

THE RIGHT TO PARODY: COPYRIGHT AND FREE SPEECH
IN SELECTED JURISDICTIONS

by

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ABSTRACT

This dissertation examines the rights to free speech and parody by combining philosophical inquiries with legal analyses. Part One draws upon natural law theories to argue that the right to free speech is a universal right, and expressing oneself through parodies is an exercise of this right. It then discusses the nature of copyright from both natural rights and utilitarian perspectives, to illuminate how the right to parody copyrighted works is also a universal right that should be accommodated by copyright law. Regarding the scope of this right, because free speech is more fundamental than copyright, a broad legal definition of parody, which encompasses works targeting the originals as well as those that direct their criticism or commentary towards something else, is preferable to narrow definitions. However, parodies must not adversely impact the interests of rights holders by serving as market substitutes for the original works or their derivatives. Courts should also apply the parody defence or exception with reference to the free speech doctrine to ensure that lawful speech would not be suppressed for the sake or under the pretext of copyright protection.

Part Two of the dissertation employs four case studies—the United States, Canada, the United Kingdom, and Hong Kong—to elucidate its arguments for a broad definition of parody and for courts to apply the parody defence or exception with reference to the free speech or freedom of expression doctrine. All four chapters explain how the free speech jurisprudences of these jurisdictions have been informed by the natural law, and how the proposed parody defence or exception would serve to bring their copyright jurisprudences, which have been influenced by utilitarianism, and/or a narrow conception of natural rights

privileging the authors' over the users' rights, in line with their free speech jurisprudences. These studies also reveal the usefulness of the free speech/freedom of expression doctrine as an external mechanism in safeguarding parodists' speech freedom. If this external solution would not be sufficient to protect free speech, then solutions within the copyright statutes would serve to create the needed breathing space for free speech.

LAY SUMMARY

This dissertation examines the rights to free speech and parody by combining philosophical inquiries with legal analyses. Part One explains how free speech is a universal right, and expressing oneself through parodies is an exercise of this right. The right to parody copyrighted works is also a universal right that should be accommodated by copyright law. Because free speech is more fundamental than copyright, parody should be defined broadly by the law. Part Two employs four case studies—the United States, Canada, the United Kingdom, and Hong Kong—to elucidate its arguments for a broad definition of parody and for courts to apply the parody defence or exception with reference to the free speech doctrine. All four chapters explain how the parody defence or exception proposed in Part One would serve to bring the copyright jurisprudences of these jurisdictions more in line with their free speech jurisprudences.

PREFACE

This dissertation is an original intellectual product of its author, Amy T. Y. Lai. Some ideas of Part One and Part Two Chapters Three and Four will appear in a special issue of the *Windsor Yearbook of Access to Justice* in 2018.

The entire dissertation will also be turned into a book, which will be published by Cambridge University Press in early 2019.

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ACKNOWLEDGMENTS

Three years ago, the “Umbrella Revolution” broke out in Hong Kong. It was the same year when I arrived in Vancouver. Glued to the Internet, I was bewildered and angered by what happened in the city that I once called home, while feeling fortunate and relieved to have settled in one of the most civilized nations in the world. Yet the ripples of the revolution and its suppression were felt across Vancouver and many Canadian cities. After all, Canada, far from a paradise, was by no means immune to corruption. Like many welcoming and tolerant societies, it has produced great leaders, educators, and thinkers. At the same time, it has served as the breeding ground for the corrupt, the deceitful, and the (willfully) ignorant to spread lies, to bully, and to ostracize the upright and clear-headed for not kowtowing to them and for calling them out.

My frustration and cynicism, caused by what I read, witnessed, and experienced, have been channeled in positive and constructive ways. Three years later, all those sleepless nights, struggles, and tears have borne fruit. Looking back, I could not help but realize how privileged I was to be able to write and complete this dissertation, which reflects my hard work, my beliefs, and my spirit, in my adopted home.

I am deeply grateful to my supervisors, Professor Graham Reynolds and Professor Joost Blom, for their kindness, diligence, patience, knowledge, and keen insights into the topic. I appreciate Professor Jon Festinger for his humor and wit as well as his generosity in

agreeing to serve on my supervisory committee. This is indeed an all-star award-winning supervisory team.

My gratitude also goes to former Dean Mary Anne Bobinski, for whom I worked as a research assistant for two years, and Joanne Chung, my first point of contact, who offered me administrative assistance throughout my studies. The discovery that the dark sides of human nature exist throughout the world was quite saddening, and so I thank and miss Rozalia Mate, who reminded me that decency does exist and helped me when I was in tears.

I am also indebted to the Centre for International Governance Innovation (CIGI) for offering me a generous scholarship in my second year and for renewing it in my third year. My unforgettable 2017 summer at the University of Waterloo, including memories of the magnificent CIGI building, inspiring exchanges with my colleagues at the Centre, and lovely Canada geese, would not have been possible without these scholarships.

It was a pleasure to meet my university examiners, Professor Mary Chapman and Professor Shigenori Matsui, and my external examiner, Professor Robert Howell from the University of Victoria, who offered stimulating perspectives on my work. I was so touched when I received input not only from my examiners, but also from the Chair of my defence and our free speech expert, Professor Paul Quirk.

I would like to thank all my professors at Simon Fraser University, although they did not play any role in this project. My classmates at the Faculty of Health Sciences are a breath of fresh air. SFU will have a special place in my heart.

Words could not express my surprise when I received an offer from Cambridge University Press in August 2017 to publish a book based on this dissertation. My deep

gratitude goes to Matthew Gallaway, senior editor at the New York office, for having faith in my work, as well as the anonymous readers for their constructive feedback. Becoming an author with this press is an even greater honor than graduating from Cambridge years ago.

Finally, I am forever indebted to my family members, who instilled in me the proper values and inspired me to become a decent human being. National and cultural identities are often arbitrary. Families, which are based on love, are genuine.

After the tear gases dispersed and the smoke subsided, Hong Kong reverted to its usual state of superficial harmony and drunkenness. Many sober people (rightly) stopped worshipping celebrities and authority figures who chose to sell their souls, lost respect for people whom they once looked up to, and “unfriended” some “friends” on Facebook and in real life. Surprisingly, feelings of disillusionment and loss can be tremendously liberalizing. Old, shaky relationships end in an instant. At any time, new and genuine ones are cultivated on shared visions, values, and experiences.

Bertrand Russell once said, “The trouble with the world is that the stupid are cocksure and the intelligent are full of doubt.” It is my wish that my work will inspire intelligent people to speak up and to parody. I hereby dedicate this dissertation to all people out there who have integrity, who help to uphold the rule of law, and who are not afraid to speak out against evil.

INTRODUCTION

*By the time I'm in the studio recording my parody,
10,000 parodies of that song are on YouTube.¹*

Over the past decades, an increasing number of Western jurisdictions have recognized “parody” as a fair use/fair dealing defence or exception in their copyright laws. They have done so either through their courts, which determined that parody is protected within existing defences, or through their legislatures, which have explicitly added exceptions or fair dealing categories to their copyright laws. In 1994, for instance, the United States Supreme Court recognized parody as fair use in its landmark decision *Campbell v. Acuff-Rose Music, Inc.*² In Canada, the Copyright Modernization Act of 2012 expands the fair dealing doctrine by permitting the use of copyrighted materials to create a parody or satire, provided that the use is “fair.”³ The Copyright Directive of the European Union, enacted in 2001 to implement the WIPO Copyright Treaty and to harmonize aspects of copyright law across Europe, provides that Member States might exempt from copyright a

¹ Gary Graff, *Weird Al Ponders Lady Gaga Parody*, REUTERS (June 23, 2010), <https://uk.reuters.com/article/music-us-weirdal/weird-al-ponders-lady-gaga-parody-idUKTRE65M0LQ20100623> (last visited Oct. 10, 2017).

² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

³ See Copyright Modernization Act, S.C. 2012, c. 20, s. 21.

“use” of a protected element “for the purpose of caricature, parody or pastiche.”⁴ In late 2014, the United Kingdom finally took up the “caricature, parody or pastiche” exception through legislative reform.⁵

To date, few Asian jurisdictions have recognized a fair use or fair dealing exception in the form of parody, but things may change in the future.⁶ In 2014, the Hong Kong government shelved its first copyright bill that accommodated parody and related derivative works. In response to an upsurge of parodic works on the Internet since the beginning of the twenty-first century, it introduced the Copyright (Amendment) Bill 2011 that criminalized the communication of copyrighted works on the Internet but did not provide for a parody exception.⁷ Due to vehement opposition from the public, Bill 2011 was withdrawn, and the revised bill, introduced in 2014, was shelved after further opposition from the public and some members of the legislature.⁸

⁴ Article 5(3) of the Copyright Directive allows Member States to establish copyright exceptions to the Article 2 reproduction right and the Article 3 right of communication to the public “for the purpose of caricature, parody or pastiche,” among others. The Copyright Directive 2001/29/EC (2001), arts. 3, 5(3).

⁵ Clive Coleman, *Parody Copyright Laws Set to Come into Effect*, BBC NEWS (Oct. 20, 2014), available at <http://www.bbc.com/news/entertainment-arts-29408121> (last visited Oct. 10, 2017); Copyright, Designs and Patents Act, 1988, s. 30A (U.K.).

⁶ In India, the Kerala High Court coined the term “counter drama” to describe a parodic work that criticized the original and holding it as fair use in *Civic Chandran v. Ammini Amma* (1996). Japan has not recognized such an exception, but advocates have been pushing for change. Latitude for Japanese parodists is nonetheless narrowed considerably due to the refusal of courts to tolerate infringements of moral rights. Susan Wilson & Cameron J. Hutchison, *A Comparative Study of ‘Fair Use’ in Japanese, Canadian and US Copyright Law*, 41 HOSEI RIRON 224, 251—52, 276—78 (2009).

⁷ E.g., Koon-Ho Justin Lam, *Copyright (Amendment) Bill 2014—The Return of Creativity Suppression?* HONG KONG LAW BLOG (Oct. 15, 2014), <http://hklawblog.com/2014/10/15/copyright-amendment-bill-2014-the-return-of-creativity-suppression/> (last visited Oct. 10, 2017).

⁸ *Id.*

The prevalence of parodies in the media and in everyday life and the increasing recognition of parody as a fair use/fair dealing defence or exception in copyright jurisprudences beg the question of whether parodying copyrighted works should be regarded more affirmatively as a right, rather than an exception or something to be exempted from copyright protection. The affirmation of creating parodies as a right leads to further questions concerning the nature and scope of this right and how it should be protected—whether through copyright law’s internal mechanisms, or with the help of a solution external to the copyright regime. As the number of jurisdictions exempting parody from copyright protection has continued to increase, while others are proposing to include it in their laws, the discussion of these issues is overdue.

Research Questions

This dissertation aims to examine several questions. First, should the right to parody constitute part of the core freedom of expression of a normative copyright regime? Scholars who advocate for a parody defence or exception generally emphasize the significance of parody as a form of cultural expression and as a potential source of innovation and growth.⁹ This dissertation will adopt a far more affirmative stance by arguing that parody is a right in both the free speech and the copyright contexts. Second, if parodying copyrighted works is a right, what should be the scope of this right and how should the law accommodate and

⁹ E.g., Kris Erickson, Martin Kretschmer & Dinusha Mendis, *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the Youtube Platform and an Assessment of the Regulatory Options*, CREATE WORKING PAPER NO. 4 (Jan. 1, 2013), <http://www.create.ac.uk/publications/copyright-and-the-economic-effects-of-parody/> (last visited Oct. 10, 2017); Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, UNITED KINGDOM INTELLECTUAL PROPERTY OFFICE (May 2011), at 5.37, available at http://orca.cf.ac.uk/30988/1/1_Hargreaves_Digital%20Opportunity.pdf (last visited Oct. 10, 2017).

protect it? This dissertation will propose that a broad legal definition of parody should be adopted by statutes and/or courts. It will also argue that courts should look beyond the copyright regime for an external solution to safeguard the right to parody, by drawing upon the free speech or the freedom of expression doctrine as they apply the parody defence or exception.

Methodology

The dissertation will combine philosophical inquiries with legal analyses in its examination of the rights to free speech and parody. Regarding the first question, it will draw upon natural law theories to argue that the right to free speech is a universal right, and expressing oneself through parodies is an exercise of this right. It will then discuss the nature of copyright from both natural rights and utilitarian perspectives, to illuminate how the right to parody copyrighted works, like the right to parody in the free speech context, is also a universal right that should be accommodated by copyright law.

Regarding the second question, the dissertation will draw upon natural rights and utilitarian perspectives to define the scope of the right to parody. It will contend that the right to free speech is more fundamental than copyright. A broad legal definition of parody, which includes works targeting the originals as well as those that direct their criticism or commentary towards something else, accommodates more speech and is preferable to narrow definitions. However, parodies must not adversely impact the interests of rights holders by serving as market substitutes for the original works or their derivatives. Although it is often appropriate for a legislature to take the responsibility to guarantee rights and to define these rights by statute, rather than calling on courts to assert their own judgments based entirely on notions of higher law, this chapter will argue that courts can and should also apply the

parody defence or exception with reference to the free speech doctrine to ensure that lawful speech would not be suppressed for the sake or under the pretext of copyright protection.

The dissertation will then employ four case studies—the United States, Canada, the United Kingdom, and Hong Kong—to elucidate its arguments for a broad definition of parody and for courts to apply the parody defence or exception with reference to the free speech/freedom of expression doctrine. It will study how the free speech jurisprudences of these jurisdictions have been informed by the natural law, and how the proposed parody defence or exception would serve to bring their copyright jurisprudences, which have been influenced by utilitarianism, and/or a narrow conception of natural rights privileging the authors' over the users' rights, more in line with their free speech jurisprudences. Studies of these jurisdictions will also reveal the usefulness of the free speech/freedom of expression doctrine as an external mechanism in safeguarding parodists' speech freedom. If this external solution would not be sufficient to protect free speech, then internal solutions, such as amending the moral rights provisions in relation to parody in copyright statutes, would serve to create the needed breathing space for free speech.

Justifying the Methodology and Choice of Jurisdictions

Undoubtedly, there exists a substantial body of research on the parody defence or exception. Examples include Richard Posner's papers that explain the right to parody from a law and economics perspective,¹⁰ and Carys Craig's papers that advocate for the expansion of the fair use/fair dealing doctrine to accommodate more derivative works through the

¹⁰ Richard Posner, *When is Parody Fair Use?* 21 J. LEGAL STUD. 67 (1992).

lenses of feminist legal criticism.¹¹ Posner endorses only a very narrow definition of parody, whereas Craig neither discusses parody and satire nor explains whether they both should be considered fair use/fair dealing. Further, the endorsement of relatively broad definitions of parody by most, if not all, scholars has been informed by instrumentalism and/or practical considerations. The novelty of this dissertation lies in its employment of natural law theories, along with utilitarian perspectives, to explore the right to parody. It was deeply inspired by Robert Merges' book, *Justifying Intellectual Property*, which is described as a "landmark" and "a new Bible" in intellectual property law, and which draws upon Locke, Rawls, and Kant to argue that IP rights are based on a solid ethical foundation and are property rights, not incentives or conventions.¹² While Merges' pioneering book does not examine the right to parody, this dissertation does.

Although there are works examining the relationship between copyright and free speech, including Jonathan Griffiths' and Uma Suthersanen's *Copyright and Free Speech: Comparative and International Analyses* (2005),¹³ and that between free speech and parody, such as Joseph Liu's article *Copyright and Breathing Space*,¹⁴ this dissertation will be the first book-length study of copyright, parody, and free speech.

¹¹ Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207 (2007); Carys Craig, *Locke, Labour, and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1 (2002).

¹² ROBERT MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2012). See reviews by Harvard law professor Henry E. Smith and Dennis Crouch of PatentlyO.com, which can be found on the Harvard University Press website: <http://www.hup.harvard.edu/catalog.php?isbn=9780674049482> (last visited Oct. 10, 2017).

¹³ JONATHAN GRIFFITHS & UMA SUTHERSANEN (EDS.) *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* (2005).

¹⁴ Joseph Liu, *Copyright and Breathing Space*, 30 COLUM. J. ARTS & L. 101 (2007).

The four case studies will also contribute significantly to the existing body of literature on the parody defence and exceptions in the selected jurisdictions. Several articles critique the narrow parody definition and the parody/satire dichotomy in American copyright law.¹⁵ Yet they do not offer a comprehensive study of the subject. In addition, few papers have addressed the lack of a parody defence or exception in the former copyright laws of Canada and the U.K., and even fewer have critiqued the new parody exceptions of the two jurisdictions, let alone how they should be applied by courts.¹⁶ As for Hong Kong, despite the controversies surrounding the copyright bills, law professor Peter Yu's policy paper submitted to the government is the only substantial work exploring the possibility of a new parody exception in the former colony.¹⁷

One may wonder why this dissertation studies the significance of the parody defence or exception in the context of copyright law, while this defence is equally, if not more, important in protecting free speech in other areas of law, one example being defamation law. Examining the parody defence or exception in copyright law by no means diminishes its significance in other areas of law. Defamation laws, by protecting the right to express opinions, also safeguard the right to express opinions through parodies. In contrast,

¹⁵ E.g., Annemarie Bridy, *Sheep in Goats' Clothing: Satire and Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 51 J. COPYRIGHT SOC'Y U.S.A. 257 (2004); Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979 (2004).

¹⁶ See e.g., Graham Reynolds, *Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada*, 33(2) MANITOBA L.J. 243 (2009); Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309 (2008).

¹⁷ Peter Yu, *Digital Copyright and the Parody Exception in Hong Kong: Accommodating the Needs and Interests of Internet Users*, JOURNALISM & MEDIA STUDIES CENTRE, UNIVERSITY OF HONG KONG (Jan. 2014), at 6, https://jmsc.hku.hk/revamp/wp-content/uploads/2014/01/jmsc_hku_submission.pdf (last visited Oct. 10, 2017).

copyright laws that do not accommodate the right to parody copyrighted works may allow valuable ideas to be suppressed for the sake or under the pretext of copyright protection. Not only would free speech be suppressed, but parody as a long-standing art form and a popular form of expression would decline. The dissertation nevertheless will not shut out defamation laws from its legal analyses. Given that the examination of the free speech jurisprudence of each jurisdiction will constitute a significant part of its thesis, defamation laws, along with other speech restrictions, will be brought into the discussion to the extent that they are relevant to the arguments.

One may also query the choice of jurisdictions in this comparative study. All common law jurisdictions, they were carefully chosen with a view to engage the theoretical core of the dissertation in a meaningful manner. The U.S. has a long history of judicial decisions holding that parody is a defence to copyright infringement. On the other hand, the parody exceptions were not included in Canadian and British statutes until recently. A similar exception had yet to be included in Hong Kong's copyright law due to strong opposition from the public. The free speech and moral rights jurisprudences of these jurisdictions, along with their varying socio-political circumstances, will also influence the ways with which the parody defence or exception may be interpreted and applied.

Although only four jurisdictions are included due to the scope of this work, the proposed parody exception also applies to other jurisdictions, including civil law jurisdictions. A book based on this dissertation, which will be published by Cambridge University Press in late 2018/early 2019, will add France to the list to further engage with the theoretical framework and to enrich the research on this topic. French copyright law has

provided for a fair dealing parody exception since 1957.¹⁸ Undefined by the statute and seemingly broad enough to encompass a great variety of works, its scope has been narrowed by the moral rights provisions in the statute and the prohibition of works considered by courts to be “denigrating” to authors or their works.¹⁹ Recent case law nevertheless indicates that authors’ moral rights may be getting eroded in its copyright jurisprudence. For instance, the French Court referenced the free speech doctrine in the copyright context for the first time in *Bauret-Allard v. Koons*, in which artist Koons raised a parody defence in his alleged infringement of a French photographer’s work.²⁰ The upcoming chapter on France will focus on the interplay of French moral rights traditions, the foundations of which were established in the nineteenth century,²¹ with new developments in France’s copyright jurisprudence.

Finally, one may also query whether the right to parody is truly a natural right, given that the right to free speech is hardly enjoyed in all jurisdictions over the world. Clearly, this dissertation aims to explain what laws on free speech and parody should be like rather than describe what these laws currently are. Hence, the mere fact that the right to free speech is

¹⁸ Alexandra Giannopoulou, *Parody in France*, study for the project *Best Case Scenarios for Copyright: Freedom of Panorama, Parody, Education, and Quotation* (Aug. 2016), at 21, available at <https://www.communia-association.org/wp-content/uploads/2016/11/Best-Case-Scenarios-for-Copyright-brochure.pdf> (last visited Oct. 10, 2017).

¹⁹ See *id.* at 25—26.

²⁰ Traditionally, French Courts would only consider the defences provided for in the copyright statute, which does not include freedom of expression. In *Bauret-Allard v. Koons*, even though Court did not rule in the defendant’s favor, its willingness to evaluate the freedom of expression defence indicated a shift in French copyright law. Marion Cavalier & Catherine Muyl, *French Court Finds Jeff Koons Appropriated Copyrighted Photograph that “Saved Him Creative Work,”* TRADEMARK & COPYRIGHT L., May 2, 2017, <http://www.trademarkandcopyrightlawblog.com/2017/05/french-court-finds-jeff-koons-appropriated-copyrighted-photograph-that-saved-him-creative-work/> (last visited Oct. 10, 2017).

²¹ The moral right as an aspect of authorial rights was brought up in the *Chambre des Député* by Lamartineon as early as 1841. See Jean Matthyssens, *Les projets de loi sur le droit d’auteur en France au cours du siècle dernier*, IV (no. Juillet) RIDA 15, 44 (1954).

severely restricted in some authoritarian nations by no means invalidates or diminishes the force of the argument that the right to parody is natural and inherent in all people. In fact, the enshrinement of freedom of expression in many national constitutions testifies to its being a value to which every nation aspires or at least pays lip services. In addition, because this work aims to propose a normative standard safeguarding the right to parody, it relies heavily upon natural law theory, despite that copyright laws of the selected jurisdictions seem to be more driven by utilitarianism than by natural rights. Regardless of the changes that the copyright laws of these (or any other) jurisdictions will undergo in the future, the proposed standard will continue to serve as a yardstick against which the new laws should be measured.

Summary

The dissertation is divided into two parts. Part One, which forms its theoretical core, will argue that the right to parody should constitute part of the core freedom of expression of a normative copyright regime. Part One, Chapter One will describe the ancient origins of free speech and its significance in the development of Western democracies. The chapter will then draw upon writings by John Milton, John Locke, John Rawls, and Immanuel Kant to examine the right to free speech or freedom of expression as a natural, universal right which is subject to restrictions necessary for the respect of the rights or reputations of others and the protection of national security and public order. Since the ancient days, people have exercised this natural right by expressing themselves through parodies. Controls on parody in authoritarian and dictatorial regimes are tacit acknowledgments of its important role in democracies and its power in bringing social change.

Part One, Chapter Two will explain why parodying copyrighted works is also a natural, universal right, and describe the extent to which copyright law should accommodate and protect the right to parody. It will study the nature of copyright from both natural law and utilitarian perspectives. Like last chapter, it will draw upon writings by Locke, Rawls, and Kant to examine the right to intellectual property, including copyright, as a natural right that accommodates users' right to create parodies of copyrighted works. It will also reference utilitarian philosophers such as David Hume and Jeremy Bentham to examine copyright as a human-made convention to foster inventions and creativity. Whether copyright is a natural right inherent in all people or a mere conventional right, it should give way to the more fundamental right to free speech when conflicts between them arise. The relative importance of these two rights justifies a broad legal definition of parody encompassing works that target the original works and those that criticize or comment on something else, as long as they would not likely serve as market substitutes for their original works or their derivatives. The public's right to parody, moreover, does not conflict with the author's moral rights. Given the fundamental nature of speech freedom, courts should also apply the parody defence or exception, which is internal to copyright law, with reference to the free speech doctrine, a mechanism external to the copyright regime, to ensure that lawful speech would not be suppressed for the sake/under the pretext of copyright protection.

Part Two will examine each of the selected jurisdictions to further the argument that the proposed parody defence or exception would serve to properly balance rights holders' and parodists' interests. Each of its four chapters will roughly follow the same structure. It will first examine how the jurisdiction's free speech tradition has been informed by the natural law tradition and how the right to parody is a natural right. The subsequent section

will explain how the copyright jurisprudence of the jurisdiction has been informed by utilitarianism and/or a propertized conception of copyright. The same section will then illuminate how the proposed exception would help to bring its copyright system in line with its free speech tradition. The last section will employ hypothetical example(s) to explain that courts should ideally apply the parody defence or exception with reference to the free speech or freedom of expression doctrine. Failing that, courts should seek internal solutions to safeguard the right to parody.

Chapter Three will study the parody defence in American copyright law. It will trace the history of the parody fair use defence and study the flawed parody/satire dichotomy created by the U.S. Supreme Court, according to which works not directing at least part of their criticisms or commentaries against the originals do not qualify as fair use. Evaluating scholarly criticisms of this dichotomy, the chapter will justify the parody definition that encompasses both “parody” and “satire” and the prioritization of the “market substitution” factor over the other three factors in the fair use analysis. It will also look at cases in which courts erroneously found “satirical” works to be unfair, and illuminate how the proposed parody definition would have enabled courts to properly balance the interests of different parties. The chapter will then turn to the importance of the First Amendment doctrine in ensuring that copyright law would not become less protective of free speech than defamation law, and that rights holders who aim to use copyright law to suppress lawful speech—including those who have lost defamation suits involving parodies of copyrighted materials—would not likely succeed.

Chapter Four will study the new “parody” and “satire” fair dealing exceptions in Canada’s Copyright Modernization Act in 2012. It will argue that a propertized conception

of fair dealing, the influence of American case law, and the very meaning of “satire” itself may work together to influence how Canadian courts define the scope of protection offered by these exceptions. Hence, courts may find that “satirical” works do not pass the second stage fairness analysis and are unfair dealings even though they would not harm the interests of copyright owners. A broad parody exception would better serve to balance the interests of both parties by reducing any influence of a propertized conception of fair dealing and by leading courts to focus on the market substitution factor. Although the Supreme Court of Canada held that courts can interpret the provisions of the Copyright Act in light of Charter values only in circumstances of “genuine ambiguity,” a broadened parody exception might create circumstances of “genuine ambiguity” in which courts would be entitled to apply the exception by engaging with the Charter to balance freedom of expression with the Act’s objectives.

Chapter Five will study the parody exception introduced into British copyright law in 2014. It will argue that “parody” in the new exemption “for the purpose of caricature, parody or pastiche” should be broad enough to cover a wide range of works regardless of their targets, and its “humor” requirement will not be difficult to fulfil. Hence, this parody exception promises to align the British copyright jurisprudence with its freedom of expression jurisprudence. Yet the moral rights provisions in the statute present a potential hindrance to free speech, while the public interest doctrine, narrowly circumscribed in *Ashdown v. Telegraph Group Ltd.*, will prevent courts from applying the parody exception in ways that best serve the public’s interests. Nonetheless, courts could enhance the protection of artistic and/or political speech through an internal solution—emphasizing the nature of the defendant’s use factor. Furthermore, should *Ashdown* be overruled, or the European Court of

Justice's decision in *Deckmyn v. Vandersteen* be followed, courts could apply the parody exception with reference to a broadened public interest doctrine to enable parodies to survive moral rights challenges.

Chapter Six will critique the parody exception in Hong Kong's Copyright (Amendment) Bill 2014. After offering a socio-political account for the upsurge of parodic works in Hong Kong's social media since the new millennium, it will explain how a parody exception would help to foster its creative industries and promote a critical political culture. However, neither the "parody, satire, caricature and pastiche" exception in the bill, nor a scholar's suggestion that the statute should not distinguish between these genres, would best serve these purposes. Furthering the argument in Part One, the chapter will contend that a broad parody exception should replace "parody" and "satire," but be distinguished from both "caricature" and "pastiche," which, unlike parody, need not carry any criticism or commentary. As free speech continues to decline in Hong Kong, this doctrine could not be relied upon as an external safeguard for the parodist's right to expression. The chapter will conclude that an internal solution—providing an exception to the author's integrity right to object to derogatory treatment in the form of parody—would serve to provide more space for free speech.

What's in a Name?

The concluding chapter will ask: Can "parody" be called by any other name and still serve its function? On a related note, if the most vital factor that determines the fairness of the use or dealing is whether the new work would harm the interests of the rights holder by substituting for the underlying work in the market, is the "parody" exception or defence even necessary in copyright law? By reiterating its ancient origins, its presences in different

cultures throughout the centuries, and the significant role that it has played in fostering criticisms and commentaries, this dissertation will conclude that “parody” should not be called by any other name as it serves its legal function to safeguard this important right. After all, names carry tremendous power.

PART ONE

CHAPTER ONE

THE NATURAL RIGHT TO FREE SPEECH AND PARODY

A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health.¹

This chapter will examine the origins of free speech, illuminate how freedom of speech is a fundamental right, and contend that making parodies is an exercise of this right. Section I will offer a story of free speech by journeying from Ancient Greece and Rome, through Renaissance Europe and early modern England, to late eighteenth-century France and America, where speech freedom was secured in different bills of rights and declared as a fundamental liberty in major revolutions. Section II will then explain that the right to free

¹ This quote originated from *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*, a decision by the Constitutional Court of South Africa. Justice Dikgang Moseneke, handing down a unanimous judgement, held that T-shirt maker Laugh It Off had not infringed on the South African Breweries' trademark with the message on its T-shirts by replacing "America's lusty, lively beer, Carling Black Label beer, enjoyed by men around the world" with "Black Labour White Guilt, Africa's lusty lively exploitation since 1652, no regard given worldwide." *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*, 2006 (1) SA 144 (CC), para. 110, *available at* <http://www.saflii.org/za/cases/ZACC/2005/7.html>.

speech is a fundamental right through the lenses of natural law, which also had its origin in ancient Greece, by examining the writings of Milton, Locke, Rawls, and Kant. The recognition of freedom of speech in major international conventions and regional treaties testifies to its being a natural right fundamental to democratic societies and the autonomy of individuals. Section III will argue further that the right to parody, an exercise of freedom of speech, stems from this natural right. The controls on parodic expressions throughout history have acknowledged their potential power in bringing social change. In addition, speaking through parodies is also an important means of self-fulfillment, the pursuit of truth, and democratic governance—all important principles underlying speech freedom.

I. THE ORIGINS OF FREE SPEECH

The ancient Greek city-state of Athens was the first society in recorded history to embrace the notions of freedom and democracy.² The term “democracy” originated from the Greek word “*dēmokratía*,” meaning the “rule of the people,” which was founded on “*demos*” (people) and “*krátos*” (power or rule).³ For Athenians to participate in their own government, “*isegoria*,” or the equality of speaking rights, was complemented by “*parrhesia*,” which refers to open and candid speech in private and public life.⁴ Athenians eulogized *parrhesia*, most frequently translated as “free speech,” “freedom of speech,” or “frank speech,” as a practice allowing them to express an egalitarianism that not only

² Kurt A. Raaflaub, *Aristocracy and Freedom of Speech in the Greco-Roman World*, in I. SLUITER & RALPH MARK ROSEN, *FREE SPEECH IN CLASSICAL ANTIQUITY* 58 (2004).

³ ROBERT HARGREAVES, *THE FIRST FREEDOM: A HISTORY OF FREE SPEECH* 5 (2002); Robert W. Wallace, *Power to Speak—and Not to Listen—in Ancient Athens*, in I. SLUITER & RALPH MARK ROSEN, *FREE SPEECH IN CLASSICAL ANTIQUITY* 221 (2004).

⁴ *Id.*

rejected hierarchy, but also freed themselves from the restraints of a reverence for superiors or for the past, so that they could move forward to create a new order.⁵ Although *parrhesia* did not carry the idea of individual freedom as it is understood today, it did encapsulate the freedom that enables people to choose their own governments and rulers.⁶ In sum, *parrhesia*, or free speech, was one of the key egalitarian foundations and participatory principles of the democratic regime of the Athenians.⁷

Unsurprisingly, the significance of *parrhesia* in democratic Athens is revealed in the writings of Greek philosophers. Socrates, the great advocate of free speech, identified equality and resistance to hierarchy as the essential attributes of a democratic regime. In this regime, citizens enjoy freedom to do whatever they want.⁸ The Assembly, the primary venue for political decisions, was a place where all citizens, irrespective of social and economic status, could “deliberate on something concerning the governance of the city (poleos dioikeseos),” where “carpenter, bronze worker, shoemaker, merchant, shop-owner, rich, poor, noble, lowly born” could stand up and participate in the deliberations.⁹ Socratic

⁵ ARLENE W. SAXONHOUSE, *FREE SPEECH AND DEMOCRACY IN ANCIENT ATHENS* 86 (2008). According to Saxonhouse, the important moment for this way of understanding democracy occurred in 508 BCE when the past, especially the hierarchy of the aristocratic past, was overturned by Cleisthenes in order to create the egalitarianism that governed a new political regime. *Id.* at 40.

⁶ Moses Finley, in *Democracy: Ancient and Modern* (1988: 116), contends that in ancient Athens there were “no theoretical limits to the power of the state, no activity ... in which the state could not legitimately intervene provided that decision was taken properly ... Freedom meant the rule of law and participation in decision making process, not the possession of inalienable rights.” HARGREAVES, *supra* note 3, at 5—6; see Wallace, *supra* note 3, at 227; SAXONHOUSE, *supra* note 5, at 23.

⁷ There were limits to free speech in ancient Athens. For example, playwrights had to observe the laws relating to impiety even when writing comedies. In addition, Athenian historian Thucydides identifies the problems of practicing *parrhesia* in democratic decision making in his *Assemblies*, one major issue being that speakers did not always speak truthfully. SAXONHOUSE, *supra* note 5, at 131.

⁸ *Id.* at 48.

⁹ *Id.* at 94, citing CYNTHIA FARRAR, *THE ORIGINS OF DEMOCRATIC THINKING: THE INVENTION OF POLITICS IN CLASSICAL ATHENS* (1988). For many generations, the trial of Socrates, who was charged

parrhesia, or the freedom to say whatever one wants so long as it is in accordance with the truth, became a significant part of his student Plato's political ideals.¹⁰ Aristotle, a student of Plato, further compared the Assembly to a potluck dinner, where each participant could contribute and benefit other citizens through the wisdom of many.¹¹

The Roman Empire did not have a word that corresponds to the Greek word *parrhesia*. The Latin term "libertas," meaning liberty, did not refer to free speech in the way Athenians would have understood it.¹² The Roman Senate and senior statesmen were the only citizens to whom the right to political discussions was formally granted.¹³ Although ordinary citizens could vote in the Roman assemblies, they had no formal right to make their voices heard.¹⁴ Yet neither the non-existence of a specific term for free speech, nor the reluctance of the elite class to extend this right to the public, indicated a lack of awareness among ordinary people that speaking freely was an important part of their freedom. Thus,

with "corrupting the young" and impiety, has served as a symbol of the violation of freedom of expression, which poses the difficult question of how to reconcile the democratic freedoms of Athens with his execution. Some affirm that Athens was a fundamentally tolerant regime and that the trial was an aberration. Hargreaves approaches the issue from a different perspective, by contending that the death of Socrates is "the first and plainest example of how a democracy may be diminished when it dispenses with the freedom of expression," and how a "truly free spirit is likely to fall victim to the tyranny of the majority as he is of a single dictator." HARGREAVES, *supra* note 3, at 21.

¹⁰ Marlein van Raalte, Socratic Parrhesia and Its Afterlife in Plato's Laws, in I. SLUITER & RALPH MARK ROSEN, FREE SPEECH IN CLASSICAL ANTIQUITY 305, 310 (2004).

¹¹ SAXONHOUSE, *supra* note 5, at 150, citing ARISTOTLE, POLITICS, Bk III, ch. 2.

¹² Raaflaub, *supra* note 2, at 54; HARGREAVES, *supra* note 3, at 22.

¹³ HARGREAVES, *supra* note 3, at 23; Raaflaub, *supra* note 2, at 55.

¹⁴ SUSAN WILTSHIRE, GREECE, ROME AND THE BILL OF RIGHTS 116 (1992).

they often found ways and opportunities to vent their opinions and even influence those of the Senate.¹⁵

Following the decline of the Roman Empire, Europe entered the Dark Ages. During this period, the Catholic Church, which became the most powerful force in medieval life, withheld from the populace their freedom of conscience and freedom of speech.¹⁶ By the fifteenth century, however, its authority was undermined by a new generation of Renaissance humanists whose spoke out against the Church and the state. They included Desiderius Erasmus, a Dutch Catholic priest and theologian who satirized the corrupt practices of the Catholic Church;¹⁷ Niccolo Machiavelli, an Italian historian and philosopher who looked to the founding and early years of ancient Roman Republic to develop a theory of free speech based on the danger of repression;¹⁸ and Martin Luther, a German priest and key figure in the Protestant Reformation.¹⁹ The spread of heresy was facilitated by the invention of the printing press.²⁰

The struggle for speech freedom continued through the Enlightenment period despite the regulation and control of the press by the Roman Catholic Church and state governments. In England, for example, freedom of speech was secured in Parliament through the Bill of

¹⁵ Raaflaub, *supra* note 2, at 55—56.

¹⁶ HARGREAVES, *supra* note 3, at 39—41.

¹⁷ *Id.* at 41—45.

¹⁸ SAXONHOUSE, *supra* note 5, at 31—32.

¹⁹ HARGREAVES, *supra* note 3, at 45—49.

²⁰ *Id.* at 50—53.

Rights in 1689.²¹ In 1695, the Licensing of the Press Act (“the Licensing Act”), through which the Crown exerted its prerogative power to control the press, was rejected by the Commons.²² In fact, the American Revolution was triggered in part by Britain’s attempt to impose stamp duties on printed materials in its American colonies.²³ Although the American Constitution of 1789 made no mention of free speech, in response to calls for greater constitutional protection for individual liberties, its Bill of Rights was ratified in 1791, and the First Amendment states: “Congress shall make no law ... abridging the freedom of speech, or of the press.”²⁴ The ideals of the American Revolution accordingly inspired the Declaration of the Rights of Man and of the Citizen in France, where, until the revolution, censorship was universal and freedom of speech granted at the discretion of the monarch.²⁵ Passed in 1789, its Article XI identifies free speech and the liberty of the press as the most precious rights of man.²⁶

²¹ *Id.* at 111; Bill of Rights (Act) 1689 (England) 1688 c.2.

²² Under the Licensing Act, established in 1662, all books were required to be licensed either by the archbishop of Canterbury or the bishop of London. *Id.* at 93. One should note that the lapse of the Act did not signify the end of censorship. In the twenty years afterwards, the government reached out for other means to regulate the press, including the 1712 Stamp Act, which imposed a tax on all printed papers, pamphlets and advertisements. Besides rules that forbade the reporting of debates in Parliament, the common law crime of seditious libel was used against authors and printers throughout the eighteenth century, through which courts placed the stability of the State over the freedom of the press. *Id.* at 113—117.

²³ *Id.* at 115.

²⁴ *Id.* at 175; U.S. Const. amend. I.

²⁵ *Id.* at 154; Déclaration des Droits de l’Homme et du Citoyen de 1789 [Declaration of the Rights of Man and of the Citizen (August 1789)].

²⁶ These freedoms died with the Reign of Terror four years later and did not revive until after the overthrow of Napoleon. *Id.* at 167.

II. THE NATURAL RIGHT TO FREE SPEECH

What is natural law, and why should a natural law approach be used to illuminate the fundamental nature of the right to free speech? From natural law perspectives, the act of positing law can and should be guided by higher principles that are universal, immutable, and discoverable by reason—principles that also offer yardsticks against which to measure positive law.²⁷ According to natural law legal theory, “the authority of legal standards necessarily derives, at least in part, from considerations having to do with the moral merit of those standards.”²⁸ To discuss the right to free speech, which has long been recognized as a fundamental right, one should draw upon natural law perspectives, which dictate what laws are just laws and what forms these laws should take, rather than law and economics perspectives or any instrumentalist perspectives.

²⁷ RAYMOND WACKS, *PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION* 15, 22 (2006).

²⁸ Natural law legal theory is to be distinguished from (though not independent of) natural law moral theory, according to which “the moral standards that govern human behavior are, in some sense, objectively derived from the nature of human beings and the nature of the world.” Kenneth Einar Himma, *Natural Law*, *INTERNET ENCYCLOPEDIA OF PHILOSOPHY*, <http://www.iep.utm.edu/natlaw/> (last visited March 30, 2018). For instance, John Finnis’ naturalism is both an ethical theory and a theory of law, according to which the purpose of moral principles is to give ethical structure to the pursuit of equally valuable basic goods, and that of the law is to facilitate “the common good” of a community through authoritative rules that solve coordination problems arising in connection with the pursuit of these basic goods. *Id.*; see originally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 276 (1980).

Like free speech, natural law has its origins in ancient Athens.²⁹ Natural law then became a major tenet of Stoic philosophy during the Hellenistic age,³⁰ and exerted a profound influence over the Roman legal doctrine of “jus natural.”³¹ Although the medieval Catholic Church appropriated the pagan idea of natural law for Christian purposes,³² it was secularized again by the Enlightenment humanists in the seventeenth century, who contended that nature’s laws and what are good and bad are discernible by human reason and therefore do not require a God or gods to confirm their validity.³³ However conservative these views concerning universal principles may seem, since the Enlightenment period they have been employed by revolutionaries in their attempts to overthrow regimes considered to have trampled upon individuals’ natural rights.³⁴

²⁹ Both Plato and Aristotle demand that human laws conform to a natural and rationally discernable standard of justice that transcends local customs or conventions. *Id.* at 11. Wiltshire interprets justice to refer to the idea that right relations among human beings are subject to principles based on higher than ordinary claims. WILTSHIRE, *supra* note 14, at 11—12, quoting E.A. Havelock, who shows that the idea of “jus action” or just action appear in Homer’s *Iliad* and *Odyssey*.

³⁰ The Stoics, following Aristotle, believed that human beings are born with a self-awareness that leads them towards self-preservation, a capacity to distinguish good from bad, and a development of laws of thought and ethics that apply to all people at all time and in all places. *Id.* at 14.

³¹ *The Digest* (also called the *Pandects*), a major source of Roman law compiled at the behest of the emperor Justinian between AD 530 and 533, holds that there are three sorts of laws: the law of the state, “ius civile,” which expresses the interests of a particular community, the law of nations, “ius gentium,” and the law of nature, “ius naturale,” which corresponds to “that which is always good and equitable.” For Romans, natural law served as the means of adapting laws peculiar to a particular locale or a legal system for an international or transnational civilization. *Id.* at 20—22.

³² According to St. Thomas Aquinas, the Dominican scholar who reconciles Aristotelian with Christian views of life, the Eternal Law is known only to God, but men can discover and participate in the Eternal Law through the light of reason, and he calls this participation the Natural law. WACKS, *supra* note 27, at 12—13; WILTSHIRE, *supra* note 14, at 35—37.

³³ In his influential work *De Jure Belli ac Pacis*, Hugo de Groot, or Grotius, asserts that even if God did not exist natural law would have the same content. WACKS, *supra* note 27, at 16; WILTSHIRE, *supra* note 14, at 69.

³⁴ WACKS, *supra* note 27, at 17.

Whereas natural-law ethics provide guidance for one's actions, such that one will pursue the good such as life and knowledge, natural rights define a moral "space" over which one has sole jurisdiction or liberty to act according to the good, and within which no other people may rightfully interfere.³⁵ The writings by Milton, Locke, Rawls, and Kant illuminate that speech freedom is a natural right.

A. John Milton's *Areopagitica*

Although both free speech and natural law found their origins in ancient Greece, no ancient Greek philosophers directly applied natural law to the concept of *parrhesia*, let alone defending free speech as a natural right. Interestingly, though, Milton's *Areopagitica: A Speech for the Liberty of Unlicenc'd Printing* (1644), considered to be "the most eloquent plea for a free press ever penned"³⁶ and "the foundational essay of the free speech tradition,"³⁷ uses ancient Athens as a model for free speech by making frequent allusions to this city and its authors. Its title was derived from Areopagus, the hill to the west of the Acropolis where the Athenian council gathered to give their advice to the polis.³⁸ "Areopagitica" is also the title of the speech, delivered by the fourth-century orator Isocrates, which invoked virtues embodied in the judges sitting on the Areopagus in the early fifth

³⁵ Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 668—69 (1997).

³⁶ HARGREAVES, *supra* note 3, at 100.

³⁷ Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY OCCASIONAL PAPERS, Paper 6 (1995), at 1, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1007&context=ylsop_papers (last visited Oct. 10, 2017).

³⁸ HARGREAVES, *supra* note 3, at 99.

century, and which Isocrates found lacking among Athenians of his own time.³⁹ By naming his essay about free press after Isocrates' speech, Milton thus suggested that the sought-after virtues would only flourish when people enjoy the freedom to offer their views in print.⁴⁰ In addition, the epigraph of the essay is a quotation from Greek playwright Euripides' *Suppliant Women*, which states that "this is true liberty where free born men, having to advise the people, may speak free."⁴¹ Through this quotation, Milton thus asserts that free speech is a right to which all free born men are entitled.⁴²

Areopagitica was first addressed to the English Parliament, which, at the height of the English Civil War, instituted a regime of prior censorship through the Licensing Order of 1643, requiring every book, pamphlet, and other written materials to be approved by the government before it could be printed.⁴³ Central to *Areopagitica*, which Milton published without official approval in 1644, is the belief that prior censorship is evil because it dampens the ability to reason, removes moral choice, and obstructs the pursuit of truth, which is necessarily intertwined with falsehood but which benefits by confronting it: "Let her [Truth] and Falshood grapple; whoever knew Truth put to the wors, in a free and open

³⁹ SAXONHOUSE, *supra* note 5, at 20.

⁴⁰ *Id.*

⁴¹ *Id.*; HARGREAVES, *supra* note 3, at 99; citing JOHN MILTON, AREOPAGITICA (1644), available at <https://www.saylor.org/site/wp-content/uploads/2012/08/ENGL402-Milton-Aeropagitica.pdf> (last visited Oct. 10, 2017).

⁴² HARGREAVES, *supra* note 3, at 99; SAXONHOUSE, *supra* note 5, at 20.

⁴³ MILTON, *supra* note 41.

encounter.”⁴⁴ Not only does Milton compare such form of censorship to murder,⁴⁵ but he also regards a good book as possessing “a potencie of life,” which means that destroying it is not “slaying of an elemental life, but strikes at that ethereal and fifth essence, the breath of reason itself, slays an immortality rather than a life.”⁴⁶ England should learn from the Greeks and Romans, who punished blasphemous and libelous writing, but would not require all authors to submit their works for prior approval. Hence, it should allow unrestricted printing and only punish those who abuse this freedom.⁴⁷

Areopagitica inspired numerous writers, including early Enlightenment thinker John Locke. Within the pamphlet itself, Milton made it quite clear that the liberty of unlicensed printing was not meant to be universal.⁴⁸ It was Locke, writing in the late seventeenth

⁴⁴ Milton argued that reading impious material is not dangerous because “[t]o the pure, all things are pure.” He further contrasts the classical, enlightened tradition of the Greeks and Romans with the censorship tradition imposed by the Catholic Church and the Spanish Inquisition. Although Greece and Rome condemned libelous materials, neither embraced censorship. It was not until after the year 800 that the Roman Catholic Church implemented a censorship policy, which became increasingly stringent in Spain and Italy during the fifteenth century and was endorsed by the Council of Trent that ended in 1563. By then, “no Book, pamphlet, or paper” could be printed unless “approv’d and licenc’t under the hands of 2 or 3 glutton Friers.” *Id.*

⁴⁵ “[W]ho kills Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye. Many a man lives a burden to the Earth; but a good Booke is the pretious life-blood of a master spirit, imbalm’d and treasur’d up on purpose to a life beyond life.” *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ According to Milton, toleration extends to “many,” but not all. Catholics were arguably excluded from toleration for political reasons as well as religious ones, the latter including the alleged superstitious nature of Catholicism: “Yet if all cannot be of one mind, as who looks they should be? this doubtles is more wholesome, more prudent, and more Christian that many be tolerated, rather then all compell’d. I mean not tolerated Popery, and open superstition, which as it extirpats all religions and civill supremacies, so it self should be extirpat, provided first that all charitable and compassionat means be us’d to win and regain the weak and the misled: that also which is impious or evil absolutely either against faith or maners no law can possibly permit, that intends not to unlaw it self: [...]” *Id.*

century, who proved to be a more coherent defender of toleration, hence a more ardent supporter of free thought and expression.⁴⁹ If Milton's advocacy for freedom of expression mainly relies upon the argument that it leads to the finding of truth,⁵⁰ then John Locke's espousal of free speech focuses as much on individual autonomy and self-government as on the "marketplace" argument.⁵¹

B. John Locke: Freedom of Conscience, Individual Autonomy, and Self-Government

Locke elevates the position of individual rights by asserting that they are not granted by any superior authority, but are inalienable rights with which people are naturally endowed, in his *Two Treatises on Government*, *An Essay Concerning Human Understanding*, and *A Letter Concerning Toleration*.⁵² The influences of these writings, all published in 1689, were far-reaching. They were crucial to the establishment of the English Bill of Rights, which secured freedom of speech and of elections for members of Parliament.⁵³ In addition, many have traced the phrase "Life, Liberty, and the pursuit of

⁴⁹ Like Milton, Locke objected to prepublication censorship. After the Licensing Act was renewed in 1693, he developed his objections to licensing in a Memorandum to the Parliament, although his major objection to the Act had more to do with monopolies than with censorship. HARGREAVES, *supra* note 3, at 111.

⁵⁰ Alon Harel, Freedom of Speech, in *THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW* 601—602 (Andrei Marmor ed., 2015).

⁵¹ *Id.* at 603.

⁵² WILTSHIRE, *supra* note 14, at 76, 79.

⁵³ HARGREAVES, *supra* note 3, at 110.

Happiness” in the American Declaration of Independence to Locke’s assertion that every person has a natural right to defend his “Life, Health, Liberty, or Possessions.”⁵⁴

A Letter Concerning Toleration is deemed to provide “the seventeenth century’s most intellectually persuasive justification for the right to free speech” after Milton’s *Areopagitica*.⁵⁵ At first glance, Locke’s espousal of free speech is not obvious. He contends that the liberty of conscience is an inalienable right, and that the power of the government “consists only in outward force” and cannot compel moral behavior, which “consists in the inward persuasion of the mind.”⁵⁶ In *An Essay Concerning Human Understanding*, he affirms that reason persuades people and leads them towards the truth: without reason, their opinions were “but the effects of chance and hazard, of a mind floating at all adventures without choice, and without direction.”⁵⁷ Political and religious leaders, who are in no superior position to grasp the truth than people with reasoning capacities, have no right to force their opinions on them, nor would such attempts do any good.⁵⁸ Freedom of conscience is the precursor and progenitor of freedom of speech. Moreover, the right to

⁵⁴ See, e.g., ROSS J. CORBETT, *THE LOCKEAN COMMONWEALTH* (2009); MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC* (1996); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988).

⁵⁵ HARGREAVES, *supra* note 3, at 104.

⁵⁶ JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1689), available at <https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/toleration.pdf> (last visited Oct. 10, 2017).

⁵⁷ JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, ch. XVII (1689), available at <http://enlightenment.supersaturated.com/johnlocke/BOOKIVChapterXVII.html> (last visited Oct. 10, 2017).

⁵⁸ “For there being but one truth ... what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors and to the religion which either ignorance, ambition, or superstition had chanced to establish in the countries where they were born?” LOCKE, *supra* note 56.

speaking freely is arguably implied in the freedom from coercion and the liberty to reason and to pursue what one considers the truth.⁵⁹

Locke's espousal of the right to free speech is also implied in his endorsement of a limited government in *Second Treatise of Government*. This government, which people form by a social contract to preserve their natural rights to life, liberty and property, can be overthrown by the same people when it becomes unjust or authoritarian.⁶⁰ It follows that freedom of speech, along with the freedom of action, is a necessary tool to keep check on the government to ensure that it would not assume a role independent of the welfare of those who have contracted together to create it.⁶¹

C. John Rawls: Free Speech, Equal Participation, and Democracy

Twentieth-century philosopher John Rawls takes up the Lockean idea of social contract in his book *A Theory of Justice* by setting up a hypothetical situation, called the "original position," in which "free and equal" persons come together to agree on the moral principles of justice that regulate their social and political relations.⁶² Calling his conception "justice as fairness," he seeks to create an agreement situation that would be fair among all

⁵⁹ HARGREAVES, *supra* note 3, at 109.

⁶⁰ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, ch. XVII—XVIII (1689), available at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf> (last visited Oct. 10, 2017).

⁶¹ SAXONHOUSE, *supra* note 5, at 22.

⁶² JOHN RAWLS, *A THEORY OF JUSTICE* 11, 13 (1971).

the parties to this hypothetical social contract.⁶³ Hence, the principles that the parties agree upon, and whatever laws or institutions required by the principles, would also be fair.⁶⁴

Rawls regards “freedom of speech and assembly” as one of the “basic liberties” under his first principle, the “Principle of Equal Liberty,” thus making an even more direct connection between free speech and the democratic system than Locke does.⁶⁵ Yet his conceptual priority to freedom of conscience claims an ancestor in Locke’s. Defining it as “religious and moral freedom” or the freedom to honor one’s “religious or moral obligations,” Rawls further identifies “the equal liberty of conscience” as the only principle that people in the original position can acknowledge and adopt to regulate the liberties of citizens in regard to their fundamental, religious, moral, and philosophical interests.⁶⁶ Under this principle, people would not take chances with their liberty by permitting the dominant religious or moral doctrines to persecute or to suppress the less dominant ones, or to subject their freedom to the calculus of social interests.⁶⁷ Freedom of conscience and freedom of speech and assembly are subsumed under a “principle of (equal) participation,” which requires that all citizens have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws of their society.⁶⁸

⁶³ *Id.* at 12—13, 16—17.

⁶⁴ *Id.* at 11—22.

⁶⁵ *Id.* at 61, 225; *see* Harel, *supra* note 50, at 607—608.

⁶⁶ RAWLS, *supra* note 62, at 205—207.

⁶⁷ *Id.* at 207.

⁶⁸ “The principle of equal liberty, when applied to the political procedure defined by the constitution, I shall refer to as the principle of (equal) participation. It requires that all citizens are to have an equal right to take part in, and to determine to the outcome of, the constitutional process that establishes the laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone’s advantage, they are to be worked out from the viewpoint of a suitably defined

In the “Preface” to the revised edition of *A Theory of Justice*, Rawls further contends that the basic rights and liberties “guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of their two moral powers—their capacity for a sense of justice and their capacity for a conception of the good.”⁶⁹ If Rawls’ conception of the good carries the ideas of self-development and self-realization,⁷⁰ then these ideas constitute an even more important component of Immanuel Kant’s theory of free speech.

D. Emmanuel Kant: Enlightenment, Self-Development, and Self-Realization

Generally considered to be a moral theorist, Kant is rightly deemed “the most forceful exponent of natural law theory in modern days” because he upholds the objective validity of fundamental moral and political principles.⁷¹ Kant’s theory of justice is thus identical with

initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution as the highest-order system of social rules for making rules. If the state is to exercise a final and coercive authority over certain territory, and if it is in this way to affect permanently men’s prospects in life, then the constitutional process hold preserve the equal representation of the original position to the degree that this is feasible.” *Id.* at 221—222.

⁶⁹ JOHN RAWLS, *A THEORY OF JUSTICE* vii (Revised ed. 1999).

⁷⁰ In *Political Liberalism*, Rawls explains that a conception of the good includes “a conception of what is valuable in human life.” Normally it consists “of a more or less determinate scheme of final ends, that is, ends [goals] that we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations.” Rawls says that we also “connect such a conception with a view of our relation to the world...by reference to which the value and significance of our ends and attachments are understood.” JOHN RAWLS, *POLITICAL LIBERALISM* 19—20 (3d ed. 2005).

⁷¹ A.P. D’ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 110 (2d ed. 1970). It should be noted, however, that Kant’s writings, who hold that rightness comes before goodness, does not completely adhere to what is known as the “paradigmatic natural law view,” according to which “(1) the natural law is given by God; (2) it is naturally authoritative over all human beings; and (3) it is naturally knowable by all human beings”; “(4) the good is prior to the right, that (5) right action is action that responds nondefectively to the good.” According to Mark Murphy, the views of many writers are easily called natural law views, even though they do not share all of these paradigmatic position, and there is “no clear answer to the question of when a view ceases to be a natural law theory, though a nonparadigmatic one, and becomes no natural law theory at all.” *The Natural Law Tradition in Ethics*, STANFORD

what is generally known as the natural law.⁷² A prime example is his “Categorical Imperative,” which identifies objectively justifiable moral principles that must apply in the same way to all rational beings without exception. His first formulation of the Categorical Imperative rests upon a principle of universality: “The first principle of morality is, therefore, act according to a maxim which can, at the same time, be valid as universal law.—Any maxim which does not so qualify is contrary to morality.”⁷³

Kant’s defence of freedom of speech combines an autonomy-based argument with his strong conviction that free speech is congenial to the self-development and self-realization of individuals.⁷⁴ The formation and expression of beliefs do not involve intersubjective agreement and do not in themselves hinder other people’s freedom. Hence, they do not give rise to moral grounds for public regulation or coercive laws, which would diminish personal freedom and autonomy, and are appropriate only when they are necessary to preserve and promote human freedom.⁷⁵

ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/natural-law-ethics/> (last visited March 30, 2018).

⁷² IMMANUEL KANT & JOHN LADD, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* xviii (2d ed. 1965).

⁷³ IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORAL: WITH ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS* 30 (*James Ellington trans., 3d ed. 1993*). Kant’s second formulation of the Categorical Imperative bears the most relevance to his theory of rights and justice, and it reads as follows: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.” *Id.* at 36.

⁷⁴ Harel, *supra* note 49, at 606.

⁷⁵ “This principle of innate freedom already involves the following authorizations, which are not really distinct from it . . . : innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence a human being’s quality of being his own master (*sui juris*), as well as being a human being beyond reproach (*iusti*), because before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it—such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and

Kant further argues that free speech is a right essential for personal development as much as for a healthy and functional society. In his essay, *What is Enlightenment?*, he notes that for “enlightenment,” or “a human being’s emergence from his self-incurred minority [or childhood],” to take place, “nothing is required but freedom...namely, freedom to make public use of one’s reason in all matters,” meaning “that use which someone makes of it as a scholar before the entire public of the world of readers.”⁷⁶ Outlawing free speech therefore makes enlightenment impossible and denies people their right of humanity.⁷⁷ Enlightenment takes place on both the personal and the state levels. His *Theory and Practice* defends free speech in the form of freedom of the press, which serves as the ultimate safeguard of the people’s rights. “[F]reedom of the pen” is the only right that people have against the sovereign by speaking out against unjust or defective laws and policies. To outlaw this freedom would deny the ruler the vital information that he needs to act as the representative of the people, thus bringing him “in contradiction with himself.”⁷⁸

insincere...; for it is entirely up to them whether they want to believe him or not.” IMMANUEL KANT, KANT: THE METAPHYSICS OF MORALS 30 (Mary Gregor trans., 1996).

⁷⁶ Kant, An Answer to the Question: What is Enlightenment? (1798), in IMMANUEL KANT, PRACTICAL PHILOSOPHY 17—19 (Mary Gregor trans., 1996).

⁷⁷ See *id.*

⁷⁸ “[F]reedom of the pen”, Kant writes, is “the sole palladium of the people’s rights. For to want to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter – whose will gives order to the subjects as citizens only by representing the general will of the people – all knowledge of matters that he himself would change if he knew about them and to put him in contradiction with himself...” IMMANUEL KANT, THEORY AND PRACTICE (1793), available at <http://users.sussex.ac.uk/~sefd0/tx/tp2.htm> (last visited Oct. 10, 2017).

E. Free Speech and Its Natural Limits

Although the right to speak is a natural right, it is not without limits. These philosophers' writings indicate that this right does not entitle the speaker to threaten national security, disregard public morals, or make defamatory remarks. To a lesser extent, their writings also suggest that no one should have the right to make hate speech, which attacks people on the basis of such attributes as race, religion, or gender.

By stressing the role of the sovereign state, Locke, Rawls, and Kant all indicate that national security is one of the constraints to which freedom of speech should be subject. According to Locke, because people cannot secure their lives, health, liberties, and properties for themselves in a state of nature, they give up part of their natural freedom and enter into a binding commitment to a majority-rule society, which, unlike nature, provides a law, a judge, and an executive working "to no other end, but the peace, safety, and public good of the people."⁷⁹ Rawls likewise asserts that "an effective sovereign, or even the general belief in his efficacy, has a crucial role" even in the best society, in order to protect the basic rights of the people, to assign them basic duties, and to "guide men's conduct for mutual advantage."⁸⁰ Kant argues for the primacy of the legal system, which constrains both the power of the sovereign and citizens' unruly desires, and which must be morally acceptable to all and based upon the "Universal Principle of Justice."⁸¹ These theorists all espouse, to

⁷⁹ LOCKE, *supra* note 60, ch. XI.

⁸⁰ RAWLS, *supra* note 69, at 238.

⁸¹ ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 11—12 (3d ed. 1997).

various extents, civil disobedience as a means to protest unjust laws.⁸² Yet advocating for and engaging in civil disobedience with the aim of changing policies or laws does not undermine the importance of the sovereignty or national security.

Another constraint on free speech is public morality. Although none of these writers comments directly on the relationship between free speech and public morality, their concerns for public morality indicate that it should pose a constraint on free speech in circumstances where expressions violate community standards. Locke, contending that the state exists not to enforce public morality but to protect people's rights, nonetheless labels certain conduct as moral vices and sets up standards concerning how people should treat their fellow beings.⁸³ Rawls, whose principle of equal liberty seems to exclude moral paternalism, does not formally or explicitly commit to the view that morals laws are inevitably unjust.⁸⁴ Kant's principle of right holds that the state should not impede the "external freedom" of an individual, "provided he does not infringe upon that freedom of others."⁸⁵ Kant nonetheless argues in several places that the proper role of the political sovereign should uphold a

⁸² According to Locke, because the government derives its authority from the people, a government that fails to discharge its fundamental duties delegitimizes itself and justifies people's rebellion against it. In Rawls's account of civil disobedience, protesters are entitled to break the law when policymakers do not respect the principles of justice governing free and equal persons. RAWLS, *supra* note 61, at 364-365. Although whether Kant supports civil disobedience may seem dubious, scholars generally agree that he at least supports a passive form of it. *See, e.g.,* MICHAEL ALLEN, CIVIL DISOBEDIENCE IN GLOBAL PERSPECTIVE: DECENCY AND DISSENT OVER BORDERS 108, 110 (2017); David Cummiskey, Justice and Revolution in Kant's Political Philosophy, in RETHINKING KANT VOLUME I 217—240 (Pablo Muchnik ed., 2008).

⁸³ In *A Letter Concerning Toleration*, he contrasts errors in religious opinions with moral vices, including prostitution and malice, criticizing the enforcers of religious orthodoxy for placing their emphasis on the former but letting pass the latter without chastisement. LOCKE, *supra* note 56.

⁸⁴ Rawls says that "justice as fairness requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted." RAWLS, *supra* note 69, at 291.

⁸⁵ KANT, *supra* note 75.

“feeling for propriety” among the public by regulating or outlawing certain practices.⁸⁶

Hence, speech that violates public morality should be restricted.

The right to free speech does not entitle speakers to make defamatory remarks. The idea of self-ownership in Locke’s famous pronouncement, “every man has a ‘property’ in his own ‘person,’” suggests that reputation is an aspect of identity cultivated through effort and a piece of property that deserves protection.⁸⁷ For Rawls, almost all expressions are significant to the exercise of one’s rational capacity to judge and shape the structure of one’s society as a free and equal citizen. Yet “libel and defamation of private persons (as opposed to political figures)” bear “no significance at all for the public use of reason to judge and regulate the basic structure, and it is in addition a private wrong ...”⁸⁸ According to Kant, a person’s innate right to freedom carries a duty to “[b]e an honorable human being ... asserting one’s worth as a human being in relation to others.”⁸⁹ One’s reputation, moreover, “is an innate external belonging” that originally belongs only to the person. Therefore, it must not be subject to manipulation by others who use it as “a mere means for others” in pursuit of their own ends.⁹⁰

Would any of these philosophers have endorsed laws prohibiting hate speech?

Although freedom of expression is a fundamental liberty under Rawls’ first principle, this

⁸⁶ Kant argues that the state should regulate “begging, uproar in the streets, stench, and public prostitution” to preserve the “moral sense” of the public and even outlaw the public professions of atheism. *Id.* at 100.

⁸⁷ LOCKE, *supra* note 60, ch. V § 27.

⁸⁸ RAWLS, *supra* note 70, at 336.

⁸⁹ KANT, *supra* note 76, at 392.

⁹⁰ KANT, *supra* note 75, at 76.

freedom should not extend to advocacy against the fundamentals of justice, as in speech advocating for the exclusion or subordination of certain groups.⁹¹ Locke and Kant, who lived several centuries ago, have been criticized for what are considered to be racism and sexism in their writings.⁹² Yet their beliefs in individual freedom and autonomy arguably would have made them supporters of hate speech laws. As explained, Locke's idea of freedom of speech is tied to his belief in individual autonomy. He also believes that the government should protect people's "Life, Health, Liberty, or Possessions." Therefore, to the extent that one's exercise of freedom of speech may adversely impact the health or autonomy of one's fellows, as in hate speech, it should be prohibited. Likewise, Kant contends that all human beings, being free and equal members of a shared moral community, should always act in such a way that they would be willing for that way to become a general law that everyone else should do the same in the same situation.⁹³ In addition, people have the "perfect duty" not to use themselves or others "merely as a means to an end."⁹⁴ Because hate speech is abusive and exploitative, people have the moral duty not to make hate speech. This further implies that hate speech should also be prohibited by law.

⁹¹ Jeremy Waldron, *What Does a Well-Ordered Society Look Like?*, 2009 HOLMES LECTURES AT HARVARD LAW SCHOOL (Oct. 5—7, 2009), at 4, *available at* http://www.law.nyu.edu/sites/default/files/ECM_PRO_063313.pdf (last visited Oct. 10, 2017).

⁹² *E.g.*, Julie K. Ward, *The Roots of Modern Racism*, THE CRITIQUE (Sept.—Oct. 2016), *available at* <http://www.thecritique.com/articles/the-roots-of-modern-racism/> (last visited Oct. 10, 2017).

⁹³ Refer to the first formulation of Kant's categorical imperative. KANT, *supra* note 73, at 30.

⁹⁴ This is the second formulation of Kant's categorical imperative. *Id.* at 36.

F. Natural Law vs Economic Perspectives

Can freedom of speech be explained by other theories? This subsection argues that the law and economics framework by Richard Posner can supplement natural law perspectives in justifying the right to free speech. In his well-cited article, *Free Speech in an Economics Perspective*, Posner proposes to build on the free-speech formula that Judge Learned Hand used in *United States v. Dennis*.⁹⁵ Judge Hand's formula determines the constitutionality of a regulation that limits freedom of speech by asking "whether the gravity of the 'evil' [i.e., if the instigation sought to be prevented or punished succeeds], discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁹⁶ Posner expands and refines the formula by decomposing the cost of regulation into its two principal components: value, or the social loss from suppressing valuable information, and error, or the legal-error costs incurred in trying to distinguish the information that society desires to suppress from valuable information.⁹⁷ Posner further discounts value to present value, to reflect the fact that the harm from allowing dangerous speech to continue may not be incurred for some years.⁹⁸ Accordingly, he uses his formula

⁹⁵ Richard Posner, *Free Speech in an Economics Perspective*, 20 SUFFOLK U. L. REV. 1 (1986).

⁹⁶ *Id.* at 8; citing *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). In symbols, the speech should be regulated only if $B < PL$, where B is the cost of the regulation (including any loss from suppression of valuable information), P is the probability that the speech sought to be suppressed will do harm, and L is the magnitude (social cost) of the harm. *Id.*

⁹⁷ Posner adds that value is a function of the size of the actual and potential audience for the speech in question and of the decrease in audience brought about by the challenged regulation. *Id.*

⁹⁸ With these adjustments, the *Dennis* formula becomes $V + E < P \times L / (1 + i)^n$, where V stands for "value," E for "error," n for the number of periods between the utterance of the speech and the resulting

to justify different laws regulating free speech. Defamatory statements are regulated because they are statements of facts with low values and legal-error costs, but would cause great harms to the reputations of the defamed persons, especially if they are private persons and not public figures.⁹⁹ The formula also applies to the regulation of obscene materials which may be offensive only by community standards, because moving the offensive materials to more discreet locations only leads to a slight diminution of their values to consumers, and close substitutes can be found for strictly prohibited materials.¹⁰⁰ As for national security laws, subversive ideas will not likely do great harms to nations with stable political institutions, which therefore have less need to regulate subversive speech than relatively unstable institutions do.¹⁰¹

Discussing the value on the cost side of the formula, Posner aptly challenges the common perception that political speech has more value than other forms of speech. He identifies serious problems with placing political speech at the top of a hierarchy of speech values because of the “historically and logically close connection between free elections and other institutions of democratic government, on the one hand, and freedom of speech and the press on the other.”¹⁰² First, there is no clear distinction between political speech and other speech.¹⁰³ Second, even if eliminating all political speech would be more harmful than

harm, and i for an interest or discount rate which translates a future dollar of social cost into a present dollar. *Id.*

⁹⁹ *Id.* at 42—43.

¹⁰⁰ *Id.* at 44—45.

¹⁰¹ *Id.* at 32.

¹⁰² *Id.* at 9.

¹⁰³ *Id.* at 10.

eliminating all art, all advertising, or even all scientific debate, “a limited abridgment of political speech may be less harmful than a more sweeping abridgment of nonpolitical speech.”¹⁰⁴ Finally, political freedom cannot be shown to be more important than economic freedom, and political monopolies may not be worse than government-imposed economic monopolies, restrictions, and exclusions.¹⁰⁵ Thus, political speech should not be considered more valuable than “economic” speech, “broadly defined to include all speech that enhances individual welfare and therefore embracing artistic expression (including even the most vulgar entertainment) and scientific inquiry.”¹⁰⁶ In fact, Posner’s refusal to prioritize one form of expression over another has seemingly inspired him to apply his formula to politically subversive expressions and pornographic and obscene materials alike, and to balance the costs of regulating such expressions against their harms in a convincing manner.

As laudable as Posner’s debunking of the hierarchy of speech values is, his economic perspective could at best supplement and will remain subordinate to the natural law perspectives in justifying speech freedom. First, in seeking to define what are valuable and harmful to the audience and society, one cannot rely solely on economics but also has to appeal to reason. For example, the moral reason against criminal solicitation—not harming or exploiting other people—is arguably as strong as any economic rationale against it. Likewise, demands for equality, liberty, and autonomy, all natural law principles, are as compelling reasons as effective governance, an economic rationale, for granting the right to free speech to all people. Second, by defining value in his formula as the social loss from

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

suppressing valuable information, Posner accords to speech a value that is primarily, if not solely, social. He contends that utterances by individuals with very small actual and potential audiences have only limited values. In doing so, he neglects the possibility that those expressions, as well as the mere act of making them, may carry tremendous values to individuals. Hence, he emphasizes the role of free speech in promoting a marketplace of ideas and democratic governance, while overlooking its related role in safeguarding and encouraging individual autonomy and self-development, which are embraced by Locke and Kant. In short, his economic framework is by no means a holistic one, and falls short of those offered by natural law philosophers.

G. International Recognition of Freedom of Speech

The recognition of the right to free speech in major international conventions further testifies to its fundamental nature and its significance to democratic societies and the autonomy of individuals. At its first session in 1946, the General Assembly of the United Nations affirmed “freedom of information,” or “the right to gather, transmit and publish news anywhere and everywhere without fetters,” as “a fundamental human right” and “the touchstone of all the freedoms to which the United Nations is consecrated.”¹⁰⁷ In 1948, two human rights declarations, the American Declaration on the Rights and Duties of Men and the United Declaration of Human Rights (UDHR), were adopted. Both state that every person has the right to freedom of opinion and expression, which is limited by the rights, security and welfare of others.¹⁰⁸ Although the UDHR does not specifically provide for

¹⁰⁷ U.N. Doc. A/RES/59/1 (Dec. 14, 1946).

¹⁰⁸ The American Declaration, Article 4 states that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” According to the UDHR, Article. 19, “[e]veryone has the right to freedom of opinion and expression,”

prohibitions on hate speech or incitement to hatred, its Article 7 provides for equal protection for all against discrimination and incitement to discrimination.¹⁰⁹ The International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966, combines the statements of rights and responsibilities in its Article 19, which states that “[e]veryone shall have the right to hold opinions without interference” and “the right to freedom of expression,” the exercise of which may be subject to certain restrictions as provided by law and are necessary, “[f]or respect of the right or reputations of others,” and “[f]or the protection of national security or of public order (ordre public), or of public health or morals.”¹¹⁰ Article 19 has been referred to as the “core of the Covenant and the touchstone for all other rights guaranteed therein,” bridging the civil and political dimensions of the Covenant by reflecting a liberal conception of society that prioritizes the “marketplace of ideas,” or the right of each person to choose their ideas and form their opinions in complete freedom from indoctrination

which includes “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” The American Declaration, Article 28, provides that “[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.” The UDHR, Article 30 specifies that nothing in the Declaration “may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948), arts. 19, 30; American Declaration on the Rights and Duties of Man (2 May. 1948), arts. 4, 28.

¹⁰⁹ UDHR, art. 7.

¹¹⁰ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976, art. 19.

and repression.¹¹¹ Its Article 20(2) also places an obligation on States Parties to prohibit hate speech.¹¹²

Similar provisions on freedom of expression and information are found in regional treaties. One example is Article 10 of the European Convention on Human Rights, which, like the ICCPR, sets forth the parameters for legal restrictions “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”¹¹³ The American Convention on Human Rights, Article 13, provides “the right to freedom of thought and expression,” which “shall not be subject to prior censorship but shall be subject to subsequent imposition of liability” to ensure “respect for the rights or reputations of others” and “the protection of national security, public order, or public health or morals.”¹¹⁴ The African Charter of Human and Peoples Rights, Article 9, grants every individual the right to receive information and the right to express and disseminate opinions “within the law.”¹¹⁵ The 2004 Revised Arab Charter on Human Rights, Article 32, “guarantees the right to information and to freedom of

¹¹¹ *Id.*

¹¹² Article 20(2) of the ICCPR provides: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

¹¹³ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), entered into force 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan. 1990, Protocol 11 on 11 Jan. 1998), art. 10.

¹¹⁴ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673 (1970), entered into force 18 July 1978, art. 13.

¹¹⁵ African Charter on Human and Peoples’ Rights (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), entered into force 21 Oct. 1986, art. 9.

opinion and expression,” among others, but provides that “such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.”¹¹⁶

Pursuant to these conventions and treaties, international courts have agreed in principle that freedom of expression must be guaranteed not only for the dissemination of expressions information and ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, disturb, or offend the state or any members of the population.¹¹⁷ Though skeptical of limiting freedom of expression or the public’s right to information, they have recognized national governments’ extensive measures to prohibit or sanction speech that incites violence, insurrection, or armed resistance.¹¹⁸ They have also held that public morality legitimizes censorship on artistic expressions in some cases.¹¹⁹ In addition, they have acknowledged the right to reputation in defamation cases, while establishing higher standards of protection for statements made about public figures and

¹¹⁶ Arab Charter on Human Rights (Cairo, Egypt, 15 Sept. 1994), revised 22 May 2004, entered into force on 15 Mar. 2008, art. 32.

¹¹⁷ See, e.g., *Fressoz & Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *Handyside v. United Kingdom*, judgment of 7 December 1976, Series A, no. 2474.

¹¹⁸ For example, in *Halis v. Turkey*, the Turkish government imprisoned a journalist who expressed positive opinion in a book review about aspects of the Kurdish separatist movement for violating the Turkish Prevention of Terrorism Act. The European Court of Human Rights found that the measures undertaken by the Government had the legitimate aim of protecting national security and public safety, although the conviction and sentence of the journalist were disproportionate and violated the journalist’s right to freedom of expression. *Halis v. Turkey*, no. 30007/96, ECHR 2005-IV.

