THE FAIR USE COMMERCIAL PARODY DEFENSE AND HOW TO IMPROVE IT

JONATHAN M. FOX *

I. INTRODUCTION

There is a stark difference between the classic literary definition of parody and the legal definition of parody. The latter is the controlling definition that applies when a copyright holder attempts to sue a parodist for an alleged infringement of a copyrighted work. The difference between the two definitions is telling because it shows how the legal and literary definitions have diverged over the last decade to the point where the legal definition is far broader than the literary definition. A classic literary definition of parody is "'humorous and aesthetically satisfying composition in prose or verse, usually written without malice, in which, by means of a rigidly controlled distortion, the most striking peculiarities of subject matter and style of a literary work, an author, or a school or type of writing, are exaggerated in such a way as to lead to an implicit value judgment of the original.'"[1] In contrast, the Supreme Court's definition of parody, which it proclaimed in *Campbell v. Acuff-Rose Music, Inc.*,[2] 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."[3]

Absent from the Supreme Court's definition is any mention of humor or what a parody should achieve. Although to constitute a fair use, a parody must pass muster with the four statutory fair use factors, as long as it comments on the original copyrighted work in some way, its use of the copyrighted elements of the original will be eligible for treatment as a fair use parody. As will be-

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1 Richard A. Posner, *When is Parody a Fair Use?*, 21 J. Leg. Stud. 67, 68 (1992) (quoting J. G. Riewald, *Parody as Criticism*, 50 Neophilologus 125 (1966)).

2 510 U.S. 569 (1994).

3 *Id.* at 580.

come clear, the Supreme Court's current definition of parody has allowed certain works, completely devoid of the elements of literary parody, to qualify as fair use parodies.

This phenomenon and some judicial opinions upholding fair use parodies reveal that there is now a real First Amendment component to the fair use parody analysis. While many have stressed the economic dimensions of fair use doctrine,[4] at least one court has found support in the policies of the First Amendment and copyright law to hold that the fair use factors constitute an affirmative right (as opposed to an affirmative defense).[5] Although some courts, even after *Campbell*, have taken a decidedly more narrow view with respect to the quantum of copyrighted material that parodists can take as a fair use,[6] the trend, which finds support in *Campbell*, the only binding Supreme Court opinion to give substantial treatment to parody as a fair use, is to allow "parodists" to take a substantial amount of copyrighted material to compose their "parodies." Quotes are used around parodist and parodies in the last sentence because, especially after *SunTrust Bank*, it is doubtful that these works fit any traditional definition of parody. Nevertheless, as will be argued, even this broader form of parody, which is consistent with the First Amendment values built into copyright law, is still worthy of fair use protection to a certain extent, though not entirely.

Now that the case law has moved away from traditional definitions of parody, some courts, in reaching their decisions, rely heavily on experts in literary and other art fields. This development is troubling because it can distract courts from the four factors that they must consider in the fair use analysis and take judges on a perilous route through the vagaries of literary and other forms of art criticism. By using the term parody in the guise of its current broad definition, courts inspire unnecessary criticism as commentators disparage the jurisprudence for distorting the meaning of the word parody beyond recognition, despite the fact that comment and criticism are core First Amendment values.

Part II of this paper will provide a brief history of the important common law, pre-1976 parody cases and discuss how the fair use factors were incorporated into the 1976 Copyright Act. This section will also discuss the Supreme Court's decision in *Campbell* and its definition of parody and how the

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4 *See e.g.* Posner, *supra* n. 1, at 69 ("The sense and, hence, scope of the fair use doctrine are most easily understood in economic terms. A use is fair in these terms when the costs of transacting with the copyright owner over permission to use the copyrighted work would exceed the benefits of transacting.").

5 *See SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n. 3 (11th Cir. 2001).

6 *See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

Court applied the four fair use factors. Part III will examine significant post-*Campbell* decisions from the Courts of Appeal and evaluate their consistency with *Campbell* and their application of the fair use factors.

Part IV will discuss and critique the opinions that a number of commentators have expressed about what to do about the broadening scope of what constitutes a fair use parody. Part V will outline a number of potential judicial and statutory reforms that attempt to maximize the fairness of fair use doctrine for both parodists and copyright holders. This Part will also try to anticipate critiques of these proposed reforms. Finally, Part VI will provide a brief conclusion.

II. BRIEF HISTORY AND THE *CAMPBELL* DECISION

*A. Fair Use's Common Law Roots and Pre-*Campbell *Parody Decisions*

The common law tradition of fair use has deep roots and was well-established by 1841 when Justice Story issued his opinion in *Folsom v. Marsh*.[7] In *Folsom*, the defendants had taken rare letters and other material written by George Washington from plaintiff's 12-volume compilation of Washington's writings to create a biography of Washington in his own words.[8] The biography that defendants created consisted mostly of letters and other original material from plaintiff's compilation that the defendants stitched together with short narrative transitions.[9] In reaching his decision in favor of the plaintiffs and upholding the lower court's injunction barring publication of the work, Justice Story surveyed the case law and deduced the following mode of analysis: "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[10] Judges used these criteria to decide fair use cases until Congress codified many elements of Justice Story's test into § 107 of the Copyright Act in 1976.[11]

One of the earliest common law cases to grant substantial latitude to parodists is *Berlin v. E. C. Prods., Inc.*[12] In *Berlin*, the famous composer Irving

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7 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841).

8 *Id.* at 345.

9 *Id.*

10 *Id.* at 348.

11 *See Campbell.*, 510 U.S. at 576.

12 329 F.2d 541 (2d Cir. 1964).

Berlin and other plaintiffs alleged that the defendant, Mad Magazine, had infringed plaintiffs' copyright when the magazine printed parodic and satirical versions of the plaintiffs' well-known compositions.[13] For example, Mad parodied a song titled "The Last Time I Saw Paris" into "The First Time I Saw Maris" and Mad also transformed "A Pretty Girl is Like a Melody" into "Louella Schwartz Describes Her Malady."[14] While Mad did not include musical notations in its versions, the magazine did provide instructions indicating that the songs should be sung to the tune of the well-known original.[15]

Faced with the allegation that Mad's parodies constituted copyright infringement, the Second Circuit, while acknowledging that the extent to which a parodist may borrow from the target of his parody was "largely unsettled,"[16] resoundingly held that "parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."[17] The court went on to rule that "where . . . it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure' up the object of his satire, a finding of infringement would be improper."[18]

It is important to note that the Second Circuit did not go into a lengthy discussion about how each of the songs that Mad had rewritten actually parodied the originals. In the two songs mentioned above that the court did briefly analyze, the former appears to be more of a satire than a parody since it took a nostalgic ballad about pre-war France and turned it into a "caustic commentary upon the tendency of a baseball hero to become a television pitchman."[19] The latter song, however, was most assuredly a parody since the original served as "a tribute to feminine beauty," while the Mad version described a hypochondriac who always complained about her sicknesses.[20] At this early date, the Second Circuit did not appear to be drawing a distinction between parody and satire and counted both as potential fair uses.

Following *Berlin*, there were numerous other parody cases, many of which ended up in the Second Circuit or the Southern District of New York. In

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13 *Id.* at 542-43.

14 *Id.* at 543.

15 *Id.*

16 *Id.* at 544.

17 *Id.* at 545.

18 *Id.*

19 *Id.* at 543.

