

**TOWARD A MODERNIZED FAIR USE STANDARD  
FOR PARODY: HARMONIZING *CAMPBELL V.  
ACUFF-ROSE MUSIC, INC. WITH ANDY WARHOL  
FOUNDATION FOR THE VISUAL ARTS, INC. V.  
GOLDSMITH***

INTRODUCTION

On a black box stage, women donning beanies imbibe cans of hard seltzer at a slumber party.<sup>1</sup> A few moments later, a crowd of actors breaks into choreographed song and dance to “Crank That” by Soulja Boy at a high school dance.<sup>2</sup> On May 12, 2022, a federal district judge deemed these scenes and others from the up-and-coming musical, *Vape*, to be a parody of the classic musical, *Grease*.<sup>3</sup> In ruling the plaintiff’s use of copyrighted material permissible, Chief Judge Swain emphasized the “transformative nature” of *Vape*’s use of material from *Grease*.<sup>4</sup> Chief Judge Swain noted that *Vape* “mocks various specific elements of *Grease*,” like adult actors portraying high school students and the spontaneous synchronized song and dance routines found in the original work.<sup>5</sup> Furthermore, the court identified that a central aim of *Vape* was to expose the misogynistic undertones of *Grease* by reinterpreting the original work through a twenty-first century lens.<sup>6</sup> *Vape* aims to reexamine *Grease* from a “‘female perspective in the #MeToo era’ and ‘expose[] how the “humor” and rape-cultured elements of *Grease* have not aged well.’”<sup>7</sup> As a result, while *Vape* encroached upon the property interests of others, the intrusion was justified due to its legal classification as a parody commenting on an original work.<sup>8</sup>

Parody is a centuries-old practice.<sup>9</sup> Originating in ancient Greek comedy with its first mention in Aristotle’s *Poetics*, *parodia* (now, “parody”)

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1. Sketchworks Comedy, *#VapeTheMusical Trailer*, YOUTUBE, at 0:53 (Jan. 30, 2019), <https://www.youtube.com/watch?v=txAPDCjyOiy> [<https://perma.cc/TL7N-VNTW>].

2. *Id.* at 1:18.

3. Sketchworks Indus. Strength Comedy, Inc. v. Jacobs, No. 19-CV-7470, 2022 WL 1501024, at \*7 (S.D.N.Y. May 12, 2022); see Jonathan Stempel, ‘*Vape*’ Is the Word: U.S. Judge Allows ‘*Grease*’ Parody, REUTERS (May 12, 2022, 4:20 PM), <https://www.reuters.com/legal/litigation/vape-is-word-us-judge-allows-grease-parody-2022-05-12/> [<https://perma.cc/3RZ6-424R>].

4. See *Sketchworks Indus. Strength Comedy, Inc.*, 2022 WL 1501024, at \*4–5.

5. *Id.* at \*4.

6. *Id.* at \*5.

7. *Id.* at \*2 (citing Second Amended Complaint ¶ 53, *Sketchworks Indus. Strength Comedy, Inc.*, 2022 WL 1501024 (No. 19-CV-7470)).

8. *Id.* at \*5.

9. See generally DONALD SELLS, PARODY, POLITICS AND THE POPULACE IN GREEK OLD COMEDY (2019); DAVID FRANCIS TAYLOR, THE POLITICS OF PARODY: A LITERARY HISTORY OF

described a literary form that treated a serious subject with satire or mockery to create a comedic effect.<sup>10</sup> Parody has since permeated a variety of mediums beyond literature, ranging from art<sup>11</sup> to theater<sup>12</sup> to film.<sup>13</sup> In the twenty-first century, parody is largely found in musical works, including musical theater and songs.<sup>14</sup> Furthermore, as demonstrated in *Sketchworks*, parody transcends its traditional role of providing comedic relief; it has evolved into a formidable vehicle for commentary, criticism, and expression on social, cultural, and political issues.<sup>15</sup>

As parody has evolved to embrace new mediums and functions, courts have begun to integrate these developments into the legal doctrine of parody. Within copyright law, parody falls under the fair use doctrine, which permits the use of another's copyrighted material provided the use is "fair" based on four statutory factors.<sup>16</sup> The current fair use doctrine is a product of judge-made law resulting from case-by-case application of the statutory fair use test and ad hoc consideration of creativity and property policy concerns.<sup>17</sup> Consequently, what constitutes fair use in a parody

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CARICATURE, 1760–1830 (2018); ROBERT CHAMBERS, *PARODY: THE ART THAT PLAYS WITH ART* (2010).

10. SIMON DENTITH, *PARODY: THE NEW CRITICAL IDIOM* 10 (2000).

11. See Annabel Sheen, *10 of the Most Parodied Artworks of All Time*, ROYAL ACAD. (Mar. 30, 2017), <https://www.royalacademy.org.uk/article/america-after-the-fall-10-most-parodied-artworks> [<https://perma.cc/9EMN-GZS8>].

12. There are many musical theater parodies that cross mediums, including adaptations that parody popular television shows. See FRIENDS! THE MUSICAL PARODY, <https://www.friendsoffbroadway.com> [<https://perma.cc/UU2X-VN6P>]; STRANGER SINGS! THE PARODY MUSICAL, <https://www.strangersingsthemusical.com> [<https://perma.cc/8A7K-46TJ>].

13. Some films parody notable literary works. See YOUNG FRANKENSTEIN (20th Century Studios 1974); MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975). Others parody popular conceptions or notions, including stereotypes of working in the music industry. See THIS IS SPINAL TAP (Spinal Tap Productions 1984); POPSTAR: NEVER STOP NEVER STOPPING (Universal Pictures 2016).

14. See *supra* note 12. Musician and comedian "Weird Al" Yankovic has made a career of parodying songs by famous contemporary musical artists, including the song "Poker Face" by popular music artist Lady Gaga. "WEIRD AL" YANKOVIC, *Polka Face*, on ALPOCALYPSE (Volcano Ent. III, LLC 2011).

15. See, e.g., Thomas A. Berry & Nicholas DeBenedetto, *The First Amendment Protects the Right to Parody the Government*, CATO INST. (Oct. 28, 2022, 5:17 PM), <https://www.cato.org/blog/first-amendment-protects-right-parody-government> [<https://perma.cc/8ZDW-AGLG>]; cf. Jack Daniel's Properties, Inc. v. VIP Prods. LLC, 599 U.S. 140, 146–56 (2023) (holding the defendant's dog toy design parodying Jack Daniel's iconic whiskey bottle design was not protected by the First Amendment exception to trademark infringement).

16. See 17 U.S.C. § 107. The fair use limitation initially was a judge-made doctrine that was later codified in the Copyright Act of 1976. See *infra* Section I.A.

17. "The task [of gauging fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); see *infra* Section I.B.

unpredictably varies based on the factual circumstances of each case, chilling authors' creativity out of fear of wrongful borrowing.<sup>18</sup>

Chief Judge Swain's decision in *Sketchworks* occurred one year prior to the Supreme Court's most recent ruling on fair use in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (*AWF II*), which recalibrated the assessment of the "purpose and character" of a non-parodic use within the statutory fair use analysis.<sup>19</sup> In *AWF II*, the Court held that a silkscreen print created by renowned artist Andy Warhol was not sufficiently "transformative" to make fair use of an original reference photograph taken by photographer Lynn Goldsmith.<sup>20</sup> While both the *Sketchworks* court and the *AWF II* Court considered similar points in their fair use analyses, they reached drastically different conclusions regarding the fairness of the uses in question. Fair use determinations involving parodic and non-parodic works are highly fact-specific, resulting in varying considerations of the statutory factors and differing weights of policy concerns. As a result, there are few consistent interpretations of present caselaw.<sup>21</sup> Furthermore, *AWF II* marks a doctrinal shift in the fair use limitation by reconsidering what constitutes transformative use and placing heavy emphasis on the commercial nature of a work when examining its purpose and character.<sup>22</sup> Thus, there is even less foresight regarding how claims of copyright infringement involving parodies will be interpreted in light of the Supreme Court's reworking of the fair use standard in *AWF II*.<sup>23</sup>

This Note proposes a means of interpreting *AWF II*, together with present parody caselaw, that provides adequate protection for parody within the changing fair use doctrine. Part I provides an overview of the fair use limitation and parody and outlines three relevant Supreme Court decisions. Part II consolidates contemporary appellate caselaw assessing fair use in parody into two analytical approaches, highlights their existing flaws, and

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18. See Beth Warnken Van Hecke, Note, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465, 466 (1992) (identifying that confusion over what material parodists can legally borrow may chill parodists' creativity); *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) ("[Copyright law] can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works.").

19. 598 U.S. 508, 532–50 (2023); see *infra* Section I.C.

20. *AWF II*, 598 U.S. at 550–51.

21. See *infra* Sections II.A, II.B.

22. See *infra* Sections II.C.1, II.C.2.

23. See *infra* Section II.C.3. At the time of writing this Note, a number of courts of appeals have interpreted *AWF II* and propagated a variety of readings of the decision. See *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024); *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699 (10th Cir. 2024), *vacated, reh'g granted*, 101 F.4th 787 (10th Cir. 2024) (ordering a rehearing to determine, in part, the impact of *AWF II* on its previous decision); *Philpot v. Indep. J. Rev.*, 92 F.4th 252 (4th Cir. 2024); *Griner v. King*, 104 F.4th 1 (8th Cir. 2024). The Court of Appeals for the Ninth Circuit is poised to interpret *AWF II* in the appeal of *Sedlik v. Von Drachenberg*, No. 21-CV-1102, 2023 WL 6787447 (C.D. Cal. Oct. 10, 2023). See Plaintiff Jeffrey B. Sedlik's Notice of Appeal at 1, *Sedlik v. Von Drachenberg*, No. 24-3367 (9th Cir. filed May 22, 2024), ECF 252.

identifies additional complications introduced by the Supreme Court's decision in *AWF II* implicating fair use. Part III proposes a qualified presumption of transformative use, along with a set of supplemental guidelines regarding commercial nature for courts to consider in their assessment of parodies, aiming to remedy these flaws and complications. Part IV anticipates and addresses possible objections to the proposal advanced in this Note.

### I. A PRIMER ON FAIR USE AND PARODY

This Part provides an overview of the fair use doctrine in copyright law, particularly as it applies to parody. Section A outlines the constitutional and statutory underpinnings of fair use and identifies a persistent tension between two relevant policy concerns. Section B relays how the Supreme Court has applied the statutory fair use test to parody in two decisions to date. Finally, Section C pivots to examine the Supreme Court's most recent application of the first factor of the statutory fair use test to a non-parodic work in *AWF II*, which may inform how the parody doctrine will be applied in the future.

#### A. *The Foundations of Fair Use*

Copyright law has both constitutional and statutory bases. Protection of copyrightable works broadly stems from the “intellectual property clause” in Article I, Section 8 of the United States Constitution, which empowers Congress “[t]o Promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the Exclusive Right to their Respective Writings.”<sup>24</sup> The Copyright Act of 1976 (the Act) refined the existing statutory foundation of copyright law codified in Title 17 of the United States Code and provides the statutory framework for modern copyright law.<sup>25</sup> In addition to defining what subject matter receives copyright protection, the Act established boundaries on how far an author's exclusive rights to their copyrighted material extend.<sup>26</sup> One such boundary, the fair use limitation, permits the secondary use of another's copyrighted work for

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24. U.S. CONST. art. I, § 8, cl. 8; see 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01–08, Lexis+ (database updated Apr. 2024) (discussing the intellectual property clause as it relates to copyright).

