Rap, Parody, and Fair Use: *Luther R Campbell aka Luke Skyywalker, ET AL v Acuff-Rose Music, Inc*

"But the Devil whoops, as he whooped of old:
It's clever, but is it Art ?"

(Rudyard Kipling, "The Conundrum of the Workshops")

"Art is either a plagiarist or a revolutionist"

Paul Gauguin (Huneker, "Pathos of Distance")

In the recent case of *Campbell v Acuff-Rose Music, Inc,*[1] the Supreme Court of the United States delivered its first opinion on the subject of fair use protection for a parody in a copyright infringement action.[2] The significance of the case lies in the fact that it is the first unanimous decision of the Supreme Court in an area that has hitherto been subject to confusing and often ambiguous judicial reasoning. The Supreme Court has signalled the way forward for fair use cases generally, and in doing so has added parody to the list of (potentially) protected species under copyright law.

1. *Facts and Background*

The fact situation that arose in *Acuff-Rose* is one that occurs with increasing frequency in today's contemporary music scene. The petitioners were the members of the controversial rap group "2 Live Crew" and their record company. They had recorded a rap "Pretty Woman", an alleged parody of the song "Oh, Pretty Woman" by Roy Orbison and William Dees. This rap version was intended "through comical lyrics, to satirise the original work".[3] The rap copies the distinctive and recognisable opening bass riff and first line of the Orbison song, but then "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones ... [that] derisively demonstrat[e] how bland and banal the Orbison song seems to [2 Live Crew]".[4] The bass riff is constantly repeated throughout the rap whilst distinctive rap-style sounds are imposed over the top.

The manager for 2 Live Crew informed Acuff-Rose Music (who held the copyright to the original Orbison song) of 2 Live Crew's parody, and offered to pay a fee for the use of the song, as well as to accord all credit for authorship and ownership of the original. Despite Acuff-Rose's refusal, in 1989 2 Live Crew released copies of the song as part of an album "As Clean As They

1 62 USLW 4169 (7th March 1994).

2 The issue as to whether parody can be fair use arose in one earlier Supreme Court case, however the Court issued no opinion because it was equally divided, and thus the decision of the Court of Appeals stood: *Benny v Loew's Inc*, 239 F 2d 532 (CA9 1956), aff'd *sub nom Columbia Broadcasting System, Inc v Loew's Inc*, 356 US 43 (1958).

3 Application to Petition for Certiorari 80a. Above n1 at 4170.

4 Federal District Court 754 F Supp 1150, at 1155 (footnotes omitted).

Wanna Be". The authors of "Oh, Pretty Woman" are identified on the album as Orbison and Dees, and the publisher as Acuff-Rose. Acuff-Rose filed suit alleging that the rap song infringed their rights in "Oh, Pretty Woman" under the *Copyright Act* of 1976.[5]

As part of their case the members of 2 Live Crew pleaded the defence of fair use. Whilst originally a judge made doctrine,[6] fair use was codified in §107 of the 1976 *Copyright Act*:

> §107. Limitations on exclusive rights: Fair use
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work ... for purposes such as criticism, comment ... is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Federal District Court granted summary judgment for the petitioners, upholding their claim to fair use. This was reversed by the Court of Appeals for the 6th Circuit, which held the defence was barred by the song's commercial character and excessive borrowing. In 1993 the US Supreme Court granted certiorari to "determine whether 2 Live Crew's commercial parody could be a fair use" (it was uncontested at both the Court of Appeals and Supreme Court levels that the use would be an infringement but for fair use.)[7]

2. *The Supreme Court Decision*

In a unanimous judgment delivered by Souter J (Kennedy J filed a concurring judgment), the Supreme Court found in principle that a parody, even for commercial purposes, could be a fair use under §107 of the Act.[8] In this particular case, the Supreme Court reversed the decision of the Court of Appeals and remanded some issues for further findings.

