

## **Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire**

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### ABSTRACT

*Satire and parody are both examples of what copyright law denominates "derivative works." And the two are, philologically, rather interrelated, while nevertheless remaining distinct categories. But, following ambiguous Supreme Court guidance, the status of the two genres in fair use defenses to allegations of copyright infringement is somewhat uncertain, and varies significantly amongst the circuit courts. Satire is the unequivocally underprivileged, when not categorically disallowed, genre in fair use evaluations. But refining, without changing, current judicial method in this area could serve to protect arguably more "Useful Art," while leaving the current treatment of parody untouched.*

*This article serves three distinct, but related, purposes: (1) to disambiguate, for copyright law purposes, the terms "parody" and "satire"; (2) to prove that protection, as fair use, for satire is constitutionally consistent—and, indeed, compelled—by both copyright and First Amendment jurisprudence; and (3) to recommend a judicial method by which to incorporate this view while leaving wholly intact all current precedent.*

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## CONTENTS

INTRODUCTION .....	185
I. PRIMER ON FAIR USE.....	185
II. DISTINGUISHING BETWEEN PARODY AND SATIRE.....	186
A. Campbell v. Acuff-Rose Music, Inc. and Subsequent Judicial Treatment .....	187
B. Confusion Over the Distinction.....	189
C. Artistry & Subtlety: Questioning the Merits of the Distinction.....	190
D. Coda on the Parody-Satire Distinction: Conjuring Up.....	191
III. EXCUSE AND JUSTIFICATION.....	192
A. Excuse and Justification at Common Law, Generally.....	192
1. Excuse and Justification in Criminal Law .....	193
2. Excuse and Justification in Tort Law.....	195
B. Excuse and Justification in Copyright .....	195
1. Genres of Discursive Derivative Works and their Protectability.....	197
a) Parody.....	198
b) Satire.....	198
c) Camp.....	199
2. Existing Instances of Fair Use to Illustrate Application of Proposed Excuse and Justification Doctrine .....	199
a) Fair Use in Parody .....	200
(1) The Hustler & Jerry Falwell Cases .....	200
(2) The <i>Wind Done Gone</i> Case .....	202
b) Fair Use in Satire: <i>Dr. Seuss Enterprises v. Penguin                 Books</i> .....	203
c) Fair Use in Camp: <i>Elvis Presley Enterprises v. Capece</i> .....	205
IV. THE SPECTRUM OF SATIRICAL FAIR USE: JUDICIAL ADMINISTRATION.....	207
Substantive Factors to be Considered (Five-Factor Test) .....	207
1. Subjective Intent of Infringer.....	208
2. Manifested Effects on the Market.....	208
3. Injury .....	209
4. “Value” of the Satire.....	209
5. Relevance or Necessity of Appropriated Work to the Satire .....	210
V. THE SIGNIFICANCE AND IMPACT OF THE PROPOSED METHOD .....	210
CONCLUSION .....	210

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### INTRODUCTION

This article explores the viability of satire as a genre appropriate for the affirmative defense of fair use in copyright infringement actions. More specifically, this article contends that satire can constitute potential “excuse” and “justification” defenses in such actions. The focus on satire finds its nascence in Justice Souter’s dictum distinguishing parody from satire in the majority opinion of *Campbell v. Acuff-Rose*,<sup>1</sup> leaving unsettled issues—and circuit splits—as to the viability of the fair use defense for these two genres, particularly satire.

Starting first with Professor Wendy Gordon’s theory advocating excuse and justification demarcation for fair use copyright law, the present article builds on the basic distinction and fervently asserts that copyright appropriation should be allowed for satirical works, under limited circumstances set out herein, as part of fair use and First Amendment jurisprudence. More specifically, satire should be thought of not simply as a type of excuse (that is, behavior that society does not want to occur, as a normative matter, yet deems acceptable under the specific facts of the case—for instance, insanity in criminal law),<sup>2</sup> but also as a potential justification (that is, behavior that is deemed acceptable as a normative matter).<sup>3</sup> This proposal culminates with both a theoretical formulation of a “spectrum of fair use” analysis<sup>4</sup> and a five-part test for the judicial administration of the proposed analysis of satire,<sup>5</sup> incorporating the fair use provisions of the Copyright Act of 1976,<sup>6</sup> and the common law doctrines of fair use, and excuse and justification.

### I. PRIMER ON FAIR USE

Cognizant of the fact that many uses of copyrighted material are still valid and deserve protection, Congress has chosen to include an explicit

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1 *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580–81 (1994).

2 *See infra* text accompanying notes 45–46.

3 *See infra* text accompanying notes 46, 50.

4 *See infra* Part III.

5 *See infra* Part IV.

6 Copyright Act of 1976, 17 U.S.C. § 107 (2000).

provision in the Copyright Act to allow for “fair use” of copyrighted materials.<sup>7</sup> Copyright gives an exclusive monopoly to the owner, for a fixed term, which was recently extended to the life of the author plus seventy years.<sup>8</sup> Fair use can be asserted at any time during this term and is exercised affirmatively by defendants in response to allegations of copyright infringement.<sup>9</sup> The last time the U.S. Supreme Court spoke extensively on the issue of fair use was in 1994.<sup>10</sup> While respecting a parodic song as an acceptable form of a fair use, the Court’s views on the treatment of satire were unclear and somewhat conflicting between the majority and concurring opinions.<sup>11</sup>

## II. DISTINGUISHING BETWEEN PARODY AND SATIRE

Colloquially, the terms “parody” and “satire” are often used interchangeably, sometimes in error and sometimes merely as tropes of a vague classification of “critical” works.<sup>12</sup> But the Supreme Court seems rather disinterested in such trivialities and appears, at least in dicta, to have adopted a fairly rigid distinction between the two genres.<sup>13</sup> This distinction leaves the two genres with seemingly very different treatment under the law—a distinction that has been taken quite seriously in a number of lower court decisions. In fact, in light of the variation among the circuits,<sup>14</sup> the

<sup>7</sup> *Id.* The full text of the provision is:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A [the copyright owner’s exclusive rights], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. *Id.*

<sup>8</sup> Formerly, protection was life plus fifty years. The recent addition of twenty years was upheld in *Eldred v. Ashcroft*, 537 U.S. 186, 193–94 (2003).

<sup>9</sup> See *infra* text accompanying note 156.

<sup>10</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

<sup>11</sup> See *infra* Part II.

<sup>12</sup> Critical: “1. Given to judging; *esp.* given to adverse or unfavourable criticism; fault-finding, censorious.” 4 OXFORD ENGLISH DICTIONARY 30 (2d ed. 1989). This meaning is also the manner in which Shakespeare said “That is some Satire keen and critical.” *Id.* (quoting WILLIAM SHAKESPEARE, *MIDSUMMER NIGHT’S DREAM* act 5, sc.1, ln. 55).

<sup>13</sup> See *Campbell*, 510 U.S. at 580–81.

<sup>14</sup> Unsurprising to most readers, the decisions of note in this inquiry are those emanating from the Second and Ninth Circuits. Historically, and more importantly, as a product of their geographies, these two circuits are where cases of satire—works of art and entertainment—tend to arise most frequently.

distinction might be best described as only *facially* rigid. What lies beneath its face, however, is the very real potential for significant chilling of free speech.

A. *Campbell v. Acuff-Rose Music, Inc.* and Subsequent Judicial Treatment

According to Justice Souter, in his opinion for the Court in *Campbell*, “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>15</sup> In his concurrence, Justice Kennedy makes the distinction between parody and satire even more pronounced, stating, “[t]he parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).”<sup>16</sup> But this distinction, as will be discussed at length in this article, does not comport with literary theories of satire and parody, which view the two as deeply intertwined and sometimes make no distinction.<sup>17</sup>

Different courts have treated the distinction between satire and parody in various ways since *Campbell*. The Ninth Circuit has generally followed Justice Souter’s opinion and even the more onerous guidelines of Justice Kennedy’s concurrence very formalistically.<sup>18</sup> The Ninth Circuit makes a strict classification based on whether or not a work specifically targets the original, then it considers this determination to the total exclusion of other factors that might be considered.<sup>19</sup> Thus the classification as parody or satire is the touchstone of whether or not fair use protection is to be afforded in the Ninth Circuit.<sup>20</sup>

Second Circuit courts, on the other hand, have ostensibly respected the parody-satire distinction. Second Circuit opinions frequently hold instances of satire to be within the technical definition of parody, and thereby entitled to fair use protection, based on a particular element of the satire be-

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In the next section, we will see exactly how much and in what ways these two courts vary. *See infra* Part II.A.

<sup>15</sup> *Campbell*, 510 U.S. at 580–81. A footnote to this quote further elaborates on the meaning of satire: “Satire has been defined as a work ‘in which prevalent follies or vices are assailed with ridicule,’ 14 Oxford English Dictionary . . . 500 [(2d ed. 1989)], or are ‘attacked through irony, derision, or wit,’ American Heritage Dictionary . . . 1604 [(3d ed. 1992).]” *Campbell*, 510 U.S. at 581 n.15.