25. Copyright Act of 1976, 17 U.S.C. §§ 101–1511.

26. 17 U.S.C. §§ 102–05, 107–12. Per the Copyright Act of 1976, copyright protection extends to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102; see 1 NIMMER & NIMMER, *supra* note 24, § 2.02–03 (discussing the scope of writings protected by copyright). The Act defines the boundaries of this protection in terms of both the uses of copyrighted material that are protected and the duration that the author of a work can enforce their exclusive rights. See 17 U.S.C. §§ 107–12.

the purpose of criticism, commentary, news reporting, teaching, scholarship, and research.<sup>27</sup> The fair use limitation originated as a judge-made doctrine and was later codified in the Act.<sup>28</sup> When a court is tasked with gauging whether a particular use is fair, the statute delineates four factors to guide the court's determination:

- (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.<sup>29</sup>

When conducting a fair use analysis, courts are often faced with two clashing policy considerations. On one hand, copyright law functions to protect and enforce the “bundle of rights” vested in an author's copyrighted work, namely by securing exclusive rights to creative property.<sup>30</sup> On the other hand, courts and scholars routinely recognize the role of copyright protection in fostering creativity and expression for the benefit of the public.<sup>31</sup> This purpose conflicts with property considerations when an

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27. 17 U.S.C. § 107; 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 13F.02–04, Lexis+ (database updated Apr. 2024) (discussing the scope and mechanics of the fair use defense). Furthermore, the fact that a copyrighted work used by another is unpublished does not bar a finding of fair use if all enumerated factors are considered. 17 U.S.C. § 107 (flush language).

28. Justice Joseph Story first posited the fair use doctrine in *Folsom v. Marsh*, instructing that courts should “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901). This reasoning was later distilled into the statutory fair use test. 4 NIMMER & NIMMER, *supra* note 27, § 13F.03 (“Though its pedigree is old, Congress recognized fair use for the first time in the Copyright Act of 1976.”).

29. 17 U.S.C. § 107. When gauging fair use in parody, the first factor tends to dominate courts' analyses. *See infra* Section II.A.

30. *See* *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 505 (S.D.N.Y. 2017) (“The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption.” (quoting *Authors Guild v. Google, Inc.* 804 F.3d 202, 212 (2d Cir. 2015))), *aff'd*, 729 F. App'x 131 (2d Cir. 2018).

31. *See* *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (“It is a fundamental objective of the copyright law to foster creativity.”); Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1335 (2015) (“[C]opyright protections exist primarily in order to promote creativity.”); Mark Bartholomew, *Copyright and the Creative Process*, 97 NOTRE DAME L. REV. 357, 358 (2021) (“What is copyright for? In contrast to some other areas of the law, there is overwhelming agreement on this question. Copyright protection is meant to foster creative expression.”); *cf.* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 341 (1991) (holding that works of authorship must have a “modicum of creativity” to constitute copyrightable expression).

author seeks to incorporate another's work in their own creative endeavors, as in a fair use claim. Given the statutory factors do not explicitly address either consideration, courts balance these competing interests based on the factual circumstances of each case.

### *B. The Protection of Parody as Fair Use*

The Supreme Court has ruled on the fair use limitation as it applies to parody two times to date, creating a brief yet complex taxonomy of relevant mandatory authority. The following Subsections detail these two decisions and highlight their respective contributions to the formation of the fair use doctrine as it relates to parody.

#### *1. Columbia Broadcasting System, Inc. v. Loew's Inc.*

The Supreme Court first addressed parodic fair use in *Columbia Broadcasting System, Inc. v. Loew's Inc.*<sup>32</sup> In 1942, Loew's Inc. acquired exclusive motion picture rights to Patrick Hamilton's play *Gas Light* and adapted it into a successful film.<sup>33</sup> A decade later, Columbia Broadcasting System, Inc. (CBS) wrote and produced a thirty-minute television show parodying *Gas Light* with American comedian Jack Benny starring in the lead role.<sup>34</sup> However, neither CBS nor Benny secured consent from either Loew's Inc. or Hamilton to produce and broadcast the show.<sup>35</sup> Loew's Inc. promptly brought legal action against Benny and CBS for infringement of its motion picture rights.<sup>36</sup> Benny and CBS argued their use of the play was protected under the fair use limitation.<sup>37</sup>

The Court was equally divided as to whether the defendants' use was unfair and did not issue a binding opinion but affirmed the Ninth Circuit's finding of infringement.<sup>38</sup> In analyzing Benny and CBS's use of Loew's Inc.'s film adaptation, the Court assessed the amount of material from the film that was copied in the television show.<sup>39</sup> If the copied material was

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32. *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub nom.* *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958) (per curiam).

33. *Id.* at 533.

34. *Id.*

35. *Id.* However, in 1945, Benny presented a fifteen-minute long national radio broadcast "burlesquing" the play after obtaining Loew's Inc.'s consent. *See id.*

36. *Id.* at 534.

37. *Id.*

38. *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958) (per curiam). The Court's mode of analysis foreshadows the third factor of the modern statutory fair use standard. *See infra* note 39.

39. *Benny*, 239 F.2d at 536. This is similar to the third factor of the statutory fair use standard, analyzing "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107; *see supra* note 38.

eliminated, all that remained in the television show were “a few gags, and some disconnected and incoherent dialogue.”<sup>40</sup> Consequently, the portion the defendants copied from the film was substantial.<sup>41</sup> Furthermore, the copied aspects were fundamental to the film adaptation, including parts of the setting, characters, plot, and dialogue of the original work.<sup>42</sup> The Court rejected the defendants’ argument of fair use, identifying that copying a serious dramatic work nearly verbatim and presenting it in a burlesque manner still constitutes infringement.<sup>43</sup> The Court also declined to consider the adaptation to be a criticism of the original work.<sup>44</sup>

## 2. *Campbell v. Acuff-Rose Music, Inc.*

Thirty years after *Columbia Broadcasting System, Inc.*, the Supreme Court revisited parody under the fair use doctrine, this time in the context of music.<sup>45</sup> In *Campbell v. Acuff-Rose Music, Inc.*, the Court assessed whether rap group 2 Live Crew’s song, “Pretty Woman,” infringed the respondent’s copyright to Roy Orbison’s rock ballad, “Oh, Pretty Woman.”<sup>46</sup> In 1964, Roy Orbison and William Dees wrote “Oh, Pretty Woman” and assigned their rights in the song to Acuff-Rose Music, Inc.<sup>47</sup> In 1989, Luther R. Campbell, a member of 2 Live Crew, wrote “Pretty Woman,” which he later described as intended, “through comical lyrics, to satirize the original work.”<sup>48</sup> 2 Live Crew’s manager informed Acuff-Rose of the song and requested permission to produce and distribute it, provided 2 Live Crew would afford all ownership and authorship of the original song

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40. *Benny*, 239 F.2d at 536.

41. *Id.*

42. *Id.* at 535–36. Consideration of the appropriated material in view of its relation to the copyrighted work as a whole reflects the analysis embodied in the third factor of the statutory fair use standard. 17 U.S.C. § 107; *see supra* note 39. Furthermore, analysis of the amount of an original work used as well as its relation to the original work as a whole (i.e., if it came from the “heart” of the original) later became a core consideration of the parodic fair use analysis under the third factor. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588–89 (1994) (“[T]he question of fairness asks what else the parodist did besides go to the heart of the original.”); *infra* Section I.B.2.

43. *Benny*, 239 F.2d at 536–37 (“Whether the audience is gripped with tense emotion in viewing the original drama, or, on the other hand, laughs at the burlesque, does not absolve the copier.”).

44. *Id.* at 537.

45. *See Campbell*, 510 U.S. at 571–72.

46. *Id.*

47. *Id.* at 572.

48. *Id.* Scholarly commentary suggests that, despite statements to the contrary, judicial assessment of parody may be inherently biased against adult-themed humor relayed in copyrighted works, resulting in a variant of censorship. *See generally* David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright*, 98 KY. L.J. 517 (2010); Paul Tager Lehr, Note, *The Fair-Use Doctrine Before and After “Pretty Woman’s” Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 46 FLA. L. REV. 443 (1994); *infra* Section II.B.2.

to Acuff-Rose and the songwriters, respectively.<sup>49</sup> Acuff-Rose denied the request, yet 2 Live Crew released recordings of “Pretty Woman” on albums and compact discs shortly thereafter,<sup>50</sup> properly crediting Acuff-Rose as the original song publisher and Orbison and Dees as the original songwriters.<sup>51</sup> Nearly a year after the release of “Pretty Woman,” Acuff-Rose sued 2 Live Crew and their record label for copyright infringement.<sup>52</sup> The appellants argued their use of material from “Oh, Pretty Woman” was protected as fair use.<sup>53</sup>

Although the Court did not rule on whether 2 Live Crew’s use amounted to infringement, it made several important points regarding the application of the fair use defense to parody.<sup>54</sup> Diverging from *Columbia Broadcasting System, Inc.*, the Court found that a parody may constitute fair use of copyrighted material.<sup>55</sup> The Court defined a parody as a “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.”<sup>56</sup> If the commentary in a parody has “no critical bearing on the substance or style of the original composition . . . the claim to fairness in borrowing . . . diminishes accordingly” and factors such as the commerciality of the use may carry greater analytical weight.<sup>57</sup> Applying these preliminary considerations to “Pretty Woman,” the Court found 2 Live Crew’s song was a parody and protected as fair use.<sup>58</sup>

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49. *Campbell*, 510 U.S. at 572.

50. *Id.* at 572–73.

51. *Id.* at 573.

52. *Id.*

53. *Id.* at 574.

54. *Id.* at 594. The Court reversed the judgment of the Sixth Circuit and remanded the case to the district court for determination of whether 2 Live Crew’s use amounted to infringement. *Id.*

55. *Id.* at 579–80. This finding aligned with contemporary appellate court holdings. *See, e.g., Fisher v. Dees*, 794 F.2d 432, 434 (9th Cir. 1986) (holding that the song “When Sonny Sniffs Glue” was a parody and made fair use of copyrighted material from the song “When Sunny Gets Blue”).

56. *Campbell*, 510 U.S. at 580. The Court referenced dictionary definitions of parody, including a “literary or artistic work that imitates the characteristic style of an author or a work for comedic effect or ridicule” and a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” *Id.* at 580 (footnotes omitted). However, when crafting the standard for what legally constitutes a parody, the Court relied upon definitions in contemporary appellate court decisions and stated that a parody must comment on or criticize an original work. *See id.* at 579–81; *supra* note 55.

57. *Campbell*, 510 U.S. at 580. The Court identified that a work may have no critical bearing on the original composition in instances where the alleged infringer “merely uses [it] to get attention or to avoid the drudgery in working up something fresh.” *Id.*

58. *Id.* at 582. The Court’s postulation of the song as a parody varied from 2 Live Crew’s description of the song as a satire. *See id.* at 572. The Court took care to distinguish parody and satire, noting that “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” *Id.* at 580–81. The parody-satire distinction plays a significant role in later parody caselaw. *See, e.g., Dr. Seuss Enters., L.P. v. Penguin Books USA*,

In analyzing the purpose and character of 2 Live Crew's song under the first fair use factor, the Court established that the threshold question for parodic fair use is whether the parodic character can be reasonably perceived.<sup>59</sup> If so, the Court determines if the use is "transformative," asking whether the new work "merely 'supersede[s] the objects' of the original" or instead "adds something new, with a further purpose or different character" and "alter[s] the [original work] with new expression, meaning, or message."<sup>60</sup> The Court concluded that "Pretty Woman" could be reasonably perceived as commenting on the original song by juxtaposing the ugliness of street life with the romantic musings of the original song.<sup>61</sup> Thus, the "joinder of reference and ridicule" in the lyrics of "Pretty Woman," which commented on the original work, were transformative.<sup>62</sup> The Court noted the commercial nature of the parody, as a song sold for profit, did not foreclose a finding of fair use.<sup>63</sup> Unlike the dispositive weight the Court of Appeals for the Sixth Circuit allotted to the commercial nature of the song, the Court found commerciality was just one element considered in the evaluation of the purpose and character of a work.<sup>64</sup> When weighed against the transformative character of the use, the commercial nature of "Pretty Woman" was insufficient to tip the scale toward a finding of unfair use.<sup>65</sup>

The Court declined to thoroughly analyze the nature of the original song and found the second fair use factor was minimally helpful in determining parodic fair use given parodies usually copy publicly expressed works.<sup>66</sup> The Court then gauged "the amount and substantiality of the portion used" in relation to the original work as a whole given the purpose and character of the parodic use under the third fair use factor.<sup>67</sup> The humor of a parody and its capacity to comment or criticize are dependent upon recognition of an original work.<sup>68</sup> Consequently, a parody must "conjure up" a sufficient

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Inc., 109 F.3d 1394, 1400–01 (9th Cir. 1997) (finding a book describing the events of the murder trial of O.J. Simpson using characters and stylistic elements of *The Cat in the Hat* by Dr. Seuss more closely aligned with satire than with parody); see *infra* Section II.A.2.

