CAMPBELL v. ACFUFF-ROSE: 
BRINGING FAIR USE INTO FOCUS?

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In recent years, you may have passed small crowds of people, standing in front of art stores, staring at what appear to be abstract paintings of brightly colored swirls. Occasionally, one of the gawkers says, "Oh, wow!" or "Oh, yes!" What they are looking at is a new generation of computer-produced "three-dimensional" art, in which pictures, under the proper stare, take on ribbed but recognizable three-dimensional shapes.2

If you just glance at the pictures, you see nothing of their proper perspective. There seem to be two basic methods for "bringing" these pictures into focus. One, apparently for those who have already learned the technique, is simply to stare at the pictures while "relaxing" one's eyes in a mystic-like trance looking a bit like Dustin Hoffman learning how to shoot in Little Big Man). The other is to use prescribed methods for forcing one's eyes to focus not at the plane of the picture, but beyond it, such as by focusing upon one's reflection in the glass of the picture frame.

The scene reminds me of efforts to quantify the concept of fair use in copyright law. Fair use was of course codified for the first time in the 1976 Copyright Act, and one might have expected that the codification would result in a certain amount of clarification and uniformity in the application of the doctrine. However, fair use has remained an elusive, if not enigmatic, doctrine. One can stare at the fair use factors described in the statute, and apparently still not know how to bring them into focus in any particular situation.

Some authors and users have sought clear-cut rules, or suggested that one or another of the fair use factors should be decisive, or at least more important, in particular situations. The typical response of the Supreme Court, in the handful of fair use cases it has decided, seems to be a rejection of the most simplifying presumptions or ordering of the factors. In this article, I shall briefly review the fair use law and the Supreme Court's analysis in particular cases. I shall then focus upon the contribution, if any, made in the recent case of Campbell v. Acuff-Rose Music.5 I conclude that, whereas the Court in Campbell purports to adopt a "totality" approach, insisting that all of the fair use factors must be weighed in any given situation, the Court effectively adopt an approach that allows one or more of the factors to be decisive in particular situations. Unfortunately, while the case offers some guidance in determining how this might be accomplished in the case before it, it offers little guidance for other cases in other contexts.

The Fair Use Factors:

The fair use doctrine, developed by the judiciary as "an equitable rule of reason," was first codified in the Copyright Act of 1976 as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, (sic) for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is 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 or value of the copyrighted work.

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

Although the purpose of the codification was ostensibly "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way," it was obvious from committee amendments to the section that it in fact went beyond prior law.

Because the factors can be vague or amorphous, lawyers, authors, and courts immediately set about trying to establish some sort of priority among the factors. For example, it was suggested that the language of the preamble, apparently limiting fair use to purposes "such as" those listed, had the effect of filtering out some cases from consideration, even before getting to the four listed factors. Leon Seltzer, in an excellent and thorough review of the law of fair use, suggested that the listed purposes focused protection upon "the use by a second author of a first author's work," what might be called the "productive" use of the work rather than the "ordinary" use of it.6 The Ninth Circuit Court of Appeals accepted such reasoning in Universal City Studios v. Sony Corp. of America.7 The Supreme Court, however, specifically found that such an understanding of fair use was "erroneous,"8 and that fair use analysis required consideration of all four factors, without using any one to screen out even "nonproductive" uses.

Other attempts to develop short-cuts or safe-harbor rules have met with similar frustration. For example, in
Williams & Wilkins Co. v. United States. It had been argued that the copying of entire articles from scientific journals could not constitute fair use, because it exceeded the amount of copying allowed under the third factor. However, the Court of Claims responded.

It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be "fair use," but this is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice. There is, in short, no inflexible rule excluding an entire copyrighted work from the area of "fair use." Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others.