20 *Id.*

Elsmere Music, Inc. v. Natl. Broad. Co.,[21] the Second Circuit in a brief *per curiam* opinion went further than the *Berlin* court and held that Saturday Night Live's ("SNL") parody of a New York City public relations campaign was a fair use.[22] SNL had taken the song "I Love New York" and transformed it into "I Love Sodom."[23] The Second Circuit ruled that "[a] parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."[24] The district court, which the Second Circuit affirmed, following the reasoning of *Berlin*, had held that the distinction between parody and satire was immaterial and that "the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself."[25]

While the Second Circuit allowed parodists substantial latitude, other federal jurisdictions were more restrictive. For example, in *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*,[26] the court held that the producers of Garbage Pail Kids trading cards, stickers, and other merchandise were not entitled to the fair use defense and that plaintiff, the makers of Cabbage Patch Kids, had demonstrated a substantial likelihood of success on its copyright claim to warrant a preliminary injunction.[27] In arriving at this decision, the court relied heavily on the Supreme Court's decision in *Sony Corp. of Am. v. Universal Studios*[28] to hold that since the Garbage Pail Kids merchandise was clearly a commercial product, there was a strong presumption that the use was unfair.[29]

Before the Supreme Court's decision in *Campbell v. Acuff-Rose*, this strong presumption against commercial parodies was not uncommon. Before *Campbell* reached the Supreme Court, the Sixth Circuit had held that 2 Live

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21 623 F.2d 252 (2d Cir. 1980).

22 *Id.* at 253.

23 *Id.*

24 *Id.* at n. 1.

25 *Elsmere Music, Inc. v. Natl. Broad. Co.*, 482 F. Supp. 741, 746 (S.D.N.Y. 1980) (footnote omitted).

26 642 F. Supp. 1031 (N.D. Ga. 1986).

27 *Id.* at 1036, 1041.

28 464 U.S. 417 (1984).

29 *Original Appalachian Artworks, Inc.*, 642 F. Supp. at 1034 ("The Supreme Court has stated that 'commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'" (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

Crew's parody of Roy Orbison's famous 1964 hit, "Oh Pretty Woman" was not a fair use and thus likely constituted copyright infringement.[30] Like the court in *Original Appalachian Artworks*, *Inc.*, the Sixth Circuit attached significant weight to the Supreme Court's language in *Sony* that commercial uses were presumptively unfair and decided to reverse and remand the district court judgment holding that 2 Live Crew's song was a fair use.[31] The Sixth Circuit emphatically concluded that "[i]t is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use."[32]

B. Campbell v. Acuff-Rose*: The Supreme Court Finally Recognizes Commercial Parodies as a Fair Use*

Against this backdrop and the fact that two recent Supreme Court opinions appeared to support the Sixth Circuit's decision, it is surprising that *Campbell* came down as a unanimous decision. The Supreme Court's only other prior treatment of parody as a potential fair use resulted in a four-four, one-sentence *per curiam* decision that affirmed the Ninth Circuit's opinion against a finding of fair use and resulted in no binding precedent.[33] Although in *Campbell*, the Supreme Court had granted certiorari to decide the narrow issue of whether a commercial parody was capable of qualifying as a fair use,[34] the decision went much further, guiding the lower courts' application of the fair use factors in the context of parody. Until that time, as the Sixth Circuit's opinion in *Campbell* demonstrated, there was substantial uncertainty in the courts about how to apply the fair use factors to a parody. If the Sixth Circuit's construction had prevailed, parody as a genre probably would have come to a screeching halt. The Sixth Circuit's decision in *Campbell* had created a strong presumption that any com-

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

31 *Id.* at 1436-37 ("We agree that commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding [in *Sony*] that 'Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'") (internal citations omitted).

32 *Id.* at 1439.

33 *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43, 43 (1958) ("The judgment below is affirmed by an equally divided court."). The Ninth Circuit's affirmed decision concerned a half-hour television "burlesque" that Jack Benny performed of a movie and play called "Gas Light." *Benny v. Loew's Inc.*, 239 F.2d 532, 533-34 (9th Cir.1956). The court held that Benny's work did not qualify as a fair use because defendants had copied plaintiffs work "practically verbatim," adding only a few comic elements. *Id.* at 536-37.

34 *Campbell*, 510 U.S. at 574.

mercial parody, solely because of its commercial nature, was not a fair use. That presumption, under the Sixth Circuit's reasoning, was so hard to rebut that it probably would have rendered most commercial parodies (probably the only kind of parody that anyone would bother suing over) copyright infringements and endangered the entire genre.[35]

In *Campbell*, the Supreme Court settled a number of issues that had caused confusion in parody jurisprudence over the years. First, the Court held that parody "can provide social benefit, by shedding light on an earlier work, and, in the process creating a new one."[36] For these reasons the Court decided to "line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107."[37] Of the four fair use factors, the *Campbell* Court devoted the most in-depth analysis to the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[38] While the Court noted that "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,"[39] it also scolded the Sixth Circuit for its "elevation of one sentence from *Sony* to a *per se* rule."[40] The Court clarified that the proper interpretation of *Sony* is that a commercial use as opposed to a non-profit one is merely "a separate factor that tends to weigh against a finding of fair use" and that the strength of that tendency can vary depending on the context.[41]

Another fundamental component of the first-factor analysis the Court clarified, is what exactly is meant by the word "parody" in the context of the fair use analysis and how apparent the parody has to be in order to qualify as such. The Court defined parody as "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 work."[42] "The threshold question . . . is whether the parodic character may reasonably be perceived" and it is immaterial whether the parody is in good taste or

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35 The Sixth Circuit's opinion in *Campbell* would have allowed for the song if it did not have a commercial purpose. "[A]n identical use of the copyrighted work in this case at a private gathering on a not-for-profit basis would be a fair use." *Campbell*, 972 F.2d at 1439.

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

37 *Id.*

38 17 U.S.C. § 107(1) (2005).

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

40 *Id.* at 585.

41 *Id.*

42 *Id.* at 580.

bad.[43] While the Sixth Circuit had held that it could not find "any thematic relationship between the copyrighted song and the alleged parody" that could be viewed "as critical comment on the original,"[44] the Supreme Court held that the 2 Live Crew version could reasonably be perceived as "commenting on the original or criticizing it, to some degree."[45] Agreeing with the dissent in the court below, the Supreme Court found that the juxtaposition of the original's romantic musings with the degrading taunts and bawdy demand for sex of the parody coupled with comments on the naiveté of the original rose to the level of parody.[46]

Aside from defining what a parody is and how to perceive it, the Court also clarified that in order to qualify as a potential fair-use parody, a work did not have to advertise itself as a parody, since "[p]arody serves its goals whether labeled or not."[47] Furthermore, the Court also clearly held that whether 2 Live Crew had parodied the song "in good faith" was also irrelevant to the fair use analysis. 2 Live Crew had asked the copyright holder if it would license its parody. The copyright holder refused, but the rap group released the song nonetheless. The Court held "[i]f the use is otherwise fair then no permission need be sought or granted.[48]

While clarifying these issues certainly served as helpful guidance to the lower courts for future parody cases, the Court gave little instruction as to how to balance the commercial character of a parody with other more redeeming qualities, such as the extent to which a parody is transformative of the original. The Court merely expounded that "parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."[49] Similarly, the Court held that use of word "including" in § 107(1) demonstrated how Congress "urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence."[50] While the *Campbell* Court clearly held that the commercial nature of a parody cannot have a presumptive effect in the analysis of the first fair use factor, it set few if any bounds on what courts may consider in evaluating this first factor.

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43 *Id.* at 582.

44 *Campbell*, 972 F.2d at 1436 n. 8.

45 *Campbell*, 510 U.S. at 583.

46 *Id.*

47 *Id.* at 583 n. 17.

48 *Id.* at 584 n. 18.

49 *Id.* at 581.

50 *Id.* at 584.

