Toon Town: DO Cartoon Crossovers Merit Fair Use Protection?

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In 1989, after retiring his popular daily comic strip *Bloom County*, cartoonist Berkeley Breathed launched a new weekly cartoon known as *Outland*.1 One of the starring characters was Mortimer Mouse, a "moth-eaten mouse with [a] 5 o'clock shadow . . . droopy red drawers . . . clutching what looks like a martini . . . smoking a cigarette [and] definitely . . . in need of a shave."2 Mortimer, an obviously disreputable-looking lampoon of Mickey Mouse, is the name Walt Disney originally intended for the rodent star.3 Upon reading the strip, Walt Disney Company chairman Michael Eisner sent Breathed a letter asking him to drop the Mortimer character.4 Breathed, however, refused the request.5 Disney, known for its vociferous attacks on copyright infringers, allegedly threatened the cartoonist with a lawsuit.6 Breathed, never one to shy away from criticism, incorporated the lawsuit into the strip itself by having the character Opus the penguin declare, "As the Walt Disney Co. is threatening to sue us over the unauthorized use of Mickey Mouse, we thought we might . . . er . . . set things straight."7 The episode then goes on to depict the Mortimer Mouse story, where a

1 See Yardena Arar, A Martini-Swilling Mouse Draws Only Murmurs from Disney, L.A. DAILY NEWS, Sept. 13, 1989, at 3D.
2 Id.; see Berkeley Breathed, Politically, Fashionably, and Aerodynamically Incorrect 8 (1992).
3 See Arar, supra note 1, at 3D.
4 See Disney Chairman Eisner Asks Breathed to Delete Comic Strip Character; Copyright Infringement, ENT. LITIG. REP., Jan. 8, 1990, at 32 [hereinafter Eisner].
5 See id.
6 See Breathed, supra note 2, at 8; Paul Richter, Disney's Tough Tactics, L.A. TIMES, July 8, 1990, at D1. Nearly one-quarter of the 800 lawsuits and regulatory actions Disney pursues each year are over copyright and trademark actions. See Richter, supra at D1. One example of Disney's active campaign to protect its copyrights is a suit against three day-care centers in Florida that had adorned their outside walls with paintings of Disney characters. See id. The matter was resolved when rival Universal Studios painted the Flintstones cartoon characters over the Disney illustrations and threw a party for the children. See id. Another example is Disney's 1989 suit against the Academy of Motion Pictures Arts and Sciences over an actress's depiction of a simpering Snow White at the opening of the Oscar ceremony. See id. After the New York Times editorialized that Disney should be given the "Can't Take a Joke" award, Garry Trudeau drew a cartoon in which a trembling Snow White, in a clandestine midnight interview, complains about Disney's treatment of her—the interview ends suddenly when a Disney lawyer arrives to take her away, singing "Hi ho, hi ho, it's off to court we go!" Id.
7 Breathed, supra note 2, at 8.
fledgling Walt Disney in 1928 hires fraternal twin brothers Mortimer and Mickey Mouse, using Mortimer as Mickey’s unbilled stunt double until he enlists in the army.8 The strip also parodies the Disney studio’s transformation under Michael Eisner from a magical kingdom into a corporate conglomerate concerned only with making money.9 Returning home after forty-five years in Europe, long-lost Mortimer attempts to rectify Eisner’s obsession with finances, but instead ends up banished to Outland, the “place everyone goes who doesn’t fit in.”10 The episode concludes with Opus stating, “Boy! What a lovely story! I certainly don’t see any reason for Disney, Inc. to sue little ol’ us, do you . . . ?”11 In weaving this parody, Breathed drew—and drew upon—such notable Disney characters as Mickey Mouse, Snow White, Dopey and Bambi.12

Breathed is not the only cartoonist to appropriate someone else’s characters.13 In a recent Zippy Sunday strip, Bill Griffith parodied both the narrowing readership of comic strips and modern big-business “Mergermania” by combining twelve different comic strip characters into one unified strip under the dominion of Disney.14 To illustrate this, Griffith placed Mickey Mouse ears on the heads of the different characters, and then drew those heads onto the bodies of his Zippy characters.15 Cartoonists have been doing these “crossovers” (where one cartoon strip uses another cartoonist’s characters) since 1907 in an attempt to create the appearance of “a comic strip world, a kind of ‘toon town where the characters live together and get to know each other after hours.”16 But what the cartoonists may not always realize is that every time they draw someone else’s characters, unless the affir-

8 See id.
9 See id. at 8–9.
10 Id. at 9. When Mortimer returns to the Disney studios, he finds his brother Mickey chained in the animation dungeon, being forced to draw the next Roger Rabbit cartoon and claiming, “Oh, Mort! Everything’s CHANGED! . . . Walt’s Gone! The magic’s over! THE GUY FROM ACCOUNTING is running the place! Morals are slipping, Mort . . . He’s introduced new cartoon characters! . . . WOMEN characters! . . . WITH PRONOUNCED BOSOMS!!” Id. Mortified upon hearing this, Mortimer hunts down and engages “top Motisketeer” Eisner in “a most un-Disneylike brouhaha,” but ultimately ends up leaving town armed only with two suitcases and Michael Eisner’s teeth marks in his right ear. Id.
11 Id.
12 See Breathed, supra note 2, at 8–9.
14 See id. (“Mergermania! 12 strips in one!! It’s the American Way!!”).
15 See id. The various characters used were: Mike Doonesbury from Doonesbury, Charlie Brown from Peanuts, Dagwood Bumstead from Blondie, Dilbert, Superman, Nancy, Cathy, Popeye, Garfield, Calvin from Calvin & Hobbes, and Billy from Family Circus. See id.
16 David Astor, An Ohio State Talk for ‘Zippy’ Creator; Bill Griffith Discusses His Comic Strip at
This note explores the legal ramifications of cartoon crossovers to determine whether such use is allowed under modern copyright principles. Part I establishes the foundation of the law of copyright protection. Part II introduces the fair use affirmative defense to copyright infringement, including the United States Supreme Court's most recent analysis in *Campbell v. Acuff-Rose Music, Inc.* Part III is a study of various copyright infringement cases involving cartoons. Part IV analyzes cartoon crossovers under the fair use affirmative defense in light of *Campbell*, concluding that crossovers are indeed a fair use of another cartoonist's protected characters.

I. THE LAW OF COPYRIGHT PROTECTION

Article I, Section 8 of the United States Constitution grants Congress the 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 . . . ." James Madison, discussing the Constitution in the Federalist Papers, noted that this power will "scarcely be questioned," and common law recognizes the right of authors to copyright their work. In light of this common-law right to protect one's creation, Congress enacted the initial copyright statute in 1790 to stimulate artistic creativity for the public benefit while providing the artist with the financial motivation for creativity that flows from a limited form of monopoly.

To establish an action for infringement of a protected copyright, a plaintiff must show both ownership of that copyright and that the defendant copied the protected material without authorization. Ownershio is shown by proof of originality, copyrightability and compliance with the applicable statutory procedures. Thus, a plaintiff who has registered a work with the United States Copyright Office can easily

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*a Festival that also Features Remarks by a Cartooning Author*; *Editor & Publisher*, Sept. 16, 1995, at 40.

19 U.S. CONST. art. I, § 8, cl. 8.
demonstrate ownership because a certificate of registration constitutes prima facie evidence of ownership.24 Full registration itself is not necessary to prove ownership, however, as one need only establish payment of the required fee, deposit of the work in question and receipt by the Copyright Office of a registration application.25 Once ownership of the copyright is shown, the plaintiff can then demonstrate that the defendant copied the work in one of two ways: (1) direct evidence; or (2) circumstantial evidence, consisting of both access to the copyrighted work and substantial similarity between the copyrighted work and the defendant's work.26 One example of direct evidence could be in the form of the defendant's explicit admission that he copied the plaintiff's work.27 Another example of direct evidence would be a witness who observed the defendant engaging in the physical act of copying.28 Circumstantial evidence, however, is the more common form of proof.29 Substantial similarity does not require literal identical copying of every detail.30 Rather, similarity is determined by the "ordinary observer" test: whether an average observer (i.e., a layman) would recognize the alleged copy as having been appropriated from the protected work.31 An example of circumstantial evidence would arise where the defendant, after seeing the plaintiff's work on television, creates a work that is substantially similar to the plaintiff's work.32

registration of the copyright with the Copyright Office before any action for infringement can be made. See 17 U.S.C. § 411(a) (1994).

24 See 17 U.S.C. §§ 408(a)-(b), 410(c) (1994). Under § 408(a), registration of a copyright in any work, whether published or unpublished, can be made by "the owner of copyright" at any time. Id. § 408(a). The claim may be registered in the Copyright Office by depositing copies of the work together with an application and fee. See id. § 408(b). Under § 410(c), the certificate of registration constitutes "prima facie evidence of the validity of the copyright . . . ." Id. § 410(c).

