Transformation as Fair Use Since *Campbell*

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Professor Field is baffled by two recent fair use opinions.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), is the latest opinion addressing fair use under § 107 of the Copyright Act and the only one to consider the extent to which parody and satire might allow use of another's work more extensive than otherwise. (An earlier parodic case generated no opinion. *Id*. at 579.)

The first of four ostensible fair use opinions, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984), sees commercial uses as presumptively unfair. That case, however, considered Sony's vicarious liability. Betamax users, alleged to have been direct infringers, were unrepresented. *Id*. at 422-23 nn.2 and 3. For that reason, *Sony's* pronouncement is most appropriately regarded as dicta.

Next, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564-65 (1985) (H&R), finds The Nation liable despite taking only 300 words from President Ford's memoir. A third opinion, Stewart v. Abend, 495 U.S. 207, 238 (1990), summarily affirms rejection of fair use as justification for making "[a] motion picture based on a fictional short story."

Abend had no bearing, but the Sixth Circuit saw *H&R* and *Sony* as putting a bawdy rap takeoff on Pretty Women outside the scope of fair use. 510 U.S. at 573-74. Reversing in *Campbell*, the Court regards the point drawn from *Sony* as less compelling. As for *H&R*, it says, "'even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech' but not in a scoop of a soon-to-be- published

memoir." *Id*. at 587 (quoting *H&R*, 471 U.S. at 564.)

More generally, *Campbell* eschews bright line rules in applying factors drawn from a long line of opinions predating enactment of § 107. *Id*. at 576. Indeed, as it marches through four factors mentioned in § 107, the opinion stresses their inclusive nature and repeatedly cites Justice Story's observations in Folsom v. Marsh, 9 F.Cas. 342, 348 (No. 4,901) (CCD Mass.1841).

Campbell most notably faults the Sixth Circuit as too quick to find liability despite a copy's implicit criticism of the original. *Id*. at 573. That acknowledged, the opinion chooses not to evaluate its quality and adds, "Whether… parody is in good taste or bad does not and should not matter to fair use." *Id*. at 582.

Defendants had offered credit and royalties, but plaintiff refused. *Id*. at 572. Indeed, regarding markets for derivatives, the Court notes "the 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." *Id*. at 592. This says nothing about the need to license derivatives in other circumstances.

On that basis, two recent cases are suspect: Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012) and Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

Brownmark considers South Park's takeoff on a video, "What What (In The Butt)," "a paean to anal sex." 682 F.3d at 689. As an observer unschooled in the nuances of South Park, I saw only a blatant ripoff. "The district court [however] concluded that '[o]ne only needs to take a fleeting glance at the South Park episode' to determine that its use

of the WWITB video is meant ‘to lampoon the recent craze in our society of watching video clips on the internet... of rather low artistic sophistication and quality.’” *Id*.

The appellate court agrees that the original exemplifies works covered by copyright and that the copy uses the heart of the original. *Id*. at 693. Still, “the amount taken becomes reasonable when the parody does not serve as a market substitute *for the work*.” *Id*. (italics added). Apparently not regarding the copy itself as a derivative, the court goes on to speculate that it might increase plaintiff’s revenue, without “cut[ting] into any real market (with real, non-Internet dollars) for derivative uses.” *Id*. at 693-94.

Yet there is no indication that a license would have refused. Moreover, viral videos, not plaintiff’s work, were identified as the target. At best defendants’ work is satire for which *Campbell* denies license based on fair use: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” 510 U.S. at 580-81. Considering only the copy’s “transformative value,” *Brownmark* nevertheless affirms a “well-reasoned and delightful” dismissal based on fair use. *Id*. at 693, 694.

In *Cariou*, the district court, finding Prince to impermissibly incorporate Cariou’s work in his own, granted “sweeping injunctive relief.” 714 F.3d at 704. With *Brownmark* justifying independent comparision, *id*. at 707, the Second Circuit simply reverses with regard to 25 of 30 works in issue. Despite use of “key portions of certain of Cariou's photographs,” it “determine[s] that… Prince transformed [them] into something new and different.” *Id*. 710. As to the remaining five, the majority was unable “confidently to make a determination about their transformative nature as a matter of law. *Id*.

Yet, once more there is no indication that a license would have refused. Moreover, Prince denied any intent to comment on, much less criticize, Cariou's work. *Id*. at 704.

Judge Wallace, dissents. *Id*. at 712. He flags the absence of ameliorating motive, but he mostly faults reliance on Brownmark, "for the proposition that all the Court needs… to determine transformativeness is view the [works] and, apparently, employ its own artistic judgment." *Id*. at 714. Noting Holmes' famous dictum in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903), he disavows the ability "to make these fact- and opinion-intensive decisions on the twenty-five works that passed the majority's judicial observation." *Id*. at 714. Still, even he seems to regard "transformativeness" as a magic key unlocking the fair use defense.

Brownmark and *Cariou* cite *Campbell*, but neither seems to heed its jaundiced view of satire as well as copies that pass muster as parody. *Brownmark* finds satire alone to support fair use. *Cariou*, exalting mere transformation, appears to call for even less justification. In that regard, *Abend* seems apt; it's difficult to imagine anything more transformative than a movie derived from a short story, yet a claim to fair use was summarily dismissed.

Certiorari has been sought in *Cariou*. If granted, the Court will have an ideal opportunity to clarify the role of transformation in assessing the fairness of substantial commercial copying that lacks critical purpose.