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WRITING SAMPLE

The following sample is an objective legal memorandum written for my Fall 2025 Applied Legal Theory & Analysis I (ALTA I) course at Detroit Mercy Law. The memorandum analyzes whether People for Alternative Medicines, Inc. (“PAM”) is likely to succeed on a fair use defense to a federal copyright infringement claim arising from its parody print advertisements modeled after Wymann Pharmaceuticals’ Clarizac advertising campaign. Specifically, the memorandum applies the four-factor fair use test under § 107 of the Copyright Act of 1976, with particular emphasis on transformativeness, parody, and market harm.

Memorandum

TO: Professor Trudeau

FROM: T02186519

DATE: November 25, 2025

RE: People for Alternative Medicines' Fair Use Defense

Question Presented

Is People for Alternative Medicines (PAM) likely to show that their NatraTab magazine advertisements satisfy the fair use exception to copyright infringement as required by the federal copyright statute, when PAM used Wymann Pharmaceuticals' advertisements of their clinical depression medication, Clarizac, as a basis for PAM's Natra Tab magazine advertisements by including notably similar visual details for the purpose of parodying Clarizac?

Brief Answer

Probably. The Copyright Act of 1976 stipulates that derivative uses of copyrighted works warrant fair use protection for the purposes of commenting, criticizing, or reporting news. The four factors that guide a fair use analysis are the purpose and commerciality of the use; the extent to which the original work reflects creative expression or factual information; the proportion of the original work that is copied by the new work; and the use's propensity to inflict cognizable market harm.

In Wymann's copyright infringement claim against PAM, the first factor weighs in favor of a fair use finding because PAM's NatraTab ads serve a different purpose than Wymann's Clarizac ads due to the former's comments on the latter that ultimately give NatraTab's a distinctive meaning from that of Clarizac's. The second factor may oppose a fair use finding because Wymann's ads were creative in nature; however, this factor carries little weight in fair use

analyses of derivative parodic uses. The third factor also favors PAM, despite NatraTab copying substantial visual details from Clarizac’s ad, because more details were needed to reference and ridicule Clarizac sufficiently. Finally, the fourth factor follows suit, favoring PAM’s fair use defense since there is no direct evidence to support a causal connection between the financial loss Wymann suffered on the Clarizac marketing campaign and NatraTab’s use in the market. Beyond that, the fourth factor should not readily presume market harm when a new work is transformative. Therefore, the court will likely conclude that PAM’s NatraTab parody advertisements qualify as a fair use and will be accordingly precluded from a copyright infringement judgment.

Statement of Facts

Plaintiff, Wymann Pharmaceuticals, Inc. (“Wymann”), brought a federal copyright infringement claim against defendant, People for Alternative Medicines, Inc. (“PAM”), alleging that an advertisement campaign of PAM’s unlawfully copied Wymann’s advertisement campaign, which both promoted a product that treats the symptoms of clinical depression.

Wymann, as a corporation, researches, develops, produces, and markets pharmaceutical drugs. Their most successful product is Clarizac, the leading medication that treats clinical depression. The medication rose to prominence after Wymann launched a promotional campaign for Clarizac five years before this claim was filed, introducing its renowned slogan, “Need Relief?,” to the world. Since then, the slogan has become a household phrase synonymous with relief from depression symptoms. So much so that patients, when speaking with medical professionals, will refer to Clarizac as the “Need Relief drug.”

Wymann’s Clarizac marketing campaign—an approximately 100-million-dollar investment endeavor—consisted of several full-page print ads, each capturing a person at close range, above the neck. The subjects in the ads, who were themselves reminiscent of everyday

people, all sported a positive expression: one posed with their hands behind their back, fronting a toothy smile; others wore a more modest, dampened smile. The top of the ad included Clarizac's slogan: "Need Relief? Get Clarizac." Also present was the Clarizac logo: a colorful combination mark, with a fluttering butterfly above it. Lastly, a blurb was included that portrayed Clarizac positively: highlighting Clarizac as the "only antidepressant medication clinically proven to eliminate the symptoms of [clinical depression] *without any harmful side effects.*" (emphasis added). Wymann circulated these print ads through publication in various U.S. magazine issues. Wymann, as the copyright holder of the Clarizac ads and trademark holder of the "Need Relief?" slogan, included copyright notices at the very bottom of the print ads.

