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A Modest Proposal: Granting Presumptive Fair Use Protection for Musical Parodies

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Notes

A Modest Proposal: Granting Presumptive Fair Use Protection for Musical Parodies

"YOU CAN'T MAKE UP ANYTHING ANYMORE. THE WORLD ITSELF IS A SATIRE.
ALL YOU'RE DOING IS RECORDING IT."[1]

In October 2007, the Bourne Company, copyright owners of "When You Wish Upon a Star," filed a complaint against Twentieth Century Fox and the producers of the popular animated TV show *The Family Guy* alleging "willful infringement of Plaintiff's copyright interests in the famous and iconic song."[2] This action resulted from an episode of *The Family Guy* titled "When You Wish Upon a Weinstein" in which the main character Peter Griffin sings re-written lyrics of "I Need a Jew" to the melody of "When You Wish Upon a Star."[3] The defendants will likely assert fair use under copyright law, an affirmative defense to copyright infringement.[4] Under the current copyright case law of fair use, this case will hinge on the classification of the "I Need

1. Art Buchwald, columnist (1925-2007).
2. Complaint at 2, Bourne Co., v. Twentieth Century Fox Film Corp., No. 07 Civ. 8580 (S.D.N.Y. October 3, 2007), *available at* http://copywrite.files.wordpress.com/2007/10/bournev20thcenturyfox.pdf [hereinafter Complaint].
3. Complaint, *supra* note 2, at 2; *see also* Family Guy, http://www.familyguy.com (last visited July 7, 2008).
4. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

a Jew" song animation as either parodic or satirical. This seemingly arbitrary distinction has evolved in the legal world as the keystone to determining the legality of using a copyrighted work in the creation of a new work.[5]

This is not the first case involving rewritten lyrics. During the height of the 2004 presidential campaign, JibJab Media launched their self-described parody version of Woody Guthrie's song "This Land is Your Land" that poked fun at the polarized political climate.[6] Over 10 million potential voters viewed the parody—a popularity that beat the candidates' own websites by threefold[7]—and heard the new lyrics that lampooned George W. Bush and John Kerry sung to Guthrie's melody.[8] In spite of, or perhaps as a result of the immense popularity of the bipartisan lampoon, the copyright holders of the original Guthrie song argued that the use constituted copyright infringement and sent a cease and desist order to the JibJab Company.[9] The parties settled out of court, however, so it is unclear whether the animation fell within the legal definition of parody and was protected under fair use. [10]

More recently, political humorist Paul Shanklin produced a controversial song titled "Barack the Magic Negro" sung to the tune of "Puff the Magic Dragon."[11] Initially aired on the Rush Limbaugh radio show in March 2007, this song mocks both Al Sharpton's and Barack Obama's respective roles within the political community and their 'use' of their race.[12] While the

5. *See generally Campbell*, 510 U.S. 569 (noting distinction between parodies and satires within fair use); Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (using parody/satire distinction as critical analysis in fair use); Annemarie Bridy, *"Sheep in Goats' Clothing: Satire and Fair Use After* Campbell v. Acuff-Rose Music, Inc.," 51 J. COPYRIGHT SOC'Y U.S.A. 257 (2004) (discussing the legal misnomer 'parody' as compared to literary forms of parody and satire).

6. JibJab, *This Land!*, http://www.jibjab.com/originals/this_land (last visited July 7, 2008).

7. Evan Hansen, JibJab beats copyright rap, http://news.com.com/JibJab+beats+copyright+rap/2100-1026_3-5322970.html (last visited July 14, 2008).

8. *Id.*

9. *Id.*

10. *Id.*

11. *See generally* Paul Shanklin, Conservative, Political Satirist, www.paulshanklin.com (last visited July 14, 2008).

12. AlterNet, Limbaugh plays "Barack The Magic Negro" on his show,

controversy over this song centered on its racist implications, the potential copyright infringement also invokes sensitive issues concerning political free speech and creative protection.

The practice of writing new lyrics to popular pre-existing songs ("re-writes") presents a difficult question in copyright law. The fair use defense to copyright infringement allows a secondary user to infringe upon a copyrighted work,[13] but determining how much copying is acceptable and for what purposes is often a subjective balancing act. Fair use encompasses infringement for commentary or criticism,[14] which is the category that re-writes have fallen into by asserting their works critique by parody the originals. But if the re-write lyrics do not comment on the original song, or 'parody' the original, the re-write is illegal under current copyright law.[15] From the political lampoons of the Capitol Steps to Weird Al's Yankovic's musical spoofs of pop culture, musical re-writes all claim legal legitimacy under fair use regardless of the subjects of their commentaries.[16] The current proliferation of both satirical and parodic re-writes reveals a potential chasm between what the law says and the de facto practice within the re-write genre.

This note argues that this disjunction between law and reality produces an unpredictable arena for re-write lyricists and would-be parodists. Propelled by abstract reasoning and policies, irregular case law further clouds this uncertainty. Part I examines the statutory and judicial application of copyright and fair use law to re-writes. Part II explores how the current case law is affecting the re-write market, concluding that the increasingly broad protection of parodies under fair use creates an imprecise shield against infringement. Part III offers one solution to the unstable treatment of re-writes by the courts, arguing that

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http://www.alternet.org/blogs/peek/50979/ (last visited July 14, 2008); see Appendix A for the complete lyrics to "Barack the Magic Negro."

13. 17 U.S.C.A. § 107 (West 2007).

14. *Id.*

15. *E.g., Campbell*, 510 U.S. at 580; *Dr. Seuss s, L.P.*, 109 F.3d at 1399-400.

16. *See generally* CAPITOL STEPS, www.capsteps.com (last visited July 14, 2008) (homepage of Capitol Steps hosts examples of musical re-writes); "WEIRD AL" YANKOVIC, www.weirdal.com (last visited July 14, 2008) (homepage of Weird Al Yankovic; claiming legal right to use songs yet still asks permission).

re-writes merit presumptive fair use protection as a result of their transformative nature and unique market position.

I. RE-WRITES ARE "LEGAL PARODIES" UNDER COPYRIGHT FAIR USE

A. Statutory Applications to Re-writes Provide Little Guidance

(1) The Goal of Copyright Law is to Encourage Creativity

The policy of copyright law is explicit in the U.S. Constitution: "[t]o promote the Progress of Sciences and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[17] While copyright law presents subsidiary economic benefits, the primary goal is to stimulate artistic creativity in order to advance the general welfare.[18] Judge Pierre Leval, an influential intellectual property Second Circuit judge, clearly summarized the specific objective of copyright and method of achieving such a goal:

> The copyright law embodies a recognition that creative intellectual activity is vital to the well being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.[19]

Congress legislated these copyright policies in the Copyright Act in 1976, securing authors exclusive rights to reproduce, redesign, distribute, and publicly perform and display their copyrighted works.[20] These statutory rights provide broad protection to copyright owners—requiring only proof of (1) an ownership of a registered copyright and (2) that the defendant copied original elements of the first work to establish a case of

17. U.S. CONST. art. I, § 8, cl. 8.
18. Harper & Row Publishers, Inc. v. Nation s, 471 U.S. 539, 545-46 (1985).
19. Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1109 (1989-1990).
20. 17 U.S.C.A. § 106 (West 2007).

copyright infringement concerning an unauthorized new work.[21] Evidence of direct copying is often non-existent, and so proof of the defendant's access to the original work and substantial similarity between the two works establishes an inference of infringement.[22] A re-writes' structure of using pre-existing melodies frequently positions the work within the boundaries of substantially similar to the original song and therefore illegal infringement.

