OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LUTHER R. CAMPBELL aka LUKE SKYYWALKER, ET AL., Petitioners v. ACUFF-ROSE MUSIC, INC.

CASE NO: 92-1292

PLACE: Washington, D.C.

DATE: Tuesday, November 9, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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LUTHER R. CAMPBELL aka LUKE :

SKYYWALKER, ET AL., :

Petitioners :

v. : No. 92-1292

ACUFF-ROSE MUSIC, INC. :

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Washington, D.C.

Tuesday, November 9, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

BRUCE S. ROGOW, ESQ., Fort Lauderdale, Florida; on behalf of the Petitioners.

SIDNEY S. ROSDEITCHER, ESQ., New York, New York; on behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 92-1292, Luther R. Campbell v. Acuff-Rose Music, Inc.

Mr. Rogow.

ORAL ARGUMENT OF BRUCE S. ROGOW

ON BEHALF OF THE PETITIONERS

MR. ROGOW: Mr. Chief Justice, and may it please the Court:

Since the statute of Anne in 1709 through the Copyright Clause of our Constitution, through the copyright statute and until today, the purpose of copyright has been to encourage creativity. Parody is a creative force in our society and has historically been a creative force, and parody should be encouraged.

The decision of the Sixth Circuit discouraged parody, and we ask the Court today to reverse the decision of the Sixth Circuit. The rule that we suggest is that parody is a fair use unless it materially impairs the market for the original, and material impairment of the market for the original means supplant the original.

QUESTION: How do you define parody?

MR. ROGOW: A parody imitates and ridicules. It pokes fun at the original. And there are many definitions

of parody --

QUESTION: So it has to poke fun at the original work.

MR. ROGOW: Not necessarily. It can poke fun at the original, or it can poke fun at something else using the original work. There are two aspects of the criticism. One would be criticism of the original work, the other would be criticism of society using the original work as a means of conveying that criticism.

QUESTION: So that any time someone takes a melodic line and substitutes new lyrics, that is permitted so long as it is making fun of something else in society.

MR. ROGOW: As long as -- yes, Justice Kennedy, as long as it is making fun of something else in society or the original, because that is the purpose of parody.

QUESTION: Well, Mr. Rogow, that's a little broader than it needs to be, isn't it, for this case?

MR. ROGOW: For this case --

QUESTION: Don't we have a situation here where it's making fun of the original?

MR. ROGOW: We do, Justice O'Connor. And for this case --

QUESTION: And I would have thought that maybe Harper & Row, the case we had here a few years ago, refused to recognize a fair use exception even for

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political commentary. So I think your position that a parody, if it's directed at something other than the original work, should have some kind of all-encompassing provision as being a fair use.

MR. ROGOW: Justice --

QUESTION: I mean that's -- that's a pretty big step to take.

MR. ROGOW: Justice O'Connor, for this case it is true that the parody in this case only poked fun at the original. And one could limit this case to just those facts and that would be quite fine. Harper & Row is actually quite helpful to us, because Harper & Row -- it is true, it was the Nation, a news magazine, but it materially impaired the market for the Harper & Row publication. And I think that's the other important factor here, impairment of the market.

QUESTION: So it's your position that a parody should be found to be a fair use when it -- when the lyrics poke fun at the original, but the music is the same?

MR. ROGOW: One -- yes. One needs to use the music from the original in order to evoke the image of the original, and that is this case. And in parody there must be some taking, some copying of a certain sort, because that is the purpose of parody, to borrow from the original

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and then to imitate and ridicule the original, which is what happened in this case.

So, yes, there does have to be some taking from the original, the music in this case. Some of which was taken, the guitar riffs especially, was necessary in order that the listener would know that what was being made fun of was the original.

QUESTION: Mr. Rogow, could you explain to me why -- why criticism either of the original song or, as your position states, of almost anything using the original song, is to be encouraged more than, let's say, patriotism? Why shouldn't be I be able to use any song that anyone's ever written in order to set patriotic lyrics to it? Isn't that something that's to be encouraged?

MR. ROGOW: It is, although one can encourage patriotism without necessarily borrowing the music from another tune, although historically we have borrowed from other tunes to have patriotic songs.

QUESTION: Well, but one can criticize other things without borrowing the music from a tune. Unless you're willing to limit your proposition as much as Justice O'Connor just suggested, your argument doesn't hold.

MR. ROGOW: For this case I can limit it to

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exactly these facts.

QUESTION: And so are -- but let's assume the more general proposition that you were trying to establish. What's your answer to my question for that?

MR. ROGOW: That as long as the parody is commenting critically upon society, be it cultural, be it social -- the social aspect of society, be it political, the use of the tune would still fall within the definition of criticism, which has to have some breathing room.

QUESTION: But why encourage -- you can criticize society in many ways. You're quite right. You can -- you can -- you can make fun of this particular tune only by using the particular tune. But you can make fun of society. You can criticize society in a lot of different ways; why do you have to take my tune to do it?

MR. ROGOW: Because sometimes taking that tune conveys to the listener something extra. This Court has, for example, the Home Box Office video --

QUESTION: My tune is very effective. You like my tune. It's catchy. People remember it. But a lot of people would want to use it for that reason, probably.

MR. ROGOW: But the tune -- Justice Scalia, the tune can go with the parody. For example, there is a video that the Court has in this case where the Beverly Hillbillies is used, but the parody is called Capitol

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Hillbillies. Now, using the Beverly Hillbillies evokes a certain image, and then the criticism that is conveyed by Capitol Hillbillies, the parody, is useful.

I think that's a threshold issue here. Is parody useful? Is criticism useful? And 107 of the copyright law does say that criticism is useful and should be encouraged.

QUESTION: Is patriotism useful?

MR. ROGOW: Yes, it is useful, but pure patriotism without making the political comment, critical comment, is not embraced within 107, although I'm not saying it isn't something worthwhile of protection. Obviously, it is. But we're in this narrow copyright area where we have on one side the private interest of the copyright holder, versus the public interest and the historical interest of promoting creativity.

And if parody does have a creative force in our society, and we suggest that it does. Historically it does. The Capitol Steps have given this Court --

QUESTION: Well, certainly the copyright statutes suggest that there's a strong public interest in protecting the copyright holder. So I -- it seems to me it's very difficult to suggest, as you do, that there's only a private interest on one side, where there's a great public interest on the other.