¹¹⁹ For instance, in *Olmedo-Bustos et al. v. Chile*, the Inter-American Court of Human Rights found that Chile had failed to meet its obligations under the American Convention when it refused to permit *The Last Temptation of Christ* to be shown in Chile. *Olmedo-Bustos et al. v. Chile*, 5 February 2001, Series C, no. 73 (I/A Court H.R.). In contrast, the European Court of Human Rights in *Otto-Preminger-Institut v. Austria* upheld the ban and seizure of a film deemed offensive to the Catholic majority of a community. *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A, no. 295-A.

therefore prioritizing freedom of expression over the preservation of reputation where matters of public concern are involved.¹²⁰ Finally, courts have put much weight on the contextual factor in assessing whether expressions would or had incite(d) hatred and whether their censorship would constitute a breach of the right to freedom of expression.¹²¹

III. THE NATURAL RIGHT TO PARODY

If the right to free speech is a natural right, then isn't making parodies, a form of speech, also a natural right subject to the same laws prohibiting expressions that are defamatory and obscene and that threaten national security? An in-depth discussion of the meaning of "parody" will be provided in the next chapter, which will compare different definitions and propose a working legal definition that properly balances owners and users' rights. A more general definition is provided at this juncture to justify the right to make parodies as a natural right. The *Oxford English Dictionary* defines "parody" as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous."¹²² The *American Heritage Dictionary* defines it as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule."¹²³ While these two definitions do not agree on whether a parody may only use the original as its target,

¹²⁰ *E.g.*, *Incal v. Turkey*, judgment of 9 June 1998, Reports 1998-IV; *Zana v. Turkey*, judgment of 25 November 1997, Reports 1997-VII.

¹²¹ In *Incal*, the Court found a breach of the right to freedom of expression, stating that, "the Court does not discern anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Turkey, and more specifically in İzmir." para. 58.

¹²² THE OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989).

¹²³ THE AMERICAN HERITAGE DICTIONARY 1317 (5th ed. 2006).

or may mimic the original in order to criticize or comment on something else, they both identify the imitation of the original work or author as the essential characteristic of parody.¹²⁴ As literary scholar Simon Dentith says, all language use involves imitation, and given that “all written utterances situate themselves in relation to texts that precede them and are in turn alluded to or repudiated by texts that follow,” parody is “one of the many forms of intertextual allusion out of which texts are produced.”¹²⁵

As in the cases of free speech and natural law, one can trace the origin of parody in ancient Greece. Different forms of parody were dominant in ancient Greek culture. The Greek term *parodia* generally refers to a mock-heroic poem, one written in epic Homeric style but with a trivial or “low” topic, although travesty poems with “high” topics but written in “low” styles could also be found, notably in the satyr plays.¹²⁶ According to Aristotle’s *Poetics*, Hegemon of Thasos, a near contemporary of Aristophanes (450—388 BC), invented parody and authored such mock-epics as the *Gigantomachia* or *Battle of the Giants*.¹²⁷ One source goes further back in time and identifies Hipponax of Ephesus of the sixth century BC

¹²⁴ Part One, Chapter Two will explain why parody should be broadly defined by the law and why a work appropriating an original work to criticize or comment on something other than the original may also be considered a parody.

¹²⁵ SIMON DENTITH, *PARODY* 5 (2000).

¹²⁶ *Id.* at 40, 42. An example of the former, and the only *parodia* that still survives today, is the *Batrachomyomachia*, or the *Battle of the Frogs and Mice*, written by an anonymous author during the time of Alexander the Great. Euripides’ *Cyclops*, a parody of the Cyclops episode in Homer’s *Odyssey*, is an example of the latter. *Id.* at 40—42.

¹²⁷ According to Fred Householder, “not only words but phrases and lines are borrowed from Homer” in Hegemon’s works. MARGARET A. ROSE, *PARODY: ANCIENT, MODERN AND POST-MODERN* 12 (1993).

as the real inventor and first author of parody.¹²⁸ Nonetheless, *parodia* does not refer merely to mock-epic. It was more frequently used by Greek and subsequent Roman writers to refer to “a more widespread practice of quotation, not necessarily humorous, in which both writers and speakers introduce allusions to previous texts.”¹²⁹ For example, the relatively well-known comic plays of Aristophanes are full of parodic allusions to tragedian Euripides (c.480—406 BC).¹³⁰ The parodic form has not vanished after the fall of the Greek Empire: it has persisted, through the middle ages to the modern and postmodern times, in literatures, popular culture, and everyday life.¹³¹

Because parody is a form of speech, the right to parody, like free speech, is essential to all the principles underlying speech freedom discussed in this chapter. Given that free speech and democracy originated in ancient Greece, where authors enjoyed much freedom despite attacks from some public officials, the proliferation of parodic forms in ancient Greek culture was perhaps not a pure coincidence. One may even attribute the profusion of parodic forms to the legends about the Olympian Gods, the scandalous incidents of which provided the opportunity for parody.¹³²

¹²⁸ For example, Hipponax’s *Hexameters* contains a parodic evocation of more serious epic openings such as Homer’s call to the Muse in the opening of the *Odyssey* (“Tell me, O Muse, of the man of many devices, who wandered full many ways after he had sacked the sacred citadel of Troy.”) *Id.* at 16.

¹²⁹ DENTITH, *supra* note 125, at 10.

¹³⁰ *Id.* at 39.

¹³¹ See, e.g., DENTITH, *supra* note 125; ROSE, *supra* note 127.

¹³² DENTITH, *supra* note 125, at 10.

Unsurprisingly, authors of parodies and satires¹³³ often fell victims to their dictatorial governments in different periods of history. For instance, the “Bishops’ Ban” in Elizabethan England prohibited the printing of satires and demanded that the published works of authors including John Marston, Gabriel Harvey and Thomas Nashe, many of which made abundant uses of parodies to critique society, be burned.¹³⁴ In Nazi Germany, Werner Finck, a famous cabaret actor and author with a gift for parody and satire, was imprisoned in a concentration camp for six weeks for attempting to ridicule the state and the party.¹³⁵ Nobel Prize-winning Italian playwright and actor Dario Fo, who frequently employed the parodic method to criticize his government as well as the Catholic Church, was censored, banned from television and briefly jailed by the government for his subversive messages.¹³⁶ In Chile, members of the Grupo Aleph, a local theatre group, were jailed after performing a parody on

¹³³ Satires need not borrow from copyrighted works, although many of them do. As Part Two, Chapter Three will explain, the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, by considering works that target something other than the original works to be “satires” that “can stand on its own two feet and so requires justification for the very act of borrowing,” set up a parody/satire dichotomy. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580—81 (1994). This dichotomy has influenced a number of decisions and led to the suppression of many “satirical” works that do not direct parts of their criticisms or commentaries against the originals. Part Two, Chapter Four will further argue that the “satire” category should be eliminated from Canadian law because a satire need not borrow from any preexisting work to offer commentary or criticism. Courts may therefore be prejudiced against works falling within this category and may be less likely to hold them as fair dealings.

¹³⁴ Marston’s *The Metamorphosis of Pigmalion’s Image and Certain Satyres* (1598), which imitates Ovid and the Satires of Juvenal to satirize the society, was one of the banned works. GEOFFREY MILES, *CLASSICAL MYTHOLOGY IN ENGLISH LITERATURE: A CRITICAL ANTHOLOGY* 358 (Geoffrey Miles ed., 1999). Debora Shuger has called this ban, issued by the Archbishop of Canterbury and the Bishop of London in 1599, “the most sweeping and stringent instance of early modern censorship.” Debora Shuger, *Civility and Censorship in Early Modern England*, in *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION* 89 (Robert C. Post ed., 1998).

¹³⁵ Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y U.S.A. 546, 560 (1997).

¹³⁶ The arrest took place in 1973 in Sardinia, Italy, after Fo refused to allow the police into his theater. Michael Billington, *Dario Fo: A Theatrical Jester Who Made Us Laugh in the Face of Tragedy*, THE GUARDIAN (Oct. 13, 2016), <https://www.theguardian.com/stage/2016/oct/13/dario-fo-theatrical-jester-dies-aged-90> (last visited Oct. 10, 2017).

the 1973 Chilean coup d'état, and then forced to go into exile by the military government that sought to control the media.¹³⁷ More recently, a popular television anchor in China was suspended from his job at the state broadcaster for making a parody of an old song to insult Mao Zedong, former chairman of the Chinese Communist Party, at a private gathering.¹³⁸

Controls on parody throughout history, such as in the form of censorship, have tacitly acknowledged its potential power in bringing social change.¹³⁹ Hence, scholars and critics have remarked how parody could spur the public to engage in the democratic process by holding up the most powerful institutions and individuals in society to sardonic scrutiny.¹⁴⁰ It is not only in developed nations that parodic works are regarded as promoting the fundamental values underlying the constitutionally protected right to freedom of expression.¹⁴¹ For example, the importance of parody in promoting democratic values has been recognized in post-apartheid South Africa, where freedom of “the press and other media” and “freedom of artistic creativity” are constitutionally-entrenched rights.¹⁴² After a

¹³⁷ KEITH RICHARDS, POP CULTURE LATIN AMERICA!: MEDIA, ARTS, AND LIFESTYLE 121—122 (2005).

¹³⁸ Fujian Bai, the anchor, sang “Taking Tiger Mountain by Strategy,” a revolutionary opera produced during the Chinese Cultural Revolution, while interjecting the lyrics with his comments to suggest that China had “suffered enough” under Mao Zedong. *China TV Anchor Bi Fujian to Be Punished for Mao Insult*, BBC NEWS (Aug. 10, 2015), available at <http://www.bbc.com/news/world-asia-china-33844095> (last visited Oct. 10, 2017).

¹³⁹ MARGARET A. ROSE, PARODY/META-FICTION 133—134 (1979).

¹⁴⁰ *E.g., id.*; Graham Reynolds, *Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada*, 33(2) MANITOBA L.J. 243, 246 (2009).

¹⁴¹ For example, the Supreme Court of Canada held that parodies can be seen as promoting the fundamental values underlying the constitutionally protected right to freedom of expression, “including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.” *RJR MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199, para. 72 (SCC).

¹⁴² Const. S. Afri, art 16(1).

long period during which thoughts and ideas were banned, South African academics have come to discover “a regenerative and often deeply subversive element that is constantly challenging power and formulating different means of expression through new forms.”¹⁴³ Expressed through parody and related forms, this subversive tendency would serve to strengthen their democracy.¹⁴⁴ As a South African judge remarked, the law must protect these new forms “whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts.”¹⁴⁵

Parodies should not be banned as long as they are not defamatory or obscene, do not threaten national security, and are not hate speech. Yet the values of parodies do not solely lie in democratic governance. In fact, parodies need not contain overly political messages. Kant’s writings have illuminated how the values underlying free expression encompass not only participation in political processes and self-government, but also individual autonomy and self-fulfillment. Even Posner has warned against a hierarchy of speech values and emphasized that cultural expressions have as many values as political ones. As one scholar remarks, the purpose of democratic society is to promote individual welfare which, in conjunction with the principle of equality, leads to the right to express beliefs and opinions. In addition, “the proper end of man is the realization of his character and potentialities as a human being . . . [and] every man –in the development of his own personality – has the right to form his own beliefs and opinions . . . [and] the right to express these beliefs and

¹⁴³ Judith February & Richard Calland, *Satire Must Be Encouraged*, IOL NEWS (Aug. 2, 2013), <http://www.iol.co.za/news/satire-must-be-encouraged-1.1557050#.VGWUg5PF8dN> (last visited Oct. 10, 2017).

¹⁴⁴ *See id.*

¹⁴⁵ Laugh It Off Promotions CC, *supra* note 1, para. 108.

opinions.”¹⁴⁶ It can be argued further that self-realization or self-fulfillment may be the only real value served by freedom of expression in that the value of democracy was based upon the value of self-realization.¹⁴⁷ In this light, political parodies are not inferior to parodies created for building cultures or for personal expression and fulfillment. The two are not all that different in terms of purposes and values. They, and the values that they serve, reinforce each other.

The right to parody, like the right to free speech, therefore is a natural right. Yet parodies appropriate materials already in existence, inside and outside of the public domain. This Part of the dissertation will proceed to examine the right to create parodies in the copyright context from different philosophical traditions. It will argue that freedom of speech is more fundamental than the right to intellectual property. This carries significant implications regarding how parody should be legally defined and how conflicts between the right to parody and copyrights in parodied materials should be reconciled under the law.

¹⁴⁶ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

¹⁴⁷ See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

CHAPTER TWO

THE NATURAL RIGHT TO PARODY COPYRIGHTED WORKS

*Many definitions of parody have paid insufficient attention to its ancient heritage.*¹

The last chapter has argued that the right to parody is fundamental as an exercise of the natural right of free speech. This chapter will argue that the right to parody is also a natural right in the copyright context. Hence, copyright law should offer a broad scope of protection to users' right to parody, by defining parody as a work that draws upon the original work to criticize or comment on it or that directs its criticism or commentary towards something else. Moreover, a parody should not require that the work contain a comic or critical intent. To qualify as fair use or fair dealing, a parody must not serve as a market substitute for the original or its derivatives.

To arrive at a legal definition of parody that would properly accommodate the users' natural right to parody, this chapter will survey various literary sources, scholarly views, and dictionary definitions of parody, and draw upon natural law and utilitarian philosophical perspectives. In particular, it will examine the nature of copyright and contend that whether deemed a natural right or an incentive to stimulate the production of works, copyright is by

¹ MARGARET ROSE, PARODY: ANCIENT, MODERN AND POSTMODERN 5 (1993).

no means absolute. Hence, the authors' or owners' rights to their works accommodate the public's right to free speech by parodying their works. These philosophical traditions, according to which the right to free speech is more fundamental than property and intellectual rights, also lend support to a broad, speech-friendly definition of parody. In addition, this broad exemption for parody is likely more economically efficient than the narrow one endorsed by law and economics research.

This chapter will argue that not all works falling within the proposed parody exception should be held as fair uses or fair dealings. The importance of property and intellectual property rights suggests that the parodic work must not impinge on the interests of the copyright owner by displacing the original or, from a utilitarian perspective, disincentivize the author. Parodies satisfying this condition and qualifying as fair uses or fair dealings would not violate the authors' moral rights of attribution and integrity. Finally, because the right to parody is a natural right in both the free speech and the copyright contexts, this chapter will conclude that to safeguard this right, courts should apply the parody exception by drawing upon the free speech/freedom of expression doctrine.

I. DEFINING “PARODY”: SOURCES, DEFINITIONS AND VIEWS

Writers exercise their right to free speech through parodies. Parodies, moreover, are often creative expressions. This is true of Hegemon of Thasos' first parody in ancient Athens, or Werner Finck's performances poking fun at the Nazi regime, or the former television anchor's parody mocking the deceased Chinese Communist leader. Yet what should be the scope of this right and how should “parody” be defined? This section will survey dictionary definitions, literary sources, and scholarly views of parody, to contend that

a parody can target the underlying work or something else, and that it need not contain a comic or critical intent.

As Dentith puts it, “the discussion of parody is bedevilled by disputes over definition,” due to “the antiquity of the word parody,” “the range of different practices to which it alludes,” and “differing national usages.”² As the previous chapter has explained, Aristotle’s use of “parodia” to refer to a “narrative poem, of moderate length, in the meter and vocabulary of epic poems, but treating a light, satirical, or mock-heroic subject” is not the only meaning of the word, because “parodia” was more frequently used by Greek and subsequent Roman writers to refer to “a more widespread practice of quotation, not necessarily humorous, in which both writers and speakers introduce allusions to previous texts.”³ Currently, the *Oxford English Dictionary* defines “parody” as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.”⁴ The *Cambridge Dictionary* defines it as “writing, music, art, speech, etc. which intentionally copies the style of someone famous or copies a particular situation, making the features or qualities of the original more noticeable in a way that is humorous.”⁵ The *American Heritage Dictionary* describes it as a “literary or artistic work that imitates the characteristic style of an author or

² SIMON DENTITH, PARODY 6 (2002).

³ *Id.* at 10.

⁴ THE OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989).

⁵ THE CAMBRIDGE DICTIONARY, 2017, <http://dictionary.cambridge.org/dictionary/english/parody> (last visited Oct. 10, 2017).

a work for comic effect or ridicule.”⁶ All of these definitions emphasize a parody’s imitation of a pre-existing work.

Two issues arise out of these definitions of “parody.” The first issue concerns the subject of the parody. Neither the description in *Poetics*, nor the definition in the *American Heritage Dictionary*, clearly indicates whether the original text or character is the subject of a parody. In fact, Greek comedian Aristophanes (c.450B—388 BC) made parodic allusions to tragedian Euripides (c.480—406 BC) both to comment on his fellow playwright and his works and to reflect on the society of his time.⁷ In contrast, the definitions in the *Oxford* and *Cambridge English Dictionaries* do indicate that a parody targets the original. The second issue is whether the parody contains comic intent. Although all of these definitions mention elements of comedy, humor, or ridicule, whether a parody is comical or not can be highly subjective.

Regarding the first issue, scholars have divided numerous conceptions of parody⁸ into two major groups according to the subjects of their critiques. The first group, which have been referred to as a “target” parodies,⁹ are based upon the “popular perception of parody and the standard dictionary definition” that conceives of parody as a “specific work of

⁶ THE AMERICAN HERITAGE DICTIONARY 1317 (5th ed. 2006).

⁷ DENTITH, *supra* note 2, at 39.

⁸ For instance, Margaret A. Rose, in her book *Parody: Ancient, Modern and Post-Modern* conducts a survey of the works of such authors as Aristotle, Ben Jonson, Friedrich Nietzsche, Mikhail Bakhtin, Susan Sontag, Michel Foucault, Jacques Derrida, Martin Amis, and Umberto Eco, and identifies thirty-seven conceptions of parody. ROSE, *supra* note 1, at 280—283; see Graham Reynolds, *Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada*, 33(2) MANITOBA L.J. 243, 245 (2009).

⁹ Michael Spence, *Intellectual Property and the Problem of Parody*, 114 LAW Q. REV. 594, 594 (1998).

humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous.”¹⁰ The second group of parodies, which have been described as “weapon parodies,”¹¹ are based upon the conception that the critique need not be performed at the “expense of the parodied text,”¹² and can instead target something other than the work itself, such as “artistic traditions, styles...genres” or society.¹³ In addition, some parodies “merely hint at the text, assuming their audience to be familiar with it,” while others “both present the text and comment upon it at the same time.”¹⁴

Numerous scholars, including Linda Hutcheon and Simon Dentith, have endorsed the broad definition of “parody” that encompasses both “target” and “weapon” parodies.¹⁵ In fact, the original meaning of *parodia* supports this broad definition. In his article “The Basis of Ancient Parody,” F. J. Lelievre notes that an ambiguity is found in the word the prefix “para,” which can be translated to mean both “nearness” and “opposition” and which convey the respective meanings of “consonance and derivation” and “transgression, opposition, or difference,” and that “in compounds a synthesis of these two forces may sometimes be

¹⁰ Ellen Gredley & Spyros Maniatis, *Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright*, 19 EUR. I.P. REV. 339, 341 (1997).

¹¹ Spence, *supra* note 9, at 594.

¹² LINDA HUTCHEON, *A THEORY OF PARODY: THE TEACHINGS OF TWENTIETH-CENTURY ART FORMS* 6 (1985).

¹³ Spence, *supra* note 9.

¹⁴ *Id.* at 595.

¹⁵ Simon Dentith offers an inclusive account of parody, referring it to a “range of cultural practices which are all more or less parodic,” hence “any cultural practice which provide a relatively polemical allusive imitation of another cultural production or practice.” He further explains that the direction of attack can vary: a parody can serve as a “rejoinder, or mocking response to the word of another,” “[b]ut many parodies draw upon the authority of precursor texts to attack, satirize, or just playfully to refer to elements of the contemporary world” or “some new situation to which it can be made to allude.” DENTITH, *supra* note 2, at 9.

found.”¹⁶ Margaret A. Rose cites the *Oxford English Dictionary*, which describes “para” as “having had the sense as a preposition of ‘by the side of,’ ‘beside,’ ‘whence alongside of, by, past, beyond, etc.’; in addition, “in composition it had the same senses with such cognate adverbial ones as ‘to one side, aside, amiss, faulty, irregular, disordered, improper, wrong,’ also expressing ‘subsidiary relation, alteration, perversion, simulation.’”¹⁷ As Rose notes, such an ambivalence towards the target entails “not only a mixture of criticism and sympathy for the parodied text, but also the creative expansion of it into something else.”¹⁸ Rose convincingly argues that if parodia can “laugh both at and with its target,”¹⁹ then there is no reason why “parody” should be narrowly defined to refer only to works that target the originals but not something else.²⁰

Regarding comic intent, scholars have different opinions on whether a parody needs to be comical. Rose, defining parody as the “comic refunctioning of performed linguistic or artistic material,” notes that “comic intent” has been a characteristic of parody since its earliest appearance in history.²¹ In contrast, Hutcheon contends that “the continuing and

¹⁶ Rose, *supra* note 1, at 8, 48; citing F. J. Lelievre, *The Basis of Ancient Parody, in GREECE AND ROME* 66 (1954).

¹⁷ *Id.* at 48.

¹⁸ *Id.* at 51.

¹⁹ *Id.* at 52.

²⁰ As Chapter Three will explain, the U.S. Supreme Court adopted a narrow definition of parody and labelled works that target something else “satire.” Although the Federal Court of Canada in *United Airlines, Inc. v. Cooperstock* adopted a broad definition of parody, Chapter Four will explain that a broadly defined parody category should replace the parody/satire dual categories in the current statute.

²¹ Rose, *supra* note 1, at 25.

unwarranted inclusion of ridicule in its definition has trivialised the form.”²² She asserts that “what is remarkable about modern parody is its range of intent—from the ironic and playful to the scornful and ridiculing.”²³ Likewise, Spence observes that some parodies exploit the disjunction between the parody and the text to comic effect, while others do not.²⁴ Ellen Gredley and Spyros Maniatis go further to argue that parodies may be characterized by “admiration and reverence.”²⁵ Indeed, not only is the comic element highly subjective, but an overemphasis on this element also risks overlooking parody’s other valuable functions. On the other hand, a broad definition of parody encompassing works with different intents helps to resolve a related issue of whether a parody needs to be critical of the original text, its characters, or anything. Neither the definitions of *parodia*, nor those of parody in various dictionaries, mention critique at all. Given that parodies perform different functions, one would be hard pressed to argue that comic or critical intent is a necessary attribute of parody.

Through surveying literary sources, dictionary definitions, and scholarly views, this chapter thus far has taken the position that a parody draws upon an existing work either to criticize or comment on the original, or direct its criticism or commentary towards something else, and need not be overly humorous or critical. The following sections will examine how the right to parody is justified from various philosophical perspectives. These perspectives

²² Gredley & Maniatis, *supra* note 10, at 339.

²³ HUTCHEON, *supra* note 12, at 6.

²⁴ Spence, *supra* note 9, at 595.

²⁵ Gredley and Maniatis use as an example the parody of *The Wizard of Oz* by Star Wars. Indeed, an essay that studies the influences of *The Wizard of Oz* on *Star Wars* is published on the official *Star Wars* website. See Bryan Young, *The Cinema behind Star Wars: The Wizard of Oz*, STAR WARS (Jan. 18, 2016), <http://www.starwars.com/news/the-cinema-behind-star-wars-the-wizard-of-oz> (Oct. 10, 2017).

further lend support to a broad scope of protection for this right through a broad, speech-friendly legal definition of parody.

II. COPYRIGHT AND THE NATURAL RIGHT TO PARODY

That one possesses a natural right to parody copyrighted works may not be as intuitive as the saying that one enjoys a natural right to parody in the free speech context. This section will draw upon the works of natural law theorists discussed in Part One, Chapter One, along with utilitarian approaches, to examine the nature of copyright. It will contend that copyright, whether considered to be a natural right or an incentive to promote the creation of new works, is by no means absolute. Hence, the owner's copyright accommodates the public's right to free speech by parodying the copyrighted work.

A. Locke's Labor Theory of Acquisition and Provisos

Locke played a pivotal role in the enactment of the first Copyright Act in Britain. In the late 1690s, the British Parliament desired to eliminate the abuses of the Licensing Act, which was enforced by the Stationers' Company, a guild of printers given the exclusive power to print and censor literary works.²⁶ Embittered by the printers' power to prevent the publication of books without their prior permission, Locke presented a memorandum to the Commons, in which he attacked the monopoly of the Stationers' Company and proposed a limited property right for authors in their books.²⁷ At his urging, the Commons rejected the

²⁶ ROBERT HARGREAVES, *THE FIRST FREEDOM: A HISTORY OF FREE SPEECH* 111 (2002).

²⁷ "I know not why a man should not have liberty to print whatever he would speak and to be answerable for the one just as he is for the other if he transgresses the law in either," Locke wrote in this memorandum to the House of Commons. *Id.* He proposed that authors' property rights in their works would be recognized for fifty years after publication or fifty to seventy years post-mortem. *Id.*

Licensing Act when it came up for renewal and appointed a committee to “prepare and bring in a Bill for the better regulation of Printing and Printing presses.”²⁸ In 1709, the Parliament enacted the Statute of Anne, or the Copyright Act of 1709, which granted publishers of books legal protection for fourteen years with the commencement of the statute, and twenty-one years of protection for any book already in print.²⁹ At the expiration of the first fourteen-year copyright term, the copyright re-vested in its author, if he or she were still alive, for a further term of fourteen years.³⁰

Although Locke’s other works do not discuss copyright, his labor theory of acquisition can be interpreted to endorse not only authors’ rights in their works, but also users’ rights to parody copyrighted works. In his *Second Treatise of Government*, Locke holds that people have a natural right of property in their bodies and own the labor of their bodies as well as the fruits of that labor.³¹ Therefore, annexing or mixing one’s labor with resources found in the common gives rise to property rights or legitimate claims to ownership, as long as “there is enough and as good left for others.”³² Alfred Yen extends Locke’s labor theory to include the natural right to one’s intellectual labor and the creations

²⁸ *Id.* at 112.

²⁹ *Id.*

³⁰ *Id.*; *The Statute of Anne: The First Copyright Statute (1709)*, JEREMY NORMAN & CO., INC., HISTORY OF INFORMATION, <http://www.historyofinformation.com/expanded.php?id=3389> (last visited Oct. 10, 2017).

³¹ “Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person.” “The labour of his body, and the work of his hands, we may say, are properly his.” JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, ch. V, § 27 (1689), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html> (last visited Oct. 10, 2017).

³² *Id.*

of such labor.³³ Robert Merges contends that Locke's labor theory applies equally well or even better to intellectual property than to real property. Drawing a parallel between the public domain and the state of nature, Merges argues that "fresh appropriation from a background of unowned or widely shared material," implied in Locke's work, is much more common today in the world of intellectual property than in the world of tangible assets.³⁴ In addition, if labor is relevant in establishing some real property rights, it plays a much larger and much more prominent role in establishing intellectual property rights.³⁵ Indeed, Locke, by describing his own work as labor, impliedly acknowledges a labor-based property claim to the product of writing.³⁶

What about making parodies of copyrighted works? According to the Charity Proviso in Locke's *First Treatise of Government*, properties are given by God for the maintenance and development of the human race and therefore are not a source of absolute power.³⁷ Hence, destitute people are entitled to assets for survival, even if those assets are otherwise

³³ Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523 (1990).

³⁴ ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY 32 (2011).

³⁵ *Id.* at 33.

³⁶ *Id.*

³⁷ *Id.* at 61—63. "God, the Lord and Father of all, has given no one of his children such a property in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplusage of his goods; so that it cannot justly be denied him, when his pressing wants call for it; and therefore no man could ever have a just power over the life of another by right of property in land or possessions; since it would always be a sin, in any man of estate, to let his brother perish for want of affording him relief out of his plenty. As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another's plenty as will keep him from extreme want, where he has no means to subsist otherwise..." JOHN LOCKE, *FIRST TREATISE OF GOVERNMENT*, ch. 4, § 42 (1689), available at <http://www.nlnrac.org/earlymodern/locke/documents/first-treatise-of-government> (last visited 10 Oct. 2017).

legitimately held by other owners.³⁸ According to Merges, if intellectual property rights get in the way of “survival and sustenance,” then such rights have to give way to the destitute.³⁹ Because those in “cultural destitution” do not have as strong a claim on the properties of the better-off people for facilitating cultural developments, a balancing of rights becomes necessary.⁴⁰ Adam Mossoff’s affirmation that human flourishing goes beyond pure “survival and sustenance” offers a more direct endorsement of parody. Just as Lockean labor can be physical or intellectual, Mossoff argues, Locke puts equal weight on economical, moral, and intellectual values.⁴¹ Following Mossoff’s logic, authors’ rights in the fruits of their intellectual labor should accommodate creative appropriations of copyrighted works for the sake of human flourishing. Parodying copyrighted materials would be a good example.

Carys Craig criticizes the natural law approach to copyright. She attacks the Lockean approach from an internal perspective by arguing that granting property rights to ideas goes against two of Locke’s very own Provisos. It violates his Sufficiency Proviso, which demands that there be “enough, and as good” left in the common for others, as well as his No-Spoilage (waste prohibition) Proviso, according to which people should not take from the common more than they can use.⁴² From an external perspective, Craig argues, the Lockean

³⁸ MERGES, *supra* note 34, at 61—63.

³⁹ Examples include cases where IP rights intersect with issues of human health, such as patents for AIDS drugs. *Id.* at 64.

⁴⁰ *Id.* at 64—65.

⁴¹ Adam Mossoff, *Saving Lock from Marx: The Labor Theory of Value in Intellectual Property*, 29 SOC. PHIL. & POL’Y 283, 309—16 (2012).

⁴² Carys Craig, *Locke, Labor, and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law*, 28 QUEEN’S L.J. 1, 23—30, 30—36 (2002).

approach prioritizes the rights of copyright holders over those of the users, hence favoring commodification over communication and public interest.⁴³

Granting property rights to ideas need not violate Locke's Provisos or prioritize owners' rights over public interests. In fact, the Provisos, by calling for the accommodation of users' rights, indicate that authors' and owners' rights can and should coexist with users'. Wendy Gordon, for example, cites Locke's Sufficiency Proviso both to affirm that authors have property rights in their works and to resolve the conflicts between creative laborers and the public.⁴⁴ According to this Proviso, individuals have a right to homestead private property by working on nature, but they can do so only "...at least where there is enough, and as good, left in common for others."⁴⁵ Applying this to the intellectual common, Gordon interprets the Proviso in an "individualized" way to mean that latecomers on the cultural scene should be free to use existing creations, as long as prohibiting the latecomers' uses would make them worse off individually than they would have been if the original creators had not produced these intangible works at issue.⁴⁶ Gordon proposes to enforce this Proviso through the "liability rule," under which latecomers or borrowers offer reasonable royalty

⁴³ *Id.* at 40—48.

⁴⁴ Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

⁴⁵ "Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same." LOCKE, *supra* note 30, § 33 (1689), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html> (last visited Oct. 10, 2017).

⁴⁶ *Id.* at 1570.

damage awards to the original creators or obtain compulsory licenses from them, and the “stowaway” approaches, which look into the latecomers’ motive(s) in using the copyrighted works.⁴⁷ Gordon does not mention parodies. However, by offering something new to society through parodies, parodists arguably prove that they are not free-riders who solely aim to take advantage of the creators and have no interest in providing benefits to the public.

Rather than rejecting the Lockean approach to intellectual property, Benjamin Damstedt acknowledges the importance of the No-Spoilage Proviso in constructing a Lockean theory of intangible properties. According to this Proviso, people were given the world “for their benefit and the greatest conveniences of life they were capable to draw from it,” and so must strive for the optimal, “best” use of the resources.⁴⁸ Intellectual property can promote the “wasteful overappropriation” of resources: intangible goods are non-rivalrous and “divisible without limit,” the creation of an intangible good produces “an unlimited number of intangible units,” and laborers would not be able or willing to convert all units into money whenever any of them are produced.⁴⁹ Justified taking can be seen as a good way to police waste prohibition.⁵⁰ Admittedly, it may be difficult to identify the point where waste begins to occur. Merges believes that so long as someone gets some use out of the

⁴⁷ *Id.* at 1573.

⁴⁸ “The same law of nature that does by this means give us property does also bound that property, too. ‘God has given us all things richly’ (I Tim. 6.17), is the voice of reason confirmed by inspiration. But how far has he given it to us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much may he by his labor fix a property in; whatever is beyond this is more than his share and belongs to others. Nothing was made by God for man to spoil or destroy.” (II, 31) Locke, *supra* note 45, § 31.

⁴⁹ Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179, 1183 (2003).

⁵⁰ *Id.* at 1196.

concept, it has not been wasted, and the fact that some people would have liked to use it at a reduced price or for free is irrelevant.⁵¹ Damstedt, on the other hand, defines Lockean waste more broadly as something that occurs where “a unit of a product of labor is not put to any use.”⁵² Limiting the ability of users to obtain copies of the intangible good therefore leads to waste.⁵³ Following Damstedt’s reasoning, to ensure productive uses of intangible copyrighted resources, users are entitled to appropriate these resources in ways that would benefit society without harming the owners. Parodying copyrighted works would be a good example, and prohibiting such a use would constitute waste.

To the extent that Locke’s labor theory can extend to copyright, his Provisos further justify the users’ right to parody copyrighted works to serve the common good. The Charity Proviso states that property rights and, by extension, intellectual property rights are not absolute. To ensure that there is “enough, and as good” for all, copyright law should not only entitle owners to copyright their works, but should also confer on the public the right to parody these works. The parody exception would also ensure the enforcement of the No-spoilage Proviso, so that any waste of intellectual resources would be minimized.

B. Rawls’ Personal Possessions and Theory of Distributive Justice

Whereas Rawls recognizes the right to freedom of speech as a fundamental liberty, both intellectual property rights and the right to parody copyrighted works can be inferred from his theory of justice. As the previous Chapter has explained, Rawls’ first principle

⁵¹ MERGES, *supra* note 34, at 58.

⁵² Damstedt, *supra* note 49, at 1194-95.

⁵³ *Id.* at 1195.

states that each person has “an equal right to the most extensive total system of equal basic liberties.”⁵⁴ The right to “personal property,” which only includes the minimum sufficient for personal independence and self-respect, constitutes an essential part of individual liberty.⁵⁵ Merges argues for a fundamental right to intellectual property within the Rawlsian framework by expanding the definition of “personal possessions” to include creative works, which are often more personal than many types of property.⁵⁶ Because individual autonomy fostered by private property forms an indispensable part of a fair, well-ordered society, Rawls’ conception of property as basic liberty evolving out of the “original position” should be broadened to include intellectual property rights.⁵⁷

Rawls’ principle of difference further justifies the potential income inequalities created by an intellectual property system, which enables creative professionals and owners of intellectual property rights to profit from their works. The principle of difference justifies social and economic inequalities to the extent that they are both “attached to offices and positions open to all under conditions of fair equality of opportunity,” and that they serve “the greatest benefit of the least-advantaged.”⁵⁸ Reasonable people behind the “veil of ignorance” would agree to include intellectual property rights as a basic liberty and the

⁵⁴ JOHN RAWLS, A THEORY OF JUSTICE 61, 225 (1971).

⁵⁵ E.g., SAMUEL FREEMAN, RAWLS 50 (2007); SAMUEL FREEMAN, THE CAMBRIDGE COMPANION TO RAWLS 67 (2003). In *Political Liberalism*, Rawls gives a detailed account of “personal property”: “For example, among the basic liberties of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers.” JOHN RAWLS, POLITICAL LIBERALISM 298 (3d ed. 2005).

⁵⁶ MERGES, *supra* note 34, at 117.

⁵⁷ *Id.* at 364.

⁵⁸ RAWLS, *supra* note 54, at 266.

apparent inequalities caused by the intellectual property system, as long as opportunities to participate in the system as creative professionals are open and equal to all, and their productions would benefit society in general.⁵⁹

Merges is at pains to point out that even if intellectual property should be recognized as a basic liberty, it is not absolute in the Rawlsian framework. Merges divides every intellectual property right into two components: the “inviolable individual contribution” or “deserving core” of the work, which represents “the act of individual will” deserving protection, and the “periphery,” which owes its origins to social forces and situational advantages and which society can claim by way of redistributive policies.⁶⁰ By dividing intellectual property rights into these two components, Merges justifies authors’ strong claims to their works and the redistributions of some of the proceeds earned from those works to the public.⁶¹ The line between the two components is murky because distinguishing the “periphery” from the “core” does not seem easy. Unsurprisingly, Merges also identifies fair use, which allows access to and use of copyrighted works, as one form of “redistribution.”⁶² It follows that the right to parody copyrighted works, not merely more

⁵⁹ MERGES, *supra* note 34, at 111, 128.

⁶⁰ Merges uses many examples, one of which is from Rawls: the willingness to undergo training may be the product of socialization, but the discipline to push that training in new directions may be a uniquely individual trait. *Id.* at 121.

⁶¹ *Id.* at 122.

⁶² In fact, Merges identifies three stages of redistribution: “(1) the initial grant of rights; (2) the deployment stage of works covered by IP rights; and (3) the time period after profits have been earned from sale of IP-covered works.” In stage 1, limits based on the needs of others, of third parties, form part of the grant of rights; after the author’s right expires, the right passes into the periphery, and the public at large has free access to the work. An example of a stage 2 issue is the set of rules that permit third-party use of and access to a creative work, including fair use in copyright law, experimental use in patent law, and nominative or nontrademark use in trademark law. In stage 3, profits earned from the sale of IP-protected works may be taxed, just like other economic activities. *Id.* at 128—129.

direct forms of redistribution of proceeds gained from those works, should form part of the Rawlsian distributive scheme.

C. Kant's Inalienable, Personal Right and Universal Principle of Right

Kantian theory of property justifies the right to parody copyrighted works from a personality-based natural rights perspective. Kant contends that land and, by extension all properties, was originally possessed in common.⁶³ Yet it would be a violation of people's freedom to deprive them of the freedom to use objects in rational pursuit of their goals and to dispose freely of objects in their physical possession.⁶⁴ The desire to control objects thus leads to the concept of property, which society translates into actual operation.⁶⁵ Potential conflicts arise when different people exercise their freedom to claim properties and/or their property claims conflict with other freedoms. According to his "Universal Principle of Right," an individual's expression of freedom of choice must coexist with expressions of freedom by other people.⁶⁶ Hence, one's claim to property of an object can be rightfully

⁶³ PAUL GUYER, KANT ON FREEDOM, LAW, AND HAPPINESS 253 (2000), *citing* IMMANUEL KANT'S THE METAPHYSICS OF MORALS, PART I, DOCTRINE OF RIGHT, § 13, 6: 262 (1797), which states that the original possession of land can only be "possession in common because the spherical surface of the earth unites all the places on its surface." "The schematism of external property rests on the agreement of all to universal a priori principles for the distribution of things in space within which property takes place: consequently it presupposes an original common possession." IMMANUEL KANT, PRELIMINARY WORKS TO THE DOCTRINE OF RIGHT § 23: 273 (1797).

⁶⁴ GUYER, *supra* note 63, at 279.

⁶⁵ *Id.* at 236.

⁶⁶ "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with universal law." The universal law of right is "to act externally so that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law." *Id.* at 240—241, *citing* KANT, *supra* note 63, at § 6: 230, 231.

established only when it is consistent with other people's freedom "in accordance with a universal law."⁶⁷

Whereas Kant considers property right to be a natural right, it is a little less clear whether he deems intellectual property a property right. Kant contends in an essay he published in 1785 that a book's author has an "inalienable right (*ius personalissimum*) always himself to speak through anyone else, the right, that is, that no one may deliver the same speech to the public other than in his (the author's) name."⁶⁸ Whereas some consider "*ius personale*" to be a mere personal right but not a property right, others argue that the authors' expressions of their desires through their works provide sufficient grounds for a theory of intellectual property rights.⁶⁹ Merges, in seeking to establish a solid ethical foundation for intellectual property, makes the argument that Kant's vision of lone individuals struggling to establish durable claims of property to objects for self-actualization and autonomy purposes readily translates to authors expressing their ideas through their works and claiming property rights to these works.⁷⁰ Certainly, others have a duty to respect claims over objects, including products of authorship. However, the Universal Principle of Right stipulates that rights granted to enhance human freedom must not be so broad as to interfere with other people's freedom. Kant arguably would not deny people freedom to appropriate copyrighted works for expressing themselves through parodies. Far from that,

⁶⁷ KANT, *supra* note 63, § 6: 231.

⁶⁸ Immanuel Kant, On the Wrongfulness of Unauthorized Publication of Books, § 8: 82 (1785), in IMMANUEL KANT, PRACTICAL PHILOSOPHY 31 (Mary Gregor ed. & trans., 1996).

⁶⁹ See, e.g., Riccardo Pozzo, *Immanuel Kant on Intellectual Property*, 29(2) TRANS/FORM/AÇÃO 11, 12 (2006); MERGES, *supra* note 34, at 71.

⁷⁰ MERGES, *supra* note 34, at 71.

because creative endeavors like writing parodies are examples of self-actualization and autonomy expansion, parodists are entitled to claim the new works as their own.

Some may argue that Kant's theory lends itself more readily to the moral rights doctrine than to the right to parody. Indeed, Kant's view that works are expressions of authors' identities and extensions of their personhood lends support for their inalienable rights in their works, so that they enjoy the moral rights, for instance, to identify as authors of their works and prevent excessive criticisms of them.⁷¹ The moral rights doctrine is nonetheless compatible with the right to parody in the Kantian framework. A parody need not violate the "integrity" of the original so long as it stands as a new work. Kant contends in his 1785 essay that a book serves as a vehicle for authorial speech and a communication from publisher to public in the name of the author.⁷² He thus compares the unauthorized publication of the author's text to compelling the author to speak against his or her will, which is wrong.⁷³ However, if the new work is modified to the extent that it would be wrong to attribute it to the author, then it can rightfully be published in the new author's name.⁷⁴

⁷¹ See, e.g., Roberta Rosenthal Kwall, "*Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*," 75 S. CAL. L. REV. 1, 19 (2001), citing IMMANUEL KANT, *ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS* (William Richardson ed. & trans., 1798).

⁷² KANT, *supra* note 68, § 8: 81, in KANT, *PRACTICAL PHILOSOPHY* 30.

⁷³ "The author and someone who owns a copy can both, with equal right, say of the same book, 'it is my book,' but in different senses. The former takes the book as writing or speech, the second merely the mute instrument of delivering speech to him or the public, i.e. as a copy. This right of the author is, however, not a right to a thing, namely to the copy (for the owner can burn it before the author's eyes), but an innate right in his own person, namely, to prevent another from having him speak to the public without his consent, which consent certainly cannot be presumed because he has already given it exclusively to someone else." *Id.* § 8: 86, in KANT, *PRACTICAL PHILOSOPHY* 35.

⁷⁴ *Id.* § 8: 86—87, in KANT, *PRACTICAL PHILOSOPHY* 35.

Hence, Kantian theory of rights justifies both the moral rights doctrine and the right to parody copyrighted works.

D. Natural Law and Relational Authorship

As explained, Craig's critique of the natural law approach fails to appreciate that the Lockean theory accommodates parodic works. Elsewhere, her reconstruction of the "author-self" readily reconciles with and complements the natural rights perspectives on parody. Craig rightly critiques the current copyright regime for propertizing and individualizing authorial activity.⁷⁵ Drawing upon relational feminism, she envisages the author as a "relational" self, who always works within a community and a network of social relations and discourses through the processes of "reinterpretation, recombination, ... and transformation."⁷⁶ The individualization of authorship should give way to a communicative approach emphasizing its participatory and dialogic nature.⁷⁷ Hence, the normative copyright regime, Craig argues, should focus less on authors' entitlement to their works and more on ways to structure relations among authors and between authors and the public, so as to foster creativity among all citizens.⁷⁸

⁷⁵ Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 J. GENDER, SOC. POL'Y & L. 207 (2007).

⁷⁶ See *id.* at 263, 265.

⁷⁷ Craig's approach would also have gained support from other scholars such as Martha Woodmansee and Carla Hesse, who illuminate how romantic authorship is a construct borne of historical and social circumstances, hence impliedly subjecting it to deconstruction. See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17(4) EIGHTEENTH-CENTURY STUDIES 425 (1984); Carla Hesse, *The Rise of Intellectual Property, 700 B.C.—A.D. 2000: An Idea in the Balance*, 131 DAEDALUS 26 (2002).

⁷⁸ See Craig, *supra* note 74, at 263—64.

Craig does not go further to describe the kinds of derivative works that should be accommodated by her idea of “relational authorship.” Yet her vision is in line with natural law perspectives: the Lockean Provisos, the Rawlsian distributive scheme, and the Kantian Universal Principle of Right and idea of authorship as communicative acts all indicate that authors’ rights in their works accommodate users’ right to parody copyrighted works.

E. The Right to Parody from Utilitarian Perspectives

Other philosophers do not consider intellectual property rights, or even property rights, to be natural rights inherent in all people. Scottish philosopher David Hume, for example, argues against Locke’s notion of the natural right to private property in both *A Treatise of Human Nature* and *Enquiry Concerning the Principles of Morals* (1751). Hume contends that humans have no primary instinct to recognize private property, which would have had no purpose where resources are abundant. Where goods are scarce and portable and disputes over them are inevitable, they establish property rights to reward them for their work and keep the society in good order.⁷⁹ Hence, all conceptions of justice regarding property are founded solely on how useful the convention of property is to society.⁸⁰ Deeming private property a creature of human convention, Hume would have recognized

⁷⁹ DAVID HUME, A TREATISE OF HUMAN NATURE, bk 3, pt 2, § 2 (1740), *available at* <http://www.earlymoderntexts.com/assets/pdfs/hume1740book3.pdf> (last visited Oct. 10, 2017).

⁸⁰ “Thus, the rules of equity or justice [regarding property] depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance.” DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, § 3 (1751), *available at* <http://www.earlymoderntexts.com/assets/pdfs/hume1751.pdf> (last visited Oct. 10, 2017).

intellectual property also as a convention to enable authors to reap benefits from their creations rather than as a form of property.⁸¹

Jeremy Bentham, who advanced the idea of utilitarianism, likewise describes property as a pure creature of law.⁸² Following his “fundamental axiom,” according to which “it is the greatest happiness of the greatest number that is the measure of right and wrong,” the most correct course of action is the one that produces the greatest net benefits.⁸³ John Stuart Mill similarly contends that “... property is only a means to an end, not in itself an end.”⁸⁴ The moral worth of actions is to be judged in terms of the consequences of those actions. Both Bentham and Mill therefore deem property rights to be a means to a social good. They endorse the patent institution which, by setting time-limited monopoly rights, incentivizes authors to invent new products before their works eventually make their way into the public domain to be freely enjoyed by all.⁸⁵

Utilitarian perspectives on property and intellectual property, being largely indifferent to questions of individual rights, seem to be a far cry from their natural law counterparts,

⁸¹ See, e.g., Hector L. MacQueen, Law and Economics, David Hume and Intellectual Property, in ARGUMENT AMONGST FRIENDS: TWENTY-FIVE YEARS OF SCEPTICAL ENQUIRY 9—14 (Nick Kuenssberg ed., 2010); Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1(1) ECONOMICA 30 (1934).

⁸² As Bentham put it, “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.” JEREMY BENTHAM, THEORY OF LEGISLATION 111—113 (C.K. Ogden ed., Richard Hildreth trans., 1931) (1802).

⁸³ Jeremy Bentham, A Comment on the Commentaries and A Fragment on Government, in THE COLLECTED WORKS OF JEREMY BENTHAM 393 (J. H. Burns & H. L. A. Hart eds., 1977).

⁸⁴ JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY AND SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 138 (1875).

⁸⁵ Ulf Petrusson, Patent and Open Access in the Knowledge Economy, in THE STRUCTURE OF INTELLECTUAL PROPERTY LAW 62 (Annett Kur & Vytautas Mizaras eds., 2011).

although the justification of intellectual property as a basic liberty and incomes for creative professionals in the Rawlsian scheme can be seen as partly utilitarian. Unsurprisingly, the right to property has remained one of the most controversial human rights in terms of its existence and interpretation. Though recognized in Article 17 of the UDHR, Article 1 of the Protocol No. 1 to the ECHR, as well as Article 21 of the ACHR, it is nowhere to be found in the ICCPR or the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸⁶ Similarly, the right to intellectual property is not found in all international conventions. It is not covered in the ICCPR, but both Article 27 of the UDHR and Article 15 of the ICESCR stipulate that everyone has the right to “the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁸⁷ Further, the European Court of Human Rights has interpreted “the peaceful enjoyment of his possessions” in the ECHR to include intellectual properties.⁸⁸ Regardless of whether intellectual property right should be regarded as a fundamental right, utilitarian theories on intellectual property are no different than natural law counterparts in that they accommodate parodies of works that fall under copyright protection and have not yet entered the public domain. The right to parody is built into natural law theories. In a utilitarian framework, parodies should be allowed as long as they do not defeat the purpose of the

⁸⁶ Universal Declaration of Human Rights, art. 17; European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, art. 1; American Convention on Human Rights, art. 21.

⁸⁷ UDHR, art. 27; International Covenant on Economic, Social and Cultural Rights, art. 15 (New York, 16 Dec. 1966) 993 U.N.T.S. 3, entered into force 3 Jan. 1976.

⁸⁸ *E.g.*, *Dima v. Romania*, no. 58472/00, ECHR 2005; *Melnychuk v. Ukraine*, no. 28743/03, ECHR 2005-IX; *Anheuser-Busch Inc. v. Portugal* [GR], no. 73049/01, ECHR 2007-I.

copyright system by harming the incentives of authors, or, in Bentham's words, by reducing the net benefits generated by authors' works.

III. JUSTIFICATIONS FOR A BROAD PARODY DEFINITION

Although both copyright and the right to parody copyrighted works are justified from different philosophical perspectives, the theories on property alone do not indicate whether a narrow or a broad definition of parody is preferable. Section I of this chapter has already evaluated different definitions of parody and contended that a broad, speech-friendly definition of parody is preferable to a narrow one. Arguably, this broad definition is further bolstered by the above philosophical traditions due to the relative importance of speech freedom and property and intellectual property rights.

Locke's writings indicate that free speech and property rights are equally important. His endorsement of a limited government to preserve people's natural rights to "Life, Health, Liberty, or Possessions" in *Two Treatises on Government* indicates both liberty and possessions are inalienable rights with which people are naturally endowed. His discussion of the liberty of conscience and expression in *A Letter Concerning Toleration* and *An Essay Concerning Human Understanding* is balanced by his labor acquisition theory in *Second Treatise of Government*. By contrast, Rawls considers free speech to be more fundamental than property. The freedom of speech is one of the basic liberties under his first principle. Although the right to "personal property" constitutes an essential part of individual liberty, an absolute right to unlimited private property is excluded from the first principle.⁸⁹ Further, property rights are not desirable for their own sake, but are restrained by justice as fairness,

⁸⁹ E.g., FREEMAN (2007), *supra* note at 55; FREEMAN (2003), *supra* note at 55.

enabling citizens to act from the principles of political justice and to pursue their own conception of the good.⁹⁰ In addition, the idea of a property-owning democracy mandates a widespread dispersal of property and a redistribution of wealth against a background of fair equality of opportunity under the difference principle.⁹¹ For Rawls, therefore, not only is freedom of speech more fundamental to property rights, but it is the former that guarantees all citizens the social conditions to use the latter to pursue justice and what is of value to them.⁹²

Kant, like Rawls, considers freedom of expression to be more fundamental than property right and any right that an author has in his or her work. Freedom of speech, which is crucial to the enlightenments of both society and individual, is an “innate” right, “that which belongs to everyone by nature, independently of any act that would establish a right.”⁹³ This innate right is distinguished from an “acquired” right, “for which such an act is required.”⁹⁴ The right to property, though stemming from “freedom,” requires action to establish it and is therefore an acquired right.⁹⁵ Kant’s 1785 essay further indicates that an author’s natural right (be it a property right or not) in his or her work should give way to other people’s right to parody it. Describing a published book as the vehicle of its author’s speech, and a communication from publisher to public in the name of the author, he contends

⁹⁰ RAWLS, *supra* note 55, at 19.

⁹¹ RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 66, 176 (2001); RAWLS, *supra* note 54, at 67, 164, 302.

⁹² Rawls, A THEORY OF JUSTICE: A REVISED EDITION xii (1999).

⁹³ IMMANUEL KANT, KANT: THE METAPHYSICS OF MORALS 63 (Mary Gregor trans., 1996).

⁹⁴ *Id.*

⁹⁵ *See id.*

that a new work can rightfully be published in the modifier's name if it has altered the original to such an extent that it can longer be attributed to the original's author.⁹⁶ Following his logic, any right of the original author in his or her work should give way to the parodist's freedom of expression, as long as the latter alters the original work sufficiently to make it a new one. Clearly, to satisfy this criterion, the new work need not criticize the old work itself, but can direct its criticism or commentary against something else.

From natural law perspectives, the view that speech rights are more important than property/intellectual property rights thus calls for a broad parody definition because it accommodates more speech than a narrow one. The same conclusion can be reached by using a utilitarian framework. In fact, the utilitarian view that the rights to property and intellectual property are mere conventional rights leads to an even stronger argument that these human-made conventions should accommodate as much speech as possible. The bottom line is that the parodies would not harm the incentives of authors.

Parody should be broadly defined whether it is an exercise of free speech or creativity. Article 27 of the UDHR protects "the right ... to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."⁹⁷ Article 15 of the ICESCR recognizes "the right ... [t]o take part in cultural life" and "[t]o enjoy the benefits of scientific progress and its applications" and protects "the freedom indispensable for scientific research and creative activity."⁹⁸ Hence, both UDHR and the

⁹⁶ Kant, *supra* note 68, § 8: 86—87, in KANT, PRACTICAL PHILOSOPHY 35.

⁹⁷ UDHR, art. 27.

⁹⁸ ICESCR, art. 15.

ICESCR recognize the importance of arts to society. Because artistic expressions and creations tend to articulate symbolic values in dramatic manners, they often come under attack by those in power. A broad definition of parody would help to prevent them from using copyright law to suppress free speech.

IV. LAW AND ECONOMICS PERSPECTIVES AND INADEQUACIES

Thus far, this chapter has justified copyright and the right to parody from natural law and utilitarian perspectives, and further argued from these perspectives that a broad parody definition, which accommodates more expressions, should be adopted by law. As the previous chapter has explained, the natural law framework offers a model for positive law. Merges asserts that the works of Locke, Rawls, and Kant provide excellent grounding in the “first principles of property,” by placing equal emphases upon the importance of property to a fair society and the limits and constraints on property rights.⁹⁹ By comparison, economic efficiency, though an important goal of any area of law, is a “second-order goal” or a “midlevel principle,” hence not an adequate foundational or normative principle.¹⁰⁰

Yet economic efficiency is not to be brushed aside. This section therefore reviews the major research conducted on copyright and parody from law and economic perspectives¹⁰¹ to assess if they are in line with the perspectives employed in this chapter.

⁹⁹ MERGES, *supra* note 34, at 10, 13.

¹⁰⁰ *Id.* at 6.

¹⁰¹ Posner clarifies that utilitarianism and economics are not the same thing. Utilitarianism holds that “the moral worth of an action, practice, institution, or law is to be judged by its effect in promoting happiness ... aggregated across all inhabitants... of ‘society’.” Normative economics holds that it is judged by “its effect in promoting “welfare,” or wealth maximization, distinguishable in ethically significant ways from the utilitarian ideal.” Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8(1) J. LEG. STUD. 103, 104—05 (1979).

The law and economics research on copyright and parody that has been published provides theoretically and empirically inadequate justifications for a narrow parody exception. Richard Posner and William Landes employ a cost-benefit analysis to explain how the various copyright doctrines can be understood as attempts to promote economic efficiency. They point out that the costs of voluntary exchanges between copyright holders and users in some cases are so high relative to their benefits that fair uses of the copyrighted materials are justified.¹⁰² One example is parody, which they value as a highly effective form of criticism.¹⁰³ In a different article, Posner points out that because authors may object to their works becoming the targets of criticism and so may charge high fees for uses, parody, which is otherwise a “taking” and a prima facie infringement, should be considered fair use.¹⁰⁴ Nonetheless, the exemption for parodies should be very narrowly confined to cases where the parody uses the borrowed work as a target. The exemption should not apply to cases where the borrowed work is used as a weapon to criticize something else, in which case it becomes a “satire,” to which the author would not normally object and so should not be exempted.¹⁰⁵

Posner’s narrow definition of parody is based upon the flawed assumption that authors and copyright owners prohibit only derivative works that target their original works, but not works that criticize or comment on something else. Market evidence shows that

¹⁰² William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 357 (1989).

¹⁰³ *Id.* at 359.

¹⁰⁴ Posner, *When is Parody Fair Use?* 21 J. LEG. STUD. 67, 67—69 (1992).

¹⁰⁵ *Id.* at 71.

copyright owners are not necessarily averse to licensing parodies.¹⁰⁶ In addition, even assuming that owners have less reason to prohibit the public from using their works as “weapons” against third-parties, they may still refuse to grant licenses to writers of these “weapons” for fear that their own works would not be shielded from criticism.¹⁰⁷ Artistic works have multilayered meanings open to different interpretations, and those that make broad criticisms of society may end up criticizing the originals, at least from readers’ perspectives.¹⁰⁸ Owners who do allow the writers to use their works for social criticisms may charge exorbitant fees, which would discourage such uses.¹⁰⁹ Hence, it may not be in society’s interest to insist that writers obtain prior approval from owners before using their works for broad social criticisms.¹¹⁰ Finally, because broad social criticism is arguably more valuable than the criticism of an individual work, satires or “weapon” parodies that make

¹⁰⁶ Juli Wilson Marshall & Nicholas J. Siciliano, *The Satire/Parody Distinction in Copyright and Trademark Law—Can Satire Ever Be a Fair Use?*, ABA SECTION OF LITIGATION/ INTELLECTUAL PROPERTY LITIGATION COMMITTEE ROUNDTABLE DISCUSSION ONLINE, https://apps.americanbar.org/litigation/committees/intellectual/roundtables/0506_outline.pdf, at 5 (last visited Oct. 10, 2017). Keller and Tushnet note that “[t]he fundamental premise that copyright owners will not create or license parodies of their works is belied by market evidence.” Several examples of copyright owners licensing parodies of their works include numerous artists granting “Weird Al” Yankovic a license to parody original songs, and Dimension Films creating the parody film *Scary Movie* based upon another Dimension Films movie, *Scream*. Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979 (2004).

¹⁰⁷ Amy Lai, *Copyright Law and Its Parody Defense: Multiple Legal Perspectives*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 311, 330 (2015).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

broad social commentaries may have an even stronger claim than “target” parodies to fulfilling the role that fair use or fair dealing was intended to play.¹¹¹

Law and economics research, by taking into account the above factors, may very well find that a broad exemption for parody is more economically efficient than a narrow one, and that the law should provide for a broad definition of parody. Regardless, as in the case of free speech, law and economics should play a supplementary role to the natural law approach, according to which positive law should stand the test of reason, and which guarantees that what economic analyses find efficient are founded upon reason.

V. PRIORITIZING THE MARKET SUBSTITUTION FACTOR

A speech-friendly definition of parody, which encompasses works targeting the originals and those criticizing or commenting on something else, is preferable to a restricted one. Requirements that the work be humorous or critical should also be abandoned. It does not follow that all works that fall within this definition would be fair uses or fair dealings. What other condition(s) should be met? That the parody should not compete with or substitute for the original or its derivatives in the market can also be gleaned from the writings of these philosophers.

Although the right to free speech is more important than intellectual property right, the right to property is still fundamental from natural law perspectives and provides incentives to create in the utilitarian framework. Because property right is fundamental in the Lockean sense, the right to parody copyrighted works implied by Locke’s provisos should

¹¹¹ Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y U.S.A. 546, 611—12 (1998).

carry the condition that the parody does not impinge on the property of the original's author (or, by implication, reduce the money that he earns in exchange for the property.¹¹²) The same condition can be inferred from Rawls' distributive scheme and its implicit endorsement of parody: the right to parody should not impinge on the authors' rights, both as a fundamental liberty and as an incentive to create.¹¹³

Kant offers even more insights into what form parodies should take so that they do not infringe the authors' rights. As explained, Kant contends that a new work can rightfully be published in the modifier's name if altered to such an extent that it can no longer be attributed to the author.¹¹⁴ In other words, no writer should take the original, change it slightly, and then pass it off as his or her own work. Arguably, a parodic work that fulfils Kant's criterion would be sufficiently different from the original and would not serve as its market substitute.

Hence, even though parodies—or any kind of fair use or fair dealing exception—may harm the authors' interests in various ways, such as by casting their original works in negative lights and thereby reducing their sales, they should not reduce their incomes by competing with their originals or derivatives in the market. On both the parody definition and the market substitution constraint, the natural law perspectives therefore converge with their utilitarian counterparts. Parodies that do not impinge on the rights of the originals' authors by

¹¹² Locke describes the evolution of the money system, in which men exchange perishable goods produced by them for imperishable money: "And thus came in the use of money, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life." LOCKE, *supra* note 31, § 47, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html> (last visited Oct. 10, 2017).

¹¹³ See *supra* Section II(B)(E).

¹¹⁴ Kant, *supra* note 68, § 8: 86—87, in KANT, PRACTICAL PHILOSOPHY 35.

substituting for their works would not likely disincentivize them. These works would not discourage authors from exercising their right to free speech in their own works and reduce the amount of creativity in society. The market substitution constraint thus reconciles two fundamental rights in natural law perspectives and fulfils the goal of the copyright system in the utilitarian framework.

What are the implications of the proposed parody exception and the market substitution factor? A work that draws upon an existing literature or television show or borrows its well-defined character(s), either to criticize or comment on the work or the character(s) or to direct its criticism or commentary against something else, would qualify as fair use or fair dealing, as long as the new work would not directly compete with the originals or their derivatives. Indeed, that an idea and the expression of the idea can be so tied together in some cases that it becomes difficult to distinguish protected expressions from unprotected ideas—good examples being common visual and cultural references¹¹⁵—further weighs in favor of this broad exemption and the market substitution factor. A parodist who inadvertently borrowed what may be considered a copyrighted expression, such as a visual or cultural reference, would not be liable for infringement, as long as the parody does not displace demands for the original or its derivatives. This would be true even if the parody does not target the borrowed expression, or does not even use it for any critical or commentary purpose.

¹¹⁵ See, e.g., Leslie A. Kurtz, *Copyright: The Scènes à Faire Doctrine*, 41 FLA. L. REV. 79 (1989); see also Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 219 n.24, 254 (2002).

VI. PARODISTS' FREEDOM OF SPEECH V. AUTHORS' MORAL RIGHTS

Moral rights are nonetheless independent of economic or property rights. At this juncture, one must take a second look at the moral rights doctrine touched upon in an earlier section on Kant, to further examine why the broad parody exception not only would not lead to moral rights violations, but also necessitates the narrow circumscription of authors' rights to integrity of their works. As the earlier section has emphasized, a parody, being a new piece of work, does not violate the author's inalienable rights in the underlying work.¹¹⁶

Concerning the moral right of attribution, the success of a parody depends in part on its ability to invoke the underlying work which, along with its author, tends to be well-known among the intended audience. As such, rather than violating the author's "right to claim authorship of" or to be acknowledged as the creator of the original work,¹¹⁷ it would impliedly recognize this right.

What about integrity right? Though inspired by an older work, a parody is a new work that does not violate the right to integrity of the underlying work by its author. The right to integrity is defined as the right of the author "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."¹¹⁸ By their ordinary meanings, to "distort" means to "pull or twist out of shape," whereas to "mutilate" means to "inflict a violent and

¹¹⁶ See *supra* Section II(C). The other moral rights, including the rights of disclosure (to publish the work anonymously or pseudonymously), are not at issue here, because a parody is based upon a work that is already published.

¹¹⁷ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*(1), Sept. 9, 1886, 331 U.N.T.S. 217 (as amended in Brussels on June 26, 1948).

¹¹⁸ *Id.*

disfiguring injury on” something.¹¹⁹ To “modify” means to “make partial or minor changes to (something).”¹²⁰ A parody, due to its imitative nature and critical or commentary purpose, almost invariably modifies or changes the original work in minor ways, although distortion or mutilation may be relatively uncommon. Arguably, it is not “prejudicial” to the author’s “honor or reputation” if it does not defame the author. In view of the importance of speech freedom, as long as the “distortion, mutilation or other modification of, or other derogatory action” in relation to the underlying work would not defame its author, the parody would not violate the author’s integrity right. In fact, authors’ moral rights to integrity of their works are adequately protected by defamation law.

VII. APPLYING THE PARODY EXCEPTION

Although it is often appropriate for a legislature to take the responsibility to guarantee rights and to define these rights by statute, rather than calling on courts to assert their own judgments based entirely on notions of higher law, courts can and should apply a broad parody exception in a way that enhances free expressions. Because the right to parody is a natural right in both the free speech and the copyright contexts, courts should draw upon the free speech doctrine when applying the parody exception in copyright disputes. This would further ensure that the right to parody is safeguarded and that meaningful expressions are not suppressed for the sake or on the pretext of copyright protection.

¹¹⁹ Definitions of “Distort” and “Mutilate” in THE OXFORD DICTIONARY (2017), <https://en.oxforddictionaries.com/definition/distort>; <https://en.oxforddictionaries.com/definition/mutilate> (last visited Oct. 10, 2017).

¹²⁰ Definition of “Modify” in THE OXFORD DICTIONARY (2017), <https://en.oxforddictionaries.com/definition/modify> (last visited Oct. 10, 2017).

Although a normative copyright regime should accommodate the right to free speech and parody, as can be gleaned through the lenses of different philosophical traditions, the conflicts between copyright and speech rights exist. This external conflict, as some scholars note, has been internalized as part of copyright law in the form of the idea/expression dichotomy and the fair dealing defence.¹²¹ By studying the tension between the public's and the rights holders' interests, and how best to promote the public good without undermining the rights holders' interests, this chapter has focused on the internal sphere. Carving out a broad parody exception that accommodates as much speech as possible would not be adequate to safeguard the right to parody: due to the external origin of this conflict, courts should apply the exception with reference to the free speech doctrine, to ensure that copyright law would not be used as a weapon to suppress free speech.

As the previous chapter has emphasized, free speech is rightfully subject to restrictions, including those concerning national security, public morality, and defamation. It follows that parodies that violate these restrictions must still be banned, regardless of the values they seem to contain and whether they would likely displace the underlying works and harm the rights holders' interests.

¹²¹ E.g., Michael D. Birnhack, *Acknowledging the Conflict between Copyright Law and Freedom of Expression*, TEL AVIV UNIV. L. FACULTY PAPERS (2008), at 26—29, https://www.academia.edu/23547708/Acknowledging_the_Conflict_between_Copyright_Law_and_Freedom_of_Expression_under_the_Human_Rights_Act (last visited Oct. 10, 2017); Joseph Liu, *Copyright and Breathing Space*, 30 COLUM. J. L. & ARTS 101, 103—04 (2007).

This chapter has argued that the right to parody is a natural right and that a broad exemption for parody can accommodate this right. This leads to other questions: Is the parody exception proposed in this chapter compatible with international conventions? If so, to what extent do the fair use or fair dealing parody exceptions in different jurisdictions meet the standard proposed in this chapter?

The proposed parody exception would have to pass the three-step test, first established by Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967, and later transplanted into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹²² Article 13 of the TRIPS Agreement requires that all member nations of the World Trade Organization provide strong protection for intellectual property rights, stating that “[m]embers shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”¹²³ The test’s “open-ended” nature, which allows the TRIPS Agreement to evolve as intellectual property continues to develop, and individual jurisdictions to tailor their exceptions to their own culture and needs, has been noted.¹²⁴ Whether the parody exception, if adopted by

¹²² Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, 331 U.N.T.S. 217 (as amended in Stockholm on July 14, 1967).

¹²³ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13 (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 321 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). The three-step test is also incorporated into the WCT (Article 10), several EU copyright directives, and several bilateral agreements. *E.g.*, *The Three-Step Test*, ELECTRONIC FRONTIER FOUNDATION, https://www EFF.ORG/files/filenode/three-step_test_fnl.pdf, at 2 (last visited Oct. 10, 2017).

¹²⁴ *E.g.*, Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1(2) J. INTELL. PROP., INFO. TECH. & E-COM. L. 67, 69 (2010); SUSY FRANKEL & DANIEL J. GERVAIS, *ADVANCED INTRODUCTION TO INTERNATIONAL INTELLECTUAL PROPERTY* 67 (2016).

members of the WTO, passes the three-step test depends upon the meanings of such words as “special,” “normal,” and “unreasonably.”

The proposed parody exception should readily meet the second and third criteria. An exception to a right conflicts with a “normal exploitation of the work” only if the uses allowed by the exceptions lead to economic competition between the users and the right holders, and thereby deprive the latter of significant or tangible commercial gains.¹²⁵ Likewise, an exception would “unreasonably prejudice” the legitimate interests of rights holders only if it “causes or has the potential to cause,” “an unreasonable loss of income to the rights holder.”¹²⁶ The proposed exception would easily meet the second and third criteria because of its prioritization of the market substitution factor. Works conforming to the proposed definition would not likely cause unreasonable or significant harm to the rights holder by competing with the underlying work and any future derivatives in the market.

¹²⁵ In the WTO panel’s report in section 110(5) case, “normal exploitation” involves consideration of the forms of exploitation that currently generate income for the rights holder as well as those which are likely to be of considerable importance in the future. Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 AM. UNI. INT’L L. REV. 581, 594 (2014); Roger Knights, *Limitations and Exceptions under the “Three-Step-Test” and in National Legislation Differences Between the Analog and Digital Environments*, WORLD INTELLECTUAL PROPERTY ORGANIZATION’S REGIONAL WORKSHOP ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION AGE (May 22—24, 2001), at 5, available at http://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_mow_01/wipo_cr_mow_01_2.pdf (last visited Oct. 10, 2016).

¹²⁶ The World Trade Organization (WTO) panel contended itself with “one—albeit arguably incomplete—way of looking at legitimate interests” in terms of “the economic value of the exclusive rights conferred by copyright on their holders.” The panel clarified that this did not mean “to say that legitimate interests are necessarily limited to this economic value,” thereby referring to a prior patent report in which another WTO panel had developed the formula of the justification of interests in the light of “public policies or other social norms.” Geiger, Gervais & Senftleben, *supra* note 125, at 16—17, citing Report of the WTO Panel, United States – Section 110(5) of the US Copyright Act, June 15, 2000, WTO Document WT/DS160/R, para. 6.227, 6.229, available at www.wto.org.

The proposed parody exception arguably should satisfy the first part of the three-step test. While the vaguely-worded first criterion may seem challenging, its ambiguity should work in favor of the proposed exception. “Certain” may mean that the exceptions should be clearly defined (hence legal “certainty”),¹²⁷ or that they should be for a specific purpose (only be made in “certain” specific cases).¹²⁸ While “special case” may mean that the exception must be narrow in “scope and reach” and must apply to limited circumstances,¹²⁹ this interpretation has to adapt to evolving technologies. “Special case” may also mean that the purpose for which the exception is made must be justified by a clear reason of public policy or other “special” circumstances.¹³⁰ The advent of the Internet has certainly facilitated the creation and dissemination of parodies, which have become very common and less “special” in some way. Yet the parody exception, the scope of which being clearly defined by the law, would serve specific purposes of accommodating free speech and fostering creative works. Undoubtedly, these are both public policy objectives. Hence, the proposed parody exception is compatible with the three-step test.

Yet to what extent do the current laws accommodate the right to parody? Part Two will explore four jurisdictions and illuminate how their freedom of expression jurisprudences are informed by the natural law tradition. Their copyright jurisprudences, nonetheless, have been heavily driven by utilitarianism and a narrow conception of

¹²⁷ *Id.* at 14, *citing* Report of the Panel, *supra* note 126, para. 6.108.

¹²⁸ Knights, *supra* note 125, at 4, *citing* SAM RICKETSON, THE BERNE CONVENTION FOR PROTECTION OF LITERARY AND ARTISTIC WORKS 482 (1987).

¹²⁹ Geiger, Gervais & Senftleben, *supra* note 125, at 593, *citing* Report of the Panel, *supra* note 126, para. 6.112.

¹³⁰ Ricketson, *supra* note 128.

natural rights that privilege authors' or copyright holders' interests over those of users.

Unsurprisingly, their current parody exceptions are not conducive to the promotion of free speech and creativity. Thus, each of the chapters will show how the proposed parody exception will help to bring these copyright systems in line with their free speech traditions by accommodating free expressions while respecting the rights holders' interests.

PART TWO

CHAPTER THREE

THE PARODY/SATIRE DICHOTOMY IN AMERICAN LAW

*Only one thing is impossible for God: To find any sense in any copyright law on the planet.*¹

*In literature imitations do not imitate.*²

Part One of this dissertation has argued that the right to free speech is a natural right. Indeed, the right to free speech in the United States, protected by the First Amendment in the Constitution, was informed by the natural law. The right to parody is an exercise of this natural right. The U.S. Supreme Court's interpretation of the fair use provisions of the Copyright Act of 1976 in its landmark decision *Campbell v. Acuff-Rose Music, Inc.* nonetheless provided for a parody defence that was driven by both utilitarianism and natural rights perspectives privileging the interests of copyright holders over the public's, and that set up a parody/satire dichotomy according to which works not directing at least part of their criticisms or commentaries against the originals do not qualify as fair use. The broad parody defence, proposed in Part One, would help to bring the American copyright jurisprudence more in line with its free speech tradition by protecting free speech without hurting the incentives or interests of rights holders.

¹ MARK TWAIN, MARK TWAIN'S NOTEBOOK 381 (Albert B. Paine ed., 1935).

² MARK TWAIN, MORE MAXIMS OF TWAIN 8 (1927).

Section I of this chapter will study the history of free speech in the U.S. as well as the parody tradition in American culture. Section II will examine the *Campbell* Court's creation of a parody/satire dichotomy and justify the importance of a parody defence despite the liberalization of fair use in recent years. Although the current parody defence would not likely be weakened by any possible moral rights claims, this section will contend that a broad parody defence should substitute for the current one, and that the purpose and character of the use and the effect of the use upon the market are the only important factors in the four-prong test. By studying several judicial decisions, this section will further explain how the parody/satire dichotomy had led to the suppression of meaningful works, before illuminating how a broad parody exemption would have enabled better accommodations of free expressions in the form of parodies, while properly balancing the interests of rights holders with those of the public.

Finally, Section III will contend that courts should apply the broad parody defence with reference to the free speech doctrine to further align the copyright system with the free speech jurisprudence. This can be accomplished by shifting the burden of proof from defendants to plaintiffs and by analogizing copyright to defamation to ensure that non-defamatory works would not be suppressed for the sake or under the pretext of copyright protection. Courts should also issue money damages instead of injunctions where necessary, so that what may be meaningful expressions would not be directly banned.

I. FREE SPEECH AND THE RIGHT TO PARODY IN AMERICA

The First Amendment of the U.S. Constitution, which states that “Congress shall make no law ... abridging the freedom of speech, or of the press,”³ serves as the guarantor of free speech in the nation. The Founding Fathers of America, or leading government officials of the period when its political institutions were created and shaped, agreed that free speech was one aspect of the freedom stemming from the inalienable rights to “Life, Liberty and the Pursuit of Happiness” to which all human beings are entitled according to the Declaration of Independence.⁴ James Madison, one of the founders who later became the Fourth President of the U.S., asserted that speech was one of the “natural rights, retained,” in contrast with government-created rights, in writing his speech to introduce the Bill of Rights to the first Congress.⁵ Thomas Paine similarly distinguished natural rights, which may not be alienated by the government, from civil rights, which are created by government.⁶ Although free speech was defended as a fundamental natural right, a part of the overall natural right to liberty to be secured by the government,⁷ it was also appreciated as a means to other

³ U.S. Const. amend. I.

⁴ Thomas West defines this period as roughly between 1765 and 1820. Thomas West, *Free Speech in the American Founding and in Modern Literalism*, 21 SOC. PHIL. & POL’Y 310, 314—15 (2004).

⁵ *Id.* 320.

⁶ *Id.* at 321.

