THE PARODY EXCEPTION IN COPYRIGHT LAW

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Foreword

‘The parody exception in copyright law’ is probably a far too modest title for this comprehensive study, unless one emphasizes the broad scope of the title and sees it as a reference to the comprehensive nature of the exercise. Sabine Jacques looks at every angle of the parody exception and finishes her book with a case study of parody in the music industry.

I had the privilege to accompany the journey of this book right from the start. It started life as a very ambitious doctoral thesis that kept growing and that went ever more in depth. It would have been all too easy, but nevertheless very interesting, to merely offer a comparative study of the parody case law in a couple of jurisdictions and to try and draw a few conclusions concerning the options for the newly introduced parody exception in the UK. Instead, Sabine Jacques went back to basics and started by asking what parody really is.

There is no point in spilling the beans here or trying to summarize her in-depth analysis. Let me just suggest that there is potentially a world of difference between ridicule and mockery and that one needs to be clear what the shift from ridicule to mockery means. How broad is the concept of mockery? In any case, there seems to be a need for the parody to refer to the original work. Its roots need to be recognizable for the parody to work. That involves a degree of copying, of sorts, so there needs to be an exception, at least arguably. From there the lines become less clear and different options are open. Is it merely a case of putting the work in a different context? Is the key point the absence of confusion between the original work and its parody? Or is it rather the absence of competition between the original work and its parody? All these are crucial questions and I leave it to the reader to discover the answers and leads in the book itself.

It is needless to say that the answers are not merely black or white, but that their shade of grey also depends to a large extent of the place parody is given in culture and how that choice is reflected in copyright law.

Copyright brings with it the three-step test and moral rights and the intriguing question of how the parody exception fits in with both of them. Yet

more questions for in-depth analysis, bringing the reader closer to the in-depth perspective. And all that is done in a comparative context, not merely in Europe, but taking in also Canada, Australia, and the US.

Parody also has a very strong link with human rights and particularly with the freedom of expression. Balancing rights in this context provides the final essential building blocks for the study of the parody exception.

With all those elements to hand there follows the case study of parody in the music industry.

What started as an ever more ambitious doctoral thesis has become a comprehensive study of the parody exception. Sabine Jacques was right to dedicate part of her research time at the start of her academic career at UEA to this project. This has become ‘the’ book on the parody exception and Sabine Jacques deserves to be congratulated for writing it and for offering us such a rich and enriching pallet.

Paul Torremans
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University of Nottingham
Nottingham, 13 June 2018

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Combining my two passions, intellectual property law and music, this book constitutes my greatest intellectual journey to date. This project would have not been possible without the precious advice, support, and contributions of many people along the way, to all of whom I owe heartfelt gratitude.

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Finally, I dedicate this book to all the artists whose creativity can only thrive where diversity can continue to exist.

Norwich, United Kingdom
1 June 2018

Contents

Table of Cases

EUROPEAN UNION

NATIONAL

Australia

Canada

France

Germany

United Kingdom

United States

Table of Legislation

INTERNATIONAL INSTRUMENTS

EUROPEAN UNION

Regulations

Directives

NATIONAL

Australia

Canada

France

United Kingdom

Statutes

Statutory Instruments

United States

List of Abbreviations

A&M	Auteurs & Media
A.C.	Canadian Reports, Appeal Cases
ACHPR	African Commission on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
AFPIDA	Branche française de l'Association littéraire et artistique internationale
AGO	Advocate-General Opinion
AGRIF	The General Alliance against Racism and for the respect of the French and Catholic Identity
ALAI	Association littéraire et artistique internationale
All ER	All England Law Reports
Ann. Prop. Ind.	Annales de la Propriété Intellectuelle
Ass plen.	Assemblée Plénière
AUSFTA	Australia–United States Free Trade Agreement
BCE	Before the Common/Current/Christian Era
BASCA	British Academy for Songwriters, Composers and Authors, UK
BBC	British Broadcasting Corporation
Berne	Berne Convention
BNP	British National Party
BSB	British Satellite Broadcasting
Bull.	Bulletin
C.A.F.	Federal Court of Canada: Appeal Division
CE	Common Era
C.F.	Canada Federal Court Reports

CA 1968	Australian Copyright Act 1968
CA 1985	Canadian Copyright Act 1985
Cah. Dr. D'auteur	Cahiers du droit d'auteur
CAIP	Canadian Association of Internet Providers
Canadian Charter	Canadian Charter of Rights and Freedoms 1982
Cass.	Cour de Cassation
CCE	Communication Commerce Electronique
CCLA	Canadian Copyright Licensing Agency
CDPA	Copyright, Patents and Designs Act 1988, as amended
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFDT	Confédération française démocratique du travail
Ch D	Chancery Division
Ch	Chancery
Ch	Law Reports, Chancery Division
Charter	EU Charter of Fundamental Rights
Chron.	Chronique
Cir.	Circuit
CJEU	Court of Justice of the European Union
CLR	Queensland Crown Lands Law Reports
CLR	Commonwealth Law Reports, Australia
CLRC	Copyright Law Review Committee, Australia
C.P.R.	Canadian Patent Reporter
D.	Recueil Dalloz hebdomadaire, partie jurisprudence
D.L.R.	Dominion Law Reports
DSB	Dispute Settlement Body
ECDR	European Copyright and Design Reports
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights

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
EU	European Union
EWCA	England and Wales Court of Appeal, UK
EWHC	England & Wales High Court (Administrative Court)
Fasc.	Fascicule
FC	Canada Federal Court Reports
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia: Full Court
FCR	Federal Court Reports, Australia
FCTD	Federal Court Trial Division, Canada
Fox Pat. C.	Fox's Patent, Trade Mark, Design and Copyright Cases, Canada
FSR	Fleet Street Reports
Gaz. Pal.	Gazette du Palais
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, Germany
HCA	High Court of Australia
HR	Human Rights
HRA	Human Rights Act 1998
Hub	The Copyright Hub
I.R.	Recueil Dalloz-Sirey: Informations Rapides
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRR	International Human Rights Reports

InfoSoc Directive	The Information Society Directive 2001/29/EC
IP	Intellectual Property
IPC	French Intellectual Property Code
IPO	UK Intellectual Property Office
IPR	Intellectual Property Reports, Australia
IPR	Intellectual Property Rights
IRPI	Institut de Recherche en Propriété Intellectuelle
J.-CL. Marques	Jurisclasseur Marques
JCP	La Semaine Juridique: Juris Classeur Périodique
Jurispr.	Jurisprudence
L	Legislation
MCPS	Mechanical-Copyright Protection Society, UK
MPA	Music Publishers Association, UK
NF	National Front party, France
NLA	Newspaper Licensing Agency
O.R.	Ontario Reports
OAS	Organization of American States
Obs.	Observations
OED	Oxford English Dictionary
OHIM	Office for Harmonization in the Internal Market
OJ	Official Journal of the European Communities
OSCE	Organization for Security and Co-operation in Europe
PCC	Patents County Court
PPL	Phonographic Performance Limited, UK
Prop. Int.	Propriété Intellectuelles
PRS	PRS for Music, UK
RDPI	Revue du droit de la propriété intellectuelle
Réf.	Référé

Rép. pén. Dalloz	Répertoire de droit pénal et de procédure pénale Dalloz
Rev. trim. dr. comm.	Revue trimestrielle de droit commercial et de droit économique
RG	Rôle Général
RIDA	Revue Internationale du Droit d'Auteur
RIDC	Revue Internationale de Droit Comparé
RLDI	Revue Lamy Droit de l'Immatériel
RPC	Reports of Patent, Design and Trade Mark Cases
RTD com	Revue Trimestrielle de Droit Commercial et de Droit Economique
S.C.R.	Canada Supreme Court Reports
SABIP	Strategic Advisory Board for Intellectual Property Policy, UK
SACEM	La Société des auteurs, compositeurs et éditeurs de musique, France
SCC	Supreme Court of Canada
SGAE	Sociedad General de Autores y Editores de España
SOCAN	Society of Composers, Authors and Music Publishers of Canada
Somm.	Sommaire
STIM	Svenska Tonsättares Internationella Musikbyrå, Sweden
TGI	Tribunal de Grande Instance
Trib. Civ	Tribunal Civil
Trib. Comm.	Tribunal du Commerce
Trib. corr.	Tribunal Correctionnel
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UGC	User-Generated Content
UK	The United Kingdom
UKSC	UK Supreme Court

UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
US	The United States of America
VCLT	Vienna Convention on the law of treaties of 1969
WLR	Weekly Law Reports
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

1

Parody—Nature and Definition

1. What is a Parody?

Parodies have been created throughout times and cultures. Representing a particular form of comment, parodies have an important function in democratic societies as a catalyst in the development of art and discourse. This important social and cultural value is reflected in the judicial latitude generally afforded to this particular type of creative endeavour even prior to its codification. Parody, used here as an umbrella term for various related terms, is now legally permissible based upon a copyright defence within the United States ('US'), Australia, Canada, and the European Union ('EU').[1] Yet the exact meaning of terms such as parody, satire, caricature, and pastiche remains nebulous.

Legislators have shied away from carving definitions. The Court of Justice of the European Union ('CJEU') has superimposed EU-wide characteristics upon the pre-existing practices of the courts of EU Member States by interpreting the terms 'caricature, parody and pastiche' for the first time in *Deckmyn*.[2] The Court establishes 'parody' as an autonomous concept in the context of EU copyright law,[3] having regard to the ordinary meaning of the terms in everyday language, and taking into consideration the context in which the parody arises.[4] 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'.[5] By adopting these requirements, the CJEU decides that 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.[6]

To evaluate the potential impact of this construction, this chapter explores the contours of the concept of parody. It considers the wider historical context before focusing on the legal evolution of the genre in the five jurisdictions under scrutiny.[7]

2. Origin and Historical Overview of Parody in Art Fields

2.1 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* translates as 'song'. Selecting which version has been adopted presents a hurdle. The first meaning seems to refer to a tension or contrast between the original and new work, while the second meaning suggests a neighbourly relationship, with the two works standing side-by-side.[8] The latter, once 'translated' into copyright language, might lead one to conclude that the new work is akin to an 'adaptation', one of the bundle of exclusive rights granted to right-holders.[9] However, based upon analysis of usage from Ancient times up to the present day,[10] scholars agree that the former meaning—a relationship of contrast between the new work and the original—dominates.[11]

2.2 Early uses of parody as a vehicle for political and social commentaries

The first use of *parodia*, dated at 335 BCE, is attributed to Aristotle in his poems referring to Hegermon.[12] 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.[13] However, parodic forms were not confined to poetry, and featured in plays including the works of Aristophanes.[14]

The analysis of the texts of these old comedies, which are still available today, reveals that two main characteristics can be assigned to parody. The first feature 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 which reference the earlier works of other

writers.[15] The parodic concept is broad and includes satire within its scope. While a humorous element is generally present, it is not mandatory.

2.3 Early particularities of music parodies

Jumping forward to the first century C.E., Quintilianus, a popular Italian author, 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.[16]

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.'[17]

Later, Quintilianus underscores his preference for the second definition, which refers to singing the lyrics from one song to a different melody. 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, focusing instead on a *degree of imitation* while simultaneously establishing *a distance* between the new and the original work.

2.4 Narrowing parody to its ridiculing or imitative function

Reference to parody in the literature is scarce from the fifth century until an apparent resurgence of the genre in the sixteenth century. This was accompanied by a growing interest from classical scholars in defining the phenomenon. It was at this time that the scope of parody narrowed to a *ridiculing* function, echoing the postmodern understanding of the genre. Scaliger, the Renaissance scholar often considered the first to devise the definition of parody for the literary genre, having rediscovered Quintilianus, determines that parody means 'to introduce in place of a serious thing another ridiculous one'.[18] The target of the parody remains undefined, permitting the mocking of the previous work *or* an unrelated subject.

Yet, Scaliger recognizes the complexity of defining parody. When discussing the figures of speech in literature, he circumscribes his basic definition by adding: 'parody, in which the serious is imitated, and by the imitation subverted'.[19] In doing so, the reference to ridicule is set aside and

the focus is on *the imitative* feature of parody. This technique, which Scaliger also calls parody, sought 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 religious texts.[20] Estienne, a contemporary of Scaliger, contributed most to defining parody in the musical field at that time. He chose to emphasize the imitation aspect in his definition of musical parody: 'a song or melody which I compose in imitation of another'.[21]

2.5 From ridicule to mockery

During the seventeenth century, parody featured prominently in drama and theatre. Here, to reinforce the criticism function of the genre, parody generally took the form of *mockery*, manifesting in grotesque gesturing and intonation by the actors, as well as the language used.[22] Present also in literature, parody was similarly used to mock previous works.[23] Ironically, while mockery was adopted in an attempt to provoke a change of style or genre, in using this tool, parodists perpetuated the very types of work that they sought to eradicate.[24]

This phenomenon, which later became known as the *parodic paradox*,[25] is 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 criticizes the chivalric romance through parody. While Cervantes aims to denigrate this genre so that literature may advance, his borrowing from this style seems only to have contributed to its proliferation.[26]

2.6 Persistence of music parodies' digression: referencing other works through alteration and distortion

In music, parody took a slightly different form. It referred either to a musical rearrangement to adapt a work for different musical registers, or a technique which transformed a song's lyrics or replaced them with an entirely different text.[27] 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 words are composed to the melody; all the stanzas of a song except the first are a kind of parody.[28]

Essentially, Rousseau is describing parody as a musical technique in which lyrics are adapted to suit the music.[29] His definition is somewhat judgemental, 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.[30]

It is apparent that parody in music at that time, unlike in drama or literature, had little to do with ridicule or mockery,[31] 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.[32] 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.[33]

2.7 Downfall of the genre

With the Enlightenment, parody gained an increasingly negative reputation as being mediocre, derivative, and parasitical owing to the emerging 'genius' cult attributed to creative works.[34] The fact that parody might even constitute a criminal offence could explain its decrease in popularity during that period. The British culture of the time provides a good illustration. The popular works *Gulliver's Travels* and *Robinson Crusoe* both include limited parody or satire.[35] This is seen as demonstrating the authors' reluctance to rely upon these techniques because they were perceived to be an *obstacle* to creativity.[36] 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.[37]

Parody's decline continued into the nineteenth century, and scholars document it being used predominantly to ridicule neoclassical speech or to express resentment towards particular poets or contemporary topics.[38] 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.[39]

2.8 Rebirth of the genre: multi-functionality of parodies

The twentieth century saw a renaissance of parody across different art forms. With this rebirth, parody becomes far more complex: its targets include specific established works and 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 1.1) 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 problematic to categorize the work definitively in any one of these sub-genres.

Figure 1.1 J-L David portrait of Madame Récamier (1800)

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

Jacques-Louis David (1748–1825), *Madame Recamier*, 1800, oil on canvas, 174 × 244 cm. Paris, Musée Du Louvre. Photo © DEA PICTURE LIBRARY / De Agostini Editore / Age footstock.
René Magritte, *Perspective: Madame Récamier by David*, 1951, oil on canvas, 60.5 × 80.5 cm. National Gallery of Canada, Ottawa. © ADAGP, Paris and DACS, London 2018. Photo ©: Artepics / Alamy Stock Photo.

As scholars rediscover the works of great authors, including Shakespeare, Swift, Proust, Verlaine, and Pope, all of which feature parody, the parodic genre's reputation is again on the rise, leading one commentator to label the twentieth century as 'an age of parodies'.[40]

This brief historical study illustrates how use of the term parody has evolved across art fields. It reveals that parody 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. Furthermore, the target of the parody may vary, to include the underlying work itself, other works, a style, or something completely unrelated. As the definitions examined here demonstrate how 'parody' is open-textured and contextual, one might wonder how cultural theorists have defined parody as a concept.

3. The Relationship of Parody with Other Related Concepts

As has been seen, parody is often used interchangeably with terms such as pastiche, caricature, satire, irony, imitation, plagiarism, and burlesque. This section is a brief sketch of the main features of each of these terms to interrogate the boundaries of the genre overall. Ultimately, this section investigates how far this terminology will assist the assessment of which activities could fall under the parody exception in copyright law.

3.1 Parody and irony

Irony[41] is distinguishable from parody because irony does not constitute an artistic genre. However, the terms are related because irony can be used as an *instrument* within the parodic creative process.[42] Hutcheon goes as far as

labelling irony as the best tool for parody.[43] Parody and irony are both forms of indirect and double-voiced discourse.[44] Neither are parasitic, since their objective is not to become a substitute of the earlier work.[45]

Literature teaches us that, in art, irony serves two functions: a semantic function and a pragmatic function.[46] The former is concerned with contrast, showing up the differences with the previous text. The latter is an evaluation from the author of the new work. When dealing with parody works, irony fulfils the *semantic* function, if we agree with Hutcheon's analysis.[47]

Put simply, parody and irony can both be described as a form of communication which relies upon an earlier work. Parody does not always rely upon irony, but irony is one instrument to achieve its aim.

3.2 Parody and satire

Scholars often imply that parody is a variant of the satirical genre.[48] If it is true that both parody and satire borrow from previous works, use irony, and adopt a critical distance from the original work, the departure is in the *way* they each rely on irony.[49] With satire, irony is used for its *pragmatic*, evaluative function[50] mostly to demonstrate the negative point of view of the satirist. It is mostly pejorative.

Hutcheon, thus, differentiates satire from parody because parody may pay tribute to the original work from which it borrows, whereas the satirist aims to ridicule the original work.[51] Chatman, however, stresses that it is hard to deny the ridiculing effect attached to the postmodern meaning of parody.[52] The difference is perhaps one of degree. Furthermore, Hutcheon argues that the difference between parody and satire lies in their focus: satire tends rather to be focused on moral and social subjects with an intention of amelioration.[53] The actual position seems less clear-cut, as parody can be used to this end too. For example, parody can lead to a new kind of art or bring a genre to an end.[54]

Rose emphasizes two differences between parody and satire.[55] She posits that parody necessarily includes an original work as an integral part of its structure, whereas satire does not have to use parts of an original work in order to achieve its aim. Secondly, parodies create a comic effect in contrast to a denigrating one, as is the case in a satire. This approach seems most familiar to the legal debates surrounding the parody exception in copyright

law.

Ultimately, these genres are not hermetically separated from one another. Parody and satire can blend in a single work called a ‘satiric parody’. Parody is either a vehicle for satire or a type of genre of parody which is satiric.[56] In English literature, there is also a mix of satires and parodies present in Swift’s *Gulliver’s Travels.*[57] Swift intended to parody previous tales of exploration, but also to satirize British politics and European society more generally. The song *Barbie Girl* by the Danish band Aqua is a more recent example. At one level, the song parodies the famous fashion doll manufactured by Mattel, but at the same time, it is a satiric commentary on the ‘blond bimbo’ image of women in today’s society.[58]

Finally, the target of the respective works distinguishes them. While parody has rather an intramural target (the original work, the author of the original work, or the author of the parody), satire has an extramural target (values, traditions, politics, authority, or other third object).

3.3 Parody and burlesque (or travesty)

The word ‘burlesque’ comes from ‘burlesco’ which derives from the seventeenth-century Italian word ‘burla’, meaning ‘to ridicule’, ‘to mock’. The latter may have older roots as ‘burra’ means ‘no sense’ in Latin. However, this is speculation. Over time, burlesque was adopted in other countries. In France, it became synonymous with ‘grotesque’ or referred to the use of vulgar vocabulary in drama and poetry.[59] It is only later that the term entered the English language.

Genette considers burlesque to be different from parody because parody modifies the object but generally not the style of the work whereas burlesque modifies the style but not the object.[60] Dentith narrows the scope of burlesque by emphasizing that the textual transformation under the genre is mainly satirical, whereas in the case of parody, the transformation is playful.[61] Hence, under this definition, the intention underlying the new work is different. In parody, the intention is to adopt a critical distance from the target work, which may have a comic effect. The intention underlying a burlesque (also called travesty) work is merely to ridicule or to mock.[62]

Hence, parody and burlesque (or travesty) seem artificial synonyms, although the main difference is one of degree: burlesque focuses on the

ridiculing aspect while parody's scope is wider to encompass a broader critical function. Humorous intent is only one of multiple facets of parody, whereas it seems more essential to burlesque. Moreover, burlesque tends to modify the style rather than the object, while parody modifies the object while retaining the style of the work.

3.4 Parody and caricature

Although caricature is recognized in the literary and musical fields, it is most frequently associated with graphic art. In terms of etymology, caricature is derived from the Italian word *caricare*, meaning 'to surcharge'. Indeed, caricature seems more akin to a *technique* than being a genre per se. The Baroque masters praised caricature in the eighteenth century, but it is possible to trace use of this technique in Ancient Egypt,[63] Greece, and later, in the works of Leonardo da Vinci. Consequently, the history of the term pre-dates parody.

More recently, English artists have used this technique in portraits of politicians and in social commentaries.[64] By virtue of its 'vicious' side, caricatures and caricaturists have been harshly treated. For example, in post-Revolutionary France, caricaturists could receive a custodial sentence.[65] In Germany, caricature was subject to censorship because it was illegal to caricature the Royal Family. Curiously, this was also the moment when caricature was most popular in France and in England. Here, there are echoes of the negative reputation associated with parody which arose because of its use of biting critique.

The invention of printing machines and newspapers marked a revival of interest in caricature.[66] Since then, caricature is still used in the daily press, and now in other media, to expose malpractice within an administration or political corruption, or simply to ridicule famous people.

Caricature is defined as the technique of exaggeration or oversimplification of idiosyncratic features of the subject.[67] This may be taken to such an extreme that the end result is grotesque to the audience. Caricature and parody are related because both may use irony to achieve their goal. But caricature may also be put alongside satire, since it also places the accent on the idiosyncrasy of morals, traditions, and behaviours meaning that its target is external to the subject on which it is based. The difference between parody and caricature is especially hard to grasp because the two terms are used

interchangeably in plain language. However, caricatures focus primarily upon living people or other reality-based subjects, while this is not particularly the case for parodies, which can focus on non-living subjects.

In sum, both parody and caricature have lost popularity at some time because of the severity of their critique. Both utilize irony as a tool, although they use it differently to achieve their aim: caricature (like satire) focuses on the pragmatic function, while parody focuses on the semantic function of irony. In other words, caricature is the oversimplification or exaggeration of its object's characteristics whereas to parody is to adopt a critical distance from the original work which can be done through the exaggeration of characteristics of the object but can also be achieved by other means. Finally, most of caricature targets living beings whereas parody can target a person or an object.

3.5 Parody and pastiche

As with parody, there is no universal definition of 'pastiche'. The term is known to derive from the Italian term 'pasticcio', meaning a confused or mixed work. In simple terms, pastiche is typically defined as the imitation of another's style. For example, it was (and still is to some extent) usual literary practice for young writers to develop their writing skills by replicating 'the style of' a particular established author.

As Genette describes, and Dentith later confirms, pastiche differs from parody because pastiche emphasizes the similarity of elements rather than seeking to transform the original.[68] As pastiche is a stylistic imitation,[69] it lacks the ironic transcontextualization which is present in parody.[70] Also, as pastiche focuses on the idiosyncrasy of an author, a pastiche work will rarely be based on a single work but rather will draw on a collection of their works. Consequently, there is less contrast between the old and the new in pastiche than exists in parody. Pastiche is closer to imitation whereas parody can be seen as a continuance of the past. While it also relies upon a previous work, parody offers the possibility for change which pastiche in literature lacks.[71]

A pastiche work is a new work which relies on a previous work and which stays in the same genre as the original work, while the parody permits the new work to depart from the genre of the original work. A few scholars, including Jameson, consider that parody can be non-critical and associate parody to pastiche for this reason.[72] However, most scholars agree that while

pastiche may include an element of criticism, this is ancillary whereas criticism is essential in parody.

One similarity between parody and pastiche is that both signal their borrowing from the original work, i.e. neither aims to be a substitute for the original.[73] This is what separates these genres from plagiarism.

If we adopt Rose's definition, then pastiche is a form of forgery albeit that the author does not intend to create a hoax.[74] This seems a reasonable characterization, since pastiche is never intended to become the original.[75] Pastiche is common in popular culture. The *Austin Powers* films are a pastiche, featuring the worst clichés of the 'Swinging Sixties', while some artists even poke fun at their own art—Quentin Tarantino's films *Pulp Fiction* and *Kill Bill* borrow from popular novels[76] and kung fu films.[77] These examples demonstrate that pastiche can encourage creativity and embraces the birth of new works.

Overall, pastiche is close to parody, since both signal that a borrowing has been made, but pastiche relies more on imitation whereas parody aims to adopt a critical stance towards the original work.

3.6 Parody and imitation

Parody is often defined by reference to imitation.[78] According to Rose, the main difference between parody and imitation lies in the fact that parody acknowledges that a borrowing has been made, whereas this signal is missing in an imitation.[79] However, many other scholars beg to differ, considering an imitation which fails to signal the borrowing made to be plagiarism.

If we refer to Hutcheon, imitation has become linked to parody because of the modern meaning of the term parody.[80] In past centuries, imitation was used by writers to approve and perpetuate works of the past, i.e. the relationship between the new work and the original work being a relationship of *inclusion*. So, even though we can see some similarities with the intent involved in an imitation and in a parody, the major difference lies, once again, in the *critical distance* missing in mere imitation works.[81]

Imitation is an established way to pay tribute to the works which are imitated.[82] William van O'Connor describes it as the 'sincerest flattery' and it is in this light that parody is an imitation.[83] We can infer from the above, that the difference between imitation and parody can be very difficult to pinpoint

in practice, since it is mainly a difference of intent.[84]

Therefore, although parody and imitation are close, what distinguishes them is that parody focuses on criticizing or mocking the original work whereas imitation merely pays tribute to the original work, thereby lacking the critical distance which is so important in a work of parody.

3.7 Parody and plagiarism

Parody should not be confused with plagiarism even though, colloquially, the terms are sometimes used interchangeably.[85] While parody and plagiarism both involve the reproduction of earlier works, the major difference between the two is foreshadowed earlier. Parodies acknowledge the borrowing which are made whereas plagiarism purposely does not.

The intention behind the work is different.[86] As discussed already, parody intends to create a distance from the work which it borrows, thereby acknowledging the borrowing. With plagiarism, the intent is to substitute or deceive the audience by passing off the borrowings as the plagiarist's own creation.[87] Parody uses irony and plays with the context in which the work evolves. Plagiarism does not change the context of the original and does not play with the original work through the use of irony. In essence, plagiarism is fraud whereas parody is creative.

3.8 Conclusion

While the preceding analysis may have failed to define clear boundaries which distinguish parody from related concepts, it has provided some insight into the relationships which exist between them. This is summarized in the following table (Figure 1.2) which is based upon Dyer's framework for the categorization of imitation.[88]

Concealed	Unconcealed

Not textually signalled	Textually signalled

Evaluatively open	Evaluatively predetermined

Plagiarism	Imitation	Pastiche	Parody	Burlesque	Caricature	Satire

Figure 1.2 Dyer's framework revisited*
*R Dyer, *Pastiche* (New York: Routledge, 2007) 24.

The first level confirms whether concealment of the imitative status is essential for the purpose of the genre or technique. The second level relates to the evidence of elements within the new work which recognizes the borrowings made. The third level reviews the public's perception of the author's judgement of the borrowings. The 'evaluatively predetermined' category identifies whether either a positive or negative judgement of the borrower is expressed. The 'evaluatively open' characterization relates to genres which either do not pass judgement, or may equally provide a positive or negative judgement on the borrowings. Once this framework is established, the place of each genre and technique can be studied.

Parody acknowledges its borrowings and depends upon the sharing of ciphers between the parodist and the public. Without this signalling of the borrowings, the public would be unable to recognize the work as a parody. Pastiche differs from parody because it relies more heavily upon imitation and features less detachment between the two works. Burlesque, caricature, and satire also expose and signal the imitation, but all three are evaluatively predetermined in the sense that they usually carry a negative judgement. Lastly, we have seen that parody *and* the three related concepts can all be distinguished from plagiarism and forgery. Plagiarism aims to hide its imitation. The only common feature with parody is its evaluative openness, i.e. without necessarily making a judgement on the elements copied.

4. Cultural Scholars' Definition of Parody

Constructing a comprehensive definition is a challenge. We have seen that not only is there a lack of any well-established definition which traverses the different art fields,[89] but also that scholars fail to agree on a definition which captures parody's many facets without blurring the frontiers between parody and other related concepts.[90] This section examines the various definitions devised by cultural theorists, to see whether these assist our quest. We may categorize these theorists as falling into one of two camps.

4.1 Linking parody to an art field or societal context

Kiremidjian belongs to a group of theorists who favour a limited definition of parody which links the definition to a specific art field or context.[91] 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.[92]

From our historical account of parody,[93] we will note that this definition does not translate directly to other art fields because it is focused on *literature* alone. Additionally, for Kiremidjian, a parody's target is the work which it imitates. Yet, we have seen that this is not always the case. Also, a parody may be created by an exaggeration of existing features, not just by substituting 'alien' content.

Rather than linking parody to a particular art field, Bakhtin founds 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 the defeat of authority, sacred institutions, official rituals, language, and values. All of these are apt targets for parody.[94] In Bakhtin's view, this social context both gives rise to grotesque, mimicries, and parodies, while also explaining why parody is more popular at some points in history than at others. Not all agree with this characterization. Dentith challenges this, by tracking parody relative to various historical events and by demonstrating that parody did not peak in the Medieval period.[95] Mack criticizes Bakhtin's definition as being unduly restrictive, and considers that 'the functions of parodies in modern times are narrow and unproductive',[96] even insignificant.

4.2 Defining parody through its functions

The second school of theorists endeavours to define parody through its *functions*, rather than based upon either context or field of art, but this school is itself sub-divided. The first focuses on the function of parody for humour or criticism, while the second attaches equal importance to its many facets.

Jameson, for example, focuses upon the comic element. He argues that parody should not be characterized 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 the similarities between two works, whereas parody's imitation is to *contrast* with the earlier work. Yet, based on the historical evolution of the term, a comic element does not seem decisive for a work to be classified as parody, rather than pastiche.

Unlike Jameson, Hutcheon considers that parody warrants a high social status and constructs her definition based upon its critique function. This emphasis leads to a parodic genre signalling an integration of discourse other than its own.[97] Hutcheon defines parody as 'a form of repetition with ironic critical distance, marking difference rather than similarity'.[98] Recognizing that this definition is broad, Hutcheon explains that it is sufficiently broad to encompass all kinds of hypertextuality,[99] because in the case of parody, the audience has a crucial role: both encoder and decoder must share the same code.[100]

Genette, in defining parody as the 'diversion with minimalistic transformation'[101] or a 'playful transformation of a particular text',[102] attempts to attribute equal weight to its critical and comedic functions. He also categorizes 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.[103] For Genette, parody is a playful transformation,[104] as its purpose is to entertain, but without mocking or being detrimental to the original text.[105] As a result, his definition is narrow. For example, he labels works such as *Don Quixote* as 'anti-novels', not parodies, because they target an entire genre, rather than a single work. Later scholars, such as Tran-Gervat, challenge such sub-categorization, since some of the elements which form the basis of the distinctions are

recognized as being elements in modern parodies too.[106]

Rose aims at crafting 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.[107] 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.[108] 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'.[109]

4.3 Lessons for the legal interpretation of parody

Few theorists contest the difficulty of defining parody. There is a general consensus that parody embodies creativity, but beyond that a parody's target may vary 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.[110] 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 general styles and conventions. Also, the amount borrowed differs from one kind of parody to another. For example, we have seen that in music it is common for a parody to copy the musical 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. We might expect any attempt to craft a definitive 'legal' definition of parody to face the very same issues.

Despite all these aspects which present uncertainty, 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. The essence of parody seems to be that it seeks to convey a

message by making a creative reference to an earlier work, or body of works.

Finally, we can already appreciate that there may be no need for positive law to delve deeply into details of that which distinguishes parody from other related concepts, such as pastiche and caricature. Since these concepts are all so closely linked, they seem capable of fitting within the same legal doctrine. Hence, while distinctions will remain relevant for experts in those particular art fields, it seems likely that these should prove irrelevant to our enquiry, which is largely concerned with the activities of users.

5. Towards a Legal Definition of Parody

While none of the countries considered in this book has elected to incorporate a definition of parody within their 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 term. 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.[111] In a 'battle' between users and right-holders of copyright works, the former tend to favour a broad definition, whereas the latter prefer a narrow and precise definition to best secure their interests.

According to statutory interpretation rules and practices, the ordinary meaning of the terms is typically the starting point when trying to understand the legal meaning of any terms which the legal instrument does not itself define. This is the case with the parody exception. Since legislators have refrained from setting out a definition within the copyright legislation, this task falls to the judiciary to develop the legal meaning in particular cases. Often, a judge's first step is to consult a dictionary. As judicial interpretative practices may have recourse to different dictionaries, it is easy to envisage that the understanding of the same term may vary from one country to another. This seems especially likely in the case of parody (and its related terms) because we have traced parody's tumultuous history and reviewed how the term seems to have defied any precise definition.

Although the meanings of parody, pastiche, caricature, and satire may vary greatly from one dictionary to another, the *legal* definition should be shaped having regard to the purpose and context of the exception within the copyright paradigm. The legislator's intent should serve two purposes: it

should act as guidance to ensure consistency and stability while allowing for a certain degree of flexibility to adapt to new circumstances. Otherwise, at a time when technological advancement enables numerous ways to rework previous copyright works, it may become tempting to stretch the meaning of the terms beyond what was intended.

Before turning to the analysis of judicial interpretation approaches in each jurisdiction, we first consider why a parody exception has been considered necessary in copyright law. This will reveal that the parody exception is situated within a wider context, meaning the existing international human rights framework may exert influence on the definition of parody in intellectual property law.

5.1 The origins of the parody exception and its basis in human rights values

As inferred earlier, a parody is a form of comment, which is seen to play an essential function in preserving and promoting the exercise of freedom of expression in a democratic society. Fostering the continuing development of art and discourse, parodies are protected under the fundamental right of freedom of expression which we will briefly outline here, while leaving the substantive discussion for Chapter 5.

Additionally, to understand the role of the parody exception within copyright law,[112] we must also consider the overarching goals of copyright protection. Traditionally, in civil law countries, copyright law merely recognizes the pre-existing natural rights of an author arising from the unique link between an author and their work. In contrast, in common law countries where the utilitarian approach prevails, exclusive rights of authors are granted in recognition of their contribution to society.

Despite these distinct rationales, the lines are often blurred and policy makers typically advance both arguments.[113] For example, copyright is a tool which can be used to foster cultural diversity.[114] The more works that 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 work has been 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 of fostering creativity as protected under the right to freedom of expression.[115]

Generally, there are two ways to appraise the relationship between the parody exception and freedom of expression.[116] 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.[117] 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 that 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.

The most persuasive arguments reject both these approaches. Strowel and Tulkens[118] and Voorhoof[119] 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.[120] It is simply easier for freedom of expression to flourish where there is a specific legal exception.

The mere existence of a parody exception does not mean that the interests of parodists are prioritized over those of right-holders;[121] rather, a specific parody exception is simply more efficient than any general defence to balance those interests. After all, the purpose of copyright legislation weighs in favour of high level of protection of exclusive rights for right-holders whilst acknowledging that it must allow for permissible uses contributing to social and cultural development. Hence, a strict interpretation of exceptions prevails, tinting the definitions likely to be attributed to parody.[122] A word of caution is in order. Although it is tempting to encapsulate many peripheral activities, one should refrain from giving the terms a meaning so broad that it is likely to jeopardize the balance struck by legislators between the right-holders and users' interests. Such interpretation, whilst attractive to circumvent the limitations of certain legal traditions (e.g. the closed catalogue of exceptions prevailing in the EU) would go against legal history and

probably set the country at odds with its international obligations.[123]

This may also explain why national courts, determining copyright disputes, are typically reticent to accept a defendant's argument which is based on freedom of expression directly. Courts perhaps fear they will jeopardize the balance which the legislator has elected to strike between freedom of expression and copyright.[124] However, enacting a parody exception maintains respect for the separation of powers between the legislative and the judicial branches,[125] since the legislator effectively legitimizes the courts to consider the proper balance of interests in any particular case. 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[126] and reinserts cultural values within the copyright paradigm.[127] As seen in what follows, this detour has consequences for the appreciation of the terms parody, pastiche, caricature, and satire within the legal sphere.

5.2 The European Union

EU copyright law requires parody to be an autonomous concept across the Union's territory.[128] Following a consistent line of jurisprudence of the CJEU, parody must be defined in relation to its ordinary meaning, in relation to the context in which it is used in the relevant Directive, and having regard to the objectives of that legislation.[129] In *Deckmyn*, the Court reviewed the dictionary definitions of the terms, and identified (agreeing with the Advocate General's Opinion—'AGO') that all parodies have two essential features: one 'structural' (a transformation which is, simultaneously, a copy and a creation); and one 'functional' aspect (it constitutes an expression of humour or mockery).[130] It seems that as the Court found no need to articulate any differences between parody, caricature, and pastiche, this should be understood to mean that the copyright provision merely lists three genres which derogate from the scope of the right-holder's exclusive rights.[131]

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'.[132] Secondly, although a humorous character is required, the nature of the humour is unspecified, leaving discretion to Member States.[133] It is worth noting that the Court includes 'mockery' under humour. This results in broadening the exception to non-comical expressions which comprise

derision, ridicule, or even material which is 'insultingly inappropriate to the circumstances'.[134] This is rather unsurprising as the AGO already emphasized that parody is an artistic expression and the result of exercise of an individual's right of freedom of expression.[135] Therefore, it can be inferred that this link to human rights considerations should influence the interpretation of the exception.[136] Thirdly, 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, works of craftmanship, and other types of artistic works. At the same time, attempts to link parody, pastiche, and caricature to particular artistic expressions impose an unnecessary limitation which overlooks the existence of various forms of 'hybrid' parody, which include combined elements of text, images, and music altogether.

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.

5.2.1 France

Prior to codification of copyright law, French courts exhibited latitude towards defendants' acts which carried an imprint of humour in recognition of a general freedom to critique, as well as humour's social function. Parodies were, therefore, afforded special treatment, long before a specific exception for the purposes of parody, pastiche, and caricature was incorporated into national copyright legislation in 1957.[137] Seen as derivative of the right of critique, parodies were praised for their dual social objectives: to entertain and to incite discourse within society.

Once copyright legislation was enacted, in the absence of a statutory definition, French courts defined 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 have recognized that parody has a broader role in society.

5.2.1.1 Defining parody broadly as a change of context

The first notable decision, *Peanuts*,[138] concerned a parody of a copyright-protected comic strip, which featured the cartoon character *Snoopy* in a

mildly pornographic scenario. 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'.[139] This definition has the particularity of reflecting the main features of parody as consistently understood by theorists,[140] insofar as it includes the role of the audience's recognition of the underlying work in the parody, and the double-voiced discourse[141] 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.[142]

This approach was soon confirmed and extended in *Tarzoon*.[143] 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,[144] the court reiterated that illustrations made to express critical 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 at that time criticized materialism, whilst simultaneously embracing it.[145] Consequently, the court accepted this particular satirical work as a parody.

5.2.1.2 Attempts at distinguishing parody from other related terms

Later in 1988, the French Supreme Court attempted to distinguish between the three terms adopted in statutory provision: parody, pastiche, and carticature.[146] Legal proceedings were 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 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[147] 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 Supreme Court defines the genre in relation to its target: a parody targets the underlying work, pastiche targets the style of a work,[148] and caricature targets a person or a character.[149]

These restricted definitions impact upon the legal protection afforded to such works. For example, this legal definition of parody does not encompass a work where 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 rationalize 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 field: parody is relevant to music, pastiche to literary works, and caricature to plastic arts. However, his categorization seems unduly restrictive. For example, it fails to take account of any equivalent for motion pictures.

Françon revisits the *Tarzoon* case[150] 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'.[151] While this definition has the advantage of including satire (or 'parody with'—targeting something other than the underlying work) within the concept of parody, Françon seems to conflate the two terms into a single genre.[152] Despite this flaw, the definition has some resonance within the literature. 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.[153]

In sum, while French jurisprudence focuses on the target of the parody, French legal scholarship tends to focus on the art field in which the parody evolves. Overall, each approach appears equally unsatisfactory, as they both impose an apparently unnecessary limit on parody. While parody, pastiche, and 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 expression. Thus, it seems unnecessary to distinguish further between the three terms in order to regulate unauthorized use within a legal regime.[154]

On balance, the use of the three different terms simply aims to reflect the diversity of existing artistic expressions.[155] Had the French legislature intended the different terms to relate to specific authorial works, then it would have been straightforward to do this explicitly, by providing a specific regime for each.[156] In the absence of such precision, the better approach is to understand parody as encompassing caricature, pastiche, and even satire.[157]

In turn, any requirement that each of the three styles must incorporate a humorous character requires 'humour'[158] to be understood more broadly than amusement or comedy, and encompass tribute or criticism as well.[159]

In the recent *Bauret v. Koons*,[160] the French tribunal of first instance endorsed the two main requirements set out in *Deckmyn*[161] as sufficient to define the purpose of parody. Consequently, previous approaches attempting to distinguish the terms in relation to particular art forms should be set aside post-*Deckmyn*.[162]

5.2.2 The United Kingdom[163]

In October 2014, UK copyright law introduced a new defence to infringment covering 'parody, caricature and pastiche'. As in France, the legislator refrained from any statutory definition, leaving the courts to interpret the terms on a case-by-case basis.[164]

In the absence of any judicial decisions applying the new exception, some insight may be gleaned from non-binding documents, such as government releases and UK Intellectual Property Office ('IPO') guidance for creators. Very early in the consultation process, the IPO acknowledges the close relationship between the three associated terms. It initially attempted to distinguish the terms based on their ordinary meaning by referring to the *Oxford English Dictionary*[165] which defines the three terms as:

> Caricature: a grotesque usually comically exaggerated representation especially of a person or ridiculously poor imitation or version.
>
> Parody: humorous exaggerated imitation of an author, literary work or style, etc or feeble imitation, travesty.
>
> Pastiche: picture or musical composition from or imitating various sources or literary or other work composed in the style of a well-known author, etc.[166]

However, instead of delving further into the distinction, the IPO moves on and states:

> [T]he UK government recognised that whilst these terms may have different connotations and meanings, they 'all include an element of imitation, and may incorporate, to a greater or lesser extent, elements of the original work. The whole point of these types of works is that they should "conjure up" the original work upon which they are based.'[167]

This perhaps demonstrates a shift in the statutory interpretative practices and marks a willingness to recognize that the three terms are so closely related that defining clear boundaries between each term is counterproductive for its

legal meaning.[168] Recalling the brief historical overview and the comparison of parody with other related terms, such a position appears to be correct. Interestingly, we can also appreciate the influence of other legal traditions. Whilst it remains unclear whether the UK governement has been influenced by the 'holistic' understanding of parody, the mention of the 'conjure-up test' seems to be a clear reference to US case law, which we shall consider shortly in the next section.

Although initially endorsing the position that the legal understanding of parody, pastiche, and caricature does not require the three terms to be distinguished, the IPO then seems to embark on a dangerous path. Instead of relying on the common denominators (imitation and incorporation) which are applicable to a wide range of uses, subsequently, the IPO's focus seems to limit the scope of parody to particular art fields. In a communication issued as part of the consultation process, the IPO recounts that parody has to be understood as 'a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule'.[169] Here preferring the *American Heritage Dictionary*[170] to the *Oxford English Dictionary*, the IPO also limits the scope of the exception to 'target parodies' (also referred to as 'parody of'). Hence, the legal meaning of parody requires the use to comment on the work or its author. The reliance on one dictionary instead of another can therefore have important consequences for the scope of the exception.

During the legislative process, there is a clear sign that the legislator intended the three terms to be taken as a whole, therefore constituting an argument against the distinction of the three terms.[171] Despite the fact that the ordinary meaning should constitute the starting point for defining parody, it seems inappropriate to use dictionary definitions to differentiate between each term, rather than to extract the commonalities between them. The latter approach affords a more comprehensive understanding which provides avenues for flexibility. This is essential if the parody exception is to adapt to new uses. Furthermore, the reliance on common features contributes to stability which is essential for parodists and right-holders.

After the introduction of the parody exception, the IPO released a guidance document for creators and right-holders. This guidance notes:

> 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.[172]

Here, while the IPO seeks to distinguish parody from pastiche or caricature, it also expands the meaning of parody, being either a comment on the original ('parody of') or on anything else outside the borrowing made ('parody with'). If anything, the different statements from the IPO demonstrate the difficulty in defining parody and its related terms.

The uncertainty surrounding the current meaning of the terms has led to a heated debate amongst scholars. The main discussion focuses on whether a holistic approach to parody should prevail over the distinction between parody, pastiche, and caricature. Emily Hudson, for example, has argued that each term should be understood separately, with the result that pastiche could be far-reaching in scope, extending uses such as mash-ups, fan fiction, sampling, collage, and other appropriation art forms.[173] While appreciating why some find this approach appealing, it seems to overlook the lessons learned from the historical account.[174] This established that pastiche focuses more on imitation than requiring any specific 'message' to be conveyed. By adopting 'pastiche' as a catch-all term for any potentially socially valuable use, there is a real risk of expanding the scope of the exception, rendering it void of substance, as well as extending it beyond the legislator's intent.[175]

Stemming from the IPO's statements during the consultation process, there was an intention to understand the three terms as fitting within the parody umbrella. While Hudson's proposals represent an elegant solution for introducing flexibility and adaptability, it might also act like a Trojan horse within the copyright system by disrupting the copyright balance too heavily in favour of users. This would ignore the high level of protection for right-holders which the EU legislation mandates.

Additionally, this proposed expansion of the 'parody' exception to uses such a sampling would seem to create an English version of 'fair use' without proper scrutiny. Hudson herself acknowledges that her definition of 'pastiche' would bring the UK closer to an understanding of parody as adopted by the US Second Circuit in *Cariou v. Prince*.[176] However, as we shall see later,[177] this particular decision has itself been the subject of criticism for stretching the scope of fair use so far that there is a real risk that this is likely to impact on the normal exploitation of works by right-holders (and their ability to license for derivative uses). [178] Such a position would also weigh against the three-step test against which all copyright exceptions

must be measured and would severely curtail the principle of strict interpretation currently prevailing.[179] This is also dangerous as fair use belongs to a different legal system in which stability is derived from a rich jurisprudence accumulated over approximately 150 years, which the UK does not have.

In essence, Hudson questions whether in *Deckmyn* the CJEU has actually interpreted the meaning of 'parody' per se, rather than 'parody' as the umbrella term including 'pastiche and caricature', and concludes in favour of the former. Indeed, a basis for this can be found in the EU Commission's position as per its written submission in *Deckmyn*.[180] *Deckmyn* arguably provides guidelines as to how one could construe the meaning of pastiche, i.e. that pastiche requires 'two key activities: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works'.[181]

This definition is hard to reconcile with *Deckmyn*.[182] Firstly, the current trend amongst Member States to refer to the exception for 'the purposes of parody, pastiche and caricature' as 'the parody exception': if the CJEU did not intend 'parody' to be used as this shorthand, then it is reasonable to presume that the Court would have taken the opportunity to emphasize the importance of distinguishing between the terms. The Court's focus on 'parody' reflects the first question referred to by the Belgian court,[183] but while summarizing the facts in the national dispute, the CJEU refers to the defendant's political *caricature*[184] within the context of the *parody* exception.[185] Thus, the Court's language suggests the three terms fit within the umbrella of parody.[186] Secondly, the CJEU agrees with the Advocate General's definition of parody by expressively referring to his Opinion.[187] Although the judgment does not repeat what the wording of Advocate General in full, it is credible that by adopting the Advocate General's solution, the Court endorsed its reasoning on this point. Here, the Opinion could not be clearer; there is no need to distinguish the three terms for the purpose of the parody exception in copyright law:

> The parody exception does not appear in isolation but rather, on the contrary, as part of a series of three categories in the form of a continuous list ('caricature, parody or pastiche'), I do not believe that a comparison with each of the concepts with which it coexists is of particular relevance for the present purposes. It may be difficult in a specific case to assign a particular work to one concept or another when those concepts are not in competition with one another. That being so, it does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the

same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the—so to speak—derived work.[188]

This warning of the danger of delineating the boundaries of each term for the effectiveness of the exception appears equally applicable to the UK as to other EU Member States. Even if the UK decides to depart from the EU understanding of parody in a post-Brexit world (and should it be allowed to do so),[189] there are numerous hurdles ahead.[190] Perhaps least convincingly, early parody cases prior to the exception refrained from distinguishing the terms and refer to 'parody'.[191] However, as these were decided prior to the introduction of the exception, English judges may well want to depart from this position. Yet, distinguishing parody from pastiche and caricature seems to be against the legislator's intent. As explained earlier, the brief overview of the IPO's statements during the consultation preceding the amendment of the Copyright Act appears to refer to parody as encapsulating other uses such as parody and pastiche.

Finally, and most importantly, Hudson's approach would probably not only jeopardize the UK's compatibility with its international obligations—as it would be more far reaching than fair use to include any type of appropriation—but it would go beyond a well-rooted rejection of a fair use style exception in UK copyright law. As we will further cover in Chapter 2, with the UK's accession to the Berne Convention in 1887, the UK Copyright Act 1911[192] paved the way for a rejection of US fair use to bring the UK closer to its Europeancontinental neighbours.[193]

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' as well as on the importance of humour or the type of humour required. In the meantime and despite the uncertainties linked to the current political context,[194] some insight can be gleaned from the interpretation of the exception by the CJEU in *Deckmyn*. In which case, the latest IPO guidance definitions should be set aside in favour of a more comprehensive approach as per the government's documents published prior to the introduction of the new exception. Although for legal purposes the three styles belong arguably to the same (legal) genre, it is legitimate to question whether the legal recognition of three 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. This will be

better appreciated when contrasted with the Canadian and Australian parody exceptions.[195]

5.3 The United States

Early US cases demonstrate a wide understanding of parody which includes uses targeting both earlier copyright-protected works or having a subject unrelated to the works it reproduces. For example, in *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*,[196] District Judge Evans defines parody and satire thus:

> A parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule. A satire is a work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly.[197]

Building upon this definition, the judge adds:

> [P]arody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected, removing the 'fair' aspect of the 'fair use' doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others.

In essence, parody cannot be a shortcut to getting a licence for a use but requires the creation of a new expression having a particular social function.[198] Hence, there needs to be some critical bearing or comment made through the parodic or satiric use.

The landmark parody case which has caused the US approach to depart from other jurisdictions is undoubtedly the *Campbell* case.[199] In 1989, a popular rap group, 2 Live Crew, created a 'parody' by replacing the original lyrics of Roy Orbison and William Dees' rock ballad *Oh, Pretty Woman*. In considering whether the use fell under the parody fair use defence, the US Supreme Court created a clear distinction between parody and satire.[200]

Taking the definition directly from that decision a parody is 'the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works'.[201] Therefore, a 'parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims) imagination […]'.[202] A parody must reproduce enough copyright-protected elements to 'conjure up' with the earlier work to make its parodic commentary recognizable.[203] The

Supreme Court limits the scope of the parodic purpose further by adding that, for fair use to apply, a parody needs to comment upon or criticize the work it borrows from, aiming at creating a new artistic work rather than 'superseding the objects of the original'.[204] Nevertheless, the Court agreed that the quality and tastefulness of the parody are irrelevant for detemining the fair use purpose.[205] Conversely, satire is defined as the use of a particular work for commenting on an unrelated object.[206] Here, the 2 Live Crew reproduction served as a vessel for a criticism of something other than the original and, consequently, would fall outside the fair use doctrine.[207] The case was remanded and the parties eventually settled out of court.

Subsequently, post-*Campbell* US courts have reinforced this binary distinction by attempting to categorize *all* transformative works as either parody or satire.[208] For example, *The Wind Done Gone*, retells the story of a literary classic, racist melodrama, *Gone With the Wind*. This use was considered as a legitimate parody because it is aimed at directly commenting on the novel's plot.[209] But the unauthorized rewrite of a song, *Boogie Woogie Bugle Boy*, to comment upon social customs was held not to be a lawful parody.[210]

More recently in *Bourne*,[211] a US district court was called upon to decide whether a parody of the author (as opposed to the author's work) could fit the purpose of parody as understood under US copyright law. The defendant reproduced the Disney musical work *When You Wish Upon A Star* in a song called *I Need A Jew* to allege that Walt Disney was racist. The court held in favour of the parodist because the use of the musical work reinforced the derivative's parodic nature by criticizing the original work.[212] In *Salinger v. Colting et al*,[213] the Swedish author, Fredrik Colting, published *60 Years Later: Coming Through the Rye* which reproduces substantial parts of J.D. Salinger's well-known *Catcher in the Rye* classic. Faced with a copyright lawsuit, Colting sought to rely on the parody exception for his new sequel to the classic. The same district court held that a tribute or sequel could not be understood as a parody unless the parodic or critical elements of the new work were the primary focus for the use.[214] Here, the underlying reasoning was that the parody exception should not become a means to legitimize any exploitation of existing copyright-protected works later claimed as comments made under the cover of parody.[215] If a parodist wishes to comment on something external using a copyright-protected work, a reference can be

made by imitating the style of the original author, rather than reproducing their specific expressions. Nevertheless, a comment on the work should be made to qualify as parody under US copyright legislation. 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.[216]

Some have argued that more recent cases have paved the way to relinquish the strict parody/satire dichotomy.[217] In a fairly recent case,[218] the Second Circuit considered the borrowing of a pair of feet from a famous photograph by Jeff Koons in a work seeking to comment on the social and aesthetic power of mass media. Here, the court seems to have focused on the creative endeavour behind the use and on the creative added value enshrined in the parody work. Nonetheless, by relying heavily on the wording of the *Campbell* decision, the court maintains the distinction but allows for exceptions.[219]

5.4 Australia

While EU law adopts a copyright exception for 'parody, pastiche and caricature', the Australian legislature preferred to draft the exclusion in terms of 'parody and satire'. This section considers whether this different choice of words is likely to capture a different sub-section of transformative uses.

As in the case of France, the UK, and the US, there is no definition of either 'parody' or 'satire' within the Australian Copyright Act itself. According to statutory interpretation rules and, especially, section 15AA of the Acts Interpretation Act 1901 (Cth), '[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'. However, the Australian Copyright Act provides very little guidance and close to nothing to help with the understanding of parody and satire.

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.[220]

Later updates[221] 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.[222]

'Satire', in turn, draws:

> 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).[223]

Hence, 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. Uncertainty surrounding 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 US ('AUSFTA').[224] If the Australian courts adopt the same approach, a parody (or 'target parody'[225]) comments on the underlying work, whereas satire (or 'weapon parody'[226]) refers to the underlying work to comment on anything other than that work.[227] As we have just seen, post-*Campbell* US courts have tended to attempt to categorize *all* transformative works as either parody or satire which has resulted in an arguably unnatural extension of the term satire so that it captures 'worthy' transformative uses which cannot fit within the restricted parody category.[228]

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.[229] At the time of enactment in 2006, its choice of wording for a 'parody' exception was unique.[230] While it is likely that the same arguments will be advanced again by right-holders before the courts during any litigation concerning unauthorized parodies,[231] it would seem counterproductive for Australian courts to adopt the US definitions for the following reasons.

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'. A hypothetical example of this is The Ashes Tour songs of the Australian cricket supporters' club called The Fanatics.[232] These songs adapt the words of well-known songs to reflect the fans' support of their team. While ordinary Australians would consider these to be clear examples of parody, a US-style approach by Australian courts would see such uses as satire, simply because the target of the songs is cricket, and not the underlying copyright-protected work. While the characterization as 'parody' or 'satire' might not impact on the outcome of any legal determination, adopting legal definitions which are unnecessarily distinct from the ordinary meaning of the term seems more likely to be detrimental to, rather than benefit, the efficient operation of the exception.

A second school of thought argues that the Australian courts should adopt the definitions provided by relevant theorists. For example, in *TCN Channel Nine v. Network Ten*,[233] a case which arose prior to the introduction of a specific exception, Conti J.'s definition of parody relied upon the scholarship of Rose. The facts in the case are very straightforward. The defendant used a number of short extracts from a Channel Nine television programme in its own light-hearted topical review show, *The Panel*. Network Ten ran two arguments in its defence. Firstly, it argued that extracts, averaging only forty 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. found it useful to draw a distinction between parody and satire: parody, in his view, requires imitation, and thus copying of earlier works whereas 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.[234] Parodic use, however, which required copying of an earlier work, either requires permission, or it must fall within one of the categories of uses covered by the fair dealing defences, which then were concerned with uses such as for the purposes of criticism, review, or news reporting.[235]

Therefore, it is possible that Australian courts may consult the works of other theorists, outlined previously in section 3. 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.[236]

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:

> [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. [237]

In contrast, Jewell and Louise’s conception of parody focuses 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’.[238] 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.[239]

Finally, the approach which has gained most support[240] is the form of statutory interpretation[241] which consults dictionaries to derive the ordinary meaning of statutory terms.[242] 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.
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.[243] Although when the practice was first adopted by courts, dictionary definitions aimed to be largely prospective, now dictionaries tend to adopt a more historical approach which captures all past usages of a term.[244] Indeed it was the recognition of the limitations of these dictionary definitions which actually motivated Conti J. to look to Rose's research instead.

Additionally, it seems legitimate to question the relevance of (historical) dictionary definitions to the purpose and objectives of a particular legislative provision.[245] Given that a legislator would aim for legislation to cover future evolution, any definition set too much in the past could be detrimental to the proper application of the parody exception. For example, although the Australian legislature was looking ahead to future uses of works in the digital age, the dictionary definitions have remained unchanged since 1981, a time when the internet barely existed,[246] 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.[247]

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. However, these definitions can constitute a valuable starting point.

While it is possible to find shortcomings with each of the approaches

described here, it is apparent they are in agreement that parody requires a combination of imitation and creation.[248] 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.[249] 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),[250] radio programmes, such as *The Blow Parade* (presented by Taylor and Hansen),[251] 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*[252]).

5.5 Canada

Canada is no exception to the approach of the other countries mentioned, since Canadian copyright legislation does not define parody and satire either.[253] Given the current absence of established 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 as well as from the first parody decision in *United Airlines, Inc. v. Jeremy Cooperstock*[254] since its introduction.

Firstly, to date, Canadian courts have rejected the definitions used in the US.[255] The *Michelin* case in 1996[256] considered a trade union parody of the Bibendum man logo in which a leaflet depicted the well-known character crushing a Michelin worker. Although the Federal Court considered the US definitions established in *Campbell*,[257] it saw no reason to adopt either the definitions or a fair use defence from another legal regime, based upon different jurisprudence,[258] not least because Canada does not have any long tradition of accepting fair use for the purposes of parody.[259] Thus, the Canadian court preferred to adopt the ordinary meaning of the terms, and

consulted the *Collins Dictionary of the English Language*.[260] 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*,[261] 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'.[262] Yet, there seems to be no reason to cling to this particular definition for the purpose of the new exception, as its limited scope seems to reflect the fact that 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 to be 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 from the definitions adopted in the cases prior the introduction of the new exception. This view is based upon Canadian principles of legal interpretation, including section 12 of the Canadian Interpretation Act.[263] 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.[264] As this is the case for parody and satire, we can presume that ordinary definitions will have to be considered.

Moreover, since 2004 in *CCH*[265] (and confirmed in 2012[266]), 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,[267] in recognition of the status of users' rights.[268] 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 reasonable to suggest that the terms should enjoy a 'large and liberal interpretation in order to ensure that users' rights are not unduly constrained'.[269]

The Canadian Federal Court has paved the way in *United Airlines* by

endorsing the EU parody requirements as established in *Deckmyn.* According to the court, these two main requirements of humorous intent and absence of confusion adequately reflect the ordinary meaning of the terms.[270] By doing so, the court equally did not find it relevant to distinguish the terms parody and satire any further and confirmed that the comment can be directed at something external to the elements reproduced.[271]

6. Conclusion

Following the introduction of a specific parody exception in copyright legislation, there are some differences between the type of uses which can benefit from the exception in the US, Australia, Canada, and the European Union. Indeed, despite the inherently speculative nature of this enquiry, since courts in the UK have yet to have the opportunity to interpret the new exception, it is possible to draw the following observations.

The historical overview demonstrates that parody (understood as a single 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 habits change. Without exception, legislators have elected to leave the particular meaning for the parody exception undefined.

In the US, this has led to the desire to limit the reach of the exception to uses which directly comment upon the work it borrows from (though the distinction is slowly fading). In doing so, the US system is characterized by an unnatural distinction between parody and satire. To avoid this fictional parody/satire dichotomy, the Australian and Canadian legislators expressly framed their copyright exception to include satire. Consequently, courts should allow the application of the parody exception to both uses which comment directly on the work they borrow from and uses which comment on a third subject, using the copyright-protected work as a vehicle for their expression.

The European approach is equally flexible. The terms used in the law indicate that uses of caricature, parody, or pastiche should be exempted from copyright infringement provided that the conditions for the exception's application are satisfied. Consequently, the CJEU's *Deckmyn* decision is welcomed, and it may resonate in Australia and Canada. By refusing to

distinguish between the terms ‘pastiche, parody, and caricature’, it has been argued here that the Court established that all three types 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 recognizably different from the underlying work to avoid confusion with it, generally achieved through comment. As copyright cases are often concerned with where the line should be drawn between ideas and protectable expressions of ideas, a broad understanding of parody should afford courts leeway to determine whether a use is a parody, or not, without the need to resort to fictitious definitions which confine what a parody is, as in the US since the *Campbell* case.[272]

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 strictly,[273] the CJEU indicates in *Deckmyn* that interpretation should not be so strict as to defeat the purpose of the exception.[274] By making plain that ‘humour’ includes mockery,[275] it seems that the term 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.[276] This is also supported by human rights considerations[277] as 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.[278] 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 expressions of criticism and comment.[279]

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[1] However, as explained in Chapter 2, the EU merely offers a possibility for EU Member States to introduce a parody exception in their national laws.

[2] C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn*).

[3] Meaning it must be interpreted uniformly throughout the EU: *Deckmyn* (n 2) [17]; Advocate General's Opinion in *Deckmyn* [2014] ECLI:EU:C:2014:458 (hereafter AGO in *Deckmyn*) [35].

[4] *Deckmyn* (n 2) [19]; AGO in *Deckmyn* (n 3) [45].

[5] *Deckmyn* (n 2) [20]; AGO in *Deckmyn* (n 3) [48].

[6] AGO in *Deckmyn* (n 3) [46]; see section 5.2.

[7] In this work, references to 'parody' encompass both parody, *sensu strictu*, and other related terms such as satire, caricature, and pastiche unless otherwise specified.

[8] L Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (University of Illinois Press 1985) 32.

[9] Adaptation is an exclusive right of the original right-holder.

[10] The fields covered in this section are poetry, literature, plastic arts, music, cinematography, and drama.

[11] A Strowel, 'La parodie selon le droit d'auteur et la théorie littéraire' (1991) 26 *RIEJ* 23, 30.

[12] S Dentith, *Parody* (Routledge, 2000) 9.

[13] Ibid, 10.

[14] For example, Aristophanes liked to mock Cratinus in his plays (e.g. *Knights*). Cratinus, an eminent poet of Old Comedy, had the reputation of often being drunk and incontinent. Cratinus replied through *Pytine* which takes inspiration from his portrayal made in *Knights*. Z P Biles, 'Intertextual biography in the rivalry of Cratinus and Aristophanes' (2002) 123(2) *The American Journal of Philology* 169.

[15] Dentith (n 12) 45–54; Biles (n 14) 197.

[16] Quintilianus translated in H E Butler, *The Institutio Oratoria of Quintilian* (4 vols II, Loeb Classical Library, 1953) 493.

[17] Ibid, 395.

[18] As cited in R Falck, 'Parody and contrafactum: a terminological clarification' (1979) 65 *The Musical Quarterly* 1, 3.

[19] Ibid.

[20] Ibid, 4.

[21] Ibid.

[22] Dentith (n 12) 126.

[23] See section 3.3.

[24] Dentith (n 12) 33.

[25] Ibid, 36.

[26] On the publications of the time: G R Hoekstra, 'An eight-voice parody of Lassus: André Pevernage's "Bonjour Mon Coeur" ' (1979) 7 *Early Music* 367; M Ribon, *Parodies Bachiques sur les Airs et Symphonies des Opera* (Paris, 1695).

[27] Falck (n 18) 5.

[28] Translation in ibid, 9.

[29] J Ward, 'The use of borrowed material in 16th-century instrumental music' (1952) 5(2) *Journal of the American Musicology Society* 88.

[30] Schilling translated in Falck (n 18) 10.

[31] It is only in the twentieth century that parody is generally defined in music in terms of a ridiculing function.

[32] D J Grout, 'Seventeenth-century parodies of French opera—Part I' (1941) 27(2) *The Music*

Quarterly 211–19.

[33] Couperin actually thanked the poets directly in the preface of one of his books: F Couperin, *Pièce de Clavecin* (3rd book, preface, Paris, 1722) reprinted in *Le Pupitre* (Paris, 1969).

[34] Further honed by concepts adopted in copyright law.

[35] C Rutz, 'Parody: a missed opportunity?' (2004) 3 *IPQ* 284, 286.

[36] D Macdonald, *Parodies: An Anthology from Chaucer to Beerbohm and After* (Random House, 1960) 563.

[37] P Dias da Silva and J Garcia, 'YouTubers as satirists: humour and remix in online video' (2012) 4 *JeDEM* 89, 91.

[38] S Chatman, 'Parody and style: rhetoric and film' (2001) 22(1) *Poetics Today* 25, 34; Dentith (n 12) 117; T Wright, *A History of Caricature and Grotesque in Literature and Art* (Chatto & Windus, 1985) 342; G D Kiremidjian, 'The aesthetics of parody' (1969) 28(2) *The Journal of Aesthetics and Art Criticism* 231–42; R Tuve, 'Sacred "parody" of love poetry, and Herbert' (1969) 8 *Studies in Renaissance* 249; W van ÓConnor, 'Parody as criticism' (1964) 25(4) *College English* 241.

[39] Dentith (n 12) 118.

[40] R L Mack, *The Genius of Parody Imitation and Originality in Seventeeth-Century English Literature* (Palgrave Macmillan, 2007).

[41] Irony comes also from ancient Greek and means dissimulation, feigned ignorance, see H G Liddell, R Scott, G Crane, H S Jones, R McKenzie, and E A Barber, *A Greek-English Lexicon* (Clarendon, 2002).

[42] For common features between both terms see M Rose, *Parody//Meta-fiction: An Analysis of Parody as a Critical Mirror to the Writing and Reception of Function* (London, 1979) 51.

[43] Hutcheon (n 8) 31; Van O'Connor (n 38) 248.

[44] Double-voicing is usually attributed to Bakhtin's works. In his study of literature and the philosophy of language, Bakhtin defines this concept in relation to parody as meaning: 'it superimposes a voice doing the parodying over the voice of what is being parodied, because the very act of reproducing another's voice makes the other's words sound mocked, exaggerated, and gives them a derisive intonation.' W G Simon, 'Bakhtin: parody' (1990) 12(1–2) *Quarterly Review of Film & Video* 23.

[45] Hutcheon (n 8) xiv.

[46] C Kerbrat-Orecchioni, 'L'ironie comme trope' (1980) 41 *Poétique*, 108–27.

[47] Hutcheon (n 8) 56.

[48] For more information see R P Blackmur, 'Parody and critique: Mann's Doctor Faustus', in *Eleven Essays in the European Novel* (Harcourt, Brace & World, 1964) 97–116; W C Booth, *The Rhetoric of Fiction* (University of Chicago Press, vol. III); L Feinberg, *The Satirist: His Temperament, Motivation and Influence* (Iowa State University Press, 1963); Macdonald (n 36); R Paulson, *The Fictions of Satire* (Johns Hopkins University Press, 1967); M Rose (n 42); C Stone, *Parody* (Martin Secker, 1914).

[49] Hutcheon (n 8) 52.

[50] See section 3.1 to understand the pragmatic and the evaluative function of irony.

[51] Macdonald (n 36) xiii.

[52] Chatman (n 38) 33.

[53] Hutcheon (n 8) 16 and 43. This idea carries on today. See, for example, the quotation from P Martens as cited in B Mouffe, *Le droit à l'humour* (Larcier, 2011) 48 where it is said that humour and law contribute to the concept of justice. Both laughter and judging comprise a repressive function.

[54] See section 2.5.

[55] Rose (n 42) 81.

[56] Hutcheon (n 8) 62.

[57] Nevertheless, in literature, the distinction between parody and satire may refer to the object that parody aims to reach being the previous work or the style of an author, whereas satire aims towards something extramural such as another person or societal value. See Y-M Tran-Gervat, 'Pour une définition opérationnelle de la parodie littéraire: parcours critique et enjeux d'un corpus spécifique' (1996) 13 *Cahiers de Narratologie* 7.

[58] It is interesting to note that this song was the object of a lawsuit in the US, and the US Appeal Court eventually decided that this work was lawful under the fair use for the purpose of parody. *Mattel v. MCA Records*, 296 F.3d 894 (9th Cir. 2002).

[59] Rose (n 42) 40.

[60] G Genette, *Palimpsestes* (Paris: Le Seuil, 1982) 29.

[61] Dentith (n 12) 11.

[62] Hutcheon (n 8) 40.

[63] In Egypt for example, humans were often represented as animals doing human activities which appear to be humorous. The Greeks used caricature humans as monsters. See Wright (n 38) 4–22.

[64] R Paulson, 'Pictorial satire: from emblem to expression' in R Quintero (ed.), *A Companion to Satire: Ancient and Modern* (Malden, Oxford, Victoria: Blackwell Publishing, 2007) 312.

[65] Da Silva and Garcia (n 37) 92; see the case of Charles Philipon who started a satirical newspaper after the French Revolution with caricatures inside. In one of his releases, he made a caricature of the King where the King's face was shaped into a pear because of its natural shape. It is relevant to understand that, at that time, calling somebody a pear meant the same as calling him a buffoon. Charles Philipon was sentenced several times to jail time.

[66] A Tunç, 'Pushing the limits of tolerance: functions of political cartoonists in the democratization process: the case of Turkey' (2002) 64 (1) *International Communication Gazette* 48.

[67] Kiremidjian (n 38) 235.

[68] Genette (n 60) 34; Dentith (n 12) 11.

[69] Genette (n 60) 30.

[70] Hutcheon (n 8) 12.

[71] Genette (n 60) 34.

[72] F Jameson, 'Postmodernism and consumer society' in Hal Foster (ed.), *The Anti-Aesthetic* (Bay Press, 1986) 127–45.

[73] Hutcheon (n 8) 38.

[74] Rose (n 42) 43.

[75] It should be noted that 'original' is used here in the sense of 'new', rather than in a 'copyright' sense to imply the work contains enough creative content to be eligible for copyright protection. Indeed, a work of pastiche can borrow ideas from multiple sources and still be considered 'original' under copyright law.

[76] *Pulp Fiction* is a 1960 pastiche borrowing from these novels.

[77] See *Kill Bill*.

[78] See section 2.

[79] Rose (n 42) 25.

[80] Hutcheon (n 8) 10.

[81] Ibid, 34.

[82] Dentith (n 12) 105.

[83] Van O'Connor (n 38) 243.

[84] In Federal Court of Australia, *TCN Channel Nine Pty Limited v. Network Ten Pty Limited (No 2)* [2005] FCAFC 53, the Australian judge, in defining parody and satire, first referred to the *Macquarie Dictionary*, then turned to the teachings of Margaret Rose for whom parody requires imitation while satire does not inevitably need it to fulfil its purpose; finally, the judge turned to *Copinger and Skone James on Copyright* for the test to apply. See section 5.4.

[85] H M Paull, *Literary Ethics* (Butterworth, 1928) 14; Rose (n 42) 41.

[86] Hutcheon (n 8) 40.

[87] P Jewell and J Louise, 'It's just a joke: defining and defending (musical) parody' (2012) 10 *Australian Review of Public Affairs* 8; M Klang and J Nolin, 'Tolerance is law: remixing homage, parodying plagiarism' (2012) 9 *SCRIPTed*, 159.

[88] R Dyer, *Pastiche* (New York: Routledge, 2007) 24.

[89] See section 2.

[90] See section 3.

[91] Like Bakhtin, discussed later.

[92] Kiremidjian (n 38) 232.

[93] See section 2.

[94] M Bakhtin, *The Dialogic Imagination* (University of Texas Press, 1981) 79; Dentith (n 12) 22.

[95] Dentith (n 12) 37.

[96] Mack (n 40) 4.

[97] 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 (n 8) 31.

[98] Ibid, 6.

[99] 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 N Korkut, *Kinds of Parody from Medieval to Postmodern* (Middle East Technical University, 2005) 8.

[100] Hutcheon (n 8) 37.

[101] Translation is mine. Genette (n 60) 40.

[102] Ibid, 202.

[103] Genette infers that there is a sharp distinction between transformation and imitation, which allows parody to differ from pastiche.

[104] Ibid, 34.

[105] Ibid, 43.

[106] Tran-Gervat (n 57) 3.

[107] Rose (n 42) 52.

[108] Dentith (n 12) 6.

[109] Ibid, 9.

[110] This is a non-exhaustive list.

[111] S McCausland, '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.

[112] We will see that Australia and Canada have preferred 'parody and satires' where the US remains

silent. See sections 5.3, 5.4, and 5.5.

[113] D Gervais, 'Intellectual property and human rights: learning to live together' in P L C Torremans (ed.), *Intellectual Property and Human Rights* (3rd edn, Kluwer, 2008) 20. The Wittem project for a European Copyright Code enshrines the parody exception under the heading 'Uses for the purpose of freedom of expression and information' (article 5.2(1)(e)). For the time being, the decision from the CJEU. *Deckmyn* (n 2), removes all doubt for Member States, [27] and [34]. For examples of the use of freedom of expression as justification for the introduction of the parody exception for policy makers, as in the UK: UK Government, *Impact Assessment: Copyright Exception for Parody* (20 December 2012) 1, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308746/ia-exception-parody.pdf (access date: 1 June 2018); *Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Hargreaves* (IPO, 2011) 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 October 2006) 2; C Geiger, 'The Constitutional Dimension of Intellectual Property' in P L C Torremans (ed.), *Intellectual Property and Human Rights* (3rd edn, Kluwer, 2008) 122.

[114] C J Craig, 'Putting the community in communication: dissolving the conflict between freedom of expression and copyright' (2006) 56 *U. Toronto L.J. 75*, 110.

[115] Conceiving copyright as a traditional property right entails a judgement on particular forms of expression which is at odds with the right to freedom of expression. A Couto, 'Copyright and freedom of expression: a philosophical map' in A Gosseries, A Marciano, and A Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan, 2008) 165.

[116] D Voorhoof, 'La Liberté d'expression est-elle un argument légitime en faveur du non-respect du droit d'auteur?' in A Strowel and F Tulkens (eds), *Droit d'auteur et liberté d'expression: regards francophones, d'Europe et d'ailleurs* (Larcier, 2006) 55.

[117] This would appear to be the approach taken by EU Member States due to the wording of the InfoSoc Directive which expressly states exclusive rights to be the rule to which exceptions must be interpreted strictly. See Chapter 3, section 2.2.

[118] A Strowel and F Tulkens, 'Equilibrer la liberté d'expression et le droit d'auteur' in Strowel and Tulkens (eds), *Droit d'auteur et liberté d'expression* 17.

[119] Voorhoof (n 116) 54.

[120] This includes not only copyright exceptions but also the idea/expression dichotomy, subject matter, and term of protection. P B Hugenholtz, 'Copyright and freedom of expression' in N Elkin-Koren and N W Netanel (eds), *The Commodification of Information* (Kluwer, 2002) 351.

[121] Strowel and Tulkens (n 116) 22.

[122] For more, see Chapter 3, sections 1 and 2.

[123] See Chapter 2, sections 3 and 4.

[124] C-306/05 *SGAE v. Rafaël Hoteles* [2006] *SA* ECLI:EU:C:2006:764, [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. Also in G B Dinwoodie, 'Copyright and free expression: engine or obstacle' in *Copyright and Freedom of Expression* (Huygens Editorial, 2008) 253–8, esp. 258.

[125] It suffices to examine the difficulty in recognizing 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.

[126] This is based on article 27 UDHR and article 15 ICESCR which preserve the right to participate in cultural life.

[127] For more on the crisis of the legitimacy of IP: C Geiger, 'Constitutionalising: intellectual property law? The influence of fundamental rights on intellectual property in the European Union' (2006) 37(4) *IIC* 371.

[128] *Deckmyn* (n 2) [17]; AGO in *Deckmyn* (n 3) [35].

[129] *Deckmyn* (n 2) [19]*;* AGO in *Deckmyn* (n 3) [45]; C-285/12 *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides* [2014] ECLI:EU:C:2014:39, [27]; C-549/07 *Friederike Wallentin-Hermann v. Alitalia* [2008] ECLI:EU:C:2008:771, [17]; C-119/12 *Josef Probst v. mr.nexnet GmbH* [2012] ECLI:EU:C:2012:748, [20] and C-49/11 *Content Services Ltd v. Bundesarbeitskammer* [2012] ECLI:EU:C:2012:419, [32].

[130] *Deckmyn* (n 2) [20]; AGO in *Deckmyn* (n 3) [48].

[131] On 28 July 2016, the German *Bundesgerichtshof* ('BGH') applied the *Deckmyn* teachings for the first time in file no. I ZR 9/15 ('Auf fett getrimmt'). This case dealt with the alteration of a photo of a famous German actor depicting her in a rather unflattering manner. The BGH confirmed the need to give a broad meaning to parody post-*Deckmyn*. Hence, the photo editing was sufficient to allow the recognition of the original while being noticeably different from it, [28]–[35].

[132] AGO in *Deckmyn* (n 3) [61]–[65]; *Deckmyn* (n 2) [21].

[133] The AGO confers a broad margin to Member States. AGO in *Deckmyn* (n 3) [69].

[134] See *Oxford English Dictionary*. The etymology of 'mockery' comes from the French verb 'se 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 Chapter 5, section 4.2.

[135] AGO in *Deckmyn* (n 3) [70].

[136] Chapter 7, section 2, explains that the greater the use of a humorous, political, or public interest character, the more likely it is that the expression will be lawful.

[137] H Schuermans, *Code de la Presse* (Larcier, 1861) 173; on the introduction of the French parody exception, see Chapter 2, section 4.1.

[138] TGI Paris, 19 janvier 1977, RIDA, 1977, n°92, pp. 167–9.

[139] Author's translation. Ibid.

[140] See section 4.

[141] See n 40.

[142] Yet the opposite result was reached in the pastiche of Calimero in light of sadomasochist situations: TGI Paris, 24 mars 2000, légipresse 2000 I, p. 71.

[143] TGI Paris, 3 janvier 1978, D., 1979, p. 99, obs. Desbois; see works mentioned in Chapter 6, section 4.3.2.

[144] Ibid.

[145] Satire seems to be understood here as referring to something external to the original work it borrows from.