The Court dealt with the second fair use factor, "the nature of the copyrighted work,"[51] summarily and held that this factor in the parody context was "not much help . . . since parodies almost invariably copy publicly known, expressive works."[52] The Court, however, devoted significantly more attention to the third fair use factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[53] This factor was significant because the Sixth Circuit had held (and the Supreme Court did not disagree) that in its version of *Pretty Woman* 2 Live Crew had taken the "heart" of the original, since it directly took the opening bass rift and opening lyrics.[54] The Supreme Court held, however, that taking the "heart" of a composition may still be allowable as a fair use in the context of parody because "the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim."[55] The Court commented that if 2 Live Crew had taken a less memorable part of Orbison's song, "it is difficult to see how its parodic character would have come through."[56] The Court held that the critical question to ask is not whether a parody took the original's heart, but "what else the parodist did besides go to the heart of the original."[57] The Court noted that despite the copying of the bass rift and opening lyrics, the 2 Live Crew version "departed markedly from the Orbison lyrics for its own ends," added distinctive sounds, overlayed music with solos in different keys, and altered the drumbeat.[58]

With respect to the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work,"[59] the Court found that the parties had not provided sufficient evidence since they had failed to provide the court with any data about what the effect of "2 Live Crew's parodic rap song" would have "on the market for a nonparody, rap version of "Oh, Pretty Woman."[60] The Court held that this was the proper inquiry because it took into account the copyright holder's absolute right to produce and license derivative works, while not impinging on fair use principles. The Court held that a parody, "like a scathing theater review," does not rise to the level of infringement

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51 17 U.S.C. § 107(2).

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

53 17 U.S.C. § 107(3).

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

55 *Id.*

56 *Id.* at 588-89.

57 *Id.* at 589.

58 *Id.*

59 17 U.S.C. § 107(4).

60 *Campbell*, 510 U.S. at 593.

merely because it hurts demand for the original.[61] Instead, in order to constitute copyright infringement the alleged infringing work must usurp demand by standing in as a substitute for the original.[62] The Court held that this possibility of substitution is unlikely in the case of a true parody "because the parody and the original usually serve different market functions."[63]

Compared to the Sixth Circuit's decision in *Campbell* and certain restrictive decisions of other federal jurisdictions, the Supreme Court's unanimous opinion in *Campbell* was a significant victory for would-be parodists. The decision not only canonized commercial parodies as potential fair uses, but also freed parodists from the burden of labeling their parodies as such and from acting in good faith. The Court's application of the third fair use factor to parodies was also extremely favorable since even the taking of the "heart" of the original work would not preclude parodists from fair use protection. Furthermore, the way the Court conceived of the fourth factor inquiry made it fairly difficult for the copyright holder to establish that the parody was an unfair use. These developments all constituted either maintenance of the Second Circuit's broad allowance for parodies or an expansion of the boundaries that court had set for parody. The only area where the Court cut back was in its distinction of parody and satire. While the Second Circuit in *Berlin* did not see any distinction, in *Campbell*, the Supreme Court held that while parody "has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[64] This seemingly minor distinction would prove to be of critical importance for the Ninth Circuit in *Dr. Seuss Enters, L.P. v. Penguin Books USA, Inc*.[65]

III. PARODY DECISIONS AFTER *CAMPBELL*

In the seven years following *Campbell*, three Courts of Appeal, the Ninth, Second, and Eleventh Circuits, interpreted *Campbell* in significant parody cases. While the Second and Eleventh Circuits handed down decisions consistent with the Supreme Court's broad allowance for parodies as a fair use, the Ninth Circuit's decision, which preceded the other two, took a more narrow

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61 *Id.* at 591-92.

62 *Id.*

63 *Id.* at 591.

64 *Id.* at 580-81.

65 109 F.3d 1394 (9th Cir. 1997).

view and is thus arguably inconsistent with *Campbell* and other subsequent parody jurisprudence.

In *Dr. Seuss Enters., L.P.,*[66] the Ninth Circuit held that an illustrated book that poked fun at the O.J. Simpson trial using stylistic and artistic elements from the famous Dr. Seuss children's book, *The Cat in the Hat*, was not a fair use and likely constituted copyright infringement.[67] Penguin attempted to defend the book in question, *The Cat NOT in the Hat*! *A Parody by Dr. Juice* ("*Dr. Juice*"), by arguing (as the title of the book suggests) that it was a parody and should be entitled to fair use protection.[68] The Ninth Circuit, however, clearly demonstrated that calling something a parody is not enough to make it a fair use and upheld the district court's preliminary injunction barring publication and distribution of the book.[69]

In holding that *Dr. Juice* was not a fair use, the Ninth Circuit conducted the four factor fair use as guided by the Supreme Court's then-recent *Campbell* decision. In its analysis of the first factor, where the court was deciding whether or not the book should be treated as a parody, the court attached substantial weight to the *Campbell* Court's distinction between parody and satire, but also to Kennedy's concurrence in the opinion where he wrote, "[t]he parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)."[70] The court then proceeded to reproduce lengthy excerpts from *Dr. Juice* written in the same poetic style as *The Cat in the Hat* and held that while the work "broadly mimic[ed] Dr. Seuss' characteristic style, it [did] not hold his style up to ridicule."[71] The court held that the depiction of O.J. Simpson wearing the Cat's distinctive stove-pipe hat in relating the story of the Brown-Goldman murders and the ensuing O.J. Simpson trial did not conjure up *The Cat in the Hat.*[72] The court also held that there was "no effort to create a transformative work."[73] Nevertheless, the court did not explicitly say that the work was not a parody or that it was a satire. It simply held that the lack of a

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66 109 F.3d 1394 (9th Cir. 1997).

67 *Id.* at 1396, 1403.

68 *Id.* at 1399.

69 *Id.* at 1403.

70 *Id.* at 1400 (quoting *Campbell*, 510 U.S. at 597 (Kennedy, J. concurring)).

71 *Id.* at 1401.

72 *Id.*

73 *Id.*

transformative character and the work's commercial use "cut against" a finding of fair use with regard to the first factor.[74]

This application of the first factor is not entirely consistent with *Campbell*. The Ninth Circuit gave no weight to the fact that the rhyming scheme used by Dr. Seuss like any rhyming scheme is not copyrightable. Furthermore, the court did not give the authors of *Dr. Juice* any credit for completely transforming the content and plot elements. It also did not evaluate whether the parodic character could be reasonably perceived, which the Supreme Court had identified as the "threshold question when fair use is raised in defense of parody."[75] Furthermore, the court did not assess the defendant's argument as to how the work commented on the original in its analysis of the first factor, as the Supreme Court's first factor analysis in *Campbell* had done.

As to the second factor, the court, following Supreme Court precedent acknowledged that it was not very helpful, but still held that it further "tilt[ed] the scale against fair use."[76] The court's analysis of the third factor is noteworthy because the only part of *The Cat in the Hat* that the court acknowledged that the authors of *Dr. Juice* took is the Cat's distinctive stove-pipe hat, which appeared thirteen times in *Dr. Juice*.[77] In this part of the opinion, the court also evaluated the defendant's argument as to why the book constitutes a parody. The defendants argued that *Dr. Juice* was a "'commentary about the events surrounding the Brown/Goldman murders and the O.J. Simpson trial, in the form of a Dr. Seuss parody that transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns.'"[78] The court's conclusory rejection of this argument is telling: "[w]e completely agree with the district court that Penguin and Dove's fair use defense is 'pure shtick' and that their post-hoc characterization of the work is 'completely unconvincing.'"[79] Instead of evaluating whether or not the work was a parody, the court avoided the question by denigrating the defense's argument with Yiddish slang.

