

WORK AS WEAPON, AUTHOR AS TARGET: WHY PARODIES THAT TARGET AUTHORS (NOT JUST THEIR WORKS) SHOULD BE FAIR USES

RYAN KAIRALLA *

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INTRODUCTION

In April 2011, comedic musician “Weird Al” Yankovic was preparing to release his thirteenth studio album. The LP *Alpocalypse* would provide his listeners with the same amusing rewrites of popular songs that they have come to expect

* Copyright © 2012 by Ryan Kairalla. J.D., 2012, New York University School of Law; B.B.A., 2008 (Economics), University of Miami. Many thanks to Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law, University of California Berkeley, for her guidance, feedback, and mentoring throughout this endeavor. I would also like to thank my colleagues in NYU Law Revue for their helpful comments, as well as for making law school a truly unforgettable experience.

from his previous efforts.¹ Yankovic intended for the album's lead single to be "Perform This Way," a spoof of recording artist/songwriter Lady Gaga's "Born This Way," which she released earlier that year.² As had been his standard practice throughout his career, Yankovic sought the pop icon's permission prior to adding "Perform" to his album.³ After sending her a recording of the song for her review, Gaga's camp rejected his request.⁴ In response, "Weird Al" decided instead to post his song on YouTube and offer free downloads of "Perform" on his website.⁵ But *Alpocalypse's* twelfth track would be saved yet. In an interview, Yankovic told Billboard.com that the initial refusal was made by Gaga's manager unbeknownst to Gaga herself and, after listening to "Perform," Gaga gave her personal blessing for the rewrite.⁶

But did he even *need* Lady Gaga's permission to borrow from her hit song? Yankovic did not think he did, as he claimed that his work was a parody and would be protected as a "fair use" under copyright law.⁷ Had Lady Gaga sought legal action under the Copyright Act, however, the extent to which Yankovic could rely on fair use as a shield is not clear-cut. Instead, it might depend significantly upon whether "Perform This Way" would constitute a "parody" as defined by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*⁸ Since *Campbell* defines parody as "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*,"⁹ "Perform This Way" would have to specifically mock "Born This Way" to fall squarely within *Campbell's* ambit.

¹Throughout his career, Yankovic's songs have spoofed the works of legendary artists such as Michael Jackson ("Eat It"), Queen ("Another One Rides the Bus"), Madonna ("Like a Surgeon"), and many others.

²"Weird Al" Yankovic, *The Gaga Saga*, AL'S BLOG (April 20, 2011), <http://alyankovic.wordpress.com/the-gaga-saga>.

³*See id.* ("[I]t has always been my personal policy to get the consent of the original artist before including my parodies on any album").

⁴Jason Lipshutz, *Weird Al Gets Gaga's Approval for "Born This Way" Parody*, BILLBOARD.COM (April 21, 2011, 2:04 PM), <http://www.billboard.com/news/weird-al-gets-gaga-s-approval-for-born-this-1005148362.story>.

⁵*See* Yankovic, *supra* note 2.

⁶Gary Graff, *'Weird Al' Yankovic: Lady Gaga Has 'Rocked the Zeitgeist'*, BILLBOARD.COM (June 1, 2011, 12:37 PM), <http://www.billboard.com/news/weird-al-yankovic-lady-gaga-has-rocked-1005209612.story>.

⁷*See* Yankovic, *supra* note 2 ("My parodies have always fallen under what the courts call 'fair use,' and this one was no different, legally allowing me to record and release it without permission.")

⁸*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁹*Id.* at 580 (emphasis added).

But Yankovic himself has admitted that he did not intend for “Perform This Way” to mock the original work from which it derived. He felt that since Lady Gaga’s song was “such an earnest human rights anthem,” a work ridiculing it might be poorly received.¹⁰ Instead, Yankovic rewrote “Born This Way” to poke fun at Gaga herself—specifically her tendency to perform in bizarre costumes.¹¹ Indeed, nearly every line of “Perform” bitingly claims that the singer would wear all sorts of strange items on stage, including Swiss cheese, a porcupine, and even bodily organs.¹²

So could “Perform”—and other unlicensed rewrites that ridicule the original work’s author—survive an infringement action? The Copyright Act grants authors an exclusive right to “prepare derivative works based on the[ir] copyrighted work.”¹³ Section 107 of the Act, however, provides an affirmative defense of “fair use” for certain otherwise infringing actions.¹⁴ Precedent has proclaimed that, in the case of critical rewrites of copyrighted works, not all works are entitled to the same level of defense. For instance, the *Campbell* Court made explicit that parodies—rewrites which borrow from an author’s work for the purpose of criticizing that work—clearly fall within the purview of the fair use doctrine.¹⁵ It also noted, however, that rewrites that are satirical in nature—i.e., the new work critiques something else unrelated to the work—are much more likely to find themselves on the wrong side of an infringement claim.¹⁶ And while later cases have used *Campbell*’s parody/satire distinction to adjudicate many fair use claims involving comedic derivatives of copyrighted works, the distinction does not provide ready assistance for those who try to evaluate the propriety of rewrites that target the original work’s *author*. Rather, such works seem to defy seamless

¹⁰ Yankovic, *supra* note 2.

¹¹ Here is how Yankovic described his song’s vision: “The basic concept is that I, as a Lady Gaga doppelganger of sorts, describe the incredibly extravagant ways in which I perform on stage. Meat dresses and giant eggs would most likely be referenced, but also much more ridiculous made-up examples of bizarre wardrobe and stage production.” *Id.*

¹² For an excerpt of the two songs’ lyrics, see APPENDIX.

¹³ 17 U.S.C. § 106(2) (2006).

¹⁴ 17 U.S.C. § 107 (2006).

¹⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[P]arody, like other comment or criticism, may claim fair use under § 107.”). It also warrants noting that, since *Campbell*, “in every case (except one) that [a] court found a parody, it also found fair use.” David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 UTAH L. REV. 779, 793 (2010).

¹⁶ See *Campbell*, 510 U.S. at 580 (“If . . . the commentary [of a rewrite] has no critical bearing on the substance or style of the original composition, . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish) . . .”).

classification into either genre. By placing the original work's author in its crosshairs, songs such as "Perform This Way" do not target a subject completely untethered to the source material (as satire does), but also do not take direct aim at the source material itself (as parody does).

Courts have only recently begun to consider whether to treat these "author parodies" more like traditional parodies, satires, or something else entirely. The Supreme Court and the circuit courts have yet to address the issue, and the few district courts that have weighed in have propounded opposite holdings. Given the prevalence of author parodies such as "Perform This Way" in popular culture,¹⁷ how the law eventually decides to view these distinctive works will have significant implications for authors and appropriators alike.

This article presents both an economic and legal argument for privileging author parodies in a fashion similar to parodies of a work. Part II will discuss relevant Copyright law, particularly the fair use statute and the parody/satire dichotomy. Part III will introduce author parodies and survey the court cases which have confronted these works. Part IV will demonstrate, through the presentation of an economic framework, that author parodies are no more likely than "work" parodies to receive favorable licensing terms from copyright holders. Thus, author parodies should be granted fair use protection to prevent a similar market failure. Part V will show that author parodies should receive similar treatment to work parodies under the § 107 factors.¹⁸

I

OVERVIEW OF RELEVANT COPYRIGHT LAW AND FAIR USE

A. Copyright Law Generally

The Constitution permits Congress to "promote the Progress of Science and useful Arts by securing for limited Times to Authors . . . the exclusive Right to

¹⁷ See *infra* Part II.A.

