The *Right* to Parody? A comparative analysis.

Sabine Jacques, LLB, LLM, LLM

Thesis submitted to the University of Nottingham for the

degree of Doctor of Philosophy

December 2015

ABSTRACT

Copyright law grants exclusive rights to right-holders which prevent others from exploiting copyright-protected works without authorisation. However, this right is not absolute. Legislation includes specific exceptions which preclude right-holders from exercising their prerogatives in particular cases which foster creativity and cultural diversity within that society. The parody exception pertains to this ultimate objective by permitting users to reproduce copyright-protected materials *for the purpose of parody*.

While the parody exception is not harmonised at international level, the EU Information Society Directive offers EU Member States the option of including a parody exception within national copyright legislation as part of a harmonising framework. The UK took advantage of this option, and introduced a new copyright exception for parody in October 2014.

To understand the meaning and scope of the new exception in UK copyright law and to analyse whether EU harmonisation of the parody exception is achievable, this thesis examines and compares four jurisdictions which differ in their protection of parodies: France, Australia, Canada and the United Kingdom. This thesis is concerned with finding an appropriate balance between the protection afforded to right-holders and the public interest in encouraging parody. This is achieved by analysing the parody exception to the economic rights of right-holders, the application of moral rights and the interaction of the parody exception with contract law.

As parodies constitute an artistic expression protected under the right to freedom of expression, this thesis considers the influence of freedom of expression on the interpretation of this specific copyright exception. Furthermore, this thesis aims to provide guidance on how to resolve conflicts where fundamental rights are in conflict.

ACKNOWLEDGEMENTS

This project enabled me to combine two passions: intellectual property law and music. The PhD adventure was a success on both accounts by allowing me to further hone the acquired knowledge in intellectual property law from previous legal education and by examining different aspects essential to the creation of music. Constituting my greatest intellectual journey to date, this thesis would have not been possible without the precious advice, support and contributions of many people along the way.

First, I would like to thank and express my gratitude to my supervisors, Professors Estelle Derclaye and Paul Torremans. Your invaluable guidance, encouragement and patience over the last three years have been essential to my development as an independent researcher. Thank you for forcing me to always go back to my research and adopt new perspectives, which has cemented my confidence in my research and analytical skills. I would also like to thank both of my examiners, Jonathan Griffiths and Nigel Gravells, for their challenging questions and useful advice.

This project would have not been possible without the financial support received from the University of Nottingham and my sponsors in the music sector: The *Music Publishers Association* (MPA), The *British Academy for Songwriters, Composers and Authors* (BASCA) and *PRS for Music*. Providing much more than financial support, this collaboration contributed to the success of this project by adding the practical insight to this project. I am especially grateful to Florian Koempel: without you the project would have not seen light, Hugo Cox for your comments and insights and Vick Bain for your infectious passionate enthusiasm.

Besides the actual thesis, the PhD adventure gives birth to profound friendships. Lynne Chave, your suggestions and criticisms helped me reach my goals. I am deeply indebted to you for your ongoing support and help. Rossella Pulvirenti, sharing a house was the best decision we could have made! I am already missing the quality time spent. Angelika Reichstein, while I do not really explain how assisted dying and parody interlink, it reflects the nature of our cherished friendship: complementary on many levels! Thank you for commenting on my thesis and making sure that the calories of our Saturday cakes were burnt off at the gym.

Furthermore, I would like to extend my thanks to other friends from A36/A37 who have supported me and made the PhD life that much more entertaining!

Special thanks go to my friends and family. I am particularly grateful to my parents for your love, patience and trust in my choices. I would of course like to thank Gauthier Dupont. I am sure you know way more about copyright than you ever wish you knew but I am deeply grateful for your love, support and curiosity.

Finally, I would like to dedicate this thesis to all the artists believing in their works and constantly forcing us to see the world differently.

Sabine Jacques
Nottingham, December 2015

Table of Contents

Abbreviations ..... *xii*

Table of cases ..... *xix*

Table of legislation ..... *xxx*

Introduction 1

1. Background to the project 1

2. Scope and aim of the contribution 9

3. Methodology 11

4. Structure of the Project 12

Chapter I: Parody - Nature and Definition 15

Introduction 15

1. The origins of the term and its evolution through the centuries 15

1.1 Introduction 15

1.2 Etymology of parody 16

1.3 Historical overview of parody in art fields 16

1.4 Theorists' views on parody 23

1.5 Conclusion 26

2. The legal definition of parody 28

2.1 Introduction 28

2.2 France 29

2.3 United Kingdom 33

2.4 Parody following the CJEU 35

2.5 Australia 37

2.6 Canada 45

2.7 Conclusion 47

Conclusion 49

Chapter II: Legality of the Parody Exception in Light of International Treaties and Domestic Copyright Laws 53

Introduction 53

1. Why is a specific parody exception needed? 53

1.1 History of copyright law 54

1.2 Legal traditions: common law & civil law jurisdictions 59

2. The international Three-step Test 62

2.1 International texts 62

2.2 Interpretation of the test 65

2.2.1 Certain special cases 66

2.2.2 Conflict with the normal exploitation 68

2.2.3 Absence of unreasonable prejudice to the legitimate interests of the author/right-holder 72

2.3 Conclusion 75

3. The Three-step Test in the Directive 75

4. The case of the parody exception at national level 82

4.1 Australia 82

4.2 Canada 86

4.3 United Kingdom 89

4.4 France 93

Conclusion 95

Chapter III: The Scope of the Parody Exception 98

Introduction 98

1. General considerations 99

2. The nature of the parody exception 101

2.1 The legal nature 101

2.2 Principles of interpretation 104

2.2.1 Community level 104
2.2.2 National level 107
2.2.2.1 France 108
2.2.2.2 UK 109
2.2.2.3 Canada 110
2.2.2.4 Australia 113
2.2.3 Conclusion 115
2.3 Relationship with contract law 116
2.3.1 Principle: freedom of contract 117
2.3.2 Exceptions 118
2.4 Conclusion 122
3. Requirements attached to the parody exception 123
3.1 Preliminary remarks 123
3.2 The intent 126
3.2.1 Humorous intent 129
3.2.2 Absence of harm 133
3.3 Absence of confusion 137
3.4 Amount reproduced 143
3.5 Motives 150
3.6 Encroachement upon the right-holder's economic rights 158
3.7 Originality 162
3.8 Alternatives to the dealing 164
3.9 Three-step Test 166
3.10 Conclusion 168
Conclusion 169

Chapter IV: Parody and Moral Rights 172

Introduction 172

1. Conception of moral rights in different legal traditions 174

2. Does parody respect moral rights? 179

2.1. The right of paternity..... 179

2.2. The right against false attribution..... 184

2.3 The right of integrity..... 187

2.3.1 The scope of the right of integrity..... 187

2.3.2 Parodies and the right of integrity..... 192

Conclusion..... 202

Chapter V: How Freedom of Expression Defines the Parody Exception.....205

Introduction..... 205

1. Protection of freedom of expression at International and European levels. 207

1.1 The right to freedom of expression at international level. 208

1.2 European recognition of freedom of expression. 209

2. Parody, facilitating the realisation of freedom of expression. 210

2.1 Copyright and freedom of expression – rights in conflict?..... 211

2.2 Justifying the parody exception. 214

2.3 A specific freedom to create?..... 217

3. Restrictions to freedom of expression to respect the rights of others.... 219

3.1 Elaboration of limitations at international level. 220

3.2 Restrictions at European level. 222

3.2.1 Principle..... 222

3.2.2 Restriction 'necessary in a democratic society' 223

3.2.2.1 Nature 224

3.2.2.2 Form 226

3.2.2.3 Attitude of the speaker..... 228

3.2.2.4 Context..... 229

3.2.2.5 Content 232

3.2.3 Conclusion 236
4. How national courts strike a balance between the rights in competition. 238
4.1 The United Kingdom 239
4.2 Canada 241
4.3 Australia 246
4.4 France 247
4.4.1 Freedom of expression and the Freedom of the Press Act 248
4.4.2 Balancing of competing rights 253
4.4.2.1 Freedom of expression v. personality rights 253
4.4.2.2 Freedom of expression v. discrimination 257
4.5.2.3 Freedom of expression v. morals 263
4.4.3 Conclusion 264
4.5 Conclusion 265
5. Factors guiding courts in their application of the parody exception. 267
5.1 Form of the expression 269
5.2 Type of parody 271
5.3 Context of the parody 273
5.4 Subject-matter of the parody 274
5.5 Standing of the speaker 278
5.6 Parodist's intent 278
Conclusion 279
Chapter VI: A Musical Affair 284
Introduction 284
1. Music and copyright 285
1.1 Music as a commodity 285
1.2 Specific nature of musical works 287

1.3 Musical parodies as a source of creativity 289
1.4 Conclusion 293
2. Infringement and defence 294
2.1 Copyright infringement 294
2.1.1 Threshold for infringement 295
2.1.2 Idea/expression dichotomy 298
2.1.3 Parody problem 299
2.2 Defence: the parody exception 300
2.2.1 Economic rights 300
2.2.1.1 Humorous intent 301
2.2.1.2 Absence of confusion 301
2.2.2 Moral rights 308
2.3 Conclusion 311
3. The music business 313
3.1 The actors 314
3.2 Publishing and recording contracts 321
3.2.1 Rights 321
3.2.2 Creativity control and moral rights 323
3.2.3 Denigrating content 325
3.2.4 Conclusion 326
3.3 Collecting rights societies 327
3.3.1 Modus operandi 328
3.3.2 Licensing for the purpose of parody 329
3.3.3 Exploiting a parody commercially 330
3.4 Online sharing platforms 333
3.4.1 Content ID 333
3.4.2 Licensing online sharing platforms 335
3.5 Conclusion 337
Conclusion 339

Conclusion..342

Bibliography...348

Abbreviations

AGO	Advocate-General Opinion
ACHPR	African Commission on Human and Peoples' Rights
TRIPs	Agreement on Trade-related Aspects of Intellectual Property Rights
ALL ER	All England Law Reports
Ann. Prop. Ind.	Annales de la Propriété Intellectuelle
Ass plen.	Assemblée Plénière
ALAI	Association littéraire et artistique internationale
CA 1968	Australian Copyright Act 1968
AUSFTA	Australia–United States Free Trade Agreement
A&M	Auteurs & Media
B.C.E.	Before the Common/Current/Christian Era
Berne	Berne Convention
AFPIDA	Branche française de l'Association littéraire et artistique internationale
BBC	British Broadcasting Corporation
BNP	British National Party
BSB	British Satellite Broadcasting
Bull.	Bulletin
Cah. Dr. D'auteur	Cahiers du droit d'auteur

FC	Canada Federal Court Reports
C.F.	Canada Federal Court Reports
S.C.R.	Canada Supreme Court Reports
CAIP	Canadian Association of Internet Providers
Canadian Charter	Canadian Charter of Rights and Freedoms 1982
CA 1985	Canadian Copyright Act 1985
CCLA	Canadian Copyright Licensing Agency
CPR	Canadian Patent Reporter
A.C.	Canadian Reports, Appeal Cases
Ch	Chancery
Ch D	Chancery Division
Chron.	Chronique
Cir.	Circuit
C.E.	Common Era
CLR	Commonwealth Law Reports, Australia
CCE	Communication Commerce Electronique
CFDT	Confédération française démocratique du travail
CLRC	Copyright Law Review Committee, Australia
CDPA	Copyright, Patents and Designs Act 1988, as amended
Cass.	Cour de Cassation
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body
DLR	Dominion Law Reports

EWHC	England & Wales High Court (Administrative Court)
EWCA	England and Wales Court of Appeal, UK
EMLR	Entertainment and Media Law Reports
ESAC	Entertainment Software Association and Entertainment Software Association of Canada
Esp.	Especially
Ets	Établissements
EU Charter	EU Charter of Fundamental Rights
Charter	EU Charter of Fundamental Rights
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Fasc.	Fascicule
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia: Full Court
C.A.F.	Federal Court of Canada: Appeal Division
FCR	Federal Court Reports, Australia
FCTD	Federal Court Trial Division, Canada
FSR	Fleet Street Reports
Fox Pat. C.	Fox's Patent, Trade Mark, Design and Copyright Cases, Canada
IPC	French Intellectual Property Code
Gaz. Pal.	Gazette du Palais
HCA	High Court of Australia

HR	Human Rights
HRA	Human Rights Act 1998
IRPI	Institut de Recherche en Propriété Intellectuelle
IP	Intellectual Property
IPR	Intellectual Property Reports, Australia
IPR	Intellectual Property Rights
CERD	International Convention on the Elimination of all forms of Racial Discrimination
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRR	International Human Rights Reports
J.-CL. Marques	Jurisclasseur Marques
Jurispr.	Jurisprudence
JCP	La Semaine Juridique: Juris Classeur Périodique
Ch.	Law Reports, Chancery Division
L	Legislation
NF	National Front party, France
NLA	Newspaper Licensing Agency
Obs.	Observations
OHIM	Office for Harmonization in the Internal Market
OJ	Official Journal

OJ	Official Journal of the European Communities
O.R.	Ontario Reports
OSCE	Organization for Security and Co-operation in Europe
OAS	Organization of American States
OED	Oxford English Dictionary
PCC	Patents County Court
Prop. Int.	Propriété Intellectuelles
CLR	Queensland Crown Lands Law Reports
D	Receuil Dalloz hebdomadaire, partie jurisprudence
I.R.	Recueil Dalloz-Sirey: Informations Rapides
Réf.	Référé
Rép. pén. Dalloz	Répertoire de droit pénal et de procédure pénale Dalloz
RPC	Reports of Patent, Design and Trade Mark Cases
RDPI	Revue du droit de la propriété intellectuelle
RIDC	Revue Internationale de Droit Comparé
RIDA	Revue Internationale du Droit d'Auteur
RLDI	Revue Lamy Droit de l'Immatériel
RTD com	Revue Trimestrielle de Droit Commercial et de Droit Economique
Rev. trim. dr. comm.	Revue trimestrielle de droit commercial et de droit économique
RG	Rôle Général
SGAE	Sociedad General de Autores y Editores de

SOCAN	Society of Composers, Authors and Music Publishers of Canada
Somm.	Sommaire
SCC	Supreme Court of Canada
Hub	The Copyright Hub
AGRIF	The General Alliance against Racism and for the respect of the French and Catholic Identity
Directive	The Information Society Directive 2001/29/EC
UK	The United Kingdom
US	The United States of America
Trib. Civ	Tribunal Civil
Trib. corr.	Tribunal Correctionnel
TGI	Tribunal de Grande Instance
Trib. Comm.	Tribunal du Commerce
IPO	UK Intellectual Property Office
UKSC	UK Supreme Court
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UGC	User-Generated Content
VCLT	Vienna Convention on the law of treaties of 1969
W.L.R.	Weekly Law Reports
WCT	WIPO Copyright Treaty

WPPT	WIPO Performances and Phonograms Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
MCPS	Mechanical-Copyright Protection Society, UK
ECDR	European Copyright and Design Reports
SACEM	La Société des auteurs, compositeurs et éditeurs de musique, France
PRS	PRS for Music, UK
BASCA	British Academy for Songwriters, Composers and Authors , UK
MPA	Music Publishers Association, UK
PPL	Phonographic Performance Limited, UK
STIM	Svenska Tonsättares Internationella Musikbyrå, Sweden
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, Germany
ADR	Alternative Dispute Resolution
SABIP	Strategic Advisory Board for Intellectual Property Policy, UK

Table of cases

AUSTRALIA

AGL Sydney Ltd v. Shortland County Council [1989] 17 IPR 99
Australian Capital Television Pty Ltd v. the Commonwealth (1992) 177 CLR 106
CBS Records Australia v. Guy Cross, (NSW) [1989] 15 IPR 385
Cunliffe and Another v. The Commonwealth of Australia (1994) 182 CLR 272
De Garis v. Neville Jeffresse Pidler, (1990) 37 FCR 99
Langer v. The Commonwealth of Australia 96/002 (High Court)
Larrikin Music Publishing Ltd. v. EMI Songs Australia Plty Ltd., (NSW) [2010] FC
Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1
Stephens and Others v. West Australian Newspapers Limited (1994) 182 CLR 211
Stevens v. Kabushiki Kaisha Sony Computer entertainment [2005] HCA 58
TCN Channel Nine Pty Ltd v. Network Ten Pty Limited [2002] FCAFC 146
TCN Channel Nine v. Network Ten [2001] FCA 108 (trial)
TCN Channel Nine v. Network Ten [2002] 55 IPR 112 (appeal)
Telstra Corp Ltd v. Royal & Sun Alliance Australia Ltd [2003] FCA 786 (Fed. Ct)
Telstra Corporation Ltd v. Australasian Performing rights association Ltd (1997) 191 CLR 140
Theophanous v. The Herald Weekly Times Limited and Another (1994) 182 CLR 104
Unions NSW v. New South Wales [2013] HCA 58
University of New South Wales v. Moorhouse (1975) 133 CLR 1

CANADA

Alberta (Education) v. Canadian Copyright Licensing Agency, 2012 SCC 37, [2012] 2 SCR 345
Allen v. Toronto Star Newspapers Ltd. (1997), 26 O.R. (3d) 308
ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd et al (1982), 35 O.R. (2d) 417 (H.C.J.)
Austin v. Columbia Gramophone Co., [1923] Mag. Cas. 398
B.W. International v. Thomson Canada, Ltd. (1996) 137 DLR (4th) 398
Bell Express Vu Limited Partnership v. Rex, [2002] 2 SCR 559
Boudreau v. Lin (1997), 150 DLR (4th) 324
Breen c. Hancock House Publisher Ltd., 6 CPR (3ed) 433 (1985)
Canwest Mediaworks Publications Inc v. Horizon Publications, [2008] BCSC 1609
CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339
Compagnie Générales des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (1996) 71 C.P.R. (3d) 348
Desputeaux v. editions Chouette (1987) Inc [2003] 1 SCR 178

Drynan v. Rostad [1994] 59 CPR (3d) 8
Entertainment Software Association of Canada v. SOCAN [2012] SCC 34
Ford v. Quebec (A.G.) [1988] 2 S.C.R. 712
Gondos v. Hardy et al, Gondos v. Toth (1982), 64 CPR (2d) 145
Hager v. ECW Press Ltd. (1999) 85 CPR (3d) 289
Ludlow Music Inc. v. Canint Music Corp. [1967] 2 Ex. C. R. 109, 51
MCA Canada Ltd. v. Gilberry & Hawke Advertising Agency Ltd (1976), 28 C.PRP (2d) 52 (FCTD
Photo Production Ltd. v. Securitor Transport Ltd., [1980] A.C. 827 (H.L.)
Prise de Parole Inc. et al. v. Guérin, éditeur Ltée [1995] 66 CPR (3d) 257 (C.F.), p.264 confirmed 73 CPR (3d) 557 (C.A.F.)
Productions Avanti Ciné-Vidéo Inc. v. Favreau (1999), 177 D.L.R. (4th) 129
R. v. Butler [1992] 1 SCR 452
R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713
R. v. Keegstra [1990] 3 S.C.R. 697
R. v. Oakes [1986] 1 S.C.R. 103
RJR MacDonald Inc. v. Canada (att. Gen), [1995] 3 S.C.R. 199
Robinson v Films Cinar Inc [2013] CSC 73
Rôtisseries St-Hubert Ltée c. Syndicat des Travailleurs(euses) de la Rôtisserie St-Hubert de Drummondville (C.S.N.) [1987] RJQ 443
RWDSU v. Dolphin Delivery Ltd., [1986] 2 SCR 573
Snow v. The Eaton Centre [1982], 70 CPR (2d) 105
Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, [2012] 2 SCR 326
Source Perrier (Societe Anonyme) v. Fira-Less Marketing Co. (1983), 70 CPR (2d 61 (F.C.T.D.)
The Queen v. James Lorimer [1984] 1 FC 1065
Théberge v. Galerie d'Art du Petit Champlain Inc. [2002] SCC 34
Weisfeld v. Canada [1995] 1 C.F. 68 (C.A.)
Zamacois v. Douville [1943] 3 Fox Pat. C. 44 (C. Échiquier)

EUROPEAN UNION

Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides (C-285/12) ECLI:EU:C:2014:39 [2014]
ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding (C-435/12) ECLI:EU:C:2014:254 [2014]
AG in Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others (C-201/13) ECLI:EU:C:2014:458 [2014]
Commission of the European Communities v Kingdom of Spain (C-36/05) ECLI:EU:C:2006:672 [2006]

Content Services Ltd v Bundesarbeitskammer (C-49/11) ECLI:EU:C:2012:419 [2012]
Copydan Båndkopi v Nokia Danmark A/S (C-463/12) ECLI:EU:C:2015:144 [2015]
Criminal proceedings against Felix Kapper (C-476/01) ECLI:EU:C:2004:261 [2004]
DR and TV2 Danmark A/S v NCB - Nordisk Copyright Bureau (C-510/10) ECLI:EU:C:2012:244 [2012]
Eva-Maria Painer v Standard VerlagsGmbH and Others (C-145/10) ECLI:EU:C:2011:798 [2011]
Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) ECLI:EU:C:2011:631 [2011]
Indep. Television Publ'ns Ltd. v. Comm'n (T-76/89) ECLI:EU:T:1991:41 [1991]
Infopaq International A/S v Danske Dagblades Forening (C-302/10) ECLI:EU:C:2012:16 [2012]
Infopaq International A/S v Danske Dagblades Forening (C-5/08) ECLI:EU:C:2009:465 [2009]
Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others (C-201/13) ECLI:EU:C:2014:2132 [2014]
Josef Probst v mr.nexnet GmbH (C-119/12) ECLI:EU:C:2012:748 [2012]
Laserdisken ApS v Kulturministeriet (C-479/04) ECLI:EU:C:2006:549 [2006]
Martin Luksan v. Petrus van der Let (C-277/10) ECLI:EU:C:2012:65 [2012]
Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s. (C-351/12) ECLI:EU:C:2014:110 [2014]
Padawan SL v Sociedad General de Autores y Editores de España (SGAE) (C-467/08) ECLI:EU:C:2010:620 [2010]
Phonographic Performance (Ireland) Limited v Ireland (C-162/10) ECLI:EU:C:2012:141 [2012]
Productores de Música de España (Promusicae) v Telefónica de España SAU (C-275/06) ECLI:EU:C:2008:54 [2008]
Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others (C-360/13) ECLI:EU:C:2014:1195 [2014]
Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (C-306/05) ECLI:EU:C:2006:764
Stichting Collectieve Antennevoorziening Gouda et autres contre Commissariaat voor de Media (C-288/89) ECLI:EU:C:1991:323 [1991]
Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and Others (C-462/09) ECLI:EU:C:2011:397 [2011]
Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) ECLI:EU:C:2014:2196 [2014]
Friederike Wallentin-Hermann v Alitalia (C-549/07) ECLI:EU:C:2008:771 [2008]

EUROPEAN COURT OF HUMAN RIGHTS (available at http://hudoc.echr.coe.int)

Aguilera Jeminez v. Spain, 8/12/2009
Alinak v. Turkey, 29/03/2005
Alves Da Silva v. Portugal, 20/10/2009
Anheuser-Buschh Inc. v. Portugal, 11/01/2007
Ashby Donald and others v. France, 10/01/2013
Aydın Tatlav v. Turkey, 2/05/2006
Barfod v. Denmark, 22/02/1989
Ben El Mahi and others v. Denmark, 11/12/2006
Castells v. Spain, 23/04/1992
Ceylan v. Turkey, 8/07/1999
De Haes and Gijsels v. Belgium, 24/02/1997
ECommHR, *Smith Kline and French Laboraties Ltd v. the Netherlands*, 4/10/1990
Féret v. Belgium, 16/07/2009
Garaudy v. France, 24/06/2003
Giniewski v. France, 31/01/2006
Gündüz v. Turkey, 4/12/2003
Handyside v. UK, 7/12/1976
I.A. v. Turkey, 13/09/2005
Jersild v. Denmark, 23/09/1994
Karataş v. Turkey, 8/07/1999
Khurshid Mustafa and Tarzibachi v. Sweden, 16/12/2008
Klein v. Slovakia, 31/10/2006
Krone Verlag GmbH & Co KG (No 3) v. Austria, 11/12/2003
Le Pen v. France, 07/05/2010
Lehideux and Isorni v. France, 23/09/1998
Leroy v. France, 2/10/2008
Lindon, Otchakovsky-Laurens and July v. France, 22/10/2007
Lingens v. Austria, 8/7/1986
Markt Intern Verlag GmbH and Klaus Beermann v. Germany, 20/11/1989
Müller and Others v. Switzerland, 24/05/1988
Murphy v. Ireland, 10/07/2003
Nikowitz and Verlagsgruppe News GmbH v. Austria, 22/02/2007
Norwood v. UK, 3/07/2003
Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey, 27/11/2007
Oberschlick v. Austria, 1/07/1991
Observer & Guardian v. UK, 29/11/1991
Otto-Preminger-Institut v. Austria, 20/09/1994

Özgür Gündem v. Turkey, 16/03/2000
Pavel Ivanov v. Russia, 20/02/2007
Pedersen and Baadsgaard v. Denmark, 17/12/2004
Peta Deutschland v. Germany, 8/11/2012
Raichinov v. Bulgaria, 20/04/2006
Soulas and Others v. France, 10/07/2008
Sunday Times (no 1) v. UK, 26/04/1979
TV Vest AS and Rogaland Pensjonistparti v. Norway, 11/12/2008
Ukrainian Media Group v. Ukraine, 29/03/2005
Verein Gegen Tierfabriken Schweiz v. Switzerland (No. 2), 30/06/2009
Vereinigung Bildender Künstler v. Austria, 25/01/2007
Wingrove v. the United Kingdom, 25/11/1996

FRANCE

Barbelivien et a v. SA Universal music publishing anciennement dénommée polygram éditions 7+ Cass., 5/12/2006
Caen, ch civ n°1, 4/12/2007, *Le Roi Pétaud et Sa Cour v. Credit Agricole*, n°06-2537
Cass 12/07/2000, D. 2001, n°3, jur, 259, note Edelman (*Peugeot v. Canal+)*
Cass 14/11/2006, *Marithe v. Association Croyances et libertés* Bull. 2006, I, n°485, p.417
Cass civ 1ere, 27/03/1990, Bull. N°75; TGI Paris 17/03/1988, gaz. Pal. 1988, 2 somm p.360
Cass, 13/02/1992, legipresse, n°93, p.87
Cass, 1re Civ., 31/01/2008, *F and others v. Mrs. M.*, n°07.12.643N, Gaz. Pal, receuil November-December 2008, p.4165
Cass, 2e. civ., 8/03/2001, *Alliance generale contre le racism et pour le respect de l'identite francaise et chretienne c/ Godefroid*, n°98-17.574
Cass, 30/01/2007, *Les Misérables*, no04-15.543
Cass, ch. Crimm, 4/11/1997, *Patrick Bruel v. Patrick Sebastien and TF1*, n°96-84338
Cass, *Exocom v. Boomerang*, 2003
Cass. (1ere ch civ), 13/01/1998, D., 1999, somm. p.167
Cass. (2e ch. civ.), 8/03/2001, Bull. civ., II, nos 46-7; J.C.P., 2001, IV, nos 1799
Cass. (ass. plén.), 12/07/2000, D., 2000, IR, p. 218
Cass. 1re civ., 13/01/1998: RIDA march 1998, p.201
Cass. 1re civ., 19/06/2008: JurisData n°2008-044405; RIDA march 2008, p.299
Cass. 1re civ., 2/04/2009, n°08-10194
Cass. 1re civ., 24/02/1998: Bull. civ. I, n°75; JCP E 1998, panor. p.636

Cass. 1re civ., 28/02/2006, JurisData n°2006-032368; RIDA march 2006, p.323
Cass. 1re civ., 7/11/2006, n°05-17.165, SA 1633 c/ Sté SCPE: JurisData n°2006-035761; JCP G 2007, II, 10026
Cass. 6/10/2011, n°10-23606, non publie au bulletin
Cass. Crim, 12/09/2007, n°06-86763, non publie au bulletin
Cass., 12/01/1988, RIDA, n°137, p.98
Cass., 12/09/2007, 06-86763, Non publié au bulletin
Cass., 15/05/2015, 13-27.391, Publié au bulletin
Cass., 19/11/ 1990 (1ere Ch A) Legipresse, n°79, p.16; D. 1991 IR 9
Cass., 2/03/1997, JCP II jurispr. N°5, 28/01/1998, p.185
Cass., 20/11/2003, Le Goff c/ Guyader – Le Ny: Juris-Data n°2003-021061; JCP n°3, 14/01/2004, sommaires de jurisprudence, IV 1 064-1 072, p.96
Cass., 21/02/1995, *Reynolds Tobbacco*
Cass., 28/01/1999, n° 96-16992, JCP G, 23/06/1999, p.1183
Cass., 2e civ., 20/11/2003, *Le Goff c/ Guyader* – Le NY: Juris-Data n°2003-021061; JCP n°3, 14/01/2004, somm., IV 1 064-1 072, p.96
Cass., 2e civ., 5/05/1993, *Association Scouts unitaires de France c/ SA Editions des Savanes,* Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentés, pp.193-4
Cass., 4/02/1992, n°90-21630; Dalloz, 2/04/1992, n°14, p.182
Cass., 4/02/2002, *La Bicyclette Bleue*
Cass., 7/12/1993, *Fluide Glacial*, n°92-81091
Cass., ch civ 24/02/1998,*TF1 c. Sony*, (1998) 177 RIDA 212
Cass., civ 1ere, 27/03/1990, Bull. N°75
Civ. 1 ère, 27/03/1990, Bull. Civ., 1990, I, n°75; JCP, G, IV, p.203; RIDA, July 1990, p.320
Commissaire Crémèr, Cass (1ere civ), 10/09/2014, n°13-14.629
Commissaire Crémèr, Paris (Pole 5 ch.2), 21/09/2012
Jean T. dit Jean Ferrat, Sarl Productions Alléluia, Gérard Meys, Sarl Teme / Sté I-France (venant aux droits de la SA Opsion Innovation) c/ association Music Contact, Paris, 18/09/2002, Dalloz 2002 A.J. p.3208
Paris (17e ch.), 25/04/2003, *Gonnet v. Gounord et Dupuis* available at http://www.antisectes.net/libel-gounord-dupuis-gonnet.htm.
Paris (1ere ch.) 15/10/1985, D 1986, somm. 1986
Paris (1re ch. A), 11/03/1991, *G. c/ Canal Plus*, Legipresse n°91-I, Informations d'actualite, p.49
Paris (4eme ch sect. b) 17/01/2003, *Le monde d'Anne Sophie*, Prop. Int. 2003, n°7, p.169
Paris (4eme ch) 27/11/1990, *aff. Jacobs Suchard Franc c. Antenne* 2, inedit (cited in Mouffe 2011, p.458)
Paris (4eme ch), 13/10/2006, Gaz. Pal. 2007, jurispr., p.2110
Paris (4eme ch), 25/03/2005, Gaz. Pal., 2005, jurispr., p.4318

Paris 11/05/1993 RIDA July 1993 p.340
Paris 18/02/2011, RG 09/19272, Propr. Int. 2011 n°39 p.187
Paris 19/06/1987, JCP 1988, II, n°20957
Paris 20/12/1977, ann. Propr ind. 1979, p.84
Paris 21/06/1988, RIDA October 1988 p.304
Paris 22/11/1984, D 1985 IR 164
Paris 26/02/2003, *SA Société des participations du Commissariat à énergie atomique v. Association Greenpeace France/Internet* CCE April 2003, comm n°38, prop. Int. July 2003, n°8, p.322
Paris 3 ch, 1/04/1987, cah. Dr. D'auteur 1988, n°1, p.16
Paris 4e ch. 12/09/2001, *Charles Talar v. Lannier*
Paris 7/04/1994: D. 1995, Somm. 56
Paris, 11ème ch. B, 13/11/1997, *X…*, D. 1998, IR, p.21
Paris, 14/02/1980, D. 1981, somm. 86
Paris, 14e ch. B, 28/11/2008, rec. dalloz 2009 n°9, p.610
Paris, 17/06/1987, JCP 1988 II 20957
Paris, 17/10/1980, Dalloz 1982, IR, p.42
Paris, 18/09/2003, *Alix Malka v. Peter Klasen*, n°12/02480
Paris, 1er ch., sect. B, 19/06/1987; JCP 1988.II.20957
Paris, 1ere ch., 17 dec 1986, *Utrillo*: RIDA 2/1987, p.66
Paris, 1re ch., 20/12/1977, Ann. propr. ind. 1979, p.84
Paris, 20/09/1993, legipresse 1994 n°108 p.9
Paris, 21/11/1990, in D., 1991, p.85, Obs Gautier. Le monde, 23/11/1990
Paris, 26/02/2003, D. 2003. Jur. 1831 ('Areva')
Paris, 28/02/1995, legipresse, 1995, n°8125, I p.92
Paris, 30/04/2003, *Société Compagnie Gervais Danone et Société Groupe Danone v. Olivier M., Réseau Voltaire et autres*, www.legalis.net
Paris, 4e ch. B., 28/01/1982, *Dame Goya c/ S.A.R.L. Editions du Square*, IR, p.165, appeal from TPI Paris, 1re ch., 18/06/1981
Paris, 4e ch., 21/06/1988: RIDA 4/1988, p.304 after referral from Cass. 1re civ., 27/03/1990, JCP G 1990, IV, p.203
Paris, 4e ch., 4/04/2007: JurisData n°2007-329335; RIDA march 2007, p.379
Paris, 4eme ch. B, 13/10/2006, D.E.
Paris, 4ème Ch., 9/09/1998, *Société Seri Brode C/ Procter & Gamble France*
Paris, 8/04/2005 rec dalloz 2005/20, 1327
Paris, 8/07/1992, legipresse 1992, n°100 p.40
Paris, *Le Pen v. Laurent Gerra*, 23/01/2013 n°11/11023
Paris, *Paul B c. Moulinsart*, 13/09/2005 at www.legalis.net
Reims, 9/02/1999: JCP G 1999, II, 10144
Riom, 15/09/1994 D. 1995, p.429
TGI *Clermont Ferrand, Ets Michelin c. CFDT*, 27/10/1993, n°848/01, inedit
TGI Evry 9/07/2009, RG n°09/02410
TGI Nancy, 15/10/1976, JCP, 1977, II, n°18526

TGI Nanterre, 1re ch., 22/05/2008, n°06/11732, *Garcia c/ Sté Moulinsart* confirmed by Versailles 17/09/2009
TGI Nanterre, réf., 28/05/2003: Légipresse 2003, I, p.118
TGI Paris (17e ch. Civ.), 3/04/2006, *Bruno Gigliotti c/ Stephane Bern and others*, Legipresse n°238 (january/February 2007), I- Actualite, p.11
TGI Paris (3e ch., sect. 3), 5/03/2008, RIDA, 2008, n°217, p.338
TGI Paris (ref) 24/02/1975, D., 1975, jurispr, p.438
TGI Paris (ref) 26/11/1977, JCP, ed. G, 1978, II, n°18924
TGI Paris 04/07/2001, *Société Compagnie Gervais Danone et Société Groupe* v. *Olivier M., Réseau Voltaire et autres*, www.legalis.net
TGI Paris 1/02/2001, Exp. July 2001, p.275
TGI Paris 12/01/1993, legipresse n°108 II p.11
TGI Paris 13/02/2001, *SNC Prisma Presse & EURL Femme c/ Monsieur V*, Available at http://www.juriscom.net/jpt/visu.php?ID=147
TGI Paris 16/02/1993, dalloz 1994, somm, p.195
TGI Paris 17/09/1984, D. 1985 IR 16
TGI Paris 26/02/1992 legipresse n°96 1992 p.127
TGI Paris 3 ch, 1/04/1987, cah. Dr. D'auteur 1988, n°1, p.16
TGI Paris 3 eme ch, 30/10/1991, SPE c/CAP, RDPI 1992, n°45, p.98
TGI Paris 3/03/2008, *Fort Boyard*
TGI Paris 5/01/1978
TGI Paris 7/10/1992, *affaire Faizant*, RIDA, January 1993, p.222
TGI Paris, 03/01/1978, D., 19790, p.99
TGI Paris, 11/05/1988, *Fanny Vlamynck c. Wolf*, LPA 17/01/1989, n°7, p.8, RIDA 1989, n°142, p.344
TGI Paris, 13/09/1984, D., 1985, IR, p.16
TGI Paris, 14/04/1999, CCE, octobre 1999, p.23
TGI Paris, 14/05/1992 RIDA October 1992 p.174
TGI Paris, 14/05/1992 RIDA October 1992 p.174
TGI Paris, 15/01/2015 available at http://www.huffingtonpost.fr/caroline-mecary/condamnation-dieudonne-barbara_b_6513612.html
TGI Paris, 17/09/1984, D, 1985, IR, p.16
TGI Paris, 17/10/1984, D. 1985, IR p.324
TGI Paris, 17e ch. Corr., 17/02/1993, *Sabatier c/ Du Roy and others*, Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, p.195
TGI Paris, 17e ch. Corr., 9/01/1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182
TGI Paris, 19/01/1977, RIDA, 1977, n°92, p.167
TGI Paris, 1ère ch. 1ère section, 14/04/1999, *Dion c/ Société Cogerev*, CCE, October 1999, p.23
TGI Paris, 2/10/1996, Legipresse 1997, n°138, I, p.4
TGI Paris, 24/03/2000, legipresse 2000 I p.71

TGI Paris, 29/11/2000, RIDA, n°189, July 2001, p.377
TGI Paris, 3/03/1993, *Caroline Grimaldi c. Société Kalachnikof*, Légipresse, no108, II, p.10
TGI Paris, 3/03/1993, legipresse 1994, n°108, II, p.10
TGI Paris, 30/04/1987, Gaz pal., 3-4/06/1987
TGI Paris, 30/04/1997, Gaz. Pal., 17-19/05/1998
TGI Paris, 31/10/2007, *Coco Mademoiselle*
TGI Paris, 3e ch., 21/03/2000, CCE 2000, comm. 88
TGI Paris, 3e ch., 29/11/2000: RIDA 3/2001, p.377
TGI Paris, 3e ch., 4/07/2001: Expertises 2001, p.395
TGI Paris, 3ème ch. civ., 1ère section, 13/05/2008, Che Guevara
TGI Paris, 7/10/1992, RIDA 1993, no155, p.222
TGI Paris, 8/07/2002 *Esso c. Greenpeace* (référé) CCE nov 2002, comm n°140
TGI Paris, 9/01/1970, RIDA 2/1970, p.172
TGI Paris, 9/01/1992, dalloz 1994, somm, p.195
TGI Paris, *Agence France Presse (et autres) c. M. Ivan Callot, Sarl Magnitude*, 13/02/2002
TGI Paris, *Femme*, 13/02/2001
TGI Paris, *OneTelFuck*, 29/05/2001 available on www.legalis.net
TGI Paris, ref, 17/06/1987, *Le Pen c/ le Canard Enchaine*
TGI Paris, *Societe Moulinsart, Mm Fanny R. c/ Eric J.*, 11/06/2004 available on www.legalis.net
Trib. Civ. Seine 26/06/1832 cited by Sirinelli 1985, p.6; Paris, 8/08/1837 cited in Sarraute 1968, p.478
Trib. Civ. Seine, 12/06/1879, Ann., Propr. Ind. 1879, p.239
Trib. Civ. Seine, 23/02/1872, Ann. Propr. Ind. 1873, p.162
Trib. Comm Seine, 26/06/1934, gaz. Pal. 1934. 2. 594
Trib. Comm Seine, 26/08/1886, Ann. 1889, p.352
Trib. Corr. Paris, 6/02/1834. Gaz. Trib. 8/02/1834
Trib. Corr. Seine, 20/03/1877, Ann, 1877, p.212
Versailles, 17/03/1994, *Malhboro*, D 1995; RIDA 2/1995, p.350
Versailles, 17/09/2009, N°RG: 06/11732
Versailles, 18/03/1998, n°1996-2195, *La Grosse Bertha* (on referral from Cass., 28/02/1996)

THE UNITED KINGDOM

Allen v. Redshaw [2013] EWCH 1312 (Pat)
Ashdown v. Telegraph Group Ltd [2001] EWCA Civ 1142

Associated Newspapers Group plc v. News Group Newspapers Ltd [1986] RPC 515, p.519
Bach v. Longman et al., 2 Cowper 623 1777
Banier v. News Group Newspapers Ltd [1997] F.S.R 812
BBC v. BSB [1992] Ch. 141, [1991] 3 WLR 174
BBC v. Wireless League Gazette Publishing Co [1926] 1 Ch. 433
Beloff v. Pressdram Ltd [1973] 1 All ER 241
British Oxygen v. Liquid Air [1925] 1 Ch. 383
Chappell & Co Ltd v. Nestle Co Ltd [1960] AC 87
Clark v. Newspapers Ltd. [1998] 1 All ER 959, Ch D
Confetti Records v. Warner Music UK Ltd [2003] EMLR 790
Delves-Broughton v. House of Harlot [2012] PCC 29
Designers Guild Limited v. Russell Williams (Textiles) Limited (Trading As Washington Dc) [2001] 1 All ER 700
Distillers Co (Biochemicals) Ltd. v. Times Newspapers [1975] 1 All ER 41
Francis, Day & Hunter v. Feldman & Co [1914] 2 Ch. 728
Fraser-Woodward Ltd v. British Broadcasting Corporation [2005] EWHC 472 (Ch)
Glyn v. Weston Feature Film Co [1915] 1 Ch 261
Hanfstaengl v. Empire Palace [1894] 3 Ch. 109
Hawkes & Son (London) Ltd v. Paramount Film Service Ltd [1934] 1 Ch. 593
Hubbard v. Vosper [1972] 2 Q.B. 84 CA (Civ Div)
Hyde Park Residence Ltd v. Yelland [2000] 3 W.L.R. 215 CA
Johnston v. Bernard [1938] 2 All ER 37
Joy Music v. Sunday Pictorial Newspaper (1920) [1960] 2 Q.B. 60
Ladbroke Ltd c. William Hill Ltd, [1964] 1 All ER 465
Ludlow Music Inc v. Williams & Others [2001] EMLR 155
Morrison Leahy Music Ltd v. Lightbond Ltd [1993] EMLR 144
Newspaper Licensing Agency & Ors v. Meltwater BV & Ors (2010) EWHC 3099 (Ch); Appeal: [2011] EWCA Civ 890; Supreme Court: [2013] UKSC 18
Newspaper Licensing Agency v. Marks & Spencer PLC [1999] RPC 536
Norowzian v. Arks Ltd (No 2) [2000] FSR 363
Pasterfield v. Denham [1999] FSR 168
Preston v. Raphael Tuck & Sons [1926] 1 Ch. 667
Pro Sieben Media AG v. Carlton UK Television [1999] 1 WLR 605
Produce Records Ltd v. BMG Entertainment UK and Ireland Ltd (1999), High Court transcript, 19 January
Robertson v. Lewis [1976] RPC 169
Schweppes v. Wellington [1984] F.S.R. 210
Sillitoe and Others v. McGraw-Hill Book Company (U.K.) Ltd. [1983] FSR 545
Sim v. Stretch [1936] 2 All ER 1237
Tidy v. Trustees of the National History Museum [1995] 39 IPR 501
Time Warner v. Channel Four Television [1994] E.M.L.R. 1
Twentieth Century Fox Film Corp. v. Anglo-Amalgamated Film Distributors [1965] 109 S.J. 107

University of London Press Ltd v. University Tutorial Press Ltd [1916] 2 Ch 601
Williamson Music v. The Pearson Partnership [1987] F.S.R. 9

UNITED NATIONS – HUMAN RIGHTS COMMITTEE

Hak-Chul Shin v. Republic of Korea (926/2000), CCPR/C/80/D/926/2000 (2004) 11 IHRR 928 (2004)
Ballantyne, Davidson, McIntyre v. Canada, (359/1989 and 385/1989), CCPR/C/47/D/359/1989 (1993); 1-1 IHRR 145 (1994)
Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000)
RakhimMavlonov and Shansiy Sa'di v. Uzbekistan (1334/2004), CCPR/C/95/D/1134/2004 (2009); 16 IHRR 650 (2009)
Tae-Hoon Park v. Republic of Korea, Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998)
Zeljko Bodrožić v. Serbia and Montenegro (1180/2003), CCPR/C/85/D/1180/2003 (2006); 13 IHRR 389 (2006)

USA

Campbell v. Acuff-Rose Music Inc (1994) 510 US 569
Disney Productions v. Air Pirates (1978) 581 F 2d 751 (9th Cir)
Newton v. Diamond (2003) 349 F.3d 591 (9th Cir.)
Dr. Seuss Enters., LP v. Penguin Books USA, Inc., (1997) 109 F 3d 1394 (9th Cir)
Suntrust v. Houghlin-Mifflin Bank (2001) 268 F 3d 1257 (11th Cir)

Table of legislation

EUROPEAN UNION

Charter on Fundamental Rights of the European Union of 2000

Council Directive 91/250/EEC of 14/05/1991 on the legal protection of computer programs, OJ L122, 17/05/1991

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L167/10, 22 June 2001 ('the Directive')

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC OJ L 165, 18.6.2013, pp.63–79

Directive 96/9/EC on the legal protection of databases, OJ L 77/20 of 27/03/1996

EU Lisbon Treaty of 2009

Green Paper on Copyright and Related Rights in the Information Society COM (95) 382, the 1996 Followed Paper COM (96) 568, the initial proposal from the Commission COM (1997) 628 and finally, the 1999 amended proposal COM (1999) 250

Regulation 524/2013 of the European Parliament and of the Council of 21/05/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC OJ L 165, 18.6.2013, pp.1–12

AUSTRALIA

Australian Copyright Act 1968: Act No. 63 of 1968 as amended, taking into account amendments up to Act No. 94 of 2010, *An Act relating to copyright and the protection of certain performances, and for other purposes*

Commonwealth of Australia Constitution Act 1900

Human Rights Act 2004

State of Victoria enacted the Charter of Human Rights and Responsibilities Act 2006 (Vic)

CANADA

Canadian Copyright Act 1985: Copyright Act (R.S.C., 1985, c. C-42)
Part I of the Constitution Act, 1982, being schedule B to the Canadian Charter of Rights and Freedoms: Canada Act 1982 (UK), 1982, c.11

FRANCE

Declaration of the Rights of Man and of Citizen of 1789
French Civil Code as amended up to February 18, 2015
French Penal Code
Law n°92-597 of 1 July 1992 on the Intellectual Property Code as last amended by law n.2006-961 of 1 August 2006 relating to copyright and related rights in the information society , JO n.178, 3 August 2006, p.11529
Loi du 29 juillet 1881 sur la liberté de la presse

UNITED KINGDOM

Alternative Dispute Resolution for Consumer Disputes Regulations 2015 2015 No. 542
Copyright, Patents and Designs Act 1988, as last amended by Copyright and Related Rights Regulations 2014, S.I. 2014 n. 2356
Human Rights Act 1998

UNITED STATES

US Copyright Act 1976, Title 17 of the U.S. Code, Public law 94-553, 90 Stat. 2541 as amended by the Digital Millenium Copyright Act, Publ. L. n°105-304, 112 Stat. 2860, 2887, Title IV, amending chapter 8, Title 17, United States Code, enacted 28 October 1998

INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights
Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994
American Convention on Human Rights
Berne Convention for the Protection of Literary and Artistic Works of 1886 (1971 version with 1979 amendments)
Convention on the Rights of the Child
Declaration on Human Rights Defenders - Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms
Declaration on Human Rights Defenders - Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms
European Convention on Human Rights of 1950
International Convention on the Elimination of all forms of Racial Discrimination
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights of 1966
Universal Declaration of Human Rights of 1948
Vienna Convention on the law of treaties of 1969
WIPO Copyright Treaty of 1996
WIPO Performances and Phonograms Treaty of 1966

Introduction

1. Background to the project

Parodies have been created throughout times and cultures. A glimpse at the general judicial latitude afforded to parodies, satires, caricatures and pastiches demonstrates the social and cultural value of this particular form of artistic expression.

For example, in France, prior to any codification of copyright law, courts exhibited latitude to defendants' acts which were imprinted with humour. Seen as derivative of the right of critique, parodies were praised for their dual social objectives: to entertain and to incite discourse within society.

A similar attitude to parody is also present in common law jurisdictions. Until 1965, UK courts did not consider a parody to infringe copyright in the underlying work. In 1894, the case of *Hanfstaengl v. Empire Palace*[1] concerned Punch Magazine's publication of unauthorised sketches of tableaux vivants featured in a play. Did the sketches, made contemporaneously during one of the performances at the Empire Theatre, infringe copyright in the painting which the tableaux had reproduced? The judge held that the test was one of intention[2]. Here, the defendant had reproduced the copyright-protected work to illustrate an accompanying report of the play in the publication. The court found that the sketches were not copies of the art works, but illustrations of the actors performing their role.

Twenty years later, in *Francis, Day & Hunter v. Feldman & Co*[3], a musician inspired to craft a response to the plaintiff's song, *The Man Who Broke the Bank*

[1] [1894] 3 Ch. 109.
[2] ibid, p. 129.
[3] [1914] 2 Ch. 728.

at Monte Carlo, did so by revising its lyrics. Tasked with determining whether this work infringed the copyright in the original, the judge assessed whether there was substantial copying. He found that because of the form of expression which the musician had adopted, it was necessary for his song to borrow from the protected work to achieve the result sought. In this light, the amount copied was not substantial, and there was no infringement of copyright[4].

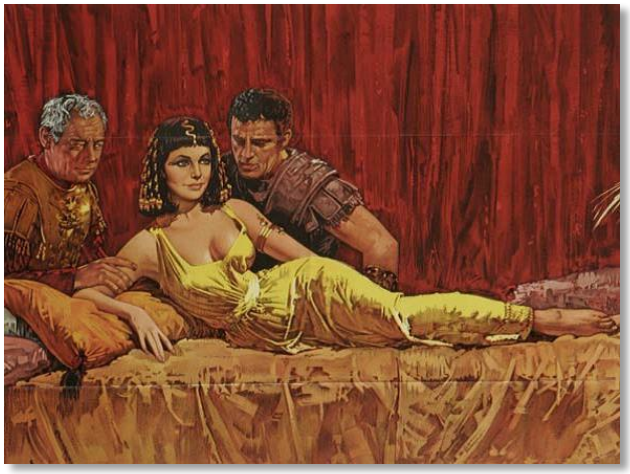
In *Glyn v. Weston Feature Film Co*[5], when the author of a novel objected to a farcical burlesque film, *Pimple's Three Weeks*, based upon her *Three Weeks* work, the court's focus was upon the degree of alteration. In a judgement (much cited judgement in several common law jurisdictions[6]), Younger J. held that the film did not infringe the copyright protecting the literary work, because so much creative effort had been applied to what had been taken from the original copyright work, that it had been changed so much as to produce an original result[7]. The reasoning in this decision echoed in a later case, *Joy Music v. Sunday Pictorial Newspaper (1920)*[8] - another parody song case. A recent hit song, *Rock-a-Billy*, was transformed into *Rock-a-Philip*, a topical jingle in support of Prince Philip. Applying the principles of *Glyn v. Weston*, McNair J. held that the later song constituted a sufficiently independent, new work[9]. Since the new work was original, it did not infringe the copyright of the earlier work. Honing the *Glyn v. Weston* test, the court considered the relationship between the two works. What proved decisive for the judge was the independence of the new work from the work from which it had borrowed. This relied upon the creative efforts of the parodist, and not from the efforts which had been borrowed.

---

4 ibid, p. 734.
5 [1915] 1 Ch 261.
6 See Australia and Canada.
7 ibid, p. 268.
8 [1960] 2 Q.B. 60.
9 ibid, p. 70.

Yet, a subsequent strengthening of exclusive rights arising under copyright law has resulted in a stifling of this ancient form of artistic expression. Despite the previous liberal approach, from 1965 onwards, UK courts began to apply a stricter copyright regime. In *Twentieth Century Fox Film Corp. v. Anglo-Amalgamated Film Distributors*[10], a parody poster created to promote the latest *Carry On* film, *Carry on Cleo*, faced a claim for infringement from the copyright owner of the poster for the film, *Cleopatra,* (Figure 1) which the later comic film loosely parodied. Seeking to distinguish the case from the earlier line of decisions, the court considered that the comic image had reproduced a substantial part of the original, and infringed copyright as a result.

Figure 1



This new approach was confirmed in *Schweppes v. Wellington*[11]. Here, the court considered a parody label used on bubble bath, *Schlurppes*, which had been based on the well-known *Schweppes* drink logo. Again, the court considered

[10] [1965] 109 S.J. 107.
[11] [1984] F.S.R. 210.

there was a substantial reproduction of the original work, and since there was no parody defence in place in UK copyright law at the time, the use infringed[12].

The supremacy of the substantiality test was clearly reinforced in *Williamson Music v. The Pearson Partnership*[13], a case concerning the use of a parody of the song, *There is Nothin' Like a Dame*, in a TV advert for National Express coaches. The defendant had taken steps to avoid infringement, changing both the lyrics (substantially) and the tune (to a lesser extent). However, as the parody work created the same overall impression as the original, the court considered the tune was a substantial reproduction of the original musical work, which amounted to copyright infringement. Here, the court recognised that a fair dealing defence might be available for parodies, if the use was for criticism and review[14]. However, this was not applicable in this particular case, since the parody was not criticising the earlier work[15]. Most recently in *Allen v. Redshaw*[16], the creator of the successful children's television show, *Button Moon*, was successful in enforcing his artistic copyright in respect of a claimed parody of his work applied to mugs, t-shirts and sweatshirts. Again, the court considered that the later use had reproduced a substantial part of the original, and reaffirmed that lack of any parody defence pursuant to UK copyright law at that time[17].

The predominance of the position of the exclusive rights-holders is also evident in Australia. Sharing the common law of its English cousin, the court in *AGL Sydney Ltd v. Shortland County Council*[18] reiterated that, absent any parody exception, parodies would not gain any special treatment under

12 ibid, p. 213.
13 [1987] F.S.R. 97.
14 ibid, [28].
15 Additionally, no sufficient acknowledgement was made, discussed further below.
16 [2013] EWCH 1312 (Pat).
17 ibid, [30].
18 (1989) 17 IPR 99, [105].

Australian copyright law. Thus, the dispute simply turned upon whether the defendant (an electricity company), when parodying the plaintiff's television advert promoting gas heating, copied a substantial part of it. As the parody was, inevitably, evocative of the original, infringement was found.

It was the outcome of a later case considered by the Federal Court[19] which constituted the springboard for Australia's copyright reform. The facts in *TCN Channel Nine v. Network Ten*[20] are very simple. The defendant used a number of short extracts from a Channel Nine television programme in its own light-hearted topical review show, *The Panel*. Here, Network Ten ran two arguments in its defence. Firstly, they argued that extracts, averaging only 40 seconds in length, could hardly constitute a 'substantial' copy. In the alternative, they argued that the use was permitted fair dealing, either for news reporting or for criticism/review. At first instance, Conti J. upheld Network Ten's main defence, considering that Channel Nine had failed to demonstrate that any substantial part of their work had been reproduced. The trial judge also considered the alternative defence. In his reasoning, Conti J. finds it useful to draw a distinction between parody and satire. Parody requires imitation, and thus copying of earlier works. Satire's aim is to pass comment on something, and does not necessarily require borrowing from an earlier work, although immediate recognition of the material is required. Accordingly, Conti J. concluded that reproducing short extracts for the purpose of satire, comedy or light entertainment could be considered as legitimate[21]. Parodic use, however, which required copying of an earlier work, either required permission, or it must fall within one of the categories of uses covered by the fair dealing defences, such as use for the purposes of criticisms, review or news reporting[22].

[19] (2002) 55 IPR 112 (appeal).
[20] [2001] FCA 108 (trial).
[21] ibid, [46].
[22] S. 41-42 Australian Copyright Act 1968 ('CA 1968').

This case, which has been written about extensively[23], generally overlooked consideration of the fairness of the use, and centred its debate on whether a parodist is entitled to use copyright-protected materials, and whether the use permitted for criticism and review requires that use to be of a serious nature[24]. This first instance decision was subsequently over-turned on appeal.

The Full Court of the Australian Federal Court found substantial copying of six (out of the possible twenty) extracts, and so went on to consider the fair dealing defence. Here, the Court emphasised the lack of a fair dealing defence for parody or satire, meaning that to be permitted the use must be for the purposes of criticism, review or news reporting. Secondly, the Court held that neither the commercial nature of the use nor its entertaining context barred the application of a defence[25]. A use could be for criticism or review, even though it was humorous. Ultimately, they found the extracts infringing, as the panel was not unanimous that any fair dealing criterion was satisfied[26].

Similarly, Canadian courts have never accepted parody as a defence, prior to its official codification. In 1967, a parody of the lyrics of Woody Guthrie's song, *This Land is Your Land*[27], was found infringing. Having recognised that the underlying work enjoyed copyright protection (without distinguishing between the musical and literary works contained therein)[28], the judge did not see fit to afford parody any particular treatment, and granted an injunction to the copyright owner, because the parody had reproduced a substantial part of the original[29]. This same approach was adopted later in *MCA Canada Ltd. v.*

---

[23] Milne 2013, p. 193; Mee 2009, p. 55; Suzor 2008, p. 218; De Zwart 2004, p. 277; Handler 2003, p. 391; Smithies and Papanikitas 2002, p. 249. Authors of books and articles are cited by name and date only. For full references, see bibliography.

[24] Suzor 2008, p. 224.

[25] Supra note 20, [37] and [70].

[26] Confirmed in *TCN*: [2005] FCAFC 53.

[27] *Ludlow Music Inc. v. Canint Music Corp*. [1967] 2 Ex. C. R. 109, 51.

[28] ibid, pp.34-6.

[29] ibid, p. 58.

Gilberry & Hawke Advertising Agency Ltd[30] in which an advertising agency used a parody version of the song, *Downtown*, to promote a car dealership. Similarly in *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd et al*[31], the lyrics of The Beatles' track, *Revolution*, were parodied as *Constitution*. Again, the court afforded no latitude based upon its status as a parody, and granted an injunction preventing its use.

The supremacy of the substantiality doctrine was also recognised in cases lacking any commercial motive. In *Rôtisseries St-Hubert Ltée c. Syndicat des Travailleurs(euses) de la Rôtisserie St-Hubert de Drummondville (C.S.N.)*[32], the defendants used a parody of the plaintiff's logo to promote a strike. Unsurprisingly, an argument that this use exercised a right based on freedom of expression was quickly brushed aside. The judge dismissed that this freedom had been stifled, because the defendant could still convey the same message, simply by using another means[33]. In another case before the Canadian courts, parodists, aware of the lack of a specific statutory exception, have attempted to fit parody uses within the fair dealing exception for the purpose of criticism[34]. In *Compagnie Générales des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*[35], the defendant, a trade union, had depicted the plaintiffs' well-known logo, the *Bibendum* man, in a promotional leaflet crushing a Michelin worker. The court did not consider the meaning of criticism could be stretched to encompass the union's parody[36].

---

30 (1976), 28 C.PRP (2d) 52 (FCTD).

31 (1982), 35 O.R. (2d) 417 (H.C.J.).

32 [1987] RJQ 443, [93] appeal was waived.

33 Similar approach was adopted in *Canwest Mediaworks Publications Inc v. Horizon Publications*, [2008] BCSC 1609, [15] (parody of the *Vancouver Sun* newspaper).

34 A tactic adopted in *Williamson Music v. The Pearson Partnership*, discussed above.

35 (1996) 71 C.P.R. (3d) 348.

36 ibid, Teitelbaum J. Some indulgency can be found in *Productions Avanti Ciné-Vidéo Inc. v. Favreau*. The case dealt with the creation of a pornographic film called *La Petite Vie* relying on a well-known television series. The judge did not reject the parody exceptions as a copyright

While the adequacy of this defence is now moot, for the purpose of this project, it is relevant to note that the defence generally fails for two reasons. Firstly, while parodies may pass comment, this comment does not always relate to the work which has been parodied[37]. Secondly, the defence requires that the copied work is given sufficient acknowledgement[38]. Parody is often incompatible with this requirement[39] because it is part of the parody process that it is the audience which recognises, based upon the alternations of the parodist, the nature of the reference made to the original work[40].

Some have tried to argue a parody implicitly acknowledges the original work. However, this raises further concerns. Firstly, there remains considerable doubt whether an implicit acknowledgement is enough to satisfy the requirement[41]. Secondly, this reasoning might lead to an arbitrary treatment of parodies, since the court will be faced with having to determine whether the parody is 'good enough' to establish this reference to the earlier work. Ultimately, this is a subjective assessment on the artistic merits of the parody which falls outside the competency of the judiciary.

Faced with the constraints of the existing legislation, the only solution to this inevitably owner-centric approach seems to be a legislative intervention. This is the path chosen by the countries studied: France, Australia, Canada and the United Kingdom ('the Study Countries'), which have all introduced a specific

---

defence. Nevertheless, as in this particular case the defendant was trying to ride on the popularity of the earlier work rather than making a parody, the judge did not accept the defence. (1999), 177 D.L.R. (4th) 129 leave to appeal to S.C.C. refused, 27527 (May 25, 2000), [574-5].

37 The fair dealing exception for the purpose of fair dealing has been interpreted broadly before 1911. Following the codification, courts have restricted the scope of 'criticism' to the criticism of a work (*British Oxygen v. Liquid Air* [1925] 1 Ch. 383) to later recognise the possibility to extend the meaning of criticism (*Hubbard v. Vosper* [1972] 2 Q.B. 84 CA (Civ Div), p.88); Sims 2010, p. 222.

38 Section 30(1) joint to section 178 Copyright, Designs and Patents Act 1988 ('CDPA').

39 Walsh 2010, p. 388.

40 Spence 1998, pp. 597-8.

41 Burrell and Coleman 2005, p. 61.

parody exception within their national copyright legislation. Despite this intervention, the legislators provided barely any guidance as to its scope or meaning.

In its recent ruling[42], the Court of Justice of the European Union ('CJEU') implied that parody is a fairly simple concept to grasp (once exposed to a parody, the public instantly recognises the underlying work, but understands from the alteration made that it is a parody, and is thus able to decipher its message or comment); yet simultaneously, the CJEU recognised that the parody exception is not without boundaries, but without really explaining which these are.

2. Scope and aim of the contribution

Copyright exceptions are concerned with striking a fair balance between opposing interests. While copyright grants its owner exclusive rights over a work to prevent others from exploiting it without authorisation, these rights are not absolute. The law circumscribes these rights by exceptions for certain socially beneficial uses, including use for the purpose of parody.

The primary aims of this project are: to examine and understand the concept of parody; the role of copyright in relation to this artistic expression; the boundaries of the exception; and its interaction with other bodies of law[43]. But this project also provides insight into the increasing influence of digitalisation and European harmonisation. The Information Society Directive ('The Directive') and its interpretation by the CJEU impact on the domestic legal systems of the Member States. As legal disparities between Member States impair the smooth functioning of the internal market for cultural works, the

[42] For the facts of *Deckmyn* (C-201/13) ('*Deckmyn*'), see chapter 5, p. 272. CJEU jurisprudence is cited by name and case number except for *Deckmyn*. For full reference, see bibliography.
[43] Mainly contract law and human rights legislation.

European Union ('EU') institutions have become more proactive in harmonising copyright law across the EU. While harmonisation so far has mainly focused on the scope of exclusive rights, the recent interpretation of the exceptions to those rights by the CJEU is indicative of the will to expedite harmonisation of the copyright exceptions as well. But is such harmonisation possible or even desirable in relation to parody, given the local nature of culture?

This research focuses on the parody exception by comparing the approach in the Study Countries, which were selected for the following reasons. France, of the civil law tradition, has a long history of permitting parody uses of protected works and enjoys a rich jurisprudence. This may prove influential in the shaping EU law on parody[44]. The three remaining countries in the Study have all introduced parody exceptions only recently. The UK, the founding common law jurisdiction, now shares the same EU-law based parody exception with France, but will it apply it in the same way? The common law jurisdictions of Australia and Canada both have copyright laws based upon UK copyright law, and the UK influence still remains to date. Yet, these jurisdictions are free to develop their copyright law without the EU harmonisation concerns of the UK.

This project aims to apply its findings, by predicting the likely impact of the parody exception on stakeholders within the UK music sector.

The research questions can be summarised as follows. A crucial aim is to determine how 'the purpose of parody' is construed under national law in each of the Study Countries. The effect of commercial use of a parody is then scrutinised. Both these aspects are evaluated by, for example, extrapolating from research on the existing fair dealing criteria and copyright law's Three-

[44] Schiek 2011, pp. 425-49.

step Test. Another crucial question is to determine the relationship between the parody exception and the enforcement of moral rights. Do these clash, or is any conflict merely superficial? Finally, this project addresses the influence of freedom of expression, as protected by the international instruments on human rights including, in Europe, the European Convention of Human Rights ('ECHR') and the EU Charter of Fundamental Rights ('the Charter'), on national copyright laws.

3. Methodology

The crux of the problem is to find the appropriate balance between the rights of copyright holders and the public interest which permitting parodic uses of protected works reflects. This thesis adopts a comparative methodology by comparing the copyright (statutory and case) laws of the Study Countries[45]. This is appropriate not only to discover how the jurisdictions protect parodies, but also to identify how this balance between the opposing interests can be achieved. Although the Study Countries share some similarities, they experience considerable differences rendering the analysis of this project meaningful[46]. As commonly understood, globalisation and commodification lead to more consideration of comparative methodology, but one must take care, and refrain from using comparative methods to legitimise a particular stance rather than seeking to go beyond the appearances. Here, comparison is chosen to guide the interpretation from the beginning, instead as support merely to justify the end result.

A historical methodology is also adopted. The project involves an analysis of the policy considerations underlying the introduction of a parody exception in the Study Countries. Additionally, as already touched upon in this

[45] Reitz 1998, p. 629. By comparing the similarities and differences, this project also underlines the unique features present in the Study countries.
[46] Van Gestel and Micklitz 2011, p. 21.

introduction, prior to a specific exception, the three common law jurisdictions made attempts to fit parody within other copyright exceptions. The project sketches out the evolution of case law in the Study Countries because, when faced with applying a new exception, courts may still consider earlier judicial comment regarding parody persuasive.

Although the examination of theoretical foundational principles enshrined in the relevant statutory and case laws also plays an essential role in this research, this research is predominantly doctrinal, aiming at rendering the law intelligible by the study of the law [47]. Nevertheless, to counter the traditional criticism that a doctrinal approach fails to consider real life problems[48], this project looks at the practical implications of a parody exception on the music industry within the UK. Additionally, taking musical parodies as an example, this permits the author to test the analysis enshrined in this research.

4. Structure of the Project

The project includes an introduction, six chapters and a conclusion. While this introduction aims to explain the background to introduction of a parody exception in national copyright laws, Chapter 1 explores what we mean by parody, to establish what 'use for the purpose of parody' might entail. This chapter starts with a historical evaluation of the meaning of parody, through different eras and in different fields of art, before turning to the definitions adopted in the law. The chapter establishes the foundations to understand which uses are to (and should) be protected under the parody exception.

Chapter 2 studies the compliance of a parody exception with international copyright law obligations, and particularly the Three-step Test. Only if this

[47] McCrudden 2006, p. 632-50.
[48] Baasch Andersen 2011, p. 32 where the author argues that the uniformity of the law is not merely created by uniform texts but by the application thereof.

test is satisfied may legislators introduce a new copyright exception. In essence, this means that a parody exception must not conflict with the normal exploitation of the work, and should not prejudice, unduly, right-holders' interests. This chapter provides the principles which legislators must follow to achieve a fair balance between the competing interests at stake.

Chapter 3 analyses how well this balance is translated into national legislation, by examining the limits and scope of the exception. Studying the differing statutory requirements attached to the exception, and their interpretation in the Study Countries, this chapter establishes guidance on how the exception should be interpreted in those countries where the parody exception is yet to be applied, so that the impact of the exception may be optimised within the constraints of their national jurisprudence. This chapter also contemplates the legal nature of the exception, since this inherently influences its interpretation by courts and affords insight on the interaction between the exception and contract law. Essentially, this part of the chapter enquires whether parties to a contract ought to be able to circumvent the exception by use of contract terms, or not.

The parody exception precludes enforcement of the 'economic rights' which copyright law affords. Chapter 4 considers whether a parody respects the moral rights of author of the original, parodied work. It questions whether moral rights present an impediment to realisation of the objectives of the parody exception. This chapter examines this issue by focusing upon whether the paternity right, right against false attribution or right of integrity are likely to be infringed by a parodic use.

As is demonstrated throughout this project, the regime of the parody exception is firmly anchored in human rights considerations. Parody, constituting a specific artistic expression, is protected under the right of

freedom of expression. Chapter 5 therefore determines the relationship between copyright and the right of freedom of expression. As this fundamental right is not absolute, the chapter considers how the limitations on free expression also serve to guide the outer limits of the parody exception.

Finally, chapter 6, by considering the specific case of musical parodies, seeks to verify the combined analysis of the earlier chapters. In doing so, the project goes beyond a strict application of the law to provide (hopefully) valuable practical insight for the music industry, in a manner which can be extended to other creative industries. By assessing the interrelation between the legal regime applicable to parodies and the existing business practices within the UK, this chapter's premise is that unless the exception works in this significant commercial sector, the objectives sought by UK legislators will be missed.

Chapter I: Parody - Nature and Definition

Introduction

The creation of parodies is socially accepted and legally permissible. Yet the exact meaning of terms such as parody, satire, caricature and pastiche remains nebulous. This chapter aims to unravel the contours of the concept of parody.

This is no easy task[49]. Legislators have refrained from carving out definitions of the terms, and judges are reluctant to do so. As these terms derive from specific artistic forms, section 1 traces the birth and evolution of parody in different art fields before moving on to study the definitions established by cultural theorists[50]. The aim of this section is to discover the multiple facets of parody and to test its limits. Next, section 2 evaluates the legal evolution of the concept in the Study countries.

1. The origins of the term and its evolution through the centuries

1.1 Introduction

The first hurdle in defining parody is to determine its origins. There are many versions regarding its birth. Nevertheless as most presume that parody's roots lie in Ancient Greece, this will be the starting point of the exploration.

This section first studies the etymology of the term parody (section 1.2), before moving on to a chronological review of parody's evolution in different art fields in Europe (section 1.3). The final section evaluates different definitions of parody by theorists (section 1.4).

[49] For example, Rose took a census of no less than thirty-seven different definitions going from Aristotle to dictionary definitions without forgetting scholars like Eco, Bakhtin, Nietzsche and Foucault. Rose 1993a, pp. 280-3.

[50] The fields covered are poetry, literature, plastic arts, music, cinematography and drama.

1.2 Etymology of parody

In Ancient Greece, *Parodia* is seen as having two different meanings, as the prefix *para-* can mean either 'counter' or 'beside', while *-ode* means 'song'. Selecting which version has been adopted presents a second hurdle (assuming that we have overcome the first by selecting etymology as the starting point to understand the term). The first meaning seems to refer to a tension or contrast between the original and new works, while the second meaning suggests a neighbourly relationship, with the two works standing side-by-side[51]. The latter, once 'translated' into copyright language, might lead one to conclude that the new work is akin to an adaptation. Adaptation is an exclusive right of the original right-holder[52]. However, based upon analysis of usage from Ancient times up to the present day, scholars agree that the former meaning – a relationship of contrast between the new work and the original - dominates[53].

1.3 Historical overview of parody in art fields

Having established the origins of the term, it seems reasonable to trace parody's evolution through the centuries to assist in our definition of parody for copyright purposes.

The first use of *parodia* is attributed to Aristotle in poems referring to Hegermon dated at 335 B.C.E.[54]. In this literary context, parodia refers to a moderate length narrative poem which uses the meter and vocabulary of the then well-established form of epic poems. Parodia of this type are satirical, addressing mock-heroic topics and intended to create a comic effect[55]. However, parodic forms were not confined to poetry, and featured in plays

[51] Hutcheon 1985, p. 32.
[52] See conclusion chapter 1.
[53] Strowel 1991, p. 30.
[54] Dentith 2000, p. 9.
[55] ibid p. 10.

including the works of Aristophanes[56]. The analysis of the texts of those old comedies which are still available today reveals that two main characteristics can be assigned to parody. The first is the prevalent reference made to the coeval language of Athens. The second feature is the target of these critiques. The parody results from political and social commentaries by reference to the earlier works of other writers[57]. The parodic concept is broad, and includes satire within its scope, and while a humorous element is generally present, it is not mandatory.

Quintilianus, a popular author in Italy during the first century C.E., provides two definitions of parody. In Book VI, Quintilianus describes parody in these terms:

> What men call wisdom is a "legacy", where "legacy" replaces "faculty". Or again we may invent verses resembling well known lines, a trick called parody[58].

In Book IX, he provides a specific definition in relation to musical works: 'Parody, a name drawn from songs sung in imitation of others, but employed by an abuse of language to designate imitation in verse or prose'[59].

Later, Quintilianus emphasises his preference for the second definition, which refers to singing a set of known song lyrics to a melody other than the original. This definition formed the basis for later music definitions of parody by scholars from the sixteenth century onwards. These all share the distinction that the requirement for any humorous element is set aside, focussing instead

[56] For example, Aristophanes liked to mock Cratinus in his plays (i.e. *Knights*). Cratinus, eminent poet of Old Comedy, had the reputation to often be drunk and incontinent. For the story, Cratinus replied through *Pytine* which takes inspiration from his portray made in Knights. Biles 2002, p. 169.

[57] Dentith 2000, pp. 45-54; Biles 2002, p. 169.

[58] Quintilianus translated in Butler 1953, p. 493.

[59] ibid, p. 395.

on a degree of imitation while simultaneously establishing a distance between the new and original work.

Reference in the literature to parody from the fifth century onwards is scarce until an apparent resurgence of the genre in the sixteenth century, along with growing interest from classical scholars to define the phenomenon. It was at this time that the scope of parody was narrowed to a ridiculing function, echoing the postmodern understanding of the genre. The Renaissance scholar Scaliger, often considered to be the first to consider the definition of parody for the literary genre, rediscovers Quintilianus, and determines that parody means 'to introduce in place of a serious thing another ridiculous one'[60]. The target of the parody remains undefined, permitting the mocking of the previous work or an unrelated subject. Yet, Scaliger recognises the complexity of defining parody. When discussing the figures of speech in literature, he tempers his basic definition by adding: 'parody, in which the serious is imitated, and by the imitation subverted'[61]. In doing so, the reference to ridicule is set aside, with the focus on the imitative feature of parody. This technique, which Scaliger also calls parody, aimed to adapt texts to ensure they conformed to the religious sensibilities of the day. The same technique was used for originally secular songs to facilitate greater dissemination of these works[62]. Estienne, a contemporary of Scaliger, contributed most to defining parody in the musical field at that time. He chose to emphasise the imitation aspect in his definition of musical parody: 'a song or melody which I compose in imitation of another'[63].

60 As cited in Falck 1979, p. 3.
61 ibid.
62 ibid, p. 4.
63 As cited in Falck 1979, p. 4.

During the seventeenth century, parody featured prominently in drama. Here, parody generally took the form of mockery, manifesting in grotesque gesturing and intonation by the actors, as well as the language used[64], to reinforce the criticism function of the genre. This style is often confused with burlesque[65]. In literature, parody was used similarly to mock previous works. While mockery was adopted in an attempt to provoke a change of style or genre, in doing so, parodists perpetuated the type of work they were trying to eradicate[66]. This phenomenon later became known as the *parodic paradox*, as exemplified by the novel *Don Quixote* by Cervantes, a work which contains all the traditional characteristics of a modern novel. In this piece, the author critiques a chivalric romance through parody[67]. While Cervantes aims to denigrate this genre of work so that literature may advance beyond it, because of his work's reliance on borrowing from this style, he also contributes to its proliferation[68].

Parody referred to a musical rearrangement to adapt works for different musical voices, or a technique which transformed a song's lyrics or replaced them entirely with a different text[69]. In Rousseau's dictionary published in 1768, a musical parody is described as:

> An instrumental piece which is made into an aria by adjusting the words. In a well-made music, the melody is composed to words; in a parody, the

64 Dentith 2000, p. 126.

65 Burlesque comes from 'Burlesco' which root is 'burla' meaning 'to ridicule', 'to mock'. This term comes from the seventeenth century and might have older roots in Latin where 'burra' means 'no sense'. The intention behind parody is to adopt a critical distance upon another work which can have a comic effect while the intention behind a burlesque or travesty work is merely the intent to ridicule or to mock. Genette 1982, p. 29.

66 ibid, p. 33.

67 This is a clear example of general or weapon parody.

68 On the publications of the time: Pevernage and Hoekstra 1979, pp. 367-77; Ribon 1695.

69 Falck 1979, p. 5.

> words are composed to the melody; all the stanzas of a song except the first are a kind of parody[70].

Essentially, Rousseau is describing parody as a musical technique in which lyrics are adapted to suit the music[71]. His definition is somewhat judgmental, since it contrasts 'well–made' music with a 'melody' in which the music seems compromised in its adaption to the words, and not vice-versa. This is echoed by the German musician Schilling, who describes parody thus:

> The Greeks understood by this comic poems… In music, parody is… the alteration of the text of a vocal composition, whereby a new text is prepared for an existing vocal composition, which is itself unchanged[72].

It is apparent that parody in music at that time, unlike in drama or literature, had little to do with ridicule or mockery[73], and so lacked any specific target. Rather, parody is used to imitate and reference previous works via alteration. As in other artistic fields, however, parody was seen as serving a beneficial function[74]. For example, the seventeenth century musician Couperin expressed his appreciation to those poets who reworked his own songs, because this increased the popularity and dissemination of his originals[75].

During the Enlightenment, parody gained an increasingly negative reputation as mediocre, derivative and parasitical owing to the emerging 'genius' cult attributed to creative works[76]. The fact that parody might even constitute an offence could explain its decrease in popularity during that period. The British culture of the time provides a good illustration. The popular works of

---

70 Translation in Falck 1979, p. 9.
71 Ward 1952, pp. 88-98.
72 Schilling translated in Falck 1979, p. 10.
73 It is only in the twentieth century that parody is defined in music mostly regarding to its ridiculing function.
74 Grout 1941, pp. 211-9.
75 Couperin actually thanked the poets directly in the preface of one of his books: Couperin, *Pièce de clavecin* (troisième livre, preface, Paris 1722) reprinted in *Le Pupitre* (Paris, 1969).
76 Further honed by concepts adopted in copyright law.

Gulliver's Travels and *Robinson Crusoe* both include only limited use of parody and satire[77], seen as demonstrating a reluctance to exploit this genre, because of its perception as an obstacle to creativity[78]. While parodies were considered derivative and unoriginal, satire was seen as creative and diverse. Most of the famous authors of the eighteenth century adopted satire as the literary tool of choice to reveal the social, political and religious conflicts of the time[79].

Parody's decline continued into the nineteenth century, and scholars document it being used predominantly to ridicule neoclassical speech or to express resentment toward particular poets or contemporary topics[80]. This lack of interest mirrored a more general disinterest in literature, which in turn has been linked to a gradual shift in audiences' habits with the emergence of film and other new forms of entertainment[81].

The twentieth century saw a renaissance of parody across different art forms. At this time, parody becomes far more complex, as its targets relate to specific previous works, well-established artistic styles or conventions, often combined in single works, and intertwined with other related genres. Magritte's parody of David's portrait of *Madame Récamier* (Figure 2) provides an interesting example. Although Magritte parodies a specific earlier artistic work, the work's intricacy derives from the intermingling with elements of satire, pastiche and caricature, making it troublesome to categorise the work definitively in any one of these genres.

77 Rutz 2004, p. 286.
78 McDonald 1960, p. 563.
79 Silva & Garcia 2012, p. 91.
80 Chatman 2001, p. 34; Dentith 2000, p. 117; Wright 1985, p. 342; Kiremidjian 1969, pp. 231-42; Tuve 1969, pp. 249-90; O´Connor 1964, pp. 241-8.
81 Dentith 2000, p. 118.

Figure 2

J-L David portrait of Madame Récamier (1800)

Magritte's parody (1951): Building upon David's painting, Magritte aims to comment on well regarded painting conventions, the mortality of humans and create an homage to David's work

As scholars rediscover the works of great authors, including Shakespeare, Swift, Proust, Verlaine and Pope, all of which feature parody, parody's reputation is again on the rise, leading one commentator to label the time: 'an age of parodies'[82].

[82] Mack 2007, p. 1.

This historical study of the evolution of the use of the term parody across art fields reveals that it is multi-functional: provoking laughter, conveying criticism, providing (positive or negative) social or political commentary, paying homage, and developing or testing artistic or musical rules and techniques[83]. Furthermore, the target of the parody is not limited, but may include the underlying work itself, other works, a style or something completely unrelated. As the definitions examined in this section are context-specific, the following section examines the definitions adopted by theorists who have scrutinised parody's history.

1.4 Theorists' views on parody

The previous section concludes that the term 'parody' is open-textured and contextual. This section now examines attempts by cultural theorists to construct a comprehensive definition which encapsulates its multi-facets, and assesses the extent to which these efforts have been successful.

Kiremidjian belongs to a group of theorists[84] who favour a limited definition. He defines parody as:

> [A] kind of literary mimicry which retains the form of stylistic character of the primary work, but substitutes alien subject matter or content … [and] thus establishes a jarring incongruity between form and content[85].

His definition is limited to literature, and does not translate directly to other art fields. Additionally, for Kiremidjian, a parody's target is the work which it imitates. Yet, it has been seen that this is not always the case. Also, a parody may be achieved by an exaggeration of features, not just by substituting alien content.

[83] See chapter 6, p. 285.
[84] Like Bakhin discussed below.
[85] Kiremidjian 1969, p. 232.

Rather than linking the study to a particular field, Bakhtin attempts to build his definition by linking parody to its context. Focusing on late Medieval and Early Modern Europe, he concludes that as parody originates from carnival. Its context is concerned with defeat of authority, sacred institutions, official rituals, language and values, all of which are apt for parodying[86]. In his view, this social context both gives rise to grotesque, mimicries and parodies, and explains why parody is more popular at some points in history than in others. Not all agree with this characterisation. Dentith's view challenges this, by relating parody to different events of history and by demonstrating that the medieval period did not represent the peak of parody[87]. Mack believes Bakhtin's definition to be unduly restrictive, and considers that 'the functions of parodies in modern times are narrow and unproductive', even insignificant[88].

The other school of theorists endeavours to create a definition of parody separate from any specific context or field of art. This school is itself sub-divided. The first sub-group of theorists focuses on the function of parody for humour or criticism, while the second sub-group attaches equal importance to all facets of parody.

As Jameson focuses upon the comic element, he argues that parody should not be characterised by its function for critical review, since without the element of ridicule parody melds into pastiche: *i.e.* a reworking 'in the style of' an original work or author. A contra-position considers that pastiche places emphasis on *similarities* between two works, whereas parody's imitation is to *contrast* with the earlier work. It is submitted that having regard to the historical review of parody undertaken in section 1.3 above, a comic element

[86] Bakhtin 1981, p. 79; Dentith 2000, p. 22.
[87] Dentith 2000, p. 37.
[88] Mack 2007, p. 4.

does not appear to be decisive for a work to be classified as parody, rather than pastiche.

Unlike Jameson, Hutcheon – considering that parody warrants a higher social status – constructs a definition which focuses on the criticism function of parody. Her emphasis is parody's signalling of an integration of discourse other than its own.[89]. Hutcheon defines parody as 'a form of repetition with ironic critical distance, marking difference rather than similarity'[90]. This definition risks over-inclusion of all types of hypertextuality[91]. However, Hutcheon recognises this issue and states that even if her definition is broad, it is not all encompassing, because unlike other kinds of hypertextuality, in the case of parody, the audience has a crucial role: both encoder and decoder must share the *same* code[92].