[146] Cass., 12 janvier 1988, RIDA, n°137, p. 98; Paris (1ère ch.) 15 octobre 1985, D. 1986, somm. 1986, obs. Colombet.

[147] Possibly raising image rights or other personality rights issues.

[148] It must be remembered 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. See section 3.5; Dalloz, 'Exception au droit d'exploitation' (2006) 9, [806]; F Delfour, *L'Imitation Créatrice* (University of

Toulouse, 2000) 72.

[149] A Berenboom, 'La parodie' in E Cornu (ed.), *Bande dessinée et droit d'auteur* (Larcier, 2009) 104; Mouffe (n 53) 20.

[150] See n 143.

[151] Translation is mine. A Françon, 'Questions de droit d'auteur relatives aux parodies et productions similaires' (1988) 6 *Droit d'Auteur* 302.

[152] This is contested by experts in various art fields. Hutcheon's explanation is that people confuse parody and satire because of how these genres use irony. He considers that parody pays tribute to the original work from which it borrows, 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 (n 38) 33; Macdonald (n 36) xiii; Hutcheon (n 8) 16 and 43.

[153] D Sangsue, *La Parodie* (Hachette Supérieur, 1994) 5.

[154] B Galopin, *Les exceptions à usage public en droit d'auteur* (IRPI, 2012) 303; P Tréfigny, 'Les conditions de licéité de l'imitation en droit d'auteur' in *l'Imitation: contribution à l'étude juridique des comportements référentiels* (PUS, 2000) 222; Strowel (n 11) 41.

[155] Strowel (n 11) 42.

[156] S Durrande, 'La parodie, le pastiche et la caricature' in *Mélanges en l'honneur de André Françon* (Dalloz, 1995) 133.

[157] As further supported by the human rights framework. See Chapter 5.

[158] *Deckmyn* (n 2) [20].

[159] *Saint-Tin*: TGI Evry, 9 juillet 2009, RG n°09/02410 confirmed Paris, 18 février 2011, RG n °09/19272, Propr. Int. 2011 n°39, p. 187.

[160] TGI Paris, 9 mars 2017, RG n°15/01086.

[161] *Deckmyn* (n 2).

[162] Yet, recently Bruguière argued for the need to go back to the Supreme Court's stance. In doing so, this scholar argues that there is more margin for courts to determine what constitute the rules of the genre in each art field. J-M Bruguière, 'La réception du fair dealing britannique dans le système d'exception fermée français' (2018) *RIDA* (forthcoming).

[163] Reference to the UK jurisdiction in this book specifically means the courts of England and Wales and the UK Supreme Court, unless otherwise stated.

[164] Interestingly, parody cases prior to the introduction of a parody exception in UK copyright law already show a tendency to understand parody as a multivalent term: see *Hanfstaengl v. Empire Palace* [1894] 3 Ch 109; *Francis, Day & Hunter v. Feldman & Co* [1914] 2 Ch 728; *Glyn v. Weston Feature Film Co* [1915] 1 Ch 261*; Joy Music v. Sunday Pictorial Newspaper* (1920) [1960] 2 QB 60; *Twentieth Century Fox Film Corp. v. Anglo-Amalgamated Film Distributors* [1965] 109 SJ 107; *Schweppes v. Wellington* [1984] FSR 210; *Williamson Music v. The Pearson Partnership* [1987] FSR 97; *Allen v. Redshaw* [2013] EWHC 1312 (Pat).

[165] Though this is not made explicit by the impact assessment, this definition coincides with the first indent of the definition found in the *American Heritage Dictionary of English Language*.

[166] *Taking Forward the Gowers Review of Intellectual Property: Proposed changes to copyright exceptions* (Newport: Intellectual Property Office, 2008) para 188.

[167] Ibid, para 189.

[168] Ibid, para 190.

[169] *Impact Assessment* (n 113) 3.

[170] Though this is not made explicit by the impact assessment, this definition coincides with the first indent of the definition found in the *American Heritage Dictionary of English Language*.

[171] In addition to the documents already mentioned, one can refer to the government's response to the *Hargreaves Review of Intellectual Property and Growth* which said it would 'bring forward proposals in autumn 2011 for a substantial opening up of the UK's copyright exceptions regime […] This will include proposals […] to introduce *an exception for parody*' (author's emphasis) *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (3 August 2011) 7.

[172] IPO, 'Exceptions to copyright: Guidance for creators and copyright owners' (October 2014) 7, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_c _Guidance_for_creators_and_copyright_owners.pdf (access date: 22 May 2018).

[173] E Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' (2017) 4 *IPQ* 346.

[174] See section 2.

[175] The legislator's intention seems to be that curtailing the exclusive rights of right-holders is only welcomed in circumstances where the use amounts to a new expression, through the emphasis of 'comment' on either earlier works or a third object, extramural to the work it borrows from. See UK Government, *Impact Assessment: Copyright Exception for Parody* (20 December 2012) 3.

[176] 714 F.3d 694 (2d Cir. 2013).

[177] See Chapter 5, section 5.5.

[178] The scholar acknowledges that this reasoning would enable the UK to get away from the straightjacket of the limited exceptions listed in article 5.3 of the InfoSoc Directive. This is a huge leap likely to change the approach endorsed at EU and UK levels. If this amounts to introducing a wider fair use approach than the one currently enforced in the US, such a move surely requires further scrutiny and public consultation.

[179] See Chapter 3, section 2.2.

[180] AGO in *Deckmyn* (n 3) [41].

[181] Hudson (n 173) 363.

[182] It is not denied that UK courts may adopt such a position in a post-Brexit world. However, current official documents from the UK government demonstrate a willingness to keep a certain influence of the CJEU in the UK. Additionally, once treated as a third country, it is reasonable to argue that the UK will have to enter into a trade agreement with the EU, in which case it is likely that the EU will seek the CJEU's interpretation being maintained in future relations between the UK and the EU.

[183] Before delivering his Opinion, it is good practice for the Advocate General to state the limits of that Opinion. Analysing the preliminary observations of the Opinion, there is nothing to suggest that the Advocate General intended to limit the Opinion to parodies only and that it does not extend to caricature and pastiche. Adopting a reasoning *a contrario*, I argue that what is not excluded is therefore included. See AGO in *Deckmyn* (n 3) [27]–[31].

[184] Interestingly, the 'caricature' is used in the French version of the judgment but not in the English version. The latter refers to 'political cartoon'. As French is the working language of the Court, one could argue that it is this version which carries more weight.

[185] *Deckmyn* (n 2) [11].

[186] Ibid, [12], where the CJEU refers to the provision as '*the* parody exception' and not the exception for parody, pastiche, or caricature. Furthermore, at [22] the CJEU refers to '*an* exception' when referring to article 5.3.k of the InfoSoc Directive. Adopting Hudson's understanding would essentially

amount to three exceptions as each term would abide by different requirements. As she acknowledges, pastiche would not require humorous intent, for example.

[187] Ibid, [20].

[188] AGO in *Deckmyn* (n 3) [46].

[189] Resulting from the EU referendum of 24 June 2016, the UK is planning to leave the EU. While the negotiations are still ongoing, it is very hard to predict what the future holds for UK copyright law. Currently, the UK needs to abide by EU law at least until the end of the transition period. If the UK leaves the EU, there are likely to be two options: (1) the UK remains part of the EEA (e.g. Norway), (2) the UK enters association agreements or free trade agreements on particular matters with the EU. Both solutions cover intellectual property matters. If the UK remains part of the EEA, it will still be bound by EU copyright legislation as these instruments have EEA relevance. Similarly, association agreements or other free trade agreements include IP provisions but these have a more general, abstract character which would allow the UK a limited margin of manoeuvre. Here, the UK courts would be able to craft their definitions of parody.

[190] Given the recent introduction of the parody exception in UK copyright law and its proximity to the provision of the InfoSoc Directive, it is more likely that the UK will be influenced by EU developments in this area. See R Arnold et al, *The Legal Consequences of Brexit Through the Lens of IP Law* (2017) Oxford Legal Studies Research Paper No. 15/2017, 9; L McDonagh, 'UK patent law and copyright law after Brexit: potential consequences' in O Fitzgerald and E Lein (eds), *Complexity's Embrace: The International Law Implications of Brexit* (MQUP, 2018) 189.

[191] As exemplified in France, see n 164.

[192] Geo.6 5(1911) c.46.

[193] Another possibility is that the UK's adoption of 'fair dealing' stems from the influence of the first Australian Copyright Act 1905 (s 28).

[194] See sections 5.

[195] Ibid.

[196] 479 F.Supp. 351 (1979) (N.D. Ga 1979).

[197] Ibid, [357]. Here the judge cites an earlier parody decision in the area of trade marks, *Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd* 467 F.Supp. 366 (S.D.N.Y. 1979) 376. This definition can be traced to *Webster's New International Dictionary* (2nd edn, 1960) where a parody is defined as '[a] writing in which the language and style of an author, or poem, or other work, is closely imitated or mimicked'. This definition is also present in *Berlin v. EC Publications, Inc.*, 219 F.Supp. 911 (S.D.N.Y. 1963) 915.

[198] In compliance with the freedom of expression justification.

[199] *Campbell v. Acuff-Rose Music Inc.* 510 US 569 (1994) (hereafter *Campbell*). The very first US case on parody seems to be the burlesque reworking of *Gaslight*, a British play. Here, the court held against the finding of fair use because the use was for the purpose of burlesque rather than parody. However, this holding was invalidated in *Campbell*. See *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956). See section 3.3 for an understanding of burlesque.

[200] Before this case, the US courts were using the terms parody and satire as synonyms. B P Keller and R Tushnet, 'Even more parodic than the real thing: parody lawsuits revisited' (2004) 94 *TMR* 979.

[201] *Campbell* (n 199) [580].

[202] Ibid, [580]–[581].

[203] *Campbell* (n 199) [588]. Therefore the removal of copyright notices on photographs is not a parody, see *Wilen v. Alt. Media Net, Inc.*, No. 03CIV2524 (RMB) (JCF) (S.D.N.Y. Jan. 26, 2005).

[204] This inherently explains why it is harder for fan fiction or mash-up works to meet the parody

purpose for fair use to apply. *Campbell* (n 199) [583]; repeated in *Suntrust Bank v. Houghton Mifflin Company*, 268 F.3d 1257, 1268–9 (11th Cir. 2001) (hereafter *Suntrust*); *Salinger v. Colting et al*, 641 F.Supp.2d 250 (S.D.N.Y. 2009) [257]–[258] (hereafter *Salinger*); *Henley v. DeVore*, 733 F.Supp.2d 1144 (C.D. Cal. 2010).

[205] *Campbell* (n 199) [582].

[206] *Dr. Seuss Enters., L.P. v. Penguin Books, U.S.A., Inc.*, 109 F.3d 1394, p. 1401 (9th Cir. 1997) (hereafter *Dr. Seuss II*); *Leibovitz v. Paramount Pictures Corp*., 137 F.3d 109, 114 (2d Cir. 1998).

[207] R A Posner, 'When is parody fair use' (1992) 21 *J. Legal Stud.* 67, 71.

[208] M McCrann, 'A modest proposal: granting presumptive fair use protection for musical parodies' (2009) 14 *Roger Williams U. L. Rev*. 96, 97; Keller and Tushnet (n 200) 979.

[209] *Suntrust* (n 204) [1268]–[1269].

[210] *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). Similarly held, in *The Cat Not in the Hat* case, whereby the parodists aimed at commenting on O.J. Simpson's trial using Dr Seuss's work, *The Cat in the Hat. Dr Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F.Supp. 1559 (S.D. Cal. 1966) (hereafter *Seuss I*) upheld in *Dr. Seuss II* (n 206). Also, in *Columbia v. Miramax* whereby the defendant borrowed from *Men in Black* for the promotion of Michael Moore's film *The Big One. Columbia Pictures Indus. v. Miramax Films Corp*., 11 F.Supp.2d 1179 (C.D. Cal. 1998).

[211] *Bourne Co. v. Twentieth Century Fox Films Corp*., 602 F.Supp.2d 499 (S.D.N.Y. 2009).

[212] Though, interestingly, Disney was not the author of this song. But the popularity of the public figure was held to be so closely attached to this copyright-protected work that the parody was acknowledged as falling under fair use. A similar outcome was held in *Burnett .v Twentieth Century Fox Film Corp*., 491 F.Supp.2d 962 (C.D. Cal. 2007).

[213] *Salinger* (n 204).

[214] Ibid, [260].

[215] *Campbell* (n 199) [599].

[216] This is to ensure that these works benefit from a 'fair use' defence to an infringement claim, e.g. *Salinger* (n 204) [257]–[258]; *Suntrust* (n 204), [1268]; *Seuss I* (n 210) [1400]. See also R Kairalla, 'Works as weapon, author as target: why parodies that target authors (not just their works) should be fair uses' (2012) 2 *NYU J. Intell. Prop. & Ent. L*., 234.

[217] A Lai, 'Copyright law and its parody defense: multiple legal perspectives' (2015) 4 *NYU J. Intell. Prop. & Ent. L*. 311.

[218] *Blanch v. Jeff Koons*, 467 F.3d 244 (2d Cir. 2006). Interestingly, the Second Circuit has the tendency to be more liberal compared to parody cases which went through the Ninth Circuit where a more conservative approach prevails.

[219] See Chapter 5, section 5.5.

[220] Attorney-General's Department, *Copyright Amendment Act 2006—Fact Sheets: New Australian Copyright Laws: Parody and Satire* http://www.ag.gov.au.

[221] Australian Copyright Council, *Parodies, Satires & Jokes* (Information sheet G083v05, 2012) 2.

[222] Ibid; repeated in Australian Copyright Council, *Parodies, satires & jokes* (Information sheet G083v05, 12/2014) 3.

[223] Information sheet G083v05, 12/2014, 3.

[224] Amended Explanatory Memorandum and Commonwealth of Australia, Parliamentary Debates, Senate, 30 November 2006 where the Minister of Justice mentions that those definitions might be relevant.

[225] 'Parody of' in the EU understanding of parody. *Campbell* (n 199) [580].

[226] 'Parody with' in the EU jargon.

[227] *Campbell* (n 199) [581].

[228] This is to ensure that these works benefit from a 'fair use' defence to an infringement claim, e.g. *Suntrust* (n 204) [1268]; *Seuss I* (n 210) [1400].

[229] C Condren, J Milner Davis, S McCausland, and R A Phiddian, 'Defining parody and satire: Australian copyright law and its new exception (Part 1)' (2008) 13(3) *MALR* 273, 279; J McCutcheon, 'The new defense of parody or satire under Australian copyright law' (2008) 2 *IPQ* 163, 178.

[230] In 2012, Canada adopted the same wording. See section 5.5; Condren et al (n 229) 278.

[231] Amongst others, submissions to Commonwealth of Australia, Attorney-General's Department, *Issues Paper, Fair Use and Other Copyright Exceptions in the Digital Age* (May 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%20Exce (access date: 22 May 2018).

[232] Examples of songs can be found at http://www.thefanatics.com/web_blog.view.php?web_blog_ID=24 (access date: 22 May 2018).

[233] [2001] FCA 108 (trial) (hereafter *TCN*).

[234] Ibid, [46].

[235] ss 41–42 Australian Copyright Act 1968 ('CA 1968').

[236] This seems to be the approach favoured in *Pokemon Company International, Inc. v. Redbubble Ltd* [2017] FCA 1541, where Pagone J. referred explicitly to the definitions noted in *TCN* before holding that there is likely to be an overlap between the purpose of the exception and the assessment of fairness. In doing so, the Australian court followed a similar path to the Canadian Supreme Court in *CCH* and collapsed the first step of the fair dealing assessment (defining the purpose of the use) with the first fairness factor. For more, see Chapters 2, 3, and 4.

[237] C Condren, J Milner Davis, S McCausland, and R A Phiddian, 'Defining parody and satire: Australian copyright law and its new exception (Part 2)' (2008) 13 *MALR* 401, 402.

[238] Jewell and Louise (n 87) 2.

[239] 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 mash-up works.

[240] Fair dealing decisions prior to the parody exception already had recourse to the use of dictionaries to define the purpose of the exception. *Stevens v. Kabushiki Kaisha Sony Computer entertainment* [2005] HCA 58; *TCN* (n 233); *De Garis v. Neville Jeffresse Pidler* (1990) 37 FCR 99; *AGL Sydney Ltd v. Shortland County Council* (1989) 17 IPR 99, [105].

[241] The Interpretation Act from 1901, applicable in the Commonwealth.

[242] Ibid, ss 15AA and 15AB.

[243] Which might explain why Australia is considering a move from the fair dealing to the fair use style of copyright exceptions, see Chapter 2.

[244] See preface to 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: 22 May 2018); Condren (n 229) 286.

[245] 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.

[246] The revolutionary impact of this technology is associated with the mid-nineties and was recognized as representing 99% of telecommunicated information in 2007. M Hilbert and P López, '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 (access date: 10 November 2018).

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

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

[249] This is confirmed in *Pokemon Company International, Inc. v. Redbubble Ltd* (n 236).

[250] News satire including both parodies and satires. http://thedailyshow.cc.com/ (access date: 22 May 2018).

[251] https://www.wikivividly.com/wiki/The_Blow_Parade (access date: 23 November 2018).

[252] https://www.youtube.com/watch?v=RvVfgvHucRY (access date: 22 May 2018).

[253] 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) 1.

[254] (2017) FC 616 (hereafter *United Airlines*).

[255] Confirmed in *United Airlines* [108] and [116].

[256] *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (1996) 71 C.P.R. (3d) 348 (hereafter *Michelin*).

[257] *Campbell* (n 199).

[258] 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 in section 29 CA 1985 is exhaustive, requiring a change of legislation to amend it. Moreover, the fair use factors do not equate to the fair dealing factors as, for example, the US does not require mention of the source and the author for the fair use for the purpose of criticism while it is required under Canadian legislation.

[259] *Michelin* (n 256) [61]–[67].

[260] 2nd edn, Collins (1986).

[261] Teitelbaum J. Some indulgence 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 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 (25 May 2000) [574]–[575].

[262] The court did have recourse to definitions established by scholars but eventually set them aside.

[263] Section 12 of the Canada Interpretation Act 1985 is analogous to section 15AA of the Australian Act Interpretation Act.

[264] L Lauzière, *L'interprétation des lois* (2012) 17, available at https://www.redactionjuridique.chaire.ulaval.ca/sites/redactionjuridique.chaire.ulaval.ca/files/lauziere-interpretation_des_lois_2012.pdf (access date 1 June 2018).

[265] *CCH Canadian Ltd v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 (hereafter *CCH*).

[266] *Entertainment Software Association of Canada v. SOCAN* [2012] S.C.C. 34 (hereafter *SOCAN*).

[267] *CCH* (n 265) [48].

[268] See Chapter 3, section 2.

[269] *CCH* (n 265) [51].

[270] *United Airlines* (n 254) [119].

[271] S Jacques, 'First application of the Canadian parody exception' (2017) 12(11) *JIPLP* 895.

[272] Note that, post-*Campbell*, US courts only apply the parody exception to 'parody of' (target parodies) not 'parody with' (weapon parodies); *Campbell* (n 199).

[273] Except for Canada with the users' rights doctrine allowing for a broad interpretation of fair dealing. See Chapter 3, section 2.2.2.

[274] *Deckmyn* (n 2) [19] and [23].

[275] *Deckmyn* (n 2) [20].

[276] See Chapter 4, section 2.1.

[277] See Chapter 5, section 4.

[278] Ibid.

[279] See Chapter 7, sections 2 and 3.

2

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

1. Introduction

A parody exception may only be introduced into national copyright law if it satisfies the three-step test enshrined in international treaties. This test, used to delineate the scope of copyright exceptions and limitations, ensures that national legislators do not render the reproduction right, recognized in the Berne Convenion, meaningless.[1] This chapter evaluates whether the parody exception, as crafted in each jurisdiction under scrutiny, passes this yardstick.

To evaluate whether the parody exception meets the three-step test, we first need to appreciate the context leading to the introduction of specific exceptions under copyright law in the first place. The underlying objective determines the exception's scope, i.e. the encroachment upon right-holders' exclusive rights which must be tolerated. This is relevant for the assessment of the three-step test.

2. Why is a Specific Parody Exception Needed in Copyright Legislation?

In this section, we consider whether copyright law requires a specific parody exception. This is best understood by briefly revisiting the history and evolution of copyright law leading up to the adoption of the three-step test by Berne signatory parties.

2.1 The birth of the copyright system

Historically, the development of creative endeavours and technologies have

always been interlinked. Gutenberg's invention of mechanical printing and the propagation of the Renaissance is a well-known illustration of this relationship. While Cavalli criticizes the overreliance on the mechanical press as a triggering event for the birth of copyright law,[2] it is very hard to deny that it was this very event which led to a collective awareness of the need for a legislative response.[3]

It was the invention of the printing press which led to the growth of the printing industry and the popularity of books. As a result, the British Monarchy assumed the right to grant royal printing privileges in return for payment to control the lawful printing of books. This practice not only enriched the Crown coffers, but created a legal instrument of control to censor which works were printed. Over time, the Crown delegated its authority by charter to The Stationers' Company,[4] a collective association for printers, and enacted law which required all printed works to be registered with this association.[5]

A turning point occurred when the charter of The Stationers' Company was not renewed. It was replaced by the Statute of Anne enacted by the UK Parliament in 1709.[6] This Act sought to end the grant of royal privileges and censorship, by vesting the exclusive right to print books in their authors for a limited period of time.[7] This first 'copyright' law[8] was the result of social, political, and economic considerations,[9] based upon newly emergent utilitarian principles.[10] Esssentially, it is in the public interest to encourage authors to disseminate their published works widely, and engage in new creative endeavours. Allocating private rights to control, and be remunerated for, commercial exploitation of works acknowledges the financial investment needed to create and publish new works. This stimulates further creativity,[11] simultaneously furthering social-based aspirations.

Similar printing privileges existed in mainland Europe.[12] 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 or utiliarian considerations. Pursuant to natural law principles,[13] positive law merely recognizes the natural rights an author has to control the uses of their work. Authors' rights 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 materialization of their own personality.[14]

The Statute of Anne's influence is perceptible in the US as well as in Australia and Canada. It is said that colonies already had their own variations of copyright legislations before the adoption of the well-known article I, section 8, clause 8 of the US Constitution in 1787.[15] While the scope of protection intended by the Founders of the Constitution remains speculative,[16] it is very clear that the protection sought had to be achieved through granting *economic rights* for a *limited period* of time to the *author*. Against this backdrop, the US adopted its first copyright legislation in 1790[17] modelled on the Statute of Anne.[18] From this point onward, US copyright legislation has undergone several major revisions until today, especially to comply with international treaties.[19]

A full history of copyright law is more complex than that of mechanical printing (and would require an interdisciplinary analysis incorporating legal theory, economics, philosophy, etc.), and the utilitarian/natural law dichotomy described has never been hermetic.[20] There are signs of purely economic considerations in authors' rights, just as there is clear evidence of the natural law within the common law.[21] Nevertheless, it can be appreciated that there are reasonable arguments which support the creation of exclusive rights for authors, based upon the underlying aim to promote public welfare using private market incentives to achieve that goal. By granting quasi-property[22] rights for intangible cultural goods, the law recognizes the importance of informational and cultural works which would be produced at sub-optimal levels without this specific legal regime. While it is clear that a paradigm which permits monopolies for certain works of authorship interferes with free market ideals, this legal fiction is considered necessary to enable investment in creative labour to be recouped.

Modern copyright laws across the globe have now embraced this basic rationale by conferring a limited monopoly for cultural works.[23] The regimes incorporate a trade-off, by providing levels of protection which are, supposedly, an adequate incentive for creators to produce cultural goods whilst simultaneously limiting the monopoly using other legal doctrines, such as the idea/expression dichotomy, the originality requirement, copyright exceptions, and duration.

2.2 The impact of different political philosophies on shaping the copyright system

As outlined already, common law and civil law conceptions of copyright law are underpinned by different philosophical foundations. Copyright law in common law countries (UK, US, Australia, and Canada) traditionally relies upon utilitarian justifications,[24] granting exclusive rights to those who invest in creating and disseminating creative works because society at large benefits from having access to such works. In contrast, copyright laws in civil law countries (e.g. France) are founded upon natural law principles, which focus more on the unique relationship between the author and their work.[25] These differing philosophical foundations are also evident in the approach adopted in respect of copyright exceptions.

Accordingly, the common law approach is to construct a copyright system which grants exclusive rights which are as limited as possible, because these rights are merely instrumental in achieving the desired societal benefit. From this perspective, copyright exceptions provide a 'breathing space' to foster third-party uses of a protected work which are likely to afford *more* benefit to society than would be obtained by permitting right-holders to retain control.

This is generally realized through the adoption of exceptions for 'fair dealing' or 'fair use'.[26] The former, evident in UK, Australian, and Canadian copyright law, seeks to exclude certain unauthorized, but socially beneficial, uses of a protected work from infringement, provided that the use is objectively fair.[27] The latter, enshrined in US copyright law, seeks the same result but does not specify particular types of unauthorized use. Instead, case law has established the relevant factors which determine whether a certain use is deserving.[28] Consequently, the US 'fair use' approach prompts a plethora of judicial decisions to test its boundaries.

In contrast, as civilian copyright laws focus on the relationship between the author and their work,[29] exclusive rights are granted to protect the author's interests. In other words, the presumption is that the author should retain control over whether and how their own works are exploited for financial benefit (irrespective of whether an alternative scheme of ownership would further the interests of society better). Historically, copyright law as per the civil law tradition included few exceptions and required[30] these to be interpreted strictly to promote legal certainty.[31]

Hence, the typical picture presented that the author's interests prevail over the public interest in civil law countries, whereas the common law jurisdictions offset the author's interests more in favour of the public

interest.[32] Yet, this image is an over-simplification.[33] Indeed, the public interest concerns underpin *all* copyright laws[34] irrespective of the underlying legal tradition. These are present in both utilitarian and natural law-based philosophies.[35]

Additionally, distinctions between common law and civil law jurisdictions have been eroded further by the adoption of international treaties and agreements which span across legal traditions.[36] Numerous amendments made to copyright laws at international and regional level have gone beyond what is needed simply to respond to technological changes.[37] As discussed further in what follows, these legislative changes have resulted in an expansion of works covered by copyright law's protection, extension to the term of protection, and an increase in the activities falling within the copyright owner's exclusive rights.[38]

All this has culminated in an increasing call for more copyright exceptions to preserve, or reinstate, the public interest[39] in light of copyright's expanded realm of exclusive rights.[40] Although copyright law grants these exclusive rights for a time-limited period, these exceptions recognize that there are legitimate circumstances in which right-holders should be precluded from enforcing their rights, even though the legal protection remains in force.[41] Generally, copyright exceptions are motivated by the social, cultural, and economic needs of a particular jurisdiction,[42] such as to foster cultural diversity and new creative endeavours in the national public interest.[43] Exceptions also assist in defining the scope of exclusive rights with greater precision.

2.3 Reinstating legitimacy in the copyright paradigm through a specific parody exception

Changing times and the developing technologies, then, have led to multiple revisions of the copyright system. The last fifty years have seen a strengthening of the exclusive rights of right-holders, shifting the balance in favour of protecting industry interests at the expense of future authors.[44]

In this context, the parody exception is a legal mechanism introduced to strike a fairer balance: right-holders *should* receive a sufficent scope of protection to recoup their investment in creating new original works, but this should not be so comprehensive as to preclude the creation of all parodies of

that work.

Like the challenges brought by technology, right-holders typically perceive the introduction of a parody exception as a threat, arguably overlooking that copyright's expansion has conferred upon them a strong and long monopoly. For example, the basic copyright term for original works currently lasts for the author's life plus seventy years whereas the Statute of Anne granted protection for a maximum of fourteen years since publication which could be renewed for another fourteen years if the author was still alive.[45]

Therefore, a parody exception in copyright law seeks to rectify the balance between right-holders, users, and subsequent authors. After all, copyright law should be crafted to permit others to appropriate existing, well-known works, provided that these are reworked to create new works which contribute to greater social welfare overall.[46] Additionally, it seems that right-holders are more reluctant to authorize use of their works for the purpose of parody compared with other types of use, perhaps fearing a negative criticism of their work or not wishing association with any particular sentiment expressed.[47] Hence, a specific exception appears to be justified, but this should not be without limits. Some appropriation made by a parodist may not provide social value because of, for example, the discriminatory nature of the comment being made.[48] In these instances, it may prove necessary to protect the interests of the author of the original work over those of the parodist. We shall now consider how this balancing is achieved within the three-step test.

3. What is the Three-Step Test?

The three-step test is an instrument of international copyright law. When first incorporated into the Berne Convention ('Berne'),[49] its aim was to guide national legislators by curtailing the exceptions which could be made to the reproduction right under national copyright law. It has now been incorporated into three subsequent international treaties: the TRIPS agreement ('TRIPS'),[50] the WIPO Copyright Treaty ('WCT'),[51] and the WIPO Performances and Phonograms Treaty ('WPPT').[52] As a result, the three-step test serves a fundamental role in the introduction of *any* new copyright exception in national law.[53]

More recently, the test has found its way into EU texts and national legislations. This has led to different interpretations creating uncertainties as

to its scope, and attracting a wealth of commentaries. As a thorough study of the three-step test is a detailed and complex endeavour,[54] which goes beyond the scope of this book, the next sections summarize the aspects which are most pertinent to our task.

3.1 The origins and morphing of the three-step test

3.1.1 Protection of the reproduction right

The three-step test appeared in the Berne Convention for the first time following a revision arising from the Stockholm Conference in 1967. This revision sought to strengthen copyright by making the exclusive 'right of reproduction'[55] mandatory at international level.[56] The three-step test was introduced to support this right based upon concern that without limits in place, national legislators might adopt exceptions which would undermine the mandatory nature of this important right.

From the very beginning, the three-step test had a double objective: firstly, it needed to recognize exceptions already present in national legislation, which, in turn, reflected different approaches based upon different philosophical underpinnings; and secondly, it sought to direct future national legislators in terms of the types of copyright exception which could be permissibly introduced.[57] This dual role explains why the test itself, set out in what follows, was drafted in such an open manner:[58]

> [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.[59]

Time passed and while signatory parties felt the need for greater harmonization, as the number of signatories to Berne grew, the chances of reaching agreement grew increasingly remote. The adoption of TRIPS presented a solution, accompanied by a shift of forum from WIPO to WTO. While Berne's primary focus is protection of authors, TRIPS sought to establish international minimum standards of intellectual property protection based upon the WTO's market-related concerns of facilitating international trade.[60] Consequently, when the three-step test was incorporated into TRIPS, it was directed to protect the interests of right-holders (not authors) and it extended the test to all exclusive rights (not just the reproduction right). This

first adjustment is not trivial because it shifts from securing the legitimate interests of *creators* to protecting the interests of those who exploit the copyright-protected works.[61]

Subsequently, the growth of the internet and its implications for copyright law led to the adoption of the WIPO Internet Treaties (WCT and WPPT). These sought to accommodate the digital environment by expanding the range of exclusive rights reserved to the right-holder. As these treaties also included the three-step test, national legislators were permitted to extend copyright exceptions to operate within this new environment.[62] During negotiations, some parties expressed concern that as the reach of the three-step test expanded, exceptions would cease to be effective in the digital context, perhaps only covering inconsequential uses rather than providing an effective counter-mechanism to the expansion of exclusive rights. As reassurance, an Agreed Statement regarding the three-step test was adopted to reflect the desired balance of interests between the rights of authors and the public interest. The Preamble in the statement[63] underlines that the same exceptions and limitations which Berne recognizes in the 'analogue world' should extend into the digital world too, although interpreted in a manner appropriate to that digital environment.[64]

3.1.2 The EU variant

The European Union implemented the WIPO treaties via the InfoSoc Directive of 2001,[65] by partial harmonization of national copyright legislation in EU Member States. The wording of the InfoSoc Directive's operative provisions includes the text of the three-step test.[66] Whilst having a main objective of harmonizing the exclusive rights of reproduction,[67] communication to the public,[68] and distribution,[69] the InfoSoc Directive also sought to recognize national initiatives which introduced related exceptions, adding these to the *acquis communautaire*. This was considered necessary because operators might exploit differences between national copyright legislation, to harm the functioning of the internal market, in terms of cross-border exploitation of works.[70] In pursuing these aims, the InfoSoc Directive seeks to achieve a fair balance between the interests of right-holders and the public.[71]

Some seventeen years later, there is a general consensus that the InfoSoc

Directive has failed to live up to its promise to harmonize copyright across the EU. There is particular disenchantment in relation to exceptions,[72] which has arisen for two main reasons. Firstly, the InfoSoc Directive stopped short of mandating exceptions which might be necessary to respect the different cultural and legal traditions of its Member States. In fact, article 5 of the InfoSoc Directive requires only *one* exception (for temporary acts of reproduction)[73] to be mandatory, and contains an exhaustive list of *twenty optional* exceptions.[74] Secondly, the role and meaning of the three-step test incorporated within the InfoSoc Directive remains largely unclear,[75] resulting in a profusion of scholarly criticism.[76]

The three-step test is enshrined in article 5(5) of the InfoSoc Directive and has a slightly different wording to that adopted in international law. According to this provision:

> 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.[77]

But who is the addressee of this version of the test, legislators or national courts? Does the EU legislature intend Member States to incorporate this test within the national legislation which enacts this part of the InfoSoc Directive?[78] If so, then, as Galopin notes, repetition of the test would appear redundant. As all EU Member States are already signatories to the relevant international copyright treaties, they have already agreed to comply with the test when enacting copyright exceptions. Additionally, it seems reasonable to presume that as article 5 establishes an exhaustive list of permitted exceptions, the EU legislature has already had regard to the three-step test and considers that these (and only these) comply.[79] For these reasons, it seems that the InfoSoc Directive's repetition of the test should be understood as fulfilling a new role.

The wording used might imply that article 5(5) is concerned with *how* the exception is *applied in individual cases*, rather than how the exception should be implemented into national legislation.[80] Accordingly, some Member States, including France, have incorporated the text of article 5(5) within their legal order and require judges to determine whether, or not, the three-step test is satisfied when applied to the particular facts before them. Some see this approach as problematic.

Firstly, legal certainty is jeopardized owing to the lack of any consensus as

to the proper interpretation of the test. As it is the defendant who must prove 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.[81] Sheer fear of litigation is likely to deter the very socially beneficial uses which the exception is there to protect. Secondly, the InfoSoc Directive's harmonization aims are thwarted by conflicting national decisions in the same or similar cases,[82] i.e. a use may be permitted in one Member State but held unlawful in another, merely because of inconsistent application of the test. Thirdly, it is doubtful that national courts are adequately equipped, in terms of the facts and resources available to them, to apply the test.[83] Thus, these concerns cast doubt that national judges are the intended target. Indeed, a third interpretation is that it is the EU courts which are the addressees of article 5(5), i.e. the InfoSoc Directive incorporates the three-step test so that the CJEU may determine the legality of the national law exception.[84]

Thus, presence of a three-step test within the InfoSoc Directive gives rise to two possibilities. First, it is there to direct national *legislators* when seeking to implement one of the permitted exceptions of article 5, as overseen by the CJEU. In this scenario, the test should be applied by the legislator to assess conditions under which any particular type of use is lawful, for example, whether use should be free, or whether a statutory licence scheme is needed for the country to meet its international obligations.[85] This approach implies that article 5(5) of the InfoSoc 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.[86] Faced with a copyright infringement claim, a national court needs to assess whether the unauthorized use meets the conditions of a defence provided by national law, and then further assess whether, given the particular surrounding circumstances of the case, 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 or hope for harmonization.

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.[87]

While awaiting a definitive interpretation from the CJEU of the test in relation to the parody exception, the Court's guidance in relation to other optional exceptions provides contradictory guidance as to the interpretation of article 5(5).[88] Some decisions indicate that the three-step test is to be considered at the stage that an exception is implemented by Member States.[89] Here, while national legislators should enjoy broad discretion, they must also respect other well-established EU principles of a high level of protection for authors,[90] proportionality,[91] legal certainty,[92] and strict interpretation.[93] Elsewhere, the CJEU seems to require national courts to construe an exception in light of the three-step test.[94] Going even further, the CJEU has also required a defendant's acts to be measured against the three-step test.[95] Yet, the CJEU has stated that provided an unauthorized use falls within an exception, then it is non-infringing and article 5(5) should be held satisfied.[96] Finally, and despite all the other inconsistency, CJEU jurisprudence is consistent in stating that the role of article 5(5) is not to broaden the scope of the listed exceptions.[97]

It will be appreciated that while the general role of the three-step test within the InfoSoc Directive remains unclear, its application to the parody exception is equally uncertain. *Deckmyn* has escalated debate among scholars,[98] all of whom are critical of the possibility that article 5(5) might further restrict the circumstances in which a parody exception would apply.[99] Another approach, which is gaining support, proposes that the role of the InfoSoc Directive's three-step test is concerned with proportionality to fine-tune the balance between right-holders and the public interest.[100]

Although in *Deckmyn* the CJEU (again) missed the opportunity to clarify the meaning of article 5(5),[101] the Court, nevertheless, directs 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'.[102] Since this statement is based upon the specific facts of the case, it seems possible to extrapolate and interpret the general role of the three-step test as extending further: i.e. to balance *all* the competing interests, including those of third parties in some particular circumstances where the parodic use is not clear cut.[103] This position finds support in recital 3 of the InfoSoc Directive which states that the harmonization 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 seems to envisage other third-party interests, such as the protection against discrimination or hate speech.[104]

3.1.3 Interim conclusion

The uncertainties surrounding the addressee of the three-step test in copyright supra-national legislation led some national legislators to introduce this instrument directly within their national laws, thereby requiring its application in individual cases whereas others deliberately have not. For example, while the UK, Canada, and the US refused to introduce this test, France[105] and Australia[106] included the test in their national legislation. Doing so, national legislators definitely require national judges to verify compliance with the three-step test on a case-by-case basis each time the application of a copyright exception is sought (although not explicitly in the case of parodies as explained later). But the reach of the test goes beyond these jurisdictions (as pointed out by Geiger); traces of the application of the three-step test by the judiciary are to be found in countries where the legislator did not insert the instrument into its national legislation.[107] There is very little doubt that the three-step test will have a significant role in the application of copyright exceptions and, therefore, the parody exception in the future.

3.2 The interpretation of the three-step test

Whilst the wording of each form of the three-step test is similar, it is erroneous to believe that the different provisions carry the same obligations.[108] In this part, we outline the differing interpretations of this test which have emerged.[109]

But before we embark on an examination of the differences, it is worthwhile highlighting aspects which enjoy a wide degree of agreement as general remarks. For example, there seems little doubt that the test comprises three distinctive steps, and that these are cumulative.[110] Furthermore, the test’s open texture was a deliberate choice to cover the different approaches to copyright exceptions (i.e. enumerated list, fair dealing, and fair use). Lastly, we can obtain some guidance on the interpretation of the three-step

test from the WTO Panel decision concerning section 110(5) of the US Copyright Code, but this is limited to the scope of the test according to TRIPS, and so it is not binding in relation to Berne.

3.2.1 Certain special cases

The first step of the three-step test requires that exceptions to exclusive rights remain confined to 'certain special cases'. The wording suggests that the step has two aspects. Firstly, it seems to require that national legislators ensure that any exception is directed to a limited number of situations only, i.e. a quantitative limit.[111] Secondly, there is a qualitative aspect: the 'special' purpose of an exception must be determined in advance.[112]

In the Berne context, it appears reasonable that the objectives for introducing a new copyright exception should be taken into consideration.[113] Yet, this is at odds with the WTO Panel decision under TRIPS,[114] which only took account of the quantitative dimension. Here, the Dispute Settlement Body ('DSB') is believed to have focused only on the quantitative assessment of the provision,[115] because consideration of the qualitative aspect might be seen as too much interference with the national sovereignty of its members.[116]

Given that the WTO is specifically economics-focused, this also suggests that the DSB approach should not become the definitive interpretation of this first step. Not only does a combined quantitative and qualitative approach find support from Berne, but the post-TRIPS WIPO Diplomatic Conference of 1996 emphasized the importance of protecting societal values. Indeed, it seems that this condition cannot be 'policy blind', since it is implicit that any national legislator introducing a copyright exception will face opposing interests. These differing interests may only be reconciled by recourse to a clearly stated and specific public policy, so that the exception secures values which are important to the relevant society.[117]

What is agreed, however, is that the concept of 'certain special cases' does establish a quantative limit which circumscribes exceptions to apply to a minority of uses in the specific circumstances stated. In essence, copyright exceptions should be definite in scope and reach.

3.2.2 Conflict with the normal exploitation of the work

The second step mandates that any exception must not conflict with the normal exploitation of the work. Given the importance of this requirement, the scope of this second step still gives rise to animated debates among scholars and stakeholders. The main issue is whether policy arguments should be taken into consideration.[118]

Despite the market-based imprint of the Panel decision, the DSB did endorse a two-part normative and empirical approach to this second step:

> 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'.[119]

Thus, an empirical approach seems to suggest that the market for the type of work which would benefit from the exception must be measured against that of the protected work, and then an assessment is made whether the exception is likely to cause significant harm to exploitation of the protected work, based upon actual or potential markets.[120] The qualitative aspect is concerned with 'norms' via a consideration of non-economic elements, including the public interest or fundamental rights concerns attached to certain exceptions.[121] Consequently, it is believed 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 upon which the exception is based.[122]

This second step also needs evaluation within the context of the digital environment. Although Berne considers the exploitation of non-digital works only, it nevertheless provides context to guide an appreciation of this step within the digital environment. Firstly, Berne provides strong protection of the reproduction right.[123] Transposed to a digital context, Senftleben argues that a reproduction right in the digital era enables right-holders to exploit and control *new* uses of protected works. Technological developments 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.[124] Secondly, it is proposed that 'normal exploitation' is not so wide as to encompass any use which a right-holder can monitor.[125] 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 unauthorized copies will not

be permitted.[126] It can be inferred that an exception which gives rise to a small number of unauthorized copies should pass this step.[127]

It seems reasonable to conclude, in both analogue and digital environments, that a conflict with the normal exploitation of a work occurs when a right-holder is deprived of an actual or potential market of significant economic importance. This is influenced by the likelihood that remuneration for an activity falling within the exception would constitute a considerable source of income, and thus forms part of the economic core of copyright.[128] Whether or not activities would provide a major source of income may be determined by studying the overall commercialization of works of a category affected by the income in question.[129] This matter is left for national legislation to decide.

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

Once the first two steps are satisfied, the third step requires some further balancing. This final stage precludes an exception which would unreasonably prejudice the legitimate interests of authors and/or right-holders.[130] Thus, we must consider three issues so that we may measure whether an 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?[131]

Firstly, the interested parties depend upon the treaty concerned. While Berne and WCT refer to the ‘author’ specifically, it is commonly accepted that this reference extends to any subsequent right-holders. Conversely, pursuant to TRIPS, the test specifically considers the interests of right-holders, i.e. those that exploit, rather than create, the rights. This explains why author-only interests, such as moral rights, were not considered by the DSB in the Panel decision.[132]

Secondly, it is reasonable to conclude that this step aims at considering interests other than a work’s normal exploitation (i.e. the subject of the second step), otherwise the second step would become redundant. From an economic perspective, any exception hampers the possibility to generate revenue to some extent, so potentially *all* sources of income should be considered.[133] But this third step, as per Berne and WCT, should also take

account of non-economic interests, particularly moral rights.[134]

Thirdly, the fact that the prejudice caused must be 'unreasonable' indicates that some 'reasonable' level of prejudice must be tolerated. Hence, any harm created by an exception must be proportionate to the objectives sought. Here, uses which ought to be beyond right-holders' control—because the use protects a value which underpins the justification for copyright law, such as the preservation of freedom of expression—imply that the exempted area is not unreasonably prejudicing the legitimate interests of the author or right-holder.[135]

In conclusion, if a use must be allowed via the existence of an exception (as it responds to important social, cultural, and economic needs of a society), interests of right-holders must still be considered and weighed fairly[136] to ensure that the prejudice caused is not disproportionate.

3.2.4 What is the realm of the three-step test?

The introduction of the three-step test into the Berne Convention in 1968 established a template for exceptions and limitations which seeks to strike a fair balance between the protected interest of authors (including right-holders) and the public interest. Subsequently, we have seen that the three-step test has not only been incorporated into other international laws, but introduced into EU and national laws too. In doing so, the test has now become the concern of the judiciary, because the legislator has placed a greater responsibility on judges to interpret and apply the three-step test to particular facts.[137] Arguably, trial judges are ill-placed to assess compliance with the three-step test, not just because of ambiguity surrounding its meaning (leaning towards a strictly economic approach due to the WTO forum), but also owing to the sheer difficulty of striking a 'fair' balance between the numerous interests at stake.

While this test was originally implemented as a protective shield to allay concerns that national legislators might introduce new, unconstrained exceptions which might annihilate the right of reproduction, it has now morphed into a torpedo which might jeopardize any meaningful role for copyright exceptions. Under the current regime, owing to its repetition in numerous legal texts at different level, exclusive rights are likely to prevail in most cases over exceptions and limitations. It is likely to be rare that a defendant will be able to muster sufficient evidence to demonstrate that all

three steps of the test are satisfied in respect of their use. Fearing litigation and lacking certainty whether the exception will apply, users seem more likely to seek the right-holder's permission as a default option, or simply elect not to use the work (whether socially valuable or not).

In light of these concerns, scholars have been vocal in calling for a re-interpretation of the test.[138] This is of particular concern for jurisdictions, such as EU Member States and Australia, where the three-step test has been incorporated into regional/national copyright legislation.[139] Against this backdrop, it appears that the recent *Deckmyn* decision may provide a way to balance the potentially economics-oriented approach of the three-step test to include social and cultural objectives for EU countries, at least.[140] Arguably, by requiring *all* competing interests to be weighed, including those of third parties, the CJEU is reminding national courts that the scope of copyright exceptions is not only subject to compliance with the three-step test, but that consideration must be given to fundamental rights too.[141] If the three-step test is to apply directly to individual cases, then national courts should also be more open to arguments based on the realization of human rights in the particular cases before them.[142] This may tip the balance in favour of the defendant more often than the current status quo would seem to suggest.

4. Compliance of the Parody Exception with the Three-Step Test

This section considers whether the current parody exceptions comply with the three-step test. This is an important line of inquiry, because it provides the yardstick against which every national version of the parody exception must be measured. We shall commence our inquiry by considering the French parody exception which is one of a list of well-established copyright exceptions. The fair dealing approaches (UK, Australia, and Canada) will then be reviewed, before finally turning to the fair use approach adopted in respect of copyright exceptions in the US.

4.1 France

Just as the UK is the home of common law, so France is the mother of the civil law tradition. France adopted a statutory parody exception with the

implementation of the Intellectual Property Code in 1957.[143] The exception, therefore, precedes the introduction of the three-step test in Berne in 1967. Yet, as France is both an EU member and a signatory to the 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 ('IPC') in recognition of accepted judicial practice.[144] Parodies and quotations were not considered to infringe authors' rights, in recognition of the right to criticize[145] upheld by the eighteenth-century revolutionaries.[146] 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.[147]

Adopting the civil law author-oriented approach outlined earlier, French courts consider that exclusive rights must be interpreted broadly to protect the author's interests appropriately. The corollary is that any statutory exceptions limiting those rights must be interpreted strictly.[148] From this perspective, a judge has generally a fairly limited role;[149] as the balancing of interests has already been undertaken by the legislator, the courts merely apply the exception.[150]

With this in mind, the parody exception[151] reads: 'Once a work has been disclosed, the author may not prohibit: … [p]arody, pastiche and caricature, observing the rules of the genre.'[152]

It is reasonable to infer that the first step of the international three-step test is satisfied, as there seems little doubt that 'parody, pastiche and caricature' constitute 'certain special cases' in the sense of the treaties.[153] Additionally, as reference is made to the 'rules of the genre', French courts have a framework to meet the second and third steps of the three-step test. As Chapter 4 will explain in more detail, the 'rules of the genre' impose additional requirements on unauthorized use, thereby providing a framework which should enable the French parody exception to comply with the three-step test. The requirements include factors (resembling fair use and fair dealing, which we shall consider shortly) allowing a judge to assess the user's motivation, as well as taking account, for example, of the extent of the use and the impact on the market of the original. Additionally, and perhaps too

often forgotten, Jean-Michel Bruguière reminds us that the rules of the genre also invite judges to consider fair practices developed in particular art fields.[154]

Prior to *Deckmyn*, French courts already weighed up the competing interests in particular cases as a matter of routine. Since its underlying rationale is as a right to critique, this has allowed judges to admit human rights-based arguments in parody cases.[155] The right to critique includes the right to create parody works without requiring authorization, since parody is heavily anchored in the tradition of fundamental rights, including freedom of expression. Indeed, the French legislator considered freedom of expression to be the most important justification for a parody exception.

Despite this apparent compliance, the French legislator responded to the InfoSoc Directive by amending article L.122-5 IPC to incorporate the wording of the three-step test into national law. While French courts have yet to apply the three-step test as an additional requirement of the parody exception, this test has been applied directly in cases involving other copyright exceptions.[156] The result of imposing the three-step test as an additional requirement before an exception applies is likely to restrict the scope of the narrowly construed exception.

In conclusion, by subjecting the unauthorized use to 'the rules of the genre', the French legislator considers the three-step test, as enshrined in international texts, satisfied. However, it seems to have considered that the EU harmonizing legislation has imposed further restrictions. As for all the other jurisdictions, this compliance is honed further by the need to respect the author's moral rights which will be covered in Chapter 6.

4.2 The United Kingdom

The newly introduced parody exception is a result of extensive consultation. Although copyright law was completely overhauled by the CDPA in 1988, it was enacted prior to both the digital revolution and most EU harmonization. The Gowers Review, reporting in 2006, first drew attention to the need for a parody exception in UK copyright law.[157] This proposal was studied by the IPO, which undertook a two-stage public consultation in 2008[158] and 2009.[159] 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 give rise to litigation owing to uncertainty surrounding its intended reach.[160] In addition, right-holders protested that they would lose income because of the exception. In sum, the debate focused around whether an exception was needed, rather than concerning what form an exception should take. Ultimately, the evidence supporting an exception was deemed to be insufficient for a change to be warranted.[161]

A new review of UK copyright law was commissioned in 2010, following a change in government.[162] The Hargreaves Review was tasked with assessing how effectively the existing intellectual property framework supported 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',[163] while also recognizing the 'long and vibrant tradition' of British comedy and the emerging 'new forms of expression' which the internet facilitates.[164]

The government undertook further consultation on the proposal, and while the representations from opponents were consistent with 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 realize the right of freedom of expression,[165] it was also linked to improving the digital skills base of the population.[166] 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'.[167] A parody exception would support a 'growing entertainment market worldwide' and permit comedy to 'reach wider audiences'.[168]

The parody exception to the economic right of reproduction finally came into force on 1 October 2014.[169] Pursuant to section 30A(1), there will be no infringement of copyright in a literary, dramatic, musical, or artistic work where there is a *fair dealing* with the original work *for the purposes of caricature, parody, or pastiche*.[170]

Before turning to a more detailed examination of section 30A(1) in light of the three-step test, it is important to note that, arguably, this provision does not limit itself to dealings by way of reproduction. Having its roots in sub-section 2(1)(i) of the Copyright Act 1911, 'dealing' is the legal term designating any use of a work which would otherwise constitute a copyright

infringement. The only conditions imposed by the legislation for an unauthorized use to fall within the exception are that the use is: (1) fair; and (2) for the purposes of caricature, parody, and pastiche.

While there is no statutory definition of 'fair', its meaning has been developed in case law. In the landmark decision of *Hubbard v. Vosper*,[171] Lord Denning indicated that fairness is a 'question of degree'. [172] Most of the judicial consideration of fairness relates to the copyright exception for criticism, review, quotation, and news reporting.[173] Stemming from this case law, three factors seem to be decisive: the commercial nature of the use; the quantity copied; and whether the work had been previously published, or not.[174]

Does the UK parody exception comply with the three-step test? Firstly, while the language of section 30A(1) CDPA 1988 is broad, being applicable to all works and presumably to all exclusive rights, the legislator has limited this exception to dealings for 'purposes of caricature, parody and pastiche'. It might be questionable whether this amounts to 'certain special cases', as understood under the first step, given the lack of any statutory definition and coherent body of decisions of what parody, caricature, and pastiche entail.[175] However, the CJEU itself, in the *Deckmyn* case, refused to define parody, despite qualifying it as an autonomous concept under EU law favouring the judicial route.[176]

Here, the intepretation of the parody exception in *Deckmyn* does provide some certainty. By requiring all parodies to have a humorous character and evoke an existing work while being noticeably different from it,[177] the CJEU provides the over-arching criteria, thus permitting the exception to apply in 'certain special cases'.[178]

Secondly, fairness also permits compliance with the second step of the test that an exception must not conflict with 'the normal exploitation of the work'. While it remains uncertain whether UK courts will adopt the same fairness factors as under other fair dealing exceptions, it is reasonable to assume that these factors will be influential. In addition, it is arguable that any fairness factors will need to comply with the two requirements set out in *Deckmyn*, at least until express rejection of the CJEU's influence post-Brexit. Here, the CJEU rejected imposition of certain factors, such as the requirement that the parody must display an original character of its own, be explicitly attributed to the parodist (distancing it from the original author),

comment only on the work on which it was based, or mention the source of the original. However, it is strongly believed that fairness factors enable the UK to pass the second step.

Finally, the exception should not 'unreasonably prejudice the legitimate interests of the author'. This suggests that the fair dealing parody exception should not impose a disproportionate prejudice to either the economic or non-economic interests of the author.[179] As the fair dealing factors already take account of commercial factors, the main question remaining is to determine the boundaries of the exception. In particular, does the UK parody exception provide restrictions to ensure that the author's moral rights are preserved? While there is no indication in section 30A(1), it is important to note that the UK parody exception is only an exception for economic rights. Therefore, the original authors retain the possibility to enforce their moral rights to secure their interests.[180]

To sum up, it seems reasonable to conclude that there is sufficient basis for the UK parody exception to satisfy the three-step test today. Of course, it remains to be seen how it will be interpreted in practice, pending further consideration and implementation by the courts.

4.3 Australia

Consistent with its common law tradition, Australian copyright exceptions, like those in the UK, also generally adopt a 'fair dealing' form.[181] The Copyright Act 1968 ('CA 1968') provides a flexible formula confined to certain limited purposes.[182] This leaves it to judges to determine which factors are pertinent to assess the fairness of any qualifying use.

A number of motivating factors seem to have led up to the introduction of a new fair dealing exception 'for the purpose of parody and satire' in 2006. This was introduced as new sections 41A and 103AA of the CA 1968. These include the need to counter-balance the increasing protection of right-holders within their copyright legislation,[183] as well as adapting the scope of the exclusive rights to take account of new technologies, and to provide additional legal certainty for users. [184] Aware that the EU Directive permitted Member States the option of providing a parody exception, Australia was keen to keep pace. 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', noting:

> 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.[185]

The Minister of Justice also referred to 'Australia's fine tradition of poking fun at itself and others', adding that the exception would 'not be unnecessarily restricted'. [186]

The introduction of a parody exception attracted little controversy in Australia. Thus, the legislative process affords sparse insight on the approach to satisfying the three-step test. However, based upon preparatory materials, the legislator's primary aim was to recognize the value of humorous and critical expressions within a democratic society,[187] which required the exclusive rights of right-holders to be balanced against the value of parody as an artistic expression.[188] 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.[189]

Initially, the Attorney-General proposed that this new fair dealing exception would be added into existing section 200AB Act 1968, which already incorporates the three-step test into the Copyright Act.[190] As we have seen earlier, the reason for repeating the international test within the national legislation is to task the judiciary with compliance with international obligations.[191] Consequently, trial 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 court.[192] Unlike the reiteration of the three-step test in the InfoSoc 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 the TRIPS Agreement.

The proposed introduction of the parody exception within section 200AB encountered serious criticism from the Senate Legal and Constitutional Affairs Committee.[193] Primarily, this arose because the three-step test was seen as being transmuted into a four-step test (the use was required to be both 'a special case' and 'for the purpose of parody'). Additionally, the additional stage was believed to create too much uncertainty for users, who would be unable to foresee whether their intended use would be permitted by the exception.[194] Consequently, the government adopted a free-standing fair dealing provision, assessing that its formula was adequate to comply with the

international three-step test.[195]

Notwithstanding the assertions made at the time, we should still satisfy ourselves that the Australian parody exception is compliant with the three-step test. As with the UK provision, it is evident that the exception extends beyond the reproduction right, as section 41 applies to all copyright dealings, including adaptations. Ricketson has traced the origins of 'dealings' in CA 1968 back to the UK Copyright Act 1911.[196] Thus, its legal meaning, as in the UK, includes any use which would otherwise result in a copyright infringement. Therefore, the only limitations imposed on parodists under section 41 are that the dealing must be 'for the purposes of parody and satire', and 'fair'.

Does 'parody and satire' amount to 'certain special cases' as understood under international treaties? As mentioned, there is no statutory definition of the terms. The principal case in which these terms have been considered by an Australian court is the *TCN* decision, decided before the enactment of a specific parody exception. Here, Conti J. consulted the *Macquarie Dictionary* definitions and determined that the essence of parody is the imitation of the original, while satire is 'form of ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses'[197] which does not require imitation to function. While the judge considered that a parody could be a fair dealing, he concluded that satire could not. Clearly, this is at odds with the wording of the new legislative exception which does envisage that certain 'satirical' uses (at least) can be fair dealing.

Based on the above, and pending further guidance from the Australian courts, it seems reasonable to assume that the terms parody and satire need to be interpreted broadly. While, like its UK counterpart, the Australian exception is framed as a fair dealing exception, the *TCN* case might suggest that fair dealing is being interpreted rather (too) restrictively. The application of fair dealing has always been a challenge for judges and, arguably, the new Australian provisions give little reassurance to defendants because there is no guidance as to how fairness is to be determined. While it is reasonable to assume that factors adopted under other fair dealing exceptions are likely to be influential, it is noteworthy that judges may depart from these and can even adopt new factors as long as these respect the three-step test and fundamental rights.[198] However, as noted by Weatherall, Australian judges seem to have put more emphasis on the purpose of the use rather than on the

fairness factors to determine the lawfulness of a use.[199] This has the effect of reintroducing some legal certainty for the exception to respect this first step.

The second step of the three-step test considers whether, or not, a use conflicts with the normal exploitation of the work. The compliance of section 41 with this step depends heavily on how fairness of a particular use is contemplated. Similar to our assessment of the UK exception, the court should take account of the nature of the particular use, right-holders' usual manner of exploitation, and typical revenue streams, including whether right-holders create or license parodies and satires. To achieve this, it seems likely that Australian judges will consider the historical development of fair dealing and use comparative analysis to determine whether there is a conflict of economic interests in a particular case. Therefore, if fair dealing implies adopting similar factors to those mentioned under section 40(2), then it is believed that the parody meets the second step of the three-step test. As further developed in Chapter 4, these include the nature of the work, availability of a licence, effect of the dealing upon the market of the original, and the quality and quantity of the copied parts.

Assuming that the first two steps are met, the Australian version of the exception still needs to comply with the third step. This step should be easier to meet given that the exception only relates to copyright and does not exempt the parodies from being liable for violation of the author's moral rights.[200]

Overall, compliance of the Australian parody exception with the three-step test is possible, but dependent upon adoption of 'fairness factors' which take due account of the second and third steps of that test. Without suitable crafting, it is arguable that the parody exception might conflict with the normal exploitation of a work, so rendering the third step moot. Given how little attention this exception received during the legislative debates, at present, it is difficult to verify its compliance with the three-step test.[201]

4.4 Canada

Consistent with its common law tradition, Canada introduced a fair dealing formula for copyright exceptions in 1921.[202] As we are now familiar, an otherwise infringing use will benefit from a defence provided (i) the use falls within one of the specified categories, and (ii) is considered to be a fair dealing by courts. While the range of exceptions has expanded, 'fair dealing'

remains a concept expounded in the case law.[203]

The specific parody exception, introduced into the Copyright Act, experienced a lengthy gestation. It first featured in Bill C-60 of 2005. This marked the start of the major reform of Canada's Copyright Act required to implement the international obligations arising from the WIPO treaties. This Bill did not progress before Parliament was dissolved in November 2005.[204] Bill-61 re-introduced the same subject matter some three years later, but it suffered the same fate.[205] In 2010, Minister Tony Clement tabled a revised proposal, Bill C-32,[206] but it failed to be implemented before a further change of Parliament. Finally, new legislation was implemented by Stephen Harper's majority in the government. Based upon Bill C-11, which largely replicated Bill C-32, it introduced a 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.[207]

Unfortunately for our purposes, the parody exception was largely overshadowed by other topics in pre-implementation discussions. The general policy behind the complete new set of new copyright exceptions—of which the parody exception was only one—was to achieve a better balance between the right-holders' right to remuneration and the need for users to access protected works, as required to protect the public interest.[208] Accordingly, the government sought to protect freedom of expression, as well as the social benefits[209] associated with parodies and satires, by providing a copyright environment more amenable to fostering the creation of these particular types of expressions.

The newly introduced parody exception, incorporated into section 29 of the Copyright Act 1985, states: 'fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.' Marking a departure from the other fair dealing provisions which we consider in this book, the Canadian legislator included parody and satire within an existing provision covering use for the purpose of research, private study, and education. By doing so, it is possible that this Canadian version of the parody exception complies more easily with 'certain special cases'. If courts still need to confirm the interpretation of parody and satire (although the first case since the introduction of the parody exception adopts the two main EU requirements), the fairness factors have already been developed under the other purposes mentioned in section 29, thereby providing more legal

certainty.

As with the other common law jurisictions considered, Canadian courts have a proactive role in interpreting the provision by identifying which uses are likely to be 'fair'. In line with the Supreme Court ruling in *CCH*,[210] fair dealing is assessed 'holistically', based mainly upon six variables. Courts must consider the purpose and character of the dealing, the 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.[211] These six factors enable section 29 to pass the second step of the three-step text more easily in a similar way to other common law jurisdictions we covered earlier.

Having passed these two initial steps, the exception should not cause a disproportionate prejudice to non-economic interests of the original author. As typical of the common law tradition, the parody exception relates to economic rights only. The Canadian legislator left the author's moral rights untouched by the exception.[212]

4.5 The United States

While the US, like UK, Australia, and Canada, is a common law jurisdiction, copyright exceptions are based upon 'fair use' and not 'fair dealing'. Fair use might be seen as the reverse of fair dealing, since there is no statutory limit regarding the purpose of a permitted use, whereas the fairness factors are codified in section 107 of the United States Copyright Act 1976. Case law interpretation of the Act has determined that use of a protected work for the purposes of parody will not infringe copyright provided the use is 'fair' as per the statutory factors.[213] In determining the fairness of the use, US courts have particular regard to the purpose and character of the use, the nature of the copyright-protected work, the amount of what is being copied, and the effect of the use upon the market of the original.[214] Like fair dealing, the fair use doctrine is broad and flexible. Therefore, judges can take account of additional factors, if relevant, and attribute more weight to some of the factors than to others.[215] In addition, while section 107 makes mention of the right of reproduction, fair use is not limited to any specific exclusive right.

The main difference between fair use and other approaches to exceptions considered previously is the undefined, open-ended character of the unauthorized use. This enables copyright defences to adapt to technology changes and users' habits without requiring specific legislation. Here, courts

take on an important role in shaping the scope and reach of copyright exceptions, but they also ensure its compliance with the three-step test on a case-by-case basis. However, as no clear-cut rules exist which distinguish permitted uses from those which may infringe based upon the reason for the use, the outcome in any litigation is unpredictable, meaning that users enjoy little legal certainty.

Despite its long standing, academic scholars still debate whether the open-ended fair use doctrine is compliant with the three-step test. This very point was considered in the DSB decision in which the European Community lodged a complaint with WTO based upon non-compliance with the TRIPS three-step test (art. 13 TRIPS) of certain exceptions included in section 110(5) of the US Copyright Code. The particular provision permits television and radio music to be played in public places (including retail establishments) without paying a royalty fee under certain conditions. In order for the fair use defence to be confined to 'certain special cases', the DSB held that the exception must be well-defined and narrow in scope.[216] Considering this interpretation, it is reasonable to argue that the fair use doctine is unlikely to be narrow and clear enough to meet the threshold.[217] Furthermore, as the defence is available to any user following a finding of copyright infringement, the potential pool of users is unlimited.[218] For these reasons, it remains questionable whether the fair use doctrine can be qualified as 'limited' in reach and scope.

However, if we consider the application of US fair use to parodies, it becomes easier to argue that fair 'parodic' use does meet the first of the three steps in the test. As seen in Chapter 1, the US Supreme Court narrowed the scope of the fair use doctrine for this use in *Campbell v. Acuff-Rose Music, Inc*.[219] Requiring a permitted parody to pass comment or criticism *of* the original borrowed work,[220] this decision did not exclude *parody with* (i.e. using the borrowed materials as a vehicle for comments) provided that comments and criticisms of society at large per se. But later lower courts have noted the parody/satire distinction as determinative because parodists who rely upon a copyright-protected work merely as a vehicle for criticism of something else do not *need* to reproduce a protected work in order to achieve this goal.[221]

The second step is probably easier to assess. Indeed, as the three-step test has its roots in the Anglo-American tradition, it is hard to deny the link

between the prohibition of conflict with the normal exploitation of the work and the fourth US factor, requiring examination of the effect of the use upon the market of the original.[222] As further developed in Chapter 4, US courts seem to look favourably on parodies which involve a comic element and some form of critical comment of the parodied work.[223] Here, it may be inferred that the *Campbell* decision broadens fair use by its reformulation of the first factor, since the US Supreme Court rephrased the question for the application of fair use as:

> [W]hether the new work merely supersedes the objects of the original creation, or whether and to what extent it is 'transformative,' altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[224]

As section 106(2) of the US Copyright Code grants the copyright holder the exclusive right to produce derivative works, the Supreme Court's dictum appears to permit US courts to circumscribe this right and permit any transformation of copyright-protected works which convey a new expression building on the original.[225] Consequently, whilst older US decisions held that the fair use doctrine did not apply to uses which left the copied elements unchanged (especially where an artistic work was copied), decisions post-*Campbell* have permitted this type of use. For example, a reduction in size of copyright photographs for online purposes,[226] a reproduction of posters and tickets as illustrations in a book on a band's history,[227] the replication of photographs on canvas[228] and in paintings[229] have all been held to be permitted fair use, despite the commercial nature of that use, because there was a transformation in use from the original expressive purpose.[230]

Provided that the second step is satisfied, fair use for the purposes of parody should not unreasonably prejudice the right-holders' legitimate interests. This is probably the hardest step for US law to satisfy. With the expansion of fair use to transformative use, it is reasonable to argue for the introduction of some kind of financial compensation, such as a compulsory licence scheme. Equally, there are concerns that the fair use case law has stifled protection of authors' non-economic interests significantly. On its accession to Berne in 1989, the US was obliged to recognize the moral rights of paternity and integrity as prescribed under article 6bis Berne Convention.[231] As a result, the Visual Artists Rights Act of 1990 ('VARA') added a new section 106A into the US Copyright Code. However, this limits

the rights of intergrity and attribution to visual arts alone.[232] As we shall see in Chapter 6, the courts' application of moral rights has eroded the level of protection granted to authors. The enforcement of moral rights is closely linked to an infringement action of economic prerogatives.[233] Therefore, it is arguable that the breadth of permitted use which courts have allowed based upon fair use transformativeness (adopting *Campbell* principles) cripples the non-economic interests of authors, jeopardizing its compliance with Berne.[234]

While the question of whether the US fair use doctrine is compliant with the international three-step test has long attracted academic attention, there has not been any challenge to the legality of fair use under the WTO.[235] Based on the guidance found in the WTO Panel decision, academics fail to agree on whether fair use complies with the obligations set out in Berne.[236] It seems that there is a case that fair use for the purposes of parody is non-compliant with the three-step test enshrined in Berne for failing to meet the third step. In other words, although the US may be compliant with the three-step test as enshrined in TRIPS, it may not be compliant with the same test contained in Berne owing to the lack of protection of moral rights.

5. Conclusion

It is undeniable that the three-step test continues to shape the scope and reach of copyright exceptions. Its influence is evident even in jurisdictions, such as the UK, which chose not to incorporate the test directly into national law. This political tool, intended initially to reconcile different legal traditions via international copyright law, seems to have transformed into a legal tool for the judiciary to use to determine appropriate application of copyright exceptions *in casu*.

This chapter has argued that the bespoke parody exceptions enshrined in the domestic law of the jurisdictions under consideration all have the potential to satisfy the international three-step test. By specifying the purposes for which the exception can be implemented and by framing the exception with the doctrines of fair dealing or the rules of the genre, and by retaining the option for the author to enforce moral rights, the parody exception in the UK, Canada, Australia, and France should meet the three steps required by international treaties. There is scope for conformity to be honed even further, because the boundaries of the exception are defined by

the manner in which it is applied by the courts in specific cases.

Some reservations have emerged regarding the US's compliance with the three-step test. Indeed, as fair use solely relies on the factors set out in legislation, the courts carry more responsibility, by applying the factors to the facts before them, to ensure that the fair use doctrine is compliant with the test. While the current focus on the transformative nature of the use is flexible, and so adaptable to technological changes, there is a real risk that it becomes too broad in scope and reach to meet the first step of the test. It remains to be seen whether the restriction of the fair use doctrine for parody works to uses which directly comment or criticize the copyright-protected work parodied is sufficient to be confined to certain special cases. Furthermore, the abridged application of moral rights possibly impedes fair use to meet the third step of the test. Therefore, the compliance of a parody exception firmly hinges upon its judicial interpretation.[237]

As the influence of the three-step test has now extended to EU national judges, some (meagre) comfort may be found in *Deckmyn*. In this case, an enabling function of the three-step test emerges. This opens the door for national courts to hear arguments based on human rights in some cases, and directs them to strike a fair balance between the competing interests at stake. This appears to coincide with the Canadian approach since *CCH*. In *CCH*,[238] the Supreme Court promotes the role of the copyright exceptions as protection of *users' rights*. Hence, the interests protected by the exclusive rights of the copyright-holder must be balanced against those interests protected by any exception. Arguably, this requires Canadian courts to adopt a proportionality-based test between the competing interests, as suggested by the CJEU in *Deckmyn* to the courts in EU Member States.

Inevitably, as the bespoke parody exceptions under scrutiny use framework conceptions, such as fair use, fair dealing, or rules of the genre, it is necessary to delineate the scope of the exception to ensure its compliance with international obligations. This is discussed in Chapter 4. But to preserve the legitimate interests of authors, it is also important to respect authors' moral rights, as dicussed in Chapter 6. Finally, as the parody exception and the moral rights require one party's interests be weighed up and balanced against competing interests, the analysis of fundamental rights values provided in Chapter 5 is inherent in satisfaction of the three-step test. Therefore, if this book adopts a linear approach for the reader's convenience, some overlaps may occur in practice. For example, as argued further in this work, the weight

allocated to particular factors in the application of a parody exception is likely to depend on the human rights aspects involved which is of particular relevance where the parody is not clear-cut.

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[1] Note that there is no agreement whether 'exceptions' and 'limitations' are separate notions. While the WT/160/DS panel report distinguishes the terms, the literature tends to use the terms interchangeably. The TRIPS Agreement, WIPO Treaties, and the InfoSoc Directive have both terms next to each other without definition. The recitals of the Directive reinforce the interchangeability of the terms. It is argued that this is likely to be the result of a compromise between the different legal traditions. This book 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. B Galopin, *Les exceptions à usage public en droit d'auteur* (IRPI, 2012) 8; A Kur, *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, 1–48; V Benabou and S Dussollier, 'Draw me a public domain' in P Torremans (ed.), *Copyright Law A Handbook of Contemporary Research* (Edward Elgar, 2007) 426; P El Khoury, *Les exceptions au droit d'auteur* (thèse Montpellier, 2007) 25.

[2] J Cavalli, *La Genèse de la Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 Septembre 1886* (Lausanne, 1986) 13.

[3] On the history of copyright: J Hofman, *Introducing Copyright: A Plain Language Guide to Copyright in the 21st Century* (Commonwealth of Learning, 2009); R Deazley, *Rethinking Copyright* (Edward Elgar, 2006); P Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford Law and Politics, 2003); G Davies, *Copyright and the Public Interest* (Thomson, 1994) 19–23; L R Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968) 3–179.

[4] M Leaffer, *Understanding Copyright Law* (Matthew Bender, 1989) 2–5.

[5] W Copinger and J F Skone James, *On Copyright* (16th edn, Sweet & Maxwell, 2010) chapter 2.

[6] Statute of Anne 1709. This was not a clear break as described by L Bently, 'Introduction to Part I: the history of copyright' in L Bently, U Suthersanen, and P L C Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Edgar, 2010) 11.

[7] 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 US, Canada, and Australia.

[8] Caution must be exercised when using the statement 'first copyright law'. The Statute of Anne is a milestone for British copyright and copyright in other countries but this does not mean it was the first one in the world. Bently (n 6) 7; S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York University Press, 2001) 40.

[9] W Cornish, 'The Statute of Anne 1709: its historical setting' in Bently, Suthersanen, and Torremans (eds), *Global Copyright* 21.

[10] See section 2.2.

[11] This approach reflects Adam Smith's theories, i.e. exclusive rights granted through copyright to right-holders are 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: P Gaudrat, 'Les démêlés intemporels d'un couple à succès: le créateur et

l'investisseur' (2001) 190 *RIDA* 70, 71; A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (5th edn, Methuen & Co., 1904).

[12] G Petri, 'Transition from guild regulation to modern copyright law (Sweden)' in Bently, Suthersanen, and Torremans (eds), *Global Copyright* 111; C Geiger, 'The influence (past and present) of the Statute of Anne in France' in Bently, Suthersanen, and Torremans (eds), *Global Copyright* 124; Cavalli (n 2) 14–16, 19.

[13] This is based on John Locke's theory that as an individual owns himself, a person is also the owner of his own work, which is a materialization 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 S Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique* (Larcier, 2007) 219; J Locke, *Second Treatise of Civil Government* (1690) available at http://www.constitution.org/jl/2ndtreat.htm chapter 5, s 27.

[14] H Desbois, *Le droit d'auteur en France* (3rd edn, Dalloz, 1978) 538.

[15] M Leaffer, *Understanding Copyright Law* (Matthew Bender, 1989) 4.

[16] Probably the best illustration of this is the framer's reluctance to refer to copyright to focus on the promotion the progress of the useful art. Ibid.

[17] Act of May 31, 1790, Ch. 15, 1 Stat. 124.

[18] G J Yonover, 'Artistic parody: the precarious balance: moral rights, parody, and fair use' (1996) 14 *Cardozo Arts & Ent. L.J.* 79, 91.

[19] Most notably the adoption of the 1909 Act overhauling the US copyright paradigm (17 U.S.C.). Yet, this revision did not enable the US legislation to meet the minimum standards set out in the Berne Union. The US entry occurred later with the Berne Convention Implementation Act 1988. Pub. L. No. 100–568 (1988).

[20] Supporting this, see Mark Schultz's contribution at the Symposium on *Authors, Attribution and Integrity* organized by George Mason University (18 April 2016). The transcript was published as part of the summer issue in 8(1) *Journal of International Commercial Law* 1, 11.

[21] Dusollier notes that the editors referred to John Locke's theories to support their position at the time of the adoption of the Statute of Anne. Dusollier (n 13) 217.

[22] Non-rivalrous and non-excludable.

[23] Monopoly here is understood as the fact that copyright protection inherently comprises a deadweight loss, given that the right-holder's enforcement of exclusive rights allows them to set the price for works at a level higher than the marginal cost of a copy. This leads to a situation where potential customers, valuing the work above its marginal cost but less than its monopoly price, will not buy the work, leading to the deadweight loss. In a way, by trying to remedy a particular type of market failure, copyright legislation can lead to another type of market failure by creating monopolies. For more, see N Elkin-Koren, 'Copyright policy and the limits of freedom of contract' (1997) 12 *Berkeley Tech. L.J.* 93, 99.

[24] On the utilitarian approach, see M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer, 2004) 12; L Guibault, *Copyright and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer, 2002) 10.

[25] 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 in (copyright is a property right). The protection is acquired by the sole creation of the work and the law simply recognizes the property right in the work.

[26] It is important to note that not all copyright exceptions take the form of fair use or fair dealing. See, amongst others. ss 28A, 28B, 29A, 31, 31A, 31B, 31BA, 31BB, and 33 CDPA 1988.

[27] Galopin (n 1) 160; Kur (n 1) 9; C Geiger, *Droit d'auteur et droit du public à l'information* (IRPI, 2004) 246; A Lepage, '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, 3; Guibault (n 24) 15; A Lucas, *Droit d'auteur et numérique* (Litec, 1998) 173.

[28] 17 US Code §§ 107–119 (fair use at § 107).

[29] See n 25.

[30] Arguably, this is still the case: Chapter 3, section 1.

[31] C Caron, 'Les exceptions au regard du fondement du droit d'auteur en droit français' in A Lucas, P Sirinelli, and A Bensamoun, (eds), *Les exceptions au droit d'auteur: état des lieux et perspectives dans l'Union européenne* (Dalloz, 2012) 24; Galopin (n 1) 160; Dusollier (n 13) 215; Geiger (n 27) 224; Senftleben (n 24) 22; Guibault (n 24) 15; Lucas (n 27) 171–3.

[32] At least initially. We will see that the evolution of the law has perhaps disrupted this balance. See Chapters 3 and 4.

[33] Dusollier (n 13) 448.

[34] D J Gervais, 'Making copyright whole: a principled approach to copyright exceptions and limitations' (2008) *UOLTJ* 1, 5; C Geiger, J Griffiths and R M Hilty, 'Declaration on a balanced interpretation of the "three-step test" in copyright law' (2008) 39(6) *IIC* 707, 708; Geiger (n 27) 226.

[35] Senftleben (n 24) 7–10; Guibault (n 24) 8; G Davies, 'The convergence of copyright and authors' rights—reality or chimera?' (1995) 26(6) *IIC* 964–89. Yet, Geiger notes a drawback of natural law considerations: C Geiger, 'The constitutional dimension of intellectual property' in P L C Torremans (eds), *Intellectual Property and Human Rights* (3rd edn, Kluwer, 2008) 123.

[36] B Sherman and L Bently, *The Making of Modern IP Law* (Cambridge University Press, 1999).

[37] Vaidhyanathan (n 8); A Strowel, *Droit d'auteur et copyright: divergences et convergences* (Bruylant and L.G.D.J., 1993) 149.

[38] The scope of copyright therefore goes beyond the realm of commercial exploitation even in cases where copyright enforcement may not be possible or is undesirable as these conflict with fundamental values or result in high transaction costs.

[39] As recalled by Numa Droz at the first diplomatic conference at Berne. Actes 1884, 67 (closing speech to the 1884 conference).

