

Who Gets the Last Laugh? Satire, Doctrine of Fair Use, and *Copywrong* Infringement

ERIC D. GORMAN*

I. INTRODUCTION

“Satire is a sort of glass wherein beholders do generally discover everybody’s face but their own; which is the chief reason for that kind reception it meets with in the world and that so very few are offended with it.”¹ But what if some people are offended by a satire? What if that satire includes those innocent offended people somehow? Are those people allowed protection or do they just have to sit there and take it?

A blond haired female hostess wearing jewelry and a long gown while turning block letters on a game board. A portly gentleman and a mailman drinking at a friendly neighborhood bar “where everybody knows your name.” A cleaning woman that does a Tarzan scream and tugs her ear. Does one owe these iconic characters some type of compensation for my use of their famous images? What if one just has their pictures at the beginning of this article? Does one owe those characters anything for using their images? What if one has another figure eerily similar to a Wheel of Fortune letter-turner extraordinaire, an unemployed larger fellow, a know-it-all postal worker, or a quick-witted, sketch creating female comedian on the cover of this article to grab people’s attention in hopes that it will attract readers? Does one owe those specific characters that are similar to my “generic” characters anything for using their celebrated/portrayed image?

* J.D., The John Marshall Law School. B.S. Mechanical Engineering, Michigan State University. Eric has both intellectual property educational background and work experience in Beijing, People’s Republic of China and Chicago, Illinois, United States of America. Special thanks to my dad, mom, and sister for their continuous support and words of encouragement. Thank you to my friends and colleagues for their helpful comments and insight. Finally, thank you to Mark Petrolis, Matthew Dixon, and Michael Karson for their invaluable editorial assistance. eric.d.gorman@gmail.com.

¹ JONATHAN SWIFT, *Preface to THE BATTLE OF THE BOOKS* 12 (Jack Lynch, Henry Morley, A. C. Guthkelch & D. Nichol Smith eds., Chatto and Windus & Oxford: Clarendon Press 1920) (1908). This text is about satiric writing depicting a literal battle between books in the King’s Library involving the struggle for supremacy between ideas and authors. *Id.*

This article will examine whether the utilization of “celebrity character” images in a satire should result in copyright infringement or be considered fair use. In the first part of the article, the doctrine of fair use will be discussed. The second part of the article will give analysis regarding satire and how it relates to parody. The third part will explain why there is a need for an additional component to the doctrine of fair use. The fourth part will conclude the anticipated outcome of the proposal.

II. BACKGROUND

This section will discuss the four factors of the fair use doctrine. An in-depth explanation will be given for each fair use factor and how that particular part pertains to copyright infringement.

A. *The Fair Use Breakdown*

The doctrine of fair use permits other people to use copyrighted material,² without the owner’s consent, in a reasonable manner for certain purposes.³ The fair use doctrine is important because it helps to determine if a copied work is done legally or not through the use of four different factors.⁴

With extensive copying or paraphrasing of the original work, or physically appropriating the original research, use of copyrighted material without the owner’s consent generally will not be considered reasonable.⁵ Under the Copyright Act,⁶ fair use prevents copyright owners from restricting distribution

² 17 U.S.C. § 107 (2006) (explaining fair use is a defense to copyright infringement); *cf.* 17 U.S.C. § 501(a) (2006) (stating that violation of any of the exclusive rights of the copyright owner constitutes copyright infringement); *cf.* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 449 (Stuart Berg Flexner ed., Random House, Inc. 2d ed. 1987) (1966) (defining a copyright as the exclusive legal right to reproduce, publish, sell, or distribute the matter and form of a work)).

³ *See e.g.*, 17 U.S.C. § 107 (“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 the above factors.”); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (holding that respondents’ unauthorized use of quotations from a public figure’s unpublished manuscript was not sanctioned by the Copyright Act’s fair use doctrine); Tiffany Design v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113, 1123 (D. Nev. 1999) (holding that copyright protection gives an exclusive right to reproduce copyrighted works); *see also* HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) (“[T]he author’s consent to a reasonable use of his copyrighted works [had] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts[.]”).

⁴ *See* 17 U.S.C. § 107 (providing the four factors for determining whether use of a work constitutes fair use).

⁵ MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); Rosemont Enters., Inc. v. Random House, Inc 366 F.2d 303, 310 (2d Cir. 1966) (holding that a narrow interpretation of fair use, with regard to insubstantial copying, does not constitute copyright infringement); Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 454 (C.D. Cal. 1979) (finding that noncommercial home-use recording of broadcast material does not constitute copyright infringement); *see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978) (stating that by copying plaintiff’s images in their entirety, defendants took more than was necessary to place firmly in the reader’s mind the parodied work and the specific attributes that were to be satirized). The court held that because the amount of defendants’ copying exceeded permissible levels, summary judgment was proper as to the copyright infringement claims. *Id.*

⁶ 17 U.S.C. § 107.

of their copyrighted works to the public.⁷ In determining whether a use is fair, one must look at the following four factors: 1) the purpose and character of the use, 2) the nature of the copyrighted work; 3) the amount taken in relation to the work as a whole; and 4) the effect of the use upon the potential market.⁸ These factors, however, are not exhaustive in determining fair use.⁹

1. Purpose and Character

The first factor deals with the nature and purpose of the accused work.¹⁰ One necessary consideration is whether the work has a commercial purpose,¹¹ or a profit (nonprofit) motive.¹²

⁷ See *id.* (stating fair use of a work including commentary, news reporting, criticism, or other uses does not constitute copyright infringement).

⁸ *Id.*; see *Davis v. Gap, Inc.*, 246 F.3d 152, 173–75 (2d Cir. 2001); *MCA*, 677 F.2d at 182–83 (determining that defendants plagiarized plaintiff's copyrighted song, substituted their own lyrics, and performed it for commercial gain, thus defendants did not make fair use of plaintiff's song); *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) (applying the four factors to an investigation of copyright infringement involving *The Implosion Conspiracy*, a book about the Rosenberg trial); *Tiffany Design*, 55 F. Supp. 2d at 1123 (applying the four factors to determine whether a computerized precursor image of Law Vegas constituted infringement); *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782, 787–90 (N.D. Ill. 1998) (applying the four factors to a fair use inquiry regarding software and shareware); *Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F. Supp. 1559, 1566 (S.D. Cal. 1996) (applying the four factors to a copyright infringement inquiry concerning mimicked Dr. Seuss' style of O.J. Simpson trial); *Horn Abbot, Ltd. v. Sarsaparilla, Ltd.*, 601 F. Supp. 360, 367 (N.D. Ill. 1984) (applying four factors in an inquiry revolving around the game "Trivial Pursuit"); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 358 (N.D. Ga. 1979) (applying the four factors to a claim alleging infringement of *Gone With the Wind*); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111–25 (1990) (commenting on how the more copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding); Matt Williams, *Recent Second Circuit Opinions Indicate That Google's Library Project is Not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 311–12 (2007) (elaborating on how Google and its proponents may still convince judges in the Second Circuit that the fair use doctrine should protect its Library Project as an innovative technological use of copyrighted material that will increase public access to information and creative expression).

⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact."); see 17 U.S.C. § 107 (listing "factors to be considered" in determining fair use).

¹⁰ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001); *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1561 (Fed Cir. 1995); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 935, 936 (2d Cir. 1994); *Tenn. Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 283 (5th Cir. 1970); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp.2d 84, 89 (S.D.N.Y. 2003); *Infinity Broad. Corp. v. Kirkwood*, 965 F. Supp. 553, 556, 560 (S.D.N.Y. 1997); *Dr. Seuss*, 924 F. Supp. at 1567; *New Era Publ'ns Int'l, ApS v. Carol Pub. Group*, 729 F. Supp. 992, 997 (S.D.N.Y. 1990); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 745 (S.D.N.Y. 1980); *Bouchat v. Balt. Ravens L.P.*, No. MJG-08-397, 2008 U.S. Dist. LEXIS 95114, at *16 (D. Md. Nov. 21, 2008); *Gregerson v. Vilana Fin., Inc.*, No. 06-1164 ADM/AJB, 2007 U.S. Dist. LEXIS 64960, at *14 (D. Minn. Aug. 31, 2007).

¹¹ See *Storm Impact*, 13 F. Supp. 2d 782 (concluding that the infringer's copying and distribution of the copyright holder's products was not fair use and that the infringer's use did infringe on the copyright holder's copyright because there was no transformation of the copyright holder's products and the infringer's business involved compiling new software programs and selling the collection to customers).

¹² 17 U.S.C. § 107; *Storm Impact*, 13 F. Supp. 2d at 786 (claiming that the infringer's use of the copyright holder's software adversely affected the market for the software because the infringer's

a. Commercial Value

The fair use doctrine uses the “purpose and character” factor to ask whether the original was copied in good faith to benefit the public, or primarily for the commercial interests of the infringer.¹³ In determining whether fair use exists, one factor that must be considered is whether the alleged infringer’s use of the owner’s works is “of a commercial nature, or is for nonprofit educational purposes.”¹⁴

In fair use analysis, the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁵ While commercial motivation and fair use can exist side by side, one may consider whether the alleged infringing use was primarily for public benefit, or for private commercial gain.¹⁶ Thus, an alleged infringer cannot profit from exploitation of another’s copyrighted material without paying a customary price for it.¹⁷

b. Transformative Work

A stronger consideration for determining a work’s nature and purpose is whether the accused work has transformed the original into something new.¹⁸

use angered some customers, the infringer provided improper technical support, and the infringer’s fee reduced the chance that customers would have registered with the copyright holder).

¹³ See 17 U.S.C. § 107 (explaining that fair use does not make light of the importance of commercial value); *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (holding that copies of a sculpture created from a copyrighted photograph was made primarily for commercial benefit).

¹⁴ *Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

¹⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Davis*, 246 F.3d at 167 (noting that the court must compare actual profits gained from infringement with potential profits defendant could have made if he or she did not infringe); *Rogers*, 960 F.2d at 309 (stating that “[k]nowing exploitation of a copyrighted work(s) for personal gain militates against a finding of fair use.”).

