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THE SUPREME COURT HOLDS THAT PARODY MAY BE A
FAIR USE UNDER SECTION 107 OF THE 1976 COPYRIGHT
ACT *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994)

Lisan Hung†

INTRODUCTION

On March 7, 1994, the United States Supreme Court held in *Campbell v Acuff-Rose Music, Inc.*¹ that parody may be considered a fair use under section 107 of the 1976 Copyright Act,² and that the commercial character of song parody alone does not create a presumption against a finding of fair use.³ The Supreme Court had only once before inquired into whether a parody may be considered fair use under section 107; however, the Court did not decide the question because it was equally divided.⁴

In *Campbell*, the Court explained that section 107 “ ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ ”⁵ Parody, the court found, has a definite claim to transformative value and thus may advance the purposes of the copyright law: to promote the development of science and the arts⁶ and to stimulate the creation and publication of edifying matter.⁷ Therefore, the Court concluded that parody may be considered under section 107 for purposes of fair use.

BACKGROUND

In 1964, Roy Orbison and William Dees composed a rock ballad entitled “Oh Pretty Woman,” and assigned the rights in that song to

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1. 114 S. Ct. 1164 (1994). The unanimous decision was written by Justice Souter, with a concurring opinion filed by Justice Kennedy.

2. 17 U.S.C. § 107 (1988 & Supp. 1994).

3. *Campbell*, 114 S. Ct. at 1179.

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

5. *Campbell*, 114 S. Ct. at 1170, quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

6. *Campbell*, 114 S. Ct. at 1171.

7. *See, id.* at 1171 n.10.

Acuff-Rose Music, Inc. (Acuff-Rose), producer of the song and respondent in the action.⁸ Acuff-Rose accordingly registered "Oh, Pretty Woman" for protection under the copyright laws.⁹

Sometime in 1989, Luther Campbell, member of the rap group¹⁰ 2 Live Crew, wrote a song entitled "Pretty Woman" that intended to satirize the Orbison original.¹¹ 2 Live Crew's manager subsequently contacted Acuff-Rose on July 5, 1989, and informed it that: 1) 2 Live Crew had written a parody of "Oh, Pretty Woman;" 2) 2 Live Crew would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison; and 3) the rap group was willing to pay a fee for the use of the Orbison original.¹² However, Acuff-Rose refused to give permission to 2 Live Crew for such use of the Orbison song.¹³

In June or July of 1989, 2 Live Crew nonetheless released records, cassette tapes, and compact discs of their song "Pretty Woman," in a collection of songs entitled "As Clean As They Wanna Be."¹⁴ In the collection, Orbison and Dees were identified as the authors of the song "Pretty Woman," and Acuff-Rose was recognized as its publisher.¹⁵ 2 Live Crew sold over a quarter-of-a-million copies of the collection before Acuff-Rose made any judicial protest.¹⁶

In 1990, Acuff-Rose brought an action against the members of 2 Live Crew and its record company, Luke Skywalker Records, alleging that 2 Live Crew's song, "Pretty Woman," was an infringement of Acuff-Rose's copyright in the Orbison song "Oh, Pretty Woman."¹⁷ As their defense, 2 Live Crew contended that "Pretty Woman" was a parody that made fair use of the original song under section 107 of the 1976 Copyright Act¹⁸ and filed a motion for summary judgment. The district court held that 2 Live Crew's song made fair use of the original song and granted summary judgment in favor of 2 Live Crew.¹⁹

8. *Id.*

9. *Id.*

10. The Court defined rap as a "'style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment.'" *Id.* at 1168 n.1 (quoting THE NORTON/GROVE ENCYCLOPEDIA OF MUSIC 613 (1988)).

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

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

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

17. *Id.*

18. 17 U.S.C. § 107.

19. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1160 (M.D. Tenn. 1991). The district court found fair use under section 107 in that 1) the commercial purpose of 2 Live Crew's song was no bar to fair use, 2) 2 Live Crew's version of the song was a parody, 3) 2 Live

Subsequently, the Court of Appeals for the Sixth Circuit reversed and remanded the decision of the lower court,²⁰ and the United States Supreme Court granted certiorari²¹ in order to determine whether 2 Live Crew's commercial parody could be a fair use within the meaning of section 107.²²

HOLDING

The unanimous decision of the Supreme Court concluded that the court of appeals had erred on two accounts. First, the court of appeals was incorrect in adjudging that the commercial nature of 2 Live Crew's parody rendered it presumptively unfair.²³ The Supreme Court explained that, "[n]o such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth [factor], market harm, in determining whether a transformative use, such as parody, is a fair one."²⁴ Second, considering that the use of the original was for parodic purposes, the court of appeals erred by holding that 2 Live Crew had excessively copied from the Orbison original.²⁵ The Supreme Court accordingly reversed the judgment of the court of appeals and remanded the decision for further proceedings consistent with their findings.