(2) Fair Use is a Necessary, but Unclear, Safety Valve on Copyright's Monopolies

Given the broad monopolies created by copyright's scope, a doctrine to safeguard and promote the creativity derived from original works naturally developed.[23] Courts have long recognized that art and science continuously evolve from earlier thoughts and ideas, and few original creations are strictly such—instead each work must borrow from earlier works.[24] A common law fair use doctrine emerged to allow certain infringing uses in order to "not put manacles upon science."[25] Enforcing copyright laws without a legitimate fair use defense would stifle the creativity and social benefits the Framers sought to protect.[26]

Despite its necessity and importance, ambiguity clouds the fair use doctrine.[27] In the 1976 amendment to the Copyright Act, Congress codified the common law fair use defense doctrine.[28] The statute lays out four factors to consider in analyzing a fair use defense and specifically states that "criticism, comment, news

21. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

22. Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169-70 (7th Cir. 1997).

23. Leval, *supra* note 19, at 1109-10.

24. *Campbell*, 510 U.S. at 575 ("[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." (quoting Emerson v. Davies, 8 F.Cas. 615, 619 (1845) (alteration in original)).

25. *Campbell*, 510 U.S. at 575 (quoting Cary v. Kearsley, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K.B. 1803)).

26. *See* Leval, *supra* note 19, at 1109 ("Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.").

27. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092-97 (discussing the uncertainty of fair use).

28. 17 U.S.C.A. § 107 (West 2007).

reporting, teaching (including multiple copies for classroom use), scholarship, or research, [do not constitute] an infringement of copyright."[29] Under this provision, users are permitted to infringe upon a copyrighted work without the author's consent if the use "does not unfairly appropriate the author's original contributions."[30]

Within this statutory framework, music re-writes fall under the protection of parodic criticism or comment. Parodies are a controversial category of fair use[31], and music re-writes are merely one genre of a number of parodic works litigated in courts. Parodic works use an original copyrighted work in order to comment or criticize the original work.[32] This umbrella category of parodies, though not specifically mentioned in the Copyright Act,[33] is accepted as a legitimate fair use defense through judicial interpretation of the statute's four factors.

The fair use statute is conspicuously in need of support to achieve its goal of clarifying and strengthening this counterbalancing doctrine.[34] The statutory language titles the doctrine of fair use as a "limitation [ ] on exclusive rights" granted to copyright owners.[35] This language could suggest the burden is on the *copyright owner* to prove a use was impermissible.[36] Conversely, fair use currently operates as an affirmative

29. *Id.* (The four factors are: "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").

30. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 548 (1985).

31. *See* Carroll, *supra* note 27, at 1107-14 (reviewing the uncertain and controversial case law of parody).

32. *Campbell*, 510 U.S. at 581 (defining parody as "literary or artistic work that imitates the characteristic style of an author or work").

33. *See* 17 U.S.C.A. §§ 101-1332 (West 2007) (no mention of parody).

34. *See* Carroll, *supra* note 27, at 1099-1102 (analyzing ambiguities within the statutory language).

35. 17 U.S.C.A. § 107 (West 2007).

36. Carroll, *supra* note 27, at 1099; *see also* Gregory M. Duhl, *Old Lyrics, Knock-off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV 665, 679-80 (2004) (discussing the confusion concerning the scope of fair use).

defense;[37] the burden of proof is on the defendant to establish that his or her actions were within the fair use doctrine.[38] Secondly, courts have rejected the idea of using the list of permitted uses as anything more than illustrative.[39] Consequently, the doctrine of fair use has largely been shaped by case law rooted in a case-by-case analysis. Individual judges must assess the creative and aesthetic values of disputed works; the result is an imprecise doctrine that offers little stability.

B. Re-writes get Promising Classification as Parodies

(1) Transformative Use Serves as a Valuable Classification

In an attempt to clarify the fair use doctrine, Judge Leval introduced the term "transformative use" into the fair use lexicon.[40] He asserts that to merit protection, the secondary use must fulfill copyright's ultimate objective: "to stimulate public creativity for public illumination."[41] Concentrating on the first factor— the purpose and character of the work— as the "soul" of fair use, Judge Leval proposes that the strength of a defendant's justification of infringement should be measured by determining "to what extent the challenged use is transformative."[42]

An important development for re-writes and parodic works occurred when the Supreme Court adopted Judge Leval's 'transformative' analysis in *Campbell v. Acuff-Rose Music Inc.*[43] In this seminal case the Supreme Court defined the first factor's analytic scope. Drawing on Justice Story's and Judge Leval's concepts, the court articulated that the crucial question is whether the second work merely "supersede[s] the object" of the original work or alternatively, whether it adds something new and in essence "transforms" the original work into a new, original

37. *Campbell*, 510 U.S. at 590; *see also* Duhl, *supra* note 36, at 679 n.71 (noting the conflicting views regarding "whether the fair use doctrine benefits the defendant by providing the defendant with a larger shield or by limiting the plaintiff to a smaller sword?").
38. 17 U.S.C.A. § 107 (West 2007).
39. *See* Carroll, *supra* note 27, at 1101.
40. Leval, *supra* note 19, at 1111.
41. *Id.*
42. *Id.* at 1111, 1116.
43. *Campbell*, 510 U.S. at 578-79.

secondary work.[44] The court used Judge Leval's classification of works as transformative to mean the "quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings" and ultimately entitled to fair use protection.[45] This classification is of particular importance to the genre of re-writes as it affords them an argument that regardless of whether the second song parodies the original, or instead satirizes general society, a re-write transforms the original enough to create a new song and is permitted under fair use.

