

TOON TOWN: DO CARTOON CROSSOVERS MERIT FAIR USE PROTECTION?

In 1989, after retiring his popular daily comic strip *Bloom County*, cartoonist Berkeley Breathed launched a new weekly cartoon known as *Outland*.¹ One of the starring characters was Mortimer Mouse, a "moth-eaten mouse with [a] 5 o'clock shadow . . . droopy red drawers . . . clutching what looks like a martini . . . smoking a cigarette [and] definitely . . . in need of a shave."² Mortimer, an obviously disreputable-looking lampoon of Mickey Mouse, is the name Walt Disney originally intended for the rodent star.³ Upon reading the strip, Walt Disney Company chairman Michael Eisner sent Breathed a letter asking him to drop the Mortimer character.⁴ Breathed, however, refused the request.⁵ Disney, known for its vociferous attacks on copyright infringers, allegedly threatened the cartoonist with a lawsuit.⁶ Breathed, never one to shy away from criticism, incorporated the lawsuit into the strip itself by having the character Opus the penguin declare, "As the Walt Disney Co. is threatening to sue us over the unauthorized use of Mickey Mouse, we thought we might . . . er . . . set things straight."⁷ The episode then goes on to depict the Mortimer Mouse story, where a

¹ See Yardena Arar, *A Martini-Swilling Mouse Draws Only Murmurs from Disney*, L.A. DAILY NEWS, Sept. 13, 1989, at 3D.

² *Id.*; see BERKELEY BREATHED, POLITICALLY, FASHIONABLY, AND AERODYNAMICALLY INCORRECT 8 (1992).

³ See Arar, *supra* note 1, at 3D.

⁴ See *Disney Chairman Eisner Asks Breathed to Delete Comic Strip Character; Copyright Infringement*, ENT. LITIG. REP., Jan. 8, 1990, at 32 [hereinafter *Eisner*].

⁵ See *id.*

⁶ See BREATHED, *supra* note 2, at 8; Paul Richter, *Disney's Tough Tactics*, L. A. TIMES, July 8, 1990, at D1. Nearly one-quarter of the 800 lawsuits and regulatory actions Disney pursues each year are over copyright and trademark actions. See Richter, *supra* at D1. One example of Disney's active campaign to protect its copyrights is a suit against three day-care centers in Florida that had adorned their outside walls with paintings of Disney characters. See *id.* The matter was resolved when rival Universal Studios painted the Flintstones cartoon characters over the Disney illustrations and threw a party for the children. See *id.* Another example is Disney's 1989 suit against the Academy of Motion Pictures Arts and Sciences over an actress's depiction of a simpering Snow White at the opening of the Oscar ceremony. See *id.* After the New York Times editorialized that Disney should be given the "Can't Take a Joke" award, Garry Trudeau drew a cartoon in which a trembling Snow White, in a clandestine midnight interview, complains about Disney's treatment of her—the interview ends suddenly when a Disney lawyer arrives to take her away, singing "Hi ho, hi ho, it's off to court we go!" *Id.*

⁷ BREATHED, *supra* note 2, at 8.

fledgling Walt Disney in 1928 hires fraternal twin brothers Mortimer and Mickey Mouse, using Mortimer as Mickey's unbilled stunt double until he enlists in the army.⁸ The strip also parodies the Disney studio's transformation under Michael Eisner from a magical kingdom into a corporate conglomerate concerned only with making money.⁹ Returning home after forty-five years in Europe, long-lost Mortimer attempts to rectify Eisner's obsession with finances, but instead ends up banished to Outland, the "place everyone goes who doesn't fit in."¹⁰ The episode concludes with Opus stating, "Boy! What a lovely story! I certainly don't see any reason for Disney, Inc. to sue little ol' us, do you . . . ?"¹¹ In weaving this parody, Breathed drew—and drew upon—such notable Disney characters as Mickey Mouse, Snow White, Dopey and Bambi.¹²

Breathed is not the only cartoonist to appropriate someone else's characters.¹³ In a recent *Zippy* Sunday strip, Bill Griffith parodied both the narrowing readership of comic strips and modern big-business "Mergermania" by combining twelve different comic strip characters into one unified strip under the dominion of Disney.¹⁴ To illustrate this, Griffith placed Mickey Mouse ears on the heads of the different characters, and then drew those heads onto the bodies of his *Zippy* characters.¹⁵ Cartoonists have been doing these "crossovers" (where one cartoon strip uses another cartoonist's characters) since 1907 in an attempt to create the appearance of "a comic strip world, a kind of 'toon town where the characters live together and get to know each other after hours."¹⁶ But what the cartoonists may not always realize is that every time they draw someone else's characters, unless the affir-

⁸ See *id.*

⁹ See *id.* at 8–9.

¹⁰ *Id.* at 9. When Mortimer returns to the Disney studios, he finds his brother Mickey chained in the animation dungeon, being forced to draw the next Roger Rabbit cartoon and claiming, "Oh, Mort! Everything's CHANGED! . . . Walt's Gone! The magic's over! THE GUY FROM ACCOUNTING is running the place! Morals are slipping, Mort . . . He's introduced new cartoon characters! . . . WOMEN characters! . . . WITH PRONOUNCED BOSOMS!!" *Id.* Mortified upon hearing this, Mortimer hunts down and engages "top Mousketeer" Eisner in "a most un-Disneylike brouhaha," but ultimately ends up leaving town armed only with two suitcases and Michael Eisner's teeth marks in his right ear. *Id.*

¹¹ *Id.*

¹² See BREATHED, *supra* note 2, at 8–9.

¹³ See, e.g., Bill Griffith, *Zippy*, BOSTON GLOBE, Nov. 12, 1995, Comics.

¹⁴ See *id.* ("Mergermania!! 12 strips in one!! It's the American Way!!").

¹⁵ See *id.* The various characters used were: Mike Doonesbury from *Doonesbury*, Charlie Brown from *Peanuts*, Dagwood Bumstead from *Blondie*, Dilbert, Superman, Nancy, Cathy, Popeye, Garfield, Calvin from *Calvin & Hobbes*, and Billy from *Family Circus*. See *id.*

¹⁶ David Astor, *An Ohio State Talk for 'Zippy' Creator; Bill Griffith Discusses His Comic Strip at*

mative defense of "fair use" applies, they are infringing upon a federally protected copyright.¹⁷

This note explores the legal ramifications of cartoon crossovers to determine whether such use is allowed under modern copyright principles. Part I establishes the foundation of the law of copyright protection. Part II introduces the fair use affirmative defense to copyright infringement, including the United States Supreme Court's most recent analysis in *Campbell v. Acuff-Rose Music, Inc.*¹⁸ Part III is a study of various copyright infringement cases involving cartoons. Part IV analyzes cartoon crossovers under the fair use affirmative defense in light of *Campbell*, concluding that crossovers are indeed a fair use of another cartoonist's protected characters.

I. THE LAW OF COPYRIGHT PROTECTION

Article I, Section 8 of the United States Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries"¹⁹ James Madison, discussing the Constitution in the Federalist Papers, noted that this power will "scarcely be questioned," and common law recognizes the right of authors to copyright their work.²⁰ In light of this common-law right to protect one's creation, Congress enacted the initial copyright statute in 1790 to stimulate artistic creativity for the public benefit while providing the artist with the financial motivation for creativity that flows from a limited form of monopoly.²¹

To establish an action for infringement of a protected copyright, a plaintiff must show both ownership of that copyright and that the defendant copied the protected material without authorization.²² Ownership is shown by proof of originality, copyrightability and compliance with the applicable statutory procedures.²³ Thus, a plaintiff who has registered a work with the United States Copyright Office can easily

a Festival that also Features Remarks by a Cartooning Author, EDITOR & PUBLISHER, Sept. 16, 1995, at 40.

¹⁷ See 17 U.S.C. § 107 (1994).

¹⁸ 510 U.S. 569 (1994).

¹⁹ U.S. CONST. art. I, § 8, cl. 8.

²⁰ THE FEDERALIST No. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

²¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994); *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981); *Pillsbury v. Milky Way Prod.*, 8 Media L. Rep. (BNA) 1016, 1023 (N.D. Ga. 1981).

²² See *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).

²³ See *Apple Barrel Prod., Inc. v. Beard*, 730 F.2d 384, 387 (5th Cir. 1984). Federal law requires

demonstrate ownership because a certificate of registration constitutes prima facie evidence of ownership.²⁴ Full registration itself is not necessary to prove ownership, however, as one need only establish payment of the required fee, deposit of the work in question and receipt by the Copyright Office of a registration application.²⁵ Once ownership of the copyright is shown, the plaintiff can then demonstrate that the defendant copied the work in one of two ways: (1) direct evidence; or (2) circumstantial evidence, consisting of both access to the copyrighted work and substantial similarity between the copyrighted work and the defendant's work.²⁶ One example of direct evidence could be in the form of the defendant's explicit admission that he copied the plaintiff's work.²⁷ Another example of direct evidence would be a witness who observed the defendant engaging in the physical act of copying.²⁸ Circumstantial evidence, however, is the more common form of proof.²⁹ Substantial similarity does not require literal identical copying of every detail.³⁰ Rather, similarity is determined by the "ordinary observer" test: whether an average observer (i.e., a layman) would recognize the alleged copy as having been appropriated from the protected work.³¹ An example of circumstantial evidence would arise where the defendant, after seeing the plaintiff's work on television, creates a work that is substantially similar to the plaintiff's work, thus leading an ordinary observer to recall the plaintiff's work.³²

registration of the copyright with the Copyright Office before any action for infringement can be made. See 17 U.S.C. § 411(a) (1994).

²⁴ See 17 U.S.C. §§ 408(a)-(b), 410(c) (1994). Under § 408(a), registration of a copyright in any work, whether published or unpublished, can be made by "the owner of copyright" at any time. *Id.* § 408(a). The claim may be registered in the Copyright Office by depositing copies of the work together with an application and fee. See *id.* § 408(b). Under § 410(c), the certificate of registration constitutes "prima facie evidence of the validity of the copyright . . ." *Id.* § 410(c).

²⁵ See *Apple Barrel*, 730 F.2d at 386-87.