¹⁶ See *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981) (holding that substantial similarity and the four fair use factors ruled in favor of copyright infringement); *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) (holding that defendant’s book might have been published for commercial gain); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307–309 (2d Cir. 1966) (finding information used in a biography of Howard Hughes constituted a fair use as it served a public interest), *cert. denied*, 385 U.S. 1009 (1967); *Schuchart & Assocs., Prof’l Eng’rs, Inc. v. Solo Serv. Corp.*, 220 U.S.P.Q. (BNA) 170, 181 (W.D. Tex. 1983) (finding defendants’ use of plaintiffs’ drawings was for commercial purposes, not for educational or non-profit use); *Publ’ns Int’l, Ltd. v. Bally Mfg. Corp.*, 215 U.S.P.Q. (BNA) 861, 862 (N.D. Ill. 1982) (holding a book giving instructions on how to win a video game was strictly commercial and non-educational and as such, not protected by the fair use doctrine); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1275 (S.D.N.Y. 1970) (finding distribution of the film at issue did not appear to serve the public interest).

¹⁷ *Rogers*, 960 F.2d at 309.

¹⁸ *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp.2d 782 (N.D. Ill. 1998) (“[T]he more transformative the new work, the less will be the significance of other factors which may weigh against a finding of fair use.”).

A transformative work supersedes the original creations, adds a different character, or adds something new to further the purpose; all while altering the first work with new expression, meaning, or message.¹⁹ Such transformative use is not absolutely necessary for a finding of fair use.²⁰ Indeed, the goal of copyright is to promote science and the arts and is generally furthered by the creation of transformative works.²¹ Works that merely copy the original are more likely to be copyright infringement.²²

Transformation is a key ingredient to fair use. Consequently, the definition of a transformative inquiry can be expanded in four ways: (1) defining transformative purpose beyond examples to include creative works; (2) considering a secondary work's expressive purpose, not just its functional purpose; (3) considering minimal aesthetic changes as sufficient for transformation; and (4) deemphasizing any market harm once transformation is found.²³ Basically, transforming a work means to give it a different meaning than the original intended.

2. Nature of Copyrighted Work

This fair use factor deals with the intention of the alleged infringer when comparing the "copied" work to the original work. According to the Copyright Act, there is analysis that requires one to examine "the nature of the

¹⁹ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (holding that a parody's commercial character is only one element to consider for fair use, but that element alone does not determine whether a parody is fair use); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006) (affirming there is no infringement where an appropriation of the copyrighted material is "transformative" because there is neither commercial exploitation nor bad faith); *Davis*, 246 F.3d at 174 (discussing analysis of transformation of an original creation); Laura Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 447–51 (2008) (suggesting that the best way to determine whether the new work is "transformative" would be to examine evidence from the view point of the reader); Williams, *supra* note 8, at 314 (discussing the Supreme Court's articulation of the transformative standard).

²⁰ *Campbell*, 510 U.S. at 579; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (assuming that the category of "fair use" is rigidly circumscribed by a requirement that every such use must be "productive"); Williams, *supra* note 8, at 318–19.

²¹ *Campbell*, 510 U.S. at 579; *Davis*, 246 F.3d at 167; Heymann, *supra* note 19, at 451, 466.

²² *Campbell*, 510 U.S. at 579 ("[T]he more transformative the new work, the less significance that will be put on the other factors, like commercialism, that may weigh against a finding of fair use.").

²³ *Accord Blanch*, 467 F.3d at 244. By recontextualizing the image, Koons altered and "transformed" Blanch's photograph in an attempt to force viewers to see the original work and its significance differently. *Id.* Koons was using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media, rather than for purposes of making money. *Id.*; see also *Bill Graham Archives v. Dorling-Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (holding that the defendants' complete reproduction of seven of the plaintiff's graphic images in a biographical book constituted fair use because all seven images were transformative in reduced size, text and placement); Jeannine M. Marques, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 332 (2007) (noting the general disagreement over which factor should weigh more heavily in the fair use analysis - the transformative or productive nature of the secondary use or the economic effects on a copyright holder, while focusing on expanding the definition of transformative in four ways); *Accord Roxana Badin, An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion From Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653, 1660 (1995) (stating that an artist may not assert a fair use defense to protect the work as publicly useful communication and criticism once the piece fails to meet the definition of a parody).

copyrighted work"²⁴ through recognition that some works are "closer to the core of intended copyright protection than others."²⁵ This means creative works have broader copyright protection compared to factual works that have limited protection. Indeed, "a use is less likely to be deemed fair when the copyrighted work is a creative product."²⁶ Another consideration is whether the original work is more factual than fictional.²⁷ Creative and original works are given greater protection than factual works.²⁸

3. Amount Taken

The third factor of fair use looks at the amount substantiality copied from the original.²⁹ In general, this means the less of the original work that is copied, the more likely the use will be fair.³⁰ This can be taken as a quantitative analysis.³¹ An impermissible level of copying may occur when the original is copied more than necessary.³² Additionally, this factor is interpreted to allow fragmentary copying, which is more likely to have a transformative purpose (positive fair use factor), than wholesale copying (copyright infringement).³³

However, one should not look solely at the quantitative aspect of copying; a qualitative analysis must take place.³⁴ The qualitative degree of the copying is

²⁴ 17 U.S.C. § 107(2) (2006) (stating the nature of the copyrighted work).

²⁵ *Davis*, 246 F.3d at 167 (stating plaintiff's copyrighted work was in the nature of an artistic creation that falls close to "the core of the copyright's protective purposes") citing *Campbell*, 510 U.S. at 586 (noting that the work was in the nature of an artistic creation that would place it in the "close core of intended copyright protection"); *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp.2d 782 (N.D. Ill. 1998).

²⁶ *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990) (claiming that fair use is more likely to be found in factual works than in fictional works).

²⁷ *New Era Publ'ns Int'l, ApS v. Carol Pub. Group*, 729 F. Supp. 992, 992 (S.D.N.Y. 1990) (arguing that if the original work is more factual than fictional, the scope of fair use is broader).

²⁸ *Campbell*, 510 U.S. at 586 (explaining that because facts do not portray original creators' inventive and artistic depictions, consequently fair use is more difficult to establish when creative works are copied).

²⁹ 17 U.S.C. § 107(3).

³⁰ *Leval*, *supra* note 8, at 1122.

³¹ *See New Era Publ'ns Int'l v. Carol Pub. Group*, 904 F.2d 152, 158 (2d Cir. 1990) (stating that the third factor has a quantitative component).

³² *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987), *reh'g denied*, 818 F.2d 252 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987); *see New Era*, 904 F.2d at 158 (discussing that courts have found that use was not fair where the quoted material formed a substantial percentage of the copyrighted work).

³³ 17 U.S.C. § 107(3) (requiring the court to consider the amount and substantiality of the portion used in relation to the copyrighted work as a whole); *Rogers*, 960 F.2d at 308 (stating that where the amount of copying exceeds permissible levels, summary judgment has been upheld for copyright infringement because there was no fair use); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978); *Leon v. Pac. Tel. & Tel. Co.*, 91 F.2d 484, 486–87 (9th Cir. 1937) (pointing out that the infringer's counsel was unable to disclose a single authority, nor was the copyright owner's counsel able to find one, which lent any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use); *Tiffany Design v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1124 (D. Nev. 1999); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440, 447–48 (N.D. Ill. 1991) (holding that the plaintiff did not demonstrate a claim for copyright infringement because the defendant established fair use defense due to the fact that the defendant's commercial did not borrow an impressible amount of plaintiff's commercial).

³⁴ *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.* 166 F.3d 65, 73 (2d Cir. 1999).

the degree of the essence of the original that is copied in relation to its whole.³⁵

The key issue is the amount of the infringing work that is copied verbatim from the copyrighted work.³⁶ Essentially, this third factor examines whether the “heart” of the original work was taken.³⁷

4. Effect on Potential Market

Finally, there is one more statutory factor to consider with fair use.³⁸ This factor examines the market harm caused by the alleged infringer’s copying.³⁹ One should measure harm by analyzing whether the infringer’s work usurps or softens the market demand of the original.⁴⁰ However, suppressing market value is allowed.⁴¹ Fair use, therefore, is limited to an author’s work that does not materially impair the marketability of the work which is copied.⁴²

A concern exists when there is an excessively widespread dissemination of derivative works that will cause a potential harm to any work’s market.⁴³ Hence, a balance must be struck between the benefit gained by the copyright owner when the copying is found to be an unfair use and the benefit gained by the public when the use is held to be fair.⁴⁴ If the unauthorized use becomes

³⁵ *Rogers*, 960 F.2d at 308; *Salinger*, 811 F.2d at 98–99 (stating that this can also reveal the amount of transformative character and purpose); see *New Era*, 904 F.2d at 159 (analyzing that the quotations in the book’s text, which amount to the bulk of the allegedly infringing passages, do not take essentially the heart of the original works).

³⁶ *Salinger*, 811 F.2d at 98.

³⁷ *Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F. Supp. 1559, 1567 (S.D. Cal. 1996); see Jonathan Fox, *The Fair Use Commercial Parody Defense and How to Improve It*, 46 IDEA 619, 627 (2006) (expanding a stark difference between the classic literary definition of parody and the legal definition of parody, with significant help from such cases as *Berlin v. E. C. Publications, Inc.* and *Campbell v. Acuff-Rose Music*).

³⁸ See *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir.1993) (mandating the court to consider four enumerated factors when determining if a use is fair).

³⁹ 17 U.S.C. § 107(4) (2006) (stating the court shall consider the effect of the use upon the potential market for or value of the copyrighted work); *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782, 789 (N.D. Ill. 1998) (claiming that that fourth fair use factor specifically examines whether the conduct of copying, if unrestricted and widespread, would adversely affect the copyright owner’s potential market).

⁴⁰ *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440, 448 (N.D. Ill. 1991).

⁴¹ See *id.*

In assessing the economic effect of the parody, the parody’s critical impact must be excluded. Through its critical function, a parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically. Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original . . . but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it.

Id. (emphasis in original) (internal quotations omitted).

⁴² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985); *Storm Impact*, 13 F. Supp. 2d at 789.

⁴³ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994) (finding that the defendant’s fair use defense to copyright infringement was impaired because they did not address the potential for their work to harm the market for derivative works the plaintiffs had exclusive right to prepare).

