ARE YOU MAKING FUN OF ME?:
NOTES ON MARKET FAILURE AND THE PARODY DEFENSE IN COPYRIGHT

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The Supreme Court granted certiorari in an important case last spring, Campbell v. Acuff-Rose, which raises a series of fundamental issues of copyright doctrine. Equally important, however, it presents a unique opportunity for the Court to expand on the emerging "economic" theory of copyright which it has endorsed in a series of recent cases and which noted copyright commentators have refined in an important series of scholarly articles. This Note describes the case and ties together the doctrinal issues in the case and the emerging economic or "market-centered" view of copyright.

The Campbell case arose when popular music group "2 Live Crew" released a rap version of Roy Orbison's 1964 pop hit "Oh, Pretty Woman." Acuff-Rose, a music publisher holding the copyright to the song, sued the group (of whom defendant Campbell is a member) for copyright infringement, seeking past damages and an injunction barring further sale of the album that includes the song. The group won at trial, where the court held that their version of the song was a parody of the original Orbison composition, and hence subject to the "fair use" defense against copyright infringement. Acuff-Rose successfully overturned the trial court's judgement in the Sixth Circuit; the Supreme Court then granted certiorari.

The doctrinal issue in the case is simple but important. The group claims that its song is more than a mere imitation of the original: that it includes an element of social commentary which brings it within the ambit of traditional parody cases. Acuff-Rose, on the other hand, asserts that the group's recording is a straightforward copy of the original — a "knockoff" dressed up with some distinctive rap additions. At most, the Court of Appeals said, the song parodies broad social mores, but they deny that it is a parody of the original song. As they read the earlier parody cases, this brings it outside the protection of the parody defense.

In one sense, the case comes at a propitious time in the development of copyright law theory. For most of its history this branch of law was characterized by what might charitably be called theoretical eclecticism; some would say just plain confusion. An amalgam of natural law principles, rudimentary

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5. 972 F.2d at 1433.
6. Id.
7. Id. at 1436 n.8.
“labor theory,” and economic (or incentive-based) rationales informed the important decisions. Little in the way of reconciliation between these three was thought necessary or even perhaps possible.

In recent years, however, a change has come over the field. With varying degrees of emphasis, major contributors to copyright scholarship have centered on the economic justification of the field in general as well particular doctrines. Most recently, Professor Paul Goldstein of Stanford published a synthesis of the field in the form of a multi-volume treatise, which is organized explicitly around economic themes. As the author says in the Introduction: “In resting United States copyright law on a utilitarian foundation of social benefit, Congress and the courts have explicitly rejected natural rights theory as a premise for copyright protection.”

The same orientation shows through in Goldstein’s introductory remarks on the fair use defense and compulsory licenses, where he says:

Congress concluded that [in cases where the statutory criteria are satisfied] the application of a fair use defense or of an exemption or compulsory license would not reduce investment incentives to a point at which authors decline to create and publishers will decline to produce desired works in desired numbers.

The recent cases reflect the same concern with economic themes; courts too are evidently attracted to a conceptually unified view of the field.

Thus courts and commentators are converging on a view of copyright that emphasizes the economic structure of its rules and doctrines. And, it is important to point out, the literature has progressed beyond the point where a crude “incentive” story passes for analysis in every case. In this vein, a number of recent articles have begun to bridge the gap between two competing aspects (sometimes formerly styled as competing theories) of copyright law: incentives to create, and incentives to use or disseminate existing creations. Most significantly for our purposes, a small but interesting series of comments has focused on the effect of copyright on facilitating a market for the exchange of rights to creative works.

The market-based approach begins with the proposition that consensual market transfers are the most effective way to simultaneously pursue the twin goals of incentive and dissemination. In this framework, in other words, one begins with the notion that if an exchange makes sense, it will probably take

8. The primary exemplar is Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Colum. L. Rev. 1600 (1982).
10. Id. at § 1.2.3.
place. Deviations from this norm must be pleaded with special facts, and convincingly.

This provides an interesting rationale for the statutorily-defined compulsory licenses in copyright law. The current thinking from the economically-oriented camp is that these are justified by market failures. That is, they exist because, typically, the cost of arranging transfers of rights in these areas exceeds the benefits of private exchanges. The statute, in other words, steps in because it is not worth the parties' effort to make a deal on their own.

Implicit in this analysis are two points worth mentioning in the context of the parody controversy: first, that social welfare considerations have a place in intellectual property law — social welfare being the item that is shorted if the private parties never form a contract; and second, that social welfare considerations justify legal "intervention" into the (non)market for these rights.

Fortunately for 2 Live Crew and their followers, the considerations just mentioned are present in this and related parody cases. And they can be seen, interestingly enough, only if one takes the economic view of copyright quite seriously.

