A Parody of a Distinction: The Ninth Circuit's Conflicted Differentiation between Parody and Satire

Christopher J. Brown
COMMENT

A PARODY OF A DISTINCTION: THE NINTH CIRCUIT’S CONFLICTED DIFFERENTIATION BETWEEN PARODY AND SATIRE

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"Thou shalt not say that to rob the public is to steal."¹

I. INTRODUCTION

In Mattel, Inc. v. MCA Records, Inc. (Mattel),² the Ninth Circuit recently held that a song based on the Barbie doll was a parody and therefore qualified for a fair use defense against a claim of trademark infringement.³ A few years ago, however, this same circuit in Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc. (Seuss)⁴ held that a book using the writing style of Dr. Seuss, as well as a character fashioned after the Cat in The Cat in the Hat, was a satire and therefore did not qualify for a fair use defense against claims of trademark and copyright infringement.⁵ A contrast of these two cases reveals the inadequacy of the standard adopted by the Ninth Circuit to

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¹ The Late John Wilkes’s Catechism of a Ministerial Member Taken From an Original Manuscript in Mr. Wilkes’s Handwriting, never before printed, and adapted to the present Occasion, With Permission (William Hone’s Eighth Commandment), quoted in FREDERICK WM. HACKWOOD, WILLIAM HONE: HIS LIFE AND TIMES 111–13 (1912).
² 296 F.3d 894 (9th Cir. 2002).
³ Id. at 902.
⁴ 109 F.3d 1394 (9th Cir. 1997).
⁵ Id. at 1406.
determine when parody should be permitted as a defense to copyright or trademark infringement.

This comment will examine the standard utilized by the Ninth Circuit both in relation to other relevant decisions and within the framework of established literary scholarship on parody. Part II examines the statutory basis of the parody defense, the Supreme Court's decision on the subject, the subsequent Ninth Circuit decisions in *Seuss* and *Mattel*, and several other recent federal court decisions. Part III discusses literary scholarship on the definition of parody. Part IV examines the standard currently in use in the Ninth Circuit in relation to all the cases discussed in Part II. Part V concludes by proposing the use of a more expansive definition of parody to allow a broader range of artistic expression to qualify for the parody defense.

II. STATUTORY PROVISIONS AND RELATED CASES

A. The Statutory Basis for the Parody Defense

Generally, a work is copyrightable when it is an "original work of authorship fixed in any tangible medium of expression." An author must register his or her work and obtain a copyright from the U.S. Copyright Office to be able to challenge another work for infringement. Another author who violates any of the exclusive rights of the copyright owner, including the right to reproduce the work and the right to create derivative works, is liable for copyright infringement. However, the defendant in such an action can argue the affirmative defense of "fair use," whereby certain uses of the copyrighted material will not be infringing. Parody is not included in the nonexclusive listing of allowable uses in the statute but can qualify as a fair use.

Four nonexclusive factors are considered in determining whether a particular use is deemed a fair use under the statute: (1) the purpose and character of the use; (2) the nature of the

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7. Id. § 411(a). An author who has applied for a copyright but not been granted one, may also bring an infringement action, arguing that he or she should have received a copyright. Id.
9. Id. § 107. The statute provides, as examples, uses "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Id.
A parody is any word, name, symbol or device used by a person in commerce to identify and distinguish his or her goods from those made by others. Infringement occurs when another person uses a registered trademark or a "colorable imitation" of such trademark in commerce in a way that is "likely to cause confusion." Different federal circuits have applied different standard lists of factors in deciding if infringement has occurred, although the lists are generally quite similar. The factors used in the Ninth Circuit are: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. The statute authorizing fair use in trademark law does not mention parody. Nevertheless, courts have countenanced parody as a protected form of expression under the First Amendment provided there is no likelihood of confusion. Courts have generally applied one of three methods of analysis: (1) recognizing parody as an affirmative defense; (2) balancing the rights of the trademark owner against First Amendment concerns; and (3) using parody not as a defense to infringement but rather as another factor to be considered in the likelihood of confusion equation. While some circuits have clearly established which

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13. 15 U.S.C. § 1114 (2000). The confusion referred to is confusion as to the source of the goods being sold, i.e., whether they were produced by or have some affiliation with the trademark holder.
15. AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir. 1979).
17. See, e.g., Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, Inc., 886 F.2d 490, 493–94 (2d Cir. 1989). "We start with the proposition that parody is a form of artistic expression, protected by the First Amendment." Id. at 493.
method of analysis is to be used,\textsuperscript{19} the Ninth Circuit has used different methods in different cases.\textsuperscript{20}

\textbf{B. The Supreme Court's Ruling on Parody}

The Supreme Court addressed parody as a defense to copyright infringement in \textit{Campbell v. Acuff-Rose Music, Inc.},\textsuperscript{21} in which the rap music group, 2 Live Crew, used the Roy Orbison song \textit{Oh, Pretty Woman} as the basis for their song \textit{Pretty Woman}.\textsuperscript{22} The Court defined parody as a work that uses "some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."\textsuperscript{23} The key factor in assessing whether a derivative work is a parody is deciding if it is transformative, if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."\textsuperscript{24} If the new work does not have "critical bearing on the substance or style of the original composition" but "merely uses [it] to get attention or to avoid the drudgery in working up something fresh, [then] the claim to fairness in borrowing from another's work diminishes accordingly."\textsuperscript{25}

The Court also created a legal distinction between parody and satire based on the presumption that a parody targets its source material and a satire does not.\textsuperscript{26} In distinguishing the two, the Court explained that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective

\begin{itemize}
\item \textsuperscript{19} See, e.g., Lyons P'ship v. Giannoulas, 179 F.3d 384 (5th Cir. 1999). "[C]onfusion resulting from a parody is not an affirmative defense to a trademark infringement claim but is instead an additional factor that should be considered." \textit{Id.} at 389 (citation omitted).
\item \textsuperscript{20} In \textit{Seuss}, the court used parody as an additional factor to consider in the likelihood of confusion equation. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1404-06 (9th Cir. 1997). In \textit{Mattel}, the court balanced the rights of the trademark owner against the First Amendment rights of the alleged infringer. \textit{Mattel}, Inc. v. MCA Records, Inc., 296 F.3d 894, 900-01 (9th Cir. 2002).
\item \textsuperscript{21} 510 U.S. 569 (1994). \textit{But see Schieffelin & Co. v. Jack Co. of Boca, 850 F. Supp. 232, 249 n.9 (S.D.N.Y. 1994) (This court, while the first to rule on a parody defense to trademark infringement after \textit{Campbell}, denied the relevance of the \textit{Campbell} decision to trademark cases); cf. Elvis Presley Enters. v. Capece, 141 F.3d 188, 199 (5th Cir. 1998). "[T]he Supreme Court considered parody in the copyright context, which is relevant to the treatment of parody in the trademark context." \textit{Id.}
\item \textsuperscript{22} \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569, 572 (1994).
\item \textsuperscript{23} \textit{Id.} at 580.
\item \textsuperscript{24} \textit{Id.} at 579.
\item \textsuperscript{25} \textit{Id.} at 580.
\item \textsuperscript{26} See \textit{id.} at 580-81. The court defined satire as "a work 'in which prevalent follies or vices are assailed with ridicule' or are 'attacked through irony, derision, or wit.'" \textit{Id.} at 581 n.15 (citations omitted).
\end{itemize}
victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing. However, in an often neglected footnote, the opinion also limited the significance of this distinction when "market substitution" of the parody for the original is not a concern. In that case, "taking parodic aim at an 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." Nevertheless, the majority opinion did suggest that a satire, in not targeting its source material, will be less protected under some circumstances than a parody.

