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## Unfair use: The Lack of Fair Use Protection for Satire Under § 107 of the Copyright Act

Adriana Collado

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# NOTES

## UNFAIR USE: THE LACK OF FAIR USE PROTECTION FOR SATIRE UNDER § 107 OF THE COPYRIGHT ACT

*Adriana Collado\**

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### I. INTRODUCTION

Shakespeare did it.<sup>1</sup> Jonathan Swift did it.<sup>2</sup> Mark Twain did it, too.<sup>3</sup> The Simpsons do it all the time, and *Saturday Night Live* could not exist

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\* J.D. Candidate, University of Florida Levin College of Law, 2004. I dedicate this Note to my family and my fiancé, John Lloyds. I would not be here without their encouragement, love, and support.

1. Michael C. Albin, *Beyond Fair Use: Putting Satire in its Proper Place*, 33 UCLA L. REV. 518, 521 (1985).

2. *Id.*

3. *Id.*

without doing it. Parody and satire have existed and thrived through the ages, and their subjects have ranged from classical epics to soap operas and current events.<sup>4</sup> Criticism and comment through parody and satire stimulate society to think critically while, hopefully, providing a good laugh along the way. Courts have recognized the value of parody in particular, and have provided “breathing room” for it through the application of the Fair Use Doctrine.<sup>5</sup>

The Fair Use Doctrine, section 107 of the Copyright Act, provides in part that a determination of fair use requires analysis of four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the copyrighted work used in relation to the copyrighted work as a whole; and (4) the effect of the secondary use upon the potential market for or value of the copyrighted work.<sup>6</sup> The Fair Use Doctrine provides secondary authors and creators with the privilege of using copyrighted material in a reasonable manner without the copyright holder’s consent.<sup>7</sup> Without fair use, the goal of copyright law — the promotion of intellectual stimulation and knowledge for public benefit<sup>8</sup> — would be stifled because copyright holders could effectively silence would-be critics and others by denying them use of their copyrighted works. The Fair Use Doctrine thus strives to balance copyright holders’ rights with the objectives of copyright law.

While courts have interpreted the Fair Use Doctrine to provide protection for parodies, courts have not accorded satire the same privilege.<sup>9</sup> This distinction between parody and satire, however, creates an unnecessary limitation on the creation of satirical works, is contrary to the goal of copyright law, and raises important First Amendment concerns.<sup>10</sup>

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4. *Id.* at 518.

5. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

6. 17 U.S.C. § 107 (1995).

7. Mary L. Shapiro, *An Analysis of the Fair Use Defense in Dr. Seuss Enterprises v. Penguin*, 28 GOLDEN GATE U. L. REV. 1, 7 (1998).

8. See Gregory K. Jung, *Dr. Seuss Enterprises v. Penguin Books*, 13 BERKELEY TECH. L.J. 119, 123-24 (1998).

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

10. See Jung, *supra* note 8, at 119-20.

## II. PARODY VERSUS SATIRE

### A. *What Is the Difference?*

Courts often had difficulty distinguishing between parody and satire because “parody often shades into satire . . . [and] a work may contain both parodic and nonparodic elements.”<sup>11</sup> Then, in *Campbell v. Acuff-Rose Music, Inc.*, the U.S. Supreme 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 works.”<sup>12</sup> Indeed, the wittiest parodies target not only the parodied material, but also the societal standards of the audience that made the original popular.<sup>13</sup> In addition, *Campbell* defined satire as “commentary [that] has no critical bearing on the substance or style of the original composition. . . .”<sup>14</sup> In subsequent decisions courts have used *Campbell*’s definitions of parody and satire to distinguish between the two genres.<sup>15</sup>

### B. *Judicial Differentiation and Interpretation of Parody and Satire in Fair Use Cases*

Courts have interpreted *Campbell*’s definitions of parody and satire to mean that, while a parody uses elements of a prior work to target the prior work itself, satire uses elements of a prior work to target some other aspect of society.<sup>16</sup> This distinction has led courts to provide fair use protection for parody because, as the *Campbell* Court stated, “[p]arody needs to mimic an original to make its point . . . satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>17</sup>

Courts have reasoned that, because copyright owners are not inclined to grant parodists permission to use their copyrighted work in a manner that holds the work up to ridicule or criticism, fair use is necessary to advance the goals of copyright law and to prevent censorship.<sup>18</sup> Courts, however, deem that copyright owners are likelier to allow use of their works in satire because satires do not target the copyrighted works

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11. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

12. *Id.* at 580.

13. Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y U.S.A. 546, 554 (1998).

14. *Campbell*, 510 U.S. at 580.

15. See *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

16. See Ochoa, *supra* note 13, at 557.

17. *Campbell*, 510 U.S. at 580-81.

18. See Jung, *supra* note 8, at 121.

directly.<sup>19</sup> Thus, courts have reasoned satires do not need fair use protection in the same way as parodies.<sup>20</sup>

### III. PRESENT STATE OF THE LAW

Modern application of the Fair Use Doctrine to parody and satire has been shaped by two cases: *Campbell v. Acuff-Rose Music, Inc.*<sup>21</sup> and *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*<sup>22</sup>

#### A. *Campbell v. Acuff-Rose, Inc.*

In *Campbell*, the U.S. Supreme Court considered whether the petitioners' parody of Roy Orbison's well-known song "Oh, Pretty Woman" was a fair use.<sup>23</sup> The petitioners' song copied the original's first line but then substituted the remaining lyrics with new ones that alluded to sexual relations with prostitutes.<sup>24</sup> The petitioners argued their song was a parody and, as such, qualified as a fair use under section 107 of the Copyright Act.<sup>25</sup>

A unanimous Court found that parody, being a form of comment or criticism qualified as a fair use.<sup>26</sup> In reaching this decision, the Court analyzed the petitioners' song under the four fair use factors.<sup>27</sup> In examining the first factor, the purpose and character of the use, the Court determined the secondary work must be transformative, "altering the first [work] with new expression, meaning, or message . . . ."<sup>28</sup> Finding parodies are transformative due to their very nature, the Court added "[t]he threshold question [in determining fair use] . . . is whether a parodic character may reasonably be perceived."<sup>29</sup> Stretching this broad standard even further, the Court indicated that when the secondary work poses little or no risk of market substitution for the original work, even a purely

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19. *See id.*

20. *See id.*

21. *Campbell*, 510 U.S. at 569.

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

23. *Campbell*, 510 U.S. at 571-72.

24. *Id.* at 582.

25. *Id.* at 572.

26. *Id.* at 579.

27. *Id.* at 578.

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

29. *Id.* at 579, 582.

satirical creation, which does not comment on the original, could receive fair use protection.<sup>30</sup>

The Court quickly dispensed with its analysis of the petitioners' work under the second fair use factor, the nature of the copyrighted work.<sup>31</sup> Under this factor, creative works receive broader copyright protection than factual works.<sup>32</sup> Accordingly, it is more difficult to establish a fair use copying of a creative work than a factual work.<sup>33</sup> For all intents and purposes, however, the Court diminished the importance of this factor in the case of parodies because the purpose of parodies is to copy known works in order to make their point.<sup>34</sup>

Under the third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the Court reasoned that because parody's humor springs from its imitation of the original, the parodist might use as much of the copyrighted work as necessary to "conjure up" the original.<sup>35</sup> As such, parodists may need to copy the copyrighted work's most distinctive feature(s) so the audience will recognize the copyrighted work as the target of the parody.<sup>36</sup>

Finally, the Court analyzed the fourth fair use factor, the effect of the use on the potential market for or value of the copyrighted work.<sup>37</sup> Here, the Court found that parodies of creative works usually serve different market functions than the originals.<sup>38</sup> Therefore, the likelihood of a parody displacing or substituting the original in the marketplace was not likely.<sup>39</sup>

The Court examined the Fair Use Doctrine carefully, and rejected the notion that any one of the fair use factors, by itself, would create a presumption against fair use.<sup>40</sup> In doing so, the Court seemingly left the door open for fair use protection for satiric works. That door was slammed shut by the Ninth Circuit, however, in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*<sup>41</sup>

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30. Jason M. Vogel, *The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in Dr. Seuss Enterprises v. Penguin Books, USA, Inc.*, 20 CARDOZO L. REV. 287, 292 (1998) (citing *Campbell*, 510 U.S. at 581 n.14.)