59. *Campbell*, 510 U.S. at 581–82.

60. *Id.* at 579 (first alteration in original).

61. *Id.* at 583. For example, the original lyrics "Pretty Woman, don't walk on by, / Pretty Woman, don't make me cry" correspond to "Bald headed woman girl your hair won't grow / Bald headed woman you got a teeny weeny afro" in 2 Live Crew's song. See *id.* at 595–96.

62. *Id.* at 583.

63. *Id.* at 583–84.

64. *Id.* at 584.

65. *Id.* This marked a departure from the Supreme Court's previous holding that "every commercial use of copyrighted material is presumptively . . . unfair." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

66. See *Campbell*, 510 U.S. at 586. The relative insignificance of the second fair use factor persists in contemporary legal assessments of parodic fair use. Cf. *infra* Sections II.A.1, II.A.2.

67. See *Campbell*, 510 U.S. at 586–89.

68. See *id.* at 588.

amount of an original work to make it recognizable.<sup>69</sup> The amount of copying in a parody beyond that necessary to establish recognition varies depending on the purpose and character of a parody and if excessive copying may reasonably create a market substitute for an original work.<sup>70</sup> The Court found “Pretty Woman” copied elements that went to the “heart” of the original song, including the opening bass riff and the first lyric.<sup>71</sup> However, such copying was not necessarily excessive purely because it came from the heart of the work.<sup>72</sup> “Pretty Woman” departs to its own verses and harmonically varies from the original song after the first lyric.<sup>73</sup> In light of this, the Court found the holistic copying was not excessive in relation to the parodic purpose of “Pretty Woman.”<sup>74</sup>

Lastly, the Court considered the fourth fair use factor, the effect of the parodic work on the potential market for or value of the original song.<sup>75</sup> The Court pointedly departed from the Sixth Circuit’s rote consideration of commerciality in assessing the likelihood of significant market harm caused by the parody.<sup>76</sup> The Court declined to follow the Sixth Circuit’s presumption of a likelihood of future market harm resulting from the parody given the “wholly commercial” use of the song.<sup>77</sup> Because the secondary use was transformative, the Court found the ability of “Pretty Woman” to serve as a market substitute and cause market harm could not automatically be inferred.<sup>78</sup> The Court posited that a parodic work is unlikely to affect the market for an original work because it usually serves a different market

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69. *Id.* The Court adopted the “conjure up” test formulated by appellate courts in *Elsmere Music, Inc. v. National Broadcasting Co.* and *Fisher v. Dees*. Under the test, use of copyrighted material is allowed provided no more of the original work is taken than is necessary to “conjure up” the object of the parody. *See Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432, 438–39 (9th Cir. 1986).

70. *Campbell*, 510 U.S. at 588.

71. *Id.*

72. *Id.* The Court noted that 2 Live Crew’s copying from the “heart” of “Oh, Pretty Woman” was justified because “the heart is . . . what most readily conjures up the song for parody” and it is “the heart at which the parody takes aim.” *Id.*

73. *Id.* at 589. The Court identified that, unlike the original, 2 Live Crew’s song used “scraper” noises, included musical solos in different keys, and varied in rhythm. *Id.*

74. *Id.* The Court remanded the case to the district court for determination of the third factor through evaluation of the copying of musical elements. *Id.*

75. Under the fourth factor analysis, the “markets” compared by the Court constitute populations of individuals who would hypothetically consume a copyrighted work and an allegedly infringing work and represent the respective values of each work. *See id.* at 590.

76. *See id.* at 590–92.

77. *See id.* at 591. The Sixth Circuit identified that “[i]f the intended use is for commercial gain, [the] likelihood [of future market harm resulting from the parody] may be presumed. But if it is for a noncommercial purpose, [that] likelihood must be demonstrated.” *Id.* (first alteration in original) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

78. *Id.*

function.<sup>79</sup> When viewed independent of its parodic function, the parody was a rap song and could impact the market for non-parodic rap derivative works of the original song.<sup>80</sup> As neither party provided evidence regarding the effect of “Pretty Woman” on the potential market for a rap version of “Oh, Pretty Woman,” the Court refrained from further consideration of the fourth fair use factor.<sup>81</sup>

The Court’s findings in *Campbell* constitute a seismic shift in the fair use doctrine as it relates to parody by both recognizing parody as a subset of fair use and outlining the contours of parodic fair use. The *Campbell* Court made significant findings concerning the purpose and character of a parodic use under the first fair use factor, namely identifying the potential of a parody to be transformative through criticizing or commenting on an original work.<sup>82</sup> The *Campbell* Court also determined the commercial nature of a parody cannot single-handedly foreclose a finding of fair use and instead is just one element to be considered when examining the purpose and character of a work.<sup>83</sup> Furthermore, the Court identified the interdependent relationship between the first and fourth factors of the fair use analysis.<sup>84</sup> The more transformative a use is, the less certain it is to serve as a market substitute for the original work and result in market harm.<sup>85</sup>

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79. *Id.* The Court found a copyrighted work and a parody of the copyrighted work would serve different market functions because they would be consumed by different populations of consumers. *See id.* at 593. Here, 2 Live Crew’s parody was a rap rendition of “Oh, Pretty Woman” and modified the lyrics of the song to reflect different sentiments than the original song. *Id.* As such, a consumer who wanted to listen to a rock ballad rendition of “Oh, Pretty Woman” would be unlikely to listen to 2 Live Crew’s song and would instead listen to the original song. A consumer who wanted to listen to a rap version of “Oh, Pretty Woman” would listen to 2 Live Crew’s song rather than the original song. Consequently, 2 Live Crew’s parody did not constitute a direct market substitute for the original song.

80. *Id.*

81. *Id.* at 593–94.

82. *Id.* at 583. The establishment of the “transformative test” for assessing the purpose and character of a work was a particularly significant change instated by *Campbell* that had a revolutionary effect on copyright law. Prior to *Campbell*, courts deployed varying interpretations of “purpose and character” in their assessments of fair use. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (considering the news reporting function of allegedly copied memoir passages in assessing the purpose and character of the allegedly infringing work). The consideration of transformativeness marked a change from courts’ previous, more stringent methods of interpreting purpose and character that primarily looked to functions of allegedly infringing works in their determinations. *See id.* By reworking the first factor to assess whether an allegedly infringing work does something more than “merely ‘supersede[] the objects’ of the original [work],” the Court broadened the scope of purpose and character and provided a more flexible inquiry under which the purpose of a use could weigh in favor of fairness. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)); *see, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 868 F. Supp. 1266, 1272–74 (N.D. Okla. 1994) (holding baseball cards that parodied authorized baseball cards served a distinct purpose despite the fact that both intended to be commercially used for trading and sale).

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

84. *See id.* at 591–92.

85. *Id.*

C. *The Supreme Court's Most Recent Ruling on Fair Use in AWF II*

In the Supreme Court's most recent ruling on non-parodic fair use, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, whether a use is transformative and of a commercial nature were consequential considerations.<sup>86</sup> In 1984, Lynn Goldsmith<sup>87</sup> licensed a photograph she took of the musician Prince to *Vanity Fair* for a one-time use as an "artist reference."<sup>88</sup> *Vanity Fair* hired renowned artist Andy Warhol to create a silkscreen print using Goldsmith's photograph and published an image of the work in an article about Prince.<sup>89</sup> *Vanity Fair* credited Goldsmith for the source photograph and compensated her with \$400.<sup>90</sup> However, Warhol went on to create fifteen additional works using Goldsmith's photograph.<sup>91</sup> In 2016, the Andy Warhol Foundation for the Visual Arts, Inc. (AWF) licensed one of those works (Orange Prince) for publication in *Condé Nast*.<sup>92</sup> AWF received \$10,000 while Goldsmith received neither compensation nor credit for her photograph.<sup>93</sup> During the interim between the initial licensing of the photo to *Vanity Fair* and the publication of Orange Prince in *Condé Nast* over thirty years later, Goldsmith licensed her works as artist references to other publications.<sup>94</sup> AWF sued Goldsmith and her representative agency for a declaratory judgment of noninfringement or fair use, and Goldsmith counterclaimed infringement.<sup>95</sup>

While the district court found that AWF's use of the photograph infringed Goldsmith's copyright, it ruled that the infringement was excused under the fair use doctrine. However, the Court of Appeals for the Second Circuit reversed, holding that all four fair use factors favored Goldsmith.<sup>96</sup> Under the first factor, the Second Circuit determined that a use is transformative if it is "in service of a fundamentally different and new artistic purpose and character" and "comprise[s] something more than the imposition of another

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86. 598 U.S. 508, 529–32 (2023) (*AWF II*).

87. The Court took care to acknowledge Goldsmith's standing as an artist. *See id.* at 515. While Andy Warhol is a well-known artistic icon, Goldsmith is also a "trailblazer" in her niche of rock-and-roll musician photography. *Id.*

88. *Id.* at 515–16.

89. *Id.* at 515.

90. *Id.*

91. *Id.* at 518. The thirteen silkscreen prints and two pencil drawings collectively constitute the "Prince Series." *Id.* at 518–22.

92. *Id.* at 519.

93. *Id.* at 520. Furthermore, Goldsmith was unaware of both the existence and AWF's use of the Prince Series until she saw one of the works featured on the cover of *Condé Nast*. *See id.* at 522.

94. *Id.* at 516–20. Goldsmith received both compensation and source credit in all instances where she herself licensed her photographs of Prince as artistic references to publications. *Id.*

95. *Id.* at 522.

96. *Id.* at 522–23; *see* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 54 (2d Cir. 2021) (*AWF I*), *aff'd*, 598 U.S. 508 (2023) (*AWF II*).

artist's style on the primary work.”<sup>97</sup> However, Orange Prince and Goldsmith's photograph had identical overarching purposes as portraits of the same subject, so the use was not transformative.<sup>98</sup> Under the second factor, the Second Circuit found the “creative and unpublished nature” of Goldsmith's photograph suggested unfair use.<sup>99</sup> Under the third factor, the Second Circuit found Orange Prince copied the essence of the original photograph, making the amount and substantiality of the portion used unreasonable in relation to the purpose of the secondary use.<sup>100</sup> Finally, the court found that AWF's commercial licensing encroached upon Goldsmith's protected markets to license the photograph to publications and create derivative works, tipping the fourth factor toward unfair use.<sup>101</sup> On appeal, the Supreme Court's sole inquiry was whether the Second Circuit correctly found that the first fair use factor weighed in Goldsmith's favor.<sup>102</sup>

The Court began its analysis of Orange Prince by revisiting its previous decision in *Campbell* and extracting two important points.<sup>103</sup> First, the Court noted that the commercial nature of a use is an additional element of the first factor to be weighed against the degree to which a secondary use has a further purpose or different character (i.e., is “transformative”).<sup>104</sup> Second, the Court identified that the first fair use factor also relates to the justification for the secondary use.<sup>105</sup> Uses that have distinct purposes are broadly justified by furthering the goal of copyright but may also be justified by the necessity of copying to achieve the purpose of the secondary use.<sup>106</sup> However, whether the amount used is justified is also a question of

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97. *AWF II*, 598 U.S. at 523 (quoting *AWF I*, 11 F.4th at 42).

98. *Id.*

99. *Id.* at 524. *But cf.* 17 U.S.C. § 107 (flush language) (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all [other] factors.”).

100. *AWF II*, 598 U.S. at 524.

101. *Id.*

102. *Id.* at 525.

103. *Id.* at 529–32.

104. *Id.* at 531 (“[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.” (alteration in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))). The Court of Appeals for the Second Circuit recently interpreted the purpose and character standard of *AWF II* in *Hachette Book Group, Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024). In assessing Internet Archive's sharing of digital copies of copyrighted books, the Second Circuit identified that although both transformativeness and commerciality are considered, “transformativeness is the ‘central’ question.” *Id.* at 179 (quoting *AWF II*, 598 U.S. at 528). The *Hachette* court also noted courts should “assess commerciality ‘with caution’” because many prototypical examples of fair use are generally conducted for profit. *Id.* at 184 (quoting *AWF I*, 11 F.4th 26, 44 (2d Cir. 2021), *aff'd*, 598 U.S. 508 (2023)).