⁷ Legal scholar John McGinnis notes that “free speech is not simply or even principally a means for sustaining a particular form of government; to the contrary, protecting free speech and other property rights is the end for which government is constituted.” *Id.* at 321.

freedoms in founding documents.⁸ In addition, both as a natural right and as a right that is highly useful to society, it was never confined to speech about political matters.⁹

The nationalization of free speech in American history was nonetheless a long and arduous journey. The ratification of the Bill of Rights in 1791 was soon followed by major national free speech controversies surrounding the 1798 Sedition Act, antislavery speech, and antiwar speech during the Civil War.¹⁰ These struggles were crucial to the drafting of the Fourteenth Amendment, ratified in 1868, which provides that persons born in the nation are American citizens and that “no state shall ... abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law.”¹¹ Previously, the Supreme Court in *Barron v. Baltimore* (1833) held that the Bill of Rights applied only to the federal government, that states were free to enforce statutes that restricted its enumerated rights, and that the federal courts could not interfere with the enforcement of such statutes.¹² In *Gitlow v. New York* (1925), the Court relied upon the due process clause of the Fourteenth Amendment to hold that almost every

⁸ For example, the Mass Declaration of Rights, 1780, art. 41 states: “The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth.” The New Hampshire Declaration of Rights, 1783, art. 22 states: “the liberty of the press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.” *Id.* 321—22.

⁹ For example, the Vermont Declaration of Rights, 1777, art. 14 states: “the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not be restrained.” Pennsylvania Declaration of Rights, 1776, art. 12 states: “the people have a right to freedom of speech, and of writing and publishing their sentiments: therefore the freedom of the press ought not to be restrained.” *Id.* at 322.

¹⁰ MICHAEL K. CURTIS, *FREE SPEECH, THE PEOPLE’S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 3 (2000), *citing* *Barron v. Baltimore*, 32 U.S. 243 (1833).

¹¹ *Id.*

¹² *Id.* at 10.

provision of the Bill of Rights applies to both the federal and the state governments.¹³ The Fourteenth Amendment, or the “second” Bill of Rights, thus requires states to respect freedoms of speech, press, religion and assembly articulated in the First Amendment.¹⁴

Under Justice Earl Warren, the Supreme Court of the mid- to late-twentieth century took an expansive stance towards the First Amendment.¹⁵ Hence, free speech was treated as presumptively protected constitutional value during this period.¹⁶ Although the later Courts lack the Warren Court’s enthusiastic commitment to free speech, they have adhered to the rule that the government cannot regulate the content of speech unless specific exceptions apply. In *Cohen v. California* (1971), Justice Harlan, citing *Whitney v. California*, emphasized that the constitutional right of free expression is a “powerful medicine” and operates to protect a marketplace of ideas.¹⁷ Associate Justice Thurgood Marshall explained in *Police Department of Chicago v. Mosley* (1972) that “the government has no power to

¹³ *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

¹⁴ *Id.*

¹⁵ BERNARD SCHWARTZ, *THE WARREN COURT: A RETROSPECTIVE* 72 (1996).

¹⁶ *Id.* at 70, 76 & 79. The speech-affirming decisions by the Warren Court include *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that the student protestors’ actions were an exercise of First Amendment rights “in their most pristine and classic form” and South Carolina’s attempt to “make criminal the peaceful expression of unpopular views” was an infringement of their rights of free speech, free assembly and freedom to petition for a redress of grievances regarding civil rights of African Americans); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that the government cannot punish inflammatory speech unless that speech is directed to inciting, and is likely to incite, imminent lawless action); and *Tinker v. Des Moines*, 393 U.S. 503 (1969) (holding that students have the right to “symbolic speech” and that they do not shed their constitutional rights at the school house gates).

¹⁷ *Cohen v. Cal.*, 403 U.S. 15, 24 (1971); citing *Whitney v. Cal.*, 274 U.S. 357, 375—77 (1927).

restrict expression because of its message, its ideas, its subject matter, or its content” under the First Amendment.¹⁸ It continued:

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁹

Hence, a law that inhibits freedom of speech must have an important and compelling interest to do so and must be narrowly tailored to serve that interest.²⁰

Although the limits of free speech were not explicitly stated in the federal Constitution or in any of the early state constitutions, the idea that free speech is not freedom for licentious speech was implicit in the very concept of freedom.²¹ Later, the limits were made explicit. The principal kinds of injurious speech recognized by the Founders included “personal libel” (speech that injures an individual), “seditious libel” (speech that injures the

¹⁸ *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁹ *Id.* at 95—96.

²⁰ Most cases dealing with content-based restrictions were decided in favor of the defendants instead of the government. One “rare” exception was *Burson v. Freeman*, which involved a Tennessee state law prohibiting election campaigning within 100 feet of a building housing a polling place. Justice Harry Blackmun wrote that the case, which involved a “content-based restriction on political speech,” required strict scrutiny and the 100-foot limit was “narrowly tailored” to serve the “compelling interest” in preserving the secrecy of the ballot. 504 U.S. 191, 206, 211 (1992).

²¹ West, *supra* note 4, at 325.

government), and speech that injures public health or the moral foundations of society.²² One predominant view of personal libel in the founding era deemed it a kind of personal injury no different from assault or rape, while another view looked at instances of libel “as breaches of the peace, and as much resembling challenges to fight.”²³ Seditious libel was considered injurious on the rationale that there can be no fundamental right to turn the people against the government that secures their rights and liberties.²⁴ Regarding public morality, Washington’s Farewell Address in 1796 stated the consensus that “virtue or morality is a necessary spring of popular government,” and speech or conduct that injures public morals must be subject to governmental control.²⁵

Free speech has nonetheless become a presumptively protected value that the government cannot regulate its content unless specific exceptions apply. The above exceptions, therefore, have been narrowly circumscribed by courts over the years. Despite the recognition of “seditious libel” as injurious speech in the founding era, the government has not attempted to punish criticisms of its officials or policies except when their speech is deemed to threaten national security in times of war.²⁶ Over the past decades, it has made

²² *Id.*

²³ *Id.* at 327—28.

²⁴ This view came from Supreme Court Justice Joseph Story’s discussion of seditious libel in his *Commentaries on the Constitution* (1833). *Id.* at 329—30.

²⁵ *Id.* at 339—40.

²⁶ The U.S. has allowed fear to trump constitutional values during wartimes. One example is the Sedition Act of 1798. During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus on eight separate occasions. Under the 1862 suspension order, some individuals were arrested for their political beliefs or expression. The Espionage Act of 1917, enacted during the WWI, made it a crime for any person willfully to “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States,” or to “obstruct the recruiting or enlistment service of the United States.” Aggressive federal prosecutors and compliant federal judges soon used the Act to prohibit seditious utterances. In 1954, in the midst of the Cold War, Congress enacted the Communist Control

great progress in the protection of dissent in wartime. The principle that speech cannot constitutionally be prohibited unless it is intended to and/or likely to incite imminent lawless action has largely withstood the pressure of the war on terrorism.²⁷ Meanwhile, most limits on obscenity and pornography have also been removed.²⁸ Although obscene material is not protected by the First Amendment, the Court, acknowledging “the inherent dangers of undertaking to regulate any form of expression,” laid down a test that a work must pass to be “obscene” and legitimately subject to state regulation.²⁹ As a result, most pornographic materials have remained protected.³⁰ In addition, at the height of the civil rights movement in the 1960s, the Supreme Court radically changed the common law of defamation that privileged the rights of plaintiffs and put publishers at a severe disadvantage,³¹ by holding

Act, which stripped the Communist Party of all rights, privileges, and immunities, and federal and state governments imposed restrictions on free expression and association. Geoffrey R. Stone, *Free Speech and National Security*, 84 Ind. L.J. 939, 941—42, 944, 949 (2009).

²⁷ Although there has been no direct federal criminal prosecutions of any individuals for antiwar dissent after 9/11, some facets of government surveillance implicate free speech concerns. On May 30, 2002, Attorney General John Ashcroft authorized FBI agents to monitor political and religious activities. Therefore, even though the government has not prosecuted individuals for their criticism of governmental actions in the war on terrorism, this likely has had a chilling effect on free speech. *Id.* at 953—55.

²⁸ *E.g.*, West, *supra* note 4, at 383; Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J. L. & PUB. POL’Y 95 (2008).

²⁹ The *Miller* test, developed by the Supreme Court, has three parts: “(a) whether “the average person, applying contemporary community standards,” would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” All three conditions must be met for the material to be labelled “obscene.” *Miller v. Cal.*, 413 U.S. 15, 39 (1973).

³⁰ Phyllis Schlafly goes so far as to argue that the judiciary has “dictated immorality” by holding for publishers of pornography in many court battles. Schlafly, *supra* note 28, at 95.

³¹ The pre-*Sullivan* law of libel applied a strict form of liability. Traded politicians, like any citizen, could establish a case by showing that defamatory words about them were published. The burden then fell on the defendant publisher who could then assert a defense by establishing the truth of the statement, proving that it was published in a privileged context, or showing it was a fair comment on a matter of

that public officials cannot recover for defamation unless they could show that defendants had acted with “actual malice,” defined as “knowledge that the information was false” or as harboring “reckless disregard of whether it was false or not.”³² This standard was soon extended to cover “public figures,”³³ although the standard for private individuals is understandably lower.³⁴ While many countries prohibit hate speech, or inflammatory speech targeting people on the basis of such attributes as race, religion, or gender, only speech that poses an imminent danger of unlawful action may be restricted and punished in the U.S.³⁵

Because governmental control over the content of the print media is mild and the Internet is largely unregulated, people have been able to express and publish their thoughts freely. Currently, one can easily locate works that the government once considered to be too “obscene” to be published or sold, until courts ruled otherwise on First Amendment grounds. They include not only world-renowned Irish author James Joyce’s *Ulysses*,³⁶ but also works

public interest. Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y. L. SCH. L. REV. 57, 65—66 (2006).

³² N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

³³ The Supreme Court in *Curtis Publishing Co. v. Butts* held that public figures who are not public officials may still sue news organizations that disseminate recklessly gathered and unchecked information about them. 388 U.S. 130 (1967).

³⁴ In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that actual malice not necessary for defamation of a private person if negligence is present. 418 U.S. 323 (1974).

³⁵ The Supreme Court ruled in *Brandenburg v. Ohio* that “The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force, or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action.” The *Brandenburg* test has not been seriously challenged. 395 U.S. at 447.

³⁶ In 1921, a lawsuit was brought against The Little Review, a New York-based literary magazine that serialized Joyce’s work, and the local district attorney declared it “obscene,” thus effectively banning the book in the U.S. THE JAMES JOYCE CENTRE (Feb 21, 2014), <http://jamesjoyce.ie/day-21-february/> (last visited Oct. 10, 2017). In 1934, the U.S. Court of Appeals for the Second Circuit ruled that the book was not obscene, thus allowing it to be published in the U.S. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

that are perhaps less well-known to the general public, such as *Fanny Hill*,³⁷ *Howl*,³⁸ and *Naked Lunch*.³⁹ Books still get banned. Yet this happens only when organizations, such as church groups, schools, and public libraries remove certain books on the ground that their sexual, political, or religious contents are inappropriate for children.⁴⁰

Parodies are commonly found in American culture and society. One example is nineteenth-century poet Edgar Allen Poe, who parodied earlier genres and authors, and whose works became the popular targets of imitation by later writers.⁴¹ Another writer Mark

³⁷ In 1821, a Massachusetts court outlawed this erotic novel by British writer John Cleland in the first known obscenity case in American history. *Commonwealth v. Holmes*, 17 Mass. 336 (1821). In 1963, Putnam published the book again under the title *John Cleland's Memoirs of a Woman of Pleasure*, which also got banned for obscenity in Massachusetts. In 1966, the U.S. Supreme Court ruled that *Fanny Hill* was not obscene. *Memoirs v. Mass.*, 383 U.S. 413 (1966). See JONATHAN GREEN & NICHOLAS J. KAROLIDES, *ENCYCLOPEDIA OF CENSORSHIP* 346 (2005).

³⁸ In 1956, American poet Allen Ginsberg published this poem, which contains many references to illicit drug use and homosexuality, as part of his poetry collection, *Howl and Other Poems*. In 1957, a bookstore manager was arrested and jailed for selling this collection to an undercover San Francisco police officer, and City Lights Publisher Lawrence Ferlinghetti was subsequently arrested for publishing the book. In the same year, Ferlinghetti won the case when California State Superior Court decided that the poem was of “redeeming social importance.” Lydia Hailman King, ‘Howl’ Obscenity Prosecution Still Echoes 50 Years Later, *FIRST AMENDMENT CENTER* (Oct. 3, 2007), <http://www.firstamendmentcenter.org/%E2%80%9898howl%E2%80%9999-obscenity-prosecution-still-echoes-50-years-later/> (last visited Oct. 10, 2017).

³⁹ Published by American writer William Burroughs in 1959, it was banned in Los Angeles and Boston in 1962. The bans were repealed in 1965 and 1966 respectively. GREEN & KAROLIDES, *supra* note 37, at 370—371. Primarily because literary writers testified to the literary value of Burroughs’ book, the Massachusetts Supreme Judicial Court ruled in favor of the appeal by holding that it was not obscene. *Att’y Gen. v. A Book Named “Naked Lunch,”* 351 Mass. 298 (1966).

⁴⁰ For example, Toni Morrison’s *The Bluest Eye* has become one of the most banned books in American schools due to its strong sexual content. The American Library Association compiles an annual list of the Ten Most Challenged Books. GREEN & KAROLIDES, *supra* note 37, at 57—58. The 2015 list includes E. L. James’ *Fifty Shades of Grey*, which contains explicit sexual content, and David Levithan’s *Two Boys Kissing*, which condones homosexuality and public displays of affection. *Top Ten Most Challenged Books Lists*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10#2015> (last visited Oct. 10, 2017).

⁴¹ *Parodying Poe*, Harry Ransom Centre, University of Texas at Austin, <http://www.hrc.utexas.edu/educator/modules/poe/parodying/> (last visited Oct. 10, 2017).

Twain frequently parodied, among other things, English detective fiction to critique European manners, artifacts, and culture.⁴² The writing of parodies was also encouraged in the early twentieth century by such periodicals as *The New Yorker*.⁴³ Over the past few decades, the parodic form has been employed in postmodern American literature to question and problematize the realist/modernist notions of the self and reality, and frequently used as a political counter-discourse by African American writers.⁴⁴ During the 2016 presidential election, Republican nominee Donald Trump's most iconic piece of campaign apparel, a baseball cap emblazoned with his slogan "Make America Great Again" that he wore frequently at press conferences, was parodied in different ways. One example was cartoonist Mike Luckovich's caricature in which Trump wears a white cap with the slogan "Make American White Again," an obvious attempt to mock him for his white supremacy.⁴⁵ Because parodies like these are neither obscene nor defamatory and do not threaten national security, it is only fair that they are protected by the law. Even if they are highly offensive to some parties, to suppress such exercises of free speech would have been unconstitutional.

⁴² E.g., JAMES E. CARON, MARK TWAIN, UNSANCTIFIED NEWSPAPER REPORTER 9 (2008); Don L. F. Nilsen, Detective Fiction, in THE MARK TWAIN ENCYCLOPEDIA 214 (J. R. LeMaster & James D. Wilson eds., 1993).

⁴³ KATHLEEN KUIPER, PROSE: LITERARY TERMS AND CONCEPTS 178 (2012).

⁴⁴ GENE A. JARRETT, REPRESENTING THE RACE: A NEW POLITICAL HISTORY OF AFRICAN AMERICAN LITERATURE 127—160 (2011).

⁴⁵ AJC Mike Luckovich (Political cartoons from The Atlanta Journal-Constitution's Pulitzer Prize winner), Nov. 23, 2015, http://www.myajc.com/rf/image_lowres/Pub/p6/MyAJC/2015/08/25/Images/photos.medleyphoto.8015971.jpg (last visited Oct. 10, 2017).

II. THE RIGHT TO PARODY IN AMERICAN COPYRIGHT LAW

Certainly, the freedom provided in the written law does not guarantee conditions that enable the exercise of free speech.⁴⁶ Even though the First Amendment makes outright bans of the controversial writings impossible, literary works may be suppressed by public or private parties. Bad reviews, withdrawals of support, and threats of litigation are some of the methods.⁴⁷ In the case of parody, which often makes use of works that have not entered the public domain, copyright law can become a powerful weapon to suppress works that are deemed offensive. Ron English, world-renowned American artist famous for his parodies of Disney and other characters, was sued by numerous right holders. English rightly believed that these big companies later dropped their lawsuits upon realizing that their chances of winning against a famous political activist and staunch supporter of free speech like him would be low.⁴⁸ Regardless, the parody exception in copyright law should align with the free speech tradition to safeguard users' fundamental right. American copyright law nonetheless

⁴⁶ Laura Stein, for example, explores how Courts, in grappling with the extents of the public's speech rights in the media, have sometimes favored interpretations that prioritize the free-speech interests of media owners and operators over those of other speakers. LAURA STEIN, *SPEECH RIGHTS IN AMERICA: THE FIRST AMENDMENT, DEMOCRACY, AND THE MEDIA* 1 (2007). West explores how certain limits on political speech, such as those imposed through campaign finance laws and licensing schemes on the media, serve the cause of free speech by preventing the wealthy from dominating public debates and promoting a health diversity on the airwaves. West, *supra* note 4, at 312, 366.

⁴⁷ Mark Crispin Miller, professor of media studies at New York University, launched the "Forbidden Bookshelf," a curated collection of books that have been suppressed in various ways throughout American history. One example is journalist I. F. Stone's *Underground to Palestine*, originally published in 1946, which depicts the oppressiveness of Israel towards Palestinians. American Zionists withdrew advertising support for the book after the author refused to remove passages supporting a binational state. The U.S. State Department canceled his passport in retaliation for his reporting, which led to a legal battle in which he tried to reclaim it. Kit O'Connell, *US Still Bans, Suppresses Books Despite that First Amendment*, MINTPRESS NEWS (Jun. 29), 2015, <http://www.mintpressnews.com/us-still-bans-suppresses-books-despite-the-forbidden-bookshelf/207064/> (last visited Oct. 10, 2017).

⁴⁸ Julie Greicius, *The Rumpus Long Interview with Ron English*, THE RUMPUS, Feb 4, 2009, <http://therumpus.net/2009/02/the-rumpus-interview-with-ron-english/> (last visited Oct. 10, 2010).

has been strongly influenced by utilitarianism, and this section will begin by examining its utilitarian rationale.

From its first enactments of the copyright law beginning in 1790 to the current federal Copyright Act of 1976, Congress has consistently rewarded the creative activities of authors to provide an economic incentive to stimulate artistic creativity for the general public good. American courts have tried to balance the rights of copyright holders and the public with the notion that “[a]n author has a right to quote, select, extract or abridge from another, in the composition of a work essentially new.”⁴⁹ Fair use developed as a common-law doctrine to help achieve the constitutional goal “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors the exclusive Right to their Writings,”⁵⁰ and also to “permit[] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁵¹

In enacting the Copyright Act of 1976, Congress restated the common law decisions, which made lawful the otherwise unauthorized, infringing use of copyrighted materials for purposes such as comment and criticism. Under § 102 of the Act, copyright protection extends to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁵² The exclusive rights

⁴⁹ *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

⁵⁰ U.S. Const. art. I, § 8, cl. 8.

⁵¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Stewart v. Abend* 495 U.S. 207, 236 (1990), *citing* *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

⁵² Copyright Act, 1976, 17 U.S.C. § 102(a) (2006).

to copyright holders, as defined in § 106, include the rights “to reproduce the copyrighted work[,]” to prepare derivative works of the original, and to distribute its copies to the public by various means.⁵³ These rights, which are subject to a time limit, generally expire seventy years after the author’s death.⁵⁴ Section 107 of the Act imposes limitations on § 106, providing that the “fair use” of a copyrighted work does not constitute infringement.⁵⁵ While fair use explicitly applies to such uses as criticism, news reporting, teaching or research, the fair use defence is by no means limited to these areas.⁵⁶ This doctrine requires a court to balance four factors in determining whether the defendant has made fair use of an original work. First, the court must ascertain “purpose and character of the use,” including whether it is for commercial or nonprofit educational purposes.⁵⁷ Second, the court must assess the nature of the copyrighted work, particularly whether it is creative or factual.⁵⁸ Third, the court must discern “the amount and substantiality of the portion” used in relation to the copyrighted work as a whole.⁵⁹ Fourth, the court must consider the effect of the use upon the market or potential market, or the value of the copyrighted work.⁶⁰

⁵³ *Id.* § 106.

⁵⁴ *Id.* § 302(a).

⁵⁵ *Id.* § 107.

⁵⁶ *Id.*

⁵⁷ *Id.* § 107(1).

⁵⁸ *Id.* § 107(2); *see, e.g.*, *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981), *rev’d on other grounds*, 464 U.S. 417 (1984).

⁵⁹ *Id.* § 107(3).

⁶⁰ *Id.* § 107(4).

A. Pre-*Campbell* References to Parody

The fair use defence, as emphasized, is not limited to the enumerated purposes in the statute. The first time the Supreme Court reviewed a parody case in the context of fair use was in its 1958 opinion, *Benny v. Loew's, Inc.*, where it affirmed without opinion the Ninth Circuit's holding that CBS's TV burlesque of Loew's film adaptation of the play *Gas Light* infringed Loew's copyright.⁶¹ On the defendants' argument that parody should be protected under the doctrine of fair use as a form of literary criticism or comment, the Ninth Circuit and the Supreme Court agreed with the District Court for the Southern District of California that the parody in question did not constitute fair use.⁶² The Ninth Circuit based its holding upon the principle that "a parodized or burlesque taking is to be treated no differently from any other appropriation."⁶³ Hence, a stringent standard was set up, according to which only parodic works borrowing very insubstantially from the original would fall safely within fair use limits.⁶⁴

The *Benny* decision did not prevent lower courts from ruling for parodists in subsequent decisions. In *Berlin v. E.C. Publications, Inc.* (1964), the Second Circuit found the book of parodic lyrics in question non-infringing because there was no substantial similarity between these lyrics and the original popular songs.⁶⁵ In dictum, the Court also

⁶¹ *Benny v. Loew's, Inc.*, 356 U.S. 43 (1958).

⁶² *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956).

⁶³ *Id.* at 537.

⁶⁴ *See id.*

⁶⁵ *Berlin v. E. C. Publ'n., Inc.*, 329 F.2d 541 (2d. Cir. 1964).

outlined the parameters for parody under a fair-use analysis, namely, that the parody does not appropriate a greater amount of the original work than is necessary to “recall or conjure up” the object of his satire.⁶⁶ In addition, without making any semantic distinction between “parody” and “satire,” the Court held that they are entitled to protection “as entertainment and as a form of social and literary criticism.”⁶⁷ The lower court in *Berlin*, however, did draw a distinction between “parody” and “satire” based upon the target of their criticism, arguing that the new songs merely “satirized” modern life and so were not subject to the *Benny* test and therefore qualified as fair use.⁶⁸ However, this same court held that a work targeting something or someone external to the underlying work was not fair use in *Walt Disney Productions v. Mature Pictures Corp* (1975). Here, Disney sought and won a preliminary injunction to prevent Mature Pictures from using *The Mickey Mouse March* as background music in a movie scene depicting the sexual coming-of-age of a group of teenaged boys.⁶⁹ The Court held that the defendant, by playing the entire song repeatedly, had used much more of the original than was necessary to accomplish any legitimate parodic purpose.⁷⁰ Moreover, because this “parody” did not target *the Mickey Mouse March*, its use of the copyrighted material was not fair.⁷¹

⁶⁶ *Id.* at 544, 545.

⁶⁷ *Id.* at 545.

⁶⁸ *Berlin v. E. C. Publ’n., Inc.*, 219 F. Supp. 911, 914 (S.D.N.Y. 1963).

⁶⁹ *Walt Disney Prod. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).

⁷⁰ *Id.* at 1398.

⁷¹ *Id.*

The doctrinal incongruity between *Berlin* and *Mature Pictures Corp.* was resolved by both the Second and the Ninth Circuits in *MCA, Inc. v. Wilson* (1981) and *Walt Disney Productions v. Air Pirates* (1978) respectively. Initially, the District Court of the Southern District of New York in *MCA* found a sexually explicit parody of the World War II-era song *Boogie Woogie Bugle Boy* to be infringing because it targeted not “Bugle Boy” but the sexual mores of the era of which the song was a product.⁷² Later on, the same court in *Elsmere Music, Inc. v. NBC* (1980) found that NBC’s Saturday Night Live parody of the “I Love New York” advertising campaign was fair use. It cited *Berlin* to allow parodists to use the copyrighted works as a means of criticizing something or someone external to them, and the Second Circuit affirmed.⁷³ In addition, the *Elsmere* court held that the concept of “conjuring up” is not “a limitation on how much of an original may be used,” but “a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point.”⁷⁴ This reasoning was then endorsed by the Second Circuit in its opinion in the *MCA* appeal, although it held that parodists could borrow from a copyrighted work as a means of criticizing or ridiculing something else, as long as the work also serves a target of criticism or ridicule in its own right.⁷⁵ The same rule evolved in *Walt Disney Productions v. Air Pirates*, where the Ninth Circuit did not “regard it as fatal ... that the ‘Air Pirates’ were parodying life and society in addition to parodying the Disney

⁷² *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 453 (S.D.N.Y. 1976), *aff’d*, 677 F.2d 180, 189 (2d Cir. 1981).

⁷³ *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff’d*, 623 F.2d 252 (2d Cir. 1980).

⁷⁴ *Id.* at 253, n.1.

⁷⁵ *MCA, Inc. v. Wilson*, 677 F.2d 180, 189 (2d Cir. 1981).

characters.”⁷⁶ The Ninth Circuit added that “[t]o the extent that the Disney characters are not also an object of the parody, however, the need to conjure them up would be reduced if not eliminated.”⁷⁷

B. The *Campbell* Decision and Its Parody/Satire Dichotomy

The narrow scope of the parody defence evolved into a parody/satire dichotomy in the Supreme Court’s landmark decision, *Campbell v. Acuff-Rose Music, Inc.* (1994). The case arose out of an unauthorized parody of a popular song called “Oh, Pretty Woman,” co-authored in 1964 and its publication rights assigned to Acuff-Rose Music.⁷⁸ In July 1989, the manager of 2 Live Crew wrote Acuff-Rose Music, informing them of its intent to create a parody of the song, to fully credit the original authors with authorship and ownership, and to pay the company the statutorily required rate for its use.⁷⁹ After Acuff-Rose Music refused to give permission to use the song, 2 Live Crew released a rap version parody of “Oh, Pretty Woman” entitled “Pretty Woman” as part of a commercial album, while acknowledging the original authors and publisher.⁸⁰ The lyrics of the first stanza closely paralleled those of the original, but are different for the rest of the song.⁸¹ The music of the parody, closely

⁷⁶ *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751, 758, n.15 (9th Cir. 1978).

⁷⁷ *Id.*

⁷⁸ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1152 (M.D. Tenn. 1992), *rev’d*, 792 F.2d 1429 (6th Cir. 1992).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1153.

paralleling the original's, was punctuated with laughter and scraper noises.⁸² The parody also directly copied the original's famous bass riff.⁸³ In June 1990, Acuff-Rose Music sued 2 Live Crew and Luke Skywalker Records in the District Court for the Middle District of Tennessee for copyright infringement, alleging, among other things, that the music of the parody and lyrics of the first stanza were too substantially similar to the original.⁸⁴ Claiming that their use fell within the fair use exception of § 107 of the Copyright Act, 2 Live Crew moved for summary judgment.⁸⁵

The District Court for the Middle District of Tennessee found 2 Live Crew's song to be a parody which constituted fair use of the original, and granted summary judgment for the defendants.⁸⁶ The Court especially noted that the commercial nature of the new work only "tends to weigh against" a finding of fair use, and therefore may be rebutted in cases where the parody helps to foster the creativity that copyright law aims to protect.⁸⁷ The plaintiffs appealed to the Sixth Circuit, which reversed the district court's decision. Relying heavily upon the Supreme Court's decision in *Sony*, the Sixth Circuit determined that commercial uses of original works are "presumptively unfair."⁸⁸ Because 2 Live Crew's use of the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1152.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1158—59.

⁸⁷ *Id.* at 1154.

⁸⁸ *Acuff-Rose Music Inc. v. Campbell*, 972 F.2d 1429, 1436, 1443 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994).

copyrighted work was “wholly commercial,” the court presumed “a likelihood of future harm” that it would bring to the market for both the original and derivative works.⁸⁹

The Supreme Court finally granted certiorari and unanimously held that 2 Live Crew’s new song was a parody and fair use of the original.⁹⁰ Led by Justice Souter, the Court determined that a commercial parody can be fair use. Thus, the Court of Appeals properly assumed that 2 Live Crew’s song contains parody commenting on and criticizing the original work, but “erred in giving virtually dispositive weight to the commercial nature of that parody by way of a presumption, [...] ‘that every commercial use of copyrighted material is presumptively . . . unfair’”⁹¹ It determined that the first factor of the fair-use test, which concerns the purpose and character of the use, inquires whether the new work supersedes the original or transforms it: “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.”⁹² Hence, the Court cautioned against “elevating commerciality to hard presumptive significance.”⁹³ Recognizing the social benefits of parody and its “obvious claim to transformative value,” the Court offered a means of identifying parody by holding that: “The heart of any parodist’s claim to quote from existing material[] is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that

⁸⁹ *Id.* at 1438—39.

⁹⁰ *Campbell*, 510 U.S. at 574.

⁹¹ *Id.*; citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

⁹² *Id.* at 579.

⁹³ *Id.* at 585.

author's works.”⁹⁴ Refusing to judge the artistic merits of 2 Live Crew's song, the Court found that it is indeed a parody that criticizes and comments on the original.⁹⁵

Here, the Supreme Court also distinguished “parody” from “satire.” After concluding that parody can be considered fair use, it added that if the new work “has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh,” then other fair use factors, such as whether the new work was sold commercially, loom larger.⁹⁶ It explained that while a parody targets and mimics the original work, a satire uses the work to criticize something else, “can stand on its own two feet and so requires justification for the very act of borrowing.”⁹⁷ Apparently favoring parody and devaluing satire, the Court nonetheless tempered its position in a footnote, by stating that if a parody's “wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives,” then “it is more incumbent on one claiming fair use to establish the extent of transformation and the parody's critical relationship to the original.”⁹⁸ On the other hand:

... when there is little or no risk of market substitution, whether because of the large extent of transformation of the original work, the new work's minimal distribution in the market, the small extent to which it borrows from the original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser

⁹⁴ *Id.* at 580.

⁹⁵ *Id.* at 582—83.

⁹⁶ *Id.* at 580.

⁹⁷ *Id.* at 580—81.

⁹⁸ *Id.* at 580, n.14.

forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.⁹⁹

In his concurring opinion, Justice Kenney took a more dichotomized position by stating that the parody “must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole,” a prerequisite that “confines fair use protection to works whose very subject is the original composition and so necessitates some borrowing from it [the original].”¹⁰⁰ He also cautioned courts to be wary of *post hoc* rationalization of just any commercial takeoff as a parody.¹⁰¹

The rest of the *Campbell* decision revolves around parody in addressing other factors of the fair-use test. The Court determined that the second factor regarding the nature of the copyrighted work, was “not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case.”¹⁰² The third factor regarding the amount and substantiality of the use turns on both the quantitative and qualitative nature of the copying. The Court held that the parody “must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable,” while leaving the exact application of this test to future cases.¹⁰³ Even though 2 Live Crew’s song copied what may

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 597.

¹⁰¹ *Id.* at 600.

¹⁰² *Id.* at 586.

¹⁰³ *Id.* at 588. It directed lower courts to inquire what else the parodist did besides going to the heart of the original. If a substantial portion of the alleged parody was copied verbatim from the original, and the parodic element added by the defendant is “insubstantial, as compared to the copying,” then the third factor will weigh heavily against the defendant. But if the parodist has merely copied some “distinctive or memorable features” in order to “conjure up” the original, and has ‘thereafter departed markedly from the

be perceived as the “heart” of the original, the Court determined that the “heart” is “what most readily conjures up the song for parody, and it is the heart at which parody takes aim.”¹⁰⁴ Hence, the copying was not excessive in relation to the parodic purpose of the new song.¹⁰⁵ Concerning the fourth factor, the Court held that it must consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market” for the original and licensed derivatives of the original, meaning that commerciality alone does not create a “presumption” of market harm.¹⁰⁶ Moreover, a parody may legitimately suppress demand for the original through its critical function, and only fails this factor when it usurps demand for the original or its derivative works.¹⁰⁷ Because neither Live Crew 2 nor Acuff-Rose Music put forth evidence to address the potential effect of the defendant’s work on the market for non-parody rap derivatives of the original, the Sixth Circuit made an “erroneous presumption” that the new song would harm the market.¹⁰⁸ Holding no opinion on whether the new song’s repetition of the bass riff is excessive copying, the Court remanded the case to the lower court “to permit evaluation of the amount taken, in light of the song’s parodic

[original] for its own ends,” the copying cannot be said to be “excessive in relation to its parodic purpose.” *Id.* at 589.

¹⁰⁴ *Id.* at 588.

¹⁰⁵ *Id.* at 588—89.

¹⁰⁶ *Id.* at 590.

¹⁰⁷ *Id.* at 598.

¹⁰⁸ *Id.* at 594.

purpose and character, its transformative elements, and considerations of the potential for market substitution.”¹⁰⁹

C. Between the Parody/Satire Dichotomy and a “No Parody” Liberalized Fair Use Standard

The *Campbell* decision helps to preserve the flexible, case-by-case analysis intended by Congress and recognizes the value of parody both as a form of criticism and catalyst in literature. Nevertheless, the narrow parody defence established in *Campbell* was driven by both utilitarianism and a narrow natural rights perspective towards copyright that privileges rights holders at the expense of the public.¹¹⁰ John Tehranian contends that the Court’s requirement that the parody targets at least in part the original belies a “propertized” vision of fair use, reducing fair use to a test about necessity and casting it as a privilege and not a right.¹¹¹ These conceptualizations of authors’ and user’s rights thus go against the utilitarian principle on which American copyright law is based. This “propertized” vision of authors’ rights and fair use, which prioritizes authors’ rights over the public’s, no doubt diverges from the natural rights conceptions of copyright and fair use/dealing explained in Part One, according to which copyright accommodates the right to parody by the public. On the other hand, Alfred Yen explains the process in which courts, generally lacking empirical evidence, engage in intuitive cost-benefit reasoning to apply the fair use doctrine.¹¹² In the case of

¹⁰⁹ *Id.* at 589.

¹¹⁰ Alfred Yen, *When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 87 (1991); JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* 41 (2011).

¹¹¹ *Id.*

¹¹² Yen, *supra* note 110.

parody, Yen argued that the according to the *Campbell* Court's reasoning, the harm to the author's incentives is offset by the unique values that it offers the public.¹¹³ Following this logic, a satire that unnecessarily borrows from the original harms the author's incentives without offering a unique value to the public.¹¹⁴ Hence, both utilitarianism and a narrow natural rights conception of copyright led to the parody/satire dichotomy suggesting that parody and satire are distinct categories.

Over the past decade, courts have, in some instances, developed an increasingly liberal fair use standard, apparently to counter the tightening statutory control over the use of copyrighted materials.¹¹⁵ To that extent, they downplayed the importance of the parody exception as defined in *Campbell*, or did not even mention this exception when holding that the works were fair uses. One example is the Second Circuit's 2006 decision in *Blanch v. Koons*. Artist Jeff Koons created a series of paintings entitled "Easyfun-Ethereal" for Deutsche Bank and Guggenheim by drawing upon images from advertisements and his own photographs.¹¹⁶ One piece, called "Niagara," used a photograph in an issue of *Allure* magazine and taken by accomplished fashion photographer Andrea Blanch.¹¹⁷ Koons borrowed only the woman's legs and feet from Blanch's photograph and pasted them

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ For instance, the 1998 Digital Millennium Copyright Act (DMCA), which was Congress' answer to copyright holders' concern about piracy on the Internet, tilts the balance in favor of them, by authorizing them to troll and investigate websites, peer-to-peer networks, and other forms of plural networks to detect piracy, and provides Internet service providers with a swift mechanism for dealing with suspected infringement. Amy Lai, *Sailing Toward a Truly Globalized World: WTO, Media Piracy in China, and Transnational Capital Flows*, 18 UCLA ENT. L. REV. 75, 79—82 (2011).

¹¹⁶ *Blanch v. Koons*, 467 F.3d 247 (2d Cir. 2006).

¹¹⁷ *Id.*

vertically instead of slanting upward as in the original.¹¹⁸ Noting that the goal of copyright law is to further creativity, the Circuit Court held that Koons’s use of Blanch’s work passed the transformative test, because it did not repackaging her expression, but rather used it as “‘raw material’ in the furtherance of distinct creative or communicative objectives,”¹¹⁹ which as Koons explained, included providing “commentary on the social and aesthetic consequences of mass media.”¹²⁰ The Second Circuit downplayed the significance of the parody exception in *Campbell*, stating that “[t]he question is whether Koons had a genuine creative rationale for borrowing Blanch’s image, rather than using it merely ‘to get attention or to avoid the drudgery in working up something fresh.’”¹²¹

This liberal view of fair use is also found in *Cariou v. Prince*, a 2013 decision by the Second Circuit. Here, a professional photographer published a book of landscapes and portraits, entitled “Yes, Rasta,” which he took while spending time with Rastafarians in Jamaica.¹²² A famous appropriation artist then used images from “Yes, Rasta” to create a group of collages called “Canal Zone,” by enlarging, tinting, collaging, cropping, or painting over these images.¹²³ The Circuit Court went further than *Koons* by not relying upon the

¹¹⁸ *Id.* at 248.

¹¹⁹ *Id.* at 251. The Court held that Koons’ painting passed the transformative test “almost perfectly” by changing the original copyrighted picture’s “colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects’ details[.]” More “crucially,” the painting had an “entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space.” *Id.* at 253.

¹²⁰ *Id.* at 253, 254.

¹²¹ *See id.* at 255.

¹²² *Cariou v. Prince*, 714 F.3d 694, 698 (2d Cir. 2013).

¹²³ *Id.*

parody definition in *Campbell* and by impliedly throwing a wrench in its parody/satire distinction. It held that fair use requires not that the work comment on the original, but only that it alter the underlying work with “new expression, meaning, or message” to the “reasonable observer.”¹²⁴ It found that the defendant’s uses of the plaintiff’s works were fair because they conveyed “new expression” and “new aesthetics with creative and communicative results” distinct from the plaintiff’s.¹²⁵ In addition, the Court ruled for the defendant despite his abundant uses of the plaintiff’s works, on the grounds that appropriating large portions of the original work is sometimes necessary and there is no rule that fair uses cannot take any more source material than necessary.¹²⁶

In the same year, the Ninth Circuit also adopted this broad view of acceptable fair use by holding that significant copying can be fair as long as the use is creatively transformative. In *Seltzer v. Green Day, Inc.* (2013), illustrator and street artist Derek Seltzer brought claims against rock band Green Day for their use of his image of a screaming face, entitled “*Scream Icon*.”¹²⁷ Seltzer used “*Scream Icon*” as street art and as a form of self-identification in advertisements for his work and gallery shows.¹²⁸ Green Day and its concert tour video producer and photographer created a four-minute video that included an image of “Scream

¹²⁴ *Id.* at 705—06.

¹²⁵ *Id.* at 708.

¹²⁶ For the fourth prong of the fair use analysis, the Second Circuit relied upon language in *Blanch* and *Campbell* and narrowed the market effect analysis to whether the new artworks “usurp” the market for the original works. Focusing on the different markets in which Cariou and Prince present their work, and seizing on the fact that Cariou failed to market his works and sold only four prints, it held that twenty-five of Prince’s works fairly used Cariou’s photographs, and remanded the issue of the transformative character of five of the works to the district court. *Id.* at 709.

¹²⁷ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1174 (2d Cir. 2013).

¹²⁸ *Id.*

Icon” poster, adding graphic elements to it and using it as a backdrop for one of Green Day’s songs (“East Jesus Nowhere”) on its 2009-10 national concert tour.¹²⁹ The Ninth Circuit cited the Second Circuit’s decision in *Cariou* to argue that a transformative use is one that delivers “new expressive content or message,” a requirement that also implicitly dissolves the parody/satire dichotomy in *Campbell*.¹³⁰ Green Day’s use of illustrator and street artist Seltzer’s screaming face icon was transformative because it constituted new creative expression and content about religion, even though it made few physical changes to the original and did not comment on it.¹³¹ In addition, the third factor “does not weigh against an alleged infringer, even when he copies the whole work, if he takes no more than is necessary for his intended use.”¹³² Therefore, Green Day’s appropriation of Seltzer’s entire icon, which it used to convey a different meaning than Seltzer did, was fair use.¹³³ By holding that significant copying can be fair use as long as the use is creatively transformative, courts have gone a long way in liberalizing the fair use standard in these cases.

In *Authors Guild, Inc. v. Google, Inc.* (2015), the Second Circuit expands upon *Campbell*’s criterion of transformativeness to encompass not only “transformative work” that adds “new expression,” but also “transformative purpose” that gives the prior work “new meaning.”¹³⁴ In 2004, Google began its massive digitization and permanent storage program

¹²⁹ *Id.*

¹³⁰ *Id.* at 1177.

¹³¹ *Id.* at 1176—77.

¹³² *Id.* at 1178.

¹³³ The Court also reasoned that because the “Scream Icon” was a single image and not “meaningfully divisible,” it was not possible to copy part of it. *Id.* at 1178.

¹³⁴ *Authors Guild, Inc. v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).

with the cooperation of the libraries of the University of Michigan and other universities, which supplied the books that Google scanned.¹³⁵ Over the years, Google has scanned and indexed millions of volumes as the list of participating libraries from around the world has grown.¹³⁶ Two class-action suits—one on behalf of publishers while the other on behalf of authors—were brought against Google in 2005 in the District Court of the Southern District of New York.¹³⁷ In November, 2013, Judge Chin formally dismissed the lawsuit by ruling that Google’s use of the works qualified as fair use, and Author’s Guild appealed.¹³⁸ In late 2015, the Second Circuit held that Google’s unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works were non-infringing fair uses, because the copying was highly transformative, the public display of text was limited, and the snippets did not provide a significant market substitute for the protected aspects of the originals.¹³⁹ The Court emphasized the “highly transformative purpose” of the copying.¹⁴⁰ Because copyright law intends to benefit the public by providing “access to knowledge” and “expanded public learning,” economic benefits for authors are merely the instrument to achieve this goal.¹⁴¹ This public-oriented transformative purpose accordingly justifies the minor losses right holders might suffer from uses of their copyrighted works

¹³⁵ *Id.* at 208, n.3.

¹³⁶ *Id.*

¹³⁷ *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

¹³⁸ *Id.*

¹³⁹ *Authors Guild, Inc. v. Google Inc.*, 804 F.3d at 229.

¹⁴⁰ *Id.* at 218, 229.

¹⁴¹ *Id.* at 212—13.

where, as here, the digitalized copies did not serve as market substitutes for the originals.¹⁴²¹⁴³

The *Google* case, which expanded *Campbell*'s criterion of transformativeness to encompass both "transformative work" and "transformative purpose," was neither unprecedented nor surprising. In *Bill Graham Archives v. Dorling Kindersley Ltd.* (2006), the Second Circuit held that a biography's reduced-sized complete images of posters of the legendary rock band "*The Grateful Dead*" were "transformative" because the biography used the images of the posters as "historical artifacts" to document the band's concerts.¹⁴⁴ This aesthetic/documentary distinction presaged the application of the fair use exception to technological reproductions of copyrighted works that do not yield new works. In *Perfect 10, Inc. v. Amazon.com* (2007), the Ninth Circuit determined that Google's posting of thumbnail images of the photos owned by the adult entertainment company to provide a searchable index of thumbnails contained benefits outweighing any infringement.¹⁴⁵ In *A.V. ex rel. Vanderhye v. iParadigms, LLC* (2009), the Fourth Circuit ruled that the archiving of plaintiffs' papers by the commercial plagiarism detection service, its purpose to detect and

¹⁴² The Court seemingly endeavored to avoid slippery-slope expansion of permissible contents under fair use analysis. Although the snippets conveyed certain amounts of expressions taken from the copyrighted works, the Court repeatedly emphasized the very constrained and controlled, "fragmentary and scattered," "cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view." Therefore, "at least as presently structured by Google, the snippet view does not reveal matter that offers the marketplace a significantly competing substitute for the copyrighted work." *Id.* at 223.

¹⁴³ The Authors Guild appealed to the Supreme Court, which declined to take the case. Corynne McSherry, *Case Closed: Supreme Court Lets Fair Use Ruling Stand in Google Books Litigation*, ELECTRONIC FRONTIER FOUNDATION (Apr. 18, 2016), <https://www.eff.org/deeplinks/2016/04/case-closed-supreme-court-refuses-hear-authors-guilds-challenge-google-books> (last visited Oct. 10, 2017).

¹⁴⁴ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d. Cir. 2006).

¹⁴⁵ *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007).

discourage plagiarism and therefore unrelated to the papers' expressive content, was fair use.¹⁴⁶ In *Authors Guild v. HathiTrust* (2014), the Second Circuit found that the scanning, digitalization, and permanent storage of full copies of copyrighted books to create a full-text search database and to provide access to the print disabled were transformative fair uses.¹⁴⁷ In light of all these cases, the Second Circuit's decision regarding Google books was almost a certainty.

Undoubtedly, the expansion of the "transformative" criterion to include "transformative purpose" that gives the prior work "new meaning" without adding "new expression" has not been confined to cases where technologies transformed aesthetic works into documentaries, indexes, or databases. The *Seltzer* Court already determined that "new expressive content or message" could justify significant copying by the new work that makes few changes to the old work. Nevertheless, the liberalization of fair use standard over the last decade has by no means negated the importance of a broad parody exemption in copyright law.

D. Substituting a Broad Parody Defence for the Parody/Satire Dichotomy

This subsection will argue that a broad parody exemption should replace the current parody/satire dichotomy, and the next will re-assess the four-prong test. First, because of the strong tradition of parody in American society, the parody defence should be given a place in its copyright law, so as to affirm the public's right to free speech and to remind users that to speak through parodies is not the same as appropriating copyrighted works for other

¹⁴⁶ A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).

¹⁴⁷ Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

purposes. Practically speaking, retaining the parody defence also has another major advantage. Probably due to their belief that “satirical” works are not fair uses, the Courts in *Koons* and *Seltzer* downplayed and evaded the *Campbell* Court’s parody/satire dichotomy respectively in holding that defendants’ uses of copyrighted works to comment on something other than the originals are fair. Nevertheless, the parody definition laid down by the *Campbell* Court has continued to be followed by courts in recent years.¹⁴⁸ For example, in *Bourne Co. v. Twentieth Century Fox Film Corp.* (2009), the District Court for the Southern District of New York accepted the defendants’ parody-of-the-author argument that their song was intended in part to poke fun at Walt Disney’s purported anti-Semitism and was fair use.¹⁴⁹ In *Henley v. DeVore* (2010), the District Court held that the senatorial candidate’s use of the author’s songs in his campaign to target the author’s viewpoints more generally was satire, not parody, and was not fair use.¹⁵⁰ Hence, as long as courts choose to follow the *Campbell* Court’s standard, rather than the liberalized fair use standard created by some recent decisions, they will likely hold that works making transformative uses of originals without criticizing or commenting on them are not fair.

Further, the expansion of fair use to include technological conversions of copyrighted materials for “transformative purposes” in cases like *Google Books, Inc.* may not even apply to parody cases. A parody can be created through conventional methods, with or without

¹⁴⁸ Some other examples include *Mattel, Inc. v. Walking Mountain Productions*, where the court held that the artist’s producing and distributing photographs containing the famous “Barbie” doll was fair use, 353 F3d 792 (9th Cir. 2003); and *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007), where the court accepted the defendants’ parody-of-the-author argument that their use of the author’s character ridiculed the author’s wholesome image and was fair use.

¹⁴⁹ *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 507 (S.D.N.Y. 2009).

¹⁵⁰ *Henley v. DeVore*, F. Supp. 2d 1144 (C.D. Cal. 2010).

using new technologies. Unlike the new works in these cases which served documentary, research, and indexing purposes, a parody may not serve a “transformative purpose” that is distinctly different from the original’s. Hence, despite the expansion of fair use to include “transformative purposes,” courts may not hold that certain parodies are fair.

One must note that the parody definition in *Campbell* otherwise measures up to the one proposed in Part One. The *Campbell* Court did not require that a parody be humorous.¹⁵¹ Further, it did not even consider critical intent to be an essential element of parody. Although “Oh, Pretty Woman” can be said to be critical of the original song “Pretty Woman,”¹⁵² the Court stated that the parody “may loosely target an original” as long as the parody “reasonably could be perceived as *commenting on* the original or criticizing it, to some degree.”¹⁵³ Thus, a work that merely serves as a commentary may qualify as a parody. In addition, the parody defence would not likely be weakened by moral rights claims. When the U.S. acceded to the Berne Convention, it stipulated that the Convention’s “moral rights” provisions were addressed sufficiently by laws covering slander and libel.¹⁵⁴ The Visual Artists Rights Act of 1990 (VARA), which was enacted as a measure sequent to the U.S. joining the Berne Convention, and which then became part of the U.S. Copyright Code, gives

¹⁵¹ The *Campbell* court drew upon the American Heritage Dictionary to state that a parody “imitates the characteristic style of an author or a work for comic effect or ridicule.” 510 U.S. at 580. The Eleventh Circuit in *Suntrust Bank v. Houghton Mifflin Co.* chose to bypass the question of whether the work in dispute was humorous, considering that it “would always be a wholly subjective inquiry.” 268 F.3d 1257, 1269 (11th Cir. 2001).

¹⁵² The Court held that the contrast between the copying work and the original “can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.” *Campbell*, 510 U.S. at 583.

¹⁵³ *Id.* at 580-81, 583.

¹⁵⁴ ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 30 (2010).

qualifying authors of visual arts the right to “prevent any intentional distortion, mutilation, or modification that would be prejudicial to his or her honor or reputation,” among others.¹⁵⁵ These rights are nevertheless subject to the fair use provision.¹⁵⁶ To date, no moral rights claims have been filed against authors of parodies or imitative works based upon visual arts. Because visual artists’ moral rights are restricted by the fair use provision, one can fairly predict that unless the parodic works are defamatory, any moral rights claims would not likely prevail under the current law.¹⁵⁷

To accommodate the public’s right to free speech, the current parody/satire dichotomy in American copyright law therefore only needs to be replaced by a broadened parody defence shielding from liability works criticizing or commenting on something other than the originals. In fact, many scholars contend that the *Campbell* Court’s distinction between parody and satire, though theoretically impossible, is practically unfeasible. Whereas Annemarie Bridy attempts to make a finer distinction than the one in *Campbell*,¹⁵⁸ others contend that judges are not well-equipped to make artistic distinctions between different genres and should not be given the discretion to do so. The latter argue for a more

¹⁵⁵ 17 U.S. Code § 106A(a)(3)(A).

¹⁵⁶ *Id.* § 106A(a)

¹⁵⁷ For example, Geri J. Yonover imagines that Renaissance artist Leonardo da Vinci filed a copyright infringement claim based on the VARA against twentieth-century artist Duchamp, who added a moustache to his replica of Leonardo’s Mona Lisa. As Yonover argues, on the fourth factor of the fair use test, Congress notes that expert testimony can show whether the use affects the honor or reputation of the artist. Thus, Leonardo should bear the burden of proof by proffering evidence that Duchamp’s replica had done damage to his reputation, one example being a reduction in the sales of his works. *The “Dissing” of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody, and Fair Use*, 29 VAL. U. L. REV. 935, 1000—01 (1995).

¹⁵⁸ Annemarie Bridy, *Sheep in Goats’ Clothing: Satire and Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 51 J. COPYRIGHT SOC’Y U.S.A. 257 (2004).

workable conception of parody that would relieve judges of the difficult task of making artistic judgments and that would comport with First Amendment principles.

Bridy cites Linda Hutcheon, who contends that parody and satire are often “used together” in a single text, and Michael Issacharoff, who observes that it is “difficult at times to unravel satire and parody” in the same work.¹⁵⁹ In light of the considerable overlapping of these two genres in any given work, what the *Campbell* Court crafted is “a sort of sliding scale according to which the burden on the defendant to justify his or her borrowing increases as the element of satire in the accused work increases.”¹⁶⁰ Bridy thus seeks a better method to classify a hybrid text without resorting to mutually exclusive and misleading definitions of parody and satire, by drawing upon Ziva Ben-Porat’s distinction between “indirectly satirical parody” and “directly satirical parody.”¹⁶¹ Bridy argues that the work from which an indirectly satirical parody borrows is not merely used as a means to an unrelated satiric end, but is included to some degree within the scope of its social, cultural or political critique. Thus, an indirectly satirical parody should qualify as fair use.¹⁶² By contrast, a directly satirical parody, which instrumentalizes the parodied text for a satirical purpose wholly unrelated to the work, has no need to “conjure up” that particular work to serve its satiric ends. As such, it should not be considered fair use.¹⁶³

¹⁵⁹ *Id.* at 273.

¹⁶⁰ *Id.* at 273.

¹⁶¹ *Id.* at 275—276, citing Ziva Ben-Porat, *Method in Madness: Notes on the Structure of Parody, Based on Mad TV Satires*, 1 *POETICS TODAY* 245, 248 (1979).

¹⁶² *Id.* at 276—277.

¹⁶³ *Id.* at 275, 277.

Bridy's view that there must be some kind of identity between a parodied text and the parody in order for the parody to qualify as a fair use is in fact very similar to the *Campbell* Court's holding that a parody must comment "at least in part" on the original author's work. If it is difficult to unravel parody and satire in a single work, then it could be equally challenging to differentiate parodies that bear some kind of identity to the parodied texts from those that bear no identity at all. Bruce P. Keller and Rebecca Tushnet contend that distinguishing parody from satire requires precisely the kind of aesthetic and literary judgment that copyright law generally instructs courts not to pass.¹⁶⁴ Clearly, whether a parody is "directly" or "indirectly satirical" and whether there exists any kind of identity between a parodied text and the parody is a similar undertaking. In addition, not only does this inquiry involve subjective judgments, but its answer ultimately hinges on the writer's original intent. Tyler T. Ochoa asserts that courts cannot definitively determine an author's intent in writing a particular work, a task which, according to many literary scholars, is "both foolish to attempt and impossible to achieve."¹⁶⁵

Contending that courts should not have the discretion to make a subjective determination about a parodist's intent, some scholars hold that parody should be reconceptualized so that it covers a wider range of works. According to Kathryn D. Piele, because courts should not pass aesthetic judgments on parodic works, and copyright law aims to encourage creativity, secondary works should fall under the protection of § 107 so long as they use original copyrighted works to "comedically criticize or comment on

¹⁶⁴ Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 987 (2004).

¹⁶⁵ Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 557 (1998).

anything.”¹⁶⁶ Paul Tager Lehr holds that parody should be defined as “an imitation of a work more or less closely modelled on the original, but so turned to produce a ridiculous (or humorous) effect.”¹⁶⁷ Sherri L. Burr goes further by emphasizing that courts should make decisions within narrow confines that do not require judgment of a particular parody’s artistic merits, including whether it is comic or not.¹⁶⁸ Hence, Burr rightly argues, parody should be defined as “a work created by one author or group of authors using the work of another with the intent to transform the original work,” which “must either educate about, comment on, criticize, ridicule, or make humorous the original work or a social condition.”¹⁶⁹

Undoubtedly, this inclusive exemption would be more responsive to First Amendment free speech principles. Joseph Liu persuasively argues that the fair use doctrine in American law is ill-defined and fails to ease its potential conflict with the First Amendment.¹⁷⁰ Treating satire as fair use would serve to reduce some of the uncertainty created by this doctrine and offer more “breathing space” to free speech.¹⁷¹ Ochoa aptly notes that asking copyright holders for permission to use their works for satirical purposes

¹⁶⁶ Kathryn D. Piele, *Three Years after Campbell v. Acuff-Rose Music, Inc.: What Is Fair Game for Parodists?* 18 LOY. L.A. ENT. L. REV. 75, 99 (1997).

¹⁶⁷ Paul Tager Lehr, *The Fair-Use Doctrine Before and After “Pretty Woman’s” Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 45 FLA. L. REV. 443, 477 (1998).

¹⁶⁸ Sherri L. Burr, *Artistic Parody: A Theoretical Construct*, 14 CARDOZO ARTS & ENT. 65, 75 (1996).

¹⁶⁹ *Id.*

¹⁷⁰ Liu critiques the idea/expression dichotomy by pointing out that because a spectrum exists between idea and expression, and any line drawn on that spectrum will always, to some extent, be arbitrary. In addition, the fair use defence is itself a multi-factored and highly contextual test the results of which are difficult to predict. Hence, the fair use defence provides little certainty to users who want to appropriate copyrighted works for expressive purposes. Joseph Liu, *Copyright and Breathing Space*, 30 COLUM. J. L. & ARTS. 101, 105 (2007).

¹⁷¹ *Id.* at 118—19.

would be interpreted as seeking their endorsement of the ideas conveyed by the new works.¹⁷² Hence, drawing the parody/satire distinction would allow copyright holders to censor satirical opinions with which they disagree.¹⁷³ Lehr illuminates that courts indeed have used the discretion inherent in the current fair-use framework to deny protection to parodies that they found distasteful, and in doing so, participated in censorship.¹⁷⁴ The *Campbell* Court attempted to temper the scope of inquiries by stating that “(t)he threshold question when fair use is raised in defense of parody is whether a parody character may reasonably be perceived.”¹⁷⁵ Ironically, though, requiring a court to make the judgment as to whether the work is a true parody that qualifies as fair use would give courts practically unfettered discretion to discard distasteful works as infringing non-parodies.¹⁷⁶ Ochoa, Keller and Tushnet even affirm the usefulness of satire, by pointing out that it may provide a “uniquely effective”¹⁷⁷ and/or “broad”¹⁷⁸ social commentary the effect of which may not have been achieved by a parody that targets the work alone and nothing else.

Expanding the scope of the parody defence to include works targeting the originals and those using the underlying works to criticize or comment on something else is preferable

¹⁷² Ochoa, *supra* note 165, at 611.

¹⁷³ *Id.*

¹⁷⁴ Lehr uses several examples, including the *MCA* decision, to show how courts denied fair use protection to what they found distasteful. Lehr, *supra* note 167, at 462—64, 469—70, 476.

¹⁷⁵ *Id.* at 470, *citing Campbell*, 510 U.S. at 582

¹⁷⁶ Lehr argues that this conclusion is easily gleaned from the two lower courts’ opinions and Justice Kennedy’s concurring opinion in the Supreme Court decision. *Id.* at 471.

¹⁷⁷ Keller & Tushnet, *supra* note 164, at 998.

¹⁷⁸ Ochoa, *supra* note 165, at 611—12.

to treating “parody and “satire” both as fair uses under copyright law, a method which, in theory, would accommodate the same amount of speech. This is not only because the *Campbell* Court’s definition of parody, as explained, is unnecessarily narrow. The latter option may not eliminate the flawed parody-satire dichotomy. Although the *Campbell* Court’s dichotomization of parody and satire is flawed, its description of “satire” as being able to “stand on its own two feet” is accurate. Whereas a parody refers to a literary composition modelled on another work, a satire does not depend upon another work for its existence. The *Oxford Dictionary* defines a satire as “a poem or a novel, film, or other work of art which uses humor, irony, exaggeration, or ridicule to expose and criticize prevailing immorality or foolishness, especially as a form of social or political commentary.”¹⁷⁹ Although literary scholar Charles A. Knight describes the tendency of satires to parody or imitate other genres or literary models, imitation of a preexisting work is by no means essential to a satire.¹⁸⁰ Courts adhering to the propertized conception of fair dealing would determine that satires need not borrow from the originals. Only expanding the scope of parody to cover both categories under the current law would eliminate what courts may perceive to be a lesser category and the flawed parody/satire dichotomy.

E. The Four-Prong Test: Transformativeness and Market Substitution

A broadened parody conception which include both “parody” and “satire” as defined by the *Campbell* Court necessitates a reassessment of the four-prong fair use analysis. Section 107’s four-pronged test, which requires courts to do a case-by-case analysis of

¹⁷⁹ OXFORD ENGLISH DICTIONARY, <http://www.oed.com/viewdictionaryentry/Entry/171207> (last visited Oct. 10, 2017).

¹⁸⁰ CHARLES A. KNIGHT, THE LITERATURE OF SATIRE 32 (2004).

parodies (or other uses of copyrighted works) that defendants claim to be fair uses of copyrighted work, ferrets out secondary works that do not meet the fair-use standard and ensures that the exclusive rights of copyright holders are protected. The importance of the right to parody raises a question: does a parody, by virtue of its nature, qualify as fair use, or does it need to go through the four-prong analysis? In determining whether a parody is fair use of the copyrighted work, courts should focus on only the first and the fourth factors: they should first determine whether the work is transformative enough to be a parody, and then assess the impact of the parody on the markets of the copyrighted work and its licensed derivatives.

Courts only need to focus on the first and the fourth factors in determining whether a parody is fair use. Although the second factor regarding the nature of the copyrighted work may help courts to determine whether uses other than parody are fair, the *Campbell* Court rightly determined that it was “not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case.”¹⁸¹ The first factor, which requires courts to look at the “purpose and character of the use,” is nonetheless important as it relates to the nature of parody. Judge Pierre Leval, in his 1990 seminal article proposing a “transformative” standard for fair use, emphasizes that the fair use intends to stimulate the “creation of new information, new aesthetics, new insights and understandings” for the “enrichment of society.”¹⁸² A parody, by definition, contains criticism and/or commentary.¹⁸³ When judging whether the parody is transformative of the original work,

¹⁸¹ *Campbell*, 510 U.S. at 586.

¹⁸² Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

¹⁸³ See Part One, Chapter Two.

courts should lean towards disallowing fair use protection for works that merely repackage the original work so as to “avoid the drudgery in working up something fresh,” and allowing protection for works provide new information, insights, and understandings.¹⁸⁴ Just as courts should not have discretion regarding whether a parody comments on the original copyrighted work or something else, they should not judge the merits of the new information or insights. On the contrary, whether the new works present information and insights that are not found in the old works is relatively objective and therefore not subject to the whim of individual judges.

The third prong of the analysis, the “amount and substantiality of the use,” is an ill-defined factor that draws together the transformativeness issue in the first prong and the market impact in the fourth.¹⁸⁵ Neither did the *Campbell* Court provide much guidance on how much copying would be permitted,¹⁸⁶ nor have subsequent decisions, such as those studied in this chapter, agreed on the acceptable amount that the new work can take from the original work.¹⁸⁷ Thus, focusing upon the amount the parodist borrows needlessly brings in a subjective and ill-defined element into the fair use inquiry for parody.¹⁸⁸ Taking the four-prong test as a whole, the ultimate purpose of this factor is to ensure either that a parodist does not free-ride on another’s creativity, which is accomplished by the first factor inquiry,

¹⁸⁴ *Campbell*, 510 U.S. at 580.

¹⁸⁵ See 17 U.S.C. § 107(3); see Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and Campbell v. Acuff-Rose Music, Inc.*, 69 S. CAL. L. REV. 767, 822 (1996).

¹⁸⁶ See *Campbell*, 510 U.S. at 586—89.

¹⁸⁷ Anastasia P. Winslow cites Michael Chagares to argue that focusing on the amount taken is “inherently ambiguous” and does not further copyright’s goal of promoting the arts, although she focuses on pre-*Campbell* decisions in her argument. Winslow, *supra* note 185, at 806.

¹⁸⁸ *Id.* at 822.

or that the parody does not serve as a substitute for the original or its derivatives, which is what the fourth factor is about.¹⁸⁹

As Part One has emphasized, the market substitution factor is crucial for determining whether parodies (or other uses) are fair uses of the underlying works. The principal consideration in applying the fourth factor should be whether the parody would likely interfere with the economic incentives that spur creativity, or, from a natural rights perspective, adversely affect the rights holder's property interest. As Judge Leval stated, "The market impairment should not turn the fourth factor unless it is reasonably substantial. When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this (consideration) weigh heavily against the secondary user."¹⁹⁰ However, it is highly unlikely that the creation of a parody would ever substantially impair copyright's economic incentive system because, as the Second Circuit noted: "any work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit," and "further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness."¹⁹¹ Anastasia P. Winslow contends that whether one work would substitute for the other is an open-ended inquiry which should be addressed through an objective comparison between the two works, by assessing the changes that the parodist has

¹⁸⁹ *Id.* at 806—07.

¹⁹⁰ Leval, *supra* note 182, at 1125.

¹⁹¹ *Warner Bros. Inc. v. Am. Broad. Co. Inc.*, 720 F.2d 231, 242—43 (2d Cir. 1983).

made to the original and the types of audiences that the works favor.¹⁹² This method for assessing the potential adverse impact of the new work on the original's market arguably should apply equally to both parodies that target the original and those that criticize or comment on something else.

A more difficult question arises in assessing the potential adverse impact of the parody on the market for licensed derivatives of the original work. Winslow persuasively argues that the economic rationale for granting owners control over secondary uses is substantially weakened, when they have no objective interest in licensing the derivative uses in question.¹⁹³ However, Winslow also points out that it is illogical to include “parodic” derivative works in the same market as “satirical” derivative works: authors probably would not license the former because they target the original works, but would probably license the latter because they target something else (or someone other than the author).¹⁹⁴ Winslow's reasoning is flawed here. As Part One, Chapter Two has explained, it would be wrong to presume that copyright owners or authors are more likely to license satirical parodies. To better assess potential adverse impact of the parodies on the market for licensed derivatives of the original works, courts should seek to assess the likelihoods that the copyright owners would license derivative works that target the same audiences as the new works do. Only if there are strong likelihoods for this to happen can the works be deemed to supplant the

¹⁹² Winslow, *supra* note 185, at 807.

¹⁹³ *Id.* at 823.

¹⁹⁴ *Id.*

licensed derivatives' markets and diminish the authors' incentives, or, from a natural rights perspective, adversely impact the authors' property rights.

F. The Parody/Satire Dichotomy's Impact on Judicial Decisions: Three Examples

The *Campbell* Court clarified its position regarding parody and satire, emphasizing that a proper fair use analysis considers and weighs all of the § 107 factors. Hence, a “parody, like any other use, has to work its way through the relevant (fair use) factors, and be judged case by case, in light of the ends of copyright law”; a satire not targeting the original work can be considered fair use, for instance, when there is little possibility that consumers would view the satire as a commercial substitute, or a small amount of the copyrighted work was used.¹⁹⁵ Yet the parody/satire dichotomy, created by the *Campbell* court and particularly through Justice Kennedy's concurring opinion, has exerted a heavy influence on many subsequent decisions. Using three judicial decisions, this subsection illuminates how this dichotomy impacted courts' reasoning processes and led to erroneous decisions in two cases.

The parody/satire dichotomy had a heavy impact on the court's reasoning in *Suntrust Bank v. Houghton Mifflin* (2001). Here, the estate of Margaret Mitchell sued to enjoin publication of Alice Randall's *The Wind Done Gone* on the ground that it constituted an unauthorized derivative work based on *Gone with the Wind*.¹⁹⁶ While the story of *Gone with the Wind* focuses on the life of a wealthy slave owner during the American Civil War, *The Wind Done Gone* retells the story from the point of view of the African-American slaves

¹⁹⁵ *Campbell*, 510 U.S. at 581, 580, n.14.

¹⁹⁶ *Suntrust Bank*, 268 F.3d at 1259.

during the same time period.¹⁹⁷ The District Court for the Northern District of Georgia initially enjoined publication, accepting the Mitchell estate's contention that it constituted an infringing work and rejecting Randall's fair use defence.¹⁹⁸ The Eleventh Circuit, holding that *The Wind Done Gone* was protected by the fair use doctrine and the First Amendment, reversed the District Court's injunction.¹⁹⁹

Both Courts were heavily influenced by the parody/satire dichotomy. Although the District Court acknowledged that *The Wind Done Gone* has numerous parodic elements, it characterized the novel as a sequel or a satire, the overall purpose of which being to "provide a social commentary on the antebellum South."²⁰⁰ Hence, the Court concluded that it was nothing more than an effort to free ride on the copyrighted work and "to entertain and sell books to an active and ready-made market for the next *Gone with the Wind* sequel."²⁰¹ In drawing this conclusion, the Court overlooked the fact that the two novels have more or less the same time frames, which weakens the argument that it competes with any potential sequel of Mitchell's work, assuming that a sequel means a story that follows the original work. The Eleventh Circuit, though making a speech-friendly decision by holding that Randall's work is fair use, pigeon-holed the work by labeling it as a parody and overlooking what would be known as its "satirical" elements.²⁰² It described Randall's novel, written

¹⁹⁷ *Suntrust Bank v. Houghton Mifflin, Co.*, 136 F. Supp. 2d 1357, 1367 (N.D. Ga. 2001), *vacated*, 268 F.3d 1257 (11th Cir. 2001).

¹⁹⁸ *Id.* at 1385.

¹⁹⁹ *Suntrust Bank*, 268 F.3d at 1277.

²⁰⁰ *Suntrust Bank*, 136 F. Supp. 2d at 1378.

²⁰¹ *Id.*

²⁰² *See Suntrust Bank*, 268 F.3d at 1269.

from the perspective of a different narrator, as “a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *Gone with the Wind*,” and held that its “for-profit status [was] strongly overshadowed and outweighed in view of its highly transformative use of *Gone with the Wind*’s copyrighted elements.”²⁰³ By labeling the work a parody, or a “[d]estructive parody” that serves social good by increasing the supply of criticism, it overlooked the fact that Randall’s work, which also comments on antebellum South in general, can also be deemed what the *Campbell* Court called a satire.²⁰⁴

Contrarily, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.* (1997), the parody/satire dichotomy led the court astray. Here, Penguin Books USA, Inc. and Dove Audio, Inc. agreed to publish and distribute a satirical account of the O.J. Simpson trial, entitled “*The Cat NOT in the Hat! A Parody by Dr. Juice*,” which recounts the events of the trial in simple and repetitive rhyming verse like those in *The Cat in the Hat* by Theodor S. Geisel under the pseudonym Dr. Seuss.²⁰⁵ Based on a pre-publication advertisement, Dr. Seuss Enterprises filed suit against the authors and publishers of the parody, claiming that it violated the Copyright Act along with other laws.²⁰⁶ The District Court of the Southern District of California entered a preliminary injunction against the defendants, holding that the

²⁰³ *Id.*

²⁰⁴ *See id.* 1283.

²⁰⁵ *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1561 (S.D. Cal. 1996), *aff’d*, 109 F.3d 1394 (9th Cir. 1997).

²⁰⁶ The plaintiff alleged that the defendants violated the Lanham Act, the Federal Trademark Dilution Act, and the California Unfair Competition law by using copyrighted expression and registered and unregistered trademarks belong to the plaintiff. *Id.* at 1561—62.

plaintiff had demonstrated a likelihood of success on the merits of its copyright claim.²⁰⁷ On an interlocutory appeal, the Ninth Circuit affirmed the District Court’s rulings.²⁰⁸

After the District Court found Penguin’s claims that its book critically commented on the original work to be “completely unconvincing,”²⁰⁹ the defendants, on appeal to the Ninth Circuit, elaborated on its claim that the work was both a satire of the O.J. Simpson trial and a parody of Dr. Seuss’ works.²¹⁰ However, the Ninth Circuit, unable to perceive any parodic element in the work, held that the characterization of the work as a parody was a “post-hoc characterization of the work” that was “pure shtick” and “completely unconvincing.”²¹¹ In addition, it quickly concluded that the commercial nature of this “satire” means that “market substitution is at least more certain and market harm may be more readily inferred.”²¹² In drawing this prompt conclusion, it did not consider all § 107 factors carefully in its fair use

²⁰⁷ *Id.* at 1562

²⁰⁸ *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1406 (9th Cir. 1997).

²⁰⁹ *Dr. Seuss Enter., L.P.*, 924 F. Supp. at 1569.

²¹⁰ Penguin elaborated on its claim that the work was both a satire and a parody: “The Parody is a commentary about the events surrounding the Brown/Goldman murders and the O.J. Simpson trial, in the form of Dr. Seuss parody the transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns. The Parody’s author felt that, by evoking the world of the Cat in the Hat, he could (1) comment on the mix of frivolousness and moral gravity that characterize the culture’s reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as *The Cat in the Hat* in a way that implied that the work was too limited to conceive the possibility of a real trickster ‘cat’ who creates mayhem along with his friends Thing 1 and Thing 2, and then magically cleans it up at the end, leaving a moral dilemma in his wake.” *Dr. Seuss Enter., L.P.*, 109 F.3d at 1402—1403. Scholars agree that *The Cat Not in the Hat!*, by juxtaposing the childish style of Dr. Seuss’ works with the events surrounding the O.J. Simpson case, succeeds in commenting not only on society’s fixation on the trial but also on the “naivete of the original,” by suggesting that the cat is a sinister and dangerous figure instead of the mischievous character depicted in the original work. Keller & Tushnet, *supra* note 162, at 993, citing *Campbell*, 510 U.S. at 599.

²¹¹ *Dr. Seuss Enter., L.P.*, 109 F.3d at 1402—03.

²¹² *Id.* at 1403.

analysis, such as by studying the amount of copying in the defendants' work, or by comparing the original's market and the disputed work's potential market.

Another decision that shows the adverse impact of the parody/satire dichotomy is *Salinger v. Colting* (2010). This lawsuit originated from Swedish American author Fredrik Colting's allegedly unauthorized sequel of J.D. Salinger's only novel *The Catcher in the Rye*, which Colting wrote under the pseudonym John David California.²¹³ Entitled *60 Years Later: Coming through the Rye*, Colting's work describes the adventures of a 76-year-old Holden Caulfield (thinly disguised as "Mr. C"), including his encounter with Salinger, who was transformed into a character in the book.²¹⁴ Salinger sought an injunction restraining publication of *60 Years Later* on the grounds that it infringed on his copyright.²¹⁵ The defendant objected, claiming fair use and First Amendment protection.²¹⁶ The District Court of the Southern District of New York issued an injunction to enjoin the publication and distribution of the book after finding Salinger was likely to prevail on the merits of the case.²¹⁷ On appeal, the Second Circuit affirmed.²¹⁸

The District Court's finding that the disputed work was not a parody of *Catcher* played a key role in its holding against the defendants. The Court analyzed the defendants'

²¹³ *Salinger v. Colting*, 264 F. Supp. 2d 250, 253 (2009), *aff'd*, 607 F.3d 68 (2d Cir. 2010).

²¹⁴ Amy Lai, *The Death of the Author: Reconceptualizing 60 Years: Coming Through the Rye as Metafiction*, 15 INTELL. PROP. L. BULL. 9, 25-27 (2010), an analysis based upon a close reading of John David California, *60 Years Later: Coming through the Rye* (2009).

²¹⁵ *Salinger*, 64 F. Supp. 2d 250, 250.

²¹⁶ *Id.* at 254.

²¹⁷ *Id.*

²¹⁸ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

fair use claim by distinguishing between parody and satire and by exploring the limits of a parodic work.²¹⁹ It rejected defendants' claims that *60 Years Later* was a parody of Caulfield and Salinger and concluded that such contentions were "post-hoc rationalizations."²²⁰ While the defendants alleged that the book aimed to examine how Caulfield's uncompromising world view in *Catcher* led to his misery and alienation from society, the Court considered "those effects already apparent in Salinger's own narrative about Caulfield."²²¹ In addition, using the narrow definition of parody, namely that it must target the original novel and its characters, the Court rejected the defendants' argument that the book parodies Salinger's reclusive nature and his alleged desire to exercise "iron-clad control over his intellectual property."²²² Accordingly, it was unable to appreciate the transformativeness of *60 Years Later*, for instance, its transformation of Salinger into a character that interacts with the protagonist.²²³ Thereafter, the Court stated rather simplistically that the new book, which was sold for profit, served a commercial purpose, which weighed against a finding of fair use.²²⁴ In an equally simplistic manner, it held that publishing *60 Years Later* could substantially harm the market for a *Catcher* sequel.²²⁵ It did not consider the small likelihood

²¹⁹ *Salinger*, 64 F. Supp. 2d at 258.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 261.

²²³ *See id.* at 263—67. It should note that the District Courts of the Central District of California and the Southern District of New York accepted the "parody-of-the-author" fair use defense in *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007) and *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009) respectively.

²²⁴ *Id.* at 267—68.