²⁶ See, e.g., *Warner Bros. v. American Broadcasting Co.*, 654 F.2d 204, 207 (2d Cir. 1981); *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). Substantial similarity is determined by whether an average observer would recognize the alleged copy as having been appropriated from the copyrighted work. See *Rogers*, 960 F.2d at 307.

²⁷ See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 548 (1985) (noting that editors of *The Nation* magazine admitted to copying verbatim 300-400 words from President Gerald Ford's unpublished memoirs); *Rogers*, 960 F.2d at 307 (noting that defendant admitted to giving explicit instructions that plaintiff's work be copied).

²⁸ See CRAIG JOYCE ET AL., COPYRIGHT LAW § 8.03, at 692 (3d ed. 1994).

²⁹ See *id.*

³⁰ See *Rogers*, 960 F.2d at 307.

³¹ *Id.*

³² See *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*, 517 F. Supp. 1202, 1204, 1207 (N.D. Tex. 1981). Sambo's restaurant had access to Dr. Pepper's commercials by obtaining and viewing copies of the "Be a Pepper" campaign. *Id.* Sambo's then created their own "Dancing Seniors"

In addition, section 106 of the Copyright Statute provides reproduction protection for the copyright owner, giving the owner exclusive rights to reproduce the copyrighted work in copies and to prepare derivative works based upon the original.³³ The law defines a derivative work as a recasting, transformation or adaptation of the original.³⁴ Copyright protection is not absolute, however.³⁵ The most common means of avoiding liability for infringement lie in the fair use affirmative defense.³⁶ This equitable doctrine permits others to use copyrighted material without the owner's consent in a reasonable manner for certain purposes.³⁷

II. THE FAIR USE DOCTRINE

The doctrine of fair use carves out a limited exception to the broad rights granted copyright owners by allowing others to make reasonable use of protected works without permission.³⁸ The purpose of fair use is to balance the need to provide individuals with sufficient incentives to create public works against the public's interest in the dissemination of information.³⁹ Fair use constitutes an affirmative defense to copyright infringement.⁴⁰ The doctrine developed over time in the case law until Congress codified it in 1976.⁴¹ Once the copyright

commercial that was substantially similar to Dr. Pepper's commercial because a combination of Sambo's lyrics and music, along with its tag line "Don't you want to be a Senior, too?" would lead an ordinary observer to recall the plaintiff's "Be a Pepper" jingle tag line. *Id.*

³³ 17 U.S.C. §§ 106(1)-(2) (1994).

³⁴ See 17 U.S.C. § 101 (1994). A derivative work is defined as:

[a work] based upon one or more preexisting works, such as a translation . . . fictionalization . . . art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

Id.

³⁵ See JOYCE, *supra* note 28, at 779.

³⁶ See *id.*

³⁷ See Rogers, 960 F.2d at 308.

³⁸ See Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966). Because the financial reward guaranteed to the copyright holder is "but an incident of [the] general objective [of copyright law], rather than an end in itself . . . courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543-44 (2d Cir. 1964).

³⁹ See Hustler Magazine v. Moral Majority, 13 Media L. Rep. (BNA) 1151, 1153 (9th Cir. 1986).

⁴⁰ See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

⁴¹ See 17 U.S.C. § 107 (1994); Campbell, 510 U.S. at 576.

owner establishes a *prima facie* case of infringement, the alleged infringer may invoke the defense.⁴² In determining whether a particular use is fair, a court weighs four enumerated factors: (1) the purpose and character of the use; (2) the nature of the original; (3) the amount and substantiality of the protected work that is used; and (4) the effect of the use upon the market for the original work.⁴³ After analyzing all four factors together, if the court determines that the overall balance weighs in favor of fair use, then there is no infringement of the copyright with respect to such use.⁴⁴ In other words, the court allows limited use of copyrighted works without permission.⁴⁵

The qualitative framework for what later came to be known as the four factors of the fair use affirmative defense was established in 1841, in *Folsom v. Marsh*, where Justice Story of the Circuit Court of Massachusetts held that the defendant infringed the copyright of the plaintiff when he copied, verbatim, 353 pages from the plaintiff's book.⁴⁶ Both the defendant and the plaintiff were publishers of books on George Washington's correspondence.⁴⁷ The court reasoned that the essential value of the defendant's work came from Washington's letters—letters whose copyright belonged exclusively to the plaintiff—and that to allow unlimited copying would destroy the plaintiff's copyright.⁴⁸ Included in the court's decision was the fact that the plaintiff copied entire letters, rather than abbreviated or select passages.⁴⁹ Because the court determined that these letters constituted the most interest and value to the public, the court stated that copying the letters in their entirety was a clear invasion of plaintiff's property right.⁵⁰ The court noted in dicta that the defendant would have escaped infringement had he published only an abridgment of plaintiff's work.⁵¹ In its decision, the court set forth a test for whether a subsequent use of copy-rightable material is a "justifiable use" of the original materials, thus

⁴² See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (MB) §§ 13.01, 13.05 (June 1995).

⁴³ See *Campbell*, 510 U.S. at 577–78; *Twin Peaks Prod. v. Publications Int'l*, 996 F.2d 1366, 1373–74 & n.3 (2d Cir. 1993).

⁴⁴ See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 416, 433 (1984); see also *Campbell*, 510 U.S. at 577–78.

⁴⁵ See *Rosemont*, 366 F.2d at 306.

⁴⁶ *Folsom v. Marsh*, 9 F. Cas. 342, 345, 349 (C.C.D. Mass. 1841) (No. 4901).

⁴⁷ See *id.* at 343.

⁴⁸ See *id.* at 349.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *Folsom*, 9 F. Cas. at 349.

constituting no infringement of plaintiff's work.⁵² The factors the court included in this test were "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."⁵³ The court determined that the defendant failed this inchoate fair use test because he copied much of plaintiff's work in its entirety, rather than taking only abbreviated passages.⁵⁴ The court thus held that excessive copying of another's work constituted copyright infringement.⁵⁵

Twentieth century cases sharpened several aspects of the fair use doctrine, including a determined attempt to express the rationale of the privilege in terms of the policies embedded in the Copyright Clause.⁵⁶ In 1964, in *Berlin v. E.C. Publications, Inc.*, the United States Court of Appeals for the Second Circuit held that a humor magazine's publication of satiric parody lyrics was not a copyright infringement.⁵⁷ The owners of twenty-five popular songs instituted an action against *Mad Magazine* alleging that *Mad's* substitution of parody lyrics for some of the original words constituted infringement of the copyrighted pieces.⁵⁸ The court noted that only the words were satirized; the magazine did not reproduce the music in any form whatsoever.⁵⁹ The court weighed the common law fair use factors and found that *Mad's* use of the lyrics had no intent or effect of fulfilling the demand for the original, nor did *Mad* appropriate a greater amount of the original than was necessary to conjure up the object of its satire.⁶⁰ In fact, noted the court, the disparities in theme, content and style between the original and the alleged infringer could hardly be greater.⁶¹ In its

⁵² *Id.* at 348. The term "fair use" was established in *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136).

⁵³ *Folsom*, 9 F. Cas. at 348.

⁵⁴ *Id.* at 349.

⁵⁵ *Id.*

⁵⁶ See JOYCE, *supra* note 28, at 787.

⁵⁷ 329 F.2d 541, 542, 545 (2d Cir. 1964). The term "fair use" was not always used before the 1976 codification of the doctrine. See *id.*

⁵⁸ See *id.* at 542-43. Two examples of *Mad's* parodies included: (1) rewriting the nostalgic ballad "The Last Time I Saw Paris" into "The First Time I Saw Maris," a caustic commentary upon the tendency of baseball heroes to become television advertising pitchmen; and (2) transforming the tribute to feminine beauty "A Pretty Girl Is Like a Melody" into "Louella Schwartz Describes Her Malady," a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight. *Id.* at 543.

⁵⁹ See *id.* at 542.

⁶⁰ See *id.* at 545.

⁶¹ See *id.*

analysis, the court articulated copyright policy and reasoned that the copyright holder's interest in a maximum financial return must sometimes defer to the greater public interest in the development of art, science and industry.⁶² Thus, the court held that *Mad's* use of the plaintiff's popular songs did not constitute infringement of the protected originals.⁶³

After a long and detailed common law tradition, Congress codified the fair use defense in section 107 of the Copyright Act of 1976.⁶⁴ In so doing, Congress sought to preserve the doctrine's common law character while leaving courts free to adapt it on a case by case basis.⁶⁵ The statutory framework, mirroring Justice Story's language in *Folsom*, creates a four part balancing test for a court to engage in to determine whether the fair use defense will be allowed.⁶⁶ The court must look to: (1) the purpose and character of the use, including whether the use is for commercial or nonprofit purposes; (2) the nature of the original; (3) the amount and substantiality of the original work used; and (4) the effect of the use on the potential market for the original.⁶⁷ These four factors are an illustrative, rather than exhaustive, list whose factors the court should balance to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work.⁶⁸ In other words, rather than creating a general definition of fair use, Congress decided that courts must analyze each case on its own facts using the four stated criteria as a gauge, and that courts are free to adapt the doctrine to particular situations as they see fit.⁶⁹ Two cases typifying fair use jurisprudence are the Supreme Court's 1985 decision in *Harper & Row, Publishers,*

⁶² See *Berlin*, 329 F.2d at 544.

⁶³ See *id.* at 545.

⁶⁴ 17 U.S.C. § 107 (1994).

⁶⁵ See *Fisher*, 794 F.2d at 435; H.R. REP. NO. 1476, 94th Cong., 2d Sess. 2043 (1976), reprinted in 1976 U.S.C.C.A.N. 5669, 5678.

⁶⁶ See 17 U.S.C. § 107; *Folsom*, 9 F. Cas. at 348; see also *Campbell*, 510 U.S. at 576-77.

⁶⁷ See 17 U.S.C. § 107. The relevant statutory language states:

[T]he fair use of a copyrighted work . . . for purposes such as criticism [or] comment . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (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.

Id.

⁶⁸ See *Rogers*, 960 F.2d at 308; *Hustler*, 13 Media L. Rep. (BNA) at 1153; see also H.R. REP. NO. 1476, reprinted in 1976 U.S.C.C.A.N. at 5680.

