Can Patents Deter Innovation? The Anticommons in Biomedical Research

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The “tragedy of the commons” metaphor helps explain why people overuse shared resources. However, the recent proliferation of intellectual property rights in biomedical research suggests a different tragedy, an “anticommons” in which people underuse scarce resources because too many owners can block each other. Privatization of biomedical research must be more carefully deployed to sustain both upstream research and downstream product development. Otherwise, more intellectual property rights may lead paradoxically to fewer useful products for improving human health.

Thirty years ago in Science, Garrett Hardin introduced the metaphor “tragedy of the commons” (1) to help explain overpopulation, air pollution, and species extinction. People often overuse resources they own in common because they have no incentive to conserve. Today, Hardin’s metaphor is central to debates in economics, law, and science and is a powerful justification for privatizing commons property (2). Although the metaphor highlights the cost of overuse when governments allow too many people to use a scarce resource, it overlooks the possibility of underuse when governments give too many people rights to exclude others. Privatization can solve one tragedy but cause another (3).

Since Hardin’s article appeared, biomedical research has been moving from a commons model toward a privatization model (4). Under the commons model, the federal government sponsored premarket or “upstream” research and encouraged broad dissemination of results in the public domain. Unpatented biomedical discoveries were freely incorporated in “downstream” products for diagnosing and treating disease. In 1980, in an effort to promote commercial development of new technologies, Congress began encouraging universities and other institutions to patent discoveries arising from federally supported research and development and to transfer their technology to the private sector (5). Supporters applauded the resulting increase in patent filings and private investment (6), whereas critics fear deterioration in the culture of upstream research (7). Building on Heller’s theory of anticommons property (3), this article identifies an unintended and paradoxical consequence of biomedical privatization: A proliferation of intellectual property rights upstream may be stifling life-saving innovations further downstream in the course of research and product development.

The Tragedy of the Anticommons

Anticommons property can best be understood as the mirror image of commons property (3, 8). A resource is prone to overuse in a tragedy of the commons when too many owners each have a privilege to use a given resource and no one has a right to exclude another (9). By contrast, a resource is prone to underuse in a “tragedy of the anticommons” when multiple owners each have a right to exclude others from a scarce resource and no one has an effective privilege of use. In theory, in a world of costless transactions, people could always avoid commons or anticommons tragedies by trading their rights (10). In practice, however, avoiding tragedy requires overcoming transaction costs, strategic behaviors, and cognitive biases of participants (11), with success more likely within close-knit communities than among hostile strangers (12–14). Once an anticommons emerges, collecting rights into usable private property is often brutal and slow (15).

Privatization in postsocialist economies starkly illustrates how anticommons property can emerge and persist (3). One promise of the transition to a free market was that new entrepreneurs would fill stores that socialists rule had left bare. Yet after several years of reform, many privatized storefronts remained empty, while flimsy metal kiosks, stocked full of goods, mushroomed on the streets. Why did the new merchants not come in from the cold? One reason was that transition governments often failed to endow any individual with a bundle of rights that represents full ownership. Instead, fragmented rights were distributed to various socialist-era stakeholders, including private or quasi-private enterprises, workers’ collective, privatization agencies, and local, regional, and federal governments. No one could set up shop without first collecting rights from each of the other owners.

Privatization of upstream biomedical research in the United States may create anticommons property that is less visible than empty storefronts but even more economically and socially costly. In this setting, privatization takes the form of intellectual property claims to the sorts of research results that, in an earlier era, would have been made freely available in the public domain. Responding to a shift in U.S. government policy (4) in the past two decades, research institutions such as the National Institutes of Health (NIH) and major universities have created technology transfer offices to patent and license their discoveries. At the same time, commercial biotechnology firms have emerged in research and development (R&D) niches somewhere between the proverbial “fundamental” research of academic laboratories and the targeted product development of pharmaceutical firms (7). Today, upstream research in the biomedical sciences is increasingly likely to be “private” in one or more senses of the term—supported by private funds, carried out in a private institution, or privately appropriated through patents, trade secrecy, or agreements that restrict the use of materials and data.

In biomedical research, as in postsocialist transition, privatization holds both promises and risks. Patents and other forms of intellectual property protection for upstream discoveries may fortify incentives to undertake risky research projects and could result in a more equitable distribution of profits across all stages of R&D. But privatization can go astray when too many owners hold rights in previous discoveries that constitute obstacles to future research (16).

Upstream patent rights, initially offered to help attract further private investment, are increasingly regarded as entitlements by those who do research with public funds. A researcher who may have felt entitled to coauthorship or a citation in an earlier era may now feel entitled to be a coinventor on a patent or to receive a royalty under a material transfer agreement. The result has been a spiral of overlapping patent claims in the hands of different owners, reaching ever further upstream in the course of biomedical research. Researchers and their institutions may resent restrictions on access to the patented discoveries of others, yet no-
body wants to be the last one left dedicating findings to the public domain.

The problem we identify is distinct from the routine underuse inherent in any well-functioning patent system. By conferring monopolies in discoveries, patents necessarily increase prices and restrict use—a cost society pays to motivate invention and disclosure. The tragedy of the anticommons refers to the more complex obstacles that arise when a user needs access to multiple patented inputs to create a single useful product. Each upstream patent allows its owner to set up another tollbooth on the road to product development, adding to the cost and slowing the pace of downstream biomedical innovation.

How a Biomedical Anticommons May Arise

Current examples in biomedical research demonstrate two mechanisms by which a government might inadvertently create an anticommons: either by creating too many concurrent fragments of intellectual property rights in potential future products or by permitting too many upstream patent owners to stack licenses on top of the future discoveries of downstream users.

Concurrent fragments. The anticommons model provides one way of understanding a widespread intuition that issuing patents on gene fragments makes little sense. Throughout the 1980s, patents on genes generally corresponded closely to foreseeable commercial products, such as therapeutic proteins or diagnostic tests for recognized genetic diseases (17). Then, in 1991, NIH pointed the way toward patenting anonymous gene fragments with its notorious patent applications on expressed sequence tags (ESTs) (18). NIH subsequently abandoned these patent applications and now takes a more hostile position toward patenting ESTs and raw genomic DNA sequences (19). Meanwhile, private firms have stepped in where NIH left off, filing patent applications on newly identified DNA sequences, including gene fragments, before identifying a corresponding gene, protein, biological function, or potential commercial product. The Patent and Trademark Office (PTO), in examining these claims (20), could create or avoid an anticommons.

Although a database of gene fragments is a useful resource for discovery, defining property rights around isolated gene fragments seems at the outset unlikely to track socially useful bundles of property rights in future commercial products. Foreseeable commercial products, such as therapeutic proteins or genetic diagnostic tests, are more likely to require the use of multiple fragments. A proliferation of patents on individual fragments held by different owners seems inevitably to require costly future transactions to bundle licenses together before a firm can have an effective right to develop these products (21).

Patents on receptors useful for screening potential pharmaceutical products demonstrate another potential “concurrent fragment” anticommons in biomedical research. To learn as much as possible about the therapeutic effects and side effects of potential products at the preclinical stage, firms want to screen products against all known members of relevant receptor families. But if these receptors are patented and controlled by different owners, gathering the necessary licenses may be difficult or impossible. A recent search of the Lexis patent database disclosed more than 100 issued U.S. patents with the term “adrenergic receptor” in the claim language. Such a proliferation of claims presents a daunting bargaining challenge. Unable to procure a complete set of licenses, firms choose between diverting resources to less promising projects with fewer licensing obstacles or proceeding to animal and then clinical testing on the basis of incomplete information. More thorough in vitro screening could avoid premature clinical testing that exposes patients to unnecessary risks.

Long delays between the filing and issuance of biotechnology patents aggravate the problem of concurrent fragments. During this period of pendency, there is substantial uncertainty as to the scope of patent rights that will ultimately issue. Although U.S. patent law does not recognize enforceable rights in pending patent applications, firms and universities typically enter into license agreements before the issuance of patents, and firms raise capital on the basis of the inchoate rights preserved by patent filings. In effect, each potential patent creates a specter of rights that may be larger than the actual rights, if any, eventually conferred by the PTO. Worked into the calculations of both risk-taking investors and risk-averse product developers, these overlapping patent filings may compound the obstacles to developing new products.

Stacking licenses. The use of reach-through license agreements (RTLAs) on patented research tools illustrates another path by which an anticommons may emerge. As we use the term, an RTL A gives the owner of a patented invention, used in upstream stages of research, rights in subsequent downstream discoveries. Such rights may take the form of a royalty on sales that result from use of the upstream research tool, an exclusive or nonexclusive license on future discoveries, or an option to acquire such a license. In principle, RTLAs offer advantages to both patent holders and researchers. They permit researchers with limited funds to use patented research tools right away and defer payment until the research yields valuable results. Patent holders may also prefer a chance at larger payoffs from sales of downstream products rather than certain, but smaller, upfront fees. In practice, RTLAs may lead to an anticommons as upstream owners stack overlapping and inconsistent claims on potential downstream products. In effect, the use of RTLAs gives each upstream patent owner a continuing right to be present at the bargaining table as a research project moves downstream toward product development.

So far, RTLAs have had a mixed reception as a mechanism for licensing upstream biomedical research patents, but they appear to be becoming more prevalent. When Cetus Corporation initially proposed RTLAs on any products developed through the use of the polymerase chain reaction (PCR) in research, they met strong resistance from downstream users concerned with developing commercial products (22). Later, Hoffmann-La Roche acquired the rights to PCR and offered licenses that do not include reach-through obligations (23). The resulting pay-as-you-go approach increases the upfront cost of a license to use PCR, but it decreases the likelihood of an anticommons emerging.