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MR. ROGOW: It is a mixed interest, really, on the copyright holder's side. The private interest, the copyright holder, Mr. Chief Justice, takes his or her copyright, subject to the fair use statutory provisions in 107. So the statute -- so the statute tells the copyright holder you may have to put up with some use of your work that will be a fair use, for the greater good of society.

QUESTION: Yeah, I don't -- I don't doubt for a minute what you say the statute says. But you're suggesting -- that there's only a private interest on one side while there's only a large -- while there's a large public interest on the other, I don't think is accurate. I think the statute itself suggests there's a strong public interest in encouraging works that can be copyrighted.

MR. ROGOW: I agree, Mr. Chief Justice. And when I said a private interest, the primary thrust, obviously, in a copyright case is protecting that private interest. The larger thrust is this is good for the public, and I concur with that. But a fair use is also good for the public, and that's the point --

QUESTION: Mr. Rogow, you started out by defining parody, and that first step, I think the Sixth Circuit, even if grudgingly, took and said, yes, this falls within parody. But you're not saying that if it's

parody, it is necessarily a permissible fair use.

MR. ROGOW: I'm not, Justice Ginsburg.

QUESTION: So what in the -- since the Fifth Circuit -- the Sixth Circuit agreed with you that we are dealing here with parody, where did the Sixth Circuit go wrong?

MR. ROGOW: By applying a presumption that if it is a commercial parody, then it is presumptively harmful to the market. And they drew that from the language in Sony and Harper & Row v. Nation.

QUESTION: But there's language in our cases that say exactly that. Is it your position that the commercial nature of the use is a factor to be considered, but it isn't -- even if it is found to be for a commercial purpose, that that isn't the end of the inquiry.

MR. ROGOW: That is our position, Justice O'Connor.

QUESTION: Now, what is the market that we should look at. Is it the market for parodies, or is it the market -- do we look at whether it would supplant, somehow, the demand for the original work? What is it we look at?

MR. ROGOW: You -- that is what you look at, Justice O'Connor; would it supplant the demand for the original work in many or -- or multiple venues, not just a

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single venue? I recognize that from the cases. And Justice Story in Folsom v. Marsh in 1841 talked about superseding the original, and that goes to supplanting the original.

QUESTION: And what were the findings of the district court as to that in this case?

MR. ROGOW: That it did not adversely effect the market. It did not supplant the original Orbison-Dees song. It did not impair its market.

QUESTION: Did --

QUESTION: And did the Sixth Circuit find that that was erroneous?

MR. ROGOW: It did not. It applied a presumption. The Sixth Circuit, Justice O'Connor, basically recognized that there were no facts in this case adduced by Acuff-Rowe to show that its market for the original song had been materially impaired. And --

QUESTION: So does this mean that parody cannot be too successful?

MR. ROGOW: No. Parody can be successful. You -- one does not look, Justice Kennedy, at the success of the parody. One looks at the harm to the market for the original work.

QUESTION: But just the market --

QUESTION: I think you're making the same point.

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Go ahead.

QUESTION: Shouldn't the market be defined more broadly as the market for the original song in the -- in the fashion in which the original song was sung. I mean, there could be -- there could be, you know, rock adaptions of waltzes and so on, and shouldn't the market be defined broadly enough to include all the possible adaptations that the copyright owner might want to -- to make or to license?

MR. ROGOW: Justice Souter, I don't have any difficulty with a broad definition of the market. What's lacking in this case is any proof that any market for the Orbison-Dees song was harmed. All -- all we have is talk about it, but no proof about it.

And I think -- and the rule that I'm suggesting puts this case in a trial court in this posture. If the defendant raises the affirmative defense of fair use parody, then the first thing the defendant must show is that it is a parody, and then the four factors are certainly relevant: purpose --

QUESTION: May I just interrupt you though, before you get to the four factors? Are you saying that the -- that the district court could not have made any findings because of the total absence of evidence on the effect on the broader market which I described?

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MR. ROGOW: This case was decided on summary judgment on the affidavits.

QUESTION: Oh, that's right, yes.

MR. ROGOW: On the affidavits that were submitted.

QUESTION: So there was nothing in the affidavits on which that could have been based.

MR. ROGOW: There was nothing in the affidavits from Acuff-Rose which created a genuine issue as to material fact --

QUESTION: Material fact.

MR. ROGOW: -- About impairment of their market. And the rule I'm suggesting, which is A, is this a parody. And that's a matter of proof and that goes to the first factor, because Congress has said consider all the factors, but it doesn't limit them to those factors, purpose and character. Purpose is parody. Parody is important. Parody is a creative force. That's the purpose.

The nature of the work -- purpose and character, I'm sorry. Character, commercial. This is commercial, so that would enter into the equation, but it should not be a presumption that completely eviscerating the rest of the factors. And the Sixth Circuit said in the last line of its opinion: "Because this was blatantly commercial, it

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cannot claim fair use." That simply goes too far and it does not -- Harper & Row and Sony don't carry the weight assigned to it in the context of parody. Those were copying cases.

QUESTION: Mr. Rogow, I take it from what you said that you would suspend the commercial aspect of it, if we're going down this list of factors, and kind of fold that into the last factor? Is that -- does commercial have any independent significance for you, or does it really weigh in evaluating the fourth factor, that is the effect of the use on the potential market for the copyrighted work?

MR. ROGOW: Justice Ginsburg, it -- it has both. It's -- obviously, the courts have had difficulty with how one uses these four factors. But it is independently, in the first factor, something to look at; is this a commercial use, as opposed to a nonprofit use, an educational use? The American Association of Law Schools does parodies all the time, from the time of Llewellen through Prosser, but those were not for profit educational kinds of uses.

So it would be something to look at, but it's not decisive. The next factor, which is the nature of the work, would, in this case, tend to favor to some extent the Orbison-Dees recording because it is a creative

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work -- work. On the other hand, of course, the parody is creative itself, but I could give points to Orbison-Dees on the second factor.

The third factor is an interesting one in this case, the amount and substantiality of the taking. And, of course, in a parody, in order to evoke the original, one must take a substantial part. So in those situations we are going to have substantial taking, especially if we're talking about, as we are in this case, a parody of the original, a criticism of the original. In this case there was taking and there is no dispute that some of the Orbison-Dees song was taken.

But the fourth factor, which this Court has said is the single most important factor, that's the key, and that's the key, I think, Mr. Chief Justice, to protecting the copyright holder's interest. Has he or she been harmed? Has there market been harmed or supplanted?

