

The New Significance of the Four Fair Use Factors as Applied to Parody: Interpreting the Court’s Analysis in *Campbell v. Acuff-Rose Music, Inc.*

Elizabeth Troup Timkovich*

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* Associate, Axinn Veltrop & Harkrider LLP, Hartford, Connecticut, practicing intellectual property, antitrust, and commercial litigation. J.D. 2002, Yale Law School; B.A. 1999, summa cum laude, University of Alabama.

I. INTRODUCTION

In evaluating copyright's fair use doctrine in the past, the United States Supreme Court has flatly stated that the effect of a new work on the market for a copyrighted work, analyzed under the fourth of the Copyright Act's four enumerated fair use factors, is the single most important consideration.¹ This Article disagrees. It proposes instead that it is the *first* fair use factor, which analyzes the purpose and character of a new work, that is most critical in fair use determinations, at least with respect to fair use in the context of parody. Support for the subrogation of the fourth fair use factor to the first can be drawn from the Supreme Court's own analysis in the landmark fair use parody case, *Campbell v. Acuff-Rose Music, Inc.*²

An introductory discussion of copyright protection and the fair use doctrine is provided below in Part II of this Article, followed in Part III by a discussion of the Court's opinion in *Campbell*, which opened the door for parodies to receive fair use protection. Part IV then goes on to discuss the constitutional goals of copyright law and how public policy is furthered by the fair use doctrine. In Part V, the Article discusses in detail the *Campbell* Court's method of analysis on the question of fair use. The Court's analysis is explained in Subpart A as placing primary emphasis on the first fair use factor; the significance of the remaining three fair use factors, including the heretofore dominant fourth, are shown to be subordinate. In Subpart B it is then demonstrated that the proposed placement of emphasis on the first fair use factor serves the constitutional goals of copyright. Lastly, Subpart C argues that this Article's conclusion, hailing the first fair use factor supreme, can be reached without nullifying precedent.

II. BACKGROUND: COPYRIGHT PROTECTION AND THE FAIR USE DOCTRINE

In intellectual property, copiers have an inherent advantage over the authors of original works because copiers can avoid the initial costs of creating works while reaping the resultant profits. To prevent this abuse and protect original copyrighted works from infringement, the law of copyright was enacted. The Copyright Act of 1976 grants to authors of copyrighted works certain exclusive rights, including the right to control

1. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) ("This last factor [effect on the market] is undoubtedly the single most important element of fair use." (quoting 4 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-76 (2001))).

2. 510 U.S. 569 (1994).

derivative works (which can include parodies).³ The scope of these rights is limited, however, by the fair use exception found in § 107 of the Copyright Act.⁴

“Fair use has been defined as ‘a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright.’”⁵ The fair use doctrine, though not nullifying the original copyright, thus allows licenses for certain uses of a copyrighted work that are judged “fair.”⁶ There is no bright-line rule stating which uses qualify under the fair use exception.⁷ The doctrine is one of equity, and must be decided on a case-by-case basis.⁸ To assist courts in determining which uses of copyrighted material are fair, the Copyright Act specifies four factors to be analyzed:

- (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.⁹

Under this four-factor test, parodies are among those works that may qualify for fair use protection.

3. The six exclusive rights guaranteed to copyright owners under the Copyright Act are:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2002).

4. *See id.* § 107.

5. *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 745 (S.D.N.Y. 1980) (quoting H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

6. *See* 17 U.S.C. § 107.

7. *See Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 587 (1985).

8. *See, e.g., id.* at 560 (“[E]ach case . . . must be decided on its own facts.” (quoting H.R. REP. NO. 94-1476, at 65 (1976))).

9. 17 U.S.C. § 107.

