Diametrically Opposing Viewpoints: Why Polar Opposites Should Not Attract the Parody Label Under the Fair Use Exception to Copyright Infringement

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NOTES

DIAMETRICALLY OPPOSING VIEWPOINTS: WHY POLAR OPPOSITES SHOULD NOT ATTRACT THE PARODY LABEL UNDER THE FAIR USE EXCEPTION TO COPYRIGHT INFRINGEMENT

Robyn M. Flegal

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I. INTRODUCTION

Three-quarters of a century ago, Judge Learned Hand observed that "the issue of fair use...is the most troublesome in the whole law of copyright."¹ Although the Supreme Court handed down influential decisions regarding the fair use defense to copyright infringement,² and though the United States Code sets forth four fair use balancing factors,³ questions about the proper scope of the fair use defense remain.⁴ Seventy-three years after Judge Learned Hand’s telling remark, the "issue of fair use"⁵ and its application continue to plague the legal system.

In June 2012, the United States District Court for the Central District of California controversially held that a pro-life organization’s tendentious and disturbingly graphic use of a family planning clinic’s counseling video was a protected parody under the fair use exception to copyright infringement.⁶ In Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform, the defendant spliced images of aborted fetuses and abortion procedures throughout the original counseling video as a way to support a diametrically opposite viewpoint.⁷ After determining that the character of the video was parodic, the court applied the remaining fair use factors to conclude that the new video was protected as fair use.⁸

Part II of this Note will begin with a discussion of the constitutional background of copyright law and the statutory development of the fair use defense to copyright infringement. Part II will then discuss the protections given to parodies as a form of criticism and comment under the umbrella of fair use by focusing on the influence and application of the Supreme Court’s

¹ Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).
³ See 17 U.S.C. § 107 (2012) (setting forth the four fair use factors, which 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.").
⁵ Dellar, 104 F.2d at 662.
⁷ Id. at 967.
⁸ Id. at 970–82.
decision in *Campbell v. Acuff-Rose Music, Inc.* Finally, Part II will discuss parodies and the fair use defense as applied to diametrically opposing viewpoints, such as the viewpoints presented in the *Northland* decision.

Part III of this Note begins by criticizing the Court's liberal labeling of potentially infringing works as criticism. Part III will then discuss instances in which courts, specifically the *Northland* court, correctly construed diametrically opposing viewpoints as criticism under the first fair use factor. Next, this Note will address the problems presented when opposing viewpoints are categorized as parodies, eliminating a need for humor in the parody analysis. Finally, this Note concurs with the outcome of *Northland* under a different analytical approach.

II. BACKGROUND

A. THE CONSTITUTIONAL UNDERPINNINGS OF COPYRIGHT LAW

The United States Constitution confers upon Congress the power to grant "authors and inventors the exclusive right to their... writings and discoveries" for a limited time. Accordingly, Congress extends copyright protection to original works of authorship in any tangible medium, including internet videos as audiovisual works. A copyright vests in the author at the moment the work is created and fixed in a tangible form.

If copyright protects an author's creation, she possesses the exclusive right to reproduce and copy the original work, to prepare derivative works based upon the original work, and to sell, rent, lease, or lend the copyrighted work to the public. These rights of exclusivity provide an economic incentive for authors to create and disseminate their expressive works. The limited monopoly also promotes public access to creative works that would likely not exist without copyright protection.

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10 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).
11 See 17 U.S.C. § 102(1) (2012) ("Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device... including... motion pictures and other audiovisual works... ").
12 Id. § 102; see also id. § 101 (defining when "[a] work is 'created' ").
13 See id. § 106 (enumerating the exclusive rights associated with a copyright).
14 See LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 342 (Ver. 3.0 2012) (discussing the utilitarian theory behind copyright protection).
To ensure an effective limited monopoly system, copyright owners may protect their exclusive rights through infringement actions. For an author with a protected copyright interest to claim copyright infringement, he or she must show both ownership of a valid and registered copyright and that the alleged infringer actually copied original parts of the author’s expression.

B. THE FAIR USE DEFENSE TO COPYRIGHT INFRINGEMENT

An alleged infringer of an author’s copyright can seek recourse from accusations of infringement by claiming the fair use defense set forth in 17 U.S.C. § 107. This provision provides an exception to infringement when the work is used “for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research.” To determine whether the fair use defense can save an otherwise infringing use, courts consider the following four factors: (1) the purpose and character of the infringing use; (2) “the nature of the copyrighted work”; (3) “the amount and substantiality of the portion used in relation to the work as a whole”; and (4) the degree to which the infringing work affects the market value of the copyrighted material. Traditionally, courts considered this defense to be a privilege vesting for a person, separate from the owner of the copyright, to use the copyrighted material in a reasonable fashion without the copyright owner’s consent.

C. PARODY AS FAIR USE

The Merriam-Webster Dictionary defines parody as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.” The U.S. Supreme Court, however, has held that parody is a genre of work that can invoke the fair use exception to copyright infringement. The Campbell v. Acuff-Rose Music, Inc. opinion, an influential fair use decision rendered by the Supreme Court, thoroughly discussed the

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19 Id.
20 Id.
application of parody as fair use. In *Campbell*, the Court recognized that, similar to "less ostensibly humorous forms of criticism," parody provides a social benefit by casting new light upon the copyrighted work and creating a new work in the process of parodying. The Court further emphasized that "the heart of" true parody lies in the potentially infringing author's use of segments of the copyrighted work to comment on that original work.

In *Campbell*, the controversy surrounded the song, *Oh, Pretty Woman*, written by Roy Orbison and William Dees. Over twenty years after the debut of the song, 2 Live Crew, a then-popular rap group, changed the original song to include crude lyrics as a way to produce a humorous rap version of Orbison and Dees's work. The Court applied the four-factor framework set forth in 17 U.S.C. § 107 to determine whether 2 Live Crew's use of the song was eligible for a fair use defense as parody.

1. The Purpose and Character of the Use. The Court analyzed the initial prong set forth in § 107(1) regarding "the purpose and character" of the infringing use, including any commercial nature, by asking whether the new work was transformative of the original creation. While a transformative nature is not mandatory for a finding of fair use, the remaining factors become less consequential when a potentially infringing work adds new and transformative content.