As a corporation, PAM furthers its agenda of promoting alternative medicine by manufacturing homeopathic and herbal remedies. Approximately 3 years ago, PAM began to manufacture and market NatraTab, an herbal remedy that treats depression symptoms. As part of NatraTab's campaign efforts, PAM began circulating several full-paged print ads in magazines, which were modeled after the Clarizac print ads herein. The print ads were "substantially similar in layout, text, and design to the Clarizac ads." Each ad in the campaign incorporated a person captured at close range. However, instead of the optimistic expressions of Clarizac's print ad subjects, NatraTab's subjects appeared in anguish: tired, anxious, sad, confused, or holding back oral gestation. At the top of the NatraTab print ads read "Need *Real* Relief" (emphasis added). NatraTab's logo, topped with a three-leaf tree branch, appeared at the bottom of the ads. Below the logo read "Herbal Tablets." Like Clarizac's print ads, a blurb was included which placed NatraTab in a superior light to the "leading medication prescribed for clinical depression" because it was free of adverse side effects.

PAM's NatraTab print ads began circulating, sometimes in the very same magazine issues as the Clarizac ads they were modeled after. While PAM's sales have skyrocketed, Wymann saw

an approximately 50% decline in Clarizac sales, which account for their largest share of profits. During this period, no new pharmaceutical depression medications entered the market.

Wymann also engaged in licensing endeavors for its popular “Need Relief?” slogan with Sunset Spa Mills Company, which also saw a sharp decline in sales of products bearing the slogan. Aside from their licensing agreement, Wymann has no other relationship with Sunset Spa Mills Company, such as an ownership interest in the company. But after PAM began marketing NatraTab, Wymann also saw a decline in license requests for its slogan.

Wymann argues that Clarizac’s sharp decline in sales is attributable to consumers purchasing NatraTab, rather than Clarizac, because they believe they are securing a natural version of Clarizac, or a natural version with the same effects as Clarizac. Despite this assertion, Wymann admits there is no direct evidence showing a causal relationship between PAM’s use of the Clarizac ads and the sales decline of the Clarizac drug itself.

Wymann’s assertion was supported by the marketability of their “Need Relief?” slogan. After conducting a thorough market analysis of the slogan, an experienced marketing professional concluded that the slogan’s marketability is primarily confined to Clarizac advertising. The existing “Need Relief” campaign has largely stagnated and reached the end of its effectiveness as an advertising strategy (a stance shared by the general public, according to a News Leak Magazine article that comments on the slogan’s stale connotation in today’s ether). While the slogan may support a limited range of derivative products, the overall structure of the Clarizac campaign does not align with a viable or recognized licensing market in the trade.

Discussion

If this action goes to trial, PAM’s use of NatraTab’s print advertisements, which parodies Wymann’s Clarizac advertisements, will likely be granted a fair use defense. A new work that

copies an original may be protected from a copyright infringement action if it qualifies as fair use—that is, if it transforms the original by adding new expression, meaning, or purpose; copies what is reasonably necessary to accomplish that purpose and does not unjustifiably harm the market for the original or its potential derivatives. As part of their NatraTab marketing campaign, PAM copies a substantial portion of the Clarizac ads to parody them; however, the NatraTab ads serve a different purpose and do not act as market substitutes that would cause cognizable harm to Wymann’s ability to market the Clarizac ads and potential derivatives. Considering this, the court is likely to agree that PAM’s NatraTab ads qualify as fair use under the Copyright Act and warrants protection from a claim of copyright infringement accordingly.