Similarly, the Ninth Circuit had suggested in the Sony case that the taking of an entire copyrighted work precluded a finding of fair use. Such a suggestion was rejected by the Supreme Court, which found in that case that "the fact that the entire work is reproduced, see § 107(3), does not have the ordinary effect of militating against a finding of fair use." The Supreme Court case of Harper & Row, Publishers v. National Enterprises had suggested that the unpublished nature of President Ford's memoirs at the time of infringement might be the decisive element in barring a claim of fair use. Following up on Harper & Row, the Second Circuit cases of Salinger v. Random House, and New Era Publications International, Apf v. Henry Holt & Co., each granting broad protection for copyrighted works against fair use, suggested that the unpublished nature of a work might be decisive in most infringement cases. Bowing to complaints by biographers and other scholars that such a restrictive reading of fair use interfered with their ability to create useful biographies and criticisms, Congress amended section 107 of the Copyright Act. The new version provides that "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Thus, Congress rejected the key nature of unpublished works, and affirmed that any fair use analysis required a weighing of all of the fair use factors.

The factor most often recognized as the most important is the fourth factor, effect of the otherwise infringing use upon an actual or potential market for the original work. In Sony, the Supreme Court considered the most important element of fair use, the market for the original work, and the potential market for the infringing use, as well as the nature of the infringing use. In Harper & Row, citing the last factor as "undoubtedly the single most important element of fair use," the court concluded that the actual harm to Harper & Row's derivative market, by the injury to their serialization rights, was not enough to defeat a finding of fair use in the quotations from the Ford memoirs. Yet, economic harm also cannot be decisive in all cases, either when there is an absence of provable harm or where some harm is proven but is outweighed by factors tilting in the opposite direction.

Campbell v. Acuff-Rose:

Roy Orbison and William Dees wrote the rock ballad "Oh, Pretty Woman" in 1964, and assigned the copyright to Acuff-Rose Music, Inc. In 1989, the rap group 2 Live Crew wrote a parody of the song, "Pretty Woman," and included it on 2 Live Crew's album As Clean As They Wanna Be. The album cover identified Orbison and Dees as the writers of the song, and Acuff-Rose as publisher. 2 Live Crew's manager notified Acuff-Rose of their intent to include the song on the new album.

Acuff-Rose sued the members of 2 Live Crew for copyright infringement, and 2 Live Crew argued that their parody of the original work was protected under the doctrine of fair use. The district court for the middle district of Tennessee held that the 2 Live Crew parody was protected as a fair use, and dismissed the case on a motion to dismiss under Rule 56. The court apparently assumed that there was substantial similarity between the works, which would constitute infringement but for a finding of fair use, but went on to find a fair use based upon the four Section 107 factors.

The Sixth Circuit Court of Appeals reversed the district court, holding that the use made by 2 Live Crew was not a fair use. The court said that the commercial purpose of the second work made it "presumptively unfair." However, the Circuit Court admitted that "commercial purpose is not itself controlling on the issue of fair use," and went on to analyze the other fair use factors.

On appeal, the Supreme Court unanimously reversed the Sixth Circuit. Justice Souter described the issue as being "whether 2 Live Crew's commercial parody of Roy Orbison's song, 'Oh, Pretty Woman,' may be a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. §107." However, it seems beyond question that a parody "may be a fair use, since parody was specifically cited as an example of fair use in the legislative history." The Court rejected the Circuit Court's analysis, holding that "It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair," and that it was error to conclude that "2 Live Crew had necessarily copied excessively from the Orbison original, considering the parody purpose of the use." Yet, the Court also did not decide the case on the merits, instead remanding the case for an ultimate determination of fair use. Quite frankly, it's hard to know what the Circuit Court is now likely to do with the case. Technically it is free to reaffirm its original conclusions, based upon a new analysis that does not emphasize the overruled points and more clearly is based upon all four fair use factors; but it might take a bold court to find that there is no fair use after the strong pro-parody language of the Supreme Court analysis.

The Campbell Case in Perspective:

It is possible to see the Supreme Court case as yet another rejection of any simplifying rules and presumptions in the application of fair use. The Court concluded that "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." Rather, "All of the factors are to be explored, and the results weighed together, in light of the purposes of copyright." Of course, that's exactly what the Circuit Court thought it was doing. To be sure, it did give perhaps "dispositive weight" to one of the factors - the commercial nature of the work - but it did not ignore the other factors, particularly the amount and substantiality of the work taken.