31. *Id.* at 293.

32. *Id.* at 293-94.

33. *See id.* at 294.

34. *Id.*

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

36. *Id.*

37. *Id.* at 590.

38. *Id.* at 591.

39. *Id.*

40. *See Jung, supra* note 8, at 126.

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

### B. Dr. Seuss Enterprises v. Penguin Books USA, Inc.

Although the Ninth Circuit cited *Campbell* when deciding *Dr. Seuss*, it did not follow *Campbell*'s interpretation of the Fair Use Doctrine.<sup>42</sup> In deciding whether the appellants' use was fair, the circuit court based its ruling on the fact the appellants' creation was a satire, not a parody.<sup>43</sup>

Appellants, Penguin Books, and Dove Audio, Inc., argued a poetic account of the O.J. Simpson double-murder trial entitled "The Cat NOT in the Hat! A Parody by Dr. Juice," did not infringe on Dr. Seuss's copyright.<sup>44</sup> Appellants argued that the author had only taken as much of Dr. Seuss's work as necessary to "conjure up" the original and that Dr. Seuss's "The Cat in the Hat" was the object of the parody.<sup>45</sup>

The Ninth Circuit analyzed the appellants' use under the four fair use factors.<sup>46</sup> To analyze the purpose and character of the appellants' use, the Ninth Circuit turned to *Campbell*'s definitions of parody and satire.<sup>47</sup> The circuit court determined that, in order to qualify as a parody and as a fair use, the appellants' work had to target Dr. Seuss's creations directly.<sup>48</sup> The appellants could not merely use Dr. Seuss's style to comment on the O.J. Simpson trial without targeting Dr. Seuss's work.<sup>49</sup>

The circuit court found that, although "The Cat NOT in the Hat!" mimicked Dr. Seuss's style, it did not ridicule or comment on it.<sup>50</sup> Thus, the circuit court did not consider the appellants' work to be a parody.<sup>51</sup> Furthermore, the circuit court stated the appellants' work was non-transformative because the appellants merely used Dr. Seuss's style and illustrations to retell the Simpson saga, without adding new expression, meaning, or message to Dr. Seuss's works.<sup>52</sup> As such, the circuit court found the first fair use factor weighed in favor of Dr. Seuss.<sup>53</sup>

Although the circuit court acknowledged the second fair use factor is not "terribly significant in the overall fair use balancing . . ." the circuit court found "the creativity, imagination and originality embodied in "The Cat in the Hat" and its central character tilt[ed] the scale against fair use."<sup>54</sup>

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42. See Jung, *supra* note 8, at 127.

43. *Id.*

44. See *Dr. Seuss*, 109 F.3d at 1397.

45. *Id.*

46. *Id.* at 1399.

47. *Id.* at 1400.

48. See *id.*

49. See *Dr. Seuss*, 109 F.3d at 1401.

50. *Id.*

51. See *id.*

52. *Id.*

53. See *id.*

54. *Dr. Seuss*, 109 F.3d at 1402.

Under the third fair use factor, the circuit court scrutinized the appellants' justification for copying Dr. Seuss's works, and noted "the extent of permissible copying varies with the purpose and character of the use."<sup>55</sup> The appellants stated that the book's author used "The Cat in the Hat" to retell the Simpson story because of the parallels between "The Cat in the Hat" and the Simpson drama.<sup>56</sup> The circuit court, however, was unconvinced by this argument and found that the third factor weighed in favor of Dr. Seuss.<sup>57</sup>

Lastly, the circuit court considered the fourth factor, the effect of the appellants' use on the potential market or value of Dr. Seuss's works.<sup>58</sup> Here, the circuit court found that because the appellants' use was non-transformative and commercial, a market substitution was more probable, and therefore market harm could be more easily inferred.<sup>59</sup>

Holding that "The Cat NOT in the Hat!" was not a parody, and thus not a fair use, the Ninth Circuit unnecessarily narrowed the *Campbell* holding and set a precedent inconsistent with the goals of copyright law and with the *Campbell* decision itself.