¹⁸ A definitional note: This Article shall hereinafter refer to rewrites that critique the original work's author as "author parodies," while referring to the traditional, *Campbell*-type parodies as "work parodies." This is done to help the reader delineate between the admittedly-similar concepts of work parody, satire, and author parody while the concepts are discussed throughout this analysis. This choice of terminology places this Article in accord with the cases and academic articles that have, albeit briefly, discussed works that parody a preexisting work's author. These writings have referred to those works by the verbose label "parody of the author." See, e.g., *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1154 (C.D. Cal. 2010); Simon, *supra* note 15, at 832. This Article shortens the term to the more manageable "author parody."

their respective Writings”¹⁹ This enumerated power led to the institution of America’s federal copyright scheme, which affords copyright holders a limited monopoly to sell, reproduce, perform, display, and create derivative works of their original creations.²⁰ These rights, however, are not absolute; instead, American copyright law adheres to its constitutional goal of promoting artistic progress by striking a careful balance between providing authors an incentive to create and allowing future authors to build upon the works that came before them.²¹ The Copyright Act and case law attempts to foster this balance in several significant ways, such as providing copyright protection for a limited period of time,²² requiring substantial similarity between two works to sustain an infringement claim,²³ and protecting only *expressions* of ideas embodied in a work, not the ideas themselves,²⁴ and allowing for a fair use of a work.²⁵

B. Fair Use

Perhaps the most important mechanism courts employ to balance the interests of authors and appropriators is the “fair use” doctrine. Fair use, originally a common law doctrine, now codified in § 107 of the Copyright Act, provides an affirmative defense to copyright infringement.²⁶ The doctrine allows for appropriations of copyrighted material for limited purposes such as “criticism,” “comment,” “news reporting,” and “teaching.”²⁷ Rather than rigidly articulate which uses the law deems “fair,” however, the doctrine directs courts to determine

¹⁹ U.S. CONST. art. I, § 8, cl. 8.

²⁰ 17 U.S.C. § 106 (2006).

²¹ In *Nash v. CBS*, Judge Easterbrook of the Seventh Circuit addressed the two competing interests that copyright law must accommodate, noting: “Intellectual (and artistic) progress is possible only if each author builds on the work of others; [however,] to deny authors all reward for the value their labors contribute to the works of others *also* will lead to inefficiently little writing, just as sure as excessively broad rights will do.” 899 F.2d 1537, 1540–41 (7th Cir. 1990).

²² See 17 U.S.C. §§ 302–305 (2006).

²³ See, e.g., *Nichols v. Universal Pictures Corp*, 45 F.2d 119, 121–22 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

²⁴ For a strong articulation of the idea/expression dichotomy can be found, see *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

²⁵ 17 U.S.C. § 107 (2006)

²⁶ *Id.*; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (tracing common law development of the fair use defense).

²⁷ 17 U.S.C. § 107 (2006).

flexibly, on a case-by-case basis, whether a particular appropriation provides sufficient social gains that outweigh the copyright holder's proprietary interests.²⁸

To accomplish this flexible, case-by-case inquiry, § 107 instructs courts to consider and balance four factors in determining whether a particular use is deemed "fair":

- (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.²⁹

Rather than view the factors in isolation, courts are instructed that the factors are all "to be explored, and the results weighted together, in light of the purposes of copyright."³⁰

C. Work Parody, Satire, and the Fair Use Factors

1. The Work Parody/Satire Distinction

Work parody as a literary form traces its roots back to Ancient Greece.³¹ Although the term possesses a rich history and etymology that makes defining it an imprecise exercise,³² the following will suffice as a working definition: work

²⁸ See *Campbell*, 510 U.S. at 576–77 ("The 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.'") (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *Harper & Row v. Nation Enters.*, 471 U.S. 539, 549 (1985) ("Section 107 requires a case-by-case determination whether a particular use is fair."); *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) ("Copyright law thus must address the inevitable tension between the property rights it establishes . . . and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others The fair use doctrine mediates between the two sets of interests").

²⁹ 17 U.S.C. § 107 (2006).

³⁰ *Campbell*, 510 U.S. at 578.

³¹ MARGARET A. ROSE, PARODY: ANCIENT, MODERN, AND POST-MODERN 6 (1993).

³² The varied roots of the word "parody" makes defining the term difficult. The term traces its etymology to Greek words *parodia* (referring to an adaptation of epic verse used to treat a light, satirical or mock-heroic subject), *parodos* (pertaining to an "imitating singer" or the idea of "singing in imitation), and *parode* (pertaining to the idea of a song or ode "sung in imitation of another"). *Id.* at 7–8. The genre has existed for millennia in some form or another, and "our understanding of what precisely the term denotes has changed in the course of the centuries."

parody is “the imitative reference of one literary text to another, *often with an implied critique of the object text.*”³³ In other words, not only does a work parody engage in mockery, but also it directs its focus to the material itself. Satire, of which work parody is sometimes classified as a subgenre,³⁴ is merely prose that ridicules prevailing social norms and follies.³⁵ Although work parody and satire are similar in that they can both make their target an object of criticism, satire “need not be restricted to the imitation, distortion, or quotation of . . . preformed artistic materials, and when it does deal with such preformed material, need not make itself as dependent on it for its own character.”³⁶

Another way to conceptualize the distinction between work parody and satire is by identifying each form’s purpose for using the primary work. Whereas satire can use a particular work as a weapon for attacking an unrelated target, in work parody the work *is* the target.³⁷ For example, the Ninth Circuit held that a spoof of *The Cat in the Hat*, which used Dr. Seuss’ text to mock the widely-publicized O.J. Simpson litigation, was satire.³⁸ The court found that the new work merely served as a vessel through which the defendant criticized a separate concept.³⁹ Conversely, the Second Circuit found that a recreation of a *Vanity Fair* magazine cover depicting a naked, pregnant Demi Moore with comedian Leslie Nielsen’s head superimposed on a model’s body constituted work parody because the new work could “reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original.”⁴⁰ In the former case, the court perceived *The Cat in the Hat* as a weapon, and in the latter the court viewed the *Vanity Fair* cover as targeted by the new work.

BEATE MÜLLER, *Introduction to PARODY: DIMENSIONS AND PERSPECTIVES* 1, 3 (Beate Müller ed., 1997).

³³ JOSEPH A. DANE, *PARODY: CRITICAL CONCEPTS VERSUS LITERARY PRACTICES, ARISTOPHANES TO STERNE* 4 (1988) (emphasis added).

³⁴ *Id.* at 10.

³⁵ ROSE, *supra* note 31, at 80.

³⁶ *Id.* at 81–82.

³⁷ For further articulation of the weapon/target distinction between work parody and satire, see Richard A. Posner, *When is Parody Fair Use*, 21 J. LEGAL STUD. 67, 71 (1992). It should be noted that Posner does not refer to the two terms as “parody” and “satire,” but rather as “target parody” and “weapon parody” respectively. Despite his use of differing terms, it is clear from the text that Posner is referring to what this analysis deems work parody and satire.

³⁸ *Dr. Seuss Enters., L.P. v. Penguin Books (“Dr. Seuss II”), U.S.A., Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997).

³⁹ *Id.*

⁴⁰ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998).

2. *The Distinction and Fair Use*

Apart from being an enjoyable exercise in artistic analysis, the categorization of a rewrite as either work parody or satire has significant legal implications for the vitality of that work's fair use claim. In fact, this categorization tends to be a dispositive action for adjudicating courts. Whereas the "work parody" label usually foretells a fair use finding, a "satire" branding is all but a kiss of death for a copyright defendant.⁴¹ As the remainder of this section shall show, this is the case because of how work parody and satire's specific attributes measure against the four fair use factors of § 107.⁴²

Fair use analysis under § 107 first commands courts to look at "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."⁴³ Although work parodies are often commercial in nature (which would normally weigh against a fair use finding under this factor) courts have been willing to downplay the significance of this attribute due to work parody's "transformative" nature.⁴⁴ As the Supreme Court articulated in *Campbell*: (1) work parody is transformative in that it "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message"⁴⁵; (2) moreover, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."⁴⁶ As a result, (3) "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."⁴⁷

⁴¹ See *supra* notes 15–16 and accompanying text; Maureen McCrann, Note and Comment, *A Modest Proposal: Granting Presumptive Fair Use Protection for Musical Parodies*, 14 ROGER WILLIAMS U. L. REV. 96, 97 (2009) (noting that the "distinction [between work parody and satire] has evolved in the legal world as the keystone to determining the legality of using a copyrighted work in the creation of a new work.").