(2) Campbell v. Acuff-Rose Music, Inc. Gives Musical Re-Writes the Go-Ahead

The Supreme Court had not ruled on the question of whether parodies fell within the Fair Use doctrine for over thirty-five years until it heard *Campbell* in 1994.[46] In *Campbell*, the court unanimously reversed a summary judgment finding of infringement for the copyright owners of Roy Orbison's "Oh, Pretty Woman," holding that 2 Live Crew's re-write of the original was not excluded from the fair use defense simply because of its commercial and parodic nature.[47]

The facts of *Campbell* are straightforward. In 1964, Roy Orbison and William Dees created the popular musical hit, "Oh, Pretty Woman," and received a copyright for their work that they assigned to publisher Acuff-Rose Music.[48] In 1989, the rap artist group 2 Live Crew released their album, "As Clean As They Wanna Be," with the song "Pretty Woman," that re-wrote the lyrics of the original Orbison song.[49] One year later, Acuff-Rose filed suit alleging copyright infringement, among other claims, on the fact that 2 Live Crew's version is substantially similar to both the melody and lyrics of the original.[50] 2 Live Crew did not

44. *Campbell*, 510 U.S. at 578-79 (quoting Folsom v. Marsh 9 F. Cas. 342, 348); *see also* Leval *supra* note 19, at 1111 (discussing transformative use).
45. *Campbell*, 510 U.S. at 579-80; *see also* Leval *supra* note 19, at 1111 (discussing transformative use).
46. Bridy, *supra* note 5, at 257.
47. *Campbell*, 510 U.S. at 572.
48. *Id.*
49. *Id.* at 573.
50. *Id.*

contest the infringement but instead argued their version fell within a finding of fair use through parody.[51]

In its opinion, the Court first emphasized the necessity of case-by-case analysis in the application of the fair use doctrine, yet ultimately gave a clear green light to parody as a presumptive fair use defense.[52] Recognizing the subtleties and difficulties inherent in the form of humorous commentary, the court also acknowledged the social benefit parodic works provide.[53] The Court defined parody as a work that uses "some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[54] In this explanation of the policy underlying this legal definition, writing for the court Justice Souter juxtaposed the art form of satire against parody and effectively drew a bright line between the two forms of commentary.[55] The court distinguishes the two through satire and parody's respective targets: a parody comments on the work it is parodying, whereas a satire uses an original work to comment on a larger issue, often society's "follies or vices".[56] Inherent in this distinction is the secondary user's justification for using the original work—fair use permits use for commentary on any original work. The court stated that "parody needs to mimic an original to make its point," as opposed to satire that can still exist effectively without using a pre-existing work.[57]

Justice Souter's analysis in 1994 provided several critical guidelines and boundaries on which courts have since focused. When a parody asserts a fair use defense, "[t]he threshold

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51. *Id.* at 583.

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

53. *Id.* ("Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.").

54. *Id.* at 580.

55. *Id.* at 580-81.

56. *Id.* at 581 n.15.

57. *Id.* at 580-81. ("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 . . . Parody needs to mimic an original to make its point . . . whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.").

question . . . is whether a parodic character may reasonably be perceived."[58] Under this umbrella, the court expounds that the taste or quality of the parody is immaterial, citing Justice Holmes' reasoned admission 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]."[59] Because of the inherent precariousness of subjective analysis in this area, the court further limits itself by disregarding the defendant's state of mind or good faith and simply applies an after the fact analysis in parody cases.[60] By default, this limitation places great importance on the literary interpretation of the parody or satire's message under the first statutory factor regarding the purpose and character of the secondary work.

The Court attempted to narrow its holding in footnote 22 by decisively refusing to rule on satirical work.[61] However, Justice Souter's characterization was the first case to distinguish the two forms of commentary and subsequently triggered a parody/satire dichotomous interpretation throughout post-*Campbell* case law.[62] Justice Kennedy's concurrence invites the legal distinction. The concurrence warns against ardent application of the fair use defense, which, in Justice Kennedy's view, would "make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original."[63] Justice Kennedy stresses the requirement that the parody comment on the original work as critical to avoid allowing "any weak transformation" to meet the requirements of fair use.[64] Reviewing the simple power of burdens of proof, Justice Kennedy reminds lower courts that "fair use is an affirmative defense, so doubts

58. *Id.* at 582.

59. *Id.* at 582-83 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (alteration in original)).

60. *Id.* at 585 n.18.

61. *Id.* at 592 n.22 ("We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.").

62. *See* Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than The Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 984 (2004) (noting "some courts have relied on the easier wholesale parody/satire distinction, placing on it an importance far out of proportion to its origins and benefits").

63. *Campbell*, 510 U.S. at 599.

64. *Id.*

about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist."[65] Although gauging the effect of a secondary work on the market for the original is a difficult undertaking, Justice Kennedy suggests that "keep[ing] the definition of parody within [proper] limits" will, in most cases, allow the courts to circumvent the fourth statutory factor, market effect, altogether.[66] Largely because of Justice Kennedy's concurrence, the Supreme Court's decision extended beyond the majority's stated purpose and effectively created a framework for application of the fair use doctrine specifically in evaluating parodies and satires.

II. PARODY'S PROTECTIVE SHIELD MAY BE FALLIBLE

A. Growing Trend of Increased Protection for Parody

In failing to clearly address the issues surrounding satirical expression, the *Campbell* decision created the potential for lower courts to exclude protection for *all* forms of satire, regardless of the amount of parodic material present. The actual results swung in an opposite direction.[67] Lower courts have difficulty applying the fair use doctrine to hybrid works containing both parodic and satirical elements, and have most often appeared to broaden the definition of parody to include many satirical works.

(1) Three Cases Find Parodic Elements Within Satires

Based on the number of cases that have since declared disputed works parodies, one might surmise satire is a dying art in the United States. The post-*Campbell* case law largely favors ruling for the defendants by finding parodies rather than satires—and like beauty's beholder, parody is in the eye of the judges. One likely explanation is that artists realize the arbitrary legal definition that has developed, and now simply 'cry parody' to avoid lawsuits.[68] The courts are seemingly receptive and frequently allow defendants to explain their largely satirical work post-hoc as

65. *Id.*
66. *Id.* at 598.
67. *See* discussion *infra* Part II.A.1.
68. *See* Keller & Tushnet, *supra* note 62, at 992 ("before *Campbell*, humorous works often called themselves 'satires'; now the preferred word is 'parody'").

rooted in parody, a defense described by the Ninth Circuit as "pure shtick."[69] After *Campbell* there have been relatively few cases concerning the specific legality of re-writes, however a brief survey of the cases concerning the general treatment of parodic and satirical works suggests a clear trend towards broadening protection under the guise of parody.

Four years after the Supreme Court held that 2 Live Crew's song legally parodied its original, in *Leibovitz v. Paramount Pictures Corporation* the Second Circuit held that the movie *Naked Gun 33 1/3: The Final Insult's* use of a cover photograph from *Vanity Fair* magazine for their movie's promotional poster respectively did the same and fell within legal fair use.[70] The original work was a photograph of a naked, pregnant Demi Moore posing in a manner reflective of Botticelli's *Birth of Venus*.[71] Defendant Paramount Pictures recreated the photo using another model, and then superimposed comedian Leslie Nielsen's head over the model's and inserted the caption "Due this March" to promote its film.[72] The only variation, beyond the obvious head swaps, were facial expressions; Moore held a serious gaze and Nielsen carried a smirk.[73] Focusing their inquiry on whether a "parodic character may reasonably be perceived," the court found parody "[b]ecause the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original."[74] This justification is a loose application of *Campbell's* requirement that the secondary use must comment on the original—here, arguably the motivating factor behind the second poster was to promote the film *Naked Gun 33 1/3*, not to comment on *Vanity Fair's original photograph*. Further, the amount of parody present compared to the work's message as a whole is seemingly absent.