⁶⁹ H.R. REP. NO. 1476, reprinted in 1976 U.S.C.C.A.N. at 5680. As an example of the illustrative

Inc. v. Nation Enterprises and the Second Circuit's 1993 decision in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*⁷⁰

In 1985, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the United States Supreme Court held that a magazine's use of verbatim excerpts from an unpublished manuscript was not entitled to the fair use defense.⁷¹ Former President Gerald Ford gave Harper & Row Publishers, ("Harper & Row"), exclusive rights to publish his as yet unwritten memoirs.⁷² Harper & Row contracted with *Time* magazine to print excerpts from the manuscript one week before shipment of the full length book to bookstores.⁷³ Two weeks before the *Time* article was scheduled for release, *The Nation* magazine secretly procured a copy of the manuscript and published excerpts, effectively "scooping" *Time*.⁷⁴ As a result, *Time* canceled its piece and refused to pay Harper & Row.⁷⁵ Harper & Row brought suit for copyright violation against *The Nation* magazine.⁷⁶

The Supreme Court began its analysis by stating that in quoting verbatim from Ford's original manuscript, *The Nation* effectively gave itself the right of first publication, an important and marketable right owned by Harper & Row.⁷⁷ Upon establishing that *The Nation* had infringed Harper & Row's copyright, the Court proceeded to analyze whether or not *The Nation's* action merited a fair use defense.⁷⁸ In its analysis of the first factor, purpose and character, the Court stated that a commercial use weighs against a fair use defense.⁷⁹ Thus, in evaluating *The Nation's* intended purpose of scooping the copyright holder's

nature of these factors, in 1984, the United States District Court for the Northern District of Georgia stated in *DC Comics Inc. v. Unlimited Monkey Business, Inc.* that:

In addition to the four factors necessarily considered in a determination of fair use, the Court considers a fifth factor. There is a difference between works that incidentally parody other works while creating a genuinely distinct product and those that comprise little more than an adaptation of another's original work. . . . Trading upon the imagination and originality of another is not fair use.

598 F. Supp. 110, 119 (N.D. Ga. 1984) (holding that singing telegrams infringed upon Superman and Wonder Woman characters).

⁷⁰ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

⁷¹ 471 U.S. at 569.

⁷² *See id.* at 542.

⁷³ *See id.* at 542-43.

⁷⁴ *See id.* at 543.

⁷⁵ *See id.*

⁷⁶ *See Harper & Row*, 471 U.S. at 543.

⁷⁷ *See id.* at 549.

⁷⁸ *See id.*

⁷⁹ *See id.* at 562.

right of first publication, the Court decided that the first statutory factor weighed against a finding of fair use.⁸⁰

The Court next decided that the second statutory factor, the nature of the copyrighted work, also weighed against a fair use defense because *The Nation* did not just copy unprotectable facts, but copied the most expressive and protectable elements of Ford's work.⁸¹ In its analysis of the amount and substantiality of the portion used, the Court also found that this third factor weighed against fair use because, although *The Nation* quantitatively only copied an insubstantial portion of Ford's book, the actual qualitative content of what was copied was the "heart" of the book.⁸² Finally, in analyzing the effect on the market, the Court first stated that this last factor is undoubtedly the single most important element of fair use.⁸³ The Court then found that this fourth factor analysis weighed against fair use since *Time's* refusal to pay Harper & Row constituted clear-cut evidence of actual damage.⁸⁴ Thus, the Supreme Court held that *The Nation's* use of verbatim transcripts from Ford's unpublished manuscript did not warrant the fair use defense.⁸⁵

In *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, the United States Court of Appeals for the Second Circuit held that a book containing a detailed summary of television show plots was not fair use of the teleplays (scripts).⁸⁶ Twin Peaks Productions, ("Twin Peaks"), brought a copyright infringement action against Publications International, Ltd., ("PIL"), for publishing a book detailing, among other things, the plot, characters, actors and episodes of the "Twin Peaks" television show.⁸⁷ The Second Circuit began its analysis by stating that in a prima facie case of copyright liability, the copyright owner must prove ownership and copying of constituent elements of the work.⁸⁸

First, the court established that Twin Peaks had proven ownership of its teleplays and televised episodes through registration with the Copyright Office.⁸⁹ Next, the court concluded that Twin Peaks had established copying of its protected works through circumstantial evi-

⁸⁰ See *id.*

⁸¹ See *Harper & Row*, 471 U.S. at 563-64.

⁸² *Id.* at 564-65.

⁸³ See *id.* at 566.

⁸⁴ See *id.* at 567.

⁸⁵ See *id.* at 569.

⁸⁶ 996 F.2d 1366, 1378 (2d Cir. 1993).

⁸⁷ See *id.* at 1370.

⁸⁸ See *id.* at 1371-72.

⁸⁹ See *id.* at 1371. Initially, there was some confusion as to whether Twin Peaks established

dence of both access and substantial similarity.⁹⁰ The court noted that PIL had access to the protected works because the ability to watch the televised programs served as the functional equivalent of access to the protectable content of the teleplays.⁹¹ The court then concluded that substantial similarity between the two works existed because two chapters of the book consisted of extensive direct quotations from the teleplays as well as a direct recounting of the first eight episodes.⁹² The court noted that the concept of similarity embraces not only global similarity in structure and sequence, but also localized similarity in language.⁹³ Thus, after establishing a *prima facie* case of copyright infringement, the court next went on to determine whether to allow PIL the fair use defense.⁹⁴

The court first established that PIL's book is a work of "comment" and perhaps "criticism," thus satisfying two of section 107's list of purposes for which a claim of fair use may be made.⁹⁵ The court next made plain that its decision would ultimately turn on whether or not PIL's book borrowed the protected expression of *Twin Peaks*'s original for purposes that advance the policies of copyright law.⁹⁶ To make this determination, the court applied the four factor balancing test.⁹⁷

As to purpose and character of the use, the court concluded that this first factor weighed in favor of infringement.⁹⁸ The court reasoned that PIL's book was merely a detailed report of the *Twin Peaks* plots that goes far beyond merely identifying their basic outline for the transformative purposes of comment or criticism.⁹⁹ Next, the court decided that the second factor, the nature of the copyrighted work, also weighed in favor of infringement because the television program

ownership of the teleplays only or of both the teleplays and the televised episodes. *See id.* The court stated, however, that its disposition of the copyright issues was unaffected either way. *See id.*

⁹⁰ *See id.* at 1372-73.

⁹¹ *See Twin Peaks*, 996 F.2d at 1372.

⁹² *See id.* at 1372-73.

⁹³ *See id.* at 1372. The court also held that PIL's book constituted a derivative work based upon *Twin Peaks*' protected product, and thus constituted infringement since the copyright owner also owns the right to make derivative works. *See id.* at 1373. The court noted, however, that this determination that the book was a derivative work was superfluous to establishing a *prima facie* case of infringement. *See id.* at 1372.

⁹⁴ *See id.* at 1373.

⁹⁵ *Id.* at 1374.

⁹⁶ *See Twin Peaks*, 996 F.2d at 1374.

⁹⁷ *See id.* at 1374-77.

⁹⁸ *See id.* at 1376.

⁹⁹ *See id.* at 1375. The official name for a work that gives a detailed plot summary is an "abridgement." *Id.* The Copyright Act recognizes abridgements as a form of a derivative work and gives the copyright holder the exclusive right to prepare such derivative works. 17 U.S.C. §§ 101, 106(2).

was not a work consisting of uncopyrightable facts, but a creative, fictional work deserving wide protection.¹⁰⁰

Third, the court focused on the amount and substantiality of the portion used in relation to the copyrighted work as a whole.¹⁰¹ The court noted that the third prong is redundant, since establishing a prima facie case of infringement included a determination that PIL's book was substantially similar to the show.¹⁰² Thus, the court held that this factor also weighed in favor of infringement because the book lifted many parts verbatim from the script.¹⁰³

Finally, the court analyzed the effect of the use upon the potential market for, or value of, the copyrighted work.¹⁰⁴ The court noted that this fourth factor favors fair use when the defendant's work fills a market niche that the plaintiff simply has no interest in occupying.¹⁰⁵ In this case, however, the court reasoned that PIL's book could interfere with *Twin Peaks*' primary existing market because it is possible that a person who had missed an episode of the show would find the book an adequate substitute for renting the videotape of that episode.¹⁰⁶ Part of the court's analysis of infringement on the potential market included the fact that *Twin Peaks* had already licensed two books and was planning to license more.¹⁰⁷ In the end, the court concluded that although *Twin Peaks* could not bar publication of works of comment, criticism or news reporting on the show, it may rightfully claim infringement with respect to a book that reports the plot in such extraordinary detail.¹⁰⁸ Thus, the Second Circuit held that PIL's book was not entitled to the fair use defense.¹⁰⁹

The Supreme Court modified long established fair use dogma in 1994, in *Campbell v. Acuff-Rose Music, Inc.*, holding that a rap parody of a ballad constituted fair use.¹¹⁰ In *Campbell*, the owners of Roy Orbison's rock ballad "Oh, Pretty Woman" brought suit after the rap

¹⁰⁰ See *Twin Peaks*, 996 F.2d at 1376.

¹⁰¹ See *id.*

¹⁰² See *id.* at 1377.

¹⁰³ See *id.* at 1376-77.

¹⁰⁴ See *id.* at 1377.

¹⁰⁵ See *Twin Peaks*, 996 F.2d at 1377. The court stated that because copyright holders rarely write parodies of their own works, write reviews of them, or write new analyses from an opposite political perspective, these would be situations where the fourth factor would favor fair use. See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 1378.