Seeking to protect the ownership, distribution, and reproduction rights of original works, Congress enacted the Copyright Act of 1976, thus incentivizing creativity. Section 106 of the act bestowed a host of exclusive rights on copyright holders, including the right to "prepare derivative works based upon the copyrighted work. . . ." 17 U.S.C.A. § 106A (West, Westlaw Edge through Pub. L. No. 119-36). In other words, copyright holders are allowed to control how their original works are used as the subject of subsequent works.

Yet, because imposing strict limitations on the use of original works through statutory authority could undermine the purpose of the copyright doctrine, §107 of the Copyright Act codified the fair use doctrine. Fair use allows someone other than the copyright holder to use copyrighted works in a manner that would be considered copyright infringement for “purposes such as criticism, comment, news reporting, teaching, scholarship, or research.” § 107 (omitting parenthetical).

Parody requires “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.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). While not explicitly listed as a protected fair use ground, “courts . . .

have held that parody, like other comment or criticism, may claim fair use under § 107." *Id.* at 579.

Section 107 lists four factors to consider when determining if a specific use of an original work qualifies as fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

§107. Each factor must be analyzed separately—"all four to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578.

The first fair use factor weighs in favor of a fair use finding because, despite the commercial use, PAM's NatraTab ads were significantly transformative.

The new work's degree of transformativeness is the core of the first factor. That is, the specific use of new work that "merely 'supersede the objects' of the original creation," thus 'supplanting' the intended use of the original creation, tips the first factor in favor of the copyright holder. *See Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)). On the other hand, the first factor will favor the creator of the new work if the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *See Campbell*, 510 U.S. at 579. In terms of parody, the conflation of referencing an original work and then ridiculing it suffices as a "comment" on the original work; one transformative enough to propel the first factor in favor of the parodist. *Id.* at 583.

Beyond the new work's transformative character, the first factor also requires the court to consider if the new work is of a commercial nature. §107. Commercialness is "not whether the

sole motive of the use is monetary gain but whether the user stands to profit from exploiting the copyrighted material without paying the customary price.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). Yet, the use of a new work for commercial purposes is not dispositive and should not bar the first factor from weighing in favor of a fair use defense. *Campbell*, 510 U.S. at 584. As the *Campbell* court opined, “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.” *Id.* at 571.

The first factor is an objective analysis of the specific use of the new work, not merely a subjective analysis of the new work’s substantive elements. In *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), an arts foundation received \$10,000 for licensing one illustration of a 16-illustration Prince series to a magazine publisher, who would use the illustration as a cover for a tribute issue to the late musician. Each illustration in the series turned a copyrighted photograph of Prince into a colorful silkscreen portrait. However, the copyrighted work was only licensed for a single use.

The Court held in favor of the copyright holder of the initial Prince photograph because the original and new works were both intended to illustrate magazine features about Prince; hence, they shared the same purpose. *Id.* at 550. As such, the use of the new work was not significantly transformative. The Court’s reasoning hinged on their view of transformative as not simply a proposed interpretation of artistic elements: “the subjective intent of the [new] user (or the subjective interpretation of the court)” should not be determinative of the first factor. *Id.* at 545. The unauthorized use of the Prince series illustration did not add any new meaning or expression, such as through criticism, critiques, or comments on the original work; instead, it merely supplanted the original work’s purpose. Combining the new use’s commercial nature and low

degree of transformativeness, especially without any other justification for the new work's unauthorized use, the Court reasoned that the first factor weighed against a finding of fair use.

Yet a new work's substantive elements can be enough to push the first factor in favor of a parodist when it references and ridicules an original, thereby “commenting” on it. In *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998), a film studio marketed its upcoming film by publishing a print ad in a magazine. The film's parody ad bore a blatant resemblance to a copyrighted photograph: both works featured a nude, pregnant woman's body wearing a ring and striking the same pose. However, while the copyrighted work featured an actress sporting a serious expression, the film's parody ad superimposed one of the film's male cast members over the body of the nude pregnant woman; his expression was “mischievous[ly] smirk.” *Id.* at 112. As the film's parody ad was a derivative work without the copyright holder's authorization, a claim of copyright infringement followed.