⁴² Some argue, however, that courts tend to place too much emphasis on the work parody/satire distinction in making a fair use finding, while effectively abandoning the flexible four-factor analysis that § 107 demands. See Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 979 (2004) (arguing that "[s]everal courts have . . . explicitly relied on the distinction between these two forms of humor to impose liability on those who have created [satire], even though the [Supreme Court] counsels a more sensitive approach").

⁴³ 17 U.S.C. § 107(1) (2006).

⁴⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Work parody tends to escape the first § 107 factor unscathed despite its oft-commercial nature, but satire is not so lucky. Whereas the Supreme Court was more willing to allow transformative work parodies to borrow from their target material to fulfill their goals, the Court noted that satires—which do not comment on the original composition itself—“require[] justification for the very act of borrowing.”⁴⁸ Consequently, a satirist’s “claim to fairness in borrowing from another’s work diminishes . . . and other factors, like the extent of its commerciality, loom larger.”⁴⁹ Thus, satires bear the full brunt of their commercialism, and do not fare as well as work parody under the first fair use factor.

The second fair use factor explores “the nature of the copyrighted work.”⁵⁰ Under this factor courts recognize that copyright affords expressive, original works more protection against copying than it affords factual works.⁵¹ Although this pronouncement would seem to count the second factor against work parodies, the *Campbell* Court also accepted that work parodies almost always borrow from expressive material, and thus the second factor is “not much help” in a fair use inquiry.⁵² Despite this diminished role that the second factor plays in this inquiry, courts evaluating *satirical* uses of expressive copyrighted material tend to weigh this factor against the defendant.⁵³

The third factor examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁵⁴ Under this factor, the extent to which a defendant can appropriate from a copyrighted work depends upon her purpose and the character of the use.⁵⁵ In the case of work parody, courts recognize that to properly “take[] aim at an original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”⁵⁶ In contrast to work parody’s dependence on its source material, satires do not need to borrow from the original work to make their point. A satirist does not have to employ the copyrighted works of Dr. Seuss to effectively

⁴⁸ *Id.* at 581.

⁴⁹ *Id.* at 580.

⁵⁰ 17 U.S.C. § 107(2) (2006).

⁵¹ *Campbell*, 510 U.S. at 586.

⁵² *Id.*

⁵³ *See, e.g., Dr. Seuss II*, 109 F.3d 1394, 1402 (9th Cir. 1997)..

⁵⁴ 17 U.S.C. § 107(3) (2006).

⁵⁵ *Campbell*, 510 U.S. at 586–87.

⁵⁶ *Id.* at 588.

comment on the O.J. Simpson trial, and thus, the satirist receives less justification to borrow from those works under the third factor.⁵⁷

The final fair use factor involves an examination of “the effect of the use upon the potential market for or value of the copyrighted work.”⁵⁸ The Court stated that the importance of the market harm measured under factor four varies “not only with the amount of harm [to the original], but also with the relative strength of the showing on the other factors.”⁵⁹ When analyzing this factor, courts must consider not only the effect that the defendant’s work will have on the market for the original work, but also on the market for potential derivatives of that work: “If the defendant’s work adversely affects the value of any of the rights in the copyrighted work . . . the use is not fair.”⁶⁰

The above principle would seem to cause the fourth factor to adversely affect work parodies and satires equally, as both constitute derivative works.⁶¹ However, when making the market harm inquiry, courts distinguish between uses that harm the market through typical market substitution and those that do so by changing consumer preferences (such as how a critique of a work may suppress the work’s demand). Parodic derivatives receive more fair use protection, as market harm through disparagement is not an interest that the Copyright Act protects.⁶² Or, to put it another way, “the role of the courts is to distinguish between ‘biting criticism [that merely] suppresses demand [and] copyright infringement, [which] usurps it.’”⁶³ Since courts refuse to find a “protectable derivative market for criticism,” work parodies, which take aim at the very works which inspired them,

⁵⁷ See *Dr. Seuss II*, 109 F.3d at 1402–03.

⁵⁸ 17 U.S.C. § 107(4) (2006).

⁵⁹ *Campbell*, 510 U.S. at 591 n.21.

⁶⁰ *Harper & Row v. Nation Enters.*, 471 U.S. 539, 568 (1985) (quoting 413 *Nimmer on Copyright* § 13.05).

⁶¹ A derivative work is:

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, 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”.

17 U.S.C. § 101 (2006).

⁶² See *Campbell*, 510 U.S. at 592.

⁶³ *Id.* (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)). Criticism of copyrighted works is expressly listed as an example of a protected category under the fair use statute. 17 U.S.C. § 107 (2006).

perform favorably under the market harm factor.⁶⁴ As the *Campbell* Court noted: “when a lethal parody . . . kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”⁶⁵ Satires, on the other hand, perform comparatively more poorly under this factor due to their failure to employ the sort of work-specific criticism (indicative of work parody) for which courts readily provide shelter under fair use doctrine.⁶⁶

III AUTHOR PARODIES

Given how the four factors differ in treatment of work parodies and satires, whether a court views a particular rewrite more like the former or the latter all but determines the fate of the rewrite’s fair use defense. Whereas work parodies almost always succeed under each of the factors, satires often languish. One can infer from this analysis that, to succeed on a fair use claim, a comedic rewrite of a copyrighted work must not select a target for mockery too unrelated to the original. Thus, an unauthorized sequel to *Gone With the Wind* that ridiculed the novel’s depiction of slavery would be deemed a fair use;⁶⁷ but, a rewrite of the song “Boogie Woogie Bugle Boy” that used the 1940s classic as a vehicle to generally critique societal customs, would not.⁶⁸

One might wonder at what point a critical derivative work becomes *so* unrelated to its source material that a copyright defendant loses the safe harbor of fair use. What if someone borrows elements from a work to create a new work that, while not mocking the original, mocks the original’s author? This question brings us to the concept of author parodies. Like work parodies, author parodies are not attacking something completely separate from the work itself. But like satire, author parodies use the original work as a weapon as opposed to a target. Courts must resolve how to treat these unique works, which seem to straddle the line between the two genres.

Author parody is by no means a new concept. Much like work parody, examples of author parody can be traced back to Ancient Greece. In Aristophanes’

⁶⁴ In fact, no court adjudicating the fair use claim of a work parody has ever failed to hold that the market harm factor in that case favored fair use. *See* Simon, *supra* note 15, at 829.

⁶⁵ *Campbell*, 510 U.S. at 592.

⁶⁶ Even though the *Campbell* Court expressly reserved judgment on how satires should fare under the market harm factor, *see id.* at 592 n.22, lower court cases post-*Campbell* have favored penalizing satirical works more for their market harm. *See, e.g., Dr. Seuss II*, 109 F.3d 1394, 1403 (9th Cir. 1997)..

⁶⁷ *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

⁶⁸ *See* MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).

The Acharnians, the playwright parodied the works of Euripides for the purpose of mocking the celebrated tragedian.⁶⁹ But despite the genre's history, as well as its presence in today's artistic landscape, an appeals court has yet to rule on an "author parody" fair use defense.⁷⁰ The Second Circuit has upheld a fair use defense where a defendant borrowed from an author's works to critique that author in a non-parody context: in *New Era Publications International v. Carol Publishing Group*, the court found noninfringing a critical biography of Scientology founder L. Ron Hubbard despite the fact that the biographer quoted extensively from Hubbard's books.⁷¹ However, only district courts have examined fair use claims of parodic rewrites that lampoon the original's author.