In Campbell, the Court held 2 Live Crew's Pretty Woman was a parody. The song repeated the original's first line but then changed other words, "substituting predictable lyrics with shocking ones... [that] derisively demonstrat[e] how bland and banal the Orbison song seems to them." The Court downplayed the import of the commercial use of the source material and found that the work did not copy too much since successful parodying requires "quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know." Here, "context is everything," in this case, 2 Live Crew "not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends." In determining whether the author of a parody has taken too much from the original, numerous factors should be considered, including whether the song's overall purpose is to parody the original or whether a likelihood exists that the parody could serve as a market substitute for the original.

Justice Kennedy, in his concurring opinion, proposed a narrower definition of parody than the majority, one that would mandate targeting the original to avoid copyright infringement:

28. See id. at 580 n.14.
29. Id. at 581 n.14.
30. See id. at 581.
31. Id. at 583.
32. Id. at 582 (quoting the district court).
33. Campbell, 510 U.S. at 588.
34. Id. at 589.
35. Id.
36. Id. at 588.
Parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition. It is not enough that the parody use the original in a humorous fashion... 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).

This requirement limits fair use protection to works that, in Kennedy’s view, of necessity must draw on one specific work; a work that merely seeks a vehicle to criticize a separate target must find a source whose author is willing to license it or else choose a source that is in the public domain and therefore does not need special protection from the courts. Kennedy also expressed doubt as to whether 2 Live Crew’s song was a legitimate parody, noting that any revamped version of an older song can invariably be said to comment on the naiveté of the original. To Kennedy, such a “weak transformation” should not provide protection from infringement.

C. Seuss and Mattel

In Seuss, the company Seuss, which owned most of the trademarks and copyrights to the works of Theodor Geisel (a.k.a. Dr. Seuss), brought suit against the publisher of the book The Cat NOT in the Hat! A Parody by Dr. Juice (The Cat Not). The authors copied many elements from The Cat in the Hat (The Cat) and other books by Seuss for their retelling of the events of the O.J. Simpson murder trial, in which Simpson was represented as the Cat. The most prominent elements copied were the Cat’s distinctive hat, parts of the front

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37. Id. at 597 (Kennedy, J., concurring). The majority held that when the parody’s "commentary has no critical bearing on the substance or style of the original composition... [then] the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish)." Id. at 580. Thus, what the majority sees as a factor to count against the defendant (or possibly an issue to address at a future time), Kennedy sees as an absolute bar to the defense. Furthermore, the majority specifies that when market substitution is not a concern, “taking parodic aim at an original is a less critical factor... 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.” Campbell, 510 U.S. at 581 n.14. This footnote directly contradicts Kennedy’s concurrence.

38. Id. at 597.

39. Id. at 599.

40. Id.


42. Id.
cover, the style of drawing human figures, and various literary devices like rhyme scheme and meter. The Ninth Circuit used the two-part substantial similarity test developed in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*: (1) determining extrinsically if there is similarity of ideas and (2) asking intrinsically if an ordinary reasonable person would perceive a substantial taking of protected expression. The use of the Cat's hat and the similarity of the back cover illustration of *The Cat Not* to the front cover of *The Cat* demonstrated substantial similarity for the court under the objective first part of the test. The defendant argued that the elements appropriated were not copyrighted or trademarked, but the Ninth Circuit held that "analytic dissection is not appropriate when conducting the subjective or 'intrinsic test.'" Having found "a strong showing of copyright infringement," the court turned to whether parody could be used as a defense under the fair use doctrine. Relying on previous Ninth Circuit precedent and Justice Kennedy's concurrence in *Campbell*, the court required that

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the fixed (or nearly fixed) pattern of accented and unaccented syllables in the lines of a poem that produces its pervasive rhythm. The basic unit of rhythm is the foot, consisting most often of an arrangement of at least one accented syllable and one or more unaccented syllables. Meter is determined by the type and the number of feet in a line.


44. 562 F.2d 1157, 1164 (9th Cir. 1977).

45. *Seuss*, 109 F.3d at 1398. The *Krofft* test has been roundly criticized, especially its second part, which was also described in *Krofft* as determining whether the "total concept and feel" of the original work was taken. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1164, 1167 (9th Cir. 1977). "[T]he touchstone of 'total concept and feel' threatens to subvert the very essence of copyright, namely the protection of original expression. 'Concepts' are statutorily ineligible for copyright protection; for courts to advert to a work's 'total concept' as the essence of its protectible character seems ill-advised in the extreme." *Melville Nimmer, Nimmer on Copyright*, § 13.03[A][1][c], at 13-39 (1963).


47. The respondents sought to exclude the title, the design of the lettering, the poetic meter, the whimsical poetic style and the visual style of illustration from consideration as to whether infringement had occurred. *Seuss*, 109 F.3d at 1399.

48. *Id.*
"the copied work must be, at least in part, an object of the parody[;] otherwise there would be no need to conjure up the original work."\(^49\) The court did not find anything in *The Cat Not* that was transformative of the original work *The Cat*, despite defendant's argument that Seuss was being parodied because his work "was too limited to conceive the possibility of a real trickster 'cat' who creates mayhem along with his friends Thing One and Thing Two, and then magically cleans it up at the end, leaving a moral dilemma in his wake."\(^50\) The court stated, rather, that

[a]lthough *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* . . . . [The authors] 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'.\(^51\)

In *Mattel*, the toy company that owned the Barbie trademark brought suit against the record label of musical group Aqua for writing and performing a song and music video entitled *Barbie Girl*.\(^52\) The court first noted that the Barbie trademark has "transcend[ed]" its identifying purpose and "taken on an expressive meaning apart from its source-identifying function."\(^53\) Consequently, use of the trademark

\(^{49}\) Id. at 1401.

\(^{50}\) Id. at 1402-03. The Ninth Circuit did not explain their reasoning in denying this argument, only commenting, "We completely agree with the district court that Penguin and Dove’s fair use defense is ‘pure shtick’ and that their post-hoc characterization of the work is ‘completely unconvincing.’" Id. at 1403. The district court relied on Justice Kennedy’s concurrence in *Campbell* in holding this use to not meaningfully comment on the original. Seuss, 924 F. Supp. at 1569. "‘Suggesting limits to the Seussian imagination’ is simply inadequate: that statement could be made about any satire, that the new work seeks to ‘suggest the limits of the prior author’s imagination’ by deploying the essence of the prior work in a new setting.” Id., citing Campbell, 510 U.S. at 599 (Kennedy, J., concurring)(cautioning against allowing vague claims of “comment on the naiveté of the original”)

\(^{51}\) Seuss, 109 F.3d at 1401 (quoting Campbell, 510 U.S. at 580).

\(^{52}\) Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899 (9th Cir. 2002).

