SEPARATING THE SHEEP FROM THE GOATS: CELEBRITY SATIRE AS FAIR USE

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INTRODUCTION

Copyright law promotes the progress of the arts by permitting authors to derive—to the exclusion of others—economic benefit from their creations, thus providing authors with a financial incentive to create.[1] In spite of this general proposition, the doctrine of fair use, now codified in the Copyright Act itself,[2] restricts authors' exclusive rights in order to promote further learning.[3] The Act directs courts to examine (among other things), the purpose of the defendant's appropriation,[4] but does not clearly define which purposes are valid and which are not. Thus, to separate "the fair use sheep from the infringing goats," courts have developed categories of valid uses.[5] In *Campbell v. Acuff-Rose Music, Inc.*,[6] the U.S. Supreme Court validated one such category by holding that it is not copyright infringement to borrow copyrighted elements from a work in order to parody that work[7] by imitating it in such a way that the audience recognizes the mimicry, but modifying it so that it appears ridiculous.[8]

According to a literal reading of the Court's opinion, a parody must target the style or substance of the borrowed work to claim the parody defense;[9] if the defendant borrowed from a work to target something *other than* the work itself, the defendant created a satire.[10] In dis-

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1 *See* Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

2 *See* 17 U.S.C. § 107 (2006). The four factors are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion taken, and (4) the effect on the market for the original or its derivative works. *Id*.

3 *See* WILLIAM F. PATRY, PATRY ON FAIR USE § 1:3 (2010).

4 *See* 17 U.S.C. § 107(1).

5 In *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 586 (1994), Justice Souter speaks of "separating the fair use sheep from the infringing goats," a reference to the biblical parable in which Jesus sits upon a throne and places the righteous sheep on his right and the sinning goats on his left, *Matthew* 25:31–46.

6 510 U.S. 569.

7 *See id*. at 579 ("We thus line up with the courts that have held that parody . . . may claim fair use under § 107.").

8 *See id*. at 580.

9 *See id*. ("[T]he 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*." (emphasis added)). The Encyclopedia Britannica defines parody as "a form of satirical criticism or comic mockery that imitates the style and manner of a particular writer or school of writers." ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com (last visited Sept. 19, 2010) (defining "parody").

10 *See Campbell*, 510 U.S. at 581 n.15 (defining "satire" as "a work 'in which prevalent follies or vices are assailed with ridicule,' or are 'attacked through irony, derision, or wit'" (internal citations omitted)). Encyclopedia Britannica defines it as an "artistic form, chiefly literary and dramatic, in which human or individual vices, follies, abuses, or shortcomings are held up to censure by means of ridicule, derision, burlesque, irony, parody, caricature, or other methods, sometimes with an intent to inspire social reform." ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com (last visited Sept. 19, 2010) (defining "satire"). The Court's use of the

tinguishing these two forms, the Court explained that parody is inherently justified because the parodist must evoke the work on which he intends to comment, whereas the satirist has no such justification when he comments on some idea unrelated to the borrowed work.[11]

In recent years, some defendants have attempted to expand the boundary of the parody rule by arguing that a parody may target not only the borrowed work, but also its author—or even a person that the public perceives to be associated with its creation.[12] An artistic work of criticism that targets an entity generally associated with a work rather than the work itself, which for the purposes of this Note will be referred to as "celebrity satire,"[13] thus finds itself somewhere between these two legal concepts. Because it attempts to ridicule social or individual fol-

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terms "prevalent follies or vices" implies that satire can only target broad social ills. Admittedly, most literary satire traditionally aimed its invective at major social vices. *See* DUSTIN H. GRIFFIN, SATIRE: A CRITICAL REINTRODUCTION 9–10 (1994). Nevertheless, this Note takes the position that a broader definition more closely captures the diversity of commentary that today's satirists are making, which includes criticism of the vices of individuals and groups as well. In any case, the author includes an alternative to the definition used by *Campbell* in order to suggest that a definition of satire can embrace criticism aimed at the characteristics or attitudes of a person. But this Note does not suggest that courts must adopt a new legal definition of satire in order to clarify the law in this area; rather, courts should ignore artistic jargon and focus on a proper application of the fair use factors.

11 *Campbell*, 510 U.S. at 580–81. Many scholars have questioned the continuing utility of this distinction, and some of those have advanced the argument that all parodies and satires should alike be protected as fair use. See, *e.g.*, Jonathan M. Fox, The Fair Use Commercial Parody Defense and How to Improve It, 46 IDEA 619, 639 (2006) (suggesting that courts consider the extent of the benefit already reaped by the copyright holder and the extent to which the work exists "in the national consciousness"); Daniel Austin Green, Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire, 11 CHAP. L. REV. 183 (2007) (proposing a five-factor test for satire based on principles of excuse and justification); David E. Shipley, A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright, 98 KY. L.J. 517, 565–72 (2010) (arguing that all satire should be deemed fair use); *see also* Blanch v. Koons, 467 F.3d 244, 255 (2d Cir. 2006) ("We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody. But the satire/parody distinction may nevertheless be relevant to the application of these principles."). However, to find that all satire is fair use would fail to fully account for the Court's concern that satirists might borrow for no reason but that creating new expression is difficult. *See Campbell*, 510 U.S. at 580.

12 *See, e.g.*, Henley v. DeVore, 733 F. Supp. 2d 1144, 1152–56 (C.D. Cal. 2010); Salinger v. Colting, 641 F. Supp. 2d 250, 257 (S.D.N.Y. 2009), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499, 507 (S.D.N.Y. 2009); Dr. Seuss Enters. v. Penguin Books USA, Inc., 924 F. Supp. 1559 (S.D. Cal. 1996).

13 This Note will use the term "celebrity satire" instead of the term "parody-of-the-author," coined by Judge Selna in *Henley*, 733 F. Supp. 2d at 1153, to emphasize that: (1) some of the cases that have satirized celebrities have not relied on parody, so use of the more encompassing term more accurately conveys the purpose of the criticism; and (2) the justification for this type of satire arises not because a given person was the "author" of the work, but because the public *associates* the individual (or entity) with the borrowed work. In some cases, that individual may be the author; however, the individual most associated with the work could be a different person, such as the recording artist, *see, e.g.*, *Henley*, 733 F. Supp. 2d 1144, the subject of the work, or even the namesake of a company highly identified with the work, *see, e.g.*, *Bourne*, 602 F. Supp. 2d 499.

lies, it is most certainly a type of satire. But since it comments on an idea related to the borrowed work—the associated celebrity—this form of critical art does not raise the concerns that *Campbell* expressed about satires more generally and, in fact, shares many legally relevant attributes with parody.

Celebrity satire can claim further support from precedent in the Second Circuit that has granted fair use protection to biographers who employ clips of a celebrity's works in order to tell the celebrity's story.[14] Just as a television biographer might use a brief segment of a song associated with a musician to illustrate what the work meant to the person's career, a celebrity satirist might use a music video to illustrate how the artist's association with the video has contributed to the way the public perceives the artist.

Celebrity satire's resistance to simple categorization should be a signal directing courts to reexamine the reasoning that underlies fair use based on commentary or criticism. Both *Campbell* and the biography cases in the Second Circuit share a recognition that a commentator can fairly appropriate a prior work when he could not have left the borrowed material out of the secondary work[15] without detracting from the impact of the criticism or comment.[16] Celebrity satire satisfies this criterion and should thus be considered a transformative fair use purpose.

Part I of this Note describes the fair use doctrine, particularly the recent focus by the courts on the concept of transformativeness. Part II examines the divergent approaches to fair use law that courts have taken with respect, on the one hand, to parody and satire, and, on the other, to biographies. Part III defines celebrity satire in relation to parody, satire,

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14 *See, e.g.*, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006) ("[C]ourts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects."); New Era Publ'ns Int'l v. Carol Publ'g Grp., 904 F.2d 152, 156 (2d Cir. 1990) ("[T]he author uses Hubbard's works for the entirely legitimate purpose of making his point that Hubbard was a charlatan and the Church a dangerous cult."); Hofheinz v. A & E Television Networks, 146 F. Supp. 2d 442, 446 (S.D.N.Y. 2001) ("[T]he use made of this particular footage . . . served to enrich the biography through the actor's perspective on his own work."); Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127, 137 (E.D.N.Y. 2001) ("[D]efendants' [d]ocumentary aims to educate the viewing public of the impact that [certain actors] had on the movie industry."); Craft v. Kobler, 667 F. Supp. 120, 126 (S.D.N.Y. 1987) ("[I]t is important for [the defendant] to quote the copyrighted material to support the instructive historical purpose on which his fair use claim is grounded.").

15 This Note will use the term "secondary work" to describe the defendant's later work, and the term "prior work" to describe the plaintiff's earlier, copyrighted work.

16 *See, e.g.*, *Bill Graham Archives*, 448 F.3d at 609 ("[B]iographies . . . require incorporation of original source material for optimum treatment of their subjects."); *New Era*, 904 F.2d at 156 ("[The] passages . . . are intended to convey the author's perception of . . . qualities that may best (or only) be revealed through direct quotation."); *Craft*, 667 F. Supp. at 126 ("[I]t is important for [the defendant] to quote the copyrighted material to support the instructive historical purpose on which his fair use claim is grounded.").

and biography, and then examines a series of recent cases in which courts struggled dealing with instances of celebrity satire. Part IV offers a rationale to protect celebrity satire as a valid category of fair use, reconciling the Supreme Court's reasoning in *Campbell* with the biography-related case law from the Second Circuit. Part V provides illustrative examples that demonstrate how courts can apply the framework proposed in Part IV. This Note concludes by suggesting that, rather than being an expansion of the parody doctrine, the framework proposed by this Note would put into place the reasoning expounded by the Supreme Court in *Campbell* in a manner that would strike a more sensible balance between copyright and fair use.

