ARTISTIC PARODY: A THEORETICAL CONSTRUCT

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In Living Color, the television show, produces a parody called *Am I Black or White?*[1] of Michael Jackson's video and song *Black and White*.[2] Michael Jackson's song, with its theme that "it makes no difference whether you're black or white," observes American society as color-blind. The *In Living Color* sketch pokes fun at Michael Jackson's naivete and perceived identity crisis. At the end of *Am I Black or White?*, the lead character destroys a car with a baseball bat, and then is arrested by white police officers and carried away as he mumbles "I must be black."

Michael Jackson does not sue.

The Capitol Steps, a Washington-based variety group, produces *We Arm the World*,[3] a parody of Quincy Jones's song *We Are the World*.[4] With its cast of many of the world's best known singers, *We Are the World* calls attention to the problems of world hunger. *We Arm the World* skewers the weapons trade among Washington, the Kremlin, and "two-bit" dictators who ultimately re-aim the arms towards the sellers.

Quincy Jones does not sue.

Paramount Pictures advertises its movie *Naked Gun 33-1/3, The Final Insult* with the head of Leslie Nielsen, the movie's star, attached to the body of a naked pregnant woman.[5] Annie Leibovitz, the celebrity photographer, finds the advertisement too close to her *Vanity Fair* magazine cover shot of a nude Demi Moore clutching her pregnant belly.[6]

Annie Leibovitz does sue.[7]

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1 *In Living Color* (Fox television).

2 MICHAEL JACKSON, BLACK OR WHITE (Michael Jackson Records 1991).

3 CAPITOL STEPS, WE ARM THE WORLD (McLean, Va. 1986).

4 MICHAEL JACKSON & LIONEL RICHIE, *We Are the World, on* WE ARE THE WORLD (USA for Africa 1985).

5 NAKED GUN 33-1/3, THE FINAL INSULT (Paramount Pictures 1994).

6 Nancy Collins, *Demi's Big Moment*, VANITY FAIR, Aug. 1991 (cover photo by Annie Leibovitz).

7 Peg Tyre, *Annie Leibovitz Sues Over Photo Parody of Pregnant Demi*, ALBUQUERQUE J., Jan. 8, 1995, at G4.

While most creators, like Michael Jackson and Quincy Jones, do not sue parodists of their works, a few do. Annie Leibovitz shares something in common with Acuff-Rose Music, Inc., the copyright holder of Roy Orbison's *Oh Pretty Woman*.[8] Leibovitz and Acuff-Rose are among the rare copyright holders who sue parodists and claim a violation of the copyright in their works.

The legal system has struggled with efforts to construct artistic parodies theoretically. The essence of parody is to make fun, to humor, to educate, to comment, and to critique. Parodists begin with another's creative output, preferably famous, and create another work that evokes laughter, partly because of the public's familiarity with the famous work.

Are *Am I Black or White*, *We Arm the World*, and the *Naked Gun* parodies and others like them legal or not?

Currently, parodies are legal when the parodist either secures permission, usually by obtaining a license from the original creator, or uses the original creator's work fairly. The copyright law's fair use doctrine requires a court to balance four factors in determining whether the defendant has made a fair use of an original work.[9] First, the court must ascertain the purpose and character of the defendant's use, including whether such use is of a commercial nature.[10] Second, the court must assess the nature of the copyrighted work,[11] particularly whether it is creative or factual.[12] Third, the court must discern the amount and substantiality of the portion used in relation to the copyrighted work as a whole.[13] And, fourth, the court must consider the effect of the use upon the potential market or value of the copyrighted work.[14] While all four factors must be weighed in making the final determination, the Supreme Court held in *Harper & Row, Publishers, Inc. v. Nation Enterprises*[15] that the most important factor is whether the defendant has harmed the potential market for the plaintiff's work.[16]

If the parodist's use of an original work is considered fair, the parodist does not have to pay royalties. If the parodist's use is judged unfair, then the parodist is liable for copyright infringe-

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8 ROY ORBISON, OH PRETTY WOMAN (Acuff-Rose Music, Inc. 1964).