A. Author Parodies in the Federal Courts

Federal district courts that have discussed the author parody fair use issue have offered contrary holdings. Some cases have treated author parodies as plausible fair uses, identifying their similarity to work parody. In *Burnett v. Twentieth Century Fox Film Corporation*,⁷² for instance, the Central District of California found fair use when the producers of "Family Guy" included on their program an animated version of the "Charwoman" fictional character, originally created by comedienne Carol Burnett.⁷³ The defendants claimed that their use of Burnett's character was intended to mock Burnett herself, and the court found this rationale supported their fair use claim.⁷⁴ The Southern District of New York reached a similar holding in *Bourne Co. v. Twentieth Century Fox Film Corporation*.⁷⁵ In *Bourne*, the defendants—coincidentally also the producers of "Family Guy" program—had written the song "I Need a Jew," which was similar in lyrics and melody to the Disney classic "When You Wish Upon a Star."⁷⁶ In arguing for their fair use claim, the defendants claimed that their song was intended to mock Walt Disney's alleged anti-Semitism.⁷⁷ Despite the fact that Disney neither wrote nor owned the copyright to "When you Wish Upon a Star," the Southern District of New York found that using a copyrighted song as a means

⁶⁹ See DANE, *supra* note 33, at 30.

⁷⁰ See *infra* note 84, and accompanying text.

⁷¹ *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152 (2d Cir. 1990).

⁷² *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007).

⁷³ *Id.* at 966.

⁷⁴ *Id.* at 968–69.

⁷⁵ *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009).

⁷⁶ *Id.* at 501.

⁷⁷ *Id.* at 507.

to ridicule a public figure closely associated with the song was sufficiently parodic to support a fair use claim.⁷⁸

In other cases, courts have negatively treated author parody fair use defenses, casting the genre as merely a form of general satire and ruling on the fair use question accordingly. For example, one federal court noted in the dicta of a literary infringement case that “[t]he satirist (or one intending to *parody an author but not any particular work*) may freely evoke another artist by using the artist’s general style,” but “[o]nly when the satirist wishes to parody the copyrighted *work* does the taking . . . become permissible.”⁷⁹ Similarly, in *Salinger v. Colting*, the same federal court that seemed to approve initially of the author parody defense in *Bourne* would later offer a repudiation of it.⁸⁰ The defendant in *Salinger* wrote an unlicensed derivative of *The Catcher in the Rye*, and depicted the classic novel’s teenage protagonist, Holden Caulfield, as a 76-year-old man.⁸¹ After dispatching with the defendant’s argument that the derivative constituted a parody of *Catcher in the Rye* and the Holden Caulfield character,⁸² the *Salinger* Court rejected the defendant’s final fair use claim—that his work constituted a permissible parody of *Catcher in the Rye*’s author, J.D. Salinger.⁸³ In reaching its holding, the court seemed to express a negative view toward the viability of author parody fair use claims generally when it stated that “the parodic framework of *Campbell* . . . requires critique or commentary of the *work*.”⁸⁴

But of all of the author parody cases confronted by the district courts, the 2010 holding of *Henley v. Devore*⁸⁵ warrants a separate, more meticulous analysis

⁷⁸ *Id.* at 507–08.

⁷⁹ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc. (“Dr. Seuss I”)*, 924 F. Supp 1559, 1568 (S.D. Cal. 1996) (emphasis added).

⁸⁰ *Salinger v. Colting (“Salinger I”)*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010). In *Salinger I*, the court attempted to reconcile the two seemingly contrary holdings of *Salinger I* and *Bourne* by arguing that the close association between Walt Disney and the “I Need a Jew” song “reinforced and reiterated” a broader attempt by the *Bourne* defendants to target the original song itself. *Id.* at 261 n.4. Conversely, the *Salinger I* court held that the author parody in their case failed to supplement a work parody of *The Catcher in the Rye*, and that author parody standing alone was not sufficiently transformative to succeed on a fair use claim. *Id.*

⁸¹ *Id.* at 258.

⁸² *Id.* at 258–60.

⁸³ *Id.* at 268.

⁸⁴ *Id.* at 261 (emphasis added). It warrants noting that the Second Circuit in *Salinger v. Colting* mentioned the lower court’s rejection of author parody as fair use, but explicitly refused to endorse or reject its holding on that issue. *See (“Salinger II”)*, 607 F.3d 68, 83 (2d Cir. 2010).

⁸⁵ 733 F. Supp. 2d 1144 (C.D. Cal. 2010).

because of its extensive discussion of the issue. Rather than merely liken author parody to either work parody or satire in a matter akin to the above cases, the *Henley* Court specifically examined how author parodies might apply to each of the four fair use factors⁸⁶—which makes the case particularly useful to this analysis. *Henley* involved two acts of alleged copyright infringement by the U.S. Senate campaign of Republican politician Charles DeVore.⁸⁷ One of those acts involved the creation of a promotional song and YouTube music video designed to poke fun at President Barack Obama and House Speaker Nancy Pelosi.⁸⁸ The campaign's song, titled "The Hope of November" ("November"), was an unauthorized rewrite of the Don Henley classic "The Boys of Summer."⁸⁹ The defendants argued that "November's" lyrics mock Henley's supposed liberal views and his support of Obama.⁹⁰ The campaign specifically claims that the narrator of the song is meant to be Henley himself, and that the song presents the classic rock legend as "disappointed and disillusioned with Obama and nostalgic for the hopeful days of Obama's campaign."⁹¹ Through Don Henley's "narration," "November" pokes fun at Obama and the naïveté and subsequent disappointment of his supporters, which includes Henley"⁹² The *Henley* court found the defendant's arguments strong enough to categorize "November" as a "reasonably perceptible" author parody, but also found that the lampooning of Don Henley was "a relatively minor element of the main satirical purpose of the song—targeting Obama and his supporters."⁹³

The court in *Henley* explored how author parodies might measure up against the four fair use factors and, while not explicitly endorsing such works as a legitimate fair use,⁹⁴ appeared to treat author parodies favorably on each prong. Regarding the purpose/character of the use, the court suggested that author parodies could be sufficiently transformative because "the purpose of an author-parodying work is to evoke the author in order to provide socially-valuable

⁸⁶ *Id.* at 1154–55.

⁸⁷ *Id.* at 1147.

⁸⁸ *Id.* at 1148.

⁸⁹ *Id.* at 1157.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The *Henley* court assumed without deciding that author parodies constituted a legitimate fair use for the purposes of adjudicating DeVore's overall copyright infringement defense. *See id.* at 1156 ("With this framework in mind, and assuming that 'parody-of-the-author' is a legitimate transformative purpose, the Court now considers the four primary elements of the fair use inquiry for each of the allegedly infringing songs.").

criticism of the author, a public figure necessarily open to ridicule.”⁹⁵ In examining the nature of the copyrighted work, the court remarked that criticism of authors may require lampooning creative, non-factual works if an author’s fame derived from such works.⁹⁶ In looking at the “amount used” factor, the *Henley* court accepted the possibility that “referencing public figures through their work may require the use of at least some portion of those works,” suggesting that at least some borrowing of the author’s copyrighted material would be appropriate for author parody.⁹⁷ Finally, on the “market harm” factor, the court surmised that “a parody lampooning the author may be unlikely to supplant any potential market for the original or derivatives thereof” because it is unlikely that the original author would ever license such a work.⁹⁸

Despite *Henley*’s favorable treatment of author parodies, the court held that even if the defendants were justified in appropriating “The Boys of Summer” to mock its author, the amount of the song used by the defendants “went far beyond that reasonably necessary to conjure up [Don] Henley.”⁹⁹ Furthermore, “many of the ‘November’ lyrics [did] not serve the purpose of ridiculing Henley and drift[ed] into pure satire, targeting Obama and Nancy Pelosi.”¹⁰⁰ Indeed, the court identified that many of “November’s” lyrics seemed to have nothing to do with mocking Don Henley at all and instead involved a general commentary on the perceived political failures of President Obama and Speaker Pelosi,¹⁰¹ which would be indicative of a more satirical purpose. As a result, the court held that “November” was not fair use and upheld the plaintiff’s infringement claim.¹⁰²

As author parody cases continue to be adjudicated, eventually courts will have to resolve the current split and definitively establish how copyright law should treat the genre. The remainder of this Article will argue that author parodies should be viewed similarly to work parodies in the area of fair use. It will do this by first presenting an economic framework supporting the contention that treating

⁹⁵ *Id.* at 1154.

