

Intellectual Property

This section takes up intellectual property: rights governing the ownership of information. There is no one distinctive set of doctrines governing all intellectual property in the same way that the law of finders applies to all (well, most) personal property or the law of trespass applies to all (well, most) real property. Instead, the name “intellectual property” is a catch-all used to group several related sets of legal rights, each of which gives the rightsholder an exclusive right to use certain information in certain ways. A defendant who uses that information in that way without the rightsholder’s permission is said to be an *infringer*.

It is common, and in some respects accurate, to describe the rightsholder as the “owner” of the information, but keep in mind that only certain specified uses count as infringement. There is no body of intellectual property law that prohibits possessing or thinking about information, for example. Instead, different bodies of intellectual property law restrict different kinds of uses. In each case, the scope of the owner’s rights is closely tied to what kinds of information that body of law protects and to the rules governing when someone becomes a rightsholder. The latter is a familiar question: just as first possession gives initial title to personal property, and conquest is at the root of title to real property, creation can provide intellectual property rights. But the former is a new kind of question; we have taken it largely for granted that land is proper subject matter for real property and other tangible things are proper subject matter for personal property. Intellectual property is different, because not every kind of information qualifies. In copyright, for example, processes are not proper subject matter: as a consequence, the list of ingredients in a recipe and the steps for combining them are not copyrightable – even if they meet all of copyright law’s other requirements.

Learning a body of intellectual property law, therefore, requires learning its subject matter, its rules of initial ownership, and its rules of infringement. In this section, we will focus primarily on copyrights, only briefly mentioning patents, trademarks, and trade secrets. Here is a brief overview of IP law’s main areas:

- Federal **copyright law** protects “original works of authorship,” like novels, biographies, songs, screenplays, paintings, blueprints, and sculptures. Copyright law has a very low threshold for protection: a work must be original (not copied from

someone else); it must also display a “modicum of creativity” and have been written down (“fixed in a tangible medium of expression”). The copyright so obtained is valid during its author’s lifetime, and for the next seventy years after that. It gives copyright owners the exclusive right to reproduce their works, to make adaptations of them, to distribute them to the public, and to perform or display them publicly – but this right only applies against people who copy from the owner. Someone who independently and coincidentally comes up with similar expression is an author in her own right, not an infringer. Below, for example, are two photographs of the same iceberg, taken by different photographers from nearby locations at almost exactly the same time. Neither infringes on the other.



Left: Sarah Scurr. Right: Marisol Ortiz Elfeldt

- Federal **patent law** protects “any new and useful process, machine, manufacture, or composition of matter.” Examples include mechanical devices like tractor plows and can openers, chemical processes used to refine oil, pharmaceutical products like anti-HIV drugs, and, a little infamously, a “Method and apparatus for automatically exercising a curious animal” by encouraging it to chase a laser pointer. *See* U.S. Pat. No. 6,701,872. To obtain a patent, an inventor must go through a detailed and expensive application process, which involves convincing the U.S. Patent and Trademark Office (USPTO) that her invention is genuinely new (“novel”), that it represents a sufficient advance on previous inventions (that it be “nonobvious”), and that it has some practical use in the world, however slight (“utility”). She must also disclose to the public, in detail, how her invention works and how best to use it. Once the USPTO issues a patent, it gives the owner the exclusive right for twenty years (from the date she filed her application with the USPTO) to make, use, offer to sell, or sell the invention. (This means that anyone

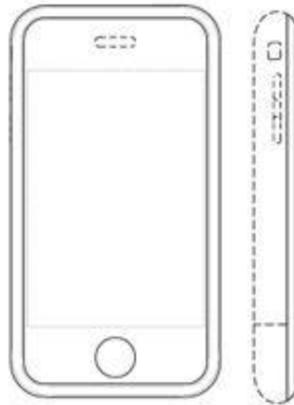
is free to copy or to study the *patent* on a new kind of steering wheel, but they cannot make, use, or sell *steering wheels* as described in the patent.)