In *Campbell*, the Court explicitly stated that under copyright law, "the heart of any parodist's claim to quote from existing material[] is the use of some elements of a prior author's composition to create a new one that, at least in

24 Id. at 579–94.
25 Id. at 579.
26 Id. at 580.
27 Id. at 571–72. The rights to Orbison and Dee's song, *Oh, Pretty Woman*, were subsequently assigned to Acuff-Rose Music, Inc. Id. at 572.
28 For example, the new lyrical selections by 2 Live Crew included the following changes to the lines of the song: "[Big hairy woman] You need to shave that stuff..."; "[Big hairy woman] All that hair, it ain't leg-i-i-it/['Cause you look like Cousin I-I-I-I-It]...", "[Two-timin' woman] You was out with my boy last night/[Two-timin' woman] That takes a load off my mind/[Two timin' woman] Now I know the baby ain't mine..." 2 LIVE CREW, *Pretty Woman*, on AS CLEAN AS THEY WANNA BE (Luke Records 1989); see also *Campbell*, 510 U.S. at 595 app. B.
29 *Campbell*, 510 U.S. at 572.
30 Id. at 576–94.
32 Id. at 579 ("The central purpose... is to see... whether the new work merely 'supersede[s]' the objects' of the original creation... or instead adds something new, with a further purpose or different character, altering the first with a new expression, meaning or message..."
33 Id.
part, comments on that author’s works.”34 However, the defendant’s claim of fair use fades if the alleged infringer’s commentary lacks components of criticism and is instead used for attention-grabbing purposes or to avoid creating an original work.35 The Court reasoned that it should not presume parody is unquestionably fair,36 asserting that parody must be fully analyzed under the microscope of all four fair use factors.37

The Court further stated that whether the parody was in good taste or bad taste was irrelevant to the fair use analysis.38 Instead, a fair use parody defense may be raised so long as the “parodic character may reasonably be perceived.”39 Tipping the balance further in favor of the defendants on the first fair use factor, the Court held that the lewd lyrics of 2 Live Crew’s work “could reasonably be perceived as” commenting on or criticizing the original by contrasting the innocent nature of the 1964 song with the “street life” of 1989.40 The Court reasoned that the “reference and ridicule” included in a parody distinguishes parodies from conventional forms of transformative comment and criticism.41

Having determined that 2 Live Crew’s use was a parody, the Court then addressed the commercial nature of the new work.42 Rejecting the lower court’s presumption against extending fair use protection to commercial works, the Court reasoned that a commercial purpose, which they found to be the purpose in this case, is merely one element to consider in the analysis of the first factor.43 However, they recognized that a commercial use often weighs against a finding of fair use.44

2. The Nature of the Copyrighted Work. The second factor of the fair use balancing test, “the nature of the copyrighted work,”45 was not thoroughly addressed by the Court in Campbell46 because the factor was not essential to the analysis. The original copyrighted musical creation was a well-known, fanciful, and valuable expressive work.47 Such works undoubtedly fall within the “core

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34 Id. at 580.
35 Id.
36 Id. at 581.
37 Id.
38 Id. at 582.
39 Id.
40 Id. at 583.
41 Id.
42 Id. at 583–85.
43 Id.
44 Id. at 585 (quoting Harper & Row, Publ’rs, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).
46 Campbell, 510 U.S. at 586.
47 Id.
of intended copyright protection," thus making it more difficult to establish fair use of the highly valuable work. However, parodies almost always copy famous works, making this factor the least helpful in separating parody from infringement.

3. Amount and Substantiality. The third fair use factor turns upon "the amount and substantiality of the portion [of the copyrighted material] used in relation to the copyrighted work as a whole." To apply this factor, courts should conduct a quantitative and qualitative review of the amount of the copyrighted materials used. The Court acknowledged that the use of a substantial portion of the copyrighted work could negatively affect any transformative nature and could increase the market harm to the original. If a new work consists primarily of the original work, the new work is more likely a "merely superseding use" acting as a substitute. In contrast, parodies tend to receive different treatment under the third factor.

In , the Court held that a parody must copy at least enough of the original to make the criticism and comment recognizable by the audience. The Court reasoned that 2 Live Crew's use of the original song was necessary to conjure up the original and to communicate the intended message. In this instance, the use was not excessive because 2 Live Crew's creation consisted of its own lyrics and sounds, and the new song was not "a verbatim 'copying' of the original." The Court weighed in favor of the defendants because the lyrical parody was substantial despite any copying.

4. Effect on the Market for the Original. Finally, the Court considered the fourth fair use factor, "the effect of the use upon the potential market for the copyrighted work," rejecting a presumption of future harm to the market for the copyrighted material. The fact that 2 Live Crew's work was for

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48 Id.
49 Id.
50 See Wm F. Patry, Patry on Copyright § 10:141 (2013) (discussing the qualitative and quantitative analysis of amount and substantiality).
52 Campbell, 510 U.S. at 587–88.
53 Id.
54 Id. at 588.
55 Id.
56 Id. at 588–89 ("If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.").
57 Id. at 589.
58 Id.
60 Campbell, 510 U.S. at 590–91.
commercial gain was insufficient for a finding of market harm to the original.\(^{61}\) When a potentially infringing use has a lesser effect on the copyright owner's expectation of financial gain from his or her limited monopoly, a lesser showing of public benefit is needed to justify the allegedly infringing use.\(^{62}\) The Court opined that a parody typically serves a different market than the original work.\(^{63}\) The Court differentiated between criticism that suppresses demand for the work, such as a negative review, and copyright infringement, which "usurps" demand by acting as a market substitute for the original.\(^{64}\)

As explained in *Campbell*, the market harm for an original work includes the harm to the market for derivative works in addition to the harm caused to the original work itself.\(^{65}\) The lower court considered whether the defendant's use adversely affected the market for the original work, but the parties did not present evidence regarding the effects on the potential rap-derivative market.\(^{66}\) Consequently, the Supreme Court in *Campbell* remanded the case for determination on the fourth factor.\(^{67}\)

D. FAIR USE AND PARODY AFTER *CAMPBELL*

In light of the *Campbell* decision, the § 107 fair use defense has been applied in a myriad of cases to determine whether a potentially infringing use is indeed a parody.\(^{68}\) For example, the court in *SunTrust Bank v. Houghton Mifflin Co.* relied upon *Campbell* to hold that a derivative work was a parody.\(^{69}\) In *SunTrust*, the book *Gone With the Wind* by Margaret Mitchell\(^{70}\) was allegedly infringed by *The...*
“Wind Done Gone,” by Alice Randall.\(^7\) The determinative question with regard to Randall’s fair use defense claim was “to what extent a critic may use a work to communicate her criticism of the work without infringing the copyright in that work.”\(^8\) To answer this question, the SunTrust court appealed to the purposes underlying the Copyright Clause to the Constitution.\(^9\) The Copyright Clause’s relationship to the First Amendment emphasizes that the free flow of criticism and commentary are among the most important policy considerations for a finding of fair use.\(^10\)

The SunTrust court addressed the “somewhat vague” definition of parody in Campbell.\(^11\) This vagueness stemmed from Justice Souter’s initial assertion in Campbell that a parody is intended for “comic effect or ridicule”\(^12\) and his subsequent references to parody as a comment upon an original work.\(^13\) However, given the Campbell court’s warning against judging the quality of a parody, the Eleventh Circuit chose to apply the broader view suggested by Justice Souter.\(^14\) The SunTrust court thus refrained from explicitly requiring humorous character to establish parody.\(^15\)

Under this broad view, the court readily concluded that the allegedly infringing novel possessed a parodic element, as the author sought to comment upon and criticize Mitchell’s depiction of slavery and the Civil War South portrayed in Gone With the Wind.\(^16\) Upon determining that the work possessed the requisite parodic character to raise a fair use defense through parody,\(^17\) the court analyzed and balanced the four fair use factors set forth in § 107 in light of Campbell.\(^18\)