⁹⁶ *Id.* at 1154–55.

⁹⁷ *Id.* at 1155.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1161

¹⁰⁰ *Id.*

¹⁰¹ An excerpt of “November’s” lyrics: “Obama overload/Obama overreach/We feel it everywhere/Trillions in the breach/Empty Bank, empty Street/Dollar goes down alone/Pelosi’s in the House/So now we all must atone/But we can see through--/Your broken promises oh One/You got your head cocked back and/Your teleprompter on, maybe/And can we tell you our love you/Will still be strong/After the hope of November’s gone?” *Id.* at 1169 Appendix A.

¹⁰² *Id.*

author parodies similarly to work parodies in the fair use context would correct a market failure in the licensing of derivative works—thereby fostering a socially optimal outcome. Following the economic argument, the Article will make a legal argument for privileging author parodies by comprehensively demonstrating why these works should perform strongly under the § 107 fair use factors.

III

PRIVILEGING AUTHOR PARODIES WOULD CORRECT A MARKET FAILURE IN LICENSING SIMILAR TO THE ONE INHERENT IN WORK PARODY

Several scholars have propounded an economic rationale for affording work parody a fair use defense. The rationale is based on the idea that, absent fair use, fewer parodic works will be created due to a copyright holder's general unwillingness to grant licenses, at any price, for derivatives which ridicule their creations. Professor Wendy Gordon notes that a copyright holder is "unlikely to license a hostile review or a parody" of her work and, consequently, her "antidissemation motives make . . . a strong case for fair use . . ." ¹⁰³ Similarly, Judge Posner's research favors privileging work parody due to the "private interest of the copyright owner . . . to suppress criticism of [his] work" rather than engage in market exchange with a potential work parodist. ¹⁰⁴

A similar economic rationale supports granting fair use protection for author parodies. Treating author parody similarly to work parody—and dissimilarly to satire and traditional derivative works—in the fair use context would correct a market failure, creating socially-valuable works that would not otherwise see the light of day. Just as authors would be generally unwilling to license parodies that ridicule their work, they would be similarly unwilling (if not more so) to license parodies in which they are personally attacked.

To illustrate this point, the remainder of this section will present an economic framework. It will demonstrate how granting author parodies a fair use defense akin to the one work parodies receive under *Campbell*, while allowing copyright holders to retain property rights over their traditional and satirical derivatives, will lead to the creation of the socially optimal number of copyrighted works:

Assume a world with economically-motivated individuals. Five of the people in this world include Carl (a Composer of original love songs), Abby (an

¹⁰³ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1633 (1982).

¹⁰⁴ See Posner, *supra* note 37, at 73.

Author parodist), Wesley (a Work parodist), Sean (a Satirist), and Tabitha (a creator of Traditional derivative works, such as adaptations or translations, which would lack any apparent fair use defense under current law). Recently, Carl penned his latest song, “Your Love is Wonderful,” which became a hit single. A short time after the song was released, others wanted to create derivatives of Carl’s work that kept the chords and melody of “Your Love is Wonderful” but changed the song’s lyrics to serve a different purpose. Abby wanted to write “Your Love is as Wonderful as America is Terrible,” a song which lampoons Carl’s extremist political views. Wesley sought to pen “Your Love is Boring,” a song which criticizes the hackneyed and simplistic message of Carl’s love song. Sean wished to compose “My H.M.O. is NOT Wonderful,” a scathing critique of the medical industry. Finally, Tabitha hoped to create “O Seu Amor é Maravilhoso,” a line-by-line translation of “Your Love is Wonderful” into Portuguese. The goal in this scenario will be to assign derivative work rights to these individuals in such a way to produce the most works of authorship at the lowest social cost.

The framework will begin with the presumption that it is economically efficient to give all of the derivative work rights to Carl, the original author. The rationale behind this presumption is not immediately apparent. The presumption particularly requires explanation when one considers that the Coase Theorem¹⁰⁵ would suggest that production of derivative works would be unaffected regardless of whether the original or the derivative author possessed the property right. Consider the following example: suppose that Carl wrote “Your Love is Wonderful” and Tabitha wanted to create her Portuguese translation of the song. Assume that Carl valued the right to prevent others from making derivatives of his song at \$1,000, and Tabitha valued the right to write her Portuguese version of the song at \$5,000. Regardless of whether we assign the derivative right to Carl or Tabitha, the socially optimal outcome of the translation being made will occur. If Carl has the derivative right, Tabitha will pay Carl between \$1,000 and \$5,000 for a license to write her work. If instead Tabitha has the derivative right, she will write “O Seu Amor é Maravilhoso” without having to pay Carl. But if, instead, the circumstances are such that Carl valued the right to protect his song at \$5,000 and Tabitha valued the right at \$1,000, Tabitha would not create the translation regardless of which party receives the derivative right. If Carl has the right, he will not grant Tabitha a license; and, if Tabitha has a right, Carl will pay Tabitha between \$1,000 and \$5,000 for her to not write her song.

But despite the Coase Theorem’s conclusion that authors collectively would create the same number of derivative works regardless of how rights are assigned,

¹⁰⁵ See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

the relevant scholarship on the subject presents several justifications for affording this right to the original copyright holder.¹⁰⁶ Chief among these are the distortions in the timing of publications that would occur if the original author did not also have an exclusive right to make derivatives. Lacking such a right, the author would have a perverse incentive to delay publication of his work “until he had created the derivative work as well (or arranged for its creation by licensees), in order to gain a head start on any would-be derivative authors.”¹⁰⁷

Therefore, to prevent the unnecessary delay of original (and derivative) works for public consumption, this framework will presume that the original author should possess the exclusive right to create derivatives of his work in all circumstances. This presumption, however, can be rebutted if allowing the original author to retain this right leads to market failure by preventing the creation of the greatest number of original works of authorship. If the socially optimal number of works will be created by doing so, then a transfer of the derivative right from Carl to one of the derivative composers should occur. Such a transfer would be equivalent to granting that derivative composer a fair use defense should Carl choose to bring an infringement action against that composer for his work.

Assume, for the purposes of this framework, that society would benefit immensely from the creation of all five songs—that Carl’s original work, Wesley’s critique of Carl’s work, Abby’s critique of Carl, Sean’s medical industry commentary, and Tabitha’s Portuguese translation would all be valuable works, both in terms of profit as well as for their important social messages of the critical works.¹⁰⁸ Therefore, the goal should be to assign derivative rights to the five individuals in such a way that no market failures will occur and all five works will be created.

¹⁰⁶ For a summary of these justifications, see Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and* Campbell v. Acuff-Rose Music, Inc., 69 S. CAL L. REV. 767, 780–82 (1996).

¹⁰⁷ William M. Landes & Richard M. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 355 (1989).

¹⁰⁸ The literature has provided much commentary on the social value of critical works—such as the derivative works composed by work parodists, author parodists, and satirists. For example: Criticism is valuable, inter alia, because the market works to further the social good only when consumers have accurate information about the goods available. As the Supreme Court has written: “So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be . . . well informed.”

Gordon, *supra* note 103, at 1634 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)).

If Wesley, Abby, Sean, and Tabitha are profit maximizers, they will each approach Carl with the hope of obtaining a license from him to create his or her derivative work. As it would be in everyone's pecuniary interest to make a deal, it would seem that a successful voluntary exchange should occur in each case. Carl should be willing to bargain separately for a share of each person's potential profits from the derivative work and society will benefit from having all five songs (including the original).