[40] Caron (n 31) 21; S Ricketson, 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, 3; Lepage (n 27) 32; D J Gervais, 'Towards a new core international copyright norm: the reverse three-step test' (2005) 9 *Marq. Intell. Prop. L. Rev.* 1–36; Kur (n 1) 4; also in *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] S.C.C. 34, [30]–[31].

[41] Lepage (n 27) 1.

[42] In *WIPO 1886, Berne Convention Centenary 1986* (Geneva, 1986) 195; Preamble of WCT 1996.

[43] 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.

[44] Desbois describes this as a new kind of censorship. Desbois (n 14) 322.

[45] See n 38.

[46] See Chapter 1, section 5.1.

[47] See sections 3.2 and 4.

[48] See further on this in Chapter 5, section 4.1.5.

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

[50] Agreement on Trade-related Aspects of Intellectual Property Rights of 1994; Annexe 1C to the Agreement Establishing the World Trade Organization, 15 April 1994. This shift also had the consequence of departing from the influence of natural laws dominating the Berne Convention to utilitarian considerations, such as primarily economic justifications for copyright. It is through article 9(1) that part of Berne has been rejuvenated, as WTO member states have to comply with articles 1–21 Berne and with 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 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 (n 24) 90, 121, and 155; Ricketson (n 40) 47, 49, and 52.

[51] Articles 1(4) and 10(1)–(2) WCT of 20 December 1996. Insofar as the three-step test is generally restrictive of the exceptions which satisfy the test, the three-step test in WCT is permissive to exceptions by noting that such exceptions are not limited to those complying with the test. A F Christie and R Wright, 'International review of intellectual property and competition law a comparative analysis of the three-step tests in international treaties' (2014) 45(4) *IIC* 409, 431; S Dusollier, 'L'encadrement des exceptions au droit d'auteur par le test des trois étapes' (2005) 2 *I.R.D.I.* 213, 215; Senftleben (n 24) 106; Ricketson (n 40) 57–63; M Ficsor, *The Law of Copyright and the Internet—The 1996 WIPO Treaties, their Interpretation and Implementation* (OUP, 2002) 60–1; Agreed Statements Concerning the WCT, *Statement Concerning Article 10*, WIPO Diplomatic Conference, WIPO Doc. No. CRNR/DC/96 (1996).

[52] Article 16(2) WIPO Performances and Phonograms Treaty of 20 December 1996.

[53] Kur (n 1) 16; Gervais (n 34) 25; H Sun, 'Overcoming the Achilles heel of copyright law' (2007) 5(2) *NJTIP* 264, 268; Gervais (n 40) 13; Senftleben (n 24) 67.

[54] This study has been done by others, including Senftleben (n 24).

[55] The reproduction right was already present but not fully recognized before 1967. C Geiger, D Gervais, and M Senftleben, 'Understanding the "three-step test"' in D Gervais (ed.) *International Intellectual Property* (Edward Elgar, 2015) 584.

[56] Many countries already had an exclusive reproduction right in their national systems but it was not yet acknowledged at international level. C Geiger, 'From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test' (2007) 29(12) *EIPR* 486–91, esp. 486.

[57] Dusollier (n 13) 436.

[58] K J Koelman, 'Fixing the three-step test' (2006) 8 *EIPR* 407–12.

[59] Article 9(2) Berne Convention.

[60] This explains why moral rights are left outside the scope of the treaty, compared to the Berne Convention for example. For more: M T Sundara Rajan, *Copyright and Creative Freedom—A Study of Post-Socialist Law Reform* (Routledge Studies in International Law, 2006) chapter 1.

[61] Even outside copyright law, as traces of three-step tests can be found in relation to trade mark, design, and patent legislation. See TRIPS, articles 17, 26(2), and 30.

[62] Sun (n 53) 277; Sundara Rajan (n 60) 22–5.

[63] The statement notes: 'Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.'

[64] Agreed Statements concerning the WIPO Copyright Treaty adopted at the Diplomatic Conference on 20 December 1996.

[65] The new Copyright Directive proposed by the Commission within the Digital Single Market Strategy will be set aside as it says nothing about the parody exception. *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market* (14 September 2016) COM(2016)593. However, the EU Parliament Culture and Education Committee ('CULT') published an opinion in favour of expanding the quotation exception in the proposed new directive to parody uses. CULT proposes to add recital 21(a), which seems to focus on short reproductions and mirrors the three-step test, recital 21(b), which suggests a user-generated content ('UGC') exception at EU level, and article 5(a), which expands the quotation exception to non-commercial parodies reproducing small parts of earlier works (and would require acknowledging the underlying copyright-protected work). Whilst inclusion of parody uses within the new directive is appreciated (should these amendments be adopted), the scope of the parody exception is likely to be reduced as it focuses on small amounts copied, non-commercial uses, and requires acknowledging the original. European Parliament, *Opinion of the Committee on Culture and Education for the Committee on Legal Affairs* (4 September 2017) COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), Rapporteur: Marc Joulaud, Amendments 14, 15, and 60. The Committee for the Internal Market and Consumer Protection also tables a similar amendment. European Parliament, *Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal* (14 June 2017) COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), Rapporteur: Catherine Stihler, Amendment 55. While this amendment is not limited to a certain amount reproduced it still requires identifying the earlier work. In addition, it provides an invitation for judges to consider fair practices in a particular sector. The latter is welcomed as it adds some flexibility in a closed system of exceptions. Yet, such provision is absent from the Council's revised presidency proposal. Council of the European Union, *Revised Presidency compromise proposal regarding Articles 2 to 9* (26 September 2017) 2016/0280 (COD).

[66] 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.

[67] Article 2 of the InfoSoc Directive.

[68] Article 3 of the InfoSoc Directive.

[69] Article 4 of the InfoSoc Directive.

[70] Recitals 6 and 7 of the InfoSoc Directive; initial proposal from the Commission COM (1997) 628, p. 8. Therefore, the harmonization had to facilitate the functioning of the internal market for copyright-protected works, recital 31.

[71] Preamble and recital 31 of the InfoSoc Directive; A Ramalho, 'Parody in trademarks and copyright' (2009) 5 *Cambridge Student Law Review* 59.

[72] See current discussions on the EU copyright reform and especially the Reda report available at https://juliareda.eu/copyright-evaluation-report/ (access date: 1 June 2018).

[73] Article 5(1) of the InfoSoc Directive.

[74] Recital 32, Article 5(2)–(3) of the InfoSoc Directive.

[75] Article 5(5) of the InfoSoc Directive.

[76] The various criticisms are summarized in what follows.

[77] The emphasis is the author's own.

[78] Some countries, such as Spain and Belgium, already had part of the three-step test in their national law while France, Greece, Ireland, Italy, Luxembourg, and Portugal introduced the test after the implementation of the InfoSoc Directive in their domestic law.

[79] Galopin (n 1) 386.

[80] Recital 44 of the InfoSoc Directive; G Mazziotti, *EU Digital Copyright and the End-user*

(Springer, 2008) 85; Dusollier (n 13) 438; C Caron, 'Les exceptions: l'impact sur le droit français' (2002) 2 *Propriétés Intellectuelles* 25, 26; P-Y Gautier, 'De la transposition des exceptions: à propos de la directive "droit d'auteur dans la société de l'information" ' (2001) 25(19) *CCE* 10.

[81] P-Y Gautier, 'Les exceptions au regard du droit d'auteur de l'Union Européenne' in Lucas, Sirinelli, and Bensamoun (eds), *Les exceptions au droit d'auteur* 42; A Lucas, 'For a reasonable interpretation of the three-step test' (2010) 32(6) *EIPR* 277; Dusollier (n 13) chapter 4; Geiger (n 27) 262.

[82] This is due to the direct effect of directives in certain cases where they are unconditional, sufficiently clear and precise. Galopin (n 1) 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 WLR 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 (n 81) 277; J Griffiths, 'The "three-step test" in European copyright law—problems and solutions' (2009) 4 *IPQ* 428.

[83] 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.

[84] In favour of this interpretation: R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 298.

[85] Recital 36 of the InfoSoc Directive and Dusollier (n 51) 26.

[86] This is supported by the verbs used in the drafting of article 5(1)–(4) and 5(5) of the InfoSoc 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 InfoSoc Directive. Finally, recital 44 infers that national judges are the addressees. M Senftleben, 'Overprotection and protection overlaps in intellectual property law—the need for horizontal fair use defences' in A Kur and V Mizaras (eds), *The Structure of Intellectual Property Law* (Edward Elgar, 2011) 152.

[87] The Wittem Project appears to extend the scope of the test to enable the adoption of new exceptions not already harmonized by the Code (article 5.5). The project is available at https://www.ivir.nl/copyrightcode/introduction/; Galopin (n 1) 398.

[88] C-463/12 *Copydan Båndkopi v. Nokia Danmark A/S* [2015] ECLI:EU:C:2015:144 (hereafter *Copydan*); C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn);* C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer KG* [2014] ECLI:EU:C:2014:2196 (hereafter *Ulmer*); C-435/12 *ACI Adam BV and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* [2014] ECLI:EU:C:2014:254 (hereafter *ACI Adam*); C-360/13 *Public Relations Consultants Association Ltd v. Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195 (hereafter *PRCA*); C-162/10 *Phonographic Performance (Ireland) Limited v. Ireland* [2012] ECLI:EU:C:2012:141; C-145/10 *Eva-Maria Painer v. Standard Verlags GmbH and Others* [2011] ECLI:EU:C:2011:798 (hereafter *Painer*); C-302/10 *Infopaq International A/S v. Danske Dagblades Forening* [2012] ECLI:EU:C:2012:16 (hereafter *Infopaq II*); C-462/09 *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH and Others* [2011] ECLI:EU:C:2011:397 (hereafter *Opus Supplies*); C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others* and C-429/08 *Karen Murphy v. Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631 (hereafter *FAPL);* C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465 (hereafter *Infopaq I*); R Arnold and E Rosati, 'Are national courts the addressees of the InfoSoc three-step test?' (2015) 10(10) *JIPLP* 744–8.

[89] *ACI Adam* (n 88) [25]; *Painer* (n 88) [101]; *Opus Supplies* (n 88) [33].

[90] *Painer* (n 88) [107].

[91] Ibid, [105]–[106].

[92] Ibid, [108].

[93] Ibid, [109].

[94] *Ulmer* (n 88) [47]; C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.* [2014] ECLI:EU:C:2014:110, [40]; *Infopaq I* (n 88) [55].

[95] *Ulmer* (n 88) [56]; *PRCA* (n 88) [53]–[63]; *FAPL* (n 88) [180]–[181].

[96] *Infopaq II* (n 88) [55]–[57]; *FAPL* (n 88) [181].

[97] *Ulmer* (n 88) [47]; *Copydan* (n 88) [90]; *ACI Adam* (n 88) [26].

[98] The literature heavily criticizes the InfoSoc 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.

[99] However, it is now clear from the jurisprudence of the CJEU that a national legislator cannot introduce an exception narrower than what is provided in the InfoSoc Directive. C-510/10 *DR and TV2 Danmark A/S v. NCB—Nordisk Copyright Bureau* [2012] ECLI:EU:C:2012:244, [36].

[100] C Geiger, D J Gervais and M Senftleben, '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, 626. Also supported by recital 3 of the InfoSoc Directive.

[101] Advocate General's Opinion in *Deckmyn* [2014] ECLI:EU:C:2014:458 (hereafter AGO in *Deckmyn*), [29]. This is because the Court is bound by what the national court asked and the Court of Appeal of Brussels focused its questions on the parody exception rather than including article 5(5) InfoSoc Directive.

[102] *Deckmyn* (n 88) [26]–[27].

[103] See Chapters 4 and 5.

[104] See Chapter 5, section 4.

[105] Law 2006-961 of 1 August 2006 concerning Copyright and Neighbouring Rights in the Information Society, published in the Official Gazette, 3 August 2006, 11529.

[106] Section 200 AB of the Australian Copyright Act of 1968, introduced into Australian law by the Copyright Amendment Act 2006 (No 158, 2006).

[107] Geiger (n 56) 486–91, esp. 489.

[108] A comparison undertaken led to the conclusion that there is not *one* three-step test but 'eight different stepped tests' at international level. Christie and Wright (n 51) 409–33.

[109] The same statement can be transferred to national decisions on the interpretation of the three-step test in the field of copyright. If one looked at the different national decisions, one would see that the decisions are far from speaking with one voice. National courts have adopted different interpretations over the years and these also depart from the panel copyright report.

[110] 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 June 1967–14 July 1967, vol. II, p. 11456; C Geiger, 'The role of the three-step test in the adaptation of the information society' (2007) *January–March UNESCO e-copyright bulletin* 1, 5; Sun (n 53) 267; Dusollier (n 51) 214; Geiger (n 27) 253; Senftleben (n 24) 125; Ricketson (n 40) 21; Lepage (n 27) 6; J Reinbothe and S v. Lewinski, *The WIPO Treaties 1996—The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—Commentary and Legal Analysis* (Butterworths, 2002) 124. However, trying to insert some flexibility into the test, Geiger et al argue that the test should be 'considered together and as a whole in a comprehensive overall assessment' Geiger et al (n 34) 711. This is vividly criticized by Lucas. Lucas (n 81) 281.

[111] '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 latter meaning prevails. In addition to the ordinary meaning, this interpretation is supported by the intention of the drafters. Geiger (n 27) 253; Senftleben (n 24) 134–5; Ricketson (n 40) 63; Reinbothe and Lewinski (n 110) 124; Ficsor (n 51) 129.

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

[113] Against this position, see S Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies, 2002) 31.

[114] The decisions of the DSB are binding on the parties of the dispute but there are considerable doubts as to their authority beyond the dispute in hand. Dusollier (n 13) 446. This is not to underestimate the importance of study of the decisions. To the contrary, signatory parties may look to these decisions to understand the interpretation of the test resulting in a consolidated practice of how the test has to be understood. Kur (n 1) 33.

[115] WTO Panel WT/DS160/5 of 16 April 1999, para VI.146. In doing so, and facing the 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.

[116] Dusollier (n 13) 446–7.

[117] Gervais (n 34) 25–7; Senftleben (n 24) 146; Ricketson (n 40) 25.

[118] For: Senftleben, Geiger, Griffiths, Hilty; *contra*: Bornkamm, Ricketson, Lucas.

[119] WTO Panel (n 115) para VI.199.

[120] Senftleben (n 24) 182 and 194.

[121] Also supported under TRIPS, see TRIPS Preamble recognizing 'the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives'. Additionally, see article 7 TRIPS for the extension to the digital environment and article 8 TRIPS for further interests to be considered.

[122] WTO Panel (n 115) para VI.211. Later, the diplomatic conference in relation to the WIPO internet treaties repeated the need for 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; S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights* (OUP, 2005) para 13.21; Senftleben (n 24) 177–84.

[123] This is exemplified by the failure to harmonize a private copying exception, despite the social value which such an exception provides.

[124] Senftleben (n 24) 180.

[125] Kur (n 1) 26; Senftleben (n 24) 181.

[126] See n 110.

[127] This echoes the conclusion reached in the Panel decision, [6.183]. Yet, the appreciation of this step in relation to specific exceptions may change with time. As this second step requires determination of whether the kinds of uses authorized by the parody exception are likely to be uses that right-holders might want to exploit for themselves, it may be that, one day, parody uses which were not deemed significant become an important source of revenue for right-holders.

[128] Senftleben (n 24) 193.

[129] Peukert argues that widely accepted exceptions such as the parody exception satisfy the second step in the digital era due to their normative justifications. A Peukert, 'A bipolar copyright system for the digital network environment' (2005) 28(1) *Hastings Communications & Entertainment Law Journal* 33, 34.

[130] While Berne and WCT refer to the author, TRIPS refers to right-holders.

[131] This step also offers the possibility for signatory parties to introduce equitable remuneration. It is

the author's opinion that no equitable remuneration or compulsory licence should be provided for the parody exception. Such remuneration would have the negative consequence of putting a price on the exercise of fundamental freedoms. Therefore, equitable remuneration is not studied here.

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

[133] This differs from the second step where only the major revenue stream is considered. See section 3.2.2.

[134] 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 6.

[135] Senftleben (n 24) 230; see Chapter 5.

[136] Gervais (n 40) 18–19; Ricketson (n 40) 27.

[137] Also inferred by the AGO in *Deckmyn* (n 101) [29].

[138] Geiger (n 56) 486–91, esp. 490; Geiger et al (n 34) 711; Max Planck Institute Declaration on the Three-step Test available at http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_ (access date: 10 November 2018); P B Hugenholtz and R L Okidiji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (Report, 2008) available at http://www.eifl.net/sites/default/files/resources/201409/conceiving_an_international_instrument_on_lim Koelman (n 58) 407–12.

[139] Here, the UK is included within EU countries. The white paper states that the UK will implement all EU legislation prior to Brexit and that the CJEU will still have an influence on the interpretation of legislation until explicit repeal by the UK government (White Paper, 2 February 2017, available at https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper (access date: 10 November 2018)).

[140] See Chapters 5 and 7.

[141] While this is not explicitly stated in the *Deckmyn* decision, it is more developed by the AGO in *Deckmyn* (n 101) [42].

[142] Traditionally, some national judges such as English judges have been more reluctant to hear arguments based on human rights law in copyright cases (aka external limits). This is because it is perceived as being the role of the legislator to strike a balance between property rights and other fundamental rights through internal limits of copyright legislation (e.g. duration, scope, subject matter, and exceptions).

[143] Article 41, 4° of the law of 11 March 1957 (now article L122-5 4° IPC); for more on this law: R Savatier, 'Loi du 11 mars 1957 sur la propriété littéraire et artistique' (1957) 42(2) *JCP* 677.

[144] The parody exception already figured in revolutionary decrees in force between 1791 and 1957. Galopin (n 1) 3; A R Bertrand, 'Exceptions à la protection en matière de droit d'auteur qui figurent au CPI' in *Droit d'auteur* (Dalloz, 2012) 326; P El Khoury, *Les exceptions au droit d'auteur, étude de droit comparé* (University of Montpellier, 2007) 22. Jean-Michel Bruguière adds that, although the parody exception consists of a judicial creation, the 'rules of the genre' was a concept created by the legislator. J-M Bruguière, 'La réception du fair dealing britannique dans le système d'exception fermée français' (2018) *RIDA* (forthcoming).

[145] 'Droit de critique'; A Strowel, 'La parodie selon le droit d'auteur et la théorie littéraire' (1991) 26 *RIEJ* 44; M Buteau, *Le droit de critique en matière littéraire, dramatique et artistique* (L. Larose et L. Tenin, 1909).

[146] Decisions prior the codification of the exception: Trib. Comm. Seine, 26 juin 1934, gaz. Pal. 1934. 2. 594; Trib. Comm. Seine, 26 août 1886, Ann. 1889, p. 352; Trib. Civ. Seine, 12 juin 1879, Ann. propr. ind. 1879, p. 239; Trib. Corr. Seine, 20 mars 1877, Ann, 1877, p. 212; Trib. Civ. Seine, 23

février 1872, Ann. propr. ind. 1873, p. 162; Trib. Corr. Paris, 6 février 1834. Gaz. Trib. 8 février 1834.

[147] Geiger (n 27) 88.

[148] Galopin (n 1) 2; P Sirinelli, 'Le droit d'auteur à l'âge du numérique' in X Greffe and N Sonnac (eds), *Culture Web. Création, contenus, économie numérique* (Dalloz, 2008) 409.

[149] See section 2.2; P Malaurie, *L'ordre public et le contrat* (Paris, 1950) 603.

[150] See Chapter 4, section 2.

[151] The wording of the exception is the same today as in the Law of 1957.

[152] WIPO's translation of the French Intellectual Property Code, available at http://www.wipo.int/wipolex/en/details.jsp?id=16750 (access date: 1 June 2018).

[153] See Chapter 1, section 5.2.1.

[154] Bruguière (n 144).

[155] See especially in trade mark cases: Riom, 15 septembre 1994 D. 1995, p. 429, note Edelman; TGI Nanterre, réf., 28 mai 2003: légipresse 2003, I, p. 118; Baud and 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 mars 2000, CCE 2000, Comm. 88, note Caron; TGI Paris, 3e ch., 4 juillet 2001: Expertises 2001, p. 395; or in relation to image rights: Reims, 9 février 1999: JCP G 1999, II, 10144, note Bigot; D. 1999, p. 449, note Edelman; Cass. 1ère Civ., 13 janvier 1998: RIDA mars 1998, p. 201, obs. Kéréver; JCP G 1998, II, 10082, note Loiseau; D. 1999, p. 120, note Ravanas.

[156] Cass. 1ère Civ., 28 février 2006, JurisData n°2006-032368; RIDA mars 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 avril 2007: JurisData n°2007-329335; RIDA mars 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. 1ère Civ., 19 juin 2008: JurisData n°2008-044405; RIDA mars 2008, p. 299; RLDI juillet 2008, n°1322.

[157] A. Gowers, *Gowers Review of Intellectual Property* (London: HM Treasury, November 2006) Recommendation 12.

[158] UK-IPO, *Taking Forward the Gowers Review of Intellectual Property: Changes to Copyright Exceptions* (Newport: UK-IPO, 2008).

[159] UK-IPO, *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (Newport: UK-IPO, 2009).

[160] Regarding the definition, scope, conditions, and the barrier between plagiarism and parody.

[161] See n 159, 46.

[162] A coalition between the Conservatives and Liberal Democrats replaced the former Labour government.

[163] Quoting from Professor Hargreaves at http://www.bbc.co.uk/news/technology-13429217 (access date: 1 June 2018).

[164] I Hargreaves, *Digital Opportunity. A Review of Intellectual Property and Growth* (Independent Report, 2011).

[165] '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) para 7.103.

[166] '[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.' See n 164, 50.

[167] Ibid.

[168] See n 165, para 7.104.

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

[170] The parody exception is also available for performances, schedule 2, para 2B.

[171] *Hubbard v. Vosper* [1972] 2 QB 84, CA (Civ Div) 94 and 98.

[172] Ibid, 94.

[173] Section 30 CDPA.

[174] However, as argued in Chapter 4, the parody exception probably requires an adaptation of these factors.

[175] And the UK does not enjoy the same rich case law as in France since Revolutionary times.

[176] *Deckmyn* (n 88) [14]–[17].

[177] Ibid, [20].

[178] The UK does not yet enjoy the same long-standing experience as French courts have since the Revolutionary decrees and which inherently helps determine the outer boundaries of the exception.

[179] Yet, under article 13 TRIPS only economic interests are taken into account.

[180] See Chapter 6.

[181] Australia codified its own fair dealing provision in 1905; it 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. A Sims, 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' (2010) 2 *IPQ* 192, 193.

[182] Ricketson (n 40) 73.

[183] 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, 8.

[184] N Suzor, 'Where the bloody hell does parody fit in Australian copyright law?' (2008) 13 *MALR* 220; M Sainsbury, 'Parody, satire and copyright infringement: the latest addition to Australian fair dealing law' (2007) 12 *MALR* 292; Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19 October 2006, 2 (Philip Ruddock, Attorney-General).

[185] Attorney-General Philip Ruddock, 'Protecting Precious Parody', *Daily Telegraph*, 30 November 2006; Second Reading speech to the House of Representatives (Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19 October 2006, 2 (Philip Ruddock, Attorney-General); Commonwealth of Australia, Parliamentary Debates, 29 November 2006, 112 (Chris Ellison, Minister for Justice and Customs).

[186] Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19 October 2006, 2 (Philip Ruddock, Attorney-General).

[187] 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 Chapter 5, section 1.

[188] Australian Government Discussion Paper, *Proposed Moral Rights Protection for Copyright Creators* (Australian Government Printer, June 1994) 49, [3.66]–[3.67]; Commonwealth of Australia, Parliamentary Debates, House of Representatives, 19 October 2006, 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 November 2006, 3.

[189] Section 103AA expands the parody exception to audio-visual content.

[190] 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 (access date: 10 November 2018).

[191] C Bond, A Paramaguru, and G Greenleaf, 'Advance Australia Fair? The copyright reform process' (2007) 10(3/4) *The Journal of World Intellectual Property* 284, 295.

[192] Gervais (n 34) 36.

[193] 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 November 2006, [3.70]; S McCausland, 'New room to lampoon: the new fair dealing exception for parody or satire' (2007) 1 *Art+Law* 3; Weatherall's Law (available at http://weatherall.blogspot.com), post date: 5 July 2006; P Loughlan, 'Parody, copyright and the new four-step test' (2006) *December IPSANZ* 46; For a general critique of the importation of the three-step test into national copyright laws: Koelman (n 58) 407.

[194] B Mee, 'Laughing matters: parody and satire in Australian copyright law' (2010) 20(1) *Journal of Law, Information and Science* 61, esp. 71.

[195] 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 book does not share her concerns. P Loughlan 'Parody, copyright and the new four-step test' (2006) *December IPSANZ* 46, 49. For a study of fairness factors, see Chapter 4, section 2.

[196] Enacted in Australian law by section 2 of the Copyright Act 1912 (Cth).

[197] *TCN* [17].

[198] By analogy with Ricketson's reasoning regarding the compliance of sub-section 40(1) with the three-step test, it could be argued that fairness under section 41 is too uncertain and vague to meet the first step of the test. S Ricketson, 'The three-step test, deemed quantities, libraries and closed exceptions' (Centre for Copyright Studies Ltd, 2002) 63.

[199] Intellectual Property Research Institute of Australia (IPRIA) and Centre for Media and Communications Law (CMCL), *Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age* (July 2005) 11.

[200] See Chapter 6.

[201] It is important to combine section 41 with section 5(2) CA 1968: 'Use made of a work in creating another work shall not make that other work an adaptation, provided such work constitutes an independent new work in relation to the work used.'

[202] Copyright Act, 1921 S.C., ch. 24 (Can.); Y Gendreau, 'Synthèse 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 rôle de la législation nationale en droit d'auteur* (ALAI, 1999) 363; S Plante, 'Les nouvelles exceptions en droit canadien: un faux débat' (1998) 11 *Cah. Prop. Intell.* 2; for more on the influence of the Statute of Anne on Canada: D J Gervais, 'A Canadian copyright narrative' in P L C Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, 2009) 51.

[203] S Beaulac, 'Legal interpretation in Canada: opening up legislative language as a means to internationalisation' (2010) 5/2010 *University of Edinburgh working papers series* 1–36.

[204] 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.

[205] Bill C-61: An Act to amend the Copyright Act, 39th Parl., 2nd Sess., 56–57 Eliz. II (2008).

[206] Bill C-32, cl. 21 (modifying § 29).

[207] The fair dealing exceptions for the purposes of parody or satire and the UGC have been in force since 7 November 2012.

[208] Plante (n 202); for more on the Canadian copyright reform: L J Murray, 'Copyright talk: patterns and pitfalls in Canadian Policy discourses' in M Geist (eds), *The Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 15.

[209] M Ficsor, *Comments on the UGC Provisions in the Canadian Bill C-32* (2010) 9 http://www.copyrightseelaw.net/archive/?sw_10_item=31; J Bailey, 'Deflating the Michelin Man' in *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 125–66, esp. 127.

[210] *CCH Canadian Ltd v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 (hereafter *CCH*); *Entertainment Software Association of Canada v. SOCAN* [2012] S.C.C. 34 (hereafter *SOCAN*).

[211] See analysis of parody factors in Chapter 4.

[212] See Chapter 6.

[213] The fair use doctrine is older than that as it can be traced back to the *Folsom v. Marsh* decision of 1841. 9 F.Cas. 342 (C.C.D. Mass. 1841) as acknowledged in *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

[214] Section 107(1)–(4).

[215] Confirmed by Congressional intent: H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976); S. REK No. 473, 94th Cong., 1st Sess. 62 (1975).

[216] WTO Panel (n 115), [6.113].

[217] H C Jehoram, 'Restrictions on copyright and their abuse' (2005) 27(10) *EIPR* 359, 362; Sun (n 53) 291.

[218] WTO Panel (n 115), [6.126].

[219] 114 S. Ct 1164 (1994).

[220] Ibid, 578–9.

[221] This teaching was previously mentioned in: *Metro-Goldwin-Mayer v. Showcase Atlanta Cooperative Productions, Inc.* 479 F. Supp 351 (N.D. Ga. 1979), 357; *MCA, Inc. v. Wilson* 425 F. Supp. 443 (S.D.N.Y. 1976), aft'd, 677 F.2d 180 (2d Cir. 1981), 180 and 453; *Fisher v. Dees* 794 F.2d 432. (9th Cir. 1986), 436; *Rogers v. Koons*, 960 F.2d 301, 309–10 (2d Cir. 1992), 310.

[222] Senftleben (n 24) 184–7. This also explains why the fourth factor has often had a dominant weight in the courts' application of fair use. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

[223] *Metro-Goldwin-Mayer v. Showcase Atlanta Cooperative Productions, Inc.* 479 F.Supp 351 (N.D. Ga. 1979).

[224] 114 S. Ct 1164 (1994) 569.

[225] And also perhaps of article 12 Berne.

[226] *Perfect 10, Inc. v. Amazon.com*, Inc. 487 F.3d 701 (9th Cir. 2007).

[227] *Bill Graham Archives v. Dorling Kindersley Ltd*, 448 F.3d 605 (2d Cir. 2006).

[228] *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), 253.

[229] *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 707.

[230] However, the expansive manner in which this US fair use doctrine is applied may tip the fair use doctrine towards non-compliance with the international test, as extending to third-party use which

conflicts with the normal use of the protected work. This seems to be the position of Goldstein. P Goldstein, 'Berne in the USA' (2008) 39(2) *International Review of Intellectual Property and Competition Law* 220.

[231] Section 43(a) Lanham Act, the general unfair competition provision, was expanded to protect the author's moral rights. Some state laws also recognized moral rights but their scope varied. See Chapter 6.

[232] Pub. L. No. 101-650, tit. VI, 104 Stat. 5128, 8510–8515 (Dec. 1, 1990).

[233] See Chapter 6, section 4.

[234] Goldstein (n 230) 220.

[235] R Okediji, 'Toward an international fair use standard' (2000) 39 *Columbia Journal of Transnational Law* 75, 161–2; J Bongiorno, 'Fair use of copyrighted images after Perfect 10 v. Amazon.com: diverging from constitutional principles & United States treaty obligations' (2009) 12 *Touro Int'l L. Rev.* 107, 153–4; R Tushnet, 'Content, purpose or both?' (2015) 90 *Wash. L. Rev*, 869; Jehoram (n 217) 359–64; D R Johnstone, 'Debunking fair use rights and copy duty under U.S. copyright law' (2005) 52 *J. Copyright Soc'y U.S.A.* 345, 398; P Samuelson, 'Possible futures of fair use' (2015) 90 *Wash. L. Rev.* 815, 852; J Hughes, 'Fair Use and its Politics--At Home and Abroad' in R Okediji (ed.), *Copyright Law in an Age of Exceptions and limitations* (Cambridge University Press, 2017) 22–4.

[236] Positions can be summarized as follows: Hugues, Hugenholtz, Senftleben, Tushnet, Samuelson, and Ricketson argue that fair use is compliant while Goldstein, Cohen, Bronkamn, Geiger, Johnstone, Sun, Ginsburg, and Jehoram believe that the US fails to meet its international obligations in this regard. Ricketson (n 40); Goldstein (n 230) 220; J C Ginsburg, *Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms—Part II (Fair Use)* 3 (Columbia Law & Econ., Working Paper No. 503, 2014), available at http://ssrn.com/abstract=2539178 (access date: 10 November 2018); Geiger et al (n 100) 612–16.

[237] This is also valid for Australia where compliance with the fair dealing defence for the purposes of parody will inherently depend on the factors adopted by judges in parody cases in the future.

[238] See n 210.

3

Consequences of the Nature of the Parody Exception

1. The ‘Mechanics’ Behind the Parody Exception

As a matter of procedure, the parody exception acts as a defence to a copyright infringement. It precludes enforcement of economic rights in circumstances which, bar the defence, would constitute an infringing activity.[1] We need to assess the relationship between the exception and the exclusive rights further, in order to understand the nature and function of the parody exception within the copyright paradigm. This relationship inherently influences the exception’s scope and contributes to the satisfaction of the three-step test.[2]

In countries favouring a high level of protection for right-holders (e.g. France and the UK), the concept of fair dealing, or rules of the genre, remains largely linked to the personal property rights vested in copyright-protected works. Traditionally, the balance struck within common law jurisdictions is presented as putting exclusive rights equal with exceptions, whereas civil law jurisdictions support a hierarchy, which ranks the rights of authors over the interests of users.[3] The reality seems to be more nuanced as both traditions adopt a owner-centric approach.[4] Indeed, with the rapid legislative and judicial expansion of copyright in recent decades, the focus in both legal traditions has been on whether there was a need to strengthen copyright exceptions to provide a stronger counter mechanism to powerful right-holders attempting to control every use made of their works.[5] These attempts to rectify the balance between the competing interests at play has led developments in Canada, where the Supreme Court has adopted the notion of ‘user rights’, to bring exceptions on par with the personal property right of the copyright-owner.[6] While other juridictions may not have gone as far as Canada’s user rights, they seem increasingly willing to accept that human

rights have a role, serving as an external counter balance to copyright's expansive scope.[7]

Often perceived as being close to the user's interests, the US fair use doctrine has equally suffered in recent decades. As further explained later in the chapter, fair use was initially conceived as a defence which placed copyright interests on an equal footing with users' and public interests. Originally, the onus fell on the right-holder to show that the unauthorized use was not 'fair' use, but over time, the shift was made towards what is described as 'affirmative defense',[8] i.e. the onus has been transferred from the claimant onto the defendant user.

Currently, fair use, fair dealing, and rules of the genre all require the defendant to demonstrate that the use for the purpose of parody is permissible. This chapter will therefore focus on the nature and function of the parody exception in copyright law to understand how these influence the interpretation of factors covered in Chapter 4.

2. The Nature of a Parody Exception in Copyright Law

The main feature of the parody exception is to allow a user to reproduce another's copyright-protected work without requiring the right-holder's authorization and without remunerating the right-holder for the use of the work. Whilst the particular legal nature of copyright exceptions remains nebulous, as we will see later, we should not underestimate its importance.[9] Not only is its impact felt when interpreting any particular exception, but it also determines the relationship between copyright legislation and contract law.[10]

2.1 A right or an interest?

Chapter 2 explained the careful balance between opposing interests which copyright legislators seek to maintain.[11] As currently understood, the balance sought requires a greater role for the public interest and fundamental rights whenever copyright exceptions are interpreted.[12] But does this imply that copyright exceptions, especially the parody exception, amount to *rights* or are more akin to *interests*?

As the role of the parody exception is firmly anchored in the recognition of

freedom of expression,[13] it is reasonable to argue that in all the jurisdictions considered, the parody exception constitutes something more important than a mere interest, which judges ought to take into consideration as secondary to an infringement. As it affirms essential democratic values within copyright legislation, the better view is that the parody exception acts as a *right.*[14] Yet this conclusion begs the question: what *kind* of right does it grant parodists?

Does the parody exception grant 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,[15] 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 as we typically know them. It necessitates prior action from right-holders.[16] The parody exception further departs from the subjective rights insofar as anyone may benefit from the exceptions, while the exclusive rights only benefit the right-holder. Consequently, reliance upon the exception by one individual does not prevent another from benefiting from it too.[17]

There has been little discussion in most jurisdictions that a user wanting to rely on a parody exception bears the burden of proof, but this question has attracted more attention in the US,[18] because there, this has not always been the case. This fact led some commentators to conclude that the focus of the US fair use doctrine focus is on the public and users, rather than authors.[19] However, in *Campbell*, the US Supreme Court could not have been clearer: 'Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favourable evidence about relevant markets.'[20] Hence, the Supreme Court confirms that fair use for parody purposes qualifies as an affirmative defence, such that the defendant bears the burden of proving that it should apply.

According to Loren, the Supreme Court's qualifying of fair use as an affirmative defence in *Campbell* is contrary to the intent of US Congress. Consequently, she cautions against attaching too much importance to the Supreme Court's statement, since the *Campbell* case did not study the question in great depth.[21] However, once the plaintiff has established copyright infringement of a protected work (e.g. proof of ownership,

substantial copying, and access to the earlier work), determining whether copying amounts to excessive copying for the purpose of copyright is determined through the fair use factors.[22]

These factors are tools for judges to appreciate the lawfulness of a particular activity, meaning that the amount copied allowed under fair use will vary from purpose to purpose and case to case. The underpinning ideology is that copyright does not aim to provide right-holders with the means to control every single use of a work,[23] but a certain (often, economic) harm should be caused to the right-holder.[24] In US law, the difference between a defence and an affirmative defence is that a defence recognizes that the defendant's acts are non-infringing, whereas in an affirmative defence, the defendant's acts have violated the exclusive rights, but the facts and justification defeat the plaintiff's claim. The defendant, thus, must persuade the judge that they have good reasons to justify their infringing activity. There are several considerations which determine whether a defence should result in an *affirmative* defence (whereby the defendant must prove mitigating circumstances for a use which would otherwise be considered as infringing). These include understanding which party has better access to the relevant evidence, as well as policy and fundamental rights considerations which tip the balance in favour of indulgence. Although these considerations may represent just a question of degree, these can be decisive in deciding the outcome of particular cases.[25]

In the context of *Campbell*, the US Supreme Court went one step further. Having qualified fair use for parody purposes as an affirmative defence, it reversed presumptions of unfairness and market harm previously adopted by the Court of Appeal,[26] possibly based upon the defendant's commercial motivation. In these circumstances, the appreciation of the fourth factor (i.e. market harm) can shift the evidentiary burden onto the plaintiff, who has better access to the relevant evidence necessary to determine market harm.[27] And yet, as Snow illustrates with the *Dr Seuss* case, in later decisions courts appear reluctant to shift the onus.[28] Here, the defendant trying to prove the lack of any market harm could only speculate, since their parody had yet to be published. Sadly, such speculation was considered insufficient to rule out market harm, and this contributed to the fair use defence being rejected.[29] Nevertheless, it is noteworthy that even in cases where the burden of proof is shifted onto the plaintiff, ultimately, the defendant's powers of persuasion

must still establish that the use was fair.

If legislative history casts some doubts over the conception of fair use as an affirmative defence, then statutory language also supports the position that fair use is a consideration when determining infringement. According to section 106 US Code, the enforcement of exclusive rights is *subject to* section 107 (i.e. the application of fair use). Section 107 itself begins: 'Notwithstanding the provisions of sections 106 and 106A' fair use does not constitute copyright infringement. Furthermore, section 108 even speaks of '*right* of fair use'.[30]

Albeit infringement should not be seen as an exemption from an infringement but should help in shaping the scope of protection,[31] backing a more holistic appreciation of copyright infringement.[32] This may be relevant for setting the alleged infringer on an equal footing with the right-holder to determine whether the use of the work made was lawful. Loren notes that as trial judges are reluctant to accept arguments that freedom of expression serves as an external limit to copyright, understanding fair use as an exception to an infringement, rather than using it to determine the scope of copyright protection, weakens the internal balance struck between freedom of expression and property rights within the copyright system.[33] She further argues that comprehending fair use as excusing an infringement requires the defendant to establish afresh that they have a right to freedom of expression, thereby creating an 'unnecessary and inappropriate burden on free speech'.[34] This is especially true outside courtrooms since it creates a chilling effect for risk-averse users. In other words, despite appreciating that their activity may be covered by fair use, a parodist will still refrain from basing their expression on a copyright-protected work fearing that they may have to prove the legitimacy of this use a posteriori.

In Canada, there is a willingness to grant a higher status to users than a mere interest. Here, the reasoning of the Canadian Supreme Court in *CCH* is particularly significant.[35] In this decision, the Court clarified the relationship between fair dealing exceptions and copyright infringement in some detail. Without departing from the common stance that a fair dealing exception requires the defendant to demonstrate that their use was fair, [36] the Court adds:

[T[he fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement

of copyright.[37]

By characterizing fair dealing as non-infringement, and thereby establishing these exceptions as 'user's rights', the Supreme Court pioneers a recalibration of exceptions within the copyright paradigm, adapting the owner-centric focus to take account of the current activities of users.[38]

Nevertheless, some still wonder whether the shift to recognize user rights results in a beneficial change, or one which falls short of its promise.[39] Currently, it is difficult to say whether the new approach has led to more flexibility and adaptability within the copyright system to users' habits.[40] Whilst acknowledging that user rights have the potential to promote the public interest in the copyright balance, Craig warns that they equally carry risks for the public interest, and wider societal values, unless these rights are carefully construed.[41] Especially as the copyright paradigm is underpinned by an owner-centric approach which leads to high level of protection for right-holders and authors, the subject-matter, scope, and duration of protection.[42] As later reforms of copyright laws have jeopardized the careful copyright balance to grant greater protection to private interests over societal values, a downgrading of copyright defences to questionable and distrustful claims against the exclusive rights (becoming sacrosanct) of right-holders followed. This explains to some extent the following restrictive approach undertaken by courts towards the dealing purposes and assessment of fairness which appears to persist despite attempts to restore an equilibrium.[43]

Despite the existence of differences in legal approaches to exceptions, the preferred approach is to treat the parody exception as granting an *objective* right[44] to parodists;[45] i.e. whenever the exception's requirements are met, right-holders should be unable to enforce their exclusive rights.[46] In effect, by providing a specific copyright exception for parody, the legislator prioritizes an individual's right of freedom of expression over another's property right.[47] To do otherwise, it seems, would call into question the legitimacy of copyright laws in light of the fundamental freedoms.[48] Therefore, the parody exception should be interpreted in a manner which permits the right of freedom of expression to be realized. While this should result in a uniformity of approach, it does not follow that exactly the same parody uses will be deemed lawful according to each national copyright law. The extent of harmonization depends ultimately on the principle of

interpretation adopted,[49] the interplay of the exception with contract law,[50] national factors attached to the exception,[51] and the balance struck by courts in the rare cases where fundamental freedoms are in direct conflict.[52]

2.2 Strict interpretation vs 'user rights' as rules of interpretation

The nature and procedural role of the parody exception within copyright law also influence the way that rules of interpretation will be applied. For example, in EU Member States, a high level of copyright protection prevails and exceptions are considered to excuse an infringement. Here, exceptions will be interpreted strictly and from a copyright-holder's perspective.[53] In contrast, in Canada, as fair dealing exceptions have been characterized as users' rights, courts are better positioned to give a 'large and liberal interpretation'[54] of fair dealing purposes and from the perspective of the user. It seems that in *CCH*, the Supreme Court of Canada not only clarified the role of fair dealing exceptions in Canadian copyright law, but it also established a new rule of interpretation requiring better consideration of users' interests. The following section considers the impact which this choice has upon the rules of interpretation which are applied.

2.2.1 Strict interpretation as a rule of interpretation

2.2.1.1 Mixed guidance at EU level

So far, we have established that EU copyright law allows some latitude for Member States to tailor the non-mandatory exceptions to their own legal systems,[55] while also providing (mandatory) guidance on the interpretation of copyright exceptions. As a general principle, the InfoSoc Directive establishes a high level of protection for copyright works.[56] Traditionally, this led to an axiom of interpretation which favours right-holders by requiring exclusive rights to be interpreted broadly.[57] In keeping with this general principle, the CJEU has held that the exclusive right of reproduction must be construed consistently as an autonomous concept of EU law.[58] Indeed, wherever a term is not defined by the InfoSoc 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.[59] As exceptions derogate from the general principle of providing a high level of protection, they should

be interpreted strictly.[60]

The InfoSoc Directive sets out to provide a fair balance of rights and interests between the different categories of right-holders and users of protected subject-matter. It recognizes that existing copyright exceptions and limitations in place in the national law of Member States need reassessment in the light of the digital environment. Proper functioning of the EU single market also requires copyright exceptions to be defined more harmoniously, as any disparity between copyright-restricted acts has direct detrimental effects on efficient functioning of the single market for copyright-protected works. This is only likely to become more pronounced as trans-border exploitation of works and cross-border activities become more prevalent. The degree of harmonization needed should, thus, be determined by their impact on the functioning of the internal market.[61] Hence, even a 'strict' interpretation does not preclude a fair balance between the interests of right-holders and those intended to benefit from the exception.[62]

Recital 31 of the InfoSoc Directive requires exceptions to be effective in their stated aim, and this principle has been honed further by the EU case law. For example, in *Painer*,[63] 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[64] required the exclusive rights of the right-holder to be circumscribed to strike a fairer balance between those rights and freedom of expression.[65] Arguably, this same reasoning should extend to the parody exception, as both exceptions are justified by the same fundamental freedoms.[66] This approach militates against a literal interpretation of the exception in favour of a 'purposive' 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.[67] 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.[68]

As mentioned,[69] 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 InfoSoc Directive should guide interpretation of

copyright exceptions.[70] Yet, in subsequent cases relating to article 5(1) of the InfoSoc Directive, the Court also notes that where the requirements of the exception are met, the three-step test should be deemed satisfied.[71] 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.[72]

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,[73] the Court repeats that the strict interpretation principle applies to the parody exception.[74] 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 taken into consideration),[75] and that national courts should ensure that competing interests are balanced proportionately.[76]

According to one reading of *Deckmyn*, the CJEU may be imposing a tripartite assessment in which national courts consider: 1) the purpose of the use, 2) the application of fairness factors to the particular facts, and 3) the proportionality test between the fundamental rights in play. On balance, however, it seems that *Deckmyn* is better understood as proposing a more 'holistic' approach, which adopts a global appreciation of all relevant factors, the purpose of the use as well as the influence of fundamental rights. When assessing whether a use should be lawful, most weight should be given to those aspects which contribute to the realization of freedom of expression, and a correct understanding of the exception's purpose should guide which national factors are pertinent to the application of the parody exception.[77]

2.2.1.2 National interpretations

In accordance with the civil law tradition in France, any derogation from legally entrenched exclusive rights, including copyright exceptions, must be interpreted strictly.[78] This well-established principle is not contained in any legislation, but derives from the legal axiom: *exceptio est strictissimae interpretationis* (exceptions must be strictly interpreted).[79] This principle may seem too limiting and inflexible, but such criticism may be based upon a misconception, since it is not advocating a 'restrictive' interpretation (based solely on the literal wording), as a 'strict' interpretation is not policy blind.

Properly understood, the principle of strict interpretation involves focusing

both on the text of the provision *and* its justifications and objectives.[80] Adopting Galopin's position,[81] this suggests 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.[82] Thus, an exception in copyright law in this instance is a balancing of fundamental freedoms, and not just a derogation from a legal right. 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.

Given the CJEU guidance, there can be no doubt that UK courts should currently interpret copyright exceptions strictly, in light of the purpose and objective of the particular statutory provision.[83] Yet, Griffiths discerns bifurcated approaches to interpretation evidenced in UK fair dealing cases.[84] 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.[85] The second approach is more permissive and favours the realization of freedom of expression,[86] to the extent that a common law parody exception seemed to exist prior to the introduction of the statutory defence.

But which approach prevails today? Recent UK jurisprudence is increasingly and inevitably influenced by CJEU case law. Most recently, in *Meltwater*,[87] the court was required to determine whether businesses 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 already licensed. In response to keywords selected by business clients, the aggregator emailed back their report which repeated short snippets from newspapers which included those keywords, along with an electronic link to the associated article. The aggregator argued that their clients' use was permitted by the temporary copies exception (article 5(1) of the InfoSoc Directive), whereas the right-holders argued for a narrow interpretation of the exception, to best preserve their exclusive rights.

Clearly influenced by *Infopaq*,[88] *Infopaq II*,[89] and *FAPL*,[90] 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, which confirmed the Supreme Court's interpretation of the exception.[91]

In conclusion, despite adopting alternative approaches in the past, UK courts now seem aware of the need to interpret copyright exceptions strictly (and not restrictively), 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*[92] precedent, it is reasonable to presume that UK courts will follow the same approach in parody cases.

In Australia, very little has been said about the principles of interpretation applied to fair dealing, and there is no statutory guidance. Furthermore, it is unclear what approach the court adopted in *TCN*, the leading fair dealing case. Indeed, the trial judge's reasoning sheds no light upon whether he was endorsing a liberal, strict, or restrictive interpretation.[93] According to Handler and Rolph, the full court 'provided only a superficial interpretation of the prescribed statutory purposes'.[94]

Given the paucity of scholarly or judicial comment on the matter, some indicators may be evident in policy documents. The Australian Law Review Committee appears to endorse the Canadian approach in the *CCH* decision, discussed earlier, which rejects a restrictive interpretation of exceptions, since the report emphasizes the need to maintain a fair balance between users' rights and the interest of right-holders.[95] 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.[96]

Surprisingly, US courts appear to adopt a mix of liberal and restrictive

interpretative approaches to fair use. Whilst the first factor is partly imprinted with a broad interpretation, as demonstrated by the new focus upon transformativeness, the other factors seem to be interpreted in a rather restrictive manner.[97] As most attention is placed upon economic considerations, and given reluctance to hear arguments based upon fundamental rights, some decisions appear at odds with the First Amendment which protects free speech. In the case of parodies, this has led to an artificial distinction between parodies and satires.[98] Although both seem equally rooted in the First Amendment,[99] one seems to be more priviledged than the other.

2.2.2 User's rights as a rule of interpretation

In contrast with the other jurisdictions considered, a liberal approach to interpretation is evident in Canada, evolving from its common law tradition. Here, copyright exceptions must be interpreted broadly and liberally since users' rights are considered to be an integral part of the Copyright Act.[100]

Simard,[101] writing on Canadian legislative interpretation in 1989, identifies that 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.[102] Adopting this approach, a literal interpretation of the Copyright Act which focuses 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.[103] In line with the traditional approach to interpretation, Canadian courts have adopted a narrow interpretation of fair dealing pursuant to the Copyright Act.[104]

Therefore, prior to the codification of a parody exception, courts rejected parody as a defence owing to the restrictive interpretation given to the purposes of the dealings. In 1967, a parody of the lyrics of Woody Guthrie's song, *This Land is Your Land*,[105] was found infringing. Having recognized

that the underlying work enjoyed copyright protection (without distinguishing between the musical and literary works contained therein),[106] the judge did not see fit to afford parody any special treatment, and granted an injunction to the copyright owner, because the parody had reproduced a substantial part of the original.[107] This same approach was adopted in *MCA Canada Ltd v. Gilberry & Hawke Advertising Agency Ltd*,[108] a case 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*,[109] 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 (i.e. the right-holders' prerogatives) was also recognized in cases in which the defendant lacked any commercial motive. In *Rôtisseries St-Hubert Ltée c. Syndicat des Travailleurs(euses) de la Rôtisserie St-Hubert de Drummondville (C.S.N.)*,[110] the defendants used a parody of the plaintiff's logo to promote industrial action. Unsurprisingly, an argument that this use exercised a right based on freedom of expression was quickly brushed aside. The judge dismissed claims that this freedom had been stifled, because the defendant could still convey the same message, simply by using another means.[111] In other cases coming before the Canadian courts, the lack of a specific statutory exception resulted in the defendant arguing that the parodic use fell within the fair dealing exception for the purpose of criticism.[112] In *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*,[113] the trade union defendant had produced a leaflet which depicted the plaintiffs' well-known *Bibendum man* crushing a Michelin worker. The court did not consider the meaning of criticism could be stretched to encompass the union's parody.[114]

Yet, in the landmark case of *CCH*,[115] the Supreme Court made a paradigm shift to bring back some flexibility into the copyright regime.[116] The case itself considered whether the Law Society's provision of self-service photocopiers fell within a fair dealing exception. The shift had been initiated in an earlier case,[117] in which the Court of Appeal 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*.[118] Here, the Court held that fair dealing must be understood 'as an integral part of the Copyright Act' rather than as a derogation or encroachment upon the right-holders' exclusive rights.[119] 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.[120]

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.[121] The Supreme Court identified that this required judges to interpret the purpose of any unauthorized use broadly,[122] by making an objective assessment of the motives underlying the use of the copyright work.[123] Yet, the Supreme Court also confirmed that the general rules of statutory interpretation must be respected:[124]

> [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.[125]

Thus, a liberal interpretation does not give courts complete free rein. But also, *CCH* marks a change from a two-step assessment (dealing and fairness) to a one-step assessment where the dealing is relegated to the first fairness factor when determining the purpose of the use.[126]

This sentiment is echoed in subsequent Supreme Court case law. Firstly, in *ESAC v. SOCAN*,[127] 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 *SOCAN v. Bell*[128] and *Alberta v. CCLA*,[129] the Supreme Court expressly rejected that in *CCH* they had endorsed an open-ended approach, akin to 'fair use'[130] in the US.[131] 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 users' rights doctrine.[132]

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 and the factors appreciated from a user's perspective.

However, is this semantic change sufficient to better protect the public interest and societal values? According to Craig, the shift to user rights might not lead to the desired results because of the international legal framework which still promotes a high protection of authors, and users' rights lack statutory entrenchment.[133] Whilst the label as a 'right' can be useful to acknowledge the role of the public interest within the copyright balance, it also places authors and users in a situation of conflict with opposing interests. What is favourable to one party is, by default, detrimental to the other.[134] This view is clearly over-simplistic since authors will, at times, also be users. Additionally, copyright rests on the belief that there is an equilibrium where the various interests meet in the name of creativity and dissemination of cultural works. Therefore, instead of a binary scale, we are faced with a dynamic and complex relationship between authors, right-holders, and users where roles reshuffle and interests can be complementary at times. As Craig explains,[135] the danger is that by rushing to embrace users' rights, we may disrupt the copyright balance by placing too much weight on the public interest. This would harm the maximization of social interests sought by granting individualized rights to all parties.

Although we are right to heed Craig's words of caution, it is worthwhile reviewing recent decisions to investigate whether the change in label has led in fact to a more liberal approach to copyright exceptions, or whether it merely camouflages the status quo. Having regard to the only parody case available to date,[136] it is difficult to discern that the user rights approach resulted in any noticeably broader interpretation.[137] In *United v. Cooperstock ('United Airlines')*, the Canadian Federal Court first endorsed the CJEU's parody characteristics[138]—i.e. humour and absence of confusion. The court found humour to be present and arguably broadened the second EU requirement (evocation of an existing work while exhibiting noticeable differences) as it merely required 'some differences'[139] between the two works. Having determined that the unauthorized use was 'for the purpose of parody', the court moved on to assess fairness of the dealing. Rather surprisingly, on consideration of the first fairness factor, the purpose of the dealing, the decision favoured the right-holder. Although the defendant spoof website employed a pop-up dialogue box to inform users that the website was not that of the claimant, and displayed a prominent disclaimer banner, the

trial judge considered that the defendant's website might be confusing with that of the copyright owner. Additionally, the judge considered that the defendant's use went beyond the limits of humour and mockery, since the motivation was to defame or punish the claimant for its wrongdoing.[140]

The reasoning in this decision is problematic. Not only does it portray a restrictive interpretation of factors and does not follow the adjustment of the test as held in *CCH* (which preferred a one-step over a two-step assessment), but it represents an unjustified and unjustifiable limit upon freedom of expression. As will be further explained in Chapter 5, limitations to freedom of expression require a proportionality test which also influences the appreciation of fairness factors. As the defendant's use was neither defamatory nor an invasion of privacy, for example, it is hard to understand how the 'purpose' factor was found to point against permitting the use, which sought to use parody to highlight the claimant's poor complaint-handling procedure. The court failed to grasp the opportunity of the shift to user rights to shift the onus onto the claimant to demonstrate that the use caused actual or probable serious harm. Indeed, the decision's reasoning in respect of the other fairness factors also seemed tainted by a restrictive interpretative approach, lacking recourse to the intended purpose of the exception to permit parodic uses. Therefore, factors such as the amount of the work copied in the dealing also weighed against the defendant, without seeming to consider the extent to which significant borrowing is inherent in the creative process behind parodies.

Thus, this first application of the newly introduced parody exception in Canadian copyright law raises doubt that the user rights approach has brought about a shift towards broader and better consideration of copyright exceptions within the copyright paradigm. If exceptions must be assessed head-to-head with the right-holders' exclusive rights, then perhaps there should be some onus upon the right-holder to demonstrate why their interest should prevail. Whilst the copyright paradigm is founded upon the idea that property right interests can outweigh freedom of expression, equally a shift from a position which ostensibly considers exceptions as a subset of infringement is evidence of the desire that the freedom of expression of the user should prevail in certain specific cases. Accordingly, not only should the dealing be interpreted broadly but the fairness factors should equally not be interpreted restrictively.[141] We consider this in more detail in Chapter 4.

As argued in the next chapter, such factors should be interpreted in light of

the purpose and underlying justifications of the copyright exception. Such an interpretative approach would be more compliant with *CCH* where the Supreme Court assessed the copyright exceptions fairness factors in light of the purpose of the dealing and would restrict Canadian courts from a schizophrenic legal reasoning, providing more legal certainty for right-holders and users wishing to rely on the parody exception. Therefore, *CCH* knocked the evaluation of whether the use could be construed as a legitimate purpose under the Act to the second stage of fair dealing and, more specifically, the appreciation of the first factor. Bringing this closer to the US's approach to copyright exceptions, it can lead to a more liberal appreciation of fairness in two ways: 1) in terms of determining the scope of the purpose allowed under the exception, and 2) in providing ways to shift the onus onto the plaintiff where desirable.[142] However, the Court in *United Airlines* reverted to a stricter interpretation where the use needs to satisfy a purpose enumerated by the Act before turning to the appreciation of fairness. If subsequent courts adopt the same approach as *United Airlines*, it seems that there is a real risk that this will undermine the steps taken by the Canadian Supreme Court and jeopardize the recalibration intended between exclusive rights and exceptions.

2.2.3 Conclusion

It is apparent from the foregoing analysis that each jurisdiction under consideration has acknowledged that it has traditionally applied too restrictive an approach to copyright exceptions. During the last decade, there has been evidence of a desire to redress this balance. Although legislators in different jurisdictions have adopted different solutions to the problem, it remains to be seen whether, and to what extent, these different solutions will lead to different results.

The EU Directive advocates that right-holders should enjoy a high level of protection, and this lent support to a restrictive interpretation of copyright exceptions. Yet its recitals also indicate that exceptions must be effective. Recent CJEU case law notes that, to be effective, the interpretation must balance the interests 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 main justification for 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.[143] Similarly, factors which contribute to the realization of this fundamental right should count more in the overall assessment than factors which do not.[144] 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.

Despite lack of consistent Australian authorities, and awaiting judicial confirmation, Australian courts have adopted a restrictive approach in the past,[145] there is ongoing pressure to infuse flexibility into the application of copyright exceptions which courts may follow in future cases.[146] It is believed that Australian courts are, therefore, likely to shift towards a strict statutory interpretation.

In the US, fair use exceptions have lost some of their original flexibility. Initially perceiving fair use from the perspective of the user, courts required the plaintiff to demonstrate that the unauthorized use was unfair. The more recent characterization of fair use as an affirmative defence has brought about a shift to a stricter (and arguably restrictive) appreciation of fair use factors, with particular weight placed upon the potential for economic harm. Additionally, the strict interpretation in *Campbell* has created an artificial distinction between parody and satire. If this distinction appears to be slowly fading, it remains an important factor in the flexibility and the fair use doctrine's ability to adapt to new uses.

Canada appears to be 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 eschews an owner-centric approach by placing 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 unauthorized use. This maintains a fair balance between the interests in play. Yet, despite the difference in emphasis which appears evident in Canada, the first application of the parody exception by Canadian courts illustrates that the users' rights doctrine may result in a narrower interpretation of the parody exception than the EU's strict interpretation

principle.[147]

3. Can the Parody Exception be Waived by Contract?

The efficacy of the parody exception nevertheless relies on the autonomous powers of users over the copyright-protected works. We have mentioned that the nature and function of the exception in the courtroom spills over to affect the relationships between parties outside of court.

While the digital environment has made unauthorized 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 contract directly with end-users,[148] in place of the more traditional and cumbersome forms of distribution of cultural works needed in the analogue world. These new models result in an imbalance in bargaining power: often, right-holders are positioned to impose their terms on users.[149]

Contracts between right-holders and users may attempt to restrict the application of the parody exception. A contractual clause may attempt to restrict a user from performing an act which would be permitted by the parody exception. 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.[150] We now consider the extent to which freedom of contract renders the parody exception optional in the countries of interest.

3.1 Principle: freedom of contract

Freedom to contract is a principle which prevails in the jurisdictions studied in this book. In effect, the parties to any contract are free to determine the terms which will bind their dealings, and the court will then enforce these contract terms, on the premise that the contract reflects the parties' intentions.[151]

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.[152] 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 in Chapter 7,[153] 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.[154] In many areas of business, where the parties are on an 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.

3.2 Exceptions: mandatory character of the parody exception

The principle of freedom of contract is not without limits. 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 guidance as to the importance of the right to freedom of expression in specific circumstances.[155] These cases underline the importance of this fundamental freedom[156] which relates to the social value attributable to an enlightened public.[157] Any limitation to the exercise of fundamental rights must be proportionate to the legitimate aim pursued. Here, 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.[158]

Secondly, the InfoSoc Directive contains no guidance as to whether the copyright exceptions are mandatory. However, the earlier Computer Programs Directive[159] specifically mandates that any contractual provision between right-holders and end-users which aims to avoid its stated exceptions 'shall be null and void',[160] and the Database Directive includes a similar provision.[161] The fact that the EU legislator has elected to make the

mandatory nature of exclusions explicit in these directives, and yet, is silence in the InfoSoc 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 InfoSoc Directive may be overridden by contract law or not.

The UK alone puts the position beyond doubt,[162] despite much lobbying to the contrary by those representing the 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.

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.[163] There is nothing in the Canadian preparatory works which indicates whether the legislator intended the parody exception to be mandatory, or not.

The situation is also ambiguous in the US. Despite the supremacy of freedom of contract, courts have held that in some circumstances, copyright exceptions could not be waived.[164] Following Reichman and Franklin, both copyright and the First Amendment protect and promote critique as well as social commentary which would be jeopardized if fair use could easily be circumvented.[165]

Similarly, neither the Australian legislation, nor the preparatory works indicate the legal nature of the exception.[166] Yet earlier in 2001, the Copyright Law Review Committee ('CLRC') was instructed[167] to investigate the extent to which electronic agreements sought to modify or exclude copyright exceptions. The CLRC report, published in 2002,[168] 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'[169] that contractual overriding would significantly disrupt the balance intended in the Copyright Act. It remains to be seen whether this approach will be followed. 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.[170]

In general, commentators support the UK legislator's approach that the parody exception should be mandatory.[171] This view is based upon the important justification underlying the exception,[172] 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 argued that the motives behind the right-holder's claim for breach are as pertinent. An assessment of these factors may lead courts to conclude that the term offends against the principle of good faith[173] 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 unauthorized access to works in the digital environment.[174] 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 countries under scrutiny have sought to target this problem specifically, or study the extent to which technical measures are hindering efforts to create parody works. However, as further explained in Chapter 4, circumventing an encryption to access a work may weigh against the parodist.[175]

4. Conclusion

Throughout this chapter, the nature of the parody exception has been explored. Commencing with consideration of the legal nature of the exception, the analysis concluded that the parody exception is currently conceived as an objective right. Therefore, although parodists cannot initiate proceedings to determine whether their use is permitted by the parody exception, it has been argued that the exception as a defence must be interpreted in such a way as 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 different jurisdictions (strict interpretation or users' rights doctrine) greatly influence the outcome as to when the exception applies in particular cases.

Although there seems to be broad agreement that the parody exception, in particular, is founded in support of the fundamental right of free expression, its characterization as a defence requires the user to justify their use, rather than perceiving this kind of use as beyond the scope of infringement. This can hamper realization of its underlying objectives. Thus, despite its procedural label as a defence, this does not prevent judges from assessing fair use, fair dealing, or rules of the genre in light of the right to freedom of expression. It has been argued that 'fairness' factors which point in favour of freedom of expression should be given greater weight when assessing whether the parody exception applies, or not.

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

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[1] Hence, the work must be original, and copyright still in force; the use must be unauthorized. In common law countries, the use must reproduce a 'substantial part of the work'. In France, the exception may apply to any reproduction. P El Khoury, *Les exceptions au droit d'auteur* (thèse Montpellier,

2007) 377.

[2] See Chapter 2, section 4.

[3] A Lucas, *Droit d'auteur et numérique* (Litec, 1998) n°338; A Lucas and H J Lucas, *Traité de la propriété littéraire et artistique* (4th edn, Litec, 2012) n°342; *contra*: C Geiger, 'De la nature juridique des limites au droit d'auteur' (2004) 13 *Propriétés Intellectuelles* 882, 885; P-Y Gautier, *Propriété littéraire et artistique* (6th edn, PUF, 2007) n°334, 385 (arguing for a right of users).

[4] Already inferred in Chapter 2, section 1.

[5] It is noteworthy that the three-step test precludes uses which go beyond the 'normal' exploitation of the works. See Chapter 2, section 3.2.2.

[6] *CCH Canadian Ltd v. Law Society of Upper Canada* [2004] 1 SCR 339 (hereafter *CCH*).

[7] One could argue that the last requirement in *Deckmyn* to weigh the interests of right-holders with the users' right to freedom of expression constitutes an invitation for judges to place the parody exception face-to-face with the property right of the right-holder(s). C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn*), [34]. Additionally, some commentators have taken the same path by suggesting that exceptions with greater human rights values should weigh more heavily against the enforcement of copyright. See P B Hugenholtz, 'Copyright and freedom of expression in Europe' in R C Dreyfuss, H First, and D L Zimmerman (eds), *Innovation Policy in an Information Age* (OUP, 2001); Wittem EU Copyright Code Project.

[8] Originally mentioned in *Harper & Row* 471 US 539 (1985), [561] and confirmed in *Campbell v. Acuff-Rose Music Inc* 510 US 569 (1994) (hereafter *Campbell*), [590]. For more on the historical development: L P Loren, 'Fair use: an affirmative defense' (2015) 90 *Washington Law Review* 685, 694. Loren argues that the qualification of affirmative was probably not intended as the House Report 1967 noted: 'The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable.'

[9] Geiger (n 3) 882.

[10] See Chapter 1, section 5.1.

[11] See Chapter 2, section 3.2.

[12] See Chapter 1, section 5.1 and Chapter 2, section 4.

[13] See Chapter 1, section 5.1 and Chapter 5, section 2.

[14] *CCH* (n 6) [48]; In *Suntrust*, Judge Birch includes in a footnote: 'I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defence, as it is defined in the Act as a use that is not a violation of copyright. However, fair use is commonly referred to as an affirmative defence, and, as we are bound by Supreme Court precedent, we will apply it as such. Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defence does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes', *Suntrust Bank v. Houghton Mifflin Company*, 268 F.3d 1257 (11th Cir. 2001) [FN 3]; repeated recently in *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016); Geiger (n 3) 882; P Chapdeleine, *Copyright User Rights* (OUP, 2017) 33.

[15] Geiger (n 3) 886; *US: Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007); *Campbell* (n 8) [590], 114 S.Ct. 1164; *Dr Seuss Enters., L.P. v. Penguin Books, U.S.A., Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997) (hereafter *Dr Seuss II*).

[16] S Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique* (Larcier, 2007) chapitre 4 Titre 3; legitimizes the business practices in place: see Chapter 7, section 1.

[17] B Galopin, *Les exceptions à usage public en droit d'auteur* (IRPI, 2012) 351.

[18] Loren (n 8) 685; N Snow, 'The forgotten right of fair use' (2011) 62 *Case W. Res. L. Rev.* 135; W

Patry, *The Fair Use Privilege in Copyright Law* (2nd edn, BNA Books, 1995).

[19] See recently J-M Bruguière, 'La réception du fair dealing britannique dans le système d'exception fermée français' (2018) *RIDA* (forthcoming) 5.

[20] *Campbell* (n 8) [590].

[21] Loren (n 8) 685.

[22] This negative effect is magnified in countries which do not have statutory factors as it renders the scope of the defence even more uncertain.

[23] As such would go against the promotion of Art and Science as intended within the US Constitution. U.S. CONST. art. I, § 8, cl. 8.

[24] C Bohannan, 'Copyright harm, foreseeability, and fair use' (2007) 85 *Wash. U. L. Rev*. 969, 973.

[25] As well as outside of court dispute resolution given the autonomy and greater power given to users.

[26] *Campbell* (n 8) [583]–[584], [591]. These paragraphs should be read alongside *Sony Corporation of America v. Universal City Studios, Inc.* (1984) 464 US 417 (hereafter *Sony*) which made the use presumptively unfair if a defendant had commercial intent. This case represents the first decision after the enactment of fair use and, interestingly, it never refers to affirmative defence or defence at all.

[27] This position was also endorsed in *Cambridge University Press v. Patton* (11th Cir. 2014) 769 F.3d 1232, 1279.

[28] Snow (n 18) 172.

[29] Ibid.

[30] Author's emphasis.

[31] *Sony* (n 26) [448]. Other decisions repeat this idea: *Eldred v. Ashcroft* 537 (2003) US 186.

[32] Ibid.

[33] Loren (n 8) 696. Similarly, Snow revisits the *Dr Seuss II* (n 15) case relating to the parody of *The Cat in the Hat* to comment on O.J. Simpson's trial. Here, the author points out the language of the court which refers to fair use as a means to 'excuse' an infringement. According to this author, as the use was inherently funny and protected by free speech, the court was wrong to reject fair use. Snow (n 18) 171.

[34] Loren (n 8) 709–10.

[35] *CCH* (n 6).

[36] Ibid, [48].

[37] Ibid. Simultaneously, the concept of abuse of rights (well-known in civil law countries such as France) made its way into Canadian law with *Kraft Canada v. Euro-Excellence* (2007) SCC 37. See P-Y Moyse, 'Kraft Canada c Euro-Excellence: l'insoutenable légèreté du droit' (2008) 53 *R.D. McGill*, 741.

[38] *CCH* was later reaffirmed in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* [2012] 2 SCR 326, [11] (hereafter *Bell Canada*) and *Alberta v. Canadian Copyright Licensing Agency* [2012] 2 SCR 326, [22] (hereafter *Alberta*).

[39] C J Craig, 'Globalizing user rights-talk: on copyright limits and rhetorical risks' (2017) 33(1) *Am. U. Int'l L. Rev.* 1.

[40] As confirmed in *United Airlines* where the judge adopted a restrictive approach to the appreciation of the parody exception. *United Airlines, Inc. v. Jeremy Cooperstock* [2017] FC 616 (hereafter *United Airlines*).

[41] Ibid.

[42] See Chapter 2, section 2.

[43] See section 2.2.

[44] Meaning the judicial norms governing society and whose keeping is guaranteed by public authority. These are immediately applicable, compulsory, and susceptible to be executed by an external power.

[45] Dusollier (n 16); Geiger (n 3) 886; L Guibault, *Copyright and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer, 2002) 95; D J Gervais, 'Quelques reflexions à propos de la distinction des "droits" et "intérêts" ' in *Mélanges en l'honneur de Paul Roubier* (Dalloz, 1961) 243.

[46] Geiger (n 3) 886.

[47] And the freedom of expression exercised by the original author. Ibid, 887; M Buydens and S Dussollier, 'Les exceptions au droit d'auteur: évolutions dangereuses' (2001) 22 *CCE* 10.

[48] See Chapter 1, section 5.1.

[49] See section 2.2.

[50] See section 3.

[51] See Chapter 4.

[52] See Chapter 5, section 5 and Chapter 7, section 2.

[53] This is also the case in Australia as further explained in section 2.2.1.

[54] *CCH* (n 6) [51]; *Bell Canada* (n 38) [15]; *Alberta* (n 38) [19].

[55] See Chapter 2, section 3.

[56] Recitals 4 and 9 InfoSoc Directive.

[57] Recitals 21 and 23 InfoSoc Directive.

[58] C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465 (hereafter *Infopaq I*) [56].

[59] Advocate-General's opinion in *Deckmyn* [2014] ECLI:EU:C:2014:458 (hereafter AGO in *Deckmyn*), [35].

[60] *Deckmyn* (n 7) [22]; AGO *Deckmyn* (n 59) [43]; C-360/13 *Public Relations Consultants Association Ltd v. Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195, [23] (hereafter *NLA*); Order in C-302/10 *Infopaq International A/S v. Danske Dagblades Forening* [2012] ECLI:EU:C:2012:16 (hereafter *Infopaq II*), [27]; C-145/10 *Eva-Maria Painer v. Standard Verlags GmbH and Others* [2011] ECLI:EU:C:2011:798 (hereafter *Painer*), [109]; *Infopaq I* (n 58) [56]–[57]; C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others* and C-429/08 *Karen Murphy v. Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631 (hereafter *FAPL*), [162]; C-277/10 *Martin Luksan v. Petrus van der Let* [2012] ECLI:EU:C:2012:65, [101]; C-435/12 *ACI Adam BV and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* [2014] ECLI:EU:C:2014:254, [23]; C-36/05 *Commission of the European Communities v. Kingdom of Spain* [2006] ECLI:EU:C:2006:672, [31]; C-476/01 *Criminal proceedings against Felix Kapper* [2004] ECLI:EU:C:2004:261, [72].

[61] Recital 31 InfoSoc Directive.

[62] *FAPL* (n 60) [162]–[164].

[63] *Painer* (n 60).

[64] Article 5(3)(d) InfoSoc Directive.

[65] *Painer* (n 60) [134]–[136].

[66] See Chapter 5, section 2.

[67] *FAPL* (n 60) [133].

[68] De Wolf & Partners, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* (2013) 489.

[69] See Chapter 2, section 3.1.2.

[70] *Infopaq I* (n 58) [58] in relation to article 5(1) InfoSoc Directive.

[71] *Painer* (n 60) [104]–[108], [132]; *FAPL* (n 60) [181]; *Infopaq II* (n 60) [56]; C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, [68].

[72] *NLA* (n 60) [54]–[63]; see Chapter 4, section 3.3.

[73] *Deckmyn* (n 7) [17].

[74] Ibid, [22].

[75] Ibid, [23].

[76] Ibid, [34].

[77] See Chapter 7, section 2.

[78] Lucas (n 3) 170 n° 335, 337.

[79] Author's translation. H Roland and L Boyer, *Adages du droit français* (4th edn, Litec, 1999).

[80] J-L Bergel, 'Méthodes et principes de coordination des règles juridiques' in *Méthodologie Juridique* (1st edn, PUF, 2001) 245.

[81] Galopin (n 17) 327. As well as Tulkens and Strowel as discussed in Chapter 1, section 5.1.

[82] This echoes the legal nature of the exception.

[83] *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].

[84] J Griffiths, 'Preserving judicial freedom of movement—interpreting fair dealing in copyright law' (2000) 2 *IPQ* 164.

[85] *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142; *Hyde Park Residence Ltd v. Yelland* [2000] 3 WLR 215, CA; *Distillers Co (Biochemicals) Ltd v. Times Newspapers* [1975] 1 All ER 41; *Beloff v. Pressdram Ltd* [1973] 1 All ER 241.

[86] *Pro Sieben Media AG v. Carlton UK Television* [1999] 1 WLR 605; *Time Warner v. Channel Four Television* [1994] EMLR 1; *BBC v. BSB* [1992] Ch 141, [1991] 3 WLR 174; *Williamson Music v. the Pearson Partnership Ltd* [1987] FSR 97; *Hubbard v. Vosper* [1972] 2 QB 84, CA (Civ Div), 90; *Johnston v. Bernard* [1938] 2 All ER 37.

[87] See n 83.

[88] *Infopaq I* (n 58).

[89] *Infopaq II* (n 60).

[90] *FAPL* (n 60).

[91] *NLA* (n 60).

[92] See n 83.

[93] 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 Channel Nine v. Network Ten* [2001] FCA 108 (trial) (hereafter *TCN*), [66]), the overall appraisal of the principles remains 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.' S Christou and A Maurushat, ' "Waltzing Matilda" or "Advance Australia Fair"? User-generated content and fair dealing

in Australian copyright law' (2009) 29 *UNSWLRS* 1, 29; M Handler and D Rolph, 'A real pea souper: the panel case and the development of the fair dealing defence' (2003) 27 *Melbourne University Law Review* 381, 382 and 390.

[94] Handler and Rolph, 'A real pea souper', 408.

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

[96] However, in the *Pokemon Company International, Inc. v. Redbubble Ltd* [2017] FCA 1541, Pagone J seems to have favoured a restrictive approach.

[97] See Chapter 4.

[98] Following the seminal *Campbell* (n 8) decision. See Chapter 1, section 5.3.

[99] See Chapter 1, section 5.1.

[100] See *CCH* (n 6) [48].

[101] J Simard, *L'interprétation législative au Canada: la théorie à l'épreuve pratique* (University of Montréal, 1998) 345.

[102] Echoing Jean-Jacques Rousseau's social contract.

[103] Simard (n 101) 16.

[104] Examples of a 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 *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (1996) 71 CPR (3d) 348 (hereafter *Michelin*), in relation to parodic works. For more: M Tawfik, '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, 195; C J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011) chapter 6; G D'Agostino, '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, 324 and 329; El Khoury (n 1) 173; C J Craig, 'The changing face of fair dealing in Canadian Copyright Law: a proposal for legislative reform' in M Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Part II, Irwin Law, 2005) 452.

[105] *Ludlow Music Inc. v. Canin Music Corp*. [1967] 2 Ex CR 109, [51].

[106] Ibid, [34]–[36].

[107] Ibid, [58].

[108] (1976) 28 C.PRP (2d) 52 (FCTD).

[109] (1982) 35 OR (2d) 417 (HCJ).

[110] [1987] RJQ 443, [93] appeal was waived.

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

[112] A tactic adopted in *Williamson Music v. The Pearson Partnership*, n 86.

[113] (1996) 71 CPR (3d) 348.

[114] Ibid, Teitelbaum J. Some indulgence 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 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 DLR (4th) 129

leave to appeal to SCC refused, 27527 (25 May 2000), [574]–[575].

[115] *CCH* (n 6).

[116] N Elkin-Koren, 'Copyright in a digital ecosystem: a user-rights approach' in R L Okediji (ed.), *Copyright in an Age of Limitations and Exceptions* (CUP, 2015) 132.

[117] *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] SCC 34, [30]–[31].

[118] *CCH* (n 6) [10] quotes *Théberge*.

[119] Ibid, [48].

[120] Ibid. Abraham Drassinower, 'Taking user rights seriously' in M Geist (ed.), *The Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 467.

[121] Craig (n 104) chapter 6.

[122] *CCH* (n 6) [51]; Also in *UK: Pro Sieben* (n 86) [614].

[123] *CCH* (n 6) [54].

[124] Ibid, [9].

[125] Ibid; *Bell Express Vu Limited Partnership v. Rex* [2002] 2 SCR 559, [26].

[126] D'Agostino (n 104) 6; Australia could potentially follow the same path as demonstrated in *Pokemon* (n 96) [70].

[127] *Entertainment Software Association of Canada v. SOCAN* [2012] SCC 34 (hereafter *SOCAN*), [71].

[128] Ibid.

[129] *Alberta* (n 38) 345.

[130] Section 107 US Copyright Code.

[131] *SOCAN* (n 127) [25]–[26].