The first factor balanced in favor of fair use because the work’s highly transformative nature outweighed its underlying commercial purpose.\(^19\) As in Campbell, the court brushed aside the second factor noting that the nature of the

\(^{7}\) Id.
\(^{8}\) Id. at 1260.
\(^{9}\) Id. at 1268.
\(^{10}\) Id.
\(^{11}\) Id.
\(^{12}\) Justice Souter also cited to Elsmere Music, Inc. v. Nat’l Broad. Co., 623 F.2d 252, 253 (2d Cir. 1980), aff’d 482 F. Supp. 741 (S.D.N.Y. 1980), in his discussion of the need for a parody to conjure up the original work. The Second Circuit in Elsmere also declared that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody….” Elsmere Music, 623 F.2d at 252–53.
\(^{13}\) SunTrust, 268 F.3d at 1268.
\(^{14}\) Id. at 1268–69 (citing Campbell v. Acuff-Rose, 510 U.S. 569, 580 (1994)).
\(^{15}\) Id.
\(^{16}\) Id. at 1269.
\(^{17}\) Id. at 1268.
\(^{18}\) Id. at 1269–76.
\(^{19}\) Id. at 1269–71.
copyrighted novel warranted a high degree of protection from copying, but that parodies inevitably comment on widely known, expressive works. Under the third factor, the court reasoned that extraneous copying—i.e., using material that is nonessential to "assure identification" of the copyrighted work—was only unlawful if such copying adversely affected the market for the copyrighted work. The SunTrust court was unable to determine "whether 'the quantity and value of the materials used [were] reasonable in relation to the purpose of the copying in terms of what was necessary to conjure up the original.'"

Finally, the court considered the evidence of substantial harm to the market for the copyrighted work, concerning itself only with the harm of market substitution. The plaintiffs did not present evidence regarding the likelihood that the defendant's work would supplant demand for Gone With The Wind itself or its derivative market, but instead presented only the value of the markets themselves. As a result, the court weighed the fourth factor in favor of the alleged infringer. After balancing the four fair use factors, the court held that the new work criticized and commented upon Mitchell's original novel in a parodic manner, and therefore presented a viable fair use defense.

E. COURTS' APPLICATION OF FAIR USE TO DIAMETRICALLY OPPOSED VIEWPOINTS

The courts in the above-mentioned cases unraveled the application of fair use to parody. Yet applying the fair use parody defense to antithetical viewpoints expressed in separate works has not been as thoroughly analyzed by the courts. The following cases provide examples of the fair use defense as applied to works expressing polar opposite viewpoints.

Prior to the Supreme Court's parody ruling in Campbell, the Second Circuit held in Maxtone-Graham v. Burtchaell that the fair use defense to copyright infringement applied to works incorporating diametrically opposed viewpoints in the context of the pro-choice versus pro-life abortion debate. Maxtone-Graham involved a book, Pregnant by Mistake by Maxtone-Graham, that included interviews with women who discussed unwanted pregnancies and their experiences with abortions. Several years later, Burtchaell, a Catholic priest,
incorporated quotes from *Pregnant by Mistake* into the title essay of his book, *Rachel Weeping.* Burtchaell claimed to include the quotes from Maxtone-Graham's book as a way to critique the accounts of the women's abortion experiences. Though Maxtone-Graham refused to authorize the use of her work in *Rachel Weeping* and expressed to Burtchaell that she included the interviews in her book to advance an understanding of the pro-choice viewpoint, Burtchaell proceeded to include the interviews in his anti-abortion essay to promote his polar viewpoint. Burtchaell then asserted the fair use defense in response to copyright infringement allegations. While the pro-choice and pro-life stances are inextricably opposed, the Maxtone-Graham court held that Burtchaell's use of the copyrighted work was fair use.

The court's rationale rested upon the notion that Burtchaell used material from the interviews as a way to critique and comment upon the original pro-life work. The court analyzed the four fair use factors as follows: first, the purpose and character of the use could be categorized as comment or criticism, and the commercial nature of the use was not dispositive of a finding against fair use. Second, the nature of the original work lent itself to use by others. Third, the volume of the quotation was minor. Finally, the effect upon the potential market was negligible because "the two works served fundamentally different functions." After balancing the four factors, the Second Circuit affirmed summary judgment in favor of Burtchaell's inclusion of the quotes as fair use.

Another example of the application of fair use to diametrically opposing viewpoints can be found in *Wojnarowicz v. American Family Ass'n.* Here, the defendant, the American Family Association (AFA), distributed a pamphlet that included copied fragments of the plaintiff's artwork. Campaigning against government funding of artwork that the AFA deemed "offensive" and

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93 Id.
94 Id.
95 Id. at 1257.
96 Id. at 1255, 1265.
97 Id. at 1265.
98 Id. at 1260.
99 Id.
100 Id. at 1261–62.
101 Id. at 1262–63 ("Maxtone-Graham's book was essentially factual in nature, and... subsequent authors may rely more heavily on such works.").
102 Id. at 1263 (discussing "the... amount and substantiality of the [use] in relation to the copyrighted work as a whole").
103 Id. at 1263–64.
104 Id. at 1265.
106 Id. at 134.
‘blasphemous’ 107 was a central activity of the organization. On the other end of the spectrum, the artist of the original work sought to convey messages about social issues surrounding AIDS, often by incorporating sexually explicit images in his art.108 Upon suit for infringement by the original artist, the AFA raised the fair use defense under the umbrella of criticism and comment, and the court again applied the four fair use factors.109

The original artist asserted that the AFA distorted his work to make it appear more offensive and, in so doing, removed the criticism from the scope of fair use protection.110 Here, the court relied upon the Second Circuit’s rationale in Maxtone-Graham.111 The Wojnarowicz court agreed with the Second Circuit and considered

it highly undesirable to hinge a legal determination solely on the relative truth or accuracy of statements made in the context of debate on a highly volatile social issue.... Only where the distortions are so deliberate, and so misrepresentative of the original work that no person could find them to be the product of mere carelessness would [the court] incline toward rejecting a fair use claim.112

The court determined that a reasonable person could have found that the distortion resulted from carelessness, rather than from intent to distort the artist’s work.113

After balancing the remaining fair use factors—the commercial purpose of the defendant’s use, the nature of the artist’s work, the volume of the taking, and the market effect on the original work114—the court held that, notwithstanding the polar nature of the defendant’s viewpoint, the use of the artwork in the pamphlets was fair and protected by the fair use defense.115

107 Id. at 133.
108 Id.
109 Id. at 142–47.
110 Id. at 143.
111 Id.
112 Id. (first alteration in original) (quoting Maxtone–Graham v. Burtchaell, 803 F.3d 1253, 1261 (2d Cir. 1986)).
113 Id. at 144.
114 Id. at 144–46.
115 Id. at 147.

12013] DIAMETRICALLY OPPOSING VIEWPOINTS

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F. THE JUNE 2012 NORTHLAND FAMILY PLANNING CLINIC V. CENTER FOR BIO-ETHICAL REFORM DECISION

In June 2012, the United States District Court for the Central District of California reconsidered the application of the fair use factors to parodies in *Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform*, a case with facts somewhat analogous to those of *Maxtone-Graham*.