⁴⁴ *Williams & Wilkins Co. v. US*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff’d per curiam* by an equally divided court, 420 U.S. 376 (1975); *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981); *Publ’ns Int’l, Ltd. v. Bally Mfg. Corp.*, 215 U.S.P.Q. (BNA) 861, 862 (N.D. Ill. 1982) (concluding the publisher stole the cover of the copyright holder’s arcade game, so because illustrations on the

“widespread,” then a copyright owner only needs to demonstrate it would prejudice the potential market for his work.⁴⁵ But “where the use is intended for commercial gain some likelihood of meaningful future harm is presumed.”⁴⁶

The doctrine of fair use, as a whole, helps to prevent potential market harm.⁴⁷ This becomes important to celebrity character image used in such works as parodies and satires.⁴⁸ There are other protections to combat infringement besides the doctrine of fair use, one being the right of publicity.⁴⁹

B. Right of Publicity

The right of publicity protects against the unauthorized use of one’s name or personality.⁵⁰ The right of publicity expires upon the death of the person so protected.⁵¹ Celebrities have a statutory right of publicity by which they can prohibit others from using their likeness.⁵² When an artist utilizes a celebrity’s character identity for commercial purposes without permission, he or she violates the celebrity’s right of publicity.⁵³ The right of publicity, as well as the

covers of one of the publisher’s books were non-educational and were only meant to lure buyers, they infringed the copyright and the fair use exception did not apply).

⁴⁵ *Harper & Row*, 471 U.S. at 568; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451(1984).

⁴⁶ *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (ruling in favor of copyright infringement because it was determined that the infringer copied the original material for its own commercial purposes without paying for it); see also *Sony*, 464 U.S. at 449 (noting commercial use is “presumptively” unfair use).

⁴⁷ See *Sony*, 464 U.S. at 450 (noting “the purpose of copyright is to create incentives for creative effort.”).

⁴⁸ See *infra* Part II(C) (discussing the use of images in satire and parodies).

⁴⁹ See *infra* Part II(B) (discussing the right of publicity).

⁵⁰ *Groucho Marx Prods. v. Day & Night Co.*, 689 F.2d 317, 320 (2d Cir. 1982); *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) (quoting *Comedy III Prods., Inc. v. Saderup*, 21 P.3d 797, 807 (Cal. 2001)) (“What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the ‘name, voice, signature, photograph, or likeness’ of the celebrity.”); William T. Gallagher, *Strategic Intellectual Property Litigation, the Right of Publicity, and the Attenuation of Free Speech: Lessons from the Schwarzenegger Bobblehead Doll War (and Peace)*, 45 SANTA CLARA L. REV. 581, 600–01 (2005) (“[T]he central justification for the right of publicity . . . is the need to protect the celebrity’s ability to control the economic value derived from non-transformative, conventional depictions of the celebrity likeness.”).

⁵¹ *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 455 (Cal. 1979).

⁵² CAL. CIV. CODE § 3344 (West 1985); see *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000) (noting that the right of publicity is designed to reserve to a celebrity the personal right to exploit the commercial value of his own identity); *McFarland v. Miller*, 14 F.3d 912, 919 (3rd Cir. 1994) (describing the heart of the right as the value of an association with the plaintiff’s image); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835–36 (6th Cir. 1983) (stating the right of publicity is a right of protection from appropriation of some element of an individual’s personality and was meant to protect famous celebrities).

⁵³ See *Carson*, 698 F.2d at 835 (“The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”); *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003) (showing that “the right of publicity protects the identity of a celebrity from exploitive commercial use.”); Erin Giacoppo, *Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film*, 48 HASTINGS L.J. 601, 603, 612 (1997) (affirming that the right of publicity protects the identification value of a celebrity’s persona against unauthorized commercial use); see also J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture - The Human Persona As Commercial Property: The Right*

doctrine of fair use, may help protect a celebrity's name in such expressions as parody and satire, but more protection is needed.

C. A Satiric Expression Compared to a Parody

The fair use defense is applied differently in cases of satire or parody.⁵⁴

1. Satire

Satire is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in doing so creates a new work that ridicules the style and expression of the original.⁵⁵ To be more exact, satire may imitate and ridicule the copyrighted work, while using the original as a "vehicle to poke fun at another target."⁵⁶ This type of use is generally granted less protection under the fair use doctrine.⁵⁷ If a satire is to warrant fair use protection, then it should impersonate⁵⁸ that part of the original work which it

of Publicity, 19 COLUM.-VLA J.L. & ARTS 129, 130–31 (1995) (discussing the difference between the right of publicity and the First Amendment while noting some criticism the right of publicity has as a threat to freedom of speech).

⁵⁴ See Daniel Austin Green, *Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire*, 11 CHAP. L. REV. 183, 199–205 (2007) (discussing the application of the fair use doctrine to parodies and satires).

⁵⁵ See e.g., *Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225, 1227 (7th Cir. 1993) (defining satire); *Rogers v. Koons*, 960 F.2d 301, 309–10 (2d Cir. 1992) (explaining that while the sculpture, "String of Puppies," critiques "our materialistic society," it does not critique the infringed photograph "Puppies" itself); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (finding "I Love Sodom," a Saturday Night Live parody, to be a fair use of "I Love New York"); *Williams v. Columbia Broad. Sys., Inc.*, 57 F. Supp. 2d 961, 968 (C.D. Cal. 1999) (explaining that use of copyrighted clay figure, "Mr. Bill," by Army soldiers to mock Navy personnel was not a parody because the object of ridicule was not "Mr. Bill," but finding that such use was fair use); *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1372 (N.D. Ga. 2001); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979); Green, *supra* note 54, at 210 (advocating excuse and justification demarcation for fair use copyright law and fervently asserting that copyright appropriation should be allowed for satirical works, under limited circumstances set out herein, as part of fair use and First Amendment jurisprudence); see also *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983) ("It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor.").

⁵⁶ *Baraban v. Time Warner, Inc.*, 54 U.S.P.Q.2d (BNA) 1759, 1762 (S.D.N.Y. 2000) (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)). "Mr. Celente's use of the Louise Ihlenfeldt photograph is neither parody nor satire . . . because he does not mimic the style of the photo. Instead, he copies the photo outright in order to comment on it and on the USCEA advertising campaign in which the photo played an integral part." *Id.*

⁵⁷ See e.g., *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400–03 (9th Cir. 1997) (explaining the book *The Cat NOT in the Hat!*, for instance, included on its cover the qualification "A Parody," though the Ninth Circuit Court of Appeals properly reclassified the work as a satire); *Baraban*, 54 U.S.P.Q.2d (BNA) at 1762; Green, *supra* note 54, at 203; see also *Campbell*, 510 U.S. at 592 n.22 ("[This Court] express[es] no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.").

⁵⁸ See e.g., *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 376 (S.D.N.Y. 1979) (noting "[a] parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule."); *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357 (accepting the definition of parody as defined in *Dallas Cowboys Cheerleaders, Inc.*).

copies.⁵⁹ If it does not, a satire will not be considered fair use.⁶⁰

Satire does not exactly mimic the original work because the new author uses the original work's expression to criticize a general societal ailment.⁶¹ A satire is a work that holds up the vices, prevalent follies, or shortcomings of an individual or institution to ridicule or derision.⁶²

One legal meaning of satire is that it can stand on its own and therefore it requires justification for the very act of borrowing.⁶³ Consequently, a satire's meaning "has an unclear legal status and may often blur with parody, which is afforded protection from charges of copyright infringement."⁶⁴

2. Parody

"A parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule."⁶⁵ Parody needs to mimic an original work to make its point⁶⁶ and so may have some claim to use the creative imagination of the copied work.⁶⁷

Parody is a valid form of commentary and criticism⁶⁸ because it almost

⁵⁹ See *e.g.*, *Berlin v. E. C. Publ'ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964) (noting "parody and satire are deserving of substantial freedom - - both as entertainment and as a form of social and literary criticism."); *Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F. Supp. 1559, 1569 (S.D. Cal. 1996); *United Feature Syndicate v. Koons*, 817 F. Supp. 370, 383 (S.D.N.Y. 1993); *Metro-Goldwyn-Mayer*, 479 F. Supp. at 360; Green, *supra* note 54, at 187-88; Fox, *supra* note 37, at 628 (stating there are instances of satire to be within the technical definition of parody, and thereby entitled to fair use protection, based on a particular element of the satire being targeted at the original); see *Rogers*, 960 F.2d at 309-10 (holding "parody and satire . . . [occurs] when one artist, for comic effect or social commentary, closely imitates the style of another artist."); *MCA, Inc. v. Wilson*, 677 F.2d 180, 189 (2d Cir. 1981) (stating that defendants sought to parody life, sexual mores and taboos, but did not comment ludicrously upon the source material).

⁶⁰ Williams, *supra* note 8, at 315; see *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring) (explaining "[t]his prerequisite confines fair use protection to works whose very subject is the original composition and so necessitates some borrowing from it").

⁶¹ *E.g.*, *Campbell*, 510 U.S. at 580; *Dr. Seuss*, 109 F.3d at 1400 (commenting that a satire uses the copyrighted work to make fun of some other target); Heymann, *supra* note 19, at 462; Williams, *supra* note 8, at 315.

⁶² *E.g.*, *Campbell*, 510 U.S. at 581 n.15; *Dallas Cowboys Cheerleaders*, 467 F. Supp. at 376; *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357; AMERICAN HERITAGE DICTIONARY 1317, 1604 (3d ed. 1992); 14 OXFORD ENGLISH DICTIONARY 247, 500 (2d ed. 1989); Green, *supra* note 54, at 187.

⁶³ *Campbell*, 510 U.S. at 576, 580-81; *Dr. Seuss*, 109 F.3d at 1400; Heymann, *supra* note 19, at 462; Green, *supra* note 54, at 187, 189, 199; Fox, *supra* note 37, at 628; see also Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 984 (2004) (noting how courts have disregarded Campbell's "nuanced reasoning" in favor of a strict parody/satire distinction).

⁶⁴ Green, *supra* note 54, at 199 (citing *Campbell*, 510 U.S. at 569). It is important to note that the legal meaning of satire is not universally agreed upon. Green, *supra* note 54, at 189, 198.

⁶⁵ *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357 (quoting *Dallas Cowboys Cheerleaders*, 467 F. Supp. at 376).

⁶⁶ *Baraban v. Time Warner, Inc.*, 54 U.S.P.Q.2d (BNA) 1759, 1762 (S.D.N.Y. 2000) (explaining that defendants' use of the photograph was neither parody nor satire because they did not mimic the style of the photograph).

⁶⁷ *Campbell*, 510 U.S. at 576, 580-81; see also *Dr. Seuss*, 109 F.3d at 1400 (relying on *Campbell*); Green, *supra* note 54, at 187; Fox, *supra* note 37, at 628.