I. HISTORY OF FAIR USE

A. *Balancing Copyright and Fair Use*

The Constitution vests Congress with the power to promote "the Progress of Science and useful Arts."[17] By granting authors an exclusive monopoly over works that they create, copyright law gives authors a powerful financial incentive to create and disseminate valuable art.[18] However, while copyright law clearly protects the economic interest of authors, its role is ultimately to serve the public's interest in the social enrichment that comes from creative endeavors.[19] Thus, an author's right is not absolute; it should be limited whenever the monopoly given to authors ceases to serve this goal.[20]

English and American courts developed the doctrine of fair use in recognition of the truism that, to a significant degree, creativity is built upon the efforts of others and often involves reference to prior works.[21] Consequently, if courts do not imply the existence of fair use, the Copyright Act would rest on shaky constitutional ground in that the Act would likely stifle the very artistic and scientific progress the Constitu-

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17 U.S. CONST. art. I, § 8, cl. 8.

18 *See* Leval, *supra* note 1, at 1107.

19 PATRY, *supra* note 3, § 1:2 ("Fair use is an important safety valve that acts as a bulwark against the monopoly power that inheres in an exclusive right and which leads owners of such rights to act in ways contrary to the public interest."); Leval, *supra* note 1, at 1109 ("Copyright law . . . is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists . . . in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.").

20 *See* Leval, *supra* note 1, at 1109 ("Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective.").

21 PATRY, *supra* note 3, § 1:3 ("Fair use recognizes that much intellectual activity is based upon the efforts of others, and frequently involves referential activity.").

tion entrusts Congress to protect.[22] While courts consider fair use an affirmative defense to infringement (rather than a justification for denying that infringement took place),[23] the judges who were most responsible for creating the doctrine did not intend that fair use be styled as an unfortunate exception to a strong copyright rule; they intended that copyright and fair use be understood as a system, with both aspects synergistically encouraging learning.[24] Hence, for copyright law to function properly, courts must apply a robust fair use doctrine to balance author's rights with the public's interest in having access to further creative output.[25]

B. *The Fair Use Factors*

When Congress updated the Copyright Act in 1976, it added a section approving courts' application of the fair use doctrine.[26] The Act indicates that the first factor that courts should consider is the "purpose and character of the use"[27] made by the defendant. Secondly, courts must examine whether the "nature of the copyrighted work"[28] is highly expressive content, which is at the heart of what copyright law seeks to protect.[29] Because historical, biographical, and other nonfiction works are largely based on facts and ideas (neither of which is protectable[30]), borrowing from these works is less likely to result in infringement than borrowing from works of fiction, including musical, visual, or dramatic works, all of which contain significantly more creative expression.[31] The third factor addresses "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[32] Here, the law directs courts to balance the appropriation against the strength of the justification offered by the defendant.[33] In making this determination,

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22 *Id*.

23 *Id*.

24 *Id*. ("[F]air use must be viewed as an integral part of the system, and not a begrudging exception to a Hobbesian state of nature where ruthless enforcement of exclusive rights as private property is the ideal.").

25 *See id*.

26 *See* 17 U.S.C. § 107 (2006).

27 *See id*. § 107(1).

28 *See id*. § 107(2).

29 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

30 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985) ("[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality." (citation omitted)).

31 *See* Leval, *supra* note 1, at 1116–17.

32 17 U.S.C. § 107(3).

33 *Campbell*, 510 U.S. at 586–87 ("Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the

courts must consider not only the quantity used, but also its qualitative value.[34] In analyzing the fourth factor, courts examine "the effect of the use upon the potential market for or value of the copyrighted work."[35] In other words, courts must consider the likelihood that the secondary work will substitute for the original work in the marketplace.

C. *Transformativeness*

As part of the analysis of the first fair use factor, the defendant must be able to articulate a valid purpose for borrowing from the earlier copyrighted work.[36] The preamble to this section does indicate a preference for noncommercial,[37] educational, and critical uses,[38] but gives no other interpretive guidance.[39] The legislative history provides still more examples,[40] but these merely provide additional suggestions rather than a clear rule. Additionally, Congress intended not to replace the common law fair use doctrine with a statutory scheme, but rather to approve of the general purpose and scope of the doctrine.[41] Therefore, courts are left to make subjective judgments about which secondary uses promote the underlying purpose of copyright law, and which do not—and are thus not worth protecting.[42]

As the fair use doctrine developed, courts subscribed to the notion that a fair use was one that was "productive": a use in which there existed a socially laudable benefit to the public beyond that provided by the prior work,[43] as opposed to an "ordinary" use, in which the second-

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statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use.").

[34] *Id*. at 587 ("[The third] factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too.").

[35] 17 U.S.C. § 107(4).

[36] *See id*. § 107(1).

[37] *See id*. § 107. However, the Court rejected the notion that a parody artist's desire to earn money from the parody creates a presumption against fair use. *See Campbell*, 510 U.S. at 584. While commerciality is sometimes relevant in other fair use cases, this Note will focus on whether the parody or satire is transformative when discussing courts' analysis of the first fair use factor in parody and satire cases.

[38] 17 U.S.C. § 107; *see also Campbell*, 510 U.S. at 584.

[39] *See* Leval, *supra* note 1, at 1106. The Supreme Court noted that courts "may be guided by the examples given in the preamble." *Campbell*, 510 U.S. at 578.

[40] *See* H.R. REP. NO. 94-1476, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678–79.

[41] *See id*. at 21 ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute . . . .").

[42] *See* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y 513, 515 (1999).

[43] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478–79 (1984) (Blackmun, J., dissenting). According to William F. Patry, the concept is an "ancient one," and can be traced back at least to the 1810 English case of *Wilkins v. Aikin*. PATRY, *supra* note 3, § 3:9.

ary user merely puts the work to its original purpose without adding any social benefit.[44] But the advent of the videocassette recorder, at issue in *Sony Corp. of America v. Universal City Studios, Inc.*,[45] placed a great deal of strain on the concept. The court found that an individual's ability to "time-shift" television viewing by recording it was an "individually productive" use worth protecting, even if the social benefit of a single instance of private infringement is negligible.[46]

In the decade after *Sony*, courts gravitated toward a new iteration of this idea, now looking to the extent to which the secondary use is "transformative."[47] The new term, coined by Judge Pierre Leval,[48] focused the inquiry not on what social benefit the user adds to the original work, but on how the secondary work puts the original to a different purpose or uses the original in a different manner.[49] Thus, for Leval, a transformative use exists when the user takes the original work as "raw material" and creates something new.[50] Leval posited that a transformative use was not as likely as a nontransformative use to supersede the original work in the marketplace, but stressed that even transformative takings might not be fair use, particularly if the amount taken is excessive.[51] Four years after Leval published his thesis, the Supreme Court adopted the concept of "transformativeness" in its seminal *Campbell v. Acuff-Rose Music, Inc.* decision.[52]

Although courts generally address the question of transformativeness as part of their analysis of the first fair use factor, the outcome there has ripple effects across the remaining factors as well. The more transformative a work, the less likely it is to borrow excessively and the less likely it is to replace the original work.[53] As a result, it is perhaps

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[44] *See Sony*, 464 U.S. at 478 n.31 (citing LEON SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978)).

[45] 464 U.S. 417.

[46] *See id.* at 455 n.40. The majority in *Sony* cites several examples designed to reduce the significance of the "productive use" idea. For example, according to the majority, a teacher who reproduces copyrighted materials in order to prepare lecture notes is clearly putting the material to a productive use, but so is the teacher who copies in order to enrich his own personal understanding of his area of expertise, which presumably would lead to greater social benefit for his students. *Id.* Thus, the majority understood the flaw in the "productive use" concept to be that an individual can contribute benefit to society by first benefitting himself, and there seems to be no reason grounded in the law's understanding of fair use for prohibiting that individual use.

[47] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 501 U.S. 569 (1994); Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 13 (S.D.N.Y. 1992); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991).

[48] Leval explained the "transformativeness" concept in his influential law review article, *Towards a Fair Use Standard*, *supra* note 1.

[49] *Id.* at 1111.

[50] *Id.* Specifically, the new creation might lead to a variety of novelties, such as "new information, new aesthetics, new insights and understandings." *Id.*

[51] *Id.* at 1111–12.

[52] 510 U.S. 569, 579 (1994). *Campbell* is discussed in greater detail *infra* Part II.A.

[53] *Campbell*, 510 U.S. at 591.

not surprising that many consider the first factor to be the essential component of the fair use analysis.[54] Nevertheless, because a work that is not transformative is not necessarily infringing, and because a transformative work can fail the fair use analysis if it borrows more than is necessary,[55] courts must weigh all four factors.[56]

II. FAIR USE FOR CRITICISM OR COMMENTARY

Criticism and commentary—usually uttered in the same breath—are today important categories of fair use.[57] This group includes works that range from serious literary criticism, such as book reviews[58] and biographies,[59] to more artistic commentary, such as parody and satire.[60] In 1994, the Supreme Court gave its approval to parody while distinguishing parody's claim to transformativeness from that of satire, finding that parody is more justified because it directly comments on the work itself rather than on some other aspect of society—as satire does.[61] However, in order to understand the Court's holding in its proper context, it is useful to consider how courts have analyzed biography, a type of criticism that shares with satire the need to use the subject's prior words in order to illustrate an argument rather than to criticize the words themselves.

A. *The Court Validates Parody*

In *Campbell*, the rap group 2 Live Crew released a song called "Pretty Woman," which they intended to be a parody of the Roy Orbison and William Dees hit, "Oh, Pretty Woman."[62] In ruling in favor of 2 Live Crew, the Court explicitly put its stamp of approval onto parody, in the process providing a significant amount of guidance to judges deciding future cases in this area.