\(^{53}\) Id. at 900. The appellate decision touches on the cultural significance of Barbie. See id. at 898. “Barbie has been labeled both the ideal American woman and a bimbo . . . . She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon.” Id. In effect, the court said that the word “Barbie” has acquired other meanings in the English language aside from its reference to Mattel’s doll. While those other meanings arose from the doll and still may have an association with it, its use merits First Amendment protection and cannot be controlled by Mattel. See id. at 900-01.
in communication was protected by the First Amendment and the trademark holder could not limit or control this use.\footnote{54}

The court then distinguished \textit{Seuss}, holding that \textit{Barbie Girl} directly targets its source: "The song pokes fun at Barbie and the values that Aqua contends she represents . . . [It] does not rely on the Barbie mark to poke fun at another subject but targets Barbie herself."\footnote{55} Rejecting the argument that using the trademark in the song's title would create confusion by suggesting that Mattel had endorsed the song, the court adopted a test developed by the Second Circuit whereby literary titles do not violate trademark law "unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source of the content of the work."\footnote{56} Here the title was relevant to the underlying work (the song) because "the song is about Barbie and the values Aqua claims she represents."\footnote{57} Since both the title and the contents of the song were entitled to protection as fair use, the Ninth Circuit upheld the district court's grant of summary judgment for the defendant.\footnote{58}

\textbf{D. Other Federal Appellate and Ninth Circuit District Court Decisions}

1. Copyright Cases

Since the Supreme Court's \textit{Campbell} decision, several other federal circuit courts have addressed cases requiring the identification and definition of parody. District courts in the Ninth Circuit have also ruled on parody cases. A comparison of factually similar cases

\footnote{54. The court analogized the Barbie trademark to other trademarks that have come to have expressive meaning beyond their source-identifying function: "How else do you say that something's 'the Rolls Royce of its class?' What else is a quick fix, but a Band Aid?" \textit{Id.} at 900. This non-actionable loss of control over the mark's use by the trademark owner only applies to communicative expression; any use as a "source-identifying function" which could cause consumer confusion will still be infringement under trademark law. \textit{Mattel}, 296 F.3d at 900-01.}

\footnote{55. \textit{Id.} at 901. While \textit{Campbell} was a copyright case, its holding has been applied to trademark cases as well. \textit{See} 5 J. Thomas McCarthy, \textit{McCarthy on Trademarks and Unfair Competition}, § 31:156, at 31-268 (2003) (describing trademark law as analogous to copyright law and stating, "[A] junior user's use that makes no comment on the senior user's mark cannot be defended as a parody, for there is no reason to use the senior mark").}

\footnote{56. \textit{Mattel}, 296 F.3d at 902 (citing Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989)).}

\footnote{57. \textit{Id.} at 902.}

\footnote{58. \textit{Id.}}
in other circuits reveals that the Ninth Circuit stands out in its unwillingness to accept a parody defense.

In a Second Circuit case, *Leibovitz v. Paramount Pictures Corporation*, a movie poster parodied a famous photo that had appeared on the cover of *Vanity Fair*. The original showed the actress, Demi Moore, visibly pregnant, posing nude with one arm covering her breasts and the other supporting her distended stomach—a pose the court recognized as one commonly used in classical art. Moore had a serious expression in the picture without "a trace of a smile." The defendants used a poster to promote the movie *Naked Gun 33 1/3: The Final Insult* that imitated the Moore photo. Portraying a nude woman in exactly the same posture as Moore in the original, the poster was also digitally enhanced to match Moore's skin tone and body shape. Superimposed over the face of the model was a picture of the face of the lead actor in the movie, Leslie Nielsen, with his jaw and eyes positioned similarly to Moore's in the original. However, Moore's serious look in the original was replaced by "Nielsen's mischievous smirk." The poster included the line, "DUE THIS MARCH." The defense did not present any evidence indicating that the advertisement was meant to relate to any aspect of the plot of the movie.

Nevertheless, the court held that the ad poster was transformative of the original work and it also commented on the original work. The transformative requirement was considered obvious since "the ad adds something new." As to commenting on the original work, the court held that "the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore [that] the ad may reasonably be perceived as commenting on the seriousness, even the

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59. 137 F.3d 109 (2d Cir. 1998).
60. *Id.* at 111-12.
61. *Id.* at 111 n.1.
62. *Id.* at 111.
63. *Id.*
64. *Id.* at 111-12.
65. *Leibovitz*, 137 F.3d at 112.
66. *Id.*
67. *Id.* at 111.
68. *Id.*
69. *Id.* at 114.
70. *Id.*
pretentiousness, of the original.\textsuperscript{71} The court also perceived a parody in comparing "a serious portrayal of a beautiful woman taking great pride in the majesty of her pregnant body . . . [and] a ridiculous image of a smirking, foolish-looking pregnant man[;]" it interpreted this comparison as a disagreement with the original work's proclamation of the beauty of the pregnant female body.\textsuperscript{72}

The Eleventh Circuit held a rewrite of the novel \textit{Gone With the Wind} (\textit{GWTW}) to be a parody in \textit{Suntrust Bank v. Houghton Mifflin Company}.\textsuperscript{73} The author appropriated the characters, plot and major scenes from \textit{GWTW} into the first half of her novel, \textit{The Wind Done Gone} (\textit{TWDG}).\textsuperscript{74} In \textit{TWDG}, however, the white landowners of the antebellum South whose lives are chronicled in \textit{GWTW} are portrayed in a less favorable manner, engaging in behaviors which would have been taboo at the time (such as homosexuality and miscegenation), while "nearly every black character is given some redeeming quality . . . that their \textit{GWTW} analogues lacked."\textsuperscript{75} The court rejected the notion that comic effect must be the aim of parody, holding that a work is a parody "if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic . . . work."\textsuperscript{76} \textit{TWDG} criticized \textit{GWTW} in its rewriting of characters' actions and motivations, seeking to "rebut and destroy the perspective, judgments, and mythology of \textit{GWTW}."\textsuperscript{77} The parody used the "original as a known element of modern culture and contribut[ed] something new for humorous effect or commentary."\textsuperscript{78}

Ninth Circuit district courts have issued decisions on two relevant copyright cases where the plaintiffs sought preliminary injunctions. In \textit{Metro-Goldwyn-Mayer v. American Honda Motor Co.} (\textit{Metro}),\textsuperscript{79} the defendant featured a character and sequence of events in a television commercial that fostered an association with the movie character James Bond.\textsuperscript{80} The court found that the commercial

\textsuperscript{71} \textit{Leibovitz}, 137 F.3d at 114.

\textsuperscript{72} \textit{Id}. at 115 (quoting \textit{Leibovitz v. Paramount Pictures Corp.}, 948 F. Supp. 1214, 1222 (S.D.N.Y. 1996)).

\textsuperscript{73} \textit{Id}. at 1257 (11th Cir. 2001).

\textsuperscript{74} \textit{Id}. at 1259.

\textsuperscript{75} \textit{Id}. at 1270–71.

\textsuperscript{76} \textit{Id}. at 1268–69.

\textsuperscript{77} \textit{Id}. at 1270.

\textsuperscript{78} \textit{Id}. at 1273 (quoting \textit{Elsmere Music, Inc. v. Nat'l Broad. Co.}, 623 F.2d 252, 253 n.1 (2d Cir. 1980)).

\textsuperscript{79} 900 F. Supp. 1287 (C.D. Cal. 1995).

\textsuperscript{80} \textit{Id}. at 1291.
infringed on elements of plaintiff’s works that were protectible under copyright law.81 The defendant argued that the use should be a fair use because the advertisement parodied the action film genre.82 The court did not really address the question of whether the commercial was a parody; rather, it decided that the advertisement’s commercial nature—using the source material to advertise a product as opposed to creating a parody to sell for its own sake—favored the plaintiff in deciding if the fair use exception should apply.83 Despite the lack of discussion, the court concluded, “defendants will be unable to show fair use or parody.”84

In Columbia Pictures Industries v. Miramax Films Corp.,85 a case factually similar to Liebovitz, a documentary movie by director Michael Moore used an advertising poster that imitated that of the blockbuster movie Men in Black (MIB).86 The MIB poster featured the film’s two stars in black suits and ties, white shirts, and sunglasses standing in front of a nighttime New York skyline with serious expressions and holding over-sized weapons; the caption read: “PROTECTING THE EARTH FROM THE SCUM OF THE UNIVERSE.”87 Moore’s movie, The Big One (TBO), used a poster in which Moore also stood before a nighttime New York skyline wearing the same outfit but with disheveled hair and a baseball cap, smirking and carrying an over-sized microphone; the caption read: “PROTECTING THE EARTH FROM THE SCUM OF CORPORATE AMERICA.”88 The court held that the TBO poster was not transformative because it did not comment on or criticize the ads for MIB; it merely incorporated elements of the MIB poster to “get attention” and “avoid the drudgery in working up something fresh.”89