Genette, in defining parody as the 'diversion with minimalistic transformation'[93] or a 'playful transformation of a particular text'[94], attempts to attribute equal weight to its critical and comedic functions. Genette categorises parody as one kind of hypertextuality, by placing reliance on two factors. The first concerns its function, in the sense of the effect on the audience - satiric, playful or serious. The second is the relationship between the two works as one of transformation or imitation[95]. For Genette, parody is a playful transformation[96], in the sense that its purpose is to entertain, but without

[89] Hutcheon qualifies irony as the best instrument to achieve parody and both terms are a form of indirect and double-voiced discourse (meaning there are two voices and two meanings within a single expression). Hutcheon 1985, p. 31.
[90] Hutcheon 1985, p. 6.
[91] i.e. 'any relationship uniting a text B (*hypertext*) to an earlier text A (*hypotext*) upon which it is grafted in a manner that is not that of commentary' Genette's definition cited in Korkut 2005, p. 8.
[92] Hutcheon 1985, p. 37.
[93] Translation is mine. Genette 1982, p. 40.
[94] Translation is mine. ibid, p. 202.
[95] Genette infers that there is a sharp distinction between transformation and imitation which allows parody to differ from pastiche.
[96] ibid, p. 34.

mocking or detriment to the original text[97]. As a result, his definition is narrow. For example, in his study of *Don Quixote* and later works where the hypertext is not a specific work, but a genre, he is required by his definition to characterise these works as 'anti-novels', being only related to and distinguished from parody. Later scholars, such as Tran-Gervat, challenge such sub-categorisation, since some of the elements which form the basis of the distinctions are recognised as being elements in modern parodies too[98].

Rose aims at a universal definition of parody: 'the comic refunctioning of preformed linguistic or artistic material'. Her use of 'comic refunctioning' identifies both the humour and the criticism functions of parody[99]. The target is also general, which reflects parody's practice across the fields of art. This simple definition is seemingly attractive, yet it sheds little light upon what is seeks to describe.

In contrast, Dentith concludes that it is impossible to encapsulate all forms of parody in a single definition[100]. Instead, an adequate definition is only possible from a particular focus, which in his case is the cultural politics of parody. He therefore suggests that this aspect of parody 'includes any cultural practice which provides a relatively polemical allusive imitation of another cultural production or practice'[101].

1.5 Conclusion

Theorists appear to agree that parodies embody creativity, and few contest the difficulties in seeking to define it. Not only is there a lack of any well-established definition in any of the relevant art fields, but theorists fail to agree

97 ibid, p. 43.
98 Tran-Gervat 2006, p. 3.
99 Rose 1993, p. 52.
100 Dentith 2000, p. 6.
101 ibid, p. 9.

on a definition which capture all facets of parody without blurring the frontiers between parody and other concepts.

Besides this lack of accepted definitions, a parody's target varies from the underlying work, established artistic conventions or styles, the author of the original work, the parodist themselves, or more generally to traditions, social values or political standpoints[102].

Additionally, the nature of a parodist's borrowing varies greatly, too. This may range from a parody which relies upon a specific previous work, to a composite of several works, to established upon general styles and conventions. Also, the amount borrowed differs from one kind of parody to another. For example, it was seen that in music that it is common for a parody to copy the music notes directly, and only alter the lyrics.

Finally, one of the most disputed aspects concerns the functions of parody. Cultural theorists either select the criticism or the comic function of parody as paramount, or view all possible functions as equally significant. The overall picture is confused and likely to encompass many activities.

Any attempt to craft a proper legal definition of parody will face the very same issues. But, despite all these aspects which present uncertainty, it is submitted that some common features can be identified. Firstly, there is consensus that parody requires an element of *imitation* irrespective of whether this is of an earlier work, works, style or artistic convention. Secondly, the parodist adopts that element of imitation in order to make an *observation*, whether by way of criticism, commentary or even homage. It is submitted that the essence of parody is to provide an observation of criticism, commentary or homage by making a creative reference to an earlier work, or body of works.

[102] This is a non-exhaustive list.

It is further submitted that there is no need for positive law to delve further into details of the distinction between parody and the different related concepts, such a pastiche and caricature, because they should fit within the same legal regime. Besides, as this section has identified, these concepts are closely linked. Hence, while distinctions will be relevant for experts in those particular fields, the next section demonstrates that where the concern is the activities of users, these become largely irrelevant.

2. The legal definition of parody

2.1 Introduction

While the previous section identified the essence of parody, this section aims to unpick its meaning under copyright law.

The CJEU recently interpreted the terms 'caricature, parody and pastiche' for the first time in *Deckmyn*. The Court establishes 'parody' as an autonomous concept in the context of EU copyright law[103], having regard to the ordinary meaning of the terms in everyday language, and taking into consideration the context in which the parody arises[104]. Here, the CJEU identifies a work as a 'parody' by its satisfaction of two requirements: firstly, it must 'evoke an existing work while being noticeably different from it,' and secondly, it must 'constitute an expression of humour or mockery'[105]. By adopting this definition, the CJEU decides it is unnecessary to *distinguish* between works of parody, pastiche or caricature, since it is better for copyright law to understand parody as a multivalent concept which *includes* forms of pastiche and caricature[106].

[103] Meaning it must be interpreted uniformly throughout the EU: *Deckmyn*, [17]; AGO *Deckmyn*, [35].
[104] *Deckmyn*, [19]; AGO, [45].
[105] *Deckmyn*, [20]; AGO, [48].
[106] AGO, [46]; see further section 2.4, chapter 1.

This landmark ruling begs an evaluation of the likely impact of super-imposing this EU-wide definition upon the pre-existing practices of the courts of EU Member States. While none of the Study Countries have legislative definitions of the terms in national copyright law, national courts have crafted their own definitions on a case-by-case basis, and legal scholars have devoted attention to understanding the meaning of the terms. Furthermore, stakeholders in the EU copyright system have voiced their own concerns about the appropriate framing of legislation, based upon possible overlap between parody and satire, or parody, pastiche and caricature[107]. In a 'battle' between users and right-holders of copyright works, the former tend to favour of a broad definition, whereas the latter prefer a narrow and precise definition to best securing their interests.

The following subsections seek to discover the meanings of the different genres of parody, pastiche, caricature and satire in the Study Countries. Sections 2.2 and 2.3 evaluate whether national approaches in France and the UK (respectively) will survive in light of the new EU interpretation (section 2.4). Sections 2.5 and 2.6 review practice in Australia and Canada (respectively), to identify whether their drafting choices have merits compared to the EU approach.

2.2 France

French courts have afforded parodies special treatment in recognition of a general freedom to criticism and the social function fulfilled by humour[108], long before a specific parody exception was incorporated into national copyright legislation in 1957[109]. As the legislation lacks any statutory definition,

[107] McCausland 2007b, p. 287.
[108] ibid.
[109] Schuermans 1861, p. 173; on the introduction of the French parody exception, see section 4.4 chapter 2.

French courts have continued to define the terms parody, pastiche and caricature on a case-by-case basis. Although parody was most closely linked to a playful, ridiculing, mocking function prior to codification, consideration of decisions since codification demonstrates that the French courts now recognise that parody has a broader role.

The first landmark decision, *Peanuts*[110], concerned a parody of a copyright protected comic strip, which featured the cartoon character Snoopy in a mildly pornographic situation. This transposition of a children's character to an unexpected context is reflected in the first instance court's definition of a parody as: 'tending to provoke complicity of the reader and irony through the distorting imitation of the original work' [111]. This definition has the particularity to reflect the main features of parody as consistently understood by theorists[112], insofar as it includes the role of the audience's recognition of the underlying work in the parody, and the double voice discourse[113] arising from the transformation (here, a change of context) of the imitation. Noticeably, the court's definition does not place any reliance on humour. To the contrary, the court considered the work a parody (within the scope of the copyright exception) because of the critical comment it conveyed[114].

This approach was soon confirmed and extended in *Tarzoon*[115]. In this case, a court of first instance was required to establish whether a satire of Tarzan fell within the copyright exception for parody. Citing human rights considerations[116], the court reiterated that illustrations made to express critical

[110] TGI Paris, 19/01/1977, RIDA, 1977, n°92, pp. 167-9.
[111] Author's translation. ibid.
[112] See above section 1.4 chapter 1.
[113] Supra note 89.
[114] Yet opposite result was reached in the pastiche of Calimero in light sadomasochist situations: TGI Paris, 24/03/2000, legipresse 2000 I p. 71.
[115] TGI Paris, 03/01/1978, D., 19790, p. 99 obs. Desbois; see works infra section 2.3.2 chapter 4, p. 192.
[116] See chapter 5, p. 205.

opinions are as socially valuable as those which were simply humorous. Here, the court noted that the defendant used the Tarzan cartoon to highlight the irony that western society during that decade pursued materialism, whilst simultaneously embracing it. Eventually, this resulted in a disdain towards safaris[117]. Consequently, the court accepted this particular satirical work as a parody.

Yet later in 1988, the Supreme Court attempted to distinguish between parody, pastiche and carticature: the three terms adopted in statutory provision[118]. Legal proceedings had been commenced by the successor-in-title of Charles Trénet and Thierry Le Luron for rights in the song *Douce France*, against a parody -*Douces Transes*- which adopted new lyrics for the original tune. The Court asserted that as a parody requires immediate identification of the underlying work, which distinguishes it from pastiche and caricature. Here, the Court understands 'caricature' as any mockery of a person[119] or character, while a 'pastiche' comments on the style or genre adopted by the original author.

In each case, the legal definition adopted by the French Supreme Court defines the genre in relation to its target: a parody targets the underlying work, pastiche targets the style of a work[120], and caricature targets a person or a character[121]. These restricted definitions impact upon the legal protection afforded to such works. For example, this legal definition of parody does not

[117] Satire seems to be understood here as referring to something external to the original work it borrows from.
[118] Cass., 12/01/1988, RIDA, n°137, p. 98; Paris (1ere ch.) 15/10/1985, D 1986, somm. 1986, obs. Colombet.
[119] Possibly raising image rights or other personality rights issues.
[120] It must be reminded that a style belongs to the sphere of ideas which is not covered by copyright. Here, style must be understood as the style of a particular work. Dalloz, 'Exception au droit d'exploitation' (2006) p. 9, [806]; Delfour, *L'imitation créatrice* (University of Toulouse 2000), p. 72.
[121] Berenboom 2009, p. 104; Mouffe 2011, p. 20.

encompass a work if the target is unrelated to the underlying work, as is often the case in satire.

Given that this restriction is not a result of any statutory interpretation, scholars have attempted to rationalise the Court's approach. Many adopt a similar stance as Desbois, who argues that the three terms identify a single category of socially valuable transformative works, but with each relating to a different art fields: parody is relevant to music, pastiche to literary works and caricature to plastic arts. However, his categorisation seems unduly restrictive. For example, it fails to take account of any equivalent for motion pictures.

Françon revisits the *Tarzoon* case[122] to build upon Desbois's analysis, and defines a parodist as one who 'creates a satiric vision of a work which is not his, for the joy of the public'[123]. While this definition has the advantage of including satire (or 'parody with' - targeting something other than they underlying work) within the concept of parody, Françon seems to conflate the two terms into a single genre[124]. Despite this flaw, the definition has some resonance. For example, Sangsue establishes a very similar definition in relation to literary works by defining parody as a playful, comic or satiric transformation of a previous work[125].

In conclusion, French jurisprudence focuses on the target of the parody, while French legal scholarship tends to focus on the art field in which the parody evolves. It is argued that both appear equally unsatisfactory, as they impose an apparently unnecessary limit on parody. While parody, pastiche and

[122] Supra note 115.
[123] Translation is mine. Françon 1988, p. 302.
[124] This is contested by experts in art fields. Hutcheon's explanation is that people confuse parody and satire because of how these genres use irony. He considers parody pays tribute to the original work from which borrows from while the satirist aims to ridicule the original work. However, Chatman stresses that according to its postmodern meaning, a ridiculing effect is integral to parody. The difference is thus one of degree. Chatman 2001, p. 33; McDonald 1960, p. xiii; Hutcheon 1985, pp. 16 & 43.
[125] Sangsue 1994, p. 5.

caricature may represent different artistic concepts or terms of art which may vary with time and space, from a legal perspective all three relate to a transformation of an existing work into a new expressions. Thus, it seems unnecessary to distinguish further between the three terms in order to regulate unauthorised use within a legal regime[126].

In light of this, use of the three different terms simply aims to reflect the diversity of existing artistic expressions[127]. Had the French legislature intended the different terms to relate to specific authorial works, it would have been straightforward to make this explicit, by providing a specific regime for each[128]. In the absence of such precision, it is submitted that a better approach is to understand parody as encompassing caricature, pastiche and even satire[129]. In turn, any requirement that each of the three styles must incorporate a humorous character requires 'humour'[130] to be understood more broadly than amusement or comedy, and encompass tribute or criticism[131].

2.3 United Kingdom

In October 2014, UK copyright law introduced a new defence to infringment covering 'parody, caricature and pastiche'. As in France, the legislator abstained from any statutory definition, leaving the courts to interpret the terms on a case-by-case basis[132].

In the absence of any judicial decisions applying the new exception, some insight may be gleaned from non-binding documents, such as government

[126] Galopin 2013, p. 303; Tréfigny 2000, p. 222; Strowel 1991, p. 41.
[127] Strowel 1991, p. 42.
[128] Durrande 1995, p. 133.
[129] See section 5.2 chapter 5, p. 271.
[130] Deckmyn, [20].
[131] *Saint-Tin*: TGI Evry 9/07/2009, RG n°09/02410 confirmed Paris 18/02/2011, RG 09/19272, Propr. Int. 2011 n°39 p. 187.
[132] The decisions on parody prior the introduction of the exception refrain from defining parody to focus on the regime. See Introduction.

releases and UK Intellectual Property Office ('IPO') guidance for creators. One government communication issued as part of the legislator consultation process defines parody as 'a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule'[133]. As this definition seems to derive from the *American Heritage Dictionary*[134], it is reasonable to assume that the ordinary meaning of the words is intended to prevail[135]. This is consistent with the IPO guidance, which notes:

> The words 'caricature, parody or pastiche' have their ordinary dictionary meanings. In broad terms parody imitates a work for humorous or satirical effect, commenting on the original work, its subject, author, style or some other target. Pastiche is a musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment[136].

Divergence is evident between these two summaries of the exception's purpose. While the first definition implies that 'parody of' an original work is the only type permitted, the second explictly states that parody can either comment on the original ('parody of') or can comment on anything else

---

[133] UK Government, *Impact assessment: Copyright exception for parody* (20/12/2012), p. 3 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308746/ia-exception-parody.pdf (access date 15/10/2015).

[134] Though this is not expressively expressed by the impact assessment, this definition coincides with the first indent of the definition found in the American Heritage Dictionary of English Language.

[135] Surely referring to the *English Oxford Dictionary* (OED). Also supported by the fact that there are mainly three statutory interpretation principles applicable within the UK. The most relevant rule for our purpose is the literal rule whereby the judge is supposed to seek the natural or ordinary meaning of terms that are not defined within the statute. Crabbe 1994, p. 34.

[136] IPO, 'Exceptions to Copyright: Guidance for Creators and Copyright Owners' (10/2014), p. 7 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf (access date 15/10/2015).

outside the borrowing made ('parody with'). It is also noteworthy that, as in France, the IPO text distinguishes between parody, pastiche and caricature, but in each case, ascribes a different meaning to the French understanding of the same term. Here, pastiche is related to musical works (not literary works), caricature relates to people/character (not artistic works), while parody remains unattached to any particular art field. Finally, based upon the IPO terminology, neither pastiche nor caricature are required to be humorous.

As the tradition is for courts to define the purpose of copyright exceptions on a case-by-case basis, future cases might shed some light on the exact meaning of 'parody', 'pastiche' and 'caricature' as well as on the importance of humour or the type of humour required. In the meantime, some insight can be gleaned from the interpretation of the exception by the CJEU in *Deckmyn*. Based on this interpretation, the nature and the justifications of the exception, the author argue that it might not be necessary to define the terms or to distinguish these.

2.4 Parody following the CJEU

Having seen that two EU Member States have such different understandings of 'parody, pastiche and caricature', the CJEU decision in *Deckmyn* is timely and-provides a valuable and influential insight on the meaning of the terms in law.

EU copyright law requires parody to be an autonomous concept across the EU territory[137]. Following a consistent line of jurisprudence of the CJEU, parody must be defined in relation to its ordinary meaning, in relation to the context it is used in the relevant Directive, and having regard to the objectives of that legislation[138]. In *Deckmyn*, the Court reviewed the dictionary definitions of the

[137] *Deckmyn*, [17]; AGO in *Deckmyn*, [35].
[138] *Deckmyn,* [19]; AGO in *Deckmyn*, [45]; *Aboubacar Diakité* (C-285/12), [27]; *Wallentin-Hermann* (C-549/07), [17]; *Probst* (C-119/12), [20] and *Content Services* (C-49/11), [32].

terms, and identified (agreeing with the AGO) that all parodies have two essential features: one 'structural' (a transformation which is, simultaneously, a copy and creation); and one 'functional' aspect (it constitutes an expression of humour or mockery)[139]. It is the author's understanding that the Court found no need to articulate any differences between the three styles, meaning the copyright provision merely lists three genres which derogate from the scope of the right-holder's exclusive rights.

Several important points derive from this decision. Firstly, it is clear that legal regulation of parody is concerned with both 'parody of' and 'parody with'[140]. Secondly, although a humorous character is required[141], the nature of the humour is unspecified, leaving discretion to Member States[142]. Finally, the AGO emphasises that parody is an artistic expression and the result of exercise of an individual's right of freedom of expression[143]. It is reasonable to infer from this the link that human rights considerations should influence the interpretation of the exception[144].

It seems reasonable to question whether the CJEU interpretation in *Deckmyn* is sufficient to achieve uniform interpretation of parody throughout the EU given the breadth of the court's interpretation. One aspect at least has been resolved. The approach of the first instance courts in France, exemplified in

[139] *Deckmyn*, [20]; AGO in *Deckmyn*, [48].
[140] AGO in *Deckmyn*, [61-5].
[141] It is worth noting that the court includes 'mockery' under humour. This results into broadening the exception to non-comical expressions which comprise derision, ridicule or even 'insultingly inappropriate to the circumstances'. See OED. The etymomology of 'mockery' comes from the French verb 'moquer' connoting a lack of respect or derision. It is often biting, bitter or even hurtful. This is in line with the established case-law under the ECHR. See infra chapter 5 section 3.2.
[142] The AGO confers a broad margin to Member States. AGO in *Deckmyn*, [69].
[143] AGO in *Deckmyn*, [70].
[144] Chapter 5 section 5, p. 205 explains that the greater the use of humour, the political or public interest character, the more likely the expression will be lawful.

the *Peanuts*[145] and *Tarzoon*[146] cases must be favoured over other approaches, e.g. the French Supreme Court and IPO guidance, which distinguish the terms in relation to particular art forms. The author's reading of Deckmyn leads to the belief that attempts to attribute specific characteristics or fields of use to the sub-genre of parody, pastiche and caricature should be avoided[147]. This approach is supported by the analysis of the history of parody in section 1.3, which highlights that parody has always been a permeable, evolving concept which should not be confined to music, literature or drawings. It is also relevant to cinematographic works, plastic arts and other types of artistic works. At the same time, attempts to link parody, pastiche and caricature to particular artistic expressions imposes an unnecessary limitation which overlooks the existence of various forms of 'hybrid' parody, which include combined elements of text, images and music altogether.

Although for legal purposes the three styles belong to the same (legal) genre, it is legitimate to question whether legal recognition that there are different styles of 'parody' has any impact, or indeed whether use of other similar terms, such as satire or burlesque, has any influence on the legal definition of parody. The next subsections seek to answer these questions, by recourse to a review of the comparable legal provisions in Australia and Canada, common law cousins to the UK. Both jurisdictions have recently introduced a parody exception into national copyright legislation.

2.5 Australia

While EU law adopts a copyright exception for 'parody, pastiche and caricature', the Australian legislature preferred to draft the exclusion in terms

[145] Supra, note 110.
[146] Supra, note 115.
[147] This infers that the traditional approach of English judges defining the terms in light of the particular facts of a case should either be set aside or not binding, serving as mere guidance. The contrary would inherently limit the scope of the exception.

of 'parody and satire'. This part considers whether this different choice of words is likely to capture a different sub-section of transformative uses.

As before in the case of France and the UK, there is no definition of either 'parody' or 'satire' within the Australian Copyright Act itself. Nevertheless, a Government Factsheet released in 2006 identifies that:

> Satire often involves attacking an idea or attitude, an institution or a social practice, through irony, derision, or wit. Parody often involves the imitation of the characteristic style of an author or a work for comic effect or ridicule[148].

Later updates [149] repeat this definition, and further identify that courts are likely to appraise the meaning of the terms in everyday language (*e.g.* by consulting dictionaries) before making a determination of the meaning within the context of the Act.

Building on definitions contained in the *Macquarie Dictionary*, the Australian Copyright Council notes that:

> A parody is an imitation of a work that may include parts of the original. In some cases, a parody may not be effective unless parts of the original are included. It seems that the purpose of a true parody is to make some comment on the imitated work or on its creator.[150]

'Satire', in turn, draws:

---

[148] Attorney-General's Department, *Copyright Amendment Act 2006 – FactSheets: New Australian Copyright Laws: Parody and Satire* <http://www.ag.gov.au>.

[149] Australian Copyright Council, *Parodies, satires & jokes* (Information sheet G083v05, 2012), p. 2.; Australian Copyright Council, *Parodies, satires & jokes* (Information sheet G083v05, 2008), p. 2.

[150] ibid; repeated in Australian Copyright Council, *Parodies, satires & jokes* (Information sheet G083v05, 12/2014), p. 3 available at http://www.copyright.org.au/acc_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=7809cf9d-d157-4308-9007-b49568f6b5f8&iFileTypeCode=PDF&iFileName=Parodies,%20Satire%20&%20Jokes (access date 15/10/2015).

> 'attention to characteristics or actions – such as vice or folly – by using certain forms of expression – such as irony, sarcasm and ridicule. Thus, while a parody is not necessarily humorous, it seems that satire has two elements, based upon the object to which the audience's attention is drawn (vice or folly etc) and the manner in which it is done (irony, ridicule etc)'.[151]

A satire may be a style of parody.

Both these definitions, although not legally binding, also set the focus on the structural features of parody –a creative imitation- but with seemingly less weight allocated to any humorous aspect of parody. Uncertainly of the legal meaning of parody and satire has given rise to four main schools of scholarly interpretation.

The first (and arguably least convincing) approach defers to the understanding of parody and satire according to US copyright law. This approach derives from the Amended Explanatory Memorandum and the second reading of the Copyright Act in the Australian Senate. These identify the US definitions of the terms as potentially relevant, because of the existence of a free trade agreement between Australia and the USA ('AUSFTA')[152]. In *Campbell*[153], a landmark US copyright case, the US Supreme Court created a clear distinction between parody and satire[154]. If the Australian courts adopt the same approach, a parody (or 'target parody'[155]) comments on the underlying work; whereas satire (or 'weapon parody'[156]) refers to the underlying work to comment on

[151] ibid, p. 3.
[152] Amended Explanatory Memorandum and Commonwealth of Australia, Parliamentary Debates, Senate, 30/11/2006 where the Minister of Justice mentions that those definitions might be relevant.
[153] *Campbell v. Acuff-Rose Music Inc* 510 US 569 (1994).
[154] Before this case, the US Courts were using the terms parody and satire as synonyms. Keller and Tushnet 2004, pp. 979-1016.
[155] 'Parody of' in the EU understanding of parody. *Campbell*: supra note 153, [580].
[156] 'Parody with' in the EU jargon.

anything other than that work.[157] Subsequently, post-*Campbell* US courts have reinforced this binary distinction by attempting to categorise *all* transformative works as either parody or satire. This has resulted in an arguably unnatural extension of the term satire to include many 'worthy' transformative uses of works which cannot fit within the parody category[158].

During the consultation process, lobbyists for right-holders championed the US definitions to support their position that the meaning of the terms (and hence the scope of the exception) should be narrow. The introduction of an exception which listed parody and satire separately is seen by some as a position statement rejecting this US jurisprudential distinction between satire and parody[159]. At the time of enactment in 2006, its choice of wording for a 'parody' exception was unique[160]. While it is likely that the same arguments will be advanced again by right-holders before the courts during any litigation concerning unauthorised parodies [161], it is argued that it would be counterproductive for Australian courts to adopt the US definitions. The US definitions might lead to a confusing and unnecessarily complex situation in which works which would be termed as 'parody' according to the ordinary meaning of the word would be legally defined as 'satire'. An hypothetical

---

[157] *Campbell*: supra note 153, [581].

[158] This is to ensure that these works benefit from a 'fair use' defence to an infringement claim, *e.g. Suntrust v. Houghlin-Mifflin Bank* 268 F 3d 1257 (11th Cir, 2001), [1268]; *Seuss* 109 F 3d 1394 (9th Cir, 1997), [1400].

[159] Condren & al. 2008a, p. 279; McCutcheon 2008, p. 178.

[160] In 2012, Canada adopted the same wording. Section 2.6 chapter 1; Condren & al. 2008a, p. 278.

[161] Amongst others submissions to Commonwealth of Australia, Attorney-General's Department, *Issues Paper, Fair Use and other Copyright Exceptions in the Digital Age* (05/2005) (Fair Use Inquiry) by the Copyright Agency Limited; Copyright Council (supported by Media Entertainment and Arts Alliance, Viscopy and the National Association for the Visual Arts) available at http://www.copyright.org.au/acc_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=7dbe6c97-6a51-410c-b0d2-462205d03531&iFileTypeCode=PDF&iFileName=Attorney-General%27s%20Department%20%E2%80%9CFair%20Use%20and%20Other%20Copyright%20Exceptions:%20An%20examination%20of%20fair%20use (access date 15/10/2015) .

example of this are The Ashes Tour songs of the Australian cricket supporters club called *The Fanatics*[162]. These songs adapt the words of well-known songs to reflect the fans' support to their team. While ordinary Australians would consider these clear examples of parody, a US-style approach by Australia courts would see such uses as satires, simply because the target of the songs is cricket, and not the copyright-protected work. While the characterisation as 'parody' or 'satire' might not impact on the outcome of any legal determination, it is submitted that adopting legal definitions which are unnecessarily distinct from the ordinary meaning of the term is more likely to be detrimental to, rather than benefit, the efficiency of operation of the exception.

A second school argues that the Australian courts should adopt the definitions provided by relevant theorists. For example, in a case which arose prior to the introduction of a specific exception, Conti J.'s attempt to define parody in *The Panel* case relied upon the scholarship of Rose[163]. Therefore, it is possible that Australian courts may consult the works of other theorists, outlined previously in section 1.4 of this chapter. As it has been demonstrated that the theorists are unable to reach any consensus between themselves, the scope of the terms would hinge upon which theorists are consulted, and varying outcomes may result for the same types of parodies.

A third approach prefers the working definitions built by legal scholars who have engaged in evaluating the meaning of parody and satire within a copyright context. Based upon the ordinary meaning of the terms, the definitions established by Condren et al. appear the most thorough to date.

These scholars label 'parody' as:

[162] Examples of songs can be found at: http://www.thefanatics.com/web_blog.view.php?web_blog_ID=24 (access date 5/10/2015).
[163] *TCN,* supra note 20 (Trial Judgment).

> [T]he borrowing from, imitation, or appropriation of a text, or other cultural product or practice, for the purpose of commenting, usually humorously, upon either it or something else;

while 'satire' is:

> [T]he critical impulse manifesting itself in some degree of denigration, almost invariably through attempted humour; the artistic results (usually humorous) of expression of such a critical impulse. [164]

In contrast, Jewell and Louise's conception of parody focus less upon humour, defining it as 'the imitation of an artistic work or artist's style, sometimes for the sake of ridicule, or perhaps as a vehicle to make a criticism or comment'[165]. It remains to be seen whether Australian courts will determine that parodies and satires require any humorous element, or whether a broader definition will be adopted[166].

Finally, the approach which has gained most support[167] is the form of statutory interpretation[168] which consults dictionaries to derive the ordinary meaning of statutory terms[169]. Traditionally, Australian courts refer to *The Macquarie Dictionary*. This includes the following definitions:

> Parody:
> 1. A humorous or satirical imitation of a serious piece of literature or writing.
> 2. The kind of literary composition represented by such imitations.

---

[164] Condren and al. 2008b, p. 402.
[165] Jewell and Louise 2012, p. 2.
[166] Yet, as the definitions proposed also refer to a particular previous work, I wish to make a reservation that the Court will understand these as allowing parodies or satires that result from the combination of different previous work without any further creation such as in mashup works.
[167] Fair dealing decisions prior to the parody exception already recourse to the use of dictionaries to define the purpose of the exception. *Stevens v. Kabushiki Kaisha Sony Computer entertainment* [2005] HCA 58; *TCN,* supra note 20; *De Garis v. Neville Jeffresse Pidler*, (1990) 37 FCR 99; *AGL Sydney Ltd v. Shortland County Council* (1989) 17 IPR 99, [105].
[168] Interpretation Act from 1901 applicable in the Commonwealth.
[169] ibid, sections 15AA and 15AB.

3. A burlesque imitation of a musical composition.
4. A poor imitation; a travesty.

Satire:

1. The use of irony, sarcasm, ridicule, etc., in exposing, denouncing, or deriding vice, folly, etc.
2. A literary composition, in verse or prose, in which vices, abuses, follies, etc., are held up to scorn, derision, or ridicule.
3. The species of literature constituted by such composition.

A common criticism of this approach to interpretation is that dictionary definitions can lag behind their contemporary usage. Although when the practice was first adopted by courts, dictionary definitions aimed to be largely prospective, nowadays, dictionaries tend to adopt a more historical approach which captures all past usages of a term[170]. Indeed it was the recognition of the limitations of these dictionary definitions, which actually motivated Conti J. to look to Rose's research instead, and led him to conclude that the difference between parody and satire is that parody requires imitation or copying to achieve its aim, while satire is possible without copying an earlier work[171].

Additionally, it seems legitimate to question the relevance of (historical) dictionary definitions to the purpose and objectives of a particular legislative provision[172]. Given that a copyright legislature would aim for legislation to cover future evolution, any definition set too much in the past could be detrimental to the proper application of any parody exception. For example, although the Australian legislature was looking ahead to future uses of works in the digital age, the dictionary definitions remained unchanged since 1981, a

[170] See preface of the third edition of the *Oxford English Dictionary* available at http://public.oed.com/the-oed-today/preface-to-the-third-edition-of-the-oed/ (access date 25/10/2015); Condren and al. 2008a, p. 286.

[171] *TCN,* supra note 20, [17].

[172] This criticism can be broadened to other countries. While resorting to dictionaries is an obvious starting point, the over reliance of judges upon dictionaries impairs the efficiency of the law.

time when the Internet barely existed[173], and they can be traced back to the definitions adopted by the *Oxford English Dictionary* in 1884, made available in a complete edition in 1933[174].

Given the advent of new technologies and the substantial changes that occurred in media and the arts, including the advent of television, film, radio and the internet, it would seem that definitions dating from 1884 may be of dubious value for judges needing to interpret whether a new form of critique arising in our digital age is a satire or parody.

While it is possible to find shortcomings with each of the approaches described above, it is apparent they are in agreement that parody requires a combination of imitation and creation[175]. The need for a humorous character is also present, but is less prominent than we have seen in the definitions adopted in the EU countries. Finally, there is no debate in Australia that the concept of parody extends to works which either comment upon the underlying work, or where the underlying work is used as a vehicle to comment upon something else.

This broad understanding is welcome, since any particular use can sit uneasily within a rigid framework of legal categories. It seems to be rare that this type of work is either a parody or a satire in a strict sense. More often, works comprise both, and might be known colloquially as a 'satirical parody' or a 'parodic satire'. Television and radio provide good examples, including satirical news programmes, such as *The Daily Show* (presented by Stewart and Noah)[176], radio programmes, such as *The Blow Parade* (presented by Taylor and

[173] The revolutionary impact of this technology is associated to the mid-nineties and was recognised as representing 99% of the telecommunicated information in 2007. Hilbert & López 2011, pp. 60-5.

[174] The difference being that the *Oxford English Dictionary* realised the limitation of these old definitions and redrafted these in 2005 to reflect a more recent meaning of parody.

[175] Adopting a wide definition of parody encompassing other genres.

[176] News satire including both parodies and satires. http://thedailyshow.cc.com/ (access date 7/09/2015).

Hansen),[177] and in Hip Hop music, where songs such as Nas' '*I Can*' (which borrows from *Für Elise* as well as older works, including Sterne's book *Tristram Shandy*[178]).

2.6 Canada

Canada is no exception to the other Study Countries, since Canadian copyright legislation does not define parody and satire either[179]. Given the current absence of case law interpreting the exception, insight will be derived from judicial attempts to define parody prior to the introduction of a specific parody exception under the Copyright Act 1985.

Firstly, to-date, Canadian courts have rejected the definitions used in the US. The *Michelin* case in 1996[180] considered a parody of *The Bibendum man*. Although the Federal Court considered the US definitions established in *Campbell*[181], it saw no reason to adopt either the definitions or a fair use defence from another legal regime, based upon different jurisprudence[182]. In particular, and in contrast to the USA, Canada does not have any long tradition of accepting fair use for the purposes of parody as a defence to copyright infringement. Thus, as the US case law has no authority in Canada[183], the court preferred to adopt the ordinary meaning of the terms, and consulted the

[177] http://www.abc.net.au/triplej/blowparade/about/ (access date 7/09/2015).
[178] https://www.youtube.com/watch?v=RvVfgvHucRY (access date 7/09/2015).
[179] Section 29 Copyright Act (1985); Commerce and Economic Development Bureau, *Bills Committee on the Copyright (Amendment) Bill 2011-Copyright Exception for Parody* (Intellectual Property Department, 2011), p. 1.
[180] *Michelin,* supra note 35.
[181] Supra note 153.
[182] Several differences distinguish the US and Canada. First, the US has a fair use system. It is an open-ended list of exceptions which is not exhaustive. While in Canada, as the system is a fair dealing exception, the list of section 29 CA 1985 is exhaustive requiring a change of legislation to amend it. Moreover, the fair use factors do not equate the fair dealing factors as for example, the US does not require mentioning the source and the author for the fair use for the purpose of criticism while it is required under Canadian legislation.
[183] Supra note 180, [61-7].

Collins Dictionary of the English Language[184]. This defined parody as 'a musical, literary or other composition that mimics the style of another composer, author, etc. in a humorous or satirical way'.

Secondly, in *Favreau*[185], a case concerning a pornographic parody of the TV situation comedy show, *La Petite Vie*, the Court of Appeal constructed its own definition of parody, as: 'normally [involving] the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment'[186]. Yet, it is submitted that this definition should be disregarded for the purpose of the new exception, as its scope is very limited, possibly because the court was only concerned with defining the term to suit the facts of that particular case. While the definition acknowledges that not all parodies are humorous, it seems restricted to works of literature and target parodies, in which the parodist's message is to comment upon the underlying work.

With the introduction of new law which specifically refers to 'parody and satire', it appears reasonable to assume that courts will seek to identify the ordinary meaning of the terms, to construct their definition, which may be different in scope to the definitions adopted in the cases prior the introduction of the new exception. This view is based upon Canadian principles of legal interpretation, and on Section 12 of the Canadian Interpretation Act[187]. The latter states that the law must be interpreted in a manner which ensures its objectives. One of the accepted principles of interpretation is the literal approach, which assumes that legislation adopts the ordinary meaning of words, unless a specific definition is provided[188]. As this is the case for parody

184 (2nd ed., Collins, 1986).
185 Supra note 36, [574-5].
186 The court did recourse to definitions established by scholars but eventually, set them aside.
187 Section 12 Canada Interpretation Act 1985 of this Act is analogous to section 15AA of the Australian Act Interpretation Acts.
188 Lauzière 2012, p. 17.

and satire, we can presume that ordinary definitions will have to be considered.

Moreover, since 2004 in *CCH*[189] (and confirmed in 2012[190]), the Canadian Supreme Court has initiated a radical shift in the interpretation of copyright fair dealing provisions, which requires that these are given a broad interpretation of its purpose[191], in recognition of the status of *users' rights*[192]. Although it remains to be seen how this principle of interpretation will impact on the understanding of 'parody and satire' by Canadian courts, it is submitted that the terms should enjoy a 'large and liberal interpretation in order to ensure that users' rights are not unduly constrained'[193].

2.7 Conclusion

This section aims to unravel whether the legislators' specific selection of terminology from parody, satire, pastiche and caricature, when framing a parody exception in copyright law was likely (or intended) to impact on the range and genres of works covered. Despite the inherently speculative nature of this enquiry, since courts in Australia, Canada and the UK have yet to have the opportunity to interpret the new exception, it is possible to draw the following observations.

Without exception, legislators have elected to leave the particular terms chosen for the parody exception undefined. This leaves courts some flexibility to adapt the definitions in relation to the particular uses which come before them. This does not imply legal uncertainty because courts do not have a free hand. It has been identified that courts in all the Study Countries will seek the

189 *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.
190 *Entertainment Software Association of Canada v. SOCAN* [2012] SCC 34.
191 Supra note 189, [48].
192 Section 2 chapter 3, p. 101.
193 Supra note 189, [51].

ordinary meaning of the terms[194]. While dictionary definitions provide an appropriate starting point, and may help to identify whether the use shares the main characteristics, courts should not be over-reliant on these, since dictionairies may not reflect the contemporary meanings of the terms.

Consequently, the CJEU's *Deckmyn* decision is welcomed, and it may echo in Australia and Canada. By refusing to distinguish between the terms 'pastiche, parody and caricature', it is the author's understanding that the Court established that all three belong to the same genre. As such, to qualify as a parody under the exception, a work within the EU must display a humorous character, and must be recognisably different from the underlying work to avoid confusion with it.

While Australia and Canada introduced the terms 'parody and satire', it is hoped that parody will be construed broadly enough to encompass forms such as burlesque, pastiche and caricature, which all share the 'parodic' characteristics identified by the CJEU[195]. Otherwise, there is a risk that courts will fall into the US 'trap' of construing the two terms as distinguishing between 'target' and 'weapon' parodies, and thereby inherently limiting the scope of the exception. Unless further distinction is specifically required, the term 'parody' will be now used as a collective term to cover this genre of works.

The main difference between the various domestic definitions of parody concerns the appraisal of humour. While the CJEU interpretation requires humour as an essential element of parody, it is arguable that in Australia and Canada, equal weight is given to humorous and critical expressions. Does this mean that critical expressions may be judged a parody in Australia, but not within the EU? This is unlikely. Although copyright exceptions are interpreted

[194] For the UK and France, this was confirmed in *Deckmyn,* Australia's Interpretation Act 1901, sections 15AA and 15AB and for Canada, section 12 Interpretation Act 1985.
[195] Analysis of requirements: section 3 of chapter 3.

strictly[196], the CJEU indicated in *Deckmyn* that interpretation should not be so strict as to defeat the purpose of the exception[197]. It is submitted that 'humour' (which includes mockery[198]) should be interpreted broadly enough to respect all different kinds of humour including acerbic and harsh criticism as long as these expressions are not intentionally harmful[199]. This is also supported by human rights considerations. As further detailed in chapter 5, the parody exception is heavily anchored by recognition of the right to freedom of expression. In this arena, courts have already acknowledged that satire, and other less comic expressions, provide a valuable starting point for reflection and discussion in our society[200]. Therefore, EU and national courts within the EU may refer to decisions in cases concerning human rights violations to support a definition of humour which extends to non-comical expression of criticism and comment.

Conclusion

Each part of this chapter has sought a different perspective in an attempt at the meaning of parody. Based upon the first section, parody, pastiche, caricature, burlesque and satire belong to different genres in different fields of art. They overlap in their use of irony, even though all use irony for different functions[201]. The historical overview demonstrates that parody (understood as a concept) is a form of criticism which is dependent upon the context in which it evolves. In order to respect this influence of the context -culture, art field, time and space - any legal definition of parody must be sufficiently fluid and flexible for courts to be able to adapt as parody changes. Although legislators

[196] Except for Canada with the users' rights doctrine allowing for a broad interpretation of fair dealing. See section 2.2.2.3 chapter 3, p. 111.
[197] *Deckmyn*, [19, 23].
[198] *Deckmyn*, [20].
[199] See sections 3.2 chapter 3 and 2.3 chapter 4.
[200] See sections 3.2.2.2 and 5.1 chapter 5.
[201] Supra section 1.4 chapter 1.

have introduced different terms, these have been shown to belong to the same general genre of 'parody'.

Despite advocating a liberal and broad interpretation, it is necessary to define some characteristics of this particular genre, so courts and stakeholders may distinguish between what is parody (and is justified to fall outside copyright infringement) and what is not. While, as seen in section 1.4, this is a daunting task for theorists wanting to pin parody down exactly, the task is simplified for positive law purposes, given that only a broad interpretation of parody is required.

From a copyright perspective, Strowel's 1991 conclusions still remain valid today[202]. These conceive a parody as a transformation of one or more earlier works, which implies elements of both copying and creation. Parody is further characterised by its distinctive use of ironic distance[203]. This enables it to fulfil a function of passing criticism or comment, and acknowledges the renown of the underlying work, but ensures no confusion arises between the underlying work and its parody. This critical ironic distance distinguishes a parody from an adaptation, which borrows from an earlier work to pay tribute to it, or from plagiarism, in which seeks to pass-off borrowings as an 'original'.

A broad interpretation of parody is unrestricted to the type of borrowing made. Whilst section 1 illustrates that parody may borrow from one or more specific works, or from established artistic styles and conventions, section 2 identifies that styles and conventions will often exist in the sphere of 'ideas' in the public domain, and so fall beyond what may be protected by copyright law. Yet, copyright cases are often concerned with where the line should be drawn between ideas and protectable expressions of ideas. Hence, a broad

[202] Strowel 1991, p. 44
[203] Supra section 1.4 chapter 1: the ironic critical distance of Hutcheon.

understanding of parody should afford courts leeway to determine whether a use is a parody, or not, without requiring to resort to fictitious definitions which confine what a parody is[204], as is arguably the position in the US since the *Campbell* case[205].

Finally, the comparative evaluation has served to emphasise the analysis of section 1, which concluded that 'humour' is only an essential element of parody *if* humour is construed as a wide-reaching and contextual term. It has been shown that at one end of the spectrum a parody may display a comical character, while at the other extreme it is a vehicle for acerbic criticism[206]. Since this evaluation has found no basis inherent in the nature of parody, at this stage of the evaluation there seems no reason for positive law to limit parody to one end of the spectrum or the other. Rather, parody should enable criticism, comment and even homage. While this might be more difficult for common law jurisdictions to accept given the established practice in defining each term in relation to particular facts, the author argues that this absence of definition should enable a more proper use of the exception in light of its nature and justifications, focusing on the application of the different factors. This working premise will be tested in later chapters.

Now that the nature of parody is better understood, we have the subject-matter for our parody exception. The following chapter examines the legality of the introduction of a parody exception in national law before turning to determining the scope of the exception[207].

---

[204] Illustrations in musical parodies: chapter 6.

[205] N.B. post-*Campbell*, US courts only apply the parody exception to 'parody of' (target parodies) not 'parody with' (weapon parodies); supra note 153.

[206] This is also supported by the CJEU addition of 'mockery' along to 'humour'. See supra note 141.

[207] Ultimately, it is the factors which determine whether the exception applies which counterbalance the broad interpretation of the exception's purpose to narrow its scope: section 3 chapter 3.

Chapter II: Legality of the Parody Exception in Light of International Treaties and Domestic Copyright Laws

Introduction

A parody exception may only be introduced into national copyright law if it satisfies what is known as the Three-step Test. This test, rooted in international treaties and supplanting national laws, ultimately delineates the scope of all copyright exceptions and limitations[208].

This chapter evaluates whether the parody exceptions introduced in the Study countries satisfy the Three-step Test of international law. To do this, section 1 revisits the theoretical justifications for a parody exception within copyright law. Sections 2 studies the Three-step Test at international level while section 3 considers its role within EU law. Finally, section 4 appraises the parody exceptions of the relevant national laws against this mandatory test.

1. Why is a specific parody exception needed?

As the first step towards understanding whether the national parody exceptions satisfy the Three-step Test, this section unpicks the justification for a specific exception for parody (subsection 1.1). Given the different legal

[208] N.B. There is no agreement whether 'exceptions' and 'limitations' are separate notions. While the WT/160/DS panel report delineates the terms, the literature uses the terms interchangeably. TRIPs Agreement, WIPO Treaties and the Directive join both terms one next to each other without definition. The Recitals of the Directive reinforces the interchangeability of the terms. It is submitted that this is likely to be the result of a compromise between the different legal traditions. This thesis treats the terms synonymously to refer to specific defences which prevent right-holders from exercising their exclusive rights in certain circumstances, i.e. leaving aside the idea/expression dichotomy, the originality requirement, the term of protection and the first sale doctrine. Galopin 2012, p. 8; Kur 2008, pp. 1-48; Dusollier 2007, p. 426; P. El Khoury, *Les exceptions au droit d'auteur* (thèse Montpellier, 2007), p. 25.

traditions of the Study Countries, a brief comparison between the structure of common law and civil law copyright is undertaken (subsection 1.2).

1.1 History of copyright law

The emergence of copyright is commonly paired to Gutenberg's invention of mechanical printing in the fifteenth century, which facilitated low-cost copying of written works throughout Europe[209]. As a result of the growth of the printing industry and the popularity of books which followed this invention, the British Monarchy assumed the right to grant royal printing privileges to print books lawfully in return for a payment. This practice not only enriched the Crown coffers, but it created a legal instrument of control to censor which works were printed. Over time, these privileges evolved into monopolies controlled by a collective association for printers: *The Stationers' Company*. The Crown delegated its authority to *The Stationers' Company*, and the law required that all printed works must be registered with this association[210].

A turning point occurred when *The Stationers' Company*'s charter was not renewed, and it was replaced by the *Statute of Anne* enacted by the Parliament in 1709[211]. This Act sought to end the grant of royal privileges and censorship, by vesting the exclusive right to print books to their authors for a limited period of time[212]. This first 'copyright' law[213] was the result of social, political

[209] On the history of copyright: Hofman 2009; Deazley 2006; Senftleben 2004, p. 7; Goldstein 2003; Stamatoudi 2001, pp. 6-9; Guibault 2002, Chapter 2; Davies 1994, pp. 19-23; Patterson 1968, pp. 3-179.
[210] Copinger & Skone James 2010, Chapter 2.
[211] Statute of Anne 1709. This was not a clear break as described by Bently 2010, p. 11.
[212] It is noteworthy to repeat that the Statute of Anne is not only the first copyright law but it had considerable influence on common law systems around the world such as the USA, Canada and Australia.
[213] Caution must be taken when using the statement 'first copyright law'. The Statute of Anne is a milestone for the British copyright and other countries but this does not mean it was the first one in the world. Bently 2010, p. 7; Vaidhyanathan 2001, p. 40.

and economic considerations[214], based upon newly-emergent utilitarian principles. The latter may be summarised as acknowledging the financial investment needed to create and publish new works. Allocating private rights to control and be remunerated for commercial exploitation of works stimulates further creation[215], simultaneously furthering social-based aspirations. It is in the public interest to encourage authors to disseminate their published works widely, and create new works.

Similar printing privileges existed in mainland Europe[216]. These were abolished following the French Revolution, and replaced by what are termed 'authors' rights'. Authors' rights are anchored primarily in natural law considerations, rather than being premised upon economic considerations. Pursuant to natural law principles[217], positive law merely recognises the natural rights an author has to control all uses of their work. Authors' right enjoy a special status as inviolable and sacred because they derive from the unique bond connecting an author to their work, which is seen as representing a materialisation of their own personality[218].

A full history of copyright law is older and more complex than that of mechanical printing, and would require an interdisciplinary analysis in fields including legal theory, economics and philosophy. Additionally, the utilitarian/natural law dichotomy described was never hermetic. There are

[214] Cornish 2010, p. 21.
[215] This approach reflects Adam Smith's theories i.e. exclusive rights granted through copyright to right-holders is necessary to circumvent market failure resulting from free-riders. Additionally, these private transactions within the market not only serve the needs of those individuals, but further society's goals too. For more: Gaudrat 2001, p. 71; Smith 1776.
[216] Petri 2010, p. 111; Geiger 2010, p. 124.
[217] This is based on John Locke's theory that as an individual owns himself, a person also owners of their own work, which is a materialisation of himself. This notion of property is philosophical, not legal, with the result that a person only has an exclusive right on their work, and not an absolute monopoly. See further: Dusollier 2007, p. 219; Locke 1690, chapter5, s. 27.
[218] Desbois 1978, p. 538.

signs of purely economic considerations in author's rights, just as there is clear evidence of the natural law within the common law[219].

Adopting the position posited by Dusollier[220] and Habermas[221], copyright is closely link to the notion of *public sphere*, which emerged in the eighteenth century, and advocates public use of one's *reason*[222]. In this context, literary works are not the sole preserve of scholars, but belong to a broader, middle-class public which gather in coffee shops and public spaces to discuss and criticise cultural works. Dusollier identifies a causal link between the creation of works, the use of reason and the public sphere. Indeed, a virtuous circle is created. Works disseminated among the public are discussed and criticised, and foster new works as a result. These, in turn, are disseminated to the public, criticised and so on. It is from this link between dissemination and creation that the need to grant exclusive rights to the author arises, but at the same time there is a need to protect this public sphere too, and contribute to its maturation. Despite other differences between civil law and common law traditions, the social value in preserving public sphere is recognised in both[223]. Ultimately, it is this public sphere which moderates the extent of the property rights granted to the author, because it is the fulcrum which balances the author's interests and the interests of the public.

---

[219] Dusollier notes that the editors referred to John Locke's theories to support their position at the moment of the adoption of the Statute of Anne. Dusollier 2007, p. 217.

[220] ibid.

[221] ibid, p. 220; Geiger 2004a, p. 883; Habermas 1962.

[222] Dusollier reports that this even led philosophes such as Kant believe that this public use of reason is inseparable of the creation of the work. Ultimately this marks the importance of this public space on the creation of works. Dusollier 2007, p. 220.

[223] Even in common law legal tradition, this superior goal is contemplated as shown by the social consideration to balance the economic consideration justifying copyright. Netanel notes that if copyright is thought as merely market driven than copyright protection sets the right-holder in a monopolistic position which increases copyright owner censorship and heavy tax on users resulting in flawed cultural diversity. Here, copyright law departs from the public sphere paradigm towards a market paradigm. Netanel 1996, p. 341.

Since the eighteenth century, Habermas identifies a societal shift from a public sphere of literature to a *domain of leisure*[224] associated with the development of mass media. Now, the public sphere is one controlled and manipulated by the media. A public which would have traditionally discussed literary works changes into a public *consuming* cultural works[225]. This results in a 'market' for cultural works which is subject to the market rules of supply and demand[226]. But this shift does not mean that the public sphere, where the middle class's discussion of literary works balances the powers of the state, has vanished[227]. Rather, it is revamped into a new, wider public sphere. Cultural goods are still consumed for their political function, but mostly for their communication and creative dimensions. This has been intensified by the advent of modern technology by which access to works, and the possibility of reworking them, is facilitated. This new public sphere values works created by this appropriation and transformation to such an extent that for many individuals it becomes a daily habit for their own social welfare. It is through this appropriation and modification of existing cultural materials that the public creates and expresses its identity, opinions, values and allegiances. This has led commentators including Dusollier, Netanel and Wong to conclude that the evolution of this 'information society' marks the rebirth of discursivity, against mass media's attempts to control society[228].

---

[224] Habermas 1962, p. 159.

[225] Gaudrat 2001, p. 73.

[226] As Gordon emphasised, in this particular market there is the hope that right-holders, publishers, creators and consumers will enter in transactions to disseminate the works and simultaneously provide an incentive to create additional cultural goods. Gordon 2003, p. 157. But cultural goods have two features which depart them from regular goods. First, the fact that somebody uses a cultural good does not prevent somebody else from using it too neither does this usage decrease the value of the good. Second, cultural goods are shielded from exclusivity meaning that a right-holder is not able to exclude someone else from using its goods. For more: Netanel 1996, p. 292; Gordon 1982, p. 1610.

[227] Dusollier 2007, p. 228.

[228] Wong 2009, p. 1075; Dusollier 2007, p. 229; Netanel 1996, p. 283; also supported by *Telstra Corporation Ltd v. Australasian Performing Rights Association Ltd* (1997) 191 CLR 140, [185] (Kirby J.).

Given this evolution of the role of creative works, it is reasonable to question why copyright is important and what functions it fulfils in this information society of today. While cultural works may have transformed into market commodities, the ultimate goal of preserving a public sphere where people may access, discuss and criticise cultural works remains fundamental. Technological developments now permit a far wider public (arguably every individual, and not just a particular class of society), to participate in the public sphere. Yet, the revisions made to the copyright laws over the last fifty years undermine this rebirth of cultural exchanges and appropriation of works for political, educational or creative purposes. Its strengthening of exclusive rights of right-holders reflect a protection of mass media interests, and results in the creation of monopolies for right-holders at the expense of future authors[229]. Hence, copyright legislation is still fundamental in fostering creativity, as it still incentivises the investments needed to create and disseminate works, but also to allow the authors to control their works to some extent. Not only does copyright protect when an author releases their work to the public, it also functions as a gatekeeper, so that right-holders and authors may object to unauthorised modification or attacks to the integrity of their works[230].

Parody has consistently contributed towards the flourishing of the public sphere, as described by Habermas, as the conveyance of ideas, opinions and criticisms relating to previous works, society, another author or the parodist themselves[231]. From a contemporary perspective, parody is an exercise of an individual's freedom of expression[232] because of the commentary it conveys. So, while copyright protection serves an important role in encouraging new

[229] Desbois describes this as a new kind of censorship. Desbois 1978, p. 322.
[230] On moral rights: chapter 4.
[231] Supra section 1 Chapter 1.
[232] Section 2.2 chapter 5; Netanel 1996, p.376; *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] SCC 34, [30-1].

works, it is vital that in doing so copyright law recognises, rather than frustrates, the socially valuable category of new works which is parody.

A parody exception in copyright law seeks to strike the appropriate balance between right-holders, users and subsequent authors. Copyright law should be crafted to permit others to appropriate existing works which have already been widely disseminated and socially accepted, to rework them, and to create new works which contribute to greater social welfare overall. A parody exception should enable the creation and protection of parodies, but it also needs to have limits. Some appropriation made by a parodist may not provide social value because of the nature of the expression being made. In these instances, it may prove necessary to protect the interests of the author of the original work over those of the parodist.

1.2 Legal traditions: common law & civil law jurisdictions

Having identified the broad rationale of a parody exception, it is necessary to evaluate whether a difference in legal tradition may affect the approach adopted in the implementation of a copyright exception in the Study Countries.

Common law and civil law conceptions of copyright law are underpinned by different philosophical foundations. Copyright law in common law countries relies upon on utilitarian justifications[233]. Exclusive rights are granted to those who invest in the creation and dissemination of creative works to encourage creativity because society benefits from having access to such works. Accordingly, common law countries (UK, Australia and Canada) construct copyright laws to grant exclusive rights which are as limited as possible, because these are only instrumental to achieve the desired result. From this perspective, copyright exceptions provide a 'breathing space' to foster third

[233] On the utilitarian approach: Senftleben 2004, p. 12; Guibault 2002, p. 10.

party uses involving a protected work which are likely to afford more benefit to society than would be obtained by permitting the right-holders to control such uses. This is realised through the adoption of exceptions for 'fair dealing'. This approach seeks to exclude certain unauthorised, but socially beneficial, uses of a protected work from infringement, provided that the use is objectively fair[234].

In contrast, in civil law countries (France), copyright law is founded upon natural law principles, which recognise the unique relationship between the author and their work[235]. From this perspective, exclusive rights are not granted to further interests of society, but to ensure that the author secures financial benefit from use of their works, and retains control over how the works may be exploited. Historically, copyright law in the civil law tradition included few exceptions, and required[236] these to be interpreted strictly to promote legal certainty[237].

Hence, it is presented that the author's interests prevail over the public interest in civil law countries, whereas the author's interests are perceived to be more fairly balanced with the public interest in common law countries. Yet, this image is an over-simplification[238]. Indeed, the public interest concerns underpin all copyright laws[239] irrespective of the underlying legal tradition.

---

[234] Galopin 2012, p. 160; Kur 2008, p. 9; Geiger 2004c, p. 246; Lepage 2003, p. 3; Guibault 2002, p. 15; Lucas 1998, p. 173.

[235] This follows Locke's theory where resources are free and abundant in the world (just like ideas) and if a person combines the resources with his personal efforts (his creativity), the result is something that he owns property over (copyright is a property right). The protection is acquired by the sole creation of the work and the law simply recognises the property right lying in the work.

[236] Arguably, this is still the case: section 2.2 chapter 3.

[237] Caron 2012, p. 24; Galopin 2012, p. 160; Dusollier 2007, p. 215; Geiger 2004c, p. 224; Senftleben 2004, p. 22; Guibault 2002, p. 15; Lucas 1998, pp. 171-3.

[238] Dusollier 2007, p. 448.

[239] Gervais 2008a, p. 5; Geiger, Griffiths & Hilty 2008, p. 708; Geiger 2004c, p. 226.

These are present in both utilitarian and natural law-based philosophies,[240] and have been further honed by the adoption of international treaties and agreements which cross legal traditions[241].

Similarly, common law and civil law countries have lost their flexibility owing to the numerous amendments made to copyright laws which have gone beyond what is necessary to respond to technological changes[242]. These legislative changes have typically resulted in an expansion of works covered by copyright law's protection, extension to the duration of protection, and increase in activities which fall within the exclusive rights of the copyright owner. As a result, there is a call for more copyright exceptions to preserve or re-instate the public interest in light of copyright's now-greater exclusive rights[243]. Copyright law grants exclusive rights placing right-holders in a monopolistic position for a time-limited period. But even while a work still enjoys copyright protection, there are legitimate circumstances where copyright exceptions should preclude rights-holders from enforcing their rights to prevent unauthorised uses[244]. Generally, copyright exceptions are motivated by the social, cultural and economic needs of a particular jurisdiction[245], either to foster cultural diversity or to preserve the public interest[246]. Concurrently, exceptions assist to define the scope of exclusive

[240] Senflteben 2004, pp. 7-10; Guibault 2002, p. 8; Davies 1995, pp. 964-89. Yet Geiger notes a drawback of natural law considerations. Geiger 2015, p. 123.
[241] Sherman and Bently 1999.
[242] Vaidhyanathan 2001; Strowel 1993, p. 149.
[243] Caron 2012, p. 21; Ricketson 2003, p. 3; Lepage 2003, p. 32; Gervais 2005b, pp. 1-36; Kur 2008, p. 4; also in *Théberge* supra note 232, [30-1].
[244] Lepage 2003, p. 1.
[245] In WIPO 1886, Berne Convention Centenary 1986 (Geneva 1986) p. 195; Preamble of WCT 1996.
[246] Consideration also has to be given to the fact that limitations on absolute protection are dictated, quite rightly, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses. *WIPO 1886, Berne Convention, Centenary 1986* (Geneva 1986), 195.

rights with greater precision, but exceptions are also essential to strike an effective balance between competing interests at a national level.

2. The international Three-step Test

The introduction identified the Three-step Test of International copyright law as an instrument to guide national legislators in the crafting of any copyright exceptions within their legal systems. This section first explains the provenance of this instrument (section 2.1), and then delineates its meaning (section 2.2).

2.1 International texts

The Three-step Test is currently enshrined in four international treaties: the Berne Convention ('Berne')[247], the TRIPs agreement ('TRIPs')[248], the WIPO Copyright Treaty ('WCT')[249] and the WIPO Performances and Phonograms

[247] Article 9(2) Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 as amended at Paris on September 28, 1979.

[248] Agreement on Trade-related Aspects of Intellectual Property Rights of 1994; Annexe 1C to the Agreement Establishing the World Trade Organization, 15/04/1994. This shift also had the consequence to depart from the natural laws influence dominating the Berne Convention to utilitarian considerations such as primarily economic justifications to copyright. It is with Article 9(1) that part of Berne has found a new youth as the WTO Member States have to comply with articles 1-21 of Berne; articles 13 (which expands the test to all exclusive rights), 17 (trade marks), 26(2) (industrial designs) and 30 (patents) TRIPs. This repetition of the test by the reference to Berne and the specific provision in TRIPs led Senftleben to conclude that the test not only extends the tool to all exclusive rights but also functions as an *additional* safeguard for the exceptions admitted under Berne. Senftleben 2004, pp. 90, 121 & 155; Ricketson 2003, pp. 47, 49 & 52.

[249] Articles 1(4) and 10(1)-(2) WCT of 20/12/1996. Insofar as the Three-step Test is generally restrictive to the exceptions which satisfy the test, the Three-step Test in WCT is permissive to exceptions by noting that exceptions are not limited to those complying with the test. Christie & Wright 2014, p. 431; Dusollier 2005, p. 25; Senftleben 2004, p. 106; Ricketson 2003, pp. 57-63; Ficsor 2002, pp. 60-1; Agreed Statements Concerning the WCT, *Statement Concerning Article 10*, WIPO Diplomatic Conference, WIPO Doc. No. CRNR/DC/96 (1996).

Treaty ('WPPT')[250]. In sum, the Three-step Test has become fundamental to the introduction of any new copyright exception into national law[251].

Berne, the first international copyright treaty, was adopted to harmonise the national copyright legislation of signatory parties to provide a minimum level of protection to authors. Berne was amended in 1967 to strengthen copyright by introducing the exclusive 'right of reproduction'[252]. The Three-step Test appeared for the first time to preserve this right. There was concern that unless some limit was placed upon the exceptions which national legislators could adopt, the overall objective of the right would be undermined. The Three-step Test thus had a double objective: to recognise exceptions already present in national legislation and to direct legislators in what new copyright exception could be introduced[253]. This dual purpose explains why the test itself, set out below, was drafted in such an open[254] manner:

> [I]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[255]

Yet as the drafters failed to provide any interpretation guidelines, or to establish any mechanism within Berne to settle disputes or oversee compliance of exceptions with the Three-step Test, a multitude of interpretations resulted.

As time passed, the signatory parties felt the need for greater harmonisation, but as the number of signatories to the convention grew, the possibility of

[250] Article 16(2) WIPO Performances and Phonograms Treaty of December 20, 1996.
[251] Kur 2008, p. 16; Gervais 2008a, p. 25; Sun 2007, p. 268; Gervais 2005b, p. 13; Senftleben 2004, p. 67.
[252] Reproduction right was already present but not fully recognised before 1967. Geiger, Gervais and Senftleben 2014, p. 584.
[253] Dusollier 2007, p. 436.
[254] Koelman 2006, pp. 407-12.
[255] Art 9(2) Berne Convention.

reaching an agreement became increasingly more difficult. A solution was presented with a shift of forum from WIPO to WTO, and the adoption of TRIPs. While Berne's primary focus is protection of literary and artistic works, TRIPs' establishment of international minimum standards of intellectual property protection is market-based, as the WTO is concerned with provisions necessary for international trade[256].

Another significant difference with Berne is that a Dispute Settlement Body ('DSB') oversees compliance with TRIPs, including the copyright provisions, and the Three-step Test[257]. To-date, one WTO Panel decision relates to section 110(5) of the US Copyright Act, which has shed some light on interpretation of the Three-step Test[258]. This decision has been heavily criticised for being too market-orientated. As it overlooks the policy considerations justifying an exception, it is perceived as failing to fairly balance the right-holders' and the public interest[259].

The growth of the Internet, and its implications for copyright law led to the adoption of the WIPO Internet Treaties (WCT & WPPT). These expanded the range of the exclusive rights reserved to the right-holder, and similarly, by reiterating the Three-step Test, permitted national legislators to extend copyright exceptions to operate within the digital environment[260].

[256] This explains why moral rights are left outside the scope of the treaty compared to the Berne Convention for example. For more: Sundara Rajan 2006, chapter 1.
[257] Therefore, there is a bigger coercive force of the TRIPs Agreement compared to the Berne Convention. WTO Document WT/DS160/R, [6.74].
[258] However, there were also two decisions in the fields of patents and trademarks. WTO Documents WT/DS114/R and WT/DS174/R.
[259] However, this is justified by the forum we are in WTO. Kur 2008, p. 46; Geiger, Griffiths & Hilty 2008, p. 707; Dusollier 2007, p. 445; Ginsburg 2001.
[260] Sun 2007, p. 277; Sundara Rajan 2006, pp. 22-5.

Whilst the wording of each Three-step Test is very similar, it is erroneous to believe that the different provisions carry the same obligations[261]. Seemingly, national legislators are required to comply with the test in each instrument, before enacting any new specific exception.

With this appreciation of the context, the following section attempts to determine the meaning of the Test(s).

2.2 Interpretation of the test

While the exact meaning of the Three-step Test still remains uncertain today, there are some aspects on which there is wide agreement. For example, there seems little doubt that the test comprises three distinctive steps, and these are cumulative[262]. While several interpretations of this test have emerged at international level[263], and are discussed herein, this section does not aim to provide a comprehensive examination of each of these, as this would exceed the scope of this thesis[264].

[261] A comparison undertaken led to the conclusion that there is not *one* Three-step Test but 'eight different stepped tests' at international level. Christie & Wright 2014, pp. 409-33.

[262] Records of the Intellectual Property Conference of Stockholm, *Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1-20)*, (1967) 11/06/1967-14/7/1967 Volume II, p. 11456; Geiger 2007, p. 5; Sun 2007, p.267; Dusollier 2005, p. 214; Geiger 2004, p. 253; Senftleben 2004, p. 125; Ricketson 2003, p. 21; Lepage 2003, p. 6; Reinbothe & Lewinski 2002, p. 124. However, trying to insert some flexibility within the test, Geiger and al. argue that the test should be 'considered together and as a whole in a comprehensive overall assessment' Geiger, Griffiths and Hilty 2008, p. 711. This is vividly criticised by Lucas. Lucas 2010a, p. 281.

[263] The same statement can be transferred to national decisions on the interpretation of the Three-step Test in the field of copyright. If one had to have a look at the different national decisions, one will see that the decisions are far from speaking with one voice. National courts have adopted different interpretation during the years and these also depart from the panel copyright report.

[264] These subsections will therefore mostly rely on the principles of interpretation provided in Vienna Convention on the law of treaties of 1969 ('VCLT'), the Panel decision and literature. For a detailed study of the Three-step Test, Senftleben 2004.

2.2.1 Certain special cases

The first step of the Three-step Test is that exception to exclusive rights may only apply in 'certain special cases'. Based upon textual and subjective approaches to interpretation, the following interpretation is generally supported[265]. National legislators must firstly ensure that any exception is directed to a limited number of situations only, as assessed quantitatively[266]. Secondly, there is a qualitative aspect: the 'special' purpose of an exception must be determined in advance[267]. This interpretation is supported by the context of the Test in Berne, given its dual objective to recognise existing national exceptions, and to provide guidance if further exceptions were deemed necessary to deal with specific national cultural, social or economic needs. Therefore, it appears reasonable that the objectives of the introduction of a new copyright exception must be taken into consideration.

Yet, this is at odds with the WTO Panel decision[268], which only considers the quantitative aspect. The DSB is believed to have focussed only on the quantitative assessment of the provision,[269] because consideration of the

[265] Article 31(1) VCLT: general rule of supremacy to text of the treaty in the context of the whole treaty and in light of its object and purpose.

[266] 'Certain' has two ordinary meanings. A qualitative sense: 'determined, fixed, settled; not variable or fluctuating' and a quantitative sense: 'of positive yet restricted (or of positive even if restricted) quantity, amount, or degree; of some extent at least'. Definitions from the *OED*. There is a common understanding that the later meaning prevails. In addition to the ordinary meaning, this interpretation is supported by the intention of the drafters. Geiger 2004, p. 253; Senflteben 2004, pp. 134-5; Ricketson 2003, p. 63; Reinbothe & Lewinski 2002, p. 124; Ficsor 2002, p. 129.

[267] Through the ordinary meaning of 'special'.

[268] The decisions of the DSB are binding the parties of the dispute but there are considerable doubts as their authority beyond the dispute in hand. Dusollier 2007, p. 446. This is not to hinder the importance of the study of the decisions. To the contrary, signatory parties may look up to these decisions to understand the interpretation of the test resulting in a consolidated practice of how the test has to be understood. Kur 2008, p. 33.

[269] By doing so, and facing a practical difficulty of calculating the number of cases likely to be relevant pursuant to the exception under scrutiny, the DSB relied upon estimates submitted by the parties to the dispute.

qualitative aspect might be seen as too much interference with the national sovereignty of its members[270].

While this interpretation is understandable given the context in which it arose (WTO – economic-centred), it should not become the definitive interpretation of this first step. In addition to the support from Berne that a combined quantitative and qualitative approach is required, as the 1996 WIPO Diplomatic Conference also stressed the importance of protecting societal values, it is submitted that this condition cannot be 'policy blind'. It is implicit that any national legislator introducing a copyright exception is faced with reconciling opposing interests. These interests may only be balanced by having a specific public policy clearly stated, so that the exception secures values which are important to the relevant society[271].

In light of the above, it is submitted that exceptions must be confined to 'certain special cases' in the sense that it will only apply to a minority of uses in specific, stated circumstances, in contrast with unshaped exceptions. This begs the question whether parody is a certain special case in the sense of the international treaties? As already mentioned and further described in section 4, the wording used by the national legislators of the Study Countries inherently limits the application of the exception to specific circumstances of parody, pastiche, caricature or satire. Therefore, these purposes are likely to represent a number of limited unauthorised reproductions of works. But the exception also has the correct qualitative attributes as delineated in chapter 1. Finally, at the time of the conclusion of Berne, some countries already had a parody exception within their national copyright law[272]. As the drafters could not agree on a list of circumstances where reproduction would not become a

[270] Dusollier 2007, pp. 446-7.
[271] Gervais 2008a, pp. 25-7; Senflteben 2004, p. 146; Ricketson 2003, p. 25.
[272] This is the case for France which adopted the exception in 1957.

copyright infringement, they have adopted the vague formula of article 9(2) BC to recognise the existing exceptions and guide the adoption of new exceptions.

In sum, this requirement enables the study of the existence of an exception in light of its policy objectives. The parody exception ultimately satisfies this first criterion if the legislatures provide strong justifications to back up their decision to adopt such exception.

2.2.2 Conflict with the normal exploitation

The second step requires that the exception does not conflict with the normal exploitation of the work. Given the importance of this requirement, the scope of this second step still leads to animated debates among scholars and stakeholders. The main issue is whether non-policy arguments should be taken into consideration at this stage[273]. Despite the market-based imprint of the Panel decision, the DSB endorsed a normative approach to this second step[274], even though in that particular case it only applied an empirical approach to the facts at stake. This latter implies that the market for the type of work seeking benefit from the exception must be measured against that of the protected work, and an assessment made whether an exception is likely to cause significant harm to exploitation of the protected work, based upon actual or potential markets[275]. But equally, 'normality' can be appreciated qualitatively and normatively via a consideration of non-economic elements, including the public interest or fundamental rights concerns attached to

[273] For: Senftleben, Geiger, Griffiths, Hilty *contra* Bornkamm, Ricketson, Lucas.
[274] At 6.166: 'In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. … [W]e will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of "normal"'.
[275] Senftleben 2004, pp. 182 & 194.

certain exceptions. Therefore, it is submitted that this step should be assessed by balancing the likely economic impact of the exception on the market of the original with the significance of the values on which the exception is based[276].

This second step also needs evaluation within the context of the digital environment. Although Berne only deals with exploitation of 'hard copy' works, it still provides context to guide an appreciation of this step when considering the digital revolution. Firstly, Berne provides strong protection of the reproduction right. This is exemplified by the failure to harmonise a private copying exception, despite the social value which such an exception provides. Transposed to a digital context, Senftleben notes that a reproduction right in the digital era enables right-holders to exploit and control new uses of protected works which establish entirely new markets for right-holders, which would not have been envisaged at the time the work was created. Conversely, potential markets which never emerge because of opposition by right-holders fall outside the scope of this step[277]. Secondly, it is submitted that 'normal exploitation' does not encompass any use which a right-holder can monitor[278]. Again, by analogy with the private copying exception, the study group at the Stockholm conference made special note that 'normal exploitation' only implies that an exception which captures a very large number of unauthorised copies will not be permitted[279]. It can be inferred that an exception which gives rise to a small number of unauthorised copies should pass this step[280]. Accordingly, it seems reasonable to conclude, in both analogue and digital environments, that a conflict with the normal exploitation of a work occurs

[276] At 6.181; Later, the diplomatic conference in relation to the WIPO Internet treaties repeated the need of a fair balance between the interests of the right-holder and the public interest which is even more important as the WCT deals directly with the challenges presented by the growth of Internet; Ricketson and Ginsburg 2005, [13.21]; Senftleben 2004, pp. 177-84.
[277] Senflteben 2004, p. 180.
[278] Kur 2008, p. 26; Senflteben 2004, p. 181.
[279] Supra note 262.
[280] This echoes the conclusion reached in the Panel decision, [6.183].

when a right-holder is deprived of an actual or potential market of considerable economic importance. This is influenced by the likelihood that remuneration for an activity falling within the exception would constitute a major source of income, and thus form part of the economic core of copyright[281]. Whether or not activities would provide a major source of income may be determined by studying the overall commercialisation of works of a category affected by the income in question.

Does a parody conflict with the 'normal' exploitation of the original? It is submitted that it does not. Primarily, it is questionable whether parodies even fall within the market considered for the appreciation of this step. Rather, parodies would seem to constitute a separate market, which is failing to fulfil its potential. From an economic perspective, there is strong support for an exception because it is the right-holders' use of exclusive rights which is hindering the emergence of this new market[282]. Here, right-holders generally refuse to license a work for a parodic use[283]. This is detrimental because, the possibility to extract further value from an existing work is lost, and the new market is not one which the right-holders are able to fulfil for themselves. Additionally, it has been seen that normative considerations also provide strong support for a parody exception. As embodiments of artistic expressions, parodies are protected by fundamental rights[284]. As such, parody is endorsed

[281] Senflteben 2004, p. 193.

[282] See empirical study on the impact of music parodies on the exploitation of works undertaken by Erickson. K. Erickson, *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube* (2013) available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAAahUKEwjP1P_a0sTIAhWBGD4KHUgUAiM&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F309900%2Fipresearch-parody-report1-150313.pdf&usg=AFQjCNE_eGs1HnNL7-KHAkuDO8TRoinl7A&sig2=oHI5Wgb_TV7Vb-T4yhm9Fw&bvm=bv.105039540,d.d24 (access date 15/10/2015).

[283] Perhaps owing to personal considerations, such as the negative reputation associated to parodies arising during the Enlightenment.

[284] See chapter 5 for full consideration.

by any democratic society which also constitutes a market of its own. Yet without the exception, the market for parody works is atrophied[285].

Secondly, even if one considers that parodic uses should fall within the scope of exclusive rights of right-holders, it remains unlikely that licensing revenue derived from parodies would ever constitute a major revenue stream for right-holders[286]. Yet, there might be situations where the message conveyed by the parody is such as to kill demand for the original work[287]. Here, the consequence of parody may deprive a right-holder of revenue which they might have otherwise derived from 'normal' exploitation of their protected work. While this might be unfortunate (or deserved) in any particular case, it is not what should be considered when assessing the second step. This loss of revenue is not the result of the parody acting as a substitute for the original on a particular market. The effect of criticism or comment conveyed by a parody falls outside the scope of protection which a right-holder enjoys. Copyright laws should not be used to determine whether criticism should be allowed or not[288]. Furthermore, such a negative impact on commercialisation of the original will only occur in rare cases. It is not valid to decide whether an exception should exist based upon the potential for some negative impact on right-holders in exceptional cases.

---

[285] Lepage 2003, p.3.

[286] Ginsburg 2001, p. 14.

[287] The literature infers that the negative economic harm in the sense of the second step of parodies upon the original work has not been established until now. K. Erickson, M. Kretschmer and D. Mendis, *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options* (IPO, 2013) available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCYQFjAAahUKEwjtsq3w1MTIAhWJFj4KHSn6AUk&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F309903%2Fipresearch-parody-report3-150313.pdf&usg=AFQjCNH5i4-Ops02XyYTytMVX6sMG8JUxw&sig2=FbMDwmhk5tkHDH2OkkLsQQ (access date 15/10/2015); Rogers and al. 2009, p. 6.

[288] Deazley 2010, p. 794; Suzor 2008, p. 220.

Finally, it must be kept in mind that even in a rare case where a parody is competing in the same market as the original (as may be the case in a parody of a parody), the very nature of a parody establishes that it is not a substitute for the original[289]. On the contrary, the existence of a parody may enhance the demand for the original work. A parody may raise awareness and contributes to dissemination of the original. The non-substitutability means that consumers may purchase both the parody and the original. Further, the message conveyed by the parody may have a positive reputational effect upon the original.

In conclusion, a parody exception should satisfy the second step, because parodic works do not encroach upon the economic core of the exclusive rights which copyright affords to protected works.

2.2.3 Absence of unreasonable prejudice to the legitimate interests of the author/right-holder

The third step requires that an exception may not unreasonably prejudice the legitimate interests of authors and right-holders[290]. Three issues must be considered to measure whether a parody exception is likely to satisfy this last step: firstly, whose interests are to be considered; secondly what interests are legitimate; and finally, how might these interests be prejudiced unreasonably[291]?

Firstly, the interested parties depend on the treaty concerned. While Berne and WCT refer to the author, it is commonly accepted that this interest extends to

[289] Supra note 282; See section 3.3 chapter 3.
[290] While Berne and WCT refer to the author, TRIPs refers to right-holders.
[291] This step also offers the possibility for signatory parties to introduce an equitable remuneration. It is the author's opinion that no equitable remuneration or compulsory license should be provided for the parody exception. Such remuneration would have the negative consequence to set a price on the exercise of fundamental freedoms. Therefore, equitable remuneration is not studied here.

any subsequent right-holders. Conversely, pursuant to TRIPs, the Test only considers the interests of right-holders. This explains why author-only interests, such as moral rights, were not considered by the DSB in the Panel decision[292].

Secondly, it is reasonable to conclude that this step aims to consider interests other than a work's normal exploitation (considered under the second step). From an economic perspective, any exception will hamper the possibility to generate revenue to some extent, so potentially all sources of income should be considered[293]. But this step should also take account of non-economic interests, particularly moral rights[294].

Thirdly, the fact that the prejudice caused must be 'unreasonable' indicates that some level of prejudice must be tolerated. This suggests that any harm created by an exception must be proportionate to the objectives sought. Here, uses which ought to be beyond the control of right-holders - because of some valuable justifications under the rationales of copyright law like the preservation of freedom of expression- imply that the exempted area is not unreasonably prejudicing the legitimate interests of the author[295].

In conclusion, it is not because a use must be allowed via the existence of an exception (as it responds to important social, cultural and economic needs of a society), that the interests of right-holders must not be considered and weigh fairly[296].

---

[292] Unless otherwise specified, 'right-holder' in this section encompasses both 'author' and 'right-holder'.

[293] This differs from the second step where only major revenue stream is considered. Supra section 2.2.2 chapter 2.

[294] Except under TRIPs where moral rights are not part of the scope of the treaty, article 9(1) TRIPs. For a detailed analysis of moral rights in relation to the parody exception, see chapter 4.

[295] Senflteben 2004, p. 230; see chapter 5.

[296] Gervais 2005b, pp. 18-9; Ricketson 2003, p. 27.

How is this proportionality test [297] carried out in relation to a parody exception? On one hand, the economic interest presupposes that a right-holder is entitled to remuneration for all uses made of their work. If a parody exception is in place, those (few) right-holders who are willing to license their work for the purpose of parody are deprived of a revenue stream [298]. Additionally, authors have a legitimate interest in protecting their moral rights, which are specifically recognised in Berne. As discussed in chapter 4[299], a parody might violate an author's right of integrity, so an author has a legitimate interest in preventing any derogatory treatment of their works.

Conversely, the justifications supporting a parody exception identify that this exception is important to preserve the public interest within the copyright paradigm. Parody represents a fundamental value in a democratic society, as well as respecting individual rights of free expression. It is further supported by economic arguments arising from market failure as a result of right-holders' reluctance to license works for parodic purposes, meaning that any market demand for parody goes unsatisfied, or may only be satisfied by unlawful use.

On balance, it is submitted that a parody exception should satisfy the third step as well. This is not to say that when considering whether a particular use should benefit from the exception, it should be presumed automatically that the balance of the interests necessarily tilts in favour of the parodist once a parody exception is place. Indeed, as the harm cannot be unreasonable, national legislators drafting a parody exception should draw courts' attention that the exception does have limits in order to protect the interest of the right-holder. For example, the harshness of a criticism conveyed by a parody might

[297] Geiger and al. 2015, chapter 5, esp. p. 176.
[298] It even more so since the advent of technology which allows right-holders to monitor more easily the uses made of their work.
[299] See section 2.3 chapter 4.

require some additional safeguards, either through requirements attached to the exception itself, or by enforcement of moral rights[300].

2.3 Conclusion

The precise contours of the Three-step Test at international level still arouse passions and controversies. This section concludes that these uncertainties at the periphery do not impact upon a parody exception, which readily satisfies the Three-step Test. Although this section has considered a parody exception in an abstract manner, the analysis already provides some insight into how national legislators ought to respect their international obligations, to ensure that the particular form of exception introduced into national copyright law is not excessive. The following section considers the meaning of the Three-step Test at European Union level, as a precursor to considering the specific parody exceptions in each of the Study Countries.

3. The Three-step Test in the Directive

The Directive aims to harmonise certain aspects of copyright (and related rights) throughout the EU, as well as implementing the WIPO Internet treaties within the EU legal order[301]. The Directive aimed to strengthen and harmonise the exclusive rights of reproduction[302], communication to the public[303] and distribution[304], while recognising national initiatives to introduce related exceptions, adding these to the *acquis communautaire*. Essentially, differences between national copyright legislations could be exploited to harm the

[300] See section 4 chapter 2 for the exception at national level; section 3 chapter 3 for the requirements attached to the exception and chapter 4 for the interaction with moral rights.
[301] The preparatory works concerning the adoption of the Information Society Directive started in 1995 with the Green Paper on 'Copyright and Related Rights in the Information Society' COM (95) 382, the 1996 Followed Paper COM (96) 568, the initial proposal from the Commission COM (1997) 628 and finally, the 1999 amended proposal COM (1999) 250.
[302] Article 2 of the Directive.
[303] Article 3 of the Directive.
[304] Article 4 of the Directive.

functioning of the internal market, in terms of cross-border exploitation of works[305]. In achieving these aims, the Directive seeks to achieve a fair balance between the interests of right-holders and the public[306]. To achieve the required harmonisation, the main international obligations arising from Berne, TRIPs and the WIPO Internet treaties were transposed within the Directive[307], including the Three-step Test.

Some fifteen years later, the Directive is generally perceived to have failed to live up to its promise to harmonise copyright across the EU, and there is particular disenchantment in relation to exceptions[308]. There are two main reasons. The Directive stopped short of mandating permissible exceptions to respect the cultural and legal traditions of its Member States. Article 5 of the Directive (concerning permitted exceptions) contains only one mandatory exception (for temporary acts of reproduction[309]), but then states an exhaustive list of *optional* exceptions[310]. Secondly, the text of the Three-step Test is repeated[311], although the intended impact of this is unclear.