⁶⁸ *E.g.*, Green, *supra* note 54, at 209; William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 709 (1993).

always “targets the original.”⁶⁹ A parody is a creation in which copyrighted work is the target of humorous criticism,⁷⁰ by appropriating known elements of a prior work to make humorous or critical comment on that same work.⁷¹

The classification of a work as a parody does not automatically immunize such work from an infringement claim, but rather the parody must be examined in light of the statutory factors.⁷² Parody is a “transformative” use posing little threat of displacing⁷³ the demand for the original work.⁷⁴ However, “[i]f a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives, then it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the original”⁷⁵ As to derivative works, while an author might license a satirist’s use of his work,⁷⁶ the law presumes reluctance towards licensed parodists, whose purpose it is to ridicule the author’s work.⁷⁷

⁶⁹ *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring) (“The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).”); see also *Metro-Goldwyn-Mayer*, 479 F. Supp. at 358–60 (discussing the amount of the original work a parody should parody); Green, *supra* note 54, at 199, 209 (“[S]atire does not so directly target the works it draw from as does its cousin, parody.”).

⁷⁰ *Dr. Seuss*, 109 F.3d at 1400; see also Heymann, *supra* note 19, at 462 (“[P]arody uses a copyrighted work to comment on the work itself, and thus engages in justifiable (and necessary) borrowing.”).

⁷¹ *Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F. Supp. 1559, 1567 (S.D. Cal. 1996); see *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring) (“Another is that parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition.”).

⁷² *United Feature Syndicate v. Koons*, 817 F. Supp. 370, 384 (S.D.N.Y. 1993); see *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (discussing that parody is not presumptively classified as a fair use, but rather “must be considered individually, in light of the statutory factors, reason, experience, and, of course, the general principles developed in past cases”); see also *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988) (“In the legislative notes . . . Congress listed examples of the ‘sort of activities the Courts might regard as fair use under the circumstances.’ [citation omitted] One of these activities is ‘use in a parody of some of the content of the work parodied.’ [citation omitted] Parody, however, was ‘not classified as *presumptively* fair use’ and thus, an assertion of the parody defense ‘must be considered individually, in light of the statutory factors, reason, experience, and, of course, the general principles developed in past cases.’” (citations omitted)

⁷³ See *Fisher*, 794 F.2d at 438 (“[T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original - - any bad review can have that effect - - but rather whether it *fulfills the demand* for the original.”) (emphasis in original); *Dr. Seuss*, 924 F. Supp. at 1569 (differentiating between parodies that make “discernable direct comment on the original” and unfair use that abuses the original creator’s imagination); *Campbell*, 510 U.S. at 583 (“Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,’ [citation omitted] the role of the courts is to distinguish between ‘biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’”).

⁷⁴ *Campbell*, 510 U.S. at 592; *Dr. Seuss*, 924 F. Supp. at 1569.

⁷⁵ *Campbell*, 510 U.S. at 580 n.14.

⁷⁶ *Dr. Seuss*, 924 F. Supp. at 1569; see also *New Line Cinema*, 693 F. Supp. at 1519 (analyzing how creators of the “Nightmare on Elm Street” movie series licensed derivative use of movie characters to rap group “Fat Boys,” and sued infringing user rapper “D.J. Jazzy Jeff”).

⁷⁷ *Campbell*, 510 U.S. at 592 (“[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”); *Dr. Seuss*, 924 F. Supp. at 1569 (“[W]hile the unlicensed satirist deprives the author of potential license fees for derivative works, the parodist is presumed to operate within a market imperfection.”); see also *Fisher*, 794 F.2d at 437 (“Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to

In summary, parody is a work that imitates or mimics another work, while satire uses the style of another work to create an original work. Satire can stand alone, while parody needs assistance from another work to prove its point. For those reasons, satire is given less protection under the fair use doctrine as compared to parody. Parody is a criticism, while satire is a commentary. There must be justification for taking of original work by a commentary, whereas original work is the target of a criticism. Since satire is given less protection under the fair use doctrine as compared to parody, there is a need for the supplementary component in the fourth fair use factor.

D. Examples of Infringement in Satire

In *Wendt v. Host Int'l, Inc.*,⁷⁸ Host International, Incorporated ("Host") created animatronic robotic figures based upon the likenesses of Cheers characters, Norm and Cliff,⁷⁹ portrayed by George Wendt and John Ratzenberger, without their permission and placed these robots in airport bars modeled upon the set from the television show Cheers.⁸⁰ The ultimate issue for the jury to decide was whether Host commercially exploited the likeness of the characters Norm and Cliff with intentions to engender profits to their enterprises.⁸¹ Additionally, an important determination was the likelihood of confusion to consumers as to whether or not Wendt and Ratzenberger sponsored, approved of, endorsed, or were otherwise associated with Host's Cheers bars.⁸² This case, in relation to satire and fair use, will be explained in the proposal section.⁸³

In *Burnett v. Twentieth Century Fox Film Corp.*,⁸⁴ the television show "Family Guy"⁸⁵ portrays an animated figure resembling the "Charwoman" from the Carol Burnett Show, performing janitorial duties in a pornography shop.⁸⁶ As

permit the granting of permission even in exchange for a reasonable fee.")

⁷⁸ 125 F.3d 806 (9th Cir. 1997).

⁷⁹ See *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284, 1285 (9th Cir. 1999) (describing the characters Norm and Cliff).

⁸⁰ *Wendt*, 125 F.3d at 809.

⁸¹ *Id.* at 812. The allegation is that Host is appropriating Wendt and Ratzenbergers' likenesses because the target audience of the Cheers bars are customers who are fans of the television series. *Id.* at 812–13. Such a similarity in marketing channels suggests that there is at least a likelihood of consumer confusion. *Id.* at 813; see also *Eastwood v. Super. Ct. for L.A. County*, 198 Cal. Rptr. 342, 349 (Cal. Ct. App. 1983), *superseded by statute*, CAL. CIV. CODE § 3344, as recognized in *KNB Enterprises v. Matthews*, Cal. App. 4th 362, 367 (Cal. Ct. App. 2000) ("The first step toward selling a product or service is to attract the consumer's attention.").

⁸² *Wendt*, 125 F.3d at 812. Section 43(a) of the Lanham Act prohibits the use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person. 15 U.S.C. § 1125(a) (2006). A reasonable juror could conclude that by using an imitation of their unique physical characteristics, Host misrepresented their association with and endorsement of the Cheers bars concept. *Wendt*, 125 F.3d at 812. A reasonable juror could also conclude that Host intended to exploit the Wendt and Ratzenbergers' celebrity by confusion as to the similarity between the figures and Wendt and Ratzenberger. *Id.* at 813.

⁸³ See *infra* Part III(A) (discussing *Wendt v. Host Int'l* as it relates to satire and fair use).

⁸⁴ 491 F. Supp. 2d 962 (C.D. Cal. 2007).

⁸⁵ *Family Guy: Peterotica* (Fox television broadcast Apr. 23, 2006).

⁸⁶ *Burnett*, 491 F. Supp. 2d at 966. The alleged Carol Burnett Show inspired charwoman was mopping the floor next to "blow-up dolls," a rack of "XXX" movies, and a curtained room with a sign above it reading "Video Booths." *Id.*; *Comedian Burnett Sues Family Guy*, BBC NEWS, Mar. 17,

the “Charwoman” mops, a “slightly altered version of Carol’s Theme from The Carol Burnett Show is playing.”⁸⁷ In response to this Family Guy clip, Carol Burnett filed suit against Fox for copyright infringement and right of publicity.⁸⁸ Again, this case’s relationship to satire and fair use will be explained more in depth in the proposal section.⁸⁹

In *White v. Samsung Electronics America Inc.*,⁹⁰ the commercial use of Vanna White’s likeness was used in a television advertisement to sell Samsung products.⁹¹ One particular Samsung Electronics America (“Samsung”) advertisement “depicted a robot dressed in a wig, gown and jewelry[,] . . . consciously selected to resemble White’s hair and dress.”⁹² Unlike the other celebrities used in the advertising campaign, White neither consented to nor was paid for the advertisements.⁹³ Samsung referred to the advertisement as the “Vanna White” advertisement.⁹⁴ The relevant question was whether Samsung “intended to profit by confusing consumers” concerning the endorsement of Samsung VCRs by Vanna Marie Rosich (aka Vanna White).⁹⁵ The proposal section will explain this case relative to satire, fair use and copyright infringement.⁹⁶

In *Elvis Presley Enterprises v. Capece*,⁹⁷ a 1960s-themed restaurant called “The Velvet Elvis” was held liable for infringement because the restaurant was an unprotected satire that targeted the society of the 1960s and did “not even attempt to parody the celebrity of Elvis Presley.”⁹⁸ The restaurant was sued by Elvis Presley Enterprises (“EPE”) for infringement because of the name of the

2007, <http://news.bbc.co.uk/2/hi/6462525.stm> (last visited Jan. 10, 2011).

⁸⁷ *Burnett*, 491 F. Supp. 2d at 966.

⁸⁸ *Id.* The exact allegations filed by Burnett against Fox were: (1) copyright infringement; (2) violation of the Lanham Act, 15 U.S.C. § 1125; (3) violation of California’s statutory right of publicity, Civil Code § 3344; and (4) common law misappropriation of name and likeness. *Id.*

⁸⁹ See *infra* Part III(A) (discussing *Burnett v. Twentieth Century Fox Film Corp.* as it relates to satire and fair use).

⁹⁰ 971 F.2d 1395 (9th Cir. 1992).

⁹¹ *Id.* at 1396. “Vanna White is a one-role celebrity. She is famous solely for appearing as the hostess on the “Wheel of Fortune” television show.” *Id.* at 1404–05 (Alarcon, J., concurring in part, dissenting in part).

⁹² *Id.* at 1396. “The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous. The caption of the ad read: ‘Longest-running game show. 2012 A.D.’” *Id.*

⁹³ *Id.* When Samsung and White could not agree on an appropriate compensation to induce her to participate in the television commercial, Samsung dressed a robot in a blond wig and glamorous clothing, the costume usually worn by television game-show hostesses. *Id.* at 1405 (Alarcon, J., concurring in part, dissenting in part).

⁹⁴ *Id.* at 1396.

⁹⁵ *Id.* at 1400. “This case concerns only the market which exists in our society for the exploitation of celebrity to sell products, and an attempt to take a free ride on a celebrity’s celebrity value.” *Id.* at 1401 n.3.

