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Copyright Law: Parody and the "Heart" of the Fair Use Privilege (Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994))

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CASE COMMENTS

COPYRIGHT LAW: PARODY AND THE "HEART" OF THE FAIR USE PRIVILEGE

Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994)

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Petitioners, collectively known as the rap group "2 Live Crew," wrote and released a parody[1] entitled "Pretty Woman," a song intended to satirize the 1964 rock ballad "Oh, Pretty Woman."[2] Respondent sued the rap group and its record company, Luke Skyywalker[3] Records, for copyright infringement.[4] The district court granted summary judgment in favor of

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* *Editor's Note*: This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Summer 1994.

1. The word "parody" is derived from the Greek word *parodia* ("mock-song") and is defined as "a literary or artistic work that broadly mimics an author's style and holds it up to ridicule." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 855 (1984); *see also* NEW COLLEGE ED., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 954 (6th ed. 1976). Under copyright law, the U.S. Supreme Court has 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." Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1172 (1994); *see also* Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (copying six out of thirty-eight bars of the song "When Sonny Gets Blue" in composing the parody "When Sonny Sniffs Glue"); MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981) (copying the music of "Boogie Woogie Bugle Boy of Company B" in composing "Cunnilingus Champion of Company C"); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y. 1980) (copying a four-note phrase from "I Love New York" in "I Love Sodom"), *aff'd*, 623 F.2d 252 (2d Cir. 1980); Walt Disney Prods. v. Mature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975) (using the "Mickey Mouse March" as background music for the movie *The Life and Times of the Happy Hooker*).

2. *Campbell*, 114 S. Ct. at 1168. Petitioners filed an affidavit describing their intent to satirize the original. *Id.*

3. Petitioner Luther Campbell's trade name, Luke Skyywalker, was the basis of a trademark infringement suit in Lucasfilm Ltd. v. Campbell, No. 90-1511 (S.D. Cal. Mar. 27, 1990).

4. *Campbell*, 114 S. Ct at 1168. Petitioners' manager offered to pay a fee for the use of the original version and give credit to Respondent, as owner, and to Roy Orbison and William Dees, as authors, of the original song. *Id.* Respondent refused to permit use of the song. *Id.* Petitioners nevertheless released tapes, albums, and compact discs of the parody, all of which identified Orbison and Dees as the authors and Acuff-Rose as the publisher. *Id.* Respondent instituted a claim of copyright infringement. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991).

Petitioners, holding that the parody was a fair use[5] of the original because the parody had taken no more material than was necessary to "conjure up"[6] the original and was unlikely to affect the market for the original.[7] The Court of Appeals for the Sixth Circuit reversed and remanded, holding that the parody's commercial nature and excessive borrowing of the "heart"[8] of the original created a presumption against fair use.[9] On certiorari,[10] the Supreme Court reversed, remanded, and HELD that a parody's commercial character is but one element to be considered in a fair use inquiry and "that insufficient consideration was given to the nature of a parody in weighing the degree of copying."[11]

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5. The Supreme Court has described fair use as an "equitable rule of reason," Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 448 (1984)), that "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that law is designed to foster". *Stewart*, 495 U.S. at 236 (quoting Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980)). The legislative history of the Act of 1976 acknowledges the absence of a definition due to the equitable nature of the doctrine. H.R. REP. NO. 1976, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79 [hereinafter HOUSE REPORT]; S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975) [hereinafter SENATE REPORT]. Fair use has been described as an equitable doctrine that raises "fundamental public polic[y]" issues when courts attempt to draw a line between private property and free use. William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 668 (1993). While Congress has not defined the term, it has given examples of what might be considered fair use, specifically "criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship, or research." 17 U.S.C. § 107 (1994).

6. The "recall or conjure up" standard originated in Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955), which held that a NBC television skit entitled "From Here to Obscurity," which parodied the motion picture *From Here to Eternity* was a new and different work that bore no substantial similarity to the motion picture. *Id.* at 352. The *Columbia Pictures* court stated that the alleged infringer was allowed to make extensive use of the copyrighted original in order to "recall or conjure up" the subject matter of the original. *Id.* at 354. The Second Circuit adopted this standard in Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544-45 (2d Cir.) (stating that there is no copyright infringement where the parodist uses no more material than is necessary to "recall or conjure up" the object of the parody), *cert. denied*, 379 U.S. 822 (1964).

7. *Acuff-Rose Music*, 754 F. Supp. at 1154-55, 1157-59.

8. This term was used in Harper & Row Publishers v. Nation Enter., 471 U.S. 539, 539 (1985), referring to the unauthorized copying of a substantial portion of verbatim quotes from an original manuscript. *Id.* at 548-49, 564-66. In music, the term "heart" refers to the song's "recognizable main theme." Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986).

9. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1435, 1437-39 (6th Cir. 1992) [hereinafter *Acuff-Rose II*]. The appellate court also held that harm to the original song's market, as established by the presumption against commercial use, was not a factor to consider. *Id.* at 1438-39.

10. Campbell v. Acuff-Rose Music, Inc, 113 S. Ct. 1642 (1993). The certified question was "[w]hether petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. § 107." *Id.* at 1642.

11. *Campbell*, 114 S. Ct. at 1168.

Congress enacted the first copyright statute in 1790,[12] pursuant to the Copyright Clause of the United States Constitution.[13] The purpose of the statute was to limit an author's monopoly over his or her copyrighted work.[14] Eventually, the concept of fair use evolved as a common law doctrine designed to maintain a balance between the public's interest in fostering creativity and the author's interest in maintaining exclusive control over the work.[15]

The origin of fair use dates back to nineteenth-century English common law, when judges developed a set of principles to determine how a subsequent author could use the original author's work without permission.[16] These principles soon found their way into U.S. jurisprudence when the courts decided *Folsom v. Marsh*,[17] the first U.S. fair use case.[18] In *Folsom*, Respondent, in his unauthorized book of the President's memoirs, copied over 300 pages of Petitioner's authorized book.[19] Petitioner claimed this verbatim copying constituted copyright infringement.[20] The court noted that proper analysis of this case required consideration of "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."[21] This synthesis of the English principles became the foundation for future decisions and legislation on the fair use doctrine.[22]

For almost a century, fair use remained a common law doctrine until Congress adopted the revised Copyright Act of 1976.[23] Under the Act,

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12. Act of May 31, 1790, 1 Stat. 124. Congress has since amended the statute in 1831, 1870, 1909, 1947, 1976, 1990, 1992, and 1995. Digital Performance in sound Recording Act of 1995, Pub. L. No. 104-39 (to be codified at 17 U.S.C. §§ 101, 106, 109, 114-115, 119).

13. Article one, section eight of the United States Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8.

14. *Id.*

15. *Id.*

16. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-17, 19-64 (1985) (reviewing early English cases and the development of fair use in the United States, respectively).

17. 9 F. Cas. 342 (C.C.D. Mass 1841) (No. 4,901).

18. PATRY, *supra* note 16, at 19-25.

19. *Folsom*, 9 F. Cas. at 345.

20. *Id.*

21. *Id.* at 348.

22. PATRY, *supra* note 16, at 19-25 (reviewing *Folsom* and comparing its principles to the fair use provision of the copyright statute).

23. 17 U.S.C. §§ 101-107 (1976). The 1909 Act did not include a fair use limitation on a copyright owner's rights. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (amended 1976). However, courts refused to strictly construe the statute, though its language was broad enough to preclude a finding of fair use. *Sony*, 464 U.S. at 447 n.29. Consequently, when Congress

Congress delineated four factors for the courts to consider when making a fair use determination:[24] (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[25] Congress' intent was to codify the existing doctrine and leave its future development to the judiciary.[26] However, despite clear legislative intent, some courts used the statute as a bright line rule for determining fair use rather than as a guideline for judicial development of the doctrine.[27] Other courts relied on dicta from two major Supreme Court decisions[28] concerning fair use and turned the inquiry into a question of whether or not the use was commercial.[29]

In *Sony Corp. of America v. Universal City Studios*,[30] the Court applied the fair use doctrine to determine whether the manufacturers' sale of home video tape recorders (VTRs) to the general public violated the Copyright Act.[31] Two owners of copyrighted television programs attempted to hold the manufacturers vicariously liable for the sale of VTRs, which were commonly used to record television shows.[32] The *Sony* Court noted that a substantial number of similarly situated copyright holders did not object to private, at-home recordings.[33] The Court also noted that the complainants

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enacted the 1976 amendments, it intended to codify the doctrine as it then existed without modifying its scope in any way. HOUSE REPORT, *supra* note 5, at 66; SENATE REPORT, *supra* note 5, at 62. In 1990, Congress amended § 107 to subject visual artists' rights of attribution and integrity of § 106(a) to fair use. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, § 603(a), 104 Stat. 5128, 5132 (1990). The 1992 amendment subjected unpublished works to the fair use doctrine as well. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (1992).

24. *Campbell*, 114 S. Ct. at 1170 (citations omitted).

25. 17 U.S.C. § 107. The first, second, and fourth factors stemmed from the court's opinion in *Folsom*. 9 F. Cas. at 348; *see also supra* text accompanying note 21.

26. HOUSE REPORT, *supra* note 5, at 66; SENATE REPORT, *supra* note 5, at 62.

27. *See* Patry & Perlmutter, *supra* note 5, at 669-70.