In *MasterCard International Inc. v. Nader* the court advanced

69. *Dr. Seuss Enter., L.P.*, 109 F.3d at 1403.

70. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 110 (2nd Cir. 1998).

71. *Id.* at 111.

72. *Id.* at 111-12.

73. *Id.*

74. *Id.* at 114 ("Applying *Campbell* to the first-factor analysis, we inquire whether Paramount's advertisement 'may reasonably be perceived' as a new work . . . ") (quoting *Campbell*, 510 U.S. at 582).

a parallel analysis and holding. During the 2000 presidential election, candidate Ralph Nader broadcasted television promotions based on MasterCard's well-known "Priceless" campaign.[75] Nader used the familiar sequence of displaying images while conveying their price, focusing on political campaign expenses such as "grilled tenderloin for fund-raiser; $1,000 a plate," before ending with the phrase "finding out the truth: priceless. There are some things that money can't buy."[76] In the resulting 2004 case Nader asserted the fair use defense, claiming his ads are protected as parodies because they "lay[] bare the artifice of the original [MasterCard], which cloaks its materialistic message in warm, sugar-coated imagery that purports to elevate intangible values over the monetary values it in fact hawks."[77] While the real focus and motivation behind Nader's campaign was likely to undercut his wealthy political opponents, the Court returned to *Campbell's* mandate that a parody need only be reasonably perceived and found Nader's ad portrayed sufficient criticism at MasterCard to qualify as a parody.[78] Again, the court placed no emphasis on the amount of parody that must be present, leaving a reader to assume that the weight of the work's message could be ninety-nine percent satirical, but as long as there is one percent of parody the work is still within the bounds of fair use.[79]

In *SunTrust Bank v. Houghton Mifflin Co.* the Eleventh Circuit expanded the parody protection veil further by holding that author Anne Randall's The Wind Done Gone parodied Margaret Mitchell's famous novel Gone With the Wind.[80] The full-length novel The Wind Done Gone recounts a similar story as Gone With the Wind, but rather than being told through the eyes of Scarlet O'Hara, is told from the viewpoint of Cynara, a former

75. Mastercard Int'l, Inc., v. Nader 2000 Primary Comm'n, No. 00-Civ. 6068(GBD), 2004 WL 434404, at *1 (S.D.N.Y. March 8, 2004).

76. *Id.*

77. *Id.* at *12.

78. *Id.* at *13.

79. *Mastercard Int'l, Inc.*, No. 00-Civ. 6068(GBD), 2004 WL 434404, at *15 (S.D.N.Y. March 8, 2004) ("That approach leaves the third factor with little, if any, weight against fair use so long as the first and fourth factors favor the parodist.") (quoting *Leibowitz*, 137 F.3d at 116); *see also* Bridy, *supra* note 4, at 273 (discussing the confusion resulted from the sliding scale test of *Campbell* concerning the amounts of parody and satire within a work).

80. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

slave on the O'Hara plantation.[81] The court held that because the book was "a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in Gone With the Wind" it clearly fell within the boundaries of parody.[82] While relying on *Campbell* for precedent, the Eleventh Circuit also asserted the importance of the First Amendment's interplay with copyright law and fair use.[83] Writing for the court, Judge Birch emphasized his commitment to a strong fair use doctrine in a footnote early in the opinion noting:

> I believe that fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. However, fair use is commonly referred to as an affirmative defense, and, as we are bound by Supreme Court precedent, we will apply it as such.[84]

However, this stance is not universally held, as evident by the district court's original decision enjoining The Wind Done Gone from publication and the commentaries criticizing the ultimate holding of fair use.[85] Despite the critics, however, this holding is consistent with *Campbell* while simultaneously widening the protection for parody.

(2) Is Satire Still Satire if Courts Label it Parody?

Leibovitz, MasterCard, and *SunTrust* illustrate both the trend to broaden protection for semi-parodic works as well as the ambiguity still present within the fair use defense. While each court found parodic elements within the challenged work, the principle motivation behind each work and overall message is satirical. Paramount Pictures likely created their humorous poster, not to comment on Leibovitz's original photograph of Demi Moore, but because they wanted a funny attention-grabber with which to promote their movie. Similarly, Nader's primary target

81. *Id.* at 1267, 1272.
82. *Id.* at 1269.
83. *Id.* at 1263-65.
84. *Id.* at 1260 n.3 (citations omitted).
85. CNNfyi.com, 'Gone With The Wind' *Parody Draws Challengers, Supporters*, http://archives.cnn.com/2001/fyi/news/04/13/wind.done.gone/ (last visited July 14, 2008).

behind his ad campaign was not MasterCard, but instead his political opponents and their exploitation of money in the current presidential race. Of the three secondary works, The Wind Done Gone most closely comments on its original predecessor. Still, Anne Randall could have written an expose of the unequal focus between whites and blacks in Gone With the Wind, or created her own story and plotline set within similar times and locations to illustrate a more accurate historical view. Yet Randall's use of famous characters and plot render the satire of historical inaccuracy arguably more effective.

Each case is consistent with *Campbell* yet offers little more than fact-specific definitions and judgments for determining the amount of 'parody' that must be present to fall within fair use. Looking at each work within the context of their creation suggests that courts allow predominantly satirical works to successfully assert fair use if any negligible sense of parody can be found. This seemingly post hoc reasoning is still consistent with *Campbell.* Indeed, *Campbell* itself holds 2 Live Crew's "Pretty Woman" "as a comment on the naiveté of the original of an earlier day" - a predominantly satirical message achieved through juxtaposition.[86] Justice Souter recognized in a footnote that a "parody that more loosely targets an original...may still be sufficiently aimed at an original work to come within our analysis of parody."[87] This "sliding scale"[88] test gives courts generous latitude in evaluating a defendant's justification for using pre-existing material, often upholding fair use because of seemingly minor points, or even post hoc and ad hoc interpretations.

B. False Sense of Security for Re-writers?

(1) Let's All Cry Parody!

Contemporaneous with the court's broad protection of parody under fair use over the years, a countless number of re-writes, or

86. *Campbell*, 510 U.S. at 583.
87. *Id.* at 580 n.14.
88. *See* Bridy, *supra* note 5, at 273 ("*Campbell* can be viewed as creating a sort of sliding scale according to which the burden on the defendant to justify his or her borrowing increases (and the amount of borrowing considered permissible decreases) as the element of satire in the accused work increases").

self-described parodies flooded the market. With what is perhaps an enterprising attitude, many artists treat *Campbell* and the resulting case law as a license to re-write, regardless of whether their works necessarily comment on the original work. The Capitol Steps, a musical political comedy group who "began as a group of Senate staffers who set out to satirize the very people and places that employed them,"[89] is one such group hiding behind the veil of parody. Using popular, familiar melodies, the Capitol Steps re-write lyrics to satirize politicians across the political climate.[90] When asked how they "get away" with their potentially infringing antics, the Capitol Steps claim protection under *Campbell*.[91] The Capitol Steps are not alone in their asserted legality. Popular Christian rock bands such as the ApologetiX openly claim protection under *Campbell* for their versions of religious lyrics set to classic rock music, as do the controversial religious sect Westboro Baptist Church for their use of "We Are the World" in their song "God Hates the World."[92]

(2) Satirical or Parodic, Re-Writes Have a Built in Defense

It is questionable whether many re-writes would actually pass muster under fair use as a protected parody. For example, the Capitol Steps' song "The Brain-Mouth Connection" uses Jim Henson's "The Rainbow Connection" melody to poke fun at President George Bush's tendency to misspeak.[93] A review of the

89. About The Capitol Steps, http://www.capsteps.com/about/ (last visited July 27, 2008).

90. *See id.* (examples of lyrics and songs).