105. *See AWF II*, 598 U.S. at 531.

106. *Id.* at 531–32. The Court identified parody and other forms of commentary and criticism are secondary uses requiring mimicry of an original work. *See id.*

degree.<sup>107</sup> Determination of the purpose and character of a secondary use requires balancing the degree to which the use is transformative against the commercial nature of the use.<sup>108</sup> If a secondary use has the same or a highly similar purpose as the first use and is commercial in nature, then the first fair use factor will likely weigh against a finding of fair use provided there is no other justification for the use.<sup>109</sup>

The Court limited its purpose and character analysis to AWF's commercial licensing of Orange Prince to *Condé Nast* and found the use shared a similar purpose with the original use of Goldsmith's photograph.<sup>110</sup> Goldsmith licensed her photograph to other magazines before and after Prince's death for use in published articles.<sup>111</sup> Orange Prince appeared in the context of a *Condé Nast* article about Prince, and because celebrity photographs are typically used to accompany magazine stories about celebrities, Orange Prince shared the same purpose as Goldsmith's photograph.<sup>112</sup> Even if the two works were not perfect substitutes, their respective "environment[s]" [were] not "distinct and different" enough to constitute different uses.<sup>113</sup> Additionally, the use of Goldsmith's photograph in Orange Prince was of a commercial nature because AWF licensed Orange Prince to *Condé Nast* for payment, just as Goldsmith licensed her photograph to *Vanity Fair*.<sup>114</sup> Collectively, the substantially similar purpose and commercial nature of AWF's licensing of Orange Prince counseled against a finding of fair use.<sup>115</sup>

The Court declined to agree with AWF's suggestion that Orange Prince was transformative because it conveyed a new meaning or message compared to Goldsmith's original photograph.<sup>116</sup> Per *Campbell*, a transformative use alters a work by providing a new expression, meaning, or message.<sup>117</sup> However, the Court clarified this does not mean that any use that adds some new expression, meaning, or message is transformative and

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107. See *id.* at 532. The *Hachette* court also emphasized this quality, noting that while many instances of copying have some further purpose and many works add something new, "that alone 'does not render such uses fair.'" *Hachette*, 115 F.4th at 180 (quoting *AWF II*, 598 U.S. at 528).

108. See *AWF II*, 598 U.S. at 532.

109. *Id.* at 532–33.

110. *Id.* at 534–35.

111. *Id.* The Court also took care to note that "licenses . . . are how photographers like Goldsmith make a living" and "provide an economic incentive to create original works, which is the goal of copyright." *Id.* at 535.

112. *Id.* at 535–38.

113. *Id.* at 535–36 (first alteration in original) (quoting *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 31 (2021)).

114. *Id.* at 537.

115. *Id.* at 537–38.

116. *Id.* at 540–41. AWF argued Orange Prince functioned to convey "the dehumanizing nature of celebrity." Brief for Petitioner at 44, *AWF II*, 598 U.S. 508 (2023) (No. 21-869).

117. See *AWF II*, 598 U.S. at 541 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

thus fair.<sup>118</sup> In *Campbell*, the Court’s analysis of the objective meaning of 2 Live Crew’s parodic song was only relevant to the investigation of the reasons for copying; any new expression, meaning, or message invoked by the song was irrelevant to the actual copying inquiry.<sup>119</sup> Ultimately, the new expression, meaning, or message of a secondary use is not dispositive of a transformative use.<sup>120</sup> Rather, the reasonably perceived meaning of a secondary work is only considered to the extent necessary to determine whether the use is distinct from the original work.<sup>121</sup>

Applying this reasoning, the Court accepted the district court’s conclusion that Orange Prince could be perceived as representing Prince as “iconic,” while Goldsmith’s photograph depicts Prince as “photorealistic” in the context of the specific use at issue.<sup>122</sup> However, the Court found this different characterization was insufficient to create a new purpose.<sup>123</sup> Both works still served to visually depict Prince alongside a magazine article about Prince, and Orange Prince does not critically assess or interpret Goldsmith’s original photograph.<sup>124</sup> The Court similarly rejected AWF’s related argument that Orange Prince functions to comment on the “‘dehumanizing nature’ and ‘effects’” of celebrity status because such commentary has no critical bearing on the original work.<sup>125</sup>

The failure to find fair use in AWF’s licensing of Orange Prince alters the analytical process for gauging the purpose and character of a work under the first statutory fair use factor. First, more weight is given to the commercial nature of a secondary use within the holistic analysis of purpose and character.<sup>126</sup> Consequently, even if a use borders on transformative, it may be deemed unfair if it is highly commercial in nature.<sup>127</sup> Second, in gauging whether a secondary use is transformative, invocation of a new

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118. *See id.* The Court cautioned that an expansive interpretation of transformative use would “swallow the copyright owner[s]’ exclusive right[s] to prepare derivative works,” and the addition of a new meaning does not “in itself dispense with the need for licensing.” *Id.*

119. *Id.* at 542. In *Campbell*, the Court examined the parodic purpose of 2 Live Crew’s song to comment on or criticize the original song and considered the new song’s lyrics in gauging whether parody could reasonably be perceived. *See Campbell*, 510 U.S. at 583.

120. *See AWF II*, 598 U.S. at 541.

121. *See id.* at 542.

122. *Id.* at 545.

123. *See id.* at 546.

124. *See id.* at 545. The Court noted that holding otherwise would risk enabling commercial copying of photographs for the same purposes as the original and allow one to claim transformative use from “modest alterations” so long as they “somehow portray[] the subject of the photograph differently.” *Id.* at 546.

125. *Id.* (quoting Brief for Petitioner, *supra* note 116, at 44, 51).

126. *Id.* at 537–38. However, the Court clarified that sometimes “a use’s transformativeness may outweigh its commercial character.” *Id.* at 538.

127. In *AWF II*, the Court rooted its finding of commercial nature in AWF’s licensing of Orange Prince to accompany a magazine article about Prince—the same use as Goldsmith’s original photograph—rather than in Andy Warhol’s original creation of the work. *See id.* at 533–40.

expression, meaning, or message is not dispositive of a finding of distinct purpose and fair use.<sup>128</sup> Rather, it is one of multiple factors to be considered and is simply relevant to the inquiry of the purpose and character of a use.

## II. PROBLEMS WITH GAUGING FAIR USE IN PARODY

The challenges courts face in determining fair use in parodic works arise from two primary issues: inconsistent interpretations of the *Campbell* decision and an overemphasis on commercial aspects in fair use analyses. First, courts' various interpretations and applications of *Campbell* and the statutory fair use test provide little guidance about how to gauge parodic fair use. As a result, courts often defer to their own readings of *Campbell* and place dispositive weight on the first fair use factor.<sup>129</sup> Second, the analysis of the first fair use factor in *AWF II* augments the impact of perceived commercial nature and underplays a secondary use's new message in a fair use determination.<sup>130</sup> This modified and mandatory interpretation of the fair use standard articulated in *Campbell* risks skewing fair use analyses of parody toward commercial and property-based considerations, chilling parodic fair use and hindering the function of parody as a means of commentary and criticism.<sup>131</sup>

This Part examines the two challenges courts face when assessing fair use in parody. Section A condenses appellate caselaw into two modes of determining fair use in parody. Section B highlights two problems that persist within both approaches. Finally, Section C delineates the ways that the Supreme Court's holding in *AWF II* aggravates existing flaws in the parodic fair use analysis and demonstrates these weaknesses in practice by applying the reworked purpose and character factor to a recent parody case.

### A. *The Two Approaches to Gauging Fair Use in Parody*

Post-*Campbell* caselaw from courts of appeals demonstrates two distinct analytical approaches to applying the fair use doctrine to parody. When evaluating fair use, appellate courts adopt either a creativity-oriented approach or a property-oriented approach, depending on their assessments of transformative use and the commercial nature of the secondary work

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128. See *id.* at 539–49.

129. See *infra* Sections II.A, II.B.

130. See *infra* Section II.C.

131. See Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 552–64 (1998) (“[A] legal doctrine that restricts the ability of the parodist to borrow from contemporary works necessarily shackles the parodist’s ability to comment upon contemporary culture.”).

under the first fair use factor.<sup>132</sup> The following Subsections describe the analytical hallmarks of these two approaches.

### 1. *The Creativity-Oriented Approach*

If a parodic work is deemed more transformative under the first factor, a court tends to adopt a creativity-oriented approach. Under this approach, a court is more likely to find that the use of a substantial portion of an original work in a parody is fair under the third fair use factor, given the transformative nature of the work.<sup>133</sup> In *Suntrust Bank v. Houghton Mifflin Co.*, the Court of Appeals for the Eleventh Circuit found the novel *The Wind Done Gone (TWDG)* made transformative and fair use of copyrighted elements of *Gone With The Wind (GWTW)*.<sup>134</sup> When gauging the third fair use factor, the Eleventh Circuit applied the “conjure up” standard from *Campbell*,<sup>135</sup> noting that use of any copyrighted material beyond that necessary to conjure up *GWTW* “must specifically serve the new work’s parodic aims.”<sup>136</sup> Thus, appropriation of famous lines and memorable scenes from *GWTW* within *TWDG* did not foreclose a finding of fair use given the parodic purpose of *TWDG*.<sup>137</sup> Additionally, a court may weigh qualities related to the transformative nature of a parody when assessing the third fair use factor.<sup>138</sup> In *Mattel Inc. v. Walking Mountain Productions*, the Court of Appeals for the Ninth Circuit found that a parodist’s photographic series, “Food Chain Barbie,” made fair use of copyrighted elements of Mattel’s Barbie doll figurine.<sup>139</sup> The Ninth Circuit found the amount of the Barbie figurine copied to “conjure up” the original was not excessive given

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132. See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

133. See *Suntrust Bank*, 268 F.3d at 1271–74.

134. *Id.* at 1269–76. *TWDG* retells *GWTW* from the perspective of a slave on a Southern plantation during and after the Civil War. *Id.* at 1270. The court found *TWDG* is “principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*.” *Id.*

135. *Id.* at 1273; *supra* note 69.

136. *Id.* at 1271. References to the plot and characters of *GWTW* are done “in service of [the parodist’s] general attack on *GWTW*.” *Id.* at 1270.

137. *Id.*

138. See generally *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

139. *Id.* at 803–06. The “Food Chain Barbie” series consists of photographs of unclothed Barbie dolls in suggestive poses on vintage kitchen appliances. *Id.* at 796. The series also includes “Barbie Enchiladas,” a photograph depicting unclothed Barbie dolls wrapped in tortillas, covered in enchilada sauce, and arranged in a casserole dish. *Id.*

the photographic medium and the transformative creation of context in the parody.<sup>140</sup>

The purpose and character of a parody also heavily influences a court's determination of the fourth fair use factor under the creativity-oriented approach. A finding of transformative use makes a court less likely to find potential harm to the market for an original work.<sup>141</sup> When a secondary use is transformative, "market substitution is . . . less certain, and market harm [to the original work] may not be so readily inferred."<sup>142</sup> Additionally, similar to the third fair use factor, a court may weigh considerations tangential to fair use when gauging potential market harm.<sup>143</sup> In *Mattel Inc.*, the court considered the public benefit derived from the parody and the copyright owner's gains from the original work when assessing possible market harm.<sup>144</sup> Given the substantial benefits derived from the artistic creativity and social criticism in the Food Chain Barbie series, the fourth factor weighed in favor of fair use.<sup>145</sup>

## 2. *The Property-Oriented Approach*

If a parodic work is found to be highly commercial under the first fair use factor, a court may adopt a property-oriented approach. Similar to the creativity-oriented approach, determination of the purpose and character of a work under the property-oriented approach guides a court's analysis of the third and fourth fair use factors. The dominant commercial nature of a parody enables a court to more readily find that the amount and substantiality of the portion of an original work used in a parody is unfair.<sup>146</sup> In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the Ninth Circuit found *The Cat NOT in the Hat! A Parody by Dr. Juice*, a book relaying events of the murder trial of O.J. Simpson using copyrighted elements from *The Cat in the Hat* and the characteristic style of Dr. Seuss, made unfair use

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140. *See id.* at 803–06. The court noted that, because the original work was a physical figurine and the allegedly infringing work was a photograph depicting the figurine, the parodist was not able to leverage the "naturally severable" features available to the copying of songs, videos, and written works in making the parody. *Id.* at 804. Consequently, the medium of expression necessitated consideration of contextual elements, and the creation of context around the physical doll in the parodist's photographic works was transformative. *See id.*

141. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

142. *Id.* In contrast, "when a commercial use amounts to mere duplication of the entirety of an original . . . [it] serves as a market replacement for [the original], making it likely that cognizable market harm to the original will occur." *Id.*; *see supra* note 79.

