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PROPERTY OFFICE

The Treatment of Parodies under Copyright Law in Seven Jurisdictions

A Comparative Review of the Underlying Principles

Parody and Pastiche. Study II. January 2013

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This is an independent report commissioned by the Intellectual Property Office (IPO)

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This is the second in a sequence of three reports on Parody & Pastiche, commissioned to evaluate policy options in the implementation of the Hargreaves Review of Intellectual Property & Growth (2011). Study I presents new empirical data about music video parodies on the online platform YouTube; Study II offers a comparative legal review of the law of parody in seven jurisdictions; Study III provides a summary of the findings of Studies I & II, and analyses their relevance for copyright policy.

The authors are grateful to Dr. Marcella Favale who contributed to the review of French law.

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ISBN: 978-1-908908-49-0

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Published by The Intellectual Property Office
8th January 2013

1 2 3 4 5 6 7 8 9 10

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1. Introduction

The Oxford English Dictionary defines Parody as ‘an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect’. It further explains Caricature as ‘a grotesque usually comically exaggerated representation especially of a person; ridiculously poor imitation or version’; and Pastiche as ‘an artistic work in a style that imitates that of another work, artist, or period’.

Other terms used for related cultural practices, and recognised under some copyright regimes, are Satire (‘the use of humour, irony, exaggeration, or ridicule to expose and criticise people’s stupidity or vices, particularly in the context of contemporary politics and other topical issues’) and Burlesque (‘an absurd or comically exaggerated imitation of something, especially in a literary or dramatic work’)¹.

In a 2008 Consultation Paper on copyright exceptions², the 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”³. Thus parodic treatment, almost by definition, involves a taking of substance, since, if the object of parody cannot be recognised, the parody fails.

The doctrinal base of UK copyright law here poses a particular risk for the development of parodies. The general test for copyright infringement, under section 16(3) of the Copyright, Designs and Patents Act 1988 (hereinafter CDPA 1988) is the taking of the work “as a whole or any substantial part of it”. Increasingly the courts have found the meaning of ‘substantial part’ in the independent skill and labour of the original author, not in the use to which a work is put⁴.

1 Stevenson A. & Soanes C., (eds.), *Oxford English Dictionary* (Oxford: Oxford University Press; 2003). There is considerable debate within literary theory if Parody should be understood as a unified genre: L. Hutcheon, *Parody: The Teachings of Twentieth-Century Art Forms* (New York: Methuen; 1985); M.A. Rose, *Parody: Ancient, Modern and Post-Modern* (Cambridge: Cambridge University Press; 1993); S. Dentith, *Parody* (London: Routledge; 2000).

2 *Taking forward the Gowers Review of Intellectual Property: Proposed changes to copyright exceptions* (Newport: Intellectual Property Office; 2008) at para. 189, p. 31.

3 The phrase probably stems from United States case law, most prominently in *Campbell v Acuff-Rose* 510 U.S. 569 (1994), at 588: “When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable”. See commentary in the section reviewing the treatment of parodies in the USA.

4 The evolution of UK parody jurisprudence from *Glyn* [1915] and *Joy Music* [1960] (which focused on the defendant’s alteration rather than on the substance of his taking) to *Schwepes* [1984] (focusing on substantial part of the plaintiff’s work, and explicitly rejecting *Joy Music*) is traced in more detail below.

Following a long line of cases, leading to *Designers Guild*⁵, this may be called a 'misappropriation doctrine' of copyright infringement⁶. Parodies will always sail close to misappropriation if conceived as the taking of someone's independent skill and labour.⁷

1. The *Gowers Review of Intellectual Property 2006* (hereinafter Gowers Review) argued that "[a]s well as reducing transaction costs across Europe, an exception to enable parody can create value", and recommended to "create an exception to copyright for the purpose of caricature, parody or pastiche by 2008"⁸. In 2008, the IPO's first stage Consultation document highlighted the lack of a statutory defence to copyright infringement for parody with reference to some rather narrow examples⁹, and recommended that a parody exception be included within the existing 'fair dealing' exception (as opposed to an unrestricted exception) under the CDPA 1988, sections 29-30.

In December 2009, the case for a parody exception was rejected in the second stage Consultation on copyright exceptions¹⁰. The document explained the position under UK law as satisfactory, as follows:

294. There is currently no exception which covers the creation of parodies, caricatures or pastiches of others' works. However there are exceptions which apply, and circumstances where this type of creative endeavour does not require the consent of the rights owner and may therefore be carried out. For example consent is not required if:

- the part of the underlying copyright work being used is not 'substantial', which may also include parodies based loosely on a work rather than copying part of it;
- the use of the underlying copyright work falls within the fair dealing exception for criticism, review and news reporting;

5 *Designers Guild v Russell Williams* [2000] 1 WLR 2416 (HL).

6 J. Pila, 'An Intentional View of the Copyright Work' (2008) 71 *Modern Law Review*, pp. 535-558; F. Kawohl & M. Kretschmer, 'Johann Gottlieb Fichte, and the Trap of *Inhalt* (Content) and *Form*: An information perspective on music copyright' (2009) 12(2) *Information, Communication & Society*, pp. 41-64.

7 The evolving European jurisprudence offers little support either, focusing the analysis of infringement on the reproduction of the various parts of a work that "contain elements which are the expression of the intellectual creation of the author of the work" – which may be as little as 11 words (*Infopaq International A/S v Danske Dagblades Forening* [2009] Case C-5/08, E.C.R. I-6569, at 39).

8 *Gowers Review of Intellectual Property* (London: HM Treasury; 2006) para 4.90 p. 68.

9 *Ibid.*, para 193, p. 32: "We are aware, for example, of a case of a public institution which, having bought an artistic work, found itself subject to potential legal action despite having, as it believed, the right to make reproductions of the artwork. In this case the artwork turned out to be or include a parody of a previous work. Others have drawn to our attention problems experienced in securing the right to use a newly acquired work and, in some cases, have decided not to pursue a project on the basis of potential infringement. Some museums and galleries are particularly concerned about modern art and we have had indications that some have adopted acquisition policies based not on the quality of the works themselves but at least in part on the potential likelihood of infringement of copyright".

10 *Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (Newport: Intellectual Property Office; 2009), at p. 45. For further discussion, see also, P. Groves, *Pistache? – A Consultation Paper* [2008] 19(5) *Entertainment Law Review* pp. 98-93; D. Bainbridge, *The Gowers Review of Intellectual Property* [2006] 11(6) *Intellectual Property & Information Technology Law*, pp. 4-10.

- enforcement of copyright is contrary to the public interest.

295. Even if the use of a work does not fall within these examples, it may also be possible to create new works of parody, etc, where the holder of the rights in the underlying work has given their permission for their work to be used in such a way. And where a work is no longer protected by copyright, there is no need to request permission at all.

This summary of the current legal position is problematic. The characterisation of parodic use as insubstantial takings has almost disappeared from UK jurisprudence (see detailed discussion in the country-by-country review below). Section 30(1) CDPA 1988 permitting “[f]air dealing with a work for the purpose of criticism or review” may allow narrow “target” parodies but does not accommodate parodies drawing on a work as part of a critique or comment directed at third parties (“weapon” parodies)¹¹. It should also be noted that the public interest defence (section 171(3) CDPA 1988) has yet to be invoked successfully before the courts. Regarding the licensing option, it has been observed, astutely, that “parodies are often extremely critical of, or offensive to, the underlying work, or to the opinions and sensibilities of the author (or the rightsholder) of that work, and that the author (or the rightsholder) may not be interested in licensing the use of the work for parodic purposes”¹².

In 2011 the ‘Hargreaves Review’ – an independent review of intellectual property and growth conducted by Professor Ian Hargreaves – commenced where Gowers had left off and brought the issue of parody to the fore again. Hargreaves emphasised that the most important issues with respect to parody concern freedom of expression (and thus were beyond the review’s terms of reference) but that there was an important economic dimension: “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. Comedy is big business”¹³. The Report concluded that “the failure to adopt these exceptions, despite the previous Government’s acceptance of Gowers’ recommendation five years ago, is a clear demonstration of the failure of the copyright framework to adapt. The Government must ensure that this failure is remedied”¹⁴.

Parody exceptions are common in other European countries, and possible under Article 5(3) of the Information Society Directive which states that ‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases (k) use for the purpose of caricature, parody or pastiche’¹⁵. It has been argued that the

11 It appears that the UK Courts only once considered a fair dealing defence in the context of parody, when a injunction was denied seeking to prevent the publication of a satirical pamphlet: *Kennard v Lewis* [1983] F.S.R. 346 (Ch.D). See A. Sims, *Strangling Their Creation: The courts’ treatment of fair dealing in copyright law since 1911* [2010] *Intellectual Property Quarterly*, pp. 192-224.

12 R. Deazley, *Copyright and Parody: Taking Backwards the Gowers Review?* [2010] 73(5) *Modern Law Review*, pp. 785-823.

13 *Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Ian Hargreaves* (London: Intellectual Property Office; 2011) para 5.35 p. 50.

14 *Ibid.*, para 5.38 p. 50.

15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

recommendation to introduce a parody exception is “nothing new or radical, having been contemplated in the Directive’s invitation to deal with parody, but rather it is playing catch-up, with a number of member states having already addressed it”¹⁶.

The purpose of this paper is to review the legal treatment of parodies in several key countries, with a view to identifying possible regulatory options for benefiting from a parody exception to copyright infringement, and distilling the (economic and non-economic) rationales underlying tests developed by legislators and courts. The selected jurisdictions share a common law heritage with the UK (Australia and Canada), or have contributed significantly to the European *acquis* (Germany, France and The Netherlands)¹⁷. The selection also includes countries with an explicit parody exception (Australia, France and The Netherlands), and countries that accommodate parody within a wider “fair use” provision (USA) or a narrow “free use” provision interpreted in the light of constitutional norms of freedom of expression and freedom of the arts (Germany)¹⁸.

It will be seen that the criteria developed for assessing parodic treatments in these jurisdictions overlap in complex ways (often fusing economic, moral, and social elements). The order of countries broadly follows a progressive liberalisation, from more restrictive to less restrictive regimes.

Before carrying out a detailed discussion of each jurisdiction, the paper summarises the position of each country in *Table 1*, bringing together all the countries ‘At-a-Glance’. In carrying out the detailed review, the paper will highlight and discuss the ‘turning points’ within each jurisdiction which have introduced a parody exception and those which are debating the possibility of introducing such an exception. Wherever possible, key cases are illustrated and reviewed by the artefacts that gave rise to the litigation, since the scope of permitted cultural activity only becomes visible in the application of legal rules formulated at a high level of abstraction. These illustrations are set out in Appendices and are used in accordance with section 30 of the *Copyright, Designs and Patents Act 1988*.

16 D. Meale & P. England, ‘Barry Trotter and the infringement of copyright – parody rules in the UK’ (April 2008) *Managing Intellectual Property*, pp. 34-38 at p. 36.

17 A Study requested by the European Commission in 2007 in implementing the Information Society Directive included information on whether or not Member States’ laws permitted parody. See Part II The implementation of Directive 2001/29/EC in the Member States: http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf

18 The role of constitutional norms in balancing copyright law is also prominent in Austria, Denmark, Finland and Sweden. *Ibid.*

Table 1 Parody: Seven jurisdictions at-a-glance

COUNTRY	LEGISLATION ON PARODY (Actual or Expected)	CASE LAW (+ for parodist) (- against parodist)	TEST
UNITED KINGDOM	Government Consultation following <i>Hargreaves Review (2011)</i> proposes introduction of a parody exception within the existing 'fair dealing' frame.	<p>+ <i>Glyn v Weston Feature Film Company (1894)</i> (<i>Burlesque film of novel</i>);</p> <p>+ <i>Joy Music (1960)</i> (<i>Rock-a-Billy/Rock-a-Philip, rock</i>);</p> <p>- <i>Twentieth Century Fox (1965)</i> (<i>Cleopatra/Carry on Cleo</i>).</p>	<p>Whether a 'substantial part' has been taken from the original to create the parody (section 16(3) CDPA 1988).</p> <p>Up to, and including <i>Joy Music (1960)</i> the courts considered the <i>mental labour</i> that went into <i>revision and alteration</i> so as to produce an original work.</p> <p>Following <i>Twentieth Century Fox (1965)</i>: narrower focus on what has been <i>taken</i>.</p>
CANADA	<p><i>Copyright Modernization Act (Bill C-11)</i> amending <i>Copyright Act 1985</i> passed on 18 June 2012 and received Royal Assent on 29 June 2012. New section 29 recognises works of (education), parody or satire under the existing 'fair dealing' exception, which is further elaborated at section 29.21 for 'non-commercial user-generated content'.</p>	<p>- <i>Ludlow Music (1967)</i> (<i>This Land is Your Land/This Land Ain't Your Land</i>);</p> <p>- <i>CGEM Michelin (1996)</i> (<i>'Michelin Tire Man'/ parody of artwork</i>);</p> <p>- <i>Avanti Ciné-Vidéo (1999)</i> (<i>La Petite Vie/La Petite Vite</i> (<i>pornographic version of situation comedy series</i>)).</p>	<p>Section 29 sets out that fair dealing for the purpose of research, private study, <i>education, parody or satire</i> does not infringe copyright.</p> <p>Section 29 is further elaborated at section 29.21 also known as the 'mash-up exception'. Section 29.21 sets out requirements for permitting user-generated content which may cover parodies that do not fall under the fair dealing exception for criticism.</p> <p>Permitted content generation must solely be <i>carried out for non-commercial purposes</i>.</p> <p>It must not have '<i>a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or subject matter</i>', including that the new work <i>should not be a substitute for the existing one</i>.</p> <p>The <i>identity of the existing work should be acknowledged</i>.</p>

<p>FRANCE</p>	<p><i>L 122-5 of the French Intellectual Property Code 1992 recognises a right to parody, pastiche or caricature.</i></p>	<p>+ <i>Moulinsart (2011) (Tintin/ artistic parody of Tintin depicting current affairs and geopolitics in France);</i></p> <p>+ <i>Esso (2004) (ESSO/ E\$\$O);</i></p> <p>- <i>Marcel Pagnol (1997) (advert selling prêt-à-porter);</i></p> <p>- <i>Jamel Debouze (2002) (humoristic audio);</i></p> <p>- <i>Greenpeace (2008) (Areva logo with a blooded skull and a dead fish).</i></p>	<p>Humoristic, and ‘<i>substantial transformation/modification of a copyright work</i>’ devoid of the intention to harm the legitimate author (financially or morally). Can be commercial use.</p> <p>The parodied work should not <i>exploit the fame of the original work in order to reach its audience.</i></p> <p>Parody defences were denied by the courts if the use was just commentary (Jamel Debouze), intended as an advertisement (Marcel Pagnol), or if the point could have been made by using different images (Greenpeace).</p>
<p>AUSTRALIA</p>	<p><i>Section 41A of the Australian Copyright Act 1968 as amended by the Australian Copyright Amendment Act 2006 recognises works of parody or satire under its ‘fair dealing’ exception.</i></p>	<p>- <i>AGL v Shortland (1989) (advert by applicant to push the message ‘energy balanced homes save money’/‘reply’ advert by defendant using similar format and same factors);</i></p> <p>- <i>The Panel (2005) (Channel Nine news clips/shown and discussed in a humorous manner on Network Ten).</i></p>	<p>Similar to UK, ‘<i>substantial part</i>’ is considered when determining the scope for parody (<i>The Panel</i> case). Assessment includes <i>interference</i> with copyright owner’s <i>financial interest</i> which can affect the <i>value of the work</i> and provide <i>an unfair advantage</i> to the parodist.</p> <p>Since Parody has been explicitly recognised as a ‘fair dealing’ exception (section 41A, 2006), the new provision has not been tested in court yet.</p>
<p>GERMANY</p>	<p><i>Article 24 of Urheberrechtsgesetz 1965 recognises parody within ‘free use’ (freie Benutzung).</i></p>	<p>- <i>Disney-Parodie (1971) (satirical cartoon, Walt Disney creating biblical figures in heaven);</i></p> <p>+ <i>Asterix case (1993) (Asterix/ Falsches Spiel mit Alcolix. Die Parodie);</i></p> <p>+ <i>Gies-Adler (2003) (German national symbol/ version of the Federal eagle used on magazine cover criticising national policy).</i></p>	<p>The courts have increasingly interpreted §24(1) ‘free use’ in the light of constitutional guarantees (Art. 5(1): freedom of expression, Art. 5(3): freedom of art, science, research and education.</p> <p>The threshold is one of ‘necessity’ to borrow from the original work.</p> <p>A clear ‘<i>inner distance</i>’ between the original and the parody must be expressed, generally through ‘anti-thematic’ treatment.</p> <p>§24(2) UrhG does not permit musical parodies as ‘free use’ where a melody has been recognisably borrowed from the work and used as a basis for a new work.</p>

USA	<p>Section 107 Copyright Act 1976 recognises parody under its ‘fair use’ doctrine.</p>	<p>+ <i>Campbell v Acuff-Rose</i> (1994) (<i>‘Pretty Woman’ by Roy Orbison/‘Oh Pretty Woman’ by 2 Live Crew</i>);</p> <p>+ <i>Suntrust Bank</i> (2001) (<i>Gone With the Wind/The Wind Done Gone</i>);</p> <p>+ <i>Louis Vuitton</i> case (2007) (<i>Louis Vuitton/Chewy Vuiton</i>).</p>	<p>The right to parody is recognised under the <i>doctrine of ‘fair use’</i> under section 107 Copyright Act 1976.</p> <p>Under the fair use doctrine, factors to consider include the purpose and character (commercial/non-profit educational use), substantiality of the portion used, and the effect of the use upon the potential market.</p> <p>The case of <i>Campbell</i> established that the key test is to determine the <i>‘transformative’ nature</i> of the parodied work. Does it add ‘something new, with a further purpose or different character, altering the first with new expression, meaning or message’?</p>
NETHERLANDS	<p>Article 18b of the Dutch Copyright Act 1912 (as amended in 2004) recognises a work in the context of a caricature, parody or pastiche.</p>	<p>- <i>Harry Potter</i> case (2003) (<i>Harry Potter/Tanja Grotter</i>);</p> <p>+ <i>Darfurnica</i> case (2011) (<i>Louis Vuitton/ Depicting a child from Darfur holding a Louis Vuitton handbag and Chihuahua dog dressed in pink</i>);</p> <p>+ <i>Miffy</i> case (2011) (<i>Miffy/ Miffy depicted within the roles of sex, drugs and terrorism</i>).</p>	<p>Before recognising the right to caricature, parody and pastiche under article 18b of the Copyright Act 1912, The Netherlands was hesitant to invoke freedom of expression for the purposes of parody.</p> <p>Under the new section the test is that the parody should <i>normally be sanctioned under rules of social custom</i>.</p> <p>The cases of <i>Miffy</i> and <i>Darfurnica</i> challenged the test, but in both cases the Court held in favour of the parodist.</p>

2. Review of parody laws in various jurisdictions

2.1 United Kingdom

There are only a handful of cases pertaining to parody and its application to copyright law in the UK. This limited body of case law may be divided into two periods: (1) pre-1960; and (2) post-1960.

2.1.1 Pre-1960: a relaxed approach to parodied content

Case law preceding the 1950s saw the courts take a more relaxed approach to parodic content. In fact, one of the first cases in the UK to have considered the issues thrown up by parody was the 1894 case of *Hanfstaengl v Empire Palace*¹⁹. The plaintiffs in this case owned the copyright to certain pictures first produced in Germany. These pictures had been represented on the stage of an English theatre in the form of *tableaux vivants* (i.e. a living picture) by the defendants. In applying the *Fine Arts Copyright Act 1852* the court held, on appeal, that the use of the plaintiff's work did not constitute a copyright infringement²⁰.

In the UK the precedent set in 1894 continued into the case of *Glyn v Weston Feature Film Company*²¹. In this case, the plaintiff brought an action for the alleged infringement of her copyright in a novel by the sale and exhibition of burlesque cinematograph films. The plaintiff claimed that a 'substantial part' was taken by the defendant in the production of the films. The court rejected the claim with reference to a lack of economic harm, and the transformative contribution of the defendant's mental labour. Younger J. delivering the judgement emphasised these points as follows²².

"It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found ... in the principle that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result."

