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OH, PRETTY PARODY: *CAMPBELL v. ACUFF-ROSE MUSIC, INC.*

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INTRODUCTION

For the second time ever, the Supreme Court addressed the affirmative defense of fair use to copyright infringement in the context of parody in *Campbell v. Acuff-Rose Music, Inc.*[1] The unanimous opinion found a parody rap version of Roy Orbison's song "Oh, Pretty Woman" by the group 2 Live Crew could be a fair use within the exceptions to the protections of the Copyright Act of 1976.[2] The fair use defense is an inconsistent and confusing area that has been called "the most troublesome [issue] in the whole law of copyright."[3] The *Campbell* decision helps preserve the flexible, case-by-case analysis intended by Congress and recognizes the value of parody both as a form of social criticism and catalyst in literature. The decision affords wide latitude to parodists, emphasizing the irrelevance of the judge's personal view of whether the parody is offensive or distasteful. It is unclear whether future courts will interpret this holding to be limited to fair use of parody in the context of song, or whether they will construe it more broadly to confer substantial freedom to parodists of all media. It is also unclear what effect this decision will have on the music industry's practice of digital sampling.

This article will review the historical background of fair use in the context of parody and the case law preceding the Supreme Court's decision. A detailed discussion of the lower courts' decisions will be followed by analysis of the Supreme Court's decision and its implications for the future.

I. BACKGROUND

American courts have been trying to balance the rights of a copyright holder with the notion that "[a]n author has a right to quote, select,

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1. 114 S. Ct. 1164 (1994).
2. 17 U.S.C. §§ 101-914 (1982).
3. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

extract or abridge from another, in the composition of a work essentially new,"[4] since the 1800s. Fair use developed as a common-law doctrine to help achieve the constitutional goal "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings,"[5] but also to "permit[ ] 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."[6] Common-law fair use doctrine made lawful the otherwise unauthorized, infringing use of copyrighted material for purposes such as comment and criticism. Congress restated the common law decisions with respect to fair use in Section 107 of the Copyright Act of 1976, which provides:

> § 107. Limitations on exclusive rights: Fair Use.
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> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.
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> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[7]

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4. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

5. U.S. CONST. art. I, § 8, cl. 8.

6. Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980).

7. 17 U.S.C. § 107. 17 U.S.C. § 106 provides in part:

> Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

Congressional intent was not to codify the doctrine rigidly, but "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[8] The statute uses the words "including," "such as," and "shall include," suggesting that the statute is to be used as a flexible guideline rather than a rigid standard to be mechanically applied. The examples and four factors it suggests are illustrative but not exhaustive of what can properly be considered fair use. The statute specifically does not state the relative weight to be given each suggested factor. Congress intended a case-by-case sensitive balancing of all relevant factors, including those not explicitly stated; the weight to be given each factor would depend heavily on the circumstances of the particular case at bar.[9] No factor was intended to be "presumptively dispositive."[10] Part of the problem courts have encountered in interpreting Section 107 is that Congress specifically intended fair use to continue to develop as a common-law doctrine and deliberately refrained from laying down a bright-line rule.

Parody has come to be recognized as protectable under the fair use doctrine. It is usually seen as a work "for purposes such as criticism" within the meaning of Section 107.[11] In 1992, Congress noted that "types of uses beyond the six enumerated in the preamble to Section 107 may also be considered. Parody is a common example of such a use."[12]

II. THE PROBLEM OF PARODY

In parody cases, judges must weigh the legitimate property interests of the copyright owner to control reproductions and derivative uses of his[13] own works against the parodist's right to engage in freedom of

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(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . .

8. H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976); S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975).

9. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 [A], at 13-155 to 13-156 (1994).

10. *Id.* at 13-157.

11. *See* Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992); S. REP. No. 473, 94th Cong., 1st Sess. 61-62 (1975); H.R. REP. No. 1476, 94th Cong., 2d Sess. 65 (1976). *See also* Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903) (finding parody involving vaudeville impersonations was fair use).

12. H.R. REP. No. 836, 102d Cong., 2d Sess. 3 n.6 (1992).

13. The pronouns "he," "his," etc. will be used throughout the comment to refer to

speech and promote his art and the public benefit derived from parody as a form of literature and social criticism. Parody as a form of criticism also plays an integral function as a catalyst in the continuing development of literature as an art.[14] One commentator has noted that "[t]o decide parody cases sensibly, courts must recognize the demands of the literary enterprise as an important interest distinct from the parodist's and the copyright owner's. Literature needs criticism, . . . and parody is a type of criticism. Failure to recognize this interest has hampered analysis in parody cases."[15] It is especially urgent to exempt parodists from the usual requirement to secure permission for use from the copyright owner since in the majority of cases the owner will refuse to give permission to another to lambast his own work.

The courts have been left to struggle to resolve the central tension between the competing goals of copyright law both to protect an individual's property right to work he has created and to foster creativity. Courts have had a difficult time agreeing on a basic definition of what actually constitutes parody,[16] and they have interpreted and weighted the suggested factors in varying manners. As a result, they have produced an inconsistent and confusing body of case law.

A. The Search for a Definition

Most courts have adopted the notion that in order for a parody to constitute fair use, the parody must involve both comedy and criticism. Comedy is a necessary element of parody,[17] but comedy alone will not suffice. The court in *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*[18] found that an alleged parody of *Gone With the Wind* was not a parody because it did not criticize the original work. The court noted that "in order to constitute the type of parody

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persons of both genders.

14. Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act, in* 34 ASCAP, COPYRIGHT LAW SYMPOSIUM 1, 4 (1987).

15. *Id.* at 6.

16. Some courts have even entertained lengthy discussions of the fine distinctions between parody, burlesque, satire, etc. *See, e.g.*, Benny v. Loew's, Inc., 239 F.2d 532, 537 (9th Cir. 1956).

17. Criticism of the source without humor is not regarded as parody. For example, it was not considered parody when priests tried to correct what they perceived as errors in their own version of the Broadway musical *Jesus Christ, Superstar*. *See* Stigwood v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972).

18. 479 F. Supp. 351 (N.D. Ga. 1979).

eligible for fair use protection, parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist."[19]

The criticism must be at least partly aimed at the source text itself. The parodist may criticize society at large in addition to the source text, but unless the parodist actually criticizes the source itself, there is no compelling reason why that particular source must be used by the parodist as the vehicle for his criticism. The parodist would have achieved his goal just as well using a source in the public domain, and there is no special reason to extend the extraordinary protections of fair use in this instance. For example, the district court in *MCA, Inc. v. Wilson*[20] found a New York production of the musical number "Cunnilingus Champion of Company C" in an off-Broadway show was *not* a parody of the song "Boogie Woogie Bugle Boy of Company B" because it was directed only at "sexual mores and taboos"[21] in general, not at the original song itself.[22] As the court in *Fisher v. Dees* noted, "a humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the target of the work in question. Otherwise, there is no need to 'conjure up' the original in the audience's mind and no justification for borrowing from it."[23]

One commentator has suggested a working definition of parody for fair use purposes. "Parody is a discrete work or passage that, through imitation, focuses attention on both the style and the substance of a source text and that uses comic techniques, such as exaggeration and incongruity, to criticize the source text."[24] This particular definition makes no reference to the amount taken from the original, the distinction between commercial and noncommercial works, or potential effects on the market of the original.[25]

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19. *Id.* at 357.

20. 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 677 F.2d 180 (2d Cir. 1981).

21. *Id.* at 453.

22. The court in MCA stated that "a permissible parody need not be directed solely to the copyrighted [work] but may also reflect on life in general," but "if the copyrighted [work] is not at least in part an object of the parody, there is no need to conjure it up." 677 F.2d at 180.

23. Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986).