¹¹⁰ 510 U.S. 569, 594 (1994).

group 2 Live Crew parodied the song.¹¹¹ The United States District Court for the Middle District of Tennessee granted summary judgment for 2 Live Crew after performing a fair use analysis and finding that the parody made fair use of Orbison's original.¹¹² The Court of Appeals for the Sixth Circuit reversed, however, holding that the blatant commercial purpose of the parody rendered it a presumptively unfair use.¹¹³ The Supreme Court, in granting certiorari to determine whether 2 Live Crew's commercial parody could be fair use, proceeded to alter the interpretation of the four statutory factors.¹¹⁴

Although it is not explicitly listed in the preamble to section 107, the Court first held that parody, like other comment or criticism, may claim fair use protection.¹¹⁵ The Court went on to re-analyze the first statutory factor, purpose and character of the use, including whether the use is for commercial or non-profit purposes.¹¹⁶ The Court held that a finding of commercial purposes is not presumptively unfair, but rather only one element of the analysis, the force of which varies with the context.¹¹⁷ Thus, the Court concluded that commerciality may weigh against the infringer, but is not by itself conclusive.¹¹⁸ The Court noted that the crux of this first factor is to determine the *transformative* nature of the new work—i.e., whether the new work added something novel, with a further purpose or different character, or altered the original with new expression, meaning, or message.¹¹⁹ To the extent that the secondary use involves merely an untransformed duplication of the original, the Court implied that the value generated is little or nothing more than the value inherent in the original.¹²⁰ The Court recognized that parody, on the other hand, does add to the original by providing the social benefit of shedding light on an earlier work and in the process, creating a new one.¹²¹ The *Campbell* Court reasoned that the more transformative the new work is, the less significant the

¹¹¹ See *id.* at 572–73.

¹¹² See *id.* at 573.

¹¹³ See *id.* at 573–74.

¹¹⁴ *Id.* at 574, 578–94.

¹¹⁵ See 17 U.S.C. § 107; *Campbell*, 510 U.S. at 579–81.

¹¹⁶ See *Campbell*, 510 U.S. at 579–85.

¹¹⁷ See *id.* at 584–85. Previously, commerciality was given hard presumptive significance. See, e.g., *Sony*, 464 U.S. at 448–49.

¹¹⁸ See *Campbell*, 510 U.S. at 584–85.

¹¹⁹ See *id.* at 579; see also *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 923 (2d Cir. 1994).

¹²⁰ See *Campbell*, 510 U.S. at 579; accord *American Geophysical Union*, 60 F.3d at 923.

¹²¹ See *Campbell*, 510 U.S. at 579.

other factors that may weigh against fair use will be, such as commercialism.¹²²

The Court stated that inherent in this first factor analysis is a threshold inquiry of whether the secondary work is a parody for section 107 purposes, thus deserving a fair use analysis.¹²³ The Court reasoned that if the secondary work has no critical bearing on the substance or style of the original, the claim to a fair use defense diminishes accordingly, and may even vanish, allowing other factors, such as commerciality, to assume greater importance.¹²⁴ The Court's test for whether parody exists is whether a reasonable person would perceive the character as parodic.¹²⁵ In addition, the Court stated that the relative bad or good faith of the alleged infringer is not determinative of fair use.¹²⁶ The Court reasoned that because parodists will seldom get permission from those whose works they are parodying, lack of permission to use a work does not weigh against a finding of fair use.¹²⁷ The Court applied this new analysis to the facts at bar and decided that while they might not assign a high rank to the parodic element of the rap song, the work could still reasonably be perceived as commenting on the original or criticizing it, thus warranting a full analysis of the fair use defense.¹²⁸

The Court next analyzed the second statutory factor, the nature of the original, which draws its origin from the concept that some works are closer to the core of intended copyright protection than others.¹²⁹ The Court implied that in general, the more factual the original, the less protection it is entitled.¹³⁰ The Court reasoned that because parodies, however, almost always copy creative, original works, this second factor analysis becomes nothing more than a tautology, invariably weighing in favor of the original artist.¹³¹ The Court agreed with both lower courts that Orbison's original, creative expression falls within the core of the copyright law's protective purposes.¹³²

¹²² See *id.*

¹²³ See *id.* at 582; see also *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 830 (S.D.N.Y. 1990); *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979).

¹²⁴ See *Campbell*, 510 U.S. at 580.

¹²⁵ See *id.* at 582.

¹²⁶ See *id.* at 585 n.18; *Fisher*, 794 F.2d at 436-37.

¹²⁷ See *Campbell*, 510 U.S. at 585 n.18; *Fisher*, 794 F.2d at 437.

¹²⁸ See *Campbell*, 510 U.S. at 583.

¹²⁹ See *id.* at 586; *Rogers*, 960 F.2d at 310.

¹³⁰ See *Campbell*, 510 U.S. at 586; *Rogers*, 960 F.2d at 310. See generally *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340 (1991) (facts not copyrightable).

¹³¹ See *Campbell*, 510 U.S. at 586.

¹³² See *id.*

The Court proceeded to look at the third statutory factor, the amount and substantiality of the portion used in relation to the whole.¹³³ In analyzing this third factor, the Supreme Court noted that the test is whether the parodist appropriated a greater amount of the original work than was necessary to "conjure up" an image of the original in order to make the object of the parody's critical wit recognizable.¹³⁴ The Court reasoned that this "recognition" test creates a plateau at which the parodist knows that his quotation of the original's most distinctive features will be identified by the audience.¹³⁵ Once the parodist takes enough to assure identification, anything taken beyond this is only reasonable to the extent of the parody's overriding purpose and character or, in contrast, the likelihood that the parody may serve as a market substitute for the original.¹³⁶ The Court reasoned that 2 Live Crew had not appropriated too much, for if they had copied a less memorable part of the original, it would be difficult to see how its parodic character would shine through.¹³⁷

Last, the *Campbell* Court re-analyzed the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work.¹³⁸ This was characterized as the most important fair use factor until *Campbell*, whereas the Supreme Court conspicuously omitted this phrasing.¹³⁹ Abandoning the idea that any factor enjoys primacy, the Supreme Court in *Campbell* dictated that all four factors are to be weighed together, in light of the purposes of copyright.¹⁴⁰ The Court noted that this analysis requires the court to consider both the *actual* market harm caused by the infringement as well as the *potential* market usurpation for derivative works.¹⁴¹

In a situation involving something beyond pure duplication for commercial purposes, the Court stated that there is no presumption or inference of market harm.¹⁴² The Court noted that this is so because, whereas pure duplication of a product supersedes the original and serves as a market replacement for it, a transformative use makes

¹³³ See *id.*

¹³⁴ *Id.* at 588; see *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978).

¹³⁵ *Campbell*, 510 U.S. at 588; accord *Berlin*, 329 F.2d at 544-45.

¹³⁶ See *Campbell*, 510 U.S. at 588.

¹³⁷ See *id.* at 588-89.

¹³⁸ See *id.* at 590-94.

¹³⁹ See *id.* at 590-93; *American Geophysical Union*, 60 F.3d at 926.

¹⁴⁰ See *Campbell*, 510 U.S. at 578; *American Geophysical Union*, 60 F.3d at 926.

¹⁴¹ See *Campbell*, 510 U.S. at 590. Evidence of substantial harm weighs against a finding of fair use because the licensing of derivatives is an important economic incentive to the creation of originals. See *id.* at 593.

¹⁴² See *id.* at 591.

market substitution less certain.¹⁴³ In parody, the Court reasoned, it is more likely that the new work will not affect the market for the original because the parody and the original usually serve different market functions.¹⁴⁴ Also, the Court noted that a parody will tend not to affect the potential market for derivative works because it is unlikely that creators of imaginative works will license critical reviews or lampoons of their product.¹⁴⁵ The Court reasoned that in the case at bar there was no evidence that a potential rap market was harmed by 2 Live Crew's version.¹⁴⁶ In sum, the Supreme Court concluded that it was error for the Court of Appeals to find that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair, and thus held that the rap parody was fair use of the protected original.¹⁴⁷

III. CARTOON CASES AND FAIR USE

In 1924, in *King Features Syndicate v. Fleischer*, the United States Court of Appeals for the Second Circuit held that a toy manufacturer's exact reproduction of a syndicated cartoon character constituted an illegal infringement.¹⁴⁸ King Features Syndicate ("King") owned exclusive rights to the cartoon strip "Barney Google," including the right to reproduce the characters.¹⁴⁹ Fleischer was a toy manufacturer who produced a toy horse fashioned after, labeled and sold as Barney Google's horse, "Sparky."¹⁵⁰

The trial court denied King's motion for a preliminary injunction and instead granted Fleischer's motion to dismiss the suit.¹⁵¹ The Second Circuit Court of Appeals reversed, reasoning that Fleischer could not avoid infringement by taking the substance or idea and producing

¹⁴³ See *id.*

¹⁴⁴ See *id.* Compare *Fisher*, 794 F.2d at 438 (holding that parody song "When Sonny Sniffs Glue" was not commercial substitute for "When Sunny Gets Blue," because consumers desirous of hearing romantic and nostalgic ballad would not be satisfied by purchasing parody instead) with *Dr. Pepper*, 517 F. Supp. at 1208 & n.14 (finding market harm in restaurant commercial parody of "Be a Pepper" campaign because plaintiff spent \$100 million on campaign, and defendant's parody could potentially distract from its uniqueness and originality, thus shortening life of campaign and causing loss of business and goodwill plaintiff had built up).

¹⁴⁵ See *Campbell*, 510 U.S. at 592.

¹⁴⁶ See *id.* at 593.

¹⁴⁷ See *id.* at 594.

¹⁴⁸ 299 F. 533, 538 (2d Cir. 1924) (decided under the Copyright Act of 1909); see also *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.* 73 F.2d 276, 278 (2d Cir. 1934) (concluding that doll manufacturer's reproduction of "Betty Boop" cartoon was infringement).

¹⁴⁹ See *King Features*, 299 F. at 534.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

it through a different medium.¹⁵² The court stated that, by doing this, Fleischer was not acting as an artisan himself, but merely as someone who appropriated the intellect and creativity of the original artist.¹⁵³ The court then stated that the copyright owner is entitled to any use of his property for financial gain.¹⁵⁴ The court noted that by securing a monopoly to the owner, the copyright laws protect the commercial value of the property while simultaneously encouraging the development of the arts.¹⁵⁵ The court reasoned that Fleischer's toy doll, manufactured in the exact image of King's protected cartoon, appropriated all of the cartoonist's intellectual and creative product.¹⁵⁶ The copyright laws, noted the court, were designed to protect the creation of such a product.¹⁵⁷ The Second Circuit held that Fleischer had infringed King's copyrighted product by manufacturing a toy doll that usurped the commercial value of the original character, and thus determined that the appropriation was not fair use.¹⁵⁸

In 1978, in *Walt Disney Productions v. Air Pirates*, the United States Court of Appeals for the Ninth Circuit held that a comic book company's copying of over seventeen copyrighted cartoon characters did not constitute fair use because the extent of the defendant's appropriation from the original exceeded permissible levels.¹⁵⁹ *Air Pirates* was an underground comic book that had transformed several well-known Disney cartoon characters into active members of a free thinking, promiscuous, drug ingesting counterculture.¹⁶⁰ The court began its discussion by noting that comic strip characters are protectable under copyright.¹⁶¹ The court then focused on the amount and substantiality of the appropriation of the Disney characters.¹⁶² In evaluating how much of a taking was necessary to recall or conjure up the original, the court first recognized that given the widespread public recognition of the Disney characters, very little appropriation would be necessary to place Mickey and his image in reader's minds.¹⁶³ The court also

¹⁵² See *id.* at 535.