25 See Apple Barrel, 730 F.2d at 386-87.

26 See, e.g., Warner Bros. v. American Broadcasting Co., 654 F.2d 204, 207 (2d Cir. 1981); Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977). Substantial similarity is determined by whether an average observer would recognize the alleged copy as having been appropriated from the copyrighted work. See Rogers, 960 F.2d at 307.


29 See id.

30 See Rogers, 960 F.2d at 307.

31 See Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202, 1204, 1207 (N.D. Tex. 1981). Sambo's restaurant had access to Dr. Pepper's commercials by obtaining and viewing copies of the "Be a Pepper" campaign. Id. Sambo's then created their own "Dancing Seniors"
In addition, section 106 of the Copyright Statute provides reproduction protection for the copyright owner, giving the owner exclusive rights to reproduce the copyrighted work in copies and to prepare derivative works based upon the original. The law defines a derivative work as a recasting, transformation or adaptation of the original. Copyright protection is not absolute, however. The most common means of avoiding liability for infringement lie in the fair use affirmative defense. This equitable doctrine permits others to use copyrighted material without the owner's consent in a reasonable manner for certain purposes.

II. The Fair Use Doctrine

The doctrine of fair use carves out a limited exception to the broad rights granted copyright owners by allowing others to make reasonable use of protected works without permission. The purpose of fair use is to balance the need to provide individuals with sufficient incentives to create public works against the public's interest in the dissemination of information. Fair use constitutes an affirmative defense to copyright infringement. The doctrine developed over time in the case law until Congress codified it in 1976. Once the copyright commercial that was substantially similar to Dr. Pepper's commercial because a combination of Sambo's lyrics and music, along with its tag line "Don't you want to be a Senior, too?" would lead an ordinary observer to recall the plaintiff's "Be a Pepper" jingle tag line. Id.

34 See 17 U.S.C. § 101 (1994). A derivative work is defined as:

[work] based upon one or more preexisting works, such as a translation . . . fictionalization . . . [a]rt reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work." Id.

35 See Joyce, supra note 28, at 779.
36 See id.
37 See Rogers, 960 F.2d at 308.
38 See Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986); Rosemont Enters. v. Random House, Inc., 306 F.2d 303, 306 (2d Cir. 1966). Because the financial reward guaranteed to the copyright holder is "but an incident of [the] general objective [of copyright law], rather than an end in itself . . . courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543–44 (2d Cir. 1964).
owner establishes a prima facie case of infringement, the alleged in-fringer may invoke the defense. In determining whether a particular use is fair, a court weighs four enumerated factors: (1) the purpose and character of the use; (2) the nature of the original; (3) the amount and substantiality of the protected work that is used; and (4) the effect of the use upon the market for the original work. After analyzing all four factors together, if the court determines that the overall balance weighs in favor of fair use, then there is no infringement of the copyright with respect to such use. In other words, the court allows limited use of copyrighted works without permission.

The qualitative framework for what later came to be known as the four factors of the fair use affirmative defense was established in 1841, in Folsom v. Marsh, where Justice Story of the Circuit Court of Massachusetts held that the defendant infringed the copyright of the plaintiff when he copied, verbatim, 353 pages from the plaintiff's book. Both the defendant and the plaintiff were publishers of books on George Washington's correspondence. The court reasoned that the essential value of the defendant's work came from Washington's letters—letters whose copyright belonged exclusively to the plaintiff—and that to allow unlimited copying would destroy the plaintiff's copyright. Included in the court's decision was the fact that the plaintiff copied entire letters, rather than abbreviated or select passages. Because the court determined that these letters constituted the most interest and value to the public, the court stated that copying the letters in their entirety was a clear invasion of plaintiff's property right. The court noted in dicta that the defendant would have escaped infringement had he published only an abridgment of plaintiff's work. In its decision, the court set forth a test for whether a subsequent use of copyrightable material is a "justifiable use" of the original materials, thus

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42 See Melville B. Nimmer & David Nimmer, Nimmer on Copyright (MB) §§ 13.01, 13.05 (June 1995).
43 See Campbell, 510 U.S. at 577-78; Twin Peaks Prod. v. Publications Int'l, 996 F.2d 1366, 1373-74 & n.3 (2d Cir. 1993).
44 See Sony Corp. of Am. v. Universal City Studios, 464 U.S. 416, 433 (1984); see also Campbell, 510 U.S. at 577-78.
45 See Roseman, 366 F.2d at 306.
47 See id. at 343.
48 See id. at 349.
49 See id.
50 See id.
51 See Folsom, 9 F. Cas. at 349.
constituting no infringement of plaintiff’s work. The factors the court included in this test were “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” The court determined that the defendant failed this inchoate fair use test because he copied much of plaintiff’s work in its entirety, rather than taking only abbreviated passages. The court thus held that excessive copying of another's work constituted copyright infringement.

Twentieth century cases sharpened several aspects of the fair use doctrine, including a determined attempt to express the rationale of the privilege in terms of the policies embedded in the Copyright Clause. In 1964, in *Berlin v. E.C. Publications, Inc.*, the United States Court of Appeals for the Second Circuit held that a humor magazine’s publication of satiric parody lyrics was not a copyright infringement. The owners of twenty-five popular songs instituted an action against *Mad Magazine* alleging that *Mad’s* substitution of parody lyrics for some of the original words constituted infringement of the copyrighted pieces. The court noted that only the words were satirized; the magazine did not reproduce the music in any form whatsoever. The court weighed the common law fair use factors and found that *Mad’s* use of the lyrics had no intent or effect of fulfilling the demand for the original, nor did *Mad* appropriate a greater amount of the original than was necessary to conjure up the object of its satire. In fact, noted the court, the disparities in theme, content and style between the original and the alleged infringer could hardly be greater. In its

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52 Id. at 348. The term “fair use” was established in *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136).
53 Folsom, 9 F. Cas. at 348.
54 Id. at 349.
55 Id.
56 See Joyce, supra note 28, at 787.
57 529 F.2d 541, 542, 545 (2d Cir. 1964). The term “fair use” was not always used before the 1976 codification of the doctrine. See id.
58 See id. at 542–43. Two examples of *Mad’s* parodies included: (1) rewriting the nostalgic ballad “The Last Time I Saw Paris” into “The First Time I Saw Marie,” a caustic commentary upon the tendency of baseball heroes to become television advertising pitchmen; and (2) transforming the tribute to feminine beauty “A Pretty Girl Is Like a Melody” into “Louella Schwartz Describes Her Malady,” a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight. Id. at 543.
59 See id. at 542.
60 See id. at 545.
61 See id.
analysis, the court articulated copyright policy and reasoned that the copyright holder's interest in a maximum financial return must sometimes defer to the greater public interest in the development of art, science and industry.\textsuperscript{62} Thus, the court held that \textit{Mad}'s use of the plaintiff's popular songs did not constitute infringement of the protected originals.\textsuperscript{63}

After a long and detailed common law tradition, Congress codified the fair use defense in section 107 of the Copyright Act of 1976.\textsuperscript{64} In so doing, Congress sought to preserve the doctrine's common law character while leaving courts free to adapt it on a case by case basis.\textsuperscript{65} The statutory framework, mirroring Justice Story's language in \textit{Folsom}, creates a four part balancing test for a court to engage in to determine whether the fair use defense will be allowed.\textsuperscript{66} The court must look to: (1) the purpose and character of the use, including whether the use is for commercial or nonprofit purposes; (2) the nature of the original; (3) the amount and substantiality of the original work used; and (4) the effect of the use on the potential market for the original.\textsuperscript{67} These four factors are an illustrative, rather than exhaustive, list whose factors the court should balance to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work.\textsuperscript{68} In other words, rather than creating a general definition of fair use, Congress decided that courts must analyze each case on its own facts using the four stated criteria as a gauge, and that courts are free to adapt the doctrine to particular situations as they see fit.\textsuperscript{69} Two cases typifying fair use jurisprudence are the Supreme Court's 1985 decision in \textit{Harper & Row, Publishers},

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\item See Berlin, 329 F.2d at 544.
\item See id. at 545.
\item See 17 U.S.C. § 107; \textit{Folsom}, 9 F. Cas. at 348; \textit{see also Campbell}, 510 U.S. at 576-77.
\item See 17 U.S.C. § 107. The relevant statutory language states: \textit{[T]he fair use of a copyrighted work . . . for purposes such as criticism [or] comment . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (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.}
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In 1985, in Harper & Row, Publishers, Inc. v. Nation Enterprises, the United States Supreme Court held that a magazine’s use of verbatim excerpts from an unpublished manuscript was not entitled to the fair use defense.71 Former President Gerald Ford gave Harper & Row Publishers, (“Harper & Row”), exclusive rights to publish his as yet unwritten memoirs.72 Harper & Row contracted with Time magazine to print excerpts from the manuscript one week before shipment of the full length book to bookstores.73 Two weeks before the Time article was scheduled for release, The Nation magazine secretly procured a copy of the manuscript and published excerpts, effectively “scooping” Time.74 As a result, Time canceled its piece and refused to pay Harper & Row.75 Harper & Row brought suit for copyright violation against The Nation magazine.76

The Supreme Court began its analysis by stating that in quoting verbatim from Ford’s original manuscript, The Nation effectively gave itself the right of first publication, an important and marketable right owned by Harper & Row.77 Upon establishing that The Nation had infringed Harper & Row’s copyright, the Court proceeded to analyze whether or not The Nation’s action merited a fair use defense.78 In its analysis of the first factor, purpose and character, the Court stated that a commercial use weighs against a fair use defense.79 Thus, in evaluating The Nation’s intended purpose of scooping the copyright holder’s

nature of these factors, in 1984, the United States District Court for the Northern District of Georgia stated in DC Comics Inc. v. Unlimited Monkey Business, Inc. that:

In addition to the four factors necessarily considered in a determination of fair use, the Court considers a fifth factor. There is a difference between works that incidentally parody other works while creating a genuinely distinct product and those that comprise little more than an adaptation of another’s original work... Trading upon the imagination and originality of another is not fair use.