[132] Also confirmed in the first Canadian parody case after the introduction of a specific exception: *United Airlines* (n 40) [107].

[133] Craig (n 39) 41.

[134] Ibid, 44.

[135] Ibid, 48.

[136] *United Airlines* (n 40).

[137] See Chapter 1, section 5.5.

[138] *United Airlines* (n 40) [119].

[139] Ibid, [120].

[140] Ibid, [124]–[125].

[141] *CCH* (n 6) [56] notes that the amount factor, for example, should be evaluated in light of the purpose. However, in *United Airlines* (n 40), the judge appears to assess the amount copied without considering the purpose of the use, [128]–[130].

[142] E.g. encroachment on the right-holder's economic rights.

[143] See Chapter 2, section 2.

[144] See Chapter 4.

[145] And again recently in *Pokemon* (n 96).

[146] The current restrictive approach prevailing arguably fuels the policy proposals on adopting fair use in Australia.

[147] *United Airlines* (n 40). Yet Craig suggests a strict interpretation departing from the restrictive approach in *Michelin* (n 104), which would align Canada more closely with the other countries under

scrutiny. Craig (n 104) 168.

[148] We are currently seeing an increased amount of 'browse-wrap', 'click-wrap', 'click-through', 'mouse-click', and 'shrink-wrap' contracts in the online environment; Galopin (n 17) 337; C Geiger, *Droit d'auteur et droit du public à l'information* (IRPI, 2004) 202; Guibault (n 45) 325; Buydens and Dusollier (n 47) 13; P B Hugenholtz, 'Adapting copyright to the information superhighway' in *The Future of Copyright in a Digital Environment* (Kluwer Law International, 1996) 84.

[149] Geiger (n 3) 889; Buydens and Dusollier (n 47) 13.

[150] For a detailed study: M Kretschmer, E Derclaye, et al, *The Relationship between Copyright and Contract Law* (2010), IPO Research Paper No. 2010 (04), available at www.ssrn.com; Guibault (n 45).

[151] *Canada: Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827 (HL), [848] (Diplock LJ); For more: S Ben-Ishai and R D Percy, *Contracts: Cases and Commentaries* (8th edn, Carswell, 2014) chapter 1, sections 3–4; for a classic approach: P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979); *UK: Chappell & Co Ltd v. Nestle Co Ltd* [1960] AC 87 (Lord Somervell of Harrow); *France*: R Sacco, 'Liberté contractuelle, volonté contractuelle' (2007) 59(4) *RIDC* 743–60; O Bustin, 'La liberté contractuelle existe-t-elle en droit d'auteur' (2003) 205(10) *Legipresse* 117; *Australia*: Australian CLRC Report 2002, Chapter 1; *US: Lochner v. New York*, 198 US 45 (1905); *ProCD v. Ziedenberg* 86 F.3d 1447 (7th Cir. 1996); D P Weber, 'Restricting the freedom of contract: a fundamental prohibition' (2014) 16(1) *Yale Human Rights and Development Journal*, Article 2.

[152] Guibault (n 45) 198.

[153] See Chapter 7, section 1.

[154] Guibault (n 45) 205.

[155] See Chapter 5, section 4.

[156] Decisions from the ECtHR will only be referred to by name. For full references, see Bibliography. *Handyside v. The United Kingdom* (1976) 1 EHRR 737, [49].

[157] *The Sunday Times v. The United Kingdom (No 1)* (1979) 2 EHRR 245, [65].

[158] Guibault (n 45) 268.

[159] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L122, 17 May 1991, 42–6.

[160] Ibid, art. 9(1).

[161] Directive 96/9/EC of 11 March 1996 on the legal protection of databases, OJ L77/20, 27 March 1996, art. 14.

[162] Section 30A(2) CDPA.

[163] It must be remembered that the codification of the parody exception attracted little attention as the exception resulted from well-established judicial practices. See Chapter 2, section 4.

[164] This was noted in a case involving first sales rights: *UMG v. Augusto* (2008) 558 F. Supp. 2d 1055.

[165] J H Reichman and J A Franklin, 'Privately legislated intellectual property rights: reconciling freedom of contract with public good uses of information' (1999) 147 *U. PA. L. Rev*. 875, 877.

[166] M De Zwart, 'Seriously entertaining: the panel and the future of fair dealing' (2003) 8 *MALR* 8.

[167] CLRC, Parliament of the Commonwealth of Australia, *Terms of reference* [23 April 2001].

[168] CLRC, Parliament of the Commonwealth of Australia, *Copyright and Contract* (2002).

[169] Ibid, [2.01] and [7.25].

[170] Galopin (n 17) 343.

[171] *France*: C Caron, 'Les exceptions au regard du fondement du droit d'auteur en droit français' in

A Lucas, P Sirinelli, and A Bensamoun (eds), *Les exceptions au droit d'auteur: état des lieux et perspectives dans l'Union européenne* (Dalloz, 2012) 22; Galopin (n 17) 360; C Colin, 'La contractualisation des exceptions en droit d'auteur: oxymore ou pléonasme?' (2010) 2 *CCE*, étude n°3, 9; M Vivant and J-M Bruguière, *Droit d'auteur* (Dalloz, 2009) 388; A Guilbert, *La contractualisation des exceptions* (University Panthéon-Assas, 2009) 18; C Alleaume, 'La contractualisation des exceptions en France' in *Droit d'auteur et numérique, quelles réponses de la DADVSI?* (Colloque organized by l'IRPI and l'AFPIDA, 9 March 2007, Prop. Int. 2007, n. 25) 438; El Khoury (n 1) 35; S Joly, 'L'ordre public et le droit d'auteur' in J-M Bruguiere, N Mallet-Poujol, and A Robin (eds), *Propriété intellectuelle et droit commun* (PUAM, 2007) 343; Dusollier (n 16); C Rigamonti in R M Hilty and C Geiger (dir.), *La balance des intérêts en droit d'auteur* (Conference Proceedings, 2004); S Dusollier in Hilty and Geiger, Ibid; Bergel (n 80) 188; Planiol cited by P Malaurie, *L'ordre public et le contrat* (Paris, 1950) 263; *Canada*: D Gervais, 'Le droit d'auteur au Canada: le point après CCH' (2005) 203 *RIDA* 7–61; *Australia*: CLRC, Parliament of the Commonwealth of Australia, *Copyright and Contract* (2002), [2.01] and [7.25]; Zwart (n 166) 8; M De Zwart, 'Technological enclosure of copyright: the end of fair dealing?' (2007) 18 *AIPJ* 7; *US*: see n 165, *contra: France*: A Lucas, *Propriété littéraire et artistique* (4th edn, Dalloz. Coll. Connaissance du droit, 2010) 58; Y Gaubiac, 'France: rapport général', in L Baulch, M Green, and M Wyburn (eds), *Alai Study Days—The Boundaries of Copyright: Its Proper Limitations and Exceptions* (Australian Copyright Council: Sydney, 1999), 199.

[172] Colin (n 171) 9.

[173] Guibault (n 45) 300.

[174] Galopin (n 17) 364.

[175] See Chapter 4.2 and 4.3.

4

Factors to Consider for the Application of the Parody Exception

By framing the parody exception as ‘fair use’, ‘fair dealing’, or the ‘rules of the genre’ legislators leave flexibility to shape the contours of assessing the parody exception.[1] The judicial interpretation will eventually define the boundaries of the exception, counterbalancing the flexibility initially introduced by legislators, to provide greater legal certainty.

The power vested in courts should not be underestimated. Indeed, the efficacy 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, for example, by making unjustified claims of infringement, pressuring users to take unnecessary licences, or agree to stricter terms of use than the law would otherwise impose.[2] This chapter sketches out the range of different factors which are potentially pertinent to the application of the parody exception.

1. The Difficulty of Defining the Exception’s Contours

The exact contours of the parody exception in Australia, Canada, and the UK 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 speculative. However, although no statutory factors exist, it is legitimate to consider landmark decisions[3] covering related areas, as the principles enunciated therein often extend beyond the particular purposes of the case at hand.[4] 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.[5]

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, fair dealing and rules of the genre traditionally constitute a two-step assessment:[6] courts must assess whether the use of the work is 'for the purpose of parody'.[7] Although this traditional approach still prevails, some countries such as Canada and Australia may be paving the way towards a one step assessment.[8] 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 of the works.[9] If either limb of the test is not satisfied, then the exception does not apply. In the case of fair use in the US, the assessment is formed of the four statutory factors and the purpose is considered within the first factor.[10]

Secondly, 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'[11] or whether the copying work 'merely "supersede[s] the objects" of the original […], or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message'.[12] 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 at hand, in arriving at their overall impression.[13] It constitutes an 'equitable rule of reason', requiring careful balancing on behalf of judges in light of copyright purposes.[14] As a consequence, uniform outcomes might not result, despite ostensibly similar facts.[15] Yet, the nature of a fairness-based exception requires the underlying protected work to have been communicated to the public already.[16] 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 parody exception is underpinned by the need to preserve the right of freedom of expression, generally colouring the factors in the assessment of the exception.[17]

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 unauthorized use. Additionally, as demonstrated in the Canadian decision in *United Airlines, Inc. v. Cooperstock*,[18] there is a certain permeability and influence of EU teachings in other territories outside the EU.[19] We shall see that there is a certain influence of the interpretation of US factors on other territories as well.

In what follows, the factors potentially relevant to the parody exception are considered in turn. As there is no hierarchy[20] or standard 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.[21] For ease, we consider the factors which are likely to be examined in all the jurisdictions under scrutiny first, and then turn to factors adopted in only some. Finally, we conclude by identifying factors which ought to be rejected if the objectives of the parody exception are to be realized.

2. Factors Commonly Applied

In this category, we review the factors which the jurisdictions share in common. For the application of the parody exception, courts are required, or will consider, the intent of the parodist, the lack of confusion between the two works,[22] the amount copied, and the commercial objective as being relevant for assessing the application of the parody exception. As a comparative exercise, we shall assess any differences in how these factors are considered or applied in particular circumstances.

2.1 The intent of the parodist

The intent of the parodist refers to their plan to create a parody. For the purpose of parody, should the court take account of the effect of the putative parody, or the creator's intent? The former would seem to be imply a subjective assessment of the court, whereas the latter would be an objective test. We shall see that it is the latter approach which already seems to be accepted in the jurisdictions of interest.

As further explained in what follows,[23] French courts pay particular attention to the parodist's intent when considering whether the use should be

permitted. The aim is to protect right-holders from malevolent behaviour. Accordingly, if the parodist intends their use to harm the work, the author, or the right-holder, this factor weighs against the parodist.[24]

UK courts are also familiar with this factor as an aspect of fair dealing.[25] Although an alleged infringer's intentions are likely to be irrelevant when determining whether the use is for the purpose of parody, intent does play a role in establishing fairness.[26] Adopting an objective standard, courts determine where the user's intent lies on a spectrum ranging from altruistic to malicious. In *Time Warner Entertainment Co Ltd v. Channel 4 Television Corporation Plc*,[27] a documentary reproduced brief extracts from the film, *A Clockwork Orange*. The Court characterizes 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 parodic use to have a humorous character, it seems that courts are likely to (or should) allocate more weight to this factor in future parody cases.

Australian courts have also considered the user's intent to be a relevant factor in assessing fairness. Finkelstein J. in *TCN*,[28] having considered UK case law,[29] notes that a user's intent may be apparent based upon an examination of the context of the unauthorized use.[30] *In casu*, the fact that the popular TV show, *The Panel*, was 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 Australian values parody particularly for its humorous character[31] caused leading commentators, including McCutcheon, to question whether the exception will favour comical parodies over those which are critical.[32]

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 unauthorized parody of the *Bibendum*, the *Michelin* man,[33] the court likewise stated its view that intent plays no role when determining the purpose of the use, but it conceded that it might be relevant when assessing its fairness.[34] This position was later confirmed in *Boudreau v. Lin*,[35] *Avanti v. Favreau*,[36] and *Alberta v. CCLA*.[37] Here, the courts noted the influence of the user's intent by denying the defence in circumstances where the

defendant's intent was seen as free-riding on the popularity of the work it had reproduced.

Interestingly, in *CCH*,[38] despite confirming that the real purpose or motive is influential,[39] the court does not seem to have been influenced by the defendant's intent.[40] 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 given to each court to determine which of the possible factors are relevant to the case at hand. This is confirmed in *United Airlines*,[41] in which the Canadian Federal Court posits that determining the real purpose or motive of the dealing includes considering whether the defendant may have ulterior motives behind the dealing.[42] The parody under evaluation was a rework of the plaintiff's *UNITED* logo. The defendant altered this by reversing the order of the letters I and T (to form the word *UNTIED*), changing their colour from blue to red, and adding a red frowning face onto the globe design. Although the Federal Court noted that the use had a humoristic character by displaying mockery, the Federal Court was unconvinced that the dealing was the result of a humorous intent.[43] In the eyes of the court, the intent was one to shame and punish United Airlines for its failings, and this weighed against the findings of fair dealing. Essentially, and citing *Deckmyn*, the court held that parody requires a humorous intent or an element of mockery, but does not extend to include intent to harm.[44] Therefore, defamatory expressions appear to fall beyond the limits of humorous character.[45]

Since the *Campbell* decision,[46] US courts have shied away from any direct appreciation of the parodist's intent to focus on the transformative character of the use.[47] Therefore, intent is analyzed less in terms of humorous character,[48] and more from the perspective of the expressive purpose combined with the other fair use factors.[49] This is illustrated by the transformation of the song *I Love New York* into *I Love Sodom* as part of a *Saturday Night Live* spoof which passed comment on the failing public image of New York City in the late 1970s. Elsemere Music Inc., failing to see the humour in the sketch, sued the National Broadcasting Company's network for copyright infringement, which, in turn, sought reliance upon the fair use doctrine. Ultimately, the court decided in favour of the defendant. Although relegated to a footnote, the articulate opinion from Goettel J. notes that substantial copying may be fair if the parodist 'builds upon the original, […]

contributing something new for humorous effect and commentary.'[50]

On occasion, intent has been alluded to as a limiting principle when attempts at parody border upon obscene humour. For example, neither transposing Disney characters into adult-only scenarios[51] nor reworking The Andrews Sisters' *Boogie Woogie Bugle Boy* into a sexual and racy musical, *Let My People Come*,[52] was upheld as fair use. This line of reasoning has even led scholars, such as Schneider, to argue that the content of the expression should be introduced as a new factor,[53] such that any expression of a sexual or obscene nature should weigh against the finding of fair use.

While most common law jurisdictions accept intent as a factor relevant to fairness, its appreciation will vary upon the particular facts of the case. Equally, many common law judges will avoid a direct appreciation of the parodist's intent to focus on the other more economic-oriented factors. A direct appreciation of intent is more developed in France where the condition can be neatly summarized as 'to entertain without causing harm'.[54] This approach will be considered next, since it may prove useful guidance for other jurisdictions. Firstly, we shall determine what kind of humorous intent is required before, secondly, establishing its contribution to defining the outer limits of the French parody exception.

2.1.1 Humorous intent

In France, it is well established that parodies should have a humorous character.[55] Sometimes the term is applied more strictly to allow comic expressions,[56] however, the current interpretation of the humorous intent expands to encompass expression of homage and criticism.[57]

As an illustration, the French court has accepted that a painting of the famous surrealist artist Magritte in *Playboy Magazine* did result in an expression of humour.[58] Here, the humorous character was perceived as deriving 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 any comic element. For example, humour was considered present in a parody of the well-known *CAMEL* logo which depicted a dying camel (used in an anti-tobacco campaign);[59] a drawing of Yves Montand next to reworked lyrics of *Les Feuilles Mortes* paying tribute to the then recently deceased singer;[60] a rework of *Tintin*'s

adventures in playful novels, in which characteristic elements of the protected work were unexpectedly distorted;[61] use of *Tarzan* as an anti-hero;[62] a light opera, *Couchés dans le foin*, parodying the Toreador tune from the opera *Carmen*;[63] and even a reworking of a Mylène Farmer song in a movie, used to emphasize the sexual character of the scene.[64]

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,[65] where song lyrics were used for a political campaign,[66] where minor amendments have been made to lyrics[67] or drawings,[68] and in an unauthorized sequel to the *Tintin* series of Hergé.[69] In the latter case, for example, the defendant had reproduced the original comic strips in his book, which had, in the court's view, created a new work borrowing from Hergé's world, rather than parodying the original.[70] Most recently, in *Naked*,[71] the court denied artist Jeff Koons' claim to a parody defence in respect of his transformation of a photograph taken by Jean-François Bauret into a sculpture, merely adding pop art elements such as flowers.

In light of these illustrative examples, it is reasonable to conclude, firstly, that appraising humorous character is inherently subjective[72] 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 upholds artistic neutrality and refrains from any qualitative judgement on the work's artistic merits.[73] It appears that judges find this easier to do where the object of the parody is the underlying work,[74] but it does not preclude the target of the comment being directed at an external object such as customs, a societal event, or the parodist himself.[75]

Secondly, preservation of the right of freedom of expression requires a broad interpretation of this criterion to ensure that all expressions of humour are covered.[76] Therefore, humorous character is a spectrum ranging from provoking laughter,[77] being playful,[78] paying tribute,[79] to providing positive or negative criticism at the other extreme.[80]

Thirdly, determining whether a humorous character is realized 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.[81]

Finally, recent decisions demonstrate that intent serves more as a supporting factor, rather than being at the heart of the consideration. Rather than focusing on humour, judges tend to focus on the effect of the putative parody on the original work, and the likelihood that the expression will harm the original author or their work.[82] It remains to be seen whether courts will give more importance to humorous intent following *Deckmyn*.

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, this requirement should not be analyzed in isolation without also assessing the presence or absence of harm.

2.1.2 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.[83]

Considering this factor first, courts determine whether the parodist reproduces the earlier work with the intent to harm the reputation or honour of the author.[84] As a corollary, if this is demonstrated, the author has a claim based upon moral rights,[85] and on other personality rights, such as defamation. In essence, courts seek to limit the degree of harm permitted by the exception. Harm under a veil of humour is allowed, provided that it does not constitute an unlawful act according to some other 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 criticize, then any harshness or maligning can be excused, because the rules of the genre are respected.

For example, the French Supreme Court has held that a music parody in which revised lyrics are sung to the original melody in a voice seeking to mock the original singer via imitation is a legitimate caricature, provided there is no confusion or obvious rudeness.[86] Courts rarely consider that a caricature will harm the personality of the author, provided it is not obviously

outrageous.[87] This is justified because such mockery is at the heart of caricature, and consequently 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,[88] the character Tintin provides another good example. In a parody which featured this famous fictional character in scenarios in which Tintin takes illicit drugs or performs sexual acts, i.e. the antithesis of the world created by Hergé, the court considered that such use denigrated the original work to such an extent that it should not benefit from the parody exception.[89] Yet, *in casu*, it is debatable whether this was the appropriate conclusion. While ostensibly refraining from judging the use based upon artistic merits, it appears that French courts are less lenient where a parody is based upon a work forming part of the cultural heritage, *even if* the rules of the genre appear to be respected. That 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[90] which reproduce well-known works belonging to French, Belgian, or Italian cultural heritage to transpose them to a fantasy world far from the world in which the original evolves would be found non-harmful.[91]

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.[92] In addition, the factor enables courts 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.[93] Yet, this factor is inherently a question of degree.[94] 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.[95]

2.2 Absence of confusion

A related aspect to the concept of harm to the author or the work is a parody which causes confusion. Currently a consideration mainly in France,[96] this factor requires the court to assess whether the audience confuses the parody with the underlying work. When encountering the parody, the public should

not believe that they are encountering the original, or assume that there is a link, whether creative or economic, between the two works. In essence, the parodic nature of the defendant's use must be immediately apparent. 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 endeavour.

In *Deckmyn*, the CJEU establishes this as a mandatory consideration for all EU Member States.[97] Thus, it is no longer only French courts that will have to devote attention to this factor. However, lack of confusion is already familiar in the common law countries of the study, as is illustrated in what follows.

Absence of confusion is not alien to the appreciation of the copyright exceptions in common law jurisdictions. In the very first fair dealing case to come before the UK courts,[98] the defendant had published a book of study materials which included the plaintiff's examination papers. The court refuted that this was 'fair dealing', but held that it was mere reproduction, as the defendant had done nothing to transform the original work.[99] 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*[100] and the US case *Disney Productions v. Air Pirates*,[101] 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.[102] Absence of confusion is also a factor in Canadian fair dealing cases, and these highlight a different form that confusion may take. In *CCH*[103] and *SOCAN*,[104] the court held there was no fair dealing in the case of plagiarism. Here, attempts to 'pass off' another's work as your own is not only unfair, but it may confuse.[105] Plagiarism is sometimes classed as an economic encroachment upon the use on the market of the original, instead of as a factor of confusion. Nevertheless, in *United Airlines, Inc. v. Jeremy Cooperstock*,[106] Phelan J. arguably misinterpreted the *Deckmyn* requirement of evocation of an existing work while exhibiting noticeable differences as an absence of confusion criterion. According to the judge, showing *some* difference (e.g. content and disclaimers) is sufficient to satisfy the EU requirement. This does not mean that confusion did not play a role in the federal court's reasoning. To the contrary, when determining the fairness of the dealing, the court questions whether a confusing parody use can ever be

fair.[107] As parody relies on the public to recognize the references made to the original work, this precludes confusing uses from being fair.[108]

How should the confusion factor be appraised? Arguably, it is the absence of confusion rather than the degree of modification which is key for parody works. As we have seen already,[109] a successful parody may result from the subtlest of changes 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 quantitatively, based upon the amount of the work reproduced relative to the new input from the parodist, as this is likely to result in subjective assessment of the resultant work's merit. Indeed, much of the creative effort on the part of the parodist generally takes place prior to the work's expression, for example, in the selection of the work(s) 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 it is successful. Inherently, there is 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 recognize the allusions made to the original work(s). However, if the parodist copies too much, the parody will be lost, and the public will question whether the work(s) is just a variant, linked to the original.

Examples of how this careful balance should be struck are evident in French and US decisions. Generally, lack of confusion results from the distortion made by the parodist.[110] Here, courts tend to find that the more modification of the underlying copyright-protected work there is (e.g. France) or *transformativeness* (e.g. US), the less likely it is that the parody creates confusion. Therefore, in a song, reproduction of the entire musical work while changing its lyrics was held as sufficient to avoid confusion;[111] whereas the addition of a commentary to a song by a comedian in a sketch (adding quips such as 'I make songs like this every day' or 'if he could do this, then I may have a chance, too') were insufficient.[112] While the French courts acknowledged that mockery was intended, it held that parody requires an actual modification of the underlying work.[113] The French court in a *Tintin* case[114] summarized 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.[115]

Here, lack of confusion resulted from a change of genre from comic book to novel, new contemporaneous characters, word games only possible in novel literary form, distortion of the characters' names,[116] 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,[117] the defendant's posters featured Tintin in new situations, such as reproducing the entire cover of the original *The Blue Lotus* book as if it were part of a film set.[118] The court noted that as Hergé's books had been adapted into films in the past, the public may assume that these posters had been authorized by the late author's estate. Here, the French court did not hesitate in examining the ways in which the right-holder had exercised their exclusive rights, and this was relevant in the court's conclusion that the use had not distanced 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 cartoon chicken in a sadomasochist context, the court held that transposing an exact copy of the fictional character into a new context, albeit far removed from its natural environment, was insufficient to avoid confusion.[119] Therefore, it seems that although theoretically parody may result simply from a subversive change in context, it will be far easier to establish in practice when there is an actual distortion, because confusion is less likely.

A similar case arose in the US, which reached a similar conclusion. In *Walt Disney Productions v. Air Pirates*,[120] an appropriation of Disney cartoon characters (including Mickey Mouse, Minnie Mouse, and Donald Duck) in other comic books, *Air Pirates Funnies*, engaging in antithetical activities, was held as being an infringement for similar reasons to the French *Calimero* case.

US courts have developed an intrinsic test which seeks to establish whether the defendant's use captures the 'total concept and feel' of the original.[121] If the ordinary public would recognize the use *as* the original, then the subjective assessment should weigh against fair use as this may result in confusion.[122] In 1979, for example,[123] when a defendant reproduced almost every aspect of the trailers used for the 'official' Superman television series

to advertise their business (merely replacing the Superman name with their own), the US court held in favour of the plaintiff. In doing so, the court concluded that the 'lay observer would instantly identify the defendant's commercial with the copyrighted material'.[124] The same year, the Court of Appeal for the Fifth Circuit refused to find fair use for parody in a case in which the defendant's posters reproduced the pose used in a number of Dallas Cowboys cheerleader posters.[125] The defendant's cheerleaders wore nearly identical uniforms too, but with the key difference that their blouses were unbuttoned to reveal their breasts. It is noteworthy that the cheerleaders in the defendant's poster were all former Dallas Cowboys cheerleaders, which was seen as increasing the likelihood of confusion.

Stemming from these US decisions, the transformative character of the use appears as essential to the appreciation of the first fair use factor, i.e. the purpose and character of the use.[126] This explains why in *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*,[127] the district court held against fair use. The case concerned a poster and trailer promoting Michael Moore's documentary, *The Big One*, which bore a striking resemblance to those used to promote the *Men in Black* film. The main differences lay in the number of characters and use of a microphone in place of the weapons featured in the original (Figure 4.1). According to the court, the use did not create a transformative work, but merely reproduced elements from the original, i.e. both featured a similar strapline and similarly dressed protagonists adopting a similar stance while carrying a large 'weapon' against a backdrop of the New York skyline at night.[128] In short, instead of transforming the copyright-protected work to comment on or criticize the original, the defendant merely used the well-known elements of the *Men in Black* poster to attract the attention of potential viewers of the documentary.


PROTECTING THE EARTH FROM THE SCUM OF THE UNIVERSE
MR. JONES
MR. SMITH
MEN IN BLACK
JULY 2


PROTECTING THE EARTH FROM THE SCUM OF CORPORATE AMERICA.
MICHAEL MOORE
THE BIG ONE
THE OUTRAGEOUS NEW COMEDY FROM THE CREATOR OF "ROGER & ME" AND "TV NATION"

Figure 4.1 Michael Moore sought to promote his new documentary by reproducing the poster of the Men in Black movie. The differences lie in the main protagonist and the replacement of weapons with a microphone.

MEN IN BLACK, US poster, from left: Tommy Lee Jones, Will Smith, 1997. © Columbia/ Everett Collection, Inc. / Alamy Stock Photo.
THE BIG ONE, Michael Moore, 1997. © Miramax/ Everett Collection, Inc. / Alamy Stock Photo.

As in France, a US court has recently held that a twenty-one-minute film, *Star Trek: Prelude to Axanar*, an unauthorized prequel to Paramount's original series, should not benefit from a fair use defence.[129] Here, the court was unable to discern any comment or criticism of the copyright-protected works in the copy. Rather, the defendant sought to remain as faithful to the original as possible, to appeal to existing *Star Trek* fans. Thus, borrowing from the *Campbell* decision, if the would-be parodist copies the 'heart' of the copyright-protected work with minimal transformation, then it is likely that the use will be characterized as merely a non-permissible superseding use, rather than a parody, since it may act as a market substitute of the original.[130]

If distortion is necessary to avoid confusion, then this goes hand-in-hand with the need for the public to be able to identify the new work as a parody. This identification[131] may be achieved in different ways. Firstly, parodists should only copy noticeable and distinctive elements of the earlier work.[132] Secondly, the more recognizable the underlying work,[133] the easier it is for the public to identify it, and simultaneously recognize that the work has been parodied.[134] 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 recognized European or international legal standard of renown, this would lead to an over-restrictive application of the exception.[135] Nevertheless, the notoriety of the original work does serve as an indicator that the parodist has not created the copied material. 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.[136] For example, French courts have applied the parody exception in a case where the parody itself included captions like 'After Prévert'[137] or 'Boycott Danone'.[138] In *Brel*,[139] the claimed parody rearranged selected lyrics from one of Brel's songs. However, it did so in such a way that it was impossible to tell that it was a

juxtaposition of excerpts, rather than a copy of the original song. Since confusion was likely, the parody fell beyond the exception. As the Supreme Court noted in this case, the crux of the matter is that the public must be aware they are not being exposed to the original work.[140]

Ultimately, including a factor which requires a distortion or modification of the original work delineates between permitted use of a copyright-protected work and unlawful use.[141] Consequently, satisfaction of these two requirements is linked. For example, lack of confusion may result from the selected form of expression. The more comical or detached the parody is from the original, the less the audience will confuse it with the original. In the US, absence of confusion is linked to the amount reproduced and any encroachment upon the protected economic rights.[142] This interlinking of factors helps us to understand why the legal concepts of fair use, fair dealing, or the rules of the genre do not rely upon a checklist of linear reasoning, but comprise a global appreciation or constitute a matter of overall impression.

2.3 Amount reproduced

As we have established, parody, by its very nature, requires copying, but this inevitably begs the question: how much copying is permitted within the exception? While it is already clear that if a defendant is seeking to rely upon a fair dealing defence, their use must already constitute a substantial part of the an earlier protected work, would it be possible for a parodist to reproduce an entire work and yet still benefit from the exception?

Early UK fair dealing decisions did not seem to consider the quantity reproduced as decisive.[143] Yet, later case law appears to allocate more weight to this when assessing whether a dealing was fair.[144] Analysis of fair dealing decisions, especially those concerning use for the purposes of criticism, indicates that courts measure the amount borrowed against the weight of comment made,[145] so bringing a qualitative aspect into the appreciation.[146] It is not only the amount of the material which is reproduced which is seen as important, but also the nature of the material copied, meaning that the copied material represents the main features of the original work for which it was granted protection in the first place. Here, the more the defendant has copied from the most prominent features of the work, the less likely it is that the dealing will be considered fair.

Yet, in the landmark decision of *Hubbard v. Vosper*,[147] a case in which the defendant's book, *The Mind Benders*, reproduced materials copied from various Scientology documents in order to criticize the movement, the UK Court of Appeal conceded that copying an entire work may be fair dealing, provided the nature and the purpose of the unauthorized use fitted within the goal of the exception. This point was also raised in a UK government report released in advance of the introduction of the parody exception.[148] Here, the report notes that while fair dealing will typically apply in respect of only partial reproductions of original works, wholesale reproduction is not excluded. Thus, in the UK, there appears room for parodies which copy the original entirely, provided sufficient distortion is achieved.

Canadian courts appear to adopt a more stringent approach than the UK. In two early cases it was established that an entire reproduction would not be a fair dealing, at least in respect of the exception for criticism.[149] Yet in *Allen v. Toronto Star Newspapers Ltd*,[150] the court adopted a more liberal approach when a newspaper report reproduced an entire magazine cover, since it was accepted that the photograph was reproduced for the purpose of reporting a current event. The court emphasized that 'the test of fair dealing is essentially purposive' and 'not simply a mechanical test of measurement of the extent of copying involved'.[151] Thus, we can assume any quantitative assessment would be accompanied by a qualitative assessment which takes the nature of the use into account. It remains to be seen how the judiciary will develop this factor in relation to parodies. However, based upon *CCH*,[152] amount is only one factor which determines fairness, rather than being decisive. Therefore, in Canada too it seems possible that a complete reproduction of a copyright-protected work might still be considered fair.[153]

The quantitative factor is also likely to be considered in Australia.[154] The *TCN* case suggests that this will be given significant weight.[155] Although the full court failed to establish definitively whether or not fair dealing would extend to use of an entire work, the first instance decision, which relies upon various UK precedents, provides some guidance. The trial court cited *Beloff v. Pressdram Ltd*,[156] to stress the importance of assessing fairness relative to the purpose of the use.[157] Similarly, the court relied on *Pro Sieben*[158] and *Hyde Park*[159] when noting that the amount copied is indicative, but not conclusive, of the fairness of the use. As the fairness is assessed on an objective fair-minded person standard, each case must be considered on its

own merits, meaning that copying the same amount of the same work may be fair in one case, but not in another. The full court hinted that a defendant might feasibly copy entire earlier works.[160]

Australian scholarship rightly recognizes the potential inaptness of this factor in relation to the parody exception,[161] as a parody must reproduce enough of the earlier work for the parody to succeed. Indeed, it has been noted that unless certain parodists are able to reproduce an entire work, whole classes of parody, such as those in the visual arts, will fall beyond the exception. This is illustrated in Figure 4.2 which depicts the famous Mona Lisa portrait alongside Duchamp's parody. Duchamp has merely changed the colours of the original painting and added a beard and moustache.[162] A parody exception which precludes an entire reproduction a priori would reduce the scope of the exception unduly.

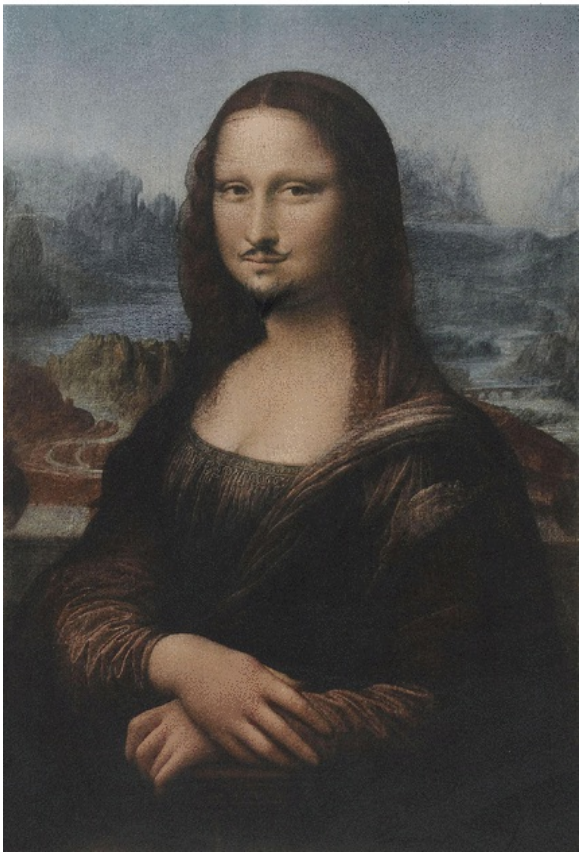

Figure 4.2 Da Vinci's Mona Lisa (1503–1505) Duchamp's L.H.O.O.Q. (1919)*

Leonardo da Vinci, *Mona Lisa*, 1503–1506, oil on canvas, 770 × 530 mm. Paris, Musée Du Louvre. Marcel Duchamp (1887–1968), *L.H.O.O.Q. La Joconde*. Centre Georges Pompidou, Paris. © Association Marcel Duchamp / ADAGP, Paris and DACS, London 2018. Photo ©: Heritage Image Partnership Ltd / Alamy Stock Photo.

Since French and US copyright law both have long-standing parody exceptions, it is interesting to see how courts in these jurisdictions take the quantity reproduced into account.

Initially US courts articulated this factor within the 'conjure up' test developed under the third factor considering the amount and substantiality of the use in relation to the protected work taken as a whole. Consequently, US courts initially articulated this 'conjure up' test as 'the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to "recall" or "conjure up" the object of his parody'.[163] Later, in *Campbell*, the Supreme Court recalled Story J.'s words in *Folsom v. Marsh*, which state that the amount and substantiality of the portion copied must be interpreted in terms of 'quantity and value of the materials used'.[164]

The 'conjure up' test bears an important role in determining fair use for the purposes of parody. Early US decisions merely referred the outer limits of the amount to the substantiality of the taking factor. Indeed, as noted in *Air Pirates*,[165] if substantial copying did not automatically preclude fair use, verbatim or almost-wholesale copying generally should not be allowed.[166] *In casu*, the court found that it would have been easy for the parodist to evoke, rather than reproduce, the copied Disney cartoon characters by drawing them as recognizable caricatures, a technique which would involve less copying.[167]

This interpretation of the conjure up test was restrictive, essentially asking whether the parodist had copied more than strictly necessary to enable the public to recall the original.[168] In *Elsmere Music, Inc. v. National Broadcasting Company*,[169] the Second Circuit sought to re-establish the enabling function of the test:

> The concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to 'conjure up' the original.[170]

This was further honed in *Fisher v. Dees*.[171] In this dispute, the defendant

appropriated the first six bars of a thirty-eight-bar song, *When Sunny Gets Blue*, to create a parody version, *When Sonny Sniffs Glue*. In weighing the fair use factors, Sneed J. noted that musical parodies might require exact or near-exact copying because of a 'special need for accuracy', which might be less important in relation to visual arts.[172] Therefore, reproducing the *heart* of a copyright-protected work would not automatically render the copying excessive.[173]

In the *Sony* decision,[174] although not discussing parody, the US Supreme Court held that fair use might permit reproduction of an entire work. In the *Campbell* parody case,[175] the Supreme Court echoes this statement by confirming that the permitted amount requires a quantitative and qualitative assessment of the circumstances. The significance of the portion reproduced to the original should be taken into account, but without prohibiting verbatim copying. The Supreme Court also recognized that greater copying may be necessary for musical parodies than for other parody types, simply to enable the public to identify the original. Thus, the reasonableness of the percentage copied would depend upon the likelihood that the parody would serve as a market substitute for the original.[176] The Supreme Court goes further by stating that extensive copying may be justified in light of the transformation of the copyright-protected work by the parodist, thus reminding us that parodies are inherently context-based.

This leniency extended to musical parodists does not imply a free rein, however. In *Henley v. DeVore*,[177] the defendant's political advertisements featured songs, *The Hope of November* and *All She Wants to Do Is Tax* (referring to Barack Obama and Nancy Pelosi, respectively) which recorded modified lyrics over karaoke versions of Don Henley's *The Boys of Summer* and *All She Wants to Do Is Dance*. In determining whether the amount copied was justified, the court distinguished between the two uses. Having established that the use of *All She Wants to Do Is Dance* was a satire, the minimal amount of transformation was held insufficient to justify the borrowing.[178] However, the use of *The Boys* incorporated aspects of parody, which might justify the amount taken. Interestingly, the court reached its decision in this case by comparing the amount of copying which other courts had permitted, instead of dealing strictly with the case at hand. Concluding that the amount approached the limit where fair use had previously been denied, and having regard to the fact that parody only derived from the need

to ‘conjure up’ with the original author rather than the work itself, the court held that the amount reproduced was excessive for fair use to apply.[179]

In sum, US courts authorize more, or less, copying depending upon the parody’s medium, the popularity of the original, and the purpose of the parody.[180] If the parody involves a film,[181] speech, or music,[182] then more (even wholesale verbatim) copying may still be fair use. In contrast, it is considered that the visual arts, including comic books and photographs, provide the parodist with alternatives to call up the original without needing to resort to exact or near-exact copying.[183] Further, the more well-known the work is, the less of that work the parodist needs to copy to identify the original work to the public.[184] Finally, appreciation of the amount reproduced goes hand-in-hand with the underlying purpose of the parody.[185] This means that if the copying is for another purpose than creating a parody, then the reproduction of large portions is less likely to be permissible.

This explains why fair use was found in a case in which pro-life organizations used several elements of an earlier video campaign which sought to de-stigmatize abortion.[186] Given that the plaintiff’s videos were not well-known, the defendants were permitted to copy large portions of the original videos. The court went further to note that the media of video or film, like speech and music, are hard to parody unless substantial amounts are copied.[187] Finally, given its directly opposing message, the defendants’ use would not serve as a market substitute for the plaintiff’s work. Here, the court decided that the true purpose of the defendants’ use was to parody the original.[188]

In France, we shall see that although early French decisions appear to grant parodies certain latitude in terms of the amount copied,[189] later decisions tend to elide this factor with the risk of confusion, as discussed already.[190] French scholarship is divided between those who consider that complete reproduction should be permitted,[191] and those who consider that permitted use should extend to substantial copies only.[192]

The divergence appears to stem from different interpretations of the *El Gringo le Jaloux* decision.[193] This case involved a promotional advert which incorporated segments from a rival’s earlier advert. The Court of Appeal held that the question of whether the parody exception would permit a reproduction depended upon whether the use created confusion. Furthermore

—and this is the source of the divergence among scholars—the court noted that the parody exception should not allow entire, or almost complete, reproduction.[194] One camp equates the latter statement with a requirement before the parody exception will apply. The other camp considers that the statement is tempered by the Court's preceding comment which renders confusion paramount. The second interpretation seems more plausible, arguably, based upon the fact that the defendant had used excerpts from the earlier commercial to promote its own business either by causing confusion and/or to take advantage of the notoriety of the earlier work. This interpretation is also consistent with the earlier *Brel* decision,[195] discussed previously, in which the Supreme Court also refused to apply the parody exception where the defendant reproduced protected lyrics for a political campaign in such a way that confusion was likely whether the use was a parody or the original.

Indeed, the French Supreme Court has accepted a parody defence in a case where an entire earlier work had been copied.[196] In a dispute concerning a musical parody, new lyrics were sung to the original musical. The parody was permitted, despite the amount of the musical work copied, because there was no confusion. The public could easily distinguish the parody from the original. In this case, the court compared 'song' with 'song', rather than considering the underlying copyright works separately. The crucial point has been emphasized in a more recent decision in which the trial judge noted that the parody exception prevents partial or full reproduction of an earlier work *used as such*.[197] 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 *whether* the reproduction (in whatever amount) is presented to the public in such a manner that confusion is likely to result. Thus, it is reasonable to conclude that provided the public recognizes the work as a parody because an element of distortion has been introduced, then the parody may reproduce an earlier work in its entirety.

Assessing eligibility for the parody exception based upon the quantity of work borrowed, as US courts have sometimes required, seems tantamount to enquiring whether the end result might have been achieved by other means which reproduced less. This appears to require courts to make an artistic judgement, which should fall beyond the judicial role. Rather, courts should limit their enquiry to whether the reproduction of earlier work is necessary to

the objective pursued, rather than being a thin disguise for, for example, forgery. Therefore, the French court's linkage of the amount copied to public confusion seems a more legitimate approach.[198]

On balance, it seems that whether the amount copied is substantial (assessed quantitatively or qualitatively) should not be decisive per se, but only ever used as one indicator for fairness.[199] As a parody exception has been introduced to enable parodies to be created, this aim will be stymied if parodists are not given free rein to copy significant amounts of protected works, and potentially entire reproduction of a copyright work in some instances.[200] Therefore, it appears illogical to invalidate a use based on the amount copied alone. Indeed, curtailing the amount which may be lawfully reproduced might actually increase the likelihood of confusion. Forcing a parody to make only a weak allusion to an earlier work may fail on its own terms. Eventually, the effectiveness of a parody exception will depend upon whether and how strictly this factor is applied by national courts.

2.4 Motives of the parodist

The parodist's motivation is another sensitive issue. Is a parodist permitted to commercially exploit the creative endeavours of others under the cover of the parody exception? US and French case law on this aspect will provide some insights which might help us to predict the likely attitudes of the UK, Canadian, and Australian courts.

In the US, the commercial nature of the use is generally studied systematically under the first factor: the purpose and character of the use.[201] In a relatively early case, *Harper & Row v. Nation Enterprises*,[202] the Supreme Court held that the commercial/non-commercial distinction is not concerned with unpicking whether or not a parodist sought monetary gain from their efforts, but rather, whether they aimed to profit from the copying of copyright materials without fairly remunerating the right-holders.[203] Consequently, fair use presupposes good faith on behalf of the parodist.[204]

With this task in mind, a US court found fair use in the case of a song, *When Sonny Sniffs Glue*, a parody of *When Sunny Gets Blue*,[205] despite the commercial nature of the use, having been included on a comedy album. The court held that the parody did not harm the economic value of the original unfairly, as consumers fond of the plaintiff's song would not be satisfied by

listening to its parody version instead. Similar logic was applied in respect of the parody novel, *The Wind Done Gone*, as no detrimental effect on the market for the original, *Gone With The Wind*, was established.[206] Rather, the circuit court acknowledged the significant transformative value of the parody, which supported a finding of fair use,[207] thereby reversing the earlier decision of the district court.

When considering commercial motives, US judges seem to pay particular attention to the potential market for derivative uses which a right-holder is likely to develop. In the *Mattel* case,[208] which considered use of a Barbie doll in photographs commenting on societal values, the court was willing to find in the defendant's favour, reasoning that the plaintiff was unlikely to enter this market or license creators likely to be critical of the protected work.[209] It is not in the public interest to grant right-holders complete control over derivative works which comment upon or criticize copyright-protected work, and so, this should be avoided.

The *Northland* decision[210] illustrates what may be included under the notion of profit. Here, the video aiming to de-stigmatize abortion was parodied in order to generate funds, albeit indirectly, for a not-for-profit anti-abortion organization. In this case, the court noted that the defendant's use generated internet traffic to its websites, and thereby benefited the organization by aiding dissemination of its message.[211] Ultimately, this 'commercial' exploitation of the parody did not prevent a finding of fair use since the defendant had transformed the plaintiff's work for the purposes of criticism, rather than to exploit 'its creative virtues'.[212] Furthermore, when examining when the parody might harm the market of the original, the court relied upon the teachings established in *Campbell*. Here, the Supreme Court conceded that a parody, by virtue of its message, might well kill off demand for the original work but harm of this kind was not protected within the realm of copyright law. Rather, what is relevant is whether the defendant's use constitutes a substitute for the original. In light of *Campbell*, even if a parody's message is, as in *Northland*, the antithesis of that of the original work, there is no cognizable market harm.[213]

In similar vein, advertising revenues derived from uploading a parody to a sharing platform, such as YouTube, may constitute a profit foreseeable under the US Copyright Act, but here,[214] a successful parody does not necessarily usurp the market for the original. Instead, it may increase advertising revenue

for the original if the right-holder has applied 'match policies'[215] on the platform.[216]

The *3C* case illustrates that the commercial character of a use might stem from seeking primarily an artistic goal.[217] Applying the teachings from *Harper & Row*, the court was willing to find that creating a parody play from a television series might still constitute a commercial exploitation under the Act, even if there was no intent to seek a pecuniary profit. Nevertheless, the court permitted the use as fair, because its transformative nature promoted the arts.[218] As the play created a dark version of the original comedy, it was not serving as a sequel of the original, and left open the possibility that the right-holder could create their own stage adaptation of the copyright work in the future. Therefore, the parodic play was unlikely to threaten the market for the original.[219]

Prior to the seminal *Campbell* decision, the defendant in *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*,[220] sought to use the characters and plot line from the movie, *A Nigtmare on Elm Street* and its sequels, to create a music video, *A Nightmare On My Street*. Considering the music video to be purely commercial, and that the unauthorized use merely served to promote the defendant's song, the court found in favour of the right-holder. This provides a clear indication that any use which attempts to exploit the creative endeavours embodied in a protected work for financial gain takes the use beyond fair use. Likewise, post-*Campbell*, a court rejected Honda's fair use arguments in relation to a commercial which copied elements from the *James Bond* series of films.[221] What tipped the balance against fair use here was that Honda sought to benefit from the success of the *Bond* films with the aim of selling more *Honda* cars, rather than to pass comment on the copyright-protected works.[222] Hence, if the motivation to copy is to attract the interest of the public in an attempt to free-ride on the original, the use should not be allowed because it results in an 'unjustifiable appropriation of copyrighted material for personal profit'.[223]

This last decision brings us to an important question as to the position of US courts on parodies in commercial advertising. While the advertising purpose of the parody will not automatically take the use outside the parody exception, nevertheless, it might erode the leniency generally exercised in favour of parodic expressions.[224] The marketing materials for the film *Naked Gun 33 1/3* included a parody of the famous nude photograph of then-

pregnant actress, Demi Moore.[225] When the photographer, Annie Leibovitz, complained, the Second Circuit found in favour of the defendant because of the strong parodic nature of the use. The defendant's argument that the film poster should be seen as an extension of the film, and that the latter commented on pregnancy and parenthood, found favour with the court. It accepted that the advertisement went beyond a mere contrasting with the original photo to reinforce the comedic nature of the movie.[226] The strength of the parody tipped the analysis of the first factor in the defendant's favour despite its advertising context.

US courts have also had the opportunity to determine cases involving songs used for political campaigning,[227] and have given thought to whether political uses are commercial. After all, according to the *Harper & Row* standard, commercial use is understood more widely than direct financial gain.[228] In *Henley v. DeVore*,[229] for example, De Vore issued an advertisement featuring a copy of Henley's music which encouraged viewers to donate toward his campaign. The court held that DeVore had gained an advantage from the use without paying the customary licensing fees, and it found in favour of the plaintiff. However, the court noted that there were circumstances in which the political nature of the use in the campaign might neutralize the commercial nature.[230] This can lead to deadlock whereby the interpretation of the first fair use factor based upon the commercial nature leans against fair use while the transformative nature weighs in its favour. This arose in *Galvin v. Illinois Republican Party*.[231] In the absence of a conclusive balance, the dichotomy of the first factor is generally resolved in light of the fourth factor, which focuses on whether the new work supersedes the original.[232]

Therefore, in the US, the possibility to exploit a parody commercially inherently depends on the transformativeness of the original. If, traditionally, commercialization weighs against fair use findings,[233] a commercially exploited parody may become less critical depending on the extent of the transformative character of the use.[234] Equally, the commercial motive can be balanced by demonstrating to the court that the use does not unfairly harm the economic value of the copyright-protected work.[235] Therefore, commercial use is not presumptively unfair.[236] In the US, transformativeness and commercial exploitation of a parody are interrelated and 'profit' goes beyond the mere monetary gain to include reputation[237] or any other benefit.[238]

Hence, courts tend to be more lenient on the question of commercialism where the use produces a value that benefits the broader public interest such as granting 'access to the arts and the humanities' which fosters 'wisdom and vision and makes citizens masters of their technology and not its unthinking servants'[239] or if exploited for 'its own sake'.[240]

In contrast, interrogating a parodist's motivation for producing a parody features erratically in French parody decisions. Although the French courts have considered whether it is legitimate for a commercially exploited parody to benefit from the parody exception,[241] the approach to commercial use seems highly fact-specific.

In a first scenario, French courts seem to apply the exception if any commercial exploitation results from an exercise of freedom of expression.[242] Hence, a political parody may be commercialized on small badges,[243] or disseminated via newspapers,[244] TV shows,[245] films,[246] or in plays[247]—all vehicles traditionally used for freedom of expression. Essentially, the parodist's main aim is to disseminate the expression to an audience, albeit it that this may generate some form of revenue.

In a second scenario, the parodist's motivation is primarily commercial. Here, French courts are careful to identify whether the parodist mainly intends to create a parody for commercial exploitation, or whether parody is merely to disguise the commercial exploitation of another's work. For example, a court is less likely to apply the exception if the defendant has borrowed another's protected work to promote their own products. Thus, French courts have found infringement when a parody has been used to promote underwear,[248] lighters,[249] branded clothes,[250] political campaign advertisement,[251] posters and postcards,[252] an operating system,[253] or card games.[254] French courts are equally reluctant to permit a user to benefit from the parody exception if they are in direct competition with the right-holder and have parodied their work in an attempt to win business.[255]

In a third scenario, French courts look unfavourably upon commercial parodies which capitalize upon their shock value, or cause offence. For example, a court refused to apply the exception when Korda distorted the famous photograph of *Che Guevara* into an image of a hostile monkey, even though it was arguably humorous and there was no public confusion.[256] Similarly, in a dispute which arose when a fashion house launched an advert which was a provocative distortion of a painting of *The Last Supper*, the

court held that the parodied image was likely to offend those of the Christian faith, and so fell outside the exception use.[257] This decision was later quashed by the Supreme Court on the basis that the commercial expression aimed to shock rather than insult the Christian community.[258] Again, it is evident that limits to freedom of expression are shaping the outer limits of the parody exception.[259]

Thus, it is evident that French courts do apply the parody to commercial use in certain circumstances, but in respect of this factor in particular, similar facts may lead to different outcomes owing to the subtlety in the balancing. This makes it difficult to predict the likely outcome given any particular set of facts. However, it is believed that the *bonus pater familias* principle, i.e. the reasonable man, helps restore legal certainty. Indeed, in most of the cases where the parody exception was found not to 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), lacked a genuine intent to parody (intending instead to benefit from the success of the original works), or was offensive to part of society.

In terms of how US and French law might provide guidance on the likely approach in our other jurisdictions, as the common law tradition typically prioritizes protection of economic rights, it might be expected that commercial motivation would count against fair dealing in the case of a parody exception. However, it is necessary to explore whether this assumption is reflected in fair dealing case law, bearing in mind that US courts seem willing to treat at least some commercial parodies as fair use, despite the US's common law tradition.

In the UK, when a commercial exploitation is permitted as a fair dealing exception, the user must demonstrate that they do not have an ulterior motive.[260] This suggests that UK courts will consider a parodist's motivation.[261] If a user has *animus furandi*, i.e. a 'deliberate intention to steal', oblique motives,[262] or intends improper actions,[263] then this will go against the use being fair.

As with all of the other factors, commercial motivation alone should not be decisive in excluding 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.[264] However, where one business uses a work created by a rival, it is reasonable to assume that this

will weigh heavily against the dealing being fair. Essentially, all the other factors 'in the mix' would then need to point directly to the fairness of the use.[265] Thus, the court will need to be satisfied that the parody claim is not merely a trick to cover an infringement.[266] The more the use is a straightforward parody, the more likely it is that commercial exploitation will be lawful.[267] However, in borderline cases, for example, where confusion is arguable, a commercial motive may be the factor in the overall assessment which tips the balance against the finding of fair dealing.

This analysis of case law supports the position articulated in an official policy document issued prior to the introduction of the exception. This contemplates disputes arising between direct commercial competitors, and identifies the parties' relationship as a relevant factor. However, the mere fact that the parties are competitors was not seen as precluding a parody defence.[268]

The position in Australia is similar to that in the UK. Australian copyright law does not exclude commercial exploitation as a fair dealing use.[269] Hence, even though private or non-commercial use is more likely to be assessed as fair, users who do commercialize their work might still be eligible to benefit from the defence.[270] Given the scarcity of fair dealing cases which consider this aspect, the *TCN* dispute remains the main touchstone, as this case concerned use between two rival television stations.[271] At first instance, the court placed reliance upon UK case law,[272] and noted that the key aspect of fair dealing is whether the use is really made for the exempted purpose, such that hidden motives may render a use unfair.[273] Citing the UK *Pro Sieben* case,[274] the first instance court acknowledged that the commercial nature of any use would have an impact on its fairness, but without being decisive.

Despite this sentiment, much of the *TCN* court's analysis of the facts concentrated upon the relationship between the parties.[275] This seems likely to result in an incorrect balancing of factors, since the court's main focus should be on the manner in which the user deals with the protected material, rather than on the characteristics of the user.[276] McCutcheon skilfully articulates this point by distinguishing between two scenarios.[277] If a court determines that it is the parody itself which is being commercialized, 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.[278] This is similar to the two first scenarios also taken into account in France.

The Canadian approach is consistent with McCutcheon's proposal. The few cases which have considered the commercial character of the use have concluded that it is relevant in the fairness assessment. Any use of a work which seeks an unfair commercial advantage over the right-holder weighs against a fair dealing.[279] Indeed, in *CCH*, the Supreme Court affirmed this liberal approach, pointing out that the wording of the fair dealing exceptions in the legislation is not limited to non-commercial use.[280] Although *CCH* was concerned with fair dealing for the purposes of criticism, and as the new parody exception has been implemented within the same section of the Canadian Copyright Act, it seems reasonable to conclude that commercial exploitation of parody works should be possible in Canada as well.[281] This interpretation is further supported by the fact that the exception for user-generated content ('UGC'), discussed earlier in Chapter 2,[282] states explicitly that it only applies to non-commercial use.[283]

In light of this analysis of common law jurisdictions, it appears likely that a parodist's motivation will always be a relevant factor when assessing whether their dealing is fair. Although commercial exploitation does not automatically prevent the parody defence from applying, it presents a significant hurdle because it is indicative that the use might be unfair, particularly if the parodied work is that of a competitor. Similarly, it seems that there is consensus that a dealing will be seen as unfair when it is really the original work which is being exploited, rather than the parody itself. This is correct because a true parody is not seeking to camouflage infringement, and a true parodist is not looking to pass off the borrowings as their own or to gain financial benefit directly from the earlier work.[284]

In conclusion, it should be possible for a commercially exploited parody to benefit from the parody exception, but the parodist's motivation is relevant because this assists the court's understanding of the real object of commerce.[285] However, this consideration should not introduce the status of the user, in the sense of their relationship with the right-holder, as an additional factor or a determinative factor. Instead of presuming that a

dealing with a rival's protected work is unfair, the court should assess the nature of the dealing, albeit that the parties' relationship may play a role in this consideration.

The main types of scenario, as illustrated in the table which follows (Figure 4.3) may be summarized, thus.

In a first scenario, a parodist is motivated initially by non-commercial concerns, but later identifies commercial avenues of exploitation. In such cases, it is suggested that a court should find the use lawful under the exception, provided the other requirements are satisfied. For example, a parody disseminated non-commercially via an online platform, such as YouTube, may, if it becomes popular enough, generate revenue through the platform's advertising system. This revenue should not prevent the parody from benefiting from the exception.[286]

In the second scenario, the parodist always intends to exploit their parody commercially. In such circumstances, the court should look favourably on exploitation via a commercial medium which is generally recognized as promoting free speech, for example, a satirical publication or programme. Here, two situations can be distinguished. In some cases, there will be no market connection between the parodist and the right-holder. For example, a party may claim the defence when generating revenue from selling t-shirts which depict a parody of a protected work, or a film may include a parody song in one scene. In the second situation, the parties may be business rivals; one party creates an advert which parodies that of a competitor, or one TV show parodies another TV show, for example.

Irrespective of the difference in circumstances, both kinds of such users should be able to benefit from the parody exception, provided the parodist has respected the other fairness requirements. It seems unduly restricted to impose an additional barrier of non-commercial exploitation, as this serves only to deter the creation of parodies. The exception is justified based upon the social value which results from freedom of expression and information. Yet the risk is that this ultimate goal becomes overlooked if the debate turns to 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 ignores the potential social value derived from parody, which is often unrelated to the motivation for its creation.

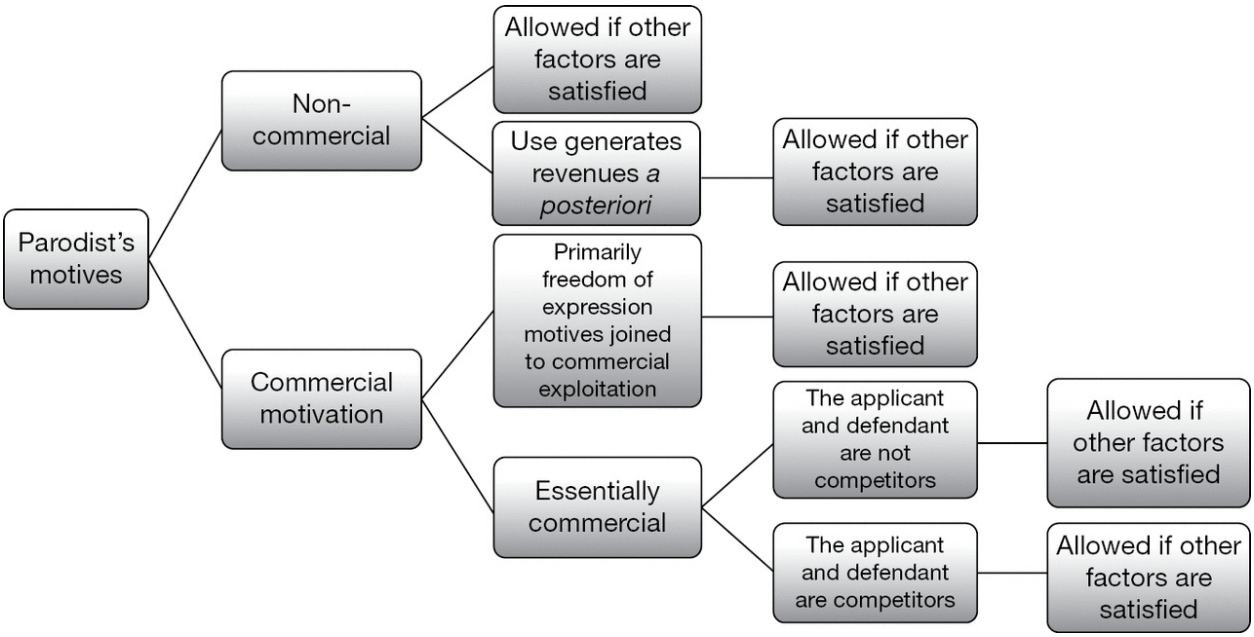

Figure 4.3 Chart summarizing the relationship between the motives of the parodist and the application of the parody exception.

3. Factors Relevant for Certain Jurisdictions Only

Having considered the factors which appear common to all of the jurisdictions of interest, we now consider those which appear relevant only in some. The following sections consider the encroachment upon economic rights, alternatives to the dealing, and the impact of a national three-step test.

3.1 Encroachment upon the right-holder's economic rights

Traditionally, the common law approach to fair dealing or fair use defences is to consider the extent to which an unauthorized use encroaches upon the economic rights of right-holders.[287] This factor is well established under UK and US law.[288] 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 or has an adverse impact on the market for the original, the balance should tilt in the plaintiffs' favour (certainly in older US cases and possibly in Canada following *CCH*).[289] Additionally, courts must consider the *potential* impact if the defendant's conduct existed on a larger scale.[290] While actual harm has to be demonstrated by the plaintiff, in this latter scenario, the onus falls on the

defendant to demonstrate that the use will not harm potential markets.[291]

But when it comes to parody uses, should market harm even be of importance? For as much as parody may stifle the demand for the original, this is likely to be because of the message it conveys rather than because of direct substitution.[292] This suggests that if there are signs of encroachment, courts should look to determine the underlying reason. After all, as noted in *Irving Berlin v. E.C. Publications, Inc*.,[293] a parody tends to acknowledge the importance of the original work, indicating that parody might only rarely harm the marketability of the earlier work. Indeed, in the landmark *Campbell* decision, the US Supreme Court acknowledged that a parody use might legitimately quash consumer demand for the original. Therefore, courts must distinguish between the effectiveness of the parody's comment (which should be permitted)[294] and direct market substitution (which should not).[295] In appraising this fourth fair use factor, US courts must distinguish between the extent of market harm produced by the infringing use and the impact on derivatives, i.e. a use which the right-holder might license.[296] Equally, courts need to consider the public benefit which derives from allowing the use.[297] Therefore, market harm should be permitted if the parody use creates greater public benefit.[298]

In *CCH*, the Canadian Supreme Court also considered this factor and developed an approach to assess it.[299] Although the burden lies with the defendant to prove that the defence should apply, if the right-holder claims that the parodic use has encroached upon their own market, then it is for the right-holder to satisfy the court that this is the case.[300] This is reasonable because only the right-holder has access to information concerning any loss in sales. This relieves the defendant from having to prove a negative. Even then, the approach is somewhat inadequate to decide whether the parody use is fair, as it omits an additional step which evaluates whether any loss of sales which the right-holder has suffered is attributable to a legitimate criticism of the copyright work.[301] Based upon the facts of this particular dispute, it is clear the encroachment factor alone was not decisive. Ultimately, the court found the dealing to be fair despite an adverse effect upon the original's market. Conversely, and as held in *Breen v. Hancock*,[302] Canadian courts should not find a dealing fair, simply because the right-holder is unable to demonstrate any financial detriment resulting from the unauthorized use. Fair dealing is not contingent upon lack of damage to the right-holder.

Nevertheless, only evidence that a use has caused actual harm, not just the possibility of harm, should be required in order to tip the balance against the user and towards unfairness.[303]

As the first parody case since the new parody exception, *United Airlines*[304] provides an interesting development. In this dispute, the Canadian Federal Court considered it appropriate to reframe how market encroachment was considered. According to the court, 'it is not the effect on the market that ought to be considered, but rather the confusion caused by the similarity between Untied.com and the United Website.'[305] Referencing the US Supreme Court's *Campbell* decision, Phelan J. identified similarities between the parody exception and the copyright exception for criticism and review.[306] He noted that criticism, including when conveyed via parody, might affect the public opinion of the original leading to market consequences. Harm derived from criticism should not be taken as an indicator of unfairness. Only if a harmful encroachment is the result of the substantial copying should the balance tilt towards an unfair dealing. In the case in point, as UNTIED.com was established to host consumer criticism of United, the trial judge was less concerned about the potential impact which the site's negative comments might have on the plaintiff's business, but rather the real risk that consumers might believe that the website was that of the plaintiff because of the amount of material from the 'official' website which the defendant had copied (although the author disagrees with the decision of the court as confusion seems unlikely owing to the numerous disclaimers present on the defendant's website). Thus, it seems that the Canadian court rightly placed weight on consideration of public confusion, preferring to assess market encroachment indirectly via the presence or absence of confusion.[307]

In Australia, based upon analysis of the *TCN* case, the court also appears to ascribe secondary importance to market encroachment. Yet, some Australian scholars anticipate that this factor will rank more highly in fair dealing cases following the new parody exception.[308] Suzor considers that any potential markets for the original work are as relevant as its existing markets.[309] Contrary to the Canadian approach already described, (although writing before the recent *United Airlines* decision) he advocates that the relevant factor for the court to weigh up is whether the unauthorized parody use might adversely affect the markets of the original. Sainsbury suggests that this factor is best evaluated both in terms of loss of sales arising from substitution

of the parody for the original, as well as potential loss of licensing revenue from the unauthorized use. She argues that market substitution should weigh against the dealing being fair, whereas loss of potential royalties generally should not. This acknowledges that a typical right-holder will refrain from granting permission for others to make parodic use of their works out of fear that they will be the target of the parody. However, she suggests that loss of revenue for satirical uses might be a legitimate concern, since satire generally reproduces a work to comment upon something else, and consequently she suggests that satirists may convey the same message without needing to copy another work.

We have seen already, however, that any distinction made between parody and satire is arguably artificial, because the same justification underpins both types of use.[310] It seems that right-holders are likely to be equally reticent to grant permission for use for the purpose of satire as they are for parody. In both cases, right-holders' refusal to license does not arise from economic considerations, but from concern to control any 'message' associated with their protected works.

Given the heavier influence of natural law upon civil law jurisdictions, it is often believed that French courts are unconcerned with economic considerations. This view is unfounded, as protection of economic rights features in the underpinnings of the French copyright system, as it does in other civil law jurisdictions.[311] In terms of the parody exception, French courts would typically consider how far a parody encroaches upon a right-holder's economic rights when considering aspects of the exception such as the absence of confusion[312] or intent to harm the author.[313] Hence, the economic impact is an indirect factor. The parody defence is unlikely to apply if the public treat the new use as an alternative to the original, because this is a strong indicator that the new use is not a true parody.[314]

Overall, it seems likely that the question of whether and how far the parodic use encroaches on the right-holder's economic rights will continue to be used by courts in all of the jurisdictions considered as a direct or indirect factor which will influence whether the parody exception will apply in particular cases. Provided that this is applied appropriately, it should weed out false parodies—those which seek to take advantage of the original work, rather than to use it as a vehicle for a new creation. In this way, the factor may contribute usefully to ensuring that a fair balance is struck between the exclusive rights of the right-holders and the public interest.

One almost inevitable drawback associated with determining the encroachment upon economic rights is that many courts consider that this requires extensive economic analysis, even though they are ill-equipped to interpret what results. Additionally, this might confuse encroachment with loss of appeal of the original in light of justified criticism by the parody. However, we have seen that few 'true' parodies will actually encroach upon a right-holder's ability to fully commercialize their works, or will result in lost licensing revenue. As the French decisions and *United Airlines* in Canada demonstrate, it would seem far more straightforward to assess whether a parody has caused any market harm during the analysis of the likelihood of confusion between the parody and the protected work. This suggests that encroachment need only be taken into account once it has already been found that there is a risk of confusion in the minds of the public, in case confusion results from an intent to free-ride on another's efforts.

3.2 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 France, during the many years that a parody exception has been in place, it does not appear that this has *ever* been held to be a relevant consideration in a decided parody case. However, as some do raise this as being relevant, as foreshadowed in the preceding section, we shall consider what, if any, weight courts will and should place on necessity when considering the parody exception in the US, UK, Australia, and Canada.

In terms of other fair dealing exceptions, courts in the US,[315] UK,[316] and Canada[317] have all identified that it is essential to evaluate how far the unauthorized dealing was necessary to achieve the intended purpose. A use is much more likely to be unfair if the same result could have been achieved without infringing copyright, but equally, the case law recognizes that necessity involves an assessment of whether that alternative means would have been equally effective. Necessity has proved to be a significant factor in exceptions including fair dealing for research or private study (as per the Canadian *CCH* case) and the reporting of current events.

Arguably, if necessity is relevant to the parody exception too, then a court should give consideration to three possibilities. Could the parodist have achieved the same end result by parodying an alternative work in the public

domain? Could the same message have been conveyed other than via parody? Was it open to the user to obtain the right-holder's permission to use the protected work, for example, by way of a licence.

With respect to the first two of these three sub-factors, it is important to recognize that by selecting a particular medium for their message, a parodist is making a creative choice. Furthermore, having elected to convey a message via parody, a parodist may have little choice as to which earlier work to select. We also need to bear in mind the teaching in the UK *Pro Sieben* case,[318] that fair dealing should respect copyright law's approach to artistic neutrality: courts should not arbitrate on matters of artistic merit. Arguably, this rule would be breached either by requiring a parodist to justify their choice of parody, or by requiring them to demonstrate that no other means of communication would have been as effective. Taking this all into account would lead us to conclude that, as in France, necessity should be afforded little weight in relation to the parody exception.

As for the possibility of securing permission, the Canadian Supreme Court, in *CCH*, considered this factor irrelevant to fair dealing, since it would render the defences redundant. A right-holder could simply circumvent an exception based upon the possibility that the user could have paid for the use. This would stretch the right-holder's monopoly in a manner incompatible with the balance which copyright law aims to strike.[319] In any event, it has been seen that this requirement is equally inapt for the parody exception, as right-holders typically refuse to grant permission for parody uses, based on subjective justifications, such as a fear of criticism.[320]

In light of the above, necessity and possible alternatives to the dealing should play no role when considering the parody exception.[321] The very existence of a parody exception in the national copyright law is evidence that the legislator considers parody as a legitimate choice of expression. This policy choice would be undermined if the monopoly of right-holders interfered unnecessarily with the creative process underlying a parody.

3.3 The resurgence of the three-step test

As we saw in Chapter 2, in the US, Australia, and Canada the fairness factors are considered to be sufficient to ensure national compliance with the international three-step test of Berne and TRIPS. In contrast, the wording of EU legislation may require national courts in EU Member States, including

the UK and France, to apply the three-step test[322] as an additional stage, when deciding whether, or not, the exception should apply, given the specific facts of the case. This requires us to consider what the impact of an additional three-step test might be for the parody exception in UK and France.

Following the implementation of the InfoSoc Directive in 2006, the French legislator introduced the second and third steps of the three-step test into the Intellectual Property Code, thereby making it mandatory for French judges to apply the test in every case.[323] 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.[324] This French legislative choice may have profound consequences on the outcome of any dispute concerning the parody exception.[325] While UK legislation does not include the three-step test in its domestic legislation, as a result of EU influence, UK 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 InfoSoc Directive is addressed to them, or only to the CJEU.

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 other general principles.[326] 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 InfoSoc 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 shortcomings 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.[327] But, in reality, it is nearly impossible for the right-holder to show evidence of the two requirements. Furthermore, it is suggested that the judge is inadequately equipped to apply the three-step test to particular disputes.

Yet in *Deckmyn*,[328] the CJEU did not interpret the InfoSoc 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 maximize the realization of all the fundamental rights in play bringing EU Member States closer to Canada and their users' rights doctrine.[329]

If, by its decision in *Deckmyn*, the CJEU has relegated the addressee of the three-step test in the InfoSoc Directive to a past debate, the Court appears to have possibly clarified the role of the test within the EU context without explicitly interpreting it.

4. Irrelevant Factors for the Application of the Parody Exception

In *Deckmyn*,[330] the CJEU provided a clear mandate that the national courts of EU Member States should disregard certain factors as irrelevant to a parody defence, namely, the originality of the parody, the target of the parody, lack of acknowledgement of the author of the underlying work, and that the parody does not have to be 'attributable to a person other than the author of the original work itself'.[331]

This list cannot be assumed to be exhaustive, since the Court's guidance was limited to answering the specific question posed by the referring Belgian court. Nevertheless, the decision is enlightening, since it may be possible to extrapolate the reasoning adopted, in the eventuality that other potential factors are identified. While *Deckmyn* is clearly binding on UK and French courts, the Canadian court's reference to the case in *United Airlines* suggests that its influence might extend to other jurisdictions. We shall, therefore, consider each of the four excluded factors in turn.

4.1 Originality of the parody

This factor has mainly arisen in pre-*Deckmyn* parody cases before the French courts, which sought to tie the parody exception to the degree of creativity embodied in the parodic expression. Thus, originality of the parody has been considered as part of the fairness assessment, i.e. whether originality is essential for a parody to comply with the rules of the genre.

If we accept the characterization of a parody as a distorted reproduction of

an earlier work used to communicate a message, then the task for a court is to distinguish between an unlawful reproduction[332] and the right kind of distortion. Faced with the predicament of drawing the line between the two,[333] some French courts elected to make the outcome contingent upon the originality of the parody.[334] In other words, did the parody embody enough creativity to be eligible for copyright protection in its own right?

The best-known example is *Korda*, in which 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 permitted the use under the parody exception. This decision was later overturned on appeal.[335] The appeal court viewed the parody as too similar to the original photograph. The parody defence was denied only because the parody lacked originality based upon the modest nature of the modifications made. This reduction in scope of the exception was seen as unjustified by many commentators.[336]

In *Deckmyn*, the CJEU rightly rejected originality as a requirement for the parody exception,[337] identifying that within the EU at least, the parody exception remains available not just to transformative, original works, but to all transformative uses which have a humorous character and are not confusable with the underlying work.

It seems likely that many parodies will be 'original', since originality, in whatever EU jurisdiction, amounts to the author's own intellectual creation. While relevant, if the parodist seeks to claim copyright in their own work,[338] it is inappropriate to the exception, as it is seems unrelated to the nature of the exception. Much of the creativity in parody lies in the selection of the underlying work, and the distortion applied. Hence, trying to measure a parody in terms of the quantitative changes made to the underlying work simply misses the objective of the exception.

In light of the foregoing, courts in jurisdictions outside the EU should follow *Deckmyn* and reject originality as a factor governing the parody exception.

4.2 Target of the parody

As discussed in Chapters 1 and 2, a parody has several possible targets. It may comment on the underlying work, comment on the author of that work,

or comment on something completely external to the work reproduced, such as the parodist themselves or a current event. Mostly, when considering whether a use of a protected work is for the purpose of parody, the target is an aspect which is accepted as belonging to a past debate.

This requirement, nevertheless, did find some support in the US, especially in the aftermath of the *Campbell* case. We saw in Chapter 1, that this case relied upon the target to differentiate between (lawful) parody and (unlawful) satire during the appraisal of the first fair use factor. However, we also saw how this distinction between parody and satire is slowly fading in recognition of the need to preserve freedom of expression.

In *Deckmyn*, the CJEU explicitly rejected that the nature of the target should be relevant to the parody exception in copyright law in EU Member States,[339] presumably because both activities result from an exercise of freedom of expression particularly valuable in a democratic society. There seems little reason to doubt that the other jurisdictions under scrutiny will follow suit. For example, the choice of legislative wording used to frame the exception in Canada and Australia shies away from distinguishing between parody and satire based upon the target's identity.[340] This choice should not be seen as trivial, but rather demonstrative of a willingness to cover the full ambit of possible targets. This lends addition weight to the conclusion that target type should not play a role in determining whether a parody use should be deemed lawful or unlawful.

4.3 Acknowledgement of the original

The question of whether a lawful parody needs to acknowledge the underlying work is perhaps one of the most debated aspects of the parody exception. Indeed, failure to acknowledge the original is a major contributing factor which denies parodies a permitted use under other fair dealing exceptions. For example, acknowledgement is generally specified as necessary for the quotation exception to apply. Only recently have later EU case law developments relaxed the form of the acknowledgment necessary for this particular exception.[341] This has led leading UK copyright scholars Bently and Aplin[342] to suggest that such a broader understanding is not only more firmly compliant with the international copyright framework, but might render the parody exception redundant.

In *Deckmyn*, the CJEU rejected acknowledgement as a mandatory

requirement,[343] since a parody which satisfies the two mandatory requirements (humorous intent and absence of confusion) should leave those exposed to the parody able to identify the original work automatically.[344] Arguably, emphasizing that the parody *is* a parody by flagging up its original basis and its author might simply 'spoil the joke', and consequently, undermine the parody's effect. Equally, the explicit identification of the original author might actually nurture confusion, by giving the illusion that the parody is the original or that the original author endorses the parody or its message.

In certain contexts, however, explicit identification may help to avoid confusion between the original and its parody, or provide evidence for the public to recognize that they are not being exposed to the original work. For example, in *Deckmyn*, the defendant's parody had incorporated a caption stating 'Fré vrij naar Vandersteen', meaning 'Fré (the parodist) freely in the style of Vandersteen (the author of the original drawing)'. As set out in section 2 of this chapter, French decisions have tended to perceive acknowledgement of the original as establishing that a parody has built upon the earlier work, rather than merely intending to free-ride on another's creative efforts. More recently, in *Les Enfants*,[345] the French court equated (indirectly) lack of identification of the original with a lack of intent to parody. As the putative parody in question reproduced a work which would be largely unknown to the French public, the court concluded that the defendant should publicly acknowledge his inspiration and use some form of captioning to reveal the creative process behind the work. Here, given the relative obscurity of the original, the lack of any additional clues to enable the public to recognize that the work was a parody contributed to a finding that permitting the use would be unfair.

In Canada, the traditional appreciation of fairness led Canadian courts to authorize uses copying unpublished works if the borrowing was acknowledged by the defendant. This is justified by a wish to contribute to a greater dissemination of the original should be set aside for parody uses.[346]

As outlined at the start of this chapter, a parody which relies upon a work which is unpublished, or is otherwise confidential, precludes the audience from identifying the borrowing as such. This is contrary to the rules of the parody genre, as traced throughout its historical developments.[347] Any would-be parody which the public fails to appreciate as being a reference to

an earlier work is not truly a parody.[348] Thus, it is not unreasonable that this kind of borrowing should fall beyond the scope of the parody exception. However, the specific means used to establish the required link should be a creative choice for the parodist to elect. On balance, the CJEU guidance in *Deckmyn* appears correct and arguably should be applicable beyond the EU jurisdiction.

