CAMPBELL v. ACUFF-ROSE: JUSTICE SOUTER'S RESCUE OF FAIR USE*

PIERRE N. LEVAL**

I. *2 LIVE CREW*

Last month, as you know, the Supreme Court delivered its opinion in *Campbell v. Acuff-Rose*, involving the 2 Live Crew's rap parody of "Oh, Pretty Woman."[1] It will come as no surprise that the opinion brought me enormous joy. I will not try to disguise that my vanity was enormously gratified by Justice Souter's very generous citation of my article on fair use standards.[2] Another part of my joy, however, came from a different source. This was the sense that the fair use doctrine had been lost adrift for a turbulent decade and now, at last, through Justice Souter's magnificent opinion had found its way.

I believe the doctrine got lost as a result of overreaction to the Supreme Court's opinion in *Sony* in 1984.[3] I have never disagreed with the bottom line of *Sony*.[4] I do not think an actionable copyright infringement has occurred when Mom and Pop record Masterpiece Theatre while they are out to dinner so they can watch it after they come home. (I am not at all sure that this result required reference to fair use.) In any event, the Supreme Court opinion included propositions that, unintendedly, cast fair use adrift. Previously, the most significant force driving a fair use finding had been the notion that *fair uses are "productive."*[5] Because time-shifting was difficult to square with the notion of "productivity," the Supreme Court announced that productivity was not an

---

* This was originally delivered at the Benjamin N. Cardozo School of Law as the keynote speech at "Copyright in the Twenty-First Century," a symposium held on April 12, 1994, sponsored by the *Cardozo Arts and Entertainment Law Journal*.

** The author is a judge of the United States Court of Appeals for the Second Circuit.

1 114 S. Ct. 1164 (1994).

2 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

3 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

4 The Court in *Sony* held that private home videotaping of a copyrighted television program to be used solely to permit a one-time *private* non-commercial home viewing at a time more convenient than the hour of broadcast, would not infringe the copyright because it would constitute a fair use. *Id.* at 442.

5 *See, e.g., Sony*, 464 U.S. at 478-82 (Blackmun, J., dissenting); Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 970 (9th Cir. 1981); Pacific & Southern Co. v. Duncan, 572 F. Supp. 1186 (N.D. Ga. 1983), *aff'd in part and rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW at xi, 3, 17, 205 (BNA Books 1985); WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 240 (BNA Books 1986).

essential requirement of fair use.[6] Justice Stevens' opinion does not suggest he intended to *overturn* the entire history of fair use thinking. Nor does the *Sony* opinion purport to define the heart of fair use. All this opinion said was that while "[t]he distinction between 'productive' and unproductive uses may be helpful, . . . it cannot be wholly determinative."[7] Unfortunately, the world of copyright lawyers, scholars, and judges overreacted. The Supreme Court's holding was generally taken to mean that productivity was no longer a useful or important standard. The notion of productivity abruptly disappeared from fair use discussions. Having been deprived of its most important compass bearing, the doctrine then drifted aimlessly without a governing standard for ten years.

Having lost their guiding standard, courts began to grope for other guides that might help explain an individual ruling. The first groping came in *Sony* itself. Searching for a rationale for its decision, the Supreme Court stressed how harmless Mom and Pop's *noncommercial* time shift was.[8] To emphasize a helpful contrast, the Court set up a straw man, a dictum that was in no way essential to the reasoning of the case: "[E]very commercial use of copyrighted material is presumptively unfair."[9] And practically every Supreme Court opinion since that time has ritualistically repeated that phrase.[10] Until the Sixth Circuit's decision in *2 Live Crew*, this slogan did not do much harm. Courts that dealt frequently with copyright issues soon realized that virtually all uses are commercial.[11] Newspapers, criticism, commentary, history—it's all published for money. When the courts found something that they thought *for other reasons* was an infringement, they would chime: "Commercial uses are presumptively unfair." On the other hand, when they believed a fair use was involved, courts would simply

6 *Sony*, 464 U.S. at 455 n.40.

7 *Id.* at 455.

8 *Id.* at 481 (Blackmun, J., dissenting).

9 *Id.* at 451.

10 *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985); Stewart v. Abend, 459 U.S. 207, 237 (1990).

11 *See, e.g., Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting). The Court recognized this issue in *Acuff-Rose* stating "[i]f, indeed, commerciality carried 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 articles 'are generally conducted for profit in this country.' " *Acuff-Rose*, 114 S. Ct. at 1174 (quoting the dissent in *Harper & Row*); *see also* American Geophysical Union v. Texaco, Inc., No. 92-9341, 1994 U.S. App. LEXIS 30437, at *25 (2d Cir. Oct. 28, 1994) ("Since many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use.").

omit any mention of the "commercial" thing. This "rule" was thus given occasional lip service, but no real force.