After the Copyright Act 1956 came into force, the case of *Joy Music v Sunday Pictorial Newspapers (1920) Ltd.*²³ saw the parody issue re-surfacing once again. The issue in question was a parody of a popular song "Rock-a-Billy", included in a newspaper article. The parody which used the words "Rock-a-Philip, rock" in the same way as the words "Rock-a-

19 [1894] 3 Ch. 109.

20 *Ibid.*

21 [1915] 1 Ch 261.

22 *Ibid.*, at p. 268

23 [1960] 2QB 60.

Billy” was intended to support activities of H.R.H. Prince Philip despite existing criticisms at the time²⁴. The plaintiffs sought to obtain an injunction to restrain publication of the parody on grounds of copyright infringement. Applying the dictum of Younger J in *Glyn v Weston Feature Film Company* the court in *Joy Music* emphasised that “in considering whether a parody of a literary work constituted an infringement of the copyright in that work the main test to be applied was whether the writer had bestowed such mental labour upon the material he had taken and had subjected it to such revision and alteration so as to produce an original work”²⁵. Applying this test to the facts of the present case, the court held that the parody constituted “a new original work derived therefrom” and as such was not a reproduction of the original work in accordance with section 49(1) Copyright Act 1956²⁶. It is also interesting to note that in delivering his judgement, in this 1960 case, McNair J accepted that “there is no decision directly on the point”²⁷.

2.1.2 Post-1960: a stricter approach to parodied content

The ‘turning point’ in English law came about with the case of *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors*²⁸. In this case, a poster based on the plaintiff’s advertisement of their film *Cleopatra* (**Figure 1, Appendix 1**) was used by the defendants to produce a humorous poster *Carry on Cleo* (**Figure 2, Appendix 1**).

Moving away from decisions such as *Hanfstaengl v Empire Palace*, *Glyn v Weston Feature Film Company* and *Joy Music v Sunday Pictorial Newspapers (1920) Ltd.*, Plowman J. questioned whether McNair J’s approach in *Joy Music* should be applied to artistic works as well as literary works. Plowman J. considered that the use of the underlying work amounted to copyright infringement as “on a visual comparison ... the defendant’s poster did reproduce a material part of the plaintiff’s poster” and granted an interim injunction restraining the defendants from further reproducing and from displaying any reproduction of the plaintiff’s work. The case was instrumental in its departure from previous case law, and for the first time, it sent out a strong signal in the shift in the copyright balance.

24 For an analysis of the case, see also, A. Walsh, Parody of intellectual property: prospects for a fair use/dealing defence in the United Kingdom [2010] 21 (11) *International Company and commercial Law Review* pp. 386-391.

25 [1960] 2 QB 60 at p. 69 per McNair J.

26 **Section 49(1)** - “Except in so far as the context otherwise requires, any reference in this Act to the doing of an act in relation to a work ... shall be taken to include a reference to the doing of that act in relation to ... a substantial part thereof, and any reference to a reproduction ... shall be taken to include a reference to a reproduction ... of a substantial part of the work ...”

27 *Supra* n. 23 at p. 64 per McNair J. for a discussion of these cases, see also, L. Bently, Parody and copyright in the common Law World [2006] in *Copyright and Freedom of Expression*, Proceedings of the ALAI conference Barcelona, Huygens, pp. 355-389; R. deazley, Copyright and Parody: Taking Backwards the Gowers Review? [2010] 73 (5) *Modern Law Review*, pp. 785-823.

28 [1965] 109 S.J. 107.

The cases which emerged thereafter, such as *Schweppes Ltd. and Others v Wellingtons Ltd.*,²⁹ and *Williamson Music Ltd. v Pearson Partnership Ltd.*³⁰ followed suit, holding in favour of the copyright holder. In *Schweppes*, the case concerned the defendant's use of the label "Schlurppes" for a tonic bubble bath which used the distinctive layout of the label "Schweppes" and a similar shape of bottle. Although the defendants attempted to rely on the earlier *Joy Music* case, pointing out that the label was a work of parody, Falconer J., rejected this proposition, emphasising that the near identical shape, design and colour scheme used for the creation of "Schlurppes" amounted to a substantial part, thereby infringing copyright³¹:

"The sole test is whether the defendant's work has reproduced a substantial part of the plaintiff's ex hypothesi copyright work. The fact that the defendant in reproducing his work may have himself employed labour and produced something original, or some part of his work which is original, is beside the point if none the less the resulting defendant's work reproduces without the licence of the plaintiff a substantial part of the plaintiff's work."

Similarly, Baker J in *Williamson Music Ltd.* held, granting the injunctions that the proper test was whether the parody made use of a substantial part of the expression of literary copyright. Although the defendant's song could not be said to infringe the plaintiff's words, there was a serious question to be tried as to whether the music constituted an infringement; and therefore on the *balance of convenience* (emphasis added) Baker J found in favour of the plaintiff³².

Bently and Sherman identify a 'discernible shift' in recent jurisprudence "towards allowing a copyright owner to control ever-smaller uses and re-uses of their works"³³, which over time may turn licensing into the default option (i.e. "normal exploitation"). It is this 'discernible shift' that may have occasioned the need to re-balance copyright law by providing for a parody exception as recommended by the Gowers Review and more recently by the Hargreaves Review.

UK: Summary of the Law

Parody cases are decided on a case-by-case basis, and (with one exception) always under the 'substantial part' doctrine. The courts have not developed a systematic approach for dealing with parodies. Until about 1960, the British courts took a 'relaxed' approach to parody. The evolution of UK parody jurisprudence from *Glyn* [1915] and *Joy Music* [1960] (which focused on the defendant's alteration rather than on the substance of his/her taking) to *Schweppes* [1984] (focusing on substantial part of the plaintiff's work, and explicitly rejecting *Joy Music*) led to the courts increasingly deciding in favour of rights holders. The case of *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors* (1965) (**figures 1, 2 appendix 1**) may be seen as a turning point in the law.

29 [1984] FSR 210 (Ch.D).

30 [1987] FSR 97. The case concerned an advertising jingle for the rapide Coach Service on Channel 4, being a parody of the song "There in Nothin' Like a dame² from the musical south Pacific (by Rodgers and Hammerstein)

31 *Schweppes Ltd.* [1984] FSR 210 at 212.

32 *Ibid.*

33 L. Bently & B. Sherman *Intellectual Property law* 3rd edn (oxford: Oxford University Press; 2008) p. 185. see also supra n. 27 r. Deazley, p. 788.

The paper will now consider the manner in which parodied content is dealt with in France, Australia, Germany, USA, and The Netherlands. However, before moving on to a consideration of these jurisdictions which have put in place a specific parody exception or have a sufficiently broad approach to infringement to encompass such works, the paper will first review another jurisdiction – Canada – which adopted a parody exception at the time of writing this paper.

2.2 Canada

In late September 2011, the Canadian government re-introduced the *Copyright Modernization Act* (known as Bill C-11) which was originally introduced by the former government – as Bill C-32³⁴. The legislative proposals introduced under Bill C-11 were almost identical to Bill C-32 introduced in June 2010. In particular, both Bills proposed an exception modifying the existing fair dealing exception to include parody and satire.

The Bill has taken its time journeying through Parliament and following years of debate over digital copyright reform, Bill C-11 was passed by the House of Commons on 18 June 2012 and received Royal Assent on 29 June, 2012³⁵. Whilst Bill C-11 or *Copyright Modernization Act* has come under heavy criticism for its introduction of the ‘digital locks’ provision, the changes to the fair dealing exception to incorporate (education), parody or satire appear to command consensus³⁶. During the Bill’s Second Reading, it was commented upon as follows:

“Innovation builds on existing ideas to solve new problems. Intellectual property laws, including copyright, play an important role in providing an incentive to create. However, copyright can also be a barrier to the development of innovative products and services... Bill C-11 would also add to the exceptions allowed for those who would use copyrighted material for certain acceptable purposes. Parody, satire and education are added to the category of fair dealing, a long-standing feature of Canada’s copyright law³⁷.”

The *Copyright Modernization Act* reflects this exception under section 29 of the Act which establishes that ‘*fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright*’ (*emphasis added*). Section 29.21 expands on the fair dealing exception and sets out the requirements for permitting ‘user-generated content’ which may cover parodies that do not fall under the above fair dealing exception. Section 29.21 reads as follows –

34 Bill C-32 was introduced in June 2010. However due to the dissolution of the Parliament in early 2011, the Bill did not move forward.

35 Bill C-11 Journey through Parliament at <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C11&Parl=41&Ses=1>

36 M. Geist, Why Canada’s new copyright bill remains flawed (October 2011) Toronto Star at <http://www.thestar.com/business/article/1063099--geist-why-canada-s-new-copyright-bill-remains-flawed>

37 Mr. Peter Braid (Kitchener-Waterloo, CPC) Hansard (February 10, 2012) para 1045. Available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=78&Parl=41&Ses=1&Language=E&Mode=1#Int-6561285>

“29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorisation to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) 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;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorisation to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one³⁸.

The following section considers earlier Canadian parody case law, prior to introducing an explicit exception. It remains to be seen to what extent the courts will now move the line of infringement to allow parodies which are not openly critical.

2.2.1 Canada – the journey towards a parody exception

It is interesting to note that no Canadian court has accepted a defence of parody to a claim of copyright infringement³⁹. In fact, the number of Canadian cases which have dealt with parody and copyright are less than the number of cases considered in UK, with the first case of its kind being considered as recently as 1967 in *Ludlow Music Inc. v. Canint Music Corp*⁴⁰. This case concerned the famous ‘This Land is Your Land’ song by Woody Guthrie which was published by Ludlow Music in 1958 in USA and Canada (**figure 3, appendix 2**). The Canadian version became a hit throughout Canada which inspired *Canint Music* to record a parody of the song (**figures 4, 5 appendix 2**) which replaced Guthrie’s lyrics with lyrics “which gently chid[ed] the Canadian Government and the Canadian people for their alleged feeling of inferiority”⁴¹.

38 Bill C-11 at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&File=45#7> amending Copyright Act, RSC, 1985, c. C-42.

39 *Compagnie Générales des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada* (CAW-Canada) (1996) 71C.P.R. (3d) 348. The argument that the fair dealing category of criticism encompasses parody was rejected by Teitelbaum. See also, G. Reynolds, *Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada* (2009) 33 (2) *Manitoba Law Journal*, pp. 243-261 at p. 244.

40 [1967] 2 Ex. C.R. 109, 51.

41 [1967] 2 Ex. C.R. 109 at 118. See also, *supra* n. 39 G. Reynolds, p. 251.

In this case, Jackett P., granted an injunction restraining the defendants from selling their parody, deeming it a “proper exercise of the judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright against what appears to be piracy”⁴². The cases which followed in 1976 (*MCA Canada Ltd. v Gilberry & Hawke Advertising Agency Ltd.*)⁴³; and 1982 (*ATV Music Publishing of Canada Ltd. v Rogers Radio Broadcasting Ltd. et al*)⁴⁴ followed in the footsteps of Jackett P., – the fact that the work was a parody was not considered to be a defence to copyright infringement.

2.2.2 The turning point: Parody defence under ‘fair dealing

The turning point in the law leading to the legislative proposals reflected in Bill C-11 can be traced back to the 1996 case of *Compagnie Générales des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada*⁴⁵ (CAW Canada) which, for the first time, addressed the issue of whether the fair dealing defence protects parody. CAW Canada had distributed leaflets depicting CGEM Michelin’s corporate logo, “a beaming marshmallow like rotund figure composed of tires” called the Michelin Tire Man” or Bibendum. The leaflets depicted two Michelin workers, one “seemingly ready to be crushed underfoot” by the Tire Man with the caption coming from his mouth: “I’m going to wait and see what happens”. Below the figures was a plea by CAW Canada “Don’t wait until it’s too late! Because the job you save may be your own. Sign today for a better tomorrow”⁴⁶. After CGEM Michelin became aware of the leaflets they sued CAW Canada for copyright (and trademark) infringement. Although Teitelbaum J., rejected the contention of parody under the category of ‘criticism’ as a defence to copyright infringement⁴⁷ the case had opened the doors to a consideration of the defence under Canada’s fair dealing provision.

Accordingly, a case decided in the Quebec Court of Appeal three years later – in 1999 – proved that the courts were more willing to consider a parody defence under the fair dealing exception. In *Productions Avanti Ciné-Vidéo Inc. c Favreau*⁴⁸ rather than rejecting the claim outright as Teitelbaum J. did, Rothman J. accepted the proposition that *a parody could act as a defence to copyright infringement in Canada in certain circumstances (emphasis added)*. Whilst the present case did not consider the parody defence within the realm of fair dealing (*Michelin* is the only case to have addressed this issue), it further established that the treatment of parodies under copyright law offered specific challenges relating to freedom of expression. However, in this case the court held that *Favreau* infringed copyright by creating a pornographic film entitled “*La Petite Vite*” (**figure 6, appendix 2**) that “substantially copied the most original and important elements of “*La Petite Vie*” ... (**figure 7, appendix 2**) “[a] highly original and very well-known situation comedy[which is] probably the most popular series in the history of Quebec television”⁴⁹.

42 [1967] 2 Ex. C.R. 109, 51 at p. 58.

43 [1976] 28 C.P.R. (2d) 52 (F.C.T.D.).

44 [1982] 35 O.R. (2d) 417.

45 1996) 71 C.P.R. (3d) 348.

46 *Ibid.*, at p. 353. For a further analysis of the case, see, G. Reynolds, A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada (2009) 6(3) Script-ed pp. 639-668.

47 *Ibid.*, at p. 381 per Teitelbaum J.

48 [1999] 177 D.L.R. (4th) 568.

49 *Ibid.*, at p. 574.

It was ultimately the case of *CCH Canadian Ltd. v Law Society of Upper Canada* which signalled a shift in the manner in which fair dealing exceptions were to be interpreted.⁵⁰ Although this case did not focus on parody, the case highlighted the breadth of the fair dealing defence. This case concerned The Great Library at Osgoode Hall which is maintained by the appellant Law Society of Upper Canada and is a reference and research library with one of the largest collections of legal materials in Canada. The Great Library has a request-based photocopy service for Law Society members, the judiciary and other authorised researchers which allows the library staff to make copies on request and deliver them in person, by mail or by facsimile. The respondents CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc., brought an action against the Law Society alleging that the Law Society had breached copyright when the Great Library reproduced a copy each of eleven of its copyright works. The Law Society counterclaimed stating that copyright is not infringed when a single copy of a reported decision, case summary, statute or regulation is made by the Great Library staff or one of its patrons at the self-service photocopier for the purpose of research. The Supreme Court of Canada unanimously held that the Law Society's practice fell within the boundaries of fair dealing.

In elaborating on this point, s. 29 of the Canadian Copyright Act 1985 as amended by the Canadian Copyright Act 1997 was referred to. Under this Act 'research' is given a large and liberal interpretation to avoid undue constraints, especially with regard to the commercial/non-commercial distinction. The Act provides guidance to help determine whether a dealing is fair: The purpose of the dealing; the character of the dealing; the amount of the dealing; the nature of the work; available alternatives to the dealing and the effect of the dealing on the work⁵¹. Applying these factors to the Law Society, the court found that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair with copies being permitted for the purposes of research, criticism, review or private study. The court also held that there was no secondary infringement by the Law Society⁵².

McLachlin CJ delivering his opinion commented:

*"In order to maintain the proper balance between the rights of a copyright owner and users' interests, [the fair dealing defence] must not be interpreted restrictively. As Professor Vaver ... has explained ... "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation"*⁵³.

50 [2004] 1 S.C.R. 339.

51 For an in-depth analysis of the case, see Mendis D., *Universities and Copyright Collecting Societies* (The Hague: T.M.C. Asser Press; 2009), chapter 4, pp. 111-119.

52 [2004] 1 S.C.R. 339.

53 *Ibid.*, para 48. For a discussion of the development of the parody defence in Canada, see also, G. Reynolds, *supra* n. 39 pp. 251-256.

Following this case some commentators have argued that the fair dealing category of criticism in Canada is broad enough to encompass parody⁵⁴. Reynolds points out “the argument that the fair dealing category of criticism encompasses parody, however, is based on the assumption that parodies are necessarily critical”⁵⁵. Reynolds argues against a parody exception embedded within the fair dealing category of criticism, reasoning that it would lead to a restrictive, limited conception of parody.

Canada – Summary of the Law

Sixteen years after *Michelin* and eight years after *CCH Canadian Ltd*, Canada introduced a parody exception under copyright law’s ‘fair dealing’ exception in June 2012. Section 29.21 of the *Copyright Modernization Act* also sets out that it is not an infringement of copyright to use an existing work which has been published and therefore made available to the public, for purposes of creating a new work as long as

- (a) The new work is carried out solely for a non-commercial purpose;
- (b) The source – i.e. author, performer, maker, and broadcaster – is mentioned;
- (c) Individual has reasonable grounds to believe that the existing work was not infringing copyright; and
- (d) The use of or authorisation to disseminate the work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter. This condition further goes on to say that the new work should not be a substitute for the existing one.

Drawing a line through Canada’s parody-related case law, it is clear that whilst *Ludlow* (**figures 3; 4,5 appendix 2**) first addressed the issue of parody, cases divided with *Michelin* (1996) which first considered a parody exception within the remit of fair dealing and was followed by *Avanti* (1999) (**figures 6,7 appendix 2**) and *CCH Canadian Ltd* (2004).

54 Emir Aly Crowne Mohammed, Parody as fair dealing in Canada: a guide for lawyers and judges (2009) 4 Journal of Intellectual Property Law and Practice pp. 468-472.

55 G. Reynolds, supra n. 39 at p. 245.

2.3 France

Underpinned by freedom of expression⁵⁶, the right to modify a copyright work for the purpose of parody is a legitimate right in France.

According to article L 122-5 of the French Intellectual Property Code, once a work has been communicated to the public in any form, the author cannot forbid a number of actions to be performed on the copyright work, such as analysis, citation, review, news reporting, use in catalogues, parody, pastiche or caricature, and access to a database on a contractual basis.⁵⁷

In France, the exception for parody includes also pastiche or caricature. Although the French Supreme Court was careful to distinguish the three forms of parody, they are subject to the same regime.⁵⁸ In fact, they all refer to humoristic, and substantial transformation of a copyright work devoid of the intention to harm the legitimate author. Parody refers to works of art such as film, music, and videos (e.g. video games) whereas caricature and pastiche impact on visual or literary works, respectively.

The right to ironise a protected copyright work without the consent of the author, however, is subject to a number of conditions.

2.3.1 The boundaries of the exception

The exception for parody cannot be invoked without the respect of certain requirements:

First, the purpose of the transformative work has to be, necessarily, that of making the public laugh. Criticism without humour is not parody, although it would still be exempted under the exception for criticism. Humoristic transformation of the work without intention to criticise it, on the contrary, is well within the boundary of parody.

56 According to many commentators, the exception of parody appears as a limitation in favour of freedom of expression. Others argue that jurisdictions would be more receptive to an exception of parody based on freedom of expression than otherwise. See L. Guibault, *Limitations found outside copyright law in Journées d'études de l'ALAI (Australian Copyright Council 1999)*, at 44. See also A Strowel and F. Tulkens, *Droit d'auteur et liberté d'expression*, (Larcier 2006 Brussels), at 21.

57 Art L 122-5 du code de la propriété intellectuelle:
 "Lorsque l'oeuvre est divulguée, l'auteur ne peut interdire: 3° Sous réserve que soient indiqués clairement le nom de l'auteur et de la source :

- a) Les analyses et les courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées
- b) Les revues de presse
- c) La diffusion, même intégrale, par la voie de presse ou de télédiffusion, à titre d'information d'actualité, des discours destinés au public prononcés dans les assemblées politiques, administratives, judiciaires ou académiques, ainsi que dans les réunions publiques d'ordre politique et les cérémonies officielles.
- d) Les reproductions, intégrales ou partielles d'oeuvres d'art graphiques ou plastiques destinées à figurer dans les catalogues d'une vente judiciaire effectuée en France (..)

4° La parodie, le pastiche et la caricature, compte-tenu des lois du genre

5° Les actes nécessaires à l'accès au contenu d'une base de données électronique pour les besoins et dans les limites de l'utilisation prévue par contrat".