ANALYSIS

The Supreme Court stated that when evaluating the fair use factors of section 107,²⁶ each of the four statutory factors must be explored and taken together into consideration, in light of the purposes

Crew had taken no more than was necessary to conjure up the original in order to parody it, and 4) it was extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. *Id.* at 1154-55, 1157-58.

20. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439. The court of appeals concluded that: 1) the parody was presumptively unfair because of its commercial nature under the first of four factors in Section 107, 2) the rap group had taken too much under the third factor by taking the heart of the original song and constructing it as the heart of the parody, and 3) the parody's commercial use presumptively established market harm under the fourth factor. Thus, the court of appeals determined that 2 Live Crew's parody was not a fair use of the Orbison original. *Id.* at 1435-1438.

21. *Campbell v. Acuff-Rose Music, Inc.*, 113 S. Ct. 1642 (1993).

22. *Campbell*, 114 S. Ct. at 1169.

23. *Id.* at 1179.

24. *Id.*

25. *Id.*

26. 17 U.S.C. § 107, which reads, as follows:

Notwithstanding the provisions of section 106 and 106A [17 U.S.C.S. §§ 106, 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of

of copyright.²⁷ Doing so, the Supreme Court held that under section 107 of the Copyright Act of 1976, 2 Live Crew's use through parody of "Oh Pretty Woman" was a fair use that avoided encroaching Acuff-Rose's rights in that song.²⁸

A. *The Purpose and Character of the Use*

In examining the first factor of section 107 in determining fair use—the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"²⁹—the Supreme Court concluded that "parody, like other comment or criticism, may claim fair use under section 107."³⁰ The Court explained that the main purpose behind weighing the first factor is to determine whether or not, and to what extent, a new work is "transformative," and "parody has an obvious claim to transformative value."³¹

The Court defined a transformative work as one that "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."³² A work that merely supersedes the objects of an original creation is not transformative.³³ The Court focused on the transformative value of a work

copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

27. *Campbell*, 114 S. Ct. at 1171.

28. *Id.* at 1179. The court noted that it was not challenged that 2 Live Crew's song would be an infringement under 17 U.S.C. § 106, but for a finding of fair use. *Id.* at 1169. Section 106 reads, in part:

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

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

29. 17 U.S.C. § 107(1).

30. *Campbell*, 114 S. Ct. at 1171. The court clarified that a parody need not be labeled a "parody" in order to assert the fair use defense. *Id.* at 1173 n.17.

31. *Id.* at 1171.

32. *Id.*

33. *Id.*

because such facilitates the goals of copyright law by promoting science and the arts.³⁴ Transformative products, which may germinate from original works, contribute to society by endowing upon it new creations.³⁵ Therefore, the Court resolved that “[a]lthough [a] transformative use is not absolutely necessary for a finding of fair use . . . 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.”³⁶

The Supreme Court concluded that the court of appeals had erred in applying a presumption “ostensibly culled from *Sony*,³⁷ that ‘every commercial use of copyrighted material is *presumptively* . . . unfair.’ ”³⁸ Instead, the Court revealed that “[t]he language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”³⁹ Therefore, in examining the first factor of section 107, all purposes must be considered and balanced.

With specific reference to parody, the Court asserted that parody is transformative in that it “can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁴⁰ For purposes of copyright law, the definition of parody 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 work.”⁴¹ Therefore, a parody, by its nature, must duplicate or imitate at least some portions of an original in order to serve parody’s end; this type of use may qualify as fair use under section 107.

34. *Id.* at 1171.

35. Whether the new work is a highly regarded piece or one held in disgust is not relevant to determining transformative value. With specific reference to parody, the court stated that, [w]hether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation.” *Campbell*, 114 S. Ct. at 1173.

36. *Id.* at 1171.

37. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

38. *Campbell*, 114 S. Ct. at 1173-74 (emphasis added).

39. *Id.* at 1174. The court further explained that it had emphasized a need for a “sensitive balancing of interest” in *Sony*. The court stated that “commercial or nonprofit educational character of a work is ‘not conclusive’ [citation], but rather a fact to be ‘weighed along with other[s] in fair use decisions.’ ” *Id.* (quoting *Sony*, 464 U.S. at 449).

