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Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody

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I. INTRODUCTION

Every Who down in Whoville liked parody a lot;
But the Ninth Circuit Grinches, with jurisdiction over

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Whoville, did not!
They were hostile to parody, whatever the season.
Please don't ask why; no one quite knows the reason.

It may have been that their ties were too tight,
Or perhaps their heads weren't screwed on just right.
But I think that the most likely reason of all
Was that their sense of humor was two sizes too small.

For nine months in 1995, media coverage of the O.J. Simpson double-murder trial transfixied the nation. The trial also gave rise to an astonishing number of books examining every possible aspect of the case, from biographies of the various personalities involved to post-hoc explanations of the verdict and its impact on or reflection of society. By one estimate, more than 60 volumes have already been published concerning the Simpson case.¹

Given the amount of information available about the Simpson case, the loss of one additional book to a court injunction may seem like a relatively minor matter. But this one book was like no other: it was a satirical account of the O.J. Simpson trial written in the style of Dr. Seuss. Entitled The Cat NOT in the Hat! and labeled “A Parody By Dr. Juice,” the book recounted the events of the trial in simple and repetitive rhyming phrases like those used in The Cat in the Hat and 46 other children’s books written by Theodor S. Geisel under the pseudonym Dr. Seuss. The Cat NOT in the Hat! was illustrated with thirteen depictions of a cartoon caricature of O.J. Simpson, also in the style of Dr. Seuss, wearing the Cat’s distinctive red-and-white stovepipe hat.

Based on a pre-publication advertisement, Dr. Seuss Enterprises filed suit against the authors and publishers of the parody, claiming that it violated the Copyright Act, the Lanham Act, the Federal Trademark Dilution Act, and California Unfair Competition law by using copyrighted expression and registered and unregistered trademarks belonging to the plaintiff.² The District Court entered a preliminary injunction against the

¹ Josh Getlin, Simpson Civil Case, LOS ANGELES TIMES, Feb. 11, 1997, at A16. A search for the words “O.J. Simpson” in the Internet bookstore amazon.com revealed 92 titles published after 1994. Amazon.com (visited Aug. 24, 1998) <http://www.amazon.com/ exec/obidos/subst/home/home.html>. Of those, 19 were videotapes or were books unrelated to the trial, and 23 were duplicate titles (paperback, audio and large-print editions), leaving a total of 50 titles currently available. A similar search on Oct. 18, 1997 resulted in a total of 45 distinct titles. Not all of the titles in earlier search are still available, however, so the estimate of more than 60 appears to be reasonable.

defendants, holding that the plaintiff had demonstrated a likelihood of success on the merits of its copyright claim, and that the trademark claim presented serious questions for review and the balance of hardships favored the plaintiff. On an interlocutory appeal, the District Court's rulings were affirmed by the Ninth Circuit in a published opinion.

In this article, I will demonstrate that the Ninth Circuit's opinion was incorrect, both as a matter of law and as a matter of public policy. In its opinion, the Ninth Circuit misapplied controlling U.S. Supreme Court precedent in holding that *The Cat NOT in the Hat!* was not a parody and was not a transformative use; in holding that the defendants were limited to that copying necessary to "conjure up" the original; and in presuming that the defendant's commercial parody would cause harm to the potential market for the original and licensed derivatives.

Part II of this article will discuss the social importance of parody and the related forms of burlesque and satire. Part III will briefly review the development of the parody defense to copyright infringement, with particular attention to the U.S. Supreme Court's 1994 opinion in *Campbell v. Acuff-Rose Music, Inc.* Part IV will summarize the Ninth Circuit's opinion in the *Dr. Seuss* case, while Part V will offer an alternative analysis explaining how the Ninth Circuit erred in enjoining publication of *The Cat NOT in the Hat!*

II. THE IMPORTANCE OF PARODY AND SATIRE

Although seemingly straightforward, the task of defining parody can be maddeningly elusive. Many authors have commented on the difficulty of defining parody and the related forms of burlesque and satire, and of

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3 Id. at 1562.
6 See Margaret A. Rose, Parody: Ancient, Modern and Post-Modern 5 (1993) ("Lack of attention to the historical background of the terms used to define parody has been but one of the problems of parody definition. One other problem has been the restriction of the description of parody to only one or two aspects of that term or its usage."); Joseph A. Dane, Parody: Critical Concepts Versus Literary Practices, Aristophanes to Sterne 5 (1988) ("The definitions of 'parody' and related words . . . have a history — a history that distorts our view of the literature we conventionally regard as parodic."); id. at 123 (describing the "unsystematic and often accidental history of the vocabulary of parody").
7 See Archibald Bolling Shepperson, The Novel in Motley: A History of the Burlesque Novel in English 4 (1936) ("The word 'burlesque' as applied to literature has been used indiscriminately to include caricature, travesty and parody — themselves words of which the meanings are not widely differentiated."); V.C. Clinton-Baddeley, The Burlesque Tra-
the inadequacy of various dictionary definitions. At times, one is reminded of Justice Stewart's famous dictum concerning pornography: "I know it when I see it." Nonetheless, in order to apply copyright law to parody intelligently, it is necessary to attempt to reach a working definition of the term "parody," and to understand how parody is related to both burlesque and satire.

To begin, the Oxford English Dictionary defines parody as follows:

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, especially by applying them to ludicrously inappropriate subjects; an imitation of a work more or less closely modelled on the original, but so turned as to produce a ridiculous effect.

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8 See George A. Test, Satire: Spirit and Art 7 (1991) ("Robert C. Elliott, having surveyed the history of the meaning of the word and the 'staggering diversity of forms, tones and materials' of satire, concluded that no single definition covered such diversity."); id. at ix ("satire is merely the aesthetic manifestation of a universal urge so varied as to elude definition"); id. at x ("What can replace such vague and ambiguous terms as parody, burlesque, and travesty commonly linked to satire?") (emphasis in original); Peter Petro, Modern Satire: Four Studies 1 (1982) (referring to "the perennial problem of the definition of satire").

9 See Rose, supra note 6, at 5 ("Many definitions of parody have paid insufficient attention to its ancient heritage."); Dane, supra note 6, at 130 ("The particular claims made by these lexicographers are of limited authority."); id. at 133 ("The value of these words as descriptions of genres in modern criticism is very limited."); Test, supra note 8, at 1 ("There is not an accepted definition of what satire is, only general dictionary descriptions.").

10 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Compare Dane, supra note 6 at 4 ("My use of the word 'parody' thus always implies 'that which we conventionally consider parody.'"); Petro, supra note 8 at 127 ("satire is a genre that is more difficult to define than to identify.").

11 The Oxford English Dictionary 247 (2d ed. 1991). See also The American Heritage Dictionary of the English Language 954 (1973 ed.) ("A literary or artistic work that broadly mimics an author's characteristic style and holds it up to ridicule."); C. Hugh Holman & William Harmon, A Handbook to Literature 344 (6th ed. 1992) ("A composition imitating another, usually serious, piece. It is designed to ridicule a work or its style or author."); Mary Ellen Snodgrass, Encyclopedia of Satirical Literature 351 (1996) ("A keen, creative form of mimicry or indirect commentary, parody . . . parallels the tone, diction, style or themes of a serious work to create incongruity, disparagement, or dissonance.").
This definition emphasizes two aspects of parody: first, that parody relies on imitation to achieve its purposes; and second, that parody may aim to ridicule a particular author or work.

When defined in this manner, parody can be considered to be merely a specific form of burlesque. In the United States, the term “burlesque” is used chiefly to refer to a form of vaudeville entertainment featuring broad, ribald comedy, dancing and striptease, but in England, “burlesque” retains its original meaning of any type of comic or derisive imitation. Thus, the Oxford English Dictionary defines burlesque as a “species of literary composition . . . which aims at exciting laughter by caricature of the manner or spirit of serious works, or by ludicrous treatment of their subjects.” Even in England, however, the relationship between parody and burlesque is not precisely defined. Some authors use the two terms more or less interchangeably, the principal distinction being that parody imitates a specific original work, while burlesque includes imitation of an author’s general style or of an entire genre of works; while others add the further limitation that parody involves applying the style of a particular work (or author) to a relatively trifling or less worthy subject.

12 See Shepperson, supra note 7, at 7 (“every parody belongs to the general class of burlesque literature.”); John D. Jump, Burlesque 2 (1972) (defining parody as one of four species of burlesque); Encyclopedia Americana 801 (1990 ed.) (“[B]urlesque is frequently a comic imitation of a serious and well-known work.”).


14 See 2 Oxford English Dictionary 672 (2d ed. 1991) (“Of the nature of derisive imitation; ironically bombastic, mock-heroic or mock-pathetic”); 2 New Encyclopedia Britannica 655 (15th ed. 1993) (“in literature, comic imitation of a serious literary or artistic form”); Jump, supra note 12, at 1 (“the use or imitation of serious matter or manner, made amusing by the creation of an incongruity between style and subject.”).


16 See Shepperson, supra note 7, at 1-8; Clinton-Baddeley, supra note 7, at 7-8.

17 See Jump, supra note 12, at 1-2. Jump divides burlesque into “high” burlesque, “in which a relatively trifling subject is ludicrously elevated by the style of presentation,” and “low” burlesque, “in which a relatively important subject
More recent scholarship, however, has charged that the uncritical association of parody with burlesque has resulted in a marginalization of the former art.\textsuperscript{18} In her definitive work,\textsuperscript{19} Professor Margaret Rose emphasizes that the word "parody" derives from the ancient Greek word "parodia," which was first used to describe mock-epic poems in the style of Homer, but which included many different forms of comic quotation and textual rearrangement of prior works.\textsuperscript{20} The word "burlesque," by contrast, is of more recent origin and was derived from the Italian word "burla," meaning joke or ridicule.\textsuperscript{21} Because of its emphasis on comedy, the art of burlesque generally has been treated as little more than a diverting amusement by the literary elite.\textsuperscript{22} Thus, according to Rose, "the relegation of parody to a sub-category of the burlesque in the eighteenth century" resulted in many of "the negative connotations attributed to parody in recent centuries,"\textsuperscript{23} and to its dismissal as "a lowly comic form which had been of little real significance in the history of literature or of other arts."\textsuperscript{24}

\textsuperscript{18} \textsuperscript{18} See Rose, supra note 6, at 5 ("Several misunderstandings have been generated by the definition of parody as burlesque"); id. at 54 ("The modern reduction of parody to a type of burlesque in descriptions given of it in the eighteenth century and after has already been seen to have limited the meaning of the more ancient definitions and uses of parody.").

\textsuperscript{19} \textsuperscript{19} See Rose, supra note 6.

\textsuperscript{20} \textsuperscript{20} Professor Rose's book contains an excellent description of the etymology of the word "parody" and of the various connotations ascribed to it throughout the centuries. Id. at 6-19.

\textsuperscript{21} \textsuperscript{21} Id. at 54; Jump, supra note 12 at 72. See also 2 The Oxford English Dictionary 672 (2d ed. 1991); The New American Heritage Dictionary of the English Language 178 (1973 ed.).

\textsuperscript{22} \textsuperscript{22} See Shepperson, supra note 7, at 3 ("burlesque' has in general been ignored by modern critics as an unruly stepchild, not entitled to a place within the family circle of respectable literature. Mistakenly adjudged as unmitigated foolishness, as 'mere imitative ridicule,' it has been treated, when it has been noticed at all, with the half-patronizing, half-contemptuous attitude which serious-minded persons always assume toward those who wear the cap and bells."); Clinton-Baddeley, supra note 7, at 8 ("Burlesque is laughter for laughter's sake"); Jump, supra note 12 at 72 ("Burlesque is mockery, it is joking, it is fun.").

\textsuperscript{23} Rose, supra note 6, at 9.

\textsuperscript{24} Id. at 1.
The dismissal of parody and burlesque as comedic arts with little lasting value, however, fails to convey the complexity of parody as a literary phenomenon, and the importance of both parody and burlesque as vehicles for literary and social criticism.

The complexity of parody is implicit in its etymology. The Greek word “parodia” is comprised of two roots: the prefix para-, meaning both similar to (as in parallel), and in opposition to (as in paranormal); and the noun “ode,” meaning a song or verse poem.25 The word “parodia” therefore implies a work that is both similar to and in opposition to the original.26 At its finest, parody “imitates and then comically transforms other works in ambiguous and often complex meta-fictional ways.”27 For example, parodists may use imitation of the original “to elicit the expectations of their audience for a text, before presenting another version or view of it.”28 By playing upon the audience’s expectations, the parody can simultaneously present an exemplar of the original work, the parodist’s comment upon the style and/or subject matter of the original, and the parodist’s comment upon the expectations of the reader or audience.29 In Rose’s words:

Whatever our attitude toward comedy, the complicated structure of more sophisticated parody — in which the target text may not only be satirised but also “refunctioned” — nonetheless demonstrates a more subtle (though still comic) use of other literary works than is implied by the term burlesque . . . . [T]he use of parody may aim both at a comic effect and at the transmission of both complex and serious messages . . . .30

In transforming an original work through comic imitation, parody can therefore reveal that the original may itself be susceptible to multiple interpretations or contain hidden layers of meaning.

Although parody may contain a variety of messages, it is most frequently used as a form of literary criticism.31 The best parodies exagger-
ate the weakest features of the original work in order to expose its inadequacies, and thereby to encourage subsequent authors to abandon the overworked cliches and excesses of the original in their own works. Such criticism may take the form of comic incongruity between the subject matter of the parody and the style used to depict it. Incongruity reveals the faults and flaws of the original work by allowing the reader to focus on the style of the original divorced from its subject matter. The critical effect of such parodies is heightened by the parodist’s deadpan seriousness in depicting the most ludicrous of subjects. By turning an author’s own words against him, parody and burlesque often prove to be more effective in stimulating artistic reform than more traditional methods of criticism.

intuitive kind of literary criticism, shorthand for what ‘serious’ critics must write out at length.”).

32 SNODGRASS, supra note 11, at 351 (“A clever, often spitefully cutting method of ridiculing or lampooning pompous or erudite authors, actors or notables, parody derides words, situations, sentimentality, posturing and overblown rhetoric through exaggeration or misapplication”).

33 See 9 THE NEW ENCYCLOPEDIA BRITANNICA 167 (15th ed. 1993) (defining parody as “a form of satirical criticism or comic mockery that imitates the style or manner of a particular writer or school of writers so as to emphasize the weaknesses of the writer or the overused conventions of the school.”); PETRO, supra note 8, at 12 (“That parody is imitation which strives toward a comical effect is indisputable, but parody can be seen also as stylization with a hostile tendency, a vehicle for reinterpretation and re-evaluation, and as a catalyst of literary change.”).

34 See JUMP, supra note 12 at 24 (“The incongruity between his subject and his style provokes laughter, and this helps us to perceive in a clearer critical light both [the original author’s] style and the feelings with which he regards his subject.”); Rose, supra note 6 at 36-37 (“a prime feature distinguishing the imitation (or the non-ironic, non-critical reproduction of the whole or part of another literary work in a text) from the literary parody is the establishment in the parody of comic discrepancy or incongruity between the original work and its ‘imitation’ and transformation.”).

35 See Rose, supra note 6, at 30 (“a parody may also be said to be ‘dissimulative’ . . . when the parodist pretends not to understand the original meaning of the parodied author.”); CLINTON-BADDELEY, supra note 7, at 10 (“The best burlesque supports an elaborate pretense of not being funny at all, and leaves audience or reader in a happy state of uncertainty whether good sense has been outraged or not.”); see also TEST, supra note 8, at 160 (“Sati- rists usually present the material deadpan, betraying no indication that what they are presenting is in any way out of order. This feigned innocence is of course a natural element in the creation of irony.”).

36 See SHEPPerson, supra note 7, at 3-4 (“During its first century, the novel received from the serious critics only the most fitful and grudging attention. . . . In the absence of formal criticism, it is not surprising to find that parody and burlesque should have proved powerful agents in controlling the excesses of this youthful literary form.”).
Parody may also use comic imitation as a vehicle for social criticism.  
Many of the most effective parodies target not only the parodied text but also the societal values and mores of the audience that has made the original popular. Comic incongruity can also be used to target serious topics by depicting them in a frivolous or lighthearted manner, as is often true of political satire. The parody form is used in order to demonstrate the pervasive influence of accepted political thought upon a well-known piece of popular culture, and to make the parodist’s criticism more palatable to the audience by mixing it with humor.

Greek Old Comedy is often cited as a prime example of the use of parodic imitation in political satire. See Dane, supra note 6, at 24 (In Aristophanes, “[o]ften the target of the chorus’s advice to the audience is related only to the political situation of the performance, and not to the dramatic situation at all.”); Snodgrass, supra note 11, at 128 (“The genius of the era [of Greek comedy] lies in its ability to lace together the comic and grotesque behaviors of fantasy figures, while lampooning real events and attitudes toward war, government, religion, and social interaction.”).

See Shepperson, supra note 7, at 8 (“parody-burlesques have appeared when some individual novel . . . has presented an absurd view of life or a corrupt, specious system of morality.”).

See Rose, supra note 6, at 30 (“the target text may be the object of some reform or rewriting by the parodist, but may also be the object of satire, or a mask used to allow other targets to be attacked or reformed in an ‘Aesopian’ or covert manner.”). See also Snodgrass, supra note 11, at 408 (“Concealed in the folds of humor, . . . satire enables the writer to afflict the pompous, unscrupulous, or infamous, then take refuge in the laughter of the audience, thus shielding the originator from reprisal.”).
current importance — politics, for instance — than an original composition."

When viewed in this manner, both parody and burlesque are considered to be specific forms of satire. The *Encyclopedia Britannica* defines satire as an "artistic form . . . in which human or individual vices, follies, abuses, or shortcomings are held up to censure by means of ridicule, derision, burlesque, irony, or other methods." In common with other authorities, however, the *Encyclopedia* also recognizes that literary satire is merely one manifestation of a universal human impulse toward mockery of every type. Thus, the *Encyclopedia* also defines satire more generally as:

42 Holman & Harmon, supra note 11, at 344 (emphasis deleted). See also Rose, Parody/Meta-Fiction, supra note 31, at 115 ("Particularly in periods of political crisis or religious dispute, preformed beliefs and prejudices have been seen by satirists and parodists as the locus of the expectations of their public, and their attacks [on those expectations] . . . have hence also been presented as attacks of broader social significance."); Geri J. Yonover, The "Dissing" of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody, and Fair Use, 29 VaL. U. L. Rev. 935, 970-71 (1995) (citing examples of political parody in the United States).

43 See DANE, supra note 6, at 10 (Parody "is seen as a variant of other official genres, the most important of these being satire. A century ago, Delepierre described parody, caricature, grotesque, and burlesque as the various 'weapons' employed by satire to combat equally various tyrannies (feudal, clerical, monarchical, and popular."); 23 THE NEW ENCYCLOPEDIA BRITANNICA 174 (15th ed. 1993) ("The satirist has at his disposal an immense variety of literary and rhetorical devices," including parody and burlesque); 24 ENCYCLOPEDIA AMERICANA 294 (Grolier 1990) ("Irony, burlesque, travesty, and parody are modes and forms of indirect satire.").

44 10 ENCYCLOPEDIA BRITANNICA 467 (15th ed. 1993). See also 14 OXFORD ENGLISH DICTIONARY 500 (2d ed. 1991) ("A poem, or . . . prose composition, in which prevailing vices or follies are held up to ridicule."); THE NEW AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1154 (1973 ed.) ("A literary work in which irony, derision, or wit in any form is used to expose folly or wickedness.").

45 See, e.g., Test, supra note 8, at ix ("what is commonly referred to as satire is merely the aesthetic manifestation of a universal urge so varied as to elude definition."); Snodgrass, supra note 11, at xiii ("satire thrives throughout the humanities as a natural outgrowth of the human need to examine self and milieu in a perpetual act of betterment."); id. at xiv (satire is both "a useful literary device and a ubiquitous glimmer or shading in every form of expression.").

Scholars have identified the roots of satire in the rituals and folk behavior of cultures throughout the world. See generally Test, supra note 8, at pp. 37-99; see also Robert C. Elliott, The Power of Satire: Magic, Ritual, Art (1960). Test notes that:

A surprising variety of societies have allowed certain persons the freedom to mock other individuals and social institutions in rituals. From
[A] mocking spirit or tone that manifests itself in many literary genres but can also enter into almost any kind of human communication. Wherever wit is employed to expose something foolish or vicious to criticism, there satire exists, whether it be in song or sermon, in painting or political debate, on television or in the movies. In this sense, satire is everywhere.46

In a similar vein, scholar George A. Test has defined satire in terms of four elements that are present in varying combinations: aggression or attack, play (both wordplay and game-playing), laughter, and judgment or criticism.47 Test uses this four-part structure to evaluate how various forms of satire are related to one another. Thus, while some parodies may be content with eliciting laughter through play,48 the best parodies use play and laughter to convey more-or-less aggressive judgments, either about the artistic worth of the imitated work or about the society that values it.49

According to Test, parodic imitation is “used in two basic ways by satirists”:

earliest times the same freedom has been claimed by and granted to social groups at certain times of the year, as can be seen in such festivals as the Saturnalia, the Feast of Fools, Carnival, and similar folk festivals in India, nineteenth-century Newfoundland, and the ancient Mediterranean world.

Test, supra note 8, at 9. In these contexts, satire helps to resolve tension between groups of different social status through the use of mockery and humor. Id. When confined within such officially sanctioned limits, satire may ironically have the effect of ratifying the existing social structure. Id. at 65-66; see also 23 Encyclopaedia Britannica 175 (15th ed. 1993). When exercised outside those limits, however, satire is likely to incur the wrath of prevailing authorities. See notes 59-66 and accompanying text.

46 23 Encyclopaedia Britannica 173 (15th ed. 1993). See also Test, supra note 8, at 4 (“Satire, whether literary or oral, whether expressed through ceremony or in art forms, seems to occur in all societies and conditions of humanity, in all periods and stages of history, at all levels of society.”).

47 Test, supra note 8, at 15-36. These elements are also implicit in many of the definitions offered by other scholars. See, e.g., Snodgrass, supra note 11, at 405 (“A vigorous, sharply pointed, and, at times, embarrassingly or cruelly effective rhetorical device or genre,” and “the art of telling truth through laughter”); Petro, supra note 8, at 128 (“Satire is the meeting point of humor and criticism in a literary work.”) (emphasis deleted).

