

FUNNY IS FAIR: THE CASE FOR ACCORDING INCREASED VALUE TO HUMOR IN COPYRIGHT FAIR USE ANALYSIS†

by ROGER L. ZISSU*

“. . . it was wrong — and possibly unconstitutional — to hold Jack Benny for his television parody of the movie *Gaslight*,” Benjamin Kaplan
*An Unhurried View of Copyright*¹

“Humor is just another defense against the universe,” attributed to Mel Brooks²

Before the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*,³ parody’s claim to copyright fair use was not given the same welcome in all cases. Although *Campbell* for the first time definitively accorded parody its own place at the table of fair comment and criticism, it conditioned this reception on commenting at least in part on a plaintiff’s work. After *Campbell*, in order for any unauthorized humorous use of a prior work to be eligible for fair use treatment, it must be, in the words of Justice Souter, a “parody” that “at least in part, comments on [the first] author’s works.”⁴

As shown below, Justice Souter’s articulation of a “commenting” requirement in *Campbell* has been consistently cited in subsequent cases that involve borrowings made to poke fun at a copied work or society at large. Although a few of the limited number of earlier opinions consider-

†This article was previously published to honor Professor Benjamin Kaplan, under a non-exclusive license, in *An Unhurried View of Copyright Republished (And With Contributions From Friends)* (LexisNexis Matthew Bender 2005).

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¹ BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 69 (1967).

² The Quotations Page, <http://www.quotationspage.com/quote/26750.html> (last visited Nov. 21, 2007).

³ 510 U.S. 569 (1994).

⁴ *Id.* at 580. In his concurrence, Justice Kennedy calls this requirement the “targeting requirement.” *Id.* at 598. I will refer to it below as the “commenting requirement” or “targeting requirement.”