⁹⁶ See *infra* Part IV(A) (discussing *White v. Samsung Electronics America Inc.* as it relates to satire, fair use, and copyright infringement).

⁹⁷ 141 F.3d 188 (5th Cir. 1998).

⁹⁸ See *id.* at 192 (noting interior of the restaurant included various pictures of Elvis, and the menu offered “Love Me Blenders” peanut butter sandwiches (a noted Elvis favorite), as well as a hotdog called “Your Football Hound Dog”); see also Aaron F. Jaroff, *Big Boi, Barbie, Dr. Seuss, and the King: Expanding the Constitutional Protections for the Satirical Use of Famous Trademarks*, 57 AM. U. L. REV. 641, 659 (2008).

restaurant, the decor, and the advertising methods used.⁹⁹ Also, in *Kelly v. Arriba Soft Corp.*,¹⁰⁰ an internet search engine's reduced size reproductions of images available on websites was held to be transformative¹⁰¹ because the search engine reproductions "served an entirely different function" than the original image.¹⁰²

Just like the satire, fair use, and copyright infringement case examples above, *Blanch v. Koons*,¹⁰³ *Rogers v. Koons*,¹⁰⁴ *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,¹⁰⁵ and *Campbell v. Acuff-Rose Music*¹⁰⁶ will also be examined with regard to the proposed additional component to the fourth fair use factor.

III. ANALYSIS

"What remains uncertain . . . is the status of satirical works, which often do not explicitly target another work."¹⁰⁷ Satire should not be treated like parody because satire is copyright infringement and parody is not.¹⁰⁸ Since there are limits on what can be done under the name of parody or satire,¹⁰⁹ an additional component for the fourth fair use factor needs to be implemented to the doctrine of fair use. "The Supreme Court, in the more than ten years after

⁹⁹ *Elvis Presley Enters.*, 141 F.3d at 200–05, 207. Because the restaurant was a comment on 1960s society, it did not "require the use of [Elvis'] marks because it [did] not target Elvis Presley . . ." *Id.* at 200. After the determination that use of the senior Elvis marks was a satire, it became easy for the court to find a likelihood of consumer confusion because of the similarity and proximity of the marks (Elvis Presley Enterprises had planned to open a worldwide chain of restaurants), seniority of the Elvis trademark, and evidence of actual confusion (applying the factors from the likelihood of confusion test to find that the defendant's use of the mark was unlawful). *Id.* at 202–05. As a result, "The Velvet Elvis" infringed upon the marks held by the estate of Elvis Presley, and even though Elvis was undoubtedly a part of the culture of the 1960s, a 1960s-themed restaurant was barred from using his name or likeness to satirize the values of the era. *Id.* at 207; Jaroff, *supra* note 99, at 659–60; see Nicholas J. Jollymore, *Expiration of the Right of Publicity - When Symbolic Names and Images Pass into the Public Domain*, 84 TRADEMARK REP. 125, 125 (1994) (contending that Elvis is synonymous with the Rock-and-Roll movement).

¹⁰⁰ 336 F.3d 811 (9th Cir. 2003).

¹⁰¹ *Id.* at 818 (concluding that such copying was transformative because "thumbnail" copies of photographs the search engine produced and displayed did not "supersede the object" of the original photos in that they "served an entirely different function"); Williams, *supra* note 8, at 317–18.

¹⁰² *Kelly*, 336 F.3d at 818; Williams, *supra* note 8, at 305.

¹⁰³ 467 F.3d 244, 252–53 (2d Cir. 2006) (describing how defendant was not liable for copyright infringement because the artist's incorporation of plaintiff's photograph in a collage painting constituted fair use).

¹⁰⁴ 960 F.2d 301, 309–10 (2d Cir. 1992) (explaining that sculptor's use of a copyright protected photograph constituted copyright infringement due to commercial benefit and blatant copying that occurred).

¹⁰⁵ 109 F.3d 1394, 1404–05 (9th Cir. 1997) (stating distribution of a publication, not owned by the distributing party, is a demonstration of copyright and trademark infringement).

¹⁰⁶ 510 U.S. 569, 577–78 (1994) (holding sufficient consideration and weight must be given to all elements of the doctrine of fair use when dealing with a parody enquiry).

¹⁰⁷ Green, *supra* note 54, at 189.

¹⁰⁸ *Cf. Campbell*, 510 U.S. at 580–81 (holding parody of a copyrighted work is fair use).

¹⁰⁹ See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 375 (S.D.N.Y. 1979) (granting a preliminary injunction for the marketing and release of an "adult" film which used the likeness of an NFL team's cheerleading uniforms, despite defendant's claims that the use was a parody).

Campbell,¹¹⁰ has yet to offer up any specific guidance as to the status of satire in copyright fair use.¹¹¹ This is a problem. The proposed additional component for the fourth fair use factor will give the guidance needed to determine what is and is not copyright infringement with regard to satire. The additional section to the fourth fair use factor is meant to be broad, rather than exact and precise, in order to encompass a great extent.

A. *Expanding on the Right of Publicity Protections*

The additional component for the fourth fair use factor should be similar to the right of publicity.¹¹² However, “the right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire.”¹¹³ This is where the proposed additional component to the fourth fair use factor differs from the right of publicity. The amended fourth fair use factor will give protection to a celebrity character that the right of publicity does not. A celebrity has a copyrightable interest in his or her character yet does not have copyright protection to that character.

“A literal depiction of a celebrity, even if accomplished with great skill, may still be subject to a right of publicity challenge.”¹¹⁴ Nonetheless, prominence invites creative comment.¹¹⁵ A satire can be created for commercial gain, so the celebrity character in the satire must be protected. The additional component for the fourth fair use factor is different from the right of publicity because it is intended to protect a celebrity’s character image against improper use in such satirical works as television shows,¹¹⁶ movies,¹¹⁷ cartoons,¹¹⁸ or publications.¹¹⁹

¹¹⁰ 510 U.S. 569 (1994)

¹¹¹ Green, *supra* note 54, at 189.

¹¹² See, e.g., *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Groucho Marx Prods. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (Cal. 1979); (all discussing the right of publicity).

¹¹³ *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1358 (D.N.J. 1981). See also *Giacoppo*, *supra* note 53, at 612; *McCarthy*, *supra* note 53, at 131 (excluding from the right of publicity a claim to identification value in news stories, biographies, novels, films, and parodies or satires using a person’s identity).

¹¹⁴ *Winter*, 69 P.3d at 478 (internal citation omitted).

¹¹⁵ *Comedy III Prods., Inc. v. Saderup*, 25 Cal. 4th 387, 397 (Cal. 2001) (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 463 (Cal. 1979)).

¹¹⁶ *30 Rock* (NBC television broadcast); *Chappelle’s Show* (Comedy Central television broadcast); *MADtv* (Fox television broadcast); *Mystery Science Theater 3000* (Comedy Central television broadcast); *Saturday Night Live* (NBC television broadcast); *Scrubs* (NBC television broadcast); *Seinfeld* (NBC television broadcast); *The Colbert Report* (Comedy Central television broadcast); *The Daily Show* (Comedy Central television broadcast); *The Kids in the Hall* (CBC television broadcast, HBO television broadcast, CBS television broadcast); *The Office* (NBC television broadcast).

¹¹⁷ *6 DEGREES OF SEPARATION* (MGM Studios 1993); *A CLOCKWORK ORANGE* (Warner Bros. 1971); *AIRPLANE!* (Paramount Pictures 1980); *AMERICAN PSYCHO* (Lions Gate 2000); *BLAZING SADDLES* (Warner Bros. 1974); *CATCH-22* (Paramount Pictures 1970); *CHICAGO* (Miramax Films 2003); *DEATH TRAP* (Warner Bros. 1982); *DOG DAY AFTERNOON* (Warner Bros. 1975); *DR. STRANGELOVE OR HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Columbia Pictures 1964); *EATING RAOUL* (20th Century Fox 1982); *FARGO* (Gramercy Pictures 1996); *HEATHERS* (New World Pictures 1989); *IDIOCRACY* (20th Century Fox 2006); *M*A*S*H* (20th Century Fox 1970); *MONTY PYTHON’S HISTORY OF THE WORLD PART ONE* (Universal Studios 1981); *MONTY PYTHON’S THE MEANING OF LIFE* (Universal Studios 1983); *O’ BROTHER WHERE ART THOU?* (Touchstone Pictures 2000); *REALITY BITES* (Universal Studios 1994); *SPACEBALLS* (MGM Studios 1987); *STALAG 17* (Paramount Pictures 1953); *SUNSET*

A celebrity's character image is what makes a celebrity recognizable. The supplementary component for the fourth fair use factor is needed, just like the right of publicity, so a celebrity's character image cannot be used by another for unauthorized monetary gain.

The current doctrine of fair use is not enough to protect a celebrity's character image from satire. If all artistic creation is in a sense a copy, then "transformativeness"¹²⁰ has no inherent meaning: Everything is transformative, because all creative expression is, to a certain degree, representational.¹²¹ What matters is whether the reader perceives the second copy as signifying something different from the first.¹²² "The inquiry is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work."¹²³ If a celebrity character image is there to attract people to the satire, then there is no transformation because a reader will perceive the image for what it is: a celebrity character and not a satire.

B. Additional Component for the Fourth Fair Use Factor and Character Image

A celebrity is defined as "a celebrated or widely known person: one popularly honored for some signal achievement."¹²⁴ Infringement of a copyrightable expression, such as a celebrity character image, could be justified as fair use based on the infringer's claim to a different artistic use.¹²⁵ "[W]ithout insuring public awareness of the original work[,] there would be no

BOULEVARD (Paramount Pictures 1950); THE BIG PICTURE (Columbia Pictures 1989); THE COURT JESTER (Paramount Pictures 1956); THE FRISCO KID (Warner Bros. 1979); THE HUDSUCKER PROXY (Warner Bros. 1994); THE PINK PANTHER (United Artists 1964); THE PLAYER (Fine Line Features 1992); THE THRILL OF IT ALL! (Universal Studios 1963); THIS IS SPINAL TAP (Embassy Pictures 1984); TO BE OR NOT TO BE (Warner Bros. 1942); TO DIE FOR (Columbia Pictures 1995); WAG THE DOG (New Line Cinema 1997); WAYNE'S WORLD (Paramount Pictures 1992).

