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Sheep in Goats' Clothing: Satire and Fair Use
After *Campbell v. Acuff-Rose Music, Inc.*

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**SHEEP IN GOATS' CLOTHING:
SATIRE AND FAIR USE AFTER *CAMPBELL v. ACUFF-ROSE
MUSIC, INC.***

by ANNEMARIE BRIDY*

[N]o workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its artifacts, or that a work may contain both parodic and nonparodic elements.¹

Justice David Souter

In the vast majority of texts, parody and satire are likely to overlap, particularly if they are used in tandem to reinforce the ultimate ideological and aesthetic objectives of the writer.²

Michael Issacharoff

INTRODUCTION

After thirty-five years of silence on the question of whether parodies of copyrighted works are entitled to special consideration under the doctrine of fair use, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* held that the Sixth Circuit Court of Appeals had erred in failing to adequately appreciate the fact that "recognizable allusion" is both a necessary and a legitimate feature of parody.³ To help explain why parodic borrowing must be viewed differently from other kinds of borrowing, Justice Souter, writing for the majority in the case, invoked a distinction between parody and satire. Parody, Justice Souter reasoned, needs to mimic an original to make its point and is therefore justified in aiming at the crea-

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¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

² Michael Issacharoff, *Parody, Satire, and Ideology*, 42 RIVISTA DI LETTERATURA MODERNE E COMPARATE 211, 214 (1989).

³ *Campbell*, 510 U.S. at 598 (concluding that the Sixth Circuit "erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use"). The Sixth Circuit had concluded that "taking the heart of the original and making it the heart of a new work" constituted an impermissibly substantial borrowing. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994).

tive content of the original.⁴ Satire, by contrast, "can stand on its own two feet" and therefore "requires justification for the very act of borrowing."⁵

Implicit in Justice Souter's distinction is the notion, advanced by the literary critic Linda Hutcheon among others, that the important generic difference between parody and satire lies in their respective objects or targets. According to Hutcheon, parodies level their aim at "intramural" targets, which means they target other texts (or, in her words, other forms of "coded discourse"). Satires, by contrast, take aim at "extramural" targets, meaning they target something or someone in the world at large.⁶ So, whereas parodies by definition rely on existing written works to do what they do (literarily and critically speaking), satires can theoretically function independently of other artistic works.

The legal consequences of Justice Souter's dichotomy seem clear enough: parodists are entitled to greater latitude than satirists when courts consider how much and what kind of borrowing is permissible before a defendant can be said to have crossed the line between fair use and infringement. But beyond inviting the fairly obvious inference that parody is to be privileged over satire for purposes of the fair use analysis, *Campbell* does not provide very clear guidance to courts faced with hybrid works that incorporate both parodic and satiric elements. *Campbell* doesn't, as the Court itself said any useful test for adjudicating the fair-use factors must, provide a workable way of separating the "fair use sheep" from the "infringing goats" when it comes to works that borrow to achieve both parodic and satiric ends.⁷

A tricky question emerges from the case: If a parodic work, to use Justice Souter's words "shades into satire,"⁸ is it legally speaking no longer classifiable (and therefore no longer defensible) as a parody? Should it be regarded as having crossed a critical boundary for fair use purposes? *Campbell* suggests that it should, but there are actually compelling reasons, rooted in the principles underlying the doctrine of fair use, why some types of parodic works that "shade into satire" should not be so regarded. After examining the curious development of the parody/satire distinction within the law of fair use, this article will draw on literary theory to propose a workable and more accurate taxonomy than that provided in *Campbell*, by means of which courts engaging in a fair use analysis can evaluate works that are hybrids of parody and satire. I will argue that the

⁴ *Campbell*, 510 U.S. at 580-81.

⁵ *Id.* at 581.

⁶ See LINDA HUTCHEON, A THEORY OF PARODY 43 (2000). A fuller discussion of this distinction, and of its legal implications, follows in a later section of this article.

⁷ *Campbell*, 510 U.S. at 581.

⁸ *Id.* at 586.

meaningful distinction to be made in the fair use analysis of hybrid works is not a distinction between parody and satire but between two discrete forms of satirical parody — directly satirical parody (which, in light of precedent, ordinarily would *not* be entitled to fair use protection) and indirectly satirical parody (which, considered in the same light, ordinarily would).

I. PARODY AND SATIRE BEFORE CAMPBELL

Prior to its ruling in *Campbell*, the Supreme Court had only once before been presented with a copyright infringement case involving the parody fair use defense. In that case, *Columbia Broadcasting System v. Loew's*,⁹ an equally divided Court affirmed without opinion the Ninth Circuit's holding that CBS's TV burlesque of Loew's film adaptation of the play *Gas Light* infringed Loew's copyright. The Ninth Circuit, affirming the trial court's judgment, based its holding on the principle that "a parodized or burlesque taking is to be treated no differently from any other appropriation."¹⁰ CBS argued that its parody should be protected under the doctrine of fair use as a form of literary criticism or comment.¹¹ So unpersuaded was the Ninth Circuit by this argument that it wryly dismissed CBS's defense as "a parody upon the meaning of criticism."¹² In the eyes of a clearly skeptical court, no "beguiling dissertation on the history of the drama, of English literature, of parody, and of burlesque" could have convinced them that copying "the substance of another's work" could be anything other than an infringement of that person's copyright.¹³

Though finding for the plaintiff, the trial court in *Benny* went out of its way to say that it had not "sounded a death knell on burlesque."¹⁴ The case's holding, Judge Carter wrote, applied only to those parodic works that borrow "the whole or a substantial part" of the original.¹⁵ Emphasizing the restricted scope of its holding, the court offered assurance that there still existed a safe zone for the parodic borrower within the doctrine of fair use. That zone, however, turned out to be extremely small. When contemplating how much borrowing by a parodist would be permissible, the court offered a decidedly less-than-liberal standard, suggesting that

⁹ 356 U.S. 43 (1958), *aff'd by an equally divided court* *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd* *Loew's, Inc. v. Columbia Broad. Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955) [hereinafter *Benny*].

¹⁰ *Benny*, 239 F.2d at 537 (quoting from the district court's opinion).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Loew's*, 131 F. Supp. at 185.

¹⁵ *Id.*

“an isolated incident, character, event, theme or setting”¹⁶ would be permissible. Under such a stringent standard, only those parodic works borrowing very insubstantially from a copyrighted original would fall safely within the protective limits of fair use.