In reaching its decision, the Court first considered the purpose of copyright. It then followed the traditional approach of fair use cases by applying each of the four enumerated factors in §107 to the facts of the case, as well as discussing the application of these factors to parodies generally. In doing so, the Court put to rest many of the ghosts that have been stalking parody cases for the previous 38 years. Whilst it also pointed where, in general, the fair use line might be drawn in future

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5 17 USC §106 (1988 ed and Supp IV). Like s31(1) of the *Copyright Act* 1968 (Cth), s106 of the US Act grants the owner of copyright certain exclusive rights, including (1) to reproduce the copyrighted work; and (2) to prepare derivative works based on the copyrighted work.

6 Above n1 at 4171.

7 Ibid.

8 Id at 4172.

parody cases, it emphasised that there are no "bright line rules" in this area, and that the fair use doctrine calls for "case-by-case analysis".[9]

3. *The Purpose of Copyright Law*

An analysis of the purpose underlying copyright protection is central to the Court's reasoning. For in any fair use adjudication, courts are required not only to look at the four factors enumerated in §107, but to weigh them together "in light of the purposes of copyright".[10]

The Court recognised that the purpose of copyright, as stated in the Constitution of the United States, is "To promote the Progress of Science and useful Arts ....".[11] By granting authors a limited monopoly over their works, copyright provides an economic incentive for authors to create new works. However art is not created in a vacuum,[12] and the Court acknowledged that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfil copyright's very purpose".[13] The fair use doctrine "permits (and requires) courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster,"[14] and aims to resolve "the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it".[15]

4. *The §107 Factors*

Any fair use case requires the court to consider at least the four statutory factors listed in §107 of the Act, and these are to be considered together and not in isolation, one from another.[16]

A. *The Purpose and Character of the Use*

The first factor to be considered under §107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes".[17] According to the Court, this requires an investigation into

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9 Ibid, citing *Harper & Row, Publishers, Inc, v Nation Enterprises*, 471 US 539, 560 (1985); *Sony Corp of America v Universal Studio Pictures, Inc*, 464 US 417, 448 n31 (1984).

10 Above n1 at 4172.

11 Id at 4171, 4172 citing US Constitution, Art I, §8, cl 8.

12 The Court noted that "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow, and use much which was well known and used before" above n1 at 4171, citing Story J in *Emerson v Davies* 8 F Cas 615, 619 (No 4, 436) (CCD Mass 1845).

13 Above n1 at 4171. This doctrine of fair use was incorporated in the statutory copyright regime with the 1976 Act, however §107 was not intended to change the common law tradition of fair use adjudication - Senate Report (1975) No 94–473 at 62 referred to above n1 at 4172.

14 Above n1 at 4172, citing *Stewart v. Abend*, 495 US 207, 236 (1990) (internal quotation marks and citation omitted).

15 Above n1 at 4171.

16 Id at 4172.

17 *Copyright Act* 1976 §107(1).

the extent to which the use "supersedes the objects"[18] or "supplant[s] the original ... or instead adds something new [to it]".[19] In the words of Circuit Court Judge Leval, it asks to what extent the new work is "transformative".[20] The more transformative the work, the more "Science and useful Arts" are progressed, and thus the more the ultimate goals of copyright are furthered.[21]

This emphasis on the transformative nature of the new work is significant in two respects. First, it moves the analysis away from the commerciality of the new work, an approach which had tended to dominate recent cases.[22] The Court specifically rejected the argument (applied by the Court of Appeals) that there is a presumption that every commercial use is unfair, and in doing so clarified the approach it had taken in *Sony Corp of America v Universal Studio Pictures, Inc.*[23]

Giving excessive weight to the commerciality of a use leaves almost no room for the doctrine of fair use to operate within. This is because most uses, including those specifically referred to in §107, are generally carried out for commercial gain.[24] Furthermore, taking the purposive approach to copyright, it is difficult to see why commerciality should have any relevance under the first factor at all, apart from the fact that it is expressly included in §107(1). Art is not further progressed because a new work is created for nonprofit rather than commercial gain. In the view of the Court then, the more transformative the new work, the less significant other factors weighing against fair use (such as commercialism) will be.