The problem here is that, while courts almost always...
look at all four factors, it frequently turns out that one of the factors provides what, to the court, is a key element that affects the outcome of the other factors. More often than with other issues, different courts seem to find different key elements. For example, in *Sony*, the Ninth Circuit saw the key element as the taking of an entire work for entertainment (non-productive) purposes, and, in that light, the purported non-commercial nature of the taking did not necessarily compel a finding of fair use. The Supreme Court, in the same case, seized upon the fact that the copying was for the purpose of time-shifting, to watch programs transmitted over the public airwaves that the public was already invited to watch for free; in this context the taking of an entire work "does not have its ordinary effect of militating against a finding of fair use." 

Similarly, in *Harper & Row*, the Circuit Court reasoned that, given the nature of the use, for newsworthy review, a fair use could be found. The Supreme Court, however, concluded that the unpublished nature of the original manuscript was decisive in tipping the scales against a finding of fair use, notwithstanding the newsworthiness of the use.

In *Campbell*, whereas Justice Souter might seem to be rejecting the use of any particular factor as decisive, he does almost elevate the nature of the work — parody — to a dispositive status. To be sure, Justice Souter concludes that parody has no automatic exemption, and that "parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law." Yet, elsewhere in the opinion, he identifies as "a central purpose of this investigation" whether "something new" has been added: "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." Similarly, the Court suggests that the second factor, the nature of the copyrighted work, "is not much help ... or ever likely to help much" in a parody case. Speaking of the fourth factor, the Court states that "when ... the second use is transformative, market substitution is at least less certain," suggesting that the parody nature of the work may tend to disprove an adverse effect upon the market for the original.

What we are left with, then, are what Judge Cardozo (in another context) referred to as "competitive analogies." Is the key element — the element which has the catalytic ability to redefine the other elements or to put them into a different context — the "commercial" nature of a work or the "parody" nature of a work? The Supreme Court has rejected the former and apparently adopted the latter. Is there any guidance for the next case where there will be different competing analogies? Not much.

There are, however, some clear shifts in the sand. Parody will clearly have to be given more weight in the fair use analysis, though how much more is not clear, since parody was an accepted category of fair use anyway. What is perhaps more significant than the narrow holding in terms of parody is Justice Souter's acceptance of "transformative" analysis. More weight is supposed to be given to "transformative" works that add "something new" or alter the first work "with new expression, meaning, or message." This represents a shift from the Supreme Court's analysis in *Sony*, which had in footnote 40 rejected a fair use analysis based upon the "productive" use of a work. We must be careful, however, not to allow the focus upon the extent of transformative use to change the issue from "how much has been taken of the copyrighted work?" to "how much has been added?" An infringer does not escape liability by the amount of material that may be new. Yet, in the context of a legitimate fair use claim, the amount and nature of new material is supposedly now relevant.

And as long as we are considering competing analogies and contexts, it is curious to note how little weight was placed upon the fact that 2 Live Crew would have been entitled to a compulsory license to record a less transformative version of the Orbison-Doez work. Shouldn't it be at least relevant in the fair use analysis that the market for recording of musical works is the compulsory licensing market? In this context, the "market" under the fourth factor is a well established and fair market, arguably undermining the need for a finding of fair use. If one of the reasons for granting fair use treatment to parodies is the fear that authors will say "no" to parody licenses, it is significant that Auff-Rose had already lost the right to say "no" under the compulsory license. True, Auff-Rose argued that 2 Live Crew did not qualify for the compulsory license because the parody altered the fundamental character of the work; but isn't it relevant that Congress saw fit not to extend compulsory licenses to works that altered the fundamental character of the musical works beyond the amount necessary to adapt them to the style of the users? Is Congress's compensation somehow unconstitutional, or otherwise inequitable, when the reason for the alteration is that the work is a parody? In any event, the need to allow 2 Live Crew to take for free what it was otherwise arguably allowed to take for a modest fee may not be as compelling, and a proper outcome might be neither fair use nor full copyright liability, but payment of a fee comparable to the compulsory licensing fee.