24. Bisceglia, *supra* note 14, at 23.

25. *Id.* at 24. Still other definitions of parody find intellectual support. *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992), defines parody as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new artwork that makes ridiculous the style and expression of the original." The *Rogers* court also stated that "copied work must be, at least in part, an object of the parody,

B. The Cases

The first time the Supreme Court reviewed a parody case in the context of fair use was in *Benny v. Loew's, Inc.* in 1958.[26] Comedian Jack Benny aired on television a parody of the movie *Gas Light* which Benny entitled "Autolight." The makers of the original *Gas Light* sued him for copyright infringement. Benny invoked the affirmative defense of fair use and argued that parody, as a form of criticism, constituted a fair use. The district court decided (and both the court of appeals[27] and Supreme Court agreed) that Benny's parody did *not* constitute fair use.[28] The courts all refused to measure parody by a different yardstick than other forms of criticism which could constitute fair use. Benny had simply borrowed too much from the original and therefore infringed on the owner's copyright.

Interestingly, that same year the same district court judge who decided against Jack Benny decided a case in favor of Sid Caesar for his television parody of *From Here to Eternity* entitled "From Here to Obscurity."[29] Here, the judge specifically noted that parodists may legitimately need more leeway than may other types of critics.[30] At that time *Benny* remained the controlling case in the Ninth Circuit since the Caesar case was not appealed. Since then, however, *Benny* has been widely criticized and is no longer accepted as the standard.

In *Berlin v. E.C. Publications, Inc.*,[31] *Mad Magazine* substituted its own lyrics for a number of Irving Berlin songs and published them in the

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otherwise there would be no need to conjure up the original work." *Id.* at 310 (citing *MCA*, 677 F.2d at 185). In *Rogers*, a sculpture based on a copyrighted photograph was found not to be a parody because it was aimed at criticizing society at large without criticizing the source text itself.

"Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After* Betamax," 97 HARV. L. REV. 1395 (1984). Parody also "giv[es] . . . social value beyond its entertainment function." Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Prods., Inc., 479 F. Supp. 351, 357 (N.D. Ga. 1979).

26. 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* Columbia Broadcasting Sys., Inc. v. Loew's, Inc., 356 U.S. 43 (1958) (affirmed by an equally divided court).

27. *Id.* at 537.

28. Loew's, Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 183 (S.D. Cal. 1955).

29. Columbia Pictures Corp. v. Nat'l Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955).

30. *Id.* at 354.

31. 329 F.2d 541 (2d Cir. 1964).

magazine. For example, "A Pretty Girl is Like A Melody" became "Louella Schwartz Describes Her Malady." The Court of Appeals for the Second Circuit decided in favor of *Mad Magazine*. "[T]he court expressed considerable misgiving at the holding in *Benny v. Loew's* . . . and . . . [a]lthough the court used a straight substantial similarity test here, it strongly implied that it would cast a benign eye on more extensive borrowing if the defendant's work were truly parodic."[32]

A case invoking the fair use defense of parody in the graphic arts is *Walt Disney Productions v. Air Pirates*.[33] Disney's Mickey and Minnie Mouse were depicted in adult situations. This opinion tried to narrow the scope of *Benny's* harsh standard, interpreting *Benny* to explicitly prohibit only "near-verbatim copying."[34] The court in *Air Pirates* found that the "Air Pirates Funnies" did violate Disney's copyright because they had copied too much. They were entitled to parody (a caricature, for example), but not necessarily to the "best parody."[35]

In *Elsmere Music, Inc. v. National Broadcasting Co.*,[36] the cast of the television show *Saturday Night Live* parodied New York State's tourist-promoting "I Love New York" campaign with one of their own entitled "I Love Sodom." The cast members sung these new lyrics to the four-note tune of the original. The district court and court of appeals found "I Love Sodom" to be both a parody and a fair use of the original. The court of appeals, however, went even further, suggesting that even more extensive use could be construed as fair use.

In *Fisher v. Dees*,[37] the defendants requested permission to parody the standard ballad sung by Johnny Mathis "When Sunny Gets Blue." The copyright owners denied permission, but the defendants composed and marketed a parody anyway. Dees created "When Sonny Sniffs Glue" and put it on his comedy album *Put It Where the Moon Don't Shine*. The lyrics "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" became "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." When the copyright owner sued, Dees claimed he made fair use of the original. The district court found "When Sonny Sniffs Glue" to be a parody and to be fair use of the

32. Bisceglia, *supra* note 14, at 11.
33. 581 F.2d 751 (9th Cir.), *cert. denied*, 439 U.S. 1132 (1978).
34. *Id.* at 757.
35. *Id.* at 758.
36. 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).
37. 794 F.2d 432 (9th Cir. 1986).

original; it granted summary judgment for Dees, and the court of appeals affirmed.[38]

One commentator has summed up the relevant case law as follows:

> The Second Circuit takes a widely permissive . . . view of parody, at least so long as it is not obscene. Caught between *Air Pirates* and *Benny*, the Ninth Circuit could almost be said not to have a coherent law about parody. Since the Second and Ninth Circuits hear the bulk of entertainment litigation, a would-be parodist might well feel uneasy about his legal prospects. This confusion is compounded if one examines the standard copyright infringement tests as they have been applied to parody.[39]

Professor Nimmer has lamented "the almost infinite elasticity of each of the four factors, and their concomitant inability to resolve the difficult questions."[40] It was against this background of confusion and inconsistency that the Supreme Court issued its decision in *Campbell v. Acuff-Rose*.

III. SECTION 107: THE FOUR FACTORS

A. The Purpose and Character of the Use

In order to be considered fair use, generally the "purpose and character" of the work must be "productive." The second artist must add something original of his own to the first work and transform it in some way.[41] However, this condition is usually met in the context of parody, which by its nature changes the original so as to criticize it. Courts are

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38. In its decision, the court defined fair use as "an equitable defense to copyright infringement. In effect, the doctrine creates a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent." *Id.* at 435. In addition, in *Fisher* the Ninth Circuit held that *Benny* "was essentially repudiated by Congress's recognition of parody in the notes to the Copyrights Act of 1976." *Id.* Congress had listed "use in a parody of some of the content of the work parodied" as among "the sort of activities the courts might regard as fair use under the circumstances." *Id.* (citing 17 U.S.C.A. § 107 Historical Note (quoting H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976))).

39. Bisceglia, *supra* note 14, at 17.

40. NIMMER & NIMMER, *supra* note 9, at 13-186.

41. *See* Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

more willing to extend fair use when the two works do not have the same "intrinsic purpose."[42] (This issue becomes more controversial when verbatim copying, such as photocopying or taping television programs off the air in their entirety, is involved. Even in these circumstances, the productive versus nonproductive distinction is not always wholly dispositive.[43])

Courts' inquiries concerning this first factor have generally centered on whether or not the work in question is "commercial" in nature.[44] Arguably, courts have placed too much emphasis on this factor; the commercial versus non-commercial distinction has no bearing on whether or not the work constitutes a parody which is fair use. Whether or not an artist's work creates a parody which legitimately adds to our body of literature as a form of social criticism and commentary should not hinge on whether the artist made a profit. In order to be considered legitimate art, it is absurd to require the artist to starve.[45] Professor Nimmer notes that "in fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship."[46] The first factor should not be found to weigh against fair use simply because the parody was intended to earn a profit.

In *Sony Corp. v. Universal City Studios, Inc.*[47] (involving home video tape recording of copyrighted television programs), the Supreme Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . ."[48] Generally, however, this notion is not taken to its logical literal extreme; such a harsh rule is "unwarranted."[49]

Instead, a work's commercial nature is more likely to be considered

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42. 659 F.2d at 970.

43. 464 U.S. at 456 n.40.

44. *See* MCA v. Wilson, 677 F.2d 180 (2d Cir. 1981); Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956).

45. Bisceglia, *supra* note 14, at 19-20.

46. NIMMER & NIMMER, *supra* note 9, at 13-158 (quoting Salinger v. Random House, Inc., 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1988)).

47. 464 U.S. 417 (1984).

48. *Id.* at 451.

49. Professor Nimmer noted that, "taken literally, that statement would cause the fair use analysis to collapse in all but the exceptional case of nonprofit exploitation. Such a categorical rule is unwarranted." NIMMER & NIMMER, *supra* note 9, at 13-163.

as one factor that tends to weigh against a finding of fair use.[50] The commercial nature of the work may also be seen by the courts as a rebuttable presumption against fair use.[51] As the Court framed the issue in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, "the crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[52] In that case, the commercial nature of the *Nation*'s verbatim copying of 300 out of 200,000 words from former President Ford's as yet unpublished memoirs helped the court to find against fair use. A work's commercial nature does not automatically constitute infringement, and a work's non-commercial nature does not automatically constitute fair use. The extreme statement made in *Sony*, however, was made in the context of complete verbatim copying of the source, not in the context of parody.

