

PAPARAZZI/BLOGGER FACE-OFF:  
OPPORTUNITY KNOCKING FOR A FAIR USE LIMIT?\*

INTRODUCTION.....	535
I. THE COPYRIGHT ACT .....	538
A. <i>Exclusive Rights to the Copyright Owner: 17 U.S.C. § 106</i> .....	538
B. <i>The Fair Use Exception: 17 U.S.C. § 107</i> .....	540
C. <i>Landmark Parody/Satire Cases</i> .....	541
1. <i>Campbell v. Acuff-Rose Music, Inc.</i> .....	541
2. <i>Suntrust Bank v. Houghton Mifflin Co.</i> .....	543
3. <i>Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.</i> ....	544
D. <i>Parody Versus Satire</i> .....	546
II. THE WEIGHING ANALYSIS OF 17 U.S.C. § 107.....	547
A. <i>Purpose and Commerciality of the Use</i> .....	547
1. The “Transformative” Extent of the New Work ..	547
2. The Commerciality of the Use .....	550
B. <i>Nature of the Use</i> .....	551
C. <i>Amount and Substantiality of the Portion Used</i> .....	551
D. <i>The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work</i> .....	552
III. RESOLUTION OF THE PRESENT DISPUTE .....	554
A. <i>Goals of the Copyright Act</i> .....	554
B. <i>Maintaining Consistency with the Fair Use Exception</i> ...	555
CONCLUSION .....	556

INTRODUCTION

The perpetual growth and expansion of content availability on the Internet has led to a number of interesting developments in the area of intellectual property, such as the copyright implications of digital mediums (e.g., music and video players) that play copyrighted music and video files reproduced and distributed over the Internet through peer-to-peer (P2P) file distribution systems;<sup>1</sup>

---

\* Permission is hereby granted for noncommercial reproduction of this Recent Development in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

<sup>1</sup> See Jill David, Note, *Does Grokster Create a New Cause of Action that Could Implicate the Apple TV?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1197, 1228-29 (2007) (arguing that “[k]nowing the Apple TV’s high probability for transmitting copyright infringing files and learning from the commercial success of iPods, Apple chose not to make the Apple TV in

scanning library books to create an online book search engine;<sup>2</sup> and fictional works of fans that are based on copyrighted stories and characters.<sup>3</sup> Recently, the focus has also included an examination of the way in which the works of others are reused on Internet websites and blogs.

In November 2006, celebrity gossip blogger Mario Lavanderia, also known as Perez Hilton ("Perez"), became the target of a copyright infringement lawsuit filed by several paparazzi photo agencies, including X17, Inc. ("X17"). X17, a Los Angeles photo agency, claims that Perez violated their copyrights by displaying their agency's photos on his website<sup>4</sup> without their permission and without properly crediting them. Perez, however, argues that his website does not violate X17's copyrights because he doodles on the photos, usually by including vulgar writings or drawings on the photos. Through his online posts that "make fun" of the celebrities in X17's copyrighted photos, Perez maintains that his photos achieve a humorous end, placing them within the scope of the fair use exception to the Copyright Act of 1976.

Under § 102 of the Act, "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>5</sup> Not only does the copyright protection of § 102 cover original photographic works,<sup>6</sup> but it is also clear from the language of the statute – protecting an author's original work "in any tangible medium of expression, *now known or later developed*"<sup>7</sup> – that Congress foresaw the potential problems that technological advancements, such as the Internet, posed to copyright holders.<sup>8</sup>

---

a way that would not let copyright infringing users infringe," and thereby "encourages these users to increase the amount of infringement they perpetuate").

<sup>2</sup> See Nari Na, Note, *Testing the Boundaries of Copyright Protection: The Google Books Library Project and the Fair Use Doctrine*, 16 CORNELL J.L. & PUB. POL'Y 417, 418 (2007) (arguing that the circumstances surrounding the Google Books Library Project, which envisions an online search catalog of major libraries worldwide, justify affording the project fair use protection).

<sup>3</sup> See Christina Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fanfiction*, 8 VAND. J. ENT. & TECH. L. 421, 425-26 (2006) (describing fan fiction as fictional works by fans about their favorite copyrighted stories and characters). Fan fiction "begins with the individual, who reacts to an original work with the question 'Now what?' and ends with thousands of individuals coming together in Internet communities to explore each other's answers to this question." *Id.* at 425.

<sup>4</sup> Perez's celebrity gossip blog is PerezHilton.com. X17 maintains a similar celebrity gossip blog at X17online.com.

<sup>5</sup> 17 U.S.C. § 102(a) (2006).

<sup>6</sup> The types of "original works of authorship" that are protected under § 102 include, among others, "pictorial, graphic, and sculptural works." *Id.* at § 102(a)(5) (emphasis added).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> See H.R. REP. NO. 94-1476, at 51 (1990), reprinted in 1976 U.S.C.C.A.N. 5659, 5664. See also *Suntrust Bank v. Houghton Mifflin, Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001)

SULLIVAN AND TESTER, PUBLISHERS OF THE JOURNAL

"Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take."<sup>9</sup>

The language of § 102 is open to a number of varying interpretations. For instance, does the Internet qualify as a "tangible medium of expression?"<sup>10</sup> For the purposes of the Copyright Act, the Internet is not the "medium of expression";<sup>11</sup> rather, the Internet is simply the aide that allows the work to be "perceived, reproduced, or otherwise communicated."<sup>12</sup> The copyrighted work itself – in the present case, the "tangible" photo originally taken by X17 – remains the "medium of expression," within the meaning of § 102.<sup>13</sup>

The Internet's easy accessibility to a plethora of eclectic material has turned celebrity gossip sites, such as Perez's, into mainstream entertainment; news and photos about countless celebrities are now more easily attainable.<sup>14</sup> Although access to Perez's website is free, X17 claims that Perez's display of their photos is ultimately commercial because of the costly ad space Perez charges on his website. Arguing that Perez's unauthorized use has not only reduced their profits, but has also undermined their reputation, X17 is requesting approximately \$7.5 million in damages.<sup>15</sup>

Put simply, if a creative work that incorporates or makes use of copyrighted material meets certain criteria, the fair use exception will protect that creation from copyright infringement allegations. Perez claims that if X17 were to prevail, the ability to transform photos under the fair use exception to the Copyright Act would effectively be eliminated.<sup>16</sup> However, if Perez prevailed, the proverbial "line" between fair use and copyright infringement would be no clearer, and enforcing copyrights online would be

---

("[C]opyright was extended to include any work 'fixed in any tangible medium of expression' in order to adapt the law to technological advances.").

<sup>9</sup> H.R. REP. NO. 94-1476, *supra* note 8, at 51.

<sup>10</sup> 17 U.S.C. § 102(a) (emphasis added).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See id.* *See also* H.R. REP. NO. 94-1476, *supra* note 8, at 52:

Under the bill it makes no difference what the form, manner or medium of fixation may be—whether it is in words, numbers, notes, sounds, *pictures*, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, *photographic*, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly *or by means of any machine or device 'now known or later developed.'*

(emphasis added).