### C. Summary of What Courts Hold Today

In *Campbell*, the Supreme Court stated no single factor could create a presumption against fair use.<sup>60</sup> In doing so, the Court seemed to expand the fair use defense by focusing on *why* the Fair Use Doctrine was created, instead of adopting a rigid application of the four factors.<sup>61</sup>

In *Dr. Seuss*, however, the Ninth Circuit focused on the distinction between parody and satire and ruled satire would not receive fair use protection.<sup>62</sup> This decision thus implies that satires are not transformative, and that defendants will not have any justification for using a copyrighted work in this way.<sup>63</sup> As a result, the Ninth Circuit's decision in *Dr. Seuss* "constricts a humorist's ability to legally borrow material from earlier

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55. *Id.*

56. *Id.* Appellants stated that they chose to use Seuss's "The Cat in the Hat" because, like the children in that story, Nicole Brown and Ron Goldman were surprised by a "cat" (O.J. Simpson) who committed immoral acts that were contrary to authority. Additionally, Simpson's attorneys imposed "tricks" on the public to get them to buy Simpson's defense, leaving a moral dilemma for the public to deal with. The circuit court did not buy this explanation and characterized it as "pure schtick." *Id.* at 1402-03.

57. *Id.* at 1403.

58. *Id.*

59. *Dr. Seuss*, 109 F.3d at 1402-03.

60. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

61. *See Jung, supra* note 8, at 119.

62. *See id.*

63. *See Ochoa, supra* note 13, at 589.

works, seemingly rejecting the broad protection of parodic authorship championed by the Supreme Court in *Campbell*.<sup>64</sup>

#### IV. WHAT THE LAW SHOULD BE

*Dr. Seuss's* denial of fair use protection for satires will have a far-reaching and negative impact on the entertainment and publishing industries, and arguably, the public at large.<sup>65</sup> Because of the interstate nature of these industries, creators of nationally distributed "works are subject to the Ninth Circuit's denial of fair use for satires."<sup>66</sup> Consequently, artists, authors, comedians, and other satirists may be exposed to liability for their creations.<sup>67</sup> In turn, this may have a chilling effect on the creation and distribution of humorous works and will promote insidious forms of censorship.<sup>68</sup>

##### A. First Amendment Considerations

The Ninth Circuit's holding in *Dr. Seuss* can potentially be used by copyright owners to censor critical, offensive, or comedic speech to the detriment of the public. The Ninth Circuit's distinction between parodies that mock copyrighted works and satires that use copyrighted works to mock something else, allows copyright holders to deny licenses to satiric works with which they disagree.<sup>69</sup> For example, satirists that propose using copyrighted works to criticize something else in an offensive manner are not likely to be granted licenses because copyright owners may fear the use will reflect negatively on their works.<sup>70</sup>

*Dr. Seuss* illustrates this point.<sup>71</sup> *Dr. Seuss Enterprises'* motivation for enjoining publication of "The Cat NOT in the Hat!" was to avoid having the wholesome reputation of *Dr. Seuss's* works associated with the sordid events of the Simpson case.<sup>72</sup> Had the authors of the book copied *Seuss's* works for another, less controversial purpose, it is likelier *Dr. Seuss Enterprises* would have granted a license for the use.

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64. Vogel, *supra* note 30, at 303.

65. *See id.* at 287.

66. *Id.* at 287-88.

67. *Id.*

68. *Id.*

69. *See* Ochoa, *supra* note 13, at 611.

70. *See* Vogel, *supra* note 30, at 313.

71. *Id.*

72. *Id.*

*Dr. Seuss* demonstrates that leaving creation of satiric works at the mercy of copyright holders ensures the works will be “less controversial, provocative, and innovative.”<sup>73</sup> This result neither encourages free expression nor promotes dissemination of information.

Although creators may argue that use of their works in satires which are controversial, distasteful, or offensive could lead to tarnishment by association,<sup>74</sup> reputational harm is not an interest that copyright law is designed to protect.<sup>75</sup> When authors or artists gain fame and fortune because their work has become popular or part of the social vernacular, they should be prepared to withstand unfavorable comments or uses of their works. Indeed, satiric use of a work is often a sign an artistic or literary creation has achieved public recognition.

Furthermore, tarnishment by association can easily be remedied by requiring satirists to label their new works as unauthorized satires. If satirists label their works accordingly, the public will be on notice the satiric works do not originate from the original authors or creators. Thus, the public will not associate the original authors with the satires, and the authors’ reputations will remain intact in the public’s mind.