9 17 U.S.C. § 107 (1994).

10 *Id.* § 107(1).

11 *Id.* § 107(2).

12 *See, e.g.*, Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 972 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984).

13 17 U.S.C. § 107(3).

14 *Id.* § 107(4).

15 471 U.S. 539 (1984).

16 Sherri L. Burr, *Introducing Art Law*, 37 COPYRIGHT WORLD 22, 24 (1994).

ment and faces an injunction.[17] The parodist may also be required to pay royalties, punitive damages, attorney's fees, and court costs.[18]

Problems inhere in the fair use doctrine because the parodist does not know definitively whether the use is fair until a judge or series of judges decides that it is fair. In other words, what may be fair for one parodist may be unfair for another. Even with the same parody, the district court may consider the use fair, the court of appeals may find it unfair, and then the Supreme Court may ultimately decide it is fair.[19] Thus, the application of the fair use doctrine can be inconsistent, unpredictable, and incoherent.

Several commentators have addressed the issue in an attempt to bring consistency, predictability, and coherence to the legal handling of artistic parodies. Justice Souter authored the majority decision in *Campbell v. Acuff-Rose Music, Inc.*[20] He rejected both the Sixth Circuit's holding that all commercial parodies are presumptively unfair and 2 Live Crew's argument that all parodies should be considered presumptively fair.[21] Judge Posner proposes dividing parodies into those that target the original work and those that use the original as a weapon.[22] He would protect the former under the fair use doctrine, but not the latter.[23]

This article analyzes these proposals and suggests that they attempt to force an unpredictable art form into a juggling act of legal squares. What is needed is to ask the hard question: should Congress recognize parody as a separate art form by defining it as a section 101 category?[24] If so, then Congress should amend section 101. Congress should then go further and consider other options that would bring predictability to the legal status of parodies by enacting a special statutory royalty scheme similar to those put forth by the former Copyright Royalty Tribunal whose responsibilities were recently replaced by the Copyright Arbitration Royalty Panels.[25]

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17 17 U.S.C. § 503 (1994).

18 *Id.* §§ 504, 505 (1994).

19 *See* Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd sub nom.* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994).

20 114 S. Ct. 1164.

21 *Id.* at 1174.

22 Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992).

23 *Id.* at 72-73.

24 17 U.S.C. § 101 (1994). Section 101 defines most key terms used throughout the copyright statute but does not currently define parody.

25 *Id.* §§ 801-803 (1994). These panels are appointed on an *ad hoc* basis by the Librarian of Congress after consultation with the Register of Copyrights. *See* Edward J. Damich, *United States: CRT RIP*, 37 COPYRIGHT WORLD 19 (1994).

I. JUSTICE SOUTER'S SEARCH FOR THE MIDDLE GROUND

In *Campbell v. Acuff-Rose Music, Inc.*, Acuff-Rose, the copyright owner of Roy Orbison's *Oh Pretty Woman*, sued 2 Live Crew for copyright infringement after 2 Live Crew released its rap music parody of *Oh Pretty Woman* on its album *As Clean as They Wanna Be.* Although 2 Live Crew had offered to afford credit for ownership and authorship of the original song to Acuff-Rose and to pay a fee for its use, Acuff-Rose declined to grant permission. In its lawsuit, Acuff-Rose contended that 2 Live Crew's lyrics ("Big hairy woman you need to shave that stuff, Bald headed woman girl your hair won't grow; Two timin' woman girl you know you ain't right") were either inconsistent with good taste or would disparage the future value of its copyright. 2 Live Crew abandoned its plans to pay and claimed that its parody was a fair use of the original.