143. *See Mattel Inc.*, 353 F.3d at 804–06.

144. *Id.* Consideration of the public benefit derived from a parody when assessing the fourth fair use factor was first done in *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

145. *Mattel Inc.*, 353 F.3d at 806.

146. *See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

of the original work.<sup>147</sup> Specifically, the work was not a parody, not transformative, and highly commercial in nature.<sup>148</sup> In gauging the third fair use factor, the court conducted a quantitative analysis of the portion of the original work used, counting the number of times the Cat in the Hat's image and hat were appropriated in the parody.<sup>149</sup> The Court found the appropriation of the Cat in the Hat's image and hat constituted the "highly expressive core of Dr. Seuss' work" because the Cat is the "central character, appearing in nearly every image of *The Cat in the Hat*."<sup>150</sup> As such, the repeated appropriation of these two elements was indicative of the amount and substantiality of the portion of *The Cat in the Hat* copied in *The Cat NOT in the Hat!*<sup>151</sup> As in *Campbell*,<sup>152</sup> the *Dr. Seuss* court weighed the parodists' weak justification for copying under the third factor, finding it did not support fair use.<sup>153</sup>

Furthermore, under the property-oriented approach, the commercial nature of a parody allows courts to assume a greater likelihood of market substitution and thus more readily infer market harm.<sup>154</sup> Similar to *Mattel Inc.*, the *Dr. Seuss* court balanced the public benefit derived from the parody against the copyright owner's gains when assessing market harm, finding substantial "good will and reputation" associated with Dr. Seuss's work.<sup>155</sup> The *Dr. Seuss* court assumed a greater likelihood of market substitution and inferred market harm on the basis of the parody's "nontransformative, and admittedly commercial," nature.<sup>156</sup>

### B. Flaws in the Two Approaches

The creativity- and property-oriented approaches to assessing fair use in parody are plagued by two flaws. First, the purpose and character factor tends to carry dispositive weight in courts' fair use analyses of parody, resulting in distorted consideration and weighing of the four statutory fair use factors. Second, the indefiniteness of what constitutes commercial nature enables courts to construe and assess commerciality based on

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147. *See id.* at 1399–1403.

148. *See id.* at 1399–1401, 1403.

149. *See id.* at 1402–03.

150. *Id.* at 1402.

151. *See id.*

152. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“[A]ttention turns to the persuasiveness of a parodist’s justification for the particular copying done . . .”).

153. *Dr. Seuss Enters., L.P.*, 109 F.3d at 1403. The defendants argued their copying was justifiable as a parody because it “transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns.” *Id.* at 1402.

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

155. *Dr. Seuss Enters., L.P.*, 109 F.3d at 1403.

156. *Id.*

decidedly noncommercial elements of parodies. The following Subsections detail these flaws and describe their persistence in precedent.

### 1. *The Dispositive Nature of the First Fair Use Factor*

Post-*Campbell* lower court decisions assessing parody demonstrate a significant flaw in contemporary assessments of parodic fair use. When applying *Campbell* to parody cases, lower courts tend to thoroughly evaluate the purpose and character of a parody, while declining to consider its “nature.” Consequently, their findings under the third and fourth statutory fair use factors hinge upon the purpose and character of a parody.<sup>157</sup> The first fair use factor, and namely whether a parody is dominantly transformative or commercial, is the impetus behind courts’ entire fair use analyses. The third and fourth fair use factors assess the portion of an original work used and the potential market harm caused, respectively. However, whether a use is transformative or commercial ultimately determines the outcomes of these factors. The dispositive weight given to the first fair use factor when assessing parody directly contradicts *Campbell*’s guidance that the four statutory fair use factors must be collectively analyzed and weighed when assessing fair use.<sup>158</sup> Additionally, if courts conduct vague or shoddy assessments of the purpose and character of works, the dispositive nature of the first factor spreads the poor analytical quality throughout the remainder of their analyses.<sup>159</sup>

### 2. *The Indefiniteness of a Commercial Nature*

Current approaches to assessing fair use also suffer from indefiniteness of what makes a parody commercial and what role commercial nature should play in a parodic fair use analysis.<sup>160</sup> When weighing the transformative and commercial natures of a parody, some courts support a lack of commerciality through emphasizing a minimally transformative

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157. See *id.* at 1402–03; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271–76 (11th Cir. 2001); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803–06 (9th Cir. 2003).

158. *Campbell*, 510 U.S. at 578.

159. See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 183–85 (2d Cir. 1981); see *infra* Section II.B.2.

160. For-profit motives historically have been considered in fair use analyses. See, e.g., *Benny v. Loew’s Inc.*, 239 F.2d 532, 534 (9th Cir. 1956), *aff’d by an equally divided Court sub nom.* *Columbia Broad. Sys., Inc. v. Loew’s Inc.*, 356 U.S. 43 (1958) (per curiam) (“[T]he chief contention advanced by appellants is that the burlesque presentation of ‘Gas Light’ was a ‘fair use’ of appellees’ photoplay; that . . . they had the right to adapt the original copyrighted dramatic work of the author of the play and of the photoplay version as a burlesque, and to present, vend, and appropriate it thus, for their own profit.”).

use.<sup>161</sup> Other courts adopt more inventive definitions of commerciality that risk chilling parody if adopted in subsequent caselaw.<sup>162</sup>

A court may justify a weak commercial nature through a finding of a strong transformative use, blurring the distinction between commerciality and transformativeness.<sup>163</sup> In *Leibovitz v. Paramount Pictures Corp.*, the Second Circuit assessed the fairness of a movie advertisement parodying a 1990 *Vanity Fair* magazine cover featuring actress Demi Moore.<sup>164</sup> The court considered specific language from *Campbell*, discussing the lesser “indulgence” afforded to parodic advertisements when assessing the purpose and character of a parody.<sup>165</sup> However, the court’s description of *Campbell*’s “clarification of the fair use defense for parodies” barely mentioned commercial nature.<sup>166</sup> Instead, the court justified the advertisement’s lack of commerciality by emphasizing its highly transformative use.<sup>167</sup>

Other justifications for commercial nature may be covertly based upon disapproval of the subject matter of a parody.<sup>168</sup> In *MCA, Inc. v. Wilson*, the Second Circuit found the defendant’s cabaret song, “Cunnilingus Champion of Company C” (Cunnilingus Champion), infringed upon MCA, Inc.’s copyright in “Boogie Woogie Bugle Boy of Company B” (Bugle Boy).<sup>169</sup> The Second Circuit upheld the district court’s findings that Cunnilingus Champion was not a parody and was dominantly commercial because it competed with Bugle Boy in the entertainment industry.<sup>170</sup> However, the denial of fair use was instead likely due to both courts’ distaste of the subject matter of the parody.<sup>171</sup>

*Leibovitz* and *MCA, Inc.* demonstrate the implications of leaving commercial nature undefined as it relates to parody. Without further instruction as to what makes a parody commercial, courts are free to craft inconsistent—and sometimes convenient—definitions of commerciality.

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161. See, e.g., *Dr. Seuss Enters., L.P.*, 109 F.3d at 1401; see *supra* Section II.A.2.

162. See Van Hecke, *supra* note 18, at 480–83.

163. See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114, 116–17 (2d Cir. 1998).

164. *Id.* at 111–12.

165. *Id.* at 113 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

166. *Id.*

167. See *id.* at 112–17.

168. See Van Hecke, *supra* note 18, at 481–83; see generally *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

169. *MCA, Inc.*, 677 F.2d at 185.

170. *Id.* (“Both Bugle Boy and Cunnilingus Champion were performed on the stage. Both were sold as recordings. Both were sold in printed copies.”).

171. *Id.* (“We are not prepared to hold that a commercial composer can plagiarize a competitor’s copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.”); see Van Hecke, *supra* note 18, at 482–83 (describing judicial disapproval of content as a dispositive factor in fair use analyses).

C. *Complications in Gauging Fair Use in Parody Under the Findings of AWF II*

The Supreme Court's findings in *AWF II* regarding the first fair use factor strain existing weaknesses in the fair use analysis of parody described above. First, the Court's decreased emphasis on a new meaning when determining if a use is transformative implicates a core feature of parody and may decrease judicial perception of parodic commentary or criticism. Second, the Court's increased emphasis on the commercial nature of a work may dominate fair use analyses of parody, further chilling judicial perception of parody. The following Subsections elaborate upon these two complications and demonstrate the practical obstacles they pose through application of the reworked purpose and character factor to a recent parody case.

1. *The Decreased Emphasis on a New Meaning When Determining if a Use is Transformative*

The Supreme Court's lessened emphasis on a new meaning when determining whether a use is transformative may elevate the importance of the first fair use factor in the assessment of parody.<sup>172</sup> A parody is only transformative if it introduces a new expression, meaning, or message that comments on or critiques an original work.<sup>173</sup> By modifying the conceptualization of transformative nature, *AWF II*'s holdings implicate the defining characteristic of parody.<sup>174</sup> In its analysis, the Court took care to distinguish Orange Prince as a non-parodic work but did not explicitly insulate parody from its reworking of the first fair use factor.<sup>175</sup> As a result, the modified standard for what makes a use transformative threatens to

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172. See *AWF II*, 598 U.S. 508, 541 (2023) (“*Campbell* cannot be read to mean that §107(1) weighs in favor of any use that adds some new expression, meaning, or message. Otherwise, ‘transformative use’ would swallow the copyright owner’s exclusive right to prepare derivative works.”); *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 181 (2d Cir. 2024) (“To construe [Internet Archive’s] use of the [w]orks as transformative would significantly narrow—if not entirely eviscerate—copyright owners’ exclusive right to prepare (or not prepare) derivative works.”).

173. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–80 (1994); see also *AWF II*, 598 U.S. at 529–32.

174. See *Campbell*, 510 U.S. at 583 (“It is this joinder of reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.”).

175. See *AWF II*, 598 U.S. at 537–40. In distinguishing Orange Prince as a non-parodic use, the Court analyzed Warhol’s Soup Cans series. *Id.* While Orange Prince shared “substantially the same purpose” with Goldsmith’s photograph, Soup Cans uses the Campbell’s soup logo to provide artistic commentary on consumerism that targets the original logo. *Id.* at 539. Although the Court did not specifically describe Soup Cans as a parody, the Court applied the *Campbell* parody analysis to the series. *Cf. id.*; *Northland Fam. Plan. Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 971 (C.D. Cal. 2012) (“The *Campbell* parody rule has been applied across all artistic media.”).

decrease judicial recognition of parody created through a new message or meaning.<sup>176</sup> If a court finds that a parody does not comment on an original work, it will be subject to the reworked non-parodic fair use standard.<sup>177</sup>

## 2. *The Increased Emphasis on the Commercial Nature of a Use*

The Supreme Court's increased emphasis on the commercial nature of a secondary use in *AWF II* may also chill judicial recognition of parody, as parodies often involve commercial elements but are nonetheless considered transformative under traditional fair use standards. The *AWF II* Court recognized that commercial nature is a distinct element of the first fair use factor, and although commercial nature is not dispositive, it is relevant to the purpose and character analysis.<sup>178</sup> However, the Court largely based its assessment of the first fair use factor on the commercial nature of Orange Prince, finding that AWF's licensing of the work for profit gave it an "undisputed commercial character."<sup>179</sup> Similar to the way the Court's reduced focus on a new meaning weakens perception of transformative use, the Court's heightened emphasis on commercial qualities may further

176. The potential of the modified standard to redefine what makes a use transformative is exemplified in the Court of Appeals for the Tenth Circuit's recent interpretation of *AWF II* in a non-parody case. *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699 (10th Cir. 2024), *vacated, reh'g granted*, 101 F.4th 787 (10th Cir. 2024). In *Whyte Monkee*, the Tenth Circuit assessed the fairness of the use of a videographer's copyrighted video footage in the Netflix docuseries, *Tiger King: Murder, Mayhem, Madness*. *Id.* at 705, 707–08. In relying upon language in *AWF II*, the court found the Defendant's use of the video footage was not transformative as the use did not target or comment on the videographer's work. *Id.* at 714. Rather, the court found the footage was used to illustrate the showmanship of Joe Exotic, the main character of the show, and provide a "historical reference point" for Mr. Exotic's life. *Id.* This finding runs contrary to a plethora of existing caselaw that considered uses of copyrighted works to provide historical reference points to be transformative. *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 605–07 (2d Cir. 2006) (finding the inclusion of reproductions of seven copyrighted Grateful Dead tour posters in a book detailing the history of the band through a chronological timeline with images and explanatory text made fair use of the original works).