58 Civ. 1ère, 12 janvier 1988.

Second, the modified work should not harm the legitimate author. That is, it should not affect their moral or commercial rights. Criticism, as mentioned, is allowed, but under no circumstances should the public be deceived on the origin of the work. In order to benefit from the parody exception, and to avoid legal pursuits from the author on grounds of breach of their paternity rights, the transformative work has to involve a substantial modification. In fact, according to some French case law, the humoristic character of an insufficient modification does not protect the parodist. For example, in a ruling of 2002, the Court of Appeal of Paris⁵⁹ reverted the ruling of the lower court⁶⁰ by denying the application of the exception for parody in a case regarding sound recordings.

In the present case, a French TV chain published an excerpt of a 1961 song by Jean Ferrat with the addition of an audio commentary by a French humorist (Jamel Debouze), who made remarks such as “songs like this, I make every day”, or “if he managed, then I have a chance as well”.

Although the added comments were not “void of a certain derision”, the judges argued, they could not be added without the consent of the author. This suggests that a simple commentary under a song, as opposed to the modification of the song itself, is not sufficient to uphold the exception of parody⁶¹.

2.3.2 The harm to the author: commercial rights

As mentioned above, the parodied work must not harm the author. In addition to possible moral damages, commercial damages also need to be considered. The modified work, therefore, should not be permitted to be commercialised in competition with the original work. This is not to say that the modified work cannot be commercialised at all.

For example, The French Court of Appeal upheld the defence of parody in the commercial exploitation of a T-shirt featuring the image of “Monsieur PROPRE” (Mister CLEAN), illustrated with the colour fuchsia along with humoristic text (“Mister QUEEN” and “AXEL is a real bitch”). They argued that these modifications constituted an essential modification destined to distinguish the original character from the parodied one. Moreover, no possible confusion with the original work was detected, and the intention of harming the author was not demonstrated. The judges added that the use of parody in this case was not limited to making fun of something, or to prompting a smile, but it was also performed with the intention, essentially commercial, to profit from the notoriety of ‘Mr. Clean’, in order to sell T-shirts and to attract customers.⁶²

59 *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*, Cour d'Appel de Paris, 18-9-2002, Dalloz 2002 A.J. p. 3208.

60 Tribunal de Grande Instance de Créteil, 19-9-2000.

61 The original text of the ruling of the Court of Appeal was: “les apartés coupant l'extrait d'une chanson, non dépourvus d'une certaine dérision, portent nécessairement atteinte au droit moral de l'auteur, même en dépit de leur vocation humoristique, et ne peuvent être ajoutés aux extraits d'une chanson sans l'autorisation de l'auteur”.

62 CA PARIS, 4ème Ch., Section A, 9-9-1998, *Société Seri Brode v/ Procter & Gamble France*.

However, as illustrated below in the case which rejected the appeal to parody regarding photographic extracts from a film, it is interesting to point out that a commercialisation of a work that is modified without humour cannot be accepted as parody.

A French magazine had published pictures taken from a film by Marcel Pagnol. The pictures were modified by replacing the original actors with mannequins wearing fashion clothes and accessories, in the same posture. The judges argued that this was not a parody of the original work by Marcel Pagnol, because it did not imitate his style, nor did it solicit a laugh, but it was merely an advertisement aimed at selling prêt-à-porter articles.⁶³

In another case, a Parisian court condemned the imitators of the magazine 'Femmes' and of the corresponding website, by copying the layout and the pictures while adding disparaging captions. The judge argued that the intention of the imitators was not to muse on the magazine Femmes, but to sell the Linux operating system to female customers.⁶⁴

Another requirement of the imitated work, deriving from the absence of harm for the rightsholders, is the absence of 'unfair advantage'. In short, if the imitated work is aimed at a commercial exploitation on a market (different from that of the original products) it should not exploit the fame of the original work in order to reach its audience. In such cases, the judges have to weigh the importance of the unfair advantage behaviour and the importance of the expression of an idea in each legal case. In practice, when the imitation is "content neutral", it is easier to appeal to unfair advantage. However, if the content of the imitated work is the reason for which the work was imitated in the first place, the judges should favour freedom of expression.⁶⁵

2.3.3 Parody on humour

Another interesting case of copyright infringement in which parody was claimed as a justification involves a book based on the character of *Tintin*. The defendant's book relates the adventures of the young reporter *Tintin* and are based on current affairs and feature ironic jokes on the geopolitical situation (**figure 8, appendix 3**). The Moulinsart Foundation, rightsholder of the copyright to *Tintin* (**figure 9, appendix 3**) sued the publisher of the book, Le Leopard Masqué, for copyright infringement. The argument of the plaintiff was based on the impossibility to make a parody on a work that is already humorous. To support this argument, the plaintiff recalled the definition of a French dictionary (Le Petit Robert), which states that parody is the ridiculing counterfeit of a serious work. However, this argument, while accepted by the lower court, was overturned by the Court of Appeal on the basis that previous case law had already ruled in favour of the parody of a humorous magazine. Moreover, the risk of confusion between the imitation and the original was ruled out because of the notoriety of the character of *Tintin* and because of the relevant difference between the plot of the book and the plot of the original comics.⁶⁶

63 *Pagnol v/ Société VOG* (Unpublished), (Tribunal de Grande Instance de Paris, 1ère Chambre, Section 1, 30/4/1997).

64 *SNC Prisma Presse & EURL Femme c/ Monsieur V*, Available at <http://www.juriscom.net/jpt/visu.php?ID=147> (Tribunal de Grande Instance de Paris, 3ème Chambre, Section 3, 13/2/2001).

65 *Supra* n. 56 Strowel and Tulkens.

66 Tribunal de Grande Instance de Paris 6/01/2011, *Moulinsart sa c/ éditions Leopard Masqué*. CA Paris, 2me Chambre, 18/2/2011, *Editions Leopard Masqué c/ Moulinsart*, Available at

2.3.4 Parody and trade marks

The exception of parody is not literally required by the French Intellectual Property Code in the matter of trade marks. Therefore French case law applies this exception to trade marks more sparingly.⁶⁷ Its requirements are similar to those examined above: There should be no risk of confusion between the imitated trade mark and the original and the reproduction should not harm the rights holder. This means that the imitated trade mark must not be commercially utilised in direct competition with the original.

For example, an imitation of the trade mark *Danone* on an Internet website built by ex-employees of the same multinational who protested against their dismissal (www.jeboycottedanone.com) was ruled as legitimate, upon the copyright exception of parody.

The first instance court had condemned the imitators for counterfeiting. However, the Court of Appeal overturned this ruling. The higher court argued that the imitations of the *Danone* trade mark evidently were not aimed at commercialising services or products in competition with *Danone* products, but they were object of an attack, not involved in business matters. Moreover, according to the judges, the products of the plaintiff were not in the least criticised on the internet website of the defendants. On the contrary, the message conveyed was that they loved *Danone* products and wished to continue manufacturing and selling them to customers. Finally, according to the Court of Appeal the defendants clearly carried out their actions within the boundaries of freedom of expression, in full respect of business law principles, according to which the products of the competitors were not criticised and there is no risk of confusion between the imitated trade mark and the original.⁶⁸

Other important examples of the French case law in the matter of parody include two cases brought against the civil liberties association Greenpeace and two multinationals: *Esso* and *Areva*.

In the case regarding *Esso*, Greenpeace reproduced on its own website the logo of ESSO by replacing the S with the symbol of the dollar, so that the logo read E\$\$O, and by using the slogan STOP E\$\$O (**figure 10, appendix 3**). Both the first instance court and the Court of Appeal rejected the action of trade mark infringement brought over by *Esso* (**figure 11, appendix 3**), by arguing that competition with the plaintiff products and confusion with the original logo were both to be excluded.⁶⁹ In fact, the court did not use the argument of freedom of expression, but it merely judged with the tools offered by copyright and competition law.

However, in the other case *Greenpeace* modified the logo of *Areva*, a company specialised in the treatment of nuclear waste, by replacing the A of *Areva* with a skull stained with blood and a dead fish.

http://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/FEVRIER_2012/CA18f_vr2011.pdf

67 *Supra* n. 56 Strowel and Tulkens.

68 Cour d'appel de Paris, 30/04/2003, *Monsieur Malnuit v/ Sociétés Compagnie Gervais Danone and Danone Group*, published on Ubiquité – Rev. dir. Tech.inf.2003/17, at 81.

69 Tribunal de Grande Instance de Paris, 30/01/2004, *Esso c/ Greenpeace France et SA Internet FRCCE* 10/04/04 n° 4 p. 24 juris data n 2005. Available at <http://www.juriscom.net/jpt/visu.php?ID=462>

The court in this case ruled against *Greenpeace*, by arguing that they harmed the original rights holder. The Court stated that the modification affected the reputation of *Areva* by implying that the company was spreading death, while not discussing options and solutions for an environmentally friendly disposal of nuclear waste. In short, the court argued that *Greenpeace* could have made its point by using different images and suggestions. The Court established that the use of offensive and shocking images was not necessary to the argument of the defendant.⁷⁰

France: Summary of the Law

The French parody exception set out under L 122-5 of the French Intellectual Property Code and underpinned by freedom of expression, reflects the recognition of parody in a commercialised work ('Monsieur PROPRE'); on existing humorous work (*Le Leopold Masqué/ TinTin* case) (figures 8, 9 appendix 3); and sometimes in relation to trade marks (*E\$\$O/ ESSO* case) (figures 10, 11 appendix 3). As such, France has developed a liberal approach as long as certain conditions are met.

The conditions are that the parody must include humour (criticism without humour will not be considered parody). However, even if humorous in character, there has to be a 'substantial modification' to the original, without which the courts will not protect the parodist. Furthermore the modified work should not harm the legitimate author – i.e. it should not affect their moral or commercial rights, although, as seen in *Le Leopold Masqué/ TinTin* it does not mean that the modified work cannot be commercialised at all. Parody defences were denied by the courts if the use was just commentary (*Jamel Debouze*), intended as an advertisement (*Marcel Pagnol*), or if the point could have been made by using different images (*Greenpeace*).

70 *SPCEA c/ Greenpeace* (Tribunal de Grande Instance de Paris, 9/7/2004) Available at <http://www.juriscom.net/jpt/visu.php?ID=552> The ruling was confirmed by the Supreme Court: Cass. civ., 1re ch., 8 avr. 2008, n° de pourvoi: 07-11251, *Greenpeace France et New-Zealand c/ SPCEA*

2.4 Australia

The *Australian Copyright Amendment Act 2006* came into force at the end of 2006, introducing a new parody exception under section 41A of the *Australian Copyright Act 1968 (as amended)*. The section reads as follows:

“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” (emphasis added).

Section 103AA of the 1968 Act (as amended) states:

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

One of the striking features of the Australian parody exception is the inclusion of ‘satire’ along with parody, under the fair dealing exception, which sets it apart from other jurisdictions. The Act does not define ‘parody’ or ‘satire’ (similar to other jurisdictions which have introduced an exception), and the inclusion of satire has led to some debate and controversy during the passage of the Bill, which will be reflected below.

Following the structural approach of this paper, the discussion will explore Australian copyright case law within the parody context, and attempt to trace the shift which led to the introduction of the relevant section, followed by an analysis of section 41A of the *Copyright Act 1968 (as amended in 2006)* (hereinafter 1968 Act). With regards to a possible ‘turning point’ it is also worth noting that the government’s support for copyright reform came about in February 2004 when Australia and USA agreed in principle on the text of the US-Australia Free Trade Agreement (AUSFTA). This Agreement came into effect on 1 January 2005⁷¹ and in May 2005 the Government published its *Fair Use Issues Paper*⁷². The paper highlighted the need for Australia to reform its copyright law, stating:

“Many observers believe copyright law should be reformed to reflect public attitudes and practices. Some interest groups feel a copyright balance might be better maintained in a rapidly changing digital environment if the Copyright Act were to include an open-ended ‘fair use’ exception that would allow the courts to determine whether a particular use of copyright material is ‘fair’ and should be lawful. Others argue the present specific exceptions in the Act should be amended to make certain uses of copyright material lawful.”⁷³

Before considering the copyright reform and section 41A, the paper will explore the journey towards the amendment.

71 US-Australia Free Trade Agreement (AUSFTA) <http://www.austrade.gov.au/ausfta/default.aspx>

72 *Fair Use and other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (May 2005). Also available at <http://www.ag.gov.au/Documents/FairUseIssuesPaper050505.pdf>

73 *Ibid.*

2.4.1 Australia – the journey towards a parody exception

Similar to the UK, the Australian copyright law before it was amended in 2006 provided for a restrictive fair dealing exception for purposes of:

- (1) Research or study (section 40);
- (2) Criticism and Review (section 41);
- (3) Reporting news (section 42).

In relation to section 40, research or study, a five factor doctrine is set out under section 40(2) to determine whether the dealing is ‘fair’. These include:

- (1) The purpose and character of the dealing;
- (2) The nature of the work or adaptation;
- (3) The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (4) The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (5) In a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

Interestingly, no such statutory factors are provided for the defences under section 41 (criticism and review) and section 42 (news reporting). However despite this gap, it has been recommended by the Australian Parliament and is widely assumed that the five-step doctrine applies universally to all fair dealing exceptions (which also now includes the parody defence)⁷⁴. After all, the exception expressly requires that the ‘dealing’ of the copyright work be ‘fair’⁷⁵.

Applying the fair dealing exception in the parody context has proved to be difficult for Australian courts. This was apparent in the case of *AGL Sydney v Shortland C.C.*⁷⁶. The applicant, a supplier of gas, had prepared an advertisement to push the message that ‘energy balanced homes save money’. The respondent prepared a ‘reply’ advertisement to emphasise that the applicant’s advertisement was misleading and that it suggested that balanced energy

74 The Copyright Law Review Committee, The Parliament of Australia, Simplification of the Copyright Act 1968 – Part I: *Exceptions to the Exclusive Rights of Copyright Owners* (September 1998), para 6.44. Available at <http://www.ag.gov.au/Documents/CLRC%20Simplification%20of%20the%20Copyright%20Act%201968%20-%20Part%201.pdf>

75 For a discussion of the fair dealing exception in Australia, see, J. McCutcheon, The new defence of parody or satire under Australian copyright law [2008] *Intellectual Property Quarterly*, particularly at pp. 163-192 at pp. 180-181.

76 [1989] 17 IPR 99.

supplies could be obtained through using gas for the three major energy needs. The question for the court was whether the copyright in a television advertisement had been infringed by the ‘reply’ advertisement by the respondent which used a similar format. Foster J. questioned whether the respondent’s advertisement amounted to a parody. He went on to say that *since no special considerations were applicable to the present case*, ‘more than a mere evoking or conjuring up of recollection’ had led to the taking of a substantial part⁷⁷ and therefore granted an injunction restraining the respondent from broadcasting its advertisement (*emphasis added*) (figure 12, appendix 4). The case brought to the forefront the need for a clear parody exception to deal with such cases in Australian copyright law.

2.4.2 The ‘Turning Point’

A decade later in 2001, the case of *TCN Channel Nine v Network Ten*⁷⁸ (*The Panel*) proved to be the turning point in Australian copyright law. In this long, drawn-out case, Channel Nine brought a case against Network Ten for copyright infringement of Channel Nine’s television broadcasts. Network Ten’s show *The Panel* (figure 13, appendix 4), played short clips from twenty of Channel Nine’s (figure 14, appendix 4) broadcast programmes. These excerpts which ranged between 8 to 42 seconds were discussed by the guests and hosts of *The Panel*. It was a light-hearted programme. As Suzor in his article states:

*“The litigation was complicated and law drawn-out, and the result was less than satisfactory in that no clear principles were expressed. Would-be parodists and their legal advisers were left in a difficult position – they had no way of knowing whether any given use of copyright material would be substantial, or, if so, whether it would be excusable under one of the fair dealing defences”*⁷⁹.

It is a very lengthy and complicated set of decisions which saw the case journey all the way to the Full Court of Australia. At trial in 2001 (No. 1) and on appeal to the Full Court in 2002⁸⁰, Network Ten successfully raised a fair dealing defence in relation to *nine* of the excerpts.

At trial in 2001, Conti J., delivering the judgement opined:

*“... the essence of parody is imitation ... whereas satire is described as being a form of ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuses, but not by way of an imitation or take-off. ... Such distinction referable essentially to imitation, though sometimes blurred at the edges by every day usage, assists an understanding as why parody (and burlesque) will not avoid copyright infringement, since imitation is in the nature of copying, in contrast to satire which involves the drawing of a distinction between the satirist and the author, composer etc.”*⁸¹

77 *Ibid.*, at p. 105. For a further analysis on the case, see also, S. Ricketson, Australia: literary work –infringement by “reply” advertisement – parody no defence [1991 13(1) *European Intellectual Property Review*, D6-7; N. Suzor, Where the bloody hell does parody fit in Australian copyright law? [2008] 13 *Media and Arts Law Review*, pp. 218-248 at pp. 231-232.

78 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] F.C.A. 108.

79 *Supra* n. 77 N. Suzor, p. 223.

80 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] 118 F.C.R. 417.

81 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] 108 F.C.R. 235 para 17 at p. 249. See also, J. McCutcheon, The new defence of parody or satire under Australian copyright law [2008] 2 *Intellectual Property*

Distinguishing between satire and parody and in considering 'substantial part' Conti J., concluded:

"On the contrary what was taken could be characterised as relatively de minimis, and for at least the most part trivial, and was used by Ten for different objects or purposes than those targeted by Nine, being in Ten's case purposes essentially of satire, light humour or light entertainment. Therefore in relation to the notion object or purpose as a consideration material to substantiality, it is readily apparent that Ten's object or purpose in taking by way of re-broadcasting has not been to create anything resembling the Nine programs from which Ten has taken footage or excerpts. Put another way, there has been no "pirating" or unfairness in the sense that such expressions have been used by the courts in relation to the analogous subject matter of published edition, and are to be correspondingly understood in relation to television broadcasting⁸²."

A subsequent appeal was made to the High Court which was allowed on different grounds and the matter as a whole was remitted to the Full Court for final determination in 2005 (No. 2)⁸³. The principal issue before the Full Court was whether the remaining 11 excerpts were "substantial parts" of the programs from which they were taken. If the answer to that question were in the affirmative, Channel Nine's copyright would have been infringed.

Finklestein J., delivering the judgement in the Full Federal Court (Hely J., dissenting) held that Channel Ten infringed Channel Nine's broadcast copyright in relation to six of the 11 excerpts rebroadcast by it. Finklestein J., delivering the judgement reasoned as follows referring to the economic significance of the work taken by Network Ten and the harm caused to Channel Nine:

"There is no fixed rule for determining how much of a copyright work must be taken for it to be a substantial part of the work. The area of substantial similarity is at the heart of copyright law, yet it remains one of its most elusive aspects⁸⁴..."

Finklestein J., elaborating on this point, further stated:

"One factor is the economic significance of that which has been taken. In Bramwell v Halcomb (1836) Lord Cottenham said that it is the "value [to the plaintiff of what has been taken] that is always looked to"⁸⁵. . . Evidence of the harm caused by the defendant's conduct is potentially relevant in a number of ways. First, and most importantly, it might indicate that the financial interest protected by copyright has been interfered with. Its absence might indicate the contrary. Second, it may indicate that the extent of the taking has been unfair, for example when it causes the plaintiff injury by reducing his profits. Third, it may be evidence of a straightforward piracy, being an intentional "stealing" for profit of the author's skill or labour. Last, it might highlight that the part taken is important, vital or material in the sense that the part gives the work its financial value⁸⁶."

Quarterly, pp.163-192 at pp. 166-167.

82 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd [2001] 108 F.C.R. 235 para 70 at pp. 288-289.

83 TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No. 2) [2005] FCAFC 53 (26 May 2005).

84 *Ibid.*, para 10.

85 *Ibid.*, para 12 Finklestein J., referring to Lord Cottenham in *Bramwell v. Hancomb* (1836) 3 My & Cr 732, 738 [40 ER 1110].

86 *Ibid.*, para 17.

