THE ART OF MAKING LAW FROM OTHER PEOPLE'S ART

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I. SETTING THE STAGE

There are few musical groups that have generated more important litigation involving their work than 2 Live Crew.[1] For this reason, it is easy to see why many people believe that Luther Campbell and 2 Live Crew make better law than music. The 1990s have found 2 Live Crew plagued with many legal battles. For example, in March 1990, 2 Live Crew was involved in a much publicized free speech controversy concerning its album, *As Nasty As They Wanna Be.*[2]

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[1] 2 Live Crew is a controversial rap-music group from Miami, Florida, whose members include Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon. Luther Campbell, the group's lead vocalist and songwriter, is a former gang member who is now the president, secretary, sole shareholder, and sole director of Luke Records, Inc. *See* Lisa Russell, *2 Live Crew's Luke Campbell Is Keen For Green, Not the Obscene*, PEOPLE, Nov. 5, 1990, at 71.

[2] In March 1990, a two-year legal battle began when Nick Navarro, the sheriff of Broward County, Florida (Fort Lauderdale), filed suit in Broward County Circuit Court to stop the retail sale of 2 Live Crew's album *As Nasty As They Wanna Be.* In mid-February 1990, the Broward County Sheriff's Office began an investigation of the *Nasty* recording in response to complaints by South Florida residents. Deputy Sheriff Mark Wichner was assigned to the case. On February 26, 1990, he traveled to Sound Warehouse, a Broward County retail music store, and purchased a cassette tape copy of the *Nasty* recording. After listening to it, he went to Broward County Circuit Court for a "probable cause" determination. *See* Bruce Rogow, *Essay: Too Live a Crew*, 15 NOVA L. REV. 241 (1991).

The court's decision, finding probable cause to declare the album obscene, prompted Navarro to warn retailers that they would be subject to arrest for obscenity if found selling the album. Judge Grossman relied upon the Florida obscenity statute. *See* FLA. STAT. ANN. § 847.011 (West 1995). Similar declarations of obscenity were made in Volusia County and Lee County, Florida. *See Volusia Grand Jury Finds 2 Live Crew's Album Obscene*, UPI, Apr. 17, 1990. The initial decision by Broward Circuit Judge Grossman spurred an immediate rush on Broward County music stores. When the sheriff's office sought to enforce the decision, it found that most of the albums had been snapped up. *See* Tom Davidson, *Police Warns Stores About Album's Sale*, SUN SENTINEL, Mar. 13, 1990, at 1B.

2 Live Crew responded by bringing a civil rights action against the sheriff in United States District Court. *See* Skywalker Records v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990); David R. Ellis, *As Fair As They Wanna Be*, 68 NOVA FLA. B.J. 83 (1994). The original federal complaint brought by the record company and the four members of 2 Live Crew sought a declaratory judgment that the recording was not obscene. The complaint was quickly amended to include a count challenging the sheriff's actions as a prior restraint. *See* Rogow, *supra*, at 245.

After a three day trial, the court declared the record to be obscene. The court specifically stated that "[t]he recording *As Nasty As They Wanna Be*, taken as a whole, is legally obscene . . . . The Court also finds *As Nasty As They Wanna Be* to be legally obscene under

At the same time that *As Nasty As They Wanna Be* generated its First Amendment whirlwind, the "clean" version, *As Clean As They Wanna Be,* planted the seeds for another 2 Live Crew legal assault. Included on the *As Clean As They Wanna Be* album was a parody of the rock ballad written by Roy Orbison and William Dees and sung by Orbison: *Oh, Pretty Woman.* The 2 Live Crew version was entitled *Pretty Woman.* The writers of *Oh, Pretty Woman,* Orbison and Dees, and the original publisher, Acuff-Rose Music, Inc. both received credit on the 2 Live Crew album and disc covers.[3]

Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records,[4] in Tennessee federal court, claiming "copyright infringement, interference with business relations, and interference with prospective business advantage for the performance and distribution of a copy of *Oh, Pretty Woman.*"[5] The district court

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the *Miller* Test . . . ." *Skyywalker Records,* 739 F. Supp. at 596. For a more detailed analysis of the obscenity trial, see Rogow, *supra,* at 250.