Finally, the *Campbell* case sheds some light on a recurring disagreement about the nature of parody. Some cases have suggested that a parody qualifies for fair use only if it parodies the work that is being taken, not if it only parodies something else, or life in general. Justice Kennedy's concurring opinion in *Campbell* states that certain general principles are now discernible to define the fair use exception for parody ...

One ... is that parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition. ... The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well). The majority opinion seems to be generally in agreement, though allowing a bit more flexibility:

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.

The *Campbell* decision is frustrating for not resolving
the case on the merits. Indeed, it fails to shed much light upon one of the basic tests for determining the acceptable scope of fair use in parody cases, the "conjure up" test. Under that test, the parodist may use enough of the work to "conjure up" the original, but it is unclear how much is too much. And if the case fails to set forth the standards for deciding parody cases, it is even less helpful in providing guidance for other areas of fair use, which can always be distinguished on a case by case basis. The case thus hasn't changed the fair use law much, though it has of course provided interesting material for what is bound to be further discussion by scholars and lower courts. One of the hot topics of the day is the degree to which sampling of sounds, particularly popular in rap music, constitutes copyright infringement. The *Campbell* case, unfortunately, has little, if anything, to say on the topic.

To conclude our inquiry with the analogy with which we began, let's see: "If you still have trouble seeing the three-dimensional images [or fair use outcome?], turn to page 90 for more detailed instructions."

Anyone willing to try can master the . . . techniques. Because you need to look without focusing, it is important to relax the muscles of your eyes. . . . Don't become obsessed with trying to see. If you have trouble doing it, take a break and think about something else for a while.48

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2 For a history of the new random dot stereogram and other recent computer generated stereograms, point out how to view them, and choice samples of the work, see Cadence Books, *Stereograms* (1994).

3 114 S.Ct. 1164 (1994).


7 While the quoted language from the House Report had been earlier agreed upon, the House Committee admitted that the doctrine had by 1976 been subjected to "a process of accretion." For example, the words "by reproduction in copies or phonorecords or by any other means" and "multiple copies for classroom use" had been added, to "make clear that the doctrine has as much application to photocopying and taping as to other forms of use" (a proposition not clear under the earlier law). Id.

8 Leon Selzer, *Exceptions and Fair Use in Copyright* 24 (1978) ["Selzer"].

9 659 F.2d 963 (9th Cir. 1981), rev'd, 464 U.S. 417 (1984). Such reasoning was also endorsed by a district court in *Pacific & Southern Co. v. Sonnen*, but, in light of the Supreme Court decision in *Sony*, specifically rejected by the Court of Appeals (which affirmed the district court, but on other grounds). 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). Of course, even though the Ninth Circuit is Sony relied upon a productive use argument, it did in fact go on to weigh the four fair use factors, finding that they did not favor fair use in that case.

10 *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455-6 (1984). The Court went on to say, in an extended footnote 40:

The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. . . . The notion of social "productivity" cannot be a complete answer to this analysis. . . . The statutory language does not identify any dichotomy between productive and unproductive time-shifting, but does require consideration of the economic consequences of copying.


12 Id. at 1353.

13 464 U.S. at 449-50. See also *Hustler Magazine v. Morral Majority*, 706 F.2d 713, 720 (9th Cir. 1986) (holding that "wholesale copying does not preclude fair use per se").


15 In discussing the second fair use factor, the Court said:

The fact that a work is unpublished is a critical element of its "nature,". . . While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press . . . the author's right to control the first public appearance of his expression weighs against such use of the work before its release.

Id. at 564. Earlier authors had suggested under pre-1976 law that fair use was simply not available in the context of unpublished works, which were governed at the time by state and not federal law. See Ralph Shaw, *Literary Property in the United States* 67 (1950); Horace G. Ball, *The Law of Copyright and Literary Property* 260 n. 9 (1944); Arthur W. Well, *American Copyright Law* § 278 at 115 (1917).


