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Parody and the Fair Use Defense

THE BEST WAY TO PRACTICE SAFE SEX WITH ALL YOUR FAVORITE CHARACTERS

INTRODUCTION

The Walt Disney Corporation is one of the world's most renowned companies; its characters (even just their silhouettes), theme parks, and merchandise are recognizable across the globe. Understandably, Disney is protective of its reputation, its characters, and the wholesome values they represent. Naturally, then, Disney takes the protection of its intellectual property seriously, and most people would think twice before attempting to sell a knock-off Mickey Mouse or a cake with Cinderella's face on it. But while a baker can't sell a cake with the classic Cinderella on it, she could sell one that depicts a disheveled Cinderella slumped near a toilet with her lipstick smeared, crown askew, and bags under her eyes. She could even have Prince Charming's pants strewn mischievously on the floor nearby. Sounds perfect for a bachelorette party.

The baker's obscene rendition of the not-so-innocent blonde beauty is exactly that—*her* rendition; as such, it would fall into the loophole—I mean defense—of parody and fair use under both copyright and trademark law. Because Cinderella is the epitome of purity, the hung-over version would be meant as a humorous comment that young women are not quite as perfect as Disney depicts them to be. Any attempt by Disney to sue for copyright and trademark infringement would probably fail, because since Cinderella is so widely known to be pure, no consumer would mistake the naughty cake as a work by Disney.

While the baker's First Amendment right to create such a culinary masterpiece is an important one, so is Disney's right to exclude others from using its copyrighted materials and tarnishing its trademarks. The sexual nature of the baker's rendition should receive statutory consideration in the balancing test for fair use under copyright law because vulgar and lewd speech is often deemed "low value" speech, and therefore the secondary user's First Amendment right is

weaker compared to the copyright owner's right to exclude. Currently, trademark and First Amendment law consider content's sexual nature when determining legality. Copyright fair use law, however, does not. The fair use test should be further expanded to consider the demographic of the copyright holder's target audience. Taken together, the lower value of the secondary user's First Amendment right and, in the case of a company like Disney, the higher potential for market harm to the copyright holder in light of the work's sexual nature, should weigh against fair use and be deemed infringement. The current judicial balancing test for whether a parody or other use is indeed fair yields inconsistent and unpredictable outcomes, often resulting in mass media companies like Condé Nast reprinting the images of protected characters and profiting significantly from the sale of those images. A statutory expansion of the fair use test would not only protect copyright holders from harmful infringement but would also protect children from exposure to lewd and vulgar material.

This note illuminates the current copyright fair use test's weaknesses and recommends additional balancing factors, particularly within parody cases, to create a more predictable test that reaches more consistent and equitable results¹ and is capable of distinguishing between true parody and "commercial takeoff rationalized *post hoc* as a parody."² Part I of this note provides a brief background of intellectual property laws and the development of and rationale for the fair use doctrine. It also discusses the August 2015 cover of *GQ* magazine, which prominently featured some of Disney's intellectual property without its consent and serves as the contemporary example of problems with copyright law and fair use. Part II delves more deeply into copyright law and examines how courts developed the doctrine of fair use until its codification in 1976. This part highlights the inconsistencies in applying the fair use doctrine to parody cases before the Copyright Amendment of 1976 and how the Supreme Court in the seminal case, *Campbell v. Acuff-*

¹ These additional factors will help create more consistency within copyright parody cases and across intellectual property law doctrine.

² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 600 (1994) (Kennedy, J., concurring). Some have posited that creators of parody only claim parody as a convenient defense once sued for infringement and that these "parodists" did not have a clear parodic intent at the time of creation. *See, e.g., id.* at 580 (noting that sometimes an infringer copies a work and "merely uses [it] to get attention or to avoid the drudgery in working up something fresh"); *see generally* Christopher J. Brown, *A Parody of a Distinction: The Ninth Circuit's Conflicted Differentiation Between Parody and Satire*, 20 SANTA CLARA HIGH TECH. L.J. 721 (2003).

Rose, applied this doctrine. Part III discusses the inconsistent application of the fair use test in parody cases since *Campbell* and how this inconsistency has strengthened the fair use doctrine to such an extent that copyright owners have little hope of stopping others from using their work for substantial financial gain. Part IV argues that by including the factors of the parody's sexual nature and the demographics of the original work's target audience in the balancing test for fair use, courts will reach more consistent and equitable results that more appropriately protect copyrighted works.

I. INTELLECTUAL PROPERTY AND THE FAIR USE DOCTRINE

A. *Types of Intellectual Property Protection and Their Goals*

The theoretical justifications for intellectual property protection vary, but it is worth discussing a few of these to provide a more robust understanding of not just the current laws, but also the intentions behind them. The main purpose of intellectual property law is to encourage creativity.³ One theory to support this rationale is that by rewarding creators with exclusive rights to profit from their creations, the value of such rights will incentivize creativity.⁴ Closely linked to this exclusive right is the utilitarian view that the exclusion of others creates a sustainable market in which competition is encouraged.⁵ Some areas of intellectual property law embody a more Lockean labor theory: that intellectual property rights exist because of the labor invested in them.⁶ Despite the many theories supporting intellectual property protection, the protection is often not absolute and is balanced against society's other interests, including its right to freedom of expression.⁷

To further its goal of encouraging creativity, intellectual property law protects intangible assets such as ideas, depictions, words, and symbols.⁸ Copyright, trademark, patent, and trade secret laws cover all intellectual property, but they vary in the content they protect and the ways they are

³ With the generally accepted premise that creativity and advancement are good for society. See U.S. CONST. art. 1, § 8, cl. 8 (also known as the Progress Clause).

⁴ LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 3 (Ver. 4.0, 2015).

⁵ LOREN & MILLER, *supra* note 4, at 3, 298 (stating that copyright law is generally understood to be driven primarily by utilitarian goals).

⁶ *Id.* at 3.

⁷ See U.S. CONST. amend. I.

⁸ LOREN & MILLER, *supra* note 4, at 1.

regulated. Patent law, for example, is governed by federal statute and prevents others from “making, using, offering [to] sell . . . selling . . . or importing” a patented invention.⁹ To be eligible for patent protection, the invention must be novel and nonobvious.¹⁰ Once patented, another person cannot create the invention, even if the second inventor created the object entirely independently without knowledge of the first.¹¹ Copyright law, although also governed by federal statute,¹² differs in this respect by requiring that an infringer copy the protected work directly in order to create liability for infringement.¹³ While copyright law may be less strict in this regard, the protection lasts considerably longer.¹⁴ Trademark law, by comparison, aims to protect more than just a work, good, or service; a trademark protects the association of a specific word, name, symbol, or device with a particular source.¹⁵ Governed by both state and federal law,¹⁶ trademark law prohibits the use of a mark in a way that is likely to cause confusion or to deceive about the source of the good¹⁷ and similarly prevents against dilution of the protected mark.¹⁸ Although there are distinct areas of intellectual property law, many of the assets the laws protect fall into more than one category and thus receive overlapping protection. Consider the iPod. Patent law protects the device’s technology, copyright law protects the overall appearance and individual models, and trademark law protects the word “iPod.” Because of this overlap, it is common for an owner to bring

⁹ 35 U.S.C. § 154 (a)(1) (2012).

¹⁰ LOREN & MILLER, *supra* note 4, at 4. Knowledge is not required to establish patent infringement; for this reason, patents are very specific. On the patent application, the patent seeker includes a precise description of the process or product to be patented (the “claim”), and this language defines the scope of the patent. *Id.* at 117. Competitors cannot recreate this exact product but could create a similar one that falls outside the claim’s language. *Id.* at 116-117, 123.

¹¹ *See* 35 U.S.C. § 271 (2012).

¹² 17 U.S.C. §§ 101-1301 (2012).

¹³ LOREN & MILLER, *supra* note 4, at 354-57.

¹⁴ Patents last for 20 years, while copyrights last for 70 years beyond the death of the copyright owner. *Id.* at 4-5.

¹⁵ Lanham Act, 15 U.S.C. § 1127 (2012).

¹⁶ *Id.* §§ 1051-1127; LOREN & MILLER, *supra* note 4, at 461. The Lanham Act governs federal trademark law and includes protection against dilution of trademarks. The federal power to regulate trademarks comes from its power to regulate interstate commerce. Because of this, an owner wishing to register a trademark on the federal register must demonstrate use in commerce. So long as an owner can demonstrate such use, trademarks can be renewed for 10-year periods indefinitely. 15 U.S.C. § 1051.

¹⁷ 15 U.S.C. § 1125(a)(1)(A).

¹⁸ Dilution can occur through either blurring or tarnishment. *Id.* § 1125(c); *see* LOREN & MILLER, *supra* note 4, at 5, 545.

multiple claims of infringement in one suit.¹⁹ Due to the likelihood of overlapping IP protection and thus overlapping IP claims, eliminating inconsistencies between the fair use IP doctrines should be a priority for both courts and the legislature.

B. *Fair Use as a Defense to Infringement*

Many areas of intellectual property law allow some “breathing space”²⁰ and permit the use of protected material in certain circumstances where the uses further scientific and educational goals or are permitted by the First Amendment.²¹ Trademark and copyright law define this breathing space as “fair use.”²² There are many types of fair use, the determination of which is a fact-sensitive inquiry.²³ Some of the more obvious examples include a teacher photocopying worksheets for her class, a critic quoting from a novel or movie in his review, or a news reporter showing a clip from a local play. Under the First Amendment, people have the right to express their opinions and offer criticism,²⁴ so book reviews, news reports, and movie critiques seem like natural exceptions to intellectual property law. The use of copyrighted materials in a classroom is also a clear exception, as the use is in furtherance of education.²⁵ Often, the very theories that support prohibiting the use of trademarked and copyrighted materials are the same theories that support allowing others to use them. The interests of the owner and the secondary user must be weighed against one another, but this balancing is not always easy to implement.

One of the areas in which this balancing act has proven legally difficult is that of parody.²⁶ Generally speaking, parody pokes fun at an original work by using it (usually without

¹⁹ It is also possible for an owner to bring multiple infringement claims (e.g., a trademark claim and a copyright claim) in a single case or controversy and see inconsistent results across these claims. *See infra* Section IV.B.3.

²⁰ *Campbell v. Acuff-Rose, Music, Inc.*, 510 U.S. 569, 579 (1994).