Despite the district court decision, Charles Freeman, owner of a small Fort Lauderdale record store (E.C. Records) serving an African-American clientele, continued to carry the record *As Nasty As They Wanna Be,* challenging the sheriff to arrest him. On June 8, 1990, Freeman sold a copy of the album to a sheriff's undercover officer; he was subsequently arrested.

A few days later, 2 Live Crew performed songs from the record at a Broward County nightclub. This performance resulted in the members' arrests. For an account of these arrests, see Rogow, *supra,* at 252-53; *see* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 656-57 (1992) (hypothesizing that the arrests were partially the result of right wing pressure from religious vigilantes). For further background on the arrests, see Bill Holland, *Courts Get Hip to 2 Live Crew Parody Case: Justices Show Awareness of Business Lingo,* BILLBOARD, Nov. 20, 1993, at 13.

Freeman, the record seller, was tried and convicted but then the conviction was reversed on appeal. *See* Freeman v. State, 594 So. 2d 834 (Fla. Dist. Ct. App. 1992). The 2 Live Crew members were also tried and acquitted. *See* State v. Campbell, No. 90-17616-MM-10 A,B,C (Broward County Ct. Oct. 20, 1990). "The panel included a 76-year-old woman—who said the cuss words weren't anything new to her—and another jurist so moved by Campbell's poetic licentiousness that she suggested delivering the verdict in rap." Russell, *supra* note 1, at 71.

The district court's original obscenity finding was also reversed on appeal in a unanimous decision by the United States Court of Appeals for the Eleventh Circuit. Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir.), *cert. denied,* 113 S. Ct. 659 (1992). For a more thorough account of this decision, see Rogow, *supra.*

[3] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1432 (6th Cir. 1992), *rev'd,* 114 S. Ct. 1164 (1994).

[4] The 2 Live Crew publisher, Skyywalker Records, derived its name from Luther Campbell's street nickname; it was solely owned by band member, Luther Campbell. "Skyywalker" posed another legal problem. After the *As Nasty As They Wanna Be* flap broke, George Lucas sued, claiming misuse of his Skyywalker trademark. That was settled and Skyywalker Records became Luke Records. The obscenity cases carried the Luke Records style, but the copyright case hewed to the former name.

[5] Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991), *rev'd,* 972 F.2d 1429, *rev'd,* 114 S. Ct. 1164. Acuff-Rose also contended that 2 Live Crew's version of *Oh, Pretty Woman* would decrease the value of the copyright. More importantly, Acuff-Rose argued that both the melody and the lyrics of the first verse in 2 Live Crew's version were substantially similar to those of the original version. 2 Live Crew countered by arguing its version of *Oh, Pretty Woman* was a parody within the meaning of fair use under the Copyright Act. Thus, the question before the Court was whether 2 Live Crew's *Pretty*

granted summary judgment in favor of 2 Live Crew, finding the parody to be a "fair use" under federal copyright law.[6] The Sixth Circuit reversed,[7] setting the stage for the first Supreme Court "fair use" parody decision: *Campbell v. Acuff-Rose Music, Inc.*[8]

II. NARROWING THE ISSUES

Although appeals can create a sprawling record of testimony, pleadings, exhibits, and arguments, appeals issues are usually resolved through a narrower approach than trials, focusing only on relevant parts of the record. In a trial, a sentence or a single document can make the difference. In an appeal, a concept or a phrase from a previous case can provide the basis for the appellate decision. This was illustrated by the *Acuff-Rose* case.