QUESTION: Have we ever said that that's not just the single most important factor, but the absolutely determinative factor?

MR. ROGOW: You have not in the two cases, Sony and Harper & Row.

QUESTION: Then how can you -- then how can you assert that -- that the summary judgment question was automatically determined if there was not enough evidence

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on that one factor? If that's just one of many factors, I don't see how -- I don't see how that can be determined.

MR. ROGOW: You're right, Justice Scalia. But in this case it was not determined solely on the fourth factor. The court looked at all of the factors and found on amount and copying, for example, that he took what had to be taken.

QUESTION: I understand. But you acknowledge that the mere fact that no information was in the record concerning impairment of the potential market, that alone is not determinative of the issue here?

MR. ROGOW: No, that alone cannot be. Parody is something that has to be looked at. There was no dispute this was a parody. I mean, the district court did, I think, the proper analysis in this case. What's the purpose of this work? Parody. What was it, the character? Commercial, Yes. And then went through all of the factors and found, using this Court's language, single most important factor that there was --

QUESTION: Was there cross-motions for summary judgment?

MR. ROGOW: They were not. There was a motion to dismiss which was converted to a motion for summary judgment, Justice Ginsburg, and then Acuff-Rose opposed the motion for summary judgment which an affidavit which

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the district court found did not address, at all, the market impairment issue or any of the other issues. It didn't address the parody issue.

Two -- there are two affidavits --

QUESTION: Well, why -- why was it appropriate not to afford an opportunity to have that issue developed at trial?

MR. ROGOW: Because Acuff-Rose failed to put forward any evidence in affidavit form that created a genuine issue as to material fact on the important factors: parody, number one. The amount of the taking there was no dispute about. Their affidavit of Mr. Spielman is basically uncontested.

QUESTION: Well, let's concentrate on this last factor which, under your analysis, is the most critical. Shouldn't there have been an opportunity to prove that there was a market out there that the copyright holder could have exploited?

MR. ROGOW: Only if the party opposing the motion for summary judgment had put in affidavits which were sufficient to create a genuine issue as to material doubt on that fact, but they were not put in. This doesn't mean that in some case where there is a genuine issue of material fact on that issue, that the case will not go to trial. It would go to trial.

QUESTION: Wasn't there -- wasn't there a suggestion that the copyright holder might want to exploit -- exploit a rap market?

MR. ROGOW: At page 321 of the Joint Appendix there is an affidavit that was filed after the judgment was entered, although the district judge allowed the record to be supplemented, of Mr. Flowers who is a licensing agent for Acuff-Rose. And if one reads that affidavit, there's just general talk in there about what people may like to do and what Acuff-Rose may like to do, but there's nothing that addresses -- even if one gives this late-filed affidavit any credence in this case, nothing that addresses whether or not their market has been materially impaired.

QUESTION: Mr. Rogow, my problem is this; I don't see how your -- one is entitled to summary judgment if the legal issue in the case is to be decided by a six factor test, if the other party happens to have produced no evidence on one of the six factors? I mean, so long as you've produced some evidence on some of the factors, isn't it -- isn't it at least a matter that should then proceed to trial?

MR. ROGOW: Justice Scalia, this Court has said that fair use is a mixed question of fact and law, and on the record in this case what we have is no evidence on any

of the four factors that created genuine issues as to material fact. So it's not that one factor was disputed. If one factor was disputed in a way that created a genuine issue as to material fact and then, in the equation, one couldn't make the fair use finding without litigating that factor, then summary judgment would not be proper. But it was proper.

QUESTION: Is fair use an affirmative defense?

MR. ROGOW: It is.

QUESTION: So the burden of negating fair use in a motion for summary judgment, then, is on the person claiming the fair use?

MR. ROGOW: The ultimate burden is to show fair use as the affirmative defense as these factors unfold. And I think this goes to the presumption, Mr. Chief Justice -- when the plaintiff files the lawsuit, all the plaintiff need show is ownership of the copyright and copying, and then the burden shifts to the defendant to raise the fair use affirmative defense.

And in this case the defendant did, raising parody as a form of criticism protected by fair use under the statute, and with affidavits saying there was no material impairment of the market. And then it shifts back to the plaintiff to burst the bubble of the presumption, if one exists, and show that there was

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either, A, not a parody, or, A and B, it was not a parody and it did materially impair the market.

QUESTION: And what is the presumption you're talking about, the bubble bursting?

MR. ROGOW: The presumption is what the Sixth Circuit relied upon, language drawn from this Court's cases in Harper & Row, that there is a presumption of harm.

QUESTION: That's not --

MR. ROGOW: That's right. The presumption of economic harm if it is a commercial use. But, of course, that was commercial copying, not commercial parody. There's a difference between parody which performs a critical role in society --

QUESTION: Well, it seems to me if your view prevails, the judgment of the Sixth Circuit ought to be reversed. But it doesn't seem to me that we ought to direct judgment here for your client, in view of the burden -- the burden of proof as to fair use being on you.

MR. ROGOW: And that burden was met, Mr. Chief Justice, by our affidavits. The district judge found that to be so. The dissenting judge in the Sixth Circuit found that to be so. Indeed, in this case what happened is the summary judgment of the trial court was reversed and summary judgment was entered for Acuff-Rose on the very

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same record that had been tried below.

QUESTION: Mr. Rogow, I'm -- there's something I may not understand. If fair use is an affirmative defense, why wasn't the obligation on your client in the summary judgment motion to plead that there was no market for derivative works to be exploited? So that if the record is bare on that, you lose or you should have lost your summary judgment to the extent that that would influence the Court's determination.

MR. ROGOW: My client's duty in raising the affirmative defense was to put on evidence that a reasonable person or jury could listen to and believe and conclude there was no material impairment of the market. That was done. It was not specifically directed to other derivative markets and other derivative pleas.

QUESTION: But the market to which you -- you referred, I take it, in your affidavits, was simply the market for the original song in the -- in the fashion, the genre in which it was originally recorded, right?

MR. ROGOW: That is correct, Justice Souter.

QUESTION: It didn't address the question of a market for derivative works at all, is that correct?

MR. ROGOW: It did not. But the opposing affidavit did not create a genuine issue with regard to that. The closest they might try --

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QUESTION: Well, it may not have created a genuine issue, but it still, on the ultimate legal question, left a relevant point black, didn't it?

MR. ROGOW: But if -- but if there is no attempt by the plaintiff, really, to fill in that blank and to make that a disputed issue of fact, then the district court could give summary judgment.