Less than a year later, however, in *Columbia Pictures Corp. v. National Broadcasting Co.*¹⁷ — another claim alleging that a television network had infringed a movie studio’s copyright by airing a TV spoof — the same judge recognized that it is in the nature of parody to require something more than the isolated borrowing permitted by *Benny*:

Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectible portion of the copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.¹⁸

In this first articulation of the now-canonical “conjure up” test, the court in *Columbia Pictures* acknowledged that the relationship between a parody and the work it targets is necessarily an intimate one, and that fair use doctrine should therefore accommodate some greater degree of similarity in cases involving parodies than might otherwise be allowed.¹⁹ But how much greater? The court remained careful in its characterization of what would be permissible, walking the same tightrope subsequent courts have walked in trying to balance the fair use rights of the parodist with the intellectual property rights of aggrieved copyright owners. While the “isolated incident”²⁰ standard from *Benny* was expanded slightly in *Columbia Pictures* to allow “an incident or *some incidents*,”²¹ the court still seemed determined to hold the line with respect to the amount and substantiality of borrowing. The parodist under *Columbia Pictures* was restricted to using, for example, “some *small and unsubstantial* part of the development of the story, and some *small and unsubstantial* amount of the dialogue.”²² The dissonance between the meagerness of these allowances and the court’s professed tolerance, in the very same paragraph of the opinion, for “more extensive” borrowing is symptomatic of a historical ambivalence in the cases regarding the license to copy that parody demands.

¹⁶ *Id.*

¹⁷ 137 F. Supp. 348 (S.D. Cal. 1955).

¹⁸ *Id.* at 354.

¹⁹ *Id.* at 352. The court acknowledged that borrowing is a “necessary element” of burlesque. *Id.*

²⁰ *Loew’s, Inc. v. Columbia Broad. Sys.*, 131 F. Supp. 165, 185 (S.D. Cal. 1955), *aff’d* 239 F.2d 532 (9th Cir. 1956).

²¹ *Columbia Pictures*, 137 F. Supp. at 354 (emphasis added).

²² *Id.* (emphasis added).

Since the early cases, courts have grappled, some more directly and explicitly than others, with the question of what it is that makes parodic borrowing exceptional. This exercise has inevitably entailed efforts to define what parody is and to distinguish it from other literary genres having the same or similar functions and conventions. The variety of terms used to describe allegedly infringing works and the frequency with which such terms are interchanged in cases involving parodies indicate the extent to which a stable concept of parody has eluded courts. In a footnote in *Benny*, the district court made the following observation *a propos* of the semantic confusion:

It will be noted that the words 'burlesque,' 'parody,' 'satire' and 'travesty' are often used interchangeably. They do have certain technical distinctions, i.e., 'parody' is usually the imitation of style or form; 'satire' often carries the connotation of bitterness; 'travesty' is synonymous with 'burlesque' but is sometimes used to mean a long burlesque. . . . While parody (q.v.) also based on imitation, relies for its effect more on the close following of the style of its counterpart, burlesque depends on broader and coarser effects.²³

The court's characterization of the distinctions among the genres as "technical" conveys the view that, for legal purposes at least, they are not meaningfully different. This view is reflected in the fact that both the district court and the Ninth Circuit in *Benny* treated the terms "parody" and "burlesque" as essentially fungible.²⁴ While not defining either term explicitly, the Ninth Circuit focused on the intended humorous effect of the accused work, pointing out that the defendant, Benny, had endeavored to transform a dramatic original by "introducing comic devices of clownish garb, or movement, or facial distortion of the actors."²⁵ In the *Columbia Pictures* opinion, the terms "farce,"²⁶ "comedy,"²⁷ and "burlesque"²⁸ all appear, with the court offering an explicit definition only of its preferred

²³ *Loew's*, 131 F. Supp. at 186 n.31.

²⁴ See, e.g., *id.* at 167, 168, 169, 171, 172, 173, 176, 177 (using the term "burlesque") and at 167, 169, 176, 177 (using the term "parody"). Courts in subsequent cases have also treated the terms as synonyms. See, e.g., *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 453 n.17 (S.D.N.Y. 1976), *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981) (asserting that "[f]or the purposes of this opinion the fine distinctions between burlesque and parody are ignored").

²⁵ *Benny v. Loew's, Inc.*, 239 F.2d 532, 537 (9th Cir. 1956). Similarly, the district court focused on the fact that the accused work had "inverted the mood [of the original] from serious to humorous" using "gags, puns, exaggerated mimicry, slapstick, and distortion." *Loew's*, 131 F. Supp. at 184.

²⁶ *Columbia Pictures*, 137 F. Supp. at 349.

²⁷ *Id.*

²⁸ *Id.*

term, "burlesque": "a recognized form of literary art . . . [in which] a part of the content is used to conjure up at least the general image of the original."²⁹

"Satire," mentioned only in passing in *Benny*, emerged as a term with distinct legal significance in *Berlin v. E.C. Publications*,³⁰ a case involving *Mad* magazine parodies of a number of popular songs. *Mad*'s publishers had printed comical lyrics, instructing readers to sing them to the tunes of the original songs. The Second Circuit, without making any semantic distinction between "satire" and "parody," premised its decision on the principle that satire and parody are both rightfully entitled to the law's protection: "we believe that parody and satire are deserving of substantial freedom — both as entertainment and as a form of social and literary criticism."³¹ The Second Circuit's acceptance in *Berlin* of the notion that parody serves a socially important critical function marked a clear departure from the Ninth Circuit's skepticism in *Benny* about the legitimacy of parody as criticism.

The Second Circuit differed, too, in its view of the wisdom of having so stringent a test as the one set out in *Benny*. Although the court found it unnecessary given the facts in *Berlin* to "determine whether parody and satire require a greater freedom than that afforded by the 'substantiality' test outlined in *Benny*,"³² it was clearly not unsympathetic to concerns that the restrictions imposed in *Benny* could hamper the development of the art of parody³³ — an outcome antithetical to the constitutional purposes of copyright.³⁴ Reserving the prerogative to adopt a more liberal standard in the future, the *Berlin* court made a point of emphasizing *Benny*'s lack of precedential weight.³⁵

Although the Second Circuit in *Berlin* treated parody and satire as equally entitled to special legal protection, the district court in the case made a dispositive, and in retrospect seminal, distinction between the two genres. This distinction turned on the question of the works' respective objects or targets. *Mad* had presented the works at issue in the case as "a

²⁹ *Id.* at 352.