²²⁵ *Id.*

of such a market—that Salinger had categorically refused to publish anything for the last half century of his life, and had never showed any interest in publishing or licensing a sequel to his work or to participate in any potential derivative market.²²⁶

G. Applying the Broad Parody Exception to *Suntrust Bank*, *Dr. Seuss Enterprises, L.P.* and *Salinger*

A broadened conception of parody as set out in Part One and this chapter would help to bring the American copyright jurisprudence more in line with its free speech tradition. In particular, the District Court’s and the Eleventh Circuit’s opposing decisions in *Suntrust* indicate that in cases where works target both the original and something outside of it, either their “parodic” or “satirical” elements could be emphasized at the expense of the other depending on whether courts want to hold for authors/rights holders or parodists. A broad definition of parody would facilitate a proper balancing of the interests of different parties.

Because *The Wind Done Gone* combines both “parodic” and “satirical” elements, one may attribute the defendants’ victory to fortune as much as to the sound judgment by the Eleventh Circuit. Should parody be redefined to include both “parodic” and “satirical” works, the correct verdict could have been reached more readily and predictably. Rather than relying exclusively on how Randall’s work targets slavery and racism in *Gone with the Wind*, the Court would have taken a more holistic view towards its commentaries on these issues both within and outside the original text. It would have found out that the work fit the definition of a parody and provided information, insights and understanding different from

²²⁶ John Tehranian, *Dangerous Undertakings: Sacred Texts and Copyright’s Myth of Aesthetic Neutrality*, in *THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY* 12 (Matthew David & Debora Halbert eds., 2014).

those of the original, rather than repackaging the original to “avoid the drudgery in working up something fresh.” Once the Court had decided that the new work was transformative enough to be a parody, and did not free ride on the original’s creativity, it likely would have put much less weight on, or even ignored completely, the ill-defined third factor and the difficult question of whether the new work had taken too much from the original.²²⁷ Instead, it would have moved readily on to the fourth prong of the test to look at whether this parody would supplant the market demand for the original or its licensed derivatives. Regarding this factor, the Court held that plaintiffs failed to show sufficient evidence on market substitution, while the concurring opinion stated that the sales of *Gone with the Wind* possibly had grown since *The Wind Done Gone*’s publication.²²⁸ Hence, the Court would have asked whether it would have been likely for Suntrust Bank to license a work similar to Randall’s, which criticizes the romanticized portrait in Mitchell’s original or, more broadly, such issues as racism. The answer would have been negative.

In *Dr. Seuss Enterprises, L.P.*, the Ninth Circuit made an egregious error by concluding that because *The Cat Not in the Hat!* criticized the society and was not a parody, there was “no effort to create a transformative work with ‘new expression, meaning, or message.’”²²⁹ A broad parody exception would not only have disallowed the Court to seize

²²⁷ The Eleventh Circuit could not make a conclusion on whether Randall had taken too much from Mitchell’s novel in the course of writing her parody. It noted that very little reference was required to conjure up the original, and by taking whole scenes, characters, and even copied some text verbatim, Randall had seemingly taken more than necessary to write her parody. However, quoting language from *Campbell*, the Court noted that a parodist must be able to conjure up at least enough of the original to make the objects of critical wit recognizable, which would leave open the possibility that Randall could still take more than the bare minimum necessary to create her parody and still be within the bounds of fair use. *Suntrust Bank*, 268 F.3d. at 1271—74.

²²⁸ *Id.* at 1275, 1281—82.

²²⁹ *See Dr. Seuss Enter., L.P.*, 109 F.3d at 1401.

upon the “satirical” elements of the work to hold that it was not fair use, but would also have compelled it to recognize that “parodic” and “satirical” elements are often commingled in a single work. As for the third-prong of the test, provided that the Court had recognized that the work’s transformativeness, it would have been more likely to have accepted the defendant’s reasoning that copying the Cat’s hat and using the image on the front and back covers and in the text had been necessary for comparing Simpson with the sinister cat character and for articulating the intended messages regarding society’s fixation on the trial and the “naivete of the original.”²³⁰ Most importantly, the Court’s recognition of the transformativeness of the new work would have led it to study more carefully the fourth factor: instead of making an improper presumption of market harm based on the commercial nature of the work,²³¹ the Court would have asked whether the parody of the Simpson trial would likely compete in the market with the works of Dr. Seuss and its authorized licensees. The former was intended mainly for “adults who are devotees of the O.J. Simpson saga or those who desire to see either O.J. Simpson or Dr. Seuss satirized in a creative and merciless manner.”²³² The latter chiefly targeted “children and their parents, both as works of humorous entertainment and as educational tools for encouraging reading and the development of moral values.”²³³ Thus, they targeted different markets. Dr. Seuss Enterprises also would have likely rejected an offer by the defendants to license *The Cat in the Hat* for use, whether to satirize the Simpson case or to parody itself, because both would

²³⁰ See *supra* note 210.

²³¹ See *supra* note 212.

²³² Ochoa, *supra* note 165, at 608.

²³³ *Id.*

have been harmful to its image. Therefore, the Court would have overruled the District Court's decision and held that the preliminary injunction was improper.

Scholars contend that Salinger's fame and status in the American literary scene likely had an impact on the Second Circuit's decision.²³⁴ John Tehranian even argues that *60 Years Later* is a better example of fair use than *The Wind Done Gone*, hence attributing the Court's decision to *Catcher*'s being the only novel of Salinger, a beloved American writer.²³⁵ If there is any truth in these opinions, then the Court's holding that the defendant's alleged parody of Salinger's desire to exercise "iron-clad control over his intellectual property" did not make *60 Years Later* a parody served as a pretext for its prejudices against the defendant. Should the meaning of parody be broadened to include works that criticize or comment on anything other than the original text, including its author, the Court would have had to recognize *60 Years Later* as a parody. Further, the Court, recognizing the transformativeness of *60 Years Later*, which targeted both the protagonist and the author-turned-character, would have more readily concluded that it in fact had not "taken well more from *Catcher*, in both substance and style, than was necessary for the alleged transformative purpose of

²³⁴ Andrew Gilden and Timothy Greene contend that conventionally popular litigants tend to win in fair use disputes and Salinger's victory was, in large part, due to his legendary status in the American literary scene, as compared to his unestablished and no-name opponent, whose writing was not treated by the Court as real art and therefore not fair use. Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?* 80 U. CHI. L. REV. DIALOGUE 88, 99—100 (2013).

²³⁵ Tehranian argues that with respect to the fourth fair use factor, *The Wind Done Gone* was more damaging to the Mitchell estate's economic interests than *60 Years Later* was to Salinger's, because the Mitchell estate had demonstrated a concrete and manifest interest in entering the market to creative derivative works based on *Gone with the Wind*, by example, by authorizing the publication of a sequel entitled *Scarlett*, in sharp contrast to Salinger who had refused to publish anything for the last half of his life or licensing to others to create derivatives of his work. In addition, large parts of *The Wind Done Gone* actually retold the story from *Gone with the Wind*, thereby engaging in more actual borrowing, both literal and structural, than *60 Years Later* did from *Catcher*. TEHRANIAN, *supra* note 110, at 185—186.

criticizing Salinger and his attitudes and behavior.”²³⁶ Most importantly, the Court would have conducted a more careful inquiry than it did, by asking whether a parody of *Catcher* in the form of *60 Years Later* would likely compete in the market with *Catcher* and its authorized licensees. Because Salinger had never shown any interest in publishing or licensing a sequel to his work or in participating in any potential derivative market, the answer could only have been negative.²³⁷

III. APPLING THE PARODY DEFENCE: THE FREE SPEECH DOCTRINE AS THE GUIDING PRINCIPLE

Part One of the dissertation has argued that the broad parody exception or defence should be applied with reference to the free speech doctrine, to ensure that free speech would not be suppressed for the sake or under the pretext of copyright protection. This chapter thus far has shown how a broad parody defence would stimulate more creative productions and facilitate the access to more knowledge, hence serving the Copyright Act’s purpose “[t]o *promote* the Progress of Science and useful Arts.”²³⁸ Creativity or public knowledge would be reduced if copyright law became a weapon for suppressing free speech. This last section of the chapter will argue that to further align the American copyright jurisprudence with its free speech jurisprudence, courts should apply the parody defence—indeed any speech-related fair use defence—with reference to the First Amendment doctrine, by shifting the

²³⁶ See *Salinger*, 64 F. Supp. 2d at 263.

²³⁷ Using the same broadened defence, the Court in *Henley v. DeVore* (2010), would have held that the senatorial candidate used the author’s songs in his campaign to target not the author but the author’s viewpoints more generally was fair use, because the campaign songs would not substitute for the originals in the market.

²³⁸ U.S. Const. art. I, § 8, cl. 8.

burden of proof from defendants to plaintiffs and by analogizing copyright to defamation to ensure that non-defamatory works would not be suppressed under the pretext of copyright protection. Courts should also issue money damages instead of injunctions where necessary, so that what may be meaningful expressions would not be banned directly.

A. Shifting the Burden of Proof: From Proving to Negating Fair Use

In applying the reformed parody defence, one method to safeguard the public's right to free speech would be to shift the burden of proof from defendants to plaintiffs: instead of parodists proving that they have made parodies of copyrighted works, copyright holders would have to negate fair use by showing that the uses of their works are not parodies. Earlier on, this chapter cites Liu's argument that American copyright law's fair use doctrine, due to its ill-defined nature, fails to ease its potential conflict with the First Amendment, and that treating satire as fair use would serve to reduce some of the uncertainty and offer more protection to free speech.²³⁹ There is more to this argument. Because fair use is an affirmative defence in copyright law,²⁴⁰ he persuasively argues that courts should carve out more space for free speech by making procedural alterations to the law, so that the copyright

²³⁹ See *supra* notes 169, 171.

²⁴⁰ The uniform treatment of fair use as an affirmative defense stems from the Supreme Court's declaration in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985), where it considered whether the fair use doctrine protected a defendant who had published presidential memoirs for the first time in a news magazine. The defendant argued that uses of copyrighted material for news purposes should be presumptively fair. The Court rejected this argument by declaring fair use to be an affirmative defense that requires a case-by-case analysis. Following this declaration, Congress amended the Copyright Act in 1992 so that "fair use is an affirmative defense" such that "the burden of proving fair use is always on the party asserting the defense." The Court in *Campbell* again declared fair use to be an affirmative defense, relying on its prior statement in *Harper & Row* and the cited 1992 legislative history. Liu, *supra* note 168, at 101. Ned Snow argued that there seemed to be no substantive reason which supports treating fair use as an affirmative defense in *Harper & Row*, the 1992 Judiciary Committee Report, or *Campbell*. Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1788 (2010).

holder would bear the burdens of negating fair use in cases that involve speech interests and of establishing real market harm. Another legal scholar Ned Snow concurs with Liu and provides further justification for shifting the burden of proof to rights holders.

Liu rightly compares copyright law to defamation and the intentional infliction of emotional distress—torts that implicate defendants’ free speech rights—in which courts made such procedural changes to ensure that public debates about public figures would remain free, robust, and without the chilling effect of potential liability.²⁴¹ In *New York Times V. Sullivan*, the Supreme Court held that the First Amendment required plaintiffs who are public officials to bear the burden of proving that defendants had acted with “actual malice” before they could recover for defamation under state law, rather than requiring defendants to prove the truth of their assertions.²⁴² In subsequent cases, courts applied the standard in *Sullivan* to defamation cases involving not only public officials, but a broader category of public figures.²⁴³ As Liu argues, defamation and copyright laws both seek to protect a private interest that is unrelated to speech: while the former protects an individual’s

²⁴¹ Liu, *supra* note 170, 107—18.

²⁴² The Court held that “[t]he state rule of law is not saved by its allowance of the defense of truth. . . . A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’ Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone.’ The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.” *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964); Liu, *supra* note 170, at 109.

²⁴³ *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974); Liu, *supra* note 170, at 109.

reputation, the latter protects an author's incentives.²⁴⁴ Nevertheless, copyright law's procedural structure contributes to the chilling effect upon free speech by placing the burden of proving fair use on defendants in the same way that defendants in defamation cases bore the burden of proving truth pre-*Sullivan*.²⁴⁵ Hence, courts should shift the burden of proving fair use in cases that raise free speech interests.²⁴⁶ After the defendant has raised a colorable speech claim to show that the use is presumptively fair, the burden should then rest on the plaintiff to negate a defence of fair use.²⁴⁷ In addition, the plaintiff should bear the burden of establishing actual market harm.²⁴⁸ Courts have allowed weak or speculative claims of market harm by plaintiffs, and have put the burden of rebutting such claims on defendants.²⁴⁹ Shifting the burden of proof would require plaintiffs to come up with concrete evidence of harm to actual or likely markets, rather than vague claims of harm to as-yet undeveloped markets.²⁵⁰

Snow follows Liu's analogy between copyright and defamation laws, but provides further justification for the shifting the burden of proof in fair use analyses by identifying the differences between the two. Snow concedes that the Supreme Court decisions on defamation leave open the possibility that the defendant should bear the burden of proving

²⁴⁴ Liu, *supra* note 170, at 112.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 115.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 115—16.

²⁴⁹ *Id.* at 115.

²⁵⁰ *Id.* at 116.

the truth of the allegation if it is directed towards ordinary people, not public figures.²⁵¹ He carefully points out that in common law, the burden of proof in defamation rested with defendants because the substantive principle that any person accused of wrongdoing is presumed innocent until proven guilty suggests that a defamed plaintiff should be presumed innocent of the defamatory accusation until a defendant could prove otherwise.²⁵² Yet copyright holders are not accused of wrongdoing. Hence, the innocent-until-proven-guilty principle becomes irrelevant in fair use analyses, and there is no reason that the speech interests of fair users must be sufficiently strong to justify assigning the burden to copyright holders.²⁵³

Would shifting the burden of proof reduce the incentives of rights holders in a utilitarian framework, and discourage them from speaking and contributing to the marketplace of ideas from natural rights perspectives? Both Liu and Snow anticipate the objection that strong protection provides incentives for copyright holders to create expressions; facing a burden of proof, they would receive less protection for their copyrighted expressions and therefore might get less incentivized.²⁵⁴ Yet both of them rightly assert that as a matter of principle, upholding the right to speak is more important

²⁵¹ See Snow, *supra* note 240, at 1798.

²⁵² See *id.*

²⁵³ *Id.* Snow points out that the “reassignment” or “restoration” of the right holders’ burden may be achieved through either Congress or the courts. Congress could amend the Copyright Act so that it expressly states that a copyright holder must prove that a defendant’s use is not fair in order to prevail on a claim for infringement. Alternatively, the Supreme Court could undo what it did in earlier decisions without overturning its holdings in those decisions. It could do so by explaining that although fair use is an affirmative defence, a defendant may invoke it merely by pleading it as opposed to proving it. Lower courts could also restore the burden to copyright holders without any instruction by the Supreme Court. *Id.* at 1808—09.

²⁵⁴ Liu, *supra* note 170, at 122; Snow, *supra* note 240, at 1816—17.

than to creating an incentive to speak, and a copyright policy therefore must yield to a constitutional right of speech.²⁵⁵ Assessing the actual impact of shifting the burden to the copyright holder, both believe that less creation by disincentivized copyright holders would not likely translate into fewer works in the overall marketplace of expressions and ideas.²⁵⁶ Snow quotes First Amendment scholar Eugene Volokh to argue that even assuming that some copyright holders would cease creating were they to bear the burden of proof, the resulting decrease in original works would likely be less than the decrease in fair-use expressions that result from shifting the burden to fair users.²⁵⁷ Liu likewise concedes that the absence of copyright would lead to fewer creative works, but contends that a broader scope of third-party use of copyrighted expressions through fair use may in fact lead to more expressions.²⁵⁸

Yet neither Liu nor Snow provides any evidence to allay fears that the shift of burden would dampen individual copyright holder's incentive to create. Snow simply asserts that some copyright holders would keep creating despite the burden of showing that defendants are not fair users.²⁵⁹ Other scholars like Julie Cohen and Rebecca Tushnet, who critique the

²⁵⁵ Liu, *supra* note 170, at 122; Snow, *supra* note 240, at 1818—19. A related objection foreseen by Snow is that the shift of burden to the plaintiff would at least be unfair where the infringement is blatant. Snow counters this objection by pointing out that only minimal resources would likely be required to prove that a blatantly infringing use is not fair. He goes further to argue that the cost borne by copyright holders to prove blatant infringement, even if non-negligible, would be justified. Because blatant fair use, unlike blatant infringement, does not exist, burdened fair users always incur the cost of contemplating an adverse judgment. Assuming that competing rights are equally important under the law, the burden of proof should lie where the right is less costly to enforce, in this case, the right of copyright and not the right of fair use. *Id.* at 1819—21.

²⁵⁶ Liu, *supra* note 170, at 122; Snow, *supra* note 240, at 1817—18.

²⁵⁷ Snow, *supra* note 240, at 1817, citing Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred, 44 Liquormart, and Bartnicki*, 40 HOUS. L. REV. 697, 721 (2003).

²⁵⁸ Liu, *supra* note 170, at 122.

²⁵⁹ Snow, *supra* note 240, at 1817.

incentive argument by delving into the nature of creative process, provide insights into why a change in law may not likely affect incentives to create. Cohen describes creativity as “intrinsically ineffable,”²⁶⁰ and as something arising out of the dynamic interactions between individual creators and multiple factors such as societies and cultures.²⁶¹ Tushnet likewise describes the desire to create as “excessive, beyond rationality and free from the need for economic incentive.”²⁶² Many experiences of creativity are accompanied by intense pleasure and not spurred by incentives like money or reputation.²⁶³ While incentives affect the extent to which some creators could afford to create, their role in creative productions is inflated.²⁶⁴ Although neither Cohen nor Tushnet mentions the burden of proof, their perspectives should serve to allay concerns over the effects that shifting the burden of proof from fair uses to copyright holders will have on the amount of creativity and speech.

One needs to go back to *Suntrust Bank, Dr. Seuss Enterprises, L.P.*, and *Colting* to examine the likely impacts of the shift of burden of proof from parodists to copyright holders, and to find out that it would likely have encouraged the defendants to produce more

²⁶⁰ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007).

²⁶¹ Cohen references Roberta Rosenthal Kwall, *Inspiration and Innovations: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006), Justin Hughes, *The personality Interests of Authors and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998), and Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993). *Id.* at 1151—52.

²⁶² Tushnet cites, among others, Margaret Atwood’s *Negotiation with the Dead: A Writer on Writing*, which suggests that writers write out of compulsion and overflowing desires. Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 522—27 (2009).

²⁶³ *Id.* at 522

²⁶⁴ Tushnet argues that the major fallacy of the incentive theory is its proposition that maximum incentives require maximum control. Regardless of the strength of copyright protection, it is the likelihood of success in the market, a highly unpredictable variable that law can do little to affect, that determines whether new authors reap rewards from their works. *Id.* at 517—18.

parodies without necessarily demotivating the plaintiffs to create. Even if the burden had fallen upon Mitchell, Dr. Seuss, and Salinger to disprove that potential uses by the public were parodies and fair uses of their works, they might not have anticipated such uses by the public when they created their works. Assuming that they had foreseen that people would parody their works without seeking their permission, it is doubtful whether vague fears that such unauthorized derivatives would diminish their future profits would have been sufficient to dampen their desires to create or deterred them from writing. On the other hand, should the burden of proving fair use be lifted off parodists' shoulders, the public would be less inhibited in parodying copyrighted works. Publishing houses, who are frequently joined as co-defendants in these cases, would have fewer doubts about publishing parodies of famous works.

Interestingly enough, after the Eleventh Circuit vacated the injunction against *The Wind Done Gone*, defendant-publisher Houghton Mifflin, apparently fearing that it would lose before the Supreme Court, chose to settle with the plaintiff's estate by making an unspecified donation to Morehouse College, a historically African American college in Atlanta, Georgia.²⁶⁵ In exchange, Suntrust Bank dropped the lawsuit.²⁶⁶ If the burden had been on the plaintiff to negate fair use, rather than on the defendant to prove it, then the latter might not have settled. In cases where the copyright holders are like Salinger, who had an aggressive record of suppressing the publications of his letters and the adaptation of his work

²⁶⁵ *'Wind Done Gone' Copyright Case Settled*, REPORTERS COMMITTEE (May 19, 2002), <https://www.rcfp.org/node/92088> (last visited Oct. 10, 2017).

²⁶⁶ *Id.*

through legal actions,²⁶⁷ this shift of burden would be especially welcomed by writers who contemplate parodying their works and publishers interested in publishing such parodies.

B. Analogizing Copyright to Defamation

Whether the burden of proof falls on plaintiffs or defendants, courts should draw upon the First Amendment principle more directly when applying the parody defence, particularly through analogizing copyright to defamation, to enhance free speech. Courts should assume that the well-known fictional characters, such as those in Mitchell's, Dr. Seuss', and Salinger's works, should be subject to at least as much criticism as public figures.²⁶⁸ Hence, they should not authorize copyright holders to exercise censorship over the content of creative parodic works in circumstances where similarly situated public figures would not be able to do so.²⁶⁹ In this way, courts could prevent plaintiffs, especially public figures, from suppressing non-defamatory speech under the pretext of copyright protection.

Ochoa offers a remarkable example of how the free speech principle should guide the application of a parody defence, by imagining the plaintiff in *Dr. Seuss Enterprises* as O. J. Simpson.²⁷⁰ If Simpson sued on the grounds that the book was libelous, or that it intentionally inflicted emotional distress upon him, he would have to prove both that the book was false, and that the defendants acted either with knowledge that it was false or in

²⁶⁷ For example, upon learning that the British writer Ian Hamilton intended to publish a biography that made extensive use of letters Salinger had written to other authors and friends, Salinger sued to stop the book's publication. The court in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) ruled that the author's right to control publication overrode the right of fair use.

²⁶⁸ See Ochoa, *supra* note 165, at 616.

²⁶⁹ *Id.* at 617.

²⁷⁰ *Id.* at 615.

reckless disregard as to whether or not it was false.²⁷¹ Yet the Ninth Circuit, by applying copyright law in an overly restrictive manner and without regard to First Amendment values, offered the fictional characters of Dr. Seuss greater protection from comment or criticism than an actual person would enjoy.²⁷² What the court should have done was to apply the parody defence in a speech-friendly manner to prevent the suppression of criticisms of this public figure.²⁷³ Another example can be made of a parody of George W. Bush's campaign website during a former Presidential Election, which a political enthusiast set up to relate satirical stories about him.²⁷⁴ If the Federal Election Commission had not decided not to take action against the man and Bush's presidential campaign had indeed filed a lawsuit against him,²⁷⁵ the court should have applied the parody exception and determined whether the enthusiast's website properly fulfils its transformative purpose by criticizing or commenting on Bush (or someone else). The court should also have considered whether Bush would have won if he had brought a defamation suit against the enthusiast. By applying the parody exception in a speech-sensitive manner, courts would ensure that the speech interests of parodists would not be impaired or suppressed under the pretext of copyright protection.

²⁷¹ *Id.*

²⁷² *Id.* at 616.

²⁷³ *Id.* at 617.

²⁷⁴ Terry M. Neal, *Satirical Web Site Poses Political Test*, WASH. P. (Nov. 29, 1999), available at <http://www.washingtonpost.com/wp-srv/WPcap/1999-11/29/002r-112999-idx.html> (last visited Oct. 10, 2017).

²⁷⁵ *FEC Takes No Action against Anti-Bush Web Site*, TECH. L.J., available at <http://www.techlawjournal.com/election/20000420.htm> (last visited Oct. 10, 2017).

C. Money Damages in Place of Injunctions

Regarding the fourth prong of the fair use test, what if the court finds that the parody will likely cause harm to the market of the original? Various scholars note that instead of issuing injunctions, courts should limit remedies to damages in cases involving speech interests, and grant injunctions only where there is strong reason to believe that damages would be inadequate.²⁷⁶ This would also substantially eliminate prior restraint concerns, currently at issue whenever a court issues a preliminary injunction in a copyright case. Although the prospect of money damages may chill free speech and parodies, granting injunctions only where damages are likely inadequate can avoid the outright banning of expressions.²⁷⁷

When the Ninth Circuit in *Dr. Seuss Enterprises, L.P.* and the District Court in *Colting* determined that the defendants' works would likely harm the markets of the originals, they should have recognized the expressive values of the works and therefore ordered damages to be paid. By affirming the District Court's order to grant a preliminary injunction prohibiting the publication and distribution of *The Cat NOT in the Hat!*, the Ninth Circuit suppressed this commentary on O. J. Simpson's trial. In the case of *Colting*, the District Court also granted Salinger's motion for a preliminary injunction. One should note

²⁷⁶ Liu, *supra* note 170, at 116; citing Jed Rubenfeld, *The Freedom Of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002); Mark A. Lemley & Eugene Volokh, *Freedom Of Speech And Injunctions In Intellectual Property Cases*, 48 DUKE L.J. 147, 211 (1998); and Tiffany D. Trunko, *Note, Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940 (1989).

²⁷⁷ Jonathan Fox argues that the copyright holder and the parodist would be incentivized to work out a licensing arrangement if an injunction is unavailable. If a copyright holder decides to seek an injunction under the new damages-are-adequate standard and he fails, the parodist would be able to publish the parody and not compensate the copyright holder. Jonathan M. Fox, *The Fair Use Parody Defense and How to Improve It*, 45 IDEA: INTELL. PROP. L. REV. 617, 646 (2006).

that the Second Circuit vacated the order and remanded the case to the District Court to apply the correct equitable standard for an injunction, according to which the plaintiff must establish that “it has suffered an irreparable injury,” that “remedies available at law, such as monetary damages, are inadequate to compensate for that injury,” that, “considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted,” and that “the public interest would not be disserved by a permanent injunction.”²⁷⁸ The decision might, as some argue, indicate a shift in law such that the violations of intellectual property rights may entitle the intellectual property owner to monetary damages.²⁷⁹

Colting nevertheless settled with Salinger’s estate in 2011, probably due to his fear that the plaintiff would take the case to the Supreme Court, and/or the amount of monetary damages would be huge. As per agreement, he must not publish or otherwise distribute his book, its electronic version, or any other editions in the U.S. or Canada until *Catcher* enters the public domain, although he would be free to sell the book in other international territories without fear of interference.²⁸⁰ Despite the Second Circuit’s decision to vacate the District Court’s order of injunction, the flawed parody conception and the ruling that Colting’s book

²⁷⁸ *Salinger*, 607 F.3d at 77, citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

²⁷⁹ The Second Circuit followed the Supreme Court’s decision in *Ebay v. MercExchange, L.L.C.*, which overruled the longstanding precedent by holding that a patentee is not entitled to a permanent injunction against a patent infringer: “the decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.” *Id.* at 391. The broad language of the *Ebay* decision has led other federal courts to apply the same factors with regard to whether a permanent injunction should be allowed for numerous other causes of action under federal law.

²⁸⁰ In addition, the settlement agreement barred Colting from using the title “Coming through the Rye” and dedicating the book to Salinger; prohibited Colting or any publisher of the book from referring to *The Catcher in the Rye*, Salinger, and the book being “banned” by Salinger, and from using the litigation to promote the book. The agreement was final and its terms were confidential. Andrew Albanese, *J.D. Salinger Estate, Swedish Author Settle Copyright Suit*, PUBLISHERS WEEKLY (Jan. 11, 2011), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html> (last visited Oct. 10, 2017).

was not fair use led to the settlement. As a result, the market places, at least those of the U.S. and Canada, have been deprived of Colting's interesting commentary on both the novel and Salinger the author.

This chapter has studied the parody/satire dichotomy in American copyright law and how a broadened parody defence would help to bring the American copyright jurisprudence more in line with its free speech tradition. The next chapter will explain why the parody and satire fair dealing exceptions in Canadian copyright law may lead to a potential parody/satire dichotomy and the suppression of expressions falling within the latter category that would not otherwise harm the rights holders' interests. Hence, a broad parody exception may be able to accommodate the users' right to freedom of expression better than the dual exceptions would.

CHAPTER FOUR

CANADA'S POTENTIAL PARODY/SATIRE DICHOTOMY

"Hey. Everyone's different," says Derek.

"But some are more different than others," says Budge, and they all laugh.¹

In Canada, the right to freedom of expression is a natural right recognized and safeguarded by the Charter of Rights and Freedoms. The right to parody stems from this natural right. Although the parody and satire categories in the fair dealing provisions of the Copyright Modernization Act 2012 seem to offer broad protection of parodic works, they may create a parody/satire dichotomy, driven by judicial globalization, the influences of American law, and the meaning of "satire." Accordingly, courts may be less inclined to treat works falling within the satire category as fair dealings, even though they would not compete with the originals or harm their rights holders' interests. A broad parody exception substituting for the parody and satire categories would serve to bring Canada's copyright system more in line with its freedom of expression jurisprudence.

Section I will study the history of freedom of expression and the tradition of parody in Canada. Section II will review the lack of recognition of a parody defence in Canadian statutes and case law prior to 2012, calls for a parody exception by scholars, and the events

¹ MARGARET ATWOOD, *THE HEART GOES LAST: A NOVEL* 230 (2015).

surrounding the legal reform. This section will then explain why the parody and satire exceptions may result in the suppression of expressions falling within the satire category. First, the broadened fair dealing by the Copyright Pentalogy in 2012 does not readily apply to parody cases. Second, the new exceptions may lead to a dichotomy in which satire becomes an inferior category, due to the potential influence(s) of American law and/or the very meaning of the word “satire.” Though works categorized as satire will pass the first-step of the fair dealing analysis, courts may be less inclined to hold that works that do not direct part of their criticism or commentary towards the originals pass the second-stage fairness analysis. A broad parody exception replacing both parody and satire categories would reduce any potential influence of a propertized conception of fair dealing and possible bias against satire, thus helping courts to properly balance the interests of rights holders with those of users. This section will also explain why parodies will likely survive potential moral rights challenges.

Section III will examine how Canadian courts can overcome the hurdles of applying the *Charter* to the parody exception to align Canada’s copyright system with its freedom of expression tradition and to safeguard the right to parody. A broadened parody exception might create circumstances of “genuine ambiguity,” so that courts would be entitled to apply the exception by engaging with the Charter to balance freedom of expression with the Copyright Act’s objectives. Considering the extensive use of the *Salinger* decision in America in the last chapter and a lack of relevant case law in Canada, this section will employ two hypotheses inspired by *Salinger* to illuminate how courts may engage with the Charter to apply a broadened parody exception.

I. FREEDOM OF EXPRESSION AND THE RIGHT TO PARODY IN CANADA

Like the United States, Canada has upheld freedom of expression as a central value of liberal democracy.² Under s. 2(b) of the Canadian Charter of Rights and Freedoms (1982) (“the Charter”), which applies to both the national and provincial governments, everyone has the fundamental freedoms of “thought, belief, opinion and expression, including freedom of the press and other media of communication.”³ Other related freedoms just as fundamental are “freedom of conscience and religion,” “freedom of peaceful assembly,” and “freedom of association.”⁴ Section 1 of the Charter provides that these fundamental freedoms are subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵ Section 33(1) further provides that Parliament or a provincial legislature may adopt legislation “notwithstanding” the protections of s. 2, by making an express declaration that its action complies with s. 1.⁶

The English common law, being the origin of the Canadian Constitution and free speech tradition, is not especially sympathetic to free speech claimants.⁷ Hence, s. 2(b) of the

² Peter Greenawalt, *Free Speech in the United States and Canada*, 55 L. & CONTEMP. PROBS. 1, 5 (1992).

³ Canadian Charter of Rights and Freedoms, s 2(b), Part I of Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁴ *Id.* s. 2(a)(c)(d).

⁵ *Id.* s. 1. *R. v. Oakes* established the standard two-prong approach for s. 1 analysis, according to which the state's objective must be of “pressing and substantial concern in a free and democratic society” and the impugned measure must meet a proportionality test. *R v Oakes* [1986] 24 C.C.C. (3d) 321, 348 (S.C.C.).

⁶ *Id.* s. 33(1). Although s. 33 in theory authorizes direct legislative overrides of charter rights, Parliament has never invoked this power and provincial legislatures have been equally reluctant to override charter rights. RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 38 (2006).

⁷ The Constitution Act of 1876, which brought to Canada a constitution “similar in principle to that of the United Kingdom,” is silent about liberties of the individual, while scholars contend that its preamble extends some freedom of expression enjoyed in the U.K. to Canada. Kent Roach & David Schneiderman,

Charter is considered to have brought a fundamental change to the constitutional landscape regarding freedom of expression.⁸ The influences of natural law on this freedom are apparent in both the Charter and the SCC's decisions. The Preamble of the Charter states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law," while the Charter was inspired by international human rights documents such as the UDHR.⁹ Like Locke and Rawls, the SCC justified the protection of freedom of expression by describing it as an essential component of democratic self-government.¹⁰ In addition, its endorsement of "the pursuit of truth," "self-fulfillment and human flourishing" as important social values that justify the protection of freedom of expression,¹¹ as well as a "marketplace of ideas" theory of free speech,¹² are reminiscent of Locke, Kant, and Milton. Further, the SCC

Freedom of Expression in Canada, 61 S. CT. L. REV. 429, 431 (2013). Although the Supreme Court of Canada occasionally vindicated free speech rights by denying jurisdiction to enact laws with regard to speech, provinces continued to have authority to regulate expressive activity. *Id.* The Canadian Bill of Rights (1960) did not serve to enhance freedom of expression, because the fundamental freedoms in its s. 1 were interpreted to reflect rights and freedoms in no "abstract sense" but "as they existed in Canada immediately before the statute was enacted." *Id.* at 432.

⁸ *Id.* at 429; Greenawalt, *supra* note 2, at 6.

⁹ Chief Justice Dickson, in *Reference Re Public Service Employees Relations Act (Alberta)*, commented that international instruments should be persuasive sources for interpretation and observed that the "Charter conforms to the spirit of the contemporary international human rights movement." [1987] 38 D.L.R. (4th) 161, 182 (S.C.C.).

¹⁰ In *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, Justice McIntyre, writing for the majority, held that "Representative democracy...which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection." "[t]he principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy." [1986] 33 D.L.R. (4th) 174, 176 (S.C.C.).

¹¹ See the majority opinion in *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 25 C.P.R. (3d) 417 (S.C.C.).

¹² The SCC in *R. v. Keegstra* valued the fostering of a vibrant and creative society by the "marketplace of ideas," although, as Krotoszynski rightly notes, this theory is also endorsed in *Erwin Toy*, in which the majority opinion stated that freedom of expression facilitates the "pursuit of truth." *R. v. Keegstra* [1990] 61 C.C.C. (3d) 1, 78 (S.C.C.); *Irwin Toy Ltd.*, 25 C.P.R. (3d) at 452; KROTOSZYNSKI, *supra* note 6, at 36.

described freedom of expression as “the matrix, the indispensable condition of nearly every other freedom.”¹³ It guarantees that expressive activities constituting speech are “infinite in variety,” including “the written or spoken word, the arts, and even physical gestures or acts,” and that “all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream” are deserving of Charter protection.¹⁴

Freedom of expression was subject to numerous restrictions in the pre-Charter era for the sake of national security, public morality, and protecting reputations of individuals. A good example was the sedition law from 1919 to 1936, drafted in response to the general labor unrest in the nation, and based upon the War Measures Act of 1914 that gave broad powers to the federal government to maintain security and order during war or insurrection.¹⁵ This draconian sedition law, long repealed, was later replaced by laws criminalizing seditious libel, conspiracy, and intention.¹⁶ Other speech restrictions include prohibitions on obscenity and defamation. The statutory offence of obscene speech first appeared in the 1892 Criminal Code.¹⁷ In applying this statute, courts adopted the English common law *Hicklin* test, a product of Victorian religious morals and class prejudices.¹⁸ Also under the common law,

¹³ R. v. Sharpe [2001] 150 C.C.C. (3d) 321, 342 (S.C.C.).

¹⁴ *Irwin Toy Ltd.*, 25 C.P.R. (3d) at 446; see, e.g., Roach & Schneiderman, *supra* note 7, at 429; KROTOSZYNSKI, *supra* note 6, at 19, 33.

¹⁵ The War Measures Act provided for the “censorship and control and suppression of publications, writings, maps, plans, photographs, communication, and means of communication.” s. 98 of the Criminal Code from 1919—1936 was principally concerned with prosecuting those who were members of an “unlawful organization.” E.g., *Section 98 Criminal Code*, THE CANADIAN ENCYCLOPEDIA, <http://www.thecanadianencyclopedia.ca/en/article/section-98-criminal-code/> (last visited Oct. 10, 2017).

¹⁶ Criminal Code, S.C. 1985, c C-46.

¹⁷ Roach & Schneiderman, *supra* note 7, at 453.

¹⁸ *Id.*

defamatory statements, whether they target public figures or private individuals, are presumed to be false and malicious and no further proof of harm needs to be shown.¹⁹

Because publishers of defamatory utterances bore the burden of proving their truthfulness or showing that these utterances fall within a limited range of privileged statements, public officials and famous people used defamation law as a means of curbing messages that would impair their reputations.²⁰

What reasonable limits that are justified in the free, democratic society in the post-Charter era? The War Measures Act was replaced by the Emergencies Act of 1988, which makes no mention of censorship, while the priority given to freedom of expression has made treason and seditious conspiracy charges difficult to sustain.²¹ The Anti-terrorism Act, introduced in 2001 in the wake of terrorist attacks on the U.S., survived Charter challenge on the ground that violence or threats of violence fall outside s. 2(b) guarantee.²² Nonetheless, it was sparingly used.²³ Meanwhile, laws on obscenity and defamation have also become

¹⁹ *Id.* at 510.

²⁰ *Id.*

²¹ Barry Cooper, *The Bureaucratization of Treason*, C2C JOURNAL (Mar. 10, 2010), <http://www.c2cjournal.ca/2010/03/whatever-happened-to-treason/> (last visited Oct. 10, 2017), citing Carl F. Stychin, *A Postmodern Constitutionalism: Equality Rights, Identity Politics and the Canadian National Imagination*, 17 DAL. L.J. JOURNAL 61, 62 (1994). Stychin argues that “Canadian” has become “an identity open to resignification and intersection through an ever-changing variety of perspectives engaged in a dialogue guaranteed by the Charter.” *Id.* at 62.

²² Justice McLachlin elaborated: “terrorist activity” is as “an act or omission, a conspiracy, an attempt or threat to commit any act or omission, counselling an act or omission and being an accessory after the fact to an act or omission,” “causing death or serious bodily harm to a person,” “endangering a person’s life,” “causing a serious risk to the health or safety of the public or any segment thereof,” “causing substantial property damage, whether to public or private property,” or “causing serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses.” *R. v. Khawaja* [2012] 90 C.C.C. (3d) 361, 374—75 (S.C.C.).

²³ Roach & Schneiderman, *supra* note 7, at 499.

much more speech-friendly. Criminal Code amendments were made early in 1959 to introduce a new definition of obscenity that concerns the “undue exploitation of sex or of sex and other characteristics.”²⁴ Because artistic freedom lies “at the heart of freedom of expression values,” the SCC later held that materials offending such standards but containing artistic or literary merit could be excused from criminal prohibition.²⁵ Concerning defamation law, although the SCC rejected importing into Canadian law the U.S. rule in *New York Times v. Sullivan*,²⁶ it reasoned that strict liability could be used as “a weapon by which the wealthy and privileged stifle the information and debate essential to a free society.”²⁷ Hence, it established a new defence of responsible communication, available to defendants in cases where the publication was “on a matter of public interest” and the defendant was “responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all relevant circumstances.”²⁸

²⁴ *Id.* at 453.

²⁵ In *R. v. Butler*, Justice Sopinka wrote that sexually degrading and dehumanizing material fails under community standards because it places “women (and sometimes men) in positions of subordination, servile submission or humiliation,” which runs against the “principles of equality and dignity of all human beings” and “results in harm, particularly to women and therefore to society as a whole.” The Butler court held that materials offending community standards are not obscene so long as they satisfy the “internal necessities” or artistic defence test, which requires assessing the materials to determine whether the exploitation of sex is internally necessary to a plot or theme, and does not merely represent “dirt for dirt’s sake.” [1992] 70 C.R.R. (3d) 129, 146, 148—49 (S.C.C.). In *Sharpe*, a child pornography case, Justice McLachlin broadened the artistic defence to include all expressions “reasonably viewed as art,” not merely those internally necessary to the literary or artistic purpose. *Sharpe*, 150 C.C.C. at 355 (3d).

²⁶ The SCC stated that the common law of defamation is not “unduly restrictive or inhibiting” and “complies with the underlying value of the Charter and there is no need to amend or alter it.” *Hill v. The Church of Scientology a/Toronto* [1995] 2 S.C.R. 1130, 1187—88 (S.C.C.).

²⁷ *Grant v. Torstar Corp.* [2009] 79 C.P.R. (4th) 407, 424 (S.C.C.).

²⁸ *Id.* at 441. Chief Justice McLachlin determined that matters of public interest included all variety of subjects in which the public would have “a genuine stake” and which would encourage “wide-ranging public debate.” *Id.* at 442.

One thing that distinguishes the Canadian freedom of expression jurisprudence from its American counterpart is its prohibition of hate speech in both pre- and post-Charter eras. Protected by the First Amendment of the U.S. Constitution, hate speech has been prohibited by Canadian criminal law for five decades.²⁹ The Charter further endorses multiculturalism and states that its provisions, including s. 2(b), “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”³⁰ Thus, the SCC ruled that the guarantee of freedom of expression by the Charter does not extend to “the public and willful promotion of hatred against an identifiable group.”³¹ In addition, the repeal of the section of the Canadian Human Rights Act prohibiting “hate messages” did not prevent the SCC from reiterating support for provincial human rights code prohibitions on hate speech.³² Nonetheless, the deliberate publication of statements that the speaker knows to

²⁹ Criminal Code, S.C. 1985, c C-46, s. 319 (1) & (2). Parliament followed the Cohen Committee’s recommendations by criminalizing the wilful promotion, other than in a private conversation, of racial hatred against certain identifiable groups. Defences to provide latitude for freedom of expression include truth, reasonable belief in the truth of a matter of public interest the discussion of which is for the public benefit, commentary in good faith opinion upon a religious subject, and good faith identification of matters tending to produce feelings of hatred. Furthermore, charges could not be laid without the provincial Attorney General’s consent. Roach & Schneiderman, *supra* note 7, at 462.

³⁰ Canadian Charter, s. 27.

³¹ In *Keegstra*, Chief Justice Dickson conducted a proportionality test to determine that hate propaganda represents “a pressing and substantial concern in a free and democratic society,” that “expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values,” and that the negative effects of restricting hate speech do not outweigh the advantages of the law. *Keegstra*, 61 C.C.C. (3d) at 3, 5.

³² In *Canada (Human Rights Commission) v. Taylor*, Justice Dickson defined “hatred” for the purposes of human rights legislation refers to “unusually strong and deep-felt emotions of detestation, calumny, and vilification.” [1990] 75 D.L.R. (4th) 577, 601 (S.C.C.). The speech restriction in the Canadian Human Rights Act was reasonable as it placed its emphasis on the discriminatory effects of hate speech on minorities. *Id.* at 609. In *Saskatchewan (Human Rights Commission) v. Whatcott*, Justice Rothstein reaffirmed each of the principal holdings of the Saskatchewan human rights tribunal’s holding and Justice Dickson’s majority opinion in *Taylor*. It found that the hate speech provision in Saskatchewan Human Rights Code minimally impaired the impugned right to freedom of expression, but severed the words “ridicules, belittles or otherwise affronts the dignity of” from the Code because such expression was not

be false and that might excite prejudices in the recipients is a protected form of expression under s. 2(b). As the SCC argued, it is difficult to determine the truth of statements, and dangerous to exclude from protection those with a marginal relation to values protected by freedom of expression.³³

The Canadian history of censorship has evolved with its freedom of expression jurisprudence.³⁴ Aside from more extreme forms of censorship imposed during the times of war and emergency through the War Measures Act,³⁵ the Customs Act of 1847 first prohibited the importation of “books and drawings of an immoral or indecent character,” conferring power on customs officials to seize materials they deemed to be of such character.³⁶ Since the SCC liberalized and modernized the obscenity law by developing the

rationality connected to the objective of reducing systemic discrimination. [2013] 355 D.L.R. (4th) 383, 414—16 (S.C.C.).

³³ In *R. v. Zundel*, Justice McLachlin opined that the fact that the particular content of a person’s speech might “excite popular prejudice” is “no reason to deny it protection.” “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free for those who agree with us but freedom for the thought that we hate.” [1992] 75 C.C.C. (3d) 449, 507 (S.C.C.).

³⁴ Pearce J. Carefoote contends that the banning of Molière’s *Tartuffe* in 1694 by Comte de Frontenac, Governor of Québec on the local bishop’s advice signaled the birth of censorship. Pearce J. Carefoote, *Censorship in Canada, Historical Perspectives on Canadian Publishing*, HISTORICAL PERSPECTIVES ON CANADIAN PUBLISHING, <http://digitalrussell.mcmaster.ca/hpcanpub/case-study/censorship-canada> (last visited Oct. 10, 2017).

³⁵ Under the War Measures Act, the Chief Censor banned 253 foreign titles and suppressed several Canadian newspapers that had questioned government policy. The Act was extended to 1919 to ban leftist publications as fears of socialism pervaded the government following the war. It was invoked during WWII and by Prime Minister Pierre Trudeau in 1970 to deal with the revolutionary group, the Front de libération du Québec. *Id.*

³⁶ From 1895 to 1958, officials could refer to a list of proscribed publications to assist them in their decisions to ban materials. Banned titles included Balzac’s *Droll Stories*, James T. Farrell’s *Bernard Clare*, Trotsky’s *Chapters from my Diary*, Erskine Caldwell’s *God’s Little Acre*, Grace Metalious’s *Peyton Place*. *Id.* There was no legal right to appeal a Customs ruling to a court: Once a book was banned, it stayed there until customs officials changed their minds. The ban on James Joyce’s *Ulysses* was lifted in 1949 when an official decided that it was not obscene. Bruce Ryder, *Undercover Censorship: Exploring*

“community standards of decency” test and by allowing experts to testify on the merits of impugned literature,³⁷ barefaced attempts to censor speech have been rare.³⁸ Limitations on literary expressions have become more difficult to justify in the post-Charter era. Yet customs officials have continued to confiscate materials under the Customs Act: despite its 1985 amendment by Parliament that replaced the “immoral or indecent” with the “obscene,”³⁹ gay- and lesbian-themed non-obscene materials have been unfairly targeted.⁴⁰

Undoubtedly, parodies that do not pose a threat to national security, contain obscene/defamatory materials, or promote hatred against identifiable groups would not likely be censored in Canada. In fact, parody has contributed significantly to the Canadian literary

the History of the Regulation of Publications in Canada, in *INTERPRETING CENSORSHIP IN CANADA* 132 (Allan C. Hutchinson & Klaus Petersen eds., 2007).

³⁷ *Brody et al. v. The Queen* [1962] 32 D.L.R. (2d) 507, 531 (S.C.C.)

³⁸ In the 1960s, provinces sported their own censorship boards—most of which later renamed as “classification” board—which worked to keep undesirable films out of the marketplace. Alberta banned Marlon Brando’s 1953 classic *The Wild One* for being a “revolting, sadistic story of degeneration.” It was also the only province to ban Andy Warhol’s *Frankenstein* in 1974. *Censorship, CANADA’S HUMAN RIGHTS HISTORY*, <http://historyofrights.ca/encyclopaedia/main-events/censorship/> (last visited Oct. 10, 2017). In 1976, a group of parents in Lakefield, Ontario demanded that Margaret Laurence’s *The Diviners* be removed from schools as “unsavory pornography.” Parental councils also raised complaints against Morley Callaghan’s *Such is my Beloved*, W.O. Mitchell’s *Who has seen the Wind?* and Alice Munro’s *Lives of Girls and Women*. Carefoote, *supra* note 33.

³⁹ In *Luscher v. Deputy Minister of National Revenue (Customs & Excise)* [1985] 17 D.L.R. (4th) 503 (F.C.A.), the Federal Court of Appeal struck down a provision of the Customs Act prohibiting the importation of material of “an immoral or indecent character” on the grounds that it constituted an overly vague restriction on freedom of expression. *Id.* at 510. Three weeks after the ruling, Parliament replaced the former provision with a prohibition on the importation of obscene material. S.C. 1985, c. 12.

⁴⁰ In 1990, Jane Rule’s *The Young in One Another’s Arms* was seized for obscenity while en route to Little Sisters bookstore. In *Little Sisters Book and Art Emporium v. Canada*, the SCC finally upheld the right of Canada Customs to inspect and seize “obscene” materials but also criticized them for focusing on materials with gay themes, particularly those imported by gay and lesbian bookstores. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120, para. 267; see Carefoote, *supra* note 34.

and cultural scenes since the early nineteenth century.⁴¹ Writers such as Stephen Leacock and Paul Hiber used the parodic form to quest for a cultural identity related to but distinct from those of the old colonial world.⁴² Much more recently, Margaret Atwood used parodies to inquire into issues such as feminism.⁴³ Unsurprisingly, minorities—Chinese Canadians and First Nations people—have continued to voice their discontents through parodying the Dominion Day (the former name of Canada Day) and the national anthem respectively.⁴⁴ Recently, a Vancouver comedy duo created a fake parodic campaign video announcing Canada’s candidacy for President of the United States, after their first parodic video in the 2012 American Presidential election.⁴⁵ Whether as a weapon of critique or a tool of identity construction, parody is vital to freedom of expression. One would imagine that should parodic works get censored or banned for containing unpopular messages, or get seized at the border for similar reasons, organizations involved in anti-censorship advocacies and other activities would rightfully intervene on behalf of their authors.⁴⁶

⁴¹ WILLIAM H. NEW, ENCYCLOPEDIA OF LITERATURE IN CANADA 866 (2002); *Humorous Writing in English*, THE CANADIAN ENCYCLOPEDIA, <http://www.thecanadianencyclopedia.ca/en/article/humorous-writing-in-english> (last accessed Oct. 10, 2017).

⁴² NEW, *supra* 41, at 867.

⁴³ *Id.*

⁴⁴ See, e.g., *Humiliation Day*, THE LONG VOYAGE: FROM THE PIGTAILS AND COOLIES TO THE NEW CANADIAN MOSAIC, <http://access-cht.ca/chinese-history/fight-for-rights/humiliation-day/?lang=en> (last visited Oct. 10, 2017); Connie Walker, “*Oh Kanata!*” Video a Twist on Canadian National Anthem, CBC NEWS (Mar. 18, 2014), <http://www.cbc.ca/news/aboriginal/oh-kanata-video-a-twist-on-canadian-national-anthem-1.2577697> (last visited Oct. 10, 2017).

⁴⁵ E.g., Lauren Sundstrom, *Hilarious Parody Video Wants Canada to Run for U.S. President*, VANCITY BUZZ (Jan. 28, 2016), <http://www.vancitybuzz.com/2016/01/canada-run-for-us-president-video/> (last visited Oct. 10, 2017).

⁴⁶ PEN Canada, established in 1921, campaigns on behalf of writers who are persecuted, imprisoned, or exiled for exercising their freedom of expression. The Writers’ Union of Canada, established in 1973, advocates on behalf of published authors, the most notable example being its fight against Bill C-54, an “anti-pornography” measure that threatens literary expression in 1987. The Freedom of Expression

II. THE RIGHT TO PARODY IN CANADIAN COPYRIGHT LAW

Copyright has posed another hurdle to Canadians' quest for freedom of expression.⁴⁷ The lack of a parody exception in copyright law or a proper definition of "parody" by statutes or by courts curtails the right to parody. The Copyright Act of 1921,⁴⁸ which came into force in 1924, defined copyright as "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public..."⁴⁹ Section 16(1)(i), which duplicated s. 2(1)(i) of the Copyright Act 1911 of the United Kingdom, provided that "[a]ny fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" shall not constitute an infringement of copyright.⁵⁰ The fair dealing provisions were reformed first, by the North American Free Trade Agreement Implementation Act, 1993, s. 64(1), and second, by An Act to Amend the Copyright Act, 1997, s. 18.⁵¹ Yet the fair dealing provisions of the Copyright Act of 1997, encoded in its s. 29-29.2, only provide exceptions for the purposes of research, private study, criticism,

Committee of the Book and Periodical Council was established in the wake of a 1978 attack upon Alice Munro's *Lives of Girls and Women*. Carefoote, *supra* note 34.

⁴⁷ David Fewer, *Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada*, 55 U. T. FAC. L. REV. 175, 198 (1997), citing *Morang & Co. v. Le Sueur* [1911] 45 S.C.R. 95 and C. Harvey & L. Vincent, *Mackenzie and Le Sueur: Historians' Rights*, 10 Man. L.J. 281 (1980).

⁴⁸ Canada's first Copyright Act of 1868 came into force after Canadian Confederation in 1867. Sara Bannerman, *Copyright: Characteristics of Canadian Reform*, in *CANADIAN COPYRIGHT AND THE DIGITAL AGENDA: FROM RADICAL EXTREMISM TO BALANCED COPYRIGHT* 18 (Michael Geist ed., 2010).

⁴⁹ Copyright Act, S.C. 1921, c. 24, s. 3(1).

⁵⁰ *Id.* s. 16(1)(i).

⁵¹ Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, 53 MCGILL L.J. 309, 318 (2007).

review, and news reporting.⁵² It was the *Copyright Modernization Act* of 2012 which introduced fair dealing categories in the form of “parody” and “satire.” The following subsections describe the lack of a parody defence in Canadian case law prior to 2012, scholars’ call for a new parody exception, and events surrounding the 2012 reform.

A. Parody in Canadian Case Law Prior to the 2012 Reform

Not only did Canada’s previous copyright statutes fail to provide for a parody exception, but Canadian courts did not even consider parody to be a defence to copyright infringement in enforcing these statutes before the 2012 reform. As the following survey of relevant judicial decisions shows, this happened regardless of whether the defendants raised

⁵² “29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned: (a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer’s performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer’s performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.” Copyright Act, S.C. 1985, c. C-42, s. 29.1—2.

a parody defence or relied upon other theories to appropriate copyrighted works for their own purposes, whether the parodic works targeted the original or something else, and whether these works served commercial or non-commercial purposes. Indications by courts that parody might serve as a defence to infringement in some circumstances were very indirect.

In *Ludlow Music Inc. v. Canint Music Corp.* (1967), the first Canadian case addressing parody and copyright infringement, defendants made a parody of American songwriter Woody Guthrie's song "This Land is Your Land," by crafting new lyrics to the old tune to "gently chide[] the Canadian Government and the Canadian people for their alleged feelings of inferiority" and retitling the song as "This Land Is Whose Land."⁵³ The song was released in the year of Canada's centennial.⁵⁴ Ludlow Music Inc., unimpressed with the parody, alleged that "the use of words" were "in bad taste and insulting to the Canadian public," and with the music of "This Land is Your Land," it would "cause incalculable damage to the Plaintiff and destroy the meaning and acceptance of the song in the minds of the Canadian."⁵⁵ The Exchequer Court of Canada determined that the law did not authorize the defendant to reproduce the tune of the song with words substantially different from those of the song.⁵⁶ Thus, it granted an injunction restraining the

⁵³ *Ludlow Music Inc. v. Canint Music Corp.* [1967] 51 C.P.R. 278, 290—91 (Ex. Ct.).

⁵⁴ *Id.* at 283.

⁵⁵ *Id.* In 1959, Ludlow Music Inc. had licensed Guthrie's work for adaptation and distribution in Canada via revisions prepared and performed by The Travellers. Ludlow Music Inc. held the rights for this authorized Canadian version and the song was to play a prominent part in the centennial celebrations of 1967. *Id.*

⁵⁶ The Court determined that "Section 2(v) of the Copyright Act recognizes that a musical work may be 'with or without words.'" In addition, "the plaintiff has copyright in the song '*This Land is Your Land*' — being the words of the song and the tune of the song considered as a single work." *Id.* at 298.

defendants from further sales of the album, deeming it a “proper exercise of 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.”⁵⁷

In *MCA Canada Ltd. (Ltée) v. Gillberry & Hawke Advertising Agency Ltd.* (1976), the question of whether a parody constitutes copyright infringement was again addressed by the Court. The defendant-advertising agency created a parody of the words of the musical work “Downtown,” composed by Tony Hatch and made famous by Petula Clark, to its original tune.⁵⁸ This time, the purpose was solely commercial: to “extoll[] the merits of Lewis Mercury, a car dealership located in downtown Ottawa.”⁵⁹ As Justice Dubé of the Federal Court of Canada, Trial Division, noted: “[t]he final stanza brings it all together in one irresistible invitation: Lewis Mercury is Downtown. They have a car for you Downtown. They are just waiting to help you Downtown.”⁶⁰ Justice Dubé therefore granted an injunction restraining the defendant from further infringement of “Downtown,” and awarded the plaintiff infringement, punitive and exemplary damages.⁶¹

The Court next addressed parody and copyright infringement in *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd. et al*, a 1982 case highly similar to *Ludlow Music Inc.* Here, the defendants made a parody of “Revolution,” a

⁵⁷ *Id.* at 299.

⁵⁸ *MCA Canada Ltd. (Ltée) v. Gillberry & Hawke Advertising Agency Ltd.* [1976] 28 C.P.R. (2d) 52, 54 (F.C.T.D.).

⁵⁹ *Id.* at 53.

⁶⁰ *Id.*

⁶¹ *Id.* at 56—57.

Beatles song composed by John Lennon and Paul McCartney, in order to offer as a “commentary on the events preceding the proclamation of the Constitution Act.”⁶² Justice Van Camp of the Ontario High Court of Justice granted a motion for an interlocutory injunction preventing the defendants from infringing ATV Music Publishing of Canada Ltd.’s copyright.⁶³ It held that “irreparable harm” must ensue to the plaintiff when the music of a song so well known was used with other words: “[i]t would be difficult ever again to listen to the original song without the words of the new song intruding.”⁶⁴

In *Canadian Tire Corp. v. Retail Clerks Union, Local 1518* (1985), the defendant-union, during a strike against a franchisee of the plaintiff which operated a Canadian Tire, used leaflets with a Canadian Tire logo overlaid with a diagonal line in the manner of international traffic signs indicating “do not enter.”⁶⁵ The Court held that the defendants were not allowed to use the logo without the permission of the copyright holder, even if such a use entailed no commercial or financial interest.⁶⁶ In *Rotisseries St.-Hubert v. Le Syndicat des Travailleurs* (1986), the defendant-union used a parody of the plaintiff’s company logo in pamphlets and on stickers and buttons during a labor dispute with the company.⁶⁷ In this

⁶² Graham Reynolds, *Necessarily Critical: The Adoption of a Parody Defence to Copyright Infringement in Canada*, 33 MANITOBA. L.J. 243, 248 (2009), citing James Zegers, *Parody and Fair Use in Canada after Campbell v. Acuff-Rose*, 11 C. I. P. R. 205, 208 (1994).

⁶³ *ATV Music Publ’g. of Canada Ltd. v. Rogers Radio Broad. Ltd. et al* [1982] 65 C.P.R. (2d) 109, 115 (Ont. S.C.).

⁶⁴ *Id.* at 114.

⁶⁵ *Canadian Tire Corp. v. Retail Clerks Union, Local 1518* [1985] 7 C.P.R. (3d) 415, 416—17 (F.C.).

⁶⁶ *Id.* at 418—21.

⁶⁷ *Rotisseries St.-Hubert v. Le Syndicat des Travailleurs* [1986] 17 C.P.R. (3d) 461, 464—65 (Que. S.C.).

case, the Court directly addressed the legality of making parodies of copyrighted works.⁶⁸ It decided that the reproduction of a substantial part of the protected works constituted a “parody” which, though falling within the scope of s. 2(b), entitled the plaintiff relief from copyright infringement because the defendants could have expressed their grievances through other means.⁶⁹

The fair dealing defence was not used in the foregoing cases. The defendants in *Ludlow Music Ltd.* and *ATV Music Publishing of Canada Ltd.* used a compulsory license defence in their arguments, whereas the defendant in *MCA* alleged that he could not identify the owner of the copyrighted work.⁷⁰ The defendants in *Canadian Tire Corp. Ltd.*, on the other hand, claimed a right to freedom of opinion through the design and a freedom to convey information through the logo respectively.⁷¹ In *Rotisseries St.-Hubert Ltee*, the defendants relied upon both s. 2(b) of the Charter and s. 3 of the Charter of Human Rights and Freedoms (Quebec).⁷² It was not until 1997 that the Federal Court addressed the issue of whether the fair dealing defence protects parody in *Compagnie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada et al.*

⁶⁸ See *id.* at 471-77.

⁶⁹ *Id.*

⁷⁰ Reynolds cites James Zegers to emphasize that in *Ludlow Music* and *ATV Music*, the compulsory license defence was used. Zeger said: “[u]nder subs. 19(1) of the Act it was not a breach of copyright in a musical recording to make a record of that work provided that records had previously made with the copyright owner’s consent and provided that proper notice was given to the owner. s. 19(2) limited s. 19(1) by prohibiting alteration to copyrighted works recorded pursuant to 19(1) unless the alteration was authorized by the owner. Essentially, s. 19 granted, under certain conditions, a license to make recordings of copyrighted work without the copyright owner’s permission.” Reynolds, *supra* note 61, at 248 (2009), citing Zegers, *supra* note 61, at 208.

⁷¹ *Canadian Tire Corp.*, 7 C.P.R. (3d) at 420.

⁷² *Rotisseries St.-Hubert Ltee*, 17 C.P.R. (3d) at 463.

C.A.W., in a union organizing campaign at CGEM Michelin Canada's Nova Scotia plants, distributed leaflets depicting CGEM Michelin's corporate logo, "a beaming marshmallow-like rotund figure composed of tires" called the Michelin Tire Man (or Bibendum):

broadly smiling... arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker. In the same leaflet, another worker safely out of the reach of "Bibendum's" looming foot has raised a finger of warning and informs his blithe colleague, "Bob, you better move before he squashes you". Bob, the worker in imminent danger of "Bibendum's" boot has apparently resisted the blandishments of the union since a caption coming from his mouth reads, "Naw, I'm going to wait and see what happens". Below the roughly drawn figures of the workers is the following plea in bold letters, "Don't wait until it's too late! Because the job you save may be your own. Sign today for a better tomorrow."⁷³

When the plaintiff alleged copyright and trademark infringements, the defendants argued that their version of Bibendum was a parody: although Canadian Copyright Act does not contain an explicit parody defence to copyright infringement, the category of "criticism" under the fair dealing defence should be interpreted in such a manner that would encompass parody.⁷⁴ Justice Teitelbaum of the Federal Court (Trial Division) nevertheless rejected the union's argument as a "radical interpretation" of the Copyright Act, which would be "creating a new exception to...copyright infringement, a step that only Parliament [has] the jurisdiction to

⁷³ *Compagnie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada et al.* [1997] 71 C.P.R. (3d) 348, 354 (F.C.).

⁷⁴ *Id.* at 377.

do.”⁷⁵ In addition, he described the logo as “private property,” which “cannot be used as a *location* or forum for expression.”⁷⁶ By substantially reproducing the “Bibendum” design on their union campaign leaflets and posters, the defendants infringed the plaintiff’s copyrights.⁷⁷

Nevertheless, in two cases that followed the *Michelin* decision, courts seemed to accept the proposition that parody could act as a defence to copyright infringement in certain circumstances. One was *Productions Avanti Ciné Vidéo Inc. v. Favreau et al.* (1999), which concerns a television series entitled “*La petite vie*,” a “highly original and very well-known situation comedy” and “probably the most popular series in the history of Quebec television.”⁷⁸ Owners of the copyrights in this series alleged that Favreau infringed their copyrights by producing a pornographic film entitled “*La petite vite*,” and the respondent’s only serious defence of his use of the original’s characters, costumes and decor constituted “a defence of fair use of these elements for purposes of parody.”⁷⁹ The Quebec Court of Appeal concluded that the defence of fair dealing does not lie where the parody is “really the appropriation or use of that work solely to capitalize on or ‘cash in’ on its originality and popularity.”⁸⁰ In *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378* (2001), the BC Automobile Association sued its office union for passing off, trademark violation and breach

⁷⁵ *Id.* at 381.

⁷⁶ *Id.* at 388.

⁷⁷ *Id.* at 397.

⁷⁸ *Productions Avanti Ciné Vidéo Inc. v. Favreau et al.* [1999] 1 C.P.R. (4th) 129, 135 (Que. C.A.).

⁷⁹ *Id.*

⁸⁰ *Id.*

of copyright by creating a website similar to the Association's and using the Association's trademarks in its domain name and meta tags.⁸¹ Although the union claimed that it copied elements of the website in order to "criticize," the Court held that such copying did not constitute fair dealing because the union website did not contain any criticism of the Association's and did not mention its source and author.⁸² While "parody" was nowhere mentioned, the Court implied that an imitative work criticizing the object of its imitation could act as a defence to copyright infringement.⁸³

In 2002 and 2004, the SCC handed down two landmark decisions that affirmed the limited nature of authors' rights in their works, which need to be balanced against the public's interests in using them. The SCC in *Galerie d'Art du Petit Champlain inc. et al. v. Théberge* (2002), in interpreting the meaning of "reproduction" within the Copyright Act, held that it is important to recognize the creator's rights while "giving due weight to their limited nature."⁸⁴ Therefore, "[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."⁸⁵ In 2004, the SCC in *CCH Canadian Ltd. v. Law Society of Upper Canada* dramatically shifted the way that copyright defences should be interpreted. When a group of publishers sued the Law Society of Upper Canada for copyright

⁸¹ B.C. Automobile Ass'n. v. O.P.E.I.U., Local 378 [2001] 10 C.P.R. (4th) 423, 429—30 (B.C. S.C.).

⁸² *Id.* at 474—75.

⁸³ *See id.* at 475.

⁸⁴ *Galerie d'Art du Petit Champlain Inc. et al. v. Théberge* [2002] 17 C.P.R. (4th) 161, 176 (S.C.C.).

⁸⁵ *Id.*

infringement in providing photocopy services to researchers, the Court unanimously held that the Law Society's practice fell within the bounds of fair dealing.⁸⁶ Prior to this case, defences to copyright infringement, fair dealing included, were seen as limitations on the copyright holder's exclusive rights and generally interpreted restrictively. Here, Chief Justice McLachlin emphasized the importance of balancing "the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."⁸⁷ She also clarified that "fair dealing" does not provide "simply a defence" to copyright infringement which removes liability, but instead defines the outer boundaries of copyright and is therefore a "user's right."⁸⁸ Citing Law Professor David Vaver, she noted that "[i]n order to maintain the proper balance between the rights of a copyright owner and users' interests," "[b]oth owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."⁸⁹

Despite these two landmark decisions by the SCC, a 2009 decision in British Columbia shows the pervasive influence of *Michelin*. In *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.* (2008/09), a media company brought an action against the defendants for passing off, trademark infringement, and copyright infringement after they created a parody edition of *Vancouver Sun* and dropped these mock copies ("fake Sun") in

⁸⁶ CCH Canadian Ltd. v. L. Soc. of Upper Canada [2004] 30 C.P.R. (4th) 1 (S.C.C.).

⁸⁷ *Id.* at 17.

⁸⁸ *Id.* at 25.

⁸⁹ *Id.*

Vancouver Sun vending machines.⁹⁰ This fake edition reproduced the masthead of the *Vancouver Sun* and contained articles criticizing Canwest newspapers' pro-Israel biases.⁹¹ The plaintiff motioned to strike various elements from the defendants' statement of defence, including paragraphs arguing that parody is a defence to copyright infringement due to the "fair dealing" exception for criticism in s. 29.1.⁹² Master Donaldson allowed the motion and struck the paragraphs from the statement of claim, citing the opinion of Justice Teitelbaum in *Michelin* that parody is not an exception to copyright infringement under the Copyright Act and does not constitute a defence.⁹³

B. Calls for a Parody Exception by Legal Scholars

The need for a parody exception in Canadian copyright law had not escaped the attention of scholars. David Fewer and Ysolde Gendreau argue that courts need to engage with the Charter in interpreting the fair dealing categories in the previous copyright statute, without further addressing the scope of protection that should be given to parody. Carys Craig, by identifying the encouragement of social dialogues and expressive activities as the goal of copyright, impliedly endorses a broad definition of parody. Graham Reynolds lays out an elaborate proposal of a new parody defence.

Writing in 1997, Fewer describes freedom of expression as the supreme law of the land that fulfils three fundamental social and democratic roles: "as a component of

⁹⁰ *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.* [2008] 2008 BCSC 1609, para. 1 (B.C. S.C.); [2009] 2009 BCSC 391, para. 2 (B.C. S.C.).

⁹¹ *Id.* at paras. 3—4.

⁹² *Id.* para. 1.

⁹³ *Id.* para. 14.

democratic self-government, as a prerequisite to individual self-fulfillment, and as a condition precedent to the search for truth.”⁹⁴ In contrast, copyright is a “statutorily granted and limited positive right.”⁹⁵ Hence, courts should subject copyright to constitutional scrutiny, rather than “subordinat[ing] a constitutionally guaranteed right to a statutory proprietary right without demonstrable justification.”⁹⁶ Fewer recognizes parody as an “ancient genre” with tremendous social values and a “time-tested example” of “transformative” and “critical” uses that “often involve authorial creativity and social critique encompassing values at the core of freedom of expression.”⁹⁷ Hence, the narrow scope of the fair dealing defences in the former Copyright Act fails to encompass the “full range of values” enshrined in freedom of expression.⁹⁸ Courts therefore should engage with the Charter and interpret the fair dealing provisions of the copyright act to accommodate works that fulfil constitutionally protected expressive functions.⁹⁹

Gendreau contends that copyright law’s accommodation of a parody defence can be achieved by judicial action in theory.¹⁰⁰ She attributes the reluctance of courts to apply the Charter to copyright law to the fact that the former is a public law instrument, while the latter is a private law matter, as well as their flawed opinion that copyright law already

⁹⁴ Fewer, *supra* note 47, at 176—77, 183, *citing* Ford v. Que. (A.G.) [1998] 2 S.C.R. 712, 765 (S.C.C.).

⁹⁵ *Id.* at 177.

⁹⁶ *Id.* at 184.

⁹⁷ *Id.* at 199—201.

⁹⁸ *Id.* at 184.

⁹⁹ *Id.* at 212—38.

¹⁰⁰ Ysolde Gendreau, Copyright and Freedom of Expression in Canada, *in* COPYRIGHT AND HUMAN RIGHTS 21—36 (Paul Torremans ed., 2004).

incorporates freedom of expression values through its internal mechanisms.¹⁰¹ While the Charter had not changed much of the balance already struck by the former Copyright Act, the *Michelin* case seemed to put a halt on any further analysis of the relationship between the two sets of rights.¹⁰² Hence, she anticipates that courts would continue to pay lip service to s. 2(b) of the Charter instead of interpreting the fair dealing provisions to accommodate parodies of copyrighted works.¹⁰³

Craig's endorsement of a parody defence stems from her belief in copyright's goal of encouraging communicative activities and social dialogues.¹⁰⁴ Courts should not import ownership values derived from copyright into an examination of the defendant's communicative activity, "aggrandiz[ing] the respectability and righteousness of the owner while thoroughly undermining the speech interests and communicative efforts of the defendant: elevating property and diminishing speech."¹⁰⁵ Craig critiques the SCC for employing a physical analogue as an analytic tool in *Michelin*, which "obviated the tangible and intangible divide between physical property and intellectual property," and avoided the appearance of imposing limits on defendants' expressive activities as well as the need to justify limiting their speech.¹⁰⁶ Her theoretical work discussed in Part One of this dissertation

¹⁰¹ *Id.* at 28—29, 31—33.

¹⁰² *Id.* at 33—34.

¹⁰³ *Id.* at 36.

¹⁰⁴ See Carys J. Craig, *Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright*, 56 U. TORONTO L.J. 75 (2006).

¹⁰⁵ *Id.* at 85.

¹⁰⁶ *Id.* at 92—94.

does not address the scope of protection that should be accorded to parodic works.¹⁰⁷

Regarding Canadian law, Craig deems it significant that the copyright owner in *Michelin* was the target of the parody's critique and would likely have refused to authorize or license the use of the logo at any price.¹⁰⁸ Nevertheless, by stressing that the law should recognize different forms of copying as expressive activities and the relevance of community in the copyright system, she impliedly endorses a broad parody exception encompassing a wide range of works.¹⁰⁹

Unlike other scholars, Graham Reynolds lays out an elaborate proposal of a new parody fair dealing exception. He first cites Michael Spence, Margaret A. Rose, and Linda Hutcheon to support a broad definition of parody in this new defence, which encompasses works targeting the originals as well as those criticizing or commenting on something else.¹¹⁰ He also contends that parodies are not necessarily critical, and therefore should not be embedded within the "criticism" fair dealing category, which would deny protection to non-critical parodies.¹¹¹ In addition, he concedes that it remains uncertain whether courts would interpret the fair dealing category of criticism liberally to include parody after *CCH Canadian Ltd.*, in view of the court's reliance on *Michelin* to strike the argument that parody is a defence to infringement in *Canwest Mediaworks Publications*.¹¹² Thus, the Copyright

¹⁰⁷ See Part One Chapter Two.

¹⁰⁸ *Id.*

¹⁰⁹ See 113—14; Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 J. GENDER, SOC. POL'Y & L. 207, 263—65 (2007).

¹¹⁰ Reynolds, *supra* note 62, at 244—46, 250—51.

¹¹¹ *Id.* at 244.

¹¹² See *id.* at 258—60.

Act should be reformed to include the sixth acceptable “parody” fair dealing category, joining research, private study, criticism, review, and news reporting.¹¹³ Individuals would then have the right to use substantial amount of copyright-protected materials without the consent of the copyright owners for the purpose of parody, as long as their dealings pass the fairness analysis.¹¹⁴

C. The New Parody/Satire Exceptions in the Copyright Modernization Act

The *Copyright Modernization Act* expands the “fair dealing” doctrine by permitting the use of copyrighted materials to create a parody or satire, provided that the use is “fair.”¹¹⁵ Neither the previous nor the new law defines what is “fair.”¹¹⁶ According to the SCC in *CCH Canadian Ltd.*, whether a dealing is fair is a question of fact and depends on the facts of each case.¹¹⁷ The Court thus identified six non-exhaustive factors to determine whether a dealing is fair, which are: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.¹¹⁸ The new Act was passed only after repeated but failed attempts to reform the

¹¹³ *Id.* at 251

¹¹⁴ *Id.* at 252—53.

¹¹⁵ Copyright Modernization Act, S.C. 2012, c. 20, s. 29.21.

¹¹⁶ *See Id.*

¹¹⁷ *CCH Canadian Ltd.* [2004] 30 C.P.R. (4th) 1 (S.C.C.).

¹¹⁸ *Id.* at 26—29.

law over a period of six years from 2005 to 2011.¹¹⁹ Its new “fair dealing” exceptions, lauded by artists and the public at large, seemed to answer the calls for a parody exception.¹²⁰

The new “parody” and “satire” exceptions have nonetheless sparked a mix of reaction— uncertainty, optimism, and skepticism—among lawyers and legal academics. As lawyer Bob Tarantino notes, in these two exceptions “lies the seed for what will be many years of speculation and debate as Canadian lawyers and potential litigants struggle with the contours of humour.”¹²¹ Although parody and satire are now categories of fair dealing, assessing when a given dealing is “fair” using the six factors outlined by the SSC in *CCH Canadian Ltd.* will remain challenging.

In a follow-up essay to his parody proposal, Reynolds expresses optimism about the broad scope of protection that the new Copyright Act will offer to parody and satire. Without directly addressing how “parody” and “satire” will be defined by courts, he contends that the

¹¹⁹ The process began in 2008, with the introduction of Bill C-61, which imposed severe penalties on infringers and which criminalized parodies and other derivative art forms. Bill C-61 drew widespread opposition from the public who feared that its draconian nature would lead to the formation of a “police state.” Artist groups in particular criticized it for making parodies and satires, time-honored artistic practices, illegal, whereas a coalition of consumer groups wrote a letter of discontent to the government. Peter Nowak, *Copyright Law Could Result in Police State: Critics*, CBC NEWS (Jun. 12, 2008), <http://www.cbc.ca/news/technology/copyright-law- could-result- in-police- state-critics-1.707544> (last visited Oct. 10, 2017). Since the failure of Bill C-61, the government made its copyright reform more open and accountable to the public. Minister of Industry Tony Clement and Minister of Canadian Heritage James Moore held large-scale nation-wide copyright consultations, known as the most successful public consultations in the recent memory of Canadians. These consultations led to a much-improved Bill C-32 in 2010. Michael Geist, Introduction, in FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT” 1 (Michael Geist ed., 2010). Bill C-11, which was virtually identical to Bill C-32, was introduced in 2011 and finally passed into law in 2012.