- **Trademark law**, which is a hybrid of state and federal rights. Its basis for protection is a little different. A trademark is a word or symbol, like NIKE or the “swoosh” logo that distinguishes goods or services in the marketplace. One gains trademark rights by using a mark on goods so that consumers associate the mark with a particular source – i.e., they know that NIKE shoes come from one company (Nike) and not another (Adidas or Reebok). These associations are called “goodwill” and it is common to say that what a trademark owner owns is the goodwill (even though it exists only in consumers’ minds). These rights exist under state common law as soon as the goodwill exists; trademark owners can also register their marks with the USPTO, which gives nationwide and not just local rights. Trademark law gives a trademark owner the right to prevent uses of the mark that cause “consumer confusion” about the source of goods: a consumer who sees non-Nike shoes falsely labeled NIKE and who mistakenly believes they come from Nike has been confused about the origin of the goods, and Nike can sue the company slapping its trademark on ersatz shoes.
- State-created **rights of publicity** protect against the commercial use of one’s name, picture, voice, or other indicia of identity without permission. For example, photoshopping a celebrity’s face onto a model wearing one of your company’s sweaters and using the photograph in an ad for those sweaters is likely to trigger the right of publicity. Some states require that one’s identity have “commercial value” to bring a right of publicity suit, others do not. (How would one build up commercial value in one’s identity? It is something one can do deliberately, or does it just happen to some people and not others?) The federal trademark law, the Lanham Act, provides a closely related cause of action for false claims about endorsement: quoting a person as saying “I always shop at Acme Hardware” is

actionable if the person didn't say it and you don't have their permission to quote them as saying it.

- **Trade secret law** was previously almost entirely a matter of common law, but now almost all states have adopted a version of the Uniform Trade Secrets Act, and the federal Defend Trade Secrets Act of 2016 substantially incorporates the UTSA's definitions. To be protected as a trade secret, information must be valuable because it is secret. Canonical examples of trade secrets include chain restaurants' secret sauces, customer lists, business plans, manufacturing designs, information on the location of valuable resources like shipwrecks and oil fields, and inventions in the development stage before they are ready to be patented. (Because obtaining a patent involves extensive disclosure, it is impossible to have a patent and a trade secret on exactly the same information; one of the major strategic decisions inventors must make when they apply for a patent is how much to include in the application to obtain a stronger or broader patent, and how much to try to hold back as a trade secret.) In general, a defendant is liable only for obtaining a trade secret through "improper means." Breach of a duty of confidentiality is far and away the most common such means – such as when employees take company documents stamped "CONFIDENTIAL" with them to their new jobs at a competitor. More colorfully, industrial espionage, such as breaking into labs or hacking into computers, is also improper means. Note that trade secret law, like copyright law, protects only against infringers who obtain the secret information, directly or indirectly, from the owner: independent rediscovery of the same information is a complete defense. So is reverse engineering, in which a defendant takes publicly available information (including legally obtained copies of the owner's goods containing or made using with the trade secret) and studies it to understand how the secret works.



- In addition to the patents discussed above (technically, “utility patents”), the federal government also issues **design patents** on “any new, original, and ornamental design for an article of manufacture” and **plant patents** for “any distinct and new variety of plant.” Design patents have become big business, particularly in the technology world where the shape of a device and its user interface are crucial aspects in selling it to consumers. Apple, for example, has sued Samsung for infringing several design patents on elements of the iPhone design; the saga of this litigation is ongoing, but as of now, Apple is defending a \$400 million damage award on appeal.

Feist Publications, Inc. v. Rural Telephone Service Co.

499 U.S. 340 (1991)

JUSTICE O’CONNOR delivered the opinion of the Court.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural’s subscribers, together with their towns and telephone numbers. The yellow pages list Rural’s

business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

[Feist published a telephone directory, containing both white and yellow pages, covering a much larger geographic area. It contained 46,878 white-pages listings. Feist requested a license to Rural's listings; Rural refused.]