<sup>16</sup> *Id.* at 597 (Kennedy, J., concurring).

<sup>17</sup> *See infra* Parts II.B–C. Moreover, it is argued here that satirical works are perhaps more a “useful Art[ ]” (to use the Constitution’s language, U.S. CONST. art. I, § 8, cl. 8) than the work being satirized, because of the value inhered in the critical nature of satire.

<sup>18</sup> *See, e.g.,* *Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997) (denying protection for a satirical work, even where it was labeled “A Parody”); *Columbia Pictures Indus. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 1998) (holding a poster for *The Big One*—a documentary of corporate America—a satire, and thus unprotected because it was substantially similar to the movie poster for the movie *Men in Black*, yet did not parody *Men in Black*).

<sup>19</sup> *E.g., Dr. Seuss*, 109 F.3d at 1400; *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

<sup>20</sup> *See, e.g., Dr. Seuss*, 109 F.3d 1394. This case is discussed in detail *infra* Part III.B.2.b.

ing targeted at the original.<sup>21</sup> Indeed, Justice Kennedy's statement<sup>22</sup>—that works targeting another may also target the “general style,” genre, or “society as a whole,”<sup>23</sup>—makes reference to a Second Circuit decision, *Rogers v. Koons*, made almost two years prior to the Supreme Court's decision in *Campbell*.<sup>24</sup> In *Rogers*, the Second Circuit Court of Appeals declared that:

Parody or satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original. Under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law.<sup>25</sup>

Deconstructing this quote, it is first observed that the terms “parody” and “satire” are joined by the disjunctive “or” when describing *what* they are. This must mean that parody and satire are unique genres, but afforded equal *status* in the eyes of the court. The next mention of the two terms addresses the *value* and *protection* of the parody and satire and makes clear that the Second Circuit does view the two as distinct (forms, plural), yet respects both as “valued forms of criticism . . . foster[ing] the creativity protected by the copyright law.”<sup>26</sup> For the Court to have relied on this opinion without embracing this essential passage is unthinkable.

Of course, even though it cited *Rogers*, the *Campbell* Court—or at least Kennedy's concurrence—may not have intended grandiose conceptions of fair use. But the Second Circuit continues to follow its own doctrine from *Rogers* and subsequent cases, even where such decisions are substantively tantamount to disregarding the parody-versus-satire message of *Campbell*.<sup>27</sup> The Second Circuit carefully holes satire cases into Kennedy's “may target those features as well” set-aside,<sup>28</sup> for pieces that have the requisite parodic element.<sup>29</sup>

21 See, e.g., *Rogers v. Koons*, 960 F.2d 301, 309–10 (2d Cir. 1992) (parody and satire occurs “when one artist, for comic effect or social commentary, closely imitates the style of another artist.”); *Berlin v. E. C. Publ'ns*, 329 F.2d 541, 545 (2d Cir. 1964) (“parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.”); but see *MCA, Inc. v. Wilson*, 425 F.Supp. 443, 453 (S.D.N.Y. 1976) (defendants sought to parody life, sexual mores and taboos, but did not comment ludicrously upon the source material) *aff'd*, 677 F.2d 180 (2d Cir. 1981).

22 And we must not forget that it was Justice Souter that wrote *Campbell*; Justice Kennedy was only concurring. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 596 (1994).

23 *Id.* at 597.

24 *Rogers*, 960 F.2d 301.

25 *Id.* at 309–10 (emphasis added).

26 *Id.* at 310.

27 See, e.g., *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006); *Yankee Publ'g v. News Am. Publ'g*, 809 F.Supp. 267, 278 (S.D.N.Y. 1992).

28 *Campbell*, 510 U.S. at 597. See also *supra* text accompanying note 16.

29 While the Second Circuit's interpretation may be a bit of a stretch jurisprudentially, insofar as it exploits the vagueness of the language, the interpretation is well-grounded philologically. Though the Second Circuit opinions do not rely on (or even mention) literary theory as reasoning for their opinions, it is well-accepted that satire may in fact require the use of parody to be effectuated. It is said that, “[l]iterary satire is a highly sophisticated art-form which thrives on parodying and debunking other lite-

## B. Confusion Over the Distinction

What remains uncertain, then, is the status of satirical works, which often do not explicitly target another work. The Supreme Court, in the more than ten years since *Campbell*, has yet to offer up any specific guidance as to the status of satire in copyright fair use. Particularly, there is no consensus as to whether the Court really insists that satire must contain parody, or whether it may be analyzed of its own accord, with or without purely parodic elements.<sup>30</sup>

Although Justice Kennedy would go so far as to require that all satire contain at least some aspect of direct *parody* in order to merit protection, the majority opinion by Justice Souter is not nearly so clear.<sup>31</sup> It would be foolhardy, as a matter of interpretation, to read such a meaning into Justice Souter's opinion. Moreover, it would be exceedingly unwise, as a matter of policy, to do so.<sup>32</sup> And one could expect that had Justice Souter (and the others joining the opinion) truly felt that way, the opinion would have been written to include such a requirement or, alternatively, Kennedy would not have written a separate concurrence in the first place.

Unlike Justice Kennedy, Justice Souter does not appear to endorse the idea of *no* degree of protection for pure satire.<sup>33</sup> Souter simply states that "satire . . . requires justification for the very act of borrowing."<sup>34</sup> The paramount concern the Court need address—the issue contested amongst the circuits and the topic of this article—is exactly what justification is required for satiric borrowing.<sup>35</sup>

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ature . . . ." Harriet Deer & Irving Deer, *Satire as Rhetorical Play*, 5 BOUNDARY 2 711, 713 (1977).

<sup>30</sup> See *Elsmere Music v. Nat'l Broad. Co.*, 482 F.Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (holding the *Saturday Night Live* performance of *I Love Sodom* a legitimate parody of the song *I Love New York*). A pre-*Campbell* case, the district court declared: "[T]he 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." *Id.* at 746. But this is the very type of inquiry that seems disallowed under *Campbell*.

<sup>31</sup> "We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107." *Campbell*, 510 U.S. at 579 (emphasis added). Surely satire could be called "other comment or criticism."

<sup>32</sup> "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.*

<sup>33</sup> *Id.* at 581.

<sup>34</sup> *Id.*

<sup>35</sup> Satire does, however, have a "target," albeit not necessarily as exact as that of a parody:

Considered from a sufficient remove, the target of satire really never changes, for the satirist always attacks pretense and stupidity, no matter what their source, no matter what their disguise. However, since the nineteenth century, American and, to a lesser degree, European satire has regarded the classic vices with a tolerance, if not sympathy, that has debilitated the satiric energies.

Richard Bridgman, *Satire's Changing Target*, 16 C. COMPOSITION & COMM. 85, 85 (1965). The philosophical inquiry that no member of the Court acknowledges, much less ventures to address, is what effect, if any, the softening of the entire genre of satire has, or should have, on its degree of protection for allegation of copyright infringement.

### C. Artistry & Subtlety: Questioning the Merits of the Distinction

Once a definitive word on satire is issued, clients may be advised properly. In the meantime, the best advice is presumably to always directly target all works from which any elements—stylistic or otherwise—are being appropriated for the satire. This response, however, serves to curb the creation of new satirical works,<sup>36</sup> which are often rather subtle in their delivery. Often satire does indeed serve “useful” purposes, independent of the work(s) it draws from.

Traditionally, satire was, as [John] Dryden described it, for example, “a kind of poetry invented for the purging of minds.” It was assumed to be a kind of doctrinaire writing, dedicated to teaching moral lessons, a form of rhetoric, a means of persuasion which, unlike comedy, was not designed merely to entertain.<sup>37</sup>

And satire is almost always “speech” in the sense of trying to convey beliefs of the author: “Satiric indignation is aroused when we discover the incongruity of the comic in a situation which our moral judgment also condemns as unworthy, as indignus. It is this combination of the moral judgment with the comic experience which gives satire its distinctive character.”<sup>38</sup>

Unlike parody, satire is often much more believable and more likely to be confused as literal rather than ironic, because of the subtlety in which it is commonly guised. Often the satirist intends not to deride as the parodist, but is merely indignant towards the objects of their satire.<sup>39</sup> To maintain a “legitimate” look and feel, the satirist often employs stylistic allusion and reference to a great many works, usually of a similar topic or style, in order to lure the audience into the illusion of legitimacy. Many satirical works do not offer overt comment or criticism to all, if any, of the works from which they appropriate small aspects. Instead, they frequently rely on subtlety to further entrench the audience.

Once convinced of the “legitimacy” of the satire, the audience will

<sup>36</sup> Some may object to discussing the “creation” of new satirical works, arguing that satire is, at best, an appropriatory art form and is not creative in itself and certainly not a “useful Art[.]” U.S. CONST. art. I, § 8, cl. 8.

<sup>37</sup> Deer & Deer, *supra* note 29, at 712 (footnote omitted).

<sup>38</sup> Louis I. Bredvold, *A Note in Defence of Satire*, 7 ELH: J. ENG. LIT. HIST. 253, 260 (1940) (emphasis omitted).