QUESTION: The plaintiff opposed summary judgment and I'm not clear now on your position about whose burden this fourth factor is. If you raised the -- if you raise it there, you as defense, are you now recognizing that it is -- it would be your burden to show the absence of an effect on the market for the copyrighted work?

MR. ROGOW: I am, Justice Ginsburg. Some evidence -- some evidence to make that showing. Then the burden would shift back to the plaintiff, sort of like the St. Mary's v. Honor Center --

QUESTION: And what was -- what was your evidence with respect to the derivative market, to rap works?

MR. ROGOW: There was nothing that specifically addressed a derivative market for rap works. What was --

QUESTION: Suppose there would be another rap version of this composition. Would that be a fair use?

MR. ROGOW: Not if it was not a parody. I mean the threshold is is this a parody. Just simply a rap version of Oh, Pretty Woman would not qualify under the fair use doctrine. That would be mere copying for a commercial use, and no --

QUESTION: Different lyrics, some variation in the musical presentation, whose copyright -- would that infringe anyone's copyright at this stage, suppose there were another version?

MR. ROGOW: It would make out a prima facie case for the plaintiff of copyright infringement. The defendant would then have the burden of --

QUESTION: Which plaintiff? Suppose we have a rap version now that has different lyrics than the 2 Live Crew, slightly different presentation of the music, and the claim is made this is a parody of the parody?

MR. ROGOW: Of the parody. That would be entitled to a fair use claim. There's nothing the matter with making fun of the people making fun of the original. In fact, that is, if we believe in -- in creativity, if we believe in some humor --

QUESTION: Does Campbell have a copyright in the parody?

MR. ROGOW: He has a copyright on the album, which would include, presumably, the parody.

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QUESTION: Is the underlying theory of your case that if there is a market to be exploited, in this case 280,000 copies, and it can be exploited best through a parody, that it is essentially fair that the person who creates the parody receives 100 percent of the profit?

MR. ROGOW: No. The thrust of my case, Justice Kennedy, is not that. The thrust of my case is that if a parody is a creative, true parodic work, then is it -- it is entitled to be called a fair use unless there is evidence that it has materially impaired or supplanted the market for the original.

The original does not hold the absolute right to preclude any other use of that original work. And the fact that 280,000 or 2,000 records were sold is not the decisive fact here. The decisive fact is that the court below applied a presumption that if it's commercial, it cannot be a fair use. That simply is wrong.

QUESTION: Thank you, Mr. Rogow.

Mr. Rosdeitcher.

ORAL ARGUMENT OF SIDNEY S. ROSDEITCHER

ON BEHALF OF THE RESPONDENT

MR. ROSDEITCHER: Mr. Chief Justice, and may it please the Court:

The argument I just heard seems to have omitted three decisions of this Court. And I'd like to talk about

those three decisions, and those were Sony, Harper & Row, and Stewart v. Abend. In each of those opinions this Court, presumably looking at the first factor, namely the factor of purpose and character of the use, stated unequivocally that every commercial use of copyrighted material is presumptively unfair.

Now, there's been no discussion of that here, and in fact it's overlooked. In the petitioner's view once it's a parody you look to the impairment of the market. And I'm going to come to impairment of the market, because there's substantial evidence of impairment of the derivative market, including the market for rap versions.

But I'd like to talk about the significance of that commercial presumption.

QUESTION: That was in dictum, wasn't it? That was not a holding.

MR. ROSDEITCHER: That was in dictum in -- yes, it was in dictum in each of the cases. But in Harper & Row it was not in dictum. As I recall, in Harper & Row they applied that presumption to the work. And it was in dictum in Sony. And it was not in dictum in Stewart and Abend. Indeed in Stewart v. Abend, it was applied in a very straightforward fashion. The Court said Hitchcock and Stewart made $12 million on Rear Window and that was

enough to meet the presumption.

But my view of the presumption is a little subtler than I think petitioners give us credit for, or even give the Sixth Circuit credit for. And the Sixth Circuit could have been clearer on this, I acknowledge, but I believe that the commercial use presumption means something like this. You have to look at the commerciality to see what purpose the so-called parodist or news reporter or critic or comment -- commentator is doing.

There's a wonderful article by Judge LaValle in which he modestly reassesses his own opinion on the Salinger letters case, and he acknowledges he made an error. He was ultimately reversed by the Second Circuit, but he acknowledges he made an error. He said the letters were being used for purposes of biography. But he saw something else in reviewing the record, and that was that the letters were also being used to dazzle, to have a good read, just not for the purpose of biography, but to sell the work for the expressive value of the underlying copyrighted material.

That's what happened in Harper & Row. The Nation was engaged in news reporting, but the court said that the Nation went further and was expressing -- and was exploiting the 300 words taken verbatim from President

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Ford's book for their expressive value so that people would know it's Ford speaking.

Now, that's what happened here. They took my client's music, partly for parody, let's assume that. I will -- if you want me, I can talk about the definition of parody.

QUESTION: Well, we do have -- we do take this case on the assumption on that there was a parody.

MR. ROSDEITCHER: And I'm accepting that.

QUESTION: You dispute that. But I think as it comes to us, we're not getting into that. Is that right?

MR. ROSDEITCHER: I want to leave with that, yes, Your Honor.

QUESTION: Yes.

MR. ROSDEITCHER: But they took the music not just for parody. When you look at this record -- and the best thing in the record is to listen to the two tapes -- you see that they were doing something more. After all, they were selling a rap album. There's no suggestion anywhere in this record that they were selling a parody record. They were selling a rap album to what they acknowledge, according to their expert -- and I'll come to the use -- utility of his affidavits.

But according to their expert, and they adopt that view, that the record was being sold to an

audience -- what they described as an audience of urban black youth or disaffected black urban youth. We dispute that the parody -- that the rap music is so limited. But that's what they say. Not that it was directed to a parody audience, but directed to a wide audience for rap music.

Rap music is danceable music. Rap music needs music. And they took our music. Now how do we know that --

QUESTION: Well, now, just let's stop a moment and inquire. Suppose you had somebody who -- who simply writes critical commentary -- very straightforward, not a parody -- about somebody else's work and he wants to sell his critical piece. Can it be a fair use?

MR. ROSDEITCHER: Yes.

QUESTION: It's perfectly commercial.

MR. ROSDEITCHER: Yes, it can be a fair use.

QUESTION: They have to rely, in part, on what was said in the original that he's -- he's criticizing and writing about.