91. Capitol Steps – Frequently Asked Questions, http://www.capsteps.com/about/faq/html (last visited Sept. 19, 2008):

> 7. How do the Capitol Steps get away with their song parodies? Asking legal advice from a comedian is like taking driving lessons from Billy Joel. Don't do it! However, we would refer you to the Supreme Court decision *Acuff-Rose v. Campbell.* And if you need actual legal advice, we hear John Edwards is available and looking for a job. *Id.*

92. *See* ApologetiX, That Christian Parody Band- Frequently Asked Questions, http://www.apologetix.com/faq/faq-detail.php?faq_q_id=1 (last visited July 27, 2008) (claiming legal protection under *Campbell*); John Hanna, *Phelpses' Parody Described as Copyright Infringement*, CJOnline, May 18, 2007, http://www.cjonline.com/stories/051807/loc_170728030.shtml (last visited July 14, 2008) (claiming "parody isn't subject to copyright laws.").

93. *Compare* Capitol Steps, The Brain-Mouth Connection,

lyrics however leaves a listener hard-pressed to find any *true* commentary on Kermit the Frog's rendition of his Hollywood dreams. Still, a possible connection could be argued saying a frog's yearning to leave his swamp and make it big in Hollywood is as far-fetched and unlikely as Bush realizing his desire to speak intelligently. Or perhaps more realistically, the Capitol Steps simply thought "The Rainbow Connection" offered an appropriate palate of word puns and lyrical wishful thinking with which to lampoon our 43rd President's tendency to create "Bushisms." It seems unlikely that the Capitol Steps originally set out to comment or criticize Jim Henson's song, but rather, they wanted to mock George W. Bush and merely used "The Rainbow Connection" to execute their satire.

Whether satirical or parodic motivations inspire a re-write, the songs often have built in justifications.[94] A re-write's close proximity to the original song creates a natural and easily acceptable interpretation of how it comments on, or parodies the original. The nature of re-writes creates this ready-made defense. Starting with a pre-existing melody and rhyme scheme, new lyrics are often puns of the existing ones—not necessarily to parody the original, but simply because the original song may have been chosen because of its easily adaptable form to the re-write's new idea.[95] Original songs are often chosen to re-write because of their subject matter, titles, time or key signature, not necessarily

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http://www.capsteps.com/sounds/bush-brainmouthconnection.au (last visited July 27, 2008):

> Why are there so many, jokes about George bush? / And how I mangle my words? / I just might have a plan, to promote Kurdistan, but it comes up 'how bout them Kurds?' / I think things real smart, but then I just brain fart, and Putin, I called him Putty-poo / Someday I'll find it, the brain mouth connection, and I'll learn to be el-e-cute...") *with* Jim Henson, The Rainbow Connection, http://kids.niehs.nih.gov/lyrics/rainbow.htm (last visited July 27, 2008) (Why are there so many songs about rainbows / And what's on the other side? / Rainbows are visions, but only illusions, and rainbows have nothing to hide / So we've been told and some choose to believe it I know they're wrong, wait and see / Someday we'll find it, the rainbow connection, the lovers, the dreamers and me. *Id.*

94. *See Campbell*, 510 U.S. at 585 n.18 (stating defendant's good faith is immaterial).

95. William Tong, Parody Song Writing Tips, http://www.amiright.com/articles/article_1032288834.shtml (last visited July 14, 2008).

because the artist desires to lampoon the original song.[96] The *Campbell* decision set a low bar for parodic interpretation, and re-writes will likely always be able to develop a sufficient justification. If courts continue to accept a minimalist connection between the original and the secondary 'parody,' re-writes should presumably remain protected.

C. Some Parodies are More Equal than Others

Despite the favorable trend in courts to broaden fair use parody doctrine and re-writes' inherent defense, the case law in this area is insufficient to offer real predictability and the forecast remains uncertain for re-writes. While the majority of cases have found parodic works, sometimes against all literary odds, there are cases with alarmingly similar fact patterns where protection under Fair Use was withheld. In such cases, there is little difference in the reasoning or approaches of the respective courts, and the only apparent explanation of the opposite holdings is whether the court gives credence to the defendants' aesthetic interpretation and justification for their work.

(1) The 9th Circuit Rejects OJ as a Mischievous Feline

In a 1997 case, *Dr. Seuss Enterprises, L.P., v. Penguin Books USA, Inc.*, the defendants asserted fair use through parody of their book, *The Cat NOT in the Hat! A Parody by Dr. Juice*, in response to the plaintiff's copyright infringement claim.[97] The book narrated the story of the O.J. Simpson trial, poking fun at the widely publicized litigation in 'Seussian' rhymes.[98] In its analysis of the first factor of the purpose and character of the use, the court stated "the critical issue under this factor is whether *The Cat NOT in the Hat!* is a parody."[99] The defendants characterized their work as a commentary on the Simpson trial "in the form of a Dr. Seuss parody that transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns."[100] Rejecting the defendant's argument that this work

96. *Id.*
97. *Dr. Seuss Enter., L.P.*, 109 F.3d at 1396, 1399.
98. *Id.* at 1401.
99. *Id.* at 1400.
100. *Id.* at 1402.

parodied Dr. Seuss's *The Cat in the Hat*, the Ninth Circuit concluded that the work did not ridicule Dr. Seuss's distinctive style and consequently fell into the category of satire.[101] While the court diligently moved through the remaining factors of the analysis, their early classification of the work as satirical proved to be a decisive factor in the remaining analysis.[102] It is hard not to speculate, however, that another court could have accepted the defendant's justification and rationale for using Dr. Seuss's famous trickster cat as a vehicle because of the parallel moral and legal inversions of the Cat and OJ Simpson.[103]

(2) Sometimes a Smirk is Just a Smirk

Another case, with disconcertingly similar facts to *Leibovitz* reveals a similar judicial rejection of an apparently plausible interpretation of parody. In *Columbia Pictures Industries, Inc. v. Miramax Films Corp.*, the copyright owners of the movie *Men In Black*'s promotional poster sued Miramax, distributor of Michael Moore's documentary *The Big One*.[104] Moore's documentary was a social commentary and exposé about the "consequences of corporate America's focus on achieving maximum profits."[105]

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101. *Id.* at 1401.