Pursuant to article 5(3)(k) of the Directive, a parody exception is included in the optional list. This permits Member States to introduce an exception to the reproduction right 'for the purpose of caricature, parody or pastiche.' The Directive itself does not provide any definition of these terms, or include any pre-conditions when the exception should apply. Indeed, the CJEU recognises the discretion afforded to Member States in the manner in which exceptions

[305] Recitals 6 & 7 of the Directive; initial proposal from the Commission COM (1997) 628, p. 8. Therefore, the harmonisation had to facilitate the functioning of the internal market for copyright-protected works, Recital 31.
[306] Preamble and Recital 31 of the Directive; Ramalho 2009, p. 59.
[307] Recitals 15-16 of the Directive.
[308] See current discussions on the EU copyright reform and especially the Reda report available at https://juliareda.eu/copyright-evaluation-report/ (access date 5/12/2015).
[309] Article 5(1) of the Directive.
[310] Recital 32, Article 5(2)-(3) of the Directive.
[311] Article 5(5) of the Directive.

are implemented[312]. This explains why the form of the exception might vary from one Member State to another[313]. However, it is also established EU law that the overall objective of the Directive cannot be distorted by differences between Member States' national legislation; rather national legislation must be applied to result in a harmonised application of exceptions[314].

In addition to variations in the form in which exceptions appear in national legislation, further uncertainty has arisen concerning the impact of article 5(5) of the Directive[315], which reiterates the Three-step Test:

> The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Who is the addressee of this version of the Test? Does the EU legislature intend Member States to introduce the Three-step Test within their domestic legal order as part of the enactment of the Directive[316]? As Galopin notes, the repetition of the Test may appear redundant, as all EU Member States are already signatories to the international copyright treaties and thus have already agreed to comply with it. Furthermore, it can be reasonably presumed that by defining an exhaustive list of permitted exceptions in article 5, the EU legislature considers that these (and only these) satisfy the Three-step Test[317]. Given this, the repetition of this instrument within this context should be understood as fulfilling a new role.

---

312 *Painer* (C-145/10), [103]; *ACI Adam* (C-435/12), [23].
313 See section 4 chapter 2.
314 *Padawan* (C-467/08), [35-6] referring to Recital 32 of the Directive; *DR and TV2 Danmark* (C-510/10), [36].
315 Griffiths 2009, p. 431.
316 Some countries already had part of the Three-step Test in their national law such as Spain and Belgium while France, Greece, Ireland, Italy, Luxembourg and Portugal have introduced the test after the implementation of the Directive in their domestic law.
317 Galopin 2012, p. 386.

The wording used implies that the article 5(5) Three-step Test is concerned with how the exception is applied in individual cases, rather than how the exception is implemented into national legislation[318]. Accordingly, Member States, such as France, which have introduced the Three-step Test within their legal order requiring judges to determine whether or not the Three-step Test is passed when applied to the particular facts before them. However, this approach faces criticism.

Firstly, legal certainty is jeopardised, not least because there is no consensus as to how the Test should be interpreted. As a defendant has the burden of proof to demonstrate that the Test is satisfied, it seems unlikely that users will be able to predict whether or not their intended use is permitted or not[319]. A fear of litigation is likely to serve as a deterrent to socially beneficial uses. Secondly, harmonisation aims are thwarted by conflicting national decisions in the same or similar cases[320]. A use may be permitted in one Member State but held unlawful in another merely because of an inconsistent application of the Test. This is exactly what the Directive intended to avoid. Finally, it is doubtful that national courts are adequately equipped to apply an instrument resulting from a political compromise as courts are unlikely to have sufficient facts and resources before them to make such assessment[321]. But perhaps national judges are not the intended target. Indeed, some scholars argue that the EU courts are the addressees of article 5(5). The Directive incorporates the

[318] Recital 44 of the Directive; Mazziotti 2008, p. 85; Dusollier 2007, p. 438; Caron 2002, p. 26; Gautier 2001, p. 10.

[319] Gautier 2012, p. 42; Lucas 2010, p. 277; Dusollier 2007, chapter 4 Titre 3; Geiger 2004, p. 262.

[320] This is due to the direct effect of Directives in certain cases where there are unconditional, sufficiently clear and precise. Galopin 2012, p. 389. This is the case of the UK where some courts have made reference to the Three-step Test. See *Fraser-Woodward Ltd v. British Broadcasting Corporation* [2005] EWHC 472 (Ch), (Mann J.); *Hyde Park Residence Ltd v. Yelland* [2000] 3 W.L.R. 215 CA, (Aldous L.J.). Additionally, some right-holders have tried to invoke the Three-step Test in front of courts to render a use illegitimate. Lucas 2010a, p. 277; Griffiths 2009.

[321] Additionally, there are serious doubts that the three-step test is workable at all for the interpretation of exceptions beyond the introduction of a copyright exception.

Three-step Test for the CJEU to determine the legality of the national law exception[322].

The presence of a Three-step Test within the Directive gives rise to two possibilities. First, it is there for national legislators to taken into consideration when implementing one of the permitted exceptions of article 5, and which can be overseen by the CJEU. In this scenario, the test should be applied by the legislator to assess under which conditions any particular type of use is lawful; *e.g.* whether use should be free, or whether a statutory licence scheme is needed for the country to meet its international obligations[323]. This approach implies that article 5(5) of the Directive simply echoes the international obligation of Member States, and is somewhat redundant. Alternatively, if the test is also directed at national judges, then article 5(5) effectively imposes an additional condition before any particular use will benefit from the exception[324]. A court needs to assess whether the unauthorised use meets the conditions set by national law for the exemption, and then assess whether, given the particular surrounding circumstances of the case, permitting the use also meets the requirements of the Three-step Test. Acting in this manner, judges acquire a larger margin of appreciation on whether any particular use should be permitted, and there is little legal certainty. Just as Member States have taken different views as to their obligation to replicate article 5(5) within national copyright law, so the literature is divided on the proper addressee(s) of the test, and there is currently no settled answer[325].

---

[322] In favour of this interpretation: Burrell and Coleman 2005, p. 298.

[323] Recital 36 of the Directive and Dusollier 2005, p. 26.

[324] This is supported by the verbs used in the drafting of article 5(1)-(4) and 5(5) of the Directive. While the earlier uses 'may' the latter uses 'shall'. Moreover, article 5(5) is also applicable to the mandatory exception enshrined in article 5(1) of the Directive. Finally, recital 44 infers that national judges are the addressees. Senftleben 2011, p. 152.

[325] The Wittem Project appears to extend the scope of the test to enable the adoption of new exceptions not already harmonised by the Code (article 5.5). The project is available at

While waiting for a definitive interpretation from the CJEU, decisions in relation to other optional exceptions provide contradictory guidance as to the interpretation of this test[326]. Unsurprisingly, some decisions reiterate that the Three-step Test is to be considered at the stage of implementation of exceptions by Member States [327]. Here, while national legislators should enjoy broad discretion, they must respect EU well-established principles of high level of protection for authors[328], proportionality[329], legal certainty[330], strict interpretation[331] and the Three-step Test[332]. Simultaneously, the CJEU requires national courts to construe the exceptions in light of the Three-step Test[333]. Going further, the CJEU also required the acts of the defendants to be measured against the Three-step Test[334]. Yet, the CJEU also held that if a use is non-infringing because it falls within an exception, article 5(5) should be held satisfied[335]. Finally, the CJEU jurisprudence agrees that article 5(5) does not aim to broaden the scope of the exceptions listed therein[336].

In light of the above, not only is the role of the Three-step Test in the Directive still unclear, but its application in relation to the parody exception is equally uncertain. This has escalated debate of this subject among scholars[337] critical

http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf ; Galopin 2012, p. 398.

[326] *Copydan* (C-463/12); *Deckmyn*; *Ulmer* (C-117/13); *ACI Adam* (C-435/12); *PRCA* (C-360/13); *PPI* (C-162/10); *Painer* (C-145/10); *Infopaq II* (C-302/10); *Opus Supplies* (C-462/09); *FAPL* (C-403/08) and (C-429/08); *Infopaq I* (C-5/08); Arnold and Rosati 2015, pp. 744-8.

[327] *ACI Adam* (C-435/12), [25]; *Painer* (C-145/10), [101]; *Opus Supplies* (C-462/09), [21-2 & 33].

[328] *Painer* (C-145/10), [107].

[329] ibid, [105-6].

[330] ibid, [108].

[331] ibid, [109].

[332] ibid, [110].

[333] *Ulmer* (C-117/13), [47]; *OSA* (C-351/12), [40]; *Infopaq I* (C-5/08), [55].

[334] *Ulmer* (C-117/13), [56]; *PRCA* (C-360/13), [53-63]; *FAPL* (C-403/08) and (C-429/08), [180-1].

[335] *Infopaq II* (C-302/10), [55-7]; *FAPL* (C-403/08) and (C-429/08), [181].

[336] *Ulmer* (C-117/13), [47]; *Copydan* (C-463/12), [90]; *ACI Adam* (C-435/12), [26].

[337] The literature heavily criticises the Directive to the point where scholars wonder whether adopting a fair use clause in EU law would solve this situation. However, academics are evenly split. In favour: Senftleben, Hugenholtz, Geiger; *contra*: Lucas, Janssens, Galopin.

of the possibility that the article 5(5) further restricts the circumstances in which an exception will apply. Another approach which is gaining support proposes that the role of the Three-step Test in the Directive is to fine tune the proportionality test between the rights of right-holders and the public interest[338]. Here, the text of article 5(5) serves to balance copyright against competing interests like freedom of expression of users[339].

In the recent *Deckmyn* decision, although the CJEU does not clarify the meaning of the Three-step Test[340], it nevertheless mentions that the parody exception requires 'a fair balance between, on the one hand, the interests and rights of (right-holders), and, on the other, the freedom of expression of the user of a protected work'[341]. It is submitted that the role of the Three-step Test might extend further: to balance all the competing interests, including those of third parties[342]. Recital 3 of the Directive provides that the harmonisation sought through the Directive 'relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest'. This does not preclude concern of third party interests, like the protection against discrimination or hate speech[343].

In conclusion, while the role of the Three-step Test in the Directive still has to be confirmed, the current impression is that article 5(5) constitute a flexible instrument for courts to carry out a fair balance between all competing interests to best achieve the harmonisation objectives, to provide adequate

[338] Geiger, Gervais and Senftleben 2014, p. 626. Also supported by Recital 3 of the Directive.
[339] *Deckmyn*, [26-7]
[340] AGO in *Deckmyn*, [29].
[341] *Deckmyn*, [27].
[342] See chapters 4 and 5.
[343] See section 3 chapter 5.

legal protection of copyright and related rights across the EU territory, and to prevent distortions in trans-border exploitation of copyright-protected works.

4. The case of the parody exception at national level

Following on from the scrutiny of the international and EU framework for a parody exception of the preceding sections [344], this section examines how national legislators have sought to respect the Three-step Test. Unsurprisingly, given the abstract nature of the Three-step Test outlined above, national legislators have tailored the parody exception to match their own legal tradition.

The section considers Australia (section 4.1), then Canada (section 4.2), before turning to the UK and France (respectively sections 4.3 and 4.4). The analysis, although based upon the preceding evaluation, is speculative since none of the national parody exceptions have been challenged based upon compliance with the Three-step Test, and indeed the exception has yet to be applied in all countries studied but France.

4.1 Australia

Consistent with its common law tradition, Australian copyright exceptions generally adopt a 'fair dealing' form [345]. The CA 1968 provides a flexible formula confined to limited purposes[346], so delegating judges to determine which factors are pertinent to assess the fairness of any qualifying use.

There were a number of motivating factors which led to the introduction of a new fair dealing exception 'for the purpose of parody and satire', as new

[344] See sections 2 and 3 chapter 2.
[345] Australia codified its own fair dealing provision in 1905 which appears to be very similar to the English provision as they share part of their legislative and common law history. Sims believes the Australians copied the provision from the cl. 4(5) of the UK's Copyright Bill 1900. Sims 2010, p. 193.
[346] Ricketson 2003, p. 73.

sections 41A and 103AA of the CA 1968, in 2006. It was sensed that there was a need to counter-balance the increasing protection of right-holders within their copyright legislation[347], to adapt the scope of the exclusive rights, given the advent of new technologies, and to provide additional legal certainty[348] for users. Aware that the EU Directive offered Member States the option to introduce a parody exception, Australia wanted to keep pace, driven to protect its rich tradition of criticising or exposing absurdity through the use of humour. During its Second Reading, Attorney-General Philip Ruddock justified the introduction of the new exception by the aim of protecting 'Australia's fine tradition of satire' adding:

> Australians have always had an irreverent streak. Our cartoonists ensure sacred cows don't stay sacred for very long and comedians are merciless on those in public life. An integral part of their armoury is parody and satire--or, if you prefer, 'taking the micky' out of someone.

The Minister of Justice added that this new exception aimed to preserve 'Australia's fine tradition of poking fun at itself and others will not be unnecessarily restricted' [349].

The introduction of a parody exception attracted little controversy in Australian legislation, thus affording sparse insight on the approach adopted regarding the Three-step Test. However, based upon preparatory materials, the legislator's primary aim was to recognise the value of humorous and

[347] Supra note 161, p. 8.
[348] Suzor 2008, p. 220; Sainsbury 2007a, p. 288; Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19/10/2006, p. 2 (Philip Ruddock, Attorney-General).
[349] Attorney-General Philip Ruddock, 'Protecting Precious Parody', Daily Telegraph, 30/11/2006; Second Reading speech to the House of Representatives (Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19/10/2006, p. 2 (Philip Ruddock, Attorney-General); Commonwealth of Australia, Parliamentary Debates, 29/11/2006, p. 112 (Chris Ellison, Minister for Justice and Customs).

critical expressions within a democratic society[350], which required the exclusive rights of right-holders to be balanced against this value as an artistic expression[351]. Accordingly, section 41A provides:

> A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

And section 103AA adds:

> A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of parody or satire.

Initially, the Attorney-General proposed that this new exception would take the form of a fair dealing exception inserted in section 200AB Act 1968. The latter incorporates the Three-step Test at national level[352]. As discussed above, the advantage of repeating the international Test within the national legislation is to relay the task of the compliance with the international obligations onto the judicial system[353]. This has the consequence that judges are required to assess whether the Three-step Test is satisfied in any particular case, based upon the evidence which the defendant has produced to the

---

[350] A distinctive feature of the Australian legislation is the absence of recognition of freedom of expression at Constitutional level. Hence, the protection of freedom of expression derives from international texts. See section 1 chapter 5.

[351] Australian Government Discussion Paper, *Proposed Moral Rights Protection for Copyright Creators* (Australian Government Printer, June 1994), p. 49, [3.66-3.67]; Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19/10/2006, p. 2 (Philip Ruddock, Attorney-General); Attorney-General's Department, Submission No 69A to the Senate Standing Committees on Legal and Constitutional Affairs, Inquiry into the Provisions of the Copyright Amendment Bill 2006, 8/11/2006, p. 3.

[352] This introduction of the Three-step Test in Australian copyright law derives from article 17.4.10 AUSFTA. The influence of the US on the Australian legal order is not to be underestimated. There are consultations of a possible reform to adopt a fair use formula instead of fair dealing. See discussion paper available at http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79

[353] Bond, Paramaguru and Greenleaf 2007, p. 295.

court[354]. Contrasting with the reiteration of the Three-step Test in the Directive, section 200AB(7) CA 1968 provides guidance as to the meaning of the test, insofar as its interpretation is required to be in compliance with article 13 of TRIPs Agreement:

> (7) In this section:
> ***"conflict with a normal exploitation"*** has the same meaning as in Article 13 of the TRIPS Agreement.
> ***"special case"*** has the same meaning as in Article 13 of the TRIPS Agreement.
> ***"unreasonably prejudice the legitimate interests"*** has the same meaning as in Article 13 of the TRIPS Agreement.
> ***"use"*** includes any act that would infringe copyright apart from this section[355]

The introduction of the parody exception within section 200AB faced serious criticism from the Senate Legal and Constitutional Affairs Committee[356]. As a result, the Government ultimately decided to introduce it as a free-standing fair dealing provision, considering that this formula adequately complies with the international Three-step Test[357]. It is also noteworthy that the exception is limited to copyright, and so may not preclude that the use will not infringe moral rights associated with the work[358].

---

[354] Gervais 2008a, p. 36.
[355] Section 200AB(7) CA 1968.
[356] Senate Inquiry, Parliament of Australia, Senate Legal and Constitutional Affairs Committee, Inquiry into the Provisions of the Copyright Amendment Bill 2006 (available at www.aph.gov.au), Report dated 13/11/2006, [3.70]; McCausland 2007b, p.290; Weatherall's Law, (available at http://weatherall.blogspot. com), post date: 5/7/2006; Loughlan 2006, p. 46; For a general critique of the importation of the Three-step Test into national copyright laws: Koelman 2006, p. 407.
[357] Nevertheless, Loughlan wonders whether the new parody exception in the copyright legislation would survive if challenged under article 13 TRIPs without further limitation. The author of this thesis does not share her concerns. Loughlan 2006, p. 49. For a study of fairness factors, see section 3 chapter 3.
[358] See chapter 4.

4.2 Canada

Again, true to its English roots, Canada adopted a fair dealing formula into its copyright law in 1921[359]. An otherwise infringing use will benefit from a defence if the use falls within one of the specified purposes, and then is considered to be fair dealing by courts. While the number of exempted purposes has expanded, the legislator has maintained the common law tradition, and so does not provide any statutory clarification as to what 'fair dealing' entails[360].

The introduction of a parody exception in the Copyright Act experienced a tumultuous birth. Initially, included in Bill C-60 in 2005, which marked the start of a major reform of Canada's Copyright Act to implement the international obligations arising from the WIPO treaties, this Bill did not progress as Parliament was dissolved in November 2005[361]. Bill-61, introducing the same subject matter three years later suffered the same fate[362]. In 2010, Bill C-32 was tabled by Minister Tony Clement which differed from the former Bills on several points. Undergoing a new change of Parliament, Bill C-32 had the same destiny as previous attempts. Eventually, Stephen's Harper majority in the Government was able to enact Bill C-11 which only differs on minor points from Bill C-32 and contains the fair dealing exception for the purpose of parody or satire. Bill C-11 received Royal Assent on 29 June 2012 and most of the provisions were brought into force on 7 November 2012[363]. Although modernisation of Canada's copyright laws to implement its

[359] Copyright Act, 1921 S.C., ch. 24 (Can.); Gendreau 1999, p. 363; Plante 1998, p. 2; for more on the influence of the Statute of Anne on Canada: Gervais 2009, p. 51.
[360] Beaulac 2010.
[361] Bill C-60: An Act to amend the Copyright Act, 38th Parl., 1st Sess., 53-54 Eliz. II (2004); see preamble of the copyright modernization Act, SC 2012, c20, available at http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_20/FullText.html (access date 16/5/2013)
[362] Bill C-61: An Act to amend the Copyright Act, 39th Parl., 2d Sess., 56-57 Eliz. II (2008)
[363] The fair dealing exceptions for the purposes of parody or satire and the UGC have been in force since 7/11/2012.

international obligations under the WIPO internet treaties commenced in 2005, the road to modernisation proved to be long and painful. The parody exception was first initiated in Bill C-32 of June 2010[364], but the Bill failed to progress, following a change of Government. However, a fair dealing exception for the purpose of parody or satire was also included in Bill C-11 of 2011, which received Royal Assent in June 2012. This came into force in November 2012, finally putting an end to the previous restrictive copyright jurisprudence[365].

Unfortunately for our purposes, the parody exception was largely overlooked in pre-implementation discussions. However, a general policy objective underlying the introduction of the complete set of new copyright exceptions was to allow a balanced approach to the right-holders' right to remuneration with the need for users to access protected works and to protect the public interest[366]. Accordingly, the government sought to protect freedom of expression, as well as the social benefits[367] associated with parodies and satires, by providing a copyright environment able to foster the nascence of such expressions[368].

The newly-introduced parody exception, as provided in section 29 of the Copyright Act 1985, reads: 'fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright'. Hence, Canadian courts have a proactive role in interpreting the provision by identifying which uses are likely to be 'fair'. According to the Supreme Court in *CCH*[369], fair dealing is assessed via a 'holistic' approach based upon six variables. Courts must consider the purpose and character of the dealing, the

[364] Bill C-32, cl. 21 (modifying §29).
[365] See introduction.
[366] Plante 1998; For more on the Canadian copyright reform: Murray 2005, p. 15.
[367] Ficsor 2010, p. 9; Bailey 2005, pp. 125-66, esp. 127.
[368] See section 3 chapter 5.
[369] Supra note 189; *SOCAN*: supra note 190.

amount copied, whether the alleged infringer had alternatives to the dealing, the nature of the copied work, and the effect of the dealing on the work[370]. As for Australia, the exception relates to economic 'copyright' only.

With this overall objective to adapt the copyright legislation to the digital environment, the legislator introduced an additional exception for non-commercial user-generated content ('UGC') in section 29.21 of the Copyright Act 1985. It is worthwhile to contrast this to the parody exception, since this exception is statutorily defined with specific requirements. Section 29.21 – colloquially termed 'the YouTube exception'- prescribes:

> (1) It is not an infringement of copyright for an individual to use an existing work ….which has been …made available to the public, in the creation of a new work …. and for the individual …to use the new work …or to authorize an intermediary to disseminate it, if
>
> (a) the use of, or the authorization to disseminate, the new work …is done solely for non-commercial purposes;
>
> (b) the source …of the existing work …[is] mentioned, if it is reasonable in the circumstances to do so;
>
> (c) the individual had reasonable grounds to believe that the existing work …was not infringing copyright; and
>
> (d) the use of, or the authorization to disseminate, the new work …does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work ….or on an existing or potential market for it, including that the new work ….is not a substitute for the existing one.

[370] See analysis of parody factors section 3 chapter 3.

How should these two provisions interact where the individual's use is a parody? Fiscor suggests the approach of *lex specialis derogat legi generali*. This requires the specific parody exception to be applied to any UGC which qualifies as a parody[371], since the specific qualities of a parody i.e. the form of comment will be absent in much UGC. Hence, the parody exception is more specific than the UGC exception[372].

In conclusion, by framing the parody exception within fair dealing, and requiring courts to balance the exclusive rights of right-holders with the rights of users (proportionality test), the Canadian legislator considers that the parody exception satisfies the Three-step Test.

4.3 United Kingdom

Given the influence of English copyright law on other common law countries, it is unsurprising that most copyright exceptions provided by the Copyright, Designs and Patents Act ('CDPA') take the form of fair dealing. Typically, the exceptions first arose as common law doctrines, which were recognised for the first time in the Copyright Act 1911[373]. Since the codification, the fair dealing exceptions have remained relatively static. Sims argues that as the codification aimed to reflect their limited status in common law, later courts also applied a narrow interpretation the statutory exceptions[374].

The newly-introduced parody exception is a result of extensive consultation. Although copyright law was completely overhauled by the CDPA in 1988, this was enacted both prior to the digital revolution and most EU harmonisation.

[371] Fiscor 2010, p. 11.
[372] ibid, p. 12; For more on this exception see Organisation for Economic Co-operation and Development, 'Participative Web: user-generated content DSTI/ICCP/IE(2006)7/FINAL Unclassified Working Party on the Information Economy', 2007.
[373] Copyright Act 1911 (1 & 2 George V c.46) s.2(i). For a history of fair dealing prior to 1911: De Zwart 2007a, p. 60.
[374] Sims 2010, p. 192.

The Gowers Review, reporting in 2006, first drew attention to the need for a parody exception in UK copyright law[375]. This proposal was studied by the UK-IPO, which undertook a two-stage public consultation in 2008[376] and 2009[377]. These consultations identified highly bifurcated opinions. Opponents argued that the existing legislation made adequate provision for parody already; that the exception would be open to abuse or countenance plagiarism; and that it would not provide legal certainty, but rather would result in more litigation owing to uncertainty surrounding its intended reach[378]. In addition, right-holders protested that they would lose income because of the exception. In sum, the debate focused on whether an exception was needed, rather than on what form an exception should take. Ultimately, the evidence supporting an exception was deemed to be insufficient for a change to be warranted[379].

Following a change in government[380], a new review of UK copyright law was commissioned in 2010. The Hargreaves Review was tasked with assessing how the existing intellectual property framework supported effectively economic growth and innovation. Reporting in 2011, Hargreaves reaffirmed the need for a parody exception within UK copyright law, as one of the factors needed to 'enhance the economic potential of the UK's creative industries',[381] while also

[375] A. Gowers, *Gowers Review of Intellectual Property* (London: HM Treasury, November 2006), Recommendation 12.
[376] UK-IPO, Taking Forward the Gowers Review of Intellectual Property: Changes to Copyright Exceptions (Newport: UK-IPO, 2008).
[377] UK-IPO, Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions (Newport: UK-IPO 2009).
[378] Regarding the definition, scope, conditions and the barrier between plagiarism and parody.
[379] Supra note 377, p. 46.
[380] A coalition between the Conservatives and Liberal Democrats replaced the former Labour government.
[381] Quoting from Professor Hargreaves at: http://www.bbc.co.uk/news/technology-13429217 (access date 25/10/2015).

recognising the 'long and vibrant tradition' of British comedy and the emerging 'new forms of expression' which the Internet facilitates[382].

The government undertook further consultation on the proposal, and while the representations from opponents was consistent to those made a few years earlier, the economics-based arguments in favour of a parody exception seemed to prevail. While it was acknowledged that a parody exception is necessary to realise the right of freedom of expression[383], this was also linked to improving the digital skills base of the population[384]. In adopting Hargreaves' proposal for a parody exception, the UK government attached importance to the anticipated economic growth opportunities that permitting parodies would allow. Comedy, for example was identified as 'big business'[385]. A parody exception would support a 'growing entertainment market worldwide' and permit comedy to 'reach wider audiences'[386].

The parody exception to the economic right of reproduction finally came into force on 01 October 2014[387]. Pursuant to Section 30A(1) CDPA: 'Fair dealing

---

[382] *Digital Opportunity: A Review of Intellectual Property and Growth: An Independent* Report by Professor Hargreaves (IPO; 2011).

[383] 'Parody may be as old as Aristophanes but it has found new popularity in recent years with the development of online social media and digital technology. Modern parodies are as likely to be made at home by ordinary people as by professional writers, broadcasters and comedians. Parodies have become part and parcel of online social interaction, with parody works adorning Facebook walls and trending on Twitter. The modern public's response to an event is as likely to be expressed through Photoshop competitions and Downfall parodies as through traditional comment, argument, and debate.' HM Government, *Consultation on copyright* (2011), [7.103].

[384] '[T]he most important issues in that area concern freedom of expression …there is an economic link. Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy.' Supra note 382, p. 50.

[385] ibid.

[386] Supra note 383, [7.104].

[387] SI 2014/2356, *The Copyright and Rights in Performances (Quotation and Parody) Regulations* (2014).

with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work'[388].

It is arguable that the UK, like the other countries examined, chose this form of exception to meet its international law obligations. The factors considered to determine the 'fairness' of the dealing ('the fairness factors') should ensure that the exception does not conflict with the normal exploitation of the work or unreasonably prejudices the interests of right-holders[389].

In addition, UK courts must interpret the parody exception consistently with the CJEU guidance in *Deckmyn*. Here, the requirements of humorous character and absence of confusion further assist courts in ensuring that the act of the defendant satisfies the Three-step Test. As the following chapter explains, it is submitted that the fairness factors are still likely to play a role post-*Deckmyn*, as courts assess whether the two parody requirements of *Deckmyn* are satisfied in the particular case.

Assuming the UK 'fair-dealing' treatment of parody exception is compliant with the international Three-step Test, what impact does article 5(5) of the Directive have on the CDPA? First of all, the UK legislator did not choose to incorporate the Three-step Test within the CDPA[390]. But this does not mean that national courts should not apply the Three-step Test in particular cases[391]. While the addressees of article 5(5) remain uncertain[392], the jurisprudence of the CJEU seems to point most strongly towards national courts, applied as a proportionality test, which courts adopt to strike a fair balance between all the

[388] Section 30A(1) CDPA relates to work. The parody exception is also available for perfomances, schedule 2, para 2B.
[389] Supra note 133, p. 4.
[390] This is because the legislator already thought that the exceptions were compliant with the test. Hart and Holmes 2004, p. 255.
[391] Supra note 320.
[392] See supra section 3 chapter 2.

competing interests in the case in point. Henceforth, UK courts might apply the Three-step Test to particular facts[393].

4.4 France

Just as the UK is the home of common law, so France is the mother of the civil law tradition. France introduced a parody exception with the adoption of its intellectual property code in 1957[394]. Therefore, the exception precedes the introduction of the Three-step Test in Berne in 1967. Yet, as France is both a member of the EU and a signatory to the later international copyright treaties discussed, the French legislator must still ensure that its exception remains compliant with its international and supra-national obligations.

The parody exception was incorporated into the French intellectual property code in recognition of accepted judicial practice[395]. Parodies and quotations were not considered to infringe author's rights, in recognition of the right to criticise[396] upheld by the 18th century revolutionaries[397]. Unfortunately, there is very little literature on these earlier practices. This may support an assumption that the introduction of a statutory parody exception was uncontentious, as it merely codified a well-established practice[398].

Following the author-oriented approach common to civil law countries, the French courts' approach is that exclusive rights must be interpreted broadly, meaning any statutory exceptions which limit those rights must be interpreted

393 Supported by *Deckmyn*, [26-27, 31, and 35]; Arnold and Rosati 2015, p. 749.
394 Article 41, 4° of the law of 11 March 1957 (now article L122-5 4° IPC); For more on this law: Savatier 1957.
395 The parody exception already figured in revolutionary decrees to govern between 1791-1957. Galopin 2012, p. 3; Bertrand 2012, p. 326; El Khoury, supra note 208, p. 22.
396 'Droit de critique'; Strowel 1991, p. 44; Buteau 1909.
397 Decisions prior the codification of the exception: Trib. Comm Seine, 26/06/1934, gaz. Pal. 1934. 2. 594; Trib. Comm Seine, 26/08/1886, Ann. 1889, p. 352; Trib. Civ. Seine, 12/06/1879, Ann., Propr. Ind. 1879, p. 239; Trib. Corr. Seine, 20/03/1877, Ann, 1877, p. 212; Trib. Civ. Seine, 23/02/1872, Ann. Propr. Ind. 1873, p. 162; Trib. Corr. Paris, 6/02/1834. Gaz. Trib. 8/02/1834.
398 Geiger 2004, p. 88.

strictly[399]. Therefore, a judge has only a limited role[400]: any balancing of interests has already been undertaken by the legislator, whereas courts apply the exception, meaning there is little margin of appreciation[401].

With this in mind, the parody exception[402] reads: 'Once a work has been disclosed, the author may not prohibit: …[p]arody, pastiche and caricature, observing the rules of the genre'[403].

It can be inferred that the first step of the international Three-step Test should be satisfied, as there seems little doubt that 'parody, pastiche and caricature' constitute 'certain special cases' in the sense of the treaties. Additionally, as reference is made to the 'rules of the genre', French courts have a framework to meet the second and third step of the Three-step Test. As chapter 3 further explains, the rules of the genre attached to the exception are a humorous intent and absence of confusion between the parody and original work.

Prior to *Deckmyn*, French courts already weighed up the competing interests in the particular case. Its underpinning by a right to criticise has allowed judges to entertain human rights-based arguments in parody cases[404]. The right to criticise includes the right to create parody works without requiring authorisation, since the practice is heavily anchored in the tradition of fundamental rights, including freedom of expression. Indeed, the French

[399] Galopin 2012, p. 2; Sirinelli 2008, p. 409.
[400] See section 1.2 chapter 2; Malaurie 1965, p. 603.
[401] See section 1 chapter 3.
[402] The wording of the exception is the same today as in the Law of 1957.
[403] WIPO's translation of the French intellectual property code, available at http://www.wipo.int/wipolex/fr/text.jsp?file_id=180336 (access date 25/10/2015).
[404] See especially in trade mark cases: Riom, 15/09/1994 D. 1995, p. 429, note Edelman; TGI Nanterre, réf., 28/05/2003: Légipresse 2003, I, p. 118; Baud & Colombet, 'La parodie de marque: vers une érosion du caractère absolu des signes distinctifs?' D. 1998, chron. p. 227 ; *contra*: TGI Paris, 3e ch., 21/03/2000, CCE 2000, comm. 88, note Caron; TGI Paris, 3e ch., 4/07/2001: Expertises 2001, p. 395; or in relation to image rights: Reims, 9/02/1999: JCP G 1999, II, 10144, note Bigot; D. 1999, p. 449, note Edelman; Cass. 1re civ., 13/01/1998: RIDA march 1998, p. 201, obs. Kéréver; JCP G 1998, II, 10082, note Loiseau; D. 1999, p. 120, note Ravanas.

legislator considered freedom of expression to be the most important justification for a parody exception.

In response to the Directive, the French legislator amended article L.122-5 IPC to insert the Three-step Test at national level. While French judges have yet to apply the Three-step Test to the parody exception, it has been applied directly in cases involving other copyright exceptions [405]. This means that any unauthorised use has to satisfy the Three-step Test as an additional requirement before the exception applies, thus restricting the scope of the exception even further.

In conclusion, by subjecting the unauthorised use to 'the rules of the genre', the French legislator considers the Three-step Test satisfied. As for all the other jurisdictions, this satisfaction is further honed by the need to respect the author's moral rights.

Conclusion

Although there remain some unresolved questions, there are strong arguments that a parody exception should satisfy the International law requirement. It is submitted that 'parody' constitutes a special case in the sense required by the international treaties, which, by its nature, does not conflict with the normal exploitation of the protected work on which it relies; nor does it unreasonably prejudice the legitimate interests of the right-holder. Compliance in the case of the specific form of parody adopted by national

[405] Cass. 1re civ., 28/02/2006, JurisData n°2006-032368; RIDA march 2006, p. 323; JCP G 2006, II, 10084, note Lucas; CCE 2006, comm. 56, note Caron; A&M 2/2006, p.177, note Dusollier; Propr. intell. 2006, p.179, obs. Lucas; RTD com. 2006, p. 370, obs. Pollaud-Dulian; Appeal referral: Paris, 4e ch., 4/04/2007: JurisData n°2007-329335; RIDA march 2007, p. 379; CCE 2007, comm. 68, note Caron; A&M 4/2007, p. 346, note Dusollier; Propr. intell. 2007, p. 320, obs. Lucas; RTD com. 2007, p. 357, obs. Pollaud-Dulian; second referral to the Supreme Court: Cass. 1re civ., 19/06/2008: JurisData n°2008-044405; RIDA march 2008, p. 299; RLDI july 2008, n°1322.

legislators is achieved both through the form of the exception and the principles of interpretation applied. Therefore, the following chapter argues the main requirements for the parody exception to apply are: a humorous intent and absence of confusion between the parody and the copyright-protected work. Inherently, these conditions support satisfaction of the third step of the Three-step Test, but it remains to be seen whether the author's moral rights are respected. The analysis in section 2.2.3 identified these as a legitimate interest contemplated within the third step. This will be considered further in Chapter 4.

Of the Study Countries, only France has introduced the Three-step Test directly into its national legislation [406]. However, there are reasonable arguments that article 5(5) of the Directive imposes an additional requirements on all EU national courts including the UK. This means that all courts of Member States must undertake the three-step analysis to the facts in hand to determine whether the defendant's use falls within the scope of exception, or whether the use is infringing. Yet, in this context, the EU Three-step Test is an assessment of proportionality, requiring national courts to strike a fair balance between all competing interests.

Canada adopts a similar approach. Since *CCH*[407], the Supreme Court promotes copyright exceptions as protection of users' rights. Hence, the interests protected by the exclusive rights must be balanced against those interests protected by any exception. This requires courts to carry out a proportionality test between the competing interests.

In contrast, Australian courts are less likely to balance all competing interests in a particular case. As the national legislation does not contain a Three-step

[406] Australia too but not applicable for parody.
[407] Supra note 189.

Test, courts may have no mechanism to take account of arguments based upon freedom of expression or furthering public interest, when assessing whether the parody defence should apply in a particular case[408].

The following chapter now considers the scope of the parody exception in the Study Countries, in more detail, to obtain greater understanding whether the Three-step Test is satisfied, and provide guidelines for how the parody exception should be applied.

[408] Chapter 5 nevertheless argues that there is room for freedom of expression as IP should not be construed impermeably to other areas of law.

Chapter III: The Scope of the Parody Exception

Introduction

This chapter attempts to delineate the scope of the parody exception, by analysing the interpretation of it in the Study Countries.

As a matter of procedure, the parody exception acts as a defence. It precludes enforcement of copyright's economic rights in circumstances which, bar the defence, would be an infringing activity. In view of the potentially serious consequences, there is a legitimate need for parodists hoping to rely upon the exception to be able to distinguish between lawful and unlawful uses. Similarly, right-holders considering legal proceedings also need to know whether an unauthorised user is likely to benefit from the exception if the dispute goes to trial.

The previous chapter[409] explained how legislators' use of framework notions, such as 'fair dealing' or 'rules of the genre', when drafting copyright exceptions delegates an influential role to the judiciary to flesh out the exception. Despite a paucity of case law in the relevant jurisdictions, it is still possible to make educated predictions as to the exception's interpretation, derived from legislative drafting, its objectives, judicial interpretation and creative norms[410].

After a brief consideration of the different legal traditions in issue in section 1, section 2 analyses the nature of the parody exception to determine how far the

[409] Supra section 4 chapter 2.

[410] The creative process provides valuable insights because most use of the defence occurs outside of litigation. Hence, judges often refer to the particular practices of the creative industries involved to determine the sector's 'norms' when establishing the exception's requirements or factors.

exception weighs against the exclusive rights afforded to right-holders. Section 3 then evaluates the requirements and factors relevant to a successful parody defence.

1. General considerations

Chapter 2 established that common law jurisdictions have framed the parody exception within 'fair dealing', whereas civil law countries tend to enumerative catalogues of exceptions with statutory requirements attached thereto. This section evaluates whether the degree of legal certainty is influenced by the common law or civil law tradition of the jurisdiction.

The fair dealing formula identifies permitted uses provided that use is 'fair'[411]. By its very nature, this fair dealing form is flexible, because judges determine fairness based upon factors deemed relevant ('the fairness factors') against particular circumstances before them. There is no hierarchy or weighting allocated to any one factor, rather fairness is a matter of overall impression[412]. As a result of this 'holistic' approach, the outcome of any particular dispute may be difficult to foresee.

The civil law approach, with its specific statutory categories of exceptions and associated requirements, promotes legal certainty. The bounds of exceptions are definite, and outcomes more predictable by interested parties. Yet it would be incorrect to assume that this approach results in a uniform application of copyright legislation within the jurisdiction. Judges still play an important

[411] The difference between fair use and fair dealing can be summarised as: fair use is primarily related to the US tradition which prescribes an open-ended approach. The different purposes for exceptions are not prescribed by law (though a non-exhaustive list of purposes is enshrined in section 107 of the US Copyright Act) but are developed by case law. However, the factors to measure fairness of the use are expressly stated within the law (section 107 US Copyright Act). Whereas in the fair dealing approach, the uses allowed under the exception are enumerated within the law but the factors are established through case law. D'Agostino 2008, pp. 309-63.

[412] *Hubbard*, supra note 37, p. 94.

interpretative role in terms of matching the facts of particular cases to the statutory provisions, meaning that some domestic discrepancies result. This is evident in the case of the parody exception, because qualification for the defence is measured against the 'rules of the genre', and compliance is determined by judges based upon the particular facts of the case. Additionally, the reasoning behind any decision is usually stated in less detail than in common law reports. As a result, decisions which postulate what the law says do so in a manner which makes it difficult for parties to predict how the same law may apply in their own circumstances[413]. Finally, if strict application of the law will result in an outcome which differs from the judge's own sense of equity and fairness, they may elect to rectify this by referring to overarching principles, such as laid out in the Constitution, which also undermines the reliability of the law to an extent[414].

Finally, divergence between the legal orders influences the evolution of the different legal traditions, and thus, the interpretation of copyright exceptions. Firstly, as Berne's objective is to strengthen the exclusive rights, it requires signatory parties to interpret the reproduction right broadly[415]. EU copyright law also impacts the interpretation of Berne's exceptions in EU Member States. Since this has a harmonising objective, the EU legislation impacts on both legal traditions. Fulfilment of these objectives would be disrupted if Member States implemented and interpreted the same copyright exceptions to mean different things[416]. The CJEU's role is to ensure consistent implementation of the Directive, and so ensure proper functioning of the internal market. Even though discretion is left to Member States as to the way they implement the

[413] Judges are seen as 'the mouth of the law'.
[414] France more easily accepts arguments based on freedom of expression within copyright law. For example, it is by relying on such considerations that judges accept satire as comprised within parody, caricature and pastiche. Supra section 2.2 chapter 1.
[415] Supra section 2.1 chapter 2.
[416] *Padawan* (C-467/08), [35].

Directive, this discretion must still be exercised within the limits and respective of the principles of EU law[417]. Member States must, then, respect a high level of protection for authors[418]; satisfy the principle of proportionality by adopting adequate measures to meet the objectives of the Directive[419]; and ensure legal certainty by setting requirements which are not dependent on uncertain circumstances, such as a discretionary human intervention[420].

In conclusion, despite the different traditions present, a uniform interpretation should be achievable throughout the EU territory[421].

2. The nature of the parody exception

While the particular legal nature of a copyright exception remains largely unexplored, its importance cannot be underestimated[422]. The legal nature of a copyright exception impacts on the interpretation of any particular exception, as well as the relationship between copyright legislation and contract law[423].

2.1 The legal nature

Chapter 2 explains how copyright legislators seek to maintain a careful balance between opposing interests and rights. Traditionally, the balance struck within common law jurisdictions is presented as putting exclusive rights face-to-face with exceptions, whereas civil law jurisdictions support a hierarchy, ranking the rights of authors over the interests of users[424]. The

[417] *Painer* (C-145/10), [104]; *DR and TV2 Danmark* (C-510/10), [36]; *Padawanm* (C-467/08), [36]; Carre 2013, pp. 38-40.
[418] *Painer* (C-145/10), [107].
[419] ibid, [105-106].
[420] ibid, [108]; *Infopaq I* (C-5/08), [62].
[421] This does not equate to identical application or outcome of a case. See section 3.1 chapter 3.
[422] Geiger 2004a, p. 882.
[423] See section 4 chapter 3.
[424] Lucas 1998, n°338; Lucas & Lucas 2012, n°342; *contra*: Geiger 2004a, p. 885; Gautier 2007, n°334, p. 385 (arguing for a right of users).

reality was seen to be more nunaced[425]. The current understanding requires greater consideration of the public interest and fundamental rights when interpreting copyright exceptions[426]. But does this imply that copyright exceptions in common law jurisdictions amount to *rights* whereas exceptions in civil law jurisdictions results in *interests*?

As the role of the parody exception is firmly anchored in recognition of freedom of expression,[427] it is reasonable to argue that in all the jurisdictions considered, the parody exception constitutes more important than a mere interest, which judges ought to take into consideration. As it affirms essential democratic values within copyright legislation, the better view is that the parody exception acts as a right[428]. Yet this conclusion begs the question: what kind of right does it grant parodists?

Does the parody exception grants authentic *subjective* rights to parodists? Traditionally, copyright law only grants legally enforceable rights to right-holders. A significant distinction is that a parodist cannot initiate legal enforcement of the exception[429], in essence, an injunction against the right-holder which prevents them from exercising their rights. As a defence, judges may only refrain from enforcing exclusive rights against the parodist, if, as a defendant, the parody exception is successfully invoked. As such, the parody exception does not vest a right which necessitates action from right-holders[430]. The parody exception further departs from the subjective rights found in copyright law insofar as anyone may benefit from the exceptions, while the exclusive rights only benefit the right-holder. Consequently, reliance upon the

[425] Already inferred in section 1 chapter3.
[426] See section 2 chapter 3.
[427] See chapter 5.
[428] *CCH*: supra note 189, [48]; Geiger 2004a, p. 882.
[429] ibid, p. 886.
[430] Dusollier 2007, chapter 4 Titre 3; legitimises the business practices in place: see section 3 chapter 6.

exception by one individual does not prevent another from benefitting from it too[431].

In light of these factors, a preferred approach is to treat the parody exception as granting an *objective* right[432] to parodists[433]; i.e. where the exception's requirements are met, right-holders are denied the possibility of enforcing their prerogatives[434]. Using the tool of a specific copyright exception for parody, the legislator, in effect, prioritises an individual's right of freedom of expression over another's property rights[435]. It is submitted that to do otherwise would call into question the legitimacy of copyright laws in light of the fundamental freedoms. Therefore, the parody exception must be interpreted in a way which supports realisation of the right of freedom of expression. While this should result in a uniformity of approach, it cannot be inferred that this will result in exactly the same parody uses being deemed lawful under each national copyright law. Such harmonisation ultimately depends on the principle of interpretation adopted[436], the interplay of the exception with contract law[437], national factors attached to the exception,[438] and the balance struck by courts in the rare cases where fundamental freedoms are in direct conflict[439].

[431] Galopin 2012, p. 351.
[432] Meaning the judicial norms governing society and whose keeping is guaranteed by public authority. These are immediatly applicable, compulsory and susceptible to be executed by an external power.
[433] Dusollier 2007, chapter 4 Titre 3; Geiger 2004a, p. 886; Guibault 2002, p. 95; Gervais 1961, p. 243.
[434] Geiger 2004a, p. 886.
[435] ibid, p. 887; Buydens & Dusollier 2001, p. 10.
[436] See section 2.2 chapter 3.
[437] See section 2.3 chapter 3
[438] See section 3 chapter 3.
[439] See section 5 chapter 5.

2.2 Principles of interpretation

Despite significant harmonisation, it has been identified that differences exist between legal orders in terms of principles of interpretation applied to copyright exceptions. While European Union countries and Australia apply a strict interpretation, Canada elects a users' rights approach. This section examines both principles.

2.2.1 Community level

While chapter 2 established that Member States have some leeway in their implementation of the Directive's exceptions[440], the CJEU provides guidance how the exceptions should be interpreted.

The Directive sets, as a general principle, a high level of protection of intellectual property[441]. This traditionally led to an axiom of interpretation which favours right-holders, and requires exclusive rights to be interpreted broadly[442]. In keeping with this general principle, the exclusive right of reproduction must be construed as an autonomous concept of EU law to ensure consistency[443]. Therefore, wherever a term is not defined by the Directive itself, or by reference to a member state's definition, it should be construed in light of the context of the provision and the objectives of the directive[444]. As exceptions derogate from the general principle of providing a high level of protection, they should be interpreted strictly[445]. However, it is

[440] Supra section 3 chapter 2.
[441] Recitals 4 & 9.
[442] Recitals 21 & 23.
[443] *Infopaq I* (C-5/08), [56].
[444] AGO, [35].
[445] *Deckmyn* (C-201/13), [22]; AGO *Deckmyn* (C-201/13), [43]; *NLA* (C-360/13), [23]; Order in *Infopaq II* (C-302/10), [27]; *Painer* (C-145/10), [109]; *Infopaq I* (C-5/08), [56-57]; *FAPL* (C-403/08), [162]; *Luksan* (C-277/10), [101]; *ACI Adam,* [23]; *Kapper* (C-476/01), [72]; *Commission v. Spain* (C-36/05), [31].

reasonable to argue that Recital 31 of the Directive requires exceptions to be effective in their stated aim:

> A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.[446]

Hence, even a strict interpretation does not preclude a fair balance between the interests of right-holders those intended to benefit from the exception[447].

For example, in *Painer*[448], the CJEU tempers the strict interpretation principle by noting that any exception's requirements must be interpreted in a way which enables the exception to fulfil its purpose. In this case, interpretation of the quotation exception[449] required the exclusive rights of the right-holder to be circumscribed to strike a fairer balance between those rights and freedom of expression[450]. It is submitted that this same reasoning should extend to the parody exception, as both exceptions are justified by freedom of expression[451]. This approach militates against a literal interpretation of exceptions in favour

[446] Recital 31 of the Directive.
[447] *FAPL* (C-403/08) and (C-429/08), [162-4].
[448] *Painer* (C-145/10).
[449] Article 5(3)(d) of the Directive.
[450] *Painer* (C-145/10), [134-136].
[451] See section 2 chapter 5.

of an interpretation driven by the end to which it aspires. In essence, the requirements associated with an exception must be interpreted in a way which preserves its effectiveness and respects its purpose[452]. That said, it remains unclear whether the Court's reasoning in *Painer* represents a general principle that exceptions must be effective, or whether the Court, instead, intended to afford special treatment to those copyright exceptions founded upon respect of fundamental freedoms[453].

As mentioned, additional uncertainty remains because of apparent inconsistencies in CJEU guidance. The CJEU has noted that the Three-step Test of article 5(5) of the Directive should guide interpretation of copyright exceptions[454]. Yet, in subsequent cases relating to article 5(1) of the Directive, the Court also notes that where the requirements of the exception are met, the Three-step Test should be deemed satisfied[455]. Furthermore, the most recent jurisprudence of the Court suggests that the defendant's use must not only satisfy the requirements of an exception, but must also satisfy the Three-step Test[456].

The CJEU may be seen as further honing these principles in *Deckmyn*. Having established that parody is an autonomous concept having a uniform meaning throughout the EU territory[457], the court repeats the strict interpretation principle applicable to the parody exception[458]. However, the Court goes on to counsel that the interpretation of the exception adopted must enable the exception to function effectively (requiring the purpose of the exception to be

[452] *FAPL* (C-403/08) and (C-429/08), [133].
[453] De Wolf & Partners, *Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* (2013), p. 489.
[454] *Infopaq I* (C-5/08), [58] in relation to article 5(1) of the Directive.
[455] *Painer* (C-145/10) [104-108]; *FAPL* (C-403/08), [181]; *Infopaq II,* [56].
[456] *NLA* (C-360/13), [54-63]. See section 3 and section 3.9 chapter 3.
[457] *Deckmyn*, [17].
[458] ibid, [22].

taken into consideration[459]), and that national courts should ensure that competing interests should be balanced proportionately[460]. It is therefore the author's argument that a holistic approach should be preferred to a tripartite assessment of the exception by national courts. In this holistic approach, factors which contribute to the realisation of freedom of expression should weigh more heavily towards the finding of a lawful use. However, the author acknowledges that there might be another reading to *Deckmyn* which implies a tripartite assessment by looking at: 1) the purpose of the use, 2) the application of factors to the particular facts, and 3) the proportionality test between the fundamental rights in play.

The following section considers the extent to which these EU principles of interpretation of the parody exception mirror those adopted by the national courts in the Study Countries.

2.2.2 National level

As we have seen, although national legislators are required to comply with International Law (and EU law, in the case of EU Member States), they retain leeway to tailor the exception according to their own legal tradition. It is, therefore natural that judges apply their domestic approach to its interpretation when courts are required to consider those exceptions. This section will not consider all principles applicable in the Study Countries, rather, it focuses on those principles of interpretation applied by national judges to copyright exceptions.

[459] ibid, [23].
[460] ibid, [34].

2.2.2.1 France

In accordance with civil law tradition, in France, any derogation from legally entrenched exclusive rights, including copyright exceptions, must be interpreted strictly[461]. This well-established principle does not derive from legislation, but is based upon the axiom: *exceptio est strictissimae interpretationis* (exceptions must be strictly interpreted)[462]. This principle may seem too restrictive and inflexible, but this perspective might be based upon a misconception of the principle's meaning and therefore, its incorrect application. Indeed, there appears to be confusion between a 'strict' and a 'restrictive' interpretation; the latter simply relying on literal wording of the exception. It is submitted that a strict interpretation is not policy blind.

Properly understood, the principle of strict interpretation involves focus both on the text of the provision and its justifications and objectives[463]. Following Galopin[464], it is argued that whenever freedom of expression surfaces in copyright law in the form of a new exception, that exception is not merely an exception to the exclusive right, but rather a restatement of the underlying fundamental principle of freedom of expression, which must be taken into consideration by the judge[465]. Thus, an exception in copyright law in this instance is a balancing of fundamental freedoms, and not a derogation from a legal right.

[461] Lucas 1998, p.170 n°335, 337.
[462] Author's translation. Roland & Boyer 1999.
[463] Bergel 2001, p. 245.
[464] Galopin 2012, p. 327.
[465] This echoes the legal nature of the exception.

Based upon this analysis, it is submitted that the French principle of strict interpretation is in harmony with the CJEU understanding of the same principle[466].

2.2.2.2 UK

Given the CJEU guidance, there can be no doubt that UK courts should interpret copyright exceptions strictly, in light of the purpose and objective of the particular statutory provision[467]. Yet, Griffiths discerns two bifurcated approaches to interpretation in evidence in UK fair dealing cases[468]. The first approach seeks to uphold the maximum possible protection for the right-holders (in line with the general principle of affording broad protection) by adopting the most restrictive interpretation of the copyright exception[469]. The second approach is more permissive and favours the realisation of freedom of expression[470], to the extent that a common law parody exception seemed to exist prior to the introduction of the statutory defence[471].

But which approach prevails today? Recent UK jurisprudence is increasingly and inevitably influenced by CJEU case law. Most recently, in *Meltwater*[472], the court was required to determine whether clients which made use of the services of an online news aggregator required permission from the right-holders in newspaper articles, given that the aggregator's use was licensed. In

---

466 See section 2.2.2.1 chapter 3.

467 *Newspaper Licensing Agency & Ors v. Meltwater BV & Ors* (2010) EWHC 3099 (Ch), [43]; Appeal: [2011] EWCA Civ 890; Supreme Court: [2013] UKSC 18; *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd* [1934] 1 Ch. 593, [604].

468 Griffiths 2000, p. 164.

469 *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142; *Hyde Park,* supra note 320; *Distillers Co (Biochemicals) Ltd. v. Times Newspapers* [1975] 1 All ER 41; *Beloff v. Pressdram Ltd* [1973] 1 All ER 241.

470 *Pro Sieben Media AG v. Carlton UK Television* [1999] 1 WLR 605; *Time Warner v. Channel Four Television* [1994] E.M.L.R. 1; *BBC v. BSB* [1992] Ch. 141, [1991] 3 WLR 174; *Williamson Music v. the Pearson Partnership Ltd* [1987] FSR 97; *Hubbard*: supra note 37, p. 90; *Johnston v. Bernard* [1938] 2 All ER 37.

471 See section 1 Introduction.

472 Supra note 467.

response to a client's selected keywords, the aggregator emailed a report containing short snippets from newspapers which incorporated those keywords, along with an electronic link to the associated article. The aggregator argued such the clients' use was permitted by the temporary copies exception (article 5(1) of the Directive), whereas the right-holders argued for a narrow interpretation of the exception, to best preserve its exclusive rights.

Clearly influenced by *Infopaq*[473], *Infopaq II*[474] and *FAPL*[475], the UK Supreme Court directed that a restrictive approach should be set aside. Although concluding that reproduction of the snippets in the emails did infringe the reproduction right, the Court concluded that on-screen browsing and internet caching fell within the scope of the temporary copies exception. However, appreciating the significance of the decision for online browsing throughout the EU territory, the Court referred the matter to the CJEU, who confirmed the Supreme Court's interpretation of the exception[476].

In conclusion, despite adopting alternative approaches in the past, UK courts now seem aware of the need to interpret copyright exceptions strictly, taking in consideration the development of new technologies and the need to strike a fair balance between the rights and interests of rights-holders and of users of protected works. Given the *Meltwater*[477] precedent, it is reasonable to presume that UK courts will follow the same approach in parody cases.

2.2.2.3 Canada

In contrast with the other jurisdictions considered, a liberal approach to interpretation is evident in Canada, evolving from its common law tradition.

[473] *Infopaq I* (C-5/08).
[474] *Infopaq II* (C-302/10).
[475] *FAPL* (C-403/08).
[476] *NLA* (C-360/13).
[477] Supra note 467.

Here, copyright exceptions must be interpreted broadly and liberally since users' rights are considered to be an integral part of the Copyright Act[478].

Simard[479], writing on Canadian legislative interpretation in 1989, identifies the traditional approach is to deduce the legislator's intent merely from the wording of the legislation. As in all the other countries studied here, the legislation enacted represents the legislator's particular social and political choices[480]. Adopting this approach, a literal interpretation of the Copyright Act which focusses upon the actual wording of the text best reflects the legislator's initial intent. Unlike in France and other civil law countries, where supremacy lies in the law as codified, in the common law tradition legislation is used to perfect or codify case law. Against this backdrop, statutes are to be strictly interpreted by applying a literal approach enlightened by the legislator's intent. Consequently, civil and common law countries appear similar in their traditional approach to legislative interpretation[481].

In line with the traditional approach to interpretation, Canadian courts have adopted a narrow interpretation of fair dealing pursuant to the Copyright Act[482]. Yet, in the landmark case of *CCH*[483], the Supreme Court made a paradigm shift. The case itself considered whether the Law Society's self-service photocopiers provided for patrons fell within a fair dealing exception. The shift had been initiated in an earlier case[484], in which the Court of Appeal

---

478 Supra note 189, [48].
479 J. Simard, *L'interprétation législative au Canada: la théorie à l'épreuve pratique* (University of Montréal 1998), p. 345.
480 Echoing Jean-Jacques Rousseau's social contract.
481 Supra note 479, p. 16.
482 Examples of narrow interpretation of fair dealing: *Zamacois v. Douville* [1943] 3 Fox Pat. C. 44 (C. Échiquier); *The Queen v. James Lorimer* [1984] 1 FC 1065; *B.W. International v. Thomson Canada, Ltd.* (1996) 137 DLR (4th) 398; *Hager v. ECW Press Ltd.* (1999) 85 CPR (3d) 289; *Boudreau v. Lin* (1997), 150 DLR (4th) 324, [48] and most strikingly in *Michelin,* supra note 35, in relation to parodic works. For more: Tawfik 2013, p. 195; Craig 2011, chapter 6; D'Agostino 2008, p. 324 & 329; El Khoury, supra note 208, p. 173; Carys 2005, p. 452.
483 *CCH*, supra note 189.
484 *Théberge* supra note 232, [30-31].

had noted the need to arrive at a fair balance between the public interest and that of right-holders, when interpreting fair dealing. The Supreme Court emphatically endorsed this users' rights doctrine in *CCH*[485]. Here, the Court held that fair dealing must be understood 'as an integral part of the Copyright Act' rather than as a mere defence[486]. As a consequence, fair dealing should not be interpreted restrictively, in order that a fair balance between users' and right-holders' interests may be struck[487].

Since it is the role of the courts to maintain the proper balance between these competing interests, courts must temper the owner-oriented approach of the Copyright Act to confer greater weight to the public interest[488]. The Supreme Court identified this required judges to interpret the purpose of any unauthorised use broadly[489], by making an objective assessment of the motives underlying the use of the copyright work[490]. Yet, the Supreme Court also confirmed the general rules of statutory interpretation must be respected[491]:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament[492].

Thus, a liberal interpretation does not give courts complete free rein.

This sentiment is echoed in subsequent Supreme Court case law. Firstly, in *ESAC v. SOCAN*[493], the Court identified the need to focus on the wording of an exception and to construe this in light of the legislator's intent. Secondly, in

485 Supra note 189, [10] quotes *Théberge*.
486 ibid, [48].
487 ibid.
488 Craig (2011), chapter 6.
489 Supra note 189, [51]; Also in UK: *Pro Sieben*, supra note 470, [614].
490 Supra note 189, [54].
491 ibid, [9].
492 ibid; *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 SCR 559, [26].
493 *SOCAN:* supra note 190, [71].

SOCAN v. Bell[494] and *Alberta v. CCLA*[495], the Supreme Court expressively rejected that in *CCH*, they had endorsed an open-ended approach, akin to 'fair use'[496] in the USA[497]. By the same token, the Court noted that while Canadian and UK copyright law share a legal history, the UK courts have adopted a more restrictive approach to defining the purpose of a use than in Canada. As a result, this trilogy of cases appears on a continuum with *CCH*, which clearly establishes a user's rights doctrine.

In these recent decisions, the Supreme Court has determined where fair dealing lies in the copyright paradigm. The Court has moved away from an owner-centric approach, to one which takes account of the interests of subsequent authors too. In doing so, the interests of users and right-holders are given equal weighting: neither interest supersedes the other. To achieve this balance, the purpose of any fair dealing exception must be broadly construed.

In conclusion, since 2004, Canada adopts a purposive statutory interpretation of its copyright exception, where the purpose is perceived as a balancing of interests between users and right-holders.

2.2.2.4 Australia

Very little has been said about the principles of interpretation applied to fair dealing in Australia. As is the case for the other countries examined in this thesis, there is no statutory guidance. Furthermore, it is unclear what approach the court adopted in the leading fair dealing case, *TCN*. Indeed, the reasoning given by Conti J. in relation to fair dealing does not demonstrate whether the

494 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 SCR 326.
495 *Alberta (Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37, [2012] 2 SCR 345.
496 S.107 US Copyright Act, supra note 411.
497 *SOCAN v. Bell,* supra note 494, [25-6].

judge endorses a liberal, strict or restrictive interpretation[498]. According to Handler and Rolph, the full court 'provided only a superficial interpretation of the prescribed statutory purposes'[499].

Given the paucity of scholarly or judicial comment on the matter, some indicators may be comprised in policy documents. The Australian Law Review Committee appears to endorse the Canadian approach in the *CCH* decision, discussed above, which rejects a restrictive interpretation of exceptions, since the report emphasises the need to maintain a fair balance between users' rights and the interest of right-holders[500]. This would encompass both a strict interpretation and a liberal interpretation.

Given their shared common law history, Australian courts are also influenced by UK copyright case law. This might suggest that Australian judges would apply a strict interpretation, as is now (arguably) adopted in UK fair dealing cases. The adoption of the new statutory fair dealing exception for parody might also point to a strict, rather than a liberal interpretation, since a liberal approach to copyright exceptions permits such wide interpretation to be tantamount to the introduction of new exceptions. Consequently, it is submitted that Australian courts are likely to cast both restrictive and liberal interpretation of fair dealing aside, in favour of a strict interpretation of the parody exception.

---

[498] Conti J established interpretation principles based upon previous case law. While some appear more liberal (like the fair dealing purpose which should not be construed narrowly; *TCN,* supra note 20, [66]), the overall appraisal of the principles remains fairly conservative. Additionally, '[T]he full court did not examine the fair dealing arguments to the extent that the court at first instance did; in this way, an opportunity to set more authoritative and coherent precedent for the interpretation of fair dealing was arguably missed'. Christou & Maurushat 2009, p. 29; Handler and Rolph 2003, p. 382 & 390.

[499] Handler and Rolph 2003, p. 408.

[500] http://www.alrc.gov.au/publications/28-copyright-and-databases/alrc%E2%80%99s-views, [28.87].

2.2.3 Conclusion

It is apparent from the forgoing analysis that each jurisdiction under scrutiny has acknowledged that it has traditionally applied too restrictive an approach to copyright exceptions. The last decade shows evidence of a wish to redress the balance. Although legislators have adopted different solutions to the problem, it is submitted that the end result is approximately the same.

The EU Directive advocates that right-holders should enjoy a high level of protection, and this led to a restrictive interpretation of copyright exceptions. Yet its recitals also indicate that any exception must be effective, and recent CJEU case law indicates that this requires a balance to be reached between the interest of users (representing the general public interest) and right-holders. As a result, a strict interpretation is appropriate which not only relies on the wording of the provision, but which should seek out the justification supporting that exception, to then arrive at a fair balance between the interests at stake. Given that the justification underlying the parody exception is that of freedom of expression, the scope of the parody exception should be construed as broadly as needed to respect this fundamental freedom. Here, use for the purpose of parody requires a liberal interpretation, even though a strict interpretation of the requirements attached to the parody exception should prevail [501] . Similarly, factors which contribute to the realisation of this fundamental right should count more in the overall assessment, than factors which do not[502]. Thus, freedom of expression provides flexibility for courts to determine the lawfulness of the use of a copyright-protected work for the purpose of parody.

[501] See section 2 chapter 1.
[502] See section 3 chapter 3.

Despite lack of Australian authorities, and awaiting judicial confirmation, it is submitted that Australian courts are likely to reject a restrictive interpretation and shift towards a (more liberal) strict statutory interpretation.

Canada is in the vanguard, with its adoption of a users' right doctrine. This not only requires a broad interpretation of the purpose of the permitted use, but it discards an owner-centric approach and places users' and right-holders' interests on a par with one another. While not rejecting the traditional approach to statutory interpretation altogether, courts should apply a purposive interpretation to the parody exception and identify the motives underlying the unauthorised use. This maintains a fair balance between the interests in play.

Yet, despite the difference in emphasis which appears evident in Canada, it remains to be seen whether the user's rights doctrine results in a markedly broader interpretation of the parody exception than the EU's strict interpretation principle[503].

2.3 Relationship with contract law

While the digital environment has made unauthorised copying more straightforward in many instances, the same environment has also made it more straightforward for right-holders to control other uses of their works. The Internet has permitted new business models to emerge, whereby right-holders directly contract with end-users[504], in place of the more traditional and cumbersome forms of distribution of cultural works needed in the 'hard-copy'

[503] Craig suggests a strict interpretation departing from the restrictive approach in *Michelin* (supra note 35), which would align Canada more closely with the other countries under scrutiny. Craig 2011, p. 168.

[504] We currently assist to an increase amount of 'browse-wrap', 'click-wrap', 'click-through', 'mouse-click' and 'shrink-wrap' contracts in the online environment; Galopin 2012, p. 337; Geiger 2004c, p. 202; Guibault 2002, p. 325; Buydens & Dusollier 2001, p. 13; Guibault 1998, p. 19; Hugenholtz 1996, p. 84.

world. These new models result in an imbalance in bargaining powers: often, right-holders are positioned to impose their terms on users[505].

Given the care with which legislators and courts seek to appropriately balance the interests of relevant parties, the aims of the parody exception would be undermined if right-holders can effectively side-step the provision by 'contracting-out' of the exception[506]. The following subsections determine the extent to which the parody exception is optional in theStudy Countries.

2.3.1 Principle: freedom of contract

Freedom to contract is a principle which prevails in the Study Countries[507]. In effect, the parties to any contract are free to determine the terms which will bind their dealings, and court will then enforce these contract terms, on the premise that the contract reflects the parties' intentions[508].

Yet to what extent do circumstances surrounding many current digital contracts concerning copyright echo the principles underpinning freedom to contract? Guibault differentiates between two contract models. In the traditional, classic contract model, parties have equal bargaining power and negotiate contract terms in good faith[509]. Under this model, each party is reasonably deemed to be aware of its rights and obligations under copyright law, such that, if a party agrees to waive exercise of any statutory exception, this is based upon an understanding of the implications. As discussed further

505 Geiger 2004a, p. 889; Buydens & Dusollier 2001, p. 13.
506 For a detailed study: Kretschmer, Derclaye, et al*, The relationship between copyright and contract law* (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624945 (access date 16/10/15); Guibault 2002.
507 ibid, pp. 112-20.
508 Canada*: Photo Production Ltd. v. Securitor Transport Ltd.,* [1980] A.C. 827 (H.L.), [848] (Diplock LJ); For more: Ben-Ishai 2014, chapter 1 sections 3-4; For a classic approach: Atiyah 1979; UK: *Chappell & Co Ltd v. Nestle Co Ltd* [1960] AC 87, (Lord Sommervell of Harrow); France: Sacco 2007, pp. 743-60; Bustin 2003, p.117; Australia: Australian CLRC Report 2002, Chapter 1.
509 Guibault 2002, p. 198.

in chapter 6[510], in certain specific business models, the classic contract model has been largely superseded by the standard form of contract model. Here, one party sets out its 'standard terms', and is unwilling to deviate from these. Instead the other party must either accept or refuse the standard terms[511]. In many areas of business, where the parties are on equal footing, and there is a wide choice of alternative suppliers, this approach may be unproblematic. In contrast, if the bargaining powers are unequal, and there is little choice between suppliers, the strongest party is able to unilaterally dictate the terms of contract.

The principle of freedom of contract is not without limits. While in all the jurisdictions of interest, contractual terms which are prohibited by law or are contrary to public order are not enforceable, the reach of this derogation differs from one jurisdiction to another.

2.3.2 Exceptions

The next part of this section enquires whether the parody exception's protection of higher values in a democratic society itself constitutes an exception to the principle of contractual freedom. But before considering the national level, some insight can be gained at a supra-national level.

Firstly, the jurisprudence of the European Court of Human Rights ('ECtHR') provides insight as how the perceived importance of the right to freedom of expression[512]. These cases underline the importance of this fundamental freedom[513] relates to the social value attributable to an enlightened public[514]. Any limitation to the exercise of fundamental rights must be proportionate to

[510] Section 3.3 chapter 6.
[511] Guibault 2002, p. 205.
[512] Section 1.2 chapter 5.
[513] Decisions from the ECtHR will only be referred by name. For full reference, see bibliography. *Handyside*, [49].
[514] *Sunday Times*, [65].

the legitimate aim pursued. Guibault concludes that any contract term which, in order to protect a copyright interest, renders an individual impotent in exercising their right of freedom of expression is unlikely to be proportionate[515].

Secondly, the Directive contains no guidance as to whether the copyright exceptions are mandatory. However, the earlier Computer Programs Directive[516] specifically mandates that any contractual provision between right-holders and end-users which aims to avoid its stated exceptions 'shall be null and void'[517], and the Database Directive includes a similar provision[518]. The fact that the EU legislator has elected to make the mandatory nature of exclusions explicit in these directives, and yet, his silence in the Directive leaves us to draw our own conclusions. Until the CJEU sheds any light on this matter, it falls to Member States to decide whether copyright exceptions derived from the Directive may be over-ridden by contract law or not.

The UK alone puts the position beyond doubt[519], despite much lobbying to the contrary by those representing right-holders' interest. The legislation is clear regarding the need to preserve the parody exception in contractual relationships. Section 30A(2) CDPA states:

> To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

A contrario, the contract remains enforceable except those terms seeking to control lawful parodies.

---

[515] Guibault 2002, p. 268.
[516] Council Directive 91/250/EEC of 14/05/1991 on the legal protection of computer programs, OJ L122, 17/05/1991, pp. 42-6.
[517] ibid, art. 9(1).
[518] Art. 14, Directive 96/9/EC on the legal protection of databases, OJ L 77/20 of 27/03/1996.
[519] Section 30A(2) CDPA.

In the other countries in the study, legislators have refrained from specifying in the legislation whether the exception is mandatory. In France, this aspect only gained significance with the copyright amendment in 2006, and currently remains unsettled[520]. There is nothing in the Canadian preparatory works which indicates whether the legislator intended the parody exception to be mandatory, or not.

Similarly, neither the Australian legislation, nor the preparatory works, indicate the legal nature of the exception[521]. Yet earlier in 2001, the Copyright Law Review Committee ('CLRC') was instructed[522] to investigate the extent to which electronic agreements sought to modify or exclude copyright exceptions. The CLRC report, published in 2002[523], acknowledges the role of the exceptions in encouraging creativity and disseminating knowledge by permitting subsequent authors space to create new works. Unsurprisingly, its consultation identified a division between right-holders arguing for stronger exclusive rights and user groups seeking reassurance that hard-fought for exceptions are not overridden in terms of use. However, an interim CLRC discussion paper of 2001 reveals a finding that terms seeking, explicitly or implicitly, to modify copyright exceptions did feature in copyright licences. In its final report entitled 'Copyright and contract', fair dealing is seen as so 'fundamental to defining the copyright interests' [524] that contractual over-riding would significantly disrupt the balance intended in the Copyright Act. It remains to be seen whether this approach will be followed.

[520] It must be reminded that the codification of the parody exception attracted little attention as the exception resulted from well-established judicial practices. See section 4 chapter 2.
[521] Zwart 2003, p. 8.
[522] CLRC, Parliament of the Commonwealth of Australia, *Terms of reference* [23/04/2001].
[523] CLRC, Parliament of the Commonwealth of Australia, *Copyright and contract* [2002].
[524] ibid, [2.01] and [7.25].

To-date, there has been little judicial consideration of this point, which might clarify the position. Indeed, one commentator has gone as far as suggesting that courts appear to avoid embarking on a determination of the legal nature of the parody exception[525].

In general, commentators support the UK legislator's approach that the parody exception should be mandatory[526]. This view is based upon the important justification underlying the exception[527], and the argument raised in the CLRC report, that permitting right-holders to circumvent the parody exception via contract would disrupt the intended balance sought by legislators to meet international, EU and domestic obligations.

In the situation of a classic contract model, the courts might find a clause preventing one party from relying upon the parody exception as null and void, having regard to factors including relative bargaining position, the fundamental rights involved (like freedom of expression), the purpose of the contract, the seriousness of the encroachment upon the freedom of expression and proportionality. It is submitted that the motives behind the right-holder's claim for breach is also pertinent. An assessment of these factors may lead

[525] Galopin 2012, p. 343.

[526] France: Caron 2012, p. 22; Galopin 2012, p. 360; Colin 2010, p. 9; Vivant & Bruguière 2009, p. 388; A. Guilbert, 'La contractualisation des exceptions' (University Pantheon-Assas 2009), p. 18; C. Alleaume, 'la contractualisation des exceptions en France' in *Droit d'auteur et numerique, quelles reponses de la DADVSI ?* (Colloque organised by l'IRPI and l'AFPIDA, 9 march 2007, Prop. Int. 2007, n. 25), p. 438; El Khoury, supra note 208, p. 35; Joly 2007, p. 343; Dusollier 2007, chapter 4 Titre 3; C. Rigamonti in Hilty, Geiger (dir), la balance des interets en droit d'auteur, conference (2004); Vivant & Bruguiere (2009), p. 388; S. Dusollier in RM. Hilty, C. Geiger (dir), la balance des interets en droit d'auteur, conference 2004; Bergel (2001), p. 188; Planiol cited by P. Malaurie, L'ordre public et le contrat (Paris, 1950), p. 263; Canada: Gervais 2005a, pp. 7-61; Australia: CLRC, Parliament of the Commonwealth of Australia, *Copyright and contract* [2002], [2.01] and [7.25]; Zwart 2003, p. 8; Zwart 2007b, p. 7 *against* France**:** Lucas 2010b, p. 58; Gaubiac, 'France: rapport général', in Baulch, Green, and Wyburn (ed.), *Alai Study days – The boundaries of Copyright: its proper limitations and exceptions* (Australian Copyright Council: Sydney, 1999), p. 1999.

[527] Colin 2010, p. 9.

courts to conclude that the term offends against the principle of good faith[528] or public policy.

Taking this a step further, it seems legitimate to question whether there should be uniform treatment of contractual restrictions to the application of an exception and technical restrictions, *i.e.* anti-circumvention methods, imposed by right-holders to prevent unauthorised access to works in the digital environment[529]. Although it is arguable that a parodist does not need to rely on the access to the medium of the original work if technical protective measures are in place, this however may make it more difficult to parody the work. None of the Study Countries have sought to target this problem, or study the extent to which technical measures are hindering efforts to create parody works.

2.4 Conclusion

Based on the solid justification supporting the parody exception, it is submitted that right-holders should not be permitted to use contract law to allow their private interest to prevail over the public interests recognised by the exception. The parody exception is more than a mere exception to a legal right, but a statutory recognition of a fundamental freedom. This factor is significant not only in the interpretation of the exception, but in allocating an appropriate weight when upholding contractual relationships, particularly if the nature of the contractual relationship is such that principles such as freedom to contract appear tendentious.

[528] Guibault 2002, p. 300.
[529] Galopin 2012, p. 364.

Building upon these conclusions, the following section examines how the legal nature of the parody exception impacts upon its interpretation and application by national courts in specific circumstances.

3. Requirements attached to the parody exception

To recap, Chapter 2 exposed the significance of the form of the parody exception in France, UK, Australia and Canada[530]. By use of legal concepts, such as 'fair dealing' or the 'rules of the genre', legislators leave flexibility to the judiciary to develop which factors are pertinent when assessing whether the exception should apply in a particular case. This judicial interpretation eventually shapes the limits of the exception, counter-balancing the flexibility initially introduced by legislators to ensure legal certainty.

The power vested in courts should not be underestimated. Indeed, the efficiency of the parody exception directly correlates with the ability of parodists to predict whether their use of a protected work falls within the parody exception. Predictability thwarts attempts by right-holders to take advantage of uncertainty, e.g. by making unjustified claims of infringement, or pressuring users to take unnecessary licences, or agree to stricter terms of use than the law would otherwise impose[531]. This following section sketches out the range of different factors which are potentially pertinent to the application of the parody exception.

3.1 Preliminary remarks

The exact contours of the parody exception in common law jurisdictions will only be defined once there is a sufficient body of cases which considers its various aspects. As this is currently lacking, the content of this section is clearly

[530] See section 4 chapter 2.
[531] See chapter 6 for examples in music parodies; Handler and Rolph 2003, pp. 407-8.

speculative. However, although no statutory factors exist, it is legitimate to consider landmark decisions [532] covering related areas, as the principles enunciated therein often extend beyond the particular purposes of the case in hand[533]. In addition, as the parody exception operates under a shared legal concept of fair dealing in common with other copyright exceptions, it seems a reasonable hypothesis that these cases can help shed light on the assessment of fairness[534].

It is also timely to recall a number of points identified in the earlier analysis of the exception, which applies to all jurisdictions of the study.

Firstly, as the parody exception acts as a defence, a court must be satisfied that the alleged infringing use is infringing an exclusive right in a protected work[535].

Secondly, both fair dealing and rules of the genre are a two-step assessment[536]: courts must assess whether the use of the work is 'for the purpose of parody'. If this provision is satisfied, the courts then determine whether the use is fair or abides by the rules of the parody genre through a meticulous examination

[532] UK: *Hubbard:* supra note 37, p. 94; Australia: *TCN,* supra note 20 (Conti J.). The Full Court missed the opportunity to make these authoritative by not examining these. Yet Hely J. notes them without endorsing or rejecting these [438-9]; and Canada: *CCH*, supra note 189, [53].

[533] Torremans 2012, pp. 319–37. Yet factors should not be overly relied upon: during the amendment of the Australian Copyright Act, there were discussions as to the expansion of these factors to all fair dealing purposes. This has been expressly rejected by the Parliament. Yet many commentators extend the application of the factors. McCutcheon 2008, p. 181; Copyright Law Review Committee, Parliament of Australia, *Report on the Simplification of the Copyright Act 1968: Part 1--Exceptions to the Exclusive Rights of Copyright Owners* (1998) [2.04 & 6.44], [4.09 & 4.21]; CLRC, Parliament of Australia, *Copyright and Contract* (2002), [3.39], [3.37]; Ricketson and Cresswell 2001, [11.35]; Handler and Rolph 2003, p. 15; Parliament of Australia, Explanatory Memorandum to the Copyright Amendment Bill 1986, [25].

[534] J. Boccara, *La fausse parodie* (Universite Pantheon-Assas Paris II, 2007-2008), p. 25; *CCH*, supra note 189, [55].

[535] Hence, the work must be original, and copyright still in force; the use must be unauthorised. In common law countries, the use must reproduce a 'substantial part of the work'. In France, the exception applies to any reproduction. El Khoury, supra note 208, p. 377.

[536] UK: *Hubbard:* supra note 37, p. 94; *Beloff:* supra note 469, [59]; Canada: *CCH*, supra note 189, [50]; *Michelin,* supra note 35, [59]; *Zamacois:* supra note 482, pp. 68-9; Australia: *TCN,* supra note 20, [49].

of the works[537]. If either limb of the test is not satisfied, then the exception does not apply.

Thirdly, courts apply an objective standard, meaning they must ask themselves 'whether a fair minded and honest person would have dealt with the copyright work in the manner as the defendant did, for the relevant purpose'[538]. This does not mean that there is no scope for the courts to introduce some degree of subjectivity. Indeed, judges determine the weight to be attributed to each factor, depending on the particular facts in hand, in arriving at their overall impression[539]. As a consequence, uniform outcomes might not result, despite ostensibly similar facts[540]. Yet, the nature of a fairness-based exception requires the underlying protected work to have been communicated to the public already[541]. This is generally not an issue for genuine parodies, since these rely upon public recognition of the underlying work, at least for the target audience. Finally, the courts' interpretation of the

[537] France: Colombet 1990, n°389; Durrande, Rép. pén. Dalloz, v°Propriété littéraire et artistique, n°58.

[538] UK: *Hyde Park*, supra note 320, [38]; *Pro Sieben:* supra note 470, [467]; *Banier v. News Group Newspapers Ltd* [1997] F.S.R 812, [815]; *Beloff*: supra note 469, [61]; *Hubbard:* supra note 37, p. 94; France: the well-established concept of *pater familias* surrounds the formula; Galopin 2012, p. 305 and esp. 312; Mouffe 2011, p. 317; Castets-Renard 2004 ; Trib. Corr. Paris 1834, supra note 397; Australia: *TCN Channel Nine Pty Ltd v. Network Ten Pty* Limited [2002] FCAFC 146, [96]; TCN, supra note 20, [53]; Canada: *CCH,* supra note 189, [52]; D'Agostino 2008, p. 327; Tamaro 1998, p. 8; Michelin, supra note 35, [70].

[539] France: Boccara, supra note 534, p. 25; UK: *Hubbard:* supra note 37, p. 94; Restated by *Sillitoe v. McGraw-Hill* [1983] FSR 545, [563]; *BBC v. BSB*: supra note 470, [149]; *Banier,* supra note 538; *Pro Sieben*: supra note 470, [613]; *Hyde Park,* supra note 320, [21]; Canada: *CCH*, supra note 189, [52-3]; *SOCAN v. Bell Canada*, supra note 494, [32]; *Alberta*: supra note 495, [19]; Australia: *TCN,* supra note 20; *TCN appeal,* supra note 538, [110], (Sundberg J.), [2] and (Finkelstein J.), [16]; *De Garis:* supra note 167, [94 and 109-10]; *University of New South Wales v. Moorhouse* (1975) 133 CLR 1, [12].

[540] This does not preclude judges from providing grounds for its decision. The judges must rely on underlying principles to justify their reasoning. Handler and Rolph 2003, p. 418; Australia: *TCN appeal,* supra note 538, [110], (Sundberg J.), [2] and (Finkelstein J.), [16].

[541] France: L. 122-5 IPC 'divulguer'; UK: HM Government, *Modernising copyright: A modern, robust and flexible framework* (2012), p. 14; Haynes 2012, p. 811; Sims 2010, p. 201; Burrell 2001, p. 361; *Ashdown*: supra note 469, [194]; *Hyde Park,* supra note 320, [20]; *British Oxygen v. Liquid air* [1925] 1 Ch. 383 53, p. 393; *Hubbard*: supra note 37, [94-5]; *Beloff:* supra note 469, [61]; Canada: D'Agostino 2008, p. 323; *CCH*, supra note 189, [58]; Australia: Sainsbury 2007a, p. 313.

parody exception is underpinned by the need to preserve the right of freedom of expression[542].

In addition to these common factors, judicial freedom within the EU is required to conform to the CJEU guidance in *Deckmyn*. Here, the two mandatory requirements of humorous character and absence of confusion overarch the national court's appraisal of the unauthorised use. As seen in chapter 1[543], the author argues that the CJEU was correct in refraining from defining the terms of the exception allowing for an elastic conception of the exception's purpose. This does not mean that the exception is without boundaries as explained through the analysis of the factors attached to the exception hereafter.

In the following parts, the factors which are potentially relevant to the parody exception are considered in turn. As there is no hierarchy or weighting of factors and none are mandatory (other than those identified for EU Member States), nothing should be inferred from the order in which the factors are considered.

3.2 The intent

Instead of defining the exception by its humorous character based on the effect of the parody, which would inherently imply a subjective assessment from judges in light of particular facts, the author argues that the humorous character should be evaluated based on the intent of the parodist. As demonstrated through this subsection, this approach is already accepted in the Study Countries.

[542] See infra chapter 5 section 2.
[543] See supra chapter 1 sections 2.4 and 2.7.

The courts in France seem to pay particular attention to the parodist's intent[544] when considering whether the use should be permitted. The aim is to protect right-holders from malevolent behavior. Accordingly, if the parodist intends the use to harm the work, the author or the right-holder, this factor weighs in favour of the right-holder[545].