48 Citing the example of impressionist Rich Little, Test states that “[w]ithout a judgment and lacking an attack, parody, burlesque, and travesty are [merely] forms of humor.” Test, supra note 8, at 34. While this may be true for some parodies, Rose has criticized this view of parody as ignoring the subtler messages that parody may contain. See notes 18-30 and accompanying text.

49 See notes 31-42 and accompanying text.
One is to attack the specific form itself, its style, manner, structure, and content and thereby the ideas, attitudes and values expressed or represented. The other use is as a conveyance for satirizing what satirists usually attack, that is, persons, institutions, behavior, and ideas. In the first instance the satirist is making an aesthetic and usually a moral judgment that involves the technique and form of presentation. In the second case the form or manner becomes a tool for the satirist and not an object of mockery.

As will be seen, some courts have seized upon such distinctions and have drawn a dichotomy between imitation that targets a particular work (labeled "parody") on the one hand, and imitation that targets some other aspect of society (labeled "satire") on the other. This approach presents at least two serious difficulties from an artistic point of view. First, it "assumes that a distinction can be made between style and content, between manner and structure, without losing sight of the intimate and ultimately interdependent nature of the two," thereby imposing a false dichotomy upon what is actually a continuum of imitative usage. Second, it assumes that courts can definitively determine an author's intent in writing a particular work, a task that many literary scholars argue is both foolish to attempt and impossible to achieve.

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50 See Test, supra note 8, at 159.
51 See notes 178-191 and 203-207, and accompanying text.
52 See Test, supra note 8, at 160.
53 See, e.g., Roger Webster, Studying Literary Theory: An Introduction 22 (2d ed. 1996) ("The whole idea that the 'intention' of the author is the proper subject of literary history seems, however, quite mistaken. The meaning of a work of art is not exhausted by, or even equivalent to, its intention.") (quoting Rene Wellek & Austin Warren, A Theory of Literature (1949)).

One of the major precepts of the objective theory of art is that "the design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art." William K. Wimsatt and Monroe C. Beardsley, The Intentional Fallacy (1946), reprinted in William K. Wimsatt, The Verbal Icon: Studies in the Meaning of Poetry 3 (1954). Entire volumes have been devoted to debating the validity of Wimsatt & Beardsley's thesis. See, e.g., Intention and Interpretation (Gary Iseminger ed., 1992); On Literary Intention: Critical Essays (David Newton-De Molina ed. 1976).

54 See, e.g., The Lexington Introduction to Literature 3 (Gary Waller, et al. eds 1987) ("No work of literature contains meanings in itself apart from interpretation, that is, apart from the understanding (and questions) that a reader brings to it. . . . [T]here are no unchanging, correct, objective meanings to the literature we read."); id. at 4-5 ("literary theory has shifted from assuming that meaning exists objectively in texts to assuming that meaning is relative, not fixed or absolute, and that meaning arises as the result of a
Two additional salient features of parody are worth noting. First, parody is unabashedly a parasitic art. Its existence depends upon the well-known predecessors from which the parodist borrows, and upon the audience's familiarity with those models. In describing parody as a form of satire, Test states:

Both approaches require the reader to know a style, manner, form, set of conventions, a pattern exterior to the satiric work, in order to understand and fully appreciate the satire. The satirist uses the prior knowledge of the audience and the presumed ability of those in the audience to detect the incongruity, contradiction, or incompatibility between what they know of the original style or form and what they perceive before them. Consequently, "the truest parodies are those that tamper least with the material they are spoofing. Just enough to blow them sky-high. That's all." Second, because parody depends upon audience recognition of its models, the window of opportunity for the parodist is often extremely short in duration. In order to make its satiric point, a parody must appear while the targeted work is still fashionable and current in the minds of the audience. Test explains:

The works and forms that a satirist can appropriate are theoretically endless, but in fact the minds and memories of the audience imposes limitations on what the satirist can choose from. Audiences in the last quarter of the twentieth century are less and less familiar with biblical and classical literature and more or better acquainted with the artifacts of commerce, popular culture, and government...
Consequently, a legal doctrine that restricts the ability of the parodist to borrow from contemporary works necessarily shackles the parodist's ability to comment upon contemporary culture.58

Because parody and satire are often used to attack powerful and popular political and social institutions,59 they sometimes provoke responses of indignation and outrage from the audience.60 Whenever this happens, calls for censorship inevitably follow.61 Many authors have been called upon to defend themselves against charges stemming from their satires,62 and history demonstrates that parodists and satirists are often among the

58 See Rose, Parody/Meta-Fiction, supra note 31, at 181 (discussing "how restricted parodists have felt in parodying contemporary works to which laws of copyright protecting them from parody applied."); Kapelke, supra note 56, at 561 ("Recognizing that burlesque is often a form of criticism, how realistic is it to tell a critic he must confine himself to works more than fifty-six years old?"). Compounding the problem is the fact that, following the recent enactment of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, the duration of copyright is now the life of the author plus 70 years, or 95 years for works made for hire and works copyrighted before January 1, 1978. 17 U.S.C. §§ 302-04 (1994).

59 See Rose, Parody/Meta-Fiction, supra note 31, at 169 ("Parody has been put to work in the cause of subverting established canons—of literary, political, and ideological kinds."); Harriette K. Dorsen, Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs, 65 B.U. L. Rev. 923, 924 (1985) ("In the nineteenth and early twentieth centuries, satiric journals were the most influential political media, regularly targeting the political, religious, and social leaders of the day.").

60 See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (suit for intentional infliction of emotional distress for publication of parody advertisement that ridiculed respondent); Rose, Parody/Meta-Fiction, supra note 31, at 21 ("the attribution of the comic effect to parody has misled many . . . into seeing the parodist as merely a mocker of other texts, and to condemning parody on moral grounds."); Dorsen, supra note 59, at 964 ("A good satire will likely offend someone.").

61 See Rose, Parody/Meta-Fiction, supra note 31, at 32 ("In the post-Reformation period when satire and biblical parody were regarded as lower forms of wit, the interconnection between political censorship and the denigration of parody must also be kept in mind.").

62 In addition to Aristophanes (see note 66 and accompanying text), Voltaire was briefly imprisoned for his use of satire, Rose, Parody/Meta-Fiction, supra note 31, at 32, and "[i]n England in 1599 the Archbishop of Canterbury and the Bishop of London issued an order prohibiting the printing of any satires whatever and requiring that the published satires of [Joseph] Hall, John Marston, Thomas Nashe, and others be burned." 23 Encyclopedia Britannica 176 (15th ed. 1993). More recently, the Nobel Prize-winning playwright and actor Dario Fo was censored, banned from television and briefly jailed for his satirical criticisms of the Italian government and the Catholic Church.
first victims of a dictatorship. Indeed, it has been argued that parody, burlesque and satire can only flourish in a free democracy, and that the relative amount of parody and satire permitted can be used an indicator of the political freedom of a society. It is noteworthy that parody first came to prominence in ancient Athens, where authors enjoyed a great deal of freedom despite attacks from some public officials.

The extreme measures taken to silence parody and satire demonstrate the power of these art forms to bring about social change. Film director Taylor Hackford explains:

> Holding up the most powerful institutions and individuals in society to sardonic scrutiny is a time-honored practice. It is used to ensure that those with great influence and power, at the very least, risk embarrassment if they abuse the trust we invest in them.

63 In Nazi Germany, Werner Finck, a well-known cabaret actor, was imprisoned in Dachau by Joseph Goebbels for attempting to “make party and State institutions ridiculous.” CLINTON-BADDELEY, supra note 7, at 12, and in Soviet Russia, the poet Osip Mandelstam was imprisoned and killed for writing a satirical poem about Joseph Stalin. 23 ENCYCLOPEDIA BRITANNICA 176 (15th ed. 1993).

64 See CLINTON-BADDELEY, supra note 7 at 11 (“It is at least certain that burlesque is a joke which can flourish only in a free and prosperous democracy”).

65 See 23 ENCYCLOPEDIA BRITANNICA 176 (15th ed. 1993) (noting that “political analysts use the amount and character of satire permitted in the U.S.S.R. as a gauge of political pressure at any given time.”).

66 In one play, Aristophanes describes how he triumphed in court against a politician that he had previously lampooned:

> Aye and I know what I myself endured
> At Cleon's hands for last year's comedy.
> How to the Council house he haled me off,
> And slanged, and lied, and slandered, and betongued me.

> Bear me no grudge, spectators, if, a beggar,
> I dare to speak before the Athenian people
> about the city in a comic play.
> For what is true even comedy can tell.
> And I shall utter startling things but true.
> Nor now can Cleon slander me because,
> With strangers present, I defame the State.

THE ACHRANANS (426 B.C.) (trans. BENJAMIN BICKLEY ROGERS), lines 377-80, 596-602, reprinted in CLINTON-BADDELEY, supra note 7, at 11.

67 See ROSE, PARODY/META-FICTION, supra note 31, at 133-34 (“Controls such as censorship on parody as a literary form have tacitly acknowledged the potential power of parody in fulfilling critical tasks.”).

68 Taylor Hackford, A Cinematic Satire With Purpose, LOS ANGELES TIMES, November 17, 1997, at F5. See also SNODGRASS, supra note 11, at 411 (satire
Even considered purely as artistic forms, however, parody and satire are deserving of legal protection.\textsuperscript{69} In Test's words:

What does all this satire accomplish? A modern aesthetic Pilate might ask, what does art accomplish? For whatever else it is, satire is art, however peculiar and baffling it may be. . . . [And] were the disposition for satire somehow to disappear from the makeup of human beings, and the variegated expressions of it were to vanish, the dance of life would be diminished by the absence of a strange and vital gesture.\textsuperscript{70}

The importance of parody as art can be demonstrated by the wide variety of authors whose parodies have enriched the world's literature and culture, from the Greek comedies of Aristophanes\textsuperscript{71} to Cervantes' \textit{Don Quixote}\textsuperscript{72} and the comedies of Moliere.\textsuperscript{73} In England, Chaucer,\textsuperscript{74} Shakespeare,\textsuperscript{75} Ben Jonson,\textsuperscript{76} Francis Beaumont,\textsuperscript{77} George Villiers,\textsuperscript{78} Alexander

\begin{quote}
"serves as a necessary vehicle for effective criticism of society's failings."; Hustler Magazine v. Falwell, 485 U.S. 46, 54-55 (1988) ("satirical cartoons . . . have undoubtedly had an effect on the course and outcome of contemporaneous debate.").
\end{quote}

\textsuperscript{69} "[E]ven if many parodies do not rise to the level of ambitious and important criticism, it cannot be denied that if the first amendment's objective is the maximization of the spectrum of available thought, parody is part of that spectrum." Richard A. Bernstein, \textit{Parody and Fair Use in Copyright Law}, 31 \textsc{Copyr. L. Symp.} (ASCAP) 1, 31 (1984).

\textsuperscript{70} \textsc{Test}, \textit{supra} note 8, at 35-36.

\textsuperscript{71} \textit{See}, \textit{e.g.}, \textit{The Acharnians} (425 B.C.); \textit{The Knights} (424 B.C.); \textit{The Birds} (414 B.C.); \textit{The Frogs} (405 B.C). \textit{See also Clinton-Baddeley, supra} note 7, at 14 ("[A]t the height of Greek civilization the plays of Aristophanes contained every known element of laughter. Their themes were satirical; there was farce and comedy in their unfolding, and parody in their language."); \textsc{Snodgrass, supra} note 11, at 35-37, 127-28.

\textsuperscript{72} MIGUEL DE CERVANTES, \textit{DON QUIXOTE} (1605). Cervantes' most famous work is considered to be a parody of medieval chivalric romance in general, rather than a parody of any particular work.

\textsuperscript{73} \textsc{See Shepperson, supra} note 7, at 63-64; \textsc{Snodgrass, supra} note 11, at 333-37.

\textsuperscript{74} \textsc{The Tale of Sir Thopas} in \textit{The Canterbury Tales} (1387). \textsc{See discussion in MacDonald, supra} note 31, at 3-11.

\textsuperscript{75} The "Pyramus and Thisbe" sequence from \textit{A Midsummer Night's Dream} (1594) is considered a parody of Richard Edwards' \textit{Damon and Pythias} (1565); while many critics believe the depiction of Ajax in \textit{Troilus and Cressida} (1602) is a burlesque caricature of Ben Jonson. \textsc{See Rose, Parody//Meta-Fiction, supra} note 31, at 72; \textsc{Clinton-Baddeley, supra} note 7, at 2 & n.3, 17-18; \textsc{see also id.} at 16-17 (describing the use of burlesque in \textit{Love's Labours Lost} (1593)); \textsc{Jump, supra} note 12 at 27 (describing Falstaff's use of parody in \textit{Henry IV, Part I} (1597)); \textsc{MacDonald, supra} note 31, at 14-18 (collecting excerpts).
Pope, Jonathan Swift, John Gay, Henry Fielding, Richard Brinsley Sheridan, Jane Austen, Lord Byron, William Thackery, Lewis Car-

Examples of burlesque can be found in Jonson's VOLPONE (1607), BARTHOLOMew FAIR (1614) and EVERYMAN Out Of His Humour (1599). See CLINTON-BADDELEY, supra note 7 at 18-20.

The Knight of the Burning Pestle (1607). See Jump, supra note 12 at 52-58.

"The first lengthy parody in post-Chaucerian literature was The Rehearsal (1671), a mock-heroic play mostly by George Villiers, the second Duke of Buckingham." MacDonald, supra note 31, at 20. The Rehearsal parodied several "extravagant and bombastic" plays by John Dryden. Id. at 20-22; see also Clinton-Baddeley, supra note 7 at 31-37; Jump, supra note 12, at 58-60.

The Rape of the Lock (1713); The Dunciad (1727).

Swift's best-known work, GULLIVER'S TRAVELS (1726), contains many parodic elements, but is principally a satire that examines utopian and anti-utopian ideals in four fictional lands. Swift also wrote other satires, such as A MODEST PROPOSAL (1720), and parodies and burlesques, such as BAUCIS AND PHILEMON (1709).

The Beggar's Opera (1728); The What D'ye Call It (1715); The Shepherd's Week (1714). See Clinton-Baddeley, supra note 7 at 43-51.

Both Fielding's An Apology for the Life of Mrs. Shamela Andrews (1741) and Joseph Andrews (1742) are parodies of an earlier novel by Samuel Richardson, Pamela, or Virtue Rewarded (1741). See also The Tragedy of Tragedies; or, The Life and Death of Tom Thumb the Great (1731), discussed in Clinton-Baddeley, supra note 7, at 53-58, and in Jump, supra note 12, at 60-64.

The Critic (1779). This work "not only attacked all the follies of the contemporary stage at once, but revived and preserved within the compass of the work almost the whole canon of the burlesque tradition." Clinton-Baddeley, supra note 7, at 72. See also Rose, Parody/Meta-Fiction, supra note 31, at 73-74.

Northanger Abbey (1818) "may be taken as a well-known example of the use of parody in a novel which takes its surface plot features from the novels which are the object of its satire." Rose, Parody/Meta-Fiction, supra, note 31, at 69-70; see also MacDonald, supra note 31, at 41 ("The target is the Gothic novel, especially Mrs. Radcliffe's Mysteries of Udolpho."). Recent scholarship has also uncovered Love and Friendship (c. 1789), an early work not published until 1922, in which "the youthful Jane Austen turns into ridicule the stock devices of the contemporary novelists. . . . Coincidence, the willing slave of most of her contemporaries, is overworked to a ludicrous degree." Shepperson, supra note 7, at 137; see also MacDonald, at 41-51 (reprinting excerpts). Shepperson notes that much of this early material was reworked in Austen's later novels, and argues that Austen's development as an author can be traced to her apprenticeship as an author of parody. Shepperson at 130-53; see also Snodgrass, supra note 11, at 39-41.

Don Juan (1824) contains elements of parody. Byron also wrote shorter parodies, such as the brief Epilogue in the style of Wordsworth, reprinted in MacDonald, supra note 31, at 95.
Gilbert & Sullivan, George Bernard Shaw, James Joyce, and Tom Stoppard all wrote parodies; prominent parodists in the United States include Mark Twain, Bret Harte, Robert Benchley, James Thurber, E.B. White, and Richard Armour. In the late 20th Century,

See Shepperson, supra note 7, at 206-33 (discussing Thackery's parodies of Sir Edward Bulwer-Lytton and Sir Walter Scott).

Both Alice in Wonderland (1865) and Through the Looking Glass (1872) contain several "nonsense poems," the most familiar of which is "Father William," that are parodies of well-known verses of Carroll's time. See Macdonald, supra note 31 at 277-93 (reprinting both Carroll's parodies and the original verses). Carroll also wrote several other short parodies. See, e.g., Jump, supra note 12, at 25 (reprinting The Three Voices, a Carroll verse parody of the Tennson poem The Two Voices.).

W.S. Gilbert wrote many short parodies before his famed partnership with composer Arthur Sullivan. Their comic opera Princess Ida (1884) was described by Gilbert as "a respectful perversion" of Tennyson's epic poem The Princess (1847); while Patience (1881) satirizes the "aesthetic" movement associated with Oscar Wilde. Many of the other comic operas of the duo burlesque English culture and political figures in varying degrees. See Clinton-Baddeley, supra note 7 at 114-20. Sullivan's music also parodies the music of other composers. For example, the melody known in the U.S. as "Hail, Hail, The Gang's All Here" comes from Gilbert & Sullivan's The Pirates of Penzance (1877), and is a parody of the "Anvil Chorus" from Giuseppe Verdi's Il Trovatore (1853).

The Admirable Bashville (1901); Androcles and the Lion (1912). See Clinton-Baddeley, supra note 7, at 120-22.

Joyce's Ulysses (1922) is modeled closely after Homer's Odyssey, with each episode in the original having a parallel in Joyce's novel, but with the time frame compressed into a single day. In addition, the "Oxen of the Sun" episode contains several parodies of the styles of various English authors. See Jump, supra note 12, at 32-34; Macdonald, supra note 31, at 522-43 (identifying the authors) One scholar considers Ulysses to be "a model for the modernist use of parody." Rose, Parody/Meta-Fiction, supra note 31, at 42; see also id. at 76-77.

Travesties (1975) uses a production of Oscar Wilde's The Importance of Being Earnest as a background for the action; while Rosencrantz and Guildenstern are Dead (1967) is based on two minor characters from Shakespeare's Hamlet. See Rose, Parody/Meta-Fiction, supra note 31, at 74-75.

Several short stories, including Grandfather's Old Ram, reprinted in Macdonald, supra note 31, at 434-39.

Condensed Novels and Other Papers (1867); Sensation Novels Condensed (1871). See Shepperson, supra note 7, at 234-36; see also Muck-a-Muck, a parody of James Fenimore Cooper, reprinted in Macdonald, supra note 31, at 97-103.

Benchley wrote many short parodies for magazines such as The New Yorker. Three are reprinted in Macdonald, supra note 31, at 111-14 and 212-17.

Bateman Comes Home (1957) is described as a parody of "several recent novels about the Deep South."
parodies have flourished on television and in motion pictures, as those media began to replace literature as the primary focus of popular culture. Parody is also prominent in both music and the visual arts. Although many of these parodies have outlived the works that inspired them, and therefore much of their critical humor is lost on modern audiences, their collective impact on the development of literature and the arts cannot be underestimated.

III. DEVELOPMENT OF THE FAIR USE DEFENSE FOR PARODY

A. Basic Principles of Copyright Law

U.S. copyright law has its basis in the Patent and Copyright Clause of the Constitution, which provides:

The Congress shall have 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.

96 See Macdonald, supra note 31, at 145-146, 251-54 (reprinting parodies of Walt Whitman and Ernest Hemingway).

97 The Classics Reclassified (1960); Twisted Tales From Shakespeare (1957); American Lit Relit (1964).

98 Parodies have always been a popular feature of television sketch comedy shows, such as The Jack Benny Show (1950-64) (see notes 146-150 and accompanying text); Sid Caesar's Your Show of Shows (1950-58) (see notes 151-153 and accompanying text); The Danny Kaye Show (1963-67); and The Carol Burnett Show (1967-79); and, more recently, Saturday Night Live (1975-present) (see notes 179-184 and accompanying text), In Living Color, and MAD TV.


100 See Yonover, supra note 42, at 971-72 (listing many examples). Yonover also notes that "[s]uch icons of musical Americana as 'Yankee Doodle,' 'The Star-Spangled Banner,' and 'My Country 'Tis of Thee' started out as English ballads and were then made into political song parodies." Id. at 970.

101 See Rose, Parody//Meta-Fiction, supra note 31, at 119 ("The history of 'successful' parodies — of their break with the past of which their own work may earlier have been a part — demonstrates in broader terms the process by which new discourses enter into written history as the supersession of others.").

102 U.S. Const. art. I, § 8, cl. 8.
As the Supreme Court has recognized, this clause reflects the view that the public welfare in artistic works will be maximized by the provision of an economic incentive to authors:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.\textsuperscript{103}

“The monopoly created by copyright thus rewards the individual author in order to benefit the public.”\textsuperscript{104}

It has been recognized, however, that a rigid application of the copyright statute would sometimes stifle the very creativity that the law is designed to foster.\textsuperscript{105} Implicit in the notion of “progress” is the idea that one must be able to study and build upon what has gone before. Science and the arts progress by incremental degrees, by criticizing, refining, synthesizing, reinterpreting, and occasionally rejecting, the theories and styles that are currently accepted or fashionable. Zoologists must be free to use the accepted system of scientific classification; it would be absurd if each author had to come up with his or her own system from scratch. Historians need to review the findings and interpretations of others in order to place their own contributions to the historical debate in context. Those who study and practice law construct their persuasive arguments using quotations from treatises, articles and reported cases. Those who study literature need to quote excerpts from the works of others in order to make their criticisms of those works comprehensible. Composers and painters traditionally have used themes from other works as a point of departure in creating their own works. In short, “[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”\textsuperscript{106} If copyright could be used to

\textsuperscript{103} Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); see also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (copyright law “is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . .”).