The court held that the new work was transformative enough for the first factor to weigh in the film studio's favor. In reaching this conclusion, the court reasoned that the new work could be reasonably perceived as “commenting on the seriousness, even the pretentiousness, of the original,” specifically, the beauty of pregnancy, or even mocking that message “unchivalrously.” *Id.* at 115. Secondly, the court extended *Campbell*'s clarification that a work's commercial nature does not automatically defeat a fair use claim under the first factor, adding that commercial parodies—including advertisements—should still receive some legal indulgence where they comment on the original work, rather than be categorically excluded from a fair use protection. *Id.* at 117.

The first factor supports PAM because, like the parody ad in *Leibovitz*, NatraTab's parody ads can reasonably be perceived as referencing Clarizac, the leading pharmaceutical for treating clinical depression. Additionally, they openly criticize its effectiveness by highlighting its side

effects. Just as in *Leibovitz*, the NatraTab ad campaign bears a striking resemblance to Wymann's original work but deliberately alters its external perception. Instead of the gleaming smiles found in Clarizac's ads, NatraTab's ads feature expressions of anguish. This alone would not cause the first factor to weigh in PAM's favor, but, because NatraTab built upon the renowned Clarizac slogan, the relatively different moods of the individuals featured in the various NatraTab ads could be perceived as mocking the relief Clarizac provides for those with clinical depression.

The NatraTab ads took Clarizac's "Need Relief?" slogan and featured the phrase "Need *Real* Relief?" (emphasis added). Seeing as most people think of relief from depression symptoms when in contact with the phrase "need relief," and Clarizac is the leading medication for those symptoms, it reasonably tracks that audiences connected the NatraTab ads to Clarizac in some way. This is further supported by the fact that NatraTab and Clarizac often appeared in the same magazine issues. Thus, it makes sense that, by noticing the distinction in the body language of the subjects in each corporation's ads, as well as the altered slogan, audiences perceived the NatraTab print ad campaign as a parodic comment on Clarizac's ads.

Secondly, if the dissimilar body language and altered slogan weren't enough to lead audiences to conclude that NatraTab's ad campaign parodied Clarizac's, the blurbs included in the ads provide further support. The subjects in each NatraTab ad conveyed a feeling associated with the side effect named in the ad's blurb. For example, one NatraTab ad featured a woman clenching her lips, holding her head, and squinting. A line from the blurb insinuated that headaches were a harmful side effect of the "leading medication prescribed for clinical depression". Logically speaking, it is not a stretch to reason that, given the widespread scope of "Need Relief" and the visual elements that resembled a successful ad campaign that had been circulating the market for years, audiences understood the blurb—and, subsequently, the ad itself—to be referring to Clarizac.

Then, like the arts foundation in *Andy Warhol*, NatraTab’s use was of a commercial nature. The commercialness of NatraTab is not merely due to the obvious fact that PAM presumably paid to market the herbal remedy, but also because the ad campaign generated profit for PAM. Since NatraTab’s ads gained prominence, their sales soared. While PAM publicly credited Wymann’s Clarizac ads as the muse for NatraTab’s ads, the corporation did not pay Wymann for this derivative use. As such, NatraTab’s clearly commercial use would oppose the first factor weighing in PAM’s favor. Yet still, as in *Andy Warhol* and *Leibovitz*, a commercial nature is not determinative of the first factor.

To reiterate, NatraTab’s use of print ads—which were themselves a derivative of an original work—did not supplant the use of the Clarizac print ads they parodied. On the contrary, NatraTab’s ads added a completely new connotation to the Clarizac ad and slogan by referencing and ridiculing Clarizac, mocking its alleged hidden side effects. In Wymann’s claim against PAM, it is unlikely the court will conclude that NatraTab’s ads use could take the place of Clarizac’s, seeing as the former promoted herbal tablets and introduced a big-pharma conspiracy, while the latter supported a traditional, chemical drug and boasted the lack of any “harmful” side effects. Consequently, despite accounting for the commercial nature of the NatraTab ads, the first factor weighs in favor of a fair use defense.