Parody occurs “when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new work that makes ridiculous the style and expression of the original.”¹⁰ It entails “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works Parody needs to mimic an original to make its point. . . .”¹¹

Because a true parody does not simply copy an existing work, but instead transforms that work into something new, granting it fair use protection falls in line with the constitutional aim of copyright to foster the creation of new arts and sciences.¹² “[P]arody,” says the Supreme Court, “has an obvious claim to transformative value [I]t can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.”¹³ Ideally, granting a parody fair use protection should not undermine the function of the copyrighted work upon which the parody is based. Instead, the public would gain an original work that it might not otherwise enjoy because an original copyright owner “will typically not exploit the potential market for skewering his own property.”¹⁴

The Supreme Court explained the applicability of the fair use doctrine to parody in its landmark 1994 *Campbell* decision, discussed below.

III. THE CASE OF *CAMPBELL V. ACUFF-ROSE MUSIC, INC.* OPENS THE DOOR FOR PARODY AS FAIR USE

The Supreme Court addressed the question of fair use in the context of parody for the very first time in its famous case, *Campbell v. Acuff-Rose Music, Inc.*¹⁵ At issue in this case was a rap song written by the petitioners, rap group “2 Live Crew,” parodying Ray Orbison’s rock ballad “Pretty Woman.”¹⁶ In writing its song, 2 Live Crew had used the characteristic opening bass riff and the first line of lyrics from Orbison’s

10. *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1371-72 n.7 (N.D. Ga.) (quoting *Rogers v. Koons*, 960 F.2d 301, 301 (2d Cir. 1992)), *vacated by* 268 F.3d 1247 (11th Cir. 2001).

11. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994).

12. See discussion of the constitutional goals of copyright, *infra* Part III.

13. *Campbell*, 510 U.S. at 579.

14. NIMMER, *supra* note 1, § 13.05[C][1], at 13-203.

15. 510 U.S. 569 (1994). Prior to *Campbell*, the Supreme Court had only once before considered whether parody may be fair use, and that time issued no opinion because of the Court’s equal division. See *Benny v. Loew’s Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff’d sub nom. Columbia Broad. Sys., Inc. v. Loew’s Inc.*, 356 U.S. 43 (1958).

16. See *Campbell*, 510 U.S. at 572.

ballad, but had substituted comical lyrics for the remainder of the song.¹⁷ The district court that heard the case initially granted summary judgment in favor of 2 Live Crew, but was reversed by the United States Court of Appeals for the Sixth Circuit, which ruled that the rap song's commercial purpose prevented a finding of fair use.¹⁸ This Sixth Circuit decision was, in turn, reversed by the Supreme Court.¹⁹ The Court held that 2 Live Crew's parody, notwithstanding its commercial nature, may be a fair use.²⁰

The Supreme Court acknowledged that the petitioners' "Pretty Woman" rap song contained quintessential parody, citing the district court's determination that the song "'quickly degenerates into a play on words, substituting predictable lyrics with shocking ones' to show 'how bland and banal the Orbison song' is."²¹ The Supreme Court further noted the clear "joinder of reference and ridicule" in the song.²² 2 Live Crew's parody was therefore a new work, transforming the original copyrighted ballad into something new. Evaluating the transformative nature of the petitioners' parody was crucial to the *Campbell* Court's analysis, for when, stated the Court, a new work is transformative, if admittedly commercial,²³ "market substitution is at least less certain, and market harm may not be so readily inferred."²⁴

Ultimately, the Supreme Court in *Campbell*, while holding that 2 Live Crew's parodic lyrics were deserving of fair use protection, declined to grant or deny the petitioners a fair use license.²⁵ Instead, the Court remanded the case, giving 2 Live Crew an opportunity to provide evidence on two specific issues: whether the copying of Orbison's music (the opening bass riff) was excessive, and whether 2 Live Crew's rap song usurped the potential market for non-parody (rap) derivative works by Acuff-Rose.²⁶ Despite the Court's decision to remand, the *Campbell* decision can nevertheless be viewed as somewhat of a victory for

17. *See id.* at 572-88.