Second, this shift in focus is eminently suited to the protection of parody, an artform which consists entirely of the transformation of an old work into a new work, and which "has an obvious claim to transformative value ...".[25] By analogy with the uses expressed to be fair uses in §107, the Court found parody to be a category of uses protected by §107.[26] This is not to say that there is any presumption that a parody is a fair use. However once "a parodic character may reasonably be perceived"[27] the application of §107 will be fashioned in light of that character. It is true that apart from the early case of *Benny v Loew's Inc*, courts in the United States have recognised that parody requires some special degree of protection.[28] However in *Acuff-Rose* the Supreme Court not only recognised this, but fashioned the requisite legal definition of parody as well as a threshold test to determine whether a work qualifies as a parody.

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18 *Folsom v Marsh*, 9 F Cas 342 (No 4, 901) (CCD Mass 1841) at 348 per Story J. See id at 4172.

19 Above n1 at 4172.

20 Leval, P N, "Towards a Fair Use Standard" (1990) 103 *Harv LR* 1105 at 1111, cited ibid.

21 Above n1 at 4172.

22 The Supreme Court apparently sanctioned this approach in *Sony Corp of America v Universal Studio Pictures, Inc*, above n9; and in *Harper & Row, Publishers, Inc, v Nation Enterprises*, above n9.

23 Above n1 at 4173.

24 Id at 4174.

25 Id at 4172.

26 "[P]arody, like other comment or criticism, may claim fair use under §107." Ibid.

27 Id at 4173.

28 See eg, *Columbia Pictures Corp v National Broadcasting Co*, 137 F Supp 348(SD Cal 1955); *Berlin v EC Publications*, 329 F 2d 541 (2d Cir 1964); *Elsmere Music, Inc v National Broadcasting Co*, 623 F 2d 252 (CA2 1980); *Fisher v Dees*, 794 F 2d 432, 438 (9th Cir 1986).

According to the Court, "the nub of the [legal] definitions [of parody] is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works".[29] From this it appears that the new work need not necessarily comment on the work it is taken from, but the Court subsequently makes it clear that the original composition itself must be commented upon.[30] This settles two areas of the law that have been in contention, namely whether the new work must be a critical work, and whether that criticism (or comment) must be directed at the work taken from. The Supreme Court has answered both of these questions in the affirmative.

The Court draws its own distinction between a parody, which focuses its commentary on a particular work, and a satire, which focuses on "prevalent follies or vices".[31] An author parodying a particular work must take from that work to make their point, and so will have "some claim to use the creation of its victim's (or victims') imagination"; on the other hand, an author merely satirising a "vice or folly" need not take from any particular work, and thus has less justification (if any) to take from a copyrighted work.[32] However appropriate or not this distinction may be in artistic terms, it is submitted that at this point the Court loses sight of the fundamental principle guiding its analysis, namely the purpose of copyright protection. Fair use protection of parody promotes the "Progress of Science and the useful Arts ..." because a parody is a new work that provides social benefit.[33] By explicitly excluding so-called satires from the liberal protection that this decision provides for parodies, the Court is implicitly stating that satire does not provide this same social benefit.

In fact this is clearly not correct. The public benefit that the Court believes is derived from parody is based on the fact that a parody both criticises and focuses that criticism on the work it has taken from.[34] The commentary on the original work sheds light on that work as well as creates a new work. By the same reasoning a satire that does not focus on the particular work taken from, but instead comments on society and its mores must surely shed light on that society and those mores, as well as creating a new work in the process. It is submitted that this public benefit generated by a satire is as great, if not greater, than that derived from a parody.

Instead of following a purposive analysis then the Court appears to be adopting an approach reminiscent of the "sweat of the brow" doctrine common to Anglo-Australian copyright cases. This is found in the desire of the Court to avoid protecting those who "merely us[e] [the original composition] to get attention or to avoid the drudgery in working up something fresh".[35] On the other hand, the Court may just be following a market failure approach.[36] Authors may be willing to licence others to use a work of theirs to criticise

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29 Above n1 at 4172.

30 Id at 4173. This is explicitly stated by Kennedy J, id at 4177.

31 14 *The Oxford English Dictionary* 500 (2d edn, 1989), cited id at 4173.

32 Above n1 at 4173.

33 Id at 4172.

34 "[Parody] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one." Ibid.

35 Id at 4173.

36 This is at least one factor behind Kennedy J's reasoning; see above n1 at 4177–8.

works other than the one taken from (or society at large) and there is then no need for fair use protection. However authors generally never licence someone to use their work as the basis for a parody that criticises that very work upon which it is based. Thus only here is there a need for fair use protection.