<sup>39</sup> While the satirist by all means intends to *comment* on the works of others, the satirist does not necessarily intend an *attack*, as the parodist does:

“[D]erision,” which is assumed to be the precise equivalent of satire[,] . . . has not been a favorite with the satirists themselves; Juvenal did not say *fecit irrisio versum*, nor did Swift write in the epitaph he proposed for himself that he had gone *ubi saeva irrisio cor ulterius lacerare nequit*. The substitution debases them both; had they written so, they would have left us curious, but cold. The word they used was *indignatio*, which is nobler and touches deep sympathies within us. And the profound distinction between derision and indignation, which current theories either ignore or obscure, may be the clue to a more authentic explanation of our enjoyment of satire.

*Id.* at 258.

then begin to notice slight irregularities or peculiarities, ultimately gleaning the satirist's intended comment. This comment is usually directed towards a whole class of works, or society at large, instead of a specific work. To the satirist, the subtlety of his or her art simply attests to its power and effectiveness, and results in the intended audience looking inward to experience what the satirist intended.<sup>40</sup> To copyright law, however, this subtlety only blurs doctrinal lines and raises many more questions.<sup>41</sup>

#### D. Coda on the Parody-Satire Distinction: Conjuring Up

The Ninth Circuit originated and “has adopted the ‘conjure up’ test where the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to ‘recall’ or ‘conjure up’ the object of his parody.”<sup>42</sup> But, given the preceding discussion on the substantial overlap of parody and satire, one might readily conclude that *merely* recalling or conjuring up would seem to be the appliance of satire much more so than of parody.

Conjuring up, however, may or may not actually be part of a satire. And even if a satire does conjure up a particular object, this conjuring may be misleading or in truth conjure up a great many objects. Alternatively, and perhaps more frequently, a reference may be more than what “is necessary to ‘recall’ or ‘conjure up,’”<sup>43</sup> yet the excess can only be recognized when the entirety of the satire is realized. In other words, a satire might use many elements of a work, such that they are not obviously discerned, but nonetheless serve on the whole as an explicit and highly critical reference to the targeted work for an audience that can fully appreciate the satire and properly divine its intended meaning. Critical speech is a cornerstone of free speech jurisprudence.<sup>44</sup> Just because the object of the criticism is not

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<sup>40</sup> Jonathan Swift, the author of such satirical classics as *Gulliver's Travels* and *A Modest Proposal* said that “[s]atire is a sort of glass wherein beholders do generally discover everybody's face but their own . . . .” JONATHAN SWIFT, *THE BATTLE OF THE BOOKS* lxv (A. Guthkelch ed., Chatto & Windus 1908) (1697).

<sup>41</sup> Aside from doctrinal legal questions, one also wonders what, if any, reaction will be elicited by a clever satirist, as court decisions frequently animate an affected group in focusing their interests on change. See, for example, *Roe v. Wade*, 410 U.S. 113 (1973) (announcing the right to have an abortion) and the subsequent revitalization of the movement against abortion. Perhaps more than any other type of person, the satirist is very likely to respond in kind when perceived to be under attack:

Censorship, like manure, is malodorous, but it encourages growth. Nothing rouses the satiric temper faster than repression. When power seeks to smother expression of opinion, it produces a hatred which in turn produces that murder by indirection we identify as satire. The censored critic must resort to the oblique attacks of insinuation and irony, or of burlesque and parody, to make his point within legal boundaries.

Bridgman, *supra* note 35, at 86. The question of the most interest is precisely where such a legal boundary is to be drawn.

<sup>42</sup> *Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394, 1400 (9th Cir. 1997).

<sup>43</sup> *Id.*

<sup>44</sup> Indeed, this is an old common law precept of liberty: “To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”

understood by all in the audience should not disqualify it from protection; it certainly does not nullify its value.

### III. EXCUSE AND JUSTIFICATION

In many areas of the law, the terms excuse and justification<sup>45</sup> enter into the lexicon and are used to draw different judicial outcomes for fact patterns that share common acts, but differ in motivation or intention. Perhaps most commonly, the terms appear in the context of criminal law, as with pleas of insanity or self-defense, an excuse and a justification, respectively. More generally, however, the significance of the two terms is aptly summarized by Professor Wendy Gordon, just before she proceeds to apply the concept to copyright law:

In common lawyer's parlance, an act or omission is said to be "justified" if we would not object to its being emulated. An act or omission is said to be "excused" if we would not want it to be emulated, but we have reasons other than the merits of the act or omission itself to relieve the defendant of liability. Thus, one might say that "justifying" an act or omission goes to the merits of the defendant's choice, while giving the defendant an "excuse" does not go to the merits. Usually, an "excuse" arises because of some kind of institutional lack of fit between the circumstances and what the applicable law seeks to accomplish.<sup>46</sup>

By implementing a framework for the protection of satirical appropriation that is balanced against deference to the original creator's copyrights, the rationale of excuse and justification defenses may be able to remedy the current unsettledness in the fair use doctrine. At best, this mechanism may be cumbersome and fact intensive, but it will also serve to better protect free speech and this "valued form[ ] . . . of criticism [which] itself fosters the creativity protected by the copyright law."<sup>47</sup> After discussing how excuse and justification rationales function in other legal contexts, it will be easier to see how excuse and justification notions may be imported to copyright doctrine. Let us turn now to just such an investigation.

#### A. Excuse and Justification at Common Law, Generally

In commencing with any discussion of excuse and justification—and particularly in one that hinges on the difference between the two—one must address the inevitable question: what difference does it make? While some may argue that the distinction is one of the foundations of jurispru-

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WILLIAM BLACKSTONE, 4 COMMENTARIES \*152.

<sup>45</sup> As already discussed, Justice Souter, in *Campbell*, 510 U.S. 569, 581 (1994), references "justification" for satire. Presumably, Souter is using the word in the common sense. This article, however, will henceforth use the word justification only in its sense as a legal term of art, particularly as used in the context of the phrase "excuse and justification."

<sup>46</sup> Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 156 (2003) (emphasis omitted).

<sup>47</sup> E.g., *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

dence,<sup>48</sup> most everyone admits that the two terms are frustratingly confused and are, in some sense, only subtly different.<sup>49</sup> But the effect of this subtle, semantic difference is fully ingrained in our culture.<sup>50</sup> However, since the abolition of forfeiture in 1828, successfully raising either defense resulted in identical “not guilty” verdicts, thus contributing to the rise of synonymous, interchangeable usage of the terms excuse and justification.<sup>51</sup>

Murder, though historically a powerful example of why we make a distinction, is by no means the only instance in which the distinction is useful. A closer look at the merits, circumstances, and conditions of making the distinction, in the context of both criminal and tort actions, will illustrate why the excuse-justification distinction is valuable in copyright as well.

### 1. Excuse and Justification in Criminal Law

Notwithstanding the fact that excuse and justification became relatively synonymous early in the nineteenth-century,<sup>52</sup> more than a century later, commentators began to again realize that there was, in fact, some value in the distinction, even absent the risk of forfeiture.<sup>53</sup> The merits of the dis-

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<sup>48</sup> A very strong statement of this notion recently appeared in the literature:

Few concepts are as basic to the law—or religion, philosophy, and life, for that matter—as are “justification” and “excuse.” They are fundamental guideposts for how we live our lives and interact with others. In the context of the criminal law, justification and excuse are touchstones for prescribing and proscribing conduct generally, and for assigning guilt or innocence in the particular case.

Eugene R. Milhizer, *Justification and Excuse: What they Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 725 (2004).

<sup>49</sup> Indeed, this subtle, somewhat rhetorical difference may blur the commonality of the basic distinction when studying legal systems comparatively:

One way of addressing this semantic imprecision . . . is to focus on the paradigmatic circumstances that raise issues of justification and excuse—such as self-defense, duress, necessity, insanity, intoxication, etc.—to evaluate how selected legal systems addressed these situations, rather than to be bound by the words themselves. This circumstantially-based approach is especially useful given that many older legal systems never developed a coherent or comprehensive systems of defenses, in which particular and distinct defenses were organized into categories based on justification and excuse.

*Id.* at 732.

<sup>50</sup> And the difference was often assumed to be a matter of justice itself:

The old common law made such a distinction in the law of homicide. Some homicides, like that done by the public hangman in carrying out the sentence of the court, were justifiable. The law actually required the hangman to kill. He was doing no more than his gruesome duty required. Other homicides, though not amounting to crimes, like killing by misadventure, were merely excusable. Such a killing, far from being required by the law was, no doubt, universally regarded as deplorable; but it was not a crime. Both justification and excuse resulted in acquittal on a charge of homicide but, if the homicide was only excusable, under the common law, the killer's goods were forfeited.

J. C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 7 (1989).

<sup>51</sup> *Id.* at 7–8.

<sup>52</sup> See *supra* notes 50–51 and accompanying text.