\textsuperscript{106} Campbell, 510 U.S. at 575 (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)). See also Pierre N. Leval, Commentary, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1109 (1990) (“First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention.”).
prevent such borrowing, innovation in science and the arts would cease to exist.107

Thus, "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose."108 In the absence of legislative guidance, courts were left with the difficult task of balancing the level of copyright protection that would provide authors and publishers with a sufficient economic incentive to create new works, on the one hand, while permitting sufficient freedom to those authors to draw upon the works of others in creating new works, on the other. Over time, courts developed two doctrines designed to achieve such a balance: the idea/expression dichotomy, which provides that copyright protects only an author’s expression, and does not extend to any facts and ideas contained in the copyrighted work;109 and the fair use doctrine, which permits a second author to copy a limited amount of expression from a copyrighted work in creating a new work.110

Curiously, the U.S. Supreme Court played an insignificant role in the early development the fair use doctrine.111 Its first two attempts to address fair use ended in affirmances by an equally divided court, thus producing no written opinions.112 Lower federal courts embraced the doctrine, however, and by 1961 fair use “was firmly established as an implied limitation on the exclusive rights of copyright owners.”113 Subsequently, when Congress enacted a comprehensive revision of the

107 See Leval, supra note 106, at 1109 (“Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.”).

108 Campbell, 510 U.S. at 575 (citation omitted). See also Note, Parody and Copyright Infringement, 56 COLUM. L. REV. 585, 595 (1956) (“Although fair use was not included by Congress in its [original] formulation of the statutory scheme of copyright, the doctrine has a definite place in the constitutional plan for literary protection.”).


111 For an excellent overview of the historical development of the fair use doctrine in the U.S., see WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 19-63 (2d ed. 1995).


Copyright Act in 1976, it codified the existing fair use doctrine in Section 107. As amended in 1992, that section reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, news reporting, or research, is not an infringement of 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 the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.\footnote{114}

In light of this history, it is clear that “[f]air use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”\footnote{115}

The Supreme Court’s first published opinion on fair use came in 1984. In \textit{Sony Corp. v. Universal City Studios, Inc.},\footnote{116} two movie studios sued Sony to enjoin sales of the Betamax videotape recorder, on the grounds that it was being promoted and used to infringe copyrighted movies. By a 5-4 vote, the Court held that the unauthorized home videotaping of broad-cast movies for time-shifting purposes was a fair use.\footnote{117} Although the works were creative rather than factual, and were copied in their entirety, the majority reasoned that timeshifting was a noncommercial use,\footnote{118} and


\footnote{115} Leval, \textit{supra} note 106, at 1110; \textit{see also} id. at 1107 ("Fair use should be perceived . . . as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.").


\footnote{117} \textit{Id.} at 447-55.

\footnote{118} \textit{Id.} at 449.
that there was no demonstrated harm to the market for the copyrighted works.\textsuperscript{119} Instead, timeshifting would allow more people to watch the television broadcast, which might lead to increased revenue from advertisers.\textsuperscript{120} The dissent argued that fair use should be limited to "productive" uses that result in the creation of new works, rather than "reproductive" uses that simply act as a substitute for the original work.\textsuperscript{121}

The following year, in \textit{Harper \& Row, Publishers, Inc. v. Nation Enterprises},\textsuperscript{122} the Court held, 6-3, that an unauthorized publication of excerpts from former President Gerald Ford's memoirs was not a fair use. Harper \& Row had licensed \textit{Time Magazine} to publish excerpts of Ford's memoirs one week before the book was shipped to stores. Working from a purloined copy of the manuscript, \textit{The Nation} "scooped" \textit{Time} by publishing an article containing key quotes from the book two weeks before its release. As a result, \textit{Time} canceled its contract with Harper \& Row.\textsuperscript{123}

The majority first considered and rejected the defendant's First Amendment defense, holding that any free speech concerns in using copyrighted material were adequately addressed by the idea-expression dichotomy and the fair use doctrine.\textsuperscript{124} The court then considered the four fair use factors listed in the statute. Although the use was for a traditional purpose, news reporting,\textsuperscript{125} the majority held that the use was commercial and in bad faith, because "the user stands to profit from exploitation of the copyrighted material without paying the customary price."\textsuperscript{126} The majority acknowledged that factual works could be more freely copied than works of fiction, but it ruled that because Ford's memoirs had not yet been published, the exclusive right of first publication outweighed the need to use verbatim quotes.\textsuperscript{127} Likewise, the majority acknowledged that 300 words quoted were "an insubstantial portion" of the 200,000 word manuscript, but it approved the district court's qualitative assessment that "\textit{The Nation} took what was essentially the heart of the book."\textsuperscript{128} Finally, the majority noted that the use had actually resulted in harm to the

\textsuperscript{119} Id. at 451, 454.
\textsuperscript{120} Id. at 452-53 \& n.38. Although the Betamax was also being used to make copies of movies for permanent retention, the Court declined to issue an injunction against Sony, holding that the Betamax was "capable of substantial non-infringing uses." Id. at 442.
\textsuperscript{121} Id. at 477-80 (dissenting opinion).
\textsuperscript{122} 471 U.S. 539 (1985).
\textsuperscript{123} Id. at 542-43.
\textsuperscript{124} Id. at 555-60.
\textsuperscript{125} Id. at 561.
\textsuperscript{126} Id. at 562.
\textsuperscript{127} Id. at 563-64.
\textsuperscript{128} Id. at 564-65.
market for prepublication excerpts of the work, i.e., the cancellation of the agreement with *Time.*

Both *Sony* and *Harper & Row* could be cited as examples of the principle that "hard cases make bad law." Both cases were complicated by unusual issues: in *Sony,* it was the extent to which a manufacturer could be held responsible for infringement by home users; in *Harper & Row,* it was the fact that *The Nation* had used a stolen copy of the manuscript instead of waiting until after the book was published. Perhaps as a result, in both cases the Court's reasoning seemed to raise as many questions as it resolved. Many of those questions were answered in 1994, however, by the Court's unanimous decision in *Campbell v. Acuff-Rose Music, Inc.* That decision, which involved an alleged rap music parody of the popular song "Oh, Pretty Woman," is discussed in Part II.D., below.

Many authors have explained "fair use" in economic terms, arguing that a court should find "fair use" only in cases of market failure. Thus, for example, a court should permit fair use in cases in which the cost of

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129 *Id.* at 566-67.
131 *Sony,* 464 U.S. at 434-42.
132 *Harper & Row,* 471 U.S. at 543.
133 Arguably, both cases would have been decided differently if those factors had not been present. For example, in every copyright case involving videotaping subsequent to *Sony,* the copyright owner successfully sued the entity that had done the actual taping. See *Patry,* *supra* note 111, at 251-57. And in *Harper & Row,* the majority relied heavily on the facts that the manuscript was stolen and had not yet been published. 471 U.S. at 564 (noting "even substantial quotations might qualify as fair use in a review of a published work"); *id.* at 550-55, 562-64.
134 See L. Ray Patterson, *Free Speech, Copyright, and Fair Use,* 40 VAND. L. REV. 1, 65 (1987) ("Sony and Harper & Row are more sound in their results than in their reasoning.").
136 See notes 195-222 and accompanying text.
negotiating a license would exceed the benefit to the user or to the public that would be expected to result.\textsuperscript{138} Permission to quote short excerpts from a work in biography or other scholarly work is an example.\textsuperscript{139} Likewise, fair use should be permitted where the copyright holder tries to use the copyright to suppress the flow of information instead of for economic gain.\textsuperscript{140} Examples include the use of a work in critical reviews\textsuperscript{141} and parodies,\textsuperscript{142} as well as in comparative advertising.\textsuperscript{143} More generally, any use

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\textsuperscript{138} Gordon, \textit{supra} note 137, at 1627-30; Landes & Posner, \textit{supra} note 137, at 357-58.


\textsuperscript{140} Gordon, \textit{supra} note 137, at 1632-35; Landes & Posner, \textit{supra} note 137, at 359.

\textsuperscript{141} Cases involving actual reviews of books and movies are scarce, apparently because such reviews are so often cited as a paradigm example of fair use. See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985) ("even substantial quotations might qualify as fair use in a review of a published work"); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1408 (9th Cir. 1986) ("A common type of 'fair use' is quotation of a passage in a book review."); Wainwright Sec., Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) ("a classic illustration of fair use is quoting from another's work in order to criticize it"); H.R. Rep. No. 94-1476, at 65 (1976) (listing "quotations of excerpts in a review or criticism for purposes of illustration or comment" among examples of fair use); Landes & Posner, \textit{supra} note 137, at 358 ("A standard example of fair use is the book review that quotes brief passages from the book being reviewed.").

\textsuperscript{142} As will be seen below, cases involving parody have been frequently litigated. See notes 145-230 and accompanying text.

which contributes to the creation of a new work without excessively diminishing the economic incentive provided to the original author should be considered a fair use. \(^{144}\)

B. Case Law Prior to 1976

Although the roots of a parody defense based on fair use can be found in a handful of cases from early in the 20th century, \(^{145}\) the first case to address the parody defense in detail was *Loew's, Inc. v. Columbia Broadcasting System*. \(^{146}\) In *Loew's*, the author of the suspense drama *Gaslight* and the producers of the motion picture version of the play sued Jack Benny and CBS to enjoin the television broadcast of a parody entitled "Auto-light." \(^{147}\) U.S. District Judge James M. Carter rejected Benny's fair use defense in sweeping terms:

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144 See Leval, supra note 106, at 1110 ("the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."); Loren, supra note 137, at 48 ("uses whose external benefits outweigh any perceived damage to the creators' incentive to create"); *Parody and Copyright Infringement*, supra note 108, at 595 ("Fair use thus can be defined as a use which will not seriously discourage progress by artists or a use whose social value greatly outweighs any detriment to the artist whose work is borrowed."). *See also* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1078 (1997) ("courts must be willing to permit a use in circumstances where it adds a great deal of value relative to what has been copied, even if the result is to harm the market for the original copyrighted work.").


147 The complete facts were somewhat more complicated. In 1945, one year after the movie was released, Benny broadcast a 15-minute parody of *Gaslight* on his radio program. Loew's had prior knowledge of the radio show and im-
We conclude that plaintiffs have a property right in "Gaslight" which defendant may not legally appropriate under the pretense that burlesque as fair use justifies a substantial taking; that parodied or burlesqued taking is to be treated no differently from any other appropriation; that as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.148

The Loew's opinion is badly flawed because of one major error: Judge Carter's refusal to concede that parody serves a legitimate fair use purpose.149 His holding amounted to a complete rejection of the fair use defense for any parody, the sole inquiry being the substantial similarity test for infringement. Judge Carter also rejected Benny's argument that his taking had no economic effect on the original, stating that "[t]he mere absence of competition or injurious effect upon the copyrighted work will not make a use fair."150

pliedly consented to it. 131 F. Supp. at 168-69. In 1952, Benny broadcast a 15-minute television parody of the movie on his 30-minute television show. Id. at 169. (The Ninth Circuit incorrectly stated that this parody was 30 minutes in length. 239 F.2d at 533.) This time, Loew's complained immediately after the broadcast. 131 F. Supp. at 169. One year later, Benny and CBS prepared a third version that the district court characterized as "a motion picture for television." Id. Unfortunately, neither opinion states exactly how long this third version was. Since it was intended to be broadcast on Benny's television show, it was probably no longer than 30 minutes; and the district court stated that "[t]he three burlesques . . . are generally and basically the same." 131 F. Supp. at 185, which suggests that the third version might have been only 15 minutes long as well.

148 131 F. Supp. at 183.
149 Thus, while Judge Carter correctly noted that fair use was intended "for the advancement of the science or art," he added, "[w]e do not think . . . the word art was used in a sense broad enough to include a T.V. program allegedly taken from a motion picture." Id. at 175.
150 Id. at 184.

Many subsequent commentators have attempted to justify the Loew's decision on the ground that Benny's skit was not a parody at all, but simply a comic adaptation of the original play. See, e.g., Landes & Posner, supra note 137, at 360 ("Benny was not attacking Gas Light any more than Abbott and Costello were attacking Frankenstein in Abbott and Costello Meet Frankenstein."); 2 PAUL GOLDSTEIN, COPYRIGHT § 10.2.1.2.a, at 10:26 (2d ed. 1996) ("In the court's view, defendant's burlesque was little more than an abbreviated version of plaintiff's motion picture, one that plaintiff might itself have made or licensed."). Others have emphasized the fact that, at the time, television was believed to pose a strong competitive threat to the entire motion picture industry. Patry, supra note 111, at 164; Note, supra note 108 at 604; Victor S. Netterville, Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary, 35 S. CAL. L. REV. 225, 233 (1965).
Not surprisingly, Loew’s was immediately appealed to the Ninth Circuit. While the decision was pending, Judge Carter was given a chance to reconsider his views in another case involving a television parody. Columbia Pictures Corp. v. National Broadcasting Co. involved Sid Caesar’s parody of the movie From Here to Eternity, entitled “From Here to Obscurity.” While Judge Carter stuck to his emphasis on the substantiality of the taking, he backed off somewhat from his view that a parody was entitled to no special consideration:

Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits a more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original. Judge Carter concluded that “[u]nlke Loew’s, here there was a taking of only sufficient [sic] to cause the viewer to recall and conjure up the original,” and held in favor of NBC.

In the words of one commentator, Judge Carter’s retreat “breathed some life back into the mangled body of parody.” Parody remained in critical condition, however, because less than a month later, the Ninth Circuit affirmed Judge Carter’s harsh Loew’s opinion in Benny v. Loew’s, Inc. The panel specifically approved Judge Carter’s initial view that parody was to be treated no differently from any other taking, and reiterated that parody was “no defense” to infringement. Defendants’ argument that parody was a form of literary criticism was dismissed as “a parody on the meaning of criticism.” The decision was appealed to the U.S. Supreme Court, where it was affirmed by an equally divided court.

These views are supported by the fact that Loew’s later permitted the parody to be broadcast after being paid a substantial amount of money. Nevertheless, the uncompromising language in Judge Carter’s opinion provoked a great deal of criticism, including a law review article by the then-Chief Judge of the Southern District of California. See Leon J. Yankwich, Parody and Burlesque in the Law of Copyright, 33 CAN. B. REV. 1130, 1148-52 (1955).

152 Id. at 354.
153 Id. at 351.
154 Bernstein, supra note 69, at 20.
156 Id. at 537.
157 Id.
The parody defense remained in this troubled state until *Berlin v. E.C. Publications*, which involved Mad Magazine's publication of satirical lyrics which could be sung to the tunes of 25 of the plaintiffs' copyrighted songs. The district court granted summary judgment to the defendants on 23 of the songs, finding that the parody lyrics were not substantially similar to the originals. On appeal, the Second Circuit affirmed without difficulty:

[A]s a general proposition, we believe that parody and satire are deserving of substantial freedom — both as entertainment and as a form of literary and social criticism. . . . At the very least, where, as here, 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.

The court was politely critical of the Ninth Circuit’s opinion in *Benny*, noting that it had been widely criticized in academic commentary, and holding that the taking in *Berlin* satisfied the “substantiality” test of *Benny*, “even if we were to find the rationale of that opinion persuasive.”

### C. Case Law Under The Copyright Act of 1976

In 1976, Congress passed the first comprehensive revision of U.S. copyright law since the 1909 Act. The 1976 Act gave statutory recognition to the judicially developed fair-use doctrine for the first time. Although parody was not listed among the illustrative uses in the statute, the legislative history of the 1976 Act expressly recognized that the “use in a parody of some of the content of the work parodied” could be a fair use.

Despite the fact that the Section 107 was “intended to restate the present judicial doctrine of fair use, [and] not to change, narrow, or enlarge it in any way,” the guidelines that it provided were not followed

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160 219 F. Supp. at 914.
161 329 F.2d at 545.
163 329 F.2d at 545.
by the Ninth Circuit in the next important parody case, *Walt Disney Productions v. The Air Pirates.* In *Air Pirates*, the defendants had published an underground comic book which depicted several Disney characters as "active members of a free-thinking, promiscuous, drug-ingesting counterculture." The district court, constrained by the restrictive opinion in *Benny*, granted summary judgment to the plaintiff. The Ninth Circuit affirmed, reinterpreting *Benny* in the process to clarify the distinction between fair use and infringement:

The language in *Benny* concerning the substantiality of copying . . . [should be] understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. . . . *Benny* should not be read as taking the drastic step of virtually turning the test for fair use into the test for infringement.

The court added in a footnote that "in so construing *Benny*, we necessarily disagree with the dictum that parody is treated no different [sic] than any other taking."

Having disposed of *Benny*'s most troublesome holding, the court then adopted the "conjure up" test that had been used in both *Columbia Pictures* and *Berlin*. Unlike the court in *Berlin*, however, it interpreted the "conjure up" test as a limitation on how much of the original could be used. Thus, the court found that "given the widespread public recognition of the major characters involved here, . . . very little would have been necessary to place Mickey Mouse and his image in the minds of the readers."

The court also asserted that "an alternative that involves less copying is more likely to be available" when the object of the parody is a comic book rather than a speech or other literary work. Finally, the court indicated its skepticism of the defendants' parodic purpose:

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167 581 F.2d 751 (9th Cir. 1978).
168 *Id.* at 753.
169 *Id.* at 756-57.
170 *Id.* at 757 n.13.
171 *Id.* at 757 ("In the absence of near-verbatim copying, other courts have analyzed the substantiality of copying by a parodist by asking whether the parodist has appropriated a greater amount of the original work than is necessary to ‘recall or conjure up’ the object of his satire.").
172 *Id.* at 757-58.
173 *Id.* at 758. Compare Warner Bros., Inc. v. American Broad. Cos., Inc., 720 F.2d 231, 241-42 (2d Cir. 1983) (indicating that copying of "substantial portions" of a literary work is likely to be infringement despite the addition of original material, whereas substantial copying of a graphic or three-dimensional work can be more easily justified because "[s]ignificant dissimilarities between two works of this sort inevitably lessen the similarity that would otherwise exist").
Also significant is the fact that the essence of this parody did not focus on how the characters looked, but rather parodied their personalities, their wholesomeness and their innocence. Thus, arguably defendants’ copying could have been justified as necessary more easily if they had paralleled closely (with a few significant twists) Disney characters and their actions in a manner that conjured up the particular elements of the innocence of the characters that were to be satirized. While greater license may be necessary under those circumstances, here the copying of the graphic image appears to have no other purpose than to track Disney’s work as a whole as closely as possible.\(^7\)

Unfortunately, the meaning of this convoluted paragraph is elusive at best. How could an artist “conjure up” particular “elements” of a cartoon character’s personality without also conjuring up other elements? What more could the defendants have done to “conjure up” the innocence of Disney’s characters in order to justify copying their appearance more closely? Is the court simply saying that the defendants’ parody wasn’t effective enough? It is clear that the Ninth Circuit felt that the Disney characters had been copied too closely under the circumstances, but it is unclear what, if anything, the defendants could have done to avoid a finding of infringement.\(^7\)

Despite this impenetrable passage, however, the greatest failing of the Air Pirates opinion was its refusal to consider whether the defendant’s parody would have usurped the demand for the original or licensed derivative works.\(^7\) Instead, the court focused solely on the substantiality of the taking, to the exclusion of the other factors:

\(^7\) See \textit{Alex Kozinski, Trademarks Unplugged}, 68 N.Y.U. L. REV. 960, 972 (1993) ("I have a hard time imagining how you could do that type of parody without using the actual characters.").

The Ninth Circuit may have been concerned that the depiction of the Disney characters in the defendants’ parody was so similar to the originals that children or adults might be confused as to whether Disney sponsored or endorsed the parody; or it might have believed that the images of the characters would be tarnished by their association with illegal activities. \textit{Id.} at 972. If so, however, it should have analyzed the issue as one of trademark infringement or dilution rather than fair use. See notes 372-73, 409-477 and accompanying text; \textit{cf.} 581 F.2d at 760 (remanding state unfair competition claim with directions to consider evidence of likelihood of confusion). Instead, it limited its discussion of trademark infringement to defendants’ use of the title “Silly Sympathies,” finding no likelihood of confusion to plaintiff’s registered trademark “Silly Symphonies.” \textit{Id.} at 759.

\(^7\) See \textit{id.} at 756 ("while some commentators have urged that the fair use defense depends only on whether the infringing work fills the demand for the original, this Court and others have also consistently focused on the substantial-
Because the amount of defendant's copying exceeded permissible levels, summary judgment was proper. While other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, this and other courts have accepted the traditional American rule that excessive copying precludes fair use.\footnote{Id. at 758. The court cited both \textit{Benny} and \textit{Berlin} to support this proposition. \textit{Berlin}, of course, had said nothing of the sort. It merely found it unnecessary to address the issue of whether any greater taking was permissible.}

In so holding, the court came perilously close to "virtually turning the test for fair use into the test for infringement," the very error for which it had criticized the \textit{Benny} opinion.

In a footnote, the \textit{Air Pirates} opinion also introduced an important limitation on the use of copyrighted works to satirize society in general:

\[W]\]e do not regard it as fatal \ldots that the "Air Pirates" were parodying life and society in addition to parodying the Disney characters. Such an effect is almost an inherent aspect of any parody. To the extent that the Disney characters are not also an object of the parody, however, the need to conjure them up would be reduced if not eliminated.\footnote{Id. at 758 n.15.}

In \textit{Elsmere Music, Inc. v. National Broadcasting Co.},\footnote{482 F. Supp. 741 (S.D.N.Y. 1980), aff'd, 623 F.2d 252 (2d Cir. 1980) (per curiam).} however, the district court expressly disagreed with this dictum, stating that even a pure satire was deserving of fair use protection. \textit{Elsmere} involved a \textit{Saturday Night Live} parody of the successful "I Love New York" advertising campaign, which portrayed officials of the biblical town of Sodom discussing ways to improve their city's image, and concluded with the cast singing "I Love Sodom" to the tune of "I Love New York." The plaintiff argued that the sketch did not qualify as a fair use, because although it satirized New York City and its problems, it did not parody the theme song itself. The district court disagreed, holding that the song was in part a target of the parody, and adding:

\[E\]ven if it were found that "I Love Sodom" did not parody the plaintiff's song itself, that finding would not preclude a finding of fair use. \ldots \[T]he 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 copyrighted song itself. To the extent that \ldots Walt

\footnote{Id. at 758 n.15.}
Disney can be read to require that there be an identity between the song copied and the subject of the parody, this Court disagrees. Having disposed of the threshold issue, the court held that the parody was a fair use, since it did not have the effect of fulfilling the demand for the original. The court also rejected the argument that the repetition of one four-note phrase at the end of the sketch was greater than necessary to “conjure up” the original, since that phrase was repeated continuously throughout the original advertisements.