81. Id. at 1299.
82. Id.
83. Id. at 1300.
84. Id. at 1301.
85. 11 F. Supp. 2d 1179 (C.D. Cal. 1998).
86. Id. at 1182. The plaintiffs sued for infringement in relation to a widespread promotional poster and one of their movie trailers. Id.
87. Id.
88. Id.
89. Id. at 1188 (quoting Campbell, 510 U.S. at 580).
2. Trademark Cases

In the Second Circuit, an independent motorcycle repair shop used the logo of a motorcycle manufacturer that also operated repair shops in *Harley-Davidson, Inc. v. Grottanelli (Harley)*. The defendant used a variation of the motorcycle company’s registered trademark on his newsletter, t-shirts and the signage for his business. The court emphasized that the variation does not comment on Harley’s mark; rather, it just uses it in a humorous fashion to promote a competing motorcycle repair business. The court also noted that when a trademark is being used to promote a competitor’s business, the defense of parodic use is sharply limited.

In the Fifth Circuit, the court held in *Lyons Partnership v. Giannoulas* that making a famous television character the butt of jokes in skits performed at sporting events qualified as parody and was not trademark infringement. The Chicken, a sports mascot, incorporated into his act a character looking like Barney, a purple dinosaur with a television show and many products marketed to children. The court noted that Barney’s shows have been criticized for portraying “a one-dimensional world where everyone must be happy and everything must be resolved right away.” In the skit, the Chicken and the Barney character danced together, but the Chicken became angry at being outdanced and attacked Barney. The court found that for a performance at a sporting event primarily attended by adults, “the humor came from the incongruous nature of such an appearance, not from an attempt to benefit from Barney’s goodwill.” The court stressed that the intended audience is an important factor in determining parody.

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90. 164 F.3d 806, 808 (2d Cir. 1999).
91. *Id.* at 812–13.
92. *Id.* at 813.
93. *Id.*
94. 179 F.3d 384 (5th Cir. 1999).
95. *Id.* at 388.
96. *Id.* at 385–86.
97. *Id.* at 386 (citation omitted).
98. *Id.* at 387.
99. *Id.* at 388.
100. *Lyons P'ship*, 179 F.3d at 388.
III. SEEKING AN UNDERSTANDING OF PARODY

A. Literary Definitions of Parody

The distinction between parody and satire set forth in Campbell is not one accepted as the standard in the literary community. Parody is often understood to simply require an incongruous use of another author's imputable style. Its subversive role is generally underscored, but this role need not openly display antipathy toward its source. Some have even denied that parody should involve any attack on the source material or author at all. Two modern theorists' definitions illustrate the direction of twentieth century scholarship. Margaret Rose has defined parody as merely "the

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102. Parody,

... searches out, by means of subversive mimicry, any weakness, pretension or lack of awareness in its original. Although it is often deflationary and comic, its distinguishing characteristic is not deflation, but analytic mimicry. The systematic appropriation of the form and imagery of secular love poetry by the sacred lyric is an example of parody in this basic sense.


Although accompanied by a comic effect, it has been seen that parody need not necessarily ridicule the work of its target. Although it is often deflationary and comic, its distinguishing characteristic is not deflation, but analytic mimicry. The systematic appropriation of the form and imagery of secular love poetry by the sacred lyric is an example of parody in this basic sense.

Margaret A. Rose, Parody/Meta-Fiction An Analysis of Parody as a Critical Mirror to the Writing and Reception of Fiction 33 (1979) (footnotes omitted).

103. "The object of a Parody is very seldom to ridicule its original, more often, on the contrary, it does it honor, if only by taking it as worthy of imitation, or burlesque." Walter Hamilton, An Introduction to the Parodies of Popular Songs, 4 Parodies of the Works of English and American Authors 1, 1 (Walter Hamilton ed., London, Reeves & Turner, 1887) [hereinafter Parodies]. "The numerous parodies of Hamlet's soliloquy were never made in derision of that solemn monologue, no more than the travesties of Virgil by Scarron and Cotton; their authors were never so gaily mad as that." Isaac D'Iseraeli, The Curiosities of Literature, reprinted in 3 Parodies of the Works of English and American Authors 1, 1 (Walter Hamilton ed., London, Reeves & Turner, 1886). Hamilton indicates this essay was originally published "more than fifty years ago." Id. at 2.

104. "Margaret Rose and Linda Hutcheon... have each recently written important books on parody [and] have concerned themselves with giving parody a much wider definition than
comic refuoning of preformed linguistic or artistic material.”
Linda Hutcheon defines it as “a form of imitation, but imitation characterized by ironic inversion, not always at the expense of the parodied text” or more simply as “repetition with difference.”

A distinction must be drawn in the legal arena, however, between parody and imitation or copying. The key to this distinction is the effect of irony, of discrepancy between the original work and the imitating work. The discrepancy may involve an attack on the coherency of the original text, commentary on the original text or on the world in general, or a discrepancy caused by the reader’s expectations about the original text.

B. A Short List of Relevant Parodies

One of the earliest existing parodies is the Battle of the Frogs and Mice, or the Batrachomyomachia, which describes the battle of the two tribes of field creatures in the epic style of Homer. Shakespeare mimicked the high dramatic style of his contemporary, Christopher Marlowe, in the players’ scene in Hamlet. John Phillips published the noted poem The Splendid Shilling in 1705; the poem is a parody of Milton’s Paradise Lost, which was published thirty-eight years earlier. “He chose [Milton’s] style for parody, had been considered by previous critics.”

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105. MARGARET A. ROSE, PARODY: ANCIENT, MODERN, AND POST-MODERN 52 (1993). While Rose includes “comic” as part of her definition, requiring a humorous effect, she defines comedy broadly. Because both the text of the parodist and the parodied work are the subject of the reader’s attention, the latter may be surprised to see the parodied text offered in its new distorted form. The sudden destruction of expectations which accompanies the perception of such incongruities has long been recognised as a basic ingredient of humour.


107. Id. at 32. Hutcheon also discusses the alternate translations of the Greek word para as referenced by Rose. See supra note 102. Providing the alternate definitions for para as 1) against and 2) beside, Hutcheon notes, “There is nothing in parodia that necessitates the inclusion of a concept of ridicule, as there is, for instance, in the joke or burla of burlesque.” HUTCHEON, supra note 106, at 32.

108. ROSE, supra note 102, at 25. See also Hutcheon, supra note 106 and accompanying text. “Irony is the major rhetorical strategy deployed by the genre” of parody. Id at 25.


110. 9 THE NEW ENCYCLOPEDIA BRITANNICA 167 (15th ed. 1998).

111. Id.

112. See supra note 101.
whilst he found a subject in the character of an impecunious college friend, who knew not how to keep a shilling in his pocket. The Splendid Shilling . . . is a burlesque in which nobody is ridiculed."\textsuperscript{113}

At the turn of the Eighteenth Century in Britain, religious works were commonly utilized to parody political or religious vices:

We have parodies on the Psalms by Luther; Dodsley parodied the book of Chronicles, and Franklin’s most beautiful story of Abraham is a parody of the Scripture-style; not one of these writers, however, proposed to ridicule their originals; some ingenuity in the application was all that they intended.\textsuperscript{114}

In 1817, William Hone was tried three times in England for blasphemy based on his imitating the form of common and well-known prayers but replacing the words with political commentary.\textsuperscript{115} Hone, defending himself, successfully argued in two of those cases that his parodies did not in any way impugn the original prayers, mainly by reciting at length a list of prior parodies that also did not target the source work.\textsuperscript{116} Lewis Carroll included poems in Alice in Wonderland, one of the most famous being Father William.\textsuperscript{117} The poem parodied The Old Man’s Comforts and How He Gained Them, by Robert Southey, who died twenty-two years prior to the publication of Carroll’s work.\textsuperscript{118} “Lewis Carroll was parodying

\textsuperscript{113} 2 PARODIES, supra note 103, at 217. The poem begins, “Happy the Man, who void of Cares and Strife, /In Silken or in Leathern Purse retains/ A Splendid Shilling; he nor hears with pain/ New Oysters cry’d, nor sighs for cheerful Ale.” John Phillips, The Splendid Shilling, reprinted in 2 PARODIES, supra note 103, at 217.