<sup>53</sup> See, e.g., Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 245–246 (1982).

function include:

1. Excusable conduct may be resisted by a person who is threatened by it; but justifiable conduct may not be resisted.

2. Excusable conduct may not lawfully be assisted by another but justifiable conduct may be.

Some, but not all, of the commentators would add:

3. Where the facts provide a justification for the defendant's conduct, he is justified even if he is unaware of those facts; and where the facts are capable only of excusing, the defendant is not excused unless he is aware of those facts.<sup>54</sup>

Professor Gordon similarly distinguishes excuse from justification as “if only” factual limitations on applying the law and “inherent limitation” impediments to applying the law, respectively.<sup>55</sup> More specifically, she asserts that excuse should be applied in copyright contexts such as “market malfunction,” as when high transaction costs interfere with its consummation.<sup>56</sup> Justification, she proposes, should be applied where even a fully-functional market would not permit use, but other norms would favor use.<sup>57</sup> The example Gordon uses is the case of a true iconoclast, who will rarely, if ever, obtain permission, yet whose work is nevertheless valuable to society as a whole, despite its economic and perhaps reputational harm to the copyright owner of the work appropriated.<sup>58</sup>

Some copyright uses may end up being rather difficult to discretely compartmentalize into excuse or justification, much like many forms of alleged copyright infringement may not be neatly categorized as parody or satire at the exclusion of the other.<sup>59</sup> But confusing areas of overlap should not prevent us from applying an otherwise valuable heuristic for assigning liability, just as it does not do so in the criminal context, though the same problem frequently arises.<sup>60</sup>

The method of analysis proposed in this article fully recognizes the difficulty of rigid classifications of excuse and justification, and therefore proposes instead that a spectrum of protection be embraced—a somewhat amorphous scale of “value” that will include both categories. While the

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<sup>54</sup> SMITH, *supra* note 50, at 8.

<sup>55</sup> Gordon, *supra* note 46, at 152.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 152–53.

<sup>58</sup> *Id.* at 154.

<sup>59</sup> Even the novice author may blend satire and parody. John J. Ruskiewicz, *Parody and Pedagogy: Explorations in Imitative Literature*, 40 C. ENG. 693, 699–700 (1979). Discussing the work of a student assigned to write a parody in a college English course, his professor said of the piece, “The achievement is fully satiric although [the author] never abandons the peculiar concern of parody with individual form and subject matter.” *Id.* at 699.

<sup>60</sup> See Robinson, *supra* note 53, at 234–36, 239–40 (discussing the classification of the defenses of necessity, self-defense, and mistake as to a justification). Cf. Gordon, *supra* note 46, at 174–75 (discussing the Hustler/Jerry Falwell cases as an example of self-defense excuse); see discussion *infra* Part III.B.2.a.1.

criminal context may be fodder for the most paradigmatic examples of excuse versus justification, a closer look into how the distinction is handled in civil suits will provide us even more guidance in how to apply the distinction to copyright cases.<sup>61</sup>

## 2. Excuse and Justification in Tort Law

Common law tort doctrine has generally permitted excuse and justification as a defense.<sup>62</sup> However, the doctrine is more far-reaching than one might first think. For instance, although a violation of the right to exclusive use of one's personal or real property may be remedied solely through tort, the *defense against* such a violation may actually excuse criminal action, so long as the defensive action is *proportionate* to the violation.<sup>63</sup> In this context, this article's proposal to extend the fair use doctrine<sup>64</sup> may not be so radical as it first seems. Instead, it is simply the application of ancient common law principles<sup>65</sup> to modern issues.

## B. Excuse and Justification in Copyright

Professor Gordon advocates a "potential role" for the justification of self-defense applied to cases of parody where a work has harmed an individual or group of individuals.<sup>66</sup> But parody is not the only literary method by which harms are brought to task for the damage that they have done—a point that Professor Gordon does not seem to address.<sup>67</sup> However, it is usually only in a very abstract sense that the satirist is defending or self-remedying any harm, impending or actual. It is not here maintained, then, that Gordon's proposed self-defense excuse should simply be extended to satire generally. Rather, the present advocacy is one that reexamines the

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<sup>61</sup> Recall that copyright infringement is, after all, a tort, save the few fairly recent modifications to the Copyright Act that criminalize specific means of infringing, such as the Digital Millennium Copyright Act's prohibitions on trafficking in electronic circumvention devices. 17 U.S.C. § 1201 (2000). The emphasis on criminal law thus far in this article has not in any way been to advocate the further criminalization of copyright infringement, but merely to illustrate the rich depths of common law from which the essential distinction advocated here is drawn.

<sup>62</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 108–109 (W. Page Keeton, ed., West Publ'g Co. 5th ed. 1984) (1941).

<sup>63</sup> See Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 860–61 (1984) (footnotes omitted):

The common law generally recognizes a person's privilege to use reasonable force to defend his lawful present possessory interest in realty or chattels. This privilege excuses any batteries that the defender commits through use of reasonable force to protect his property from another person's tortious or criminal act. The justifications for this self-help remedy exemplify the cardinal concerns that underlie all tort self-help mechanisms.

<sup>64</sup> Much more broadly, in fact, than Professor Gordon has advocated thus far. See Gordon, *supra* note 46, at 151–56.

<sup>65</sup> "It turns out that the Roman system of pleading was most congenial to developing substantive guidelines that defined what excuses and justifications should be allowed to statutory violations." Richard A. Epstein, Lecture, *The Modern Uses of Ancient Law*, 48 S. CAL. L. REV. 243, 259 (1997).

<sup>66</sup> Gordon, *supra* note 46, at 174–76.

<sup>67</sup> See *id.* at 149–50 (Professor Gordon's focus is on self-defense).

fundamental nature of excuses and justifications, and then applies what is gleaned from the general nature of these defenses to the art of satire.

The satirist follows a long tradition of protesting, through their craft, what they believe has been inured in the masses as subtly as the message they seek to convey. One satirist's description of the craft is that "[w]e participate in the communion of those men—few though they may be—for whom things matter, and with them we share the faith in the validity of universal principles."<sup>68</sup>

The work of a satirist is idealistic,<sup>69</sup> and ideals are the very substance of what the First Amendment seeks to protect.<sup>70</sup> Lockean conceptions of natural rights to undo the effects of harm only further justify encouragement of a self-help remedy.<sup>71</sup>

Indeed, many argue that satire—especially in America—is continually losing the harshness that it once had:

Satire requires a strong and even arrogant sense of what is normal and right, but the many surface certainties by which the modern social world operates yield swiftly to profound and crippling doubts. With illness regarded as the normal condition in a post-Freudian world, the satirist is faced with the prospect of commanding a person suffering from an incurable disease to cure himself.

As a consequence, we still do not have in modern American satire either the icy, detached observer scornfully raking the idiocies of fools, or the enraged moralist launching headlong attacks against scoundrels. Rather, as observers have repeatedly noted, the American satirist tends to be tolerant, bemused, indulgent about what he exposes. His tone is affectionate, he wants to tease people into sense, although he is prepared to admit that his version of sense may ultimately be as foolish as yours.<sup>72</sup>

Should the satirist really be penalized merely for not being so brazen as the parodist, as current law would have us believe?

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<sup>68</sup> Bredvold, *supra* note 38, at 264. He continues, saying:

The judgment at the core of the feeling of indignation involves a conviction regarding righteousness; indignation is the emotional realization of righteousness and all great satirists, as has always been observed, have been moralists. Though their picture of mankind has been anything but cheerful, they have not yielded to the ultimate cynicism, the derision which is directed against the very concept of the good. For in the true satirist, derision is limited and tempered by moral idealism.

*Id.*

<sup>69</sup> See Susan W. Tiefenbrun, *On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh*, 11 CARDOZO STUD. L. & LIT. 35, 44 (1999) (contrasting 1940s Vichy France to the idealism of the Free French forces and Charles de Gaulle and describing Jean Anouilh's use of parody and satire to avoid censorship).

<sup>70</sup> "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>71</sup> Gordon, *supra* note 46, at 175–76.

<sup>72</sup> Bridgman, *supra* note 35, at 88–89.

### 1. Genres of Discursive Derivative Works and Their Protectability

Many works that communicate a message are restricted even though the United States holds “free speech” to be a fundamental right extended to all of its citizens, regardless of their viewpoint.<sup>73</sup> Even speech that advances little, if any, substantive dialogue—such as commercial speech—may be protected under the law.<sup>74</sup> Communication of non-commercial opinions, though, is held in even higher regard,<sup>75</sup> even when its content is most abominable.<sup>76</sup> This is so true that speech is often protected even notwithstanding real harms that may result from its delivery.<sup>77</sup>

Copyright law, however, is in some sense an aberration from our free speech values. In a content-neutral manner,<sup>78</sup> the government restricts speech that appropriates material, even slightly, from any work properly covered under the current shield of copyright law.<sup>79</sup> Surely there is no real basis for a constitutional challenge to copyright, especially since copyright is itself provided for in the Constitution.<sup>80</sup> Still, one must remember that copyright often pits these two provisions of the Constitution—free speech and copyright’s monopoly grant—against one another.<sup>81</sup> This article embraces the idea that the private privilege<sup>82</sup> will yield to the public need<sup>83</sup>—

<sup>73</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (holding a school district’s exclusion of a religious club from using a school building as viewpoint discrimination in violation of the First Amendment’s guarantee of free speech).