40. *Id.* at 1172. Parody is generally described as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” *Id.*

41. *Id.*

However, the Court further explained that a work merely labeled as a "parody" will not automatically be considered transformative. A parody accepted as fair use of an original must have some critical bearing on the substance or style of the original creation.⁴² If a parody merely uses an original as a means to gain attention or to bypass the need for the alleged parodist's own creative thought, then the fair use claim in using the original work wanes.⁴³ Instead, other factors, such as the extent of a parody's commercialism, must consequently be given more weight.⁴⁴ Because there is no definite formula as to the minimum amount of appropriation of an original requisite for a successful parody, the Court concluded that each parody must be adjudged on a case by case analysis, with consideration of the purposes of copyright law.⁴⁵

In the instant case, the Supreme Court found that it could be reasonably inferred that 2 Live Crew's song made some comment on or criticism of the Orbison original. The Court explained that when fair use is used as a defense in parody, "[t]he threshold question . . . is whether a parodic character may reasonably be perceived."⁴⁶ Accordingly, it found that 2 Live Crew's song could reasonably be perceived as a parody that commented or criticized the Orbison original in that,

2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.⁴⁷

42. *Id.* at 1174.

43. *Id.* Because Parody must mimic the original to some extent in order to make the point of the parody, the court acknowledged that parodies have some claim to use a creator's imagination. On the other hand, a satire need not rely upon the original creation. Therefore, in examining a satire, justification for borrowing from an original work would be required. *Id.*

44. *Id.*

45. *Campbell*, 114 S. Ct. at 1174. The Court disagreed with 2 Live Crew's contention that any parodic use is presumptively fair. Instead, the court explained that the 1976 Copyright Act had "no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shies into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and non-parodic elements." *Id.*

46. *Id.* at 1173. The court added that, "[t]he only further judgment . . . that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element." *Id.* at n.16.

47. *Id.* at 1173.

Accordingly, 2 Live Crew's parody of "Oh, Pretty Woman" was a transformative use that could be considered as a fair use under the first factor of section 107.⁴⁸

B. *The Nature of the Copyrighted Work*

The Court next examined the second statutory factor of section 107, the nature of the copyrighted work.⁴⁹ The Court explained that consideration of this second factor "calls for the recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."⁵⁰ In other words, the value of the original material used is influential in determining fair use.

In applying the second factor to the case at hand, the Court agreed with the two lower courts in deciding that although the original song's "creative expression for public dissemination falls within the core of the copyright's protective purposes,"⁵¹ the second factor of section 107 was of little help in the instant case or in future cases involving parodied works.⁵² This conclusion was based on the Court's recognition that "parodies almost invariably copy publicly known, expressive works."⁵³

C. *The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

The third factor the Court weighed was whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole⁵⁴ . . . are reasonable in relation to the purpose of the copying."⁵⁵ This enquiry is linked to both the first and fourth⁵⁶ statutory factors, in that the extent of permissible copying varies with the pur-

48. *Id.*

49. 17 U.S.C. § 107(2).

50. *Campbell*, 114 S. Ct. at 1175.

51. *Id.* at 1175. Both the District Court and the Court of Appeals had made the same decision.

52. *Id.*

53. *Id.*; *see, e.g.*, *Stewart v. Abend*, 495 U.S. 207 at 237-238 (1990) (contrasting fictional short story with factual works); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (contrasting soon-to-be published memoir with published speech); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (contrasting motion pictures with news broadcasts); *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991) (contrasting creative works with bare factual compilations).

54. *Campbell*, 114 S. Ct. at 1175. The court noted that this could be explained through Justice Story's words in *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841), as "the quantity and value of the materials used." *Id.*

55. 17 U.S.C. § 107(3).