Trademark holders are granted a cause of action for tarnishment to protect their product or service marks from being associated with inferior or distasteful products or services. Because the public often uses or purchases a product or service based on its reputation, status, or goodwill, protection against tarnishment is necessary for trademarks. Conversely, the public arguably does not consider the reputation of an author or creator when purchasing or using a creative work. Usually, the consumer’s major consideration is whether the work appeals to his taste, intellect or emotion. Accordingly, protection from tarnishment is not necessary in copyright law.

### B. Satire as a Fair Use

In *Campbell*, the Supreme Court rejected the notion that any one of the four fair use factors creates a presumption against fair use.<sup>76</sup> In *Dr. Seuss*, however, the Ninth Circuit focused on the first factor, the purpose and character of the use, and found satires were non-transformative works.<sup>77</sup>

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73. See Jung, *supra* note 8, at 133.

74. Tarnishment is a form of trademark dilution in which a junior mark’s similarity to a famous mark causes consumers to mistakenly associate the famous mark with the junior user’s inferior product or service. 74 AM. JUR. 2D *Trademarks and Tradenames* § 116 (2003).

75. Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and Campbell v. Acuff-Rose Music, Inc.*, 69 S. CAL. L. REV. 767, 783-84 (1996).

76. Jung, *supra* note 8, at 126.

77. *Id.* at 127.

In finding satires were non-transformative, the Ninth Circuit employed the first factor to create a presumption against fair use for satires.<sup>78</sup> Consequently, the circuit court failed to consider each factor thoroughly and simply “went through the motions” in examining each factor.

Moreover, the Ninth Circuit’s finding that satires are non-transformative is incorrect because a satire can be as transformative as any parody.<sup>79</sup> Just because the object of a satire’s criticism is something other than the copyrighted work does not mean that the satirist’s creation lacks innovation or originality.<sup>80</sup>

Furthermore, in considering the fourth fair use factor, the Ninth Circuit did not address how Dr. Seuss would be hurt by a work clearly labeled as a parody.<sup>81</sup> Instead, the circuit court held that because “The Cat NOT in the Hat!” was non-transformative, market substitution was more certain and harm could more easily be inferred.<sup>82</sup> However, it seems unlikely readers would regard “The Cat NOT in the Hat!” as a substitute for the original, especially since the works target different audiences. While the original Dr. Seuss work is sold in the children’s section of the bookstore, “The Cat NOT in the Hat!” would likely be sold in the adult humor section. Furthermore, the fact “The Cat NOT in the Hat!” was labeled as a parody on its front cover and the author’s name was clearly depicted reduced the possibility readers would confuse or substitute the secondary work for the original.

The *Campbell* Court allowed room for fair use protection for satires when there is “little or no risk of market substitution. . . .”<sup>83</sup> Consequently, the Ninth Circuit should have provided fair use protection for “The Cat NOT in the Hat!” because it was unlikely it would serve as a market substitute for the original work.

### C. Economic Considerations

Economic analysis of the Fair Use Doctrine provides ample reasons for extending fair use protection to satires.<sup>84</sup> The market failure theory, proposed by Professor Wendy Gordon of Boston University School of Law, states fair use should be implemented when “the incentive and dissemination purposes of copyright conflict and create a market failure.”<sup>85</sup>

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78. *Id.*

79. *Id.*

80. *Id.*

81. *See Jung, supra* note 8, at 130.

82. *Id.* at 129-30.

83. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 n.14 (1994).

84. *See Jung, supra* note 8, at 125.

85. *Id.*

Usually, a copyright holder will license the use of his work if the income he could earn by exploiting the work himself would be less than what the purchaser is offering to pay for the use of the work.<sup>86</sup> In some instances, however, a copyright holder will refuse to license a work even if it is economically advantageous to do so.<sup>87</sup> The copyright holder may not want his work to be criticized or associated with a certain viewpoint or person, or he may want to keep information from the public.<sup>88</sup> In these cases, a market failure occurs and, “because the free flow of information is at stake, a strong case for fair use can be advanced.”<sup>89</sup>