<sup>14</sup> *See* Robin Abcarian, *Perez Hilton Takes Their Best Shots*, L.A. TIMES, Dec. 17, 2006, available at <http://www.latimes.com/entertainment/news/la-et-bloggers17dec17,0,7885328.story?coll=la-home-headlines> ("These days, no one has to wait for People's weekly appearance on the newsstand or even 'Access Hollywood's' nightly roundups to find out about Nicole Richie's latest arrest or shockingly low weight.").

<sup>15</sup> *See* TMZ.com, *Perez Hilton Sued for \$7.5 Million*, Nov. 30, 2006, <http://www.tnz.com/2006/11/30/perez-hilton-sued-for-7-5-million>.

<sup>16</sup> Abcarian, *supra* note 14.

come even more difficult. Regardless of the potentially significant consequences to intellectual property law associated with declaring either party the victor in this case, X17's claim is superior to that of Perez; an examination of both the statutory language itself, as well as the legislative intent of the Copyright Act, strongly suggest that Perez's reproduction of X17's photos on his website fails to meet the criteria for fair use protection.

Part I begins with an introduction to two particular sections of the Copyright Act that apply to the circumstances of the present dispute. This introduction briefly analyzes the language of both § 106, which outlines the exclusive rights granted to a copyright owner, as well as § 107, the fair use exception to the Copyright Act. Part I also examines case law addressing fair use in the context of parody and satire, clarifies the distinction between the two forms of expression, and, in doing so, arrives at the conclusion that Perez's use is a satire, and not a parody, of X17's original photos. Although satires can still fall within the purview of the fair use exception, fair use protection is more difficult to establish for satires than for parodies.<sup>17</sup> Part II explores the fair use exception in more detail, examining Perez's use of X17's photos in the context of four considerations that must be weighed in determining fair use of a copyrighted work. Part II's examination of Perez's conduct will illustrate that applying the weighing analysis of § 107 further supports a finding of copyright infringement. Finally, Part III illustrates that a finding of copyright infringement with respect to Perez's use is a result consistent with established goals of the fair use exception.

## I. THE COPYRIGHT ACT

### A. *Exclusive Rights to the Copyright Owner: 17 U.S.C. § 106*

In pertinent part, § 106 of the Act grants to the copyright owner:

the exclusive rights to do any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- ...
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and *pictorial*, graphic, or sculptural works,

<sup>17</sup> See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 161 (2007).

including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly . . . .<sup>18</sup>

Clause (1) appears to be applicable to Perez's use, which essentially amounts to "reproducing" X17's photo on his own website. However, Congress's inclusion of clause (5) indicates a distinction between "reproduction" and "display":

For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images *on a screen* or tube would not be a violation of clause (1), *although it might come within the scope of clause (5)*.<sup>19</sup>

Although not constituting a "reproduction" within the meaning of § 106(1), since the allegedly infringing photos are shown in an intangible form via Perez's website,<sup>20</sup> Perez's use may still amount to copyright infringement under § 106(5), which grants the copyright owner the exclusive right of public *display*.<sup>21</sup> "Display" of a copyrighted work, within the meaning of § 106(5), "include[s] the projection of an image on a screen or other surface by any method [and] the transmission of an image by electronic or other means."<sup>22</sup> Moreover, because the definition of a "transmission" "is broad enough to include all conceivable forms and combinations of wires and wireless media, including but by no means limited to radio and television broadcasting as we know them,"<sup>23</sup> the transmission of an image onto a computer screen arguably fits squarely within this classification. Also, a "public" display includes not only those displays "that occur initially at a public place, but also acts that transmit or otherwise communicate a . . . display of the work to the public by means of any device or process."<sup>24</sup> Given these instructive definitions, the showing of a copyrighted photo on a publicly accessible Internet website would appear to constitute a violation of § 106(5) of the Act.

The problem with the argument that Perez's use appears to violate § 106(5) is that Perez does not display the photos *exactly* in their respective original forms; instead, Perez makes the *previously-mentioned minimal alterations to the original photos, ar-*

<sup>18</sup> 17 U.S.C. § 106 (2006) (emphasis added). It is conceivable that "[a] single act of infringement may violate all of these rights at once . . ." H.R. REP. NO. 94-1476, *supra* note 8, at 61.

<sup>19</sup> H.R. REP. NO. 94-1476, *supra* note 8, at 62 (emphasis added).

<sup>20</sup> *See id.*

<sup>21</sup> *See* 17 U.S.C. § 106(5).

<sup>22</sup> H.R. REP. NO. 94-1476, *supra* note 8, at 64.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* *See also* 17 U.S.C. § 101(2).

guably placing his use outside the scope of a § 106(5) violation. However, even if Perez's use does not constitute a violation under § 106(5), the minimal alterations made by Perez to X17's original photos could qualify the altered photos as an infringing derivative work under § 106(2), since the photos, although slightly "altered," still "incorporate a portion of the copyrighted work in some form . . . ."<sup>25</sup>

It is also conceivable that Perez's showing of X17's copyrighted photo on his publicly accessible Internet website is in violation of § 109(b), which takes into consideration the possible implications of new technology when publicly displaying a copy of an original work.<sup>26</sup> Section 109(b) stands for the belief "that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner."<sup>27</sup> However, this is the generally accepted view with respect to *direct* displays to the public, "as in a gallery or display case, or indirectly, as through an opaque projector."<sup>28</sup> All such displays assume that the viewer is in the same location as the copy being displayed. Thus, "the public display of an image of a copyrighted work would not be exempted from copyright control . . . if the image were transmitted by any method (by closed circuit or open circuit television, for example, *or by a computer system*) from one place to members of the public located elsewhere."<sup>29</sup>

Because the viewers of Perez's website are not viewing the allegedly infringing copy at the same place in which the copy is located, the display would not come under the protection of § 109.<sup>30</sup> The purpose of § 109 "is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected."<sup>31</sup> However, similar to § 106(5), § 109 refers to *exact* copies of original works (e.g., a copy of an original painting),<sup>32</sup> and, as such, because Perez does not display X17's photos on his website in exactly their original form, the argument claiming a possible violation of § 109(b) would likely fail.

#### B. *The Fair Use Exception: 17 U.S.C. § 107*

The Copyright Act's fair use exception, as outlined in 17

<sup>25</sup> H.R. REP. NO. 94-1476, *supra* note 8, at 62. See also 17 U.S.C. § 101.

<sup>26</sup> See H.R. REP. NO. 94-1476, *supra* note 8, at 80.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> See 17 U.S.C. § 109(b).