³⁰ 329 F.2d 541 (2d Cir. 1964).

³¹ *Id.* at 545.

³² *Id.*

³³ The *Berlin* court was impressed by scholars' criticism of the *Benny* decision, citing several law review articles by commentators who suggested that the stringency of the *Benny* test would have deleterious effects of the progress of literature. *Id.* at 544-45.

³⁴ "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

³⁵ *Berlin*, 329 F.2d at 545 n.3.

collection of parody lyrics to fifty-seven old standards which reflect *the idiotic world we live in today*.'³⁶ The lyrics were intended not to poke fun at the songs themselves, but to ridicule a variety of pop-culture phenomena, including, for example, baseball great Roger Maris's "selling out" to become a corporate pitchman.³⁷ The court reasoned that because *Mad* had not directly targeted the lyrics of the original works, the *Mad* songs were not (notwithstanding the defendant's own characterization of them) parodies. Quoting from the *Webster's New International Dictionary*, the district court defined parody as "a writing in which the language and style of an author, or poem, or other work, is closely imitated or mimicked."³⁸ Pointing out that the subject matter of *Mad*'s parodies differed completely from that of the originals, the court found that "[*Mad* had] not *parodied* [the original] lyrics. Rather they [had] *satirized*, in original words and thought, several aspects of modern life."³⁹

Benny's parody rule was inapplicable to the case, the court concluded, because *Mad* had not targeted the original songs themselves for ridicule (i.e., by borrowing or reproducing the lyrics) but had instead used the song tunes merely as a means to another end — the satirization of modern life. In the district court's analysis, *Mad* saved itself from the rigors of the *Benny* test by coopting the songs at issue not for the purpose of poking fun at their style or substance, but with the aim of using them to skewer the world at large.⁴⁰ By holding that the *Mad* lyrics were not, in fact, parodies of the original Berlin works, the Court circumvented *Benny*.⁴¹ Since there was no binding case law holding that satiric use (as opposed to parodic use) wasn't fair, the district court steered clear of *Benny* by invoking a distinction between parody and satire, and by finding that the defendant's use of the works in question fell squarely (and fairly) within the limits of the latter category.⁴²

Although *Berlin's* novel distinction between parodic and satiric use did not figure expressly into the decision in *Walt Disney Productions v.*

³⁶ *Id.* at 543 (emphasis added).

³⁷ *Id.* at 542. The ballad *The Last Time I Saw Paris* had been transformed by *Mad* into "The First Time I Saw Maris." *Id.* at 543.

³⁸ *Berlin v. E.C. Publ'ns, Inc.*, 219 F. Supp. 911, 913 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 541 (2d Cir. 1964).

³⁹ *Id.* at 914 (emphasis added).

⁴⁰ *Id.*

⁴¹ *Id.* at 913 (citing *Benny*). Despite the fact that the *Benny* decision did not carry a majority of the Supreme Court Justices, the district court in *Berlin*, unlike the Second Circuit, seems to have considered itself bound by the high court's equally divided affirmance of the Ninth Circuit decision in the case.

⁴² By invoking the generic distinction, the court could hold for E.C. Publications (*Mad*) without seeming to reject the (controversial) teaching of *Benny*.

Mature Pictures Corp.,⁴³ the next parody case to come before the Southern District of New York, the question of what or whom the parodist could legitimately target was again implicated in the court's fair use analysis. Plaintiff Disney sought and won a preliminary injunction to prevent Mature Pictures from using *The Mickey Mouse March* as background music during an explicit scene in a movie depicting the sexual coming-of-age of a group of teenaged boys.⁴⁴ Mature Pictures argued that the music was being used in its film to "highlight and emphasize the transition from childhood to manhood . . . in a highly comical setting,"⁴⁵ and that the scene in question was "merely a 'humorous take-off' on the [Disney song]."⁴⁶ Applying the "conjure up" test from *Columbia Pictures*, the court held that the defendant, by playing the entire song over and over again, had used much more of the original than was necessary to accomplish any legitimate parodic purpose.⁴⁷ The amount of borrowing, however, was not the only factor weighing against the defendant; the court regarded the object of the defendant's borrowing as equally problematic.

In the judgment of the court, Mature Pictures was not only guilty of overkill, its shot had fallen wide of an acceptable parodic mark: "While defendants may have been seeking in their display of bestiality to parody life, they did not parody *the Mickey Mouse March* but sought only to improperly use the copyrighted material."⁴⁸ Whereas the district court in *Berlin* had thought it permissible for the defendant to make use of a copyrighted work to ridicule something beyond the scope of that work (e.g., the world at large), the same court in *Mature Pictures* said just the opposite: instrumentalizing a copyrighted work to critique something or someone external to the work itself is not a protected use. Can these two divergent decisions be reconciled? Perhaps. If one regards the amount and substantiality of the borrowing in each case as the truly decisive factor, the outcomes make sense: *Mad* had completely changed the lyrical subject matter of Berlin's songs, and it had not actually reproduced in print any of Berlin's music; Mature Pictures, by contrast, had made no alterations whatsoever to Disney's song and had repeatedly reproduced both the music and the lyrics in their entirety. However, in terms of what constitutes a legally permissible *target* for a defendant pursuing a parody defense, the two cases point in opposite directions.

⁴³ 389 F. Supp. 1397 (S.D.N.Y. 1975).

⁴⁴ *Id.* at 1397.

⁴⁵ *Id.* at 1398.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (emphasis added).

Mature Pictures' disapproval of extramural targets carried the day with the district court in *MCA v. Wilson*,⁴⁹ a case involving a sexually explicit parody of the World War II-era song *Boogie Woogie Bugle Boy*. In *Berlin*, the fact that the accused works were found not to be parodies meant, ironically, that they were protected under the doctrine of fair use; however, in *MCA*, the court's finding that the accused work "[was] not a parody or burlesque of Bugle Boy"⁵⁰ yielded the opposite result. The work was found to be infringing because it had targeted not "Bugle Boy" itself but the sexual mores of the era of which the song was a product:

First, defendants concede that ["The Cunnilingus Champion of Co. C"] was not intended to be a parody of Bugle Boy in the sense of taking Bugle Boy out of context in an attempt to hold it up to ridicule. Defendants may have sought to parody life, or more particularly sexual mores and taboos, but it does not appear that they attempted to comment ludicrously upon Bugle Boy. . . . [Champion] attempts to burlesque life, more particularly sexual mores. This purpose does not justify the unwarranted use and abuse of Bugle Boy.⁵¹

The district court in *MCA* thus fell back on the view from *Mature Pictures* that parodies using an original copyrighted work simply as a vehicle for ridiculing an extramural object are not protected under the doctrine of fair use. Taken together, these two decisions undercut *Berlin's* more permissive stance that it is acceptable for a borrower to use a copyrighted work in order to ridicule or poke fun at (or, in the terminology of *Berlin* to "satirize") the world in general.