On appeal, the Second Circuit affirmed “on Judge Goettel’s thorough opinion.” In a footnote, however, the court proposed a more lenient interpretation of the “conjure up” test:

[W]e note that the concept of “conjuring up” an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled to at least “conjure up” the original. Even more extensive use would still be a 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.

Less than one year after the Second Circuit’s Elsmere decision, however, another panel of the Second Circuit rejected the view that a satire need not parody the copyrighted work itself in order to qualify as a fair use. MCA, Inc. v. Wilson involved a take-off on the popular song “Boogie Woogie Bugle Boy (of Company B).” The allegedly infringing song, entitled “Cunnilingus Champion of Company C,” was presented as part of an off-Broadway play called Let My People Come — A Sexual Musical. The court said:

We agree . . . that a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general. However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up . . . . The district court held that defendant’s song was neither a parody or burlesque of Bugle Boy nor a humorous commentary on

180 482 F. Supp. at 746 (footnotes omitted).
181 Id. at 747.
182 Id.
183 623 F.2d at 253.
184 Id. at n.1. 253.
the music of the 40's. We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism.\(^{186}\)

Judge Mansfield wrote a critical dissent, relying largely on the fourth fair use factor. The majority had dismissed this factor by noting that both works were exploited in records, in stage performances, and in printed copies.\(^{187}\) Judge Mansfield argued that this analysis was "fatally defective," saying:

The issue is not whether the parody uses the same media as the copyrighted work — most parodies do — but whether it is "capable of serving as a substitute for the original," which depends on demand and product overlap rather than on the market in which the two products were vended. Applying this correct standard, it is eminently clear that the two works respond to wholly differing demands and that a customer for one would not buy the other in its place.\(^{188}\)

Judge Mansfield also argued that fair use should apply even if the work itself was not a target of the parody, arguing that "[p]ermissible parody, whether or not in good taste, is the price an artist pays for success, just as the public figure must tolerate more personal attack than the average citizen."\(^{189}\)

In 1986, the Ninth Circuit summarized the state of parody law in *Fisher v. Dees*.\(^{190}\) *Fisher* concerned a 29-second parody of the popular song "When Sunny Gets Blue" entitled "When Sunny Sniffs Glue." The *Fisher* court agreed with *Air Pirates* and *MCA* that "a humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the target of the work in question."\(^{191}\) However, it expressly endorsed *Elsmere*'s expansive reading of the "conjure up" test, rejecting the argument that courts should "limit the amount of permissible copying to that amount necessary to evoke only initial recognition in the listener."\(^{192}\) The court also paid particular attention to the fourth fair use factor, saying:

\(^{186}\) 677 F.2d at 185.
\(^{187}\) Id. at 183, 185.
\(^{188}\) Id. at 190 (Mansfield, J., dissenting) (citation omitted).
\(^{189}\) Id. at 191 (Mansfield, J., dissenting).
\(^{190}\) 794 F.2d 432, 434 (9th Cir. 1986).
\(^{191}\) Id. at 436.
\(^{192}\) Id. at 438.
Copyright law is not designed to stifle critics. . . . Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it fulfills the demand for the original.193

Comparing the two works, the court concluded that there was no cognizable economic effect on the original:

We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such as the composers’ song would be satisfied to purchase the parody instead. Nor are those fond of parody likely to consider “When Sunny Gets Blue” a source of satisfaction.194

D. Campbell v. Acuff-Rose Music, Inc.

In 1994, the U.S. Supreme Court issued its first written opinion in a copyright case involving parody.195 In Campbell v. Acuff-Rose Music, Inc.,196 the Sixth Circuit had ruled that a rap music parody of the popular song “Oh, Pretty Woman” recorded by the controversial rap group 2 Live Crew was not a fair use of the plaintiff’s copyrighted work because of the parody’s “commercial” character.197 A unanimous Supreme Court reversed, holding that “a parody’s commercial character is only one element to be weighed in a fair use enquiry,”198 and remanded for further fact-finding on the likely effect of the parody on the potential market for a non-parody rap version of the song.199 In so holding, the Court commented extensively on the four factors that comprise the fair use doctrine.

1. Purpose and Character of the Use

According to the Court, the “central purpose” of the first factor is to determine

193 Id. at 437-38.
194 Id. at 438.
195 The Court had previously decided one case involving an alleged parody of a copyrighted work, but it had not issued an opinion because the Court was equally divided. See Loew’s Inc. v. Columbia Broad. Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955), aff’d sub nom. Benny v. Loew’s, Inc., 239 F.2d 532 (9th Cir. 1956), aff’d by an equally divided court sub nom. Columbia Broad. Sys., Inc. v. Loew’s, Inc., 356 U.S. 43 (1958), discussed in notes 146-158 and accompanying text.
198 Campbell, 510 U.S. at 572.
199 Id. at 593-94.
whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression meaning or message; it asks, in other words, whether and to what extent the new work is "transformative." 200

Although a transformative use is not necessary to a finding of fair use, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." 201 Because parody "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one," it "has an obvious claim to transformative value," and may qualify as a fair use under §107. 202

In its opinion, the Court recognized a possible distinction between parody and satire: 203

[T]he heart of any parodist's claim to quote from existing material, 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. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, ... the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) ... Parody needs to mimic the original to make its point, and so 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. 204

Although this passage suggests that a parody or satire must target the original work in order to qualify as a fair use, in a footnote the Court retreated from this extreme position:

If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives ..., it is more incumbent on one claiming fair use to establish the extent of transformation and the parody's critical relationship to the original. By contrast, where there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows

200 Id. at 579 (citations and internal quotes omitted).
201 Id.
202 Id.
203 The Court quoted two definitions of "satire" as a work "in which prevalent follies or vices are assailed with ridicule," or are "attacked through irony, derision, or wit." Id. at 581 n.15 (citations omitted).
204 Id. at 580-81.
from the original, or other factors, taking parodic aim at the original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.205

Taken together, these passages suggest that even a satire that does not target the original work may legitimately be deemed a fair use as long as only a small amount of original expression is taken and the satire does not act as a market substitute for the original or for authorized derivative works. This interpretation is supported by the Court's insistence that "parody, like any other use, has to . . . be judged case by case, in light of the ends of the copyright law."206 In a concurring opinion, however, Justice Kennedy indicated that he would reject such an interpretation.207

Next, the Court held that the Sixth Circuit erred "[i]n giving virtually dispositive weight to the commercial nature of the parody."208 The Sixth Circuit had relied on a passage from the Supreme Court's Sony opinion stating that "every commercial use of copyrighted material is presumptively . . . unfair."209 The Supreme Court, however, rejected the view that the quoted language created a per se rule against commercial uses, saying:

If, indeed, commerciality carried a presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of §107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." Congress could not have intended such a rule . . .210

Instead, the Court held only that "the fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against

205 Id. at 580 n.14 (emphasis added).
206 Id. at 581 (emphasis added).
207 Id. at 597 (Kennedy, J., concurring) ("The 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.").
208 Id. at 584.
210 Id. at 584, quoting Harper & Row, 471 U.S. at 592 (Brennan, J., dissenting).
a finding of fair use,"  

2. Nature of the Copyrighted Work

The Court agreed with the general proposition that under the second factor, creative works are entitled to greater copyright protection than factual works, but added that this factor is of little significance in a parody case, because "parodies almost invariably copy publicly known, expressive works."  

3. Amount and Substantiality of the Portion Used

In assessing the third factor, "attention turns to the persuasiveness of a parodist's justification for the particular copying done." The Court held that parody often will require copying of qualitatively important portions of a work, because "the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable." The Court also recognized that the "conjure up" test did not delineate the maximum amount that could be taken, saying that "[o]nce enough has been taken to assure identification, how much more is reasonable will depend" on the other fair use factors. Finally, the Court indicated that the amount copied should be compared to the amount of original comment added by the parodist:

[T]he question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat. This is not a case, then, where "a substantial portion" of the parody itself is composed of "verbatim" copying of the original. It is not, that is, a case where the parody is so insub-

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212 Campbell, 510 U.S. at 585. For example, the use "of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence ... than the sale of a parody for its own sake." Id.
213 Id. at 586.
214 Id.
216 Id.
stantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists. 217

4. Effect upon the Potential Market or Value

The fourth factor requires courts to “take account not only of harm to the original but also of harm to the market for derivative works.” 218 The Court again held that it was error for the Sixth Circuit to presume a likelihood of harm to the market from the commercial character of the use, saying:

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. . . . 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. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way that is cognizable under this factor, that is by acting as a substitute for it. . . . This is so because the parody and the original usually serve different market functions. 219

The Court cautioned that any diminution in market value caused by the critical aspects of the parody is not actionable, endorsing the view that “the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.” 220 It also noted that “the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.” 221 Instead, the pertinent inquiry would be the effect of 2 Live Crew’s rap parody on the market for a non-parodic rap version of the original. Since neither party had introduced evidence concerning the market for such potential derivative uses, the Court remanded the case for further consideration. 222

E. Case Law Subsequent to Campbell

Other than the Dr. Seuss case, only one published Court of Appeal opinion has applied Campbell to a copyright case involving parody. 223 In

217 Id. at 589 (footnote and citation omitted).
218 Id. at 590, quoting Harper & Row, 471 U.S. at 568.
219 Id. at 591 (citations omitted).
220 Id. at 592 (internal quotes omitted).
221 Id.
222 Id. at 592-94.
223 Other Court of Appeals opinions have discussed the possible application of Campbell to other types of intellectual property. See Elvis Presley Enters.
Leibovitz v. Paramount Pictures Corp., the Second Circuit considered a parody of the famous photograph of a nude, pregnant Demi Moore on the cover of Vanity Fair magazine. The parody, which appeared in a newspaper ad for the movie The Naked Gun 33-1/3: The Final Insult (itself a parody of police detective movies), superimposed the smirking face of the film's male star, Leslie Nielsen, onto the body of a nude pregnant model, carefully posed to imitate the original. The Court of Appeals affirmed the district court's opinion granting summary judgment in favor of the defendant. The Court held that the advertisement was a "transformative" work that "may reasonable be perceived as commenting, through ridicule, on what a viewer might reasonably think is the undue self-importance" of the original photograph, and that "the strong parodic nature of the ad tips the first factor significantly toward fair use, even after making some discount for the fact that it promotes a commercial product." The court noted that the ad "took more of the Leibovitz photograph than was minimally necessary to conjure it up," but it gave the third factor "little, if any, weight . . . so long as the first and fourth factors favor the parodist." Finally, the court agreed that the ad "did not interfere with any potential market for [plaintiff's] photograph or for any derivative works based on it."

IV. DR. SEUSS ENTERPRISES V. PENGUIN BOOKS USA, INC.

The Cat in the Hat is one of the most well-known of the 47 children's books written by Theodor S. Geisel under the pseudonym Dr. Seuss. In the district court's words, "Dr. Seuss's works are designed to hold a child's interest through playful rhymes and illustrations which describe and depict extremely fanciful creatures and situations." In The Cat in the Hat, two

v. Capece, 141 F.3d 188, 198-200 (5th Cir. 1998) (rejecting parody defense to trademark infringement in name and decor of defendant's restaurant, "The Velvet Elvis"); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968-976 (10th Cir. 1996) (holding that baseball cards featuring parodies of major league baseball players were protected by the First Amendment against claims based on the players' rights of publicity).


137 F.3d at 111-12.

The district court reasoned that the ad "was intended to make a mockery of an image that had become a 'cultural icon,'" and that there was no evidence that the ad would adversely affect the sale or licensing of the original photo. 948 F. Supp. at 1221, 1226.

137 F.3d at 114.

Id. at 115.

Id. at 116.

Id.

young children are left alone in their house on a rainy day. Their boredom is interrupted by the arrival of the Cat, a “mischievous but well-meaning character” who is “almost always depicted with his distinctive scrunched and somewhat shabby red and white stove-pipe hat.” With his friends Thing 1 and Thing 2, the Cat wreaks havoc on the neat and orderly home. The children persuade the Cat to return the house to normal and the Cat departs just as their parents return, leaving the children to wonder whether they should tell their parents about the unauthorized visitor.

In 1995, Alan Katz wrote and Chris Wrinn illustrated *The Cat NOT in the Hat!*, a satire of the O.J. Simpson double-murder trial, in the style of Dr. Seuss. Penguin Books USA, Inc. and Dove Audio, Inc., agreed to publish and distribute the book in hardbound and audio formats. The story begins in Brentwood:

A happy town
Inside L.A.
Where rich folks play
The day away

But under the moon
The 12th of June
Two victims flail
Assault! Assault!

Somebody will go to jail!
Who will it be?
Oh my! Oh me!

The district court found that *The Cat NOT in the Hat!* was not based on any one Dr. Seuss book in particular. Rather, “Penguin’s book appears to wander through Dr. Seuss’s works, picking up an illustration here, [and] a rhyme there.” Thus, the third page mimics the title poem of Dr. Seuss’ *One Fish / Two Fish / Red Fish / Blue Fish* with the words “One Knife? / Two Knife? / Red Knife / Dead Wife.” Later, the book depicts Simpson’s houseguest Kato Kaelin in a manner similar to Dr. Seuss’ Horton the Elephant, together with a take-off on the familiar refrain of “Horton Hatches The Egg”:

I meant what I said

232 109 F.3d at 1396.
233 *Dr. Seuss, The Cat in the Hat* (1957).
234 109 F.3d at 1396.
235 *Id.* at 1401.
236 924 F. Supp. at 1561.
237 924 F. Supp. at 1563.
238 924 F. Supp. at 1579.
And I said what I meant
An elephant's faithful
One hundred percent!\(^{239}\)

Which was altered to read:

He said what he meant
A houseguest is faithful
One hundred percent.

Although the district court found that these instances were substantially similar to the originals, it held that the taking from *One Fish / Two Fish / Red Fish / Blue Fish* was not substantial enough to warrant a finding of infringement,\(^{240}\) and that the taking from *Horton Hatches The Egg* was justified under the fair use doctrine as a criticism of "the original work's endorsement of unquestioning faithfulness."\(^{241}\)

Thus, the only similarities on which the district court based its preliminary injunction were the similarities between Dr. Seuss' illustrations of the Cat in the Hat, and the parody's front and back cover illustrations of O.J. Simpson and the narrator, respectively, wearing the Cat's stove-pipe hat.\(^{242}\) The court held that Penguin was not entitled to a parody defense, because "[c]ourts have allowed parody claims only where there was a discernable direct comment on the original."\(^{243}\) The court found Penguin's claims that its book critically commented on the original work to be "completely unconvincing,"\(^{244}\) and endorsed Justice Kennedy's concurring opinion in *Campbell*, which had questioned the majority opinion's characterization of 2 Live Crew's parody as "a comment on the naivete of the original."\(^{245}\)

On an interlocutory appeal to the Ninth Circuit, Penguin elaborated on its claim that the work was both a satire of the O.J. Simpson trial and a parody of Dr. Seuss' works:

The Parody is a commentary about the events surrounding the Brown/Goldman murders and the O.J. Simpson trial, in the form of Dr. Seuss parody the transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns. The Parody's author felt that, by evoking the world of

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\(^{239}\) Dr. Seuss, *Horton Hatches the Egg* (1940).

\(^{240}\) 924 F. Supp. at 1566.

\(^{241}\) Id. at 1570.

\(^{242}\) Id. at 1564. The illustrations relied on by the district court are reproduced in 924 F. Supp. at 1577-78, and in the Ninth Circuit's opinion in 109 F.3d at 1407-08.

\(^{243}\) 924 F. Supp. at 1569.

\(^{244}\) Id.

\(^{245}\) Id., quoting *Campbell*, 510 U.S. at 599 (Kennedy, J., concurring).
the Cat in the Hat, he could (1) comment on the mix of frivolousness and moral gravity that characterized the culture's reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as *The Cat in the Hat* in a way that implied that the work was too limited to conceive the possibility of a real trickster "cat" who creates mayhem along with his friends Thing 1 and Thing 2, and then magically cleans it up at the end, leaving a moral dilemma in his wake.246

The Court of Appeals agreed with the district court that this was a "post-hoc characterization of the work" that was "pure shtick" and "completely unconvincing."247

In analyzing the first fair use factor, the Ninth Circuit correctly observed that "the inquiry is whether *The Cat NOT in the Hat!* merely supersedes the Dr. Seuss creations, or whether and to what extent the new work is 'transformative,' i.e., altering *The Cat in the Hat* with new expression, meaning or message."248 However, it refused to find that *The Cat NOT in the Hat!* was a parody, which it defined as "a literary or artistic work that broadly mimics an author's characteristic style and holds it up to ridicule."249 The court said:

> Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold his style up to ridicule. The stanzas have "no critical bearing on the substance or style of" *The Cat in the Hat*. Katz and Wrinn merely use the Cat's stove-pipe hat, the narrator ("Dr. Juice") and the title (*The Cat NOT in the Hat!* "to get attention" or maybe even "to avoid the drudgery in working up something fresh." Acuff-Rose, 510 U.S. at 580, 114 S.Ct. at 1172. While Simpson is depicted 13 times in the Cat's distinctively scrunched and somewhat shabby red and white stove-pipe hat, the substance and content of *The Cat in the Hat* is not conjured up by the focus on the Brown-Goldman murders or the O.J. Simpson trial.250

Because it was unable to perceive any parodic character in the work, the Ninth Circuit concluded that "there is no effort to create a transformative work with 'new expression, meaning or message,'"251 and added that "the

246 109 F.3d at 1402-03.
247 Id. at 1403.
248 109 F.3d at 1400.
249 Id. at 1401.
250 Id.
251 Id.
infringing work’s commercial character further cuts against the fair use defense.”

The court held that the second factor also favored the plaintiff, but it conceded that “this factor typically has not been terribly significant in the overall fair use balancing.”

Next, the court stated that the third factor “really raises the question of substantial similarity discussed in the preceding section [on infringement], rather than whether the use is ‘fair.’” The court observed that “the Cat’s image is the highly expressive core of Dr. Seuss’ work,” and rejected the defendants’ claim that “they selected The Cat in the Hat as the vehicle for their parody because of the similarities between the two stories.”

Finally, the court presumed that The Cat NOT in the Hat! presented a likelihood of harm to the potential market for the original and licensed derivatives of the original:

Because, on the facts presented, Penguin and Dove’s use of The Cat in the Hat original was nontransformative, and admitted commercial, we conclude that market substitution is at least more certain and market harm may be more readily inferred.

The Court also held that Penguin and Dove “must bring forward favorable evidence about relevant markets,” and that their “failure to submit evidence on this point” disentitled them to rely on the fair use defense.

V. A CRITICAL ANALYSIS OF THE NINTH CIRCUIT’S OPINION

A. Fair Use Defense to Copyright Claim

In holding that the defendants were not entitled to rely upon a fair use defense, the Ninth Circuit held that The Cat NOT in the Hat! was not a parody; that as a satire it was not a “transformative” use of the original; that as a result, the defendants had no permissible justification for using the Cat’s “image” and stove-pipe hat on the front and back cover (and

252 Id.
253 Id. at 1402.
254 Id.
255 Id.
256 Id.
257 Id. at 1403.
258 Id.
259 Although the court repeatedly characterizes the allegedly infringing work as having “appropriated the Cat’s image,” 103 F.3d at 1398, 1402, this statement is misleading because the Cat in the Hat does not appear anywhere in the defendant’s work. See notes 234-242 and 324-330 and accompanying text.
and that harm presumptively existed to the potential market for the original or for licensed derivative works. Each of these holdings was in error.

1. Purpose and Character of the Use

According to Campbell, “[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”[261] In the case of The Cat NOT in the Hat!, not only may a parodic character reasonably be perceived, but the work manifestly satisfies several traditional and judicial definitions of parody.

In Campbell, the Supreme Court quoted a dictionary definition of parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule.”[262] By contrast, the Ninth Circuit quoted a slightly different definition: a “literary or artistic work that broadly mimics an author’s characteristic style and holds it up to ridicule.”[263] The Ninth Circuit found that although the defendant’s work did broadly mimic the characteristic style of Dr. Seuss, it did not ridicule it. But under the definition quoted by the Supreme Court, it is not necessary that the original be held up to ridicule; it is sufficient that the alleged parody seeks to achieve a comic effect through exaggerated imitation. Likewise, in Elsmere Music, Inc. v. National Broadcasting Co.,[264] the Second Circuit stated that a parody is a fair use if it “builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.”[265]

While the Ninth Circuit emphasized several times the use of the Cat’s hat in the text, the district court’s holding was based only on the front and back cover of the defendants’ work. 924 F. Supp. at 1563-64 (discussing similarities), id. at 1566 (dismissing some similarities as insubstantial), id. at 1570 (dismissing some similarities as fair use); see also 109 F.3d at 1399 (injunction based only on back cover).

510 U.S. at 582.

Id. at 580 (emphasis added). See also Nike Inc. v. “Just Did It” Enters., 6 F.3d 1225, 1227 (7th Cir. 1993) (“a writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule”).

109 F.3d at 1401 (emphasis added).

623 F.2d 252 (2d Cir. 1980) (per curiam).

623 F.2d at 253 n.1. This decision was cited with approval by the Supreme Court in Campbell. 510 U.S. at 580. See also Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 321 (4th Cir. 1992) (holding that t-shirt using recognizable trade dress of Budweiser label to extol virtues of Myrtle Beach, S.C., was a trademark parody); compare id. at 327 (Powell, retired Associate Justice, dissenting) (“It does not ridicule Budweiser or offer social commentary on the evils of alcohol.”).
One way of achieving a humorous effect or comment on the original work is re-imagine the original work in an incongruous context. Thus, the Oxford English Dictionary defines parody 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, especially by applying them to ludicrously inappropriate subjects." Although the Supreme Court quoted only the first portion of this definition in Campbell, it did not hold, or even suggest, that parodies involving "ludicrously inappropriate subjects" could not qualify as a fair use. Indeed, the rap music parody involved in the Campbell case itself relied heavily on this type of parodic incongruity.