U.S.C. § 107, states, in pertinent part, that the reproduction of a copyrighted work “for purposes such as criticism, [or] comment” is fair use, and does not constitute copyright infringement.<sup>33</sup> The four considerations that must be weighed in determining whether such reproduction qualifies as fair use include:

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>34</sup>

Because of “the endless variety of situations and combinations of circumstances that can rise in particular cases,” § 107 mandates that any examination of fair use be conducted on a case-by-case basis, in order to allow “the courts [the freedom] to adapt the doctrine to particular situations.”<sup>35</sup>

### C. Landmark Parody/Satire Cases

#### 1. *Campbell v. Acuff-Rose Music, Inc.*<sup>36</sup>

In *Campbell v. Acuff-Rose Music, Inc.*, defendant-petitioner 2 Live Crew, a rap music group, included in their commercially-sold album their parody of Roy Orbison’s “Oh, Pretty Woman,” a song copyrighted by plaintiff-respondent Acuff-Rose Music, Inc. (“Acuff-Rose”).<sup>37</sup> In response to Acuff-Rose’s subsequent suit for copyright infringement, 2 Live Crew argued that their parody was fair use of the original.<sup>38</sup> The United States Supreme Court reversed the decision of the Court of Appeals, which had held that 2 Live Crew’s parody, “Pretty Woman,” constituted copyright infringement and not fair use.<sup>39</sup>

The Supreme Court maintained that the Court of Appeals erred in placing too much emphasis on both the commercial na-

---

<sup>33</sup> 17 U.S.C. § 107.

<sup>34</sup> *Id.*

<sup>35</sup> H.R. REP. NO. 94-1476, *supra* note 8, at 66.

<sup>36</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>37</sup> *See id.* at 572-73.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 569.

ture, and on the economic effects, of 2 Live Crew's parody.<sup>40</sup> The Court of Appeals' finding of copyright infringement was largely based on the belief that "the effect on the potential market for the original (and the market for derivative works) is 'undoubtedly the single most important element of fair use.'"<sup>41</sup> The Supreme Court maintained that, with respect to the commerciality of 2 Live Crew's parody in the context of § 107(1), "the mere fact that a use is . . . not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."<sup>42</sup> Furthermore, the Supreme Court stated that the Court of Appeals' view that "every commercial use . . . is presumptively . . . unfair"<sup>43</sup> should not have been accorded "virtually dispositive weight" in their finding of copyright infringement.<sup>44</sup> The Supreme Court concluded, because parodies, "pure and simple," typically operate in a different market than the original work, 2 Live Crew's parody was unlikely to serve as a substitute of the original.<sup>45</sup>

Finally, the Supreme Court disagreed that 2 Live Crew's parody copied too much of the original work,<sup>46</sup> explaining that not only "the quantity of the materials used, but [also] their quality and importance" must be considered. The Supreme Court did concede, however, that "a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original."<sup>47</sup> Still, because a parody "must be able to 'conjure up' at least enough of the original to make the object of its critical wit recognizable," the Supreme Court recognized that some amount of copying is inherent in parody.<sup>48</sup> Taking this concept into account, the Supreme Court held that, with respect to 2 Live Crew's parody, "no more was taken than necessary . . ."<sup>49</sup> As such, in light of the errors made in the Court of Appeals' analysis, the Supreme Court reversed, holding that the characteristics surrounding 2 Live Crew's parody did not create a presumption against fair use.<sup>50</sup>

<sup>40</sup> See *id.* at 570-71.

<sup>41</sup> *Id.* at 574 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

<sup>42</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

<sup>43</sup> *Id.* at 573-74. (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

<sup>44</sup> *Id.* at 583-84.

<sup>45</sup> *Id.* at 591-93. Pursuant to § 107(4), the Court also considered a possible market for derivative works, but found no evidence suggesting that 2 Live Crew's parody would have an adverse economic effect "on the market for a nonparody, rap version of 'Oh, Pretty Woman.'" *Id.* at 593.

<sup>46</sup> *Id.* at 588-89.

<sup>47</sup> *Id.* at 587-88.

<sup>48</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

<sup>49</sup> *Id.* at 589 (quotations omitted).

<sup>50</sup> *Id.* at 569.



## 2. *Suntrust Bank v. Houghton Mifflin Co.*<sup>51</sup>

Fair use in the context of parody was more recently examined in *Suntrust Bank v. Houghton Mifflin Co.* In *Suntrust Bank*, defendant-appellant Houghton Mifflin Co. was sued for publishing *The Wind Done Gone* ("TWDG"), a parody of *Gone With the Wind* ("GWTW"), a copyright of which was held in trust by plaintiff-appellee Suntrust Bank ("Suntrust").<sup>52</sup> The Court of Appeals for the Eleventh Circuit, in vacating the district court's preliminary injunction in favor of Suntrust, maintained that Suntrust was unlikely to succeed over Houghton Mifflin's defense of fair use.<sup>53</sup>

When applying a fair use analysis to parody, the Court of Appeals for the Eleventh Circuit believed that the *Campbell* Court inadequately described what constituted parody.<sup>54</sup> Consequently, the *Suntrust Bank* court came up with its own classification, defining "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."<sup>55</sup> Applying this classification, the Eleventh Circuit held that "the parodic character of [defendant-appellant's novel,] *TWDG*" could be reasonably perceived as a parody, due to its "specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites . . . ."<sup>56</sup>

In conducting its fair use analysis, the Eleventh Circuit followed *Campbell*, stating that, in the context of parody, the commercial nature of the work was not dispositive against a finding of fair use.<sup>57</sup> Instead, the court stated that "*TWDG*'s for-profit status [was] strongly overshadowed and outweighed in view of its highly transformative use [as a parody] of *GWTW*'s copyrighted elements."<sup>58</sup> The court also extended the protection afforded under § 107(3) by holding that, despite the fact that *TWDG* incorporated a significant number of characteristics found in *GWTW*, "[a] use does not necessarily become infringing the moment it does more than simply conjure up another work."<sup>59</sup> Finally, because Houghton Mifflin provided evidence demonstrating that *TWDG* would likely neither substitute, nor ultimately displace revenue of,

<sup>51</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>52</sup> *Id.* at 1259.

<sup>53</sup> *Id.* at 1257.

<sup>54</sup> *See id.* at 1268 (stating that "[t]he Supreme Court's definition of parody in *Campbell* . . . is somewhat vague.").

<sup>55</sup> *Id.* at 1268-69.

<sup>56</sup> *Id.* at 1269.

<sup>57</sup> *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1272-73. Moreover, the court maintained that the degree of fame attached to the original work does not affect this factor of the analysis; well-known works are granted neither superior, nor inferior, copyright status, with respect to other lesser-known works. *Id.* at 1272.