The Court began by summarizing the history of fair use,[63] and then proceeded to apply the first fair use factor—the purpose and character of the use. Without much fanfare, the Court declared that parody in

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54 Leval, *supra* note 1, at 1116 ("Factor One is the soul of fair use.").
55 *Campbell*, 510 U.S. at 579.
56 *Id*. at 590–91.
57 PATRY, *supra* note 3, § 3:52.
58 *Id*.
59 *See* cases cited *infra* note 99.
60 *See Campbell*, 501 U.S. at 579.
61 *See id*. at 579–81.
62 *Id*. at 572.
63 *See id*. at 575–79.

general may claim fair use as a transformative work.[64] The opinion then defined the limits of parody, holding that if the commentary is not critical of the substance or style of the original work, such that the defendant can be said to be borrowing in order to bring attention to the defendant's work or avoid having to invent new material, its justification weakens.[65] The Court noted, however, that a finding in favor of the defendant as to the third and fourth factors might lead looser forms of parody—and even satire—to be fair use.[66] Hence, it would be inaccurate to suggest that all parodies are presumptively justified, particularly considering that a given parody may contain several nonparodic elements.[67] Likewise, a satire that provides little commentary on the borrowed work does not necessarily fail to state a fair use claim.

The Court then applied the remaining factors to parody.[68] In its view, the second factor[69] is unlikely to be much help to a court when analyzing a parody defense.[70] As to the third factor,[71] while any work can appropriate too much, or take from the most valuable portions of the original, the Court held that the law should take account of the fact that a parodist may have to appropriate the original work's most recognizable features in order to make the parody effective.[72] The majority opinion concludes by clarifying the relevant considerations under the fourth factor.[73] The Court counseled judges not to presume that a work's commerciality will harm the market for the original,[74] and not to consider the negative effect that the criticism may have on the value of the original work.[75] Rather, courts must look into whether the parody risks substituting for the original work in the market, satisfying the

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64 *Id*. at 579 ("Suffice it to say now that parody has an obvious claim to transformative value.").

65 *Id*. at 580 ("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. . . .").

66 *Id*. at 580 n.14.

67 *See id*. at 581.

68 *See id*. at 586–94.

69 The second factor examines "the nature of the copyrighted work." 17 U.S.C. § 107(2) (2006).

70 *Campbell*, 510 U.S. at 586.

71 The third factor examines "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3).

72 *Campbell*, 510 U.S. at 588.

73 The fourth factor examines "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(2).

74 *Campbell*, 510 U.S. at 590–91 ("[The Ninth Circuit] resolved the fourth factor against 2 Live Crew . . . by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.").

75 *See id*. at 591–92.

same desire as does the original, or risks harm to a potential derivative market that the plaintiff is entitled to exploit.[76]

The Court's analysis proceeded through two broad steps. First, the Court determined that parody is worth protecting since a parodist cannot—without abandoning the parodist's chosen commentary—substitute the appropriation with fresh material.[77] Furthermore, the Court acknowledged that parody has a social benefit that justifies some disparagement of—and the resultant potential economic harm to—the prior work.[78] In the Court's view, parody should not be limited by the effect that the critical speech might have on the author's personal feelings or the public image of the work.[79]

Second, having determined that parody is justified, the Court found that the third and fourth fair use factors can be effectively applied in parody cases to balance the conflicting interests of the parties.[80] The Court determined that the third factor can be applied to parody as in other fair use cases, with the caveat that courts must be cognizant of parody's need to borrow enough material to conjure up the original work—which may involve appropriating its more important parts.[81] As for the fourth factor, the Court felt that most parodies are unlikely to substitute for the original work in the marketplace, assuming the parodist borrows no more than is reasonably necessary.[82] But despite this general proposition, some parodies may limit a plaintiff's ability to license the author's work to others for the purpose of making derivative works, such as adaptations to different media or genres.[83] Though these determinations are always a challenge for courts to make, the *Campbell* majority provided clear guidance specific to the unique challenges that parody presents with respect to the fair use factors, showing its confi-

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[76] *See id*. at 591–93.

[77] *Campbell*, 510 U.S. at 580–81 ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination . . . .").

[78] *Id*. at 579 ("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.").

[79] *See id*. at 591–92 ("[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act."). The Court clarified that copyright law protects against economic harm that results from the secondary work's substituting for the original, but does not protect the original from harm that results from criticism. *See id*. at 592 ("This distinction between potentially remediable displacement and unremediable [sic] disparagement is reflected in the rule that there is no protectible [sic] derivative market for criticism.").

[80] *See id*. at 581 ("[P]arody, 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.").

[81] *See id*. at 588 ("Parody's humor . . . necessarily springs from recognizable allusion to its object through distorted imitation. . . . 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.").

[82] *See id*. at 591.

[83] *See id*. at 590–91.

dence that lower courts will be able to strike a proper balance between copyright and fair use in the parody arena.

In a separate concurring opinion, Justice Kennedy showed greater faith in the ability of courts to adhere to a bright-line parody rule, thereby making the parody analysis more uniform.[84] He believed that if courts stray from enforcing the requirement that parody target the original work, a defendant might create a weakly transformative derivative of the original, claiming parody as a post-hoc rationalization.[85] His opinion contrasts strongly with the majority's more nuanced approach to parody, illuminating the extent to which *Campbell* gives lower courts the flexibility to permit weaker parodies and satires that do not borrow excessively and have a negligible effect on the market for the original work.[86] Thus, *Campbell* should be understood not as a case that enshrines parody to the exclusion of other related genres of criticism, but as a case that lays down certain fair use principles more closely applicable to forms of artistic social criticism.

B. *Biography As Fair Use*

It is not only parodists and satirists who comment about public figures. Critical biographers often engage in serious criticism that targets a specific individual or group.[87] Their work intersects with copyright law when the biographer borrows from another author's copyrighted work to illustrate a larger argument about the biographer's subject, a purpose the Second Circuit has in general agreed is a valid fair use purpose under the first fair use factor.[88]

In *Hofheinz v. A & E Television Networks*,[89] the Southern District of New York extended this reasoning beyond appropriating the sub-

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84 *See id*. at 597–98 (Kennedy, J., concurring) ("If we keep the definition of parody within these limits, we have gone most of the way towards satisfying the four-factor fair use test in § 107.").

85 *See id*. at 600. For a general discussion of the two opinions, see Green, *supra* note 11, at 189.

86 *Compare Campbell*, 510 U.S. at 599 (Kennedy, J., concurring) ("The fair use factors thus reinforce the importance of keeping the definition of parody within proper limits. More than arguable parodic content should be required to deem a would-be parody a fair use."), *with id*. at 580 n.14 ("[W]hen there is little or no risk of market substitution . . . 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.").

87 *See* ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com (last visited Sept. 19, 2010) (defining "biography").

88 *See* cases cited *supra* note 14. In fact, in *New Era*, the court specifically approved quotations included for the purpose of illustrating by juxtaposition the contrast between the subject's pomposity on the one hand, and his banality on the other, 904 F.2d 152, 156 (2d Cir. 2001), a purpose very similar to that of the celebrity satirist, as discussed in greater detail *infra* Part III.

89 Hofheinz v. A & E Television Networks, 146 F. Supp. 2d 442 (S.D.N.Y. 2001).

ject's words, finding that a biographer can fairly incorporate examples of copyrighted works associated with the biographer's subject.[90] The defendant had produced a video biography of actor Peter Graves.[91] The program showed clips of Graves in some of his early films—films in which the copyright was held by the plaintiff—in order to demonstrate the types of roles that the actor chose at that point in his career, and his reasons for choosing them.[92]

The court found without hesitation that the clips were used for a transformative purpose,[93] and, since it satisfied the remaining factors, the biography was fair use.[94] In a prior case, *New Era Publications International v. Henry Holt & Co.*,[95] the Second Circuit had accepted the argument that a critical biographer must include actual quotation from the subject of the criticism in order to be accurate and credible.[96] But here, since Graves was not the "author" of the films in which he appeared, the defendant was not quoting him as a person. A & E used the film at issue because his association with it illustrated a relevant comment about his life and career, and the clips enlivened the televised biography.[97] The court reasoned that just as the defendant in *New Era* used quotations from his subject to report a fact about him, A & E's biography treated Graves's appearance in the film as a fact about Graves's life.[98] Hence, the biography was transformative of the original work, employing a creative work to serve an entirely factual purpose that ultimately enriched the comments made about the actor.

There is a notable parallel between the kinds of justifications offered in *New Era* and *A & E Television* in the biography domain, and the distinction that the Supreme Court made in *Campbell* between paro-

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90 *Id.*

91 *Id.* at 443.

92 *Id.* at 444 ("This archival showing had a point, explained on camera by Graves: 'You had to pay the rent and buy the groceries . . . . And also, I always felt that they or most anything else I did-was good training to get to learn more about acting.'").

93 *Id.* at 446 ("The Court of Appeals summed up the application of [the first fair use] factor to works of biography: our cases establish that biographies in general and critical biographies in particular, fit comfortably within these statutory categories of uses illustrative of uses that can be fair." (internal quotation marks and citations omitted)).

94 *Id.* at 447–49.

95 904 F.2d 152 (2d Cir. 1990).

96 *See* New Era Publ'ns Int'l v. Henry Holt & Co., Inc., 873 F.2d 576, 591–92 (2d Cir. 1989) (Oakes, J., concurring).

97 *A & E Television*, 146 F. Supp. 2d at 446.