At face value, the second factor weighs against a fair use finding, but the facts of the case call for a reduction in this factor’s weight.

The Campbell court clarified that when an original work is protected by §107 of the Copyright Act, the second factor “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.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). As such, because PAM parodies Clarizac, this factor carries little weight.

The third factor weighs in favor of a fair use finding because NatraTab's substantial replication of the Clarizac ads' elements was necessary for its parodic purposes.

The third factor assesses how much of the original work a new work has drawn on. A parodic new work relies on the audience grasping its reference to an original work in order to understand its stance on the original. *Id.* at 588. A parody can use “the heart” of an original work, or the “most distinctive or memorable features.” *Id.* However, once a parody takes enough of the original work for audiences to connect the dots between the two works, what’s reasonable for the new work to take beyond that depends on the first and fourth factors. That is, if a parody takes beyond the “heart” of the original, but is also highly transformative, it is less likely to stand as a market substitute for the original. *Id.* at 590. In these instances, the third factor tends to favor a fair use defense.

A third factor analysis under the fair use doctrine is not limited to the quantity of elements used; rather, when assessing the amount of an original work an authorized derivative work uses, the qualitative elements of each work are to be compared. In *Lombardo v. Dr. Seuss Enterprises, L.P.*, 279 F. Supp. 3d 497 (S.D.N.Y. 2017), a playwright produced a parodic risqué play based on Dr. Seuss’s *How the Grinch Stole Christmas*. The play, *Who’s Holiday*, was “a one-actress 75-minute comedic play featuring a rather down-and-out 45-year-old version of Cindy-Lou Who.” *Id.* at 503. *Who’s Holiday* transformed elements of the characters, plot, setting, and rhythmic structure by imbuing them with explicit, adult themes.

The court held that the third factor favored the playwright because of the production’s parodic purpose. *Id.* at 511. In its opinion, the court emphasized that the third factor calls for analyzing which details of the original story were reasonable to use in the new, derivative stage play. This analysis naturally relates to the first factor because it requires the court to consider the same qualitative details that the new work is likely to have transformed in order to solidify its

parodic elements. Regarding the proportion of those details used, the court noted that “‘a parody . . . is entitled to more extensive use of the original work than is ordinarily allowed under the substantial similarity test.’” *Id.* (quoting *Adjmi*, 97 F. Supp. 3d at 533). In this case, although the play used a substantial number of the copyrighted artistic elements from Dr. Seuss’s beloved story, they were not presented to the audience in their original form. The specific details the playwright took were intended to serve the production’s purpose of mocking the original through a “distorted imitation.” *Id.* at 512.

However, without justification, the third factor does not allow derivative works to meticulously copy an unreasonable proportion of original works, regardless of a valid parody. In *Dr. Seuss Enters., L.P. v. ComicMic LLC*, 983 F.3d 443 (9th Cir. 2020), a publishing company planned to publish *Oh, the Places You’ll Boldly Go! (Boldly)*, an unauthorized mash-up of *Star Trek* and Dr. Seuss’s *Oh, the Places You’ll Go! (Go!)*. *Boldly* all but repackaged *Go!*, replacing its characters with those from the *Star Trek* franchise, and copying close to 60% of *Go!* (14 pages out of 24). For each of the highly imaginative illustrations *Boldly* copied, the publishing company replicated *Go!*’s composition, arrangement, and visual elements as closely as possible. *Id.* at 456. The copyright holders of *Go!* brought a copyright infringement claim against the publishing company.

The court held that the first factor weighed heavily against a fair use defense for the publishing company because too much of *Go!*’s qualitative substance, including its heart, was copied. *Id.* at 458. The court reached this conclusion because *Boldly* did not sufficiently employ any transformative factors related to a fair use purpose, such as parody. Much of the court’s reasoning harbored evidentiary support from *Boldly*’s illustrator, who admitted to deliberately and meticulously transferring the visually artistic elements from *Go!* To *Boldly*, while keeping the minute details intact. Referring to the first factor, which also weighed against a fair use finding,

the court implied that a *Star Trek* and *Go!* mashup could've been created without extensively exploiting the original work, especially for a commercial nature.