One other factor to be considered in evaluating the "character" of the use is whether the parodist acted in good faith.[53] It is not presumptively considered bad faith if a parodist asks the owner of the copyright for permission, is refused permission, but publishes or performs the parody anyway. The court in *Fisher v. Dees* noted that

> parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee. . . . [T]he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought. . . . Moreover, to consider Dees blameworthy because he asked permission would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them.[54]

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50. Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980).

51. *See* Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).

52. 471 U.S. 539, 562 (1985).

53. NIMMER & NIMMER, *supra* note 9, at 13-168 to 13-170; *Fisher*, 794 F.2d at 437; *Harper & Row*, 471 U.S. at 562.

54. *Fisher*, 794 F.2d at 437; Nimmer has stated "only by the recognition of a fair use defense is society likely to reap the benefit of this socially useful literary genre." NIMMER & NIMMER, *supra* note 9, § 13.05 [C], at 13-210 (citing Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After* Betamax, 97 HARV. L. REV. 1395 (1984)).

Additionally, it will usually not be possible for a parodist to obtain a license under Section 115(2) of the Copyright Act because the licensee is prohibited from altering the "fundamental character" of the work.[55]

B. The Nature of the Copyrighted Work

This factor has proved particularly vague and unhelpful in the context of parody. Generally, this factor has accorded greater protection from copying to more creative works.[56] In addition to the creativity of the source text, the court in *MCA v. Wilson* considered "whether it represented a substantial investment of time and labor made in anticipation of a financial return."[57] This factor may become particularly relevant when the source text is unpublished or out-of-print.[58]

C. The Amount and Substantiality of the Portion Used

If too much is taken from the original, then the second work does not make fair use of the first. The question is just how much is too much. *Air Pirates* stated that "excessive copying precludes fair use."[59] It is clear that near verbatim copying is too much.

This factor is particularly unhelpful in the unique context of parody, especially parody in song. Unlike other types of works which may qualify as fair use, "[p]arody by its nature demands close imitation, and any attempt to limit its scope will correspondingly limit the parodist in his craft."[60] The question then becomes whether courts will or should treat parody differently from other genres. The court in *Benny* refused to give parody special treatment, saying "parodized or burlesque taking is to be treated no differently from any other appropriation; . . . if it is determined that there was a substantial taking, infringement exists."[61] This view, however, confuses the concepts of fair use and substantial similarity. The fair use defense is meaningless if there is no substantial

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55. Bisceglia, *supra* note 14, at 14 n.49. The author also notes that "[t]he House Report makes it clear that the music cannot be 'perverted, distorted, or travestied.'" 126 CONG. REC. H10,727-28 (daily ed. Sept. 21, 1976).

56. NIMMER & NIMMER, *supra* note 9, at 13-170.

57. 677 F.2d 182 (2d Cir. 1981), *cited in* NIMMER & NIMMER, *supra* note 9, at 13-171.

58. *See generally* NIMMER & NIMMER, *supra* note 9, at 13-173 to 13-181.

59. 581 F.2d 751, 758 (9th Cir. 1978).

60. Bisceglia, *supra* note 14, at 17.

61. Benny v. Loew's, Inc., 239 F.2d 532, 537 (9th Cir. 1956) (quoting Loew's, Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 183 (S.D. Cal. 1955)).

similarity, particularly in parody. "Without substantial similarity, there is no need to discuss fair use. . . . [O]nly if it finds substantial similarity does the court need to decide if the use is nevertheless a fair one."[62] Professor Nimmer has noted:

> what may be regarded as the crucial problem of fair use. That problem arises where it is established by admission or by the preponderance of the evidence that the defendant had copied sufficiently from the plaintiff so as to cross the line of substantial similarity. The result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he has made of plaintiff's material is a "fair use." In this more meaningful sense fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial.[63]

In cases of parody, the inquiry really is whether the use is fair despite substantial taking from the original.

However, it still may be necessary for the court to examine the degree of permissible similarity above the substantial threshold in determining whether the work constitutes a fair use.[64] The court will consider the actual amount copied from the original as well as the substance. It is possible, then, for a parodist to take only a small portion quantitatively from the original yet still infringe on the owner's copyright if he takes the "heart" of the source text.[65] For example, in *Harper & Row*, the magazine took only 300 words out of 200,000 but was found to have

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62. Bisceglia, *supra* note 14, at 10 n.26.

63. NIMMER & NIMMER, *supra* note 9, at 13-154.

64. Courts seem to be willing to grant artists more latitude in cases of parody. The court in *Berlin* noted that "parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." Berlin v. E.C. Publications, 329 F.2d 541, 545 (2d Cir. 1964) The court in *Elsmere* recognized the important function of parody as an art and stated "an author is entitled to more extensive use of another's copyrighted work in creating a parody than in creating other fictional or dramatic works." Elsmere Music v. Nat'l Broadcasting Co., 482 F. Supp. 741, 745 (S.D.N.Y. 1980) (quoting Columbia Pictures Corp. v. Nat'l Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955)). The court in *Warner Bros. v. American Broadcasting Cos.* noted "the 'parody' branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law." 720 F.2d 231, 242 (2d Cir. 1983).

65. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 565-66 (1985).

infringed the copyright because it took the "heart."[66] However, it is also possible for the parodist to take the "heart" of the source text yet still be found to have made a fair use. For example, in *Elsmere Music* even though Saturday Night Live was found to have taken the "heart" of the original, that taking was allowed as a fair use.[67]

Parody in the specific context of song poses a unique set of problems in the determination of fair use.

> A song parodist depends on the listener's being able to recall the whole work, music and words. The music functions as the recall device; when you hear the tune, you think of the words too. The incongruity, and the joke, come from hearing the old tune with a new referent.[68]

Three factors courts consider in deciding whether a taking is too excessive are "the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody."[69] Courts have been less lenient in finding fair use in media other than song. Part of the rationale for the court's finding of copyright infringement in *Air Pirates* was that the medium of graphic art justified less taking.[70] On the other hand, the court in *Fisher* noted:

> The unavailability of viable alternatives is evident in the present case. Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy" provides some license for "closer" parody.[71]

To help decide just how much of a substantial taking is "too much,"

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66. *Id.*
67. 482 F. Supp. at 744.
68. Bisceglia, *supra* note 14, at 15 n.60.
69. Fisher v. Dees, 794 F.2d 432, 439 (9th Cir. 1986); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757-58 (9th Cir. 1978).
70. *Air Pirates*, 581 F.2d at 757-58. *See also* Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Ga. 1986) (finding that the drawings of "Garbage Pail Kids" did not make fair use of "Cabbage Patch Kids" they parodied).
71. *Fisher*, 794 F.2d at 439 (quoting *Air Pirates*, 581 F.2d at 758).

courts have developed the "conjure up" test.[72] Parodists are allowed to copy only as much as is necessary to "conjure up" the original. The test asks "whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire."[73] The court in *Fisher* noted that a parody by nature required more than *de minimis* copying, and for parody of song in particular "[a] parody is successful only if the audience makes the connection between the original and its comic version. To 'conjure up' the original work in the audience's mind, the parodist must appropriate a substantial enough portion of it to evoke recognition."[74] It is not clear just how much is necessary to "conjure up" an original, and courts determine this on a case-by-case basis.[75] It is unclear whether the parodist is only allowed enough to "evoke . . . *initial* recognition"[76] or is simply restrained by a general limitation on the amount he may take.[77] (Under this second view, a parodist may reasonably use more than the exact bare minimum necessary to "conjure up" the original.)[78]

In cases of parody in song, it is often unclear whether the court is comparing the similarity and amount taken from the lyrics, music, or both.[79] *Acuff-Rose* presents the unusual situation where both are altered.[80] (Usually, in song parody cases, the lyrics are altered while the music remains the same.)