56. *See infra* note 67 and accompanying text.

pose and character of the use of that copying, and those facts will show the degree to which the parody may serve as a market substitute for the original or its potentially licensed derivatives.⁵⁷

In the instant case, the Supreme Court decided that the court of appeals was "insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled [that] 2 Live Crew's use [of the original was] unreasonable as a matter of law."⁵⁸ The court of appeals had determined that, when weighing the third statutory factor, a court must consider the following: 1) the *quality* and *importance* of the original materials used, in addition to the *quantity* of that material used, and 2) whether a "substantial portion of the infringing work was copied verbatim" from the copyrighted work.⁵⁹ Using these factors, the court of appeals consequently concluded that since 2 Live Crew took the heart of the original song and used it as the heart of its parodied work, 2 Live Crew "purloined a substantial portion of the essence of the original."⁶⁰

While the Supreme Court agreed with the above considerations for general purposes of the fair use analysis, the Court did not concede to the application of that query to works involving parody, especially to the parody at hand. The Court explained that:

Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. [Citations omitted]. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.⁶¹

After the minimum amount necessary to secure identification of an original has been appropriated, a court's examination of a parodist's reasonable use will then depend on evaluation of the first and fourth factors of section 107.⁶²

Therefore, the Supreme Court concluded that, as to the lyrics of 2 Live Crew's song, "no more was taken [from the original] than neces-

57. *Campbell*, 114 S. Ct. at 1175.

58. *Id.* at 1176.

59. *Id.* at 1175-76. The appeals court felt that this latter query is relevant because it may reveal a disputed work's transformative character or purpose under the first factor, or the extent of market harm under the fourth factor because a "work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original." *Id.* at 1176.

60. *Acuff-Rose Music*, 972 F.2d at 1438.

61. *Campbell*, 114 S. Ct. at 1176.

62. *Id.*

sary," even if the portion of the original taken was the heart of the original.⁶³ Albeit 2 Live Crew copied the opening bass riff, and the first line of their song went to the heart of the original work, the Court recounted that "the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."⁶⁴ The Court accordingly concluded that the instant case is not "a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists."⁶⁵

In contrast, as to the music used in 2 Live Crew's song, the Court expressed no opinion as to whether repetition of the bass riff was excessive copying, and remanded that issue to the lower court in order to measure the amount taken under this third factor, with reflection also of the fourth factor.⁶⁶

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

The fourth factor in determining fair use is "the effect of the use upon the potential market for or value of the copyrighted work."⁶⁷ The Court asserted that when delving into the fourth factor, an examining court must consider not only the extent of the market harm caused by the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."⁶⁸ Thus, the inquiry must take into account both the harm to

63. *Id.* The court of appeals had suggested that "no more was taken than necessary" but decided that the copying was excessive in relation to its parodic purpose because the portion of the original taken was the *heart* of the original. *Acuff-Rose Music*, 972 F.2d at 1438.

64. *Campbell*, 114 S. Ct. at 1176.

65. *Id.* It is important to note that in reaching its conclusion, the Supreme Court felt that what 2 Live Crew had done beyond using the heart of the original was a significant determinant in favoring a finding of fair use. First, the Court recognized that after 2 Live Crew copied the first line of the original song, the group "departed markedly" from the original song to further their own purpose. In addition, 2 Live Crew, after copying the bass riff and repeating it, also produced their own distinctive sounds. For example, the group introduced "scraper" noises into the music, overlaid music with solos of different keys, and altered the drum beat. Consequently, as to the lyrics of 2 Live Crew's song, the Court concluded that no more than necessary was taken from the Orbison original. *Id.*

66. *Id.* at 1176-77.

67. 17 U.S.C. § 107(4).

68. *Campbell*, 114 S. Ct. at 1177 (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-181-82 (1993)).

the original *and* the harm to the market for derivative works.⁶⁹ When examining the harm to the market for derivatives, the particular harm that this enquiry should focus upon is *market substitution*.⁷⁰

In specific reference to parody, the Court settled that, in general, parody, in its purest form, has no derivative market because of its critical nature.⁷¹ However, the Court qualified this conclusion by adding that where a work may encompass elements of parody and other elements that fall within a protectable market for derivative work, the examining court then must evaluate the harm to the market for those other elements.⁷²

In view of the instant case, the Court asserted that because 2 Live Crew's song incorporated not only parody, but rap music as well, the derivative market for rap music would be a proper focus of inquiry.⁷³ However, neither respondents nor petitioners introduced any affidavits or evidence regarding the effect of the subject song on the market for a non-parody, rap version of the Orbison original.⁷⁴ The Court con-

69. *Id.* at 1177. The Court explained that harm to derivative markets is a proper focus because the licensing of derivatives is an important economic incentive to the creation of original work. *Id.* at 1178.

70. *See, id.* at 1177. If the parody is one that impairs the market for derivative uses of the original work exclusively because its critical commentary is potent, then it is not the type of use that is targeted by the copyright laws. The Court explains that this is because the effect of such critical commentary is the same type of threat to the derivative market as to the original market. *Id.* at 1178. The Court further recognized in note 24 that

[i]n some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm. A work whose overriding purpose and character is parodic and whose borrowing is slight in relation to its parody will be far less likely to cause cognizable harm than a work with little parodic content and much copying.