UK courts are also familiar with this factor[546]. Despite the irrelevance of the intentions of the alleged infringer when determining if the use falls within the purpose of parody, intent plays a role in establishing fairness[547]. Adopting an objective standard, courts determine where lies the user's intent on a spectrum between altruistic and malicious. In *Time Warner Entertainment Co Ltd v. Channel 4 Television Corporation PLC* [548] a documentary reproduced brief extracts from the film, *A Clockwork Orange*. The Court characterises fair dealing as referring to the *true* purpose of the use, meaning attention must be given to the genuineness of the user's intention. A fair dealing exception cannot be invoked to disguise an infringement. Given the interpretation of the exception in *Deckmyn* requiring the use to have humorous character, courts are likely going to allocate more weight to this factor in parody cases.

Australian courts also consider the user's intent to be a relevant factor in assessing fairness. Finkelstein J. in *TCN*[549], having considered UK case law[550], notes that a user's intent may be apparent based upon an examination of the context of the unauthorised use[551]. In casu, the fact that *The Panel* is a popular

[544] For a difference between intent and effect, Rosati 2015, p. 219.
[545] See infra section 3.2.1 and 3.2.2 of this chapter.
[546] *Hyde Park,* supra note 320, [36]; *Pro Sieben*: supra note 470, [614]; *Time Warner:* supra note 470, [15]; *Beloff:* supra note 469, [61]; *Hubbard:* supra note 37, p. 94.
[547] *Pro Sieben*: supra note 470, [614].
[548] *S*upra note 470, [468-9].
[549] See introduction.
[550] *TCN appeal,* supra note 538, [97]: Hely J citing *Hyde Park,* supra note 320 and *Pro Sieben*: supra note 470, [614].
[551] *TCN appeal,* supra note 538, [17].

TV show, known for discussing current events in a humorous way, tipped the balance in favour of fairness. Statements made by the Attorney-General in the lead-up to the introduction of the exception may also have some sway. His comment that an average person particularly values parody's humorous character[552] caused leading commentators, including McCutcheon, to question whether the exception will be more favourable to comical parodies than those which are critical[553].

Canada adopts the same approach, arriving at the same result, without reference to decisions from other common law jurisdictions. In a case relating to an unauthorised parody of the *Bibendum Michelin man*[554], the court stated its view that intent plays no role when determining the purpose of the use, but conceded it could be relevant when assessing the fairness of the use[555]. This position was later confirmed in *Boudreau v. Lin*[556] and *Avanti v. Favreau*[557]. Here courts again noted the influence of the user's intent on the question of fairness, by refusing the defence where the parodist's intent was seen as free-riding on the popularity of the work it had reproduced. Interestingly, in *CCH*[558], the Court was not influenced by intent at all. It is submitted that the fact that this influential decision is silent on the matter does not mean that this factor is no longer relevant. Rather, it highlights the nature of the fair dealing assessment, and the discretion allocated to each court to determine which of the possible factors are relevant to the case at hand.

---

552 Philip Ruddock, 'Protecting precious parody', Daily Telegraph, 30/11/2006.
553 McCutcheon 2008, p.173.
554 See Introduction; *Michelin,* supra note 35.
555 ibid, [70].
556 In the present case, a professor had reproduced a student's research at a symposium without any acknowledgement. The Court could not hold in favour of the Professor as this one had actively removed the name of the student from the paper to substitute with his own. These evidences of malicious intent could not support fair dealing. *Boudreau v. Lin*: supra note 482, [68].
557 See facts in section 2.6 chapter 2; *La Petite Vie*: supra note 185, [57-8].
558 Supra note 189.

While common law jurisdictions accept intent as a factor relevant to fairness, given the nature of the fair dealing approach, it seems that the weight attributed to the factor will vary depending upon the facts of the case. The approach is more developed in France, and the condition can be neatly summarised as 'to entertain without causing harm'[559].

Aiming to understand this requirement and provide guidance for courts of other jurisdictions, the reasoning will be two-part: section 3.2.1 discusses what kind of humorous intent is required before turning to the establishment of the outer limits of the exception in section 3.2.2.

3.2.1 Humorous intent

It is well-established that parodies should have a humorous character[560]. Sometimes the term is applied more strictly to allow comic expressions[561], the current interpretation of the humorous intent expands to encompass expression of homage and criticism[562].

As illustration, French courts have accepted as humorous including a painting of Magritte, famous surrealist artist, in *Playboy Magazine*[563]. Here, the humorous character was seen to derive from the juxtaposition of Playboy's sexual elements with Magritte's artistic world. Humour can be even more biting. French courts have found the criterion satisfied in works which lack

[559] TGI Paris, 13/01/2001, *Prisma*; Galopin 2012, p. 305.
[560] Confirmed in *Deckmyn*, [20] including mockery. See supra note 141.
[561] *Saint-Tin* Paris 2011, supra note 131; Versailles, 17/09/2009, N°RG: 06/11732; TGI Nanterre, 1re ch., 22/05/2008, n°06/11732; Paris, 4eme ch. B, 13/10/2006, D.E.; TGI Paris 7/10/1992, *affaire Faizant*, RIDA, January 1993, p. 222; TGI Clermont Ferrand, *Ets Michelin c. CFDT*, 27/10/1993, n°848/01, inedit; El Khoury, supra note 208, p. 358.
[562] The *Faizant* case was reversed in appeal Paris 11/05/1993 RIDA juillet 1993 p. 340; *Saint-Tin*: supra note 131; TGI Paris, 31/10/2007, *Coco Mademoiselle*; Cass., 4/02/2002, *La Bicyclette Bleue*; appeal of TGI Clermont Ferrand, *Ets Michelin v. CFDT*, Riom, 15/09/1994; TGI Paris 5/01/1978 speaking of 'grossissement burlesque' or 'imitation burlesque' (TGI Paris, 14/05/1992; TGI Paris 9/01/1970) or 'travestissement comique' (*Douces Transes*: Paris 1985, supra note 118; TGI Paris 9/01/1970).
[563] TGI Paris 3 ch, 1/04/1987, cah. Dr. D'auteur 1988, n°1, p. 16.

any comic element. For example, humour was held present in a parody logo used in an anti-tobacco campaign which depicted a dying camel in the well-known CAMEL logo[564]; a drawing of Yves Montand next to reworked lyrics of *Les Feuilles Mortes* paying tribute to the then recently deceased singer[565]; a rework of Tintin's adventures in playful novels in which characteristic elements of the protected work were unexpectedly distorted[566]; the use of Tarzan as an anti-hero[567]; a light opera *Couchés dans le foin* parodying the Toreador tune from the opera, *Carmen*[568]; and even a reworking of one of Mylène Farmer's song in a movie to emphasise the sexual character of the scene[569].

Yet, the broad interpretation of humorous intent adopted in France is not so broad as to extend to a mere reworking. For example, French courts have found humorous intent to be lacking where the only change is one of colour, such as replacing the red colour in the DANONE logo with black (Figure 3)[570]; where song lyrics were used for a political campaign[571]; where minor amendments have been made to lyrics[572] or drawings[573]; and an unauthorised sequel to the Tintin series of Hergé[574]. In the latter case, the defendant had

[564] Paris, (14eme ch) 22/05/2002, 2002/00949 confirmed by Cass., (Ch. Civ 2), 19/10/2006, n°05-13489.
[565] *Affaire Faizant*, supra note 561 which refused the application of the parody exception overturned in appeal Paris 11/05/1993 RIDA July 1993 p. 340.
[566] The humorous intent stems from the comic allusions, word games, puns and additional turnover cues which enable the reader to recognise the allusion and enjoy the allusions (p. 18). *Saint-Tin*: supra note 131.
[567] *Tarzoon*: supra note 115; See chapter 4.
[568] Trib Seine, 1934, supra note 397.
[569] TGI Paris, 3e ch., 29/11/2000: RIDA 3/2001, p. 377.
[570] TGI Paris 04/07/2001, *Société Compagnie Gervais Danone et Société Groupe Danone v. Olivier M., Réseau Voltaire et autres*, www.legalis.net , upheld on appeal Paris, 30/04/2003.
[571] Paris, 4e ch., 21/06/1988: RIDA 4/1988, p. 304 after referral from Cass. 1re civ., 27/03/1990: JCP G 1990, IV, p. 203.
[572] TGI Paris, 9/01/1970RIDA 2/1970, p. 172.
[573] Paris, 17/10/1980 D 1982, somm. 42.
[574] TGI Nanterre, 1re ch., 22/05/2008, n°06/11732, *Garcia c/ Sté Moulinsart* confirmed by Versailles 17/09/2009.

reproduced comic strips from the originals in his book, which had, in the court's view, created a new work which appeared to comment on Hergé's world, and not a parody work[575].

Figure 3

In light of these illustrative examples, it is reasonable to conclude: firstly, appraising humorous character is inherently subjective[576] and sensitive to the practices, social customs and norms at a point in time within a particular society. Therefore, courts must ensure that their reasoning refrains from any qualitative judgment on the work's artistic merits[577]. Yet, it appears that judges find this easier where the object of the parody is the underlying work[578]. This criticism is less relevant in the case of pastiche and caricature, where the target is generally a person. Furthermore, it does not preclude the target of the comment to be directed at an external object such as customs, societal event or the parodist himself[579].

---

[575] Similar reasoning was already adopted in *La Bicyclette Bleue*, parody of *Gone with the Wind*. While the court of first instance found that the defendant's act resulted in a mere transposition of action of the copyright-protected novel, the Supreme Court and Court of appeal on referral from the Supreme Court eventually decided that no infringement was established as only the ideas had been copied rather than the expression of these ideas. Unfortunately, it seems that this decision of first instance has not been published. Cass., 4/02/1992, n°90-21630; Dalloz, 2/04/1992, n°14, p. 182, note Gautier; Paris, 21/11/1990, in D., 1991, p. 85, Obs Gautier. *Le monde*, 23/11/1990; Analysis can be found in Strowel 1991, p. 47 (discussing the court of first instance's decision).

[576] *Saint-Tin* TGI 2009, supra note 131; TGI Paris 3 ch, 1/04/1987, cah. Dr. D'auteur 1988, n°1, p. 16; TGI Seine, 1879, supra note 397; Trib civ. Seine, 23/02/1872, supra note 397.

[577] Bloch 2002, p. 129.

[578] Supra note 570; *Douces transes*: supra note 118; Gautier 1991, p. 85.

[579] *Tarzoon*: supra note 115.

Secondly, the preservation of the right of freedom of expression requires a broad interpretation of this criterion to ensure that all expressions of humour are covered. Therefore, humorous character is a spectrum ranging from provoking laughter[580], being playful[581], paying tribute[582], to providing positive or negative criticism at the other extreme[583].

Thirdly, determining whether humorous character is realised, requires judges to consider the intent of the parodist, and not the effect of the parody on the public. This is justified because a parody's impact relies heavily on external factors; not just the parodist's talent, but also on the audience - over which the parodist has no control[584].

Finally, recent decisions demonstrate that this criterion serves more as a supporting factor. Instead of focusing on humour, judges tend to focus on the effect of the work on the original, and whether the expression harms the original author or their work[585].

---

[580] *Saint-Tin*: supra note 131; TGI Paris, 31/10/2007, *coco mademoiselle*; Paris, 13/09/2005; *Douces Transes*: Paris 1985, supra note 118; Francon 1988, p. 304.

[581] *Saint-Tin*, supra note 131; TGI Paris, 31/10/2007, *coco mademoiselle*; Ccass, 4/02/2002, *La bicyclette bleue*; TGI Paris, 3e ch., 29/11/2000: RIDA 3/2001, p. 377; Paris 3 ch, 1/04/1987, cah. Dr. D'auteur 1988, n°1, p. 16; *Tarzoon*: supra note 115; Trib Seine, 1934, supra note 397.

[582] *Saint-Tin*: supra note 131; TGI Paris, 31/10/2007, *coco mademoiselle*; Paris 11/05/1993 RIDA juillet 1993 p. 340 nevertheless negatively criticised by Francon, obs sous Paris, 11/05/1993, RTDcom., 1993, p. 507.

[583] *Saint-Tin*: supra note 131; TGI Paris, 31/10/2007, *coco mademoiselle*; TGI Paris, 23/03/2001, *jeboycottedanone.com* CCE July-August 2001, comm n°70, note Huet; TGI Paris, 8/07/2002 *Esso c. Greenpeace* (référé) CCE nov 2002, comm n°140, obs Caron et Linant de Bellefonds overturned in Paris 26/02/2003, *SA Société des participations du Commissariat à énergie atomique v. Association Greenpeace France/Internet* FR CCE April 2003, comm n°38, prop. Int. July 2003, n°8, p. 322, obs Lucas, D. 2003, p. 1831, n. Edelman. Accepted in Riom, 15/09/1994, D. 1995, p. 429, note Edelman; Cass., 21/02/1995, *Reynolds Tobbacco*; Versailles, 17/03/1994, *Malhboro*, D 1995; RIDA 2/1995, p. 350; *Tarzoon*: supra note 115.

[584] TGI Paris, 14/05/1992 RIDA October 1992 p. 174; Mouffe 2011, pp. 290 & 292; Berenboom 2009, p. 115.

[585] Versailles, 17/03/1994, *Malhboro*, D 1995; Delfour, supra note 120, p. 74; Paris 11/05/1993 RIDA July 1993 p. 340; Strowel 1991, p. 48; TGI Paris, 17/10/1984, D. 1985, IR p. 324, obs. Lindon; Bercheron, art. 1382-1386 Civil code, fasc. 133-1, n°66.

In conclusion, it is hard to pin down the exact characteristics of an appraisal for humorous intent. If courts have adopted different positions in similar cases, they have done so based on a combination of factors surrounding the humorous requirement, such as parasitism or confusion created between the two works. Additionally, in France, this requirement cannot be analysed in isolation without also assessing the presence or absence of harm.

3.2.2 Absence of harm

The absence of harm truly defines the outer limits of humour in French parody cases. This factor denies a parodist benefit from the exception if their intention is to harm the original author or his works through parody[586].

Considering first intent to harm the author, courts determine whether the parodist reproduces the earlier work with the intent to harm the reputation or honour of the author[587]. As a corollary, if this is demonstrated, the author has a claim based upon moral rights[588], and on other personality rights, such as defamation. In essence, courts seek to limit the degree of harm permitted under the exception. Harm under the cover of humour is allowed, provided that does not constitute an illicit act under another area of law. If the primary intent is to defame, denigrate or cause injury, the parodist is considered to have gone beyond the rules of the genre, and arguably beyond what a fair-minded and honest person would have done with the work. In contrast, if the primary intent is to entertain or criticise, then any harshness or maligning can be excused, because the rules of the genre are respected.

For example, the Supreme Court has held that a music parody in which revised lyrics are sung to the origin melody in a voice imitating the original singer,

[586] Strowel 1991, p. 48; Francon 1988, p. 304.
[587] *Douces Transes*, supra note 118.
[588] Galopin 2012, p. 307; Mouffe 2011, p. 314; Berenboom 2009, p. 116; Bellefonds 2002, p. 217; Isgour 2000, pp. 59–68; Strowel 1991, p. 48; Francon 1988, p. 304.

and seeking to mock them, is a legitimate caricature, provided there is no confusion or obvious rudeness[589]. Courts rarely consider that a caricature will harm the personality of the author, provided it is not obviously outrageous[590]. This is justified because such mockery is at the heart of caricature and pastiche, and so courts are willing to concede a degree of harm, so as to respect the nature of the genre.

Considering now the intent to denigrate the underlying work via parody[591], the character Tintin provides another good example. In a parody which featured this famous fictional character in scenarios being the antithesis of the world created by Hergé, *e.g.* in which Tintin takes illicit drugs or performs sexual acts, the court considered such use denigrated the original work to an extent which should not benefit from the parody exception[592]. Yet, *in casu*, it is submitted that the decision is debatable. Although attempting to refrain from assessing the work's artistic merits, French courts seem less lenient where a parody comments a work considered to be part of the cultural heritage, even if the rules of the genre appear to be respected. This said, as in the case of potential harm to the author, if a parody is considered to be too outrageous, it seems to fall beyond the limit of the harm allowed under the exception. Therefore, it remains to be seen whether parodies like the creations of Ole Ahlberg[593] which reproduce well-known works belonging to French, Belgian

[589] *Douces Transes*: supra note 118; TGI Paris, 9/01/1970 JCP, 1970, II, 16645.
[590] Cass., 2/03/1997, JCP II jurispr. N°5, 28/01/1998, p. 185; Paris, 28/02/1995, legipresse, 1995, n°8125, I p. 92; TGI Paris 12/01/1993, legipresse n°108 II p. 11; TGI Paris 26/02/1992 legipresse n°96 1992 p. 127; Cass, 13/02/1992, legipresse, n°93, p. 87; *Douces Transes*: supra note 118; Paris 19/06/1987, JCP 1988, II, n°20957; TGI Paris (ref) 24/02/1975, D., 1975, jurispr, p. 438, note Lindon.
[591] TGI Paris, *Societe Moulinsart, Mm Fanny R. c/ Eric J.*, 11/06/2004 available on www.legalis.net; Cass, *Exocom v. Boomerang*, 2003; TGI Paris, *OneTelFuck*, 29/05/2001 available at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=319 (access date 25/10/2015).
[592] ibid.
[593] See http://oleahlberg.dk/paintings (access date 27/10/2015).

or Italian cultural heritage to transpose them in a fantasy world far from the world in which the original evolves would be found non-harmful (Figure 4).

Figure 4

Tintin parodies

Magritte and Tintin parody *Mona Lisa parody*

In conclusion, this factor reminds parodists that freedom of expression is not absolute, meaning that not all expressions made under the cover of humour will benefit from the exception[594]. In addition, the factor enables court to consider the other interests of authors, including moral rights, and to consider harm protected by other areas of law, as required by the Three-step Test[595]. Yet, this factor is inherently a question of degree[596]. While preserving freedom of expression requires a liberal interpretation of humour, it does not support an obviously outrageous or malevolent statement. These are rightly prohibited[597].

3.3 Absence of confusion

A related aspect to the concept of harm to the author or the work is a parody which creates confusion. Considered by French courts, this factor requires the court to assess whether the parody creates confusion with the underlying work on which it is based in the mind of its audience. On seeing/hearing the parody, the public should not believe that they are seeing/hearing the original, or that there is a link, whether artistic or economic, between the two works. In essence, the parodic nature of the defendant's use must be immediately apparent, meaning the original work is reproduced not because the parodist seeks to benefit from another's creative efforts, but because copying is essential to this particular creative endeavor.

In *Deckmyn*, the CJEU establishes this factor as mandatory for EU Member States[598], meaning that it is not only French courts which will need to devote

[594] See chapter 5.
[595] See chapter 2.
[596] For example, in *Commissaire Crémèr*, the facts dealt with a cartoon parody of a famous comedian (Bruno Cremer) known for impersonating Commissaire Maigret in a TV series. The Supreme Court held that the parody exception was applicable despite the parody being 'particularly ridicule and belittling'. Cass (1ere civ), 10/09/2014, n°13-14.629 on appeal from Paris (Pole 5 ch.2), 21/09/2012. This decision is criticised by Pollaud-Dulian, RTD Com. 2014, p. 815.
[597] Bloch 2002, p. 131.
[598] *Deckmyn,* [20].

particular attention to this factor. However, this is an aspect which is already familiar in the common law countries of the study, as illustrated below.

In the first fair dealing case to come before the UK courts[599], the defendant had published a book of study materials which included the plaintiff's examination papers. The court denied this was 'fair dealing', but mere reproduction, as the defendant had done nothing to transform the original work [600]. The role that transformation plays in avoiding confusion is established in Australia, too. Analysis of the court's reasoning in *De Garis v. Neville Jeffress Pidler Pty Ltd*[601] and *Disney Productions v. Air Pirates*[602], leads one commentator to conclude that the more the original work is distorted, the more likely it is that the use will fall within the parody exception[603]. Absence of confusion is also a factor in Canadian fair dealing cases, and these highlight a different form that confusion may take. In *CCH*[604] and *SOCAN*[605], the court held there was is no fair dealing in the case of plagiarism. Here, attempts to 'pass off' another's work as your own is unfair, and may create confusion. Such use may be appraisal as an economic encroachment of the use on the market of the original, instead of as a factor of anti-confusion.

How should this factor be appraised? It is submitted that it is the absence of confusion, and not the extent of modification which is key for parody works. As has been seen already[606], a successful parody may result from a relatively subtle change to the original work, or it may even reproduce the totality of the earlier work. Hence, it is dangerous for courts to assess parodic use based

[599] *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601.
[600] ibid, [613]; Confirmed in *Hubbard:* supra note 37, p. 94.
[601] Supra note 167.
[602] (1978) 581 F 2d 751 (9 Cir).
[603] Sainsbury 2007a, pp. 311-2; Sainsbury 2007b, p. 154.
[604] Supra note 189, [54].
[605] Supra note 494, [33].
[606] See section 1 chapter 1.

upon the amount of the work reproduced compared to the original input from the parodist in final expression, as this is likely to result in subjective assessment of the work's merit. Indeed, much of the creative effort on the part of the parodist arguably takes place prior to the work's expression, *e.g*. in the selection of the work to parody and in the selection of the best elements to modify in order to communicate the desired message. It is this aspect of the parody which determines whether the parody is successful. There is, inherently, a fine line between the amount of copying needed for the purpose of parody and that which will lead to confusion. Unless a parodist is permitted to copy a sufficient amount of a protected work, the public will fail to recognise the allusions made to the original work. However, if the parodist copies too much, the parody will be lost, and the public will question whether the work is just a variant, linked to the original.

Examples of how this careful balance should be struck are evident in French decisions on parody. Generally, lack of confusion results from the nature of the distortion made by the parodist[607]. Here, courts tend to find that the more modification of the underlying copyright-protected work there is, the less likely the parody creates confusion. Therefore, in a song, reproduction of the entire musical work while changing its lyrics was held as sufficient to avoid

[607] *Saint-Tin*: supra note 131; Paris, *Paul B c. Moulinsart*, 13/09/2005 at www.legalis.net; référé 11/06/2004; Paris (4eme ch sect. b) 17/01/2003, *Le monde d'Anne Sophie*, Prop. Int. 2003, n°7, p. 169, obs Lucas; TGI Paris, *Agence France Presse (et autres) c. M. Ivan Callot, Sarl Magnitude*, 13/02/2002; TGI Paris, *Femme*, 13/02/2001; TGI Paris, 29/11/2000, RIDA, July 2001 n°189 p. 377; TGI Paris 1/02/2001, Exp. July 2001, p.275, note Herest & chron. Kerever RIDA 2001, n°190, p. 379; ass plen. 12/07/2000, JCP 2000, II 10439; *Calimero*: supra note 120; Paris 11/05/1993, RIDA 1993, n°157, p.340, RTD com. 1993. 510, obs. Françon; TGI Paris 16/02/1993, dalloz 1994, somm, p. 195, obs Bigot; TGI Paris, 7/10/1992, RIDA 1993, no155, p. 222, obs. Kéréver; TGI Paris, 9/01/1992, dalloz 1994, somm, p. 195 obs Bigot; TGI Paris 3 eme ch, 30/10/1991, *SPE c/CAP*, RDPI 1992, n°45, p. 98; Cass civ 1ere, 27/03/1990, Bull. N°75; TGI Paris 17/03/1988, Gaz. Pal. 1988, 2 somm p. 360; *Douces Transes*: supra note 118; Paris, 14/02/1980, D. 1981, somm. 86, obs. Colombet; *Tarzoon*: supra note 115; Paris 20/12/1977, *Peanuts*: supra note 110; Trib. Seine, 1886, supra note 397; Trib. Seine, 1879, supra note 397.

confusion[608]; whereas the addition of a commentary to a song by a comedian in a sketch (adding quips such as 'songs like this, I make every day' or 'if he managed, then I have a chance as well') was insufficient[609]. While the court acknowledged that mockery was intended, it held that parody requires an actual modification of the underlying work[610]. The court in a *Tintin case*[611] summarised it well:

> [P]arody [is] the result of a work of distortion or subversion and thus, a detachment from the original work, in order for the public not to be mistaken on the impact of the words and on the author of the parody[612].

In casu, lack of confusion resulted from a change of genre from comic book to novel, new contemporaneous characters, word games only possibly in novel literary form, distortion of the characters' names[613] and the links created with the underlying work (*i.e.* Tintin appears as the father of the main character, Saint-Tin).

Yet, modifications of a copyright-protected work may be insufficient if, despite modification, the parodist work is perceived as a sequel to the original work. In another *Tintin case*[614], the defendant's posters featured Tintin in new situations, such as reproducing the entire cover of the original *The Blue Lotus* book as if part of a filming set. The court noted that as Hergé's books had been adapted into films in the past, the public may assume that these posters had

---

608 *Douces Transes*: supra note 118; repeated in TGI Paris, 29/11/2000, RIDA, juillet 2001 n°189 p. 377 (change of lyrics while keeping the tune for a movie scene).

609 *Jean T. dit Jean Ferrat, Sarl Productions Alléluia, Gérard Meys, Sarl Teme / Sté I-France (venant aux droits de la SA Opsion Innovation) c/association Music Contact*, Paris, 18/09/2002, Dalloz 2002 A.J. p. 3208.

610 Similar reasoning was held in TGI Paris, *Agence France Presse (et autres) c. M. Ivan Callot, Sarl Magnitude*, 13/2/2002 whereby the defendant reproduced the copyright-protected material accompanied with denigrating comments.

611 *Saint-Tin*: supra note 131.

612 ibid.

613 For example, Tintin becomes 'Saint-Tin' and Milou becomes 'Lou'.

614 Paris, *Paul B c. Moulinsart,* 13/09/2005 at www.legalis.net.

been authorised by the late author's estate. Here, the court did not hesitate to examine the manner in which the right-holder had exercised his exclusive rights, and this was a relevant factor in the court's conclusion that the use had not distance itself far enough from the original to avoid confusion. An attempt at parody which results in artistic confusion is not covered by the parody exception.

In a further case, considering a reproduction of the famous *Calimero* character in a sadomasochist context, the court held that the exact copying of the fictional character transposed to a new context, far removed from its natural environment, was not sufficient to avoid confusion[615]. Therefore, it seems that although parody may, at least in theory, result simply from a change in context as an act of subversion, it is far easier to establish when there is an actual distortion, because confusion is less likely.

If distortion is necessary to avoid confusion, then this element goes hand-in-hand with the need for the public to be able to identify the new work as a parody. This identification[616] can be achieved in different ways. Firstly, parodists should only copy visible and distinctive elements of the earlier work[617]. Consequently, the more well-known the underlying work is[618], the

[615] Confirmed in TGI Paris, 11/05/1988, *Fanny Vlamynck c. Wolf*, LPA 17/01/1989, n°7, p. 8, RIDA 1989, n°142, p. 344; the literature nevertheless argues that the parody exception should apply where the defendant reproduces protected characters to put them in contexts where the original author would have never put them. Francon 1988, p. 303; *Peanuts*, supra note 110; *contra Calimero*, supra note 120.

[616] Identification does not equate to express acknowledgement of the underlying copyright-protected work. The inadequacy of express acknowledgement is further detailed in chapter 4 in relation to the paternity right and expressly rejected in *Deckmyn,* [21].

[617] TGI Paris (3e ch., sect. 3), 5/03/2008, RIDA, 2008, n°217, pp. 338-42; *Douces Transes*, supra note 118; Trib. Comm Seine, 26/08/1886, Ann. 1889, p. 352; Trib civ. Seine, 1879, supra note 397.

[618] *Saint-Tin*: supra note 131; TGI Paris 3/03/2008, *Fort Boyard*; TGI Paris, *Agence France Presse (et autres) c. M. Ivan Callot, Sarl Magnitude*, 13/02/2002; *Calimero*: supra note 120; Paris 11/05/1993 RIDA July 1993 p. 340; TGI Paris 7/10/1992; TGI Paris, 14/05/1992 RIDA October 1992 p. 174; Cass., civ 1ere, 27/03/1990, Bull. N°75; Paris (4eme ch) 27/11/1990, *aff. Jacobs Suchard Franc c. Antenne 2,* inedit (cited in Mouffe 2011, p. 458); Paris 21/06/1988, RIDA

easier it is for the public to identify it, and simultaneously recognise that the work has been parodied[619]. However, this is not to say that only parodies of 'well-known' (in some absolute sense) works may benefit from the exception. As there is no European or international legal basis, this would lead to an over-restrictive application of the exception[620]. Nevertheless, the notoriety of the original work does serve as an indicator that the parodist has not created the copied materials. Hence, the more well-known the copyright-protected work is, the less distortion the parodist needs to make, to avoid public confusion.

Likelihood of confusion will also be reduced if the parodist makes the parodic nature of their act explicit[621]. For example, French courts have applied the parody exception in a case where the parody itself included captions like 'After Prevert'[622] or 'I boycott Danone'[623]. In *Brel*[624], the claimed parody rearranged selected lyrics from one of Brel's songs. However, it did so in a way that it was not possible to tell that it was the juxtaposition of excerpts, and not a reproduction of the original song. In view of the likelihood of confusion, the

October 1988 p. 304; *Douces Transes*: supra note 118; *Tarzoon*: supra note 115; *Peanuts*: supra note 110.

[619] *Douces Transes*: supra note 118.

[620] Recent French decisions appear to elevate the well-known character of the earlier work as a requirement to the application of the parody exception. It is doubtful that this reasoning is doubtful post-*Deckmyn*. Yet as mentioned, in certain cases parodies can be covered by the UGC exception in Canada. In which case, s.29.21(b) Copyright Act 1985 requires 'the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so'. Some parodies might qualify under the UGC exception subject to the respect of this condition.

[621] Though this raises the question of whether the parody can still be successful if the public is forewarned of the parody nature of the use. This is the same as telling the punchline, before the joke itself, thereby ruining it.

[622] Paris 11/05/1993 RIDA July 1993 p. 340.

[623] TGI Paris, ordonnance de référé du 23/04/2001.

[624] Cass civ. I, 27/03/1990, Bull., I n°75, *Madame Jacques Brel c. Rpr.*

'parody' fell beyond the exception. As the Supreme Court notes in this case, the crux is that the public is aware they are not exposed to the original work[625].

Ultimately, by requiring a distortion or modification of the original work, this factor delineates between permitted use of a copyright-protected work and plagiarism[626]. It is evident that realisation of this requirement is linked to the previous factor. For example, absence of confusion may result from the form of expression. The more comic the parody is, the less the audience will confuse it with the original. This interlinking of the factors helps to understand why the legal concepts of fair dealing or the rules of the genre, do not rely upon linear reasoning, but constitute a matter of impression.

3.4 Amount reproduced

The very nature of parody requires copying, but this inevitably begs the question of how much copying is permitted within the exception. While it is already clear that, if a defendant is relying upon a fair dealing defence, their use must constitute a substantial reproduction of an earlier works, is a parodist able to reproduce a copyright-protected work it its entirety, and still benefit from the exception?

Early UK fair dealing decisions did not seem to consider the quantity reproduced as decisive[627]. Yet, later case law appears to allocate more weight to this factor in the assessment of fairness[628]. Analysis of fair dealing decisions,

[625] See *Deckmyn*, the defendant incorporated the caption 'Fré vrij naar Vandersteen' meaning 'Fré freely in the style of Vandersteen'. This caption is an additional evidence for the public to recognise that they are not exposed to the original.

[626] This has been expressly noted in a French decision 6/02/1834, Trib Corr of Paris where the judge adopted a very liberal approach by stating that as for criticism, parodies should not be considered as infringing copyright unless it amounts to plagiarism. Accordingly, the reproduction of copyright-protected elements should not result in riding on the coattails of somebody else's success. *Saint-Tin* Paris 2011, supra note 131.

[627] *University of London Press Ltd v. University Tutorial Press Ltd*, supra note 599, [608-14].

[628] *Hyde Park,* supra note 320, [23]; *Ashdown*: supra note 469, [153]; *Pro Sieben*: supra note 470, [613]; *Time warner:* supra note 470; [12–6]; *Associated Newspapers Group plc v. News Group*

especially those concerning use for the purposes of criticism, indicates that courts compare the amount borrowed with the weight of comments made[629]. This brings a qualitative aspect into the appreciation[630]. It is not only the amount of the material which is reproduced that is important, but also the nature of the material copied, and how the features copied relate to the main features of the original work. Here, the more the defendant copies the most prominent features of the work, the less likely it is to be considered fair.

Yet, in the landmark decision of *Hubbard v. Vosper*[631], a case in which the defendant reproduced Scientology documents in a book which criticised the movement, the Supreme Court accepted the possibility that copying an entire work may be fair dealing, provided the nature and the purpose of the unauthorised use fits within the goal of the exception. This point is also raised in a UK Government report released in advance of the introduction of the parody exception[632]. Specifically, the Government notes that while fair dealing generally applies in respect of partial reproductions of original works, it does not exclude a wholesale reproduction. Thus, in the UK, there appears room for parodies which copy the original entirely, provided sufficient distortion is achieved.

Canadian courts appear more stringent than those in the UK, and established in two early cases that an entire reproduction is not fair, at least for the purpose of criticism[633]. Yet in *Allen v. Toronto Star Newspapers Ltd*.[634], a newspaper

Newspapers Ltd [1986] RPC 515, p. 519; *Hubbard:* supra note 37, p. 94; *Ladbroke Ltd c. William Hill Ltd*, [1964] 1 All ER 465, p. 469; *Johnstone*, supra note 470; *BBC v. Wireless League Gazette Publishing Co* [1926] 1 Ch. 433, [439].

629 *Johnstone*, supra note 470.

630 *Hyde Park,* supra note 320, [28 & 32]; *Pro Sieben:* supra note 470, [613-4]; *BBC v. Wireless League Gazette Publishing Co* [1926] 1 Ch. 433.

631 Supra note 470, [94 & 98].

632 HM Government, 'Modernising copyright: A modern, robust and flexible framework.' (2012) p. 14.

633 *Zamacois:* supra note 482; D'Agostino 2008, p. 321.

634 (1997), 26 O.R. (3d) 308, [211].

reproduced a complete magazine cover, and the court adopted a more liberal approach, since the photograph was reproduced for the purpose of reporting a current event. The court stressed their view that 'the test of fair dealing is essentially purposive' and 'not simply a mechanical test of measurement of the extent of copying involved'. Thus, we can assume any quantitative assessment is accompanied by a qualitative assessment which takes into account the nature of the use involved. It remains to be seen how the judiciary will developed this factor in relation to parodies. However, building upon *CCH*[635], this factor is only one element which determines fairness, and so will not be decisive on its own. Therefore, also in Canada , it seems possible that wholesale reproduction of a copyright protected work might still be considered as fair[636].

The quantitative factor is likely to be considered in Australia too[637]. The *TCN* case seems indicative of the importance attributable to this factor[638]. Although the full court failed to establish whether fair dealing extended to use of an entire work, some guidance can be found in the trial decision. This decision referred to the UK precedent, *Beloff v. Pressdram Ltd*[639], and repeated the importance of assessing fairness relative to the purpose of the use[640]. Additionally, the court relied on *Pro Sieben*[641] and *Hyde Park*[642] to note that the amount copied is an indication, but not decisive of the fairness. As the fairness is assessed by the objective standard of a fair minded person, each

[635] *CCH*, supra note 189, [56] citing *Hubbard:* supra note 37, also mentioned in *Michelin,* supra note 35, [65]; *SOCAN v. Bell Canada,* supra note 494, [41]; *Alberta*: supra note 495.
[636] For completeness, it is submitted that the parodies which fall within the non-commercial user-generated content exception are not limited to a particular amount of borrowing. Indeed, s. 29.21 CA 1985 does not enunciate this factor as a condition to the application of the exception.
[637] Suzor 2008, p. 243.
[638] *TCN appeal,* supra note 538, [434]; *TCN,* supra note 20.
[639] Supra note 469.
[640] *TCN,* supra note 20, [49-50].
[641] *Pro Sieben:* supra note 470.
[642] *Hyde Park,* supra note 320, [38].

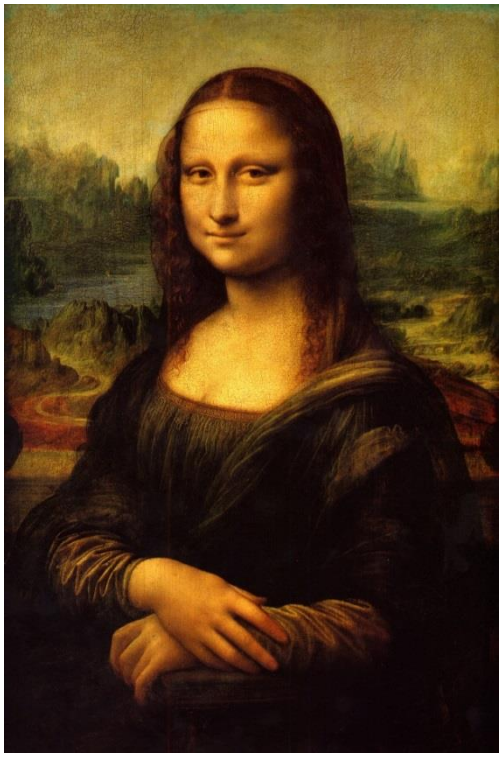
circumstance is considered on its own merits, so copying the same amount of the same work may be fair in one case, and not in the other. The full court also countenanced that a defendant might feasibly copy entire earlier works[643].

Australian scholarship rightly underlines the fragility of this factor in relation to the parody exception[644], given the very nature of parody and the need to reproduce enough of the earlier work for the parody to succeed. Indeed, commentators note that if parodists are unable to reproduce an entire work, visual artists, such as painters and photographers may be simply unable to rely on the exception (Figure 5[645]). A parody exception which precludes an entire reproduction reduces the scope of the exception unduly.

[643] *TCN appeal,* supra note 538, [276].
[644] McCutcheon 2008, p. 185; Suzor 2008, p. 243; Handler and Rolph 2003, p. 403.
[645] The original work was created before copyright, but the reasoning remains valid for parodies of copyright-protected work.

Figure 5

Da Vinci's *Mona Lisa* (1503-1505) Duchamp's *L.H.O.O.Q.* (1919)



Given that France has a long-standing parody exception, how do French courts appraise the quantity reproduced? Although earlier French decisions appear to grant certain latitude to the extent which can be reproduced within a parody[646], later decisions tend to elide this factor with the risk of confusion, as discussed already, above.

French literature seems torn between those scholars who argue that integral reproductions should be permitted[647], and those who consider that substantial copies, but not complete reproductions, should be permitted [648] . The

[646] Paris, 1re ch., 20/12/1977, Ann. propr. ind. 1979, p. 84.

[647] A. Lucas, *Fasc. 1248: Droits des auteurs. - Droits patrimoniaux. - Exceptions au droit exclusif* (2013) Jurisclasseur, [44]; Mouffe 2011, p. 296; El Khoury, supra note 208, p. 69; Strowel 1991, p. 48.

[648] A. Bertrand, 'Exceptions à la protection en matière de droit d'auteur qui figurent au CPI' in *Droit d'auteur* (2012) p. 350; Dalloz, *Exception au droit d'exploitation* (2006), p. 9; D. Voorhoof,

divergence appears to stem from different interpretations of the *El Gringo le Jaloux* decision[649]. This case involved unauthorised use of parts of one commercial in another which promoted a rival's business. The Court of Appeal held that whether a reproduction is permitted under the parody exception depends upon whether the reproduction creates confusion. Furthermore -and this is the source of the divergence among scholars- the court notes that the parody exception should not allow an integral or almost integral reproduction. Based upon the latter statement, a first camp equates this statement to a requirement of the exception. A second camp considers the latter statement is tempered by the court's first. Indeed, this seems more plausible, as the dispute concerned commercial competitors and the parody arguably used excerpts from the competitor's earlier commercial to promote its own business by creating confusion and/or taking advantage of the notoriety of the earlier work. This interpretation ties in with the *Brel decision*[650], discussed above, in which the Supreme Court also refused to apply the parody exception where a work reproduced portions of lyrics for a political campaign, as the manner in which the earlier work was used created confusion as to whether the use was a parody or the original.

Indeed, the Supreme Court has found the parody exception to apply in a case where an entire earlier work has been copied[651]. In a dispute concerning a musical parody, new lyrics were juxtaposed to the original musical work. The fact that there was no confusion because the public could easily distinguish between the original and the parody prevailed, despite the amount of the musical work copied, and so the parody was deemed lawful. In this case, the

Is freedom of expression a legitimate argument for disrespecting copyright? The parody as a metaphor (2000), p. 17; Dalloz, *La parodie ne saurait justifier la reproduction intégrale ou quasi intégrale de l'oeuvre originale* (1991) *Recueil Dalloz*, p. 35; Francon 1988, p. 303.

[649] Paris 4 eme ch. 27/11/1990, *Suchard c. Antenne* 2, D 1991, IR 35.

[650] See section 3.3 chapter 3. Cass., civ. I, 27/03/1990, Bull., In n°75, *Madame Jacques Brl c. Rpr*.

[651] *Douces Transes*: supra note 118.

Court compared 'song' with 'song', rather than considering the underlying copyright works separately. The crucial point is emphasised in a more recent decision in which the trial judge noted that the parody exception prevents partial or integral reproduction of an earlier work used as such[652]. Hence, it is the illusion of being exposed to the original work which should be prohibited, irrespective of the amount copied.

Pursuant to the French regime, the amount reproduced in quantitative terms is not determinative, but rather how the amount reproduced is presented to the public, and whether confusion is likely to result. Thus, it is submitted that as long as the public recognise the work as a parody, because of an element of distortion, then the parody may reproduce the earlier work in its entirety.

Obliging parodists to limit the quantity of work borrowed is tantamount to requiring courts to undertake an artistic judgement whether the same parodic effect might have been achieved otherwise, and this assessment falls beyond the judicial role. Rather, courts should limit their enquiry as to whether the reproduction of earlier work is necessary for the objective pursued, and is not *e.g.* a disguised forgery. Therefore, the French court's linking of the amount copied to public confusion seems a legitimate approach[653].

It is argued that whether the amount copied is substantial (assessed quantitatively or qualitatively) should only ever be used as one indicator for fairness, and not decisive in itself. As a parody exception is introduced to permit parodies to be created, this will be stymied if parodists are not given free rein to copy significant amounts of protected works. Therefore, it appears impractical to invalidate a use based on the amount copied. Indeed limiting the amount able to be reproduced, might actually increase the likelihood of

[652] TGI Paris, *Femme*, 13/02/2001 available at www.legalis.net.
[653] See section 3.3 chapter 3.

confusion, and a parody which makes only a weak allusion to an early work may fail on its own terms. The main concern is to enable creation of parodies which might imply integral reproduction of copyrighted material [654]. Eventually, the effectiveness of the exception will depend upon whether and how strictly courts apply this factor. Will parody photographs of famous paintings like those of the London-born artist Broadhead be covered by the exception (Figure 6)?

Figure 6[655]

Vermeer, *The Glass of Wine* (1658-1660) Broadhead, *Wine Tasting* (2011).

Re-interpreting historical images, Broadhead links the past to the present to comment upon enduring social and aesthetic narratives.

3.5 Motives

A parodist's motive for creating a parody is a factor which features erratically in French parody decisions. In particular, French courts have considered whether it is legitimate for a parody which is commercially exploited to benefit

[654] Mee 2009, p. 82.
[655] Again, although this example features an original work in the public domain, the principle of the question remains valid.

from the parody exception in various disputes[656]. The French courts' approach to commercial use depends upon the particular scenario.

In a first scenario, French courts consider the exception to apply where any commercial exploitation results as a consequence of an exercise of freedom of expression[657]. Hence, a political parody may be commercialised on label pins[658], or disseminated via newspapers[659], TV shows[660], movies[661] or in plays[662]; all mediums traditionally used as vehicles for freedom of expression.

In a second scenario, the parodist has a primarily commercial motive. Here, French courts are careful to identify whether the parodist's main intent is to create a parody for commercial exploitation, or whether parody is merely a disguise to commercially exploit the work of another. By way of illustration, courts are less likely to apply the exception if another's protected work is borrowed by the defendant to promote their own products. Thus, French courts have held uses to be infringing, where a parody has been used to promote underwear[663], lighters[664], branded clothes[665], political campaign

[656] TGI Paris, 3ème ch. civ., 1ère section, 13/05/2008, *Che Guevara*; Paris, 4ème Ch., 9/09/1998, *Société Seri Brode C/ Procter & Gamble France*; Cass. (1ere ch civ), 13/01/1998, D., 1999, somm. p. 167, obs. Bigot; Trib civ. Seine, 1879, supra note 397.

[657] Cass., 13/01/1998, supra note 656; TGI Paris, 3/03/1993, legipresse 1994, n°108, II, p. 10; Paris, 8/07/1992, legipresse 1992, n°100 p. 40; Paris, 20/09/1993, legipresse 1994 n°108 p. 9; Cass., 7/12/1993, (*Fluide Glacial*), n°92-81091.

[658] Cass., 13/01/1998, supra note 656.

[659] Cass., 7/12/1993, *Fluide Glacial,* n°92-81091; Paris, 20/09/1993, *Agrif c. Godefroy*, Légipresse, n°108, II, p. 9; TGI Paris, 3/03/1993, *Caroline Grimaldi c. Société Kalachnikof*, Légipresse, n°108, II, p. 10; Paris, 8/07/1992, legipresse 1992, n°100 p. 40.

[660] Reims 9/02/1999; Delfour, supra note 120, pp. 58-9 with the exception of application of publicity rights such as illustrated by TGI Paris 17/09/1984, D. 1985 IR 16 obs Lindon confirmed in Paris 22/11/1984, D 1985 IR 164, obs Lindon.

[661] TGI Paris, 29/11/2000, RIDA, n°189, July 2001, p. 377, obs. Kerever.

[662] Trib. civ Seine, 1879, supra note 397.

[663] TGI Paris, 24/01/1976, cite par Mouffe 2011, p. 398.

[664] TGI Paris, 2/10/1996, Legipresse 1997, n°138, I, p. 4.

[665] TGI Paris, 30/04/1997, Gaz. Pal., 17-19/05/1998.

advertisement[666], posters and postcards[667], an operating system[668] or card games[669]. French courts are also reluctant to apply the parody exception where one competitor has parodied the work of a direct competitor in an attempt to win consumers to their goods[670].

In a third scenario, the courts look unfavourably upon commercial parodies which capitalise upon their shock value, or cause offence. For example, courts refused the exception in a notorious photograph of *Che Guevara* in which Korda distorted the image as a hostile monkey, even though there was no public confusion and humour was present[671]. Similarly, in a dispute involving a provocative distortion of a painting of *The Last Supper* for a fashion advertisement, the court held the parodied image was likely to offend those of the Christian faith, and so fell outside the exception use[672].

Thus, it is evident that French courts do permit the parody exception to apply to commercial use in certain circumstances, but here particularly, similar facts may lead to different outcomes owing to the subtlety in the balancing. This makes the outcome most uncertain. However, it is believed that the *pater familias* principle helps restore legal certainty. Indeed, in most of the cases where the parody exception did not apply, the outcome was also contingent upon other factors, because the parodist acted in bad faith, did not respect the rules of the genre (*i.e.* by creating confusion or harming the author) or lacked

[666] Paris (4eme ch), 25/03/2005, Gaz. Pal., 2005, jurispr., p. 4318.
[667] Paris, *Paul B c. Moulinsart,* 13/09/2005 at www.legalis.net.
[668] TGI Paris, 13/02/2001, *SNC Prisma Presse et EURL Femme c/ Charles V. et association Apodeline.*
[669] TGI Nancy (référence), 15/10/1976, JCP, 1977, n°18526, obs. Lindon.
[670] Paris 4e ch. A 27/11/1990
[671] Paris (4eme ch), 13/10/2006, Gaz. Pal. 2007, jurispr., p. 2110.
[672] Paris, 8/04/2005 rec dalloz 2005/20, 1327, note Rolland; Voorhoof, supra 648, p. 18; see section 3.2.2.5.2 chapter 5.

a genuine intent to parody (intending instead to benefit from the success of the original works).

As the common law tradition typically bestows more importance to the protection of an author's economic rights, it might be expected that this stance would count against the parody exception applying in the case of commercial exploitation of the parody, but is this position reflected in fair dealing case law?

If commercial exploitation is possible under the UK fair dealing exception, it is necessary that the user does not have ulterior motives[673]. Thus, UK courts will consider a parodist's motives[674]. If a user has *animous furandi*, meaning the 'deliberate intention to steal', or, in a contemporary context oblique motives[675] or intends inappropriate actions[676], then this will count against the use being fair.

As with all of the other factors, a commercial motivation alone should not be decisive to exclude fair dealing. It should be possible for a parodist to leverage a parody for commercial benefit, or for one competitor to parody another and still enjoy the exception's protection[677]. However, where one business uses a work created by a rival, it is reasonable for this to weigh heavily as pointing away from fair dealing, meaning that all other factors 'in the mix' will need to be generally pointing to the fairness of the use[678]. Thus, the court will need to be satisfied that the parody claim is not merely a *trick* to cover an infringement[679]. The more the use is a straightforward parody, the more likely

673 *BBC v. BSB*: supra note 470, [144]; *Sillitoe and Others v. McGraw-Hill Book Company (U.K.) Ltd.* [1983] FSR 545, [563]; *Johnstone*, supra note 470.
674 *Hyde Park,* supra note 320, [37]; *Pro Sieben:* supra note 470, [614].
675 Such as personal gain.
676 Sims 2010, p. 198.
677 *Pro Sieben*: supra note 470, [616–7]; *BBC v. BSB*: supra note 470, [157-8].
678 *Newspaper Licensing Agency v. Marks & Spencer PLC* [1999] RPC 536, [546-7].
679 *Time Warner:* supra note 470, [469]; *Hubbard:* supra note 37, p. 94.

it is that commercial exploitation will be lawful[680]. However, in borderline cases, *e.g.* where confusion is arguable, a commercial motive may be the factor in the overall assessment tipping the balance against the finding of fair dealing.

This analysis of case law supports the position articulated in government press releases issued prior to the introduction of the exception, which envisaged disputes between direct competitors. In such circumstances, the relationship between the parties was identified as a relevant factor, but the mere fact the parties were competitors was not seen as precluding the user to commercially exploit their parody[681].

The position in Australia is similar to that described in the UK. Australia does not exclude commercial exploitation as a fair dealing use[682]. Hence, even if private or non-commercial use is more likely to be assessed as fair, users might still be eligible to benefit from the defence, even if they commercialise their work[683]. Given the scarcity of fair dealing cases which consider this aspect, the main touchstone is the *TCN* dispute, concerning use between two rival television stations[684]. In the first instance hearing, the court, reliant upon UK case law[685], notes the key aspect of fair dealing: the use is made for the exempted purpose, such that hidden motives may render a use unfair[686]. Making reference to *Pro Sieben*[687], the Australian court recognised that the commercial nature of a use impacts upon its fairness, without being decisive. Despite this, much of the court's analysis concentrated upon the relationship

[680] It must be reminded that the ECHR protects commercial expressions. See section 1 chapter 5.
[681] HM Government, 'Modernising copyright: A modern, robust and flexible framework.' (2012) p. 14.
[682] Sainsbury 2007b, p. 154.
[683] Sainsbury 2007a, p. 311.
[684] *TCN,* supra note 20.
[685] ibid, [49] citing *Beloff:* supra note 469 and *BBC v. BSB*: supra note 470, [514].
[686] *TCN appeal,* supra note 538, [97]: Hely J citing *Hyde Park,* supra note 320; *TCN,* supra note 20, [115] also citing *Time Warner:* supra note 470.
[687] *TCN appeal*, supra note 538, [104]; *TCN,* supra note 20, [52] citing *Pro Sieben:* supra note 470.

between the parties[688]. It is submitted that this may result in an incorrect balancing of factors. A court should not focus attention on the nature of the parties, but concentrate on the manner in which the user deals with the protected material[689].

McCutcheon skilfully articulates the point by distinguishing between two scenarios[690]. If a court determines that it is the parody itself which is being commercialised, then the parody should be permitted. It is reasonable that the creator of a parody, as with any other creative work, might wish to disseminate their work in a commercial manner. Alternatively, if a parody is merely being used as a vehicle to promote another product; either to undermine a competitor's product or to compete with it, the court should consider this a factor weighing against the application of the exception[691].

The Canadian approach is consistent with this. The few cases which have considered the commercial character of the use concluded that it is relevant in the fairness assessment, that the use of a work which seeks to take an unfair commercial advantage over the right-holder of that work weights against a fair dealing[692]. Indeed, the Supreme Court in the landmark *CCH* decision affirmed this liberal approach, and stated that section 29 Copyright Act, setting out the fair dealing exceptions, is not limited to non-commercial use[693]. As *CCH* was concerned with fair dealing for the purposes of criticism, and as the new parody exception has been implemented within section 29 too, it is

688 Handler and Rolph 2003, p. 404.
689 ibid, p. 405.
690 McCutcheon 2008, p. 182.
691 She illustrates her theory by the Telstra decision assuming there had been substantial copying. In this case, she argues that the court should render the use unfair as the defendant has a competitive commercial purpose. *Telstra Corp Ltd v. Royal & Sun Alliance Australia Ltd* [2003] FCA 786 (Fed. Ct).
692 *La Petite Vie*: supra note 185, [57]; *Michelin,* supra note 35, [56]; *Allen v. Toronto Star Newspapers Ltd.* (1995), 26 O.R. (3d) 308, 129 DLR (4th) 171 (Ct. J. (Gen. Div.)), [211]; *Zamacois:* supra note 482.
693 *CCH*, supra note 189, [51].

submitted that commercial exploitation of parody works should be possible in Canada as well. Any commercial use of a parody work automatically precludes it from the protection of the UGC exception, discussed in section 4.2 chapter 2, as this applies to non-commercial uses only[694].

In light of this analysis of common law jurisdictions, it appears likely that a parodist's motive will be a relevant factor in the assessment of the fairness of their dealing. Although a commercial intent does not automatically prevent the parody defence from applying, it does lend significant weight to a finding that the use is unfair, particularly if the parodied work is that of a competitor. The same result should be reached where it is really the original work which is being exploited, rather than the parody itself. This is correct because, it is submitted, a true parody does not constitute a mechanism to camouflage infringement, and a true parodist does not seek to make the borrowings their own or to financially benefit directly from the earlier work[695].

In conclusion, it is argued that it should be possible for a commercially exploited parody to benefit from the parody exception, but that the parodist's motives are relevant, because these assist courts in understanding the real object of commerce[696]. However, it is submitted that the status of the user, in the sense of their relationship with the right-holder, should not be a factor. Courts should assess the manner in which the protected work is dealt with (in which the parties' relationship may play a role), rather than simply honed in on the relationship between the parties, *e.g.* that they are business rivals.

The main types of scenario can be summarised as below, and illustrated in table (Figure 7) hereunder. In a first scenario, a parodist initially has non-commercial motives, but finds commercial avenues of exploitation *a posteriori*.

694 S. 29.21(1) CA 1985.
695 Section 1 chapter 1.
696 Tricoire 2005, p. 77.

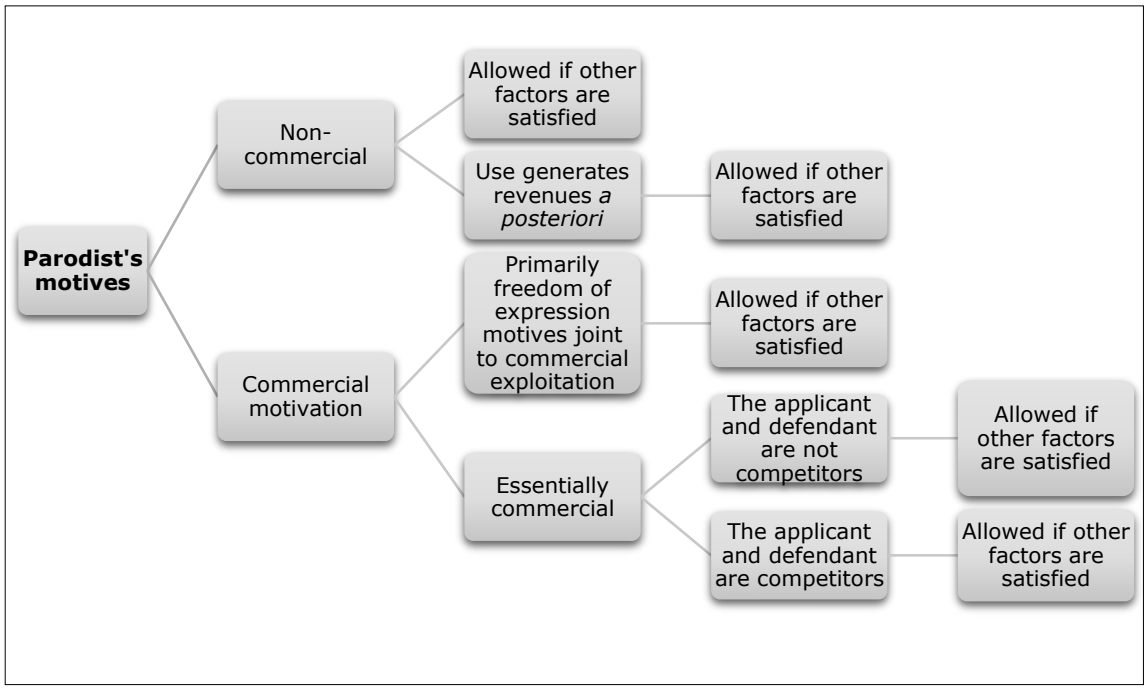
In such cases, it is submitted that a courts should find the use lawful under the exception, provided the other requirements are satisfied. For example, parodies disseminated non-commercially via platforms like *YouTube* may, if popular enough, start to generate revenue through its advertising system. This revenue should not prevent the work from benefiting from the exception[697].

In the second scenario, the parodist always intends to exploit their parody commercially. In such circumstances, it is submitted that a court should look favourably on exploitation via a commercial medium which promotes free speech, such as a satirical publication or programme, even if the parodist's motivation is primarily commercial. Here, two situations can be distinguished. In some cases, there will be no market connection between the parodist and the right-holder. For example, the defence may be claimed by a party generating revenue by selling t-shirts depicting a parody of a protected work, or a movie may feature a parody of a song in one scene. Alternatively, the parties may be business rivals, and one party may seek to parody the other's work: one TV show parodying a rival TV show, for example. Irrespective of the difference in circumstances, it is submitted that a court should allow such uses to benefit from the parody exception, provided the parodist has respected the other associated requirements. Adding an additional barrier to the creation of parodies in preventing its commercial exploitation seems unduly restrictive. The goal of the exception is to create social value by furthering freedom of expression and information, and yet this can get lost if the debate becomes focused upon whether it should be lawful for one party to make money from copying something which someone else has created. If commercial motivation *per se* renders a use unlawful, this incorrectly and undesirably overlooks the

[697] Section 3.4 chapter 6.

potential social value derived from parody, which is often unrelated to the motivation for its creation.

Figure 7



3.6 Encroachement upon the right-holder's economic rights

Traditionally, fair dealing considers the extent to which the use encroaches on the economic rights of right-holders[698].

This factor is well established under UK law[699]. It is understood as the need to appraise to what degree a use competes with the exploitation of the copyright-protected work by its right-holder. If the judge finds that the use acts as a substitute for the original work, the balance should tilt in favour of the

[698] This factor is probably the manner in which common law legislators ensure the compliance of copyright exceptions with the international Three-step Test.

[699] *Ashdown*, supra note 469, [155]; *NLA*, supra note 678, [546-547]; *Hubbard*, supra note 37, pp. 94-5; *Hawkes & Son,* supra note 467, [598]; HM Government, *Modernising copyright: A modern, robust and flexible framework* (2012), p. 14; Sims 2010, p. 192.

plaintiffs. Yet, this factor should not rule out the possibility for a use to be commercially exploited.

The Canadian Supreme Court considered this factor to be relevant in *CCH* and developed an approach to its assessment[700]. Although it is the party wishing to rely upon the defence who has the burden of proving the exception's requirements are satisfied, if the right-holder claims that the parodic use has encroached upon their own market, then it is the right-holder who must satisfy the court that this is the case[701]. It is submitted that while this is reasonable - because the right-holder has access to the relevant information concerning any loss in sales, whereas a defendant would not have access to this data- this requirement is not very adequate to decide the fairness of the use[702].

Again, from the facts in this particular dispute, it is clear that this factor alone is not decisive, because the court found the dealing to be fairdespite an adverse effect upon the original's market. Thus, placing reliance on *Breen v. Hancock*[703], Canadian courts should not find a dealing fair, simply because the right-holder is unable to demonstrate any financial detriment owing to the unauthorised use. Indeed, fair dealing is not contingent upon lack of damage to the right-holder. Nevertheless, only evidence that the use causes actual harm, rather than just the potential to harm, should be required from the right-holder to tip the balance towards unfairness[704].

The Australian courts, based upon the analysis of the *TCN* case (and despite the aforementioned focus on the rivalrous nature of the parties) appear to attribute less importance to this factor. Yet some scholars anticipate this factor

[700] *CCH*, supra note 189, [59].
[701] ibid, [72].
[702] The decision should be made upon proper economic evidence, and not upon court speculation as to the potential economic damage which might result.
[703] *Breen c. Hancock House Publisher Ltd.,* 6 CPR (3ed) 433 (1985).
[704] *Alberta*: supra note 495, [35]; *SOCAN v. CAIP*, 2004 SCC 45.

will rank more highly in fair dealing cases concerning the new parody exception[705]. Sainsbury suggests that this factor is best evaluated not only by calculating the loss of sales arising from substitution of the parody for the original, but in terms of loss of licensing revenue from the unauthorised use. If market substitution is found, Sainsbury argues that this should weigh against a finding of fairness, whereas loss of potential royalties should not necessarily do so. She acknowledges that right-holders typically refrain from granting permission for use of their works for parodic use anyway, out of fear that they will be the target of the comment conveyed. But, to her, loss of revenue for satirical uses (whereby the work is reproduced to comment upon something other than the underlying work) might be a relevant factor, as satires do not require the copying of another work to convey its message.

However, it is submitted that this distinction between parody and satire is artificial, as the same justification underpins both uses, and right-holders refuse to grant a license for the purpose of satire on the same grounds as for parody. Right-holders' refusal to license does not arise from economic considerations, but based upon their concern to control any 'message' associated with their protected works. Suzor, departing from the Canadian approach, argues that the potential market of the original work is as relevant as the existing markets for such works[706]. Under this approach, a right-holder merely has to show that the unauthorised use might adversely affect the markets of the original, for it to be a relevant factor for the court to weigh up.

Given the heavier influence of natural law upon civil law jurisdictions, it is often believed that French courts put aside economic considerations, but this is unfounded, as has been demonstrated by the presence of these very factors

[705] Suzor 2008, p. 243; McCutcheon 2008, p. 185; Sainsbury 2007b, p. 154 Sainsbury 2007a, pp. 312-4; Handler and Rolph 2003, p. 404.
[706] Suzor 2008, p. 243.

in the underpinnings of the copyright system in civil law countries, including France[707]. In terms of the parody exception, French courts often assess the degree to which a parody encroaches upon a right-holder's economic rights when considering other conditions attached to the exception, such as the absence of confusion[708] or intent to harm the author[709]. Hence, courts do consider the economic impact indirectly, and are unlikely to apply the exception if the new use demotivates the public from accessing the original, as a true parody is not a substitute for the original[710].

Ultimately, it is submitted that encroachment upon the right-holder's economic rights will be a factor which influences whether the parody exception is applicable in particular circumstances. As the comparative analysis has shown, the encroachment may be proven by demonstrating that the market value of the original has been lessened, or from a loss in licence fees. That said, it is submitted that if relied upon this factor should look at the actual damage caused. If merely the potential for damage is taken into consideration, it is likely that this would be used by right-holders to undermine the effectiveness of the exception. For example, if a right-holder has no history of licensing its work for parodic uses, then it should not be able to rely upon the fact that its work *could* be licensed for this purpose to claim a loss in revenue stream[711].

However, if this factor is applied appropriately, then it will weed out false parodies *i.e.* those which aim to benefit from the work borrowed, rather than

[707] See section 1.2 chapter 2.
[708] See section 3.3 chapter 3.
[709] See section 3.2.2 chapter 3.
[710] *Saint-Tin*, supra note 131; TGI Paris 5/03/2008, *Fort Boyard*, Prop. Int.. 2008 n°28 p. 327, obs Bruguiere, RIDA n°217, July 2008 p. 338 & Sirinelli p. 233; Paris (4eme ch sect. b) 17/01/2003, *Le monde d'Anne Sophie*, Prop. Int. 2003, n°7, p. 169, obs Lucas; TGI Paris 9/01/1970, JCP 1971.II. 16645.
[711] See section 2.2.2 chapter 2.

use a protected work as the medium for a new creation. In this way the factor can contribute to the striking of a fair balance between the exclusive rights of the right-holders and the public interest. Nevertheless, this requirement has the drawback to see some judges embark in deep economic analysis for which they are ill-equipped. Additionally, the encroachment might be a result of a fair criticism upon the original. In conclusion, as most parodies will not encroach upon the exclusive rights of right-holders[712], this factor should only be taken into consideration where the parody already creates confusion in the public's mind to determine whether the confusion results from the aim to free-ride on the efforts of another.

3.7 Originality

Some French courts have tied the parody exception to the degree of creativity embodied in the parodic expression. This section considers those cases to determine whether this factor should feature as part of the fairness assessment, or whether originality is essential for a parody to comply with the rules of the genre.

As has been shown, a parody consists of a distorted reproduction of an earlier work in order to communicate a message. Although mere reproduction is therefore not lawful pursuant to the parody exception[713], appraisal of whether enough of the right kind of distortion has been made can be a difficult line for courts to draw[714]. Faced with this predicament, some French courts have elected to make the determination contingent upon the originality of the parody[715].

[712] ibid.
[713] Paris, 17/06/1987, JCP 1988 II 20957, note Auvret; Paris, 17/10/1980, Dalloz 1982, IR, p. 42, obs Colombet.
[714] El Khoury, supra note 208, p. 161; Bloch (2002), p. 117; Edelman (1990), p. 227.
[715] Paris (4eme ch), 13/10/2006, Gaz. Pal. 2007, jurispr., p. 2110; TGI Paris, *Femme*, 13/02/2001; *La Petite Vie:* supra note 185, [67]; TGI Paris, 14/04/1999, CCE, octobre 1999, pp. 23-4;

In *Korda*, for example, the defendant had parodied the famous portrait of Che Guevara as an angry monkey. The trial judge accepted that there was sufficient distortion that the two works would not be confused, and applied the parody exception; but this decision was overturned on appeal[716]. The appeal court ruled that the parody was too similar to the original photograph, and the minor amendments made lacked originality. It is submitted that this reduction in scope of the exception is unjustified[717].

It seems likely that most parodies will be 'original', since the 'author's own intellectual creation' threshold is likely to apply. However, it is inappropriate. Whether or not a parody itself enjoys copyright protection seems unrelated to the nature of the exception. Much of the creativity in a parody lies in the distortion operated. Hence, trying to measure a parody in terms of the amount of quantitative changes to the underlying work misses the objective of the exception.

However, *Deckmyn* rightly impacts on this factor in France and the UK, as the CJEU expressly rejects originality as a requirement for the parody exception[718]. Thus, a parody defence is available to all transformative uses which have a humorous character and are not confusable with the underlying work, and not just to transformative works.

In light of the foregoing, it is submitted that originality, despite setting a relatively low threshold, should not be included as a fairness factor in order to

---

Versaillles 15/12/1993 *La Bicyclette Bleue*; Paris 11/05/1993, R.I.D.A., 1993, n°157, p. 340, obs. Kerever and Françon, Rev. trim. dr. comm., 1993, p. 510; TGI Paris, 30/04/1987, Gaz. Pal., 3-4/06/1987; TGI Paris, 17/09/1984, D, 1985, IR, p. 16; TGI Paris, 13/09/1984, D., 1985, IR, p. 16, obs Lindon; Paris 20/12/1977, ann. Propr ind. 1979, p. 84; TGI Paris (ref) 26/11/1977, JCP, ed. G, 1978, II, n °18924; *Peanuts*: supra note 110; TGI Nancy, 15/10/1976, JCP, 1977, II, n°18526 obs Lindon.

716 Paris (4eme ch), 13/10/2006, Gaz. Pal. 2007, jurispr., p. 2110.

717 Mouffe 2011, p. 289; Berenboom 2009, p. 109; Bloch 2002, p. 117; Fletcher-Boulvard 1997, p. 67; Françon 1988, p. 304.

718 *Deckmyn*, [21].

maximise the exception's effectiveness. This is only relevant, if the parodist seeks to claim copyright in their own work. It is reasonable that the work must satisfy the originality requirement of the country where protection is sought.

3.8 Alternatives to the dealing

Whenever a party elects to convey a message through parody, there is likely to be an alternative method which could have been adopted to impart the same information. In the many years that the parody exception has been in place in France, no evidence has been found which identifies this as a relevant consideration. Therefore, the developments of this section will only focus on the UK, Australia and Canada.

If necessity is a factor, a parodist has three alternatives to unauthorised use of a protected work: the parodist could have made use of an alternative work in the public domain; the use of the work was not necessary to achieve the parodist's aim; or the user had the option to gain the right-holder's permission, including by way of a licence.

In applying other fair dealing exceptions, the UK[719] and Canadian[720] courts have both stressed the necessity of the dealing in order to achieve the intended purpose. A use is therefore more likely to be unfair, if the same result could have been achieved without the dealing. To determine this, the courts need to assess whether the use would have been *equally effective* without the borrowing made of the protected work. Irrespective of the value of this factor for other exceptions, such as fair dealing for research or private studying (as per the *CCH* case) or reporting current events, it is submitted that this factor should be afforded little weight in relation to the parody exception. This is essentially

[719] *Hyde Park*, supra note 320, [154-5]; *Pro Sieben*, supra note 470, [613-4]; *Beloff*, supra note 469, [262]; *Hubbard:* supra note 37, p. 94.
[720] *CCH*, supra note 189, [57].

a creative choice on the part of the parodist, and indeed, having elected to convey a message via parody, a parodist may have little choice as to which earlier work to use. Therefore, as demonstrated in *Pro Sieben*[721], fair dealing should not include any necessity test which requires judges to arbitrate on matters of artistic merits, and this would be the result if parodists are required to prove that none of the alternative channels of communication would serve the same purpose equally well.

As for the possibility of securing permission, case law indicates that use is unlikely to be fair if a licence was available[722]. But, it has been demonstrated that this requirement is inapt for the parody exception, as right-holders typically refuse to grant permission for parody uses, based on subjective justifications, such as their fear of criticism[723]. In *CCH*, the Canadian Supreme Court considered that this factor was irrelevant, since allowing the right-holder to circumvent an exception based upon the possibility that the user could have paid for the use would stretch the right-holder's monopoly incompatibly with the balance which copyright law aims to strike[724].

In the light of the above, it is argued that alternatives to the dealing should not constitute a factor when considering the parody exception[725]. The existence of the parody exception is evidence that the legislator considers parody as legitimate means to convey a message, and this factor would undermine this assumption to unduly extend the monopoly of right-holders and infers in the creative process of the parody.

---

721 *Pro Sieben*: supra note 470, [613-4].
722 In *CCH*, the Court said this was irrelevant, supra note 189, [70]; *Hawkes & Son,* supra note 467, [598-602]; HM Government, *Modernising copyright: A modern, robust and flexible framework* (2012) p. 14.
723 Section 1 chapter 2.
724 Supra note 189, [70].
725 While this factor is in Australia: Brundenall 1997, p.n449; it is criticised in relation to the parody exception. McCutcheon 2008, p. 185.

3.9 Three-step Test

As explained in chapter 2, EU legislation requires courts in the UK and France to apply the Three-step Test to the facts of the case,[726] as an additional requirement to the application of the exception. In contrast, in Australia and Canada, the fairness factors are considered as sufficient to ensure the compliance with the international Three-step Test. This section considers the impact of this factor for the parody exception in UK and France.

Following the implementation of the Directive in 2006, the French legislator introduced the second and third step of the Three-step Test into the intellectual property code, thereby making it mandatory for French judges to apply the test in every case[727]. At the time, this action faced severe criticism, based upon the lack of clarity of the test, unpredictability of the likely outcome, and the disruption of traditional competences between the legislator and the judiciary[728]. This French legislative choice may have profound consequences on the outcome of any dispute concerning the parody exception. While UK legislation does not include the Three-step Test in its domestic legislation, as a result of the EU influence, courts have applied the Three-step Test to particular disputes. As explained in chapter 2, this gives rise to doubts as to the proper application of UK copyright exceptions, as it is unclear whether the UK judiciary considers that the Three-step Test contained within the Directive is addressed to them, or only to the CJEU.

[726] See sections 3, 4.2 and 4.3 chapter 2.

[727] Confirmed by the French Consitutional Council and the literature. Decision n°2006-540 DC, 27/07/2006, La loi relative au droit d'auteur et aux droits voisins dans la societe de l'information, indent 35; Galopin 2012, p. 387; Caron 2006, p. 11; Lucas, '3. Nouvelles exceptions et triple test', in Lucas & Sirinelli, *La loi n°2006-961 du 1er aout 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information: premieres vues sur le texte promulgue a l'issue de la censure du Conseil Constitutionnel* (2006) 20 *Prop. Intell.*, p. 297.

[728] A study of the debate and surrounding criticisms falls beyond the subject of this project and belongs to a past debate, but see: Galopin 2012, pp. 386-91.

It is submitted that the inclusion of the Three-step Test in domestic legislation undermines the legal certainty aimed at by the framework notions, such as rules of the genre, and general principles[729]. Indeed, judges from different Member States who have applied the test to the same facts have reached opposite results, which does nothing to further the unity of the internal market which the Directive seeks. Furthermore, the application of this test by the courts is likely to deter users from adopting parody, simply because they are unable to predict whether their use is likely to benefit from the exception, or not.

Not only does the application of the Three-step Test undermine legal certainty but it also has procedural consequences. Having considered the short-comings in detail in chapter 2, this will not be repeated here. In relation to parodies, this will rarely be possible as it is not a parody which is harmful to the normal exploitation of a work but the multiplication of parody uses[730]. But in reality, it is nearly impossible for the right-holder to show evidence of the two requirements. Furthermore, it is put forward that the judge is inadequately equipped to apply the Three-step Test to particular disputes.

Yet in *Deckmyn*[731], the CJEU did not interpret the Directive's Three-step Test, but rather the Court seemed to translate it into a requirement that national courts strike a fair balance between the competing fundamental interests at stake. This approach results in a refined proportionality test which attempts to reconcile the competing interests to maximise the realisation of all the fundamental rights in play bringing EU Member States closer to Canada and their users' rights doctrine[732].

729 Galopin 2012, p. 387.
730 Gautier 2006, p. 12.
731 Supra note 42.
732 See sections 3 and 4 chapter 2 and chapter 5 for the balancing of competing fundamental freedoms.

If, by its decision in *Deckmyn*, the CJEU has relegated the addressee of the Three-step Test in the Directive to a past debate, the Court appears to have possibly clarified the role of the Test within the EU context.

3.10 Conclusion

As demonstrated in this section, consideration of the parody exception in a particular case requires an in-depth, fact-contingent analysis. The (artificial) linear analysis of the potentially relevant factors simply reinforced why the question of fair dealing, or compliance with the rules of the genre, inherently requires an overall, contextual assessment of the use.

While Canadian and Australian courts might be drawn to consider the same economics-driven factors developed for fair dealing under other exceptions, application of the exception in France and the UK must now confine attention to the two mandatory requirements from *Deckmyn*: humorous intent and an absence of confusion. This is not to say that EU Member States must set aside the factors developed in accordance to their own legal tradition, but it does require courts to refrain from use of these factors beyond what is needed for them to determining whether these two requirements are satisfied. Therefore, considerations based on originality, the existence of alternatives to the dealing, acknowledgement or competition between the parties should be set aside. The analysis has demonstrated that none of these factors are pertinent to the two *Deckmyn* requirements.

Preservation of freedom of expression overarches the exception's interpretation. Therefore, the requirement pertaining to the realisation of this fundamental right, i.e. the meaning of humour, should enjoy a more liberal interpretation than others.

Nevertheless, the variety of factors which are all potentially relevant in determining whether the parody exception should apply begs the question whether the Directive's harmonisation objectives are achievable. With *Deckmyn*, the CJEU grants national courts significant discretion whether to apply the exception in particular cases. The two requirements set out in *Deckmyn* are questions of fact, which allows local factors to influence the outcome, *e.g*. whether there is a humorous character. Therefore, despite mandating an autonomous definition of 'parody', a use may be found infringing in some Member States while being permitted as lawful in others.

Finally, the need for an objective appraisal when considering the exception to particular facts is influenced by the national concept of good faith or construction of a fair minded person. These concepts are already well-developed in the Study Countries. Therefore, these concepts are flexible enough to adapt to particular circumstances identified in this section and generally predictable enough for parodists.

Conclusion

Throughout this chapter, the scope of the parody exception has been explored. Starting by determining the legal nature of the exception, the analysis concluded that the parody exception is an objective right. Therefore, although parodists cannot initiate proceedings to determine that their use is permitted by the parody exception, the exception as a defence must be interpreted in a way to allow exercise of the freedom of expression. Ultimately, this influences the principle of interpretation of the exception. It remains to be seen whether the different approaches adopted in difference jurisdictions (strict interpretation or user's rights doctrine) greatly influence the outcome as to when the exception applies.

This conclusion led onto an examination of the regulation of the relationship between copyright and contract law. As the exception is heavily anchored in human rights considerations, it is argued that parties should not be able to use contract law to circumvent the parody exception.

The core of this chapter focused upon the requirements and fairness factors attached to the exception. Firstly, the humorous requirement is best appraised based on the parodist's actual intent at the time their work was created. A negative approach should be adopted. In effect, instead of determining whether a particular form of humour should be permitted under the exception, a better approach is to ask whether the parody results from a specific intent to harm the right-holder or the original works. It was then argued that the most important factor is the absence of confusion, because this is intrinsic to parody. True parodists do not want to create confusion or appropriate the original work, and so they need to reproduce any protected content and distort it, so as to distance the parody from the original to create a new work.

All the other factors studied constitute ways to interrogate this original intent. Therefore, no one factor is decisive, and each will weigh differently depending on the circumstances of the case. Elevating an absence of confusion to the principal requirement enables the specific nature of a parody to be legally recognised, and indeed it is the distortion needed to satisfy this criterion that the humorous character is derived from.

In undertaking the comparison, discrepancies in the application of the exception between the different jurisdictions were discussed. Nevertheless, it is not considered that these differences will manifest themselves in a different scope of the exception. On the contrary, it is believed that the different provisions have similar potential, albeit different outcomes might arise

because of the interpretation of the exception in light of particular circumstances in a specific context.

Chapter IV: Parody and Moral Rights

Introduction

While the parody exception constitutes an exception to the economic rights of right-holders, a full appreciation of the exception's interaction with copyright requires an evaluation of parody's interaction with the moral rights of original authors. Moral rights have an incongruous label, since they are not concerned with 'morality' *per se*, but with safeguarding the non-pecuniary interests of authors[733]. Moral rights seek to protect an author's personal interests by preserving the direct imprint of the author's personality in the works created[734].

Traditionally, moral rights also further the public interest by preserving the integrity of artistic and cultural expressions, to ensure that the public is exposed to a work as intended by its author[735]. Also, by permitting an author to maintain a degree of control over their work, even if economic rights are controlled by another, the public is reassured that a work receives its proper attribution. This implies that here the public interest is usually aligned with the personal interests of the author[736]. However, this is too simplistic a model. In the case of parodies and satires, the public interest lies with users of those authorial works, because their modifications made to original expressions stimulate public discourse[737]. As a full study of moral rights goes beyond the scope of this thesis (and has been undertaken already[738]), this chapter focuses

[733] Davies and Garnett 2010, p. 3; Dietz 1994a, pp. 207&211; Goudreau 1994, p. 403.
[734] Bird & Ponte (2006), p. 217; *Desputeaux v. editions Chouette (1987) Inc* [2003] 1 SCR 178, [57]; Sainsbury 2003, p. 2; Caron 1998a, p. 121; Goudreau 1994, p. 404; Vaver 1987, p. 752.
[735] Dworkin 1986, p. 330.
[736] Caron 1998b, p. 56.
[737] See section 2.1 chapter 2.
[738] For more on moral rights see: Davies and Garnett 2010; Gautier 2007; Adeney 2006; Bellini 2005; Sainsbury 2003, p. 234; Goudreau 1994; Ricketson 1990, p. 78; Dworkin 1986, pp. 329-36; P. Sirinelli, *Le Droit Moral de L'auteur et Le Droit Commun Des Contrats* (thesis, 1985).

on three moral rights most affected by parodies: the rights of paternity and integrity, and the right against false attribution.

Since their judicial creation during the late eighteenth century, moral rights received international recognition in the Berne Convention in 1928[739]. Article 6bis enshrines a minimum level of protection of the paternity and integrity rights, but leaves the form of implementation and further development to signatory parties[740]. Pursuant to article 6bis(1):

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Parodies have the potential to conflict with the integrity right, because a parody by its very nature requires a 'distortion' of another work. Additionally, parodies face issues with the right to paternity, given that a parody will reproduce a substantial enough part of an earlier expressions that the earlier work is recognised by the public. Should the original author's paternity right extend to parodies of their works? Moreover, some jurisdictions, including Australia[741] and the UK[742], also grant authors a right to object to any false attribution. This might be infringed if an author's name is associated with an altered version of their work (such as a parody) which the author themselves has not altered. It is easy to appreciate why the original author might want to oppose such activities.

---

[739] Amended in 1948.

[740] Article 27(2) UDHR apparently provides a fundamental justification for author's right's moral interests like article 15(1)(c) ICESCR, moral rights are also enshrined in article 1 WCT (referring to articles 1 to 21 Berne) and article 5 WPPT. Moral rights are expressly left out of TRIPs Agreement (article 9(1) TRIPs). Adeney, 2006, p. 150; Grosheide 2010, p. 256; Dietz 1994, p. 177; Dworkin 1986, p. 329.

[741] Section 195AC(1) CA 1968 combined with Section 195AD(a)(i)-(ii) CA 1968.

[742] Section 84(6) CDPA.

Irrespective of whether a parody benefits from the parody exception, a parodist using a copyright-protected work as the basis for their parody must respect the author's moral rights. If parodies which benefit from the parody exception then 'fall foul' of author's moral rights, then the exception's goal is likely to be compromised.

This chapter analyses the relationship between parody and the moral rights of authors resulting in a possible conflict between the freedom of expression of the original author and freedom of expression of the parodist. As the difference between legal traditions in copyright law is most evident in their respective treatment of moral rights, section 1 is a theoretical evaluation of the conception of moral rights in each case. Then, section 2 examines whether an author's moral rights are preserved when their work is subject to parody.

1. Conception of moral rights in different legal traditions

Despite an international recognition of moral rights within Berne and the influence of natural law and utilitarian approach on both legal traditions, common law and civil law jurisdictions have adopted particularly different systems to protect moral rights. These find root in the theoretical founding principles underlying the protection of such interests[743].

Moral rights ('*le droit moral*'[744]), almost sacred in France[745], are founded upon Kantian theory. An author's right consists in 'an inherent right in his own person, namely a right to prevent another making him address the public without his consent'[746]. Adopting the Kantian belief of supremacy of the

[743] Lucas-Schloetter 2015, pp. 50-2.
[744] *Le droit moral* in civil law jurisdictions acts as a single overarching principle. Alternatively, the concept of moral rights has a plural form in common law jurisdictions. For simplification, I refer to 'moral rights'.
[745] Werra 2015, p. 69.
[746] Kant cited by Adeney 2006, p. 26.

author's personality as an essential tool to promote creativity in society[747], the civil law tradition considers that creative works require legal protection which specifically preserves the imprint of the author's personality in the works created[748]. This, arguably romantic and old-fashioned, conception of the author as 'creative genius' led to a form of subjective individual rights which protect the non-economic interests of an author. Consequently, an author's right comprises two integral components: exclusive rights (protecting their economic rights[749]) and moral rights (protecting their personality-based interests[750]).