<sup>74</sup> See *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm.*, 447 U.S. 557 (1980) (reaffirming the First Amendment’s protection of commercial speech).

<sup>75</sup> *Id.* at 562–63 (clarifying that the protection for commercial speech is a somewhat “lesser protection” than is afforded other types of speech).

<sup>76</sup> See *Virginia v. Black*, 538 U.S. 343 (2003) (holding criminalization of cross-burning *with the intent to intimidate* acceptable, but that such intent cannot be imputed by the act, leaving at least *some* degree of protection possible for even this type of expression).

<sup>77</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that although the Communications Decency Act of 1996 had a valid interest in preventing harmful speech from reaching minors, its overbreadth rendered it unconstitutional).

<sup>78</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 193–94 (2003) (rejecting *inter alia* the claim “that the [Copyright Term Extension Act] is a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for such regulations.”).

<sup>79</sup> And this shield has expanded greatly in the last century. See *id.* at 194 (upholding the Copyright Term Extension Act and leaving open the status of future attempts to expand the terms of copyright protection).

<sup>80</sup> Indeed, *Eldred v. Ashcroft* expressly held CTEA’s extension of existing and future copyrights does not violate the First Amendment. *Id.*

<sup>81</sup> The *Eldred* court was very cognizant of this fact:

The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression. As *Harper & Row* observed: “[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”

*Id.* at 219 (alteration in original) (quoting *Harper & Row v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

<sup>82</sup> See Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. (forthcoming 2007) (arguing for an alternative model that classifies copyright as a privilege rather than a property right).

that copyright protection will not trump all expression of commentary on the protected material.

Indeed, this is exactly why the fair use doctrine exists, and is explicitly provided for in the Copyright Act.<sup>84</sup> Fair use is simply the acknowledgment that in certain instances, the value of freedom of speech is of greater moment than the value of copyright protection or promoting the creation of new works. The greatest problem with fair use, however, is that we are given no metric with which to make the requisite balance of interests.<sup>85</sup> This, then, is what this article seeks to do. Although the specific emphasis here is on satire, the proposed method of analysis could easily be extended to at least *some* other types of alleged fair use.

That the very nature of a work, notwithstanding its content, may have some influence on the fair use determination, may well be conceded without resorting to such rigid demarcations as Justices Kennedy and Souter's opinions in *Campbell* would lead us to believe are necessary.<sup>86</sup> To understand how the nature of a work may nonetheless be a crude proxy for its value as speech, we must start by fully understanding the differences between various genres of critical and annotative works.

#### a) Parody

Parody may be best described by the words of Justice Souter in *Campbell*: "Parody needs to mimic an original to make its point . . ." <sup>87</sup> Parody does in fact need a target, by its very definition. A parody will directly critique its target, generally mockingly or at least to humorous effect. Further, it is unambiguous that such a use can be classified as at least potentially protectable under current fair use jurisprudence.<sup>88</sup>

#### b) Satire

As previously discussed, satire has an unclear legal status and may often blur with parody,<sup>89</sup> which is afforded protection from charges of copyright infringement.<sup>90</sup> Unlike Justice Souter's description of parody, his de-

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<sup>83</sup> "No exercise of [a] private right can be imagined which will not in some respect, however slight, affect the public . . . . But subject only to constitutional restraint the private right must yield to the public need." *Nebbia v. New York*, 291 U.S. 502, 524-25 (1934).

<sup>84</sup> 17 U.S.C. § 107 (2000).

<sup>85</sup> *Campbell* offers nothing in the way of a test or formal steps of analysis, only glancingly mentioning factors to be considered, with no regard as to their relative importance. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

<sup>86</sup> *Compare id.* at 586 with *id.* at 598-600 (Kennedy, J., concurring).

<sup>87</sup> *Id.* at 580-81.

<sup>88</sup> *See id.* (holding that parody qualifies for protection as fair use under the Copyright Act and leaving questionable the status of satirical works under the law). *See also* *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Elsmere Music v. Nat'l Broad. Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980) *aff'd*, 623 F.2d 252 (2d Cir. 1980).

<sup>89</sup> *See supra* Part II.B.

<sup>90</sup> *Campbell*, 510 U.S. 569.

scription of satire as something that “can stand on its own two feet and so requires justification for the very act of borrowing[,]”<sup>91</sup> is not so universally agreed upon.<sup>92</sup> Commonly, in both literary scholarship and judicial holding,<sup>93</sup> satire is recognized as a justified use of the works that fall prey to it. Traditionally, satire does not so directly target the works it draws from as does its cousin, parody. Moreover, many readers or audience members may not even detect (readily, if at all) the appropriation of the style or subject matter at issue in the satire. Of course, such individuals are obviously not the audience for whom the satire was intended to affect.

Oblivious audience members ought not be a Typhoid Mary for the whole of the work, given that a work is substantially appreciated by those in the intended audience. People that fail to grasp the real meaning of a satire may even become outraged at the work as a result of their failure to detect its irony.<sup>94</sup> While outrage may result from parody as well, it is less likely to be a result of failing to discern the intentions of its creator as it is an outright offense to the creator's intention.

### c) Camp

Camp is a related but unique method of commenting on matter. It may employ parody, satire, or rest somewhere in between the two, perhaps as an eerie fascination with, or celebration of, its subject. A campy commentary or exhibition may be described as “so bad, it's good,” pretentious bad taste;<sup>95</sup> or the Yiddish word, “kitsch.”<sup>96</sup>

## 2. Existing Instances of Fair Use to Illustrate Application of Proposed Excuse and Justification Doctrine

By looking at how previous, seminal, relatively uncontroversial cases involving parody, satire, and camp have been decided, an examination can ensue as to just how such decisions may reconcile with the more general conception of excuse and justification in tort law. After examining the holdings of prior cases of fair use, we can then reexamine the cases under

<sup>91</sup> *Id.* at 581.

<sup>92</sup> *See supra* Part II.B.

<sup>93</sup> *Id.*

<sup>94</sup> No doubt many a reader of Jonathan Swift's *A Modest Proposal*—both when first published and today—were outraged at the “modesty” of his proposals. *See* Robert Phiddian, *Have you Eaten Yet? The Reader in A Modest Proposal*, 36 *STUD. ENG. LITERATURE* 603 (1996).

<sup>95</sup> Indeed, this is often intentional, even if self-deprecating to some degree, and may be a distinct marketing feature. For instance:

Roberts [the creator and chairman of Buca restaurants] describes the decor of the Buca restaurants as “kitschy,” “campy,” “tschochy,” and “Italian gaudy.” He states that the use of Italian decor elements in an excessive, humorous, irreverent way, so as to create a parody of a 1940's/1950's Southern Italian immigrant restaurant, characterizes Buca restaurants and defines the Buca trade dress.

*Buca, Inc. v. Gambucci's Inc.*, 18 F. Supp. 2d 1193, 1196 (D. Kan. 1998).

<sup>96</sup> Kitsch: “Art or *objets d'art* characterized by worthless pretentiousness; the qualities associated with such art or artifacts.” 8 *OXFORD ENGLISH DICTIONARY* 472 (2d ed. 1989).

the excuse and justification framework. Upon reexamination, we will be able to extrapolate a rudimentary fair use heuristic upon which there can be further particularized a more detailed analysis—what in Part IV will be introduced and proposed as “The Spectrum of Satirical Fair Use.”

a) Fair Use in Parody

As we know from *Campbell*, parodic works are well within what the Court will recognize as a fair use of copyrighted materials.<sup>97</sup> Parody is undertaken for innumerable reasons, yet the reason for the parody has no apparent effect on a court’s analysis under fair use.<sup>98</sup> Instead, it seems from *Campbell* and the circuit court decisions subsequent to and following *Campbell* (doctrinally), that any direct attack brings the issue under the penumbra of fair use,<sup>99</sup> where total freedom of speech overrides interests in protecting copyright owners.

(1) The Hustler & Jerry Falwell Cases

The general animosity between Jerry Falwell (along with his non-profit group, Moral Majority), and Larry Flynt, publisher of Hustler Magazine, was long-standing and very public.<sup>100</sup> However, a parodic exposé of Falwell, published in Hustler, brought their rivalry into the chambers of the United States Supreme Court.<sup>101</sup> This case is perhaps best known as a First Amendment case as it involved claims by Falwell of intentional infliction of emotional distress and defamation, coupled with Falwell’s status as a “public figure.”<sup>102</sup>

In addition to traditional First Amendment analysis, the lampoon, given its obvious falsity, comedic intent, and method of delivery, can be further shielded from liability under the fair use copyright defense of parody.<sup>103</sup> Although Hustler did not infringe any of Falwell’s copyrights in its publication, we do know—from *Campbell*—that parody is valued highly

<sup>97</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

<sup>98</sup> See *infra* note 133.