²¹ *See* 17 U.S.C. §§ 106, 107 (2012).

²² 15 U.S.C. § 1125(c)(3) (trademark fair use); 17 U.S.C. § 107 (copyright fair use). In patent law, the concept of a “blocking patent” is supported by similar theories. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 991-92 (1997). An innovator is free to improve a preexisting invention and patent that improvement. *Id.* The ability to patent the improvement presumably incentivized the innovator, and society is now better off because of the improvement. *Id.* at 992.

²³ *See* H.R. REP. NO. 94-1476, at 65 (1976). (“Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”).

²⁴ *See* U.S. CONST. amend. I.

²⁵ 17 U.S.C. § 107.

²⁶ *See infra* Part II.

authorization) and changing it to a more humorous or critical version of itself.²⁷ For a true parody to be successful, an artist must take enough of the original so that his audience recognizes the target of the parody and can understand the point the artist is making. It follows logically, then, that a parodist who wishes to be successful will parody (and therefore sample from) well-known works. There are those, however, who lack true parodic intent and will copy well-known works to gain attention, stir up controversy, and turn a large profit. Unfortunately, it is almost impossible to distinguish between a parodist whose critique was intended from the start and a copier who feigns parody after the fact. So, for example, a magazine may take a famous character known for his etiquette and depict him in a sexual manner in order to ridicule his rigid conservatism, and the owner of the character's trademark and copyright must sit by and watch him be defiled.

C. *GQ and C-3PO: Fair Use or Abuse?*

Since the release of *Star Wars* in 1977, the film series and franchise are among the most well-known and successful in the industry.²⁸ The saga, which takes place “a long time ago, in a galaxy far, far away,”²⁹ appeals to fans of all ages worldwide, in part due to the action scenes and memorable characters, but also due to the fact that six *Star Wars* films have been released since the 1977 original.³⁰ Many of these characters, including Princess Leia and droid C-3PO, are registered trademarks and copyrights of Lucasfilm, now owned by Disney.³¹ The August 2015 cover of *GQ* magazine³² featured

²⁷ Courts struggle to define parody, but see Section II.C for a more thorough discussion and definition.

²⁸ As of August 25, 2015, *Star Wars* was the fifth-highest-grossing movie franchise at \$4.54 billion, a statistic that does not include revenue from the franchise's seventh film that debuted in December 2015. Natalie Robehmed, *The Top-Grossing Movie Franchises*, FORBES (Aug. 25, 2015, 9:30 AM), <http://www.forbes.com/sites/natalierobehmed/2015/08/25/the-top-grossing-movie-franchises/> [<http://perma.cc/L3VU-9HRH>].

²⁹ STAR WARS EPISODE IV: A NEW HOPE (Lucasfilm & Twentieth Century Fox Film Corp. 1977).

³⁰ In addition to the seven major motion pictures, the franchise has released spinoff films and a cartoon series. STAR WARS, <http://www.starwars.com/> [<http://perma.cc/TMQ2-YXWW>] (last visited June 28, 2016).

³¹ Matt Krantz et al., *Disney Buys Lucasfilm for \$4 Billion*, USA TODAY (Oct. 30, 2012, 10:15 PM), <http://www.usatoday.com/story/money/business/2012/10/30/disney-star-wars-lucasfilm/1669739/> [<http://perma.cc/7LZQ-JMHK>].

³² *GQ* is one of the many magazines owned by mass-media company Condé Nast. *About Us*, CONDÉ NAST, <http://www.condenast.com/about-us/about-us> [<http://perma.cc/PZ8T-NYYN>] (last visited June 28, 2016).

comedian-actress Amy Schumer dressed in the very recognizable Princess Leia bikini costume, with C-3PO's finger in her mouth and a provocative look on her face.³³ The cover was meant to showcase an interview with Schumer featured in the magazine dubbing her “[T]he Funniest Woman in the Galaxy” for her performance in the film *Trainwreck*.³⁴ *GQ*'s choice to use words like “galaxy” and portray Schumer as a naughty Princess Leia alongside the *Star Wars* characters was presumably intended to capitalize on the hype surrounding the release of a new *Star Wars* film, *The Force Awakens*, in December 2015.³⁵ In the photos accompanying the article itself, Schumer is pictured in a sexual act with a lightsaber and naked in bed with C-3PO and fellow droid R2-D2.³⁶ But Schumer was in no way associated with *Star Wars*, and Disney was in no way associated with the lewd cover image, despite the confusion these images created.³⁷ The popularity of the *Star Wars* characters among children likely contributed to the disbelief and outrage expressed by the general public over their vulgar use.³⁸

If Disney did not authorize the offensive use of its characters, then how could *GQ* use Disney's intellectual property on its cover and distribute it to its audience of over seven million people?³⁹ The answer: parody. Apparently, *GQ* (and maybe Schumer, too) was mocking the way Hollywood portrays females, men's obsession with *Star Wars* characters, and the innocent

³³ Cover, *GQ* (Aug. 2015), <http://www.gq.com/gallery/amy-schumer-photos-star-wars-trainwreck> [http://perma.cc/5SGE-HC6F].

³⁴ Chris Heath, *The Force Is Strong with This One*, *GQ* (July 20, 2015), <http://www.gq.com/story/amy-schumer-cover-story-photo-shoot> [http://perma.cc/99YW-S5NZ].

³⁵ *Star Wars: The Force Awakens*, LUCASFILM, <http://lucasfilm.com/star-wars-episode-7-the-force-awakens> [http://perma.cc/WS4C-CD97] (last visited June 28, 2016).

³⁶ Heath, *supra* note 34 (photographs by Mark Seliger); Mark Seliger, *Amy Schumer Is the Funniest Woman in the Galaxy*, *GQ* (July 20, 2015), <http://www.gq.com/gallery/amy-schumer-photos-star-wars-trainwreck#3> [http://perma.cc/H5UJ-7XC8].

³⁷ See Emanuella Grinberg, *Disney Does Not 'Condone' Star Wars-Themed Amy Schumer GQ Photos*, CNN (July 20, 2015, 10:45 AM), <http://www.cnn.com/2015/07/19/entertainment/amy-schumer-star-wars-gq-disney/> [http://perma.cc/S2E3-YH3N] (“Some *Star Wars* fans took to social media to call out Lucasfilm and parent company Disney for what they considered a ‘tasteless’ and ‘lame’ photo shoot. In response, Lucasfilm has been issuing the following statement via its *Star Wars* Twitter account over and over again. ‘Lucasfilm & Disney didn’t approve, participate in or condone the inappropriate use of our characters in this manner.’”).

³⁸ *Disney Wants You to Know It Wasn't Involved with GQ's Racy Amy Schumer 'Star Wars' Shoot*, VARIETY (July 17, 2015, 5:25 PM), <http://variety.com/2015/film/news/amy-schumer-star-wars-gq-cover-disney-lucasfilm-1201543231/> [http://perma.cc/N7QE-TSUW] (citing fans' disbelief that Disney would allow this use, calling it a “shame” and “distasteful”).

³⁹ *Media Kit*, CONDÉ NAST, <http://www.condenast.com/brands/gq/media-kit/print> [http://perma.cc/D6RV-68WS] (last visited June 28, 2016).

nature of C-3PO—or so news reports have posited.⁴⁰ As explained above, it is nearly impossible to tell whether *GQ* truly intended to create a parody or if it used the images to garner attention knowing it could use the parody defense if sued by Disney. *GQ*'s reliance on the fair use doctrine—despite the likelihood of harm to Disney by prominently displaying sexualized images of popular children's characters, particularly when the First Amendment provides limited protection to sexual and lewd content—is rather disturbing. In light of such egregious appropriation and the increased accessibility to media since the Supreme Court decided *Campbell v. Acuff-Rose* in 1994,⁴¹ the parody defense may be too strong in some circumstances. The current balancing test employed in copyright parody⁴² cases should be revisited to address the harm to copyright holders in certain instances. If the parody is sexual and the copyright owner's target audience is children, the likelihood of market harm to the copyright owner increases. In such an instance, children may be harmed by exposure to the sexual content, but since they cannot bring a copyright infringement suit, one way to protect this interest is to absorb it into the balancing test for harm to the copyright owner.

II. COPYRIGHT LAW AND ALL ITS INCONSISTENCIES

Copyright is governed by federal statute under Congress's constitutional power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴³ The First Congress enacted the first set of

⁴⁰ Kara Cutruzzula, *May the Force Be with Amy Schumer*, N.Y. TIMES (July 18, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/07/18/amy-schumer-gq-cover/> [<http://perma.cc/Z3W8-CXYD>] (noting that *GQ* had yet to comment on the cover).

⁴¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Since 1994, technology has improved significantly to provide ease of access to all types of media almost instantly. In the case of the *GQ* cover, in addition to the images being prominently displayed in a local store, they appeared in electronic media and by simply searching for images of C-3PO on Google. See Josh Halliday, *GQ and Men's Health Report Biggest Sales in PPA Digital Report*, THE GUARDIAN (Feb. 14, 2013) <https://www.theguardian.com/media/2013/feb/14/gq-mens-health-digital-sales-abc> [<http://perma.cc/J2M2-7Z62>] (describing *GQ*'s successful digital sales and noting generally that the “emergence of tablet devices in recent years has fundamentally changed how magazines are consumed”).

⁴² The defense of parody under trademark law will be briefly discussed in Section IV.B.3, but because the characters themselves would be covered by copyright (whereas trademark law governs the brand association between the characters and Disney) and the copyright fair use test needs improvement, this note will focus on copyright law.

⁴³ U.S. CONST. art. I, § 8, cl. 8.

copyright laws in 1790, and since then, the laws have been revised in 1831, 1870, 1909, and most recently in 1976.⁴⁴ The 1976 revision was partially in response to significant changes in technology, including television and VCR tape-recording capabilities,⁴⁵ but this revision was also intended to give “express statutory recognition” to the judicial doctrine of fair use.⁴⁶ As discussed in detail below, Congress acknowledged fair use as an available, equitable defense to infringement and supplied the courts with a nonexhaustive list of factors to balance when determining whether an appropriation is indeed fair.