¹⁵³ See *id.*

¹⁵⁴ See *King Features*, 299 F. at 536.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 538.

¹⁵⁷ See *id.* at 537.

¹⁵⁸ See *id.* at 538.

¹⁵⁹ 581 F.2d 751, 753, 758 (9th Cir. 1978). This case was decided under the Copyright Act of 1909. See *Walt Disney*, 581 F.2d at 754.

¹⁶⁰ See *id.* at 753.

¹⁶¹ See *id.* at 754-55.

¹⁶² See *id.* at 756-58.

¹⁶³ See *id.* at 757-58.

reasoned that because the medium involved is a graphic work rather than a purely textual one, recognizable caricature that conjures up the image of the original in the reader's minds does not require excessive copying.¹⁶⁴ The court also found it significant that the essence of the parody did not focus on how the characters looked, but instead focused on their personalities, wholesomeness and innocence.¹⁶⁵ The court stated that the desire to copy substantially in order to make the "best parody" needs to be balanced against the rights of the owner in his or her original expressions, and concluded that excessive copying will be allowed only if there exists a "special need for accuracy."¹⁶⁶ The court found that in the case at bar, Air Pirates had copied the Disney characters in their entirety, thereby taking more than was necessary to conjure up the famous characters in readers' minds.¹⁶⁷ The Ninth Circuit thus held that such excessive copying precluded a claim of fair use.¹⁶⁸

In 1981, in *Pillsbury v. Milky Way Productions*, the United States District Court for the Northern District of Georgia held that a humor magazine's publication of a picture resembling copyrighted trade characters constituted fair use.¹⁶⁹ Milky Way, publishers of *Screw* magazine, published a picture of plaintiff's trademark and two stanza jingle ("The Pillsbury Baking Song") along with figures resembling plaintiff's trade characters Poppin' Fresh and Poppie Fresh engaged in sexual intercourse and fellatio.¹⁷⁰ After establishing that Pillsbury had established a prima facie case of copyright infringement, the court then analyzed the validity of the defendant's affirmative defense of fair use.¹⁷¹ In its finding that defendant's work constituted fair use of plaintiff's protected copyrights, the United States District Court for the Northern District of Georgia performed an analysis of all four statutory factors.¹⁷²

¹⁶⁴ See *Walt Disney*, 581 F.2d at 758.

¹⁶⁵ See *id.* The court stated in dicta that defendants' copying may have been justified if: they had paralleled closely (with a few significant twists) Disney characters and their actions in a manner that conjured up the particular elements of the innocence of the characters that were to be satirized. While greater license may be necessary under those circumstances, here the copying of the graphic image appears to have no other purpose than to track Disney's work as a whole as closely as possible.

Id. Unfortunately, the court did not give any examples to help explain what this cryptic language actually means. See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ 8 Media L. Rep. (BNA) 1016, 1024 (N.D. Ga. 1981).

¹⁷⁰ See *id.* at 1016-17.

¹⁷¹ See *id.* at 1020-21.

¹⁷² *Id.* at 1021-24.

The court found that the effect of the appropriation on market value weighed in favor of Milky Way, stating that Pillsbury failed to introduce any substantive evidence supporting its claim of economic harm, and the court would not automatically presume economic injury merely because of the commercial nature of both works.¹⁷³ The court next focused on the purpose and character of the use, again finding in favor of Milky Way by concluding that the parody was more of an editorial or social commentary on the values epitomized by the characters than an attempt to capitalize financially on the original work.¹⁷⁴ In its analysis, the court noted that social commentary in a newspaper or magazine is not put to a commercial use simply because one sells a newspaper rather than gives it to the public free of charge.¹⁷⁵ As to the nature of the copyrighted work, the court found in favor of infringement because the original works were imaginative elements responsible for consumer recognition.¹⁷⁶ Finally, the court analyzed the amount and substantiality of the use, and again found in favor of infringement, stating that Milky Way used more of the copyrighted works than was necessary to suggest the original to its readers.¹⁷⁷ The court noted that in our media-saturated society, it would be difficult to find anyone of television age who would not recognize the famous doughboy and jingle.¹⁷⁸ The court reasoned that although it is difficult to estimate the extent that the plaintiff's work would have to be copied to remind viewers of the original, given its widespread recognition, it would certainly be less than the amount borrowed.¹⁷⁹ In its totality analysis, the court indicated that Milky Way's excessive appropriation did not foreclose the fair use defense because a court must consider all four factors together, with special emphasis on the effect of the copying upon the potential market for the protected work.¹⁸⁰ In the end, the *Pillsbury* court held that Milky Way's appropriation constituted fair use because Pillsbury failed to show any appreciable harm to the potential market for, or the value of, its copyrighted works and because Milky Way lacked any intent to fill the demand for the original.¹⁸¹

¹⁷³ See *id.* at 1022.

¹⁷⁴ See *Pillsbury*, 8 Media L. Rep. (BNA) at 1022.

¹⁷⁵ See *id.* The court also noted that the Copyright Act does not exclude pornographic materials from the parameters of the fair use defense. See *id.*

¹⁷⁶ See *id.* at 1023.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *Pillsbury*, 8 Media L. Rep. (BNA) at 1023.

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 1023-24. The court noted that it did not condone the manner in which

In 1987, however, in *Steinberg v. Columbia Pictures Industries, Inc.*, the United States District Court for the Southern District of New York held that a movie poster's copying of Steinberg's cartoon was not a parody and therefore not entitled to the protection of the fair use affirmative defense.¹⁸² Steinberg is an artist famous for his cartoons in the *New Yorker* magazine.¹⁸³ Columbia Pictures Industries used Steinberg's "New Yorker View of the World" cartoon to design its promotional poster for the movie "Moscow on the Hudson."¹⁸⁴ In analyzing the first statutory factor, the purpose and character of the use, the court stated that Columbia did not design either the movie or the poster to be a parody of Steinberg's cartoon.¹⁸⁵ The court determined that the poster merely borrowed numerous elements of Steinberg's cartoon to create an advertisement to promote an unrelated commercial product.¹⁸⁶ The court refused to allow a fair use defense, reasoning that Columbia's variation on the visual joke of Steinberg's cartoon did not, without an element of humor aimed at some aspect of the illustration itself, render it a parody under section 107 entitled to the affirmative defense.¹⁸⁷ The court thus held that Columbia's copying of Steinberg's cartoon was not fair use, and, therefore, it constituted an actionable copyright infringement.¹⁸⁸

In 1993, in *United Feature Syndicate, Inc., v. Koons*, the United States District Court for the Southern District of New York again refused to apply a fair use analysis to the appropriation of a cartoon character because it concluded that a sculpture modeled after a copyrighted cartoon character was not a section 107 parody entitled to a fair use defense.¹⁸⁹ Koons used United Feature Syndicate's ("United Feature") cartoon character Odie from the *Garfield* strip as a model for a theme exhibition on "banality."¹⁹⁰ The only difference between the three-dimensional sculpture and the two dimensional

defendant chose to "assault the corporate citadel, but value judgments have no place in [the analysis]." *Id.*

¹⁸² 663 F. Supp. 706, 715 (S.D.N.Y. 1987).

¹⁸³ *See id.* at 708.

¹⁸⁴ *See id.* at 708-10.

¹⁸⁵ *See id.* at 715.

¹⁸⁶ *See id.*

¹⁸⁷ *See Steinberg*, 663 F. Supp. at 714. The court noted that the other fair use factors did nothing to mitigate their determination: the work at issue was an artistic creation, a very substantial portion of which was copied, and the value of Steinberg's reputation was injured by having the public believe that he lent his work to a profit-making enterprise. *See id.* at 715.

¹⁸⁸ *See id.*

¹⁸⁹ 817 F. Supp. 370, 384 (S.D.N.Y. 1993).

¹⁹⁰ *Id.* at 372-73.

character, besides relative size, was a slightly longer tongue on Koon's piece.¹⁹¹

The court determined that the sculpture did not qualify as a section 107 parody entitled to the fair use defense because it was, at best, a parody of society at large rather than a parody of Odie.¹⁹² The court maintained that a section 107 parody entitled to the defense must at least in part comment upon the copied work, and Koons admitted that he could have used other images or figures besides Odie to make his point.¹⁹³ In light of this admission, the court stated that it became even more obvious that his sculpture was not a comment, criticism, or parody directed at Odie.¹⁹⁴ Thus, there was no justification for the fair use defense.¹⁹⁵

The court applied an analysis of all four statutory factors to show that, even assuming that Koons's sculpture was a section 107 parody, it would still fail the analysis for a fair use defense.¹⁹⁶ As to the purpose and character of the use, the court found that the use had a commercial nature because Koons sold two copies of the sculpture for \$125,000 each, and thus clearly had an intent to make a profit.¹⁹⁷ The court noted that the mere fact that an infringing copy can be classified as art does not necessarily afford the copier a valid fair use defense.¹⁹⁸ In analyzing the nature of the copyrighted work, the court rebuffed Koons's argument that the popularity and commercial success of the *Garfield* characters transformed them into the public domain, thereby resulting in a loss of copyright protection.¹⁹⁹ The court noted that these imaginative characters did not lose copyright protection as a result of their incorporation into American culture.²⁰⁰ In analyzing the amount and substantiality of the portion used, the court found that Koons's sculpture copied Odie virtually in its entirety, thus exceeding a permissible level of use.²⁰¹ Finally, as to the potential effect on the market, the court suggested that if the unauthorized use of Odie became widespread, it would prejudice United Feature's potential licensing market not only in three-dimensional representations, but also in posters,

¹⁹¹ See *id.* at 373.