\textsuperscript{114} D’Israeli, supra note 103, at 1.

\textsuperscript{115} “William Hone was publishing and selling very largely political parodies, founded on the style and phraseology of the English Liturgy, which the government [was] not slow to pounce upon as profane publications.” HACKWOOD, supra note I, at 111.

\textsuperscript{116} At the third trial the court forbid him to use this defense. Id. at 165. In that case, he successfully argued, among other things, that the prayer he had used, the Athanasian Creed, was not actually a sacred text. Id.

\textsuperscript{117} A sample verse: “‘In my youth,’ said his father, ‘I took to the law./And argued each case with my wife;/And the muscular strength, which it gave to my jaw/Has lasted the rest of my life.” LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 43-44 (Roger Lancelyn Green ed., Oxford Univ. Press 1971) (1865, 1871).

\textsuperscript{118} THE NEW ENCYCLOPEDIA BRITANNICA, supra note 110, at 167. Robert Southey died in 1843. CAMBRIDGE GUIDE, supra note 101, at 936. A sample verse: “‘In the days of my youth,’ father William replied,‘I remembered that youth could not last/I thought of the future whatever I did./That I never might grieve for the past.” Robert Southey, The Old Man’s Comforts and How He Gained Them, reprinted in 3 PARODIES, supra note 103, at 156 (1886).
Southey and Wordsworth in nonsense verse for humorous effects, not seriously questioning the convictions expressed by the originals.\textsuperscript{119}

Walter Hamilton collected and published six volumes of parodies in the 1880s.\textsuperscript{120} The extensive selection of parodies of contemporary authors bespeaks the lack of rules or limits at that time in the United States. For instance, fifty-eight parodies of Edgar Allen Poe's \textit{The Raven} are included with names as unrelated as \textit{My Christmas Pudding}, \textit{On a Fragment of a Five-Dollar Bill}, \textit{Her Pa's Dog}, and \textit{The Ravenous Bull and the Bicycle}.\textsuperscript{121} From the twentieth century, a book by Louis Untermeyer included twenty-four supposed translations of Horace's \textit{Integer Vitae} by past and present poets that borrowed from specific poems but did not parody the substance of those works.\textsuperscript{122} James Joyce, in his landmark work \textit{Ulysses}, included a chapter titled "Oxen of the Sun" which "parodies most of the major English prose writers and genres, from the medieval to the modern period, in 32 chronological steps. The events of the chapter are told through these successive parodic filters."\textsuperscript{123} Other examples include Timothy Findley's \textit{Famous Last Words} (1981), a murder mystery which used a character created by Ezra Pound; J.W. White's \textit{The Man From Krypton} (1978), which used Superman in a discussion of religion; and David Thomson's \textit{Suspects} (1985), a novel providing biographical sketches of multiple famous movie characters.\textsuperscript{124}

Cartoon characters have been used from their inception to parody famous individuals in the manner the Cat was used to parody Simpson in \textit{Seuss}.\textsuperscript{125} The first picture is of a magazine cover from 1896 showing Tammany Hall politicians represented as the Yellow

\begin{footnotes}
\item[119] KENT & EWEN, supra note 104, at 15.
\item[120] 1-6 PARODIES, supra note 103 (1884-1889).
\item[121] 2 PARODIES, supra note 103, at 28–95, 136. One of the parodies is by Poe himself. \textit{Id.} at 28. The climactic verse from \textit{Her Pa's Dog} follows, wherein a young man spends the night with a young woman and encounters her father in the morning:
\begin{quote}
At the barn the cock was crowing, and I thought I would be going./So I started very quickly to retreat across the floor,/But the old man quick did foller, then he took me by the collar,/And you oughter heard me holler as he pitched me throigh the door,'Seek 'em, Bull!' he loudly uttered, in a sort of fiendish roar. Merely that, and nothing more.
\end{quote}
\textit{Id.} at 41. Poe died in 1849. CAMBRIDGE GUIDE, supra note 101, at 785.
\item[122] LOUIS UNTERMEYER, INCLUDING HORACE 3–45 (1919).
\item[123] 21 THE ENCYCLOPEDIA AMERICANA INTERNATIONAL EDITION 472 (2000).
\item[124] These examples were identified by Leslie Kurtz. See Leslie A. Kurtz, \textit{The Independent Legal Lives of Fictional Characters}, 1986 WIS. L. REV. 429, 436 (1986).
\item[125] See Appendix A for examples.
\end{footnotes}
Kid and the Brownies, some of the earliest cartoon characters. The second picture is of a more recent use, showing Bill Clinton represented as Superman.

C. Relevance to the Legal Definition of Parody

While courts possess the authority to create a legal definition of parody that differs from the definitions used by those who dedicate themselves to literature and the arts, it is nevertheless troubling that so many artistic works of the past may not have received protection at the time of their publication under the definition chosen by some of today’s courts. In Campbell, Souter quoted two dictionary definitions of parody but neglected to incorporate the broader one into the legal definition he created. Consequently, the parody defense has been limited to a subset of the works that a more expansive definition would protect. This outcome impedes the goal for copyright law expressed in the Constitution of “promot[ing] the Progress of Science and useful Arts.”

IV. TOWARD A BETTER STANDARD

A. Applying the Seuss standard to Mattel

Comparing Seuss and Mattel demonstrates the Ninth Circuit’s inconsistency in applying the parody standard. The parsimonious analysis used in Seuss, if applied to Mattel, would lead to a decision that parody did not exist in the song Barbie Girl. The Mattel court distinguished Seuss by emphasizing that Aqua’s Barbie Girl targeted
Mattel’s doll and reiterated the *Seuss* court’s claim that *The Cat Not* did not target *The Cat*. However, the court stretches the evidence by proclaiming that “the song pokes fun at Barbie and the values that Aqua contends she represents.” The song can at least as readily be understood as sensationally exploiting Barbie and Ken by sexualizing them and presenting them participating in a debauched lifestyle. The use of double entendre in the lyrics creates the understanding that there is a straightforward (and perhaps naïve) interpretation of the song as well as an underlying interpretation rife with sexual meaning. For example, “You can brush my hair, undress me everywhere” on one level accurately portrays how a child might play with a Barbie doll; at the same time, it can also be viewed as a response to Ken’s frequent refrain “Come on Barbie, let’s go party!” implying assent to sexual abandon. The district court believed that “life in plastic, it’s fantastic” represented an explicit denunciation of “the plastic values [Barbie] represents.” However, the subsequent line, “Imagination, life is your creation” suggests the “plastic” lyric is better understood as a literal statement endorsing the pleasure a youthful imagination can create through an object made of plastic fashioned into human form. The line “I’m a blonde bimbo girl, in a fantasy world/Dress me up, make it tight, I’m your dolly” does suggest some criticism of Barbie. Yet while “bimbo” can mean a woman of limited intelligence, it also can mean a sexually active and indiscriminate woman. The following line’s “make it tight” suggests the use of “bimbo” should more appropriately be viewed as a further effort by the song to sexualize a child’s toy rather than an oblique criticism of the values some in society have reportedly associated with the Barbie phenomenon. Nor can it be assumed that this song bears the weight of any heavy-handed analysis. Arguably the song merely portrays a woman imagining herself as a Barbie doll. “Bimbo” may have been

130. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002).
131. *Id.* The lyrics to *Barbie Girl* can be found in an appendix to the opinion. *See id.* at 909.
132. Double entendre: “a word or expression capable of two interpretations with one usu. risqué.” *MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra* note 129, at 347.
133. *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1140 (C.D. Cal. 1998). The author relies on the district court’s analysis on this point because the appellate court provides no meaningful explanation of their decision in finding *Barbie Girl* a parody.
134. *See WEBSTER’S CONCISE DICTIONARY*, which defines “bimbo” as “Slang. 1. foolish or inept person. 2. disreputable woman.” *WEBSTER’S CONCISE DICTIONARY* 40 (2001).
135. The District Court discussed criticisms that have been leveled against Barbie. *See Mattel*, 28 F. Supp. 2d at 1139.
selected as a lyric because of its basic alliterative relation to "Barbie."\textsuperscript{136}

The Ninth Circuit in \textit{Seuss} held that \textit{The Cat Not} was not a transformative work because the substance of the original was not conjured up in the satire; rather \textit{The Cat Not} only used \textit{The Cat} as a source ""to get attention' or 'to avoid the drudgery in working up something fresh.'\textsuperscript{137} In comparing the amount of copying in \textit{The Cat Not} and in \textit{Barbie Girl}, the song immediately benefits from being in a different medium than the original it targets. Any comparison of an original and new work will necessarily find many more similarities when both works are in the same medium, making it easier to point to allegedly infringing elements. However, the Ninth Circuit's criticism of \textit{The Cat Not} could fairly be applied to \textit{Barbie Girl}: the song does not meaningfully criticize anything about Mattel's Barbie except her feminine, but asexual nature, a quality standard applied to all children's dolls representing adult women. Analyzed under the \textit{Seuss} standard, Aqua had no justification for singling out Barbie to satirize the nature of a doll.

\textbf{B. Applying the Mattel standard to Seuss}

The permissive analysis used by the Ninth Circuit in \textit{Mattel}, if applied to \textit{Seuss}, would find that \textit{The Cat Not} was a legitimate parody. In \textit{Mattel}, the court held that "'the song pokes fun at Barbie and the values that Aqua contends she represents.'\textsuperscript{138} In \textit{Seuss}, the court held that \textit{The Cat Not} has "'no critical bearing on the substance or style of \textit{The Cat in the Hat}.'\textsuperscript{139} Yet critical assessments of Dr. Seuss support the argument that \textit{The Cat Not} parodied the substance of Seuss's work. The idyllic world Seuss portrayed is aptly parodied by the messy realities of the O.J. Simpson trial. "'[I]t is hard to take the optimistic, personable Cat's transgressions too seriously, especially since nothing truly bad ever happens in the story. Even his worst actions can be repaired and rescued.'\textsuperscript{140}

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\item \textsuperscript{136} Alliteration is "'the repetition of consonant sounds at the beginning of words or within words'" and is used for "'unity, emphasis, and musical effect.'" MORNER & RAUSCH, supra note 43, at 5.
\item \textsuperscript{137} Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997).
\item \textsuperscript{138} Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 901 (9th Cir. 2002).
\item \textsuperscript{139} Seuss, 109 F.3d at 1401.
\item \textsuperscript{140} RUTH K. MACDONALD, DR. SEUSS 164 (1988).
\end{itemize}
\end{footnotesize}
The plot of *The Cat*, wherein the Cat creates mayhem in a variety of different ways, bears comparison to Simpson's situation. The book opens with the Cat showing up at the house of two children who are home alone. He proceeds to play a balancing game with various household objects, including the family's pet fish, which ends with everything falling down. He then brings in two loony characters—Thing One and Thing Two. They proceed to fly kites indoors and make a wreck of the once clean and orderly household. As mother is spied returning, the Cat appears with a machine that magically cleans everything up just in time. The children are left with the moral question whether they should mention the strange events to their mother.

This storyline provides unique opportunities for comparison to Simpson's situation. Although Simpson was a celebrity as a star football player, his playing days were past and he was largely out of the limelight prior to the murder of his wife and her companion. As the Cat appeared at the house, Simpson suddenly appeared in the national spotlight unheralded and would not go away. Those who observed him, like the children in *The Cat*, were simultaneously fascinated and alarmed. He created mayhem in his actions, and, like the Cat's balancing act, one expected everything to ultimately come crashing down. Like the Cat with Thing One and Thing Two,

142. Id. at 12–23.
143. Id. at 28–37.
144. Id. at 38–45.
145. Id. at 46–59.
146. Id. at 60–61. MacDonald asserted that the only thing for the children to do is to keep their mother in the dark. "It is clear to the reader at the end... that keeping quiet is the answer... [T]he children's lack of participation in the actual mayhem does not clear them of the guilt of having counenanced it." MACDONALD, supra note 140, at 109.
147. It appears from the quotes provided from the work in Seuss that *The Cat Not* portrayed Simpson as having committed the murders he was accused of despite his acquittal at criminal trial. In discussing Simpson and his trial, this Comment accepts the view of the author of *The Cat Not* for the sake of argument.
148. "The statement, 'We did nothing at all,' holds for nearly the entire book... [The children] are innocent bystanders, nearly mute observers of what goes on." MACDONALD, supra note 140, at 108–09.
149. Several critics have noted that reading Dr. Seuss provides children with a way to voyeuristically participate in the mayhem. "Every detail in a Seuss illustration is calculated to add its bit to increasing the child's vicarious anxiety... The greatest pleasure in Seuss is derived from the sense of having a season pass to utter chaos with no personal responsibility for any of it." Selma G. Lanes, *Seuss for the Goose Is Seuss for the Gander*, DOWN THE RABBIT HOLE: ADVENTURES AND MISADVENTURES IN THE REALM OF CHILDREN'S LITERATURE (1971),
Simpson introduced his cadre of lawyers, and they proceeded to make the situation even more confusing and chaotic. In the end, magically as it were, Simpson and his companions disappeared with a smile and a wave none the worse for the day's questionable activities.  

This trickster analogy, derided by the *Seuss* court, is a staple of Seussian criticism. "The Cat in the Hat is nothing less than an archetypal trickster hero...[H]e boldly mocks authority figures and breaks all societal rules." Just as "Barbie" has meaning in our culture beyond Mattel's doll, as the *Mattel* court indicated, the story of *The Cat in the Hat* is one of the most well-known tales in the United States and has become part of our cultural heritage. While the *Seuss* court apparently believed the authors of *The Cat Not* could have picked another character and story as the basis of their parody, it was not so bold as to suggest any alternative.