<sup>99</sup> See *supra* Part II.B.

<sup>100</sup> Larry Flynt, *The Porn King and the Preacher: How I Found Myself in Jerry Falwell’s Embrace*, L.A. TIMES, May 20, 2007, at M1.

<sup>101</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The lampoon purported to be a disclosure of Falwell’s first sexual experience and asserted, *inter alia*, that this had occurred in an outhouse and was between Falwell and his mother. The piece was immediately regarded by readers as exactly what it was: a parodic, ad hominem attack of Falwell, not readily misunderstood to be an assertion of fact. *Id.* at 48.

<sup>102</sup> Although the issue was not raised, the article at question was in fact a satire—or maybe just outright appropriation—as well, but of the Italian alcoholic beverage Campari, not Falwell or Moral Majority. Although the article was not “targeting” or “attacking” Campari in any way, it undoubtedly mimicked the distinctive Campari “First Time” ad campaign. The campaign involves publishing celebrity interviews about their first time drinking Campari, with the transparent double entendre of being about the interviewee’s first sexual experience. In Hustler’s lampoon of Falwell, the allusion to Campari ads was the explicit, albeit fabricated, message to be conveyed (or “conjured up”) to readers. See *id.*

<sup>103</sup> See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578–81 (1994) (holding parody acceptable for a fair use inquiry).

enough even to vitiate the otherwise inexcusable infringement of constitutionally provided-for copyright protection.<sup>104</sup> Parody—like any other type of speech—deserves protection, subject only to generally accepted limits on speech. And implicit in First Amendment doctrine is the idea that permissible speech will frequently excuse the resultant harms, at least to some extent.

Recall, as discussed already, that defenses to a tort can even excuse related, proportionate criminal acts.<sup>105</sup> *A fortiori*, such a defense could potentially excuse other related torts such as defamation or intentional infliction of emotional distress. In the tort of copyright infringement, and more specifically its defense of fair use, the tort itself is quite likely inextricably intertwined with First Amendment theory.<sup>106</sup> In addition to excusing Hustler from the harms it caused Falwell, the excuse framework can likewise excuse harms resulting from fair use—both are First Amendment issues.

The suit Falwell brought, however, was not the only public judicial spectacle between the two men. When Moral Majority began sending photocopies of a Hustler attack on Falwell to their entire mailing list, Flynt, of course, could not stand for such treatment, so Hustler sued Moral Majority for copyright infringement.<sup>107</sup> This case, too, was destined to become a legal chestnut, this time specifically on the issue of copyright fair use. But in the second round, it was Falwell who was vindicated.<sup>108</sup>

Although Flynt was allowed to publish his attacks on Falwell as free speech, the Ninth Circuit in *Hustler II* held that rebuttal of a copyrighted work by its subject could excuse the act of infringing.<sup>109</sup> Obviously, the successful fair use defense likewise excuses related economic harm done to the copyright holder. As Professor Gordon asserts, this appears to be a self-defense fair use justification.<sup>110</sup>

But let us now imagine a slightly enhanced version of this case, one where Falwell additionally brought personal harm to Flynt through his use of Hustler's copyrighted work. If such harm was not precluded by First Amendment doctrine, and found at trial to have actually existed, Falwell might still have an excuse. To see this, we must again return to general excuse and justification principles at common law from time immemorial.

Self-defense, either from physical or other harm, is a justification because, normatively, we want such behavior to be allowed as a matter of law.<sup>111</sup> We do not want further harms to occur, but if they are incident to

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104 *Id.* at 579–80.

105 *See supra* note 63 and accompanying text.

106 As was surely the case in *Hustler*, 485 U.S. 46.

107 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

108 *Id.* at 1156.

109 *Id.* at 1153.

110 Gordon, *supra* note 46, at 154.

111 *See SMITH, supra* note 50, at 8–9.

the self-defense and proportional to the action being defended against, we will excuse the retaliator.<sup>112</sup> Thus, in our hypothetical extension of the Flynt-Falwell facts, Falwell's self-defense *justification* might in turn *excuse* at least some measure of resulting emotional distress to Flynt.

## (2) The *Wind Done Gone* Case

Margaret Mitchell's novel, *Gone With the Wind*, has certainly been no stranger to criticism in recent decades.<sup>113</sup> Alice Randall chose to criticize Mitchell's work in a uniquely parodic way. Randall decided to tell another fictional story—one replete with the same cast of characters as Mitchell's tale. However, Randall's tale was told from the perspective of Mitchell's African-American characters. Controversy surrounding Randall's story, *The Wind Done Gone*, eventually reached the docket of the Eleventh Circuit Court of Appeals, where it was held that a fair use defense as parody was appropriate.<sup>114</sup>

Professor Gordon has highlighted *The Wind Done Gone* as another example of self-help or self-defense remedy to harms inflicted by a copyrighted work, like Falwell's distribution of Hustler page photocopies.<sup>115</sup> By Gordon's own admission, though, this view is subject to some criticism.<sup>116</sup> I would indeed object to the categorization of the work as one of self-defense.<sup>117</sup> Nevertheless, the work should receive some measure of protection, although by means of *excuse*, not *justification*.

Justifications, such as self-defense, are a class of activities that society deems appropriate, notwithstanding the harms they inflict.<sup>118</sup> And, at least to some degree, society encourages such actions.<sup>119</sup> However, this has an important consequence in a case such as Randall's and the harm she experienced.<sup>120</sup> Were so-called self-defense actions encouraged among mem-

<sup>112</sup> See *id.*; Gordon, *supra* note 46, at 152.

<sup>113</sup> See Hubert H. McAlexander, *Gone With the Wind* (Novel), NEW GEORGIA ENCYCLOPEDIA (Jan. 20, 2004) (Book Review), <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2427> (last visited Oct. 12, 2007).

<sup>114</sup> Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

<sup>115</sup> See Gordon, *supra* note 46, at 174–75; *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

<sup>116</sup> Gordon, *supra* note 46, at 175 n.72. Here Professor Gordon acknowledges that a personal attack self-defense privilege may not be available where whole groups are attacked, while nevertheless concluding “that the *Falwell* case could be treated as suitable precedent for the privilege of group self-defense.” *Id.*

<sup>117</sup> It seems that only relatively small groups could coherently self-defend, but certainly not a group as large as the one on behalf of whom Randall claims to speak. Gordon refers to and cites Randall's statement of harm, recalling that “Randall said she would rather have been ‘born blind’ if blindness would have enabled her to avoid reading Mitchell's novel, so great was the emotional harm she felt.” *Id.* at 174 (footnote omitted). But such exaggeration will get one further in the realm of literature than in most lawsuits.

<sup>118</sup> See *supra* Part III.A.

<sup>119</sup> See *id.*

<sup>120</sup> Although the harm mentioned seems rather hyperbolic, there can be no doubt that Randall and many others have experienced very real, albeit intangible, harm. See *supra* note 117.

bers of a large group, such self-defense could easily result in an aggregately overwhelming force against the original work, inflicting far greater harm to the original copyright holder (and perhaps others) than is proportionate to the harm experienced or threatened. The common law has always required “proportionality” in any type of justification defense.<sup>121</sup> If copyright begins actively employing a justification-based defense, there is no reason to bypass this basic standard.

Still, Randall's work should clearly fall within fair use boundaries because of the specific facts, intentions, and circumstances—the traditional rationale of granting *excuses* at common law. As the court duly noted, “there is no great risk that readers will confuse [*The Wind Done Gone*] for part of *Gone With the Wind*'s ‘ongoing saga.’”<sup>122</sup> Confusion and resultant economic harm will thus become part of the test proposed here.<sup>123</sup>

b) Fair Use in Satire: *Dr. Seuss Enterprises v. Penguin Books*

Courts have made clear—and rightly so—that what the appropriator calls a work is not determinative of its actual classification as satire or parody. The book *The Cat NOT in the Hat!*, for instance, included on its cover the qualification “A Parody,” though the Ninth Circuit Court of Appeals properly reclassified the work as a satire.<sup>124</sup> However, as this paper seeks to prove, satire can in fact be valuable and should be eligible for protection as fair use.

The book at issue was written in the distinctive style of Dr. Seuss, but was not overtly critical of Dr. Seuss.<sup>125</sup> Rather, it sought to retell the story of O.J. Simpson's trial for the Brown and Goldman murders.<sup>126</sup> Although Simpson was acquitted, many people felt that the acquittal was a travesty of justice.<sup>127</sup> The book, though comical, certainly expressed just such a sentiment. Although the book was clearly a satire, the defendants consistently referred to it as parody, perhaps in an attempt not to offend the Supreme Court's parody-satire distinction.

The court harshly criticized the satirist, finding the “fair use defense is ‘pure shtick’ and that their post-hoc characterization of the work is ‘completely unconvincing.’”<sup>128</sup> But what Penguin and Dove essayed was very much in keeping with what the satirist traditionally strives to do.<sup>129</sup> They

121 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (3d ed. 2001).