Not surprisingly, the decision in *Elsmere Music, Inc. v. National Broadcasting Co.*⁵² — the next in the line of parody cases to come before the Southern District of New York — turned on a resolution of the doctrinal incongruity between *Berlin* on the one hand and *Mature Pictures* and *MCA* on the other. *Elsmere*, owner of the copyright in the "I Love New York" advertising campaign, sued NBC alleging that a *Saturday Night Live* parody of the campaign entitled "I Love Sodom" infringed its copyright. *Elsmere* argued, citing *Mature Pictures* and *MCA*, that the *SNL* parody was not a fair use because it did not directly target the song or the campaign itself but merely used the song as a way of targeting the City of New York and its image problems.⁵³ In dicta, the court categorically rejected the argument, citing back to *Berlin*:

⁴⁹ 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd*, 677 F.2d 180 (2d Cir. 1981).

⁵⁰ *Id.* at 453.

⁵¹ *Id.*

⁵² 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

⁵³ *Id.* at 745.

[E]ven if it were found that 'I Love Sodom' did not parody the plaintiff's song itself, that finding would not preclude a finding of fair use. Under the holding of *Berlin v. E. C. Publications, Inc.*, *supra*, and the criteria set down in § 101 of the 1976 Copyright Act, 17 U.S.C. § 107, *the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied song itself.* To the extent that either *MCA* or *Walt Disney* [*v. Mature Pictures*] can be read to require that there be an identity between the song copied and the subject of the parody, this Court disagrees.⁵⁴

Asserting the permissibility of a disidentity between the target of a parody and the work used to aim at that target, the *Elsmere* court registered its preference for resolving the discrepancy between *Berlin* and *Mature Pictures/MCA* in favor of allowing parodists to use the works from which they borrow as a means of criticizing extramural targets.

This reasoning was substantially endorsed by the Second Circuit in its opinion in the *MCA* appeal. Confronted with the contradictory stances taken by the district court in *Elsmere* and *MCA*, the Second Circuit found that there was error in the *MCA* opinion and resolved the conflict in favor of allowing extramural targets: "We agree with appellants' argument to the extent of holding that a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general."⁵⁵ The court added an important qualification: "However, if the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up."⁵⁶ Unlike the district court in *Elsmere*, which theoretically allowed for a complete lack of identity between the copied work and the parodic target, the Second Circuit in *MCA II* required that there be at least a partial identity between the two.

After *MCA II*, then, the rule that had evolved in the Second Circuit was that parodists could borrow from a copyrighted work to criticize an extramural target, so long as the copyrighted work was in some way also a target of the parody. In other words, the copyrighted work could not be used purely as a means of criticizing something else; it could be an instrument of criticism or ridicule, but it also had to be a target of criticism or ridicule in its own right.⁵⁷ This rule is consistent with the one that had

⁵⁴ *Id.* at 746 (emphasis added).

⁵⁵ *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) [hereinafter *MCA II*].

⁵⁶ *Id.*

⁵⁷ Note that this rule is not quite consistent with the result in *Berlin*. The Second Circuit in *Berlin* observed that the defendant's works "were as diverse in their targets for satire as they were broad in their humor." *Berlin*, 329 F.2d at 543. But among those targets were not the copyrighted works themselves.

developed by the same time in the Ninth Circuit. In *Walt Disney Productions v. Air Pirates*, the Ninth Circuit Court of Appeals did not "regard it as fatal . . . that the 'Air Pirates' were parodying life and society in addition to parodying the Disney characters."⁵⁸ However, the Ninth Circuit in *Air Pirates* articulated a caveat similar to the one laid down by the Second Circuit in *MCA II*: "To the extent that the Disney characters are not also an object of the parody, however, the need to conjure them up would be reduced if not eliminated."⁵⁹

A series of decisions in both circuits after *MCA II* and *Air Pirates* followed this rule. In the Ninth Circuit, there was *Fisher v. Dees*,⁶⁰ a case alleging that Dees' parodic song *When Sonny Sniffs Glue* infringed Fisher's copyright in the '50s standard *When Sonny Gets Blue*. The court held for Dees, affirming the district court's summary judgment.⁶¹ Plaintiffs argued that Dees' parody was not directed at the original and was therefore not entitled to fair use protection.⁶² The court disagreed, holding that "it was clear to us that Dees's version was intended to poke fun at the composer's song, and at [the performer's] rather singular vocal range."⁶³ The court "reject[ed] the notion that the song was used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time."⁶⁴

In the Second Circuit, decisions in *Steinberg v. Columbia Pictures Industries*,⁶⁵ *Rogers v. Koons*,⁶⁶ and *United Feature Syndicate v. Koons*⁶⁷ also relied to some extent on determinations concerning the permissibility of extramural targets. The dispute in *Steinberg* involved a movie poster promoting the movie *Moscow on the Hudson*. Steinberg sued alleging that Columbia's poster infringed his copyright in an illustration he had drawn for the *New Yorker* magazine depicting "a parochial New Yorker's view of the world."⁶⁸ Holding for Steinberg, the court rejected Columbia's argument that the poster was protected as fair use under the parody branch of the doctrine:

As this circuit has held, the copyrighted work must be 'at least in part an object of the parody' [citing *MCA II*]. The record does

⁵⁸ 581 F.2d 751, 758 n.15 (9th Cir. 1978), *aff'g* 345 F. Supp. 108 (N.D. Cal. 1972) (on copyright infringement claims only).

⁵⁹ *Id.* at 758 n.15.

⁶⁰ 794 F.2d 432 (9th Cir. 1986).

⁶¹ *Id.* at 440 (concerning the copyright claim in the case).