¹²⁰ Grace Westcott, *The Freedom to Mock*, PEN CANADA (Jul. 10, 2012), <http://pencanada.ca/blog/the-freedom-to-mock/> (last visited Oct. 10, 2017).

¹²¹ Bob Tarantino, *Parody Defence Not Far Away*, LEXOLOGY (May 22, 2012), <https://www.lexology.com/library/detail.aspx?g=8e21ff72-411d-473e-9ba8-20e5b1bf870e> (last visited Oct. 10, 2017).

two new categories, taken together, will be broad enough to encompass works that target originals as well as those commenting on something else.¹²² In addition, the fact that “parody” and “satire” fall within the same section as research and private study in the fair dealing provisions means that they need not be “critical” and can include non-critical works.¹²³ Reynolds particularly lauds the new law for not requiring the parody to satisfy an “attribution” requirement, which could serve as an artificial barrier affecting its message and/or diminishing its overall impact.¹²⁴

Reynolds’ sentiment is mirrored by lawyer and critic Douglas Murray, who believes that courts will provide “satire” a sufficiently broad interpretation to include those works that may not be considered fair use by American courts.¹²⁵ Because the new statute expressly includes “satire” as a purpose in its fair dealing provisions, he argues, Canadian courts will find it difficult to restrict the definition of satires to indirect critiques of the original works while excluding those that target exclusively something else.¹²⁶ Murray also relies upon *CCH Canadian Ltd.* to argue that courts will offer the fair dealing provisions, including the new additions of parody and satire, liberal interpretations.¹²⁷ Andrei Mincov, another lawyer and

¹²² Graham Reynolds, Parodists’ Rights and Copyright in a Digital Canada, in DYNAMIC FAIR DEALING: CREATING CANADIAN DIGITAL CULTURE 249 (Darren S. Wershler-Henry, Rosemary J. Coombe & Martin Zeilinger eds., 2014).

¹²³ *Id.* at 248—249.

¹²⁴ *See id.* at 249.

¹²⁵ Douglas Murray, *The Funny Thing about Satire: Parody and Satire Added to Canada’s Fair Dealing Defence*, BROADCASTER MAG. 12 (Oct. 2013), available at https://issuu.com/glaciermedia/docs/brc_2013oct01 (last visited Oct. 10, 2017).

¹²⁶ *Id.*

¹²⁷ *Id.*

critic, even considers the new law “dangerous” because its new “satire” exception could serve as “an excuse for virtually any unauthorized use of a work that has been modified into or merged with some other work.”¹²⁸ Thus, the exception will become so broad that it will justify virtually *any* infringement and serve “no meaningful objective” other than to “make a parody of the Copyright Act.”¹²⁹

Michael Geist feels less uncertain that the new categories will offer broad protection for using copyrighted works for parodic or satirical purposes. Geist explains that as the number of fair dealing purposes has grown, the first-stage test should now be very easy to meet.¹³⁰ A perfunctory first-stage purposes test in the future Canadian fair dealing analyses nonetheless may be followed by a far more rigorous second-stage fairness assessment.¹³¹ Through the study of the “Copyright Pentalogy,” five decisions handed down by the SCC on 12 July 2012 and a few months after the new Copyright Act came into force, Geist further argues that Canada has shifted from a fair dealing to a fair use approach like the one employed in the U.S.¹³² Although virtually any copying qualifies as “fair use,” whether a particular use is legally “fair” would be determined through a multi-factor analysis.¹³³ The

¹²⁸ Andrei Mincov, *New Section 29.21 of the Copyright Act—Good or Bad?* MINCOV L. CORP. (Oct 15, 2012), <http://mincovlaw.com/blog-tag/new%20copyright%20act&page=3> (last visited Oct. 10, 2017).

¹²⁹ *Id.*

¹³⁰ Geist describes other factors that have made the first stage test easy: the expansive approach articulated by the Courts; the Court’s expressly stating that the first part of the fair dealing test involves a low threshold; and its consideration of the copying purposes of not only the actual copier, but also the intended recipient. MICHAEL GEIST, *THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 171, 176-180 (2013).

¹³¹ *Id.* at 159.

¹³² *Id.* at 178.

¹³³ *Id.* at 180.

following subsection will argue that the dual parody and satire categories may lead to a parody/satire dichotomy and the use of the second-stage fairness assessment to suppress expressions categorized as “satire.”

D. A Potential Parody/Satire Fair Dealing Dichotomy

In *Society of Composers, Authors and Music Publishers of Canada, Canadian Recording Industry Association and CMRRA-SODRAC Inc. v Bell Canada*, the SCC held that *CCH Canadian Ltd.* created “a relatively low threshold for the first step” of the fair dealing analysis, so that “the analytical heavy-hitting is done in determining whether the dealing was fair” in the second step of the test.¹³⁴ The Copyright Pentalogy led to much optimism among academics and the public at large. Such optimism is not unwarranted considering the broadened scope of fair dealing in two of the five cases, *Bell Canada* and *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)*. This subsection will nonetheless argue that broadened fair dealing does not readily extend to cases involving parodies. It will then explain why the parody/satire dichotomy in American copyright jurisprudence may influence Canadian courts. This, along with a propertized notion of fair dealing and the very meaning of “satire,” may lead Canadian courts to treat works in the “satire” category as a category inferior to “parody.” Therefore, works in this inferior category may not pass the second-stage fairness assessment, even if they would not likely serve as market substitutes for their originals or their derivatives and would not harm the interests of right holders.

¹³⁴ *SOCAN v. Bell Canada* [2012] 102 C.P.R. (4th) 241, 250 (S.C.C.).

1. The Broadened Scope of Fair Dealing in *Bell Canada* and *Alberta (Minister of Education)*

In *Bell Canada*, the SCC determined whether online music service providers allowing consumers to listen to free 30–90 second previews for musical works before making purchases constitutes fair dealing under the Copyright Act.¹³⁵ The Copyright Board held that the previews constitute fair dealing for the purpose of research and do not amount to copyright infringement.¹³⁶ After the Federal Court of Appeal upheld the Board’s decision, SOCAN appealed to the SCC. Applying the fair dealing analysis set out in *CCH Canadian Ltd.*, the Court affirmed that fair dealing must be interpreted broadly, because allowing users to engage in some activities that would otherwise constitute copyright infringement serves to attain “the proper balance” between “protection of the exclusive rights of authors and copyright owners and access to their works by the public.”¹³⁷ In addition, it held that the first stage of the analysis constitutes a relatively low threshold, and that an in-depth analysis takes place at the second stage when determining whether the dealing is fair.¹³⁸

The SCC determined that the consumers’ use of previews of musical works constituted “research” for the purpose of identifying which songs to purchase, which satisfied the first step of the fair dealing inquiry.¹³⁹ Moving on to the second stage fairness analysis, the Court determined that the purpose behind the use of the previews was to

¹³⁵ *Id.* at 245.

¹³⁶ *Id.* at 244.

¹³⁷ *Id.* at 250.

¹³⁸ *Id.*

¹³⁹ *Id.* at 247.

facilitate consumer research rather than to replace the songs, and there were “reasonable safeguards” to ensure that previews were actually used for this purpose.¹⁴⁰ With respect to the character of the dealing, the previews could not be duplicated or further distributed.¹⁴¹ On the amount of the dealing factor, the Court assessed the proportion of the preview in relation to the whole work rather than the aggregate number of previews streamed by consumers, and determined that it constituted a modest dealing.¹⁴² Regarding the alternatives to the dealing, because methods typically requiring the returns of songs is “an expensive, technologically complicated, and market-inhibiting alternative” to help consumers identify the right music, previews of songs are “reasonably necessary” to achieve their research purpose.¹⁴³ On the nature of the work factor, the Court, affirming the desirability of disseminating the music, concluded that previews facilitated potential consumers’ identification of musical works they want to buy and the dissemination of these works.¹⁴⁴ Finally, as for the effect of the dealing on the work, because previews were shorter and of lower quality, they would not adversely affect the works and would encourage the purchase of the songs.¹⁴⁵ Concluding that the Board properly balanced the purposes of the Copyright Act by encouraging the creation and

¹⁴⁰ *Id.* at 251.

¹⁴¹ *Id.* at 252.

¹⁴² *Id.*

¹⁴³ *Id.* at 253.

¹⁴⁴ *Id.* at 254.

¹⁴⁵ *Id.*

dissemination of works while ensuring fair rewards to creators, the SCC unanimously dismissed SOCAN's appeal.¹⁴⁶

Carys Craig identifies the inclusion of technological neutrality¹⁴⁷ as a landmark aspect of the Copyright Pentalogy.¹⁴⁸ In *Bell Canada*, Justice Abella explained that this principle “seeks to have the Copyright Act applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication.”¹⁴⁹ In other words, it ensures that the law is applied to create equivalent effects in different technological contexts. Because assuming (or even double-counting) unfairness based on the aggregate volume of digital dealings could effectively weaken or eviscerate the fair dealing defence in the online environment, the Court determined that the relevant amount in the fair dealing analysis is the proportion of each extract to the whole work.¹⁵⁰ Ensuring that copyright law would not potentially impede the opportunities for greater access afforded by the Internet,

¹⁴⁶ *Id.*

¹⁴⁷ Carys J. Craig, Technological Neutrality: (Pre)Serving the Purposes of Copyright Law, in MICHAEL GEIST, COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 277 (2013). In *Robertson v Thomson* (2006), the SCC first explicitly addressed the significance of “media neutrality” in the copyright context. The majority found that reproduction of *The Globe & Mail* newspaper in an electronic database caused the original compilation work reproduced individual articles as opposed to the newspaper per se, thereby potentially infringing the copyright of freelance authors in their works. The dissenting Justices invoked the concept of media neutrality to emphasize the functional equivalence of electronic and traditional archiving, which, as Craig argues, shows a commitment to a principle of media neutrality attentive primarily to the purpose of the law. [2006] 52 C.P.R. (4th) 417 (S.C.C.).

¹⁴⁸ Craig, *supra* note 147, at 277.

¹⁴⁹ *Bell Canada*, 102 C.P.R. (4th) at 253; Craig, *supra* note 146, at 282.

¹⁵⁰ The Court explained: “[G]iven the ease and magnitude with which digital works are disseminated over the Internet, focusing on the ‘aggregate’ amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works. If...large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement. This...potentially undermines the goal of technological neutrality...” *Bell Canada*, 102 C.P.R. (4th) at 253.

this principle helps to facilitate the protection of the users' rights articulated in *CCH Canadian Ltd.*¹⁵¹

The other decision that broadened the scope of fair dealing is *Alberta (Minister of Education)*, in which the SCC considered whether the photocopying of textbook excerpts by teachers, on their own initiative, to distribute to students as part of course materials is fair dealing pursuant to the new Copyright Act.¹⁵² Because photocopying, which served the allowable purpose of “research or private study,” easily passed the first step purpose analysis,¹⁵³ the dispute centered on the Copyright Board’s application of the factors in *CCH Canadian Ltd.* in the second part fairness assessment. Justice Abella, writing for the majority, focused on only four factors. On the purpose of the dealing, she held that the teachers’ instructional purposes are consistent with “research” and “private study” as long as they had no ulterior motive in providing photocopies to their students.¹⁵⁴ Citing *Bell Canada*, the majority also held that the Copyright Board misapplied the amount of the dealing factor by making a quantitative assessment based on aggregate use. Instead, this factor required an examination of the proportion of the short excerpts that the teachers copied

¹⁵¹ See *id.* Carys identifies three formulations of the principle in the Copyright Pentalogy. The narrowest formulation is found in the dissenting judgment of Rothstein J in *Entertainment Software Association*, which, as in *Robertson*, reflects a restrictive vision concerned only with non-discrimination between technological means in a formalistic sense. The intermediate approach is found in *Bell*, which reflects a more functional and effects-oriented vision of technological neutrality. The majority judgment in *ESA* reached the most expansive version of the principle, by drawing an explicit connection between this functional approach and copyright’s policy balance, with the statement that “[t]he traditional balance between authors and users should be preserved in the digital environment.” Craig, *supra* note 147, at 281—284.

¹⁵² *Alberta (Minister of Educ.) v. Canadian Copyright Licensing Agency* [2012] 102 C.P.R. (4th) 255 (S.C.C.).

¹⁵³ *Id.* at 262.

¹⁵⁴ *Id.* at 262—66.

in relation to each entire textbook.¹⁵⁵ The Board also erred in finding that schools had “reasonable alternatives” to photocopying textbooks, such as buying original texts for each student or the school library, and that photocopying short excerpts was reasonably necessary to achieve the purpose of “research” and “private study” for the students.¹⁵⁶ Finally, regarding whether the dealing adversely affected or competed with the original work, the majority could not see how photocopying short excerpts of complementary texts would compete with the textbook market, or find any evidence of a link between photocopying short excerpts and a decline in textbook sales.¹⁵⁷ The Court, in a 5/4 split, held that the Board’s finding of unfairness was based on a misapplication of the *CCH Canadian Ltd.* factors.¹⁵⁸ Determining that this outcome was “unreasonable,” it allowed the appeal by *Alberta (Minister of Education)* and remitted the matter back to the Board for reconsideration.¹⁵⁹

Paul Daly contends that the SCC in *Alberta (Minister of Education)* usurped the role of the Copyright Board and misapplied the “correctness” standard in replacement of the “reasonableness” standard adopted by the Board.¹⁶⁰ In addition, the Board’s unreasonable

¹⁵⁵ *Id.* at 272—73.

¹⁵⁶ *Id.* at 273—74.

¹⁵⁷ *Id.* at 274.

¹⁵⁸ *Id.* at 259.

¹⁵⁹ *Id.* at 274.

¹⁶⁰ The SCC in *Dunsmuir v New Brunswick* held that there are two standards of review: reasonableness and correctness. The standard of correctness is applicable to constitutional questions, resolutions of jurisdictional overlaps, true questions of jurisdiction, and questions of general law of central importance to the legal system. The standard of reasonableness applies to interpretations of a decision maker’s home statute, issues where law and fact are intertwined, and policy-making decisions. The Copyright Act is the home statute of the Copyright Board, which should apply the statute according to the reasonableness standard [2008] 291 D.L.R. (4th) 577, 579 (S.C.C.). Paul Daly, Courts and Copyright: Some Thoughts on

observation under the “effect of the dealing on the work” factor was insufficient for the Court to strike down the decision, as long as it had the “justification, transparency and intelligibility” that enabled it to fall within a range of “possible, acceptable outcomes.”¹⁶¹ Reynolds, however, deems the standard of review by the Court to be one of reasonableness, which shows the “continuing evolution of the SCC’s interpretation of the purpose of the Copyright Act ... to contributing to the development of a robust public domain.”¹⁶²

Two elaborations by Reynolds, which illuminate the reasonableness of the SCC’s decision in *Alberta (Minister of Education)* are especially noteworthy. When evaluating the alternatives to the dealing factor, the Board reasoned that educational institutions could “[b]uy the originals to distribute to students or to place in the library for consultation,” on the assumption that they could afford to purchase multiple copies of original texts to distribute to students.¹⁶³ Reynolds considers this a “curious statement” because the Board notes in the

Standard of Review, in MICHAEL GEIST, COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 48 (2013).

¹⁶¹ *Id.* at 62, citing *Dunsmuir*, 291 D.L.R. (4th) at 602. Citing Justice Rothstein’s dissenting opinion, Daly also argues that Justice Abella’s careful slicing of the Copyright Board’s decision into various components went against her previous advice to review administrative decisions in the round and not to “segment” them into distinct components. As Justice Rothstein stated: “I do not think it is open on a deferential review, where a tribunal’s decision is multifactored and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.” *Alberta (Minister of Educ.)*, 102 C.P.R. (4th) at 275.

¹⁶² Reynolds argues that Justice Abella did not incorrectly apply a correctness standard in *Alberta (Minister of Education)*, but rather applied a reasonableness standard of review in a manner consistent with the way in which reasonableness has been applied in *Dunsmuir*, in numerous SCC decisions handed down post-*Dunsmuir*, and in several Canadian appellate decisions. Graham Reynolds, Judicial Review of Copyright Board Decisions in Canada’s Copyright Pentalogy, in MICHAEL GEIST, COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 35 (2013).

¹⁶³ *Id.* at 27; citing Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in Its Repertoire, CBD No. 6, para 107 (2009), <http://www.cb->

previous sentence that the option of purchasing the book is “from a practical standpoint...not open to the student.”¹⁶⁴ Accordingly, Justice Abella rightly called the Board’s suggestion that schools could “buy the original texts to distribute to each student” “a demonstrably unrealistic outcome.”¹⁶⁵ Although the Board failed to determine what factor(s) contributed to the decline in textbooks sales, it concluded that “the impact of photocopies...is sufficiently important to compete with the original to an extent that makes the dealing unfair.”¹⁶⁶ Again, Justice Abella fairly critiqued the “evidentiary vacuum” in the Board’s conclusion that the photocopies had a sufficiently detrimental impact on the original.¹⁶⁷ Reynolds aptly concludes that not only did the Board’s decision fall out of the range of “possible, acceptable outcomes,”¹⁶⁸ but the SCC’s decision also shows that “fairness is not as discretionary a concept as it seems to be.”¹⁶⁹

The broadened fair dealing in *Bell Canada* and *Alberta (Minister of Education)* does not readily apply to parody cases, nor does the optimism inspired by the two cases. First, creating a parody involves a conscious choice of what work(s) to use and how much to borrow from the work(s). Unlike offering previews of musical works to consumers in *Bell Canada*, how the principle of technological neutrality can work in the favor of parodists is

cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf [*Alberta (Minister of Education)* (CB)].

¹⁶⁴ *Id.* at 28, citing *Alberta (Minister of Educ.) (CB)*, *supra* note 163.

¹⁶⁵ *Id.* at 28, citing *Alberta (Minister of Educ.)*, 102 C.P.R. (4th) at 267.

¹⁶⁶ *Id.* at 29, citing *Alberta (Minister of Educ.) (CB)*, *supra* note 163, para. 111.

¹⁶⁷ *Id.* at 29—30, citing *Alberta (Minister of Educ.)*, 102 C.P.R. (4th) at 268.

¹⁶⁸ *Id.* at 31, citing *Dunsmuir*, 291 D.L.R. (4th) at 602

¹⁶⁹ *Id.* at 32.

not clear. If anything, advances in technology have arguably facilitated access to a greater pool of works from which the user could choose, and the increased availability of alternatives could weaken the fair dealing defence by making the parodying of copyrighted works less justified. It was practically unrealistic for schools to purchase multiple copies of original textbooks in *Alberta (Minister of Education)*, hence reasonable for them to copy excerpts of textbooks to the students. On the contrary, it may be far more difficult for users to prove that they have had no reasonable available alternatives if the works they parodied are not even the targets of their criticisms or commentaries.

2. Possible Interpretations of “Parody” and “Satire” and a Potential Dichotomy

The last chapter has argued that the parody/satire dichotomy in American copyright law has led to the erroneous suppression of works that would not otherwise displace the underlying works or harm their authors’ interests. Will the parody and satire fair dealing categories in Canadian copyright law solve this problem? This section will explain that they may lead to a similar dichotomy, because American law may influence how Canadian courts will define “parody” and “satire.” In addition, because satire, unlike parody, need not imitate preexisting works, courts that adhere to a propertized conception of fair dealing may be less likely to hold that works categorized “satires” pass the second-stage fairness assessment, even if these works would not likely displace the underlying works or harm their authors’ interests.

In the era of globalization, legal problems tend to arise in similar ways, especially in advanced societies and economies.¹⁷⁰ Whereas national governments used to respond to these problems independent of other nations, they now frequently look to one another, leading to the convergence of national laws.¹⁷¹ Judicial globalization, as part of legal globalization, refers to judicial interaction across borders.¹⁷² While the most active types of interaction can be found in processes like dispute resolution, a more passive and implicit form of interaction occurs in the form of the “cross-fertilization” of national judicial decisions.¹⁷³ Judges cite or rely on foreign law and decisions for argumentation and for enriching their legal reasoning.¹⁷⁴ The U.S. Supreme Court, which almost never quotes other courts, has long been the main supplier of ideas and is the most quoted among the foreign courts.¹⁷⁵ According to Justice Kathryn Neilson of the Court of Appeal for British Columbia, due to Canada’s Commonwealth background, the presence of both civil and common law systems, and its broad participation in and endorsement of international conventions, the nation has

¹⁷⁰ Ralf Michaels, Globalization and Law: Law beyond the State, *in* LAW AND SOCIETY THEORY 300—304 (Reza Banakar & Max Travers eds., 2013).

¹⁷¹ *Id.*

¹⁷² Anne-Marie Slaughter, *Judicial Globalization*, 40 VIR. J. INT’L L. 1103, 1103 (2000).

¹⁷³ *Id.* at 1116—19.

¹⁷⁴ Courts organize meetings with other courts to negotiate agreements for the common interpretations of legal concepts, and set up epistemic legal communities encompassing clerks, referendaires, lawyers, advocate generals, private practitioners, law professors and state advisors, NGOs, and amici curiae. Judicial networks have been established by the European legislature (EJN – European Judicial Network) as well as by judiciaries themselves. Academic institutions also set up forums where judges and academics meet in order to create bridges between research and practice. Marta Cartabia & Sabino Cassese, *How Judges Think in a Globalised World? European and American Perspectives*, GLOBAL GOVERNANCE PROGRAMME OF ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES/EUROPEAN UNIVERSITY INSTITUTE (Dec. 2013), at 3, http://cadmus.eui.eu/bitstream/handle/1814/30057/2013_07-Policy%20Brief_RSCAS_GGP-WEB.pdf?sequence=1&isAllowed=y (last visited Oct. 10, 2017).

¹⁷⁵ *Id.*

been more receptive towards judicial globalization than the U.S., and judicial use of sources from other jurisdictions has always been an aspect of Canadian jurisprudence.¹⁷⁶ The drafters of the Charter, foreseeing that foreign sources would play a pivotal role in the development of its jurisprudence, included specific provisions dealing with international and foreign laws.¹⁷⁷ In addition, statistics show that Canadian judges have consistently displayed an interest in American law even if English law continues to be more influential.¹⁷⁸ Basil Markesinis and Jörg Fedtke note that regarding the reception of American law in Canada, there is “no slavish adoption of its solutions nor, indeed, the opposite, that is, a closing of the eyes towards the large (and sometimes menacing) Southern neighbour, but an opportunity for a genuine dialogue in search for inspiration.”¹⁷⁹

On legal globalization more generally, one field in which laws in various jurisdictions are becoming increasingly similar is intellectual property.¹⁸⁰ The verdicts in *Bell Canada* and

¹⁷⁶ Justice Kathryn Neilson, “*Judicial Globalization*”—*What Impact in Canada?* HUTCHEON DINNER (Oct. 21, 2009), at 19, available at https://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf. Justice Neilson cited Justice Beverly McLachlin, current Chief Justice of the SCC, among other Justices: “This is the Canadian experience—one that has, from the beginning, accepted foreign law as capable of providing useful insights and perspectives. Foreign law is used selectively, where it is relevant to and useful to resolving disputes.” *Id.* at 20, citing Beverley McLachlin, *Canada and the United States: A Comparative View of the Use of Foreign Law*, The American College of Trial Lawyers Northwest Regional Conference, Alberta (Aug. 8, 2009).

¹⁷⁷ *Id.* at 12.

¹⁷⁸ Statistics show that the SCC has cited American case law almost forty times as often as the U.S. Supreme Court has cited Canadian case law. An analysis of the reserved decisions issued by the SCC since 2000 shows that “[o]ne in every five ... uses American citations, and two-thirds of those (or one in seven) involve the use of one or more citations to the [United States Supreme Court].” Peter McCormick, *American Citations and the McLachlin Court: An Empirical Study*, 47 OSGOODE HALL L.J. 83, 93 (2009).

¹⁷⁹ SIR BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* 84—85 (2006).

¹⁸⁰ Michaels, *supra* note 170, at 71.

Alberta (Minister of Education) were perhaps not only reasonable but also expected when one considers that previews of songs offered by online musical stores and the limited use of copyrighted materials have been legal in many nations. For example, Napster and iTunes, both American companies, enable users to browse their music catalogues and preview, purchase and play songs on their mobile handsets through integrated music players. Before the SCC handed down the *Alberta (Minister of Education)* ruling, the Association of Universities and Colleges of Canada had issued fair dealing guidelines for post-secondary school teachers, which permitted limited copying of copyrighted materials for classroom uses.¹⁸¹ Furthermore, publishers and the academic community in the U.S. have long established a set of fair use guidelines setting out permissible classroom uses of copyrighted materials at all levels of educational institutions, which are widely recognized by courts and the Copyright Office as minimum standards for fair use in education.¹⁸² These facts, though not referenced by the SCC, may have influenced its holdings that copying excerpts of

¹⁸¹ According to the guidelines, “no copying may exceed 10 per cent of a Published Work, other than a textbook produced primarily for the post secondary education market, or the following, whichever is greater.”; “No copying may exceed 5 per cent of a textbook produced primarily for the post secondary education market, or the following, whichever is greater.” *Fair Dealing Guidelines, Association of Universities and Colleges of Canada, 2011*, available at <http://uvpress.blogs.uv.es/2011/08/05/03-fair-dealing-guidelines-aucc/> (last visited Oct. 10, 2017).

¹⁸² “Circular 21” published by the Copyright Office permits a teacher to make one copy of any of the following: “a chapter from a book,” “an article from a periodical or newspaper,” “a short story, short essay, or short poem,” or “a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.” Teachers may photocopy articles to hand out in class, but classroom copying cannot be used to replace texts or workbooks used in the classroom. Pupils cannot be charged more than the actual cost of photocopying. The number of copies cannot exceed more than one copy per pupil. *Reproduction of Copyrighted Works by Educators and Librarians*, UNITED STATES COPYRIGHT OFFICE (2014), available at <https://www.copyright.gov/circs/circ21.pdf>, at 6—8 (last visited Oct. 10, 2017).

textbooks and previewing music for respective purposes of education and research are both “possible, acceptable” outcomes.¹⁸³

The SCC cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the “fundamental differences” in the respective legislative schemes.¹⁸⁴ Yet Canadian courts have referenced American courts’ decisions either to lend support to their arguments or to clarify Canadian law, or both. One good example of judicial globalization in the context of copyright is found in *CCH Canadian Ltd.*, in which the SCC drew references to American case law to formulate its standard of “original” in copyright law. The majority referenced Justice O’Connor’s concern in *Feist Publications Inc. v. Rural Telephone Service Co.*, a 1991 decision by the U.S. Supreme Court, that the “industriousness” standard of originality would violate the tenet of Copyright law in protecting expressions but not ideas.¹⁸⁵ Under the American standard, a work that originates from an author and is not a mere copy of another work is sufficient to ground copyright.¹⁸⁶ Although many Canadian courts have adopted a low standard of originality by requiring only “industriousness” on the part of the author, the SCC held that mere labour could not ground a finding of originality, and contributions in terms of skills and judgments are necessary for a work to be “original” enough for copyright protection.¹⁸⁷ The SCC did not rely entirely on

¹⁸³ See *supra* note 168.

¹⁸⁴ *Compo Co. v. Blue Crest Music Inc.* [1979] 45 C.P.R. (2d) 1, 9 (S.C.C.).

¹⁸⁵ *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 17, citing *Feist Publ’n. Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 353 (1991).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 15—16, 18. The SCC also referenced *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, 154 D.L.R. (4th) 328 (C.A.), a 1998 decision by the Federal Court of Appeal of Canada. It also cited French law, under which “originality means both the intellectual contribution of the author and the novel nature of the work as compared with existing works,” an understanding reinforced by the

Feist Publications, Inc. to formulate its standard of originality, by holding that an “original” work must be more than a mere copy of another work, but need not be creative in the sense of being novel or unique.¹⁸⁸ Nonetheless, this does not disprove the value of American law to its decision.

Elsewhere, courts have referenced American statutes and decisions to clarify Canada’s own laws. In *Théberge*, for example, the SCC cited the expansive derivative works provision in American copyright law, along with relevant decisions by the Seventh and the Ninth Circuits, as a contrast to the lack of an explicit and independent concept of “derivative work” in Canadian legislation.¹⁸⁹ Another example is *Michelin*, in which the Federal Court distinguished Canadian fair dealing from American fair use by emphasizing the exhaustiveness of the former and the open-endedness of the latter.¹⁹⁰ In *Bell Canada*, the SCC made good use of the U.S. Supreme Court’s decision in *Campbell* to reject SOCAN’s argument that the definition of “research” should require the creation of something new. The SCC pointed out that it was not clear whether transformative use was “absolutely necessary” even for a finding of fair use in American law.¹⁹¹

Certainly, American statutes and cases have not been the only source of inspiration or guidance for Canadian courts. Markesinis and Fedtke illuminate how Canada’s mixed

expression “*le droit d’auteur*”—literally the “author’s right” in the French title of the Copyright Act. *Id.* at 16.

¹⁸⁸ *See id.* at 15—18.

¹⁸⁹ *Théberge*, 17 C.P.R. (4th) at 188—89.

¹⁹⁰ *Michelin*, 71 C.P.R. (3d) at 379—82.

¹⁹¹ *Bell Canada*, 102 C.P.R. (4th) at 249—50, citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

cultural background has “prepared Canadians for an open and multi-cultural approach to law,” through a survey of the frequent citations by Canadian courts to English cases as well as those from other jurisdictions.¹⁹² The SCC also referenced a number of English cases and an Australian case in *CCH Canadian Ltd.*¹⁹³ and both English and New Zealand cases in *Alberta (Minister of Education)*.¹⁹⁴

Definitions of “parody” and “satire” by the U.S. Supreme Court will provide one source of guidance for Canadian Courts to define “parody” and “satire.” Canadian courts will also look to the British and commonwealth jurisdictions, which also employ two-step fair dealing analyses, as important sources to interpret and apply the new fair dealing exceptions. Whereas the New Zealand Parliament has yet to include a parody exception to its law, Australia’s Copyright Amendment Act 2006 already added “parody or satire” to its fair dealing exceptions to copyright infringement.¹⁹⁵ In 2014, a new fair dealing exception was introduced into British copyright law, which provides that the use of copyrighted material for the purpose of “caricature, parody or pastiche” would not be infringement.¹⁹⁶ The U.K. Intellectual Property Office further defines “parody” as something that “imitates a work for

¹⁹² MARKESINIS & FEDTKE, *supra* note 179, at 83.

¹⁹³ These include *Hubbard v. Vosper* [1972] 1 All E.R. 1023; *Associated Newspapers Group plc v. News Group Newspapers Ltd.* [1986] R.P.C. 515; *Sillitoe v. McGraw-Hill Book Co. (U.K.)* [1983] F.S.R. 545; *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241; *Pro Sieben Media AG v. Carlton UK Television Ltd.* [1999] F.S.R. 610. The Australian case that was referred to but not followed was *Moorehouse v. Univ. New S. Wales* [1976] R.P.C. 151 (Aus. H.C.).

¹⁹⁴ These include *Sillitoe v. McGraw-Hill Book Co. (U.K.) Ltd.* [1983] F.S.R. 545; *Univ. London P., Ltd. v. Univ. Tutorial P., Ltd.* [1961] 2 Ch. 601; *Hubbard v. Vosper* [1972] 1 All E.R. 1023. The New Zealand case was *Copyright Licensing Ltd. v. Univ. Auckland* [2002] 3 N.Z.L.R. 76.

¹⁹⁵ Copyright Act 1968, s. 41A (Aus.).

¹⁹⁶ Copyright, Designs and Patents Act, 1988, s. 30A (U.K.).

humorous or satirical effect.”¹⁹⁷ To date, however, no one in the U.K. or Australia has raised a parody or satire defence to copyright infringement. Assuming that Canadian courts will draw upon American case law to determine how “parody” and “satire” should be defined, its parody/satire dichotomy—that a parody mimics and targets the original work, and that a satire uses the work as a weapon to criticize something else—may impact Canadian decisions.

In addition, Canadian courts will likely reference dictionaries for the meanings of “parody” and “satire.” As mentioned, the *Oxford English Dictionary* and the *American Heritage Dictionary* agree on the imitative nature of parody, but do not agree on whether a parody may only use the original and its characteristic style as the target, or may imitate the original in order to criticize or comment on something else.¹⁹⁸ Thus, even assuming that Canadian courts are not influenced by American cases, they may not adopt an inclusive parody definition and may require that a parody direct part of its criticism or commentary at the underlying work.

Works falling within either “parody” or “satire” category will pass the first-step purpose analysis. Yet for two reasons, the potential parody/satire dichotomy means that “satires” may not pass the second-step fairness assessment even if they would not otherwise displace the underlying works or harm their rights holders’ interests. In both *Théberge* and

¹⁹⁷ Intellectual Property Office, *Exceptions to Copyright: Guidance for Creators and Copyright Owners* (Oct. 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf, at 6 (last visited Oct. 10, 2017).

¹⁹⁸ See Part One, Chapter Two.

CCH Canadian Ltd., the SCC affirmed the limited nature of authors' rights.¹⁹⁹ Nonetheless, a propertized conception of fair dealing continued to run through many parody cases. This chapter has drawn upon Craig's critique of the *Michelin* Court for employing a physical analogue to obviate the differences between physical property and intellectual property and to justify its imposition of limits on the parodist's expressive activities.²⁰⁰ In fact, the propertized conception of copyright was by no means adopted by the *Michelin* Court alone. Semblances of this physical analogue can be found in earlier cases. The Court in *Ludlow Music Ltd.* issued an injunction against defendants' parodic song to protect plaintiff's "property rights against encroachment" by the song.²⁰¹ The Court in *ATV Music Publishing of Canada Ltd.* held that the "intruding" words of defendants' song caused "irreparable harm" to the plaintiff.²⁰² These physical analogues led up to the *Michelin* Court's holding that the plaintiff's "private property" could not be used as "a *location* or forum for expression" by defendant.²⁰³ Despite both *Théberge* and *CCH Canadian Ltd.*, *Canwest Mediaworks Publications Inc.*—a more recent case—showed the pervasive influence of *Michelin*, by relying on Justice Teitelbaum's opinion to hold that parody does not constitute a defence to copyright infringement.²⁰⁴ Second, even assuming that this recent parody case is a mere outlier, and courts will no longer treat intellectual properties as if they are tangible,

¹⁹⁹ *Théberge*, 17 C.P.R. (4th) at 176; *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 25.

²⁰⁰ See Section I(B).

²⁰¹ *Ludlow Music Inc.*, 51 C.P.R. at 301.

²⁰² *ATV Music Publ'g. of Canada Ltd.*, 65 C.P.R. (2d) at 114.

²⁰³ *Michelin*, 71 C.P.R. (3d) at 391.

²⁰⁴ *Canwest Mediaworks Publ'n. Inc.*, paras. 13—14.

physical properties, the fact that satire need not imitate a preexisting work may still lead Canadian courts to consider a dealing in the form of “satire” to be less fair than “parody.”

Hence, courts may use the second-stage fairness assessment to hold that the “satires” are not fair dealings of the original works. Four of the fair dealing factors mentioned in *CCH Canadian Ltd.* are particularly important in illuminating the adverse impacts of a satire category.²⁰⁵ On the purpose of the dealing, courts will “make an objective assessment of the user/defendant’s real purpose or motive” in using the copyrighted work.²⁰⁶ “Research done for commercial purposes,” the SCC stated, “may not be as fair as research done for charitable purposes.”²⁰⁷ On the amount of the dealing, the quantity of the work taken “will not be determinative of fairness, but it can help in the determination.”²⁰⁸ In *Bell Canada* and *Alberta (Minister of Education)*, the SCC assessed the proportions of the originals copied in relation to the whole works.²⁰⁹ Considering the alternatives to the dealing, courts will determine whether the use of the originals are “reasonably necessary” to achieve the purpose of the satire, and whether there was an “equally effective” alternative as opposed to simply another alternative.²¹⁰ Finally, concerning the effect of the dealing on the work, courts will

²⁰⁵ The four factors studied in this paragraph are the ones identified as useful to highlighting the shortcomings of a satire category and the necessity for replacing parody and satire categories by a broad parody category. The character of the dealing and the nature of the work factors are not useful in fleshing out the adverse effect of categorizing a work as satire.

²⁰⁶ *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 27.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Bell Canada*, 102 C.P.R. (4th) at 252; *Alberta (Minister of Educ.)*, 102 C.P.R. (4th) 255, 272—73.

²¹⁰ *CCH Canadian Ltd.*, at 30 C.P.R. (4th) at 28.

consider whether the dealing will compete with the work.²¹¹ The SCC emphasized that “it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”²¹²

Even assuming that the propertized conception of fair dealing, considered to have informed the *Campbell* decision, now has minimal influence on Canadian courts, the fact that satires need not rely on the imitation of preexisting works may still persuade courts to consider fair dealings in the form of “satire” unfair. On the first factor, although courts will find that fair dealing for the purpose of satire is the “real motive,” the commercial nature of some satires may lead courts to hold that their authors are riding the coattails of the originals, thus tipping the scales towards finding that their dealings are unfair.²¹³ On the second factor, courts may be influenced by the argument in *Campbell*, or even in *Salinger*, that the satirical nature of the works—that they target something other than the originals—does not justify extensive copying of the originals.²¹⁴ On the third factor, courts may cite *Campbell* to hold that the uses of the originals are not “reasonably necessary” because a satire can “stand on its own two feet” and other alternatives would be “equally effective.”²¹⁵ Therefore, even if courts find that the satires would not likely compete with the original works, the other factors may lead them to hold that their dealings of the underlying works are unfair.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See *CCH Canadian Ltd.*, at 30 C.P.R. (4th) at 28.

²¹⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580—81 (1994); *Salinger v. Colting*, 641 F. Supp. 2d 250, 263—67 (S.D.N.Y. 2009).

²¹⁵ See *Campbell*, 510 U.S. at 580—81 (1994); *CCH Canadian Ltd.*, at 30 C.P.R. (4th) at 28.

3. *United Airlines, Inc. v. Cooperstock*

Interestingly enough, the Federal Court provided a broad definition of “parody” in *United Airlines, Inc. v. Cooperstock* (2017), the first decision to consider the scope of the “parody” category of fair dealing since the legislative amendments in 2012. In 1997, Jeremy Cooperstock registered the domain name “UNTIED.com” to set up a parody of the official website of United Airlines after the airline company disregarded his serious, polite complaint about its services.²¹⁶ Apart from mocking the design and logo on United’s actual website, Cooperstock’s work reflected public opinions about the company through its complaints page.²¹⁷ In 2012, United brought proceedings against Cooperstock in the Superior Court of Quebec and the Federal Court of Canada, the former petitioning to have some senior airline employees’ contact information removed from his parody,²¹⁸ and the latter alleging copyright and trademark infringements.²¹⁹ Cooperstock’s motions to dismiss the application for an injunction by United were denied by the Superior Court in 2014 and 2016, and the Court of Appeal of Quebec upheld the injunction in early 2017.²²⁰ On June 23, 2017, the Federal Court ruled that the parody website infringed United’s copyright and trademarks.²²¹

²¹⁶ Ellen Roseman, *United Airlines Fights Legal Battle with Untied Website*, TORONTO STAR (Nov. 30, 2012), https://www.thestar.com/business/personal_finance/spending_saving/2012/11/30/united_airlines_fights_legal_battle_with_untied_website.html (last visited Oct. 10, 2017).

²¹⁷ *Id.*

²¹⁸ *United Airlines, Inc. v. Cooperstock* [2014] 2014 QCCS 2430 (QCCS); *United Airlines, Inc. v. Cooperstock* [2016] 2016 QCCS 4645 (QCCS), *aff’d* [2017] 2017 QCCA 44 (QCCA).

²¹⁹ *United Airlines, Inc. v. Cooperstock* [2017] 147 C.P.R. (4th) 251 (F.C.).

²²⁰ *Cooperstock v. United Airlines, Inc.* [2017] 2017 QCCA 44 (QCCA).

²²¹ *Cooperstock*, 147 C.P.R. (4th) at 295.

The Federal Court, seeking to find the meaning of “parody” in Canadian copyright law, determined that the words of the legislation must be “read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²²² It then referenced *CCH Canadian Ltd.*, in which the SCC emphasized the importance to balance the rights of authors with those of users and the definition of parody by the *Concise Canadian Oxford Dictionary*.²²³ It also drew upon the *Campbell* Court’s narrow definition of parody, and emphasized the need to use it “cautiously considering the differences between fair use in the United States and fair dealing in Canada.”²²⁴ It determined that the definition of parody used by the European Court of Justice in *Deckmyn v Vandersteen* (2014) “is consistent with the ordinary meaning of the term, the purpose and scheme of the fair dealing provisions in the Copyright Act, and the intention of Parliament.”²²⁵ Hence, it held that parody should have two basic elements: “the evocation of an existing work while exhibiting noticeable differences” and “the expression of mockery or humour.”²²⁶ In addition, Justice Phelan contended that:

In addition, in my view, parody does not require that the expression of mockery or humour to be directed at the exact thing being parodied. It is possible, for example, for a parody to evoke a work such as a logo while expressing mockery of the source

²²² *Id.* at 285.

²²³ *Id.* at 284—85, 286, 288—93.

²²⁴ *Id.* at 287.

²²⁵ *Id.* at 288.

²²⁶ *Id.*

company, or to evoke a well-known song while expressing mockery of another entity entirely.²²⁷

Although the *Cooperstock* Court's definition of parody will very likely be followed by other judges of the Federal Court, it may get appealed and/or not be followed by other courts in the future. Rights holders may appeal the Federal Court's definition of "parody" by bringing it to the Federal Court of Appeal. If so, the Federal Court of Appeal may look at the definitions of parody in different jurisdictions to determine whether to narrow the scope of the "parody" exception. Should it adopt a narrower definition, it would examine whether the allegedly infringing works still pass both stages of the test and are fair dealings of the works parodied.

In addition, decisions by the Federal Court are not binding on provincial and territorial courts. One must note that in the *Cooperstock* case, whether or not the law requires the expression of mockery or humor in a parody to be directed at the parodied work would hardly have changed the Federal Court's determination that Cooperstock's parody website, which targeted United Airlines, constituted parody under the law. In fact, the broad definition adopted by the Federal Court made the "satire" exception seemingly redundant. Hence, even though other courts will reference the *Cooperstock* decision, depending on the circumstances of the cases, they may choose to adopt different definitions, and may determine that a parody must direct its part of its criticism or commentary at the original work.

²²⁷ *Id.*

Even if the future Federal Court followed the definition in *Cooperstock* that parody need not target “the *exact* thing being parodied” and can express mockery of “another entity entirely,” this definition might not prevent the Court from requiring that the parody’s target and the parodied work be connected. Use *Ludlow Music Inc.*, in which defendants parodied “This Land is Your Land,” an American song, to describe Canadian people as an example of how a song targeting something else and not the “exact thing being parodied” can still have a connection to the original. Although the new song “This Land is Whose Land” targeted Canadian people and not the Americans, the “exact thing being parodied,” its mockery of Canada’s usurpation of the Aboriginal peoples’ lands²²⁸ may be seen as a subtle criticism of the colonialist subtext in the American version (treating “this land” originally belonging to the Indian Americans as “your”—the white settlers’—land). For other examples, whether this connection exists might be difficult to judge. Where the Court requires a connection

²²⁸ “The early French had great persistence,

Despite the Indians' combined resistance;

With righteous feeling, they started stealing,

This land that's made for you and me....

This land is your land, this land is my land,

This voyageur and fleur-de-lie-land;

So populate it, then separate it,

This land is made for you and me.

Then came the English and assorted henchmen,

Who started fighting with all those Frenchmen;

All through this bother, they told each other,

This land is made for you and me....” *Ludlow Music Inc.*, 51 C.P.R. at 295.

between the parody's target and the parodied work but perceives no connection, it may categorize the work as "satire."

E. Substituting a Broad Parody Exception for the Dual Categories

A broad parody fair dealing exception should substitute for both the "parody" and "satire" exceptions under the current law. This broad category, modelled on the one proposed in Part One and encompassing works that target the originals and those that criticize or comment on something else, would serve to reduce any influence of a propertized conception of fair dealing and possible bias against "satires," and further align the Canadian copyright jurisprudence with its freedom of expression jurisprudence. As a result, courts would be less inclined to hold that parodies that otherwise would not compete with the originals are unfair. Hence, a reformed exception would more likely protect users' right to freedom of expression and more properly balance the interests of authors and rights holders with those of users.

1. When a Broad Parody Exception Probably Matters

The current parody and satire exceptions would not likely lead to the suppression of free expression where the imitative works unambiguously target the originals or what they represent. Excellent examples include parodies of corporate logos by trade unions in *Canadian Tire Corp. Ltd.* and *Michelin*. Under the current law, the courts would very likely have found that the parodies of the Canadian Tire's logo and of CGEM Michelin's logo both fell squarely into the "parody" fair dealing category and passed the first step purpose analysis.²²⁹ These parodies of corporate logos would also have passed the second step

²²⁹ *Canadian Tire Corp.*, 7 C.P.R. (3d) at 416—17; *Michelin*, 71 C.P.R. (3d) at 354.

fairness assessment easily. On the purpose of the dealing factor, the courts would have held that both logos had served non-commercial purposes of protesting against the companies in the form of parody.²³⁰ Regarding the amount of the dealing and the alternatives to the dealing, the courts would likely have held that using the entire logos had been reasonable for protests and few other alternatives could have better served such purposes.²³¹ As for the effect of the dealing on the original work, regardless of how long the parodies had circulated in public, they would not have competed with the companies represented by the logos, even if the protests may have hurt their businesses.²³² Therefore, in cases like these, courts would reach the correct decisions easily, whether the current parody exception is replaced by the more inclusive one.

Whether the current exceptions are replaced by a broad parody exception or not, courts also would not likely hold that imitative works targeting something other than the original but containing little or no critical or commentary value are fair dealings. A good example would be *MCA Canada Ltd.*, in which the advertising agency borrowed the original tune of “Downtown” to extoll the merits of its car dealership in downtown Ottawa. Because the imitative work was not satirical in the ordinary sense of the word, it would have been unlikely for the court to consider it “satire” under the current law or fall within the broad “parody” exception.²³³ Even if the court had categorized this work as “satire” or “parody,” on the purpose of the dealing, the court would likely have determined that the song had little

²³⁰ See *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 27.

²³¹ See *id.* at 27—28.

²³² See *id.* at 28.

²³³ *MCA Canada Ltd. (Ltée)*, 28 C.P.R. (2d) at 54.

critical or commentary value and had primarily served the commercial purpose of promoting the car dealership.²³⁴ Regarding the amount of the dealing, using the whole tune would have further tipped the scale towards a finding of unfairness.²³⁵ In addition, the court would have found that the relationship between the song and the car dealership was too strenuous, and that the defendant had had many “equally effective” alternatives to promote its business.²³⁶ Therefore, even though the defendant’s work would hardly compete with the original or serve as its substitute,²³⁷ the court likely would have held that its dealing of the original work was unfair, whether a broad parody exception replaces the dual exceptions.

In some cases, the more inclusive parody exception would serve to promote freedom of expression by reducing any influence of the propertized conception of fair dealing on courts’ decisions and/or potential bias against “satires.” Good examples would be *Ludlow Music Inc.*, in which the defendants parodied “This Land is Your Land” to create a new song about Canadian people,²³⁸ and *ATV Music Publishing of Canada Ltd.*, in which the defendants parodied the Beatles’ song “Revolution” and turned it into a “commentary on the events preceding the proclamation of the Constitution Act” of Canada.²³⁹ As discussed, the former arguably mocked the American version’s colonialist assumptions while satirizing

²³⁴ *See id.* at 27.

²³⁵ *See id.*

²³⁶ *See id.* at 28.

²³⁷ *See id.*

²³⁸ *Ludlow Music Inc.*, 51 C.P.R. at 290—91.

²³⁹ Reynolds, *supra* note 61.

Canada for its treatment of First Nations peoples.²⁴⁰ The latter, which directly commented on Canadian affairs, can be interpreted as an oblique critique of America.²⁴¹ If courts had found that they did not clearly target the originals and had put them in the “satire” category, they may have easily used the alternatives to the dealing factor to tip the scale against findings of fair dealings. In addition, considering that both songs had used the entire tunes of the originals to serve both commercial and commentary purposes, the court would easily have held that they were not fair dealings. Contrarily, if a broad parody exception were to replace the parody and satire exceptions, the new songs would have felt squarely within the “parody” category. Courts would more likely have held that these new works, though commercial in nature, served the purpose of parody by providing commentaries.²⁴² Whether or not other reasonable alternatives may have been available to the parodists, their works would not likely harm their markets.²⁴³ Hence, courts would more likely have considered these “parodies” as fair dealings than if they had been categorized as “satires.”

2. The Misapplication of Two Fairness Factors in *Cooperstock*

The broad parody exception would not prevent courts from holding that parodies are unfair dealings even if they would not compete with the parodied originals or the services they represent. This is indicated by the Federal Court’s decision that Cooperstock’s website, which it categorized as “parody,” infringed the copyright of the airline company.

²⁴⁰ See *supra* Section IID3.

²⁴¹ See Reynolds, *supra* note 61.

²⁴² *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 27.

²⁴³ See *id.* at 28.

Nonetheless, the Court's erroneous decision did not diminish the superiority of a broad parody exception, because the decision was caused by its misapplication of two important factors in the second stage fairness analysis.

On the purpose of the dealing factor, the Court determined that Cooperstock's "real purpose or motive" was to "embarrass," "punish," even "defame" United Airlines for its perceived wrongdoings rather than to engage in parody, because his website "extended too far" the humor and mockery required of parody.²⁴⁴ Yet Cooperstock's transposition of two of the letters in the word "United" to make "Untied" the title of his parody website, which suggests the disorder and chaos in the company's services, presented sufficient evidence of his humorous intent to pass any "objective assessment" by the Court.²⁴⁵ Regarding Cooperstock's "real purpose or motive," the Court did not specify at what point the element of humor or mockery is "extended too far" so that what was humorous became embarrassing or punitive.²⁴⁶ Arguably, intents for humor or mockery often go along with other intents in parodies, and they do not cancel out one another. Hence, any embarrassment or even punishment caused by Cooperstock's parody website did not make his humorous or mockery intent or motive less real.

Having wrongly determined that Cooperstock's real purpose or intent was to embarrass, punish, even to defame the airline company, the Court continued to misapply the effects of the dealing factor, holding that Cooperstock's substantial copying of the original

²⁴⁴ *Cooperstock*, 147 C.P.R. (4th) at 289.

²⁴⁵ *See Id.*

²⁴⁶ *See id.*

website and logo had a harmful impact on United Airlines by defaming it.²⁴⁷ As the Court argued, the parody made customers believe that they were interacting with United Airlines when they were actually interacting with UNTIED.com, and that United Airlines was unprofessional or that it did not respond to complaints.²⁴⁸ Admittedly, the parody, by evoking the original, may have caused slight confusion at first glance. Yet a reasonable person would soon notice that UNTIED.com was a complaints website that took the form of a parody upon finding, for example, a “complaints database” and disclaimers indicating that it was not the website of United.²⁴⁹ Regarding the question of whether the parody had any harmful impact on United’s original website, the Federal Court should have followed *CCH Canadian Ltd.*, and asked: did the parody website harm United by competing with it in the airline services market?²⁵⁰ Although UNTIED.com had been around for 20 years, it existed merely to mock and to criticize rather than to compete.²⁵¹ If the Court had correctly applied these two factors in conducting the fair dealing analysis, then it would very likely have held that the parody website was fair dealing.

F. Surviving Moral Rights Challenges

While a broad and inclusive parody exception would not shield courts from making erroneous decisions, as the *Cooperstock* case has shown, it is still preferable to the parody

²⁴⁷ See *id.* at 292.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 270—71.

²⁵⁰ See *CCH Canadian Ltd.*, at 30 C.P.R. (4th) at 28.

²⁵¹ See *Cooperstock*, 147 C.P.R. (4th) at 289; see also Roseman, *supra* note 215.

and satire exceptions in the current law. Will the moral rights provisions in the copyright statute conflict with a broad parody exception? Interestingly enough, none of the scholars studied in this chapter has addressed the potential conflicts between the moral rights provisions and the parody and satire fair dealing categories. Thus, they seem to imply that parodic (and satirical) works exempted by the new categories would survive potential moral rights challenges.

The moral rights provisions provide for the author's "right to the integrity of the work and ... the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous."²⁵² On the right to integrity, the statute states that "the author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation," "distorted, mutilated or otherwise modified" or "used in association with a product, service, cause or institution."²⁵³ In *Théberge*, the SCC held that the author's moral rights are infringed "only if the work is modified to the prejudice of the honour or reputation of the author."²⁵⁴ However, the test for the prejudice to the honor or reputation of the author was laid down much earlier in *Snow v. Eaton Centre Ltd. et al.*, a leading case on moral rights in 1982. Here, the defendant had purchased a sculpture of sixty geese from the plaintiff, attached red ribbons around the necks of the geese, and placed them in the shopping centre as part of its Christmas decoration.²⁵⁵

²⁵² Copyright Act, s. 14.1(1).

²⁵³ *Id.* s. 28.2(1).

²⁵⁴ *Théberge*, 17 C.P.R. (4th) at 171.

²⁵⁵ *Snow v. Eaton Ctr. Ltd. et al.* [1982] 70 C.P.R. (2d) 105, 106 (Ont. H.C.J.).

The plaintiff, alleging that the addition of the ribbons made the geese “look ridiculous” and modified his work in a manner prejudicial to his honour or reputation, brought a moral rights claim against the defendant to have the ribbons removed.²⁵⁶ The Ontario High Court of Justice opined that the words “prejudicial to his honour or reputation ... involve a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at.”²⁵⁷ Relying upon experts and artists in the field who agreed with the prejudice to the plaintiff’s honour and reputation, the Court held for the plaintiff and granted the injunction.²⁵⁸ In *Prise de Parole Inc. v. Guérin, Éditeur Ltée*, the Federal Court of Canada applied the test for infringement of moral rights used in *Snow*, determining that although the defendant’s new work was a “clumsy adaptation” of the author’s work from the author’s “subjective” perspective, this perspective “must be reasonably arrived at.”²⁵⁹ Finding that the author’s work was not “distorted to the prejudice of the author’s honour and reputation,” that “he had not been ridiculed or mocked by his colleagues or the newspapers,” and that there was no change in the amount of his public appearances, and that no complaints had been made about the adaptation, the court held that his moral rights were not infringed.²⁶⁰

Parodies will likely survive moral rights claims of attribution and those that are not defamatory and do not distort the original works to the honor of their authors arguably would survive claims to integrity by authors. One must note that the *Snow* decision came down long before the SSC’s 2004 decision in *CCH Canadian Ltd.*, which acknowledged fair dealings as

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Prise de Parole Inc. v. Guérin, Éditeur Ltée* [1995] 66 C.P.R. (3d) 257, 260 (F.C.).

²⁶⁰ *Id.* at 266.

“user rights,” and the copyright reform in 2012. In addition, attaching red ribbons to the geese arguably did not carry criticism or commentary, or any strong message other than signaling it as part of the Christmas decoration.²⁶¹ According to *CCH Canadian Ltd.*, parodying the author’s work would be a “user’s right.”²⁶² As emphasized in Part One of the dissertation, parodies, though built upon existing works, are new works. In addition, they almost invariably modify the underlying works to convey messages. Although the *Snow* Court indicated that the moral rights of integrity are “not unconstitutional” and are greater than those based on libel or slander,²⁶³ the Court in *Prise de Parole Inc.* stressed the objective component of the test by giving weight to the reasonableness standard and by examining whether the new work distorts the original to the prejudice of its author’s reputation or honor and causes ridicule or mockery.²⁶⁴ In determining whether parodies that modify the underlying works violate authors’ moral rights to integrity, future courts will likely put more weight on the parodists’ right to freedom of expression and less on the authors’ subjective feelings. Hence, compared to the time before fair dealings were acknowledged as rights and parody (and satire) were introduced into the law, one would reasonably expect courts to find parodies violate neither the attribution rights of the originals’ authors, nor their integrity rights so long as the parodies do not defame them.

²⁶¹ *Snow*, 70 C.P.R. (2d) at 106.

²⁶² *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 25.

²⁶³ *Snow*, 70 C.P.R. (2d) at 106.

²⁶⁴ *Prise de Parole Inc.*, 66 C.P.R. (3d) at 266.

III. PARODY IN APPLICATION: APPLYING THE CHARTER OR RECONFIGURING FAIR DEALING'S PURPOSE?

As Part One has argued, courts should apply the parody exception by drawing upon the free speech doctrine. The previous chapter has made extensive use of the *Salinger* decision to explain how the parody defence should be applied by courts. Both Fewer and Reynolds address the hurdles of applying the *Charter* to copyright litigation more generally and suggest approaches to overcome these hurdles. Their works provide insights into how courts may apply the Charter to a broad parody exception in particular. Because there is a lack of parody case law in Canada, this section will employ two hypotheses inspired by the *Salinger* lawsuit to illuminate how courts may engage with the Charter to apply a broadened parody exception in Canadian copyright law.

A. The *Charter* Challenges in Copyright Actions

Fewer's 1997 article examines how copyright law may operate as a form of public censorship through the assertion of Crown copyright against private individuals, and as a form of private censorship when courts preserve the copyright owners' proprietary interests but neglect the public's right to expression guaranteed by s. 2(b) of the *Charter*.²⁶⁵ When defendants raised a s. 2(b) of the *Charter* defence to copyright infringements, Canadian courts had rejected the argument out of hand, paying little, if any, consideration of the scope

²⁶⁵ Fewer, *supra* note 47, at 197.

of s. 2(b), or whether the Charter even applies to such cases.²⁶⁶ Thus, they had not attempted to link the assertion of a *Charter* right to the fair dealing defence, the idea/expression dichotomy, or the public interest defence.²⁶⁷

Fewer examines three different ways in which the Charter might be applied to copyright litigation.²⁶⁸ A major hurdle in applying *Charter* to copyright law arises from the black-letter text of s. 32(1), which compels state actors to conform to the *Charter*, meaning that a litigant must successfully characterize the impugned act as “government action” to successfully raise a *Charter* claim.²⁶⁹ Nevertheless, Fewer argues, a defendant might characterize any assertion of a right granted under the Copyright Act as government action. Hence, the defendant invokes s. 2(b) not against the copyright owner, but against the federal government’s statutory regime, by asserting Parliament, in granting exclusive rights to copyright owners under the Copyright Act, has extended the reach of their rights too far and trodden upon user rights to freedom of expression guaranteed by s. 2(b).²⁷⁰ In addition, a

²⁶⁶ Fewer cites several cases, including the 1984 case of *James Lorimer*, in which the Federal Court of Appeal dismissed the *Charter* claim: “If, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer’s freedom of expression in some circumstances, this is not among them.” *The Queen v. James Lorimer & Co.* [1984] 77 C.P.R. (2d) 262, 273 (F.C.A.). In *Source Perrier*, the Court declined to extend the scope of s. 2(b) to the parody, stating that “the most liberal interpretation of ‘freedom of expression’ does not embrace the freedom to depreciate the goodwill of registered trade marks, nor does it afford a licence to impair the business integrity of the owner of the marks merely to accommodate the creation of a spoof.” *Source Perrier (Société Anonyme) v. Fira-Less Marketing Co.* [1983] 70 C.P.R. (2d) 61, 67 (F.C.T.D.). In *R. v. Ghnaim*, a case under the Copyright Act’s criminal provisions involving infringement of copyright in pornographic videotapes, Justice Ketchum denied that the expression in the form of obscenity lay within the scope of s. 2(b). *R. v. Ghnaim* [1988] 23 C.I.P.R. 102 (At. Prov. Ct.). *Id.* at 176, 210.

²⁶⁷ *Id.*

²⁶⁸ Fewer, *supra* note 47, at 213.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 219.

defendant might characterize any court order under the Copyright Act as government action, and challenge court-ordered remedies as infringing their freedom of expression.²⁷¹ Finally, a defendant might argue for the Charter's application to common law that has developed around the Copyright Act, on the ground that the jurisprudence under the Copyright Act has developed in a fashion that is incompatible with freedom of expression.²⁷² The SCC in *Dolphin Delivery Ltd.* stated that "there can be no doubt" that the Charter was applicable in this fashion: "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."²⁷³ In *R. v. Salituro*, the SCC further held that:

Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action ... then the rule ought to be changed.²⁷⁴

Reynolds, writing almost two decades later, provides an up-to-date account of how the *Charter* right to freedom of expression might be applied to copyright litigation. Like Fewer, Reynolds identifies the possibility for litigants to challenge the Copyright Act for placing unreasonable limits on their right to expression. He nonetheless points out that such challenges would fail because in *Michelin*, the leading case governing the intersection of

²⁷¹ *Id.* at 217.

²⁷² *Id.* at 217—18.

²⁷³ *Id.*, citing *Dolphin Delivery Ltd.*, 33 D.L.R. (4th) at 190, 198.

²⁷⁴ *Id.*, citing *R. v. Salituro* [1991] 3 S.C.R. 654, 675 (S.C.C.).

copyright and freedom of expression, Justice Teitelbaum concluded that “[t]he Charter does not confer the right to use private property—the Plaintiff’s copyright—in the service of freedom of expression.”²⁷⁵ In addition, Reynolds concurs with Fewer by acknowledging that courts can apply the Charter to common law by interpreting provisions of the *Copyright Act* in light of *Charter* values.²⁷⁶ Nonetheless, he aptly points out that this could only happen in limited circumstances. In *Bell ExpressVu*, a 2002 decision, the SCC held that statutory provisions may only be interpreted in light of *Charter* values in circumstances of “genuine ambiguity.”²⁷⁷ Iacobucci J cited Major J who, in *CanadianOxy Chemicals Ltd v Canada (AG)*, noted that: “[i]t is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids.”²⁷⁸ To determine whether circumstances of “genuine ambiguity” exist, courts must determine the intention(s) of the statute and then apply the modern approach to statutory interpretation.²⁷⁹ Only when the application of this approach results in “differing, but equally plausible, interpretations” may *Charter* values be used as an interpretive mechanism.²⁸⁰ In such circumstances, the reviewing court would not simply ask whether there is “existence of justification, transparency and intelligibility within the

²⁷⁵ Graham Reynolds, *The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright*, 41 QUEEN’S L.J. 1, 44 (2016); citing *Michelin*, 71 C.P.R. (3d) at 388.

²⁷⁶ See *Id.* at 13.

²⁷⁷ *Id.* at 34, 39, citing *Bell ExpressVu Ltd. Partnership v. Rex* [2002] 18 C.P.R. (4th) 289, 308 (S.C.C.).

²⁷⁸ *Id.* at 39, citing *Bell ExpressVu Ltd.*, 18 C.P.R. (4th) at 308.

²⁷⁹ *Id.* at 39, 40. .

²⁸⁰ *Id.* at 40, citing *Bell ExpressVu Ltd.*, 18 C.P.R. (4th) at 320.

decision-making process” or “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”²⁸¹ Instead, it would need to ask whether a proper balance has been achieved between the relevant *Charter* value, or freedom of expression, with the objectives of the *Copyright Act*.²⁸²

Reynolds persuasively argues that the SCC could also re-conceptualize fair dealing as a stand-alone defence to promote or protect freedom of expression.²⁸³ Aside from drawing references to scholars who have linked the SCC’s fair dealing jurisprudence to freedom of expression or to human rights more broadly,²⁸⁴ he cites Justice McLachlin’s holding in *CCH Canadian Ltd.* that fair dealing categories are to be given “large and liberal” interpretations to indicate the embeddedness of s. 2(b) in the SCC’s fair dealing jurisprudence.²⁸⁵ Hence, he foresees that the SCC might in future re-conceptualize fair dealing not only as a limit on copyright holder’s right, or even a “user right,” but also as a defence, the purpose of which being to promote or protect freedom of expression.²⁸⁶

Whether it is possible to challenge the Copyright Act is beyond the scope of this chapter. The idea of applying the Charter to common law so as to bring the Canadian copyright jurisprudence in line with s. 2(b) does provide insights into how the reformed

²⁸¹ *Id.* at 41, citing *Dunsmuir*, 291 D.L.R. at 637.

²⁸² *Id.* at 41, 42, citing *Doré c. Québec (Tribunal des professions)* [2012] 343 D.L.R. (4th) 193, 219 (S.C.C.).

²⁸³ *See id.* at 38—39.

²⁸⁴ Scholars cited include DAVID VAVER, COPYRIGHT LAW 669–672 (2000) and Marcelo Thompson, *Property Enforcement or Retrogressive Measure?: Copyright Reform in Canada and the Human Right of Access to Knowledge*, 4 UNIV. OTTAWA L. & TECH. J. 163 (2007). *Id.* at 38.

²⁸⁵ *Id.*, citing *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 25.

²⁸⁶ *Id.*, citing *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 25.

parody exception should be applied by courts, as does the idea of issuing remedies that would not infringe defendants' freedom of expression. The following hypotheses inspired by the Salinger lawsuit in the U.S. will show that courts can and should apply the parody exception by engaging with the *Charter*, and should issue damages rather than injunctions where there are infringements.

B. Parody and the *Charter*: Two Salinger-inspired Hypotheses

After the publication of his only novel, Salinger had led a reclusive life until his death.²⁸⁷ After his estrangement from his wife, he began a number of short-term relationships with younger women, including the 18-year-old Joyce Maynard in 1972.²⁸⁸ In 1998, to raise tuition for her three children, Maynard sold fourteen love letters by Salinger at an auction to a software entrepreneur and art collector, who later returned the letters to the author.²⁸⁹ Because of copyright restrictions, the auction house put Salinger's letters on view in a private room under guard, so that they could be seen only by people judged to be prospective buyers.²⁹⁰

²⁸⁷ E.g., *Top 10 Most Reclusive Celebrities*, TIME, available at http://content.time.com/time/specials/packages/article/0,28804,1902376_1902378_1902428,00.html (last visited Oct. 10, 2017).

²⁸⁸ E.g., Dinitia Smith, *J.D. Salinger's Love Letters Sold to Entrepreneur Who Says He Will Return Them*, N.Y. TIMES (June 23, 1999), available at <https://partners.nytimes.com/library/books/062399salinger-auction.html> (last visited Oct. 10, 2017); Lorri Drumm, *Pittsburgh Woman's Letters from J.D. Salinger Fetch \$185,000*, PITT. POST-GAZETTE (June 20, 2014), available at <http://www.post-gazette.com/ae/books/2014/06/19/Pittsburgh-woman-s-letters-from-J-D-Salinger-fetch-150-000/stories/201406190305> (last visited Oct. 10, 2017).

²⁸⁹ E.g., Smith, *supra* note 288; Drumm, *supra* note 288.

²⁹⁰ Smith, *supra* note 288.

Let us imagine that a Canadian journalist posing as a prospective buyer had gained access to the letters at the auction, remembered the contents, and later published part of them in the Canadian media. Let us also imagine that Salinger was a Canadian author and the entire incident had taken place in Canada. In either scenario, if Salinger, the copyright holder of his own letters, had sued the journalist and the media for infringement in a Canadian court, would the defendants benefit from a fair dealing defence, and could the court use the *Charter* to protect the defendants' right to freedom of expression?

If the current Copyright Act applied to this scenario, defendants could raise a fair dealing defence by claiming that they had published the copyrighted materials for a news reporting purpose.²⁹¹ Nevertheless, under the nature of the work factor, the fact that the letters were both confidential and unpublished might tilt the scale towards a finding that the dealing was unfair. As the SCC held in *CCH Canadian Ltd.*, “[a]lthough certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work—one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.”²⁹² Re-conceptualizing fair dealing as a stand-alone defence to promote or protect freedom of expression by the SCC, as Reynolds suggests, would tilt the scale towards a finding of fairness and protecting defendants' freedom of expression.²⁹³ However, because the “news reporting” provision is straightforward and would not lead to different interpretations for a “genuine ambiguity” to

²⁹¹ See Copyright Act, s. 29.2.

²⁹² *CCH Canadian Ltd.*, 30 C.P.R. (4th) at 28.

²⁹³ See Reynolds, *supra* note 275, at 38.

occur, the court could not apply s. 2(b) of the Charter directly to the provision to ensure the protection of the defendants' expressive right.²⁹⁴

Now, suppose Salinger had published the letters in the form of a book, and a Canadian reader had then published a new work parodying his love letter series. While the new work could be read a social commentary on romances more generally, some readers interpreted it as an oblique commentary on Salinger's relationship with Maynard depicted in the original. In addition, the new work contained elements of humor that only a highly sophisticated reader would appreciate. Again, let us imagine that Salinger was a Canadian author and the entire incident had taken place in Canada. Salinger, offended by what he considered a rude and defamatory commentary on his romantic affair as much as by its infringement of his copyright in his novel, had realized that he would have little luck winning a defamation lawsuit.²⁹⁵ He therefore sued the writer and the publisher in a Canadian court for copyright infringement. Could the defendants raise a fair dealing defence, and could the court use the *Charter* to protect the defendants' freedom of expression?

Obviously, the author and the publisher of the imitative work could raise a parody defence against the author's charge of infringement under Canada's new law. Like the previous scenario, re-conceptualizing fair dealing as a stand-alone defence to promote or

²⁹⁴ See *id.* at 39—42.

²⁹⁵ In *Grant v. Torstar*, the SCC, quoting *Jameel & Ors v. Wall Street Journal Europe SpA*, made the public interest defence available "to anyone who publishes material of public interest in any medium", and defined the concept of "public interest" expansively: "Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a 'public figure', as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence." *Torstar*, 79 C.P.R. (4th) at 442.

protect freedom of expression by the SCC would tip the scale towards a finding of fairness and protecting the defendants' right to free expression through making the parodic work.

What about a direct application of the Charter? The court could and should engage the Charter directly when interpreting and applying the “parody” fair dealing provision, in order to prevent the plaintiff from suppressing the defendants' speech. Part One and this chapter have already explained the desirability of a single parody exception encompassing works that target the originals as well as those that comment on something else. Even assuming that a single parody exception was in place, the statutory language might not have defined “parody” succinctly by describing the whole range of works that it encompasses, or stating that the parodic works need not be humorous. This would likely create a situation of “genuine ambiguity.”²⁹⁶ Because the *Théberge* Court held that Canadian copyright law aims both to “obtain[] a just reward for the creator to protect authors' rights and to provide incentives for the creation and dissemination of expressive works,”²⁹⁷ the court would evaluate different conceptions of “parody.” A narrower exception would certainly offer more protection of authors' rights, reduce the likelihood that their works would be used against their wishes, and incentivize them to write more. A broader exception would make a larger range of imitative works legal and might lead to more works in the market. These “differing, but equally plausible, interpretations” of “parody” would allow the court to engage s. 2(b) of the Charter directly when interpreting and applying the parody provision.²⁹⁸ Thus, in this hypothetical, the court could and should interpret “parody” liberally to enable the

²⁹⁶ See Reynolds, *supra* note 275, at 39—40; citing *Bell ExpressVu Ltd.*, 18 C.P.R. (4th) at 308.

²⁹⁷ *Théberge*, 17 C.P.R. (4th) at 176.

²⁹⁸ See *Id.* 40—42, citing *Doré*, 343 D.L.R. (4th) at 219.

defendant's work to pass the first-step of the fair dealing analysis, even though its critique of Salinger's work and its humorous elements were not very obvious. Because the work, albeit serving a commercial purpose as much as providing a commentary on the original, would not likely compete with the original in its market, the court would likely determine that its use of the original was fair in the second-stage fairness analysis.

Finally, even if the court found that the parody had infringed Salinger's original letters in this hypothetical, it should order a remedy in line with s. 2(b) of the *Charter* on the ground that the defendants' speech had values. Compared to granting injunctions, which would suppress the parodist's speech, money damages would have been far more appropriate to compensate for the estimated losses that the parodic work would cause the author. In addition, s. 38 of the Copyright Act raises serious concerns by allowing the plaintiff to "recover possession of all infringing copies of that work or other subject-matter, ... take proceedings for seizure of those copies or plates."²⁹⁹ To protect the defendants' freedom of expression, courts should avoid granting the plaintiff's request to transfer ownership of the parodic work to him.

This chapter has argued that despite the seemingly broad scope of protection offered to imitative works by the Canadian copyright law, a broad parody exception should substitute for the dual parody and satire exceptions to prevent a parody/satire dichotomy and to safeguard the right to parody in Canada. The next chapter will turn to the new parody exemption in British copyright law. Although this exemption seems to meet the definition

²⁹⁹ See Copyright Act, s. 38(1).

proposed in Part One, the right to parody may be threatened by moral rights challenges and will likely be curtailed by a narrow public interest doctrine under British law.

CHAPTER FIVE

THE (DECEPTIVELY) BROAD BRITISH PARODY EXCEPTION

*I may not agree with you, but I will defend to the death your right to make an ass of yourself.*¹

*Imitation is the sincerest form of flattery that mediocrity can pay to greatness.*²

In the United Kingdom, the right to freedom of expression is protected by the Human Rights Act of 1988. The right to parody stems from this freedom. Yet it was not recognized in the copyright context until the introduction of an exemption “for the purpose of caricature, parody or pastiche” in 2014. The exemption, which does not require that parodies target the original works, appears to be broader in scope than its American and Canadian counterparts, and would seem to bring its copyright system in line with its freedom of expression jurisprudence. However, the moral rights provisions in the copyright statute potentially conflict with and circumscribe the parody exception. A narrow public interest doctrine also means that it cannot function as an additional safeguard for free expressions that take the form of parody.

Section I will offer an overview of the British jurisprudence of freedom of expression and parodies in its culture. Section II will examine how the parody exception, while

¹ Oscar Wilde’s quote, in ALAN HAWORTH, *FREE SPEECH: ALL THAT MATTERS* 137 (2015).

² Oscar Wilde, *Quotes*, GOODREADS, <https://www.goodreads.com/quotes/558084-imitation-is-the-sincerest-form-of-flattery-that-mediocrity-can> (last visited Oct. 10, 2017).

promising, may not safeguard free expression. The “humor” requirement will not likely become an obstacle because “British humor” is broad enough to encompass a variety of contents, styles, and sensibilities. However, the seemingly broad parody exception may come into conflict with and become narrowed by the moral rights provisions. After Brexit, British courts may not follow the European Court of Justice’s decision in *Deckmyn v. Vandersteen*, and allow parodies to survive moral rights challenges by drawing upon the right to freedom of expression. Therefore, in assessing a parody for fairness, courts can and should prioritize the market substitution factor and place greater emphasis on the nature of the defendant’s use factor to protect artistic and/political expressions. This section will employ both case law and hypotheses to illuminate how courts, by prioritizing these factors, would promote different parodic works which might otherwise be considered unfair dealings of their underlying works.

Section III will examine why British courts might not be able to apply the parody exception by drawing upon the freedom of expression doctrine. The public interest doctrine in British copyright jurisprudence was narrowly circumscribed by the judgement in *Ashdown v. Telegraph Group Ltd.* In addition, British courts might not follow the *Deckmyn* after Brexit. Hence, unless *Ashdown* is overruled, or the *Deckmyn* decision continues to be followed post-Brexit, courts could not rely upon this external mechanism to safeguard the right to parody. This Section will illuminate how courts could nonetheless resort to an internal solution to help protect artistic and/or political speech by emphasizing the nature of the defendant’s use factor. Regarding potential moral rights claims, only if the *Ashdown* decision is overruled, or *Deckmyn* is followed post-Brexit, would courts be able to draw upon

a broad public interest or freedom of expression doctrine to enable non-defamatory parodies to survive these challenges.

I. FREEDOM OF EXPRESSION AND THE RIGHT TO PARODY IN THE UNITED KINGDOM

In the U.K., freedom of expression is protected under the Human Rights Act 1988 (HRA), which incorporates most of the substantive provisions of the European Convention on Human Rights (ECHR) into its domestic law.³ English law, however, has traditionally taken little notice of freedom of speech.⁴ Magna Carta, which retains a potent symbolic power through its recognition of the basic liberties of “freemen of the realm” and the state’s obligation to protect them, has been of little practical importance.⁵ The Bill of Rights 1689, which contains specific declarations of rights, only protected freedom of speech of members of Parliament but not that of citizens.⁶ Prior to 1998, British citizens did not enjoy any textual guarantee to freedom of speech, which existed in the form of a residual liberty.⁷ Hence, they were free to express an opinion or disclose information only when the expression was not forbidden by legislation or the common law.⁸

³ See Human Rights Act, 1998, c. 42.