122 *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1281 (11th Cir. 2001).

123 See *infra* Part IV.A.2.

124 *Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997).

125 *Id.* at 1401.

126 *Id.* at 1396.

127 See generally Peter Charles Hoffer, *Invisible Worlds and Criminal Trials: The Cases of John Proctor and O.J. Simpson*, 41 AM. J. LEGAL HIST. 287.

128 *Dr. Seuss*, 109 F.3d at 1403.

129 See generally discussion *supra* Part II.C (discussing the craft of satire and its subtle delivery of often moral messages, in a tone of righteous indignation).

insisted that “[t]he Parody . . . transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns.”<sup>130</sup> Specifically, the author sought to “(1) comment on the mix of frivolousness and moral gravity that characterized the culture’s reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as *The Cat in the Hat* . . . .”<sup>131</sup> While the latter may well be nothing more than a post hoc rationale to conform to the demands of case precedent, the “mix of frivolousness and moral gravity” seems an obvious object of the work. This most certainly comes across in the book’s rhymes, such as:

One Knife?  
Two Knife?  
Red Knife  
Dead Wife.<sup>132</sup>

Perhaps a rather tasteless depiction, but tastelessness alone is not enough to quench First Amendment protection. Aestheticism is rarely an acceptable rationale for a court to adopt, particularly in the copyright context.<sup>133</sup>

It is hard to imagine much, if any, actual harm to Dr. Seuss Enterprises that could have resulted from the sale of *The Cat NOT in the Hat!*, yet the court denied protection because the piece was *satirical*.<sup>134</sup> The Ninth Circuit has acknowledged that “[p]arody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment.”<sup>135</sup> But we know from *Rogers*<sup>136</sup>—cited even by Justice Kennedy in his *Campbell* concurrence—that *both parody and satire* are valued for their social commentary.<sup>137</sup>

One must ask whether the court’s estimation that the work did not “hold his style up to ridicule” is too subjective a test.<sup>138</sup> Again emphasizing the subtlety of satire, the more proper inquiry for the Court to make should perhaps be to the availability of substitutable styles.

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<sup>130</sup> *Dr. Seuss*, 109 F.3d at 1402.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1401.

<sup>133</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 582 (1994).

Whether . . . parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.”

*Id.* (alteration in original).

<sup>134</sup> *Dr. Seuss*, 109 F.3d 1394.

<sup>135</sup> *Id.* at 1400.

<sup>136</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

<sup>137</sup> *Id.* at 310.

<sup>138</sup> *Dr. Seuss*, 109 F.3d at 1401 (emphasis omitted).

c) Fair Use in Camp: *Elvis Presley Enterprises v. Capece*

Camp may involve parody, satire, or lie in between the two.<sup>139</sup> But, like satire, camp will apparently remain unprotected if it lacks purely parodic elements. Put differently, direct attacks against a specific target are required to successfully defend any appropriation. To see an example of camp and its relation to parody, we will examine a set of facts from a case that did just that. Although it was actually a trademark (not a copyright) case, there is essentially no distinction between the two fields in the issue of parody and satire as fair use.<sup>140</sup> Moreover, this specific set of facts amply illustrates the problems of legally distinguishing and muddling parody and satire.<sup>141</sup>

Elvis Presley Enterprises, Inc. (EPE) holds all trademarks, copyrights, and publicity rights belonging to the Elvis Presley estate, including at least seventeen federal trademark registrations for "Elvis Presley" or "Elvis."<sup>142</sup> More than 700,000 visitors each year make the pilgrimage to the Elvis estate, Graceland.<sup>143</sup> In April 1991, Barry Capece, through a limited partnership called "Beers 'R' Us", opened a nightclub in Houston, Texas and called it "The Velvet Elvis."<sup>144</sup> Details of the establishment, from the court opinion, paint a vivid picture. There were velvet paintings of celebrities and female nudes; a bare-chested Mona Lisa; lava lamps; cheap ceramic sculptures; beaded curtains; vinyl furniture; Playboy centerfolds covering the men's room walls; and menu offerings such as "Love Me Blenders" (a frozen drink), peanut butter and banana sandwiches, and "Your Football Hound Dog" hotdogs.<sup>145</sup>

Although making explicit reference to Elvis, it is unclear whether Elvis was the direct target of parody or was merely used to represent the owners' perceived tastelessness of the entire era. There are no doubt many other plausible rationales for the use of an Elvis theme. The Fifth Circuit Court of Appeals, however, in reversing the district court, held a likelihood

<sup>139</sup> See *supra* Part III.B.1.c.

<sup>140</sup> See Steven M. Perez, *Confronting Biased Treatment of Trademark Parody Under the Lanham Act*, 44 EMORY L.J. 1451.

Although distinct as legal theories, there is no evidence to suggest that copyright and trademark laws require different valuations of parody. Both require a level of transformation of the original to make their point. Often the same subject can be parodied with both trademark and copyright. . . . The opinion seems to echo the notion that trademark law may not be the proper remedy for expressive parody if there is no threat of market substitution . . . .

*Id.* at 1496–97.

<sup>141</sup> The Supreme Court even quoted a trademark case in *Campbell*: "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." *Yankee Publishing v. News America Publishing*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) quoted in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 583 (1994).

<sup>142</sup> *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 191 (5th Cir. 1998).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 192.

of confusion with EPE.<sup>146</sup> Thus, the campy Velvet Elvis nightclub was deemed not privy to the fair use defense, resulting in an injunction against its continued operation.<sup>147</sup>

Put simply, the district court had it right,<sup>148</sup> at least if fair use cases were analyzed according to the model suggested in this article. The district court found that the parodic message, among other things, was enough to withstand the Lanham Act (trademark) consumer confusion analysis.<sup>149</sup> A colorful cadre of “expert” consumers of Elvis paraphernalia not only provide evidence but also seem to have quintessential reactions to parody and satire, as discussed above:

In an attempt to prove actual confusion, Plaintiff offered the testimony of four witnesses. Three of the four witnesses were members of the Elvis Presley fan club in Austin, Texas. These fan club members were all women ranging in age from mid-forties to early seventies. They had been shown samples of ads for “The Velvet Elvis” one month before trial and had the opportunity to visit the bar the day before testifying. The first woman, an Elvis fan since age seven and a five time visitor to Graceland, testified that she was *offended by the nude paintings of women and the audacity of the bar’s owner to hang these paintings in the same room with pictures of Elvis*. The second woman, who had an extensive collection of Elvis memorabilia and had been to Graceland twenty-five times, testified that she was also *not pleased to see Elvis’s memorabilia in a bar, much less a bar that openly displayed portraits of nude women*. The third woman, who was the President of the Austin Elvis Presley Fan Club and claimed to have been to Graceland between forty and fifty times, was likewise *offended by the nudity in the decor and was disappointed to have Elvis’s name associated with an establishment of this type*. The fourth witness was a man who had been to both “The Velvet Elvis” bars. He testified that when first visiting the original “The Velvet Elvis,” he initially thought he might be able to buy some Elvis merchandise. He *quickly realized*, though, upon closer inspection of the bar’s decor, *that the bar had nothing to do with Elvis Presley*. Consistently, each witness acknowledged that once inside “The Velvet Elvis” and given an opportunity to look around, each had no doubt that the bar was not associated or in any way affiliated with E[lvis Presley Enterprises].<sup>150</sup>

After considering this and other evidence, the district court properly realized the value of the satirical statement being made.<sup>151</sup> Their opinion did not give carte blanche authorization to use Elvis’ marks, however. They found confusing and enjoined the actual advertisement used to promote the bar.<sup>152</sup> But allowing the bar to exist was a great, albeit ultimately

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<sup>146</sup> *Id.* at 204.

<sup>147</sup> *Id.* at 207.

<sup>148</sup> *Contra id.* at 196, 207.

<sup>149</sup> *Elvis Presley Enters. v. Capece*, 950 F. Supp. 783, 796 (S.D. Tex. 1996), *rev’d*, 141 F.3d 188 (5th Cir. 1998).

<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *See id.* at 797–98.

<sup>152</sup> *Id.* at 797.

Pyrrhic, victory for fair use by the district court. The court of appeals issued the fatal blow to fair use and—worse yet—further muddled the apparent legal distinction between parody and satire.<sup>153</sup>

#### IV. THE SPECTRUM OF SATIRICAL FAIR USE: JUDICIAL ADMINISTRATION

So far, this article has discussed the general, then applied it to the specific. To wit, common law notions of excuse and justification have been discussed at length, and then used to re-reason the holdings in actual cases in which the fair use defense has been raised. At this point, however, we reach the climax of our story and, remembering everything learned so far, embark on the derivation of a new analytical framework with which to examine fair use defense of satire. The result will more closely tailor the goals of fair use protection by restricting protection for what might otherwise be protected as parody, while allowing for many works that would currently be denied protection (depending on the court),<sup>154</sup> as satirical works that do not contain purely parodic elements.