More recently, some universities and other nonprofit research institutions have balked at terms DuPont Corporation has offered for licenses to use patented oncormouse (24) and cre-lox (25) technologies, although others have acquiesced to the license terms (26). These patents cover genetically engineered mice useful in research that could result in products falling outside the scope of the patent claims. DuPont has offered noncommercial research licenses and sublicenses on terms that seem to require licensees to return to DuPont for further approval before any new discoveries or materials resulting from the use of licensed mice are passed along to others or used for commercial purposes (27). DuPont thereby gains the right to participate in future negotiations to develop commercial products that fall outside the scope of their patent claims. In effect, the license terms permit
DuPont to leverage its proprietary position in upstream research tools into a broad veto right over downstream research and product development.

As RTLAs to use patented research tools multiply, researchers will face increasing difficulties conveying clear title to firms that might develop future discoveries. If a particularly valuable commercial product is in view, downstream product developers might be motivated and able to reach agreements with multiple holders of RTLAs. But if the prospects for success are more uncertain or the expected commercial value is small, the parties may fail to bargain past the anticommons.

**Transition or Tragedy?**

Is a biomedical anticommons likely to endure once it emerges? Recent empirical literature suggests that communities of intellectual property owners who deal with each other on a recurring basis have sometimes developed institutions to reduce transaction costs of bundling multiple licenses (28). For example, in the music industry, copyright collectives have evolved to facilitate licensing transactions so that broadcasters and other producers may readily obtain permission to use numerous copyrighted works held by different owners. Similarly, in the automobile, aircraft manufacturing, and synthetic rubber industries, patent pools have emerged, sometimes with the help of government, when licenses under multiple patent rights have been necessary to develop important new products (28). When the background legal rules threaten to waste resources, people often rearrange rights sensibly and create order through private arrangements (12-14). Perhaps some of the problems caused by proliferating upstream patent rights in biomedical research will recede as licensors and licensees gain experience with intellectual property rights and institutions evolve to help owners and users reach agreements. The short-term costs from delayed development of new treatments for disease may be worth incurring if fragmented privatization allows upstream research to pay its own way and helps to ensure its long-run viability. Patent barriers to product development may be a transitional phenomenon rather than an enduring tragedy.

On the other hand, there may be reasons to fear that a patent anticommons could prove more intractable in biomedical research than in other settings. Because patents matter more to the pharmaceutical and biotechnology industries than to other industries, firms in these industries may be less willing to participate in patent pools that undermine the gains from exclusivity (29). Moreover, the lack of substitutes for certain biomedical discoveries (such as patented genes or receptors) may increase the leverage of some patent holders, thereby aggravating holdout problems. Rivals may not be able to invent around patents in research aimed at understanding the genetic bases of diseases as they occur in nature.

More generally, three structural concerns caution against uncritical reliance on markets and norms to avoid a biomedical anticommons tragedy: the transaction costs of rearranging entitlements, heterogeneous interests of owners, and cognitive biases among researchers.

**Transaction costs of bundling rights.** High transaction costs may be an enduring impediment to efficient bundling of intellectual property rights in biomedical research. First, many upstream patent owners are public institutions with limited resources for absorbing transaction costs and limited competence in fast-paced, market-oriented bargaining. Second, the rights involved cover a diverse set of techniques, reagents, DNA sequences, and instruments. Difficulties in comparing the values of these patents will likely impede development of a standard distribution scheme. Third, the heterogeneity of interests and resources among public and private patent owners may complicate the emergence of standard license terms, requiring costly case-by-case negotiations. Fourth, licensing transaction costs are likely to arise early in the course of R&D when the outcome of a project is uncertain, the potential gains are speculative, and it is not yet clear that the value of downstream products justifies the trouble of overcoming the anticommons.

Even when upstream owners see potential gains from cooperation and are motivated to devise mechanisms for reducing transaction costs, they may be deterred by other legal constraints, such as antitrust laws. Patent pools have been a target of antitrust scrutiny in the past (30), which may explain why few, if any, such pools exist today. Although antitrust law may be less hostile to patent pools today than it was in 1975 when a consent decree dismantled the aircraft patent pool (31), the antitrust climate changes from one administration to the next (32). Even a remote prospect of facing treble damages and an injunction may give firms pause about entering into such agreements.

**Heterogeneous interests of rights holders.** Intellectual property rights in upstream biomedical research belong to a large, diverse group of owners in the public and private sectors with divergent institutional agendas. Sometimes heterogeneity of interests can facilitate mutually agreeable allocations (you take the credit, I’ll take the money) (33, 34), but in this setting, there are reasons to fear that owners will have conflicting agendas that make it difficult to reach agreement. For example, a politically accountable government agency such as NIH may further its public health mission by using its intellectual property rights to ensure widespread availability of new therapeutic products at reasonable prices. When NIH sought to establish its co-ownership of patent rights held by Burroughs-Wellcome on the use of azidothymidine (AZT) to treat the human immunodeficiency virus (HIV) (35), its purpose was to lower the price of AZT and promote public health rather than simply to maximize its financial return. By contrast, a private firm is more likely to use intellectual property to maintain a lucrative product monopoly that rewards shareholders and funds future product development. When owners have conflicting goals and each can deploy its rights to block the strategies of the others, they may not be able to reach an agreement that leaves enough private value for downstream developers to bring products to the market.

A more subtle conflict in agendas arises between owners that pursue end-product development and those that focus primarily on upstream research. The goal of end-product development may be better served by making patented research tools widely available on a nonexclusive basis, whereas the goal of procuring upstream research funding may be better served by offering exclusive licenses to sponsors or research partners. Differences among patent owners in their tolerance for transaction costs may further complicate the emergence of informal licensing norms. Universities may be ill equipped to handle multiple transactions for acquiring licenses to use research tools. Delays in negotiating multiple agreements to use patented processes, reagents, and gene fragments could stifle the creative give-and-take of academic research. Yet academic researchers who fail to adopt new discoveries and instead rely on obsolete public domain technologies may find themselves losing grant competitions. Large corporations with substantial legal departments may have considerably greater resources for negotiating licenses on a case-by-case basis than public sector institutions or small start-up firms. This asymmetry may make it difficult to identify mutually advantageous cross-licensing arrangements. Patent owners are also likely to differ in the time frames they can tolerate for recouping current investments in transaction costs.

Owners are also likely to differ in their willingness and ability to infringe the patents of others, resulting in asymmetrical motivations to negotiate cross-licenses. Use of a patented invention in an academic laboratory or a small start-up firm may be
inconspicuous, at least if not described in a publication or at a scientific meeting. Patent owners may be more reluctant to sue public sector investigators than they are to sue private firms. Differences in institutional cultures may make academic laboratories and biotechnology firms more tolerant of patent infringement than large pharmaceutical firms. Owners who do not feel vulnerable to infringement liability may be less motivated to enter into reasonable cross-licenses than owners who worry more about being sued.

Cognitive biases. People consistently overestimate the likelihood that very low probability events of high salience will occur (36). For example, many travelers overestimate the danger of an airplane crash relative to the hazards of other modes of transportation. We suspect that a similar bias is likely to cause owners of upstream biomedical research patents to overvalue their discoveries. Imagine that one of a set of 50 upstream inventions will likely be the key to identifying an important new drug, the rest of the set will have no practical use, and a downstream product developer is willing to pay $10 million for the set. Given the assumption that no owner knows ex ante which invention will be the key, a rational owner should be willing to sell her patent for the probabilistic value of $200,000. However, if each owner overestimates the likelihood that her patent will be the key, then each will demand more than the probabilistic value, the upstream owners collectively will demand more than the aggregate market value of their inputs, the downstream user will decline the offers, and the new drug will not be developed. Individuals trained in deterministic rather than probabilistic disciplines are particularly likely to succumb to this sort of error (37).

A related "attribution bias" suggests that people systematically overvalue their assets and disparage the claims of their opponents when in competition with others (38). We suspect that the attribution bias is pervasive among scientists because it is likely adaptive for the research enterprise as a whole. Overcommitment by individuals to particular research approaches ensures that no hypothesis is dismissed too quickly, and skepticism toward rivals' claims ensures that they are not too readily accepted. But this bias can interfere with clear-headed bargaining, leading owners to overvalue their own patents, undervalue others' patents, and reject reasonable offers. Institutional ownership could mitigate these biases, but technology transfer offices rely on scientists to evaluate their discoveries. When two or more patent owners each hope to dominate the product market, the history of biotechnology patent litigation suggests a likelihood that bargaining will fail (39).

Conclusion

Like the transition to free markets in post-socialist economies, the privatization of biomedical research offers both promises and risks. It promises to spur private investment but risks creating a tragedy of the anticommons through a proliferation of fragmented and overlapping intellectual property rights. An anticommons in biomedical research may be more likely to endure than in other areas of intellectual property because of the high transaction costs of bargaining, heterogeneous interests among owners, and cognitive biases of researchers. Privatization must be more carefully deployed if it is to serve the public goals of biomedical research. Policy-makers should seek to ensure coherent boundaries of upstream patents and to minimize restrictive licensing practices that interfere with downstream product development. Otherwise, more upstream rights may lead paradoxically to fewer useful products for improving human health.