18. *See id.* at 573-74.

19. *See id.* at 594.

20. *See id.*

21. *Id.* at 573 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154-55, 1157-58 (M.D. Tenn. 1991)).

22. *See id.* at 583.

23. The Supreme Court in *Campbell*, in reversing the decision of the Sixth Circuit, held that the commercial nature of the petitioner's parody did not militate against a finding of fair use; it was just one factor to be weighed. *See id.* at 572. The Court thus overruled the precedent of *Sony Corp of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), in which it held that every commercial use of copyrighted material is presumptively an unfair infringement.

24. *Campbell*, 510 U.S. at 591.

25. *See id.* at 593-94.

26. *See id.* at 589-94.

parodists. The Court's process of analysis, focusing primarily on the evaluation of the challenged work's transformative nature, a question within the scope of the first fair use factor, can be seen as a significant shift in judicial emphasis. The Court may be moving away from the fourth fair use factor, an approach (historically the Supreme Court's favorite) which seems more favorable to copyright owners, and toward the first factor. The result of such a shift in fair use analysis, attaching primary significance to the purpose and character of the new use, rather than to possible commercial effects on the market for the original, is an approach that is both more equitable and more in tune with the constitutional goals of copyright. Furthermore, it might open the door for increased fair use protection for new, transformative, works.

IV. THE PUBLIC BENEFIT POLICY OF COPYRIGHT SUPPORTS GRANTING LICENSES FOR FAIR USE

The United States Constitution empowers Congress “[t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁷ This public policy is embodied in the Copyright Act, which has the fundamental purpose of “encourag[ing] the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on.”²⁸

This policy of enlarging the realm of new works of arts and science would be significantly hampered if authors never wrote parodies for fear of being denied fair use protection.²⁹ Subsequent writers need the chance to improve on earlier works.³⁰ After all, “copyright is intended to increase and not to impede the harvest of knowledge.”³¹

Though the stated policy of copyright is to reward authors with fair returns for their creative labors, the penultimate aim, by this incentive, is to stimulate artistic creativity for the benefit of the *entire* general public.³²

27. U.S. CONST. art. I, § 8.

28. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)).

29. This is an aspect of the incentive theory of copyright that is not pointed out as often as is the argument that allowing fair use protection for parodies might inhibit the incentives of copyright holders to create.

30. *See, e.g.*, *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1370-71 (N.D. Ga.), *vacated by* 268 F.3d 1247 (11th Cir. 2001).

31. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

32. *See, e.g., id.* at 546 (“[This] *limited grant* is a means by which an important *public purpose* may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius

Therefore, the monopoly grant of rights to copyright owners is a limited one: A copyright owner is only guaranteed a *fair* return for his creative labor, the duration of his copyright lasts only for a limited time, and his rights are subject to statutory limitations such as the fair use exception.

The “promotion of science and the useful arts” requires this limit on the scope of an author’s control. Were an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors.³³

Therefore, the relevant inquiry in fair use cases should not be how to maximize the reward for an individual author, but rather how to strike a balance so as to maximize the benefits to *society* of gaining new works (while still providing sufficient incentives to copyright owners to create).

V. EXPLAINING *CAMPBELL* IN LIGHT OF THE PUBLIC POLICY GOALS OF COPYRIGHT AND THE FIRST FAIR USE FACTOR

While not necessarily supporting the Court’s ultimate decision to remand *Campbell*, this Article does submit that the *Campbell* Court’s method of analysis, which focused largely on the transformative nature element of the fair use test, was proper in light of the public policy of copyright.³⁴ The *Campbell* Court noted the importance of conducting fair use analyses in such a way as should advance the ultimate goal of copyright law, that is the promotion of science and the useful arts.³⁵ “[P]arody,” said the Court, “like any other use, has to work its way

after the limited period of exclusive control has expired. The monopoly created by copyright thus rewards the individual author in order to benefit the *public*.” (emphasis added) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 477 (1984)); *Nation*, 471 U.S. at 558 (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.” (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (internal citations omitted))); see also *SunTrust*, 136 F. Supp. 2d at 1379 (“[T]he copyright laws were not intended to provide a copyright owner with an absolute and unqualified monetary return on his work, but rather ‘to secure a fair return for an author’s creative labor’ and ultimately to stimulate ‘artistic creativity.’” (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994))); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

33. *Nation*, 471 U.S. at 582 (Brennan, J., dissenting).