According to this view, when the parodist offers a royalty to the copyright holder that will adequately compensate her, we should not sanction refusals to license.13 This is so because in these cases we know that the refusal to license is based on a "non-economic" motive, and we know that copyright law's preference for dissemination is too strong to give any credence to such motives in such cases.

In the following paragraphs I try to elaborate somewhat on the notions of "adequate compensation" and "non-economic motives." I hope to show that the parody defense makes sense when there is a clear failure in the market for parody licenses. As a preliminary matter, one should realize that either of the following two pieces of evidence would be helpful in establishing a parody defense as outlined here: (1) that a consensus of licensing experts agrees that the parody will not appreciably injure the market for the original work; or (2) that, prior to the release of the parody, the parodist made an offer to pay a royalty that would generously compensate the copyright holder.

These factors would help weed out two classes of cases. First, the "knockoff," disguised as a parody. And second — the key cases from our point of view — those where the copyright holder refuses to grant a license for legitimate economic reasons, i.e., where a license would not have been mutually advantageous.

Of course, there is a ready-made response to the second point; the chorus, emanating from Chicago, can be heard even at this distance, veritably shouting, "the proof that the license is not mutually advantageous is that it did

13. I do not contend that this is established by the facts in Campbell, where the defendants merely offered to pay the statutorily-defined compulsory license fee for a phonorecording of the copyrighted song — i.e., the statutory "cover" charge. I merely point out that if Acuff-Rose had negotiated with them, the group might have reached such a bargain. (Perhaps a remand to the trial court for further findings on this and related issues is in order.)
not in fact Take PLACE!!" Two points should suffice to show that, in this case at least, this response is as full of wind as the city from whence it comes.

First, licensing, like many another economic decision, is fraught with enough uncertainty, guile, strategy, and outright nonrational behavior (e.g., spite, shortsightedness, fear of embarrassment, etc.), that only a doctrinaire purist whose fingers were worn from reciting the neoclassical rosary could fail to come in touch with it. In short, to paraphrase the old economist joke, a five dollar bill is in fact occasionally left on the sidewalk. Especially when those out for a walk are artists or other creative types. Arrayed against the clear evidence that this is so is the stark assumption that it cannot be. The assumption loses.

Second, even conceding that at some margin off in the receding distance a hyper-risk averse creative person (!) might possibly be deterred from creating something by the risk that a court might some day force her to part with a license involuntarily, we ought to be willing to pay that small (perhaps nonexistent) price in the service of the dissemination principle. For surely it is easier to imagine a case where a copyright holder refuses a license out of contempt for the parodist, her work, or her point of view, than it is to imagine a hypothetical creative person deterred from pursuing a muse because of the possible future invocation of the parody defense.

In fact, we need not imagine this case; arguably, Campbell is it. The district court opinion shows that the group approached the plaintiff, Acuff-Rose, for a license. There is no evidence that the terms were unsatisfactory, or that any bargaining over royalties or the like took place. Acuff-Rose turned the group down flat—quite plausibly, because the licensing staff at Acuff-Rose disliked the group's version of the song. Thus we see the case in a new light, one quite companionable to the economic view of copyright: Acuff-Rose refused to negotiate a mutually advantageous transfer because they didn't like the defendant's song.

The irony of the situation is striking. Acuff-Rose, after refusing an economically rational exchange, argues that selling copies of the song should be

14. See Harriette K. Dorsen, Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs, 65 B.U. L. Rev. 923, 960 (1985): Few authors would willingly submit their work to the harsh lampooning of the typical satire and thus the satirist does not interfere with the market for the copyrighted work by substituting for it any more than the reviewer who criticizes and comments on the work in writing. In addition, it is unreasonable to believe that any author would hesitate to create a work for fear that the work might become a target of criticism through satire or parody.

15. On the dissemination principle as it applies in parody cases, see Beth Warnken Van Hecke, Note, But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use, 77 Minn. L. Rev. 465, 467-68 (1992).

16. 754 F.Supp. at 1152. See also Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986), where parodists were also denied a license.

17. Defendant's letter requesting a license included a lyric sheet and cassette tape of the parody. 972 F.2d at 1432. However, plaintiff denies he heard the parody prior to rejecting the licensing request. 754 F.Supp. at 1155.
enjoined because it undermines economic incentives. After arguably ignoring the economics of the initial exchange, it argues economics after the fact to stop distribution of the song. At the very least the fact that a license was offered and refused calls into question the argument that the parody substantially interferes with the market for parodies. If Acuff-Rose was concerned with establishing a market for parodies, they had a strange way of showing it. Yes, perhaps they disapproved of the group's version of the song. But wasn't there some price at which the sting of the raunchy parody could have been numbed? Or against which even the most generous prospect of alternative parodies paled in comparison? Again, they apparently didn't try to find out.