Northland arose from a suit brought by the Northland Family Planning Clinic (Northland), a pro-choice abortion clinic, against the Center for Bio-Ethical Reform (CBR), an anti-abortion organization, for copyright infringement after CBR posted a video online interspersing images of aborted fetuses and abortion procedures throughout a Northland counseling video entitled *Everyday Good Women*. Northland created its video to offer support and counseling to women facing abortion decisions and “to de-stigmatize abortion.” CBR, on the other hand, created its video to “expose the ‘fallacies’” espoused in the Northland video regarding the effects of choosing to undergo an abortion procedure. Both parties moved for summary judgment. Northland asserted that CBR violated its exclusive right to the original video, while CBR raised the fair use defense.

To determine whether CBR’s use of Northland’s video to support its contrary stance was copyright infringement, the district court scrutinized the facts under the fair use factors as set forth in 17 U.S.C. § 107 of the Copyright Act. The court applied the fair use factors in light of “the goals of the

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117 Id. at 982–83.

118 See NORTHLAND FAMILY PLANNING CENTERS, http://www.northlandfamilyplanning.com (last visited Sept. 21, 2013) (“As abortion care providers, we are dedicated to providing high-quality reproductive health and abortion services in a respectful, nurturing and inspiring atmosphere.”).


121 Northland, 868 F. Supp. 2d at 966.

122 Id. at 967 (quoting Pl.’s Notice of Lodging, Ex. F, Deposition of Eric Holmberg ("Holmberg Dep.") 39:1–8, 40:18–41:5, Docket No. 77).

123 Id. at 968.

124 Id.

125 Id. at 969–70.
Copyright Act” to determine whether CBR’s video amounted to fair use under the policy of “promot[ing] the progress of science and art by protecting artistic and scientific works while encouraging the development and evolution of new works.” Ultimately, the court relied upon the accepted practice of flexibly balancing the fair use factors as a way to ensure that creativity was not stifled.

Applying the first fair use factor, the purpose and character of the use, the court considered (1) whether the work was transformative, and (2) whether the work was created for a commercial purpose.

First, the court considered CBR’s argument that the work was a parody. The court acknowledged that parodies are transformative because parody “comment[s] on the original work, and in the process, create[s] a new [work].” Parody requires mimicry of the original work by the alleged infringer. CBR’s video, the court reasoned, was a parody because it “use[d] segments of Northland’s video... to deride the original work’s message.” CBR’s video conveyed a message that abortion is not, as Northland communicated in its original video, a normal decision. Rejecting Northland’s argument, the court did not determine that CBR used the video to debate the more general abortion theme, rather than to criticize the particular video. CBR did not present both sides of the debate, but instead relied only upon its pro-life stance in its derivative work. The court ruled that CBR copied solely to “dispel the ‘falsities’ of the Northland Video,” and therefore targeted the copyrighted work. CBR’s video would not have been a parody if it had commented on an entirely new subject—for example, the general abortion debate rather than the video itself.

126 Id. (quoting Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 799 (9th Cir. 2003)) (internal quotation marks omitted).
127 Id. at 970 (citing Campbell v. Acuff-Rose, 510 U.S. 569, 577 (1994)).
128 Id.
129 Id. at 970–78.
130 Id. at 970, 978–79.
131 Id. at 971–72.
132 Id. at 971.
133 Id. at 972.
134 Id.
135 Id.
136 Id. at 972–73.
137 Id.
138 Id.; see also id. at n.6 (“[E]ven if this Court found that the accused Videos broadly criticized the pro-choice position in addition to the Northland Video, the analysis would be in accord with Campbell.”).
Continuing with the first fair use factor, the court rejected Northland's contention that the use of humor is essential to the fair use parody defense.\(^{140}\) While modern definitions of parody typically include comic effect or ridicule, the court distinguished parody in the copyright context.\(^{141}\) To defeat allegations of copyright infringement, parody only needs to comment on or criticize elements of the prior composition to create a new work.\(^{142}\) Contemplating the application of parody in *Campbell* and *SunTrust*, Judge Selina stated that, "for purposes of copyright law, humor is not a necessary element of parody."\(^{143}\) Thus, the accused video satisfied a *Campbell* analysis because they were highly critical and ridiculed the original video.\(^{144}\)

The *Northland* court additionally held "that fair use protection is not limited to parodies of well-known works."\(^{145}\) According to this Court, allowing relatively unknown works to be parodied fosters creativity and promotes the underlying goals of copyright law.\(^{146}\)

An issue of first impression arose before the *Northland* court given that CBR's use of the original video consisted mainly of video splicing.\(^{147}\) Though CBR put forth minimal creativity in splicing the videos, CBR's use sufficiently "changed and commented on" the Northland video.\(^{148}\) In this instance, the verbatim copying of the work was necessary to "capture the essence of the [video's] message" and create a parody.\(^{149}\) The court held that the new video, though very basic, was sufficiently transformative to receive consideration under the fair use defense.\(^{150}\)

Regarding the commercial nature of the potentially infringing use, the court ruled that while CBR might have marginally profited from the video, the commercial nature of the work becomes less important when the work possesses a highly transformative nature.\(^{151}\) The transformative nature of CBR's work rendered any profits derived from the video insignificant in light of

\(^{140}\) Id. at 973–74.

\(^{141}\) Id. at 973.

\(^{142}\) Id.

\(^{143}\) Id. at 973 n.7, 974.

\(^{144}\) Id.

\(^{145}\) Id. at 976.

\(^{146}\) Id.; see *supra* notes 125–27 (discussing goals of the Copyright Act and the flexible balancing approach to effectuate these goals).

\(^{147}\) *Northland*, 868 F. Supp. 2d at 976–77 ("[C]ourts have not addressed verbatim use of copyrighted video content in the parody branch of the fair use doctrine.").

\(^{148}\) Id. at 977–78.

\(^{149}\) Id. at 977.

\(^{150}\) Id. at 978 ("The new background soundtrack, the visuals, and the juxtaposition of the new video clips with the original creates an entirely different impact on the viewer.").

\(^{151}\) Id. at 978–79 (citing *Campbell* v. *Acuff-Rose Music*, Inc., 510 U.S. 569, 579 (1994)).
its parodic use. In sum, after balancing transformation and commercial gain, the first factor weighed in favor of CBR.

Turning to the second factor, the nature of the original work, the court noted “that creative works are ‘closer to the core of intended copyright protection’ than informational and functional works.” Northland’s video was creative in addition to informational and functional. Thus, the second factor weighed “slightly in favor of Northland.”

The third fair use factor, the amount and substantiality of the portion used, was thoroughly analyzed by the Northland court. The court relied upon the Campbell rationale that courts should consider: (1) “the persuasiveness of a parodist’s justification for the particular copying done”; and (2) “the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives.” As demonstrated in Campbell, parodists are afforded additional leeway to “take recognizable material from the original [work] in order to convey [a parodic] message.” While CBR took between forty-eight and fifty-three percent of the Northland video to assemble its video, the court held that the copying was not excessive.