Viewed in this light, it is clear that The Cat NOT in the Hat! is at least in part a parody. By juxtaposing the childish style of Dr. Seuss' works with the events surrounding the O.J. Simpson case, the parody succeeds in commenting both on society's fixation on the trial and on the "naivete of the original." By placing O.J. Simpson in the Cat's hat, the authors not only comment on Simpson's evasion of responsibility for his actions, but they also subtly suggest that the Cat in the Hat may be seen as a sinister

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266 See Berlin v. E.C. Publications, 329 F.2d 541, 545 (2d Cir. 1964) ("the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, [is] traditionally a tool of parodists"); Anheuser-Busch, 962 F.2d at 321 (defining a trademark parody as "a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner."); see also notes 31-36 and accompanying text.


268 510 U.S. at 580 & n.13.

269 Id. at 583 ("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").

270 Id. See Gregory K. Jung, Comment, Dr. Seuss Enterprises v. Penguin Books, 13 Berkeley Tech. L. J. 119, 130 (1998) (noting that the authors' characterization of the work as a parody "does not seem any more implausible than 2 Live Crew's characterization of its version of "Pretty Woman" as a criticism of the banality of Orbison's version."); Mary L. Shapiro, Comment, An Analysis of the Fair Use Defense in Dr. Seuss Enterprises v. Penguin, 28 Golden Gate U. L. Rev. 1, 31 (1998) (noting several similarities between The Cat NOT in the Hat! and 2 Live Crew's parody, and concluding that "both commented on society and the naivete of the original work.").
and dangerous figure, instead of the merely mischievous character depicted in the original work.271

Indeed, it is difficult to imagine how else Dr. Seuss' work could be parodied except by applying his characteristic style to patently adult subject matter. Dr. Seuss' work is already comic and often even satirical in nature, so merely employing Seussian characters and rhymes in a humorous children's work would be a flattering imitation at best, and piracy at worst. Only by using the works of Dr. Seuss to comment on "ludicrously inappropriate subjects" such as the O.J. Simpson trial can Dr. Seuss' style be held up to ridicule. What better way could there be to criticize or make fun of the character of the mischievous Cat, who manages to evade responsibility for his actions by disappearing into the night, than by comparing the Cat to a real-life multiple murderer who accomplished the same goal?

The Ninth Circuit, however, refused to accept the authors' characterization of the work as a parody.272 Instead, it rejected their argument as a "post hoc characterization" that was "pure shtick" and "completely unconvincing."273 In doing so, the panel overlooked the fact that all literary criticism is a "post hoc characterization" of the work being examined, and that regardless of the authors' intent, a work can have many different meanings to different people.274 Instead of following the Supreme Court's directive to inquire only "whether a parodic character may reasonably be perceived,"275 the Ninth Circuit panel allowed its own views concerning the artistic merits of the work to color its judgment, an error which the Supreme Court and other courts have repeatedly cautioned against.276

271 See Jason M. Vogel, Note, 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, 317 (1998) ("The Cat NOT in the Hat! implicitly asserts that, in some respects, O.J. Simpson is like the Cat in the Hat. This creates the reciprocal implication that the Cat in the Hat is somewhat like O.J. Simpson. This inference should be construed as commenting upon Dr. Seuss's work.").

272 See notes 246-252 and accompanying text.

273 109 F.3d at 1403.

274 See notes 50-54 and accompanying text.

275 Campbell, 510 U.S. at 582.

276 See Campbell, 510 U.S. at 582 ("Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use."); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."); University of Notre Dame du Lac v. Twentieth Century Fox Film Corp., 256 N.Y.S.2d 301, 307 (App. Div. 1965) ("Whether 'John Goldfarb, Please Come Home' is good burlesque or bad, penetrating satire or blundering buffoonery is not for us to decide. It is fundamental
refusing to recognize the parodic content of *The Cat NOT in the Hat!,* the Ninth Circuit ignored these admonitions, and instead joined the ranks of those courts that have, in effect, shielded Disney and other cultural icons of childhood from any type of critical comment in the form of parody.277

In rejecting the defendants' claim of parody, the Ninth Circuit relied in part on the Second Circuit's opinion in *Rogers v. Koons,*278 in which the court stated that "though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody."279 That statement, however, must be considered in the context of the facts of that case. Pop sculptor Jeff Koons had taken a copyrighted photograph, removed the copyright notice, and directed his artisans to copy the photograph as closely as possible in three-dimensional form.280 He attempted to avoid a finding of infringement by claiming that his sculpture was a criticism of "the mass production of commodities and media images" and was intended to be a comment on "the political and economic system that created it."281 Because Koons did not make any serious attempt to add any original expression of his own, the Second Circuit properly held that his sculpture was not a parody. In doing so, however, it explained:

> By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.282

In this case, Dr. Seuss' work is well known to the public; the defendants clearly acknowledged the existence of the prior work, both by labeling their work a parody and identifying the original in their advertising, and by recognizable allusions to the title (*The Cat NOT in the Hat!* and the

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277 See *Walt Disney Prods. v. Air Pirates,* 581 F.2d 751, 753 (9th Cir. 1978) (holding that "a rather bawdy depiction of the Disney characters as active members of free thinking, promiscuous, drug ingesting counterculture" was not a fair use); *Walt Disney Prods. v. Mature Pictures Corp.,* 389 F. Supp. 1397 (S.D.N.Y. 1975) (holding that repeated use of the Mickey Mouse March in a pornographic movie featuring sex acts with teenagers in Mouseketeer hats was not a fair use).

278 960 F.2d 301 (2d Cir. 1992).

279 Id. at 310.

280 Id. at 305.

281 Id. at 309.

282 Id. at 310.
author ("Dr. Juice") of the original; and the defendants created a new work that commented on the original by adding substantial original and separate expression of their own. In this instance, therefore, Rogers does not militate against a finding of fair use.

In any event, the Ninth Circuit made an even more egregious error when it concluded that since the The Cat NOT in the Hat! was not a parody, "there is no effort to create a transformative work with 'new expression, meaning, or message.'"\(^\text{283}\) Although the majority in Campbell indicated that a satire may require a greater justification for borrowing from another's work than a parody, it did not hold that a satire could not be a fair use.\(^\text{284}\) Indeed, it stated that a satire could be a fair use if "there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, . . . [or] the small extent to which it borrows from the original."\(^\text{285}\) In holding that The Cat NOT in the Hat! was not a transformative use entitled to fair use protection, the Ninth Circuit erred in relying on Justice Kennedy's concurring opinion,\(^\text{286}\) which was dictum endorsed by only one justice.

In Campbell, the Supreme Court endorsed the theory of "transformative use" set forth in a law review article by U.S. District Judge Pierre N. Leval.\(^\text{287}\) In Judge Leval's words:

> [If] the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — that is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.\(^\text{288}\)

Thus, in a case involving an alleged parody of the cover of the Old Farmer's Almanac by New York magazine, Judge Leval eloquently defended satire as a fair use:

> But the dispute as to whether New York's cover was a parody misses the point. Yankee's argument implies that the special considerations emanating from the First Amendment depend on whether the allegedly infringing work is one of parody. That is not correct. . . . [P]arody is merely an example of the types of expressive content that are favored in fair use analysis under the

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\(^{283}\) 109 F.3d at 1401.

\(^{284}\) See notes 203-206 and accompanying text.

\(^{285}\) 510 U.S. at 580 n.14.

\(^{286}\) See 109 F.3d at 1400 (quoting concurring opinion of Justice Kennedy).


\(^{288}\) Leval, 103 Harv. L. Rev. at 1111, cited in Campbell, 510 U.S. at 579.
copyright law and First Amendment deference under the trademark law. . . . *New York*'s commentary on the times — that the reeling economy may be toppling *New York* from its glamorous, free-spending perch toward the Yankee thrift characteristic of the *Almanac* — is an expressive message that is fully entitled to First Amendment deference, as much so as in the case of typical parody.289

In such a case, the justification for permitting borrowing from the creative works of another is that works of popular culture are common points of reference for our society.290 They come to symbolize certain ideas and values through the characters they contain and the events they portray.291 Unreasonably restricting the use of well-known works to satirize society therefore runs the risk of restricting the free communication of ideas.292

289 Yankee Publ'g Inc. v. News Am. Publ'g, Inc., 809 F. Supp. 267, 279 (S.D.N.Y. 1992). *Yankee Publishing* was also cited with approval in *Campbell*, 510 U.S. at 583. See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964) ("as a general proposition, we believe that parody and satire are deserving of substantial freedom — both as entertainment and as a form of social and literary criticism.").

290 Cf. *White v. Samsung Elects. Am., Inc.*, 989 F.2d 1512, 1512 n.6 (9th Cir. 1993) (Kozinski, J., joined by O'Scannlain & Kleinfeld, JJ., dissenting from denial of rehearing en banc) (listing 23 uses of trademarks as cultural references in books, movies, fine art and popular songs).


292 See *Cohen v. California*, 403 U.S. 15, 26 (1971) ("we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); see also *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996):

> [C]elebrities are "common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory." Through their pervasive presence in the media, sports and entertainment celebrities come to symbolize certain ideas and values. . . .Celebrities, then, are an important element in the shared communicative resources of our cultural domain.

Because celebrities are an important part of our public vocabulary, a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of the idea or value that the celebrity symbolizes in society. . . . In order to effectively criticize society, parodists need access to images that mean something to people, and thus celebrity parodies are a valuable communicative resource. Restricting the use of celebrity identities restricts the communication of ideas.
As the Second Circuit stated in *Warner Bros., Inc. v. American Broadcasting Companies*: 293

Especially in an era of mass communications, it is to be expected that phrases and other fragments of expression in a highly successful copyrighted work will become part of our language. . . . It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor. 294

In his concurring opinion in *Campbell*, Justice Kennedy argued against permitting the unauthorized use of a copyrighted work as a "weapon" to attack targets other than the original work (a use the majority labeled "satire"). 295 He argues that although a parody of a particular work must borrow from the original, the satirist has a wide range of potential weapons to choose from, including the entire store of public domain works. 296 But even assuming that a workable distinction could be drawn between the use of parody as a "weapon" and as a "target," 297 this argument is unpersuasive for several reasons. First, it ignores the fact that the work used as a weapon must be current enough to enable the audience to identify it. 298 The vast majority of public domain works are more than 75
years old. Even those few works that are still readily recognized by older adults may not have any meaning or cultural significance for younger adults, who are likely to view them as outdated and irrelevant. Second, "a parodist's choice of a particular weapon as embodying something else that is the ultimate 'target' is not accidental." By choosing a particular work, the parodist is making an artistic decision that the work is best suited for his or her purposes. The reason may be a felicitous meter or rhyme scheme, the identification of the work in the public's mind with a particular time period or other target, or a previously unrecognized connection of artistic themes; but it is an inherently artistic judgment that should be left to artists, not judges. Third, unless the copyright holder is willing to license the work for use in satires, drawing a weapon/target distinction would deprive the satirist of a range of artistic choices without any

299 Prior to passage in 1998 of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, the maximum term of copyright for works published before Jan. 1, 1978 was 75 years from the date of first publication. The maximum term for such works has now been extended to 95 years. 17 U.S.C. § 304. For works created on or after Jan. 1, 1978, the term of copyright has been extended to life of the author plus 70 years, or in the case of works made for hire, the earlier of 95 years from the date of first publication or 120 years from the date of creation. 17 U.S.C. § 302. These durations are so long that secondary authors will rarely live to see the familiar works of their childhood fall into the public domain.

300 Moreover, in an increasingly diverse, multi-cultural society, it is myopic to assume that there is a core of public domain works that is familiar to the majority of the public. By contrast, it is a reasonable assumption that most people have at least a passing familiarity with the most popular current songs, movies and television shows.

301 Merges, supra note 142, at 311; see also Susan Linehand Faaland, Comment, Parody and Fair Use: The Critical Question, 57 WASH. L. REV. 163, 185 (1981) ("Defendants might have a logical reason for conjuring up a song without intending to parody the song itself."); Vogel, supra note 271, at 315 ("Artistic ideas of the satirist are likely to be inextricably tied to the underlying borrowed material."); TEST, supra note 8, at 160 (noting the "intimate and ultimately interdependent nature" of weapon and target).

302 The Supreme Court has cautioned that judges are ill-equipped to make artistic judgments of this type. See note 276 and accompanying text. See also Kathryn D. Piele, Three Years After Campbell v. Acuff-Rose Music, Inc.: What is Fair Game for Parodists?, 18 LOY. L.A. ENT. L.J. 75, 98 (1997) ("Courts should not have discretion to make a subjective determination about what an original work represents or what a secondary work is attempting to say about it."); Paul Tager Lehr, Note, The Fair Use Doctrine Before and After "Pretty Woman's" Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody, 46 FLA. L. REV. 443, 474-75 (1994) ("Judges surely are not equipped to determine what a work of art means, nor are they equipped to distinguish a parody that comments on the original work from a satire that uses the original work to comment on society").
countervailing societal benefit. Denying permission would serve only to permit government-sanctioned censorship, and would not serve the copyright holder's economic interest.\textsuperscript{303} For these reasons, the majority of academic commentators agree that the use of parody as a "weapon" to attack targets other than the copyrighted work should be given protection under the fair use doctrine.\textsuperscript{304}

In this case, \textit{The Cat NOT in the Hat!} contains an expressive message that is deserving of fair use protection. It suggests that O.J. Simpson behaved like a naughty child in trying to place the blame for the Brown-Goldman murders on a mysterious unknown visitor, when in reality, Simpson and the "Cat" were one and the same:

\begin{verbatim}
JUICE
+ST
JUSTICE
Hmm . . . take the word JUICE.
Then add ST.
Between the U and I, you see.
And then you have JUSTICE.
Or maybe you don't.
Maybe we will.
And maybe we won't.
'Cause if the Cat didn't do it?
Then who? Then who?
Was it him?
Was it her?
\end{verbatim}

\textsuperscript{303} This argument is more fully developed in the discussion of the fourth factor. See notes 357-374 and accompanying text.

\textsuperscript{304} See, e.g., Winslow, supra note 142, at 803-05 (arguing that no distinction should be made between weapon parody and target parody); Merges, supra note 142, at 311-12 ("Perhaps one might even argue that 'weapon' cases are more deserving of fair use 'protection' since they presumably serve the goal of promoting criticism of and commentary on 'larger' social issues and values."); Faaland, supra note 301, at 186 n.137 ("a parody which does closely track the original's wording and structure can quite legitimately carry social criticism without criticizing the original."); Dorsen, supra note 59, at 958 ("Satire is a creative literary form using copyrighted material to fashion something entirely new, rather than merely reproducing the product of the copyright owner."); Vogel, supra note 271, at 310-16 (arguing that rationale for protecting parody applies equally to satire); L. David McBride, Note, \textit{Copyright: Same Song, Different Verse: Parody as Fair Use After Campbell v. Acuff-Rose Music, Inc.}, 48 OKLA. L. REV. 627, 646-47 (1995) (same).

Both Paul Goldstein and Judge Richard A. Posner have expressed the contrary view. See \textit{Goldstein}, supra note 295, at 10:27-28; Posner, supra note 142, at 71, 73-74. For additional criticism of their views, see notes 362-369 and accompanying text.
Was it me?
Was it you?
Oh me! Oh my!
Oh my! Oh me!

The murderer is running free.\textsuperscript{305}

While many commentators expressed the view that Simpson was in fact guilty of the Brown-Goldman murders, most of them did so in a stultifyingly serious, pompous and self-important manner. By framing their social satire with a common cultural reference that would be instantly recognizable to everyone, the defendants were attempting to convey their message in a unique manner to an audience already satiated with the coverage of the traditional media. In addition, using a well-known children's book to comment on the trial acted as a "comment on the mix of frivolousness and moral gravity that characterized the culture's reaction to the events surrounding the Brown/Goldman murders."\textsuperscript{306} In so doing, the defendants did not merely supersede the original; instead, they "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning or message."\textsuperscript{307} As such, the defendants' use was a "transformative" use that was deserving of fair use protection.

2. \textit{Nature of the Copyrighted Work}

In \textit{Campbell}, the Supreme Court acknowledged that the second factor has little role to play in parody cases, because "parodies almost invariably copy publicly known, highly expressive works."\textsuperscript{308} This fact, however, suggests that the purpose of copyright, to encourage the creation of new creative works, is little served by protecting such works against limited use by others as vehicles for parody and satire:

After all, any work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity, but it places a substantial inhibition on the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.\textsuperscript{309}

\textsuperscript{305} 109 F.3d at 1402 (quoting \textit{The Cat NOT in the Hat!}).
\textsuperscript{306} \textit{Id.} (quoting the defendants' opening brief on appeal).
\textsuperscript{307} \textit{Campbell}, 510 U.S. at 579.
\textsuperscript{308} 510 U.S. at 586.
\textsuperscript{309} Warner Bros., Inc. v. American Broad. Cos., Inc., 720 F.2d 231, 242-43 (2d Cir. 1983). Posner correctly points out that this argument assumes an \textit{ex post} point of view rather than an \textit{ex ante} one. Posner, \textit{supra} note 142, at 72-73. However, it is likely that the effect of protecting parody and satire as fair
Moreover, "[t]he public interest [in dissemination of the parody] should increase in direct proportion to the publicity received by the object of the parody, as our nation is committed to an 'uninhibited, robust, and wide-open' debate on public issues, and the more public a work is, the more available it should be for use in commentary."

3. Amount and Substantiality of the Portion Used

According to the Supreme Court, "[t]he third factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . are reasonable in relation to the purpose of the copying." The Ninth Circuit found that the defendants "appropriated the Cat's image, copying the Cat's Hat and using the image on the front and back covers and in the text (13 times)," and held that such copying was unreasonable, because "the Cat's image is the highly expressive core of Dr. Seuss' work."

The Ninth Circuit's rationale is misleading as a factual matter, because it implies that the character of the Cat in the Hat (the Cat's "image") was copied verbatim by the defendants. That is incorrect. The character of the Cat in the Hat does not appear at all in the defendant's work. What appears is a caricature of O.J. Simpson drawn in the style of Dr. Seuss, wearing the Cat's distinctive red-and-white stove-pipe hat. It is only the hat that makes the allusion to The Cat in the Hat recognizable. Without the hat, the defendant's drawings would still be Seussian in general appearance, but no particular character (and certainly not the Cat) could be identified. Thus, the Ninth Circuit's ruling amounts to a virtual monopoly on any use of a red-and-white stovepipe hat.

But even accepting the Ninth Circuit's finding that the defendant copied the "highly expressive core" of the plaintiff's work, that finding is merely the beginning of the analysis. As the Supreme Court explained in *Campbell*:

use on the economic incentives to the original author are extremely modest. *See* notes 340-349 and accompanying text.

310 *Winslow*, *supra* note 142, at 811 (footnote deleted; emphasis in original); *see also* notes 384-399 and accompanying text (discussing public interest under First Amendment of permitting parodies of celebrities and other public figures).

311 *Campbell*, 510 U.S. at 586 (citation and internal quote omitted).

312 109 F.3d at 1402.

313 *See* 924 F. Supp. at 1577. The back cover also features a drawing of the narrator wearing a red-and-white stovepipe hat. While this drawing bears some similarities to the plaintiff's drawing of the Cat, it is a recognizable human character, and could not be mistaken for the Cat in the Hat. *Id.* at 1578.
Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at an 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. 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.\textsuperscript{314}

Thus, “[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.”\textsuperscript{315} Similarly, if the defendants in \textit{Dr. Seuss} had refrained from copying the red-and-white stovepipe hat, it is difficult to see how their intended message, the comparison of O.J. Simpson to the Cat, could have been made.

The Ninth Circuit, however, ignored this aspect of the \textit{Campbell} opinion, and instead endorsed a more restrictive analysis:

This court has adopted the “conjure up” test where the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to “recall” or “conjure up” the original.\textsuperscript{316}

This statement of the “conjure up” test is both unnecessarily grudging and inconsistent with the Supreme Court’s more generous standard in \textit{Campbell}. The Supreme Court stated that “the parody must be able to ‘conjure up’ \textit{at least} enough of that original to make the object of its critical wit recognizable,”\textsuperscript{317} and recognized that an even greater taking might be permissible:

Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original, or, in contrast, the likelihood that the parody may serve as a market substitute for the original.\textsuperscript{318}

In addition, the Supreme Court specifically cited a footnote in the Second Circuit’s \textit{Elsmere} decision, in which the court stated:

\begin{quote}
[W]e note that the concept of “conjur[ing] up” an original came into the copyright law not as a limitation on how much of an
\end{quote}

\begin{thebibliography}{9}
\bibitem{314} 510 U.S. at 588 (citations omitted).
\bibitem{315}  \textit{Id.} at 588-89.
\bibitem{316}  103 F.3d at 1400.
\bibitem{317}  510 U.S. at 588 (emphasis added).
\bibitem{318}  \textit{Id.}
\end{thebibliography}
original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. 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.\textsuperscript{319}

The Ninth Circuit's continued reliance on an outdated, restrictive version of the "conjure up" test was therefore error.

Instead, the Supreme Court's opinion in \textit{Campbell} directs lower courts to inquire "what else the parodist did besides go to the heart of the original."\textsuperscript{320} If a substantial portion of the alleged parody was copied verbatim from the original, and the parodic element added by the defendant is "insubstantial, as compared to the copying," then the third factor will weigh heavily against the defendant.\textsuperscript{321} But if the parodist has merely copied some "distinctive or memorable features" in order to "conjure up" the original,\textsuperscript{322} and has "thereafter departed markedly from the [original] for its own ends," the copying cannot be said to be "excessive in relation to its parodic purpose."\textsuperscript{323}

In the \textit{Dr. Seuss} case, the defendants did not copy any portion of the text of the plaintiff's works verbatim. Instead, the defendants evoked the works of Dr. Seuss primarily through the use of simple rhymes, a similar poetic meter, and illustrations drawn in the style of Dr. Seuss.\textsuperscript{324} They also used a title that was similar to, but recognizably different from, one of the plaintiff's well-known works, and a pseudonym ("Dr. Juice") that rhymed with the plaintiff's, but was obviously also a take-off on O.J. Simpson's nickname. The district court found only two similarities between the


\textsuperscript{320} 510 U.S. at 589.