REFERENCES AND NOTES

9. W. N. Horfield, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (Yale Univ. Press, New Haven, CT, 1923), this work introduced the now standard vocabulary of "privileges of use" and "rights of exclusion."
11. ______, The Firm, The Market and The Law (Univ. of Chicago Press, Chicago, IL, 1988), p. 174. "The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave."
22. "Cetus to exact royalties from PCR sales; probe ab-solves convicted rapist," Biotechnology Newswatch 8, 7 (5 September 1988).
24. Harvard University, U.S. Patent 4,736,866, 1988; U.S. Patent 5,087,571, 1998, DuPont, as research sponsor, holds an exclusive license under these patents.
27. This interpretation requires careful parsing of inart- fully drafted licenses, on file with the authors.
38. Supported by the Cook Endowment at the University of Michigan Law School and the Office of Health and Environmental Research of the U.S. Department of Energy. We thank I. Cockburn, F. Collins, R. Cook-Deegan, S. Cullen, R. Eckelsson, P. Goldstein, D. Hanahan, E. Jordan, K. Paigen, R. Nelson, N. Ner- nel, E. Posner, H. Varmus, anonymous reviewers for Science, and workshop participants at the National Bureau of Economic Research and the University of Michigan, Stanford University, and George Washing- ton University law schools for reading and comment- ing on earlier versions of this manuscript.
Action was brought regarding home run baseball that was hit in record-breaking performance in which claims for conversion, trespass to chattel, injunctive relief, and constructive trust were asserted. The Superior Court, San Francisco County McCarthy, J., held that: (1) allegations did not support claim for trespass to chattel; (2) spectator failed to establish that he had achieved full possession of baseball; (3) spectator, who undertook significant but incomplete steps to achieve possession of baseball and whose effort was interrupted by unlawful acts of others, had a legally cognizable prepossessory interest in baseball, which could support conversion claim; but (4) both spectator and fan who ultimately recovered baseball had an equal and undivided interest in the ball.

So ordered.

West Headnotes

[1] Trespass 386

386 Trespass
   386d Acts Constituting Trespass and Liability Therefor
       386k5 Trespass to Personal Property
           386k8 k. Taking, Carrying Away, or Detaining Property. Most Cited Cases
Baseball spectator's allegations that second fan intentionally took home run baseball that was hit in record-breaking performance from him and refused to give it back did not support claim for trespass to chattel; there was no allegation that second fan damaged the ball or that he interfered with spectator's use and enjoyment of the ball.


389 Trover and Conversion
   389II Actions
       389II(A) Right of Action and Defenses
           389k15 Title and Right to Possession of Plaintiff
           389k16 k. In General. Most Cited Cases
Baseball spectator failed to establish by a preponderance of the evidence that he would have retained control of home run baseball that was hit in record-breaking performance after all momentum ceased and after any incidental contact with people or objects and, consequently, he did not achieve full possession, for purposes of maintaining an action for conversion against spectator who ultimately recovered ball.


389 Trover and Conversion
   389II Actions
       389II(A) Right of Action and Defenses
           389k15 Title and Right to Possession of Plaintiff
           389k17 k. Special Property or Qualified Interest or Right. Most Cited Cases
Baseball spectator, who undertook significant but incomplete steps to achieve possession of home run baseball that was hit in record-breaking performance and whose effort was interrupted by the unlawful acts of others, had a legally cognizable prepossessory interest in baseball, which constituted a qualified right to possession that could support a cause of action for conversion.

[4] Abandoned and Lost Property 1

1 Abandoned and Lost Property
   III Finding Lost Goods
       1k13 k. Title and Rights of Finders Inter Se.
Most Cited Cases
Under principles of equitable division, both base-
ball spectator who initially undertook significant
steps to achieve possession of home run baseball
that was hit in record-breaking performance, but
was foiled by unlawful acts of crowd, and spectator
who ultimately recovered baseball had an equal and
undivided interest in the ball; second spectator's
claim was compromised by first spectator's pre-
possessionary interest, and first spectator could not
demonstrate full control.

FACTS

MCCARTHY, J.

*1 In 1927, Babe Ruth hit sixty home runs. That re-
cord stood for thirty four years until Roger Maris
broke it in 1961 with sixty one home runs. Mark
McGwire hit seventy in 1998. On October 7, 2001,
at PacBell Park in San Francisco, Barry Bonds hit
number seventy three. That accomplishment set a
record which, in all probability, will remain un-
broken for years into the future.

The event was widely anticipated and received a
great deal of attention.

The ball that found itself at the receiving end of Mr.
Bond's bat garnered some of that attention. Baseball
fans in general, and especially people at the game,
understood the importance of the ball. It was worth
a great deal of money FN1 and whoever caught it
would bask, for a brief period of time, in the reflec-
ted fame of Mr. Bonds.

FN1. It has been suggested that the ball
might sell for something in excess of
$1,000,000

With that in mind, many people who attended the
game came prepared for the possibility that a record
setting ball would be hit in their direction. Among
this group were plaintiff Alex Popov and defendant
Patrick Hayashi. They were unacquainted at the
time. Both men brought baseball gloves, which they
anticipated using if the ball came within their reach.

They, along with a number of others, positioned
themselves in the arcade section of the ballpark.
This is a standing room only area located near right
field. It is in this general area that Barry Bonds hits
the greatest number of home runs. FN2 The area was
crowded with people on October 7, 2001 and access
was restricted to those who held tickets for that sec-
tion.

FN2. The Giants' website contains a page
which shows where each of Bonds' home
runs landed in 2001. This page was intro-
duced into evidence and is part of the re-
cord. It shows that most of the balls are
clustered in the arcade area.

Barry Bonds came to bat in the first inning. With
nobody on base and a full count, Bonds swung at a
slow knuckleball. He connected. The ball sailed
over the right-field fence and into the arcade.

Josh Keppel, a cameraman who was positioned in
the arcade, captured the event on videotape. Keppel
filmed much of what occurred from the time Bonds
hit the ball until the commotion in the arcade had
subsided. He was standing very near the spot where
the ball landed and he recorded a significant
amount of information critical to the disposition of
this case.

In addition to the Keppel tape, seventeen percipient
witnesses testified as to what they saw after the ball
came into the stands. The testimony of these wit-
nesses varied on many important points. Some of
the witnesses had a good vantage point and some
did not. Some appeared disinterested in the out-
come of the litigation and others had a clear bias.
Some remembered the events well and others did
not. Some were encumbered by prior inconsistent
statements which diminished their credibility.

The factual findings in this case are the result of an
analysis of the testimony of all the witnesses as
well as a detailed review of the Keppel tape. Those
findings are as follows:

When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

*2 Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

FN3. Ted Kobayashi, a defense expert, testified that there was insufficient reaction time for the crowd to descend on Mr. Popov. This opinion is completely unconvincing. It is premised on the assumption that people did not begin to react until the ball hit Mr. Popov's glove. A number of witnesses testified that they began reacting while the ball was in the air. People rushed to the area where they thought the ball would land. If people were unable to anticipate where a ball will land while it is still in the air, no outfielder would ever catch a ball unless it was hit directly to him or her. Moreover, the tape itself shows people descending on Mr. Popov even as he was attempting to catch the ball.

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. Neither the tape nor the testimony is sufficient to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

The videotape clearly establishes that this was an out of control mob, engaged in violent, illegal behavior. Although some witnesses testified in a manner inconsistent with this finding, their testimony is specifically rejected as being false on a material point. FN4

FN4. Because the probability of truth does not favor the testimony of any of these witnesses in other particulars, their entire testimony is rejected. BAJI 2.22 This finding does not apply to Mr. Hayashi.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.

Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act. FN5 While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

FN5. Plaintiff argues that the Keppel tape shows Mr. Hayashi biting the leg of Brian Shepard. The tape does not support such a conclusion. The testimony which suggests that a bite occurred is equally unconvincing. In addition, there is insufficient evidence that Mr. Hayashi assaulted or attempted to take the ball away from Mr. Popov.

Although the crowd was still on top of Mr. Popov, security guards had begun the process of physically pulling people off. Some people resisted those efforts. One person argued with an official and another had to be pulled off by his hair.

Mr. Hayashi kept the ball hidden. He asked Mr. Keppel to point the camera at him. At first, Mr. Keppel did not comply and Mr. Hayashi continued to hide the ball. Finally after someone else in the crowd asked Mr. Keppel to point the camera at Mr.
Hayashi, Mr. Keppel complied. It was only at that point that Mr. Hayashi held the ball in the air for others to see. Someone made a motion for the ball and Mr. Hayashi put it back in his glove. It is clear that Mr. Hayashi was concerned that someone would take the ball away from him and that he was unwilling to show it until he was on videotape. Although he testified to the contrary, that portion of his testimony is unconvincing.

Mr. Popov eventually got up from the ground. He made several statements while he was on the ground and shortly after he got up which are consistent with his claim that he had achieved some level of control over the ball and that he intended to keep it. Those statements can be heard on the audio portion of the tape. When he saw that Mr. Hayashi had the ball he expressed relief and grabbed for it. Mr. Hayashi pulled the ball away. Security guards then took Mr. Hayashi to a secure area of the stadium.

*3 It is important to point out what the evidence did not and could not show. Neither the camera nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge

**LEGAL ANALYSIS**

Plaintiff has pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust.