28. Harper & Row Publishers v. Nation Enter., 471 U.S. 539 (1985); *Sony*, 464 U.S. at 417. The only other opinion addressing fair use is Stewart v. Abend, 495 U.S. 207 (1990) (briefly discussing the doctrine in an analysis of the implications of a reversion of renewal rights granted during the first copyright term on the continued use of a derivative work).

29. *See* Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440 (N.D. Ill. 1991) (copying and satirizing a copyrighted advertisement for batteries in a commercial advertisement for beer); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) (copying a rap group's performance in a commercial advertisement for beer); DC Comics, Inc. v. Unlimited Monkey Business, Inc., 598 F. Supp. 110 (N.D.Ga. 1984) (using copyrighted characters to provide singing telegram services).

30. 464 U.S. 417 (1984).

31. *Id.* at 420.

32. *Id.*

33. *Id.* at 421.

failed to show that this noncommercial activity either harmed or was likely to harm the commercial value of their copyrighted programs.[34] In its analysis, the *Sony* Court stated that if the VTRs were used for primarily commercial purposes, it would be "presumptively unfair" to the copyright owners, but not conclusive of unfair use.[35] Therefore, the *Sony* Court concluded that home video recordings of copyrighted television programs came within the fair use doctrine and thus the manufacturers who sold VTRs were not liable for copyright infringement.[36]

The Supreme Court again followed this "equitable rule of reason"[37] balancing analysis in *Harper & Row Publishers, Inc. v. Nation Enterprises*[38] In *Harper & Row*, a magazine company published an article that drew its content directly from an unpublished presidential manuscript for which Harper & Row held the copyright; the article did not include any independent input.[39] This caused Petitioner, the copyright holder, to breach a pre-publication agreement with another magazine company.[40] The *Harper* Court held that the unauthorized publication of verbatim quotes from the "heart" of the manuscript was not fair use because it was intended to displace the copyright holder's "commercially valuable right of first publication."[41] The *Harper* Court stated that such harm to the copyright holder's commercial market was the single most important factor of the fair use doctrine.[42]

The Supreme Court emphasized the commercial nature of the use and the potential harm to the original work's market, the first and fourth fair use factors, respectively, in support of its respective holdings in *Sony* and *Harper & Row*.[43] Consequently, some courts have used this dicta to create presumptions against fair use based on whether or not the new work was commercial.[44] As a result, the Supreme Court took the opportunity in the instant case to demonstrate proper application of the fair use doctrine to commercial works.[45]

In the instant case, the Court made it clear that a determination of fair use depends on the facts of the individual case and not on whether certain fair use factors exist.[46] As to its fair use analysis, the instant Court found

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34. *Id.* at 456.
35. *Id.* at 448.
36. *Id.* at 456.
37. *Id.* at 450. See *supra* note 5 and accompanying text for further discussion.
38. 471 U.S. 539 (1985).
39. *Id.* at 543.
40. *Id.* at 542.
41. *Id.* at 562.
42. *Id.* at 567.
43. *Id.* at 549; *Sony*, 464 U.S. at 448.
44. *See, e.g., Acuff-Rose*, 754 F. Supp. at 1154-55, 1157-59.
45. *Campbell*, 114 S. Ct. at 1164.
46. *Id.* at 1170-71.

that lower courts are at a minimum required to address the four factors delineated by Congress in the Copyright Act.[47] Legislative intent supports this holding because the legislature left the development of the doctrine to the courts.[48] Furthermore, the instant Court stated that lower courts should neither exclude factors outside the fair use provision nor apply the factors selectively.[49]

The instant Court explained that the first factor, the purpose and character of the use, requires a determination of whether the new work displaces the original or whether it is simply "transformative."[50] However, the instant Court cautioned that the less transformative the new work, the more important other factors become.[51] The instant Court explained that the nature of the copyrighted work, the second factor, determines whether the original is entitled to copyright protection.[52] However, this factor is less helpful in parody cases because the nature of a parody requires copying a well-known work.[53] Further, the Court observed that the third factor weighs whether the amount of copying was reasonable in light of the first factor, the purpose and character of the use.[54] The instant Court concluded that the third factor also influences the analysis of the fourth factor because when direct copying exists, it is more likely that the subsequent work will displace the original work's market.[55]

According to the instant Court, the lower court erred when it limited the fair use analysis to whether the commercial nature created a presumption against such use.[56] The Court found that, while the lower court correctly considered the quality, quantity, and importance of the portion copied,[57] the lower court did not appreciate that the nature of parody required "recognizable allusion" to the original by "conjuring up" its "heart."[58] The Court maintained that the reasonableness factor must be resolved in favor of the parodist only when the parodist creates an allusion.[59] The instant Court also