Some acknowledgment of the arbitrary nature of this distinction was made by the Court when it stated that in the end parody often shades into satire, and that a work may contain both parodic and non-parodic elements. The extent to which this can occur is evidenced by this very case. Whilst the District Court did find 2 Live Crew's rap to be a parody, the Court of Appeals had great difficulty in finding the requisite critical element. The Supreme Court however found that the rap "reasonably could be perceived as commenting on the original or ciriticizing it, to some degree" and thus passed the threshold test, although Kennedy J was "not so assured that 2 Live Crew's song is a legitimate parody".[37] Thus it is always necessary to look further at the remaining factors in §107.[38]

B. The Nature of the Copyrighted Work

By adopting parody as a distinct category of fair use, the Court rendered the second factor under §107 obsolete. This factor, "the nature of the copyrighted work,"[39] recognises that it is more difficult to establish the fair use of original works which are closer to the core of intended copyright protection, than of those that are not.[40] Parodies rely on the recognition of the original work they are parodying for their effect, and thus are nearly always based on well known works (which are works closer to the core of intended copyright protection). In the words of the Supreme Court then, this factor is never likely "to help much in separating the fair use sheep from the infringing goats in a parody case".[41]

C. The Amount of the Portion Used

The third factor in §107(3) looks at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole". As it stands, this factor sits oddly in §107, because it is the substantiality of the amount taken that first determines prima facie infringement. However courts are obliged by the statute to consider this factor, and the Supreme Court interpreted it to require an investigation into whether the amount taken (which is a combination of the quantity, quality and importance of the materials used[42]) is "reasonable in relation to the purpose of the copying".[43] By relating the reasonableness of the amount taken to the purpose of the copying, the Court is following the approach it adopted under the first factor and recognising the special requirements of parody. Because parody is based upon and aimed at a specific

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37 Above n1 at 4178.
38 See generally above n1 at 4173.
39 *Copyright Act* 1976 §107(2).
40 Id at 4174, citing *Stewart v Abend*, above n14 at 237–8.
41 Above n1 at 4174.
42 Id at 4175.
43 Id at 4174.

original work, it "must be able to 'conjure up'[44] at least enough of that original to make the object of its critical wit recognizable".[45]

So even if the copying is "qualitatively substantial",[46] that does not make it unreasonable, if the amount of copying was necessary to "conjure up" the original. The Supreme Court thus found that the Court of Appeals erred when it held that 2 live Crew's copying was excessive merely because it "was taking the heart of the original and making it the heart of a new work",[47] because "the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim".[48] Indeed the Supreme Court agreed with the suggestion of the Court of Appeals that "it may not be inappropriate to find that no more was taken than necessary".[49]

Two interesting points emerge from this discussion of §107(3) by the Supreme Court. First, the Court not only looked at the amount of material copied, but also what was done with that material.[50] This is an investigation remarkably similar to that into the "transformative" nature of the work under the first factor, and demonstrates the interrelationship of the different factors in the eyes of the Court. On the facts in this case, the Supreme Court found the extent to which 2 Live Crew departed from the Orbison song to be "significant" under the third factor.[51]

Second, the Court attempted to resolve the issue of how much more the parodist can take, over and beyond what is necessary to "conjure up" the original. Earlier cases have swayed between treating the "conjure up" test as a floor or a ceiling on the amount copied. In *Acuff-Rose* the Supreme Court treated it as a floor, stating that a "parody must be able to conjure up at least enough of [the] original".[52] In determining how much more can be taken, however, the Court was not quite so sure of itself, stating that it "will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original".[53]

D. *Effect of the Use Upon the Market for or Value of the Original*

The final fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work", §107(4), has been viewed by courts as the most important in any fair use evaluation.[54] This is again because of the rationale of

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44 Id at 4175. The phrase first appeared in dicta in *Columbia Pictures Corp v National Broadcasting Co* above n28.

45 Above n1 at 4175.

46 Id at 4174–5 referring to the decision of the Court of Appeals for the 6th Circuit 972 F 2d at 1438.

47 Ibid.

48 Above n1 at 4175.

49 Id at 4174. Note that this finding on the facts is limited to the lyrics, and the Court remanded for further evaluation whether repetition of the bass riff is excessive copying.