177. The decreased weight given to a new meaning under the reworked non-parodic fair use standard poses a particular threat to borderline cases of parody and may compel courts to err on the side of not finding a work to be a parody.

178. *AWF II*, 598 U.S. at 530–32.

179. *Id.* at 534–38. The Court also emphasized the relative stakes that the parties to the action had in the licensing of Orange Prince, noting that "[s]uch licenses, for photographs or derivatives of them, are how photographers like Goldsmith make a living." *Id.* at 535. This provides an interesting contrast with the use of original works in parodies, in which the parodist generally is the less financially enabled party. *See, e.g.*, *Sketchworks Indus. Strength Comedy, Inc. v. Jacobs*, No. 19-CV-7470, 2022 WL 1501024 (S.D.N.Y. May 12, 2022). Although the profits of *Vape* were not disclosed in *Sketchworks*, profits from the original Broadway musical *Grease* as well as the later film adaptation likely outweigh those accrued from the play. Between 1972 and 1979, *Grease* grossed \$70 million on Broadway, returning \$400,000 for every \$10,000 invested in the production. Tom Buckley, '*Grease* Breaks a Record on Broadway', N.Y. TIMES, Dec. 7, 1979, at C8. Moreover, the film adaptation of *Grease* is one of the fifteen most profitable movies of all time and grossed \$394 million, returning nearly twenty times its \$20 million production cost. Daniel Bukszpan, *The 15 Most Profitable Movies of All Time*, CNBC (Jan. 29, 2014, 2:35 PM), <https://www.cnbc.com/2010/09/10/The-15-Most-Profitable-Movies-of-All-Time.html> [<https://perma.cc/C5F6-B7AF>].

diminish judicial recognition of parody. Parodic works frequently use the same medium as the original works,<sup>180</sup> likely to optimize audience recognition of the work being parodied, and as a result share similar commercial attributes. The emphasis on the shared commercial quality of licensing in *AWF II* suggests that the commercial aspects of a parody could overpower judicial perception of parody.<sup>181</sup> The heightened focus on commercial nature may also blur the boundaries of commerciality, enabling courts to decline to recognize parodies they dislike for reasons unrelated to fair use.<sup>182</sup> Although more recent decisions suggest these practices may be waning,<sup>183</sup> cases with flawed analyses remain good law and may be relied upon as precedent in future fair use determinations.<sup>184</sup>

### 3. *The Complications of AWF II in Practice*

It remains unclear whether *AWF II*'s reworked interpretation of the first fair use factor definitively applies to parody. In *AWF II*, the Supreme Court appeared to affirm key components of the *Campbell* parodic fair use framework.<sup>185</sup> However, the Court did not provide explicit guidance insulating parodic works from analysis under the reworked purpose and

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180. See *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 804 (9th Cir. 2003) (“Copyright infringement actions generally involve songs, video, or written works. Because parts of these works are naturally severable, the new work can easily choose portions of the original work and add to it.” (citations omitted)); *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (holding that the song “I Love Sodom” on a broadcasted television comedy sketch was a parody and made fair use of the advertising jingle “I Love New York”). The common commercial attributes between a parody and an original work are also exemplified in *Sketchworks*. See *Sketchworks Indus. Strength Comedy, Inc.*, 2022 WL 1501024, at \*1–2. In creating a parody of *Grease*, it is logical that the parodists also used a musical medium to ensure maximum recognition of the original work. Similarly, it is logical that the parodic musical production would also be put on for profit.

181. In *AWF II*, Goldsmith licensed her photograph to *Vanity Fair* for \$400 while AWF licensed Orange Prince to *Condé Nast* for \$10,000. *AWF II*, 598 U.S. at 537. The sensitivity of the modified purpose and character factor to commercial nature is exemplified in the Fourth Circuit’s recent interpretation of *AWF II* in a non-parody case. *Philpot v. Indep. J. Rev.*, 92 F.4th 252 (4th Cir. 2024). In *Philpot*, the Fourth Circuit assessed the fairness of a news website’s use of a photographer’s copyrighted photograph without a license. *Id.* at 256–57. The court found the website’s use of the photograph was not fair use due to lack of transformativeness and commercial nature. *Id.* at 260. The court noted that “the article [containing the photo] was not especially profitable” for the Defendant, earning them only \$2 to \$3 in advertising revenue. *Id.* However, “the salient question is whether [the Defendant] stood to profit, not whether it was particularly successful [in the use of the copyrighted work,]” and the use was found to be commercial. *Id.* Thus, even miniscule profits can classify a use as commercial and weigh against a finding of fair use in non-parodic works. *Cf. Mattel Inc.*, 353 F.3d at 797 (“The ‘Food Chain Barbie’ series earned [the defendant a] total gross income of \$3,659.”).

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

183. See, e.g., *Sketchworks Indus. Strength Comedy, Inc.*, 2022 WL 1501024, at \*3–7 (finding a modernized parody musical of *Grease* containing themes of drug use and rape culture made fair use of the original work).

184. At the time of writing this Note, *MCA, Inc.* has been neither overruled nor abrogated.

185. *AWF II*, 598 U.S. at 529–33. The Court acknowledged that parodies must have a transformative nature through commenting on or criticizing an original work and must conjure up an original work by borrowing from it. *Id.*

character factor. As a result, future courts could incorporate the findings in *AWF II* when assessing parody under the fair use doctrine.

The implications of *AWF II*'s purpose and character analysis on parody are best demonstrated through application of the reworked first factor to a recent case. In *Lombardo v. Dr. Seuss Enterprises, L.P.*, a federal district judge assessed the use of copyrighted material from the popular children's book *How the Grinch Stole Christmas!* (*Grinch*) in the plaintiffs' one-woman comedic play, *Who's Holiday!* (the Play).<sup>186</sup> *Grinch* recounts the story of the Grinch, a pessimistic green creature residing on Mount Crumpit. The Grinch, who hates Christmas, learns the true meaning of the holiday after stealing and subsequently returning holiday decorations and gifts belonging to the Whos celebrating in Who-Ville.<sup>187</sup> When stealing the decorations and gifts in the middle of the night, the Grinch encounters and interacts with Cindy-Lou Who, a two-year-old girl.<sup>188</sup>

The Play features a "down-and-out 45 year-old version of Cindy-Lou Who" who resides in a trailer in the hills of Mount Crumpit.<sup>189</sup> Over the course of the Play, and while consuming copious amounts of hard alcohol and prescription drugs, Cindy-Lou recounts her life story, beginning with her initial childhood encounter with the Grinch, as in the original story of *Grinch*.<sup>190</sup> She shares how, as a teenager, she began a romantic relationship with the Grinch, had a child with him, and later killed him in self-defense.<sup>191</sup> As a result, Cindy-Lou served time in prison, and her child was put in foster care.<sup>192</sup> Throughout the play, Cindy-Lou speaks only in rhyming couplets reminiscent of Dr. Seuss's style, but incorporates inappropriate language and adult-themed humor.<sup>193</sup>

When assessing the fairness of the use under the first factor, the district court held that the Play was a parody and made fair and transformative use of material from *Grinch*, thoroughly analyzing its transformative nature while dismissing any effect of its commerciality.<sup>194</sup> However, if assessed

186. 279 F. Supp. 3d 497, 502 (S.D.N.Y. 2017), *aff'd*, 729 F. App'x 131 (2d Cir. 2018).

187. *Id.* at 502–03.

188. *Id.* When the Grinch steals the Whos' Christmas trees, decorations, and presents, Cindy-Lou asks the Grinch why he is taking her family's tree. *Id.* The Grinch concocts a lie that he is repairing a broken light on the tree and will return the tree after he fixes it. *Id.* at 503. Cindy-Lou then returns to bed, believing the Grinch's lie. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* For example, when describing her initial encounter with the Grinch, Cindy-Lou states, "I watched for a while as he was stealin our shit / Then I cooed by mistake and he saw me. That twit." *Id.*

194. *Id.* at 506–10. The court did not address the possible effect of the second fair use factor. *Id.* at 510–11. The court found the amount and substantiality of the original *Grinch* used in the Play and the effect of the Play on the market for the original *Grinch* also weighed in favor of the parodists. *Id.* at 511–

under the reworked purpose and character analysis of *AWF II*, the outcome of the case could have been significantly different. The district court might have determined that the Play was not a parody, concluding that it did not comment on or criticize *Grinch* but merely appropriated its characters and “Seussian” style to convey its own independent storyline.<sup>195</sup> As a result, the fairness of a hypothetical “non-parodic use” would be assessed under the modified first fair use factor of *AWF II*. Under the modified first factor, the court could have determined that the Play was a satirical derivative work, given its distinct plot and appropriation of similar characters and settings.<sup>196</sup> Consequently, the lack of transformativeness in the Play would weigh against a finding of fair use.

Furthermore, *AWF II*'s increased emphasis on commercial nature would warrant reconsideration of the commerciality of the Play.<sup>197</sup> The district court glossed over the commercial nature of the Play in its analysis, finding it had little significance given the strong transformative quality.<sup>198</sup> Unlike the district court's vague characterization of commercial nature, the Off-Broadway opening of the Play was a great success, and it continues to be performed across the United States, garnering critical acclaim.<sup>199</sup> Under the modified first fair use factor, such a strong commercial nature could weigh

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12. The Play used a reasonable portion of the original given the intended transformative use. *Id.* at 512. There was scant possibility that consumers of the original children's book would attend a play clearly created for adult audiences, preventing encroachment on the market for the original *Grinch*. *Id.*

195. *See id.* at 507–08 (“Defendant argues that the Play does not poke fun of the Seussian rhyming style, but instead usurps that style in order to sell a commercial work. Nor, according to defendant, does the Play comment on or ridicule the characters and themes of *Grinch*; it merely uses *Grinch*, Cindy-Lou, the Grinch character, and the dog Max as building blocks for a sequential work, featuring those same characters in the Seuss-created settings of Mount Crumpit and Who-Ville.” (internal quotation marks omitted)). The court could have adopted reasoning similar to that in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, in which the court found the defendants' book appropriated the style of *The Cat in the Hat* without commenting on or criticizing the substance of the original book. *See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399–1401 (9th Cir. 1997).

196. *See Lombardo*, 279 F. Supp. 3d at 509–10; *cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994) (“Parody needs to mimic an original to make its point . . . whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”).

197. *See Lombardo*, 279 F. Supp. 3d at 510.

198. *Id.* (“Given that the Play's use of *Grinch* is transformative, it is of little significance that the use is also of a commercial nature.”).