⁶² *Id.* at 436.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 663 F. Supp. 706 (S.D.N.Y. 1987).

⁶⁶ 960 F.2d 301 (2d Cir. 1992), *aff'g* 751 F. Supp. 474 (S.D.N.Y. 1990).

⁶⁷ 817 F. Supp. 370 (S.D.N.Y. 1993).

⁶⁸ *Steinberg*, 663 F. Supp. at 709.

not support a claim that the defendants intended to satirize plaintiff's illustration;. . . Defendants' variation on the visual joke of plaintiff's illustration does not, without an element of humor aimed at some aspect of the illustration itself, render it a parody and therefore a fair use of the plaintiff's work⁶⁹

Similarly, in *Rogers v. Koons*, the court found that although the defendant's sculpture "String of Puppies" — an exact three-dimensional rendering of plaintiff's photograph "Puppies" — could legitimately be viewed as "a satirical critique of our materialistic society, it is difficult to discern [in it] any parody of the [plaintiff's] photograph 'Puppies' itself."⁷⁰ The court was willing to accept Koons' characterization of his work as a "satire or parody of society at large,"⁷¹ but it didn't agree that the sculpture was therefore a fair use of Rogers' work. To explain how it could be that Koons' work could be a parody or satire and yet still not be entitled to protection under the doctrine of fair use, the court invoked the rule from *MCA II*:

It is the rule in this Circuit that though the satire need not be only of the copied work and may, as appellants urge of "String of Puppies," also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.⁷²

The result in *United Feature Syndicate v. Koons* was substantially the same. The plaintiff in the case was the same sculptor who had been sued in *Rogers*, and the facts in the case were closely analogous to those in the earlier case.⁷³ Koons had recreated in sculpture form the image of the cartoon dog "Odie" (featured in the *Garfield* comic strip) without the permission of the strip's owner.⁷⁴ Although he testified that he was unaware of the identity of the character when he chose to include it in his sculpture, Koons argued that Odie was used in his work "to symbolize the cynical and empty nature of society."⁷⁵ Citing *Rogers*, the court quickly dispatched Koons' argument, saying that there could be no finding of fair use given that Odie himself was not an object of the parody but merely "an

⁶⁹ *Id.* at 730. Note that the court does not distinguish between the terms "satire" and "parody" but rather uses them interchangeably.

⁷⁰ *Rogers*, 960 F.2d at 310.

⁷¹ *Id.* at 309.

⁷² *Id.* Note, again, that the court freely substitutes "satire" for "parody."

⁷³ *United Feature Syndicate v. Koons*, 817 F. Supp. 370, 375 (S.D.N.Y. 1993) (stating that "the *Rogers* decision does provide a helpful framework in which the Court can examine the legal issues presented by the parties in the instant motion").

⁷⁴ *Id.* at 372.

⁷⁵ *Id.* at 384.

animal figure' that is part of a more general parody on the banality of life or criticism of the mass media culture at large."⁷⁶ Had Koons not professed ignorance of Odie's origin and pop-cultural significance, he might have fared better given the requirement that the object of the borrowing must also be, to some extent, a target of the parody. Koons might have prevailed on the merits if he had argued something to the effect that Odie's own banality was symbolic of the banality of the mass-media culture that created and embraced him. In that case, the court, applying *MCA IP's* test, could have viewed Koons' use of Odie as permissible; the figure could have been held to function as both an instrument and an object of the artist's social critique.

II. PARODY AND SATIRE PART WAYS: CAMPBELL'S DICHOTOMY

When *Campbell* came before the Supreme Court in 1993, more than three decades after *Benny* had drawn a line in the sand for would-be parodists, the terms "parody" and "satire" were still being used interchangeably (and somewhat confusedly) in both the Second and the Ninth Circuits. In *Rogers*, for example, Judge Cardamone wrote that "parody or satire . . . is when one artist . . . closely imitates the style of another artist."⁷⁷ Similarly, in *Air Pirates*, Judge Cummings made reference to "the parodied work and those specific attributes that are to be satirized."⁷⁸ No legal distinction between the two terms was recognized in either circuit, and works described under both rubrics were regarded in both circuits as equally deserving of fair use protection.

In the Ninth Circuit, *Benny's* rule that any substantial parodic borrowing was infringing had been all but neutralized by means of a very narrow construction under which its rule was held to apply only in cases involving near-verbatim copying. In both circuits, the test applied in parody cases for evaluating the amount and substantiality of borrowing was the time-honored "conjure up" test from *Columbia Pictures*. Whether a parodist was actually entitled to borrow more than the minimum amount required to invoke the original work in the minds of the audience was not entirely settled. In *Elsmere*, the Second Circuit suggested in dicta that a parodist could borrow "not only as much, but at least as much as is required to 'conjure up' the original."⁷⁹ More extensive borrowing would still constitute fair use "provided the parody builds upon the original, using the original as a known element of modern culture and contributing

⁷⁶ *Id.*

⁷⁷ *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

⁷⁸ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978).

⁷⁹ *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

something new for humorous effect or commentary.”⁸⁰ In *United Feature Syndicate*, however, the district court did not follow *Elsmere*’s lead, applying instead the more conservative “only as much” rule: a “parody falls within the scope of fair use only if the unauthorized user takes no more of the copyrighted work than is necessary for purposes of the parody.”⁸¹ The Ninth Circuit favored the latter approach, observing that existing constraints did not entitle a parodist to make the “best parody” of the original work.⁸² It was settled law in both circuits that a parodist could permissibly borrow from a copyrighted work to target an extramural object, so long as the work being borrowed from was also in some way a target of the borrower’s criticism or ridicule.