D. The Effect of the Use on the Potential Market for or Value of the Copyrighted Work

The effect the second work will have on the market for either the

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72. *See Air Pirates*, 581 F.2d at 757 (citing Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822, (1964); and Columbia Pictures Corp. v. Nat'l Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955)).

73. *Air Pirates*, 581 F.2d at 757.

74. *Fisher*, 794 F.2d at 435, n.2.

75. There are, however, "outer boundaries"; "on the one hand, 'substantial copying by a defendant, combined with the fact that the portion copied constituted a substantial part of the defendant's work' does not automatically preclude the fair use defense. On the other hand, 'copying that is virtually complete or almost verbatim' will not be protected." *Fisher*, 794 F.2d at 438 (quoting *Air Pirates*, 581 F.2d at 756).

76. *Id.* at 438. This view is rejected in *Fisher*.

77. This is the view taken by the courts in *Fisher*, *Air Pirates*, and *Elsmere*.

78. NIMMER & NIMMER, *supra* note 9, § 13.05 [C], at 13-207.

79. *See* MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd and modified by* 677 F.2d 180 (2d Cir. 1981).

80. As in *Fisher*, where the parody "ends with noise and laughter mixed into the song," 794 F.2d at 438, the parody in *Acuff-Rose* adds scrapers and laughter to the background.

original work or derivative works otherwise protected by the owner's copyright heavily influences court determination of fair use. The district courts in *Benny* and *Elsmere Music* and the courts of appeals in *MCA* and *Berlin* all discussed this factor. Nimmer has observed that "this emerges as the most important, and indeed, central fair use factor."[81] The Supreme Court agreed, remarking that market effect "is undoubtedly the single most important element of fair use.[82] The court in *MCA, Inc. v. Wilson* characterized the fourth factor as balancing "the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use."[83]

The determination of a parody's effect on the market for the source text is especially difficult. Parody by definition criticizes the original and thus may reduce its demand; "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically."[84] The court in *Fisher v. Dees* stated:

> [I]n assessing the economic effect of the parody, the parody's critical impact must be excluded. . . . Copyright law is not designed to stifle critics. . . . [T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can have that effect—but rather whether it *fulfills the demand for* the original. Biting criticism suppresses demand; copyright infringement usurps it.[85]

In order to infringe on the owner's copyright under the fourth factor, the parody must supplant demand for the original; suppression of demand alone does not constitute infringement.[86]

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81. NIMMER & NIMMER, *supra* note 9, at 13-183.
82. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 566 (1985).
83. NIMMER & NIMMER, *supra* note 9, at 13-182 (quoting *MCA*, 677 F.2d at 183).
84. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967).
85. Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986).
86. The court in *Fisher* also noted that "'[d]estructive' parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author." *Id.* (quoting Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After* Betamax, 97 HARV. L. REV. 1395, 1411 (1984)).

A court is likely to find that the parody does not usurp demand for the original source text. The court in *Fisher* noted:

> [W]e do not believe that consumers desirous of hearing a romantic and nostalgic ballad such as the composer's song would be satisfied to purchase the parody instead. Nor are those fond of parody likely to consider "When Sunny Gets Blue" a source of satisfaction. The two works do not fulfill the same demand.[87]

The same may not be true of the parody's effect on the market for derivative works of the original.[88]

In order to better evaluate the fourth factor, Nimmer has proposed a "functional test."[89] Under this test, the court must compare more than whether or not the two works appear in the same medium; it must compare the function of the two works in the relevant market.[90] As long as the parody performs a different function than the original, that parody may be fair use. Its medium is irrelevant.[91] (A work in the same medium but performing a different function could be considered fair use, but a work in a different medium but performing the same function could not constitute fair use.) In performing a different function, the second work does not usurp or supplant the market for the original or for derivative works of the original to which the copyright owner is entitled.[92] For

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87. *Id.* at 438.

88. In some cases it may even be argued that parody will stimulate demand for the original and its derivatives.

89. NIMMER & NIMMER, *supra* note 9, § 13.05 [B], at 13-191.

90. The court in MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981), looked only at whether the two works were in the same medium. If the two were in the same medium, then they were assumed to compete.

91. Nimmer gives the example:

> Suppose *A* is the copyright owner of a published novel. *B* produces a motion picture copied from and substantially similar to A's novel. The motion picture may well not adversely affect the sale of *A*'s novel. In fact, it almost certainly will have the opposite effect. It is nevertheless clear that *B* may not invoke the defense of fair use. *B*'s motion picture has not prejudiced the sale of *A*'s work in the book medium, but it has certainly prejudiced the sale of *A*'s work in the motion picture medium. If the defendant's work adversely affects the value of any of the rights in the copyrighted work (in this case the adaptation right) the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff.

NIMMER & NIMMER, *supra* note 9, § 13.05 [B], at 13-191 to 13-193.

92. At least one commentator has argued that parody can never fail the functional test.

example, in *Berlin* the lyrics were printed in a humor magazine and not as sheet music. The two were found to perform different functions, and the parody was deemed fair use.[93] In *Harper & Row*, however, the defendant did not pass the functional test. By prepublishing excerpts from Ford's book, the *Nation* effectively prevented the publisher from exploiting the derivative market for first serial rights. (This market was now worth nothing; the copyright owner was harmed.) The defendant usurped a derivative market of the original, and its actions could thus not be considered fair use.[94]

IV. *CAMPBELL v. ACUFF-ROSE MUSIC, INC.*

The courts struggled with the issue of fair use in the context of parody. The resulting case law was an unhappy mix of inconsistency and confusion. It was in this context that the Supreme Court revisited the issue of parody and fair use in the case *Campbell v. Acuff-Rose Music, Inc.*

A. The Facts

In 1964, Roy Orbison and William Dees co-authored the song "Oh, Pretty Woman" and assigned their rights in the song to Acuff-Rose Music. The song became a hit, and it has continued to generate profits for Acuff-Rose. In July of 1989,[95] Linda Fine, 2 Live Crew's manager, wrote the copyright owners informing them of 2 Live Crew's intent to create the parody. The rap group intended to fully credit Orbison and Dees with authorship and ownership and to pay Acuff-Rose the statutorily required rate for use of the song. Acuff-Rose flatly refused to give 2 Live Crew its permission to use the song; they replied, "we cannot permit the use of a parody of 'Oh, Pretty Woman.'"[96]

The source text fulfills its intended function; the parody then functions to criticize the original. Parody, then, will always fulfill a function different from the original (unless the original criticizes itself). Bisceglia, *supra* note 14, at 22-23.

93. NIMMER & NIMMER, *supra* note 9, § 13.05 [B], at 13-195.

94. *Id.* at 13-195 to 13-196.

95. The exact dates in question were a source of factual dispute between the parties at trial. The approximate dates used here are the ones found to be correct by the district court. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1168 n.2 (1994).

96. This is an excerpt from Acuff's letter in reply to Fine. Eventually, the Supreme Court found that 2 Live Crew's unsuccessful attempt to obtain permission did not weigh against a finding of fair use. It stated that "[i]f the use is otherwise fair, then no permission need be sought or granted." *Id.* at 1174 n.18. *See also* Fisher v. Dees, 794 F.2d 432, 437 (9th

Later in July 1989, 2 Live Crew released a rap version parody of "Oh, Pretty Woman" entitled "Pretty Woman." It was sold on albums, tapes, and compact discs as part of a collection entitled *As Clean As They Wanna Be*. The song "Pretty Woman" was placed in between songs entitled "Me So Horny" and "My Seven Bizzos." Orbison and Dees and Acuff-Rose were fully acknowledged respectively as the authors and publisher of the original on both the compact disc cover and on the disc itself. The record album was clearly commercially distributed for the purpose of making a profit.

The lyrics of the first stanza closely parallel those of the source text. However, they differ markedly from those of the original for the rest of the song. The music of the parody also closely parallels that of the original but is punctuated with laughter and scraper noises. The parody directly copies the famous bass riff from the original.