\textsuperscript{321} \textit{Id.} at 589. \textit{See also id.} at 587-88 ("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.").

\textsuperscript{322} \textit{Id.} at 588.

\textsuperscript{323} \textit{Id.} at 589.

\textsuperscript{324} 924 F. Supp. at 1565 ("Penguin's book mimics the illustration and rhyming style of Dr. Seuss. Although these elements are not copyrightable, they are relevant to whether copying took place.").
text of the allegedly infringing work and any of the plaintiff's works, and it held that both uses were permissible.

The only similarities on which the district court based its injunction were the front and back cover illustrations, and in each the principal feature was the Cat's red-and-white stovepipe hat. The hat, of course, is a "distinctive or memorable feature" of the original, but one that was copied only to "conjure up" the original in order to drive home the defendants' comparison of O.J. Simpson to the Cat. Thereafter, the defendants "departed markedly" from the original, using the hat not to illustrate the story of a mischievous cat who wreaks havoc upon a child's house on a rainy day, but to illustrate the caricature of O.J. Simpson in retelling the story of the Brown/Goldman murders and the subsequent criminal trial. The other illustrations that accompany the defendants' original text were also substantially original, incorporating fragments from the plaintiff's

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325 924 F. Supp. at 1563-64.
326 Id. at 1566, 1570. The Court also held that the one illustration of Kato Kaelin that was similar to Horton The Elephant was permissible. Id. at 1570.
327 924 F. Supp. at 1564. The district court also noted some specific similarities in the illustrations. Id. While most of these similarities can be attributed to the use of a similar style of illustration, the back-cover illustration of The Cat NOT in the Hat! is recognizably derived from the cover illustration of The Cat in the Hat. Id. Again, however, the copying is not verbatim; the back-cover illustration shows a recognizably human figure, rather than the Cat himself. Id. at 1578. Thus, "out of Dr. Seuss's original, sixty-one page, fully-illustrated work, the defendants infringed no text and only one illustration." Vogel, supra note 271, at 307.
328 The alleged repetitive use of the hat 13 times in the illustrations accompanying the text is justified by the context in which the hat appears. In each case it accompanies a caricature of O.J. Simpson, thereby reinforcing both the comparison of O.J. Simpson to the Cat and highlighting the distinction between the original and the parody, rather than merely supplanting the original. Cf. Campbell, 510 U.S. at 589 n.19 (noting that repetition "may serve to heighten the comic effect of the parody" in certain circumstances), citing Elsmere Music, Inc. v. National Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980) (holding that repetition of four-note musical theme in song parody was justified in view of the amount of repetition in the original), aff'd, 623 F.2d 252 (2d Cir. 1980) (per curiam). As in Elsmere, moreover, the repetition in this case is a characteristic of the original work. Literary scholars agree that the best parodies are those that tamper least with the original material. See notes 55-56 and accompanying text.
329 The cover illustration, for example, depicts Simpson in the Cat's hat, wearing a suit and holding a bloody glove, with a carefree smirk on his face. 924 F. Supp. at 1577. In quantitative terms, "the district court found no infringing text and only one infringing image in this parody, which contained over forty-four illustrated pages." Vogel, supra note 271, at 305.
works only in order to "conjure up" the style of the original.\textsuperscript{330} Certainly \textit{The Cat NOT in the Hat!} cannot be characterized as "a work composed primarily of an original, \ldots with little added or changed," or as a work in which the parodic element added by the defendants was "insubstantial" compared to the copying. Given the Ninth Circuit's failure to apply the proper test in considering the third factor, its conclusion that the third factor favored the plaintiff was clearly erroneous.

4. \textit{Effect upon the Potential Market or Value}

Under the fourth factor, courts must consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant \ldots would result in a substantially adverse impact on the potential market" for the original and licensed derivatives of the original.\textsuperscript{331} In \textit{Campbell}, the Sixth Circuit had quoted from a previous Supreme Court opinion, \textit{Sony Corp. of America v. Universal City Studios, Inc.},\textsuperscript{332} in which the Supreme Court had said: "If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, that likelihood must be demonstrated."\textsuperscript{333} The Supreme Court reversed, holding that it was error for the Sixth Circuit to presume market harm in this manner and limiting the scope of its previous opinion in \textit{Sony}:

No "presumption" or inference of market harm that might find support in \textit{Sony} is applicable to a case involving something beyond mere duplication for commercial purposes. \textit{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 \textit{Sony} itself (home copying of television programming). In the former circumstances, what \textit{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 of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. 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. Indeed, as to parody pure and simple, it is more likely that the new work will not

\textsuperscript{330} See 924 F. Supp. at 1564 (finding significant similarities in only three of seven illustrations alleged to be similar).


\textsuperscript{332} 464 U.S. 417 (1984) (holding that home videotaping of copyrighted works broadcast on television for time-shifting purposes was a fair use). For a summary of the \textit{Sony} case, see notes 116-121 and accompanying text.

\textsuperscript{333} \textit{Id.} at 451.
affect the market for the original in a way that is cognizable under this factor, that is by acting as a substitute for it. . . . This is so because the parody and the original usually serve different market functions.\textsuperscript{334}

In the Dr. Seuss case, however, the Ninth Circuit committed the same error as the Sixth Circuit did in \textit{Campbell}, relying on a presumption of market harm based on the commercial nature of the alleged parody:

Because, on the facts presented, Penguin and Dove's use of The Cat in the Hat original was nontransformative and admittedly commercial, we conclude that market substitution is at least more certain and market harm may be more readily inferred.\textsuperscript{335}

The Ninth Circuit's inference cannot be justified under \textit{Campbell}. \textit{The Cat NOT in the Hat!} did not consist of "verbatim copying of the original in its entirety for commercial purposes."\textsuperscript{336} Instead, it consisted of borrowing a small amount of protected expression for the purpose of creating a new work that commented on both the original and on the O.J. Simpson double-murder trial. As such, it was unquestionably a "transformative" use,\textsuperscript{337} rendering \textit{Sony}'s presumption of market harm inapplicable.

Of course, a finding that the defendant's use was "transformative" does not end the inquiry. All derivative works are "transformative" uses,\textsuperscript{338} and the copyright holder's exclusive rights include the right "to prepare derivative works based on the copyrighted work."\textsuperscript{339} Thus, the task is to distinguish between those transformative uses that are exclusively reserved to the copyright holder and those that are permitted to others under the fair use doctrine.

Some courts are inclined to find market harm whenever the copyright holder has lost potential revenue in the form of royalties for permission to use excerpts of the original work.\textsuperscript{340} A more well-reasoned analysis, however, recognizes that the lost royalties argument is inherently circular: it assumes that the copyright owner is entitled to permission fees in evaluat-

\textsuperscript{334} \textit{Campbell}, 510 U.S. at 591 (citations and internal quotes omitted).
\textsuperscript{335} 109 F.3d at 1403.
\textsuperscript{336} \textit{Campbell}, 510 U.S. at 591.
\textsuperscript{337} See notes 283-307 and accompanying text.
\textsuperscript{338} \textit{Cf.} 17 U.S.C. § 101 (1994) ("A 'derivative work' is a work based on one or more preexisting works, such as a translation, . . . abridgement, condensation, or any other form in which a work may be recast, \textit{transformed}, or adapted.") (emphasis added).
\textsuperscript{340} \textit{See, e.g.}, Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122-23 (9th Cir. 1997); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1387-88 & n.4 (6th Cir. 1996) (en banc); American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929-31 (2d Cir. 1995).
ing whether the use is fair; but no such entitlement exists unless the use is not fair.\textsuperscript{341} In Judge Leval's words:

By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. Therefore, if an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user. . . . The market impairment should not turn the fourth factor unless it is reasonably substantial.\textsuperscript{342}

To determine whether market impairment is "reasonably substantial," the court should keep in mind the ultimate goal of copyright, which is to encourage the creation of new works.\textsuperscript{343} This goal is threatened only when there is market competition (actual or potential) between the allegedly infringing work and the original or an authorized derivative work.\textsuperscript{344} If there is little or no likelihood that the third-party use will compete with an authorized derivative work, then the public interest is served by permitting the unauthorized use: the public gets the benefit of a new creative work,

\textsuperscript{341} See \textit{Campbell}, 510 U.S. at 585 n.18 ("If the use is otherwise fair, then no permission need be sought or granted."); \textit{Princeton Univ. Press}, 99 F.3d at 1397 (Merritt, J., dissenting) ("If the publishers have no right to the fee in many of the instances in which they are collecting it, we should not validate that practice by now using the income derived from it to justify the further imposition of fees."); see generally Lydia Pallas Loren, \textit{Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems}, 5 J. INTELL. PROP. L. 1, 38-48 (1997) (identifying six problems resulting from allowing "lost" permission fees to constitute market harm).

\textsuperscript{342} Leval, \textit{supra} note 106, at 1125; see also id. ("When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication"); \textit{Campbell}, 510 U.S. at 590 ("substantially adverse impact on the potential market"); \textit{id.} at 593 ("Evidence of substantial harm" to the market for derivative works).

\textsuperscript{343} See \textit{Twentieth Century Music Corp. v. Aiken}, 422 U.S. 151, 156 (1975) ("the ultimate aim [of copyright] is . . . to stimulate artistic creativity for the general public good."); Leibovitz v. Paramount Pictures Corp., 948 F. Supp. 1214, 1223 (S.D.N.Y. 1996) ("the core purpose of copyright . . . [is] to foster the creation and dissemination of the greatest number of creative works."), aff'd, 137 F.3d 109 (2d Cir. 1988).

\textsuperscript{344} See \textit{Fisher v. Dees}, 794 F.2d 432, 438 (9th Cir. 1986) ("infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable."); Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 448 (N.D. Ill. 1991) ("the type of harm to the market with which the court is concerned is limited to the harm likely to be caused by the challenged work usurping or replacing the demand for the original."). \textit{See also} Leval, \textit{supra} note 106, at 1125 ("The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute").
without substantially diminishing the creative incentive to the copyright holder. Likewise, if the copyright holder seeks to suppress the unauthorized use not to protect his or her own works from economic competition, but to suppress the third-party's point of view, that is an improper purpose that conflicts with the goals of both copyright and the First Amendment.

Because the goal of copyright law is to encourage the creation of new works, one could ask whether an author might be deterred from creating a work because of the fear that his work might become the subject of a parody or satire in the future. No court has expressly relied on this rationale, and the few courts and authors that have considered the possibility have properly rejected it. Any author who ventures to place his or her work before the public runs the risk that it may be criticized and that por-

345 See Leibovitz v. Paramount Pictures Corp., 948 F. Supp. 1214, 1223 (S.D.N.Y. 1996) ("the defendant's transformation of the plaintiff's photograph has resulted in public access to two distinct works, serving distinct markets, with little risk that the creator of the first work will be disinclined to create further works that may be open to parody."); aff'd, 137 F.3d 109 (2d Cir. 1998); Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1377 (2d Cir. 1993) ("In the cases where we have found the fourth factor to favor a defendant, the defendant's work filled a market niche that the plaintiff simply had no interest in occupying."); see also MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) (fourth factor calls for striking a balance "between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."). Although the Ninth Circuit quoted Wilson on this point, 109 F.3d at 1403, it failed to make such an analysis. See notes 375-382 and accompanying text.


347 See Leibovitz, 948 F. Supp. at 1226 (finding "little risk that the creator of the first work will be disinclined to create further works that may be open to parody."); Merges, supra note 142, at 308 ("surely it is easier to imagine a case where a copyright holder refuses a license out of contempt for the parodist, her work, or her point of view, than it is to imagine a hypothetical creative person deterred from pursuing a muse because of the possible future invocation of the parody defense."); Dorsen, supra note 59, at 960 ("it is unreasonable to believe that any author would hesitate to create a work for fear that the work might become a target of criticism through satire or parody."); Vogel, supra note 271, at 315 ("it is unreasonable to suggest that potential authors will be dissuaded from creating new works solely because their product may later be used as 'unpermitted' and uncompensated elements of a satire.").
tions may be quoted in an unfavorable review. Any marginal deter-
rence that might be caused by allowing criticism or satire in the form of
parody, therefore, probably would be de minimis.

The Supreme Court recognized these principles in *Campbell* when it
stated:

[T]here is no protectable derivative market for criticism. The
market for potential derivative uses includes only those that cre-
ators of original works would in general develop or license
others to develop. Yet the unlikelihood that creators of imagina-
tive works will license critical reviews or lampoons of their own
productions removes such uses from the very notion of a poten-
tial licensing market.

Consequently, the proper inquiry is the competitive effect of the alleged
parody on the market for non-parody derivatives of the original. Since
neither party had introduced evidence on that issue in the lower courts,
the Court held that summary judgment was inappropriate, and remanded
for further factfinding.

In the *Dr. Seuss* case, therefore, the proper inquiry is whether a satire
of the O.J. Simpson trial, written in the style of Dr. Seuss, is likely to com-
pete in the market with the works of Dr. Seuss and its authorized licen-
sees. To state the question is virtually to answer it, for the works of Dr.
Seuss and its licensees are intended primarily for children and their par-
ents, both as works of humorous entertainment and as educational tools
for encouraging reading and the development of moral values. *The Cat
NOT in the Hat!*, on the other hand, is intended primarily for adults who
are either devotees of the O.J. Simpson saga or those who desire to see
either O.J. Simpson or Dr. Seuss satirized in a creative and merciless man-
ner. While both works depend upon humor for their appeal, the humor in
each is of an entirely different character: the innocent and playful humor

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348 See note 141, supra.
349 See Merges, *supra* note 142, at 308 ("even conceding that at some margin off in
the receding distance a hyper-risk averse person (!) might possibly be de-
terred from creating something by the risk that a court might some day
force her to part with a license involuntarily, we ought to be willing to pay
that small (perhaps nonexistent) price in the service of the dissemination
principle.").
350 510 U.S. at 592.
351 *Id.* at 592-93.
352 *Id.* at 593-94.
353 Undoubtedly there are also adults without children who enjoy Dr. Seuss’
works, but their reasons for buying such works are likely to be either the
same as those with children, or else nostalgia for the familiar works of their
childhood.
of Dr. Seuss versus the jaded, satirical and mocking tone of the parody.354 Those who desire the former are not likely to be satisfied by the latter, and vice versa. Indeed, one cannot imagine anyone buying the defendant's parody as a substitute for a genuine Dr. Seuss story. This case, then, is an instance in which the disparities between the markets for the two works are so great that summary judgment for the defendants probably would be appropriate.355

The district court questioned this conclusion, however, relying on the distinction between satire and parody:

Both satire and parody are "transformative" uses posing little threat of displacing the demand for the original work. As to derivative works, however, while an author might license a satirist's use of his work, the law presumes a reluctance to license parodists, persons whose purpose it is to ridicule the author's work. Thus while the unlicensed satirist deprives the author of potential license fees for derivative works, the parodist is presumed to operate within a market imperfection.356

Although the Supreme Court in Campbell declined to express an opinion on this point,357 there are several problems with the district court's reasoning. First, it assumes that a court is capable of definitively determining the "target" or targets of a parodic work of art, an assumption which is highly

354 See Leibovitz v. Paramount Pictures Corp., 948 F. Supp. 1214, 1223 (S.D.N.Y. 1996) ("The end result of the Nielsen ad parodying the Moore photograph is that the public now has before it two works, vastly different in appeal and nature, where before there was only one."); aff'd, 137 F.3d 109 (2d Cir. 1998); see also Shapiro, supra note 270, at 45 ("Even a superficial analysis shows that market substitution in Seuss Enterprises was virtually non-existent given the market segment the infringers targeted.").

355 See, e.g., Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986):

We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such as the composers' song would be satisfied to purchase the parody instead. Nor are those fond of parody likely to consider [the original] a source of satisfaction. The two works do not fulfill the same demand. Consequently, the parody has no cognizable economic effect on the original.

See also Leibovitz, 948 F. Supp. at 1226; Elsmere Music, Inc. v. National Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980), aff'd, 623 F.2d 252 (2d Cir. 1980) (per curiam); Berlin v. E.C. Publications, Inc. 329 F.2d 541, 545 (2d Cir. 1964) ("it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original").

356 924 F. Supp. at 1568-69 (footnotes and citations omitted).

357 510 U.S. at 592 n.22 ("We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.").
questionable. Second, it depends on a finding that there is no element of parody in the defendants' work, a finding that is not justified in this case. Third, even assuming that the defendants' work is a "pure" satire with no element of parody, it is inadequate to assert that an author "might" license a satirist's use of his work, since an author "might" also have a sufficiently well-developed sense of self-esteem to license a parody of his or her own work. Instead, one should ask whether it is sufficiently likely that an author would license a satirist to use his or her work that a court should distinguish satire from the reasoning in Campbell and other parody cases.

Judge Richard Posner is a leading proponent of the view that "the [fair use] doctrine should provide a defense to infringement only if the parody uses the parodied work as a target rather than as a weapon." His reasoning, however, is purely rhetorical: if the parodied work is used only as a weapon and not a target, he asks, "why should the owner of the original be reluctant to license the parody?"

Posner's rhetorical question has been answered by Robert Merges, who argues that Posner's as-

358 See Merges, supra note 142, at 311; Winslow, supra note 142, at 804, 808; see also notes 50-54, 276 and 302, and accompanying text.
359 See notes 261-282 and accompanying text.
360 There have been a few instances in which parodies have been licensed by the copyright owner. See Yonover, supra note 42, at 976 (citing examples from the musical Forbidden Broadway). Yonover notes, however, that "[m]ost of such licensed, so-called parodies have been kinder, gentler jabs — more homage than sharp jibe — than the usual parodying work presents." Id.
In New Line Cinema Corp. v. Bertlesman Music Group, 693 F. Supp. 1517 (S.D.N.Y. 1988), the owners of the copyright in the movie A Nightmare on Elm Street made a rap music video based on the movie. This case is sometimes cited by commentators as an example of a licensed parody. But although the district judge in one instance referred to the plaintiff's video as a "derivative parody" rather than a "derivative work," id. at 1524, there is nothing in the description of the plaintiff's video to indicate that it was anything other than a straight derivative work of a movie that already contained elements of black humor. Likewise, it was established that defendants' alleged parody was nothing more than a competing derivative work: the similarities between the works were pervasive, not merely substantial, id. at 1522-23, and "the testimony elicited at the hearing indicated that the term 'parody' was only applied to the [defendants'] work after an awareness of the possibility of litigation." Id. at 1530.
361 See Campbell, 510 U.S. at 592 ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.") (emphasis added).
362 Posner, supra note 142, at 71; see also Goldstein, supra note 295, §10.2.1.2.b. at 10:27 ("Unlike parody, satire should fall entirely outside the scope of fair use.").
363 Posner, supra at 71; see also Goldstein, supra at 10:27 ("the copyright owner who is not willing to license a parody of his work may be more than willing,
sumption “seems wrong, at least in those cases where the ‘target’ of the parody is a set of values or cultural assumptions deeply cherished by the copyright holder or at least widely held by the segment of the public loyal to her.”

Merges’ view is supported by the experiences of political satirists such as The Capitol Steps, who note that “[a]sking permission for such uses is interpreted by music publishers as seeking their endorsement of the political ideas contained in our lyrics.”

Drawing a distinction between “weapon” and “target” parody would therefore allow the copyright holder to censor satirical opinions with which he or she disagrees.

Because social criticism is arguably even more valuable to society than criticism of particular works of art, Merges and others argue that satire, like parody, should be protected as fair use whenever the copyright owner refuses an offer to license the work for reasonable compensation.

Con-
sequently, the fourth factor should focus on “whether a reasonable market transaction for the right to parody [or satirize] can be envisioned.”

To answer this question, one only has to imagine the probable reaction of Dr. Seuss Enterprises to an offer by the defendants to license The Cat in the Hat for use in a satire of the O.J. Simpson case. The answer almost certainly would have been a polite but very firm refusal, regardless of the generosity of the terms offered. Dr. Seuss Enterprises would very likely view any biting satire of adult subject matter as incompatible with its "image" as a provider of wholesome family entertainment. Of course, it is precisely this incompatibility that gives the defendant’s work its parodic character; but in any event, the incompatibility of the satire with the plaintiff's “image” demonstrates that the plaintiff's desire to suppress the defendant's work is not for the purpose of protecting the plaintiff's works from economic competition, but for the purpose of suppressing the defendant's message.

Because the fourth factor considers “the effect of the use upon the market for or value of the copyrighted work,” it could be argued that harm to the plaintiff’s “image,” either because consumers are confused about the source of the parody or because the defendant’s work somehow “tarnishes” the plaintiff's image or reputation, should be considered in determining whether a use is fair. According to Campbell, however, the suppression of non-competitive messages is not a legitimate purpose of copyright law, regardless of the effect that the defendant's use may have on consumer demand for the original. This concern, therefore, raises

369 Merges, supra, at 312. See also Winslow, supra, at 809-10 (proposing that “The Likelihood of a Voluntary Exchange” should be one of three factors considered in parody cases).

370 Dr. Seuss, of course, often satirizes the foibles of adults, but he does so in a manner that is consistent with the innocent and playful children's world he has created. It is simply inconceivable that Dr. Seuss would publish a children's book about a double murder whose perpetrator escaped justice.