Other factors, however, could disincentivize Carl from negotiating with Abby, Wesley, Sean, and Tabitha. It may be that, for certain reasons, Carl has a strong personal motive not to disseminate certain types of derivative works, causing him to forego a voluntary exchange—which would ultimately be in society's interest.¹⁰⁹ It is unlikely that this would be the case when Tabitha offers to buy a license from Carl to make a Portuguese version of “Your Love is Wonderful.” There is no apparent reason why Carl would have a significant incentive to prevent the licensing of a traditional derivative work. Thus, since it would be profitable to do so, Carl would negotiate and eventually grant the license to Tabitha, and she would be able to compose “O Seu Amor é Maravilhoso.” Similarly, Carl should also be willing to negotiate with Sean and grant a license for Sean's satirical work “My H.M.O. is NOT Wonderful.” Although the highly critical message of Sean's song is not as innocuous as Tabitha's, Sean would have no personal interest in suppressing a song that offers a general critique of the medical industry. As a result, the negotiation should prove successful.¹¹⁰ Since no

¹⁰⁹ See Gordon, *supra* note 103 (“The owner of a copyright, however, may not be willing to exploit all of the possible derivative works over which his copyright would ordinarily give him control. . . . [b]ecause the owner's antidissemation motives make licensing unavailable in the consensual market”); see also Winslow, *supra* note 106 at 793 n.143 (“One assumption underlying the preference for voluntary exchange is that people will value resources to reflect the value society places on them. This assumption fails when there are external benefits, because society reaps a benefit from which the transacting parties do not profit.” (citation omitted)).

¹¹⁰ See Posner, *supra* note 37, at 73 (noting that for satires there is “no obstruction to letting the market make the tradeoff” for derivative rights because the author would have no personal antidissemation motive). However, one can certainly question the assumption that copyright holders will voluntarily negotiate licenses for satirical derivatives regardless of that satire's subject. In offering a critique of Posner's views, Professor Merges notes that a copyright holder may still have an antidissemation motive with regard to a satire if that satire critiques “a set of values or cultural assumptions deeply cherished by the copyright holder or at least widely held by the segment of the public loyal to her.” Robert P. Merges, *Are You Making Fun of Me: Notes on Market Failure and the Parody Defense in Copyright*, 21 *AIPLA Q.J.* 305, 311 (1993). If, for example, Carl does not share Sean's views on the medical industry as propounded in his satirical work, he might refuse to negotiate a license with Sean. To the extent that these sort of antidissemation motives regarding satirical works will interfere with market exchange for

failure in market exchange is likely to occur for Tabitha's traditional derivative or for Sean's satire, both derivatives would be made. Therefore, the socially optimal outcome can occur by allowing Sean (and generally all copyright holders of original works) to retain the exclusive right to make traditional derivatives and satirical works.

But the same cannot be said for work parodies. Carl would understandably bristle at Wesley's request to rewrite "Your Love is Wonderful" as a new song that will ridicule his original composition. Rather than readily grant a license to Wesley in exchange for a share of "Your Love is Boring's" profits, Carl would instead have a strong personal motive to censor Wesley's song and refuse to grant him a license at any price.¹¹¹ As the Ninth Circuit aptly noted: "Self-esteem is seldom strong enough to permit the granting of permission [for a work parody] even in exchange for a reasonable fee."¹¹² Echoing similar sentiment, the *Campbell* Court noted that "the unlikelihood that [authors] . . . will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."¹¹³ Even though the socially optimal outcome would be a successful licensing transaction between Carl and Wesley the work parodist, Carl's personal interest would keep him from negotiating. To prevent the resulting market failure that would occur here—and with all work parodies—the derivative work right must shift from the original author to the work parodist.

Finally, the framework will examine Carl's incentives to negotiate with Abby, the author parodist. We must now determine whether this would be a situation where Carl would gladly negotiate with Abby the way he did with the translator and the satirist, or, in a manner similar to the work parody example, whether Carl would have qualms about licensing "Your Love is Wonderful" for a rewrite that personally attacks him. It seems intuitive that Carl would likely have a strong personal interest in preventing the composition of author parodies at his expense. "Authors, like all people, do not like to be ridiculed. Given the fact that a person's reputation . . . cannot be restored with money once it has been destroyed, the chance that an author . . . would allow the destruction of those things via

satirical derivative licenses, it stands to reason that the economic fair use argument for privileging satires strengthens accordingly.

¹¹¹ See *supra* notes 103–104, and accompanying text.

¹¹² *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

¹¹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994); see also Brian R. Landy, *The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody*, 54 OHIO ST. L.J., 227, 250–51 (1993) ("In parody cases, a plaintiff usually will refuse to grant permission, no matter what the price, simply because the plaintiff has an interest which is opposed to that of society: not to allow criticism of the plaintiff's work.").

parody is very slim.”¹¹⁴ Consequently, one could argue that *Campbell*’s famous work parody maxim that “[p]eople ask . . . for criticism but they only want praise”¹¹⁵ would be just as true, if not more so, for personal attacks as it would be for attacks of a person’s art. Whereas work parodies only indirectly target an individual’s labors, author parodies directly assault the individual—and thus may cut even deeper.

Furthermore, empirical evidence supports the intuition that public figures are unlikely to put a price on leaving themselves vulnerable to personal attack, through author parody or otherwise. A survey of 164 libel plaintiffs by Bezanson, Soloski, and Cranberg investigated, *inter alia*, whether the plaintiffs considered money damages an adequate remedy for the harm they suffered.¹¹⁶ The plaintiffs in the study rejected that proposition by an overwhelming margin.¹¹⁷ Such a finding reflects the notion that, for defamation victims, “money damages cannot replace a reputation once lost.”¹¹⁸ This information has implications for the possibility of successful voluntary exchange regarding author parodies. If no amount of money can adequately compensate those personally attacked through libel, this would suggest that no amount of money can compensate a copyright holder enough for them to permit a personal attack through author parody. Moreover, the similarities in plaintiff-motivations for bringing libel lawsuits and infringement claims against author parodies make the survey results all the more applicable. In both situations, the plaintiff suffers a personal public humiliation, inspiring them to pursue legal action.¹¹⁹

¹¹⁴ Alfred C. Yen, *When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 104–05 (1991).

¹¹⁵ *Campbell*, 510 U.S. at 592 (quoting WILLIAM S. MAUGHAM, *OF HUMAN BONDAGE* 241 (Penguin Books 1992) (1915)).

¹¹⁶ RANDALL P. BENZANSON, ET AL., *LIBEL LAW AND THE PRESS* 23–28 (1987).

¹¹⁷ The vast majority of the surveyed plaintiffs instead felt that a retraction or apology would repair their harm suffered; moreover, less than one percent of the plaintiffs even requested money damages in their respective libel suits. *Id.*

¹¹⁸ Lucila I. van Dam, Note, *Long Live the Lie Bill!*, 41 U. MICH. J.L. REFORM 525, 531–32 (2008) (quoting DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 165 (1991)).

¹¹⁹ Professor Yen makes an analogous proposition regarding libel law and work parody: A libel victim sues because statements made to the public portray the victim in an unflattering light. The victim suffers through the ridicule and scorn heaped upon him by those who have seen the libelous statement. Similarly, an author sues a parodist because she resents the public portrayal of her work in an unflattering light. She suffers because those who have seen the parody hold her in lower esteem and laugh at her work.

Whereas individuals like Carl have every incentive to prevent author parodies of their work, society has a strong interest in their creation. Significant external benefits result from educating society about public figures through criticism.¹²⁰ The public's interest notwithstanding, it is likely Carl will refuse to sell Abby a license for her author parody. Consequently, Carl's refusal would create a market failure similar to the one that occurs in the work parody scenario. And just like with work parody, the presence of a market failure justifies reassigning the derivative work right over author parodies to the author parodist.