With regard to the market-based fourth factor, the court held that because *Dr. Juice* was nontransformative and commercial "market substitution is at least more certain, and market harm may be more readily inferred."[80] Furthermore, the court held that because of the affirmative nature of the fair use

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74 *Id.* at 1401.

75 *Campbell.*, 510 U.S. at 582.

76 *Dr. Seuss Enters., L.P.*, 109 F.3d at 1402.

77 *Id.*

78 *Id.*

79 *Id.* at 1403.

80 *Id.*

defense and the fact that the defendants had failed to submit evidence about the relevant markets, the defendants were disentitled to the defense.[81]

Although at the outset of its opinion the *Dr. Seuss* Court acknowledged that "[p]arody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment,"[82] the court did little to uphold or even consider the defendant's claim that the work was a parody. It is possible that part of the court's reluctance to consider the defendant's arguments carefully stems from the procedural posture of the case. The district court had granted a preliminary injunction and the Court of Appeals could "reverse the grant of the preliminary injunction only if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact."[83] Nevertheless, it is possible to view the grant of a preliminary injunction in this case as an abuse of discretion since the district court in granting it had arguably not accurately followed the Supreme Court's application of the four fair use factors.

In *Leibovitz v. Paramount Pictures Corp.*,[84] the Second Circuit continued its tradition of granting broad protection to parodies and paid close attention to *Campbell*. The parody at issue in *Leibovitz* was a photograph of Leslie Nielsen's face, the star of *Naked Gun 33 1/3*, superimposed on a doctored photograph of a nude pregnant female designed to look like Demi Moore.[85] Paramount used this photograph in advertisements for the *Naked Gun* sequel. The parody's target was Annie Leibovitz's photograph of a nude pregnant Demi Moore that appeared on the front cover of *Vanity Fair*'s August 1991 issue, one of the magazine's best-selling issues. According to the court, Demi Moore appeared in a "pose evocative of Botticelli's *Birth of Venus*[,] . . . Moore's facial expression [was] serious without a trace of a smile."[86]

Leibovitz alleged that Paramount's advertisement constituted copyright infringement and Paramount countered that the photograph was a fair use parody.[87] The district court had granted summary judgment for Paramount and Leibovitz appealed.[88] Before getting to the application of the fair use factors,

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81 *Id.*

82 *Id.* at 1400.

83 *Id.* at 1397 n.2.

84 137 F.3d 109 (2d Cir. 1998).

85 *Id.* at 111.

86 *Id.*

87 *Id.* at 112.

88 *Id.*

the Second Circuit provided a lengthy summary of *Campbell*[89] in which it indicated how that case "clarified the fair use defense in general and its particular application to parodies."[90] Unlike the Ninth Circuit, the Second Circuit began its application of the first factor by asking whether the work could reasonably be perceived as a parody, a new work that commented on the original.[91] The court held that the striking contrast of Nielsen's smirking face and Moore's serious expression could reasonably be perceived as commenting on the seriousness and pretentiousness of the original.[92] The court held that the ad could also reasonably be perceived as disagreeing with the original's grand portrayal of the pregnant female body by substituting a "'smirking, foolish-looking pregnant man.'"[93] Although the court noted that the commercial nature of the ad would cut against the fair use defense, the court held that "[o]n balance, the strong parodic nature of the ad tips the first factor significantly toward fair use . . . ."[94]

While the court did not attach much weight to the second factor, it held that the factor did favor Leibovitz.[95] With respect to the third factor, before beginning its analysis, the court noted that it could only consider the copyright protected elements of the original, which included artistic elements such as lighting, resulting skin tone of the subject, and the camera angle, but did not include the appearance of a nude, pregnant female.[96] The court held that by digitally enhancing the body of the photo so that it was difficult to tell the difference between the parody and the original, Paramount had taken more than was necessary to "conjure up" the original.[97] Nevertheless, relying on language from *Campbell*, the court held that taking more than was necessary would not necessarily tip the third factor against the alleged infringer if the first and fourth factors favored the parodist.[98] The court concluded its analysis of the third factor by noting that since the first and fourth factors favored fair use, even the presence of extensive copying in this case could not help Leibovitz.[99]

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89 *Id.* at 112-14.
90 *Id.* at 112.
91 *Id.* at 114.
92 *Id.*
93 *Id.* at 115.
94 *Id.*
95 *Id.*
96 *Id.* at 115-16.
97 *Id.* at 116.
98 *Id.*
99 *Id.*

The court quickly summed up its analysis of the fourth factor in favor of Paramount by indicating that Leibovitz "all but concede[d] that the Paramount photograph did not interfere with any potential market for her photograph or for derivative works based upon it."[100] The court concluded its opinion by remarking that it was "satisfied that the balance [of the fair use factors] . . . markedly favors the defendant."[101]

In contrast to *Dr. Seuss*, *Leibovitz* reveals how difficult it is for the copyright holder to establish that a parody is not a fair use. The Second Circuit accurately reiterated the salient points from *Campbell* and applied the four factor fair use analysis in a manner consistent with the Supreme Court's opinion. Nevertheless, despite reaching this decision in favor of parodists, the Second Circuit does not once mention the First Amendment, free speech, or the social/cultural value of parody.

On the other hand, in *SunTrust Bank v. Houghton Mifflin Co.*[102] the Eleventh Circuit devoted substantial attention to the interplay of copyright and the First Amendment in the course of overruling a preliminary injunction granted by the district court that would have barred publication of Anne Randall's *The Wind Done Gone* ("TWDG"), a parody of Margaret Mitchell's *Gone With the Wind* ("GWTW").[103] The court held that the district court's injunction was "at odds" with copyright law because of the availability of a viable fair use defense and with the First Amendment because the injunction served as a prior restraint on speech.[104]

Unlike *Leibovitz*, before the Eleventh Circuit got to its application of the four factors to TWDG, it did not provide an extensive summary of *Campbell*, but, rather, traced the origin of the Constitution's Copyright Clause to the Statute of Anne, and then in a section titled "The Union of Copyright and the First Amendment," the court described at length the idea/expression dichotomy and the fair use doctrine as First Amendment based responses to a copyright holder's broad rights.[105] Some of the court's observations in this section are particularly revealing of how it regarded the importance of the First Amendment and its application to this case. Although the court notes that "courts often need not entertain related First Amendment arguments in a copyright case" because "First Amendment principles are built into copyright law through the

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100 *Id.*

101 *Id.* at 117.

102 *Suntrust Bank*, 268 F.3d at 1257.

103 *Id.* at 1259.

104 *Id.* at 1277.

105 *Id.* at 1262-65.

idea/expression dichotomy and the doctrine of fair use," the court still stressed that it "must remain cognizant of the First Amendment protections interwoven into copyright law."[106] At the outset of its opinion, the Eleventh Circuit further demonstrated its stance on the First Amendment's interplay with copyright law in a footnote which noted:

> I believe that fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. However, . . . [because] we are bound by Supreme Court precedent, we will apply it as [an affirmative defense]. Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes.[107]

This court, to an extent much greater than others that have considered parody cases, saw the First Amendment broadly, and fair use in particular, as a substantial limitation to a copyright holder's exclusive rights.

The Eleventh Circuit started its fair use analysis by adopting the Supreme Court's broad definition of parody as a work whose "aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic work."[108] The court held that under this definition the parodic character of TWDG was clear because the book was "a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW."[109] Although the court admitted that the TWDG was clearly a commercial use, it held that its "for-profit status [was] strongly overshadowed and outweighed in view of its highly transformative use of GWTW's copyrighted elements."[110] In support of this holding, the court noted how Randall wrote her story from the perspective of a different narrator, flipped GWTW's traditional race roles, wrote in a different style, and included plot elements found nowhere in GWTW.[111] The court concluded that the first factor "certainly militates in favor of a finding of fair use . . . ."[112]

The Eleventh Circuit, consistent with other parody cases, attached little weight to the second factor. The court could not reach any conclusion on

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106 *Id.* at 1264-65.