98 *Id.* at 446–47. A judge in another New York federal court came to a similar conclusion in a later case involving the same plaintiff. *See* Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127, 137 (E.D.N.Y. 2001) ("While plaintiff's copyrighted movies aimed to entertain their audience, defendants' [d]ocumentary aims to educate the viewing public of the impact that [certain actors] had on the movie industry."). Later, the Second Circuit approvingly cited *A & E Television*'s reasoning that a later work that appropriates an earlier copyrighted work for its ability to illustrate a factual proposition rather than for its creative content is transformative. *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006).

dy and satire. Like a parodist, the defendant in *New Era* appropriated earlier expression in order to criticize the expression itself, and by extension, those most closely associated with it. Like a satirist, the defendant in *A & E Television* utilized the earlier work for its ability to make a larger point about something that the work helps to evoke for the audience.

Nevertheless, there is a stark contrast between the relative ease with which the *A & E Television* court was able to declare A&E's biography validly transformative[99] and the difficulty that courts have faced with satire.[100] Uninhibited by *Campbell*'s parody–satire distinction, *A & E Television* relied on a series of cases from the Second Circuit that gave biographies the green light as to the first fair use factor.[101] Although a satire may not be considered a scholarly work in the same way as a biography,[102] the law does not make distinctions between forms of commentary on the basis of a court's subjective appreciation of the particular vehicle chosen.[103]

The law does necessarily categorize certain secondary works.[104] But *Campbell* strongly suggests that categories do not create a presumption that a given type of work has a valid purpose under the first fair use

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[99] Other judges in the same district have similarly been unburdened by a lengthy analysis of the first factor in the context of biographies. *See, e.g.*, Monster Commc'ns, Inc. v. Turner Broad. Sys., 935 F. Supp. 490, 493–94 (S.D.N.Y. 1996); Wright v. Warner Books, Inc., 748 F. Supp. 105, 108 (S.D.N.Y. 1990). It should be noted that few cases dealing with biographies exist outside of the Southern District of New York, likely due to New York City being the situs of the headquarters for many large publishing houses and other media companies.

[100] *See generally* Green, *supra* note 11, at 186–91 (discussing the varying approaches courts have taken to satire and questioning the merits of the legal distinction between satire and parody).

[101] *See* New Era Publ'ns Int'l v. Carol Publ'g Grp., 904 F.2d 152, 156 (2d Cir. 1990); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987). However, the Ninth Circuit has noted that, where the biography uses clips as video "filler" without the use of voice-overs or other accompanying commentary, the work may not qualify as fair use. Elvis Presley Enters. v. Passport Video, 349 F.3d 622, 628–29 (9th Cir. 2003).

[102] In *A & E Television*, Judge Sweet dismissed any notion that a biography's lack of academic prestige should count against it in the fair use analysis: "[Defendant's work] may not be a 'scholarly' biography, but the use made of this particular footage . . . served to enrich the biography through the actor's perspective on his own work." 146 F. Supp. 2d at 446.

[103] The Supreme Court's opinion in *Bleistein v. Donaldson Lithographing Co.* made a similar point about illustrations:

> It 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. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt.

188 U.S. 239, 251–52 (1903).

[104] *See supra* note 39 and accompanying text.

factor.[105] Hence, if a particular type of satire serves the same illustrative function as a biography, it should not be dismissed from fair use protection because it fails to curry the favor of the academic community. If these two lines of cases are to be reconciled, the explanation would need to get to the heart of *Campbell*'s concern about satire. As the remainder of this Note argues, the recent emergence of celebrity satire highlights the marginality of the difference between satirical and serious criticism of celebrities, and will force the law to reconsider whether all satires are created equal.

III. CELEBRITY SATIRE

A. *Fitting In with Parody and Satire*

The use of the terms "parody" and "satire" has engendered significant confusion among both literary scholars and legal practitioners.[106] One reason for this confusion is that each concept now has separate meanings in literature and in the law. In literary terms, a satire criticizes as ridiculous some human or individual shortcoming through subtle wit[107] and is delivered through a wide variety of techniques, including parody.[108] In other words, satire is best understood as an umbrella term encompassing the use of certain methods to deliver social commentary. Parody delivers the satirical message[109] by imitating a work in a way that exposes it to ridicule.[110] The parodist mimics certain attributes of a

105 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

106 *See* Green, *supra* note 11, at 189.

107 ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com (last visited Sept. 19, 2010) (defining "satire"). Specifically, satire is an "artistic form, chiefly literary and dramatic, in which human or individual vices, follies, abuses, or shortcomings are held up to censure by means of ridicule, derision, burlesque, irony, parody, caricature, or other methods, sometimes with an intent to inspire social reform." *Id.* For a fuller explanation of the techniques employed in satire, see MATTHEW HOGART & BRIAN CONNERY, SATIRE: ORIGINS AND PRINCIPLES 108–31 (2009).

108 ENCYCLOPEDIA BRITANNICA ONLINE, *supra* note 107.

109 Parody can be nonsatirical when its author intends to poke light-hearted fun by, for example, placing the work in an awkward context, or mocking the work solely on an artistic level. Some of the best examples of nonsatirical parody are those created by Weird Al Yankovic. For example, Yankovic's song "Fat," a parody of Michael Jackson's hit song "Bad," derives its humor from the fact that a popular song (and music video) is set to funny lyrics. The song neither criticized "Bad" nor Michael Jackson (who was not overweight) in any way, nor did it criticize individuals who are overweight. In fact, Yankovic makes it a personal policy to gain a license from the recording artists before creating a parody of their songs. *See FAQ*, "WEIRD AL" YANKOVIC: THE OFFICIAL WEBSITE, http://www.weirdal.com/faq.htm (last visited Feb. 18, 2011). These recording artists would be unlikely to grant a license if they felt that Yankovic was criticizing them or their work.

110 Parody is "*a form of satirical criticism* or comic mockery that imitates the style and manner of a particular writer or school of writers." ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com (last visited Sept. 19, 2010) (emphasis added) (defining "parody").

work to ensure that the audience recognizes it, but diminishes or exaggerates other attributes of the original work to focus the attention of the audience on the broader commentary.[111]

The Supreme Court's articulation of these two concepts, however, focuses neither on artistic techniques nor on the presence of a broad social message, but on finding an identity between the work that is referenced and the object of the commentary: a parody references a work and then comments on it directly; a satire references a work but then comments on something else.[112] For the Court, since, in a parody, the referenced work and the subject of commentary are exactly the same, the parodist needs to evoke the work.[113] Because the parodist's craft depends for its very existence on that reference, the Court was confident that—unlike the satirist—the true parodist would not borrow from a work merely to avoid the creativity involved in generating new ideas.[114] But as this Note argues, recent cases involving celebrity satire represent a clear challenge to the notion that evocation of a work is necessary only if the work is commented upon directly.

In a celebrity satire, the satirist references a copyrighted work because it indirectly—but strongly—evokes a celebrity in a specific way. Some celebrities use their fame to forcefully advance their political or social views outside of the context of their work.[115] Others become associated in the public's mind with certain unflattering traits due to personal scandals and may use their art to try to rehabilitate their public image.[116] A celebrity creates fodder for the satirist when these associations seem at odds with each other, setting the celebrity up for ridicule for this inconsistency as the satirist juxtaposes these two notions in the same work.[117] When one of these associations arises as a result of the popularity of the celebrity's copyrighted works (and if a satirist wishes to use those works), a legal conflict can emerge.

Celebrity satire differs from parody in the purpose served by the borrowed work. A parody directly refers to and comments on the same work, only indirectly commenting on the individuals most associated with the parodied work. Conversely, a celebrity satire refers to a work to *directly* comment on the associated celebrity, generally employing at

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111 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994).

112 See *supra* note 10 for a discussion of the Supreme Court's definition of satire.

113 *Campbell*, 510 U.S. at 580.

114 *Id.*

115 Jonathan Gray, *Throwing Out the Welcome Mat: Public Figures as Guests and Victims in TV Satire*, *in* SATIRE TV: POLITICS AND COMEDY IN THE POST-NETWORK ERA 149–52 (Jonathan Gray et al. eds., 2009).

116 *See* Jonathan Gray et al., *The State of Satire, the Satire of State*, *in* SATIRE TV, *supra* note 115, at 6.

117 *See, e.g.*, Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499 (S.D.N.Y. 2009).

least one other reference to the celebrity to focus the attention of the audience on the celebrity.[118] In other words, whereas the parodist must criticize what it borrows, the celebrity satirist uses a work for its ability to illustrate something about the individuals evoked by the work.[119] The satirist may even use a copyrighted work to show the celebrity in a *positive* light, juxtaposing it with something inconsistent with that work, thus showing the audience how its view of the celebrity may be flawed.[120]

While this type of satire may not be as common as parody, evidence suggests that it is becoming more common in today's popular media.[121] Several comedy programs based on satire of the media, politics, and popular culture have been created in recent years, such as *The Daily Show with Jon Stewart*, *The Colbert Report*, *Family Guy*, and *The Simpsons*, and continue to enjoy high ratings among young adults—a coveted audience for advertisers.[122] The recent popularity of these pro-

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118 One relatively novel type of commentary that can be used to deliver celebrity satire is the so-called "mash-up," or its close cousin, the "cut-up." Both variants interweave or splice together several short clips of sometimes-copyrighted works. This phenomenon has recently generated legal debate about whether it infringes on the rights of authors. *See, e.g.*, Andrew S. Long, Comment, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317 (2007). While some mash-ups are done solely to create noncritical music, and are thus beyond the scope of this Note, the technique has also been used to mix several pieces of audio or video either to ridicule the associated celebrity for making inconsistent statements, or to make the celebrity appear to say things he did not by taking his statements out of context for humorous or critical effect. *See id*. at 323–25. The popularity of YouTube (http://www.youtube.com), which allows users to create and post videos for free on the Internet, combined with the widespread availability of digital editing software, enables even the most amateur satirist to create mash-up and cut-up videos by digitally mixing potentially copyrighted video and audio, thereby creating a video quite different than the originals, *see* Long, *supra*, at 317.