⁴ Eric Barendt, *Freedom of Expression in the United Kingdom under the Human Rights Act 1998*, 84 IND. L.J. 851, 851 (2009); Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT’L L.J. 329, 330 (2002).

⁵ Vick, *supra* note 4, at 337.

⁶ *Id.*

⁷ *Id.* at 330, 341.

⁸ Barendt, *supra* note 4, at 852—53.

In the pre-HRA era, British judges nonetheless had demonstrated a willingness to address free speech claims for many years by relying upon societal traditions to check the abuse of governmental powers to restrict the “fundamental human right” to freedom of speech.⁹ Thus, they have often articulated a common law right to this freedom.¹⁰ This liberal approach to the freedom of speech, despite the lack of a strong free speech tradition in English law, was particularly obvious during the passage of the HRA in Parliament and in the period between its enactment and its coming into effect in October 2000.¹¹ The HRA marked a shift in the treatment and perception of freedom of expression from a residual freedom, one with an uncertain common law status, to a positive right explicitly recognized

⁹ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 187, 197 (2006). *Brind* demonstrates that the absence of a written provision protecting free expressions does not bar consideration of speech interests as either a “right” or a decisional “principle”: Three of the five Law Lords viewed free expression as a fundamental “right.” While all five Lords believed that when an administrator promulgates a regulation that impinges on free expression, the regulation must receive “close” or the “closest scrutiny” and/or further an “important public interest.” *Id.* at 197, *citing* *R v Secretary of State for the Home Department ex p Brind* [1991] 1 A.C. 696 (E.W.C.A. Civ.).

¹⁰ Barendt, *supra* note 4, at 852—53. The classic example is Lord Reid in *Brutus v. Cozens*, which argued that the word “insulting” in the public order legislation should not be construed to penalize the use of offensive language during an anti-apartheid demonstration at Wimbledon. [1972] UKHL 6, [1973] A.C. 854 (H.L.) (appeal taken from Eng.). In some cases they have even said that the common law extended the same protection to exercise of the freedom as the ECHR. One example is *Derbyshire County Council v. Times Newspapers Ltd.*, in which the Court of Appeal invoked the Convention to develop the common law where there were conflicting first instance precedents. [1993] A.C. 534 (H.L.) (appeal taken from Eng.).

¹¹ Barendt, *supra* note 4, at 853—54. The sympathetic approach to freedom of speech is evidenced in two leading decisions of the House of Lords at that time. In *R. v. Secretary of State for the Home Department*, it held that provisions in the Prison Service Standing Orders should not be applied to prevent prisoners giving interviews to journalists unless the latter agreed not to publish the interview. In his leading speech, Lord Steyn asserted that “the starting point is the right of freedom of expression, as strongly protected in the common law as it is under the Convention.” [2000] 2 A.C. 115 (H.L.) (appeal taken from Eng.). In *Reynolds v. Times Newspapers Ltd.*, Lord Steyn referred to “a constitutional right to freedom of expression in England,” which “will shortly be buttressed by statutory requirements” of the HRA, impelling the House of Lords to extend the qualified privilege defense to cover the publication by the media to the general public of defamatory allegations, at least where the publication was in the public interest and the requirements of responsible journalism had been satisfied. [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.).

by law.¹² Article 10(1) of the HRA, which is identical to Article 10 of the European Convention, provides that “[e]veryone has the right to freedom of expression,” including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”¹³ Article 10(2) also directly limits its scope, stating that: “the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.”¹⁴ Since then, courts have confidently asserted the fundamental nature of the right to freedom of expression and demanded careful scrutiny of any restriction on this right.¹⁵ In *R. v. Shayler*, the first important free speech case after the HRA came into force, Lord Bingham stated confidently that this fundamental right had been recognized in common law for some time, but was now “underpinned by statute.”¹⁶ Another example is the more recent *Laporte* case, in which he compared the common law’s approach to the freedom of expression, which was “hesitant and negative,” with the “constitutional shift” represented by Articles 10 and 11 of the HRA, according to which the freedoms of expression and association are “fundamental rights” and “[a]ny prior restraint on their exercise must be scrutinised with particular care.”¹⁷

¹² Vick, *supra* note 4, at 330; Barendt; *supra* note 4, at 851.

¹³ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221, 230.

¹⁴ *Id.* art. 10(2).

¹⁵ Barendt, *supra* note 4, at 854—55.

¹⁶ *Id.* at 854, *citing* *R. v. Shayler* [2002] UKHL 11, [2003] 1 A.C. 247, paras. 21—22 (appeal taken from Eng.).

¹⁷ *Id.*, *citing* *R (on the application of Laporte) v. Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 A.C. 105, paras. 34, 85 (appeal taken from Eng.).

The HRA stipulates that the exercise of freedom of expression is limited “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”¹⁸ Even before the HRA, laws had been enacted throughout the history of England and the U.K. to protect national security, including different versions of the Treason Act and the Seditious Libel Act criminalizing disloyalty against the Crown and the nation.¹⁹ Defamation law similarly had a long, though somewhat obscure, history in England.²⁰ For a long time, English law had put the burden of proving the truth of allegedly defamatory statements on defendants, and had not recognized any general privilege for the press or for anyone else to defame even a prominent public figure on the ground that it expresses the writer’s honest and reasonable belief on a matter of public interest.²¹ Regarding public morality, the 1727 judgment against bookseller Edmund Curl for the publication of *Venus in the Cloister; or, The Nun in her Smock* established obscene libel as an offence at English common law, and became “the first recorded instance of a conviction on grounds of obscenity in the English-speaking world.”²² The 1857 Obscene

¹⁸ Human Rights Act, 1998, c. 42, art. 10(2).

¹⁹ See, e.g., Treason Act, 1351, c. 2; Treason Act, 1695, c. 3; Treason Act, 1708, c. 21; Treason Act, 1945, c. 44; *Sedition Act*, 1661, c. 1.

²⁰ The common law action for defamation was established in sixteenth-century England. Reputation was protected by the law—meaningfully albeit narrowly—from the twelfth to the sixteenth century in local and ecclesiastical courts. LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 68—79 (2007).

²¹ See, e.g., *Campbell v. Spottiswoode* [1863] 3 B. & S. 769, 777 (Q.B.); *Blackshaw v. Lord* [1984] 1 Q.B. 42 (E.W.C.A.).

²² DEREK JONES, CENSORSHIP: A WORLD ENCYCLOPEDIA 311 (2001).

Publications Act empowered magistrates to order the destruction of offending books and prints.²³ In *Regina v. Hicklin* (1868), Chief Justice Cockburn further interpreted the word “obscene” in this Act to mean a “tendency to deprave and corrupt the minds and morals of those who are open to such immoral influences, and into whose hands a publication of this sort might fall,” a standard which made many works of literature—not merely pornographic materials—illegal.²⁴

Over the past few decades, the above laws and policies have been replaced by more lenient ones. In some cases, more relaxed laws were enacted long before the HRA. For example, the Obscene Publications Act 1959 introduced a defence of merit on the grounds of “science, literature, art or learning.”²⁵ After the Court found that *Lady Chatterley’s Lover*, once declared obscene under the *Hicklin* test, had literary merit and its publication was legal, publishers in different media enjoyed far more freedom to publish sexually explicit materials.²⁶ Much more recently, the Defamation Act 2013 introduced new statutory defences of truth, honest opinion, and “publication on a matter of public interest,” which are

²³ LEONARD FREEDMAN, *THE OFFENSIVE ART: POLITICAL SATIRE AND ITS CENSORSHIP AROUND THE WORLD FROM BEERBOHM TO BORAT* 82 (2009). In fact, the Society for the Suppression of Vice, dominated by Church of England clergy, businessmen, lawyers, and civil servants, was set up in London in 1802, to pursue and prosecute a network of distributors of “indecent.” Targets included not just books and images, but “toys and snuff boxes with abominable devices imported in immense quantities from France.” The Society hired informers to purchase the goods, so that it could initiate private prosecutions. *Id.* at 14.

²⁴ *Regina v. Hicklin* [1868] 3 Q.B. 360, 371 (Q.B.); Katherine Mullin, *Poison More Deadly than Prussic Acid: Defining Obscenity after the 1857 Obscene Publications Act (1850–1885) in PRUDES ON THE PROWL: FICTION AND OBSCENITY IN ENGLAND, 1850 TO THE PRESENT DAY* 19–20 (David Bradshaw & Rachel Potter eds., 2013). According to Mullin, the *Hicklin* test has been understood as a “watershed moment ‘extending the Act to other than traditional pornographic material intended for sexual gratification’ and marking the beginnings of a legal crusade against the literary ‘obscene’.” *Id.* at 18.

²⁵ FREEDMAN, *supra* note 23, at 82.

²⁶ *Id.* at 83.

especially empowering for the media in expressing opinions about public figures.²⁷

Certainly, laws that threaten people's speech freedom have continued to be established in the name of national security. An example is the Terrorism Act 2006, passed after 9/11 in the U.S. and the bombing of London underground trains and buses in 2005, which makes it an offense to publish material likely to be understood by members of the public who read or hear it as a direct or indirect encouragement of terrorism or a glorification of terrorism.²⁸ Yet in 2009, the U.K. Government abolished the offence of seditious libel, which made criticism of the Monarch or the Government a criminal offence and was used to silence political dissent.²⁹

Compared to laws protecting national security and banning obscene and defamatory expressions, laws prohibiting hate speech are relatively recent. With the influx of immigrants in the twentieth century, the Race Relations Acts were passed to maintain a multiracial and tolerant society.³⁰ Later, the Public Order Act 1986 made it an offence,

²⁷ The government said that the Act would reverse the "chilling effect" the former defamation laws had on freedom of expression and legitimate debate, by provide "clearer, better protection for people publicly expressing opinions" than the old laws did. Clive Coleman, *Defamation Act 2013 Aims to Improve Libel Laws*, BBC NEWS (Dec. 31, 2013), <http://www.bbc.com/news/uk-25551640> (last visited Oct. 10, 2017).

²⁸ Under this Act, enacted after the London bombings in July 2005, the prosecution need not prove that any particular acts of terrorism were encouraged, that any person was encouraged to commit such an act, or that the publication was likely to instigate an imminent act of terrorism. In addition, the reporting of the trials of defendants prosecuted under the Terrorism Act was censored. For instance, the trials of defendants in *R. v. Incedal and Rarmoul-Bouhadiar* were mostly held in secret and reporters who attended them were prohibited by law from reporting it to the public. Ian Cobain, *Why Is the Crux of the Incedal Case a Secret? You're Not Allowed to Know*, THE GUARDIAN (Mar. 26, 2015), available at <https://www.theguardian.com/law/2015/mar/26/erol-incedal-case-secret-trial-terror> (last visited Oct. 10, 2017).

²⁹ E.g., Index on Censorship, *UK Government Abolishes Seditious Libel and Criminal Defamation*, HUMAN RIGHTS HOUSE (Jul. 13, 2009), <http://humanrightshouse.org/Articles/11311.html> (last visited Oct. 10, 2017).

³⁰ FREEDMAN, *supra* note 23, at 86.

among other things, to use “threatening, abusive or insulting” words, behavior, or written material, with the intent to “stir up racial hatred,” or in circumstances where racial hatred is “likely to be stirred up.”³¹ The Racial and Religious Hatred Act of 2006, in response to terrorist attacks, extends the proscription of incitement to racial hatred to protect “group[s] of persons defined by reference to religious belief or lack of a religious belief.”³² The law aimed to protect Muslims who are not distinct “ethnic” groups protected by the proscription of racial hatred, and Christians who are no longer protected by the law on blasphemy.³³ Due to a broad provision explicitly protecting freedom of expression, only the use of “threatening words or behavior” or “written material” intended to “stir up religious hatred” would be an offence.³⁴ Similarly, the Criminal Justice and Immigration Act 2008, which amended Part 3A of the Public Order Act, made it an offence to incite hatred on the ground of sexual orientation through the use of words, behavior or written material, public performances, broadcasting programs, or possession of inflammatory materials that are “threatening” and not merely abusive or insulting.³⁵

Unsurprisingly, there has been a decline in censorship in Britain on the grounds of obscenity, national security, or potentially defamatory materials over the years. The

³¹ Public Order Act, 1986, c. 4, s. 18(1).

³² Racial and Religious Hatred Act, 2006, c. 1, s. 29(A).

³³ Barendt, *supra* note 4, at 856.

³⁴ Barendt notes that the new law looks “purely cosmetic,” because it is unclear in what circumstances a person could be prosecuted for incitement to religious hatred, where his or her speech would not already be caught by existing public order law or covered by the wide freedom of expression provision. *Id.* at 857.

³⁵ Criminal Justice and Immigration Act, 2008, c. 4, s. 74; see *Sexual Orientation: CPS Guidance on Stirring up Hatred on the Grounds of Sexual Orientation*, THE CROWN PROSECUTION SERVICE (Mar. 17), 2010, http://www.cps.gov.uk/legal/s_to_u/sexual_orientation/ (last visited Oct. 10, 2017).

censorship of printed literature for obscenity is largely a thing of the past.³⁶ Books and media were banned for national security reasons,³⁷ but the censorship of potentially defamatory materials³⁸ will become increasingly uncommon due to a higher legal standard of what constitutes defamation. However, laws governing hate speech, which have led to the censorship or self-censorship of offensive materials, may potentially restrict freedom of expression in the future. In fact, the Criminal Justice and Immigration Act 2008 has not guaranteed the freedom of expressing opinions against sexual minorities even where they are not threatening.³⁹ Even in cases where the offensive materials are not forbidden by law,

³⁶ JOE BROOKER, *THE ART OF OFFENCE: BRITISH LITERARY CENSORSHIP SINCE 1971 (1971–THE PRESENT DAY)* 205 (2013). The last literary work to be successfully prosecuted under the 1959 Act was Hubert Selby’s *Last Exit to Brooklyn*, which was banned as obscene by a jury, but then cleared when this verdict was overturned for technical reasons by a court of appeal in 1968. *Id.* at 180. Obscenity in drama, on the other hand, has an unresolved status since the inconclusive outcome of the *Romans in Britain* trial in 1982. It involved Howard Brenton’s play, which contained a scene in which a Roman soldier attempts the anal rape of a young, male Celt. Justice Staughton rejected the defence that the Sexual Offences Act was not applicable to the simulated behavior of the theatre stage. The prosecution team nonetheless requested an adjournment and the Attorney-General was obliged to enter the verdict of *nolle prosequi*, an unwillingness to prosecute. *Id.* at 188–89, 204.

³⁷ One example was *Spycatcher*, written by former secret service agent Peter Wright, as well as newspaper reports of the book, which were banned by the British Government for their breach of confidentiality during the period from 1985 to 1988. In 1988, Law Lords ruled the media could publish extracts from the book, on the ground that any damage to national security has already been done by its publication outside of England, but agreed the book constituted a serious breach of confidentiality. Despite the defeat, Home Secretary Douglas Hurd claimed the ruling “vindicated” the government’s attempts to ban it to preserve its life-long “duty of confidentiality.” 1988: *Government Loses Skycatcher Battle*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/13/newsid_2532000/2532583.stm (last visited Oct. 10, 2017).

³⁸ One example was *Unlawful Killing*, the 2011 British documentary film questioning the circumstances of the deaths of Princess Diana and Dodi Fayed. Ben Child, *Princess Diana Documentary Unlawful Killing Is Shelved*, THE GUARDIAN (Jul. 5, 2012), available at <https://www.theguardian.com/film/2012/jul/05/princess-diana-documentary-unlawful-killing> (last visited Oct. 10, 2017).

³⁹ For instance, in *Core Issues Trust v. Transport for London*, a Christian charity’s attempt to put advertisements on London buses that say “NOT GAY! EX-GAY, POST-GAY AND PROUD. GET OVER IT!” was rejected by the bus company. The court held that advertisements on buses were “highly intrusive” and the plaintiff’s ad would “cause grave offence to a significant section of the many inhabitants of London.” In addition, it would interfere with their right to respect for private and family life under Article 8(1) of the ECHR, rather than contributing to a “reasoned debate.” Finally, the

unofficial or de facto censorship may occur.⁴⁰ In 1989, when the Ayatollah Khomeini pronounced a *fatwa* on Salman Rushdie for his work *The Satanic Verses*, Rushdie went into hiding, while publishers, fearing violent reprisals, delayed publishing the paperback copy of the book, and some bookstores ceased to stock it or kept it hidden under the counter.⁴¹ In 2004, Birmingham Repertory Theatre was forced to cancel performances of the play called *Behzti*, which contained a rape scene in a Sikh temple, due to violent protests from the Sikh community.⁴²

Hence, British are arguably entitled to the right to parody, as long as their parodies neither violate the laws on national security, obscenity and defamation, nor constitute hate speech by targeting racial, ethnic, and religious groups or sexual minorities. Indeed, parody has enjoyed a long history in English culture and literature. Whereas the first usage of the term did not appear until the very late sixteenth century, parody as a literary form can be found as early as in medieval England in what today's literary critics described as the parody or burlesque genre of imitative, satirical works.⁴³ In the Victorian era, such writers as Lewis Carroll, A.C. Hilton, and James Kenneth Stephen gave parody a significant boost.⁴⁴ Oscar

advertisement was "homophobic" and the defendants would have been acting in breach of their equality duty should they allow it. [2013] 22 H.R.L.R. 434, 464 (Q.B.).

⁴⁰ Brooker, *supra* note 36 at 202.

⁴¹ *Id.* at 201—202.

⁴² Sarah Left, *Play Axed after Sikh Protests*, THE GUARDIAN (Dec. 20, 2004), available at <https://www.theguardian.com/uk/2004/dec/20/arts.religion1> (last visited Oct. 10, 2017).

⁴³ According to the *Oxford English Dictionary*, the first usage of the term in England was found in Ben Johnson's *Every Man in His Humour* in 1598: "A Parodie, a parodie! to make it absurder than it was." Martha Bayless nonetheless discovered its first appearances in medieval England. MARTHA BAYLESS, *PARODY IN THE MIDDLE AGES: THE LATIN TRADITION* (1997).

⁴⁴ Christian Rutz, *Parody: A Missed Opportunity?* 3 INTELL. PROP. Q. 284, 287 (2004).

Wilde parodied different literary conventions to satirize Victorian society.⁴⁵ The satirical form of parodies also became associated with both censorship and de-censorship. In 1873, *The Happy Land*, a musical play co-authored by F. Tomline (W.S. Gilbert) and Gilbert à Beckett, parodied Gilbert's earlier work *The Wicked World* to criticize its contemporary government.⁴⁶ After the actors turned their characters into caricatures of real-life politicians on the opening night of the play, the Lord Chamberlain withdrew the licence of the play before later restoring a censored and a much milder version of it.⁴⁷ The twentieth century, which saw a loosening of censorship laws and turbulent events like the two World Wars, witnessed a continued trend of using parody to criticize social and political mores.⁴⁸

⁴⁵ E.g., RUTH ROBBINS, *OSCAR WILDE* 56 (2011); AMY S. WATKIN, *BLOM'S HOW TO WRITE ABOUT OSCAR WILDE* 188 (2010); GEORGE ROWELL, *THE VICTORIAN THEATRE 1792-1913, A SURVEY* 111 (1956).

⁴⁶ Andrew Crowther, *Background of The Happy Land*, THE GILBERT AND SULLIVAN ARCHIVE, http://www.gilbertandsullivanarchive.org/gilbert/plays/happy_land/background.html (last visited Oct. 10, 2017).

⁴⁷ The three politicians being caricatured were the William Ewart Gladstone (Prime Minister), Robert Lowe (Chancellor of the Exchequer), and A.S. Ayrton (Commissioner for Public Works). At that time, plays were licensed by the Reader of Plays at the Lord Chamberlain's office and direct political satire was one thing the Office did not allow in plays. The Lord Chamberlain later restored the play on condition that the three characters were no longer made up to look like the real-life politicians, and that they adhered to the script in the Licensing Copy. *Id.*

⁴⁸ One example is the first violent scene in *Clockwork Orange* (1962), Anthony Burgess' highly controversial—albeit never banned—novel, which parodies the terms of debate in the trial on *Lady Chatterley's Lover* and its procedures. In this scene, the four teenaged gang members harass and assault an elderly man after finding objectionable the three crystallography textbooks he has carried home from the public library. By having the four self-appointed jurors base their verdict of guilty and mete out their punishments on the grounds that they are obscene, Burgess satirizes the motivations of those who based the charge of obscenity on certain words extracted from the book without reference to their overall context. Rod Mengham, *Bollocks to Respectability: British Fiction after the Trial of Lady Chatterley's Lover (1960–1970)*, in *PRUDES ON THE PROWL: FICTION AND OBSCENITY IN ENGLAND, 1850 TO THE PRESENT DAY* 265 (David Bradshaw & Rachel Potter eds., 2013).

II. THE RIGHT TO PARODY IN BRITISH COPYRIGHT LAW

The road towards a parody exception in British law was nonetheless a long, bumpy one. Certainly, since the incidents of *The Satanic Verses* and *Behzti*, authors may have felt inhibited from producing parodies that are merely insulting to certain groups but that do not violate hate speech laws. In addition, speech that inflames racial, ethnic, and religious groups, and topics such as rape and child molestation are generally regarded as unfit subjects for public expressions of humor.⁴⁹ These controversial issues aside, copyright might disentitle British citizens from making parodies. Yet before 2014, neither British statutory law nor common law entertained a copyright exception to accommodate parodies regardless of their subject matter. As the following subsection will show, despite promises of a parody exception to copyright infringement in various judicial decisions from the late nineteenth through the mid-twentieth century, courts denied the parody defence in subsequent decisions on the ground that the parodies borrowed too much from the original works.

A. Thwarted Promises of a Parody Exemption Pre-2014

The earliest English case that implicitly involved a parody defence is *Hanfstaengl v. Empire Palace* (1894).⁵⁰ An artist whose paintings had been represented by the *Empire Theatre* in the form of *tableaux vivants* brought infringement actions against the *Daily*

⁴⁹ In July 2001 the satirical TV program, *Brass Eye*, presented a spoof of the media's hyping of pedophile cases by inveigling celebrities into reciting absurd "facts" such as, "We have footage, too alarming to show you, of a little boy being interfered with by a penis-shaped sound wave generated by an online pedophile." It concluded with a fictional crowd capturing a pedophile and burning him on a 25-foot phallus. The program was met with protests from the distressed public as well as rebukes from government ministers. Freedman, *supra* note 23, at 83—84.

⁵⁰ *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (H.L.); James R. Banko, "Schlurppes Tonic Bubble Bath": *In Defense of Parody*, 11 Pa. J. INT'L BUS. L. 627, 634 (1990).

Graphic and the *Westminster Budget* for printing sketches of the *tableaux vivants*.⁵¹

Although the Court did not address whether the sketches offered possible “criticism” of the originals, it focused on their purposes and likelihood of substituting for the plaintiff’s originals to determine that they were not copies or reproductions of the originals within the meaning of s. 1 of the Fine Arts Copyright Act, 1862.⁵² The Court stated that the copyright statute aimed “both to protect the reputation of the artist from being lessened in the eyes of the world, and also to secure him the commercial value of his property.”⁵³ The defendants’ copies were “rough sketches, made for a very different purpose and answering a very different purpose, that purpose being, not to give an idea of the plaintiff’s pictures, but to give a rough idea of what is to be seen at the Empire Theatre.”⁵⁴ Because there was “no piracy, actual or intended,” and no possibility of confusion, the defendants’ sketches were not infringements of the originals.⁵⁵

Although the Copyright Act 1911, like the 1862 statute, also failed to provide for a parody exception, case law in the early-twentieth century continued to imply a parody exception in copyright disputes by emphasizing the amounts of the original works used in the new works. In *Francis, Day & Hunter v. Feldman & Co.* (1914), the Court held that the defendants’ song, which was based upon and responded to the plaintiffs’ work, did not

⁵¹ Scenes “presented on stage by costumed actors who remain silent and motionless as if in a picture.” [French, “living pictures.”] AMERICAN HERITAGE DICTIONARY 1236 (1982). *Id.*

⁵² *Hanfstaengl* [1894] 3 Ch. at 130—32.

⁵³ *Id.* at 133.

⁵⁴ *Id.* at 132.

⁵⁵ *Id.* at 130.

infringe its copyright.⁵⁶ Here, the copyright owners of “You made me love you (I didn’t want to do it)” alleged that the defendants infringed their copyright by printing, selling, and otherwise disposing of a song called “You didn’t want to do it—but you did.”⁵⁷ The Court held that “colourable imitation” means “the reproduction of a work or of any substantial part of it in any material form,” and copyright does not extend to phrases, ideas, or methods.⁵⁸ Although the defendants’ song was based upon the plaintiffs’ work and the composer had the original before him or in his mind at the time he wrote it, it did not serve as a substitute for the original and did not infringe its copyright.⁵⁹

In *Glyn v. Weston Feature Film Co.* (1916), the Court not only focused on the amount of the original work copied but also emphasized the originality of the new work.⁶⁰ The author and copyright owner of the novel “*Three Weeks*” alleged that the defendants’ cinematograph films under the title of “*Pimple’s Three Weeks (without the Option)*” reproduced substantial parts of the novel, and demanded, among other things, an injunction to restrain the defendant from selling, letting, or authorizing their public exhibition or otherwise infringing the plaintiff’s copyright as well as damages.⁶¹ The Court held that “[t]he great bulk of the film is taken up with happenings which have no counterpart in the novel; a great part of the novel is

⁵⁶ *Francis, Day & Hunter v. Feldman & Co.* [1914] 2 Ch. 728 (E.W.C.A.).

⁵⁷ CATHERINE COLSTON, *PRINCIPLES OF INTELLECTUAL PROPERTY* 194—195 (1999), referring to the original decision.

⁵⁸ *Id.* at 195.

⁵⁹ *Id.*

⁶⁰ *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261 (E.W.H.C. ch.).

⁶¹ *Id.*

taken up with other incidents which have no counterpart in the film.”⁶² Because the amount of the taking was not substantial, the film did not constitute any infringement of the plaintiff’s copyright in the novel.⁶³ The judge further emphasized 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.”⁶⁴ The defendant’s work, which appropriated only a limited portion of the old work, became an original work in its own right.⁶⁵

The parody defence was raised, addressed, and accepted for the first time in *Joy Music Ltd. v. Sunday Pictorial Newspapers (1920) Ltd.* (1960). The copyright owners of the popular song “Rock-a-Billy” claimed that the defendant infringed their copyright by publishing “Rock-a-Phillip Rock!” in a newspaper feature article titled “Rock-a-Philip, Rock! Rock!”⁶⁶ The defendant claimed that he intended to write a parody of the song “Rock-a-Billy” to poke fun at the activities of H.R.H. Prince Philip.⁶⁷ The Court held that in considering whether a parody of a literary work infringed 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

⁶² *Id.* at 269.

⁶³ *Id.*

⁶⁴ *Id.* at 268.

⁶⁵ *Id.* at 268—69.

⁶⁶ *Joy Music, Ltd. v. Sunday Pictorial Newspapers (1920) Ltd.* [1960] 2 Q.B. 60 (Q.B.).

⁶⁷ *Id.*

original work.”⁶⁸ According to the English Copyright Act of 1956, the reproduction of a work for the purpose of a finding of copyright infringement means the reproduction of “a substantial part of the [original] work.”⁶⁹ Although the defendant’s parody had its origin in the song “Rock-a-Billy,” it was “produced by sufficient independent new work to be in itself not a reproduction of the words of the original song but a new original work,” and therefore was not a reproduction of a substantial part of the original work within the meaning of s. 49(1) of the statute.⁷⁰ In addition, the value of the song was already considerably exhausted by the time of publication of the article.⁷¹ While the Court did not address the plaintiffs’ concern that the new song targeted not the original but an unrelated figure, it impliedly endorsed a broad definition of parody encompassing works targeting originals as well as those criticizing or commenting on something else.

In 1983, the Chancery Division of the High Court of Justice nonetheless denied the legitimacy of the parody defence in *Schweppes Ltd. v. Wellingtons Ltd.* by reverting to the substantial use test used in the earlier cases.⁷² The plaintiffs in this case held the copyright of their yellow and gold label bearing the word “SCHWEPPES” on their tonic water bottles.⁷³ They alleged that the defendants infringed their copyright by selling tonic bubble bath in bottles “bearing two yellow labels which have a very close resemblance indeed to the

⁶⁸ *Id.* at 70.

⁶⁹ Copyright Act, 1956, c. 74, s. 49(1).

⁷⁰ *Joy Music Ltd.* [1960] 2 Q.B. at 70.

⁷¹ *Id.*

⁷² *See Schweppes Ltd. v. Wellingtons Ltd.* [1984] F.S.R. 210 (E.W.H.C. ch.).

⁷³ *Id.* at 211.

corresponding labels on the plaintiffs' bottle," the only difference being that "Schweppes" had been changed into "Schlurppes."⁷⁴ The defendant, conceding they had taken a substantial part of the plaintiffs' label, relied on the judgment in *Joy Music* to argue that they had labored to make the bottle a parody.⁷⁵ The Court nonetheless rejected the defendant's defence. It emphasized that the test is always: "Has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work?" and pointed out that evidence of sufficient alteration and even originality were beside the point if the resulting work reproduced "a substantial part" of the plaintiffs' work without a licence.⁷⁶

In *Williamson Music Ltd. v The Pearson Partnership Ltd.* (1986), the same Court continued to apply the substantial use test to reject the parody defence.⁷⁷ In this case, the plaintiffs were the owners of the copyright in Rodgers and Hammerstein's musical *South Pacific* and the music and lyrics of the song "There is Nothin' Like a Dame."⁷⁸ When the defendants advertised a service of express coaches between London and other places in the U.K. with a jingle imitating "There is Nothin' Like a Dame," the plaintiffs sued for copyright infringement. The defendants argued that their new song was a parody of the plaintiffs' by showing evidence of the composer's creative effort.⁷⁹ The Court determined that the only

⁷⁴ *Id.*

⁷⁵ *Id.* at 212.

⁷⁶ *Id.* at 212—13. Justice Falconer rejected the defendants' parody defence by stating that in *Joy Music*, the actual words of the song were not reproduced, but a new, original version of it was issued, and there was no reproduction of a substantial part of the original. In contrast, the Schlurppes label reproduced a very substantial part of the original design by using a nearly identical shape, design and color scheme. *Id.*

⁷⁷ *Williamson Music Ltd. v. The Pearson Partnership Ltd.* [1987] F.S.R. 97 (E.W.H.C. ch.).

⁷⁸ *Id.* at 98.

⁷⁹ *Id.* at 108—11. They also conducted a survey in Birmingham, in which over 130 people picked at random from the street were asked to listen to a recorded piano version of the tune of the parody. Five

relevant test was the “substantial part test” as put forward in the *Schweppes*, “whether a substantial portion has been taken, not whether a substantial change or addition has been effected.”⁸⁰ Acknowledging the fact that the parody was not at all “a slavish copy” of the original, it nonetheless relied on the reports obtained by the plaintiffs, including one by a reputable conductor and composer, which stated that the harmony, rhythmical patterns, melodic elements and overall structure of the defendants’ song were strongly dependent on the original, such that the former would not have come into existence but for its heavy reliance on the latter.⁸¹ The Court also rejected the defendants’ argument that a certain sequence of chords was of “the simplest and most obvious” nature and could not be the plaintiffs’ original creation, and that the defendants’ sequence was not an exact repetition but a different chord progression.⁸² It emphasized that infringement of copyright in music “is not a question of note for note comparison, but of whether the substance of the original copyright work is taken or not,” which is “to be determined by the ear as well as by the eye.”⁸³ Because hearing the parody as a whole produced an impression of the original and “the effect on the ear was one of noticeable similarity,” a substantial part of “Nothin’ Like a Dame” was present in the defendants’ advertisement and the test of substantiality was satisfied.⁸⁴

respondents responded that they thought the tune was “There is Nothin’ Like a Dame” and four others said that the tune reminded them of it. *Id.* at 111.

⁸⁰ *Id.* at 109.

⁸¹ *Id.* at 109—10.

⁸² *Id.* at 110.

⁸³ *Id.* at 108.

⁸⁴ *Id.*

When the Copyright, Designs and Patents Act 1988 (CDPA) first came into force, fair dealing defences were limited to the defined purposes of research and private study, criticism and review, and reporting current events.⁸⁵ In a more recent case, *Allen v. Redshaw* (2013), which raised the possibility of a parody defence, the Court continued to focus on the amount of the original copied.⁸⁶ Here, the claimant was an artist, writer and puppeteer who devised with his business partner a stage puppet show called “Mr Spoon on Button Moon,” for which he designed its puppets, sets and props and produced numerous drawings and paintings.⁸⁷ After Thames Television commissioned a Button Moon television series based upon the stage show, the claimant continued to own the rights in all the underlying artistic works.⁸⁸ He sued the defendant for passing off and infringement of copyright, in his sale of china mugs, T-shirts, and sweatshirts decorated with a design which copied the Mr Spoon character, the rocket and the button moon.⁸⁹ The defendant claimed that he intended to create a “combined parody/joke product” that bore “only a passing resemblance” to the claimant’s works and pointed to the “distinct differences which set them apart.”⁹⁰ The Court held that regardless of the defendant’s motives, there is no defence of parody to an infringement of copyright claim if the defendant copies a substantial part of the claimant’s

⁸⁵ Copyright, Designs and Patents Act, 1988, c. 48, ss. 29, 30.

⁸⁶ *See Allen v. Redshaw* [2013] 2013 WL 2110623 (P.C.C.)

⁸⁷ *Id.* para. 2.

⁸⁸ *Id.* para. 3.

⁸⁹ *Id.* para. 4.

⁹⁰ *Id.* at paras. 21—23. The defendant claimed: “his (the claimant’s) artwork is a 3D ‘stop-go’ animation using puppets, and ours is a blatantly a 2D drawing. Its composition is totally made by ourselves and has several unique elements. It has no reference to Button Moon or Mr Allen or any other trademark or copyright.” *Id.* para. 21.

work.⁹¹ Not only did the defendant copy substantial elements of the claimant's original designs, evidenced by "[t]he same or a substantially similar design" on the mug and on the cardboard box in which the mug is presented, but there existed "a causal connection between the parties' respective works," whether the copying was direct or indirect.⁹² The fact that the defendant combined the rocket design with the wording of a recycling slogan did not make it a parody of the claimant's designs or entitle the defendant to a parody defence.⁹³

B. Calls for a Parody Exception in British Copyright Law

The foregoing decisions show that despite promises of a parody defence to copyright infringement in judicial decisions up until the mid-twentieth century, the substantial use test was subsequently employed by courts to deny this exception to defendants who claimed that they intended to parody plaintiffs' works. However, the courts did not rule out the parody defence. The court in *Allen* implied that parody might serve as a defence, only that it must not copy a substantial part of the original work. For a long time, many scholars had called for an explicit parody exception in copyright law.

James Banko (1990) contends that the parody defence should serve as a legitimate shield to a *prima facie* finding of infringement.⁹⁴ He criticizes the indeterminacy of the substantial use test by pointing out that the meaning of "substantial" is "murky."⁹⁵ In

⁹¹ *Id.* paras. 30—31.

⁹² *Id.* paras. 29, 31.

⁹³ *Id.* para. 30.

⁹⁴ James Richard Banko, "*Schlurppes Tonic Bubble Bath*": *In Defense of Parody*, 11 U. PA. J. INT'L BUS. L. 627, 653 (1990).

⁹⁵ *Id.* at 652—54.

addition, this test ignores the fact that a successful parody may copy a “substantial” amount and still deserve a defence against an action to enjoin it.⁹⁶ Drawing upon American case law, Banko argues that after an initial finding that a work is a parody, the court should examine whether it directly competes with the original work: only a parody that directly competes with the market for the original constitutes infringement.⁹⁷ If there is no economic harm caused by direct competition, there is no infringement and the parody may not be enjoined.⁹⁸

Christian Rutz (2004) emphasizes that parody deserves protection under the HRA and criticizes the CDPA for not providing for a parody defence against copyright infringement.⁹⁹ After critiquing the substantial use test, Rutz contends that the exemptions of criticism and review in s. 30(1) would not serve as an adequate defence for parody, as they require explicit identification and acknowledgment of the original.¹⁰⁰ In addition, the moral rights provisions in ss. 80(1) and (2) may create an additional obstacle “by preventing additions or alterations to, deletions from, or adaptations of a copyright work which amount to distortion or mutilation of the work or are otherwise prejudicial to author or director’s honor or reputation.”¹⁰¹ Rutz proposes to introduce a flexible fair use defence in the CDPA to accommodate freedom of speech, which should apply whether the parody focuses mainly on the work parodied or directs criticism or commentary on general aspects of life or social

⁹⁶ *Id.* at 653.

⁹⁷ *Id.* at 639—41.

⁹⁸ *Id.* at 654.

⁹⁹ Christian Rutz, *Parody: A Missed Opportunity?* 3 INTELL. PROP. Q. 284, 289—93 (2004).

¹⁰⁰ *Id.* at 285, 289—291

¹⁰¹ *Id.* at 292.

values.¹⁰² Thus, the defence provision should not define parody too precisely, and should contain some minimal requirements. For example, it can require that a parody not copy “significantly more than is adequate to conjure up the original work in the interest of humour and criticism.”¹⁰³

Alina Walsh (2010) laments that the “caricature, parody, or pastiche” exception in the Copyright Directive, enacted by the EU to implement the WIPO Copyright Treaty and to harmonize aspects of copyright law across Europe, had not been adopted by British law.¹⁰⁴ Like Rutz, Walsh contends that the general defence of fair dealing in s. 30(1) of the CDPA does not offer effective protection for parody, because its requirement that the parody acknowledge its source would weaken its ability to amuse the reader or audience.¹⁰⁵ Conceding that the complex nature of parody would make a clear definition difficult, she looks to the American case law for a model to accommodate parody and argues that British courts should discard the substantial use test and opt for a balancing test like the one adopted by American courts.¹⁰⁶ Under this model, courts should look at the way the material has been

¹⁰² *Id.* at 296—97.

¹⁰³ *Id.* at 314.

¹⁰⁴ See Alina Walsh, *Parody of Intellectual Property: Prospects for a Fair Use/Dealing Defence in the United Kingdom*, 21 INTELL. CO. & COM. L.R. 386, 386 (2010).

¹⁰⁵ Walsh addresses the possible argument that a good parody would implicitly acknowledge its source, by pointing out that implicit acknowledgement is unlikely to be enough. Moreover, this may lead to a potential arbitrary distinction between good and bad parodies. While the source of a good parody would be easily identifiable and thus deemed to be acknowledged by implication, it may be more difficult to connect a weak parody with the original work. Being highly subjective, such a distinction would also force the courts to assess the artistic standards of parodies in question, something that falls outside the competence of the judiciary. *Id.* at 388.

¹⁰⁶ *Id.* at 390. Walsh contends that the acknowledgement in *Williamson* of the “conjuring up” of the original in parody is not helpful, because the essence of parody requires the use of the most striking elements of the original, which reaches beyond a mere “conjuring up.” *Id.* at 388.

altered, as well as the amount and substantiality of the material used, the purpose of its use and its influence on the market.¹⁰⁷

Unsurprisingly, all three scholars critique the indeterminacy of the substantial part test. Both Walsh and Rutz contend that a flexible and broad parody exception encompassing both “parodic” and “satirical” works would be a viable solution, and look to the American example for a multi-factor balancing test to determine whether the work would qualify for a parody defence. Banko also impliedly endorses a broad parody exception, by emphasizing that whether the parody infringes the original’s copyright should be determined by whether the former directly competes with the latter in the market.

C. Implementing the New Parody Exception in the Copyright Act

In 2006, the *Gowers Review of Intellectual Property* recommended that the U.K. follow Article 5(3)(k) of the Copyright Directive to “create an exception to copyright for the purpose of caricature, parody or pastiche by 2008,” pointing out that in the absence of such an exception, the nation was missing out on economic benefits to be derived from innovative forms of transformative creativity.¹⁰⁸ Hence, as early as in January 2008, the Intellectual Property Office (UKIPO) triggered the first part of a two-stage consultation process on exceptions to copyright to seek views on whether a new “parody” exception should be

¹⁰⁷ *Id.* at 390.

¹⁰⁸ ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 66—68 (2006), available at http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf (last visited Oct. 10, 2017). The then Chancellor of the Exchequer Gordon Brown commissioned Andrew Gowers to lead the review in December 2005, which was published on 6 December 2006 as part of the Chancellor’s annual pre-budget report.

introduced as well as what form it might take.¹⁰⁹ In December 2009, the UKIPO launched the second stage of consultation, which led to the rejection of the proposal of this new exception.¹¹⁰

In 2011, the government began a fresh round of consultation in its attempt to reform British copyright law to provide economic, social and cultural benefits by removing unnecessary restrictions on the production of parodic works, fostering creative talent, and facilitating the development of freedom of expression.¹¹¹ Its consultative paper published on December 14, 2011 includes various recommendations adopted from the 2011 report undertaken by Ian Hargreaves (“the Hargreaves Report”), Professor of Digital Economy at Cardiff University.¹¹² At the conclusion of this new round of consultation, the government published its 2012 policy statement, *Modernising Copyright*, which declared its intention to follow Article 5(3)(k) of the Copyright Directive, and to introduce a new “fair dealing”

¹⁰⁹ UK INTELLECTUAL PROPERTY OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: CHANGES TO COPYRIGHT EXCEPTIONS (2008).

¹¹⁰ UK INTELLECTUAL PROPERTY OFFICE, TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: SECOND STAGE CONSULTATION ON COPYRIGHT EXCEPTIONS (Second Consultation Paper) (2010). In response to the consultation, stakeholders raised several objections to the introduction of a parody defence, suggesting that (i) the existing law offered sufficient scope for parody; (ii) the lack of a specific exception for parody has not posed a practical problem for parodists to date; (iii) such an exception might be abused to justify piracy and/or might interfere with the economic exploitation of underlying works and/or the exercise of moral rights, and (iv) it would be difficult to distinguish between legitimate and illegitimate parodies. Following this process, the government decided not to proceed with the proposal. *Id.* at 32—36.

¹¹¹ See, e.g., Nick Rose, *The Hargreaves Report*, 22(7) ENT. L. REV. 201 (2011); Ed Baden-Powell & Jessica Woodhead, *Big Leaks Will Inspire You, but Who Gets the Credit?* 23(3) ENT. L. REV. 59 (2012).

¹¹² The report offered a review of intellectual property law and its effect on economic growth in the United Kingdom. It concluded that the U.K.’s inflexible copyright law was stifling innovation and failing to accommodate important contemporary cultural practices, and recommended wholesale changes in the strategic direction of its intellectual property law policy. Rose, *supra* note 111, at 201—02.

exception for “parody, caricature and pastiche.”¹¹³ Without such an exception, “the UK may be at a disadvantage on the world stage and ... British broadcasters, production companies, and creators who produce commercially valuable parody works may be inhibited from making the most of their potential.”¹¹⁴ The government nonetheless aimed “to find a balance between the interests of rights holders, creators, consumers and users” in introducing this exception.¹¹⁵

In the original consultation document to *Modernising Copyright*, the government clarifies that the upcoming legislation would not define the terms “parody,” “caricature” and “pastiche,” which would bear their ordinary meanings.¹¹⁶ The response document confirms that “fair dealing” would bear its usual meaning in common law, under the objective test set out in *Hyde Park Residence Ltd v Yelland*.¹¹⁷ In *Modernising Copyright*, the government highlights three key factors in determining whether a particular dealing with a work is “fair”: first, the degree to which a use competes with the owner’s exploitation of the original work (if “a use of a work acts as a substitute for it, and thus affects its value, then it is less likely to be fair,” although “this consideration does not rule out fair dealing for a commercial purpose”); second, the extent of the use and the importance of what has been taken (a “useful test may be whether it was necessary to use the amount taken for the relevant purpose,”

¹¹³ Ed Baden-Powell & Ed Weidman, *Whose Line Is It Anyway?—New Exceptions for Parody and Private Copying*, 24(4) ENT. L. REV. 130, 130 (2013).

¹¹⁴ *Id.*, citing MODERNISING COPYRIGHT: A MODERN, ROBUST AND FLEXIBLE FRAMEWORK 29 (2012).

¹¹⁵ *Id.*, citing MODERNISING COPYRIGHT 2 (2012).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 131.

although “this does not rule out copying of a whole work, but will usually mean only part of a work may be copied”); and third, whether a work has been published or not (if it has “not been published, then dealing with it is unlikely to be fair”).¹¹⁸ The document also explains that the existence of a licence is an important factor (If a use “competes with a licensed use and so potentially harms rights holders, it is less likely to be fair dealing, particularly if a licence is easily available on reasonable and proportionate terms.”)¹¹⁹ These factors are meant to assure copyright owners that they would not lose out unduly to substitutional sales, substantial copying, and/or exploitation of previously unreleased content, and that collecting societies would not suddenly be deprived of a mandate to license previously licensable activities.¹²⁰ Finally, the fair dealing exception would co-exist with s. 80 of the CDPA.¹²¹ Respect for moral rights, or the right to object to derogatory treatment, which applies to any dealing that amounts to “distortion or mutilation” of the work or is “otherwise prejudicial to the honour or reputation” of its creator, could be a factor when considering whether a dealing is fair.¹²²

On Oct 1, 2014, s. 30A was introduced into the CDPA, providing that “fair dealing with a work for the purpose of caricature, parody or pastiche does not infringe copyright in the work.”¹²³ It was added to the exceptions of “Research and private study,” “Criticism or

¹¹⁸ *Id.*, citing MODERNISING COPYRIGHT 14.

¹¹⁹ *Id.*, citing MODERNISING COPYRIGHT 14.

¹²⁰ *Id.*, citing MODERNISING COPYRIGHT 23, 33, 40.

¹²¹ *Id.*, citing MODERNISING COPYRIGHT 4.

¹²² *Id.*, citing MODERNISING COPYRIGHT 16, 30.

¹²³ Copyright, Designs and Patents Act, s. 30A. The *Copyright and Rights in Performances (Quotation and Parody) Regulations 2014* (the Regulations) was drafted to incorporate this new exception into British law. The Regulations were pulled from Parliament in May 2014 after a dramatic turn of events, and re-laid

review,” and “Reporting of current events,” which had been in place since the introduction of the CDPA in 1988.¹²⁴ The “parody” exception also contains a provision stating that “to the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”¹²⁵

On the whole, the changes to the copyright law, including this exception, have been welcomed as they render non-infringing many acts considered to be “fair” by the majority and bring the legislation closer to the consensus view of other nations.¹²⁶ In addition, the parody exception partially addresses the concerns of the scholars discussed: although “fair dealing” is not replaced by American-style “fair use,” several factors have taken over the substantial use test, the most significant one being whether the new work directly competes with the parodied original and harms the interests of the owner(s). However, because “parody,” along with “caricature” and “pastiche,” is not defined by the statute, the question regarding what works qualify as “parody” is left to debate.

before Parliament in June, with a view of their coming into force on October 1, 2014. Oyinade Adebisi, “*Law Imitating Life*”: *Will the Day Ever Come? Parody, Caricature and Pastiche*, 25(7) ENT. L. REV. 243, 243 (2014).

¹²⁴ The provisions for news reporting, criticism and review have now been extended to include “quotation” in general. Copyright, Designs and Patents Act, s. 30.

¹²⁵ *Id.* s. 30A(2).

¹²⁶ See, e.g., Mark Sweney, *UK Copyright Laws to Be Freed Up and Parody Laws Relaxed*, THE GUARDIAN (Dec. 20, 2014), available at <https://www.theguardian.com/media/2012/dec/20/uk-copyright-law-parody-relaxed> (last visited Oct. 10, 2017); Wayne Beynon, *British Comedy Gets the Last Laugh Following Parody Law Reform*, HUFFINGTON POST (Nov. 27, 2014), http://www.huffingtonpost.co.uk/wayne-beynon/parody-law-reform_b_6230498.html (last visited Oct. 10, 2017).

D. Towards a Broad Parody Definition: the UKIPO's Recommendation and the ECJ's Decision in *Deckmyn v. Vandersteen*

The new parody exception in British copyright law looks more promising than its American and Canadian counterparts as it is broad enough to cover a wider range of works. Neither the parody exception in s. 30A(1), nor the Copyright Directive, defines the key concepts of caricature, parody or pastiche. Yet the UKIPO Guidance not only clarifies that they are intended to bear their ordinary dictionary meanings, but also endorses a broad definition of parody by stating that parody “imitates a work for humorous or satirical effect,” without specifying whether it targets the original or an unrelated subject or both.¹²⁷ It also differentiates “parody” from both “pastiche” and “caricature,”¹²⁸ both of which imitate preexisting works but need not contain any message, a difference the importance of which will be elaborated upon in the next chapter on Hong Kong. Coincidentally, in the same year that the parody exception came into force, the European Court of Justice (ECJ) addressed a number of questions relating to the parody exception under Article 5(3)(k) of the Copyright Directive in *Deckmyn v. Vandersteen*. Affirming that the concept of “parody” must be regarded as “as an autonomous concept of EU law and interpreted uniformly throughout the

¹²⁷ UK Intellectual Property Office, *Exceptions for Copyright: Guidance for Creators and Copyright Owners* (Oct. 2014), at 6, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf (Oct. 10, 2017).

¹²⁸ “Pastiche is musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.” *Id.*

European Union,” it opted for a broad, inclusive definition of parody encompassing works that target the originals and those that comment on unrelated subjects.¹²⁹

In *Deckmyn*, copyright infringement proceedings were brought against Johan Deckmyn, a politician of the far-right Vlaams Belang political party, and the association responsible for the party’s funding.¹³⁰ At a City of Ghent’s new year reception, Deckmyn handed out calendars with a front cover depicting the Mayor of Ghent throwing coins to citizens appearing to be from diverse religious and ethnic backgrounds.¹³¹ The cover was based upon a famous *Suske en Wiske* comic book entitled “De Wilde Weldoener,” completed in 1961 by Mr Vandersteen, in which a character in a white tunic is shown throwing coins to townspeople.¹³² The heirs of the comic’s author and its copyright holders sued Deckmyn and his funding association for copyright infringement in the Belgian courts.¹³³ The defendants appealed, arguing that the calendar image should fall within the exception for caricature, parody or pastiche under the Copyright Directive, as implemented by Article 22(1)(6) of the Belgian Copyright Act 1994.¹³⁴ The plaintiffs, however, argued that the derivative work could not fall within the parody exception because it lacked originality and conveyed a racially discriminatory message.¹³⁵

¹²⁹ *Deckmyn v. Vandersteen* [2014] Case C-201/13, para. 15 (E.C.J.).

¹³⁰ *Id.* para. 7.

¹³¹ *Id.* para. 8.

¹³² *Id.* para. 9.

¹³³ *Id.* para. 10.

¹³⁴ *Id.* para. 11.

¹³⁵ *Id.* para. 12.

The hof van beroep te Brussel (Court of Appeal, Brussels), perceiving an absence of consistency in the legal tests for the parody exception, decided to stay the proceedings and refer three questions to the ECJ.¹³⁶ The first question was whether the concept of parody is an independent concept under EU law.¹³⁷ The second question was whether a parody must satisfy three conditions: displaying an original character, in such a way that the parody cannot reasonably be attributed to the author of the original work; intending to provoke humor or to mock, regardless of whether the criticism is directed at the original work or at something or someone else; and mentioning the source of the parodied work.¹³⁸ The last question was whether a work must satisfy any other conditions or conform to any other characteristics to be classified as a parody.¹³⁹

The ECJ found that, in the interest of a uniform application of EU law, parody should be considered an autonomous concept of EU law.¹⁴⁰ Following the opinion of the Advocate General, it also confirmed that there are only two essential characteristics of a parody: a parody must evoke an existing work, while being “noticeably different” from it, and “must constitute an expression of humor or mockery.”¹⁴¹ The ECJ left it to the national courts of Member States to decide on a case-by-case basis whether a parody is noticeably different

¹³⁶ *Id.* para. 13.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* paras. 14—17.

¹⁴¹ *Id.* para. 20.

from its original and whether it constitutes an expression of mockery or humor.¹⁴² In addition, rights holders have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with a discriminatory message.¹⁴³ Hence, national courts must draw their attention to the principle of non-discrimination based on race, color and ethnic origin, specifically defined in Council Directive 2000/43/EC of 29 June 2000, and confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union.¹⁴⁴ The ECJ noted that the objectives of Directive 2001/29 include giving effect to fundamental rights and freedoms and achieving a “fair balance” of rights and interests between rights holders and users of copyrighted work.¹⁴⁵ It therefore emphasized that a national court must “strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k),” in light of all the circumstances of the case.¹⁴⁶

Will Brexit diminish or negate the influence of *Deckmyn* on British courts and on how parody is to be defined? Brexit will not change the fact that the parody exception became part of the CDPA and will have been in effect even before the exit takes place. Insofar as the aim of Brexit is to achieve political independence from the EU institutions, Brexit could mean that the U.K. will not be subject to the jurisdiction of the ECJ, and ECJ

¹⁴² *Id.* paras. 33.

¹⁴³ *Id.* paras. 29—30.

¹⁴⁴ *Id.* para. 30.

¹⁴⁵ *Id.* paras. 27, 34.

¹⁴⁶ *Id.*

decisions will then cease to be binding on the English courts, unless the U.K. agrees to continue to be subject to the ECJ under either the exit agreement or any future agreement.¹⁴⁷ However, assuming that one or more cases before Brexit raise(s) the issue of how parody is to be defined, and British court(s) follow the ECJ's decision, in the post-Brexit era courts will likely pay regard to these earlier decisions and therefore continue to be influenced by *Deckmyn*. In addition, assuming that no cases involving the parody exception are brought in British courts before Brexit, to the extent that its parody exception is modelled upon the Copyright Directive, the ECJ's interpretation of EU law and of the parody exception will likely continue to play some role in English jurisprudence, even as English courts are moving away from the ECJ's decisions.¹⁴⁸ Finally, even assuming that British courts do not follow *Deckmyn*, they will still likely heed the UKIPO's recommendation and adopt the broad parody definition.

E. The New Parody Exception: "Humor" and Potential Moral Rights Challenges

The broad parody exception in British law seems to satisfy the demands by the scholars discussed in this chapter and bring its copyright system in line with its freedom of expression tradition. Yet there are two potential obstacles to a parody defence. First, while a parody need not be humorous in American law, the UKIPO states that a parody "imitates a work for humorous or satirical effect," and the ECJ gave even greater emphasis on humor by

¹⁴⁷E.g., *Brexit - the Potential Impact on the UK's Legal System*, TAYLOR WESSING (June 2016), <https://united-kingdom.taylorwessing.com/download/article-brexit-uk-legal-system.html> (last visited Oct. 10, 2017); *Brexit—UK and EU Legal Framework*, NORTON ROSE FULBRIGHT (Apr. 2017), <http://www.nortonrosefulbright.com/knowledge/publications/136975/brexit-uk-and-eu-legal-framework> (last visited Oct. 10, 2017).

¹⁴⁸ NORTON ROSE FULBRIGHT, *supra* note 147.

ruling that a parody “must constitute an expression of humor or mockery” while evoking an existing work and be “noticeably different” from it. Because neither UKIPO nor ECJ determined what “humor or mockery” entails, and the ECJ left the matter to the national court, this will create some uncertainty for courts. Second, a parody defence may fail because the work is deemed to violate the author’s moral right(s). As this subsection will explain, while the humor requirement will not likely present a problem, the moral rights provisions may conflict with the parody exception.

1. The “Humor” Requirement

The “humor” requirement should not be difficult to satisfy because “British humor” is a broad concept that encompasses a variety of contents, styles, and sensibilities. Scholars have identified two issues raised by the “humor or mockery” requirement laid down by the ECJ. First, they note that courts may have difficulty in deciding whether parodies are humorous or not, and that the intention of the parodist, not the parody’s impact upon the public, should be the relevant yardstick under this aspect of definition. Sabine Jacques,¹⁴⁹ for example, contends that courts are ill-equipped to predict the public’s reactions to a parody, let alone that there are likely a range of reactions towards a parody across different sectors of the public.¹⁵⁰ Requiring national courts to determine whether an alleged infringement is humorous enough could result in arbitrary decisions.¹⁵¹ Hence, the ECJ’s requirement for

¹⁴⁹ Sabine Jacques, *Are National Courts Required to Have an (Exceptional) European Sense of Humour?* 37(3) EUR. INTELL. PROP. REV. 134, 136 (2015). See also E. Rosati, *Just a Laughing Matter? Why the Decision in Deckmyn is Broader than Parody*, 52 COMMON MKT. L. REV. 511, 518—20 (2015).

¹⁵⁰ Jacques, *supra* note 149.

¹⁵¹ *Id.*

humor appears to be workable if it is based upon the intent of the parodist to engender humor, which is to be decided upon particular facts by national courts.¹⁵²

Scholars have also identified the problem of establishing the meaning of humor and which standard to adopt. Jacques queries whether the autonomous concept of parody requires courts to develop an objective “European” sense of humor test given that the ECJ provides no guidance on this matter.¹⁵³ Jonathan Griffiths elaborates on the multifaceted nature of “humor,” citing as an example a 2015 Belgian case,¹⁵⁴ in which artist Luc Tuymans produced a hyperrealistic painting based very closely on Katrijn van Giel’s photograph of a prominent Belgian right-wing politician Jean-Marie Dedecker.¹⁵⁵ When the photographer brought proceedings for copyright infringement, the artist argued that this work was covered by the parody exception in Belgian law.¹⁵⁶ The Belgian court, without making reference to *Deckmyn*, held that the defence did not apply because the artist did not have a humorous intent and that the painting was a mere “reproduction.”¹⁵⁷ Griffiths draws upon criticism by members of the artistic community that this judgment made an illegitimate distinction between obvious permissible forms of humor and more referential, post-modern forms of

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Jonathan Griffiths, Fair Dealing after *Deckmyn*—the United Kingdom’s defence for Caricature, Parody or Pastiche, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 80 (M. Richardson and Sam Ricketson eds., 2017), citing Van Giel Tuymans, Rechtbank van de eerste aanleg [Court of First Instance of Antwerp], Judgment of the President, Docket no 14/4305/A, 15 January 2015. The case was subsequently settled.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

expression.¹⁵⁸ Griffiths, wondering whether the ECJ meant that “mockery” is a “sub-set” of humor, argues that the painting’s mockery of the politician, which can be understood as a particular type of (derisive) humor, does not fall outside of Article 5(3)(k) of the Copyright Directive.¹⁵⁹ Hence, the Belgian court held wrongly that the parody defence did not apply to the painting.¹⁶⁰

The requirement that a parody be humorous or satirical would not make the parody exception diverge greatly from the broad standard proposed in Part One of the dissertation. Humor has a long and rich history in English literature and culture. Rather than referring exclusively and narrowly to the overly comical or funny, the concept is broad enough to cover a variety of contents, styles, and sensibilities. Good examples of humor can be found in the different kinds of irony in medieval English poet Geoffrey Chaucer’s poetry and in the speeches of William Shakespeare’s witty and comic characters.¹⁶¹ Other examples abound in the satirical works of eighteenth- and nineteenth-century writers including Alexander Pope, Jonathan Swift, and John Dryden, who ridiculed the world in their attempts to educate the public.¹⁶² From the late nineteenth through the early twentieth century, comedies-of-manners satirizing certain social groups, like Oscar Wilde’s works, were published alongside comic fantasies by “benign humorists” like Lewis Carroll, Edward Lear, and Beatrix Potter, who

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 81.

¹⁶⁰ *Id.*

¹⁶¹ DON L.F. NILSEN, HUMOR IN BRITISH LITERATURE, FROM THE MIDDLE AGES TO THE RESTORATION: A REFERENCE GUIDE IX—XX (2000).

¹⁶² DON L.F. NILSEN, HUMOR IN EIGHTEENTH- AND NINETEENTH-CENTURY BRITISH LITERATURE: A REFERENCE GUIDE XV—XVI (1998).

offered a respite from social and cultural problems by writing about imaginary times and places for both children and adult readers.¹⁶³ In the “tragicomedies,” as they are sometimes called, by twentieth-century writers Bernard Shaw and Henry James, elements of tragedy and comedy are commingled to the extent that the line between the two genres is often blurred or erased.¹⁶⁴

Today, what is known as “British humor” is a broad concept that often entails ridiculing mundane reality and satirizing the absurdity of everyday life.¹⁶⁵ Although other people and things often serve as targets of humor, self-deprecation is also common.¹⁶⁶ Aside from negative humor, which can take the form of “denigrating,” “biting sarcasm,” there are also positive forms of humor, for instance, jokes “looking on the bright side of life.”¹⁶⁷ Following the ECJ decision, British courts will determine whether a parody contains “an expression of humor or mockery” on a case by case basis and will be able to draw upon British conventions. Even assuming that British courts will not follow *Deckmyn* after Brexit, they will likely reference the UKIPO’s description of parody as an imitation of a work for “humorous or satirical effect,” thus also drawing upon its own conventions. In either

¹⁶³ DON L.F. NILSEN, HUMOR IN TWENTIETH-CENTURY BRITISH LITERATURE: A REFERENCE GUIDE 1 (2000).

¹⁶⁴ *Id.* at 3.

¹⁶⁵ SALVATORE ATTARDO, ENCYCLOPEDIA OF HUMOR STUDIES 342 (2014).

¹⁶⁶ Roger Dobson, *Joking aside, British Really Do Have Unique Sense of Humour*, INDEPENDENT (Mar. 9, 2008), available at <http://www.independent.co.uk/news/uk/this-britain/joking-aside-british-really-do-have-unique-sense-of-humour-793491.html> (last visited Oct. 10, 2017).

¹⁶⁷ *Id.*

scenario, British humor alone should be so broad that a work can incorporate different conventions and still qualify as “parody” under the law.

Whether the parodist’s intent or the parody’s impact should serve as the relevant yardstick can be addressed by looking at the significance that the ECJ and the UKIPO attached to the parodist’s freedom of expression through the parody. The Advocate General in *Deckmyn* identified parody as “a form of artistic expression and a manifestation of freedom of expression” or possibly both,¹⁶⁸ and the ECJ required national courts to strike a fair balance between the interests of rights owners and freedom of expression of users who rely on the exception for parody.¹⁶⁹ Similarly, the British government emphasized the social and cultural benefits brought by the parody exception and the necessity to balance the interests of rights holders and users.¹⁷⁰ Whether or not British courts are bound by the ECJ decision, they should examine the intents of parodists to engender humor freedom, which they can reasonably determine by evaluating the parodies rather than their impacts on the public, which may be difficult to measure and out of the former’s control. The appropriate test for the parody exception, therefore, is whether the intent to produce humor is reasonably apparent from the parodic work.

¹⁶⁸ *Deckmyn v. Vandersteen*, Opinion of Advocate General Cruz Villalón [2014] Case C-201/13, para. 70.

¹⁶⁹ *Deckmyn* [2014] Case C-201/13, paras. 27, 34.

¹⁷⁰ See UK INTELLECTUAL PROPERTY OFFICE, MODERNISING COPYRIGHT: A MODERN, ROBUST AND FLEXIBLE FRAMEWORK EXECUTIVE SUMMARY 2 (2012).

2. The Moral Rights Constraint

That the new parody exception shall coexist with the current UK moral rights regime, some have argued, makes it a timid defence to copyright infringement.¹⁷¹ In introducing the parody defence, the British government emphasized that the moral rights provisions of the CDPA, which would not be amended with the introduction of s. 30A, would provide a valuable constraint on the scope of the new defence.¹⁷² The UKIPO confirmed.¹⁷³ Thus, the author's right of attribution continues to apply, as does his or her right to object to the "derogatory treatment" that amounts "to distortion or mutilation of the work or [are] otherwise prejudicial to the honour or reputation of the author or director."¹⁷⁴ The UKIPO's Impact Assessment document further states that the application of the "integrity right" is intended to "limit the potential for harm to copyright owners caused by this exception" and "potential for any lost sales due to negative reputational effects" of the parody.¹⁷⁵

Griffiths seeks to resolve the potential conflict between attribution right and the parody exception through the principle of freedom of expression.¹⁷⁶ The CDPA provides a number of exceptions to the attribution right, but no general exception to the right of

¹⁷¹ E.g., Alec Cameron, *Copyright Exceptions for the Digital Age: New Rights of Private Copying, Parody and Quotation*, 9 J. INTEL. PROP. L. & PRACTICE 1002, 1006 (2014).

¹⁷² "The Existing moral rights regime will be maintained unchanged, so that creators will be protected from damage to their reputation or image through the use of works for parody." UK INTELLECTUAL PROPERTY OFFICE, *supra* note 170, at 31.

¹⁷³ UK Intellectual Property Office, *supra* note 127, at 7.

¹⁷⁴ Copyright, Designs and Patents Act, s. 80(2)(b).

¹⁷⁵ UK Intellectual Property Office, *Copyright Exception for Parody: Impact Assessment (IA)* (Dec. 13, 2012), available at <http://webarchive.nationalarchives.gov.uk/20140603102647/http://www.ipo.gov.uk/ia-exception-parody.pdf> (last visited Oct. 10, 2017).

¹⁷⁶ Griffiths, *supra* note 154.

attribution for parody. However, s. 30A does not require acknowledgement of a parodied work, an omission pointing to the fact that parodies tend only to make implicit, rather than explicit, reference to works upon which they are based.¹⁷⁷ Thus, Griffiths contends that a court confronted with a claim for attribution of an underlying, parodied work might hold that the right to be identified as the author of a work is implicitly satisfied in the case of a parody.¹⁷⁸ In addition, s. 77(8) requires that where an author specifies a pseudonym, initials or some other form of identification in asserting the right to be identified, “the form shall be used,” while any reasonable form of identification can be employed in satisfaction of the attribution right.¹⁷⁹ To get around this requirement, Griffiths argues that courts might rely upon *Deckmyn*’s confirmation that parody is protected by freedom of expression and that a requirement for a parody to be accompanied by a heavy-handed acknowledgement of authorship would violate that right.¹⁸⁰

The CDPA defines integrity right as the right to object to “derogatory treatment” of the work that constitutes “distortion or mutilation” of the work *or* is “otherwise prejudicial to the honor or reputation” of the creator.¹⁸¹ The lack of certainty regarding whether the “distortion or mutilation” clause should be treated separately from the “honor or reputation” clause thus creates another potential conflict with the parody exception. Some courts have supported the interpretation that distortion and mutilation can be treated as individual

¹⁷⁷ *Id.* at 75.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 76.

¹⁸⁰ *Id.*

¹⁸¹ Copyright, Designs and Patents Act, s. 80(2)(b).

concepts. One example is *Tidy v. Trustees of the Natural History Museum* (1996).¹⁸²

Elsewhere, courts have adopted the idea that “distortion or mutilation” should be considered part of the clause prohibiting damage to the author’s honor or reputation. In *Confetti Records v. Warner Music UK Ltd.* (2003), for example, the defendant claimed that there could be no derogatory treatment unless the treatment was prejudicial to the honor or reputation of the author, whereas the claimant argued that treatment was derogatory if it was a distortion or mutilation of the work, even if it did not prejudice the honor or reputation of the author.¹⁸³

The court determined that s. 80 of the CDPA intended to give effect to Article 6bis of the Berne Convention (1928), which reads: “to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”¹⁸⁴ It also reasoned that in the “compressed drafting style” of the British legislature, the word “otherwise” suggests that the distortion or mutilation is only actionable if it is prejudicial to the author’s honor or reputation.¹⁸⁵ Therefore, “the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author’s honor or reputation.”¹⁸⁶

As emphasized throughout Part One and in the last chapter of the dissertation, a parody often modifies and sometimes distorts or mutilates a copyrighted work, for instance, by rewriting it or part of it or by including new elements. Courts therefore should follow the

¹⁸² *Tidy v. Trustees of the Natural History Museum* [1996] 39 I.P.R. 501 (E.W.H.C. ch.).

¹⁸³ *Confetti Records v. Warner Music UK Ltd.* [2003] 2003 WL 21162437, para. 149 (E.W.H.C. ch.).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* para. 150.

¹⁸⁶ *Id.*

judgment in *Confetti Records* and consider the distortion or mutilation of the original work to be a violation of the author's integrity rights only if it is prejudicial to his or her honor or reputation.

Still, opinions differ as to when a parody might constitute the "derogatory treatment" of a work that is "prejudicial to the honour or reputation of the author or director." Some commentators contend that a parody will not usually be prejudicial to the author's honor or reputation.¹⁸⁷ Others claim that an author's integrity rights "are often outraged by a parodic or burlesque treatment of his work"¹⁸⁸ and that "the creation of an express integrity right reinforces the author's armoury against the parodist."¹⁸⁹ Still others claim that the author's integrity right will only be infringed where the parody is "offensive to the spirit of the original work."¹⁹⁰ Thus, the issue of whether and when a parody will amount to a derogatory treatment has remained unresolved.

Addressing the potential prejudices to the author's honor or reputation caused by a parody, Griffiths uses the same argument that he has used to resolve the potential conflict between the owner's attribution right and the user's right to parody. If the court holds that the parody falls within s. 30A, the parodist can claim that the work is protected by freedom of

¹⁸⁷ Michael Spence, *Intellectual Property and the Problem of Parody*, 114 L. Q. REV. 594, 597 (1998), citing MODERN LAW OF COPYRIGHT AND DESIGNS 99 (Laddie, Prescott & Vitoria, 2d eds., 1985).

¹⁸⁸ *Id.*, citing STANFORTH RICKETSON, LAW OF INTELLECTUAL PROPERTY 202 (1984). See also STANFORTH RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 486 (1987).

¹⁸⁹ *Id.* at 597, citing G. Dworkin, *Moral Rights in English Law—the Shape of Rights to Come*, 11 EUR. INTELL. PROP. REV. 329 (1986).

¹⁹⁰ *Id.* at 587, citing Weir, *The Parodist's Nirvana: Droit Moral and Comparative Copyright Law*, 11(4) COPYRIGHT REP. 1, 26 (1994).

expression within the framework established in *Deckmyn* to find that the parodist's freedom of expression matters more than the author's allegation that his reputation was jeopardized.¹⁹¹ Michael Spence, however, contends that freedom of expression trumps intellectual property only if the original texts have been necessary for the parodists to criticize either them or their authors, because authors may seek redress through laws on injurious falsehood and defamation.¹⁹² Those whose works have been appropriated to comment on something else may claim an integrity right in their works and seek redress through copyright law.¹⁹³ Maree Sainsbury nonetheless argues that the author's moral rights should not be used to stifle criticism or comment, whether the parody comments on the original or something else, as long as the parodist has not been motivated by malice or is excessively critical.¹⁹⁴

As Part One, Chapter Two has emphasized, the public's right to parody should not conflict with authors' moral rights. Griffiths' arguments, which draw upon the principle of freedom of expression in *Deckmyn* decision, reconcile the potential conflict between the two sets of rights like Part One has done. Still, because the British government and the UKIPO both emphasized that moral rights provisions are intended to place a constraint on the right to parody, and British courts may not follow *Deckmyn* after Brexit, moral rights claims by

¹⁹¹ Griffiths, *supra* note 154, at 77.

¹⁹² Spence, *supra* note 188, at 612—13

¹⁹³ *Id.*

¹⁹⁴ Maree Sainsbury, *Parody, Satire, Honour and Reputation: The Interrelationship of the Defence of Fair Dealing for the Purposes of Parody and Satire and the Author's Moral Rights*, 18(3) AUS. INTELL. PROP. J. 149, 166 (2016).

authors potentially narrow what looks like a broad parody exception. This issue will be addressed further in Section III of this chapter.

F. Market Substitution, Amount of Use, and Nature of Dealing

According to British case law, a work that falls within any of the enumerated fair dealing purposes would need to be evaluated according to several fairness factors, including the nature of the work being used,¹⁹⁵ how the original work was obtained,¹⁹⁶ the amount taken,¹⁹⁷ how transformative the dealing is,¹⁹⁸ the existence of commercial benefit,¹⁹⁹ whether the dealing has malevolent or altruistic motives,²⁰⁰ its potential market impact on the original,²⁰¹ and potential alternatives of the dealing.²⁰² This subsection will explain that the prioritization of the market substitution factor would enable the parody exception to promote free speech and creativity. More emphasis on the nature of the defendant's dealing would also facilitate the accommodation of artistic speech and expressions related to public affairs.

¹⁹⁵ Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 342 (2008), citing *Hyde Park Residence Ltd. v. Yelland* [2000] 3 W.L.R. 215, para. 40 (dealing with current events).

¹⁹⁶ *Id.*, citing *Beloff v. Pressdram Ltd.* (1972) [1973] 1 All E.R. 241 at 264 (Ch.).

¹⁹⁷ *Id.*, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023, 1031 (C.A.).

¹⁹⁸ *Id.*, citing DAVID VAVER, COPYRIGHT VOL. 2 522 (1998) [unpublished, archived at Osgoode Hall Law School Library].

¹⁹⁹ *Id.*, citing *Newspaper Licensing Agency Ltd. v. Marks & Spencer Plc*, [1999] E.M.L.R. 369 (C.A.).

²⁰⁰ *Id.* at 343, citing *Hyde Park Residence Ltd.*, para. 36.

²⁰¹ *Id.*, citing *Hubbard*, [1972] 1 All E.R. at 1031.

²⁰² *Id.*, citing *Hyde Park Residence Ltd.*, [2000] 3 W.L.R. 215, para. 40

Griffiths draws attention to *Ashdown v. Telegraph Group Ltd.* (2001), in which the Court of Appeal approved a passage from *The Modern Law of Copyright and Designs*, a leading commentary summarizing the existing jurisprudence on “fairness.”²⁰³ According to this commentary, the most important factor is whether the alleged fair dealing is “commercially competing with the proprietor’s exploitation of the copyright work, a substitute for the probable purchase of authorized copies, and the like,” whereas the second and third most important factors are “whether the work has already been published or otherwise exposed to the public” and “the amount and importance of the work that has been taken” respectively.²⁰⁴ Neither the *Ashdown* decision nor the passage touches on parody, or clarifies how the amount and importance of the work factor applies to parody. Yet by prioritizing the market substitution factor over the other factors, the approach is in line with scholars’ recommendations and the proposed standard of this dissertation.

Griffiths persuasively argues that certain aspects of the factor-based fair dealing approach above need to be adjusted in order to recognize the particular qualities of parody. Concerning the first factor, any potential licensing market for the parodic use of work should be ignored, and economic loss suffered as a result of a parody’s criticism should not militate in favor of the rights holder.²⁰⁵ Because a parody draws upon published and recognizable work, the second factor is unlikely to have any relevance in this context.²⁰⁶ Considering the

²⁰³ Griffiths, *supra* note 154, at 87—90, *citing* *Ashdown v. Telegraph Group Ltd.* [2001] 44 E.M.L.R. 1003, 1011 (C.A. civ.)

²⁰⁴ *Id.* at 88, *citing* *Ashdown* [2001] 44 E.M.L.R. at 1011.

²⁰⁵ *Id.* at 90.

²⁰⁶ *Id.* at 89.

third factor, courts have recognized that a use is more likely to be unfair if it takes a large amount of a work in absolute or proportionate terms, or if it takes a large or disproportionate part of “important” elements of that work.²⁰⁷ Because a parody has to evoke a published work, the assessment of the “importance” of the part of a work taken by a parodist may have to be more permissive than it is for some other forms of permitted use, and the taking of the whole of a particular component of a composite may have to be held to be fair under s. 30(A).²⁰⁸

Griffiths’ analysis partially addresses what Alec Cameron and Oyinade Adebisi consider to be a major concern raised by the UKIPO’S guidance notes.²⁰⁹ The UKIPO explains that fair dealing in the context of parody permits “use of a limited, moderate amount of someone else’s work” and that outright copying of an original work would not be permitted.²¹⁰ As an example, it says “[t]he use of a few lines of a song for a parody sketch is likely to be fair, whereas the use of a whole song would not be and would continue to require a licence.”²¹¹ The confusion stems from the difficulty in defining and quantifying “moderate.” In fact, the CDPA defines “infringement” as the use of “the whole or a substantial” part of a work without permission.²¹² Therefore, a new fair dealing exception,

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Cameron, *supra* note 171; Adebisi, *supra* note 123.

²¹⁰ UK Intellectual Property Office, *supra* note 127, at 5—6.