4.4 Attribution of the identity of the parodist

Related to the question which we have just considered is whether courts should only permit parodies if the parodist is identified in the parody. Should courts require that parodists take responsibility for the expression they create? According to the CJEU, this should not be a condition for the parody exception to apply in copyright law.[349]

Since a parodist, via parody, is inevitably creating a new expression (whether original enough to surpass the protection threshold or not), potentially they will have an interest in being associated with their own expression. Indeed, we have seen that this may reinforce the parodic nature of their efforts by reducing the chance that the public will mistake the parody for the original work. If present, it may also contribute to the overall assessment of fairness. However, it seems that this should be another choice for the parodist to make, rather than being a mandatory requirement of law. After all, if copyright law protects works without requiring authors/right-holders to be identified with their work, it does not seem just to impose stricter conditions to control uses in which copyright might not even subsist. Thus, the CJEU was correct to reject this factor as being a mandatory condition for the parody exception in copyright law to apply. We shall return to consider this aspect in more detail in Chapter 6.[350]

5. Can Domestic Courts Adopt Additional Factors?

Previous sections analyzed the relevance of the ‘traditional’ fairness factors adopted in the judicial consideration of the parody exception, as well as evaluating the specific factors which have been established since a specific legislative parody exception has been introduced. However, both the arts and users’ habits are prone to constant development, and the speed of this has been greatly facilitated by the advent of new technologies and increasing use

of the internet. This final section considers whether national courts might introduce new factors and seek to adapt the parody exception to new kinds of uses.

In jurisdictions in which the fairness factors are developed in case law by the judiciary, such as the UK, Australia, and Canada, the system is sufficiently flexible that courts are open to the introduction of new aspects and considerations, generally pertaining to 'fairness', which will assist their determination of the lawfulness of the parody under review. This is already well established. Previously, for example, in *CCH*, the Canadian Supreme Court noted that it 'may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair'.[351] In doing so, the Canadian Court relied on an earlier UK case, *Sillitoe v. McGraw-Hill Book Co. (U.K.)*,[352] in which the court reviewed customary practices to establish whether the use complained of was for the purpose of criticism. Thus, we may reasonably expect courts to look to new and evolving industry practices to understand whether any particular use is a fair dealing.

Bruguière argues that even in France, courts can rely on best and fair practices within a sector to establish fairness.[353] Consideration of best practices, he argues, leads to the establishment of new fairness factors as is necessary within the framework of copyright exceptions to ensure that it adapts to retain its legitimacy in the eyes of the public. As we have seen, there is a similar approach adopted in the US and Canada.

In the US, where the fairness factors have been cemented in the US Copyright Act, the possibility remains open to add new factors into the statute.[354] This possibility could gain popularity in future parody cases. Indeed, the parody exception should be applied in a way which fosters the realization of its objectives.[355] The overview of national disputes which have reached the courts illustrates why the content of the parodic expression often results in a copyright infringement claim. It is understandable why right-holders and authors will try, for example, to prevent a parody which imports a sexual connotation into the original work or which is used in a political speech to convey a message which is contrary to their own beliefs or corporate brand message. We return to review the legitimacy of such concerns in the next chapter and again in Chapter 7.[356]

This is not to say that we should rely on human rights considerations in

every parody dispute, in which case we might jeopardize the copyright balance intended by legislators. Instead of brandishing a freedom of expression argument in every scenario, a better understanding of the relationship between freedom of expression and copyright leads to recourse to the proportionality principle well-known in human rights law in these exceptional borderline parody cases.[357]

6. Conclusion

The core of this chapter focused upon the requirements attached to the parody exception in national law, including the 'fairness factors'—the kind of considerations which are used to establish whether the use is 'fair'.

In section 2, we saw that the most important factor in a parody defence is the absence of confusion between the use and the protected work. An immediately perceivable distinction between the altered reproduction and the original is intrinsic to what we understand parody to be. True parodists do not want their expression to create confusion or to appropriate the original work. Rather, the medium of parody requires them to reproduce the protected content and distort it to some extent, thereby distancing the parody from the original. The intent is to create a new expression which conveys a different message to the public than the original.

In terms of the requirement that a parody is humorous, it was argued that this requirement is best appraised based on the parodist's own intent at the time the parody was created. Additionally, rather than establishing positive characteristics which are indicative of 'humour', it was argued that a negative approach is preferable. In other words, rather than enquiring whether any particular form of humour should be permitted under the exception, a better approach is to ascertain whether the parody results from a specific intent to harm the right-holder or the original work.

All the other factors studied constitute different ways to interrogate the parodist's intent. Therefore, no single factor ought to be decisive, and each will weigh differently depending on the circumstances of the case. Elevating an absence of confusion as primary filter and humour as secondary filter enables the specific nature of a parody to be legally recognized because it is from the distortion needed to satisfy this criterion that the humorous character can be derived.

The jurisdictional comparison identified distinctions between the

application of the parody exception in the countries considered. Nevertheless, based upon the global appreciation of factors which the national courts undertake, it does not seem that these differences will manifest to affect the scope of the exception to any significant extent. On the contrary, it appears that the different national provisions all aim to achieve the same result, albeit that in specific cases, different outcomes might arise because of the fact-intensive nature of the enquiry. The artificially linear analysis of the potentially relevant factors in this chapter has only served to reinforce why it is inherent in the question of fair dealing, fair use, or compliance with the rules of the genre, that an overall, contextual assessment of the use is required.

While US, Canadian, and Australian courts may be drawn to consider the same economics-driven factors[358] developed for fair use/dealing under other copyright exceptions, in the UK and France (as in other EU Member States), courts must 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 with their own legal tradition, but it does require courts to refrain from applying these factors beyond what is needed to determine whether these two requirements are satisfied. Therefore, considerations based on the parody's originality; the question of whether there are alternatives to the parodic dealing, requiring the creator of the parody and/or original to be acknowledged; or any competitive relationship between the parties should be set aside. The analysis of section 3 strongly suggests that none of these factors is pertinent to the *Deckmyn* requirements, and they are in fact more likely to hinder, rather than further, realization of the objective underlying this copyright exception.

Nevertheless, the variety of factors which are all potentially relevant in determining whether the parody exception should apply begs the question whether the InfoSoc Directive's harmonization 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 allow local factors to influence the outcome, for example, 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 the notion of a fair-minded person. These concepts are already well-developed in the jurisdictions considered in this book.

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[1] See Chapter 2, section 4.

[2] See Chapter 7, section1 for examples in music parodies; M Handler and D Rolph, 'A real pea souper: the panel case and the development of the fair dealing defence' (2003) 27 *Melbourne University Law Review* 381, 407–8.

[3] *UK: Hubbard v. Vosper* [1972] 2 QB 84, CA (Civ Div) (hereafter *Hubbard*), 94; *Australia: TCN Channel Nine v. Network Ten* [2001] FCA 108 (trial) (hereafter *TCN*), (Conti J.). The Full Court missed the opportunity to make these authoritative by not examining them. Yet Hely J. notes them without endorsing or rejecting them [438]–[439]; and *Canada: CCH Canadian Ltd v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 (hereafter *CCH*), [53].

[4] P Torremans, 'The perspective of the introduction of a European fair use clause' in *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer, 2012) 319–37. Yet these 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 Parliament. However, many commentators extend the application of the factors. J McCutcheon, 'The new defense of parody or satire under Australian copyright law' (2008) 2 *IPQ* 163, 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] and [6.44]; [4.09] and [4.21]; CLRC, Parliament of Australia, *Copyright and Contract* (2002), [3.39] and [3.37]; Handler and Rolph (n 2) 15; Parliament of Australia, Explanatory Memorandum to the Copyright Amendment Bill 1986, [25].

[5] J Boccara, *La fausse parodie* (Université Panthéon-Assas Paris II, 2007–2008) 25; *CCH* (n 3) [55].

[6] *UK: Hubbard* (n 3) 94; *Beloff v. Pressdram Ltd* [1973] 1 All ER 241 (hereafter *Beloff*), [59]; *Canada: United Airlines, Inc. v. Jeremy Cooperstock* [2017] FC 616 (hereafter *United Airlines*), [106]; *CCH* (n 3) [50]; *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (1996) 71 C.P.R. (3d) 348 (hereafter *Michelin*), [59]; *Zamacois v. Douville* [1943] 3 Fox Pat. C. 44 (C. Échiquier) (hereafter *Zamacois*), 68–9; *Australia: TCN* (n 3) [49]; *US*: see first factor, the purpose and character of the use, before turning to the assessment of the three other factors.

[7] As the purpose has been dealt with in Chapter 1, it will not be covered again in this chapter. See Chapter 1, section 5.

[8] See Chapter 3, section 2.2.2 for Canada and the approach endorsed in *CCH* (n 3); see *Pokemon Company International, Inc. v. Redbubble Ltd* [2017] FCA 1541 (hereafter *Pokemon*), [70] for Australia.

[9] *France*: V C Colombet, *Précis Dalloz de propriété littéraire et artistique* (9th edn, Dalloz, 1999) n °389; Durrande, Rép. pén. Dalloz, v° Propriété littéraire et artistique, n°58.

[10] To a certain extent, it could be argued that the Canadian Supreme Court in *CCH* intended to relegate the assessment of purpose to the second step of the enquiry, when determining the first fairness factor. See G d'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use* (2007) 3(4) CLPE Research Paper 28/2007, 6. However, this approach was not followed in *United Airlines* (n 6) where the Canadian Federal Court reverted to a

strict traditional approach to fair dealing. See [106]–[140].

[11] *UK: Hyde Park Residence Ltd v. Yelland* [2000] 3 WLR 215 CA (hereafter *Hyde Park*), [38]; *Pro Sieben Media AG v. Carlton UK Television* [1999] 1 WLR 605 (hereafter *Pro Sieben*), [467]; *Banier v. News Group Newspapers Ltd* [1997] FSR 812 (hereafter *Banier*), [815]; *Beloff* (n 6) [61]; *Hubbard* (n 3) 94; *France*: the well-established concept of 'pater familias' surrounds the formula; B Galopin, *Les exceptions à usage public en droit d'auteur* (IRPI, 2012) 305, esp. 312; B Mouffe, *Le droit à l'humour* (Larcier, 2011) 317; C Castets-Renard, *Notions à contenu variable et droit d'auteur* (L'Harmattan, 2004); Trib. Corr. Paris, 6 février 1834. Gaz. Trib. 8 février 1834; *Australia: TCN Channel Nine Pty Ltd v. Network Ten Pty Limited* [2002] FCAFC 146, [96]; *TCN* (n 3) [53]; *Canada: CCH* (n 3) [52]; G D'Agostino, '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, 327; N Tamaro, *Loi sur le droit d'auteur: Texte annoté* (4th edn, Toronto, Éditions Carswell, 1998) 8; *Michelin* (n 6) [70].

[12] *Campbell v. Acuff-Rose Music Inc.* 510 US 569 (1994) (hereafter *Campbell*), [579] citing *Folsom v. Marsh*, 9 F.Cas. 342 (hereafter *Folsom*), [348] (C.C.D. Mass. 1841).

[13] *France*: Boccara (n 5) 25; *UK: Hubbard* (n 3) 94; restated by *Sillitoe v. McGraw-Hill* [1983] FSR 545 (hereafter *Sillitoe*), [563]; *BBC v. BSB* [1992] Ch 141 (hereafter *BSB*), [149]; *Banier* (n 11) 11; *Pro Sieben* (n 11) [613]; *Hyde Park* (n 11) [21]; *Canada: CCH* (n 3) [52]–[53]; *Entertainment Software Association of Canada v. SOCAN* [2012] S.C.C. 34 (hereafter *SOCAN*), [32]; *Alberta v. Canadian Copyright Licensing Agency* [2012] 2 S.C.R. 326, [22] (hereafter *Alberta*), [19]; *Australia: TCN* (n 3); *TCN Channel Nine v. Network Ten* [2002] 55 IPR 112 (hereafter *TCN appeal*), [110], (Sundberg J.), [2] and (Finkelstein J.), [16]; *De Garis v. Neville Jeffresse Pidler* (1990) 37 FCR 99 (hereafter *De Garis*), [94] and [109]–[110]; *University of New South Wales v. Moorhouse* (1975) 133 CLR 1, [12]; *US*: *Campbell* (n 12) [577]–[578].

[14] *US: Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) (hereafter *Sony*); *Campbell* (n 12) [578]; *Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F.Supp. 1559 (S.D. Cal. 1966) (hereafter *Seuss I*), 1399 (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, [1399] (9th Cir. 1997) (hereafter *Seuss II*).

[15] 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 (n 2) 418; *Australia: TCN* appeal (n 13) [110], (Sundberg J.), [2] and (Finkelstein J.), [16].

[16] *France*: L. 122-5 IPC 'divulguer'; TGI Paris 9 mars 2017, *Bauret v. Koons*, RG n°15/01086 (hereafter *Les Enfants*) (where the application of the parody exception was denied partly as the original work was not known by the French public); *UK*: H.M. Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012) 14; J Haynes, '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; A Sims, 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' (2010) 2 *IPQ* 192, 201; R Burrell, 'Reining in copyright law: is fair use the answer?' (2001) 4 *IPQ* 361; *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142 (hereafter *Ashdown*), [194]; *Hyde Park* (n 11) [20]; *British Oxygen v. Liquid Air* [1925] 1 Ch 383 53, 393; *Hubbard* (n 3) 94–5; *Beloff* (n 6) [61]; *Canada*: D'Agostino (n 11) 323; *CCH* (n 3) [58]; it must be noted that several decisions weighed the use of unpublished works in favour of the application of fair dealing given that this contributes to the wider dissemination of cultural works (see section 4.3); *Australia*: M Sainsbury, 'Parody, satire and copyright infringement: the latest addition to Australian fair dealing law' (2007) 12 *MALR* 292, 313. It must be noted that sometimes the reproduction of an unpublished work will tilt the balance in favour of fairness if it is accompanied by an acknowledgment as it contributes to further dissemination of cultural works; *US: Campbell* (n 12) [586]; repeated in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (hereafter *Suntrust*); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th

Cir. 2012) (hereafter *Brownmark*); *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F.Supp.2d 962 (C.D. Cal. 2012) (hereafter *Northland*); *TCA Television Corp. v. McCollum*, No 15 Civ. 4325 (S.D.N.Y. Dec. 17, 2015).

[17] See Chapter 7, section 2.

[18] *United Airlines* (n 6).

[19] See Chapter 1, section 5.5.

[20] Although D'Agostino argues that *Ashdown* (n 16) may have introduced the following hierarchy from most important to least important: (1) market substitution; (2) nature of the work; (3) amount reproduced. See D'Agostino (n 10) 33.

[21] However, the weight of each factor can arguably be determined by its relationship with freedom of expression. See Chapter 5.

[22] Arguably these two first factors will increasingly gain importance in the application of this specific exception.

[23] See sections 2.1.1 and 2.1.2.

[24] Ibid.

[25] *Hyde Park* (n 11) [36]; *Pro Sieben* (n 11) [614]; *Time Warner v. Channel Four Television* [1994] EMLR 1 (hereafter *Time Warner*), [15]; *Beloff* (n 6) [61]; *Hubbard* (n 3) 94.

[26] *Pro Sieben* (n 11) [614].

[27] *Time Warner* (n 25) [468]–[469].

[28] See Chapter 1, section 5.4.

[29] *TCN* appeal (n 13) [97]: Hely J. citing *Hyde Park* (n 11) and *Pro Sieben* (n 11) [614].

[30] *TCN* appeal (n 13) [17].

[31] P Ruddock, 'Protecting precious parody', *Daily Telegraph*, 30 November 2006.

[32] McCutcheon (n 4) 173. To some extent, the parodist's intent was considered in the recent *Pokemon* case when determining the purpose of the use. Here Talbot J. noted that although some uses could be found humorous or satirical, nothing in the evidence demonstrated the defendant's intention to create these works for the purpose of parody. *Pokemon* (n 8) [70].

[33] *Michelin* (n 6).

[34] Ibid, [70].

[35] 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 he had actively removed the name of the student from the paper to substitute with his own. This evidence of malicious intent could not support fair dealing. *Boudreau v. Lin* (1997) 150 D.L.R. (4th) 324, [68].

[36] See the facts in Chapter 2, section 2.6; *Productions Avanti Ciné-Vidéo Inc. v. Favreau* (1999) 177 D.L.R. (4th) 129 (hereafter *La Petite Vie*), [57]–[58].

[37] *Alberta* (n 13) [23].

[38] *CCH* (n 3).

[39] *CCH* (n 3) [54].

[40] *CCH* (n 3) [66].

[41] *United Airlines* (n 6).

[42] Ibid, [122].

[43] Ibid, [124].

[44] Ibid.

[45] Though it is somewhat surprising that the Canadian court first decides that the use is humoristic

and then decides that it is not. This is somewhat confusing and could perhaps be avoided by adopting a more holistic approach whereby fairness factors help in deciding whether the use was for the purpose of parody.

[46] *Campbell* (n 12).

[47] Essentially, if the defendant intends to give a whole new meaning to the work, it is more likely to be fair use. *Galvin v. Ill. Republican Party*, 130 F.Supp.3d 1187 (N.D. Ill. Sept. 9, 2015) (hereafter *Galvin*).

[48] *Irving et al v. E.C. Publications, Inc.* 329 F.2d 541 (2d Cir. 1964) (hereafter *Irving*) noted: 'our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here' referring to *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 47 L.Ed. 460 (1903). Confirmed in *Campbell* (n 12) [582]–[583].

[49] Here, US courts adopt a liberal approach, which can be contrasted with their French counterparts. As recently held by the Tribunal of First Instance of Paris, the creation of a new expression does not suffice to trigger the application of the parody exception. *Les Enfants* (n 16). In contrast, fair use was found in a parody of an educational abortion campaign video for an anti-abortion campaign: *Northland* (n 13).

[50] *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, [253 n.I] (2d Cir. 1980) (hereafter *Elsmere*).

[51] *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) (hereafter *Air Pirates*).

[52] *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (hereafter *Wilson*).

[53] J N Schneider, 'Parody and the fair use defense: the best way to practice safe sex with all your favorite characters' (2016) 81 *Brook. L. Rev*. 1777.

[54] TGI Paris, 13 février 2001, *SNC Prisma Presse & EURL Femme c/ Monsieur V*, N RG 00/16766; Galopin (n 11) 305.

[55] Confirmed in *Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn*), [20] including mockery.

[56] TGI Evry, 9 juillet 2009, RG n°09/02410 confirmed Paris, 18 février 2011, RG 09/19272, Propr. Int. 2011 n°39 p. 187 (hereafter *Saint-Tin*); Versailles, 17 septembre 2009, N°RG: 06/11732; TGI Nanterre, 1ère ch., 22/05/2008, n°06/11732; Paris, 4e ch. B, 13/10/2006, D.E.; TGI Paris, 7 octobre 1992, *affaire Faizant*, RIDA, janvier 1993, 222; TGI Clermont Ferrand, *Ets Michelin c/ CFDT*, 27 octobre 1993, n°848/01, inédit; P El Khoury, *Les exceptions au droit d'auteur* (thèse Montpellier, 2007) 358.

[57] The *Faizant* case was reversed on appeal, Paris, 11 mai 1993, RIDA, juillet 1993, 340; *Saint-Tin* (n 56); TGI Paris, 31 octobre 2007, *Coco Mademoiselle*; Cass., 4 février 2002, *La Bicyclette Bleue*; appeal of TGI Clermont Ferrand, *Ets Michelin c/ CFDT*, Riom, 15 septembre 1994; TGI Paris, 5 janvier 1978 speaking of 'grossissement burlesque' or 'imitation burlesque' (TGI Paris, 14 mai 1992; TGI Paris 9 janvier 1970) or 'travestissement comique' (Cass., 12 janvier 1988, RIDA, n°137, 98 (hereafter *Douces Transes*)).

[58] TGI Paris, 3e ch., 1 avril 1987, cah. Dr. d'auteur 1988, n°1, 16.

[59] Paris, 14e ch., 22 mai 2002, 2002/00949 confirmed by Cass., 2e ch. Civ., 19 octobre 2006, n°05-13489. Interestingly, this decision was decided under trade mark law where there is no parody exception to date. See S Jacques, 'A parody exception: why trade mark owners should get the joke' (2016) 38(8) *EIPR* 471, 477.

[60] *Faizant* (n 56) 222, which refused the application of the parody exception, overturned on appeal, Paris, 11 mai 1993, RIDA, juillet 1993, 340.

[61] The humorous intent stems from the comic allusions, word games, puns, and additional turnover

cues which enable the reader to recognize and enjoy the allusions (p. 18). *Saint-Tin* (n 56).

[62] TGI Paris, 3 janvier 1978, D. 1979, p. 99 obs. Desbois (hereafter *Tarzoon*).

[63] Trib. Comm Seine, 26 juin 1934, Gaz. Pal. 1934. 2. 594.

[64] TGI Paris, 3e ch., 29 novembre 2000: RIDA, mars 2001, p. 377.

[65] TGI Paris, 4 juillet 2001, *Société Compagnie Gervais Danone et Société Groupe Danone v. Olivier M., Réseau Voltaire et autres*, www.legalis.net, upheld on appeal, Paris, 30 avril 2003.

[66] Paris, 4e ch., 21 juin 1988: RIDA, avril 1988, p. 304 after referral from Cass. 1ère Civ., 27 mars 1990: JCP G. 1990, IV, p. 203.

[67] TGI Paris, 9 janvier 1970, RIDA, février 1970, p. 172.

[68] Paris, 17 octobre 1980 D. 1982, somm. 42.

[69] TGI Nanterre, 1ère ch., 22 mai 2008, n°06/11732, *Garcia c/ Sté Moulinsart* confirmed by Versailles 17 septembre 2009.

[70] Similar reasoning was already adopted in *La Bicyclette Bleue*, a 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 février 1992, n°90-21630; Dalloz, 2 avril 1992, n°14, p. 182, note Gautier; Paris, 21 novembre 1990, in D. 1991, p. 85, obs. Gautier. *Le Monde*, 23 novembre 1990; analysis can be found in A Strowel, 'La parodie selon le droit d'auteur et la théorie littéraire' (1991) 26 *RIEJ* 44, 47 (discussing the court of first instance's decision). This example demonstrates that transformativeness can justify more uses than uses permissible under the parody exception.

[71] *Les Enfants* (n 16).

[72] Ibid; TGI in *Saint-Tin* (n 56); TGI Paris, 3e ch., 1 avril 1987, cah. Dr. d'auteur 1988, n°1, p. 16; Trib. Civ. Seine, 12 juin 1879, Ann. propr. ind. 1879, p. 239; Trib. Civ. Seine, 23 février 1872, Ann. propr. ind. 1873, p. 162.

[73] P Bloch, *Image et droit* (L'Harmattan, 2002) 129.

[74] See n 65; *Douces Transes* (n 57); P-Y Gautier, 'La bicyclette bleue n'est pas une contrefaçon d'autant en emporte le vent' (1991) *Recueil Dalloz* 85.

[75] *Tarzoon* (n 62).

[76] See Chapter 5, section 4.1.2.

[77] *Saint-Tin* (n 56); TGI Paris, 31 octobre 2007, *coco mademoiselle*; Paris, 13 septembre 2005; *Douces Transes* (n 57); A Françon, 'Questions de droit d'auteur relatives aux parodies et productions similaires' (1988) 6 *Droit d'auteur* 302, 304.

[78] *Saint-Tin* (n 56); TGI Paris, 31 octobre 2007, *coco mademoiselle*; Cass, 4 février 2002, *La Bicyclette Bleue*; TGI Paris, 3e ch., 29 novembre 2000: RIDA, mars 2001, p. 377; Paris, 3e ch., 1 avril 1987, cah. Dr. d'auteur 1988, n°1, p. 16; *Tarzoon* (n 62).

[79] *Saint-Tin* (n 56); TGI Paris, 31 octobre 2007, *coco mademoiselle*; Paris, 11 mai 1993, RIDA, juillet 1993, p. 340 nevertheless negatively criticized by Françon, obs. sous Paris, 11 mai 1993, RTDcom., 1993, p. 507.

[80] *Saint-Tin* (n 56); TGI Paris, 31 octobre 2007, *coco mademoiselle*; TGI Paris, 23 mars 2001, *jeboycottedanone.com* CCE juillet–août 2001, Comm. n°70, note Huet; TGI Paris, 8 juillet 2002 *Esso c/ Greenpeace* (référé) CCE nov. 2002, Comm. n°140, obs. Caron et Linant de Bellefonds overturned in Paris 26 février 2003, *SA Société des participations du Commissariat à énergie atomique c/ Association Greenpeace France/Internet* FR CCE avril 2003, Comm. n°38, prop. Int. juillet 2003, n°8, p. 322, obs. Lucas, D. 2003, p. 1831, n. Edelman. Accepted in Riom, 15 septembre 1994, D. 1995, p.

429, note Edelman; Cass., 21 février 1995, *Reynolds Tobacco*; Versailles, 17 mars 1994, *Marlboro*, D. 1995; RIDA, février 1995, p. 350; *Tarzoon* (n 62).

[81] TGI Paris, 14 mai 1992, RIDA, octobre 1992, p. 174; Mouffe (n 11) 290 and 292; A Berenboom, 'La parodie' in E Cornu (ed.), *Bande dessinée et droit d'auteur* (Larcier, 2009) 115.

[82] Versailles, 17 mars 1994, *Marlboro*, D. 1995; E Delfour, *L'imitation créatrice* (University of Toulouse, 2000) 74; Paris 11 mai 1993, RIDA, juillet 1993, p. 340; TGI Paris, 17 octobre 1984, D. 1985, IR p. 324, obs. Lindon; Bercheron, art. 1382–1386 Civil Code, fasc. 133-1, n°66; Strowel (n 70) 48.

[83] Strowel (n 70) 48; Françon (n 77) 304.

[84] *Douces Transes* (n 57).

[85] Galopin (n 11) 307; Mouffe (n 11) 314; Berenboom (n 81) 116; X L de Bellefonds, *Droits d'auteur et droits voisins* (Dalloz, 2002) 217; M Isgour, 'La satire: réflexions sur le "droit à l'humour" ' (2000) 1&2 *A&M* 59–68; Strowel (n 70) 48; Françon (n 77) 304.

[86] *Douces Transes* (n 57); TGI Paris, 9 janvier 1970, JCP, 1970, II, 16645.

[87] Cass., 2 mars 1997, JCP II jurispr. N°5, 28 janvier 1998, p. 185; Paris, 28 février 1995, légipresse, 1995, n°8125, I p. 92; TGI Paris 12 janvier 1993, légipresse n°108 II p. 11; TGI Paris 26 février 1992 légipresse n°96 1992 p. 127; Cass, 13 février 1992, légipresse, n°93, p. 87; *Douces Transes* (n 57); Paris 19 juin 1987, JCP 1988, II, n°20957; TGI Paris (ref) 24 février 1975, D. 1975, jurispr, p. 438, note Lindon.

[88] TGI Paris, *Société Moulinsart, Mme Fanny R. c/ Eric J.*, 11 juin 2004, available on www.legalis.net; Cass., *Exocom c/ Boomerang*, 2003; TGI Paris, *OneTelFuck*, 29 mai 2001 available at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=319 (access date: 1 June 2018).

[89] *Société Moulinsart* (n 88).

[90] See http://www.artnet.com/artists/ole-ahlberg/ (access date: 1 June 2018).

[91] This example can be compared to *Air Pirates* (n 51) mentioned in section 3.1.

[92] See Chapter 5.

[93] See Chapter 2.

[94] 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 ridiculous and belittling'. Cass. 1ère ch. Civ., 10 septembre 2014, n°13-14.629 on appeal from Paris (Pole 5 ch. 2), 21 septembre 2012. This decision is criticized by Pollaud-Dulian, RTD Com. 2014, p. 815.

[95] Bloch (n 73) 131.

[96] Though the Canadian decision in *United Airlines* (n 6) demonstrates the increasing importance of this criterion in Canada, [123] and [138].

[97] *Deckmyn* (n 55) [20].

[98] *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601.

[99] Ibid, [613]; confirmed in *Hubbard* (n 3) 94.

[100] See n 13.

[101] *Air Pirates* (n 51).

[102] Sainsbury (n 16) 311–12; M Sainsbury, 'Parody, satire, honour and reputation: the interplay between economic and moral rights' (2007) 18 *AIPJ* 149, 154.

[103] *CCH* (n 3) [54].

[104] *SOCAN* (n 13) [33].

[105] Therefore, the entire reproduction of the original work generally leads to the finding of confusion. See section 2.3.

[106] *United Airlines* (n 6).

[107] Ibid, [123].

[108] Arguably, this case implies that the threshold for absence of confusion for parody as established in *Deckmyn* is lower than the traditional appreciation of confusion in common law jurisdictions. *Deckmyn* (n 55).

[109] See Chapter 1, section 1.

[110] *France: Saint-Tin* (n 56); Paris, *Paul B c/ Moulinsart*, 13 septembre 2005 at www.legalis.net; référé 11 juin 2004; Paris (4e ch. sect. b) 17 janvier 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 février 2002; TGI Paris, *Femme*, 13 février 2001; TGI Paris, 29 novembre 2000, RIDA, juillet 2001, n°189 p. 377; TGI Paris 1 février 2001, Exp. July 2001, p.275, note Herest & chron. Kéréver, RIDA, 2001, n°190, p. 379; ass. plen. 12 juillet 2000, JCP 2000, II 10439; TGI Paris, 24 mars 2000, légipresse 2000, I p. 71 (hereafter *Calimero*); Paris 11 mai 1993, RIDA, 1993, n°157, p. 340, RTD com. 1993. 510, obs. Françon; TGI Paris, 16 février 1993, Dalloz 1994, somm., p. 195, obs. Bigot; TGI Paris, 7 octobre 1992, RIDA, 1993, n°155, p. 222, obs. Kéréver; TGI Paris, 9 janvier 1992, Dalloz 1994, somm., p. 195 obs. Bigot; TGI Paris, 3e ch., 30 octobre 1991, SPE c/CAP, RDPI 1992, n°45, p. 98; Cass. ch. Civ 1ère, 27 mars 1990, Bull. n°75; TGI Paris, 17 mars 1988, Gaz. Pal. 1988, 2 somm., p. 360; *Douces Transes* (n 57); Paris, 14 février 1980, D. 1981, somm. 86, obs. Colombet; *Tarzoon* (n 62); Paris 20 décembre 1977, TGI Paris, 19 janvier 1977, RIDA, 1977, n°92, pp. 167–9 (hereafter *Peanuts*); Trib. Comm. Seine, 26 août 1886, Ann. 1889, p. 352; Trib. Civ. Seine, 12 juin 1879, Ann. propr. ind. 1879, p. 239; *US: Campbell* (n 12).

[111] *Douces Transes* (n 57); repeated in TGI Paris, 29 novembre 2000, RIDA, juillet 2001, n°189 p. 377 (change of lyrics while keeping the tune for a movie scene).

[112] *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 septembre 2002, Dalloz 2002 A.J., p. 3208.

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

[114] *Saint-Tin* (n 56).

[115] Ibid.

[116] For example, Tintin becomes 'Saint-Tin' and Milou becomes 'Lou'.

[117] Paris, *Paul B c/ Moulinsart*, 13 septembre 2005 at www.legalis.net.

[118] Hence, fan fiction works are unlikely to be covered by the exception unless these result in a clear parody.

[119] Confirmed in TGI Paris, 11 mai 1988, *Fanny Vlamynck c/ Wolf*, LPA 17 janvier 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 never have put them. Françon (n 77) 303; and as decided in *Peanuts* (n 110); *Tarzoon* (n 62).

[120] *Air Pirates* (n 51).

[121] *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052, 105 S. Ct. 1753, 84 L. Ed. 2d 817 (1985).

[122] *Campbell* (n 12) [582]: 'The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.'

[123] *DC Comics Inc. v. Crazy Eddie, Inc.*, No 79 Civ. 3786-PNL (S.D.N.Y. 1979) (hereafter *Crazy Eddie*).

[124] Ibid, per Leval J.

[125] *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979), [14].

[126] *Seuss II* (n 14) [1400]; *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (hereafter *Mattel*).

[127] 11 F.Supp.2d 1179 (C.D. Cal. 1998) (hereafter *Miramax*).

[128] Ibid, [36].

[129] *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No 2:15-cv-09938-RGK-E (C.D. Cal. 2017) (hereafter *Axanar*).

[130] *Campbell* (n 12) [588].

[131] 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* (n 55) [21].

[132] TGI Paris, 3e ch., sect. 3, 5 mars 2008, RIDA, 2008, n°217, pp. 338–42; *Douces Transes* (n 57); Trib. Comm. Seine, 26 août 1886, Ann. 1889, p. 352; Trib. Civ. Seine, 12 juin 1879, Ann. propr. ind. 1879, p. 239.

[133] *Les Enfants* (n 16); *Saint-Tin* (n 56); TGI Paris, 3 mars 2008, *Fort Boyard*; TGI Paris, *Agence France Presse (et autres) c/ M. Ivan Callot, Sarl Magnitude*, 13 février 2002; *Calimero* (n 110); Paris, 11 mai 1993, RIDA, juillet 1993, p. 340; TGI Paris, 7 octobre 1992; TGI Paris, 14 mai 1992, RIDA, octobre 1992, p. 174; Cass., ch. Civ. 1ère, 27 mars 1990, Bull. N°75; Paris, 4e ch., 27 novembre 1990, *aff. Jacobs Suchard Franc c/ Antenne 2*, inédit (cited in Mouffe (n 11) 458); Paris, 21 juin 1988, RIDA, octobre 1988, p. 304; *Douces Transes* (n 57); *Tarzoon* (n 62); *Peanuts* (n 110).

[134] *Douces Transes* (n 57).

[135] Recent French decisions appear to elevate the well-known character of the earlier work as a requirement for 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, section 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. As opposed to the US where fair use was found in relation to parodies of little-known works (e.g. cookie stamp designs), implicitly recognizing that the object of a parody need not be well-known. *Rycraft, Incorporated v. Ribble Corporation*, No 97-1573-KI, 1999 WL 375610, [8]–[12], 1999 U.S. Dist. LEXIS 6052, [24]–[31] (D. Or. 1999) (hereafter *Rycraft*). This possibility was already noted in *Kane v. Comedy Partners*, 68 U.S.P.Q.2d (BNA) 1748, 2003 WL [975] 22383387, [1], 2003 U.S. Dist. LEXIS 18513, [1] (S.D.N.Y. 2003), aff'd, 98 Fed.Appx. 73 (2d Cir. 2004) and confirmed in *Northland* (n 13). Although in *Campbell*, the Supreme Court also held that parodies 'almost invariably copy publicly known, expressive works' *Campbell* (n 12) [586].

[136] 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. See, for example, *Les Enfants* (n 16) 19, where the French court derived confusion from the lack of publicity as to where the parodist's inspiration was derived from.

[137] Paris, 11 mai 1993, RIDA, juillet 1993, p. 340.

[138] TGI Paris, ordonnance de référé du 23 avril 2001.

[139] Cass. Civ. I, 27 mars 1990, Bull., I n°75, *Madame Jacques Brel c/ Rpr* (hereafter *Brel*).

[140] See *Deckmyn* (n 55), where 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 recognize that they are not being exposed to the original.

[141] This has been expressly noted in a French decision of 6 February 1834 (Trib. Corr. of Paris) where the judge adopted a very liberal approach by stating that as with criticism, parodies should not be considered as infringing copyright unless it amounts to unlawful use. Accordingly, the reproduction of copyright-protected elements should not result in riding on the coat-tails of somebody else's success. Court of Appeal in *Saint-Tin* (n 56).

[142] Whilst in France, the amount will be considered with the presence of acknowledgement of the original to determine whether there is confusion.

*This example borrows from a work where copyright protection has lapsed but the questions raised remain valid.

[143] *University of London Press Ltd v. University Tutorial Press Ltd* (n 98) [608]–[614].

[144] *Hyde Park* (n 11) [23]; *Ashdown* (n 16) [153]; *Pro Sieben* (n 11) [613]; *Time Warner* (n 25) [12]–[16]; *Associated Newspapers Group Plc v. News Group Newspapers Ltd* [1986] RPC 515, p. 519; *Hubbard* (n 3) 94; *Ladbroke Ltd v. William Hill Ltd* [1964] 1 All ER 465, 469; *Johnstone v. Bernard* [1938] 2 All ER 37 (hereafter *Johnstone*); *BBC v. Wireless League Gazette Publishing Co* [1926] 1 Ch 433, [439] (hereafter *BBC*).

[145] *Johnstone* (n 144).

[146] *Hyde Park* (n 11) [28] and [32]; *Pro Sieben* (n 11) [613]–[614]; *BBC* (n 144).

[147] *Hubbard* (n 3) [94] and [98].

[148] H.M. Government, *Modernising Copyright* 14.

[149] *Zamacois* (n 6); D'Agostino (n 11) 321.

[150] (1997) 26 O.R. (3d) 308, [211].

[151] Ibid.

[152] *CCH* (n 3) [56] citing *Hubbard* (n 3), also mentioned in *Michelin* (n 6) [65]; *SOCAN* (n 13) [41]; *Alberta* (n 13).

[153] Based on these decisions from the Supreme Court, the federal court was wrong to decide otherwise in *United Airlines* (n 6) [129]–[130]. For completeness, it is argued that the parodies which fall within the non-commercial UGC exception are not limited to a particular amount of borrowing. Indeed, section 29.21 CA 1985 does not enunciate this factor as a condition for the application of the exception.

[154] N Suzor, 'Where the bloody hell does parody fit in Australian copyright law?' (2008) 13 *MALR* 243.

[155] *TCN* appeal (n 13) [434]; *TCN* (n 3).

[156] *Beloff* (n 6).

[157] *TCN* (n 3) [49]–[50].

[158] *Pro Sieben* (n 11).

[159] *Hyde Park* (n 11) [38].

[160] *TCN* appeal (n 13) [276].

[161] McCutcheon (n 4) 185; Suzor (n 154) 243; Handler and Rolph (n 2) 403.

[162] The original work was created before copyright, but the reasoning remains valid for parodies of copyright-protected work.

[163] Ibid.

[164] *Folsom* (n 12) [348].

[165] *Air Pirates* (n 51).

[166] Ibid, [756].

[167] Ibid, [758].

[168] *Seuss II* (n 14) [1400]. We can appreciate how difficult it might be to apply this factor without imposing an artistic judgement on the user.

[169] *Elsmere* (n 50).

[170] Ibid, [253, n 1]; also in *Mattel* (n 126) [804].

[171] 794 F.2d 432, 438 (9th Cir. 1986) (hereafter *Fisher*).

[172] As in France, there seems to be a possibility to rely on fair practices commonly agreed upon in a particular art field to determine whether a particular use is fair.

[173] *Fisher* (n 172) [439] repeated in *Northland* (n 13) [980].

[174] *Sony* (n 14) [449]–[450]. This is not a parody case but is concerned with home videotaping of television programmes.

[175] *Campbell* (n 12) [587]–[588].

[176] *Campbell* (n 12) [589]. Therefore, the third factor also overlaps to some extent with the fourth fair use factor. *Campbell* (n 12) [587].

[177] 733 F.Supp.2d 1144 (C.D. Cal. 2010) (hereafter *Henley*).

[178] Ibid, [1160].

[179] Ibid, [1161]: 'Indeed, the Defendants' appropriation approaches or exceeds the amounts borrowed in many cases where courts rejected the fair use defense.' See e.g. *Seuss II* (n 14) [1402]–[1403] (defendants copied visual elements of main character and rhyme scheme but substantially changed language); *Wilson* (n 52) [185] (defendants merely substituted dirty lyrics into song); *Air Pirates* (n 51) (defendants copied visual elements of animated characters rather than evoking them); *Miramax* (n 127) [1185]–[1186] (defendants copied the 'total "look and feel" ' of plaintiff's poster and merely substituted character).

[180] *Fisher* (n 172) [439]; repeated in *Northland* (n 13) [981].

[181] Although in *New Line Cinema Corp. v. Bertlesman Music Group., Inc.*, the court eventually decided that for the purposes of the use, the defendants had copied more than necessary. Here, the defendants' use consisted of a song and music video referring to the plaintiffs' movies by reproducing part of the plot and its protagonists. 693 F.Supp. 1517 (S.D.N.Y. 1988) (hereafter *Bertlesman*).

[182] *Irving* (n 48) where Metzner J. notes that 'the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial" taking, if that standard is not to be woodenly applied'.

[183] *Air Pirates* (n 51).

[184] *Fisher* (n 172) [439]; *Suntrust* (n 16); *Air Pirates* (n 51) [756] (near-verbatim copying of Disney characters impermissible) or *Axanar* (n 129) (each scene conjured up with *Star Trek*); *Rycraft* (n 135) [28] (near-verbatim copying of cookie stamp sheets permitted despite the original being little known).

[185] See n 173.

[186] *Northland* (n 13).

[187] This case can be compared with the controversial decision in *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), aff'd by an equally divided court, 356 U.S. 43, 78 S.Ct. 667, 2 L. Ed.2d 583 (1958) where the use was not permitted and *Columbia Pictures Corp. v. National Broadcasting Co.*, 137

F.Supp. 348 (S.D. Cal. 1955) where the parody exception was successfully invoked.

[188] *Northland* (n 13) [981].

[189] Paris, 1ère ch., 20 décembre 1977, Ann. propr. ind. 1979, p. 84.

[190] See section 2.2.

[191] A Lucas, *Fasc. 1248: Droits des auteurs.—Droits patrimoniaux.—Exceptions au droit exclusif* (2013) Jurisclasseur, [44]; Mouffe (n 11) 296; El Khoury (n 56) 69; Strowel (n 70) 48.

[192] A Bertrand, 'Exceptions à la protection en matière de droit d'auteur qui figurent au CPI' in *Droit d'auteur* (Dalloz, 2012) 350; Dalloz, *Exception au droit d'exploitation* (2006) 9; D Voorhoof, 'Freedom of expression, parody, copyright and trademarks', in X., Proceedings of the ALAI Congress, 13–17 June 2001 on Adjuncts and Alternatives to Copyright, Columbia University, New York, ALAI-USA, 2002, 636–49.; Dalloz, 'La parodie ne saurait justifier la reproduction intégrale ou quasi intégrale de l'oeuvre originale' (1991) *Recueil Dalloz* 35; Françon (n 77) 303.

[193] Paris, 4e ch., 27 novembre 1990, *Suchard c/ Antenne* 2, D. 1991, IR 35.

[194] See nn 192 and 193.

[195] See section 2.2. Cass., ch. Civ. I, 27 mars 1990, Bull., I n°75, *Mme Jacques Brel c/ Rpr*.

[196] *Douces Transes* (n 57).

[197] TGI Paris, *Femme*, 13 février 2001, available at www.legalis.net.

[198] See section 2.2.

[199] Here, the author believes that the Canadian Federal Court rushed in its assessment of the amount copied in *United Airlines* (n 6) [128]–[130].

[200] B Mee, 'Laughing matters: parody and satire in Australian copyright law' (2002) 20 *Journal of Law, Information and Science* 55, 82.

[201] As a reminder, this factor has two limbs: (1) transformative use, (2) commerciality.

[202] 471 U.S. 539 (1985) (hereafter *Harper*).

[203] Ibid, [562]; repeated in *Blanch v. Koons*, 467 F.3d (hereafter *Blanch*), [253].

[204] Ibid, quoting *Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968). See *Hill v. Whalen & Martell, Inc.*, 220 F.359 (S.D.N.Y. 1914) where the parody defence was invoked in bad faith and, therefore, rejected. Similarly, in *Wilen v. Alt. Media Net, Inc.*, bad faith derived from the attempt to justify the removal of the copyright notice from the copyright-protected work as parody use. No 03CIV2524 (RMB) (JCF) (S.D.N.Y. 2005).

[205] *Fisher* (n 172).

[206] *Suntrust* (n 16) [1274].

[207] Ibid, [1275]–[1277].

[208] *Mattel* (n 126).

[209] At [49]–[50]. See also section 3.1.

[210] *Northland* (n 13).

[211] Ibid, [979].

[212] Ibid.

[213] Ibid, [982].

[214] *Brownmark* (n 16).

[215] S Jacques, C Garstka, M Hviid, and J Street, 'Automated anti-piracy systems as copyright enforcement mechanism: the need to consider cultural diversity' (2018) 40(4) *European Intellectual Property Review* 218–28.

[216] *Brownmark* (n 16) [694].

[217] *Adjmi v. DLT Entm't Ltd*, 97 F.Supp.3d 512 (S.D.N.Y. 2015) (hereafter *3C*).

[218] Ibid, 40.

[219] Ibid, 52. A similar outcome was reached in *Galvin* (n 47) in relation to a parodic use of a photograph used in a political campaign as the audience for the two works was different, see [1188]–[1189].

[220] *Bertlesman* (n 182).

[221] *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F.Supp. 1287 (C.D. Cal. 1995) (hereafter *MGM*).

[222] Similar outcomes in *Miramax* (n 127) (documentary commercial copying *Men in Black*); *Tin Pan Apple, Inc. v. Miller Brewing Co*., 737 F.Supp. 826, 832 (S.D.N.Y. 1990) (beer commercial copying music video); *Original Appalachian Artworks v. Topps Chewing Gum*, 642 F.Supp. 1031 (N.D.Ga. 1986) (Garbage Pail Kid stickers distributed by a chewing gum manufacturer); *Crazy Eddie* (n 123) (commercial copying Superman).

[223] *Crazy Eddie* (n 123) approved in *Warner Bros. v. American Broadcasting Companies* 654 F.2d 204 (2d Cir. 1981); *Warner Bros., Inc. v. ABC, Inc*., 720 F.2d 231 (2d Cir. 1983).

[224] *Campbell* (n 12) [585].

[225] *Leibovitz v. Paramount Pictures Corp*., 137 F.3d 109 (2d Cir. 1998) (hereafter *Leibovitz*).

[226] This case can be compared to *Steinberg v. Columbia Pictures Industries, Inc.*, where fair use was denied because the use did not result in a parody as it merely copied *The New Yorker*'s parody for advertising purposes of *The Moscow on the Hudson* movie. 663 F.Supp. 706 (S.D.N.Y. 1987).

[227] *MasterCard Int'l, Inc. v. Nader 2000 Primary Comm., Inc*., No 00 CIV. 6068 (GBD) (S.D.N.Y. 2004) (copying of MasterCard's commercial advertisement in a presidential campaign);

[228] *Harper* (n 203) [562].

[229] *Henley* (n 178).

[230] Referring to *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014), [1159].

[231] *Galvin* (n 47).

[232] Ibid. See section 3.1.

[233] *Harper & Row*, 105 S. Ct. 2231; *Sony* (n 14).

[234] *Campbell* (n 12) [579]–[580]; *Mattel* (n 126) [803]; *Blanch* (n 204) [254].

[235] *Fisher* (n 172), referring to *Milky Way Productions*, 215 U.S.P.Q., n. 9. *Fisher*'s presumption of unfairness of commercial motives was overturned in *Campbell* (n 12), see n 284.

[236] Campbell (n 12) [584]–[585].

[237] *Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968).

[238] *Northland* (n 13) (where the parody generated traffic and encouraged discussion on the defendant's website).

[239] *Blanch* (n 204) [254].

[240] *Campbell* (n 12) [585].

[241] TGI Paris, 3e ch. Civ., 1ère sect., 13 mai 2008, *Che Guevara*; Paris, 4e ch., 9 septembre 1998, *Société Seri Brode c/ Procter & Gamble France*; Cass. (1ere ch. Civ), 13 janvier 1998, D. 1999, somm. p. 167, obs. Bigot; Trib. Civ. Seine, 12 juin 1879, Ann. propr. ind. 1879, p. 239.

[242] Cass., 13 janvier 1998 (n 242); TGI Paris, 3 mars 1993, légipresse 1994, n°108, II, p. 10; Paris, 8 juillet 1992, légipresse 1992, n°100, p. 40; Paris, 20 septembre 1993, légipresse 1994, n°108, p. 9; Cass., 7 décembre 1993, n°92-81091 (hereafter *Fluide Glacial*).

[243] Cass., 13 janvier 1998 (n 242).

[244] *Fluide Glacial* (n 243); Paris, 20 septembre 1993, *Agrif c/ Godefroy*, légipresse, n°108, II, p. 9; TGI Paris, 3 mars 1993, *Caroline Grimaldi c/ Société Kalachnikof*, légipresse, n°108, II, p. 10; Paris, 8 juillet 1992, légipresse 1992, n°100, p. 40.

[245] Reims, 9 février 1999; Delfour (n 82) 58–9 with the exception of application of publicity rights such as illustrated by TGI Paris, 17 septembre 1984, D. 1985 IR 16, obs. Lindon confirmed in Paris, 22 novembre 1984, D. 1985 IR 164, obs. Lindon.

[246] TGI Paris, 29 novembre 2000, RIDA, n°189, juillet 2001, p. 377, obs. Kéréver.

[247] Trib. Civ. Seine, 12 juin 1879, Ann. propr. ind. 1879, p. 239.

[248] TGI Paris, 24 janvier 1976, cited by Mouffe (n 11) 398.

[249] TGI Paris, 2 octobre 1996, légipresse 1997, n°138, I, p. 4.

[250] TGI Paris, 30 avril 1997, Gaz. Pal., 17–19 mai 1998.

[251] Paris, 4e ch., 25 mars 2005, Gaz. Pal., 2005, jurispr., p. 4318.

[252] Paris, *Paul B c/ Moulinsart,* 13 septembre 2005 at www.legalis.net.

[253] TGI Paris, 13 février 2001, *SNC Prisma Presse et EURL Femme c/ Charles V. et association Apodeline.*

[254] TGI Nancy (référence), 15 octobre 1976, JCP, 1977, n°18526, obs. Lindon.

[255] Paris, 4e ch. A, 27 novembre 1990.

[256] Paris, 4e ch., 13 octobre 2006, Gaz. Pal. 2007, jurispr., p. 2110.

[257] Paris, 8 avril 2005, Recueil Dalloz 2005/20, 1327, note Rolland; Voorhoof (n 193) 18.

[258] This is in line with the ECtHR stance as recently repeated in *Sekmadienis Ltd v. Lithuania*, App No 69317/14 (20 January 2018).

[259] See Chapter 7, sections 2 and 3.

[260] *BSB* (n 13) [144]; *Sillitoe* (n 13) [563]; *Johnstone* (n 144).

[261] *Hyde Park* (n 11) [37]; *Pro Sieben* (n 11) [614].

[262] Such as personal gain.

[263] Sims (n 16) 198.

[264] *Pro Sieben* (n 11) [616]–[617]; *BSB* (n 13) [157]–[158].

[265] *Newspaper Licensing Agency v. Marks & Spencer Plc* [1999] RPC 536, [546]–[547] (hereafter *NLA*).

[266] *Time Warner* (n 25) [469]; *Hubbard* (n 3) 94.

[267] It must be remembered that the ECHR protects commercial expressions. See Chapter 5, section 4.1.

[268] H.M. Government, *Modernising Copyright* 14.

[269] Sainsbury (n 102) 154.

[270] Sainsbury (n 16) 311.

[271] *TCN* (n 3).

[272] Ibid, [49] citing *Beloff* (n 6) and *BSB* (n 13) [514].

[273] *TCN* appeal (n 13) [97]: Hely J citing *Hyde Park* (n 11); *TCN* (n 3) [115] also citing *Time Warner* (n 25).

[274] *TCN* appeal (n 13) [104]*;* TCN (n 3) [52] citing *Pro Sieben* (n 11).

[275] Handler and Rolph (n 2) 404.

[276] Ibid, 405.

[277] McCutcheon (n 4) 182.

[278] She illustrates her theory with 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).

[279] *La Petite Vie* (n 36) [57]; *Michelin* (n 6) [56]; *Allen v. Toronto Star Newspapers Ltd* (1995), 26 O.R. (3d) 308, 129 D.L.R. (4th) 171 (Ct. J. (Gen. Div.)), [211]; *Zamacois* (n 6).

[280] *CCH* (n 3) [51].

[281] Interestingly, this factor was not considered in *United Airlines* (n 6). This either means that the commercial motives of the defendant are strictly defined to mean pecuniary gain (and not generating internet traffic) or that this factor is not that important when assessing the application of the parody exception.

[282] See Chapter 2, section 4.4.

[283] Section 29.21(1) CA 1985.

[284] See Chapter 1, section 1.

[285] A Tricoire, 'L'exception de parodie est-elle recevable en matière publicitaire?' (July/August 2005) 223 *Chroniques et opinion Légipresse* 77.

[286] See Chapter 7, section 1.5.

[287] This factor is probably the way in which common law legislators ensure the compliance of copyright exceptions with the international three-step test.

[288] *UK: Ashdown* (n 16) [155]; *NLA* (n 266) [546]–[547]; *Hubbard* (n 3) 94–5; *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd* [1934] 1 Ch 593, [598]; H.M. Government, *Modernising Copyright* 14; Sims (n 16) 192; *US: Irving* (n 48); *MGM* (n 223); *Seuss II* (n 14); *Miramax* (n 127); *Leibovitz* (n 226); *Suntrust* (n 16); *Mattel* (n 126); *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*, 320 F.Supp.2d 84 (S.D.N.Y. 2003); *MasterCard Int'l, Inc. v. Nader 2000 Primary Comm., Inc.*, No 00 CIV. 3802 (HB) (S.D.N.Y. 2004); *Henley* (n 179); *CCA and B, LLC v. F + W Media, Inc.*, 819 F.Supp.2d 1310 (N.D. Ga. 2011); *Northland* (n 13); *Brownmark* (n 16); *3C* (n 218); *Galvin* (n 47); *Axanar* (n 129).

[289] This factor ultimately contributes to the realization of the second step of the three-step test.

[290] *Campbell* (n 12) [590].

[291] Interestingly, this led the court, in *Henley* (n 178), to note that this factor weighs against fair use where a parody song copies the musical composition in its entirety.

[292] '[T]here is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.' *Campbell* (n 12) [592].

[293] *Irving* (n 48).

[294] e.g. *Northland* (n 13); *3C* (n 218); *Galvin* (n 47).

[295] *Campbell* (n 12) [591]–[593] confirmed in *Suntrust* (n 16); *Mattel* (n 126); *Henley* (n 178), *CCA and B, LLC v. F + W Media, Inc*., 819 F.Supp.2d 1310 (N.D. Ga. 2011). This involves relying on the *Sony* test, 'when a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects," ' *Sony* (n 14), citing *Folsom* (n 12) [348]; and more recently applied in *Axanar* (n 129).

[296] *Seuss II* (n 14) [1403].

[297] *Wilson* (n 52) [183] confirmed in *Miramax* (n 127) [46]–[47].

[298] Ibid.

[299] *CCH* (n 3) [59].

[300] Ibid, [72].

[301] The decision should be made upon proper economic evidence, and not upon court speculation as to the potential economic damage which might result.

[302] *Breen v. Hancock House Publisher Ltd*, 6 C.P.R. (3ed) 433 (1985).

[303] *Alberta* (n 13) [35]; *SOCAN v. CAIP*, 2004 S.C.C. 45.

[304] *United Airlines* (n 6).

[305] Ibid, [138].

[306] Ibid, [139]–[140]; section 29.21 CA 1985.

[307] As discussed earlier, the problem is more in the court's appraisal of confusion.

[308] Suzor (n 154) 243; McCutcheon (n 4) 185; Sainsbury (n 102) 154; Sainsbury (n 16) 312–14; Handler and Rolph (n 2) 404.

[309] Suzor (n 154) 243.

[310] See Chapter 1, section 5.

[311] See Chapter 2, section 2.

[312] See Chapter 4, section 2.2.

[313] See Chapter 4, section 2.1.2.

[314] *Saint-Tin* (n 56); TGI Paris, 5 mars 2008, *Fort Boyard*, Prop. Int. 2008 n°28 p. 327, obs. Bruguiere, RIDA, n°217, juillet 2008, p. 338 and Sirinelli p. 233; Paris, 4e ch. sect. b), 17 janvier 2003, *Le monde d'Anne Sophie*, Prop. Int. 2003, n°7, p. 169, obs. Lucas; TGI Paris, 9 janvier 1970, JCP 1971.II. 16645.

[315] This led to the distinction between parodies (target) and satires (weapon) as noted in the landmark case of *Campbell* (n 12) [581] and [597].

[316] *Hyde Park* (n 11) [154]–[155]; *Pro Sieben* (n 11) [613]–[614]; *Beloff* (n 6) [262]; *Hubbard* (n 3) 94.

[317] *CCH* (n 3) [57].

[318] *Pro Sieben* (n 11) [613]–[614]; also *Hyde Park* (n 11).

[319] *CCH* (n 3) [70].

[320] See Chapter 2, section 2.

[321] While this is a factor in Australia: P Brundenall, 'Fair dealing in Australian copyright law' (1997) 20 *UNSW Law Journal* 449; it is criticized in relation to the parody exception. McCutcheon (n 4) 185.

[322] See Chapter 2, sections 3, and 4.

[323] Confirmed by the French Constitutional Council and the literature. Decision n°2006-540 DC, 27 juillet 2006, La loi relative au droit d'auteur et aux droits voisins dans la société de l'information, indent 35; Galopin (n 11) 387; C Caron, '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, 11; A Lucas, '3. Nouvelles exceptions et triple test', in A Lucas and P 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: premières vues sur le texte promulgue a l'issue de la censure du Conseil Constitutionnel' (2006) 20(297) *Prop. Intell*. 315.

[324] A study of the debate and surrounding criticisms falls beyond the subject of this project and belongs to a past debate, but see Galopin (n 11) 386–91.

[325] Not even in the latest decision, *Les Enfants* (n 16).

[326] Galopin (n 11) 387.

[327] P-Y Gautier, 'L'élargissement des exceptions aux droits exclusifs, contrebalancé par le "test des trois étapes" ' (2006) 11 *CCE* 9, 12.

[328] *Deckmyn* (n 55).

[329] See Chapter 2, sections 3 and 4 and Chapter 5 for the balancing of competing fundamental freedoms.

[330] *Deckmyn* (n 55) [21].

[331] Ibid.

[332] Paris, 17 juin 1987, JCP, 1988 II 20957, note Auvret; Paris, 17 octobre 1980, Dalloz 1982, IR, p. 42, obs. Colombet.

[333] El Khoury (n 56) 161; Bloch (n 73) 117; B Edelman, 'Le personnage et son double' (1990) 30 *Recueil Dalloz* 227.

[334] Paris, 4e ch., 13 octobre 2006, Gaz. Pal. 2007, jurispr., p. 2110; TGI Paris, *Femme*, 13 février 2001; TGI Paris, 14 avril 1999, CCE, octobre 1999, pp. 23–4; Versaillles 15 décembre 1993, *La Bicyclette Bleue*; Paris, 11 mai 1993, RIDA, 1993, n°157, p. 340, obs. Kéréver and Françon, Rev. trim. dr. comm., 1993, p. 510; TGI Paris, 30 avril 1987, Gaz. Pal., 3–4 juin 1987; TGI Paris, 17 septembre 1984, D. 1985, IR, p. 16; TGI Paris, 13 septembre 1984, D. 1985, IR, p. 16, obs. Lindon; Paris, 20 décembre 1977, ann. propr. ind. 1979, p. 84; TGI Paris (ref), 26 novembre 1977, JCP, ed. G, 1978, II, n °18924; *Peanuts* (n 110); TGI Nancy, 15 octobre 1976, JCP, 1977, II, n°18526 obs. Lindon.

[335] Paris, 4e ch., 13 octobre 2006, Gaz. Pal. 2007, jurispr., p. 2110.

[336] Mouffe (n 11) 289; Berenboom (n 81) 109; Bloch (n 73) 117; F Fletcher-Boulvard, 'La caricature: dualité ou unité' (1997) *RTD Civ*. 67; Françon (n 77) 304.

[337] *Deckmyn* (n 55) [21].

[338] Similar considerations are present in US cases as demonstrated in *Keeling v. Hars*, No 13-694 (2d Cir. 2015) where the Second Circuit held that if the defendant adds substantial original expression of ideas, then copyright protection may subsist in the parody.

[339] *Deckmyn* (n 55) [21].

[340] See Chapter 2, sections 4.3 and 4.4.

[341] *Eva-Maria Painer v. Standard Verlags GmbH and Others* [2011] ECLI:EU:C:2011:798 (hereafter *Painer*), [149].

[342] L Bently and T Aplin, 'Whatever became of global mandatory fair use? A case study in dysfunctional pluralism.' Forthcoming in S Frankel (ed.), *Is Intellectual Property Pluralism Functional?* (Edward Elgar, 2018).

[343] *Deckmyn* (n 55) [21].

[344] See Chapter 1, section 5.

[345] *Les Enfants* (n 16).

[346] *CCH* (n 3) [58]; *SOCAN* (n 13) [47].

[347] See Chapter 1, sections 2 and 3.

[348] Given the lack of engagement of the Canadian federal court with this factor in *United Airlines* (n 6), it could be posited that the factor is less relevant in parody cases.

[349] *Deckmyn* (n 55) [21].

[350] See Chapter 6, section 4.1.

[351] *CCH* (n 3) [55].

[352] *Sillitoe* (n 13).

[353] J M Bruiguière, 'La réception du fair dealing britannique dans le système d'exception fermée

français.' Forthcoming in (2018) *RIDA* 27, 28 and esp. 37; similarly in the UK, industry practices have played a role in the assessment of fairness; see early UK cases such as *Sillitoe* (n 13).

[354] Confirmed by Congressional intent: H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976); S. REK No. 473, 94th Cong., 1st Sess. 62 (1975).

[355] e.g. Painer (n 342); On compliance with the three-step test see Chapter 2, section 4.

[356] See Chapter 5, section 4.1.5 and Chapter 7, sections 2 & 3.

[357] As previously argued by E Treppoz, 'Retour sur la denaturation contextuelle du dialogues des Carmelites' (2017) 352 *Légipresse* 441.

[358] Especially relevant in the US once again as the fourth factor is generally decisive.

5

How Freedom of Expression Defines the Parody Exception

1. Introduction

Whilst initially, copyright policy was rooted in natural law and, more specifically, in the Lockean moral-desert theory,[1] today, copyright is more often justified based upon broadly utilitarian principles. This shift, explained by the mercantile approach to intellectual property endorsed since the eighties,[2] makes recourse to human rights principles, including the right to property, more difficult.[3] Largely unconcerned with trade-related matters, the human rights framework is nevertheless, a posteriori, a beneficial counterweight to the development of imperfect copyright policy. In an increasingly complex haystack of copyright rules, the human rights framework usefully reinjects values into the system. It counterbalances economic analysis by emphasizing the cultural values ingrained in creative endeavours. Revisiting the well-trodden debate on the interaction between intellectual property rights and fundamental rights is beyond the scope of this book.[4] Nevertheless, some references to it are unavoidable, and it is briefly summarized in what follows.

The parody exception exacerbates tensions between copyright and freedom of expression as well as providing avenues to delineate its scope. As Gervais has eloquently argued, ‘intellectual property and human rights can live together’ and must learn from each other.[5] Departing from the frequent depiction of two systems in conflict, it is more helpful to see fundamental rights as enabling means to *humanize* the copyright paradigm. Instead of merely regarding copyright as a tool to foster economic growth and enrich the big players of creative industries,[6] human rights considerations lend

legitimacy to the scheme by appealing to the conscience of stakeholders and users. This appeal to moral imperatives introduces a new, implicit sense of which uses should, or should not, be allowed. This is of particular relevance for the parody exception, which can be used as a vehicle for particularly acerbic comment. Therefore, right-holders may attempt to rely on the user's sympathy for an author, or his work, in the process of creating a parody.

Additionally, it is inevitable that the wording of any new copyright exception is the result of policy compromises. Consequently, the resulting legislation is imprinted with a certain degree of vagueness.[7] The parody defence is no exception. Here, the human rights framework can guide the courts in defining the scope. As further observed later, this role is particularly well established in France but also in the US, to a certain extent. However, there are avenues available for other jurisdictions to follow suit. For example, in European countries, ECtHR case law can assist in defining the outer boundaries of the parody exception.[8] However, some caution is needed, as human rights-based arguments are not a panacea for all ills. Whilst human rights considerations can guide the judge as to the relevant factors and appropriate weighting, direct recourse to human rights arguments should only be relied upon in particular equivocal cases.

Leaving the property-based rhetoric aside, this chapter focuses on the role freedom of expression may serve as a 'double gate-keeper', wrestling against the excessive expansion of exclusive rights, while also constraining the outer limits of the parody exception. Consequently, this chapter does not endeavour to provide a comprehensive study of freedom of expression either. It first outlines how human rights are intrinsically embodied in the parody exception (section 2), before establishing freedom of expression within the international and European legal order framework (section 3). These foundations enable us to review factors established in the ECtHR's rich jurisprudence which may legitimately restrict freedom of expression so as to protect the rights of others (section 4). The final step is to understand how national legislators and courts strike a balance between freedom of expression values and copyright values in the jurisdictions under scrutiny.

2. The Parody Exception Embodying Human Rights Aspects

The prevailing trend of only strengthening copyright displays a tendency to overlook that the granting of exclusive rights to right-holders has limited

legitimacy.[9] Before legislation incorporated a specific parody exception, some courts sought to limit copyright law's expanding scope by imposing external limits, applying fundamental freedoms to balance the rights of authors and the interests of parodists.[10] We shall see that the introduction of a parody exception into copyright legislation reinstates some legitimacy by correcting the internal balance, thereby maximizing the realization of all the fundamental rights at play.

Copyright's linkages with human rights could be described as integrated.[11] As a property right, copyright enjoys protection as part of the human right to property, which is enshrined in article 17 of the Universal Declaration of Human Rights ('UDHR').[12] Furthermore, article 27 UDHR recognizes a right to participate in cultural life,[13] a provision which does not merely focus on economic incentives but includes a right to protect both moral and material interests of the creator resulting from any scientific, literary, or artistic endeavour. Notably, this right is not limited to creators, but extends to users, who have the right to participate in cultural life and to enjoy the arts in a society. Consequently, copyright can be seen as an instrument to foster the realization of both human rights and policy goals. It can strike a balance between both article 27 UDHR objectives by enabling individuals to access and create works while also ensuring that creators (who may be the same individuals) secure personal and economic interests vested in the works created.[14]

Traditionally, exercise of the freedom of expression, enshrined in article 19 UDHR, has two strands: the right to express ideas, and the right to receive information.[15] It is evident that both are pertinent to parody. By allowing the creation of new cultural works, the parody exception contributes to the realization of the first strand of freedom of expression.[16] Parodies can also raise concerns under the right to freedom of information when copyright owners enforce their rights in an attempt to stifle this form of social commentary, including when this is perceived as prejudicial to their honour or reputation.[17]

The parody exception impacts on the realization of the right to freedom of expression. A parodist may wish to borrow another author's (copyright-protected) expression in order to exercise their own right of free expression. The parody exception underlines that copyright law should provide some latitude for subsequent authors to use existing works to create new ones.

However, applying it involves a delicate balancing exercise, distinguishing between instances in which a right-holder should retain control over their protected work and those when the public interest supersedes the enforcement of their exclusive rights.[18] 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.[19] Again, this is potentially detrimental to society as a whole. Exceptions to economic rights —such as the parody exception—should perhaps be seen as a way to preserve the freedom of expression of others at the expense of the copyright-owner's prerogatives.[20] Yet, the parody exception should not be absolute and might itself be restricted in specific circumstances to preserve the rights of others.[21]

Overall, copyright and freedom of expression share the same objectives:[22] both rights promote the creation of new expressions and mandate that ideas must remain free. The introduction of a parody exception may be conceptualized as constituting an internal copyright mechanism to balance the exclusive rights granted to authors with freedom of expression. Therefore, copyright grants individual rights because the making available of new works is beneficial for society at large, and a parody exception legitimately limits the exercise of those rights in those particular circumstances when it is socially valuable to do so. In this way, the perceived conflict between the two bodies of law is resolved. While this synopsis is reasonable at a macro level, the exact influence exerted by the human rights framework and constitutional values varies at a national level, including in the jurisdictions of interest in our study. Having first surveyed the scope of freedom of expression at a supra-national level, including limiting factors, we shall then review how differences in legal traditions emerge to shape the contours of the parody exception at national level.

3. Scope of Freedom of Expression at Supranational Levels

A brief overview of the right to freedom of expression may be useful at this point, to set the stage for this discussion. Freedom of expression is widely accepted as an essential component of promoting values of tolerance and pluralism in a democratic society.[23] Consequently, this fundamental right is

protected in most international human rights treaties[24] and European instruments.[25]

3.1 International recognition of the right to freedom of expression

The UDHR is a non-binding instrument[26] which resulted from the historical events of the Second World War and the Holocaust.[27] Article 19 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.

The right is repeated and clarified in article 19(2) of the International Covenant on Civil and Political Rights ('ICCPR') which reads:

> 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 these formulations indicate, the right to free expression is broad in scope. Not only is the right extended to every individual,[28] but its application is unrestricted as to the protected forms of expression. Consequently, it encompasses political, artistic,[29] and commercial[30] 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.[31]

3.2 European recognition of the right to freedom of expression

In Europe, two instruments are applicable. As Member States of the Council of Europe, the UK and France, being of interest in our study, 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.[32]

Article 10 is similarly worded to its international counterpart,[33] but there is an important distinction. Unlike the influential, but non-binding, UDHR and

ICCPR, the provisions of the ECHR may be invoked directly before the national courts of Member States, and the resulting decisions are subject to the review of the European Court of Human Rights ('ECtHR').[34] This provision is, therefore, very powerful because it imposes obligations[35] upon legislators and governments, as well as the judiciary, and even in respect of disputes between private individuals.[36]

Additionally, the European Union reaffirms the protection of fundamental freedoms through the Charter.[37] 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,[38] this step has not yet been taken.[39] The provisions of the Charter are almost identical to the ECHR, and the CJEU often relies on the application of the ECHR to interpret the provisions of the Charter.[40] Therefore awaiting further jurisprudence interpreting the Charter, the following sections will refer to the ECHR when analysing European jurisdictions.

4. Restrictions to Freedom of Expression to Respect the Rights of Others

As mentioned earlier, the right of freedom of expression is broad but not absolute. As certain restrictions have already been established at supra-national level, these will be reviewed next, as they will inform the legitimate limits of the parody exception at national level.

Under the supra-national human rights framework, any restriction to the exercise of the right of freedom of expression must satisfy a three-pronged test.[41] Applying 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).[42] The latter is interpreted as requiring the interference to be 'necessary in a democratic society'.[43]

Analysis of the decisions handed down by both the Human Rights Committee (the independent body monitoring the respect of the ICCPR) and the ECtHR reveals that a generally rigorous approach is adopted to ensure that freedom of expression is realized. While the approach adopted interprets restrictions strictly,[44] this does not mean that restrictions are impossible. The

Special Rapporteur notes, [45] for example, that a restriction is desirable when permitting free expression would seriously encroach upon the fundamental rights of others, as might be the case for hate speech[46] or other discriminatory messages.[47] Yet, while restricting the expression of hatred or discrimination, care is required to preserve freedom of expression where possible and to avoid censorship.[48] Indeed, as expressions which might (merely) offend, shock, or disturb[49] are considered to be an integral aspect of pluralism—a democratic society is required to demonstrate tolerance and broadmindedness.[50]

The final requirement of necessity 'in a democratic society' has been the focus of most attention and discussions.[51] It grants a certain margin of appreciation to national authorities to balance the interests at stake. Whilst it is reasonable to respect national values and sensitivities, this also represents a barrier in practice to the harmonization of copyright exception and uniform application between jurisdictions.

In point of fact, the ECHR affords Member States 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 in what follows.[52] The study of the application of these factors by the ECtHR provides the groundwork for understanding how courts should apply the parody exception in ambiguous cases where the lawfulness parody is *not so clear-cut*.

4.1 Relevant factors under the ECHR

A thorough study of the ECtHR's jurisprudence on the margin of appreciation not only goes beyond the scope of this book, but has already been undertaken by others.[53] Yet, it can be distilled from the Court's decisions that a restriction will be deemed necessary in a democratic society if it addresses a 'pressing social need'.[54] Social need itself turns upon several factors, including the nature, form, attitude, context, and content of the expression. We shall briefly review each of these in turn.

4.1.1 Nature of the expression

Generally, the ECHR protects all expressions, but ECtHR decisions indicate that some expressions (those which are political,[55] of public interest,[56] or artistic[57]) are more deserving of protection than others (for example, purely commercial expressions[58]) because of their particular discursive role in a democratic society.[59] Over time, the ECtHR has been consistent in emphasizing that the need to preserve freedom of political expression and freedom of information arises from the great importance of political debate.[60] Hence, criticism of politicians[61] is generally justified because 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, the judiciary, and other authorities. By accepting a public role, a person knowingly exposes themselves to public scrutiny, meaning public figures must show more tolerance than individuals who are not well-known. [62] Thus, expressions which criticize public figures, for example, should be given greater latitude than those targeting private individuals.[63]

Yet, the characteristic of many expressions (including parodies) is such that they blend artistic, political, and commercial expressions, meaning that they simultaneously span several categories. For example, in *Karataş v. Turkey*,[64] the Court considered a poem, authored by a Turkish citizen, which was directly critical of the Turkish authorities.[65] The Turkish government sought to censure its publication, characterizing the work as illegitimate propaganda which threatened the 'unity of the State'. Here, the nature of the individual's expression was deemed particularly pertinent, being both artistic and political. The Court acknowledged that the poem's message might incite hatred and violence (which is not permitted pursuant to the ECHR), but equally, the author's choice of medium—poetry—limited its reach to a minority of people.[66] Thus, a call to arms presented in this form would have far less impact than a political statement made in the mass media.[67] In addition, given the political character of the poem, the Turkish authorities enjoyed only a narrow margin of appreciation to limit freedom of expression,[68] leading the Court to conclude that by preventing publication of the poem, the Turkish government had violated article 10 ECHR.[69]

In contrast, where the nature of an expression is purely commercial,

national authorities are afforded a wider margin of appreciation to restrict freedom of expression.[70] For example, the ECtHR reviewed an Austrian decision which sought to restrain publication of a newspaper advertisement[71] comparing one journal's subscription rates with those of a competitor. The Austrian authority had held that even though the advert contained accurate information, interference with this commercial expression was necessary to protect more generally against unfair competition via misleading advertising.[72] 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.

4.1.2 Form of the expression

The form of the expression also impacts the margin of appreciation granted to national authorities. Although the Court has yet to consider a case involving parody, the ECtHR has considered criticism made utilizing humour.[73]

Apocolypse,[74] for example, concerned display of the eponymous artwork at a contemporary art exhibition. 'Apocolypse' depicted numerous figures engaging in sexual acts.[75] Although the bodies in the picture were hand-drawn by the artist, the face of each figure was made from a cropped photo of a different Austrian politician or public figure. Overturning the Austrian courts' ban on the exhibition of the artwork, the ECtHR held that this was an illegitimate interference with 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. This made it clear that the work was one of satire, and not an attempt to depict reality, and so it should have been interpreted as such by the national courts.[76]

The ECtHR described 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'.[77] Having regard to its function, the Court cautioned that national institutions must take particular care when restricting this form of expression. By permitting satires[78] to prevail over the private interests of others, the ECtHR shows a determination to grant greater protection to humorous expression compared to non-humorous forms.

4.1.3 Attitude of the speaker

The ECtHR identifies the attitude of the individual exercising their freedom of expression as a relevant consideration.[79] In *Oberschlik v. Austria (No 2)*,[80] a journalist was sued for defamation as a result of an article in which he was critical of the leader of a far-right party, labelling the politician an 'idiot' based upon a speech the leader had given. The Court held that personal attacks might be protected as a legitimate expression, provided that the speaker could provide an objectively reasonable explanation for the criticism.[81]

It would seem that the same consideration should be applied in the case of a parody, because it appropriately reflects the humoristic intent requirement for the application of the parody exception.[82] As argued in Chapter 4,[83] humoristic intent which has the aim of harming authors and/or their works, or where the parodist acts in bad faith to plagiarize the protected materials should not be 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 objectively *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.[84] 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.

4.1.4 Context in which the expression is made

The ECtHR has had cause to examine the significance that the context of an expression may have on several occasions.

The ECtHR considered the interplay between freedom of expression and governmental measures aimed at fighting discrimination in *Jersild*.[85] The case relates to a documentary made for a Danish current affairs television programme. The documentary interviewed a particular group of young people who had been identified as racist in the Danish press. In the course of filming, the interviewees made various abusive and derogatory remarks directed at immigrants and the ethnic groups present in Denmark. In light of these offensive comments, the Danish authorities sought to prevent the

programme from being aired, which the film's producer argued 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',[86] since inter-racial tolerance and respect is fundamental in any democratic, pluralistic society. Therefore, the offensive statements made by the group during the interview did not warrant the protection of 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'[87] to discuss matters of public interest.[88] Given that the interview was preceded in the final documentary by a public discussion of racism in Denmark, the context made clear that the producer's intent was to challenge, rather than to promote or proliferate, the racist views of the interviewees.[89]

The Court relied upon *Jersild* and confirmed the importance of context in *Soulas and Others v. France*.[90] These proceedings concerned an attempt to block publication of a book exploring the integration of Islamic immigrants into European society. The ECtHR was required 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 Court acknowledged that the book's subject matter constituted a topic of legitimate debate in Europe,[91] the Court concluded that this particular expression should not be permitted under the Convention,[92] because it sought to encourage readers to reject immigrants, a message which undermined the ideals of a pluralistic society.[93]

These principles were further honed in *Leroy v. France*.[94] Here, the Court was required to adjudicate over a cartoon which focused on the 9/11 attacks on the World Trade Center. The cartoon featured the phrase 'We have all dreamt of it … Hamas did it'—being 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. The ECtHR considered otherwise. 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. Consequently, the national court's

interference to prevent publication was ‘relevant and sufficient’ to the legitimate aim of maintaining public order.

Most recently, in *Sekmadienis v. Lithuania*,[95] the ECtHR took the opportunity to explain that an expression which cannot be restricted based solely upon its content *could* be restrained for having an offensive impact in specific circumstances. In the case at hand, a clothing company was fined because of the use of religious references to promote its products in, arguably, a humoristic way. The adverts featured halo-ed models wearing the company’s clothing, alongside captions such as ‘Jesus, what trousers!’ and ‘Dear Mary, what a dress!’. The Court emphasized the national court’s duty to ensure that there are sufficient reasons to limit the protected freedom of commercial expression.[96] Here, the ECtHR established that a restriction was not justified simply because the religious symbols had been used for a non-religious purpose.[97]

Context is, therefore, extremely important when it comes to assessing a parody. Parody, as we have seen, introduces a distance from the original work.[98] Humour (understood liberally) creates a separation between the reality of the original and the ‘other’ world in which parody expressions evolve. This distance may vest in the parody itself, but it may also arise from the context in which a parody expression is made.

4.1.5 Content of the expression

A parody is required to have humorous intent to benefit from the parody exception.[99] Furthermore, if the parody’s message is of relevance to the public interest, then it should receive greater protection based on the additional support of article 10 ECHR.[100] The converse is also true. In this part we examine how far a parodist is permitted to go. A careful examination is needed to determine the distinction between an expression which may (only) ‘offend, shock or disturb’[101] and one which falls outside the protection of article 10 ECHR, because it amounts to a serious incitement to extremism (‘hate speech’) or discrimination (article 14 ECHR).[102] A parody which crosses this line might arguably harm the author of the original work, or diminish the work itself. In this respect, the ECtHR has provided some helpful guidance.