50 "[C]ontext is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original ..." id at 4175.

51 Note that there is nothing in §107 to indicate that courts are also required to look at the extent to which the works differ.

52 Ibid (internal quotation marks omitted).

53 Ibid.

54 See, eg, *Harper & Row, Publishers, Inc, v Nation Enterprises*, above n9 at 566.

copyright protection, namely to "Promote the Progress of Science and useful Arts" by providing authors with limited monopoly profits from their works. This fourth factor aims to protect these monopoly profits from being harmed by unfair uses. Note however that market substitution (where a new work usurps the demand for the original) is the only harm against which protection is offered. Copyright protection does not extend to works which "suppress" rather than usurp demand for the original, such as "a scathing theater review"[55] or "biting criticism".[56]

This protection has two aspects. First, it protects against uses that harm the market for the original. No such harm is to be inferred or presumed just because the new work is done for commercial purposes, at least where the new work goes beyond mere duplication of the original and involves some element of transformation.[57] According to the Supreme Court, it is "more likely" that a parody "pure and simple" will not cause the relevant market harm to an original work, because the original and the parody will "usually" serve different markets.[58] The Court does not address the issue of how the relevant market is to be defined. By using words such as "more likely" and "usually" the Court also appears to be leaving the door fairly wide open for subsequent courts to use an expansive market definition to find that an original work and its parody do serve the same market.[59] This is quite an unsatisfactory state for the law to be in.

Note that in this case, 2 Live Crew presented uncontroverted affidavits denying any market harm to the original song.

Second, this protection extends to harm to the market for derivative works.[60] This is because economic gain from licensing derivatives is an important part of the economic incentive to create originals that copyright protects.[61] The Court however expressly held that there is no protectable derivative market for criticism, because this protection is limited to works that creators of original works would be likely to exploit or licence others to exploit.[62] There are two possible explanations for this. On the one hand, it could be argued that since authors generally will not develop criticisms (or licence others to), there is no market to be protected. On the other hand, this limitation could be justified in terms of market failure. It has been argued that fair use should only protect works where there is market failure.[63] The market for

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55 Above n1 at 4176.

56 Above n1 at 4176, citing *Fisher v Dees*, above n28.

57 See above n1 at 4176, where the Supreme Court held that the Court of Appeals had erred on this point.

58 Ibid, citing Bisceglia, J, "Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act" (1987) 34 *Copyright Law Symposium* (ASCAP) 1 at 25.

59 As occurred in *MCA, Inc v Wilson* 677 F 2d 180 (2d Cir 1981).

60 Above n1 at 4175, citing *Harper & Row* above n9. §106 provides that one of the exclusive rights of the copyright owner is to prepare derivative works based on the copyrighted work. A derivative work is defined to be one "based upon one or more preexisting works ..." §101.

61 Above n1 at 4176.

62 Ibid.

63 See, eg, Posner, R A, "When is Parody Fair Use?" (1992) 21 *J Legal Stud* 67; and the reply by Merges, R P, "Are you making fun of me?: Notes on market failure and the parody defence in copyright" (1993) 21 *AIPLA QJ* 305.

parodies is just one such market, because there is no price at which an original author will licence a parody of their work, and thus parodies should be permitted under the rubric of fair use (perhaps with a compulsory fee). In this respect it is interesting to note that 2 Live Crew offered a fee to Acuff-Rose Music for their use of "Oh, Pretty Woman", but Acuff refused to enter into any fee negotiations.

Works can, however, have more than one derivative aspect, and here 2 Live Crew's work is not only a parody but also a rap. The derivative market for rap is protected by copyright.[64] In the present case, 2 Live Crew had the burden of proof to show that there was no harm to the derivative market for a non-parody, rap version of "Oh, Pretty Woman". As they did not present any evidence on this issue, they were unable to obtain summary judgment from the Court and the issue was left to be addressed on remand.