A. *Statutory Copyright Protection Under 17 U.S.C. § 106*

Copyright law protects an author’s expression of information, and similar to other areas of intellectual property, this protection is nearly absolute. “Copyright does not preclude others from using the ideas or information revealed by the author’s work. It pertains to the literary[,] musical, graphic, or artistic form in which the author expressed intellectual concepts.”⁴⁷ Section 106 of the Copyright Act grants copyright owners the exclusive rights to reproduce the work, prepare derivative works,⁴⁸ distribute the work publicly, perform the work publicly, display the work publicly, and digitally perform the work for sound recordings.⁴⁹ While these rights belong exclusively to the owner of the copyright, they can be transferred and licensed to others.⁵⁰ Violating one of these rights without permission results in copyright infringement. The work need not be copied in full nor sold for profit for a

⁴⁴ H.R. REP. NO. 94-1476, at 47-48 (1976).

⁴⁵ *Id.* at 48, 51 (specifically commenting that the bill was “not intend[ed] either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent”).

⁴⁶ *Id.* at 65.

⁴⁷ *Id.* at 56.

⁴⁸ 17 U.S.C. § 106(2) (2012); H.R. REP. NO. 94-1476, at 57 (requiring, for a derivative work, “a process of recasting, transforming, or adapting ‘one or more preexisting works’”). This statute has been interpreted broadly. *See, e.g.,* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1341 (9th Cir. 1988) (describing copy of a work epoxied to decorative tile); *Gracen v. Bradford Exchange*, 698 F.2d 300, 301-02 (7th Cir. 1983) (describing hand-painted image on a plate of scene from *The Wizard of Oz*). Examples of derivatives also include translations, dramatizations, motion picture versions, and abridgments. H.R. REP. NO. 94-1476, at 169-70; *see* 17 U.S.C. § 106(2). In the case of the *GQ* magazine cover depicting *Star Wars* characters, the small changes to the characters, if not direct copying, would certainly fall within the category of derivative works.

⁴⁹ 17 U.S.C. § 106(3)-(6).

⁵⁰ *Id.* § 201(d).

secondary use to constitute infringement.⁵¹ Copyright infringement has been regarded as a strict liability offense, and in instances of willful infringement, is a criminal offense.⁵²

To establish a prima facie case of infringement, a plaintiff must show that he or she is the owner of a valid copyright and that the defendant engaged in one of the acts reserved exclusively to the owner under 17 U.S.C. § 106.⁵³ Proof of the second element depends on which right the defendant allegedly violated,⁵⁴ but it always requires the plaintiff to establish that the defendant actually copied *from* the work and that the copy is substantially similar to the copyrighted work.⁵⁵ For example, a plaintiff's and a defendant's paintings may look similar simply because the artists painted the same model, and not because defendant copied the plaintiff's work. If the defendant copies only a small portion of a plaintiff's painting, or if the elements copied were not original enough,⁵⁶ the court will similarly find that no infringement has occurred. The enumerated rights in the Copyright Act are, however, limited by sections 107-122 of the Act.⁵⁷

When Congress amended the Copyright Act in 1976, it recognized common law fair use doctrine as "one of the most important and well-established limitations on the exclusive right of copyright owners" and accordingly codified the doctrine in section 107.⁵⁸ Fair use is a defense to copyright—in other words, a use may be infringing, but if the infringement falls under fair use, the original owner has no cause of action. "Although the courts have considered and ruled upon the fair

⁵¹ LOREN & MILLER, *supra* note 4, at 364, 367, 369.

⁵² See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.08 (rev. ed. 2010) ("Innocent intent should no more constitute a defense in an infringement action than in the case of conversion of tangible personality. In each case, the injury to a property interest is worthy of redress, regardless of the innocence of the defendant."); 17 U.S.C. § 506.

⁵³ LOREN & MILLER, *supra* note 4, at 354.

⁵⁴ *Id.* For example, if plaintiff alleges that defendant violated his right to publicly perform the work, plaintiff will need to show that a performance occurred and that it occurred publicly, whereas if plaintiff alleges defendant violated his right to distribute the work, plaintiff will need to show that defendant transferred ownership of the tangible copyrighted material. *Id.*

⁵⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903) ("Others are free to copy the original. They are not free to copy the copy.").

⁵⁶ See 17 U.S.C. § 102(a); see also *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 132 (2d Cir. 2003) (stating that "works which express enough originality to be protected also contain material that is not original, and hence that may be freely used by other designers," such as works in the public domain); see also *Bleistein*, 188 U.S. at 239.

⁵⁷ 17 U.S.C. §§ 106-122.

⁵⁸ H.R. REP. NO. 94-1476, at 65 (1976).

use doctrine over and over again, no real definition of the concept has ever emerged,” and Congress has even admitted that since fair use is an equitable doctrine, “no generally applicable definition is possible.”⁵⁹ Congress did give some guidance through the statute’s legislative history by providing a nonexhaustive list of examples of potential fair use, including excerpts of a work for comment, quotation of a passage in a scholarly work, “use in a parody of some of the content of the work parodied,” summaries of a work, and a teacher’s reproduction.⁶⁰

The history of the amendment only mentions parody in the list of examples that the court “might regard” as fair use, and parody, just like any other potential fair use, must be deemed fair based on the four-factor balancing test. The statute expressly instructs courts that

[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶¹

Along with these factors is the statutory caveat that although they may “provide some [gauge] for balancing the equities,” the factors are “in no case definitive or determinative” of fair use.⁶² Congress also acknowledged that each case would be unique, and therefore no exact rule or formula is practical; all Congress felt it could do was endorse the doctrine and provide some guidelines. “[T]here is no disposition to freeze the doctrine . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”⁶³ With the official sanction from Congress, courts continued to freely adapt the doctrine, resulting in an inconsistent application of fair use, particularly regarding parody.

⁵⁹ *Id.*

⁶⁰ *Id.* at 65-66.

⁶¹ 17 U.S.C. § 107.

⁶² H.R. REP. NO. 94-1476, at 65.

⁶³ *Id.* at 66.

B. Courts' Development of the Fair Use Doctrine

Because section 107 explicitly established the judicial role in the realm of fair use, courts continued to build on their previous fair use analyses, which were generally inconsistent within and among the circuits. For this reason, it is important to look back at parody cases decided both before and after the 1976 Copyright Act in order to get an understanding of the doctrine and to determine where some wiggle room remains. Interestingly enough, the cases prior to 1976 do not agree on whether parody may be considered a fair use. In *Benny v. Loew's Inc.*, the Ninth Circuit held that the defendants infringed an author's copyright of the film *Gas Light* by producing the television parody "Auto-light," stating that parody should not be treated differently from any other taking.⁶⁴ In other words, parody was not a legitimate defense.

The Second Circuit found differently in *Berlin v. E.C. Publications*, where defendant *Mad Magazine* had parodied several of the plaintiff's songs. The court held that parody is "deserving of substantial freedom," particularly when "it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire."⁶⁵ In 1975, the U.S. District Court for the Southern District of New York used this "conjure up" test and found infringement in *Walt Disney Productions v. Mature Pictures Corp.*⁶⁶ There, the court held that the use of the "Mickey Mouse March" during a sexually explicit scene in the pornographic film *The Life and Times of the Happy Hooker* was not fair use despite the defendant's argument that the use of the song was a parody because it was "merely a 'humorous take-off' on the music" and did not target the song, but life in general.⁶⁷ The court also commented that the use of the song in the "setting

⁶⁴ *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956); see Brief for Petitioner, Columbia Broad. Sys., Inc. v. Loew's Inc., 1957 WL 87600, at *5 (No. 90).

⁶⁵ *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). Implicit in the idea of parody is that a parodist is mocking the original work, so the parodist must take something from the original so that the audience knows who or what the target of the parody is.

⁶⁶ *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).

⁶⁷ *Id.* at 1398. The court emphasized that defendants took more than was necessary by repeating the song throughout the film and that while "defendants may have been seeking in their display of bestiality to parody life, they did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material." *Id.*

provided” would “immediately compromise the work,”⁶⁸ suggesting that the sexual nature of the setting weighed against fair use. It was amidst this series of inconsistent cases that Congress amended the Copyright Act, making it clear that fair use, in some instances parody, was an equitable defense to copyright infringement.⁶⁹

After the amendment, courts continued to inconsistently apply the fair use doctrine, weighing some factors heavily while blurring others. Particularly, courts seemed to disagree as to whether a work is transformative, how much a parody may take from an original work, and how necessary it is that the parody comment directly on the work it steals from versus commenting on society more generally. In 1978, in *Walt Disney Productions v. Air Pirates*, the Ninth Circuit determined that the use of Disney characters in a cartoon depicting them as “active members of a free-thinking, promiscuous, drug-ingesting counterculture” was not fair use because the defendants appropriated more of the work than was necessary.⁷⁰ The court qualified the holding in *Benny* and seemed to adopt the “conjure up” test used in *Berlin* as a limitation on how much of the original work could be used.⁷¹ Importantly, the court was skeptical of the defendant’s motives, insinuating that the defendant’s true intent was to track his work as close to Disney’s as possible in order to gain attention.⁷² The court did not consider the effect of the parody on the market but did contend, in dicta, that parody may be a critique on society in general, as opposed to a critique on the copyrighted work, but then the need to use the specific characters would diminish.⁷³

⁶⁸ *Id.*

⁶⁹ 17 U.S.C. § 107 (1976).

⁷⁰ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753, 757 (9th Cir. 1978) (quoting Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571, 582 (1976)).

⁷¹ Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y U.S.A. 546, 575 (1997); see *Air Pirates*, 581 F.2d at 757-58 (“[G]iven the widespread public recognition of the major characters involved here, . . . very little would have been necessary to place Mickey Mouse and his image in the minds of the readers.”).

⁷² *Air Pirates*, 581 F.2d at 758. This rationale seems to indicate that the court considered the possible commercial advantage of using Disney characters.

⁷³ *Id.* A balance between the copier’s First Amendment right and copyright owner’s right to his expression “has been struck at giving the parodist what is necessary to conjure up the original, and in the absence of a special need for accuracy that standard was exceeded.” *Id.* (citations omitted). In other words, if the critique was general to society, the defendant would not need to copy so much and so specifically from the original work to make his point.