What was ultimately clear following *The Panel* case was that Australian copyright law was far from clear. The law was so uncertain that ‘it was impossible to determine whether a parody would constitute an infringement, except in cases where only the most trivial or *de minimis* portions of copyright material was used’⁸⁷. Around the same time as the Full Federal Court was delivering their decision on the case, the Government had begun to review Australia’s copyright law, following the US-Australia Free Trade Agreement (AUSFTA). It is believed that *The Panel* case was instrumental in motivating the introduction of the parody exception and the distinction by Conti J., at trial is reflected in the explanatory memorandum to the amending Bill⁸⁸.

2.4.3 Post-2005 – Copyright Amendment Act 2006

Following the publication of the *Fair Use Issues Paper* in May 2005, the introduction of a specific fair dealing exception for parody, pastiche and caricature was put forward⁸⁹. The draft of the Copyright Amendment Bill 2006 contained a limited exception for parody and satire. In the form in which it was introduced, an exception for parody and satire was proposed along the lines of the three-step test of the Berne Convention⁹⁰:

- (1) The use amounted to a special case;
- (2) The use did not conflict with a normal exploitation of the subject matter; and
- (3) The use did not unreasonably prejudice the legitimate interests of the copyright holder.

The restrictive wording of the proposed exception came under criticism which led the legislators to re-word the exception as reflected under section 41A of the 1968 Act. Whilst the wording moved away from the Berne-styled three-step test, the expansion of the defence to include ‘satire’ has also led to concern. The Australian Copyright Council stated:

“We have concerns about [the] operation [of an exception for satire], as satire (unlike parody) does not relate to comment on a particular work, but comment on the characteristics of a person or society. Reproducing a work for the purposes of satire may assist to make a satirical point or observation, but, is unlikely to be a comment on the work itself⁹¹.”

In reply, the Attorney General’s Department, charged with drafting the Bill explained why satire was included alongside parody:

87 *Supra* n. 77 N. Suzor, p. 225.

88 Copyright Amendment Bill 2006, Explanatory Memorandum at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html

89 *Supra* n. 72 pp. 21-22.

90 Article 9(2) Berne Convention for the Protection of Literary and Artistic Works

91 Australian Copyright Council, Submission to the Senate Legal and Constitutional Affairs Committee on Copyright Amendment Bill 2006, October 2006, para. 45.

“First, satire may be far less damaging to the creator. In some circumstances parody of a creator may destroy his or her market in a way satire will not. Secondly, satire may have a more useful social benefit in adding to political and social discussion. While the Government does not intend to legislate to allow all ‘transformative uses’ it considers satire is a particularly [sic] type of transformative use which may be justified, with appropriate safeguards to protect copyright owners⁹².”

The copyright journey in Australia led to a parody defence, with the expansion of the defence to include ‘satire’ becoming the subject of debate⁹³. The Australian courts have not yet been presented with the opportunity to consider the new defence.

Australia – Summary of the Law

Similar to the UK, the Australian copyright law before it was amended in 2006 provided for a restrictive fair dealing exception for purposes of research or study (section 40); criticism and review (section 41); and reporting news (section 42). Cases such as *AGL Sydney v Shortland C.C.* (figure 12, appendix 4) illustrated the difficulties of applying a restrictive fair dealing exception to recognise parody.

The Panel case in 2001 (figures 13, 14, appendix 4) was the turning point in the law which prompted the coming into being of section 41A of the *Australian Copyright Act 1968 (as amended)*. The section recognises that a work of parody or satire which is an adaptation of a literary, dramatic or musical work does not constitute an infringement of the copyright in the existing work. The section is yet to be tested. Significant earlier cases, such as *The Panel*, illustrated the Australian test as similar to the UK in the interpretation of ‘substantial taking’. This could be an *interference* with copyright owner’s *financial interest* which can affect the *value of the work* and provide an *unfair advantage* to the parodist.

92 Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Copyright Amendment Bill 2006*, Submission (No. 69A) by Attorney-General’s Department, p. 3. Available at Parliament of Australia at <http://www.aph.gov.au/> See also, S. MacCausland, Protecting “a fine tradition of satire”: the new fair dealing exception for parody or satire in the Australian Copyright Act [2007] 29(7) *European Intellectual Property Review*, pp. 287-292.

93 C. Condren, J. Milner Davis, S. McCausland, R. Phiddian, Defining parody and satire: Australian copyright law and its new exception: Part 2 – Advancing ordinary definitions [2008] 13(4) *Media and Arts Law Review*, pp. 401-421.

2.5 Germany

There is no specific parody exception under German Copyright Law. The adoption of the Information Society Directive in 2003⁹⁴ did not change that position. As it stands, parody under German law generally falls under the adaptation right under §23 of the Germany copyright law. This makes parodying a work subject to the consent of the author. §23 of the Copyright Act - Urheberrechtsgesetz (UrhG) 1965 (as amended) (hereinafter UrhG) – states:

“Adaptations or other transformations of a work may be published or exploited only with the consent of the author of the adapted or transformed work. In the case of cinematographic adaptations of a work, of the execution of plans and sketches for a work of fine art, or of copies of an architectural work, the author’s consent shall be required for the making of such adaptation or transformation.”

However, the adaptation right under Article 23 is qualified by §24 of UrhG which provides for ‘free use’ (*freie Benutzung*):

24(1) – An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work.

Whilst ‘free use’ is not defined under the UrhG, the traditional interpretation focused on similarities between the old and the new work, *not the differences* when examining the overall impression both give⁹⁵. It is also interesting to note that §24 appear under Section IV ‘scope of copyright’ as opposed to Section VI ‘limitations on copyright’. Accordingly, the question of whether parody is lawful under §24(1) UrhG does not arise when it comes to a defence for copyright infringement although the outcome of the test is similar to that of a defence provision. If the parody does not constitute a free use – *freie Benutzung* – it is likely to infringe copyright according to §23 UrhG (adaptation right, which as discussed, requires the consent of the owner)⁹⁶.

2.5.1 Application of §24 for purposes of parody

In an early case in 1958⁹⁷ the German highest federal court (*Bundesgerichtshof*, BGH⁹⁸) constructed a wide interpretation of ‘free use’. The Court held that in a parodied film Sherlock Holmes and Dr. Watson had acted out different roles in new stories with a comic tenor and therefore did not infringe. Subsequent decisions did not follow a clear line.

94 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Germany implemented the Directive in 2003 – Act amending the Law on Copyright and Related Rights 1965 of 10 September 2003.

95 C. Rutz, Parody: a missed opportunity? [2004] 3 *Intellectual Property Quarterly* pp. 284-315 at pp. 299-306.

96 *Ibid.*

97 *The Man Who Was Sherlock Holmes* [1958] GRUR 354.

98 BGH decisions can be appealed on constitutional points to the Constitutional Court (*Verfassungsgericht*). This has not happened for Parody cases, but jurisprudence from the *Verfassungsgericht* (e.g. BVerfG GRUR 2001, 149 – *Germania 3*, relying on “freedom of citation”, *Zitierfreiheit*, §51 UrhG) has influenced the increasing recognition of constitutional norms in parody case law.

The case of *Disney-Parodie*⁹⁹ in 1971 focused on a question of ‘necessity’ to arrive at the answer. In a satirical cartoon *Walt Disney* was shown to create angels and biblical figures in heaven. The cartoon had appeared some months after the death of *Walt Disney*, creator of the comic figures *Mickey Mouse*, *Goofy* and *Donald Duck*. The highest federal court (Bundesgerichtshof, BGH) decided that a parody would only fall within the category of free use if the parts taken from the original work were necessary (*notwendig*) to create a successful parody. The Court reasoned that ‘only this could prevent a misuse of the §24 provision’. Elaborating on the point of ‘necessity’ nearly three decades later, the BGH clarified in *Landgericht (Mannheim) (Freiburger Holbein-Pferd*¹⁰⁰) that the prerequisite for ‘free use’ is that the original work should only have served as an inspiration for further individual creativity. In other words, the resulting work must reflect individuality, and the ‘necessity’ of having borrowed characteristics of the original work must pale in comparison¹⁰¹.

Another leading key parody case concerned the French comic book figure ‘Asterix’¹⁰². In this case, the first plaintiff owned the exclusive exploitation rights in *Asterix* cartoon series and its associated figures. The second plaintiff was the artist of the *Asterix* figures and the *Asterix* cartoons. The defendant was the publisher and editor-in-chief of a comic book, *Falsches Spiel mit Alcolix. Die Parodie (False Play with Alcolix: The Parody)* (**figure 15, appendix 5**). The book contained a number of short stories and individual drawings by several artists, which referred to the famous *Asterix* cartoon series (**figure 16, appendix 5**) and its figures in various ways. The plaintiffs claimed that the 18 stories and drawings in the defendant’s book were based on several *Asterix* figures and their characteristic features. The plaintiffs further alleged that the stories and drawings in the defendant’s comic book were not parodies but adaptations and therefore did not constitute free use of the *Asterix* cartoons under §24.

The District Court ruled in favour of the plaintiffs agreeing with the plaintiff’s objection to the inclusion of the drawings. However, the court at first instance dismissed the plaintiff’s request to stop the defendant from advertising and distributing its comic *False Play with Alcolix: The Parody*, particularly in using the name *Alcolix*. The plaintiffs and the defendant appealed the decision.

The Court of Appeal affirmed that graphically portrayed characters, such as *Asterix* and *Obelix*, were indeed protected by copyright and granted an injunction to stop the defendant from selling the comic book¹⁰³. The Court stated that the drawings in the jacket, front and back and also the drawing on page 5 infringed the copyright of *Asterix*¹⁰⁴. Referring to free use under §24, the Court stressed that the pre-existing work should only be adopted in a way that serves as a stimulus for the creation of another work. Any appropriated features would have to fade (*verblassen*) in comparison to the unique character of the newly created work

99 BGH GRUR 1971, 588.

100 [1997] GRUR 364.

101 E. Adeney, Authors’ rights in works of public sculpture: a German/Australian comparison [2002] 33(2) *International Review of Intellectual Property and Competition Law* pp. 164-185.

102 BGH, March 11, 1993.

103 [1993] ZUM 534.

104 For a discussion of the case, see also, K.H. Pilny, Germany: copyright: protection of comic strips under copyright law – “Alcolix”/“Asterix” parodies [1995] 17(7) *European Intellectual Property Review*, D198-199; Case Comment, Germany: Copyright Act, Secs. 2, 23, 24 – “Alcolix” 25(4) [1994] *International Review of Intellectual Property and Competition Law*, pp. 605-610.

– a requirement not met in this case¹⁰⁵. Referring to *Disney-Parodie*, the Court further went on to say that the decisive factor is the difference maintained between the new work and the borrowed personal creative features of the work used. Here, the standard of assessment must not be too mild¹⁰⁶.

In the third instance, the highest federal court BGH took a broader view for free use in the *Alcolix* case¹⁰⁷. It asked whether within the context of parody the *Asterix* characters sufficiently satisfy the test. In answering the question, the BGH invoked Article 5 of the German Constitution, which expressly protects freedom of expression, specifically freedom of art¹⁰⁸. Pointing to the fact that the doctrine of free use can be restrictive in ‘not leaving creators enough freedom to satisfy the constitutional guarantee’, the Federal Court remanded the case to the intermediate court to complete inquiry into whether new characters based on infamous characters such as *Asterix* satisfy the test. In completing the inquiry the Court held that this fact has to be assessed from the perspective of readers conversant with both the parody and the prior work¹⁰⁹.

The test applied in *Asterix/Alcolix* changed with *Gies Eagle* (2003)¹¹⁰. At issue was a caricature of the German national symbol (an eagle, created by the artist Gies in the 1950s) used to illustrate a critical feature on taxation on the cover of the current affairs magazine *Focus* (**figure 17, appendix 5**). A collecting society, asserting the artist's copyright in his version of the federal eagle (**figure 18, appendix 5**), petitioned for an injunction against a caricature of the eagle in that form. The intermediate court refused to approve any injunction¹¹¹. The BGH in the final instance found sufficient change of form from the artist's version of the federal eagle to the caricature to deem the caricature ‘free use’. The Court held that the precondition for an unrestricted use, for example in the form of parody or caricature, is that the new work, despite the external correspondences, maintains a clear ‘internal distance’ (*innerer Abstand*) that is expressed generally in an ‘anti-thematic treatment’ (*antithematische Behandlung*). The fact that the critical treatment using the artistic means of caricature is directed not at the work itself but rather to its thematic environment (*thematisches Umfeld*) is of no consequence. The Court reasoned that statutory law had to be construed in conformity with the Constitution, in this case applying the constitutional guarantee of freedom of the press (Article 5(1))¹¹².

105 [1994] GRUR 206 at 215. See also, P.E. Geller, A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations? Available at http://www.criticalcopyright.com/Geller-German_FairUse_TRIPs.pdf

106 *Supra* n. 104 Case Comment, at p. 608.

107 [1994] GRUR 206. See also *supra* n. 105 P.E. Geller at pp. 906-907.

108 *Ibid.*

109 BGH, March 11, 1993; [1994] GRUR 206; [1993] ZUM 534.

110 Bundesgerichtshof (Gies-Adler) (I ZR 117/00) (Unreported, March 20, 2003). See also, Case Comment, Germany: Copyright Act, Secs. 23, 24(1), 45 et seq.; Basic Law, Art. 5(1), first sentence – “Gies Eagle” [1994] 35(8) *International Review of Intellectual Property and Competition Law* pp. 984-987.

111 OLG Cologne, May 5, 2000, 2000 *Neue Juristische Wochenschrift* 2212. For an analysis of the case, see also, P.E. Geller, A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations (15 September 2010) at http://www.criticalcopyright.com/Geller-German_FairUse_TRIPs.pdf pp. 901-919 at p. 909.

112 *Ibid.*

The distance to the work used which is necessary for an unrestricted use can, even where there is a clear adoption, result from the fact that the new work maintains a clear internal distance to the borrowed created features of the older work, and for this reason is by its nature to be regarded as independent. In such cases, too, it can be said that the individual features of the older work “fade into the background”. This can be in the form of a parody in which the older work itself is made the subject matter of a critically humorous and ironic interpretation, but is also possible in different ways, such as by means of a caricature that does not concern the older work itself but rather the subject matter represented in the older work. However, the precondition for such an unrestricted use that is characterised by a certain number of adopted features is that the new work, despite the external correspondences, maintains a clear (internal) distance that is expressed generally in an anti-thematic treatment.¹¹³

2.5.2 Parody and Music under German Copyright Law

UrhG contains a special provision for the use of music and therefore, musical parodies are considered separately from other forms of parody. The free use provision of §24(1) does not apply to the use of music, according to §24(2) UrhG:

24(2) – Paragraph (1) shall not apply to the use of a musical work where a melody has been recognisably borrowed from the work and used as a basis for a new work.

As Rutz states, §24(2) applies if the parody copies a melody and not just a motive or theme and does it in a recognisable way. There is considerable legal debate about the constitutionality of granting special status to music which is said to lack flexibility with most musical parodies constituting an infringement under of §24(2)¹¹⁴.

113 *Ibid.*, pp. 986-987.

114 *Supra* n. 95 C. Rutz, p.p. 306-307. On the origins of the provision, see also F. Kawohl and M. Kretschmer, Abstraction and registration: conceptual innovations and supply effects in Prussian and British copyright (1820-50) 2003 (2) *Intellectual Property Quarterly* pp. 209-228.

Germany – Summary of the Law

Germany recognises a freedom to parody under §24 of UrhG (which qualifies the exclusive adaptation right under §23). §24 provides for ‘free use’ (*freie Benutzung*) stating that “an independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work”. In applying the ‘free use’ limitation to recognise works of parody, the Courts emphasised that a parody would only fall within the category of free use if the parts taken from the original work were *necessary* to create a successful parody (*Disney-Parodie* 1971).

According to a line of cases leading up to *Asterix/Alcolix* (1994, **figures 15, 16 appendix 5**), for a parody to be ‘free use’, the critique had to be directed towards the parodied work not against the author or third parties, and any appropriated features would have to *fade* in comparison to the unique character of the newly created work. However, the test was changed in *Gies Eagle* (2003, **figures 17, 18 appendix 5**). Decisive is now the transformative inner distance (*innerer Abstand*) between original and parody, and the critique can be directed elsewhere, for example to the thematic context (*thematisches Umfeld*).

Increasingly, the Courts have referred to the German Constitution in developing the appropriate scope for parodic expression. Art. 5 of the Constitution expressly protects freedom of expression (“[e]very person shall have the right to express and disseminate his opinions in speech, writing and pictures”), and freedom of the arts.

Musical parodies are considered separately from other types of parodies (§24(2) UrhG). According to this section a parody of a musical work will not fall under ‘free use’ where a melody has been recognisably borrowed from the work and used as a basis for a new work.

2.6 USA

The United States does not make reference to 'parody' in the *Copyright Act 1976* (hereinafter 1976 Act)¹¹⁵. Parody may fall within the 1976 Act's 'fair use' doctrine which gives statutory recognition to four factors created by judicial treatment when determining whether a use of a copyright work is 'fair'¹¹⁶. The factors to be considered "shall include" –

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (b) The nature of the copyrighted work;
- (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) The effect of the use upon the potential market for the value of the copyrighted work.

Whilst the fair use doctrine creates a potentially broad, open-ended exception, the entitlement to especially lenient treatment for parody under the fair use doctrine has been hotly debated¹¹⁷. There is a rich body of cases that can be drawn upon: from those which have shown conservative judgement on the matter¹¹⁸ to those which have taken a very lenient approach¹¹⁹.

Following the structure of this paper, the focus is on the cases that have had an effect on the development of parody content in the USA. The discussion is divided into two parts: (1) The conservative years: 1976-1993; and (2) 1994 and beyond: A relaxed approach to parodied content.

115 17 U.S.C. § 107 (2006).

116 Section 107 Copyright Act 1976.

117 M. Spence, Intellectual Property and the problem of parody [1998] 114 (Oct) *Law Quarterly Review*, p. 594-620, particularly pages pp. 605-613.

118 *Metro-Goldwyn-Mayer, Inc., v Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351 (U.S. Dist. 1979). This was the first case to marshal the new statutory fair use doctrine in defence of parody.

119 *Campbell v Acuff-Rose Music* 510 U.S. 569 (1994).

2.6.1 The conservative years: 1976 – 1993

Metro-Goldwyn-Mayer, Inc., v Showcase Atlanta Cooperative Productions, Inc., was the first American case to have relied on §107 of the 1976 Act in defence of parody. In this case the District Court (for the Northern District of Georgia, Atlanta Division) held that the defendant's three-hour three-act play titled *Scarlett-Fever* was neither a parody nor a satire, and infringed the copyright of the plaintiff's novel *Gone with the Wind*. In considering whether *Scarlett Fever* amounted to a parody, the District Court confirmed:

"In looking at the play as a whole, the Court finds that "Scarlett Fever" is neither a parody, nor a satire. Rather, "Scarlett Fever" is a musical adaptation of the film "Gone With The Wind" and the novel Gone With The Wind, generally in the nature of comedy, with some elements of parody but also with some elements of tragedy or straight drama. The underlying rationale for applying the "fair use" doctrine to parody and satire is that these art forms involve the type of original critical comment meant to be protected by §107 of the Copyright Act of 1976. . . Parody 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 others¹²⁰."

It is clear from reading the above quote that this lower federal court of Georgia in 1979 took a very strict approach in applying the fair use exception to protect parody. However, the District Court (for the Southern District of New York) took a very different view one year later in the case of *Elsmere Music Inc., v National Broadcasting Company Inc*¹²¹. The case turned on the question as to what was being parodied by defendants' use of the four-note melodic "heart" of plaintiff's "I Love New York" jingle. The plaintiff claimed that the defendants' skit only mocked the City of New York and its public relation woes during an economic downturn in the late 1970's. In this case the court established that because the defendants took no more of the original song than was necessary to 'conjure up' the object of the satire, and because the parody was done with neither the intent nor effect of fulfilling the demand for the original tune, no actionable infringement took place pursuant to the fair use defence¹²².

120 *Supra* n. 118 p. 357.

121 482 F. Supp. 741 (U.S. Dist. 1980). The case concerned the popular song 'I Love New York' by Elsmere Music Inc which the defendants made into a parody version called 'I love Sodom'.

122 *Ibid.*

MGM v Showcase Atlanta (1976) was the first case to have considered parody under the new law and *Elsmere* (1979) the first case to use ‘conjure up’ under the current regime (1976 Act). However as illustrated, under Copyright Act 1909 (as amended) *Columbia Pictures Corporation v National Broadcasting Co Inc.*, appears to be the first case to have used the wording ‘conjure up’ in 1955, although not necessarily the first case to consider parody under the 1909 Act¹²³. Set out below are two parody cases considered under the previous 1909 Act.