5. *The Australian Perspective*

Questions concerning the status of parodies under copyright law are dealt with at least in form differently in the United States than in Australia. Whereas United States courts look at whether the parody is a fair use (and are quite willing to accept that the parody constitutes a prime facie infringement of the copyright in the parodied work), Australian courts focus on the initial question of whether the parody infringes the copyright in the parodied work at all. Indeed there has been no Australian case that has successfully argued that an infringing parody nonetheless constitutes a fair dealing of the parodied work. However with the increasing willingness shown by Australian courts to look to developments in the United States (especially in the field of intellectual property) and the similarities that exist between the Australian and United States copyright statutes, the decision in *Acuff-Rose* is bound to have an impact on Australian law.

For an Australian court the initial question to be determined is whether the allegedly infringing work can be characterised as a parody. In this respect the relevance of *Acuff-Rose* lies in the statement by the Supreme Court that for a work to be parodic it must contain not only elements of humour but also a critique of the work parodied. Many of the English and Australian cases dealing with alleged parodies have ignored this point, and instead labelled as parodies works that more accurately should be called "burlesques" (or "spoofs"),[65] although there are some notable exceptions.[66]

Having found the requisite parodic element, the key issue for the courts is the test used to determine whether the parody infringes the copyright in the parodied work. Infringement occurs where there has been a taking from a substantial

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64 Above n1 at 4176. Similarly in Australia a copyright owner has the exclusive right to prepare a rap based on their copyrighted song as an "adaptation" of that song protected by s31(1)(a)(vi) of the *Copyright Act* 1968 (Cth) (see the definition of "adaptation" in s10(1)).

65 For example *Joy Music Ltd v Sunday Pictorial Newspapers Ltd* [1960] 2 WLR 645; *Williamson Music Ltd v The Pearson Partnership* [1987] FSR 97; *AGL Sydney Ltd v Shortland County Council* (1989) 17 IPR 99.

66 For example Gummow J in *Hogan v Pacific Dunlop Ltd* (1988) AIPC 90–530 at 38, 570.

part of the copyrighted work,[67] which is a question of quality and not quantity. Thus the true question is what constitutes a substantial taking by a parody. The recognition by the Supreme Court of the need to look at the amount taken in the light of a work's parodic nature may encourage Australian courts to step away from the inflexible approach adopted recently by some judges[68] and to recognise that parodies have a special claim to protection in that they must take a certain amount from the parodied work in order to be successful.

Indeed by focusing on the transformative value of the parody, and on what was done by the parodist with the parts they took from the work parodied, the Supreme Court seems to be heralding a move back to the approach adopted earlier this century in England where the courts, in determining whether a parody infringed the copyright in the parodied work, would look at the effort bestowed in creating a new work.[69]

6. *Further Comments*

A few final comments should be made about the case. First, the Court brushed aside the argument that the use of "Oh, Pretty Woman" by 2 Live Crew, after they had been refused permission by Acuff-Rose, weighed against a finding of fair use; "[i]f the use is otherwise fair, then no permission need be sought or granted".[70]

Furthermore the Court made a potentially far-reaching remark concerning the remedy available to an aggrieved copyright owner. In a footnote at the end of the Court's discussion on the purpose of copyright law and the fair use exception, the Court questioned the automatic availability of an injunction against a parodist who has overstepped the fair use line. It suggested that where the public interest in publication is strong enough, then damages may be adequate protection for the copyright owner against the parodist.[71] With this the Court is perhaps hinting at a move towards a form of compulsory licensing for parodies in the public interest.

Finally, an interesting issue that arises in cases such as this is the relationship between parodic fair use and moral rights. Whilst, at the time of writing, neither the United States of America nor Australia have comprehensive moral rights legislation, they are both obliged under Article 6 bis of the Berne Convention[72] to protect moral rights, and at least in Australia there is both domestic and international pressure for such a move.[73] However, when it comes to

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67 See ss14(1) and 31 of the *Copyright Act* 1968 (Cth).

68 See, eg, *AGL Sydney Ltd v Shortland County Council* where Foster J stated that no special consideration was to be given to the parodic nature of a work in determining questions of copyright infringement, above n65 at 105; see also *Schweppes Ltd v Wellington Ltd* [1984] FSR 210.