In *Elsmere Music, Inc. v. National Broadcasting Co.*, the Second Circuit affirmed the district court's holding that even though *Saturday Night Live's* parodied use of "I Love New York" in "I Love Sodom" was a critique on society in general, the threshold question was whether the use was a valid parody at all.⁷⁴ Holding that the use was a valid parody, the court found it to be a fair use because it did not fulfill the market demand for the original song.⁷⁵ Only a year later, however, the Second Circuit changed course on whether a parody must comment on the original.⁷⁶ In 1981, the Second Circuit held that an off-Broadway play's song, "The Cunnilingus Champion of Company C," infringed on "The Boogie Woogie Bugle Boy of Company B" by using the original's tune but exchanging the lyrics for ones much more sexual and explicit.⁷⁷ The Second Circuit held that the parody must at least comment on the parodied work and can, in addition, comment on society in general.⁷⁸ Notably, the court expressed its disgust at the obscene nature of the parody, stating, "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody."⁷⁹ In dissent, Judge Mansfield strongly disagreed, stating that since the parody did not replace the market demand for the original song, regardless of how much of the original work was copied, the use was fair.⁸⁰

In 1986, the Ninth Circuit gave the fourth factor some much-needed attention when it decided *Fisher v. Dees*.⁸¹ In *Fisher*, the court ruled in favor of an alleged infringer whose song "When Sunny Sniffs Glue" parodied the popular song "When Sunny Gets Blue."⁸² The court agreed with *Air Pirates* and *MCA* that parody deserves protection only if the copied work is the target

⁷⁴ *Elsmere Music Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252, 253 (2d Cir. 1980); Ochoa, *supra* note 71, at 577-78.

⁷⁵ *Elsmere Music Inc.*, 482 F. Supp. at 747.

⁷⁶ The Ninth Circuit in *Air Pirates* determined that the parody may target society in general, not just the intellectual property used, which differed from the district court's holding. *Air Pirates*, 581 F.2d at 758; *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975). The Second Circuit weighed in on this "target" component in *Elsmere*, agreeing with the Ninth Circuit that society can be the parody's target, but then in *MCA* stated that while society can be the target, the work parodied must also be targeted. *Elsmere Music Inc.*, 482 F. Supp. at 746-47.

⁷⁷ *MCA, Inc. v. Wilson*, 677 F.2d 180, 182, 185, 187 (2d Cir. 1981).

⁷⁸ *Id.*; see Ochoa, *supra* note 71, at 547 & n.186.

⁷⁹ *MCA*, 677 F.2d at 185.

⁸⁰ *Id.* at 190-91 (Mansfield, J., dissenting).

⁸¹ *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).

⁸² *Id.* at 434, 440.

of the parody to some extent, but it disagreed that the copied material must be limited to that which is necessary to “conjure up” the original.⁸³ The *Fisher* decision aligned with Judge Mansfield’s dissent in *MCA* but marked a departure from the “conjure up” test used in *Berlin* and *Air Pirates*. Amidst all of this inconsistency, and nearly 20 years after the 1976 Copyright Act amendment, the Supreme Court addressed parody as fair use for the first time in 1994 in *Campbell v. Acuff-Rose*.⁸⁴

C. Campbell v. Acuff-Rose

Decided by a unanimous Court in 1994, *Campbell v. Acuff-Rose Music, Inc.* is the only Supreme Court case to consider whether parody is a sufficient defense to copyright infringement under section 107.⁸⁵ In *Campbell*, Acuff-Rose Music filed suit against 2 Live Crew, claiming that 2 Live Crew’s rap song “Pretty Woman” infringed its copyright for the rock song “Oh Pretty Woman” by using the same opening line and changing the remaining lyrics to more shocking ones that were still reminiscent of the predictable lyrics of the original work.⁸⁶ 2 Live Crew asserted that their version was a parody and that the similarity to the original work was intentional, meant to “ridicule the white-bread original” and remind the listener “that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences.”⁸⁷ The district court held that the parody was fair use, but on appeal, the Sixth Circuit held that the commercial nature of the parody rendered

⁸³ *Id.* at 438.

⁸⁴ The Supreme Court did rule on fair use in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), but did not rule on parody until *Campbell*. The Supreme Court did consider parody in *Benny v. Loew’s Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff’d sub nom. Columbia Broadcasting System, Inc. v. Loew’s, Inc.*, 356 U.S. 43 (1958) (per curiam), but due to an equally divided Court, never issued an opinion.

⁸⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.”). Although the Supreme Court had previously considered fair use, this was the first time it considered parody as a specific type of fair use under section 107. *Id.*; Ochoa, *supra* note 71, at 571-76 (stating that the Court considered and rejected parody as a fair use defense in *Columbia Broadcasting System, Inc.*, but this was prior to Congress passing section 107); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 671 (1993).

⁸⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572-74 (1994).

⁸⁷ *Id.* at 582 (citing *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting)).

the use infringement.⁸⁸ The Supreme Court granted certiorari to determine whether parody could be considered fair use under section 107, how to use the statute's four factors to determine fair use, and whether the commerciality of a parody causes a presumption of infringement.⁸⁹ Ultimately, the Supreme Court ruled that the parody was a fair use.

1. *Campbell's* Analysis of the Four Fair Use Elements

In *Campbell*, the Court began by recounting that the Copyright Act's purpose, found in the U.S. Constitution, was "[t]o promote the Progress of Science and useful Arts,"⁹⁰ and noted that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill [this] very purpose."⁹¹ The Court quoted Justice Story and other scholars who have acknowledged that very little creation is truly new, and in the interest of promoting art and science, people naturally are inspired by or build upon the works of others.⁹² With the stage set for fair use as an established and necessary defense to copyright infringement, the Court emphasized that the test for whether a work is fair use is not a bright-line rule, but rather is fact sensitive and requires an equal balancing of all four factors.⁹³ The Court also expressly acknowledged that parody falls within section 107's meaning of fair use because parody, "[l]ike less ostensibly humorous forms of criticism, [] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."⁹⁴

In reversing the Sixth Circuit's decision, the Supreme Court analyzed and balanced the four factors of fair use *de novo*, beginning with the first prong of the fair use test, which analyzes "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational

⁸⁸ Essentially, the Court of Appeals felt that the overwhelmingly commercial nature of the song, which sold nearly a quarter of a million copies, was dispositive of the fair use claim, and it did not consider the remaining three balancing factors in its decision. *Id.* at 573-74.

⁸⁹ *Id.* at 574.

⁹⁰ *Id.* at 575 (quoting U.S. CONST. art. I, § 8, cl. 8).

⁹¹ *Id.*

⁹² *Id.* (citing *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436)).

⁹³ *Id.* at 577 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

⁹⁴ *Id.* at 579.

purposes.”⁹⁵ Because the very nature of parody is to “shed light on an earlier work,” it requires taking parts—in some cases large parts—of a previous work in order to create that commentary. Often this factor of creating commentary, the “character,” is analyzed by questioning whether or not the work is “transformative.”⁹⁶ However, if

the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.⁹⁷

In other words, if the work is not transformative and seems to only have copied the original due to lack of effort, then the claim of infringement seems more likely.⁹⁸ The Court did make it clear that while a lack of transformation could make the fair use defense vanish entirely, it alternatively might just diminish it and thrust more importance onto the remaining three factors.⁹⁹ The balancing of these factors is important because under the statute, parody *can* be a fair use, but just like any of the other listed fair uses, not all parody *is* fair use.¹⁰⁰ Similarly, the Supreme Court held that the commercial or nonprofit aspect of the first factor is only one element in evaluating whether the work is fair use and that the Sixth Circuit erred when it held that the commercial use of 2 Live Crew’s song was essentially dispositive of their defense.¹⁰¹

The Supreme Court also found error in the circuit court’s reasoning that the amount of the original song that 2 Live Crew

⁹⁵ 17 U.S.C. § 107(1) (2012). The “purpose and character” prong includes, among other aspects, how transformative the new work is and whether its purpose is educational, commercial, critical, etc.

⁹⁶ *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

⁹⁷ *Id.* at 580.

⁹⁸ When an alleged infringer only adds a sexual component to the original work, it is likely done for attention and to leech off the original artist’s creativity. The sexual gloss added by the secondary user is arguably not transformative enough to meet this criteria. See *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 482 F. Supp. 741, 746 252 (S.D.N.Y. 1980).

⁹⁹ Later, the Ninth Circuit in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), seemed to exploit the “transformative” requirement.

¹⁰⁰ *Campbell*, 510 U.S. at 581.

¹⁰¹ *Id.* at 584. The Court dispensed with the second factor rather quickly, explaining that the second factor only recognizes that “some works are closer to the core of intended copyright protection than others,” and this factor is rarely helpful in “separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.” *Id.* at 586.

had taken was excessive and therefore unfair.¹⁰² “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.”¹⁰³ In other words, the parody will likely need to take the “heart of the work” in order for the audience to recognize it, and infringement will depend on how much more, beyond what was necessary, was taken.¹⁰⁴

The Court again found error in the Sixth Circuit’s analysis of the fourth factor: market harm. The type of market harm contemplated under section 107(4) includes both harm to the market for the original and harm to the market for derivative works.¹⁰⁵ Parody, by its nature, aims to criticize original work and therefore may have an adverse effect on the original’s demand (consumers may have a subconscious or actual aversion to the original as a result of the parody), but this type of market harm does not lead to infringement.¹⁰⁶ “[T]he role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses the demand [and] copyright infringement[, which] usurps it.’”¹⁰⁷ Infringement occurs when the copied work takes the place of the original in a current or potential market.¹⁰⁸ Those asserting the parody defense¹⁰⁹ must show that there is no harm to the market for the original—and harm is often unlikely because parody generally targets a different audience—and that the parody does not harm any potential markets, here the market for a rap version of “Oh

¹⁰² This seems to resolve the debate between the Second and Ninth Circuits about the amount necessary to conjure up the original. *See supra* Section II.B.

¹⁰³ *Campbell*, 510 U.S. at 588.

¹⁰⁴ *See id.* at 589. The Court described the copying in this case as not one in which “the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.” *Id.* This begs the question, of course, how much is too much?

¹⁰⁵ 17 U.S.C. § 107(4) (1976); *Campbell*, 510 U.S. at 590 (explaining the application of the fourth factor).

¹⁰⁶ *Campbell*, 510 U.S. at 592.

¹⁰⁷ *Id.* (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

¹⁰⁸ *Id.* Because copyright holders also have rights to derivative works, there may be potential markets that do not yet exist because the derivative does not yet exist. For example, a copyright owner of a novel would be able to prevent someone from creating a film version, because the existence of the film would harm the novel’s potential market in the film industry. If the film existed, consumers would not want to view a second film created by the novel’s copyright owner; the place in the market would have been usurped.