In June 1990, Acuff-Rose sued 2 Live Crew and Luke Skyywalker Records in the United States District Court for the Middle District of Tennessee for copyright infringement.[97] Acuff-Rose claimed that the rap group's lyrics "are not consistent with good taste or would disparage the future value of the copyright" and claimed that the music of the whole parody and lyrics of the first verse were too substantially similar to the original. 2 Live Crew claimed their use of "Oh, Pretty Woman" fell within the fair use exception of Section 107 of the Copyright Act of 1976.[98] Defendant moved the district court for summary judgment. 2 Live Crew deposited $13,867 with the court, the amount the group believed it owed to Acuff-Rose as a fee under the Copyright Act.[99]

B. The District Court Decision

The district court framed the issue as follows: "whether 'Pretty Woman' constitutes fair use of copyrighted material pursuant to 17

Cir. 1986).

97. Acuff-Rose also sued on tort claims of interference with business relations and interference with prospective business advantage under Tennessee law. The district court found these claims to be preempted by § 301 of the Copyright Act. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1159-60 (M.D. Tenn. 1991). Acuff-Rose did not challenge this finding on appeal. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1433 n.5 (6th Cir. 1992).

98. 17 U.S.C. § 107.

99. The sum was deposited pursuant to FED. R. CIV. P. 67. The district court did not address whether this sum was a sufficient amount to comply with the terms of the Copyright Act.

U.S.C. § 107."[100] This case was one of first impression for the Sixth Circuit. The court first discussed the standard which must be met in order to grant summary judgment; 2 Live Crew bore the burden of showing the lack of a genuine issue of material fact.[101] The court then discussed fair use. Copyright both creates incentives for creativity and protects a creator's right to a "fair return" from his efforts.[102] Fair use is the "privilege in others other than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent."[103] The court then quoted Section 107 and began to evaluate this case under each factor. (The court, however, noted that factors not explicitly listed in Section 107 may be considered as well.) In assessing the purpose and character of the use, the court noted the completely commercial nature of 2 Live Crew's parody. This factor only "tends to weigh against" a finding of fair use and may be rebutted. The court here easily found that 2 Live Crew's version was indeed a parody of the original. The court simply stated, "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody."[104] The court then recognized the important and serious function of parody as literary criticism and noted that extending fair use in cases of parody helps foster the creativity copyright law desires to protect. In discussing the first factor, the court then considered attributes of the song which make it parody. (Although discussed under the rubric of the purpose and character of the use, these characteristics also buttress the argument that the taking was not too "substantial" under the third factor.) The court noted that "[a]lthough the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones."[105] A "loud, barking laugh" and "heavily distorted 'scraper'" can be heard in the background. 2 Live Crew did use the basic beat and bass riff of Orbison's original. However, the first soloist sings in a different key than the chorus, and on four separate occasions the rap group "repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying [sic] scratch

100. 754 F. Supp. at 1152.
101. *Id.* at 1152, 1153.
102. *Id.* at 1153 (quoting Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 546 (1985)).
103. *Id.* (citations omitted).
104. *Id.* at 1155.
105. *Id.*

on a record."[106] In the parody, "[t]he physical attributes of the subject woman deviate from a pleasing image of femininity to bald-headed, hairy and generally repugnant."[107] The images and themes of the parody are "completely inconsistent" with the original. The rap version criticized the source text as well as society in general; the court found that "[i]n sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them."[108]

The court then quickly found the second factor, the nature of the copyrighted work, to weigh in favor of Acuff-Rose based on the creative nature of their song and the fact that the original had been published.[109]

In examining the third factor, the amount and substantiality used, the court looked at both qualitative and quantitative factors. 2 Live Crew did use the title of the original, the same guitar refrain, key lyrics, opening drum beat and melody and chorus. The question is whether this amount of taking was more than necessary to "conjure up" the original.[110] The court then noted that a parody's effectiveness depends upon copying the original and that extra leeway is necessary for parodies of songs.[111] The court found this third factor to weigh in favor of the parodists, noting the aspects of the parody which differ from the original. The group "appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose."[112]

The court then discussed the fourth factor, the parody's effect on the market for the original. Following the rationale of *Fisher*, it reasoned that the original song and the parody were unlikely to fill the same demand and substitute for each other. The court found this factor to weigh in favor of 2 Live Crew. The audiences for the two were extremely different:

> [T]he odds of a record collector seeking the original composition who would also purchase the 2 Live Crew

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106. *Id.*

107. *Id.*

108. *Id.* The affidavit submitted for the defendants by Oscar Brand further noted that "African-American rap music . . . uses parody as a form of protest, and often substitutes new words to 'make fun of' the 'white bread' originals and the establishment." Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1433 (6th Cir. 1992) (quoting Brand's affidavit).

109. 754 F. Supp. at 1155, 1156.

110. *Id.* The Court then cited the *Fisher, Elsmere, Berlin, Air Pirates*, and *MCA* decisions.

111. *Id.* at 1156 (citing Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)).

112. *Id.*

> version are remote. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."[113]

Acuff-Rose did not successfully affirmatively show any harm to existing or potential markets. The court then determined that the parody would not cause harm to the markets for derivative works of the original. The court rejected Acuff-Rose's arguments that the parody prevented them from creating and marketing their own rap version or "burlesque" of the original or that the parody somehow "tarnished" the original in a way that will result in loss of future licensing agreements.[114] Acuff-Rose was still free to make and market any version of the song they wished. The court then noted that fair use is necessary precisely because the original author is so unlikely to grant permission to parody his own creation. The court then cited the *Fisher* court's distinction between criticism which suppresses rather than usurps demand for the original.[115]

The district court found 2 Live Crew's version to be a parody which constituted fair use of the original and granted summary judgment for 2 Live Crew.[116]

C. The Court of Appeals

Acuff-Rose appealed. The Court of Appeals for the Sixth Circuit reviewed the district court's grant of summary judgment de novo and reversed and remanded.[117] The court first noted that no material facts were in dispute here, only the legal conclusions to be drawn from them.[118]

The court stated that parody has been recognized to come under the rubric of Section 107 but then found that parody "must be either subsumed within the statutory terms 'criticism' or 'comment,' or be an

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113. *Id.* at 1158 (citing affidavit of William Krasilovsky and quoting that of Oscar Brand).

114. *Id.*

115. The remainder of the opinion was devoted to discussion of Acuff-Rose's state tort claims.

116. In granting summary judgment, the district court ordered the funds 2 Live Crew deposited with the court of $13,867 to be returned.

117. Acuff-Rose v. Campbell, 972 F.2d 1429 (6th Cir. 1992).

118. On appeal, the court reviewed only the district court's findings of law and not its findings of fact.

entirely separate category of exception."[119] The court observed its perception of the divergence between the popular and statutory definitions of parody and the confusion which results. It then stated:

> For the purposes of this opinion, we will assume, as found by the district court, that 2 Live Crew's song is a parody of Acuff-Rose's copyrighted song. . . . We do so with considerable reservation, as the district court's parody analysis does not, in our view, comport with proper analysis of that term. . . . [E]ven accepting that "Pretty Woman" is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song.[120]

The court opined there was no parody because 2 Live Crew did not aim its criticism at the source text; "[t]he 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."[121]

The court then began its analysis of 2 Live Crew's "Pretty Woman" under the four factors suggested in Section 107. Relying heavily upon the Supreme Court's decision in *Sony*, the court stated that "[t]he use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair."[122] 2 Live Crew's parody was created primarily for commercial purposes. The court of appeals criticized the district court for finding that commerciality only "tends" to weigh against fair use and stated that "the facts in the record require that we start from the position that the use is unfair. . . . We find that the admittedly commercial nature of the derivative work . . . requires the conclusion that the first factor weighs against a finding of fair use."[123] The court then quickly agreed with the district court that the creative nature of the original weighed against a finding of fair use.[124]

The court then examined the third factor, the amount and substantiality of the portion used based on the "conjure up" test and the qualitative and quantitative extent of the taking. Parodies are generally granted more

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119. *Id.* at 1434-35.
120. *Id.* at 1435, 1436 n.8.
121. *Id.* at 1436 n.8.
122. *Id.* at 1436.
123. *Id.* at 1436-37 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
124. *Id.* at 1437.

latitude in the extent and nature of taking than are other types of copying.[125] The court was critical of the district court's analysis of the taking involved. 2 Live Crew used the music and meter of the original, including the bass riff "near verbatim."[126] "We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original" and "cannot be used in any way to support a finding of fair use."[127]

The court then went on to analyze the fourth factor, the effect of the parody on the market for the original. Actual present harm or certainty of future harm need not be shown in order to find the use was not fair. "What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated."[128] Since the use of the copyrighted work was "wholly commercial," the court presumed that "a likelihood of future harm to Acuff-Rose exists."[129] The market for both the original and derivative works was harmed by the parody. The fourth factor weighed heavily against a finding of fair use.