4.1.5.1 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 freedom of 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.[103]

For example, in *Féret v. Belgium*,[104] the ECtHR considered that criminal sanctions imposed on the leader of a far-right political party were legitimate. The party had been distributing leaflets during an election campaign which 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 held these statements were an incitement to racial discrimination, meaning that sanctions did not violate the leader's right to freedom of expression.[105]

4.1.5.2 Offending personal religious convictions

Where personal religious beliefs are involved, national authorities benefit from a wider margin of appreciation. In *Wingrove v. UK*,[106] the ECtHR explained:

> [A]s in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended. This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material.

Whilst blasphemy laws have been abolished in all the jurisdictions under scrutiny, this case provides some guiding principles which might justify restricting a parodist's expression if it attacks another's religious beliefs. Therefore, with the wider margin of appreciation granted, the ECtHR recognizes the importance of respecting an individual's expectation to peacefully enjoy the rights guaranteed under article 9 ECHR, including a corresponding duty to avoid causing gratuitous offence to others by use of

profanity.[107]

This might arise if the content of the expression directly targets those of a specific faith—for example by insulting use of religious symbols, if the message jeopardizes the right of individuals to express their faith, denigrates a religion, or incites hatred or violence towards those holding a particular belief.

A good case in point concerned a poster produced by Norwood, a member of the far-right British National Party ('BNP') in the wake of the 9/11 attacks. This depicted the Twin Towers in flames alongside the Islamic crescent and star symbol represented as a prohibition sign, accompanied by the statement: 'Islam out of Britain—Protect the British People'.[108] Norwood argued his display of the poster was a permissible criticism of Islam, rather than representing 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 clear attack on Muslims living in the UK because it associated them all with the terrorist attacks.[109] Thus, displaying the poster constituted a prohibited act (pursuant to article 17 ECHR—abusive exercise of rights) meaning the applicant did not enjoy the protection of article 10 ECHR.[110]

Similarly in *I.A. v. Turkey*,[111] the ECtHR had to determine whether state interference with an author's statement that 'God Muhammed' did not condemn necrophilia or bestiality[112] was a legitimate restriction necessary in a democratic society. In this case, the Court determined the expression to be an abusive attack of the Prophet which did justify the Turkish court's interference.[113]

Although article 9 ECHR recognizes the right to freedom of religion, the ECtHR does not consider that this shields those individuals who exercise this freedom from all criticism.[114] Criticism should be permitted to a reasonable extent to allow others to exercise their own right to free expression. Legitimate criticism may take the form of denial, or dissemination of material which is hostile to a particular faith.[115]

4.1.5.3 Message contrary to morality

The ECtHR has also held that concerns of morality may provide justification to override an individual's right to freedom of expression.

In *Muller v. Switzerland*, [116] the Court refrained from revising a national decision to restrict the freedom of expression of the artist of a painting

depicting ‘vulgar images of sodomy, fellatio between males, bestiality, erect penises and masturbation’[117] based upon obscenity grounds. The Court, while recognizing art’s vital role in a democratic society to promote cultural diversity,[118] confirmed that this did not preclude the public display of specific artistic expressions in cases of abuse.[119] In issues involving morality, national authorities benefit from a wider margin of appreciation because a uniform European conception of morality just does not exist.[120] In this case, the ECtHR found no reason to interfere with the Swiss court’s findings, since they were best placed to determine whether the images depicted would offend ‘the sense of sexual propriety of persons of ordinary sensitivity’ in that Member State.[121] Therefore, the artist’s right to free expression should not prevail.[122]

The Court reached similar conclusions regarding religious morals. In *Otto Preminger Institute v. Austria*, the conviction of a writer for blasphemy following the screening of his film was the subject of debate. Here, the Court noted that uniformity of religious morals might not exist even within a single country.[123] This afforded national authorities a wide margin of appreciation for deciding whether freedom of expression might be justifiably curtailed on religious morality grounds. Thus, the Austrian court’s interference to prevent the film from being shown was a legitimate violation of the right to freedom of expression to protect the religious sensibilities of the local Catholic community,[124] even though the film was only accessible to paying viewers aged eighteen years and over.

Since there is no uniform European 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.[125]

4.1.5.4 Denialism

In the final scenario which we shall consider, the ECtHR has also identified that it may be appropriate to curtail expressions which seek to deny certain significant historical events. In *Lehideux*,[126] the Court considered a French newspaper’s publication of pro-Nazi statements contained in a eulogy of Marshal Pétain. 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.[127] Thus, the Court was satisfied that the

criminal conviction of the article's authors met the first two requirements of article 10(2) ECHR. Ultimately, the ECtHR held that the French court's interference was in violation of article 10 ECHR, nevertheless. This was based upon the fact that while reporting the pro-Nazi statements, the paper had stated expressly its disapproval of 'Nazi atrocities and persecutions'.[128] This satisfied the Court that the article's aim was to engender debate concerning the country's history, thereby promoting the broadminded, pluralist values essential in a democratic society. Thus, in this case, interference was not necessary, even though the publication might offend, shock, or disturb the newspaper's readers.[129]

4.2 Lessons from ECtHR jurisprudence

As is apparent from the preceding snapshot of ECtHR jurisprudence, the balancing exercise which national courts are required to undertake is far from straightforward. Although courts must interpret an individual's right to free expression broadly,[130] this right should not be preserved to such an extent that it extinguishes the competing rights of others. Rather, courts must take the particular facts of the case into consideration to ensure realization of all fundamental rights at stake.

Although the cases identified have not considered parody works, they provide an insight into the type of balancing which would be required. Arguably, where the balance tips in favour of exercise of free expression, then the parody should also enjoy the benefit of the parody exception, whereas those which would be legitimately curtailed as an abuse of the right to freedom of expression[131] should not be covered by the parody exception either. The lessons which national courts can draw from our analysis of key ECtHR decisions are summarized in what follows.

Firstly, courts should determine whether the purpose of the expression is to propagate a discriminatory message (hate speech), or to engender debate.[132] 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 article 10 ECHR does not protect hate speech, 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 with messages relating to religion,[133] several reports demonstrating that the current legal framework is adequate to protect religious beliefs, such that freedom of expression should not be further restricted.[134]

Thirdly, the context in which the expression is made is relevant. Although freedom of expression is recognized 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 expression.

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[135] are the most prone to restriction.

5. Striking a Balance at Domestic Level: the Importance of Constitutional Influences

However, in order for the factors discussed to be taken into consideration by judges, national authorities should be comfortable to hear arguments based on human rights considerations which is not always the case. The balancing of freedoms involves issues of ‘necessity’ and ‘proportionality’ to be taken into account, assessments which are highly fact-sensitive. Added to this is a varying margin of appreciation, based upon national values and sensitivities which vary over time and from place to place. As a result, the outcome of any balancing exercise is uncertain, and the same facts may result in divergent outcomes in different jurisdictions. If this flexibility can be appreciated to tailor restraints to national sensitivities and values, it also infuses uncertainty at national level as a consequence. Additionally, the supranational human rights law only provides an overarching framework for balancing freedom of expression, copyright, and other interests. National legislation and constitutional influences provide additional guidance, adding further levels of complexity.

This section considers the impact which national considerations may have

on the outer boundaries of the parody exception at a macro level. As we have already reviewed the European regime, this section commences with a review of France and then the UK. The latter stands in for individual analysis of the Australian and Canadian regimes, in light of their shared influence of the common law tradition.[136] Attention then turns to the US, which is distinguishable from other common law jurisdictions by the significant constitutional influence upon copyright law.

5.1 France: a liberal interpretation of freedom of expression through a bifurcated system

In France, the supra-national human rights framework protecting freedom of expression is supplemented by the constitutional protection of article 11 of the Declaration of the Rights of Man and of the Citizen of 1789. As we have discussed previously, in France, parody is perceived as a continuation of the right to critique,[137] which the historical revolutionaries considered essential.

Additionally, the French legal system has adopted a bifurcated regime to protect freedom of expression based upon the context in which the expression is made. Where an expression (including a parody) is published in the media,[138] any restriction to exercise this freedom of expression needs to be determined by the specific body of law governing the freedom of the press.[139] In these cases, French courts recognize the media's role as the public's watchdog in a democratic society, by applying a higher threshold before their freedom of expression is curtailed. In all other cases, any restriction to the 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,[140] 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,[141] 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*.[142] Although this decision does not relate to unauthorized 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 other fundamental rights. An issue

of *New Look*, an adult magazine, included risqué photographs of young models wearing Scout uniforms captioned with phrases which parodied well-known scouting expressions. The Scouting Association sought an injunction from the court restraining circulation of the offending magazine. The Court of Appeal's analysis emphasized 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, thereby affording wide latitude to the magazine's rights of freedom of expression. Here, the Act limits the scope of tort actions to those situations where the use violates the fundamental rights of the claimant.[143] As no violation of fundamental rights could be established, the court found no reason to prevent publication of the pictures.

The Supreme Court quashed the decision, holding that nothing could be implied in the Freedom of the Press Act which could impose 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) was the same. However, the case was dismissed because fault (one of the three mandatory requirements for a tort action)[144] 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 would have specified it within the code. Given that the code does not characterize the fault required for tort, the general approach as in ordinary law is applicable.

General law is criticized for being inadequate given the uncertainties in the application of article 1382 Civil Code. The principal criticism levied is that the jurisprudence under article 1382 is insufficiently specific and predictable to satisfy the second requirement of article 10(2) ECHR.[145] Additionally, balancing freedom of expression and tort law is a perilous exercise because the establishment of a fault in this context requires a subjective appraisal from courts, resulting in somewhat arbitrary decisions. Massis criticizes this decision in *Scouts v. New Look*[146] 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 realization of freedom of expression.[147] 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.[148]

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. Parodists did not enjoy absolute freedom under this traditional liberal approach, since two limits were applied to protect the rights of others. Firstly, the parodist needed to comply with the requirements of the parody exception. Freedom to parody is limited by an intent to harm; since this did not comply with the rules of the genre, for example, passing beyond the limits of humour tilts the balance back in favour of the other competing rights. Secondly, the freedom to parody is limited by the content of the parody in a scenario in which the parody violates the fundamental rights of others. As a result of the broad scope of the law on freedom of the press, few parodies of copyright works will fall within the ambit of the ordinary law, which might only apply to parodies made by private individuals, or in a strictly private context.

Guignols de l'info[149] serves as an illustration of how the conflict may be resolved. The case relates to a TV sketch which used puppets to parody Peugeot cars. This depicted the company's CEO as a dissatisfied Peugeot customer. Peugeot objected to the use of its registered trade mark, considering the sketch denigrated both the reputation of the company and that of its goods. Although Peugeot commenced an action under trade mark law, the court established that as the dispute related to press freedom,[150] rather than ordinary law, the dispute should be decided on this basis.[151] The court concluded that the parody had caused no real harm or negative impact[152] because it featured in a satirical news programme which was founded upon making provocative statements (rather than in a car magazine, for example). As such, the parodic nature of the sketch would be evident from its use of humour and over-exaggeration. Neyret concludes that this decision's reasoning, which links humour to the expression's context, has served to raise the threshold for establishing fault in a tort claim.[153]

The French courts considered the interplay between copyright and freedom of expression again in *Bauret v. Koons*.[154] The tribunal rejected that the parody exception applied to Koons' transformation of Bauret's photograph, *Les Enfants*, into a pop art sculpture, *Naked*,[155] but it went on to consider whether the used was nevertheless justified, based upon Koons' right of freedom of expression. As a preliminary step to this assessment, the tribunal noted that the right to property (specifically copyright), and the right to

freedom of expression were of equal importance in a democratic society. In order to reconcile these two fundamental rights, the court's assessment focused upon proportionality. In essence, the court sought to reconcile whether upholding the right-holder's exclusive legal rights would be disproportionate having regard to the user's interests. In this case, the tribunal concluded that the restriction on Koons' use was proportionate to the legitimate aim which copyright protection pursued. There seemed to be no apparent need for Koons to copy Bauret's work to convey his own expression, not least because the photograph copied was largely unknown to the French public.

In other words, by placing both fundamental rights on an equal footing, the French tribunal required the later artist's expression to be justified by a pressing social need before he should be allowed to reproduce another's copyright-protected work which fell beyond the parody exception.[156] Here, the mere continuation of an artistic movement (e.g. *objets trouvés* or appropriation art) was insufficient as this in itself did not constitute exercise of the right to critique deriving from Revolutionary times.

5.2 The UK: perceptible tensions between freedom of expression and copyright

In the UK, the Human Rights Act 1998 ('HRA') incorporates the principles of the ECHR into the legal framework.[157] Perhaps given its relatively recent enactment, very little case law exists under the HRA which analyzes the tensions between freedom of expression[158] and copyright. Arguably, *Ashdown*[159] is most enlightening, not least because Lord Phillips specifically identifies the potential for copyright to clash with freedom of expression.[160] 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, provided that the conditions of article 10(2) ECHR (i.e. be prescribed by law, pursue a legitimate objective, and be proportionate) are met.[161] As such, the court confirmed that the CDPA is self-contained, i.e. the legislator had achieved the appropriate balance between copyright law and freedom of expression via the framing of the various doctrines enshrined in the legislation, such as the idea/expression dichotomy, the substantiality doctrine, the fair dealing exceptions, and the public interest defence, concluding that UK courts ought

to respect this internal balancing.[162]

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.[163] In this light, it is reasonable to require that, whenever a defendant invokes a fair dealing exception, and the court considers all the surrounding circumstances of the case, it should be able to attribute most weight to those factors which contribute to realization of the defendant's freedom of expression. Similarly, it is legitimate that expressions which, owing to their nature, are excluded from protection of freedom of expression are also denied the benefit of an exclusion in copyright law too, and/or may be restricted by other bodies of law, whether in criminal or civil proceedings.

Unsurprisingly, these restrictions must satisfy the requirements set out in article 10(2) ECHR.[164] Hence, whenever a court is confronted with conflicting fundamental rights, it must base its decision on the result which permits maximum realization 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 overarching requirements of the ECHR and the Charter.[165]

5.3 Canada: increased role of the Canadian Charter of Rights and Freedoms

Freedom of expression is protected at national level in section 1 and 2(b) of the Canadian Charter of Rights and Freedoms.[166] Section 1 establishes that the freedoms which the Canadian Charter guarantees may only be restricted by 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' while section 2(b) establishes as a fundamental right, 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'.

Freedom of expression itself enjoys a liberal interpretation.[167] It protects all forms of expression including political speech, artistic expression, search for truth, and commercial expressions.[168] Freedom of expression does not extend to expressions which are particularly hostile to the values enshrined in the Canadian Charter because these are inconsistent with the values promoted in a democratic society.[169] Similarly, as in the other jurisdictions under scrutiny, Canadian courts take context into account when considering

whether a restriction placed upon an expression is justifiable. Hence, courts are less likely to accept restrictions to political expressions than in respect to advertising expressions[170] or expressions with a more problematic content, such as pornography[171] or violence.[172] In practice, Canadian courts have limited freedom of expression where an expression is likely to harm the interests of others or concerns public order.[173]

Traditionally, it was believed that the Charter did not apply to the judiciary but simply to government acts.[174] This issue was considered by the Canadian Supreme Court in *Irwin Toy v. Quebec*.[175] Firstly, the Supreme Court interpreted freedom of expression so broadly that all copyright works are likely to be protected under section 2(b) of the Canadian Charter.[176] Secondly, once a court has established that an expression is protected under the Canadian Charter, it must consider whether the purpose or effect of the government's legislative 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 their protected expression complies with the principles enshrined in the Canadian Charter.[177] 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.[178]

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.[179] This echoes the European system.[180] 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.[181]

As in the UK courts, 'external' freedom of expression considerations have often been ignored[182] or rejected[183] by courts in copyright litigation in early cases. Fewer[184] criticizes this approach as now being inconsistent with the Supreme Court's decision in *Irwin Toy v. Quebec,*[185] 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.[186]

When the application of the Copyright Act is found to breach a Charter right, the test provided in *R. v. Oakes*[187] 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 adversely disproportionate effect on the person it applies to.[188] 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.

Yet, even violent expressions constitute an expression in the sense of section 2(b) of the Canadian Charter, meaning that a restriction must still respect section 1 of the Canadian Charter.[189] Protection of freedom of expression and provisions against hate speech or discrimination must be interpreted in a manner consistent with Canada's multi-culturalism. Therefore, aspects such as context and content of the expression will be relevant to determine the validity of the restriction.[190] For example, an expression of hatred targeting a minority will be considered differently from hate speech towards the majority culture.

The *Michelin* decision in 1996[191] is the Canadian case which brings the tensions between copyright law and freedom of expression into sharpest relief. The case considered a parody of the Bibendum figure before a specific parody exception was introduced into Canadian copyright law. In this case, the court held that the parodist's right of freedom of expression did not justify the reproduction of the copyright-protected image.[192] Indeed, the court did not consider that the defendant's freedom of expression had been restricted unduly, since it was considered that the defendant could have conveyed the same message using different means.[193] 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.[194] Referring to *Weisfeld v. Canada*,[195] the court found it insufficient to prove that the freedom of expression has been compromised simply by demonstrating that the use amounts to a new expression. Noting that the fundamental rights are not absolute, the court construed section 2(b) not only as excluding expressions of violence but also expressions using another's property in the name of freedom of expression.[196]

The *Michelin* court further expounded that even had the defendants' expression been found to be protected by the Canadian Charter, the defendant would still have failed under the section 1 test, since it was 'demonstrably justified in a free and democratic society' to override freedom of expression in order to enforce copyright.[197] Here, the court characterized copyright law as reflecting a 'pressing and real' need to protect authors within a democratic society by ensuring them remuneration for use of their works. Ultimately, the court held that one right-holder's property interests should be prioritized over another's exercise of freedom of expression. However, by focusing on one specific copyright justification, it seems that this decision oversimplifies the true nature and purpose of copyright. Although remuneration of authors is one aspect, it overlooks the goal of promoting cultural diversity. This aspect recognizes the need for authors to be able to rely upon previous works in order to create new ones.[198]

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 opening the dialogue within society and the diversification of ideas, concepts which are at the centre of both copyright protection and freedom of expression.[199] By rendering the parody use unlawful, the court applied copyright law in a restrictive manner, depriving copyright protection of its justification.[200] Despite the criticisms surrounding this decision, *Michelin* remains good authority in Canada,[201] pending any judicial review of the newly introduced parody exception.

In sum, the nature of freedom of expression in Canada is such that as soon as one party attempts to communicate, their expression is eligible for protection by section 2(b) of the Canadian Charter,[202] irrespective of the content of the message.[203] Once it is determined that an expression is protected by the Charter, a court must apply the criteria established in *R. v. Oakes* to determine whether any claimed restriction to the right of free expression is justified. Despite a generally liberal interpretation of freedom of expression in Canada[204] and the Supreme Court *Irwin Toy* ruling[205] which ostensibly places freedom of expression and copyright protection on equal footing, *Michelin* has curtailed this fundamental freedom in respect of expressions via parody, because of its reliance upon another's protected work to convey its message. It remains to be seen whether *Michelin* remains good law, in light of the new parody exception.

5.4 Australia: a patchwork of state laws

In Australia, and in contrast to the other countries under scrutiny, freedom of expression has no federal constitutional guarantee in Australia.[206] Australian courts only recognize a more limited constitutional right[207] to freedom of political and public expression which does not extend to other kinds of expressions.[208] Therefore, the protection of freedom of expression derives from direct application of international treaties, as exposed previously,[209] as the notion of freedom of expression is a well-established principle of common law.

Additionally, a patchwork of state laws[210] restricts freedom of expression in various ways through laws which regulate obscenity, blasphemy, and defamation, as well as anti-discrimination provisions.[211] These laws are justified based upon the need to protect public morality or the reputation of others, and to prevent hate speech.[212] Given that constitutional protection of freedom of expression only extends to political communications, Australian state laws have not faced challenge for unduly impairing freedom of expression. They have the potential, nevertheless, to restrict parodists' freedom of expression severely, unless their provisions are strictly construed.[213]

5.5 The US: a robust culture of promoting free speech

The US legal system is alone in the fact that copyright protection and freedom of expression both enjoy protection within the Constitution. Copyright law features in Article I, section 8, clause 8,[214] while freedom of expression is contained in the First Amendment of the US Constitution. Yet, remarkably few decided cases have ventured to discuss the potential conflict between these two constitutional rights in parody cases.[215]

As in the other jurisdictions under scrutiny, the US copyright regime has in-built freedom of expression safeguards. In addition, a study of the eighteenth-century framers' intentions suggests that the Copyright Clause was seen as a tool for promoting the First Amendment freedom of expression values.[216] Hence, freedom of expression affects the US copyright paradigm in several ways. Firstly (and as for other jurisdictions examined in this book), the idea/expression dichotomy is seen to define the balance between the two

constitutional rights.[217] In addition to the ability to reuse unprotected ideas, the fair use doctrine enables users to reproduce copyright-protected expressions in the specified circumstances to preserve these constitutional values.[218] In other words, since the Constitution grants 'authors […] the exclusive right to their respective writings […] for limited times' for the purpose of promoting progress in the arts, the fair use doctrine promotes progress by allowing the public to build upon earlier protected works.[219]

The Constitutional mission statement impacts on the scope of protection of the US copyright regime and, consequently, fair use.[220] According to US scholarship, the fair use doctrine enables individuals to reuse parts of earlier copyright-protected works to promote freedom of expression values and engage in a socially-valuable commentary or criticism.[221] The underlying goal of this doctrine is to strike a balance between property rights that foster the creation of new cultural works and the ability of other creators to draw on previous works as raw material for new expressions. Here, freedom of expression justifications have been relied upon to define the scope of the parody exception by reminding that quality or bad taste should not weigh negatively in the court's assessment. In other words, freedom of expression goes beyond protecting successful parodies and protects uses which comment or criticize earlier works (to some degree at least).[222] In contrast, a use which merely reproduces an earlier copyright work for want of effort should weigh against the finding of fair use.[223] Here, the First Amendment both limits and broadens the scope of the fair use doctrine, firstly by requiring some form of commentary, and secondly, by refraining from defining parody based upon some element of humour.[224] It follows that the first fair use factor—the *purpose* and *character* of the use—taints the appreciation of the remaining fair use factors (the nature of the protected work, the substantiality of the portion copied, and the market effect of the use) in particular cases.[225]

This is illustrated in early cases and is repeated in most recent decisions. For example, in the 1964 case of *Berlin v. E.C Publications, Inc.*,[226] the defendant released parodies of popular songs without copying either the original lyrics or the music. Rather, the magazine published parodic lyrics, written in the same metre as the originals, along with instructions that the reader should sing song X 'to the tune of' song Y. In determining whether this use was 'fair', the court took the opportunity to comment on the relationship between parody, copyright, and freedom of expression:

> [A]s a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism […] At the very least, where, as here, it is clear that the parody has neither the intent or the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper.[227]

This reasoning gave rise to the often-referred-to 'conjure up test',[228] which seeks to establish whether the amount which the defendant has reproduced from the original is more than, or just the minimum amount, needed to ensure the public's ability to recall the earlier work. This test is seen as a free speech safety valve within copyright, but equally, it protects copyright interests too, as the right-holder is guaranteed the maximum protection of property rights which is compatible with the other constitutional values.[229] What is noteworthy is that the court recognized that parodies and satires were justified on the same basis. As a result, we should expect a similar regime irrespective of whether the third party use seeks to comment on the earlier protected work or something else. Despite this, the 'conjure up' approach led to the seminal parody decision, *Campbell*, and its progeny.

In the *Campbell* decision,[230] the Supreme Court's consideration of the Copyright Clause of the US Constitution led it to endorse that it is the transformative nature of a use which should weigh most heavily in favour of fairness because the creation of a new expression can be seen as promoting 'progress' in the arts. Thus, 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.'[231] This emphasis upon transformation has caused critics to argue for a return to a narrower understanding of the fair use doctrine, based upon a more even weighting on the remaining factor.

In terms of parody, the court's endorsement of transformation may stretch the meaning of parody under US copyright law,[232] but *Campbell* is most notable for our study as a result of the distinction it drew between parody and satire (i.e. distinguishing 'parody of' from 'parody with'). Post-*Campbell*, courts have interpreted the decision as saying that parodies are de facto presumptively fair even though the Supreme Court expressly refrained from stating this to be so.[233] For example, in *Dr Seuss v. Penguin Books*, a satire of the protected work was held to infringe despite its transformative nature, and the low likelihood that it would supplant demand for the original.[234] However, slowly, this distinction seems to be fading.[235]

More recently, in *Blanch v. Koons*,[236] the Second Circuit concluded that a collage which Koons created by appropriating photographic images of pairs of feet and legs from various commercial adverts fell within *Campbell*'s definition of transformative use.[237] By emphasizing the transformativeness of the use, the court considered that there was no need to dwell upon the parody/satire distinction which was held as being crucial in *Campbell*. Consequently, the arguably satirical use was deemed to be fair.[238] The Second Circuit adopted the same approach and expanded it further in the highly controversial *Cariou v. Prince* decision.[239] In another case involving appropriation art, Prince had taken photographs which appeared in Cariou's book concerning Rastafarianism to use as raw material for a collage painting. Although the district court took a firm stance against Prince, and upheld Cariou's copyright,[240] the Second Circuit was critical of the first instance court's narrow interpretation of transformativeness. Instead, the Second Circuit considered the use as transformative because Prince's painting was seen as manifestly different from the Cariou photographs. The latter sought to depict the natural beauty of subjects and landscapes in black and white while the former created a 'hectic and provocative' expression which played with colours and distorted scales (see Figure 5.1). The appeal court concluded that any reasonable observer would understand the two expressions to convey different messages and meanings.[241] In other words, if the unauthorized use creates a new expression, there is no further requirement as to the subject of the comment according to this interpretation of the fair use doctrine.[242]

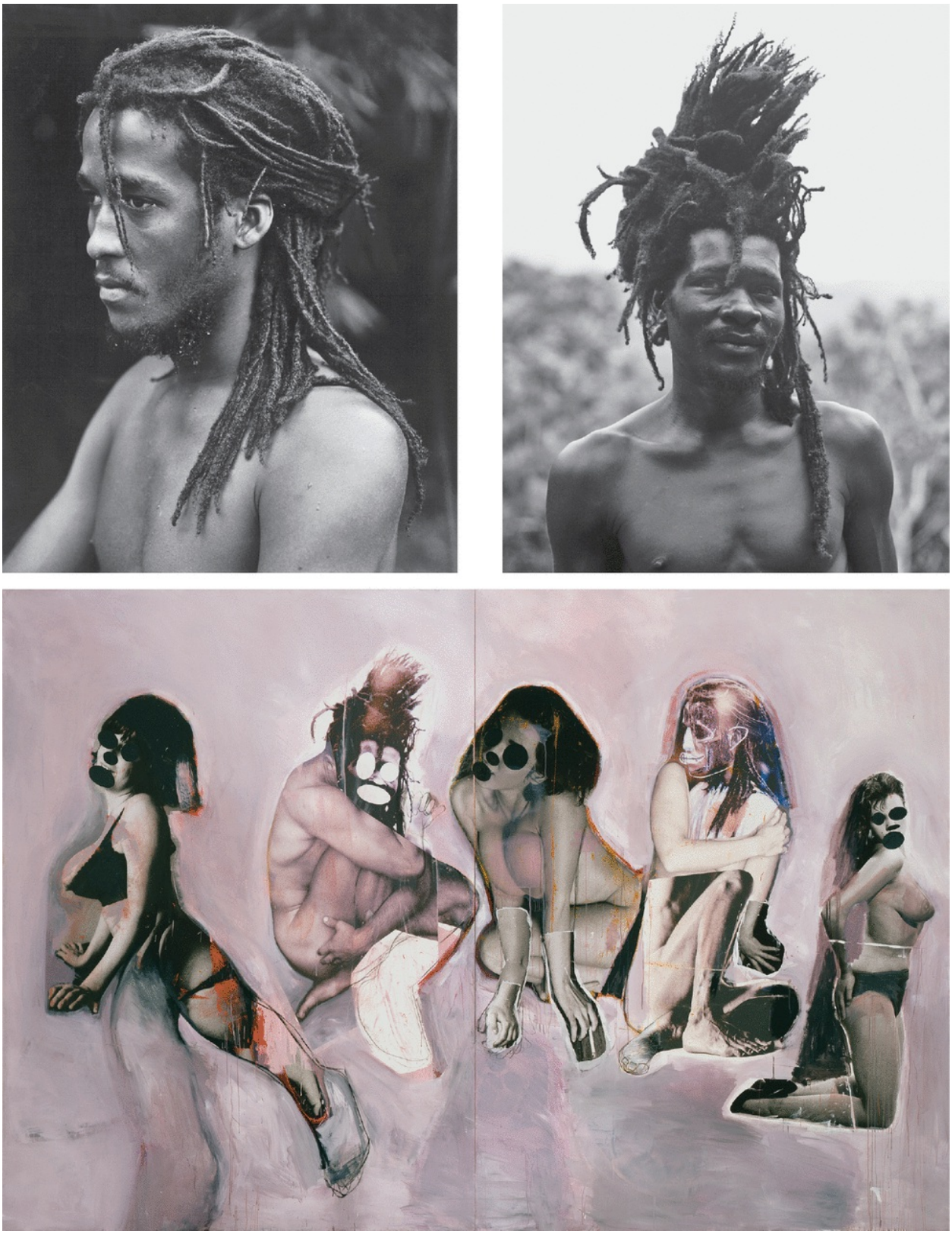

Figure 5.1 Patrick Cariou, *Yes Rasta*, pp. 11, 59; Richard Prince, *James Brown Disco Ball*.

© 2002 powerHouse Books. © **Richard Prince. Courtesy Gagosian. Photo: Robert McKeever.**

In *Kienitz v. Sconnie Nation LLC*,[243] the Seventh Circuit expressed reservations about the Second Circuit's approach in *Cariou*. The first criticism was that the Second Circuit seemed to reduce fair use to a question of transformativeness. The Seventh Circuit considered that this focus was too extreme, and might jeopardize a right-holder's possibility to license works for derivative uses as envisaged by section 106(2) US Copyright Act.[244] In the case at hand, the court reviewed unauthorized use of a photograph of Soglin, the Major of Madison, Wisconsin, taken by Kienitz to create a protest t-shirt which mocked Soglin for attempting to shut down a local annual event. The defendant had sold some of the shirts with a view to making a modest profit. While the Seventh Circuit noted that the form of the use as a political comment went in the defendant's favour because it was consistent with constitutional values,[245] the political nature of their new expression, per se, was insufficient to override the photographer's copyright claim. Although the First Amendment protected healthy democratic debate, copyright law grants exclusive rights to those political expressions which are fixed and original. The Seventh Circuit considered that the balancing of rights required courts to compare the two works to establish whether the (transformed) use sought to complement or supplant the market for the original work. Here, the court held that the parody did not replace the original, and might even lead to an increase in demand as it came to the attention of a wider audience. Therefore, the defendant's use was deemed to be fair, although the Seventh Circuit preferred to assess all four statutory factors, and place any emphasis on the fourth factor of market substitution.[246]

This was more recently reiterated in in *ADJMI v. DLT Entertainment Ltd*,[247] in which a district court in the southern district of New York noted in respect of a dark theatrical take on a famous TV sitcom that:

> Transformative use is neither a sufficient nor exclusive means to establish fair use, but '[s]uch works […] lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright […] and the more transformative the new work,' the greater the likelihood of a finding of fair use.[248]

Hence, the balance which needs to be struck within US copyright law is to promote *progress* in the arts and sciences by providing economic incentives (property rights) but not to such an extent that it prevents others building on previous works, as this might stifle creativity. With this in mind, it is clear

that US courts have recognized that parody has a valid purpose. Once this worthy purpose has been established, the parody, like any other use, must be measured against the statutory fair use factors.[249] Whilst the transformative nature of the use tilts the balance in favour of the defendant, it does not preclude courts from offsetting this by the combined weight of the remaining factors.

The robust US First Amendment culture also explains why courts tend to refrain from finding infringement of publicity rights unless the use complained of constitutes defamation or a violation of privacy.[250] Even in such cases, courts seem to have raised the threshold by requiring evidence of 'actual malice' on the part of the defendant.[251] Although *Kienitz v. Sconnie* considered the rights of a politician,[252] the principle may be expanded to any public figure, such as a famous musician,[253] especially if the parody comments upon the target individual's opinions.[254]

6. Conclusion

Copyright law aims to reward authors and right-holders to foster creative endeavours. The bundle of exclusive rights granted to right-holders is not absolute. Limits are necessary to enable future creators to draw upon earlier ideas. Whilst the idea/expression dichotomy ensures free access to abstract ideas, copyright exceptions go one step further and grant access to expressions as well, but only in particular circumstances. Both breathing spaces are essential to preserve and promote the values of freedom of expression. Although a parody exception might be perceived as a threat to the existing balance of rights and interests, it is required to ensure that this particular form of expression can be shielded from infringement. The provision of a specific exception focussed upon parody provides courts with the most appropriate tool to fine-tune the balance as appropriate for this form of social and artistic criticism.

However, the parody exception incorporates its own limits. Certain parodic uses will still be curtailed. Locating where the outer boundary lies is far from straightforward for parodists (seeking guidance whether their use is permitted), right-holders (assessing whether copyright infringement is likely to succeed), and judges (required to assess the defence on a case-by-case basis) alike. Whilst the underlying parodic purpose may serve as a

presumption of fairness, the exception still requires delineation into workable factors which determine whether any particular use, given the surrounding circumstances, should be lawful. The individual factors bear national characteristics and so will vary according to legal tradition and judicial development in this area of law. Our evaluation of national jurisprudence reveals that differences are inter- and intra-jurisdictional, since there is a degree of inconsistency between decisions applying the exception within a single territory.[255] For example, although the exception is well-established in France and the US, similar facts have led to opposite outcomes, exacerbating legal uncertainty and jeopardizing the promotion of creative expression.

We have located the source of this uncertainty. Firstly, fair use or fair dealing relies on factors which are not parody-specific, but are common to a number of different copyright exceptions. Secondly, as case law evolves, courts attach varying priorities to the relevant factors,[256] which may lead to apparently irreconcilable outcomes between allowed and prohibited uses.[257] In contrast, in France, 'the rules of the genre' is a test which is specific to the parody exception, although, even then, courts enjoy some latitude when applying the factors to the use in question. Most importantly, although courts generally acknowledge that the parody exception is founded in the protection of the human rights, there is a marked reticence to resolve potential conflicts between copyright and freedom of expression head-on. Understandably, judges typically use the parody exception to resolve this conflict indirectly, although our overview of ECtHR case law suggests that there may be an alternative route which might provide stakeholders with more specific guidance for assessing the legality of a use.

The objective of a parody exception is to preserve a new critical comment made not by producing a journalistic or educational text, but by reproducing the whole or a substantial part of a prior protected work, to create a new creative expression. Hence, a parody is both complementary to the earlier work (since it conveys a different message to the original), as well as being creative (giving rise to a new work). Once the purpose of the use is established as being of the correct kind, the second stage is to verify the 'fairness' of the use, according to the variety of factors which have been established by the legislature and courts: fair dealing, fair use, or the rules of the genre. Although procedurally, the parody exception acts as a defence, this should not become a barrier which disengages it from its roots and function.[258] Currently, as there is no established hierarchy or single decisive

factor, the overall fact-based assessment carried out by courts may appear rather perilous and subjective.

As the parody exception is so deeply rooted in the fundamental value of freedom of expression, this chapter has proposed that exception should include a balancing test based upon expressive values.[259] Such an approach would not only clarify the relationship between parody, copyright, and freedom of expression but it would bolster the safeguards in place for right-holders, by shielding them from uses which have minimal social value, while fostering parodies of the type which society values the most. As has been demonstrated throughout this chapter, the outer limits of the parody exception in each jurisdiction which has been studied are determined by the influence of freedom of expression on copyright, the margin of appreciation, and the proportionality test.

Since parody is a vehicle for freedom of expression to be realized by encouraging discursivity in democratic societies, 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, which may appear inevitable in ambiguous parody cases, becomes more straightforward, if based upon the guidance which has been evolved already under human rights law. The human rights framework would seem to inject the much-needed legal certainty required in this area of copyright law, as well as increasing the likelihood of greater harmonization of the parody exception, which is especially attractive in a borderless world.[260]

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[1] J Locke, *Second Treatise of Civil Government* (1690) available at http://www.constitution.org/jl/2ndtreat.htm (access date: 10 November 2018); J Hughes, 'Copyright and incomplete historiographies: of piracy, propertization, and Thomas Jefferson' (2006) 79 *Southern California Law Review*, 1011–13.

[2] See the amendments made to section 301 of the US Trade Act 1974. This provision enables the imposition of sanctions on international treaty violations burdening or restricting US commerce. This has been increasingly used in the field of intellectual property. Furthermore, the change in forum from the WIPO-administered Berne Convention to the WTO which is trade specific inherently taints copyright policy.

[3] And to a certain extent this explains the reluctance of accepting human rights considerations when applying framework notions such as 'fair use', 'fair dealing', and 'rules of the genre'.

[4] For a more complete study, see e.g. C Geiger and E Izyumenko, *Intellectual Property before the European Court of Human Rights* (2018) Centre for International Intellectual Property Studies Research Paper No 2018-01, forthcoming in C Geiger, A Nard, and X Seuba (eds), *Intellectual*

Property and the Judiciary (EIPIN series vol. 4, EE, 2018).

[5] D Gervais, 'How intellectual property and human rights can live together' in P Torremans (ed.), *Intellectual Property Law and Human Rights* (3rd edn, Kluwer, 2015) chapter 1.

[6] Here, the author makes a presumption that in the eyes of the wider public, copyright policy has lost legitimacy due to the perception that the current rules only benefit multinational companies at the expense of creators.

[7] See Chapters 2 and 4.

[8] Especially since the judicial reticence for the ECtHR to hear intellectual property cases has vanished. *Anheuser-Busch Inc. v. Portugal* (2007) 44 EHRR 42 (ECtHR, Grand Chamber) (hereafter *Anheuser-Busch*) [66]–[72]; *Smith Kline and French Laboratories Ltd v. the Netherlands* (1990) 66 DR 70 (ECommHR) (hereafter *Smith Kline*). For more, see Chapter 7, section 2.

[9] C Geiger, 'The constitutional dimension of intellectual property' in P L C Torremans (ed.), *Intellectual Property and Human Rights* (3rd edn, Kluwer, 2008) 121; C Geiger, 'Constitutionalising: intellectual property law? The influence of fundamental rights on intellectual property in the European Union' (2006) 37(4) *IIC* 371, 378; C Geiger, 'Fundamental rights, a safeguard for the coherence of intellectual property law?' (2004) 35(3) *IIC* 268, 271; P B Hugenholtz, 'Copyright and freedom of expression in Europe' in R C Dreyfuss, H First, and D L Zimmerman (eds), *Innovation Policy in an Information Age* (OUP, 2001) 346.

[10] Yet asking courts to balance freedom of expression and copyright is not desirable given that it might jeopardize the balance intended by the legislator between these rights. This resulted in the rejection by courts of arguments based on freedom of expression to authorize a parody. C-337/95 *Evora v. Dior* [1997] ECLI:EU:C:1997:517; M Senftleben, 'Chapter 13: quotations, parody and fair use' in P B Hugenholtz, A Quaedvlieg, and D Visser (eds), *A Century of Dutch Copyright Law* (deLex, 2012) 372; A Lucas, 'Droit d'auteur, liberté d'expression et droit du public a l'information' (2005) 1 *A&M* 13, 21; P B Hugenholtz, 'Copyright and freedom of expression' in N Elkin-Koren and N W Netanel (eds), *The Commodification of Information* (Kluwer, 2002) 357. Yet, the argument of freedom of expression led to a recognition of parody uses in trade mark law in France: TGI Paris, ord. réf. 24 octobre 1991, inédit; upheld on appeal Paris, 28 janvier 1992; Cass. Comm. 21 février 1995, BC, IV, n °55; D. 1995, IR, p. 97 (hereafter *Marlboro case*); TGI Paris, 17 février 1990, J.-CL. Marques, fasc. 7140, n°15; Cass. (2e Civ.), 2 avril 1997; Cass. 12 juillet 2000, D. 2001, n°3, jur., 259, note Edelman (hereafter *Peugeot v. Canal+*); Versailles 17 mars 1994 (hereafter *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 on appeal Paris, 30 avril 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 janvier 2004, *Esso v. Greenpeace*, Internet Fr., www.legalis.net; confirmed on appeal Paris, 16 novembre 2005; TGI Paris, ord. réf., 2 août 2002, Propr. ind. 2002, Comm. n°68, note Tréfigny; Paris, 26 février 2003, D. 2003. Jur. 1831, note B. Edelman; CCE 2003, Comm. n°38, note Caron; Propr. intell. 2003, p. 322, note Bénabou (hereafter *Areva*).

[11] But it must be noted that this is not unanimously accepted. See for example, Farida Shaheed, UN Special Rapporteur in the field of cultural rights, who spoke on 6 May 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 realized. In this light, exceptions are vital to safeguard the balance the interests of right-holders and the interests of others to participate in cultural activities. Speech available at https://juliareda.eu/2015/05/intellectual-property-rights-are-not-human-rights/ (access date: 10 November 2018); more on this scepticism: J Griffiths and L McDonagh, 'Fundamental rights and European IP law: the case of Art 17(2) of the EU Charter' in C Geiger (ed.), *Constructing European Intellectual Property* (EIPIN, 2013) 75.

[12] See, for example, in European countries: Protocol 1 Article 1 of the ECHR, and explicitly in

Article 17(2) of the EU Charter. The ECtHR recognized intellectual property to be protected under the fundamental right to property. C-479/04, *Laserdisken ApS v. Kulturministeriet* [2006] ECLI:EU:C:2006:549, [65]; C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, [61]–[70]; ECtHR *Anheuser-Busch* (n 8) [66]–[72]; *Smith Kline* (n 8). For more on copyright as a property right and the scepticism attached thereto: Griffiths and McDonagh (n 11) 75; for the EU, C-277/10 *Martin Luksan v. Petrus van der Let* [2006] ECLI:EU:C:2006:549, [68]–[71]; J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European Copyright law' (2013) 38(1) *E. L. Rev.* 65–78.

[13] This provision should be read alongside articles 15(1)(c) and 27 ICCPR. Further guidance can be found in Office of the High Commissioner for Human Rights, CCPR General Comment No 23, adopted on 8 April 1994 and available at http://www.refworld.org/docid/453883fc0.html (access date: 10 November 2018).

[14] This is also valid in the US and facilitated by the constitutional embedding of copyright and freedom of expression. See *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (hereafter *Harper*), [558]. See section 5.5.

[15] P El Khoury, *Les exceptions au droit d'auteur* (thèse Montpellier, 2007) 157.

[16] The realization of freedom of expression is the primary justification for the introduction of a parody exception. *RJR MacDonald Inc. v. Canada (Att. Gen.)* [1995] 3 S.C.R. 199 (hereafter *RJR*), [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." ' See Chapter 5, section 5.1. 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 (n 15) 161; A Lucas, *Fasc. 1248: Droits des auteurs.—Droits patrimoniaux.—Exceptions au droit exclusif* (2013) Jurisclasseur, [19].

[17] See Chapter 4, section 2.3.

[18] 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.' C J Craig, 'Putting the community in communication: dissolving the conflict between freedom of expression and copyright' (2006) 56 *U. Toronto L.J.* 75, 108.

[19] 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. B Mouffe, *Le droit à l'humour* (Larcier, 2011) 35; N W Netanel, *Copyright's Paradox* (OUP, 2008) 3.

[20] 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 (n 9) 121.

[21] See chapter 7, section 2.7.

[22] Demonstrating the absence of conflict between IPRs and Human Rights: E Derclaye (2008), 'Intellectual property rights and human rights' in P Torremans (ed.), *Intellectual Property and Human Rights* (2nd edn, Kluwer, 2008) 133, esp. 154; D Gervais, 'Intellectual property and human rights: learning to live together' in P L C Torremans (ed.), *Intellectual Property and Human Rights* (3rd edn, Kluwer, 2008) 21; P Torremans, 'A clash between theory and practice? Introduction' in F Brison, S Dussollier, M-C Janssens, and H Vanhees (eds), *Moral Rights in the 21st Century* (Larcier, 2015) 224.

[23] Amongst others: C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariat voor de Media* [1991] ECLI:EU:C:1991:323; *Handyside v. The United Kingdom* (1976) 1 EHRR 737 (hereafter *Handyside*).

[24] Article 19 UDHR; article 19 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.

[25] *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.

[26] A Weber, *Manual on Hate Speech* (Council of Europe Publishing, 2009) 8.

[27] 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), 1; similarly, at European level with the ECHR. D Sugarman and M Butler, *A Handbook on European Discrimination Law* (European Union Agency for Fundamental Rights, 2011) 12, available at http://eprints.lancs.ac.uk/34017/ (access date: 10 November 2018).

[28] 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).

[29] *Hak-Chul Shin v. Republic of Korea* (926/2000), CCPR/C/80/D/926/2000 (2004); 11 IHRR 928 (2004), [7.2] and [8].

[30] *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) (hereafter *Bodrožić*), [7.2]; *Rakhim Mavlonov 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, General Comment, General Comment No 34: Freedom of expression (article 19), 12 September 2011; CCPR/C/GC/34, [11]; E Barendt, 'Copyright and free speech theory' in J Griffiths and U Suthersanen (eds), *Copyright and Free Speech* (OUP, 2005) 25.

[31] See Section 4.1.5 and Chapter 7, section 3.

[32] The article further indicates that it does not prevent states from requiring broadcasting, television, or cinema enterprises to be licensed.

[33] Being media-neutral, freedom of expression is applicable to all types of communication. Weber (n 26) 20.

[34] Amongst others: *Karataş v. Turkey*, (1999) IHRL 2880 (hereafter *Karataş*); *Ceylan v. Turkey*, (2000) 30 EHRR 73 (hereafter *Ceylan*), [32]; repeated in *Ashby Donald and others v. France*, App No 36769/08 (hereafter *Ashby*), [38]. D Voorhoof, 'Is freedom of expression a legitimate argument for disrespecting copyright? The parody as a metaphor' (2000) 14, available at http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/FOXandParody.actu (access date: 10 November 2018).

[35] *The Sunday Times v. The United Kingdom (No 1)* (1979) 2 EHRR 245 (hereafter *Sunday Times*) but also in *Handyside* (n 23).

[36] *Özgür Gündem v. Turkey* (2001) 31 EHRR 49, [43]; *Khurshid Mustafa and Tarzibachi v. Sweden*, App No 23883/06, [33].

[37] As stated by the Preamble of the Charter, the Charter aims to reaffirm 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, see Griffiths (n 12).

[38] This possibility was provided by Protocol No 14 of the ECHR which entered into force on 1 June 2010. The EU Lisbon Treaty of 2009 enables the EU's accession to the ECHR.

[39] Accession is currently at a standstill following a negative opinion delivered by the CJEU in Opinion C-2/13 of the full Court, 18 December 2014, ECLI:EU:C:2014:2454.

[40] Articles 52(3) and 53 of the Charter provide that the meaning and scope of the right to freedom of expression are identical to those 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 (access date: 10 November 2018); also the approach in Advocate General's Opinion in *Deckmyn* [2014] ECLI:EU:C:2014:458, [80].

[41] Article 19(3) ICCPR provides: '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. This provision must be read alongside article 20 ICCPR prohibiting '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. The combination of these two provisions enables the prohibition of any kind of discrimination. Under the ECHR, this three-pronged test is provided in article 10(2).

[42] Hence, national authorities must demonstrate that the restriction is 'relevant and sufficient'; see ECtHR, *Leroy v. France*, App No 36109/03 (hereafter *Leroy*), [46]; *Handyside* (n 23) [50]; *Sunday Times* (n 35) [62]; *Jersild v. Denmark* (1994) 19 EHRR 1 (hereafter *Jersild*), [31].

[43] This echoes the language of article 10(2) ECHR: *Bodrožić* (n 30) [7.2]; *Malcolm Ross v. Canada*, Communication No 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000), [11.6]; *Tae-Hoon Park v. Republic of Korea*, Communication No 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998), [10.3]; M O'Flaherty, '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 *EHRLR* 2, 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 October 2008, Geneva) 11, available at http://www.article19.org/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf (access date: 24 October 2015); 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.

[44] O'Flaherty (n 43) 2–28; ECtHR: amongst others *Peta Deutschland v. Germany*, App No 43481/09 (hereafter *Peta*), [46].

[45] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23 (20 April 2010), [79].

[46] Article 20 ICCPR; article 4(a) of the CERD.

[47] Article 14 ECHR; '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 April 2010), [79].

[48] 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.

[49] *Sunday Times* (n 35) repeated in *Ashby* (n 34) [31]; *Peta* (n 44) [46]; *Aguilera Jeminez v. Spain*, App Nos 28389/06, 28955/06, 28957/06, 28959/06, 28961/06, 28964/06, 8 December 2009 (hereafter *Jeminez*), [22]; *Vereinigung Bildender Künstler v. Austria*, App No 68354/01 (hereafter *Vereinigung*), [26]; *Raichinov v. Bulgaria*, App No 47579/99, [47]; *Pedersen and Baadsgaard v. Denmark (No 2)* (2006) 42 EHRR 486, [79]; *Özgür Gündem v. Turkey*, [43]; *Castells v. Spain* (1992) 14 EHRR 445 (hereafter *Castells*), [42]; *Oberschlick v. Austria* (1995) 19 EHRR 389 (hereafter *Oberschlick*), [57]; *Handyside* (n 23) [49]; D Voorhoof, 'Freedom of expression under the human rights system from Sunday Times (n 1) v. U.K. (1979) to Hachette Filipacchi Associés ('ici Paris') v. France (2009)' (2009) 2 *Inter-Am. & Eur. Hum. Rts. J.* 3, 10; A Strowel and F Tulkens, 'Equilibrer la liberté d'expression et le droit d'auteur' in A Strowel and F Tulkens (eds), *Droit d'auteur et liberté d'expression: regards francophones, d'Europe et d'ailleurs* (Larcier, 2006) 12.

[50] *Verein Gegen Tierfabriken Schweiz v. Switzerland (No 2)*, App No 32772/02 (hereafter *Tierfabriken*), [107]; *Handyside* (n 23) [49]; *Observer & Guardian v. UK* (1991) 14 EHRR 229, [50]; *The Sunday Times v. The United Kingdom (No 2*) (1992) 14 EHRR 229, [40–[41], 64]; *Lingens v. Austria* (1986) 8 EHRR 407 (hereafter *Lingens*), [41]; *Oberschlick* (n 49) [57]; *Castells* (n 49) [42]; *Jersild* (n 42) [23]–[24]; *Jeminez* (n 49) [22]; *Vereinigung* (n 49) [26]; *Karataş* (n 34) [48]; *Ceylan* (n 34) [32]; A Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, OUP, 2012) 637.

[51] *Handyside* (n 23) [45], repeated in *Sunday Times* (n 35) [59]–[66], *Lingens* (n 50) [47].

[52] 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* (n 34); *Peta* (n 44) [46]; P B Hugenholtz, 'Copyright and freedom of expression in Europe' in Dreyfuss, First, and Zimmerman (eds), *Innovation Policy* 350.

[53] Mowbray (n 50); A Nicol QC, G Millar QC, and A Sharland, *Media Law & Human Rights* (2nd edn, OUP, 2009).

[54] Mowbray (n 50) 632; Voorhoof (n 49) 14.

[55] *Lingens* (n 50) [41]–[43]; *Oberschlick* (n 49) [57]–[61]; *Baka v. Hungary*, App No 20261/12 (hereafter *Baka*), [159]; *Satakunnan Markkinapörssi Oy and Satamedia Oy*, App No 931/13 (hereafter *Satamedia*), [167].

[56] *Sunday Times* (n 35) [65]; *Barfod v. Denmark*, App No 11508/85, [29]–[32]; *Baka* (n 55) [159]; *Satamedia* (n 55) [167]; *Thorgeir Thorgeirson v. Iceland* (1992) 14 EHRR 843, [63].

[57] *Alinak v. Turkey*, App No 40287/98, [41]–[42]; *Karataş* (n 34) [49]; *Müller and Others v. Switzerland*, App No 10737/84, [27].

[58] *Ashby* (n 34) [39]; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* (1990) 12 EHRR 161, [33]; *Hertel v. Switzerland*, App No 25181/94, [47]; *Mouvement Raëlien Suisse v. Switzerland* (2013) 56 EHRR 14, [61].

[59] Confirmed recently in *Sekmadienis v. Lithuania*, App No 69317/14 (hereafter *Sekmadienis*).

[60] Also in *Ceylan* (n 34) [33] (similar approach for public figures as for politicians).

[61] Mouffe (n 19) 47; Voorhoof (n 49) 19; *Vereinigung* (n 49) [34]; *Alves Da Silva v. Portugal*, App No 41665/07 (hereafter *Da Silva*), [28]; *Ukrainian Media Group v. Ukraine*, App No 72713/01, [65]–[70]; *Handyside* (n 23) [48]–[50]; *Lingens* (n 50) [42]; *Oberschlick* (n 49) [58]–[59]; *Castells* (n 49) [43].

[62] Voorhoof (n 49) 20.

[63] *Handyside* (n 23) [48]–[50]; *Lingens* (n 50) [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* (n 49) [58]–[59]; *Castells* (n 49) [42]–[46] where the Court operates an internal ranking between different types of political expression.

[64] *Karataş* (n 34).

[65] Ibid, [49].

[66] It must be remembered 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* (1998) 25 EHRR 1, [48].

[67] *Karataş* (n 34) [52]; *Jersild* (n 42) [31].

[68] *Wingrove v. the United Kingdom* (1996) 24 EHRR (hereafter *Wingrove*), [58].

[69] Ibid, [54].

[70] *Krone Verlag GmbH & Co KG (No 3) v. Austria* (2003) 36 EHRR 57, [30].

[71] Ibid.

[72] Ibid, [31].

[73] *Leroy* (n 42); *Jeminez* (n 49); *Da Silva* (n 61); *Nikowitz and Verlagsgruppe News GmbH v. Austria*, [2007] EMLR 245; Mouffe (n 19) 173.

[74] *Vereinigung* (n 49). This case was not dealt with under copyright law but instead defamation law.

[75] Damaged by a visitor who threw red paint over the painting.

[76] *Vereinigung* (n 49) [33].

[77] Ibid, [33]; repeated in *Da Silva* (n 61) [27].

[78] As argued in Chapter 1, parody is a multivalent concept which encompasses multiple uses including satire.

[79] For example, good faith is interpreted in favour of the defendant. *Lingens* (n 50) [46].

[80] *Oberschlick* (n 49).

[81] Ibid, [33].

[82] Such as in C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn*).

[83] See Chapter 4, section 2.1.

[84] Parodies do express some kind of truth although the parody does not have to accurately reflect reality. Edelman, note under Cass., 12 juillet 2000, D., 2001, 260.

[85] *Jersild* (n 42) (expression of unlawful racist views).

[86] Ibid, [30].

[87] Ibid, [31].

[88] Ibid, [35].

[89] Ibid, [33].

[90] Ibid.

[91] Ibid, [11].

[92] Referring to article 20 ICCPR (prohibition of discrimination) alongside article 4 CERD.

[93] Repeated in *Le Pen v. France*, App No 18788/09.

[94] *Leroy* (n 42).

[95] *Sekmadienis* (n 59).

[96] Citing *Tierfabriken* (n 50) [75]–[76].

[97] *Sekmadienis* (n 59) [79] as previously decided in *Giniewski v. France*, App No 64016/00 (hereafter *Giniewski*), [52]–[53] and *Terentyev v. Russia*, App No 25147/09, [22].

[98] See Chapter 1 section 2.

[99] See Chapter 4, section 2.1.

[100] *Ashby* (n 34) [39].

[101] *Handyside* (n 23) [49].

[102] Declaration of the Committee of Ministers on freedom of political debate in the media, adopted on 12 February 2004; Voorhoof (n 49) 34.

[103] Voorhoof (n 49) 36.

[104] *Féret v. Belgium*, App No 15615/07, [78].

[105] This could have been influential in *Deckmyn* (n 82). See Chapter 7, section 2.

[106] See n 68, [58].

[107] *Sekmadienis* (n 59) [74].

[108] *Norwood v. UK* (2004) 40 EHRR SE 111. Repeated in *Pavel Ivanov v. Russia*, App No 35222/04 (hereafter *Ivanov*). The application was consequently declared inadmissible by the Court because it was incompatible *ratione materiae* with the provisions of the Convention.

[109] '[S]uch 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', *Ivanov* (n 108) [53]. Non-discrimination is also protected through article 14 ECHR and Protocol no 12 to the ECHR.

[110] The Court also supported its reasoning under the admissibility criteria of article 35(3) and (4) ECHR.

[111] *I.A. v. Turkey*, App No 42571/98 (hereafter *I.A. v. Turkey*).

[112] Ibid, [29].

[113] Ibid, [30]; *Otto-Preminger-Institut v. Austria* (1994) 19 EHRR 34 (hereafter *Otto-Preminger-Institut*), [47]; recently repeated in *Sekmadienis* (n 59) [81].

[114] Weber (n 26) 49.

[115] Cases where the court decided against a violation of article 10: *Otto-Preminger-Institut* (n 113) [47]*; Wingrove* (n 68) [60]; *I.A. v. Turkey* (n 111) [29]; *Murphy v. Ireland* (2004) 38 EHRR 212 (hereafter *Murphy*), [82]; *contra: Giniewski* (n 97) [51]–[52]; *Aydın Tatlav v. Turkey*, App No 50692/99, [28]; *Klein v. Slovakia*, App No 72208/01, [52]; *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey*, App No 6587/03, [30]; *Sekmadienis* (n 59) [84], *Giniewski v. France*, App No 64016/00, [56].

[116] *Müller and Others v. Switzerland*, App No 10737/84 (hereafter *Müller*).

[117] The words of the Cantonal Court in *Müller* (n 116) [14].

[118] Ibid, [33].

[119] Ibid, [34].

[120] Ibid, [35].

[121] Ibid, [36].

[122] Ibid, [37].

[123] Ibid, [50].

[124] Ibid, [56].

[125] *Handyside* (n 23) [48]; *Müller* (n 116) [35]; *Otto-Preminger-Institut* (n 113) [50].

[126] *Lehideux and Isorni v. France*, App No 24662/94 (hereafter *Lehideux*), [53–[58] repeated in

Garaudy v. France, App No 65831/01.

[127] This reinforces the teachings of *Jersild* (n 42) [35] by noting which expressions fall outside the scope of protection of article 10 ECHR.

[128] *Lehideux* (n 126) [53].

[129] Ibid, [55].

[130] Voorhoof (n 49) 10.

[131] Weber (n 26) 30–47.

[132] For example, in *Jersild* (n 42), the aim of the journalist was to expose problems of public concern, [33]; in *Lehideux* (n 126), the applicants did not deny or revise what they referred to as 'Nazi atrocities and persecution', [47]; in *Gündüz v. Turkey*, App No 35071/97 the Court held that the programme was made in a way to encourage the debate on a question of public interest, [44].

[133] A wider margin of appreciation for religious matters is justified by the absence of European consensus among the member states. *Wingrove* (n 68) [58]; *Otto-Preminger-Institut* (n 113) [50]; *Murphy* (n 115) [67], [81]–[82]; *TV Vest AS and Rogaland Pensjonistparti v. Norway*, App No 21132/05, [67].

[134] Report adopted by the Commission at its 70th plenary session (16–17 March 2007); Recommendation 1805(2007) on blasphemy, religious insults and 'hate speech' against persons on grounds of their religion, adopted on 29 June 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*, App No 5853/06. The case was held inadmissible by the ECHR; Resolution 1510(2006) on freedom of expression and respect for religious beliefs, adopted on 28 June 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 penalized by law.

[135] Example: insulting the government is not permitted. *Castells* (n 49); *Lindon, Otchakovsky-Laurens and July v. France*, App Nos 21279/02 and 36448/02.

[136] Canada is actually a mixed regime featuring French and English influences.

[137] A Strowel, 'La parodie selon le droit d'auteur et la théorie littéraire' (1991) 26 *RIEJ* 23, 44; M Buteau, *Le droit de critique en matière littéraire, dramatique et artistique* (L. Larose et L. Tenin, 1909).

[138] This term is understood broadly as comprising print press but also magazines, TV, film, theatre, etc.

[139] Loi du 29 juillet 1881 sur la liberté de la presse.

[140] Abuses of freedom of expression repressed by the Freedom of the Press Act cannot be pursued under ordinary law: Cass., 1ère Civ., 31 janvier 2008, *F et autres c/ Mme. M.*, n°07.12.643N, Gaz. Pal, recueil novembre–décembre 2008, p. 4165; Cass., 2e Civ., 20 novembre 2003, *Le Goff c/ Guyader—Le Ny*: Juris-data n°2003-021061; JCP n°3, 14 janvier 2004, somm., IV 1 064-1 072, p. 96; Cass, 2e Civ., 8 mars 2001, *Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne c/ Godefroid*, n°98-17.574.

[141] Amongst others: Cass. (2e ch. Civ.), 8 mars 2001, Bull. Civ., II, nos 46–7; JCP, 2001, IV, nos 1799–1800; Cass. (ass. plén.), 12 juillet 2000, D., 2000, IR, p. 218; 2001, jurispr., p. 259, obs. Edelman; JCP, 2000, jurispr., II, n°10439; Bull., 2000, n°7, p. 10; Sem. Jur., 13 décembre 2000, p. 10,

obs. Lepage.

[142] Cass., 2e Civ., 5 mai 1993, *Association Scouts unitaires de France c/ SA Editions des Savanes*, Recueil Dalloz Sirey, 1994, 25e cahier, sommaires commentés, pp. 193–4, obs. Massis. Cass., 19 novembre 1990 (1ère ch. A) légipresse, n°79, p. 16; D. 1991 IR 9.

[143] Based upon the principle *lex specialis derogat lex generalis.*

[144] 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.

[145] i.e. a restriction to the exercise of freedom of expression needs to be provided by law.

[146] Cass., 2e Civ., 5 mai 1993, *Association Scouts unitaires de France c/ SA Editions des Savanes*, Recueil Dalloz Sirey, 1994, 25e cahier, sommaires commentés, 193–4, comm. Massis.

[147] This can be explained by, first, the right to freedom of expression having been interpreted by the ECtHR as being broad 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.

[148] A mutually exclusive relationship between the Freedom of the Press Act and article 1382 Civil Code implies that if an applicant is not successful in 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 paradoxical situation as the adoption of the Freedom of the Press Act aimed to raise the standard for restriction to the right of freedom of expression; Cass., 2e Civ., 2 avril 1997; *SA Automobiles Peugeot c/ Canal Plus;* JCP n°5, 28 janvier 1998, jurispr., II 10 010, p. 185.

[149] Cass., 12 juillet 2000, D., 2000, IR, p. 218, et 2001, jurispr., p. 259, obs. Edelman; JCP, 2000, jurispr., II, n°10439; Bull., 2000, n°7, p. 10; Sem. Jur., 13 décembre 2000, p. 10, obs. Lepage.

[150] Ibid.

[151] This decision is confirmed in several later decisions: Cass., 20 novembre 2003, *Le Goff c/ Guyader—Le Ny*: Juris-data n°2003-021061; JCP n°3, 14 janvier 2004, sommaires de jurisprudence, IV 1 064-1 072, p. 96; Cass, 31 janvier 2008, *F et autres c/ Mme. M.*, n°07.12.643N, Gaz. Pal, recueil novembre-décembre 2008, 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 octobre 2011, n°10-23606, non publié au bulletin.

[152] This decision led some scholars to wonder whether the court had implicitly recognized the existence of a parody exception in trade mark law through the interplay of freedom of expression. Note Edelman under Cass., 12 juillet 2000, D. 2001, n°3, jur., 259. This reasoning was repeated in TGI Paris, 1ère ch. 1ère section, 14 avril 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.

[153] Neyret (2008) 2402.

[154] TGI Paris, 3e ch. 4e section, 9 mars 2017, *Bauret v. Koons*, N° RG: 15/01086.

[155] See Chapter 4, section 2.2.1.

[156] Repeated in Versailles, 16/03/2018, *Malka v. Klasen*, RG n° 15/06029, p. 13.

[157] This Bill has constitutional characteristics.

[158] Section 12 HRA.

[159] *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142 (hereafter *Ashdown*).

[160] 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.'

[161] Ibid, [38].

[162] 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 lead to the maximization of the realization of the freedom of expression. Barendt (n 30) 15; K Q Garnett, 'The impact of the Human Rights Act 1998 on UK copyright law' in Griffiths and Suthersanen (eds), *Copyright and Free Speech* 172.

[163] *Ashdown* (n 159) [45].

[164] See Chapter 5, section 4.

[165] C Angelopoulos, 'Freedom of expression and copyright: the double balancing act' (2008) 3 *IPQ* 328, 341 and 352; M D Birnhack, 'Acknowledging the conflict between copyright law and freedom of expression under the Human Rights Act' (2003) 14(2) *Ent. L. Rev.* 24–34.

[166] Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c.11 ('Canadian Charter').

[167] *R. v. Keegstra* [1990] 3 S.C.R. 697 (hereafter *Keegstra*), [729].

[168] *Irwin Toy Ltd v. Quebec (AG)* [1989] 1 S.C.R. 927 (hereafter *Irwin Toy*); *R. V. Edwards Books and Art Ltd* [1986] 2 S.C.R. 713.

[169] *Keegstra* (n 167), [733].

[170] R Moon, *The Constitutional Protection of Freedom of Expression* (University of Toronto Press, 2000) 76.

[171] *R. v. Butler* [1992] 1 SCR 452; *Irwin Toy* (n 168), [970]. On how obscenity legislation was set aside to censor pornographic content: Moon (n 170) 105.

[172] Moon (n 170) 35.

[173] Ibid, 36.

[174] D Fewer, 'Constitutionalizing copyright: freedom of expression and the limits of copyright in Canada' (1997) 55 *U.T.L.J.* 175, 217.

[175] *Irwin Toy* (n 168).

[176] Any activity that 'conveys or attempts to convey a meaning' Ibid, [968].

[177] This should be easily achieved given that the broad interpretation given in *Irwin Toy* (n 168) 'is expressive if it attempts to convey meaning'.

[178] *Irwin Toy* (n 168) [978]–[979].

[179] Section 1 Canadian Charter.

[180] S Beaulac, *Legal Interpretation in Canada: Opening up Legislative Language as a Means to Internationalisation* (2010) 5/2010 University of Edinburgh Working Papers Series 1, 24. See section 3.2.

[181] Section 15 Canadian Charter.

[182] Craig (n 18) 78; Fewer (n 174) 195.

[183] In relation to parody: *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (1996) 71 C.P.R. (3d) 348 (hereafter *Michelin*), [70]; *The Queen v. James Lorimer* [1984] 1 FC 1065; *Source Perrier SA v. Fira-Less Marketing Co. Ltd* (1983) 70 C.P.R. (2d) 61 (FCTD). These decisions demonstrate the strength of the proprietary vision of intellectual property rights. For more: C Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011) 208–22.

[184] Fewer (n 174) 193.

[185] See *Irwin Toy* (n 168).

[186] J Bailey, 'Deflating the Michelin Man' in M Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 141.

[187] [1986] 1 S.C.R. 103.

[188] Ibid, [138]–[139]; in *RJR* (n 16), the Supreme Court favoured freedom of expression over a federal law prohibiting the advertising of tobacco products for not being proportionate to the objective sought. There might have been a different outcome if the law limited the prohibition to advertising targeting children.

[189] See *Irwin Toy* (n 168).

[190] *Keegstra* (n 167), [734].

[191] *Michelin* (n 183).

[192] Ibid, [78]–[79].

[193] Ibid, [79] and [106].

[194] Ibid, [86]–[88].

[195] [1995] 1 C.F. 68 (CA), [85].

[196] Craig vigorously criticizes 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 focusing on the assumption that copyright should be considered as any other form of private property; for example, the act of buying a book does not give property over the expression exercised by the author of the book to the book's owner. By treating copyright as akin to tangible property, the court appears to grant a 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 (n 183) 212–22; Craig (n 18) 93.

[197] *Michelin* (n 183) [109].

[198] Craig (n 18) 81.

[199] Ibid, 112.

[200] Also criticized Bailey (n 186) 125; J S T Kotler, 'Trade-mark parody, judicial confusion and the unlikelihood of fair use' (2000) 14 *IPQ* 219, 231.

[201] Referred to by the Supreme Court in *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] SCC 34, [46] and [73], for example.

[202] *Irwin Toy* (n 168) [968].

[203] *Keegstra* (n 167) [729].

[204] Ibid.

[205] See *Irwin Toy* (n 168).

[206] Yet, political communications have been recognized 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' and 'partial and unsatisfactory'. K Gelber, 'Hate speech and the Australian legal and political landscape' in K Gilbert, and A Stone, (eds), *Hate Speech and Freedom of Expression in Australia* (The Federation Press, 2007) 3.

[207] 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 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: R Burrell and J Stellios, 'Copyright and freedom of political communication in Australia' in Griffiths and Suthersanen (eds), *Copyright and Free Speech* 257–86.

[208] *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.

[209] Mainly respecting articles 19 UDHR, 19 ICCPR, and 4 CERD.

[210] The State of Victoria enacted the Charter of Human Rights and Responsibilities Act 2006 (Vic). This includes a provision dealing with freedom of expression, section 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.

[211] Known as anti-vilification provisions.

[212] There appears to be a consensus that anti-vilification laws should not be overly protective, Gelber (n 206) 5.

[213] The author regrets having found very little on the relationship between copyright and freedom of expression in Australia.

[214] This provision grants the power to Congress to pass legislation which promotes 'the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right in their respective writings and discoveries'.

[215] *Adjmi v. DLT Entm't, Ltd*, 97 F.Supp.3d 512 (S.D.N.Y. Mar. 31, 2015); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd*, 604 F.2d 200 (2d Cir. 1979); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Walt Disney Prods. v. Air Pirates*, 345 F.Supp. 108 (N.D. Cal. 1972); *Time, Inc. v. Bernard Geis Assoc.*, 293 F.Supp. 130 (S.D.N.Y. 1968). But see also *Harper* (n 14).

[216] *Harper* (n 14) [58].

[217] Ibid, [556]; *Feist Publications, Inc. v. Rural Telephone Service Co*. (1991) 499 U.S. 340 (hereafter *Feist*), [349]–[350].

[218] *Eldred v. Ashcroft* (2003) 537 U.S. 186 (hereafter *Eldred*), [219].

[219] *Campbell v. Acuff-Rose Music Inc.* 510 US 569 (1994) (hereafter *Campbell*), [575].

[220] Not only does the Constitution enable Congress to enact legislation but it simultaneously limits its powers, e.g. *Graham v. John Deere Co. of Kansas City* (1966) 383 U.S. 1, 5 (1966). *Feist* (n 217). This case notes that Congress has no constitutional power to protect unoriginal works under copyright law. See Chapter 4. Courts tend to have relied on this to avoid a direct discussion confronting free speech and copyright, i.e. if it is fair use, the courts do not see a reason to appreciate an argument based on the First Amendment.

[221] *Eldred* (n 218) [219].

[222] *Campbell* (n 219) [583].

[223] Recently recalled in *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (hereafter *Kienitz*), [760].

[224] This is most prominently evident from *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (hereafter *Suntrust*), 1276–7 (11th Cir. 2001); *Castle Rock Entm't, Inc. v. Carol Publ. Group, Inc*., 150

F.3d, [142]; *Adjmi v. DLT Entm't, Ltd*, 97 F.Supp.3d 512 (S.D.N.Y. Mar. 31, 2015), [531].

[225] *Campbell* (n 219) [580]–[584]. For example, *Loew's Inc. Columbia Broadcasting System, Inc.* was heavily criticized for having put too much reliance on the financial motivation of the parodist and may limit the availability of raw material to create new art and valuable forms of expression. 131 F.Supp. 165 (S.D. Cal. 1955), aff'd sub nom. *Benny v. Loew's*, 239 F.2d 532 (9th Cir. 1956), aff'd sub nom. *Columbia Broadcasting Sys., Inc. v. Loew's, Inc*., 356 U.S. 43 (1958). Criticized later by Judge Kaufman in *Berlin v. E.C Publications, Inc*. For more on criticisms of Loew's decision, see C Goetsch, 'Parody as free speech—the replacement of the fair use doctrine by First Amendment protection' (1980) 3 *W. New Eng. L. Rev.* 39, 51.

[226] 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

[227] Ibid, 545.

[228] See Chapter 1 section 5.3 and Chapter 4, section 2.3.

[229] *Blanch v. Koons*, 467 F.3d, [250].

[230] See Chapter 1, section 5.3.

[231] *Campbell* (n 219) [579].

[232] *Suntrust* (n 224) [1259].

[233] *Campbell* (n 219) [580].

[234] *Dr. Seuss Enters. v. Penguin Books, USA, Inc*., 109 F.3d 1394 (9th Cir. 1997). See also *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

[235] *Blanch v. Koons* (n 229); *Cariou v. Prince* 714 F. 3d 694 (2d Cir. 2013); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 507 (S.D.N.Y. 2009); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 968–9 (C.D. Cal. 2007). However, the split was applied in *Henley v. DeVore*, 733 F.Supp. 2d 1144 (C.D. Cal. 2010) (hereafter *Henley*); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.* (hereafter *Seuss I*), 924 F.Supp. 1559, 1568 (S.D.Cal. 1996).

[236] 467 F.3d 244 (2d Cir. 2006).

[237] Ibid, [253].

[238] Ibid, [254]–[255].

[239] See n 234. cert. denied 134 S. Ct. 618 (2013).

[240] Ibid.

[241] *Cariou v. Prince* (n 234) [707].

[242] *Campbell* (n 219) 579; *Blanch* (n 229) [253]; *Castle Rock* (n 224) [142]. *Cariou v. Prince* was eventually settled out of court as the plaintiff failed to convince the Supreme Court to review the Second Circuit's decision, [699], cert. denied, 134 S. Ct. 618 (2013).

[243] *Kienitz* (n 223).

[244] Ibid, [759].

[245] However, US commentators warn that one should refrain from elevating the fair use doctrine to having constitutional status. See R C Denicola, 'Copyright and free speech: constitutional limitations on the protection of expression' (1979) 67 *Cal. L. Rev.* 283, 299.

[246] Repeated in *Quenton Galvin and Jacob Meister v. Illinois Republican Party, Illinois House Republican Organisation, Roderick Drobinski, Friends of Rod Drobinski, Jamestown Associates LLC, and Majority Strategies, Inc*. (2015) No 14 C 10490.

[247] 97 F.Supp.3d 512 (2015).

[248] Ibid, [531].

[249] *Campbell* (n 219) [579]–[580]; *ADJMI* (n 247) [531].

[250] *Quenton Galvin and Jacob Meister v. Illinois Republican Party, Illinois House Republican Organisation, Roderick Drobinski, Friends of Rod Drobinski, Jamestown Associates LLC, and Majority Strategies, Inc.* (2015) No 14 C 10490; *Dhillon v. Does* 1-10, No C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014), [5]; *Henley* (n 235); *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); *N.Y. Times Co. v. Sullivan*,376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (hereafter *Sullivan*).

[251] *Blanch v. Koons* (n 236) [279]–[280].

[252] *Kienitz* (n 223).

[253] *Henley* (n 235).

[254] *Bourne Co. v. Twentieth Century Fox Films Corp*. (2009) 602 F.Supp.2d 499 (S.D.N.Y. 2009), [507]–[508], finding parody where the parody ridiculed Walt Disney for holding anti-Semitic views; *Burnett v. Twentieth Century Fox Film Corp*. (2007) 491 F.Supp.2d 962 (C.D. Cal. 2007), [968]–[969], finding parody where the work ridiculed Burnett's image. *Contra: Salinger v. Colting et al* (2009) 641 F.Supp.2d 250 (S.D.N.Y. 2009).

[255] See Chapters 4 and 7, section 2.

[256] *US*: first preference for the purpose (first factor) and now a combination of 2 and 4 (market substitution is prevalent).

[257] *US: Benny v. Loew's, Inc*. (1956) 239 F.2d 532 (9th Cir. 1956); decisions after *Campbell* (n 219).

[258] See Chapter 3, section 1.

[259] See also Chapter 7, section 2.

[260] See section 4.1 and Chapter 7, sections 2 and 3.

6

Parody and Moral Rights

1. Introduction

While the parody exception constitutes an exception to the economic rights of right-holders, a comprehensiveappreciation of the exception requires an evaluation of the interaction between parodies and an author's moral rights.[1] Not only does a consideration of moral rights enable a fuller understanding of a creator's relationship with their work, but it may also shed some light upon the boundaries of the parody exception.[2]

According to the traditional civil law approach, moral rights are distinct from economic rights. They seek to preserve the imprint of the author's personality on the work which they have created,[3] thereby recognizing and protecting their personal interest surrounding artistic reputation, honour, and dignity. 'Moral' rights, therefore, have acquired a somewhat incongruous label, since they are not concerned with 'morality' per se, but rather in safeguarding an author's non-pecuniary interests.[4]

Ever since their inception during the late eighteenth century, primarily in Western Europe, moral rights have developed in a fragmented and uneven fashion around the world, despite having received some level of international recognition in a revision to the Berne Convention in 1928.[5] Article 6bis Berne enshrines a minimum level of protection of the rights of paternity[6] and integrity, although the form that implementation takes[7] and further development is left to the signatory parties.[8] 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.

Moral rights arguably provide protection beyond the author's personal interests. By preserving the integrity of artistic and cultural expressions, the public interest is protected too, insofar as this ensures that the public is exposed to a work in the form which the author intended.[9] By permitting an author to maintain some control over their own work, the public is reassured that a work receives its proper attribution, even if the associated economic rights are controlled by another. This might suggest that the public interest here is usually aligned with the personal interests of the author,[10] but such an inference is based upon too simplistic a model.

In the case of parody and satire, the public interest also often lies with those users who would adapt authorial works because, as we have seen, modifications made for these purposes stimulate public discourse.[11] As others have already undertaken a comprehensive study of moral rights,[12] this chapter focuses on the three moral rights most affected by parodies: the right of paternity[13] (i.e. the author's right to have their name associated with their own work), the integrity right (protecting the work against unauthorized distortion), and the right against false attribution (guarding against an erroneous representation that an individual is the author of a work).[14]

2. Why Parodies Sit Uncomfortably with Moral Rights

The idea underlying moral rights is to respect the author's own conception of how their expression should be embodied in a tangible good. It is, thus, easy to appreciate why moral rights might conflict with another's wish to create a parody based upon that expression. Firstly, as a parody is, by its very nature, a 'distortion' of another work, parodies have the potential to conflict with the integrity right. Similarly, a parody which criticizes or mocks has the potential to hurt the artistic sensibilities of the original author, as well as his honour and/or reputation. Secondly, the right of paternity may be problematic, given that a parody will reproduce a substantial enough part of an earlier expression to enable the public to recognize it *as* a parody of that the earlier work. Should an author's paternity right extend to parodies of their works? Thirdly, in those jurisdictions, including the US,[15] UK,[16] and Australia,[17] which recognize the right to object to any false attribution, there may be infringement if the original author's name is associated with an altered, parody version of their work which the original author has not authorized. In

each of these scenarios, it is apparent why the original author might want to oppose such acts.