119 *See supra* note 117. This phrasing should be reminiscent of the discussion of biographies, *supra* Part II.B.

120 For example, in *Bourne*, 602 F. Supp. 2d 499, discussed *infra* Part III.C, the defendant's animated television show used the hopeful message of the plaintiff's song, "When You Wish upon a Star" (with the lyrics modified to have the singer wish for the help of a Jew), to provide a sharp contrast to the anti-Semitic views that some members of the public attribute to Walt Disney. Because the public could strongly associate both that rumor and the song with Walt Disney, the defendant's use of the song served to promote the irony in the joke. *See Bourne*, 602 F. Supp. 2d at 507.

121 *See* Gray et al., *supra* note 116.

122 Press Release, News Corp., FOX 09/10 Season and Summer 2010 Performance Highlights (Aug. 2, 2010), *available at* http://www.newscorp.com/news/FOX09-10SeasonandSummer2010.pdf. Moreover, each of these shows are ranked within the top twenty-five most popular shows on the web service, Hulu.com, which allows users to legally watch full episodes of popular network shows free of charge, usually one day after the show airs on the network. Robert Seidman, *Hulu Movers & Shakers: 2009 Recap*, TV BY THE NUMBERS (Dec. 31, 2009), http://tvbythenumbers.com/2009/12/31/hulu-movers-shakers-2009-recap/37371. *Family Guy* was ranked number two, *The Simpsons* was ranked number four, *The Daily Show with Jon Stewart* was ranked number seven, and *The Colbert Report* was ranked number seventeen. It is also worth noting that *Saturday Night Live* and *The Office*—both comedy shows that rely on parody and satire—were ranked number one and number three respectively.

grams may help to explain why celebrity satire has just begun to draw the attention of courts.

B. *Celebrity Satire and Biography*

Like a biographer, a celebrity satirist would use copyrighted works associated with a celebrity when those works illustrate a specific aspect of that celebrity. Of course, the substantive content of the two forms is where their difference lies. Whereas a biographer would focus on specific factual events in the celebrity's life,[123] a celebrity satirist likely would focus more on the character traits and beliefs of the celebrity.[124] But once the defendant can show that the borrowed work was used for its potential to illustrate information factually rather than to entertain through its creative expression, the first factor tips in the defendant's favor.[125] Thus, this distinction is not relevant to the fair use analysis. Both biographies and celebrity satires at times need to use a subject's prior work to comment on something other than—albeit related to—those works.

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[123] CONCISE OXFORD DICTIONARY OF LITERARY TERMS (Chris Baldick ed., 3d ed. 2008), *available at* http://oxfordreference.com/pages/Subjects_and_Titles__2E_L05 (defining "biography") ("A narrative history of the life of some person . . . .").

[124] *See, e.g.*, Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (Salinger's reclusive nature); *Bourne*, 602 F. Supp. 2d 499 (Disney's purported anti-Semitism); *see also* CONCISE OXFORD DICTIONARY OF LITERARY TERMS, *supra* note 123, "satire" ("A mode of writing that exposes the failings of individuals . . . .").

[125] *See* Hofheinz v. A & E Television Networks, 146 F. Supp. 2d 442, 446–47 (S.D.N.Y. 2001) ("The 20 seconds of footage shown . . . was not shown to recreate the creative expression reposing in plaintiff's film . . . [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business."). In discussing the factual nature of the defendant's use of the plaintiff's work, the court was not saying that facts are favored over opinions, but that the information was used as if it were factually true for the purposes of the illustration. *See id.* at 447 ("[T]he use made of plaintiff's footage in the program was for the purpose of commenting on Graves and *what he thought about* a picture he appeared in." (emphasis added)). In an effort to ease the discomfort felt by many documentarians about their fair use rights, the industry recently collaborated on a statement of best practices. ASS'N OF INDEP. VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), *available at* http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf. In this document, the filmmakers agree that a documentarian is within his or her rights to quote "copyrighted works of popular culture to illustrate an argument or point." *Id.* at 4. The statement goes on to explain that "[h]ere the concern is with material . . . that is quoted *not because it is, in itself, the object of critique* but because it aptly illustrates some argument or point that a filmmaker is developing." *Id.* (emphasis added). While this document does not have the force of law, it is nevertheless a powerful restatement of the law to which an entire industry has agreed to bind itself.

C. *The Opening Salvo*

District courts in both the Southern District of New York and the Central District of California have recently decided cases in which the defendant has attempted to shepherd its satire into the safer confines of the parody doctrine by arguing that a "parody-of-the-author" is a legitimate form of parody. The federal judges who heard these cases differed markedly in their approaches to applying *Campbell*.

Bourne Co. v. Twentieth Century Fox Film Corp.[126] involved a *Family Guy* episode in which Peter Griffin, the main character, sits by his window, staring out toward the stars and wishing that a Jew would magically solve his financial troubles, all the while singing to the tune of a slightly modified version of Disney's "When You Wish upon a Star."[127] The scene is clearly evocative of a similar scene in the Disney film *Pinocchio*.[128] The defendant claimed two separate rationales for the argument that their reinterpretation of "When You Wish upon a Star" was a parody:[129] First, according to the defendants, their song commented on the "saccharine sweet" nature of the original and its unrealistic notion that wishing upon stars is an effective way to make dreams come true.[130] Second, the defendants hoped that their audience would find it ironic that one of Disney's most popular and beloved songs was being used to wish for a Jew, given that many people are aware of a persistent rumor that Walt Disney was anti-Semitic.[131]

Assuming that a reasonable member of the audience can perceive "I Need a Jew" as a comment on the original song, the defendant's first argument fits properly within the boundary of parody. Still, the joke directed at Walt Disney is more properly termed celebrity satire than parody: rather than criticizing the song, it praised the positive themes of the song in order to illustrate the seeming hypocrisy of the man most associated with it. In spite of this distinction, Judge Deborah Batts found that *both* of the defendants' arguments constituted parody; her

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126 602 F. Supp. 2d 499.

127 *Id.* at 501–02.

128 *Id.*

129 *Id.* at 506–07.

130 *Id.* at 506.

131 *Id.* at 507 ("Defendants' proffered evidence [is] that the song in the Episode makes an additional comment, or 'inside joke', about the 'widespread belief' that Walt Disney was anti-Semitic. Defendants argue that, '[t]he creators of the Family Guy Song thought it would be the perfect, cutting commentary to use the iconic song most closely-associated with Walt Disney, Wish Upon a Star, in a parodic reverie where the main character 'wishes upon a star' for, of all things, a Jew." (alterations in original) (citations omitted)).

opinion made no legal distinction between the parody of the work and the commentary about Walt Disney.[132]

Because the commentary at issue in *Bourne* arguably featured a combination of a true parody of the borrowed work and a concomitant attempt to criticize the associated celebrity, the court was able to avoid the more difficult question of whether the latter is truly a parody. But the relative weakness of the defendants' respective cases in *Salinger v. Colting* and *Henley v. DeVore* would force each court to tackle the issue more explicitly.

D. *Two Views of Campbell*

Three months after her decision in *Bourne*, in *Salinger v. Colting*,[133] Judge Batts was presented with an opportunity to clarify whether *Bourne* represented an extension of the parody doctrine to encompass "parodies" of the author. In *Salinger*, the defendant wrote a reexamination of the book *Catcher in the Rye*, a highly popular novel written by J.D. Salinger, in which the reader is reintroduced to Salinger's sixteen-year-old protagonist, Holden Caulfield, at the age of seventy-six.[134] According to the defendant, the purpose of this aspect of the book was to show that the character traits that readers of the original book admired in the teenage Caulfield are not as appealing as the character has aged.[135] Furthermore, as Salinger's well-known reclusiveness had not extinguished the public's interest in him, the author had become sort of a fictional character in his own right.[136] Hence, the defendant created a character called "Mr. Salinger," juxtaposing a representation of the real author with his fictional creation in order to illustrate the extent to which the distinction between the real and fictional worlds can become blurred.[137]

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132 *Id*. at 508 ("Defendants have established that their song, 'I Need a Jew' contains *several layers* of parody." (emphasis added)). Interestingly, at several points in the discussion of this issue, Judge Batts referred to the defendant's critique of Walt Disney as a "joke" rather than as a parody. *See id*. at 507–08.

133 Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

134 *Id*. at 258.

135 Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 5, Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09-CV-5095), 2009 WL 1916613 ("In short, *60 Years* scrutinizes and criticizes the iconic stature of both Salinger and his most famous character by transforming the precocious and authentic Holden into a 76-year-old man fraught with indecision and insecurity.").

136 *See id*. at 3–4.

137 *See id*. at 4–5. Colting also stated that Salinger had purportedly had trouble distinguishing between himself and his character, and that Caulfield was a somewhat autobiographical character, possibly leading to Salinger's staunch defense of his intellectual property rights and Colting's parody of the same. *Id*. at 4.