In the case of *Hill v Whalen & Martell Inc.*, 220 F. 359 (1914), the complainant exclusive licensee sought injunctive relief enjoining defendant entertainer from utilising the copyrighted cartoon characters’ persona in defendant’s dramatic performances. The district court (New York) held that the defendant’s use of the complainant’s copyrighted cartoon characters was intended to injure and did injure to a substantial degree by affecting the value of complainant’s copyright. Injunctive relief was granted as well as damages and costs.

Leo Feist, Inc., et al v Song Parodies Inc., et al; Robbins Music Corporation v SAME 146 F. 2d 400 (United States Court of Appeals for the Second Circuit) (1944) is another case involving parody. In this case the defendants appealed a decision of the District Court of the United States for the Southern District of New York, which held that defendants had infringed the plaintiffs’ copyrights of certain songs. The Appeals Court (second circuit) affirmed and upheld the earlier decision of the district court.

The trend set in 1980 by the *Elsmere* case continued to some extent during the 1980’s with the right to parody triumphing over copyright infringement. In the case of *Warner Bros. Inc., v American Broadcasting Companies Inc., & Ors*¹²⁴ the district court (for the Southern District of New York) held that the defendants parody version of *Superman* titled “The Greatest American Hero” did not infringe copyright and the defendants were entitled to the use the plaintiff’s copyright under the “fair use” doctrine. A similar decision upholding fair use was delivered in the cases of *Hustler Magazine Inc., v Moral Majority Inc., & Ors*¹²⁵.

123 Interestingly, the wording is used as early as 1955 in the case of *Columbia Pictures Corporation v National Broadcasting Co Inc.*, 137 F. Supp. 348 (December 9, 1955). In this case the plaintiff sued the defendant television broadcaster for allegedly taking certain items from a copyrighted motion picture and using them in a similar, shorter television production. The District Court (for the Southern District of California, Central Division) held in favour of the defendant broadcaster because the broadcaster’s *burlesque* television production did not substantially take from the company’s copyrighted work; it was fair use where it took only enough to cause the viewer to recall and conjure up the original, a necessary element of burlesque, and because it did not mislead the viewers. Carter J., delivering his opinion, commented that “In historical burlesque a part of the content is used to *conjure up*, at least the general image, of the original. Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original” (*ibid.*, at p. 50).

Carter J., goes on to define burlesque as taking “the locale, the theme, the setting, situation and even bare basic plots without infringement, since such matters are ordinarily not protectable ... The doctrine of fair use permits burlesque to go somewhat farther so long as the taking is not substantial. It may take an incident of the copyrighted story, a developed character (subject to the limited right of an author in certain situations)” (*ibid*) (also at p. 50).

124 523 F. Supp. 611 (U.S. Dist. 1981).

125 606 F. Supp. 1526 (U.S. Dist. 1985).

However the 1980's also saw a number of cases where copyright was upheld over claims of parody as fair use, for example in the cases of *Original Appalachian Artworks Inc., v Topps Chewing Gum Inc.*,¹²⁶ and the *Nightmare on Elm Street*¹²⁷. In the latter case the district court (for the Southern District of New York) concluded that defendants' conduct was wilful and done to directly compete with the plaintiffs and if the defendants' music video was released it was likely to harm the value of the derivative use of the plaintiffs' copyright¹²⁸.

2.6.2 1994 and beyond: A relaxed approach to parodied content

Campbell v Acuff-Rose Inc.,¹²⁹ which journeyed all the way to the Supreme Court, signified a turning point for parody and copyright law. *Acuff-Rose Inc.*, was the assignee of the copyright to the 1964 rock ballad *Oh Pretty Woman* by Roy Orbison and William Dees (**figure 19, appendix 6**). In 1984, a US rap group known as *2 Live Crew*, led by Luther Campbell released its version of *Oh Pretty Woman* which it titled *Pretty Woman* and the album *As Clean as They Wanna Be* (**figure 20, appendix 6**). Following a year of success for *2 Live Crew* which also saw almost a million copies being sold, *Acuff-Rose* sued *2 Live Crew*, its individual band members, and its record company for copyright infringement. In their defence, *2 Live Crew* claimed that its version was a parody within the remit of the fair use doctrine.

The ensuing case consisted of an extensive debate on the first and fourth factors of the fair use doctrine, namely, the purpose and character of the use, including whether such use is of a *commercial nature or is for non-profit educational purposes*; and the *effect of the use upon the potential market* for the value of the copyrighted work.

The district court (for the Middle District of Tennessee) ruled that *2 Live Crew's* version was fair use, and emphasised that its commercial purpose did not prevent the fair use defence from being applied and held in favour of *2 Live Crew*¹³⁰. Chief District Judge, Thomas A. Wiseman, Jr., presiding over the case, focussed on the nature of parody as "editorial or social commentary":

126 642 F. Supp. 1031 (U.S. Dist. 1986).

127 *New Line Cinema Corporation, The Elm Street venture and the Fourth New Line-Heron Venture v Bertlesman Music Group Inc & Ors* 693 F. Supp. 1517 (U.S. Dist. 1988).

128 *Ibid.*

129 510 U.S. 569 (1994). For a good discussion of this case, see also, M. Spence, Intellectual Property and the problem of parody [1998] 114 (Oct) *Law Quarterly Review*, p. 594-620 at pp. 605-613; S. M. Maniatis, E. Gredley, Parody: a fatal attraction? Part I: The nature of parody and its treatment in copyright [1997] 19(7) *European Intellectual Property Review*, pp. 339-344 at pp. 342-343; R. J., Bernstein, US Supreme Court rules on parody and fair use [1994] 5(3) *Entertainment Law Review*, pp. 95-97; P. Groves, Mamams don't let your babies grow up to do parodies! [1994] 5(1) *Entertainment Law Review*, pp. 3-5; 2 Live Crew's commercial parody raps knuckles of US copyright law [1994] 16(8) *European Intellectual Property Review*, pp. 358-360; J.C. Knapp, Laugh and the Whole World . . . Scowls at you? A Defence of the United States' Fair Use Exception for Parody under TRIPS (2005) 33(2) *Denver Journal of International Law and Policy*, pp. 347-366; D. Meale & P. England, Barry Trotter and the infringement of copyright – parody rules in the UK (April 2008) *Managing Intellectual Property*, pp. 34-38 at p. 36.

130 *Acuff Rose Inc., v Campbell* 754 F. Supp. 1150 (U.S. Dist. 1991).

“Many parodies distributed commercially may be more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff’s original work. . . . The defendant may rebut the presumption of commercial use by convincing the court that the parody does not unfairly diminish the economic value of the original”¹³¹.”

However, the Court of Appeals (Sixth Circuit) reversed the district court decision and focused on the first factor of the fair use doctrine. The Court of Appeals, relying on a previous Supreme Court decision – *Sony Corp. of America v Universal City Studios, Inc.*,¹³² – emphasised that “every commercial use of copyright is presumptively . . . unfair . . .”¹³³. Senior District Judge, Charles W. Joiner delivering the opinion went on to state that “while commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain”¹³⁴. Citing and relying on another Supreme court decision – *Harper & Row Publishers v Inc., v National Enterprises et al*¹³⁵. – the Court of Appeals pointed out that “the crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”¹³⁶.

With the focus kept firmly on the first doctrine, and holding in favour of *Acuff-Rose*, the Appeals Court concluded:

“That the district court erred in the process of determining that the criticism constituted a fair use of the copyrighted work. We find that the admittedly commercial nature of the derivative work -- the purpose of the work being no less important than its character in the Act’s formulation -- requires the conclusion that the first factor weighs against a finding of fair use”¹³⁷.

The decision led to a petition to the highest court in the country – the US Supreme Court – to review the Appeals Court decision.

Granting the petition to review the case, Souter J., delivering the unanimous opinion of the Supreme Court held that the Court of Appeals had erred in basing its judgement on the conclusion that the parody’s commercial nature rendered the parody presumptively unfair under §107’s first and fourth factors¹³⁸. In assessing whether the first factor – the purpose and character of the use – should be weighed in favour of fair use, the court held that the important inquiry is not whether the use is a commercial or non-profit one, but whether it is ‘transformative’ – i.e. does it add ‘something new, with a further purpose or different character, altering the first with new expression, meaning or message’¹³⁹. Because the ‘goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative

131 *Ibid.*, at p. 1154 per Thomas A. Wiseman, Jr.

132 464 U.S. 417 (1984) at p. 451.

133 972 F.2d 1429; 1992 U.S. App at p. 1436 per Senior District Judge Charles W. Joiner.

134 *Ibid.*

135 471 U.S. 539; 105 S. Ct. 2218 (1984).

136 471 U.S. at 562; *supra* n. 133 p. 1436.

137 972 F.2d 1429; 1992 U.S. App at p. 1437.

138 *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 114 S. Ct. 1164 (1994).

139 *Ibid.*, at p. 579 per Souter J.

works' the court held that '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'¹⁴⁰.

Souter J., also stressed the importance of exploring all four factors of §107 and cautioned against rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster¹⁴¹. As such, the Court made it clear that the four factors should not be treated as establishing 'bright-line rules'¹⁴². In referring to the fourth factor of the fair use doctrine, the court went on to establish that "the parody and the original usually serve different market functions" and therefore its harm must be proven not assumed¹⁴³. The case was significant as dicta in previous Supreme Court decisions had led the lower courts to rule against commercial use and focus extensively on the fourth factor dealing with potential market impact. In *Campbell*, the Supreme Court offered a different direction.

2.6.3 Beyond Campbell

Campbell was hailed "as something of a breakthrough for the parodist as well as a step forward in establishing a viable theory of parody for U.S. copyright law"¹⁴⁴. Beyond the Court's decision, the case also brought to the forefront the distinction between parody and satire thereby highlighting a possible division between (1) those that *target* (i.e. comment, criticise or make fun of) a specific work and (2) those that use the work as a *weapon* or vehicle by means of which to attack an external target. In relation to the second group – weapon parody – the court in *Campbell* alluded to the danger that the creator of a weapon parody might draw on the text simply to "get attention or to avoid the drudgery in working up something fresh"¹⁴⁵. In *Campbell* the Court further clarified that a permissible parody in the USA must utilise and target a specific copyright work to be eligible for the fair use doctrine; it may not utilise a specific work as a weapon to attack a general target¹⁴⁶. However, as Michael Spence notes, "the conflict between free speech and intellectual property is far more difficult to resolve in the situation exemplified by weapon parody than it is in the situation exemplified by target parody"¹⁴⁷. The problem is that parodies cannot always be divided into so conveniently polarised categories.

Furthermore, Graznak argues that in assessing parody "the recognition of the polarised cultures from which the parties come is vital to an understanding of the whole affair"¹⁴⁸. Pointing out *Acuff-Rose's* deep-seated Nashville roots, against *2 Live Crew's* African-

140 *Ibid.* See also, J.C. Knapp, Laugh and the Whole World . . . Scowls at you? A Defence of the United States' Fair Use Exception for Parody under TRIPS (2005) 33(2) *Denver Journal of International Law and Policy*, pp. 347-366 at p. 350; *supra* n. 129 R. J., Bernstein, at p. 96.

141 510 U.S. 569 at p. 584 *per* Souter J.

142 *Ibid.*

143 *Ibid.*, at p. 591 *per* Souter J.

144 *Supra* n. 129 S. M. Maniatis, E. Gredley, p. 342.

145 510 U.S. 569 114 S. Ct. 1164 at p. 580 (1994).

146 510 U.S. 569 at 592 (1994). See also, D. Meale & P. England, *supra* n. 129 p. 36.

147 *Supra* n. 129 M. Spence, p. 613.

148 *Supra* n. 129 P. Graznak, p. 3.

American background, he goes on to say that “the High Court’s decision cannot be made in a legal vacuum but must take into account a diversity of social factors. What is thought as satire to *Acuff-Rose*, a *2 Live Crew* fan, or a Supreme Court judge, may be entirely different”¹⁴⁹.

Beyond *Campbell*, the strong presence of the decision has been felt. In *Liebovitz v Paramount Pictures Corporation* the district court (for the Southern District of New York) followed *Campbell* in holding that the transformative character of an advertising poster outweighed its admittedly commercial purpose¹⁵⁰. In *Suntrust Bank v Houghton Mifflin Company* the Appeals Court (Eleventh Circuit) reversing the judgement of the district court (for the Northern District of Georgia) and in applying *Campbell* held that the defendant’s book, *The Wind Done Gone* is clearly a parody of the classic novel, *Gone with the Wind*¹⁵¹. Similarly, in *Louis Vuitton Malletier S.A. v Haute Diggity Dog, LLC*¹⁵² – where the parody defence was upheld under both copyright and trademark laws – the District Court referring to *Campbell* held that the similarities between the two companies’ products “are necessary as part of the parody, for without them, no parody exists”¹⁵³. In this case, “*Louis Vuitton Malletier*” (LVM) the well-known maker of luxury goods (**figure 21, appendix 6**), sued a Las Vegas company, “*Haute Diggity Dog LLC*” (**figure 22, appendix 6**) its principal owner and one of its retail distributors for infringement of its LOUIS VUITTON, LV marks and design copyright. The defendant, *Haute Diggity Dog LLC* admitted that its product names – CHEWY VUITON – and designs were intended to mimic LVM’s famous products and won the case under the fair use exception.

149 *Ibid.*

150 948 F. Supp. 1214 (U.S. Dist. 1996).

151 268 F.3d 1257 (U.S. App. 2001).

152 507 F.3d 252 (4th Cir. 2007).

153 *Ibid.* See also, E. Barraclough, Chewy Vuitton bites back (2007) 167 *Managing Intellectual Property*, pp. 46-47.

USA: Summary of the Law

The USA recognises parodies within the ‘fair use’ exception under section 107 of the *Copyright Act 1976*. Whilst the years 1976-1993 generally reflected a conservative approach to the fair use exception as far as parody was concerned, the 1994 case of *Campbell v Acuff-Rose Inc.* (figures 19, 20 appendix 6) saw a turning point in the law. Amongst the four statutory factors for assessing fair use is a requirement to consider the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes (factor 1) and the effect of the use upon the potential market for or value of the copyrighted work (factor 4).

In *Campbell*, the Supreme Court allowed a commercial work (“Pretty Woman” by 2 Live Crew, a parody of “Oh Pretty Woman” by Roy Orbison) to fall under the fair use exception, stating that in considering the relevant fair use factors the important inquiry is not whether the use is a commercial or non-profit one, but whether it is ‘transformative’ – i.e. does it add ‘something new, with a further purpose or different character, altering the first with new expression, meaning or message’.

Campbell also draws an influential distinction between parodies (1) that target a specific work (comment, critique or making fun typically fall under fair use), and those (2) that use the work as a weapon or vehicle by means of which to attack an external target (not fair use if a means to avoid “working up something fresh”).

The precedent set by *Campbell* has been followed in a number of other cases: *Suntrust Bank v Houghton Mifflin Company (Gone with the Wind/The Wind Done Gone)* and *Louis Vuitton Malletier S.A. v Haute Diggity Dog, LLC (Louis Vuitton/Chewy Vuitton)* (figures 21, 22 appendix 6).

2.7 The Netherlands

The Netherlands recognises a right to caricature, parody or pastiche in Article 18b of the *Dutch Copyright Act 1912 (as amended in 2004)*. Article 18b states:

“Publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche will not be regarded as an infringement of copyright in that work, provided the use is in accordance with what would normally be sanctioned under the rules of social custom¹⁵⁴.”

154 IViR, University of Amsterdam, Unofficial English Translation of the *Dutch Copyright Act 1912 (as amended)* at http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf. Specifically, The Netherlands transposed the InfoSoc Directive into their law through the Act of July 6, 2004, which became effective on September 1, 2004 introducing Article 18b amongst other provisions.

An analysis of this section is carried out below within the context of *Miffy*¹⁵⁵ and *Darfurnica*¹⁵⁶ - the two leading cases in Dutch copyright (and trademark) law which illustrate the manner in which Article 18b of the *Copyright Act 1912 (as amended)* has been applied. Whilst freedom of expression is strongly embedded in the Dutch values it has not always been transposed into the Dutch courts. According to Hugenholtz, “courts in the Netherlands have long been hesitant . . . to apply Article 10 of the European Convention on Human Rights (ECHR) in copyright cases”¹⁵⁷. However, as he goes on to point out, a few cases in the early nineties began challenging this position.

2.7.1 A Balancing Act in the early 1990’s: Copyright Law and Freedom of Expression

In 1994, the case of *De Volkskrant*¹⁵⁸ probed the balance between copyright law and freedom of expression. The case involved an interview, published in the daily newspaper *De Volkskrant*, with a well-known ‘corporate raider’¹⁵⁹. The piece was illustrated by a photograph taken in the interviewee’s office which displayed the interviewee’s office and the works of art within the office. The photograph in particular portrayed a statuette of an archer, aiming, as it would seem, at the head of its collector. The Dutch licensing society for visual arts, *Stichting Beeldrecht*, claimed damages for copyright infringement. *De Volkskrant* admitted that no statutory copyright limitation was applicable as Dutch law does not recognise a *fair use* defence. Instead, the defendant invoked the protection of Article 10 ECHR. Whilst the Court ultimately found in favour of the plaintiff, the collecting society, the Court also pointed out that under certain circumstances, copyright law may conflict with freedom of expression under Article 10. In considering Article 10, the Court pointed out that there had clearly been a ‘shift in legal doctrine since the 1980’s’¹⁶⁰. Nevertheless, the Court considered it unnecessary to invoke Article 10 because it concluded that depicting the work of art in such a prominent manner was not really necessary for the purpose of *De Volkskrant*’s news reporting.

Whilst a later case – in 1998 – saw copyright law triumphing over freedom of expression in the *Anne Frank* and the ‘missing pages’ case¹⁶¹, the balance between copyright law and freedom of expression had begun to be challenged, although cases continued to be decided in favour of the owner of the original work.

155 *Mercis B.V. /Punt.nl B.V.* District Court of Amsterdam, 22 December 2009 LJN: BK7383. Overturned by Court of Appeal of Amsterdam, decision 13 September 2011, LJN: BS7825, (*Mercis B.V./Punt.nl B.V.*)

156 Nadia Plesner Joensen /Louis Vuitton Malletier SA. Court in preliminary proceedings of The Hague (27 January 2011). Overturned by District Court of The Hague, 4 May 2011, IER 2011/39.

157 P. B. Hugenholtz, Copyright and Freedom of Expression in Europe in R. C. Dreyfuss, H. First, D. L. Zimmerman (eds.) chapter 14, *Expanding the Boundaries of Intellectual Property* (Oxford: Oxford University Press; 2001), pp. 343-364 at pp. 353-354.

158 *Boogschutter*, District Court of Amsterdam 19 January 1994, [1994] Informatierecht/AMI 51. For a commentary see, *ibid*, P.B. Hugenholtz at p. 354.

159 For a commentary see, *ibid*, P.B. Hugenholtz.

160 *Ibid*.

161 *Anne Frank Fonds v. Het Parool*, Court of Appeal Amsterdam 8 July 1999 [1999] Informatierecht/AMI 116.

2.7.2 The Harry Potter/Tanja Grotter case

The case of *Harry Potter/Tanja Grotter*¹⁶² brought the issue of parody to the forefront – a year before the copyright law was amended to recognise a parody right. The District Court of Amsterdam had to decide whether Demitri Yemet's *Tanja Grotter en de Magische Contrabas* (*Tanja Grotter and the Magic Double Bass*) (hereinafter *Tanja Grotter*) (figure 23, appendix 7) infringed the copyright of J.K. Rowling's *Harry Potter and the Philosopher's Stone* (hereinafter *Harry Potter*) (figure 24, appendix 7) or Time Warner's trade mark rights in its Harry Potter trade mark.