In *Acuff-Rose*, the Court focused on: (a) the definition of parody and (b) the amount of weight that should be given to two sentence fragments in two cases—*Sony Corp. of America v. Universal Studios, Inc.*,[9] and *Harper & Row, Publishers, Inc. v. Nation Enterprises.*[10] However, to understand the outcome of the case, one must compare the way the oral argument and opinion addressed three elements: (1) parody; (2) the presumption regarding commercial use; and (3) the effect on the potential market for the

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Woman constituted a fair use of the copyrighted *Oh, Pretty Woman*, according to the Copyright Act. *Id.*

6 17 U.S.C. § 107 (1994). The section in its entirety states:

> § 107. Limitations on Exclusive Rights: Fair Use
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> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyright work.
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> 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. *See Acuff-Rose*, 754 F. Supp. at 1150.

7 *Acuff-Rose*, 972 F.2d at 1429.

8 114 S. Ct. at 1164.

9 464 U.S. 417 (1984). The critical language in *Sony* states that "every commercial use . . . is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner." *Id.* at 451.

10 471 U.S. 539 (1985). The *Harper & Row* Court remarked that the effect on the potential market for the original is "undoubtedly the single most important element of fair use." *Id.* at 566.

original.[11]

III. Defining Parody

The first question posed by the Court was: what is parody?[12] Campbell's counsel tested broad definitions of parody certain to be endorsed by various amici curiae interests.[13] The colloquy that followed illustrates how an advocate must know when to give up, as well as how to use the Court's questions as a segue to shift from defining parody to addressing the pertinent cases.

> JUSTICE O'CONNOR: How do you define parody?
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> MR. ROGOW: A parody imitates and ridicules. It pokes fun at the original. And there are many definitions of parody—
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> JUSTICE O'CONNOR: So it has to poke fun at the original work.
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> MR. ROGOW: Not necessarily. It can poke fun at the original, or it can poke fun at something else using the original work. There are two aspects of the criticism. One would be criticism of the original work, the other would be criticism of society using the original work as a means of conveying that criticism.
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> JUSTICE KENNEDY: So that any time someone takes a melodic line and substitutes new lyrics, that is permitted so long as it is making fun of something else in society.
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> MR. ROGOW: As long as—yes, Justice Kennedy, as long as it is making fun of something else in society or the original, because that is the purpose of parody.
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> JUSTICE O'CONNOR: Well, Mr. Rogow, that's a little broader than it needs to be, isn't it, for this case?
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> MR. ROGOW: For this case—

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[11] This was vividly demonstrated through the oral argument. *See* Official Transcript of the Proceedings Before the Supreme Court of the United States at 5, Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) (No. 92-1292) [hereinafter Official Transcript]. *The Justices who asked the questions are not identified in the Official Transcript; those* attributions are based on the author's notes made after the argument. During oral argument the Court remarked to counsel for Campbell, "the Sixth Circuit agreed with you that we are dealing with parody, where did the Sixth Circuit go wrong?" In response, the author remarked: "[b]y applying a presumption that if it is a commercial parody, then it is presumptively harmful to the market. And they drew that from the language in *Sony* and *Harper & Row v. Nation Enterprises.*" *Id.* at 10.

[12] *Acuff-Rose*, 114 S. Ct. at 1164. The Supreme Court reversed a decision by the Sixth Circuit that the commercial nature of a parody precluded a finding of fair use. A unanimous Court held that fair use cannot be presumed without consideration of all relevant factors. The Court concluded that for parody to be a fair use, the parodic character of the work must be reasonably perceived without regard to taste.

[13] These interests include such political satirists as Mark Russell, the *Capitol Steps*, and the *Harvard Lampoon*. *See infra* note 40 and accompanying text.

> JUSTICE O'CONNOR: Don't we have a situation here where it's making fun of the original?
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> MR. ROGOW: We do, Justice O'Connor. And for this case—
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> JUSTICE O'CONNOR: And I would have thought that maybe Harper & Row, the case we had here a few years ago, refused to recognize a fair use exception even for political commentary. So I think your position that a parody, if it's directed at something other than the original work, should have some kind of all-encompassing provision as being a fair use.
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> MR. ROGOW: Justice—
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> JUSTICE O'CONNOR: I mean that's—that's a pretty big step to take.
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> MR. ROGOW: Justice O'Connor, for this case it is true that the parody in this case only poked fun at the original. And one could limit this case to just those facts and that would be quite fine. Harper & Row is actually quite helpful to us, because Harper & Row—it is true, it was the Nation, a news magazine, but it materially impaired the market for the Harper & Row publication. And I think that's the other important factor here, impairment of the market.[14]

