SUPREME COURT OF THE UNITED STATES

No. 92–1292

LUTHER R. CAMPBELL AKA LUKE SKYYWALKER, ET AL., PETITIONERS *v.* ACUFF-ROSE MUSIC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 7, 1994]

JUSTICE KENNEDY, concurring.

I agree that remand is appropriate and join the opinion of the Court, with these further observations about the fair use analysis of parody.

The common-law method instated by the fair use provision of the copyright statute, 17 U. S. C. §107 (1988 ed. and Supp. IV), presumes that rules will emerge from the course of decisions. I agree that certain general principles are now discernable to define the fair use exception for parody. One of these rules, as the Court observes, is that parody may qualify as fair use regardless of whether it is published or performed for profit. *Ante*, at 22. 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. *Ante*, at 10. It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. 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 *Rogers* v. *Koons*, 960 F. 2d 301, 310 (CA2 1992) ("[T]hough the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody"); *Fisher* v. *Dees*, 794 F. 2d 432, 436 (CA9 1986) ("[A] humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the

target of the work in question"). This prerequisite confines fair use protection to works whose very subject is the original composition and so necessitates some borrowing from it. See *MCA, Inc.* v. *Wilson*, 677 F. 2d 180, 185 (CA2 1981) ("[I]f the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up"); Bisceglia, Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, pp. 23–29 (1987). It also protects works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism. See *Fisher*, *supra*, at 437 ("Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee"); Posner, When Is Parody Fair Use?, 21 J. Legal Studies 67, 73 (1992) ("There is an obstruction when the parodied work is a target of the parodist's criticism, for it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work") (emphasis omitted).

If we keep the definition of parody within these limits, we have gone most of the way towards satisfying the four-factor fair use test in §107. The first factor (the purpose and character of use) itself concerns the definition of parody. The second factor (the nature of the copyrighted work) adds little to the first, since "parodies almost invariably copy publicly known, expressive works." *Ante*, at 17. The third factor (the amount and substantiality of the portion used in relation to the whole) is likewise subsumed within the definition of parody. In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry. Some parodies, by their nature, require substantial copying. See *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 623 F. 2d 252 (CA2 1980) (holding that "I Love Sodom" skit on "Saturday Night Live" is legitimate parody of the "I Love New York" campaign). Other parodies, like Lewis Carroll's "You Are Old, Father William," need only take parts of the original composition. The third factor does reinforce the principle that courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses. See, *e.g.*, *Walt Disney Productions* v. *Air Pirates*, 581 F. 2d 751 (CA9 1978); *DC Comics Inc.* v. *Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (ND Ga. 1984). But, as I believe the Court acknowledges, *ante*, at 18–20, it is by no means a test of mechanical application. In my view, it serves in effect to ensure compliance with the targeting requirement.

As to the fourth factor (the effect of the use on the market for the original), the Court acknowledges that it is legitimate for parody to suppress demand for the original by its critical effect. *Ante*, at 22–23. What it may not do is usurp demand by its substitutive effect. *Ibid.* It will be difficult, of course, for courts to deter-

mine whether harm to the market results from a parody's critical or substitutive effects. But again, if we keep the definition of parody within appropriate bounds, this inquiry may be of little significance. If a work targets another for humorous or ironic effect, it is by definition a new creative work. Creative works can compete with other creative works for the same market, even if their appeal is overlapping. Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work, which is why the parody must "make some critical comment or statement about the original work which reflects the original perspective of the parodist —thereby giving the parody social value beyond its entertainment function." *Metro-Goldwyn-Mayer, Inc.* v. *Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (ND Ga. 1979).

The fair use factors thus reinforce the importance of keeping the definition of parody within proper limits. More than arguable parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a "comment on the naivete of the original," *ante*, at 13, because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven's Fifth Symphony or "Achy, Breaky Heart" is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to

create.

The Court decides it is "fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree." *Ante*, at 13 (applying the first fair use factor). While I am not so assured that 2 Live Crew's song is a legitimate parody, the Court's treatment of the remaining factors leaves room for the District Court to determine on remand that the song is not a fair use. As future courts apply our fair use analysis, they must take care to ensure that not just any commercial take-off is rationalized *post hoc* as a parody.

With these observations, I join the opinion of the Court.