¹⁰⁹ *Id.* at 590 (stating that fair use is an affirmative defense asserted by the alleged infringer).

Pretty Woman.”¹¹⁰ Ultimately, the Court remanded the case, and the parties reached a settlement that allowed 2 Live Crew to obtain a license from Acuff-Rose.¹¹¹ The Court’s application of the market harm factor favors the parodist who can claim the two works are not competing in the same target market; therefore, the test does not adequately protect a copyright owner’s concerns about market consequences. This case solidified fair use’s protections of parody, potentially to a fault. *Campbell* allows a defendant to take another person’s song, change only the lyrics,¹¹² and sell the “new” song for profit, so long as the target audience is different from the original song’s. As such, the holding rewards melody theft and allows lazy songwriters to leech off the success of others.

2. The Parody Case Did Not Define “Parody”

The Court’s emphasis in *Campbell* was on determining whether the use presented was fair using the balancing factors, but it refused to evaluate the artistic quality of the parody. It quoted Justice Holmes in *Bleistein v. Donaldson Lithographing Co.* to reiterate the view that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.”¹¹³ Apparently, Supreme Court Justices can judge countless other matters, but cannot pass judgment on works of art. By refusing to evaluate the parody itself, the Court declined to consider policies and concerns associated with fair use and free speech that it has in other related areas of the law, particularly with regard to sexual and lewd content.¹¹⁴ As discussed in Section IV.B.2, the Supreme Court and various lower courts have defined and evaluated the sexual nature of works to determine the level of First Amendment protection these works deserve and thus were capable of evaluating the sexual nature of 2 Live Crew’s rendition. The Court could have considered whether the lyrics were lewd enough to diminish 2 Live Crew’s right to this type of expression and whether children would be exposed to the

¹¹⁰ *Id.* at 593.

¹¹¹ *Id.* at 594; LOREN & MILLER, *supra* note 4, at 403.

¹¹² Note that only the lyrics of “Pretty Woman” and “Oh Pretty Woman” were changed; the tune and even the topic of the two songs are the same.

¹¹³ *Campbell*, 510 U.S. at 582 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251(1903) (alterations in original)).

¹¹⁴ *See infra* Section IV.B.2.

sexual parody. If, due to either the original's popularity or the reach of the parodied version, it was likely that children would be exposed to vulgarity, then 2 Live Crew's First Amendment rights would diminish further while market harm to Acuff-Rose and harm to juvenile listeners would increase. On balance then, Acuff-Rose's right to prevent such an appropriation would prevail. For all this "sensitive balancing of interests"¹¹⁵ and concern with the improvement of society, the Court ignored many of the other competing interests considered by the circuit courts, leaving certain questions unresolved.¹¹⁶

III. A POST-CAMPBELL WORLD

A. *Inconsistent Applications of Campbell: The Cat NOT in the Hat!, The Wind Done Gone, and Spaceballz*

Just three years after *Campbell*, the Ninth Circuit in *Dr. Seuss Enterprises v. Penguin Books USA Inc.* ruled that Penguin Books' O.J. Simpson-themed adaptation of *The Cat in the Hat, The Cat NOT in the Hat!*, was not a fair use.¹¹⁷ Despite the imitation of Dr. Seuss's characteristic rhyme scheme and the defendant's claim that the book parodied the Cat's seemingly benign antics by comparing them to Simpson's legal tricks in court to show how defying authority may harm others, the court did not accept the argument. Instead, the court called it "pure shtick" and described the "post-hoc characterization of the work" as "completely unconvincing."¹¹⁸ Although the *Campbell* Court echoed Justice Holmes's recommendation in *Bleistein* that courts refrain from evaluating the artistic merit of a work, the Ninth Circuit opined on that very issue. By calling the argument "pure shtick," the court questioned the parody's artistic value and indicated its disbelief that the defendant's motive was to incorporate a critique of *The Cat in the Hat*.¹¹⁹ The court was

¹¹⁵ *Campbell*, 510 U.S. at 584 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)).

¹¹⁶ Many of the parodies where the parody was sexual in nature and the original work targeted families or children were held to be infringing, yet the sexual nature and type of audience were not addressed in *Campbell*. See *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975); see also *supra* Section II.B.

¹¹⁷ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

¹¹⁸ *Id.* at 1403.

¹¹⁹ The harsh critique of the defendant's argument shows that the court questioned the parodic nature of the work in general and saw the use as a blatant rip-

also concerned that the defendant took more of the original work than was necessary and that the parody would cause harm to the potential market for derivative works.¹²⁰ Without going into much detail, the court held that the likelihood of market substitution was enough to weigh against the defendants.¹²¹

In 2001, the Eleventh Circuit held in *Suntrust Bank v. Houghton Mifflin Co.* that Alice Randall's novel, *The Wind Done Gone*,¹²² which copied the famous storyline from *Gone with the Wind*, was fair use.¹²³ Randall "appropriated the characters, plot and major scenes" from *Gone with the Wind* in her novel but claimed that it was a critique of the original's "depiction of slavery and the Civil-War era American South."¹²⁴ The district and circuit courts both relied on *Campbell* but arrived at different conclusions: while the district court held that *The Wind Done Gone* was not a parody at all, the circuit court held that the criticism was a parody and that Houghton Mifflin had a fair use defense.¹²⁵ One rather shocking result from the Eleventh Circuit's finding of fair use, as one scholar points out, is that it eliminated "any requirement that parody include humor and broadened the definition of parody beyond that provided in *Campbell*."¹²⁶ According to the *Suntrust* court, all a work needed to do to qualify as a parody was to comment or criticize the original for an artistic purpose, as opposed to a scholarly or journalistic reason.¹²⁷ This enlarged the doctrine to encompass almost any unauthorized use where the user could claim the material was taken in the name of art.

In 2002, Lucasfilm sued the distributors of *Spaceballz*, an animated pornographic film based on *Star Wars*, for both

off of the Dr. Seuss classic that attempted to capitalize on the original work's notoriety. The court also believed that the characterization of the work as a parody only occurred after its creation in an attempt to fit within the fair use defense. *Id.*

¹²⁰ *Id.*; Ochoa, *supra* note 71, at 589.

¹²¹ *Dr. Seuss Enters.*, 109 F.3d at 1403. Recall that under 17 U.S.C. § 106(2), a copyright gives its holder the right to derivative works. Here, the court found that *The Cat NOT in the Hat!* could fulfill the place in the market for *The Cat in the Hat* derivative works, which belonged to Dr. Seuss Enterprises. *Id.*

¹²² ALICE RANDALL, *THE WIND DONE GONE* (2001).

¹²³ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276-77 (11th Cir. 2001).

¹²⁴ *Id.* at 1259.

¹²⁵ *Id.* at 1272, 1276-77 ("We reject the district court's conclusion that Suntrust has established its likelihood of success on the merits. To the contrary, based upon our analysis of the fair use factors we find, at this juncture, *TWDG* is entitled to a fair-use defense.").

¹²⁶ Barbara S. Murphy, *The Wind Done Gone: Parody or Piracy? A Comment on Suntrust Bank v. Houghton Mifflin Company*, 19 GA. ST. U. L. REV. 567, 594 (2002).

¹²⁷ *Suntrust Bank*, 268 F.3d at 1268-69.

trademark and copyright infringement.¹²⁸ Without conducting an in-depth analysis of the factors, the Second Circuit refused to issue an injunction against the defendant and cited both *Campbell* and *Dr. Seuss* to rule that the film was a parody of *Star Wars* because it “broadly mimics an author’s characteristic style and holds it up to ridicule” and thus may constitute fair use.¹²⁹ It seems that even after *Campbell*, courts continue to apply the balancing test inconsistently, sometimes straying quite far from precedent. While some circuits, like the Ninth Circuit in *Dr. Seuss*, rightly question the work’s underlying parodic nature, circuits like the Eleventh and Second are expanding the precedent in generous, even dangerous, ways. The uncertainty of the parody test may prevent copyright owners from bringing suit when their works are used and exploited by others.¹³⁰ While copyright is intended to promote science and creativity, the fair use defense sometimes promotes “pure shtick,” instead.

B. *Could Disney Win Now?*

In light of these inconsistencies, if Disney were to bring a suit against *GQ* alleging infringement for the use of Princess Leia and C-3PO on its magazine cover, it is not clear whether Disney would prevail. *GQ* could claim the use of the characters was a fair parody, triggering the precarious balancing test. Under the first factor (the purpose and character of the work), the critical nature of the parody seems to weigh in favor of fair use, but the use of C-3PO on the cover only months before the release of a new *Star Wars* film shows that the use was highly commercial, weighing against fair use.¹³¹ One could also see the work as a source of information and entertainment that tips the scale in favor of fair use. But is the use transformative? Maybe. The images of the characters are identical to the ones

¹²⁸ *Lucasfilm Ltd. v. Media Mkt. Grp., Ltd.*, 182 F. Supp. 2d 897, 899 (N.D. Cal. 2002). In 1987, Brooksfilms and MGM made the parody film *Spaceballs*, a nonpornographic parody of *Star Wars*. *Spaceballs*, IMDB (Apr. 21, 2016, 10:00 AM), <http://www.imdb.com/title/tt0094012/> [<http://perma.cc/XE9X-B5EG>]. Director Mel Brooks gained George Lucas’s consent prior to filming. Josh Rottenberg, *Mel Brooks Looks Back on ‘Spaceballs,’* ENT. WKLY. (Aug. 3, 2012, 12:00 AM), <http://www.ew.com/article/2012/08/03/mel-brooks-looks-back-spaceballs> [<http://perma.cc/4GY8-6ZW4>]. The suit against Media Market Group over the pornographic parody indicates that the parody’s sexual nature was a concern to copyright holders.

¹²⁹ *Lucasfilm Ltd.*, 182 F. Supp. 2d at 901.

¹³⁰ Another shocking aspect of this fact is that if deep-pocket copyright owners like George Lucas and the Mitchell estate cannot be successful in these cases, then it becomes more likely that a humble owner will not even attempt to bring a claim at all.