102. *Dr. Seuss Enter., L.P.*, 109 F.3d at 1402-403 (dismissed analysis of "the nature of the copyrighted work" because of vast creativity embodied in *The Cat in the Hat*. The court concentrated the third factor analysis on the substantial similarity of the two works, a point already conceded by assertion of fair use, yet characterized the defendant's fair use defense as 'pure shtick' and 'completely unconvincing' and tilted that factor towards the plaintiffs; and looked at 'the effect of the use upon the potential market,' determining that '[b]ecause, on the facts presented, [the defendants'] use of *The Cat in the Hat* original was nontransformative, and admittedly commercial...market harm may be more readily inferred').

103. *Id.*

> The Parody's author felt that, by evoking the world of The Cat in the Hat, he could: (1) comment on the mix of frivolousness and moral gravity that characterized the culture's reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as The Cat in the Hat in a way that implied that the work was too limited to conceive the possibility of a real trickster "cat" who creates mayhem along with his friends Thing I and Thing 2, and then magically cleans it up at the end, leaving a moral dilemma in his wake. *Id.*

104. Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179, 1181 (C.D.Cal. 1998).

105. *Id.* at 1182.

Miramax drew on *Men In Black*'s slogan "Protecting the Earth from the scum of the universe," to create their own promotional slogan: "Protecting the Earth from the scum of corporate America."[106] The visual impressions of the two posters were also similar. *The Big One*'s campaign placed Michael Moore in a similar outfit and position to *Men in Black* stars Tommy Lee Jones and Will Smith—wearing a black suit "standing in front of a nighttime New York City skyline."[107] The posters' respective sentiments capture the differences: Jones and Smith have their arms crossed with serious facial expressions, and Moore wears a black baseball cap under disheveled hair with a smirk on his face.[108] Asserting a fair use defense through parody, Miramax argued that their work pokes fun at the "Men In Black image by suggesting that an unfit documentarian may 'assume the mantle of hero and do battle against the villains of corporate America, as the [Men In Black] do battle against aliens.'"[109] Drawing largely on *Dr. Seuss*, the court rejected Miramax's fair use defense, determining *The Big One* poster and trailer was not a transformative work of *Men In Black*'s promotional campaign.[110] After this determination was made, the court again moved quickly through the remaining three factors, dismissing and tilting the weight towards infringement based on the conclusion that the second work is not a "transformative work which alters the original with new expression, meaning or message."[111]

While some courts have tended to require only a negligible basis upon which they can reasonably perceive parodic character, *Dr. Seuss* and *Columbia Pictures* demonstrate the subjective nature of parody analysis. This inconsistency is alarming. The stark contrast between *Leibovitz* and *Columbia Pictures* exposes the absence of an existing judicially manageable standard regarding parodic character. Why is a smirking expression parodic in the Southern District of New York but found satirical and ultimately illegal in the Central District of California?[112] The

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1187.
110. *Id.* at 1188.
111. *Id.*
112. *Compare supra* notes 70-74 and accompanying text *with supra* notes

balance between legally acceptable amounts of parody and satire within a work is both intangible and elusive. Despite the inherent parodic character of most re-writes, they remain subject to litigation given the absence of judicial predictability. *The Family Guy*'s song is the most recent example of a challenged re-write, and is a case with the potential to break through the thin mantle of protection for re-writes under Fair Use.

III. CARVING OUT PRESUMPTIVE PROTECTION FOR RE-WRITES

The current ex ante assertions of fair use parody may end in a hubristic fall. The absence of adequate case law, in both quantity and quality, and the demonstrated subjective analysis yields tenuous support for works claiming parody under fair use. Creating a clearer standard would decrease the amount of subjectivity currently required and offer stability for artists by reducing the unpredictability of liability.[113] Musical re-writes are prime candidates for presumptive protection under fair use. The long history of musical re-writes, their transformative nature, their inherent parodic connection to the original works, and the absence of competition with the original are all factors that weigh heavily towards stabilizing the legal arena for re-writes and granting them presumptive protection.

A. Re-writes have a Strong Argument for Transformative use

(1) History of Musical 'Parody' Supports Re-writes' Transformative Nature

History is a persuasive authority towards treating re-writes as transformative works. A decidedly distinct genre of creative authorship from literature, music's history and development is unique and deserves separate considerations under copyright law.[114] A brief review of the historical presence of musical parody and borrowing reveals its long tradition and creative necessity.

105-112 and accompanying text.

113. *See* Carroll, *supra* note 27, at 1120 ("The uncertainty that prevails even in litigated settings makes the costs and risks associated with relying on the fair use doctrine problematic for many users.").

114. *See* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N. C. L. REV. 548, 610-13 (2006) (discussing musical borrowing in popular music traditions).

Re-writes are an important part of American history. Spurred by political unrest against England, the American colonists used existing tunes to give rise to "liberty songs" with lyrics "meant to ignite the colonists' passions for the cause of liberty."[115] Our national anthem's melody existed well before Francis Scott Key penned its famous lyrics.[116] Originally a popular English drinking tune in the late 1700s,[117] the melody of "The Star Spangled Banner" was used for many parodies, often political in nature.[118] The famous slogan of the 1840 presidential campaign "Tippecanoe and Tyler Too" were lyrics of a musical re-write of the minstrel song "The Little Pig's Tail."[119] Within the same election year, another popular song used the melody of "Auld Lang Syne" to create another pro-Harrison song.[120] Few Americans might claim familiarity with composer William Steffe, however his original camp-meeting song has been re-written several times and is now embedded in American consciousness as the songs "John Brown's Body" and "Battle Hymn of the Republic."[121] In 1900 Mark Twain wrote his own version, "Battle

115. Colonial Williamsburg, A Colonial Parody of a British Song: 'A New Song, to the Plaintive Tune of *Hosier's Ghost*', http://www.history.org/history/teaching/enewsletter/volume3/october04/primsource.cfm (last visited July 27, 2008).

116. The New York Times nytimes.com, Word for Word: Musical Sendups; Stop, in the Name of Parody! The Supremes Uphold a Tradition, March 13, 1994, http://query.nytimes.com/gst/fullpage.html?res=950CE1D7123DF930A25750C0A962958260 (last visited July 14, 2008) [hereinafter Word for Word].

117. Word for Word, *supra* note 116; *See also* University of Virginia Library, Patriotic Odes: A New Song, http://www.lib.virginia.edu/small/exhibits/music/patriotic.html (last visited July 14, 2008).

118. Word for Word, *supra* note 116 ("To Genet in New York, where he reigns in full glee/ Some anti's have lately prefer'd their petition...").

119. Word for Word, *supra* note 116; *see also* The Capitol Times, 13-year-old's Song Lives Long After Writer's End, Nov. 22, 2007, http://www.madison.com/archives/read.php?ref=/tct/2007/02/19/0702190164.php (last visited July 14, 2008).

120. Word for Word, *supra* note 116 ("Should good old cider be despised/And ne'er regarded more?/Should plain log cabins be despised/Our father built of yore?/For Old Tippecanoe, my boys/For Old Tippecanoe/Let's take a mug of cider now/For Old Tippecanoe").