In contrast, the common law tradition countries lack any 'romantic' conception, but perceive moral rights as a 'necessary evil' instrumental in encouraging creativity, exercise of the right of freedom of expression. Based upon a utilitarian approach, moral rights are protected to the extent they are socially useful. Society benefits if the public is able not only to identify from whom a work originates, but also know that the work before them is authentic. Given that moral rights were not seen originally as part of copyright[751], protection of moral rights was initially developed under other areas of law,

[747] Noticeably, moral rights provisions are placed before economic rights in the IPC (articles L. 113-1, L. 121-1 to L. 121-9). Lucas & Lucas 2012, n°503.

[748] Bird & Ponte 2006, p. 217; *Desputeaux*, supra note 734, [57]; Sainsbury 2003, p. 2; Caron 1998a, p. 121; Goudreau 1994, p. 404; Vaver 1987, p. 752.

[749] See section 3 chapter 3 on the application of the exception.

[750] Davies and Garnett 2010, p. 25; Dietz 1994, pp. 202-6; Caron 1998a, p. 120; Influenced by Québec, moral rights in Canada are not conceived as separate to copyright like in other common law jurisdictions but are treated as a separate branch under the copyright umbrella. *Théberge:* supra note 232. The Supreme Court noted that the presence of the two sets of rights in different sections of the Act depicts that the separation between economic and moral rights.

[751] Therefore, the ownership, duration of protection and the provisions for infringement and remedies are different for moral rights than economic rights. UK: Adeney 2006, p. 390; Australia: Sainsbury 2007b, p. 152.

such as tort, contract, defamation, passing off, privacy etc.[752], before later being adopted as statutory rights within copyright legislation[753].

How does this difference in conceptualisation influence how legislation protects moral rights? The quasi-divine character of moral rights in France materialises in an overarching principle[754], rather than detailed rules of law adopted in common law jurisdictions[755]. Integral within author's right, moral rights are not alien to, or in conflict with, economic rights, but rather embody a different component of a unitary copyright paradigm. That said, the two components receive separate treatment. Moral rights are perpetual, inalienable and imprescriptible[756], whilst economic rights are of fixed term, transferable and susceptible of prescription. Consequently, any legal exceptions provided in copyright law for economic rights are not automatically applicable to moral rights.

Bowing to international pressure, the UK[757] and Australia[758] eventually introduced specific moral rights provisions within their copyright law. The provisions are very specific, leaving courts with little discretion. UK and Australia have adopted different approaches. While the Australian provisions are concerned with delineating the scope of protection of moral rights, the UK

[752] Except in Canada, which under the influence of Québec, has introduced specific moral rights legislation in 1931. For more on the history of moral rights in Canada: Adeney 2006, p. 291; Davies and Garnett 2010, pp. 27, 36 and 677. For more on the protection of moral rights in other areas of law: Bird & Ponte 2006, p. 213; Sundara Rajan 2005, p. 316; Ricketson 1990, p. 82.

[753] This recognition results from the international pressure following Berne. For more on the history of the introduction of moral rights in Australian copyright law: Davies and Garnett 2010, p. 34; Adeney 2006, p. 541; Sainsbury 2003, p. 31. On the history of moral rights in the UK: Adeney 2006, pp. 365, 394-406.

[754] Resulting in a greater weight allocated to judicial interpretation. Grosheide 2010, p. 256.

[755] This statement must be tempered for Canada which, in contrast with the UK or Australia, has less detailed moral rights provisions also resulting in a greater power of interpretation in the hands of judges.

[756] L. 121-1 at 4° IPC. For more Lucas & Lucas 2012, n°504-511.

[757] Mainly chapter IV of the CDPA 1988 (sections 77-95).

[758] Part IX of Copyright Act 1968 (sections 189-195AZR).

provisions' primary focus is determining which aspects moral rights do not protect[759]. The statutory list of exceptions does not include parody.

Canada seems to lie midway between France and the other common law jurisdictions of the UK and Australia. While Canadian courts have generally determined copyright in works by their economic components[760], there are signs this might change. Despite a paucity of case law interpreting moral rights, Canada seems to be moving away from allocating only a secondary role to moral rights, and towards a rebalancing between moral and economic rights[761]. Yet currently, as moral rights remain distinct from economic rights, fair dealing exceptions remain solely applicable to economic rights.

When considering UK and French national legislation, it should be noted that EU partial harmonisation of copyright law, including the Directive, has not harmonised moral rights[762]. These remain an exclusive competence of Member States. This does not mean that European legal texts are silent on the question of moral rights. For example, Recital 19 of the Directive states:

> [M]oral rights of right holders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works and of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

Additionally, the EU's General Court has emphasised that the essential function of copyright is to 'protect the moral rights in the work and ensure a

[759] Adeney 2006, p. 570.
[760] *Desputeaux*, supra note 734, [57]; *Théberge* supra note 232, [11-2]; Goudreau 1994, p. 404.
[761] For example, one can speculate that the view expressed by the Supreme Court in *CCH* could amount as to interpret moral rights in harmony with the public interest which comprises the interests of users to manipulate works to create new ones. Supra note 189.
[762] Synodinou 2012, chapter 11.

reward for creative effort'[763]. Thus, when the CJEU subsequently noted that right-holders have in principle a legitimate interest not to be associated with the particular comment made through parody[764] (especially where freedom of expression in such expression can legitimately be restricted[765]), it is debatable whether this served only to remind national judges of the need to consider moral rights according to their International obligations, or whether it implied that the CJEU has, de facto, harmonised moral rights within the EU[766].

In conclusion, although there is convergence within the jurisdictions scrutinised in this thesis in that the parody exception does not extend to moral rights[767]. This aspect aside, there is wide variation between the four jurisdictions in the protection afforded to moral rights[768]. The following section considers the extent to which authors are able to control parodic uses of their works by exercise of their moral rights.

[763] Decision of the CFI (T-76/89) *Indep. Television Publ'ns Ltd. v. Comm'n*, [58].
[764] *Deckmyn*, [31].
[765] See section 3.2 chapter 5.
[766] Argued by Rosati 2015, p. 529.
[767] UK: section 79(4)(a) CDPA does not include parody as an exception to the parody right; *Impact Assessment,* supra note 133; H.M. Government, *Modernising copyright: A modern, robust and flexible framework* (UK, 2012), p. 4; Groves 2008, p. 92; Adeney 2006, p. 417; Baden-Powell 2013, p. 131; Baden-Powell 2012, p. 59; Jacob 2014, p. 436; Spitz 2005, pp. 55-156; Bate 1989, pp. 81-2; Australia: Government, *Parodies, satires & jokes*. *Information sheet* (Australian Copyright Council G083v03, 2008) pp. 1-6; Nevertheless, the Commonwealth Attorney-General did not fail to mention that the introduction of the integrity right is not intended to stifle parody or satires; Commonwealth, Parliamentary Debates, House of Representatives, 18 June 1997, pp. 5547–8 (Hon Daryl Williams QC); McCutcheon 2007, pp. 148-9; Canada: Geist 2013, p. 443; Mohammed 2009, p. 471; France: Lucas-Schloetter 2015, p. 62. This is also the position in the Wittem European Copyright Code, see article 5.6(2) which requires parody to respect the right of attribution.
[768] Traditionally, France is seen as providing a high level of protection of moral rights whereas common law jurisdictions (especially the UK and Australia) are criticised for providing a minimum level of protection deriving from article 6bis Berne (example: common law jurisdictions do not protect divulgation or provide for withdrawal rights). Bently & Sherman 2014, pp. 276 and 283-4.

2. Does parody respect moral rights?

To unravel the interplay between parodies and moral rights, the following subsections focus on three rights considered: the right of paternity (section 2.1); the right to object to false attribution (section 2.2); and right of integrity (section 2.3).

2.1. The right of paternity[769]

The right of paternity requires an author's claim to authorship to be acknowledged each time their work is exploited. This requirement also serves as a public mark of a work's authenticity[770], and facilitates an author to establish a reputation[771]. While legislation does not regulate the form this recognition should take[772], and although identification is traditionally achieved by affixing the author's signature to the work, customary practices in different authorial fields prescribe other forms of attribution[773].

In order to respect article 6bis(1) Berne, the national legislation provides:

> France: 'An author shall enjoy the right to respect for his name, his authorship and his work'[774].
>
> Canada: 'The author of a work has, […], the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous'[775].
>
> UK: 'The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this

[769] Also referred to as 'right of attribution' in common law countries.
[770] Davies and Garnett 2010, p. 5; Adeney 2006, p. 179; Dworkin 1986, p. 329.
[771] Davies and Garnett 2010, p. 6; Dworkin 1986, p. 331.
[772] The Australian provision requires the identification to be clear and prominent. Section 195AA CA 1968; Galopin 2012, p. 265; Sainsbury 2003, p. 47; Ricketson 1990, p. 81.
[773] Eugene Gairal, *Les Oeuvres D'art et Le Droit* (Univerity of Lyon, 1900), p. 261.
[774] L. 121-1 IPC.
[775] Section 14.1(1) CA 1985.

section; but the right is not infringed unless it has been asserted in accordance with section 78'[776].

Australia: 'The author of a work has a right of attribution of authorship in respect of the work. The author's right is the right to be identified in accordance with this Division as the author of the work if any of the acts (the attributable acts) mentioned in section 194 are done in respect of the work'[777].

Unarguably, the UK provision departs from the other jurisdictions by making protection contingent upon prior assertion of the right by the author[778]. Hence, for example, unless the paternity right has been asserted, a parodist will not infringe this moral right, even if they have failed to attribute authorship of the original[779]. Australia distinguishes itself by exhaustively listing which acts are attributable. The French and Canadian provisions are characterised by their brevity, because the codification of the paternity right is simply 'formal' recognition of an uncontroversial and well-established legal principle[780].

It has been established in the earlier chapters that a parody only 'succeeds' if the public identify the underlying parodied works. A parodist is not aiming to confuse the public as to who the author of the original work is, but to build upon the common reference point provided by the earlier work to convey a new expression. Arguably, requiring a parody to explicitly identify the original authors, in effect carry a warning label that the work is a parody, severely compromises the parody itself. Alternatively, the presence of the original author's name on the parody might actually cause confusion in the

[776] Section 77(1) CDPA.
[777] Section 193(1)-(2) CA 1968.
[778] Contrastingly with France and Canada, the CDPA determines the circumstances in which the right arises. Section 77(2)-(6) CDPA. Section 77(3) CDPA also mention the need to respect the right of attribution where there is an adaptation made but as explained in chapter 1, parody is not considered as infringing the adaptation right.
[779] Section 78 CDPA; Davies and Garnett 2010, p. 137.
[780] Trib. Civ. Seine 26/06/1832 cited by Sirinelli 1985, p. 6; Paris, 8/08/1837 cited in Sarraute 1968, p. 478.

minds of the public as to whether the work is a parody, or whether the author is connected to it. The requirement may also preclude a parodist from being able to identify themselves as author of the parody. Moreover, in some cases the original author may not want to be explicitly linked with a parody, so as to avoid association with the message which the parody of their work conveys[781]. Despite some official guidance on these issues, the relationship between the copyright exceptions and moral rights remains largely unexplored.

Legislative guidance has been provided which explains that a party enjoying the benefit of a copyright exception still needs to respect the paternity right[782]. The French legislator did not hesitate to expressly reiterate the need to acknowledge the original author in relation to the exceptions enshrined in L.122-5, 3° IPC. Yet, this insertion is not made in relation to the parody exception (L.122-5, 4° IPC). This can be seen as the express recognition of the inadequacy of this requirement in relation to the parody exception. Similarly in Canada, other fair dealing exceptions, like the UGC, explicitly require acknowledgment for the application of the exception[783]. Yet, as in Canada, the law remains silent in relation to the fair dealing exception for the purpose of parody[784]. The Canadian Court of Appeal recognised the overlap of moral and

[781] Davies and Garnett 2010, p. 116; Groves 2008, p. 92.

[782] The relationship between economic rights and moral rights is hard to define. Lucas & Lucas 2012, n° 502-3.

[783] Section 29.21 CA 1985. This right has to be reasonably executed. It is possible that applying the teachings from *CCH* (supra note 189), courts will rebalance moral rights and users' rights to protect the public interest. This is likely to result in even allowing parody works argued under the user-generated content exception to still be held as non-infringing by courts despite the lack of the presence of the name of the author of the parts reproduced.

[784] Section 29 CA 1985. This approach should not be extendable to the UK and Australia because they consider moral rights as separate to copyright. Nevertheless, a study of the exceptions suggests such extension possible. Certain exceptions (such as the English exception for research and private study or criticism, review and news reporting – sections 29 and 30 CDPA) must be accompanied by a 'sufficient acknowledgement'. Similar indication exists in Australia. See sections 41-42 CA 1968.

economic rights in the only dispute[785] which has touch significantly on moral rights. Although defining the right of attribution (as a right deriving from the personality of the author which is closely linked to the dignity and honour of the author[786]), the decision itself offered no further indication as to how the right should be respected. It is argued the paternity right must be recognised in a manner which does not completely circumscribe permitted uses because of the exceptions to the associated economic rights.

How is it possible for the paternity right to be reconciled with parodies in practice? Given the open-ended nature of the statutory requirements, is the intrinsic label left by the parodist which permits the public to identify the original work sufficient attribution? The French Supreme Court thought so in the *Douces Transes* case[787], concerning a musical parody with altered lyrics. Here, the Court considered that the vocal imitation used and the reproduction of the entire musical work was sufficient for the public to recognise the original song, and thus satisfy the paternity right of the original author. Furthermore, the new lyrics avoided confusion between the two works. It is customary for one performer to impersonate another, by imitating their voice, while (over-)exaggerating its distinctive characteristics. This is an accepted form of mockery and not actionable defamation.

The UK courts have adopted a similar approach. In *Preston v. Raphael Tuck & Sons*[788], the court also considered whether attribution needs to be explicit. Here, the defendant had altered the shape of a painting by trimming its borders of an oval, changed the background colour to black, and omitted any reference to the original artist. The court identified the appropriate test as whether a reasonable person, seeing the altered work would not only recognise it, but

[785] *Desputeaux*, supra note 734, [57].
[786] ibid, [49].
[787] *Douces Transes*: supra note 118.
[788] [1926] 1 Ch. 667.

also associate its authorship with the original author[789]. Recognition, or a more general association with the work is not sufficient, but if the test is satisfied without doing so, the court found no reason for the author's name to be made explicit. If the traditional manner of identifying the author is omitted in a parody, it is because it is present, implicitly, albeit in a different form.

Whether a use infringes the right of attribution is heavily dependent upon the nature of the work and the circumstances surrounding the use[790]. In the case of a parody, much will depend upon whether the parodist has selected a well-enough known work to parody, and their skill in execution. Although appropriate authorship of any altered work is always potentially problematic, it is submitted that parodists should always be able to be recognised as the author of their parody[791]. It is the parodist who, by altering an existing work, has created a new work, and so it is fitting that they are identified by the public as its author. If this approach is adopted then a true parody, which properly benefits from the parody exception in terms of the economic rights associated with a work, will automatically respect the paternity rights in that original work too. The paternity right will not jeopardise the aims of the parody exception. Conversely, if a parodist's efforts are unsuccessful, and the public is unsure whether they are exposed to an original or to a parody, then not only is the altered work unlikely to fall within the parody exception, but it is reasonable to assume that the work does not respect the author's paternity rights either. Infringement of both rights may be measured by the same yard stick.

[789] Echoing defamation law principles.
[790] Adeney 2006, p. 686.
[791] See the legal uncertainty currently experienced in Canada as opposed to France where parodies are seen creations of the author.

The reasonable person test, proposed by the UK court seems a sensible approach[792]. The nature and prominence of the 'signage' needed to identify the underlying work in the parody is proportional to the renown of the earlier work. The more famous the underlying works, the more subtle the signposting can be, and still respect the paternity right[793]. If a parodist elects to parody a lesser known work, then they will need to be more explicit to ensure proper identification by the public. If the work selected is too obscure, then the parodist may need to expressly mention the original author's name to meet the requirements of the paternity right. This in turn may lead to public confusion in which case the parody 'fails' on both counts.

2.2. The right against false attribution

As reasonable corollary to an author's right to be identified with their work, it is that they should not be identified as the author of a work which they have not actually created. This premise is the basis of a moral right which permits an author to object to a false attribution of authorship, and use of their name on a work of another[794].

This right is integral with, or the obverse of, the right of paternity in France[795], whereas the UK[796] and Australia[797] perceive this as a separate right, and there is somewhat of a hybrid approach in Canada[798]. This section considers the approach adopted in the UK and Australia as a standalone right. As with the

[792] McCausland 2007b, p. 4.
[793] Groves 2008, p. 92. Also rejected in *Deckmyn* in relation to economic rights, [21].
[794] For more: Davies and Garnett 2010, p. 209.
[795] Recognised by judges in Paris, 1ere ch., 17 dec 1986, Utrillo: RIDA 2/1987, p. 66; Lucas & Lucas, 2012, n° 502-3.
[796] UK: section 84 CDPA.
[797] Australia: Section 195AC(1) CA 1968 combined with Section 195AD(a)(i)-(ii) CA 1968.
[798] Canada does not have a separate right to object to false attribution. Adeney 2006, p. 328. Nevertheless, some argue that the absence of the right against false attribution is compensated by the right of anonymity. This right of anonymity only exists for an author in relation to his work, leading to unclear situations related to altered works. Indeed, courts need to determine whether the altered work can be considered as a work of the original author in the first place.

paternity right, the right against false attribution applies in relation to the exploitation of the copyright-protected work, including adaptations thereof[799]. While in Australia, the duration of protection is aligned on the duration of the right of paternity[800], in the UK, this right expires twenty years after the death of the author who is falsely attributed[801]. The rationale here is that after this time, little damage is caused to any residual reputation.

As discussed in the preceding section, as parody is a rework of earlier works[802], it seems reasonable the original author might have a basis to object to false attribution of their work. But does this position stand up to further scrutiny?

Firstly, an author who wishes to rely upon the right against false attribution must demonstrate a misrepresentation of the copyright-protected work as the endeavour of another, creating confusion as to who created the work. Yet, as argued consistently throughout this thesis, this is exactly opposite to a parodist's intention. By reproducing earlier works with which the target public is familiar, the parodist is without doubt alluding to this earlier work, but only as one step in the parody process. The parodist does not intend the author of this work to receive the credit for the comment conveyed by the parody itself. Thus, providing the requirements for the parody exception are met, it is reasonable to presume that parody should not present itself as attributable to the original author[803].

This position finds support in UK case law[804] which has had to specifically reconcile a parody with the right against false attribution. In *Clark v.*

[799] UK: Section 84(2)-(8) CDPA; Australia: sections 195AD-AH CA 1968.
[800] Australia: section 195AM CA 1968.
[801] UK: Section 86(2) CDPA.
[802] Though probably not 'adaptation' as intended under copyright law. See conclusion chapter 1.
[803] Otherwise, these parodies create confusion in the public and would not be exempted under the exception.
[804] Similar position is likely to be held in Australia too. Given the paucity of case law, scholars refer to the UK *Clark v. Newspapers Ltd.* decision. Sainsbury 2007b, p. 165.

Newspapers Ltd.[805], the High Court had to determine whether the publication of a parody diary ostensibly written by Alan Clark (then a prominent politician) resulted in false attribution. The parody series, published in *The Evening Standard*, featured a photograph of Mr Clark accompanied by banner titles including: *Alan Clark's Secret Election Diary* and *Alan Clark's Secret Political Diary*. The likelihood of confusion arose because, although the entries in the parody diary were fairly outlandish and comical, the politician was known for his outspoken views and unorthodox private life, which he had documented in his own published diaries. Therefore, it was conceivable that some readers would believe that *The Evening Standard* was actually publishing the politician's own work. The court held that false attribution can only 'be neutralised by an express contradiction, [which] has to be as bold, precise and compelling as the false statement'[806]. In the present case, although the real author's details were mentioned in the standfirst, it was simply too discrete, and Mr Clark's rights had been infringed.

Although this case was determined long before the UK's parody exception was introduced, it provides some insight, since it is notes the need to consider the parody as a whole, to ensure that the parody signals are sufficient that the public are not deceived. In this light, transitory confusion may be excused, but more prolonged, or even permanent, confusion should be excluded. This seems consistent with the parody exception. Although it has been argued that the right against false attribution adds an additional requirement to the parody exception 'in the sense that the notional [audience] should not be confused'[807] about the true authorship of the parody, it is submitted that this is already implicit in the main requirement of absence of confusion.

[805] [1998] 1 All ER 959, Ch D.
[806] Ibid, p. 971.
[807] Torremans 2015, p. 48

Additionally in *Deckmyn*[808], the CJEU expressly rejected the requirement that the parody 'could reasonably be attributed to a person other than the author of the original work itself' for the application of the exception. This seems to suggest that, pursuant to EU law at least, there is probably no conflict between this right and the parody exception. Any parody which creates confusion as to either the authorship of the underlying work, or the parody itself is arguably not a parody, or at least not one which would be considered as a fair dealing, or abiding by the rules of the genre[809], and so falls outside the parody exception too. Therefore, economic rights and moral rights seem to be reconciled on this issue too.

2.3 The right of integrity

This subsection considers whether an author's right of integrity, arguably the most important[810] of the moral rights, may be the moral right which 'trumps' the parody exception. The section commences with an analysis of the nature of this right (section 2.3.1), and then applies these principles to parody works (section 2.3.2).

2.3.1 The scope of the right of integrity

The right of integrity, recognised in article 6bis Berne, is understood as the right for authors to retain control over the form of their creative expression. No one is permitted, without the author's consent, to alter a protected work, or present it in a manner other than that intended by its author.

The implementation of this right by the signatory parties under scrutiny varies greatly. The national legislation provides:

808 *Deckmyn*, [21].
809 Also admitted by Torremans 2015, p. 48.
810 Gautier 2014, p. 206.

France[811]: 'An author shall enjoy the right to respect […] his work.'

Canada[812]: 'The author of a work has, […], the right to the integrity of the work…' to which section 28.2(1) CA 1985 adds: '(1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution'.

UK[813]: 'The author […] has the right […] not to have his work subjected to derogatory treatment.

(2)For the purposes of this section—

(a)"treatment" of a work means any addition to, deletion from or alteration to or adaptation of the work, […]; and

(b) the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director;'

Australia [814] : 'A person infringes an author's right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected, to derogatory treatment.'

Derogatory treatment is defined as: '(a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or (b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation'[815].

The first major difference is the fact that the UK, Canada and Australia[816] subject the author's right to object to a treatment of their work to Berne's

[811] L. 121-1 IPC.
[812] Section 14.1 CA 1985.
[813] Section 80(1)-(2) CDPA.
[814] Section 195AQ(2) CA 1968.
[815] Section 195AJ CA 1968.
[816] It is noteworthy that the terminology differs insofar that Canada refused to adopt the expression 'derogatory treatment' in its legislation. Also, the UK in section 80(2)(a) provides a

criterion – that which is prejudicial to their honour or reputation - whereas in France no legislative standard is set: their work must be respected[817]. In common law countries, it is only if the prejudice to honour or reputation of the author is established that the integrity right is violated. This concept encompasses both objective and subjective perceptions as *honour*[818] usually refers to the personal feeling of the author and *reputation*[819] connotes a potential impact on the public. Yet, is accepted that article 6bis(1) of Berne refers to the 'honour or reputation' of the artist, rather than their personal convictions[820]. If an author feels under personal attack, there are alternative legal remedies[821].

In the UK[822] and Australia[823], an objective approach is preferred[824]. Accordingly, the impact of any distortion of a work is measured against the notional standard of a 'right-thinking person'. This ensures that personal feeling or justified criticisms do not violate the integrity right[825]. Also, as the

detailed definition of what is supposed to be understood as derogatory treatment. Like the UK, Australia reproduces the concept of 'derogatory treatment' but specifies what is understood under the concept for each category of work.

817 Waisman 2008, p. 274.

818 Garnett and al. 2011, [11]-[45]; Adeney 2005, pp. 111–34.

819 For example, in the UK, 'reputation' in the right of integrity is to be interpreted similarly to reputation in the tort of defamation: 'A defamatory statement is one which injures the reputation of another by exposing to hatred, contempt or ridicule, or which tends to lower him in the esteem of right-thinking members of society'. *Sim v. Stretch* [1936] 2 All ER 1237, 1240, (Lord Atkin).

820 Dietz 1994, p. 181; Ricketson 1990, p. 82.

821 Particularly defamation law.

822 On the integrity right in the UK: Garnett and al. 2011, [11-41 to 11-48].

823 Given the absence of case law, the subjective approach cannot be ruled out completely Adeney 2005, p. 129.

824 Echoing defamation law tests. *Confetti Records v. Warner Music UK Ltd* [2003] EMLR 790, [149-50]; *Pasterfield v. Denham* [1999] FSR 168, [182]; *Delves-Broughton v. House of Harlot* [2012] PCC 29, [24]; *Tidy v. Trustees of the National History Museum* [1995] 39 IPR 501 per Rattee J. These two cases nevertheless refer to the subjective approach taken by the Canadian courts in *Snow v. Eaton* but refuse to follow it. Teilmann 2005, p. 22. Doubts concerning the interpretation of this objective test are expressed by Griffiths. Griffiths 2005, pp. 235, 239.

825 This is the aim of defamation law or injurious falsehood. UK: Spence 1998, p. 613; Australia: Australian Copyright Council, *Moral Rights* (Information sheet G043v13, 2012), pp. 1-8; Sainsbury 2007b, pp. 149–66, 154; Sainsbury 2003, p. 234.

integrity right attaches to a particular work, general statements or criticisms fall outside the scope of this right[826].

In France, any 'treatment' of a work may result in an infringement of the author's right of integrity[827]. Yet, the lack of reference to detriment to 'honour and reputation' does not mean that this standard is not relevant in French law[828]. Rather, as in the case of the paternity right, French courts had already developed this right prior to codification under defamation law[829], so the legislator did not consider that elaboration was needed. A review of the cases concerning defamation and the integrity right, in conjunction with the legal literature soon reveals the 'honour and reputation' standard is applied[830]. Yet this concept is broader than that known in common law jurisdictions or in international treaties. The French interpretation of this concept sets a subjective approach, so providing authors with an absolute, discretionary right to object to any alteration of their work, irrespective of its form or amount[831].

Canada sits midway between Australia and UK on one side, and France on the other, setting a subjective approach, which must be reasonably exercised[832]. In *Snow v. The Eaton Centre*[833], a sculpture in a shopping centre was altered by the temporary affixing of Christmas garlands. The Ontario High Court held that it was sufficient that the artist was concerned that the alteration would harm

[826] See section 2.2.2 chapter 6 for an overview of moral rights in music; For the analysis of the integrity right in the UK: Griffiths 2005, pp. 211–44.
[827] This leads to a subjective approach as the author can object to any unauthorised treatment. Lucas-Schloetter 2015, p. 56.
[828] Grégoire 2013, p. 4.
[829] Adeney 2005, p. 113.
[830] Grégoire 2013, p. 6; Gairal, supra note 773, p. 264; Adeney 2005, p. 114.
[831] Grégoire 2013, p. 11; Davies and Garnett 2010, p. 373; *French Supreme Court in TF1 v. Sony* Cass., ch civ 24/02/1998 [1998] 177 RIDA 212.
[832] *Prise de Parole Inc. et al. v. Guérin, éditeur Ltée* [1995] 66 CPR (3d) 257 (C.F.), p. 264, esp pp. 267-8; confirmed 73 CPR (3d) 557 (C.A.F.); Davies and Garnett 2010, p.691; McKeown 2010, p. 214; Adeney 2006, p. 334; Adeney 2005, p. 128; Goudreau 1994, p. 420.
[833] [1982], 70 CPR (2d) 105.

their honour or reputation, and in this case, the court considered that these concerns were reasonable. The integrity right was infringed, illustrating how powerful moral rights can be. In light of this approach, Adeney defines honour under Canadian law as 'moral dignity which is enjoyed when one has the feeling of meriting respect and of maintaining self-esteem' whilst reputation means 'a matter of being honourably regarded from a moral point of view'[834]. Therefore the appraisal of the prejudice of the honour or reputation also carries an objective element[835]. An important exception exists in the case of artistic works such as paintings, sculptures or engravings whereby any distortion is deemed prejudicial to the author's honour or reputation[836].

A second difference between national laws is the type of treatment which an author may object to. While in France, there is no limit to the form or amount of any alteration[837] to the tailored versions of the Berne provision in the remaining jurisdictions[838], these differences inherently influence the scope of the integrity right. There is consensus that the right encompasses a material distortion[839], meaning the addition or deletion of elements of the work, mutilation or other modification of the work[840]. The subjective nature of the test in Canada[841] and France[842] recognises as a treatment, the need to respect

[834] Adeney 2006, p. 337; Carrière 1991, p. 270.
[835] As confirmed in *Prise de Parole Inc v. Guerin* (1996) 66 CRP (3d) 257.
[836] Section 28.2 (2) CA 1985.
[837] *Barbelivien et a v. SA Universal music publishing anciennement dénommée polygram éditions* 7+ Cass., 5/12/2006; Grégoire 2013, p. 11; Davies and Garnett 2010, p. 373; *TF1 c. Sony* in Cass., ch civ 24/02/1998 (1998) 177 *RIDA* 212.
[838] Canada refused to implement 'other derogatory treatment' but included contextual treatment. The UK in s. 80(2)(a) provides a detailed definition of what is supposed to be understood as derogatory treatment. Like the UK, Australia reproduces the concept of 'derogatory treatment' but specifies what is understood under the concept for each category of work.
[839] France: Lucas & Lucas 2012, n°545; Gautier 2007, p. 235; UK: Setion 80 (2)(a) CDPA; Burrell and Coleman 2005, p. 77; Canada: section 28.2(1)(a) CA 1985; Australia: Adeney 2006, pp. 581 & 588; Adeney 2001, p. 299.
[840] Echoing the wording of Berne (article 6bis(1)).
[841] Section 28.2(1)(b) CA 1985. Davies and Garnett 2010, p. 691; Adeney 2006, p. 333.
[842] Lucas & Lucas 2012, n°546.

the 'spirit' of the work. This enables the author to object to any use which denatures[843] the meaning or ambit[844] of the work. This includes a change of context[845], or unauthorised use of the work in commercial advertising.

2.3.2 Parodies and the right of integrity

It has been established that the integrity right may be enforced to protect a work from distortion, and also that an element of distortion is mandatory in parody. The latter may take a multitude of forms, including a physical alteration, or a change of context. This seems to suggest that a parody permitted by the application of the parody exception might then be thwarted based upon exercise of the author's integrity right. This clash has caused courts and scholars to reflect more on the manner in which the interests of both authors and the public can be accommodated in the creation of parodic works[846].

The French courts attempt to reconcile the public's interest in the creation of parodies and the right of authors to preserve the integrity of their works, by directly equating the parody standard[847] with respect for the author's moral rights[848]. Accordingly, provided a parody complies with the rules of the genre, the right of integrity in the underlying work is deemed respected[849].

---

[843] The author has the right to assure that the work in form and in spirit remains the way it has been thought by its creator. Grégoire 2013, p. 6; Adeney 2006, p. 182; Sirinelli, supra note 738, p. 10.

[844] Like a discriminatory content or hate speech. See section 3.2.2.5 chapter 5.

[845] This is not the case in the UK where a change of context does not alter the character of the work and therefore, there is no violation of the integrity right. Garnett and al. 2011, [11-48]; *Contra* Porsdam interprets 'distortion' and 'otherwise prejudicial' as including contextual uses. Porsdam 2007, p. 62.

[846] Werra 2009, p. 269.

[847] See section 3 chapter 3.

[848] Galopin 2012, p. 266; Davies and Garnett 2010, p. 380; Adeney 2006, pp. 188-9; Vivant 2006, p. 60.

[849] This is easily conceivable as economic rights and moral rights are conceived as parts of author's right.

In *Peanuts*[850], concerning a pornographic parody of a cartoon character, the court considered the author's integrity right was not infringed. Although conceding the parody was acerbic, the parody's transposition of the cartoon character into an adult context, while arguably altering the spirit of the original work, satisfied the rules of the genre. The parodist was exercising their right of criticism. Similarly, in the *Tarzoon* case[851], which treated the Tarzan character as an anti-hero (Figure 8), the court refused to enforce the author's moral rights. Again, because there was no confusion between the parody and the original, the rights of the author of the Tarzan cartoon was not infringed[852].

[850] See section 2.2 chapter 1 for the facts.
[851] ibid.
[852] Yet the opposing outcome was reached in *Calimero*, supra note 120.

Figure 8

The original: Its parody:

But the parody exception does not grant parodists a carte blanche exemption from moral rights concerns. The fact that a use falls within the parody exception of economic rights, does not absolve courts of their responsibility to consider whether the parodist's use is an abuse of that legal defence[853]. This would occur if the excepted use fails to abide with the exception's rationale[854]. Here, courts pay particular attention to the impact of the parody's message, as well as the impact of the alterations made to the original work on the public. Consequently, if the public perceives the parody as resulting in an abuse, moral rights resurface, as a regulative instrument to counterweigh these

[853] For more: see section 3.1 chapter 4.

[854] Therefore, if there is a breach of moral rights, the parody is said to go beyond what is prescribed by the rules of the genre. There is thus, infringement of author's right. Cass., *Cremer et le maillon faible*, 10/09/2014.

possible abuses of the application of the parody exception[855]. In effect, a parody which infringes the integrity of the original work, fails to satisfy the rules of the genre.

Traditionally, using a non-commercial work in a commercial context equals changing the spirit of a work. Hence, contractual clauses usually do not regulate commercial uses[856]. Authors generally retain control to authorise commercial use of their work, or not[857]. A copyright-protected work created for non-commercial purposes, if reproduced in commercial advertising without permission, is likely to infringe the integrity right of the author[858].

Essentially, although the French integrity right is seen as an absolute right exercised at the author's discretion, in fact its application is subject to the parody exception. For this specific purpose, the French copyright legislation establishes a direct correlation between the economic rights exception and the limit set on moral rights. Ergo, enjoyment of the parody exception will not be curtailed by the integrity rights of the author. Given this, it might be presumed that the same outcome would result in common law jurisdictions, as these are generally perceived as affording less robust moral rights protection. Yet the situation is actually more complicated, as the following paragraphs will explain.

Canada, like France, conceives moral rights as an integral part of copyright. Although case law has yet to consider the moral rights provisions in relation to the new parody exception, the following may be deduced. While, it is not

---

855 Cross-ref *Aigle Noir*, section 2.2.2 chapter 6.

856 Moral rights are of public order. Cass. 1re civ., 2/04/2009, n°08-10194; moral rights and contract: see section 3.2.2 chapter 6.

857 ibid.

858 Cass. 1re civ., 2/04/2009, n°08-10194; *TF1 v. Sony;* Cass. 1re civ., 24/02/1998: Bull. civ. I, n°75; JCP E 1998, panor. p. 636 reproduction of music snippets to enrich the advertisement; Paris 7/04/1994: D. 1995, Somm. 56, obs. Colombet. The musical work was joint to an ad 1) for a voice mailbox and 2) for an erotic TV show.

necessarily the case that Canada will adopt the same correlation as applied in France[859], the shift in approach of the Canadian Supreme Court demonstrated in *CCH*[860] might provide an avenue for Canadian courts to reconcile the public interest with the moral rights of the original author. Since *CCH*, copyright should be understood as a unified system. This necessitates a balance between the rights of authors and users. By extending the directions in *CCH* to moral rights, it is submitted that an author's moral rights must be counterbalanced by those of the public, including users and subsequent authors[861]. Hence, a unified system will simply not function, if reproduction of a work permitted by a fair dealing exception is precluded by the integrity right.

Similarly, the UK courts have yet to consider the integrity right's interaction with the new parody exception. While it seems clear that general comments or criticisms of an author's style, as may occur in some works of pastiche or satire, will not infringe the integrity right[862], a parody which distorts a protected work might infringe the author's integrity right if its nature is such as to objectively harm their honour or reputation.

Is it possible to reconcile a parody with the integrity right of the original author pursuant to UK law? While a parody falls within the meaning of a 'treatment', as defined in the CDPA[863], whether or not it is 'derogatory' is an objective assessment, from the perspective of the notional observer. It seems that most parodies, even those which are 'close to the knuckle', will not undermine the standing of the underlying work, or the original author, because the observer is aware of how parody operates[864]. For example, the observer appreciates that

[859] *Prise de Parole Inc v. Guerin* (1996) 66 CPR (3d) 257 whereby the court found a use non-infringing the economic rights but nevertheless, infringing under moral rights.
[860] Supra note 189.
[861] Geist 2013, p. 443.
[862] Davies and Garnett 2010, p. 236.
[863] Section 80(2)(a): '[A]ddition to, deletion from or alteration to or adaptation of the work'.
[864] The parody evolves in a fantasy world separate from the original.

the fact that a work is parodied does not mean that the author of that work has endorsed the parody, or countenanced its message. Thus the author's integrity right will be considered intact, because neither their honour nor reputation has been objectively prejudiced[865].

However, in rare cases, it does seem possible that a parody might be prejudicial to the original author's integrity, and yet still fall within the parody exception. While this might be seen to jeopardise the intended legislative balance between the interests of right-holders and authors, it might serve to protect a more fundamental balance. While the integrity right is usually described as a 'timid thing'[866], its potency may lie in a case where a parodic use conflicts with the original author's right to freedom of expression[867].

Although freedom of expression is taken into account for the economic rights through the fair dealing defences, the motivation behind the distortion of a protected work appears unaccounted for in the case of moral rights, a seeming case of 'legislative failure'[868]. Nevertheless, it would be wrong to assume that any derogatory treatment will infringe the integrity right. Some uses (like parody), based on freedom of expression arguments can be justified and legitimised. As chapter 5 demonstrates, article 10 ECHR requires a balancing exercise between the rights of authors and the freedom of expression of parodists. Therefore, parodies (justified as the exercise of one author's free expression) should not be permitted if they infringe the original author's integrity right by default. Here, we face a conflict between the right of freedom of expression of the original author and the same right exercised by the parodist.

---

[865] *Clark,* supra note 805; Garnett and al. 2011, [11-46]; Griffiths 2005, p. 239.
[866] As for the other common law jurisdictions, there is very little case law interpreting moral rights. See section 2.2.2 chapter 6.
[867] Griffiths 2005, p. 212.
[868] Griffiths 2005, p. 223.

In this regard, *Deckmyn* brings vital insight. In the *Deckmyn* case itself, the parody in dispute was reasonably interpreted to imply that the mayor of Ghent prioritised use of the city funds on immigrants or refugees, rather than the local population. Given the arguably discriminatory nature of the parody's message, the CJEU reminded of the need for national courts to balance preservation of the right to freedom of expression of the parodist with the interests of the author of the underlying work[869]. This is not to say that the CJEU has harmonised moral rights[870], as this remains within the exclusive competences of national legislators. Rather, it recognises that EU jurisprudence should take into consideration the protection of moral rights as required by International and EU law, and provided for in the national legislation of the Member States[871].

If *Deckmyn* had to be decided pursuant to UK law, then it is likely that requiring an author's work to be associated with a racially intolerant message which they did not endorse, might be seen, objectively, as a derogatory treatment, and so infringe the integrity right[872]. However, if an objective approach to the integrity right does not suffice to exempt a lawful parody from breaching moral rights, the explicit reference of the CJEU to the other competing fundamental rights might solve the issue[873]. Accordingly, there might be situations where a parody, following a strict application of the integrity right, violates the author's rights, but this violation is outweighed by the public interest in permitting the parodist to exercise their right of freedom of expression, and vice versa.

869 *Deckmyn*, [29-30].
870 Rosati 2015, p. 512.
871 See section 1 chapter 4.
872 Therefore, parodies also raise concerns under the right to freedom of information, see chapter 5.
873 Detailed analysis of the balancing exercise in chapter 5.

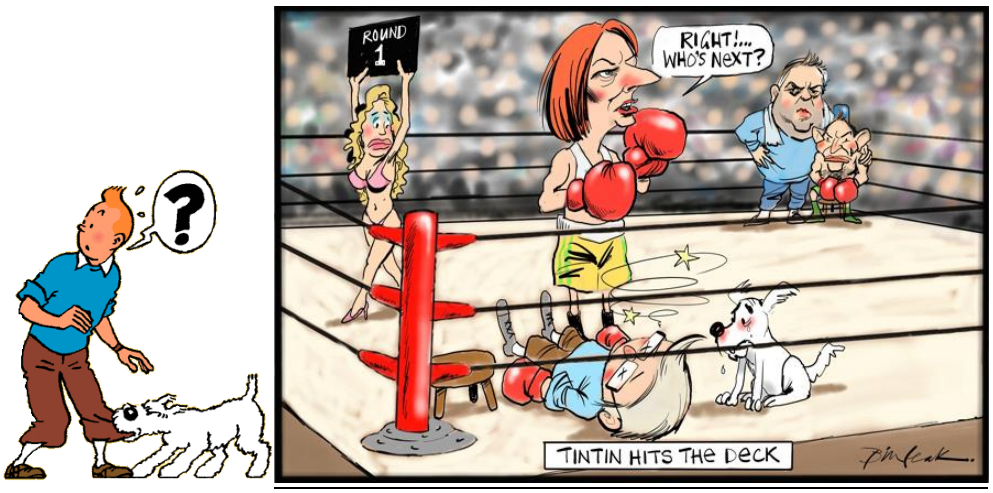
Turning finally to Australia, the interaction between the integrity right and parody was considered before the Australian moral rights legislation was introduced. Here, the legislator stated plainly that the integrity right is not intended to stifle parody or satire[874]. Thus, the Discussion Paper states, for example[875], that a parody or satire of a film would not be considered a derogatory treatment under the Act, because their use as vehicles for the exercise of freedom of expression and criticism are a valued part of a democratic society. The Discussion Paper, nevertheless, acknowledges that there will be borderline cases (without defining these), in which a parody will infringe the author's integrity right[876]. Therefore, although the integrity right has yet to be applied by Australian courts, it is feasible that at least some works of parody or satire will be considered to harm the 'honour or reputation' of the original author[877].

We find a good (hypothetical) example in threatened legal proceedings concerning parodic use of the Tintin character. Australian cartoonist Bill Leak often uses an aged *Tintin*-esque character to depict politician Kevin Rudd (Figure 9).

[874] Commonwealth, Parliamentary Debates, House of Representatives, 18/06/1997, pp. 5547–8 (Hon Daryl Williams QC).
[875] Discussion Paper, Proposed Moral Rights Legislation for Copyright Creators, Commonwealth of Australia (ACT, 1994) pp. 46-9.
[876] Spies 2011, p. 1141.
[877] Weir 1992, p. 196.

Figure 9

The original: Its parody:



It is easy to imagine Hergé's estate might argue that that the distortion of Tintin's facial features betrays a fundamental part of work, which embodies eternal youthfulness[878]. Alternatively, the estate might object to the association of the character within a political context, or in association with specific (objectionable) political viewpoints, which betrays the essence of the original[879]. In each case, the parody could be argued to prejudice the honour and reputation of the author.

Sainsbury identifies that the original author must demonstrate any treatment satisfies two requirements to succeed. Firstly, they must show some form of

[878] After threatening Leak with infringement, Tintin's right-holders decided not to pursue legal action, provided the parody was not commercialised; see: http://www.dilanchian.com.au/index.php/lightbulb-blog/23-ip-technology-e-business/290-fair-dealing-for-satire-but-tintins-not-laughing

[879] This is based on the French dispute over a sequel of *Les Misérables* whereby the Supreme Court upheld that irrespective of the high reputation of the original, the plaintiffs need to establish that the use jeopardises the essence of the work. Yet the inclusion of contextual uses under Australian law remains unclear. Cass, 30/01/2007, no04-15.543; Benabou and Dusollier 2007, p. 180.

prejudice to their honour or reputation caused by the parody; and secondly, they need to demonstrate the reasonableness of this belief[880].

Thus, an author must do more that prove that their work has been subjected to a treatment, it must be reasonable to assume that that treatment will harm the author's honour or reputation. As long as the public understands the parody as a separate work from the original[881], it will be difficult for the author to demonstrate damage to their integrity[882], unless the parodic context includes such undesirable elements, such as pornography or discrimination, which may well change the public perception of the original work. Then, the original author might be able to establish that the parody has damaged their reputation, *e.g.* because the original work will always be tainted by recollection of the offensive parody.

In conclusion, although the parody exception does not apply directly to the integrity right of the original author, the nature of parody is such that a parodic use is likely to respect the legitimate interests of authors. However, at the margins there will be cases where the parody exception and integrity right are not completely aligned. In such cases, courts in all the jurisdictions considered should ensure that the interests of the original author is not over-compensated in the balancing with the parodist's right to freedom of expression. Here, the right of freedom of expression requires the right of free expression of the original author (as protected by the integrity right) to be balanced against exercise of the same right by the parodist. The nature of the parody's message may provide the means to determine which will prevail.

[880] Sainsbury 2007b, p. 158.
[881] Therefore, no confusion is created in the public.
[882] Suzor 2008, p. 246.

Conclusion

The parody exception does not constitute an exception to moral rights. Nevertheless, the copyright paradigm increasingly demands a unified understanding of both economic and moral rights. If not, the system may implode, as a seemingly incoherent web of rights perceived to be of questionable legitimacy in the eyes of the public[883]. Against this backdrop, it is argued that copyright protects the object of creation, and it should not be used as a tool to appraise the message conveyed by that creation, or to overprotect personal sensibilities[884].

Moral rights exist in recognition of the creative process, and so should not be used as an obstacle to block another's creativity, without due cause. The current reality is that a rigid exercise of moral rights, while benefitting the existing generation of authors would seriously encroach upon the avenues available to the next generation of authors, including parodists or satirists, to create and exploit their own new works.

While the copyright parody exception introduces a policy-led breathing space in the case of economic rights, in the case of moral rights it is submitted that the same result may be achieved with a focus upon the purpose of the later work. Once courts have satisfied themselves that the new work has been created for the purpose of parody, infringement of moral rights should be tested by measurement of origin confusion. Only if the public is likely to be confused as whether the original author is the author of the parody, or fail to see the new work as parody, should the moral rights be deemed infringed. There is an inverse proportionality relationship in play. If the public is not confused as to the authorship of the parody, then the special link between an

[883] Ramalho 2009, p. 72.
[884] Also supported by the goals of the Berne Convention; Mee 2009, p. 85; Adeney 2006, p. 126.

author and their work is not affected. In most parodies, there will be no confusion as it is the nature of a parodic work that the public recognises that a borrowing has been made. The second requirement of humour enables courts to delineate what types of message, or kinds of alteration, will prejudice the author or their work.

Only outright piracy should be unlawful. Therefore, an overlap in the regime applied to parodies between economic and moral rights is observed. We have seen in the previous chapter that absence of confusion is a key factor to determine the applicability of the parody exception; with the other factors being derivatives and contributing to its assessment[885]. Hence, it is submitted that moral rights should be subject to the same condition. Here, moral rights should be exercised reasonably by the application of a purposive interpretation.

This does not suggest that a parodist is unrestrained, since an author under attack retains other means of redress beyond copyright law. Any interpretation of moral rights which fails to permit parody diminishes their legitimacy, since its effect is to permit one generation of authors to wield a right of artistic censorship over the next, while simultaneously shielding their own works from critical comment.

In all the jurisdictions studied, moral rights legislation includes flexibility essential to balance the different interests involved. By relying on legal concepts, such as a 'right-thinking person', 'reasonableness' or 'good faith', and the two main parody requirements, courts are equipped to balance a parodist's right to comment and communicate in their chosen medium (even if these may offend the feelings or artistic sensibilities of original authors to a

[885] See section 3 chapter 3.

reasonable degree) and the need for later authors to show due respect to the author whose work they have reproduced.

If parodies are able to respect moral rights, then the international Three-step Test is easier to satisfy[886]. Yet any author's exercise of their moral rights in relation to parodies of their work, must also take account of the public interests they represent. This may call for a less strict application of the moral rights paradigm, at least in some jurisdictions, such as France.

While moral rights are sometimes perceived in the UK as the 'last hope' for cases having little hope of success under economic rights, it appears that such cases –in parody at least- are a lost cause. A parody which benefits from the copyright exception should not falter under moral rights either. In short, moral rights and copyright issues are decided together.

[886] See section 4 chapter 2.

Chapter V: How Freedom of Expression Defines the Parody Exception

Introduction

Parody constitutes an artistic form of expression protected under the fundamental right to freedom of expression. This freedom grants every individual the right to express themselves freely and contribute to cultural diversity.

Traditionally, exercise of the freedom of expression has two strands, which are both pertinent to parody: the right to express ideas, and the right to receive information[887]. This chapter demonstrates that the parody exception is an element which permits the first strand of freedom of expression to be fulfilled[888], because creating new works exercises the right to express ideas[889]. The originality[890] of the new expression derives from the alterations made to the borrowed materials. Additionally, as demonstrated in chapter 4, parodies raise concerns under the right to freedom of information if copyright owners can stifle this form of social commentary prejudicial to their honour or reputation[891]. Yet because parody relies upon on another's material, tensions might exist between promoting the fundamental freedoms of the parodist and any copyright protection vesting in the earlier expressions of ideas.

---

[887] El Khoury, supra note 208, p. 157.

[888] The realisation of freedom of expression is the primary justification to the introduction to a parody exception. *RJR MacDonald Inc. v. Canada* (att. Gen), [1995] 3 S.C.R. 199, [72]: 'both critical and non-critical parodies can be seen as promoting the fundamental values underlying the constitutionally protected right to freedom of expression, "including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process."'.

[889] Section 2.2 chapter 5. Under the French legal tradition, parodies are close to sacred as they are seen as the exercise of the right of critique in an unconventional way. El Khoury, supra note 208, p. 161; Lucas, supra nte 647, n. 19.

[890] 'Originality' is used in the lay-sense here, and not the threshold for copyright protection.

[891] See section 2.3 chapter 4.

The current trend to strengthen copyright has a tendency to forget the limited legitimacy of affording exclusive rights to right-holders[892]. Before a parody exception was available, some courts were tempted to seek external limits to copyright law by reaching out and applying fundamental freedoms to balance the rights of authors and the interests of parodists[893]. Nevertheless, the introduction of a parody exception in copyright law reinstates some legitimacy by correcting the internal balance achieved by legislators to maximise all the fundamental rights at play. As this chapter exposes, freedom of expression not only provides a justification for a parody exception, but also provides guidance for courts as to its interpretation. Hence, this chapter does not aim to provide a comprehensive study of freedom of expression, but rather endeavours to explain why this fundamental right acts as a 'double gate-keeper', which wrestles against the excessive expansion of exclusive rights, while also dictating the outer limits of the parody exception.

This chapter considers these aspects according to the following structure. Section 1 revisits the foundations of the right to freedom of expression at international and European levels. Section 2 demonstrates that parody forms

[892] Geiger 2015, p. 121; Geiger 2006, p. 378; Geiger 2004b, p. 271; Hugenholtz 2001, p. 346.

[893] Yet asking courts to balance freedom of expression and copyright is not desirable given that it might jeopardise the balance intended by the legislator between these rights. This resulted in the rejection of courts of arguments based on freedom of expression to authorise a parody. *Evora v. Dior* (C-337/95); Senftleben 2012, p. 372; Lucas 2005, p. 21; Hugenholtz 2002, p. 357. Yet, the argument of freedom of expression led to a recognition of parody uses in trade mark law in France: TGI Paris, ord. ref. 24/10/1991, inedit; upheld in appeal Paris, 28/01/1992; Cass Comm 21/02/1995, BC, IV, n°55; D. 1995, IR, p. 97 (*Marlboro case*); TGI Paris, 17/02/1990, J.-CL. Marques, fasc 7140, n°15; Cass., (2eme Civ), 2/04/1997; Cass 12/07/2000, D. 2001, n°3, jur, 259, note Edelman (*Peugeot v. Canal+*); Versailles 17/03/1994 (*Michelin*); TGI Paris 4/07/2001, *Société Compagnie Gervais Danone et Société Groupe Danone v. Olivier M., Réseau Voltaire et autres*, www.legalis.net upheld in appeal Paris, 30/04/2003, *M. Olivier (jeboycottedanone.com) v. Société Compagnie Gervais Danone et Société Groupe Danone*, www.forum.internet.org; Ordonnance /07/2002 TGI Paris; TGI Paris 30/01/2004, *Esso v. Greenpeace*, Internet Fr., www.legalis.net ; confirmed on appeal Paris, 16/11/2005; TGI Paris, ord. réf., 2/08/2002, Propr. ind. 2002, Comm. n°68, note Tréfigny; Paris, 26/02/2003, D. 2003. Jur. 1831, note B. Edelman; CCE 2003, Comm. n°38, note Caron; Propr. intell. 2003, p. 322, note Bénabou ('*Areva*').

an internal limit in copyright law promoting freedom of expression. As freedom of expression is not absolute, section 3 studies the factors which may legitimately restrict freedom of expression to protect the rights of others. Section 4 then moves on to the national level, and studies how courts actually balance various competing fundamental rights. Section 5 sets out guidance for the application of the parody exception to ensure the realisation of all fundamental rights.

1. Protection of freedom of expression at International and European levels.

As the parody exception is grounded in freedom of expression justifications, it is reasonable that a legitimate parody will stay within the accepted bounds of expressions protected under this right. This section seeks to identify the scope of freedom of expression.

Freedom of expression is widely accepted as an essential component of promoting values of tolerance and pluralism in a democratic society [894]. Consequently, this fundamental right is protected in most international human rights treaties [895] and European instruments [896]. The following subsection examines the scope of protection of freedom of expression by reviewing its legal foundations at international and European levels.

[894] Amongst others: *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariat voor de Media*, (C-288/89); *Handyside,* supra note 513.

[895] Article 19 of the Universal Declaration of Human Rights ('UDHR'); Article 19 of the International Covenant on Civil and Political Rights ('ICCPR'); Article 5(d)(viii) of the International Convention on the Elimination of all forms of Racial Discrimination ('CERD'); Article 13 of the Convention on the Rights of the Child; Article 6 of the Declaration on Human Rights Defenders - Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms; and article 6 of the Declaration on Human Rights Defenders - Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

[896] EU: Article 10 ECHR; Article 11 of the EU Charter. Other regional instruments: Article 13 of the American Convention on Human Rights; and, Article 9 of the African Charter on Human and Peoples' Rights.

1.1 The right to freedom of expression at international level.

International recognition of freedom of expression results from the historical events of the Second World War and the Holocaust[897]. Article 19 of the UDHR, a non-binding instrument[898], provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This right is repeated and clarified in the ICCPR where article 19(2) reads as:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

As its formulation in Articles 19 UDHR and ICCPR indicates, the right to free expression is very broad in scope. Not only is the right extended to every individual[899], but its application is not restricted to particular forms of expression, meaning it includes political, artistic[900] and commercial[901]

[897] A. Callamard, 'Expert Meeting on the Links between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence', *Article XIX* (UNHCHR, 2-3/10/2008), p. 1; Similarly at European level with the ECHR. Sugarman and Butler 2011, p. 12.

[898] Weber 2009, p. 8.

[899] Therefore, there cannot be any distinctions 'of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' for the application of this right (Article 2 ICCPR).

[900] *Hak-Chul Shin v. Republic of Korea* (926/2000), CCPR/C/80/D/926/2000 (2004); 11 IHRR 928 (2004), [7.2 & 8].

[901] *Ballantyne, Davidson, McIntyre v. Canada*, (359/1989 and 385/1989), CCPR/C/47/D/359/1989 (1993); 1-1 IHRR 145 (1994), [11.3]. In this decision, the Committee notes that freedom of expression includes commercial speech though it holds a lower level of protection than political expressions. On the application of Article 19 to political expressions see Human Rights Committee, General Comment No 10: Freedom of expression (Article 19), 29/06/1983, HRI/GEN/1/Rev. 9 (Vol. I), [181];1-2 IHRR 9(1994), [2]; *Zeljko Bodrožić* ***v.*** *Serbia and Montenegro* (1180/2003), CCPR/C/85/D/1180/2003 (2006); 13 IHRR 389 (2006), [7.2]; *RakhimMavlonov and Shansiy Sa'di v. Uzbekistan* (1334/2004), CCPR/C/95/D/1134/2004 (2009); 16 IHRR 650 (2009). This includes commercial advertising, Human Rights Committee,

expressions disseminated through any media. The content of such expressions is equally unrestricted, such that the freedom potentially applies to all expressions including those which offend, shock or disturb. Yet, in particular circumstances, certain types of expressions may be legitimately restricted by national legislation mainly in order to preserve the rights of others[902].

1.2 European recognition of freedom of expression.

Two European instruments are applicable to France and the UK. As Member States of the Council of Europe, these jurisdictions are bound by the ECHR and its protocols. Article 10(1) ECHR is the most relevant provision for the protection of freedom of expression:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[903]

Article 10 is similarly worded to its international counterpart, but there is an important distinction. Unlike the UDHR and ICCPR, the provisions of the ECHR can be invoked directly before the national courts of Member States, and decisions are subject to the review of the European Court of Human Rights ('ECtHR')[904]. This provision is, therefore, very powerful because it imposes obligations[905] upon legislators and governments, as well as the judiciary, and even in respect of disputes between private individuals[906].

General Comment, General Comment No34: Freedom of expression (art. 19), 12/09/2011; CCPR/C/GC/34, [11]; Barendt 2005, p. 25.

[902] See section 3 chapter 5.

[903] The article further indicates that it does not prevent States from requiring broadcasting, television or cinema enterprises to be licensed.

[904] Amongst others: *Karataş v. Turkey*; *Ceylan v. Turkey*, [32]; Repeated in *Ashby Donald and others v. France*, [38]. Voorhoof 2009, p.14.

[905] *Sunday Times (no 1) v. UK* but also in *Handyside v. UK*.

[906] *Özgür Gündem v. Turkey*, [43]. But in *Khurshid Mustafa and Tarzibachi v. Sweden*, [33].

Additionally, the European Union reaffirms the protection of fundamental freedoms through the Charter[907]. Article 11(1) of the Charter repeats the provision of Article 10(1) ECHR to preserve freedom of expression.

Although it is possible for the European Union to accede to the ECHR[908], this step has not yet been taken[909]. The provisions of the Charter are almost identical to the ECHR and the CJEU must rely on the application of the ECHR to interpret the provisions of the Charter[910]. Therefore, the following sections will refer to the ECHR when analysing European jurisdictions.

2. Parody, facilitating the realisation of freedom of expression.

As outlined in chapter 2, the right to freedom of expression is a key justification of a parody exception in copyright law[911]. To grasp how freedom of expression influences this exception, section 2.1 considers the on-going debate surrounding the conflict between freedom of expression and copyright; Section 2.2 analyses the relationship between freedom of expression and the parody exception; and section 2.3 explores whether there is basis for a third limb of the right to freedom of expression.

[907] As stated by the Preamble of the Charter, the Charter aims to reaffirms rights resulting from international and constitutional traditions within the EU territory. For an analysis of the increasing reference to the Charter by the CJEU in copyright cases, Griffiths 2013, pp. 65-78.
[908] This possibility was given by Protocol n°14 of the ECHR which entered into force on 1/06/2010. The EU Lisbon Treaty of 2009 enables the EU's accession to the ECHR.
[909] Accession is currently at a standstill following a negative opinion delivered by the CJEU in Opinion 2/13 of the full Court, 18/12/2014, ECLI:EU:C:2014:2454.
[910] Article 52(3) and 53 of the Charter provides that the meaning and scope of the right to freedom of expression is identical as under the ECHR. EU Network of independent experts on fundamental rights, 'Commentary of the Charter of Fundamental Rights of the European Union' (June, 2006) available at http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf; Also the approach in *Deckmyn*, AGO, [80].
[911] See section 1 chapter 2 for the overview of all the justifications to the parody exception.

2.1 Copyright and freedom of expression – rights in conflict?

Freedom of expression and copyright are sometimes presented as being in conflict[912]. This section aims to establish that this perception is ill-founded[913] because both bodies of law share the same objective of promoting cultural diversity[914]. In this context, the parody exception reinforces this aim by fostering this particular form of creative expression.

Freedom of expression is brandished as a central pillar of a democratic society[915]. This fundamental right protects the right of individuals to express themselves freely without interferences imposed by the State on the content or form of the expression[916]. While copyright law also offers protection to certain forms of creative expression[917], this is achieved by awarding, *inter alia*, an exclusive right to reproduce a protected expression. Copyright may be exercised to prevent others from using protected expressions to express their own views. At first sight then, freedom of expression appears incompatible with copyright, since copyright law places restrictions upon which expressions may be freely reproduced[918].

---

912 On the ambiguous relation between copyright law and freedom of expression: Couto 2008, p. 160; Angelopoulos 2008, pp. 328-53; Hugenholtz 2002, p. 344.

913 Tensions between the two bodies of law will only appear in rare circumstances whereby courts will have to balance the rights carefully to ensure the realisation of both rights. Couto 2008, p. 160; Craig 2006, p. 75.

914 Craig 2011, p. 204.

915 Amongst others: EU: ECtHR *Verein Gegen Tierfabriken Schweiz v. Switzerland (No. 2)*, [107]; *Aguilera Jeminez,* [22]; *Vereinigung Bildender Künstler v. Austria,* [26]; *Karataş v. Turkey,* [48]; *Ceylan v. Turkey,* [32]; *Jersild,* [23-4]; *Castells,* [42]*; Observer & Guardian,* [50]; *Oberschlick,* [57]; *Lingens,* [41]; *Sunday Times (no 1) v. UK; Handyside v. UK,* [49]; Canada: *Ford v. Quebec* (A.G.) [1988] 2 S.C.R. 712, 765, [b]; *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 SCR 573, 583, [b]; *Lorimer:* supra note 482; *Source Perrier (Societe Anonyme) v. Fira-Less Marketing Co.* (1983), 70 CPR (2d_ 61 (F.C.T.D.); Australia: *Unions NSW v. New South Wales* [2013] HCA 58; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 (political insults); *Australian Capital Television Pty Ltd v. the Commonwealth* (1992) 177 CLR 106 (political broadcast and advertising).

916 Barendt 2005, p. 24.

917 Gendreau, 2008, p. 221.

918 Craig 2006, p. 76; Fewer 1997, p. 184.

Indeed, freedom of expression is not the only fundamental right at play[919]. Copyright is also protected under the fundamental right to property,[920] through the interaction of Article 27 UDHR[921], Article 15 ICESCR, Article 1 Protocol 1 of the ECHR[922], and explicitly in Article 17(2) of the EU Charter[923]. Given the absence of any hierarchy, no one freedom prevails over the other. Legislatures should allocate equal weight to each right in a manner which ensures the realisation of all freedoms[924]. This implies a balancing of the rights to maximise their realisation.

Copyright law's own objective is to strike a balance between encouraging creativity by rewarding/incentivising those who invest in the creation of new works and protecting the interests of the public to use and access these expressions[925]. As a consequence of this internal balance, copyright law should provide some latitude for subsequent authors to use existing works to create

[919] But it must be reminded that copyright differs from real property insofar as copyright is not rivalrous. Farida Shaheed, UN special rapporteur in the field of cultural rights, spoke on 6/5/2015, and argued that intellectual property rights are not human rights, but only instrumental in permitting other human rights, e.g. freedom of expression to be realised. In this light, exceptions are vital to safeguard the balance the interests of right-holders and the interests of others to participate in in cultural activities. Speech available at https://juliareda.eu/2015/05/intellectual-property-rights-are-not-human-rights/

[920] This instrument specifically includes intellectual property rights within the fundamental right to property. Therefore, for EU countries, there is little doubt left as to whether copyright should be considered as a fundamental right.

[921] Mainly in (2): 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' But French commentators see recognition in (1): 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' This results in a right to culture, seen as another dimension of fundamental rights. Article 27 UHDR protects the moral and material interests resulting from the creation of works by authors and the wider public's right to participate freely in cultural life of a society.

[922] Copyright is seen as a fundamental right under the right to property in European countries. The ECtHR recognised intellectual property to be protected under the fundamental right to property. *Laserdisken II* (C-479/04), [65]; *Promusicae* (C-275/06), [61-70]; ECtHR *Anheuser-Buschh Inc. v. Portugal,* [66-72]; ECommHR 4/10/1990, *Smith Kline and French Laboraties Ltd v. the Netherlands*. For more on copyright as a property right and the scepticism attached thereto: Griffiths and McDonagh 2013, p. 75.

[923] *Martin Luksan v. Petrus van der Let* (C-277/10), [68-71]; Griffiths 2013, pp. 65-78.

[924] Torremans 2015, p. 252; Geiger 2006, p. 386.

[925] See section 1.1 chapter 2.

new ones. This is a delicate balancing exercise because it is necessary to determine when and to what extent a right-holder should have control over their protected work and when circumstances dictate that the public interest supersedes the enforcement of their exclusive rights[926]. If exclusive rights are construed too narrowly, authors might have inadequate incentive to create new works, which is potentially detrimental to cultural diversity. Conversely, if these rights are construed too broadly, right-holders might have an undesirable censorial control over critical and parody uses of their works[927]. Again, this is potentially detrimental to society as a whole. Exceptions to economic rights – such as the parody exception - should be seen as a way to preserve the freedom of expression of others at the expense of the copyright's owner prerogatives[928]. Yet, the parody exception is not absolute and is restricted in specific circumstances to preserve the rights of others[929].

In conclusion, it is submitted that copyright and freedom of expression share the same objectives:[930] both rights promote the creation of new expressions and mandate that ideas must remain free. Therfore, introducing a parody exception may be conceptualised as constituting an internal copyright mechanism to balance the exclusive rights granted to authors with freedom of expression. Copyright affords individual rights because the making available of new works is beneficial for society at large, and a parody exception

[926] To borrow the words of Craig: 'Herein lies the explanation for the copyright system: copyright is an institution whose existence and maintenance encourage the kinds of communicative activity that lie at the heart of the rationale for freedom of expression, and so at the heart of a culture and society that furthers the capacities of the human self that we most value'. Craig 2006, p. 108.

[927] While limited copyright can serve as the 'engine of free expression', copyright laws that exceed their proper limits can serve as an effective engine for censorship and suppression. Mouffe 2011, p. 35; Netanel 2008, p. 3.

[928] As expressed by Geiger, where the exercise of exclusive rights does not contribute to the objective of copyright to encourage the creation of new works, the system must be corrected. Geiger 2015, p. 121.

[929] See section 5.4 chapter 5.

[930] Demonstrating the absence of conflict between IPRs and Human Rights: Derclaye 2008, p. 133 esp. p. 154; Gervais 2015, p. 21; Torremans 2015, p. 224.

legitimately limits exercise of those rights in those particular circumstances where it is in socially valuable to do so. In this way, the perceived conflict between the two bodies of law is resolved.

2.2 Justifying the parody exception.

In chapter 2, the differences between natural-law and utilitarian justifications to copyright were revisited[931]. Traditionally in civil law countries, copyright law merely recognises the pre-existing natural rights of an author arising from the unique link between an author and their work. In contrast, in the utilitarian approach it is society which permits exclusive rights to authors in recognition of their contribution to society.

Despite these distinct rationales, the lines are often blurred and policy makers typically advance both arguments.[932]. For example, copyright is a tool which can be used to foster cultural diversity[933]. The more works which are created, the more likely it is that these will express a wide divergence of opinions. But copyright is used as an economic tool, which is mainly focused upon the incentive of remuneration. The predominant trend in copyright law over the last decade is ever-expanding the scope of protection afforded to right-holders by focusing on the economic aspect of copyright. One explanation of this is that an author only benefits from remuneration retrospectively, once their

[931] See section 1.2 chapter 2.

[932] Gervais 2015, p. 20. The Wittem project for a European Copyright Code enshrines the parody exception under the heading of 'Uses for the purpose of freedom of expression and information' (Article 5.2(1)(e)). For the time being, the decision from the CJEU the *Deckmyn* erases all doubts for member states, [27 & 34]. For examples of use of freedom of expression as justification to the introduction of the parody exception for policy makers like in UK: *Impact Assessment,* supra note 133, p. 1; *Digital Opportunity*: supra note 382, p. 50; Canada: Bills Committee on the Copyright (Amendment) Bill 2011, *Copyright Exception for Parody*; Australia: 'A further exception promotes free speech and Australia's fine tradition of satire by allowing our comedians and cartoonists to use copyright material for the purposes of parody or satire.' P. Ruddock, *Copyright Amendment Bill 2006: Bill and explanatory memorandum* (First and Second readings, House of Representatives; 19/10/2006), p. 2; Geiger 2015, p. 122.

[933] Craig 2006, p. 110.

work is exploited. Hence, copyright's emphasis has gradually shifted to preserve the investment made in the creation of works resulting in a corresponding down-playing of the cultural dimension in copyright. The parody exception permits greater consideration of copyright as a means for fostering creativity as protected under the right to freedom of expression[934].

Traditionally, there are two ways to appraise the relationship between the parody exception and freedom of expression[935]. In the first, copyright is considered the principle to which freedom of expression (exercised through parody) is an exception. In this scenario, parodies might be expected to be upheld as lawful in limited cases[936]. Alternatively, freedom of expression is seen as the main 'rule' to which copyright seen as an exception, should be strictly interpreted. From this perspective, it is the right-holder who must justify their objection to a parody of their protected work is proportionate to the legitimate aim sought by copyright, as against the social need of a democratic society.

It is submitted that the most persuausive argument rejects both these approaches. Strowel and Tulkens[937] and Voorhoof[938] argue that international and European provisions protecting freedom of expression are limited by copyright. National copyright laws enshrine internal limits in order to respect the right of freedom of expression[939]. It is simply easier for freedom of expression to flourish where there is a specific legal exception. The mere

[934] Conceiving copyright as traditional property right entails a judgment on particular forms of expression which is at odds with the right to freedom of expression. Couto 2008, p. 165.
[935] Voorhoof 2006, p. 55.
[936] This would appear the approach taken by EU Member States due to the wording of the Infosoc Directive which expressively states exclusive rights to be the rule to which exception must be interpreted strictly. See section 2.2 chapter 3.
[937] Strowel and Tulkens 2006, p. 17.
[938] Voorhoof 2006, p. 54.
[939] This includes not only copyright exceptions but also the idea/expression dichotomy, subject matter and term of protection. Hugenholtz 2002, p. 351.

existence of a parody exception does not mean that the interests of parodists are prioritised over those of right-holders[940]; rather, a specific parody exception simply works more efficiently than any general defence to balance those interests. National courts, determining copyright disputes, are typically reticent to accept a defendant's argument which is based on freedom of expression, perhaps because they fear jeopardising the balance which the legislator has elected to strike between freedom of expression and copyright[941]. However, enacting a parody exception maintains respect for the separation of powers between the legislative and the judicial branches[942], since the legislator effectively legitimises the courts to consider the proper balance of interests in any particular case.

A parody exception is also measured against the Three-step Test of international copyright law, which overarches the introduction of any new copyright exception[943]. The third step of this test, interpreted as authorising public interests considerations, requires an exception to balance the legitimacy of the interests of authors[944] against the prejudice to the user. Ultimately, the introduction of a parody exception results from a balance achieved by legislatures between the goal of increasing the economy and fostering cultural diversity[945] and reinserts cultural values within the copyright paradigm[946].

---

940 Strowel and Tulkens 2006, p. 22.

941 *SGAE v. Rafaël Hoteles SA* (C-306/05), [52]. This does not exclude that in exceptional circumstance, arguments based upon other fundamental rights outside copyright will not be applicable. See in common law countries the public interest defence and the theory of abuse of rights in France: See section 3 chapter 4. Also in Dinwoodie 2008, pp. 253-8, esp. p. 258.

942 It suffices to examine the difficulty to recognise the legality of parodies of trade marks despite the argument based on freedom of expression which has constitutional value. Given the absence of exception for the purpose of parody in trade mark law, courts have been reluctant to render uses for this purpose lawful.

943 See chapter 2.

944 Including right-holders.

945 This lies on article 27 UDHR and article 15 ICESCR which preserves the right to participate in cultural life.

946 For more on the crisis of the legitimacy of IP: Geiger 2006, p. 371.

While this section establishes the relationship between the parody exception in copyright law and freedom of expression, it leaves open the question of whether this link amounts to a third branch of the right to freedom of expression: the freedom to create.

2.3 A specific freedom to create?

The concept of a *freedom to create*, as an aspect of the right to freedom of expression, has been developed primarily in France[947]. A freedom to create justifies a parody exception insofar as it limits the rights of one author for the benefit of another[948]. Based upon notions of reciprocity, it creates a coherent system whereby one author is able to rely on another earlier author's work to create a parody. The argument presented is that this is not to the original author's detriment, because they are also free to reproduce work of others when creating their own work.

But does this give rise to a distinct right to create? Cohen concludes that the situation is more nuanced[949], since freedom to create cannot be both contained within freedom of expression and be distinguished from it. Rather, freedom to create would appear to share common characteristics with freedom of expression, as well as features of its own. Yet, it is not clear that it is so.

Under Cohen's approach, the freedom of expression umbrella consists of three spokes: the right to freedom of expression, freedom of opinion and freedom to create. These freedoms are distinct, but indivisible. While the freedom to create and freedom of opinion are distinguishable from the right to freedom of expression - since the external distribution component is implicit only in the

947 This is probably due to the importance of natural law and divine origin of rights. Galopin 2012, p. 120; Mouffe 2011, p. 37.
948 And could justify the introduction of other exceptions covering other derivative works such as mash-ups.
949 Cohen 2005, p. 423.

latter case – the first two are also separable. Creating is different from thinking because it requires an action beyond thought to give rise to a work[950]. This aspect distinguishes freedom to create from the other two freedoms, since the act of 'creation' gives rise to new opinions or ideas.

This unique aspect of creation, with its potential to give rise to new social values, should impact on the manner in which the parody exception is applied by courts. It is now apparent why the parody exception appertains to the freedom of creation, since it encourages the creation of new works[951] which would otherwise be unlawful. It follows that lack of censorial power over parodies is essential to preserve freedom of expression. Cohen argues that censorship is not incompatible with the freedom to create, since attempts to censor may be avoided by delivering the same message in an alternative way[952].

It could be argued that applying Cohen's conception means that the parody exception is unnecessary to support freedom to create, since a parodist has the option to deliver their message in a manner which does not reproduce copyright material. However, it is submitted that this approach is unsatisfactory, because it overlooks the fact that the freedom of expression umbrella not only protects the content of a message but also its form, i.e. the manner in which the chosen message is delivered. While there might be alternative ways for a parodist to convey their idea, these might not represent the most effective way to do so. While it is conceded that a parody exception should not permit the reproduction of protected material merely to spare another's time and effort[953], the analysis of earlier chapters has already

[950] ibid, p. 424.
[951] AG in *Deckmyn*, [49 & 51]: 'In addition, a parody is, naturally, always a creation.'
[952] Cohen 2005, p. 425.
[953] Nimmer cited in Strowel and Tulkens 2006, p. 18.

demonstrated that the very nature of parody requires a specific type of *creative* reproduction, which is not a lazy short-cut or disguised piracy.

In conclusion, introducing a parody exception into copyright law makes a welcome contribution to the realisation of the freedom to create as a vital limb of the freedom of expression. Although freedom of creation has been developed almost exclusively in France, this thesis argues that it should be endorsed by the other Study Countries. Recognition of this freedom requires copyright law's exclusive rights to balance the competing interests of today's authors with the interests of future authors. Each should have an equal right to create. By conceptualising the parody exception as a manifestation of the freedom to create, courts should feel more confident to attribute greater weight to factors which contribute to the realisation of the parodist's creative skills and efforts, such as the work's humorous character and absence of any confusion between the parody and original works. But this position does not imply that parodists have a free rein either. The following section demonstrates that this rooting in the freedom of expression defines outer boundaries, both in terms of form and content, as to the parodies which copyright law should permit.

3. Restrictions to freedom of expression to respect the rights of others.

Despite its broad scope, the right to freedom of expression is not absolute. This subsection studies the factors which serve to restrict freedom of expression, which in turn informs the legitimate limits of a parody exception. Having first analysed the existing legal framework (section 3.1), the section then focusses upon the interpretation of the possible restrictions to an individual's freedom of expression (section 3.2).

3.1 Elaboration of limitations at international level.

Article 19(3) ICCPR, provides the international legal basis for national legislators to enact legislation which limits the exercise of freedom of expression in certain circumstances. This provision developed a three-pronged test for the first time:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputation of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.

Following this test, a restriction must be provided by law (principle of predictability), pursue a particular aim (principle of legitimacy) and be necessary (principles of necessity and proportionality). The latter is interpreted as requiring the interference to be 'necessary in a democratic society'[954].

An analysis of the decisions handed down by the Human Rights Committee reveals that it adopts a rigorous approach to ensure that freedom of expression is realised. Unsurprisingly, the approach is to interpret restrictions strictly[955], but this does not mean that restriction is impossible. The Special Rapporteur[956] notes, for example, that restriction is desirable when permitting free

[954] This echoes the language of article 10(2) ECHR: *Zeljko Bodrožić v. Serbia and Montenegro*, [7.2]; *Malcolm Ross v. Canada*, [11.6]; *Tae-Hoon Park v. Republic of Korea*, [10.3]; O'Flaherty 2012, p.13; A. Callamard, (Article 19 Executive Director), *Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (UNHCHR, 2-3/10/2008, Geneva), http://www.article19.org/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf, (access date 24/10/2015), p. 11; ARTICLE 19 Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights – ARTICLE 19, London, 2006 – Index Number: LAW/2006/0424, p. 2.

[955] O'Flaherty 2012, pp. 2-28.

[956] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23 (20/04/2010), [79].

expression would seriously encroach upon the fundamental rights of others, as might be the case for hate speech[957] or other discriminatory messages[958]. Yet, while restricting the expression of hatred or discrimination, caution must be taken to preserve freedom of expression and avoid censorship[959].

Under the ICCPR[960], article 19 must be read alongside article 20 prohibiting 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'[961]. Following the HR Committee[962], this balancing of freedoms might be intricate in practice especially at international level, but should provide the margin of appreciation necessary for courts at national level. The combination of these two provisions enables the prohibition of any kind of discrimination[963].

[957] Article 20 ICCPR; Article 4(a) of the CERD.

[958] 'Any restriction or limitation must be consistent with other rights recognized in the Covenant and in other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination as to race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status'. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, (20/04/2010), [79].

[959] UN Secretary-General: 'In case of freedom of expression… there are zones in which it is both very difficult and very dangerous to draw the line between legitimate and illegitimate exercise of liberty' cited by Partsch 1992, p. 26.

[960] Article 5 ICCPR: 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant'.

[961] Article 20(2) ICCPR. The relationship between article 19(3) and article 20 ICCPR is seen by the HR Committee as complementing each other insofar as the restrictions allowed under article 20 must respect the test set in article 19(3). The distinction between the acts permitted under article 19(3) and 20 lies in the fact that for the specific circumstances set in article 20, the Covenant requires a positive duty for the states (i.e. their legal prohibition). As such, article 20 is *lex specialis* to article 19(3). *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000), [10.6]; O'Flaherty 2012, p. 15; Human Rights Committee, General Comment, General Comment No 34: Freedom of expression (art. 19), 12/09/2011; CCPR/C/GC/34, [50-2].

[962] Human Rights Committee, General Comment No. 11, adopted 29/07/1983, Article 20 (2).

[963] Studying the interplay between freedom of expression and articles 2 and 26, O'Flaherty concludes that the current international framework provides adequate protection against religious discrimination. O'Flaherty 2012, pp. 1-28; 'Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or

Therefore, the interplay between freedoms must be assessed on a case-by-case basis, taking into consideration all the facts of a particular case.

3.2 Restrictions at European level.

3.2.1 Principle

Mirroring the conclusions reached through the study of the right to freedom of expression under international treaties, it has been established that article 10 ECHR must be interpreted broadly[964], with any interference placed upon its exercise to be construed strictly[965]. This European right of free expression encompasses expressions which might offend, shock or disturb the States or groups of individuals[966], because such expressions are part of pluralism - an essential feature of a democratic society, which requires tolerance and broadmindedness[967]. Being media-neutral, freedom of expression is applicable to all types of communication[968]. Yet, this right is not absolute. Article 10(2) ECHR repeats the three-pronged test against which all restriction must be measured. Under this provision, any restriction to freedom of expression must

other opinion, national or social origin, property, birth or other status' Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), [1].

964 Hugenholtz 2001, p. 348.

965 Amongst others *Peta Deutschland v. Germany,* [46].

966 This facilitates the preservation of pluralism and tolerance indivisible from democratic societies. *Sunday Times (no 1) v. UK*. repeated in *Ashby Donald and others v. France*, [31]; *Peta Deutschland v. Germany,* [46]; *Aguilera Jeminez,* [22]; *Vereinigung Bildender Künstler v. Austria,* [26]; *Raichinov v. Bulgaria,* [47]; *Pedersen and Baadsgaardv. Denmark,* [79]; *Özgür Gündem v. Turkey,* [43]; *Castells v. Spain,* [42]; *Oberschlick v. Austrian*, [57]; *Handyside v. UK,* [49]; Voorhoof 2009, p. 10; Strowel and Tulkens 2006, p. 12.

967 *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2) *2009,* [107]; *Handyside,* [49]; *Observer & Guardian,* [50]; *Sunday Times n. 2,* [40-1, 64]; *Lingens,* [41]; *Oberschlick,* [57]; *Castells,* [42]; *Jersild,* [23-24]; *Aguilera Jeminez*, [22]; *Vereinigung Bildender Künstler v. Austria,* [26]; *Karatas v. Turkey,* [48]; *Ceylan v. Turkey,* [32]; Mowbray 2012, p. 637.

968 Weber 2009, p. 20.

be 'prescribed by law', for the protection of 'rights of others', and 'necessary in a democratic society'.

The final requirement that any restriction must be 'necessary in a democratic society' is the focus of most attention and discussions[969]. Finally, a restriction applied to freedom of expression must be proportionate to the legitimate aim pursued. Hence, national authorities must demonstrate that the restriction is 'relevant and sufficient'[970].

Traditionally, Member States have discretion to appreciate on a case-by-case analysis that the restriction satisfies the test. National courts are thus entitled to render a parody unlawful where the restriction is deemed necessary in a democratic society. Yet, as is explained in the following sections, the ECtHR does not confer the same margin of appreciation upon national authorities. In determining whether the restriction is necessary in a democratic society, this margin varies depending on diverse factors as examined below[971]. The study of the application of these factors by the ECtHR provides the groundwork for understanding how courts should apply the parody exception.

3.2.2 Restriction 'necessary in a democratic society'

A thorough study of the ECtHR's jurisprudence on this aspect goes beyond the scope of this thesis and has already been undertaken by others[972]. Yet it can be distilled from the Court's decisions that a restriction will be deemed necessary in a democratic society if it answers a 'pressing social need'[973]. This

[969] *Handyside,* [45], repeated in *Sunday times v. UK,* [59-66], *Lingens v. Austria,* [47]. See section 3.2.2 chapter 5.
[970] *Leroy v. France,* [46]; *Handyside,* [50]; *Sunday Times,* [62]; *Jersild v. Denmark,* [31].
[971] As demonstrated, the national margin of appreciation is rather limited when dealing with political expressions or public matters and wider in relation to artistic or commercial expressions. *Ashby Donald and others v. France*; *Peta Deutschland v. Germany,* [46]; Hugenholtz 2001, p. 350.
[972] Mowbray 2012; Andrew and al. 2009.
[973] Mowbray 2012, p. 632; Voorhoof 2009, p. 14.

need varies depending on several factors such as: the nature, form, attitude, content and context of the expression.