In our case, the third factor also weighs in PAM's favor, largely because of its transformative purpose. While PAM admits to using a substantial number of Clarizac's design elements for its NatraTab ads, similar to the playwright in *Lombardo*, PAM must use those elements in order to parody the pharmaceutical drug and its corresponding marketing campaign. As a print advertisement that is meant to be seen in magazines, the heart of the Clarizac ads is subjective: some may say the textual elements (the blurb, the combination mark logos, and the slogan) are what most readily bring the Clarizac ads to mind; others may argue it's the overall positive mood and body language. This very subjectivity supports NatraTab's need to draw heavily on elements from Clarizac's ads for its parodic purpose, because it's difficult to predict which single detail the audience will spot that allows them to link the ads to each other. Just like the playwright in *Lombardo*, if NatraTab "copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through." *Campbell*, 510 U.S. at 589-90. In practical terms, without a close range shot of everyday people dramatically expressing a bodily reaction—or without the altered "Need *Real* Relief?" slogan (emphasis added) that Clarizac is known for—it would be difficult for the NatraTab ads to successfully conjure up the Clarizac ads.

However, unlike the publishing company in *Dr. Seuss Enterprises*, PAM's NatraTab ads are unlikely to supersede Wymann's use of Clarizac's ads in their respective market. As established by the first factor analysis, the use of Wymann's Clarizac ads by NatraTab builds on the latter by commenting on its alleged hidden side effects and mocking the relief it provides for those with clinical depression. While the publishing company in *Dr. Seuss Enterprises* superseded the original work's object due to a lack of transformativeness and a commercial nature, PAM's NatraTab ads

cannot readily serve as a market substitute for Wymann’s Clarizac ads, as *Boldly* can for *Go!*. The ads of the two corporations, and their respective marketing campaigns, rest on opposite ends of the market for medical relief products: Clarizac stands for tradition (chemically manufactured pharmaceutical drugs), and NatraTab is the new-age underdog (homeopathic and herbal remedies). Considering this, the degree to which PAM copies Wymann’s ads is justified, even though it is of a commercial nature, because it’s unlikely that NatraTab’s ads themselves could supplant Wymann’s Clarizac ads in their respective market.

The fourth factor likely weighs in favor of a fair use defense as the transformative purpose of NatraTab’s ads bars a presumption of cognizable market harm.

This factor requires the court to consider the “extent of market harm caused” by the derivative use of the new work and “whether unrestricted and widespread conduct of the sort engaged in by [PAM] . . . would result in a substantially adverse impact on the potential market’ for the original [work] . . . and derivative works.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); see *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 512 (S.D.N.Y. 2017). The critical question is “whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015).

As it applies to parodies, a spectrum exists: on one end, it’s “likely that cognizable market harm to the original will occur” when a new work serves as a market replacement that supplants the original; on the other end, a new work of a transformative use, including a “pure and simple” parody, is “at least less certain . . . to affect the market in a way cognizable under this factor.” *Campbell*, 510 U.S. at 591. To clarify, a parody does not have an adverse effect on the market for an original work simply because its comments on and criticism of the original work are rather

scathing. *Id.* at 592. See *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986). “[T]he economic effect . . . is not its potential to destroy or diminish the market for the original . . . [it’s] whether it fulfills the demand for the original. Biting criticism suppresses demand; copyright infringement usurps it.” Thereby, the fourth factor will weigh against a fair use defense “when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable.” *Id.*

Market harm is not to be presumed under the fourth factor merely because a derivative work is of a commercial nature. In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), a rap group used Roy Orbison’s rock ballad, “Oh, Pretty Woman,” as the subject of their parody song, titled “Pretty Woman.” From Orbison’s original work, the rap group copied the bass riff and the first line’s lyrics. However, the rest of the rap group’s parody song “juxtapose[d] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.” *Id.* at 583.