MR. ROSDEITCHER: Right, but in the -- correct. And I'm not saying that the mere fact that they made a profit is enough to change the equation. What I'm saying is --

QUESTION: And the market might be quite

different for the critical work. It might be a separate market, in a sense.

MR. ROSDEITCHER: Yes. But let me go back to Judge LaValle's example and then we use our example. The author was using the Salinger letters for a biography, but as he pointed out, they went further, they took too much.

QUESTION: Wait a minute, I didn't quite get it. The Salinger letters?

MR. ROSDEITCHER: The Salinger letters case, the Second Circuit in the Southern District. And we refer to a -- we refer to the case in our brief. Judge LaValle said that his mistake was in not recognizing that they did more than just take enough to serve the interests of biography. They were anxious to sell the beauty and dazzling quality of the letter.

And what I'm saying in this case is it's not just that they profited from the parody. They profited here, in addition, because they needed music and they needed dazzling, good music, and they took one of the great rock and roll classics --

QUESTION: Well, that sounds like -- that sounds like an argument that it shouldn't have been held to be a parody because too much was taken, and I thought we had gotten over that.

MR. ROSDEITCHER: No, we -- well, if that's,

Your Honor.

QUESTION: I thought we had accepted the fact that this was a parody.

MR. ROSDEITCHER: Your Honor, you can have a parody that takes too much. That is, I can write a parody. And, indeed, that's what I'm fearful of. I think that is the great danger. One can write parodic lyrics and take all the music or most of the music, and sell and sell and profit by and exploit and take advantage of the music. And as Justice Kennedy suggested, on their conclusion that it's fair use, they get the profit, they get a copyright on their recording. They presumably will claim a copyright on the derivative work that we can't, because it's allegedly fair use and fair game, so that anybody, any other rap artist --

QUESTION: Why isn't -- why isn't a parody of the whole thing more persuasive than just a few phrases? I mean, if you're going to have parody as a fair use at all, it seems to me you might be much more effective using the whole thing than just a phrase.

MR. ROSDEITCHER: That's because, Your Honor, I think we have to go back and do some balancing. And this came up earlier in the Chief Justice's remarks which were made so well in Harper & Row. But the copyright protection itself is an engine of free expression and is

designed to encourage dissemination of ideas and creativity. In this case, if you allow the taking of as much as they took -- and could I take a moment to give you what I think are the salient facts to tell you what's going on?

This -- what's going on in this case is not about parody. I'll accept there's a parody there. This case is about selling rap music by -- in the words of one of the scholars that we refer to, Professor Light or Mr. Light, in an article in the South Atlantic Quarterly which is referred in our brief, much of rap is -- much of rap is sold by fusing a street message, as Mr. Light says, with pop music.

And he gives a wonderful example of how this whole phenomenon started, and it gives -- and it throws light on what's happened here. There was a very famous hard rock song called Walk This Way by Aerosmith. Another group, another rap group, Run DMC, decided that they would change that into a rap song. They actually hired the guitarist from the Aerosmith group to do it and they did it. They made a rap song with hard rock music and they sold it -- it was the greatest rap hit, at that time, ever.

And I'd like to read you what Mr. Light concludes from this and how he describes what happened

thereafter in rap. "Rap was established as a viable pop form, at least as long as its connections to the traditional rock and roll spirit were made explicit."

Now, that's what happened here. Let me just review a few of the very simple facts to show you that what happened here was they took our music in order to have a free ride on our good music and make a profit from our good music.

QUESTION: They did, of course, offer to pay for it, didn't they?

MR. ROSDEITCHER: Yes.

QUESTION: So to the -- and why didn't you accept the offer?

MR. ROSDEITCHER: Your Honor, we did not think that was the best vehicle for exploiting the market.

QUESTION: You really wanted to prevent this -- you really wanted to prevent this music from being distributed at all, as I understand the complain.

MR. ROSDEITCHER: Your Honor, my client -- as part of the -- as part of the marketability of the copyrighted work, you have to have the right to say no.

QUESTION: I understand.

MR. ROSDEITCHER: And if it is not a fair use, we had a right to say no, that this wasn't the way to best exploit the rap market.

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QUESTION: If you prevail -- if you prevail, would it be an adequate remedy to just give you royalties for the amount of their sales?

MR. ROSDEITCHER: Your Honor, I think that would be creating a kind of compulsory license which doesn't exist in this case.

QUESTION: Mr. Rosdeitcher, you -- you cited Judge LaValle, and you that's an idea that he put forward, that it -- even if this were found to be taking too much and therefore an infringement, it doesn't follow like the night the day that you would be entitled to stop it, does it?

MR. ROSDEITCHER: I'm sorry, Your Honor.

QUESTION: It doesn't follow from the fact -- even if a court held that this parody took too much and that, looking at the four factors, you win and you establish infringement. But you have featured Judge LaValle and you know he has put forth a very interesting idea that there may be infringements that are not properly subject to injunction because you take into account the value of parody. You take into account First Amendment concerns not simply on the liability side, but on the remedy side.

MR. ROSDEITCHER: Your Honor, I'd be -- I'd be very reluctant to follow down -- follow Judge LaValle all

the way down that path for this reason. Congress gave very careful consideration to --

QUESTION: You take the sweet but not the bitter from him.

MR. ROSDEITCHER: Yes.

(Laughter.)

QUESTION: And why is that so?

MR. ROSDEITCHER: And that is because --

QUESTION: Why do you find his thinking --

MR. ROSDEITCHER: The reason -- I'm sorry. The reason why I don't think I would take it to that length is Congress spent an enormous amount of time -- my colleagues here worked on this -- on the question of the compulsory license and the scope of the compulsory license.

Congress has fashioned a compulsory license. If Congress feels that there are additional areas for compulsory licenses, I think that's an area that requires testimony from the music industry, that requires testimony from other people, from parodists, from everyone, so that legislative judgment which was made in the case of songs that do not change the fundamental character of the work are subject to a compulsory license.

QUESTION: Mr. Rosdeitcher, I assume you would have given a license if they had offered you enough money

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for it.

(Laughter.)

QUESTION: I don't consider that a market failure. They just weren't --

MR. ROSDEITCHER: That's entirely possible.

QUESTION: -- Willing to pay you enough to induce you to give over the song to that use.

MR. ROSDEITCHER: That is entirely possible. And, in fact, Judge -- Justice Scalia.