3.2.2.1 Nature

Generally, the ECHR protects all expressions, but the ECtHR has identified in its decisions that expressions which are political[974], of public interest[975] or artistic[976] deserve more protection than, for example, purely commercial expressions[977], because of their particular role in a democratic society. Thus, expressions which criticise politicians and public figures should be given greater latitude than expressions targeting private individuals[978], for example. Over time, the ECtHR has consistently emphasised that the importance of political[979] debate results in the need to preserve freedom of political expressions. Thus, criticism of politicians[980] is generally justified because of the nature of their occupation opens up their personal actions to closer scrutiny. The Court has extended the same approach to other public figures, including members of parliament, government, judiciary and other authorities. By accepting a public role, a person knowingly exposes themselves to public scrutiny, meaning public figures must show more tolerance[981] than individuals who are not well-known.

---

[974] *Lingens v. Austria,* [41-3]; *Oberschlick v. Austria,* [57-61].
[975] *Sunday Times,* [65]; *Barfod v. Denmark,* [29-32].
[976] *Alinak v. Turkey,* [41-2]; *Karataş v. Turkey,* [49]; *Müller and Others v. Switzerland,* [27].
[977] *Ashby Donald and others v. France,* [39]; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany,* [33].
[978] *Handyside,* [48-50]*; Lingens,* [42] where the Court dealt with the revision of an interference with one's freedom of expression because of defamation through the criticism of a politician during an interview. The Court said that the limits of criticism are wider for politicians as their position inherently implies close public scrutiny; *Oberschlick,* [58-59]; *Castells,* [42-6] where the Court operates an internal ranking between different types of political expressions.
[979] Also *Ceylan v. Turkey,* [33] (similar approach for public figures than politicians).
[980] Mouffe 2011, p. 47; Voorhoof 2009, p. 19; *Vereinigung Bildender Künstler v. Austria,* [34]; *Alves Da Silva v. Portugal,* [28]; *Ukrainian Media Group v. Ukraine,* [65-70]; *Handyside,* [48-50]; *Lingens;* [42]; *Oberschlick,* [58-9]; *Castells*, [43].
[981] Voorhoof 2009, p. 20.

Yet, the characteristic of many expressions (like parodies which blend artistic, political and commercial expressions) is such that they fall into several categories simultaneously. For example, *Karataş v. Turkey*[982] related to the publication of a poem, authored by a Turkish citizen, which was directly critical of the Turkish authorities[983]. The Turkish government sought to censure publication, alleging the poem was nothing more than impermissible propaganda against the 'unity of the State'. Here, the nature of the individual's expression was pertinent, because it was both artistic and political. The Court acknowledged that, while such message might incite its audience to hatred and violence (which is not permitted pursuant to the Convention), the author's choice to adopt the form of poetry limited its reach to a minority of people[984]. This lessened the impact for a call for an uprising compared with other political statements made in mass media[985]. In any event, given the political character of the poem, the Turkish authorities had only a narrow margin of appreciation to limit freedom of expression[986]. In conclusion, the Court held that preventing publication of the poem was a restriction which violated article 10 ECHR[987].

In contrast, where the nature of an expression is purely commercial, national authorities are afforded a wider margin of appreciation in relation to restrictions to freedom of expression[988]. This could be the case regarding the use of parody in a commercial advertisement to promote a particular product. The ECtHR reviewed an Austrian decision which sought to restrain

[982] *Karataş v. Turkey*.
[983] ibid, [49].
[984] It must be reminded that the right to freedom of expression not only protects the content but also the form of the expression. *De Haes and Gijsels v. Belgium,* [48].
[985] *Karataş v. Turkey*, [52].
[986] *Wingrove v. The United Kingdom,* [58].
[987] ibid, [54].
[988] *Krone Verlag GmbH & Co KG (No 3) v. Austria,* [30].

publication of a newspaper advertisement[989] which compared one journal's subscription rates with those of a competitor. The national authority found that even though the information contained in the advert itself was accurate, interference with this commercial expression was necessary to provide general protection against unfair competition via misleading advertising, having regard to the particular circumstances and specific business practices in issue[990]. After undertaking its own balancing of the interests at stake, the Court disagreed, finding that the Austrian measure violated article 10 ECHR because it was a disproportionate sanction for the objective sought.

3.2.2.2 Form

The form of the expression also impacts the margin of appreciation granted to national authorities. Although the Court has not had the opportunity to deal with a parody case yet, the ECtHR has overturned national decisions where criticism has been made utilising humour[991]. By permitting satires[992] to prevail over the private interests of copyright owners, the ECtHR shows its determination to grant greater protection to humorous forms of expression compared to other forms.

Apocolypse[993], concerned a contemporary art exhibition which featured an artwork, 'Apocolypse', depicting numerous figures engaging in sexual acts (Figure 10[994]). Although the bodies of those appearing in the picture were hand-drawn by the artist, the faces consisted of photographs of public figures which had been cropped from newspapers. The ECtHR held that the Austrian

[989] ibid.
[990] ibid, [31].
[991] *Leroy v. France*; *Aguilera v. Spain*; *Vereinigung Bildender Künstler v. Austria*; *Alves Da Silva v. Portugal*; *Nikowitz and Verlagsgruppe News GmbH v. Austria*; Mouffe 2011, p. 173.
[992] As argued in chapter 1, parody is a multivalent concept which encompasses multiple uses including satires.
[993] This case was not dealt under copyright but defamation law.
[994] Damaged by a visitor who threw red paint on the painting.

courts' prohibition of the exhibition of the artwork was an illegitimate interference of the artist's freedom of expression. The Court noted that the eyes in the photos used had been blocked out, and the bodies depicted in an unrealistic and exaggerated manner. It was clear that the work was satire, not attempting to depict reality, and so should have been interpreted by the national courts as such[995]. In describing satire as 'a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate'[996], the ECtHR cautioned that particular care must be taken when restricting a satirist's expression.

[995] *Vereinigung Bildender Künstler v. Austria,* [33].
[996] ibid, [33]; repeated in *Alves Da Silva v. Portugal,* [27].

Figure 10

otto muehl: **apocalypse**
(nach attacke)

3.2.2.3 Attitude of the speaker

The ECtHR also identifies the attitude of the individual exercising their freedom of expression as a relevant consideration[997]. In *Oberschlik v. Austria (No 2)*[998], a journalist found himself sued for defamation for an article which criticised a speech given by the party leader of a far-right party, in which he labelled the leader an 'idiot'. When the case came before the ECtHR, the court held that personal attacks might be protected as a legitimate expression,

[997] For example, good faith is interpreted in favour of the defendant. *Lingens,* [46].
[998] *Oberschlik.*

provided that the speaker could provide an objectively reasonable explanation for the criticism[999].

It is submitted that this same approach should be applied in the case of a parody, because it appropriately reflects the humoristic intent requirement for the application of the parody exception[1000]. As argued in Chapter 3[1001], it is submitted that humoristic intent which has the aim to harm authors and/or their works, or where the parodist acts in bad faith to plagiarise the protected materials is not covered by the exception. The Court's approach demonstrates that it is legitimate for an individual to make value judgements when expressing their opinion, and as such the statement made does not have to be true to be protected speech. The same reasoning appears to be directly transferrable to parodies. As a manifestation of criticism, parodies may be accurate and true, but equally they may be neither[1002]. Overall, if a parody meets the requirements of the parody exception under copyright law, this should be indicative that a parodist has not exceeded his right to freedom of expression.

3.2.2.4 Context

It has been seen that a parody introduces a distance from the original work. As such, humour creates a separation between reality and the 'other' world in which parody expressions evolve. This distance lies in the parody itself or in the context in which a parody expression is made and inherently influences the need for an interference with the parodist's freedom of expression. The

[999] ibid, [33]
[1000] Such as in *Deckmyn*.
[1001] Section 3.2.
[1002] Parodies do express some kind of truth although the parody does not have to accurately reflect reality. Edelman, note under Cass., 12/07/2000, D., 2001, 260.

Court had the possibility to study the importance of the context of an expression in several cases.

In *Jersild v. Denmark*[1003], the ECtHR considered the interplay between freedom of expression and measures directed at fighting discrimination. The case relates to a documentary made for a Danish current affairs television programme which interviewed a particular group of young people who had been identified in the press as racist. In the course of the documentary, the interviewees made various abusive and derogatory remarks directed at immigrants and the ethnic groups present in Denmark. In light of this, the Danish authorities sought to prevent the programme from being broadcast, and the applicant – the film's producer - argued that the interference violated his right to freedom of expression under article 10 ECHR.

The Court affirmed 'the vital importance of combating racial discrimination in all its forms and manifestations'[1004], since inter-racial tolerance and respect is a fundamental limb in any democratic, pluralistic society. Therefore, the offensive statements made by the group during the interview were not themselves protected by article 10 ECHR. However, the article 10 rights of the producer had been breached because of the important role of the press as a 'public watchdog'[1005] to discuss matters of public interest[1006]. Given the context of the interview within the final documentary (it being preceded by a public discussion of racism in Denmark), made clear the programmers' intent was to challenge, rather than to promote or proliferate, the racist views of the interviewees[1007].

[1003] *Jersild v. Denmark* (expression of unlawful racist views).
[1004] ibid, [30].
[1005] ibid, [31].
[1006] ibid, [35].
[1007] ibid, [33].

The importance of context was confirmed in *Soulas and Others v. France*[1008]. Dealing with an attempt to block publication of a book concerning Islam and immigration into Europe, the Court had to determine whether this interference by the French court was in violation of the publisher's and author's right to freedom of expression. Although the ECtHR acknowledged that the question of integration of immigrants constitutes a matter of legitimate debate in Europe[1009], the Court, referring to its decision in *Jersild* and to article 20 ICCPR alongside article 4 of the CERD, concluded that this particular expression should not be permitted under the convention, because its message was to encourage a rejection of immigrants which did not further the ideals of a pluralistic society[1010].

These ideas were developed further in *Leroy v. France*[1011] where the Court was required to adjudicate in the case of a cartoon which featured the 9/11 attacks on the World Trade Centre and featured the phrase 'We have all dreamt of it… Hamas did it' - a parody of Sony's slogan: 'We have all dreamt of it… Sony did it'. The cartoonist argued that the cartoon was a legitimate political expression which aimed, through satire, to comment upon the decline of American imperialism. However, the ECtHR considered that, although the image related to an event which was a matter of public interest, the cartoon itself went beyond that necessary for legitimate criticism. Given the sensitivity surrounding the subject matter used as the vehicle for comment, the cartoon would be construed as indicating the cartoonist's support for the terrorist attacks, and could provoke a public reaction which could lead to new acts of violence. In this light, the interference of the national court to prevent

[1008] At [33].
[1009] ibid, p. 11.
[1010] Repeated in *Le Pen v. France*.
[1011] *Leroy v. France.*

publication was 'relevant and sufficient' to the legitimate aim of maintaining public order.

3.2.2.5 Content

A parody is required to have humorous intent to benefit from the parody exception[1012]. To determine how far a parodist is allowed to go, it is necessary to undertake a careful examination to distinguish between expressions which may 'offend, shock or disturb'[1013] and those expressions which amount to a serious incitement to extremism ('hate speech') or discrimination, which fall outside the protection of article 10 ECHR[1014]. But what guidance has the ECtHR given as to how national courts should draw the line between messages allowed under the parody exception and messages which harm the original author or his work[1015]?

3.2.2.5.1 Racially and Ethnically Discriminatory messages

Although the ECtHR approach makes it difficult to draw a clear line between the expressions which warrant protection pursuant to article 10 ECHR and those which violate the right to free expression, statements which convey a message likely to incite discrimination or arouse hatred towards certain racial or ethnic groups are unlikely to be protected, because such statements stand in contradiction with the Convention's values of tolerance and pluralism[1016].

For example, in *Féret v. Belgium*[1017], the ECtHR considered that criminal sanctions invoked against the leader of a far-right political party for

[1012] Section 3.1 chapter 3.
[1013] *Handyside,* [49].
[1014] Article 17 ECHR; Declaration of the Committee of Ministers on freedom of political debate in the media, adopted on 12/02/2004; Voorhoof 2009, p. 34.
[1015] See section 5.4 chapter 5.
[1016] Voorhoof 2009, p. 36.
[1017] At [78].

distributing leaflets during an election campaign were legitimate. The leaflets included statements such as: 'Stand up against the Islamification of Belgium', 'Stop the sham integration policy' and 'Send non-European job-seekers home'. The ECtHR considered these statements were an incitement to racial discrimination, meaning that the leader's right to freedom of expression had not been violated.

3.2.2.5.2 Religious hate speech

Article 9 ECHR recognises the right to freedom of religion, but the ECtHR considers that individuals who exercise their freedom to manifest their religion should expect it to be criticised[1018] to a reasonable extent by others exercising their own right to free expression. Such criticism may take the form of denial, or dissemination of material which is hostile to their particular faith[1019]. But there are instances where critical religious expressions should be restricted[1020]. This is the case where an expression is gratuitously offensive, where the content directly targets specific believers, the expression insults the sacred symbols of a religion, the message jeopardises the right of believers to express their religion and denigrates their faith, or if the message incites hatred or violence towards the believers.

For example, the British National Party ('BNP') produced a poster which depicted the Twin Towers in flames along with the Islamic crescent and star symbol in a prohibition sign. The image was accompanied by the statement:

[1018] Weber 2009, p. 49.
[1019] Cases where the court decided against a violation of article 10: *Otto-Preminger-Institut v. Austria,* [47]; *Wingrove v. The United Kingdom*, [60]; *I.A. v. Turkey*, [29]; contra: *Giniewski v. France*, [51-2]; *Aydın Tatlav v. Turkey*, [28]; *Klein v. Slovakia*, [52]; *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey*, [30].
[1020] Weber 2009, p. 52.

'Islam out of Britain - Protect the British People'[1021]. Norwood argued that displaying the poster in his window was permissible exercise of his freedom of expression to criticise Islam, and did not represent an intention to attack those who followed Islamic beliefs, or an incitement for others to do so. The ECtHR disagreed. It considered the poster was a public attack on Muslims living in the UK because it associated them all with the terrorist attacks[1022]. As displaying the poster thus constituted a prohibited act pursuant to article 17 ECHR (preventing abusive exercise of rights), the applicant did not enjoy the protection of article 10 ECHR[1023].

In *I.A. v. Turkey*[1024], the ECtHR had to determine whether state interference with a writer's expression that 'God Muhammed' did not condemn necrophilia or bestiality [1025] was a legitimate restriction necessary in a democratic society. In this case, the Court considered the statements to be an abusive attack of the Prophet which justified interference[1026].

3.2.2.5.3 Denialism

The ECtHR has also endorsed a curtailment of expressions which aim to negate significant denialism of historical events. In *Lehideux*[1027], the Court considered a French newspaper's publication of pro-Nazi statements contained in the eulogy of Marshal Pétain. Although the Court was satisfied

[1021] *Norwood v. UK*. Repeated in *Pavel Ivanov v. Russia*. The application was consequently declared inadmissible by the Court because it was incompatible *ratione materiae* with the provisions of the Convention.
[1022] 'such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.' *Pavel Ivanov v. Russia,* [53]. Non-discrimination is also protected through article 14 ECHR and Protocol no12 to the ECHR.
[1023] The court also supported its reasoning under the admissibility criteria of article 35 (3) and (4) ECHR.
[1024] *I.A. v. Turkey*.
[1025] ibid, [29].
[1026] ibid, [30].
[1027] *Lehideux and Isorni v. France,* [53-8] repeated in *Garaudy v. France*.

that the criminal conviction of the article's authors met the first two requirements of article 10(2) ECHR, the Court then found that the French court's interference still violated article 10 ECHR. The ECtHR acknowledged that the act of praising a prominent Nazi collaborator went against the values underlying the Convention, and that pro-Nazi statements enjoyed no protection pursuant to the right to freedom of expression[1028]. However, alongside to the pro-Nazi statements, the authors expressly stated their disapproval of 'Nazi atrocities and persecutions'[1029]. This satisfied the Court that the article's aim was to engender debate concerning the country's history which would promote the pluralism and broadmindedness essential in a democratic society. Thus, in this case, interference was not necessary, even if the publication would offend, shock or disturb the newspaper's readers[1030].

3.2.2.5.4 Message contrary to morality

Overriding issues of morality are also seen to conflict with an individual's right to free expression.

The ECtHR had the opportunity[1031] to revise a national decision which restricted the freedom of expression of an artist based on notions of morality in relation to a painting described as depicting 'vulgar images of sodomy, fellatio between males, bestiality, erect penises and masturbation'[1032]. The Court first recognised the role of art in a democratic society to promote cultural diversity[1033], but it thenobserved that this does not preclude artistic expression from being restricted in cases of abuse[1034] and that a national authority benefits

[1028] This reinforces the teachings of *Jersild v. Denmark,* [35] by noting which expressions fall outside the scope of protection of article 10 ECHR.
[1029] *Lehideux*, [53].
[1030] ibid, [55].
[1031] *Muller v. Switzerland.*
[1032] The words of the Cantonal Court in *Muller v. Switzerland*, [14].
[1033] ibid, [33]
[1034] ibid, [34].

from a wider margin of appreciation when determining what might be contrary to morality in a particular state[1035]. In this case, the ECtHR found no reason to interfere with the Swiss court's findings, that given the current conceptions of sexual morality in that country, the images depicted would offend 'the sense of sexual propriety of persons of ordinary sensitivity'[1036]. Therefore, the artist's right to free expression should not prevail[1037].

Similarly, *Otto Preminger Institute v. Austria* concerned the screening of a film depicting the conviction of a writer for blasphemy. Here, the Court identified that uniformity of religious morals could not be considered to exist even with in a single country[1038], so affording a wide margin of appreciation for national authorities to decide. Thus interference by the Austrian courts to prevent the film from being shown so as to protect the religious sensibilities of the local Catholic community[1039] was a legitimate violation of the right to freedom of expression, even though the film was only accessible to paying viewers aged over 17 years.

Since there is no uniform conception of 'morality', the ECtHR grants a wider margin of appreciation to national courts when dealing with works which are alleged to be obscene or blasphemous[1040].

3.2.3 Conclusion

In conclusion, the balancing exercise which must be undertaken by courts is far from straightforward. Although courts must interpret an individual's right to free expression broadly[1041], that right should not be preserved at the expense

[1035] ibid, [35].
[1036] ibid, [36].
[1037] ibid, [37].
[1038] ibid, [50].
[1039] ibid, [56].
[1040] *Handyside v. UK,* [48]; *Muller v. Switzerland*, [35]; *Otto Preminger Institute v. Austria*, [50].
[1041] Voorhoof 2009, p. 10.

of rights of others. Therefore, courts must take into consideration the particular facts of the case to ensure realisation of all fundamental rights in competition. While the cases discussed did not cover parody works, they provide an insight into how national courts should undertake the careful balance between authorised expressions under the parody exception; and expressions which are not protected by the right to freedom of expression should not be covered by the parody exception either. By making this overall assessment, the ECtHR determines whether there has been an abuse[1042] and, if so, to revise the national authority's decision. Through the section's analysis of key ECtHR's decisions, the following conclusions can be drawn.

Firstly, courts should determine whether the purpose of the expression is to propagate a discriminatory message (hate speech), or to engender debate relating to an issue of public interest[1043]. Only in the second scenario is the expression within the scope of article 10 ECHR.

Secondly, courts enjoy a varying margin of appreciation, which is determined by the form and content of the expression. For example, given that hate speech is not protected by article 10 ECHR, Member States have only a narrow margin of appreciation for expressions inciting hatred. Similarly, because of the value attributed to truth in a democratic society, little margin of appreciation is granted for political speeches. Greater margin of appreciation is permitted where courts are dealing which religious messages[1044], although several reports demonstrate that the current legal framework is adequate to protect

[1042] Weber 2009, pp. 30-47.
[1043] For example, in *Jersild*, the aim of the journalist was to expose problems of public concerns, [33]; In *Lehideux and Isorni*, the applicants did not deny or revise what they referred to as 'Nazi atrocities and persecution', [47]; in *Gündüz v. Turkey* the court held that the programme was made in a way to encourage the debate on a question of public interest, [44].
[1044] Wider margin of appreciation for religious matters is justified by the absence of European consensus among the member states. *Wingrove v. The United Kingdom,* [58]; *Otto-Preminger-Institut v. Austria,* [50]; *Murphy v. Ireland*, [67, 81-2]; *TV Vest AS and Rogaland Pensjonistparti v. Norway,* [67].

religious beliefs, such that freedom of expression should not be further restricted[1045].

Thirdly, the context in which the expression is made is relevant. Although freedom of expression is recognised for all types of expressions, some forms attract greater protection than others. For example, expression made in any form of media is considered as close to sacred by the ECtHR. National authorities also enjoy a broader margin of appreciation when dealing with commercial expression, as compared with political or artistic forms of expressions.

Finally, while the limits to freedom of expression turn on the particular facts at issue, there is general agreement that expressions which are intentionally racist, glorify human rights violations or are defamatory[1046] are most prone to restriction.

4. How national courts strike a balance between the rights in competition.

Building upon the previous section's formulation of the over-arching frameworks for balancing competing human rights, this section seeks to

[1045] Report adopted by the Commission at its 70th plenary session (16-17/3/2007); Recommendation 1805(2007) on blasphemy, religious insults and "hate speech" against persons on grounds of their religion, adopted on 29/06/2007 where the Council of Europe Parliamentary Assembly discussed the caricatures of Muhammad published by a Danish newspaper. *Ben El Mahi and others v. Denmark*. The case was held inadmissible by the ECHR; Resolution 1510(2006) on Freedom of expression and respect for religious beliefs, adopted on 28/06/2006; General policy recommendation No. 7 on national legislation to combat racism and racial discrimination (2002). This last Recommendation by the European Commission against Racism and Intolerance (which was established by the Council of Europe) calls for criminal law provisions combating various racist expressions. Such expressions concern public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a group of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin. Public expression, with a racist aim, of racist ideology or the public denial, with a racist aim, of crimes of genocide, or crimes against humanity or war crimes should also be penalised by law.

[1046] Example: insulting the government is not permitted. *Castells*; *Lindon, Otchakovsky-Laurens and July v. France*.

illustrate how national courts apply the framework to strike a fair balance between freedom of expression and copyright. This enables us to identify which factors a court should take into account when considering whether the parody exception applies to the particular set of facts[1047]. The following subsections begin with the common law countries, the UK, Canada and Australia (respectively sections 4.1, 4.2 and 4.3) before turning to France (section 4.4.).

4.1 The United Kingdom

The UK incorporated the principles of the ECHR into its legal framework via the Human Rights Act 1998 ('HRA')[1048]. Perhaps given the relatively recent enactment of the HRA, very little case law exists which analyses the tensions between freedom of expression[1049] and copyright. Arguably, *Ashdown*[1050] is most enlightening. Indeed, Lord Phillips specifically identifies the potential for copyright to clash with freedom of expression.[1051]. The Court of Appeal, considering the publication of a copyright-protected transcript of a private discussion between two leading politicians, held that copyright law legitimately restricts freedom of expression, when the conditions of article 10(2) ECHR are met[1052]. As such, the Court confirmed that the CDPA is self-contained. The legislator had struck the appropriate balance between the exclusive rights granted by copyright law and freedom of expression when framing the copyright provisions in the CDPA via the various doctrines enshrined in the legislation, such as the idea/expression dichotomy, the

[1047] See section 5 chapter 5.
[1048] This Bill has constitutional characteristics.
[1049] Section 12 HRA.
[1050] *S*upra note 469.
[1051] ibid, [30]: 'The Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright'.
[1052] ibid, [38].

substantiality doctrine, the fair dealing exceptions and the public interest defence, and that courts ought to respect this internal balancing[1053].

Nevertheless, whenever two bodies of laws are directly in conflict, section 3 HRA requires courts to apply legislation in a manner which is compatible with the ECHR[1054]. Against this backdrop, it is reasonable that, whenever a defendant invokes a fair-dealing exception, the court considers all the surrounding circumstances of the case, to be able to attribute most weight to those factors which contribute to realisation of the defendant's freedom of expression. Similarly, it is legitimate that expressions, which, because of their nature, fall outside the scope of protection of freedom of expression, might not benefit from exclusions in copyright law and/or may be restricted by other bodies of law, whether in criminal or civil proceedings.

Unsurprisingly, these restrictions must satisfy the requirements set in article 10(2) ECHR[1055]. Hence, whenever a court is confronted with conflicting fundamental rights, it must base its decision on the result which permits maximum realisation of all the rights in play. Overall, whatever balance is achieved 'internally' by copyright law does not preclude further judicial review for compliance with the over-arching requirements of the ECHR and the Charter[1056].

[1053]The question remains whether the internal balance struck under copyright law necessarily preserves the exercise of freedom of expression. The interpretation of case law does not conclude to the maximisation of the realisation of the freedom of expression. Barendt 2005, p.15; Garnett 2005, p. 172.

[1054] Supra note 469, [45].

[1055] See section 3.2 chapter 5.

[1056] Angelopoulos 2008, pp. 341 & 352; Birnhack 2003, pp. 24-34.

4.2 Canada

Freedom of expression is protected at national level in section 1 and 2(b) of the Canadian Charter of Rights and Freedoms[1057].

Section 1 enshrines the regime for the restrictions to the freedoms of the Canadian Charter which 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Traditionally, it was believed that the Canadian Charter did not apply to the judicial branch[1058], but in *Irwin Toy v. Quebec*[1059], the Supreme Court reconsidered this and established the test for the application of freedom of expression by courts. Firstly, the Supreme Court interpreted freedom of expression so broadly that all works are likely to be protected under section 2(b) of the Canadian Charter[1060]. Secondly, once the court established that the expression is protected under the Canadian Charter, the court must consider whether the purpose or the effect of the government's action is to restrict this fundamental freedom. Only the effect of the legislation is susceptible to be infringing a Charter's right. Thirdly, the applicant must demonstrate that his expression complies with the principles enshrined in the Canadian Charter[1061]. Finally, if the application of the law amounts to a restriction of freedom of expression, the onus shifts to the defendant to demonstrate that the restriction is justifiable pursuant to section 1 of the Canadian Charter[1062].

[1057] Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c.11 ('Canadian Charter').
[1058] Fewer 1997, p. 217.
[1059] [1989] 1 S.C.R. 927.
[1060] Any activity that 'conveys or attempts to convey a meaning' ibid, [968].
[1061] This should be easily achieved given the broad interpretation given in *Irwin* (supra note 1069) 'is expressive if it attempts to convey meaning'.
[1062] ibid, [978-9].

Hence, freedom of expression is not absolute and should be limited where this is 'prescribed by law' and a 'pressing and substantial objective' through 'reasonably and demonstrably justified' means[1063]. This echoes the European system[1064]. In short, the Canadian Charter strikes a balance between individual rights and freedoms on the one hand and the collective rights to cultural identity and equality on the other hand[1065].

As in the UK courts, 'external' freedom of expression considerations have often been ignored[1066] or rejected[1067] by courts in copyright litigation. Fewer[1068] criticises this approach as being inconsistent with the Supreme Court's decision in *Irwin Toy v. Quebec*[1069], since freedom of expression is protected at constitutional level by the Canadian Charter, and copyright is equally protected to the extent that it does not unjustifiably hinder freedom of expression[1070].

When the application of the Copyright Act is found to breach a Charter right, the test provided in *R. v. Oakes*[1071] is applied. Here, the Supreme Court established four criteria which must be present for a restriction on freedom of expression to be lawful: the law must pursue a sufficiently important objective to justify the limitation; the restriction must be reasonably connected to this objective; the restriction must not impair the right more than necessary to meet the objective; and finally, the effect of the restriction must not have an aversely

[1063] Section 1 of the Canadian Charter.
[1064] Beaulac 2010, p. 24. See section 3.2.2 chapter 5.
[1065] Section 15 Canadian Charter.
[1066] Craig 2006, p.78; Fewer 1997, p. 195.
[1067] See Introduction. In relation to parody: *Michelin,* supra note 35, [70]; *Lorimer:* supra note 482; *Source Perrier SA v. Fira-Less Marketing Co. Ltd.*, (1983) 70 CPR (2d) 61 (FCTD). These decisions demonstrate the strength of the proprietary vision of intellectual property rights. For more: Craig 2011, pp. 208-22.
[1068] Fewer 1997, p. 193.
[1069] Supra note 1069.
[1070] Bailey 2005, p. 141.
[1071] [1986] 1 S.C.R. 103.

disproportionate effect on the person it applies to[1072]. This approach should be applied in copyright disputes in which the Canadian Charter is raised directly against the Copyright Act (e.g. the parody exception), being a government action going against freedom of expression.

Freedom of expression enjoys a liberal interpretation[1073]. It protects all forms of expression including political speech, artistic expression, search for truth and commercial expressions[1074]. Expressions particularly hostile to the values enshrined in the Canadian Charter remain outside the scope of freedom of expression because these are inconsistent with the values promoted in a democratic society[1075]. As in the other jurisdictions under scrutiny, Canadian courts render a restriction justifiable depending on the content of the expression. Hence, restrictions to political expressions will be less easily accepted by courts than advertising expressions[1076] or expressions with a more problematic content like pornography[1077] or violence[1078]. In practice, Canadian courts have limited freedom of expression where an expression is likely to harm the interests of others or concerns public order[1079].

Yet, any other expressions, even violent, constitute an expression in the sense of section 2(b) of the Canadian Charter. Any restriction thereof must respect section 1 of the Canadian Charter[1080]. These provisions (protection of freedom of expression and provisions against hate speech or discrimination) must be

[1072] ibid, [138-9]; In *RJR MacDonald,* supra 888, the Supreme Court prevailed freedom of expression over a federal law prohibiting the advertising of tobacco product for not being proportionate to the objective sought. A different outcome might have happened if the law limited the prohibition to advertising targeting children.
[1073] *R. v. Keegstra* [1990] 3 S.C.R. 697, [729].
[1074] *Irwin,* supra note 1069; *R. V. Edwards Books and Art Ltd.,* [1986] 2 S.C.R. 713.
[1075] *Keegstra*, supra note 1073, [733].
[1076] Moon 2000, Chapter 3, p. 76.
[1077] *R. v. Butler* [1992] 1 SCR 452; *Irwin,* supra note 1069, p. 970. How obscenity legislation was set aside to censor pornographic content: Moon 2000, Chapter 4, p. 105.
[1078] Moon 2000, Chapter 2, p. 35.
[1079] ibid, p. 36.
[1080] Supra note 1074.

interpreted in a manner to enhance Canada's multiculturalism. Therefore, elements such as the context and the content of the expression will be relevant to determine the validity of the restriction[1081]. For example, an expression of hatred targeting a minority will be considered differently from hate speech towards persons belonging to the majority culture.

Michelin[1082] represents the Canadian decision which most explicitly considers the tensions between copyright law and freedom of expression arguments. The case considers a parody of the Bibendum figure prior to the introduction of a parody exception in Canadian copyright law. The court decided that the parodist's right of freedom of expression did not justify their reproduction of the copyright-protected image[1083]. In any event, the court did not consider that the defendant's freedom of expression had been restricted unduly, because the defendant could have invoked other means to convey the same message[1084]. In reaching this conclusion, the court found no reason to review the compliance of the copyright law's restriction with section 1 of the Canadian Charter, given that the parody in dispute was held to be outside the scope of section 2(b) of the Canadian Charter[1085]. Referring to *Weisfeld v. Canada*[1086], the court noted that is not sufficient to demonstrate that the use amounts to a new expression. As the right to freedom of expression is not absolute, the court considered that section 2(b) not only excludes expressions of violence but also expressions using another's property in the name of freedom of expression[1087].

[1081] *Keegstra*, supra note 1073, [734].
[1082] *Michelin,* supra note 35.
[1083] ibid, [78-9].
[1084] ibid, [79 & 106].
[1085] ibid, [86-8].
[1086] [1995] 1 C.F. 68 (C.A.) p.85.
[1087] Craig vigorously criticises this reasoning of the court, reminding us that the recognition that copyright is intangible property is fundamental to understanding the copyright paradigm, but, the reasoning of the court appears to be heavily focussing on the assumption that copyright should be considered as any other form of private property; *e.g.* the act of buying a book does not give property over the expression exercised by the author of the book

The Court in *Michelin* further expounded that, even had the defendants' expression been found to be protected by the Canadian Charter, the defendants would have then failed under the test enshrined in its section 1, since that restriction of freedom of expression by the enforcement of copyright exclusive rights would have been 'demonstrably justified in a free and democratic society'[1088]. Here, the judge asserted that copyright law reflects a 'pressing and real' need for a democratic society to protect authors by ensuring remuneration. Ultimately, the Court held that interests of right-holders 'trump' the exercise of one's freedom of expression. By focusing on one specific copyright justification, this decision oversimplifies the true nature and purpose of copyright, which, although it encompasses the remuneration of authors, also includes the promotion of cultural diversity by recognising the need for authors to rely upon previous works in order to create new ones[1089].

As the court acknowledged, copyright-protected works are expressions falling within the ambit of section 2(b) of the Canadian Charter. Hence, the defendants' use arguably contributes to open the dialogue within society and the diversification of ideas, concepts which are at the centre of both copyright protection and freedom of expression[1090]. By rendering the parody use unlawful, the court deprived copyright protection of its justification[1091]. Despite the criticisms surrounding this decision, *Michelin* remains good authority in Canada[1092], pending any judicial review of the newly introduced parody exception.

---

to the book's owner. By treating copyright as akin to tangible property, the court appears to grant an power to the right-holders to exercise a certain kind of censorship over the use of their forms of expression, as the 'property' granted by copyright is the expression in itself. Craig 2011, pp. 212-22; Craig 2006, p. 93.

[1088] *Michelin,* supra note 35, [109].

[1089] Craig 2006, p. 81.

[1090] ibid, p. 112.

[1091] Also criticised Bailey 2005, p. 125; Kotler 2000, p. 231.

[1092] Referred by the Supreme Court in *Theberge,* supra note 232, [46 & 73] for example.

In sum, the nature of freedom of expression in Canada is such that as soon as one party seeks to communicate, their expression is potentially protected by section 2(b) of the Canadian Charter[1093], irrespective of the content of the message[1094]. Once it is determined that an expression is covered by section 2(b) of the Canadian Charter, a court must determine whether restriction to freedom of expression, pursuant to section 1 of the Canadian Charter, is justified in a particular case according to the criteria established in *R v. Oakes*. Despite the general liberal interpretation of freedom of expression in Canada[1095] and the Supreme Court ruling in *Irwin Toy v. Quebec,*[1096] placing freedom of expression and copyright protection on equal footing, *Michelin* has significantly curtailed this fundamental freedom in relation to expressions, such a parody, which rely upon another's protected work as the vehicle to convey its message.

4.3 Australia

In contrast to the other countries under scrutiny, and as a result of a patchwork of state laws[1097], freedom of expression has no constitutional guarantee in Australia[1098]. Instead, Australian courts recognise a more limited freedom of political and public expression which derives from the Constitution[1099]. This

[1093] *Irwin, s*upra note 1059, [968].
[1094] *Keegstra*, supra note 1073, [729].
[1095] ibid.
[1096] Supra note 1059.
[1097] The State of Victoria enacted the Charter of Human Rights and Responsibilities Act 2006 (Vic). This includes a provision dealing with freedom of expression, s. 15. However, as a State Act, it is limited in its application to Victorian laws, courts and public authorities; section 16(2) Human Rights Act 2004 applicable in the Australian Capital Territory.
[1098] Yet, political communications have been recognised by courts since 1992 as deriving from the constitution. Additionally, two legislative Bills protect freedom of expression but these do not have constitutional value, they are ordinary legislation. The first one is s. 16 of the Human Rights Act 2004 and s. 15 of the Charter of Human Rights and Responsibilities Act 2006. This lack of constitutional protection led scholars to describe the protection of freedom of expression in Australia as 'delicate', 'partial and unsatisfactory'. Gelber 2007, p. 3.
[1099] The courts reached this conclusion by relying on sections 7 and 24 of the Constitution inferring freedom of political communications. *Unions NSW v. New South Wales* [2013] HCA

does not extend to other kinds of expressions[1100]. Therefore, the protection of freedom of expression derives from application of international treaties, as exposed previously[1101]. Furthermore, the idea of freedom of expression is a well-established principle of common law.

State law restricts freedom of expression in several ways through the law of obscenity, blasphemy law, the law of defamation and anti-discrimination provisions[1102]. This is justified on the basis of protection of public morality or the reputation of others, and to prevent hate speech. Given the lack of constitutional protection of freedom of expression, these laws have not been challenged for impairing freedom of expression. However, given that only political communications enjoy constitutional protection, these laws, especially the anti-vilification laws[1103], have the potential to severely restrict freedom of expression of parodists, unless their provisions are strictly construed[1104].

4.4 France

In France, creation of parodies is seen as a continuation of the right to critique [1105], considered essential to the historical revolutionaries. As

58; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 (political insults); *Australian Capital Television Pty Ltd v. the Commonwealth* (1992) 177 CLR 106 (political broadcast and advertising). For more on the interpretation of the freedom to political expressions: Burrell and Stellios 2005, pp. 257-86.

[1100] *Langer v. The Commonwealth of Australia* 96/002 (High Court)*; Theophanous v. The Herald Weekly Times Limited and Another* (1994) 182 CLR 104*; Stephens and Others v. West Australian Newspapers Limited* (1994) 182 CLR 211; *Cunliffe and Another v. The Commonwealth of* Australia (1994) 182 CLR 272*; Australian Capital Television Pty. Limited and Others v. The Commonwealth* (1992) 177 CLR 106.

[1101] Mainly the respect of articles 19 UDHR, 19 ICCPR and 4 CERD.

[1102] Known as anti-vilification provisions.

[1103] There appears to be a consensus that anti-vilification laws should not be overly protective, Gelber 2007, p. 5.

[1104] The author regrets having found very little on the relationship between copyright and freedom of expression in Australia.

[1105] Strowel 1991, p. 44; Buteau 1909.

mentioned in chapter 2[1106], in addition to the international and European regimes, outlined earlier in this chapter[1107], freedom of expression enjoys constitutional protection through article 11 of the Declaration of the Rights of Man and of the Citizen of 1789. Yet this right is not shielded from conflict with other fundamental rights.

The French courts have been required to balance the freedom of expression of parodists with other fundamental rights of third parties. These French decisions highlight the dual role of freedom of expression. Firstly, freedom of expression as the basis to justify the parody exception serves to guide courts in their application of the rules of this genre to maximise the realisation of this right[1108]. Accordingly, if the claimed parody appropriates a protected work mainly to benefit from the fame of the original, this use would not fall within the scope of the exception. Secondly, as reflecting the limited character of this fundamental right, the parody exception must be balanced with the preservation of fundamental rights of others[1109]. Where several fundamental rights are in conflict, courts are required to adopt the balance which affords maximum realisation of all fundamental rights in issue.

4.4.1 Freedom of expression and the Freedom of the Press Act

Unique to this particular jurisdiction, the limits of the parody exception in France follow a bifurcated regime determined by the context of the expression. Where an expression, (including a parody) is published in the media[1110], any restriction to exercise this freedom of expression needs to be determined by

[1106] See section 4.4 chapter 2.
[1107] See section 1 chapter 5.
[1108] See section 3 chapter 3.
[1109] See section 5 chapter 5.
[1110] This term is understood broadly as comprising print press but also magazines, TV, film, theatre etc.

the specific body of law governing the freedom of the press[1111]. In these cases, French courts apply a higher threshold of scrutiny given the recognised role of the media as the public's watchdog in a democratic society. In all other cases, restriction of a parodist's exercise of freedom of expression is governed by the application of other general laws, such as criminal law, civil responsibility and defamation law. These two regimes are mutually exclusive[1112], meaning that a claimant who is unsuccessful in establishing that there has been a violation of the Freedom of the Press Act, cannot seek damages based on tort law, for example[1113], as an alternative cause of action.

Despite this demarcation, courts have on occasions blurred the line between the two regimes, as illustrated in *Scouts v. New Look*[1114]. Although this decision does not relate to unauthorised reproduction of a copyright-protected work, it does demonstrate how conventional laws may be overridden by the Freedom of the Press Act in circumstances in which freedom of expression is in conflict with another fundamental right. An issue of *New Look*, a magazine for adults, included risque photographs of young people in scout uniforms captioned with phrases which parodied well-known scouting expressions. The claimant sought an injunction from the court restraining circulation of the offending magazine.

[1111] Loi du 29 juillet 1881 sur la liberté de la presse.

[1112] Abuses of freedom of expression repressed by the Freedom of the Press Act cannot be pursued under ordinary law: Cass, 1re Civ., 31/01/2008, *F and others v. Mrs. M.*, n°07.12.643N, Gaz. Pal, receuil November-December 2008, p.4165; Cass., 2e civ., 20/11/2003, *Le Goff c/ Guyader* – Le NY: Juris-Data n°2003-021061; JCP n°3, 14/01/2004, somm., IV 1 064-1 072, p. 96; Cass, 2e. civ., 8/03/2001, *Alliance generale contre le racism et pour le respect de l'identite francaise et chretienne c/ Godefroid*, n°98-17.574.

[1113] Amongst others: Cass. (2e ch. civ.), 8/03/2001, Bull. civ., II, nos 46-7; J.C.P., 2001, IV, nos 1799-1800; Cass. (ass. plén.), 12/07/2000, D., 2000, IR, p. 218 ; 2001, jurispr., p. 259, obs. Edelman; J.C.P., 2000, jurispr., II, n° 10439; Bull., 2000, n°7, p. 10; Sem. Jur., 13/12/2000, p. 10, obs. Lepage.

[1114] Cass., 2e civ., 5/05/1993, *Association Scouts unitaires de France c/ SA Editions des Savanes,* Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentés, pp. 193-4, obs. Massis. Cass., 19/11/ 1990 (1ere Ch A) Legipresse, n°79, p. 16; D. 1991 IR 9.

The Court of Appeal's analysis emphasised that freedom of expression could only be restricted in those cases of abuse proscribed by law. As the images complained of appeared in a magazine, the Freedom of the Press Act was determinative. This limits the scope of tort actions to those situations where the use violatesthe fundamental rights of the claimant, which is appropriate given the broad latitude afforded to freedom of expression. Here, the ordinary civil responsibility regime must be set aside for the more liberal Freedom of the Press Act[1115]. The court found no reason to prevent publication of the pictures and preserved the exercise of freedom of expression.

The Supreme Court quashed the decision, holding that nothing could be implied in the Freedom of the Press Act which imposes a limitation of tort law. In the Court's view, the scope of a tort action, whether brought under the Freedom of the Press Act or under the general law (article 1382 Civil Code) is the same. However, the court dismissed the case, as fault (one of the three mandatory requirements for a tort action[1116]) had not been established. Following the Court's approach, if the aim of the Freedom of the Press Act was to limit the faults giving rise to a tort action, the legislator should have specified it within the code. Given that the code does not characterise the fault required for tort, the general approach as in ordinary law is applicable.

Ordinary law is criticised for being inadequate given the uncertainties in the application of article 1382 civil code - principally, whether the jurisprudence under article 1382 is specific and predictable to satisfy the second requirement of article 10(2) ECHR[1117]. Additionally, balancing freedom of expression and tort law is a perilous exercise because the establishment of a fault in this

[1115] Based upon the principle that *lex specialis derogat lex generalis.*
[1116] Article 1382 French civil code: 'Any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage'. The success of this tort action relies on the ability to prove three elements: a fault, damage and a causal link between the fault and the damage.
[1117] *i.e.* a restriction to the exercise of freedom of expression needs to be provided by law.

context implies a subjective appraisal from courts resulting in partly arbitrary decisions. Massis criticises this decision[1118] for feeding the debate on the adequacy of the regime of ordinary law when conflicting with freedom of expression. Such reasoning is said to result in a negative impact on the realisation of freedom of expression[1119]. As Massis notes, this justifies the approach of the Court of Appeal which moderated the application of article 1382 civil code in the context of the press[1120].

Such criticisms appear legitimate, because the Supreme Court's approach seems to curtail the tolerance traditionally granted to parodists by law based upon justification founded in freedom of expression. This traditional liberal approach did not result in absolute freedom for parodists. Two limits exist in the French application of the parody exception to ensure the protection of the rights of others. Firstly, the requirements for the parody exception need to be satisfied. Any intent to harm constitutes a limit to the freedom of parodists. If the parody goes beyond what is accepted under the genre *e.g.* passing the limits of humour, the balance tilts back in favour of the other competing rights. Secondly, the content of the parody might limit the freedom of parodists where the parody violates the fundamental rights of others.

[1118] Cass. 2e civ., 5/05/1993, *Association Scouts unitaires de France c/ SA Editions des Savanes,* Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, pp. 193-4, commentaire Massis.
[1119] This can be explained by: first, the right to freedom of expression has been interpreted by the ECtHR as being broadly when in the context of the press because of its public watchdog role and second, the adoption of a specific law regulating conflicts in a press context.
[1120] It must be noted that the mutually exclusive relationship between the Freedom of the Press Act implies that if an applicant is not successful for a tort action under the Freedom of the Press Act, this does not prevent him/her from claiming damages under ordinary law as a subsidiary action if the three requirements are satisfied. Notably, these three requirements do not take into account the intent of the speaker. Therefore, a speaker might engage his civil responsibility even where there is no intent to harm. Inherently, this amounts to a paradox situation as the adoption of the Freedom of the Press Act aimed to heighten the standard for restriction to the right of freedom of expression; Cass. 2e civ., 2/04/1997; *SA Automobiles Peugeot c/ Canal Plus;* JCP n°5, 28/01/1998, juriprudence, II 10 010, p. 185.

An illustration of how the conflict may be resolved is demonstrated in *Guignols de l'info*[1121]. This case relates to a parody of Peugeot cars, which made use of Peugeot's registered trade mark. Using puppets, a TV sketch depicted the company's CEO as a dissatisfied Peugeot customer. Peugeot considered the sketch to be denigrating and likely to harm the reputation of both the company and its goods. Although the action was commenced under trade mark law, the court established that as the dispute related to press freedom[1122] rather than ordinary law, the dispute should be decided on this basis[1123].

The Court concluded that as the parody featured in a satirical news programme, rather than, say, a car magazine which reviewed the technical merits of vehicle, it had caused no harm. Provocative statements were the very essence of the show's format, such that the parodic nature of the sketch would be evident from its humorous messages. Indeed, the excessive nature of the statements made prevented any real (or negative) impact[1124]. Based upon this reasoning, Neyret concludes that humour increases the threshold required to establish fault in a tort claim[1125].

Given its broad scope, the parodies considered for this thesis will generally fall within the ambit of the law on the freedom of the press, since only parodies

[1121] Cass., 12/07/2000, D., 2000, IR, p. 218, et 2001, jurispr., p. 259, obs. Edelman; J.C.P., 2000, jurispr., II, n° 10439; Bull., 2000, n°7, p. 10; Sem. Jur., 13/12/2000, p. 10, obs. Lepage.
[1122] ibid.
[1123] This decision is confirmed in several later decisions: Cass., 20/11/2003, *Le Goff c/ Guyader – Le Ny*: Juris-Data n°2003-021061; JCP n°3, 14/01/2004, sommaires de jurisprudence, IV 1 064-1 072, p. 96; Cass, 31/01/2008, *F and others v. Mrs. M.,* n°07.12.643N, Gaz. Pal, receuil Novembre-decembre 2008, p. 4165. The scope of the Freedom of the Press Act is broad given that the Court established that this law was applicable in relation to expressions in blog posts. Cass. 6/10/2011, n°10-23606, non publie au bulletin.
[1124] This decision led some scholars to wonder whether the Court had implicitly recognised the existence of a parody exception in trade mark law through the interplay of freedom of expression. Note Edelman under Cass., 12/07/2000, D. 2001, n°3, jur., 259. This reasoning was repeated in TGI Paris, 1ère ch. 1ère section, 14/04/1999, *Dion c/ Société Cogerev,* CCE, October 1999, pp. 23-4, comm. Desgorges. This case dealt with a caricature of Céline Dion in a satirical magazine.
[1125] Neyret 2008, p. 2402.

made by private individuals, or in a strictly private context, fall to be considered under ordinary law.

4.4.2 Balancing of competing rights

Based upon those conflicts which have been brought before the scrutiny of French courts, case law demonstrates that parodies are generally tolerated under the law. In situations of conflict between the freedom of expression exercised by parodists and the exercise of other fundamental rights by others, including the enforcement of copyright, courts tend to determine whether the exercise of the right of freedom of expression amounts to an abuse. In which case, free expression is limited to preserve the rights of others.

4.4.2.1 Freedom of expression v. personality rights

Personality rights[1126] is the French collective term referring to the rights deemed intrinsic to every human to protect their essential interests[1127]. Traditionally, these recognise a right to life, right to human dignity, right to respect for private life and image rights; all of which must be balanced against freedom of expression.

For example, French courts consider that freedom of expression must be balanced against invasion of privacy. In a dispute relating to publication of a cartoon in a satirical newspaper, Le Pen, then leader of the French National Front, objected to an image evidently depicting himself and his wife semi-clad with the captions: 'Recent developments in the Le Pen case' and 'Buttock to buttock of the infernal couple'[1128]. While the court recognised that genre of

[1126] Mostly referred to as publicity rights such as tort and passing off in common law jurisdictions.
[1127] Author's own translation from Cornu (ed.), see 'Personnalité', in Vocabulaire juridique.
[1128] TGI Paris, ref, 17/06/1987, *Le Pen c/ le Canard Enchaine;* Paris, 1er ch., sect. B, 19/06/1987; JCP 1988.II.20957, note Auvret.

satirical caricature permits exaggeration, distortion and irony, the court did not consider it extended to an image which was tantamount to an invasion of privacy. This amounted to an abuse of freedom of expression. In Auvret's opinion[1129], judges should have characterised the attack made on the ex-leader giventhat the difficulty in this case lies in the separation between the political function of Le Pen and his personal life.

Freedom of expression, even in a press context, does not shield the speaker from potential criminal conviction. Harm to another's reputation can give rise to defamation claims[1130] or result in outrageous comments punishable by criminal law[1131]. The line between the exaggeration allowed under satire and that precluded as an outrageous comment is unclear. This opens the door to subjective appraisal by judges.

French courts have established that parodies which remain true to the rules of the genre lack the intent required by law for a tort action to succeed. Thus, in a case relating to a pastiche of another article published in a satirical newspaper to criticise Scientology, the trial judge rejected a claim that the pastiche was defamatory[1132]. The judge considered that the pastiche satisfied the rules of the genre and consequently lacked any intent to defame. The genre permitted a message which was harsh and provocative, and the article stopped short of the limit, i.e. an expression which intentionally harms or makes a personal attacks.

[1129] Supra note 1128.
[1130] Article 29 of the Freedom of the Press Act 29/07/1881.
[1131] R621-1 and 621-2 Penal Code.
[1132] Based on Articles 23, 29 (2) et 33 (2) Freedom of the Press Act. Corr. Paris (17e ch.), 25/04/2003, *Gonnet v. Gounord et Dupuis* available at http://www.antisectes.net/libel-gounord-dupuis-gonnet.htm.

In *Gigliotti v. Bern*[1133], a radio commentator created a song about the claimant (and brother of a singer) which described him as a thug, bastard and sadist. The tribunal decided that it was not an abuse of freedom of expression amounting to defamation. Although the phrases, in isolation, could be seen as offensive, when considered in context, the public could easily discern the song's humorous character, which was voluntarily outrageous. The fact that the public would not take the song seriously precluded it from being defamatory.

In *G. v. Canal Plus*[1134], the courts considered a satirical TV programme using puppetry to depict the claimant, a prince, as lazy, work-shy and gay[1135]. The court held that a malicious intent towards a parody's target would serve as a limit to freedom of expression, so as to preserve the right of the parody's target, but, conversely, a parody made without any malicious intent will not harm the target's personality rights.

In *Dion v. Cogerev*[1136], Canadian singer Céline Dion was the target of a photomontage which depicted her naked and covered with faeces. The picture featured in a satirical magazine, well-known for its outrageous and provocative humour. Given the context of the publication and the reputation of the target for paying particular care to her image, there is no doubt that the public would not take the publication seriously. This absence of confusion

[1133] TGI Paris (17e ch. Civ.), 3/04/2006, *Bruno Gigliotti c/ Stephane Bern and others*, Legipresse n°238 (january/February 2007), I- Actualite, p. 11.
[1134] Paris (1re ch. A), 11/03/1991, *G. c/ Canal Plus*, Legipresse n°91-I, Informations d'actualite, p. 49.
[1135] The Court made the parody prevail on the rights of the targeted person.
[1136] TGI Paris, 1re ch. 1er sect., 14/04/1999, *Dion c/ Ste Cogerev*; Juris-data n°040882; CCE, October 1999 p. 23.

between the caricature and the image of the singer led the tribunal to conclude that there was no harm caused to the reputation of the target[1137].

Following this jurisprudence, it can be seen that requiring a parody to be humorous for it to be covered by the parody exception provides a yardstick for courts, which either tips the balance towards protection of freedom of expression or to preserve personality rights[1138], and, further, that a parody's context is an essential component when striking a fair balance.

If sued for defamation, a speaker may still protect their right to freedom of expression by reliance upon the defences of truth and good faith. For the truth defence to apply, the defendant must demonstrate the veracity of his statement, although this defence is not available for defamatory allegation regarding one's right to privacy or racial defamation[1139]. For a good faith defence to be successful, the defendant must satisfy four requirements which have been established by courts[1140]: legitimacy of the goal sought, absence of malicious intent, particular care in the expression and quality of the speaker[1141].

To conclude, it is apparent that in the case of a clash of fundamental rights, the rules of the genre guide courts in their determination whether the balance

[1137] This was already the result in 1982 in a similar case. Paris, 4e ch. B., 28/01/1982, *Dame Goya c/ S.A.R.L. Editions du Square*, IR, p. 165, appeal from TPI Paris, 1re ch., 18/06/1981.
[1138] Similar reasoning in Paris, *Le Pen v. Laurent Gerra*, 23/01/2013 n°11/11023.
[1139] Sylvie Menotti, *La preuve de la vérité du fait diffamatoire* (courdecassation.fr 2004) <https://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2004_173/deuxieme_partie_tudes_documents_176/tudes_theme_verite_178/fait_diffamatoire_6395.html> (access date 10/06/2015).
[1140] TGI Paris, 17e ch. Corr., 9/01/1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182, note Bilger; TGI Paris, 17e ch. Corr., 17/02/1993, *Sabatier c/ Du Roy and others*, Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, pp. 195-6; note Bigot.
[1141] The weight attributed to each factor varies depending on the facts of the case. TGI Paris, 17e ch. Corr., 9/01/1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182, note Bilger (an allegation made by Bedos (comedian, journalist and historian) about National Front political party receiving money from the Iraqi regime, enemy in time of war, is likely to amount with treason and harm to the national defence or impairment to morality); TGI Paris, 17e ch. Corr., 17/02/1993, *Sabatier c/ Du Roy and others*, Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, pp. 195-6; note Bigot.

favours protection of the freedom of expression of the defendant or the rights of the claimant. While freedom of expression calls for a liberal interpretation of the parody exception, it is not absolute. When freedom of expression conflicts with image rights or the right to privacy, humoristic character influences the court's balancing of rights. Firstly, the humorous character, appraised through the intent of the speaker, informs the court on the legitimacy of the criticism or comment made. A malicious intent tips the balance towards the protection of the rights of the person targeted, while a harsh criticism made non-maliciously via humour tips the balance in favour of protecting freedom of expression[1142]. Secondly, humour enables the public to detect the parody, meaning they do not take the message of the expression literally, but as a second degree joke. This eliminates confusion between reality and the use made. Provided the public is not confused, the rights of the parody's target are not harmed[1143], yet if the court notes a manifestly illicit character within the expression, then freedom of expression must be set aside.

4.4.2.2 Freedom of expression v. discrimination

In France, protection against discrimination, hate and racial violence typically prevails over the right to freedom of expression. Therefore, those wishing to

[1142] Malicious intent can be showed through any factual elements. In a case dealing with the sale of a voodoo doll caricaturing the French ex-President Sarkozy along with a satirical leaflet as a complementary to a newspaper, the court decided that the requirement of humour was not satisfied given that the doll is sold with pins that the public can stick in the voodoo doll mirrors the intent to hurt which goes beyond the rules of the genre of parody. Nevertheless, the interdiction of the voodoo doll is not a proportionate means to the harm caused. Therefore, the judges compelled the editor to sell the dolls with a disclaimer ('it has been decided that the incitement of readers to pin needles in the doll joined to the booklet implies the idea of physical harm, even symbolically, which amounts to an attack to the dignity of Mr Sarkozy' and underneath 'Court injunction'). Paris, 14e ch. B, 28/11/2008, rec. dalloz 2009 n°9, p. 610, note Edelman.

[1143] Caen, ch civ n°1, 4/12/2007, *Le Roi Pétaud et Sa Cour v. Credit Agricole*, n°06-2537; TGI Paris, 1re ch. 1er sect., 14/04/1999, *Dion c/ Ste Cogerev*; Juris-data n°040882; CCE, October 1999 p. 23.

exercise their right to freedom of expression to pass comment on these sensitive topics are required to take extra care.

In *Bruel v. Sebastien*[1144], a French comedian sought to comment upon the views of the National Front. He did this by dressing up as its leader, Le Pen, and performing a song - *Casser du noir* ('Crush the black'[1145]), a parody of *Casser la voix*. Although the court recognised that, based upon an analysis of the song's lyrics, the use of the song was intended as parody, the court considered that the parodist had placed insufficient distance between the anti-racist ideals behind the original song and the racist views of the National Front. Given the context of the parody, which featured as part of a political debate concerning immigration, there was a risk that the altered lyrics would appear to incite, rather than criticise discrimination, hate and racial violence. There were insufficient signals to the public to seek a double meaning to the lyrics[1146], and as such, the work went beyond legitimate free speech. This decision was upheld by the Supreme Court.[1147]

The importance of this distance between the parody and parodied work in the public mind has been confirmed by later decisions, although its application is not straightforward. In *La Grosse Bertha*[1148], a satirical magazine published a drawing, captioned: 'I suck was his name by Robert Obscene'[1149]. This depicted an image of a moribund Christ, looking on as the Pope engages in sexual acts with a Brazilian transvestite, a priest drowns a child in baptismal

[1144] Cass, ch. Crimm, 4/11/1997, *Patrick Bruel v. Patrick Sebastien and TF1,* n°96-84338.
[1145] Author's own translation.
[1146] This could be criticised as to what extent is dressing up not enough to enable the recognition by the public. In addition, the programme was pre-recorded, such that the defendant would have been aware how the message would come across. This precluded a 'good faith' defence.
[1147] The Court confirmed that, taken literally, the song lyrics constituted an incitement to hatred, violence and discrimination which is not allowed under either the law of the press: Article 24(6) of the law on the freedom of the press.
[1148] Versailles, 18/03/1998, n°1996-2195, *'La Grosse Bertha'* (on referral from Cass., 28/02/1996).
[1149] Author's own translation.

font and a naked woman is ripped open by a crucifix. The General Alliance against Racism and for the respect of the French and Catholic Identity ('AGRIF') sued for incitement to discrimination, hatred and violence against Catholics. The trial judge noted the obvious satirical and humoristic character of the magazine, and held in favour of freedom of expression, a decision later confirmed on appeal. Here, the court considered it relevant that the images were not on public display, but only available to those who decided to purchase the magazine. Yet the appeal decision was quashed by the Supreme Court and referred back to the Appeal Court. Given their outrageous character, the Supreme Court considered that publication of the drawing might still result in an abuse of free expression. Ultimately, the Appeal Court decided that, while the drawings clearly ridiculed the Catholic church, beliefs and religious symbols, given the context of the parody within a magazine known by its readers for its provocative nature, there was no intent to incite general public hatred or violence[1150]. The court concluded that in the particular circumstances, there was no abuse of freedom of expression[1151]. This same reasoning was adopted in relation to the publication of caricatures of the Prophet Muhammed (Figure 11 for the cover of the issue) in the satirical magazine *Charlie Hebdo*[1152].

[1150] Therefore, there was no infringement of article 1382 Civil code or article 24 of the law on the freedom of the press.

[1151] This case went back to the Supreme Court which dismissed the appeal on cassation. Cass, 2e. civ., 8/03/2001, *Alliance generale contre le racism et pour le respect de l'identite francaise et chretienne c/ Godefroid,* n°98-17.574. A similar case went all the way up to the Supreme Court whereby the facts dealt with the publication of drawings which are allegedly incite to hatred, violence and discrimination towards Catholics. As an example, one of the 6 drawings depicts Michael Jackson carrying out a paedophilia act on baby Jesus. Baby Jesus is represented with characteristic features of Hitler. Therefore, literally, these drawings incite to violence, hatred and discrimination. Yet the Court deemed the action barred.

[1152] This issue reproduced amongst others the caricatures published in the Danish Newspaper Jylland-Posten. Paris, 11eme ch., 12/03/2008.

Figure 11

(Translation: 'It's hard to be loved by idiots')

Although the line of reasoning might appear to be clear, these cases can be contrasted with the outcome in others which appear similar. One case concerned a caricature depicting the Pope[1153] being guillotined while being

[1153] Paris, 11ème ch. B, 13/11/1997, *X*…, D. 1998, IR, pp. 21-2.

targeted by a swinging wrecking ball. In this case the Court of Appeal acknowledged the acerbic nature of the cartoon, but considered that the image was an impermissible incitement to violence. Much seems to have hinged upon the timing of the drawing's publication, since there was a particular sensitivity surrounding the subject matter, as the Pope had just been the victim of a violent attack[1154].

Finally, the fact that a parody has a commercial character does not automatically tip the balance against freedom of expression. This is exemplified by the *Last Supper* decision[1155], in which a commercial clothing company parodied the famous Leonardo Da Vinci painting of that name to promote the launch of their new collection. The male subjects in the original painting were replaced by women wearing the company's clothing, while the only man featured was only partially clothed (Figure 12). Copyright in the painting was not in issue, but the French Association protecting beliefs and individual freedoms failed to 'get' the joke, and sued the company. It considered that use of such a sacred scene for advertising purposes was a gross insult to the Catholic community[1156]. The Supreme Court found in favour of freedom of expression, and held the commercial nature of the use was not determinative as to whether the expression was lawful. Ultimately, it was satisfied that the image aimed to shock, rather than to insult, the Catholic community and its symbols[1157].

[1154] This was repeated in another case dealing with religious caricatures in a case where an armed hand was firing at the head of baby Jesus to which the statement 'they want money, let's give them lead' is affixed. Cass., 28/01/1999, n° 96-16992, JCP G, 23/06/1999, p. 1183, note Viney.

[1155] Cass 14/11/2006, *Marithe v. Association Croyances et libertés Bull*. 2006, I, n°485, p. 417.

[1156] Under articles 29(2) and 33 Law of the press.

[1157] The Supreme Court quashed the decisions of first instance and appeal which both held that the commercial character joint to the suggestion made through the depiction of the half-naked man tilted the balance in favour of the association for the finding of insult to the Catholics. These jurisdictions concluded as such after studying the jurisprudence of the ECtHR and especially the *Otto-Preminger institute 1994,* [47].

Figure 12

4.5.2.3 Freedom of expression v. morals

Religious hate or discrimination is not the only target under the scrutiny of French courts. Child pornography is another area which the courts have ruled as going beyond the limits acceptable for the exercise of freedom of expression. The Supreme Court applied the penal law which makes child pornography a criminal offence to prevent publication of a cartoon featuring a juvenile hero, Tintin, engaging in pornography[1158]. Interestingly, the court commented that, had a juvenile Smurf been depicted in a similar context, the outcome might have been different. Here, the significance turns upon Tintin's human resemblance, whereas Smurfs lack such obvious human features.

[1158] Cass. Crim, 12/09/2007, n°06-86763, non publie au bulletin.

4.4.3 Conclusion

In conclusion, several lessons can be drawn from the French court's developed consideration of the parody exception as the exercise of freedom of expression[1159]. Firstly, parodies of copyright works should benefit from a liberal interpretation of free expression (i.e considered under the Freedom of the Press Act rather than the more restricted approach of ordinary law). Secondly, when it is necessary to balance freedom of expression against other fundamental rights, the rules of the genre guide courts how to strike a fair balance.

For example, a parody which has an obviously humorous character creates a separation between reality and the fantasy world in which the parody is located. An adequate separation means that the public will not take the parody's message at face value but will seek out a secondary meaning to the message: the rules of the parody genre are respected. Building further on this, the context in which the expression is presented adds an essential element to the message.

Context provides the unwritten cipher to indicate whether the message must be taken literally (which could adversely affect the rights of others) or as a parody. Only when the context of the parody is such that it offsets the humour and the resultant message appears to be literal will there be a potential conflict with the fundamental rights of others. Depending upon the particular facts, this might lead to the conclusion that the parody constitutes an abuse such that the rights of others should prevail. The fact that the parody is used for commercial purposes is not sufficient in itself to tip the balance against the parodist.

[1159] Even if this one is not strictly applied to copyright works.

4.5 Conclusion

The study of national courts' decisions reveals a reluctance to accept a general defence based upon freedom of expression arguments, outside the statutory provisions provided within copyright law. Although sometimes perceived as a threat to the existing internal balancing of rights and interests, a specific parody exception seeks to provide courts with more appropriate, fine-tuning tools to determine where the appropriate balance lies, given the particular characteristics of parody. Since parody is a vehicle for realising freedom of expression, national courts must respect the limits attached to this fundamental right. This means that a judicial weighing-up of all the relevant rights at stake becomes inevitable. Just as copyright, a manifestation of the right to property is not absolute, so the right to freedom of expression of the parodist also has limits to respect the fundamental rights of others.

It is submitted that an appropriate balance can be struck through proper application of a parody exception. While none of the three common law countries in the Study has had an opportunity to apply the exception, the fact that all three jurisdictions acknowledge the need to incorporate a specific exception, is indicative that copyright law frequently proves inadequate in cases where freedom of expression is exercised in this particular form. The fact that parody combines creativity with imitation makes it difficult for this form to be accommodated under general copyright exceptions, despite the fact that international law protects the form of expression as much as its content.

Examination of the more established French jurisprudence in this area identifies how freedom of expression can be maintained while still respecting the rights of others. Although the analysis in chapter 3 identifies that some recent decisions tend to interpret parody's humour requirement narrowly, in

the sense of provoking laughter[1160], a better interpretation defines humour in terms of an absence of harm to the original author or his works. Additionally, the decisions discussed in this chapter demonstrate the importance of the context of the expression. Therefore, the absence of confusion requirement should be examined by taking consideration of the context in which the parody expression is made, and not only by analysing the degree of modification made by the parodist to the original work. Such an interpretation provides clear guidance for courts, provides parodists sufficient latitude, and still respects the rights of others. Applying this in particular cases requires courts to identify the limits of permissible free expression.

The analysis of the national regime of all four countries has established that domestic legislators have implemented their international law obligations to respect fundamental rights through a variety of domestic law instruments. Each jurisdiction has legislation in place to protect the reputation of others (moral rights [1161] and defamation law), but also the particular types of messages which might be conveyed through a parody. A parody which serves only to incite hate or violence, which discriminates against particular groups, or which is contrary to morality should fail to satisfy the humour required to avoid copyright liability. As such, the limits to legitimate freedom of expression should not be seen as an additional requirement before copyright law's parody exception will apply, but rather is an integral part of its application.

Given their proximity to the facts of the case, it is reasonable to delegate scrutiny of the content of any parody to national courts. However, courts should resist presuming that the rights of the copyright holder should be favoured over the parodist's rights, since human rights jurisprudence requires

[1160] ibid.
[1161] See chapter 4.

both to be respected equally. Failure to do this results in an undesirably restrictive interpretation of the parody exception. Nevertheless, the current trend of legislation and the judicial interpretation suggests both are tending to restrict freedom of expression[1162].

The following section studies specific factors relevant to the parody exception to demonstrate to national courts how a fair balance between freedom of expression and third part rights may be achieved. The recent referral to the CJEU in *Deckmyn*[1163] provides the perfect exemplar for analysis of these factors.

5. Factors guiding courts in their application of the parody exception.

It has been seen that freedom of expression considerations should provide national courts with guidance[1164] to establish when a parody defence is applicable, since parody is a legitimate manner for an individual to realise their right to free expression. This has two consequences. Firstly, factors attached to the parody exception which contribute to the realisation of freedom of expression should be interpreted broadly[1165]. Secondly, having regard to the fact that freedom of expression is not absolute, any interpretation of the parody exception must respect the restrictions attached to free speech.

In any case of competing fundamental rights, national authorities must strike a fair balance by means of an overall assessment of all facts of a case. The following subsections evaluate the main factors which should guide a court

[1162] A good example is the current strengthening of anti-discrimination laws, which runs the risk of rendering the protected groups more vulnerable, rather than protecting them effectively.
[1163] *Deckmyn*.
[1164] See section 2 chapter 3 on the principle of interpretation where it is argued that strict interpretation requires judges to consider the justification to the introduction of the exception for its application.
[1165] See section 1 chapter 5 where I established that the right to freedom of expression is broad in scope and covers in terms of content expressions which shock, offend or disturbs a particular society but also various forms. See section 5.2 chapter 5.

seeking a fair balance of rights in copyright parody cases. There is no hierarchy between these particular factors, and no one is decisive. Rather, each contributes to a global appraisal of whether or not it is appropriate to restrict a parodist's freedom of expression.

The author therefore argues that based on her understanding of *Deckmyn*, national courts should prefer a holistic assessment of the parody exception. Building upon the analysis of the factors in chapter 3[1166], it is argued that each factor bears a different weight depending on whether the particular factor contributes to the realisation of the parodist's freedom of expression or not. The more the factor enables the realisation of freedom of expression, the more the use should be rendered lawful. By the same token, if through the application of these factors, the use violates the fundamental rights of others, the less likely the use will be found lawful. A correct interpretation of the factors established in chapter 3 with its interaction with fundamental rights provides enough guidance for courts to establish whether the two mandatory requirements set out in *Deckmyn* are realised *in casu*. By adopting this holistic approach rather than the traditional tripartite reasoning[1167] where courts look at first at the purpose, then at the factors before finally applying the proportionality test, the goals of the exception should be realised and harmonisation among EU countries is more likely to be achieved. Nevertheless, this does not mean that EU national courts will reach the same decision in similar cases. While this could be seen as a failure to the goal of harmonisation, it is necessary to take into consideration the cultural sensitivities present at national level.

[1166] See supra section 3 chapter 3.
[1167] See supra section 2.2 chapter 3.

5.1 Form of the expression

The form of the expression is probably the most obvious factor which must be considered. A parody warrants special treatment from other kinds of borrowed works, such as plagiarism, because of its role in freedom of expression. The less comfortably a 'borrowed' works fits within the limits determined by the parody genre, the more likely it is that a fair balance will favour the copyright holder[1168].

This point is illustrated in *Glam & Shine*[1169], in which the French court considered whether the parodist had complied with the rules of the genre. An artist reproduced three fashion photographs in his own work without the permission of the copyright holders, and combined these with images of other objects. The photos were slightly altered, by cropping and changing the skin tone of the models to blue (Figure 13). The artist argued this reproduction of the copyright works was a legitimate exercise of his right to free expression, since his work required the public to reflect upon the interplay and contrast between the original works, and to encourage debate as to the tastes and priorities of current society.

[1168] Paris, 14e ch. B, 28/11/2008, rec. dalloz 2009 n°9, p. 610, note Edelman; Cass., 13/01/1998, supra note 656 (in relation to the right of privacy).

[1169] Paris, 18/09/2003, *Alix Malka v. Peter Klasen*, n°12/02480.

Figure 13

In reaching its conclusion, the court considered that it was necessary to ensure that freedom of expression did not overwhelm the exclusive rights afforded by copyright. Here, the work was not a true parody which could be supported by free expression arguments, but merely an appropriation of another's work[1170]. This result can been seen to derive from the very essence of parody. The parody was unsuccessful because the artist had failed to distance his work enough from conventional fashion images, such that any message he intended the artwork to convey was so subtle that it had got lost.

Although parody is similar in some respects to irony or exaggeration, such that it is unreasonable to expect objectivity or from a parodist[1171], it is crucial that the public is able to identify a parody as such, so that they do not take its

[1170] While the Supreme Court did not criticise the final conclusion, it did criticise the deciosn for not fully explaining how the balance between competing interests had been struck; Cass., 15/05/2015, 13-27.391, Publié au bulletin.

[1171] The finding might be counterbalanced by the quality of the parodist. i.e. if the parodist is not only a humourist but is a journalist or a historian, he might have a greater duty for accuracy towards society. See section 5.5 chapter 5.

message as accurate[1172]. It is this appreciation of the separation between the two works, in which the parody belongs to a parallel fantasy world, which has been recognised in French jurisprudence, and which identifies when a parody should be lawful because it does not harm the other fundamental rights at stake. This need for separation does not prevent a parody from conveying a serious message, because, if the parody works, the public will detach that serious message from the copyright work.

5.2 Type of parody

As discussed earlier in the chapter, international and national legal instruments consider that artistic expressions fall within the scope of the right to freedom of expression[1173], but also recognise that different types of expressions fall within that category. Some art works equate to a socio-political comment[1174] or adapt a well-known earlier work[1175], but artistic expressions may include a commercial element[1176]. Parodies similarly serve different functions in the public forum, ranging from light entertainment to matters of serious public concern. To quote Nobel Peace Prize winner, Kofi Annan:

> Cartoons make us laugh. Without them, our lives would be much sadder. But they are no laughing matter: They have the power to inform, and also to offend[1177].

Thus, reflecting the spectrum of protection afforded to freedom of speech based upon its social value,[1178] a general principle is applied that political

[1172] Paris, *Le Pen v. Laurent Gerra*, 23/01/2013 n°11/11023.
[1173] Under the ICCPR: *Hak-Chul Shin v. Republic of Korea;* Under the ECHR: *Muller v. Switzerland,* [27].
[1174] *Vereinigung Bildener Kunstler.*
[1175] *Akdas.*
[1176] *Krone Verlag.*
[1177] Kofi Annan, Nobel Peace Prize at the symposium "Unlearning Intolerance"- New York, 16/10/2006 at http://www.cartooningforpeace.org/en/qui-sommes-nous/ (access date 27/03/2015).
[1178] See section 2 chapter 5.

parodies, typically political cartoons, should enjoy greater latitude compared with those which are merely artistic or commercial expressions. Given this, the mere fact a parody might cause offence should not be taken to imply that it is necessarily wrong, but rather the level of offence which is tolerated is likely to depend upon the gravity of the parody's message.

This point is nicely illustrated by the efforts[1179] of Herge's estate to restrain publication of a cartoon in a political Australian magazine depicting Kevin Rudd, in a Tintin parody (Figure 14).

Figure 14

It can be appreciated that cartoons of this type are able to bring political questions of public importance to the attention of a wider audience[1180] than would access more conventional commentaries and other sources of

[1179] The dispute arose prior the introduction of a parody exception in Australian copyright law, and was eventually settled between the parties.

[1180] For more on the power of political cartoons, R. Phiddian, *Censorship and the political cartoonist*, refereed paper presented to the Australasian Political Studies Association Conference (University of Adelaide, 29 Sept-1st Oct 2004).

information. For this reason, they are a valuable resource which informs and invokes a wider public debate of current events[1181].

This example also demonstrates the importance of satire as a form of artistic expressions within a democratic society. The inherent nature of satire requires reality to be exaggerated and distorted, and its very aim is to engender a public reaction of shock, surprise or offence. It is submitted that the same reasoning should be applied to parodies at large. Indeed, since satire represents one facet of parody, there is no reasonable justification to distinguish between these forms of expression.

Owing to the important role of political satire/parody in the public arena, any interference with the parodist's freedom of expression requires careful analysis. However, it has been outlined that the same weight is not attached to purely commercial expressions. As a consequence, national courts might require more leeway to restrict unauthorised reproduction of a copyright work for a parody used in an advertising context.

5.3 Context of the parody

Context, in terms of the manner in which a parody is communicated, will influence whether it is permitted or restricted. For example, in the decision of *Karataş v. Turkey*[1182], discussed previously[1183], the ECtHR took account that the commentator elected to a poetry form to express his concern of the existing state of political unrest; a form which by virtue of its nature was likely to have limited public appeal[1184]. As a result, the Court considered that the poem's publication was likely to have a negligible impact on public order. However,

[1181] McCutcheon 2008, p. 172.
[1182] *Karataş*, supra note 904.
[1183] Section 3.2 chapter 5.
[1184] ibid, [52].

had a different form of work been selected to comment on the same issues which would appeal to the mass media, the outcome may have been otherwise.

In light of the important role of a free press as a safeguard of democracy, any restriction to an expression made in the press, which raises awareness or opens a valuable debate, should be reserved for exceptional circumstances, for example, where the speaker uses the wide dissemination to call for social disorder[1185]. In contrast, parodies used in a purely commercial context might have less social value, and this change in context might be sufficient to tip the balance in favour of upholding the property rights of a copyright-holder[1186].

Considerations of context also need to take account of historical and social context, since different sectors of society and different nationalities have different sensitivities. For example, parodies which use protected works to comment on events such as the Holocaust will be dealt with differently in Germany and France, where the state has specific duties to their Jewish population, than in other countries, such as the UK, Australia or Canada[1187].

In conclusion, assessing whether a parody amounts to an abuse of freedom of expression cannot be achieved by analysing the parody on its own but requires national authorities to study the context in which the parody arises. This implies establishing the context of its publication, as well as the particular sensitivities of its likely audience.

5.4 Subject-matter of the parody

The message conveyed by a parody is another significant factor which national courts should take into account. While an individual's right to free expression is unlikely to require restriction when it manifests itself in a light-hearted

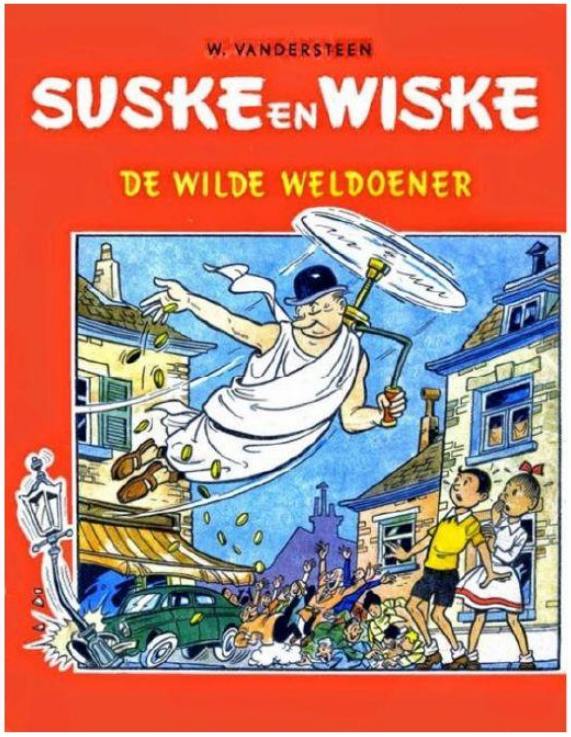
[1185] *Jersild v. Denmark.*
[1186] *Ashby Donald and others v. France.*
[1187] *Peta Deutschland v. Germany; Leroy v. France*.

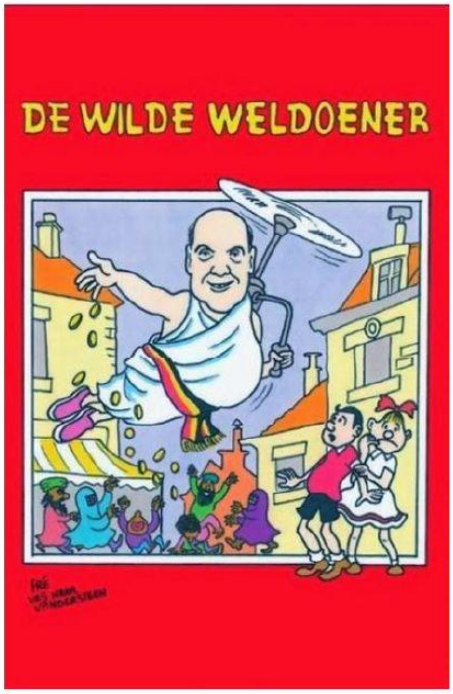
parody, the same cannot be assumed where a parody conflicts with the values underpinning that fundamental right or offends against the accepted moral norms of a particular society.

The first distinction to be made relates to the reproduction of copyright-protected materials to criticise the work (or the values encapsulated in the work) it borrows from (parody of) and the criticism of something external and unrelated to the work copied (parody with). Where the right-holder does not endorse the message of the parody, but the message is a reasonable one, courts should award greater consideration to the preservation of freedom of expression. Conversely, where the measure itself is on the boundary of what is acceptable, courts should enjoy greater margin of appreciation to strike a balance between the rights of the right-holders, the interests of the author of the derivative work and the interests of society at large.

These issues are explored in the recent *Deckmyn* case (Figure 15).

Figure 15





The Vlaams Belang party, a Flemish nationalist political party, distributed a leaflet featuring a parody of the well-known *Spike and Suzy* comic book cover entitled *The Compulsive Benefactor*. This copyright-protected image had been altered to promote their political message: the main figure is replaced by an image of Ghent's mayor, M. Termont, wearing a belt featuring the colours of the Belgian flag. Instead of throwing coins to adults and children as in the original image, he is handing out money to people from different ethnic backgrounds. The parody clearly intends to convey that the mayor is more interested in spending public money on immigrants than on other causes.

In such cases, a national court has to determine whether a parody remains within the acceptable limits of freedom of expression. If the parody fails to respect another fundamental rights (such as the right to religion), promotes values which are contrary to principles over-arching fundamental rights (e.g.

racial hatred, discrimination or glorification of terrorism), then as the ultimate balance struck by the court must realise all fundamental rights in issue, this might result in a necessary restriction to the parodist's freedom of expression.

This does not imply that any message contrary to what is accepted by a society at large has to be censored. Democratic societies encourage pluralism, including messages that shock, disturb or offend. The limit lies where the message incites violence, hatred or discrimination, as argued in *Deckmyn*. If the content of the parody goes against the morals of a particular society, the national court has a greater margin to interfere with the parodist's freedom of expression. For example, there is a general consensus that it is not acceptable to circulate images which depict sexual relationships between adults and children, or with corpses or animals. But morals do evolve over time and vary from place to place[1188], and account should be taken of this to avoid unnecessary censorship[1189].

Despite a careful balancing of fundamental rights in play, some parodies might still be considered unlawful because of their particular nature. For example, the broadcast of a parody which featured in the US satire programme, *The Daily Show*, was banned in the UK because it relied on extracts of proceedings in the UK House of Commons, a use which is contrary to the guidelines for Westminster Parliamentary broadcasting[1190].

[1188] Hence, it seems dubious to assume that a 'European' sense of morality exists, even though OHIM and designated EU trade mark and design courts are meant to assess designs and trade marks as if it did. Yet this is implied by the AGO in *Deckmyn*, [83]: 'most deeply rooted beliefs in European society'.

[1189] As discussed previously in relation to the French Supreme Court in Ch. Crim., 12/09/2007, 06-86763, Non publié au bulletin. Child pornography is not morally accepted and constitutes a criminal offence. Therefore, a cartoon hero resembling a child entering in sexual relationships with adults led to a restriction. Yet, if the cartoon had depicted a non-human juvenile hero, such as Smurf, in similar situations would not call for a restriction.

[1190] Annex 2: use of signals providing that 'No extracts of Parliamentary proceedings may be used in any light entertainment programme or in a programme of political satire'. The episode was banned without legal action. O'Farrell, 'Not Poke Fun at Parliament? That's a laugh' (The

5.5 Standing of the speaker

The social standing of the person communicating the parody is a further relevant consideration, since this impacts on the way in which the public will construe the message. As has been described previously, the press are acknowledged as having a crucial role in a democratic society. This means that journalists, and other social commentators to society to ensure that their message will not be misconstrued, as it is likely to be taken at face value[1191]. This makes it more likely that a parody communicated by a comedian will satisfy the rules of the genre. The public know that they must not take the content too seriously.