Conversion is the wrongful exercise of dominion over the personal property of another. There must be actual interference with the plaintiff's dominion. Wrongful withholding of property can constitute actual interference even where the defendant lawfully acquired the property. If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

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FN6. Defense counsel has attempted to characterize this encounter as one in which Mr. Popov congratulates Mr. Hayashi for getting the ball and offers him a high five. This is an argument that only a true advocate could embrace.

FN7. Testimony was also received about events which occurred after baseball officials escorted Mr. Hayashi to a secure area. This evidence was admitted to allow counsel to explore the possibility that Major League Baseball retained constructive possession of the ball after it landed in the stands and later gifted it to Mr. Hayashi. Defense counsel has properly abandoned this theory. There is no evidence to support it.


The act constituting conversion must be intentionally done. There is no requirement, however, that the defendant know that the property belongs to another or that the defendant intends to dispossess the true owner of its use and enjoyment. Wrongful pur-
pose is not a component of conversion FN11


The injured party may elect to seek either specific recovery of the property or monetary damages. FN12

FN12. Witkin, supra, at section 611.

Trespass to chattel, in contrast, exists where personal property has been damaged or where the defendant has interfered with the plaintiff's use of the property. Actual dispossession is not an element of the tort of trespass to chattel. FN13


[1] In the case at bar, Mr. Popov is not claiming that Mr. Hayashi damaged the ball or that he interfered with Mr. Popov's use and enjoyment of the ball. He claims instead that Mr. Hayashi intentionally took it from him and refused to give it back. There is no trespass to chattel. If there was a wrong at all, it is conversion.

Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. FN14. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.


The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Base-

ball. At the time it was hit it became intentionally abandoned property. FN15. The first person who came in possession of the ball became its new owner. FN16


The parties fundamentally disagree about the definition of possession. In order to assist the court in resolving this disagreement, four distinguished law professors participated in a forum to discuss the legal definition of possession. FN17. The professors also disagreed.

FN17. They are Professor Brian E. Gray, University of California, Hastings College of the Law; Professor Roger Bernhardt, Golden Gate University School of Law; Professor Paul Finkelman, The Chapman Distinguished Professor of Law, The University of Tulsa School of Law; and Professor Jan Stiglitz, California Western School of Law.

The discussion was held during an official session of the court convened at The University of California, Hastings College of the Law. The session was attended by a number of students and professors including one first year property law class which used this case as vehicle to understand the law of possession.
The disagreement is understandable. Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used. FN18 Various courts have condemned the term as vague and meaningless. FN19


This level of criticism is probably unwarranted.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

Professor Roger Bernhardt FN20 has recognized that “[p]ossession requires both physical control over the item and an intent to control it or exclude others from it. But these generalizations function more as guidelines than as direct determinants of possession issues. Possession is a blurred question of law and fact.” FN21

FN20. Professor Bernhardt is the author of the textbook Property, Cases and Statutes, published by the West Group as well as the co-author of Real Property in a Nutshell with Professor Ann M. Burkhart.

FN21. Real Property in a Nutshell, Roger Bernhardt and Ann M. Burkhart, chapter one, page 3

Professor Brown argues that “[t]he orthodox view of possession regards it as a union of the two elements of the physical relation of the possessor to the thing, and of intent. This physical relation is the actual power over the thing in question, the ability to hold and make use of it. But a mere physical relation of the possessor to the thing in question is not enough. There must also be manifested an intent to control it.” FN22


The task of this court is to use these principles as a starting point to craft a definition of possession that applies to the unique circumstances of this case.

We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent to the world. FN23 The question is whether he did enough to reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

FN23. Literally.

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition
“A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor.”

FN24. This definition is hereinafter referred to as Gray's Rule.

*5 Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases. FN25 Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman FN26 who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.


Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control. FN27 Moreover, such efforts must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.

FN27. The degree of control necessary to establish possession varies from circumstance to circumstance. “The law ... does not always require that one who discovers lost or abandoned property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit.” Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel (1981) 640 F.2d 560, 571. (emphasis added)


This rule is applied in cases involving the hunting or fishing of wild animals FN29 or the salvage of sunken vessels. FN30 The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal. FN31

FN29. Liesner v. Wanie (1914) 156 Wis. 16, 145 N.W. 374; Ghen v. Rich 8 F. 159
to wrap one's arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray's Rule is adopted as the definition of possession in this case.

FN34. Professor Gray has suggested that the way to deal with this problem is to demand that Mr. Popov sue the people who assaulted him. This suggestion is unworkable for a number of reasons. First, it was an attack by a large group of people. It is impossible to separate out the people who were acting unlawfully from the people who were involuntarily pulled into the mix. Second, in order to prove damages related to the loss of the ball, Mr. Popov would have to prove that but for the actions of the crowd he would have achieved possession of the ball. As noted earlier,
this is impossible.

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

FN35. There are a number of ways courts can enforce the rule of law. Major League Baseball, as well as each individual team has a duty to provide security against foreseeable violence in the stands. The failure to provide that security, or worse, the tacit acceptance of some level of violence, will inevitably lead to lawsuits against the teams and the parent organization.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. That will not happen.

For these reasons, the analysis cannot stop with the valid observation that Mr. Popov has not proved full possession.

FN36. The court is indebted to Professor Jan Stiglitz of California Western School of Law for his valuable insights and suggestions on this issue.

The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can An action for conversion may be brought where the plaintiff has title, possession or the right to possession.

FN37. See note 14

Here Mr. Popov seeks, in effect, a declaratory judgment that he has either possession or the right to possession. In addition he seeks the remedies of injunctive relief and a constructive trust. These are all actions in equity. A court sitting in equity has the authority to fashion rules and remedies designed to achieve fundamental fairness.

[3] Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

Possession can be likened to a journey down a path. Mr. Popov began his journey unimpeded. He was fast approaching a fork in the road. A turn in one direction would lead to possession of the ball he would complete the catch. A turn in the other direction would result in a failure to achieve possession he would drop the ball. Our problem is that before Mr. Popov got to the point where the road forked, he was set upon by a gang of bandits, who dislodged the ball from his grasp.

*7 Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. The difference is that he was able to extract himself from their assault and move to the side of the road. It was there that he discovered the loose ball. When he picked up and put it in his pocket he attained unequivocal dominion and control.

If Mr. Popov had achieved complete possession be-
fore Mr. Hayashi got the ball, those actions would not have divested Mr. Popov of any rights, nor would they have created any rights to which Mr. Hayashi could lay claim. Mr. Popov, however, was able to establish only a qualified pre-possessory interest in the ball. That interest does not establish a full right to possession that is protected from a subsequent legitimate claim.

On the other hand, while Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

[4] An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

The concept of equitable division was fully explored in a law review article authored by Professor R.H. Helmholz in the December 1983 edition of the Fordham Law Review. Professor Helmholz addressed the problems associated with rules governing finders of lost and mislaid property. For a variety of reasons not directly relevant to the issues raised in this case, Helmholz suggested employing the equitable remedy of division to resolve competing claims between finders of lost or mislaid property and the owners of land on which the property was found.


There is no reason, however, that the same remedy cannot be applied in a case such as this, where issues of property, tort and equity intersect.

The concept of equitable division has its roots in ancient Roman law. FN39 As Helmholz points out, it is useful in that it “provides an equitable way to resolve competing claims which are equally strong.” Moreover, “[i]t comports with what one instinctively feels to be fair.”


FN40. id. at 315.

*8 Although there is no California case directly on point, *Arnold v. Producers Fruit Company* (1900) 128 Cal. 637, 61 P. 283 provides some insight. There, a number of different prune growers contracted with Producer's Fruit Company to dry and market their product. Producers did a bad job. They mixed fruit from many different growers together in a single bin and much of the fruit rotted because it was improperly treated.

When one of the plaintiffs offered proof that the fruit in general was rotten, Producers objected on the theory that the plaintiff could not prove that the prunes he contributed to the mix were the same prunes that rotted. The court concluded that it did not matter. After the mixing was done, each grower had an undivided interest in the whole, in proportion to the amount of fruit each had originally contributed.

The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength
of the claim.

Application of the principle of equitable division is illustrated in the case of *Keron v. Cashman* (1896) 33 A. 1055. In that case, five boys were walking home along a railroad track in the city of Elizabeth New Jersey. The youngest of the boys came upon an old sock that was tied shut and contained something heavy. He picked it up and swung it. The oldest boy took it away from him and beat the others with it. The sock passes from boy to boy. Each controlled it for a short time. At some point in the course of play, the sock broke open and out spilled $775 as well as some rags, cloths and ribbons.

The court noted that possession requires both physical control and the intent to reduce the property to one's possession. Control and intent must be concurrent. None of the boys intended to take possession until it became apparent that the sock contained money. Each boy had physical control of the sock at some point before that discovery was made.

Because none could present a superior claim of concurrent control and intent, the court held that each boy was entitled to an equal share of the money. Their legal claims to the property were of equal quality, therefore their entitlement to the property was also equal.

Here, the issue is not intent, or concurrence. Both men intended to possess the ball at the time they were in physical contact with it. The issue, instead, is the legal quality of the claim. With respect to that, neither can present a superior argument as against the other.

Mr. Hayashi's claim is compromised by Mr. Popov's pre-possessory interest. Mr. Popov cannot demonstrate full control. Albeit for different reasons, they stand before the court in exactly the same legal position as did the five boys. Their legal claims are of equal quality and they are equally entitled to the ball.

The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff's cause of action for conversion is sustained only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties.