A federal district court in Tennessee granted summary judgment for 2 Live Crew.[26] The Sixth Circuit Court of Appeals reversed, granting judgment for Acuff-Rose.[27]

The Supreme Court held that the Sixth Circuit erred when it concluded that the commercial nature of 2 Live Crew's parody of *Oh Pretty Woman* rendered it presumptively unfair.[28] The Court stressed that while there were no bright-line rules to determine fair use, the inquiry into the first statutory fair use factor—the purpose and character of the defendant's use—should focus on whether the new work merely supersedes the object of the original creation or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message.[29] The more transformative the new work, the less significant the other statutory factors, like commercialism, that may weigh against a finding of fair use.[30]

Further, the Supreme Court held that "a parody's commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying."[31] The Court's holding was limited to reversing the Sixth Circuit's decision granting judgment for Acuff-Rose after focusing on the commercial nature of 2 Live Crew's parody and that 2 Live Crew took the heart of the original

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26 *See Acuff-Rose*, 754 F. Supp. 1150.
27 *See Acuff-Rose*, 972 F.2d 1429.
28 *Acuff-Rose*, 114 S. Ct. 1164.
29 *Id.* at 1171.
30 *Id.*
31 *Id.* at 1168.

and made it the heart of the new song.[32]

Justice Souter focused significantly on the nature of parody and the amount taken from Roy Orbison's work to create 2 Live Crew's work. Justice Souter wrote that "parody has an obvious claim to transformative value . . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[33] Justice Souter perceived criticism of the original as crucial to the fair use claim. He wrote: "If . . . the commentary has no critical bearing on the substance or style of the original composition, . . . the claim to fairness in borrowing . . . diminishes . . . and other factors, like the extent of its commerciality, loom larger."[34]

Consider the impact of Justice Souter's reasoning on the Capitol Steps's *We Arm the World.* This parody would probably fail the fair use test because its commentary focuses less on the original composition and more on a social condition, namely the arms trade. However, the Capitol Steps could argue that its work is transformative because the group altered the original work to criticize and ridicule the arms trade.

Justice Souter also considers that parody's "art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable."[35] Later, he states that "context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original."[36]

Luther Campbell and 2 Live Crew satisfied this test. Justice Souter wrote that:

> It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the base riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat.[37]

Justice Souter then separated the lyrics from the music, finding that as to the lyrics "no more was taken than necessary."[38] As to

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32 *Id.* at 1168-69.
33 *Id.* at 1171.
34 *Id.* at 1172.
35 *Id.* at 1176.
36 *Id.*
37 *Id.* (footnote and citations omitted).
38 *Id.* (citing *Acuff-Rose,* 972 F.2d at 1438).

the music, he remanded the issue for an "evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution. . . ."[39]

Justice Souter's fair use reasoning could pose problems for the Capitol Steps should the group be sued. The Capitol Steps did not alter the music from *We Are the World* to create *We Arm the World.* The group focused, instead, on creating new lyrics, counting on the public to recognize the music and assess the differences between the two works.

Justice Souter dedicated considerable space to discussing the fourth fair use factor, in particular, whether 2 Live Crew's use had harmed the market for the Roy Orbison song. He recognized that some parodies may harm the market, but certain types of harm are not cognizable under the copyright law. "[W]hen a lethal parody, like a scathing theater review, kills demand for the original," he wrote, "it does not produce a harm cognizable under the Copyright Act."[40] The Court remanded the case for consideration of whether 2 Live Crew's parody harmed the market for a rap version of the original.[41]

Market harm is difficult to determine. How would a court measure market harm, for example, to Annie Leibovitz's photo of pregnant Demi Moore? While some magazine covers are sold separately as posters (the most famous was a New Yorker cover that became the subject of a lawsuit against Columbia Pictures[42]), Leibovitz may need to establish that her magazine photo became a poster and that the Naked Gun advertisement displaced sales of the poster. What is the likelihood that a consumer would enter a store seeking a pregnant Demi Moore poster, but exit with a pregnant Leslie Nielsen poster? Ms. Leibovitz may face an uphill battle in her lawsuit because of this difficult threshold.