71 471 U.S. at 560.
72 See id. at 542.
73 See id. at 542-43.
74 See id. at 543.
75 See id.
76 See Harper & Row, 471 U.S. at 543.
77 See id. at 549.
78 See id.
79 See id. at 562.
right of first publication, the Court decided that the first statutory factor weighed against a finding of fair use.\textsuperscript{80}

The Court next decided that the second statutory factor, the nature of the copyrighted work, also weighed against a fair use defense because \textit{The Nation} did not just copy unprotectable facts, but copied the most expressive and protectable elements of Ford's work.\textsuperscript{81} In its analysis of the amount and substantiality of the portion used, the Court also found that this third factor weighed against fair use because, although \textit{The Nation} quantitatively only copied an insubstantial portion of Ford's book, the actual qualitative content of what was copied was the "heart" of the book.\textsuperscript{82} Finally, in analyzing the effect on the market, the Court first stated that this last factor is undoubtedly the single most important element of fair use.\textsuperscript{83} The Court then found that this fourth factor analysis weighed against fair use since \textit{Time}'s refusal to pay Harper & Row constituted clear-cut evidence of actual damage.\textsuperscript{84} Thus, the Supreme Court held that \textit{The Nation}'s use of verbatim transcripts from Ford's unpublished manuscript did not warrant the fair use defense.\textsuperscript{85}

In \textit{Twin Peaks Productions, Inc. v. Publications International, Ltd.}, the United States Court of Appeals for the Second Circuit held that a book containing a detailed summary of television show plots was not fair use of the teleplays (scripts).\textsuperscript{86} Twin Peaks Productions, ("Twin Peaks"), brought a copyright infringement action against Publications International, Ltd., ("PIL"), for publishing a book detailing, among other things, the plot, characters, actors and episodes of the "Twin Peaks" television show.\textsuperscript{87} The Second Circuit began its analysis by stating that in a prima facie case of copyright liability, the copyright owner must prove ownership and copying of constituent elements of the work.\textsuperscript{88}

First, the court established that Twin Peaks had proven ownership of its teleplays and televised episodes through registration with the Copyright Office.\textsuperscript{89} Next, the court concluded that Twin Peaks had established copying of its protected works through circumstantial evi-

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\item \textsuperscript{80} See id.
\item \textsuperscript{81} See Harper \& Row, 471 U.S. at 563-64.
\item \textsuperscript{82} Id. at 564-65.
\item \textsuperscript{83} See id. at 566.
\item \textsuperscript{84} See id. at 567.
\item \textsuperscript{85} See id. at 569.
\item \textsuperscript{86} 996 F.2d 1366, 1378 (2d Cir. 1993).
\item \textsuperscript{87} See id. at 1370.
\item \textsuperscript{88} See id. at 1371-72.
\item \textsuperscript{89} See id. at 1371. Initially, there was some confusion as to whether Twin Peaks established
dence of both access and substantial similarity. The court noted that PIL had access to the protected works because the ability to watch the televised programs served as the functional equivalent of access to the protectable content of the teleplays. The court then concluded that substantial similarity between the two works existed because two chapters of the book consisted of extensive direct quotations from the teleplays as well as a direct recounting of the first eight episodes. The court noted that the concept of similarity embraces not only global similarity in structure and sequence, but also localized similarity in language. Thus, after establishing a prima facie case of copyright infringement, the court next went on to determine whether to allow PIL the fair use defense.

The court first established that PIL's book is a work of "comment" and perhaps "criticism," thus satisfying two of section 107's list of purposes for which a claim of fair use may be made. The court next made plain that its decision would ultimately turn on whether or not PIL's book borrowed the protected expression of Twin Peak's original for purposes that advance the policies of copyright law. To make this determination, the court applied the four factor balancing test.

As to purpose and character of the use, the court concluded that this first factor weighed in favor of infringement. The court reasoned that PIL's book was merely a detailed report of the Twin Peaks plots that goes far beyond merely identifying their basic outline for the transformative purposes of comment or criticism. Next, the court decided that the second factor, the nature of the copyrighted work, also weighed in favor of infringement because the television program ownership of the teleplays only or of both the teleplays and the televised episodes. See id. The court stated, however, that its disposition of the copyright issues was unaffected either way. See id.

The court also held that PIL's book constituted a derivative work based upon Twin Peaks' protected product, and thus constituted infringement since the copyright owner also owns the right to make derivative works. See id. at 1373. The court noted, however, that this determination that the book was a derivative work was superfluous to establishing a prima facie case of infringement. See id. at 1372.

The official name for a work that gives a detailed plot summary is an "abridgement." Id. The Copyright Act recognizes abridgements as a form of a derivative work and gives the copyright holder the exclusive right to prepare such derivative works. 17 U.S.C. §§ 101, 106(2).
was not a work consisting of uncopyrightable facts, but a creative, fictional work deserving wide protection.100

Third, the court focused on the amount and substantiality of the portion used in relation to the copyrighted work as a whole.101 The court noted that the third prong is redundant, since establishing a prima facie case of infringement included a determination that PIL's book was substantially similar to the show.102 Thus, the court held that this factor also weighed in favor of infringement because the book lifted many parts verbatim from the script.103

Finally, the court analyzed the effect of the use upon the potential market for, or value of, the copyrighted work.104 The court noted that this fourth factor favors fair use when the defendant's work fills a market niche that the plaintiff simply has no interest in occupying.105 In this case, however, the court reasoned that PIL's book could interfere with Twin Peaks' primary existing market because it is possible that a person who had missed an episode of the show would find the book an adequate substitute for renting the videotape of that episode.106 Part of the court's analysis of infringement on the potential market included the fact that Twin Peaks had already licensed two books and was planning to license more.107 In the end, the court concluded that although Twin Peaks could not bar publication of works of comment, criticism or news reporting on the show, it may rightfully claim infringement with respect to a book that reports the plot in such extraordinary detail.108 Thus, the Second Circuit held that PIL's book was not entitled to the fair use defense.109

The Supreme Court modified long established fair use dogma in 1994, in *Campbell v. Acuff-Rose Music, Inc.*, holding that a rap parody of a ballad constituted fair use.110 In *Campbell*, the owners of Roy Orbison's rock ballad "Oh, Pretty Woman" brought suit after the rap

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100 See *Twin Peaks*, 996 F.2d at 1376.
101 See id.
102 See id. at 1377.
103 See id. at 1376-77.
104 See id. at 1377.
105 See *Twin Peaks*, 996 F.2d at 1377. The court stated that because copyright holders rarely write parodies of their own works, write reviews of them, or write new analyses from an opposite political perspective, these would be situations where the fourth factor would favor fair use. See id.
106 See id.
107 See id.
108 See id.
109 See id. at 1378.
group 2 Live Crew parodied the song.\textsuperscript{111} The United States District Court for the Middle District of Tennessee granted summary judgment for 2 Live Crew after performing a fair use analysis and finding that the parody made fair use of Orbison's original.\textsuperscript{112} The Court of Appeals for the Sixth Circuit reversed, however, holding that the blatant commercial purpose of the parody rendered it a presumptively unfair use.\textsuperscript{113} The Supreme Court, in granting certiorari to determine whether 2 Live Crew's commercial parody could be fair use, proceeded to alter the interpretation of the four statutory factors.\textsuperscript{114}

Although it is not explicitly listed in the preamble to section 107, the Court first held that parody, like other comment or criticism, may claim fair use protection.\textsuperscript{115} The Court went on to re-analyze the first statutory factor, purpose and character of the use, including whether the use is for commercial or non-profit purposes.\textsuperscript{116} The Court held that a finding of commercial purposes is not presumptively unfair, but rather only one element of the analysis, the force of which varies with the context.\textsuperscript{117} Thus, the Court concluded that commerciality may weigh against the infringer, but is not by itself conclusive.\textsuperscript{118} The Court noted that the crux of this first factor is to determine the transformative nature of the new work—i.e., whether the new work added something novel, with a further purpose or different character, or altered the original with new expression, meaning, or message.\textsuperscript{119} To the extent that the secondary use involves merely an untransformed duplication of the original, the Court implied that the value generated is little or nothing more than the value inherent in the original.\textsuperscript{120} The Court recognized that parody, on the other hand, does add to the original by providing the social benefit of shedding light on an earlier work and in the process, creating a new one.\textsuperscript{121} The \textit{Campbell} Court reasoned that the more transformative the new work is, the less significant the