While it is open for a parodist to seek the author's permission to parody their work, this might prove to be an impossible quest, but additionally, it seems rather counterproductive to leave the ability to criticize, satirize, or ridicule to the gift of one party, who might be the target of that critique. Considering that authorization might be perceived as approval of the parody message conveyed, it is reasonable to imagine that authors and parodists alike might rather avoid this endorsement. Arguably, the uncertainty which results inherently has a chilling effect. Parodists wishing to utilize a copyright-protected work to create their new expression might elect to self-censor rather than risk liability arising from moral rights. The relationship between parody and moral rights seems to create tension between authors—the author of the original work on one side and the putative parodist on the other.

Evaluating whether moral rights are real, rather than merely theoretical concerns to parodists, requires us to consider the contours of moral rights protection in more detail. Since the difference between legal traditions in copyright law is most evident in the national treatment of moral rights, it is helpful to undertake a theoretical overview first, before drilling down to examine whether an author's moral rights will be preserved if their work is subject to parody.

3. The Implications of Monist and Dualist Theories for the Parody Exception

As we have touched upon already, the protection of moral rights contained in the Berne Convention has permitted diverse schemes at national level. However, divergence seems almost inevitable, since the Convention, an international compromise, merely reflects two established and competing theories[18] underlying the protection of authorial interests.[19]

The first—the 'monist' theory—conceptualizes authors' works as the embodiment of the author's personality.[20] Translating this theory into doctrinal law, moral and economic rights are so inextricably intertwined that infringement of one will automatically indicate infringement of the other, and the award of double damages is envisaged.[21] The second—the 'dualist' theory—identifies an author's personal and economic interests as being

separable and distinct, thereby paving the way for aspects, such as duration and alienability, of economic and moral rights to differ. Hence, whilst monism begs for unity of treatment under copyright law, dualism would permit personal interests to be regulated by other bodies of law.

Whilst the jurisdictions under scrutiny are founded on dualism, additional conceptual differences are evident.

3.1 France: *Le droit moral*

In France, moral rights (or '*le droit moral*'[22]) are almost sacred.[23] Founded in Kantian theory, an author has 'an inherent right in his own person, namely a right to prevent another making him address the public without his consent'.[24] Adopting a Kantian perspective, society should hold the author's personality supreme in order to promote creativity.[25] In this vein, the civil law tradition affords creative works legal protection, specifically to preserve the imprint of the author's personality in the works created.[26] This arguably romantic and old-fashioned conception of the author as 'creative genius' resulted in a form of subjective individual rights to protect non-economic authorial interests, meaning authors' rights comprise two integral components: exclusive rights (protecting economic interests)[27] and moral rights (protecting personality-based interests).[28]

3.2 Common law tradition and moral rights

In contrast, authors under the common law tradition have never enjoyed this 'romantic' conception. Based upon a utilitarian approach, moral rights are typically perceived as a 'necessary evil' and only instrumental in encouraging creativity and fostering exercise of the right of freedom of expression. Consequently, moral rights are protected only to the extent they are socially useful. Societal benefits accrue if the public is able to *identify* the originator of a work and have confidence that an identified work is *authentic*. Originally, these aspects were considered as separate to copyright protection,[29] with the result that any protection thereof arose under other areas of law, such as tort, contract, defamation, passing off, privacy etc.[30] Only later did moral rights become statutory rights within the remit of copyright legislation (although the US still relies heavily on other areas of

law).[31]

3.3 Moral rights and economic rights: unity or separation?

Having identifed how the different legal traditions led to different conceptualizations, we may consider how this difference has influenced the legal protection of moral rights. In terms of legislation, the almost-divine character of moral rights in France materializes into a statement of overarching principle,[32] rather than the more detailed rules which are characteristic of legislation in common law jurisdictions.[33] Although moral and economic rights embody different components of a unitary copyright paradigm, the two components receive separate treatment. Moral rights are perpetual, inalienable, and imprescriptible,[34] 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.

Relevantly recent, and eventually bowing to international pressure, specific moral rights provisions were introduced into copyright law in the UK[35] and Australia[36] relatively recently.[37] In each case, the legislative provisions are prescriptive and specific, leaving little room for judicial discretion. What is interesting is that the UK and Australian legislators adopted different approaches. While the Australian provisions are concerned with delineating the scope of moral rights protection, the primary focus of the UK provisions is identifying those aspects which moral rights do not protect.[38] While both sets of legislation include a statutory list of exceptions, neither includes an exception for parody. Thus, despite the enactment of a parody exception in respect of copyright's economic rights, a permitted parody might still infringe moral rights in France, the UK, and Australia.

Although Canada is a common law jurisdiction, its legal tradition is founded in a combination of English and French law. Canada introduced moral rights provisions into copyright law as early as 1931,[39] and consideration of this early legislation reveals a monist theory influence. For example, the moral rights remain in force for the same duration as the corresponding economic rights last.[40] Furthermore, as in France, there seems to be a correlation between acts which infringe copyright and moral rights.[41] Despite retaining the possibility for claimants to bring claims of infringement

on both copyright and moral rights grounds, Canadian courts have tended to determine infringement of works based upon the economic component only.[42] There are recent signs this might change.[43] This may be explained by the reluctance of English-speaking judges so far to align economic with moral considerations, affirming a dualist approach to be preferred.[44] Nevertheless, French-speaking judges (probably under the influence of the French system) have had less of a struggle to do so.[45] Despite the paucity of case law on moral rights, Canadian courts seem to be moving away from a secondary role to one which achieves a closer balancing between moral and economic rights.[46] Yet, as in the other jurisdictions, as moral rights curently remain distinct from economic rights, fair dealing exceptions, including parody, remain applicable to economic rights alone.

3.4 European Union influence despite the lack of EU harmonization

When considering UK and French national legislation, we cannot ignore the influence of the partial EU harmonization of copyright law. Although the InfoSoc Directive has not harmonized moral rights[47]—these remain an exclusive competence of Member States—this does not mean that EU legal texts are silent on this matter. For example, Recital 19 of the InfoSoc 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.

Additionally, the EU General Court has identified that an essential function of copyright is to 'protect the moral rights in the work and ensure a reward for creative effort'.[48] Thus, when the CJEU noted subsequently, in *Deckmyn*, that in principle a right-holder may have a legitimate interest not to be associated with a comment made through a particularly parody[49] (e.g. when it is legitimate to restrict freedom of expression),[50] this seems most likely to have been a timely reminder that national courts should keep in mind the moral rights obligations of International law. An alternative interpretation preferred by Rosati (at least) is to infer that the CJEU is attempting de facto harmonization of moral rights within the EU. [51]

3.5 The United States and the patchwork of protection

In the US, as for the other common law jurisdictions, the focus of copyright law is to provide property rights as a means to secure investment in creative endeavours rather than as a tool to protect personal interests.[52] However, having ratified the Berne Convention in 1989, the US was required to comply with the minimum level of moral rights protection which is defined therein. In the lead up to the US accession to Berne, a working group was tasked with identifying the existing level of compatibility with Berne. Despite the dissonance expressed by signatory parties at the time, the working group concluded that US statutory and common law was already Berne compliant,[53] such that new moral rights legislation was deemed superfluous. Only later, with the advent of new technologies, has the strengthening of the moral rights protection been considered.[54]

Thus, the current US moral rights protection framework for an author's paternity and integrity rights consists predominantly of a combination of state and federal law torts, including defamation, libel, misrepresentation, and unfair competition.[55] In addition, a call to strengthen moral rights relating to motion pictures was met by the National Film Preservation Act 1988. This authorized the Library of Congress to select twenty-five films annually to be added to a national register, based upon their social and cultural significance.[56] This instrument was shortly followed by the Visual Artists Rights Act 1990 ('VARA').[57] However, given the overall scepticism towards moral rights,[58] VARA recognizes paternity and integrity rights for a limited set of works, i.e. pictorial, graphic, and sculptural works.[59] Later, in order to join WCT and WPPT (which encompass moral rights-related concerns by incorporation of the relevant Berne provisions[60]), the Digital Millennium Copyright Act ('DMCA') was enacted in 1998. Once again, Congress did not consider that substantial changes were needed either to copyright law, or otherwise, to implement the WIPO treaties.[61] Yet, DMCA did add two provisions which affect moral rights: section 1201, addressing technological protection measures and section 1202, which protects rights management information.[62] The latter has been interpreted by courts as providing a right against false attribution.[63] Finally, trade mark legislation goes some way to protect personal interests with section 43(a) Lanham Act providing protection against false designation of origin and preventing the nature or quality of a protected work from being misrepresented.[64] Hence, this provision contains

three rudimentary types of protection against false attribution, preservation of authorship, and integrity.[65]

Contract law also plays a certain role in preserving the author's moral rights in the US as it does in other jurisdictions under scrutiny (although its effectiveness is yet to be proven). Whether in the form of guild agreements or other personal contracts, these allow authors to negotiate the protection of their paternity and integrity rights. Here, the Creative Commons and its various licences are usually brandished as a successful example in which private ordering protects authors' moral interests.[66]

In this disparate landscape of under-developed protection, the author's personal interests are protected in various ways, which are all external to copyright law. As a result, the fair use parody defence does not apply to moral rights as protected under US law. Thus, as in the other jurisdictions, we must consider the rights in more detail and evaluate whether moral rights are likely to buttress creators against attempts to rely upon the parody exception, potentially erecting an additional barrier for parodists in their creative endeavours.

3.6 Conclusion

Our study has identified a wide jurisdictional variation in the nature and scope of protection afforded to moral rights.[67] This is attributable to different attitudes engrained in the civil and common law traditions, which remain evident to this day.[68] The scattered protection of personal interests according to the Anglo-American tradition may create difficulties for an author wishing to bring a claim to protect these interests.

One common thread is that the parody exception in 'copyright' law does not extend to moral rights.[69] Insofar as moral rights actions remain distinct and separate from copyright infringement, it remains to be determined whether, and in what circumstances, the author of a copyright work could enjoin a parodist from reproducing their work based upon a protected personal interest.

4. Does the Parody Exception Clash with the Personal Interests of the Author?

As we have seen, the purpose of moral rights is to protect an author from harm arising as a consequence of a distortion of their work or an inadequate/inaccurate attribution. To what extent will the paternity and integrity rights come to the rescue if an author wishes to object to a parodic use of their work?

4.1 The paternity right

The right of paternity requires acknowledgement of an author's claim to authorship each time their work is exploited. This requirement serves as a public mark of a work's authenticity[70] and facilitates an author in establishing a reputation.[71] Neither national nor international legislation defines the form which this recognition should take.[72] 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.[73]

4.1.1 Countries with dedicated authorship provisions in their copyright law

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.'[74]

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.'[75]

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 section; but the right is not infringed unless it has been asserted in accordance with section 78.'[76]

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.'[77]

The UK provision clearly departs from the other jurisdictions by making

protection contingent upon prior assertion of the right by the author.[78] Hence, unless the paternity right has been asserted, a parodist, for example, will not infringe this moral right, even if they have failed to attribute authorship of the original.[79] Australia distinguishes itself by establishing an exhaustive list of those acts which are attributable.[80] It also provides a 'reasonableness' defence,[81] meaning that the the failure adequately to attribute a work to its author will not constitute a paternity right violation if it was reasonable in the circumstances.[82] The French and Canadian provisions are characterized by their brevity. This can be explained by the fact that the codification of the paternity right is simply 'formal' recognition of an uncontroversial and well-established legal principle.[83] However, the reasonableness criterion in Canadian legislation enables courts to recognize an implied waiver of this right, weakening the author's claim to identification.

4.1.2 The US: the odd one out

In contrast to the other common law jurisdictions which have introduced specific provisions to protect the paternity right, we have seen that the US patchwork relies on a feeble recognition of the right in VARA, indirect application via section 43(a) of the Lanham Act, a somewhat dubious route through the DMCA[84] and a mandate to protect copyright management information ('CMI').[85] Unsurprisingly, therefore, the weak, indirect protection has been widely criticized as disserving creators and breaching the US international obligations under Berne.[86] It also explains why, in practice, the paternity right is frequently preserved by contract law, providing some redress for uncredited uses.

Firstly, the limited scope of VARA prevents a wider application of the paternity right. This legislation only applies to works of visual art which are embodied in a limited number of originals (up to 200 reproductions of a painting, print, drawing, or sculpture). Photographs are only protected if these have to be produced for exhibition purposes only, thereby preventing many commercial artists from relying on this provision. Yet, a waiver will only be enforceable if it has been agreed in writing, designating the works specifically and signed by the author.[87]

Secondly, section 1202 US Copyright Act, which is concerned with the integrity of CMI (and implements article 12 WCT), offers a cause of action

against any usurpation of rights management information which might facilitate infringement of an economic right. This establishes a higher threshold for protection as compared with the right enshrined in article 12 WCT.[88] It undermines a claimant's position, since they must establish that the defendant has actual or constructive knowledge that the removal or alteration of the CMI would induce copyright infringement.[89] Moreover, section 1202(c), which provides a definition of CMI, requires details of the author, the right-holder, and the title of the work to be included. In some circumstances, the writer, performer, and director of a work also need to be mentioned.

Thirdly, section 43(a) of the Lanham Act bestows a private federal cause of action on 'any person who believes that he is or is likely to be damaged' by a 'false designation, description or representation in a commercial context'.[90] Therefore, the Lanham Act makes a misleading or erroneous indication of origin actionable, but apparently only if inaccurate authorship claims are made. Arguably, it does not extend to situations where no credit is given. For example, in *Batiste v. Isaac Bolden, Inc.*,[91] the Ninth Circuit considered the defendant's sampling from the Batiste brothers' track, *Funky Soul*. Originally, *Funky Soul* had been recorded with the help of Isaac Bolden, a local music publisher and record label. To this end, the eldest Batiste brother (and group manager) signed a contract to transfer all the economic rights associated with the recording to Bolden. This agreement asserted that Batiste senior was the sole right-holder. In fact, the track was authored by both brothers. Subsequently, Bolden granted a licence to the Cordes brothers to permit them to sample *Funky Soul* in their track, *So On*. The liner notes accompanying the release of *So On* only credited the eldest Batiste brother. When Bastiste junior commenced proceedings on the basis of section 43(a), the court found for the defendant because of the lack of confusion between the original and the sampled version. While the liner notes did not credit each of the Batiste brothers, it referred to the band's name and the eldest brother which was held sufficient.

What is even more worrisome is that the Supreme Court's ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp*[92] has been seen to suggest that attribution claims are only protectable within the limits of VARA.[93] Against this backdrop, the general assumption seems to be that an author has no right to guarantee their association with their own work, particularly if that right

has been waived or if ownership of the work has been transferred without an express requirement that authorship is to be credited in subsequent uses.[94] This suggests that the fact that a parodist has not acknowledged the author of the copyright-protected work will not be actionable unless it is brought under the remit of the right against false attribution as it is more likely to create confusion between the two works.[95]

4.1.3 Reconciling parody with the paternity right

The relationship between the copyright exceptions and moral rights remains largely unexplored. As is now familiar to us, a parody only 'succeeds' if the public identifies the underlying parodied work(s). A parodist is not aiming to *confuse* the public as to authorship, but seeks to build upon the common reference point provided by the earlier work to convey a new expression. Arguably, requiring a parody to identify the author of the parodied work explicitly would severely compromise it as a parody. In effect, it would carry a warning label that would potentially 'spoil the joke'. Alternatively, the presence of the original author's name on the parody might confuse the public, causing them to wonder whether the altered work is a parody, or the original author's own work. Indeed, requiring parodists to identify original authors might preclude them from being able to identify themselves as authors of the parody. In any event, it is questionable whether the original author would want their name linked explicitly with a parody, since they may prefer to avoid any direct association with the message which the parody of their work conveys.[96]

The legislative guidance which has been provided indicates that a party which benefits from a copyright exception must still respect the paternity right.[97] In France, while the legislation is explicit in respect of the exceptions enshrined in L.122-5, 3° Intellectual Property Code (IPC), the parody exception, in L.122-5, 4° IPC, is silent in this regard. This strongly suggests that those reliant upon the parody exception do not need to have regard to the paternity right. Similarly in Canada, although all other fair dealing exceptions are contingent upon acknowledgment of authorship,[98] in the case of fair dealing for the purpose of parody, the requirement is absent.[99] There has been only one Canadian case which has considered moral rights directly.[100] Here, the Court of Appeal recognized the potential for the same use to infringe both

the moral and economic rights in a work; the decision itself offered no further indication as to how the paternity right should be respected in the event that an exception rendered the use lawful in respect of the economic rights. However, it appears that the manner in which the paternity right is recognized should not completely circumscribe use which is permitted because of an exception applying to the associated economic rights only.

But is it possible for the paternity right to be reconciled with a parody in practice? Since the statutory requirements concerning the parody exception are open-ended, then it seems possible that the intrinsic label left by the parodist which permits the public to identify the original work is sufficient attribution. Indeed, the French Supreme Court thought so in *Douces Transes*.[101] In considering a musical parody with altered lyrics, the court considered that the vocal imitation and the reproduction of the entire musical work was sufficient for the public to recognize the original song, and thus satisfy the paternity right of the original author. Furthermore, the new lyrics ensured that the two works were not confused, since it was customary in musical parodies for one performer to impersonate another, by (over-)exaggerating the distinctive characteristics of their voice. As an accepted form of mockery, the court determined that the parody should not be an actionable treatment under moral rights provisions.

The UK courts have adopted a similar approach, albeit not in a parody case. In *Preston v. Raphael Tuck & Sons*,[102] the High Court considered whether attribution needed to be explicit. Here, the defendant had altered the shape of a painting by trimming its borders to an oval shape, changed the background colour to black, and omitted any reference to the original artist. The court identified that mere recognition, or a more general association with the 'original' work, was insufficient, but that the appropriate test was whether a reasonable person seeing the altered work would recognize it and associate its authorship with the original author.[103] Provided the test was satisfied, however, there was no need for the author's name to appear on the work. This suggests that in the case of a parody, the original author's attribution does not need to be explicit, since sufficient attribution is made implicitly.[104]

Infringement of the right of attribution is heavily fact dependent, turning upon the nature of the work and the circumstances surrounding the use.[105] In the case of a parodic use, if the parodist does seek to rely upon implicit attribution, much will depend upon whether the parodist has selected a well-

enough known work to parody, and their skill in execution. A true parody, i.e. one which avoids infringement of the economic rights because the parody exception applies, would seem to automatically respect the paternity right in that original work too. As such, the paternity right will not jeopardize 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 right either. Infringement of both rights may be measured by the same yardstick.

The reasonable person test, proposed by the UK court, seems a sensible approach.[106] 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 work, the more subtle the signposting can be, and still respect the paternity right.[107] If a parodist elects to parody a lesser known work, then they may need to be more explicit to ensure proper identification by the public.[108] 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.

Essentially, even though authors receive a lower level of protection in some jurisdictions in terms of the right of attribution, this does not mean that the authors' interests are not protected in another way. When it comes to parody, for example, these interests are taken into account when assessing the application of the exception. By compelling the parodist to avoid confusion between the original work and its parody use, the law requires the public to be able to identify the original and its author. Therefore, if the acknowledgement of the earlier author is not made explicit, it is nevertheless present in another form.

Finally, although appropriate authorship of any altered work is always potentially problematic, it is opined that parodists should always be able to be recognized as the author of their parodies.[109] 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.

4.2 The right against false attribution

A reasonable corollary to an author's right to be identified with their work is that the original author should not be identified as the author of a work which they have not 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 the work of another.[110]

4.2.1 Objecting to a parody based on false attribution

In France, this right is integral to, or the obverse of, the right of paternity,[111] whereas the UK,[112] Australia,[113] and the US[114] perceive this as a separate right[115] Canada adopts something of a hybrid approach, and although Canada does not have a specific right, it might adopt the same approach as in France.[116] As with the paternity right, the right against false attribution applies to the exploitation of the copyright-protected work, including adaptations thereof.[117] While in Australia, the duration of protection is aligned on the duration of the right of paternity,[118] in the UK, this right expires twenty years after the death of the author who is falsely attributed.[119] The rationale here is that after this time, little damage is caused to any residual reputation.[120] Australia is likely to adopt a similar approach to the UK owing to the influence of UK jurisprudence on the development of the law there.

As discussed in the preceding section, as parody is a reworking of earlier works,[121] at first blush, it seems reasonable that the original author might have a basis to object to a parody as a false attribution of their work. In this part, we examine whether this position stands up to further scrutiny.

4.2.2 The right against false attribution in the US

In the US, it was traditionally possible to bring an action for a 'false designation of origin'[122] by relying upon trade mark law. Authors could bring an action pursuant to section 43(a) of the Lanham Act. For example, the Monty Python team brought an action against broadcaster, ABC,[123] in order to disassociate themselves from an unauthorized abridged version of their work. The Lanham Act has also been applied in parody cases, as exemplified by *Waits v. Frito-Lay, Inc*.[124] Singer-songwriter Waits had always expressed a strong belief that an artist's musical integrity was compromised by

permitting their works to feature in commercial advertising. Unsurprisingly, therefore, he took no exception to a Frito-Lay parody of one of his songs, which also mimicked his distinctive gravelly voice to promote a new line of *Doritos* corn chips. The Ninth Circuit affirmed the jury's finding that the advert might lead to consumer confusion. By imitating his song and his voice, the defendant was making a false representation that Waits had endorsed the promoted product line.[125]

However, in 2003, the US Supreme Court reviewed the legitimacy of this approach in *Dastar*.[126] In 1995, to mark the fiftieth anniversary of World War II, Dastar produced a video of edited clips from a 1948 television series, *Crusade in Europe*. The series was based on a book of the same name by Dwight Eisenhower. Although the Dastar video reproduced about half of the original TV series, neither the book nor the original programme nor its producers received any credit. Fox had acquired the rights to the original book, and although the TV series had entered the public domain in 1977, the company had licensed others to distribute *Crusade in Europe* on video. Fox launched proceedings against Dastar under the Lanham Act for inadequate attribution of the film clips used.[127] Essentially, Fox argued that Dastar were 'passing off' others' work as their own.

Although the district and appeal courts found for Fox, the Supreme Court disagreed. The court held that the Lanham Act claim was concerned with the commercial origin of the tangible goods, meaning the Dastar videos were correctly attributed. As the rights to the intellectual property embodied in those goods protecting the creative efforts of the original authors had expired, the Lanham Act did not oblige Dastar to give any credit for the excerpts which it had copied.[128] The court was concerned that claims about authorship might be used to circumvent the time limit placed upon copyright law's exclusive rights. The ruling proved to be controversial. On one hand, adopting a broad interpretation, the decision seems to accept that authorship should be properly attributed, albeit that attribution claims should be based upon the US Copyright Act. However, a narrower interpretation limits its teachings to circumstances, as in *Dastar*, where copyright in the work has expired.[129]

Beyond the controversy surrounding *Dastar*,[130] section 1202(a) US Copyright Act requires consideration. This provision, implementing article 12 WCT, protects against false copyright management information, which

may include identification information concerning a work's authorship. Yet, as we have seen already,[131] this provision is of limited scope, since removal of authorship information will only be a violation if it is reasonably foreseeable that removal amounts to, or facilitates, infringement of economic rights.[132]

Given that the right of attribution receives such a low level of protection,[133] one may wonder whether there is any interplay between a parody of a copyright-protected work and a false attribution claim in US law. If it is accepted that authors do have a moral claim to be recognized as the author of their own creation, and equally, be able to object to being associated with a work which they have not (solely) created, then it needs to be recognized that this might not always further the public interest. As the US right to false attribution is closely linked to protecting consumers, it seems fair to assess where the consumer interest lies in relation to parody works. Whilst requiring accurate authorship attribution information to be affixed on the work would inform most consumers as to the work's originator,[134] it might also devalue the consumer experience in two ways. Firstly, additional attribution might spoil the visual appeal of the work, especially in the case of a visual works. Secondly, attribution might ruin the message which the parody is conveying, in terms of the criticism or comment being made via parody.[135] Here, it might actually be in the consumer's best interest *not* to be told who the author is, so that they work this out for themselves.[136]

With a parody, the public will be exposed to the work of at least two creators: the author of the earlier work and the creator of the parody. In the absence of a statutory attribution requirement in establishing lawful use, contextual attribution may serve the same purpose as an explicit disclaimer.[137] As mentioned, the more popular the earlier work, the more likely it is that a parodic treatment of that work will be recognized as such. If fair use obliged a parodist to credit the author of the original, the amusement provoked by the realization of the reference made would be lost. Equally, some members of the public might feel intellectually offended. Furthermore, it may be argued that US courts already consider attribution implicitly as part of the fair use assessment.[138] Consequently, although US law seems to lack a specific right of false attribution (pending clarification of *Dastar*'s reach), a flexible approach to the right against false attribution seems appropriate in fair use cases.

4.2.3 Parody and the tolerance of temporary confusion

Firstly, an author who wishes to rely upon the right against false attribution must demonstrate a misrepresentation of the copyright-protected work which creates confusion concerning authorship. In terms of whether a parody creates such confusion, it seems that a parodist's intention is exactly the opposite. The parodist, by reproducing an earlier work which is familiar to the target public, is certainly alluding to this earlier work, but this is only one step in the parody process. The next step is that the public identify the work as a parody. The parodist does not intend the author of the original work to receive the credit for the comment conveyed by the parody itself. Thus, providing the parody is recognized as such (i.e. the requirements for the parody exception are met), it is reasonable to presume that parody is not attributed to the author of the original work.[139]

This position finds support in UK case law[140] which has had to specifically reconcile a parody with the right against false attribution. In *Clark v. Newspapers Ltd*,[141] the High Court had to determine whether the publication of a parody diary ostensibly written by Alan Clark (a then 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'.[142] 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 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'[143] about the true authorship of the parody, this appears already implicit in the main requirement of absence of confusion.

Additionally in *Deckmyn*,[144] the CJEU expressly rejected that the parody exception should only apply if the parody 'could reasonably be attributed to a person other than the author of the original work itself'. 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—either with respect to its authorship, or the work 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.[145] Therefore, economic rights and moral rights seem to be reconciled on this issue too.

4.3 The integrity right

The integrity right is probably both the most important moral right for authors and the most challenging to reconcile with parody works. The integrity right protects authors against distortion, mutilation, or other modifications of their works.

4.3.1 Respect of the work in the way intended by its author

According to article 6bis(1) of the Berne Convention, an author has 'the right … 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'. Despite its importance, its implementation into national law varies greatly, leading to various degrees of protection.

4.3.1.1 Protecting the integrity of works through copyright legislation

The national legislation provides:

France:[146] 'An author shall enjoy the right to respect […] his work.'

Canada:[147] '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:[148] '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:[149] '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.'[150]

The first major difference is the fact that in France no legislative standard is set: an author's work must be respected.[151] In the UK, Canada, and Australia,[152] the author's right to object to a treatment of their work applies the Berne criterion. The integrity right is violated only if it can be established that the treatment is prejudicial to the author's honour or reputation. It is accepted that article 6bis(1) Berne refers to the 'honour or reputation' of the author as an author, rather than extending to any personal convictions.[153] If an author feels under personal attack, there are alternative legal remedies.[154] However, the Berne wording remains open to an objective or subjective approach.

In the UK[155] and Australia,[156] an objective approach is preferred.[157] 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.[158] Also, as the integrity right attaches to a particular work, general statements or criticisms fall outside the scope of this right.[159]

In France, although ostensibly any ‘treatment’ of a work may infringe an author’s right of integrity,[160] the ‘detriment to honour or reputation’ standard is still relevant[161] as French courts had already developed this as being integral to the right prior to its codification within defamation law.[162] It is apparent from any review of the cases concerning defamation and the integrity right, in conjunction with the legal literature, that the ‘honour and reputation’ standard is applied.[163] Yet, the integrity right is broader than that recognized in either the common law jurisdictions or in international treaties, because the French interpretation adopts a subjective approach. Thus, authors enjoy an absolute, discretionary right to object to any alteration of their work, irrespective of its form or amount.[164]

Canada sits midway between Australia and the UK on one side, and France on the other. In *Snow v. The Eaton Centre*,[165] a sculpture in a shopping centre was altered by the temporary affixing of Christmas garlands. The Ontario High Court found the integrity right had been infringed because the sculptor considered that the alteration was detrimental to their honour or reputation, and the court considered that these concerns were reasonable. This finding illustrates how powerful moral rights can be.

In light of the *Snow* decision, 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’ is ‘a matter of being honourably regarded from a moral point of view’.[166] Therefore, the appraisal of the prejudice to the honour or reputation also carries an objective element as well as a subjective aspect.[167] Although Canadian law sets out a subjective approach, this is only actionable if an objection is reasonably exercised.[168] However, in the case of paintings, sculptures, or engravings *any* distortion is *deemed* prejudicial to the author’s honour or reputation.[169] Additionally, the Canadian Copyright Act provides authors with a kind of association right,[170] permitting them to prevent the use of their work in association with products which would be preducial to their honour or reputation.[171]

A second difference between national laws is the type of acts which amount to an actionable ‘treatment’. While in France, there is no requirement relating to the form or amount of an actionable alteration,[172] in the remaining jurisdictions which have adopted tailored versions of the Berne provision

wording,[173] the different forms adopted have influenced the resulting scope of the integrity right. There is consensus that the right to object arises in the case of a material distortion,[174] meaning the addition or deletion of elements of the work, mutilation, or other modification of the work.[175] However, the subjective nature of the tests in Canada[176] and France[177] recognizes the need to respect the 'spirit' of the work. This enables the author to object to any use which denatures[178] the meaning or ambit[179] of the work which might not be deemed a 'treatment' in the UK or Australia. This includes a change of context,[180] or unauthorized use of the work in commercial advertising.

4.3.1.2 The US reluctance to recognize an integrity right for distortion or mutilation

Some early decisions have granted authors the right to object to unauthorized pornographic distortion of works[181] and subsequent displays of works in a context which they do not approve of.[182] However, difficulties arise as to the standard to be applied. Can it be good taste? Artistic worth? Religious beliefs? Political ideology? Or something else? This inherently constitutes a practical difficulty for courts in their application of the moral rights doctrine.

Although fair practices have filled in the US legislative gaps in relation to the paternity right, the integrity right continues to face continued hostility.[183] Nevertheless, the right is protected to some extent by VARA and other areas of law—mainly contract, defamation, and trade mark laws, which afford an author some degree of protection against an unauthorized treatment of their work.

The first avenue is via the civil tort of defamation,[184] which arises from common law and statutory law. Some have argued that the US protection against libel[185] or slander[186] is broader than the minimum requirements of article 6bis Berne, since the derogatory treatment does not have to relate to a specific protected work.[187] However, the safeguard of free speech protected by the First Amendment to the US Constitution provides strong ammunition for anyone wishing to engage with a work even if this might be deemed derogatory to its author, unless the author is able to prove that the statement made is false. In this respect, defamation laws are more restrictive than the Berne Convention, since article 6bis does not impose a veracity requirement.[188] Consequently, defamation laws offer different protection to the integrity right contained in the Berne Convention.

Section 43(a) of the Lanham Act provides the second avenue available to

authors. In addition to protecting against any ‘false designation of origin’, the provision also extends to shielding against any misrepresentation of the nature, characteristics, and qualities of goods. In *Gilliam v. ABC*,[189] the Monty Python team had transferred the right to broadcast their TV performances to the British Broadcasting Company (‘BBC’), while retaining artistic control over the programme content. BBC licensed the rights to ABC in the US, in accordance with the terms of the agreement, but ABC then edited the show to shorten its length by over 25 per cent. Gilliam, a member of the Monty Python team, sued ABC for violating the agreement, claiming the alterations fell within the scope of the authors’ artistic control. The Second Circuit agreed that the editing was an unauthorized treatment which was no longer faithful to the original work, and found in favour of the British comedians. However, in light of the subsequent *Dastar* decision of the Supreme Court,[190] some argue that VARA is now the only avenue to protect an author’s integrity right.[191]

As we have seen, VARA, contained in 17 U.S.C. section 106A,[192] only provides protection to the authors of paintings, drawings, prints, sculptures, and certain still photographic images.[193] However, these authors enjoy the right to object to ‘any intentional distortion, mutilation, or other modification’ of the work ‘which would be prejudicial to his or her honor or reputation’.[194] While being faithful to article 6bis Berne, this right comes with certain limitations attached. For example, some potential harmful modifications which are attributable to ‘the passage of time or the inherent nature of the materials’ will not be actionable.[195] Additionally, an author can only object to a modification required to preserve or display the work in public if this results from gross negligence.[196] Furthermore, the ‘reproduction, depiction, portrayal, or other use of a work’ will not amount to modification as intended under the Act.[197]

The limited scope of protection is revealed by a dispute between the artist, Frederick Hart, and Warner Brothers concerning a reproduction of Hart’s famous sculpture, *Ex Nihilo*, in the film, *The Devil’s Advocate*. Hart commenced proceedings claiming the unauthorized mutilation of his work. While the original sculpture, on public display in the National Cathedral in Washington resulted from his personal quest for Catholic faith, the Warner Brothers’ film featured a similar-looking sculpture decorating the apartment of a character who is later revealed to be the Devil. In the film’s closing

scene, the human forms featured in the sculpture come to life and engage in sexual acts. Hart claimed that the film served to demonize his work which depicted his own spiritual journey. Had the dispute not been settled,[198] it seems that Hart would have faced difficulty in relying upon VARA, as 'reproduction, depiction, portrayal, or other use of a work' is not a modification which is covered under the Act.[199] However, very recently, graffiti writers have successfully brought a claim under VARA for the destruction of their art by real estate developers in the *5Pointz* litigation.[200]

The most significant limitation, however, is that both rights of attribution and integrity are subject to a fair use defence.[201] Yonover cautions that it is unclear whether Congress intended to create a presumption such that any parody which benefits from the parody fair use exception in respect of the copyright work will also enjoy a fair use parody defence in respect of moral rights.[202]

Finally, authors may resort to contract law to protect their interests. As Nimmer explains, just as a contractual obligation may require a party to attribute the work to its author,[203] the agreement might also include an obligation not to distort the work.

4.3.2 Reconciling parody with the integrity right

We have established that the integrity right may be enforced to protect a work from distortion. This might suggest that a parodic use permitted by the parody exception applied to the economic rights might then be thwarted based upon exercise of the author's integrity right, since parody mandates some element of distortion of the underlying original work. This apparent clash requires us to enquire whether parodic works can accommodate the interests of both authors and the public.[204]

The French courts have considered the balancing of the public's interest in permitting parodies and the right of authors to preserve the integrity of their works on several occasions. In *Peanuts*,[205] for example, concerning a pornographic parody of the *Snoopy* cartoon character, the court considered that neither the economic rights nor the author's integrity right were infringed. Although conceding the parody arguably altered the spirit of the original work, the parody's transposition of the children's cartoon character into an adult context satisfied the rules of the genre. Thus, the parodist's right

of criticism should prevail over the original author's moral interests. Similarly, in *Tarzoon*,[206] which morphed the heroic Tarzan character into an X-rated cartoon, 'The Shame of the Jungle', the court held that because there was no confusion between the parody and the original work, the author's integrity right was not infringed.[207]

Thus, 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[208] with respect for the author's moral rights.[209] Accordingly, provided a parody complies with the rules of the genre, the right of integrity in the underlying work is deemed to have been respected.[210]

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.[211] This would occur if the permitted use fails to abide by the exception's rationale.[212] Here, courts pay particular attention to the impact of the parody's message,[213] 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 possible abuses of the application of the parody exception.[214] 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 changes the spirit of a work. A copyright-protected work created for non-commercial purposes, if reproduced in commercial advertising without permission, is therefore likely to infringe the integrity right of the author in France.[215] As a result, it is often seen as unnecessary to resort to contract law to regulate commercial uses,[216] since authors generally retain control over whether commercial use of their work is permitted, or not.[217]

Overall, although the French integrity right is seen as an absolute right exercised at the author's discretion, in practice its scope is subject to the parody exception. For this specific purpose, the French copyright doctrine establishes a direct correlation between the economic rights exception and the limit of moral rights. Ergo, use permitted by the parody exception will not then be curtailed by exercise of integrity right. Given that this is the position

in the jurisdiction seen as most protective of the integrity right, it might be presumed that the less protective common law jurisdictions would reach the same conclusion. Yet the situation is actually more complex, as the following paragraphs will explain.

In Canada, moral rights provisions have yet to be considered in relation to the new parody exception. However, the following may be reasonably deduced. While Canada will not necessarily adopt the same correlation as in France,[218] the Canadian Supreme Court's shift in approach in *CCH*[219] seems to provide lower courts with an avenue to reconcile the public interest with the moral rights of the original author. In *CCH*, the court characterized copyright as a unified system which necessitates a balance between the rights of authors and the rights of users. As Canada, like France, conceives moral rights as an integral part of copyright, if the court's directions in *CCH* are extended from economic rights to moral rights, then it appears that an author's moral rights must be counterbalanced, likewise, by those of users, including subsequent authors.[220] Hence, the proposed unified system will simply fail to function, if a reproduction permitted by a fair dealing exception is then precluded by the integrity right.

Similarly, the UK courts have yet to consider the integrity right's interaction with the new parody exception. It seems clear that general comments or criticisms of an author's style, as may occur in some works of pastiche or satire, already fall beyond the scope of the UK integrity right,[221] because a parody is a 'treatment' as defined in the CDPA,[222] which distorts a protected work. Hence, it is conceivable that this kind of use might infringe the author's integrity right, if owing to its nature, it harms the author's honour or reputation.

The question of whether or not a treatment is 'derogatory' is an objective assessment according to UK law. It seems unlikely that most parodies, even those which are 'near the knuckle', will undermine the standing of the underlying work, or the original author, because any reasonable observer is aware of how parody operates.[223] There is no presumption, for example, that the author of that work has endorsed the parody or countenanced its message. This suggests that an author's integrity right will be considered intact, because objectively, neither their honour nor reputation has been prejudiced.[224] In rare cases, however, 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 jeopardize the intended legislative balance between the interests of right-holders and authors, it might serve to protect a more fundamental balance.

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'.[225] Nevertheless, as Chapter 5 explained, although article 10 ECHR requires a balancing between the rights of an author and the right of freedom of expression of others, locating the balance point is not always clear-cut in parody cases. Here, we face a conflict between the right of freedom of expression of the original author and the same right exercised by the parodist. While the UK integrity right is usually described as a 'timid thing',[226] in fact, its potency may lie in an occasional case where a parodic use conflicts with the original author's right to freedom of expression.[227] Here, the parody should be upheld as an infringement of the author's integrity right.

In this regard, *Deckmyn* brings vital insight. In that case, the parody in dispute implied that the Mayor of Ghent prioritized city spending upon immigrants and refugees over the local population. Given this arguably discriminatory message, the CJEU seems to remind national courts of the need to have regard to the interests of the author of the underlying work.[228] This interpretation does not the CJEU to have harmonized moral rights,[229] but rather it recognizes that EU jurisprudence must have regard to moral rights which are recognized by international and EU law, although provided for in the national legislation of the EU Member States.[230]

Had *Deckmyn* to be decided pursuant to UK (rather than Belgian) law, then requiring an author's work to be associated with a racially intolerant message which they did not endorse might be seen as an objectively derogatory treatment which would infringe the integrity right.[231] If not, the explicit CJEU reference to the need to consider other competing fundamental rights might solve the issue.[232] Accordingly, it is possible to envisage that a parody which violates an author's moral rights might nevertheless be permitted because the harm resulting from this violation is outweighed by the public interest in permitting the parodist to exercise their right of freedom of expression, and vice versa.[233]

In Australia, the interaction between the integrity right and parody was

considered before the Australian moral rights legislation was introduced. Here, the legislative intent was plainly expressed that permitted parody or satire should not be stifled by the exercise of moral rights.[234] Thus, a discussion paper, for example,[235] proposes that a parody or satire of a film would not be considered a derogatory treatment under the Act, because of its value as a vehicle for the exercise of freedom of expression within a democratic society. The discussion paper, nevertheless, acknowledges that there may be borderline cases (without defining these further) in which a permitted parody will infringe the author's integrity right.[236]

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.[237] We may find a good (hypothetical) example in threatened legal proceedings concerning parodic use of the Tintin cartoon character. Tintin, an intrepid young reporter, relies upon Snowy, the faithful dog companion who accompanies Tintin into dangerous adventures and always ends up saving the day. Bill Leak, an Australian cartoonist, often used an aged Tintin-*esque* character to depict politician Kevin Rudd, former Prime Minister of Australia, serving from 2007 to 2010 and again in 2013. In the threatened proceedings, Leak used the Rudd/Tintin analogy to depict the criticism levied at the then-Prime Minister's budget in 2007 and general lack of a real economic plan for the country .[238]

It is easy to imagine that Hergé's estate might argue that Leak's distortion of Tintin's facial features to portray the middle-aged politician betrays that fundamental part of work which embodies eternal youthfulness.[239] Alternatively, the estate might object to the politicizing of their character or the association with specific (and potentially objectionable) political viewpoints which betrays the essence of the original.[240] In either case, the parody could be argued to prejudice the honour and reputation of the author.

To succeed in an integrity rights claim in Australia, Sainsbury identifies that an author must demonstrate that any treatment satisfies two requirements. Firstly, they must identify some form of prejudice to their honour or reputation which they attribute to the parody; and secondly, they need to demonstrate the reasonableness of this belief.[241]

This resembles the UK position, as there is an objective assessment whether the parodic treatment is likely to harm the author's honour or reputation. As long as the public understands the parody as being a separate

work from the original,[242] it will be difficult for the author to demonstrate damage to their integrity,[243] unless the parodic context includes an undesirable aspect, such as pornography or discrimination. Then, the original author might be able to establish that the parody has caused harm, for example, because the original work will always be tainted by recollection of the offensive parody.

In sum, although the parody exception relates only to economic rights and so does not apply to the integrity right of the original author, the nature of parody is such that a parodic use which is permitted by the parody exception is also likely to respect this moral right too, provided that the parody exception is interpreted correctly. However, at the margins, it is possible to envisage cases where the parody exception and integrity right are not completely aligned. In such cases, courts need to balance the interests of the original author against the parodist's right to freedom of expression. Here, the integrity right of the author is protecting their right of freedom of expression, so one party's right of free expression is being balanced against the same right of another. The nature of the parody's message seems to provide the means to determine whose right of expression should prevail.

The law in the US contrasts with those in the other jurisdictions under consideration, since US copyright legislation has its main emphasis on the economic rights, leaving the safeguarding of an author's interests and compliance with the Berne Convention to other areas of law. As these alternative avenues are available to authors in other jurisdictions too, this suggests that US law offers inadequate and ineffective redress when compared to other countries which have elected to incorporate moral rights as an integral part of copyright law. Despite modest legislative changes to incorporate VARA, the general resistance to embrace moral rights persists, which is most apparent in relation to the integrity right. This stems from concerns that integrity right might interfere with the constitutional protection afforded to free speech. Thus, from a moral rights perspective, parodists are least likely to face legal barriers in the US.

Given the feeble protection of moral rights in the US, could copyright claims be used to censor a distasteful parody? The jurisprudence indicates no.[244] In the words of Judge Mansfield dissenting in *MCA, Inc. v. Wilson*:[245] '[P]ermissible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average private citizen.'[246] Suffice it to say here that if a parodist goes too

far, there will be possible causes of action, but outside the scope of copyright law.[247] Therefore, if the parody is legitimate, commercial depreciation of the original resulting from the commentary is not a purpose of copyright law unless it amounts to market substitution.[248]

5. Conclusion

Although the parody exception does not extend explicitly to constitute an exception to moral rights, in this chapter we have seen that the copyright paradigm demands a unified understanding of the economic *and* moral rights. Otherwise, the system risks becoming perceived by the public as a seemingly incoherent web of rights of questionable legitimacy.[249] Consequently, as copyright[250] protects the object of expression, it is a somewhat inappropriate tool either to appraise the message conveyed or to protect the personal sensibilities of the expressor.[251] Thus, although moral rights exist in recognition of the creative process, they should not be used as a barrier to another's creativity without due cause. This is necessary to reflect inter-generational fairness. Over-broad exercise of moral rights, while benefiting current authors, would limit later authors, including parodists and satirists, to build upon existing protected works to create and exploit new works.

While the copyright parody exception introduces a policy-led free space which applies in the case of economic rights, legislators appear to have overlooked the need to consider moral rights, too. However, it has been posited that once a court is satisfied that the unauthorized use has been for the purpose of parody, infringement of attribution rights could be tested based upon the likelihood of confusion. The court should enquire whether the public exposed to the parody is likely to confuse the parody with the original work, or is left unsure whether the parody has been created by the author of the original work. There is an inverse proportionality relationship in play. If the public is no more than transiently confused regarding the authorship of the parody, then the special link between an author and their work is not affected. In most parody cases, there will be no confusion as it is in the nature of a parodic work that the public recognizes 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 (i.e. the respect of the integrity right).

Therefore, in the case of parodies, we have observed an overlap between the regime applied to the economic and moral rights,[252] based upon a reasonable exercise of moral rights based upon a purposive interpretation. This does not suggest that a parodist is unrestrained, since an author feeling under attack retains means of redress beyond copyright law. Any interpretation of moral rights which fails to permit all parodic uses of a work satisfying the parody exception 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 the 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 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 (and more specifically its third step) is easier to satisfy.[253] Yet any author's exercise of their moral rights in relation to parodies of their work must also take account of the public interest which parody represents. This may require some jurisdictions, such as France, to relax the protection afforded to moral rights. Arguably, in the US, a wider range of authors require the kind of protection which VARA affords.

While moral rights are sometimes perceived in the UK as the 'last hope' for cases having little chance of succeeding based upon economic rights, it appears that, for parody at least, this final glimmer has been extinguished. A parody which benefits from the copyright exception should not falter under moral rights either. But our consideration suggests that evaluation of the fundamental interests in play in the integrity right might assist a court to determine whether the copyright protection *should* apply.

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[1] Also recognized recently in France in Versailles, 16 March 2018, *Alix Malka v. Peter Klasen*, n° RG 15/06029 (case remanded) 13.

[2] Some argue that moral rights are anchored in article 8 ECHR and the right to a private life and family life. See C Geiger and E Izyumenko, *Intellectual Property before the European Court of Human Rights* (2018) Centre for International Intellectual Property Studies Research Paper No 2018-01, 57, forthcoming in C Geiger, C A Nard, and X Seuba (eds), *Intellectual Property and the Judiciary* (EIPIN series Vol. 4, EE, 2018).

[3] R C Bird and L M Ponte, '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, 217; *Desputeaux v. Editions Chouette (1987) Inc.* [2003] 1 S.C.R. 178 (hereafter *Desputeaux*), [57]; C Caron, *Abus de droit et droit d'auteur* (Litec, 1998) 121; M Goudreau, 'Le droit moral au Canada' (1994) 25 *R.G.D.* 403, 404; D Vaver, 'Authors' moral rights—reform proposals in Canada: charter or barter of rights for creators?' (1987) 25 *Osgoode Hall L.J.* 749, 752.

[4] G Davies and K Garnett QC, *Moral Rights* (Sweet & Maxwell, 2010) 3; A Dietz, 'The moral right of the author: moral rights and the civil law countries' (1994) 19 *Colum. VLA J.L. & Arts* 199, 207 and 211; Goudreau (n 3).

[5] Amended in 1948.

[6] 'Right to claim authorship' in article 6bis Berne Convention.

[7] Article 6bis(3) Berne Convention.

[8] 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 the TRIPS Agreement (article 9(1) TRIPS). E Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP, 2006) 150; W Grosheide, 'Transition from guild regulation to modern copyright law—a view from the low countries' in L Bently, U Suthersanen, and P L C Torremans (eds), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar, 2010) 256; A Dietz, 'The artist's right of integrity under copyright law—a comparative approach' (1994) 25(2) *IIC* 177; G Dworkin, 'Moral rights in English law—the shape of rights to come basic features of the droit moral' (1986) 8(11) *EIPR* 329.

[9] Dworkin (n 8) 330.

[10] C Caron, '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, 56.

[11] See Chapter 2, section 2.

[12] For more on moral rights, see Davies and Garnett (n 4); P-Y Gautier, *Propriété littéraire et artistique* (6th edn, PUF, 2007) first part, second title; Adeney (n 8); E Bellini, 'Moral rights and droit moral: a matter of paradigms' (2005) 204 *RIDA* 3; M Sainsbury, *Moral Rights and their Application in Australia* (The Federation Press, 2003) 234; Goudreau (n 3); S Ricketson, 'Moral rights and the droit de suite: international conditions and Australian obligations' (1990) 1 *Ent. L. R.* 78; Dworkin (n 8) 329–36; P Sirinelli, *Le droit moral de l'auteur et le droit commun des contrats* (thesis, 1985); D Nimmer, *Nimmer on Copyright* (Matthew Bender, 1997) vol. III, § 8D.

[13] Also known as 'right of attribution'. The author will refer to 'paternity right'.

[14] Other moral rights include: right of divulgation (or right of first publication in the US) and right of withdrawal and the related *droit de suite* (or resale royalty right in the US). It is noteworthy that the right against false attribution is not actually a moral right but is usually associated with these. See *UK*: section 84 CDPA and *Australia*: section 195AC(1) CA 1968 combined with section 195AD(a)(i)–(ii) CA 1968.

[15] Section 43(a) Lanham Act.

[16] Section 84(6) CDPA.

[17] Section 195AC(1) CA 1968 combined with section 195AD(a)(i)–(ii) CA 1968.

[18] For more, see M T Sundara Rajan, *Moral Rights* (OUP, 2011).

[19] A Lucas-Schloetter, 'Rapport général: le droit moral dans les différents régimes du droit d'auteur' in F Brison, S Dussollier, M-C Janssens,.and H Vanhees (eds), *Moral Rights in the 21st Century* (Larcier, 2015) 50–2.

[20] This is the case for Germany.

[21] See Sundara Rajan (n 18) 75–88.

[22] *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'. Nimmer (n 12), vol. III, § 8D.01[A], fn 4.

[23] J De Werra, 'Moral rights, a view from continental Europe' in Brison et al (eds), *Moral Rights* 69.

[24] Kant cited by Adeney (n 8) 26.

[25] Notably, moral rights provisions are placed before economic rights in the IPC (articles L. 113-1, L. 121-1 to L. 121-9). A Lucas and H J Lucas, *Traité de la propriété littéraire et artistique* (4th edn, Litec, 2001) n°503.

[26] Bird and Ponte (n 3) 217; *Desputeaux* (n 3) [57]; Sainsbury (n 12) 2; Caron (n 3) 121; Goudreau (n 3) 404; Vaver (n 3) 752.

[27] See Chapter 4 on the application of the exception.

[28] Davies and Garnett (n 4) 25; Dietz (n 8) 202–6; Caron (n 3) 120; influenced by Québec, moral rights in *Canada* are not conceived as separate to copyright as in other common law jurisdictions but are treated as a separate branch under the copyright umbrella. *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] S.C.C. 34 (hereafter *Théberge*). The Supreme Court noted that the presence of the two sets of rights in different sections of the Act demonstrates the separation between economic and moral rights.

[29] Therefore, the ownership, duration of protection, and provisions for infringement and remedies are different for moral rights than for economic rights. *UK*: Adeney (n 8) 390; *Australia*: M Sainsbury, 'Parody, satire, honour and reputation: the interplay between economic and moral rights' (2007) 18 *AIPJ* 149, 152.

[30] Except in *Canada*, which under the influence of Québec, introduced specific moral rights legislation in 1931. For more on the history of moral rights in Canada: Adeney (n 8) 291; Davies and Garnett (n 4) 27, 36, and 677. For more on the protection of moral rights in other areas of law: Bird and Ponte (n 3) 213; M T Sundara Rajan, 'The "New Listener" and the virtual performer: the need for a new approach to performers' rights' in M Geist, *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 316; Ricketson (n 12) 82.

[31] 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 (n 4) 34; Adeney (n 8) 541; Sainsbury (n 12) 31. On the history of moral rights in the *UK*: Adeney (n 8) 365, 394–406.

[32] Resulting in a greater weight allocated to judicial interpretation. Grosheide (n 8) 256.

[33] This statement must be tempered for Canada which, in contrast to the UK or Australia, has less detailed moral rights provisions also resulting in a greater power of interpretation in the hands of judges.

[34] L. 121-1 at 4° IPC. For more: Lucas and Lucas (n 25) n° 504–11.

[35] Mainly chapter IV of the CDPA 1988 (sections 77–95).

[36] Part IX of Copyright Act 1968 (sections 189–195AZR).

[37] Yet, earlier recognition of moral consideration was present, see in the *UK: Donaldson v. Beckett*

(1774) 98 ER 257.

[38] Adeney (n 8) 570.

[39] For more on the history of Canada and the introduction of moral rights, see Sundara Rajan (n 18) 122–7.

[40] This is the minimum set in Berne: fifty years after the author's death.

[41] More evidently than in France, different provisions deal with infringement of copyright and moral rights, respectively sections 27 and 28.1 CA. However, there are also overlaps, bringing the Canadian system closer to that of Germany (i.e. monist theory). See Sundara Rajan (n 18) 131.

[42] *Théberge* (n 28) [11]–[12]; Goudreau (n 3) 404.

[43] See Chapter 4.

[44] See *Théberge* (n 28).

[45] *Desputeaux* (n 3) [57].

[46] One can speculate that the view expressed by the Supreme Court in *CCH* could amount to interpreting moral rights in harmony with the public interest, which comprises the interests of users in manipulating works to create new ones. *CCH Canadian Ltd v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 (hereafter *CCH*).

[47] T-E Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer, 2012) chapter 11.

[48] Decision in T-76/89 *Independent Television Publications Ltd v. Commission* (1991) ECLI:EU:T:1991:41, [56].

[49] *Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn*), [31].

[50] See Chapter 5, section 4.

[51] Argued by E Rosati, 'Just a matter of laugh? Why the CJEU decision in *Deckmyn* is broader than parody' (2015) 52 *CMLR* 511, 529.

[52] This explains why there was basically no moral rights protection in the Copyright Act 1976.

[53] This was confirmed by the House and Senate hearings on the subject of moral rights. The moral rights provisions were therefore removed from the Berne Implementation Act 1988. See S. Rep. No 100–352, at 9–10 (1988); H.R. Rep. No 100–609, at 37–8 (1988); see also S. Exec. Rep. No. 100–17, at 55 (1988) (to accompany S. Treaty Doc. No. 99–27 (1986)).

[54] The United States Copyright Office is undertaking a public study to assess the current state of US law recognizing and protecting moral rights for authors, specifically the rights of attribution and integrity (23 January 2017). See https://www.federalregister.gov/documents/2017/01/23/2017-01294/study-on-the-moral-rights-of-attribution-and-integrity (access date: 1 June 2018).

[55] Privacy and contract law are also used to protect the authors' personal interests. G J Yonover, 'Artistic parody: the precarious balance: moral rights, parody, and fair use' (1996) 14 *Cardozo Arts & Ent. L.J.* 79, 94.

[56] See the National Film Preservation Act 1988. This legislation expired in 1991. The 1992 Act no longer focused on moral rights. Nimmer (n 12) vol. III, § 8D.02[D][3].

[57] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 17 U.S.C. § 106A ('VARA').

[58] There was a general fear from creative industries of the litigation, which the introduction of moral rights in US law would attract.

[59] These rights could nevertheless be waived in particular circumstances (17 U.S.C. 106A(e)). Interestingly, this statute includes a right to prevent destruction of the work (17 U.S.C. 106A(3)(b)).

[60] It must be remembered that TRIPS includes no equivalent of article 6bis Berne.

[61] H.R. Rep. No. 105-551, pt. 1, [9] (1998).

[62] 17 U.S.C. §§ 1201–1202.

[63] *Williams* v. *Cavalli S.p.A.*, No CV 14–06659–AB (JEMx), 2015 WL 1247065, [3] (C.D. Cal. Feb. 12, 2015); *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, 999 F.Supp.2d 1098, 1101–2 (N.D. Ill. 2014); *Compare Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 305 (3d Cir. 2011); *Fox v. Hildebrand*, No CV 09–2085 DSF (VBKx), 2009 WL 1977996, [3] (C.D. Cal. July 1, 2009). Though some courts limited this possibility to the digital sphere: *Textile Secrets Int'l Inc. v. Ya-Ya Brand Inc.*, 524 F.Supp.2d 1184, 1201 (C.D. Cal. 2007); *IQ Grp., Ltd v. Wiesner Publ'g, LLC*, 409 F.Supp.2d 587, 597 (D.N.J. 2006).

[64] Lanham Act, 15 U.S.C. §§ 1051–1129 (2000).

[65] It is noteworthy to mention that some states have strengthened the protection given to authors' personal interests by adopting a type of moral rights legislation. For example, the states of New York and California (see, respectively, New York Arts & Cult. Aff. Law § 14.03 and Cal. Civ. Code § 987). Other states include California, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, Pennsylvania, and Rhode Island. However, as specified by §301 17 U.S.C., preemption be might applied. For discussion on states besides California and New York, see generally Nimmer (n 12) § 8D. 09; § 8D. 07[C]; Yonover (n 55) 95–6.

[66] The default licence option now includes attribution. *Creative Commons Project*, Cover Pages (22 August 2008), available at http://xml.coverpages.org/creativeCommons.html (access date 10 November 2018).

[67] Traditionally, France is seen as providing a high level of protection of moral rights whereas common law jurisdictions (especially the UK and Australia) are criticized for providing a minimum level of protection deriving from article 6bis Berne (for example, common law jurisdictions do not protect against divulgation or provide for withdrawal rights). L Bently and B Sherman, *Intellectual Property Law* (4th edn, OUP, 2014) 276 and 283–4.

[68] For a comprehensive study of the paternity right in the US, UK, Australia, and Canada, see Ginsburg (n 130) 263.

[69] *UK*: section 79(4)(a) CDPA does not include parody as an exception to the paternity right; UK Government, *Impact Assessment: Copyright Exception for Parody* (20 December 2012); H.M. Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (UK, 2012) 4; P Groves, 'Pistache?—A consultation paper' (2008) 19 *Ent. L. R.* 89, 92; Adeney (n 8) 417; E Baden-Powell, 'Whose line is it anyway?—new exceptions for parody and private copying' (2013) 24(4) *Ent. L. R.* 130, 131; E Baden-Powell and J Woodhead, 'Big leeks will inspire you, but who gets the credit?' (2012) 23(3) *Ent. L. R.* 59; Sir Robin Jacob, 'Parody and IP claims: a defence?—a right to parody?' in R C Dreyfuss and J C Ginsburg (eds), *Intellectual Property at the Edge: The Contested Contours of IP* (CIPIL, 2014) 436; B Spitz, 'Droit d'auteur, copyright et parodie ou le mythe de l'usage loyal' (2005) 2 *RIDA* 55; S Bate, 'Moral rights: parody and caricature' (1989) 7 *International Media Law* 81–2; *Australia*: Government, *Parodies, Satires & Jokes. —Information Sheet* (Australian Copyright Council G083v03, 2008) 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, 5547–8 (Hon Daryl Williams QC); J McCutcheon, 'Property in literary characters—protection under Australian copyright law' (2007) 29(4) *EIPR* 140, 148–9; *Canada*: M Geist, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013) 443; E A C Mohammed, 'Parody as fair dealing in Canada: a guide for lawyers and judges' (2009) 4 *JIPLP* 468, 471; *France*: Lucas-Schloetter (n 19) 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.

[70] Davies and Garnett (n 4) 5; Adeney (n 8) 179; Dworkin (n 8) 329.

[71] Davies and Garnett (n 4) 6; Dworkin (n 8) 331.

[72] The Australian provision requires the identification to be clear and prominent. Section 195AA CA 1968; B Galopin, *Les exceptions à usage public en droit d'auteur* (IRPI, 2012) 265; Sainsbury (n 12) 47; Ricketson (n 12) 81.

[73] E Gairal, *Les oeuvres d'art et le droit* (University of Lyon, 1900) 261.

[74] L. 121-1 IPC.

[75] Section 14.1(1) CA 1985.

[76] Section 77(1) CDPA.

[77] Section 193(1)–(2) CA 1968.

[78] In contrast to France and Canada, the CDPA determines the circumstances in which the right arises. Section 77(2)–(6) CDPA. Section 77(3) CDPA also mentions 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.

[79] Section 78 CDPA; Davies and Garnett (n 4) 137.

[80] Section 194 CA 1968.

[81] E.g. sections 195, 195AA, and 195AB CA 1968.

[82] This defence is also available for a violation of the integrity right but not the right against false attribution.

[83] Trib. Civ. Seine 26 juin 1832 cited by P Sirinelli, *Le droit moral de l'auteur et le droit commun des contrats* (Paris II, 1985) 6; Paris, 8 août 1837 cited in R Sarraute, 'Current theory on the moral right of authors and artists under French law' (1968) 16 *Am. J. Comp. L.* 465, 478.

[84] For example, article 10(3) Berne makes attribution a condition to the quotation right.

[85] Furthermore, the name of the author is required for registering copyright. See 17 U.S.C. §409(2).

[86] J Ginsburg, 'The most moral of rights: the right to be recognized as the author of one's work' (2016) 8(1) *Geo. Mason J. Int'l Com. L.* 44. However, as acknowledged by Ginsburg, what represents a violation of US international obligations is less the lack of protection of US authors than the failure to protect foreign authors (see article 5 Berne). Ibid, 49.

[87] In this respect, the US is closer to its Australian counterpart.

[88] Section1202 is nevertheless broader than article 12 WCT insofar as it is not limited to electronic communications. Ginsburg (n 86) 62.

[89] E.g. *McClatchey v. Associated Press*, 2007 U.S. Dist. LEXIS 17768, [1] (W.D. Pa. March 9, 2007).

[90] Also known as 'reversed passing off'.

[91] 179 F.3d 217 (5th Cir. 1999).

[92] 539 U.S. 23 (2003) (hereafter *Dastar*).

[93] See section 4.2.2.

[94] Nimmer (n 12), vol. III, § 8D.03[A][2][a].

[95] See section 4.2.

[96] Davies and Garnett (n 4) 116; Groves (n 69) 92.

[97] The relationship between economic rights and moral rights is hard to define. Lucas and Lucas (n 25) n° 502-3.

[98] Section 29.21 CA 1985. This right has to be reasonably executed. It is possible that in applying the teachings from *CCH* (n 46), 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.

[99] 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 is 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'. A similar indication exists in Australia. See sections 41–42 CA 1968.

[100] *Desputeaux* (n 3) [57].

[101] Cass., 12 janvier 1988, RIDA, n°137, 98 (hereafter *Douces Transes*).

[102] [1926] 1 Ch 667.

[103] Echoing defamation law principles.

[104] Based on this argument, it could be suggested that under Canadian law, the paternity right can be deemed as waived in parody cases under the reasonableness criterion. See also *Eva-Maria Painer v. Standard Verlags GmbH and Others* [2011] ECLI:EU:C:2011:798.

[105] Adeney (n 8) 686.

[106] S McCausland, 'New room to lampoon: the new fair dealing exception for parody or satire' (2007) 1 *Art+Law* 3, 4.

[107] Groves (n 69) 92. Also rejected in *Deckmyn* (n 49) in relation to economic rights, [21].

[108] TGI Paris, 9 mars 2017, *Bauret v. Koons*, RG n°15/01086 (hereafter *Les Enfants*).

[109] See n 70.

[110] For more: Davies and Garnett (n 4) 209.

[111] Recognized by judges in Paris, 1ère ch., 17 décembre 1986, *Utrillo*: RIDA 2/1987, p. 66; Lucas and Lucas (n 25) n°502-3.

[112] *UK*: section 84 CDPA.

[113] *Australia*: section 195AC(1) CA 1968 combined with section 195AD(a)(i)–(ii) CA 1968.

[114] *US*: section 43(a) Lanham Act (deriving from unfair competition); *Dastar* (n 92).

[115] Analytically distinct from moral rights which traditionally assert authorship instead of disclaiming authorship.

[116] *Canada* does not have a separate right to object to false attribution. Adeney (n 8) 328. Nevertheless, Adeney argues 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.

[117] *UK*: section 84(2)-(8) CDPA; *Australia*: sections 195AD–AH CA 1968.

[118] *Australia*: section 195AM CA 1968.

[119] *UK*: section 86(2) CDPA.

[120] Since the heavily criticized *Dastar* (n 92), actions under section 43(a) Lanham Act are limited to the duration of copyright.

[121] Though probably not 'adaptation' as intended under copyright law. See the Conclusion in Chapter 1.

[122] For older decisions, see *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981); *Geisel v. Poynter Products Inc.*, 283 F.Supp. 261 (S.D.N.Y. 1968); *Rich v. RCA Corp.*, 390 F.Supp. 530 (S.D.N.Y. 1952).

[123] *Gilliam v. American Broadcasting Companies (ABC), Inc.*, 538 F.2d 14, 24, 192 USPQ 1, [24] (CA, 2d Cir. 1976).

[124] 978 F.2d 1093 (CA, 9th Cir. 1992).

[125] Ibid, [1106]–[1111].

[126] *Dastar* (n 92).

[127] For a detailed report of this case, see T Ochoa, 'Introduction: rights of attribution, section 43(a) of the Lanham Act, and the copyright public domain' (2003) 24 *Whittier L. Rev.* 911.

[128] *Dastar* (n 92) [33]. Hence, the idea of misattribution and non-attribution in the US is linked to consumer deception.

[129] And the Supreme Court's commitment to preserve the public domain.

[130] Reviewing the influence of *Dastar* (n 92), see J C Ginsburg, 'Moral rights in the US: still in need of a guardian ad litem' (2012) *Cardozo Arts & Ent. L.J.* 73, 81–2; J C Ginsburg, 'The right to claim authorship in US copyright and trademarks law' (2004) 41 *Houston Law Review* 268.

[131] See section 4.1.2.

[132] Interestingly, US courts have noted that uploading works online without attribution does not amount to false CMI as posting generally does not amount to asserting ownership over works. See *Tomelleri v. Zazzle, Inc.*, No 13-2576, 2015 U.S. Dist. LEXIS 165007 (D. Kan. Dec. 9, 2015), [36]–[37]; *Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F.Supp. 2d 920, 929 (N.D. Ill. 2013).

[133] For more: Ginsburg (n 130).

[134] Though this may lead to impracticalities based on the nature of the work involved which explains why other jurisdictions such as Canada and the EU have limited the right to attribution to situations where it is reasonable and feasible to do so. Additionally, this requirement may lead to confusion for the rushed consumer exposed to thousands of works on a daily basis. This latter position is argued by R Tushnet, 'Naming rights: attribution and law' (2007) 3 *Utah L. Rev.* 781, 803.

[135] Ibid.

[136] Therefore, an alternative theory supports reliance on defamation and invasion of one's privacy. Defamation, as accepted in cases where the work falsely attributed is of an inferior quality compared to the original. See Nimmer (n 12) vol. III, § 8D.03[B][1].

[137] This is already recognized in US trade mark parodies: see *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g. Group, Inc.*, 886 F.2d 490, 496 (2d Cir. 1989) cited by R Tushnet (n 134) 816.

[138] *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992), [310]. The public needs to be aware of the original for adequate attribution to be given. The court goes further and adds that the audience also needs to recognize another expression attributable to another person.

[139] Otherwise, these parodies create confusion in the public and would not be exempted under the exception.

[140] A 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 (n 29) 165.

[141] [1998] 1 All ER 959, Ch D.

[142] Ibid, 971.

[143] P Torremans, 'A clash between theory and practice? Introduction' in Brison et al (eds), *Moral Rights* 48.

[144] *Deckmyn* (n 49) [21].

[145] Also admitted by Torremans (n 143) 48.

[146] L. 121-1 IPC.

[147] Section 14.1 CA 1985.

[148] Section 80(1)–(2) CDPA.

[149] Section 195AQ(2) CA 1968.

[150] Section 195AJ CA 1968.

[151] A Waisman, 'Rethinking the moral right to integrity' (2008) 3 *IPQ* 268, 274.

[152] It is noteworthy that the terminology differs insofar as Canada refused to adopt the expression 'derogatory treatment' in its legislation. Also, the UK in section 80(2)(a) CDPA 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.

[153] Dietz (n 8) 181; Ricketson (n 12) 82.

[154] Particularly defamation law and privacy laws.

[155] On the integrity right in the *UK*: K Q Garnett, J R James, and G Davies, *Copinger and Skone James on Copyright* (16th edn, Sweet & Maxwell, 2011) [11-41]–[11-48].

[156] Given the absence of case law, the subjective approach cannot be ruled out completely: see <<<REFO:JART>>>E Adeney, 'The moral right of integrity: the past and future of "honour" ' (2005) 2 *IPQ* 111<<<REFC>>>, 129.

[157] Echoing defamation law tests. *Confetti Records v. Warner Music UK Ltd* [2003] EMLR 790, [149]–[150]; *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. The latter two cases nevertheless refer to the subjective approach taken by the Canadian courts in *Snow v. Eaton* but refuse to follow it. S Teilmann 'Framing the law: the right of integrity in Britain' (2005) 1 EIPR 19, 22. Doubts concerning the interpretation of this objective test are expressed by Griffiths. J Griffiths, 'Not such a "timid thing": the UK's integrity right and freedom of expression' in J Griffiths and U Suthersanen (eds), *Copyright and Free Speech* (OUP, 2005) 235, 239.

[158] This is the aim of defamation law or injurious falsehood. *UK*: M Spence, 'Intellectual property and the problem of parody' (1998) 114 LQR 594, 613; *Australia*: Australian Copyright Council, *Moral Rights* (Information Sheet G043v13, 2012) 1–8; Sainsbury (n 29) 149–66, 154; Sainsbury (n 12) 234.

[159] See Chapter 6, section 2.2.2 for an overview of moral rights in music; for analysis of the integrity right in the *UK*: Griffiths (n 157) 211–44.

[160] This leads to a subjective approach as the author can object to any unauthorized treatment. Lucas-Schloetter (n 19) 56.

[161] S Grégoire, 'Fasc. 1213: Propriété littéraire et artistique.—exercice des droits des auteurs.—droit moral. droit au respect (CPI, Art. L. 121-1)' (2013) *Jurisclasseur* 1, 4.

[162] Adeney 2005, p. 113.

[163] Grégoire (n 161) 6; Gairal (n 73) 264; Adeney 2005, p. 114.

[164] Grégoire (n 161) 11; Davies and Garnett (n 4) 373; *French Supreme Court in TF1 v. Sony*, Cass., ch. Civ., 24 février 1998 [1998] 177 RIDA 212.

[165] [1982] 70 C.P.R. (2d) 105.

[166] Adeney (n 8) 337; L Carrière, '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) 270.

[167] As confirmed in *Prise de Parole Inc. v. Guerin* (1996) 66 C.R.P. (3d) 257.

[168] *Prise de Parole Inc. et al v. Guérin, éditeur Ltée* [1995] 66 C.P.R. (3d) 257 (C.F.), p. 264, esp pp. 267–8; confirmed 73 C.P.R. (3d) 557 (C.A.F.); Davies and Garnett (n 4) 691; JS McKeown, *Canadian*

Intellectual Property Law and Strategy (OUP, 2010) 214; Adeney (n 8) 334; Adeney 2005, p. 128; Goudreau (n 3) 420.

[169] Section 28.2(2) CA 1985.

[170] Section 28.2(2)(1)(b) CA 1985.

[171] For more, see Sundara Rajan (n 18) 127.

[172] *Barbelivien et autres c/ SA Universal music publishing anciennement dénommée Polygram éditions* 7+ Cass., 5 décembre 2006; Grégoire (n 161) 11; Davies and Garnett (n 4) 373; *TF1 c/ Sony* in Cass., ch. Civ., 24 février 1998 (1998) 177 RIDA 212.

[173] Canada refused to implement 'other derogatory treatment' but included contextual treatment. The UK in section 80(2)(a), (3), (4) CDPA 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.

[174] *France*: Lucas and Lucas (n 25) n°545; Gautier (n 12) 235; *UK*: section 80(2)(a) CDPA; R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (CUP, 2005) 77; *Canada*: section 28.2(1)(a) CA 1985; *Australia*: Adeney (n 8) 581 and 588; E Adeney, 'Defining the shape of Australia's moral rights: a review of the new laws' (2001) 4 IPQ 291, 299.

[175] Echoing the wording of Berne (article 6bis(1)).

[176] Section 28.2(1)(b) CA 1985. Davies and Garnett (n 4) 691; Adeney (n 8) 333.

[177] Lucas and Lucas (n 25) n°546.

[178] The author has the right to ensure that the work in form and in spirit remains the way it has been thought by its creator. Grégoire (n 161) 6; Adeney (n 8) 182; Sirinelli (n 12) 10.

[179] Like discriminatory content or hate speech. See Chapter 5, section 4.1.5.

[180] 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 (n 155) [11-48]; *contra*: Porsdam interprets 'distortion' and 'otherwise prejudicial' as including contextual uses. E Porsdam, *Copyright and Other Fairy Tales: Hans Christian Andersen The Commodification of Creativity* (Edward Elgar, 2007) 62.

[181] Citing *Benson v. Paul Winley Sales Corp.*, 452 F.Supp. 516 (S.D.N.Y. 1978).

[182] Citing *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. N.Y. County 1948), aff'd, 275 A.D. 692, 87 N.Y.S.2d 430 (1st Dep't 1949).

[183] This can be partly explained from the strong protection granted to free speech (e.g. criticism and comment) in the US under the First Amendment to the Constitution which influenced the shaping of the US copyright regime. Recognizing an integrity right would add a limitation to free speech by restricting the individual's use of prior creative works. For more, see R Kwall, *The Soul of Creativity* (Stanford University Press, 2010) 53–68.

[184] Similar to the situation prior to the introduction of specific integrity right provisions in the other jurisdictions analysed. See section 4.3.

[185] For published written statements.

[186] For published spoken words.

[187] A Adler, 'The US perspective' (2016) 8(1) *Geo. Mason J. Int'L Com. L.* 26, 28. See *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67 (1948) where the Supreme Court noted that the use of music in a film was insufficient to demonstrate the composer's approval and endorsement even if the association is unsympathetic to their political ideology.

[188] This differentiates the US defamation regime from the English one where truthfulness is only considered in terms of defences to the allegation made. Another limitation related to the standing of the speaker which will be further considered in Chapter 7, section 2.1.

[189] *Gilliam v. American Broadcasting Companies (ABC), Inc.*, 538 F.2d 14, 24, 192 USPQ 1, (CA, 2d Cir. 1976).

[190] Nimmer (n 12), § 8D. 04[A][2].

[191] See subsection 4.3.1.2.

[192] 17 U.S.C. § 106A(a)–(b). See *Cort v. St. Paul Ins.*, 311 F.3d 979, 985 (9th Cir. 2002).

[193] The limitations linked to this instrument were covered earlier. See subsection 3.5.

[194] 17 U.S.C. §106A(a)(2).

[195] 17 U.S.C. §106A(c)(1).

[196] 17 U.S.C. §106A(c)(2).

[197] 17 U.S.C. §106A(c)(3).

[198] For more, see P K Yu, *Intellectual Property and Information Wealth* (vol. 1, Greenwood Publishing Group, 2007) 100.

[199] 17 U.S.C. §106A(c)(3). A similar exception exists in relation to the reproduction of works by libraries and archives (17 U.S.C. §108) and the performance and display of visual works in an educational context (17 U.S.C. §110(1)).

[200] *Cohen and Others v. G&M Realty LP and Others* (unreported, E.D.N.Y. 2018).

[201] 17 U.S.C. § 107.

[202] Yonover (n 55) 110.

[203] Nimmer (n 12) vol. III, § 8D.06[D].

[204] J De Werra, 'The moral right of integrity' in E Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009) 269.

[205] See Chapter 1, section 5.2.1.1, for the facts.

[206] TGI Paris, 3 janvier 1978, D., 19790, p. 99 obs. Desbois.

[207] Yet the opposing outcome was reached in *Calimero*, TGI Paris, 24 mars 2000, légipresse 2000 I, p. 71.

[208] See Chapter 4, section 2.1.

[209] Galopin (n 72) 266; Davies and Garnett (n 4) 380; Adeney (n 8) 188–9; P Vivant, 'Courte citation et parodie: des exceptions au droit moral?' (2006) 2 *RLDI* 59, 60.

[210] This is easily conceivable as economic rights and moral rights are conceived as parts of the author's rights.

[211] For more, see Chapter 4, section 3.1.

[212] 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 the author's right. Cass., *Cremer et le maillon faible*, 10 septembre 2014.

[213] See Chapter 5, section 4.1.5 and Chapter 7, section 2.7.

[214] TGI Paris, 15 janvier 2015, *Aigle Noir*.

[215] Cass. 1ère Civ., 2 avril 2009, n°08-10194; *TF1 c/ Sony;* Cass. 1ère Civ., 24 février 1998: Bull. Civ. I, n°75; JCP E 1998, panor. p. 636: reproduction of music snippets to enrich the advertisement; Paris 7 avril 1994: D. 1995, Somm. 56, obs. Colombet. The musical work was added to an advertisement 1) for a voice mailbox and 2) for an erotic TV show.

[216] Moral rights are of public order. Cass. 1ère Civ., 2 avril 2009, n°08-10194.

[217] Ibid.

[218] *Prise de Parole Inc. v. Guerin* (1996) 66 C.P.R. (3d) 257 whereby the court found a use to be

non-infringing of economic rights but, nevertheless, infringing of moral rights.

[219] See n 46.

[220] Geist (n 69).

[221] Davies and Garnett (n 4) 236.

[222] Section 80(2)(a): '[A]ddition to, deletion from or alteration to or adaptation of the work.'

[223] The parody evolves in a fantasy world separate from the original.

[224] *Clark* (n 141); Garnett (n 155) [11-46]; J Griffiths, 'Not such a "timid thing": the UK's integrity right and freedom of expression' in J Griffiths and U Suthersanen (eds), *Copyright and Free Speech* (OUP, 2005) 239.

[225] Ibid, 223.

[226] As for the other common law jurisdictions, there is very little case law interpreting moral rights. See section 5.

[227] Griffiths (n 224) 212.

[228] *Deckmyn* (n 49) [29]–[30].

[229] As proposed by Rosati (n 51) 512.

[230] See Chapter 4, section 1.

[231] Therefore, parodies also raise concerns under the right to freedom of information, see Chapter 5.

[232] See detailed analysis of the balancing exercise in Chapter 5.

[233] See Chapter 7, section 2.

[234] Commonwealth, Parliamentary Debates, House of Representatives, 18 June 1997, 5547–8 (Hon Daryl Williams QC).

[235] Discussion Paper, Proposed Moral Rights Legislation for Copyright Creators, Commonwealth of Australia (ACT, 1994) 46–9.