QUESTION: Now we're talking money here, and they didn't give you what you thought was enough to make that worthwhile, so --

MR. ROSDEITCHER: Yes.

QUESTION: I thought the record was otherwise, that you gave them a flat no, you weren't --

MR. ROSDEITCHER: We gave them a flat -- we gave them a flat no. But I wanted to say --

QUESTION: You weren't willing to negotiate.

MR. ROSDEITCHER: -- That the fact that in this case my client gave them a flat no doesn't mean that somebody else won't bargain. And that question of market failure was never really explored in the record.

QUESTION: Nothing in the record shows you knew that they were going to sell 248,000 copies.

MR. ROSDEITCHER: The record -- what the record

shows -- and I think this is helpful to my notion of exploitation of the underlying work. The record shows this background, and it's the letter attached to Mr. Campbell's affidavit which appears at page -- at page 87 of the record.

The record shows that two -- and this is, I think, wonderful background to this. They started out by saying that they already had released two albums, and that they were now going to release their third. That the two other albums were very successful commercially, that both of them had gone gold, one of them was close to platinum, that they were high up on the rap charts -- not on the parody charts, on the rap music charts.

And they told us if you give us a license at the statutory rate -- which, incidentally, was not applicable here because compulsory license doesn't apply -- we will sell this to hundreds of thousands of new homes. Now, they did have a track record. They had a track record of selling lots and lots of records. Now, my client decided that they did not think this was a good way to exploit this market and exercised their right as copyright owners to say no, a right which is absolutely essential if they are to have a marketable copyright.

I take that history and I add to that history the fact that they then took this record, they took our

song -- now, the amount of song has been underplayed by petitioners, it's been underplayed by the district court. What they took was, if you -- when you listen to these two tapes, the first thing you hear when you hear the Orbison and Dees record is a wonderful, powerful, dynamic, jolting guitar riff that is so famous and begins that work. That guitar riff then is played throughout the Orbison and Dees work, and then you hear the Pretty Woman melody, which is very familiar.

They took the guitar riff. Now, in the Orbison and Dees work they play it 10 times. They played it 16 times. At one point they play it 8 times. They played it because it's one of the most wonderful, danceable, dynamic musical works of rock and roll -- this record of Orbison and Dees was one of the all-time hits -- and they played it over and over again to dazzle, to have a good hear, to have a good dance. And then they say we can now profit and free ride on the genius of Roy Orbison and Bill Dees. That's what they were about.

When they sold the record, they didn't put parody, they didn't give it another name. They called it Pretty Woman, they dropped the word "Oh." If you look at their letter, they think the name of our song is Pretty Woman. They call it Pretty Woman. They're asking for a license on Pretty Woman.

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They then say -- it's written by Roy Orbison and Bill Dees. It's published by my client. Let's talk about that in terms of market -- let me turn to market, because I think that shows enough what they were trying to do. They were trying to exploit Pretty Woman by Bill Orbison -- Roy Orbison and Bill Dees.

QUESTION: It seems to me it would have -- if they'd been deceptive and had not revealed the true author. Maybe I'm wrong on that, but it does seem to me that the fact they offered to pay you royalties and the fact they were candid about the true origin of the work tends to cut in their favor rather than the other way. Maybe I'm --

MR. ROSDEITCHER: Except for this, there's -- I won't dwell on this too much, but there is something disingenuous about this letter. Luther Campbell testified that the record, that is this album, was released in June of 1989. The letter comes to us, and if you read the letter it plainly suggests that we're coming to ask your permission.

QUESTION: They attached a check, didn't they, in fact?

MR. ROSDEITCHER: Pardon?

QUESTION: Wasn't there a check?

MR. ROSDEITCHER: Later on. As I understand,

the check came later on. In the court proceeding a year later they purported to deposit $13,000, which they said was the statutory rate, which, incidentally, did not apply, and they deposited it in court. And the check wasn't -- the check was not sent with this letter. The check was deposited in court a year later when we sued them. That's when the check was deposited.

QUESTION: Wasn't --

QUESTION: You say they purported to deposit. I mean, how do you purport to deposit?

MR. ROSDEITCHER: I'm sorry. They did deposit, I'm sorry.

QUESTION: They did deposit.

(Laughter.)

MR. ROSDEITCHER: I'm so used to purported and allegedlies, that I'm --

QUESTION: Mr. Rosdeitcher, am I wrong in remembering that in one of the cases that you referred to, the Rear Window case.

MR. ROSDEITCHER: Yes.

QUESTION: Wasn't that a case where there was no injunction, there was damages but no injunction?

MR. ROSDEITCHER: Your Honor, I just don't recall. I'd have to look at the case, but I just don't recall. They may -- that may be.

And if it please the Court, I'd like to go on to two points before I finish. One is the impairment of the market issue and the other is the procedural posture of this case which is kind of interesting; who gets summary judgment or should anybody get summary judgment.

On the impairment of the market, the Court asked earlier was there any evidence in the record of a market for a rap version of our song. Well, of course -- of course there's evidence in the record. There's indisputable evidence in the record. 248,000 albums, as of the date of the motion for summary judgment, containing our song were sold to a rap market. By their letter, that's what they were aimed at and that's what they were selling to.

There's other evidence in the record, in Mr. Flowers' affidavit he reports that the Brothers Make 3 told us that they had sampled, which means they duplicated, the entire chorus section of our song to use it as a hook, meaning something catchy to attract people, in a rap song that they were doing, and then they asked for a license. And so there's evidence, plain evidence that there's a rap market for our song.

The articles that we cite show that there's a vast market for rock and roll music of our kind in --

QUESTION: Mr. Rosdeitcher, in the -- I presume

there were reviews in various periodicals of the rap version? Does the record show that?

MR. ROSDEITCHER: The record -- unfortunately, the record doesn't show any of that, Your Honor.

QUESTION: I'd be curious to know whether it was recognized in those reviews as a parody or just another rap or music.

MR. ROSDEITCHER: Your Honor, I -- if I can go off the record, I originally bought this record when I was in the running for coming onto this case. I went into Sam Goody and I went to the rap section and I pulled this off the shelf next to 2 Live Crew's other rap songs. That's where the -- that's where it's viewed. That's where it's sold.

So there's no question that there's a rap market and that they exploited it and that that injures us. That injures a potential market that we have. The standard --

QUESTION: Well, counsel, do we look to the market for the original work and whether that's supplanted?

MR. ROSDEITCHER: No.

QUESTION: Do you agree that that's what we look to?

