's copyright." The Court failed to give concrete guidance for analysis of this factor; any guidance the Court attempted to give was nebulous at best. While it is true that the "open-ended" factors of section 107 "call for a fact-intensive analysis in each case," the Court neglected to provide further guidance to subsequent courts deciding fair use issues.

The Court's analysis of the fourth statutory factor recognized the diminishing effect that the difference between the original and 2 Live Crew's version would have on potential market harm. The Court judiciously rejected the use of Sony as controlling precedent in this case. There was a lack of complete and direct duplication of copyrighted material in the Acuff-Rose case which was present in Sony. However, the Court neglected to discuss the different audiences that the two versions of the song were intended to target. This factor may be helpful in determining the relevant market for any derivative works, such as a non-parody rap version of "Oh, Pretty Woman." The Court rendered the potential audience irrele-

184. Acuff-Rose, 114 S. Ct. at 1172.
185. Id. In addition, it may not be the duty or privilege of copyright holders to become "censors of parody." Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1446 (6th Cir. 1992), rev'd, 114 S. Ct. 1486 (1994) (Nelson, J., dissenting). "[P]arody, whether or not in good taste, is the price an artist pays for success . . . ." Id. (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting)).
186. Acuff-Rose, 114 S. Ct. at 1176. "Parody's humor . . . necessarily springs from recognizable allusion to its object through distorted imitation." Id.
188. Id. at 52.
189. Acuff-Rose, 114 S. Ct. at 1178-79. The original version of the song was a pop ballad, while the 2 Live Crew version was a rap music parody of the original. Id. at 1168.
190. Id. at 1177.
191. Id. In Sony, there was a verbatim copy of the original work which led the Court to determine that market harm would occur. Id. (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

http://digitalcommons.law.villanova.edu/mslj/vol2/iss2/6
vant by holding that the "unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own products removes such uses from the very notion of a potential licensing market." However, as the Court noted, there was no evidence presented by either party as to the effect this parody would have on the market for derivative works, and the Court suggested that this lack of evidence would be remedied on remand. The Court ignored the fact that these determinations had already been made by the district court. In granting summary judgment for 2 Live Crew, the district court found that the intended audiences of the two songs were completely different, and held that Acuff-Rose had not presented any evidence that harm to any market had occurred.

The lack of a bright line rule for parodists to follow could open the floodgates of copyright litigation. However, the Acuff-Rose Court noted that Congress intended the statute which codified the Fair Use Doctrine to be "illustrative and not limitative." Only general direction is given in section 107 because the nature of parody and artistic works is such that no two examples can be analyzed under the same rigid rule. Nevertheless, the lack of a bright line rule does not guarantee every parody classification as a fair use solely because of its parodic nature. The Court preserved the integrity of its opinion by stating that parodies are given no preference under the Copyright Act and are required to withstand the factor-based scrutiny of section 107.

V. IMPACT

The United States Supreme Court's ruling in Acuff-Rose "has the potential to advance significantly freedom of expression within the framework of constitutional and statutory copyright." Parodists, by definition, require a momentous amount of liberty in order to accomplish the purpose of their art. The Court recognized that any further restrictions on parodists' freedom would stifle their

193. Acuff-Rose, 114 S. Ct. at 1178. The Court held this in light of the fact that the "market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." Id.
194. Id. at 1178-79.
195. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1158 (M.D. Tenn. 1991). The district court also found that Acuff-Rose could have recorded any version of the original song and would not have been harmed by the 2 Live Crew version because it was a parody. Id.
196. Id. at 1170. This is exemplified by the terms "including" and "such as" being used in the preamble paragraph of the text. Id.
creative efforts and all but eliminate this socially valuable art form. The "free-fire zone within which critics and parodists get [an exemption from copyright infringement is] commonsensical."\textsuperscript{198}

By mandating that all four statutory factors be evaluated as a whole, and no factor be given greater weight than the others, the Court has provided a general structure for a case by case analysis of parody. This approach will prevent lower courts from making the same type of error that the Sixth Circuit did in giving dispositive weight to one factor. However, the statutory test enumerated in the section 107 factors lacks the concrete structure for courts to make consistent judgments on the issue of fair use. Parodies, by their nature, vary from one to the next, and it is this aspect of the parody problem that mandates application of the section 107 factors on a case-by-case basis. However, the Court overlooked some other potential pitfalls contained within section 107 by focusing for the most part on the first statutory factor. For example, the Court did not give a definitive answer as to what markets are encompassed by the fourth statutory factor, only that the market for "critical reviews" and "lampoons" is not included.\textsuperscript{199}

When the Court granted \textit{certiorari} to the Sixth Circuit, it limited the issue to "whether the petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. Section 107."\textsuperscript{200} The only question the Court actually answered was whether the Sixth Circuit erred in the supposition that the commercial nature of the parody presumptively precluded it from classification as a fair use.\textsuperscript{201} This holding was the Court's sole success at clarifying the section 107 factor analysis. The Court never concluded whether this particular parody was a fair use, and thus further muddied the copyright waters. The Court stated that the Sixth Circuit had erred in its application of the first and fourth factors, but neglected to offer possible improvements or correct applications of the section 107 analysis of the facts.

Had the Court decided this case in a manner consistent with the Sixth Circuit, journalists, writers and performers would be in constant jeopardy of infringing on the rights of copyright owners under the Act. The media would be prohibited from mimicking

\begin{itemize}
\item \textsuperscript{198} Kurt Anderson, \textit{The Freedom to Ridicule}, \textit{Time}, December 13, 1993, at 93. "If the [Acuff-Rose] court's decision goes the wrong way, it will surely make journalists as well as ironists more hesitant to expose and criticize by mimicking or quoting the powerful and celebrated." \textit{Id}.
\item \textsuperscript{199} Acuff-Rose, 114 S. Ct. at 1178.
\item \textsuperscript{201} Acuff-Rose, 114 S. Ct. at 1179.
\end{itemize}
the subjects of their stories and newscasts. Political comedians would be practically rendered impotent. Cartoonists who dabble in the public arena would also be caught in the middle of this legal argument. An ancient art form would be lost in a mire of legal dribble, to the detriment of all society. Despite the missed opportunity to provide lower courts with guidance regarding the application of section 107, the Supreme Court in Acuff-Rose temporarily preserved parody and all those who use it to criticize and entertain.

Melissa M. Francis

202. Various performers, satirists and comedians filed *amici curiae* briefs with the Court preceding this case. One such group, Capitol Steps Productions, Inc., filed a brief in support of 2 Live Crew. *Acuff-Rose*, 113 S. Ct. at 1642. The Capitol Steps commented on political figures and current affairs and set these comments to popular music. Another such performer, Mark Russell uses similar methods in his political comedy. Both use well-known melodies and substitute their own words to comment on the current political scene, and both would have been adversely affected by a decision in favor of Acuff-Rose. While both performers parody various popular songs in their comedic criticism, it is unclear whether this criticism rises to the level required by the Acuff-Rose Court. While these performances are critical, they do not necessarily criticize the original work, and thus may not be afforded fair use protection. The Court was not clear on this point.