PARODY, COMMERCIAL SPEECH AND THE FIRST AMENDMENT: THE SUPREME COURT MOVES TO THE LEFT

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When Omer smote 'is bloomin' lyre,
He'd 'eard men sing by land and sea;
An' what 'e thought 'e might require 'E went an' took—the same as me!

The market-girls an' fishermen,
The shepherds an' the sailors, too,
They 'eard old songs turn up again,
But kep' it quiet—same as you!

They knew 'e stole; 'e knew they knowed.
They didn't tell, nor make a fuss,
But winked at 'Omer down the road,
An' 'e winked back—the same as us!

—Rudyard Kipling[1]

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[1] RUDYARD KIPLING, RUDYARD KIPLING'S VERSE 349 (Definitive ed., Doubleday 1943).

I. INTRODUCTION

There has always been a need to balance protection of copyrighted material against its constructive use and enhancement. Lord Ellenborough eloquently expressed this inherent tension when he stated: "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science."[2] The purpose of copyright protection is "[t]o promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[3] In order to fulfill this purpose, it is therefore necessary to ensure that some opportunity exists for the fair use of copyrighted materials.

In *Campbell v. Acuff-Rose Music, Incorporated*[4] the Supreme Court examined commercial parody as fair use under the Copyright Act of 1976.[5] In 1990 Acuff-Rose Music Company, Incorporated had filed suit against the rap music group *2 Live Crew* and their record company for infringement of Acuff-Rose's copyright on the Roy Orbison rock ballad, *Oh Pretty Woman.* Acuff-Rose alleged that *2 Live Crew's* rap version of the song, also entitled *Pretty Woman* unlawfully copied the bass riff and first line of the lyrics from Orbison's original work.[6] *2 Live Crew* denied this allegation and maintained that it had only made fair use of the original because the rap version did nothing more than conjure up the original in order to parody it.[7]

The district court granted summary judgment for *2 Live Crew* and held that the commercial purpose of the rap song did not preclude its fair use by the group.[8] The Court of Appeals for the Sixth Circuit reversed and remanded the case,[9] holding that although the song by *2 Live Crew* was a parody of the original, the admittedly commercial nature of the parody weighed heavily against a finding of fair use.[10] The Supreme Court then granted certiorari to determine whether or

[2] Carey v. Kearsley, 4 Esp. 168,170, 170 Eng. Rep. 679, 681 (K.B. 1803).

[3] U.S. CONST, art. I, § 8, cl. 8.

[4] 114 S. Ct. 1164(1994).

[5] 17 U.S.C. § 107 (1988 & Supp. IV 1992).

6 Before releasing this parody, 2 Live Crew sought permission of the music company to use the song, and even offered fees. Acuff-Rose refused, but the song was released anyway. Almost one year later, after more than a quarter of a million copies of the recording had been sold, Acuff-Rose initiated this lawsuit. *Campbell,* 114 S. Ct. at 1168.

[7] *Id.*

[8] Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150 (M.D. Tenn. 1991).

[9] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992).

[10] *Id.* at 1435,1437.

not a commercial parody could be considered fair use within the meaning of the Copyright Act of 1976.[11] Although the focus of the case was on copyright issues, the Court's holding was a surprising one with implications that reach all the way to the First Amendment. Before analyzing the potentially far-reaching effects of this decision, however, this paper will first discuss the procedural and factual backdrop of the alleged copyright infringement by the group *2 Live Crew.* The paper will next examine how the Supreme Court applied the doctrine of fair use to a commercial rap song by this group. Finally, the paper will conclude with an assessment of the decision's constitutional significance.

II. COPYRIGHT PROTECTION AND THE FAIR USE DOCTRINE: STATUTORY AND CASE LAW BACKGROUND

While statutory protection for original literary works dates back to the 1710 Statute of Anne,[12] the premise that certain fair use does not infringe on this protection has a common law tradition. This tradition began in England after courts interpreting the statute held that in some instances fair abridgments did not infringe upon an author's rights.[13]

In the United States, the first copyright statute enacted by Congress did not have any explicit reference to fair use,[14] nevertheless, the doctrine was still recognized in common law cases such as *Folsom v. Marsh*.[15] In *Folsom,* Justice Story explained that questions of copyright fair use required one to analyze "the nature and objects of the selection [copied], the quantity and value of the materials used, and the degree in which the use [of the selection] might prejudice the sale, diminish the profits, or supersede the objects, of the original work."[16]

This dictum essentially created the fair use doctrine, and it remained in effect until 1976 when the Copyright Act codified fair use as a defense to infringement.

11. 17 U.S.C. § 107 (1988 & Supp. IV 1992).

12 An Act for the Encouragement of Learning, 8 Anne, ch. 19 (Eng.).

13 *Campbell,* 114 S. Ct. at 1170 (citing W. PATRY, THE "FAIR USE" PRIVILEGE IN COPYRIGHT LAW 6-17 (1985) and Pierre N. Levai, *Toward a "Fair Use" Standard,* 103 HARV. L. REV. 1105,1105 (1990)).