34. The *Campbell* Court perhaps should not have divided 2 Live Crew’s song into two separate components, ruling on the lyrics separately from the music, in considering fair use. The work should instead have been considered as a whole. See, e.g., *SunTrust*, 136 F. Supp. 2d at 1367 (“[T]he court must consider the whole of both works.”). The fact that the song was in rap form itself arguably contributes to the criticism of the traditional ballad that was the original Orbison song. As this does not affect this Article’s argument, however, for the proper analytical arrangement of the four fair use factors, this issue is left to others to debate.

35. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

through the relevant [fair use] factors, and be judged case by case, *in light of the ends of the copyright law*.”³⁶ In light of this mandate, the Court’s treatment of the four fair use factors in *Campbell* may be used to support the proposition that it is the first fair use factor (evaluating the purpose and character of the disputed work) that carries the most weight in the fair use analysis of parody, rather than the historically preferred fourth factor (which evaluates the effect on the market for the copyrighted work).

A. *Explaining the Court’s Analysis as Showing the First Fair Use Factor to Be Most Important*

1. *Emphasis on the Transformative Nature of New Works Strengthens the Importance of the First Fair Use Factor*

The weightiness of the first fair use factor concerning the purpose and character of the disputed work is evident from the very first paragraph of the Supreme Court’s *Campbell* decision.³⁷ In its opening paragraph, the Court criticized the Sixth Circuit (which held the disputed work to be infringing) for giving “insufficient consideration . . . to the *nature* of parody in weighing the degree of copying.”³⁸ The *Campbell* Court then went on to evaluate whether the new work, 2 Live Crew’s parodic rap song, merely supplanted the plaintiff’s original ballad, or whether it instead transformed the original work into something new.³⁹ *Campbell*’s focus on the transformative nature of the new work is crucial to the argument that the Court has moved toward a method of fair use analysis in which the first fair use factor dominates.

The Court’s newly placed emphasis on the transformative nature of new works has been cited as a crucial development in the field of fair use analysis.⁴⁰ It is an approach to fair use that is very much in line with the congressional goals of copyright, as “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁴¹ This statement by the *Campbell* Court supports the proposition, put forward in this Article, that

36. *Id.* at 581 (emphasis added).

37. *See id.* at 571-72.

38. *Id.* at 572 (emphasis added).

39. *See id.* at 578-81.

40. *See, e.g.,* NIMMER, *supra* note 1, § 13.05[A][1][b], at 13-160 (“[P]roductive use is now of crucial importance to the fair use analysis.”).

41. *Campbell*, 510 U.S. at 579.

the transformative nature inquiry of the first fair use factor has come to outweigh the remaining fair use factors.

2. The Weakened Importance of the Fourth Fair Use Factor, Evaluating the Effect upon the Potential Market for the Copyrighted Work

The Court's decision in *Campbell* to remand on the question of market harm to a potential non-parody rap derivative of the ballad "Pretty Woman" does appear at first glance to support the Supreme Court's tradition of treating the fourth fair use factor, which evaluates the effect upon the potential market for the copyrighted work, as the "single most important element."⁴² However, a closer look at the entire fair use analysis employed by the Court weakens such a conclusion. For example, while the Court did place a heavy evidentiary burden on petitioner 2 Live Crew to supply market evidence on remand, it hedged this demand in a footnote, stating that "[i]n some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm."⁴³ Nimmer in his treatise on copyright points to this footnote in *Campbell* and proposes that "[p]erhaps the Court intended to wink at a grant of defense summary judgment with no greater evidence adduced, and simply did not wish to reach that judgment itself."⁴⁴