To determine whether CBR’s use was excessive, the court considered the following three factors: (1) “the degree of public recognition of the original work”; (2) “the ease of conjuring up the original work”; and finally (3) “whether the overriding purpose was to parody” or to further another purpose. These factors weighed in favor of CBR because of (1) the need to copy enough to make the parody of the obscure video known, (2) the difficulty in conjuring up a video parody, and (3) the overriding purpose of parody in CBR’s new work. The court reasoned that the overriding purpose of CBR’s video was to parody the Northland video, while garnering business and commenting on the pro-choice position were “incidental to [this] primary purpose.”

Lastly, the Northland court considered the fourth factor, the effect of CBR’s video on the market for Northland’s copyrighted material. The opinion focused on the extent to which the potentially parodying work “usurp[ed] the

152 Id. at 979.
153 Id. at 982.
154 Id. (quoting Campbell, 510 U.S. at 586).
155 Id.
156 Id. at 979–82.
157 Id. at 979–80 (quoting Campbell, 510 U.S. at 586–87) (internal quotation marks omitted).
158 Id. at 980 (citing Campbell, 510 U.S. at 588–89).
159 Id. at 980–81.
160 Id. (citing Fisher v. Dees, 794 F.2d 432, 439 (9th Cir. 1986)).
161 Id. at 981.
162 Id.
163 Id. at 982 (citing Campbell, 510 U.S. at 591–92).
potential market for the original or its derivatives," relying upon the notion that damage by way of criticism is not relevant to the market harm analysis. The court reasoned that while Northland suffered harm through the termination of potential licensing agreements and decreased value of its counseling video, those harms were not protected under the Copyright Act. Though CBR’s video reduced demand for the original video, the directed criticism of the CBR video was not a market substitute because the “purposes and messages of the two [were] diametrically opposite.”

The Northland court weighed each of the fair use factors and determined that CBR’s use of the copyrighted material in the Northland video was fair and therefore not an infringement of copyright.

III. ANALYSIS

As demonstrated in Part II, the abundance of fair use case law and the varied application of the four § 107 factors reaffirm Judge Learned Hand’s assertion that fair use was, and indeed still is, one of the most troublesome aspects of copyright law. The Campbell Court attempted to resolve the application of the fair use defense to parody by reasoning that parody suffices as a form of criticism or comment. However, while stating that a parody creates a new work in the process of parodying an original work, the Court left precisely what amounts to a parody open to interpretation.

The mandatory application of the four-factor fair use test to an alleged parody is not open to debate. The weight and reasoning under each factor, however, is susceptible to criticism. First, whether a potentially infringing work truly amounts to criticism should be thoroughly considered before a fair use determination is made. Second, diametrically opposing viewpoints should be regarded as criticism rather than as parody under the first fair use factor. Third, the lack of a humor requirement for the parody defense and the low standard for what constitutes parody should be reexamined. Courts should consider the policy concerns implicated by affording such a wide breadth to the fair use

164 Id.
165 Id.
166 Id.
167 The court granted summary judgment to CBR. Id. at 982–83.
170 Id.
171 Id. at 577–78 (“All are to be explored and the results weighed together, in light of the purposes of copyright.”).
defense to copyright infringement. Finally, upon these considerations, the Northland court should have alternatively analyzed CBR's video as fair use criticism and comment—not as parody.

A. THE LIBERAL CONSTRUCTION OF CRITICISM UNDER THE FIRST FAIR USE FACTOR

The Court in Campbell applied a case-by-case fair use analysis rather than a bright-line rule. However, the legislature and the Campbell court specifically proclaimed that criticism and comment are eligible for fair use. The Campbell court liberally construed 2 Live Crew's allegedly infringing work as criticism and comment by ruling that its lewd lyrics were critical of the original version of Oh, Pretty Woman. The Supreme Court gave much credit to 2 Live Crew for its critique of the song, reasoning that the lyrics criticized or commented upon the original song by contrasting the hard times of present with the innocence of yore. Precisely how lyrics such as “Big hairy woman all that hair it ain’t legit/Cause you look like ‘Cousin It,’” commented upon or criticized the naiveté of an earlier time remains unclear. However, the Court reasoned that such lyrics were in fact criticism or comment in the form of parody and were eligible for fair use protection.

The Eleventh Circuit then adopted the case-by-case application and liberal construction of comment or criticism set forth by the Court in Campbell. The SunTrust court broadly interpreted the potentially infringing author's sequel to Margaret Mitchell's Gone With the Wind as criticism or comment, focusing on the policy concerns surrounding the free flow of criticism and commentary. While the court generously reasoned that the new work was a "specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in [Gone With the Wind]," it did not provide a definition or any sort of framework as to what constitutes criticism.

172 See id. at 577 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").
174 When weighing in favor of the potentially infringing work, the Court explicitly recognized comment and criticism as eligible for fair use when it referred to, "other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works." Campbell, 510 U.S. at 583.
175 Id.
176 Id.
177 Id.; id. app. B at 595–96.
179 Id. at 1268.
180 Id.
However, the opinion did provide specific examples as to how the characters of the new work were distinguishable from the characters of the original work, and described the new work as "a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of [Gone With the Wind]." The court spent most of its time describing the ways in which the works differed. On the other hand, an equally reasonable interpretation of the new work might have been simply that the new work was a derivative work or fan fiction of the original rather than criticism. While the work may have, in some respect, criticized the character choice and sentiments of the original book, the court did not entertain this "fan fiction" interpretation.

A rationale that the second author knowingly sought to criticize the work by telling the story from a new character's point of view leaves room for future authors of fiction to use creative works to their advantage. It seems likely that authors will be able to avoid copyright infringement by simply adding several new characters and retelling a nearly identical story from another perspective without creating a truly new work.

In summary, courts prefer a finding of comment or criticism in potentially infringing works as opposed to a finding of infringement. Such a preference likely stems from the high regard given to criticism and comment as fair use and the value of creative works to the public. Courts may fear that a narrow construction of criticism would stifle creativity in new works. Courts are more willing to assume the risk of occasionally affording fair use protection to works that infringe, rather than to risk denying fair use protection to a non-infringing creative work. The labeling of potentially infringing works as criticism or comment is even more clearly demonstrated in works portraying diametrically opposing viewpoints, as discussed below in Part III.B.

B. WHY DIAMETRICALLY OPPOSING VIEWPOINTS SHOULD BE LABELED AS CRITICISM RATHER THAN PARODY

As previously demonstrated, courts may rely upon the weight given by the Supreme Court in Campbell to the four statutory factors when contemplating the favorable treatment parodies receive under the fair use analysis. Courts reliant upon Campbell assume that a parody is protected as a criticism of the

181 Id. at 1270–71.
182 Id. at 1270.
183 See supra note 69 and accompanying text (discussing the parody defense in a sequel to Gone With the Wind).
original copyrighted work.\textsuperscript{184} For a fair use claim to survive, the potentially infringing work must possess components of criticism, and must not be for the purpose of gaining attention or avoiding the task of creating a new work.\textsuperscript{185} The courts have not, however, presented a consistent framework for analyzing whether diametrically opposing viewpoints should be scrutinized as parody or as criticism under the fair use factors. Allowing courts broad authority to apply and interpret diametrically opposing viewpoints as parody creates obstacles for authors whose original works set forth viewpoints that inextricably contrast with the opinions of subsequent “parodists.”