14 Act of May 31,1790,1 Stat. 124 (1790).

15. 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)(No. 4,901).

16. Id.

> Notwithstanding the provisions of sections 106 and 106A [of Title 17], 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 the work in any particular case is a "fair use" the factors to be considered shall include (1) the purpose and the character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of "fair use" if such finding is made upon consideration of all the above factors.[17]

The purpose of Section 107 was to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.[18] It was believed that such a codification would thus allow courts to continue using the common law tradition of fair use and avoid any rigid application that might "stifle the very creativity which that law is designed to foster."[19] Because of the breadth of such a rationale, the Copyright Act provides no bright line guidance about what constitutes fair use and necessitates a case by case analysis of any potential infringements.[20]

[17] 17 U.S.C. § 107 (1988 & Supp. IV 1992). Section 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:
> (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 ending. . . .

17 U.S.C. § 106 (1988 & Supp. IV 1992). A derivative work is defined as one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work." 17 U.S.C. § 101 (1988 & Supp. IV 1992).

18. H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976); S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975)(reprinted in 1976 U.S.C.C.A.N. 5659, 5679).

19 Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State University Research Found., Inc. v. Am. Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

20 Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

In *Sony Corporation of America v. Universal City Studios, Incorporated*,[21] the Court examined the fair use doctrine in the context of time-shifting television programs by copying them with a video cassette recorder ("VCR"). The case arose after the owners of several copyrights for television programs tried to hold VCR manufacturers liable for the copyright infringement activities of VCR users.[22] The Court held that the sale of VCR's to the general public did not constitute contributory infringement of television program copyrights.[23] It reached this conclusion by reasoning that with little likelihood of other copyright holders objecting to time-shifting, and with a lack of any serious harm to the value or potential market for such copyrighted works, there could be no infringement.[24]

The Supreme Court also held that a copyright owner did not possess the exclusive right to the use of his work because anyone could reproduce the work if the reproduction constituted a fair use.[25] In deciding that *time-shifting* was a fair use under the Copyright Act, the Court placed a great deal of weight on the non-commercial aspects of this copying. The Court recognized that copying for noncommercial purposes might impair the copyright holder's ability to protect its creation,[26] but it found such copying need not be prohibited because it did not stifle the author's incentive to create.[27] The rationale behind the Court's decision was that any rule to the contrary would inhibit the access to ideas and undermine the goals of the copyright statute without any countervailing benefit.[28] To emphasize this point, the Court went on to declare that "although every commercial use of copyrighted material is presumptively an unfair exploitation . . . non-commercial uses are a different matter. A challenge to a non-commercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[29]

[21] 464 U.S. 417,451 (1984).

[22] The District Court entered judgment for the manufacturers. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Ca. 1979). The Ninth Circuit, however, reversed, holding the manufacturers liable for the contributory infringement. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1984).

[23] *Sony,* 464 U.S. at 456.

24. Id.

[25] *Id.* at 447.

[26] *Id.* at 449-50.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 451. In the *Campbell* case, the Sixth Circuit placed great weight on this presumption against commercial uses. Acuff-Rose Music, Inc., v. Campbell, 972 F.2d 1435, 1437 (1992).

In *Harper & Row, Publishers, Incorporated v. Nation Enterprises*[30] the Court revisited the issue of fair use in a case that dealt with a copyright on former President Ford's memoirs. Harper & Row had sold the exclusive right to print prepublication excerpts from President Ford's book to *Time Magazine,* but *Nation Magazine* scooped *Time* and printed an article that included quotes, paraphrases, and facts drawn from an illegally obtained copy of this manuscript. The scoop led *Time* to cancel its contract with Harper & Row, and as a result the publisher brought suit against *Nation* for copyright infringement. Analyzing the facts, the Court determined that *Nation's* 2,250 word article, which contained over three hundred words of verbatim manuscript quotations,[31] was little more than a concerted attempt to make a media event out of an unauthorized first publication.[32] Predictably, the Court held that *Nation* could not prove any fair use sanctioned by Section 107 of the Copyright Act, and the company was found liable for infringing upon Harper & Row's copyright.[33] In reaching this decision, it is significant to note that the publication's commercial, as opposed to nonprofit, nature weighed heavily against a finding of fair use.[34] Also of importance was the Court's declaration that an element of good faith is required in the fair use defense.[35] Prior to *Campbell,* the Supreme Court had only once considered whether or not parody could be considered fair use under the Copyright Act, but did not issue an opinion because it was equally divided.[36]

The question had been answered, however, by lower courts. In *Fisher v. Dees,*[37] composers of the song *When Sunny Gets Blue* brought a copyright infringement action against disc jockey Rick Dees for his parody entitled *When Sonny Sniffs Glue.* Like *Campbell,* the parodist had asked the composers for permission to use the original, been refused, and had released the new song anyway. The parody by Dees

[30] 471 U.S. 539(1985).