¹¹⁸ *Futurama* (Fox television broadcast); *South Park* (Comedy Central television broadcast); *The Simpsons* (Fox television broadcast). See also *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007), and *BBC NEWS*, *supra* note 87 (detailing a lawsuit by Carole Burnett for copyright infringing use of her character and music in an episode of *Family Guy*).

¹¹⁹ See, e.g., Christine Kearney, *Chuck Norris Sues, Says His Tears No Cancer Cure*, THOMSON REUTERS, Dec. 23, 2007, available at <http://www.reuters.com/article/rbssTechMediaTelecomNews/idUSN2129580420071222> (last visited Jan. 10, 2011) (detailing how publishers and authors have misappropriated and exploited Chuck Norris' name and likeness without authorization for their own commercial profit).

¹²⁰ See Heymann, *supra* note 19, at 445, 447–50, 452, 455–58, 460–62, 464–66 (discussing the term "transformativeness" throughout the text of her writing).

¹²¹ *Id.* at 455.

¹²² *Id.*

¹²³ See *Winter v. DC Comics*, 69 P.3d 473, 481 (Cal. 2003) (quoting *Comedy III Prods., Inc. v. Saderup*, 25 Cal. 4th 387, 407 (Cal. 2001)) ("[I]n determining whether the work is transformative, courts are not to be concerned with the quality of the artistic contribution – vulgar forms of expression fully qualify for First Amendment protection.").

¹²⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 359 (Phillip Babcock Gove, ed. 1981); see also *Parks v. LaFace Records*, 329 F.3d 437, 447 n.3 (6th Cir. 2003).

¹²⁵ *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992); see also Heymann, *supra* note 19, at 461 (discussing the *Blanch* court's holding that Koons' appropriation of photograph was fair use, in part because of "Koons' efforts to engage viewers in a different interpretive discourse from that of *Blanch*.").

practicable boundary to the fair use defense."¹²⁶ Thus, there needs to be a supplementary component added to the fourth fair use factor for slight variations to celebrity character images, such as cartoon representations of the depicted character.

As in each of the *Koons* cases,¹²⁷ as well as *Dr. Seuss*,¹²⁸ reader recognition of the defendant's different perspective on context "mediates any potential conflict between a reader-response view of transformativeness and the derivative work right."¹²⁹ Just like in right of publicity, there needs to be credit given for a work involving a celebrity character that may fall within the protection of transformative use. In the aforementioned cases, there was no permission given for use of protected work by others in the respective commercial beneficial situations.¹³⁰ Not giving a celebrity compensation/credit for the character where it is due is a problem that needs to be resolved.

One is subject to liability when use of another person's name, likeness, or other indicia of identity is appropriated for commercial value without consent.¹³¹ Hence, use of a character in a satire will make the author of the work liable for copyright infringement under the additional component to the fourth fair use factor. "[A]n illustrated biography of a celebrity may be written without consent, but the celebrity's name or photograph may not be used to sell a product."¹³² The proposed additional component for the fourth fair use factor would have the same protection as this example, but for unauthorized use of a celebrity's character image in satirical works.

¹²⁶ *Rogers*, 960 F.2d at 310; Heymann, *supra* note 19, at 460–61.

¹²⁷ *Blanch v. Koons*, 467 F.3d 244, 250–54 (2d Cir. 2006) (describing how defendant was not held liable for copyright infringement since the artist's incorporation of plaintiff's photograph in a collage painting constituted fair use); *Rogers*, 960 F.2d at 309–10 (describing how sculptor's use of copyright protected photograph constituted copyright infringement due to the commercial benefit and blatant copying that occurred).

¹²⁸ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1406 (9th Cir. 1997) (stating that distribution of a publication, not owned by the distributing party, is a demonstration copyright and trademark infringement).

¹²⁹ Heymann, *supra* note 19, at 464; see Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 764 (2005) ("It may be that consumers are perfectly capable of contextualizing reworkings of expressive texts if they have sufficient information about the source.").

¹³⁰ *Blanch*, 467 F.3d at 256; *Dr. Seuss, Inc.*, 109 F.3d at 1396. "[C]ourts will not sustain a claimed defense of fair use when the secondary use can fairly be characterized as a form of commercial exploitation, i.e., when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material." *Blanch*, 467 F.3d at 253. "The greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair." *Id.* The Second Circuit has characterized this factor as calling for the striking of a balance "between 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...[T]he less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use." *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

¹³¹ *Parks v. LaFace Records*, 329 F.3d 437, 458 (6th Cir. 2003); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 339 (E.D. Pa. 1996); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹³² Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 950 (1985). Compare *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (1975) (use of photograph of sports figure in connection with article about him not prohibited by New York statute) with *Onassis v. Christian Dior*, 472 N.Y.S.2d 254 (1984) (using a look-a-like of Jacqueline Onassis in advertisement is prohibited by New York statute)).

1. Examples exhibiting a need for an additional component applied to the fourth Fair Use factor

The issue in *Elvis Presley Enterprises*¹³³ “involved a celebrity trying to limit the use of his or her name and image.”¹³⁴ “The plaintiffs raised the claim of potential and actual confusion.”¹³⁵ “[W]hile this argument is persuasive because a consumer might reasonably believe that Elvis’ estate was involved in running a restaurant, Elvis was not the only target of the defendant’s satire.”¹³⁶ This just goes to show that a celebrity can be protected from unauthorized involvement and use in satirical works. However, this problem needs a more concrete rule set in place.

“One cannot transform something one doesn’t adapt or comment on.”¹³⁷ “The transformative work must use the preexisting work for a different purpose from its creator.”¹³⁸ Celebrity image in a satire is used to make money and generate interest in one’s product, just like a celebrity does when their picture is sold, so there is no creativity; no transformation.

In reaching the conclusion in *Kelly*,¹³⁹ it was reasoned that photographs “are artistic works intended to inform and to engage the viewer in an aesthetic experience.”¹⁴⁰ A satire using a celebrity image cannot “serve an entirely different function”¹⁴¹ than the fame associated with a celebrity image. A celebrity image in a satire is used for one main reason: to make one’s satire popular and obtain monetary gain through the use and fame of that celebrity image. This satire would then have the same function of a celebrity: to gain fame. There is nothing transformative¹⁴² about this satire, compared to the reasoning employed in *Kelly*. The proposed additional component to the fourth fair use factor would not allow for this copyright infringement of celebrity image in a satire.

If it is determined that a work is worthy of First Amendment protection because added creative elements significantly transform the celebrity depiction, then it must be determined whether that work cutting into the market of the celebrity’s image is relevant or not.¹⁴³ Further, any additional component to the

¹³³ 141 F.3d 188 (5th Cir. 1998).

¹³⁴ Jaroff, *supra* note 99, at 677.

¹³⁵ *Id.* (citing *Parks*, 329 F.3d at 446 (noting that Rosa Parks alleged that the title of the song “Rosa Parks” leads consumers to believe that she was affiliated with the group OutKast)).

¹³⁶ Jaroff, *supra* note 99, at 677–78.

¹³⁷ Brief of Petitioner-Appellant at 12, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (No. 05-2514); *see also* Williams, *supra* note 8, at 321.

¹³⁸ Williams, *supra* note 8, at 327 (stating that the court cited the *Bill Graham Archives* opinion on this point and did not cite *Kelly*).

¹³⁹ 336 F.3d 811 (9th Cir. 2003).

¹⁴⁰ *Id.* at 818; *see also* Williams, *supra* note 8, at 317–18 (reviewing the *Kelly* court’s discussion of the artistic nature of photographs).

¹⁴¹ *Kelly*, 336 F.3d at 818.

¹⁴² *See id.* at 819 (holding that the operator’s use of the images as thumbnails was a fair use, as it was transformative in nature); Williams, *supra* note 8, at 323 (stating that the *Kelly* court found Arriba Soft’s uses transformative for altering the function of the photographs at issue to increase access to information).

¹⁴³ *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (2004)

fourth fair use factor would significantly outweigh the “transformative” celebrity image fair use protection. This would constitute copyright infringement because the additional component to the fourth fair use factor will designate that use of an altered celebrity image as satire. “However, if the marketability and economic value of the challenged work do not derive primarily from the celebrity’s fame, there would generally be no actionable right of publicity.”¹⁴⁴ There must be an “actionable right” put in effect for a celebrity to protect their image from use in such works as satire.

In *Blanch v. Koons*,¹⁴⁵ it was found that Koons’ painting may be better characterized as a satire, rather than a parody, because its message appears to target the genre of which ‘Silk Sandals’ is typical, rather than the individual photograph itself.¹⁴⁶ The *Campbell*¹⁴⁷ reasoning was applied properly by holding that such a satire is still transformative and may still be fair.¹⁴⁸ Koons removed the image from a magazine, digitized it, and superimposed part of it, along with the other images of legs and feet, onto an image of a landscape, thus transforming it.¹⁴⁹ If ‘Silk Sandals’ would have been a celebrity character image instead of a pair of legs, a holding for fair use due to transformation and no copyright infringement would have been the result. Not giving credit or compensation to a celebrity for use of their image is wrong. The protection of celebrity image from copyright infringement must be tightened.

Where an expressive and creative appropriation of a celebrity image constitutes caricature, parody, or satire, there can be no legitimate argument that the right of publicity has been violated because there is little possibility that the owner’s ability to derive economic value from the likeness or image has been lessened.¹⁵⁰ This is similar to the Schwarzenegger bobblehead doll

(discussing the requirement that fair use analysis “look[] to adverse impact... of usurpation of the demand for plaintiff’s work through defendant’s copying of protectable expression from such work.”); see also Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 221–22 (1993) (arguing that limiting fair use doesn’t always make sense, as increased usage of a celebrity’s picture work to the benefit of the person’s notoriety and marketability in certain instances).

¹⁴⁴ *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) (internal quotation omitted).

¹⁴⁵ 467 F.3d 244 (2d Cir. 2006)

¹⁴⁶ See *id.* at 250–51 (holding that Koons was not liable for copyright infringement because the artist’s incorporation/use of Blanch’s photograph (which depicted a pair of legs-Silk Sandals) in a collage painting constituted fair use through transformation).

¹⁴⁷ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588–89 (1994) (holding that sufficient consideration and weight must be given to all elements of the doctrine of fair use when dealing with a parody enquiry).