II. Posner's Parody as Target, Parody as Weapon

Judge Posner proposes different thresholds for parodies. He separates parodies into those that target the original and those that use the original as a weapon.[43] Judge Posner argues that the copy-

39 *Id.* at 1177.
40 *Id.* at 1178.
41 *Id.* at 1179.
42 *See* Steinberg v. Columbia Pictures, Inc., 663 F. Supp. 706 (S.D.N.Y. 1987).
43 *See* Posner, *supra* note 22. Posner reveals his class biases when he states that "high-brow parody rarely infringes the copyright on the parodied work." *Id.* at 76. "[U]nlike low-brow parody, very often it really does criticize the original: high-brow audiences being more interested in issues of tastes and standards than popular audiences are." *Id.* at 77.

right exemption for parodies "should not extend to cases in which the parody does not attack the parodied work but rather uses the work to attack something else."[44] He would permit copyright protection for parodies that target or attack the original work because the harm that results from attacks that expose the weakness of the original work, such as in a book review, "is not the kind of harm that copyright law, whether analyzed in economic or any other terms, seeks to prevent."[45]

Judge Posner's proposal was adopted in part by Justice Kennedy in his concurring opinion in *Campbell v. Acuff-Rose Music, Inc.* Justice Kennedy wrote, "It is not enough that the parody uses the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs. . . ."[46]

Notwithstanding Justice Kennedy's concurrence, Judge Posner's proposal presents problems because not all parodies are easily categorized. Compare, for example, another commentator's thoughts on parody as target. Linda Hutcheon writes in her book *A Theory of Parody* that parody's target "is always another work of art or, more generally, another form of coded discourse."[47] In effect, all parodies target. The question is whether it targets the original work of art or a social condition. The latter is what Judge Posner terms parody as weapon, but it is indeed parody as target aimed at something other than the original work.

The problem arises when a parody has both elements, targeting the original work as well as a social condition. Would Judge Posner have part of the parody be considered a fair use and part of it be considered an infringement?

Consider, for example, *In Living Color's Am I Black or White?* This parody pokes fun at the black and white lyrics of Michael Jackson's original work, but it also targets Michael Jackson for ridicule. The sketch implies that Michael Jackson has confused racial identity: after altering his nose, chin, and eyes, and lightening his skin, he is not sure whether he is black or white. If Michael Jackson sued *In Living Color*, a judge or series of judges would assess whether this

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For his definition of high-brow parody, Posner refers to Dwight MacDonald's anthology on the subject. *See generally* DWIGHT MACDONALD, PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM—AND AFTER (1960). Posner does not state that many artists and art works that are now considered "high-brow" were considered "low-brow" in their day. Mozart's *The Magic Flute*, for example, was originally conceived of as musical comedy to entertain the masses.

44 Posner, *supra* note 22, at 67.

45 *Id.* at 70.

46 114 S. Ct. at 1180 (Kennedy, J., concurring).

47 LINDA HUTCHEON, A THEORY OF PARODY 16 (1985).

sketch is fair use or infringement. Based upon Posner's theory of parody separation, it would be very difficult to reach a legal determination.

It is exactly because of these theoretical challenges that I propose, in the next two sections of this article, that Congress define parody and the limitations on the parodist's use of another author's work.

III. Parody as Art

With most art forms, definition can be elusive. And so it is with parody. In *Campbell v. Acuff-Rose Music, Inc.*, Justice Souter cited several definitions. The Greeks define *parodeia* as "[a] song sung alongside another."[48] In the American Heritage Dictionary, a parody is a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule."[49] The Oxford English Dictionary provides that a parody is a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous."[50]

Obviously, the Greek definition is too limiting since parodists may use other artistic media besides songs, such as videos, television, photographs, paintings, sculpture, and so forth. Under this definition, for example, Paramount Pictures could not argue that its advertisement was a parody as a defense against Annie Leibovitz's lawsuit.