¹⁹² See *id.* at 383-84.

¹⁹³ See *id.*

¹⁹⁴ See *United Feature*, 817 F. Supp. at 384.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* at 378-82.

¹⁹⁷ See *id.* at 379.

¹⁹⁸ See *id.*

¹⁹⁹ See *United Feature*, 817 F. Supp. at 380.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 381.

cards, T-shirts, calendars and other derivative works.²⁰² This analysis was only dicta, however, insofar as the court ultimately held that Koons's sculpture of United Feature's protected cartoon character did not warrant a fair use defense.²⁰³

IV. ANALYSIS

In the years before the Supreme Court decided *Campbell v. Acuff-Rose Music, Inc.*, the general litigation surrounding the fair use defense to parody had mixed results.²⁰⁴ In situations involving almost *in toto* appropriation of cartoon characters, however, fair use was denied in all instances except one.²⁰⁵ Yet, despite this precedent, one cartoonist's appropriation in a comic strip of another cartoonist's protected characters is in fact the exact sort of parody or satire that deserves exemption from liability under the fair use defense.

In our society, parody is a valued form of criticism, encouraged because it fosters the creativity protected by the copyright laws.²⁰⁶ In every parody case involving cartoons, however, the court analyzing the four fair use factors has found infringement—with the exception of the United States District Court for the Northern District of Georgia in *Pillsbury v. Milky Way Productions*.²⁰⁷ Although a cartoon crossover on the newspaper comics pages (where one cartoon strip expressly uses another's characters) has never been litigated, in light of this precedent, all such crossovers would seem to infringe on protected territory, and the offending cartoonists thus unknowingly put themselves at legal risk.²⁰⁸ One would surmise, therefore, that both Berkeley Breathed and Bill Griffith have opened themselves up to potential liability by using

²⁰² See *id.* at 381–82.

²⁰³ See *id.* at 384.

²⁰⁴ Compare *Fisher*, 794 F.2d at 434, 440 (concluding that "When Sonny Sniffs Glue," parody of romantic song "When Sunny Gets Blue," was fair use), and *Elsmere Music, Inc. v. National Broad. Co.*, 482 F. Supp. 741, 747 (S.D.N.Y. 1980) (finding "I Love Sodom" Saturday Night Live skit parodying "I Love New York" ad campaign to be fair use), *aff'd*, 623 F.2d 252, 253 (2d Cir. 1980), with *Dr. Pepper*, 517 F. Supp. at 1208 (finding restaurant commercial parody of "Be a Pepper" campaign not fair use), and *Metro-Goldwyn-Mayer*, 479 F. Supp. at 361 (musical revue parody of "Gone with the Wind" found not to be fair use).

²⁰⁵ Compare *Pillsbury*, 8 Media L. Rep. (BNA) at 1024 (fair use), with *Walt Disney*, 581 F.2d at 758 (no fair use), and *King Features*, 299 F. at 538 (no fair use), and *United Feature*, 817 F. Supp. at 383–84 (no fair use), and *Steinberg*, 663 F. Supp. at 715 (no fair use).

²⁰⁶ See *Rogers*, 960 F.2d at 310.

²⁰⁷ See 8 Media L. Rep. (BNA) at 1024. Compare *id.*, with *Walt Disney*, 581 F.2d at 758, and *King Features*, 299 F. at 538, and *United Feature*, 817 F. Supp. at 384, and *Steinberg*, 663 F. Supp. at 715.

²⁰⁸ The legality of cartoon crossovers has never been discussed before, but the United States District Court for the Southern District of New York has presented the possibility for such a

protected characters in their strips.²⁰⁹ Even if a court would likely have found copyright infringement in a crossover situation in the past, this probability has changed with the Supreme Court's revision of the fair use criteria in *Campbell v. Acuff-Rose Music, Inc.*, although that case did not involve cartoons.²¹⁰

In light of the *Campbell* Court's re-analysis of the fair use defense, which provides the parodist with more legal rights, the two decisions closest to a crossover situation—*Walt Disney v. Air Pirates* and *Pillsbury v. Milky Way Productions*—must be reconciled.²¹¹ Post-*Campbell*, the *Pillsbury* decision provides the correct analysis for crossovers; and as the following discussion illustrates, cartoon crossovers, such as the *Outland* and *Zippy* crossovers mentioned above, should indeed constitute fair use.

The Court in *Campbell* paved a new road for the parodist.²¹² Three aspects of the decision allow much more latitude in copying a protected work than has been afforded in the past.²¹³ First, the Court stated that a commercial use does not create a presumption of unfair use.²¹⁴ This gives all parodies fair treatment with no initial presumptions based on any actual or perceived commercial nature. Second, by not explicitly stating, as it had in the past, that the fourth factor (effect on the potential market) is the single most important element of fair use, the Court apparently abandoned the idea that any one factor enjoys primacy, instead implying that all four factors are to be weighed together equally.²¹⁵ This re-analysis ensures that a court will perform a full and fair analysis of a crossover, rather than find a presumption against fair use simply because potential market harm exists. Finally, and perhaps most importantly, the Court lowered the parody "threshold" analysis, thus opening up the fair use defense to many more situations by stating that "taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found

situation by noting that syndicated cartoon characters "can be the subject of a parody which is protected by the fair use doctrine." *United Feature*, 817 F. Supp. at 380 n.5.

²⁰⁹ See BREATHED, *supra* note 2, at 8-9; Griffith, *supra* note 13.

²¹⁰ See 510 U.S. 569, 578-94 (1994). This case involved 2-Live Crew's rap music parody of Roy Orbison's *Oh, Pretty Woman*. See *id.* at 572.

²¹¹ See *id.* at 578-94. Compare *Walt Disney*, 581 F.2d at 758 (no fair use), with *Pillsbury*, 8 Media L. Rep. (BNA) at 1017 (fair use).

²¹² See generally *Campbell*, 510 U.S. at 578-94.

²¹³ Compare *Campbell*, 510 U.S. at 584-85, with *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

²¹⁴ See *Campbell*, 510 U.S. at 584-85.

²¹⁵ See *American Geophysical Union*, 60 F.3d at 926; see also *Campbell*, 510 U.S. at 578; *Harper & Row*, 471 U.S. at 566 (fourth factor is most important).

to be fair use" if the other factors weigh in the parodist's favor.²¹⁶ In the past, courts would sometimes deny outright the fair use defense by stating that the alleged parody did not qualify as a section 107 parody because there was not a sufficient element of humor aimed at the original.²¹⁷ Post-*Campbell*, however, nearly all parodies should easily pass this lowered threshold test and receive a full fair use analysis, rather than being stopped at the gate by a determination that there is not a sufficient element of humor aimed at some specific aspect of the original.²¹⁸

In a cartoon crossover situation, the prima facie case of infringement is easily established. Common law has long recognized that copyright protection is available for cartoon and comic strip characters.²¹⁹ Because all syndicated features are registered with the Copyright Office, ownership of the copyright in the cartoon character is thus easily established.²²⁰ Under the copyright statute, the certificate of registration constitutes evidence of ownership.²²¹ Next, copying of a protected work is easily established by either (1) direct evidence; or (2) circumstantial evidence consisting of (a) access to the original (which can be established by viewing the comics pages in our nation's newspapers) and (b) substantial similarity (which can be established in that an exact reproduction of another cartoonist's character would lead an ordinary observer to equate the copy with the original).²²² In the *Outland* example, direct evidence of unauthorized copying of protected characters is available because Breathed explicitly refers to his reproductions by name as Walt Disney, Mickey Mouse and the rest of the Disney characters.²²³ Griffith's infringing use of other cartoonists' syndicated characters in the *Zippy* strip meets the circumstantial evidence test because

²¹⁶ See *Campbell*, 510 U.S. at 580-81 n.14.

²¹⁷ See *United Feature*, 817 F. Supp. at 383-84; *Steinberg*, 663 F. Supp. at 714.

²¹⁸ Compare *Campbell*, 510 U.S. at 580-81 n.14, with *Steinberg*, 663 F. Supp. at 714 (holding that defendant's MOSCOW ON THE HUDSON cartoon was not § 107 parody entitled to fair use analysis since it did not have element of humor aimed at some aspect of plaintiff's "New Yorker View of the World" illustration).

²¹⁹ See, e.g., *Walt Disney*, 581 F.2d at 754 (Mickey Mouse and other Disney characters); *King Features*, 299 F. at 535 (Barney Google's horse Sparky); *United Feature*, 817 F. Supp. at 376 (Garfield's doggie pal Odie). Copyright protection is unavailable for things such as facts or ideas. See, e.g., *Feist Publications*, 499 U.S. at 344.

²²⁰ See 17 U.S.C. § 410(c).

²²¹ See *id.*

²²² See, e.g., *Warner Bros., Inc., v. American Broad. Co.*, 654 F.2d 204, 207 (2d Cir. 1981); *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). Even if one cartoonist uses another's character in a different plot, or portrays the character with an altered personality, this still constitutes a "copy" for purposes of copyright infringement. See *Walt Disney*, 581 F.2d at 754.

²²³ See BREATHED, *supra* note 2, at 8-9.

of the cartoonist's access to the protected characters, and the *in toto* similarity and obvious reference to those other characters.²²⁴ First, access is established because the protected characters that Griffith used can be seen on comics pages all across the country. This access is similar to that in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, where the Second Circuit held that the ability to watch televised programs serves as the functional equivalent of access to the protectable content of the teleplays.²²⁵ Similarly, the ability to read the comics pages also serves as the functional equivalent of access to the protectible comic strip characters.²²⁶ Second, substantial similarity can be established because an ordinary observer reading the *Zippy* strip would no doubt recognize the protected characters in the same way that the *United Feature* court held that an ordinary observer would equate Odie with Koons's sculpture, which was a virtual reproduction of the cartoon dog in both appearance and expression.²²⁷ In the *Zippy* strip, Griffith's reproduction of the twelve protected characters in both appearance and expression is similar to Koons's reproduction of Odie.²²⁸ In sum, a cartoon crossover will always involve a copyright infringement of a protected work even if no direct evidence is available, because an exact reproduction of a protected character is obviously a virtual copy of that character's appearance and expression, and an ordinary observer should easily recognize this overwhelming similarity.²²⁹

In addition, because a cartoon crossover is essentially a recasting of the protected cartoon character into an adaptation, this constitutes an infringement of the original artist's protected rights to reproduce and prepare derivative works of the original.²³⁰ In the *Outland* example, the unauthorized adaptation of protected characters is an obvious transformation of the original because Breathed places protected characters into an alternate cartoon reality.²³¹ Similarly, Griffith's unauthorized use of other cartoonists' syndicated characters is evident based on the borrowing of twelve famous cartoon characters' heads for use in the *Zippy* universe.²³²

²²⁴ See Griffith, *supra* note 13.