[31] The District Court held that the Ford memoirs were protected by copyright at the time of the Nation publication and that their use of the copyrighted material was infringing. Nation Enterprises v. Harper & Row, 557 F. Supp. 1067 (S.D.N.Y. 1983). The Court of Appeals for the Second Circuit reversed, holding that Nation's publication of the three to four hundred words it identified as copyrightable expression was sanctioned as fair use of the copyrighted material under Section 107 of the Act. Nation Enterprises v. Harper & Row, 723 F.2d 195 (2d Cir. 1983).

[32] *Harper & Row,* 471 U.S. at 548.

[33] *Id.* at 569.

[34] *Id.* at 562.

[35] *Id.*

[36] Columbia Broadcasting System v. Loew's Inc., 356 U.S. 43 (1958), *affg sub nom.* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956).

[37] 794 F.2d 432 (9th Cir. 1986).

copied the first six of the original's thirty-eight bars of music, the song's recognizable main theme; Dees, however, did change the opening lyrics of the original,[38] and the parody only ran for about thirty seconds on the approximately forty minute long album.

The court in *Fisher* also found that although the parodists had copied the work after the owners had denied permission, these efforts did not show bad faith or preclude an assertion of the fair use defense because it was rare for parodists to ever get permission from an original artist.[39] In reaching this conclusion, the court recognized that the fair use doctrine existed to permit copyright use that could not otherwise be obtained.[40]

Although the Ninth Circuit found Dees' parody to be a fair use of the original song,[41] the court made it clear that fair use created a limited privilege to use copyrighted material and parody itself was not a presumptively fair use of another artist's work.[42] Here, the portions copied had qualified as fair use because they were only used to conjure up the original and meet the comedic objective of poking fun at the song and the unique vocal range of its singer.[43]

The Ninth Circuit also held that the presumption against applying the fair use doctrine to commercial copying could only be rebutted by showing that the parody did not unfairly diminish the economic value of the original work.[44] But, in assessing whether a parody's commercial nature could diminish the economic value of the original, the court stated that it was primarily concerned with whether the parody could satisfy the demand for, or act as a substitute of, the original.[45] The two parody cases from the Second Circuit, *Elsmere Music, Incorporated v. National Broadcasting Company*[46] and *MCA, Incorporated v. Wilson*,[47] provide a useful contrast to *Fisher* because they both evaluate the amount and substantiality of material that a parodist can take from an original work.

Elsmere concerned a Saturday Night Live ("SNL") parody of the song *I Love New York*. The SNL version was entitled *I Love Sodom,*

[38] *Compare* "[W]hen Sunny gets Blue, her eyes get gray and cloudy, then the rain begins to fall," *with* "[Wlhen Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434.

[39] *Id.*

40. Id. at 437.

[41] *Id.* at 440.

[42] *Id.* at 435.

[43] *Id.* at 436.

44.Id.

[45] *Id.* at 438.

[46] 482 F. Supp. 741 (S.D.N.Y.), *affd,* 623 F.2d 252 (2d Cir. 1980).

[47] 677 F.2d 180 (2d Cir. 1981).

and was sung *a cappella* by a chorus line of three SNL regulars to the tune of *I Love New York.*[4]* The court held that, although the parodists had copied and repeated a four note phrase that was considered the heart of the composition, they were still not guilty of excessive taking.[49] As part of its rationale, the court observed two things: (1) the parodic use of the copied material lasted only eighteen seconds, and (2) the repetition of the copied material served both to ensure viewer recognition and to satirize the frequent broadcasting of the original work.[50]

In *MCA,* on the other hand, the court held that the doctrine of fair use was inapplicable to a song which closely tracked the music and the meter of the 1940s' standard *Boogie Woogie Bugle Boy of Company B/'*[1] A notable distinction from *Elsmere* was the fact that the composers of the *Cunnilingus Champion of Company C* admitted that their song had not been conceived as a parody of *Bugle Boy*. Instead, *Bugle Boy* was copied because the song was "immediately identifiable as something happy and joyous, and brought back a certain period in our history when we felt that way."[52] Also central to the court's holding was evidence that the new song was a nearly verbatim copy of Bugle Boy and that its purpose was simply to reap the benefits of a well-known tune and short-cut the rigors of composing original music.[53]

III. CAMPBELL V. ACUFF-ROSE MUSIC, INCORPORATED

A. AN ANALYSIS

In *Campbell v. Acuff-Rose, Incorporated*,[54] the Supreme Court reversed and remanded the Sixth Circuit's decision that *2 Live Crew's* rap version of *Pretty Woman* was not fair use of a Roy Orbison song by the same title. The rationale behind this reversal was largely due to the Court's finding that the lower court had erred when it had assigned presumptive force to the song's commercial nature and neglected the other three factors required for a fair use defense.

48 *Elsmere,* 482 F. Supp. at 743.

49. Id. at 744.

[50] *Id.* at 747.

[51] The song was titled *Cunnilingus Champion of Company C. MCA,* 677 F.2d at 182.

[52] *Id.* at 184.