The defendants argued that Rowling's copyright was limited in the sense that she used common-place ideas and concepts such as orphans, magic powers, magical objects which could be used by any author to write a story. Secondly the defendants argued that *Tanja Grotter* functioned as an ironic parody, creating a contrast between the two books. By putting *Tanja Grotter* in a Russian setting, Yemets argued that he "intended to mock the cult of Harry Potter and the commercialisation which surrounded it Yemets ridiculed Rowling by taking the characters that she had taken from the public domain and making them larger than life, thus giving them an ironic character"¹⁶³. The defendant also invoked freedom of expression under which parodies should be allowed.

The Court considered the plots and the points of similarity between the two books and concluded that under Article 13 of the Dutch Copyright Act, *Tanja Grotter* was an 'adaptation' of Rowling's copyright-protected novel, *Harry Potter*, rather than being a "new and original work". Article 13 reads as follows:

*"The reproduction of a literary, scientific or artistic work includes the translation, arrangement of music, cinematographic adaptation or dramatisation and generally any partial or total adaptation or imitation in a modified form, which cannot be regarded as a new, original work"*¹⁶⁴.

The Court rejected the defendant's parody defence. The Court pointed out that the object of parody is to make the original work the subject of laughter, with the original being the dominating factor. Furthermore, the two works should not be in competition with each other. "The Double Bass fell on the wrong side of this distinction and could not be considered a parody. Yemets did not do enough to show the contrast between his work and Rowling's. He did not ridicule Harry Potter and the cult that surrounds him 'to such an extent so as to incite laughter'"¹⁶⁵.

162 *Rowling /Uitgeverij Byblos BV* [2003] E.C.D.R. 23 (RB (Amsterdam)).

163 For a commentary on the case, see, I. Simon, Case Comment: Parodies: A Touch of Magic [2004] 26(4) *European Intellectual Property Review*, pp. 185-190 at p. 186.

164 IViR, University of Amsterdam, Unofficial English Translation of the *Dutch Copyright Act 1912 (as amended)* at http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf

165 I. Simon, Case Comment: Parodies: A Touch of Magic [2004] 26(4) *European Intellectual Property Review*, pp. 185-190 at p. 186.

2.7.3 The Turning Point

The ‘turning point’ in Dutch copyright law came with the statutory recognition of the right to parody, pastiche and caricature in 2004, following the implementation of the *InfoSoc Directive*¹⁶⁶. After the introduction of the new Article 18b, the Courts showed a greater willingness to invoke freedom of expression within the context of parody. Commenting on this new provision Guibault states that the “courts more often than not find in favour of the parodist”¹⁶⁷.

One of the first cases to apply article 18b, was the *Darfurnica*¹⁶⁸ case. In this case Nadia Plesner, an artist, parodied *Louis Vuitton*’s product in her work ‘Simple Living’. The work showed an African child (from Darfur) holding a Chihuahua dressed in pink and a *Louis Vuitton* handbag (**figures 25, 26 appendix 7**). This was a reference to Paris Hilton of whom many pictures have been published in which she is depicted with the same attributes. Plesner gave the following explanation:

“Since doing nothing but wearing designer bags and small ugly dogs apparently is enough to get you on a magazine cover, maybe it is worth a try for people who actually deserve and need attention. If you can’t beat them, join them! This is why I chose to mix the cruel reality with showbiz elements in my drawing ‘Simple Living’¹⁶⁹.”

In 2008 Plesner used ‘Simple Living’ as an illustration on T-shirts and posters which she sold for the benefit of an organisation dedicated to helping the victims in Darfur. *Louis Vuitton* alleged that Plesner infringed the copyright and trade mark in their “Audra” bag: its multicolour canvas design was the same depicted by Plesner (**figure 27, appendix 7**).

In the District Court of The Hague, *Louis Vuitton*’s claim was accepted in *ex parte* proceedings on 27 January 2011 prohibiting Plesner and the gallery to infringe the Community design rights of *Louis Vuitton*. As Plesner was not present at the *ex parte* proceedings in January 2011, she counter-sued *Louis Vuitton* in March 2011¹⁷⁰. In preliminary proceedings in the Court of The Hague in April 2011, both parties relied on the fundamental rights conferred

166 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

167 L. Guibault, The Netherlands: Darfurnica, Miffy and the right to parody! [2011] 3 *Journal of Intellectual Property Information Technology and E-Commerce Law*, pp. 236-248.

168 ‘Darfur Nica’ is created to the same dimensions as artist Pablo Picasso’s ‘Guernica’ – a 1937 polemic against the carpet-bombing of the Basque town of the same name.

169 Nadia Plesner Joensen /Louis Vuitton Malletier SA) Court in preliminary proceedings of The Hague (27 January 2011). Overturned by District Court of The Hague, 4 May 2011, IER 2011/39.

An unofficial English translation of the case made available by Kennedy Van der Laan attorneys in Amsterdam, the firm that represented Nadia Plesner. Available at http://www.mediareport.nl/wp-content/uploads/2011/03/kvdl-716759-v1-english_translation_court_order_louis_vuitton_vs_plesner_27_january_2011.pdf

170 An unofficial English translation of the case (389526/ KG ZA 11-294 – 4 May 2011) made available by Kennedy Van der Laan attorneys in Amsterdam, the firm that represented Nadia Plesner is available at <http://www.mediareport.nl/wp-content/uploads/2011/05/english-translation-plesner-vs-louis-vuitton-judgement-4-may-2011.pdf>

upon them by the ECHR, with Plesner relying on Article 10 (freedom of expression) and *Louis Vuitton* relying on Article 1 (protection of property). *Louis Vuitton* further sought an injunction based on their Community Design registration for the multi-colour canvas design of their handbag, claiming that the use of the handbag affected their reputation.

The preliminary assessment of the Court of The Hague was that in the present circumstances, the importance of letting Plesner continue to freely express her (artistic) opinion in the work ‘Simple Living’ outweighed the importance of *Louis Vuitton*’s peaceful enjoyment of her property¹⁷¹. Moreover, the Court of The Hague pointed out that the fact that *Louis Vuitton* is a famous company whose products are very renowned means that they should put up with critical use to a greater degree than other claimants¹⁷². Elaborating on this point the Court went on to state:

“The circumstances that Plesner has begun to increasingly use the illustration ‘Simple Living’ as an eye-catcher for its activities, under preliminary judgement does not make her use unlawful. Firstly as already considered, the illustration is to be regarded as a lawful statement of the (artistic) opinion, of Plesner¹⁷³.”

The judge ruled that a restriction of the freedom of art in this case would be contrary to Article 10 ECHR. Previously, following the *ex parte* proceedings in January 2011, the District Court of The Hague had ordered a ban on the use of the design valid throughout the European Union and ordered a penalty of €5,000 per day. This would have meant that Plesner would have had to pay €400,000 on the day of the interim order. Quashing the order of 27 January 2011, the Court of The Hague decided to apply the sentence retroactively and therefore abolished the accrued penalty keeping in line with the jurisprudence of the European Court of Human Rights¹⁷⁴. The Court also ordered *Louis Vuitton* to pay the costs of the proceedings, including the costs met by Plesner totalling €15,334.31 and declared the judgement provisionally enforceable.

The approach taken by *Darfurnica* in relation to parody was reflected and cemented in the *Miffy* case. Netherland’s well-known rabbit *Miffy*¹⁷⁵ or *Nijnte* (in Dutch) (**figure 28, appendix 7**) was at the heart of one of the leading cases which applied Article 18b. In this case a total of seven cartoons of *Miffy* were posted on the defendant’s website Punt.nl. The issue was that *Miffy* was depicted in unusual incarnations which included adult themes and further included parodies of *Miffy* at a party (**figure 29, appendix 7**), a red-eyed *Miffy* sniffing cocaine or *lijntje* and *Miffy* in an airplane about to crash into a skyscraper or *nijn-eleven* (**figure 30, appendix 7**). The creators of *Miffy*, Mercis and Bruna objected to these on the basis of their copyright and trade mark rights.

171 For a commentary of the case, see, L. Guibault, The Netherlands: *Darfurnica*, *Miffy* and the right to parody! [2011] 3 *Journal of Intellectual Property Information Technology and E-Commerce Law*, pp. 236-248 at pp. 236-237.

172 *Supra* n. 170 unofficial translation of the decision of 4 May 2011, para 4.8

173 *Ibid.*, at para 4.9.

174 *Ibid.*, paras 4.10-4.11. Also see, *supra* n. 167 L. Guibault p. 237.

175 *Mercis B.V. /Punt.nl B.V.* District Court of Amsterdam, 22 December 2009 LJN: BK7383. Overturned by Court of Appeal of Amsterdam, decision 13 September 2011, LJN: BS7825, (*Mercis B.V./Punt.nl B.V.*)

The defendants argued that their work was covered by Article 18b of the *Copyright Act*. The wording of Article 18b which is set out above reads that “the use must be in accordance with what would normally be sanctioned under the rules of social custom”. ‘Social custom’ also appears in Article 15a (quotation) and 16 (educational use) and therefore is not uncommon in Dutch copyright law. The District Court of Amsterdam partly accepted the defendant’s parody defence but awarded an injunction relating to two of the seven drawings. The Court held that five of the drawings carrying adult themes with a humorous intent together with lack of competition or confusion, contrasted with the small children’s world that *Miffy* occupies and therefore can be accepted as parodies¹⁷⁶. However the Court rejected the cartoons of *Miffy* sniffing cocaine, *lijntje*, and crashing into a skyscraper *nijn-eleven* because in accordance with ‘social custom’ under Article 18b they were deemed to affect the reputation of the trade marks by associating *Miffy* with drug use and terrorism.

On appeal, the Court of Appeal *reversed* the ruling in first instance and declared that parodies of *Miffy* do not infringe copyright owned by Mercis and Bruna and are not necessarily unlawful. The Court found that all images can be regarded as admitted parodies including the two which were banned. As Guibault argues, the Court of Appeal drew a more principal line:

All cartoons clearly have a humoristic and ironising nature, even though not everyone will think it is funny. Hence, these parodies cannot be forbidden based on copyright law or trademark law¹⁷⁷.

The Netherlands – Summary of the Law

The Netherlands implementing the 2001 InfoSoc Directive into national law introduced a right to parody under Article 18b of the Copyright Act 1912 (as amended). Prior to the enactment of this provision, the Dutch courts appeared to be hesitant to extend freedom of expression – a right well recognised in Dutch society – to parody cases. Cases such as *De Volkskrant*, *Anne Frank* and *Tanja Grotter/Harry Potter* (figures 23, 24, appendix 7) were reflective of this.

However, recognising a right to caricature, parody or pastiche has changed this position. The law states that a work of caricature, parody or pastiche will not be considered an infringement of copyright in literary, scientific or artistic work as long as it is used in accordance with what would normally be sanctioned *under the rules of social custom*.

The case of *Darfurica* which represented a child from Darfur holding a *Louis Vuitton* bag and a Chihuahua dressed in pink (figures 25, 26, 27, appendix 7) and *Miffy* (figures 28, 29, 30 appendix 7) tested new Article 18b to its limit, in particular social custom. Both cases upheld the right to parody and the freedom of expression.

176 For a commentary on the case, see, L. Guibault, The Netherlands: Darfurnica, Miffy and the right to parody! [2011] 3 *Journal of Intellectual Property Information Technology and E-Commerce Law*, pp. 236-248 at pp. 237-238.

177 *Ibid.*, at p. 238.

3. Conclusion

This review of seven jurisdictions has identified numerous criteria developed by legislators and judicial interpretation for assessing permitted and not-permitted parodic uses of copyright works. Some of these criteria form part of a cumulative test where each requirement must be met for an exception to be available (as will be the case in Canada, and perhaps France), some are factors that must inform an overall assessment whether there is non-infringing use (such as in Australia and the USA), sometimes in the light of constitutional or human rights guarantees (such as in Germany and The Netherlands).

In conclusion, the key criteria are now listed, and then interpreted for their underlying economic and non-economic rationales. The order progresses from criteria most restrictive of the scope for unlicensed parodies to criteria that are most permissive. It should be noted that some criteria can easily be combined with any other (such as the requirement to acknowledge the source work for the parody), while others are incommensurate (in that they derive from a different logic, and may not be applied coherently together – such as the criteria of ‘social custom’ and ‘non-commerciality’):

Criterion 1: Parody must be non-commercial;

Criterion 2: Parody must not have an adverse effect on the market for the original;

Criterion 3: Parody must not use more of the original than necessary;

Criterion 4: Parody must add some significant new creation;

Criterion 5: Parody must have humorous or critical intention;

Criterion 6: Parody must be directed at the work used (‘target’);

Criterion 7: Parody must not harm the personality rights of the creator of the original work;

Criterion 8: Parody must be sanctioned under the rules of social custom;

Criterion 9: Parody must acknowledge source of original work.

Criterion 1: Parody must be non-commercial.

This criterion is only explicit as a *cumulative requirement* in the new Canadian legislation (no infringement if the new work “is done solely for non-commercial purposes”), although it is present as a factor contributing to the assessment in most of the other jurisdictions considered. The US fair use doctrine (Section 107, Copyright Act 1976) includes as factor 1 the determination of “[t]he purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes”.

From an economic perspective, non-commerciality may appear to be shorthand for an evaluation of potential competition, i.e. substitution of the original work by the parody. Yet the criterion is much too strong for that purpose, and does not appear to have a sound base in economic theory. The incentive copyright law is designed to provide, will only be affected by a lost sale, yet commercial parody may well increase demand for the original, or be sold in a different market altogether.

From a non-economic perspective, the most effective expressions may well embrace commercial use (such as in the commercial media). So if freedom of speech is at stake, a requirement for non-commercial use again seems overly demanding¹⁷⁸.

Criterion 2: Parody must not have an adverse effect on the market for the original.

This criterion is prevalent in most jurisdictions considered: Factor 4 of the Australian test under Section 40(2) of the Copyright Act 1968 (as amended) requires the consideration of “[t]he effect of the dealing upon the potential market for, or value of, the work or adaptation”; Factor 4 of Section 107 of the US Copyright Act 1976 requires a determination of “[t]he effect of the use upon the potential market for or value of the copyrighted work.” In France too, a parody is not permitted to be commercialised in competition with the original work¹⁷⁹.

From an economic perspective, Rogers, Tomalin and Corrigan capture the possible market effects of the presence of parodies succinctly¹⁸⁰: “In general, the existence of more parody could both decrease demand (e.g. by influencing consumers’ views on the value of the original work) or increase demand (e.g. by increasing the awareness of consumers to the original work and hence acting as ‘advertising’).”¹⁸¹

178 The point was made by the U.S. Supreme Court in *Campbell*, rejecting the proposition that the parody’s commercial nature rendered the parody presumptively unfair: *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 114 S. Ct. 1164 (1994).

179 A requirement that a permitted reproduction “does not conflict with a normal exploitation of the work” is also part of the Berne three-step-test (Art. 9(2), Berne Convention) which delimits the possible scope of national copyright exceptions. Art. 13 of the TRIPS Agreement (1994), Art. 10 of the WIPO Copyright (Internet) Treaty (1996), and Art. 5(5) of the EU Information Society Directive (2001/29/EC) make the test applicable to all copyright exceptions and limitations.

180 M. Rogers, J. Tomalin and R. Corrigan, *The Economic Impact of Consumer Copyright Exceptions: A literature review* [2009], London: Consumer Focus, p. 32.

181 Landes and Posner characterise certain parodies as complementary goods rather than substitutes, performing a function similar to book reviews: W.M. Landes & R.A. Posner, Fair Use, Parody and Burlesque, in *The Economic Structure of Intellectual Property Law* [2003]. Cambridge (Mass): HUP Belknap Press, p. 150.

However, legislators and judges appear ambiguous, if not confused, when attempting to articulate what “the financial interest protected by copyright” is. Germany emphasises the equitable participation of the creator in any exploitation of copyright works; France focuses on substitution in that under no circumstances the public should be deceived about the origin of the parody. Canada’s proposed legislation “includes” substitution as a “substantial adverse effect, financial or otherwise” in test (d): “the use of, or the authorisation to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one”¹⁸².

So what may be non-substitution harm, “financial or otherwise”? One possibility is to conceive of permitted parodies as a lost licensing opportunity. Under such a conception, paradoxically the presence of parodies may increase sales but still may conflict with “normal exploitation”, since more could be earned if they were licensed. Another possibility is that parodies may damage the sales of works not by substitution but by highlighting dubious qualities of the original. In summary, there has been no coherent articulation in case law of what may amount to non-substitution harm. Evaluating economic harm to rights holders without also assessing the value of parody to users appears inappropriate¹⁸³.

Criteria 3, 4, 5 & 6

Criteria 3, 4, 5 and 6 all focus *not* on the market effects but on the contribution and intention of parodic works. This kind of assessment surfaces in most jurisdictions reviewed, and will be discussed together. In the French line of cases, parody defences were denied by the courts if the use was just commentary (Jamel Debouze), intended as an advertisement (Marcel Pagnol), or if the point could have been made by using different images (Greenpeace)¹⁸⁴. In Germany, permitted parodies must reflect a transformative inner distance (*innerer Abstand*) between original and parody, and by the ‘necessity’ of having borrowed, characteristics of the original work must pale in comparison¹⁸⁵. Similarly, UK case law until 1960 relied on dicta in *Glyn*¹⁸⁶ that “no infringement of the plaintiff’s rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result”.

182 Bill C-11 amending *Copyright Act*, RSC, 1985, c. C-42:

at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&File=45#7>

183 As Rogers et al. argue [2009, p. 32]: “The total value of consumers’ benefits (or consumer surplus) from parody may be very large and, in general, this will have no direct association with the possible economic damage.”

184 Marcel Pagnol (*Pagnol v/ Société VOG*, *Unpublished*), (Tribunal de Grande Instance de Paris, 1ère Chambre, Section 1, 30/4/1997); Jamel Debouze (*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* Cour d’Appel de Paris, 18/9/2002, Dalloz 2002 A.J. p.3208); Greenpeace (*Greenpeace France et New-Zealand c/ SPCEA* Cass. civ., 1re ch., 8 avr. 2008, n° de pourvoi: 07-11251).

185 *Alcolix* [1994] GRUR 206; *Gies-Adler* [2003] (I ZR 117/00).

186 [1915] 1 Ch 261.

As assessment factors, Australia's fair dealing defence requires a consideration of "the purpose and character of the dealing" and "the nature of the work or adaptation"¹⁸⁷. Similarly, the statutory factors for determining "fair use" in the United States include "the purpose and character of the use" and "the nature of the copyrighted work"¹⁸⁸. Following *Campbell*, the important inquiry is not whether the use is a commercial or non-profit one, but whether it is 'transformative' – i.e. does it add 'something new, with a further purpose or different character, altering the first with new expression, meaning or message'¹⁸⁹. 'Target' parodies (directed critically at a work) are more likely to pass this test than 'weapon' parodies that might simply draw on a work "to get attention or to avoid the drudgery in working up something fresh"¹⁹⁰.

Wendy Gordon, in a widely cited article¹⁹¹, has attempted to give an economic explanation for the "fair use" doctrine's emphasis on transformative use: these are uses where the rights owner may have a strong motivation for refusing to licence in order to protect his/her reputation. In Gordon's terms, this constitutes a secondary market failure, as leaving licensing to rights owners will not ensure the most efficient use of their works¹⁹².

An alternative economic explanation for the emphasis of parody case law on transformative and critical qualities (that could not be achieved without the use of the original) is much more straightforward: Innovative parodies are precisely the kind of creative activity that copyright is meant to incentivise in the first place, and if parodic use can take place without leading to under-production of original works, it should be permitted¹⁹³.

Finally, from a non-economic perspective, parody criteria affording special treatment to transformative and critical uses also naturally ally with the protection of the parodist's right to freedom of speech¹⁹⁴.

187 Copyright Act 1968 (amended 2006), section 41A.

188 Copyright Act 1976, section 107.

189 *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 114 S. Ct. 1164 (1994), at p. 579.

190 *Ibid.* at p. 580.

191 Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors", 82 *Columbia Law Review* 1600 (1982)

192 Gordon explains the underlying economics as an "endowment effect": "The logic of endowment effect is this: the hostile use causes harm to reputation and peace of mind. Reputation and peace of mind are 'priceless' in the sense that they have high endowment effects. If an author had a right to refuse permissions, she might not sell licenses, even though, were the entitlement reversed, she might not be able to buy the user's silence. In cases of high endowment effect, therefore, the 'highest-valued use' can change as entitlements change, and the market provides no stable guide to social value." W.J. Gordon, "Market Failure and Intellectual Property: A response to Professor Lunney" (2002), 82 *Boston University Law Review* 1031, at 1033.