The Sixth Circuit, however, took the Supreme Court's utterances seriously.[12] It detected the presence of commercial motivation in the 2 Live Crew rap. That was presumptively unfair. The case became very easy to decide. If the presumptive unfairness of commercial uses was really a rule, virtually all cases would be easily decided as commercial motivation is virtually ubiquitous in publishing. Fair use would become a faint memory.

In cases subsequent to *Sony* the courts groped for more "rules" that might help explain this now directionless doctrine. We were told things like:

> (1) "[T]he unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use."[13]
> (2) Factual works are more prone to fair use than fiction.[14]
> (3) The fourth factor [effect on the market] is by far the most important.[15]
> (4) One wins the first factor [purpose and character of the use] simply by producing a work in the area of criticism, comment, news reporting, or scholarship.[16]

Then we were told that because it is so easy to win the first factor, winning the first factor doesn't mean anything.[17]

None of these utterances offered any meaningful help in understanding the doctrine of fair use. Some were extremely harmful. Collectively they instilled fear in the publishing world. Publishers, who must lay out the money, became extremely wary of the unpredictable shark-infested waters. The cost was great. The public, which is the intended beneficiary of the copyright law,[18] lost the publication of a number of illuminating historical works.[19]

12 Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992).

13 *Harper & Row*, 471 U.S. at 554 (internal quotes and citations omitted).

14 *Id.* at 563.

15 *Id.* at 566.

16 Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), *reh'g denied*, 818 F.2d 252 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); New Era Publications Int'l, ApS v. Henry Holt & Co., 873 F.2d 576, 583 (2d Cir. 1989).

17 *Salinger*, 811 F.2d at 97; *New Era*, 873 F.2d at 583.

18 L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 70 (1991); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 978 (1990).

19 In *Salinger*, 811 F.2d 90, the novelist J.D. Salinger was successful in suppressing the use of his personal letters in a biography written by Ian Hamilton. "Hamilton would be forced to rewrite his book twice. Initially called 'J.D. Salinger: A Writing Life,' the book would eventually be recast as the saga of writing a biography of an author who does not want the story of his life written." Katherine Stephen, *A Biographer's Quest for J.D. Salinger*, L.A. TIMES, Aug. 5, 1988, at 1, 22; *see also* Amy Gamerman, *Unfair Use: Copyright Decision*

Other works that *were* published were less valuable and interesting than they might otherwise have been because of the suppression of interesting material that might lose in a fair use tussle in which no one understood the rules.[20]

I suggest to you that *2 Live Crew* fixed the rudder and restored the compass bearing. It has dispelled all those unhelpful slogans from the fair use discussions—particularly the pernicious "commercial use" presumption. And what are the new bearings? The most important thing *2 Live Crew* teaches about fair use is that it is a doctrine of the copyright law that seeks to advance the goal of copyright. That familiar goal is to bring intellectual enrichment to the public by giving authors a *limited* control over their writings to provide them with financial incentive to create. The control is *limited* because of the recognition that a stranglehold would be counterproductive.

The law of fair use focuses on one aspect of where those limits should be drawn. As one of the eighteenth-century lords put it, "[o]ne must not manacle science."[21] Every advance in knowledge or art builds on previous advances. An author's exclusive control must not be so stringent as to prevent those who come after from using the prior work for further advancement. The *2 Live Crew* opinion refocuses the fair use doctrine on the central purpose of copyright.

The opinion teaches us further that every fair use factor is to be understood as a subset of that overall goal. They are not separate factors. Each is part of a multifaceted assessment of the question: Where should the author's exclusivity *stop* in order to best serve these familiar overall objectives of the copyright law?

The opinion stresses this dynamic interrelationship. Of cardinal importance is the close interdependence of the first and fourth factors. The fourth factor looks at the harm which the secondary work may do to the copyright market of the original *by offering itself as a substitute* (for either the original or its derivatives). The first factor looks primarily at whether the use made of the original seeks to *transform* the taken material into a new purpose or message, distinct from purposes of the original. It follows logically that the

Cramps Writers' Style, WALL ST. J., Apr. 10, 1990, at A16; *see* David A. Kaplan, *The End of History?*, NEWSWEEK, Dec. 25, 1989, at 80 ("To avoid their books being shelved judicially, book publishers are censoring themselves.").

20 *See, e.g.*, Gamerman, *Unfair Use*, WALL ST. J., Apr. 10, 1990 (discussing the "emasculation" of Bruce Perry's biography of Malcolm X). After the *Salinger* and *Nation* decisions, Mr. Perry excised Malcolm X's previously unpublished letters from his forthcoming biography.