[53] *Id.* at 183-85.

[54] 114 S. Ct. 1164(1994).

Justice Souter, writing for a unanimous majority, arrived at this decision after carefully reexamining the *Campbell* facts in light of all four factors of Section 107.[65]

The first of the fair use factors was an inquiry into the purpose and character of the copyright's use, including whether or not the use was of a commercial nature or, alternatively, for nonprofit educational purposes.[56] The purpose behind this inquiry was to determine whether the new work simply superseded the original creation or instead added something new that altered its meaning or message. In essence, this part of the test asked whether and to what extent the new work was *transformative*.[57] This question was asked because transformative works are generally believed to further the copyright goals of promoting science and the arts; such songs are therefore less apt to be copyright infringers.[58] Also significant for transformative works was the Court's finding that the "more transformative the new work, the less significant will be other factors, like commercialism, that may weigh against a finding of fair use."[59]

Turning to the transformative value of parody, the Court next found that parodic works have an obvious claim to transformative value because the parodist seeks to use some elements of a prior author's composition to create a new one that comments on that author's works.[60] The Court rejected, however, the idea that all parodic usage is presumptively fair, declaring instead that parody, like any other potential infringement, must be judged on an individual basis in light of the ends of copyright law, and Section 107's four factor fair use test. The Court also stated that the threshold question for the fair use affirmative defense was whether or not a work's parodic character could reasonably be perceived.[61]

Analyzing the *2 Live Crew* rap song, the Court held that the group's parody reasonably could be perceived as commenting on the original or criticizing it, to some degree.[62] Thus, although commercial in nature, the song was found to be a legitimate parody and hence allowable under the fair use doctrine. Justice Souter explained that this result differed from that of the Sixth Circuit because the lower

[55]17 U.S.C. § 107 (1988 & Supp. IV 1992).

[56] *Id.* at § 107(1).

[57] *Campbell*, 114 S. Ct. at 1171.

[58] *Id.* (citing *Sony,* 464 U.S. 417,433 n.40).

59. *Id.*

60. *Id.* (citing *Fisher,* 794 F.2d at 432). For a discussion of *Fisher* see *supra* notes 37-44 and accompanying text. *See also MCA*, 677 F.2d at 180, and text accompanying notes 46-52, *supra.*

[61] *Campbell,* 114 S. Ct. at 1173.

62.Id.

court had incorrectly restricted its inquiry to only assessing the commercial nature of the copyright use. This limited inquiry was held to be in error because the language of Section 107(1) made it clear that the commercial or non-profit educational purpose of a work was only one element of the first factor. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all the illustrative uses listed in the preamble paragraph of Section 107, including news reporting, comment, criticism, teaching, scholarship, and research.[63]

While assessing the second fair use factor, the nature of the copyrighted work,[64] the Court remarked that its analysis showed how some works were closer to the core of intended copyright protection than others.[65] The Court agreed with lower court findings that the creative expression in Orbison's original fell within the core of copyright's protective purposes,[66] but it remarked that this fact was unlikely to help decide fair use in a parody case because ". . . parodies almost invariably copy publicly known, expressive works."[67]

The third factor, analyzed under Section 107, was whether or not the amount and substantiality of the portion used[68] was reasonable in relation to the purpose of the reproduction. The Sixth Circuit had concluded 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."[69] The Supreme Court disagreed, however, and instead held that the third factor presented difficulties for a parody because parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation thus, "when parody takes aim at a particular original work, the parody must be able to conjure up at least enough of the original to make the object of its critical wit recognizable."[70] Quotation of the original's most distinctive portions was then found to be the only way that a parodist could assure identification.[71] The Court also included in its rationale a comment explaining how *2 Live Crew* had only

[63] *Id.* at 1174 (citing *Harper & Row,* 471 U.S. at 592). For a discussion of *Harper & Row* see *supra* text accompanying notes 29-35.

64. 17 U.S.C. § 107(2X1988 & Supp. IV 1992).

[65] *Campbell*, 114 S. Ct. at 1175.

[66] *Id.*

[67] *Id.*

68. 17 U.S.C. § 107(3) (1988 & Supp. IV 1992).

[69] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429,1438 (1992).

[70] *Campbell*, 114 S. Ct. at 1176 (citing *Elsmere,* 623 F.2d at 253 n.l and *Fisher,* 794 F.2d at 438-439). For a discussion of *Elsmere* see *supra* text accompanying notes 45-49. For a discussion of *Fisher* see *supra* text accompanying notes 37-44).