In sum, 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" was not fair use. The court reversed and remanded.[130]

In a lengthy dissent, Judge Nelson noted the "hopeless conflict" and confusion among prior cases deciding the issue of fair use.[131] He attributed this confusion to the attitude of the courts in fair use cases that "we think we know fair use when we see it, even if we cannot do a very good job of relating what we see (or do not see) to the governing text" and described the statute itself as "Delphic."[132]

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125. The court said:

> The concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of the original in order to make its humorous point. A parody is entitled at least to "conjure up" the original.

Id. at 1437-38. It is a floor, not a ceiling.

126. *Id.* at 1438.

127. *Id.*

128. *Id.* (citing Sony Corp. v. Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).

129. *Id.*

130. "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." *Id.* at 1439.

131. *Id.* (Nelson, J., dissenting).

132. *Id.* at 1439-40.

The dissent then set forth its own definition of parody:

> A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic (or, I would add, for satiric) effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable.[133]

The dissent would have held that 2 Live Crew's effort was a parody that distorted the original work for comic or satiric effect.[134] The dissent also concluded that the profit motive was an insufficient basis to find the work presumptively unfair. Both cases which cite the proposition that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright" were cases involving verbatim copying without any alteration of the originals.[135] Parody transforms the original; it does not merely reproduce it. The parodist adds his own original creativity. The strong presumption against fair use when the derivative is commercial in nature should apply only to commercial reproduction, not commercial transformation. Too much public benefit is derived from parody to call it presumptively unfair simply because it earns a profit.[136]

Judge Nelson felt that in the case of parody, the fact that the original source was creative should not work against the parodist. Parody by nature aims its criticism at creative works.[137] He believed that parody deserves substantial leeway and concluded that the rap song passed the "conjure up" test and was not the "near verbatim" copying found improper in *Air Pirates*.[138] Since the markets and intended audiences for the two works were entirely different, the fourth factor weighed in favor of 2 Live Crew. He worried about "the prospect of the courts turning copyright holders into censors of parody" if they force parodists to obtain permission from the copyright holders.[139] Judge Nelson then recognized a factor not explicitly stated in Section 107, "the social value of the

133. *Id.* at 1441.
134. *Id.* at 1442.
135. *Id.* at 1443. The two cases were *Sony* and *Harper & Row*.
136. *Id.*
137. *Id.* at 1444.
138. *Id.* at 1444-45.
139. *Id.* at 1446.

parody as criticism."[140] Here, this factor weighed strongly in favor of finding fair use. The dissent concluded that 2 Live Crew's parody of "Oh, Pretty Woman" was fair use.[141]

D. The Supreme Court

The Supreme Court granted certiorari and handed down a unanimous opinion holding that 2 Live Crew's version of "Oh, Pretty Woman" was a parody and could be a fair use. "Because we hold that a parody's commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand."[142] Justice Souter delivered the opinion of the Court.

The Court's approach continued the common law tradition of case-by-case fair use adjudication. 2 Live Crew's song would infringe on Acuff-Rose's copyright if it did not fall under the fair use exception of Section 107. The Court recognized the central "tension in the need simultaneously to protect copyrighted material and to allow others to build upon it."[143]

Inquiry into the first factor, the purpose and character of the use, asks whether the new work supersedes the original or transforms it; "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[144] The Court recognized the social benefit derived from parody and noted parody's "obvious claim to transformative value."[145] The Court then offered a means of identifying parody: "the heart of any parodist's claim to quote from existing material[ ] is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[146] The Court acknowledged that "[p]arody needs to mimic an original to make its point," but noted that a parodist must aim at least part of his criticism at the source text itself.[147]

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140. *Id.*
141. *Id.*
142. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1168 (1994).
143. *Id.* at 1169.
144. *Id.* at 1171. The Court noted that the only other time it had ever addressed the issue of parody as fair use, the Court was equally divided and did not issue an opinion. *Id.* (citing Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.*, Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1985)).
145. *Id.*
146. *Id.* at 1172.
147. *Id.*

Although parody has the ability to be a fair use, courts must determine in each individual case whether the parody in question was or was not a fair use by rigorous analysis of the four factors stated in Section 107.

The Court found 2 Live Crew's song to be a parody, criticizing and commenting on the original. The Court refused to judge the song's artistic merits, saying, "[w]hile we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree."[148] The rap song both refers to the original and ridicules it at the same time.

The Court then criticized the court of appeals for confining its inquiry to the commercial nature of the use. That court had "inflated" the importance of this fact and applied a presumption "ostensibly" culled from *Sony* that "'every commercial use of copyrighted material is presumptively . . . unfair.'"[149] The Court stated that "[i]n giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred."[150] Commercial nature is "only one element" of many to be considered.[151] The decision of the court of appeals clearly narrowed fair use beyond congressional intent.[152] Rejecting a rigid, bright-line approach, the Court stated:

> The Court of Appeals's elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, . . . *Sony* stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."[153]

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148. *Id.* at 1173.

149. *Id.* at 1173-74 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

150. *Id.* at 1174.

151. *Id.*

152. The Court noted that even the examples of uses explicitly listed in Section 107 are often created for profit and that educational and nonprofit uses may be found to be infringement. *Id.* The Court quoted Samuel Johnson that "[n]o man but a blockhead ever wrote, except for money." *Id.* (quoting BOSWELL, LIFE OF JOHNSON 19 (G. Hill ed., 1934)).

153. *Id.* (quoting Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 562 (1985)).

The Court cautioned against "elevating commerciality to hard presumptive significance."[154]

The second factor, the nature of the copyrighted work, "calls for [the] recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[155] Roy Orbison's "Oh, Pretty Woman" is creative in nature and "falls within the core of copyright's protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."[156]

The Court then turned to the third factor, the amount and substantiality of the use. Courts must look at both the quantitative and qualitative nature of the copying.[157] The Court recognized the unique situation of parody:

> Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable.[158]

The Court left exact application of this "conjure up" test to future cases. It noted that "[w]hat makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend."[159] The Court noted that 2 Live Crew did copy the distinctive bass riff and opening line of the original, the portion which may be perceived as the "heart" of the original. However, the court of appeals was "insufficiently appreciative of parody's need for the recognizable sight or sound."[160] The "heart" is "what most readily conjures up the song for parody, and it is the heart at

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154. *Id.*
155. *Id.* at 1175.
156. *Id.*
157. *See id.*
158. *Id.* at 1176.
159. *Id.*
160. *Id.*

which parody takes aim. Copying does not become excessive in relation to the parodic purpose merely because the portion taken was the original's heart."[161]

The Court then determined that 2 Live Crew did not take too much from the original. The song's parodic character depended in part on taking the "memorable" part of the original. Whether taking the heart of an original will weigh toward fair use or infringement is very context specific and will depend on the facts in each case. If an artist takes the heart of the original but then adds creative value of his own, the factor is more likely to weigh toward fair use than is the case where the substantial copying done outweighs the parodist's own contribution. Despite 2 Live Crew's taking of the "heart" of the original, the copying of the lyrics was not excessive in relation to its parodic purpose, and the Court determined that "no more was taken than necessary."[162] The Court then remanded for evaluation of the amount taken in regard to the music itself and left this question open.[163]

The Court then analyzed the fourth factor, the effect of the parody on the potential markets for both the original and its derivative works. Since fair use is an affirmative defense, the defendant must show favorable evidence concerning these potential markets in order to prevail.[164] The Court held the court of appeals' presumption against 2 Live Crew on the basis of commerciality to be error; commerciality alone does not create a "presumption" of market harm.[165] The Court distinguished *Sony* by saying that *Sony* raised a presumption arising from commerciality in a case of complete verbatim copying. However, in the case of transformative works, market harm can not be inferred from commerciality alone.[166] Often, parody will not adversely affect the market for the original since the parody and the original serve different functions. The parody is not likely to act as a substitute for the original.[167] Parody only fails this fourth factor when it usurps demand for the original; parody may legitimately suppress demand for the original through its critical function.[168] The Court noted that "there is no protectable