371 See notes 261-282 and accompanying text.


373 See Campbell, 510 U.S. at 591-92 (“We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”); accord, Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 110 (2d Cir. 1998) (“fair use does not condemn the suppression or even destruction of the market by ... a parody. Rather, it is concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright holder.”); Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986) (“the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original ... but rather whether it fulfills the demand for the original.”); see also Vogel, supra note 271, at 307 (Campbell "clearly indicated that reputational harm is not cognizable under copyright law."); id. at 295 (“only harm
issues that are more properly the domain of trademark and trade disparagement laws, the effect of which will be considered below.\textsuperscript{374}

The Ninth Circuit did not engage in any analysis of harm to actual or potential markets. Instead, it reasoned that the defendants were not entitled to relief from the preliminary injunction because of their failure to submit evidence concerning the relevant markets for the two works.\textsuperscript{375} In so holding, it relied on the following passage from \textit{Campbell}:

Although 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff-Rose, introduce evidence or affidavits addressing the likely effect of 2 Live Crew's parodic rap song on the market for a non-parody, rap version of "Oh, Pretty Woman." . . . The District Court essentially passed on this issue, observing that Acuff-Rose is free to record "whatever version of the original it desires"; the Court of Appeals went the other way by erroneous presumption. Contrary to each treatment, it is 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, 2 Live Crew, to summary judgment.\textsuperscript{376}

This passage, however, does not justify the Ninth Circuit's conclusion. \textit{Campbell} arose in the context of the defendants' motion for summary judgment, where the question is whether there was a "genuine issue of any material fact,"\textsuperscript{377} thereby necessitating a trial. Since fair use is an affirmative defense,\textsuperscript{378} on which the defendant has the burden of proof at trial, 2 Live Crew, as the moving party, could not demonstrate the absence of a genuine issue of material fact on the issue of market harm without introducing evidence or affidavits on that issue.\textsuperscript{379} \textit{Dr. Seuss}, however, arose in
the context of the plaintiff's motion for a preliminary injunction. In order to prevail, the plaintiff needed to demonstrate a likelihood of success on the merits, which includes the burden of showing a likelihood that it would prevail against any affirmative defenses raised by the defendant.\textsuperscript{380} Since a motion for a preliminary injunction is generally made at the outset of the case, before either party has had the benefit of discovery, the absence of evidence on one or more issues is not a surprising matter.\textsuperscript{381} Instead, the court must predict, on the basis of the materials before it, which party will prevail after discovery has been taken and, if necessary, a trial has occurred.\textsuperscript{382} In this case, therefore, not only would drawing an inference about the unlikelihood of market harm from the nature of the two works at issue have been proper, but it was necessary to correct the district court's erroneous presumption to the contrary.

Because The Cat NOT in the Hat! does not compete with any use that is reasonably likely to be made by the plaintiff, its publication would have no cognizable effect on the plaintiff's economic incentive to create new works. Consequently, the fourth factor should have been held to favor the defendants.


\textsuperscript{381} See University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) ("given the haste that is often necessary . . ., a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than a full trial on the merits."); Compuserve, Inc. v. Cybergamers, Inc., 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (same; copyright case).

\textsuperscript{382} New England Braiding Co., 970 F.2d at 882-83 ("At this preliminary stage, the trial court does not resolve the validity question but rather must . . . make an assessment of the persuasiveness of the challenger's evidence, recognizing that it is doing so without all evidence that may come out at trial.").
5. **Balancing the Factors**

A brief summary of the four factors demonstrates that the issuance of a preliminary injunction was an abuse of discretion. The defendant's work, whether considered a parody or a satire, was a transformative use entitled to fair use consideration. It was also a commercial use, so the first factor contains elements favoring both parties. The second factor favors the plaintiff, but it has been recognized as being not very important in the context of a parody case. The amount taken by the defendants was minimal (a red-and-white stovepipe hat, some similarity in a few illustrations, and a few catch phrases), and certainly was not excessive, given the substantial original comment added by the defendants. Finally, there is no evidence that the defendants' work would have had any effect on the market for the original or licensed derivatives; indeed, given the satirical nature of the parody, it is highly unlikely that Dr. Seuss would have chosen to license a similar work. Permitting the defendants to publish it, therefore, would result in "public access to two distinct works, serving distinct markets, with little risk that the creator of the first work will be disinclined to create further works."\(^{383}\)

One further consideration deserves mention: the public interest in permitting the defendants to express their views on the O.J. Simpson trial. The Supreme Court has held that the First Amendment does not create a defense to the Copyright Act separate and distinct from the fair use doctrine,\(^{384}\) but that is because the fair use doctrine is deemed to already reflect First Amendment values.\(^{385}\) If the fair use doctrine is to serve its purpose, therefore, those values should at least implicitly be taken into consideration in determining the scope of fair use.

The First Amendment interest in this case can be easily seen if one assumes that the plaintiff were O.J. Simpson, rather than Dr. Seuss Enterprises. If Simpson sued on the grounds that the book was libelous, or that it intentionally inflicted emotional distress upon him, he would have to prove both that the book was false, and that the defendant's acted either with knowledge that it was false or in reckless disregard as to whether or not it was false.\(^{386}\) If Simpson sued on the grounds that the book violated his right of publicity, the use would be protected, either as a news account

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\(^{385}\) Id.

of the trial itself, or by the First Amendment as a parody of or social commentary on a newsworthy celebrity. For example, in Cardtoons, L.C. v. Major League Baseball Players Ass'n, the Tenth Circuit refused to enjoin a series of trading cards featuring parodies of well-known baseball players, saying:

Since celebrities will seldom give permission for their identities to be parodied, granting them control over the parodic use of their identities would not directly provide them with any additional income. It would, instead, only allow them to shield themselves from ridicule and criticism.

The Tenth Circuit also noted that "fame is a double-edged sword — the law cannot allow those who enjoy the public limelight to so easily avoid the ridicule and criticism that sometimes accompany public prominence."

Yet by applying copyright law in a mechanical and overly restrictive manner, without regard to First Amendment values, the Ninth Circuit in effect has given the fictional characters of Dr. Seuss greater protection from comment or criticism than an actual person would enjoy. While criticism of political activists and public officials may be nearer to the "core"

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387 See, e.g., Cal. Civ. Code § 3344(d) (Deering Supp. 1998) ("use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account ... shall not constitute a use for which consent is required"); Eastwood v. Superior Court, 421-26, 198 Cal. Rptr. 342, 349-52 (1983) (news account protected under First Amendment unless it constitutes a knowing or reckless falsehood). It should be noted, however, that the First Amendment would not necessarily protect a purported "news broadcast or account" that duplicated an artistic work in its entirety. See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (broadcast of plaintiff's "human cannonball" act on television news program was not protected by First Amendment).

388 95 F.3d 959 (10th Cir. 1996).

389 Id. at 974; see also White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., joined by O'Scannlain and Kleinfeld, JJ., dissenting from denial of rehearing en banc) ("The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them."). In light of the subsequent U.S. Supreme Court opinion in Campbell, it seems likely that the panel opinion in White is no longer good law. Cf. Cardtoons, 95 F.3d at 970, 972-73 (distinguishing White as involving commercial speech, but noting its disagreement with the decision and relying instead on both Campbell and Kozinski's dissent in White).

390 95 F.3d at 976. See also Nike, Inc. v. "Just Did It" Enters., 6 F.3d 1225, 1227 (7th Cir. 1993) ("When businesses seek the national spotlight, part of the territory includes accepting a certain amount of ridicule.").
of First Amendment protection, fictional characters should be subject to at least as much criticism and comment as sports and entertainment celebrities. Certainly, the law should not authorize copyright holders to exercise censorship over the content of another’s creative parodic or satiric work in circumstances where a similarly situated public figure would not be able to do so.

Consider, for example, the facts in Hustler Magazine v. Falwell. Hustler published a parody of a Campari Liqueur advertisement in which celebrities talked about their “first times,” that is, the first time they tasted Campari. In the parody ad, Falwell’s “first time” was depicted as “a drunken incestuous rendezvous with his mother in an outhouse.” Falwell sued Hustler for invasion of privacy, libel and intentional infliction of emotional distress. Despite the highly offensive nature of the parody, the Court unanimously held that it was protected by the First Amendment. Surely the result should not be any different if Campari was the plaintiff instead of Falwell, and the action was one for copyright or trademark infringement instead of reputational injury.

391 See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) (“The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are ‘intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.’”) (citation omitted).

392 “[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors . . . may legitimately be mentioned and discussed in print.” Carlisle v. Fawcett Publications, Inc., 20 Cal. Rptr. 405, 414 (1962). Surely the characters of Dr. Seuss can be said to have created “legitimate and widespread attention” and “achieved a marked reputation . . . by appearing before the public.” Cf. Dr. Seuss Enters., 109 F.3d at 1396 (“the Cat . . . continues to be among the most famous and well recognized of the Dr. Seuss creations.”).

393 See National Life Ins. Co. v. Phillips Publ’g, Inc., 793 F. Supp. 627, 641 (D. Md. 1992) (“Corporations should not be given a greater right than an individual to protect their reputation and to silence speech.”).

395 Id. at 48.
396 Id.
397 Id. at 47-48.
398 Id. at 50-57.
399 See Mark A. Lemley and Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L.J. (forthcoming Nov. 1998) (examining and rejecting traditional justifications for treating copyright cases differently from other restrictions on speech for purposes of prior restraint doctrine) (manuscript on file with author); David S. Welkowitz, Trademark
The district court dismissed these considerations, arguing instead that "the potential satirist has many alternatives to pilfering the protected expression of a copyrighted work." This argument has been rebutted above. The district court also reiterated an argument made by the Ninth Circuit in the Air Pirates case, saying:

Of course, allowing free taking of distinctive elements from a work in current favor might produce a more effective satire. The court, however, must balance the interests of the public, the copyright owner, and the parodist.

This argument suggests that only a less effective satire would have been deserving of First Amendment protection. But surely there is a greater public interest in allowing satirists to express their views in an effective manner rather than in an ineffective one. Moreover, the district court's argument overlooks the fact that copyright law exists for the benefit of the public rather than for the benefit of the copyright owner. It provides a limited monopoly to authors to encourage the creation of artistic works in order to benefit the public interest, and it tolerates that monopoly only because of the limits placed upon it by copyright law itself. Thus, in the words of Judge Leval:


400 924 F. Supp. at 1567.
401 See notes 295-304 and accompanying text.
402 924 F. Supp. at 1568; see also Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) (copyright law "do[es] not permit [defendants] to take as much of a component part as they need to make the 'best parody.' Instead, their desire to make the 'best parody' is balanced against the rights of the copyright owner in his original expressions.").
403 See notes 37-42 and 59-68 and accompanying text (discussing the importance of satire in social criticism). See also Jung, supra note 270, at 132 ("The copyright system allows fair use protection for parody not because the idea could not be expressed otherwise, but because parody is a very effective way to communicate certain ideas. . . . [But] A well-produced satire can be just as effective in making a generic idea dynamic and catchy, not to mention entertaining.").
404 See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public.").
405 Id. at 560 (noting that "First Amendment protections [are] already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable ideas, and the latitude for scholarship and comment traditionally afforded by fair use."). Many commentators have likewise concluded that copyright law is constitutional only because of the limits placed upon it by the idea/expression dichotomy and the fair use doctrine. See, e.g., Lemley & Volokh, supra note 399 (manuscript at 18-21); Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970); Melville B.
Fair use is not a grudgingly tolerated exception to the copyright owner’s rights of private property, but a fundamental policy of the copyright law. The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author’s monopoly. But it depends equally on the recognition that the monopoly must have limits. Those limits include the public dedication of facts (notwithstanding the author’s efforts in uncovering them); the public dedication of ideas (notwithstanding the author’s creation), and the public dedication of the right to make fair use of the material covered by the copyright.\footnote{Leval, \textit{supra} note 106, at 1135-36; \textit{see also} \textit{id.} at 1110 (“Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”).}

In light of this public purpose, the copyright owner’s interest should be considered only as a proxy for the public interest in encouraging the creation of new works. In the absence of any substantial harm to the copyright holder’s economic incentive, enjoining a parody or satire that contains substantial original expression simply does not serve that public interest.\footnote{This analysis accepts as a given the current judicial attitude favoring preliminary injunctions in copyright cases. \textit{See} Lemley & Volokh, \textit{supra} note 399, manuscript at 11-18 (describing the modern trend). There is, however, a persuasive argument that such preliminary injunctions violate the First Amendment’s prohibition against prior restraints in any copyright case in which a nonfrivolous defense of idea/expression or fair use is raised. \textit{Id.} at 22-32 (describing prior restraint doctrine), 32-56 (rejecting distinctions between copyright and other restrictions on speech), and 57-59 (distinguishing cases in which such credible defenses are raised from cases of verbatim copying). At the very least, they suggest, courts should require clear and convincing evidence of a high probability of success, and they should not presume irreparable injury without evidence that damages would be inadequate. \textit{Id.} at 52-54 & 57-59.}

In this case, the defendants relied on copyright’s incentive in creating on original work of humorous entertainment and social commentary. In so doing, they “conjured up” the plaintiff’s works by borrowing a minimal amount of raw material — pieces of a few illustrations and a few well-known phrases — in order both to parody the author’s works and to satirize the O.J. Simpson trial by comparing his exploits to those of a well-
known copyrighted character. The defendants conduct had a minimal effect, if any, on the plaintiff's economic incentive to create new works. The defendant's work, therefore, should not be viewed as an "unreasonable attempt to cash in on another's creativity," but rather as a fair and reasonable use of brief excerpts from the copyrighted work of another to create a new work of a substantially different character, deserving of fair use protection.

B. Trademark and Dilution Theories of Protection

As discussed above, it is likely that Dr. Seuss was less concerned with the minimal threat of economic competition posed by the defendants' work, and more concerned about protecting its "image" as a provider of wholesome family entertainment. One way in which the plaintiff's "image" could be threatened is the possibility that consumers might be confused as to the source of the parody, and therefore seek to hold Dr. Seuss responsible for what they perceived as an offensive and tasteless departure from the author's usual standards of propriety.

The prevention of confusion among consumers as to the origin, sponsorship or approval of goods and services is the province of trademark and unfair competition law. Like the fair use doctrine in copyright law, the "likelihood of confusion" test in trademark law is a balancing test that involves consideration of many factors. Many courts have applied those factors to cases involving trademark parody. The majority of those courts have concluded that although use in a parody is not a per se defense to trademark infringement, it is a factor that may be taken into consideration in determining whether likelihood of confusion exists. Several

408 924 F. Supp. at 1568.
409 See note 370 and accompanying text.
410 See, e.g., 15 U.S.C. § 1114(1)(a) (1994) (use in commerce of registered trademark which is "likely to cause confusion, or to cause mistake, or to deceive"); 15 U.S.C. § 1125(a) (1994) (use in commerce of unregistered marks or false descriptions or representations which are "likely to cause confusion, or to cause mistake, or to deceive").
411 See Restatement (Third) of Unfair Competition §§ 21-23 (1995) (listing eight factors, grouped into three categories). Unfortunately, each circuit has adopted its own "list" of seven to thirteen factors, each of which contains slight variations from their common source, § 731 of the 1938 Restatement of Torts. See generally 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 24.06[4][a] (3d ed. 1994) (describing test in each circuit and citing cases).
413 See, e.g., Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 194 (5th Cir. 1998); Hormel Foods Corp. v. Jim Henson Prods., 73 F.3d 497, 503 (2d Cir. 1996);
cases have adopted the catch-phrase "[a] non-infringing parody is merely amusing, not confusing."\(^{414}\)

Parody can affect the likelihood of confusion determination in many ways. First, the parodist usually modifies the trademark in a humorous\(^ {415} \), or at least distinctive,\(^ {416} \) manner. Second, sometimes the parody is marketed through different channels than the original mark.\(^ {417} \) Third, there is usually little likelihood that the trademark owner will seek to expand into


\(^{414}\) MCCARTHY, supra note 411, § 31.38[1]; see, e.g., Cardtoons, L.C. v. Major League Baseball Players' Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) ("As with all successful parodies, the effect of the cards is to amuse rather than confuse."); Nike, 6 F.3d at 1228 ("If the defendant employs a successful parody, the customer would not be confused, but amused."); Jordache, 828 F.2d at 1486 ("the intent is not necessarily to confuse the public but to amuse").

\(^{415}\) See, e.g., Jordache, 828 F.2d at 1485 (defendant sold blue jeans for larger women using name "Lardashe," together with a smiling pig logo: "a large, brightly colored [smiling] pig head and two hooves, giving the impression that a pig is peering over the back pocket."); Nike, 6 F.3d at 1229-30 (T-shirts bearing the name "Mike" and swoosh logo sold to people name Mike or Michael).

\(^{416}\) See, e.g., Hormel, 73 F.3d at 503 (wild boar puppet given two-syllable name "Spa'am" as a takeoff on SPAM luncheon meat); L & L Wings, 962 F.2d at 318-19 (T-shirts using Budweiser trade dress but replacing "Budweiser" and "Anheuser-Busch" with "Myrtle Beach, S.C."). Defendants are more likely to run afoul of trademark law if they fail to alter the most recognizable feature of the trademark. See, e.g., Elvis Presley Enters., 141 F.3d at 201-02 (nightclub using name "The Velvet Elvis" displayed the "Elvis" portion in bold letters, with "an almost unnoticeable 'Velvet' appearing alongside in smaller script."); Balducci, 28 F.3d at 774 (in advertisement for fictitious product "Michelob Oily," "[s]everal of Anheuser-Busch's marks were used with little or no alteration.").

\(^{417}\) See, e.g., Hormel, 73 F.3d at 503-04 (name "Spa'am" always marketed in connection with wild boar puppet and "Muppet Treasure Island" mark, instead of on food products); Nike, 6 F.3d at 1229 (noting that defendant "does not sell his shirts off the rack in stores. His was a mail-order business."). Likelihood of confusion is somewhat more likely to be found when the marks are used in similar contexts. See, e.g., Balducci, 28 F.3d at 774 ("Balducci published the parody on the back cover of a magazine—a location frequently devoted to real ads, even in Snicker. This location threatens to confuse consumers accustomed to seeing advertisements on the back cover of magazines.").
the parodist’s market by licensing a competing parody. \(^{418}\) The intent of
the parodist is usually an important consideration. \(^{419}\) While some paro-
dists are willing to announce their parodic intentions, \(^{420}\) others prefer a
stealth approach in which they seek to cause momentary or even pro-
longed (but temporary) confusion before revealing the true nature of the
parody. \(^{421}\) In either event, it is the dissonance between the audience’s
knowledge of the original and the alteration made by the parodist that
gives the work its parodic character. \(^{422}\) So long as the confusion is suc-
cessfully dissipated, this factor should not count against the parodist. \(^{423}\)

\(^{418}\) See, e.g., Hormel, 73 F.3d at 504 (“Hormel has shown no intention of entering
the field of puppet entertainment”); but see Elvis Presley Enters., 141 F.3d
at 202-03 (noting that “EPE has plans to open a worldwide chain of Elvis
Presley restaurants,” and “[t]he pervasiveness of EPE’s marks across the
spectrum of products”).

\(^{419}\) See Hormel, 73 F.3d at 503 (“Henson’s use of the name ‘Spa’am’ is simply
another in a long line of Muppet lampoons. . . . [Consumers] are likely to
see the name ‘Spa’am’ as the joke it was intended to be.”); Nike, 6 F.3d
at 1232 (“Throughout this case Stanard has asserted that he intended only to
poke fun at Nike’s corporate identity. He intended to use his own name to
play a witty prank on the perception of the viewer.”); L & L Wings, 962
F.3d at 320 (“Berard testified that his intent in creating the T-shirt design
was to parody the Budweiser beer label.”); Jordache, 828 F.2d at 14867
(“An intent to parody is not an intent to confuse the public.”); but see Mu-
tual of Omaha, 836 F.3d at 400 (intent to parody “is not dispositive, for
intent to pass off one’s good as another’s is not essential to an infringement
claim”).

\(^{420}\) See, e.g., Cliffs Notes, 886 F.2d at 496 (“The label ‘A Satire’ is also prominently
used five times on the cover (and four on the back) of Spy Notes”; advertis-
ing material contained the legend “The Outrageous Parody from the Cre-
ators of Separated at Birth”; and “the copyright notice page states ‘Spy
Notes’ is a parody of Cliffs Notes.”); L.L. Bean, Inc. v. Drake Publ'g, Inc.,
811 F.2d 26, 32 (1st Cir. 1987) (“The article was labelled as ‘humor’ and
‘parody’ in the magazine’s table of contents section.”).

\(^{421}\) See, e.g., Nike, 6 F.3d at 1227 (“Stanard admitted that his ‘whole point’ was to
give someone viewing from a distance the impression that the shirt actually
read NIKE.”); Balducci, 28 F.3d at 774 (“The disclaimer is virtually
undetectable.”).

\(^{422}\) See Nike, 6 F.3d at 1231 (“Parodies do not exist by mere happenstance. Actual
knowledge of the trademark by the presenter as well as by the observer or
consumer is virtually required.”); see also notes 25-36 and accompanying
text.

\(^{423}\) See Nike, 6 F.3d at 1231 (defendant stated “that to be initially tricked at first
.glance from across the room was ‘the whole point.’ But a jury could surely
conclude that any initial confusion ends with a closer look, when the ob-
server ‘gets it.’”); Cliffs Notes, 886 F.2d at 494 (“A parody must convey two
simultaneous — and contradictory — messages: that it is the original, but
also that it is not the original and is instead a parody. To the extent it does
only the former but not the latter, it is not only poor parody but also vulner-
able under trademark law, since the customer will be confused.”); Yankee
Perhaps the most important consideration is whether there is any evidence of actual confusion.\(^{424}\) In a well-known case, for example, defendant printed posters that read “Enjoy Cocaine” using the same script lettering, color and format used by Coca-Cola.\(^{425}\) The court concluded that “some persons of apparently average intelligence did attribute sponsorship to plaintiff and discontinued their use of Coca-Cola as an expression of resentment.”\(^{426}\) Where substantial actual confusion exists,\(^{427}\) and the infringing product or use is one of which a majority of consumers dis-
approve, there is undoubtedly harm to the trademark owner\textsuperscript{428} that may constitutionally be enjoined.\textsuperscript{429} Courts should be careful, however, to guard against a "ratchet" effect caused by the inherently circular reasoning of confusion as to sponsorship. Since most consumers are unfamiliar with the law, a certain percentage of consumers is bound to believe that any parody can only lawfully be produced with the approval of the trademark owner.\textsuperscript{430} If courts rely on this belief to enjoin all unauthorized parodies, only authorized parodies will appear in the marketplace, which will reinforce the perception that all parodies must be authorized.\textsuperscript{431} For this reason, courts should accommodate free speech concerns by giving parodies the benefit of the doubt,\textsuperscript{432} particularly where it is clear that the majority of consumers in the relevant market are not confused.\textsuperscript{433}

survey was phrased in a "blatantly suggestive" manner. \textit{Id.} at 404 (Heaney, J., dissenting).