*9 The parties are ordered to meet and confer forthwith before Judge Richard Kramer to come to an agreement as to how to implement this decision. If no decision is made by December 30, 2002, the parties are directed to appear before this court on that date at 9:00 am.

The court retains jurisdiction to issue orders consistent with this decision. The ball is to remain in the custody of the court until further order.

Popov v. Hayashi
Not Reported in Cal.Rptr.2d, 2002 WL 31833731 (Cal.Superior)
Copyrights and Intellectual Property

For purposes of determining whether parody of copyrighted work is "fair use," the inquiry focuses on whether new work merely supersedes object of original creation or whether and to what extent it is "transformative" and alters original work with new expression, meaning or message. 17 U.S.C.A. §§ 101, 107.

For purposes of determining whether parody of copyrighted work is "fair use," the more "transformative" the new work is, the less significant are other factors, like commercialism, that might weigh against finding of fair use, even though transformative use is not absolutely necessary for finding of fair use; transformative works lie at heart of fair use doctrine's guarantee of breathing space within confines of copyright. 17 U.S.C.A. §§ 101, 107.

Parody, like other comment or criticism, may claim fair use status under Copyright Act. 17 U.S.C.A. §§ 101, 107.

For purposes of copyright law, "parody" is use of some elements of prior author's composition to create new one that, at least in part, comments on original author's work. 17 U.S.C.A. §§ 101, 107.

See publication Words and Phrases for other judicial constructions and definitions.

For purposes of determining whether parody of copyrighted work is "fair use," threshold question is whether parodic character may reasonably be perceived; whether
parody is in good taste or bad does not and should not matter. 17 U.S.C.A. §§ 101, 107.

8. Copyrights and Intellectual Property

For purposes determining whether parody of copyrighted work is fair use, every commercial use of copyrighted material is not presumptively unfair; work's commercial nature is only one element to be considered. 17 U.S.C.A. §§ 101, 107.

9. Copyrights and Intellectual Property

Fact that use of copyrighted work is educational and not for profit does not insulate it from finding of infringement, any more than commercial character of use bars finding of fairness. 17 U.S.C.A. §§ 101, 107.

10. Copyrights and Intellectual Property

Consideration of “nature of copyrighted work,” as required by Copyright Act, in determining fair use is of little value in parody cases as parodies almost invariably copy publicly known and expressive works. 17 U.S.C.A. §§ 101, 107.

11. Copyrights and Intellectual Property

For purposes of determining whether use of copyrighted work is “fair use,” consideration of amount and substantiality of portion of original used in relation to copyrighted work as a whole and whether substantial portion of infringing work was copied verbatim from copyrighted work is relevant question; consideration turns on persuasiveness of justification for particular copying. 17 U.S.C.A. §§ 101, 107.

12. Copyrights and Intellectual Property

Even if allegedly infringing work copies “heart” from original, use for parody may still be “fair use” as parody takes aim at “heart” of original as part of work which will most readily conjure up original for parody. 17 U.S.C.A. §§ 101, 107.

13. Copyrights and Intellectual Property

Song parody did not borrow excessively from original lyrics, even if parody did borrow from “heart” of original lyrics, but repetition of music required evaluation in light of song’s parodic purpose and character and its transformative elements and consideration of potential for market substitution. 17 U.S.C.A. §§ 101, 107.

14. Copyrights and Intellectual Property

For purposes of determining “fair use,” court considers effect of use on potential market for or value of copyrighted work which requires determination of extent of market harm caused by particular actions of alleged infringer and determination of whether unrestricted and widespread conduct of sort engaged in by alleged infringer would result in substantially adverse impact on potential market for original. 17 U.S.C.A. §§ 101, 107.

15. Copyrights and Intellectual Property

Fact that use of copyrighted song in parody was wholly commercial would not allow presumption of likelihood of future harm to copyright holders as presumption of market harm applies only when commercial use amounts to mere duplication of entirety of original. 17 U.S.C.A. §§ 101, 107.

16. Copyrights and Intellectual Property

Fact that parody may harm market for original, or kill demand for original completely, does not produce harm cognizable under Copyright Act; court distinguishes between biting criticism that merely suppresses demand and copyright infringement which usurps it. 17 U.S.C.A. §§ 101, 107.

17. Copyrights and Intellectual Property

If parody of copyrighted work has effect not only in arena of criticism but also in protectable markets for derivative works, law looks beyond criticism to other elements of

See publication Words and Phrases for other judicial constructions and definitions.

18. Copyrights and Intellectual Property ⇝ 53.2

Fact that parody may impair market for derivative uses by very effectiveness of its critical commentary is no more relevant under copyright than like threat to original market. 17 U.S.C.A. §§ 101, 107.

19. Copyrights and Intellectual Property ⇝ 66

Absent anything in record to show effect of song parody on derivative market for non-parody, rap version of copyrighted work, authors of parody, as proponents of affirmative defense of fair use, were not entitled to summary judgment.

Syllabus *

Respondent Acuff-Rose Music, Inc., filed suit against petitioners, the members of the rap music group 2 Live Crew and their record company, claiming that 2 Live Crew’s song, “Pretty Woman,” infringed Acuff-Rose’s copyright in Roy Orbison’s rock ballad, “Oh, Pretty Woman.” The District Court granted summary judgment for 2 Live Crew, holding that its song was a parody that made fair use of the original song. See Copyright Act of 1976, 17 U.S.C. § 107. The Court of Appeals reversed and remanded, holding that the commercial nature of the parody rendered it presumptively unfair under the first of four factors relevant under § 107; that, by taking the “heart” of the original and making it the “heart” of a new work, 2 Live Crew had, qualitatively, taken too much under the third § 107 factor; and that market harm for purposes of the fourth § 107 factor had been established by a presumption attaching to commercial uses.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Held: 2 Live Crew’s commercial parody may be a fair use within the meaning of § 107. Pp. 1169–1179.

(a) Section 107, which provides that “the fair use of a copyrighted work . . . for purposes such as criticism [or] comment . . . is not an infringement . . .,” continues the common-law tradition of fair use adjudication and requires case-by-case analysis rather than bright-line rules. The statutory examples of permissible uses provide only general guidance. The four statutory factors are to be explored and weighed together in light of copyright’s purpose of promoting science and the arts. Pp. 1169–1171.

(b) Parody, like other comment and criticism, may claim fair use. Under the first of the four § 107 factors, “the purpose and character of the use, including whether such use is of a commercial nature . . .,” the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is “transformative,” altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. 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 part, comments on that author’s work. But that tells courts little about where to draw the line. Thus, like other uses, parody has to work its way through the relevant factors. Pp. 1171–1172.

(c) The Court of Appeals properly assumed that 2 Live Crew’s song contains parody commenting on and criticizing the original work, but erred in giving virtually dispositive weight to the commercial nature of that parody by way of a presumption, ostensibly culled from Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451, 104 S.Ct. 774, 792, 78 L.Ed.2d 574, that “every commercial use of copyrighted

material is presumptively ... unfair..."  

The statute makes clear that a work's commercial nature is only one element of the first factor enquiry into its purpose and character, and Sony itself called for no hard evidentiary presumption. The Court of Appeals's rule runs counter to Sony and to the long common-law tradition of fair use adjudication. Pp. 1172–1174.

(d) The second § 107 factor, "the nature of the copyrighted work," is not much help in resolving this and other parody cases, since parodies almost invariably copy publicly known, expressive works, like the Orbison song here. P. 1175.

(e) The Court of Appeals erred in holding that, as a matter of law, 2 Live Crew copied excessively from the Orbison original under the third § 107 factor, which asks whether "the amount and substantiality of the portion used in relation to the copyright-ed work as a whole" are reasonable in relation to the copying's purpose. Even if 2 Live Crew's copying of the original's first line of lyrics and characteristic opening bass riff may be said to go to the original's "heart," that heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Moreover, 2 Live Crew thereafter departed markedly from the Orbison lyrics and produced otherwise distinctive music. As to the lyrics, the copying was not excessive in relation to the song's parodic purpose. As to the music, this Court expresses no opinion whether repetition of the bass riff is excessive copying, but remands to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution. Pp. 1175–1177.

(f) The Court of Appeals erred in resolving the fourth § 107 factor, "the effect of the use upon the potential market for or value of the copyrighted work," by presuming, in reliance on Sony, supra, at 451, 104 S.Ct., at 739, the likelihood of significant market harm based on 2 Live Crew's use for commercial gain. No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. The cognizable harm is market substitution, not any harm from criticism. As to parody, pure and simple, it is unlikely that the work will act as a substitute for the original, since the two works usually serve different market functions. The fourth factor requires courts also to consider the potential market for derivative works. See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 688 (1985). If the later work has cognizable substitution effects in protectible markets for derivative works, the law will look beyond the criticism to the work's other elements. 2 Live Crew's song comprises not only parody but also rap music. The absence of evidence or affidavits addressing the effect of 2 Live Crew's song on the derivative market for a nonparody, rap version of "Oh, Pretty Woman" disentitled 2 Live Crew, as the proponent of the affirmative defense of fair use, to summary judgment. Pp. 1177–1179.

972 F.2d 1429 (CA6 1992), reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, post, p. 1180.

Bruce S. Rogow, for petitioners.

Sidney S. Rosedelitcher, for respondent.