Accepting the defendant's statement of his intention at face value, the defendant's novel can be understood as combining a parody of Holden Caulfield, which simultaneously satirizes the public's adoration with him, with a celebrity satire of the character's creator, J.D. Salinger. To support his fair use argument as to his satire of the author, the defendant relied on *Bourne*.[138] But Judge Batts did not find the analogy persuasive.[139] She found that it was crucial to the holding in *Bourne* that the creators of *Family Guy* directly commented on the plaintiff's song as well, and that the subtle comment about Walt Disney served to enhance the underlying parody.[140] By rephrasing her prior holding in this way, she was able to distinguish the author's use of *Catcher in the Rye*:

> Defendants' use of Salinger as a character. . .is at most, a tool with which to criticize and comment upon the author, J.D. Salinger, and his supposed idiosyncracies [sic]. It does not, however, direct that criticism toward *Catcher* and Caulfield themselves, and thus is not an example of parody.[141]

By the time *Henley*[142] was decided, as the presiding judge, James Selna, noted, a clear split had developed among the district courts on this issue. In *Henley*, the defendant, a primary candidate for the U.S. Senate, created two political advertisements for distribution on YouTube.com. The ads used karaoke versions of two of musician Don Henley's songs, modifying the lyrics in a way that explicitly criticized President Obama, Nancy Pelosi, and Barbara Boxer. The defendant argued that the songs were in part a parody of liberals generally, including Henley,[143] and that the lyrics of the songs in fact have some liberal themes.[144]

Judge Selna rejected these arguments, finding a difference between criticism of a view that the author happens to hold, and criticism of an author *because* he holds that view in particular.[145] The former, accord-

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138 *See Salinger*, 641 F. Supp. 2d at 261 n.4.

139 *See id*. While the defendant ultimately lost the case, his failure to convince the court to rule in his favor was predicated on how relatively insignificant this criticism was compared to the overall lack of parodic purpose in his sequel, not necessarily on the lack of a basis in fair use to criticize Salinger. *Id*. at 263. But in a footnote, the court did express its doubt that parody-of-the-author was a valid defense to copyright infringement. *Id*. at 261 n.4.

140 *Id*.

141 *Id*. at 261.

142 733 F. Supp. 2d 1144 (C.D. Cal. 2010).

143 *See id*. at 1155. Don Henley disputed the contention that he is, or that the public views him as, a liberal. *Id*.

144 *Id*. at 1155–58. The defendants felt that "The Boys of Summer" lamented the failure of the 1960s to effect societal change, as highlighted by the lyric: "Out on the road today / I saw a DEADHEAD sticker on a Cadillac / A little voice inside my head said, / 'Don't look back. You can never look back.'" *Id*. The defendants also believed that one way in which to interpret "All She Wants to Do Is Dance" is as a criticism of U.S. foreign policy in Latin America during the 1980s, and the American public's apathy towards the situation. *Id*.

145 *Id*. at 1155.

ing to Judge Selna, is satire lacking justification for borrowing without permission, whereas the latter "may be justified" as parody.[146] *Henley* suggests that it is the self-referential nature of parody that justifies its being fair use, and that the same attribute could justify targeting the author of a work. Put another way, the defendants could have justifiably rewritten "The Boys of Summer" either in a manner that mocked the specific way in which the song addresses liberalism or in a manner that mocked Henley for writing a song that applauds liberalism, but was not justified in using the song without permission to ridicule liberals generally. In this way, Judge Selna approached *Campbell* not by examining its words, but by grappling with the core principles of fair use. In his view, *Campbell* held that satire cannot claim fair use with respect to a borrowed copyrighted work if the satirist has no need to reference the work,[147] but it may be permissible to borrow from the work to criticize the author in certain cases.[148]

Given the fact that many parodies implicitly carry with them a satirical message, it is doubtful that the *Henley* rule can effectively separate the sheep from the goats. Is it possible to determine the extent to which the song "I Need a Jew" takes aim at Walt Disney vis-à-vis anti-Semitic stereotypes generally? Did the defendant's songs in *Henley* target liberals more than it targeted Don Henley? In each case, the defendant's songs did not directly refer to the targeted celebrity, leaving the effectiveness of the satire entirely up to the audience's ability to understand the subtle critique.[149] Thus, to reconcile these divergent outcomes, the answer must lie in the strength of the connection between the celebrity and the criticized idea. On the one hand, as the *Bourne* court noted, the rumor that Disney was anti-Semitic is a well-known, popular-

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146 *See id*. Despite a thorough discussion of the issue, the court ultimately decided that it did not need to make that decision because the defendant's use failed the fair use test based on the remaining factors, *see id*., thus leaving the court's analysis as dicta.

147 *See id*. ("[T]he would-be parodist who targets the author's viewpoints generally is essentially creating satire and therefore *lacks the need to reference* the author." (emphasis added) (citations omitted)).

148 *Id*. ("The parodist targeting the author may be justified in using the original work to conjure up the author . . . .").

149 For the audience to have understood that the DeVore campaign was targeting Don Henley, it would have had to not only recall that Henley performed it, but also that the defendant's overtly political critique had some bearing on him. This would only have been possible if Henley had well-known political views, which the parties disputed. *See id.* Similarly, for the audience to have understood *Family Guy*'s critique of Walt Disney, it would have to have associated the song with Disney himself, and also that *Family Guy*'s clear jab at simplistic stereotypes of Jewish people has some relationship to Walt Disney's views. Hence, it seems that in this area, there will always be a close factual determination of the intended audience's ability to make these associations. These two cases had divergent outcomes in part because, in *Bourne*, Judge Batts took judicial notice of the well-known rumor that Disney was anti-Semitic, whereas in *Henley*, Judge Selna did not make such a determination with respect to Henley's political views. *Compare* Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499, 507–08 (S.D.N.Y. 2009), *with Henley*, 733 F. Supp. 2d at 1155.

ly held belief.[150] On the other hand, Henley may not be known for making political statements, and his songs may do very little to associate him with liberalism. The use of either a direct reference to the celebrity in the satire itself or a strong association helps to ensure that the public will recognize the satirist's work as a satire.

Taken together, *Salinger* and *Henley* offer clearly contrasting approaches to interpreting the Supreme Court's holding in *Campbell*. The *Salinger* court summarily rejected the possibility that *Campbell* allows for parody that targets a work's author to be fair use, reasoning that the text of the opinion clearly defines parody in terms of criticism of the composition.[151] But Judge Selna understood that the Court's failure to recognize the possibility that the parody doctrine might include this kind of criticism does not imply that it would be excluded from fair use protection should the Court have the opportunity to decide such a case in the future.[152] Recognizing this, Judge Selna thus attempted to discern the underlying basis of the Court's distinction between parody and satire, finding it conceivable that targeting the author could be a valid fair use purpose in the proper case.[153] But *Henley* ultimately fails to clearly identify the justification necessary for such a satire to be deemed fair use. Part IV offers such a justification—firmly rooted in the rationale that *Campbell* provides—one which will allow courts to analyze future cases in this area more predictably.

IV. THE CASE FOR CELEBRITY SATIRE

A. *Social Benefit*

A key principle underlying each established category of fair use is the extent to which the work in question is beneficial to the public good.[154] In other words, as a threshold matter, any creative mode that wishes to claim sanctuary in the name of fair use must further the overall goal of fair use—to promote access to creative works.[155] For celebrity satire cases, this benefit arises from the need to have a healthy and robust public conversation not only about politics, but about other social values as well—values on which celebrities regularly comment.

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150 *Bourne*, 602 F. Supp. 2d at 507–08.

151 *See* Salinger v. Colting, 641 F. Supp. 2d 250, 257 (S.D.N.Y. 2009).

152 *See Henley*, 733 F. Supp. 2d at 1154 ("*Campbell*'s language does not necessarily preclude parodies targeting the author.").

153 *See id*. ("Under *Campbell*'s reasoning, rather than its precise phrasing, criticism of the author via the author's works may fit within the structure of protectable parody.").

154 PATRY, *supra* note 3, § 3:9 ("The key issue in every case is whether the use is beneficial to society.").

155 *See supra* Part I.A.

The Supreme Court has long upheld the ability to lampoon public figures as an important First Amendment right. In *New York Times Co. v. Sullivan*,[156] a case in which a police commissioner brought a libel action against several civil rights leaders after they criticized the actions of the police force, the Court held that a public official cannot recover damages for defamation related to his official conduct unless the official proves that the statement was made with actual malice.[157] According to the Court, such a high burden needed to be placed on public officials in order to protect the public's right to keep government responsive to their will through lawful means.[158] As such, even if the speech is not in good taste, a person has the right to speak on all public institutions.[159] The Court later extended the *Sullivan* standard to cover public figures, such as celebrities.[160]

Although the Court has acknowledged the high social utility of criticism of public figures, a person does not have an absolute right to borrow copyrighted expression for that purpose because the First Amendment does not preempt the Copyright Act.[161] Rather, the Court has held that the fair use doctrine provides an adequate safeguard of free speech rights while at the same time protecting the rights of artists.[162] Still, this fact does not prevent First Amendment cases from guiding courts in their quest to determine whether a given use is socially beneficial and thus worth protecting as a threshold matter.

There is significant social benefit to be gained by promoting celebrity satire. That the majority in *Campbell* seemed to draw a contrast between parody and satire does not mean that the Court intended that lower courts value this benefit less than that provided by parody.[163] A distinction between the two concepts arises only when this value is stacked against the importance that the law attaches to copyrights. The

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156 376 U.S. 254 (1964).

157 *Id*. at 279–80.

158 *Id*. at 269.

159 *Id*.

160 *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 (1989).

161 Eldred v. Ashcroft, 537 U.S. 186, 218–19 (2003); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985). For a general discussion of the way in which free speech is restricted by copyright law, see Green, *supra* note 11, at 197–98.

162 *See Eldred*, 537 U.S. at 219.

163 *See* Campbell v. Acuff-Rose Music, Inc., 501 U.S. 569, 579 (1994) ("*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." (emphasis added)). If the social benefit provided by parody arises from its creation of a new work that sheds light on a previous work, many satires—particularly celebrity satire—would fit the bill. In addition to the majority opinion, Justice Kennedy's concurring opinion relies in part on a Second Circuit opinion from two years prior, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), which noted that both parody and satire are valued forms of expression, *id*. at 309–10 ("Under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law."). Green, *supra* note 11, at 188, argues that it is "unthinkable" that Kennedy could have relied on *Rogers* without also embracing this language.