193 For a good discussion of the trade-off between under-production and under-use, and the importance to distinguish static (allocative and productive efficiency in a constant environment) and dynamic effects (such as induced changes), see C. Handke, *The Economics of Copyright and Digitisation* [2010], A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy, London: SABIP, section 8, at 48ff. There are important implications for studying copyright innovation empirically: "Humdrum innovation concerns all facets of technological innovations and can be assessed with the familiar instruments of empirical research on innovation. Content creation concerns aesthetic and intellectual variations that distinguish different copyright works from each other." C. Handke, *Economic Effects of Copyright: The Empirical Evidence So Far* [2011], Report for the U.S. National Academies of the Sciences, p. 15.

194 See for example M. Spence, Intellectual Property and the problem of parody [1998] 114 (Oct) *Law Quarterly Review*, pp. 594-620, see in particular section (iv): Parody as a problem of free speech, at 608ff: "In considering

Criteria 7 and 8

Criteria 7 and 8 focus on aspects of parodic treatment for which it is hard to find an underlying economic rationale¹⁹⁵. In fact, perceived personality interests of creators may well be in conflict with many economically beneficial digital innovations. In the UK, parodists potentially face liability under the right to object to false attribution of authorship (section 84(1), CDPA 1988), and the right to object to derogatory treatment (section 80(1), CDPA 1988)¹⁹⁶. In France a distinction is made between economic rights in a work and the author's *droit moral*, while in Germany, monistic theory discourages the separation of economic and moral rights. However, commercial practice regarding the moral rights does not differ as much between civil and common law jurisdictions as many commentators suggest¹⁹⁷. For example, while in Germany, moral rights (*Urheberpersönlichkeitsrechte*) cannot be waived, they are often not enforceable if use conforms to the usual market practice, and even can be contractually "transferred" (*übertragen*) to be exercised on behalf of the author by a third party. With regard to the question of infringement, there is no separate test for moral rights. If a parody infringes copyright it also infringes the author's moral rights¹⁹⁸. The case law in the jurisdictions investigated offers no coherent rationale for providing a different standard for assessing derogatory treatment with respect to parodies of copyright works than, say, for defamation with regard to natural persons¹⁹⁹.

Social custom or social norms are often seen as an alternative to law in the system of social

the free speech argument, I shall take it as axiomatic that our legal system recognises a principle that speech should be free, whether because free speech is thought necessary to the discernment of truth, to citizen participation in a democracy or to speaker or listener autonomy. I shall also take it as axiomatic that the principle applies to speech which is commercially motivated." The economic premise for reforming parody law has been criticised by Lionel Bently and Robin Jacob: L. Bently, Parody and Copyright in the Common Law World [2006] in *Copyright and Freedom of Expression*, Proceedings of the ALAI conference Barcelona, Huygens, pp. 355-389; R. Jacob, Parody and IP Claims: A Defence? – A right to Parody? [forthcoming 2013] in *IP at The Edge*, Cambridge University Press.

- 195 These criteria chime with the third leg of the Berne three-step-test that national copyright exceptions and limitations must "not unreasonably prejudice the legitimate interests of the author (Berne Convention Art. 9(2), *supra* n. 179).
- 196 Spence argues that the question of when a parody will amount to a derogatory treatment is "clearly unsettled" [p. 597]: "Some commentators believe that the right to prevent derogatory treatment is 'of no general relevance to the topic of parody' because a parody will not usually be prejudicial to the author's honour or reputation. Others claim that an author's moral rights 'are often outraged by a parodic or burlesque treatment of his work' and that 'the creation of an express integrity right reinforces the author's armoury against the parodist'. Still others claim that this may, but need not be, the case and that the author's moral right will only be infringed where the parody is 'offensive to the spirit of the original work'."
- 197 It had been assumed, when the Copyright Designs and Patents Act 1988 was adopted, that the inclusion of the possibility of waiver was likely to render most moral rights valueless: their existence would become a matter of bargaining, not right and, waiver would thus be very widespread (R. Durie, *Moral Rights and the English Business Community* [1991], 2 *Entertainment Law Review*). Kretschmer & Bently's 2011 survey of visual creators indicates that only 17% waive their moral rights: p.95]
- 198 *Alcolix* [1994] GRUR 206.
- 199 In any case, the constitutional and human rights framework regarding freedom of speech and expression should shape what is considered to be "unreasonably prejudice [to] the legitimate interests of the author", i.e. the third leg of the Berne three-step-test: cf. C. Geiger, J. Griffiths, R.M. Hilty, Declaration on a Balanced Interpretation of the 'Three-Step-Test' in *Copyright Law* [2008] 39(6) *IIC*, pp. 707-713.
-

control.²⁰⁰ On the other hand, the concept of social custom is also imported into the standards for determining liability within many branches of law.²⁰¹ Rules of social custom are both inherently conservative and evolutionary (as custom is defined over time). Dutch case law appears to suggest that the concept of social custom is able to respond to new attitudes and practices, such as the sudden arrival of digital technologies enabling parodic appropriation, editing, remixing and re-presentation.

Criterion 9: Parody must acknowledge source of original work.

The requirement to acknowledge the original work that forms the basis of a parody is implicitly served by all successful parody, as parody fails as a genre if the audience misses the object of exaggeration, ridicule or criticism. Typically, parody (and related cultural practices) trade on this allusion being implicit, i.e. as a connection to be formed in the mind of the audience. It therefore appears inappropriate to require explicit signposting of sources as a rule. Canadian legislation²⁰² which received Royal Assent in June 2012 qualifies the requirement to mention the source (existing work or other subject matter, name of author, performer, maker or broadcaster) “if it is reasonable in the circumstances to do so”.

200 R.C. Ellickson, Law and Economics Discovers Social Norms [1998] 27 *Journal of Legal Studies* 537.

201 R.A. Epstein, The Path to ‘The T.J. Hooper’: The Theory and History of Custom in the Law of Tort [1992] 21 *Journal of Legal Studies* 1.

202 Bill C-11 amending *Copyright Act*, RSC, 1985, c. C-42:
at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&File=45#7>

3.1 Summary

In conclusion, the law of parody reviewed in seven jurisdictions offers numerous criteria for assessing the scope for permitted parodies, some of which can be interpreted from underlying economic rationales. However several key aspects remain unresolved:

(1) How to address the balance or trade-off between economic (e.g. substitution; innovation) and non-economic (e.g. freedom of expression of users; personality interests of the author) factors.

(2) Regarding economic factors (which were the key focus of this study), key questions are not answered by legislators and court in a coherent manner. In particular, there is a prevalent ambivalence about the concept of economic harm: Can there be a gap between substitution and normal exploitation? In other words, can there be parodies that do not function as a substitute to an original work and still affect the normal exploitation in an economically harmful way? How do the benefits to users (and indeed general welfare implications from follow-on innovation, e.g. the creative contribution of the parodist) feed into the assessment of economic harm?

While the trade-off between economic and non-economic factors (1) involves perennial methodological issues of jurisprudence that may not be solved by positive law, the alleged economic effects of parody (2) are open to empirical investigation.

Appendix

These Appendices offer examples of parodies that were subject to key court proceedings, as critically reviewed in the country sections of this report. A visual and textual appreciation of the artefacts that gave rise to legal disputes is essential to understand the scope of copyright infringement, as developed in the seven jurisdictions under examination. These illustrations are reproduced in accordance with section 30(1) Copyright, Designs and Patents Act 1988 (as amended).

“Section 30: Criticism, review and news reporting

(1) Fair dealing with a work for the purpose of criticism and review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public”.

Appendix I – United Kingdom

Twentieth Century Fox Film Corp v. Anglo-Amalgamated Film Distributors (1965)

Figure 1



Figure 1 Source: <http://www.paulgormanis.com/?p=1820#more-1820>

Figure 1 Notes: Figure 1 depicts the Twentieth Century Fox poster for the 1963 film *Cleopatra*. Two years later in 1965, Twentieth Century Fox brought a copyright infringement case against the creators of *Carry on Cleo*.

Figure 2

'Carry on Cleo' Poster (A parody of the 'Cleopatra' film poster)



Figure 2 Source: <http://www.paulgormanis.com/?p=1820#more-1820>

Figure 2 Notes: The issue here was that the poster for *Carry on Cleo* created by British film poster artist, Tom Chantrell, had parodied the *Cleopatra* poster above. The main point of contention was that the *Carry On* production had made use of the Elizabeth Taylor/Richard Burton set including full use of props in designing the humorous *Carry on Cleo* poster artwork. The Court held that the underlying work of the *Carry on Cleo* poster amounted to copyright infringement “on visual comparison ...” and rejected the defendant’s parody defence.

Appendix II - Canada

Ludlow Music Inc. v. Canint Music Corp (1967)

Figure 3

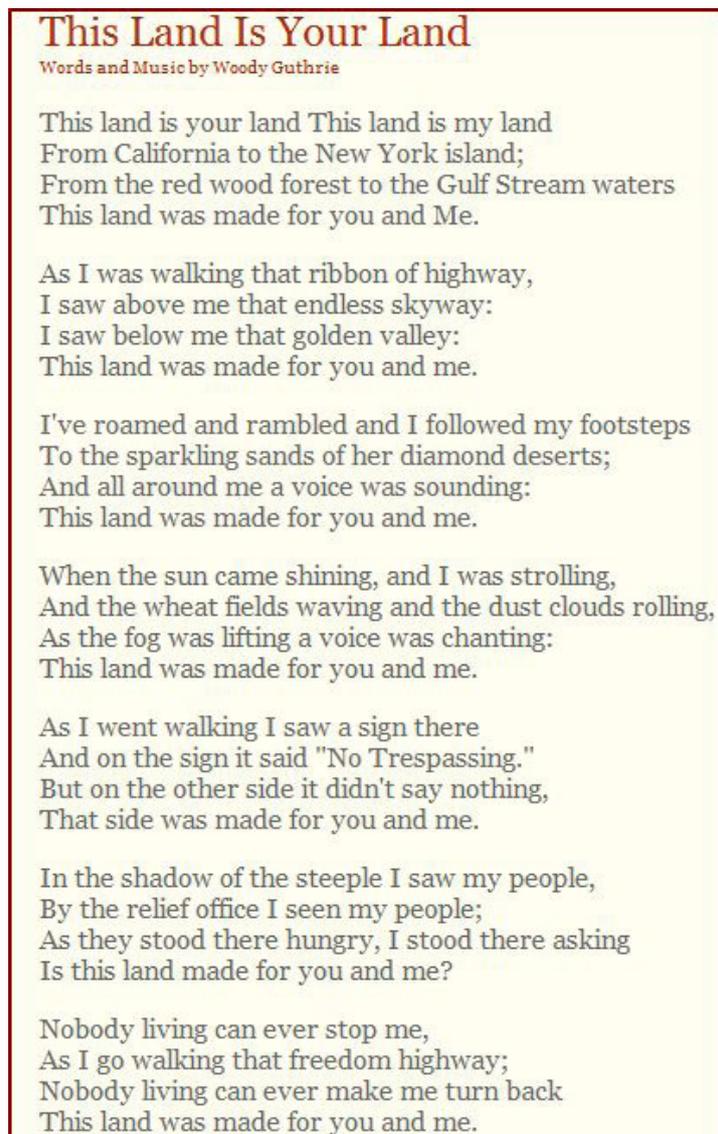


Figure 3 Source: http://woodyguthrie.org/Lyrics/This_Land.htm

Figure 3 Notes: Figure 3 sets out the lyrics of the famous song by Woody Guthrie 'This Land is Your Land', published by Ludlow Music in 1958 in USA and Canada. The Canadian version became very popular and led to a parody version of the song titled 'This Land is Whose Land' (Figure 4).

'This Land is Whose Land' – by Brothers-in-Law

Figure 4

1. First came the Norsemen, or Scandinavians,
Extremely coarse men, mostly unshaven,
They wandered inland, they called it "Vinland",
This land that's made for you and me.

cho: This land that's your land, this land that's my land,
This far from Norway, this just won't try land,
Your average Viking had no great liking
For this land that's made for you and me!

2. The early Frenchmen had great persistence,
Despite the Indians' combined resistance,
With righteous feeling, they started stealing
This land that's made for you and me.

cho: This...
This voyageur land, this fleur de lys [pron. "lie"] land,
This decimated, soon separated,
This...

3. Then came the English and assorted henchmen,
Who started fighting with all those Frenchmen,
Through this spot of bother, they told each other,
["I say,] this land is...

cho: This...
This Rule Britannia, steak and kidney pie land,
This land of Tory, of hope and glory,
This...

4. While French and English were busy fighting,
US investors were quietly buying,
We didn't spot it, until they got it,
This land that's...

Last chorus:
This land ain't your land, this land ain't my land,
This all-Canadian, pie-in-the-sky land,
Though we bemoan it, we still don't own it,
This land...

- made by the Brothers-in-Law, 60's.
@political @parody @Canada

Figure 4 Source: <http://mudcat.org/@displaysong.cfm?SongID=7273>

Figure 4 Notes: Figure 4 sets out the lyrics of *'This Land is Whose Land'* performed by the Canadian satirical music group, Brothers-in-Law and published by Canint Music. The group parodied Woody Guthrie's famous song 'This Land is Your Land'. The Court granted an injunction restraining the defendants from selling the parody version of Woody Guthrie's song in order to "protect property rights against encroachment that has no apparent justification". The lack of a parody defence was felt in this case and cases which followed in the 1970's and 1980's also did not uphold parody as a defence to copyright infringement.

Figure 5



Figure 5 Source: <http://tinyurl.com/8abx2f4> (Billboard Magazine, April 8 1967)

Figure 5 Notes: A short discussion of the case (*Ludlow Music Inc. v. Canint Music Corp*) was published in the *Billboard* Magazine on April 8, 1967 at p. 55. The article draws attention to the damage which may be caused to Guthrie's original version, as a result of the parodied version. In particular, the article iterates Ludlow's argument that the new parodied version is "insulting to the Canadian public" and infringes copyright in the original version. At the time, the defendants argued that there is nothing in Canadian or British case law which prohibits replacing original lyrics with new lyrics to an existing copyright tune. The Court, rejecting the defendant's argument held in favour of the plaintiffs, Ludlow Music.

Figure 6

Productions Avanti Ciné-Vidéo Inc. c Favreau (1999)



Figure 6 Source: http://www.youtube.com/watch?v=hceZKUsnELs&feature=player_detailpage [Youtube video; performance in French]

Figure 7

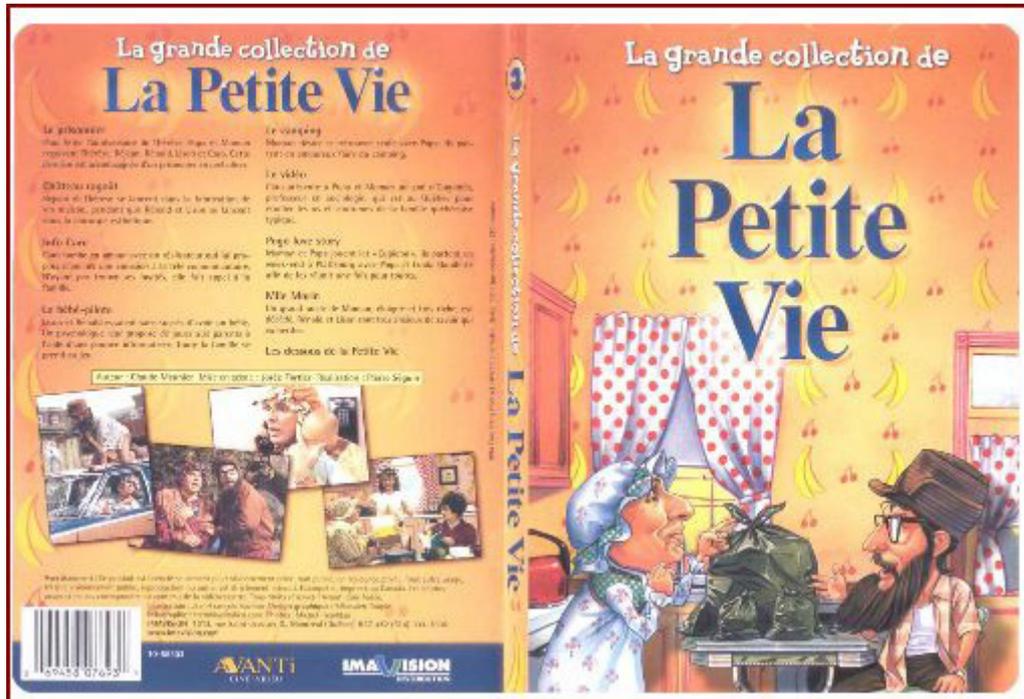


Figure 7 Source: <http://www.cinemapassion.com/jaquettesdvd/La-petite-vie-vol-3---SLIM.php>

Figures 6 & 7 Notes: *La Petite Vie* (figure 7) is a well-known, original situation comedy popular amongst Quebec television viewers. Favreau created a parody version of the original titled *La Petite Vite* (figure 6), which had pornographic undertones and which substantially copied the most important and original elements of *La Petite Vie*. Although the parody defence was rejected by the Court it was clear from the case that the Canadian courts had begun to consider a parody defence within the fair dealing exception.

Appendix III - France

Moulinart sa c. Editions Leopard Masqué. CA Paris, 2me Chambre, 18-2-2011

Figure 8

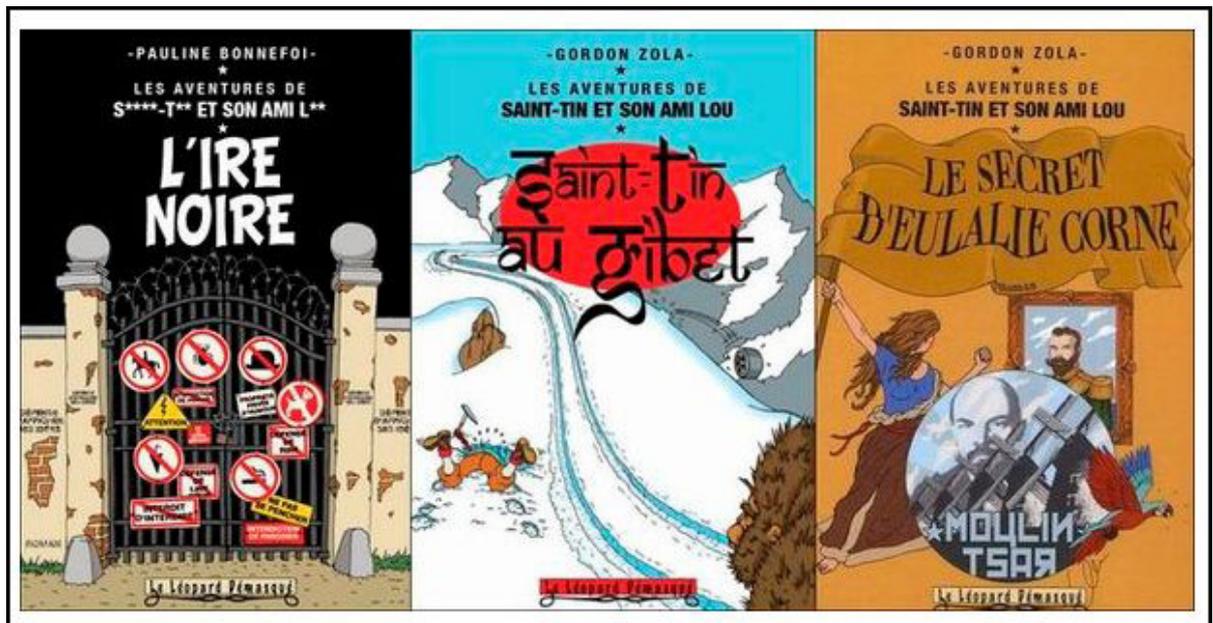


Figure 8 Source: http://www.lexpress.fr/culture/livre/bd/le-leopard-masque-blanchi-pour-ses-parodies-de-tintin_965192.html (*L'Express* (French) Newspaper, February 22, 2011).