107 *Id.* at 1260 n.3 (internal citations omitted).

108 *Id.* at 1268-69.

109 *Id.* at 1269.

110 *Id.*

111 *Id.* at 1270.

112 *Id.* at 1271.

whether Randall had taken too much from GWTW in the course of writing her parody and admitted that determination of whether the use was fair was complicated by the fact "that literary relevance is a highly subjective analysis ill-suited for judicial inquiry."[113] SunTrust argued that very little reference is required to conjure up GWTW because it is such a famous work, and because Randall had taken whole scenes, characters, and even copied some text verbatim, she had taken more than was necessary to write her parody.[114] The court, however, quoting language from *Campbell*, noted that a parodist "'must be able to conjure up *at least* enough of the original to make the object of its critical wit recognizable,'"[115] which would leave open the possibility that Randall could still take more than the bare minimum necessary to create her parody and still be within the bounds of fair use.

While the court was unable to decide which side the third factor favored, it resolved the fourth factor in favor of the TWDG primarily because SunTrust was unable to provide sufficient evidence and argument to demonstrate how "TWDG would supplant demand for SunTrust licensed derivatives."[116] In contrast, the court held that the defendants had met their burden by providing evidence focusing on market substitution that showed why TWDG is unlikely to displace sales of GWTW, although the court did not mention what this evidence was.[117] The concurrence commented that readers of TWDG may want to read the original again, so "[i]t is not far-fetched to predict that sales of [GWTW] have grown since [TWDG]'s publication."[118]

SunTrust Bank, with its long exposition on the constitutional dimensions of the fair use defense and its broad conception of what constitutes parody, went a good deal further toward providing substantial protection for parody than any of the opinions since *Campbell*. Nevertheless, in doing so, it is hard to argue that the Eleventh Circuit unreasonably distorted or misapplied *Campbell*. In *SunTrust Bank*, the court accurately applied the Supreme Court's definition of parody and applied the four fair use factors in a manner consistent with *Campbell*. In fact, *Dr. Seuss* is a good deal more inconsistent with *Campbell* to the detriment of parodists than *SunTrust* is inconsistent with *Campbell* in parodists' favor.

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113 *Id.* at 1273.

114 *Id.*

115 *Id.* (citing *Campbell*, 510 U.S. at 588).

116 *Id.* at 1275.

117 *Id.*

118 *Id.* at 1281-82 (Marcus, J., concurring).

IV. COMMENTATORS' IDEAS ABOUT HOW COPYRIGHT LAW SHOULD TREAT PARODIES

Not surprisingly, this trend of increasing the breadth of the fair use parody defense in *Campbell*'s wake has generated substantial criticism from certain commentators who fear that judges have given parodists too much leeway and allowed them to get away with copyright infringement in the name of parody. There have been a variety of different ideas about how to mend and fix the current state of fair use law as it applies to parodies. One common theme underlying many of these different parody reform proposals is the notion that copyright holders are being treated unfairly by fair use parody doctrine. Whether or not this view is valid and whether copyright holders even have an expectation to be treated fairly by fair use doctrine will be discussed in Part V, *infra*. Because the scholarly literature generated by this line of parody cases is quite voluminous, only a few representative ideas will be discussed.

Before *Campbell* was even decided, Judge Richard Posner had already sounded the alarm that "the doctrine [fair use] should provide a defense to infringement only if the parody uses the parodied work as a target rather than as a weapon . . . ."[119] Posner recognized that there will be difficulty in making this distinction and in dealing with "overlaps."[120] Posner also recommended that parodists should be allowed to take only as much as is necessary from the original to achieve an effective parody and no more.[121] Posner's final recommendation was the fact that a parodist takes only a small amount of copyrighted material should not serve as a defense to infringement, just as in the law of larceny where there is no privilege for stealing small.[122]

In *Campbell*, the Supreme Court adopted Posner's first point about the target/weapon distinction to a certain extent in its distinction between parody and satire; however, the Court did note in a footnote that "looser forms of parody" and even satire could qualify as a fair use if the new work is highly transformative, minimally distributed, does not borrow much from the original, "or other factors" are present.[123] In this one footnote, the Court refutes Posner's suggestions at parody law reform by alluding to the possibility of fair use satires that use the original as a weapon as opposed to the target by creating a standard whereby a small taking of copyrighted material by a parodist (or even a satirist)

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119 Posner, *supra* n. 1, at 71.

120 *Id.*

121 *Id.* at 71-72.

122 *Id.* at 72.

123 *Campbell*, 510 U.S. at 581 n. 14.

could be deemed a fair use while a large taking would not be.[124] As to Posner's recommendation about allowing the parodist to take only as much as is necessary to achieve an effective parody, in *Campbell*, the Court appeared to agree with this standard, but held that what was necessary in a particular case could be quite extensive and includes "the heart [of the work] at which the parody takes aim."[125] In his concurrence in *Campbell*, Justice Kennedy more closely followed Posner's target/weapon distinction when he wrote, "[t]he parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)."[126] Nevertheless, Kennedy's target analysis would allow for broader fair use protection since Posner appears not to make the same broad allowance for works containing elements of parody and satire as Justice Kennedy does.

In the wake of *Dr. Seuss*, Judge Alex Kozinski, a Ninth Circuit judge, who did not serve on the panel that decided *Dr. Seuss*, recommended fundamental changes to the fair use analysis (with special attention to parodies) that would require a statutory overhaul. In addition to providing a hilarious parodic (or maybe satirical) summary of the *Dr. Seuss* case in the style of Dr. Seuss,[127] Kozinski observed that the fair use doctrine is a "blunt" instrument used in dealing with parodies because the work either is banned by injunction and never sees the light of day or is allowed to be published with absolutely no compensation to the original author for the parody's use of the original's copyrighted elements.[128] To solve this problem, Kozinski recommended that § 107 should not apply "when an infringing use contains enough original expression to qualify as a derivative work . . . ."[129] At the same time, Kozinski suggested that sections 502 and 503, which allow judges to grant injunctions to halt or restrain the publication of derivative works, should also be inapplicable for such infringing uses.[130] Instead, copyright injunctions should be granted "only when there is strong reason to believe that damages will be inadequate."[131] To ensure that the copyright

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124 *Id.*

125 *Id.* at 588.

126 *Id.* at 597 (Kennedy, J., concurring).

127 *See* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use*, 46 J. Copy. Socy. U.S.A. 513, 513-14 (1999) (explaining that "[t]hose lawyers for Seuss were so sly and so slick / that they wrote a complaint and filed it real quick: / 'We took a look. We saw a book. / We saw a book writ by a crook. / This crook had took our own book's look!").

128 *Id.* at 524-25.

129 *Id.* at 525.