GWTW, the court maintained that the factor examining the potential economic effect on the original weighed in favor of Houghton Mifflin.<sup>60</sup> Based on its fair use analysis, the Eleventh Circuit vacated the preliminary injunction granted by the district court, holding that it was unlikely that Suntrust could overcome Houghton Mifflin's fair use defense.<sup>61</sup>

### 3. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*<sup>62</sup>

The outcomes of both *Campbell* and *Suntrust Bank* demonstrate that parody can be an effective defense to copyright infringement. However, as *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.* illustrates, it is not enough to simply classify the allegedly infringing work as a parody of the original. Indeed, there have been "[c]ases that rejected claims that the defendant's work constituted a parody of the plaintiff's . . . on the basis that the invocation of the 'parody' label was not enough, without credible compliance with norms and traditions associated with parody, to avoid an infringement claim."<sup>63</sup>

In *Dr. Seuss*, plaintiff-appellee Dr. Seuss<sup>64</sup> Enterprises L.P. ("Seuss") brought suit<sup>65</sup> against defendant-appellants, publishers Penguin Books USA, Inc. and Dove Audio, Inc., and authors Alan Katz and Chris Wrinn (collectively, "Appellants"), for their combined efforts in the creation and distribution of an alleged parody entitled *The Cat NOT in the Hat! A Parody by Dr. Juice* (the "Dr. Juice Parody"), which presented "a rhyming summary of highlights from the O.J. Simpson double murder trial."<sup>66</sup> In affirming the district court's finding of copyright infringement and upholding the preliminary injunction, the Court of Appeals for the Ninth Circuit maintained that the Dr. Juice Parody was not entitled to fair use protection because the way in which it incorporated characteristics of Dr. Seuss' copyrighted works failed to qualify the work as an actual parody.<sup>67</sup>

Arguably, "the most famous and well recognized of the Dr. Seuss creations" is the Cat, wearing "his distinctive scrunched and

<sup>60</sup> *Id.* at 1275-76.

<sup>61</sup> *Id.* at 1276.

<sup>62</sup> *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

<sup>63</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1649-50 (2004). See also *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992) (finding that defendant's infringing work failed to distinguish itself as a "parody" of the original).

<sup>64</sup> "Dr. Seuss" was the pseudonym employed by the late author Theodor S. Geisel. See *Dr. Seuss*, 109 F.3d at 1396.

<sup>65</sup> The action included both copyright as well as trademark infringements claims. See *id.* For the purposes of this discussion, only the copyright claim, and the court's resulting "fair use" analysis, will be examined in detail.

<sup>66</sup> *Id.* at 1396-97.

<sup>67</sup> *Id.* at 1401.

somewhat shabby red and white stove-pipe hat.”<sup>68</sup> Dr. Seuss’ original work, *The Cat in the Hat*, tells the tale of the Cat who surprises two children while their mother is away, and who creates a household mess through his antics, before the children ultimately gain control over the Cat’s misbehaving.<sup>69</sup> Appellants argued that, similar to the original work, “Nicole Brown and Ronald Goldman were surprised by a ‘Cat’ (O.J. Simpson) who committed acts contrary to moral and legal authority.”<sup>70</sup> In its analysis, the Ninth Circuit began by defining the relevant distinction as “between parody (in which the copyrighted work is the target) and satire (in which the copyrighted work is merely a vehicle to poke fun at another target).”<sup>71</sup> According to the court, the Dr. Juice Parody “broadly mimics Dr. Seuss’ characteristic style,<sup>72</sup> [but] does not hold *his style* up to ridicule”;<sup>73</sup> instead, the familiar poetic style and illustrations<sup>74</sup> are incorporated simply to recount the circumstances surrounding the Simpson trial.<sup>75</sup> Because the Dr. Juice Parody used Dr. Seuss’ style as a vehicle to “poke fun” at a different target – the Simpson murder trial – as opposed to targeting Dr. Seuss’ style itself,<sup>76</sup> the Dr. Juice Parody constituted a satire, and therefore could not claim a fair use defense as a parody.

The Ninth Circuit continued its fair use analysis, focusing next on § 107(3). No longer able to claim protection based on the fact that the Dr. Juice Parody was, in fact, a parody, it became necessary for Appellants to justify their copying of Dr. Seuss’ work.<sup>77</sup> Recall that, because they target the original work, parodies are generally afforded wide latitude to copy as much of the original work as is necessary to bring the original work to mind.<sup>78</sup> A satire, on the other hand, “can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>79</sup> Appellants

<sup>68</sup> *Id.* at 1396.

<sup>69</sup> See DR. SEUSS, *THE CAT IN THE HAT* (Houghton Mifflin) (1957).

<sup>70</sup> *Dr. Seuss*, 109 F.3d at 1401.

<sup>71</sup> *Id.* at 1400.

<sup>72</sup> For example, the Ninth Circuit stated that the stanza reading “One Knife? / Two Knife? / Red Knife / Dead Wife,” was undoubtedly intended to imitate “the first poem in Dr. Seuss’ *One Fish Two Fish Red Fish Blue Fish*: ‘One fish / two fish / red fish / blue fish. Black fish / blue fish / old fish / new fish.’” *Id.* at 1401.

<sup>73</sup> *Id.* (emphasis in original).

<sup>74</sup> O.J. Simpson is portrayed several times “in the Cat’s distinctively scrunched and somewhat shabby red and white stove-pipe hat . . .” *Id.*

<sup>75</sup> See *id.*

<sup>76</sup> The court held that the substance of the Dr. Juice Parody had “no critical bearing on the substance or style of *The Cat in the Hat*”; that Dr. Seuss’ style was used merely “to get attention’ or maybe even ‘to avoid the drudgery in working up something fresh.’” *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)).

<sup>77</sup> “[T]he extent of permissible copying varies with the purpose and character of the use.” *Dr. Seuss*, 109 F.3d at 1402 (quoting *Campbell*, 510 U.S. at 586).

<sup>78</sup> See *Campbell*, 510 U.S. at 588; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1272-73 (11th Cir. 2001); *Dr. Seuss*, 109 F.3d at 1400.

<sup>79</sup> *Dr. Seuss*, 109 F.3d at 1400 (quoting *Campbell*, 510 U.S. at 580).

argued that Dr. Seuss' *The Cat in the Hat* was used "as a vehicle for their parody because of similarities between the two stories."<sup>80</sup> The Ninth Circuit, however, found Appellants' assertion "completely unconvincing,"<sup>81</sup> and maintained that its fair use analysis supported the decision to uphold the preliminary injunction.<sup>82</sup>

#### D. Parody Versus Satire

The court in *Suntrust Bank* established that a parody is a work that incorporates elements of an original in order to comment on or criticize the original.<sup>83</sup> A satire, on the other hand, "employ[s] the original work 'as a vehicle for commenting on some individual or institution and not on the work itself.'"<sup>84</sup> As such, because "a satire merely uses the original to 'avoid the drudgery in working up something fresh' and does not challenge readers to reassess the original," the incorporation of the original in a satire requires a higher degree of justification than that required of parody.<sup>85</sup> "Both parody and satire require the addition of creative labor to change a work into a caricature, but parody is more likely to succeed on a fair use defense than satire is because the parody has a better reason to copy from the original."<sup>86</sup>

When Perez displays X17's photos on his own blog, he argues that his use is fair because of the humorous end he achieves through his alterations of the original photos. However, these alterations generally involve little more than the insertion of a single sexually suggestive word or mark. Moreover, Perez cannot argue that his modifications aim to comment on or criticize the original photos. Rather, the targets of Perez's commentary or criticism, through his "altered" photos, are the subjects of the photos, i.e., the celebrities themselves. Because the inclusion of X17's original photos on his blog does not ultimately constitute a new work that comments on such photos, Perez cannot claim that his work is fair use as a parody. Instead of inviting a reassessment of the original

<sup>80</sup> *Dr. Seuss*, 109 F.3d at 1402.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 1403.