The Supreme Court in *Campbell* addressed errors below concerning two important elements of the fair use analysis: the weight that should be given to the commercial character of a parody and the extent to which parodic borrowing should be treated as a special case when it comes to assessing the degree and kind of copying that is permissible.⁸³ The dispute in *Campbell* involved a musical parody by the rap group 2 Live Crew of Roy Orbison’s song *Oh, Pretty Woman*.⁸⁴ Owners of the copyright to Orbison’s song sued for infringement, contending that 2 Live Crew’s version of the song does not comment on the copyrighted work because, whereas the original song is “‘primarily about loneliness,’”⁸⁵ the 2 Live Crew version is “‘primarily about the physical attributes of women.’”⁸⁶

The district court entered summary judgment for 2 Live Crew, agreeing with the defendant’s argument that the song was a parody entitled to fair use protection. In reaching this conclusion, the court distinguished 2 Live Crew’s borrowing from the proscribed near-verbatim copying in *Air Pirates*, likened it to the permissible borrowing in *Fisher* and *Berlin*, and ultimately found that although “[n]otable aspects of the original song are plainly present in 2 Live Crew’s version,”⁸⁷ it “appropriates no more of the original than is necessary to accomplish reasonably its parodic purpose.”⁸⁸

In a divided opinion, the Court of Appeals for the Sixth Circuit reversed, holding that the “blatantly commercial” character of 2 Live Crew’s

⁸⁰ *Id.*

⁸¹ *United Feature Syndicate*, 817 F. Supp. at 384.

⁸² *Air Pirates*, 581 F.2d at 758.

⁸³ *Acuff-Rose Music, Inc. v. Campbell*, 510 U.S. 569, 572 (1994).

⁸⁴ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1151 (M.D. Tenn. 1991), *rev’d*, 972 F.2d 1429 (6th Cir. 1992), *rev’d*, 510 U.S. 569 (1994).

⁸⁵ *Id.* at 1154.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1157.

⁸⁸ *Id.*

parodic borrowing disqualified the work from fair use protection.⁸⁹ Analyzing the purpose of the use, the majority grudgingly accepted the district court's characterization of the 2 Live Crew song as a parody.⁹⁰ It concluded, however, that the district court had erred as a matter of law in its assessment of whether the amount the defendants borrowed was impermissibly substantial.⁹¹ Although it conceded that 2 Live Crew's borrowing may, in fact, have been no more than was necessary to conjure up the original, it emphasized the importance, as a matter of law, of the qualitative nature of the borrowing.⁹² Incorporating a qualitative test into the substantiality analysis, the majority found it necessary to consider "what degree of the essence of the original is copied in relation to its whole."⁹³ Considering this, they found that the defendants had crossed the line not because they took too much of Orbison's work, but because they took "the heart of the original."⁹⁴

The Supreme Court reversed, holding that the Court of Appeals had given too much weight to the commercial character of the parody, and that it had failed to fully grasp the nature of parody in assessing the amount and substantiality of 2 Live Crew's copying.⁹⁵ Parody, Justice Souter explained, "presents a difficult case,"⁹⁶ because it is in the very nature of the genre to go straight to the heart of the parodied original: "it is the heart at which parody takes aim."⁹⁷ If a parody did not reproduce "the original's most distinctive or memorable features,"⁹⁸ it would fail qua parody; the audience would miss the allusion, and, in doing so, would altogether miss the point. Because parody's "art lies in the tension between a known original and its parodic twin,"⁹⁹ any parody that did not do what the Sixth

⁸⁹ See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994).

⁹⁰ *Id.* at 1435. In a footnote, the majority engages in a lengthy discussion of its reservations concerning the district court's parody analysis. In the view of the majority, 2 Live Crew's song, even if it is acknowledged to be a "comment on the banality of white-centered popular music," does not target the original song in a way that satisfies the requirements of *Rogers* and *MCA II*. In the absence of a comment "expressly and unambiguously directed at the message of the original work," the majority wrote, there can be no parody. *Id.* at 1436.

⁹¹ *Id.* at 1438.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Campbell*, 510 U.S. at 572.

⁹⁶ *Id.* at 588.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

Circuit had faulted 2 Live Crew for doing would be artless at best and altogether unrecognizable as a parody at worst.

It was in the context of assessing the special nature of parody and the implications of its exceptional status for the fair use analysis that Justice Souter in *Campbell* drew the distinction between parody and satire to which the opening paragraphs of this article allude. *Campbell* was the first case since *Berlin* to differentiate between the two terms for the purposes of the fair use analysis, and it was, at the time it was decided, the only case to suggest that satire has a lesser entitlement than parody to fair use protection. Under *Campbell*, the burden placed on the satirist is greater than that placed on the parodist to justify a borrowing: The parodist must justify only the amount that he or she has borrowed (because it is assumed that borrowing from another work is a generic requirement of parody), but the satirist must justify "the very act of borrowing" (because it is assumed that satire, in terms of its relation to another work, "can stand on its own two feet.").¹⁰⁰

The difference between the two genres for the *Campbell* court, as for the *Berlin* court, came down to their respective targets.¹⁰¹ A parody "takes aim at a particular work . . . [as] the object of its critical wit."¹⁰² This text-to-text (i.e., intertextual) relationship, Justice Souter remarked, inheres in the word *parody*, which comes from the Greek *parodeia*, meaning "a song sung alongside another."¹⁰³ A satire, on the other hand, offers "commentary [that] has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh."¹⁰⁴ Satire, as it is described in *Campbell*, makes use of an original text for no other purpose than to criticize "prevalent follies or vices" that exist in the world and beyond the targeted text.¹⁰⁵ In a satire, Justice Souter went on to explain, "society is lampooned through its creative artifacts."¹⁰⁶ This lampooning is differentiated from that of parody, in which one creative artifact lampoons another.¹⁰⁷

While *Campbell* assuredly does not stand for the proposition that borrowing for satiric purposes is *per se* or even presumptively unfair, the

¹⁰⁰ *Id.* at 580-81.

¹⁰¹ This point was put succinctly in Justice Kennedy's concurrence: "In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry." *Id.* at 598 (Kennedy, J., concurring).

¹⁰² *Id.* at 588.

¹⁰³ *Id.* at 580.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* n.15.

¹⁰⁶ *Id.* at 581.

¹⁰⁷ *Id.* at 588 (stating that "[p]arody's humor necessarily springs from recognizable allusion to its object through distorted imitation").

case's parody analysis raises the evidentiary bar for satirists by positing an unprecedented dichotomy between satire and parody — genres that literary theorists have long regarded as often (if not usually) intertwined or overlapping. Take, for example, Linda Hutcheon:

Yet the obvious reason for the confusion of parody and satire . . . is the fact that the two genres are often used together. Satire frequently uses parodic art forms for either expository or aggressive purposes, when it desires textual differentiation as its vehicle.¹⁰⁸

Hutcheon's observation that parody and satire are commonly commingled in a single text is echoed by Michael Issacharoff:

But satire and parody can coexist in a given work, seeing that it is possible simultaneously to lambaste ideas and their manner of expression. It is consequently difficult at times to unravel satire and parody¹⁰⁹

How, in light of the existence of a sizeable gray area comprised of individual works that fall legitimately under both rubrics, are courts to make sense of *Campbell's* injunction to draw the line between satire and parody?