C. Comparison to the Decisions of Other Circuits

The Second, Fifth, and Eleventh Circuits all require targeting of the source work in parody cases, yet in cases with facts similar to...
Seuss and Columbia, these circuits reached opposite results. In Suntrust, the author took characters from a previous book, changed their names and some of their motivations, and added some new events in their lives.\textsuperscript{155} The authors of The Cat Not took substantially less: characters from the original were included in the new work, but their association with real people significantly changed them.\textsuperscript{156} Drawings were likewise altered, such that thirteen appearances of the Cat's hat represented the most substantial taking in the text.\textsuperscript{157} The district court issued a preliminary injunction based strictly on the use of the Cat's distinctive hat and the similarity of the back cover of The Cat Not to the front cover of The Cat.\textsuperscript{158} The Suntrust decision also accepted that a parody will at times "us[e] the original as a known element of modern culture and contribut[e] something new for humorous effect or commentary."\textsuperscript{159} As previously mentioned, The Cat is one of the most popular and universally known children's books in the United States and the world.\textsuperscript{160}

The Fifth Circuit in Lyons accepted the defendant's argument that his use of a Barney look-alike as the butt of cruel jokes in skits performed at sporting events was "a sophisticated critique of society's acceptance" of Barney.\textsuperscript{161} The court upheld the use because "the humor came from the incongruous nature of such an appearance [at a sporting event for adults], not from an attempt to benefit from Barney's goodwill."\textsuperscript{162} Furthermore "the intended audience is an important factor in determining whether a performance qualifies as a parody."\textsuperscript{163} The use of Seuss's Cat character in The Cat Not was likewise incongruous in making the Cat into a vicious murderer, and the book was clearly intended for an adult audience.\textsuperscript{164} The Cat Not

\textsuperscript{155} See Suntrust, 268 F.3d at 1267.

\textsuperscript{156} See generally, Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

\textsuperscript{157} Id. at 1398.

\textsuperscript{158} Id. at 1399.

\textsuperscript{159} Suntrust, 268 F.3d at 1273.

\textsuperscript{160} See supra note 153.

\textsuperscript{161} Lyons P'ship v. Giannoulas, 179 F.3d 384, 387 (5th Cir. 1999).

\textsuperscript{162} Id. at 388.

\textsuperscript{163} Id.

\textsuperscript{164} "Dr. Seuss's books are targeted at children ... whereas Penguin's book is targeted at adults ...." Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1571 (S.D. Cal. 1996).
targeted the original much more in its perversion of the relatively benign "trickster" Cat than did the defendant in *Lyons* by taking a familiar character and subjecting him to physical abuse.

The facts in *Leibovitz* are almost identical to those in *Columbia*. The main difference is that in *Leibovitz* the defendants used a variation of a serious magazine cover photo to advertise a humorous film. In *Columbia*, the defendants used a variation of a mock-serious movie poster advertising a comedy as the basis for their own advertisement featuring a comic movie poster advertising a documentary. The *Columbia* poster did not attempt to exactly replicate parts of the original as was the case in *Leibovitz*. It pictured a different person with different props and a different slogan but maintained the same background, positioning and theme. It is arguably much more critical of the original than the poster in *Leibovitz*, where the court relies on the replacement of a serious expression with a smirk to find a litany of criticisms of the pretentiousness of the original. The poster in *Columbia* arguably mocks the fake seriousness of a fantasy-based comedy movie about the world being threatened by invading aliens by comparing it to a documentary about the real business practices the director believes threaten the well-being of the nation's citizens. More succinctly, and to paraphrase an old saying, the message could be that the microphone is mightier than the over-sized weapon.

The often-used quote from *Campbell*, which is applicable to any parody, could have been brought out to oppose protection for any of these works. They used the other work "to get attention or to avoid the drudgery in working up something fresh." However, parodies by any definition do not start with something "fresh," and the accusation of seeking to avoid "drudgery" attacks the parody form rather than singling out those works that should not be granted

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167. *Leibovitz*, 137 F.3d at 111–12.
protection as parody. Parody always begins by appropriating some elements from another work of art. Ultimately, the only utility in this line of criticism is in providing the court with the opportunity to surreptitiously assess the quality or worthiness of the accused work.

These other circuits, ostensibly applying the same requirement that the parody must target the original, have in practice utilized a looser test, one that does not require the palpable evidence the Ninth Circuit demands. The Supreme Court found parody in the 2 Live Crew song that the Sixth Circuit majority had previously argued was not a parody at all. Likewise, other circuits since the Campbell decision have accepted works as parodies as long as a reasonable argument to that effect can be made. In Mattel, at least the Ninth Circuit took a large step in that direction. The better approach, though, would be to abandon the current definition of parody altogether.

D. A Better Standard

Courts are faced with the difficult task in parody cases of distinguishing between instances where a prior work is used as the base to create something significantly different and instances where a prior work is used only to benefit inappropriately from another's creativity. In Justice Souter's words, the task is to separate "the fair use sheep from the infringing goats." Copyright holders have a statutory right to prevent others from creating derivative works. Trademark holders have the statutory right to protect their marks from uses by others that will generate confusion among the public at large.

173. Parody is, after all, "a formal or structural relation between two texts." HUTCHEON, supra note 106, at 22. The second work creates a relation with the first work by appropriating from it.

174. "The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use." Campbell, 510 U.S. at 582 (footnote omitted).

175. While decided on other grounds, the Sixth Circuit majority expressed grave reservations about the District Court's finding that the song was a parody. "[W]e cannot discern any parody of the original song. Failing a direct comment on the original, there can be no parody, as the 'copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.'" Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1436 (6th Cir. 1992) (citation omitted).

176. Campbell, 510 U.S. at 586.


At the same time, an overriding goal of intellectual property law is the promotion of the arts and sciences. Justice Story's words, quoted by Justice Souter in the *Campbell* opinion, reflect a generally accepted sentiment: "Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." The line-drawing involved in determining the situations in which a parodist can utilize the style of another contemporary artist has a sweeping effect on the creation of parodies. A high bar will become a significant disincentive for artists whose innovations might be interpreted as infringement and suppressed by the courts. Given the general acceptance of greater protection for cartoon characters than literary characters, limitations will especially burden parodists in the cartoon medium.

Yet, the impact will certainly not be felt only in the cartoon medium. Lewis Carroll's *Father William*, were it first published today and within the term of protection of Robert Southey's *The Old Man's Comforts and How He Gained Them*, would probably be held an infringing work in the Ninth Circuit. Under the *Krofft* test, the first element can be met by the copying of the character Father William. The strong similarity in the structure of the poems, as well as the imitation of the meter and the rhyme scheme, could satisfy the second element. The fair use parody defense then could be denied since any criticism of Southey's poem in Carroll's poem can fairly be characterized as merely commenting on the naiveté of the original.

An unresolved question that could more tightly restrict the parody defense is whether an imitation of the style but not the subject matter of a prior work can, by itself, meet the first element of the *Krofft* test. Or, alternately, can the use of a twenty word sentence from the first work, or ten words, or three? The court in *Seuss* was satisfied that the test was met by the similarity of cover pictures and a similar hat. What will be found acceptable in art forms that are not

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179. *See*, e.g., U.S. CONST. art. I, § 8, cl. 8.
180. *Campbell*, 510 U.S. at 575 (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845).
181. "[A] comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression." Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978).
182. *See supra* notes 117–118 and accompanying text.
A PARODY OF DISTINCTION

pictorial or visual to show similarity of ideas remains an unknown and unsettling question.

Justice Kennedy argued that works not targeting the original can either pay a licensing fee to that author or use another work whose author will accept a licensing fee.\textsuperscript{184} However, he disregards the importance of finding a text that will be familiar to the intended audience. The selection must be a work that will be easily identifiable to a diverse group of potential readers.\textsuperscript{185} For instance, when the magazine \textit{Spy} wanted to present Bill Clinton as a superhuman being, it probably did not spend much time considering which of a range of fictional characters would best convey its message.\textsuperscript{186} Rather, it quickly chose Superman because Superman occupies a unique place in our cultural landscape.\textsuperscript{187} Other candidates like Samson, Hercules, the Hulk, or any other fictional strong men do not have the same cachet, would not be as readily identified by viewers, or have other associations that would confuse the message. Superman best represents the all-powerful, invincible figure that \textit{Spy} wanted to use to convey its message about Bill Clinton.