\textsuperscript{111} See id. at 572–73.
\textsuperscript{112} See id. at 573.
\textsuperscript{113} See id. at 573–74.
\textsuperscript{114} Id. at 574, 578–94.
\textsuperscript{116} See \textit{Campbell}, 510 U.S. at 579–85.
\textsuperscript{117} See id. at 584–85. Previously, commerciality was given hard presumptive significance. See, e.g., \textit{Sony}, 464 U.S. at 448–49.
\textsuperscript{118} See \textit{Campbell}, 510 U.S. at 584–85.
\textsuperscript{119} See id. at 579; see also American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 923 (2d Cir. 1994).
\textsuperscript{120} See \textit{Campbell}, 510 U.S. at 579; accord American Geophysical Union, 60 F.3d at 923.
\textsuperscript{121} See \textit{Campbell}, 510 U.S. at 579.
other factors that may weigh against fair use will be, such as commercialism. 122

The Court stated that inherent in this first factor analysis is a threshold inquiry of whether the secondary work is a parody for section 107 purposes, thus deserving a fair use analysis. 123 The Court reasoned that if the secondary work has no critical bearing on the substance or style of the original, the claim to a fair use defense diminishes accordingly, and may even vanish, allowing other factors, such as commerciality, to assume greater importance. 124 The Court's test for whether parody exists is whether a reasonable person would perceive the character as parodic. 125 In addition, the Court stated that the relative bad or good faith of the alleged infringer is not determinative of fair use. 126 The Court reasoned that because parodists will seldom get permission from those whose works they are parodying, lack of permission to use a work does not weigh against a finding of fair use. 127 The Court applied this new analysis to the facts at bar and decided that while they might not assign a high rank to the parodic element of the rap song, the work could still reasonably be perceived as commenting on the original or criticizing it, thus warranting a full analysis of the fair use defense. 128

The Court next analyzed the second statutory factor, the nature of the original, which draws its origin from the concept that some works are closer to the core of intended copyright protection than others. 129 The Court implied that in general, the more factual the original, the less protection it is entitled. 130 The Court reasoned that because parodies, however, almost always copy creative, original works, this second factor analysis becomes nothing more than a tautology, invariably weighing in favor of the original artist. 131 The Court agreed with both lower courts that Orbison's original, creative expression falls within the core of the copyright law's protective purposes. 132

122 See id.
124 See Campbell, 510 U.S. at 580.
125 See id. at 582.
126 See id. at 585 n.18; Fisher, 794 F.2d at 436–37.
127 See Campbell, 510 U.S. at 585 n.18; Fisher, 794 F.2d at 437.
128 See Campbell, 510 U.S. at 585 n.18.
129 See id. at 586; Rogers, 960 F.2d at 310.
131 See Campbell, 510 U.S. at 586.
132 See id.
The Court proceeded to look at the third statutory factor, the amount and substantiality of the portion used in relation to the whole. In analyzing this third factor, the Supreme Court noted that the test is whether the parodist appropriated a greater amount of the original work than was necessary to "conjure up" an image of the original in order to make the object of the parody's critical wit recognizable. The Court reasoned that this "recognition" test creates a plateau at which the parodist knows that his quotation of the original's most distinctive features will be identified by the audience. Once the parodist takes enough to assure identification, anything taken beyond this is only reasonable to the extent of the parody's overriding purpose and character or, in contrast, the likelihood that the parody may serve as a market substitute for the original. The Court reasoned that 2 Live Crew had not appropriated too much, for if they had copied a less memorable part of the original, it would be difficult to see how its parodic character would shine through.

Last, the Campbell Court re-analyzed the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work. This was characterized as the most important fair use factor until Campbell, whereas the Supreme Court conspicuously omitted this phrasing. Abandoning the idea that any factor enjoys primacy, the Supreme Court in Campbell dictated that all four factors are to be weighed together, in light of the purposes of copyright. The Court noted that this analysis requires the court to consider both the actual market harm caused by the infringement as well as the potential market usurpation for derivative works.

In a situation involving something beyond pure duplication for commercial purposes, the Court stated that there is no presumption or inference of market harm. The Court noted that this is so because, whereas pure duplication of a product supersedes the original and serves as a market replacement for it, a transformative use makes

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133 See id.
134 Id. at 588; see Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978).
135 Campbell, 510 U.S. at 588; accord Berlin, 929 F.2d at 544-45.
136 See Campbell, 510 U.S. at 588.
137 See id. at 588-89.
138 See id. at 590-94.
139 See id. at 590-95; American Geophysical Union, 60 F.3d at 926.
140 See Campbell, 510 U.S. at 578; American Geophysical Union, 60 F.3d at 926.
141 See Campbell, 510 U.S. at 590. Evidence of substantial harm weighs against a finding of fair use because the licensing of derivatives is an important economic incentive to the creation of originals. See id. at 593.
142 See id. at 591.
market substitution less certain.143 In parody, the Court reasoned, it is more likely that the new work will not affect the market for the original because the parody and the original usually serve different market functions.144 Also, the Court noted that a parody will tend not to affect the potential market for derivative works because it is unlikely that creators of imaginative works will license critical reviews or lampoons of their product.145 The Court reasoned that in the case at bar there was no evidence that a potential rap market was harmed by 2 Live Crew's version.146 In sum, the Supreme Court concluded that it was error for the Court of Appeals to find that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair, and thus held that the rap parody was fair use of the protected original.147

III. Cartoon Cases and Fair Use

In 1924, in King Features Syndicate v. Fleischer, the United States Court of Appeals for the Second Circuit held that a toy manufacturer's exact reproduction of a syndicated cartoon character constituted an illegal infringement.148 King Features Syndicate ("King") owned exclusive rights to the cartoon strip "Barney Google," including the right to reproduce the characters.149 Fleischer was a toy manufacturer who produced a toy horse fashioned after, labeled and sold as Barney Google's horse, "Sparky."150

The trial court denied King's motion for a preliminary injunction and instead granted Fleischer's motion to dismiss the suit.151 The Second Circuit Court of Appeals reversed, reasoning that Fleischer could not avoid infringement by taking the substance or idea and producing

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143 See id.
144 See id. Compare Fisher, 794 F.2d at 438 (holding that parody song "When Sonny Sniffs Glue" was not commercial substitute for "When Sunny Gets Blue," because consumers desirous of hearing romantic and nostalgic ballad would not be satisfied by purchasing parody instead) with Dr. Pepper, 517 F. Supp. at 1208 & n.14 (finding market harm in restaurant commercial parody of "Be a Pepper" campaign because plaintiff spent $100 million on campaign, and defendant's parody could potentially distract from its uniqueness and originality, thus shortening life of campaign and causing loss of business and goodwill plaintiff had built up).
145 See Campbell, 510 U.S. at 592.
146 See id. at 593.
147 See id. at 594.
148 299 F. 533, 538 (2d Cir. 1924) (decided under the Copyright Act of 1909); see also Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc. 73 F.2d 276, 278 (2d Cir. 1934) (concluding that doll manufacturer's reproduction of "Betty Boop" cartoon was infringement).
149 See King Features, 299 F. at 534.
150 See id.
151 See id.
it through a different medium. The court stated that, by doing this, Fleischer was not acting as an artisan himself, but merely as someone who appropriated the intellect and creativity of the original artist. The court then stated that the copyright owner is entitled to any use of his property for financial gain. The court noted that by securing a monopoly to the owner, the copyright laws protect the commercial value of the property while simultaneously encouraging the development of the arts. The court reasoned that Fleischer's toy doll, manufactured in the exact image of King's protected cartoon, appropriated all of the cartoonist's intellectual and creative product. The copyright laws, noted the court, were designed to protect the creation of such a product. The Second Circuit held that Fleischer had infringed King's copyrighted product by manufacturing a toy doll that usurped the commercial value of the original character, and thus determined that the appropriation was not fair use.