¹⁴⁸ *Blanch*, 467 F.3d at 253 (acknowledging that this is a very important holding on this point because prior holdings had rigidly dismissed the value of satires); Williams, *supra* note 8, at 328; see Carey Lening, *Ninth Circuit Judge Would “Dump” Fair Use, Injunctive Relief for Derivative Works*, 72 BNA PAT. TRADEMARK & COPYRIGHT J. 643, 643 (2006) (noting that the fair use analysis is a red herring that invites a back door approach to stifling speech that would otherwise be unconstitutional); see also Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y 513 (1999) (stating that the injunctive relief associated with fair use results in extreme remedies that leave little room for a fair, even-handed resolution); Tyler Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y 546 (1998).

¹⁴⁹ *Blanch*, 467 F.3d at 244. The original photograph shows the lower part of a woman’s legs crossed at the ankles, resting on the knee of a man apparently seated in an airplane cabin. *Id.* She is wearing Gucci sandals with an ornately jeweled strap. *Id.* One of the sandals dangles saucily from her toes. *Id.*; Williams, *supra* note 8, at 326.

¹⁵⁰ Gallagher, *supra* note 50, at 584.

example involving the unauthorized sale of Schwarzenegger's likeness.¹⁵¹ So when the right of publicity cannot protect a celebrity image from satire, a new law/rule must fill that void for celebrity image protection from copyright infringement in such works.

2. Expanding upon the fourth Fair Use factor to help protect character image use is necessary

It is not necessary that the cover of a satirical work contain the satirical material itself, so long as that cover is distinguishable enough to make consumer confusion unlikely.¹⁵² This would never happen when a celebrity image is used in a satire because the whole point of using the celebrity image in a satire is to entice people and get their attention. The additional component to the fourth fair use factor would eliminate this possible flaw in the doctrine of fair use and would not allow copyright infringement of a celebrity image in a satire. After all, the "spectrum of fair use" analysis has qualities that many might see as fatal flaws: uncertainty, subjectivity, and arbitrariness.¹⁵³

Character images that are depicted by celebrities need to have the same protection given to those portrayals as are given to the celebrity personally. There is a copyrightable interest in these character images by the people representing them, yet use of these character images cannot be done without consequences. Right of publicity protects celebrities, yet the same characters that may have made these celebrities famous are given no copyright protection. With consumer confusion, the right of publicity protects celebrities from possible copyright infringement of their image, so the next step in copyright protection must be taken by adjoining an additional component to the fourth fair use factor.

¹⁵¹ John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. TIMES, May 18, 2004, at A16 (writing about how Arnold Schwarzenegger filed a lawsuit against a small Ohio toy maker, claiming that the company's \$19.95 Schwarzenegger bobblehead doll illegally exploits his image for commercial purposes, without permission to use his recognizable global celebrity name and likeness); Gallagher, *supra* note 50, at 582 (stating that there was fair use for the Schwarzenegger bobblehead doll); see Tyler T. Ochoa, *The Schwarzenegger Bobblehead Case: Introduction and Statement of Facts*, 45 SANTA CLARA L. REV. 547 (2005) (describing how a company manufacturing Schwarzenegger bobblehead dolls holding assault rifles settled out of court with Schwarzenegger to discontinue the line, yet continues to make satirical bobbleheads of the celebrity in a pink dress under the title of "girly man"). This article refers to lawsuits against defendants Todd and Toby Bosley and their company, Ohio Discount Merchandise, Inc., (collectively as the "ODM"). *Id.* at 550. The first lawsuit was filed by plaintiff Oak Productions, Inc., which manages Schwarzenegger's rights of publicity, alleging right of publicity and related claims. *Id.* at 553. The second lawsuit was filed by plaintiff Fitness Publications, Inc., which publishes books and magazines about weightlifting, alleging copyright infringement relating to photographic images used on the packaging for ODM's Schwarzenegger bobblehead doll. *Id.* at 554.

¹⁵² 15 U.S.C. § 1125 (2006); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992) (stating that a false association claim requires that the misuse of a trademark or other distinguishing device confuse consumers as to the origin, approval, or endorsement of the product); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group*, 886 F.2d 490 (2d Cir. 1989); see *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 452 U.S. 941 (1981) (limiting infringement claims under section 43(a) to those where use of trademark leads to confusion over endorsement or sponsorship).

¹⁵³ Green, *supra* note 54, at 210.

IV. PROPOSAL

The proposed component to be added to the fourth fair use factor deals with character protection. This additional component for the fourth fair use factor is not designed to conflict or challenge any of the statutory considerations. This component is intended merely to provide further guidance on the application of general common law principles of excuse and justification¹⁵⁴ in conjunction with statutory protection for fair use.¹⁵⁵ The additional section to the fourth fair use factor is meant not to be exact and precise, but broad in order to encompass a great extent. Adding a supplementary component to the fourth fair use factor is just another step in the right direction for the history of fair use.

The true purpose of copyright is to benefit the public by obtaining new work.¹⁵⁶ Yet using a celebrity character image in satire often does not fulfill that purpose, but rather infringes on the copyright. An artist depicting a celebrity character cannot contribute a merely trivial variation, but must create something recognizably his or her own, in order to qualify for legal protection.¹⁵⁷ Even if a work is considered transformative and fits within the current four fair use factors, it is hard to say that a re-creation of a celebrity character image is original work distinct from the character in general. Presently, courts do consider whether a product containing a celebrity's character likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's character likeness.¹⁵⁸ With the proposed additional component to the fourth fair use factor, even if a re-creation of a character is considered transformative, the edited fourth fair use factor would still consider the work of the creator to be copyright infringement because recreation of a celebrity character image in order to benefit one's work is not fair use, but rather infringing on the copyrighted character image.

This supplementary section to the fourth fair use factor will protect against unwarranted use of a character image, and not the celebrity image itself. For example, these character images could include such personalities that celebrities are best known for: Michael Richards as "Kramer" in *Seinfeld*,¹⁵⁹ Judy Garland as "Dorothy" in *The Wizard of Oz*,¹⁶⁰ Leonard Nimoy as "Spock" in *Star*

¹⁵⁴ *Id.* at 193–95.

¹⁵⁵ *Id.* at 208.

¹⁵⁶ *Blanch v. Koons*, F.3d 244, 249 (2d Cir. 2006) (affirming that Koons did not infringe the copyright of Blanch's photograph because Koons' incorporation of the photograph in a collage painting constituted fair use, pursuant to 1976 Copyright Act); Williams, *supra* note 8, at 329; Mark Hamblett, *Artist Koons' 'Transformative' Use of Photo Affirmed by 2nd Circuit*, 236 N.Y. L.J. col. 3 at 1, Oct. 30, 2006, (quoting Koons' lawyer, John B. Koegel).

¹⁵⁷ *See Winter v. DC Comics*, 69 P.3d 473, 480–81 (Cal. 2003) (declaring that when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, the artist's right of free expression is outweighed by the right of publicity).

¹⁵⁸ *See id.* at 480 (stating in this context, the word "expression" means expression of something other than the likeness of the celebrity).

¹⁵⁹ *Seinfeld* (NBC television broadcast).

¹⁶⁰ *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

Trek,¹⁶¹ Candice Bergen as “Murphy Brown” in *Murphy Brown*,¹⁶² Sarah Jessica Parker as “Carrie Bradshaw” in *Sex & the City*,¹⁶³ Tom Selleck as “Thomas Magnum” in *Magnum, P.I.*,¹⁶⁴ and Kelsey Grammer as “Dr. Frasier Crane” in *Cheers*¹⁶⁵ and *Frasier*.¹⁶⁶

Although these individuals can get protection for themselves through the right of publicity,¹⁶⁷ the same protection does not extend to the characters they portrayed.¹⁶⁸ The right of publicity does not protect use of a character image in a satire because 1) a character image is not given copyright protection through the right of publicity, only a celebrity is given that protection, and 2) there is no consumer confusion of endorsement, as in the case of a celebrity being used in a satire. This is why the fourth fair use factor, not the right of publicity, needs to be altered in order to protect against unlawful satirical use of a character image. The additional component to the fourth fair use factor will provide much needed protection from those who try and capitalize on currently defenseless character portrayals for their own personal commercial benefit. The following examples demonstrate why character images need to be protected from commercial exploitation.

A. Examples of Infringement in Satire the Proposal Would Protect Against

In *Wendt*,¹⁶⁹ the ‘goods’ of the individuals portraying the two iconic Cheers characters represent their skill and fame as actors.¹⁷⁰ Those very same ‘goods’ are obviously related to Host’s ‘goods’, which are products sold in their Cheers bars and the bars themselves.¹⁷¹ Host intended to confuse customers as to Wendt and Ratzenberger’s sponsorship or endorsement of the Cheers bars by creating robots with their physical characteristics.¹⁷² Thus, by using an

¹⁶¹ *Star Trek: The Original Series* (NBC television broadcast).

¹⁶² *Murphy Brown* (CBS television broadcast).

¹⁶³ *Sex and the City* (HBO television broadcast); *SEX AND THE CITY* (New Line Cinema 2008, Warner Bros. 2008, HBO Films 2008).

¹⁶⁴ *Magnum, P.I.* (CBS television broadcast).

¹⁶⁵ *Cheers* (NBC television broadcast).

¹⁶⁶ *Frasier* (NBC television broadcast).

¹⁶⁷ *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) “[T]he so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed and planned, endows the name and likeness of the person involved with commercially exploitable opportunities” (quoting *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (Cal. 1979)).

¹⁶⁸ *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1286 (9th Cir. 1999) (stating that the right of publicity, as defined by the state courts, is limited to using a celebrity’s name, voice, face or signature); *Lugosi v. Universal Pictures*, 603 P.2d 425, 433 (Cal. 1979) (Mosk, J., concurring) (“If Bela Lugosi were alive today, he would be unable to claim an invasion of his right to privacy for Universal’s exploitation . . . of products created in the image of Count Dracula, a role Lugosi played.”); see, e.g., *Stephano v. News Group Publ’ns, Inc.*, 474 N.E.2d 580, 583–84 (N.Y. 1984) (finding right of publicity under New York law limited to statutory protection of “name, picture or portrait”).

¹⁶⁹ 125 F.3d at 806.

¹⁷⁰ *Id.* at 812.