Alternatively, other commentators, such as Julie Bisceglia, argue fair use protection for satires is unnecessary because if a copyright holder refuses to license his work to a satirist, the satirist can find other material to use.<sup>90</sup> Proponents of this argument justify this position by reasoning that, because satires do not target any particular copyrighted work, satires are not dependent on the use of any particular work.<sup>91</sup>

This argument, however, fails to consider that certain satiric uses are likely to be universally offensive to copyright holders.<sup>92</sup> In *Dr. Seuss*, for example, Dr. Seuss Enterprises did not want its creations to be associated with the scandalous Simpson trial.<sup>93</sup> It is reasonable to presume other copyright holders, such as Disney, Warner Brothers, or Hanna-Barbera, would also be unwilling to license their respective creations for this purpose.<sup>94</sup> Indeed, it is unlikely any copyright holder of a children’s cartoon character would be willing to license his creation for a use he deems unsavory, offensive, or inappropriate.<sup>95</sup>

Additionally, the assumption a satirist can “shop around” for copyrighted works to employ in his satire ignores the nature of the creative process.<sup>96</sup> A satirist’s ideas are often intertwined with their underlying source material.<sup>97</sup> Thus, if a satirist is refused the use of a copyrighted work, he will be unable to apply his idea to a different source without

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86. *Id.*

87. *Id.*

88. *Id.* at 125-26.

89. Jung, *supra* note 8, at 126.

90. See Vogel, *supra* note 30, at 312.

91. *Id.*

92. See *id.* at 313.

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

94. Vogel, *supra* note 30, at 314.

95. *Id.* at 314-15.

96. *Id.* at 315.

97. *Id.*

materially altering the effect, purpose, or message of the work.<sup>98</sup> Consequently, the idea may not be created at all, thus generating a result is contrary to the goals of copyright law.<sup>99</sup>

Another concern voiced by critics is that allowing fair use protection for satire allows those who are unable or unwilling to generate their own creations the ability to use copyrighted works “to get attention or to avoid the drudgery in working up something fresh . . . .”<sup>100</sup> Although distinguishing between genuine creators and free riders can sometimes be difficult, the transformativeness requirement under the first fair use factor helps weed out the free riders.<sup>101</sup>

Courts, on a case-by-case basis, could examine whether a work is transformative enough to merit fair use protection. In performing this analysis, courts would not be judging the artistic merit or quality of the work;<sup>102</sup> rather, they would only be judging how much the work changes the copyrighted material or imparts it with new meaning or purpose. Therefore, even if free riders attempt to label their works as satires to gain protection under the Fair Use Doctrine, courts, by analyzing the transformativeness of the work, will be able to enjoin these infringing uses.

Furthermore, providing fair use protection for satires makes sense because satires do not displace the copyrighted works in the marketplace, and thus, do not provide a disincentive to original creators.<sup>103</sup> In fact, it is arguable that satiric works *increase* demand for the copyrighted works.<sup>104</sup> The satire may revive interest in a copyrighted work that is no longer as popular as it once was. After all, satires are not funny if the public does not recognize the relationship between the satires and the works they are copying.<sup>105</sup>

As Robert P. Merges has proposed,<sup>106</sup> “[a]s long as the [satirist] offers a royalty to the copyright holder that will adequately compensate her, we should not sanction refusals to license. This is so because in these cases we know that the refusal to license is based on a noneconomic motive, and we

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98. *Id.*

99. Vogel, *supra* note 30, at 315.

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

101. *Id.* at 586.

102. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (stating that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [artistic creations] . . .”).

103. Michael A. Einhorn, *Miss Scarlett's License Done Gone!: Parody, Satire, and Markets*, 20 *CARDOZO ARTS & ENT. L.J.* 589, 604 (2002).

104. *See* Albin, *supra* note 1, at 545.