²²⁵ See *Twin Peaks*, 996 F.2d at 1372.

²²⁶ See *id.*

²²⁷ See *United Feature*, 817 F. Supp. at 378.

²²⁸ See *id.*

²²⁹ See *id.* at 377-78.

²³⁰ See 17 U.S.C. §§ 101, 106.

²³¹ See BREATHED, *supra* note 2, at 8-9.

²³² See Griffith, *supra* note 13.

Thus, a cartoon crossover involves a copyright infringement through the unauthorized copying of a protected original and its use in a derivative work.²³³ Yet, why are these cartoonists who appropriate protected characters not subject to legal consequences? No court has ever discussed industry custom and usage as an exemption from copyright infringement.²³⁴ The only way for the offending cartoonist to be free from liability must lie in the affirmative defense of fair use. Applying a post-*Campbell* analysis to the *Outland* and *Zippy* examples demonstrates how a court should work its way through all four statutory factors to find fair use in cartoon crossover situations.²³⁵ The first factor in the fair use analysis is the "threshold" inquiry of whether the cartoons constitute a parody for section 107 purposes.²³⁶ Generally, the courts look not at whether the parody was done in good taste or bad, but whether the infringer uses some element of a prior author's composition to create a new one that, at least in part, comments on that author's work in addition to commenting on society, thus justifying the borrowing.²³⁷ If the secondary work has no critical bearing on the substance or style of the original, the claim to fairness in borrowing from another's work diminishes accordingly, and may even vanish, allowing other factors, such as commerciality, to assume greater importance.²³⁸ The policy behind requiring this threshold inquiry of whether a parodic character can be recognized is that a work which makes some critical comment about the original reflects the perspective of the parodist, thereby giving the parody social value beyond its entertainment function.²³⁹ Without this requirement of social value, any comic use of an existing work would be protected, removing the "fair" from the term "fair use" and negating the underlying purpose of copyright law—protecting original works from unfair exploitation.²⁴⁰

²³³ See 17 U.S.C. §§ 101, 106.

²³⁴ In fact, the only case in which custom and usage was ever mentioned by a court was *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*, where the court noted that use of a competitor's product for the purpose of advertising was generally accepted in the industry. 517 F. Supp. at 1208.

²³⁵ See *Campbell*, 510 U.S. at 578–94.

²³⁶ See *id.* at 580–83.

²³⁷ See *id.*; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.); *Fisher*, 794 F.2d at 436; *Walt Disney*, 581 F.2d at 758 n.15; *Berlin*, 329 F.2d at 545. Otherwise, there is no need to "conjure up" the original in the reader's mind and no justification for borrowing from it. See *Fisher*, 794 F.2d at 436; *Walt Disney*, 581 F.2d at 758 n.15.

²³⁸ See *Campbell*, 510 U.S. at 580; see, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (holding that substitution into copyrighted song while performing for commercial gain constitutes musical plagiarism, not fair use); *United Feature*, 817 F. Supp. at 384 (holding that sculpture of "Odie" illustrating banality deserves no fair use defense because the sculptor admitted that other images or figures could have been used instead).

²³⁹ See *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357.

²⁴⁰ See *id.*

Previously, courts had required a much higher showing of critical commentary on the original to pass this threshold, but the Court in *Campbell* lowered the test, allowing parodies that more loosely target an original to be sufficiently aimed at an original work to fall within the section 107 parody requirement and receive a full fair use analysis.²⁴¹ In light of the *Campbell* re-analysis, whether or not a court assigns a high rank to the parodic element of the allegedly infringing work, the threshold has been lowered to the point where all parodies should qualify as section 107(1) parodies for purposes of analyzing a fair use defense.²⁴² Nonetheless, in both the *Outland* and *Zippy* cartoons, the reader can clearly perceive a parodic nature.²⁴³ Certainly, *Breathed's* scathing depiction of the modern corporate structure as a power hungry, money driven conglomerate includes the Disney Studio as part of the critique. Likewise, Griffith's commentary on the proliferation of corporate merger and how it will control the dissemination of information directly implicates Disney—the company that just bought the American Broadcasting Company, a major television network. Thus, these two cartoons not only comment on modern corporate society in general, but also specifically target Disney as the epitome of modern corporate values.²⁴⁴ Therefore, the “threshold” inquiry of whether the use constitutes parody is easily passed because the Supreme Court in *Campbell* allowed a great degree of latitude in finding parodic content.²⁴⁵

Even if these were two situations where a reader could not perceive any commentary on the original, *Campbell* dictates that the cartoonist could still claim the fair use defense.²⁴⁶ For example, one could argue that the very fact that Griffith uses twelve different cartoon characters rather than just one is similar to *United Feature Syndicate, Inc. v. Koons*, where Koons admitted that he could have used other images in his sculpture besides *Odie*, and thus the court rejected the fair use defense

²⁴¹ See *Campbell*, 510 U.S. at 580–81 n.14.

²⁴² See *id.* at 580–81 n.14, 582–83. Previously, courts were more willing to deprive a parody the fair use analysis by claiming that the threshold was not passed. See *MCA*, 677 F.2d at 185 (concluding that song spoof in nude cabaret show falls short of “parody” for § 107 purposes); *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357 (finding that cabaret song and dance spoof of *GONE WITH THE WIND* is not eligible for fair use protection because it does not comment on the movie but only achieves pure comic effect); see also *DC Comics, Inc., v. Unlimited Monkey Bus, Inc.*, 598 F. Supp. 110, 119 (N.D. Ga. 1984) (finding that singing telegram spoofs of Superman and Wonderwoman are mere adaptations sold on strengths of plaintiff's imagination and originality, not parodies that create genuinely distinct product deserving fair use protection).

²⁴³ See *Campbell*, 510 U.S. at 582–83.

²⁴⁴ See *id.*; *Walt Disney*, 581 F.2d at 758 n.15.

²⁴⁵ See *Campbell*, 510 U.S. at 583 (“We have less difficulty in finding that critical [parodic] element in 2 Live Crew's song than the Court of Appeals did . . .”).

²⁴⁶ See *id.* at 580–81 & n.14.

as a matter of law.²⁴⁷ If the *Koons* interpretation of fair use was still applicable, then a reader could interpret Griffith's parody of newspaper comics competing for ever-narrowing readership not as a critique of any of the actual characters he copies, but rather a parody of the comic industry as a whole, thus subjecting him to infringement.²⁴⁸ *Campbell*, however, lowers the "threshold" inquiry to the extent that even if the commentary has no critical bearing on the original, the lack of criticism only diminishes, and does not extinguish, the right to claim fair use as a defense.²⁴⁹ Instead, the other statutory factors assume greater importance in the court's balancing test.²⁵⁰ Thus, even if a reader perceives no parodic content of the original in *Breathed* or Griffith's work, rather than denying a fair use defense, a court would instead more closely scrutinize the remaining factors.²⁵¹

As such, the next step would be to continue a full first factor analysis of the purpose and character of the use.²⁵² *Breathed* and Griffith's use of protected characters is not intended for commercial purposes, but for social commentary. Newspapers purchase comic strips such as *Outland* and *Zippy* not on the strength of their periodic use of protected characters, but because of the quality of the strips themselves. Therefore, using protected characters for crossovers brings in no additional financial reward for the cartoonists and is similar to *Pillsbury*, where the court stated that the parody of Poppin' Fresh was more in the nature of an editorial or social commentary on the values epitomized by the characters than an attempt to capitalize financially on the original work.²⁵³ As the *Pillsbury* court stated, social commentary in a newspaper is not a commercial use simply because the publication is sold rather than given to the public.²⁵⁴

Additionally, the Supreme Court's indication that a more transformative use (i.e., where the new work adds something new, altering the original with a new expression, meaning or message) makes the other statutory factors less significant bodes well for cartoonists.²⁵⁵ Both *Breathed* and Griffith's works altered the originals in expression and meaning by engaging "innocent" characters in a contemporary corpo-

²⁴⁷ See *United Feature*, 817 F. Supp. at 384; Griffith, *supra* note 13.

²⁴⁸ See *United Feature*, 817 F. Supp. at 384; Griffith, *supra* note 13.

²⁴⁹ See *Campbell*, 510 U.S. at 580.

²⁵⁰ See *id.* at 580-81 & n.14.

²⁵¹ See *id.*

²⁵² See 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 578-85.

²⁵³ See *Pillsbury*, 8 Media L. Rep. (BNA) at 1021-22.

²⁵⁴ See *id.* at 1022.

²⁵⁵ See *Campbell*, 510 U.S. at 579.

rate plot and issuing a message on the inherent dangers of big business values.²⁵⁶ Because parody fosters the creativity and social value inherent in a scathing commentary on society's problems, and because both of the works in question involve very transformative uses, the first factor analysis weighs in favor of the parodists getting a fair use defense.²⁵⁷

The second factor (the nature of the copyrighted work), however, weighs in favor of copyright infringement almost as a matter of law.²⁵⁸ The copyright laws provide an infringer much less latitude in copying fictional works than factual ones.²⁵⁹ One factor to consider is whether the original is creative, imaginative, or represents an investment of time in anticipation of a financial return.²⁶⁰ In the two examples above, the copied characters are syndicated cartoon strips that certainly fit this category: they are unique characters designed by creative individuals for use on the comics page or in the movies, whereby they will generate a financial return for the artist. As such, the nature of the original in any crossover will be a creative, publicly known work heavily protected by copyright.²⁶¹ Thus, because cartoon characters are creative and imaginative works deserving wide copyright protection, this second factor analysis is nothing more than a tautology that can almost be eliminated from the fair use analysis because the owner of the original is invariably guaranteed protection for the creative works.²⁶²

The third factor, which concerns amount and substantiality used, also weighs in favor of copyright infringement in a crossover situation. Within this inquiry, courts focus on what else the parodist did besides going to the heart of the original.²⁶³ Thus, if little is added or changed, a court could arguably find the parody to be a superseding use that substitutes for the original rather than a unique work entitled to fair use.²⁶⁴ But because a parody's humor and comment derive from distorted imitation of a known original, it follows that the parodic work must consist primarily of the original.²⁶⁵

In determining the amount of taking necessary to the parodic work, the courts evaluate the pervasiveness of public recognition of the

²⁵⁶ See *BREATHED*, *supra* note 2, at 8–9; Griffith, *supra* note 13.