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. ...

The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. *Id.*, § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. ...

Originality is a constitutional requirement. The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.” In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U. S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (1884)—this Court defined the crucial terms “authors” and “writings.” In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality. ...

It is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and factual compilations. “No one may claim originality as to facts.” Nimmer, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. ...

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by

readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. ...

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. ...

B

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement. ...

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in *Jeweler's Circular Publishing Co.*, 281 F., at 88:

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).

... Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles. Throughout history, copyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U. S., at 563. But "sweat of the brow" courts took a contrary view; they handed out

proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. ...

C

... In enacting the Copyright Act of 1976, Congress dropped the reference to “all the writings of an author” and replaced it with the phrase “original works of authorship.” 17 U. S. C. § 102(a). ...

As discussed earlier, however, the originality requirement [for compilations] is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i. e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. Such works are incapable of sustaining a valid copyright. ...

In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not “sweat of the brow,” is the touchstone of copyright protection in directories and other fact-based works. ... The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101. ...

III ...

The selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural’s white pages are entirely typical. Persons desiring telephone service in Rural’s service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly “select” to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution. . . .

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, “great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.” *Baker v. Selden*, 101 U. S., at 105.

Notes and Questions

1. Even on a sweat-of-the-brow theory, there is a decent argument that Rural didn't have to sweat very much. But if originality rather than investment of labor

is the basis for copyright protection, then some who labor will not be rewarded with a copyright. Take *Jeweler's Circular Publishing Co.*, quoted in *Feist*. The plaintiff published a 326-page directory of jewelers, *Trade-Marks of the Jewelry and Kindred Trades*. It obtained the information in the directory at great effort, by writing to a large number of jewelers. The defendant – according to the court, at least – skipped this work by copying from the plaintiff's book rather than by doing its own research. Presumably, after *Feist*, there is no copyright in books like *Trade-Marks of the Jewelry and Kindred Trades*. Does this result make sense? Without copyright, will telephone books and jewelers' directories cease to exist because no one will invest in creating them?

2. Do you agree with the *Feist* decision as a matter of law and/or policy? Would Demsetz's theory of property rights suggest protection for Rural's white pages?
3. Would the following works satisfy the "originality" requirement for copyright protection as set out in *Feist*? Do you think that, as a matter of policy, they should be protected by copyright law?
 - a. A translation of Homer's *Iliad*.
 - b. Your civil procedure, contracts, or torts textbook.
 - c. Your notes for this class.
 - d. Google's database of streets, stores, mountains and other geographic features. That is, the information (data) behind Google Maps.
 - e. The pattern (shape) of a dress. In answering this question, note that three-dimensional works, such as sculptures, can be protected by copyright.
 - f. The reconstructed text of the Dead Sea Scrolls. The Dead Sea Scrolls are ancient Jewish writing found in urns in caves in the Judean Desert. The parchment upon which the scrolls were written had, however, fragmented into small scraps, each of which might contain a few letters or part of a letter. In order to be intelligible, the scraps had to be fitted together, like a jigsaw puzzle, except many of the pieces were missing or so damaged that they no longer fit together. Researchers have devoted whole lifetimes to reconstructing these scrolls. The writers of the original scrolls would, of course, have had copyright in their contents, if there were copyright law at the time the scrolls were written. The question is whether the researchers who painstakingly pieced together the scrolls can secure a copyright in the text they reconstructed. Note

that the reconstructed text probably differs in many (but unintended) ways from the original.

Campbell v Acuff-Rose Music

114 S.Ct. 1164 (1994)

Justice SOUTER delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976.

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc. Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work..." On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew's song. Acuff-Rose's agent refused permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" Nonetheless, in June or July 1989, 2 Live Crew released records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs entitled "As Clean As They Wanna Be." The albums and compact discs identify the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose. Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement.