Court understood that parodies have features in common with each other that provide them with a justification beyond the social benefit they provide.[164] The question, then, is whether the same reasoning can be applied to celebrity satire.

B. *Necessity*

A compelling argument for protecting celebrity satire must include not only a justification for the social importance of the commentary, but also a rationale for its borrowing from the copyrighted work. In the case of secondary works that argue for fair use on the basis of criticism or comment, courts generally look to whether the appropriation was truly necessary.

The Second Circuit has noted that appropriation may often be necessary to enable a biographer to present the best-quality biography possible.[165] It would be unreasonable to ask a biographer to refrain from quoting the biographer's subject in favor of a loose paraphrase because substituting a paraphrase for a direct quote detracts from the impact of the biographer's commentary.[166] This reasoning applies no less to celebrity satire than to biography. In a celebrity satire, the celebrity's creative works are how the celebrity communicates with the public and are thus what the satirist quotes. The public associates certain works with certain celebrities, each new association shaping the celebrity's persona. Something would be lost if the law were to ask the satirist to forego the use of these associations.

The Supreme Court emphasized the importance of necessity in *Campbell* when it found that parody must conjure up the prior work to make its point, whereas satire can just as easily rely on fresh material.[167] To phrase it differently, the Court felt that a satire that makes no comment on a prior work is no more effective when it borrows from that work than when the satirist works up something new. The implication of this reasoning is that, in cases of criticism or comment, the use of borrowed copyrighted material is put to a valid fair use purpose when

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164 *Campbell*, 501 U.S. at 579 ("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.").

165 *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006) ("[C]ourts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects.").

166 *See* Craft v. Kobler, 667 F. Supp. 120, 126–28 (S.D.N.Y. 1987) ("Since the point depends on a perception of the style of writing and manner of expression, it could not be made effectively without direct quotation."). For a fuller treatment of the issue, see Leval, *supra* note 1, at 1114.

167 *Campbell*, 501 U.S. at 580–81.

the borrowed portion increases the impact of the commentary beyond what the user could have achieved by inventing fresh material or by simply doing nothing.[168]

Celebrity satire derives its critical impact from the audience's realization that a person, group, or other definable entity is not who or what the audience previously thought. It challenges the notions that the public has attached to certain celebrities by presenting a contrasting idea. When a celebrity has previously become associated with a copyrighted work that contrasts with another idea, the satirist can make an effective comment simply by drawing audience's attention to the inconsistency and allowing them to resolve the resultant tension. In this juxtaposition, the borrowed work serves an essential illustrative role in the comparison, ensuring that the satirist is borrowing out of necessity rather than out of a desire to derive advantage from the popularity of the work. Thus, like parody, celebrity satire can employ short portions of copyrighted material for a valid fair use purpose.

C. *Balance*

Whereas the first fair use factor is focused entirely on the nature of the defendant's use, the remaining factors shift the analytical framework toward the plaintiff's work. In particular, the third and fourth factors direct courts to compare the two works—first, by the amount taken in relation to the plaintiff's entire work, and second, by the place each will hold in the marketplace.[169] The Supreme Court's exposition of the factors in *Campbell* made clear that the analysis of these factors must not

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168 Daniel Austin Green proposes a model that orders the relative "value" of various types of satirical commentary along a spectrum:

> [G]reater weight ought to be attributed to commentative [sic] works that comment on (in order of least to strongest presumption of value): (1) society at large, (2) a class or group of persons, (3) a class or genre of copyrighted works, (4) a specific work and/or its creator. The same hierarchy should likewise be applied to critical works. And the hierarchy is again consistent with Campbell's insistence upon a definite target. While this type of valuation allows broader protection, it still favors works that specify a target, but makes no bright line distinctions.

Green, *supra* note 11, at 209–10. Green does note a correlation between this spectrum and the satirist's need to borrow a given work. *Id.* at 210 ("[O]ne can intuit that commentary on society at large is less likely to necessitate appropriation of any one work than commentary on a class or style of works."). Nevertheless, Green understands the question of necessity to be a factor analytically separate from the question of how to value the usefulness of various satires based on their respective targets. *See id.* at 209–10. By contrast, this Note argues that the necessity question was the impetus driving the Supreme Court's parody-satire distinction in *Campbell*, and should be the central factor in any framework for deciding criticism- and commentary-based fair use questions.

169 *See* 17 U.S.C. § 107(3)–(4) (2006). As noted *supra* Part II.A, *Campbell* held that the second factor is not relevant to an analysis of parody since parody universally targets more expressive fictional works. There is little reason to believe that celebrity satire would be treated any differently.

undo the prior determination that the work was generally put to a validly transformative purpose.[170] In other words, if a parody has already been recognized as an important form to protect, it would be incongruous to find that a parody is not fair use because it necessarily borrows too much from the original work.

An analysis directed at whether the use is necessary to the satirist's commentary encompasses the question of whether sanctioning the appropriation maintains an appropriate balance between copyright and fair use. In examining the remaining fair use factors, courts should inquire into whether the amount and substantiality of the appropriation was a close fit in relation to the justification, with an eye toward the likelihood that the satire would substitute for the original in the market.[171]

Basic to a common sense understanding of fundamental fairness is the axiom that if one has a justifiable need to intrude on the rights of another, that person should intrude no more than is required to fulfill the need. Following this principle, the third fair use factor directs courts to analyze the use at the micro level in order to determine whether each character, dramatic or musical phrase, visual element, etc. serves that justification in a way that fresh material would not.[172] In this way, the test is a microcosm of the focus on necessity as part of the first factor.[173] Because parody needs to create tension between the original and the imitation in order to succeed, the audience must quickly comprehend the reference.[174] Understanding this fact, the Court recognized that parody might need to take from the "heart" of the original.[175] Since celebrity satire also relies on audience recognition of associations the satirist intends to make between the borrowed work and a targeted celebrity, the analysis of this factor for celebrity satire should not differ from that applied to parody in *Campbell*.

A satire will almost never risk substituting for the original so long as the transformativeness of the work is more than barely perceptible: if the satirist's true purpose is commentary rather than entertainment

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170 *See Campbell*, 510 U.S. at 588–89 ("We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound. . . . If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through."); *id*. at 592 ("Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it." (internal quotation marks and citations omitted)).

171 *See id*. at 587 (citing Leval, *supra* note 1, at 1123). In framing the remaining factors in this way, the author has not overlooked the second factor, which looks at "the nature of the copyrighted work." 17 U.S.C. § 107(2). But as discussed *supra* Part II.A, the Supreme Court has held that this factor does not help to decide the outcome in a parody case. The same would almost certainly apply in a satire case.

172 *See Campbell*, 510 U.S. at 586.

173 *See supra* Part IV.B.

174 *See Campbell*, 510 U.S. at 588.

175 *Id*.

through the copyrighted expression, it will satisfy the fourth factor. One of the more important considerations bearing on a use's likelihood of substituting for the original is the extent to which the audience recognizes that what it is watching is in fact a satire rather than an entirely original composition. This will often turn on the strength of the satirist's evocation of the targeted celebrity. Furthermore, if the satirist makes clear that the expression employed is borrowed, members of the satirist's audience who are unfamiliar with the original may be motivated to seek it out in order to better understand the satire. Indeed, this could stimulate renewed interest in a forgotten work, leading to a significant financial boon for the author. The reference need not necessarily identify the author so long as it is clear that the expression was borrowed from *someone*, with the degree of explicitness necessarily varying depending on the relative popularity or obscurity of the borrowed work.

Just as it was important to the Supreme Court in *Campbell* that courts take care not to enjoin a parody because its critical message negatively affected the market for the original,[176] it is similarly important to protect the criticism inherent in celebrity satire. Like a parody, a celebrity satire ridicules an artist through the celebrity's work. Thus, in the same way that authors are unlikely to license their works in order for those works to be ridiculed through parody, satires that target an author's own image would face a similar hurdle.[177] In fact, it seems likely that because celebrity satire aims its invective at a person more directly than does parody, which targets the author of a work only indirectly, a proposal to create such a work would be even less likely to garner that person's approval.[178] Hence, private bargaining would not adequately safeguard the public's interest in having access to celebrity satire.

The fair use doctrine already possesses the tools necessary to craft case-by-case solutions that maintain a proper balance between the public's right to have access to celebrity satire and the copyright holder's right to derive economic benefit from the author's work.

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176 *Id*. at 592.

177 Indeed, one writer argues that the unlikelihood that the original author would license his work at any price due to the negative light cast on the work should lead to a victory for the defendant as to the first fair use factor. *See* Jason M. Vogel, Note, *The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in* Dr. Seuss Enterprises v. Penguin Books USA, 20 CARDOZO L. REV. 287, 316 (1998). But this approach likely places a disproportionate amount of reliance on the free market to safeguard the public's interest in having access to creative works. This focus on the economic analysis also fails to recognize that in many circumstances, a satirist might cast a prior work in a negative light merely through its association with a project that the prior author would find offensive, but such a borrowing, if not relevant to any concept the public associates with the prior work, may nevertheless be an example of the satirist attempting to "avoid the drudgery of working up something fresh." *Campbell*, 510 U.S. at 580.

178 *See* MICHAEL C. DONALDSON, CLEARANCE AND COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION 63 (3d ed. 2008) ("If you parody a person, the chances of upsetting that person are substantial.").

V. THE SHEEP AND THE GOATS

The framework proposed by this Note can effectively separate "the fair use sheep from the infringing goats"[179] in cases in which a defendant purports to satirically target a celebrity person or group. This Part offers an illustration of how the framework would apply to actual cases that have been litigated in the courts.