In fact, the refusal to license has the air of a refusal "on principle." Presumably, some parodies would have been okay, but not a "rap" parody, or at least not this one. This is precisely the point at which the policy favoring dissemination enters the picture.

And note, before we turn to a discussion of that policy, that it is most emphatically not offered as a "noneconomic" value that informs copyright law as an adjunct to the incentive effect. Perhaps it is defensible on such a ground; noted theorists in the field have argued that something akin to it is inherent in the very kind of property that copyright is. I want to make a much more modest argument, however: that the dissemination policy makes sense in strictly economic terms.

A dissemination principle makes sense in copyright because (1) we strongly want mutually advantageous transactions involving copyrights to in fact take place; but (2) not all transactions in fact take place voluntarily. Again, compulsory licensing provides a clear example of the importance of this policy for copyright law.

But, it may be argued, compulsory licensing is an extreme remedy justifiable only when the costs of entering into a series of voluntary transactions exceed the surplus that would be generated thereby. Only those parody cases that fit this mold would thus be subject to the fair use defense.

The specification of the problem is right, only it is not carried far enough. For it must be recognized that in some cases, "transaction costs" should be defined to include such costs as the risk of bargaining breakdown (which are at the very least increased by the prospect of an embarrassing par-
ody), or even the extra costs of overcoming a party’s noneconomic resistance to an exchange. In such cases, the logic of compulsory licensing applies: the law must supply a mutually beneficial exchange where the market will not. The parody in Campbell, and other parodies “distasteful” to the copyright holder, involves a mild extension of the dissemination principle latent in the compulsory licensing sections of the copyright code, not to mention other doctrines and practices in the field.

To take an analogous example, consider laws prohibiting employment discrimination on the basis of race or sex. Where an employer refuses to hire a qualified employee whose employment would, viewed solely under objective economic criteria, benefit both parties, the law in effect steps in and supplies the exchange. Put differently, the law refuses to sanction the employer’s subjective, noneconomic taste for discrimination; it restricts the decision criteria to the economic sphere. The justifications for such rules are of course legion, beginning with a fundamental respect for equality; but they also include the notion that the nation’s economy cannot afford to sanction discrimination in the labor market — in short, that the cost of foregoing otherwise rational (mutually advantageous) labor “transactions” is too high to bear.

Much the same can be said about parody transactions. As long as the parodist offers a royalty to the copyright holder that will adequately compensate her, we should not sanction refusals to license. This is so because in these cases we know that the refusal to license is based on a noneconomic motive, and we know that copyright law’s preference for dissemination is too strong to give any credence to such motives in such cases.

Before concluding, a word must be said about market exchanges of copyrights. As I mentioned earlier, consensual transfers are so much the norm in copyright law that coerced exchanges must be convincingly justified. My comments here are occasioned by a recent article on the parody defense by 23. See Robert Cooter, The Cost of Coase, 11 J. Leg. Stud. 1, 23 (1982) (non-objective factors, i.e., unobservables, make it harder to determine opponent’s reservation price and hence make bargaining more likely to break down).

24. I realize I am using this in a way that would be contrary to the views of some economists, who would content that any subjective preference an individual uses to construct her own private “utility function” is an “economic” value. For those who hold such beliefs, the proper way to phrase this thought is: we will refuse to recognize that portion of subjective value based on these preferences.

25. See Sheldon N. Light, Parody, Burlesque, and the Economic Rationale for Copyright, 11 Conn. L. Rev. 615 (1979) (in most, if not all, of the decisions concerning parody, the interests which the copyright holders sought to protect were not economic or commercial; they were personal interests in stopping uses which were personally offensive or unflattering, and hence not in line with an economic view of copyright).

26. I do not contend that this is established by the facts in Campbell, where the defendants merely offered to pay the statutorily-defined compulsory license fee for a phonorecording of the copyrighted song — i.e., the statutory “cover” charge. I merely point out that if Acuff-Rose had negotiated with them, the group might have reached such a bargain. (Perhaps a remand to the trial court for further findings on this and related issues is in order.) Note further that techniques exist for valuing harm to reputation (e.g., in libel and defamation cases), so that to the extent this is a legitimate economic concern of the copyright holder these techniques can be employed in calculating the compensation to be paid.
Judge Richard Posner. 27

Judge Posner distinguishes between parodies that use a copyrighted work as a “weapon” to criticize or comment on something else, and those where the target of the parody is the copyrighted work itself. He argues that the parody defense should be available in the latter cases, but not in the former. 28 This proposal apparently turns on the fact that copyright holders will under normal circumstances license parodies that use their works as a “weapon” aimed at something else; Posner asks rhetorically, “[W]hy should the owner of the original be reluctant to license the parody” in such a case? Since licenses should be forthcoming in these cases, no parody defense should be invoked in the absence of a license.