\textsuperscript{428} \textit{See} MCCARTHY, supra note 411, § 31.38[1][a] ("Such a 'satire' skirts close to trade libel because of the potential damage to business reputation caused by consumers who will refuse to deal with" the trademark owner).

\textsuperscript{429} \textit{See} Shaughnessy, supra note 412, at 1112 ("if a parody creates a genuine likelihood that consumers will believe the trademark owner sponsored it . . . prohibition of the parody does not offend constitutional principles."); Lemley \\& Volokh, supra note 399 (manuscript at 62-69) (concluding that trademark law is substantively constitutional when applied to commercial speech, but that preliminary injunctions may run afoul of the prior restraint doctrine).

\textsuperscript{430} \textit{See}, e.g., Balducci, 28 F.3d at 775 (although "[o]ver half of those surveyed thought Balducci needed Anheuser-Busch's approval to publish the ad," only "[s]ix percent thought that the parody was an actual Anheuser-Busch advertisement."); Warner Bros., Inc. v. American Broad. Cos., 720 F.2d 231, 246 (2d Cir. 1983) ("Perhaps some viewers will think that every program with a dramatic courtroom lawyer was made by the producers of the Perry Mason series").

\textsuperscript{431} \textit{See} MCCARTHY, supra note 411, § 24.03[4][b] at 24-20 ("This is a 'chicken and the egg' conundrum."); cf Loren, supra note 341, at 38-41 (criticizing a similar "inherent circularity" in permitting "lost" permission fees to constitute market harm in copyright fair use cases).

\textsuperscript{432} \textit{See}, e.g., \textit{Cliffs Notes}, 886 F.2d at 495 ("somewhat more risk of confusion is to be tolerated when a trademark holder seeks to enjoin artistic expression such as a parody."); RESTATEMENT, supra note 411, § 20, Reporter's Note, comment b, at 219 ("in the context of expressive uses a court may require more substantial evidence of confusion.") (approving \textit{Cliffs Notes}); \textit{Warner Bros.}, 720 F.2d at 246 ("The 'average lay observer' test, however, must be applied by fact-finders within an outer limit of reasonable fact-finding marked by judges. Otherwise the scope of protection . . . would be expanded far beyond what Congress prescribed in the Lanham Act.").

\textsuperscript{433} \textit{See} \textit{Cliffs Notes}, 886 F.2d at 496:

There may be a few purchasers who have been assigned to read the novels who would buy the parody thinking it is a serious work and is produced by \textit{Cliffs Notes}. In view of the public interest in free expres-
A cautious parodist might seek to guard against a finding of likelihood of confusion by including a disclaimer on his or her product. Courts agree that a label of "parody" or "satire," while not dispositive, may "be helpful in avoiding confusion." An even more explicit disclaimer would inform consumers that the parody is unauthorized by the trademark holder. Because many parodists thrive on their "unauthorized" status, one might expect that most parodists would be willing to label their products in this manner. Other parodists, however, believe that temporary confusion heightens the artistic effect of the parody. For this reason, courts have declined to impose a requirement that such a disclaimer be attached.

In the Dr. Seuss case, the defendants' work was "prominently subtitled 'A Parody,' and the author [was] described as 'By Dr. Juice as told to Alan Katz and Chris Winn." In addition, "[a] circular red sticker on the back cover disclaims any relationship between The Cat Not in the Hat and Dr. Seuss." Based in part on the disclaimers, the district court held that the plaintiff had NOT established a reasonable likelihood of success on the
merits of its trademark claim. Nonetheless, the court enjoined sale of the parody pending trial, on the grounds that the plaintiff had raised "serious questions providing a fair basis for litigation," and that "the balance of hardships tips markedly in its favor." Although both the district court and the Ninth Circuit rejected the argument that the preliminary injunction constituted an unlawful prior restraint, it has been persuasively argued elsewhere that the use of such a generous standard for preliminary injunctions creates a serious risk of enjoining constitutionally protected speech. The injunction cannot be justified on the grounds that it is content-neutral (it isn't) or that there are "reasonable alternative avenues of communication" (there aren't); nor is it a reasonable "time, place

442 Id.; see also Balducci, 28 F.3d at 776 ("By using an obvious disclaimer, . . . [or] altering the protected marks in a meaningful way, or doing some collection of the above, [defendant] could have conveyed its message with substantially less risk of consumer confusion.").

443 Id. at 1575.

444 Id. at 1574-75; 109 F.3d at 1403 n.11.

445 Lemley & Volokh, supra note 399 (manuscript at 62-69); see, e.g., Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, 718 F. Supp. 1159 (S.D.N.Y. 1989) (preliminarily enjoining distribution of defendants' work based on likelihood of success on the merits of plaintiff's trademark claim), rev'd, 886 F.2d 490 (2d Cir. 1989) (holding defendants' work to be non-infringing parody protected by the First Amendment).

446 See, e.g., Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, 604 F.2d 200, 206 (2d Cir. 1979) ("The prohibition of the Lanham Act is content neutral . . . and therefore does not arouse the fears that trigger the application of constitutional 'prior restraint' principles."). Volokh and Lemley point out that this is nonsense; both trademark and copyright prohibit the use of particular content, so they cannot be content-neutral. Lemley & Volokh, supra note 399 (manuscript at 35 & 64). "These courts have apparently confused viewpoint-neutrality with content-neutrality." Id. at 64; see Boos v. Barry, 485 U.S. 312, 319 (1988) ("[A]lthough we agree the provision is not viewpoint based . . . [that] does not render the statute content neutral.") (plural-ity); id. at 1171 (Brennan, J., concurring) (agreeing that the statute is "a content-based restriction").

447 See, e.g., Dallas Cowboys Cheerleaders, 604 F.2d at 206; compare L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 30-31 (1987) ("trademarks offer a particularly powerful means of conjuring up the image of their owners and thus become an important, perhaps indispensable, part of the public vocabulary."); New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (9th Cir. 1992) ("It is no more reasonably possible . . . to refer to the New Kids as an entity than it is to refer to the Chicago Bulls, Volkswagens or the Boston Marathon without using the trademark."); White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1512 n.6 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) (listing 23 uses of trademarks in songs, books, movies and television). See generally Rochelle Cooper Dreyfuss, Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 Notre Dame L. Rev. 397 (1990).
and manner” restriction, since the injunction prevents any use of a red-
and-white stovepipe hat in the defendants’ works, at any time or place. As the Supreme Court has recognized, forbidding the use of particular expression creates “a substantial risk of suppressing ideas in the pro-

The “no alternative avenues” argument originated in a case rejecting the right of war protesters to distribute leaflets on a shopping center owner’s property. See Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972). Many authors have pointed out that a restriction on the location of speech is merely a time, place and manner restriction, and is quite different from a restriction on the words that a speaker may use. See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 971-72 (10th Cir. 1996); Rogers v. Grimaldi, 875 F.2d 994, 998-99 (2d Cir. 1989); Robert C. Denicola, Trademarks as Speech: Constitutional Implications of the Emerging Rationales for Protection of Trade Symbols, 1982 Wis. L. Rev. 158, 197; Shaughnessy, supra note 412, at 1111-12.

448 See Texas v. Johnson, 491 U.S. 397, 407 (1989) (holding that statute prohibiting flag-burning was not a reasonable time, place or manner restriction); id. at 417 (“To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable boundaries.”); Regan v. Time, Inc., 468 U.S. 641, 648 (1984) (“In order to be constitutional, a time, place, and manner regulation must . . . not be based upon either the content or subject matter of speech.”) (quotes omitted).

The strongest support for the notion that trademark law is a reasonable time, place and manner restriction is San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), in which the Supreme Court held that a statute giving exclusive use of the word “Olympic” to the USOC “restricts only the manner in which SFAA may convey its message.” Id. at 536. However, the majority emphasized that the statute “applies primarily to commercial speech,” and it refused to apply the overbreadth doctrine, saying “[t]here is no basis in the record to believe that the Act will be interpreted or applied to infringe significantly on noncommercial speech rights.” Id. at 536 n.15. The court also noted that “[t]he possibility for confusion as to sponsorship is obvious,” id. at 539, even though it had ruled that the statute did not require proof of confusion. Id. at 529-30. Finally, the court cited with approval a case which allowed the use of the protected Olympic symbols in a non-misleading and non-commercial manner. Id. at 536 n.14, citing Stop the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112 (S.D.N.Y. 1980); see also Lighthawk v. Robertson, 812 F. Supp. 1095, 1099-1101 (W.D. Wash. 1993) (satirical, non-commercial use of “Smokey Bear” protected by First Amendment; distinguishing San Francisco Arts & Athletics on these grounds). In overlooking these significant qualifications in the majority opinion, the district court erred in applying San Francisco Arts & Athletics to what it correctly acknowledged was non-commercial speech. See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (defining “commercial speech” as “speech which does no more than propose a commercial transaction.”); Lemley & Volokh, supra note 399 (manuscript at 64-69)(trademark law is constitutional only if the defendant’s speech is commercial speech and is in fact misleading).
cess. While this risk is justified where necessary to serve a compelling governmental interest, such as avoiding consumer confusion or providing an economic incentive to create new works, it should not be imposed without a final determination that the work is infringing.

In the absence of a likelihood of confusion, trademark owners have turned to anti-dilution laws as a means of protecting their marks against parody and satire. The dilution theory of trademark protection starts from the proposition that a trademark is associated in the public's mind with the quality of the goods and services provided by the trademark owner. Permitting the use of the mark on other goods or services, even if they are unrelated and non-competing, allows the public to associate

449 Cohen v. California, 403 U.S. 15, 26 (1971) (reversing conviction of petitioner for wearing jacket reading "Fuck the Draft"); cf. San Francisco Arts & Athletics, 483 U.S. at 569 (Brennan, J., dissenting) ("As Judge Kozinski observed in dissent in the Court of Appeals, . . . a jacket reading 'I Strongly Resent the Draft' would not have conveyed Cohen's message").

450 See Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (to justify a content-based restriction, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.") (quotes and citation omitted).

451 See, e.g., Balducci, 28 F.3d at 776 (concluding that "the First Amendment places no bar to the application of the Lanham Act in this case" because "Balducci's ad parody was likely to confuse consumers as to its origin, sponsorship or approval."); L & L Wings, 962 F.2d at 322 ("The purpose of the Lanham Act is to eliminate consumer confusion, not to banish all attempts at poking fun or eliciting amusement.").


453 Lemley & Volokh, supra note 399 (manuscript at 59) (concluding that preliminary injunctions are unconstitutional in copyright cases "[w]here the defendant raises a credible argument worthy of trial that he didn't copy the work, that he copied only the unprotectable elements, or that his copying was protected by fair use."); id. at 62-69 (concluding that preliminary injunctions are unconstitutional in trademark cases when applied to non-misleading, non-commercial speech).


455 See Shaughnessy, supra note 412, at 1086 ("For the trademark owner, the chief value of the mark lies in its ability to associate favorable experiences or impressions with the product to which it is attached, not simply in its capacity to identify the source or sponsorship of that product. For the consumer, the mark is valuable as an inexpensive and convenient source of information about products — information the consumer could otherwise acquire only through the expenditure of time and effort.") (footnotes omitted).
another set of reputational images with the mark, thereby diminishing or
diluting the value of the mark to the senior user. Courts have recog-
nized two types of dilution: blurring, or the loss of distinctiveness that
may occur when a second party begins using the same mark; and
tarnishment, the association of the mark with goods or images that are
inappropriate or offensive, or at least inconsistent with the image pro-
lined by the senior user.

While superficially appealing, neither of these rationales can with-
stand critical scrutiny in the context of a trademark parody. The blur-
ing rationale is inapposite, because the use of a trademark in a parody or
satire conjures up the images that are already associated with the mark,
and therefore reinforces, rather than dilutes, the mark’s association with
the products of the senior user. To the extent that tarnishment depends
upon consumer confusion as to the source or sponsorship of the parody,
the plaintiff should have to prove that a likelihood of confusion exists

456 Shaughnessy, supra note 412, at 1086-87; see also Frank Schechter, The Ra-
tional Basis of Trademark Protection, 40 HARV. L. REV. 813 (1927); Beverly
W. Pattishall, The Dilution Rationale for Trademark—Trade Identity Protec-
tion, Its Progress and Prospects, 71 NW. L. REV. 618 (1977); Posner, supra
note 142, at 75.

457 MCCARTHY, supra note 411, § 24.13[1][a][i]; RESTATEMENT, supra note 411,
§ 25(1)(a); Shaughnessy, supra note 412, at 1089; see, e.g., Hyatt Corp. v.
Hyatt Legal Servs., 736 F.2d 1153, 1157-58 (7th Cir. 1984).

458 MCCARTHY, supra note 411, § 24.13[1][a][ii]; RESTATEMENT, supra note 411,
§ 25(1)(b); Shaughnessy, supra note 412, at 1089-90; see L.L. Bean v. Drake
Publishers, Inc., 811 F.2d 26, 31 (1st Cir. 1987) (“The threat of tarnishment
arises when the goodwill and reputation of a plaintiff’s trademark is linked
to products which are of shoddy quality or which conjure associations that
clash with the associations generated by the owner’s lawful use of the
mark.”); American Express Co. v. Vibra Approved Lab. Corp., 10
American Express card containing a condom with the well-known slogan
“Don’t Leave Home Without It”).


460 See, e.g., Jordache, 828 F.2d at 1489 (“parody tends to increase public identi-
cation of a plaintiff’s mark with the plaintiff.”); Hormel, 73 F.3d at 506
(same); Denicola, supra note 447, at 188 (“the use of famous marks in paro-
dies causes no loss of distinctiveness, since the success of the use depends
upon the continued association of the mark with the plaintiff.”); Yankee
Am. Publ’g, 809 F. Supp. at 282 (same).

If taken to its logical extreme, this rationale proves too much. All secondary
uses of a famous mark conjure up the images associated with that mark to
some extent. This suggests that courts are implicitly balancing the risk of
dilution against free speech concerns. See Deere & Co. v. MTD Prods., Inc.,
41 F.3d 39, 44 (2d Cir. 1994) (“Such uses risk some dilution of the identify-
ing or selling power of the mark, but that risk is generally tolerated in the
interest of maintaining broad opportunities for expression.”).
among consumers in the relevant market. If, on the other hand, it is clear that consumers are not confused, then any harm to the plaintiff results solely from the effectiveness of the parody in persuading consumers to view the plaintiff's carefully-crafted "image" in a more critical and less ingenuous manner. For this reason, some courts have held that applying anti-dilution statutes to suppress parody violates the First Amendment:

Trademark parodies, even when offensive, do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may be a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner. . . . While such a message lacks explicit political content, that is no reason to afford it less protection under the first amendment. Denying parodists the opportunity to poke fun at symbols and names that have become woven into the fabric of

461 See Welkowitz, supra note 454, at 545 ("Assuming that the associational values of the second user differ from the original mark, the confusing second use may alter consumer perceptions of and reactions to the mark.") (emphasis added); id. at 580 (asserting the "probable nonexistence of a definable state of dilution separate from confusion" and suggesting that "courts view dilution as related closely to confusion, using something like a 'possibility of confusion' test.").

Even proponents of dilution as a separate theory acknowledge that "[f]or dilution to occur, the relevant public must make some connection between the senior user's mark and the junior user's unauthorized usage of it." McCarthy, supra note 411, §24.13[1][b] at 24-107 (emphasis added); see also id. at 24-109 ("the dilution theory presumes some kind of mental association in the reasonable buyer's mind between the two parties' uses of the mark.") (emphasis in original). Dilution therefore could be conceived as merely shifting the burden of proof on the issue of confusion where the plaintiff's mark is unusually strong. See Robert N. Klieger, Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection, 58 U. Pitt. L. Rev. 789, 846-47 (1997) ("Dilution law thus creates no new rights in truly famous marks, but simply relieves the senior users of such marks from having to make a confusion showing."); cf. Restatement, supra note 411, at §25(1) (dilution statutes may impose liability "without proof of a likelihood of confusion") (emphasis added). To date, however, neither legislatures nor courts have recognized the absence of confusion as a defense to anti-dilution statutes.

462 See Shaughnessy, supra note 412, at 1113 ("A trademark parody dilutes its target only by adding a humorous picture of the mark to the collection of images the owner has created for it.").
our daily life would constitute a serious curtailment of a protected form of expression.\textsuperscript{463}

Likewise, the Restatement of Unfair Competition excludes from the definition of dilution the unauthorized use of a mark "to comment on, ridicule, parody, or disparage the [owner's] goods, services, business or mark."\textsuperscript{464}

The district court's opinion in the Dr. Seuss case suggests that the court was concerned with the possibility of dilution by tarnishment.\textsuperscript{465} Despite this language, however, the court held that the defendant's parody was exempt from liability under the Federal Trademark Dilution Act.\textsuperscript{466} The Act expressly provides that "noncommercial use of a mark" is not actionable.\textsuperscript{467} The Act does not define "noncommercial,"\textsuperscript{468} but the district court noted that when the bill was introduced, Senator Hatch stated that the exception would include "parody, satire, editorial and other forms

\textsuperscript{463} L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir. 1987); see also McCarthy, supra note 411, §24.16[2] at 24-134 ("Tarnishment caused merely by an editorial or artistic parody which satirizes plaintiff's product or its image is not actionable under an anti-dilution statute because of the free speech protections of the First Amendment."); Posner, supra note 142, at 75 ("it can be argued that creators of intellectual property should not be allowed to control the public image of their property by forbidding others to suggest variant images of it."); Klieger, supra note 461, at 830. ("Unless senior users of a mark have an absolute right to control the mark and its associations, tarnishment without resulting consumer confusion should not be actionable.")

\textsuperscript{464} Restatement, supra note 411, at § 25(2); see also id., comment i: The expression of an idea by means of the use of another's trademark in a parody, for example, will often lie within the substantial constitutional protection accorded noncommercial speech and may thus be the subject of liability only in the most narrow circumstances. Although such non-trademark uses of another's mark may undermine the reputation and value of the mark, they should not be actionable under the law of trademarks.

The Restatement recommends that the law of defamation or trade disparagement, with its explicit constitutional limitations, be utilized instead of trademark dilution. Id., comment i. For a discussion of these constitutional limitations, see note 475 and accompanying text.

\textsuperscript{465} The district court stated that "[t]he works of Dr. Seuss are associated with genuine wit, inventiveness, and wholesomeness," whereas the defendants' work "deals in macabre humor about an infamous and gruesome double murder." 924 F. Supp. at 1574 (emphasis added).


\textsuperscript{468} Cf. Welkowitz, Oh Deere, supra note 466 at 24 (noting that "drawing the line between 'noncommercial' and 'commercial' may prove to be a more elusive task than the drafters of the law anticipate.").
of expression that are not part of a commercial transaction.” The district court interpreted this statement to incorporate by reference the Supreme Court’s definition of commercial speech as “speech which does no more than propose a commercial transaction,” and suggested that such a limitation was required by the First Amendment. The plaintiff did not appeal this ruling to the Ninth Circuit.

The district court's ruling is consistent with the limitations that have been placed on copyright and trademark actions in order to accommodate First Amendment concerns. According to Campbell, copyright law is concerned only with economic competition with the plaintiff's work, not with reputational injury. Likewise, trademark law exists “to eliminate consumer confusion, not to banish all attempts at poking fun or eliciting amusement.” It would be inconsistent with our nation's commitment to free expression to allow these limitations to be circumvented through the uncritical application of dilution theory. Given the sensitivity of this ruling to First Amendment concerns, it is a shame that both the district court and the Ninth Circuit permitted their concerns about possible tarnishment to color their opinions on the merits of the copyright and trademark claims. If courts are concerned about the risk of tarnishment or harm to the plaintiff's reputation, they should look instead to the law of trade libel or product disparagement, which reflects First Amendment concerns by requiring a showing that the defendant made a false statement.

471 924 F. Supp. at 1574 (“The Court therefore holds that the First Amendment would apply to this use of the trademarks at issue”); see also notes 444-453 and accompanying text (arguing that trademark law can constitutionally be applied only to misleading commercial speech).
472 See note 373 and accompanying text.
474 See Shaughnessy, supra note 412, at 1115-16 (concluding that dilution unaccompanied by likelihood of confusion or trade disparagement conflicts with the First Amendment); Lemley & Volokh, supra note 399 (manuscript at 68 n.251) (“It is worth noting that the argument that false or misleading speech is unprotected, the one most commonly used to defend trademark laws against First Amendment attack, offers no support whatever for dilution statutes such as 15 U.S.C. § 1125(c).”).
475 924 F. Supp. at 1574 (finding irreparable injury based on the “genuine wit, inventiveness and wholesomeness” of the original work, compared to the “macabre humor” of the parody); 109 F.2d at 1403 (noting that “[t]he good will and reputation associated with Dr. Seuss’ work is substantial” in evaluating the fourth fair use factor); id. at 1406 (finding harm to the “good will and reputation associated with The Cat in the Hat character and title, the name ‘Dr. Seuss,’ and the Cat's Hat”).
of fact with knowledge that it was false or in reckless disregard as to whether or not it was false. At the very least, courts should require a strong showing of likelihood of confusion before enjoining noncommercial speech under trademark law.

VI. CONCLUSION

The Ninth Circuit's opinion in Dr. Seuss Enterprises is riddled with errors of law and is unreasonably hostile to parody and satire as important forms of entertainment and social criticism. Unfortunately, because the opinion was the first Court of Appeals decision to apply the Supreme Court's decision in Campbell to a copyright case involving parody, other courts may look to the Dr. Seuss opinion for guidance. Those courts should reject the Dr. Seuss opinion and should instead give parodists and satirists the freedom to borrow small amounts of copyrighted works in forging their own original creations. The Ninth Circuit also should seize the earliest possible opportunity to overturn the Dr. Seuss opinion and to conform its approach to parody cases to the more generous standards of the Supreme Court.


477 See notes 444-453 and accompanying text.