Figure 8 Notes: Figure 8 depicts some of the parodied work by Le Leopard Masqué based on the famous *Tintin* comic books (Figure 9). The parodied work whilst relating the adventures of *Tintin* was based on current affairs and went on to make ironic jokes on the geopolitics situation in France. The Moulinart Society alleged that the parodied work infringed copyright in the original *Tintin* publications.

Figure 9

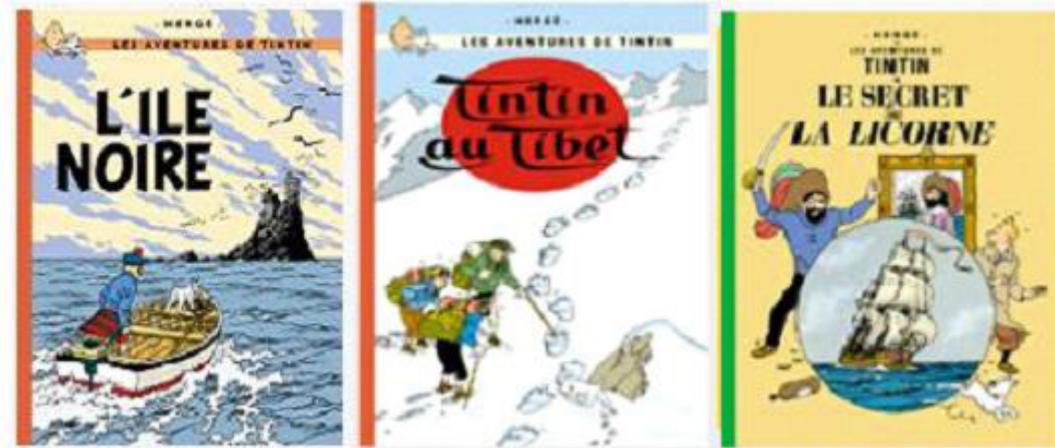


Figure 9 Source: <http://us.tintin.com/> (The Adventures of *Tintin*, Official Website)

Figure 9 Notes: Figure 9 depicts three of the original *Tintin* books by Moulinsart Society, rightsholder of the copyright to *Tintin* publication. Figure 8 (above) shows the parodied work of the original artwork. It should also be pointed out that there were many other *Tintin* books parodied by Le Leopard Masqué. The question for the Court was whether the parodied work infringed the original artwork. The Court of Appeal held in favour of the defendant and upheld the parody defence. The Court further established that it is possible to parody an already humorous work.

Esso c/ Greenpeace France et SA Internet FRCCE 10/04/04 n° 4

Figure 10



Figure 10 Source: <http://www.greenpeace.org/international/en/news/features/greenpeace-wins-against-oil-gi/> (Greenpeace Website)

Figure 10 Notes: Figure 10 portrays a parody of the *Esso* (figure 11) logo with a ‘double dollar sign’. *Esso* claimed copyright infringement, and also argued that the parody version would confuse customers into thinking that they were at a real *Esso* site thereby damaging their “good reputation” and infringing their trademark. The Court rejecting *Esso*’s arguments held in favour of the defendants, *Greenpeace* stating that the parody was within acceptable limits of the freedom of expression defence.

Figure 11



Figure 11 Source: <http://www.esso.fr/Europe-French/PA/default.aspx> (*Esso France*)

Figure 11 Notes: Figure 11 illustrates the original *Esso* logo on which *Greenpeace* based their ‘double dollar’ parody. The Court of Appeal threw out *Esso*’s claims of damage to “good reputation” and trademark infringement

Appendix IV – Australia

AGL Sydney v Shortland C.C. [1989] 17 IPR 99

Figure 12: Transcript of advertisement

“The format of the advertisement was as follows. A young husband and wife are looking at a vacant block on a half-developed housing estate. Accompanied by their builder (a ‘crusty fellow in his mid-fifties’) they are walking over the block envisaging where the different rooms of their intended house will be. Excitedly, the wife leads them from ‘room to room’ and the builder follows taking notes of various matters. The question of heating is raised and he automatically makes a note ‘Gas Heater’. Then, before the wife embarks on a discussion about kitchen taps, the following dialogue ensues:

Builder: Hang on before we get carried away, there are a couple of fundamental questions like hot water and cooking.

(The husband and wife both look puzzled).

Husband: Uh-huh?

(The builder unrolls the plan and circles key areas of house as he talks.)

Builder: I suggest you go for gas for hot water, cooking and heating your major appliances and you keep electricity for lights, television and *other* appliances.

Husband: Why?

Builder: Basically you’re balancing your energy needs and, because the big jobs are using an economical fuel

Wife: Gas?

Builder: Yeah *For the average home* you’ll save a bundle on fuel costs.

Husband: Makes sense.

Builder: I can’t think of anything that makes more sense. You could even probably afford those fancy taps.

We dissolve to the final graphics as the builder finishes his line. Final graphic reads:

Energy balanced homes save money.

LIFESTYLE GAS

The respondent was a supplier of electricity and was concerned about the number of electric hot water systems that were being changed for gas appliances. Moreover, there was soon to be launched on the market a new electrical twin heater. The respondent therefore wished to prepare an **advertisement 'replying' to the applicant's campaign**. Essentially, **the respondent's view was that the applicant's advertisement was misleading in that it suggested that balanced energy supplies could be obtained through using gas for the three major energy needs**. It was argued that this would, in fact, result in a substantial imbalance in favour of gas. The respondent's advertising agency therefore developed the following advertisement to counter the effect of the applicant's advertisement. The setting and characters used in the reply advertisement were the same (the same actor played the part of the builder as well) and the same sequence of events was followed. However, the aim of the advertisement was to destroy the credibility of the authoritative old builder when he spoke of balancing energy needs. The dialogue ran as follows:

Female: The main entrance is going to be right here.

Male: And the baby's room here.

Female: Oh, it's going to be pink.

Builder: Now hang on - first things first. What about heating?

Male: Heating?

Builder: I'd say that you're probably better off with gas hot water.

Female: Gas? Why gas?

Builder: Well - you're balancing your energy needs.

Female: But this new electric hot water system.

Male: The twin element

Female: Isn't that much cheaper than gas to run?

Male: Yeah - with the new off peak rates it works out about a third cheaper.

Builder: Crikey - I had no idea.

Male: And it has this amazing booster element.

Female: Mmm, so no more cold showers.

Male: Besides, it'd cost a bit to put the gas on up here, wouldn't it?

Builder: A fair whack.

Female: We came up here for the fresh air.

Builder: I see your point. So - twin element - that will make it a whole lot easier. Electric hot water, eh. You live and learn. You live and learn”.

Figure 12 Source: Reproduced from, S. Ricketson, Australia: literary work - infringement by “reply” advertisement - parody no defence [1991] 13(1) *EIPR* D6-7

Figure 12 Notes: The respondent argued that their reply advertisement (above, under the title ‘LIFESTYLE GAS’) amounted to a parody. However, the Court held that the parody exception did not apply to the present case and Foster J. granted an injunction restraining the respondent from broadcasting their advertisement. The Court also confirmed that the reply advertisement infringed copyright laws and therefore did not fall within the boundary of the Australian ‘fair dealing’ exception.

TCN Channel Nine Pty Ltd v Network Ten Pty Ltd [2001] F.C.A. 108

Figure 13



Figure 13 Source: <http://www.youtube.com/watch?v=IKgQKrmVPWw> [Youtube video]

Figure 13 Notes: This is a clip from *The Panel*, broadcast on Australian TV Channel, *Network Ten* which was found to be infringing copyright laws in playing short clips from Channel 9 (below, Figure 14) programmes. The show was recorded in 2000 – a year before Channel 9 brought proceedings against Channel Ten. This particular clip shows an interview with Tim Brooke-Taylor, a British comic actor who starred in the UK comedy series, *The Goodies*.

Figure 14

Figure 14 Source: <http://channelnine.ninemsn.com.au/> (Channel 9 Official logo)

Figure 14 Notes: Channel 9 sued *Network Ten's 'The Panel'* for infringing copyright laws and won the case against Network Ten after a very long court battle. The case was significant in highlighting the lack of clarity in Australian copyright law, particularly in relation to the parody defence. As Finklestein J stated in the Full Federal Court 'substantial similarity' is at the heart of copyright law. Yet it remains one of its 'most elusive aspects'. Not long after this case was decided, the *Copyright Amendment Act 2006* was introduced making way for a parody defence in Australia.

Appendix V – Germany

Asterix/Alcolix BGH, March 11, 1993; [1994] GRUR 206; [1993] ZUM 534

Figure 15

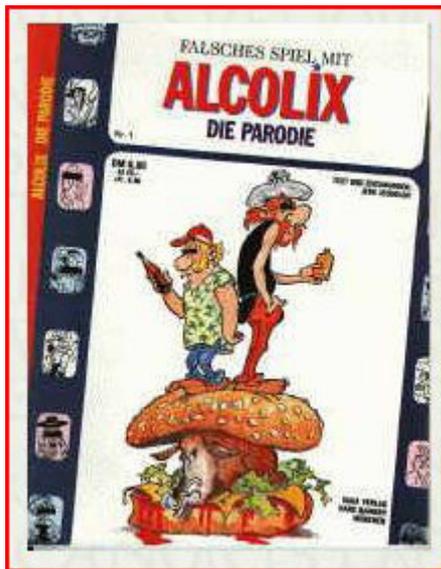


Figure 15 Source: <http://www.asterix-fan.de/cb/pa/parodie.htm> (Asterix Fan website, Germany)

Figure 16



Figure 16 Source: <http://www.asterix.com/index.html.de>

Figures 15 & 16 Notes: Figure 15 picture depicts a parodied work of the popular comic *Asterix* (figure 16) written by René Goscinny and illustrated by Albert Uderzo. The parodied work formed part of a comic book titled *Falsches Spiel mit Alcolix. Die Parodie* (*False Play with Alcolix: The Parody*) which included 18 stories and drawings by different authors and artists. The plaintiffs claimed that the 18 stories and the corresponding drawings infringed copyright in the original *Asterix* publications. The Court held that the parodied work infringed copyright in *Asterix* and did not constitute free use of the *Asterix* cartoons under §24 of UrhG.

The Court granted an injunction to stop the defendant from selling the comic book

Bundesgerichtshof (Gies-Adler) (I ZR 117/00) (Unreported, March 20, 2003)

Figure 17



Figure 17 Source: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=26996&Frame=4&.pdf> (*'Bundesgerichtshof Im Namen Des Volkes Urteil'* Federal Court Judgement; case report)

Caricature of the German national symbol

Figure 18



Figure 18 Source: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=26996&Frame=4&.pdf>

German national symbol

Figures 17 & 18 Notes: Figure 17 portrays a caricature of the German national symbol (Figure 18) which was created in the 1950's by artist Gies. The caricature which was used to illustrate a critical feature on taxation was published on the cover of the current affairs magazine *Focus*. The question for the Court was whether the caricature (Figure 17) infringed the copyright of Gies (Figure 18). The Federal Court (*Bundesgerichtshof*) held that there was sufficient change of form from the artist's version of the federal eagle to the caricature. As such the caricature could fall within the 'free use' exception under §24. Furthermore, the Court took the view that the new work portrayed an 'inner distance' from the original – a precondition for parody or caricature to be recognised under German copyright law. Applying these relevant laws and applying Article 5(1) – freedom of the press – the Federal Court reasoned that statutory law had to be construed in conformity with the Constitution and held that the caricature fell within the free use exception.

Appendix VI – USA

Acuff Rose Inc., v Campbell 510 U.S. 569 (1994)

Figure 19



Figure 19 Source: <http://www.youtube.com/watch?v=xieI5OVBQbl&feature=playerembedded#> [Youtube video]

Figure 19 Notes: Figure 19 represents a performance of the 1964 rock ballad *Oh Pretty Woman* – by Roy Orbison and William Dees, with Acuff-Rose being the assignee of the copyright. This very famous song by Orbison/Dees signalled a turning point for copyright law and parody in USA in 1984 – when a new version of the song was released by *2 Live Crew* (figure 20).

Figure 20



Figure 20 Source: <http://www.youtube.com/watch?v=JJjuxDa9sWM&feature=playerembedded> [Youtube video]

Figure 20 Notes: Figure 20 depicts a performance of *Pretty Woman* by 2 Live Crew, a US rap group. After being sued by Acuff-Rose for copyright infringement 2 Live Crew claimed their version was a parody of *Oh Pretty Woman* (figure 19) and therefore fell within the fair use exception under section 107 *Copyright Act 1976*. It led to a very lengthy court battle with particular attention being placed on the first and fourth factors of the fair use exception. The Supreme Court held that the important question is not limited to whether the use is commercial or non-commercial; but rather whether it is 'transformative' – i.e. does it add something new, 'altering the original with new expression, meaning or message'. Applying this test, the Supreme Court upheld the parody defence within the fair use exception in favour of the defendant, 2 Live Crew.

Louis Vuitton Malletier S.A. v Haute Diggity Dog, LLC 507 F.3d 252 (4th Cir. 2007)

Figure 21



Figure 21 Source: http://www.louisvuitton.com/front/#/eng_US/Homepage (Louis Vuitton website, USA)

Figure 22



Figure 22 Source: http://www.amazon.com/lassic-Brown-Chewy-Vuiton-Dog/p/004G1U5BI/ref=sr_1_2?ie=UTF8&qid=1331495089&sr=8-2 (Amazon.com website)

Figure 21 & 22 Notes: Figure 21 portrays *Louis Vuitton* products, well-known maker of luxury goods. *Haute Diggity Dog LLC* ‘*Chewy Vuiton*’ products parodied *Louis Vuitton* handbags (figure 22). This led *Louis Vuitton* to sue *Haute Diggity Dog LLC* for design, copyright and trademark infringement. Following on from the *Campbell* case (figures 19 & 20 above) the Court held in favour of the defendants under the fair use exception.

Appendix VII – The Netherlands

Rowling /Uitgeverij Byblos BV [2003] E.C.D.R. 23 (RB (Amsterdam))

Figures 23 & 24

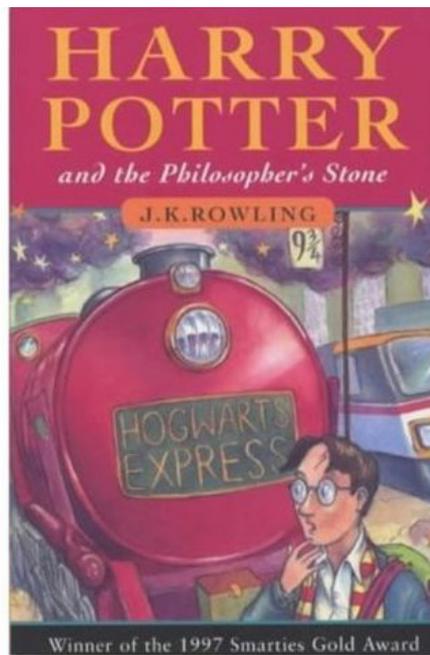
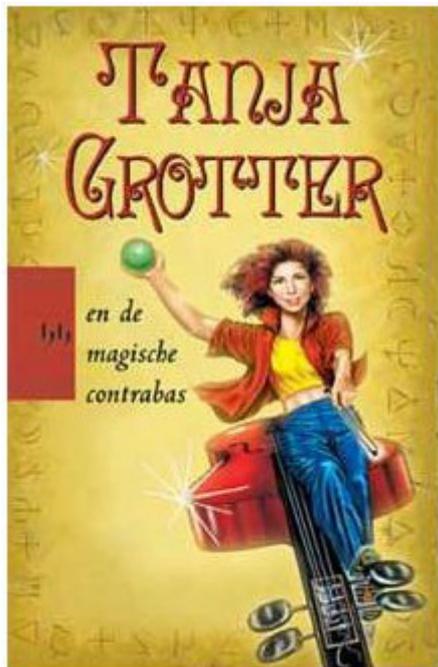


Figure 23 Source: <http://englishrussia.com/2009/07/22/the-unknown-harry-potter-stories-from-russia/>

Figure 24 Source: <http://www.amazon.co.uk/Harry-Potter-Philosophers-Stone-Book/dp/0747532745>

Figures 23 & 24 Notes: Figure 23 illustrates Demetri Yemet's *Tanja Grotter en de Magische Contrabas* (*Tanja Grotter and the Magic Double Bass*) book said to have infringed the copyright in J.K. Rowling's *Harry Potter and the Philosopher's Stone* book (figure 24) and Time Warner's trade mark rights in its *Harry Potter* trade mark. The defendant, Yemets, argued that Rowling's copyright did not extend to common place ideas and concepts such as orphans and magic powers which could be used by any author to write a book. Furthermore, he argued that his book was an ironic parody of *Harry Potter* and invoking freedom of expression he argued that the parody defence should be upheld. Applying Article 13 of the *Dutch Copyright Act* the Court rejected the defendant's arguments and held that the object of parody – i.e. to make the original work the subject of laughter, with the original being the dominating factor – was not achieved in the *Tanja Grotter* book.

Nadia Plesner Joensen /Louis Vuitton Malletier SA) Court in preliminary proceedings of The Hague (27 January 2011). Overturned by District Court of The Hague, 4 May 2011, IER 2011/39

Figure 25



Figures 25 (above), 26 & 27 (next page) Source: http://www.mediareport.nl/wp-content/uploads/2011/03/kvdl-716759-v1-english_translation_court_order_louis_vuitton_vs_plesner_27_january_2011.pdf

English translation of the case with illustrations (including figures 25, 26 & 27) of the Court Order of 27 January 2011

Figure 26



Figures 26 & 27 Source: Please see previous page (p. 83) for reference

Figure 27



Figures 25, 26 & 27 Notes: Nadia Plesner's 'Simply Living' art (Figures 25 & 26) portrayed at exhibitions showed the 'cruel reality' of life alongside showbiz elements. 'Simply Living' was also meant as a parody of Paris Hilton who is often pictured with a Chihuahua dressed in pink and carrying a *Louis Vuitton* "Audra" handbag (Figure 27). *Louis Vuitton* alleged that Plesner infringed the copyright, trade mark and design right in their "Audra" bag as the multicolour canvas design was the same depicted by Plesner in her artwork. Invoking freedom of expression, the District Court of Hague threw out *Louis Vuitton's* claims and upheld the defence of parody in favour of Plesner.

Mercis B.V. /Punt.nl B.V. District Court of Amsterdam, 22 December 2009 LJN: BK7383. Overturned by Court of Appeal of Amsterdam, decision 13 September 2011, LJN: BS7825, (Mercis B.V./Punt.nl.B.V.)

Figure 28

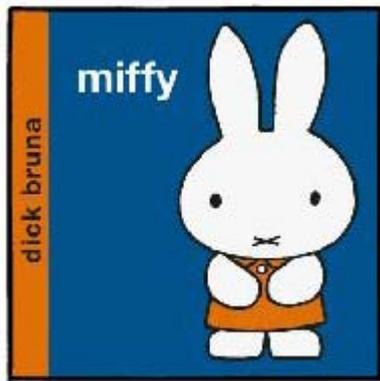


Figure 28 Source: <http://www.miffy.com/>

Miffy or Nijnte (in Dutch) is a children's cartoon character. Copyright and trade mark rights to this character are owned by Mercis and Bruna.

Figure 29



Figure 29 Source: <http://www.24oranges.nl/2009/12/28/miffy-gets-to-do-cocaine-but-may-not-be-a-terrorist/>

Parody of Miffy at a party

Figure 30



Figure 30 Source: <http://www.hoogenhaak.nl/news/miffy-parody-allowed-netherlands-/848>

Parody of a red-eyed *Miffy* sniffing cocaine (left) and *Miffy* crashing into a sky scraper (right) –*nijn-eleven*

Figures 28, 29 and 30 Notes: The issue was that *Miffy* (Figure 28) was depicted in unusual ways in seven cartoons which included adult themes such as *Miffy* at a party (Figure 29), red-eyed *Miffy* sniffing cocaine and in an airplane about to crash into a skyscraper (Figure 30). The creators (Mercis and Bruna) alleged that these drawings infringed their copyright and trade mark rights. The defendants relied on Article 18b which permits parody if it is within the rules of social custom. The District Court partly accepted the defendant's parody defence for 5 of the 7 cartoons, but rejected it for the cartoons depicted under Figure 30. The Court of Appeal reversed the decision of the District Court and held that the cartons do not infringe copyright of the creators and therefore are not unlawful.

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