Modern dictionaries define criticism as “the expression of disapproval of someone or something based on perceived faults or mistakes.”\textsuperscript{186} Though the Northland court’s categorization of CBR’s work as parody was suspect, the courts in Maxtone-Graham, Wojnarowicz, and Northland correctly considered diametrically opposing viewpoints as criticism under the fair use test.

The Maxtone-Graham court held that the potentially infringing author’s use of the original work’s pro-choice interviews to support his pro-life essay amounted to critique and comment of that original work.\textsuperscript{187} The court reasoned that the new work was protectable criticism and comment because it organized the original work in such a way as to present an argument against abortion.\textsuperscript{188} The court likely failed to detail why the work was criticism or comment because the critical nature of the new work was self-evident. Burtchaell used the original work of Maxtone-Graham to express his disapproval of the pro-choice sentiments expressed in the original work.\textsuperscript{189} Any other rationale concerning Burtchaell’s use of the excerpts would be implausible. The pro-life versus pro-choice debate readily lends itself to an inference of criticism, condemnation, or at the very least, comment.

Similarly, the court in Wojnarowicz found that the pamphlet distributed by the defendants counted as criticism in the form of an attack on federal funding of contemporary art.\textsuperscript{190} It quickly considered whether or not the work was criticism, reasoning that no one disputed the defendant’s overriding purpose for issuing its pamphlet.\textsuperscript{191} This was likely undisputed because the two authors so

\textsuperscript{184} See Campbell, 510 U.S. at 580 (explaining that a parody uses “some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works”).

\textsuperscript{185} Id. at 580–81.


\textsuperscript{187} Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1265 (2d Cir. 1986).

\textsuperscript{188} Id. at 1264–65.

\textsuperscript{189} Id. at 1255.


\textsuperscript{191} Id.
clearly stood for diametrically opposite positions. The AFA sought to campaign against the funding of offensive works, while the original artist sought to create controversial and sexually suggestive works that were foreseeably perceived as offensive to some.\textsuperscript{192} The AFA expressed disapproval of the original artist's sexually explicit works and the government's funding of such art.\textsuperscript{193} Therefore, the \textit{Wojnarowicz} court correctly determined that the pamphlet possessed a critical nature meriting fair use protection under the first factor, the purpose and character of the infringing work.

C. FINDING CRITICISM RATHER THAN PARODY UNDER THE \textit{NORTHLAND} FACTS

The \textit{Northland} court should have weighed in favor of CBR under the first fair use factor by determining that the allegedly infringing work was criticism rather than parody. If the CBR video was criticism, but not parody, the analysis would have mirrored the rationales in \textit{Maxtone-Graham} and \textit{Wojnarowicz}. CBR undoubtedly created its video for the purpose of questioning and expressing disapproval of the messages underlying Northland's counseling video. According to the \textit{Northland} court, CBR's video derided the original work's message by splicing alarming clips and images of aborted fetuses with Northland's video.\textsuperscript{194} Though the court's determination that the CBR video fell within the umbrella of parody was questionable, the court was undeniably correct that the CBR video criticized Northland's original work.\textsuperscript{195} The court also determined that CBR's video sought to impeach the subject matter of the original video.\textsuperscript{196} CBR certainly intended for the new work to discredit and comment upon Northland's video. Accordingly, the court correctly determined that CBR sufficiently transformed the original video into a work criticizing and commenting on the original message.

When an author uses another work with the intent to express a diametrically opposite viewpoint, the straightforward use constitutes criticism under the first factor of the fair use analysis. The courts in the aforementioned cases held that the use of another work to express an opposing viewpoint is criticism under the first fair use factor. However, a subsequent, potentially infringing work that is critical of the original should not automatically be protected as fair use. Courts

\textsuperscript{192} \textit{Id.} at 133.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform, 868 F. Supp. 2d 962, 972 (C.D. Cal. 2012).}
\textsuperscript{195} \textit{Id.} at 972–73.
\textsuperscript{196} \textit{Id.} at 973.
making a fair use determination must still balance all four fair use factors pursuant to § 107.197

D. IMPOSING A HUMOR REQUIREMENT

Courts properly established that polar viewpoints are criticism or comment under the first fair use factor. However, labeling diametrically opposing viewpoints as parody overextends criticism and comment by rendering humor unnecessary to the parody defense. As Justice Souter recognized in Campbell, “It is uncontested here that 2 Live Crew’s song would be an infringement of Acuff-Rose’s rights in ‘Oh, Pretty Woman,’ under the Copyright Act of 1976... but for a finding of fair use through parody.”198 Construing Campbell to support fair use protection for humorless parody is an overly broad interpretation of Justice Souter’s opinion.

The Campbell Court expressly referenced humor several times throughout its influential opinion.199 However, the Court left open to considerable interpretation whether humor is necessary for a work to qualify as parody for fair use purposes. For example, Justice Souter initially suggested in Campbell that parody is an “ostensibly humorous” form of criticism,200 and he included a dictionary definition describing parody as invoking “comic effect or ridicule.”201 The Court also cited to Elsmere Music, Inc. v. National Broadcasting Co., in which the Second Circuit held that parody was protected as fair use and emphasized that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody.”202

Mere sentences after Justice Souter referenced humor, he contradictorily regarded parody as simply a work that comments upon the originally copyrighted material.203 This latter description of parody became the relevant definition throughout the remainder of the opinion.204 Despite the broader construction of parody referenced in the opinion, the Court’s initial allusion to an element of humor, the modern definitions of parody mentioning humor, and

198 Campbell, 510 U.S. at 574.
199 In fact, the Court uses “humor” and “humorous” no less than seven times. See id. at 579, 588, 597, 598 (Kennedy, J., concurring).
200 Id. at 579.
201 Id. at 580 (quoting AMERICAN HERITAGE DICTIONARY 1317 (3d ed. 1992)) (internal quotation marks omitted).
203 Campbell, 510 U.S. at 580.
204 Id. at 580–84.
the conflicting definitions set forth by Justice Souter suggest that humorless critiques should not be construed as parody. The *Campbell* Court's ambiguity with regard to the humor requirement left room for interpretation by the lower courts.