In 1978, in *Walt Disney Productions v. Air Pirates*, the United States Court of Appeals for the Ninth Circuit held that a comic book company's copying of over seventeen copyrighted cartoon characters did not constitute fair use because the extent of the defendant's appropriation from the original exceeded permissible levels. Air Pirates was an underground comic book that had transformed several well-known Disney cartoon characters into active members of a free thinking, promiscuous, drug ingesting counterculture. The court began its discussion by noting that comic strip characters are protectable under copyright. The court then focused on the amount and substantiality of the appropriation of the Disney characters. In evaluating how much of a taking was necessary to recall or conjure up the original, the court first recognized that given the widespread public recognition of the Disney characters, very little appropriation would be necessary to place Mickey and his image in reader's minds. The court also

152 See id. at 535.
153 See id.
154 See King Features, 299 F. at 536.
155 See id.
156 See id. at 538.
157 See id. at 537.
158 See id. at 538.
159 581 F.2d 751, 753, 758 (9th Cir. 1978). This case was decided under the Copyright Act of 1909. See Walt Disney, 581 F.2d at 754.
160 See id. at 753.
161 See id. at 754-55.
162 See id. at 756-58.
163 See id. at 757-58.
reasoned that because the medium involved is a graphic work rather
than a purely textual one, recognizable caricature that conjures up the
image of the original in the reader's minds does not require excessive
copying.164 The court also found it significant that the essence of the
parody did not focus on how the characters looked, but instead focused
on their personalities, wholesomeness and innocence.165 The court
stated that the desire to copy substantially in order to make the "best
parody" needs to be balanced against the rights of the owner in his or
her original expressions, and concluded that excessive copying will be
allowed only if there exists a "special need for accuracy."166 The court
found that in the case at bar, Air Pirates had copied the Disney char-
acters in their entirety, thereby taking more than was necessary
to conjure up the famous characters in readers' minds.167 The Ninth
Circuit thus held that such excessive copying precluded a claim of fair
use.168

In 1981, in Pillsbury v. Milky Way Productions, the United States
District Court for the Northern District of Georgia held that a humor
magazine's publication of a picture resembling copyrighted trade char-
acters constituted fair use.169 Milky Way, publishers of Screw magazine,
published a picture of plaintiff's trademark and two stanza jingle ("The
Pillsbury Baking Song") along with figures resembling plaintiff's trade
characters Poppin' Fresh and Poppie Fresh engaged in sexual inter-
course and fellatio.170 After establishing that Pillsbury had established
a prima facie case of copyright infringement, the court then analyzed
the validity of the defendant's affirmative defense of fair use.171 In its
finding that defendant's work constituted fair use of plaintiff's pro-
tected copyrights, the United States District Court for the Northern
District of Georgia performed an analysis of all four statutory factors.172

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164 See Walt Disney, 581 F.2d at 758.
165 See id. The court stated in dicta that defendants' copying may have been justified if:
they had paralleled closely (with a few significant twists) Disney characters and their
actions in a manner that conjured up the particular elements of the innocence of
the characters that were to be satirized. While greater license may be necessary
under those circumstances, here the copying of the graphic image appears to have
no other purpose than to track Disney's work as a whole as closely as possible.
166 See id.
167 See id.
168 See id.
170 See id. at 1016–17.
171 See id. at 1020–21.
172 Id. at 1021–24.
The court found that the effect of the appropriation on market value weighed in favor of Milky Way, stating that Pillsbury failed to introduce any substantive evidence supporting its claim of economic harm, and the court would not automatically presume economic injury merely because of the commercial nature of both works. The court next focused on the purpose and character of the use, again finding in favor of Milky Way by concluding that the parody was more of an editorial or social commentary on the values epitomized by the characters than an attempt to capitalize financially on the original work. In its analysis, the court noted that social commentary in a newspaper or magazine is not put to a commercial use simply because one sells a newspaper rather than gives it to the public free of charge. As to the nature of the copyrighted work, the court found in favor of infringement because the original works were imaginative elements responsible for consumer recognition. Finally, the court analyzed the amount and substantiality of the use, and again found in favor of infringement, stating that Milky Way used more of the copyrighted works than was necessary to suggest the original to its readers. The court noted that in our media-saturated society, it would be difficult to find anyone of television age who would not recognize the famous doughboy and jingle. The court reasoned that although it is difficult to estimate the extent that the plaintiff's work would have to be copied to remind viewers of the original, given its widespread recognition, it would certainly be less than the amount borrowed. In its totality analysis, the court indicated that Milky Way's excessive appropriation did not foreclose the fair use defense because a court must consider all four factors together, with special emphasis on the effect of the copying upon the potential market for the protected work. In the end, the Pillsbury court held that Milky Way's appropriation constituted fair use because Pillsbury failed to show any appreciable harm to the potential market for, or the value of, its copyrighted works and because Milky Way lacked any intent to fill the demand for the original.

173 See id. at 1022.
174 See Pillsbury, 8 Media L. Rep. (BNA) at 1022.
175 See id. The court also noted that the Copyright Act does not exclude pornographic materials from the parameters of the fair use defense. See id.
176 See id. at 1023.
177 See id.
178 See id.
179 See Pillsbury, 8 Media L. Rep. (BNA) at 1023.
180 See id.
181 See id. at 1023–24. The court noted that it did not condone the manner in which
In 1987, however, in *Steinberg v. Columbia Pictures Industries, Inc.*, the United States District Court for the Southern District of New York held that a movie poster’s copying of Steinberg’s cartoon was not a parody and therefore not entitled to the protection of the fair use affirmative defense. Steinberg is an artist famous for his cartoons in the *New Yorker* magazine. Columbia Pictures Industries used Steinberg’s “New Yorker View of the World” cartoon to design its promotional poster for the movie “Moscow on the Hudson.” In analyzing the first statutory factor, the purpose and character of the use, the court stated that Columbia did not design either the movie or the poster to be a parody of Steinberg’s cartoon. The court determined that the poster merely borrowed numerous elements of Steinberg’s cartoon to create an advertisement to promote an unrelated commercial product. The court refused to allow a fair use defense, reasoning that Columbia’s variation on the visual joke of Steinberg’s cartoon did not, without an element of humor aimed at some aspect of the illustration itself, render it a parody under section 107 entitled to the affirmative defense. The court thus held that Columbia’s copying of Steinberg’s cartoon was not fair use, and, therefore, it constituted an actionable copyright infringement.

In 1993, in *United Feature Syndicate, Inc., v. Koons*, the United States District Court for the Southern District of New York again refused to apply a fair use analysis to the appropriation of a cartoon character because it concluded that a sculpture modeled after a copyrighted cartoon character was not a section 107 parody entitled to a fair use defense. Koons used United Feature Syndicate’s (“United Feature”) cartoon character Odie from the *Garfield* strip as a model for a theme exhibition on “banality.” The only difference between the three-dimensional sculpture and the two dimensional

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183 See id. at 708.
184 See id. at 708-10.
185 See id. at 715.
186 See id.
187 See *Steinberg*, 663 F. Supp. at 714. The court noted that the other fair use factors did nothing to mitigate their determination: the work at issue was an artistic creation, a very substantial portion of which was copied, and the value of Steinberg’s reputation was injured by having the public believe that he lent his work to a profit-making enterprise. See id. at 715.
188 See id.
190 Id. at 372-73.
character, besides relative size, was a slightly longer tongue on Koon’s piece. ¹⁹¹

The court determined that the sculpture did not qualify as a section 107 parody entitled to the fair use defense because it was, at best, a parody of society at large rather than a parody of Odie. ¹⁰² The court maintained that a section 107 parody entitled to the defense must at least in part comment upon the copied work, and Koons admitted that he could have used other images or figures besides Odie to make his point. ¹⁹³ In light of this admission, the court stated that it became even more obvious that his sculpture was not a comment, criticism, or parody directed at Odie. ¹⁰⁴ Thus, there was no justification for the fair use defense. ¹⁹⁵

The court applied an analysis of all four statutory factors to show that, even assuming that Koons’s sculpture was a section 107 parody, it would still fail the analysis for a fair use defense. ¹⁰⁶ As to the purpose and character of the use, the court found that the use had a commercial nature because Koons sold two copies of the sculpture for $125,000 each, and thus clearly had an intent to make a profit. ¹⁹⁷ The court noted that the mere fact that an infringing copy can be classified as art does not necessarily afford the copier a valid fair use defense. ¹⁹⁸ In analyzing the nature of the copyrighted work, the court rebuffed Koons’s argument that the popularity and commercial success of the Garfield characters transformed them into the public domain, thereby resulting in a loss of copyright protection. ¹⁹⁹ The court noted that these imaginative characters did not lose copyright protection as a result of their incorporation into American culture. ²⁰⁰ In analyzing the amount and substantiality of the portion used, the court found that Koons’s sculpture copied Odie virtually in its entirety, thus exceeding a permissible level of use. ²⁰¹ Finally, as to the potential effect on the market, the court suggested that if the unauthorized use of Odie became widespread, it would prejudice United Feature’s potential licensing market not only in three-dimensional representations, but also in posters,

¹⁹¹ See id. at 373.
¹⁰² See id. at 383–84.
¹⁰⁵ See id.
¹⁰⁴ See United Feature, 817 F. Supp. at 384.
¹⁹⁶ See id.
¹⁰⁶ See id. at 378–82.
¹⁷ See id. at 379.
¹⁰⁸ See id.
¹⁹⁹ See United Feature, 817 F. Supp. at 380.
²⁰⁰ See id.
²⁰¹ See id. at 381.
cards, T-shirts, calendars and other derivative works. This analysis was only dicta, however, insofar as the court ultimately held that Koons’s sculpture of United Feature’s protected cartoon character did not warrant a fair use defense.