¹³¹ See *infra* Section IV.B.1.

used elsewhere and have only been placed in a somewhat sexual position, with Amy Schumer and the surrounding setting doing much of the work to create the sexual gloss.¹³² Looking to the second factor, the nature of the *Star Wars* copyrighted work is creative, but as Justice Souter pointed out in *Campbell*, this factor is not very helpful in determining fair use or infringement.¹³³

The third factor, the amount of the copyrighted work taken, does not seem to be so straightforward. Would a court care that *GQ* only used C-3PO on the cover?¹³⁴ That it only used his upper torso? That his image is an exact photo, not a sketch altered in any way? That the use of multiple characters' images appeared in only one article within one issue of the magazine? Often, in the case of parody, this third factor allows for extra "breathing space" and permits a larger taking to be deemed fair.¹³⁵

The fourth factor too presents some issues. Would a court define the market as one for sexual parodies of the *Star Wars* characters—a market that, clearly, Disney would not pursue? Or would a court view it as the market for magazine covers? The uncertainty surrounding the balancing test compared to the certainty of negative publicity¹³⁶ and the risk of developing unwanted precedent¹³⁷ most likely weigh in favor of Disney not bringing suit, which highlights how strong the fair use doctrine has become¹³⁸ and the need to tame it, or at the very least, improve its predictability.

¹³² *Cover*, *supra* note 33.

¹³³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

¹³⁴ It is also possible Disney could argue that *GQ* "used" Princess Leia by dressing Amy Schumer in one of the Princess's well-known costumes.

¹³⁵ *Campbell*, 510 U.S. at 586 (permitting a full song to be parodied); *Elsmere Music Inc. v. Nat'l Broad. Co.*, 623 F.2d 252 (2d Cir.1980) (similarly finding the parodied version of a copyrighted song to be fair use where the tune was kept the same and only the lyrics were changed).

¹³⁶ See Eriq Gardner, *Disney Sues over Musical Featuring 'Spider-Man,' 'Mary Poppins' and 'The Lion King'*, HOLLYWOOD REP. (Sept. 26, 2013, 10:09 AM), <http://www.hollywoodreporter.com/thr-esq/disney-sues-musical-featuring-spider-637362> [<http://perma.cc/LL42-NE4K>]; Kristy Puchko, *Disney Sues over Mockbuster Frozen Land*, CINEMABLEND (Dec. 30, 2013, 12:54 PM), <http://www.cinemablend.com/new/Disney-Sues-Over-Mockbuster-Frozen-Land-40897.html> [<http://perma.cc/CK4R-D8QH>].

¹³⁷ If a court were to hold that the use was fair, this might seem to give license to others to use Disney's works so long as they are parodied in some slight way.

¹³⁸ Because parody has become such a strong defense to infringement, *GQ* is allowed to copy and use the exact image of the *Star Wars* characters in its magazine without Disney's consent and despite any confusion or harm such use creates. See *supra* note 35 and accompanying text.

IV. ADDITIONAL FACTORS TO CONSIDER WHEN BALANCING:
THE CRITERIA ARE NOT “DEFINITIVE OR
DETERMINATIVE”

A. *Theoretical Basis for Considering Other Factors*

In the very first U.S. case to address fair use, Justice Story began the opinion by expressing how difficult such cases are: “This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases.”¹³⁹ Later, Judge Learned Hand described fair use as “the most troublesome issue in the whole law of copyright.”¹⁴⁰ Congress acknowledged this same difficulty when it codified section 107 in 1976, by explaining that defining fair use is an impossible task and that Congress can best serve the courts by providing a flexible framework with suggested balancing factors.¹⁴¹ Congress made it clear that the four balancing factors were not definitive or determinative and instead were provided as a gauge to balance the equities of the two parties¹⁴² and the “fundamental public policies at stake.”¹⁴³ As William Patry and Shira Perlmutter have argued, “Flexibility and sensitivity . . . are essential to [fair use’s] successful functioning.”¹⁴⁴ Thus it is clear that the doctrine of fair use not only has the flexibility to consider additional factors but was intended to do so. It has also been argued that the parody defense has grown too strong and no longer fairly balances competing interests but instead “permit[s] blatant rip-offs of valuable intellectual property . . . [and] erod[es] the economic incentive to create intellectual property.” This “in turn, is hampering, not helping the free flow of ideas,”¹⁴⁵ in direct contrast to the purpose behind fair use. Including additional factors in the balancing test is not only allowed under the statute and the doctrine, but is also necessary to rein in the parody and fair use defenses.

¹³⁹ *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

¹⁴⁰ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam); see Patry & Perlmutter, *supra* note 85.

¹⁴¹ See *supra* Section II.A.1.

¹⁴² H.R. REP. NO. 94-1476, at 65 (1976).

¹⁴³ Patry & Perlmutter, *supra* note 85, at 668.

¹⁴⁴ *Id.*

¹⁴⁵ Schuyler Moore, *What’s So Funny About Parody?*, 11 UCLA ENT. L. REV. 21, 21 (2004).

B. *A Vote for Sex (as an Additional Balancing Element)*

As discussed in Section I.A, intellectual property requires unique protection due to its intangible nature and the importance of encouraging progress in science and education. The Framers of the U.S. Constitution believed that Congress needed the power to grant authors exclusive rights in their writings to achieve progress as a society.¹⁴⁶ The fair use doctrine “permits . . . courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁴⁷ This understanding seems to beg the question: What is that “very creativity”? Courts refuse to define art¹⁴⁸ and thus refuse to define this “creativity” of society that needs to be balanced against an author’s exclusive copyright. While “art” will likely remain undefined by the courts, the Supreme Court and Congress have determined that in some circumstances, sexual and lewd material does not deserve full legal protection.¹⁴⁹ By carrying this rationale into copyright law, cases could be resolved more consistently within copyright law and between copyright and trademark claims.¹⁵⁰ Given the commonness of lewd parodies,¹⁵¹ the shocking and often insulting effect they have on audiences, the competing “fundamental public policies” on sexual material,¹⁵² and the tendency of some judges to include the parody’s sexual nature in their analysis, the parody’s sexual nature should be one of the statutory factors weighed in the balancing test.

¹⁴⁶ See U.S. CONST. art. I, § 8; see also LOREN & MILLER, *supra* note 4, at 298.

¹⁴⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

¹⁴⁸ See *supra* Section II.C.2.

¹⁴⁹ See *infra* Section IV.B.2.

¹⁵⁰ As discussed in Section I.A, *supra*, many intellectual property assets receive overlapping coverage from the various means of intellectual property protection, and frequently, plaintiffs bring copyright and trademark claims together. If a copyright infringement claim is brought with a trademark dilution or tarnishment claim, as discussed in Section IV.B.3, *infra*, a court will examine the sexual nature of the alleged violation in determining the merit of the trademark claim, but not necessarily for the copyright claim. This factor may lead to the plaintiff winning the trademark claim but losing the copyright claim. See *Pillsbury Co. v. Milky Way Prods.*, No. C78-679A, 1981 U.S. Dist. LEXIS 17722 (N.D. Ga. Dec. 24, 1981) (finding that when defendant parodied Pillsbury’s characters in a sexual manner in their magazine, plaintiffs sustained the burden of proof for their state “anti-dilution” claim but failed to sustain their burden on their copyright claim).

¹⁵¹ See *supra* note 119 and accompanying text.

¹⁵² See *infra* Section IV.B.2.

1. The Sexual Character of a Work Fits Within the First Prong of the Balancing Test

The first prong of the fair use balancing test states that courts should consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁵³ The purpose and character factor includes an inquiry into the work’s type, transformative nature, purpose,¹⁵⁴ and commerciality, but as always, this is not an exhaustive list. A work’s commercial purpose is not determinative,¹⁵⁵ but commerciality can and should be considered. One scholar notes that a “defendant’s active marketing of the plaintiff’s work, such as the use of the copyrighted material on the cover of a larger work to attract buyers, should be considered more commercial than [its use in] . . . an article or photograph included within a magazine.”¹⁵⁶ *GQ*’s use of C-3PO on its cover would fall under this heightened commercial purpose of the infringing use. Using the beloved *Star Wars* characters on the cover was clearly a tactic to elicit sales of the magazine based on the attention *GQ* knew the issue would draw.

While the first prong’s commerciality factor has received much attention, courts have included other factors in their first-prong analyses. For example, courts have considered the “user’s bad faith, distortion of the copyright owner’s work, . . . the user’s interest in responding to a personal attack,” as well as more general considerations including public interest, the First Amendment, and privacy concerns.¹⁵⁷ The broad use of the word “character” allows for the flexibility Congress intended. In the legal sense, “character” is usually defined in terms of people’s morals and behavior,¹⁵⁸ but this common emphasis on morality can logically be carried over into considering the sexual character of a work, in addition to the broad general definitions of the word. Definitions of “character” include “a feature used to separate distinguishable things into categories” and “main or essential nature especially as strongly marked and serving to distinguish.”¹⁵⁹ Under any of the definitions of “character,” a

¹⁵³ 17 U.S.C. § 107(1) (2012).

¹⁵⁴ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-47, 561-63 (1985).

¹⁵⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994); see Patry & Perlmutter, *supra* note 85, at 677-80.

¹⁵⁶ Patry & Perlmutter, *supra* note 85, at 681.

¹⁵⁷ *Id.* at 685 (citations omitted).

¹⁵⁸ *Character*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁵⁹ *Character*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2012).

work's sexual nature is a permissible attribute for consideration, whether analyzing its moral aspects or distinguishable features. When considering "purpose and character," courts should give attention to the "degree of social benefit fostered by that type of [sexual] use,"¹⁶⁰ in addition to determining whether the use is for entertainment, scholarship, or commercial gain.

2. Legal Theories Regarding Sexual Content in Intellectual Property and First Amendment Jurisprudence

The sexual nature of content is not a new consideration for courts or lawmaking bodies. Those advocating for more liberal views of women's sexuality have heralded the benefits of expressing sexuality, while those concerned with the well-being of sensitive audiences have warned against the harms of explicit content. At common law, many original works were denied the protection of intellectual property laws when the nature of the work was sexual.¹⁶¹ Similarly, in intellectual property law and related fields, protection of sexual content has often been denied. For example, in order to be registered as a federal trademark, a mark cannot consist of or be comprised of "immoral" or "scandalous" material.¹⁶² The U.S. Patent and Trademark Office has used an "offensiveness" standard to determine that immoral or scandalous material is material that is "shocking to the sense of propriety, offensive to the conscience or moral feelings or calling out for condemnation," or is simply vulgar.¹⁶³ Marks referring to sex are often deemed to be scandalous and are therefore ineligible for trademark protection.¹⁶⁴

Fair use of copyrighted material developed as a doctrine to balance an artist's right to ownership of his creations with a secondary user's First Amendment right to freedom of speech. Sexual, lewd, or obscene speech, however, is not fully protected by the First Amendment, and in some instances is not protected at all. It has long been held that obscene speech, including pornographic material, "is not protected by the freedoms of speech and press."¹⁶⁵ Speech is obscene if an average person viewing the

¹⁶⁰ Patry & Perlmutter, *supra* note 85, at 681.