Id. at n.24.

71. *Id.* at 1177-78. The Court expressed that the role of the courts is to distinguish between "biting criticism that merely suppresses demand and copyright infringement which usurps it." *Id.* at 1177. A biting criticism, "like a scathing theater review, kills demand for the original, [but] does not produce a harm cognizably under the Copyright Act." *Id.* at 1178.

The market for potential derivative uses encompasses only markets in which the creators of the original works would develop or license others to develop. The Court perceptively recognized that it is unrealistic to believe "that creators of imaginative works will license critical reviews or lampoons of their own productions." *Id.* It is the nature of people to want only praise of their creations. Thus, such critical uses of an original work do not fall within the realm of potential licensing markets and therefore are not potential derivative uses. *Id.* As a general rule, there is no protectable derivative market for criticism, and consequently no derivative market for a work that is purely a parody. *See id.*

However, as to the derivative markets for works making no comment on nor criticism of an original, but using the elements of an original as vehicles for satire or amusement, the Court in note 22 stated that they expressed no opinion as to those particular types of works. *Id.* at n.22.

72. *Id.*

73. *Campbell*, 114 S. Ct. at 1178-79.

74. *Id.* at 1178. The Court noted that there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parody-rap version. In doing so, the Court rejected

cluded that it was therefore “impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense, namely 2 Live Crew, to summary judgment.”⁷⁵

In reaching its conclusion, the Court disagreed with the court of appeals’ application of an evidentiary presumption against fair use in assessing the likelihood of significant market harm. The court of appeals, quoting the language from *Sony Corp. of America v. Universal City Studios, Inc.*,⁷⁶ had held that “if the intended use [of the original] is for commercial gain, that likelihood [of significant market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.”⁷⁷ Thus, the court of appeals had erroneously concluded that because 2 Live Crew’s song was wholly commercial, a likelihood of future harm to the respondents could be presumed.⁷⁸ Instead, the Supreme Court declared that,

No “presumption” or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes. *Sony*’s discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the non-commercial context of *Sony* itself (home copying of television programming). In the former circumstances, what *Sony* said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly “supersedes the objects” [citations omitted] of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. [Citation omitted]. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.⁷⁹

respondent Acuff-Rose contention that 2 Live Crew’s rap parody and another rap group’s endeavor to obtain a license to record a rap derivative of the original evidenced the existence of a rap market and, ergo, harm to such market. *Id.* at 1178-79.

Moreover, the Court lectured that “since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.” *Id.* at 1177. Therefore, “[i]n moving for summary judgment, 2 Live Crew left themselves at just such a disadvantage when they failed to address the effect on the market for rap derivatives, and confined themselves to uncontroverted submissions that there was no likely effect on the market for the original.” *Id.*

75. *Id.* at 1179.

76. 464 U.S. 417 (1984).

77. *Campbell*, 114 S. Ct. at 1177 (quoting *Sony*, 464 U.S. at 451).

78. *Id.*

79. *Id.*

Hence, the Court concluded that because parody and the original work usually serve different market functions, parody does not affect the market for an original for purposes of the fourth factor.⁸⁰

CONCLUSION

The United States Supreme Court concluded that parody may be considered a fair use under section 107, and that the commercial character of parody alone does not create a presumption against a finding of fair use. Instead, all four statutory factors of section 107 must be taken into consideration together, with regard to the purpose of copyright.

The importance of this decision is that the Court has allowed parody to be placed in the category of works that are possible fair uses. Thus, this finding will facilitate copyright's interest in stimulating the creation of new works by allowing criticisms or reviews that normally occur in the free marketplace to be evaluated for its transformative value and not merely on its commercial effect upon the original.⁸¹ As the Court stated, "the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement which usurps it."⁸²

The decision evidences support of copyright's enduring goal of developing science and the arts and stimulating the creation and publication of edifying matter. It is a facilitation that should continue to persist far into the future.

80. *Id.*

81. See also, Henry R. Kaufman and Michael K. Cantwell, *From a First Amendment Standpoint, the 2 Live Crew Case Added 'Breathing Space' Into the Copyright Mix*, NAT'L L. J., May 16, 1994, at C3.

82. *Campbell*, 114 S. Ct. at 1178.