21 Cary v. Kearsley, 170 Eng. Rep. 679, 680 (K.B. 1802) (Lord Ellenborough).

more the appropriator is using the material for new *transformed* purposes, the less likely it is that appropriative use will be a substitute for the original, and therefore the less impact it is likely to have on the protected market opportunities of the original.

The opinion thus restores the lost emphasis on "productive use," but now in the context of a far more sophisticated discussion, related in every detail to the basic objectives of copyright doctrine.

The *2 Live Crew* opinion does not ensure perfect answers to all future disputes. I have heard it criticized from the protectionist wing of the copyright bar as interfering excessively with the *absolute right* of an author to exercise total control over the use of the author's creations. With all respect, I don't think the copyright law provides such an absolute right. I have heard criticism also from the appropriation art lobby for insufficient protection of the right to appropriate.[22] In my view, some of these statements have been so extreme in the proposition that *any change* rebuts infringement that they threaten to swallow much of the copyright law, leaving authors and artists defenseless. If minor changes will circumvent the protection of copyright law, what will protect the ability of authors, composers, and artists to earn a living through their creations?

One thing is certain: under the *2 Live Crew* standards, as under any standard, the courts will produce decisions that will not satisfy one hundred percent of the copyright community; no standards could. But I submit that *2 Live Crew* has restored valid compass bearings to the fair use doctrine by relating it in each of its component inquiries to the overarching central purpose of copyright.

II. APPROPRIATION

This rethinking of fair use as an essential tool in achieving the public-enriching goal of copyright also illuminates the analysis of *remedies* when the fair use defense fails. This subject has particular bearing on the hotly debated issues of appropriation art. I suggest that all of us who deal with copyright—lawyers, judges, authors, appropriators—have gone much too far in attaching opprobrium to a judgment of infringement. Courts are quick to decorate a finding of infringement with dramatic invective like "piracy" and "stealing." The world of authors, appropriators, and the consum-

22 Appropriation art ranges from Andy Warhol's use of Campbell's trademarked soup cans, to Sherrie Levine's virtual reproductions of Walker Evan's photographs; *see generally* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103 (1988).

ing public is quick to draw the inference that a judgment of infringement maligns the worth of an appropriating work. These attitudes go hand-in-hand with the hair-trigger inclination of courts to accompany findings of infringement with injunctive relief—to wipe the infringing work from the face of the earth.

In my view there is no necessary logic to these associations. A finding of infringement does not necessarily contradict high utility and original authorship in the infringing work. While many infringing works represent scandalous larceny whose existence is unjustified, in other cases a valuable work narrowly fails the fair use test. True, compensation is owed for use of material from an original. But in such instances courts inflict unjustifiable harm *on the public* by coupling a finding of infringement with the grant of an injunction. A finding of infringement can thus mean nothing more than an entitlement to compensation.

Artists, no matter how great, must pay for what they use in making their works. They pay for paint, for canvas, for steel, for clay, for a model's time. Why should they not also pay a reasonable fee for the use of another artist's work as part of a new work? A finding of such an obligation to pay need not imply a derogatory judgment of the new appropriative work.

We have tended to think of appropriative works as falling into two categories: (i) those that infringe, and (ii) those that pass the fair use test and therefore do not infringe. I would suggest that we should revise that thinking and divide appropriative works into *three* zones:

> (i) At one extremity are the works properly described as acts of piracy, those that deserve to be enjoined.
> (ii) At the other end is the band that satisfies the fair use test and achieves immunity from *any* judicial remedy because there is no infringement.
> (iii) In the center is a numerically small but important band encompassing works which, although they fail the fair use test, have originality and independent value, and represent a sufficiently small threat to the economic entitlements of the author of the original, so that the public-enriching objectives of the copyright law are better served by withholding injunctive relief. Such infringements should be compensated only by damages.[23]

[23] *See* Universal City Studios v. Sony Corp. of Am., 659 F.2d 963, 976 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984) (awarding damages over an injunction); Honorable James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983 (1990); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1030 (1970) ("[A]n award of damages should be preferred to the injunction relief remedy.") [Judge Leval's position is evidenced in several of his cases; *see* Salinger v. Random House, 650 F. Supp. 413, 426 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987) (injunction issued); New Era Publications v. Henry Holt & Co., 695 F. Supp. 1493, 1525-28 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989) (majority rejected Judge Leval's reasoning but nevertheless declined to issue an injunction on the basis of the doctrine of laches). At the Second Circuit Chief Judge Oakes concurred with the majority opinion but split on this issue. *Henry Holt*, 873 F.2d at 595. Judge Oakes agreed with Leval that "enjoining publication of a book is not to be done lightly." *Id.* at 596. *Eds.*].

> And the damages should be in a carefully measured amount, an amount designed to provide reasonable compensation to the initial author for the use of her material and to compensate for any modest loss of market opportunity.