[71] *Campbell,* 114 S. Ct. at 1176.

copied the first line of Orbison's lyrics and thereafter departed markedly from Orbison's words.[72] The Court went on to note, however, that even though parody could not avoid using some characteristic feature of an original, there was a point where the taking could become excessive. Where this point lay would depend on whether the purpose was to parody the original or serve as its market substitute.[73]

The fourth factor analyzed in the fair use test was the effect of the use upon the potential market for, or value of, the copyrighted work.[74] Here again, the Court found that the Sixth Circuit had erred. This time the error was due to the lower court's presumption that significant market harm would result if the intended use was for commercial gain.[75] In a rebuttal of this presumption, the Supreme Court remarked that when the second use is transformative, market substitution is uncertain and market harm cannot be readily inferred.[76] Addressing parody in particular, the Court determined that under this part of the test, it was likely that a parodic work would not affect the market for the original because the parody and the original usually serve different market functions."[77] The Court contrasted the transformative use of the *2 Live Crew* song to use which merely duplicated the original. The Court then noted that only the latter created the kind of a market replacement that could cause cognizable market harm.[78] Upon finishing his assessment of all four fair use factors, Justice Souter, writing for the majority, then concluded that commercial parody was permissible under the Copyright Act.

Although there was no dissenting opinion, Justice Kennedy did write a separate concurrence to emphasize that parody could only qualify as fair use if it made humorous or ironic comments about the original composition.[79] The parody "must target the original, Land] not just its general style . . . [or] genre of art."[80] Kennedy cautioned about allowing any modern version of a familiar composition to be construed as a comment on the naivete of the original,[81] because

[72] *Id.*

[73] *Id.*

74. Id. (citing Copyright Act § 17 U.S.C. § 107(4) (1988 & Supp. IV 1992).

75. Id.

76. Id. at 1177.

[77] *Id.* at 1177-78.

[78] *Id. See also supra* notes 20-28 and accompanying text. It is also important to note that harm to the market is not in and of itself lethal to parody. The fact that the biting criticism may suppress demand is different than the unlawful usurping of the market through copyright infringement. *See supra* notes 37—44.

79 *Campbell,* 114 S. Ct. at 1180.

[80] *Id.*

81 *Id.* at 1181.

allowing weak transformations to qualify as parody would weaken copyright protection.[82] Justice Kennedy concluded his opinion by noting that although proper parody might be legitimate, he had doubts as to whether *2 Live Crew's* song was parodic, and he felt that doubts over fair use should be resolved against any self-proclaimed parodist.[83]

B. RAMIFICATIONS

Campbell is a significant reinterpretation of the fair use doctrine because it appears that the Court will no longer give the presumption against commercial use much weight. *Campbell* also marks a change in the fair use standard of review, because now, instead of using economic models to determine fair use, the Court only requires that the more traditional standard of reasonableness be applied. This approach diminishes First Amendment issues as they relate to the fair use doctrine and it gives fair use application a large measure of flexibility.

This fact is significant because copyright law in general does not permit exceptions to infringement issues; and it is the fair use doctrine which provides the law's most significant escape clause. Congress itself noted that the statutory requirements of the Copyright Act are merely an attempt to establish fundamental guidelines which can be reshaped by the fair use doctrine on a case by case basis.[84] Thus, while fair use was intended as an equitable method of balancing the interests of all constituent parties, its new-found strength will have to be carefully scrutinized less the fears of Justice Kennedy be realized and copyright protection weakened.

C. THE EXIGENCY OF PARODY

It can be argued that the outcome of *Campbell* was legally and morally correct because individual parodists should be rewarded for their labors. These rewards are warranted because true parody takes countless hours of effort and thought. The satire involved must be thought-provoking and insightful, otherwise it will fall short of its purpose to both entertain and serve as significant social

82. Id.

83. *Id.*

84 H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976).

commentary.[8]" So, while it is true that the author of a copyrighted song has an obvious right to be rewarded, does that same author have a concomitant right to deny others their creative contributions? The answer seems to be no when one considers the fact that the parodist is generally not well compensated for his efforts, and yet his work makes no less a social contribution.[86]

Also important is the notion that parody does not reduce the value of the original songwriter's composition. That composition will continue to stand on its own artistic merits, and it will continue to be purchased regardless of any market the parody may create.[87] This is particularly true when one considers the fact that a parody is, by definition, a humorous attempt at imitating, not duplicating, the original. Thus, the parody might even increase demand for the original.[88]

Although the contention could also be made that since the parody is based on someone else's work, the original songwriter is entitled to compensation, this contention forgets the fact that many originals are themselves based on the work of other songwriters. In fact many of today's rhythms and lyrics are, to some degree, derivative of previous works by other composers and this truism holds for virtually all forms of creative human endeavors.

Copyright law was designed to inure to the benefit of the whole of society and not just the individual creator. However, in order to encourage creativity that benefits the common good, it was necessary to give individual efforts some measure of temporary protection so that these efforts could be rewarded. This protection not only safeguards individual creative efforts, but also inspires others to create. The resultant invention cycle thus enhances and gives value to the community at large.[89]

[85] *See* JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 100 (Peter Larlett ed., 2d ed. 1967). Locke strongly advocated the creation of private property, particularly that which derived from the fruits of individual labors. *Id.* This idea is a natural continuation of Locke's thoughts, and has been firmly incorporated into our system of justice.

[86] Indeed, it can be argued that parody, in some respects, makes *more* of a contribution.