IV. Analysis

In the years before the Supreme Court decided *Campbell v. Acuff-Rose Music, Inc.*, the general litigation surrounding the fair use defense to parody had mixed results. In situations involving almost in toto appropriation of cartoon characters, however, fair use was denied in all instances except one. Yet, despite this precedent, one cartoonist’s appropriation in a comic strip of another cartoonist’s protected characters is in fact the exact sort of parody or satire that deserves exemption from liability under the fair use defense.

In our society, parody is a valued form of criticism, encouraged because it fosters the creativity protected by the copyright laws. In every parody case involving cartoons, however, the court analyzing the four fair use factors has found infringement—with the exception of the United States District Court for the Northern District of Georgia in *Pillsbury v. Milky Way Productions*. Although a cartoon crossover on the newspaper comics pages (where one cartoon strip expressly uses another’s characters) has never been litigated, in light of this precedent, all such crossovers would seem to infringe on protected territory, and the offending cartoonists thus unknowingly put themselves at legal risk. One would surmise, therefore, that both Berkeley Breathed and Bill Griffith have opened themselves up to potential liability by using

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202 See id. at 381–82.
203 See id. at 384.
204 Compare Fisher, 794 F.2d at 434, 440 (concluding that “When Sonny Sniffs Glue,” parody of romantic song “When Sunny Gets Blue,” was fair use), and Esmere Music, Inc. v. National Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980) (finding “I Love Sodom” Saturday Night Live skit parodying “I Love New York” ad campaign to be fair use), aff’d, 623 F.2d 252, 253 (2d Cir. 1980), with Dr. Pepper, 517 F. Supp. at 1208 (finding restaurant commercial parody of “Be a Pepper” campaign not fair use), and Metro-Goldwyn-Mayer, 479 F. Supp. at 361 (musical revue parody of “Gone with the Wind” found not to be fair use).
205 Compare Pillsbury, 8 Media L. Rep. (BNA) at 1024 (fair use), with Walt Disney, 581 F.2d at 758 (no fair use), and King Features, 299 F. at 538 (no fair use), and United Feature, 817 F. Supp. at 383–84 (no fair use), and Steinberg, 663 F. Supp. at 715 (no fair use).
206 See Rogers, 960 F.2d at 310.
208 The legality of cartoon crossovers has never been discussed before, but the United States District Court for the Southern District of New York has presented the possibility for such a
protected characters in their strips.\textsuperscript{209} Even if a court would likely have found copyright infringement in a crossover situation in the past, this probability has changed with the Supreme Court's revision of the fair use criteria in \textit{Campbell v. Acuff-Rose Music, Inc.}, although that case did not involve cartoons.\textsuperscript{210}

In light of the \textit{Campbell} Court's re-analysis of the fair use defense, which provides the parodist with more legal rights, the two decisions closest to a crossover situation—\textit{Walt Disney v. Air Pirates} and \textit{Pillsbury v. Milky Way Productions}—must be reconciled.\textsuperscript{211} Post-\textit{Campbell}, the \textit{Pillsbury} decision provides the correct analysis for crossovers; and as the following discussion illustrates, cartoon crossovers, such as the \textit{Outland} and \textit{Zippy} crossovers mentioned above, should indeed constitute fair use.

The Court in \textit{Campbell} paved a new road for the parodist.\textsuperscript{212} Three aspects of the decision allow much more latitude in copying a protected work than has been afforded in the past.\textsuperscript{213} First, the Court stated that a commercial use does not create a presumption of unfair use.\textsuperscript{214} This gives all parodies fair treatment with no initial presumptions based on any actual or perceived commercial nature. Second, by not explicitly stating, as it had in the past, that the fourth factor (effect on the potential market) is the single most important element of fair use, the Court apparently abandoned the idea that any one factor enjoys primacy, instead implying that all four factors are to be weighed together equally.\textsuperscript{215} This re-analysis ensures that a court will perform a full and fair analysis of a crossover, rather than find a presumption against fair use simply because potential market harm exists. Finally, and perhaps most importantly, the Court lowered the parody "threshold" analysis, thus opening up the fair use defense to many more situations by stating that "taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found

\textit{situation by noting that syndicated cartoon characters "can be the subject of a parody which is protected by the fair use doctrine." United Feature, 817 F. Supp. at 390 n.5.}

\textsuperscript{209} \textit{See Breathed, supra note 2, at 8-9; Griffith, supra note 13.}

\textsuperscript{210} \textit{See} 510 U.S. 569, 578-94 (1994). This case involved 2-Live Crew's rap music parody of Roy Orbison's \textit{Oh, Pretty Woman}. \textit{See id.} at 572.

\textsuperscript{211} \textit{See id.} at 578-94. \textit{Compare} Walt Disney, 581 F.2d at 758 (no fair use), \textit{with Pillsbury}, 8 Media L. Rep. (BNA) at 1017 (fair use).

\textsuperscript{212} \textit{See generally Campbell, 510 U.S. at 578-94.}


\textsuperscript{214} \textit{See Campbell, 510 U.S. at 584-85.}

\textsuperscript{215} \textit{See American Geophysical Union, 60 F.3d at 926; see also Campbell, 510 U.S. at 578; Harper \& Row, 471 U.S. at 566 (fourth factor is most important).}
to be fair use" if the other factors weigh in the parodist's favor. In the past, courts would sometimes deny outright the fair use defense by stating that the alleged parody did not qualify as a section 107 parody because there was not a sufficient element of humor aimed at the original. Post-Campbell, however, nearly all parodies should easily pass this lowered threshold test and receive a full fair use analysis, rather than being stopped at the gate by a determination that there is not a sufficient element of humor aimed at some specific aspect of the original.

In a cartoon crossover situation, the prima facie case of infringement is easily established. Common law has long recognized that copyright protection is available for cartoon and comic strip characters. Because all syndicated features are registered with the Copyright Office, ownership of the copyright in the cartoon character is thus easily established. Under the copyright statute, the certificate of registration constitutes evidence of ownership. Next, copying of a protected work is easily established by either (1) direct evidence; or (2) circumstantial evidence consisting of (a) access to the original (which can be established by viewing the comics pages in our nation's newspapers) and (b) substantial similarity (which can be established in that an exact reproduction of another cartoonist's character would lead an ordinary observer to equate the copy with the original). In the example, direct evidence of unauthorized copying of protected characters is available because Breathed explicitly refers to his reproductions by name as Walt Disney, Mickey Mouse and the rest of the Disney characters. Griffith's infringing use of other cartoonists' syndicated characters in the Zippy strip meets the circumstantial evidence test because

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217 See United Feature, 817 F. Supp. at 383-84; Steinberg, 663 F. Supp. at 714.
218 Compare Campbell, 510 U.S. at 580-81 n.14, with Steinberg, 663 F. Supp. at 714 (holding that defendant's Moscow on the Hudson cartoon was not § 107 parody entitled to fair use analysis since it did not have element of humor aimed at some aspect of plaintiff's "New Yorker View of the World" illustration).
219 See, e.g., Walt Disney, 581 F.2d at 754 (Mickey Mouse and other Disney characters); King Features, 299 F. at 535 (Barney Google's horse Sparky); United Feature, 817 F. Supp. at 576 (Garfield's doggie pal Odie). Copyright protection is unavailable for things such as facts or ideas. See, e.g., Feist Publications, 499 U.S. at 544.
221 See id.
222 See, e.g., Warner Bros., Inc., v. American Broad., Co., 654 F.2d 204, 207 (2d Cir. 1981); Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977). Even if one cartoonist uses another's character in a different plot, or portrays the character with an altered personality, this still constitutes a "copy" for purposes of copyright infringement. See Walt Disney, 581 F.2d at 754.
223 See Breathed, supra note 2, at 8-9.
of the cartoonist’s access to the protected characters, and the in toto similarity and obvious reference to those other characters.\(^{224}\) First, access is established because the protected characters that Griffith used can be seen on comics pages all across the country. This access is similar to that in Twin Peaks Productions, Inc. v. Publications International, Ltd., where the Second Circuit held that the ability to watch televised programs serves as the functional equivalent of access to the protectable content of the teleplays.\(^{225}\) Similarly, the ability to read the comics pages also serves as the functional equivalent of access to the protectible comic strip characters.\(^{226}\) Second, substantial similarity can be established because an ordinary observer reading the Zippy strip would no doubt recognize the protected characters in the same way that the United Feature court held that an ordinary observer would equate Odie with Koons’s sculpture, which was a virtual reproduction of the cartoon dog in both appearance and expression.\(^{227}\) In the Zippy strip, Griffith’s reproduction of the twelve protected characters in both appearance and expression is similar to Koons’s reproduction of Odie.\(^{228}\) In sum, a cartoon crossover will always involve a copyright infringement of a protected work even if no direct evidence is available, because an exact reproduction of a protected character is obviously a virtual copy of that character’s appearance and expression, and an ordinary observer should easily recognize this overwhelming similarity.\(^{229}\)