\textit{Seuss} illustrates several other weaknesses of the source targeting limitation. First, certain works will experience market failure because no author will want the material being discussed associated with his or her work.\textsuperscript{188} \textit{The Cat Not} provides a perfect example of this problem. For an author seeking to contrast the innocence of a famous character with O.J. Simpson and his murder trial, it seems unlikely

\begin{itemize}
\item \textsuperscript{184} See Campbell, 510 U.S. at 597 (Kennedy, J., concurring).
\item \textsuperscript{185} "[T]he parodies of \textit{The Book of Common Prayer}, for instance, are not attacking that text (or Christianity), but are using the fact that parodic allusions to it will be easily recognizable to many readers in order to launch satiric attacks on other targets." KENT \& EWEN, supra note 104, at 8.
\item \textsuperscript{186} See Appendix A.
\item \textsuperscript{187} Kurtz explains that:
\begin{quote}[f]ictional characters, like real people, are a part of the world in which we live, a part of our culture. Every artist builds upon the creativity of the past, and the creations of others are among the raw materials used to create new works of art . . . . [T]he public domain must retain the materials that authors draw from to create new forms of expression.
\end{quote}Kurtz, supra note 124, at 438.
\item \textsuperscript{188} Wendy Gordon identified this concern as one of three necessary for the fair use defense. Wendy J. Gordon, \textit{Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors}, 82 COLUM. L. REV. 1600, 1601 (1982). "(1) [D]efendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner’s incentives would not be substantially impaired by allowing the user to proceed[.]" Id. For an application of these concerns to \textit{Seuss}, see Vogel, supra note 46, at 310–11.
\end{itemize}
that, being turned down by the Cat in the Hat, such author just needs to shop his idea around to the owners of Big Bird and Mickey Mouse. None will authorize this use, and as a consequence the public is denied this contribution to creative expression.\(^{189}\)

Second, the assumption that a parodist can shop around for the appropriate vehicle for the incipient idea percolating in his mind fundamentally ignores the nature of the creative process.\(^{190}\) The author of *The Cat Not* realized that *The Cat* provided an especially relevant comparison to the facts of the Simpson trial. Perhaps Donald Duck, Bugs Bunny or some few other fictional characters well-known to the general public have similarly created a chaotic and seemingly unfixable situation, only to magically make everything right at the last moment. Yet the Cat in the Hat’s primary association with that story provides much greater impact for the author. The fact that *The Cat* comes with its own distinctive writing style that can be dramatically utilized furthers the impact of the choice. The *Seuss* court did not suggest any alternate works or characters the authors could have chosen for their parody, nor could they, for the authors chose the best work imaginable to serve their purposes.

Third, potential authors will not be dissuaded from creating a new work merely because it may later be parodied.\(^ {191}\) Applying the copyright fair use factors ensures that the parody does not serve as a market substitute for the original. Since the copyright owner suffers no cognizable economic loss, it is unlikely that anyone would forego creative expression out of fear of parody.

The inappropriate distinction that has been drawn between parody and satire should be abandoned. A better definition, drawing on Rose and Hutcheon, is the ironic refunctioning of a prior work.\(^ {192}\) The word “comic” which Rose used (“comic refunctioning”) has been left out because it suggests that traditional humor is required, which is not what Rose intended.\(^ {193}\) Rose’s view of comedy in incongruity is

\(^{189}\) While the copyright holder may not want his or her creation used in a particular fashion, such a possibility is a risk taken in presenting the creation to the public. “Nurturing authorship is not necessarily the same thing as nurturing authors.” Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990).

\(^{190}\) Vogel, *supra* note 46, at 315.

\(^{191}\) *Id.*

\(^{192}\) “[W]e will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.” Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268–69 (11th Cir. 2001)

\(^{193}\) *See supra* note 105.
better expressed for those not versed in literary theory by the use of "ironic," the term chosen by Hutcheon in her definition. Requiring irony will allow differentiation between parodies and derivative works. Composing a sequel, for example, would not meet the requirement of ironic refunctioning.

Other factors currently applied in the parody analysis in trademark and copyright cases should still be used to determine whether infringement exists. In trademark cases, the likelihood of confusion standard will still indicate whether the refunctioning makes clear to the public that the trademark holder is not associated with the parody. In copyright cases, the four fair use factors provided in the statute will still indicate where to draw the line between derivative works and parodies. Changing the definition of parody will promote the development of the arts without taking away any of the rights appropriately given to trademark and copyright holders.

E. An analysis of the cases discussed under the proposed standards

Using the proposed definition, Seuss, Mattel and Columbia would all qualify as parody. Whether or not the book in Seuss parodied its source, it refunctioned Seuss's The Cat by replacing the fictional characters with real people. Replacing a jovial talking cat with a murderously jealous husband is ironic by nature of its incongruousness. The song in Mattel also defied our expectations by refunctioning a plastic doll as a living person with physical desires, ironically intermixing these desires with comments on the doll's "plastic" existence. The poster in Columbia replaced larger-than-life, mock-serious heroes with an unassuming everyman figure, simultaneously challenging the premise of the prior film.

194. See supra note 106 and accompanying text.
196. The most important factor for parody cases is the fourth, the effect of the use on the commercial value of the copyrighted work. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 599 (1994) (Kennedy, J., concurring). This factor will best distinguish between parody and imitation. It "underscores the importance of ensuring that the parody is in fact an independent creative work." Id.
198. Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 901 (9th Cir. 2002).
Of the appellate cases discussed, the uses of *Leibovitz*, *Lyons* and *Suntrust* would all receive protection as parodies. Showing a pregnant man was in itself an ironic refunctioning in *Leibovitz*. Making an oppressively benevolent children's character the butt of jokes during adult entertainment, as occurred in *Lyons*, shocked expectations. The novelist in *Suntrust*, by taking someone else's characters in a historical novel and revealing that their former noblesse was all a charade, while imbuing their formerly inferior slaves with majesty, undermined the original in a startling way. All these cases clearly exhibit ironic refunctioning. The uses would only need to address the additional trademark or copyright requirements.  

Two other cases were discussed in Part II of this Comment where parody was not an adequate defense. These outcomes would not change under the new definition. In *Harley*, while defendant did change the Harley-Davidson logo in what he called a whimsical fashion, which might qualify as refunctioning, he did not demonstrate any irony in the new design. It served the same purpose as the Harley-Davidson design would have—indicating that he sought business repairing Harley-Davidson motorcycles; as such, he cannot demonstrate irony. If the new logo still conveyed the same message to the public, then arguably the changes would be de minimis and not even qualify as refunctioning. *Metro* would also depend on the defendants demonstrating refunctioning and irony. Putting an action character in a typical action situation would arguably not be refunctioning and almost certainly not ironic. Even if the defendants did demonstrate ironic refunctioning, they still must prove that their use does not create a likelihood of confusion. This task would be exceedingly difficult since the advertisement used a character indistinguishable from James Bond to promote their automobile—a use which directly conflicted with the trademark owners' licensing of the character for use in auto advertising. In both of these cases, use of the parody defense by the defendants appeared to be an unwarranted attempt to avoid liability for copying that sought only to benefit from the intellectual property of others. Under the proposed definition, these defendants would still be found guilty of infringement.

200. Only *Suntrust* could have any problem here. Like 2 Live Crew in *Campbell*, defendants must show that their use will not harm the market for derivative works, such as a version of *GWTW* told from the viewpoint of the slaves which is licensed by Suntrust and does not disparage the white characters.

V. CONCLUSION

Courts have been involved in needless and convoluted interpretation of parodies to try to determine if they target their sources. This requirement relies on an unsuitably narrow definition of parody, denying protection to works that should be protected. Expanding the definition of parody would simplify the legal analysis for courts, protect artistic and literary works that deserve protection, and still preserve the rights appropriate for copyright and trademark holders.
Appendix A
Appendix A (cont’d.)