²¹¹ UK Intellectual Property Office, *Explanatory Memorandum to the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014*, at 8, available at http://www.legislation.gov.uk/ukdsi/2014/9780111116029/pdfs/ukdsiem_9780111116029_en.pdf (last visited Oct. 10, 2017).

²¹² Copyright, Designs and Patents Act, s. 16(3)(a).

which essentially carves out a dealing or use that is exempted from copyright protection, arguably defeats itself if it is overly restrictive and if it rules out using a “substantial” or qualitatively significant part of the work for the purpose served by the dealing. Because a parody must evoke its underlying work and be “noticeably different” from it, its borrowing would not, in words of Endicott and Spence, “undermine” the original work’s “expressive effect.”²¹³

By comparing “fair dealing” in British law with “fair balance” in EU law, Griffiths sees the need for British courts to depart from the former to accommodate the latter.²¹⁴ He explains that in the “fair balance” concept referred to by the ECJ in *Deckmyn*, the goal of a decision-maker is to adjudicate between two competing fundamental rights claims: the fundamental right of property by rights holders and the right to freedom of expression by parodists.²¹⁵ On the clear hierarchy in the freedom of expression jurisprudence in the European legal order, great significance is attached to political expressions and expression on matters of public interest, and high levels of protection are provided for artistic or creative forms of expression.²¹⁶ By contrast, commercial speech and the consumption of popular music do not have equivalent status.²¹⁷ However, the mere existence of a profit motive on the part of a defendant is not relevant: a distinction is drawn between expression with a

²¹³ Timothy Endicott & Michael Spence, *Vagueness in the Scope of Copyright*, 121 L. Q. REV. 657, 673—74 (2005).

²¹⁴ Griffiths, *supra* note 154, at 93—94.

²¹⁵ *Id.* at 93.

²¹⁶ *Id.*

²¹⁷ *Id.*

purely commercial purpose, which is accorded a lower level of protection, and expression on matters of general interest, which is strongly protected even where its publication is profit-driven.²¹⁸ To accommodate fair balance, British courts conducting the traditional fair dealing analysis therefore would have to place more emphasis on the “nature of the defendant’s use,” which they have paid little regard to in the past.²¹⁹ Following Griffith’s argument, whether British courts follow *Deckmyn* to accommodate the fair balance test or not, they can and should emphasize more strongly the nature of the defendant’s use/dealing of the copyrighted work, so as to offer stronger protection for artistic and political expressions.

G. Testing the New Parody Exception

To illuminate how the parody exception would help to promote freedom of expression and creativity, as long as courts prioritize the market impact factor and emphasize the nature of the defendant’s use, this subsection will apply the new parody exception to *Allen* and *Williamson Music*, in which the parody defence was rejected by courts before this new law came into force, and two hypothetical cases. Let’s assume that the court found that the defendant’s designs in *Allen*, which copied the plaintiffs’ Mr Spoon character, rocket, and button moon, were parodies of the originals. When it came to the fairness assessment, the fact that the defendant benefited from a market that the plaintiffs could potentially enjoy, along with the substantially copying, would have militated against a finding of fair dealing.²²⁰ Even if the court had emphasized more strongly the nature of the defendant’s use

²¹⁸ *Id.* at 94.

²¹⁹ *Id.*

²²⁰ See Griffiths, *supra* note 154, at 88, citing *Ashdown* [2001] 44 E.M.L.R. at 1011.

factor, it would likely have held that the designs accomplished little other than reproducing the originals and carried little political and/or artistic expression(s).²²¹ Let's also assume that the Court in *Williamson Music* had considered the defendants' advertisement jingle "There is Nothin' Like a Dame" contained enough humor to be a parody. When it comes to the fairness assessment, although the advertisement would not have any impact on the original's market, the court would likely have held that the jingle borrowed too much from the original, a factor militating against a finding of fair dealing.²²² Placing more emphasis on the nature of the defendant's use, the court would likely have held that the jingle had a pure commercial purpose and carried no political and very little artistic expression.²²³ In both cases, the parody defence would have been unsuccessful.

One needs to further examine whether or not meaningful parodic works may be considered fair dealings under the new law. One example is "Newport State of Mind," the parody of the music video of "Empire State of Mind,"²²⁴ cited in the *Hargreaves Report*. The UKIPO guidance document casts doubt on whether "Newport State of Mind" would meet the requirements of "fair dealing," noting that "although the lyrics of the song and accompanying video were parodied, the underlying music track and arrangement were unchanged."²²⁵ The

²²¹ See *id.* at 94.

²²² See *id.* at 88, citing *Ashdown* [2001] 44 E.M.L.R. at 1011.

²²³ See *id.* at 94.

²²⁴ "Newport" was directed by the London-based filmmaker M-J Delaney, and featured London-based actors Alex Warren and Terema Wainwright who rap and sing in the video respectively. Published on the web on 20 July 2010, the video went viral. By the middle of August 2010, nearly 2.5 million people had watched it on YouTube, which removed it on 10 August due to a copyright claim by EMI Music Publishing.

²²⁵ UK Intellectual Property Office, *supra* note 175, at 4.

prioritization of the market substitution and the nature of the defendant's use factors would likely lead to a different result. Although the music track and arrangement were borrowed, the parody with its new lyrics and video would make it an unlikely market substitute for the original.²²⁶ A market for licensed parodies like this one also should not exist because the copyright holder would not have consented to it. In addition, the parody was not an advertisement and contained artistic expressions. Should the court emphasize the nature of the defendant's dealing, the parody's artistic expressions would tip the balance towards a finding of fair dealing.²²⁷ Hence, courts may find for parodists in circumstances where parodies combine old music with new lyrics and videos.

Would parodies that employ the old soundtracks and new videos, such as numerous parodies of the Miley Cyrus's Wrecking Ball video, pass the fairness assessment? As the UKIPO comments, "videos consisting of an entirely unchanged soundtrack (unchanged lyrics and music) accompanying a replacement video" would not constitute "fair dealing."²²⁸ Regarding the market substitution factor, it is uncertain whether the court would consider a parodic video a market substitute for the original by using a soundtrack identical to it: although some people who like the music alone may download the video and be content to listen to the unchanged soundtrack, others may prefer to enjoy also the visual aspects of the video and would loath to see a different video accompanying the music. On the amount and significance of the dealing factor, because the parody uses the entire soundtrack, the court would likely find that it borrowed too much from the original. Such a video, however, may

²²⁶ See Griffiths, *supra* note 154, at 88, citing *Ashdown* [2001] 44 E.M.L.R. at 1011.

²²⁷ See *id.* at 94.

²²⁸ UK Intellectual Property Office, *supra* note 175, at 4.

contain political and/or artistic message(s). Should the court place a heavy emphasis on the nature of the defendant's use factor, there may be a chance, however slight, for it to hold that the work is a fair dealing of the original.

III. APPLYING THE PARODY EXCEPTION: AN EXTERNAL DOCTRINE OR AN INTERNAL SOLUTION?

As the foregoing section has argued, the parody exception in British copyright law, seemingly broader than its American or Canadian counterparts, may come into conflict with the moral rights provisions. As promised, this last section of the chapter will revisit the moral rights issue by explaining how the narrow public interest doctrine in British law will make it difficult to apply the exception according to the method proposed in Part One, Chapter Two.

This section will return to *Ashdown*, in which the Court of Appeal held that copyright is a valid limit on the exercise of freedom of expression. After this decision, scholars criticizing its narrow circumscription of the public interest doctrine and its rigid application of the fair dealing factors proposed an alternative approach to fairness which addresses the requirements of the European Convention. This approach was later adopted by the ECJ in *Deckmyn*. However, unless the *Ashdown* decision is overruled by the Supreme Court, or British courts follow the ECJ's decision, they will have to adhere to a narrow public interest doctrine in copyright cases.

This section will end by hypothesizing a parody of J.K. Rowling's last *Harry Potter* novel, to illuminate how a broadened public interest doctrine would serve as an external mechanism to safeguard parodists' right to freedom of expression where it conflicts with owners' interests. However, so long as the *Ashdown* decision remains binding, and *Deckmyn*

is not to be followed after Brexit, courts may only resort to copyright law's internal mechanism by putting more weight on the nature of the defendant's use factor. In addition, where the public's right to parody comes into conflict with the authors' right of integrity, a broad public interest or freedom of expression doctrine would facilitate the entry of parodic expressions into the public sphere as long as they do not defame the authors. Unless *Ashdown* is overruled, or courts continue to follow *Deckmyn*, the right to parody in British law will be threatened by potential moral rights challenges.

A. The HRA and How the Court Should Have Ruled in *Ashdown*

Under the HRA, legislation “must be read and given effect” in ways that are compatible with the ECHR.²²⁹ Alternatively, courts may declare a provision in an Act of Parliament incompatible with the Convention.²³⁰ A court should first determine whether the right to freedom of expression is at issue in the case before it. It should then examine whether the restriction imposed by the statute meets the conditions required under ECHR, Article 10(2) for a valid limit on exercise of the right. According to Article 10(2), the limit must be prescribed by law and be imposed for a legitimate aim under the Convention to prevent disorder or to protect health, morals, or the reputation or rights of others.²³¹ It must also be necessary for that purpose and be proportionate and justified by relevant and sufficient reasons.²³² The requirement that the legislation at issue should be interpreted and applied

²²⁹ Human Rights Act, 1998, c. 42, s. 3(1).

²³⁰ *See id.* s. 4.

²³¹ European Convention on Human Rights, art. 10(2).

²³² *Id.*

compatibly with the right enables courts to depart from the plain meaning of the legislation and uphold a Convention right.

In *Ashdown*, the Court of Appeal nonetheless held that copyright is a valid limit on the exercise of freedom of expression and that the existing statutory defences within the CDPA, s. 30 were adequate to resolve the dispute between the right to freedom of expression and copyright.²³³ The dispute emerged after *Sunday Telegraph* published a minute written by Paddy Ashdown, the former leader of the Liberal Democrats, of his secret meeting with the Prime Minister on October 21, 1997, several months after the general elections, about his proposal to form a coalition cabinet.²³⁴ Two years after the meeting, Ashdown, upon stepping down from his leadership position, considered the possibility of publishing his memoirs and presented parts of his diaries, including the as-yet-published minute, to several publishers on a confidential basis.²³⁵ The document reached the hands of the political editor of the *Sunday Telegraph*.²³⁶ On November 28, 1999 *The Telegraph* published three separate items about the minute, one being a major story incorporating about a fifth of the minute, either verbatim or in close paraphrase.²³⁷ Ashdown sued the newspaper for breach of confidence and infringement of copyright and applied for summary judgment on the copyright claim.²³⁸

²³³ *Ashdown* [2001] 44 E.M.L.R. 1003 (C.A. civ.).

²³⁴ *Id.* at 1003—04.

²³⁵ *Id.* at 1003.

²³⁶ *Id.*

²³⁷ *Id.* at 1003—04.

²³⁸ *Id.* at 1004.

Besides the obvious defences of fair dealing for the purpose of criticism or review and fair dealing for the purpose of reporting current events and public interest, *The Telegraph* brought to the court a novel claim, by arguing that the court was obliged, under s. 3 of the HRA, to interpret ss. 30 and 171(3) of the CDPA compatibly with the right to freedom of expression contained within Article 10 of the European Convention.²³⁹ It claimed that the articles in question raised a matter of legitimate political controversy and promoted public knowledge and discussion of the actions of those responsible for governing the country.²⁴⁰ The High Court (Chancery Division), conceding that the Telegraph Group's claim could fall within the prima facie right to freedom of expression under Article 10(1), noted that this right was not absolute and was to be balanced with the legitimate conflicting interests listed in Article 10(2).²⁴¹ It held that Ashdown's copyright interest fell within Article 10(2) and that the requisite balance between Article 10(1) and the conflicting interest covered by Article 10(2) was adequately struck by the provisions of the CDPA as a whole.²⁴² It thereby issued a summary judgment on the copyright claim and granted an injunction against further infringement.²⁴³

The Court of Appeal dismissed the newspaper's appeal. Like the Chancery Division, it held that the existing statutory defences within s. 30 of the CDPA were adequate to resolve

²³⁹ See *Ashdown v. Telegraph Group Ltd.* [2001] 20 E.M.L.R. 544, 545 (E.W.H.C. ch.).

²⁴⁰ *Id.* at 557—58.

²⁴¹ *Id.* at 552—54.

²⁴² *Id.* at 560.

²⁴³ *Id.* at 561—62. “The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself, in the legislation it has enacted. There is no room for any further defences outside the code which establishes the particular species of intellectual property in question.” *Id.* at 555.

the dispute between the right of freedom of expression and copyright.²⁴⁴ As a general rule, freedom of expression should have no impact on the regular course of copyright litigation, and only in “rare circumstances” will it come into conflict with the protection afforded by the Copyright Act.²⁴⁵ It also agreed with the Vice-Chancellor in finding that the CDPA, s. 30(1) (fair dealing for the purpose of criticism or review) did not apply because the minute itself had not been subject to criticism or review.²⁴⁶ In considering the application of s. 30(2) (fair dealing for the purpose of reporting current events), it found that the *Sunday Telegraph*’s activities could arguably be described as “reporting current events” but could not constitute fair dealing.²⁴⁷ First, the defendant’s publication of Ashdown’s minute was found to be a commercially competitive use of the work, which has been frequently held to militate strongly against a finding of fair dealing.²⁴⁸ Not only was the article found to have competed with Ashdown’s own intended exploitation of the minute within his autobiography, but the *Sunday Telegraph* had also been motivated by profit.²⁴⁹ Second, the minute had not been published prior to its disclosure by the newspaper, another factor which also militated against

²⁴⁴ *Ashdown* [2001] 44 E.M.L.R. at 1010—11.

²⁴⁵ “Where the subject matter of the information is a current event, section 30(2) of the Copyright Act may permit publication of the words used. But it is possible to conceive of information of the greatest public interest relating not to a current event, but to a document produced in the past. We are not aware of any provision of the Copyright Act which would permit publication in such circumstances, unless the mere fact of publication, and any controversy created by the disclosure, is sufficient to make them ‘current events’.” *Id.* at 1018.

²⁴⁶ *Id.* at 1011.

²⁴⁷ *Id.* at 1024—26.

²⁴⁸ *Id.* at 1026—27.

²⁴⁹ *Id.* at 1025—26.

a finding of fairness.²⁵⁰ Third, regarding the amount and importance of the work taken, the court determined that the defendant had taken too much of the claimant's "work product."²⁵¹ Accordingly, the appeal was dismissed.²⁵²

The *Ashdown* decision has been heavily criticized for its narrow circumscription of the public interest doctrine and its rigid application of the fair dealing factors.²⁵³ Scholars argue that in light of the HRA's requirements, "fairness" under s. 30 should have been assessed differently. First, courts should consider not only the commercial use of the alleged fair dealing but its overall purpose, and should apply a strong presumption in favor of the defendant where the publication raises issues of legitimate public concern.²⁵⁴ Hence, *The Telegraph's* reporting of newsworthy events should have been taken into consideration.²⁵⁵ In particular, the commercial and non-commercial dichotomy is inadequate in assessing the nature of the dealing.²⁵⁶ Although *The Telegraph* had a commercial motivation, the value of newspapers goes beyond mere profits due to the contributions that they make to the public discourse and the marketplace of ideas.²⁵⁷ Accordingly, certain effects of the unauthorized

²⁵⁰ *Id.* at 1027.

²⁵¹ *Id.* at 1027—28.

²⁵² *Id.* at 1029.

²⁵³ M.D. Birnhack, *Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act*, 14(2) ENT. L. REV. 24 (2003); Christina J. Angelopoulos, *Freedom of Expression and Copyright: The Double Balancing Act*, 3 INTELL. PROP. Q. 328 (2008). Angelopoulos cites the ruling in *Lion Laboratories* to argue that if a defence of public interest can be used to deflect the confidence action, then there is no prima facie reason why the copyright action should succeed. *Id.* at 344.

²⁵⁴ *Id.* at 339—40.

²⁵⁵ *Id.* at 342—44.

²⁵⁶ Birnhack, *supra* note 253, at 33.

²⁵⁷ *Id.*

publication on the market of the protected work should be tolerated, and the fact that Ashdown might suffer financial loss due to *The Telegraph*'s publication of the document did not indicate conclusively that its dealing of the work was unfair.²⁵⁸ In addition, limits placed on the "amount and importance" of the work copied are arbitrary, and the media should be granted a wide margin of discretion concerning the amount of the work that can be used, in order to avoid the potential chilling effect of sanctions for copyright infringement.²⁵⁹

It was perhaps no coincidence that the commentators' proposal to widen the scope of a public interest doctrine according to the HRA and the ECHR was incorporated into the ECJ's fair balance test in *Deckmyn*. Regarding the conflict between the right to freedom of expression and copyright, if *Ashdown* is overruled by the Supreme Court, then courts may rely on the external mechanism in the form of a public interest doctrine. Alternatively, should British courts follow the fair balance approach of *Deckmyn*, they can hold for defendants if their expressions are political and/or artistic in nature. If neither of these takes place, courts may resort to an internal solution by putting more weight on the nature of the defendant's use factor. Accordingly, less emphasis would be placed on whether the uses are commercially motivated or whether large amounts of the original works have been copied, even if these factors are not discarded in any fair dealing assessment.

²⁵⁸ *Id.*

²⁵⁹ The *Ashdown* court's conclusion that a "statement by the *Sunday Telegraph* that they had obtained a copy of the minute coupled with one or two short extracts from it would have sufficed" conflicts with the ECHR's decision in *Fressoz and Roire v. France*, which held that: "In essence, [Art.10] leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism." Angelopoulos, *supra* note 254, at 343, citing *Fressoz and Roire v. France*, (1999) 5 B.H.R.C. 654, (2001) 31 E.H.R.R. 2.

B. A *Harry Potter* Hypothesis

Through a hypothesis inspired by British writer J.K. Rowling's *Harry Potter* novels, this subsection and the next will further illuminate how drawing upon a broad public interest doctrine in applying the parody exception would serve to promote freedom of expression and a robust public sphere. Rowling's fantasy fiction, which has earned her worldwide fame, has not gone without criticism.²⁶⁰ The naïve worldview in the *Harry Potter* stories, in which the good always defeat the bad, has been criticized.²⁶¹ Although her later novels arguably reveal a more complex and ambiguous vision of the adult world,²⁶² the similar, good triumphs-over-evil pattern shared by each of the first six books prevails.²⁶³ The seventh and last novel, *Harry Potter and Deathly Hallows* continues to honor the "ancient convention of closure in all of fairytaledom" by revealing to readers in a section entitled "Nineteen Years Later" that Harry is married to Ginny, and Hermione married to Ron.²⁶⁴

Let us imagine a scholar-cum-writer produced a critical work, in the form of a sequel, critiquing Rowling's worldview. This "sequel" cited extensive passages from her last novel,

²⁶⁰ See, e.g., JACK ZIPES, STICKS AND STONES: THE TROUBLESOME SUCCESS OF CHILDREN'S LITERATURE FROM *SLOVENLY PETER* TO *HARRY POTTER* (2001); Mark Harris, *The End of Childhood*, ENT. WKLY. (Jul. 27, 2007), available at <http://www.ew.com/ew/article/0..20048278.00.html> (last visited Oct. 10, 2017).

²⁶¹ Jack Zipes points out that each *Harry Potter* novel begins with the protagonist trapped in "The Prison" of his home, followed by the "Noble Calling" during his most depressive moment, the ensuing "Heroic Adventures," and finally the "Reluctant Return Home." *Id.* at 160. If the books consisted of a lot of unexpected twists, Zipes argues, they would not have become so popular in a consumerist society. *Id.* at 162.

²⁶² See, e.g., Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523, 1525—266, 1535 (2006). Barton contrasts the relatively light-hearted and straightforward stories of good triumphing over evil in the first three novels with the more complex visions of the wizard society that follow, in which there are no easy triumphs, nor clear lines between good and evil.

²⁶³ See Zipes, *supra* note 262; Harris, *supra* note 261.

²⁶⁴ See Harris, *supra* note 261.

rewrote many parts of her story, and incorporated all major characters, landmarks, as well as symbols. Like the author who parodied Salinger's novel, this writer had also marketed this critical work as a "sequel" to Rowling's work. Given Rowling's aggressive stance towards what she considered to be infringements, which has led to numerous legal disputes over the *Harry Potter* series,²⁶⁵ she might regard "sequel" as a rip-off and take legal action against the parodist.

Due to a lack of precedent concerning literary parodies in British case law, the court might reference decisions by American courts, especially *Suntrust Bank v. Houghton Mifflin Co.* and *Salinger v. Colting*. The British court might determine that the borrowing of Rowling's novel by the new work is comparable to the parody of *Gone with the Wind* by *The Wind Done Gone*.²⁶⁶ However, like the *Salinger* Court, it might also find that the parodist copied too much of Rowling's work and/or that the "sequel," by quoting extensively from the original's important passages, would compete with the original and harm its sales.²⁶⁷ Should a greater scope for freedom of expression be allowed because British courts follow *Deckmyn* (after Brexit), or the public interest doctrine be broadened because *Ashdown* is overruled, the parodist's freedom of expression would be safeguarded.²⁶⁸ The court would

²⁶⁵ The worldwide popularity of the *Harry Potter* series has led to the appearance of a number of locally produced, unauthorized sequels as well as other derivative works. Rowling has attempted to curb outright piracy as well as not-for-profit endeavors. *E.g.*, John Eligon, *Rowling Wins Lawsuit against Potter Lexicon*, N.Y. TIMES (Sep. 8, 2008), available at <http://www.nytimes.com/2008/09/09/nyregion/09potter.html> (last visited Oct. 10, 2017); Kieren McCarthy, *Warner Brothers Bullying Ruins Field Family Xmas*, THE REGISTER (Dec. 21, 2000), https://www.theregister.co.uk/2000/12/21/warner_brothers_bullying_ruins_field/ (last visited Oct. 10, 2017).

²⁶⁶ See Part Two Chapter Three, Section IIF.

²⁶⁷ See *id.*

²⁶⁸ See *supra* Section IIF, Section IIIA

more likely determine that the parodist's critique of Rowling's original work enriched the market place of ideas, and even consider that some negative impact on the profits of Rowling's work should be tolerated. Alternatively, if neither of the above happens, the court could rely on an internal mechanism by focusing more strongly on the nature of the defendant's dealing and the artistic and political values of the parody.²⁶⁹ In doing so, it would more likely hold that the parody of Rowling's work constituted fair dealing.

C. Surviving Moral Rights Challenges

While more emphasis by courts on the nature of the defendant's use factor would help the parodist to survive copyright claims by rights holders, only external solutions—a broadened scope for the public interest doctrine with the overruling of *Ashdown*, or a direct engagement with users' right to freedom of expression by following the *Deckmyn* decision—would help parodies to survive potential moral rights claims, and, in the on-going hypothesis, Rowling's moral rights claims against the parodist of her novel.

As discussed previously, authors of original works may file claims of false attribution against parodists. If an author requests to have the original work identified as his or her own in the parody, the court drawing upon a broad public interest doctrine or directly engaging with the parodist's freedom of expression could argue that the parodist has the right to implicit attribution by evoking the well-known work.²⁷⁰ Another challenge may arise when the parody gets mistaken for the original work or a new work by the original author. In *Clark v Associated Newspapers Ltd.* (1998), confusion arose when the defendant published

²⁶⁹ See Griffiths, *supra* note 154, at 94.

²⁷⁰ See *id.* at 75.

parodies of the published diaries of the plaintiff by using the plaintiff's name in the parodies' titles. The court emphasized the significance of ensuring that no confusion arises over the authorship of the parody or satire and that of the original work.²⁷¹ Admittedly, an effective parody that avoids using the original author's name in its own title (as is often the case) would lessen the chance of false attribution.²⁷² Courts drawing upon a broad public interest doctrine would permit parodists to cite the original titles and original authors' names in ways that would not reasonably lead to false attribution. In the *Harry Potter* hypothesis, a court drawing upon this doctrine would less likely hold that a parody named after Rowling's original novel or Rowling infringes Rowling's attribution right.

What about integrity right? In *Confetti Records*, Justice Lewison stated that it was not necessary to read down s. 80 of the *CDPA* in order to ensure compliance with Article 10 of the *ECHR*, and that Article 10 allows states to curtail the right to freedom of expression in order to protect the reputation of others.²⁷³ Because the test for determining whether a work is prejudicial to one's honor or reputation has yet to be standardized, a greater scope for public interest or freedom of expression would mean that expressions that would have been found to violate the authors' integrity rights in the past would more likely be considered legal by courts.

²⁷¹ *Clark v. Associated Newspaper Ltd.* [1998] R.P.C. 261 (E.W.H.C. ch.).

²⁷² *Sainsbury*, *supra* note 195, at 165.

²⁷³ *Confetti Records*, para. 161.

While the word “honor” can be subjective, courts in common law jurisdictions have instilled an objective element in it.²⁷⁴ A “reasonableness” test was considered in the English case of *Tidy v Trustees of the Natural History Museum*, in which Justice Rattee stated that “... before accepting the plaintiff’s view that the reproduction in the book complained of is prejudicial to his honour or reputation, I have to be satisfied that that view is one which is reasonably held, which inevitably involves the application of an objective test of reasonableness.”²⁷⁵ Citing *Snow v. Eaton Shopping Centre*, the Canadian case on integrity right, the judge determined that whether a work would pass the test depends on whether its author’s reputation would be harmed “in the mind of any reasonable person looking at the reproduction of which he complains.”²⁷⁶

The reasonableness test nonetheless has not fully evolved with specific objective criteria. In *Morrison Leahy Music Ltd. v Lightbond Ltd.* (1993), George Michael and the owner of copyright in his musical works brought an injunction to prevent the defendants from releasing a sound recording consisting of a medley derived from five of Michael’s compositions and interspersed with other music (the “Bad Boys Megamix”).²⁷⁷ The court, granting the injunction, held that taking short snatches of compositions from their original context and playing them in a new context could cause the “distortion or mutilation” of the works and amount to a “derogatory treatment” of the work and a breach of the author’s

²⁷⁴ Sainsbury, *supra* note 195, at 155, citing ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 117 (2006).

²⁷⁵ *Tidy*, 39 I.P.R. at 504.

²⁷⁶ *Id.*

²⁷⁷ *Morrison Leahy Music Ltd. v Lightbond Ltd.* [1993] E.M.L.R. 144 (E.W.H.C. ch.).

integrity right, a matter of fact to be resolved at trial.²⁷⁸ In two cases decided after *Tidy*, courts sought to be more objective in their assessments. In *Pasterfield v. Denham* (1998), the court held that expert evidence would be necessary to support the claim of breach of integrity right. Here, the plaintiff alleged that the defendant's alterations to his leaflet's drawings were distortions or mutilations that prejudiced his honor or reputation as an artist.²⁷⁹ The court ruled that the plaintiff's expert was unable to identify the extent of the defendant's alterations and made no reference to the honor or reputation of the plaintiff.²⁸⁰ In addition, there was "no suggestion of dishonesty or fraud or any intention to injure" plaintiff, "nor was it foreseeable that the offending words would do so," and it was not sufficient that he was aggrieved by what had occurred.²⁸¹ In *Confetti Records* (2003), the defendant altered the plaintiffs' musical work by re-mixing it and including different words that allegedly contained references to violence and drugs.²⁸² The claim for infringement of integrity right failed because the court failed to infer evidence from the work that the references were in fact "derogatory" and the author made no complaint about the references hurting his reputation or honor.²⁸³

It is uncertain whether the court, in assessing whether the parody of the *Harry Potter* novel violated Rowling's integrity right, would follow *Pasterfield* to require expert evidence,

²⁷⁸ *Id.* at 151.

²⁷⁹ *Pasterfield v. Denham* [1999] F.S.R. 168, 168—70 (Ply. C.C.)

²⁸⁰ *Id.* at 182—83.

²⁸¹ *Id.* at 185.

²⁸² *Confetti Records*, paras. 49—61.

²⁸³ *Id.* paras. 150—60.

or follow *Confetti* and rely on its own judgment. According to the facts presented in the hypothesis, Rowling might not be able to furnish expert evidence of how her right of integrity has been violated. The latter approach, however, would lead to an uncertain outcome. One might think that the court would not reasonably consider a work that merely articulated artistic and political views towards Rowling's novel, and that neither showed any malice nor defamed the original's author, infringed the author's integrity right. Yet even an objective test would not guarantee a decision that would promote freedom of speech without violating the author's integrity right. Thus, should the court draw upon a broad public interest doctrine or directly engage with freedom of expression of the parodist, they would be less likely to consider the parody to be an infringement of Rowling's integrity right, as long as it did not contain statements that defamed the author or cause direct damage to her reputation.

The parody exception in British copyright law seems broader and more able to promote freedom of expression than its American and Canadian counterparts. Yet the right to parody is potentially threatened by the moral rights provisions in the statute, and the narrow public interest doctrine will prevent courts from applying the exception in ways that help parodies to survive moral rights claims and that best serve the speech interests of the public. Should the *Ashdown* decision be overruled, or should the *Deckmyn* decision be followed, courts could facilitate the role of parody in promoting freedom of expression, creativity, and a robust public sphere.

The U.K. is not the only jurisdiction in which courts can not rely upon a public interest/free speech doctrine to safeguard the right to parody. The next chapter will turn to Hong Kong, where the right to freedom of speech has been under attack for two decades.

Thus, even if a parody exception is included in its copyright law, the free speech doctrine can not be relied upon to safeguard the public's right to parody. Carving out an exception to the author's integrity right to object to derogatory treatment of the work in the form of parody would provide breathing space for parodists to exercise their right to free expression.

CHAPTER SIX

A PARODY EXCEPTION FOR HONG KONG IN CRISIS

These two characters—Egao (惡搞)—expose the superficiality and vulgarity of Hong Kong society, and its general lack of awareness of the “parody” concept ... Western societies have long tolerated parodies: their politicians know too well that parodists are not stupid.¹

My anxiety is this: not that this community’s autonomy would be usurped by Peking, but that it could be given away bit by bit by some people in Hong Kong. We all know that over the last couple of years we have seen decisions taken in good faith by the Government of Hong Kong appealed surreptitiously to Beijing—decisions taken in the interests of the whole community lobbied against behind closed doors by those whose personal interests may have been adversely affected.²

The right to freedom of speech in Hong Kong is protected not only by its Basic Law but also its Bill of Rights, despite its handover from Britain to the People’s Republic of China (PRC) in 1997. Although parodies are commonly found in Hong Kong culture, the

¹ Chip Tsao 陶傑, *Dare to Play 敢於嬉戲*, SING TAO DAILY 星島日報 (Nov. 28, 2011), <https://hk.news.yahoo.com/%E6%95%A2%E6%96%BC%E5%AC%89%E6%88%B2-223000150.html> (last visited Oct. 10, 2017) (translation by the dissertation’s author).

² The most quoted quote by Chris Patten (Hong Kong’s last and most beloved governor), in Edward A. Gargan, *British Governor of Hong Kong Takes a Parting Shot at Beijing*, N.Y. TIMES (Oct. 3, 1996), available at <http://www.nytimes.com/1996/10/03/world/british-governor-of-hong-kong-takes-a-parting-shot-at-beijing.html> (last visited Oct. 10, 2017).

right to parody has not been recognized in its copyright jurisprudence, and the Hong Kong government's attempt to introduce a parody fair dealing exception was opposed by the public. This chapter will ground the significance of a parody exception in Hong Kong's sociopolitical context. It will explain how the exception proposed in this dissertation would serve to align Hong Kong's copyright system with its free speech tradition and promote a critical political culture necessary for Hongkongers' self-governance of their home.

Section I will examine freedom of expression as a right enshrined in Hong Kong laws from its colonial days to its post-handover period as well as the parody tradition in Hong Kong culture. Section II will account for the absence of parody cases and a parody defence in its case law, and the boom in parodies on its social media platforms since the changeover. A parody fair dealing exception will serve to promote a critical political culture necessary for Hong Kong people's self-governance of their home, foster creative industries, and empower Hongkongers to thrive in difficult times. Whereas the public fears that the parody exception in its Copyright (Amendment) Bill 2014 would become a tool for suppressing speech, this section will argue that the parody exception, broadly defined to include "parody" and "satire" but clearly distinguished from "caricature" and "pastiche," would serve to bring Hong Kong's copyright system in line with its free speech tradition and enhance the stated functions of parody.

Previous chapters have contended that courts should apply the parody exception with reference to the free speech doctrine. Section III will explain that while Hong Kong courts should ideally do the same, this external doctrine could not be relied upon to safeguard the right to parody in Hong Kong, given that freedom of expression has been continually eroded since the changeover by both the PRC and the Hong Kong governments. This Section will

therefore look within the Copyright Ordinance for an internal solution: amending the moral rights provisions, especially providing an exception to the author's integrity right to object to derogatory treatment of the work in the form of parody, would create breathing space for parodists to exercise their right to free expressions.

I. FREE SPEECH AND THE RIGHT TO PARODY IN HONG KONG LAW

During most of its colonial period, Hong Kong followed the English tradition of residual freedom on matters related to free speech.³ Although there was little provision for free speech, it was tolerated in a "reasonably open society, where the press is free and critical, and academic and artistic freedoms are respected."⁴ Thus, this freedom, though not legally guaranteed, was practically available.⁵ Its status changed in the years leading to Hong Kong's changeover. Statutory freedom of expression was introduced with the adoption in 1990 of the Hong Kong Bill of Rights Ordinance (BoR), directly based upon the ICCPR.⁶ Coming into effect on 8 June 1991, it introduced the positive protection of fundamental rights and freedoms by incorporating the ICCPR as applied to Hong Kong. Article 16 of the BoR on the "[f]reedom of opinion and expression," which replicates Article

³ Mei-Ning Yan, *Freedom of Expression and the Right of Journalists to Cover Protests and Demonstrations: Hong Kong and Beyond*, 33 H.K. L.J. 613, 624 (2003). The first colonial constitution, the Royal Charter of 1843, and the Letters Patent, Colonial Regulations, and Royal Instructions to the territory's subsequent governors, all ignored this matter. DEREK JONES, CENSORSHIP: A WORLD ENCYCLOPEDIA 1096 (2001).

⁴ Peter Hutchings, *Freedom of Speech in Hong Kong and the Problem of "China"*, 8 CARDOZO STUD. L. & LIT. 267, 269 (1996), citing Yash Ghai, Freedom of Expression, in HUMAN RIGHTS IN HONG KONG 370 (Raymond Wacks ed., 1992).

⁵ *Id.* at 274.

⁶ Yan, *supra* note 3, at 624; Jones, *supra* note 3, at 1096. The colony had been a signatory party to the ICCPR since 1976.

19 of the ICCPR, states that “[e]veryone shall have the right to hold opinions without interference” and “the right of freedom of expression,” which includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁷

The right to freedom of expression became a constitutional right after Hong Kong’s handover to China in July 1997. Under the 1984 Sino-British Joint Declaration (the Joint Declaration) and the Basic Law of the Hong Kong Special Administrative Region (the Basic Law), the Hong Kong “way of life” is to be preserved for fifty years after the changeover.⁸ The Preamble of the Basic Law, in particular, states that for the sake of “[u]pholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities,” the PRC government has decided that after the changeover, the Hong Kong Special Administrative Region “will be established in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China, and that under the principle of ‘one country, two systems,’ the socialist system and policies will not be practiced in Hong Kong.”⁹ Thus, many of the provisions in the Basic Law were designed to reassure the public that life would not change after the handover in 1997 and that Hong Kong would enjoy a “high degree of autonomy” from the PRC

⁷ Hong Kong Bill of Rights Ordinance, 1991, c. 383, art. 16.

⁸ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, 1984; The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, 1997, c. 2101 (Hong Kong Basic Law).

⁹ Hong Kong Basic Law, Preamble.

government.¹⁰ Article 27 of the Basic Law, which has served as Hong Kong's mini-constitution since the changeover, provides that its residents shall have "freedom of speech, of the press and of publications; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions and to strike."¹¹ Moreover, Article 39 of the Basic Law stipulates that the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through Hong Kong laws.¹² In other words, the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and that such restrictions shall not contravene the provisions of the ICCPR applicable to Hong Kong.

Through the BoR and the Basic Law, the ICCPR is put into effect in Hong Kong. Article 16(3) of the BoR stipulates, and Article 39 of the Basic Law indicates, that the right to freedom of expression is not absolute and may be subject to limitations permissible under Article 19(3) of the ICCPR.¹³ This right may therefore be "subject to certain restrictions, but these shall only be such as are provided by law and are necessary—(a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals."¹⁴

¹⁰ In particular, Article 8 of the Basic Law provides that the "laws previously in force in Hong Kong law," including legislation, common law, and the rules of equity, shall be maintained so long as they do not violate the Basic Law. Article 18 of the Basic Law provides that the Chinese government will not legislate for Hong Kong except in limited areas, such as defence, foreign affairs, and other matters considered "outside the limits of the autonomy of the Region." Hong Kong Basic law, arts. 8, 18.

¹¹ *Id.* art. 27.

¹² *Id.* art. 39.

¹³ Hong Kong Bill of Rights Ordinance, art. 16(3); Hong Kong Basic Law, art. 39.

¹⁴ ICCPR, art. 19.3.

A. Laws on Defamation, Obscenity, and Hate Speech

As in other jurisdictions, freedom of expression in Hong Kong is subject to restrictions necessary for the protection of others' reputations. The law on defamation in Hong Kong is governed mainly by common law, under which the burden of proof lies on the defendant rather than the plaintiff.¹⁵ Public or media discussions of public affairs involving statements of fact have not generally been given the protection of qualified privilege.¹⁶ However, the defence known as "fair comment on a matter of public interest" offers much room for the public and the media to exercise their freedom of speech.¹⁷

Regarding obscenity, the British government had adopted a hands-off policy for a long time, which led to the circulation of sexually explicit materials of various kinds in a semi-open fashion or underground.¹⁸ In 1987, it finally enacted the Control of Obscene and Indecent Articles Ordinance (COIAO) to exert some control over the publication and display of indecent and obscene articles¹⁹ in the printed and electronic media. This law nonetheless

¹⁵ Rick Glofcheski, Defamation, in HONG KONG MEDIA LAW 45—46 (Doreen Weisenhaus ed., 2014).

¹⁶ Defamation Ordinance, 1924, c. 21, s. 28: "A defamatory statement published by or on behalf of a candidate in any election to the Legislative Council or to a District Council shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election. . ."

¹⁷ For example, in *Oriental Press Group Ltd. v Next Publications* [2003] 1 HKLRD 751 (C.F.A.), the Court of Final Appeal held that the dealings in shares in a public company by the vice-chairman of the company was a matter of public interest. A "fair" comment is one which could have been made by an honest person, it must not have been motivated by "malice" and the defendant must have believed it to be true or justified. In *Cheng v. Tse* [2000] 3 HKLRD 418 (C.F.A.), the Court of Final Appeal decided that malice only means that the person making the statement did not believe it to be true or justified. Provided that he or she did believe it, it makes no difference that it was motivated by spite or a desire for political or personal benefit.

¹⁸ Zhou He, Pornography, Perceptions of Sex, and Sexual Callousness: A Cross-cultural Comparison, in *MEDIA, SEX, VIOLENCE, AND DRUGS IN THE GLOBAL VILLAGE* 133 (Kamalipour & Rampal eds., 2001).

¹⁹ The COIAO defines the term "article" broadly, meaning "anything consisting of or containing material to be read or looked at or both read or looked at, any sound recording, and any film, video-tape, disc or

gives vague definitions of what constitute “obscenity” and “indecent,”²⁰ and attempts to distinguish “obscene” from “indecent,” undertaken by the Obscene Article Tribunal (OAT), have fallen short of resolving the wide disparities between public standards of the community and private tastes of individuals.²¹ In addition, section 28 of the COIAO contains the defence of public good, which is available for both indecency and obscenity charges, if the OAT finds that “the publication or display is in the interests of science, literature, art or learning, or any other object of general concern.”²² Similarly, the Film Censorship Ordinance states that in considering whether a film “portrays, depicts or treats cruelty, torture, violence, crime, horror, disability, sexuality or indecent or offensive language or behavior,” the censor shall take into account “the artistic, educational, literary or scientific merit of the film and its importance or value for cultural or social reasons.”²³ Hence, sexually explicit materials have remained bountiful in Hong Kong.²⁴

Like Canada and the U.K., Hong Kong has laws banning hate speech, but their scopes are much narrower than their Canadian and British counterparts. Its Equal Opportunities

other record of a picture or pictures.” Control of Obscene and Indecent Articles Ordinance, 1987, c. 390, s. 2(1) & (4). However, films for public screen purposes, videotapes or laserdisc of these films, and videos shown on buses, trains, at piers, and in other public places are instead regulated by the Film Censorship Ordinance. Television broadcasts are governed by the Broadcasting Ordinance. Rebecca Ong, *Policing Obscenity in Hong Kong*, 4(2) J. INT’L COM. L. & TECH. 154, 155—56 (2009).

²⁰ He, *supra* note 18, at 133.

²¹ The Obscene Article Tribunal (OAT), comprising of adjudicators who are lay individuals appointed from different social strata and age groups, is intended to provide a reflection of society’s moral fiber and balanced and acceptable community standards on obscenity and indecency. Ong, *supra* note 19, at 156.

²² COIAO, s. 28.

²³ Film Censorship Ordinance, 1988, c. 392, s. 10(2)(a), (3)(b).

²⁴ He, *supra* note 18, at 133.

Commission (EOC), established in 1996, is responsible for implementing laws that prohibit discrimination, including the Race Discrimination Ordinance (RDO) and the Sex Discrimination Ordinance (SDO). The former, which has come into operation since 2009, defines “race” as “the race, colour, descent, national or ethnic origin of the person.”²⁵ It prohibits not only direct and indirect forms of racial discrimination, but also racial harassment, or the engagement in “any unwelcome, abusive, insulting, or offensive behavior constituting a racially hostile environment and causing humiliation or threat.”²⁶ It also prohibits racial vilification, or the public incitement of “hatred, serious contempt for, or severe ridicule of a person because of his/her race.”²⁷ The SDO, enacted in 1995 and last amended in 2013, does not target hate speech or speech that calls for violence against women; rather, it applies to the employment context and prohibits discrimination in employment on the grounds of sex, marital status, and pregnancy, as well as sexual harassment in employment.²⁸

²⁵ Race Discrimination Ordinance, 2009, c. 602, s. 8(1)(a).

²⁶ *Id.* cl. 7.

²⁷ *Id.* cl. 46. There is no case law on racist speech. To date, the RDO has been invoked once in a case involving the alleged racial discrimination against an Indian child by the Hong Kong police. *See Singh Arjun (by his Next Friend Singh Anita Guruprit) v. Secretary for Justice & Another* [2016] HKDC 626 (D.C.).

²⁸ *See Sex Discrimination Ordinance*, 1995, c. 480. As of January 16, 2016, the EOC recommended the introduction of legislation to protect lesbian, gay, bisexual and transgender (LGBT) people against discrimination on the grounds of sexual orientation, gender identity or “intersex status.” As is the case with sex discrimination, the EOC is more concerned with discrimination in the employment and education contexts than with hate speech against LGBT people. *See Equal Opportunities Commission, Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status* (Jan. 2016), available at <http://www.legco.gov.hk/yr15-16/english/panels/ca/papers/ca20160215-rpt201601-e.pdf> (last visited Oct. 10, 2017).

B. Laws on Public Order and a Failed “Anti-subversion Bill”

The evolution of laws safeguarding national security and public order in Hong Kong presents a more interesting story than those in the other jurisdictions. The colonial period saw the passing of several sedition laws,²⁹ both to secure peace in the colony and to respond to the political turbulences in China and in Taiwan, including the 1907 Chinese Publications (Prevention) Ordinance,³⁰ the 1914 Seditious Publications Ordinance,³¹ the 1938 Sedition Ordinance and Sedition Amendment Ordinance,³² and the 1951 Objectionable Publications Ordinance.³³ Not only were all of these ordinances seldom invoked, but they were also

²⁹ Jones, *supra* note 3, at 1097.

³⁰ The purpose of passing this law was to prevent the incitement of rebellions against China, due to the “amount of seditious matter published in this Colony for some time past, which in the opinion of the Government may have the effect of inciting to crime in China.” Hualing Fu, Past and Future Offences of Sedition in Hong Kong, in HUALING FU, CAROLE J. PETERSEN & SIMON N.M. YOUNG, NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY 221 (2005), *citing* HONG KONG HANSARD 1907 56 (1907).

³¹ This law was necessary, according to the Attorney General and the Colonial Secretary, because “newspapers and documents of a highly objectionable character have been brought into the Colony and distributed amongst some of its inhabitants.” Those publications “of a highly seditious and disloyal character and which contain matter which is subversive of all social and economic conditions and which, disseminated amongst ill-educated persons, are likely to be productive of disturbance and ill-feeling in the Colony.” *Id.* at 222, *citing* HONG KONG HANSARD 1914 34 (1914).

³² According to the Seditious Amendment Ordinance (No. 28), a seditious intention was an intention (i) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors, or against the Government of this Colony or the Government of any other part of His Majesty’s dominions or of any territory under His Majesty’s protection as by law established; or (ii) to excite His Majesty’s subjects or inhabitants of the Colony to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Colony as by law established; or (iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Colony; or (iv) to raise discontent or disaffection amongst His Majesty’s subjects or inhabitants of the Colony; or (v) to promote feelings of ill-will and hostility between different classes of the population of the Colon. *Id.* at 224.

³³ Also referred to as the Control of Publications Consolidation Ordinance 1951, it subjected three broad categories of newspapers to its control, as well as “any publication that was, from the point of view of the Governor in Council, calculated or [was] likely to be prejudicial to the security of the Colony or the prevention of crime or to the maintenance within the Colony of public order, safety, health or morals.” *Id.*, *citing* Section 5, Control of Publications Consolidation Ordinance 1951.

repealed over the years. The only exception is the Sedition Ordinance, which was last amended in the year of the changeover to limit its scope by requiring “the intention of causing violence or creating public disorder or a public disturbance” on the part of the offender.³⁴

Besides sedition laws, the Public Order Ordinance places an additional restraint on free speech and on public assembly. Enacted in 1967³⁵ following the pro-communist riots in the colony, and amended in 1980, its earlier versions required that protesters obtain a license from the police before public gatherings and processions. In 1995, two years from the handover, the Legislative Council (Legco) repealed many provisions to bring it in line with the Bill of Rights and the ICCPR, so that protestors would only need to give prior notification to the police.³⁶ This ignited pressure from the PRC government, which feared that the 1995 amendment would reduce public order regulatory powers of the post-handover Hong Kong government.³⁷ The latest version of the Ordinance, which came into force on 1

³⁴ *Id.* at 231; Albert Chen, The Consultation Document and the Bill: An Overview, in HUALING FU, CAROLE J. PETERSEN & SIMON N.M. YOUNG, NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY 103 (2005).

³⁵ Before 1967, the law dealing with public order was to be found in the Public Order Ordinance, the Peace Preservation Ordinance, the Summary Offences Ordinance, and in the common law. The 1967 version of the law was a consolidation of various pieces of preexisting legislation. Legislative Council of Hong Kong, *A Note on provisions relating to the regulation of public meetings and public processions in the Public Order Ordinance (Cap. 245)* (2000/2001), at 1, available at <http://www.legco.gov.hk/yr00-01/english/panels/se/papers/ls21e.pdf> (last visited Oct. 10, 2017).

³⁶ Yiu-Chung Wong, “One Country” and “Two Systems”: Where Is the Line? in ONE COUNTRY, TWO SYSTEMS IN CRISIS: HONG KONG’S TRANSFORMATIONS SINCE THE CHANGE OVER 78 (Yiu-Chung Wong ed., 2004).

³⁷ The PRC government, fearing that the 1995 amendment would reduce public order regulatory powers of the post-handover Hong Kong government, passed a resolution under Article 160 of the Basic Law that major amendments to the Ordinance would be scrapped, and the Office of the Chief Executive Designate proposed amendments to the Ordinance in April 1997, which led to widespread criticisms that the future Hong Kong government intended to restrict its people’s civil liberties. PANG-KWONG LI, *POLITICAL*

July 1997, strikes a compromise by adopting a procedure halfway between the licensing and notification systems.³⁸ Pursuant to the new law, the Police Commissioner, after notification by the protesters, can object to the public assembly or procession “only if he reasonably considers that the objection is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others.”³⁹ In addition, the Ordinance confers on the police the power to prohibit the display of “any flag, banner or other emblem” at a public gathering that “is likely to cause or lead to a breach of the peace.”⁴⁰

In 2003, the Hong Kong government’s attempt to introduce a national security law, which would have posed further restraints on freedom of speech, failed—at least temporarily. The law was based upon Article 23⁴¹ of the Basic Law, which prohibits “treason, secession, sedition, subversion” against the Chinese government without defining the precise meaning of these words, and empowers and mandates the Legco of the post-handover Hong Kong government to enact laws to define and penalize such actions. After Beijing’s reminder of the obligation to enact the law under Article 23,⁴² the Hong Kong government released its

ORDER AND POWER TRANSITION IN HONG KONG 180—181 (1997). On 15 May, the CE Office scaled down the amendments, before the Provisional Legislative Council passed the latest version of the Ordinance.

³⁸ See Public Order Ordinance, 1967, c. 245, s. 14.

³⁹ *Id.* s. 14(1).

⁴⁰ *Id.* s. 3(1).

⁴¹ Article 23 reads: “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.” Hong Kong Basic Law, art. 23.

⁴² Carol Jones, *The Law Wars: Article 23*, in *LOST IN CHINA? LAW, CULTURE AND IDENTITY IN POST-1997 HONG KONG* 174 (2015). Beijing’s reminder reflected its long-standing fear that Hong Kong could become

proposals of the law for a three-month consultation exercise on 24 September 2002 and issued the National Security (Legislative Provisions) Bill on 14 February 2003. Opponents criticized the bill for its untimeliness and its vaguely-defined terms such as “subversion” and “sedition” according to which any speech instigative of the Chinese government could be held as illegal.⁴³ The Hong Kong government’s consistent refusal to listen to the public and its issuance of the bill only seven weeks after the close of the consultation period fueled a mass protest on 1 July 2003.⁴⁴ On 5 September 2003, the bill was withdrawn, and further public consultation on the implementation of Article 23 was shelved.⁴⁵

C. Press Freedom and the Right to Parody

If the right to freedom of expression is a natural right guaranteed by the BoR and based upon the ICCPR, then so is the right to parody. Up until 1997, Hong Kong had seen less censorship than most East Asian countries.⁴⁶ Despite all those seemingly draconian laws during the colonial era, British governors adopted a laissez-faire policy with regards to social

a base for subversion, given Hongkongers’ vehement support for the Tiananmen demonstrators in June 1989. *See also* Carole J. Petersen, Hong Kong’s Spring of Discontent: The Rise and Fall of the National Security Bill in 2003, *in* HUALING FU, CAROLE J. PETERSEN & SIMON N.M. YOUNG, NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY 18 (2005). Writing in 1990, David Clark already identified Article 23 as problematic, on the grounds that it attempted to restrict free political activity, thus contradicting Article 27, which stated that Hongkongers would enjoy freedom of speech, of the press and of publication. In addition, it prohibited acts of treason, secession, sedition and subversion, the last an offence not known to the common law. Jones, *supra* note 42, at 174, *citing* D. Clarke, Sedition and Article 23, *in* HONG KONG’S BASIC LAW: PROBLEMS AND PROSPECTS 31—32 (1990).

⁴³ Jones, *supra* note 42, at 175; Chen, *supra* note 34, at 102.

⁴⁴ This was the largest protest in history against the Hong Kong government, in which 500,000 people took to the street to demonstrate against Article 23. Petersen, *supra* note 42, at 13, 49; Jones, *supra* note 42, at 173, 177-178.

⁴⁵ Chen, *supra* note 34, at 94.

⁴⁶ Jones, *supra* note 3, at 1096.

and political issues, which led to a free press in the colony since the early years of its establishment.⁴⁷ In the countdown to the handover, the colonial government further brought the Film Censorship Ordinance in line with the BoR by removing the “damaging good relations with other territories” clause, which had empowered the Censorship Board to ban films raising politically sensitive matters in the past.⁴⁸ In May 1996, the British Privy Council ruled that a newspaper that had disclosed details of an investigation carried out by the Independent Commission against Corruption (ICAC) was protected by Article 16 of the BoR.⁴⁹ This decision set an important precedent affirming the importance of the BoR as an essential safeguard for freedom of expression and freedom of the press. Despite the political changeover, therefore, Hong Kong should continue to benefit from a free press, and no one—be they Hong Kong residents or foreigners passing through Hong Kong—should be prohibited from voicing their opinions, written or verbal, as long as they are not defamatory, obscene, or discriminatory in nature and do not threaten public order.

⁴⁷ British governor Hercules Robinson (1859-65) set a precedent for free press by holding a public enquiry on civil service abuses to which the printed media were invited to give evidence. Although the 1907 Chinese Publications (Prevention) Ordinance and the 1914 Seditious Publications Ordinance could be invoked by governors to stifle critics, local newspapers were given a completely free rein until the 1940s, when the Japanese took over. After 1945, upheavals in neighboring countries, including the communist takeover of Mainland China, had little impact on such a laissez-faire policy. The authorities seldom convicted local journalists under the 1951 Objectionable Publications Ordinance, one exception being Lee Tsung-ying, a left-wing journalist, who was found guilty of sedition in 1953 for calling the British “butchers” for their handling of riots following the fire in the Shek Kip Mei squatter which left 55,000 Chinese immigrants homeless. *Id.*

⁴⁸ Jones describes the Film Censorship Ordinance 1973 as setting “ultra vires” standards by authoring the film censorship board to ban films on the grounds that they contain criticisms of the judiciary and of the Hong Kong government and seditious materials, and damage good relations with other territories. In 1988, a new Film Censorship Ordinance dropped the first three criteria but kept the “damaging good relations with other territories” clause. *Id.*

⁴⁹ *Ming Pao Newspaper Ltd. & Others v. Attorney General of Hong Kong* [1996] 6 HKPLR 103 (C.A.).

The right to parody stems from freedom of expression and freedom of the press. There are examples of parody in traditional and modern Chinese literatures and cultures.⁵⁰ It is both difficult and beyond the scope of this chapter to determine whether Hong Kong people in general have read the works of particular Chinese authors, some of which are rather obscure, and the extent of Chinese literary and cultural influences on this former British colony. Yet there has been no lack of parodies in Hong Kong's popular culture. *Enjoy Yourself Tonight* (1967-1994), a popular variety show that aired on Television Broadcasts Limited, the first wireless commercial television station in the territory, became the first mass entertainment show to frequently mock social affairs by parodying songs and performing satirical dramas.⁵¹ In addition, film actor and director Stephen Chow frequently parodied Hollywood and Hong Kong action films and characters in his works.⁵²

Hongkongers enjoy the right to draw upon the tradition of parody to voice their opinions, whether through writing, artworks, or performances, as long as their works are not defamatory, obscene, or discriminatory in nature and do not threaten public order. As the next section will show, no disputes involving parodies have been brought to courts and a parody defence has not been invoked in case law, unlike in the other selected jurisdictions. Due to the boom in parodies in Hong Kong's social media over the past two decades,

⁵⁰ Herbert Franke offers examples of the parodies of funerary texts as recorded in *Cho-keng lu* by Tao Tsung-I published in 1366. Herbert Franke, *A Note on Parody in Chinese Traditional Literature*, 18(2) *ORIENS EXTREMUS* 242 (1971). Andrew Stuckey offers examples like early twentieth-century writer Lu Xun's short story, "Mending Heaven," a parody of the Chinese origin myth of Nu Wa. ANDREW STUCKEY, *OLD STORIES RETOLD: NARRATIVE AND VANISHING PASTS IN MODERN CHINA* 17 (2010).

⁵¹ Doris Yu & Zoe Tam, *Humour out of Chaos: How Satire Helps Channel People's Frustrations*, H.K. FREE P. (Mar. 28, 2016), <https://www.hongkongfp.com/2016/03/28/humour-out-of-chaos-how-satire-helps-channel-hong-kong-peoples-frustrations/> (last visited Oct. 10, 2017).

⁵² Kin Yan Szeto, *The Politics of Historiography in Stephen Chow's Kung Fu Hustle*, 49 *JUMP CUT* (2007), <https://www.ejumpcut.org/archive/jc49.2007/Szeto/> (last visited Oct. 10, 2017).

providing for a parody fair dealing exception in its copyright law has nonetheless become urgent.

II. THE RIGHT TO PARODY IN HONG KONG COPYRIGHT LAW

Copyright law in Hong Kong has followed to a great extent the English model. The Hong Kong Copyright Ordinance, which became effective after 27 June 1997, is its first purely local copyright law. Yet the Copyright Act 1956 of the United Kingdom has continued to apply to protect copyrights of works created before 27 June 1997.⁵³ No parody cases have been brought to Hong Kong courts, and neither has the parody defence been invoked, before or after 1997, according to Hong Kong law databases.⁵⁴ Nonetheless, parody is not a new genre to Hong Kong people, and socio-political crises plaguing the territory have further led to the boom in parodic works in its social media over the past two decades. As the need for a parody fair dealing exception arose, the government proposed to amend the Copyright Ordinance in 2011 and 2014. This section will argue that the Ordinance should follow the standard proposed in Part One to provide for a parody exception that would safeguard freedom of expression and generate a vibrant public discourse.

⁵³ The Copyright Ordinance, Chapter 39, was introduced in Hong Kong in 1973 to supplement and extend the remedies available under the Copyright Act of 1956. The Law Commission of Hong Kong, Reform of the Law Relating to Copyright (Nov. 1993), at iv, *available at* <http://www.hkreform.gov.hk/en/docs/rcopyright-e.pdf> (Oct. 10, 2017).

⁵⁴ See Hong Kong Legal Information Institute, <http://www.hklii.hk/chi/> (last accessed Oct. 10, 2017).

A. Fair Dealing in Hong Kong Copyright Law and the Absence of a Parody

Defence

Copyright lawsuits in Hong Kong have largely involved making, possessing and/or distributing allegedly pirated and counterfeit goods. In typical scenarios, customs officers seized pirated videos or counterfeit goods at borders or defendants' premises, or located defendants' home addresses through the Internet service providers, and seized the computers by which defendants distributed pirated materials in digital formats.⁵⁵ Yet other scenarios abound. *Crown Record Co. Ltd. v. Eng Kin Film Co. Ltd.* (1992), for example, involved a dispute between the sole copyright owner of the lyrics and music of a Cantonese opera and the film company that sold the discs and video cassettes of a filmic adaptation of the opera.⁵⁶ In *Johan Hendrik Cornelis Kemp v. Sing Pao Newspaper and Publications, Ltd.* (1994), a freelance professional photographer brought suit against a newspaper for publishing without his permission six of his photographs about horse racing in Vietnam.⁵⁷ In *Fossil, Inc. v. Trimset Ltd. and Another* (2003), the Court held that the defendants infringed the plaintiffs' copyright by producing and selling a counterfeit that was substantially a copy of the plaintiffs' innovative and commercially successful model.⁵⁸

As in other jurisdictions, wholesale copying is not necessary for a finding of copyright infringement. Section 22 of the Copyright Ordinance states that infringement

⁵⁵ *E.g.*, HKSAR v. Chan Nai Ming [2007] HKCFA 36 (C.F.A.); Ho Hon Chun Daniel & Others v. HKSAR [2006] HKCFA 15 (C.F.A.); HKSAR v. Mega Laser Products (HK) Ltd. & Others [1999] HKCA 222 (C.A.).

⁵⁶ *Crown Record Co. Ltd. v. Eng Kin Film Co. Ltd.* [1992] CA 241 (C.A.).

⁵⁷ *Johan Hendrik Cornelis Kemp v. Sing Pao Newspaper and Publ'n., Ltd.* [1994] HKDC 4 (D.C.).

⁵⁸ *Fossil, Inc. v. Trimset Ltd. & Another* [2003] HKCFI 64 (C.F.I.).

occurs when a person “without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright,” “in relation to the work as a whole or a substantial part of it” “either directly or indirectly.”⁵⁹ In *Fossil, Inc.*, the Court, drawing upon the “substantial similarity” test set out in *Copinger & Skone James on Copyright*, found that the defendants’ watch was “substantially a copy” of the plaintiffs’ because they shared an identical concept and dominant features, so that the differences between them did not detract from their overall similarity.⁶⁰ In addition, the Court in *Apple Daily Ltd. v. Oriental Press Group Ltd. and Others* (2010) held that copyright protection extends not only to expressions, but also to the compilations of information, due to the skill and labor in its assembly, selection or presentation.⁶¹

Substantial copying does not necessarily constitute copyright infringement.

According to ss. 38 and 39 of the Copyright Ordinance, fair dealing with a work for the purposes of “research or private study,” “criticism, review and news reporting,” “giving and receiving instruction,” or “public administration,” does not constitute infringement under the current law.⁶² In determining whether any dealing with a work is fair, the court shall take into account “all the circumstances of the case and, in particular—(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature; (b) the nature of the work; (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and (d) the effect of

⁵⁹ Copyright Ordinance, 1997, c. 528, s. 22(2), (3).

⁶⁰ *Fossil, Inc.* [2003] HKCFI 64, paras. 16, 19, 22.

⁶¹ *Apple Daily Ltd. v. Oriental Press Group Ltd. & Others* [2010] HKCFI 929, para. 23 (C.F.I.).

⁶² Copyright Ordinance, ss. 38, 39.

the dealing on the potential market for or value of the work.”⁶³ The Court in *Capcom Co. Ltd. v. Pioneer Technologies Ltd.* (2008) determined that the defendants’ reproduction of images, though identical or substantially similar to plaintiffs’ video game in their magazine, was necessary “for the purpose of criticism or review” and constituted fair dealing.⁶⁴ Certainly, fair dealing does not serve as an automatic shield from infringement charges. In *Konami Kabushiki Kaisha & Another v. Info Power Ltd.* (2007), the Court of Appeal found that the defendant had reproduced a large number of images from the plaintiff’s video work while providing very few comments in its booklets.⁶⁵ Hence, it determined that it was “highly arguable” that the trial judge was wrong in concluding that the defence of fair dealing was available to the defendant.⁶⁶

Records show that no parody cases have been brought to courts and a fair dealing defence for the purpose of parody has not been invoked in Hong Kong. There have been no cases in which the works of literary writers had been parodied through close imitations and reproductions of their characters, plots, and expressions, as in *Salinger* and *Suntrust Bank*. Nor have there been cases in which corporate logos had been parodied by disgruntled employees or trade unions, as in *Michelin*, or by other parties for any critical or commentary purposes. Where defendants had copied the logos of plaintiffs’ products and faced charges of

⁶³ *Id.* s. 38(3).

⁶⁴ *Capcom Co. Ltd. v. Pioneer Technologies Ltd.* [2008] HKDC 57 (D.C.), *aff’d* [2008] HKCA 739 (C.A.).

⁶⁵ *Konami Kabushiki Kaisha & Another v. Info Power Ltd.* [2007] HKCA 724 (C.A.).

⁶⁶ *Id.* para. 38.

passing off, copyright and/or trademark infringement(s), they did not attempt to raise a parody defence like defendants in many English and Canadian cases did.⁶⁷

As discussed, Hong Kong has not lacked parodies and good examples can be found in *Enjoy Yourself Tonight* and Stephen Chow's movies. Yet these parodies have not resulted in infringement lawsuits. In *Enjoy Yourself Tonight*, actors frequently performed Cantonese pop songs with brand new lyrics both to poke fun at the original performers and to comment on social affairs.⁶⁸ The television station never got sued for these one-time, light-hearted performances, likely because they were not considered to have any negative impact on the sales of the originals. Chow's movies, rather than borrowing substantially from older works, parody them rather loosely. An example is *From Beijing with Love* (1994), an action comedy film alluding to the James Bond movie *From Russia with Love* (1963), in which Chow played a Chinese James Bond who does not know how to use guns.⁶⁹ Another example is *Love on Delivery* (1994), in which Chow's character is introduced in a parody of the introductory scene from Hollywood blockbuster *Terminator II* (1991).⁷⁰ *Kung Fu Hustle* (2004), a martial arts comedy film, evokes numerous characters in Hollywood cinema and

⁶⁷ E.g., *Tong Wai Man v. Tam Lun Sang* [2013] 2013 WL 5915372 (C.F.I.); *Leung Ting v. Lee Yun Tim* [2008] 2008 WL 654169 (C.F.I.).

⁶⁸ Yue & Tam, *supra* note 51. Refer to *Enjoy Yourself Tonight's Classic Parodies* for the videos of some of these performances (Feb. 12, 2010), <http://hakaider00.mysinablog.com/index.php?op=ViewArticle&articleId=2170520> (last visited Oct. 10, 2017).

⁶⁹ Szeto, *supra* note 52. The Chinese title and the name of Chow's character, "ling ling chat," is a homophone for the number "007" in Cantonese.

⁷⁰ *Love on Delivery with Stephen Chow*, MARTIAL ARTS AND ACTION MOVIES, <https://martialartsactionmovies.com/love-on-delivery-with-stephen-chow/> (last visited Oct. 10, 2017).

the Hong Kong martial arts tradition.⁷¹ No infringement lawsuits have been brought against Chow and his co-producers. Because his works did not borrow substantially from the originals, any such lawsuits would very likely have failed.

Although a fair dealing parody defence has not been raised in a copyright suit, “parody” has been mentioned in several cases. In a decision where a famous entertainer brought an action of passing off against a bank, a court made a brief reference to “parody” by citing a foreign decision.⁷² The other decisions that mention “parody” do not even involve intellectual property. Nonetheless, the judges offered detailed descriptions of parody that are highly similar to the definition proposed in this dissertation. In *Tong Sai Ho v. Obscene Articles Tribunal* (2008) and *Ming Pao Newspapers Ltd v. Obscene Articles Tribunal* (2008), the Court reviewed the Obscene Articles Tribunal’s classifications of a controversial gender/sex column in the student press of a local university and of a well-known Hong Kong newspaper’s supplement comment on the student column. Holding that the supplement was a “parody” of the student column, it offered a broad definition of “parody,” which, in this case, aimed “to show and invite its readers to reflect on the different attitudes of people to sex and what they considered as deviant sexual behavior,” hence serving as “a critique not only of certain attitudes in the society but also of the way the relevant message was conveyed” in the

⁷¹ Szeto, *supra* note 52. They include Sing’s “the One” character, which is a parody of Neo in the *Matrix* trilogy (1999, 2003), and the Landlady and Landlord, which allude to the leading couple in Hong Kong writer Jin Yong’s martial arts novel *The Return of the Condor Heroes* (1959—61).

⁷² The decision is *Lau Tak Wah Andy v. Hang Seng Bank Ltd.* (1999), where a famous entertainer brought an action of passing off against a bank to restrain its unauthorized use of his name, image or likeness in a promotional campaign which suggested his approval or endorsement of its products. The Court referenced *Pacific Dunlop* (1989), an Australian case heavily relied upon by the entertainer’s lawyer, in which the Federal Court of Australia affirmed the lower court’s holding the defendant’s television advertisement, easily recognizable as being a parody of a scene from the plaintiff’s film, was passing off on the ground that the audience would be misled into believing that a commercial arrangement had been concluded between the plaintiff and the defendant. [1999] HKCFI 648, para. 17 (C.F.I.).

student column.⁷³ In *Grant David Vincent Williams v. Jefferies Hong Kong Ltd.* (2013), an employee sued his company for terminating his employment over a “Hitler video” incidentally referred to in a daily newsletter that was sent to subscribers without his superior’s prior approval.⁷⁴ The Court identified the video as a “parody”, describing it as an “art form ... since the Greek and Roman times” in which “the theme or style, or both, of a person’s activity are exaggerated or applied to an inappropriate subject for the purpose of ridicule and effect.”⁷⁵

Due to the lack of cases in which the parody defence would have been useful, it is no surprise that the defence has not been invoked by defendants. This situation is bound to change in light of the proliferation of parodic works in Hong Kong’s social media for almost two decades, which provided a sound rationale for the Hong Kong government to reform its copyright law and to introduce a parody exception.

B. The Proliferation of Parodies, or *Egao*, in Twenty-First Century Hong Kong

There are several Chinese terms for “parody,” depending on the contexts in which it appears.⁷⁶ As discussed, literary parodies in the form of unauthorized sequels, like those of Salinger’s or Mitchell’s works, have yet to be seen in Hong Kong. Its parodies, most

⁷³ *Tong Sai Ho v. Obscene Articles Tribunal* [2008] HKCFI 901, para. 15 (C.F.I.); *Ming Pao Newspapers Ltd. v. Obscene Articles Tribunal* [2008] HKCFI 899, para. 15 (C.F.I.).

⁷⁴ *Grant David Vincent Williams v. Jefferies H.K. Ltd.* [2013] HKCFI 1011 (C.F.I.).

⁷⁵ *Id.* para. 49.

⁷⁶ In the context of literary and film criticisms, it is more properly translated as 戲仿 or 滑稽模仿作品, literally meaning “imitation for laughter/ridicule.” See, e.g., LINGUEE, <https://www.linguee.com/english-chinese/search?source=auto&query=parody> (last visited Oct. 10, 2017); CAMBRIDGE (ENGLISH-CHINESE) DICTIONARY, <https://dictionary.cambridge.org/dictionary/english-chinese-traditional/parody> (last visited Oct. 10, 2017).

frequently found in social media and created by Internet users through editing and remixing existing materials, are commonly referred to as “egao” (惡搞).⁷⁷ Literally meaning “making bad” or “evil doing,” egao was etymologically derived from the Japanese word “kuso-ge,” which describes badly made video games as well as the appreciation of these sub-par games.⁷⁸ Around year 2000, kuso-ge, brought into Taiwan by young netizens who frequented Japanese websites, soon became an Internet phenomenon and spread to Hong Kong and China.⁷⁹ In addition, although the father of egao is widely considered to be Stephen Chow, owing to the presence of parodies in his films, it became associated with a wider scope of meanings.⁸⁰ It now indicates “an online-specific genre of satirical humor and grotesque parody circulating in the form of user-generated content” fashioned by simple editing tools.⁸¹ Internet forums, Facebook, and Youtube have become highly popular channels for disseminating these amateurish, user-generated parodies.

Although the targets of egao have included celebrities, political figures, and private individuals, egao has always carried strong connotations of social criticism and has served as

⁷⁷ To be more exact, “egao” is Mandarin pinyin. The Cantonese transliteration for 惡搞 is “ngok gaau.”

⁷⁸ Gabriele de Seta, Egao and Online Satire, in POP CULTURE IN ASIA AND OCEANIA 228 (Jeremy A. Murray & Kathleen M. Nadeau eds., 2016). The word “Kuso-ge” was coined in the 1980s by Jun Miura, an illustrator and writer for the Japanese video game magazine *Weekly Famitsu*, to describe video games of sub-par qualities that have garnered a cult following. The introduction of Kuso fandom sought to teach gamers how to appreciate and enjoy bad games. Oliver Jameson, *You’ve Probably Never Played ... Ikki*, MINUS WORLD (Feb. 10, 2016), <https://minusworld.co.uk/2016/02/10/ypnp-ikki/>, Kuso, KNOW YOUR MEME, <http://knowyourmeme.com/memes/subcultures/kuso> (last visited Oct. 10, 2017).

⁷⁹ Kuso, *supra* note 78.

⁸⁰ Hoiying Ng, *Mo Lei Tau and Egao: Fun and Politics in the Structure of Feeling of Hong Kong Youth*, GLOBAL YOUTH CULTURES (Oct. 2, 2014), <https://globalyouthcultures.wordpress.com/2014/10/02/mo-lei-tau-and-egao-hong-kong-youth/> (last visited Oct. 10, 2017).

⁸¹ de Seta, *supra* note 78, at 227.

a creative outlet for Internet users to express their views on society and politics in their own styles.⁸² Unsurprisingly, the explosion of parodies in Hong Kong's social media has been fueled by its social and political turmoil since the political changeover.

At this juncture, it is necessary to pick up where Section I left off and return to the large-scale demonstration against Article 23 in 2003. Although the opposition succeeded, the demonstration and its related democratic activities also alarmed both the Hong Kong and the PRC governments.⁸³ China thus tightened its grip on Hong Kong through various hard-line measures,⁸⁴ which it supplemented by a “velvet glove” approach through propaganda and other initiatives.⁸⁵ The former have enabled the “mainland” ways to continue to seep into Hong Kong, eroding its core values such as freedom of speech and leading to further protests.⁸⁶ Although the latter did improve the territory's immediate economic prospects, they made it more economically dependent on Mainland China in the long run.⁸⁷ In short,

⁸² Ng, *supra* note 80. Ng contends that netizens create online parodies to express views on various issues, or simply for fun, or both.

⁸³ *Wen Wei Po*, a pro-Beijing newspaper, criticized the democracy movement for turning Hong Kong into a city of “turmoil.” Petersen, *supra* note 42, at 52. Mainland politicians used the phrase “fanzhong luangang” (rebellious against China and causing chaos in Hong Kong) to describe the demonstration. Jones, *supra* note 42, at 180.

⁸⁴ One immediate example was its appointment of Zheng Qinghong, a member of the Standing Committee of the Political Bureau of the PRC, to oversee Hong Kong affairs, and set up a coordination Committee comprising eighteen members, including officials from the State Council's Hong Kong and Macao Affairs Office, the Liaison Office in Hong Kong, the Liaison Office in Macao, the Ministry of Public Security, the Ministry of National Security, the Party Central Committee's United Front Department and the PLA. Jones, *supra* note 42, at 180—181.

⁸⁵ Examples include arranging visits of the PRC's Olympic athletes and the Chinese astronaut Yang Liwei to Hong Kong. *Id.* at 181.

⁸⁶ On 1 July 2004, another half million people took part in a protest against the Hong Kong government, fueled by reports that three popular radio phone-in hosts had resigned due to intimidation by the Chinese authorities. *Id.*

⁸⁷ *Id.*

both strategies have made Hongkongers resentful of the “mainlandisation”—both political and cultural—of their home.⁸⁸

One of the 2003 initiatives was the Individual Visit Scheme (IVS), a liberalization measure under the Closer Economic Partnership Arrangement, which enabled Chinese tourists to travel to Hong Kong on an individual basis.⁸⁹ Implemented also to boost Hong Kong’s economy after the Severe Acute Respiratory Syndrome epidemic,⁹⁰ which spread from China to Hong Kong and which caused almost 300 deaths in the city,⁹¹ the IVS has been one major cause of Hong Kong-Mainland China conflicts. Despite the dramatic surge in the numbers of Chinese tourists since the IVS, tourism has never made up more than five percent of Hong Kong’s GDP and Chinese tourism has merely contributed to half of this percentage.⁹² Yet many Chinese tourists, whose arrogance and lack of manners have often made newspaper headlines, both Hong Kong and international,⁹³ have continued to act out their “benefactor mentality” or “master mentality” by treating Hong Kong people with

⁸⁸ *Id.*

⁸⁹ Daniel Garrett, Contesting China’s Tourism Wave: Identity Politics, Protest and the Rise of the Hongkonger City State Movement, in *PROTEST AND RESISTANCE IN THE TOURIST CITY* 110 (Claire Colomb & Johannes Novy, eds., 2016); See Tourism Commission of Hong Kong, *Individual Visitor Scheme*, http://www.tourism.gov.hk/english/visitors/visitors_ind.html (last visited Oct. 10, 2017).

⁹⁰ Garrett, *supra* note 89, at 110.

⁹¹ E.g., Meagan Fitzpatrick, *SARS 10th Anniversary in Hong Kong Brings Vivid Memories*, CBC NEWS (Mar. 18, 2013), <http://www.cbc.ca/news/world/sars-10th-anniversary-in-hong-kong-brings-vivid-memories-1.1321674> (last visited Oct. 10, 2017); *The SARS Epidemic: China Wakes Up*, THE ECONOMIST (Apr. 24, 2013), available at <http://www.economist.com/node/1730968> (last visited Oct. 10, 2017).

⁹² *Hong Kong: The Facts—Tourism*, GOVHK (May, 2016), <http://www.gov.hk/en/about/abouthk/factsheets/docs/tourism.pdf> (last visited Oct. 10, 2017).