[236] A Spies, 'Revering irreverence: a fair dealing exception for both weapon and target parodies' (2011) 34 *UNSW Law Journal* 1122, 1141.

[237] M Weir, 'Making sense of copyright law relating to parody: a moral rights perspective' (1992) 18 *Monash University Law Review* 194, 196.

[238] http://www.abc.net.au/news/2007-05-11/costello-attacks-rudd-budget-cliches/2545144 (access date: 10 November 2018).

[239] After threatening Leak with infringement, the right-holder agreed to refrain from legal action, provided the parody was not commercialized; see https://www.pressreader.com/australia/the-australian/20070601/282119222117475 (access date: 10 November 2018).

[240] 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 jeopardizes the essence of the work. Yet the inclusion of contextual uses under Australian law remains unclear. Cass, 30 janvier 2007, n°04-15.543; V L Benabou and S Dussollier, 'Draw me a public domain' in P Torremans (ed.), *Copyright Law. A Handbook of Contemporary Research* (Edward Elgar, 2007) 180.

[241] Sainsbury (n 29) 158.

[242] Therefore, no confusion is created in the public.

[243] N Suzor, 'Where the bloody hell does parody fit in Australian copyright law?' (2008) 13 *MALR* 218, 246.

[244] See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (finding of parody where a commercial advertisement for Campari liqueur depicted Reverend J Falwell having sexual intercourse with his

mother); *MCA, Inc. v. Wilson* 677 F.2d 180, 191 (2d Cir. 1981): here, parody was nevertheless rejected because it did not target the song itself. The use was found to be infringing but the song was sung and played as background music while an actress and three actors engaged in a variety of sexual activities; *Walt Disney Prods. v. Air Pirates*, 345 F.Supp. 108 (N.D. Cal. 1972); *Adjmi v. DLT Entm't Ltd*, 97 F.Supp.3d 512 (S.D.N.Y. Mar. 31, 2015), [531]–[532].

[245] 677 F.2d 180, 191 (2d Cir.1981) citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed.2d 686 (1964).

[246] Repeated in *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014), [759].

[247] This may be an additional difference between intellectual property and traditional property where a land owner has grounds to exclude unwanted individuals from their lands.

[248] *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994), [592].

[249] A Ramalho, 'Parody in trademarks and copyright' (2009) 5 *CSLR* 59, 72.

[250] Understood here as including economic and moral rights.

[251] Also supported by the goals of the Berne Convention; B Mee, 'Laughing matters: parody and satire in Australian copyright law' (2002) 20 *Journal of Law, Information and Science* 55, 85; Adeney (n 8) 126.

[252] See Chapter 4.

[253] See Chapter 2, section 4.

7

The Music Industry and the Future of the Parody Exception in Copyright Law

This book represents an attempt to define the scope of the parody exception in copyright law using a comparative methodology. Although it would be unproductive for legislators to continually attempt to re-draw the line between legitimate and illegitimate parodies as the arts and users' habits develop, certain factors can help to preserve some degree of legal certainty for right-holders and users alike. However, this is far from a simple task. Not only is parody difficult to define within specific art fields,[1] making it difficult to devise a legal definition, which is not overly broad, or too narrow, but judicial application of any copyright exception has been seen to vary over time as well as being dependent upon jurisdiction and context.[2]

Yet, it is clear that parody is something distinct from a mere re-working or altered copy. A parody communicates a new and distinctive message from the earlier work it reproduces, and typically results in the creation of a new expression which may be eligible for copyright protection in its own right. Indeed, the essence of a true parody is that, despite relatively modest degrees of modification, a parody retains an independent relationship with the earlier work which is simple for the public to grasp. Hence, the public has a specific role to play in any parody. A parody will only succeed if the target public recognizes the underlying parodied work. Arguably, this constitutes basis for a more holistic assessment of the parody exception as proposed in this book. Thus, the most appropriate way to define parody is, purposively, by reference to its two main characteristics, a humorous intent (beyond merely synonymous with 'comic') and absence of confusion, as a yardstick. This parodic purpose should not only influence the exception's scope, but locates parody appropriately within the broader legal system.

National legislators have sought to ensure that parodic uses do not conflict with the normal exploitation of the original work, which would unduly prejudice the legitimate interests of right-holders and authors, by framing the parody exception within their own legal traditions as ‘fair dealing’, ‘fair use’, or subject to ‘the rules of the genre’. Whilst these framework notions ought to confine the exception’s reach while enabling courts to realize the exception’s goals, the analysis of the French and US case law reveals a different picture in practice.[3] Instead, the outcome of a specific case is often very difficult to predict. However, some degree of legal certainty is still evident, as the recognizable form of the exception combined with established characteristics of a parody provides parties with basic guidelines. It is argued that lack of harm to the right-holder (measured by an objective standard) might serve as a practical first proxy for the requirement for ‘humorous intent’. This enables national courts to take every facet of humour into account, while also establishing limits on the use falling within the exception. Similarly, the requirement of absence of confusion ensures that only true parodic uses are permitted. Here, the comparative analysis has identified a range of factors which courts might adopt, according to the particular principles of interpretation applied in each jurisdiction.[4]

In this final chapter, we venture modest predictions as to what the future might hold in this area of copyright law, based upon an evaluation of existing business practices. It then outlines some additional avenues which might promote legal certainty while furthering the goals sought by the enactment of a specific parody exception.

1. The Role of Business Practices in the Realization of the Goals Underpinning the Parody Exception

Overall, the parody exception adds more credibility to the copyright paradigm because it recognizes that the nature of creativity involves borrowing and taking inspiration from others. Nevertheless, it requires that all levels (policy, legal, and industry) accept the consequences of this 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 creative industries, in terms of production, distribution, and consumption, but current industry practices sometimes focus almost exclusively on distribution concerns. A

rounded policy perspective must acknowledge the need for a fair balance between *all* actors if creativity is to be maximized. At this early stage, the jury is still out on whether the parody exception will meet its objectives. Yet, an optimum outcome will only be achieved if business models cease equating parody with plagiarism or a denigrating use.

In this section, we adopt the UK music industry as our example.

1.1 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 needed to continually reinvent itself in light of technological changes. Initially designed to control public performances of musical works,[5] current business models adopted in the music industry seek to capture all revenue streams generated by performing, communicating, and reproducing music. These result in new layers of complexity to the functioning of the industry itself.[6]

The copyright regime and the recent CJEU *Deckmyn*[7] ruling seem to indicate that the concept of parody is fairly simple to grasp. Any parody meeting the two requirements could be lawful. Considering parodies as instantly recognizable, such an interpretation should imply that actors within the music industry adjust their business practices. Simultaneously, the CJEU indicated that the parody exception has limits, but it refrained from clearly revealing what these limits are. Given the uncertainty revolving around the exception, actors in the music industry see parody as a threat to the exploitation of copyright-protected works.[8]

1.2 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. Copyright law grants composers and songwriters[9] exclusive rights in their authorial works, which they can license or assign to intermediaries (usually record labels or publishers[10]) who, in turn, administer these rights on the author's behalf in return for a percentage of revenue.[11] Predominantly, licences are made available for public performances[12] and reproduction.[13] Additionally, producers obtain distinct rights in the sound recordings of

particular 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 7.1).[14]

Thus, the music industry is uniquely characterized by its multiple layers of distinct rights and multiple copyright-owners and licensees, with copyright at the centre of this complex web of rights.[15] In this ecosystem, 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.

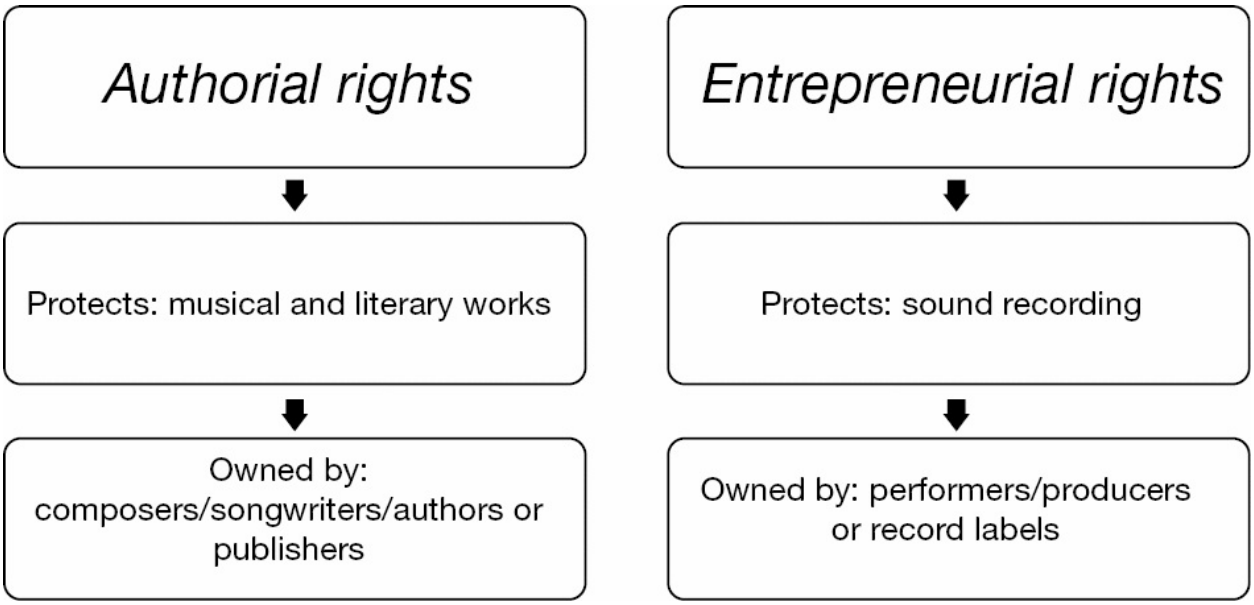


Figure 7.1 Traditional model of the multi-layering of rights involved in the music industry.

The new digital environment has altered this traditional model. In economic terms, prior to the advent of online music distribution, the market structure has often been depicted as an oligonomy.[16] In other words, 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 (especially publishers) were once essential, because content creators required their financial support

upfront before they could create[17] or to disseminate their works. The rise of online music distribution has restricted the role of record labels because the upfront costs are now greatly reduced (although it will be argued that their role is still fundamental in ensuring remuneration). In the new digital environment, artists can record their tracks at home using inexpensive software, and then market their music themselves on an online platform.[18]

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, such as PRS for Music, 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.[19] 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 any online platform, such as Apple Music, Deezer, or Spotify, is only able to provide a worthwhile service if they have access to 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:[20] one stream to the composers and songwriters,[21] and one stream to the performers featured on the recording.[22]

In this setting, the music industry is based on 'control over publishing rights, marketing and promotional power and control of distribution'.[23] But does this system foster creativity including the creation of parodies? 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 music-making and distribution.[24] And this is reflected in the contractual relationships between the various actors involved.

1.3 Publishing and recording contracts

Before the parody exception was enacted, parodists either ran the risk of being sued or had to secure a licence or other permission for the use. Generally, requests to use resulted in an outright refusal from the right-holders (rarely the original authors themselves), who saw the use as detrimental to the value of the protected works.

In order to release an album on the music market, songwriters often require the help of intermediaries: publishers and record labels.[25] Although no two publishing or recording contracts are identical,[26] there are common provisions which we shall now evaluate so that we may assess their likely impact on original authors, right-holders, and parodists.

1.3.1 Rights

The author of an original musical work, or the producer of the sound recording, is the first right-holder of the exclusive rights granted by copyright in a musical composition,[27] but these rights can be assigned or licensed.[28] In order to create the relationships described in the preceding section, a typical publishing contract[29] requires a songwriter to assign[30] their rights in their songs to a music publisher. In return, the publisher promotes and exploits the work,[31] and provides the songwriter with financial support in the form of advances and royalties (typically a percentage of sales).[32] A publisher's main competence is onward licensing of the works to record labels, so the music is available to end-consumers. In the case of a typical record contract for a sound recording,[33] the producer of the sound recording assigns their copyright to a record label.[34] In return, the record label provides upfront capital for the 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.[35]

1.3.2 Creativity control and moral rights

Songwriters and performers, like authors, are entitled to a bundle of moral rights associated with their copyright works.[36] 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.[37] 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.[38] The second moral right is the moral right not to have their work subjected to any derogatory treatment,[39] 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.[40]

In the UK, copyright mainly focuses upon economic rights. Therefore, it is not surprising that moral rights can be waived via contract.[41] This waiver can 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 including a moral rights waiver in the widest possible terms.[42]

Even if moral rights have been waived, publishers will generally agree to impose contract terms in ongoing 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, 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 exception, since any contractual terms seeking to override the exclusion will be unenforceable. Previously, parodists wanting to obtain permission to alter the words or music to a song were required to seek a 'mechanical'[43] licence from the publisher, which would be subject to the songwriter also granting permission. The introduction of the parody exception suggests that a parodist who is confident that their parody satisfies the exception's requirements no longer need to seek permission, thereby rendering a mechanical licence superfluous. Yet, the exception only acts as a defence.[44]

While licensing a work for commercial use (termed a 'synchronization licence') can be a significant source of revenue, some songwriters are categorically opposed to any such commercial use, or at least require that their prior authorization is sought, so that they may vet which commercial ventures are associated with their work. Given that musical parodies for

commercial adverts are unlikely to fall within the scope of the fair dealing exception,[45] companies interested in using a musical work to promote their particular products should still seek mechanical and synchronization licences, and might also require the songwriter's permission, depending upon the nature of the particular publishing contract in place.

1.3.3 Denigrating content

But what if the parodist is a party to a publishing contract? Can the publisher take action against the parody songwriter, for example, if its content is defamatory (and therefore not a true parody)? 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.[46] Hence, if a parody songwriter's work goes beyond what is permitted under the exception,[47] the parodist will be financially liable and the publisher will be protected to a degree.[48]

The preceding analysis is based on the presumption that the parodist also alters the musical composition to create the new work. But many popular musical parodies reproduce at least one of the works making up the musical composition (e.g. the original tune is retained) using, for example, a sampling technique. If a parodist wants to sample a sound recording legally, they need a licence from the record label[49] which owns the rights in the sound recording, as well as a licence from the right-holders of the underlying composition.[50] However, a parody involving sampling which falls within the scope of the new fair dealing exception could be created without requiring any licence.

It must be kept in mind that because the parody exception is merely a defence, it always carries with it a degree of unpredictability. 'Weird Al' Yankovic, a well-known parodist in the US, is often cited by music industry representatives as the appropriate role model which parodists should follow. Despite the US fair use defence available for parody works, Weird Al always secures appropriate permissions in advance for any parodic use because of the certainty it provides. 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 ultimately be 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.[51]

1.3.4 Conclusion

The artificial fragmentation of songs into multiple copyright works, and the sheer number of right-holders involved demonstrate why the mandatory character of the exception is crucial to the realization of the objectives of the exception. Yet, as the parody exception is a defence, cautious parodists may continue to seek an arguably unnecessary licence for their use. In contrast with the old regime, any licence should only be subject to the authors' permission, when the use is for advertising a commercial product, rather than an artistic pursuit. In the case of an advertisement, for example, use is solely driven by commercial motives, so it seems appropriate that right-holders and/or songwriters would need to give permission as it could lead to the belief that the original creator is in some way linked to the product advertised.

Therefore, the parody exception should render the copyright regime more in line with music making, since it acknowledges that certain borrowings are permissible. However, as a practical matter, its potential is restricted, since the copyright objectives might be overridden by contractual terms. Even if the contractual terms are legally unenforceable, this outcome would only result from a formal determination at the end of legal proceedings, and only a small proportion of relevant cases ever reach this stage. In the meantime, restrictive contract terms serve as a deterrent to the creation of parodies.

1.4 Collecting rights societies

As most musical works likely to be parodied are registered with collecting rights societies, we need to explore the extent to which the practices of these organizations are likely to impact the creation of musical parodies.

We have seen how the fragmentation of ownership of rights creates barriers for those who need to license works and those owners trying to monitor how their works are used. Collective rights management organizations have been established to administer rights on behalf of right-holders.[52] Essentially, they provide a practical and efficient mechanism to administer and enforce copyright.[53]

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, for example, Pan-European licensing.[54]

1.4.1 Modus operandi

As we have touched upon already, one of the main roles of a collecting society, such as PRS, is to grant blanket licences to users. A society has the ability to license its entire repertoire, which may comprise many thousands of works to an interested party, for a particular period and at a fixed rate.[55] 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, Phonographic Performance Limited ('PPL'[56]) has a wider reach, and collects income internationally in respect of use of the neighbouring rights granted to performers.[57] In this way, collecting societies, such as 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 and the 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 the right to reproduce the work.[58] Aside from efficiencies gained in administration and enforcement of their rights, members 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 unauthorized uses and negotiate royalty rates.[59]

1.4.2 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.[60] This means that parodists have been required to negotiate with authors and creators directly.[61] If a parodist was successful in tracking down the relevant parties and securing permission (or decided, instead, to 'run the risk' and proceed without consent) and then wished to commercialize their work, they might elect to register their parody with PRS.[62] The current PRS registration form requires any parody to identify itself as such, and to detail the previous works on which it is based. In effect, the parody work is then treated as a jointly-owned work, as between the parodist and the original work's right-holder. 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, irrespective of any direct agreement reached between the parodist and the right-holders.

1.4.3 Exploiting a parody commercially

Prior to the introduction of the 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, and none to 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 incentivize parodists to create such works,[63] thus undermining one of the stated policy goals of the new legislation.[64]

In France, with its established parody exception, SACEM,[65] the equivalent of PRS in France, operates a similar regime for musical parodies, but in this case 12.5 per cent of the gross income of the revenue generated from the reproduction right is allocated to the parodist, while the remaining 87.5 per cent 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.[66]

One argument which might be advanced to justify the collecting societies' approach is that there is no right to parody.[67] Rather, the parody exception is 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 as if the exception was a right?[68] Is a parodist even entitled to remuneration for their parody?

The answers to these questions depend upon the breadth of cultural diversity which society is seeking. After all, diversity is what the copyright system is also meant to promote. Because the revised law recognizes parody as a legitimate art form, and because it is reasonable to assume that an independent copyright could subsist in the parody,[69] its creators should be entitled to exploit their work in the same way as any other creator.

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. Launched in September 2013 to provide a common platform for online transactions for use by the creative industries, and established in response to a proposal of the Hargreaves Review,[70] the Hub still enjoys wide support from industry actors, including PRS and PPL. Its goal is to facilitate content licensing, as well as providing information about copyright law to those wishing to create. It is based on the simple idea of creating a single destination where individuals in particular may find out how to secure permission to use any particular work. This initiative is still at an experimental stage, currently operating in relation to photographs and images only.[71]

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. 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, if 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.[72]

Given the current 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 need for parties to negotiate with each other for this use.[73] While an equivalent compulsory 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;[74] to be both fair and effective, the licence fee should take account of the amount borrowed, for example.[75]

The issue of whether 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.

1.5 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 unauthorized use of music by private individuals. Online video distribution platforms, such as YouTube, not only simplify the way users 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.

1.5.1 Content ID

In 2007, YouTube introduced a content recognition system, called Content ID. This uses a complex algorithm to cross-check all newly-uploaded content against an established database of works from the collecting societies' repertoires to identify potential copyright infringement. The algorithm detects complete and partial matches. Right-holders receive an automated notification each time any new content is uploaded which finds a 'match'. Right-holders are offered 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.

Revisiting the UK's case for change and the parody of *Empire State of Mind*, now famous *Newport State of Mind* parody fared in 2010: once the parody was uploaded onto YouTube, the representatives for artist Jay-Z, the author of the original musical work used in the parody track, received a standard form notice from YouTube alerting of a potential copyright infringement. Not wishing his work to be parodied, the decision was 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 refused.

YouTube has not revised its procedure since the UK parody exception was introduced in October 2014,[76] meaning any parody uploaded to the site will still be identified as a potential copyright infringement. The YouTube procedure fails to take proper account of the fact that, in the vast majority of cases, the parties do not have the same bargaining power, so it has an incentive to favour the right-holder's position to preserve its safe harbour provided under the E-Commerce Directive.[77] 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.[78] As a result, right-holders have de facto power to censor parodies on YouTube (although they may prefer to simply re-direct the advertising revenue towards their account), 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 dissemination of parodies more difficult.

1.5.2 Licensing online sharing platforms

It might be fair to say that the original online notice-and-take-down

procedure has slowly transformed into 'notice-and-share-the-revenue' systems. Collecting rights societies, such as PRS, have grasped an opportunity to generate revenue from online platforms. PRS and YouTube have agreed licence terms, such that a proportion of revenue generated from use of protected works on YouTube is passed on to PRS 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 the dealings between PRS and YouTube is that the terms agreed are kept confidential.[79] 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 previously stated:

> If PRS for Music becomes aware that a member's 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.[80]

Whether such a clause remained in a more recent agreement reached in 2016is 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.[81]

Given that, on one side, Google is seeking to monetize data and collecting bodies, on the other side, seeks to maximize 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,[82] which would provide parties with a framework when negotiating a licence for (parody) use.[83] It seems feasible that the Copyright Tribunal[84] could oversee such proceedings.[85] 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.[86] 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 creative industry. A further option is to establish a 'licence of right' system, as currently established in CDPA in respect of design law.[87]

1.6 Reflecting on UK practices

There is more to the parody exception than a desire to foster economic growth. The primary aim of the change in UK legislation sought added the social and cultural value which this particular kind of work provides. Yet, the way in which business actors rely on copyright undermines these goals. Shielding behind arguments that the exception is vague and unpredictable, business practices have established a system which fortifies established copyright works by considering all unauthorized reproduction as unlawful irrespective of whether the parody exception applies. Ultimately, in this scenario, a parodist's position is no better position than before the parody exception was introduced.

How far 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 having different, and potentially conflicting, interests. All too often, the net result is a strengthening of the right-holders' established position 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, legislation alone, is insufficient to break down the barriers parodists face which derive 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.

Right-holders should be protected against those infringers who attempt to label a substantial reproduction as a 'parody', but the current attitude of blanket denial is likely to thwart the parody exception, and impinge upon the proper functioning of the internal market. Given Brexit, the UK legislature could take action at a national level to mitigate the current status quo, whether 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),[88] 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 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 throughout this section. Yet, further factors can be derived from the ECtHR case law to deal with parody cases which are not so clear-cut.

2. Shaping the Parody Exception Using the Human Rights Framework

One of the difficulties which courts face when determining whether the parody exception should apply to a specific use is the potential conflict between copyright and freedom of expression.[89] Although this can be reasonably explained by the devolution of powers within a jurisdiction, it can create apparently inconsistent outcomes (between or even within jurisdictions). Certainly, the form of the exception, i.e. fair use, fair dealing etc., goes some way to provide the flexibility needed to enable a court to weigh up the human rights values in issue, but this can be further developed in two ways. Firstly, human rights values colour the appraisal of the traditional fair use, fair dealing, or rules of the genre factors. If the use enables a realization of freedom of expression, it is more likely that the use should be lawful (e.g. the intent, the form, the medium, and the type of the expression). Secondly, judges are invited to consider other parameters which traditionally fall outside the scope of copyright such as the standing of the speaker, the context, and the content of an expression. As we have established that parody is deeply embedded as a tool for promoting this human right, this section considers whether national courts should take guidance, when applying the parody exception, from human rights cases.[90]

Although traditionally, copyright law adopts a somewhat 'content neutral' approach, in *Deckmyn*, the CJEU, [91] has suggested that evaluation of content may enable the fundamental rights in tension in any particular case to be resolved.

2.1 The standing of the speaker

The standing of the speaker, i.e. the parodist, is a relevant consideration, since this has an impact on the way in which the message conveyed will be construed and, therefore, whether the parodic nature of a work would be evident to the public. For example, a parody communicated by an established comedian seems more likely to satisfy the parody exception's requirements than the same message conveyed by a newsreader. Recipients of the comedian's message are aware that they must not take the content too seriously, or that a serious message being delivered under the cover of comedy may include exaggeration. Either offset the potential harm created. Conversely, the more authoritative the speaker's position, the more likely it is that their message will be taken at face value, therefore requiring more cues for the public to decipher the parodic nature of the use. For example, Chapter 5 identifed the vital role of the press within a democratic society.[92] This suggest that 'speakers', such as journalists and other social commentators, owe a special duty to society to ensure that their message is unlikely to be misconstrued.[93] As a result, a politician seeking to use parody to convey a political message might need to provide more and/or less subtle cues to ensure that the public understand that they are communicating via parody.

2.2 The intent of the speaker

It has been seen that the parodist's intent is a significant factor, but this requires courts to differentiate between legitimate criticism conveyed by acerbic or caustic humour and illegimate claims of parody to shield otherwise malicious or insulting comments.[94]

As explained earlier, this is not to say that parodists should enjoy more legal protection than other speakers;[95] but, 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. We

saw that in *Douces Transes*,[96] the French Supreme Court recognized that a song which complied with the rules of the genre for the parody exception in copyright law did not create a freedom to parody which overrode defamation law.[97] A parodist might then still defeat a defamation claim by demonstrating that their statement is true, and given that parody typically involves some degree of exaggeration, the comment made might not need to be completely accurate to be justified[98] under defamation law either.[99]

This further reinforces the idea that parodies exist in a separate reality to the original work. Provided the public is able to recognize the parody genre, this mitigates the harm to the original, because the detachment ensures that it is still likely to be able to convey its own, independent message.[100]

2.3 The form of the expression

The form of the expression is probably the most obvious element which must be considered. A parody warrants special treatment from other kinds of 'borrowed' works and adaptations because it results in the dissemination of a separate expression. The less comfortably 'borrowed' works fit within the limits determined by the parody genre, the more likely it is that a fair balance will favour the copyright-holder.[101]

This point is illustrated in the French *Glam & Shine* decision.[102] An artist produced a collage which reproduced three fashion photographs without the permission of the copyright-holder. The photos were slightly altered, by cropping and changing the skin tone of the models to blue (Figure 7.2). The artist claimed his reproduction was a parody which invited the public to reflect upon the tastes and priorities of current society, and thus was a legitimate exercise of his right to freedom of expression.

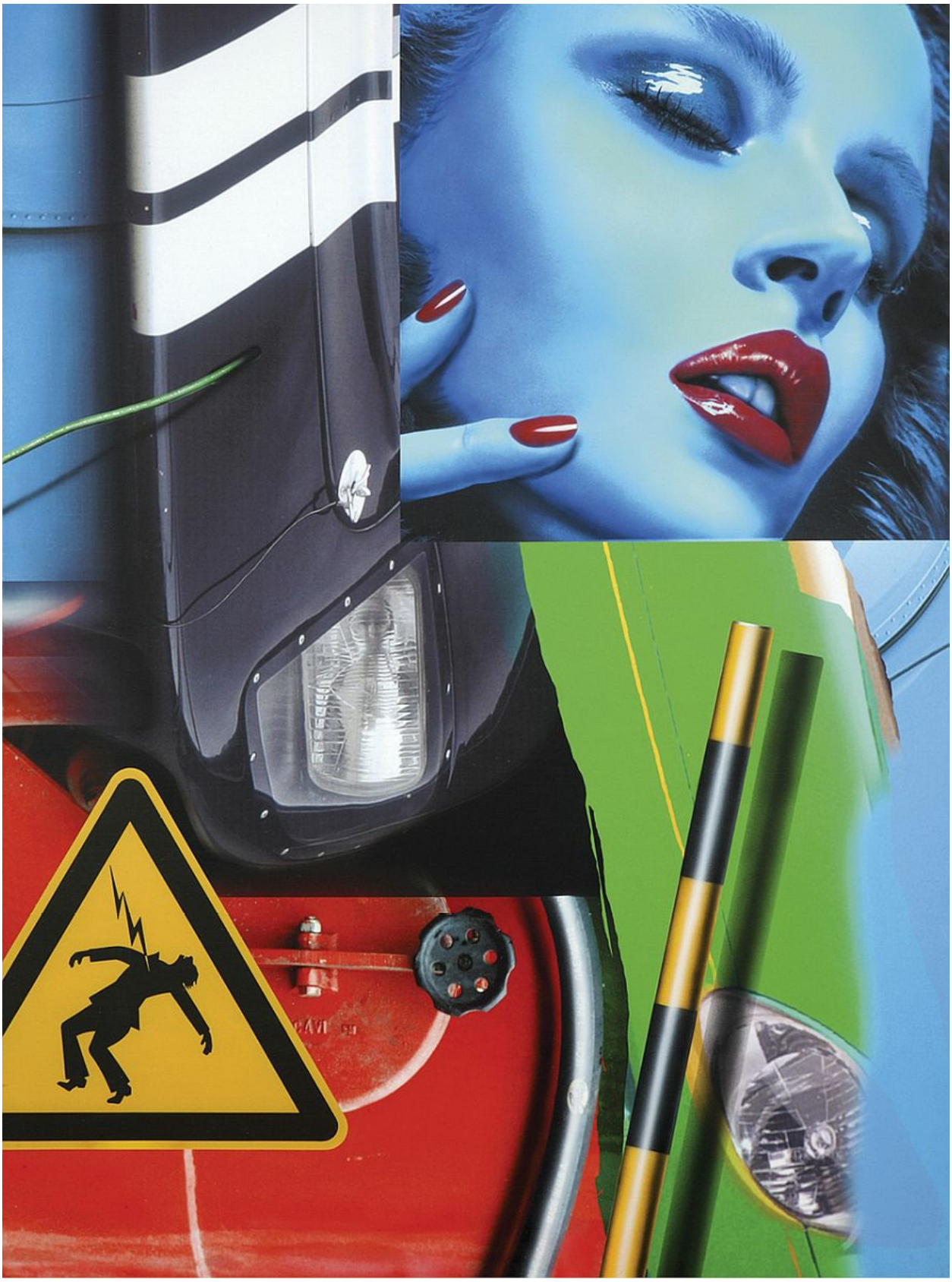


Figure 7.2 Example of Peter Klasen's use of Alix Malka's photograph.
Peter Klasen, *Blue face red machine high voltage*, 2008, inkjet print and acrylic, 130 x 97 cm. © ADAGP, Paris and DACS, London 2018. Photo ©TAJAN.

Here, the claim to the parody defence failed because none of the courts accepted the work was more than a mere appropriation of another's work.[103] The parody was unsuccessful because the artist had failed to distance his work enough from conventional fashion images. Any message which the artist intended the artwork to convey was so subtle that it had been lost. In reaching its conclusion, the court of appeal underlined the need to ensure that freedom of expression did not overwhelm the exclusive rights afforded by copyright. When the case was remanded to the court of appeal of Versailles, the court further considered the parody exception as well as its interaction with freedom of expression. On the application of the parody exception, the court held that humorous character was lacking and there was not material alteration of the original works beyond cropping and the blue tint applied to the photographs. Therefore, the parody was not obvious to the public exposed to the defendant's use. The court then moved on to consider whether denying the use as a parody which fell exception had the effect of violating the defendant's right of freedom of expression. The court paid particular attention to the commercial nature of the use and noted that the use did not contribute to a debate of public interest. If the parodist claims that his freedom of expression has been unduly restricted, he bears the burden of proof. In any case, the parody exception is not a means to justify any kind of borrowing. Additionally, the court noted the artist's motive was primarily commercial. Finally, the fact that his freedom of expression had not been violated unjustifiably was underlined as the defendant had himself conceded that use of the copyright-protected photographs was not essential to convey his message.

The distance between the parody and the original required to avoid confusion is also present in the US through the transformativeness approach. However, as we have seen, not all transformation amounts to fair use, and not all transformations are parodies. When, in *Cariou v. Prince*, the district court in the Second Circuit found in favour of appropriation artist Richard Prince, it is implicit that the court's determination turned upon whether it resulted in a new artistic expression.[104] Concluding that his use did result in a new expression, the court found in favour of the parodist. Although criticized,[105]

this decision demonstrates the importance of freedom of expression in the US appreciation of the parody exception which can lead to a result which would be difficult to reach in other jurisdictions scrutinized in this book.[106]

2.4 The type of the expression

The right of freedom of expression protects expression of all types. However, there is a hierarchy in place, which affords national courts more margin of appreciation in respect of some types than others. Social-political[107] and cultural expressions,[108] are held in highest esteem, but even commercial expressions are protected.[109]

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.[110]

Thus, the parody exception in copyright law should reflect the same spectrum of protection afforded to freedom of expression based upon its social value.[111] Political parodies, typically political cartoons, should enjoy greater latitude under copyright law 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 should not benefit from the exception, but rather the level of offence to be tolerated should be proportionate to the gravity of the parody's message.

This point is nicely illustrated by the efforts[112] of Hergé's estate to restrain publication of the cartoon depicting politician Kevin Rudd, as a Tintin parody, which we considered previously in Chapter 6.[113] Clearly, cartoons of this type are capable of engaging a wider/different audience than a conventional political commentary,[114] thereby providing a valuable resource which informs and invites public debate of current events.[115] The example also demonstrates the importance of satire as a form of artistic expression within a democratic society. Satire inherently requires reality to be exaggerated and distorted, as its very aim is to engender a public reaction of shock, surprise, or offence. The same logic should be applied to parodies at large. Indeed, since satire represents one facet of parody, there seems no reason to distinguish between these forms of expression.[116] For example, a

parody which has an obviously humorous character creates a separation between the reality of the original work and the altered reality 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.

Owing to the important role of political comment in the public arena, any interference with a political parodist's freedom of expression requires careful analysis. However, purely commercial expressions do not carry the same significance. Consequently, it is legitimate that national courts might place more restriction upon free expression and more weight upon the exclusive rights of the right-holder in respect of an unauthorized parody of a copyright work for a parody used in an advertising context.

2.5 The medium used

The medium used to disseminate a parody may also influence a national court to decide whether the use should be permitted, or not. ECtHR jurisprudence has established that the medium may influence the impact of an expression. For example, print media tend to have less impact than a broadcast because the latter has a wider reach.[117] Similarly, the ECtHR has also held an expression communicated via a book of poetry to have less impact because the need to purchase the work inevitably reduced the number of people having access to the potentially harmful expression.[118]

In terms of parody, we have seen that in France and in the US, the fact that a parody has been reproduced on goods which do not aim to commercially exploit the parodic expression (e.g. lighters, pins, t-shirts) is likely to go against the parodist. Commercialization in this form is seen as indicative that the parodist may intend to do more than simply seeking remuneration for their creative efforts, by potentially free-riding on the creative efforts of the right-holder. Finally, in the digital world, a freely available online parody is likely to have more impact than one behind a paywall.

If humorous character is established negatively by establishing lack of harm, then this would be connected to the medium used to disseminate the parody.

2.6 The context of the expression

Context, i.e. the manner in which a parody is communicated, should also influence whether the use is permitted or restricted. The ECtHR has emphasized that this is significant in terms of the right to freedom of expression.

For example, in *Karataş v. Turkey*,[119] discussed earlier,[120] the Court took account of the fact that the commentator had selected poetry to express concern about the state of political unrest in Turkey and published it in a poetry book. The Court considered that this context of expression was likely to have limited public appeal,[121] such that the publication was likely to have a negligible impact on public order. However, had a context of work having mass appeal been selected to convey the same comment, then the conclusion was likely to have been different.

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.[122] 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.[123]

Considerations of context also need to take account of historical and social factors, 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.[124]

Context provides the unwritten cipher which indicates whether a message should be taken literally (which could adversely affect the rights of others) or as a parody. Only when the parodic context is misconstrued (such that its humour and the message are taken at face value) is there the potential for 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.

In conclusion, assessing whether a parody amounts to an abuse of freedom of expression cannot be achieved by analysing the parody in isolation.

National courts should have regard to the context in which the parody arises, in terms of the context of its publication, as well as the particular sensitivities of its likely audience.

2.7 The content of the expression

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 parody, the same cannot be assumed where a parody conflicts with the very values underpinning that fundamental right or offends against the accepted moral norms of a particular society.

The first distinction to be made is to identify whether the reproduction of the protected work for parody is intended to criticize the work itself, including the values which it encapsulates (i.e. a 'parody of') or whether it comments on something external and unrelated to the work copied (i.e. 'parody with'). In either case, the right-holder may not endorse the parody's message. Where the message is uncontentious, courts should award greater weight to preservation of freedom of expression than to preservation of the right-holder's property rights. Conversely, where the message itself is on the boundary of acceptability, courts should enjoy a 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 were explored in *Deckmyn*.[125] In this case, Vlaams Belang, a right-wing and Flemish nationalist political party, distributed a leaflet featuring a parody of the well-known *Spike and Suzy* comic book cover entitled 'De Wilde Weldoener'—The Compulsive Benefactor (Figure 7.3). The copyright-protected image had been altered to promote the party's political message. The main figure was replaced with an image of Ghent's mayor, M. Termont, sporting a belt coloured like the Belgian flag. Instead of throwing coins to adults and children, as in the original image, the Mayor is depicted handing out money to people from different ethnic backgrounds. The parody clearly intended to convey the message that M. Termont had prioritized public spending on immigrants rather than on other causes.

104

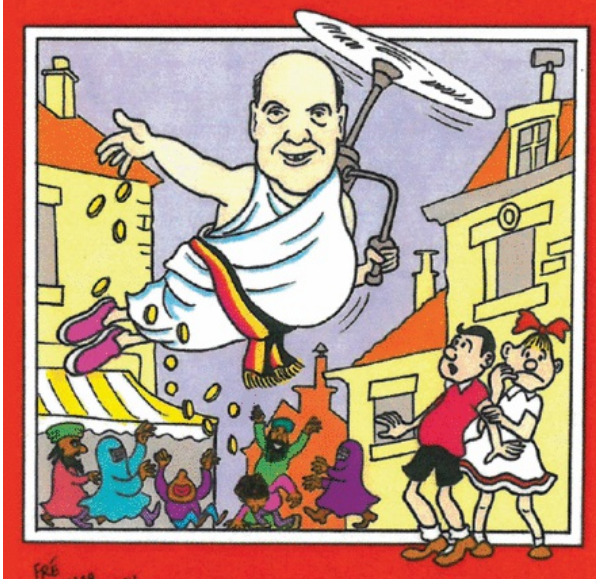
WILLY VANDERSTEEN

SUSKE EN WISKE

DE WILDE WELDOENER

Standaard Uitgeverij

DE WILDE WELDOENER



FRÉ VRIJ NAAR VANDERSTEEN

Figure 7.3 The Compulsive Benefactor cover of one of the comic albums of Spike and Suzy and its parody.

In cases such as this where the parody is not strikingly evident, a national court must determine whether the parody before them remains within the acceptable limits of freedom of expression. If the parody fails to respect another fundamental right (such as the right to religion) or promotes values which are contrary to principles overarching fundamental rights (e.g. racial hatred, discrimination, or glorification of terrorism), then, as the ultimate balance struck by the court must realize *all* fundamental rights in issue, this might justify restricting the parodist's freedom of expression in favour of the fundamental rights of others.

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. However, human rights law recognizes that freedom of expression does have a limit. In *Deckmyn*,[126] it was argued that the Vlaams Belang message which incited violence, hatred, or discrimination fell beyond this limit. Also, there is a general consensus that it is unacceptable to circulate images which depict paedophilia, necrophilia, or bestiality. 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, particularly when exercise of this right potentially compromises the property rights of others. But morals do evolve over time and vary from place to place,[127] and account should be taken of this to avoid unnecessary censorship.[128]

3. Preventing Abuses

The previous section considered the influence of freedom of expression on the appreciation of the requirements attached to the parody exception. When the parodist's right to free expression is in conflict with the exercise of another's fundamental right, including exercise of copyright law's exclusive rights, a court should consider whether exercise of the right of freedom of expression amounts to an abuse of that right. If so, limiting freedom of expression is justified to preserve the rights of others. In this section, we shall

consider examples where exercise of the right to freedom of expression has been curtailed in order to protect abuse of other fundamental rights. The focus is on French parody cases, because of the relative wealth of relevant case law available. However, these are not limited to copyright cases. This section therefore serves two purposes: (1) demonstrating that the parody exception may extend its reach beyond copyright law, and (2) providing insight as to how the balance between copyright and freedom of expression may be struck.

3.1 Freedom of expression v. personality rights

Personality rights[129] is collective term used in France to refer to the basic human rights deemed necessary to protect an individual's essential interests.[130] Traditionally, these recognize a right to life, right to human dignity, right to respect for private life, and image rights. In a balancing of fundamental rights, all of these rights must be balanced against freedom of expression.

Thus, 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, Jean-Marie 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'.[131] While the court recognized that the genre of satirical caricature permits exaggeration, distortion, and irony, the court did not consider that it extended to an image which was tantamount to an invasion of privacy. In Auvret's opinion,[132] the court should have characterized the nature of the expression attacking the ex-leader as being an invasion of privacy or not, given that the difficulty in this case arose from a separation between Le Pen's public political role 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 by making an expression which is proved to be false can give rise to a defamation claim,[133] while particularly outrageous comments may give rise to criminal liability.[134] The line between the exaggeration allowed under satire and that precluded as an outrageous comment is unclear. This opens the door to courts making ostensibly subjective appraisals.

If sued for defamation, a speaker may still protect their right to freedom of expression by showing the statement made is either true or was made in 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.[135] For a good faith defence to be successful, the defendant must satisfy four requirements which have been established by courts:[136] legitimacy of the goal sought, absence of malicious intent, particular care in the expression and quality of the speaker.[137]

French courts have established that parodies which remain true to the rules of the genre for the purposes of copyright law also lack the intent required for a tort action, such as breach of privacy or defamation, to succeed. Thus, when a satirical newspaper published a pastiche of another article to criticize Scientology, the trial judge held that the pastiche was not defamatory.[138] In this case, the pastiche genre permitted a message which was harsh and provocative, and because the article satisfied the rules of the genre, the use lacked the intent required to defame.

The context of the expression is also important. In *Gigliotti v. Bern*,[139] a radio commentator's song which described the claimant (the brother of a famous French singer) as a thug, a bastard, and a sadist was held not to be defamatory either. The court conceded that certain phrases, taken in isolation, could be seen as offensive, but overall, the song was evidently humorously outrageous in character. The fact that the public would not take the song seriously prevented it from being defamatory.

Similarly, in *Dion v. Cogerev*,[140] Céline Dion, the Canadian singer, sued the publisher of a photomontage for defamation. The image appeared to depict Dion naked and covered with faeces. As the picture featured in a satirical magazine, and the singer was well-known for taking particular care of her appearance, the court held that the magazine's readership, viewing the image in context, would not take the montage to be real. Thus, the lack of confusion between the published caricature and the image of the singer led the tribunal to conclude that Dion's reputation had not been harmed.[141]

In *G. v. Canal Plus*,[142] the court was required to consider a sketch in a satirical TV puppet show, which depicted the claimant, a prince, as lazy, work-shy, and gay.[143] The court held that the parody would only defame, i.e. harm the personality rights of its target, if the defendant displayed a

malicious intent towards the target. Only then would it be legitimate to limit freedom of expression.

It is evident from this jurisprudence that the presence or absence of humour is the measure which determines whether the balancing of rights favours protection of freedom of expression in the parody use or points to upholding the personality rights of the parody's target.[144] The parody's context is an essential component when striking a fair balance.

It is apparent that in the case of a clash of fundamental rights involving parody, the rules of the genre guide French courts in their determination of whether the balance favours protection of freedom of expression or the personality rights of the claimant. Thus, the 'parody exception' in French law extends beyond the confines of copyright law. 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. Malicious intent tips the balance towards the protection of the rights of the person targeted, while harsh criticism made non-maliciously via humour tips the balance in favour of protecting freedom of expression.[145] 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,[146] yet if the court notes a manifestly illicit character within the expression, then freedom of expression of the parodist must be set aside.

3.2 Freedom of expression v. non-discrimination

In France, protection against discrimination, hate, and racial violence typically prevails over the right to freedom of expression. Therefore, those wishing to exercise their right to freedom of expression to pass comment on these sensitive topics are required to take extra care.

In *Bruel v. Sebastien*,[147] a French comedian sought to comment upon the views of the National Front. He did this by dressing up as its then leader, Jean-Marie Le Pen, and performing a song—*Casser du noir* ('Crush the black'[148]), a parody of *Casser la voix*. Although the court recognized from

the song's lyrics that it was intended to be a 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. There were insufficient signals for the public to seek a double meaning to the lyrics.[149] Given the context of the use, which featured as part of a political debate concerning immigration, there was a risk that the altered lyrics would appear to incite, rather than criticize, discrimination, hate, and racial violence. On balance, the work went beyond legitimate free speech.[150]

The importance of establishing this distance between the parody and its target in the public mind has been confirmed by later French decisions, although its application is not straightforward. In *La Grosse Bertha*,[151] a satirical magazine published a drawing, captioned: 'I suck was his name by Robert Obscene'.[152] 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 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 Court of Appeal. Given their outrageous character, the Supreme Court considered that publication of the drawing might still result in an abuse of free expression. Ultimately, the Court of Appeal 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.[153] The court concluded that in the particular circumstances, there was no abuse of freedom of expression.[154] This same reasoning was adopted in relation to the publication of caricatures of the Prophet Muhammed in the satirical magazine *Charlie Hebdo*.[155]

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[156] being both guillotined and

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.[157]

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,[158] 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. Copyright in the painting was not in issue, but the French association protecting beliefs and individual freedoms failed to see any humour in the image, and sued the company. It considered that use of such a sacred scene for advertising purposes was a gross insult to the Catholic community.[159] 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.[160]

3.3 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.[161] 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.

4. A Desirable Harmonization

If a court's consideration of the parody exception necessarily involves a

balancing of fundamental rights (section 3), against a complex factual matrix (section 2), does this mean that international or even EU-wide harmonization within copyright law is inevitably ill-fated? The short answer is: no, not necessarily, although the two 'universal' requirements attached to the parody exception might leave right-holders and creators with a bitter taste because they will inevitably need to relinquish some control over their protected work.

The additional guidance suggested in section 2 of this chapter contributes to the ultimate goal of harmonization. As the guidance is based upon international human rights law principles, it provides an attractive, if not definitive, solution because it is applicable to all the jurisdictions considered within this book. Nevertheless, it is unrealistic to expect that national courts would reach the same decision in the same or closely similar cases. This is not a failure of harmonization, but recognition that harmonization does not demand uniformity, because it is necessary to take national cultural and social sensitivities into account.

Taking account of national cultures fosters the integration of cultural diversity within the EU and international legal frameworks. Cultural diversity is used in a broad sense to cover the 'manifold ways in which the cultures of groups and societies find expression'.[162] It is often brandished as a policy goal which should be reflected in the application of substantive provisions, including the parody exception, within the internal single market.[163] In its goal of harmonization, the EU legislator must consider two legal traditions: common law and civil law countries. Whilst we have seen that the boundaries between the two can sometimes be blurred, differences subsist. Copyright exceptions and limitations represent an example where harmonization is more difficult to achieve. As Member States have introduced exceptions and limitations in their national law according to their legal culture and traditions, these tend to vary greatly. Therefore, harmonization does require a compromise to be reached. By endorsing the French requirements for the parody exception, the CJEU seems to have gathered inspiration from this national tradition. As we have seen, in civil law jurisdictions including France, the terms 'parody, pastiche and caricature', if not true synonyms, exist along an overlapping spectrum of genres, whereas the common law tradition is more likely to interpret the three terms as distinct and distinguishable. If this is maintained, then the harmonization goal will be jeopardized, given that the net result is that the exception will be deemed to

apply to different types of uses. Consequently, the autonomous understanding of parody, as defined by the CJEU in *Deckmyn*,[164] should be seen as a trade-off between the copyright and *droit d'auteur* legal traditions. National cultures and traditions may then resurface when it comes to shaping the exception to specific factual scenarios. As EU law leaves Member States unrestrained when it comes to implementation of copyright exceptions, common law and civil traditions may elect fair dealing or the rules of the genre to fine-tune the parody exception to their own legal tradition.

The CJEU's direction to pay more attention to human rights values when applying the parody exception can also be seen as an indication of respecting national specificities while achieving broad harmonization. In this chapter,[165] we have identified that the human rights framework has two functions in relation to the parody exception. First, an understanding of freedom of expression, as explained in ECtHR jurisprudence, offers guidance to national courts when assessing, for example, fair dealing or rules of the genre as to the factors which must be considered to ensure freedom of expression is promoted and preserved. Second, the human rights framework provides guidance regarding the balancing of fundamental rights, while allowing enough flexibility for national cultural differences to be preserved. Although the copyright paradigm remains largely content neutral, the proportionality requirement added by the CJEU in *Deckmyn*[166] reminds national authorities of their international obligations to give some effect to all the human rights at stake. This requires national courts to take the content of an expression into account, which might indicate that, despite the exception's requirements being met, the use results in an abuse and should not be allowed as it endangers human rights values.

In Chapter 4, we saw that the protection afforded to moral rights is linked to a jurisdiction's legal traditions with arguably less market impact than the associated economic rights. Nevertheless, the lack of harmonization between economic and moral rights in terms of a common parody exception could curtail the effectiveness of the parody exception. Within the EU, moral rights have not been harmonized, and the divergent protection afforded between Member States was shown to have a potential indirect effect on the scope of the parody exception in copyright law. As we have seen, civil law jurisdictions, such as France, operate a direct relation between the lawfulness of a use under the parody exception and the lawfulness of a use under a moral rights claim, whereas common law jurisdictions, such as the UK, were more

likely to treat the same use differently. Thus, use permitted by the parody exception in copyright law might be precluded as a derogatory treatment, for example. Divergent outcomes could hinder the objectives of a harmonized parody exception. Yet, we also saw that as a result of the narrow scope of moral rights in common law jurisdictions, as well as the adoption of objective standards, it appears that moral rights would seldom preclude a use permitted by copyright law. Indeed, the advocated approach to interpretation of the parody exception would tend to exclude uses which would harm the moral rights of authors.

The ultimate aim of copyright law should be to offer a workable framework which enables the creative process to flourish and be adequately rewarded. This is achieved by striking a balance between the rights granted to right-holders—especially the reproduction right—and subsequent uses built upon earlier copyright-protected expressions. After all, even if this is not consistently stated throughout the EU copyright instruments, the policy goal has always been to protect end-users, as evidenced by the existence of copyright exceptions and limitations in EU copyright law. Nevertheless, the very fact that the interest of end-users is protected through exceptions, such as the parody exception, makes these interests appear secondary to those of the right-holders.

5. Conclusion: Towards a *Right* to Parody?

Whether deliberately, or not, the framing of the parody exception as a defence—thereby placing the burden of proof on the parodist—both stymies freedom of expression in copyright cases and reinforces the music business practices outlined earlier. Ultimately, as the parody exception is rooted in the human rights framework and the protection of freedom of expression, one may wonder whether protecting parodies through a defence is the best way to realize its underpinning goals.

We have seen that copyright protection, including at an international level, favours the interests of right-holders and places the user's interests in a secondary position. However, this approach is perhaps unsustainable given the expansion of the scope of exclusive rights through legal instruments and jurisprudence. There have been several calls to balance exclusive rights with stronger copyright exceptions which better protect users' interests. Notably, Canada is at the vanguard. Through its establishment of the user's rights

doctrine, the Canadian Supreme Court requires equal weighting between exclusive rights and defences. While it remains to be seen whether this will lead to a broader interpretation of the parody exception, it marks a shift in the balancing of interests within copyright law. This contrasts with the situation in the EU, where the InfoSoc Directive requires that right-holders receive a high level of protection, which has resulted in exceptions being narrowly construed.[167] This has prompted commentators to seek alternative routes. Hugenholtz, for one, has argued that those copyright exceptions which are in place to protect human rights require enhanced protection compared to others. Largely adopting Hugenholtz's reasoning, this book has proposed ways for courts to take proper account of fundamental rights when assessing whether a parody falls within the scope of exception, irrespective of whether this is undertaken via a fair dealing, fair use, rules of the genre enquiry, or otherwise.

Procedurally, the inadequacy of protecting parodies through a defence has been noted by the judiciary. In the US, Judge Birch of the Eleventh Circuit has noted on two occasions that the parody defence would be better recast as a right, but even as currently provided, the defence should be applied to guarantee higher fundamental values.[168] Fair use should be seen as a 'breathing space within the confines of copyright'[169] to guarantee the First Amendment in order to foster the creation of cultural works. The legal history of this doctrine demonstrates that wherever there is a public interest in a particular use, right-holders should not be in a position to impede it.[170]

Additionally, the fact that the defendant bears the burden of demonstrating that their parodic use is lawful creates the impression that the enquiry is concerned with 'excusing' infringing (wrongful) conduct whereas the enquiry should be devoting attention to promoting the right of freedom of expression and creativity. In other words, the fundamental roots of this copyright exception are generally absent in the courts' reasoning, altering the intended balance between property rights and freedom of expression values to favour the copyright-holder.[171] But why should the right-holder's expression prevail, since other expressions, including parody, also enjoy protection under the right to freedom of expression?

In the overview provided in Chapter 4, the range of judicially-developed 'fairness factors' applied to assess whether an unauthorized use of a copyright expression should be permitted were considered.[172] This leads to a

flexible tool which is adaptable to various circumstances. A court's assessment of these factors might seem unpredictable, owing to the need to determine fairness on a case-by-case basis, which renders some of the factors inapplicable in certain cases. Although this flexibility in necessary and intentional, the legal uncertainty which may result can be divisive for the defendant. As the current state of play favours right-holders, any doubt in the fairness appreciation tips the balance in favour of upholding the claimant's rights.

In Chapter 5, we reviewed how a fair balance could be reached between copyright's property rights and competing freedom of expression values. If circumstances suggest that a parodist's right to freedom of expression prevails over copyright, then perhaps it should be the right-holder's role to prove that the use is unfair?[173] This debate seems to be moot in the current climate which requires those seeking to rely upon a copyright exception to 'justify' their use.

The mandatory character of the parody exception, as recognized in France and the UK, goes some way to redress the balance. By removing the ability for copyright-owners to 'contract out' of the parody exception, this suggests there is some will to remove right-holders' control over the exception. This book goes one step further, by arguing that courts should respect the proportionality test, prescribed at an international level, in order to protect and promote freedom of expression. The current expansive scope of protection which copyright-protected works enjoy may be enforced to undermine protection of freedom of expression. In parody cases, in recognition of the value attached to this form of social comment in a democratic society, the human rights framework should provide guidance in the application of the 'fairness factors', which might rescue the defendant's use, as well as offering greater clarity.[174]

Furthermore, jurisprudence which has interpreted the right of freedom of expression suggests a hierarchy of priorities, which may assist in determining whether permitting use is objectively fair, including in circumstances in which the parody's content is seen as sensitive or controversial. Despite the fact that, typically, copyright assessments aim to be content neutral, this arrangement seems to offer an avenue for copyright-holders to enforce their exclusive rights in order to censor the message conveyed. Yet, most concede that expressions which may offend, shock, or disturb should be allowed in a democratic society. This is particularly relevant in parody cases. Although

many parodies are comic and light-hearted, others use a protected work to convey a message concerning a distasteful topic or to express a view which the original author might not endorse,[175] but which are an essential part of a healthy political discourse. As parody is an effective communication tool, it increases citizen participation in the democratic process. Parodies should only be unlawful, then, in situations of abuse. In the absence of an established legal right to parody, factors such as the standing of the speaker, the intent of the parodist, the form of the expression, its context, the medium used, the content of the message, and the type of expression transposed from the well-established human rights context enable the parody exception in copyright law to refocus on the realization of freedom of expression.

Overall, this book argues for a more holistic approach in the appraisal of the parody exception in copyright law, determining the legality of the use by reference to the human rights framework. It certainly does not exhaust this area of the law but, hopefully, it provides ideas as to how one might construe the parody exception to foster cultural diversity and strike a fair balance between the interests of right-holders, parodists, and society at large.

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[1] See Chapter 1, section 2.

[2] See Chapter 1, section 5 and Chapter 4.

[3] The other jurisdictions under scrutiny are omitted since, at the current time, a well-established body of case law is still lacking.

[4] See Chapter 4.

[5] See the story on the birth of the French collecting rights society ('SACEM'). M Kretschmer, G M Klimis, and R Wallis, '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, 269.

[6] 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.' L Pallas-Loren, 'The dual narratives in the landscape of music copyright' (2014) 52 *Houston Law Review* 537.

[7] C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter *Deckmyn*).

[8] This is reinforced by the fact that the parodies reproduce already well-known works and, therefore, commercially successful works.

[9] Creators of music and lyrics are members of the British Academy for Songwriters, Composers and

Authors (‘BASCA’), defending their interests.

[10] Who themselves are members of the Music Publishers Association (‘MPA’).

[11] 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 require authors to partially waive their integrity rights to authorize them to make an adaptation of the work, for a movie for example.

[12] This licence is essential to lawfully perform a protected work publicly (either live performances or radio broadcasts). This licence is usually granted by PRS for Music (‘PRS’).

[13] A mechanical licence, traditionally granted by MCPS (part of PRS), refers to the authorization for the reproduction or distribution of works, such as through vinyl records, CDs, or digital products.

[14] This latter might include two authorial works depending on whether lyrics have been attached to the tune.

[15] See also Gammons’ metaphor between copyright in music and Ying Yang. H Gammons, *The Art of Music Publishing* (Focal Press, 2011) 21.

[16] i.e. ‘companies act as an oligopoly to one group and an oligopsony to another’; A Solo, ‘The role of copyright in an age of online music distribution’ (2014) 19 *MALR* 169, 171; F MacMillan, ‘Commodification and cultural ownership’ in J Griffiths and U Suthersanen (eds), *Copyright and Free Speech* (OUP, 2005) 48.

[17] See the endless inexpensive new processes to rework music such as digital sampling and mash-up etc.

[18] Solo (n 16) 169. Yet, it is not implied that the role of record labels and publishers has been lessened but rather that the focus has changed. In the digital world, these intermediaries are fundamental for at least five reasons: they 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. M F Schultz, ‘Live performance, copyright, and the future of the music business’ (2009) 43 *University of Richmond Law Review* 685–755; B R Day, ‘In defense of copyright: creativity, record labels, and the future of music’ (2011) 21 *Seton Hall J. Sports & Ent. L.* 61–103.

[19] Pallas-Loren (n 6) 539.

[20] L Bently, ‘Authorship of popular music in UK copyright law’ (2009) 12 *Information, Communication & Society* 179, 189.

[21] 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.

[22] These are paid by the record label and by PPL for the revenues deriving from communication to the public.

[23] P Tschmuck, ‘Copyright, contracts and music production’ (2009) 12 *Information, Communication & Society* 251, 254.

[24] Pietilä argues, in relation to the South African music industry but it 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 a re-modelling of the financial incentive system in place to prevent the concentration of ownership in the hands of a few dictating the market. T Pietilä, ‘Whose works and what kinds of rewards’ (2009) 12 *Information, Communication & Society* 229–50.

[25] This section only focuses 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 to ensure high quality music.

[26] A Thompson, 'Recording contracts' in N Riches (ed.), *The Music Management Bible* (SMT, 2012) 37.

[27] Here, musical composition is understood in the legal sense as copyright subsisting in the music and in the lyrics, and copyright in the sound recording.

[28] Section 9(1) CDPA.

[29] The different forms of publishing contract include (1) the *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, licenses others to use the works, collects the licensing fees, and prepares the accounts; (2) the *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) the *exclusive deal* is generally a demonstration of publishers' trust in the talent. This deal comes with important capital advances and an assignment of exclusive rights from the songwriter. A Harrison, *Music: The Business* (6th edn, Random House, 2014) 128–45.

[30] 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, such as 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 inconvenience of not having any capital advance. Gammons (n 15) 82.

[31] 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 permission from writers and publishers); *synchronization* 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 musicals. Harrison (n 29) 119–27.

[32] Tschmuck (n 23) 259.

[33] These can take different forms: licence, exclusive long-term recording contract, development deal, production deal, and the most recent 360° model. Harrison (n 29) 73–89; Kretschmer et al (n 5) 178.

[34] 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.

[35] S Greenfield and G Osborn, 'Copyright and power in the music industry' in S Firth and L Marshall (eds), *Music and Copyright* (2nd edn, Edinburgh University Press, 2009) 96.

[36] 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 6.

[37] In relation to performers, there are exceptions when it is not reasonably practicable to do so: section 205C CDPA.

[38] Sections 78 and 205D CDPA. Exceptions: sections 79 and 205E CDPA. See Chapter 3, section 3.

[39] Sections 80 and 205F CDPA. See Chapter 6, section 5.

[40] Section 84 CDPA. See Chapter 6, section 4.

[41] 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 irrespective of contractual terms.

[42] Harrison (n 29) 145.

[43] See n 13.

[44] See Chapter 3, section 1.

[45] See Chapter 4, section 2.4 and Chapter 6, section 4.

[46] This clause is also found in most recording deals.

[47] See, for example, the songs of neo-Nazi music groups like No-Remorse, Skrewdriver, RaHoWa, or Skullhead.

[48] 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 4, 5, and 6. The user remains liable under the new law.

[49] Or, rather, from PPL given that major labels are members of PPL.

[50] Which most likely will be from the publisher because of the transfer of copyright ownership through the publishing contract.

[51] K McLeod and P Dicola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011) 239.

[52] Section 116(2) CDPA defines 'licensing body'.

[53] Harrison (n 29) 365.

[54] This is ongoing as the European Commission approved the joint venture (ICE) 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 20 July 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 (access date: 10 November 2018) and from the European Commission, Mergers: Commission approves joint venture for cross-border licensing of online music between PRSfM, STIM, and GEMA, subject to commitments (Brussels, 16 June 2015) available at http://europa.eu/rapid/press-release_IP-15-5204_en.htm (access date: 10 November 2018).

[55] The latter can take the form of a flat fee or a percentage of earnings.

[56] 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.

[57] 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 (n 29) 372.

[58] MCPS is itself owned by PRS, but remains autonomous in its decision-making, although PRS manages its royalty processing services.

[59] On the benefits of joining PRS, see Gammons (n 15) 39.

[60] 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 (access date: 10 November 2018).

[61] Section 1.3 demonstrates that licensing for parody purposes often remains outside the rights transferred or licensed to publishers and labels, requiring parodists to negotiate with every author, songwriter, composer, and artist involved.

[62] Which only happens in rare cases.

[63] P Tafforeau, *Pratique de la propriété littéraire et artistique: contrats et gestion collective, droit d'auteur et droits voisins* (LexisNexis, 2013) 238.

[64] Currently, policy makers seem to dress up any change in the 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.

[65] 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.

[66] Remuneration keys come from an interview between Saceml and SACEM:available at http://saceml.deepsound.net/reponses_sacem.html.

[67] See section 5.

[68] See Chapter 3, section 2.

[69] 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* (n 7) [21].

[70] I Hargreaves, *Digital Opportunity. A Review of Intellectual Property and Growth* (Independent Report, 2011) 33.

[71] A beta version of this private initiative can be accessed at www.copyrighthub.co.uk.

[72] 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 per cent 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. L Pallas-Loren, 'Untangling the web of music copyrights' (2002) 53 *Case W. Res. L. Rev.* 677.

[73] J Toynbee, 'Musicians' in S Frith and L Marshall (eds), *Music and Copyright* (2nd edn, Edinburgh University Press, 2009) 135.

[74] Including further legislative changes, or somewhat of an about-turn from the industry to establish a voluntary scheme.

[75] This would also be a solution for the sampling music and other parodies which are not clear-cut cases under the law.

[76] And applies fair use, expanding the reach of fair use beyond the US territory.

[77] Article 14 E-Commerce Directive provides the intermediary with a shield against liability for the uploading of infringing content by third parties as long as the intermediary was not aware of the presence of the infringing content on its platform. Upon notification, the intermediary must act expeditiously to remove access to the infringing content. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (17 July 2000) OJ L 178, 1–16. This safe harbour is threatened by the current copyright reform and leans towards the introduction of automated anti-piracy systems with complaints and redress mechanisms operated by private actors, namely platforms and right-holders. See text proposed by the EU Commission Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market—COM (2016) 593. For more, see S Jacques, C Garstka, M Hviid, and J Street, 'Automated anti-piracy systems as copyright enforcement mechanism: the need to consider cultural diversity' (2018) 40(4) *European Intellectual Property Review* 218.

[78] 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 US, Google announced on 19 November 2015 that they will start to proactively defend uses under the cover of fair

use even in court if necessary. Parody and critique are cited as examples. Press release available at http://googlepublicpolicy.blogspot.nl/2015/11/a-step-toward-protecting-fair-use-on.html?m=1 (access date: 1 June 2018).

[79] So confidential that even the members of PRS are kept in the dark which has led to BASCA being asked to swap this secrecy for more transparency.

[80] Available at http://www.prsformusic.com/creators/helpcentre/pages/youtubedealhelp.aspx (access date: 21 July 2015).

[81] See the study carried out by Kretschmer et al, which describes the uneven bargaining powers which result in outcomes favourable to right-holders who continue to dictate the terms of the licence, which often conflicts with copyright statutory exceptions. M Kretschmer, E Derclaye, M Favale, and R 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.

[82] Thompson provides a summary on the arbitration system within the music industry in the UK. Thompson (n 26) 239.

[83] This solution is also shared by Benabou: V-L Benabou, *Rapport de La Mission du CSPLA sur les 'Oeuvres Transformatives'* (2014) 72.

[84] Sections 149 and 205B and schedule 6 CDPA.

[85] Yet, currently, the copyright tribunal only deals with commercial uses and would have to be extended to non-commercial uses too.

[86] Note, that to benefit from safe harbour provisions, YouTube must not be aware of the content uploaded to its website. Therefore, the organization often prefers to consider alleged infringing content as infringing, rather than analysing whether, based upon the specific fact, the use is covered by a copyright exception. In any event, it seems inappropriate for a private body to determine such cases.

[87] Section 237(2) CDPA. 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.

[88] The Alternative Dispute Resolution for Consumer Disputes Regulations 2015, SI 2015/542; 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 June 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 June 2013, pp. 1–12.

[89] See Chapter 1, section 5.1 and Chapter 5.

[90] Building on the factors established, see Chapter 5, section 4.2.

[91] *Deckmyn* (n 7).

[92] See Chapter 5, section 4.1.3.

[93] TGI Paris, 17e ch. Corr., 9 janvier 1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182, note Bilger; TGI Paris, 17e ch. Corr., 17 février 1993, *Sabatier c/ Du Roy et autres*, Recueil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, pp. 195–6; note Bigot.

[94] B Mouffe, *Le droit à l'humour* (Larcier, 2011) 485.

[95] Yet the study of the national case law demonstrates that French courts adopt a liberal approach to determining the intent of parodists.

[96] Cass., 12 janvier 1988, RIDA, n°137, 98.

[97] Repeated in, amongst others, Cass. 14 novembre 2006, *Marithe v. Association Croyances et*

libertés Bull. 2006, I, n° 485, p. 417; Versailles ch. 01 Sect. 01 28 septembre 2006 n°05/04741.

[98] *Jersild v. Denmark* (1994) 19 EHRR 1.

[99] D Türk and L Joinet, 'The right to freedom of opinion and expression: current problems of its realization and measures necessary for its strengthening and promotion' in K Boyle and F D'Souza (eds), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Article XIX, London and Human Rights Centre, University of Essex, 1992) 52.

[100] This is also the case in the US as seen in Chapter 5, section 5.5. *Quenton Galvin and Jacob Meister v. Illinois Republican Party, Illinois House Republican Organisation, Roderick Drobinski, Friends of Rod Drobinski, Jamestown Associates LLC, and Majority Strategies, Inc*. (2015) No. 14 C 10490; *Dhillon v. Does* 1-10, No. C 13-01465 SI, 2014 WL 722592, [5] (N.D. Cal. Feb. 25, 2014); *Henley v. DeVore*, 733 F.Supp.2d 1144 (C.D. Cal. 2010); *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L.Ed.2d 41 (1988); *N.Y. Times Co. v. Sullivan*,376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

[101] Paris, 14e ch. B, 28 novembre 2008, Recueil Dalloz, 2009 n°9, p. 610, note Edelman; Cass. (1ère ch. Civ.), 13 janvier 1998, D., 1999, somm. p. 167 (in relation to the right of privacy).

[102] TGI Paris, 31 janvier 2012, *Alix Malka v. Peter Klasen*, n° RG 10/02 (First instance); Paris, 18 septembre 2013, *Alix Malka v. Peter Klasen*, N° RG 12/02480 (appeal); Cass., 1ère Civ., *Alix Malka v. Peter Klasen*, 15 mai 2015, n° 13-27.391 (Supreme Court); Versailles, 16 mars 2018, *Alix Malka v. Peter Klasen*, n° RG 15/06029 (case remanded).

[103] While the Supreme Court did not criticize the final conclusion, it did criticize the decision for not fully explaining how the balance between competing interests had been struck; Cass., 15 mai 2015, 13-27.391, Publié au bulletin.

[104] However, perhaps the Second Circuit misapplied or failed to consider other factors such as market substitution.

[105] See Chapter 5, section 5.5.

[106] And this despite the *Ashby* ruling (*Ashby Donald and Others v. France*, App No 36769/08, 10 January 2013) as demonstrated in *Malka* (n 102).

[107] *Vereinigung Bildender Künstler v. Austria*, App No 68354/01.

[108] *Akda v. Turkey*, App No 41056/04, 16 February 2010.

[109] *Krone Verlag GmbH & Co KG (No 3) v. Austria* (2003) 36 EHRR 57.

[110] Kofi Annan, Nobel Peace Prize at the symposium 'Unlearning Intolerance', New York, 16 October 2006 at http://www.cartooningforpeace.org/en/presentation/ (access date: 1 June 2018).

[111] See Chapter 5, section 2.

[112] The dispute arose prior the introduction of a parody exception in Australian copyright law, and was eventually settled between the parties.

[113] See Chapter 6, section 4.3.2.

[114] For more on the power of political cartoons, see R Phiddian, *Censorship and the Political Cartoonist*, refereed paper presented to the Australasian Political Studies Association Conference (University of Adelaide, 29 September–1 October 2004).

[115] J McCutcheon, 'The new defense of parody or satire under Australian copyright law' (2008) 2 *IPQ* 163, 172.

[116] As demonstrated in the previous chapter, the parody/satire distinction seems to be fading in the US. This is welcomed especially in a country with such a robust protection for the First Amendment.

[117] Jersild (n 98).

[118] Therefore, the expression was unlikely to incite hatred and violence, despite its content. *Karataş*

v. Turkey (1999) IHRL 2880.

[119] Ibid.

[120] See Chapter 5, section 4.1.1.

[121] *Karataş* (n 118) [52].

[122] *Jersild* (n 98).

[123] *Ashby Donald and Others v. France*, App No 36769/08.

[124] *Peta Deutschland v. Germany*, App No 43481/09; *Leroy v. France*, App No 36109/03.

[125] *Deckmyn* (n 7).

[126] Ibid.

[127] Hence, it seems dubious to assume that a 'European' sense of morality exists, even though the EU Intellectual Property Office 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* (n 7) [83]: 'most deeply rooted beliefs in European society'.

[128] As discussed previously in relation to the French Supreme Court in ch. Crim., 12 septembre 2007, 06-86763, Non publié au bulletin. Child pornography is not morally acceptable and constitutes a criminal offence. Therefore, a cartoon hero resembling a child engaging in sexual relationships with adults has been restricted. Yet, if the cartoon had depicted a non-human juvenile hero, such as a Smurf, in similar situations it would not call for a restriction. See section 3.3.

[129] Mostly referred to as publicity rights such as tort and passing off in common law jurisdictions.

[130] Author's own translation from Cornu (ed.), see 'Personnalité', in *Vocabulaire juridique*.

[131] TGI Paris, ref., 17 juin 1987, *Le Pen c/ le Canard Enchainé;* Paris, 1ère ch., sect. B, 19 juin 1987; JCP 1988.II.20957, note Auvret.

[132] See n 131.

[133] Article 29 of the Freedom of the Press Act of 29 July 1881.

[134] R621-1 and 621-2 Penal Code.

[135] Sylvie Menotti, *La preuve de la vérité du fait diffamatoire* (courdecassation.fr 2004) available at https://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2004_173/deuxieme_ (access date: 10 June 2015).

[136] TGI Paris, 17e ch. Corr., 9 janvier 1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182, note Bilger; TGI Paris, 17e ch. Corr., 17 février 1993, *Sabatier c/ Du Roy and Others*, Recueil Dalloz Sirey, 1994, 25e cahier, sommaires commentés, pp. 195–6; note Bigot.

[137] The weight attributed to each factor varies depending on the facts of the case. TGI Paris, 17e ch. Corr., 9 janvier 1992, *Le Front National c/ Bedos*, Gaz pal. 1992.1.182, note Bilger (an allegation made by Bedos (comedian, journalist, and historian) about the National Front political party receiving money from the Iraqi regime, enemy in time of war, is likely to amount with treason and harm to national defence or impairment to morality); TGI Paris, 17e ch. Corr., 17 février 1993, *Sabatier c/ Du Roy and Others*, Recueil Dalloz Sirey, 1994, 25e cahier, sommaires commentes, pp. 195–6; note Bigot.

[138] Based on Articles 23, 29(2), and 33(2) Freedom of the Press Act. Corr. Paris, 17e ch., 25 avril 2003, *Gonnet v. Gounord et Dupuis*.

[139] TGI Paris, 17e ch. Civ., 3 avril 2006, *Bruno Gigliotti c/ Stephane Bern et autres*, légipresse n°238 (janvier/février 2007), I-Actualite, p. 11.

[140] TGI Paris, 1ère ch. 1ère sect., 14 avril 1999, *Dion c/ Ste Cogerev*; Juris-data n°040882; CCE, octobre 1999 p. 23.

[141] This was already the result in 1982 in a similar case. Paris, 4e ch. B., 28 janvier 1982, *Dame Goya c/ S.A.R.L. Editions du Square*, IR, p. 165, appeal from TPI Paris, 1ère ch., 18 juin 1981.

[142] Paris, 1ère ch. A, 11 mars 1991, *G. c/ Canal Plus*, légipresse n°91-I, Informations d'actualite, p. 49.

[143] The court made the parodist's interests prevail over the personality rights of the targeted person.

[144] Similar reasoning in Paris, *Le Pen v. Laurent Gerra*, 23 janvier 2013 n°11/11023.

[145] Malicious intent can be shown through any factual elements. In a case dealing with the sale of a voodoo doll caricaturing French ex-President Sarkozy along with a satirical leaflet as a complement to a newspaper, the court decided that the requirement of humour was not satisfied; the fact that the doll is sold with pins that the public can stick into it 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 in relation 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 novembre 2008, Recueil Dalloz, 2009 n°9, p. 610, note Edelman.

[146] Caen, ch. Civ. n°1, 4 décembre 2007, *Le Roi Pétaud et Sa Cour c/ Crédit Agricole*, n°06-2537; TGI Paris, 1ère ch. 1ère sect., 14 avril 1999, *Dion c/ Ste Cogerev*; Juris-data n°040882; CCE, October 1999, p. 23.

[147] Cass., ch. Crim., 4 novembre 1997, *Patrick Bruel v. Patrick Sebastien and TF1*, n°96-84338.

[148] Author's own translation.

[149] This could be criticized as dressing up may not be 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.

[150] This decision was upheld by the Supreme Court. 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.

[151] Versailles, 18 mars 1998, n°1996-2195, *'La Grosse Bertha'* (on referral from Cass., 28 février 1996).

[152] Author's own translation.

[153] Therefore, there was no infringement of article 1382 of the Civil Code or article 24 of the Law on the Freedom of the Press.

[154] This case went back to the Supreme Court which dismissed the appeal. Cass, 2e Civ., 8 mars 2001, *Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne 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 an incitement to hatred, violence, and discrimination towards Catholics. As an example, one of the six drawings depicts Michael Jackson carrying out an act of paedophilia 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.

[155] This issue reproduced amongst others the caricatures published in the Danish Newspaper *Jylland-Posten*. Paris, 11e ch., 12 mars 2008.

[156] Paris, 11e ch. B, 13 novembre 1997, *X* … , D. 1998, IR, pp. 21–2.

[157] 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' was affixed. Cass., 28 janvier 1999, n°96-16992, JCP G, 23 juin 1999, p. 1183, note Viney.

[158] Cass. 14 novembre 2006, *Marithe c/ Association Croyances et libertés* Bull. 2006, I, n°485, p. 417.

[159] Under articles 29(2) and 33 of the Law of the Press.

[160] The Supreme Court quashed the decisions at first instance and on appeal, which both held that the commercial character joined to the suggestion made through the depiction of the half-naked man tilted the balance in favour of the association for a finding of insult to Catholics. These courts concluded thus after studying the jurisprudence of the ECtHR and especially the *Otto-Preminger-Institut v. Austria* (1994) 19 EHRR 34, [47].

[161] Cass. Crim., 12 septembre 2007, n°06-86763, non publié au bulletin.

[162] Article 4(1) UNESCO Convention on Cultural Diversity of 20 October 2005.

[163] At least ever since the Treaty of Maastricht in 1992.

[164] *Deckmyn* (n 7).

[165] See sections 2 and 3.

[166] *Deckmyn* (n 7) [27] and [31].

[167] Recitals 9, 31, and 32 InfoSoc Directive.

[168] See *Suntrust Bank v. Houghton Mifflin Co*., 268 F.3d 1257, n. 3 (11th Cir. 2001) (Birch J.): 'I believe that fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright […] Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes'; echoing *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch J.): 'Although the traditional approach is to view "fair use" as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.' More notably, despite the reluctance of the US Congress to settle the debate as to the burden of proof of fair use at the time of its inception, section 108 US Copyright Code refers specifically to the 'right of fair use as provided under section 107'. Section 108(f)(4) of the US Copyright Act.

[169] *Campbell v. Acuff-Rose Music Inc.* 510 US 569 (1994), [579].

[170] See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 105 S. Ct. 2218, 2230 (1985); going even further, the First Amendment would grant authors a right not to speak in agreement with William F. Patry, 'Fair use after Sony and Harper & (and) Row' (1986) 8 *Comm. & L.* 21, 30.

[171] According to Snow, this shift leads to deeper consequences: 'free speech once defined the scope of copyright; today, copyright defines the scope of free speech.' Ned Snow, 'The forgotten right of fair use' (2011) 62 *Case W. Res. L. Rev.* 135, 137.

[172] Although the US has chosen to codify the fair use factors, it must be reminded that these were initially developed by courts and that the list remains non-exhaustive. For example, *Campbell* (n 169) [585] n 18 (considering defendant's intent and explaining that permission is not necessary if use is fair); *Harper* (n 170) [562] (stating fair use presumes good faith and fairness); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ('courts may weigh "the propriety of the defendant's conduct" in the equitable balance of a fair use determination' (citation omitted)).

[173] Early English cases which contemplated introducing the fair use doctrine described this mechanism as a way to define the scope of the rights granted under copyright, delineating the scope of infringement. Hence, the burden of proof was on the right-holder to show that the use was unfair also in early English case law. W Patry, *The Fair Use Privilege in Copyright Law* (2nd edn, BNA Books, 1995) 3–26.

[174] See section 2.
[175] This is particularly the case in satire cases.

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Index