The Supreme Court further weakened the traditional dominance of the fourth fair use factor in another footnote in *Campbell*:

Even favorable evidence [about the relevant market], without more, is no guarantee of fairness This [fourth] factor, no less than the other three, may be addressed only through a "sensitive balancing of interests." Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also *with the relative strength of the showing on the other factors.*⁴⁵

The fourth factor therefore cannot stand alone, but instead varies with the strength of the other factors. For example:

[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect

42. See NIMMER, *supra* note 1, § 13.05[A], at 13-76.

43. *Campbell*, 510 U.S. at 593 n.24.

44. NIMMER, *supra* note 1, § 13.05[C][2], at 13-216.

45. *Campbell*, 510 U.S. at 590 n.21 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 464 U.S. 417, 455 n.40 (1984) (emphasis added)).

the market for the original in a way cognizable under this factor
[P]arody and the original usually serve different market functions.⁴⁶

Based on this statement, the fact that the transformative nature analysis of the first fair use factor can act almost as a presumption against the market harm analysis of the fourth factor serves to illustrate the subjugation of the fourth fair use factor to the first with regard to parody.

The *Campbell* decision also demonstrates a withdrawal from the presumption of fourth factor importance in the Court's *failure* to say something. Unlike previous fair use decisions (including the Sixth Circuit's *Campbell* decision, reversed here by the Court), the Supreme Court in *Campbell* declined to state affirmatively that the fourth fair use factor is the most important, a statement that has been made by courts since the Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises* held that "[t]his last factor is undoubtedly the single most important element of fair use."⁴⁷ This noticeable omission by the *Campbell* Court was recently noted by the United States District Court for the Northern District of Georgia in *SunTrust Bank v. Houghton Mifflin Co.*⁴⁸ While itself stating that the fourth factor was the most important, the *SunTrust* court referred to *Campbell* as a contrast for "omitting that this factor is the most important element."⁴⁹ Similarly, while Nimmer states in his copyright treatise that the fourth fair use factor is the most important, he notes that "the Court's most recent opinion in *Campbell* repels any categorical reliance on the fourth fair use factor."⁵⁰

In overruling the Sixth Circuit's decision in *Campbell*, which cited *Nation* for the proposition that the fourth factor was undoubtedly the single most important element of fair use, and that fair use was presumptively foreclosed by the commercial nature of 2 Live Crew's song, the Supreme Court held that, "[i]n giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred."⁵¹ Instead, "the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character."⁵² The *Campbell* Court's limitation of the presumption against

46. *Id.* at 591 (internal citation omitted).

47. *See* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). *See* discussion, *infra* Part V.C, distinguishing *Campbell* from *Nation*.

48. 136 F. Supp. 2d 1357, 1382 (N.D. Ga.), *vacated by* 268 F.3d 1257 (11th Cir. 2001).

49. *Id.*

50. NIMMER, *supra* note 1, § 13.05[B][3], at 13-199.

51. *Campbell*, 510 U.S. at 584.

52. *Id.*

commerciality can be interpreted as part of a shift away from the primary importance of the fourth (market effect) factor, at least in cases of parody.

3. The Inter-Relatedness of the Four Fair Use Factors Supports the Proposition that the First Factor Dominates

The Court's method of analysis in *Campbell* of the fair use factors minimizes the individual importance of factors two through four and subjugates them to the analysis of the first factor regarding the purpose or nature of the new work. For example, there is a complete lack of emphasis placed on the second fair use factor (the nature of the copyrighted work) in *Campbell*. Recognizing little value in this second factor, the Court stated that it "is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."⁵³

Similarly, with regard to the third fair use factor (the amount and substantiality of the portion used), "attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will *harken back to the first of the statutory factors*, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use."⁵⁴ The Court further weakened the third factor's individual significance by linking it to the fourth factor, stating that "[t]he facts bearing on this [third] factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives."⁵⁵ For example, whether a substantial portion of a copyrighted work was copied verbatim is a relevant question because it may reveal a lack of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth.