Campbell can be viewed as creating a sort of sliding scale according to which the burden on the defendant to justify his or her borrowing increases (and the amount of borrowing considered permissible decreases) as the element of satire in the accused work increases.¹¹⁰ But does the artist who parodies an original work in order to satirize the cultural values for which that work stands (i.e., values that exist both in the fictive world of the original work *and* in the real world beyond the work) necessarily need to borrow less than does the artist who creates a parody with no other motive than to lampoon, for example, the overwrought artistic style of the original work? In both cases, the need to "conjure up" the original exists, because both works accomplish their purposes through parody, even though the purpose of the former work is more expansive than that of the latter and is, to at least some degree, extramurally directed.

In terms of the underlying purposes of the fair use doctrine as codified in the Copyright Act of 1976, a work that parodies another work in order to satirize its values or ideology would seem to be no less justifiably classifiable as criticism or comment than a work whose ridicule is directed more narrowly at the stylistic features of the other work.¹¹¹ Indeed, Jus-

¹⁰⁸ HUTCHEON, *supra* note 6, at 43.

¹⁰⁹ Issacharoff, *supra* note 2, at 214.

¹¹⁰ See *Campbell*, 510 U.S. at 581.

¹¹¹ The 1976 Copyright Act provides that:

tice Souter recognizes, in a footnote in *Campbell*, that a “parody that more loosely targets an original . . . may still be sufficiently aimed at the original to come within our analysis of parody.”¹¹² This position is entirely consistent with the line of cases from the Second and the Ninth Circuits preceding *Campbell*, which permit extramural targets so long as the original work is itself in some way targeted as an object of the borrower’s criticism or ridicule.¹¹³ Notwithstanding Justice Souter’s expression of tolerance for “loose” parodies, however, the *Campbell* opinion casts a diffuse (and arguably unjustified) shadow of suspicion on works that contain, in Justice Souter’s words, “both parodic and nonparodic [viz. satiric] elements.”¹¹⁴ These are the works that straddle the line, the opinion suggests, the ones for which courts must be on their guard lest an infringing goat be allowed to pass for a fair use sheep.

III. SHEEP IN GOATS’ CLOTHING: SATIRIC PARODY AS FAIR USE

The contribution that literary theory can make to sorting out the classificatory dilemma presented by works that defy *Campbell*’s parody-satire dichotomy lies in its analysis of the ways in which, and the ends to which, satire and parody often overlap in individual artistic works. There is consensus among theorists of parody that the primary distinction between the two genres lies in what they target.¹¹⁵ Whereas a parody by definition takes aim at another text, a satire is not by definition dependent on a pre-existing text; “its targets are (extratextual) things rather than signs.”¹¹⁶ This distinction is consistent with *Campbell*’s definition of satire as a work “in which prevalent follies or vices [in society] are assailed with ridi-

“the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”
17 U.S.C. § 107 (2000).

¹¹² *Campbell*, 510 U.S. at 581 n.14.

¹¹³ See, e.g., *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff’d*, 623 F.2d 252 (2d Cir. 1980) (disagreeing with the proposition that there must be a perfect identity between the song copied and the object of the parody); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978) (asserting that it is not “fatal” that the defendants were targeting “life and society” in addition to the work being parodied).

¹¹⁴ *Campbell*, 510 U.S. at 581.

¹¹⁵ See, e.g., HUTCHEON, *supra* note 6, at 43 (“I would argue that the difference between the two terms . . . lies in what is being made into a target.”); Seymour Chatman, *Parody and Style*, 22 POETICS TODAY 25, 30 (2001) (“We must of course remember the clear distinction between parody and satire in general. Nonparodic satire can be directed at anything in the world But parody only satirizes other texts or genres.”).

¹¹⁶ Issacharoff, *supra* note 2, at 214.

cule,"¹¹⁷ and it helps to gloss Justice Souter's somewhat cryptic assertion that satire can "stand on its own two feet"¹¹⁸ vis-a-vis another text. There is also, however, an equally broad consensus that parody has long been used for satiric effect and that, in this respect, parody and satire are difficult to isolate both historically and generically speaking.¹¹⁹ Michael Issacharoff contends that:

parody can have satirical intent — so that the deliberate distortion of an intertext may be intended to have a social, political and philosophical impact more profound than the immediate purpose of undermining a specific textual target.¹²⁰

Linda Hutcheon argues for the existence of both "parodic satire" and "satiric parody," though her effort to explain, through examples, how the two hybrid forms actually differ goes a long way to prove the point that when parody and satire coincide, the results resist easy classification.¹²¹ A more useful way of classifying hybrid texts for both literary and legal purposes is offered by Ziva Ben-Porat, who explains the satirical function of parody by differentiating between "indirectly satirical parody" and "directly satirical parody."¹²² An indirectly satirical parody "critically exposes not only the formal features of its model and all those elements which comprise its [aesthetic] mechanism for modelling reality, but also the represented 'reality elements.'"¹²³ Among "reality elements," Ben-Porat counts such things as mores, attitudes, types, social structures, and prejudices.¹²⁴ In an indirectly satirical parody, the copied text is not merely exploited as a means

¹¹⁷ *Campbell*, 510 U.S. at 581 n.15.

¹¹⁸ *Id.* at 581.

¹¹⁹ See, e.g., Chatman, *supra* note 115, at 30 ("I shall use 'parody' to refer primarily to stylistic imitation for satirical effect . . ."); Issacharoff, *supra* note 2, at 216 ("parody can have a satirical intent . . ."); GERARD GENETTE, *PALIMPSESTS: LITERATURE IN THE SECOND DEGREE* 24 (Channa Newman & Claude Dubinski trans., 1997) ("parody inevitably connotes satire and irony . . ."); HUTCHEON, *supra* note 6, at 43 ("Satire frequently uses parodic art forms . . ."); SIMON DENTITH, *PARODY* 9 (2000) ("But many parodies draw on the authority of precursor texts to attack, satirise, or just playfully to refer to elements of the contemporary world.").

¹²⁰ Issacharoff, *supra* note 2, at 216.