As I read it, the Supreme Court in *2 Live Crew* has directed the adoption of such an approach. In footnote 10, which may become one of the most-often cited parts of this opinion, the Supreme Court said, "Because the fair use inquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, 'to stimulate the creation and publication of edifying matter are not always best served by . . . automatically granting injunctive relief.' "[24] The footnote goes on to point out that § 502(a) provides only that a court "may" grant injunctions.[25]

In debatable cases of the fair use defense, where *transformative* objectives offer some justification, albeit insufficient to pass fair use, and the harm to the original author's commercial interests is not excessive, courts should remember that there is no automatic right to an injunction.

When I have talked about this notion in the past, I have been asked if I am advocating a system of compulsory license. That is not the description I would choose, for it implies the *withdrawal* of a remedy *provided* by the copyright law. A preferable view is that the copyright statute confers *limited* rights and remedies, which exist, furthermore, to serve the public good. Against some appropriations, there is no remedy at all because they are protected by fair use. Against some, a remedy lies for *reasonable compensation.* In some cases, the remedy of statutory damages authorizes damages in large amounts.[26] And, finally, in some cases, the axe! But courts should distinguish carefully among these different categories and should not grant the discretionary remedy of injunction except in appropriate cases.

[24] *Acuff-Rose*, 114 S. Ct. at 1171 n.10 (internal quotes and citation omitted).

[25] *Id.*

[26] The Copyright Act permits a court to award statutory damages up to $100,000 for a wilful infringement. 17 U.S.C. § 504(c)(2) (1988). Court costs and attorney's fees may also be awarded to the prevailing party. 17 U.S.C. § 505 (1988).

I believe the adoption of such an approach will better serve the goals of copyright in dealing with the difficult problems of appropriation. Useful appropriators who do not pass the fair use test unquestionably owe compensation, but the public may be entitled to the survival of their works.

In *2 Live Crew* the Supreme Court has reoriented the doctrine of fair use to serve the central goal of copyright—to promote the growth and dissemination of knowledge. This same reorientation promises also to enlighten our understanding of copyright's remedies.

Join me in a toast to fair use which, like Odysseus, suffered ten storm-tossed years, lost and wandering, but has now refixed its compass on its goal.

THE ROLE OF THE COPYRIGHT OFFICE: AN INTRODUCTION

HOWARD B. ABRAMS*

Copyright in 1994 is in a time of stress and transition, and the Copyright Office is no less so.

Any number of issues come to mind. Notwithstanding the modernization represented by the 1976 Copyright Act[1] subsequent developments in international relations, technology, business practices, and other areas are testing the viability of the copyright system. The Berne Convention's challenge to our protection of author's moral rights has at best only been partially answered by the Visual Artists Rights Act of 1990.[2] Such technologies as satellite broadcasting and digital sound recording have left problems, legislation, and litigation in their wake,[3] and the looming presence of the national information superhighway promises to force a fundamental reexamination of the balance between the rights of authors, publishers, and consumers of copyrighted works.[4] The issue of when photocopying for corporate research is fair use has come to the fore,[5] and the same issue applied to academic research cannot be far behind.

The duties of the Copyright Office, both formal and informal, are under similar stress. Perhaps most obviously, the Copyright Office is charged with keeping records of copyright ownership and transfers, and has accumulated what is clearly the world's premier and authoritative data in this area. But has reality kept up with its promise? The backlog of registrations and filings has left the Copyright Office weeks and often months behind in fulfilling its basic

* Professor of Law, University of Detroit Mercy School of Law. Thanks are due to Professor Marci Hamilton of the Benjamin N. Cardozo School of Law and to the staff of the *Cardozo Arts & Entertainment Law Journal* for their work in organizing the conference and publishing these proceedings.

[1] General Revision of Copyright Law, Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 2541 (1976) (effective Jan. 1, 1978) (codified as amended at 17 U.S.C. §§ 101-810 (1988 & Supp. V 1993)).

[2] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, § 603(a), 104 Stat. 5089, 5128-5130 (1990) (effective June 1, 1991) (codified at 17 U.S.C. § 106A (Supp. V 1993)).

[3] *See, e.g.*, Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. II, § 202(2), 102 Stat. 3935, 3949-3957 (1988) (codified at 17 U.S.C. § 119 (1988 & Supp. V 1993)); Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 2, 106 Stat. 4237, 4237-4247 (1992) (codified at 17 U.S.C. §§ 1001-1010 (Supp. V 1993)).

[4] *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

[5] *See, e.g.*, American Geophysical Union v. Texaco Inc., No. 92-9341, 1994 U.S. App. LEXIS 30437 (2d Cir. Oct. 28, 1994) (2-1), *aff'g* 802 F. Supp. 1 (S.D.N.Y. 1992).