53. *Id.* at 586.

54. *Id.* at 586-87 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985); *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (emphasis added)).

55. *Id.* at 587; *see also* *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1380-81 (N.D. Ga.), *vacated by* 268 F.3d 1257 (11th Cir. 2001) ("[H]ow much more [taking] is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original The fourth factor is largely addressed by the third factor, which reveals the degree 'to which the parody may serve as a market substitute for the original'" (quoting *Campbell*, 510 U.S. at 588)).

A good summation of the relationship among the four fair use factors, illustrating the subordination of other factors to the first factor and the weakened significance of the fourth factor in cases of parody, is found in Justice Kennedy's concurring opinion in *Campbell*. Justice Kennedy argued that

[t]he first factor . . . itself concerns the definition of parody. The second factor . . . adds little to the first The third factor . . . is likewise subsumed within the definition of parody. In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry. Some parodies, by their nature, require substantial copying As to the fourth factor . . . the Court acknowledges that it is legitimate for parody to suppress demand for the original by its critical effect. What it may not do is usurp demand by its substitutive effects [I]f we keep the definition of parody within appropriate bounds, *this inquiry may be of little significance*. If a work targets another for humorous or ironic effect, it is by definition a new creative work. Creative works can compete with other creative works for the same market, even if their appeal is overlapping. Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work [an element of the first factor] . . . thereby giving the parody social value beyond its entertainment function.⁵⁶

The fact that the analyses of the other fair use factors can be considered as “subsumed” in the analysis of the first supports this Article’s argument for the dominance of the first fair use factor in the Supreme Court’s analysis of fair use in the parody context.

B. The Dominance of the First Fair Use Factor Serves the Overall Purpose of Copyright

In making its decision, the *Campbell* Court recognized that the purpose of copyright law is to promote the progress of science and the arts through the creation of new and useful works.⁵⁷ This constitutional policy is supported by the method of analysis applied by the Court in *Campbell*. For instance, the Court maintained the flexibility of applying

56. *Campbell*, 510 U.S. at 598-99 (Kennedy, J., concurring) (emphasis added) (citations omitted).

57. The *Campbell* Court stated that, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts. . . .’” *Id.* at 575. The *Campbell* Court also recognized the purpose of copyright to foster the creation of new works when it stated that “the goals of the copyright law, ‘to stimulate the creation and publication of edifying matter,’ are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.” *Id.* at 578 n.10 (internal citation omitted).

the fair use doctrine on a case-by-case basis, eschewing a bright-line rule. Looking at the legislative history of § 107 of the Copyright Act, the Court noted that “[t]he fair use doctrine . . . ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”⁵⁸ Fair use analyses based primarily on the purposes and characters of new works (the first fair use factor) require such judicial flexibility to be effective, as no bright line rule could anticipate every situation under such an equitable analysis.

The *Campbell* Court’s emphasis on the first fair use factor is justified also by the public benefit theory of copyright of aiming to provide the public with new works of art and science. The Court prescribed in *Campbell* that the focus of the first factor analysis rests on the transformative nature of the parody, essentially asking whether something *new* was created from the copyrighted work.⁵⁹ The *Campbell* Court made it clear that a work’s transformative nature can negate a presumption of market harm in the case of parody, since “there is no protectible derivative market for criticism [including parody],” as this is a derivative that the original copyright holder is not likely to exploit.⁶⁰ Therefore, extending fair use protection to parodies found to be transformative under the first fair use factor serves the public policy of providing the public with more creative works rather than fewer, since such works otherwise might never be published.⁶¹

If this Article is correct in its proposal that the Court’s primary emphasis in the analysis of fair use has shifted from the fourth fair use factor to the first, that is a step in the right direction of copyright public policy. The Court’s fair use analysis may be viewed as more concerned with providing to the public at large the benefits of copyright (receiving an increased number of new works) rather than with maximizing the rewards to individual authors.