130 *Id.*

131 *Id.*

holder would be properly compensated for a parody's use of the original's copyrighted elements, Kozinski would maintain the part of § 504(b) that allows the copyright owner to recover any profits of the infringer that are "attributable to the infringement," but now, in the absence of § 107, the parodist would be responsible for paying the copyright holder the portion of his profits that are attributable to the use of the original's copyrighted elements.[132] With regard to actual damages, Kozinski would also redraft § 504(b) so that it read: "'The copyright owner is entitled to recover the actual damages suffered as a result of the infringement, *except* those damages attributable to critical evaluation of the copyrighted work.'"[133]

Kozinski's suggestions about how copyright law should deal with parodies are grounded in a blend of economic and First Amendment principles. With regard to the First Amendment, Kozinski believes that it "suggest[s] that to the extent we can do without copyright injunctions, we should."[134] Kozinski is also uneasy about the ease with which copyright injunction can be granted and the silencing effect that those injunctions have. From an economic perspective, Kozinski is worried that parody law as it currently exists does not maximize utility since it fails to give authors and publishers any incentive to produce the kinds of famous works that inspire parody.[135] Kozinski believes that his proposed rule cures these problems by "stripping copyright owners of their right to control the uses to which their work is put, while strengthening their right to demand compensation for the value they create."[136] Applying his proposed rule to the *Dr. Seuss* case, Kozinski reasons that when Penguin came to ask for a license, it would have a substantial incentive to strike a deal in advance rather than "wonder what percentage of its [the parody's] profits a court in the future might choose to give away."[137]

Yet Kozinski's proposal has one substantial limitation when it comes to parodies that are unlikely to turn a profit attributable to their original elements. He writes,

> So even without the threat of injunction, commercial publishers would still be willing to produce infringing works only when they promised to create a lot more original value than they took from the copyright holder. In other words,

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132 *Id.* at 526.

133 *Id.*

134 *Id.* at 521.

135 *Id.* at 525.

136 *Id.* at 527.

137 *Id.*

> we have given publishers the incentive to infringe only when it is efficient. If this means *Dr. Juice* can't find a publisher, no big loss.[138]

For the author who cannot get his parody published because a publisher does not think that it is economically efficient for him to publish the parody, it certainly is a big loss. It is also a big loss for the entire reading public who will be denied a chance to read a parody because no publisher is willing to take a risk on the work, not because the work is not of publishable quality, but because the publisher is uncertain about how much of the work's potential success will be attributable to its use of non-copyrighted materials.

Kozinski's fair use reforms are also complicated by the fact that deciding which elements of a parody are infringing uses and which are not would make negotiations between publishers and copyright holders extremely difficult. For courts, this new legal landscape would probably be about just as complicated as the current application of the four fair use factors. Furthermore, the new fair use regime would likely act as a disincentive for current authors to produce parodies of copyrighted works, since they know that any work they produce will now not only have to clear the traditional hurdle of getting published, but also have to use the original minimally enough so that a publisher will feel confident that it can strike a deal with the copyright holder that will still allow the work to turn a profit. Many agree that parodies are socially desirable, but Kozinski's reforms could make the legal climate so difficult for authors that they cease to produce any parodies of works not in the public domain.

An alternative, more recent proposal for fair use reform, applying specifically to so called "re-writing cases" like *The Wind Done Gone*, suggests that courts should maintain the fair use analysis as traditionally applied, but also supplement it with additional factors to take into account at what point the original is in its term of copyright protection and the extent of rewards the copyright holder of the original has reaped from the copyright.[139] On top of these factors, the author would add an additional First Amendment inquiry which would give re-writers greater latitude when using elements of works in proportion to the extent of the work's presence "in the national consciousness."[140] The author reasons that Margaret Mitchell wrote *Gone With the Wind* in 1936, she and her heirs have reaped millions of dollars from the work, and *The Wind Done Gone* would do little to hurt the original's value.[141] Therefore, the author ar-

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138 *Id.*

139 *See* Note, *Gone With the Wind Done Gone: "Re-Writing" and Fair Use*, 115 Harv. L. Rev. 1193 (2002).

140 *Id.* at 1214.

141 *Id.* at 1212.

gues, it is hard to argue that Mitchell would be any less likely to write the book if she had known that more than 60 years after publication "she [or her heirs] would be unable to extract a licensing fee from Alice Randall . . . ."[142] On the other hand, the author reasons, if a book has only been in circulation for two years and the author has yet to earn a substantial amount of income through sales of the work or through derivative works, a court should be less likely to find fair use.[143] With regard to the additional First Amendment inquiry, the author suggests that certain works like *Gone With the Wind* are so ingrained in our culture and so iconic that fiction authors should "be afforded an opportunity to meet the book on its own terms."[144] The author admits that deciding which books fall into this iconic category would be challenging.[145]

These proposed fair use reforms would probably make parody cases even more complicated without adding any predictability to the system and might also tend to impinge on First Amendment rights. While *Gone With the Wind*, may be a good case in point to illustrate the usefulness of these proposed reforms, it is hard to see how these changes could apply to parodies of works that are even slightly less well-known. The four factor fair use test is complicated enough as it is and adding these additional elements will probably not help matters. For example how should courts evaluate a rewriting of a *Harry Potter* book from Voldemort's point of view? The series has netted Scholastic and J.K. Rowling millions, but the books are only at the very beginning of their term of copyright protection. Application of this rule would also infringe on First Amendment principles embedded in fair use doctrine because it would act as a form of censorship, curtailing an author's ability to create parodies of recent works or works that have not been very successful. The author's idea of creating special allowances for the parodists of books that achieve iconic status suffers from the same First Amendment concerns and deciding which books fit into iconic category inside or outside of a courtroom is likely to be fraught with difficulty.

An alternative, fairly extreme view is that "the parody defense has simply gone too far and is now permitting blatant rip-offs of valuable intellectual property."[146] Moore argues that any fair use protection of parodies cannot be grounded in the First Amendment because copyright law is on "equal footing

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142 *Id.*

143 *Id.*

144 *Id.* at 1215.

145 *Id.* at 1216.

146 Schuyler Moore, *What's So Funny About Parody?*, 11 UCLA Ent. L. Rev. 21, 21 (2004).

with the First Amendment."[147] Moore's equal footing argument is based on the fact that both the Copyright Clause, which authorizes Congress to pass laws protecting copyrights,[148] and the First Amendment are in the Constitution, and so they must be on equal footing. Moore's equal footing argument, however, is fundamentally flawed because it ignores the language of the First Amendment which commands, "Congress shall make no law . . . abridging the freedom of speech."[149] Thus, Congress cannot use the power delegated to it by the Copyright Clause (or any other part of the Constitution) to pass any law which abridges the freedom of speech. Moore does not provide any ideas about how to fix the problems he perceives with the fair use protection parodies receive under current law, but he does suggest that this protection has no basis in law and should be dramatically curtailed.[150]

V. PARODY FAIR USE REFORM: IS IT NECESSARY? IF SO, WHAT SHOULD THE COURTS OR CONGRESS DO?

Courts and commentators often conceive of fair use doctrine as integrating First Amendment principles into copyright law. Before discussing potential reforms to fair use parody law, it is worth examining whether copyright holders have any expectation to be treated fairly by fair use doctrine. In *Campbell*, the court, quoting an old Second Circuit case with approval held "[t]he fair use doctrine thus permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law was designed to foster."[151] Similarly, in a recent law review article on fair use, one scholar describes fair use doctrine as one of copyright's "safety valves" that is now the "last safe haven of copyright refugees" in a world where the idea/expression dichotomy is even "more nebulous" than fair use and "gets less

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147 *Id*. at 22.

148 U.S. Const. art. I, § 8, cl. 8 (explaining that Congress shall have the power "to 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").