17 873 F.2d 576 (2d Cir. 1989), rehg denied, 884 F.2d 659 (2d Cir. 1989).


19 *Sony* at 451.

20 *Harper & Row* at 566.


22 *See*, e.g., *Williams & Witkin Co. v. U.S.*, 487 F.2d 1345 (1973), aff'd by an equally divided Court, 420 U.S. 376 (1975), in which the potential harm to the development of science and medicine was held to outweigh the unproven degree of harm to the copyright owner.

23 It is unclear whether the notice was given before or after release of the album, and exactly what was meant by the offer to pay "the statutorily required rate for use of the song." *Acuff-Rose Music v. Campbell* 754 F. Supp. 1150, 1152 (M.D. Tenn. 1991), apparently in reference to the compulsory license under 17 U.S.C. §115. Apparently, the $13,867
deposited in court by the defendants, id., was the amount that would have been due under the compulsory license. Accraft-Rose Music v. Campbell, 972 F.2d 1429, 1432 (6th Cir. 1992).


26 Id. at 1436, picking up on language from Sony, that “Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner,” 464 U.S. at 451.

27 Id. at 1436-7.


29 House Report, supra note 3, at 63-6.

30 In the concurrence at 114 S.Ct. at 1180-2, Justice Kennedy refers to first-in-proceedings by the district court. However, there is little in the Supreme Court opinions that would lead the district court to alter its analysis, since its decision in favor of fair use would presumably satisfy the Supreme Court’s call for “sensitivity” to the requirements of parody. It is the logic of the Court of Appeals opinion that is overstated in the Supreme Court case, and presumably it will be up to the Circuit Court to respond to the criticisms of its approach.

31 114 S.Ct at 1170-1, citing Harper & Row, Sony, and the House and Senate Reports.

32 “Five of the recent leading cases were reversed at every stage of review,” Pierre N. Leval, “Toward a Fair Use Standard”, 103 Harv. L. Rev. 1105 (1990) ("Leval") (citing Rosemont Enterprises, Sony, Harper & Row, Sulzinger, and New Era).

33 464 U.S. at 450.

34 114 S.Ct. at 1172.

35 Id. at 1172.

36 Id. at 1175.

37 Id. at 1177.

38 Id. Unlike in the Sony case, the Court admirably makes clear that it is the defendant who wants to take advantage of the fair use defense who has the burden of proof on market harm. The Court even concludes that “2 Live Crew left themselves at... a disadvantage when they failed to address the effect on the market for rap derivatives,” id., suggesting that “The evidentiary hole will doubly be plugged on remand,” id. at 1179.


40 114 S.Ct. at 1171. Judge Leval’s article, Leval, supra note 29, seems to have been instrumental in developing the logic for the “transformative” analysis.

41 The proposal had been best developed by Leon Silver, see Silver, supra note 7.


43 Justice Stevens identifies 2 Live Crew’s failure to address the effect of their work upon the market for rap derivative works of the Beastie Boys song as grounds for remand, since the judicial record is thus incomplete. However, wouldn’t the rap derivative market likely be covered by the compulsory license, to the extent that a rap version would arrange the work to fit the (rap) style of the performer, but not change “the basic melody or fundamental character of the work” under § 115(a)(2)?


45 114 S.Ct. at 1180. Indeed, it was apparently this point that had led the Sixth Circuit to question whether the 2 Live Crew song even qualified as a "parody," 972 F.2d at 1435 n. 8.

46 114 S.Ct. at 1172.

47 Indeed, plaintiff’s expert musicologist identified five specific “riffs” which “may have actually been sampled or lifted and then incorporated into the recording of ‘Pretty Woman’ as performed by 2 Live Crew,” 972 F.2d at 1433. None of the courts involved in the case considered whether the standards for infringement or fair use should be any different for sampling of the sound recording than for independent fixation or imitation of the music. It is at least arguable that the right to make a parody does not include the right to take the exact fixation of sounds separately protected by copyright in the sound recording, or that the standards for determining permissible use should be different.

48 Id. at 90.