MR. ROSDEITCHER: No, if you define original work as the original Roy Orbison recording. The

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original --

QUESTION: And all its derivatives.

MR. ROSDEITCHER: And all it's -- if you look at all of its derivatives --

QUESTION: We don't look at the market for parodies.

MR. ROSDEITCHER: You look at the market. In this case you look at the market for rap. And I'm prepared to look at that market for rap because they've made a case. They, themselves, have made the case that there is a rap market for a rap version of our rock and roll classic. We have in the record on page -- on page 326(a) and 327(a), evidence of the interest of a rap group called the Brothers Make 3 in making a rap version of our song and fusing our music.

And then the literature it replete with evidence that this is a classic way in which rap music is given a mainstream appeal. So there is a rap market. And then -- then you have to ask yourself what's the evidence of any potential injury?

Now, they had the burden of proof here. They did not carry the burden of proof. They put in two affidavits Rule 56(e) required them to put in an affidavit containing facts, not conclusions. We talk about this in our brief, but I'll briefly state this. You

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can't put in an expert's affidavit and say that the expert's affidavit amounts to a fact because the expert makes a conclusion.

I thought I would read to you very briefly from the statement by -- give me a moment -- well, I have misplaced it. There's a statement by -- ah, here it is. There's a statement by Justice -- Judge Easterbrook talking about the requirements of Rule 56(e) for expert affidavits. And he points out that the affidavit must do more than present something that would be admissable.

They shall, quote, set forth facts, and by implication in the case of experts who are not fact witnesses, a process of reasoning beginning from a firm foundation. And he goes on to say that an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process. Now there -- that comes from Mid-State Fertilizer v. Exchange National Bank, 877 Fed 2nd, 1333, at page 1339.

Now, that -- that is exactly what you'll find when you look at Oscar Brand's and Krasilovsky's affidavit. They talk about this having different audiences. First of all, they're obviously talking about the Roy Orbison recording, which Mr. Brand strangely calls a country music record. Fortunately, petitioners, who are savvy music people, themselves in their brief at page 34

and 36 recognize that the Orbison work is a classic rock and roll work.

QUESTION: Counsel, the district court, it seems to me, found that the 2 Live Crew version was a parody and that Acuff-Rose could still market a rap version, that it wasn't affecting that.

MR. ROSDEITCHER: Well, he applied the wrong standard. He did -- he did two things, Your Honor. One, he mistakenly accepted these conclusory affidavits as 56(e) affidavits. They were not. And so he started from the position that there were different audiences and he was wrong.

And then he said that 2 Live Crew -- I mean that my client had the burden of showing that they were actually prevented. Now, this Court made it clear in Sony, and it made it clear again -- it made it clear in Sony when it set out the standards of proof. It said in the case -- on economic harm, in a case where you have commercial use -- and here you have commercial use in spades. In a case where you have --

QUESTION: Well, do you think that a commercial use can ever be a fair use?

MR. ROSDEITCHER: Yes, some commercial uses can be fair uses. But --

QUESTION: If we think the Sixth Circuit didn't

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give enough room at the joints, so to speak, for dealing with the commercial nature so that it's a factor, but it isn't the be all and end all, you still have to weigh it, what should we do here, send it back?

MR. ROSDEITCHER: No, you should affirm the judgment. You could affirm the judgment. And if the law and the facts support the judgment of the Sixth Circuit, which we maintain they do, then under United States v. New York Telephone and other cases this Court has decided, you can firm the affirm the judgment.

QUESTION: Well, I guess we could also say they were -- they fell off on putting total stress on the commercial use and we think they ought to take another look.

MR. ROSDEITCHER: Can I come back to this commercial use now, then. First of all, I think there is a situation where commercial use may actually sweep the boards on all of the factors. In this case, we showed not just that they made a profit from the parody, but that when you take the amount they used it; the way they displayed it; how they played this music not just a background to the singing of the lyrics, but in wonderful virtuosity and displays and dazzling displays in the middle and at the end; that they were selling this music. It reflected also in how they marketed it.

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Now, in that circumstance, I believe that the -- that it is not a fair use. That is the fair use exception was never intended to reward someone --

QUESTION: May I ask you one question there about the similarity of the two works and so forth? Do you think their version changed the basic melody or fundamental character of the work, within the meaning of the statute?

MR. ROSDEITCHER: Yes.

QUESTION: It did change the melody.

MR. ROSDEITCHER: It changed it --

QUESTION: But it didn't entirely supplant it.

MR. ROSDEITCHER: It changed it but it -- it effected -- it created a record which would compete with any rap version we would create. It changed it --

QUESTION: What would you say if another group used a rap version but didn't change the words at all, but changed it from rock to rap? Would that be -- could they have gotten a compulsory license or would that have changed the fundamental character?

MR. ROSDEITCHER: Probably. I'd have to listen to it. But it could be that another -- that there could be a rap compulsory license version of our song. I'd have to hear the song.

QUESTION: But as long as there's a parody

element in it, it can't be, is that it?

MR. ROSDEITCHER: Well, it could be parody. But, you know, rap has many messages. Rap has -- rap has humor. It has acerbic -- it has an acerbic criticism of society. According to the record, 2 Live Crew has a message --

QUESTION: I understand. But the thing that's in the back of my mind is you seem to be categorically confident that there could be no compulsory license here.

MR. ROSDEITCHER: Yes.

QUESTION: And it seems to me -- I'm not quite clear on where the line between --

MR. ROSDEITCHER: Let me tell you -- let me tell you why I think --

QUESTION: Does compulsory license include words or just music?

MR. ROSDEITCHER: Yes, yes, because the --

QUESTION: Just changing the words would -- would destroy it, whether you changed it to make it a parody or not. That alone would deny the compulsory license, wouldn't it?

MR. ROSDEITCHER: Yes. And the statute talks about an arrangement that changes the fundamental character of the work, and work is defined in the statute under section 101 as the music and the words. So if they

change either fundamentally -- they plainly change the words.

QUESTION: But it has -- but it has to be fundamental change.

MR. ROSDEITCHER: Yes. And changing --

QUESTION: But you can't change -- just leave out the "Oh" from "Oh, Pretty Woman," that wouldn't be enough?

MR. ROSDEITCHER: No, no.

(Laughter.)

MR. ROSDEITCHER: Let me -- I have a moment, I see. Let me just quickly run to the procedural issue. They're not entitled to summary judgment. All they do is say it's fair use, that it's a parody. They say it's a parody. We'll accept that it's a parody. They don't get into the commercial issue as we have done, and they don't properly look at the proper market.