5.6 Parodist's intent

It has been seen that the parodist's intent is significant, but this requires courts to differentiate between criticism conveyed by acerbic wit and deliberately malicious allegations which are likely to be prejudicial to the reputation of the target[1192].

As previously explained, parodists do not enjoy *more* legal protection than other speakers[1193]; rather, it is the role of the parody exception to ensure that they do not end up enjoying *less*. Even if a parody is lawful according to copyright law, defamation law might still apply to the parody if it is an unjustified attack upon a person's work or reputation. This point was

Guardian, 31/07/2011) available at http://www.theguardian.com/commentisfree/2011/jul/31/jon-stewart-parliament-broadcast-satire (access date 1/04/2015).

[1191] TGI Paris, 17e ch. Corr., 9/01/1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182, note Bilger; TGI Paris, 17e ch. Corr., 17/02/1993, *Sabatier c/ Du Roy and others*, Receuil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, pp.195-6; note Bigot.

[1192] Mouffe 2011, p. 485.

[1193] Yet the study of the national case law demonstrates that French courts adopt a liberal approach to determine the intent of parodists. Section 4.4 chapter 5.

established in France in *Douces Transes*[1194]. Le Luron changed the lyrics of a Charles Trenet song, *Douce France*, to ridicule personality traits of the original author. Although recognising the song bore all the traits of a parody, the Supreme Court noted freedom to parody is not absolute, and should be limited where the parody results in defamatory statements[1195]. A parodist can still defeat a defamation claim by demonstrating that the statement made is true, and given that parody requires some degree of exaggeration, the comment made might not need to be completely accurate to be justified [1196] under defamation law either[1197].

This further reinforces the idea that parodies evolve in a separate reality. Provided the public is able to recognise the parody genre, this mitigates harm to the reputation of the right-holder, author or the person targeted by the use because the parody is detached from reality[1198]. As such, the parody exception within copyright law raised the threshold for the finding of defamation or outrageous comments. The risks still exist if the parody is unsuccessful, since the attack will then be taken more seriously by the public and be perceived as a malicious intent to harm, which is properly excluded by copyright infringement and/or defamation actions.

Conclusion

This chapter undertook the study of the intricate interplay between human rights and the parody exception. Given that freedom of expression protects the form as much as the content of an expression, could it be said that a parody exception amounts to a *right* to parody? This is debatable. At the very least, it

[1194] *Douces Transes*: supra note 118.
[1195] Repeated in amongst others Cass 14/11/2006, *Marithe v. Association Croyances et libertés* Bull. 2006, I, n° 485, p. 417; Versailles Ch. 01 SECT. 01 28/09/2006 n°05/04741.
[1196] *Jersild v. Denmark.*
[1197] Türk & Joinet 1992, p. 52.
[1198] See section 4.4.2 chapter 5.

represents a freedom and a tolerance of this specific type of expression enshrined in law. There are a myriad of types of parody, including pastiche, caricature and satire. In this project, it is argued that it is impossible and unnecessary to separate these into distinct categories, as what is common to each, is that they fulfil a valuable social function by promoting diversity and discussion. With this chapter, the author argues that the proportionality test can already be taken into consideration when studying the factors of the parody exception in relation to particular facts without constituting a separate stage in the reasoning. A more traditional approach which looks first at the purpose, then interprets the factors and finally applies the proportionality test between the competing fundamental rights in play can also be read in *Deckmyn*. Yet such approach is likely to reduce the scope of the exception as each step is looked at separately in a linear manner but also does not take into consideration the justifications underpinning the exception throughout the application of the factors.

The chapter first explained that copyright and parody are both protected under fundamental rights. The former is a manifestation of the right to property, and the latter of the right of freedom of expression. Neither right is absolute. Despite frequent portrayals to the contrary, the first part explained why there is no real conflict between the two. Rather, the two rights share the same over-arching objective of promoting creativity. Nevertheless, despite sharing a common goal, in some circumstances, the specific interests of one party will come into conflict with those of another. In such cases, courts seek to balance the rights of the parties, in a manner which optimises realisation of both rights.

It is not unreasonable to argue that a parody exception is unnecessary in copyright law, since copyright law contains 'internal' balances to ensure that freedom of expression is appropriately respected. However, it has been argued

that by providing a bespoke exception, the legislator resolves any perceived conflict between the competing interests at stake. The exception provides courts with a more specific sign-post which directs courts to those instances when the rights of the parodist should prevail to over those of the copyright holder. By providing a specific exception, legislatures reassure courts that a parodic use of a protected work might be legitimate, since the analysis of national court decisions in section 4 reveals that they appear reluctant to do so, when only general exceptions are in place.

The chapter proposed that because parodies are a realisation of freedom of expression, parodists should stay within the accepted limits of this right. In this sense, principles established under freedom of expression serve as a yardstick to determine the outer limits of the parody exception. It is reasonable that where a parody fails to gain protection under the right of freedom of expression, that it should not enjoy exemption from copyright law either. Similarly, if a parody completely undermines another's exercise of their fundamental rights, it is proper that national authorities are able to restrict that parody so as to realise the values protected through other fundamental rights[1199].

[1199] Report adopted by the Commission at its 70th plenary session (16-17/03/2007); Recommendation 1805(2007) on blasphemy, religious insults and 'hate speech' against persons on grounds of their religion, adopted on 29/06/2007 where the Council of Europe Parliamentary Assembly discussed the caricatures of Muhammad published by a Danish newspaper. *Ben El Mahi and others v. Denmark*. The case was held inadmissible by the ECtHR; Resolution 1510(2006) on Freedom of expression and respect for religious beliefs, adopted on 28/06/2006; General policy recommendation No. 7 on national legislation to combat racism and racial discrimination (2002). This last Recommendation by the European Commission against Racism and Intolerance (which was established by the Council of Europe) calls for criminal law provisions combating various racist expressions. Such expressions concern public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a group of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin. Public expression, with a racist aim, of racist ideology or the public denial, with a racist aim, of crimes of genocide, or crimes against humanity or war crimes should also be penalised by law.

It is submitted that there is no need for copyright law to 'invent' its own balancing framework. The existing fundamental rights mechanisms are already adequate for this purpose. This frees copyright law from focusing on the subject-matter of a parody, which is appropriate for copyright to remain content-neutral. Additionally, scholars agree that the legislation in place in most countries is already strong enough[1200]. Hence, copyright law should defer to specialist legislation which controls sensitive subject matter[1201]. In any event, by understanding the parody exception as part of an integrated system, a copyright exception does not remove a court's ability to curtail parodies which abuse freedom of expression[1202].

Interferences with the freedom of expression of the parodists might be necessary in particular circumstances, because interference is sometimes justified in a democratic society. The margin of appreciation differs according to the circumstances in which the parody is created, and may vary from jurisdiction to jurisdiction. Again, this is necessary given the lack of consensus

[1200] 'Most countries already have excessive or at least sufficient 'hate speech' legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance'. UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR, Special Rapporteur on Freedom of Expression, 'Joint Declaration: International mechanisms for promoting Freedom of expression' (12/2006) 2; Parmar 2009, p. 355.

[1201] Since the rejection to argue the exercise of human rights under copyright law, the CJEU statement in *Deckmyn*, [31] is somewhat surprising as it could jeopardise the internal balance reached under copyright. Nevertheless, it is likely to bring EU Member States closer to the Canadian balance of rights. Though *Dior v. Evora* seems to allow reaching outside copyright (external balance) to strike a balance between copyright and freedom of expression; See the failed French attempts to rely on freedom of expression in order to justify a copyright infringement (and expand the exceptions beyond what is permitted by legislator): Cass. 1re civ., 7/11/2006, n°05-17.165, *SA 1633 c/ Sté SCPE*: JurisData n°2006-035761; JCP G 2007, II, 10026, note Manara; CCE 2007, comm. 7, Caron and Tafforeau, *Fasc. 1417: Droits Voisins Du Droit D'auteur. - Exceptions Aux Droits Voisins (IPC, Art. L.211-3, Art. L.212-10 et Art. L.331-4; C. Patr., Art. L.132-5; C. Sport, Art. L.333-7)* (2013) Jurisclasseur, [74].

[1202] Mouffe 2011, p. 480.

on cross-cutting values within democratic societies. This is true internationally, but also within the European Union.

Hence, national authorities have to strike a balance between all the competing rights. To achieve this balance, courts must carefully analyse the parody itself, to satisfy themselves that the work has the necessary qualities of the genre: particularly a humorous intent. But it has been seen that a parody's context is equally significant. Courts must engage in an equally careful examination of all surrounding factors, such as type, form, context, intent and standing of the speaker. Only then may they establish whether the parody is created within the tolerance provided by copyright law in order to realise the right of freedom of expression within accepted bound. If the circumstances are such that the parodic nature of the work is insufficiently clear, then the public may take it at face value. In this case, it may be legitimate for courts to determine that the parody is an abuse of freedom of expression.

Chapter VI: A Musical Affair

Introduction

Although the parody exception applies to all categories of work, it is likely to have a different impact on each creative field. By applying the principles established in chapter 3, 4 and 5 to music parodies, this chapter illustrates why the introduction of a parody exception is even more necessary for certain art fields than others. Furthermore, this chapter studies the current business practices and their impact on the policy goal underlying the parody exception.

Music has always been a means of communication which holds a unique social role. Music is an artistic expression protected by freedom of expression. Copyright law automatically protects specific forms of self-expression by granting exclusive rights. These reward right-holders for their investment and foster creativity by incentivising new works. Given this role, copyright law should be construed in a manner which is consistent with freedom of expression *and* which encourages music creativity.

As music copyright represents one of the most litigious areas in contemporary copyright law, and raises some of the most pressing issues, it is essential to consider the likely impact of the parody exception on this creative industry. This chapter aims to undertake such an evaluation on three levels: policy, law and industry practices. Unlike previous chapters, this chapter is not comparative, as its main focus is the UK music industry.

As the first stage of this analysis, section 1 focuses on the role of musical parodies within musical culture. Having defined the subject-matter, section 2 studies the copyright regime applicable to musical parodies. Finally, section 3 goes beyond copyright to determine what practical difficulties music parodists might still face, despite the new exclusion.

1. Music and copyright

Any copyright regime can only be effectively applied to musical creations based upon a thorough appreciation of those aspects specific to music. Hence, to grasp the importance of the new exception for this art field, it is essential to understand how copyright law has treated music so far. To this end, section 1.1 unravels how something as abstract as music has evolved into property; section 1.2 elucidates music's particularities, and explains their repercussions when copyright law is applied to musical works. Finally, section 1.3 explores the true nature of musical parodies.

1.1 Music as a commodity

Tracing the history of music's treatment as a commodity can be linked to the development of the printing press[1203]. Before then, music was long appraised differently to literary works because it was generally communicated to the public via its performance, rather than in any written form[1204]. The advent of printing technologies created a new market for published music[1205]. In the eighteenth century, trade in printed music was not seen as a lucrative activity because it was complex and expensive to produce. The process required two print runs. First, the musical stave was printed, and then the clefs, notes and other annotations were added in the second pass. Nevertheless, despite being a risky market with high transaction costs, music publishing continued to grow. Because it gave a tangible form to music, it enabled the rise of property

[1203] Music publishing is older than book publishing. The development of the attribution concept and quality control can be traced back to the Renaissance where creators engaged in a patronage system whereby noblemen commissioned works for which creators received money. Artists tailored their creations for patrons who retained full ownership over the works. Carroll 2004, pp. 1453 & 1491; Rose 1993b, pp. 16-7.

[1204] Therefore, most musical composers were also professional performers. Carroll 2005, p. 926; Carroll 2004, p. 1408.

[1205] Chanan cited by Carroll. Carroll 2005, p. 926.

claims over previously intangible expressions[1206]. Unlike literary works, musical works were not under the monopoly of *Stationers*, but subject to royal printing patents. These privileges attributed two property characteristics to music: firstly, the publishers' right to print and sell music; and secondly, the transferability of this right while the privilege lasted. The right granted to publishers was, in essence, an economic right which enabled them to control prices for a fixed term. This provided an opportunity for them to recoup the investment made in producing the printed music. These rights extended to literal copying only[1207], meaning parody uses would not have been considered as infringement.

The legal protection granted to musical works was extended by the Statute of Anne in 1777, as the demand for printed music grew unabated. Increasingly, composers sought to control publication of their own works[1208]. In 1842, English copyright law was extended to include performing and publication rights within the realm of the control of publishers[1209].

Subsequent advances in technology have radically changed the way in which printed music is produced, and substantially reduced the reproduction and distribution costs which publishers incur[1210]. Additionally, modern digital technology offers new ways to record and distribute music, and gives rise to new methods to create music and make it easy to combine existing materials to create new musical works, for musicians and the public alike.

[1206] Carroll 2004, pp. 1452-3; Keyes 2003, p. 420.
[1207] Up until the 19th century, many composers felt empowered to copy previous works to create rearrangements. Examples include the works of Bach, Beethoven, Brahms, Debussy, Handel, Queen, Mozart, Monteverdi, Public Enemy, Vivaldi and Wagner. McDonagh 2012, p. 402; on Wagner and Debussy: Rosen 2008, p. 305-8.
[1208] Carroll 2005, p. 920.
[1209] *Bach v. Longman et al.*, 2 Cowper 623 1777; Scherer 2008, p. 10.
[1210] Carroll 2005, p. 926; Carroll 2004, p. 1492.

Such fundamental changes in the costs and circumstances surrounding the creation and dissemination of music make it appropriate to question what copyright law's role should be in this new environment[1211]. Instead of modifying copyright in music to reflect the reduction in costs and greater ease of creation, every revision in copyright law over the last decades has been to strengthen the property characteristics of intellectual works for right-holders: expanding the subject-matter eligible for protection, the scope of protection and the duration of copyright itself. This expansion has been at the expense of new creators in this entertainment industry, musical parodists included[1212].

Although the act of creation rarely takes place in a cultural 'vacuum', from the turn of the 20th century, basing a new work on another's earlier work has been censured for being derivative. This reflects a copyright paradigm which protects only self-contained, original works. The introduction of a parody exception balances the expanding control granted to right-holders with the need for parodists to 'borrow' from previous works for this purpose. It adapts the copyright paradigm to encourage the creation of this particular artistic form of expression.

1.2 Specific nature of musical works

It has been evident throughout this thesis that copyright law tends to assume that one size fits all[1213]. While this is a potential asset which allows the law to

[1211] Carroll 2005, p. 909.

[1212] Strengthening protection encourages creation if the licensing mechanism in the free market works. Yet demonstration of the assertiveness of right-holders is found in the dispute over VCR back in the eighties in courts and towards governments. Other illustrations of technological challenges for copyright regimes comprise the advent of printing technology to create music sheets, phonograph and player piano, radio, recorded song media, digital music, peer-to-peer file sharing etc. This self-interest is generally advocated by music publishers and professional composers. ibid, p. 919.

[1213] Legal principles such as the idea/expression dichotomy, originality test, duration and the substantiality test are similar across the different categories of protected works. Keyes 2003, p. 420.

adapt to technical and cultural challenges, it simultaneously represents its greatest weakness, since it can disregard the particular aspects of each different art form it seeks to protect[1214]. Given that music raises unique considerations, it is argued that copyright law should be applied to reflect its underlying policy objectives in a manner which is consistent with these idiosyncrasies. But what is it which is specific to music?

Craig and Laroche identify four main ways in which musical works differ from other categories of works protected by CDPA[1215]. Firstly, public performances represent the primary medium to engage with music; the work and the performance are inextricably linked[1216]. Music results from a journey of sound waves through the atmosphere to the ears of a listener. This is probably the most abstract kind of artistic expression[1217]. Secondly, music provokes unparalleled biological responses in the brain[1218]. Thirdly, music is a language. Non-musicians may recognise a 'wrong' note, and yet, full appreciation of its structure and syntax requires a profound knowledge. Finally, and most importantly for our focus, copying and musical borrowing is an accepted part of the process of music creation[1219]. Grounded in this musical culture, musicologists, for example, focus on the relatedness of musical ideas within

[1214] Craig and Laroche 2014, p. 45.
[1215] ibid, p. 46.
[1216] Additionally, under the copyright system, composition and performance are treated as different functions but when it comes to music, the two are closely intertwined. In Jazz and rock music for example, composition occurs through performance. Toynbee 2009, p. 127.
[1217] Keyes 2003, p. 421.
[1218] Craig and Laroche 2014, p. 47; Bently 2009, p. 184; Keyes 2003, p. 421.
[1219] McDonagh explains that the appellation of musicals borrowing is unfortunate given that the elements borrowed are never returned. This concept aims to identify unlicensed reproduction of music where the circumstances justify the use as part of the creative process. McDonagh 2012, p. 401; Arewa 2006, pp. 4-21; Rose as cited in Carroll 2005, p. 949; Carroll 2004, p. 1411; Keyes 2003, p. 426. See section 1.3 chapter 6.

music composition to establish both a coherence within a music genre, and variations to these standards[1220].

Chapter 1 illustrated that creative borrowing is not confined only to music, but penetrates other art forms such as literary and cinematographic works[1221]. Yet the traditional, romantic, vision of the author's genius[1222] sits most uneasily with this type of human creativity and so seeks to minimise the prominence of borrowing in music-making[1223]. This mismatch of the copyright paradigm is full-blown in musical expressions because borrowing is such an established practice in musical culture, provided that certain techniques and an appropriate level of abstraction of this type of expression is respected. Hence, in contrast with literary and other visual works, copyright applied to musical works requires special consideration[1224].

1.3 Musical parodies as a source of creativity

Prior the introduction of a specific exception, courts found parody uses to be infringing copyright[1225]. To understand how the defence should operate[1226], it is legitimate to determine the subject-matter of the exception by examining what musical parodies and pastiches consist of within musical culture.

[1220] Examples are found in the way music is taught to students who are encouraged to re-compose particular works in the style of a particular composer (pastiche) but also the creation of covers in popular music consisting of the re-composition of a song to a particular style and other transformative uses such as digital sampling in Hip-Hop, central to music composition. Craig and Laroche 2014, p. 47.
[1221] See section 1.3 chapter 1.
[1222] Le Chapelier's report introducing the 1791 French Revolutionary decree on the protection of dramatic works: 'The most sacred, the most legislate, the most unassailable ... the most personal of properties, is a work which is the fruit of the imagination of a writer'. Cited by Kretschmer and Pratt 2009, p. 169.
[1223] Evans 2011, p. 843.
[1224] Craig and Laroche 2014, p. 48; Livingston and Urbinato 2013, p. 227; Arewa 2006, pp. 4-21; Rose as cited by Carroll in Carroll 2005, p. 949; Keyes 2003, p. 426; Grinvalsky 1992, p. 395.
[1225] See introduction.
[1226] See section 2 chapter 6.

Without providing an exhaustive list on the different forms of musical parodies[1227], this section concentrates on particular types of parodies including humour[1228]. As recounted in chapter 1, parody in music is an old practice which has had a chequered history. Some of the earliest known Roman examples marry the words from a familiar song with a different melody[1229], while in the sixteenth century, parody referred to the opposite: changing the lyrics of a well-known song, and retaining the original melody[1230]. Only more recently, in the 20th century, did ridicule become an essential element of such a work[1231].

Just as there is no intrinsic definition of music or parody, there is no settled definition of humour. What is agreed upon is that humour can take a myriad of forms. Yet, theorists agree that humour is related to expectations[1232]. As Mera explains:

> Almost all humor is set up by creating a sense of anticipation that is then subverted or dislocated. For an audience to find something funny, they must be complicit in this anticipation; they must expect what you predict them to expect. For example, a man walks down the street and is hit on the head by a falling brick. This situation probably would not, in itself, seem funny to the majority of people. Now a superstitious man walks down the street, carefully avoids walking under a ladder, sidesteps a waiting banana peel, and still is hit on the head by a falling brick. This situation has become funny because an expectation has been created and then overturned[1233].

[1227] See section 1.3 chapter 1.
[1228] Unintentional humour (*laughing at* rather than *laughing with* the author) is left outside this section given that the exception only applies to intentional humour.
[1229] *Quitilianus*, supra note 58, p. 395.
[1230] The adaptation either took account of religious sensibilities, or rearranged works to accommodate different voices; see contemporary publications, e.g. Ribon 1695.
[1231] The online *Oxford Music Dictionary* defines parody as the reworking of previous works with a satiric or comic intent aimed to make them appear ridiculous.
[1232] Mera 2002, p. 91; On expectations of listeners: Meyer 1956, p. 73.
[1233] Mera 2002, p. 91.

This humorous character is transposed in music by composing in a particular style, and abiding to the accompanying musical rules, then unexpectedly breaking or overturning these established conventions. Haydn's well-known joke quartet (Op.33/2) illustrates this device. By delaying the end of the piece and toying with the conventions, the public is invited to play along with the composer and guess when (or perhaps if) the piece will end[1234]. The audience's knowledge of the conventional sonata form creates the expectation when the piece will end, and by breaking the standard form, Haydn fools the listener[1235]. The concept of music expectation suggests that humour in music is connected not only to a particular composition but also to its context[1236].

A familiar example of modern parody or pastiche is the Lloyd Webber and Rice musical: *Joseph and the Amazing Technicolor Dreamcoat*. The authors, taking inspiration from the Bible's Book of Genesis, adopt an eclectic variety of musical styles to recount (in song) the story of Joseph's family estrangement and eventual reconciliation. Its music pastiches include a soulful Jacques Brel-esque ballad, *Those Canaan Days*, and features some obvious parodies of Elvis in the rock numbers: *Poor, Poor Pharaoh*, *King of my Heart* and *Song of the King*[1237].

Included within the umbrella of parody is musical satire. As defined in chapter 1[1238], satire differs from parody *stricto sensu*, insofar as satire does not reproduce an earlier work to pass comment upon it, but rather to comment upon something else. A traditional example is Mozart's *A Musical Joke* which

[1234] ibid, p. 92.
[1235] The story says that Haydn wrote this *Joke* to win a bet that 'the ladies will always begin talking' before the music stops. Other examples can be found in the opening of Haydn's *Largo e sostenuto third movement* (Op.33/2). Sisman 1993, pp. 102-5.
[1236] Context is even more significant where the musical parody is joined to a cinematographic work whether it is a film or a music video. As illustration, see the ingenious musical parody (*Springtime for Hitler*) in Mel Brooks' *The Producers* (1968). See section 5.3 chapter 5.
[1237] The latter instantly brings Elvis's '*All Shook up*' to mind, and its lyrics make explicit reference to the song: 'Well this dream has got me *all shook up*'.
[1238] See section 1.3 chapter 1.

is an obvious satire of the inferior quality of the popular music of the time, while also parodying inferior composers by mocking their errors, ignorance of structural conventions and dull transitions[1239].

As with other musical works, the creation of musical parodies has been facilitated by developments in technology, resulting in endless ways of combining existing musical works to create new music. Given that parody goes hand-in-hand with copying somebody else's work, artists instead allude to sampling a sound recording for the creation of new musical parodies. Mash-up, generally defined as a layering of multiple works, is equally relevant to the creation of modern musical parodies[1240]. This places mash-ups at odds with current copyright concepts, and results in them being found to infringe the earlier works and sound recordings[1241]. Negativland's parody of U2's song, *Still haven't found what I am looking for*, is an example of artists who choose to sample popular bands to pass comment upon the (unfair) practices of the music industry and the increasing levels of control exerted by record companies[1242].

Most problematic for our particular focus are musical parodies which reproduce an entire copyright-protected work[1243]. Traditional examples are the pro-union songs of Woody Guthrie. He re-uses known melodies, such as in *This world is not my home* which he felt was undermining workers' conditions

[1239] Full analysis: Rosen 2008, pp. 311-2.
[1240] Danger Mouse's *Grey Album* the work combines vocals from Jay-Z's *The Black Album* and instrumentals from the Beatles' *White Album*. For a musical analysis of this mashup and the creative impact of mashups, Adams 2015, p. 7.
[1241] Except in Canada where a UGC exception has been introduced in section 29.21 of the Copyright Act susceptible of allowing this kind of rework of previous works for non-commercial purposes. Amongst others, Serazio argues for greater protection of mash-up works given that today's youth widely use this technique to express themselves: Serazio 2008, p. 79.
[1242] Camachan 1999, p. 1036.
[1243] 'When the text is changed, the music is generally altered very little' cited in Pevernage and Hoekstra 1979, p. 369.

by asking these to accept their pain[1244]. Keeping the old melody, Guthrie reworked the lyrics to better reflect the reality of workers' conditions.

In stark contrast to Bakhtin's findings regarding parody in literature, parody has resulted in significant developments in music[1245]. While the social function of parody is not guaranteed to be present in every case, parody impacts the way we appreciate artistic expressions and the established conventions attached to particular genres. Furthermore, in our current society which encourages self-reflexivity, parody became an essential vehicle for discourse, which constantly re-evaluates the triangular relationship between creators, works and the public[1246].

1.4 Conclusion

Copyright legislation protects original works fixed in a tangible form. Based on the (misplaced) premise that borrowing is incompatible with creativity[1247], copyright concepts currently seek to protect independently created works[1248]. Given that borrowing is widely accepted in the music sphere, and music creators have historically relied heavily on this practice in music-making, any conception of self-contained, independent creativity invariably has a negative impact even greater than upon other art fields where borrowing is less crucial to their development.

While the parody exception takes this borrowing practice better into consideration within copyright law, its application begs the question whether copyright legislation is adequate when applied to music, or whether a mismatch remains between copyright legal principles and the reality of music

[1244] McLeod 2005, p. 23.
[1245] Bakhtin concludes that parody is insignificant. See section 1.4 chapter 1.
[1246] Mera 2002, p. 99.
[1247] Though incremental innovation is far more readily accepted in other IP fields e.g. design and patent law.
[1248] Evans 2011, p. 863.

creativity which should urge courts to interprete the parody exception in a particular way.

2. Infringement and defence

As outlined above, copyright law arguably is better suited to other art forms, like literature, which are not constrained by the limited choices inherent in music composition[1249].

2.1 Copyright infringement

The mismatch between copyright and music[1250] is magnified by the different copyright protections embodied in a song[1251]. A song is traditionally comprised of separate copyright works: the lyrics and music are protected as separate authorial works. For copyright to subsist, each work has to satisfy the originality and fixation requirements[1252]. Songwriters, composers and authors are granted a bundle of exclusive rights including the rights of reproduction, performance and distribution, whereas the sound recording does not require originality to attract protection, but results in a more limited set of exclusive rights. This multi-layering of rights is also tied in with different right-holders[1253]. In short, copyright law constructs an artificial division for music, especially in common law countries. The exhaustive categories of works

[1249] See section 1.2 chapter 6.
[1250] Section 1 chapter 6.
[1251] 'Song' is used as referring to the final product regardless of copyright fragmentation.
[1252] Fixation is not a requirement for copyright to subsist in France. In relation to music, fixation usually takes the form of graphical reproductions, music sheet or any kind recording.
[1253] Bently in relation to popular music where he concludes that despite the openness of the creative input of different actors involved in music-making, the copyright Act privileges some type of authorship over others without clear reasons. Bently 2009, p. 188. Also, these are often subsequently assigned as demonstrated in section 3 chapter 6.

conceptualised independently by CDPA challenge courts by requiring them to identify the different works and labour[1254].

2.1.1 Threshold for infringement

The CDPA regulates certain specified unauthorised acts[1255]. A parodist infringes copyright if they, without prior permission, reproduce any copyright work[1256]. Infringement requires the claimant to establish a causal link between the protected work and the alleged infringement. Per Diplock LJ: 'there must be a sufficient objective similarity between the infringing work and the copyright work, or a substantial part of thereof'[1257]. The doctrine of substantiality is key to the infringement test[1258]. Under English law, this assessment is not to be applied quantitatively, but qualitatively[1259], based upon the particular facts. In relation to music, courts have some latitude to depart from an analysis of whether there is identical note-for-note copying, and assess instead whether the overall impression is the same[1260]. Therefore, a definite or considerable degree of similarity is sufficient for the findings of copyright infringement.

In *Hawkes v. Paramount*[1261], the court held that use of a mere twenty-second excerpt of the four minutes long Colonel Bogey tune in a newsreel was a substantial reproduction of this copyright work. But even smaller segments

[1254] Sections 1.1 and 3 CDPA. More on the problem of categorization under English copyright law: Bently 2009, p. 195.
[1255] Section 16(1) CDPA.
[1256] Section 17 CDPA.
[1257] *Francis Day and Hunter v. Bron* [1963] Ch 587, (Diplock LJ). Hence, for the finding of infringement, two ingredients must be combined: there must be copying (whether conscious or unconscious) and a causal connection between the two works. In Canada, see for example, *Gondos v. Hardy et al, Gondos v. Toth* (1982), 64 CPR (2d) 145.
[1258] Section 16(3) CDPA. The landmark decision on this doctrine lies in *Designers Guild Limited v. Russell Williams (Textiles) Limited* (Trading As Washington Dc) [2001] 1 All ER 700.
[1259] *Ladbroke v. William hill* [1964] 1 WLR 273, [276].
[1260] Supra note 1257.
[1261] Supra note 467.

have the potential to be infringing if they are a significant or memorable part of the work[1262]. Given that 'substantial' lacks a statutory definition, UK court based this on the facts and in relation to the protected work as a whole. But the CJEU's *Infopaq*[1263] ruling impacts on this, since it interpreted infringement based upon whether the part copied reproduces the author's own intellectual creation[1264]. Therefore, any industry belief that copying three notes or less avoids infringement is misplaced[1265].

The problem with applying the substantiality doctrine in music cases is that determining what constitutes a substantial part depends on how music is heard[1266] through the ears of the particular listener[1267]. Copyright ought only to protect the expression of ideas and not ideas (i.e. style and conventions)

[1262] Similarly to UK law, Australian legislation requires substantial copying for the finding of infringement. Illustrating the difficulties linked to this assessment, judges had to consider whether the copying of a flute riff from Kookaburra used in the Men at Work song Down Under amounts to substantial taking. The judges held in favour of infringement despite that the taking was only two bars long while the whole work is four bars long. *Larrikin Music Publishing Ltd. v. EMI Songs Australia Plty Ltd.*, (NSW) [2010] FCAFC 47; Examples can also be found in Canada where judges did not hesitate to find the similarities between the melody, key and chord progressions of the two works infringing. *Drynan v. Rostad* [1994] 59 CPR (3d) 8.

[1263] *Infopaq I* (C-5/08). Applied by UK courts in *Meltwater*: supra note 467.

[1264] *Infopaq I*, [37]. Liu 2014, pp. 588-94. This decision can be reconciled with the recent Canadian decision in *Robinson v Films Cinar Inc* [2013] CSC 73. In this case, the Supreme Court found that the defendant had reproduced a substantial part of the protected work despite the absence of literal copying and the distance operated by the defendant in the use..

[1265] This legend probably derived from the US case *Newton v. Diamond*, where judges held that the copying of three notes (C-F flat-C) by the Beastie Boys did not amount to substantial reproduction. (2003) 349 F.3d 591 (9th Cir.).

[1266] McDonagh 2012, pp. 411-2.

[1267] Similar to the *reasonable person* in the context of tort law. Criticising the current lay observer in Canada: Craig and Laroche carryg out an interesting exercise on how untrained ears hear works included in others. Craig and Laroche 2014, pp. 43, 55 and esp. 62; Lund 2011, p. 171 (the aural appreciation of music can be deeply flawed); Keyes 2004, p. 431: 'The overriding problem with the reasonable listener model in the context of music copyright litigation is that this reasonable listener is not being called upon to gauge conduct of parties to the litigation; rather, the standard is being used to determine how a reasonable listener would aurally perceive a given piece of music'. However, there is no accepted 'social norm' that would provide any meaningful standard on how a piece of music would be perceived by a 'reasonable listener'. In fact, music perception is an inherently subjective process that differs from individual to individual'. Keyes suggests something similar with the 'intended audience test': Keyes 2003, p. 440; Grinvalsky 1992, p. 423.

themselves. Courts thus bear the difficult task of identifying which aspects of the works are protected, and which must remain in the public domain[1268] (such as music key or music genre, musical structure or composition[1269], common chord progressions, etc) without overly dissecting the work[1270]. Mere imitation of style, for example, should not be infringing[1271]. And yet, pastiche[1272] cases are not straightforward for the judiciary. For example, many rock ballads follow the AABA form (verse-verse-bridge-verse) which is traditionally 32-bars long with each section lasting 8-bars[1273]. This common style has been adapted in songs such as in *Every breath you take*[1274] as AABA-C-AABA Coda. Another common feature of rock ballads consist of the harmonic pattern I-vi-IV-V[1275]. Given the extensive use of these two characteristics in the 1950s, Covash concludes that any parody is likely to include these[1276]. But harmonies also influence the selection of timbre, modulation and tone. How will these be perceived by judges[1277]? Can they assist in distinguishing between style (which refers to ideas) and originality (the particular expression of an idea)?

[1268] This is reinforced by the nature of music which language is rather limited compared to other categories of works such literary works. Therefore it is hard to determine the portion of language which ought to remain in the public domain and what portions deserve protection. Liebesman 2007, p. 334; Grinvalsky 1992, p. 396.

[1269] Example: verse, chorus, verse, chorus, bridge, verse common in popular music.

[1270] Too much dissection carries the risk of rendering any musical expression as unprotected idea. Liebesman 2007, p. 332; Abramson 1988, p. 148.

[1271] This is illustrated by the *Norowzian* case where the claimant produced a film with a 'jump cutting' technique reproduced by the defendant in a commercial advertisement. The court of appeal held that copying editing styles was not sufficient for infringement. *Norowzian v. Arks Ltd* (No 2) [2000] FSR 363, [368].

[1272] A work created '*in the style of…*'.

[1273] Covash 2005, pp. 65–76.

[1274] *The Police* (1983) written by *Sting*.

[1275] Chord progression often associated with *Doo-wop*.

[1276] Covash 2005, p. 75.

[1277] Coulthart argued successfully that in particular circumstances such chord progressions could be found original which appears reasonable given the interpretation of 'sufficiently original' to attract copyright protection following *Infopaq*. Cited by McDonagh 2012, p. 419. In Canada, the new arrangements made by the defendant to an old tune for an opera was found infringing despite the fact that what was copied was merely style and conventions rather than expression. *Austin v. Columbia Gramophone Co.,* [1923] Mag. Cas. 398. Whereas in Australia, a similar case was held non-infringing. *CBS Records Australia v. Guy Cross*, (NSW) [1989] 15 IPR

The separating line between the two can be problematic, and courts[1278] might seek recourse to expert opinions[1279]. Regarding a sampling of a seven-and-a-half-second segment from the sound recording *Higher and Higher* by The Farm in *Macarena* by Los Del Rio[1280], Justice Parker confirmed that, despite his personal initial impression that the unauthorised sampling appeared infringing, a full determination would require the court to have guidance from music experts and extrinsic factual evidence to determine whether a substantial part has been copied[1281]. More recently, Robbie Williams was found to have infringed the copyright of Loudon Wainwright III since the song *Jesus in a Camper Van* included two lines of lyrics which bore a close resemblance with the claimant's earlier work[1282]. Wainright's lyrics went:

> Every Son of God gets a little hard luck sometimes, especially when he goes round saying he is the way.

While the later William's lyrics say:

> I suppose even the Son of God gets it hard sometimes, especially when he goes round saying I am the way.

385. The same outcome was reached in the English case *Robertson v. Lewis* where the defendants made arrangements over traditional Scottish airs. [1976] RPC 169.

[1278] Given their lack of expertise in music. Livingston and Urbinato 2013, p. 241. Noteworthy, in Canada a *merger* doctrine was introduced: where a musical expression blends with the sphere of ideas, the expression shall not be protected. But here again, there are no clear rules as when an expression is deemed to have merged with the idea. Craig and Laroche 2014, p. 50; Liebesman 2007, p. 334; Grinvalsky 1992, p. 396.

[1279] For an analysis of the role of experts in court: Keyes 2003, p. 434.

[1280] *Produce Records Ltd v. BMG Entertainment UK and Ireland Ltd* (1999), High Court transcript, 19 January.

[1281] The case was settled out of court. Greenfield and Osborn argue that if Justice Parker had struck out the action directly, this decision would have set a precedent that no authorisation has to be required for similar use of samples. Greenfield and Osborn 2009, p. 94.

[1282] *Ludlow Music Inc v. Williams & Others* [2001] EMLR 155.

Irrespective of whether the expertise is provided by musicologists or musicians, producers, DJs, music journalists or even fans, their input can greatly assist courts in their task[1283]. While courts are not bound by their opinion, they serve as useful guidance. This is appropriate, since it is the parties of the case which select their preferred expert, such that the degree of subjectivity[1284] might be questionable[1285].

2.1.3 Parody problem

One aim of a parody exception is to reinstate in copyright law a more nuanced consideration of the nature of music creation, having regard to its ultimate aim to encourage more creation. Citing *Newport State of Mind*, a song parodying Jay-Z's *Empire State of Mind* song and video as supporting the case for change, the UK government acknowledged the existing burden parodists were likely to face. Indeed, current parodies typically reproduce one of the protected works included in a song (literary, musical or the copyright embodied in the sound recording) in its entirety. Parodists who devote the time and expense necessary to clear the rights with the right-holders often find their request is met with an outright refusal because right-holders perceive parody as denigrating their works. This results in a censorship of this specific type of expression. Avoiding infringement might become even more complex if the parodied work is itself based upon earlier protected works, since permission from all right-holders is required. Prior to the specific exception, application of the substantiality doctrine rendered most parodies liable for infringement

[1283] Craig and Laroche 2014, p. 43; Bently 2009, p. 198.
[1284] McDonagh 2012, p. 416; Bently 2009, p. 192; Liebesman 2007, p. 332.
[1285] The inherently limited character of expert opinions led some scholars to suggest a greater reliance on technologies or physics to separate the protected expressions from the unprotected ideas. According to Liebesman, subjectivity could be overcome by 'objectively mapping a song's many artistic elements' and 'using a link between the wave motion theory of physics and music to mathematically model a song'. Liebesman 2007, p. 332. Yet technology bears the opposite disadvantage of lacking subjectivity. See *Content ID* recognition system in section 3.4 chapter 6.

of three separate copyrights, the music, the lyrics and the sound recording. Compliance with copyright law came at the expense of creativity[1286].

2.2 Defence: the parody exception

Earlier chapters have explained why current copyright legislation recognises that certain unauthorised uses of a work should be possible[1287] for the purpose of parody. This section demonstrates the difficulty of applying the parody exception to musical parodies and suggests modifications to facilitate its application and respect music culture and practices. Finally, although the neighbouring rights granted to entrepreneurial works, such as sound recordings, are pertinent to music parodies[1288], this section concentrates on authorial works, since the legislation extends the exception to neighbouring rights as well.

2.2.1 Economic rights

A parody may reproduce a copyright work without risk of infringement, providing the dealing is deemed fair. Before addressing factors of fairness, courts first have to determine whether the use is for the purpose of parody. Interpreted by the CJEU in *Deckmyn*[1289], two requirements must be met: 'a parody is an expression of humour or mockery which, while evoking an existing work, is noticeably different from that work'[1290]. Although the scope of the exception is detailed in chapter 4, this section revisits the particular fair dealing factors as applied to music parodies.

[1286] This is made intricate by the contractual relationships between authors/performers and producers/record labels as the possibility to parody are left out of their mandate requiring parodists to negotiate individually with artists. See section 3.
[1287] Although parodists might rely on other exceptions such as the quotation exception or as in Canada, the UGC exception.
[1288] Especially, when dealing with parodies using sampling or mash-up techniques.
[1289] Section 2.4 chapter 1.
[1290] *Deckmyn,* [20].

2.2.1.1 Humorous intent

The first stage for English courts is to determine whether the parody reflects the humorous intent of its creator[1291]. Section 1.3 demonstrated that humour in music is less prone to take the form of ridicule (as exemplified in Midnights Beat's successful parody of Kesha's *Tik Tok*) and more likely to take subtle forms of humour, such as The Barron Knights 1960s song, *Call Up the Groups*, which parodied the work of several contemporary pop bands[1292] to pass comment upon conscription practice in the British Army. To avoid arbitrary outcomes, 'humour' should be construed widely enough to include entertainment, homage and even criticism[1293].

2.2.1.2 Absence of confusion

The second stage is to establish whether the parody evokes the protected work, while being noticeably different from it. To this end, the form of fair dealing of the exception assists judges in their function to determine 'whether a fair minded and honest person would have dealt with the copyright work in the manner as the defendant did'[1294]. This may involve consideration of different factors, including the amount copied, the commercial motives of the parodist, the impact of the parody on the market of the original, whether the earlier work has been published and the content itself[1295]. Yet these factors should not be applied separately as a third requirement, but should be applied in a holistic manner to investigate whether the two main requirements set out in *Deckmyn* are satisfied *in casu*[1296]. When it comes to musical parodies, the amount

[1291] Section 3.2 chapter 3.
[1292] The Searchers, Freddie and the Dreamers, the Dave Clark Five, the Bachelors, the Rolling Stones and the Beatles. The song reached Number 3 in the charts in 1964.
[1293] AGO in *Deckmyn*, [46].
[1294] *Hyde Park,* supra note 320, [40].
[1295] This section does not aim to re-examine each individual factor (section 3 chapter 3) but discuss the most contentious factors in relation to musical parodies.
[1296] Jacques 2015, p. 699.

borrowed, the commercial motives of the parodists and the particular message of the parody have to be carefully considered.

2.2.1.2.1 Amount borrowed

Within fair dealing, it is essential to re-examine the concept of substantiality[1297]. While the exception is only applicable where there is a copyright infringement and therefore substantial copying, does it allow wholesale reproduction of a work? Should Richard Cheese and Lounge Against the Machine, performing swinging versions of popular rock, rap and metal songs obtain a licence to reproduce the literary work of another? The humorous character derives from the contrast between the borrowed lyrics to retro style music. For example in *Tuxicity*, Cheese reproduces the literary work of System of a Down's *Chop Suey song*. The opposite technique consists of the reproduction of the musical work (and to this end, the parodist might sample the sound recording of the original[1298]) to altered new lyrics. Generally, most musical parodies in popular music (further honed by digital technologies) will reproduce entirely one of the protected works involved in the song.

In this light, parodies using sampling or relying on mash-up techniques are likely to be more contentious than musical parodies which do not reproduce directly from the sound recording[1299]. As shown in the previous section, few cases actually make it to court[1300]. A well-known example consists of JAMs' (aka KLF) album 1987: *What the Fuck is Going On?* Here, the song The Queen and I plainly samples ABBA's recording of *Dancing Queen* [1301] . JAMs

[1297] See section 2.1 chapter 6.
[1298] Example: Midnights Beat's parody of Kesha's *Tik Tok* or Rucka Rucka Ali's parody version of the same song *Go Cops*.
[1299] Mcleod and Dicola 2011, p. 73.
[1300] See section 2.1 chapter 6.
[1301] This case does not discuss parody but unravels the problem that parodists using sampling techniques might face.

unauthorised sampled sequences led, inevitably, to threats of legal proceedings from the Mechanical-Copyright Protection Society ('MCPS') shortly on the album's release[1302]. JAMs provided evidence of his unsuccessful attempts to get permission, compelling him to capitulate and release an edited version of the album sample free, although he provided purchasers instructions how to reproduce the original album - samples included. Here the joke was that while it is straightforward for individuals to do this with current technology, it would have been nearly impossible to recreate the illegal album in the 80s.

The amount copied is crucial in musical parodies because traditionally, the wholesale reproduction of an earlier work is not considered as fair[1303]. The fragmentation of a song into three separate works exacerbates the task of parodists, who need to establish the defence in relation to each copyright infringement.

Despite citing the *Newport State of Mind* parody in the case for change, the official guidance provided to creators and right-holders then comments that a total reproduction will hardly ever be deemed fair[1304]. This begs the question whether fair dealing should be re-examined to reflect the practices accepted in music culture. To avoid creative censorship, it is submitted that analysis of whether the parody defence is appropriate should be based upon consideration of a song as a whole[1305].

[1302] See section 3.1 chapter 6 for the actors in the music industry.
[1303] Section 3.4 chapter 3.
[1304] Guidance for creators: supra note 136, p. 7.
[1305] Such as already appreciated in *Williamson Music v. Pearson Partnership*, supra note 13. In addition to the introduction of a parody exception, Canada introduced the UGC exception susceptible to legitimate wholesale reproduction of previous works if the use satisfies the requirements enshrined in section 29.21 CA 1985.

This is the approach adopted by French courts in the landmark case *Douces Transes*[1306], discussed earlier. The defendant reworked Trenet's lyrics, without any alteration of the musical work. The case reached the Supreme Court, which held that the reproduction of the musical work allows the public to identify the original work immediately, while alteration of the lyrics alone is sufficient to create a legal parody. This approach reflects the long-established real world practice of musical parody. Assessing a parody song as a 'whole' eliminates any risk of confusion. Hence, substantial copying (including wholesale reproduction of one of its constituent elements) tips the balance to unfairness, only in cases where a parody label is used to diguise little more than copying.

2.2.1.2.2 Commercial motives

Traditional application of fair dealing prescribes that any commercial exploitation of the unauthorised work will, most likely, render the use unfair. Yet parodies may be created for either commercial or non-commercial uses, and the ECtHR has recognised that freedom of expression encompasses freedom of commercial speech[1307]. Some parodies, not exploited commercially initially, become revenue-generating later. Music parodies are typical examples of this, particularly in light of the increasing popularity of online sharing platforms like *YouTube*. Successful content uploaders are often approached by music publishers keen to release a record[1308]. Indeed, the *Newport State of Mind* parody is an example of this phenomenon. While Delaney was approached to release a record, this possibility was thwarted by the threat of legal proceedings.

[1306] *Douces Transes*: supra note 118.
[1307] *Ashby Donald and Others v. France*; *Krone Verlag v. Austria* (No. 3); *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*.
[1308] Section 3.4 chapter 6.

English case law indicates that any use which directly competes with the copyright owner is also unlikely to be fair[1309]. But to what extent do musical parodies compete with the original? This depends on how the relevant market is defined. If the market is defined as being the music market then a parody will always be considered as in competition with the original. This stance is likely to retain the *status quo*, rather than encourage more creativity, because parodists basing parodies on protected works will be unable to generate revenue from their work[1310]. Additionally, given that *Deckmyn* has established that a parody must be noticeably different to the original, it is difficult to conceive how a parody can ever be a direct substitute for the original. Rather, it seems more appropriate to classify a parody as belonging to a different market[1311]. This approach better reflects the reality where parodies will compete with each other on a particular market for parody works.

Perhaps more controversial is whether the parody exception should apply when the parody features in commercial advertising. In this context, two techniques are adopted to try to avoid the need for a licence: the musical work is reproduced, but the lyrics are changed to refer to the product the advertisement promotes[1312] or a close sound-a-like musical work is created as background music to the advertisement. The first scenario was examined by French courts in two instances. The decisions reject that the parody exception is applicable, and the reasoning adopted applies equally to the second

[1309] *Newspaper Licensing Agency Ltd v. Marks and Spencer PLC* [1999] R.P.C. 536, pp. 546-7.
[1310] Also, as copyright lasts for 70 years after death of the author, few out of copyright works enjoy suitable levels of recognition to make a good basis for parody.
[1311] Erickson, supra note 282, p. 10; Deazley 2010, p. 794.
[1312] For example, the BBC created a new trailer for their show *Great British Bake Off* reproducing the music from The Sound of Music to which, the lyrics have been altered to amongst others '*The hills are alive with the smell of baking, with cakes that we baked for a thousand years*'. Although the BBC asserted the use was covered by the new parody exception, they simultaneous withdrew the advert, maintaining that it had served its purpose; see: http://ipkitten.blogspot.co.uk/2015/08/crumbs-bake-off-parody-goes-off-air.html (access date 10/10/2015).

scenario. Given that the advert is created simply with the commercial intent to promote the product, without any ambition to criticise, educate, inform or foster discourse, a song cannot be altered under the cover of the parody exception in an advertising context [1313]. This outcome is confirmed in *Montagné*[1314], where the defendant changed the song *On va S'aimer* to *On va Fluncher* to promote a restaurant chain FLUNCH.

While it is submitted that, where the user's main purpose is to create a parody, they should be able to benefit from the exception, and still receive any revenue generated[1315], this does not apply to commercial advertising scenarios. Use of musical works for commercial advertising purposes, even if these are altered, should require permission since the primary motivation of the copying is not to create a parody but to make an advert[1316].

[1313] Paris 4e ch. 12/09/2001, *Charles Talar v. Lannier*, in relation to the distortion of the song *Femme Libérée*. In casu, only one co-author had authorised the advertising use but such commercial context requires the authorisation of all co-authors.

[1314] The complexity of this case is demonstrated by the different instances. This case was referred none less than three times to the Supreme Court. Trial decision: TGI Paris, 3/09/1997: held in favour of defendants and denied the action based on infringement of moral rights given that the rights were transferred to editors opening the door to the possibility of parodying even in the case of advertising; Appeal: Paris, 28/06/2000: confirmed trial judge's decision on all accounts; Supreme Court, 28/01/2003: overturned previous decisions and repeats that moral rights cannot be transferred and therefore, the distortion might still infringe the applicant's rights if no permission was given; Referral to Court of Appeal Paris 2004: repeated the decision of TGI Paris 3/09/1997; Supreme Court 5/12/2006: quashed the appeal decision, repeated the previous decision of the Supreme court and refered the case to another court of appeal; On referral to Versailles 18/01/2007: court held that the altered lyrics constituted a parody which substantially distorted the original in a way which required prior authorisation from the authors of the original given that any distortion of the original constitute an infringement of the integrity right. Supreme Court, 2/04/2009: Although the defendant's use constituted a parody of the original, the use for advertising purposes still required prior authorisation. If economic rights can be transferred by contract, this is not the case for moral rights which are perpetual, inalienable and imprescriptible under French legislation.

[1315] See section 3.3 chapter 6.

[1316] Failing to obtain a license for such use could give right to actions of passing off or publicity rights in addition to copyright infringement. This is also supported by *Deckmyn*, [26].

2.2.1.2.3 Striking a balance

Finally, judges must 'seek to achieve a 'fair balance' between, in particular, the rights and interests of authors/right-holders on the one hand, and the rights of (potential) users of protected subject-matter on the other'[1317]. To achieve this balancing exercise, courts have to pay close attention to the content and context of the parody[1318]. A good illustration for the UK courts is the famous song from World War 1, *Mademoiselle from Armentières*, and its reworking to *Three German Officers* with crude lyrics relating to the rape of women across the Rhine. Is such use covered by the exception? While the exception allows harsh criticism and justified disrespect[1319], its limits are reached when the use causes harm to the original author or his works[1320], or to the fundamental rights of others. Therefore, racist or xenophobic lyrics would most likely fall within this category depending on the context of the use.

This position was endorsed by the French Supreme Court in *Casser du noir* ('Crush the Blacks''), considered earlier[1321]. A comedian who reworked the lyrics of *Casser la Voix* to criticise the political views of the ex-leader of the NF, may have gone too far by inciting racial hatred. *Prima facie*, the Court recognised that the lyrics, if removed from the context of the TV programme in which the song featured, could stir violence against a group of individuals, but this was an artificial analysis. Ultimately, despite aiming to engender political debate on immigration in France (tilting the balance towards greater protection of the expression), the court felt that the changes made were too

[1317] ibid.
[1318] See section 5 chapter 5 for an analysis of all the factors judges should take into consideration to carry out this balance.
[1319] See section 1 chapter 5.
[1320] This simultaneously opens a cause of action under moral rights' provisions but also action under tort law or even criminal proceedings. For moral rights, see chapter 4 but also, section 2.3 chapter 6 for specific consideration of music parodies.
[1321] See section 4.2.2 chapter 5.

subtle. Even taking the song in context, there were not enough cues for the public to distance the anti-racist ideas of the original singer from the racist ideas of the NF. This led to a finding that the parody was unlawful because it would be understood as an expression of racial hate.

In conclusion, judges must make a careful, contextual comparison of the parody and the original song to establish whether the parody meets the requirements established in *Deckmyn*. This makes the outcome of such a fact-heavy assessment hard to predict. Yet, this section demonstrated that, if anything, the assessment is even more complicated in the music sphere as it is generally easier for one musical work to sound similar to another because of the limited 'language' of music and the layers of copyright works making up a song. The next section analyses the impact of the exception on the exercise of moral rights by authors.

2.2.2 Moral rights

As examined in chapter 4, the parody exception is not a defence to any associated violation of moral rights. A parody eligible for the copyright exception may still infringe the author's paternity and integrity rights[1322]. The earlier analysis concluded that a permitted parody would generally respect moral rights, provided moral rights were construed in harmony with the objectives underlying the parody exception. It would seem pointless to introduce a specific parody exception for economic rights which could then be barred by moral rights in the same works.

The most contentious area is the author's right to object to any derogatory treatment of their work[1323]. Several English decisions have applied this

[1322] As a reminder, common law countries require these rights to be asserted by the author. Common law jurisdictions differ from civil law jurisdictions also on the fact that moral rights can be waived.
[1323] Section 80 CDPA; See section 2.3 chapter 4.

provision to music works, albeit not in the case of parody. In *Morrisson*[1324], the defendant planned to release a sound recording comprising a medley of selected George Michael works, mixed with other music. The judge granted an interim injunction considering it to be arguable that transposing segments of existing works into a new context could amount to a derogatory treatment, which would need to be finally determined by reference to music experts[1325]. In *Confetti Records*[1326], the claimant's song, *Burnin*, consisted essentially of an instrumental beat accompanied with vocal repetition of the word 'burning'. The disputed re-mix, *Crisp Biscuit*, involved a band rap or MC rapping over the *Burnin* backing track to create a new work. The claimant sued, claiming the use was a derogatory treatment of his work, primarily because the superimposed rap contained references to violence and drugs[1327]. Derogatory treatment implies a prejudice to the author's honour or reputation resulting from the use made[1328]. Yet in this case, the claimant failed to provide evidence that his honour or reputation had been objectively prejudiced. In such cases, the court analyses harm in relation to the artist as viewed through the lens of a right-thinking person, rather than relying on the author's personal convictions. As Sainsbury comments, this is to make exercise of the integrity right in relation to music works more complicated, but not impossible. In some cases, it would be possible to sustain an argument that the altered lyrics associated the revised message with the original musical work, and certain messages could prejudice the honour or reputation of its original author[1329].

[1324] *Morrison Leahy Music Ltd v. Lightbond Ltd* [1993] EMLR 144.
[1325] Eventually, the case was not decided.
[1326] *Confetti Records, Fundamental Records & Andrew Alcee v. Warner Music UK Ltd* (t/a East West Records) [2003] ECDR 336.
[1327] ibid, [61].
[1328] As previously decided in *Pasterfield v. Denham* [1999] FSR 168.
[1329] Sainsbury 2007b, p. 163.

Learning from other jurisdictions, French courts have had the opportunity to consider how moral rights apply to musical parodies. Overall, if an altered work fails to satisfy the requirements to qualify for the parody exception, then this triggers the possibility of action under the integrity right. This approach is illustrated by *Brel*[1330], which concerned an association's reproduction of the lyrics of Brel's song *T'as Voulu Voir Vésoul* on a propaganda poster. The Court first examined whether the requirements of the exception were satisfied, and held that *in casu*, the lyrical pastiche was not successful in distancing the new work from of the original. It concluded that as the parody was not noticeably different from the original, it amounted to a derogatory treatment[1331].

More recently in *L'Aigle Noir*[1332] ('The Black Eagle'), a comedian reworked the lyrics of Barbara's song[1333] as *Le Rat Noir* ('The Black Rat'). This mocked both her Judaism, and the sexual abuse she had suffered at the hands of her father, by comparing the songstress and her father to rats (an image usually used by anti-Semitics) which deserved extermination. The court held that the comedian infringed Barbara's moral right of integrity, since his expression conveyed a notably vulgar message which lacked any humorous intent. While the original lyrics represent the exercise of Barbara's freedom of expression on incest, the altered lyrics diminished the gravity of Barbara's personal tragedy, which was prejudicial to the respect and honour owed to the deceased[1334].

[1330] Civ. 1 ère, 27/03/1990, Bull. Civ., 1990, I, n°75; JCP, G, IV, p. 203; RIDA, July 1990, p. 320, obs. Kéréver.

[1331] Similar approach in relation to a comedian commenting on excerpts of a song, the Court held that despite the presence of humour, such use requires the authorisation of the author without which the use constitutes a violation of the author's moral right. *Jean T. dit Jean Ferrat, Sarl Productions Alléluia, Gérard Meys, Sarl Teme / Sté I-France (venant aux droits de la SA Opsion Innovation) c/ association Music Contact*, Paris, 18/09/2002, Dalloz 2002 A.J. p. 3208.

[1332] TGI Paris, 15/01/2015.

[1333] Barbara is the composer and songwriter of this song.

[1334] While the Court refers to the deceased's honour, it is legitimate to assume that the same outcome would have been reached if Barbara was still alive.

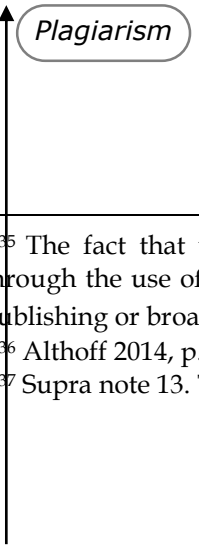
To conclude, the parody exception's requirements provide a yardstick to determine whether there is an infringement to moral rights. Given that common law countries permit authors to waive their moral rights, this will reduce the protection afforded to authors who are parodied.[1335].

2.3 Conclusion

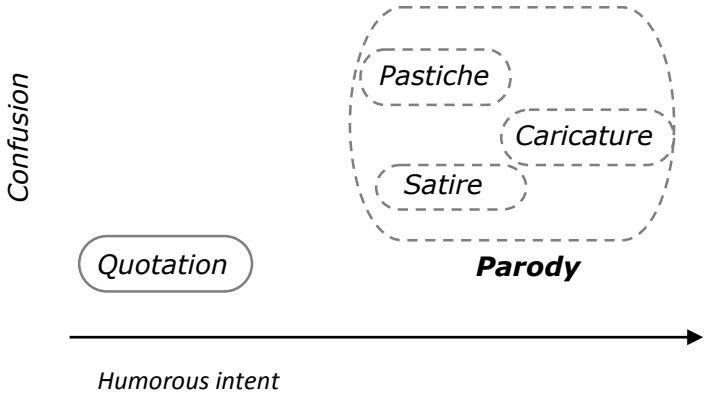
The requirement of humorous intent and absence of confusion between the protected work and the parody should be welcomed by creative industries. These ensure that not all sound-alike uses are covered by the exception, which might deny the right-holder a legitimate source of remuneration [1336] . Nevertheless, the question remains as to whether the reproduction of an entire musical work (or sound recording) or literary work, forming 'half' of a parodied song will fall with the exception pursuant to UK law.

It is submitted that when assessing if the parody exception should apply to a composite musical work, UK courts should consider the song as a whole, rather than dissecting it into three separate works[1337]. Following this approach, only excessive copying which does not fall within the customary understanding of music parodies will be found infringing. Consequently, more emphasis should be placed on the true purpose of the use. The proposed position could be illustrated as depicted below:

Figure 16



[1335] The fact that waiver is possible enables music producers and broadcasters to insist, through the use of contract law, on the waiver of moral rights as a condition of producing, publishing or broadcasting the work; See section 3.2 chapter 6.
[1336] Althoff 2014, p. 267.
[1337] Supra note 13. This is only for infringement purposes and does not concern ownership.



As a starting point, one can look at quotations: here the user expressly acknowledges their source and does not compete with the original, because the public is not confused by the use. At the other end of the spectrum, is plagiarism, where the user copies another's work with the intent that the public believes him/her to be the creator of the borrowed materials – akin to 'stealing' credit from the right-holder. In between, fall the different uses under the parody exception. The more the use displays a humorous intent, the less likely the use will be found infringing. In relation to music parodies, pastiche usually displays a more subtle form of humour, such that the use might have to reproduce a greater amount from the original than it would be the case with an equivalent literary works to ensure the parody work *i.e.* it is the recognition of the original work by the public but without any confusion between the works which eventually avoids any competition between the original work and its parody[1338].

In any case, courts should avoid a subjective determination of what constitutes a parody. This implies that judges adopt a wide definition of humour to

[1338] It is easy to imagine a third axis could be added to this graph to include the importance of context. The greater the social value of the message, the more likely it is to qualify within the exception. Conversely, commercial speech is afforded less weight in the balancing, so the greater the commercial content of the parody, the less likely it is to fall within the exception.

encompass all its facets. However, this does not translate in free rein to parodists. Unless waived, authors retain their moral rights providing some, if limited, additional safeguard as to how the work can be altered.

Furthermore, the particular message of a musical parody cannot violate the fundamental rights of others and, especially, convey a discriminatory message. Parodists might fear that this opens the door to censorship. Yet, the number of situations where the freedom of expression and other fundamental rights are in competition should be rare.

But, in most cases, disputes will be concluded long before any prospect of trial. Therefore, a change of legislation is insufficient in itself to foster any increase in creation of parodies. It is necessary to ensure that business practices reflect and reinforce the intended goals of copyright.

3. The music business

Every wave of new technology has brought new challenges for copyright law. The same is true of the music industry which has to continually reinvent itself in light of these changes. Initially designed to control public performances of musical works[1339], the current business models adopted in the music industry seek to capture any revenue streams generated by performing, communicating and reproducing music. These result in new layers of complexity to the functioning of this industry itself[1340].

[1339] See the story on the birth of the French collecting rights society ('SACEM'). Kretschmer and al 1999, p. 269.

[1340] Pallas revisits the complexity of music licensing through the lens of dual competing narratives in music copyright. 'The first narrative explains the varying treatment of music businesses as being aimed at maintaining fair remuneration for copyright owners in light of changing technologies. The second narrative sees the varying treatment as being aimed at protecting incumbent entities from the competition brought about through changing business models made possible by technological advances'. Pallas-Loren 2014, p. 537.

The copyright regime and the recent CJEU ruling in *Deckmyn* seem to indicate that the concept of parody is fairly simple to grasp. Any parody meeting the two main requirements is lawful. Considering parodies as instantly recognisable, such interpretation should imply that actors within the music industry adjust their business practices. But simultaneously, the CJEU indicated that the parody exception has limits without revealing what these limits consist of. Given the uncertainty revolving around the exception, parody is seen as a threat to the exploitation of copyright-protected works by actors in the music industry[1341].

This section aims to evaluate how stakeholders have integrated the new exception in their practices, since copyright legislation (and therefore legal proceedings) form the foundation on which the music industry relies to establish licensing practices, a mainstay of their business.

3.1 The actors

Copyright aims to foster creation and dissemination of works by granting right-holders a financial reward. Translated into the music recording industry, this economic incentive benefits both content creators and intermediaries (publishers and record labels). Copyright law grants composers and songwriters[1342] exclusive rights in their authorial works, which they can license or assign to intermediaries (usually publishers[1343]) who, in turn, administer these rights on the author's behalf in return for a percentage of revenue[1344]. Predominantly, licences are made available for public

[1341] This reinforced by the fact that the parodies reproduce already well-known works and therefore, commercially successful works.
[1342] Creators of music and lyrics are members of the British Academy for Songwriters, Composers and Authors ('BASCA'), defending their interests.
[1343] Who themselves are members of the Music Publishers Association ('MPA').
[1344] Here, only economic rights are considered. Moral rights stay with the author (creator) unless they have not been asserted or they have been waived in writing. Publishers often

performances[1345] and reproduction[1346]. Additionally, producers obtain distinct rights in the particular recorded performance. Again, these rights can be assigned or licensed to intermediaries (record labels) in exchange for management and financial support for the promotion and distribution of the recordings. These sound recordings consist intrinsically of multiple works: the sound recording itself and the underlying authorial work(s) (Figure 17)[1347]. Thus, the music industry is uniquely characterised by its multi-layers of distinct rights and multiple copyright owners and licensees, with nebulous musical copyright at the centre of this complex web of rights[1348]. In this framework, the public are consumers who provide the money to sustain the industry by paying for recorded or printed music. Additionally, the wider public has a general interest in accessing knowledge and culture, of which music is a part.

require authors to partially waive their integrity rights to authorise them to make an adaptation of the work for a movie for example. See section 3.2.2 chapter 6.

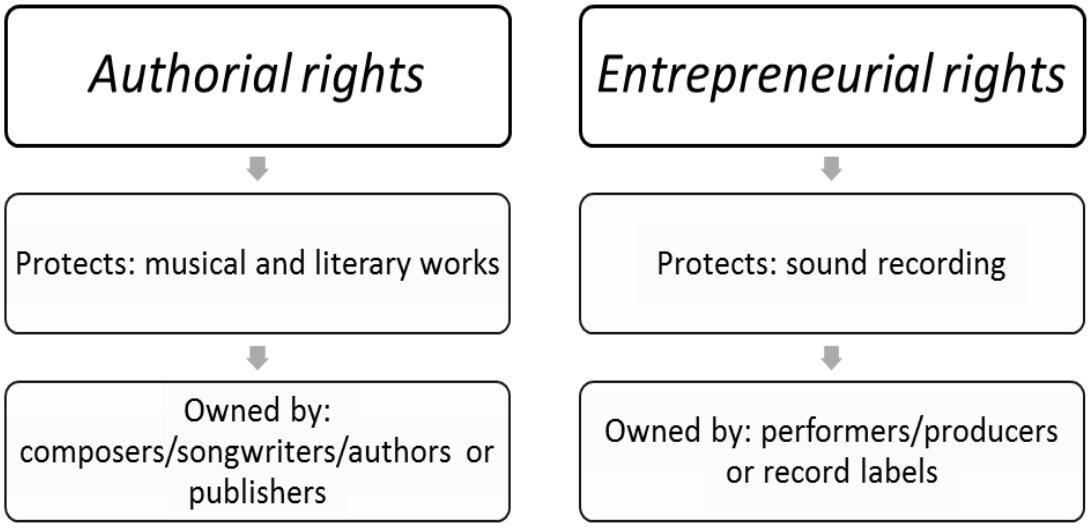
[1345] This license is essential to lawfully perform a protected work publicly (either live performances or radio broadcasts). This license is usually granted by PRS for Music ('PRS').

[1346] Mechanical license, traditionally granted by *MCPS* (part of PRS), refers to the authorisation for the reproduction or distribution of works such as through vinyl records, CDs or digital products.

[1347] This latter might include two authorial works depending on whether lyrics have been attached to the tune.

[1348] Gammons metaphor between copyright in music and Ying Yang. Gammons 2011, p. 21.

Figure 17



The new digital environment has altered this traditional model. In economic terms, prior to the advent of online music distribution, the market structure was depicted as an oligonomy[1349]. In other words, prior to the online distribution, many artists were ready to sell their works to intermediaries (the oligopsony role) while at the same time, many consumers were ready to buy end products (the oligopoly role). It is evident that copyright legislation is key for market players, because it is this which determines the extent of their control of distribution. This has now changed. Intermediaries (labels and publishers) were once essential, because content creators required their financial support upfront before they could create[1350] or disseminate their works. The rise of online music distribution has restricted the role of record labels because the upfront costs are now greatly reduced. In the new digital

[1349] i.e. 'companies act as an oligopoly to one group and an oligopsony to another'; Solo 2014, p. 171; MacMillan 2005, p. 48.
[1350] See section 3.2 chapter 6 and the endless inexpensive new processes to rework music such as digital sampling and mash-up etc.

environment, artists can record their tracks at home using inexpensive software, and then market their music themselves on an online platform[1351].

Collecting rights societies still have a crucial role in this new environment, in licensing the works and collecting the royalties on the right-holders' behalf. Right-holders are not obliged to register their works with a collecting right society, like PRS, and may retain control over the distribution and licensing of their works. Passing this responsibility for the management of songs over to PRS significantly reduces the otherwise high transaction costs[1352]. In both analogue and digital worlds, if any business wants to play music (whether in the form of a live performance or simply playing a radio broadcast), they require a licence from PRS. Equally, before a new online platform, such as Apple Music, Deezer or Spotify, are able to provide a valuable service, they require an extensive catalogue of music. Costs would be exorbitant if each of these platforms had to negotiate a licence with every individual right-holder, and such a catalogue would be impossible to manage, since each individual licensor might demand different terms. Therefore, PRS reduces the transaction costs, since PRS is able to grant blanket licences for its repertoire, and then remunerate the right-holders from the royalties it receives. Traditionally, two revenue streams flow back to right-holders[1353]: one stream to the composers

[1351] Solo 2014, p. 169. Yet, it is not implied that the role of record labels and publishers has been lessened but that the focus has changed. In the digital world, these intermediaries are fundamental for at least five reasons: provide high quality music, effectively enforce intellectual property rights, ensure fair remuneration to songwriters through the interplay of royalties facilitating the relations between lyricists and composers but also deciding which composition is better for which artist, tour revenues are not enough to provide fair remuneration to composers and songwriters and finally, while fan fundraising seems to increase, the amounts raised are not enough for emerging artists. Schultz 2009, pp. 685-755; Day 2011, pp. 61-103.

[1352] Pallas-Loren 2014, p. 539.

[1353] Bently 2009, p. 189.

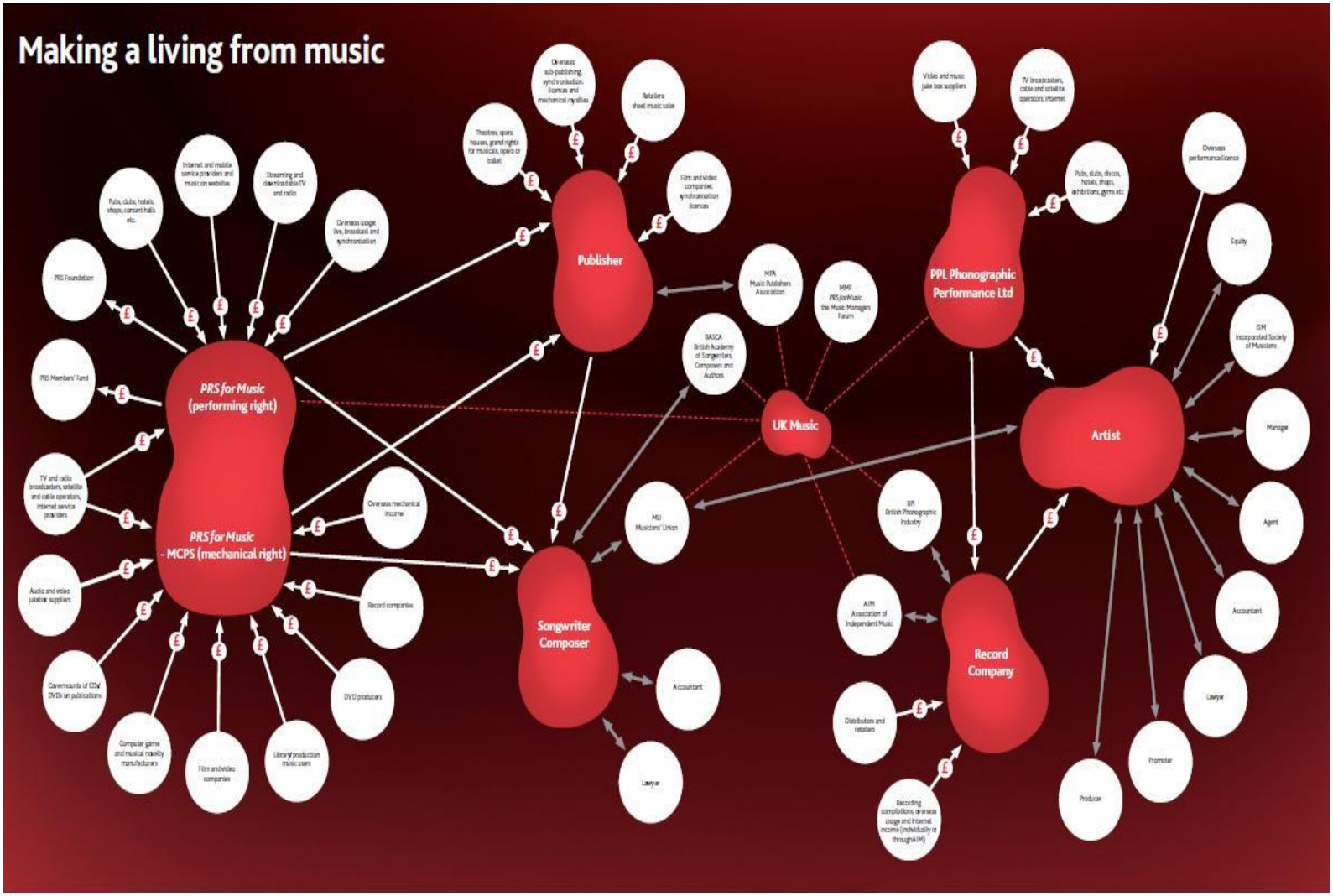
and songwriters[1354]; and one stream to the performers featured on the recording[1355].

In this setting, the music industry is based on 'control over publishing rights, marketing and promotional power and control of distribution'[1356]. But does this system foster creativity? Or, does this central control morph into a censorship power?

Based upon the current configuration of contractual rights arising out of copyright, it can be appreciated that the interests of creators and performers are not always aligned with those of publishers, labels, broadcasters and other businesses involved in the music-making and distribution[1357]. Figure 18 is a diagram which represents the different relationships in the music industry[1358].

[1354] These are called *mechanical royalties,* paid by MCPS for the reproduction of copies of the work. When the work is played in public or communicated to the public, the royalties are paid by PRS to the composer and songwriter.
[1355] These are paid by the record label and by PPL for the revenues deriving from communication to the public.
[1356] Tschmuck 2009, p. 254.
[1357] Pietilä argues, in relation to the South African music industry but can legitimately be extended to the global music industry, for a better control of copyright of composers, songwriters and musicians against the interests of publishers and labels. Additionally, she advocates for a re-modelling of the financial incentive system in place to prevent the concentration of ownership in the hands of few dictating the market. Pietilä 2009, pp. 229-50.
[1358] This poster comes from PRS.

Figure 18


Making a living from music
Publisher
PRS for Music (performing right)
PRS for Music - MCPS (mechanical right)
Songwriter Composer
PPL Phonographic Performance Ltd
UK Music
Artist
Record Company
Overseas sub-publishing, synchronisation, licences and mechanical royalties
Retailers sheet music sales
Theatres, opera houses, grand rights for musicals, opera or ballet
Film and video companies' synchronisation licences
Internet and mobile service providers and music on websites
Pubs, clubs, hotels, shops, concert halls etc.
Streaming and downloadable TV and radio
Overseas usage live, broadcast and synchronisation
PRS Foundation
PRS Members' Fund
TV and radio broadcasters, satellite and cable operators, internet service providers
Audio and video jukebox suppliers
Cover mounts of CDs/DVDs on publications
Computer game and musical novelty manufacturers
Film and video companies
Library/production music users
DVD producers
Record companies
Overseas mechanical income
MPA Music Publishers Association
BASCA British Academy of Songwriters, Composers and Authors
MMF PRS for Music the Music Managers Forum
MU Musicians' Union
Accountant
Lawyer
Video and music juke box suppliers
TV broadcasters, cable and satellite operators, internet
Pubs, clubs, discos, hotels, shops, exhibitions, gyms etc.
Overseas performance licence
Equity
ISM Incorporated Society of Musicians
Manager
Agent
Accountant
Lawyer
Promoter
Producer
BPI British Phonographic Industry
AIM Association of Independent Music
Distributors and retailers
Recording compilations, overseas usage and internet income (individually or through AIM)

Now that the actors are known, the following section focuses on the contractual relationships to understand their impact on creativity, and ultimately, their impact on the creation of parodies.

3.2 Publishing and recording contracts

Prior to the exception, parodists either ran the risk of being sued or had to secure a licence/permission for the use. This later generally resulted in an outright refusal from the right-holders (rarely the original authors themselves), who saw the use as denigrating their works. The artificial fragmentation of songs established by copyright legislation and the number of right-holders involved demonstrate the importance of a mandatory exception.

To develop successfully and release an album on the music market, songwriters often require the help of intermediaries: publishers and record labels[1359]. Although no publishing or recording contract is identical[1360], there are common provisions. These standardised provisions have been evaluated for this section, to assess their likely impact on original authors, right-holders and parodists.

3.2.1 Rights

The author of the original work or the producer of the sound recording is the first right-holder of the exclusive rights granted by copyright in the musical

[1359] This section only focusses on major labels (as opposed to indie labels for example). UK major labels are: *EMI Group*, *Sony Music Entertainment*, *Warner Music Group* and *Universal Music Group*. Traditionally, this meant that these labels had manufacturing and distribution facilities in main territories. The advent of online music distribution (i.e. download based models like *iTunes* and streaming based models like *YouTube*) impacted their essential role in distribution. Today, their main feature is to have important offices and qualified staff in different territories and ensure high quality music.

[1360] Thompson 2012, p. 37.

composition[1361], but these rights can be assigned or licensed[1362]. In order to create the relationships described in the preceding section, a typical publishing contract[1363] requires a songwriter to assign[1364] their rights in their songs to a music publisher. In return, the publisher promotes and exploits the work[1365], and provides the songwriter with financial support in the form of advances and royalties (typically a percentage of sales)[1366]. A publisher's main competence is onward licensing of the works to records labels, so the music is available to end-consumers. In the case of a typical record contract for a sound recording[1367], the producer of the sound recording assigns their copyright to a record label[1368]. In return, the record label provides upfront capital for the

[1361] Here, musical composition is understood as the legal sense as copyright subsisting in the music and in the lyrics, and copyright in the sound recording.

[1362] Section 9(1) CDPA.

[1363] The different forms of publishing contract include the (1) *administration deal* where no advances are made and the songwriter retains ownership. The administrator is responsible for registering the works with the collecting rights societies, license others to use the works, collects the licensing fees and prepare the accounts; (2) *sub-publishing deal* which is a mix between the administration deal and the exclusive deal. Only some rights are licensed to the publisher and the deal might come with some capital advance; (3) *exclusive deal* is generally a demonstration of trust from publishers in the talent. This deal comes with important capital advances and an assignment of exclusive rights from the songwriter. Harrison 2014, pp. 128-45.

[1364] Assignment implies a transfer of ownership to the co-contractor while licensing does not infer transfer of ownership to the co-contractor. Licensing generally occurs in B2B relationships like a deal between publishers of two territories in an administration contract. Yet licensing can occasionally happen between a songwriter and a producer bearing the advantage of eschewing creative control from the publisher's side but the inconvenient of not having any capital advance. Gammons 2011, p. 82.

[1365] From offering *mechanical licences* for the reproduction of a song on a sound recording (in the UK, this is usually done by MCPS but MCPS can only license for straight covers, not derivative works which requires the permission from writers and publishers), *synchronisation* licences for combining a song with visual images (film, advert etc), *performing rights* covering the right to publicly reproduce a song but this is not limited to live performances and includes broadcast and Internet making available to the public (this is generally achieved through PRS), print licences and grand rights for theatrical productions and musical. Harrison 2014, pp. 119-27.

[1366] Tschmuck 2009, p. 259.

[1367] These can take different forms: licence, exclusive long term recording contract, development deals, production deals and the most recent 360° model. Harrison 2014, pp. 73-89; Kretschmer and al 1999, p. 178.

[1368] In standard contracts, musicians exclusively license all exploitation of rights throughout the world during copyright protection to a label to ensure that all present and future performances can be recorded.

production, promotion, and distribution of the recording, as well as paying royalties based upon record sales. Record companies and music publishers use the royalties they receive to recoup the initial financial advances, but more significantly, these contracts allow intermediaries to control the uses made of these works and creations[1369].

3.2.2 Creativity control and moral rights

Songwriters and performers, like authors, are entitled to a bundle of moral rights associated with their copyright works[1370]. The first of the moral rights is the right to be identified as the author or performer of the work each time a performance is broadcast, or otherwise communicated to the public[1371]. Before moral rights take effect, the rights must be asserted pursuant to UK copyright law. For a songwriter or performer, these rights are most easily achieved by having a credit clause within the contract[1372]. The second moral right is the moral right to not have their work subjected to any derogatory treatment[1373], enabling creators to retain a certain creativity control over their works. Finally, songwriters have the right to be protected against false attribution whether in writing, orally or even implied[1374].

In the UK, copyright mainly focuses upon economic rights. Therefore, it is not surprising that moral rights can be waived via contract[1375]. This waiver can

[1369] Greenfield and Osborn 2009, p. 96.
[1370] As a reminder, moral rights only concern authorial works and therefore, not sound recordings. Moral rights were extended to performers in 2006 with the enactment of The Performances (Moral Rights, etc) Regulations 2006. See chapter 4.
[1371] In relation to performers, there are exceptions when it is not reasonably practicable to do so: Section 205C CDPA.
[1372] Sections 78 & 205D CDPA. Exceptions: sections 79 & 205E CDPA. See section 2.1 Chapter 4.
[1373] Sections 80 & 205F CDPA. See section 2.3.1 chapter 4.
[1374] Sections 84 CDPA. See section 2.2 chapter 4.
[1375] Section 87 CDPA. Moral rights can be waived in Canada as well but not in France or Australia. In these latter countries, moral rights will be enforceable irrespectively of contractual terms.

apply to specific works or works in general and can be done for existing or future works or creations. This has resulted in the standard music industry contracts to include a moral rights waiver in the widest possible terms[1376].

Even if moral rights have been waived, publishers will generally agree to impose contract terms in on-going transactions, which require songwriters to be given appropriate credit and restrict certain uses of the licensed work. For example, publishers generally state that any adaptations or re-arrangements of the work require the songwriters' consent. Typically, and prior to the introduction of the new parody exception, publishing contracts would classify parody in the same way, as a type of work which would only be licensed with the songwriters' permission. While such a clause might be justifiable under the old law, the task of the parodist should be facilitated by the mandatory nature of the new exception, since any contractual terms seeking to override the exclusion will be unenforceable. Previously, parodists were required to seek a mechanical licence from the publisher, subject to the songwriter granting permission, to obtain authorisation to alter the words or music. This introduction of the parody exception suggests that (assuming the parodist is confident that their parody satisfies the exception's requirements), seeking permission is no longer required, and a mechanical licence is superfluous. Yet one must remember that the exception acts as a defence. Therefore, the cautious might still prefer to secure a licence, aware that the exception is heavily reliant on particular facts, and therefore the outcome is less predictable.

Some songwriters might also be opposed to granting synchronisation licences for use of their work in commercial advertising. While these licences can be a significant source of revenue, certain songwriters are categorically opposed to such commercial use, or at least require that their prior authorisation is

[1376] Harrison 2014, p. 145.

obtained, so that they may vet which commercial ventures their work is associated with. Given that musical parodies for commercial adverts are unlikely to fall within the scope of the exception[1377], companies interested in using a musical work to promote their particular products should still seek mechanical and synchronisation licences, and might also require the songwriter's permission, depending upon the nature of the particular publishing contract in place.

3.2.3 Denigrating content

But what if the parodist is a party to a publishing contract? Can the publisher take action against the songwriter/parodist if its content is defamatory, for example? A publishing contract typically includes an indemnity clause, in which the artist agrees to indemnify the publisher against any third-party proceedings which might arise as a result of their work[1378]. Hence, if a parodist/songwriter's work goes beyond what is permitted under the exception[1379], the parodist will be financially liable and the publisher will be protected to a degree[1380].