Parodies that target the original copyrighted work are different, Posner argues. They are akin to book reviews, where the dissemination of useful and credible commentary, even at the expense of the market for the work under review, is so socially valuable that coerced transfers (i.e., a defense to infringement) are justified. Importantly, the credibility of a book review stems from the fact that the book review need not be sanctioned by the author. 29

My problems with Posner’s distinction begin with its workability. He admits there “may of course be problems” with it; the truth of this can be seen from the Campbell case itself. Is 2 Live Crew parodying (1) Roy Orbison’s song, “Oh, Pretty Woman”; (2) Popular notions of romantic love; (3) Banal cultural values that emphasize meeting and wooing a “pretty woman”; (4) “White-bread” mainstream culture, which produced (1) through (3); or (5) some or all of the above? It seems hard to say. Certainly a parodist’s choice of a particular “weapon” as embodying something else that is the ultimate “target” is not accidental. Indeed, a successful parody might often be expected to parody both a copyrighted work and the values it represents. Surely, for example, a parody of “Gone With the Wind” might use the movie as a weapon to parody romanticized notions of the Civil War and southern “gallantry,” while successfully mocking some of the overdone aspects of the film itself.

The second problem with Posner’s “weapon”/“target” distinction is his assumption that a copyright holder will normally license parodies of the first sort, but not the second. This seems wrong, at least in those cases where the “target” of the parody is a set of values or cultural assumptions deeply cherished by the copyright holder or at least widely held by the segment of the public loyal to her. In these cases, in the words of the dissenting Sixth Circuit opinion, denying the parody defense allows the copyright holder to “censor” those parodies she disapproves of. 30 For the reasons discussed above, if her disapproval stems not from an economic assessment of the market impact of the parody, but from revulsion at the parodist’s art or message, copyright law ought not to sanction it. Perhaps one might even argue that “weapon” cases are more deserving of fair use “protection” since they presumably serve the goal of promoting criticism of and

28. Id. at 71.
29. Id. at 69.
30. 972 F.2d at 1429 (Nelson, J., dissenting).
commentary\textsuperscript{31} on "larger" social issues and values. Put another way, these are cases where in general the loss in private value to the copyright holder is even less significant compared to the social welfare gain stemming from the parody.

Having put forth a transactional, or market-centered, account of the parody defense, a few words are in order about the limitations of such an account. First, it is very different from a First Amendment view of parody. From the perspective of the First Amendment it should make no difference whether a parodist offered to take a license from the copyright holder; the parody is either privileged free expression or it is not. The ability or willingness of the parodist to pay is irrelevant. Perhaps this points up a shortcoming with the transactional approach. For present purposes, I am only interested to show that it is a quite distinct basis on which to ground the parody defense.

Second, to characterize a parody as a work for which there is likely to be a breakdown in the market for permissions is to invite opportunistic defendants to plead parody every time licensing negotiations in fact lead to an impasse. The only way to discourage this is to distinguish between "true" parodies and "coocked" ones, i.e., infringing works labeled as parodies for purposes of a successful legal defense. This of course means that many cases will recapitulate the problems I have identified with the Court of Appeals opinion in Campbell. The difference is that under a market-based view of parody the existence of and reasons for bargaining breakdown between the parties become paramount. Certainly it cannot be argued that the addition of the transactional analysis would make parody more open-ended than the current approach. For, as exemplified by Campbell, this approach focuses exclusively on whether the defendant's work was a "true" parody, which seems inevitably to entangle the court in a difficult discussion of the nature of the work, the parody, and the relationship between the two.

Ultimately the problem with the parody defense may be that it necessitates a brand of value assessment that is explicitly shunned in other copyright doctrines. The fair use section of the statute asks courts to keep in mind whether an infringing work involves criticism, commentary, scholarship or news reporting. Meanwhile, doctrines of copyrightability — notably the requirements for registration and "originality" — have developed with an eye towards value neutrality. It seems impossible to remain neutral in the same sense when assessing whether a work is "really" a parody, i.e., whether it really criticizes or comments on the original in some meaningful sense. Viewed from this angle, the proposal in this short essay is to inject a bit more neutrality into the discussion, by focusing on whether a reasonable market transaction for the right to parody could be envisioned. If it can, and if this is used to justify imposition of the parody defense, then at least we could claim that the law was neutral in this respect: that it allowed dissemination of every parody capable of generating a net profit to the parodist and copyright holder. This would at least bring us a step closer to a limited form of "market neutrality" in this area of copyright law.

\textsuperscript{31} These are mentioned explicitly in the preamble to 17 U.S.C. § 107.