161. *Id.*
162. *Id.*
163. *Id.* at 1176-77.
164. *Id.* at 1177.
165. *Id.*
166. *Id.*
167. *Id.* at 1177-78.
168. *Id.* at 1178.

derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."[169] Parodies thus are not considered potential derivative markets in themselves. However, parodies can affect other potential derivative markets of the original work. In this case, the Court noted that:

> 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals.[170]

As with market harm to originals, the only harm to derivative markets which weighs against fair use is the parody's usurpation of demand for the derivative work, not suppression of it. 2 Live Crew and Acuff-Rose failed to put forth evidence to address the potential effect on the market for non-parody rap derivatives of the original. The rap group only made "uncontroverted" submissions attesting that their song would not harm the market for the original. The district court had "passed" on this issue, and the court of appeals had made an "erroneous presumption" in the other direction.[171] The Court noted that "it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense, 2 Live Crew, to summary judgment. The evidentiary hole will doubtless be plugged on remand." [172]

In a concurring opinion, Justice Kennedy joined the Court's opinion and agreed remand was appropriate. He stressed that in order to be parody, the work must at least in part aim its criticism at the source text. Comedy alone is insufficient; the work must criticize as well. Fair use helps protect works which authors would refuse to license for criticism of

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169. *Id.*

170. *Id.* (citations omitted) (footnote omitted). The Court also noted in a footnote that "[e]ven favorable evidence, without more, is no guarantee of fairness" and gave the example of "the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair." *Id.* at 1177 n.21.

171. *Id.* at 1178-79.

172. *Id.* at 1179.

their work. He noted, "[t]here is an obstruction when the parodied work is a target of the parodist's criticism, for it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work."[173] A proper definition of parody goes "most of the way" in determining fair use, but Justice Kennedy specifically cautioned that analysis of fair use "is by no means a test of mechanical application."[174] He stressed that "[t]he fair use factors thus reinforce the importance of keeping the definition of parody within proper limits."[175] Since fair use is an affirmative defense:

> [D]oubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original . . . If we allow any weak transformation to qualify as parody . . . we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.[176]

He concluded that the majority's opinion "leaves room" to find copyright infringement on remand: "[a]s future courts apply our fair use analysis, they must take care to ensure that not just any commercial take-off is rationalized post hoc as a parody."[177]

E. Future Impact

For the second time ever, the Supreme Court addressed the fair use defense in the context of parody. The Court tries to preserve the breadth of Section 107 intended by Congress by returning to fair use's common-law roots and requiring case-by-case rigorous analysis rather than rigid or mechanical application of bright-line rules. However, the Court does so by sacrificing clarity. Murkiness is inherent in the common-law nature

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173. *Id.* at 1180 (quoting Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 73 (1992)).
174. *Id.* at 1180-81.
175. *Id.* at 1181.
176. *Id.*
177. *Id.* at 1182.

of the doctrine. In the absence of clear guidelines, fair use is essentially a rule of reason, the outcome depending on the facts and circumstances in each case.

> [I]n designing a matrix of interrelated factors that includes the transformative nature of the work, the extent and type of commercial exploitation, the critical relationship to the original, the risk of market substitution, the extent of parodic content and the amount of copying, the Court has given the next generation of fair use litigants significant ammunition to bolster their respective positions in what, more than ever, will be a fact-driven analysis.[178]

Results must necessarily be context-specific. It may well be impossible to develop a hard and fast rule in this difficult area of copyright law.

The scope of this decision and its broader implications for free speech, copyright holders, and the music industry are unclear. The Court was clearly concerned about the tension between too narrow a construction of fair use which would stifle free speech and too liberal a construction which would openly invite litigation and abuse. The Court attempted to strike a balance between stifling artistic freedom and granting a license to steal. Sensing the danger inherent in leaving intact the Sixth Circuit's reversion to a *Benny* type standard that any commercial parody would be held presumptively invalid, the Supreme Court opinion signalled a conscious return to express congressional intent to adjudicate fair use issues on a case-by-case basis. Parody is an art form with intrinsic value in the perpetuation and development of literature as a whole; it adds to the richness of our culture. The Supreme Court was unwilling to run the risk of setting a precedent that would suppress the very free speech and criticism so integral to American history and culture. Although the Court did not explicitly advance a First Amendment analysis, "Justice David H. Souter invoked 'the fair use doctrine's guarantee of *breathing space* within the confines of copyright.'"[179] As a society, we improve through

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178. Robert G. Sugarman & Joseph P. Salvo, *'Campbell v. Acuff-Rose': Parody as Fair Use*, N.Y.L.J., Mar. 25, 1994, at 1.

179. Henry R. Kaufman & Michael K. Cantrell, *The Parody Case: 2 Versions*, NAT'L LAW J., May 16, 1994, at C2. The "breathing space" concept promulgated by the Court in New York Times v. Sullivan, 376 U.S. 254 (1964), stands for broad protection of free speech rights. Justice Souter's use of "breathing space" suggests that the Court will find that free speech concerns will tip the balance against the copyright holder in future fair use

criticism and are enriched by possessing the freedom to criticize. However, the more liberal construction embraced by the Court may allow some to take a shortcut to profit at the expense of another's creativity and artistry through mere incantation of parodist. If applied too liberally, the cry of parody will defeat the purpose of the copyright law to foster creativity. The Court's opinion expressed the fear that "anyone who calls himself a parodist can skim the cream and get away scot free."[180] If interpreted too narrowly, this can be used as a club to suppress social criticism and unpopular views. The Court erred on the side of caution because it was worried about such limitations of free speech.

It is unclear what this decision actually means for copyright holders and would-be parodists. The decision is like the town fair: there is something there for everyone. At least one commentator believes that "the court's decision is not a harbinger of an age of parodists running amok through copyright owners' archives."[181] Yet another lauds the free speech aspects of the decision; "whether a parody is in good taste or not, we have to allow it to be heard in order to preserve that right."[182] In attempting to resolve conflicting and competing rights, the Supreme Court tries to keep all the plates spinning without letting any fall. The Court has given little guidance as to which plates should fall and for what reasons. In avoiding *Benny's Mikado*-type approach,[183] the Court has created a legal free-for-all that will take years and considerable litigation to resolve.

The Court does leave room for a very liberal interpretation of its decision; it specifically states that "[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."[184] However, what may prevent misuse through too liberal an interpretation is the possibility of limiting the decision's applicability to parody in the context of song. The Court specifically highlighted the special need for substantial

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litigation. One commentator has suggested that the decision is "a virtual judicial sanction of open copying of protected expression for parodic purposes." Chris Hager, *2-Live Crew Raps with the Supremes*, NEW LEGIS., Mar.-Apr. 1994, at 37, 40. However, the Court's obvious concern with the potential for such abuse suggests that the decision is a yellow light, not a green one. *See* Kaufman & Cantrell, *supra*.

180. *Acuff-Rose*, 114 S. Ct. at 1176.

181. Charles S. Sims & Peter J.W. Sherwin, *The Parody Case: 2 Versions*, NAT'L LAW J., May 16, 1994, at C1.

182. Maxine S. Lans, *Supreme Court gives good rap to parody*, MARKETING NEWS, June 6, 1994, at 10.

183. "I've got a little list—I've got a little list." WILLIAM S. GILBERT & ARTHUR SULLIVAN, THE MIKADO act 1, part 2.

184. *Acuff-Rose*, 114 S. Ct. at 1172 n.14.

copying in parody of song due to the listener's need to recognize the original melody. There is the suggestion in *Air Pirates* that parody in other media such as the graphic arts has less pressing a need for such close imitation and may be afforded less latitude by the courts. Even though that issue was not specifically before the Court, *Acuff-Rose* left completely unclear whether it will be interpreted to apply to parodies in all media or whether it will be limited to parody in the context of song.