The Court ultimately structured its opinion on parody along the same lines as the above argument. It seemed to accept, at least to some degree, counsel's argument that "fair use" may extend beyond the narrow definition of "only pok[ing] fun at the original;" as long as it mimics the original and creates a new work, it will be a "fair use." Summarizing his opinion and defining parody, Justice Souter stated:

> For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. . . . If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.[15]

Justice Scalia further warned potential plagiarists: "[Y]ou can make fun of society. You can criticize society in a lot of different ways;

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[14] Official Transcript, *supra* note 11, at 3-5.
[15] *Acuff-Rose*, 114 S. Ct. at 1172.

why do you have to take my tune to do it?"[16]

Convinced that the 2 Live Crew work was a parody,[17] the Court also rejected label requirements as necessary to claim fair use protection:

> We note in passing that 2 Live Crew need not label its whole album, or even this song, a parody in order to claim fair use protection, nor should 2 Live Crew be penalized for this being its first parodic essay. Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).[18]

Perhaps this view was inspired by the unusual response of Acuff-Rose's counsel to whether 2 Live Crew's song was "recognized in . . . reviews as a parody, or just another rap or music:"[19]

> MR. ROSDEITCHER: Your Honor, I—if I can go off the record, I originally bought this record when I was in the running for coming onto this case. I went into Sam Goody and I went to the rap section and I pulled this off the shelf next to 2 Live Crew's other rap songs. That's where the—that's where it's viewed. That's where it's sold.[20]

This personal experience statement had little bearing on the Court's findings. It ultimately concluded that parody has some protection no matter where the work was sold or how it was reviewed.

Unlike parody, satire faces an ambiguous claim to the fair use defense. Assuming one can even define the difference:

> [p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrow-

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16 Official Transcript, *supra* note 11, at 7.

17 *Acuff-Rose*, 114 S. Ct. at 1173:
While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

18 *Id.* at 1173 n.17.

19 Official Transcript, *supra* note 11, at 41.

20 *Id.*

> ing. . . . [N]o workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and non-parodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.[21]

The Court reaffirmed that "the ends of the copyright law" must be measured by the four statutory factors: (1) the purpose and character of use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect on the market for the copyrighted work.[22] The Sixth Circuit's focus on the commercial nature of the use failed to employ this analysis:

> The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony*, that "every commercial use of copyrighted material is presumptively . . . unfair. . . ."[23] In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.[24]

Justice Souter emphasized that *Sony* stood for a "sensitive balancing of interests," and that "[t]he Court of Appeals' elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* as it does to the long common-law tradition of fair use adjudication."[25] It is quite astounding to see the difference a sentence can make depending upon which court wields the pen.

IV. The Fair Use Focus Narrows

Once the Court exhausted its discussion of parody, it then concentrated on the fair use doctrine. Acuff-Rose's counsel was asked point blank: "[D]o you think that a commercial use can ever be a fair use?"[26] Counsel replied "yes," and recognizing the vulner-

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21 *Acuff-Rose*, 114 S. Ct. at 1172. In the opinion, the Supreme Court accepted the definition of a satire as either a work "in which prevalent follies or vices are assailed with ridicule," The Oxford English Dictionary 500 (2d ed. 1989), or are "attacked through irony, derision, or wit." The American Heritage Dictionary 1604 (3d ed. 1992).

22 17 U.S.C. § 107.

23 *Sony*, 464 U.S. at 451.

24 *Acuff-Rose*, 114 S. Ct. at 1173-74.

25 *Id.* at 1174.