Before leaving the framework, some mention should be made of the fact that, in practice, not *all* authors will behave similarly to Carl. Certainly, some public figures will allow others to turn their works into author parodies. Lady Gaga, for one, seemed not to mind the needling she received from Al Yankovic's "Perform This Way."¹²¹ And perhaps other authors might be willing to grant author parody licenses to others—albeit at a higher price than they would for traditional derivatives—as a way to compensate themselves partially for the harm they will suffer. However, the notion that some authors in the real world might be good sports in the face of ridicule does not negate the strong economic justifications for granting author parodies fair use protection. Authors who happily welcome public ridicule are the exception rather than the rule.¹²² Moreover, the external benefits of criticism¹²³ are too valuable to let the potential target determine whether the criticism will occur—even if the target is willing to permit it for only a marginally higher fee. "The social product [of criticism] is diminished if persons are able to exact compensation from truthful critics of their failings, for such a right reduces the incentive to produce truth."¹²⁴

In sum, the socially optimal result—demonstrated through the creation of Carl's original song and all four derivative works—occurs by allowing Carl to keep some of his derivative work rights but transferring the rest to the other authors. Stripping Carl of all of his derivative rights may prevent the creation of any of the five songs because Carl would be incentivized to delay production of the

Yen, *supra* note 114, at 105–06.

¹²⁰ See *supra* note 108, and accompanying text; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (discussing the public benefits derived from permitting criticism of public officials); Winslow, *supra* note 106 at 796.

¹²¹ See *supra* Part I.

¹²² See *supra* note 113 and accompanying text; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (quoting WILLIAM S. MAUGHAM, *OF HUMAN BONDAGE* 241 (Penguin Books 1992) (1915)) ("People ask . . . for criticism, but they only want praise.").

¹²³ See *supra* note 108, and accompanying text.

¹²⁴ Posner, *supra* note 37, at 74.

original song. On the other hand, affording Carl full control over all subsequent derivatives of “Your Love is Wonderful” will lead to the composition of only Tabitha’s translation and Sean’s satire, and the public will likely never hear Wesley’s work parody or Abby’s author parody due to market failure. The answer, therefore, is to afford author parodies a fair use defense similar to the one that work parodies currently receive under *Campbell*, and not treat such works in a manner akin to traditional or satirical derivatives.

IV

PRIVILEGING AUTHOR PARODIES IS PROPER UNDER THE FAIR USE FACTORS DUE TO THEIR SIMILIARITY TO WORK PARODIES (AND DISSIMILARITY TO SATIRES)

The previous section demonstrates that permitting a fair use defense for author parodies would correct a market failure similar to the one corrected by granting fair use protection for work parodies. This section will now supplement the economic argument for protecting author parodies with a legal one. It will do this by applying the § 107 factors and past precedent to demonstrate that courts in future cases should generally provide author parodists with an affirmative defense to copyright infringement. As shown by the four § 107 factors, author parodies (1) are transformative; (2) have a compelling reason to use creative works; (3) have a strong claim to appropriate copyrighted material due to their dependence on that material; and (4) do not impose a cognizable market harm upon the copyright holder.

A. The Purpose and Character of the Use

Much like “Perform This Way” and “The Hope of November” from the *Henley* case, author parodies are often commercial in nature. Normally, a work’s commerciality weighs against its fair use claim.¹²⁵ However, if a work has transformative value, such as in cases of commercial work parody, it can still perform favorably under the purpose/character factor: “[T]he 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.”¹²⁶ Not only “is the goal of copyright, to promote science and the arts, . . . generally furthered by the

¹²⁵ *Harper & Row v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. [Every] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984))).

¹²⁶ *Campbell*, 510 U.S. at 579.

creation of transformative works,”¹²⁷ but these works tend to present “little or no risk of market substitution” due to the differences in purpose between the original and subsequent creation.¹²⁸

Author parodies are undoubtedly transformative works. By using a copyrighted work as a tool by which to lampoon the work’s author, the author parodist “adds something new, with a further purpose or different character.”¹²⁹ In accord with the foregoing, Judge Pierre Leval, an originator of the “transformative” term, noted that “exposing the character of the original author” can create the sort of “new information, new aesthetics, [and] new insights and understandings” that are indicative of transformative works.¹³⁰ Therefore, in a manner similar to *Campbell*-type work parodies, the transformative nature of author parodies mitigates the use’s commerciality, leading to a strong performance on the purpose/character factor.

B. The Nature of the Copyrighted Work

Author parodies typically borrow from expressive, original, and creative works, a fact well exemplified by the district court cases that have adjudicated fair use claims in this area.¹³¹ The Nature factor “recognizes that there is a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works for factual compilations.”¹³² Since creative works “fall[] within the core of . . . copyright’s protected purposes,”¹³³ the non-factual nature of author parody’s source material appears to weaken the fair use claim of these works. However, work parodies, which also primarily exploit creative works to accomplish their purposes, almost always attain fair use protection.¹³⁴ This is partially due to the fact that courts tend to discount the importance of the second factor when analyzing work parodies because such uses “almost invariably

¹²⁷ *Id.*

¹²⁸ *Id.* at 581 n.14.

¹²⁹ *Id.* at 579.

¹³⁰ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

¹³¹ See *supra* Part III.A. Every author parody case referenced in this Article used a fictional work as its source material: *Burnett* (“The Charwoman,” fictional character), *Bourne* (“When You Wish Upon a Star,” song), *Salinger* (“The Catcher in the Rye,” fictional novel), and *Henley* (“The Boys of Summer,” song).

¹³² *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001).

¹³³ *Campbell*, 510 U.S. at 586.

¹³⁴ See *Simon*, *supra* note 15 and accompanying text.

[involve the] copy[ing of] . . . expressive works.”¹³⁵ A similar discounting of the second factor also seems appropriate for author parodies, as “criticism of public figures through their work may require the use of well-known creative expressions”¹³⁶

C. Amount and Substantiality of the Portion Used

Just how much a fair use defendant can borrow from the original work varies with the type of use in which the defendant is engaged.¹³⁷ A proper mockery of a copyrighted work necessitates reference to that work, and thus work parodists have a strong claim to some borrowing of copyrighted material under the Amount Used factor.¹³⁸ Conversely, satirical works are not dependent on their source material to achieve their broad societal commentary. Rather, satirists exploit copyrighted materials “merely to get attention or to avoid the drudgery in working up something fresh.”¹³⁹ Thus, satirical works have less justification to borrow from the copyright holder.

As for an author parodist’s dependence on his source material, one could plausibly argue that, unlike work parodists, author parodists do not *need* to appropriate an author’s work to achieve their purpose. Al Yankovic could have conceivably critiqued Lady Gaga’s unique fashion sense through a variety of different methods (a magazine editorial, perhaps), but likely took an approach best suited to his talents as a songwriter—and most likely to lead to his financial gain. But, on the other hand, many authors are known to the public primarily through the works they create. Thus, limiting an author parodist’s access to his target’s body of work could have a chilling effect on the socially valuable criticism that he or she could have created. As the *Henley* court noted: “without the ability to evoke their works—the very reasons [authors] live in the public eye—a would-be [author] parodist may lack an adequate tool with which to lampoon.”¹⁴⁰

¹³⁵ *Campbell*, 510 U.S. at 586; *see also* *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1223 (S.D.N.Y. 1996) (noting that the Nature factor “assumes less importance in the fair use analysis with respect to a parody”).

¹³⁶ *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1154 (C.D. Cal. 2010).

¹³⁷ *Campbell*, 510 U.S. at 586–87.

¹³⁸ *Id.* at 588 (“When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of the original to make the object of its critical wit recognizable.”).

¹³⁹ *Id.* at 580.