121. Songs of the Civil War 1860-65, http://history.sandiego.edu/GEN/snd/a-civilwar.html (last visited July 14, 2008) (penned during the Civil War); *see also* Word for Word, *supra* note 116.

Hymn of the Republic, Updated,"[122] as a parody in protest of the American-Philippine War, and it is just one of the multiple parody versions of the song, ranging from union rallying anthems "Solidarity Forever"[123] to a white supremacist version in the movie American History X.[124]

Each of these re-writes played an important function within their respective contexts, using a pre-existing melody to transform and create a new song—sometimes commenting on the original song, sometimes simply using the original's familiar melody. Regardless of the subject matter of their target, each re-write developed a new song from its respective musical predecessor, demonstrating the strong custom of musical borrowing. The historical convention of musical re-writes offers a strong argument for treating re-writes as transformative works. The Supreme Court recently recognized the important function history plays in interpreting and evolving copyright law, invoking Justice Holme's quip, "a page of history is worth a volume of logic."[125] A lesson in history reveals the longstanding custom of musical borrowing and provides contextual support for treating re-writes as transformative works.

(2) Covers Re-record While Re-writes...

Another popular musical tradition is recording cover versions or covers—a new rendition of a previously released song. Under the Copyright Act, a cover version of an original song requires a mechanical license to avoid infringement.[126] This provision allows for any musician to record and distribute his or her own version of another artist's song, however, it also automatically requires stipulated payments of royalties to the

122. *See* Samuel Langhorne Clemens, aka Mark Twain, The Battle Hymn of the Republic, Updated, http://blue.carisenda.com/archives/mark_twain/the_battle_hymn_of_the_republic_updated.html (last visited July 14, 2008).

123. Written by Ralph Chaplin in 1915.

124. *See* IMDb, Soundtracks for American History X, http://www.imdb.com/title/tt0120586/soundtrack (last visited July 14, 2008).

125. Eldred v. Ashcroft, 537 U.S. 186, 188 (2003) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

126. 17 U.S.C.A § 115(a)(2) (West 2007); *see also* HFA, Mechanical Licensing FAQ, http://www.harryfox.com/public/infoFAQMechanicalLicensing.jsp (last visited July 14, 2008).

original copyright holder.[127] Initially cover versions may appear analogous to re-writes, and consequently scholars have suggested re-writes deserve a comparable license system.[128] However, the distinction between covers and re-writes, and the ultimate rebuttal to a mechanical licensing for re-writes lies in the transformative nature of re-writes as compared to the duplicative nature of cover versions. While covers simply create a new version, or rendition of a pre-existing song, re-writes incorporate sufficient original creativity to "supersede[]... the original" through new lyrics and new subject matter.[129] A re-write can transform the original song's "raw material" into a secondary song with original lyrics, original meanings, and new creative insights.[130]

B. Re-writes Have a Strong Argument Against Market Substitution

1. Market Substitution Factor is Critical in a Fair use Analysis

The final statutory fair use factor considers "the effect of the [unauthorized] use upon the potential market for or value of the original work.[131] Footnote 14 in *Campbell* emphasizes that the most important question of the fair use analysis is found under this fourth factor—to what extent does the parodic or satirical work substitute for the original or licensed derivatives within the market?[132] Justice Souter was wary of creating a legal division between parody and satire, recognizing that when there is "little or no risk of market substitution...looser forms of parody may be

127. HFA, Mechanical Licensing FAQ, http://www.harryfox.com/public/infoFAQMechanicalLicensing.jsp (last visited July 14, 2008).

128. *See* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A 513 (1999) (suggesting potentially infringing works be legally permitted, but allow copyright holders to recover profits as a result of the infringement as well as any damages suffered).

129. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (quoting Folsom v. Marsh 9 F. Cas. 342 (No. 4,901), 348 (CCD Mass. 1841) (internal quotations omitted)); *see also* Leval, *supra* note 20, at 1111.

130. *See* Leval, *supra* note 19, at 1111.

131. 17 U.S.C.A § 107(4) (West 2007).

132. *Campbell*, 510 U.S. at 581 n.14 ("taking parodic aim at an original is a less critical factor in the analysis."); *see also* Keller & Tushnet, *supra* note 62, at 984 (noting "Justice Souter's nuanced reasoning has been overlooked in most post-*Campbell* cases.").

found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required."[133] This judicious reasoning, though hidden in a footnote, identified the importance of market effect, which runs as a major theme throughout Justice Souter's opinion.[134] This market emphasis coupled with the Court's recognition that "parody presents a difficult case" suggests that potentially transformative works, such as parodies and satires, are best dealt with methods other than those of the traditional fair use factors.[135]

It is important to distinguish that a market analysis is not concerned with an original work's diminished sales as a result of the challenged use, but only whether the secondary work usurps the original's market role and serves as a substitute.[136] The two main purposes of copyright law confirm this distinction: 1) to protect and encourage an artist's incentive to create and 2) to supply to the public the benefit of available creative works.[137] Copyright law was not designed to confer monopolistic economic benefits upon an author, but rather to encourage creative pursuits through economic incentives.[138] Within this economic intellectual property system, as opposed to a system that emphasized the moral rights of artists, a no harm-no foul approach achieves the goals to foster creativity without stifling the social benefits and vision copyright is designed to protect.[139]

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133. *Campbell*, 510 U.S. at 581 ("[n]o workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its artifacts, or that a work may contain both parodic and nonparodic elements.").

134. *Id.* at 584 ("Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that '[n]o man but a blockhead ever wrote, except for money.'").

135. *Id.* at 588 ("Where we part company with the court below is in applying these guides to parody... Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation.").

136. *Id.* at 591-92.

137. Duhl, *supra* note 36, at 729.

138. *See* Leval, *supra* note 19, at 1109.

139. *See id.* ("The competing goals—the copyright holder's expectation of protection for resource investment and financial reward as well as the public's interest in having access to an ever-increasing number of creative works—are both fulfilled when transformative or public uses that do not harm the copyright holder's market are found to be fair.").

(2) Re-writes' Conspicuous Copying Prevents any Consumer Confusion

Re-writes, whether they are ninety-nine percent parody or ninety-nine percent satire, most likely never serve as a market substitute for the original song. This is largely attributable to re-writes self-awareness as a genre. As opposed to a song that copies a melody, or parts of a melody, unwittingly or not and attempts pass it off as original, re-writes consciously use an original melody and rhyme scheme with no pretexts of complete originality. Listeners are seldom confused between the original and the re-write because of re-writes' kitschy transformation, in fact most authors of re-writes count on their listeners' recognition and awareness of the original song. The genre, although not exclusively, often uses garish and overstated lyrics in such a manner that allows for no confusion as to the purpose of the song. Like many complex works of authorship, re-writes' more fine-tuned and subtle messages are often discovered only after a second or third listening. As a result of this self-awareness, listeners appreciate both the original version of the song as well as a re-write without conflating the two.