<sup>83</sup> *Suntrust Bank*, 268 F.3d at 1268-69.

<sup>84</sup> Anupam Chandler & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 615 (2007) (quoting 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, § 12.2.1.1(b), 12:31 (3d ed. 2005)). *See also* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 446 (2007) (stating that satires "[use] a work to make a broader critical point, not necessarily aimed at the work itself"); Tushnet, *supra* note 17, at 161 ("A satire borrows a familiar work to get its audience's attention and to make fun of something other than the original . . .").

<sup>85</sup> Tushnet, *supra* note 17, at 161. *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81 (1994) ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.").

<sup>86</sup> Tushnet, *supra* note 17, at 161.

creation – a common consequence of parodic works<sup>87</sup> – Perez’s use of X17’s original photos results in a work that simply “stand[s] on its own two feet,” allowing Perez to avoid the burden of creating something unique.<sup>88</sup> Therefore, having made use of X17’s original photos to comment on a different target, Perez can only attempt to argue that his use of the original photos was to achieve a satiric end. Making this distinction is significant because, although both types of commentary are still examined under the four-factor analysis of § 107, the factors are weighed differently with respect to both parody and satire.<sup>89</sup>

## II. THE WEIGHING ANALYSIS OF 17 U.S.C. § 107

The aforementioned distinction between parody and satire suggests that defending satire as fair use is typically more difficult to accomplish than defending parody as fair use. However, despite the difficulty in defending satire as fair use, the Supreme Court has maintained that, because no single factor of § 107 is dispositive of fair use, even a satire that does not take aim at an original work may still be accorded fair use protection under certain circumstances:

[W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work’s minimal distribution in the market, the small extent to which it borrows from an original, or other factors, 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.<sup>90</sup>

As *Campbell* makes clear, weighing the factors of § 107 “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis.”<sup>91</sup>

### A. *Purpose and Commerciality of the Use*<sup>92</sup>

#### 1. The “Transformative” Extent of the New Work

With respect to Perez’s argument of satiric fair use, although the first factor may be given more weight than others depending

<sup>87</sup> See *id.*

<sup>88</sup> *Campbell*, 510 U.S. at 580-81.

<sup>89</sup> See *id.* at 581 n.14.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 577. Cf. *Abilene Music, Inc. v. Sony Music Entm’t*, 320 F. Supp. 2d 84, 89 (S.D.N.Y. 2003) (“Once a work is determined to be a parody, the second, third, and fourth factors are unlikely to militate against a finding of fair use.”).

<sup>92</sup> See 17 U.S.C. § 107(1).

on the circumstances involved, all of the factors remain interrelated, and should not be "treated in isolation, one from another. All are to be explored, and the results weighed together . . . ."<sup>93</sup> That being said, the first factor of § 107 "determine[s] whether and to what extent the new work is 'transformative.'"<sup>94</sup> Case law suggests that, to be transformative, the "use must ordinarily add new material or commentary that reflects critically on the original."<sup>95</sup> The significance of this "transformative" factor is evident from the different applications to both parody and satire: "satires (which use a copyrighted work merely as a vehicle to poke fun at another target), as opposed to parodies (which target the copyrighted work which is being used) are less likely to be considered 'transformative' uses for the purposes of fair use."<sup>96</sup>

From the outset, Perez's use of X17's original photos lacks considerable transformative value because, as a satire, it incorporates a significant amount of the originals. However, if Perez's allegedly infringing use of X17's photos manages to serve a different purpose than that served by X17's use, the first factor will weigh heavily in favor of fair use.<sup>97</sup> "[A]s long as the defendant's work performs a different function from that of the original, the defense of fair use may be invoked."<sup>98</sup> In order to meet the "different function" requirement, the new work cannot "merely supersede the objects of the original creation . . . [it must add] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>99</sup>

The scope of the fair use defense is substantially limited for the written portions of celebrity gossip blogs because they are primarily factual, merely providing continually updated information about various celebrities.<sup>100</sup> However, the photos used to supplement such written blogs cannot be construed in the same light as the textual material. A purely factual blog about a celebrity should not be accorded a high degree of protection<sup>101</sup> because "factual information belongs in the public domain[;] . . . allowing the first publisher to prevent others from copying such informa-

<sup>93</sup> *Campbell*, 510 U.S. at 578.

<sup>94</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007) (quoting *Campbell*, 510 U.S. at 579); see also 17 U.S.C. § 107(1).

<sup>95</sup> Tushnet, *supra* note 17, at 161.

<sup>96</sup> William M. Hart, *An Overview of the Copyright Law*, 646 PLI/Pat 7, 134-35 (2001). Had Perez's use constituted parody, as opposed to satire, the first factor would have weighed heavily in favor of fair use, due to parody's "obvious claim to transformative value." *Campbell*, 510 U.S. at 579.

<sup>97</sup> See *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964).

<sup>98</sup> *Id.*

<sup>99</sup> *Perfect 10*, 487 F.3d at 720 (quoting *Campbell*, 510 U.S. at 579).

<sup>100</sup> Suheil J. Totah, *In Defense of Parody*, 17 GOLDEN GATE U. L. REV. 57, 63 (1987).

<sup>101</sup> See *id.* (stating that, while the scope of the fair use defense is broad when the work is factual, the scope of the defense narrows with respect to non-factual, creative works).

CALLUM AND REBECCA CARDOZO LAW LIBRARY

tion would defeat the objectives of copyright by impeding rather than advancing the progress of knowledge."<sup>102</sup>

Although this discussion is more concerned with the visual accompaniment than the written portion of the blog, it is still interesting to consider the significance, if any, of the fact that celebrity gossip blogs, including the ones presently at issue, may not be completely factual. An early authority<sup>103</sup> previously attempted to rely "on intellectual property law as precedential authority . . . [for] controlling the release of factual material [including] domestic information (*gossip*) . . . [claiming] that the right to control such information [was] supported by common law copyright."<sup>104</sup> However, the scope of copyright law has evolved since this publication, primarily as a result of the Copyright Act, which protects only expression,<sup>105</sup> rather than "the ideas or the facts expressed" in a given work.<sup>106</sup> The Copyright Act "protects the interest in the flow of information . . . by distinguishing between an idea (or a fact) and its expression; expression is protected, but the free flow of information is safeguarded by making ideas (or facts) freely available."<sup>107</sup> Thus, as an idea is not always the equivalent of fact, the information need not be completely factual for a lack of protection to apply. As such, since gossip is, at least partially, factually based, "copyright protection, as traditionally understood, will rarely support a right of control."<sup>108</sup>

Returning to the present circumstances, although we have established that facts properly belong in the public domain,<sup>109</sup> a photo accompanying a textual entry on a celebrity gossip blog, for the purposes of copyright, should be viewed independently from the written material as a creative work that deserves more protection.<sup>110</sup> "[T]he publication of *facts*, regardless of how much effort

<sup>102</sup> Sparaco v. Lawler, Matusky, Skelly, Eng'rs LLP, 303 F.3d 460, 466 (2d Cir. 2002).