For U.S. Supreme Court briefs, see:

1993 WL 391046 (Pet.Brief)
1993 WL 391058 (Resp.Brief)

Justice SOUTER delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. § 107 (1988 ed. and Supp. IV). Although the District Court granted summary judgment for 2 Live Crew, the Court of Appeals reversed, holding the defense of fair use barred by the song's
commercial character and excessive borrowing. Because we hold that a parody’s commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand.

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called “Oh, Pretty Woman” and assigned their rights in it to respondent Acuff-Rose Music, Inc. See Appendix A, infra, at 1179. Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wonyong, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group.1 In 1989, Campbell wrote a song entitled “Pretty Woman,” which he later described in an affidavit as intended, “through comical lyrics, to satirize the original work....” App. to Pet. for Cert. 80a. On July 5, 1989, 2 Live Crew’s manager informed Acuff-Rose that 2 Live Crew had written a parody of “Oh, Pretty Woman,” that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew’s song. See Appendix B, infra, at 1179–80. Acuff-Rose’s agent refused permission, stating that “I am aware of the success enjoyed by ‘The 2 Live Crews’, but I must inform you that we cannot permit the use of a parody of ‘Oh, Pretty Woman.’” App. to Pet. for Cert. 85a. Nonetheless, in June or July 1989,2 2 Live Crew released records, cassette tapes, and compact discs of “Pretty Woman” in a collection of songs entitled “As Clean As They Wanna Be.” The albums and compact discs identify the authors of “Pretty Woman” as Orbison and Dees and its publisher as Acuff-Rose.

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement. The District Court granted summary judgment for 2 Live Crew,3 reasoning that the commercial purpose of 2 Live Crew’s song was no bar to fair use; that 2 Live Crew’s version was a parody, which “quickly degenerates into a play on words, substituting predictable lyrics with shocking ones” to show “how bland and banal the Orbison song is; that 2 Live Crew had taken no more than was necessary to “conjure up” the original in order to parody it; and that it was “extremely unlikely that 2 Live Crew’s song could adversely affect the market for the original.” 754 F.Supp. 1150, 1154–1155, 1157–1158 (MD Tenn.1991). The District Court weighed these factors and held that 2 Live Crew’s song made fair use of Orbison’s original. Id., at 1158–1159.

The Court of Appeals for the Sixth Circuit reversed and remanded. 972 F.2d 1429, 1439 (1992). Although it assumed for the purpose of its opinion that 2 Live Crew’s song was a parody of the Orbison original, the Court of Appeals thought the District Court had put too little emphasis on the fact that “every commercial use ... is presumptively ... unfair,” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451, 104 S.Ct. 774, 792, 78 L.Ed.2d 574 (1984), and it held that “the admittedly commercial nature”

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1. Rap has been defined as a “style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment.” The Norton/Grove Concise Encyclopedia of Music 613 (1988). 2 Live Crew plays “[b]ass music,” a regional, hip-hop style of rap from the Liberty City area of Miami, Florida. Brief for Petitioners 34.

2. The parties argue about the timing. 2 Live Crew contends that the album was released on July 15, and the District Court so held. 754 F.Supp. 1150, 1152 (MD Tenn.1991). The Court of Appeals states that Campbell’s affidavit puts the release date in June, and chooses that date. 972 F.2d 1429, 1432 (CA6 1992). We find the timing of the request irrelevant for purposes of this enquiry. See n. 18, infra, discussing good faith.

3. 2 Live Crew’s motion to dismiss was converted to a motion for summary judgment. Acuff-Rose defended against the motion, but filed no cross-motion.
of the parody "requires the conclusion" that the first of four factors relevant under the statute weighs against a finding of fair use. 972 F.2d. at 1435, 1437. Next, the Court of Appeals determined that, by "taking the heart of the original and making it the heart of a new work," 2 Live Crew had, qualitatively, taken too much. Id., at 1438. Finally, after noting that the effect on the potential market for the original (and the market for derivative works) is "undoubtedly the single most important element of fair use," Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566, 105 S.Ct. 2218, 2233, 85 L.Ed.2d 588 (1985), the Court of Appeals faulted the District Court for refusing to indulge the presumption that "harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses." 972 F.2d. at 1438–1439. In sum, the court concluded that its "blatantly commercial purpose ... prevents this parody from being a fair use." Id., at 1439.

We granted certiorari, 507 U.S. 1003, 113 S.Ct. 1642, 123 L.Ed.2d 264 (1993), to determine whether 2 Live Crew's commercial parody could be a fair use.

II

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, 17 U.S.C. § 106 (1988 ed. and Supp. IV), but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts..." U.S. Const., Art. I, § 8, cl. 8.5 For as Justice Story explained, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Emerson v. Davies, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass.1845). Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science." Carey v. Kearsley, 4 Esp. 168, 170, 170 Eng.Rep. 679, 681 (K.B.1808). In copyright cases brought under the Statute of Anne of 1710,6 English courts held that in some instances "fair abridgements" would

4. Section 106 provides in part:

"Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending..."

A derivative work is defined as one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

2 Live Crew concedes that it is not entitled to a compulsory license under § 115 because its arrangement changes "the basic melody or fundamental character" of the original. § 115(a)(2).


6. An Act for the Encouragement of Learning, 8 Anne, ch. 19.
not infringe an author’s rights, see W. Patry, The Fair Use Privilege in Copyright Law 6-17 (1985) (hereinafter Patry); Leval, Toward a Fair Use Standard, 108 Harv.L.Rev. 1105 (1990) (hereinafter Leval), and although the First Congress enacted our initial copyright statute, Act of May 31, 1790, 1 Stat. 124, without any explicit reference to “fair use,” as it later came to be known, the doctrine was recognized by the American courts nonetheless.

[1] In Folsom v. Marsh, 9 F.Cas. 342 (No. 4,901) (CCD Mass. 1841), Justice Story distilled the essence of law and methodology from the earlier cases: “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Id., at 348. Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story’s summary is discernible: 8

“§ 107. Limitations on exclusive rights:
Fair use

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

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

“(2) the nature of the copyrighted work;

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

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

“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” 17 U.S.C. § 107 (1988 ed. and Supp. IV).


[2] 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. Harper & Row, 471 U.S., at 560, 105 S.Ct., at 2230; Sony, 464 U.S., at 448, and n. 31, 104 S.Ct., at 792, & n. 31; House Report, pp. 65-66; Senate Report, p. 62. The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given, § 101; see Harper & Row, supra, 471 U.S., at 561, 105 S.Ct., at 2230, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. 9 Nor may the four

9. See Senate Report, p. 62 (“Whether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors”).
statutory factors be treated in isolation, one from another. All are to be explored, and
the results weighed together, in light of the purposes of copyright. See Leval 1110–1111;
Patry & Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 Cardi-

A

3, 4] The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial
nature or is for nonprofit educational purposes.” § 107(1). This factor draws on
Justice Story’s formulation, “the nature and objects of the selections made.” Folsom v.
Marsh, supra, at 348. The enquiry here may be guided by the examples given in the
preamble to § 107, looking to whether the use is for criticism, or comment, or news
reporting and the like, see § 107. The central purpose of this investigation is to see,
in Justice Story’s words, whether the new work merely “supersede[s] the objects” of
the original creation, Folsom v. Marsh, supra, at 348; accord, Harper & Row, supra,
471 U.S., at 562, 105 S.Ct., at 2231 (“supplanting” the original), or instead adds some-
thing new, with a further purpose or different character, altering the first with new
expression, meaning, or message; it asks, in other words, whether and to what extent the
new work is “transformative.” Leval 1111. Although such transformative use is not abso-
lutely necessary for a finding of fair use,

Sonny, supra, 464 U.S., at 455, n. 40, 104
S.Ct., at 795, n. 40,11 the goal of copyright, to
promote science and the arts, is generally
furthered by the creation of transformative
works. Such works thus lie at the heart of
the fair use doctrine’s guarantee of breathing
space within the confines of copyright, see,
e.g., Sony, supra, at 478–480, 104 S.Ct., at
807–808 (BLACKMUN, J., dissenting), and
the more transformative the new work, the
less will be the significance of other factors,
like commercialism, that may weigh against a
finding of fair use.

5] This Court has only once before even
considered whether parody may be fair use,
and that time issued no opinion because of
the Court’s equal division. Beazly v. Loew’s
Inc., 239 F.2d 532 (CA9 1956), aff’d sub nom.
Columbia Broadcasting System, Inc. v.
Loew’s Inc., 356 U.S. 43, 78 S.Ct. 667, 2
L.Ed.2d 583 (1958). Suffice it to say now
that parody has an obvious claim to transfor-
mative value, as Acuff-Rose itself does not
deny. Like less ostensibly humorous forms
of criticism, it can provide social benefit, by
shedding light on an earlier work, and, in
the process, creating a new one. We thus line
up with the courts that have held that parod-
y, like other comment or criticism, may
claim fair use under § 107. See, e.g., Fisher
v. Dees, 794 F.2d 432 (CA9 1986) (“When
Sonny Sniffs Glue,” a parody of “When Sun-
y gets Blue,” is fair use); Elamere Music,
Inc. v. National Broadcasting Co., 482
F.Supp. 741 (SDNY), aff’d, 626 F.2d 252
(CA2 1980) (“I Love Sodom,” a “Saturday
those raising reasonable contentions of fair use”
where “there may be a strong public interest in
the publication of the secondary work [and] the
copyright owner’s interest may be adequately
protected by an award of damages for whatever
infringement is found”); Abend v. MCA, Inc., 863
F.2d 1465, 1479 (CA9 1988) (finding “special
circumstances” that would cause “great injus-
tice” to defendants and “public injury” were
injunction to issue), aff’d sub nom. Stewart v.
Abend, 495 U.S. 207, 110 S.Ct. 1750, 109
L.Ed.2d 184 (1990).