149 U.S. Const. amend. I.

150 Moore, *supra* n. 147, at 22-23.

151 *Campbell*, 510 U.S. at 576 n. 8 (internal quotations, alterations, and citations omitted). It is possible to read this quote as providing protection for both copyright holders and alleged infringers, since one could argue that if blatant copying were allowed it would stifle creativity, as artists might lose the incentive to create without copyright protection. Yet the reference to "rigid application" implies that fair use doctrine is meant to be fair to the alleged infringer, since rigid application of the copyright would treat any copying, even minor copying for a non-commercial purpose, as an infringement.

play" than fair use in the current literature.[152] Absent from these descriptions is any notion that fair use is supposed to be fair to the copyright holder. It appears that the purpose of fair use is to be fair to the party accused by the copyright holder of infringement. However, the very title of Kozinski's article "What's So Fair About Fair Use" implies that fair use doctrine should, in addition to protecting the accused infringer, also protect the copyright holder, who already has the full force of the Copyright Act behind him. Nevertheless, regardless of whether traditional fair use principles support the idea that fair use should serve both parties to a copyright dispute, fair use parody jurisprudence as it stands allows for such a substantial amount of copying on the road to creating a parody that courts should, at least in this area of fair use doctrine, allow both the copyright holder and the alleged infringer to benefit from the protection of fair use.

A. Judicial Reforms

One issue currently plaguing parody jurisprudence is one of semantics. The legal use of the word parody in the fair use analysis bears little resemblance to the common meaning of the word. This disconnect in meaning inspires commentators like Moore to critique recent parody jurisprudence as distorting the meaning of the word parody beyond all reason. Courts could increase the coherence of fair use parody jurisprudence by substituting a different word that is more indicative of what the court is actually looking for. Although most would find 2 Live Crew's version of Pretty Woman to be at least mildly amusing, the Supreme Court made it very clear that the work's humorous component was not what made the song a fair use.[153] Instead, it was primarily the song's transformative character coupled with the fact that it commented on or criticized the original.[154] Both of these characteristics that won the song fair use protection are only tangentially related to the traditional definition of parody. Similarly, in its decision in *SunTrust Bank*, the Eleventh Circuit established that "judges need not set themselves up as arbiters of whether the product is funny."[155]

The parody defense, as it is defined by the courts, does not exist to protect funny works, but exists to protect transformative works that take copyrighted elements of original works and use them to comment on and/or criticize

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152 Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 544, 549, 550 (2004).

153 *Campbell*, 510 U.S. at 582.

154 *Id.* at 579.

155 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* vol. 4 § 13.05[C][2] (Matthew Bender & Co. 1978).

the original.[156] Since the work's critical and transformative component is what makes it eligible for fair use protection, the term courts use for the doctrine should clearly reflect these important criteria. Perhaps the term "fair use critique"[157] would be more indicative of what the courts are actually doing in fair use parody cases and help further the coherence of the doctrine.

Another problem with using the word parody in the fair use analysis is that it tends to bring non-legal actors into the fair use analysis, unnecessarily complicating an analysis that is already quite complex. This phenomenon was particularly apparent in the district court's decision in *SunTrust Bank*, in which the judge, Charles A. Pannell, in footnotes and the main text of the opinion, quoted extensively from experts in the literary and publishing fields about whether or not Randall's book was a parody and whether the book was a sequel or something new.[158] In his analysis of the first fair use factor, Pannell concluded that while the TWDG had some transformative and parodic elements, they were outweighed (in addition to the commercial character of TWDG) by the fact that the book was an attempt to create a sequel and provide social commentary on the antebellum south as opposed to GWTW.[159] In reaching this conclusion, Pannell seems to have been persuaded by the plaintiff's literary experts, particularly Joel Conarroe, president of the organization that awards Guggenheim Fellowships, that by using her book to critique GWTW and the antebellum south, Randall had crossed the bounds of parody.[160] Conarroe pointed out that "[a]s several serious writers of fiction and non-fiction have shown (for example Toni Morrison,[161] William Stryton, and C. Vann Woodward), one can write about the lives of slaves in the United States without reference to Margaret Mitchell's novel . . . ."[162] One way of reading the court's decision is that Judge Pannell got distracted by all the literary experts who had submitted affidavits and allowed their opinions to color his judgment about the character of Randall's work. Although both sides had their bevy of experts, the plaintiff's crew tended to be comprised of more scholarly types, while the defense's array of experts mostly consisted of authors.

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

157 Despite this suggestion, this article will continue to use the word "parody" in its legal-fair-use sense to avoid confusion.

158 *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp.2d 1357, 1373-78 (N.D. Ga. 2001), *aff'd*, 268 F.3d 1257 (11th Cir. 2001).

159 *Id.* at 1377.

160 *Id.* at 1374 n. 11.

161 Ironically Morrison served as one of Houghton Mifflin's experts in defense of Randall's work.

162 *Id.* at 1376 n. 14.

It is noteworthy that in its reversal of the district court's opinion, the Eleventh Circuit barely paid any attention to the expert affidavits present in the record, and, when it did, it referred to them as "'experts,'" implying that the court was capable of determining whether or not the book was a fair use by itself.[163] Indeed, throughout its opinion the court, instead of quoting what experts said about TWDG and GWTW, the court engaged in a close textual and legal analysis of the two works guided by the four fair use factors.[164] The Eleventh Circuit's approach is far preferable to the district court's because the determination of whether or not a work is a fair use parody is most definitely a legal question, not a literary one. As the Supreme Court has held, the parodic element must be reasonably perceivable.[165] Federal judges do not need literary experts or experts of any kind to tell them what is reasonably perceivable.

B. Statutory Reforms

These two judicial reforms, replacing the term parody with another word and eliminating the reliance on expert opinions, however, do not get to the heart of a more fundamental question: should the law change to address the fact that parodists now have the explicit permission of the Supreme Court to take substantial copyrighted elements from the targets of their parodies? To put the question another way: should copyright holders be entitled to any compensation from the parodists of their works if the parodies are legal fair uses? One response to this question from an economic perspective is that the vast majority of works parodied are wildly successful, allowing the copyright holder to tap the work for tremendous amounts of money. Thus, the fact that the copyright holder does not receive any compensation from parodists will not substantially affect an author's motivation to produce the kinds of creative works that are likely to be so successful that someone will want to parody them. From a First Amendment perspective, one response is that by not allowing for fair use paro-

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163 *See SunTrust Bank*, 268 F.3d at 1268 n.23 (explaining "[t]he benefit of our approach to 'parody,' which requires no assessment of whether or not a work is humorous, is apparent from the arguments made by the parties in this case. SunTrust quotes Michiko Kakutani's review of TWDG in the New York Times, in which she states that the work is 'decidedly unfunny.' Houghton Mifflin, on the other hand, claims that TWDG is an example of 'African-American humor,' which, Houghton Mifflin strongly implies, non-African-American judges are not permitted to evaluate without assistance from 'experts.' Under our approach, we may ignore Houghton Mifflin's questionable argument and simply bypass what would always be a wholly subjective inquiry.").

164 *See id.* at 1269-74.

165 *Campbell*, 510 U.S. at 581.

dies, the law is stifling and censoring future authors who seek to comment and criticize a work directly on its own terms. This response, however, is vulnerable to the criticism that there are other ways that artists can comment on and critique works that do not involve the taking of copyrighted elements. However, as the Supreme Court has held, parodies are particularly effective at conveying their message of critique because of their integration of elements of the original.