26 Official Transcript, *supra* note 11, at 44.

ability of the Sixth Circuit's holding, sought to salvage its decision by providing an alternative definition to the Sixth Circuit holding:

> MR. ROSDEITCHER: [T]he Sixth Circuit could have been clearer on this, I acknowledge, but I believe that the commercial use presumption means something like this. You have to look at the commerciality to see what purpose the so-called parodist or news reporter or critic or comment—commentator is doing.[27]

Shortly thereafter, Acuff-Rose's counsel reached the primary theme of his argument—2 Live Crew stole the heart of *Oh, Pretty Woman*:

> Rap music is danceable music. Rap music needs music. And they took our music. . . . They profited here, in addition, because they needed music and they need dazzling, good music, and they took one of the great rock and roll classics. . . . They took the guitar riff. Now, in the Orbison and Dees work they play it 10 times. They played it 16 times. At one point they play it 8 times. They played it because it's one of the most wonderful, danceable, dynamic musical works of rock and roll—this record of Orbison and Dees was one of the all-time hits—and they played it over and over again to dazzle, to have a good hear, to have a good dance. And then they say we can now profit and free ride on the genius of Roy Orbison and Bill Dees. That's what they were about.[28]

This attempt to portray the members of 2 Live Crew as thieves was difficult given Campbell's request for permission and subsequent offer to pay for the use of *Oh, Pretty Woman*, and his deposit of $13,000 (the statutory licensing rate) in the district court registry.[29] Justice Scalia zeroed in on the critical non-legal issue of remuneration.

> JUSTICE SCALIA: Mr. Rosedeitcher, I assume you would have given a license if they had offered you enough money for it. (Laughter.). . . They just weren't . . . [w]illing to pay you enough to induce you to give over the song to that use. . . . Now we're talking money here.[30]

During the rebuttal by 2 Live Crew's counsel, Justice Scalia added:

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27 *Id.* at 26.

28 *Id.* at 28, 29, 37.

29 *See Acuff-Rose*, 972 F.2d at 1432; *see also* Holland, *supra* note 2, at 13. For more information on compulsory licensing, see MELVILLE NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.04 (1995). The payment in this case seems to suggest consent on the part of Acuff-Rose for monetary remuneration.

30 Official Transcript, *supra* note 11, at 34-35.

> JUSTICE SCALIA: [B]ut Mr. Rosedeitcher is right that the reason people bought this record and the reason the record was sold to them was largely for the music and not for the—for the subtle parody. Then—then they have suffered a loss. That money should have been their money rather than your money. . . . You're making money from their music, if he's right about that—about that premise.[31]

Justice Scalia's inquiries set the stage for the ultimate question: how does one measure the money the copyright holder has lost if the work is a parody? The acknowledgment that money, not law, is the reason for fair use fights, prompted Justice Souter's reference to Samuel Johnson's[32] pronouncement that "[n]o man but a blockhead ever wrote, except for money."[33]

V. Measuring the Money

The Court continued its discussion by focusing on the monetary aspects inherent within the dispute.

> JUSTICE O'CONNOR: Now, what is the market that we should look at. Is it the market for parodies, or is it the market—do we look at whether it would supplant, somehow, the demand for the original work? What is it we look at?
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> MR. ROGOW: You . . . look at, Justice O'Connor; would it supplant the demand for the original work in . . . multiple venues, not just a single venue . . . .
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> JUSTICE O'CONNOR: And what were the findings of the district court as to that in this case?
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> MR. ROGOW: That it did not adversely affect the market. It did not supplant the original Orbison-Dees song. It did not impair its market.[34]

Justice Souter's discussion of the fourth fair use factor answered his earlier question: whether "the market [should] be defined broadly enough to include all the possible adaptations that the copyright owner might want to . . . make or to license?"[35]

> The effect of the use upon the potential market for or value of the copyrighted work requires courts to consider not only the

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31 *Id.* at 52.

32 Samuel Johnson (1709-1784) was an English poet, essayist, critic, journalist, lexicographer, and conversationalist who was generally regarded as one of the outstanding figures of the 18th Century. 6 Encyclopaedia Britannica 594 (15th ed. 1995).

33 *Acuff-Rose*, 114 S. Ct. at 1164 (quoting 3 James Boswell, Life of Johnson 19 (G. Hill ed. 1934)).