11] The obvious statutory exception to this focus
on transformative uses is the straight reprodu-
cition of multiple copies for classroom distribution.
Night Live” television parody of “I Love New York,” is fair use); see also House Report, p. 66; Senate Report, p. 61, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5678 (“[U]se in a parody of some of the content of the work parodied” may be fair use).

[6] The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson’s Court of Appeals dissent, as “a song sung alongside another.” 972 F.2d, at 1440, quoting 7 Encyclopedia Britannica 708 (15th ed. 1975). Modern dictionaries accordingly describe a parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” 12 or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” 13 For the purposes of copyright law, the nub of the definitions, and 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 part, comments on that author’s works. See, e.g., Fisher v. Dees, supra, at 437; MCA, Inc. v. Wilson, 677 F.2d 180, 185 (CA2 1981). If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors,


14. A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody. If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives (see infra at 1177–1179, discussing factor four), it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the like the extent of its commerciality, loom larger.15 Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.15 See *ibid.;* Biscoglia, Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, p. 25 (1987).

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair, see *Harper & Row*, 471 U.S., at 561, 105 S.Ct., at 2230. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

Here, the District Court held, and the Court of Appeals assumed, that 2 Live original. By contrast, when there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work’s minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.

15. Satire has been defined as a work “in which prevalent follies or vices are assailed with ridicule.” 14 Oxford English Dictionary, supra, at 500, or are “attacked through irony, derision, or wit,” American Heritage Dictionary, supra, at 1604.
Crew’s “Pretty Woman” contains parody, commenting on and criticizing the original work, whatever it may have to say about society at large. As the District Court remarked, the words of 2 Live Crew’s song copy the original’s first line, but then “quickly degenerat[e] into a play on words, substituting predictable lyrics with shocking ones . . . [that] derivisively demonstrat[e] how bland and banal the Orbison song seems to them.” 754 F.Supp., at 1155 (footnote omitted). Judge Nelson, dissenting below, came to the same conclusion, that the 2 Live Crew song “was clearly intended to ridicule the whitebread original” and “reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.” 972 F.2d, at 1442. Although the majority below had difficulty discerning any criticism of the original in 2 Live Crew’s song, it assumed for purposes of its opinion that there was some. Id., at 1435–1436, and n. 8.

[7] We have less difficulty in finding that critical element in 2 Live Crew’s song than the Court of Appeals did, although having found it we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. 16 Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At

16. The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely “supersede the objects” of the original. See infra, at 1175–79, discussing factors three and four.

17. We note in passing that 2 Live Crew need not label their whole album, or even this song, a parody in order to claim fair use protection, nor should 2 Live Crew be penalized for this being its first parodic essay. Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived). See Patry & Perlmutter 716–717.
terribly,265 called from Sony, that “every commercial use of copyrighted material is presumptively ... unfair...” Sony, 464 U.S., at 451, 104 S.Ct., at 792. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term “including” to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into “purpose and character.” As we explained in Harper & Row, Congress attempted to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. 471 U.S., at 561, 105 S.Ct. at 2230; House Report, p. 66, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5679. Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are generally conducted for profit in this country.” Harper & Row, supra, at 592, 105 S.Ct., at 2246 (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that “[n]o man but a blockhead ever wrote, except for money.” 3 Boswell’s Life of Johnson 19 (G. Hill ed. 1934).

Sony itself called for no hard evidentiary presumption. There, we emphasized the need for a “sensitive balancing of interests,” 464 U.S., at 455, n. 40, 104 S.Ct., at 795, n. 40, noted that Congress had “eschewed a rigid, bright-line approach to fair use,” id., at 449, n. 31, 104 S.Ct., at 792, n. 31, and stated that the commercial or nonprofit educational character of a work is “not conclusive,” id., at 448-449, 104 S.Ct., at 792, but rather a fact to be “weighted along with other[s] in fair use decisions,” id., at 449, n. 32, 104 S.Ct. at 792, n. 32, (quoting House Report, p. 66) U.S.Code Cong. & Admin.News 1976, pp. 5659, 5679. The Court of Appeals’s elevation of one sentence from Sony to a per se rule thus runs as much counter to Sony itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in Harper & Row, Sony stands for the proposition that the “fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.” 471 U.S., at 562, 105 S.Ct., at 2231. But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school. See generally Patry & Perlmutter 679-680; Fisher v. Dees, 794 F.2d, at 437; Maxtone-Graham v. Burchael, 803 F.2d 1253, 1292 (CA2 1986); Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522 (CA9 1992).18

18. Finally, regardless of the weight one might place on the alleged infringer’s state of mind, compare Harper & Row, 471 U.S., at 562, 105 S.Ct., at 2231 (fair use presupposes good faith and fair dealing) (quotation marks omitted), with Folsom v. Marsh, 9 F.Cas. 342, 349 (No. 4,901) (CCD Mass.1841) (good faith does not bar a finding of infringement); Leval 1126-1127 (good faith irrelevant to fair use analysis), we reject Acuff-Rose’s argument that 2 Live Crew’s request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew’s actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or grant-
[10] The second statutory factor, "the nature of the copyrighted work," § 107(2), draws on Justice Story's expression, the "value of the materials used." Folsom v. Marsh, 9 F.Cas., at 348. This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, e.g., Stewart v. Abend, 495 U.S., at 237–238, 110 S.Ct., at 1768–1769 (contrasting fictional short story with factual works); Harper & Row, 471 U.S., at 563–564, 105 S.Ct., at 2231–2233 (contrasting soon-to-be-published memoir with published speech); Sony, 464 U.S., at 455, n. 40, 104 S.Ct., at 792, n. 40 (contrasting motion pictures with news broadcasts); Feist, 499 U.S., at 348–351, 111 S.Ct., at 1289–1291 (contrasting creative works with bare factual compilations); 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.65[A][2] (1993) (hereinafter Nimmer); Leval 1116. We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. 754 F.Supp., at 1155–1156; 972 F.2d, at 1437. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

[11] The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," § 107(3) (or, in Justice Story's words, "the quantity and value of the materials used," Folsom v. Marsh, supra, at 348) are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry ed. Thus, being denied permission to use a work does not weigh against a finding of fair use. See will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. See Sony, supra, 464 U.S., at 449–450, 104 S.Ct., at 792–793 (reproduction of entire work "does not have its ordinary effect of militating against a finding of fair use" as to home videotaping of television programs); Harper & Row, supra, 471 U.S., at 564, 105 S.Ct., at 2232 ("[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir). The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives. See Leval 1123.

The District Court considered the song's parodic purpose in finding that 2 Live Crew had not helped themselves overmuch. 754 F.Supp., at 1156–1157. The Court of Appeals disagreed, stating that "While it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial.... We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original." 972 F.2d, at 1438.

The Court of Appeals is of course correct that this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In Harper & Row, for example, the Nation had taken only some 300 words out of President Ford's memoirs, but we signaled the significance of the quotations in finding them to amount to "the heart of the book," the part most likely to be newsworthy and important in licensing serialization. 471 U.S., at 564–566, 568, 106 S.Ct., at 2232–2234, 2234 (internal quotation marks omitted). We also agree with the Court of Appeals that whether "a substantial portion of the infringing work

was copied verbatim” from the copyrighted work is a relevant question, see id., at 565, 105 S.Ct., at 2232, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Where we part company with the court below is in applying these guides to parody, and in particular to parody in the song before us. Parody presents a difficult case. Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. See, e.g., Elsmere Music, 623 F.2d, at 253, n. 1; Fisher v. Dees, 734 F.2d, at 438-439. What makes for this recognition is quotation of the original’s most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

[12] We think the Court of Appeals was insufficiently appreciative of parody’s need for the recognizable sight or sound when it ruled 2 Live Crew’s use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the “heart” of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. 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. See Fisher v. Dees, supra, at 439.

[13] This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, see Harper & Row, supra, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing “scraper” noise, overlaying the music with solos in different keys, and altering the drum beat. See 754 F.Supp., at 1155. This is not a case, then, where “a substantial portion” of the parody itself is composed of a “verbatim” copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that “no more was taken than necessary,” 972 F.2d, at 1438, but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original’s “heart.” As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit

19. This may serve to heighten the comic effect of the parody, as one witness stated, App. 32a, Affidavit of Oscar Brand; see also Elsmere Music, Inc. v. National Broadcasting Co., 482
evaluation of the amount taken, in light of the song’s parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

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[14] The fourth fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.” § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” for the original. Nimmer § 13.05[A][4], p. 13–102.61 (footnote omitted); accord, Harper & Row, 471 U.S., at 569, 105 S.Ct., at 2235; Senate Report, p. 65; Folsom v. Marsh, 9 F. Cas., at 349. The enquiry “must take account not only of harm to the original but also of harm to the market for derivative works.” Harper & Row, supra, 471 U.S. at 569, 105 S.Ct., at 2234.