¹⁶¹ Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL'Y REV 119, 119-20 (2012).

¹⁶² 15 U.S.C. § 1052(a) (2012).

¹⁶³ U.S. PATENT AND TRADEMARK OFFICE, U.S. TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1203.01 (2015).

¹⁶⁴ See *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1338 (Fed. Cir. 2003).

¹⁶⁵ *Roth v. United States*, 354 U.S. 476, 481 (1957).

work in light of contemporary community standards would find that the work (1) “appeals to the prurient interest,” (2) “depicts or describes, in a patently offensive way, sexual conduct specifically defined by . . . law,” and (3) “lacks serious literary, artistic, political, or scientific value.”¹⁶⁶ The Supreme Court has wrestled with the amount of protection to grant nonobscene, sexually explicit speech and has found that this type of speech may deserve some First Amendment protection,¹⁶⁷ but not as much as political speech.¹⁶⁸

Therefore, if a parody is obscene, it lacks First Amendment protection, and thus the original artist’s exclusive right to his copyrighted work has no other competing right to be balanced against. In these instances, the parody defense must fail. Since the Supreme Court has been able to clearly articulate and follow guidelines to determine whether content is obscene,¹⁶⁹ those same considerations can and should be used in copyright cases to determine how strong the copier’s competing rights are compared to the original artist’s section 106 rights.

3. Sexual Content and Trademark Dilution and Tarnishment

The sexual nature of an infringing work claiming fair use is considered in an area of law closely related to copyright: trademark. As discussed in Part I, trademark protection differs from copyright in that it protects the association a consumer makes with both a good and the source of that good.¹⁷⁰ The emphasis is on the goodwill and reputation of the source, rather than on the source itself. Federal trademark law, like copyright law, includes fair use as a defense to infringement for similar policy reasons. Trademark’s fair use statute differs from copyright’s in that use is only fair if it refrains from diluting the brand through either blurring¹⁷¹ or tarnishment.¹⁷² The

¹⁶⁶ *United States v. McCoy*, 602 Fed. App’x. 501, 504 (11th Cir. 2015) (quoting *Miller v. California*, 413 U.S. 15, 24, 30, 93 (1973)).

¹⁶⁷ Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 309 (1995).

¹⁶⁸ *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (stating that “few of us would march our sons and daughters off to war” to protect this sort of speech).

¹⁶⁹ *See Miller*, 413 U.S. at 23-26.

¹⁷⁰ *See supra* Section I.A.

¹⁷¹ Blurring occurs when the second user’s use of the original mark may cause confusion as to ownership, and thus consumers may erroneously attribute the second mark to the original source. 15 U.S.C. § 1125(c)(2)(B) (2012).

secondary use's sexual nature is taken into account, as it is presumed that obscene or vulgar use may tarnish the brand. But the vulgarity is weighed against whether the use would actually result in brand harm or whether a reasonable consumer would understand that the vulgarity is clearly not attributable to the original source, thus avoiding confusion and harm.¹⁷³ Although trademark tarnishment analysis may have its weaknesses, at least the obvious sexual nature and potential for harm are recognized.¹⁷⁴ It seems illogical that courts and lawmaking bodies recognize that the sexual nature of a copied work can cause harm to the original artist in one area of intellectual property but do not explicitly recognize it as a potential source of harm in a closely related field. The refusal to recognize the sexual nature of a copied work in copyright fair use analysis leads to inconsistencies within individual cases where the owner of the work loses on the copyright claim but wins on the trademark claim.¹⁷⁵

4. Courts' Current Analyses of Sexual Parodies

Although parody's sexual nature is not a required consideration in copyright infringement cases as it is in First Amendment protection and trademark infringement cases, courts often consider the issue anyway. Unfortunately, courts' handling of sexual and obscene content in the area of parody has been inconsistent. On one hand, some courts almost equate sexuality with transformative parody and therefore put less emphasis on the other four balancing factors of fair use,¹⁷⁶ while other courts

¹⁷² Tarnishment occurs when the second user's use of the original mark causes an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." *Id.* § 1125(c)(2)(C).

¹⁷³ See *Girl Scouts of U.S. v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228, 1230-31, 1233 (S.D.N.Y. 1969) (holding that a poster of a pregnant Girl Scout and tagline "Be Prepared" was fair use because the content of the poster was clearly not attributable to the Girl Scouts organization).

¹⁷⁴ *Compare* *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901-02, 907 (9th Cir. 2002) (finding that Aqua's use of "Barbie" in its popular song, which called the doll a "blond bimbo girl" and focused on sexuality, was a clear parodic use), *with* *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 203, 205 (2d Cir. 1979) (enjoining defendant from using Dallas Cowboys Cheerleader uniforms on topless women in its film, because it would likely tarnish the brand and was likely that the public would erroneously assume plaintiff approved the use).

¹⁷⁵ See, e.g., *Pillsbury Co. v. Milky Way Prods.*, No. C78-679A, 1981 U.S. Dist. LEXIS 17722, at *8, *11 (N.D. Ga. Dec. 24, 1981).

¹⁷⁶ *Lucasfilm Ltd. v. Media Mkt. Grp., Ltd.*, 182 F. Supp. 2d 897 (N.D. Cal. 2002); *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541 (2d Cir. 1964); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 274 (2007).

show disdain for the lewd nature of the work and find it infringing.¹⁷⁷ Some critics argue that the fair use doctrine as it stands grants courts too much freedom to censor material they find to be distasteful or offensive,¹⁷⁸ but Congress intended to give courts this type of freedom.¹⁷⁹ Prior to the 1976 amendment to the Copyright Act, courts had been deciding fair use cases on the basis of sexual obscenity¹⁸⁰ and commercial use.¹⁸¹ The amendment and legislative history are silent on the treatment of sexuality when considering fair use, but they clearly express that the commercial nature of a work is only one element to consider.¹⁸² Thus, if Congress had a problem with the way courts were balancing the sexual nature of parody, it could have redirected them when it codified the fair use doctrine, but instead it encouraged them to continue to develop the doctrine just as they had been.

5. Not Evaluating the Sexual Nature of a Work Creates Inconsistencies Within Individual Cases

Often, many works that are copyrighted are also trademarked and have become so synonymous with the source of the work that the consumer associates the good with the source. This is likely to happen with many of Disney's marks like Mickey Mouse and C-3PO. The public recognizes these as copyrighted works that cannot be reproduced and associates them both consciously and subconsciously with Disney.¹⁸³ While the sexually explicit or suggestive nature of a parody has been considered an important factor in the fairness of trademark parody,¹⁸⁴ it is not expressly recognized in copyright law. It seems that the law as it stands may allow *GQ's Star Wars* parody under fair use of

¹⁷⁷ See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

¹⁷⁸ See Paul Tager Lehr, Note, *The Fair-Use Doctrine Before and After "Pretty Woman's"* *Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 46 FLA. L. REV. 443, 446-47 (1994).

¹⁷⁹ H.R. REP. NO. 94-1476, at 66 (1976) ("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.")

¹⁸⁰ See *MCA, Inc.*, 677 F.2d at 185; *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1397-98 (S.D.N.Y. 1975); see also *supra* Section II.B.

¹⁸¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

¹⁸² H.R. Rep. No 94-1476, at 65 (1976).

¹⁸³ See *supra* Section I.C for a discussion of the consumer confusion that resulted from *GQ's* use of the copyrighted *Star Wars* characters.

¹⁸⁴ See *supra* Section IV.B.3.

copyright but would prohibit the use of the Disney “D” or other insignia on sexually suggestive material. The *GQ* cover is a more provocative and noticeable use of Disney’s intellectual property than a small insignia on the bottom corner of a sexually suggestive magazine. The fact that the more subtle use of Disney’s intellectual property would be illegal, yet the *GQ* cover is not, seems unbalanced and inconsistent. If Disney were to bring both trademark¹⁸⁵ and copyright claims against *GQ* for the use of its characters, its trademark claim would probably succeed, and its copyright claim would probably fail.¹⁸⁶

C. *Balancing Competing Rights and Potential Harms Under Copyright Law*

Including sexuality in the fair use balancing test would allow courts to take a closer look at the type of parody when determining how much protection the secondary use should be afforded. Courts’ consideration of the sexuality of material in First Amendment and other intellectual property issues highlights how practical and plausible this solution is. Implicit in courts’ evaluation of the sexual nature of content¹⁸⁷ is the idea that the court is protecting against harm.¹⁸⁸ The fourth factor in the current balancing test is “the effect of the use upon the potential market for or value of the copyrighted work”—in other words, the harm or potential harm to the market.¹⁸⁹ This prong takes into account not only harm that the parody would cause to the market but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market”¹⁹⁰ and “the market for derivative works.”¹⁹¹

As discussed in *Fisher v. Dees*, the fourth prong seeks to distinguish between an infringing work that “suppresses demand”

¹⁸⁵ C-3PO and Princess Leia, along with several of the other *Star Wars* characters, are registered trademarks. *Trademark Electronic Search System (TESS)*, UNITED STATES PATENT AND TRADEMARK OFFICE, <http://tmsearch.uspto.gov/> [<http://perma.cc/U8Z9-S95R>] (last visited July 16, 2016) (search “C-3PO” and “Princess Leia”).

¹⁸⁶ See *supra* note 150 and accompanying text.

¹⁸⁷ This is true whether courts’ evaluation of the content’s sexual nature occurs as it currently does in trademark and First Amendment issues, or if the sexual nature is eventually evaluated in copyright.

¹⁸⁸ See *Shaman*, *supra* note 167 (arguing that some speech receives less First Amendment protection not because it has a low value to society but because it does in fact cause harm).

¹⁸⁹ 17 U.S.C. § 107(4) (2012).

¹⁹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting NIMMER ON COPYRIGHT § 13.05 (A)(4)).