This brief, thrust-and-parry survey of only some of the many issues at play reveals that there are no easy answers as to how to balance the First Amendment's free speech values with copyright law's long-term grant of exclusive rights to the copyright holder. Of the proposed changes mentioned in Part III, *supra*, Kozinski's seems to balance these conflicting concerns most ably. One way to refine his proposed rules[166] would be to not do away with the fair use factors as he suggests but keep them and allow one of three possible outcomes: (1) fair use; (2) semi fair use—the author owes some amount of compensation to the copyright holder that the court will determine; (3) not a fair use—infringement. Works qualifying for category (1) would exhibit the characteristics of a fair use parody as it is now conceived but would do so to a very large extent. For example, a song that only takes a tiny bit of the original, but uses it to clearly criticize the original, and is highly transformative. Works qualifying for category (2), which would encompass a broad array of works, would probably cover all the major parody cases discussed above, after and including *Campbell*. In such cases, courts would have to make an assessment, as

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[166] It is important to note at the outset, that the suggestions that follow are only meant to apply to commercial parodies. Non-commercial parodies would still be subject to the traditional statutory fair use doctrine. It should also be noted that the typical commercial parody case differs from the classic fair use example, a book review that quotes from a copyrighted text in its criticism of a just-released publication. Even though both a book review and a commercial parody are commercial uses, a parody is a commercial use to a much greater degree, since they are usually designed to appeal to a very broad audience and make large profits. The categorization of works as commercial or non-commercial is too simplistic because it ignores the substantial difference between the commercial character of a parody of Gone With the Wind promoted by a big-name publisher and the commercial character of the periodical the New York Review of Books (probably the most commercial of any book review since the publication consists almost entirely of book reviews in contrast to newspapers and certain magazines, which rely minimally on book reviews to support their revenues). Even a scholarly work of literary criticism that covers a particularly famous author, say Richard Orwell, and quotes extensively from Orwell's works in the course of its discussion is not nearly as commercial as the typical commercial parody. Usually works of literary criticism are published by small academic presses and are not designed to appeal to a broad audience. In contrast, one who parodies a work like Gone With the Wind, Dr. Seuss, or Pretty Woman with a major record label or publisher is probably doing so at least partly to turn a profit on the original's popularity and profitability.

they do in the typical infringement case, about how much of the parody's profit was due to its use of the original's copyrighted elements. Works fitting into category (3) would exhibit extensive copying and little transformation and would thus be devoid of any protection whatsoever. Category (3) works would be treated just as if the parodist had copied the original verbatim even if that was not actually the case. Although it is hard to attach any kind of empirical figures to the fair use test, assuming it was possible and 100 was equal to verbatim copying, works in category (1)—totally fair use protected works—would score in the range of 1-24; category (2) works—those subject to profit apportionment—would score 25-75; and category (3) works— those treated as verbatim copying—would score 76-100.

In addition to these changes, as Kozinski suggests, injunctions should only be granted "when there is strong reason to believe that damages will be inadequate."[167] In this legal climate the copyright holder and the parodist will have tremendous incentives to work out a licensing arrangement because now that the relatively quick injunction is unavailable, neither party will want to risk protracted litigation and all it entails. Furthermore, if a copyright holder does decide to seek an injunction under the new damages-are-inadequate standard and he fails, the parodist should be able to publish the parody and not compensate the copyright holder regardless of how many copyrighted elements of the original the parodist used in his parody.[168] Also, if a copyright holder brings a damages action seeking compensation for the parodist's use of the original's copyrighted elements once the work is already published and the allegedly infringing parody is found to be a category (1) full-fledged fair use, the copyright holder should have to pay the parodist triple his attorneys' fees. The same rule should apply to supposed parodists in damage actions if their fair use is found to be a category (3) non fair use. They would have to pay the copyright holder triple his attorneys' fees.

This legal landscape would set up a strong incentive for parodists to take minimally and transform substantially, so that they would fall into a category (1) use. Even if authors opted to take a little bit more and transform a bit less, they would likely still fall into a category (2) and it would be possible for the author's publisher and the copyright holder to work out a licensing agreement. The copyright holder would have an incentive to work out such an agreement in order to recover money and avoid going through protracted litiga-

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167 Kozinski & Newman, *supra* n. 127, at 525.

168 In this situation the parodist would not be allowed to take additional copyrighted elements after the injunction was denied unless he was prepared to compensate the copyright holder for their use.

tion in which the damage calculation is far from certain.[169] For the same reasons, publishers of parodic works that would fall into category (2) would also want to work out a deal and avoid being sued later. This regime would also deter artists from composing works that would fall into category (3). Although these works would thus be effectively censored from the commercial field, there is not a strong First Amendment principle that would support their publication. From a First Amendment perspective, these works, since they are close to if not entirely verbatim copying, add very little to the marketplace of ideas and by definition would only be providing very little if any comment or criticism on the original work.[170] This strongly unfavorable climate for close to verbatim copying would not, however, completely silence such authors since they might be able to squeeze the book into fair use doctrine if it were not used commercially but used in a non-profit educational context.

By substantially limiting injunctions to cases where damages are likely not to be adequate,[171] the law would facilitate the entry of parodies into the marketplace of ideas regardless of how much they have taken from the original. This change would also substantially eliminate prior restraint concerns (a serious First Amendment matter), which are currently at issue whenever a court issues a preliminary injunction in a copyright case. Finally, the damages regime gives further incentives for both the copyright holder and the parodist to act in ways that make it more likely that First Amendment concerns will be avoided and that parties will work out their disputes in licensing arrangements as opposed to full-blown litigation.

There are numerous possible critiques of these proposals for parody fair use reform. One criticism would question the necessity and prudence of creating a whole new statutory scheme to address a relatively minute area of copyright law. Nevertheless, as courts have recognized, there are certain characteris-

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169 If the copyright holder refused to offer a reasonable fee to the parodist (or to deal at all) because of the copyright holder's dislike of the parody, the work would still get published now that injunctions are very unlikely to issue, unless the parodist's publisher thinks publication is too risky.

170 It should be noted that Rebecca Tushnet argues that verbatim copying whether for a parodic or other purposes is consistent with First Amendment values and that parody jurisprudence has created a strong preference for transformative works, despite the fact that non-transformative works are just as worthy of protection from a First Amendment perspective. Tushnet, *supra* n. 153, at 537. However, in order to illustrate how copyright fails to take into account certain free speech values, Tushnet uses several examples that would probably qualify as fair uses under current law. *See id.* at 568-81.

171 It is hard to imagine too many copyright cases in which damages would be insufficient, so it is likely that under this regime judges would issue very few if any such injunctions, which is the primary objective of this proposal.

tics of commercial parodies that differ substantially from other kinds of potential fair uses.[172] Instead of forcing the courts to use the same four-factor test for each kind of fair use, there is some sense to developing different statutory regimes specifically designed to address particular kinds of potential fair uses. Another basis of critique would question how the copyright holder and the parodist are supposed to conduct licensing agreement negotiations before there is any case law to guide their bargaining. However, copyright holders and publishers already have substantial experience in working out other kinds of licensing agreements so they will be able to rely on this experience until there is case law specifically addressing how profits will be apportioned in category (2) cases.

Still another criticism would focus on the fact that these proposals leave a good chunk of the four-factor test intact, which does not help to improve the consistency or predictability of fair use decisions. Because of the nature of parodies, it is very difficult to arrive at any bright-line rules. One improvement these proposals have over the current system is giving judges the discretion to choose between a variety of different responses. Giving judges this option will result in less strained decisions in close cases. Instead of infringement or fair use, judges will now be able to apportion damages in whatever way they see fit in addition to still having infringement and fair use as options.

VI. CONCLUSION

Although the Supreme Court's decision in *Campbell* rescued the genre of commercial parody from the serious threat of injunction, the post-*Campbell* jurisprudence appears to be swinging too far in the other direction to the point where claiming the fair use parody defense can immunize substantial takings of copyrighted material. Although commercial parodies are deserving of protection from a First Amendment perspective, their strong commercial status renders their position in the realm of copyright law decidedly more suspect. In order to solve this problem, the law should change to allow and encourage parodies that take minimally and transform substantially to continue to receive broad protection, while giving copyright holders compensation for parodies that take some more and transform less. The law also should deter commercial parodies that take substantially and transform minimally.

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[172] *See also supra* n. 167.