Further, must a parody be comic in order to satisfy the American Heritage Dictionary definition? Does the parodist fail in his or her art form when the audience reacts with shame, disgust, or lust, such as the Village Gate's parody *The Cunnilingus Champion of Company C* of the Andrews Sisters' song *Boogie Woogie Bugle Boy*[51] or with *Saturday Night Live's* parody *I Love Sodom* of *I Love New York*?[52] Throughout history, parodists have all but put an Uncle Sam's hat on the Mona Lisa. Would such a parody make you laugh or fill you with disgust? Does your reaction depend on whether you agree with the theory put forth several years ago that the model for the Mona Lisa was Leonardo da Vinci in drag?

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48 114 S. Ct. at 1172 (citations omitted).

49 *Id.*

50 *Id.*

51 *See* MCA, Inc. v. Wilson, 425 F. Supp. 443, 445 (S.D.N.Y. 1976), *aff'd as modified*, 677 F.2d 180, 183 (2d Cir. 1981).

52 *See* Elsmere Music, Inc. v. National Broadcasting Corp., 482 F. Supp. 741 (S.D.N.Y. 1979), *aff'd*, 623 F.2d 252 (9th Cir. 1980).

Moreover, why should parodists feel compelled to imitate an author or class of authors to make them appear ridiculous in order to satisfy the Oxford English Dictionary definition? Under this definition, the *In Living Color* sketch would qualify as a parody because it does imitate Michael Jackson's song to make it appear ridiculous, but the Capitol Steps's *We Arm the World* would not because it aims to make the arms trade appear ridiculous and not the original song.

Linda Hutcheon defines parody as "repetition with critical distance, which marks difference rather than similarity."[53] For her, "[i]ronic inversion is a characteristic of all parodies," but the irony is "not always at the expense of the parodied text."[54] Under her definition, the Capitol Steps's *We Arm the World* would be considered ironic inversion that was not at the expense of Quincy Jones's *We Are the World* because it pokes fun at a world problem, namely the arms trade, rather than at the song itself, in contrast to *In Living Color's Am I Black or White*, which pokes fun at the text of Michael Jackson's song. Hutcheon also says that "criticism need not be present in the form of ridiculing laughter for this to be called parody."[55]

Hutcheon maintains that "[t]he most parodied paintings are, not surprisingly, the most familiar ones."[56] This statement applies for other art forms as well. Millions of copies of Michael Jackson's *Black and White* and Quincy Jones's *We Are the World* were purchased by a worldwide audience. Annie Leibovitz's photograph of Demi Moore became one of *Vanity Fair's* most controversial covers in the magazine's history, earning several news stories in broadcast and print media. And consider the familiarity of Roy Orbison's *Oh Pretty Woman* before and after the movie *Pretty Woman*[57] made Julia Roberts a superstar. Before the movie, the song was known primarily to country music fans. After the movie exposed the song to a broader audience, 2 Live Crew performed its parody version to its target audience, relying on rap fans' new-found familiarity with the song.

Parodies are thus time-sensitive. While original works may endure through the ages, most parodies do not. They are dependent upon present public familiarity with the original works. In fifty

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53 HUTCHEON, *supra* note 47, at 6.

54 *Id.*

55 *Id.*

56 *Id.* at 8.

57 PRETTY WOMAN (Warner Bros./Time-Warner Entertainment Co. 1994).

years, Americans may still see *Gone With the Wind*[58] on network television or rent it on video, but how many will remember Carol Burnett's parody *Went With the Wind*[59] during which she descended a staircase wearing curtain rods?

And imagine the likely longevity of Billy Frollick's *Dumpisms*,[60] self-styled as an unauthorized parody of Winston Groom's *Gumpisms: The Wit and Wisdom of Forrest Gump*,[61] a little humor book written as a companion to the hit movie *Forrest Gump*.[62] *Gumpisms* promptly became a best seller and sparked the creation of *Dumpisms: The Witless Wisdom of Horace Dump*, which sold at least one copy.