Parody as applied to humorless works is most clearly demonstrated when a party makes use of copyrighted materials to support a diametrically opposing viewpoint. In *Northland*, for example, the court relied upon the reasoning in *Campbell* and *SunTrust* to explicitly declare that humor is not an essential element of parody.205

Northland argued that CBR's video was not a parody because the video was not a "humorous mimicry" of the original work.206 The court rejected this argument, by opining that "Northland overstated the importance of comedy in parody analysis."207 The *Northland* court relied exclusively upon the logic of Justice Souter in that parody creates a new work which comments on or criticizes the original and can "imitate[] a prior work for 'comic effect or ridicule'" without being humorous.208 While the *Northland* court may have unambiguously decided that humor was unnecessary,209 the court refrained from deciding whether comic effect or ridicule were crucial to parody because CBR's video "undoubtedly aimed at ridiculing the Northland Video."210

The ruling in *Northland* runs contrary to the modern definitions of parody, which include an element of comic effect.211 CBR's video humorlessly condemned Northland's counseling video by incorporating graphic and disturbing images of live abortions throughout the video in an effort to wholly contradict the underlying purpose of Northland's original work. Regardless of whether such a disturbing video would amuse someone with a very twisted sense of humor, a reasonable person would not in the slightest sense find CBR's videos to provide comedic relief. The district court was free to interpret the parody defense in such a broad manner, but this broad interpretation flies in the face of the Copyright Act's underlying purpose.212

The Copyright Clause exists to protect authors of an original work by conferring upon these authors the exclusive right to their works and, in so
doing, promotes the authorship of creative works.\textsuperscript{213} Parody is considered highly transformative under the first fair use factor, the purpose and character of the use, factor because parody sheds fresh light on an earlier work and creates a new work in the process of parodying.\textsuperscript{214} As opposed to other forms of transformative comment or criticism, parody incorporates a distinguishing aspect of ridicule.\textsuperscript{215} As the \textit{Campbell} Court explained, "[t]he more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use."\textsuperscript{216} Thus, a finding of a humorless parody weighs heavily in favor of the accused infringer and typically results in a finding of fair use after balancing the four fair use factors.

Broadly interpreting parody to include humorless critiques allows authors of purely critical and disparaging works to claim parody and receive preferential treatment through fair use. In \textit{Northland}, CBR's video might have been traditional comment or criticism and protected fair use. CBR's video should not have received the favorable treatment of parody and the heavy weight attached to the transformative nature of a parody under the fair use analysis. The lack of comedic effect in CBR's video and its strained ridicule of the Northland video should have prevented a finding of parody and accompanying heightened transformativeness.

In contrast to the underlying purpose of the Copyright Act, CBR's executive director, Gregg Cunningham, disclosed that CBR is "preparing similar Fair Use critiques of every abortion clinic video . . . in the U[nited] S[ates] and . . . our CBR affiliates are working on them abroad. Northland is only a pilot project."\textsuperscript{217} Construing Cunningham's statements, CBR plans to take advantage of the broad application of the fair use defense to infringement and the \textit{Northland} court's liberal construction of parody in an attempt to counteract the fundamental intentions of the Copyright Clause. By affording fair use protection for CBR's use of Northland's video, creativity and the production of similar counseling videos by family planning clinics across the country will likely be stifled.

\textit{Northland}'s founder and her employees spent significant time and creative effort writing the script for the \textit{Northland} video,\textsuperscript{218} which was registered with

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id}; \textit{LOREN \& MILLER}, \textit{supra} note 14, at 342.
\item \textit{Id.} at 583.
\item \textit{Id.} at 569.
\item Michael Rose, \textit{Judge Rules It's Fair to Appropriate Abortion Clinic's Video}, \textit{HUFFINGTON POST} (June 26, 2012, 5:16 PM) (internal quotation marks omitted), \url{http://www.huffingtonpost.com/michael-rose/judge-rules-it's-fair-to-a_b_1628106.html}.
\end{enumerate}
\end{footnotesize}
the U.S. Copyright Office. Accordingly, the video was the type of work that the Constitution seeks to protect. Despite the protection afforded for the original video, however, the court ruled that CBR's video was a parody and held that CBR's use was a protected fair use. The fair use defense stemmed from a desire to prevent courts from rigidly applying the copyright statute in ways that might stifle the creativity the law was designed to foster. However, creativity will likely be suppressed if persons and critics such as CBR can continue to use minimal levels of creativity to create subsequent works and label them parody.

The Northland court determined that the damages suffered by Northland in the form of decreased licensing revenues were insufficient to weigh the fourth factor against fair use. However, the court did not consider the effect on the entire market for family planning counseling videos to be a harm. The likelihood that a fear of attack by CBR would discourage women's clinics from creating similar works should have been addressed by the court. The threat of non-humorous parodic videos not only harms the market through harsh critique, but also could be construed as usurping the demand for counseling videos. The target audience for a counseling video is likely women who are unsure about whether to undergo an abortion procedure. Such women will likely be as influenced by the CBR videos as the original Northland video. The fourth factor was not as important to the overall analysis because the court ruled that the purpose and character of the use was parody. However, if the purpose and character of the use was merely to criticize rather than to parody, the market effects may have played a larger role in the analysis, possibly leading to a different outcome.

Courts may have refrained from requiring humor in parody because of the subjective nature of humor. But a humor determination would be far less subjective in cases presenting diametrically opposing viewpoints. For example, few people would find the essay presented in Maxtone-Graham, the pamphlet deriding the art in Wojnarowicz, or the depictions of abortions in Northland to be funny. While the subjective nature of a humor determination may be a valid concern, the dilemma simply would not be present when considering

219 Id.
220 Id. at 976, 982.
221 Id. at 970 (quoting Campbell, 510 U.S. at 577).
222 Id. at 982.
223 SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 n.23 (11th Cir. 2001) ("The benefit of our approach to 'parody,' which requires no assessment of whether or not a work is humorous, is apparent from the arguments made by the parties in this case. ... Under our approach, we may ignore... and simply bypass what would always be a wholly subjective inquiry.").
diametrically opposed viewpoints. Courts should analyze diametrically opposed subject matter as criticism and comment and refrain from labeling the subsequent works as parody. Unlike the song in *Campbell* or the novel in *SunTrust*, the new works in *Northland, Wojnarowicz*, and *Maxtone-Graham* clearly fall under the umbrella of criticism and comment without any attempt at comedic effect.

The case-by-case fair use analysis and four-factor balancing test must still be implemented. However, the courts should refrain from freely distributing the parody label to works lacking even the slightest trace of humor, especially when considering works presenting non-humorous content and diametrically opposed viewpoints.

In sum, holding that humor is unnecessary to qualify as parody under the fair use factors presents a risk that subsequent users will abuse original works supporting diametrically opposing viewpoints. Courts remain free to determine the transformative nature of a work. These courts should thoroughly consider the core theory behind the Copyright Clause when determining that a work is a parody. Ruling that a work is a parody qualifies the work for favorable treatment under the fair use test. Liberal constructions of parody could undermine the purpose of the Copyright Clause by discouraging authors from creating controversial works for fear that those with opposite viewpoints could easily "parody" the original materials.

### E. HOW *NORTHLAND* SHOULD HAVE BEEN ANALYZED IN ITS ENTIRETY UNDER A MORE STRINGENT INTERPRETATION OF THE PARODY EXCEPTION

The *Northland* court should have adopted the analysis structure set forth above. This analysis would have prevented abuse of the parody defense, but would likely have resulted in the same outcome.