199. *See* Elisabeth Vincentelli, *Review: 'Who's Holiday!' Is a Raunchy Riff on Dr. Seuss's Yuletide Tale*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/theater/review-whos-holiday-dr-seuss.html> [<https://perma.cc/F94Z-9MZB>]; Emily McClanathan, *Review: Funny, Moving 'Who's Holiday' at Theater Wit Is the Malört of Holiday Shows*, CHI. TRIB. (Nov. 28, 2023, 11:15 AM), <https://www.chicagotribune.com/2023/11/28/review-funny-moving-whos-holiday-at-theater-wit-is-the-malrt-of-holiday-shows/> [<https://perma.cc/G7KD-URF4>]; Andrew Gans, *Who's Holiday!, Starring Lesli Margherita, Streams to Benefit Broadway Cares/Equity Fights AIDS Beginning December 11*, PLAYBILL (Dec. 11, 2020), <https://playbill.com/article/whos-holiday-starring-lesli-margherita-streams-to-benefit-broadway-cares-equity-fights-aids-beginning-december-11> [<https://perma.cc/PY3E-7WCK>].

against a finding of fair use.<sup>200</sup> In assessing the purpose and character of the Play as a whole, the highly commercial nature could lead the court to adopt a property-oriented approach.<sup>201</sup> As in precedent caselaw,<sup>202</sup> the third and fourth fair use factors would also likely weigh against a finding of fair use, and the Play would be found to infringe upon *Grinch*.<sup>203</sup>

As demonstrated through their hypothetical application to *Lombardo*,<sup>204</sup> the two implications of *AWF II* are particularly potent in tandem. If a parody does not comment on or criticize an original work in the eyes of a court, the work will be subject to the reworked non-parodic fair use standard by default. Under the reworked standard, the increased weight of the commercial nature of the parody will likely push courts to adopt a property-oriented approach in their fair use analyses.<sup>205</sup> This has the potential to stifle parody that would have previously been considered fair use, chilling the social benefits derived from parody. Collectively, these concerns necessitate modernizing the approach to determining parodic fair use to provide sufficient protection for parodies under the reinterpretation of the first fair use factor in *AWF II*.

### III. A MODERNIZED APPROACH TO GAUGING THE PURPOSE AND CHARACTER OF PARODY

*Campbell* lends procedural insights about the structure of rules used to gauge fair use. Fair use determinations should not rely on bright-line rules and should instead be conducted using case-by-case analyses.<sup>206</sup>

200. The weight of the commercial nature of the Play against a finding of fair use depends on how narrowly or broadly one construes the *AWF II* Court's findings regarding commerciality. Recall the Court considered both the general fact that AWF's use was commercial and the specific fact that both AWF and Goldsmith competed in the market for visuals to accompany magazine articles about Prince. See *supra* Section I.C. If a court interpreted *AWF II* broadly and considered the general commercial use, then the weight of the commercial nature of the Play against a finding of fair use would likely be stronger. In contrast, if a court interpreted *AWF II* narrowly and considered the degree to which the Play competed with the original work in the same market, then the weight of the commercial nature of the Play against a finding of fair use would likely be weaker.

201. See *supra* Section II.A.2.

202. See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

203. Cf. *id.*

204. See *supra* Section II.C.3.

205. In the hypothetical analysis of *Lombardo v. Dr. Seuss Enterprises, L.P.*, the Play has a sizable commercial nature that weighed the first factor against a finding of fair use. See *supra* note 199 and accompanying text. *But cf.* *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 510 (S.D.N.Y. 2017) (identifying “where [a] work is transformative . . . the fact that the work is also commercial is of less importance. . . . Given that the Play’s use of *Grinch* is transformative, it is of little significance that the use is also of a commercial nature.”), *aff’d*, 729 F. App’x 131 (2d Cir. 2018). However, works with even a slight commercial character could have similar purpose and character analyses under *AWF II* given the increased emphasis on commercial nature. Cf. *supra* Section II.C.2.

206. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

Furthermore, the four statutory factors that compose the fair use standard should each be evaluated in relation to one another and the overarching purposes of copyright.<sup>207</sup> While standards are useful for their flexibility, they also risk becoming overly fluid.<sup>208</sup> Retaining a loose standard for fair use threatens to wreak particular havoc in the assessment of parody, given the potential for abuse in foreclosing parodic uses based on overpowering commercial qualities and the subject matter of parodic works.<sup>209</sup> Moreover, a loose standard may enable judges to adopt the role of a critic and make subjective determinations when assessing parody, a practice repeatedly cautioned against in fair use caselaw.<sup>210</sup>

Considering these insights, it would be unwise to fashion a means of gauging parody based on definitive rules or straying from the existing statutory fair use test.<sup>211</sup> A feasible solution instead lies in adjusting the existing mode of analysis of the purpose and character of a work. This Part proposes two adjustments to the existing fair use analysis aimed at reducing the likelihood that post-*AWF II* courts will decline to extend fair use to deserving parodies. Section A discusses a proposed qualified presumption of transformative use for parodic works, and Section B details supplemental inquiries that courts should make when assessing the commercial nature of a parody. Finally, Section C applies the proposed adjustments in a hypothetical analysis of a recent parody case to demonstrate the cogency of the approach.

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207. See *id.* at 578.

208. A notable example of a fluid standard in copyright law is the “idea-expression dichotomy.” See 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19E.04, Lexis+ (database updated Apr. 2024) (“The idea-expression dichotomy allows anyone to use ideas without seeking permission from the person who first expressed those ideas, but does not allow the use of the expression of those ideas.”); *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 704 (2d Cir. 1992) (“Drawing the line between idea and expression is a tricky business. Judge Learned Hand noted that ‘[n]obody has ever been able to fix that boundary, and nobody ever can.’” (alteration in original) (quoting *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930))).

209. Cf. *supra* Section II.B.2.

210. See *AWF I*, 11 F.4th 26, 41 (2d Cir. 2021) (“[T]he district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.”), *aff’d*, 598 U.S. 508 (2023); *Campbell*, 510 U.S. at 582–83 (“[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.” (second alteration in original) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903))).

211. Some scholarship argues that courts deviate too far from the statutory fair use factors when assessing parody and suggests adopting a new framework for judging parody conceptualized in terms of reasonable perception. See David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 UTAH L. REV. 779, 780–81 [hereinafter *Reasonable Perception and Parody*]; cf. David A. Simon, *The Confusion Trap: Rethinking Parody in Trademark Law*, 88 WASH. L. REV. 1021, 1023 (2013). But see *infra* Section IV.B.

### A. A Qualified Presumption of Transformative Use for Parody

When assessing the purpose and character of a parodic work, courts should operate under a presumption of transformativeness, contingent upon two qualifications. First, the parodic nature of the work must be reasonably perceived, allowing it to qualify as a parody in the eyes of a court. Retaining the reasonable perception requirement from *Campbell* is sound, as the Court's findings in *AWF II* do not implicate this requirement.<sup>212</sup> Furthermore, the current approach to assessing whether parody is reasonably perceived is effective per contemporary parody caselaw. The present approach requires that courts objectively assess whether parody is perceived, thereby preventing purely subjective assessments of parody.<sup>213</sup>

Second, the parody must convey a new message that does not merely duplicate the original work and reasonably relates to its message or meaning. There are countless ways to comment on or criticize a work, ranging from explicit references to its qualities<sup>214</sup> to subtle commentary on an implied or underlying meaning.<sup>215</sup> Requiring that a parody relay a new message reasonably relating to the message of an original work would safeguard the more creative and indirect avenues of parody that may not pass muster as transformative criticism or commentary under the stringent *AWF II* analysis.<sup>216</sup> Additionally, requiring a lack of duplication and a reasonable relationship between a parodic message and the meaning of an original work prevents clearly unrelated messages from qualifying as parodies.<sup>217</sup>

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212. See *Campbell*, 510 U.S. at 582 (“The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”).

213. Cf. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (declining to consider public surveys assessing public perception of parodic character in its analysis of reasonable perception).

214. See, e.g., *Sketchworks Indus. Strength Comedy, Inc. v. Jacobs*, No. 19-CV-7470, 2022 WL 1501024, at \*4–5 (S.D.N.Y. May 12, 2022). The *Sketchworks* court found the parodic message of *Vape* is derived from placing aspects of *Grease* in a twenty-first century context. *Id.* While the creators of *Grease* likely incorporated social aspects of the 1950s to keep with the work's setting, *Vape* shows how then-intuitive choices present differently in the twenty-first century.

215. See, e.g., *Mattel Inc.*, 353 F.3d at 796. The *Mattel Inc.* court justified the parodic fair use of the Food Chain Barbie series by identifying that it criticized Barbie's implied representation of “the ideal American woman” and symbolism of “beauty, wealth, and glamour” through creation of context. *Id.* at 802 (citation omitted).

216. This qualification embodies the *Campbell* Court's finding that “[a] parody that more loosely targets an original . . . may still be sufficiently aimed at an original work” to comment on or criticize it within the scope of parody. *Campbell*, 510 U.S. at 580 n.14.

217. Cf. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997). If the parodic nature of *The Cat NOT in the Hat!* was reasonably perceived under the proposed approach, the work likely would not qualify as a parody through failing to meet the reasonable relation requirement. See *id.*

*B. Supplemental Inquiries Regarding the Commercial Nature of a Parody*

When assessing the purpose and character of a parody, courts should make supplemental inquiries regarding the commercial nature of the work. Rather than limit the commercial inquiry to the sale of a parodic work for profit, courts should also explore whether a parody functions as a market substitute for equivalent noncritical derivative works, assess the market demand for the original work at the time the parody was produced, and consider the relative commercial gains of the original author and the parodist. These supplemental inquiries would enable a court to make a more informed determination of the commercial nature of a parody and constrain its ability to craft convenient interpretations that deny fair use to deserving parodies.

The *Campbell* Court first posited assessing whether a parody functions as a market substitute for equivalent noncritical derivative works made by the original creator in its examination of the fourth fair use factor.<sup>218</sup> Although subsequent courts often overlook this suggestion in their fourth factor analyses,<sup>219</sup> the inquiry is informative to consider when gauging the commercial nature of a work. The inability of a parody to function as a market substitute for an equivalent, noncritical work would suggest against a highly commercial classification.<sup>220</sup>

Additionally, examining the market demand for the original work could provide insights to a parodist's motives in creating a parody. If the market demand for an original work is high, creation of a parody that is minimally transformative could indicate the parodist created it with the goal of displacing sales of the original work, weighing in favor of a commercial

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218. See *Campbell*, 510 U.S. at 592–93. The Court described that there is no legally cognizable potential derivative market for critical works because the market for potential derivative uses includes “only those that creators of original works would in general develop or license others to develop.” *Id.* at 592. Because it is unlikely that an author would license “critical reviews or lampoons of their own productions,” parodies can only infringe upon a derivative market for a non-critical equivalent (i.e., what is left of a parody after the critical aspect is removed). See *id.* at 592–93; cf. *Benny v. Loew's Inc.*, 239 F.2d 532, 536 (9th Cir. 1956) (“If the material taken by appellants from ‘Gas Light’ is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue. If the television play were presented without appellants’ contribution, there would be left the plot, story, principal incidents, and same sequence of events as in the photoplay.”), *aff'd by an equally divided Court sub nom.* *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958) (per curiam).

219. Subsequent courts instead seem to prefer the fourth factor analysis proposed in *MCA, Inc. v. Wilson*, weighing “the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.” 677 F.2d 180, 183 (2d Cir. 1981); see *Dr. Seuss Enters., L.P.*, 109 F.3d at 1403; *Mattel Inc.*, 353 F.3d at 804–05. But see *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274–75 (11th Cir. 2001) (assessing the capacity of the parodic novel *The Wind Done Gone* to function as a market substitute for the original novel *Gone With the Wind*).

220. Cf. *Suntrust Bank*, 268 F.3d at 1275 (describing the low likelihood of the parodic novel *The Wind Done Gone* displacing sales of the original novel *Gone With the Wind*).

nature.<sup>221</sup> Conversely, a highly transformative parody of an original work with low market demand would weigh against a finding of commercial nature.

Finally, assessing the relative commercial gains of the original author and the parodist from their respective works would further inform the determination of the commercial nature of a parody. Contemporary courts have alluded to financial gains from original works and parodies in dicta but have yet to give comparisons of such gains analytical weight.<sup>222</sup> Future courts should consider these relative financial gains to overcome the for-profit/nonprofit binary that consumes their current commercial analyses and ascertain a refined degree of commercial nature. For example, applying this inquiry to *Mattel Inc.*, the Ninth Circuit would have considered the parodist's meager total gross income earned from the Food Chain Barbie series in addition to the act of selling the photographs for profit.<sup>223</sup> Because the parodist's actual financial gains from the parody were modest compared to Mattel's earnings from sales of Barbie dolls at the time,<sup>224</sup> consideration of the relative financial gains would lessen the commercial nature of the parody.<sup>225</sup>

### C. The Modernized Approach in Practice

The cogency of the proposed approach is demonstrated through application of the analytical adjustments to the assessment of the parodic purpose and character in *Lombardo v. Dr. Seuss Enterprises, L.P.*<sup>226</sup> In applying the qualified presumption of transformative use for parody, a court assessing *Who's Holiday!* (the Play) would likely find the parodic nature of the work to be reasonably perceived for the same reasons as in the actual

221. *But cf.* Pillsbury Co. v. Milky Way Prods., Inc., No. C78-679A, 1981 WL 1402, at \*8 (N.D. Ga. Dec. 24, 1981) (finding a pornographic adaptation of the Pillsbury "Poppin' Fresh" trade character to be "more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work").