One important aspect of the Supreme Court's opinion is its express decision not to rule based on the Court's perception of the artistic merit of the parody. It is a dangerous trend for our judges to assume the role of obscenity police. The court in *University of Notre Dame du Lac v. Twentieth Century Fox Film Corp.*[185] held that "[w]hether 'John Goldfarb, Please Come Home' is good burlesque or bad, penetrating satire or blundering buffoonery is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness, or whether it pains or pleases." In *Acuff-Rose*, the Court reaffirmed this principle and reversed what may have been a trend among some circuit decisions to rule against the parodist based partly on the judge's perception of the inherent worth and quality of the parody itself. For example, in *MCA, Inc. v. Wilson*, the court of appeals' distaste for the nature of the alleged parody, "Cunnilingus Champion of Company C," was manifest in the language of its decision. The court wrote, "[w]e are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted 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."[186] Similarly, the majority in finding against the underground comic strip in *Air Pirates* suggested its distaste for the use of Mickey and Minnie in a graphic and arguably obscene manner was a factor in its decision.[187] In *Walt Disney Productions v. Mature Pictures Corp.*, the court was less than amused when it found against the film company for playing the "Mickey Mouse March" as accompaniment to its "Life and Times of the Happy Hooker."[188] Even the court in *Fisher*, for purposes of factual determination whether the work was obscene wrote "assuming

185. 256 N.Y.S.2d 301, 307 (N.Y. App. Div. 1965).
186. MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981).
187. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978).
188. 389 F. Supp. 1398 (S.D.N.Y. 1975).

without deciding that an obscene use is not a fair use."[189]

The Court in *Acuff-Rose* specifically stated that "the fact that this use is pornographic in nature does not militate against a finding of fair use."[190] The district court noted that "[i]t is unclear exactly what Acuff-Rose means when it complains in its response to the Motion for Summary Judgment that the parody 'dirt[ies]' the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use."[191] The dissent in *MCA* noted that "permissible parody, whether or not in good taste, is the price an artist pays for success."[192] Similarly, the dissent in the *Acuff-Rose* Sixth Circuit opinion wrote:

> The 2 Live Crew "Pretty Woman" is hopelessly vulgar, to be sure, but we ought not let that fact conceal what may be the song's most significant message—for here the vulgarity . . . is the message. The original work may not seem vulgar, at first blush, but the 2 Live Crew group are telling us, knowingly or unknowingly, that vulgar is precisely what "Oh, Pretty Woman" is. Whether we agree or disagree, this perception is not one we ought to suppress.[193]

The dissent in the *Acuff-Rose* court of appeals decision explicitly stated that "[v]ulgarity, in practice, probably cuts against acceptance of the parody defense."[194] The Supreme Court clearly found that:

> [W]e have less difficulty in finding that critical element in 2 Live Crew's song than the Court of Appeals did, although having found it we will not then take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that,

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189. Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).

190. Acuff-Rose, Inc. v. Campbell, 754 F. Supp. 1150, 1155 n.4 (M.D. Tenn. 1991) (citing Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124, 131 & n.10 (N.D. Ga. 1981)).

191. *Id.* (citation omitted).

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

193. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1446 (6th Cir. 1992) (Nelson, J., dissenting).

194. *Id.* at 1446 n.9 (citing *MCA*, 677 F.2d at 185).

> parody is in good taste or bad does not and should not matter to fair use.[195]

The Court then cites Justice Holmes' remark that:

> It 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.[196]

The decision in *Acuff-Rose* clearly reaffirms the basic notion that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed."[197]

Acuff-Rose may also have consequences for the genre of rap and the music industry as a whole because of its implications for the technique of digital sampling. This practice of "quoting, sampling, or lifting"[198] essentially involves verbatim taking of small pieces of music from an original song and copying it for use in a new song. Digital samplers can record and replay nearly any sound.

Such "[b]orrowing from other songs is an essential part of rap music."[199] As Jam Master J of RUN-DMC describes it, rap "[is] an art because we change it around. We'll take that beat and this bass line and another bass line and put my own little keyboards and my own little scratching sounds to it and turn it into a whole other record."[200] Others call such taking stealing. Rap is a multi-million dollar industry, and big money is at stake. As one attorney puts it, "[i]t's dirt simple. . . . You can't use somebody else's property without their consent. [Sampling] is a euphemism in the music industry for what anyone else would call

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195. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1173 (1994).
196. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 241 (1903).
197. Yankee Publishing, Inc. v. News Am. Publishing, Inc., 809 F. Supp. 267, 280 (S.D.N.Y. 1992).
198. Herbert Buchsbaum, *The law in your life*, 126 SCHOLASTIC UPDATE, Sept. 17, 1993, at 12(3).
199. *Id.*
200. *Id.* at 10-11.

pickpocketing."[201] At least one court agrees. In 1991, a New York court found that musician Biz Markie infringed on the copyright of a preexisting song by digitally sampling from it without the copyright owner's permission and granted a preliminary injunction.[202] The very first sentence of the decision admonishes, "Thou shalt not steal."[203] It is no defense that others in the music industry frequently incorporate bits of others' work into their own without the owner's consent.[204] Digital sampling without permission from the copyright owner was found to present a genuine issue of material fact in a 1993 case.[205] In response to the increasing number of lawsuits against rap musicians for sampling (fragmented literal similarity), these artists are beginning to change their practices. Rapper LL Cool J now tours with a band rather than samplers, and M.C. Hammer did not use samples on his last album.[206] However, multiple samples still appear in many rap songs.

Digital sampling is only briefly and peripherally dealt with in all three decisions. The decision implicitly seems to condone such a practice. However, the decision raises questions as to what limits will be put on digital sampling. "[T]he affidavit of musicologist Earl Spielman refers to a 'one measure guitar lick' that 'may have actually been sampled or lifted and then incorporated into the recording of "Pretty Woman" as performed by The 2 Live Crew.'"[207] The dissent in the court of appeals intimated it might be lenient in allowing digital sampling. "It is arguable, moreover, that a 'sampling' of no more than a few notes should be governed by the maxim de minimis non curat lex."[208] (The dissent then noted that no actual sampling was proved in this instance.) The majority, however, expressed outrage that a group could legitimately "simply recor[d] verbatim" through sampling and then just add its own additions.[209]

The implications could have major consequences for the rap industry as a whole since digital sampling is such an integral part of how so much rap music is created. If future courts in suits against rap musicians for

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201. *Id.* at 11.
202. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).
203. *Id.* at 183.
204. *Id.* at 185 n.2.
205. Jarvis v. A & M Records, 827 F. Supp. 282 (D.N.J. 1993).
206. Buchsbaum, *supra* note 198, at 11.
207. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1444 n.5 (6th Cir. 1992) (Nelson, J., dissenting).
208. *Id.*
209. *Id.* at 1438.

sampling take such language as a cue and increasingly find against rap groups, the industry may be threatened. Rather than chance an expensive suit, groups will increasingly cut songs containing samples from their albums, stifling their creativity. The process of checking each sample's copyright may be so costly and time-consuming as to render the production of rap albums much more expensive and possibly even infeasible.[210] Some believe this will simply force artists to be more original and creative and will prevent them from making money off of someone else's ideas. Whether good or bad, curtailment of digital sampling may force substantial changes in industry practices.

In addition, it is not clear which definition of parody the Court eventually accepts or the intended scope of its analysis. Rather, the three decisions of the *Acuff-Rose* litigation illustrate the fluidity and flexibility of the interpretation of Section 107. Each court came to a different conclusion based on the same set of facts. This case clearly demonstrates that "reasonable minds can look at different aspects of a single situation and reach opposite conclusions regarding purpose, nature, amount of copying, and market effect."[211] The problem is exacerbated in the clear absence of guidelines as to which factors should outweigh others in a close call. If the Supreme Court's purpose in *Acuff-Rose* was to provide guidance and shed light in this witches' brew of copyright law and free speech, it failed miserably. It can be said with positive assurance that it is absolutely certain the matter is doubtful.

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210. Buchsbaum, *supra* note 198, at 11.
211. NIMMER & NIMMER, *supra* note 9, at 13-190.