<sup>103</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 5 HARV. L. REV. 193, 200-01 (1890). *The Right of Privacy* "is the 20th most cited American law review article of all time . . ." Rochelle C. Dreyfuss, *Warren and Brandeis Redux: Finding (More) Privacy Protection in Intellectual Property Law*, 1999 STAN. TECH. L. REV. 8, ¶ 7 (1999).

<sup>104</sup> Dreyfuss, *supra* note 105, at ¶ 8 (emphasis added). Warren and Brandeis included the following example to illustrate their belief in the extension of copyright law to privacy:

A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents.

*Id.* (citing Warren & Brandeis, *supra* note 105, at 200-01).

<sup>105</sup> Of course, circumstances exist in which the expression may not be protected – for example, when "the expression can be said to have merged with the ideas (or the facts), or to have been fairly used." Dreyfuss, *supra* note 105, at ¶ 9 (internal citations omitted).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See Sparaco v. Lawler, Matusky, Skelly, Eng'rs LLP, 303 F.3d 460, 466-67 (2d Cir. 2002).

<sup>110</sup> See Totah, *supra* note 102, at 63.

was expended in discovering them, is not original authorship."<sup>111</sup> However, distinct from "facts set forth in an author's writing[, which] were not created by an author's act of authorship, and are therefore not protected by copyright," the accompanying photo is an original work actually created by the "author's act of authorship."<sup>112</sup>

With this in mind, Perez's fair use defense strengthens only if his use of the photos is sufficiently different from, or transformative of, X17's use of the original photographs. It is not enough for Perez to simply identify his use as satiric,<sup>113</sup> especially because a satire is typically not significantly transformative of the original work, having incorporated much of the original to target something (or someone) else. In this case, because Perez's use of X17's photos accomplishes the same information-supplementing objective as that accomplished by X17's use on its own website, Perez's use can be viewed as "supersed[ing] the objects of the original creation,"<sup>114</sup> ultimately resulting in the first factor weighing against fair use.

## 2. The Commerciality of the Use

The first factor also includes a consideration of the use's commerciality. Although the inclusion of this provision does not create a "not-for-profit" limitation on all fair use, "the commercial or non-profit character of an activity . . . can and should be weighed along with other factors in fair use decisions."<sup>115</sup> Although access to his website is free, Perez's use of X17's photos still qualifies as commercial because Perez receives income from his website in the form of advertising revenue – "increased user traffic and subsequently, increase[d] advertising revenue," will constitute use that is "commercial in nature."<sup>116</sup> Placed in the context of Perez's fair use argument, although X17's claim that Perez's use of their photos has caused a loss in profits is not dispositive to a finding of copyright infringement,<sup>117</sup> the commerciality

<sup>111</sup> *Sparaco*, 303 F.3d at 467 (emphasis added).

<sup>112</sup> *Id.*

<sup>113</sup> See Madison, *supra* note 65, at 1649-50 (stating that absent evidence of traditional characteristics of parody, merely labeling a work as such will not succeed against a copyright infringement claim); see also *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992) (finding that defendant's infringing work failed to distinguish itself as a "parody" of the original). Although these authorities discuss the ineffectiveness of a simple label (without more) in the context of parody, the same reasoning can be applied to satire.

<sup>114</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>115</sup> H.R. REP. NO. 94-1476, *supra* note 8, at 66.

<sup>116</sup> Melanie Costantino, *Fairly Used: Why Google's Book Project Should Prevail Under the Fair Use Defense*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 235, 263 (2006) (citing *Perfect 10*, 416 F. Supp. 2d at 846-47).

<sup>117</sup> See *id.* See also Totah, *supra* note 102, at 65 (stating that in the context of parody, "mere detrimental economic effect on the original is insufficient"); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001) (arguing that the commerciality of a work is not dispositive against finding fair use).



of Perez's use remains relevant to the weighing analysis of § 107,<sup>118</sup> particularly in connection with § 107(4), discussed below.

### B. *Nature of the Use*<sup>119</sup>

The Eleventh Circuit in *Suntrust Bank* recognized that the second factor of § 107 establishes "a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations."<sup>120</sup> This factor is given little weight in parody cases, however, "since parodies almost invariably copy publicly known, expressive works"<sup>121</sup> in order to conjure up, and comment on, the original. Although not significantly considered in parody cases, this factor requires a different perspective in satire cases. Here, given that "satire can stand on its own two feet and so requires justification for the very act of borrowing,"<sup>122</sup> by its very nature, an unoriginal satiric use, such as that of Perez, will not be given much protection from claims of infringement. The nature of the use need not be completely one-dimensional:

[T]hough the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work. . . . By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.<sup>123</sup>

Perez's use, however, is solely satiric, lacking any indication that he intends to use X17's original photos to target anything (or anyone) other than the celebrity subjects in the photos, ultimately weakening Perez's claim of fair use.

### C. *Amount and Substantiality of the Portion Used*

Subsection (3) of § 107 addresses the reasonableness of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>124</sup> In examining this third factor, "attention turns to the persuasiveness of a parodist's justification for the particular copying done," keeping in mind that copying,

<sup>118</sup> See H.R. REP. NO. 94-1476, *supra* note 8, at 66.

<sup>119</sup> See 17 U.S.C. § 107(2).

<sup>120</sup> *Suntrust Bank*, 268 F.3d at 1271.

<sup>121</sup> *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

<sup>122</sup> *Campbell*, 510 U.S. at 580-81.

<sup>123</sup> *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992)).

<sup>124</sup> 17 U.S.C. § 107(3).

even substantial copying, may be permitted depending on the first factor – i.e., “the purpose and character of the use.”<sup>125</sup>

X17 claims, and Perez does not contradict, that Perez typically incorporates their agency’s original photos in their entirety.<sup>126</sup> For the circumstances of this case, in that Perez’s work can only be viewed as a satire, this factor, similar to that examining the nature of the use, is examined differently than a case involving a parody. Because the new work does not comment on the original work through its incorporation of the original work, more justification for the borrowing is required for Perez’s satiric use than would be required had Perez’s use constituted a parody.<sup>127</sup> Furthermore, because fair use is an affirmative defense, Perez, as the party asserting the defense, carries the burden of providing justification for his borrowing.<sup>128</sup> As he has repeatedly ignored X17’s reminders to credit them for his use of their photos on his website,<sup>129</sup> choosing instead to simply stand behind his claim of fair use without providing any significant basis for such a claim, Perez will likely fail to justify his borrowing. Consequently, this undermines his fair use defense with respect to this factor.

D. *The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work*<sup>130</sup>

In circumstances similar to those of the present dispute, the factor concerning the economic effect on the original work should be given more weight than the other factors. Access to the celebrity gossip blogs of both Perez and X17 is free. Thus, revenue is generated primarily through sales of online advertising space<sup>131</sup> and, at least for X17, providing photos to pop-culture magazines, such as “People” and “Us Weekly.”<sup>132</sup> This business model is negatively affected by the ubiquity of celebrity blogs. For example, in November 2006, X17 was able to get photos of a recently-separated Britney Spears, a pop icon, “kissing an unidentified man.”<sup>133</sup> X17 could potentially make tens of thousands of dollars from a single magazine for providing an *exclusive* story;<sup>134</sup> as such, in order to prevent unauthorized downloading of X17’s photos on

<sup>125</sup> *Campbell*, 510 U.S. at 586-87.