(3) Audiences Know Re-writes are not Covers

A comparison of re-writes to covers helps to articulate the different market functions of the two works and demonstrates the necessity for distinct legal treatment. Covers, by definition and legal requirement, are prohibited from "chang[ing] the basic melody or character of the work," and thus are always duplicate songs rather than transformative or even derivative songs.[140] This equivalent nature of covers places them in direct competition with the original song's market, or in danger of acting as a substitute for the original. In fact, cover versions may experience greater commercial success than their predecessors, and fans unknowingly attribute all creative credit to the cover artist. In contrast, re-writes significantly change the lyrics, message, and

140. 17 U.S.C.A. § 115(a)(2) (West 2007) ("A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work.").

tone of the original version in such a manner as to create essentially a new song, with a new market.[141] A consumer desirous to hear the Disney classic "When You Wish Upon a Star" will not be fulfilled by *The Family Guy*'s re-write "I Need a Jew." Similarly, a person attending a Capitol Steps concert one night likely did not forgo a concert of the original songs simply because he or she already heard the original melodies. The nature of re-writes, whether wholly parodic or satiric, lends itself towards a market niche entirely separate from any original song.

C. Self Aware Musical Re-writes Deserve Presumption Fair Use Protection

As a result of their transformative nature and distinct market functions, musical re-writes should be afforded a presumption of Fair Use protection. The current case law, while favorable to re-writes, offers no solid protection for this transformative genre. Given the subjective nature of the Fair Use analysis for parody and the inconsistency of the case law, the Second and Eleventh Circuits may have given parodists a false sense of security. While these two circuits' decisions are consistent with *Campbell*, their increasingly broad interpretations leave little critical analysis of what parody or satire is protected, beyond a generalization that any work *claiming* to be a parody falls within fair use. The Ninth Circuit already demonstrated its misgivings to extend broad protection of parody, and it may be a simple waiting game for parody cases to arrive in other circuits to determine the real limits of the protection provided by *Campbell*. To a certain extent, any decisions rendered by other circuits are only important as an indicating trend—the current four-factored analysis for parody is entrenched within a subjective literary judgment by the presiding judge and offers little predictability for would be parodists or satirists.

An affirmative presumption of legality under fair use for the re-write genre would offer stability and predictability for lyricists and musicians, and would not require any extension of the fair use doctrine nor transgress any rights potentially claimed

141. *See Campbell*, 510 U.S. at 591 ("parody and the original usually serve different market functions.").

by the original copyright holder. Re-writes fit squarely within the broad limits of parody fair use already created by the courts. As discussed in Part II of this note, only a *minimal* perception of parodic character is needed for lyricists to avail themselves of fair use. The puns, plays on rhyme scheme, and emphasis on meter inherent in re-writes already create a natural parodic interpretation based on simply the style of both songs.[142] The targeted subject matter, whether the original song, society in general or both often lends only slight additional weight to a re-write's parodic character. A re-write fits within Judge Leval's and the Supreme Court's definition of transformative that the "quoted matter is used as raw material, transformed in the creation of ... new aesthetics, new insights and understandings."[143] Finally, in large part due to their transformative nature, re-writes do not act as substitutes within the market for the originals. A new song is created, and while it copies an existing melody, the re-write does not claim the melody as its own creation but instead draws on audiences' familiarity with the original tune to create "new insights and understandings."[144]

An affirmative presumption of legality under fair use for re-writes would not foreclose copyright holders from suing re-writes. If the copyright owner of the original song believed a re-write infringed upon their exclusive rights they could still sue, however, the burden would be on the owner to prove the re-write is beyond fair use's scope.[145] This shift solidifies a majority de jure trend of protecting both satire and parody (although labeling both art forms as legal parody), offering lyricists of re-writes consistent legal treatment. The current subjective enforcement of fair use parodies may foster unequal critiques of re-writes and result in a chilling effect on the genre.

CONCLUSION

The current case concerning *The Family Guy*'s use of the

142. *See* William Tong, Parody Song Writing Tips, http://www.amiright.com/articles/article_1032288834.shtml (last visited July 14, 2008).

143. *Campbell*, 510 U.S. at 579-80; Leval, *supra* note 19, at 1111.

144. *Campbell*, 510 U.S. at 579-80; Leval, *supra* note 19, at 1111.

145. *See* Duhl, *supra* note 36, at 679-80 (discussing fair use as affirmative right).

plaintiff's "When You Wish Upon a Star" is particularly challenging. Under a narrow *Campbell* analysis, the song could be found wholly satirical because of the lack of commentary on "When You Wish Upon a Star" —a mere recapitulation of the song's melody and rhythm, and therefore not protected by fair use. The current legal status of parody is as cryptic as it is unpredictable and offers protection to an increasingly broad body of works by simply labeling them parodies, rather than through clear legal analysis. While the Second and Eleventh Circuit have demonstrated their willingness to accept almost any explanation regarding a work's commentary on the original, the Ninth Circuit has not been so lenient. The silent agreement to afford satires protection by labeling them parodies creates a false sense of security and can be exposed through a narrow application of *Campbell*. While many may disagree with *The Family Guy*'s use of the Disney classic, an appropriate review of fair use with an emphasis on the transformative nature and potential for market substitution reveals *The Family Guy*'s song, like all re-writes, is within the legal boundaries of copyright law and fair use. In order to avoid potential injustice and to resurrect the original spirit of both copyright and fair use doctrine, an affirmative presumption of fair use protection should be granted to musical re-writes.

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APPENDIX A

"I need a Jew"
Nothing else has worked so far,
So I'll wish upon a star,
Wondrous sparkling speck of light,
I need a Jew...

Lois makes me take the rap,
Because our checkbook looks like crap,
Since I can't give her a slap,
I need a Jew...

Where to find
A bum or stien or stein
To teach me how to whine
And do my taxes...

Though by many they're abhorred,
Hebrew people I've adored,
Even though they killed my lord,
I need a Jew!

"When You Wish Upon a Star"
When you wish upon a star, makes no difference who you are
Anything your heart desires will come to you

If your heart is in your dreams, no request is too extreme
When you wish upon a star as dreamers do

(Fate is kind, she brings to those who love
The sweet fulfillment of their secret longing)

Like a bolt out of the blue, fate steps in and sees you thru
When you wish upon a star, your dreams come true

"Barack the Magic Dragon"
Barack the Magic Negro lives in D.C.
The L.A. Times, they called him that
'Cause he's not authentic like me.

Yeah, the guy from the L.A. paper
Said he makes guilty whites feel good
They'll vote for him, and not for me
'Cause he's not from the hood.

See, real black men, like Snoop Dog,
Or me, or Farrakhan
Have talked the talk, and walked the walk.
Not come in late and won!

Refrain: Oh, Barack the Magic Negro, lives in D.C.
The L.A. Times, they called him that
'Cause he's black, but not authentically.
(repeat Refrain)

Some say Barack's "articulate"
And bright and new and "clean"
The media sure loves this guy,
A white interloper's dream!

But, when you vote for president,
Watch out, and don't be fooled!
Don't vote the Magic Negro in
'Cause... (music stops, Sharpton rants, music returns)