A. *The Sheep*

The framework proposed by this Note validates the court's holding in *Bourne* that the defendant's song was a fair use of plaintiff's copyrighted song, but provides a separate rationale for the defendant's criticism of Walt Disney, distinct from the defendant's criticism of the song itself. As the court noted, the public strongly associates Walt Disney both with the song, with its pleasant notion that everyone's dreams do come true, and with being anti-Semitic. Although the defendants did not criticize the original tune for the purpose of this particular comment, the song was instrumental in evoking Walt Disney in that particular light in order to highlight Disney's lack of commitment to the values represented by his company's song. If the defendant had not used the song, the irony would not have been possible, resulting in a less effective comment. As a result, the comment on Walt Disney was a valid celebrity satire, even in the absence of a concomitant parody of the song.

While the defendant's novel in *Salinger* may have infringed on J.D. Salinger's copyright after a full consideration of the fair use factors, the defendant's juxtaposition of Salinger with his creation, Holden Caulfield, created a valid celebrity satire of Salinger as a threshold question. A reasonable reader of the defendant's novel, *60 Years*, could perceive the ironic tension generated by the novel's portrayal of the ill will that "Mr. Salinger" harbors against his own creation, Holden Caulfield, for bringing Salinger the fame he never wanted. Although Holden Caulfield, the copyrighted character, is not a target for criticism for the purpose of this particular message, his presence provides a necessary contrast to "Mr. Salinger," thus giving the defendant a justification for the appropriation. This commentary is a clear example of celebrity satire, but, since it was not a major theme of the book, it does not justify each instance in which the defendant used Salinger's protected expres-

[179] *See supra* note 5.

sion. Nevertheless, it is important to recognize that the defendant's argument fails at the balancing stage, rather than at the justification stage.

B. *The Goats*

Some commentators have suggested that satire is equally as entitled to fair use protection as parody,[180] but this view does not take into account that Supreme Court precedent clearly does suggest that at least some forms of satire are not so entitled. By way of illustrations from two recently litigated cases, it should be clear that the framework that this Note proposes draws a meaningful distinction between celebrity satire and satire generally.

In *Henley*, the defendant attempted to suggest that the public identifies Don Henley as a liberal in addition to associating him with his own songs. The defendant further suggested that his songs feature liberal themes. If the latter proposition were true, the court would likely have understood the defendant's work to be parody. But since there was no alleged contradiction between Henley's public image and the themes contained in his songs, the defendant did not make any criticism attributable to Henley in a way distinguishable from the criticism already directed at liberals in general. Hence, the borrowed songs did not increase the critical impact of the intended commentary beyond the extent to which changing the lyrics to any song will grab the listener's attention. If the defendant had truly wanted to ridicule Henley for his political beliefs, several alternative methods involving the creation of fresh material that merely refer to Henley would have been available to his campaign. Thus, the defendant's ads were not fair use.

The creators of *Family Guy* were recently the subject of a lawsuit filed by Art Metrano,[181] an actor best known for his role as Captain Mauser in the *Police Academy* film series. He created a comedy routine called "The Amazing Metrano" in which he performs hackneyed magic tricks with his hands for comic effect.[182] The creators of *Family Guy* portrayed a cartoon image of Jesus Christ performing the act, preceded by a comment by character Stewie Griffin stating that he had gone back

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180 *See, e.g.*, Shipley, *supra* note 11.

181 Complaint, Metrano v. Twentieth Century Fox Film Corp., No. 08-CV-6314 (C.D. Cal. filed Sept. 25, 2008), 2008 WL 5168527. The parties have since agreed to settle the case. Joint Stipulation to Dismiss Case Pursuant to Stipulation Filed by Plaintiff Arthur Metrano, Metrano v. Twentieth Century Fox Film Corp., No. 08-CV-6314 (C.D. Cal. filed June 18, 2010), ECF No. 72.

182 Complaint, *supra* note 181, at 3.

in time and found that Christ's talents were somewhat exaggerated.[183] The most obvious purpose of the use was to ridicule the biblical claims that Christ performed amazing miracles—a purpose clearly satirical in nature. The unresolved question is whether a parody of Metrano's routine or a satire directed at Metrano himself is also reasonably perceptible. However, it is difficult to imagine any perceptible commentary about Metrano. It is apparent that Metrano does not take his routine to be serious magic, so it would be ineffective to criticize him for doing so—the audience pays for the tongue-in-cheek nature of the performance.[184] Because this is the same form of comedy that entertains *Family Guy*'s audience, the use should not be considered transformative.[185] Even if the satire directed at Christians had some transformative value, the fact that the same comedic effect is achieved by both works bears strongly on the fourth factor—the risk that the use will substitute for the original work. Furthermore, because *Family Guy* did not incorporate his likeness, and because his routine likely lacks sufficient public exposure to evoke him solely using the routine, there is a high risk that the *Family Guys* audience will think that the creators of the show invented the act rather than Metrano. Given the relatively short nature of Metrano's routine, the amount borrowed was likely substantial enough to obviate the public's need to pay to see his act, which further bears on the fourth factor. Finally, because the satire does not truly comment on Metrano's public persona, it is unlikely that Metrano would be unwilling to license the use of his act for a satire directed at Christians. As an author, he is entitled to share in the profits generated by his expression.

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183 Defendant's Motion to Dismiss Under FRCP 12(b)(6) and Supporting Memorandum of Points and Authorities at 3, Metrano v. Twentieth Century Fox Film Corp., No. 08-CV-6314 (C.D. Cal. filed June 15, 2009), 2009 WL 2216857.

184 *Cf.* Salinger v. Colting, 641 F. Supp. 2d 250, 261 (S.D.N.Y. 2009) ("While *60 Years* may, as Defendants' assert, accentuate and comment upon Holden Caulfield's naïveté, depression, loneliness, absurdity, and inability to grow and mature as a person, because these characteristics were abundant, and perhaps even central to the narrative of *Catcher*, this aspect of *60 Years* does not add something new . . . ." (internal quotation marks omitted)).

185 In a similar case, Williams v. CBS, 57 F. Supp. 2d 961 (C.D. Cal. 1999), the defendant used the image of Saturday Night Live character "Mr. Bill," a clay figure who miraculously emerges unscathed from terrible accidents, as part of a public spirit message to rally fans at an Army-Navy football game:

> Although the Segment does show Sailor Bill being obliterated in a number of ways intended to be comical, it is part of Mr. Bill's 'shtick' to be the unfortunate object of similar misfortune in civilian life. The exploits of Sailor Bill do not poke fun at Mr. Bill, but merely copy his antics. Therefore, the Sailor Bill segment falls into the category of satire, not parody.

Id. at 968–69.

CONCLUSION

As a matter of principle, the purpose of copyright law is to promote expression.[186] The natural corollary to this point is that copyrights should not work to eliminate certain types of speech from the public discourse, and should restrict later speech only where the content can be expressed in a different manner without losing its effectiveness. After all, little is gained by promoting duplicative expression, so the social cost of requiring the author to invent new expression is low. Conversely, if a certain type of commentary can be effectively made only by using copyrighted works, a finding of infringement would censor that speech entirely, imposing a very high social cost. By taking a textual approach to *Campbell*, courts ironically risk censoring important artistic expression under the guise of applying a case that attempted to remove barriers to artistic social criticism.[187]

This Note encourages courts to adopt a pragmatic approach to applying *Campbell*, and, in doing so, recognize that some artistic forms of criticism, while not fitting within the definition of parody, are nevertheless entitled to protection as fair use. The principles that underlie much of the fair use case law suggest that courts should focus less on the specific question of whether a satire targets "the work" borrowed and more on the question of whether the borrowed material increases the impact of the satirist's message in a way that fresh material would not. Just as a biographer is justified in using a film clip only if it illustrates something about the biographer's subject, a satire can use protected expression only when it plays an essential role in illustrating an aspect of the celebrity who is the subject of the criticism. Moreover, the same reasoning that led the Supreme Court to doubt whether most truly transformative parodies would receive negative treatment under the remaining three factors should apply in a similar way to celebrity satire.

Allowing celebrity satire to gain presumptive validity as a transformative purpose under the first fair use factor should be an attractive solution for judges who acknowledge the deep problems with the exclusion of satire but are uncomfortable with expanding the scope of permissive borrowing from copyrighted works. After all, drawing the line at parody ensures that litigants are somewhat limited in their ability to invent any conceivable target for their criticism on a post-hoc basis. Yet celebrity satire maintains a clear limit on the individuals who may be targeted—only those who can be reasonably said to be publically identified with the work.

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186 *See* Leval, *supra* note 1, at 1107.

187 *See* Henley v. DeVore, 733 F. Supp. 2d 1144, 1150–51 (C.D. Cal. 2010).

It is unrealistic to expect the Court to take up this issue again anytime soon,[188] and equally unrealistic to expect lower courts to reject the course they have taken in rejecting satire. There are legitimate concerns, grounded in copyright law, that uses of a prior work for the purpose of satire unfairly deprives the author of royalties to which he would have been entitled when most satires would pose no threat to negotiations over licensing such works. Moreover, the proliferation of decisions cementing this distinction has created a significant body of precedent, which greatly hampers a court's ability to chart a new course. Thus, it would be more prudent for courts to identify specific instances of satire, such as celebrity satire, that do not arouse those same concerns, and advocate for their protection on a case-by-case basis. In time, the law will become more developed, making it easier for both lower courts and satirists to discern the line between permissible and impermissible borrowing.

[188] At least one other scholar agrees with the author's assessment. *See* Shipley, *supra* note 11, at 564–65.