34 Official Transcript, *supra* note 11, at 10-11.

35 *Id.* at 12.

> extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original. The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.[36]

This assessment, utilizing the fundamentals of a fair use analysis, hewed to the accepted copyright norms, but added a gloss reserved for parodies as new works deserving of protection:

> Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. . . . This is so because the parody and the original usually serve different market functions.[37]

Justice Kennedy then asked whether it is "fair that the person who creates the parody receives 100 percent of the profit." Counsel responded:

> MR. ROGOW: The thrust of my case is that if a parody is a creative, true parodic work, then is it—it is entitled to be called a fair use unless there is evidence that it has materially impaired or supplanted the market for the original. The original does not hold the absolute right to preclude any other use of that original work. . . .[38]

This pivotal statement underlies why the fair use doctrine applied to 2 Live Crew's parody of *Oh, Pretty Woman.* By accepting this reasoning, the Court acknowledged that human nature, literature, and the law require the protection of parodies from copyright holders. Thus, "fair use" protection for parody, as distinct from satire, stems partially, but not exclusively, from non-legal factors.

> This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectable derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential li-

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[36] *Acuff-Rose*, 114 S. Ct. at 1177 (internal quotation marks and citations omitted) (ellipsis in original).

[37] *Id.* at 1177-78.

[38] Official Transcript, *supra* note 11, at 24.

censing market. "People ask . . . for criticism, but they only want praise."[39]

The Court, quoting from *Of Human Bondage*, recognized that law, life, literature, and music are all intertwined.[40]

VI. CONCLUSION

The Supreme Court ultimately remanded *Campbell v. Acuff-Rose* to the trial court for a determination of the effect on the market, *sans* the commercial use presumption.[41] Subsequent proceedings have not occurred and the parties may avoid them by amicably resolving the case. As of now, negotiations are pending.

While this modern African-American hip-hop group provided the Supreme Court of the United States with a vehicle to liberate the ancient Greek art form of "parodeia,"[42] *Campbell v. Acuff-Rose* left important questions unanswered. The line between satire and parody, as well as between parody and plagiarism is still not clear since, as the Court stated, each case must be addressed individually.[43] Certainly, the Court's language favoring parody will give parodists and satirists comfort. Parodists and satirists are given even further comfort since the difficulties and expense of litigating fair use will inhibit copyright holders from initiating lawsuits. Thus, the *Campbell v. Acuff-Rose* decision means that more voices will be heard.

Finally, the legal advocacy lessons learned from *Campbell v. Acuff-Rose* are apparent. A word, a case phrase, posed questions from the bench, an understanding of human nature, history, and literature all contribute in making law. Making music legal is now an art form too.

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[39] *Acuff-Rose*, 114 S. Ct. at 1178 (quoting W. SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (Penguin ed. 1992)).

[40] Money, race, rock and roll, law, and ego were the elements that made *Campbell v. Acuff-Rose* fun to litigate. The *Harvard Lampoon's* amicus curiae brief—the first in its history—added to the pleasure. Explaining the Lampoon's long history of parody, and the subsequent successes of former Lampoon alumni, the Lampoon noted: another Lampoon alumnus, Levin Hicks Campbell was appointed by President Nixon to the United States Court of Appeals for the First Circuit. Some Lampoon alumni, however, have not fared as well. Elliot L. Richardson, for example, had difficulty holding onto a job during the Nixon Administration. Brief Amicus Curiae of The Harvard Lampoon, Inc., in Support of Petitioners at 8 n.2, Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) (No. 92-1292).

[41] *Acuff-Rose*, 114 S. Ct. at 1179. Evidence is needed to determine not just market harm, but also the character and purpose of use.

[42] *Id.* at 1172. The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson's Court of Appeals dissent, as "a song alongside another." *Acuff-Rose*, 972 F.2d at 1440 (quoting 7 ENCYCLOPAEDIA BRITANNICA 768 (15th ed. 1975)).

[43] *Acuff-Rose*, 114 S. Ct. at 1170.