¹⁷¹ *Id.*

¹⁷² *Id.* at 813 (stating that Host intentionally designed the animatronic figures to resemble Wendt and Ratzenberger and that it recognized from the outset that the value of the association

imitation of their unique physical characteristics, Host misrepresented their association with and endorsement of the Cheers concept.¹⁷³

Although Host did not plaster Wendt's face on a billboard with a Budweiser logo, it did cash in on the Cheers goodwill by creatively putting its familiar scene to work.¹⁷⁴ The robots are a new derivation of a copyrighted work.¹⁷⁵ Host is still making money off of the character by exploiting their fame for its own commercial monetary returns. The proposed additional section added to the fourth fair use factor will add onto protection for individuals. This protection will not only be for the individual's celebrity, but also for the "character" identifiable to that individual. An actor or actress does not lose the right to control the commercial exploitation of his or her likeness by being portrayed as fictional character.¹⁷⁶ Although the character may be fictional, it still deserves the protection from commercial exploitation.

In *Burnett v. Twentieth Century Fox Film Corp.*,¹⁷⁷ the United State District Court for the Central District of California agreed with defendant that the claim was barred by the doctrine of fair use.¹⁷⁸ Also, the likelihood that viewers were confused by defendant's use of the entertainer's character was not found to be true.¹⁷⁹

Obviously, people would not confuse the Charwoman cartoon character on *Family Guy* with the real life Carol Burnett,¹⁸⁰ but Ms. Burnett still has a copyrightable interest in the characters she portrays. Right of publicity will not protect this character image because there is an absence of consumer confusion.¹⁸¹ This copyrightable interest needs to be protected through the fair use doctrine, especially the fourth fair use factor dealing with marketability.

Another case that solidifies a need for the additional component to the fourth fair use factor is *White v. Samsung Electronics America*.¹⁸² The commercial advertisements in each case showed attributes of the plaintiff's identities which

with Wendt and Ratzenberger themselves was "a major drawing card of the Cheers concept"); see *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 354 (9th Cir. 1979) ("When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived.").

¹⁷³ *Wendt*, 125 F.3d at 812.

¹⁷⁴ *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284, 1288 (9th Cir. 1999).

¹⁷⁵ *Id.*

¹⁷⁶ *Wendt*, 125 F.3d at 811; *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 823 (Cal. 1979).

¹⁷⁷ 491 F. Supp. 2d 962 (C.D. Cal. 2007).

¹⁷⁸ *Id.* at 971. The purpose and character of the use was transformative because it created a parody of the entertainer for comic effect. *Id.* at 967–69. The court rejected plaintiffs' contention that defendant took more of the entertainer's character and theme music than was necessary to place the image in the minds of viewers. *Id.* at 970. The court also found that commercial substitution was not likely in the instant case; see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (finding that commercial substitution occurs when the copied work supplants the original work); see also *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (finding fair use where the material facts were not at issue or were admitted; judgments pertaining to fair use "are legal in nature" and are to be made by the court).

¹⁷⁹ *Burnett*, 491 F. Supp.2d at 972 (stating that this pertains to the claim under 15 U.S.C. § 1125).

¹⁸⁰ *Id.* at 973 (stating that "no reasonable viewer would mistake the Charwoman or Carol Burnett as anything other than the target of a Family Guy parody").

¹⁸¹ *Id.* at 972–73.

¹⁸² 971 F.2d 1395 (9th Cir. 1992).

made it appear that the plaintiff was the person identified in the commercial.¹⁸³ “No effort was made to dispel the impression that the plaintiffs were the source of the personal attributes at issue.”¹⁸⁴ White was required to show that in running the robot advertisement, Samsung created a likelihood of confusion,¹⁸⁵ over whether White was endorsing Samsung’s VCRs.¹⁸⁶ Vanna White alleged facts showing that Samsung had appropriated her identity, so the summary judgment was reversed rejecting White’s common law right of publicity claim.¹⁸⁷ The court held that Samsung knowingly used Vanna White’s character likeness for advertising purposes.¹⁸⁸

This is an example of a satire that was not given fair use protection because Samsung was using the “Vanna White, Wheel of Fortune letter-turner extraordinaire” character image as a vehicle to help sell their products.¹⁸⁹ This satire was not given fair use protection because the fourth fair use factor dealing with potential marketability was affected.¹⁹⁰ This factor of the fair use doctrine needs to be utilized more when dealing with satire, character images, and copyright infringement, and the only viable way to do so is to strengthen the fourth fair use factor by implementing the additional component.

It is clear to anyone viewing the television commercial that the advertiser was not depicting Vanna White.¹⁹¹ No reasonable person could confuse a metal robot with Vanna White,¹⁹² however, Samsung was commercially exploiting the character, and thus the fair use defense, specifically the fourth factor, determined that this use was unfair to the owner of the copyrightable interest.¹⁹³ Although it is clear that the commercial depicted a metal robot rather than the plaintiff, Vanna White,¹⁹⁴ the “Vanna White” character drove the

¹⁸³ *Id.* at 1396.

¹⁸⁴ *Id.* at 1404.

¹⁸⁵ *Id.* at 1399–1400. See *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997) (“[The factors relevant to likelihood of confusion include the] 1) strength of the plaintiff’s mark; 2) relatedness of the goods; 3) similarity of the marks; 4) evidence of actual confusion; 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant’s intent in selecting the mark; 8) likelihood of expansion of the product lines” (citing *Newton v. Thomason*, 22 F.3d 1455, 1462 (9th Cir. 1994))); see, e.g. *Academy of Motion Picture Arts v. Creative House*, 944 F.2d 1446, 1454 (9th Cir. 1991) (stating the factors relevant to likelihood of confusion).

¹⁸⁶ *White*, 971 F.2d at 1400; *HMH Publ’g Co. v. Brincat*, 504 F.2d 713 (9th Cir. 1974); *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612 (D.C.N.Y. 1985).

¹⁸⁷ *White*, 971 F.2d at 1399 (stating that the Ninth Circuit Court reversed the grant of summary judgment to Samsung on White’s common law right of publicity claim because she alleged sufficient facts to support the claim and on the Lanham Act claim because she raised a genuine issue of material fact).

¹⁸⁸ *Id.* at 1397. California Civil Code § 3344(a) states “any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner for purposes of advertising or selling, without such person’s prior consent, shall be liable for any damages sustained by the person or persons injured as a result thereof.” *Id.*; *White*, 1992 U.S. App. LEXIS 19253, at *1 (9th Cir. Aug. 19, 1992).

¹⁸⁹ See *White*, 971 F.2d at 1397 (describing the advertisement depicting the character image).

¹⁹⁰ See 17 U.S.C. § 107 (stating the fourth factor for determining whether use of a work constitutes fair use is the effect of the use upon the potential market).

¹⁹¹ *White*, 971 F.2d at 1404.

¹⁹² *Id.*

¹⁹³ See *id.* at 1397 (discussing Samsung’s use of the Vanna White character in their advertisement campaign).

¹⁹⁴ *White*, 1992 U.S. App. LEXIS 19253, at *28.

advertisement's success in selling products and making money.

V. CONCLUSION

Suppose one depicted a mechanical robot of a dark haired, Caucasian male wearing blue pants and a blue shirt with red boots, red exterior underwear, and a red cape while "flying" through the sky with one stiff-arm extended forward with a fist. What if this mechanical robot even had a giant red "S" on his shirt and a yellow belt? If this mechanical robot with precise physical attributes and identifications was then to be used in a commercial, can any particular person claim that the mechanical robot is using his identity?¹⁹⁵ Can one use this "generic robot" to sell products without any negative repercussions?¹⁹⁶

As one can see from the case examples, the additional component dealing with marketability must be added to the fourth fair use factor immediately. The current fourth fair use factor provides protection against potential market harm for tangible items,¹⁹⁷ but not for a fictional character. The fourth fair use factor needs to extend to character images because there is a copyrightable interest in that work, just as there is for works like satire or parody. Currently protection exists for a celebrity, but not for the character played by the celebrity. One might ask how the very same person may have protection from copyright infringement while walking down the street, but not when acting as a character. Rather than protection, when acting as a character, the image can be used (in commercials, satires, etc.) by another without any worries of wrongdoing or future consequences. This must be changed.

Adding a component to the fourth fair use factor to protect a marketable character image from copyright infringement will advance the fair use doctrine in the proper direction. Although a character image is not tangible like a celebrity, this character can and should still be allowed the same protection that the right of publicity grants to a celebrity person.

In a slight tweaking of Jonathan Swift's wise words, creating a satire should help one discover his own face rather than simply the faces of everyone else. A satirist should be an individual whose witty comments and cleverly-crafted criticisms help make society a better place. But these quick-wits and intelligent humors must not, and should not, invade another's protectable and marketable character image. There must be tighter rules and regulations put in place so that the satirists of the world can still make their sharp, droll observations without infringing upon copyrights and potential markets.

As Mr. Swift would put it, "satire is a sort of glass wherein beholders do

¹⁹⁵ See *SUPERMAN: THE MOVIE* (Warner Bros. 1978); *SUPERMAN II* (Warner Bros. 1980); *SUPERMAN III* (Warner Bros. 1983); *SUPERMAN IV: THE QUEST FOR PEACE* (Warner Bros. 1987).

¹⁹⁶ See *White*, 971 F.2d at 1399 (declaring that the identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice). Suppose one depicted a mechanical robot of a bald, African-American male wearing a baggy black uniform with red trim jumping through the air with a basketball in one hand, stiff-armed, legs extended open like scissors. *Id.* What if this mechanical robot even had the number 23 on his uniform and had his mechanical tongue hanging out? *Id.*

¹⁹⁷ 17 U.S.C. § 107(4) (2006).

generally discover everybody's face but their own."¹⁹⁸ Perhaps that is because some satirists do not want to see their own face when they are cheating people out of their protected character image to sell their products. Since "[s]atire is tragedy plus time,"¹⁹⁹ without stricter IP rules, it is just a matter of time before satires can freely infringe upon copyrightable material while hiding behind the defense of fair use. This article has not attempted to analyze or refute such an argument due to the inherently fact based determinations that a proper fair use analysis requires. However, the argument should give courts pause . . . pause to think.

¹⁹⁸ JONATHAN SWIFT, *Preface to THE BATTLE OF THE BOOKS* (Jack Lynch, Henry Morley, A. C. Guthkelch & D. Nichol Smith eds., Chatto and Windus & Oxford: Clarendon Press 1920) (1908), available at http://www.quoteland.com/author.asp?AUTHOR_ID=125.

¹⁹⁹ LENNY BRUCE, *PERFORMING AND THE ART OF COMEDY, THE ESSENTIAL LENNY BRUCE* (John Cohen ed., Ballantine Books) (1967), available at <http://www.quoteland.com/search.asp>.