<sup>126</sup> See Abcarian, *supra* note 14.

<sup>127</sup> See Tushnet, *supra* note 17, at 161; see also *Campbell*, 510 U.S. at 580-81.

<sup>128</sup> See *Campbell*, 510 U.S. at 590.

<sup>129</sup> See Abcarian, *supra* note 14. Perez also received a joint cease-and-desist letter sent by a group of “notoriously competitive paparazzo agencies” similar to X17. *Id.*

<sup>130</sup> See 17 U.S.C. § 107(4) (2006).

<sup>131</sup> See *Perez Hilton Sued for \$7.5 Million*, *supra* note 15 (noting that perzhilton.com “reportedly charges between \$9,000 and \$16,000 a week for ad space”).

<sup>132</sup> See Abcarian, *supra* note 14.

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

the Spears story, Brandy Navarre, co-owner of X17, "spent hours personally attaching photos in e-mails that she sent to glossy weeklies and the big infotainment TV shows . . . instead of the much faster but more vulnerable technology called FTP (file transfer protocol), which transfers the images directly into clients' computers."<sup>135</sup> However, despite taking such precautions, Perez still managed to obtain the photos and post them on his website before X17 was able to do the same on their own website.<sup>136</sup> As a result, "Us Weekly" decided to shrink the "photo play" of the originally two-page spread sold by X17 to the magazine, ultimately lowering the selling price by \$10,000.<sup>137</sup>

When a magazine, such as "Us Weekly," drops its paying price for X17's photo because it has already been made available on Perez's website, the magazine does not do so because Perez's use is catering to a different audience. From a business perspective, this would not make sense. If Perez's use actually operated in a different market, or catered to a different audience, Perez's use would be of no economic concern to the magazine. It is precisely because Perez's website appeals to the very same audience that the magazine decided to drop its paying price for X17's photo. In other words, X17, Perez, and other pop-culture mediums, such as "People" and "Us Weekly," operate in the same market, all providing updated information about people's favorite celebrities. And it is when the multiple works are operating in the same market that the author of the original work should be entitled to more protection than if the new work either fulfilled a different purpose, or appealed to a different audience.

Because Perez's use constitutes a satire, and not a parody, the economic effect on X17's original use is much more significant – the economic effect is accorded more weight when the two works "fulfill the same demand," i.e., when the two works appeal to the same audience.<sup>138</sup> For example, "when a parody commercially harms the original by performing a similar function in the same market, the social value of the use is probably outweighed by the economic detriment to the original, and therefore copyright infringement should be found."<sup>139</sup> Considering the social benefit that parody provides by "shedding light on an earlier work, and, in the process, creating a new one,"<sup>140</sup> and the lack thereof provided by satire, satire should be subjected to, at the very least, the same

---

<sup>135</sup> *Id.*

<sup>136</sup> *See id.*

<sup>137</sup> *Id.*

<sup>138</sup> Totah, *supra* note 102, at 69 (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

<sup>139</sup> *Id.*, at 65.

<sup>140</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

standard of scrutiny as parody, purely with respect to the economic effect of the use. Therefore, considering Perez's satire operates not only in the same market as X17's original photo, but also to the original photos' economic detriment, the factor evaluating the use's potential economic effect on the value of the original should weigh against fair use protection.

Moreover, because the Internet provides users virtually limitless access to the work of others, one of the few ways to monitor reused works on the internet is by looking to the economic effect the "borrowing" website has on the website containing the original work. This can be accomplished to some degree by comparing the number of "page impressions" at each site, or "the number of times a page is displayed from the site to users."<sup>141</sup> This number is "often used as a measure for advertising charges – the more page impressions a site generates among users, the more the site can charge for advertisements placed on the site."<sup>142</sup> Because "[r]educed page impression counts cost the website owner advertising revenues,"<sup>143</sup> X17 would simply have to establish that, as a result of Perez using their photos to operate in the same market, X17 is being "deprived of exposure to potential advertisers[, . . . resulting] in decreased advertising revenue and a consequent decrease in the value of the copyrighted work . . . ." <sup>144</sup> Doing so would suggest that Perez's website is receiving advertising revenue that X17 would presumably be receiving instead, but for Perez's unauthorized copying. Given the fact that, "[i]f a website owner can produce empirical evidence of market harm, especially lost advertising revenue, then a claim may exist, potentially under copyright,"<sup>145</sup> X17's providing evidence of such an economic detriment on the market for (or value of) their original photo would certainly further weaken Perez's fair use claim.

### III. RESOLUTION OF THE PRESENT DISPUTE

#### A. Goals of the Copyright Act

*Suntrust Bank* outlined three interrelated goals of copyright law: "the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author."<sup>146</sup>

<sup>141</sup> David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 1 (1998).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Allison Roarty, *Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right*, 68 FORDHAM L. REV. 1011, 1041 (1999).

<sup>145</sup> Robert M. Scott, *Deep Linking: Policy and Rule Considerations for Safeguarding Open Internet Navigation*, 1 J. TELECOMM. & HIGH TECH. L. 355, 365 (2002).

<sup>146</sup> *Suntrust Bank v. Houghton Mifflin, Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001).

Copyright law aims to expand the amount of knowledge available to the public by preventing an underproduction in the very works that “produce a more robust intellectual and artistic culture.”<sup>147</sup> This aim is accomplished through the third goal, by granting authors a “right to protect [their] original work against imitation”;<sup>148</sup> without such a right “authors would have little economic incentive to create and publish their work.”<sup>149</sup> By allowing for this exclusive control to protect original creations, and by providing authors with “a marketable right to the use of one’s expression,” copyright law directly encourages the creation and dissemination of new ideas.<sup>150</sup>

Hand-in-hand with the first goal of promoting learning is the second goal of copyright law: protecting the public domain. While the first goal incentivizes authors to create by granting these authors a “limited monopoly” over their original works, the second goal ensures that the author’s exclusive control will only last for a limited period, after which, “the works will . . . enter the public domain, [thereby protecting] the public’s right of access and use.”<sup>151</sup> Exclusive control is granted primarily to guarantee authors a “fair return for [their] labors”; authors are deemed adequately compensated once the period of exclusive control expires, at which point, the authors’ works enter the public domain.<sup>152</sup> Limiting the period of control not only protects the public’s right to use, but doing so also indirectly furthers the promotion of learning, since granting exclusive control indefinitely would undoubtedly stifle the creation of new ideas that build upon previous works.

### B. *Maintaining Consistency with the Fair Use Exception*

The fair use defense is undoubtedly important for “encourag[ing] and allow[ing for] the development of new ideas that build on earlier ones, thus providing a necessary counterbalance to the copyright law’s goal of protecting creators’ work product.”<sup>153</sup> However, when “the requisite level of creativity [to constitute an ‘original’ work] is low,”<sup>154</sup> the actual originality of many “new creations,” such as those claimed by Perez, becomes dubious at best,

<sup>147</sup> Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1492 (2007).