222. *See* *Mattel Inc.*, 353 F.3d at 797 ("The 'Food Chain Barbie' series earned [the defendant a] total gross income of \$3,659."); *Suntrust Bank*, 268 F.3d at 1274 (discussing how the original work and subsequent derivative works "have generated millions of dollars for the copyright holders"); *cf.* AWF II, 598 U.S. 508, 520 (2023) ("Condé Nast paid AWF \$10,000 for the license. Goldsmith received neither a fee nor a source credit." (emphasis added)).

223. *See* *Mattel Inc.*, 353 F.3d at 797 ("The 'Food Chain Barbie' series earned [the defendant a] total gross income of \$3,659.").

224. *See* Bloomberg News, *Mattel's Profit Is Up by 35%, Led by Sales of Barbies*, N.Y. TIMES (Feb. 4, 2003), <https://www.nytimes.com/2003/02/04/business/mattel-s-profit-is-up-by-35-led-by-sales-of-barbies.html> [<https://perma.cc/Z4KW-HXN6>].

225. In *Mattel Inc.*, the Ninth Circuit may have accounted for the parodist's meager financial gains in its assessment of the parodic work's commercial nature, noting that the commercial expectation did not weigh much against the parodist. *See* *Mattel Inc.*, 353 F.3d at 804–05.

226. 279 F. Supp. 3d 497, 502–04 (S.D.N.Y. 2017), *aff'd*, 729 F. App'x 131 (2d Cir. 2018); *see supra* Section II.C.3.

decision.<sup>227</sup> A court would also likely find that the parody relayed a message reasonably related to the meaning of the original work. The *Lombardo* court identified that the Play recontextualizes *How the Grinch Stole Christmas!* (*Grinch*) by placing Cindy-Lou Who, “a symbol of childhood innocence,” in “outlandish, profanity-laden, [and] adult-themed” struggles with substance abuse, teenage pregnancy, murder, and prison culture.<sup>228</sup> Furthermore, the Play makes fun of *Grinch*’s utopian depiction of Who-Ville and Seussian rhyming style within these contexts.<sup>229</sup> A court would likely find the new message reframing elements of *Grinch* in real world and adult contexts is reasonably related to the original meaning of *Grinch* portraying the idealist nature of Who-Ville. By fulfilling the two qualifications, the Play would be presumed to be a transformative use under the proposed approach.

In applying the supplemental inquiries regarding the commercial nature of a parody, a court assessing *Lombardo* would likely find the inability of the Play to function as a market substitute for equivalent noncritical derivative works weighs against a finding of commercial nature. Within *Lombardo*, the parodic elements of the Play largely come from recounting Cindy-Lou Who’s teenage and adult years through adult-themed events and themes.<sup>230</sup> An equivalent noncritical derivative work would likely comprise a one-woman play about Cindy-Lou Who’s teenage and adult life that lacks adult and profane themes and is appropriate for the general audience of *Grinch*. Given the Play and the equivalent noncritical play would appeal to different audiences of adults only and individuals of all ages, respectively, the Play would likely not function as a market substitute under the proposed approach.<sup>231</sup>

Furthermore, a court assessing *Lombardo* would likely find the market demand for the original work at the time the parody was produced favors a finding of commercial nature. Given that *Grinch* is set during Christmas, demand for the original work is likely greater during the months of the holiday season. The Play was first performed on November 28, 2017 and to

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227. *Lombardo*, 279 F. Supp. 3d at 507–09. The court identified the Play was perceivable as a parody through recontextualizing *Grinch*’s easily recognizable plot in adult-themed and outlandish scenarios, poking fun at *Grinch*’s utopian depiction of Who-Ville, and recontextualizing the Seussian rhyming style. *Id.*

228. *Id.* at 508.

229. *Id.* at 508–09. For example, when Cindy-Lou “recounts her time in prison, her cell mate confronts her [and shouts,] ‘STOP SPEAKING IN RHYME.’” *Id.* at 508. The court found this symbolizes how “rhyming is unsuitable for the real world and invites the audience to contemplate the juxtaposition of speaking in rhyme and doing prison time.” *Id.* at 509.

230. *See id.* at 508–09.

231. *Grinch* is predominantly marketed to children and families, while the Play is marketed only to adults. *See supra* note 199. These two consumer populations constitute completely separate markets. *Cf. supra* note 79.

date has exclusively run during November and December.<sup>232</sup> Consequently, the performance of the Play only during times when market demand for *Grinch* is high would likely weigh in favor of a finding of commercial nature under the proposed approach.

Finally, a court assessing *Lombardo* could find the relative commercial gains of the original author and the parodist weigh for or against a finding of commercial nature. The original 1957 book *How the Grinch Stole Christmas!* is ranked sixty-first among the Top 100 Picture Books survey published by the School Library Journal, and publisher Random House Publishing has sold at least 7.5 million copies of the book to date.<sup>233</sup> Although the Play has evidently experienced some commercial success through its repeated productions, its gross income undoubtedly pales in comparison to that of *Grinch*. As a result, the relatively modest commercial gains of the parodist would weigh against a finding of commercial nature under the proposed approach. Conversely, despite the meager success of the Play relative to *Grinch*, its commercial success is not negligible.<sup>234</sup> Thus, the commercial gains of the parodist could also weigh in favor of a finding of commercial nature under the proposed approach.<sup>235</sup>

The application of the proposed adjustments to *Lombardo* further demonstrates the ability of the approach to remedy flaws exacerbated by the reworked purpose and character analysis of *AWF II*. The qualified presumption of transformative use for parody safeguards against a stringent construction of commentary and ensures courts do not wrongfully deny fair use to parodies that employ creative means of criticism.<sup>236</sup> Furthermore, the detailed analysis of the commercial nature of a parody through specific

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232. See Adam Hetrick, *Lesli Margherita Stars in Who's Holiday! Opening Off-Broadway November 28*, PLAYBILL (Nov. 28, 2017), <https://playbill.com/article/lesli-margherita-stars-in-whos-holiday-opening-off-broadway-november-28> [https://perma.cc/NYA2-3NCU]. Additionally, to date, the Play has exclusively run during the holiday season. See *supra* note 199.

233. See Carey Purcell, *After 60 Years, 'The Grinch' Is Still Stealing Christmas*, FORBES (Dec. 21, 2017, 10:43 AM), <https://www.forbes.com/sites/careypurcell/2017/12/21/after-60-years-the-grinch-is-still-stealing-christmas/?sh=508b2bd5bd47> [https://perma.cc/5GQA-TM87].

234. Cf. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 797 (9th Cir. 2003) (“The ‘Food Chain Barbie’ series earned [the defendant a] total gross income of \$3,659.”).

235. Critics of considering the relative commercial gains of an original author and a parodist when assessing the commercial nature of a use may argue that the inquiry is overly broad and inherently leveraged against original works with great commercial success. For example, if a work with great commercial success is repeatedly parodied, any parody that produces commercial gains less than those of the original could be found to be fair use. Historically, consideration of relative commercial gains is an ad hoc determination occasionally contemplated by judges. See, e.g., *id.* Formalization of the comparison of relative commercial gains as a supplemental inquiry makes the consideration universal. Furthermore, judges may use their discretion to determine if commercial gains are sufficiently similar or disparate to weigh for or against a finding of commercial nature.

236. See *supra* Section II.C.1.

inquiries prevents courts from dismissing a parody as non-transformative by simply labeling it as commercial.<sup>237</sup>

#### IV. POSSIBLE OBJECTIONS TO THE MODERNIZED APPROACH

As a matter of course, the approach advanced in this Note may face objections. This Part anticipates and responds to some of these objections.

##### *A. Overly Broad Approach to Transformative Use*

One objection to the proposed approach is that instating a qualified presumption of transformative fair use for parody is overly broad. A parodic purpose and character analysis that errs on the side of transformative use may endanger an author's ability to capitalize upon a market for derivative works. Derivative works and adaptations of an original work can be highly profitable and compose an important facet of an author's rights in their work.<sup>238</sup>

The proposed inquiries assessing commercial nature lessen the likelihood that a parody that wrongfully infringes upon a market for derivative works would benefit from fair use. The supplemental inquiry into the capacity of a parody to serve as a non-parodic market substitute when assessing its commercial nature directly addresses this concern and would filter out potentially infringing parodies. Moreover, the analysis of the market demand for the original work when gauging the commercial nature of a parody would protect against the possibility of a parodist seeking to take advantage of a particularly lucrative derivative work market.

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237. See *supra* Section II.C.2.

238. Additionally, critics may argue against adopting a broader definition of transformative use given the advent of artificial intelligence (AI). Generative AI technology and its implications have made both courts and administrative bodies wary of loosening standards in copyright law. In view of the inherent capacity of generative AI to create parodic works, it may be unwise to adopt a more permissive standard for gauging the purpose and character of parodies. While this specific objection is not addressed at length in this Note, the U.S. Copyright Office currently provides safeguards against awarding fair use to AI-generated works through authorship standards and other requirements. See, e.g., U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021) (“[T]he Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”).

### B. *Perpetuation of Existing Flaws in Gauging Fair Use in Parody*

Another objection the proposed approach may face is that it further enables existing flaws in how courts assess parodic fair use. Recall that Section II.A described the two approaches contemporary courts typically adopt when assessing parody. Critics of the analytical adjustments advanced in this Note may argue that building upon these existing approaches perpetuates the flawed quality of the first fair use factor and advocate that overhauling the fair use standard for parody would provide a better solution.<sup>239</sup>

While breaking free from the statutory fair use test may sound appealing in theory, it would likely be difficult to execute in practice. Courts have long used the statutory fair use framework to assess parody, and the Supreme Court impliedly affirmed the use of the statutory test for gauging parodic fair use in *AWF II*.<sup>240</sup> Furthermore, courts have acknowledged that the first and fourth fair use factors are intertwined and necessarily influence one another.<sup>241</sup> The approach advanced in this Note provides a more attainable solution that remedies major flaws in the existing approach. The requirement of more specific and deliberate inquiries under the first fair use factor would result in better-informed analyses of the purpose and character of parody. Additionally, incorporation of aspects relevant to the third and fourth fair use factors into the analysis of commercial nature under the first factor inhibits courts' abilities to reach default conclusions on those factors under the two existing analytical approaches.

### CONCLUSION

Although a federal district judge vindicated the fairness of the musical *Vape* in *Sketchworks*, similar future parodies may not be as fortunate. The significant weight of the first fair use factor and the ambiguity surrounding what renders a use commercial in nature provide few consistent interpretations of parodic fair use. This inconsistency in parody caselaw chills the social benefits derived from commentary and criticism, deterring parodists from engaging in secondary usage out of fear of inexcusable infringement. The recalibration of the first fair use factor in *AWF II* aggravates existing flaws in the assessment of parodic fair use and skews analyses toward commercial and property-based considerations, threatening to narrow the scope of judicially recognized parody. By applying the

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239. A number of scholars have proposed modes of assessing fair use that completely break away from the statutory test. *See, e.g., Reasonable Perception and Parody*, *supra* note 211.

240. *See AWF II*, 598 U.S. 508, 528–34 (2023).

241. *See id.* at 536 n.12.

proposed qualified presumption of transformative use and supplemental guidelines for assessing commercial nature detailed in this Note, courts can make informed determinations of parodic fair use and reduce the likelihood of declining to extend fair use to deserving parodies. Adopting these adjustments to the existing frameworks for evaluating parodic fair use offers a practical and effective means of safeguarding the benefits of parody amidst the evolving doctrinal landscape of fair use.

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