[87] *See* Wendy J. Gordon, *A Property Right In Self-Expression: Equality And Individualism In The Natural Law Of Intellectual Property,* 102 YALE L.J. 1533, 1538 (1993). Gordon is a follower of Locke's natural law philosophy. She believes that when public property interests conflict with those of a laborer, the public interests should prevail.

[88] *See* DANIEL J. BOORSTEIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 58 (1972). Boorstein argues that when events make an already popular individual even more well known, these events have the effect of automatically raising that person to "celebrity" status.

[89] *See* Douglas G. Baird, *Common Law Intellectual Property and the Legacy of Int'l News Serv. v. Associated Press,* 50 U. Chi. L. Rev. 411, 415-16 (1983). It is important to note, however, that in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975), the Court concluded that although it is important to encourage and reward private creative efforts, this individual motivation must remain inferior to the rights of the public to have broad access to works of art such as literature and music.

Once such a creation loses its protection and becomes available to the public, however, the work loses all previous restrictions on its common utilization.[90] This end to a work's copyright protection is important because it allows others to build upon the original artist's work, and through this process ideas are expanded, embellished, and elaborated upon. Songwriting is part of this intellectual idea evolution, and since parody, like songwriting, is for the good of the community, the right to parody should fall under this penumbra of copyright protection as well.[91] And in point of fact, the American judicial system itself has noted that the parody has special status under the First Amendment.[92]

Parody is also worthy of protection because it provides a medium by which the foibles of society can be exposed. In fact, this medium, along with satire, is frequently more effective than straightforward commentary because it allows a point to be made in such an oblique manner that it is more stinging and convincing than if it were made through simple exposition. Satire and parody are also more memorable and usually have a larger, more receptive audience.

Aside from any pragmatic benefits that can be achieved by protecting the right to parody, there is also the notion that parody deserves a special niche in society because it allows us to laugh at ourselves. In a world that is confronted daily with man's inhumanity, there is something to be said for a work that allows us to laugh at ourselves. To that end, society has as much a vested interest in parody as it does in other new ideas.[93]

Another reason parody should be afforded protection is because parodies are consistent with the "marketplace of ideas" concept. Parodies help facilitate exposure to new ideas and increase our ability to comment critically on those in the public eye.[94] Even when a parody is found to be entertainment, rather than legitimate social criticism, the Supreme Court believes it is nonetheless deserving of Constitutional protection.[95]

[90] *See* Gordon, *supra* note 87, at 1559.

[91] White v. Samsung Elec. Am., Inc., 989 F.2d 1512 (9th Cir. 1992).

[92] Groucho Marx Prod. v. Day & Night Co., 689 F.2d 317, 319 n.2 (2d Cir. 1982).

[93] *Elsmere,* 623 F.2d at 253. *See also* Victor S. Wetterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary,* 35 S. Cal. L. REV. 225, 227 (1962).

[94] *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 8-51 (1993). *See also* L.L. Bean, Inc. v. Drake Publishers, 816 F.2d 26 (1st Cir. 1987), *cert, denied,* 483 U.S. 1013(1987).

[95] L.L. Bean, Inc. v. Drake Publishers, 811 F.2d 26 (1st Cir.), *cert, denied,* 483 U.S. 1013 (1987) (rejecting the trademark dilution claim as its application to a noncommercial parody violates the First Amendment).

D. PARODY AND COMMERCIAL FREE SPEECH

This idea of constitutionally protecting parody is the heart of the more sophisticated issue decided in *Campbell*. That issue was whether or not parody should be protected by the First Amendment when it is found within a commercial vehicle like a song rather than an editorial or critical review. Although the Court's answer to this question was yes,[96] it is clear that a special exception for parody within the commercial speech doctrine is unwarranted.

The reason such protection is unnecessary is borne out in such cases as *White v. Samsung Electric America*.[91] In this case, the Ninth Circuit held that commercial parodies of Vanna White, the hostess on the syndicated game show Wheel of Fortune, were prohibited. The case involved a magazine advertisement for Samsung electronics products which featured a robot posed next to a Wheel of Fortune game board and a statement that read, "[L]ongest-running game show 2012 A.D."[98] Despite the fact that the point of the ad was only to assert that Samsung products would be working long after Vanna White had been replaced by a robot, Ms. White sued Samsung for appropriating her identity and likeness and infringing on her right of publicity. The Ninth Circuit found that the California common law right of publicity encompassed claims relating to the use of identity.[99] The problem with this outcome, however, was that in allowing Ms. White to pursue her infringement claim, the court not only created a new cause of action against those who parody celebrities, but it cut back on a valuable form of commercial free speech.

This commercial-noncommercial dichotomy has several inherent weaknesses, however. The first is the idea that commercial and artistic objectives are present in almost all art and music. Mass media, for example, is certainly intended to be commercial, but, at the same time, these forms of expression are designed to entertain, so they involve a certain degree of artistic creativity. If it is fair to assume that a noncommercial use does not pose a threat to a commercial use, then surely the opposite is also true and commercial usage should not destroy the value of an artistic thought or expression.