58. *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

59. *See id.* at 579.

60. *Id.* at 592.

61. *See, e.g., id.* at 597 (Kennedy, J., concurring) (The fair use exception for parody “also protects works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism” (citing Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 73 (1992) (“[I]t may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work.”))).

C. *Justifying the Departure from Nation's Emphasis on the Fourth Fair Use Factor: Distinguishing Parody from News Reporting*

As previously noted in this Article, the Supreme Court in 1985 in *Harper & Row, Publishers, Inc. v. Nation Enterprises* stated that the fourth fair use factor (the effect on the market for the copyrighted work) is the single most important in fair use analyses.⁶² While this Article proposes instead that in the context of parodies it is the first fair use factor that is most important and not the fourth, *Nation* need not necessarily be overruled; it can be distinguished from the case of parody in *Campbell*.

In *Nation*, the defendant news magazine “scooped” Time Magazine by publishing without permission excerpts from President Ford’s then unpublished memoirs.⁶³ Time Magazine had purchased the right from the book’s publisher to be the first news magazine to publish excerpts from the book.⁶⁴ The defendant claimed that its publication was protected fair use under § 107 of the Copyright Act, but the Court denied the fair use defense, proclaiming the dominance of the fourth fair use factor, and holding that the defendant had violated the plaintiff’s commercially valuable right of first publication.⁶⁵ Note that the Court, in making its decision, placed a good deal of importance on the purpose of the defendant’s work, which it found to be the intended purpose of scooping the plaintiff and supplanting the demand for its copyrighted work.⁶⁶

In such a case, it might not necessarily be wrong for the Court to place such significance on the fourth factor of market harm. The profitability of news reporting, as distinguished from the case of parody in *Campbell*, is extremely sensitive to timing: The first one to break the news will arguably receive the bulk of the profits. The case of parody, however, is not so time sensitive. For example, 2 Live Crew wrote its rap song many years after Orbison’s “Pretty Woman” ballad was released. Additionally, the market for a true parody ideally should not impinge on the market for the work on which it is based. Because the two cases can be distinguished from one another, interpreting the Court’s fair use analysis in *Campbell* to place primary importance on the first factor over the fourth does not necessitate a shocking reversal in copyright jurisprudence; it is possible for both *Campbell* and *Nation* to co-exist, though each advocates the dominance of a different fair use factor.

62. 471 U.S. 539, 566 (1985).

63. *See id.* at 542-43.

64. *See id.*

65. *See id.* at 566-69.

66. *See id.* at 562.

VI. CONCLUSION

This Article has attempted to interpret the Supreme Court's actions in *Campbell* in a way that aligns with the public benefit goals of copyright. The Court's fair use analysis in the context of parody can be explained as shifting the primary fair use emphasis away from the fourth fair use factor (market harm), where it was placed by the *Nation* Court in 1985 in the context of news reporting, to the first fair use factor (purpose of the work). It is plausible that the Court made this shift knowingly, so as to advance the public policy of copyright, to foster the creation of new works available to the public. The analysis involved in the Court's evaluation of the first fair use factor is the most in tune with this public policy question, as it entails determining whether the disputed parody has transformed the original copyrighted work into something new. The fourth fair use factor has far less significance in this analysis, as, ideally, a transformative parody should not supplant market demand for the copyrighted work upon which it is based.

Explaining the *Campbell* Court's method of analysis in this light does much to reconcile the Court's fair use treatment of parody with copyright policy, while avoiding the need to overthrow much (if any) pre-existing Court doctrine, such as the *Nation* decision.