²⁵⁷ See *Rogers*, 960 F.2d at 310.

²⁵⁸ See 17 U.S.C. § 107(2); *Campbell*, 510 U.S. at 586.

²⁵⁹ See generally *Feist Publications*, 499 U.S. at 344 (facts not copyrightable).

²⁶⁰ See *Rogers*, 960 F.2d at 310.

²⁶¹ See *Campbell*, 510 U.S. at 586.

²⁶² See *United Feature*, 817 F. Supp. at 380.

²⁶³ See *Campbell*, 510 U.S. at 588–89 (noting that heart of song is what most readily conjures up song for parody, and it is heart at which parody takes aim).

²⁶⁴ See *id.*

²⁶⁵ See *id.*

original to determine how much appropriation is required to conjure it up in the minds of the readers.²⁶⁶ In general, however, using some characteristic features cannot be avoided.²⁶⁷ Although quantity is important, this inquiry focuses primarily on the quality of how much of the original work is used in relation to the purpose of its use.²⁶⁸ In other words, what matters is whether the parodist copied more than necessary in order for the reader to recognize the original.²⁶⁹ In our Disney saturated society, Breathed's verbatim copying of Mickey and his pals certainly goes beyond any minimum level of "conjuring up" necessary for readers to identify these characters.²⁷⁰ One could reason, as did the court in *Pillsbury*, that the extent the Disney characters would have to be copied to remind viewers of the originals is difficult to estimate, but, given their widespread recognition, it would certainly be less than what was borrowed.²⁷¹ For example, rather than actually using the Disney Studio and its famous characters in his critique, Breathed could have created a generic animation studio that hinted at Disney.²⁷² Mortimer Mouse, with his red drawers with yellow buttons and shoes, conjures up the identity of Disney without having to use Mickey, Snow White, and the rest. Griffith's work comes closer to what may be a more acceptable level of copying.²⁷³ He uses only the heads of protected characters, and on these he places mouse ears, thus implying, rather than explicitly stating, that it is Disney that is the focus of the commentary.²⁷⁴

Most courts generally afford parody significant leeway with respect to the extent and nature of their copying.²⁷⁵ But in a situation of near verbatim copying, the third factor inquiring into the amount and substantiality of the use may, as a matter of law, be resolved against the parodist.²⁷⁶ Because the Court in *Campbell* indicated that fair use is a case by case analysis, however, it left open a window where almost

²⁶⁶ See *id.*; *Walt Disney*, 581 F.2d at 757 (noting that Disney characters are so well known that very little is necessary to place Mickey Mouse in minds of readers).

²⁶⁷ See *Campbell*, 510 U.S. at 588.

²⁶⁸ See *id.* at 586-87 (the extent of permissible copying varies with the purpose and character of the use); *Rogers*, 960 F.2d at 311.

²⁶⁹ See *Campbell*, 510 U.S. at 586-87; *Rogers*, 960 F.2d at 311 (what is relevant is the amount and substantiality of the copyrighted *expression* used, not the *factual content* of the material in the copyrighted piece).

²⁷⁰ See BREATHED, *supra* note 2, at 8-9.

²⁷¹ See 8 Media L. Rep. (BNA) at 1023.

²⁷² See BREATHED, *supra* note 2, at 8-9.

²⁷³ See Griffith, *supra* note 13.

²⁷⁴ See *id.*

²⁷⁵ See *Rogers*, 960 F.2d at 310.

²⁷⁶ See *Campbell*, 510 U.S. at 589. Previously, near verbatim copying was a threshold test

wholesale copying may be permitted in some situations, depending on the analysis of the other statutory factors.²⁷⁷ Thus, even if the crossover borrows an unacceptable amount from the original, this does not end the inquiry but rather confirms that all four fair use factors must be weighed together.²⁷⁸

The final, but no longer primary, factor to be considered is the effect of the borrowing on the market value of the original.²⁷⁹ Similarity of medium (play, book, movie, etc.) is not relevant to this analysis.²⁸⁰ Also, in assessing this factor, the parody's critical impact is ignored.²⁸¹ "Copyright law is not designed to stifle critics. . . . Biting criticism suppresses demand; copyright infringement usurps it."²⁸² Thus, the concern with market replacement is not whether a "bad review" by the secondary work causes the market to diminish because of its critical nature, but whether the secondary work fulfills demand for the original, either in whole or in part.²⁸³

This determination involves a comparison of the function of the two works.²⁸⁴ If the function of both works is to entertain, the analysis then focuses on the appeal of the derivative work.²⁸⁵ For example, the analysis of a musical parody would consider whether people listen to the secondary work solely for its musical appeal, in which case the defendant's right to appropriate is stronger, or whether people listen to the secondary work purely because of its comic effect, in which case the plaintiff is afforded more protection.

In assessing the actual market harm as well as the potential market usurpation for derivative works, crossovers seem to have little or no effect. It is true that both the original and the crossover attempt to entertain through graphic cartoon humor. Arguably, the same people who read the strips containing the crossovers are also familiar with the original strips since many perusers of the comics page read the majority of strips offered. Nonetheless, this does not mean that *Breathed* or *Griffith's* work will usurp the other cartoons' readers or newspaper

whereby the parody was eliminated entirely from fair use protection. See *Walt Disney*, 581 F.2d at 757; *Metro-Goldwyn-Mayer*, 479 F. Supp. at 358-59.

²⁷⁷ See *Campbell*, 510 U.S. at 588.

²⁷⁸ See *id.* at 578; *Pillsbury*, 8 Media L. Rep. (BNA) at 1023.

²⁷⁹ See *Campbell*, 510 U.S. at 590.

²⁸⁰ See *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 7 Media L. Rep. (BNA) 2190, 2192 (N.D. Ga., 1981).

²⁸¹ See *Fisher*, 794 F.2d at 437.

²⁸² *Id.* at 437-38.

²⁸³ *Campbell*, 510 U.S. at 590-92; *Fisher*, 794 F.2d at 438.

²⁸⁴ See *Campbell*, 510 U.S. at 591; *Metro-Goldwyn-Mayer*, 479 F. Supp. at 361.

²⁸⁵ See *Campbell*, 510 U.S. at 591-92; *Metro-Goldwyn-Mayer*, 479 F. Supp. at 361.

space. On the contrary, because the parody gives these strips "free press," readership may actually increase.

Newspapers buy, and people read, *Outland* and *Zippy* because of the unique appeal of these strips. If newspapers choose not to buy, or if people choose not to read, *Garfield*, *Family Circus*, or any other strip used by Griffith or Breathed, it is likely not because Berkeley Breathed or Bill Griffith creates a substitute for those strips, but because cartoon fans do not like those strips. Certainly, a Disney parody will not take away from anyone going to see Disney movies. The children who go to see *Pocohontas* do not make up the readership of *Outland*. Likewise, the parents who do make up this readership are not going to tell a small child "No, we can't go see *Aladdin*. But, hey, here's the Sunday comics."

As far as derivative works go, unlike the situation where Koons sold his Odie statues for \$125,000 each, thus prejudicing the potential merchandising market for the syndicate, use of protected characters in a comic strip crossover will have no such effect.²⁸⁶ First, crossovers involve no sale. Second, whereas United Feature Syndicate may one day decide to grant a license to a sculptor to produce Odie statues, no syndicate or movie studio will ever grant a license allowing another cartoonist to critically review or lampoon their product.²⁸⁷ Finally, the potential for market substitution decreases with an increase in the amount of transformative use.²⁸⁸ Thus, in a crossover situation, because the "transformativeness" of the appropriated character is so high, a presumption *against* market harm is effectively created.

V. CONCLUSION

After all four factors are analyzed, a cartoon crossover results in a successful fair use defense. Even though factors two and three (the nature of the copyrighted work and the amount and substantiality of the portion used) will almost always weigh in favor of infringement, the first and fourth factors (purpose and character of the use and the effect on the potential market for the copyrighted work) must weigh more heavily in favor of the fair use defense where comic strip crossovers are concerned.²⁸⁹ This is so for three reasons. First of all, in such situations, the parodist's intent is for social critique or commentary, not to fill the demand for the original. Second, crossovers do not usurp

²⁸⁶ See *United Feature*, 817 F. Supp. at 379.

²⁸⁷ See *Campbell*, 510 U.S. at 592; *United Feature*, 817 F. Supp. at 382.

²⁸⁸ See *Campbell*, 510 U.S. at 591.

²⁸⁹ See 17 U.S.C. § 107; *Campbell*, 510 U.S. at 578-94.

the value of the original product in either the actual existing market or in the potential derivative market for merchandising. Finally, the purpose of parody is criticism, which is valued because it fosters creativity while showing us our foibles as a society. As such, it promotes the purpose behind copyright law by encouraging commentary and creativity.²⁹⁰ This policy behind copyright protection, combined with the Supreme Court's re-analysis of the fair use factors in *Campbell v. Acuff-Rose Music, Inc.*, should thus allow a cartoonist to appropriate another cartoonist's protected characters for crossover use in a cartoon strip.²⁹¹ Post-*Campbell*, social commentary on the comics page is the sort of parody that is to be accorded a successful fair use defense.

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²⁹⁰ See *Campbell*, 510 U.S. at 577; *MCA*, 677 F.2d at 183; *Pillsbury*, 8 Media L. Rep. (BNA) at 1023.

²⁹¹ See *Campbell*, 510 U.S. at 578-94.