The first fair use factor, "the purpose and character of the use,"[224] would weigh in favor of CBR without a finding of parody. As described above, the purpose and character of CBR's use of the Northland video was to criticize the pro-choice stance of the family planning clinic. The court need not even delve into an inquiry as to whether the work was a highly transformative parody because CBR's video was so clearly criticism.

Under the first factor, the court properly ruled that the work did not generally comment upon the abortion debate, but instead specifically set out to condemn the particular video created by Northland.[225] It would be difficult to argue that CBR's work was directed at the pro-choice position, resulting in a new work that commented upon the general debate. CBR used images directly

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from the counseling video, as opposed to generalized information on the issue of abortion.\textsuperscript{226}

The \textit{Northland} court was also correct in ruling that the criticism did not need to be directed toward a well-known work. The court reasoned that a parody of an unknown work fosters creativity, and extended that same reasoning to criticism.\textsuperscript{227} Critics need a way to create new works that disparage original works, and the need for criticism does not extend only to well-known expressions.

The court should not have allocated substantial weight to the necessity of copying Northland's work verbatim in the absence of parody. The court ruled that CBR's exact copying was both necessary to parody the relatively unknown video and transformative enough to receive consideration under the fair use defense.\textsuperscript{228} However, in the absence of parody, verbatim copying is not as necessary. CBR could have criticized the counseling video without setting forth the minimal creative effort necessary to splice segments into the original video. Instead, CBR could have incorporated its own creative material along with the shocking images.

The final consideration under the first fair use factor is the commercial nature of the work. Since commercial nature is less important when dealing with parodies, the court should reconsider the significance of CBR's economic gain in the absence of the highly transformative parodic nature. It seems unlikely that, even after thorough consideration, the statements made by CBR's director about his intent to parody other clinic videos and the marginal profits experienced by CBR\textsuperscript{229} would be enough to outweigh the critical nature of the CBR video.

The second fair use factor, the nature of the work, would be analyzed in the same manner as the original analysis. The court acknowledged that Northland's video was a creative work and was closer to the core of intended copyright protection.\textsuperscript{230} Accordingly, the second fair use factor would weigh in favor of Northland.

The third factor, the amount and substantiality of the portion used, would be analyzed differently if CBR's work was not considered parody. Parodists receive more leeway to copy the original work under this factor because enough of the original must be used to ensure the parody is understood.\textsuperscript{231} To determine whether CBR's copying was excessive, the court looked to three

\textsuperscript{226} Id. at 973.
\textsuperscript{227} Id. at 976.
\textsuperscript{228} Id. at 977-78.
\textsuperscript{229} Id. at 979.
\textsuperscript{230} Id.
\textsuperscript{231} Id. at 980.
factors: (1) "the degree of public recognition of the original work," (2) "the ease of conjuring the original work," and (3) "whether the overriding purpose was to parody." 232

The first two excessiveness factors would continue to weigh in favor of CBR if the work were deemed criticism rather than parody. The Northland video is not a readily recognizable work, so conjuring it up would be difficult. However, the third factor would likely weigh in Northland’s favor because the overriding purpose of the work would be criticism rather than parody. Unfortunately for Northland, the weight distributed to the first two excessiveness considerations would likely be insufficient to tip the third fair use factor in its favor considering the transformative purpose and character of the criticism.

Finally, the fourth factor, market harm, would probably be altered if the work were not a parody. The Northland court erred when it neglected to determine the harm to the overall market for counseling videos and derivative works. 233 The court focused on the extent to which CBR’s video usurped the market for the original video and determined that damage due to criticism was not relevant to the market harm analysis. 234 However, the work may have been more of a substitute than the court recognized. Both works were available on YouTube, 235 and they did not serve entirely different purposes and markets since both videos would influence women debating whether to undergo an abortion procedure. The harms to Northland in the form of failed licensing agreements and reputational damage may not be the type of market harm protected under fair use, 236 but the court should not have disregarded the real ability to substitute one video for the other. 237 The court noted that the CBR video was not a substitute since the purposes of the works were diametrically opposite. 238 Contrary to this ruling, if the work were criticism rather than parody, the minimal level of creativity put forth by CBR and the easy access to both videos would weigh heavily in favor of Northland and may have led to a determination that the videos were substitutes despite conflicting underlying messages.

232 Id. at 980–81 (citing Fisher v. Dees, 794 F.2d 432, 439 (9th Cir. 1986)) (internal quotation marks omitted).
233 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (requiring courts to consider the harm to the market for derivative works in addition to the harm caused to the original work).
234 Northland, 868 F. Supp. 2d at 981–82; see also Campbell, 510 U.S. at 592–93 (explaining that harm due to criticism is not a recognized harm in copyright).
236 Id. at 982.
237 Id. at 980–82.
238 Id. at 982.
Thus, the four fair use factors would be weighted differently if the CBR video were deemed criticism rather than parody. Despite these differences, it remains likely that factors one and four—the critical purpose and character of the use and the minimal market harm to the original work—would outweigh factors two and three—the creative nature of the original work and the large amount of material copied from the original work. The court’s end result was probably correct, but the analysis would have proceeded differently if the CBR videos were not awarded the liberal construction of parody under the first factor of the fair use defense.

IV. CONCLUSION

The finding that a work is parody under the first factor of the fair use defense to copyright infringement leaves much room for interpretation. Courts would benefit from the implementation of clearer guidelines. The court’s broad interpretation in *Campbell* of exactly what can be considered parody allows room for error when courts use discretion to apply the case-by-case fair use analysis. While bright-line rules are probably not suitable to the fair use analysis, clearer guidelines would be beneficial.

Narrowing what constitutes parody would protect authors of original works from potential abuse by infringers seeking to take advantage of the Supreme Court’s liberal and vague definition of parody within the scope of fair use. Combining the broad interpretation of parody, the judicial preference to construe potentially infringing works as criticism and comment (as seen in *Campbell* and *SunTrust*) and a failure to set forth clear instructions for how to determine whether a work constitutes parody or criticism and comment leaves the courts with a highly subjective analysis. Such subjectivity is counterproductive because courts have expressed concerns about the resulting subjectivity if humor were relevant to the parody analysis. In actuality, the desire to avoid the subjectivity of humor in parody has left the courts with a vague definition and more intuitive inquiries.

Works construing diametrically opposing viewpoints, as demonstrated in *Northland*, are certainly comment or criticism, but not parody, under the first fair use factor. The author of the potentially infringing work in *Northland* sought to discredit the original author’s work through shocking methods of critique. The first factor should have resulted in a finding of criticism rather than parody because the works set forth diametrically opposing views.

However, implementing a humor requirement for a work to receive parody’s preferential treatment under the fair use analysis is key to the elimination of abuse under the fair use framework. A court’s finding that a work is parody renders the remaining three fair use factors less significant and weighs heavily in
favor of an ultimate finding of fair use. Liberally allowing parody to apply to non-humorous works provides an unfair advantage to authors of works who simply possess viewpoints that conflict with the views the author of the original work sought to convey. Failing to require humor in parody is contrary to modern definitions of parody and threatens the very theory underlying the Copyright Clause and the fair use defense.