They put in an affidavit which doesn't meet these standards of rule 56(e). It's irrelevant in any event because it doesn't address derivative works, so it's worthless.

And then the question is do we -- are we entitled to summary judgment.

QUESTION: You didn't ask for it in the district court, did you?

MR. ROSDEITCHER: We didn't ask for it, no. But the -- the judge, relying on the judge in the -- the judges in the Sixth Circuit, relying on Harper & Row, said that they could look at the record, and if the record was such that it was plain that the ultimate question here of fair use was -- could be answered on undisputed facts, then you could grant summary judgment, and on that basis effectively granted summary judgment.

And I think you can do that here. And why do I say that? I think this is -- this is probably the first copyright case that can be decided on the doctrine of res ipsa loquitur. Res ipsa loquitur being the record that they sold, the amount of music that they took, the way that they marketed the song, which creates both the notion that they were exploited our copyrighted song on the one hand, and that they were exploiting a market which we had every right to exploit --

QUESTION: Trial counsel was far less sure of that that you are, and never asked -- never asked for summary judgment in the district court.

QUESTION: Why didn't they ask for summary judge -- I don't know. I wasn't -- I wasn't there at the time. The strategy in the district court, as I saw it from the record, was to establish issues of fact. I, frankly, do not feel there are issues of fact and that the

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issues here are absolutely clear.

But they've exploited our work for a profit, they're freeriding on our music, and that, in addition, they have impaired a market which we are entitled to exploit. And that therefore all of the factors, the first factor being predominantly commercial here because of the exploitation of this music for profit. The second factor, which is basically conceded -- but there's an additional thing to the second factor, the nature of the work.

This is music. Music's lifeblood is adaptability. What makes a song in the 1960's a great song may not make it a great song in the 1970's, and as the record shows and one of their briefs shows in the record, we then had the song done in the hard rock style, from the soft rock to the hard rock. And now we're in the eighties and nineties and they've shown that you can now take that rock song and, as many rap artists have done, convert it to --

QUESTION: To a rap.

MR. ROSDEITCHER: To a rap song.

QUESTION: May I ask one last question? At the outset of your argument you acknowledge that you would agree this was a parody. How do you define parody when you make that concession?

MR. ROSDEITCHER: I would define parody as

the -- some of the limiting cases do, that as a -- I would limit it to parody that is critical of the underlying work, because I think that's a sensible limitation.

QUESTION: In your example, I think it was Aerosmith progressed or regressed to rap.

MR. ROSDEITCHER: Yes.

(Laughter.)

QUESTION: What -- under the definition of parody that's been submitted to us, would you not expect that it could be argued that that was a parody?

MR. ROSDEITCHER: It could be. In fact, any change in the lyrics that's funny seems to me to be a parody. It makes ridiculous the original situation. It could be read back to criticize the original because if it's funny it's mocking it, poking fun at it, and therefore it would be a parody and it would be fair use and they could profit by it.

Thank you, Your Honors.

QUESTION: Thank you, Mr. Rosdeitcher.

Mr. Rogow, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF BRUCE S. ROGOW

ON BEHALF OF PETITIONERS

MR. ROGOW: Sony and Harper & Row frame this case. Sony says there must be some meaningful likelihood of future harm to the copyright holder, and Harper & Row

gives life to that formulation. In Harper & Row the market was supplanted. Time Magazine decided not to pay $12,500 to Harper & Row because the Nation had taken President Ford's words and published them, copied them without permission.

That gives, I think, the framework for deciding this case. Meaningful likelihood of harm, there is none here. I hear this talk about they might want to do a rap version at some point. There's nothing to keep them from licensing a rap version. But this is a parody--

QUESTION: No, but Mr. Rosdeitcher is right that the reason people bought this record and the reason the record was sold to them was largely for the music and not for the -- for the subtle parody. Then -- then they have suffered a loss. That money should have been their money rather than your money.

MR. ROGOW: Justice Scalia --

QUESTION: You're making money from their music, if he's right about that -- about that premise.

MR. ROGOW: And there's -- there's no reason to think that he is right. This is 1 cut out of 10 on the record. This album was not named -- the 2 Live Crew album was not named Pretty Woman, it was named As Clean as They Wanna Be. And this was 1 cut out of 10. So this kind of argumentation about what might be, what might have -- what

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might have occurred, why they sold it, how they sold it, is completely belied by any facts in this record; here's how they could prove their case.

QUESTION: You mean it would be a different case if they had packaged this as a separate tape with only the Oh, Pretty Woman on it?

MR. ROGOW: Not -- not necessarily. We would still have fair use and we would still argue fair use. But it would look much different in terms of how fair was it, if they were trying to confuse people. But this is not a Lanham Act case. This is a record that's out there. One cut uses Oh, Pretty Woman, and makes fun of Oh, Pretty Woman. Was that fair? We submit it is fair unless they can show that their market was materially impaired, supplanted.

And how could they do it? I think this is helpful. They could do it by showing that they had someone to whom they were going to license this. But the truth is they don't want to license this as a parody. And one can understand that. Most authors don't want to give a license to someone to make fun of their work --

QUESTION: Don't they simply have to show that there was someone to whom they could license it?

MR. ROGOW: And they could --

QUESTION: So they don't have to have a license

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holder nearby. You're talking about market, not a particular market participant.

MR. ROGOW: They do need to show, as in Harper & Row v. Nation, that there is some meaningful likelihood that there is someone to whom they would license this. And that is completely --

QUESTION: Or you needed to you -- I thought you conceded last time around that there wasn't such a thing, that this is your burden. You have to show that there is no market that they could exploit that you have made an inroad on by virtue of this recording?

MR. ROGOW: No, Justice Ginsburg. I won't say that that is our total burden. Our burden is to make some showing that this would not impair their market. The ultimate burden is upon them to show they were injured by the loss of a market, just as Harper & Row showed they were injured by the publication in the Nation.

QUESTION: Let me ask just one very brief question. Do you think you were entitled to a compulsory license under the statute?

MR. ROGOW: No.

QUESTION: You don't.

MR. ROGOW: No.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rogow. The case is submitted.

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(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)

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Luther R. Campbell aka Luke Skywalker, ET AL., Petitioners v. Acuff-Rose Music, Inc. CASE NO: 92-1292

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BY Ann Marie Federico

(REPORTER)