Questions arise: Has Frollick created art with his unauthorized parody of *Gumpisms*? Is *Dumpisms* repetition with critical difference? The contrasts between *Gumpisms* and *Dumpisms* in cover, images, and words are striking. Whereas the *Gumpisms* cover is predominantly blue, the *Dumpisms* cover is predominantly red. While *Gumpisms* features a slender, nicely dressed Tom Hanks as Forrest Gump sitting on a park bench and staring peacefully into space, *Dumpisms* displays a grossly overweight, exceedingly hairy, and somewhat bald-headed Horace Dump sitting in a tiny school chair reading what appears to be a tabloid. As for advice, Forrest Gump admonishes not to talk back to your teacher, first sergeants, the police, and your mama,[63] and Horace Dump warns to respect female gym teachers, lonely ranchers, and fellow inmates.[64] On ingratiating techniques, *Gumpisms* cautions, "[r]emember this: while somebody is down there kissin' your butt, they could just as easily be bitin' it too,"[65] while *Dumpisms* instructs, "[k]issing butt, groveling, and sucking up shamelessly never made anybody poor."[66]

Perhaps Frollick's *Dumpisms* makes readers laugh, and that is its contribution to art. Perhaps the differences between *Dumpisms* and *Gumpisms* are sufficiently critical to sustain defining the former as parody. However, this may be an instance where both the original and the parody fail to survive the test of time.

In dealing with any artistic form, lawyers must be mindful of Justice Holmes's exhortation in *Bleistein v. Donaldson Lithographing*

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58 GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939).
59 *The Carol Burnett Show* (Westinghouse television broadcast 1967).
60 BILLY FROLLICK, DUMPISMS: THE WITLESS WISDOM OF HORACE DUMP 3 (1994).
61 WINSTON GROOM, THE WIT AND WISDOM OF FORREST GUMP 3 (1994).
62 FORREST GUMP (Paramount Pictures 1994).
63 GROOM, *supra* note 61, at 3.
64 FROLLICK, *supra* note 60, at 3.
65 GROOM, *supra* note 61, at 21.
66 FROLLICK, *supra* note 60, at 20.

Co.[67] that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[68] Similarly, in assessing the legality of parodies, decisions must be made within narrow confines that do not require judgment of a particular parody's artistic merits, such as whether or not it is comic. A legal definition of parody should not rely on any particular judge's sense of humor.

I thus propose that Congress amend section 101 of the Copyright Act to add the following definition:

> A "parody" is a work created by one author or group of authors using the work of another with the intent to transform the original work. The parody must either educate about, comment on, criticize, ridicule, or make humorous the original work or a social condition.

This is a broad definition that would classify *Am I Black or White?*, *We Arm the World*, and perhaps the *Naked Gun 33-1/3* advertisement as parodies because they comment on a music icon and his lyrics, criticize the arms trade, and ridicule the photograph of a famous actress who bared all while pregnant, respectively. Notice also the reference to "well known" works. To succeed, parodists depend on public familiarity with the original work. If the Capitol Steps rewrites the lyrics to a song that is unfamiliar to the public, the reaction comes not from comparing the two works, but solely from the social commentary. In such an instance, the Capitol Steps would have created satire. Hutcheon writes that satire, unlike parody, "is both moral and social in its focus."[69]

Justice Souter would probably agree with Hutcheon's interpretation of parody as "repetition with difference"[70] and her analysis of the differences between parody and plagiarism as "a matter of intent." The parodist imitates with critical irony while the plagiarist imitates with the intent to deceive.[71] Under this definition, the parodist must intend to transform the original work and in doing so either educate about, comment on, criticize, ridicule, or induce laughter at the original work or a social condition.

Once parody is more clearly defined and understood, the next

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67 188 U.S. 239 (1903).

68 *Id.* at 251.

69 HUTCHEON, *supra* note 47, at 16.

70 *Id.* at 32.

71 *Id.* at 40.

issue is what should be the financial relationship between the author of the original work and the author of the parody?