[15] Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets. In moving for summary judgment, 2 Live Crew left themselves at just such a disadvantage when they failed to address the effect on the market for rap derivatives, and confined themselves to uncontroverted submissions that there was no likely effect on the market for the original. They did not, however, thereby subject themselves to the evidentiary presumption applied by the Court of Appeals. In assessing the likelihood of significant market harm, the Court of Appeals quoted from language in Sony that “[i]f the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.” 972 F.2d, at 1438, quoting Sony, 464 U.S., at 451, 104 S.Ct., at 104 S.Ct., at 798.

The court reasoned that because “the use of the copyrighted work is wholly commercial, . . . we presume that a likelihood of future harm to Acuff-Rose exists.” 972 F.2d, at 1438. In so doing, the court resolved the fourth factor against 2 Live Crew, just as it had the first, by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.

No “presumption” or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. Sony’s discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of Sony itself (home copying of television programming). In the former circumstances, what Sony said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly “supersedes[s] the objects,” Folsom v. Marsh, supra, at 348, of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. Sony, supra, 464 U.S., at 451, 104 S.Ct., at 798. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it (“superseding[ing]
[its] objects"). See Leval 1125; Patry & Perlmuter 692, 697–698. This is so because the parody and the original usually serve different market functions. Bisceglia, ASCAP, Copyright Law Symposium, No. 34, at 23.

[16] We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing [theatrical review], kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because “parody may quite legitimately aim at garrotting the original, destroying it commercially as well as artistically,” B. Kaplan, An Unhurried View of Copyright 69 (1967), the role of the courts is to distinguish between “[b]iting criticism [that merely] suppresses demand [and] copyright infringement, [which] usurps it.” Fisher v. Dees, 794 F.2d, at 438.

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. “People ask … for criticism, but they only want praise.” S. Maugham, Of Human Bondage 241 (Penguin ed. 1992). Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of “Oh, Pretty Woman,” see 972 F.2d, at 1439, the court erred. Accord, Fisher v. Dees, supra, at 437; Leval 1125; Patry & Perlmuter 688–691.22

with the relative strength of the showing on the other factors.

22. We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.

23. See Nimmer § 13.05[A][4], p. 13–102.61 (“a substantially adverse impact on the potential market”); Leval 1125 (“reasonably substantial” harm); Patry & Perlmuter 697–698 (same).

[17, 18] In explaining why the law recognizes no derivative market for critical works, including parody, we have, of course, been speaking of the later work as if it had nothing but a critical aspect (i.e., “parody pure and simple,” supra, at 1177). But the later work may have a more complex character, with effects not only in the arena of criticism but also in protective markets for derivative works, too. In that sort of case, the law looks beyond the criticism to the other elements of the work, as it does here. 2 Live Crew’s song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry, see Harper & Row, supra, 471 U.S., at 568, 105 S.Ct., at 2234; Nimmer § 13.05[B]. Evidence of substantial harm to it would weigh against a finding of fair use,24 because the licensing of derivatives is an important economic incentive to the creation of originals. See 17 U.S.C. § 106(2) (copyright owner has rights to derivative works). Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.24

[19] Although 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff–Rose, introduced evidence or affidavits addressing the likely effect of 2 Live Crew’s parodic rap song on the market for a nonparody, rap version of “Oh, Pretty Woman.” And while Acuff–Rose would have us find evidence of a rap market in the very facts that 2 Live Crew recorded a rap parody of “Oh, Pretty Woman” and another rap group sought a license to record a rap deriv-

24. In some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm. A work whose overriding purpose and character is parodic and whose borrowing is slight in relation to its parody will be far less likely to cause cognizable harm than a work with little parodic content and much copying.
there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parody, rap version. The fact that 2 Live Crew's parody sold as part of a collection of rap songs says very little about the parody's effect on a market for a rap version of the original, either of the music alone or of the music with its lyrics. The District Court essentially passed on this issue, observing that Acuff-Rose is free to record "whatever version of the original it desires," 754 F.Supp., at 1158; the Court of Appeals went the other way by erroneous presumption. Contrary to each treatment, it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense, 2 Live Crew, to summary judgment. The evidentiary hole will doubtless be plugged on remand.

III

It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

"Oh, Pretty Woman" by Roy Orbison and William Dees

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you, you're not the truth,
No one could look as good as you

APPENDIX B TO OPINION OF THE COURT

"Pretty Woman" as Recorded by 2 Live Crew

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It'
Big hairy woman
APPENDIX B—Continued

Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice
Bald headed woman here, let me get this hunk of biz for ya
Ya know what I'm saying you look better than rice a roni
Oh bald headed woman
Big hairy woman come on in
And don't forget your bald headed friend
Hey pretty woman let the boys
Jump in
Two timin' woman girl you know you ain't right
Two timin' woman you's 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
Oh, two timin' woman
Oh pretty woman
Justice KENNEDY, concurring.

I agree that remand is appropriate and
join the opinion of the Court, with these
further observations about the fair use analysis
of parody.

The common-law method instituted by
the fair use provision of the copyright statute, 17
sumes that rules will emerge from the course
of decisions. I agree that certain general
principles are now discernible to define the
fair use exception for parody. One of these
rules, as the Court observes, is that parody
may qualify as fair use regardless of whether
it is published or performed for profit. Ante,
at 1178. Another is that parody may
qualify as fair use only if it draws upon the
original composition to make humorous or
ironic commentary about that same composi-
tion. Ante, at 1172. It is not enough that
the parody use the original in a humorous
fashion, however creative that humor may be.
The parody must target the original, and not
just its general style, the genre of art to
which it belongs, or society as a whole (al-
though if it targets the original, it may target
those features as well). See Rogers v.
Koons, 960 F.2d 301, 319 (CA2 1992)
("[T]hough the satire need not be only of the
copied work and may . . . also be a parody of
modern society, the copied work must be, at
least in part, an object of the parody"); Fisher
v. Dees, 794 F.2d 432, 436 (CA9 1986)
("[A] humorous or satiric work deserves protection
under the fair-use doctrine only if the copied
work is at least partly the target of the work
in question"). This prerequisite confines fair
use protection to works whose very subject is
the original composition and so necessitates
some borrowing from it. See MCA, Inc. v.
Wilson, 677 F.2d 180, 185 (CA2 1981)
("[I]f the copyrighted song is not at least in part
an object of the parody, there is no need to
conjure it up"); Biscoglia, Parody and Copy
right Protection: Turning the Balancing Act
Into a Juggling Act, in ASCAP, Copyright
It also protects works we have reason to fear
will not be licensed by copyright holders who
wish to shield their works from criticism.
See Fisher, supra, at 437 ("Self-esteem is
seldom strong enough to permit the granting
of permission even in exchange for a reason-
able fee"); Posner, When Is Parody Fair
Use?, 21 J. Legal Studies 67, 73 (1992)
("There is an obstruction when the parodied
work is a target of the parodist's criticism,
for it may be in the private interest of the
copyright owner, but not in the social inter-
est, to suppress criticism of the work") (em-
phasis deleted).

If we keep the definition of parody within
these limits, we have gone most of the way
towards satisfying the four-factor test in § 107. The first factor (the purpose
and character of use) itself concerns the de

copy publicly known, expressive works.” Ante, at 1175. The third factor (the amount and substantiality of the portion used in relation to the whole) is likewise subsumed within the definition of parody. In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry. Some parodies, by their nature, require substantial copying. See Eismere Music, Inc. v. National Broadcasting Co., 623 F.2d 252 (CA2 1980) (holding that “I Love Sodom” skit on “Saturday Night Live” is legitimate parody of the “I Love New York” campaign). Other parodies, like Lewis Carroll’s “You Are Old, Father William,” need only take parts of the original composition. The third factor does reinforce the principle that courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else’s song or place the characters from a familiar work in novel or eccentric poses. See, e.g., Walt Disney Productions v. Air Pirates, 581 F.2d 751 (CA9 1978); DC Comics Inc. v. Unlimited Monkey Business, Inc., 598 F.Supp. 110 (ND Ga.1984). But, as I believe the Court acknowledges, ante, at 1176–77, it is by no means a test of mechanical application. In my view, it serves in effect to ensure compliance with the targeting requirement.

As to the fourth factor (the effect of the use on the market for the original), the Court acknowledges that it is legitimate for parody to suppress demand for the original by its critical effect. Ante, at 1177–78. What it may not do is usurp demand by its substitutive effect. Ibid. It will be difficult, of course, for courts to determine whether harm to the market results from a parody’s critical or substitutive effects. But again, if we keep the definition of parody within appropriate bounds, this inquiry may be of little significance. If a work targets another for humorous or ironic effect, it is by definition a new creative work. Creative works can compete with other creative works for the same market, even if their appeal is overlapping. Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work, which is why the parody must “make some critical comment or statement about the original work which reflects the original perspective of the parodist—thereby giving the parody social value beyond its entertainment function.” Metro–Goldwyn–Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc., 479 F.Supp. 351, 357 (ND Ga.1979).

The fair use factors thus reinforce the importance of keeping the definition of parody within proper limits. More than arguable, parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a “comment on the naiveté of the original,” ante, at 1173, because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven’s Fifth Symphony or “Achy Breaky Heart” is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright diserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.

The Court decides it is “fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree.” Ibid. (applying the first fair use factor). While I am not so assured that 2 Live Crew’s song is a legitimate parody, the Court’s treatment of the
remaining factors leaves room for the District Court to determine on remand that the song is not a fair use. As future courts apply our fair use analysis, they must take care to ensure that not just any commercial takeoff is rationalized post hoc as a parody.

With these observations, I join the opinion of the Court.