¹⁴⁰ *Henley*, 733 F. Supp. at 1154. While examining the defendant’s author parody claim, the court further noted that, “[i]n this case, . . . the Defendants argue that they sought to poke fun at

The *Campbell* ruling provides additional, albeit indirect, support for allowing author parodists to exploit an author's works. The Court held that the law allows work parodists access to the original work's "most distinctive or memorable features, which the [work] parodist can be sure the audience will know."¹⁴¹ One could read the spirit of this language as generally permitting authors of critical derivatives to invoke their target's most prominent attributes to achieve their purpose. This language provides the satirist with little benefit on the third factor, as his target's most prominent attributes bear no relation to the original work from which they have appropriated. However, it helps the author parodist immensely, as his target author's "most distinctive or memorable features" from the public's perspective are likely to be the very works which may have made that author famous. Accordingly, the author parodist has a strong claim to borrowing his target author's material.

In keeping with the case-by-case nature of a fair use inquiry, the unique features of a particular author parody could affect the permissibility of borrowing. Some authors exist in the public's consciousness for reasons unrelated to their works. Professional athletes Peyton and Eli Manning, for example, are most known for their quarterbacking prowess in the National Football League, but they also happen to be authors of a children's book.¹⁴² An effective critique of these public figures would likely not require conjuring up their copyrighted work product, and so the third factor argument weakens accordingly here. A doctrinally obedient fair use analysis may require distinguishing between famous authors and famous people who also happen to produce works of authorship. Line drawing in this particular area, however, may prove unworkable for courts. It is impractical to demand that federal judges acquire the pop culture acumen necessary to identify which public figures' fame is enmeshed with their copyrighted material sufficiently enough to permit copying by author parodists. A more prudent course—particularly in light of author criticism's significant external benefits—would be for courts to indulge a strong presumption of such enmeshment and hold that author parodies generally have a claim to borrow from their target's material under the Amount Used factor.¹⁴³

[Don] Henley, a famous musician. The best, and perhaps only, way to conjure up Henley in a manner recognizable to the public is through his music." *Id.*

¹⁴¹ *Campbell*, 510 U.S. at 588.

¹⁴² See PEYTON MANNING, ELI MANNING, & ARCHIE MANNING, FAMILY HUDDLE (2009).

¹⁴³ Just how much material the author parodist can borrow will likely depend on the derivative work's overall purpose. If author criticism constitutes a small portion of the defendant's work, courts will not countenance a significant appropriation of the author's material. *Cf. Campbell*, 510 U.S. at 588 ("Once enough has been taken to assure identification,

D. Effect on Potential Market for or Value of the Copyrighted Work

The Market Effect “inquiry must take account not only of harm to the original [work], but also of harm to the market for derivative works.”¹⁴⁴ Regarding harm to the original work, it is foreseeable that a well-executed author parody will damage more than its victim’s ego. It stands to reason that a scathing critique of a public figure may make that person’s body of work—including the specific work exploited by the author parodist—less valuable to consumers. This type of injury, however, falls outside of the scope of protection provided by the law to copyright holders. The fourth factor only recognizes harm caused by uses which affect a work’s demand through market substitution, not through criticism which changes consumer preferences.¹⁴⁵ Since author parodies do not act as a market substitute for their source material, they do not present cognizable market harm to the original under this factor.

Author parodies also do not harm the potential market for derivative works. Under the fourth factor, “[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”¹⁴⁶ As demonstrated in the economic argument advanced in the previous section, no such potential market exists. Rare is the author who will compose or license a self-damaging derivative. The *Henley* court expressed a similar view regarding Market Effect: “[A] parody lampooning the author may be unlikely to supplant any potential market for the original or derivatives thereof because of the unlikelihood that authors would license parodies ridiculing themselves.”¹⁴⁷ Since no cognizable market harm occurs to either the author’s original work or any potential derivatives, author parodies perform strongly under the fourth factor.

Because author parodies perform similarly well as work parodies under all four § 107 factors, a strong legal argument can accompany the economic argument propounded earlier for affording these works a legitimate fair use defense.

CONCLUSION

Author parodies present an intriguing issue in copyright law. Borrowing definitional elements from both traditional parody and satire, these works push the boundary regarding what forms of social critique courts should protect with an

how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original”); *see also Henley*, 733 F. Supp. at 43–44.

¹⁴⁴ *Harper & Row v. Nation Enters.*, 471 U.S. 539, 568 (1985).

¹⁴⁵ *See Campbell*, 510 U.S. at 591–92.

¹⁴⁶ *Id.* at 592.

¹⁴⁷ *Henley*, 733 F. Supp. at 1155.

affirmative infringement defense. As the doctrine continues to develop, this Article aims to provide courts with some guidance for shaping the contours of this emerging issue. Author parodies are a valuable form of social criticism and a strong economic and legal argument can be made for treating these works similarly to a parody which targets a copyrighted work. Granting author parodies a fair use defense would correct a market failure stemming from a copyright holder's unwillingness to voluntarily transact with an author parodist. These parodies also perform well under the § 107 factors. They are an example of the sort of transformative work that the copyright law seeks to encourage. Moreover, authors are generally famous for the works they create, which affords those who criticize them some entitlement to appropriate their target's material. Some authors (such as professional athletes) achieve their fame in areas unrelated to their works, which one could argue diminishes an author parodist's entitlement to use their work to assist in their critique. However, the difficulty in determining which authors adequately achieved their fame primarily through their copyrighted material, coupled with author parody's social value, should encourage courts to presume the suitability of an author parodist's appropriation. Finally, author parodies do not impose the sort of market harm on the original author's works which copyright law seeks to protect.

APPENDIX

“Born This Way” (Lady Gaga)

My mama told me when I was young
 We are all born superstars
 She rolled my hair and put my lipstick on
 In the glass of her boudoir
 "There's nothing wrong with loving who you are"
 She said, "Cause he made you perfect, babe"
 "So hold your head up girl and you'll go far,
 Listen to me when I say

I'm beautiful in my way
 'Cause God makes no mistakes
 I'm on the right track, baby
 I was born this way
 Don't hide yourself in regret
 Just love yourself and you're set
 I'm on the right track, baby
 I was born this way

Oh there ain't no other way
 Baby I was born this way
 Baby I was born this way
 Oh there ain't no other way
 Baby I was born this way
 I'm on the right track, baby
 I was born this way

Don't be a drag—just be a queen
 Don't be a drag—just be a queen
 Don't be a drag—just be a queen
 Don't be!

Give yourself prudence and love your friends
 Subway kid, rejoice your truth
 In the religion of the insecure
 I must be myself, respect my youth
 A different lover is not a sin
 Believe capital H-I-M
 I love my life I love this record and
 Mi amore vole fe yah (Love needs faith)

“Perform This Way” (“Weird Al” Yankovic)

My mama told me when I was hatched
 Act like a superstar
 Save your allowance, buy a bubble dress
 And someday you will go far
 Now on red carpets, well, I'm hard to miss
 The press follows everywhere I go
 I'll poke your eye out with a dress like this
 Back off and enjoy the show!

I'm sure my critics will say
 It's a grotesque display
 Well, they can bite me, baby
 I perform this way
 I might be wearin' Swiss cheese
 Or maybe covered with bees
 It doesn't mean I'm crazy
 I perform this way

Ooo, my little monsters pay
 Lots 'cause I perform this way
 Baby, I perform this way
 Ooo, don't worry, I'm okay
 Hey, I just perform this way
 I'm not crazy
 I perform this way

I'll be a troll or evil queen
 I'll be a human jelly bean
 'Cause every day is Halloween
 For me...

I'm so completely original
 My new look is all the rage
 I'll wrap my small intestines 'round my neck
 And set fire to myself on stage
 I'll wear a porcupine on my head
 On a W-H-I-M
 And for no reason now I'll sing in French
 Excusez-moi, Qui a pété? (Who Cut the Cheese?)

Lady Gaga—Born This Way Lyrics, LYRICS.COM, <http://www.lyrics.com/born-this-way-lyrics-lady-gaga.html> (last visited Oct. 6, 2011); *Weird Al Yankovic—Perform This Way Lyrics*, LYRICS.COM, <http://www.lyrics.com/perform-this-way-lyrics-weird-al-yankovic.html> (last visited Oct. 6, 2011).