IV. RETHINKING THE FAIR USE/INFRINGEMENT DICHOTOMY

The litigation of *Campbell v. Acuff-Rose Music, Inc.* exposed the limitations for both original authors and parodists of the fair use/infringement dichotomy. Under the statutory royalty scheme available in 1989, the copyright owner was compelled to grant a license to use an exact cut of an original song in return for receiving statutory royalties. Under the fair use scheme, the copyright owner cannot control the use of his work, and receives no revenues.

Initially, 2 Live Crew wrote Acuff-Rose a letter to announce that it had created a rap parody of *Oh Pretty Woman* and that it was prepared to pay Acuff-Rose a royalty fee similar to that required if it had made an exact cut of the song.[72] Acuff-Rose declined to grant permission to use the song, and initiated suit alleging copyright infringement. 2 Live Crew affirmatively asserted the fair use defense.

When 2 Live Crew's defense succeeded in the district court, Acuff-Rose was confronted with a situation where it was unable to control the use of its copyrighted work *and* it was unable to collect royalty fees for that use. Acuff-Rose was thus better off before suing because initially it at least had access to royalties. Once the fair use defense succeeded, 2 Live Crew did not have to pay royalties and Acuff-Rose had incurred significant legal costs.

Because section 801 statutory royalty fees[73] were not available for parodists in 1989, the options for a parodist looked as follows:

> Fair Use,
> Author License, or
> Infringement.

Musicians wishing to make a parody of copyrighted works either requested a license from the author, such as the practice of "Weird Al" Yankovic, or trusted that their use was fair, such as the practice of Capitol Steps. If the copyright holder was unwilling to grant a license, then musicians had to rely on the fair use defense in the event of a lawsuit. If the fair use defense failed, they were liable for infringement.

I propose increasing the available options for parodists as follows:

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72 *See Acuff-Rose*, 754 F. Supp. at 1152.
73 17 U.S.C. § 801.

Fair Use,
Compulsory License,
Author License, or
Infringement.

The fair use category would be limited to one-shot parodies of copyrighted works, such as those performed at a school or social revue, or by a stand-up comedian, which are not recorded for subsequent resale to the public.

Into the compulsory license category would fall copyrighted works, including audio works, visual works, and audiovisual works that have become famous. Parodists would be free to create, but would be required to pay royalties established by the Copyright Arbitration Royalty Panels. Original creators could not prevent parodies of their famous works, but they would have the right to receive royalties.

Any copyrighted work could be the subject of an author-generated license. Licenses could be set up to exceed or cut the statutory royalties payments. In the latter case, authors would have to explicitly state that they were waiving the right to receive minimum statutory royalties.

Infringement would constitute all other uses, uses for which no payment was made under a statutory or author license and for which there was no fair use or other statutory exception. How would *Am I Black or White?*, *We Arm the World*, and the *Naked Gun* advertisements fare under this structure?

Since *In Living Color* is a television show that is duplicated for reruns and may be recorded by the home viewing audience, its use of Michael Jackson's *Black or White* would not qualify as a fair use. *In Living Color* could still use Michael Jackson's work, but would have to pay royalties under either a compulsory license or an author license. Failure to pay royalties would constitute infringement and Michael Jackson would be entitled to section 502 through 505 remedies,[74] including an injunction and attorney's fees.

The Capitol Steps would face a similar outcome because it not only performs publicly, but it also records its music for public sale. Thus, it would be required to pay royalties under a compulsory or author license. For this reason, I anticipate that Capitol Steps would probably oppose Congress's adoption of my proposal.

The *Naked Gun 33-1/3, The Final Insult* advertisement would also not qualify for the fair use exception. Annie Leibovitz would only be able to stop the advertisement if she could prove that her

74 17 U.S.C. §§ 502-505 (1994).

photo was not subject to the compulsory license scheme, and that she had not granted an author license.

This scheme may bring a measure of consistency, predictability, and coherence to the fair use drama, or it may generate more law review articles attacking why it will not work. In the latter case, this article will become a target for criticism, but hopefully not the subject of a parody.