In addition, because a cartoon crossover is essentially a recasting of the protected cartoon character into an adaptation, this constitutes an infringement of the original artist’s protected rights to reproduce and prepare derivative works of the original.\(^{230}\) In the Outland example, the unauthorized adaptation of protected characters is an obvious transformation of the original because Breathed places protected characters into an alternate cartoon reality.\(^{231}\) Similarly, Griffith’s unauthorized use of other cartoonists’ syndicated characters is evident based on the borrowing of twelve famous cartoon characters’ heads for use in the Zippy universe.\(^{232}\)

\(^{224}\) See Griffith, supra note 13.
\(^{225}\) See Twin Peaks, 996 F.2d at 1372.
\(^{226}\) See id.
\(^{227}\) See United Feature, 817 F. Supp. at 378.
\(^{228}\) See id.
\(^{229}\) See id. at 377–78.
\(^{231}\) See Breathed, supra note 2, at 8–9.
\(^{232}\) See Griffith, supra note 13.
Thus, a cartoon crossover involves a copyright infringement through the unauthorized copying of a protected original and its use in a derivative work. Yet, why are these cartoonists who appropriate protected characters not subject to legal consequences? No court has ever discussed industry custom and usage as an exemption from copyright infringement. The only way for the offending cartoonist to be free from liability must lie in the affirmative defense of fair use. Applying a post-Campbell analysis to the Outland and Zippy examples demonstrates how a court should work its way through all four statutory factors to find fair use in cartoon crossover situations. The first factor in the fair use analysis is the "threshold" inquiry of whether the cartoons constitute a parody for section 107 purposes. Generally, the courts look not at whether the parody was done in good taste or bad, but whether the infringer uses some element of a prior author's composition to create a new one that, at least in part, comments on that author's work in addition to commenting on society, thus justifying the borrowing. If the secondary work has no critical bearing on the substance or style of the original, the claim to fairness in borrowing from another's work diminishes accordingly, and may even vanish, allowing other factors, such as commerciality, to assume greater importance. The policy behind requiring this threshold inquiry of whether a parodic character can be recognized is that a work which makes some critical comment about the original reflects the perspective of the parodist, thereby giving the parody social value beyond its entertainment function. Without this requirement of social value, any comic use of an existing work would be protected, removing the "fair" from the term "fair use" and negating the underlying purpose of copyright law—protecting original works from unfair exploitation.

234 In fact, the only case in which custom and usage was ever mentioned by a court was Dr. Pepper Co. v. Sambo's Restaurants, Inc., where the court noted that use of a competitor's product for the purpose of advertising was generally accepted in the industry. 517 F. Supp. at 1208.
235 See Campbell, 510 U.S. at 578-94.
236 See id. at 580-83.
237 See id.; Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.): Fisher, 794 F.2d at 436; Walt Disney, 581 F.2d at 758 n.15; Berlin, 329 F.2d at 545. Otherwise, there is no need to "conjure up" the original in the reader's mind and no justification for borrowing from it. See Fisher, 794 F.2d at 436; Walt Disney, 581 F.2d at 758 n.15.
238 See Campbell, 510 U.S. at 580; see, e.g., MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (holding that substitution into copyrighted song while performing for commercial gain constitutes musical plagiarism, not fair use); United Feature, 817 F. Supp. at 384 (holding that sculpture of "Odie" illustrating banality deserves no fair use defense because the sculptor admitted that other images or figures could have been used instead).
239 See Metro-Goldwyn-Mayer, 479 F. Supp. at 357.
240 See id.
Previously, courts had required a much higher showing of critical commentary on the original to pass this threshold, but the Court in *Campbell* lowered the test, allowing parodies that more loosely target an original to be sufficiently aimed at an original work to fall within the section 107 parody requirement and receive a full fair use analysis. In light of the *Campbell* re-analysis, whether or not a court assigns a high rank to the parodic element of the allegedly infringing work, the threshold has been lowered to the point where all parodies should qualify as section 107(1) parodies for purposes of analyzing a fair use defense. Nonetheless, in both the *Outland* and *Zippy* cartoons, the reader can clearly perceive a parodic nature. Certainly, Breathed's scathing depiction of the modern corporate structure as a power hungry, money driven conglomerate includes the Disney Studio as part of the critique. Likewise, Griffith's commentary on the proliferation of corporate merger and how it will control the dissemination of information directly implicates Disney—the company that just bought the American Broadcasting Company, a major television network. Thus, these two cartoons not only comment on modern corporate society in general, but also specifically target Disney as the epitome of modern corporate values. Therefore, the "threshold" inquiry of whether the use constitutes parody is easily passed because the Supreme Court in *Campbell* allowed a great degree of latitude in finding parodic content.

Even if these were two situations where a reader could not perceive any commentary on the original, *Campbell* dictates that the cartoonist could still claim the fair use defense. For example, one could argue that the very fact that Griffith uses twelve different cartoon characters rather than just one is similar to *United Feature Syndicate, Inc. v. Koons*, where Koons admitted that he could have used other images in his sculpture besides Odie, and thus the court rejected the fair use defense.

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242 See id. at 580–81 n.14, 582–83. Previously, courts were more willing to deprive a parody the fair use analysis by claiming that the threshold was not passed. See *MCA*, 677 F.2d at 185 (concluding that song spoof in nude cabaret show falls short of "parody" for § 107 purposes); *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357 (finding that cabaret song and dance spoof of *Gone with the Wind* is not eligible for fair use protection because it does not comment on the movie but only achieves pure comic effect); see also *DC Comics, Inc. v. Unlimited Monkey Bus.*, Inc., 598 F. Supp. 110, 119 (N.D. Ga. 1984) (finding that singing telegram spoofs of Superman and Wonderwoman are mere adaptations sold on strengths of plaintiff's imagination and originality, not parodies that create genuinely distinct product deserving fair use protection).
243 See *Campbell*, 510 U.S. at 582–83.
244 See id.; *Walt Disney*, 581 F.2d at 758 n.15.
245 See *Campbell*, 510 U.S. at 589 ("We have less difficulty in finding that critical [parodic] element in 2 Live Crew's song than the Court of Appeals did . . . .").
246 See id. at 580–81 & n.14.
as a matter of law. If the *Koons* interpretation of fair use was still applicable, then a reader could interpret Griffith's parody of newspaper comics competing for ever-narrowing readership not as a critique of any of the actual characters he copies, but rather a parody of the comic industry as a whole, thus subjecting him to infringement. *Campbell,* however, lowers the "threshold" inquiry to the extent that even if the commentary has no critical bearing on the original, the lack of criticism only diminishes, and does not extinguish, the right to claim fair use as a defense. Instead, the other statutory factors assume greater importance in the court's balancing test. Thus, even if a reader perceives no parodic content of the original in Breathed or Griffith's work, rather than denying a fair use defense, a court would instead more closely scrutinize the remaining factors.

As such, the next step would be to continue a full first factor analysis of the purpose and character of the use. Breathed and Griffith's use of protected characters is not intended for commercial purposes, but for social commentary. Newspapers purchase comic strips such as *Outland* and *Zippy* not on the strength of their periodic use of protected characters, but because of the quality of the strips themselves. Therefore, using protected characters for crossovers brings in no additional financial reward for the cartoonists and is similar to *Pillsbury,* where the court stated that the parody of Poppin' Fresh was more in the nature of an editorial or social commentary on the values epitomized by the characters than an attempt to capitalize financially on the original work. As the *Pillsbury* court stated, social commentary in a newspaper is not a commercial use simply because the publication is sold rather than given to the public.

Additionally, the Supreme Court's indication that a more transformative use (i.e., where the new work adds something new, altering the original with a new expression, meaning or message) makes the other statutory factors less significant bodes well for cartoonists. Both Breathed and Griffith's works altered the originals in expression and meaning by engaging "innocent" characters in a contemporary corpo-

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247 See *United Feature,* 817 F. Supp. at 384; *Griffith,* supra note 13.
248 See *United Feature,* 817 F. Supp. at 384; *Griffith,* supra note 13.
249 See *Campbell,* 510 U.S. at 580.
250 See id. at 580-81 & n.14.
251 See id.
252 See 17 U.S.C. § 107(1); *Campbell,* 510 U.S. at 578-85.
253 See *Pillsbury,* 8 Media L. Rep. (BNA) at 1021-22.
254 See id. at 1022.
255 See *Campbell,* 510 U.S. at 579.
rate plot and issuing a message on the inherent dangers of big business
values. Because parody fosters the creativity and social value inherent
in a scathing commentary on society's problems, and because both of
the works in question involve very transformative uses, the first factor
analysis weighs in favor of the parodists getting a fair use defense.

The second factor (the nature of the copyrighted work), however,
weighs in favor of copyright infringement almost as a matter of law.
The copyright laws provide an infringer much less latitude in copying
fictional works than factual ones. One factor to consider is whether
the original is creative, imaginative, or represents an investment of
time in anticipation of a financial return. In the two examples above,
the copied characters are syndicated cartoon strips that certainly fit
this category: they are unique characters designed by creative individu-
als for use on the comics page or in the movies, whereby they will
generate a financial return for the artist. As such, the nature of the
original in any crossover will be a creative, publicly known work heavily
protected by copyright. Thus, because cartoon characters are creative
and imaginative works deserving wide copyright protection, this sec-
ond factor analysis is nothing more than a tautology that can almost
be eliminated from the fair use analysis because the owner of the
original is invariably guaranteed protection for the creative works.