II

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts..." U.S. Const., Art. I, § 8, cl. 8. For as Justice Story explained, "[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." *Emerson v. Davies*, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass.1845). [F]air use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, [which contains the following section]:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, 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—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Congress meant § 107 “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way” and intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus “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.” *Stewart v. Abend*, 495 U.S. 207, 236, 110 S.Ct. 1750, 1767, 109 L.Ed.2d 184 (1990). The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.

A

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1). The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation, *Folsom v. Marsh*, *supra*, at 348; accord, *Harper & Row*, *supra*, 471 U.S., at 562, 105 S.Ct., at 2231 (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” *Leval* 1111. Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

[P]arody has an obvious claim to transformative value, as Acuff–Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson’s Court of Appeals dissent, as “a song sung alongside another.” 972 F.2d, at 1440, quoting 7 *Encyclopedia Britannica* 768 (15th ed. 1975). Modern dictionaries accordingly describe a parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, 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. 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.

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred. The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." *Harper & Row, supra*, at 592, 105 S.Ct., at 2246 (Brennan, J., dissenting).

B

The second statutory factor [is] "the nature of the copyrighted work." This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public

dissemination falls within the core of the copyright's protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” § 107(3) are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives.

Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable 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. But using some characteristic features cannot be avoided.

This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2

Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing “scraper” noise, overlaying the music with solos in different keys, and altering the drum beat. This is not a case, then, where “a substantial portion” of the parody itself is composed of a “verbatim” copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that “no more was taken than necessary,” but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original’s “heart.” As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song’s parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

D

The fourth fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.” § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market” for the original. The enquiry “must take account not only of harm to the original but also of harm to the market for derivative works.”

[When] the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions. We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because “parody may quite

legitimately aim at garroting the original, destroying it commercially as well as artistically,” the role of the courts is to distinguish between “[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.” *Fisher v. Dees*, 794 F.2d, at 438.

III

We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

“Oh, Pretty Woman” by Roy Orbison and William Dees

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you
Mercy
Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?
Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty Woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight
Pretty Woman, don't walk on by,

Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,
Hey, O.K.
If that's the way it must be, O.K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

APPENDIX B TO OPINION OF THE COURT

“Pretty Woman” as Recorded by 2 Live Crew

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It'
Big hairy woman
Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice
Bald headed woman here, let me get this hunk of biz for ya
Ya know what I'm saying you look better than rice a roni
Oh bald headed woman
Big hairy woman come on in
And don't forget your bald headed friend

Hey pretty woman let the boys
Jump in
Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind
Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

Notes and Questions

Consider whether the following actions would qualify as fair use. In evaluating these actions, consider both the statutory factors in Copyright Act § 107 (quoted in the *Campbell* decision) and the Supreme Court's interpretation of these factors in *Campbell*. In all of these examples, assume that the actions were done without permission of the copyright holder.

1. Someone write a highly critical book review, in which she quotes several full paragraphs from the book being reviewed.
2. The copy center photocopied excerpts from an article by Demsetz on property rights for distribution in a 1L class.
3. You use a DVR (digital video recorder) or VCR (video cassette recorder) to record over-the-air broadcast television. Would it matter if the DVR or the VCR had a feature that allowed users to fast-forward or skip through commercials?
4. A company purchases scientific journals and keeps the bound volumes in its library. When employees want to read an article, the library photocopied the requested article and delivers it to the employee.
5. James "Mad Dog" Mattis is fired by President Trump and decides to write a book about his time in the Trump Administration. The New York Times obtains a leaked draft of the book and publishes two full newspaper pages of excerpts. The excerpts contain what the New York Times editors believe are the most important parts of the book.

6. A rap musician “samples” music from a classic Beatle’s album and uses it in her latest album.
7. A Harry Potter fan publishes an Encyclopedia of Harry Potter. Many entries include quotations from the Harry Potter books.