¹²¹ See HUTCHEON, *supra* note 6, at 64:

There is, on the one hand a *type* of the *genre* parody (in Genette's terms) which is satiric, and whose target is still another form of coded discourse On the other hand, besides this satiric parody, there is parodic satire (a *type* of the *genre* satire) which aims at something outside the text, but which employs parody as a vehicle to achieve its satiric or corrective end.

¹²² Ziva Ben-Porat, *Method in Madness: Notes on the Structure of Parody, Based on Mad TV Satires*, 1 *POETICS TODAY* 245, 248 (1979).

¹²³ *Id.*

¹²⁴ *Id.*

to an unrelated satiric end; it is itself quite pointedly implicated in the parodist's satiric purposes. It accomplishes its satire parodically, by means of a mediating text that it takes to be emblematic (or at least partially emblematic) of the reality elements (or at least some of the reality elements) it sets out to critique.¹²⁵ By contrast, a directly satirical parody "exposes aspects of 'reality' which are not actually represented in its model (the parodied text)."¹²⁶ The directly satirical parody instrumentalizes the parodied text for a satiric purpose that is wholly unrelated to the 'reality' modelled in (and by) that text.¹²⁷

Ben-Porat's model captures quite cogently the important legal distinction the *Campbell* court sought to make between a work that "needs to mimic an original to make its point" and one that can "stand on its own

¹²⁵ An example of an indirectly satirical parody that was found to have warranted fair use protection in the wake of *Campbell* is Alice Randall's parody of Margaret Mitchell's classic *Gone With the Wind*. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), *vacating* 136 F. Supp. 2d 1357 (N.D. Ga. 2001). The district court, which held in favor of the plaintiff (trustees of Mitchell's estate), based its holding in part on the proposition that there must be an exact identity between the work targeted and the parody: "Here the parodical work must parody the work itself and not other general concepts and ideas about the way black Americans have been and are treated in the South." *Id.* at 1379. The Court of Appeals for the Eleventh Circuit vacated the district court's grant of a preliminary injunction against Randall's publisher. Writing for the Eleventh Circuit, Judge Birch focused on the extent to which Randall's parody accomplished its satiric purpose by attacking the "reality elements" — the world modelled — in Mitchell's text:

TWDG is not a general commentary upon the Civil-War-Era American South, but a specific criticism and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW. . . . It is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of GWTW. Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War.

Id. at 1269-70.

¹²⁶ Ben-Porat, *supra* note 122, at 248.

¹²⁷ An example of a directly satirical parody that was found not to have warranted fair use protection in the wake of *Campbell* is the parody of *The Cat in the Hat* that was disputed in *Dr. Seuss Enterprises v. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997). Defendants had parodied distinctive elements of the children's classic *The Cat in the Hat* to create a satire (called *The Cat NOT in the Hat!*) of the O.J. Simpson murder trial. Invoking *Campbell* and the "at least in part" rule articulated earlier in *Rogers* (and reiterated in *Campbell*), the court in *Dr. Seuss* held that the stanzas from the parody had "no critical bearing on the substance or style of *The Cat in the Hat*" and that the copyrighted work had been used impermissibly, as nothing more than "a vehicle to poke fun at another target." *Id.* at 1400-01.

two feet."¹²⁸ It does so, however, without resorting, as the court in *Campbell* did, to mutually exclusive (and therefore misleading) definitions of parody and satire. The distinction *Campbell* established between parody and satire is more accurately characterized, employing Ben-Porat's taxonomy, as a distinction between two types of satirical parody. The fact of the matter from the point of view of genre theory isn't so much that parody "shades into satire" — that it is troublingly prone, as Justice Souter suggested, to cross some generic threshold beyond which it becomes not-parody — but that parody is quite frequently (and frequently quite legitimately from a fair use perspective) satirical in purpose. When it is — that is to say, when a parody's intertextuality is extratextually (or, to use Hutcheon's term, extramurally) directed — courts need to examine *how* the parody in question accomplishes its satiric ends in order to evaluate its eligibility for fair use protection.

If the parody is directly satirical, then there is arguably no need for it to conjure up the particular work it instrumentalizes to serve its satiric ends.¹²⁹ Some other work, presumably, might have done just as well. To use Justice Souter's terms, a directly satirical parody lacks the necessary "joinder of reference and ridicule"¹³⁰ that legitimates parodic borrowing as a protected form of criticism or commentary. If, on the other hand, the parody is indirectly satirical — i.e., if the object of the parody's reference is itself a partial or intermediate object of the parody's extramurally directed ridicule — then the parodist legitimately targets the work from which s/he borrows. Reference and ridicule are joined, even if the scope of the ridicule exceeds (or otherwise imperfectly coincides with) the scope of the reference.¹³¹

The parody-satire dichotomy invoked by the *Campbell* court makes for an impracticably ill-defined middle ground between parodic works whose ridicule is directed solely at the texts from which they borrow and parodic works whose ridicule is directed wholly elsewhere. Because so many parodies seeking fair use protection are likely to fall somewhere between these two extremes, the fair use analysis needs to incorporate a more nuanced mechanism than *Campbell* provides for separating the fair use sheep from the infringing goats in parody cases. A fair use test that

¹²⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

¹²⁹ See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978) (asserting that "[t]o the extent that the [plaintiff's] characters are not also an object of the parody [i.e., in addition to life and society in general] . . . , the need to conjure them up would be reduced if not eliminated").

¹³⁰ *Campbell*, 510 U.S. at 583.

¹³¹ See, e.g., *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (declining to require that there be an exact identity between the song being copied and the object of the parody).

distinguishes not between parody and satire but between indirectly satirical parody and directly satirical parody would better serve the well-established principle, cited approvingly in *Campbell*, that parodic borrowing should be viewed as permissible so long as the work "conjured up" by the parodist is *an* object (perhaps among other objects) of the parodist's critique.¹³² A satirical parody should be eligible for fair use protection so long as the work from which it borrows is included to some degree within the scope of its social, cultural, or political critique. For purposes of the fair use analysis, it is important for courts to recognize that not all types of satiric works function as autonomously as is implied in Justice Souter's assertion that they can "stand on [their] own two feet."¹³³

¹³² See *Campbell*, 520 U.S. at 580 (citing both *Fisher* and *MCA* as affirming the parodist's right to quote from existing material to create a new work that "at least in part" comments on the original).

¹³³ *Id.* at 581.