¹⁹¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

for the original in the market and one that “usurps” the original’s spot in the market.¹⁹² Generally, when a work is copied identically, courts find it clear that the copy may take the place of the original in the market.¹⁹³ But when something is parodied, it is generally considered transformative,¹⁹⁴ and thus the parody is not “usurping” the original’s place in the market. Viewing market harm in this way almost entirely removes the fourth prong from the parody analysis¹⁹⁵ and eliminates the consideration of whether the “unrestricted conduct” has a “substantially adverse impact” on the market. Although the parody may not be putting itself in the place of the original on the shelves, the harm done to the original may allow competitors to hold that spot.¹⁹⁶ The harm to the original in the market is likely to be greater when the nature of the parody is sexual *and* the original’s target audience is children. Because the potential for greater harm exists depending on the original’s target audience, market demographics should be considered within the market prong.¹⁹⁷

1. Existing Protections Against Harm to Juveniles

Congress was clear in the Copyright Act Amendment of 1976 that fair use is about balancing competing rights and interests,¹⁹⁸ and another area of clear interest for courts and legislatures is protecting juveniles from harm, particularly

¹⁹² *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

¹⁹³ *See Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 136 (2d Cir. 2003).

¹⁹⁴ *See Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003); *Berlin v. E.C. Publ’ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964).

¹⁹⁵ For something to be a parody, it will have to have the transformative component, and thus it is likely that the copy will be targeting a new audience. For example, in *Lucasfilm*, the court felt that *Star Wars* would not aim to exploit the pornographic film market that the parody did, and in *Campbell*, the Court concluded that 2 Live Crew’s rap version of the song was targeting a new market for rap music that would not harm plaintiff’s current target market. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994); *see Lucasfilm Ltd. v. Media Mkt. Grp., Ltd.*, 182 F. Supp. 2d 897, 901 (N.D. Cal. 2002); *cf. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

¹⁹⁶ *See David Fagundes, Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 361-62 (2014) (discussing the type of market harm that fair use seeks to avoid and suggesting that perhaps a net effect market-harm approach would provide a more accurate and economically efficient reading of this prong).

¹⁹⁷ Alternatively, the target demographic of the original and the potential for resulting harm to others could be weighed as a fifth factor entirely. “Flexibility and sensitivity are essential to [fair use’s] successful functioning.” Patry & Perlmutter, *supra* note 85, at 668.

¹⁹⁸ *See H.R. REP. NO. 94-1476*, at 65 (1976).

harm of a sexual nature.¹⁹⁹ Beyond the statutes and regulations that protect children from direct harm,²⁰⁰ there exists a body of law that regulates juveniles' exposure to sexually explicit, lewd, or obscene material. This priority to protect juveniles is often balanced against the First Amendment right to free speech and, in many cases, the protection of juveniles prevails. In *Ginsberg v. New York*, the Supreme Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults.²⁰¹ In *Bethel School District v. Fraser*, the Supreme Court held that a public school has a right to censor lewd and vulgar speech that occurs on school grounds.²⁰² Part of the Court's analysis was its consideration of the children's presence in public schools and the acknowledgement that "First Amendment jurisprudence recognizes an interest in protecting minors from exposure to vulgar and offensive spoken language."²⁰³ These examples illustrate the importance of considering the harm to minors when balancing First Amendment rights and other competing interests.

2. Regulation of Obscene, Lewd, and Vulgar Content

The interest in protecting minors not just from sexual content, but also from content that is vulgar and offensive, is seen most prominently in movie, radio, and television regulations. The Motion Picture Association of America (MPAA) was founded in 1922 in response to a desire for the government to censor American films.²⁰⁴ The MPAA does not censor content, but instead balances artists' free speech rights with the public's desire to know what type of content it will be watching. The MPAA is

¹⁹⁹ Some of the most obvious statutory protections that come to mind include strict criminal liability for statutory rape, molestation, and child endangerment.

²⁰⁰ See Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251-2252 (2012)); see also Sexual Exploitation of Children Act, Pub. L. No. 95-222, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253 (2012)).

²⁰¹ *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁰² *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."). The Court held that it was an appropriate function of public schools to determine what manner of speech is inappropriate and to thus prohibit the use of vulgar and offensive terms on school grounds. *Id.* at 685-86.

²⁰³ See *id.* at 676; *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Ginsberg*, 390 U.S. 629.

²⁰⁴ *Our Story*, MPAA, <http://www.mpa.org/our-story> [<http://perma.cc/652F-3QNJ>] (last visited June 28, 2016).

responsible for providing a rating system for movies and television shows, evaluating films and shows against this rating system, and assigning a rating grade “G” through “NC-17” depending on components such as vulgarity, violence, and sexual content.²⁰⁵ Although the MPAA rates this content, this is not enforced by law and instead functions as a code that movies and theaters follow, which highlights the importance that society places on such a rating system and the transparency of content.

Similarly, the Federal Communications Commission (FCC) has the power to regulate indecent and obscene television and radio broadcasts, but unlike the MPAA, this administrative agency has the power to legally enforce its regulations.²⁰⁶ In *FCC v. Pacifica Foundation*, the FCC defined “indecent” in response to a radio broadcast by George Carlin that featured a monologue about “Seven Words You Can Never Say on Television.”²⁰⁷ The FCC defined indecent language as language or material that depicts or “describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.”²⁰⁸ The crux of this case was not so much the language Carlin used, but that he used it in a broadcast during a time in which many children would be listening.²⁰⁹ This led to a movement toward creating “safe-harbor” hours on television and radio during which the FCC could more closely regulate content, due to the likelihood that children would be exposed to it. The Broadcast Decency Enforcement Act of 2005 prohibits indecent language between the hours of 6:00 a.m. and 10:00 p.m.²¹⁰ Under this Act, the FCC is able to fine broadcasters who use indecent language or images during the safe-harbor hours, even if the use of the language is only “fleeting.”²¹¹ The Act was signed in 2005, following two instances that contributed to the Act’s passage: Bono’s utterance of “this is really, really

²⁰⁵ *Film Ratings*, MPAA, <http://www.mpa.org/film-ratings/> [<http://perma.cc/599N-FRQN>] (last visited June 28, 2016).

²⁰⁶ 18 U.S.C. § 1464 (2012) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”); *About the FCC*, FCC, <https://www.fcc.gov/about/overview> [<http://perma.cc/J9RR-NCBS>] (last visited June 28, 2016).

²⁰⁷ *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (appendix).

²⁰⁸ *Id.* at 732.

²⁰⁹ *Id.* (“[T]he Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, [and] noted that they ‘were broadcast at a time when children were undoubtedly in the audience.’” (quoting 56 F.C.C.2d 94, 99 (1975))).

²¹⁰ 47 U.S.C. § 609 (2012).

²¹¹ *Id.* One single utterance of the “F word” is enough for a fine to be imposed. 19 F.C.C.R. 4975 (2004), 2004 WL 540339.

fucking brilliant” as he accepted a Golden Globe award,²¹² and the infamous Janet Jackson wardrobe malfunction during the 2004 Super Bowl halftime show.²¹³ Both of these instances were fleeting and unplanned, yet they provoked a public outcry and resulted in stricter regulations and fines, showing just how important the policy of protecting minor audiences from indecent and obscene material is.²¹⁴

It seems that even where minors are only *part* of the audience, protecting them from inappropriate material is a high priority. As such, when considering the harm a parody may do to the market, courts should consider the overall harmful effect that takes into account the typical audience member. By including the audience demographics, courts will be able to more accurately balance the competing rights of the parties while furthering other goals. The right to display sexual content without regard for the presence of children should not be given more weight than the right of a copyright owner to his material.²¹⁵

CONCLUSION

As Congress and the courts have emphasized multiple times, determining whether a use of a copyrighted work is fair involves balancing the copyright owner’s right to control his creations with the copier’s right to fair use and freedom of expression. Examining the history of fair use and parody in copyright law, however, reveals that the current balancing test supports laziness and outright copying, due to the test’s inconsistent application and courts’ failure to consider additional factors. Much of the fair use jurisprudence focuses on balancing, which begs the question: Does a balance truly exist where a

²¹² *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4980 & n.4 (2004).

²¹³ See Press Release, FCC, FCC Chairman Powell Calls Super Bowl Halftime Show a “Classless, Crass, Deplorable Stunt.” Opens Investigation (Feb. 2, 2004), 2004 WL 187406.

²¹⁴ See Lili Levi, *The FCC’s Regulation of Indecency*, 7 FIRST AMENDMENT CENTER 1 (Apr. 2008); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529-30 (2009) (“The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.”).

²¹⁵ In the case of the *GQ* cover with C-3PO’s finger in Amy Schumer’s mouth, the fact that this provocative image appears on the cover of a widely distributed magazine makes it highly likely that children will see this image due to its level of exposure and the visibility of the *Star Wars* character. If the cover attracted a child enough that he would look through the magazine for more *Star Wars* pictures, he would encounter a naked woman in bed with some of his favorite characters—a confusing image indeed.

media mogul like Condé Nast is allowed to portray in a sexual manner copyrighted characters that typically appeal to a juvenile audience? As the law currently stands, this type of copying for massive profit, despite a high likelihood of confusion as to authorization and attribution, is permitted.

The *GQ* August 2015 cover featuring a provocative image of Amy Schumer with C-3PO created much outrage, leaving Disney to defend itself publicly but with no recourse privately. If the fair use balancing test included an examination of the sexual nature of the copy (as other areas of First Amendment and intellectual property law do), in addition to the commercial nature of the copy under the “purpose and character” prong of the test, this first factor would weigh against fair use. Similarly, if the fourth prong, which considers market harm, considered the demographic of the market more generally to take into account net harm to others (particularly harm to juveniles, which the legislature and courts deem important to protect against in other related areas), this fourth factor would also weigh against fair use. On balance, the test would become more predictable, and Disney (and others similarly situated) would be more likely to prevail in a copyright infringement suit. The current inconsistency and lack of additional protection in the test is enough to prevent a massive corporation like Disney from stopping the abuse of its characters. More concerning is the logical conclusion that if a powerful company like Disney cannot fight off plagiarizers, then a less powerful copyright owner certainly cannot. With technology improving rapidly and peer-to-peer marketplaces like Amazon and eBay becoming more popular, the ability to “parody” copyrighted works is increasing. Congress’s 1976 amendment to the Copyright Act left it flexible enough to respond to changing technology. To curb the trend of sexualizing copyrighted material for profit, the fair use test needs to be strengthened—before coloring books contain images of C-3PO at a brothel and Darth Vader pole-dancing.

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