The analysis in the preceding paragraph is based on the presumption that the parodist alters the musical composition to create the new work. But most popular musical parodies reproduce at least one of the works making up the musical composition using a sampling technique. If a parodist wants to sample a sound recording legally, they need a licence from the record label[1381] which owns the rights in the sound recording, as well as a licence from the right-

[1377] See section 2.2.1.2.2 chapter 6.
[1378] This clause is also found in most recording deals.
[1379] See for example the songs of the neo-Nazi music groups like *No-Remorse*, *Skrewdriver, RaHoWa* or *Skullhead.*
[1380] The publisher is therefore protected financially – to the extent to which the parodist has sufficient resources, against uses which do not fall within the exception as determined in chapters 3, 4 and 5 of this thesis. The user remains liable under the new law.
[1381] Or rather, from PPL given that major labels are members of PPL.

holders of the underlying composition[1382]. Therefore, a parody involving sampling which falls within the scope of the new fair dealing exception may be created without requiring any licence.

It must be kept in mind that the parody exception is merely a defence, which carries a degree of unpredictability. Weird Al Yankovic, a well-known parodist in the USA, is often cited by music industry representatives as the appropriate role model which parodists should follow. Despite the fact that a fair use defence is available for parody works, Weird Al prefers certainty by seeking appropriate permissions in advance for any parodic use. Because of his approach, the relevant right holders are now more willing to countenance his use, and so he has secured greater bargaining power. In practice, even well-established artists are reluctant to embark on litigation to determine whether their use will be ultimately deemed fair. More successful artists might be a more attractive target for legal proceedings. Therefore, for some, advance clearance, although perhaps unnecessary, is just a simpler option[1383].

3.2.4 Conclusion

In summary, these practices demonstrate why the mandatory character of the exception is crucial to the realisation of the objectives of the exception. Yet, the parody exception is a defence. As such, cautious parodists will still seek an arguably unnecessary licence for their use. In contrast with the old regime, any licence should not be subject to the authors' or creators' permission, unless the use is for a commercial advertisement. In this case, because the use is not for artistic purposes but driven by commercial motives only, right-holders and/or songwriters might need to give permission.

[1382] Which most likely will be from the publisher because of the transfer of copyright ownership through the publishing contract.
[1383] Mcleod and Dicola 2011, p. 239.

Therefore, the exception renders the copyright regime more in line with music making, since it acknowledges that certain borrowings are permissible, but it is potentially restricted, since the copyright objectives might be over-ridden by contractual terms. Even if the contractual terms are unenforceable, this finding would only result from the formal determination of legal proceedings, and only a small proportion of relevant cases ever reach this stage. In the meantime restrictive contract terms serve a deterrent effect. As most musical works likely to be parodied are registered with collecting rights societies, the following section explores the extent to which their practices are likely to encourage the creation of musical parodies.

3.3 Collecting rights societies

In essence, copyright law grants exclusive rights for individual authors to exercise themselves, or to transfer to other parties able to exploit them more successfully. But the fragmentation of ownership of rights which is particularly prevalent within the music section creates barriers for those who need to license works and those owners trying to monitor how their works are used. Collective rights management organisations have been established to administer rights on behalf of right-holders. [1384] Essentially, they provide a practical and efficient mechanism to administer and enforce copyright[1385].

The advent of the Internet has not altered their role, but arguably requires an expansion of territorial activity from administering rights within a single national territory to, *e.g.* Pan-European licensing[1386].

[1384] Section 116(2) CDPA defines licensing body.
[1385] Harrison 2014, p. 365.
[1386] This is undergoing as the European Commission approved the joint venture between PRS, STIM (Sweden) and GEMA (Germany) for cross-border licensing of online music. See press releases from PRS on the launch of the Hub on the 20/7/2015 available at *https://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/prs-for-music-stim-and-gema-establish-the-worlds-first-integrated-licensing-and-processing-hub.aspx* and from the European Commission, Mergers: Commission approves joint venture for cross-border licensing of

3.3.1 Modus operandi

As indicated in section 3.1, one of the main roles of collecting societies, such as PRS, is to grant blanket licences. The society has the ability to license to an interested party its entire repertoire, which may comprise many thousands of works, for a particular period and at a fixed rate[1387]. This provision of a 'one-stop' service enables businesses, such as radio stations, to secure licences for sound recordings expediently to meet their business needs. Additionally, the Phonographic Performance Limited ('PPL'[1388]) has a wider reach, and collects income internationally in respect of use of the neighbouring rights granted to performers[1389]. In this way, collecting societies, like PRS and PPL, manage copyright for the authors, songwriters and performers of musical compositions. Their activities extend beyond granting licences to third parties on the owner's behalf, to monitoring that use of the works is in compliance with the agreed licence terms, and collecting the royalties due. Royalties generated from exploitation of the works managed are distributed to their members. Operation of the societies is funded by charging each member an administration fee, which is usually a percentage of the gross income collected.

On becoming a member, some of the right-holder's exclusive rights are either assigned or licensed to the collecting society. Whilst PRS manages performing rights, MCPS administers for the right to reproduce the work[1390]. Aside from efficiencies gained in administration and enforcement of their rights, members

online music between PRSfM, STIM and GEMA, subject to commitments (Brussels, 16/06/2015) available at *http://europa.eu/rapid/press-release_IP-15-5204_en.htm*

[1387] The latter can take the form of a flat fee or a percentage of earnings.

[1388] PPL is the record industry's licensing body. It licenses public performances and negotiates collective agreements with broadcasters but does not include an anti-piracy unit.

[1389] In their attempt to provide a one-stop service, PRS and PPL sometimes provide joint licences to clear both the master and the publishing rights. While these joint licences are rather limited at the moment (small workplaces, community buildings and amateur sports clubs), improvements are in the pipeline. Harrison 2014, p. 372.

[1390] MCPS is itself owned by PRS, but remains autonomous in its decision-making, although PRS manages its royalty processing services.

also gain a significant advantage in terms of being able to leverage greater collective bargaining power to better serve their interests. This is even more important in the digital age, with the emergence of various online music platforms which base their business model upon exploitation of unlicensed music. With their collective muscle, the societies are better placed than any individual right-holder to police unauthorised uses and negotiate royalty rates[1391].

3.3.2 Licensing for the purpose of parody

One might imagine that a parodist seeking a licence to reproduce an earlier work would simply approach MCPS. Yet, MCPS does not have authority to license the reproduction or adaptation of a work for parody[1392]. This means that parodists are required to negotiate with authors and creators directly[1393]. If a parodist is successful in tracking down the relevant parties and securing permission (or decides instead to 'run the risk' and proceed without consent) and then wishes to commercialise their work, they might elect to register their parody with PRS[*1394*]. The current PRS registration form requires any parody to identify itself as such, and to detail the previous works on which it is based. As the collecting societies are privately owned, it is the membership which sets the remuneration formula to be applied to particular types of works. PRS thus determines how to allocate any licensing revenue generated by the registered parody between the parodist and the right-holders of the original work,

[1391] On the benefits of joining PRS: Gammons 2011, p. 39.
[1392] See clause 4.5(a) of the PRS Limited Online Music Licences available at http://www.prsformusic.com/SiteCollectionDocuments/Online%20and%20Mobile/loml-terms-and-conditions.pdf
[1393] Section 3.2 demonstrated that licensing for parody purposes remains often outside the rights transferred or licensed to publishers and labels requiring parodists to negotiate with every author, songwriter, composer and artist involved.
[1394] Which only happens in rare cases.

irrespective of any direct agreement reached between the parodist and the right-holders.

3.3.3 Exploiting a parody commercially

Prior to the introduction of the new UK parody exception, the royalty formula for any PRS-registered parody allocates *all* the income generated from exploitation under the PRS scheme to the right-holders of the original works, not the right-holder of the parody. Under the new regime, this practice has the appearance of an impermissible contract which seeks to override the exception. Furthermore, lack of remuneration does little to incentivise parodists to create such works [1395], thus undermining one of the stated policy goals of the new legislation[1396].

In France, with its established parody exception, SACEM[1397], the equivalent of PRS in France, operates a similar regime for musical parodies, but in this case 12.5% of the gross income of the revenue generated from the reproduction right is allocated to the parodist, while the remaining 87.5% is allocated to the right-holders of the original authorial works. Similarly, in terms of revenue generated from the performing right, one-sixth is allocated to the performer of the parody, while five-sixths is allocated to the performance right-holder of the original[1398].

One argument which might be advanced to justify the collecting societies' approach is that there is no right to parody, rather the parody exception is

[1395] Tafforeau 2013, p. 238.
[1396] Currently, policy makers seem to dress up any change in law in terms of economic growth – whereas the more general point is probably just one of fairness. Yet one of the strongest rationales for permitting parodies is justified on a more rounded view of what adds value to society.
[1397] It is noteworthy that while PRS and MCPS are separate bodies under the same brand, SACEM manages both performing and reproduction rights for its members.
[1398] Remuneration keys come from an interview between Saceml and SACEM: http://saceml.deepsound.net/reponses_sacem.html

merely a (limited) defence (in certain cases). As such, why should private commercial entities revise their practices to accommodate what might be the exceptional case, rather than the norm (if the exception was a right[1399])? Is a parodist even entitled to remuneration for their parody?

The answers to these questions depend upon the type of cultural diversity which society is seeking. After all, this is what the copyright system is meant to promote. Because the revised law recognises this particular art form is legitimate, and because it is reasonable to assume that an independent copyright subsists in the parody[1400], its creators should be entitled to exploit their work in the same way as any other creator can.

But this is not tantamount to saying that parodists should be able to 'free-ride' on the successful works of others. The exception comes with safeguards through the mandatory requirements which are attached. Also, given the difficulty of predicting the outcome of legal proceedings, commercially-motivated parodists using sampling techniques or creating parodies for advertising purposes will still seek licences for their use, and, as such, collecting societies gain from facilitating further licensing of such works.

In this regard, it is worthwhile considering whether there may be a role for the Copyright Hub[1401]. This was launched in September 2013 to provide a common platform for online transactions for use by the creative industries, and was established in response to a proposal of the Hargreaves Review[1402]. The Hub enjoys wide support from industry actors, including PRS and PPL. Its goal is to facilitate content licensing, as well as providing information about

[1399] See section 2 chapter 3.
[1400] Although the CJEU did not include originality as one of the requirements for the application of the exception, given the low originality threshold of *Infopaq*, it seems that originality will be met, if the 'distancing' requirement is met. *Deckmyn*, [21].
[1401] A beta version of this private initiative can be accessed at www.copyrighthub.co.uk.
[1402] *Digital Opportunity*: supra note 382, p. 33.

copyright law to those wishing to create. It is based on the simple idea of creating a single destination where any individual can find out how to secure permission to use any particular work. This initiative is still at an early experimental stage, currently operating in relation to photographs and images only.

While the project is warmly welcomed, and while it may prove more practically effective than any statutory or judicial approach, it seems that it has limited impact for parodies, not least because PPL does not license works for parody uses. However, it may be beneficial for those right-holders who are willing to consider licensing their works for such uses, since they would be able to use this interface to set licence terms for users. The Copyright Hub has the further advantage that content providers have flexibility to decide whether or not to license on a case-by-case basis, as well as the level of fees and the period of the licence. Besides, the Hub will only be valuable if it is reliable and, as is particularly pertinent in the case of musical works, it properly identifies all the relevant right-holders which need to agree to the work. Only then may users be assured that they have all necessary permissions in place to avoid legal proceedings[1403].

Given the limitations of the Hub, how might the current system be improved to encourage the creation of musical parodies? One way might be via compulsory licences, as these are already well-established in the music business. In the US, for example, statutory compulsory mechanical licences exist between record labels and publishers, so obviating the parties having to negotiate with each other for this use[1404]. While an equivalent compulsory

[1403] Otherwise we might end up in a situation like the Verve saga where the band had sought licence clearance for sampling the Rolling Stones but had missed one publisher which led the Verve to have to give up 100% of the royalties on the album opener *Bittersweet Symphony*. This saga led some scholars to argue for the establishment of a single right-holder for downstream users to license from. Pallas-Loren 2002, p. 677.
[1404] Toynbee 2009, p. 135.

licence scheme does not exist in the UK, the idea is attractive. Parodists doubting the legality of the work would always be able to secure a licence. Yet, such a scheme is not without its hurdles[1405]; to be both fair and effective, the licence fee should take account of the amount borrowed, for example[1406].

The issue of whether the music industry business practices foster or hinder music parodies is further exemplified by the agreements which collecting societies have reached with online sharing platforms, as well as the operation of the platforms themselves. The next section considers these issues further.

3.4 Online sharing platforms

The launch of YouTube in 2005 (owned by Google since 2006) marked the start of a new battle for collecting societies: controlling unauthorised use of music by private individuals. Online video distribution platforms, such as YouTube, not only simplify the way we access content, but also facilitate the uploading and distribution of content. The site combines both amateur and professional content on a single website. By inviting individuals to *Broadcast Yourself*, YouTube quickly became the most popular online sharing website, with global reach, and it hosts countless parody works in all their forms. In addition to simplifying the sharing of home movies, YouTube also simplified online piracy and infringement. So, copyright owners started a never-ending game of notice-and-take down procedures against YouTube users.

3.4.1 Content ID

In 2007, YouTube introduced a content ID recognition system. This uses a complex algorithm to cross-check all newly-uploaded content for copyright

[1405] Including further legislative changes, or a fairly about-turn from the industry to establish a voluntary scheme.
[1406] This would also be a solution for the sampling music and other parodies which are not clear-cut cases under the law.

infringement against an established database of works built upon the collecting societies' repertoires. The algorithm detects complete and partial matches. Upload of any content which finds a 'match' results in an automated notification being sent to the relevant right-holders. Right-holders are given five possibilities: (1) do nothing; (2) block the content; (3) mute any audio; (4) add an advertisement and collect the revenue; or (5) monitor its viewing statistics.

Re-visiting the UK's case for change, this is how the *Newport State of Mind* parody fared, once the parody was uploaded onto YouTube. The author of the musical work on which the parody was based, Jay-Z (or rather his legal representatives), received a standard form notice from YouTube, alerting them of a potential copyright infringement. Steps were taken to block the work. Faced with the additional threat of legal proceedings, the parody's creator, Delaney, sought a licence for the use, but this was not successful because Jay-Z does not want his work to be parodied.

YouTube has not revised its procedure since the parody exception was introduced, meaning any parody uploaded on the site will still be identified as a potential copyright infringement. The YouTube procedure fails to take proper account that, in the vast majority of cases, the parties do not have the same bargaining power, so it will always favour the right-holder's position. Although the uploader has some limited opportunity for dialogue with the right-holders to try to persuade them that their parody is lawful given the exception, there is no independent arbitration. The decision to block lies with copyright owners[1407]. As a result, right-holders have *de facto* power to censor

[1407] This is explained by the safe harbour provisions which dictate that online intermediaries should not be aware of the infringing content to avoid liability. This led intermediaries to prefer blocking content rather than investigating whether the content is indeed legitimate. Additionally, agreements exist between PRS and YouTube to automatically take down content. Yet in the USA, Google announced on 19/11/2015 that they will start to proactively defend uses under the cover of fair use even in court if necessary. Parody and critique are

parodies on YouTube, and to deprive parodists of the recognition of their work, as well as remuneration. Whilst this procedure is not limited to parodies but to any content reproducing earlier works, it ultimately renders the creation of parodies more difficult.

3.4.2 Licensing online sharing platforms

It might be said that the notice-and-take-down procedure has slowly transformed into 'notice-and-share' in the revenue systems. Collecting rights societies like PRS grasped an opportunity to generate revenue from online platforms. Licences have been agreed between PRS and YouTube, and revenue generated is passed on to society members. These joint online licences are not limited only to transformative uses, but cover all works included in the collecting right societies' repertoire. One notable characteristic of these deals between PRS and YouTube is that they are highly confidential[1408]. However, based upon what little information is available, the agreement does not seem to take account of works which are lawful because of the copyright exceptions. For example, the PRS website states:

> If PRS for Music becomes aware that a members' work fits the definition of derogatory use, PRS for Music can notify YouTube on that member's behalf and work with YouTube to remove that content. Under the Joint Online Licence, a derogatory use is defined as a parodied work, or one that is insulting or detrimental to the composer of the commercially released sound recording[1409].

ceited as example. Press release available at: http://googlepublicpolicy.blogspot.nl/2015/11/a-step-toward-protecting-fair-use-on.html?m=1 (date access: 19/11/2015).

[1408] So confidential that even the members of PRS are kept in the dark which led BASCA has been asked to stop this secrecy for more transparency.

[1409] Available at http://www.prsformusic.com/creators/helpcentre/pages/youtubedealhelp.aspx (access date 21/07/2015).

Whether such clause in a new agreement reached earlier this year remains is unclear, but there is nothing to indicate that any changes were made to reflect the new parody exception. In these circumstances, contract law is being exploited to permit these powerful actors to dictate what content is created and disseminated, regardless of the objectives of copyright law[1410].

Given that, on one side, Google is seeking to monetise data and collecting bodies, on the other side, seek to maximise the revenue generated for right-holders, the careful balance crafted by legislators in copyright law is simply lost. One solution may be the implementation of an alternative dispute resolution ('ADR') scheme, such as mediation or arbitration[1411], which would provide parties with a framework when negotiating a licence for (parody) use[1412]. It seems feasible that the Copyright Tribunal[1413] could oversee such proceedings[1414]. Referral to an independent third-party is appealing because it would enable parodists and other creators of transformative content to overturn decisions of YouTube's internal dispute resolution system[1415]. Nevertheless, it may stretch the abilities of at least some ADR schemes to set an appropriate licence rate, having regard to all the various factors of this

[1410] See the study carried out by Kretshmer and al. which describes the uneven bargaining powers result in outcomes favourable to right-holders who continue to dictate the terms of the licence which often conflicts with copyright statutory exceptions. Kretschmer, Derclaye, Favale, Watt, *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy* (SABIP), 2010. Available at SSRN: http://ssrn.com/abstract=2624945.

[1411] Thompson provides a summary on arbitration system within the music industry in the UK. Thompson 2012, p. 239.

[1412] This solution is also shared by Benabou, Benabou, *Rapport de La Mission Du CSPLA Sur Les "Oeuvres Transformatives"* (2014), p. 72.

[1413] Sections 149, 205B and Schedule 6 CDPA.

[1414] Yet currently, the copyright tribunal only deals with commercial uses and would have to be extended to non-commercial uses too.

[1415] It must be reminded that to benefit from safe harbours provisions, YouTube must not be aware of the content uploaded on its website. Therefore, it often prefers to consider alleged infringing content as infringing rather than analysing whether in reality the use is exempted of infringement by the interplay of exceptions. Anyway, it seems a bit tedious to ask private bodies to decide cases.

creative industry. A further option is to establish a 'licence of right' system, as currently established in CDPA in respect of design law. Any design protected by UK unregistered design right is subject to a compulsory licence for the final five years of protection. Anybody, including an infringer, must be granted a licence. If the parties cannot reach an agreement on the terms of use, then an application can be made for the licence terms to be determined by the Comptroller[1416].

3.5 Conclusion

There is more to the parody exception than a desire to foster economic growth. This change in legislation primarily aims to add social and cultural value in our society. Yet, the way in which business actors rely on copyright undermines these other goals. Arguing that the exception is vague and unpredictable, business practices built a system fortifying established copyright-protected works by considering all unauthorised reproduction of protected works as unlawful regardless of the application of the parody exception. Ultimately, such a system positions the parodist in a no better position than prior to the exception.

How much parodists should be tolerated is a difficult question to answer, and one which is further complicated by the fragmentation of copyright's exclusive rights between different actors in the music industry, each of whom has different and potentially conflicting interests. All too often, the net result is a strengthening of the established position of the right-holders, at the parodist's expense. While the introduction of a specific parody exception under copyright law may (ultimately) go some way to redress the balance, this, in itself, is insufficient to break down the barriers parodists face which derive

[1416] Section 237(2) CDPA.

from established practices implemented by the key commercial actors in this creative sector.

The mandatory nature of the exception provides a parodist with some ammunition when their lawful parody clashes with an unyielding contractual clause. Yet, the position still remains uncertain whether the parody exception is such that a parodist is entitled to exploit any lawful parody commercially, on the same footing as any other original copyright work. Certainly, by failing to revise their practices in light of the legislative changes, the major music industry actors have taken the stance that, whatever the legal reality, musical parodies undermine the interests of original right-holders, such that parodists should not be able to generate revenue from their work.

While right-holders of the original should be protected against infringers who should not be able to shield behind the parody exception when it is not a true parody, the current attitude of blanket denial is likely to thwart the parody exception, and impact upon the proper functioning of the internal market. While waiting for an action at EU level, the UK legislature could take action at a national level to mitigate the current *status quo*. Either through the adoption of ADR schemes (which are known to operate well to resolve disputes concerning registration of domain names, and as implemented in consumer law to settle disputes between consumers and traders[1417]), or through the introduction of copyright licences of right (used in design law). Both aim at firstly, rebalancing the unequal bargaining positions of the parties to any dispute by encouraging negotiation; secondly, providing access to an

[1417] The Alternative Dispute Resolution for Consumer Disputes Regulations 2015 2015 No. 542; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC OJ L 165, 18.6.2013, pp. 63–79 and Regulation 524/2013 of the European Parliament and of the Council of 21/05/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC OJ L 165, 18.6.2013, pp. 1–12.

independent third-party to bring an objective view of the relative strength of the case; and finally, concluding a legally binding agreement as to future uses.

Finally, a solution closer to home lies in the interpretation of the exception. It is beneficial to identify business practices which hinder the ultimate goal of creativity, but good business practices can only be adopted where the law is clear and predictable. Current actors within the music industry perceive uncertainty around the application of the exception, justifying the barriers exposed through this section. Yet, this thesis has demonstrated that the exception is not as unpredictable as argued by the actors within the industry.

Conclusion

Through the analysis of musical parodies, this chapter has explored the troublesome aspects of the copyright paradigm in light of policy goals of fostering creativity and adequately protecting property rights, without creating monopolies in shared cultural works. From a copyright policy perspective, it has shown that it is only possible to provide proper incentives to create if the law takes adequate account of actual creative processes in play.

A better understanding of music-making demonstrates that it is possible to copy a substantial amount of an earlier piece, but the end result might sound very different; and the fact that two music compositions sound alike does not mean that there has been substantial copying under copyright principles. Currently, there is much scope for copyright legislation to be improved to better reflect the role of the creator. However, the introduction of a parody exception represents a positive step forward to address the current mismatch, since it focuses more on the promotion of creativity, and provides some recognition that music borrowing and reuse are integral and essential, rather than detrimental, to the creative process in music.

From a legal dimension, the current infringement test inadequately respects the nature of music, by treating it as any other type of private property. Section 1 of this chapter exposed the importance of acquiring a basic knowledge of music (or any other creative discipline). Otherwise, it is unrealistic to expect that copyright principles could be applied to such an area in a manner which reflects the law's underlying objectives appropriately. To this end, it is proposed that the original works and parody should be considered as wholes, when determining whether the parody exception applies, rather than fragmenting either work into the different copyright elements it embodies.

Finally, from an industry dimension, the key question which remains is to identify which rights and freedoms a parodist enjoys, if their parody is lawful; and in particular the extent to which a lawful parody may be commercially exploited. This shapes the minimum levels of control which right-holders should be able to exert to foster music creativity and a growing economy. Here, care is necessary to ensure that the *status quo* does not create too high a barrier for entry for new creators in the entertainment industry. This is ultimately counterproductive in a sector where commercial success is so dependent on changing tastes and styles. Major players within this creative industry should (be made to) adapt their business practices to reflect policy goals which seek to enrich the cultural environment by increasing the number of new works which are available, if only because it is in their own long term interests to do so.

Overall, the parody exception adds more credibility to the copyright paradigm because it recognises the nature of music composition involves borrowing or taking inspiration from others, before transformation. Nevertheless, it requires that all levels (policy, legal and industry) accept the consequences of this new provision and adapt their practices. This may require the judiciary to reframe how questions such as infringement are assessed. Similarly, it is

uncontroversial that intellectual property is important for the music, in terms of production, distribution and consumption, but current music industry practices focus almost exclusively on distribution concerns. A policy perspective must acknowledge the need for a fair balance between all actors if creativity is to be maximised. At this early stage, the jury is still out on whether the parody exception will prove to be efficient. Yet, full efficiency will never be achieved if business models continue to equate parodies with plagiarism and denigrating use.

Conclusion

This project attempted to determine the meaning and scope of the parody exception in copyright law. While the public will easily identify the parody purpose, there are certain cases blurring the boundaries of parody. This project aimed to discover what the limits to parody are.

Understanding the parody exception required an understanding of how the parody exception (within copyright law) interacts with other bodies of law, particularly contract law and human rights law. In an attempt to evaluate the impact of the exception on the activities of creative industries, this project focused upon the role the exception might play in respect of musical parodies within the UK music sector. The aim of this final conclusion is to underline why it is believed that the introduction of a parody exception constitutes an improvement over the pre-existing law in the common law countries, and to comment on the important role of copyright exceptions within the wider copyright paradigm.

As parody constitutes an artistic expression and genre, it seemed essential to discover the term's meaning and evolution in different fields of art, as a precursor to understanding its meaning in law. The first part of chapter 1 explained why defining parody is so difficult: its meaning changes over time, and across art field and with context. Yet, it is clear that parody is something distinct from a mere re-working or altered copy. A parody communicates a new message by reproducing an earlier copyright-protected work. The true essence of parody is its distinct relationship with its earlier work which is simple for the public to grasp. This relationship retains an independent status in the minds of the public, despite its modification. Hence, the public has a specific role to play in any parody. A parody will only succeed if the targeted public recognises the parodied work.

The evaluation of the second part of chapter 1 concludes that, despite a lack of any adequate definition which captures the many facets of parody in the field of art, the concept of parody seems fairly simple to grasp and the Study Countries are correct in their decision to leave the term undefined in their copyright legislation. The comparison emphasised how EU harmonisation and interpretation of parody in *Deckmyn* will impact on the manner in which national judges within the EU will determine whether a use is made 'for the purpose of parody', as required by the parody exception. The study of the position in Canada and Australia sought to identify how a difference in legal tradition and case law influences the understanding of the role which a copyright exception serves. For example, Canada's more liberal interpretation of the exception's purpose creates the potential to include related concepts, such as burlesque, spoof, travesty etc., within the parody exception, while Australia's interpretation is more likely to be stricter.

Chapter 1 concludes that the most appropriate way to define parody is, purposively, by reference to its two main characteristics: a humorous intent and absence of confusion. This serves as a yardstick throughout the project, because the purpose of parody inherently influences not only the exception's scope, but also its position within the broader legal system.

Having established the subject-matter of the exception in chapter 1, chapter 2 considers the legality of a parody exception within national copyright law, having regard to the international law obligations of the Study Countries. Despite the remaining uncertainties concerning the interpretation of the Three-step Test at international level, chapter 2 makes the important finding that the parody exception in the Study Countries should satisfy this mandatory test. By framing the exception as 'fair dealing' or subject to 'the rules of the genre', national legislators ensure that parodic use does not conflict with the normal exploitation of the original work, and does not unduly

prejudice the interests of right-holders (an aspect developed further in Chapter 3).

Chapter 2 also engages with the consequence of requiring national courts to apply this Three-test Test, to specific cases. While of the four countries, only France has elected to include such a test within its copyright legislation, EU harmonisation seems to extend this additional requirement to all EU Member States. Yet in this context, the test seems best understood as a refining 'proportionality' test, which this project hones further in chapter 5.

To meet the Three-step Test, the Study Countries shaped a parody exception according to their own legal traditions. Chapter 3 attempts to delineate the scope of the parody exception relative to a right-holder's exclusive rights. Given the lack of case law concerning this exception in all but one of the countries examined, this chapter attempts to identify factors to guide a court's application of this law. At this stage, it is argued that the need for 'humorous intent' is most practically measured in a negative manner – as the absence of harm to the right-holder, or the copyright protected work, as measured by an objective standard. This permits national courts to take account of all facets of humour, but also sets limits on the use falling within the exception, as parody requires the public to recognise that a parodic reference is being made to an earlier work, as demonstrated by a lack of confusion between the parody and its underlying work. Here, the comparative analysis has identified several factors which courts might adopt, according to the particular principles of interpretation applied in each jurisdiction. This exercise underlines that, despite the different principles applied in EU Member States, Australia and Canada, a similar interpretation of the exception might be expected.

Chapter 3 tackles an important question: is it possible for a parody which is commercially exploited to benefit from the parody exception, or is a

commercial nature sufficient to render it unlawful? The analysis identifies that the latter conclusion is too sweeping. Yet, a parodist's motivation is essential when determining whether the exception will apply. Here, it is essential that the unauthorised work is made for the purpose of parody. A use which is being exploited based upon the comment which it makes may properly fall within the exception irrespective of commercial exploitation, whereas one which seeks commercial benefit from the work it reproduces falls properly outside it.

But a consideration of any copyright exception is incomplete unless its interaction with the author's moral rights is also resolved. Although moral rights factor in proper satisfaction of the Three-step Test, the parody exception does not extend to moral rights. Chapter 4, therefore, evaluates the extent to which a parody respects, or clashes with, the moral rights associated with the parodied work. The comparative analysis reveals that perception of moral rights and economic rights is crucial, and this varies between the legal traditions. The French conception of author's rights perceives economic and moral rights as two sides of the same coin. This enables a direct correlation between the two regimes to be established, and avoid any conflict. The picture is more complex in common law jurisdictions, as moral rights are considered to be independent of the economic rights vested in the same work. Here, the exercise of moral rights has the potential to thwart the aims of the parody exception. Yet, an analysis of the paternity right, right against false attribution and integrity right demonstrates that, if properly construed, parodies permitted under the parody exception will avoid infringement of these moral rights too.

Chapter 5 considers the relationship between copyright and human rights. It establishes that copyright and parody both enjoy protection as fundamental rights (through the right to property and the right of freedom of expression,

respectively), but that neither is absolute. Given this, the core of this chapter attempts to demonstrate how, when these two fundamental rights clash, a careful balance can be struck between all the competing interests in play to arrive at the ultimate goal: maximum realisation of all the fundamental rights at stake. As a result of this balancing exercise, chapter 5 identifies how the outer limits of the parody exception are defined. Although traditionally, copyright is rather 'content neutral', the CJEU, in *Deckmyn,* seems to have set some limits by requiring national courts to balance, proportionally, the fundamental rights involved in any particular case. This chapter provides guidance as to how interests may be balanced in rare cases where a parody conflicts with other fundamental rights, such as the principle of non-discrimination.

Finally, having established the legal regime applicable to parodies in Chapters 1 to 5, chapter 6 applies this regime to a case study of a particular type of the genre: music parodies. This analysis evaluates the likely impact of the newly introduced parody exception on the UK music sector to evaluate its effectiveness. If the parody exception does not succeed in relation to this creative endeavour, then it may be reasonable to assume that the ultimate objectives underlying the exception will fail to live up to its expectations.

To this end, chapter 6 looks beyond copyright law's infringement regime and examines current business practices within the UK music industry, which rely heavy upon standard form contracts. In this respect, the UK is the only of the Study Countries which has rendered the parody exception mandatory, meaning that parties cannot use contractual terms to circumvent the parody exception. Nevertheless, chapter 6 demonstrates how, in the music industry at least, contracts are still likely to be more influential in the creation and exploitation of parodies under the new copyright exception, having regard, for example, of the Content ID system in use on the major online sharing

platforms, the licensing schemes and the way collecting rights societies' operate. These market-based barriers will clearly stymie the realisation of the parody exception's objective: to facilitate the creation and exploitation of parodies.

The challenge, therefore, that this project sets as its key recommendation, is how best to re-frame the parody exception as a *right* to exercise freedom of expression, and not merely a permitted use.

Bibliography

Books

Adeney E. (2006), *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006)

Andrew, NQC., Millar, GQC. and Sharland, A. (2009), *Media Law & Human Rights* (2nd ed., OUP, 2009)

Atiyah, P.S. (1979), *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979)

Baasch Andersen, C. (2011), 'Applied uniformity of a uniform commercial law' in Andenas, M., and Baasch Andersen, C. (eds), *Theory and Practice of harmonisation* (Edward Elgar, 2011)

Bailey, J. (2005), 'Deflating the Michelin Man' in *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005)

Bakhtin, M. (1981), *The Dialogic Imagination* (University of Texas Press, 1981)

Barendt, E. (2005), 'Copyright and Free Speech Theory' in Griffiths, J. and Suthersanen, U. (eds), *Copyright and free speech* (OUP, 2005)

Bellefonds, X.L. de (2002), *Droits d'auteur et droits voisins* (Dalloz, 2002)

Benabou, V. and Dussollier, S. (2007), 'Draw me a public domain' in Torremans, P. (ed) *Copyright Law A handbook of contemporary research* (Edward Elgar, 2007)

Ben-Ishai, S. and Percy, R.D. (2014), *Contracts: Cases and Commentaries* (8th edition, Carswell, 2014)

Bently, L. (2010), 'Introduction to Part I: the history of copyright' in Bently, L., Suthersanen, U. and Torremans, PLC (eds), *Global Copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (Edward Edgar, 2010)

Bently, L. and Sherman, B. (2014) *Intellectual Property Law* (4th ed., OUP, 2014)

Berenboom, A. (2009), 'La parodie' in Cornu, E. (ed.) *Bande dessinée et droit d'auteur* (Larcier, 2009)

Bergel, J-L. (2001), 'Methodes et principes de coordination des regles juridiques' in *Methodologie Juridique* (1st ed., PUF, 2001)

Bloch, P. (2002), *Image et droit* (L'Harmattan, 2002)

Burrell, R. and Coleman, A. (2005), *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005)

Burrell, R. and Stellios, J. (2005), 'Copyright and Freedom of Political Communication in Australia' in Griffiths, J. and Suthersanen, U. (eds), *Copyright and free speech* (OUP, 2005)

Buteau, M. (1909), *Le droit de critique en matière littéraire, dramatique et artistique* (L. Larose et L. Tenin, 1909)

Butler, H.E. (1953), *The Institutio Oratoria of Quintilian* (4 vols II, Loeb Classical Library, 1953)

Caron C. (1998a), *Abus de Droit et Droit D'auteur* (Litec, 1998)

Caron, C. (2012), 'Les exceptions au regard du fondement du droit d'auteur en droit francais' in Lucas, A., Sirinelli, P. and Bensamoun, A. (eds) *Les exceptions au droit d'auteur: etat des lieux et perspectives dans l'Union europeenne* (Dalloz, 2012)

Carre, S. (2013), 'Le rôle de la Cour de Justice dans la construction du droit d'auteur de l'Union' in GEIGER, C. (ed.), *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe* (Collection du CEIPI, LexisNexis, 2013)

Carrière, L. (1991), 'Droit d'auteur et droit moral: quelques réflexions préliminaires' in Barreau du Québec (ed.), *Développements récents en droit de la propriété intellectuelle* (Les Editions Yvon Blais Inc., 1991)

Castets-Renard, C. (2004), *Notions à contenu variable et droit d'auteur* (L'Harmattan, 2004)

Cohen, D. (2005), 'La Liberté de Créer' in *Libertés et droits fondamentaux* (9th ed., Montchrestien, 2011)

Colombet, V.C. (1999), *Précis Dalloz de propriété littéraire et artistique* (9th ed.,Dalloz, 1999)

Copinger , W. and Skone James, F. (2010), *On Copyright* (16th ed, Sweet & Maxwell, 2010)

Cornish, W. (2010), 'The Statute of Anne 1709: its historical setting' in Bently, L., Suthersanen, U. and Torremans, PLC (eds), *Global Copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (Edward Edgar Publishing, 2010)

Couto, A. (2008), 'Copyright and Freedom of Expression: A Philosophical Map' in Gosseries, A., Marciano, A. and Strowel,A. (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan, 2008)

Covash, J. (2005), 'Form in Rock Music' in Stein, D. (ed.), *Engaging Music* (OUP, 2005)

Crabbe, V.C.R.A.C. (1994), *Legislative Drafting* (The Glass House, 1994)

Craig, C. and Laroche, G. (2014), 'Out of Tune: Why Copyright Law Needs Music Lessons' in Doagoo, BC. and others (eds), *Intellectual Property in the 21st Century: interdisciplinary approaches* (Irwin Publishing, 2014)

Craig, C.J. (2005), 'The changing face of fair dealing in Canadian Copyright Law: a proposal for legislative reform', in Geist, M. (eds), I*n the public interest: the future of Canadian copyright law* (Part II, 2005) available at https://www.irwinlaw.com/content_commons/in_the_public_interest

Craig, CJ. (2011), *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011)

Davies, G. (1994), *Copyright and the public interest* (Thomson, 1994)

Davies, G. and Garnett, K QC (2010), *Moral Rights* (Sweet & Maxwell, 2010)

De Werra, J. (2009), 'The moral right of integrity' in Derclaye, E. (ed) *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009)

De Werra, J. (2015), 'Moral rights, a view from continental Europe' d'auteur' in Brison, F., Dussollier, S., Janssens, M-C. & Vanhees, H. (ed) *Moral rights in the 21st Century* (Larcier, 2015)

Deazley, R. (2006), *Rethinking Copyright* (Edward Elgar, 2006)

Dentith, S. (2000), *Parody* (Routledge, 2000)

Derclaye, E. (2008), 'Intellectual Property Rights and Human Rights' in Torremans, P. (ed), I*ntellectual Property and Human Rights* (2st, Kluwer, 2008)

Desbois, H. (1978), *Le droit d'auteur en France* (3nd Ed., Dalloz, 1978)

Dinwoodie, G.B. (2008), 'Copyright and free expression: engine or obstacle', in *Copyright and Freedom of expression* (Huygens Editorial, 2008)

Durrande S. (1995), 'La parodie, le pastiche et la caricature' in *Mélanges en l'honneur de André Françon* (Dalloz, 1995)

Dusollier, S. (2007), *Droit d'auteur et protection des œuvres dans l'univers numérique* (Larcier, 2007)

Ficsor, M. (2002), T*he law of copyright and the Internet – The 1996 WIPO Treaties, their interpretation and implementation* (OUP, 2002)

Galopin, B. (2012), *Les exceptions à usage public en droit d'auteur* (IRPI, 2012)

Gammons, H. (2011), *The art of music publishing* (Focal Press, 2011)

Garnett, K QC, James, JR and Davies, G. (2011), *Copinger and Skone James on Copyright* (16th ed, Sweet & Maxwell, 2011)

Garnett, KQ. (2005), 'The Impact of the Human Rights Act 1998 on UK Copyright Law' in Griffiths, J. and Suthersanen, U. (eds), *Copyright and free speech* (Oxford University Press, 2005)

Gautier, P-Y. (2007), *Propriété littéraire et artistique* (PUF, 6th ed., 2007)

Gautier, P-Y. (2012), 'Les exceptions au regard du droit d'auteur de l'Union Europeenne' in Lucas, A., Sirinelli, P., Bensamoun, A. (eds) *Les exceptions au droit d'auteur: etat des lieux et perspectives dans l'Union europeenne* (Dalloz 2012)

Geiger, C. (2004c), Droit d'auteur et droit du public *à* l'information (IRPI, 2004)

Geiger, C. (2015), 'The Constitutional Dimension of Intellectual Property' in Torremans, PLC (eds), *Intellectual Property and Human Rights* (3rd ed, Kluwer, 2008)

Geiger, C. (2010), 'The influence (past and present) of the Statute of Anne in France' in Bently, L., Suthersanen, U. and Torremans, PLC (eds), *Global Copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (Edward Edgar Publishing, 2010)

Geiger, C., Gervais, D. & Senftleben, M. (2015), Understanding the 'three-step test' in Gervais (eds) International Intellectual Property (Edward Elgar, 2015)

Geist, M. (2013), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013)

Gelber, K. (2007), 'Hate speech and the Australian legal and political landscape' in Gilbert, K. and Stone, A. (eds) *Hate speech and freedom of expression in Australia* (The Federation Press, 2007)

Gendreau, Y. (1999), 'Synthese possible ou impossible du droit civil et de la common law – l'exemple du Canada' in *La mise en oeuvre des droits d'auteur Le role de la legislation nationale en droit d'auteur* (ALAI, 1999)

Gendreau, Y. (2015), 'Copyright and Freedom of Expression in Canada' in Torremans, PLC (ed), *Intellectual Property and Human Rights* (3rd, Kluwer, 2008)

Genette, G. (1982), *Palimpsestes* (Le Seuil, 1982)

Gervais, D. (2015), 'Intellectual Property and Human Rights: Learning to live together' in Torremans, PLC (ed), *Intellectual Property and Human Rights* (3rd, Kluwer, 2008)

Gervais, D.J. (1961), 'Quelques reflexions à propos de la distinction des "droits" et "intérêts"' in *Mélanges en l'honneur de Paul Roubier* (Dalloz, 1961)

Gervais, D.J. (2009), 'A Canadian copyright narrative' in Torremans, PLC (ed), *Copyright Law: A handbook of contemporary research* (Edward Elgar, 2009)

Goldstein, P. (2003), *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford Law and Politics, 2003)

Greenfield, S. and Osborn, G. (2009), 'Copyright and Power in the Music Industry' in Firth and Marshall (eds), *Music and Copyright* (2nd ed., Edinburgh University Press, 2009)

Griffiths, J. (2005), 'Not Such a "Timid Thing": The UK's Integrity Right and Freedom of Expression' in Griffiths, J. and Suthersanen, U. (eds), *Copyright and free speech* (OUP, 2005)

Griffiths, J. and McDonagh, L. (2013), 'Fundamental rights and European IP law: the case of Art 17(2) of the EU Charter' in Geiger, C. (ed), *Constructing European Intellectual Property* (EIPIN, 2013)

Grosheide, W. (2010), 'Transition from Guild Regulation to Modern Copyright Law -- a View from the Low Countries', Bently, L., Suthersanen, U. and Torremans, PLC (eds), *Global Copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (Edward Elgar, 2010)

Guibault, L. (2002), *Copyright and contracts: An analysis of the contractual overridability of limitations on copyright* (Kluwer, 2002)

Habermas, J. (1962), 'The Structural Transformation of the Public Sphere An Inquiry into a Category of Bourgeois Society' translated by Thomas Burger with the assistance of Frederick Lawrence (MIT, 1962)

Harrison, A. (2014), *Music: the business* (6th ed., Random House, 2014)

Hofman, J. (2009), *Introducing Copyright A plain language guide to copyright in the 21st century* (Commonwealth of Learning, 2009)

Hugenholtz, P.B. (1996), 'Adapting copyright to the information superhighway' in *The Future of Copyright in a Digital Environment* (Kluwer Law International, 1996)

Hugenholtz, P.B. (2001), 'Copyright and Freedom of expression in Europe' in Dreyfuss, RC., First, H. and Zimmerman, DL. (eds.), *Innovation Policy in an Information Age* (OUP, 2001)

Hugenholtz, P.B. and Okediji, R.L. (2008), *Conceiving an international instrument on limitations and exceptions to copyright* (IVIR, 2008)

Hugenholtz, PB. (2002), 'Copyright and Freedom of Expression', in Elkin-Koren, N. and Netanel, NW. (eds), *The Commodification of Information* (Kluwer Law International, 2002)

Hutcheon, L. (1985), *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (University of Illinois Press, 1985)

Jacob, Sir Robin. (2014), 'Parody and IP Claims: A Defence? - a Right to Parody?' in Dreyfuss, RC. and Ginsburg, JC. (eds), *Intellectual Property at the edge: the contested contours of IP* (CIPIL, 2014)

Janssens, MC (2009), 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation' in Derclaye, E. (ed), *Research Handbook on the future of EU copyright* (Edward Elgar, 2009)

Joly, S. (2007), 'L'ordre public et le droit d'auteur' in Bruguiere, J-M., Mallet-Poujol, N. & Robin, A., (eds), *Propriete intellectuelle et droit commun* (PUAM 2007)

Locke, J. (1690), *Second treatise of civil government* (1690) available at http://www.constitution.org/jl/2ndtreat.htm

Lucas, A. & Lucas, H.J. (2012), *Traité de la propriété littéraire et artistique* (Litec, 4ed., 2001)

Lucas, A. (1998), *Droit d'auteur et numerique* (Litec, 1998)

Lucas, A.(2010b), *Propriete literaire et artistique* (4th ed., Dalloz. Coll. Connaissance du droit, 2010)

Lucas-Schloetter, A. (2015), 'Rapport general: le droit moral dans les différents regimes du droit d'auteur' in Brison, F., Dussollier, S., Janssens, M-C. & Vanhees, H. (eds) *Moral rights in the 21st Century* (Larcier, 2015)

Mack, R.L. (2007), *The genius of Parody Imitation and originality in the seventeeth-century English literature* (Palgrave Macmillan, 2007)

MacMillan, F. (2005), 'Commodification and Cultural Ownership' in Griffiths, J. and Suthersanen, U. (eds), *Copyright and free speech* (OUP, 2005)

Malaurie, P. (1965), 'La jurisprudence combattue par la loi' in *Melanges offerts a Rene Savatier* (Dalloz, 1965)

Mazziotti, G. (2008), *EU digital copyright and the end-user* (Springer, 2008)

McDonald, D. (1960), *Parodies: An anthology from Chaucer to Beerbohm and after* (Random House, 1960)

McKeown, JS. (2010), *Canadian Intellectual Property Law and Strategy* (OUP, 2010)

McLeod, K. (2005), *Freedom of Expression (R): Overzealous Copyright Bozos and Other Enemies of Creativity* (Doubleday, 2005)

Mcleod, K. and Dicola, P. (2011), *Creative license: the law and culture of digital sampling* (Duke University Press, 2011)

Meyer, L.B. (1956), *Emotion and meaning in music* (University of Chicago Press, 1956)

Moon, R. (2000), *The constitutional protection of freedom of expression* (University of Toronto Press, 2000)

Mouffe, B. (2011), *Le droit à l'humour* (Larcier, 2011)

Mowbray, A. (2012), *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, OUP, 2012)

Murray, L.J. (2005), 'Copyright talk: patterns and pitfalls in Canadian Policy discourses' in Geist, M. (eds), in *The public interest: the future of canadian copyright law* (Irwin Law, 2005)

Netanel, NW (2008), *Copyright's Paradox* (OUP, 2008)

Partsch, K.J. (1992), 'Racial speech and human rights: article 4 of the Convention on the elimination of all forms of racial discrimination' in Boyle, K. and D'Souza, F. (eds), *Striking a Balance: Hate speech, Freedom of expression and non-discrimination* (Article XIX, London and Human Rights Centre, University of Essex, 1992)

Patterson, L.R. (1968), *Copyright in historical perspective* (Vanderbilt University Press, 1968)

Petri, G. (2010), 'Transition from guild regulation to modern copyright law (Sweden)' in Bently, L., Suthersanen, U. and Torremans, PLC (eds), *Global Copyright: Three hundred years since the Statute of Anne, from 1709 to cyberspace* (Edward Edgar, 2010)

Porsdam, E. (2007), *Copyright and Other Fairy Tales: Hans Christian Andersen The Commodification of Creativity* (Edward Elgar, 2007)

Reinbothe, J. and Lewinski, S.v. (2002), *The WIPO Treaties 1996 – The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – Commentary and legal analysis* (Butterworths, 2002)

Ribon (1965), *Parodies bachiques sur les airs et symphonies des Opera* (Paris, 1695).

Ricketson, S. and Cresswell, C. (2001), *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Sweet & Maxwell, 2001)

Ricketson, S. and Ginsburg, J. (2005), *International Copyright and Neighbouring Rights* (OUP, 2005)

Roland, H. & Boyer, L. (1999), *Adages du droit français* (4th ed., Litec, 1999)

Rose, M. (1993a), *Parody: Ancient, Modern and Post-Modern* (Cambridge University Press, 1993)

Rose, M. (1993b), *Authors and owners: the invention of copyright* (Harvard University Press, 1993)

Rosen, RS. (2008), *Music and Copyright* (OUP, 2008)

Sainsbury, M. (2003), *Moral rights and their application in Australia* (The Federation Press, 2003)

Sangsue, D. (1994), *La parodie* (Hachette Supérieur, 1994)

Schiek, D. (2011) 'Comparative law and European harmonisation – a match made in heaven or uneasy bedfellows?' in Andenas, M. and Baasch Andersen, C. (eds.) *Theory and Practice of Harmonisation* (Edward Elgar, 2011).

Schuermans, H. (1861), *Code de La Presse* (Larcier, 1861)

Senftleben, M. (2004), *Copyright, limitations and the three-step test: an analysis of the three-step test in International and EC Copyright law* (Kluwer International, 2004)

Senftleben, M. (2011) , 'Overprotection and protection overlaps in intellectual property law – the need for horizontal fair use defences' in Kur, A. & Mizaras, V. (eds), *The structure of intellectual property law* (Edward Elgar, 2011)

Senftleben, M. (2012), 'Chapter 13: Quotations, Parody and Fair Use.' in Hugenholtz, PB., Quaedvlieg, A. and Visser, D. (eds), *A century of Dutch Copyright Law* (deLex, 2012)

Sherman, B. and Bently, L. (1999), The Making of Modern IP law (Cambridge University Press, 1999)

Sirinelli, P. (2008), 'Le droit d'auteur à l'age du numerique' in Greffe, X. and Sonnac, N. (eds), *Culture Web. Creation, contenus, economie numerique* (Dalloz, 2008)

Sisman, E.R. (1993), *Haydn and the classical variation* (Harvard University Press, 1993)

Stamatoudi, I.A. (2001), *Copyright and Multimedia Products* (Cambridge University Press: 2001)

Strowel, A. and Tulkens, F. (2006), 'Equilibrer la liberté d'expression et le droit d'auteur' in Strowel, A. and Tulkens, .F (eds), *Droit D'auteur et Liberté D'expression: Regards Francophones, d'Europe et D'ailleurs* (Larcier, 2006)

Sugarman, D. and Butler, M. (2011), *A Handbook on European Discrimination Law* (2011) http://eprints.lancs.ac.uk/34017/

Sundara Rajan, M.T. (2005), 'The "New Listener" and the virtual performer: the need for a new approach to Performer's rights' in Geist, M. *In the Public Interest: The Future of Canadian Copyright Law* (2005) available at http://www.irwinlaw.com/pages/in-the-public-interest--the-future-of-canadian-copyright-law

Sundara Rajan, M.T. (2006), *Copyright and creative freedom – a study of post-socialist law reform* (Routledge Studies in International Law, 2006)

Synodinou, T-E. (2012), *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International, 2012)

Tafforeau, P. (2013), *Pratique de la propriété littéraire et artistique: contrats et gestion collective, droit d'auteur et droits voisins* (LexisNexis, 2013)

Tamaro, N. (1998), *Loi sur le droit d'auteur: Texte annoté* (Toronto, 4e éd., Éditions Carswell, 1998)

Thompson, A. (2012), 'Recording contracts' in Riches, N. (ed.), *The music management bible* (SMT, 2012)

Torremans, P. (2015), 'A clash between theory and practice? Introduction' in Brison, F., Dussollier, S., Janssens, M-C. & Vanhees, H. (ed) *Moral rights in the 21st Century* (Larcier, 2015)

Torremans, P.L.C. (2012), *The Perspective of the Introduction of a European Fair Use Clause. In Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International, 2012)

Torremans, PLC (2015), 'Copyright (and Other Intellectual Property Rights) as a Human Right' in Torremans, PLC (eds), *Intellectual Property and Human Rights* (3rd, Kluwer Law International, 2008)

Toynbee, J. (2009), 'Musicians' in Frith and Marshall (eds) *Music and Copyright* (2nd ed., Edinburgh University Press, 2009)

Tréfigny, P. (2000), 'Les conditions de licéité de l'imitation en droit d'auteur' in *L'imitation: Contribution à l'étude juridique des comportements référentiels* (P.U.S., 2000)

Türk, D. & Joinet, L. (1992), 'The Right to freedom of opinion and expression: current problems of its realization and measures necessary for its strengthening and promotion' in Boyle, K. and D'Souza, F. (eds), *Striking a Balance: Hate speech, Freedom of expression and non-discrimination* (Article XIX, London and Human Rights Centre, University of Essex, 1992)

Vaidhyanathan, S. (2001), *Copyrights and copywrongs The rise of intellectual property and how it threatens creativity* (New York University Press, 2001)

Vivant, M. & Bruguière, J-M. (2009), *Droit d'auteur* (Dalloz, 2009)

Voorhoof, D. (2006), 'La Liberté d'expression est-elle un argument légitime en faveur du non-respect du droit d'auteur ?' in Strowel A and Tulkens F (eds), *Droit D'auteur et Liberté D'expression: Regards Francophones, d'Europe et D'ailleurs* (Larcier, 2006)

Weber, A. (2009), *Manual on Hate Speech* (Council of Europe Publishing, 2009)

Wright, T. (1985), *A history of caricature and grotesque in literature and art* (Chatto & Windus, 1985)

Articles

Abramson, EM (1988), 'How Much Copying under Copyright? Contradictions, Paradoxes, Inconsistences.' (1988) 61 Temple Law Review 133

Adams, K. (2015), 'What did Danger Mouse do? The Grey Album and musical composition in configurable culture' (2015) 37(1) Music Theory Spectrum 7

Adeney, E. (2001), 'Defining the shape of Australia's moral rights: a review of the new laws' (2001) 4 IPQ 291

Adeney, E. (2005), 'The moral right of integrity: the past and future of "honour"' (2005) 2 IPQ 111

Althoff, J. (2014), 'Case Comment The Parody Exception: Seeing the Funny Side of It' (2014) 25(7) Ent. L.R. 265

Angelopoulos, C.J. (2008), 'Freedom of expression and copyright: the double balancing act' (2008) 3 IPQ 328

Arewa, OB. (2006), 'From J.C Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2006) 84 Case Research Paper Series in Legal Studies Working Paper 04

Arnold, R. and Rosati, E. (2015), 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) JIPLP 741

Baden-Powell, E. (2013), 'Whose Line Is It Anyway? - New Exceptions for Parody and Private Copying' (2013) 24(4) Ent. L.R. 130

Baden-Powell, E. and Woodhead, J. (2012), 'Big Leeks Will Inspire You, but Who Gets the Credit?' (2012) 23 Entertainment Law Review 59

Bate, S. (1989), 'Moral Rights: Parody and Caricature' (1989) 7 International Media Law 81

Beaulac, S. (2010), 'Legal Interpretation in Canada: Opening Up Legislative language as a means to internationalisation' (2010) 5/2010 University of Edinburgh working papers series 1-36.

Bellini E. (2005), 'Moral Rights and Droit Moral: A Matter of Paradigms' (2005) 204 RIDA 3

Bently, L. (2009), 'Authorship of Popular Music in UK Copyright Law' (2009) 12 Information, Communication & Society 179

Bertrand, A.R. (2012), 'Exceptions à la protection en matière de droit d'auteur qui figurent au CPI' in Droit d'auteur, 2012, 326 (cujas)

Biles, Z. (2001), 'Intertextual biography in the rivalry of Cratinus and Aristophanes' (2002) 123(2) The American Journal of Philology 169

Bird, RC. and Ponte, LM. (2006), 'Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations' (2006) 24 Boston University International Law Journal 213 available at

<https://www.bu.edu/law/central/jd/organizations/journals/international/volume24n2/documents/213- 282.pdf.>
Birnhack, MD. (2003), 'Acknowledging the conflict between copyright law and freedom of expression under the Human Rights Act' (2003) 14(2) Ent. L.R. , 24
Bond, C., Paramaguru, A., and Greenleaf, G. (2007), 'Advance Australia Fair? The Copyright Reform Process' (2007) 10(3/4) The Journal of World Intellectual Property 284
Brundenall, P. (1997), 'Fair dealing in australian copyright law' (1997) 20 UNSW Law Journal 449
Burrell, R. (2001), 'Reining in copyright law: is fair use the answer?' (2001) 4 IPQ 361
Bustin, O. (2003), 'La liberté contractuelle existe-t-elle en droit d'auteur (2003) 205(10) Legipresse 117
Buydens, M. & Dussollier, S. (2001), Les exceptions au droit d'auteur: évolutions dangereuses (2001) 22 CCE 10
Camachan, R. (1999), 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law' (1999) 8 AULR 1033
Caron, C. (1998b), 'Abus de Droit et Droit D'auteur: Une Illustration de La Confrontation Du Droit Spécial Au Droit Commun En Droit Civil Français.' (1998) 176 RIDA 3
Caron, C. (2002), 'Les exceptions: l'impact sur le droit francais' (2002) 2 Propriétés Intellectuelles 25
Caron, C. (2006), 'La loi du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information' (2006) CCE étude 22
Carroll, M. (2004), 'Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property' (2004) 72 U.Cin.L.Rev. 1405
Carroll, M. (2005), 'Struggle for Music Copyright' (2005) 57 Fla.L.Rev. 907
Chatman, S. (2001), 'Parody and style: Rhetoric and Film' (2001) 22(1) Poetics Today 25
Christie, A.F. and Wright, R. (2014), 'International Review of Intellectual Property and Competition Law A Comparative Analysis of the Three-Step Tests in International Treaties' (2014) 45(4) IIC 409
Christou, S., & Maurushat, A. (2009), '"Waltzing Matilda" or "Advance Australia Fair"? User-generated content and fair dealing in Australian copyright law' (2009) 29 UNSWLRS 1
Colin, C. (2010), 'La contractualisation des exceptions en droit d'auteur: oxymore ou pleonasme?' (2010) 2 CCE, étude n°3
Condren, C., Davis, J.M., McCausland, S. & Phiddian, R.A. (2008), 'Defining parody and satire: Australian copyright law and its new exception (Part 1)' (2008) 13(3) MALR 273

Condren, C., Davis, J.M., McCausland, S. & Phiddian, R.A. (2008), 'Defining Parody and Satire: Australian Copyright Law and Its New Exception (Part 2)' (2008) 13 MALR 401

Craig, CJ. (2006), 'Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright' (2006) 56 U. Toronto L.J. 75.

D'Agostino, G. (2008), 'Healing fair dealing? A comparative copyright analysis of Canada's fair dealing to U.K. fair dealing and U.S. fair use' (2008) 53 McGill Law Journal 309

Davies, G. (1995), 'The convergence of copyright and authors' rights – reality or chimera?' (1995) 26(6) IIC 964

Day, BR. (2011), 'In Defense of Copyright: Creativity, Record Labels, and the Future of Music' (2011) 21 Seton Hall J. Sports & Ent.L. 61

De Zwart, M. (2007b), 'Technological enclosure of copyright: The end of fair dealing?' (2007) 18 AIPJ 7

De Zwart, M. (2003), 'Seriously entertaining: the panel and the future of fair dealing' (2003) 8 MALR 1

De Zwart, M. (2004), 'Copyright in Television Broadcasts: Network Ten v. TCN Channel Nine—"A Case Which Can Excite Emotions"' (2004) 9 MALR 277

De Zwart, M. (2007a), 'A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age' (2007) 1 IPQ 60

Deazley, R. (2010), 'Copyright and Parody:Taking Backward the Gowers Review?' (2010) 73 MLR 794

Dietz, A. (1994), The artist's right of integrity under copyright law - a comparative approach (1994) 25(2) IIC 177

Dietz, A. (1994a), 'The Moral Right of the Author: Moral Rights and the Civil Law Countries' (1994) 19 Colum.-VLA J.L. & Arts 199

Dusollier, S. (2005), 'L'encadrement des exceptions au droit d'auteur par le test des trois étapes' (2005) 2 I.R.D.I. 213

Dworkin, G. (1986), 'Moral Rights in English Law - the Shape of Rights to Come Basic Features of the Droit Moral' (1986) 8 (11) EIPR 329

Edelman, B. (1990), 'Le personnage et son double' (1990) 30 Receuil Dalloz 227

Evans, TM. (2011), 'Sampling, Looping, and Mashing... Oh My !: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law' (2011) 21 Fordham IPLJ 843

Falck, R. (1979), 'Parody and Contrafactum: A Terminological Clarification' (1979) 65 The Musical Quarterly 1

Fewer, D. (1997), 'Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada' (1997) 55 U.T.L.J. 175

Ficsor, M. (2010), Comments on the UGC provisions in the Canadian Bill C-32 (2010) available at www.copyrightseesaw.net

Fletcher-Boulvard, F. (1997), 'La caricature: dualité ou unité' (1997) RTD Civ. 67

Francon, A. (1988), 'Questions de droit d'auteur relatives aux parodies et productions similaires' (1988) June Droit d'auteur 302

Gaudrat, P. (2001), 'Les démêlés intemporels d'un couple à succès: le créateur et l'investisseur' (2001) 190 RIDA 70.

Gautier, P-Y. (1991), 'La bicyclette bleue n'est pas une contrefaçon d'autant en emporte le vent' (1991) Recueil Dalloz 85

Gautier, P-Y. (2001), 'De la transposition des exceptions: a propos de la directive 'droit d'auteur dans la societe de l'information'' (2001) 25(19) CCE 10

Gautier, P-Y. (2006), 'L'élargissement des exceptions aux droits exclusifs, contrebalance par le 'test des trois étapes' (2006) 11 CCE 9

Geiger, C. (2004a), 'De la nature juridique des limites au droit d'auteur' (2004) 13 Propriétés Intellectuelles 882

Geiger, C. (2004b), 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35(3) IIC 268

Geiger, C. (2006), Constitutionalising: Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union (2006) 37(4) IIC 371

Geiger, C. (2007), 'The role of the three-step test in the adaptation of the information society' (2007) January-March UNESCO e-copyright bulletin 1

Geiger, C., Gervais, D.J. and Senftleben, M. (2014), 'The three-step test revisited: how to use the test's flexibility in national copyright law' (2014) 29(3) Am U Int'l L Rev 581

Geiger, C., Griffiths, J. and Hilty, R.M. (2008), 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39(6) IIC 707

Gervais, D. (2005a), 'Le droit d'auteur au Canada: Le point après CCH' (2005) 203 RIDA 7

Gervais, D.J. (2005b), 'Towards a new core international copyright norm: the reverse three-step test' (2005) 9 Marq.Intell.Prop.L.Rev. 1

Gervais, D.J. (2008a), 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) UOLTJ 1 available at www.uoltj.ca

Giles, K. (2005), 'Mind the gap: parody and moral rights' (2005) 18(5) AIPLB 69

Ginsburg, JC. (2001), 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-step Test" for Copyright Exceptions' (2001) The Centre for Law and Economics Studies, Columbia University, working paper No 181, 1.

Gordon, W.J. (1982), 'Fair Use as Market Failure: a Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 Columbia Law Review 1600

Gordon, W.J. (2003), 'Excuse and justification in the law of fair use: transaction costs have always been part of the story' (2003) 50 J. Copyright Soc'y U.S.A 149

Goudreau, M. (1994), 'Le Droit Moral Au Canada' (1994) 25 R.G.D. 403

Grégoire, S. (2013), 'Fasc. 1213: Propriété Littéraire et Artistique. - Exercice Des Droits Des Auteurs. - Droit Moral. Droit Au Respect (CPI, Art. L. 121-1)' (2013) Jurisclasseur 1

Griffiths, J. (2000), 'Preserving Judicial Freedom of Movement – Interpreting Fair Dealing in copyright Law' (2000) 2 IPQ 164

Griffiths, J. (2009), 'The "three-step test" in European copyright law – problems and solutions' (2009) 4 IPQ 428

Griffiths, J. (2013), 'Constitutionalising or harmonising? The Court of Justice, the right to property and European Copyright law' (2013) 38(1) E.L.Rev. 65-78

Grinvalsky, P. (1992), 'Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement' (1992) 28 Cal.-W.-L.-Rev. 395

Grout, D.J. (1941), 'Seventeenth-Century parodies of French opera – Part I' (1941) 27(2) The Music Quarterly 211

Groves, P. (2008), 'Pistache? - A consultation paper' (2008) 19 Ent.-L.-R. 89

Guibault, L. (1998), 'Pre-emption issues in the digital environment: can copyright limitations be overriden by contractual agreements under European Law?' (1998) available at http://www.ivir.nl/publicaties/download/337

Handler, M. (2003), 'The Panel Case and Television Broadcast Copyright' (2003) 25 Sydney Law Review 391

Handler, M. and Rolph D., D. (2003), 'A Real Pea Souper: The Panel Case and the Development of the Fair Dealing Defence' (2003) 27 Melbourne University Law Review, 381

Hart, M. and Holmes, S. (2004), 'Implementation of the Copyright Directive in the United Kingdom' (2004) 26(6) EIPR 254

Haynes, J. (2012), 'Critically reconceptualizing the United Kingdom ' s fair dealing exception to copyright infringement in light of the government's most recent proposals for reform and lessons learnt from civil law countries' (2012) 34(12) EIPR 811

Hilbert, M. & López, P. (2011), 'The World's Technological Capacity to Store, Communicate, and Compute Information' (2011) 332(6025) Science (journal) 60; available at http://www.martinhilbert.net/WorldInfoCapacity.html./

Isgour, M. (2000), La satire: réflexions sur le "droit à l'humour." (2000) 1&2 A&M 59

Jacques, S. (2015), 'Are the new fair dealing exceptions an improvement on the old law?' (2015) 10(9) JIPLP 699

Jewell, P. and Louise, J. (2012), 'It's just a joke: Defining and defencing (musical) parody' (2012) 10(2) Australian Review of Public Affairs 1

Keller, B.P. & Tushnet, R. (2004), 'Even more parodic than the real thing: parody lawsuits revisited' (2004) 94 TMR 979

Keyes, JM. (2003), 'Musical Musings: The Case for Rethinking Music Copyright Protection' (2003) 10 Mich. Telecom. & Tech. L. Rev. 407

Kiremidjian, G.D. (1969), 'The Aesthetics of Parody' (1969) 28(2) The Journal of Aesthetics and Art Criticism 231

Klang, M. and Nolin, J. (2012), 'Tolerance is law: Remixing Homage, Parodying Plagiarism' (2012) 9 Scripted 154

Koelman, K.J. (2006), 'Fixing the Three-Step Test' (2006) 8 European Intellectual Property Review 407

Kotler, JST (2000), 'Trade-Mark Parody, Judicial Confusion and the Unlikelihood of Fair Use' (2000) 14 IPQ 219

Kretschmer, M and Pratt, AC (2009), 'Legal Form and Cultural Symbol: Music, Copyright and Information Studies' (2009) 12 Information, Communication & Society 165

Kretschmer, M., Klimis, GM. and Wallis, R. (1999), 'The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates' (1999) 17 Prometheus: Critical Studies in Innovation 267

Kur, A. (2008), 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations under the Three Step-Test?' (2008) Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04, 1

Lepage, A. (2003), 'Vue générale sur les exceptions et les limitations au droit d'auteur dans l'environnement numérique' (2003) January-March e.Bulletin du droit d'auteur 1

Liebesman, YJ. (2007), 'Using Innovative Technologies to Analyze for Similarity between Musical Works in Copyright Infringement Disputes' (2007) 35 AIPLA Q.J. 331

Liu, D. (2014), 'Test of infringement: what is it now?' (2014) 36(9) EIPR 588

Livingston, M. and Urbinato, J. (2013), 'Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike' (2013) 15 Vanderbilt j. of ent. and tech. law 227

Loughlan, P. (2006), 'Parody, Copyright and the New Four-Step Test' (2006) December IPSANZ 46

Lucas, A. (2004), fasc. 1248 (2004) Juris-Classeur Propriété littéraire et artistique

Lucas, A. (2005), 'Droit d'auteur, liberte d'expression et droit du public a l'information' (2005) 1 A&M 13
Lucas, A. (2010a), 'For a reasonable interpretation of the three-step test' (2010) 32(6) EIPR 277
Lund, J. (2011), 'An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement (2011) 11(1) Va Sports & Ent LJ 137
McCausland, S. (2007a), 'Protecting "a fine tradition of satire": the new fair dealing exception for parody or satire in the Australian Copyright Act' [2007] 29(7) EIPR 287.
McCausland, S. (2007a), 'New Room to Lampoon: The New Fair Dealing Exception for Parody or Satire' (2007) 1 Art+Law 3 available at http://search.informit.com.au/documentSummary;dn=200705452;res=IELAPA (access date 09/10/2015).
McCrudden, C. (2006), 'Legal research and the social sciences' (2006) 122 LQR 632
McCutcheon, J. (2007), 'Property in literary characters - protection under Australian copyright law' (2007) 29(4) EIPR 140
McCutcheon, J. (2008), 'The new defense of parody or satire under Australian copyright law' (2008) 2 IPQ 163
McDonagh, LT. (2012), 'Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?' (2012) 43 IIC 401
Mee, B. (2009), Laughing Matters: Parody and Satire in Australian Copyright Law (2002) 20 Journal of Law, Information and Science 55
Mera, M. (2002), 'Is Funny Music Funny? Contexts and Case Studies of Film Music Humor' (2002) 14 Journal of Popular Music Studies 91
Milne, E. (2013), 'Parody Affective Registers, Amateur Aesthetics and Intellectual Property' (2013) 19 Cultural Studies Review 193
Mohammed, EAC. (2009), 'Parody as Fair Dealing in Canada: A Guide for Lawyers and Judges' (2009) 4 JIPLP 468
Netanel, N. (1996), 'Copyright and Democratic Civil Society' (1996) 106 Yale Law Journal 283
Neyret, L. (2008), 'La Responsabilité Civile Arbitre Du Conflit Entre Droit Des Marques et Liberté D'expression' (2008) Recueil Dalloz 2402
O´Connor, W.v. (1964), 'Parody as criticism' (1964) 25(4) College English 241
O'Flaherty, M. (2012), 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12 E.H.R.L.R 2
Pallas-Loren, L. (2002), 'Untangling the Web of Music Copyrights' (2002) 53 Case-W.-Res.-L.-Rev. 673
Pallas-Loren, L. (2014), 'The Dual Narratives in the Landscape of Music Copyright' (2014) 52 Houston Law Review 537

Parmar, S. (2009), 'The Challenge of "Defamation of Religions" to Freedom of Expression and the International Human Rights' (2009) 3 E.H.R.L.R. 353
Pevernage, A. and Hoekstra, G.R. (1979), 'An Eight-Voice Parody of Lassus: André Pevernage's "Bonjour Mon Coeur"' (1979) 7 Early Music 367
Pietilä, T. (2009), 'Whose Works and What Kinds of Rewards' (2009) 12 Information, Communication & Society 229
Plante, S. (1998), 'Les nouvelles exceptions en droit canadien: un faux debat' (1998) 11 Cah. prop. intell. Available at http://cpi.robic.ca/Cahiers/11-1/08Plante.html
Pollaud-Dulian, F. (2007), Propriete litteraire et artistique (2007) April/June RTD.com
Ramalho, A. (2009), 'Parody in trademarks and copyright' (2009) Cambridge Student Law Review 59
Reitz, J. (1998), 'How to do Comparative Law' (1998) 46 ASCL 617
Ricketson, S. (1990), 'Moral Rights and the Droit de Suite: International Conditions and Australian Obligations Sources of Australia's International Obligations' (1990) 1 Ent. L.-R. 78
Ricketson, S. (2003), 'SCCR/9/7: WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment (related)' (2003) WIPO Study Committee on Copyright and related rights 1
Riewald, J.G. (1966), 'Parody as Criticism' (1966) 50 Neophilologus 125
Rogers, M., Tomalin, J., and Corrigan, R., 'The economic impact of consumer copyright exceptions: A literature review' (2009) Consumer Focus 1
Rosati, E. (2015), 'Just a matter of laugh? Why the CJEU decision in Deckmyn is broader than parody' (2015) 52 CMLR 511
Rutz, C. (2004), 'Parody: a missed opportunity?' (2004) 3 IPQ 284
Sacco, R. (2007), 'Liberte contractuelle, volonte contractuelle' (2007) 59(4) RIDC 743
Sainsbury, M. (2007a), 'Parody, satire and copyright infringement: the latest addition to Australian fair dealing law' (2007) 12 MALR 292
Sainsbury, M. (2007b), 'Parody, satire, honour and reputation: The interplay between economic and moral rights' (2007) 18 AIPJ 149
Sarraute, R. (1968), 'Current Theory on the Moral Right of Authors and Artists Under French Law' (1968) 16 Am. J. Comp. L. 465
Savatier, R. (1957), 'Loi du 11 mars 1957 sur la propriete literaire et artistique' (1957) 42(2) JCP 677
Scherer, FM. (2008), 'The Emergence of Musical Copyright in Europe from 1709 to 1850' (2008) 5(2) RERCI 3
Schultz, MF. (2009), 'Live Performance, Copyright, and the Future of the Music Business' (2009) 43 University of Richmond Law Review 685
Serazio, M. (2008), 'The Apolitical Irony of Generation Mash- Up: A Cultural Case Study in Popular Music' (2008) 31 Popular Music and Society 79

Silva, P.D., and Garcia, J.L. (2012), 'YouTubers as satirists Humour and remix in online video' (2012) 4 JeDEM 89
Sims, A, (2010), 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' (2010) 2 IPQ 192
Smithies, T. and Papanikitas, G. (2002), 'TCN Channel Nine Pty Ltd v. Network Ten Pty Ltd' (2002) 7 MALR 249
Solo, A. (2014), 'The Role of Copyright in an Age of Online Music Distribution' (2014) 19 MALR 169
Spence, M. (1998), 'Intellectual Property and the Problem of Parody' (1998) 114 LQR 594
Spies, A. (2011), 'Revering Irreverence: A Fair Dealing Exception for Both Weapon and Target Parodies' (2011) 34 UNSW Law Journal 1122 available at <http://heinonline.org/HOL/Page?handle=hein.journals/swales34 &div=56&g_sent=1&collection=journals>
Spitz, B. (2005), 'Droit d'auteur, copyright et parodie ou le mythe de l'usage loyal' (2005) 2 RIDA 55
Strowel, A. (1991), 'La parodie selon le droit d'auteur et la théorie littéraire' (1991) 26 RIEJ 23
Sun, H. (2007), 'Overcoming the Achilles Heel of Copyright Law Overcoming the Achilles Heel of Copyright Law' (2007) 5(2) NJTIP 264
Suzor, N. (2008), 'Where the bloody hell does parody fit in Australian copyright law?' (2008) 13 MALR 218
Tawfik, M. (2013),'The supreme Court of Canada and the "fair dealing trilogy": elaborating a doctrine of user rights under Canadian copyright law' (2013) 51 Alta. L. Rev. 191
Teilmann, S. (2005), 'Framing the Law : The Right of Integrity in Britain' (2005) 1 EIPR 19
Torremans, P. (2002), 'Lettre d'Angleterre Évolutions Récentes En Droit D'auteur' (2002) 3 Propriétés Intellectuelles 1
Tran-Gervat, Y-M. (2006), 'Pour une définition opérationnelle de la parodie littéraire : parcours critique et enjeux d'un corpus spécifique' (2006) 13 Cahiers de Narratologie 1
Tricoire, A. (2005), 'L'exception de parodie est-elle recevable en matiere publicitaire?' (July/August 2005) 223 Chroniques et opinion Legipresse 77
Tschmuck, P. (2009), 'Copyright, Contracts and Music Production' (2009) 12 Information, Communication & Society 251
Tuve, R. (1969), 'Sacred "Parody" of love poetry, and Herbert' (1969) 8 Studies in Renaissance 249
Van Gestel, R. and Micklitz, H. (2011), 'Revitalizing doctrinal legal research in Europe European' University Institute Working Paper 2011/05 available at

http://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf.
Vaver, D. (1987), 'Authors' Moral Rights - Reform Proposals in Canada: Charter or Barter of Rights for Creators?' (1987) 25 Osgoode Hall L.J. 749
Vivant, P. (2006), 'Courte Citation et Parodie: Des Exceptions Au Droit Moral?' (2006) 2 RLDI 59
Voorhoof, D. (2000), 'Is freedom of expression a legitimate argument for disrespecting copyright? The parody as a metaphor' (2000) available at http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/FOXandParody.actualised.sept2006.CPH.pdf
Voorhoof, D. (2009), 'Freedom of Expression under the Human Rights System From Sunday Times (n 1) v. U.K. (1979) to Hachette Filipacchi Associes ('ici Paris') v. France (2009)' (2009) 2 Inter-Am. & Eur. Hum. Rts. J. 3
Waisman, A. (2008), 'Rethinking the Moral Right to Integrity' (2008) 3 IPQ 268
Walsh, A. (2010), 'Parody of intellectual property: prospects for a fair use/dealing defence in the United Kingdom' (2010) 21 (11) I.C.C.L.R 388
Ward, J. (1952), 'The use of borrowed material in 16th-Century Instrumental Music' (1952) 5(2) Journal of the American Musicology society 88
Weir, M. (1992), 'Making sense of copyright law relating to parody: a moral rights perspective' (1992) 18 Monash University Law Review 194
Wong, M.W.S. (2009), '"Transformative" User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?' (2009) 11 Vanderbilt j. of ent. and tech. law 1075
Yurkowski, RA. (2001), "Is Hyde Park hiding the Truth? An Analysis of the Public Interest Defence to Copyright Infringement" (2001) 32 Victoria University of Wellington Law Review 1

Documents and Conference papers

Attorney-General's Department, *Submission No 69A to the Senate Standing Committees on Legal and Constitutional Affairs*, Inquiry into the Provisions of the Copyright Amendment Bill 2006, 8 November 2006
Australian CLRC Report (2002)
Australian copyright council, *Moral Rights* (2012)

Australian Government Discussion paper, 60. *Proposed Moral Rights for Copyright Creators* (Commonwealth of Australia, Canberra, 1993)
Australian Government Discussion Paper, *Proposed Moral Rights Protection for Copyright Creators* (Australian Government Printer, June 1994)
Australian Government, *New Australia Copyright Laws, Parody and Satire* (factsheet 2006)

Australian Government, *New Australian copyright laws – Parody and satire* (Attorney General's Department ed, 2006)

Australian Government, Parodies, satires & jokes (Information sheet, Australian Copyright Council, 2008)

Australian Government, Parodies, satires & jokes (Information sheet, Australian Copyright Council, 2012)

Berne, 'Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20)', (1967) *Records of the Intellectual Property Conference of Stockholm* (June 11 to July 14, 1967 Volume II, 1145)

Bill C-60: An Act to amend the Copyright Act, 38th Parl., 1st Sess., 53-54 Eliz. II (2004); see preamble of the copyright modernization Act, SC 2012, c20, available at http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_20/FullText.html (access date 16/5/2013)

Bill C-61: An Act to amend the Copyright Act, 39th Parl., 2d Sess., 56-57 Eliz. II (2008) available at http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=3188787

Callamard, A., *Expert Meeting on the Links between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence*, Article XIX (UN HCHR, 2-3 October 2008)

CLRC, Parliament of Australia, *Copyright and Contract* (2002)

CLRC, Parliament of Australia, *Report on the Simplification of the Copyright Act 1968: Part 1--Exceptions to the Exclusive Rights of Copyright Owners* (1998)

CLRC, Parliament of the Commonwealth of Australia, *Terms of reference* (23/04/2001)

Commerce and Economic Development Bureau, Bills Committee on the Copyright (Amendment) *Bill 2011-Copyright Exception for Parody* (Intellectual Property Department, 2011)

Commonwealth of Australia, Parliamentary Debates, 29 November 2006

Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19 October 2006, (Philip Ruddock, Attorney-General)

Commonwealth, Parliamentary Debates, House of Representatives, 18 June 1997, pp 5547–8 (Hon Daryl Williams QC).

De Wolf & Partners, *Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* (2013) available at

http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators*, Commonwealth of Australia (ACT, 1994)

Erickson K, Evaluating the Impact of Parody on the Exploitation of Copyright Works : An Empirical Study of Music Video Content on YouTube (2013).

Erickson, K., Kretschmer, M. and Mendis, D., *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options* (IPO 2013)

EU Network of independent experts on fundamental rights, *Commentary of the Charter of Fundamental Rights of the European Union* (June, 2006) available at http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf;

Gaubiac, Y., 'France: rapport general', in L. Baulch, M. Green and M. Wyburn (ed.), *Alai Study days – The boundaries of Copyright: its proper limitations and exceptions* (Australian Copyright Council Sydney, 1999)

Gowers, A., *Gowers Review of Intellectual Property* (London: HM Treasury, November 2006)

Hargreaves, I., *Digital opportunity. A review of intellectual property and growth* (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf.

HM Government, *Modernising copyright: A modern, robust and flexible framework* (2012)

Initial proposal from the Commission COM (1997) 628 and finally, the 1999 amended proposal COM (1999) 250

Kretschmer, M., Derclaye, E., Favale, M. and Watt, R., *The relationship between copyright and contract law* (2010) April report available at http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf

Kretschmer, M., Derclaye, E., Favale, M., Watt R., *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP*), (2010) Available at SSRN: http://ssrn.com/abstract=2624945

Lauzière, L., *L'interprétation des lois* (2012) http://www.redactionjuridique.chaire.ulaval.ca/fileadmin/files/documents/Travaux_de_la_Chaire/interpretation_des_lois.pdf (last accessed on 08/09/2015).

Organisation for Economic Co-operation and development, *Participative Web: user-generated content DSTI/ICCP/IE(2006)7/FINAL Unclassified Working Party on the Information Economy* (2007)

Parliament of Australia, *Explanatory Memorandum to the Copyright Amendment Bill* 1986

Reda, J. (2015), *Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (2014/2256(INI)) (24/06/2015) available at https://juliareda.eu/copyright-evaluation-report/

Ricketson, S., 'SCCR/9/7: WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment (related)' [2003] *Standing Committee on copyright and related rights*

Rigamonti, C in RM Hilty, C. Geiger (dir), *La balance des interets en droit d'auteur*, conference 2004

Ruddock, P., 'Protecting precious parody', *Daily Telegraph*, November 30, 2006

Ruddock, P., *Issues Paper Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005) available at http://infojustice.org/download/copyright-flexibilities/articles/K%20Weatherall%20Copyright%20exceptions.pdf

Senate Inquiry, Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Copyright Amendment Bill 2006* (available at www.aph.gov.au), Report dated November 13, 2006

The wittem project (2010) http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf

UK-IPO, *Exceptions to Copyright : Guidance for Creators and Copyright Owners* (2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf (last accessed on 08/09/2015).

UK-IPO, *Impact Assessment BIS1057 on a copyright exception for parody* (2012), available at http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ia-exception-parody.pdf,

UK-IPO, *Taking Forward the Gowers Review of Intellectual Property: Changes to Copyright Exceptions* (Newport: UK-IPO, 2008)

UK-IPO, *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (Newport: UK-IPO 2009) (Second Consultation Paper)

Weatherall's Law, (available at http://weatherall.blogspot. com), post dated (5/07/2006)

WIPO, *Agreed Statements Concerning the WIPO Copyright Treaty, Statement Concerning Article 10*, WIPO Diplomatic Conference, WIPO Doc. No. CRNR/DC/96 (1996).

WTO Document WT/DS160/R available at https://www.wto.org/english/tratop_e/dispu_e/1234db.pdf

WTO Documents WT/DS114/R available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm

WTO Documents WT/DS174/R available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm

Theses

Delfour, E., *L'imitation créatrice* (University of Toulouse, 2000)

Boccara, J., *La fausse Parodie* (Universite Pantheon-Assas Paris II, 2007-2008)

El Khoury P, *Les Exceptions Au Droit D'auteur, Étude de Droit Comparé* (University of Montpellier, 2007)

Gairal, E., *Les Oeuvres D'art et Le Droit* (Univerity of Lyon, 1900)

Guilbert, A., *La contractualisation des exceptions* (University Pantheon-Assas 2009)

Korkut, N., *Kinds of Parody from Medieval to Postmodern* (Middle East Technical University, 2005)

Malaurie, P., *L'ordre public et le contrat* (Paris, 1950)

Simard, J., *L'interprétation législative au Canada: la théorie à l'épreuve pratique* (University of Montréal 1998).

Sirinelli, P., *Le Droit Moral de L'auteur et Le Droit Commun Des Contrats* (Paris II, 1985)

Dictionaries

American Heritage Dictionary

Collins Dictionary of the English Language

Cornu, G., *Vocabulaire juridique* (PUF)

English Oxford Dictionary
Macquarie dictionary
Oxford Music Dictionary