The Court held that the fourth factor did not weigh against a fair use defense simply because the rap group’s parody song was of a commercial nature. The Court reasoned that “no presumption or inference of mark harm” should apply to cases beyond those where a new work duplicates, or copies verbatim, an original work for commercial purposes, which was not the case in *Campbell*. On the contrary, the fourth factor stood to favor the rap group because their parody song was not only for commercial purposes, it was also highly transformative, subverting the meaning of Orbison’s song by poking fun at its romantically naive approach to sexual fornication and dated outlook on street life. *Id.* at 582. The Court reasoned that the rap group’s parody song served a different market function than the original: both were in completely different genres, conveyed conflicting views of society, and took different approaches to modern love and lust.

Furthermore, courts have held that the fourth factor can weigh in favor of the allegedly infringing party if the copyright holder suffered no actual market harm—and isn't expected to in the future—as a result of an unauthorized derivative use. In *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), a visual artist used an original photograph that was published in a magazine issue in his collage painting. The new work was transformative, changing the meaning of the original, which was intended to convey eroticism and sexuality, into a commentary on mass media and consumerism.

The court held that although the visual artist's collage painting was for commercial purposes, the photographer could not support a fourth factor contention because she did not suffer any actual adverse market harm, nor was there any support for an adverse impact on the photograph's marketability. The court reasoned that the photographer admitted that she had no history of licensing any of her photographs for visual or graphic art purposes, she had not published the photograph since its initial publication, the value of the photograph did not decrease as a result of the new work's use, and the new work caused no harm to her career or future planned endeavors.

But, in an earlier case, the unauthorized copying of an original work, especially for a commercial purpose, limits the marketability of the original work and thus constitutes an adverse market effect cognizable under the fourth factor. In *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), the same visual artist as in *Blanch* was not as successful in his fair use defense. The visual artist, Jeff Koons, turned an original work (a postcard photograph of a married couple holding a group of puppies) into an unauthorized derivative sculpture. Koons bought the postcard, ripped off the photographer's copyright notice, and commissioned the unauthorized derivative sculpture. Koons sold three copies of his derivative reproduction of the new work, profiting \$367,000. While Koons purported that his new work was a parody, commenting on society's aesthetic values of mass

production and consumerism, this assertion was fruitless, as the new work wasn't actually a parody of the postcard photograph itself.

The court held that, given the commercial nature of the new work, the lack of a transformative purpose, and Koons's bad faith efforts, the fourth factor weighed against a fair use defense. The court concluded that if Koon's unauthorized use of the original work circulated to a widespread degree, it would "prejudice . . . the potential market for [the photographer's] work". *Id.* at 312. In reaching this conclusion, the court noted the plausibility of the photographer suffering a reduced interest in his original work, especially if someone intended to use the original work as the basis of a derivative sculpture. Alternatively, the market for the postcard photograph could be adversely affected if Koons sold pictures of his derivative sculpture. *Id.*

In our case, the fourth factor will likely weigh in favor of a fair use finding, given the lack of evidence that the Clarizac ads suffered any actual market harm as a result of PAM copying Wymann's marketing campaign. Nor is there any evidentiary support that NatraTab's derivative use has the propensity to adversely affect the market for or the value of Clarizac's ads in the future. As it would be easy to get lost in the waters of hypotheticals in a case such as ours, we must solidify our scope for applying the fourth factor to this case.

There could be an argument that NatraTab's derivative use of Wymann's Clarizac ads caused Wymann to suffer a significant decrease in sales. However, as the *Campbell* court clarified in its opinion, the first factor should not consider Wymann's potential decrease in Clarizac's licensing profits or licensing requests because market harm should not be presumed, seeing as Clarizac's ads are highly transformative. This limitation logically follows the purpose of the Copyright Doctrine, which promotes creativity and the creation of original works; if the inability to derive from original works were to increase simply because copyright holders point out various

market *what-ifs*, without sufficient evidentiary support, the efficiency of the Copyright Doctrine will dwindle.