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47. *Campbell*, 114 S. Ct. at 1170-71.
48. *Id.* at 1170.
49. *Id.* at 1170.
50. *Id.* at 1171. The Court used this word to describe the extent to which an original work is altered with a new and different expression or meaning. *Id.*
51. *See id.*
52. *Id.* at 1175.
53. *Id.*
54. *Id.*
55. *Id.* at 1176-77.
56. *Id.* at 1173-74.
57. *Id.* at 1175.
58. *Id.* at 1176. The Court stated that while the "heart" of the original composition may be the opening bass-riff and the first line of the song that portion is the most memorable portion of the song. *Id.* If Petitioners had copied a less recognizable portion of the song, their parody would not have been as effective. *Id.*
59. *Id.*

contended that the lower court erred in presuming harm to the market from the commercial nature of the song.[60] The instant Court concluded that when the new work is transformative, as a parody is, market substitution cannot be easily inferred because a parody may legitimately suppress demand for the original work without constituting copyright infringement.[61]

The Supreme Court has been consistent in its application of the fair use doctrine.[62] Throughout its decisions and in the instant case, the Court has repeatedly emphasized that the doctrine is one of equity that requires a balancing of public and individual interests.[63] Thus, a case-by-case approach is necessary.[64] Confusion in the application of the fair use doctrine arose because lower courts ignored the equities of the doctrine in favor of adopting bright line rules.[65] However, this rigid application of the doctrine subverted both legislative intent and common law doctrines.[66]

The district court in the instant case correctly recognized that the fair use doctrine is based on equity.[67] Like the Supreme Court, the district court recognized that the nature of a parody is to provide social commentary on an original work, and that to accomplish this purpose it was necessary to recall just enough of the original in the audience's minds.[68] Without this "conjuring up," the work could not be a parody.[69]

In contrast, although the appellate court acknowledged that the contested work was a parody, it still found that using the "heart" of the original was not fair use of the original.[70] The appellate court's decision would have crippled the very purpose of fair use that is to foster the development of new works.[71] The Supreme Court correctly recognized that the facts of the instant case warranted sufficient consideration of the nature of parody in order to determine whether it was fair use.[72]

The district court correctly dispelled the argument that a commercial purpose automatically precludes a finding of fair use.[73] The appellate court, on the other hand, applied dicta from *Sony* with the force of law to create a

60. *Id.* at 1177-79.
61. *Id.* at 1178.
62. *Id.* at 1164; *Harper & Row*, 471 U.S. at 539; *Sony*, 464 U.S. at 417.
63. *See Campbell*, 114 S. Ct. at 1178.
64. *Id.* at 1170-71; *Harper & Row*, 471 U.S. at 560; *Sony*, 464 U.S. at 448.
65. *Campbell*, 114 S. Ct. at 1170.
66. *Id.* at 1170, 1174.
67. *See Acuff-Rose*, 754 F. Supp. at 1150.
68. *See id.* at 1154-55, 1157-58.
69. *Id.* at 1155 (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981)).
70. *Acuff-Rose II*, 972 F.2d at 1438.
71. *Campbell*, 114 S. Ct. at 1169.
72. *Id.* at 1171-73.
73. *Id.* at 1178-79.

commercial presumption against fair use.[74] Moreover, the appellate court used dicta from both *Sony* and *Harper & Row* to presume harm to the original market from the parody's commercial purpose.[75] The Court's instant decision clearly upholds an ad hoc approach to the application of the fair use doctrine.[76] This method of analysis is in line with judicial development of the doctrine as well as the legislative intent of the fair use statute.[77] Creating a presumption out of any one of the fair use factors would render the entire doctrine useless.[78] Such a presumption would also run counter to the constitutional goal of limiting an author's monopoly in the interest of fostering the creation of new works.[79]

The Supreme Court has had a limited history in the application of the fair use doctrine.[80] In each of its three decisions, the Court applied a balancing of equities approach to determine fair use.[81] Society's interests in freedom of creative expression should be balanced with the rights of the copyright holder.[82] Therefore, in the instant case, the Supreme Court correctly applied the fair use statute because the nature of parody requires substantial copying of the "heart" of the original song.[83]

74. *Id.* at 1174.
75. *Id.* at 1177-78.
76. *Id.* at 1168-74.
77. *Id.* at 1171-73; *see also* HOUSE REPORT, *supra* note 5, at 65; SENATE REPORT, *supra* note 5, at 62.
78. *Campbell,* 114 S. Ct. at 1171-73.
79. U.S. CONST. art. I, § 8.
80. *Campbell,* 114 S. Ct. at 1164; *Harper & Row,* 471 U.S. at 539; *Sony,* 464 U.S. at 417.
81. *Campbell,* 114 S. Ct. at 1171-73.
82. *Id.*
83. For further discussion, see *supra* text accompanying notes 65-68.