105. *See id.*

106. Professor of Law, University of California, Berkeley.

know that copyright law's preference for dissemination is too strong to give any credence to such motives in such cases.<sup>107</sup>

## V. POSSIBLE SOLUTIONS/COMPROMISES

In *Campbell*, the Supreme Court defined satire as "commentary."<sup>108</sup> In turn, the Fair Use Doctrine states "fair use of a copyrighted work . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright."<sup>109</sup> If *Campbell's* definition of satire is interpreted literally, it is arguable that satire, as a commentary or critical work, is already covered under the Fair Use umbrella. The fact the Supreme Court has defined satire as a form of comment adds credibility to this argument because commentary is one of the uses specifically enumerated in the Fair Use Doctrine.<sup>110</sup>

Should that argument fail, however, there are other possible ways to encourage satiric uses while preventing censorship by copyright holders. One possible solution is to implement a "fared use" system of anti-censorship contracts, as suggested by Tom W. Bell.<sup>111</sup> In his article, "Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine,"<sup>112</sup> Bell endorses allowing secondary users and copyright owners to option out of copyright law and contract under a fared use system.<sup>113</sup> He proposes the use of anti-censorship contracts which would commit copyright owners to allow criticism, satire, and other potentially offensive uses.<sup>114</sup> Users, in turn, would pay market price licensing fees to copyright owners.<sup>115</sup> Bell argues that, under this system, fair use litigation would decrease because the uncertainty of what connotes a fair use would be eliminated, and secondary users would have free rein to use the copyrighted material however they chose.<sup>116</sup>

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107. Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 310 (1993).

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

109. 17 U.S.C. § 107 (1995).

110. *Id.* The Fair Use Doctrine also states that fair use of a copyrighted work for news reporting, teaching, scholarship, or research, is not an infringement of copyright. *Id.*

111. Assistant Professor, University of Dayton School of Law, Program in Law and Technology.

112. Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

113. *See id.*

114. *Id.* at 603.

115. *See id.*

116. *See id.*

A problem with Bell's approach, however, is some copyright holders will still refuse to license their works for critical or offensive uses, no matter what the price. These copyright owners would rather forego profits than allow their works to be used in ways in which they do not approve. In these instances, Bell argues the Fair Use Doctrine will still provide some protection for critics and satirists because, as the reasoning in *Campbell* demonstrates, "the [F]air [U]se [D]octrine sometimes favors public access over sound economics."<sup>117</sup> However, as *Dr. Seuss* has shown, satire is not one of the uses currently protected by the Fair Use Doctrine; therefore it is difficult to see how Bell's system would enable satirists to use works copyright owners refuse to license.

Another possibility is for courts to require unauthorized satirists to pay copyright holders for actual damages sustained from the use of the copyrighted work, rather than granting injunctions that prevent dissemination of the satiric work. This solution would promote the goals of copyright and still allow copyright holders to receive compensation for any actual damages. This solution, however, seems a bit problematic because the amount of actual damages suffered by the copyright holder might be difficult to quantify or predict. As such, satirists might be dissuaded from creating satiric works because they may predict (correctly or incorrectly) the actual damages they may have to pay the copyright owner will exceed the value of creating the satiric work.

As the foregoing demonstrates, finding a solution that strikes a balance between the interests of copyright holders and satirists is not an easy task, but it is one that legislators and courts should continue to work toward.

## VI. CONCLUSION

Society benefits when existing material is transformed into new works that comment on current events or social mores.<sup>118</sup> If satires are not allowed to receive fair use protection, the incentive to create satires will be diminished and fewer satires will be created, much to society's detriment.<sup>119</sup> The *Campbell* court seemingly tried to prevent this scenario by adopting a broad standard that allowed protection for satires under the Fair Use Doctrine.<sup>120</sup> Unfortunately, the Ninth Circuit narrowed this

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117. Bell, *supra* note 112, at 579, 594.

118. Jung, *supra* note 8, at 119.

119. *Id.* at 133.

120. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 n.14 (1994).

standard and, essentially, made fair use protection turn on whether a work is a satire or a parody.<sup>121</sup>

The lack of fair use protection for satiric works further hurts the public because it stifles the creative process and inhibits artistic expression. A satirist's decision to use a particular work to make a point is not accidental; the satirist is making an artistic decision in choosing the work that best suits his purposes.<sup>122</sup> Under current law, unless the copyright owner is willing to license his work, the lack of fair use protection for satire deprives satirists of a range of artistic options without a countervailing social benefit.<sup>123</sup>

For these reasons, courts should reject the Ninth Circuit's holding in *Dr. Seuss* and instead adopt the broader standard suggested by the Supreme Court in *Campbell*.

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

122. See Ochoa, *supra* note 13, at 597.

123. *Id.* at 597-98.