[96] Despite the fact that commercial speech had historically been accorded less than full First Amendment protection, but it has been recognized as requiring a special form of protection. The seminal case on this issue is Cent. Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980). This case developed the thesis that the litmus test for defining commercial speech was not whether a profit was achieved but rather whether a commercial transaction was involved.

[97] 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1992).

[98] *Id.* at 1396.

[99] *Id.* at 1399.

When the Supreme Court decided to protect commercial speech it also established the criteria that defined when First Amendment protection should be accorded. These requirements include that: (1) the expression must be protected by the First Amendment, (2) the commercial speech must concern a lawful activity, (3) the government interest in regulating the speech must be substantial, and (4) the commercial speech in question must advance the asserted government interest.[100]

The underlying social motivation for specialized protection of commercial speech goes back to the *marketplace of ideas* philosophy first articulated by John Stuart Mill.[101] This philosophy argues that protection of commercial speech is necessary in order to assure that all decision makers have equal access to necessary information. Because of the importance of such information in an open democratic society, the need for a commercial speech exception seems self-evident.

Another reason to protect the kind of commercial speech found in *Campbell* is that in doing so the Court safeguarded the ability of an individual to profit from his artistic endeavors. Such protection is firmly embedded in the Constitution, and it goes to the very heart of our free market economy. Support for this idea is strong because most people believe that both creative and non-creative labors should be rewarded without a confiscatory government intruding.[102]

E. FAIR USE COPYRIGHT AND PARODY

The seminal issue in analyzing if a parody makes fair use of copyrighted material is the question of whether or not the parody replaces the original work.[103] Infringement takes place only when a parody acts as a substitute to the original in those markets that the original was initially intended to reach, or in the alternative, those markets where the original has the future ability to become commercially valuable.[104]

In *Campbell,* the Supreme Court has explicitly and implicitly agreed to many of the arguments discussed earlier. The Court's deci

100 Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 566 (1980).

[101] *See generally* JOHN STUART MILL, ON LIBERTY (1859).

[102] *See* U.S. CONST, art. I, § 10, cl. 1: "No State shall enter into any Treaty, Alliance, or Confederation; . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

[103] Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986).

[104] *Id.* (citing Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978), *cert, denied,* 439 U.S. 1132 (1979) and Berlin v. E.C. Publications, 329 F.2d 541, 545 (2d Cir.), *cert, denied,* 379 U.S. 822 (1964)).

sion was unique, however, because it enunciated a surprisingly liberal position that not only emphasized the fair use doctrine and its social implications, but also cut back on commercial interest protections. Such a stance differs markedly from the more conservative interpretation one would have anticipated from a Rehnquist Court. The decision is also noteworthy because the Court has in effect dismissed the application of the conservative *recall or conjure up* test and replaced it with a more pragmatic *market impact* standard.[105] The difference between these two is at once subtle and profound.

VI. AN OVERARCHING SIGNIFICANCE

Campbell can be viewed from two entirely different perspectives. First, there is the practical observation that "although a parody may be of a commercial character, this is no longer a 'death knell' because musical parodists will almost always prevail against copyright owners."[106] The second perspective is that posited by commentators who view *Campbell* from a very narrow and technical vantage. These individuals have focused on the application of the fair use doctrine itself, and have suggested that fair use might now be viewed as a method of incorporating First Amendment policies into the right of publicity.[107] To the extent that the so-called right of publicity is a component of parody, these ruminations bear fruit of some value and greatly contribute to a thoughtful analysis of some of *Campbell's* macro-implications.

A. FREE SPEECH V. COMMERCIALISM

There are essentially two competing interests involved in the conflict between free speech and commercialism. On one extreme there is the right to comment openly and critically about our culture, while at the other extreme lies the right of authors and artists to be protected from the unfair use of their creative labors. Because no one can deny that either of these interests is worthy of protection, the problem to

[105] *Id.* at 1177.

[106] Jay Lee, *Campbell v. Acuff-Rose Music: The Sword of the Parodist is Mightier Than the Shield of the Copyright Holder,* 29 U.S.F. L. REV. 279,310 (1994). *See also The Supreme Court 1993 Term: Leading Cases,* 108 HARV. L. REV. 139 (1994).

[107] *See, e.g.,* Douglas G. Baird, *Human Cannonballs And The First Amendment; Zucchini v. Scripps-Howard Broadcasting Co.,* 30 STAN. L. REV. 1185, 1206 (1978); Roberta Rosenthal Kwall, *Is Independence Day Dawning For The Right Of Publicity*?, 17 U.C. DAVIS L. REV. 191, 232 (1983).

be reckoned with is how to strike a balance between the two, that is, how to accord maximum utilization to First Amendment freedoms while at the same time protecting the spirit of a free-market economy. From a legal standpoint the law has historically concerned itself with insuring that commerce flowed freely and that innovation, creativity, and development were given at least temporary shelter through the intellectual property laws.[108]

Because the framers of the Constitution never dreamed that this country would evolve from an agrarian-based economy to a nation where an overwhelming majority of our labor force is involved in the production of goods and services, it is no surprise that commercial interests abruptly clash with the open access of thought that is guaranteed by the First Amendment. How then should modern courts balance these interests? This was the dilemma faced in *Campbell,* and the Court there seems to suggest *sotto voce* that the law needs to find ways to protect the marketplace of ideas even if there is a resultant cost to the marketplace of commerce.