The third factor, which concerns amount and substantiality used,
also weighs in favor of copyright infringement in a crossover situation.
Within this inquiry, courts focus on what else the parodist did besides
going to the heart of the original. Thus, if little is added or changed,
a court could arguably find the parody to be a superseding use that
substitutes for the original rather than a unique work entitled to fair
use. But because a parody's humor and comment derive from dis-
torted imitation of a known original, it follows that the parodic work
must consist primarily of the original.

In determining the amount of taking necessary to the parodic
work, the courts evaluate the pervasiveness of public recognition of the

256 See Breathed, supra note 2, at 8–9; Griffith, supra note 13.
257 See Rogers, 960 F.2d at 310.
258 See 17 U.S.C. § 107(2); Campbell, 510 U.S. at 586.
259 See generally Feist Publications, 499 U.S. at 344 (facts not copyrightable).
260 See Rogers, 960 F.2d at 310.
261 See Campbell, 510 U.S. at 586.
262 See United Feature, 817 F. Supp. at 380.
263 See Campbell, 510 U.S. at 588–89 (noting that heart of song is what most readily conjures
up song for parody, and it is heart at which parody takes aim).
264 See id.
265 See id.
original to determine how much appropriation is required to conjure it up in the minds of the readers. 266 In general, however, using some characteristic features cannot be avoided. 267 Although quantity is important, this inquiry focuses primarily on the quality of how much of the original work is used in relation to the purpose of its use. 268 In other words, what matters is whether the parodist copied more than necessary in order for the reader to recognize the original. 269 In our Disney saturated society, Breathed's verbatim copying of Mickey and his pals certainly goes beyond any minimum level of "conjuring up" necessary for readers to identify these characters. 270 One could reason, as did the court in Pillsbury, that the extent the Disney characters would have to be copied to remind viewers of the originals is difficult to estimate, but, given their widespread recognition, it would certainly be less than what was borrowed. 271 For example, rather than actually using the Disney Studio and its famous characters in his critique, Breathed could have created a generic animation studio that hinted at Disney. 272 Mortimer Mouse, with his red drawers with yellow buttons and shoes, conjures up the identity of Disney without having to use Mickey, Snow White, and the rest. Griffith's work comes closer to what may be a more acceptable level of copying. 273 He uses only the heads of protected characters, and on these he places mouse ears, thus implying, rather than explicitly stating, that it is Disney that is the focus of the commentary. 274

Most courts generally afford parody significant leeway with respect to the extent and nature of their copying. 275 But in a situation of near verbatim copying, the third factor inquiring into the amount and substantiality of the use may, as a matter of law, be resolved against the parodist. 276 Because the Court in Campbell indicated that fair use is a case by case analysis, however, it left open a window where almost

266 See id.; Walt Disney, 581 F.2d at 757 (noting that Disney characters are so well known that very little is necessary to place Mickey Mouse in minds of readers).
267 See Campbell, 510 U.S. at 588.
268 See id. at 586-87 (the extent of permissible copying varies with the purpose and character of the use); Rogers, 960 F.2d at 311.
269 See Campbell, 510 U.S. at 586-87; Rogers, 960 F.2d at 311 (what is relevant is the amount and substantiality of the copyrighted expression used, not the factual content of the material in the copyrighted piece).
270 See Breathed, supra note 2, at 8-9.
271 See 8 Media L. Rep. (BNA) at 1023.
272 See Breathed, supra note 2, at 8-9.
273 See Griffith, supra note 13.
274 See id.
275 See Rogers, 960 F.2d at 310.
276 See Campbell, 510 U.S. at 589. Previously, near verbatim copying was a threshold test
wholesale copying may be permitted in some situations, depending on
the analysis of the other statutory factors.277 Thus, even if the crossover
borrows an unacceptable amount from the original, this does not end
the inquiry but rather confirms that all four fair use factors must be
weighed together.278

The final, but no longer primary, factor to be considered is the
effect of the borrowing on the market value of the original.279 Similarity
of medium (play, book, movie, etc.) is not relevant to this analysis.280
Also, in assessing this factor, the parody’s critical impact is ignored.281
“Copyright law is not designed to stifle critics. . . . Biting criticism
suppresses demand; copyright infringement usurps it.”282 Thus, the
concern with market replacement is not whether a “bad review” by the
secondary work causes the market to diminish because of its critical
nature, but whether the secondary work fulfills demand for the origi-
nal, either in whole or in part.283

This determination involves a comparison of the function of the
two works.284 If the function of both works is to entertain, the analysis
then focuses on the appeal of the derivative work.285 For example, the
analysis of a musical parody would consider whether people listen to
the secondary work solely for its musical appeal, in which case the
defendant’s right to appropriate is stronger, or whether people listen
to the secondary work purely because of its comic effect, in which case
the plaintiff is afforded more protection.

In assessing the actual market harm as well as the potential market
usurpation for derivative works, crossovers seem to have little or no
effect. It is true that both the original and the crossover attempt to
entertain through graphic cartoon humor. Arguably, the same people
who read the strips containing the crossovers are also familiar with the
original strips since many perusers of the comics page read the major-
ity of strips offered. Nonetheless, this does not mean that Breathed or
Griffith’s work will usurp the other cartoons’ readers or newspaper

whereby the parody was eliminated entirely from fair use protection. See Walt Disney, 581 F.2d at
277 See Campbell, 510 U.S. at 588.
278 See id. at 578; Pillsbury, 8 Media L. Rep. (BNA) at 1023.
279 See Campbell, 510 U.S. at 590.
281 See Fisher, 794 F.2d at 437.
282 Id. at 437-38.
283 Campbell, 510 U.S. at 590-92; Fisher, 794 F.2d at 438.
space. On the contrary, because the parody gives these strips “free press,” readership may actually increase.

Newspapers buy, and people read, *Outland* and *Zippy* because of the unique appeal of these strips. If newspapers choose not to buy, or if people choose not to read, *Garfield, Family Circus*, or any other strip used by Griffith or Breathed, it is likely not because Berkeley Breathed or Bill Griffith creates a substitute for those strips, but because cartoon fans do not like those strips. Certainly, a Disney parody will not take away from anyone going to see Disney movies. The children who go to see *Pocahontas* do not make up the readership of *Outland*. Likewise, the parents who do make up this readership are not going to tell a small child “No, we can’t go see *Aladdin*. But, hey, here’s the Sunday comics.”

As far as derivative works go, unlike the situation where Koons sold his Odie statues for $125,000 each, thus prejudicing the potential merchandising market for the syndicate, use of protected characters in a comic strip crossover will have no such effect.\(^{286}\) First, crossovers involve no sale. Second, whereas United Feature Syndicate may one day decide to grant a license to a sculptor to produce Odie statues, no syndicate or movie studio will ever grant a license allowing another cartoonist to critically review or lampoon their product.\(^{287}\) Finally, the potential for market substitution decreases with an increase in the amount of transformative use.\(^{288}\) Thus, in a crossover situation, because the “transformativeness” of the appropriated character is so high, a presumption against market harm is effectively created.

V. Conclusion

After all four factors are analyzed, a cartoon crossover results in a successful fair use defense. Even though factors two and three (the nature of the copyrighted work and the amount and substantiality of the portion used) will almost always weigh in favor of infringement, the first and fourth factors (purpose and character of the use and the effect on the potential market for the copyrighted work) must weigh more heavily in favor of the fair use defense where comic strip crossovers are concerned.\(^{289}\) This is so for three reasons. First of all, in such situations, the parodist’s intent is for social critique or commentary, not to fill the demand for the original. Second, crossovers do not usurp

\(^{286}\) See United Feature, 817 F. Supp. at 379.

\(^{287}\) See Campbell, 510 U.S. at 592; United Feature, 817 F. Supp. at 382.

\(^{288}\) See Campbell, 510 U.S. at 591.

\(^{289}\) See 17 U.S.C. § 107; Campbell, 510 U.S. at 578–94.
the value of the original product in either the actual existing market or in the potential derivative market for merchandising. Finally, the purpose of parody is criticism, which is valued because it fosters creativity while showing us our foibles as a society. As such, it promotes the purpose behind copyright law by encouraging commentary and creativity. This policy behind copyright protection, combined with the Supreme Court's re-analysis of the fair use factors in *Campbell v. Acuff-Rose Music, Inc.*, should thus allow a cartoonist to appropriate another cartoonist's protected characters for crossover use in a cartoon strip. Post-*Campbell*, social commentary on the comics page is the sort of parody that is to be accorded a successful fair use defense.

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290 See *Campbell*, 510 U.S. at 577; *MCA*, 677 F.2d at 183; *Pillsbury*, 8 Media L. Rep. (BNA) at 1023.

291 See *Campbell*, 510 U.S. at 578-94.