<sup>148</sup> *Suntrust Bank*, 268 F.3d at 1261.

<sup>149</sup> *Id.* at 1262.

<sup>150</sup> *See id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

<sup>151</sup> *Id.* at 1262.

<sup>152</sup> *See id.* (quoting *Harper & Row*, 471 U.S. at 546).

<sup>153</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007).

<sup>154</sup> *Feist Publ’ns, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (cited in Michael D. McCoy & Needham J. Boddie, II, *Cybertheft: Will Copyright Law Prevent Digital Tyranny on the Superhighway?*, 30 WAKE FOREST L. REV. 169, 178 (1995)).

effectively undermining the protections the Copyright Act meant to establish. True, the primary purpose of copyright law is “[t]o promote the Progress of Science and useful Arts,”<sup>155</sup> not to frustrate such progress by rigidly invalidating any subsequent work that borrows or builds off of a previous creation in even the slightest way. While “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout,”<sup>156</sup> invalidating Perez’s use will hardly stall advancement of “the Progress of Science and useful Arts,”<sup>157</sup> given Perez’s clear efforts to avoid the burden of creating a novel composition.

As previously explained, when Perez displays X17’s photos, his alterations typically involve no more than the insertion of a single word, or a sexually suggestive mark. Also, the information conveyed, or purpose served, by Perez’s photos, even with such “alterations,” is identical to that of the photos used by X17: providing the frequently updated celebrity gossip blogs with a visual supplement. Despite the similar purpose served in relation to X17’s use of its own photos, with a generally-accepted low creativity threshold, Perez’s use could potentially be deemed an original satiric work within the scope of the fair use exception to the Copyright Act. To ensure against this detrimental effect on copyright protection, the creativity threshold must be higher. Otherwise, copyright law runs the risk of disrupting the flow of new works accessible to the public – who will want to create when the law that is supposed to ensure the protection of their original work allows others to reap the benefits of creating virtually the same work? In this way, striking down Perez’s use as infringement would be consistent with, not contrary to, the goals of copyright law and the intent behind the fair use exception.

#### CONCLUSION

Since the inception of X17’s lawsuit against Perez, there have been a few developments in the case’s progression. Perez’s attempt to dismiss X17’s suit was denied,<sup>158</sup> and in June 2007, Perez was dropped from his website’s original hosting company, but was restored almost immediately by a different internet service pro-

<sup>155</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (citing U.S. CONST., art. I, § 8, cl. 8).

<sup>156</sup> *Id.* (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845) (No. 4436) (“Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”)).

<sup>157</sup> U.S. CONST., art. I, § 8, cl. 8.

<sup>158</sup> See Posting of Jonathan Bailey to The Blog Herald, <http://www.blogherald.com/2007/10/01/copyright-cases-to-watch-x17-v-perez-hilton/> (Oct. 1, 2007).

vider.<sup>159</sup> X17's attempt to shut down Perez's website until the resolution of the suit was unsuccessful, as their motion for an injunction was denied.<sup>160</sup> Perez countered by filing his own lawsuit against X17 for unfair competition, claiming that X17 "violat[es] wage and labor laws by making its photogs [sic] toil for long hours with minimal pay," allegedly giving X17 "an unfair advantage over its competitors."<sup>161</sup> However, Perez's suit was dismissed in November 2007 because he "[had] no standing to intervene on behalf of the shutterbugs who *do* work for the company."<sup>162</sup> Depositions for X17's lawsuit were originally scheduled for late September 2007, but "there is no word yet on a trial date."<sup>163</sup>

Perez claims that he is fighting for all bloggers by contesting X17's lawsuit,<sup>164</sup> but, in actuality, he appears to have distanced himself from virtually all other bloggers with his conduct. Undoubtedly, "[m]any bloggers do what Perez Hilton does" by taking photos off of other websites and inserting it into their own personal blogs.<sup>165</sup> One of the main differences between Perez and these other bloggers is that Perez makes a large amount of money through his blog by charging for advertising space on his website.<sup>166</sup> Perez further separates himself from these bloggers by drawing attention to himself, not only through the economic benefit he receives from his website, but also through his blatant refusal, in the face of constant reminders, to properly attribute the work appearing on his blog to the original creator.<sup>167</sup>

Although courts assumed that clear rules would follow from successive decisions concerning fair use,<sup>168</sup> "the repeated application of the fair use doctrine has [instead] resulted in it growing increasingly unpredictable."<sup>169</sup> This case will be no exception. Perez is convinced that if the lawsuit resulted in a finding of copyright infringement, "[t]he effect would be to eliminate the ability to comment on and transform photographs under the fair use ex-

<sup>159</sup> See Gary Gentile, *Perezhilton.com shut for several hours*, USA TODAY, June 21, 2007, available at [http://www.usatoday.com/tech/products/2007-06-21-1377385902\\_x.htm](http://www.usatoday.com/tech/products/2007-06-21-1377385902_x.htm).

<sup>160</sup> See *id.*

<sup>161</sup> Natalie Finn, *Judge Tosses Perez's Shutterbug Squabble*, E! NEWS, Nov. 21, 2007, <http://www.eonline.com/uberblog/detail.jsp?contentId=a444bce9-7323-46e9-b17f-bb05fe9f75bb>.

<sup>162</sup> *Id.* (emphasis added).

<sup>163</sup> Bailey, *supra* note 160.

<sup>164</sup> See Abcarian, *supra* note 14.

<sup>165</sup> Plagiarism Today, <http://www.plagiarismtoday.com/2007/02/23/perez-hilton-gets-sued-again/> (Feb. 23, 2007); see also Abcarian, *supra* note 14.

<sup>166</sup> See Abcarian, *supra* note 14.

<sup>167</sup> See Plagiarism Today, *supra* note 167 ("He has made a good living off of other's work, but has not even paid a token price in return."). See also Abcarian, *supra* note 14.

<sup>168</sup> See Parchomovsky & Goldman, *supra* note 149, at 1496 ("As Justice Kennedy has noted, '[t]he common-law method instated by the fair use provision of the copyright statute . . . presumes that rules will emerge from the course of decisions.'").

<sup>169</sup> *Id.*

ception to the Copyright Act.”<sup>170</sup> However, as Perez neither comments on nor transforms X17’s original photos, this prediction is wholly inaccurate. Considering the goals copyright law is meant to achieve, coupled with the recognition that the fair use doctrine was intended to exempt from copyright infringement claims only those works that satisfied a four-factored analysis, the only reasonable outcome of the present dispute between X17 and Perez is a finding of copyright infringement.

*Eaton O’Neill\**

---

<sup>170</sup> Abcarian, *supra* note 14.

\* Articles Editor, CARDOZO ARTS & ENT. L. J. (2008-2009); J.D. Candidate 2009, Benjamin N. Cardozo School of Law. B.A., *cum laude*, Psychology, New York University (2006). Many thanks to my family and friends for their continued support and encouragement.  
© 2008 Eaton O’Neill.