By seeing how the excuse and justification paradigm might have been applied in the cases already discussed, we have drawn out what factors emerge as powerful indicia of the appropriateness of fair use. For instance, in the *Wind Done Gone* discussion, it emerged as critical that Randall's work would not easily be confused or result in much economic harm to the original, such that the court was willing to *excuse* (though not *justify*) the appropriation of Mitchell's characters.<sup>155</sup>

In this section, we will use the insights gained in earlier sections, organizing them into a multi-factor test with which to examine claims of fair use. The factors will be aligned—or “ranked,” if you will—in some rough approximation of importance. Conceptually, the factors might be thought of as comprising a spectrum (from greater to less importance) that warrants extension of the fair use defense.

There is no doubt that the alleged user bears the burden in any claim of fair use. “Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist.”<sup>156</sup>

##### A. Substantive Factors to be Considered (Five-Factor Test)

We have looked at examples of appropriated use in parody, satire, and camp. Each have been reanalyzed under the excuse and justification rubric.<sup>157</sup> By looking at these cases, the re-reasoning performed here, and the

<sup>153</sup> See *Elvis Presley Enters.*, 141 F.3d 188.

<sup>154</sup> See *supra* Part II.B.

<sup>155</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1281 (11th Cir. 2001) (Marcus, J., concurring).

<sup>156</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring).

<sup>157</sup> See *supra* Part III.B.2.

general common law principles of excuse and justification, we have been able to determine the factors of greatest import. These elements, discussed individually below, are the backbone of the proposed method of fair use analysis. These factors are not designed to conflict or challenge any of the statutory considerations; they are intended merely to provide further guidance on the application of general common law principles of excuse and justification<sup>158</sup> in conjunction with statutory protection for fair use. The factors here need not be in lieu of § 107; the two may (and should) be used in conjunction.

### 1. Subjective Intent of Infringer

If the paradigm of excuse and justification is in fact a proper manner in which to analyze fair use, then it is only proper to likewise take into account the subjective intent of the party accused of the tort.<sup>159</sup> After all, even in criminal law, the intent can excuse,<sup>160</sup> or at least lessen the penalty for an otherwise inexcusable act.<sup>161</sup> An example is the person that reasonably, while nonetheless inaccurately, appraises a danger in a situation and acts in what is believed to be self-defense. Such a person might be acquitted, but will almost certainly be punished less severely than would normally be required for the act committed. Similarly, while it should by no means be determinative, the intent of the appropriator of a copyrighted work seems to be a quite logical consideration.

### 2. Manifested Effects on the Market

Market effects—in any market—are complex phenomena. They may or may not be readily observed and are only occasionally as predictable as one would hope. But they, too, are an important consideration. It is important to remember that effects will arise both intentionally and unintentionally and may either hurt or help the appropriated work. This part of the analysis must be performed with the utmost diligence.

When the appropriator has intended to harm the sales of the appropriated work, there can be little justification for sustaining fair use if the appropriator's work is, or can be, a substitute for the original.<sup>162</sup> However, even where the intent is to do harm, when this intent arises in order to remedy another harm, it may still be acceptable, such as in the *Wind Done Gone* case.<sup>163</sup> Intent should not be imputed merely by the fact of a com-

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<sup>158</sup> See *supra* Part III.A.

<sup>159</sup> See *supra* Part III.A.2.

<sup>160</sup> See *supra* Part III.A.1.

<sup>161</sup> See *id.*

<sup>162</sup> “In his discussion of the fourth factor, Souter noted that a parody, by commenting on the original, serves a different market function than that found in the original.” Jeremy Kudon, Note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 596 (2000). Exploitation or other appropriation of goodwill is certainly not the type of use to be encouraged.

<sup>163</sup> See *supra* Part III.B.2.a.2.

mercial use.<sup>164</sup>

Profits earned do not mean that economic harm to the owner of the appropriated work was intended.<sup>165</sup> For instance, works critical of another that are sold for a profit are still entitled to some fair use defense, even though they may harm sales of the works they critique.<sup>166</sup>

### 3. Injury

Injury is certainly an important factor. But injury is not only a consideration of the harm done to the copyright owner. Even more important when operating in the excuse and justification framework, injury to those other than the owner—that is, injury caused by the copyrighted material—can give rise to a strong defense against infringement, as in *The Wind Done Gone*.<sup>167</sup>

### 4. “Value” of the Satire

Copyright itself exists in order to promote the “useful arts.”<sup>168</sup> We have also seen that parody and satire are valid forms of criticism and commentary.<sup>169</sup> That being understood, though, it is reasonable to conclude that not all parody or satire is as “useful” as others. Thus, in determining the “value” of a satire, it is important to first make two distinctions: commentary versus criticism. Commentary is often directed at a “general style, the genre of art to which [a work] belongs, or society as a whole . . . .”<sup>170</sup> Criticism, on the other hand, almost always “target[s] the original,” which is what *Campbell* tells us is required to qualify as parody.<sup>171</sup> Thus, in extending the penumbra of fair use to satire, it is perfectly consistent with *Campbell* to give greater weight to satire that is critical in message.<sup>172</sup>

By a parity of reason, we can make a similar distinction *within* the two classes of commentary and criticism. That is, greater weight ought to be attributed to commentative works that comment on (in order of least to strongest presumption of value): (1) society at large, (2) a class or group of persons, (3) a class or genre of copyrighted works, (4) a specific work

<sup>164</sup> “[T]he Court of Appeals [in *Campbell*] faulted the District Court for ‘refusing to indulge the presumption’ that ‘harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses.’” *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 574 (1994) (citation omitted).

<sup>165</sup> “Fully evaluating the [purpose and character] requires more than just examining the use’s degree of commerciality.” William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 684 (1993).

<sup>166</sup> *Id.* at 684–85.

<sup>167</sup> See discussion of *Hustler Magazine v. Moral Majority* and *The Wind Done Gone*, *supra* Part III.B.2.a.1–2.

<sup>168</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>169</sup> See *supra* note 25 and accompanying text.

<sup>170</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 597 (1994) (Kennedy, J., concurring).

<sup>171</sup> *Id.* at 597–98.

<sup>172</sup> *Id.* at 599.

and/or its creator. The same hierarchy should likewise be applied to critical works. And the hierarchy is again consistent with *Campbell*'s insistence upon a definite target.<sup>173</sup> While this type of valuation allows broader protection, it still favors works that specify a target, but makes no bright line distinctions.

#### 5. Relevance or Necessity of Appropriated Work to the Satire

Necessity is perhaps the hardest and most subjective determination to make. But one can intuit that commentary on society at large is less likely to necessitate appropriation of any one work than commentary on a class or style of works. This element of the test is one that allows for a totality of circumstances type analysis. While subjective, it merely supplements the other factors we have looked at.

### V. THE SIGNIFICANCE AND IMPACT OF THE PROPOSED METHOD

The method proposed in this article truly is a modest proposal. The method would incorporate and refine existing Court doctrine, leading to greater consistency and ability to exercise First Amendment speech rights. The proposed analysis would result in a lesser protection for satire than that afforded to parody, yet in some sense a shadow of parody's protection.

Excusing and justifying satire would expand the scope of fair use commentary and criticism, but this cost would be far exceeded by the value inherent in protecting discursive speech. Copyright and free speech frequently collide. Such collision results in either copyright or free speech confining or restricting the other. Unfortunately, as the law stands currently, satire is all too often falsely imprisoned. Hopefully the test proposed here gives judges—the dutiful jailers—the keys to free satire.

### CONCLUSION

The “Spectrum of Fair Use” analysis has qualities that many might see as a fatal flaw: uncertainty, subjectivity, and arbitrariness. But so does the current standard under *Campbell*. Relying on the common law pedigree of excuse and justification simultaneously lends credibility, while necessarily importing case-specific and highly fact-intensive analysis.<sup>174</sup> But at least the satirist will have a way to deliver modest proposals without having to become a parodist.<sup>175</sup>

A commenter on a draft of this paper rightly questioned the self-proclaimed “modesty” of the proposal herein, intimating that (not unlike the best satirists) your humble author is masquerading a radical idea in the guise of modest doctrinal proposals. Perhaps so, perhaps not; I leave that

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<sup>173</sup> *Id.* at 597.

<sup>174</sup> *See supra* Part III.

<sup>175</sup> *See supra* text accompanying note 72.

2007]

*Gulliver's Trials*

211

to readers to decide.

*Gulliver's Travels* leads its readers through stirring journeys.<sup>176</sup> For those that wish to opine on their meaning, that process can likewise prove exciting. But Swift's contemporary intellectual compatriots face a very different adventure if they satirize, for they face a new Brobdingnag:<sup>177</sup> the courtroom. This proposal is no way intended to turn satirists into the Brobdingnagians of copyright law, but it is most certainly intended to help satirists rise above their current status under the law as tiny Lilliputians and savage Yahoos.<sup>178</sup>

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<sup>176</sup> JONATHAN SWIFT, *GULLIVER'S TRAVELS* (Walter J. Black, Inc. 1943).

<sup>177</sup> *See id.*

<sup>178</sup> *See id.*