Implicitly, *Campbell* seems to say that a dynamic, vital society needs to be able to express itself openly with few exceptions. The rationale for this statement is that the free flow of such expressions will, in the long run, profit all of society, *including* commerce and industry. This freedom of expression is believed to be warranted because none can say what the consequence of censorship, albeit limited censorship, might be upon the inspiration of authors to write, investors to invest, or, yes, songwriters to compose. Therefore, if individuals must sustain some moderate and limited loss of protection, that loss should only be allowed if the greater body of society is enriched by the encroachments of such works as parody and satire. The Supreme Court did not articulate this idea in the *Campbell* decision, but this conclusion leaps from the Court's opinion as surely as the brightness of spring follows the bleakness of winter.

What is fascinating about the *Campbell* decision is the fact that these decidedly liberal views emanate from a Supreme Court that is notoriously conservative, and which when commercialism is involved, has rarely ruled in favor of First Amendment rights.[109] Nonetheless, it is here that we find Justice Souter declare for a unanimous court

[108] These goals can be accomplished through the use of specific patent and copyright protection.

109. See United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) (holding that a federal statute that prohibits a licensed broadcaster in a nonlottery state from advertising a lottery, while permitting a licensed broadcaster in a lottery state to advertise lotteries which could be received in the nonlottery state, did not violate the First Amendment).

that "[W]e do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act."[110]

To the Court's credit, it did not directly address the supposedly offensive content of *2 Live Crew's* parody. Instead, it very clinically and methodically analyzed the law and facts, and did not allow the message of the parody to obfuscate the legal issues at hand,[111] a methodology a more conservative court might not have followed. Does this case therefore provide an indication that the Supreme Court is moving, if not to the left, at least a little more towards the center? A Court determined to act as a conservative ideologue would surely not have reached the conclusions so forcefully stated, and it certainly would not have used the liberal reasoning that is so prevalent in the Court's dicta.[112] This underlying theme *is* present however, and it seems to show then that when dealing with civil matters involving First Amendment issues, the Supreme Court has taken a pronounced turn towards former Warren Court positions. Although the possibility of that new thinking carrying over into matters of criminal law remains to be seen, *Campbell* does appear to mark the beginning of a more practical and less conservative Supreme Court. If this is indeed true, the implications for the nation will be profound, particularly when one recalls that the new Congress is a resolutely conservative one.

VII. CONCLUSION

By holding that *2 Live Crew's* commercial parody of Roy Orbison's *Pretty Woman* was a fair use within the parameters of Section 107 of the Copyright Act of 1979, the Supreme Court drew the conclusion that such composition was not an infringement of basic copyright law. This decision, in the eyes of the Court, merely continued the common- law tradition of "fair use" case-by-case. Although this outcome on its face seems to be a common sense determination of First Amendment freedoms, it is important to note the concerns enunciated by Justice Kennedy.[113] Kennedy cautioned that "[Als future courts apply our 'fair use' analysis, they must take care to ensure that not just any

[110] *Campbell,* 114 S. Ct. at 1178.

111.Id. at 1167-1179

[112] *Id.*

[113] *Id.* at 1180-82 (Kennedy, J., concurring).

commercial take-off is rationalized post hoc as a parody."[114] Justice Kennedy also observed that underprotection of copyright disparages the goals of copyright just as much as overprotection because it reduces the financial incentive to create.[115]

These statements are noteworthy because if a song or novel is not intended as parody, then that work is no more deserving of protection than any other composition which substantially duplicates the words of an original. It is for this reason that future decisions in this area will no doubt focus more on the facts of *Campbell* than on its points of law.

This point aside, a far more significant conclusion springs from this opinion. That conclusion is that an ostensibly conservative Supreme Court has substantially moved to the left, away from protecting business interests and towards a new position that will give a high degree of deference to freedom of expression. Considering the recent opinions of the Court with regard to commercial speech,[116] this could be a momentous ruling.

If future decisions hold true to this prediction, *Campbell* may ultimately be much more than merely an expression of the Court's view towards the First Amendment. Instead, the decision might signal a philosophical shift from the protection of commercial property rights towards the protection of broader rights and freedoms for all of society. If this comes to fruition, *Campbell* will be a landmark decision with profound consequences for commerce and industry in particular and the American people in general.

[114] *Id.* at 1182.

[115] *Id.* at 1181.

[116] *See* Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989); Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993); Edenfield v. Fane, 113 S. Ct. 1792 (1993); United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993); Ibanez v. Florida Dept., 114 S. Ct. 2084 (1994).