69 See, eg, *Joy Music Ltd v Sunday Pictorial Newspapers Ltd* above n65; *Glyn v Weston Feature Film Co* [1916] 1 CH 261; *Francis, Day & Hunter v Feldman & Co* [1914] 2 Ch 728.

70 Above n1 at 4174 n18.

71 Id at 4172 n10 citing Leval above n20 at 1132; and *Abend v MCA, Inc*, 863 F 2d 1465, 1479 (CA9 1988) aff'd *sub nom Stewart v Abend* above n14.

72 Berne Convention for the Protection of Literary and Artistic Works 1886.

73 See Copyright Law Review Committee, *Proposed Moral Rights Legislation for Copyright Creators* (Discussion Paper, June 1994).

parodies and moral rights many problems immediately present themselves. The first and most obvious is the extent to which a parody can (or does) infringe an original author's moral rights, and most importantly, their right of integrity. As stated in the Berne Convention, this is the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to [the author's work] which would be prejudicial to his (sic) honour or reputation".[74]

Thus to infringe an original author's moral rights, a parody must firstly be characterised as a modification of an original work. This depends on whether the parody is viewed solely as a new work, or whether it is seen as a reworking of existing material. Following the discussion above, it is submitted that a parody would be characterised as both a modification of an original work and as a new work. The next issue then is what (if any) modification is permitted. Because parodies do distort or modify works to a critical end there is every likelihood that they would be classified as infringing the right of integrity of the authors whose works they critique. Perhaps the only way to safeguard the protection of parodies against this would be to legislate for their protection.[75]

On a related note, it is interesting to consider that in the present case the Supreme Court sought to reverse a trend towards judicial moralising discernible in some previous cases[76] by excluding questions of taste (and presumably obscenity) from fair use questions.[77] To allow otherwise under the present copyright regime would subvert the role of copyright law and allow judges to take on the role of de facto censors, a role for which they are eminently unsuitable. However, from the point of view of an original author, the case for moral rights protection is often strongest when it comes to obscene parodies. Should obscene parodies then be excluded from any legislative protection? If so, then judges will once again have the power to censor certain works by declaring them obscene.

7. *Conclusion*

With its decision in *Acuff-Rose* the Supreme Court has finally spoken on the issue of fair use protection of parodies, and clarified many of the issues that have led to conflicting results in this area of the law. Parodists can rest somewhat easier knowing that their art has been granted privileged recognition, and that their pursuit of commercial gain will not disentitle them to fair use protection. However, the generality and flexibility of the statements used by the Court, the absence of "bright line rules", and the inherent subjectivity required to determine issues such as whether a parodic character may reasonably be perceived in a work, and what market the work serves, means that there is still much room in which lower courts can move in applying this decision. Furthermore, Kennedy J warned that the law should not swing too far in favour of

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74 Above n72 at Art 6(1).

75 As for example occurs in France, a country with a strong history of moral rights protection: Art 41(4) of the law of 11 March 1957.

76 See generally Schooner, S L, "Obscene Parody: The Judicial Exception To Fair Use Analysis" (1984) 14 *Journal of Arts Management and the Law* 69.

77 Above n1 at 4173.

the parodist, because "underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create".[78] Instead, future courts "must take care to ensure that not just any commercial take-off is rationalised *post hoc* as a parody".[79]

The decision will also have ramifications beyond the field of parody. All invocations of §107 of the *Copyright Act* will have to consider the reasoning of the Court in this case. The interrelationship of the four factors and the way they have been (re)interpreted will impact on every case defended under §107. The rejection of the presumption against fair use for commercial works is highly significant, although commerciality remains as a factor that tends to weigh against a finding of fair use. The discussion of other factors, such as the irrelevance of "taste" or obscenity considerations, will be important in some cases, although the potential moral rights dimension should also be noted for future cases.

The decision will also have ramifications beyond the United States of America. Given the practice (or inevitability) of artists drawing on the works of others it cannot be too long before similar issues to those raised in *Acuff-Rose,* both in relation to parodies and to copyright infringement in general, come before an Australian court. At the very least, the decision of the Supreme Court provides a guide to these issues, and may even encourage the adoption of a broader approach to infringement actions in Australia.

Parody is (fair use) art. It is art that must both plagiarise and revolutionise.

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78 Id at 4178.

79 Ibid.

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