Additionally, the more likely cause of Wymann's over a million-dollar decrease in sales is that their Clarizac campaign has nearly run its course in terms of marketability. Since its publication, Clarizac's campaign garnered widespread success. However, in the years that followed, their slogan now warrants awkward distaste amongst audiences, according to a News Leak Magazine article. Beyond that, a marketing expert has confirmed the contention that Wymann's Clarizac campaign is losing steam due to its continued reliance on a marketing tactic that has exceeded industry norms: a single ad campaign without major changes for over four years is nearly unheard of.

Considering this, there is no evidence to support that PAM's parody of the Clarizac ads caused actual market harm to Wymann. That is not to say that Wymann has not suffered any market harm. The corporation has indeed experienced a sharp decline in Clarizac sales, which has presumably led to overall profit losses, as Clarizac is their number one selling product to date and accounts for the largest share of its profits. Establishing a causal link between the specific use of the NatraTab ads and adverse market effects for Wymann requires leaning on circumstantial, rather than direct, evidence—which courts, including *Campbell*, have declined to apply.

Giving deference to the facts, however, unlike the visual artist's use of the postcard photograph in *Rogers*, NatraTab's derivative use of the Clarizac ads has not caused cognizable market harm to the use of Clarizac ads in the market for magazine advertising. This conclusion is largely supported by the highly transformative purpose of the NatraTab ads. That is, like the rap group in *Campbell*, PAM's NatraTab ads do not supplant the use of Clarizac ads in the magazine advertising market. On the contrary, NatraTab's ads effectively comment on Clarizac's proposed

relief of clinical depression symptoms while ridiculing Wymann for their alleged silence on Clarizac's harmful side effects.

While a rap parody of a rock ballad is factually different from a natural medicine corporation parodying a pharmaceutical drug manufacturer, for our application of the fourth factor, they are adequately similar because the parties in both cases are participants in the same industry (*Campbell's* parties represent the music industry, while PAM and Wymann represent the medical relief industry—at the most basic level). So, just as the rap group in *Campbell's* transformative parody of a commercial nature received fourth factor support for a fair use defense, so should PAM, a party whose derivative use is similarly transformative and of a relatively equal commercial degree. Thus, just as our case is similar to *Campbell*, it is also similar to *Blanch* because neither Wymann nor PAM has proffered support showing actual adverse market effects directly caused by PAM's parody ads circulating the market. Any potentially adversarial effects for Clarizac derivatives are negated by the transformative nature of NatraTab.

Lastly, the use of NatraTab's parody ads does not supplant the use of Clarizac's ads in the market, as they serve different purposes. The purpose of the Clarizac ads is to promote their pharmaceutical drug, among other things, while the purpose of NatraTab's parody ads is to directly ridicule Clarizac for its allegedly harmful side effects through mocking its long-used marketing efforts. Given these dissimilar purposes and the conflicting portrayal of modern medicine, it is unlikely that magazine companies would choose to publish PAM's ads in lieu of Wymann's, merely because of the role NatraTab ads play in the industry as a derivative parody of Clarizac. Nothing in the facts supports such a conclusion.

Therefore, as the *Campbell* court frowned on presuming market harm for transformative uses such as that of the NatraTab ads, it stands to reason that the fourth factor will likely weigh in

PAM's favor because their parodic, derivative use of the NatraTab ads within the market for medical relief products has not had any cognizable adverse effect on the market for or value of Wymann's Clarizac ads.

Conclusion

To conclude, if this action goes to trial, the court is likely to rule in favor of PAM's fair use defense. PAM's NatraTab print advertisements were parodic because they mocked Clarizac's print advertisements and challenged their alleged silence regarding the drug's harmful side effects, while altering the artistic details and marketing tactics to serve a different purpose. Additionally, the portions of the Clarizac advertisements that PAM copied were necessary to conjure up the original, and nothing in the record indicates any actual or potential adverse effect on the market for the Clarizac print advertisements. Accordingly, because the factors that carry weight in parody fair use cases favor PAM, they are likely to prevail on their fair use defense.