⁹³ Amy Li, *Rude Awakening: Chinese Tourists Have the Money, But Not the Manners*, S. CHINA MORNING POST (Dec. 31, 2014), available at <http://www.scmp.com/news/china/article/1671504/rude-awakening-chinese-tourists-have-means-not-manners> (last visited Oct. 10, 2017).

condescension and disparagement.⁹⁴ The daily influx of tourists has impacted many Hongkongers' daily lives and made them feel like strangers in their own home, thus leading to many anti-Chinese tourism protests.⁹⁵ The One Way Permit Scheme, administered by the Chinese government and allowing 150 Mainland Chinese a day to settle permanently in Hong Kong, has further worsened the hegemonic crisis in the city.⁹⁶ In 2012, the Hong Kong government implemented a policy that substantially reduced the number of birth tourists from China who had been swarming Hong Kong's hospitals and exploiting their medical resources.⁹⁷ Nonetheless, the One Way Permit Scheme was considered by many to be a sufficient and effective tool for the Beijing government to change the population mix in Hong Kong and integrate it with China.⁹⁸

⁹⁴ At an interview, a Chinese tourist remarked that "if the Beijing government had not taken care of Hong Kong, it would have been died a long time ago!" Another made a similarly condescending remark: "If we do not come to Hong Kong to consumer its goods and services, what could you eat (how could you even support yourselves)?" originally from a Chinese essay by Chi Chi 致知, *Where does the Mainland Chinese' "Benefactor Mentality" Come from?* 大陸人的「恩主心態」從何來, SPARK (Feb. 19, 2014), <https://sparkpost.wordpress.com/2014/02/19/%E5%A4%A7%E9%99%B8%E4%BA%BA%E7%9A%84%E3%80%8C%E6%81%A9%E4%B8%BB%E5%BF%83%E6%85%8B%E3%80%8D%E5%BE%9E%E4%BD%95%E6%9D%A5/> (last visited Oct. 10, 2017).

⁹⁵ Garrett, *supra* note 89, at 107, 111—116.

⁹⁶ Christopher Yeung, *Is It Time for HK to Say No to the One-way Permit Scheme?* EJ INSIGHT (Aug. 21, 2015), available at <http://www.ejinsight.com/20150821-is-it-time-for-hk-to-say-no-to-the-one-way-permit-scheme/> (last visited Oct. 10, 2017).

⁹⁷ Emily Tsang, *Mainland Women Gatecrashing Hong Kong's Maternity Wards, 3 Years after CY Leung's 'Zero-quota' Policy*, S. CHINA MORNING POST (Apr. 24, 2016), available at <http://www.scmp.com/news/hong-kong/health-environment/article/1938268/mainland-women-gatecrashing-hong-kongs-maternity> (last visited Oct. 10, 2017). The birth tourism phenomenon began after the 2001 case *Director of Immigration v. Chong Fung Yuen*, in which the Court of Final Appeal held that a boy born in Hong Kong to two mainland parents neither of whom was a Hong Kong resident nevertheless was entitled to the right of abode.

⁹⁸ Yeung, *supra* note 96.

The successful opposition to the National Security Bill in 2003 was followed by a short period of optimism among the Hong Kong populace, who began campaigning for democratic reform and universal suffrage in the election of Hong Kong's Chief Executive.⁹⁹ In April 2004, however, the Standing Committee of the National People's Congress of China, pushed too far by the protest, expressly ruled out both universal suffrage in 2007 and a fully elected Hong Kong legislature in 2008.¹⁰⁰ In 2013, law professor Benny Tai initiated the "Occupy Central" campaign to pressure the Chinese government into granting an electoral system that "satisf[ies] the international standards in relation to universal suffrage" in the Hong Kong Chief Executive Election in 2017.¹⁰¹ The originators of the campaign, as well as the student groups which played a part of it, adopted and adhered to the principle of non-violent civil disobedience after Martin Luther King.¹⁰² After a week-long boycott of classes by students who were frustrated at Beijing's decision to rule out fully democratic elections for Hong Kong, the "Occupy Central" movement commenced on 28 September 2014.¹⁰³ It ended in December, with the founders surrendering themselves to the police and

⁹⁹ Article 45 of the Basic Law states that there shall be "gradual and orderly progress" in the method of selecting the Chief Executive and that the "ultimate aim" is selection "by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures." Hong Kong Basic Law, art. 45. In the last quarter of 2003, the Hong Kong government, as part of its effort to regain public support, seemed prepared to talk about democratic reforms. At a public forum in November 2003, the Secretary for Constitutional Affairs indicated that changes to the method of selecting the Chief Executive were possible for 2007 and that the government would soon begin public consultation on the issue. Petersen *supra* note 42, at 55—56.

¹⁰⁰ *Id.* at 58—60.

¹⁰¹ *Occupy Central with Love and Peace, Occupy Central with Love and Peace: Manifesto* (Jan. 2, 2013), http://oclp.hk/index.php?route=occupy/book_detail&book_id=11 (last visited Oct. 10, 2017).

¹⁰² *See Id.*

¹⁰³ *Occupy Central Urges Hong Kong Protesters to Retreat*, BBC NEWS (Dec. 2, 2014), available at <http://www.bbc.com/news/world-asia-china-30288543> (last visited Oct. 10, 2017).

announcing their plan to extend the spirit of the movement through community work and education.¹⁰⁴

Since the beginning of this century, creating online parodies has become a popular way for Hong Kong netizens to vent their anger over the Chinese and the Hong Kong governments as well as uncivil and ill-mannered Mainlanders.¹⁰⁵ A music video, titled “Locusts World (蝗蟲天下)” and created by a group of netizens who frequented *Hong Kong Golden Forum*, was posted on *Youtube* in 2011. Borrowing the music of Cantonese pop song “Under Fuji Mountain” by Hong Kong popular singer Eason Chan, the parody contains new lyrics mocking tourists, new immigrants, and pregnant women from China for corrupting the former colony by ignoring public hygiene, robbing and stealing resources, and driving up prices of properties and other commodities.¹⁰⁶ It describes Mainlanders with such conduct as locusts: scenes of locusts darkening the sky, ravaging farmlands, and devouring crops alternate with news photographs and episodes of Mainland children urinating and defecating on Hong Kong’s streets and public transport, Mainlanders selling counterfeit goods in the city’s black markets, and small businesses closing due to rent hikes.¹⁰⁷ Early 2012 saw a series of escalating Hong Kong-Mainland China conflicts, leading to the disparaging description of Hong Kong people as “dogs” by a professor at Peking University, in response

¹⁰⁴ *Id.*

¹⁰⁵ de Seta, focusing primarily on egao in Mainland China, explains that egao has served as a weapon for Chinese Internet users “to participate in a burgeoning online civil society,” “to channel grassroots creativity and to vent widely shared discontents.” de Seta, *supra* note 78, at 229.

¹⁰⁶ See SuperBillionLearn, *Locusts World* (蝗蟲天下) MV, YOUTUBE (Feb. 1, 2012), <https://www.youtube.com/watch?v=GZ-AFS1QJNM> (last visited Oct. 10, 2017).

¹⁰⁷ *See id.*

to their accusations of Mainland visitors eating food on Hong Kong's subway train.¹⁰⁸ Soon after that, a group of Hong Kong people published a full-page advertisement in a popular tabloid, *Apple Daily*, which shows a locust overlooking Hong Kong's skyline.¹⁰⁹ With a headline screaming "Hong Kong people have had enough!" the advertisement demands that Chinese tourists, immigrants, and birth tourists respect Hong Kong culture, and implores the Hong Kong government to prohibit birth tourism.¹¹⁰ This further popularized the locust metaphor and inspired more locust-themed parodic songs on *Youtube*.¹¹¹

Hong Kong's Chief Executives, none of whom has been elected through universal suffrage, along with principal government officials and pro-establishment legislative

¹⁰⁸ E.g., Jonathan Watts, *Chinese Professor Calls Hong Kong Residents 'Dogs of British Imperialists'*, THE GUARDIAN (Jan. 24, 2012), available at <https://www.theguardian.com/world/2012/jan/24/chinese-professor-hong-kong-dogs> (last visited Oct. 10, 2017).

¹⁰⁹ Sources say that over 800 people donated more than 100,000 Hong Kong dollars (CAD\$16500) through a fund-raising campaign on Facebook and *Hong Kong Golden Forum* to get the ad cost covered. *About That Hong Kong 'Locust' Ad ...*, WSJ (Feb. 1, 2012), available at <https://blogs.wsj.com/chinarealtime/2012/02/01/about-that-hong-kong-locust-ad/> (last visited Oct. 10, 2017).

¹¹⁰ The full translation of the text in the advertisement is as follows:

"Do you want Hong Kong to spend HK\$1,000,000 every 18 minutes raising children of parents who are both non-residents?

Hong Kong people have had enough!

Because we understand that you are victimized by poisoned milk powder, we've tolerated your coming over and snapping up milk powder;

Because we understand that you have no freedom, we've received you on your "Free Trip" to Hong Kong;

Because we understand that your education lags behind, we've shared our educational resources with you;

Because we understand that you don't read traditional Chinese, we've adopted crippled Chinese characters.

"(In simplified Chinese) Please respect our local culture when you come to Hong Kong; if it were not for Hong Kong you'd be all screwed."

[We] strongly demand that the government revise the 24th clause of Basic Laws!

Stop the endless invasion of Hong Kong by non-resident pregnant women from Mainland China!"

(translation by the dissertation's author).

¹¹¹ See, e.g., ChunYip Tang, *The Locusts Medley of HK Golden* (高登蝗蟲金曲大串燒), YOUTUBE (May 20), 2014, <https://www.youtube.com/watch?v=L4VtqIInEN0> (last visited Oct. 10, 2017); Lucifer Chu, *Locust Attacks* (進擊的蝗蟲), YOUTUBE (Jul. 1, 2013), <https://www.youtube.com/watch?v=JZ2KPGLlvhE> (last visited Oct. 10, 2017).

councilors, have also been the main targets of online parodies. Leung Chun-ying (nicknamed CY Leung), the highly unpopular Chief Executive from 2012 to 2017, has been criticized for his hypocrisy, insensitivity, and alleged corruption since he took up his position.¹¹²

Unsurprisingly, parodies containing his images swarmed Hong Kong's social media while he was in office. In one example, Leung's image was photoshopped onto the protagonist's in the movie poster of *The Wolf of Wall Street* (2013). Because one of Leung's nicknames is "Wolf," a pun on his last name alluding to his cunning personality, the poster aptly carried the new title, "The Wolf of Government House."¹¹³ Another popular target has been Carrie Lam, former Chief Secretary for Administration and current Chief Executive, who justified her decision to run in the 2017 Chief Executive Election by claiming that "God" had called

¹¹² After his election, a number of illegal structures were found at Leung's house, which led him to be criticized for his hypocrisy for using the same accusation in attacking his opponent during the 2012 election. In 2014, an Australian newspaper revealed how he accepted HKD50 million in a deal with Australian engineering firm UGL in 2011, a payment that he had not declared to the Executive Council as required by law. In a media interview during the Occupy Central Movement, he attempted to justify the conservative electoral model for Hong Kong by making this insensitive comment: "if it's entirely a numbers game—numeric representation—then obviously you'd be talking to half the people in Hong Kong [who] earn less than US\$1,800 a month [the median wage in HK]. You would end up with that kind of politics and policies." In 2015, he claimed that his position is "transcendent" of the executive, judicial, and legislative branches of Hong Kong. *E.g.*, Keith Bradsher & Chris Buckley, *Hong Kong Leader Reaffirms Unbending Stance on Elections*, N.Y. TIMES (Oct. 20, 2014); Kris Cheng, *Failure to De-colonise 'Caused Many Problems' for Hong Kong, Says Former Beijing Official*, H.K. FREE P. (Sep. 21, 2015); Raymond Yeung & Kimmy Chung, *Hong Kong Leader CY Leung Accuses Lawmaker on Panel Probing HK\$50m Payment of Prejudice*, S. CHINA MORNING POST (May 17, 2017); Ying-Kit Lai, *CY Leung Admits Liability to Illegal Structures*, S. CHINA MORNING POST (Nov. 23, 2012).

¹¹³ See "Why is 'Internet Article 23' Likely to Pass? REAL H.K. NEWS (Dec. 7, 2015), <https://therealnewshk.wordpress.com/2015/12/08/why-is-internet-article-23-likely-to-pass/> (last visited Oct. 10, 2017). Other parodies appropriated propaganda posters issued during the Chinese Cultural Revolution and replaced Mao Zedong's image with Leung's. *E.g.*, Kris Cheng, *Government Says New Copyright Law Will Not Restrict Free Speech amid Concerns of Parody Ban*, H.K. FREE P. (Dec. 3, 2015), <https://www.hongkongfp.com/2015/12/03/govt-says-new-copyright-law-will-not-restrict-speech-amid-concerns-of-parody-ban> (last visited Oct. 10, 2017).

on her.¹¹⁴ One parody had Lam's image photoshopped into a Christian art picture portraying heaven, accompanied by the ancient proverb: "Those whom God wishes to destroy, he first makes mad," to express strong public sentiments against Lam's pro-Beijing stance and fears that she would make an even worse leader than her predecessor.¹¹⁵ Regina Ip, former Chief Secretary for Security who tried to push the National Security bill in 2003, also ran for the Chief Executive position. Her catchy blue and red campaign logo carried the slogan "Win Back Hong Kong," in which a red heart appeared above the letter "i" where the dot should be.¹¹⁶ Scoffing at the pro-Beijing politician's purported goal to "put Hong Kong back on the right track," a netizen parodied her slogan and logo by changing the words to "Die Back Big Six" (a literal translation of the vulgar Cantonese expression "get your ass back to the Mainland and die" 死番大陸) and substituting a skeleton head for the dot in "Die."¹¹⁷

Hongkongers certainly have not shied away from parodying Xi Jinping, President of China, especially during the "Occupy Central" movement. Examples included images of Xi holding a yellow umbrella against the background of protest sites in Hong Kong, which went viral over the Internet, and life-size cardboard figures based on such images which were

¹¹⁴ E.g., Kris Cheng, *Newly Elected Carrie Lam Reiterates God Called Upon Her to Run, as She Begins Forming Cabinet*, H.K. FREE P. (Mar. 30, 2017), <https://www.hongkongfp.com/2017/03/30/newly-elected-carrie-lam-reiterates-god-called-upon-run-begins-forming-cabinet/> (last visited Oct. 10, 2017).

¹¹⁵ See image stored at <https://tse3.mm.bing.net/th?id=OIP.kbAEBYP7KGHJtdHplmMvxQEgDY&pid=15.1120160> (last visited Oct. 10, 2017).

¹¹⁶ See image at https://upload.wikimedia.org/wikipedia/commons/thumb/e/ea/Win_Back_HK_Logo.svg/1280px-Win_Back_HK_Logo.svg.png (last visited Oct. 10, 2017).

¹¹⁷ See image at <https://i0.wp.com/hkjam.com/wp-content/uploads/2016/12/sketch-1481878217678.png?fit=1200%2C675> (last visited Oct. 10, 2017).

placed at many protest sites.¹¹⁸ These were based upon a photograph of Xi captured by the state-run Xinhua News Agency during his trip to Wuhan in July 2013 to oversee the construction of a dam.¹¹⁹ The photograph, which won China's top photojournalism prize, shows Xi standing in the rain, holding a large black umbrella and talking to the engineers. The presence of the umbrella made it a handy target for Hong Kong protesters. Although the yellow ribbon was initially chosen as symbol of the campaign,¹²⁰ after participants used their umbrellas to defend themselves against the tear gas and other violent acts by the police, the umbrella—the yellow one in particular—became a fresh symbol of the movement and the spirit of resistance.¹²¹ The original photograph was deemed typical of political propaganda by the state-run media to push a grassroots image of a president who cares about ordinary people in China.¹²² By turning the umbrella's color to yellow, parodists fashioned a powerful weapon to satirize his authoritarianism and his “behind-the-scene,” despotic control of the former colony.

¹¹⁸ Ellie Ng, *Chinese President's Umbrella Becomes Occupy Central's Favorite Meme*, H.K. FREE P. (Oct 24, 2014), <https://www.hongkongfp.com/2014/10/24/xi-jinping-yellow-umbrella-political-meme/> (last visited Oct. 10, 2017).

¹¹⁹ Jackson Connor, *Photo Of President Xi Jinping Holding Umbrella Wins China's Top Photojournalism Prize*, HUFFINGTON POST (Oct. 23, 2014), http://www.huffingtonpost.com/2014/10/23/xi-jinping-umbrella-photojournalism-prize-chinese-president_n_6035944.html (last visited Oct. 10, 2017).

¹²⁰ Those who did not agree with the movement wore blue ribbons to show their support for the police, whose uniform was blue, and the authorities, and to call for a return to normalcy. Jasmine Coleman, *Hong Kong Protests: The Symbols and Songs Explained*, BBC NEWS (Oct. 4, 2014), available at <http://www.bbc.com/news/world-asia-china-29473974> (last visited Oct. 10, 2017).

¹²¹ A New Yorker coined the term “Umbrella Revolution” on *Twitter*, with reference to the umbrellas that participants used in defence against the tear gas. Many people, including founders of the movement, preferred the term “Umbrella Movement” to connote the peacefulness of the campaign and its participants. Rishi Iyengar, *6 Questions You Might Have about Hong Kong's Umbrella Revolution*, TIME MAG. (Oct. 2014), available at <http://time.com/3471366/hong-kong-umbrella-revolution-occupy-central-democracy-explainer-6-questions/> (last visited Oct. 10, 2017).

¹²² Ng, *supra* note 118.

Without a doubt, the trend of using parodies to articulate their views, vent their frustrations, and participate in the civil society and Hong Kong politics will continue. Unlike the earlier parodies in television shows and movies that loosely imitate older works, many of these parodies borrow substantially from the originals. Conflicts between the right to freedom of expression of netizens and the copyright of the owners are therefore foreseeable.

C. Justifying a Parody Exception in the Hong Kong Context

One might argue that a fair dealing exception in the form of parody would not be necessary. If the rights holders of the “Under Fuji Mountain,” the Chinese President’s photograph, the “The Wolf of Wall Street” poster, and various artworks bring copyright claims against those who parodied their works, the latter may be able to rely upon the existing defence of “criticism” under the current law.¹²³ However, it remains uncertain whether courts would consider parodies, the critical message(s) of which are not always explicit, to be fair dealings. As Part One has argued, the right to parody is a universal right essential to democratic governance that should be accommodated by the copyright law of every jurisdiction. In addition, a parody exception is especially vital to Hong Kong for three related reasons. First, it would help to promote a critical political culture crucial to self-governance and enhance Hong Kong’s position and reputation as “the window on China.” Second, it would encourage creativity in a city striving to make its creative industries as a major economic force. Third, making and appreciating parodies empower Hong Kong people to thrive in difficult times.

¹²³ Qili Xu, for example, argues that there is no need for a new fair dealing exception in the form of parody. Qili Xu, *Copyright Protection in the Digital Age: A Tripartite Balance*, 45 H.K. L.J. 751, 781 (2012).

As a former British colony situated in Southern China, Hong Kong has long enjoyed a vibrant and independent media and a unique position as a window into Mainland China.¹²⁴ Both local and foreign journalists have made use of its unique geopolitical position and strong legal protections for freedom of expression to report on news from Hong Kong, China, and the greater Asia region.¹²⁵ However, due to the peacefulness of the former colonial regime and the lack of social and political turmoil, Hong Kong did not begin to develop a critical political culture until after its handover to China.¹²⁶ If Hong Kong people are to successfully govern Hong Kong, it is necessary to foster a critical political culture while enhancing its position and reputation as a “window on China.”¹²⁷

This chapter has already stated that Hong Kong has seen less censorship than most other Asian countries, and that Article 16 of the BoR serves as an essential safeguard for freedom of expression and freedom of the press. Yet the years leading to the handover already saw a rising trend of self-censorship by its print media.¹²⁸ Some newspapers began hiring Mainland Chinese journalists with close ties to the Chinese Communist Party, while

¹²⁴ *Threatened Harbor: Encroachments on Press Freedom in Hong Kong*, PEN AMERICAN CENTER (Jan. 16, 2015), https://www.pen.org/sites/default/files/PEN-HK-report_1.16_lowres.pdf (last visited Oct. 10, 2017).

¹²⁵ *Id.*

¹²⁶ Peter Yu, *Digital Copyright and the Parody Exception in Hong Kong: Accommodating the Needs and Interests of Internet Users*, Journalism & Media Studies Centre, University of Hong Kong (Jan. 2014), at 6, https://jmsc.hku.hk/revamp/wp-content/uploads/2014/01/jmsc_hku_submission.pdf (last visited Oct. 10, 2017).

¹²⁷ *See id.*

¹²⁸ In March 1997, Martin Lee, a leading Hong Kong Democrat, confirmed on CNN’s Q&A talk show that the Hong Kong printed media was already censoring itself. In two surveys conducted in 1990 and 1996, 20 percent of all local journalists admitted to self-censorship, with 10 percent willing to “sacrifice some press freedom for the sake of public interest.” In 1996, 84 percent of Hong Kong Journalists’ Association (HKJA) members expressed fears of shrinking press freedom, with 60 percent witnessing self-censorship in their organizations. Jones, *supra* note 3, at 1098.

some outspoken writers who were critical of the PRC government lost their newspaper columns.¹²⁹ Local television stations heavily invested in China's emerging media market removed controversial talk shows and shelved sensitive documentaries.¹³⁰ Self-censorship also occurred in higher educational institutions. In 1997, the most liberal university in the territory, under the leadership of its new vice-chancellor, refused to reappoint a well-qualified law professor who was critical of China's human rights record and its interventions in Hong Kong's internal affairs.¹³¹

Given that parodies have played a critical role for Hongkongers to criticize their government, greater protection of parodies would foster a critical political culture crucial for their governance of their home. Chris Patten, the last and most beloved governor of Hong Kong, once revealed his anxiety over Hong Kong's future was "not that this community's autonomy would be usurped by Peking, but that it could be given away bit by bit by some people in Hong Kong."¹³² It was not only the pro-China politicians who are giving away Hong Kong's autonomy. As expected, the problem of self-censorship has only become more severe after the handover, which is revealed by the mounting pressure on Hong Kong journalists by media companies to censor sensitive information, the increasingly pro-

¹²⁹ *Id.* at 1098—1099.

¹³⁰ Albert Cheng's Cantonese talk show "Newstease" was dropped by the local Asia Television in late 1994. A BBC documentary called "Mao Zedong: The Last Emperor" was shelved by TVB. *Id.* at 1099.

¹³¹ The professor was Nihal Jayawickrama, who had lectured on international law and human rights at Hong Kong University for twelve years. A member of the Geneva-based International Commission of Jurists, he had criticized China's handling of human rights and of Tibetan affairs, and the appointment of a "Provisional Legislature" to replace Hong Kong's democratically elected Legislative Council on 1 July 1997. After the university discontinued his contract, he went on to become a distinguished professor at the University of Saskatchewan in Canada. *Id.* at 1099.

¹³² Gargan, *supra* note 2.

government stance by TVB, the only free-to-air terrestrial television broadcaster in Hong Kong, and the continual erosion of academic freedom at different school levels.¹³³ It is not only media organizations and academic institutions that have exercised self-censorship. In January 2015, a pro-establishment supporter fired off a letter to Puma, a sportswear company, about an entrant number on a runner's t-shirt in a photograph that Puma posted on its official Facebook page ahead of the annual Standard Chartered Hong Kong Marathon. The supporter complained that the random-looking number "D7689" was a thinly-veiled, profane insult of Hong Kong's then-Chief Executive.¹³⁴ The apology by Puma's global chief executive, who called it "a very unfortunate issue" that they did not identify on the spot, and the rapid take-down of the photography, reflected the eagerness of some corporations,

¹³³ Increasing censorship was revealed by a poll of 422 journalists conducted by the HKJA from December 23 to February 4, 2014. The dismissals of newspaper reporters and media hosts have become more common, notable examples including Kevin Lau, who got removed from his post as the chief editor of Ming Pao, a newspaper used to be known for its candid reports, and Li Wei-ling, an outspoken host who was abruptly fired by Commercial Radio. Jeffie Lam, *Self-censorship 'Common' in Hong Kong Newspapers, Say Journalists*, S. CHINA MORNING POST (Apr. 23, 2014), available at <http://www.scmp.com/news/hong-kong/article/1495138/press-freedom-hong-kong-low-level-journalists-study-finds?page=all> (last visited Oct. 10, 2017). TVB was given the uncomplimentary nickname, "Chinese Centralized Television Broadcasts" (in short, CCTVB) for their increasingly pro-government stance. Rebecca Wong, *How and Why Hong Kong's Press Downplayed the 'Umbrella Movement' of 2014*, FREE SPEECH DEBATE (Mar. 10, 2015), <http://freespeechdebate.com/en/discuss/how-and-why-hong-kongs-press-downplayed-the-umbrella-movement-of-2014/> (last visited Oct. 10, 2017). One example of the continual erosion of academic freedom was Hong Kong University's "covert attempts" to pressure HKU researcher Robert Chung into discontinuing his public opinion polls about the Chief Executive and his government in 2000. Jones, *supra* note 3, at 1101. In 2016, a school body overseeing around 40 secondary and primary schools issued a new code of conduct stating that its teachers and staff are "absolutely not allowed to distribute messages containing a political stance on the school's communication platforms" or on their personal platforms. Young Wang, *New Conduct Code from Hong Kong School Body Po Leung Kuk Stops Teachers Posting Politics*, S. CHINA MORNING POST (Oct. 25, 2016), available at <http://yp.scmp.com/news/hong-kong/article/104687/new-conduct-code-hong-kong-school-body-po-leung-kuk-stops-teachers> (last visited Oct. 10, 2017).

¹³⁴ "D7" in Cantonese sounds like the "fuck" word. "689," the number of electoral college votes it took for Chief Executive Leung Chun-ying to get elected in 2012, was slightly more over half of the 1,200-member election committee that represented vested interests rather than the Hong Kong voting population at large. The number has been used as a nickname for Leung to satirize his lack of popular mandate to lead the city and the lack of legitimacy of the voting system. *E.g.*, 689, THE ENCYCLOPEDIA OF VIRTUAL COMMUNITIES IN HONG KONG, <http://evchk.wikia.com/wiki/689> (last visited Oct. 10, 2017).

including global ones, to pander to the pro-establishment camp and the Hong Kong government by censoring anything that may cause them embarrassment and displeasure.¹³⁵ Within a short time, parodies of “D7689” flooded the social media. Protection of parodies through the copyright regime would encourage netizens to participate in politics by expressing their views on different platforms.¹³⁶ This would counteract the impacts that self-censorship has had on free speech and enhance Hong Kong’s reputation for free speech and free press.

A parody exception would also help to foster creativity in Hong Kong, which has been striving to make its cultural and creative industries as major economic forces. Due to its lack of natural resources, the territory has served as commercial intermediary and a financial hub for many years. Since the turn of the twenty-first century, the government has emphasized that creative thinking and high-tech innovation should play an important role in its industrial development and education policies.¹³⁷ In April 2009, it even set up “Create Hong Kong”, an agency under its Commerce and Economic Development Bureau, to spearhead the development of Hong Kong’s cultural and creative industries.¹³⁸ Although

¹³⁵ Puma’s general manager for Asia Pacific and Japan later explained that the photograph showed a fake runner number which he surmised had been created by Photoshop. Samuel Chan, *Puma Apologises for ‘D7689’ Hong Kong Marathon Photo Targeting CY Leung*, S. CHINA MORNING POST (Jan. 26, 2015), available at <http://www.scmp.com/news/hong-kong/article/1692371/claws-out-puma-apologises-d7689-hong-kong-marathon-photo-targeting-cy> (last visited Oct. 10, 2017).

¹³⁶ THE ENCYCLOPEDIA OF VIRTUAL COMMUNITIES IN HONG KONG, *supra* note 134.

¹³⁷ See Chief Executive Tung Chee Hwa, *The Policy Address*, 1998, 2001, available at https://www.policyaddress.gov.hk/pa01/high_e.htm (last visited Oct. 10, 2017); <https://www.policyaddress.gov.hk/pa98/english/high.htm> (last visited Oct. 10, 2017).

¹³⁸ E.g., *Study on Creative Industries in Hong Kong: Key Recommendations*, HONG KONG IDEAS CENTRE (Aug. 9, 2009), <http://www.ideascentre.hk/wordpress/wp-content/uploads/2009/02/study-on-creative-industries-in-hong-kong-key-recommendations-82009.pdf> (last visited Oct. 10, 2017); Danielle Belopotosky, *Hong Kong Moves to Refashion Itself as a Global Hub of Creativity*, N.Y. TIMES (Nov. 22,

copyright protection is important to the successful development of the creative sector, creating an exception for parody would remove the unnecessary restrictions on parodic productions and reduce the administrative costs incurred in obtaining copyright clearances.¹³⁹ This in turn would help to nurture new creative talents and enrich the cultural and entertainment industries.¹⁴⁰

The saying that art offers a beacon of hope to people who live in dark times is perhaps clichéd. Arts have been created in times both good and bad, and great works of art alone do not redeem bad realities.¹⁴¹ Nevertheless, creating and appreciating art works help people to engage with reality, to reach out, and even to fight.¹⁴² If the 2016 U.S. Presidential Election result has made some Americans, who elect their President every four years through universal suffrage, turn to art for solace,¹⁴³ then Hong Kong people, the vast majority with no say in electing their Chief Executive, have all the more reason to treasure creative art as a means to thrive in difficult periods. Thus, greater protection for parodies would well serve

2014), available at https://www.nytimes.com/2014/11/22/business/international/hong-kong-moves-to-refashion-itself-as-a-global-hub-of-creativity.html?_r=1 (last visited Oct. 10, 2017).

¹³⁹ Yu, *supra* note 126, at 9.

¹⁴⁰ *Id.* at 10.

¹⁴¹ David Berry, *Art Can Be a Beacon of Hope or An Explanation of the World, but Whether It Can Shape It in Dark Times IS Uncertain*, NATIONAL POST (Dec. 2, 2016), available at <http://nationalpost.com/entertainment/art-can-be-a-beacon-of-hope-or-explanation-of-the-world-but-whether-it-can-shape-it-in-dark-times-is-uncertain> (last visited Oct. 10, 2017).

¹⁴² *See id.*

¹⁴³ E.g., Megan Garber, *Still, Poetry Will Rise*, THE ATLANTIC (Nov. 10, 2016), available at <https://www.theatlantic.com/entertainment/archive/2016/11/still-poetry-will-rise/507266/> (last visited Oct. 10, 2017); Marsha Lederman, *Seeking Solace in the Power of Art in a World Turned Upside Down*, THE GLOBE AND MAIL (Nov. 11, 2016), available at <https://beta.theglobeandmail.com/arts/seeking-solace-in-the-power-of-art-in-a-world-turned-upside-down/article32818390/?ref=http://www.theglobeandmail.com&> (last visited Oct. 10, 2017).

Hong Kong society, many members of which have felt disgruntled with both the local and the PRC governments, by empowering them not only to create parodies to vent and/or to profit, but also to seek comfort in times of social and political unrest.

A parody exception, therefore, would serve to enhance a critical political culture and to foster creativity, and participating in parodic arts would make it more bearable to live in dark times. The introduction of the parody exception by the Hong Kong government nonetheless caused uproar among Hongkongers, who suspected that it was politically motivated and would serve as a weapon to curb free speech under the pretext of copyright protection.

D. Copyright (Amendment) Bills 2011 and 2014

Enacted in 1997, the Copyright Ordinance of Hong Kong stipulates that works transmitted both on and outside of the Internet enjoy copyright protection.¹⁴⁴ Since its enactment, it has undergone five amendments leading to the gradual liberalization of copyright regime and expansion of users' rights.¹⁴⁵ These amendments do not include the copyright bills in 2011 and 2014, which were withdrawn and suspended respectively.

¹⁴⁴ Copyright Ordinance, s. 26.

¹⁴⁵ Although the amendment passed in 2001 made possessing or distributing copyright infringing works “for the purpose of, in the course of, or in connection with, any trade or business” a criminal offence, the amendment passed in 2004 confined the scope of end-user criminal liability to four categories of work. The LegCo passed a general fair dealing exemption for the purpose of education and public administration as well as a new “business end-user” distribution offence in 2007, so that copying with an intent to distribute or distributing copyright infringing works, “for the purpose of or in the course of any trade or business,” on a frequent or regular basis would be a criminal offence, thus exempting some commercial entities (such as photocopying shops) as well as non-profit-making educational institutions from criminal liability. The 2009 amendment further prescribed two separate sets of numeric limits, applicable to different categories of works, within which the copying and distribution offence does not apply. Intellectual Property Department, *The Government of HKSAR, Amendment to Copyright Ordinance 2001—2004*, paras. 2(a), 4, available at http://www.ipd.gov.hk/eng/faq/copyrights/cpr_amend.htm (last visited Oct. 10, 2017); Copyright (Amendment) Ordinance 2007, cls. 4, 14, 17, available at

The Copyright (Amendment) Bill 2011, introduced by the Hong Kong government,¹⁴⁶ sparked controversies by introducing an exclusive technology-neutral “communication right” of the copyright owner to protect copyrighted materials in a digital environment.¹⁴⁷ According to ss. 31(3) and 118(8C), in determining whether any distribution, or “communication,” of an infringing copy “is made to such an extent as to affect prejudicially the owner of the copyright,” the court may take into account “all the circumstances of the case and, in particular—(a) the purpose of the distribution; (b) the nature of the work, including its commercial value; (c) the amount and substantiality of the portion copied (in relation to the work as a whole) that was distributed; (d) the mode of distribution; and (e) the economic prejudice caused to the owner of the copyright as a consequence of the distribution, including the effect of the distribution on the potential market for or value of the work.”¹⁴⁸

Bill 2011 did not contain a provision exempting parody or other derivative works from criminal or civil liability. Hence, a person would be criminally liable for infringement

<http://www.legco.gov.hk/yr06-07/english/ord/ord015-07-e.pdf> (last visited Oct. 10, 2017); Copyright (Amendment) Ordinance 2009, cl. 6, *available at* <http://www.legco.gov.hk/yr09-10/english/ord/ord015-09-e.pdf> (last visited Oct. 10, 2017).

¹⁴⁶ Article 62(5) of the Basic Law provides that the Hong Kong government has the powers and functions to draft and introduce bills, motions and subordinate legislation. Hong Kong Basic law, art. 62(5).

¹⁴⁷ Section 28A(2) of the bill defines the electronic communication of the work to the public to include “(a) the broadcasting of the work; (b) the inclusion of the work in a cable programme service; and (c) the making available of the work to the public.” According to s. 118(8B), one commits an offence if he or she, without obtaining a license from the copyright owner of the copyrighted work, “communicates the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward;” or “communicates the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.” Copyright (Amendment) Bill 2011, cls. 13, 51, *available at* <http://www.legco.gov.hk/yr10-11/english/bills/b201106033.pdf> (last visited Oct. 10, 2017).

¹⁴⁸ *Id.* cls. 27, 51.

by “communicating” a copy of an infringing parody to the public in the course of trade or business or to such extent as to affect prejudicially its copyright owner.¹⁴⁹ The Commerce and Economic Development Bureau and the Intellectual Property Department, at the request of the Bills Committee, did consider exempting parodies not involving large scale copyright piracy and profit-making from criminal liability. They nonetheless clarified that the Bill aimed to combat large-scale copyright piracy rather than targeting parodies.¹⁵⁰ Because a dissemination of a parody on the Internet that is not made for profit and does not prejudicially affect the copyright owner would not constitute a criminal offence under either the existing Ordinance or the Bill, the worry that the Bill would “tighten the grip” on parody was unfounded.¹⁵¹ Furthermore, they surveyed the parody exception in multiple jurisdictions, including the U.K., the U.S., and Canada, to explain the difficulty in constructing an undisputed legal definition of parody, and the potential uncertainty in terms of the scope and application of the proposed exception.¹⁵² Arguing that the exception would adversely impact the existing balance of interests between rights holders and users under the Copyright Ordinance, they concluded that a legislative proposal on parody exception could not be made responsibly in the absence of a thorough assessment and prior informed public consultation.¹⁵³

¹⁴⁹ *See id.*

¹⁵⁰ Commerce and Economic Development Bureau & Intellectual Property Department, *Copyright Exception for Parody* (Oct. 2011), para. 1, available at <http://www.legco.gov.hk/yr10-11/english/bc/bc10/papers/bc101122cb1-385-4-e.pdf> (last visited Oct. 10, 2011).

¹⁵¹ *Id.* para. 2.

¹⁵² *Id.* paras. 8—12.

¹⁵³ *Id.* para. 24.

Due to the diverse views on Bill 2011 during its examination in the LegCo, particularly regarding its failure to include a parody exception, the Bureau withdrew it and issued a consultation paper in 2013 to seek further opinions from the public on the treatment of parody before re-introducing the bill.¹⁵⁴ The paper clarified the current status of parodies under the Copyright Ordinance, stating that they do not constitute copyright infringement if they incorporate only the ideas of the underlying works, reproduce insubstantial parts of them, incorporate substantial parts after obtaining authorization from the copyright owners, or incorporate those in the public domain with expired copyrights.¹⁵⁵ Furthermore, parodies do not constitute infringement if their incorporations of underlying copyrighted works fall within the fair dealing exceptions, while those falling outside of these cases may attract civil liability for copyright infringement.¹⁵⁶ In addition, those who distribute copies of infringing parodies to the public in the course of trade or business, or to such extent as to affect prejudicially the copyright owner, may be criminally liable.¹⁵⁷ As the paper explained, however, in reality it would seem unlikely for the distribution of a copy of an infringing parody to be considered “*to the extent as to affect prejudicially the copyright owner,*” because parodies generally target different markets from those of the underlying works and are therefore unlikely to displace demands for them.¹⁵⁸

¹⁵⁴ Commerce and Economic Development Bureau & Intellectual Property Department, *Treatment of Parody under the Copyright Regime Consultation Paper* (2013), available at <https://www.gov.hk/en/residents/government/publication/consultation/docs/2013/Parody.pdf> (last visited Oct. 10, 2017).

¹⁵⁵ *Id.* para. 12.

¹⁵⁶ *Id.* para. 14.

¹⁵⁷ *Id.* para. 15.

¹⁵⁸ *Id.* para. 15. Members of the Bills Committee requested the Administration to provide information on how the court considers the issue of “prejudice” in criminal cases of copyright infringement in Hong Kong

The consultation paper presented three options for change. First, the new law may clarify the existing general provisions for criminal sanctions regarding both the existing “prejudicial distribution” offence and the proposed “prejudicial communication” offence, so as to better reflect the policy intent to combat commercial-scale copyright infringement.¹⁵⁹ Second, the law may go further than the first option by introducing a criminal exemption to specifically exclude parody from the existing “prejudicial distribution” and the proposed “prejudicial communication” offences to better target wilful trademark counterfeiting or copyright piracy on a commercial scale.¹⁶⁰ However, this proposal would not deprive copyright owners of their existing rights to pursue civil claims against creators and/or distributors of infringing parodies.¹⁶¹ Third, the law may consider introducing a fair dealing exception for parody based on the approaches in Australia, Canada and the UK.¹⁶² Under this

and other jurisdictions. The Administration issued a report that address this issue by distilling laws and provisions of Hong Kong and other jurisdictions: “First, copyright works infringed have a commercial value. Secondly, the infringement involves more or less a complete reproduction of the original work which can be used as a substitute of the original work. Thirdly, the mode of distribution, namely through the Internet, enables a potentially large number of members of the public to receive the infringing copies. Fourthly, the infringer’s overall conduct has the potential in displacing the demand for the original work thereby shrinking the legitimate market for the copyright work. In the light of the above factors, clear economic prejudice has been caused to the copyright owners even though some infringers may not have an apparent profit motive.” Commerce and Economic Development Bureau & Intellectual Property Department, *Amendments to Clause 51 of the Copyright (Amendment) Bill 2011* (Feb. 2012), <http://www.legco.gov.hk/yr10-11/english/bc/bc10/papers/bc100228cb1-1180-1-e.pdf> (last visited Oct. 10, 2017).

¹⁵⁹ *Id.* paras. 28—29.

¹⁶⁰ *Id.* paras. 30.

¹⁶¹ *Id.*

¹⁶² *Id.* para. 32.

option, the distribution and communication of parody would not incur any civil nor criminal liability as long as the qualifying conditions of the exception are met.¹⁶³

The Copyright (Amendment) Bill 2014 proposed a number of changes, including a new section 39A stating that “[f]air dealing with a work for the purpose of parody, satire, caricature or pastiche does not infringe any copyright in the work.”¹⁶⁴ In determining whether a dealing is fair, the Court would take into account the overall circumstances of a case, including the following factors: “the purpose and nature of the dealing,” including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature, “the nature of the work,” “the amount and substantiality of the portion dealt with in relation to the work as a whole,” and “the effect on potential market for or value of the work.”¹⁶⁵ To allay public anxiety over the possible impact of the existing “prejudicial distribution offence” and the proposed “prejudicial communication offence” on the free flow of information across the Internet and to provide greater legal certainty, the legislation would also clarify the criminal liability for causing prejudice to the copyright owner. To substitute for the “more than trivial economic prejudice” factor that the Court would use to consider whether the conduct of an act would be “to such an extent as to affect prejudicially the copyright owner,” submitted in March 2012 Committee Stage Amendments, the new bill provided that the Court “may take into account all the circumstances of the case;” and in

¹⁶³ *Id.*

¹⁶⁴ Copyright (Amendment) Bill 2014, cl. 19, *available at* <http://www.gld.gov.hk/egazette/pdf/20141824/es32014182421.pdf> (last visited Oct. 10, 2017). The other newly added purposes include commenting on current events, quotation, giving educational instruction (especially for distance learning), facilitating daily operations of libraries, archives and museums, and media shifting of sound recordings.

¹⁶⁵ *Id.*

particular, “whether economic prejudice is caused to the copyright owner as a consequence of the communication, having regard to whether the communication amounts to a substitution for the work.”¹⁶⁶

The proposed exceptions of “parody, satire, caricature or pastiche” of Bill 2014 were based upon Western models, which the Bills Committee and the Bureau consulted throughout the drafting processes. Considering that the parody exceptions in the Western jurisdictions have been regarded as a big step forward in liberalizing fair use or fair dealing, the negative criticisms towards the Bill by Hongkongers may seem mind-boggling.

E. Netizens’ Fears of the Two Bills

Netizens nicknamed both Copyright (Amendment) Bills “Internet Article 23,” after the Article 23 of the Basic Law that led to the introduction of the controversial national security bill in 2003.¹⁶⁷ Regarding Bill 2011, they reasoned that the authorities could use the unspecified circumstances of communication and the term “prejudicially” to mean whatever they want them to mean by reference to the non-exclusive list of statutory criteria in s. 118(8C), and in doing so, hold parodists criminally liable for their works.¹⁶⁸ Furthermore, the criminal provisions would entitle the government to bypass copyright owners to prosecute on their behalf those distributing parodic or other derivative works or sharing other

¹⁶⁶ *Id.* cl. 57; Commerce and Economic Development Bureau & Intellectual Property Department (2012), *supra* note 158.

¹⁶⁷ Badcanto, *Hong Kong Copyright (Amendment) Bill 2011 Criminalises Parody and Uploading/Posting of Unauthorised Copyrighted Materials Including News Articles/AFP’s Misleading Report on Hong Kong Copyright Amendment* (Apr. 27, 2012), <https://badcanto.wordpress.com/2012/04/27/hong-kong-copyright-amendment-bill-2011-criminalises-parody-and-posting-of-unauthorised-copyrighted-materials-including-news-articles/> (last visited Oct. 10, 2017).

¹⁶⁸ *Id.*

people's works on the Internet.¹⁶⁹ Thus, the new law would serve as a powerful political tool to suppress free speech.¹⁷⁰ Some even compared it to book-burning during the Qin Dynasty and the Cultural Revolution of China.¹⁷¹ In 2011 and 2012, numerous protests were initiated by netizen groups as well as by legislators of pan-democratic groups, although these protests were much smaller in scale than those triggered by the national security bill in 2003.¹⁷²

The fear that Bill 2011, if passed into law, would function as a tool for suppressing free speech is not unwarranted. Its failure to provide for a parody exception and its lack of specificity, along with its criminalization of the “communication” of copyrighted works, would lead to a law far more draconian than its foreign counterparts. For example, in the U.S., criminal copyright infringement requires that the infringer act “for the purpose of commercial advantage or private financial gain.”¹⁷³ In Canada, it similarly requires infringement that involves commercial activities such as the sale or rental of copyrighted materials.¹⁷⁴ Because Bill 2011 did not define “prejudicially” and “economic prejudice” is only one possible kind of prejudice, nothing would prevent the court from finding parodists

¹⁶⁹ Ricky Chan, *Intellectual Property Department of Hong Kong: Withdraw Copyright (Amendment) Bill 2011* (online petition), <https://www.change.org/p/intellectual-property-department-of-hong-kong-withdraw-copyright-amendment-bill-2011-3> (last visited Oct. 10, 2017).

¹⁷⁰ *Id.*; Badcanto, *supra* note 167.

¹⁷¹ Badcanto, *supra* note 167.

¹⁷² *E.g.*, *Netizens Protest Internet Article 23* 網民遊行反網絡 23 條, APPLE DAILY 蘋果日報 (Dec. 5, 2011), available at <http://hk.apple.nextmedia.com/news/art/20111205/15862730> (last visited Oct. 10, 2017); *Netizens Petition against Internet Article 23* 網民請願反網絡 23 條, APPLE DAILY 蘋果日報 (May 21, 2012), available at <http://hk.apple.nextmedia.com/news/art/20120521/16354818> (last visited Oct. 10, 2017).

¹⁷³ Copyright Act, 1976, 17 U.S.C. § 506(a) (U.S.A.).

¹⁷⁴ Copyright Act, R.S.C., 1985, c. C-42, s. 42.1. (Can.)

of the Cantopop song “Under Fuji Mountain” criminally liable, as long as the copyright owners could convince the court that they have been “prejudicially affected” by its parodic version, “Locusts World.”¹⁷⁵ Even assuming that courts interpret “prejudicially” to refer solely to the economic impact of the parody on the underlying work, the threshold of “more than trivial economic prejudice” is both vague enough to cause uncertainty and low enough to make parodists whose works merely caused unsubstantial damages to their authors criminally liable.¹⁷⁶ Criminalizing the parody of works would also mean that the government, or even private citizens who feel troubled by the political messages in parodies, could bring criminal suits against parodists.¹⁷⁷ Furthermore, even though a single parody containing new lyrics may not lead to criminal liability like large-scale piracy does, the fear of civil liability, due to the lack of a civil exemption for parody, would be sufficient to discourage parodies and chill free speech.

Bill 2014, with its parody exception, continued to be nicknamed “Internet Article 23” and the opposition by both netizens and pan-democratic legislators indicated a deep distrust of the Hong Kong government. One criticism was that its exceptions for “parody, satire, caricature or pastiche” did not include a provision restricting contractual terms by businesses from overriding or limiting such exceptions, like the British example did.¹⁷⁸ Hence the bill

¹⁷⁵ See Badcanto, *supra* note 167.

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*

¹⁷⁸ Stuart Lau, *Hong Kong Copyright Bill Explained: Why Are People So Concerned about This?* S. CHINA MORNING Post (Dec 9, 2015), <http://www.scmp.com/news/hong-kong/politics/article/1888931/hong-kong-copyright-bill-explained-why-are-people-so> (last visited Oct. 10, 2017).

did not offer consumers and businesses sufficient clarity and certainty.¹⁷⁹ Moreover, one legislator argued that it should adopt the U.S. legal principle of “fair use,” as opposed to the Hong Kong model of “fair dealing,” so that even a use falling outside of the prescribed purposes can be fair, as long as it is consistent with several “fairness” factors.¹⁸⁰

The fear that the bill’s lack of a provision restricting contractual terms that circumvent copyright exceptions would enable businesses to ban the making of parodies is reasonable. Although such a provision would interfere with the freedom of contracts, it would safeguard the right to make parodies for speech purposes, a natural right to which all people are entitled. Requesting that the bill adopt fair use (like American law does) nonetheless would lead to a revamping of Hong Kong’s copyright regime.¹⁸¹ In fact, the bill’s inclusion of a parody exception already took a huge step forward in liberalizing the regime by shielding parodic works consistent with “fairness” factors from civil and criminal liabilities. When introducing Bill 2014, the government applied the new law to several hypothetical cases on its website, including rewriting song lyrics and capturing copyrighted images, in its attempt to dispel confusion and allay anxiety.¹⁸² It clarified that if rewriting lyrics for songs falls within the existing or proposed scope of exceptions, such as for the purposes of criticism and review, commenting on current events or parody, and meets the fairness conditions, there would be no legal liability—civil or criminal—for copyright

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See Intellectual Property Department, *The Government of HKSAR, Copyright (Amendment) Bill 2014: Frequently Asked Questions*, http://www.ipd.gov.hk/eng/intellectual_property/copyright/Q_A_2014.htm#q6 (last visited Oct. 10, 2017).

infringement.¹⁸³ Following this logic, parodic songs like “Locusts World” would not likely attract any liability. Similarly, capturing copyrighted images would incur no civil or criminal liability so long as it falls within the existing or proposed scope of exceptions and meets the relevant qualifying conditions. Thus, appropriating copyrighted images, like movie posters, news photographs or campaign logos, to mock political figures would very likely be legal under the proposed law.

It would be fair to say that with the shelving of Bill 2014 in early March 2016, netizens lost the opportunity to have their right to parody enshrined in law. Because the exception would have provided a boost to Hong Kong’s cultural and creative industries, unless the bill is reconsidered by a new legislature in the next term, Hong Kong’s culture sector and economy may suffer in the long run. Undoubtedly, the proposed fair dealing exception in Bill 2014 can be improved. The next two sections will examine Peter Yu’s view on a parody exception in Hong Kong law. It will also propose ways of redrafting this new exception both to safeguard netizens’ rights to freedom of expression and to better reflect the role of parody.

F. Undistinguished Genres in a Parody Exception?

Bill 2014 did not offer definitions of “parody,” “satire,” “caricature” and “pastiche.” The “Keynote” document accompanying the bill on the government’s website nonetheless cites the *Concise Oxford English Dictionary* (12th Edition, 2012) in a footnote, defining “parody” as “an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect” or as “a travesty”; “satire” as “the use of humour, irony,

¹⁸³ *Id.*

exaggeration, or ridicule to expose and criticize people's stupidity or vices" or as "a play, novel, etc. using satire"; "caricature" as "a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect"; and "pastiche" as "an artistic work in a style that imitates that of another work, artist or period."¹⁸⁴ The Bills Committee was well aware of the difficulty in defining "parody." A report that accompanied Bill 2011, after surveying the status of parody in the copyright statutes of various jurisdictions, described "parody" as a broad term "used loosely for referring to a wide range of materials created by netizens that have adapted or modified existing copyright works for sharing and dissemination on the Internet."¹⁸⁵ As such, it is "often associated or used interchangeably with 'satire,' 're-mix,' 'caricature,' 'mash-up works,' 'derivative works,' etc. to describe a variety of online materials created for different purposes."¹⁸⁶

To date, almost no scholarly voices have been heard regarding the meaning and scope of "parody" in the context of Hong Kong's copyright reform. The exception is Yu, who contends that the statute should not distinguish among the four genres by providing definitions for them.¹⁸⁷ Yu concedes that the lack of clarity in the Ordinance could lead to overzealous criminal prosecutions and would cost netizens who face prosecutions before the available definitions are made by courts a huge amount of time, effort, and resources

¹⁸⁴ Intellectual Property Department, The Government of HKSAR, *Keynote to Copyright (Amendment) Bill 2014*, n.1, available at http://www.ipd.gov.hk/eng/intellectual_property/copyright/Keynote_2014_e.pdf (last visited Oct. 10, 2017).

¹⁸⁵ Commerce and Economic Development Bureau & Intellectual Property Department, the Government of HKSAR, *supra* note 150, para. 16.

¹⁸⁶ *Id.*

¹⁸⁷ Yu, *supra* note 126, at 15.

regardless of whether they would prevail in the end.¹⁸⁸ He nonetheless argues that “standards that are intended to provide *floors* to benefit the public could easily be turned into *ceilings* to cause public harm.”¹⁸⁹ Accordingly, “supposedly helpful definitions seeking to provide guidance to internet users could end up backfiring on them by creating *harmful* limits on otherwise legitimate, commonplace user activities.”¹⁹⁰

Yu also recommends that the phrase “parody, satire, caricature and pastiche” be replaced by “parody, satire, caricature, pastiche or other similar or related purposes,” the language proposed by the Irish Copyright Review Committee.¹⁹¹ Unsurprisingly, he also advocates for the law to include an exemption for UGC. Arguing that much of the content generated by Internet users would not be covered by an exception for parody, satire, caricature or pastiche, he proposes a new exception for PNCUGC (predominantly noncommercial user-generated content) similar to the one Canada recently adopted.¹⁹² This new exception would cover such examples as the uploading of a home video showing a child’s performance of a Cantopop or Mandopop song which, being neither a parody nor satire, would constitute the unauthorized communication of a copyright work to the public and open the child performer to both civil and criminal liabilities for copyright

¹⁸⁸ *Id.*

¹⁸⁹ Yu draws upon the “Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals,” which U.S. Congress adopted in 1976, as support. As Dan Burk and Julie Cohen observed, “[US] courts have shown a deplorable tendency to act as though the guidelines defined the outer limits of fair use ... [even though these] guidelines were intended to delineate fair use minima: a floor rather than a ceiling.” *Id.*, citing Dan L. Burk and Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV J. L. & TECH. 41, 57 (2001).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 16.

¹⁹² *Id.* at 17.

infringement.¹⁹³ Because Hong Kong has no plan to introduce a fair use provision, the PNCUGC exception would be necessary to accommodate a huge variety of transformative works that do not compete with the underlying ones and to shield their creators from liabilities.¹⁹⁴

G. In Defence of a Broad-But-Not-Too-Broad Parody Exception

Not distinguishing among the four genres in the “parody” exception, as Yu recommends, may pose problems. If Hong Kong’s copyright system has largely followed the British utilitarian tradition, then Bills 2011 and 2014, which aimed to offer greater protection for copyrighted works in a digital environment, were inspired by a narrow conception of natural rights that prioritizes right holders’ interests over those of the users. As in the other jurisdictions, a broad parody exception can serve to bring Hong Kong’s copyright system more in line with its natural law-inspired free speech tradition. Should the government return to this issue and redraft the bill in the next legislative term, it should propose to substitute a broad parody exception for “parody” and “satire” to reduce the potential prejudicial effect of “satire” and the propertized conception of fair dealing, and thereby discourage courts from treating “satire” as a form of dealing that is less fair than “parody.” The law should also distinguish parody from both caricature and pastiche. Drawing these distinctions would prevent courts from imposing unfair standards on these two genres, both theoretically and practically different from parody, and would help to

¹⁹³ *Id.* at 22.

¹⁹⁴ *Id.* at 26.

educate the public about the significant role of parody in generating a vibrant political discourse and countering self-censorship.

1. Broadening “Parody” to Include “Parody” and “Satire”

An inclusive parody category, clearly defined as encompassing works targeting the originals and those criticizing or commenting on something else, should replace the two fair dealing categories of “parody” and “satire” in Bill 2014. In fact, the government’s document, by defining parody as “an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect,” does not restrict the genre to “target parodies” and seems to include what are known as “weapon parodies.”¹⁹⁵ This definition nonetheless lacks clarity. The document also defines “satire” as “the use of humour, irony, exaggeration, or ridicule to expose and criticize people’s stupidity or vices.”¹⁹⁶ Because “satire” is made redundant by an inclusive parody exception, it should be omitted.

Keeping both “parody” and “satire” and not defining them in the statute would likely pose problems, as courts may determine that dealing with a work for the purpose of satire is less fair than for the purpose of parody. Yu notes the oft-noted distinction between “parody” and “satire” in *Campbell*, namely, “[p]arody needs to mimic an original to make its point,” whereas “satire can stand on its own two feet and so requires justification for the very act of borrowing.”¹⁹⁷ He argues that this distinction was made only in the context of *Campbell* and

¹⁹⁵ See Intellectual Property Department, The Government of HKSAR, *supra* note 184.

¹⁹⁶ *Id.*

¹⁹⁷ Yu, *supra* note 126, at 16—17.

it is problematic to hold that parody is more likely to be protected than satire.¹⁹⁸ Yet the parody exception has remained untested in all jurisdictions whose laws the bills committee consulted, except the U.S. and Canada. Hong Kong courts, in seeking to interpret the scope of “parody” and “satire,” would likely consult the governmental document, which indicates that a “satire” need not invoke any existing work.¹⁹⁹ Courts may also reference American and Canadian cases. While they may rely on the Canadian court’s recent decision to hold that “parody” includes both target and weapon parodies, nothing would stop them from drawing upon American case law. Therefore, unless a well-defined and inclusive parody category replaces “parody” and “satire,” the flawed parody/satire dichotomy created by American judges and/or the propertized conception of fair dealing may impact Hong Kong courts’ judgements. After holding that works are “satires” on the ground that they criticize or comment on something else, Hong Kong courts may determine that works borrowing too much from their originals for satirical purposes are not fair dealings, even though they would not likely cause any economic prejudice to the originals’ authors by displacing demands for their works.

The parodies discussed in this chapter can be used to illuminate how a broad, well-defined parody exception would help courts to properly balance the right holders’ interests with those of the users and bring Hong Kong’s copyright system more in line with its free speech tradition. Among all the parodies described, only those of Regina Ip’s campaign logo and President Xi’s photograph targeted the underlying works.²⁰⁰ The former targeted Ip’s

¹⁹⁸ *Id.* at 17.

¹⁹⁹ See Intellectual Property Department, The Government of HKSAR, *supra* note 184.

²⁰⁰ See *supra* Section IIB.

pro-Beijing stance by turning her slogan “Win Back Hong Kong” into “Die Back Big Six,” whereas the latter targeted Xi’s hypocrisy and despotic control of Hong Kong by turning the umbrella into a symbol of protest against both the Hong Kong and the PRC governments.²⁰¹ The others targeted something else. “Under Fuji Mountain” was given new lyrics and a new title “Locusts World” to satirize the conduct of Chinese tourists and immigrants in Hong Kong.²⁰² If parody and satire remain two different categories, the court may categorize “Locusts World” as “satire” that can stand on its own rather than as a vaguely defined “parody” and hold that “Locusts World” had used too much of “Under Fuji Mountain” to serve its satirical purpose. On the contrary, replacing the parody and satire categories by the proposed parody exception would reduce any potential influence of “satire” and/or a propertized conception of fair dealing on courts. Courts, focusing on whether these parodies served as market substitutes for the originals, would more likely hold for the parodists and less likely suppress their right to freedom of expression.

2. Distinguishing “Parody” from “Caricature” and “Pastiche”

In addition to broadening “parody” to replace the parody and satire categories, the law should distinguish parody, a vehicle for criticism or commentary, from “caricature” and “pastiche,” neither of which needs to serve any critical or commentary purpose. In doing so, the law would avoid two potential pitfalls: requiring that these two genres carry messages like parodies do, and offering an overly broad and vague definition of parody so that it encompasses caricature and pastiche. Providing for a well-defined parody would also help to

²⁰¹ *See id.*

²⁰² *See id.*

educate the public about the expressive purpose of parody and facilitate its role in Hong Kong society.

The *Oxford English Dictionary* defines caricature as “[a] picture, description, or imitation of a person in which certain striking characteristics are exaggerated in order to create a comic or grotesque effect.”²⁰³ Although elements of caricature are found in ancient Greek and Roman arts and in the allegorical arts of the medieval period, caricature is generally regarded to have been invented by Italian painters Annibale and Agostino Carracci, before it evolved into a mode of political discourse in France and England in the seventeenth and eighteenth centuries respectively, and became an important element in American social and political satires in the twentieth century.²⁰⁴ Yet the term “caricature,” derived from the Italian word *caricare* (meaning to load or to exaggerate), refers simply to a loaded portrait that exaggerates the subject’s features.²⁰⁵ Hence, despite its heavy presence in social and political commentaries, a caricature need not serve any critical or commentary purpose.

Political caricatures, which were abundant in colonial Hong Kong, have continued to flourish over the past decade. John Tsang, former Financial Secretary of Hong Kong and a candidate in the 2017 Chief Executive Election, is well liked by Hong Kong people. Many of

²⁰³ Intellectual Property Department, The Government of HKSAR, *supra* note 184, *citing* OXFORD ENGLISH DICTIONARY (12th ed. 2012), *available at* <https://en.oxforddictionaries.com/definition/us/caricature> (last visited Oct. 10, 2017).

²⁰⁴ EDWARD LUCIE-SMITH, *THE ART OF CARICATURE* 21, 33, 51, 99—116 (1981).

²⁰⁵ “As the French synonym, *portrait charge*, indicates, a caricature is a loaded portrait (i.e., *ritratti carichi*), a portrait with extras. A 1773 complaint against the caricature-drawing Marquess of Townshend maintains that the loaded portrait aims ‘With wretched pencil to debase/Heaven’s favorite work, the human face,/To magnify and hold to shame/Each little blemish of our frame.’” Deidre Lynch, *Overloaded Portraits: The Excesses of Character and Countenance*, in *BODY AND TEXT IN THE EIGHTEENTH CENTURY* 127 (Veronica Kelly & Dorothea von Mücke eds., 1994).

his caricatures do not contain overt political messages.²⁰⁶ This is not true for former Chief Executive CY Leung, whose caricatures have almost always contained disparaging messages. In a number of his caricatures, fangs are added to his mouth and a pair of horns to his head to make him resemble a demon.²⁰⁷ Assume that the law recognized an exception for the purposes of parody, caricature and pastiche and provides clear definitions of these genres. If the caricatures of Leung and Tsang were modeled on copyrighted photographs and the rights holders sued the caricaturists, the authors of Tsang's caricatures could argue that they had used the original materials for the purpose of caricature, while the authors of Leung's caricatures could rely on both the caricature and the parody exceptions. If the law did not distinguish parody and caricature or provide clear definitions for them, as Yu suggests, it might lead to two results. Caricatures of Leung may easily meet the definition of parody, while those of Tsang might not. Certainly, courts could also vaguely define "parody" as an umbrella term to ensure that caricatures fall within this category. Nonetheless, a law distinguishing the two would serve to emphasize, rather than diminish, the expressive purpose of parody and facilitate its role in generating a vibrant political discourse.

The law should also distinguish "parody" from "pastiche," which, like caricature, need not serve any critical or commentary purpose. Derived from the Italian word *pasticcio*, which denotes a *pâté* of various ingredients,²⁰⁸ this concept travelled to France in the

²⁰⁶ See images at <https://www.clsa.com/special/fsi/2017/images/john.jpg> (last visited Oct. 10, 2017); <https://i.pinimg.com/736x/15/d7/d6/15d7d6236e921bb7125cf5d51d05a759--caricatures.jpg> (last visited Oct. 10, 2017).

²⁰⁷ See images at <http://static6.businessinsider.com/image/4ff1a1996bb3f7bd72000000/hong-kong-protest-burning.jpg> (last visited Oct. 10, 2017); http://www.hrichina.org/sites/default/files/2014_10_10_occupy_hk_art_01.jpg (last visited Oct. 10, 2017).

²⁰⁸ INGEBORG HOESTEREY, *PASTICHE: CULTURAL MEMORY IN ART, FILM, LITERATURE* 1 (2001).

seventeenth century, where it became known as “pastiche.”²⁰⁹ The *Oxford English Dictionary* defines “pastiche” as “an artistic work in a style that imitates that of another work, artist or period,”²¹⁰ whereas critics such as Linda Hutcheon and Mary A. Rose describe postmodern pastiche as “imitation without critical commentary” and as a repetition “without difference.”²¹¹ Examples of pastiche are abundant in cinema, literature, and fashion photograph, and others, including Steven Soderbergh’s *Kafka* (1991), which assembles the motifs and characters in Franz Kafka’s works in a contemporary revolutionary scenario,²¹² Milan Kundera’s *Immortality* (1990), which sets up imaginary encounters between famous figures,²¹³ and Franciscus Ankoné’s homage to art deco designer Erté in a multi-page presentation of models in French fashion in *New York Times Magazine*.²¹⁴ Given the liberal meaning of pastiche, Yu’s example of the PNCUGC—the uploading of a home video showing a child’s performance—may be categorized as pastiche.

Public figures are seldom simply pastiched in Hong Kong media. The rare pastiches, notably those involving John Tsang, further illuminate the importance for the law to distinguish parody from pastiche. Tsang is nicknamed “Uncle Pringles” for his trademark moustache which reminded people of the brand character of Pringles, an American brand of

²⁰⁹ *Id.* at 2.

²¹⁰ Intellectual Property Department, The Government of HKSAR, *supra* note 184; OXFORD ENGLISH DICTIONARY (12th ed. 2012), available at <https://en.oxforddictionaries.com/definition/pastiche> (last visited Oct. 10, 2017).

²¹¹ HOESTEREY, *supra* note 208, at 121.

²¹² *Id.* at 78.

²¹³ *Id.* at 88.

²¹⁴ *Id.* at 107.

potato snack chips. Playing on this resemblance, some netizens created pastiches by photoshopping a can of Pringles bearing its brand character into Tsang's photographs.²¹⁵ Other netizens adorned the Pringles character with a pair of glasses to make him resemble Tsang more closely and added "John Tsang" to the bottom of his face.²¹⁶ Assume the law provided clear definitions of parody and pastiche, and the copyright holder of Pringles sued the authors of these works. Although the mere juxtaposition of Tsang's image with the Pringles character indicates their resemblance and may be an attempt to endear Tsang to the public, this remix arguably does not carry any criticism or commentary and might not qualify as a parody. Thus, those who simply photoshopped a can of Pringles into the photographs would find the pastiche exception useful, whereas those who modified the Pringles character could comfortably rely on the pastiche or the parody exception, or both. By distinguishing parody from pastiche, the law would avoid imposing an unfair standard on pastiches by requiring that they contain criticism or commentary like parodies do. It would also serve to educate the public about the expressive purpose of parody and facilitate its role in Hong Kong society.

3. The Likely Low "Humor" Bar

As explained in Part One, a parody need not be humorous. Assuming that the law, like the explanatory note to Bill 2014, requires that a parody contain humor, courts would not

²¹⁵ See image at http://vignette1.wikia.nocookie.net/evchk/images/5/55/542853_10200258924251319_1188036266_n.jpg/revision/latest?cb=20130301172144 (last visited Oct. 10, 2017).

²¹⁶ See images at https://4.bp.blogspot.com/-Agh97KrYJS4/WErCPxK1M9I/AAAAAAAAABl8/cFnUkqCa2YU9Yuf25qIHfXQk_ljtS7_0QCLcB/w1200-h630-p-k-no-nu/John%2BTsang.JPG (last visited Oct. 10, 2017).

likely set a high bar for this requirement. First, the meaning of “humor” has never been addressed by Hong Kong courts. Hence, courts may simply follow the social consensus regarding its meaning. The creative and witty uses of symbols and homophones to satirize the Hong Kong government and the Chief Executive in pro-democracy protests and television shows have been lauded as “humorous” by the media.²¹⁷ Courts may easily find that the parodies discussed in this chapter, which all manifest their authors’ creativity and wittiness, or attempts at creativity and wittiness, meet the humor requirement.

Second, due to the lack of precedent addressing this issue, courts may look to the laws of foreign jurisdictions, many of which have not defined humor either and/or cautioned courts against evaluating whether a work is “humorous.” In *Deckmyn*, for example, neither the Advocate General nor the ECJ defined “humour.”²¹⁸ The ECJ held that national courts should have broad discretion in determining whether a work has the status of a parody, and by implication, whether the work contains humor.²¹⁹ The Advocate General also stated that humor can be mixed with other intentions, and “extreme seriousness” “may underlie a humorous expression.”²²⁰ In *Campbell*, the U.S. Supreme Court cautioned courts against evaluating a parody’s success, and by implication, the funniness of its jokes.²²¹ Therefore,

²¹⁷ See e.g., Yu & Tam, *supra* note at 51; Isabella Steger & Edward Ngai, *In Hong Kong, a Democracy March with a Sense of Humor*, WSJ (Jul. 2, 2014), <http://blogs.wsj.com/chinarealtime/2014/07/02/in-hong-kong-a-democracy-march-with-a-sense-of-humor/> (last visited Oct. 10, 2017).

²¹⁸ See *Deckmyn v. Vandersteen* [2014] Case C-201/13, para. 33 (E.C.J.); *Deckmyn v. Vandersteen*, Opinion of Advocate General Cruz Villalón [2014] Case C-201/13, para. 68 (E.C.J.).

²¹⁹ *Deckmyn* [2014], *supra* note 218, at para. 33.

²²⁰ *Deckmyn*, Opinion of the A.G. [2014], *supra* note 218, para. 68.

²²¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 596, 582 (1994) (*quoting* *Yankee Publ’g. v. News Am. Pub’g., Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (Leval, J.) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”))

even if the new law requires that a parody contain humor, the parodies commonly found in Hong Kong's social media, like those examined in this chapter, would easily pass muster.

Clearly, the Hong Kong government has had no plan to adopt a fair use provision. Yet fair dealing exceptions in forms of parody, caricature and pastiche, as long as they are clearly defined and correctly applied, should partially make up for the relative lack of flexibility of fair dealing. Provided that courts pay attention to the market substitution factor, they would be inclined to consider works that would not likely displace demands for their works fair dealings.

III. APPLYING THE PARODY EXCEPTION: FROM AN UNRELIABLE FREE SPEECH DOCTRINE TO MORAL RIGHTS EXEMPTIONS

Part One and the previous chapters on the U.S., Canada, and the U.K. have argued that to align the copyright systems with the free speech traditions of these jurisdictions, courts should apply the parody exception by drawing upon the free speech doctrine. In doing so, courts would ensure that controversial but lawful expressions would not be suppressed under the pretext of copyright protection. The last chapter has also explained how a narrowly circumscribed public interest doctrine in the British copyright jurisprudence may not help parodies to survive moral rights claims by authors. This section will illuminate how the external freedom of expression doctrine can not be relied upon to safeguard the right to parody in Hong Kong, given that this freedom has been constantly attacked since its changeover and will likely continue to shrink in the years to come. It will therefore explore a solution internal to the copyright statute: providing an exception to the author's integrity

right to object to derogatory treatment of the work in the form of parody, so as to provide more space for Hongkongers to exercise their freedom of expression through parodies.

A. Freedom of Expression: An Unreliable External Doctrine

The appeal to freedom of expression and freedom of the press by Hong Kong courts in copyright claims is not unprecedented.²²² Courts should apply the parody exception with reference to this core principle. For example, they may follow the ECJ's appeal to this principle in *Deckmyn*, prioritizing the artistic and/or political values of the parodies over the interests of the rights holders. They may also follow Liu's suggestion discussed in Part Two, Chapter Three and analogize copyright infringement with defamation, to ensure that controversial materials that are not defamatory would not be banned. However, this core freedom has been assaulted since the changeover by both the PRC and the Hong Kong governments. Hence, it could not be relied upon as an external doctrine to safeguard the right to parody.

1. Assaults on Free Speech: Old and Recent

Section II has examined examples of self-censorship engaged by Hong Kong's media. Unsurprisingly, efforts at censorship have also been undertaken by the PRC government, which has repeatedly violated the Joint Declaration by going against its "One country, two systems" principle and curtailing Hong Kong people's freedom of speech since

²²² Wong Wing Yue Rosaline v. Next Media Interactive Ltd. & Others [2017] HKCFI 269 (C.F.I.). The Court weighed the plaintiff's right to privacy and copyright in her photographs, obtained and published without her consent by a media company against freedom of the press and the need to protect press sources. Finding for the company, it refused to issue the company a disclosure order requesting it to disclose the sources of the photographs.

the early days after the changeover. One early example happened in 1999, when Cheung Man-Yee, then Director of Broadcasting of the Radio Television of Hong Kong (RTHK) (a governmental organization) and a staunch defender of press freedom, was removed from her position after she invited Taiwan's official representative in Hong Kong to deliver a short speech in a radio program defending the view that Taiwan is an independent nation and should enjoy a state-to-state relationship with China.²²³ Given its strong reaction to the speech, the PRC government was believed to be the party requesting Cheung's removal.²²⁴ A year later, the Hong Kong Cable Television's interview of the Vice-President Elect of Taiwan's second presidential election, who advocated Taiwan independence and sovereignty, continued to trigger strong reactions from Beijing and pro-CCP groups in Hong Kong.²²⁵ The Chinese government warned Hong Kong journalists about their responsibility "to uphold the integrity and sovereignty of the country and not to advocate 'two states' theory and independence of Taiwan," an issue that it considered to have "nothing to do with press freedom."²²⁶

A much more recent and blatant example of the PRC government's attack of Hongkongers' freedom of expression involved its abduction of five booksellers of a Hong

²²³ Wong, *supra* note 36, at 22—23 (Yiu-Chung Wong ed., 2004). In July 1999, Lee Teng-hui, then Taiwan's elected president, proposed a "two state" theory regarding the international status of Taiwan to a journalist from *Voice of Germany*, a German weekly. The short speech by Cheng An-Kuo, the de facto Taiwan official representative in Hong Kong, in the RTHK program triggered strong reactions from local pro-CCP groups.

²²⁴ On August 19, 1999, Qian Qichen, then Vice Premier for Hong Kong Affairs, stated publicly that Hong Kong should not promote the "two state" theory as it contravenes Beijing's seven principles that have governed Taiwan and Hong Kong relationships since 1997. Cheung was transferred to Tokyo where she took on a new position as the principal Hong Kong Economic and Trade Representative. *Id.*

²²⁵ *Id.* at 23—24.

²²⁶ *Id.* at 23.

Kong bookstore selling controversial books that criticized President Xi. Late 2015 saw a series of “kidnapping” incidents, one taking place in Hong Kong, in which agents from its central investigation team arrested the booksellers and detained them in China.²²⁷ On the arrest of one victim, China’s foreign ministry claimed that because he had broken Chinese laws, the Chinese authorities across the border were within their rights to handle his case.²²⁸ Nonetheless, distributing materials that criticize public figures is legal in Hong Kong, as long as the materials do not violate laws on defamation and obscenity and do not threaten national security.²²⁹ The PRC government therefore lacked legal grounds to arrest or detain the booksellers, let alone bypass legal procedures in its secret arrest of one of the booksellers in Hong Kong.²³⁰

Apparently, these violent acts by the PRC government have not directly impacted Hong Kong’s freedom of expression jurisprudence. The most important court decision banning political speech has been *HKSAR v. Ng Kung Siu and Another* (1999), in which the Final Court of Appeal upheld the conviction of two individuals for desecrating the Hong

²²⁷ E.g., Elizabeth Joseph & Katie Hunt, *Missing Hong Kong Bookseller: I Was Kidnapped by Chinese ‘Special Forces,’* CNN (June 16, 2016), <http://www.cnn.com/2016/06/16/asia/china-hong-kong-booksellers/index.html> (last visited Oct. 10, 2017); Tony Cheung & Phila Siu, “Outrage Expressed in Hong Kong over Missing Bookseller, but No Answers Forthcoming,” *S. China Morning Post* (June 7, 2016), available at <http://www.scmp.com/news/hong-kong/law-crime/article/1977002/outrage-expressed-hong-kong-over-missing-bookseller-no> (last visited Oct. 10, 2017). Five men associated with the publishing house in Causeway Bay disappeared one after another, beginning in October 2015. The first victim vanished first from Pattaya, Thailand. Three others went missing while they were in Mainland China. The last one disappeared from Hong Kong in December 2015. Since then, four had been allowed to return to Hong Kong, while one still remains detained. Lam Wing-kee, one of those allowed to return to Hong Kong, disclosed to the media how he was abducted, blindfolded and handcuffed by secret agents in October 2015. According to Lam, the fact that the territory’s autonomy had been trampled upon by Beijing prompted him to speak out at the risk of his safety.

²²⁸ Cheung & Siu, *supra* note 227.

²²⁹ *Id.*

²³⁰ *Id.*

Kong flag and the Chinese flag, on the grounds that flag desecration is not legal and there are other protest methods.²³¹ This decision, which outraged democrats and free speech activists, became a handy tool for pro-China commentators to advocate for even more stringent laws banning opinions disfavored by the Chinese government. Examples are views held by “localist” groups, formed after the 2014 civil disobedience movement, that Hong Kong should enjoy more political and cultural autonomy from China or even become an independent city-state.²³² The PRC government views any talks about “independence” (which includes autonomy) as illegal, while the Hong Kong government declared that to “advocate independence” is against the Basic Law.²³³ Pro-China commentators drew upon the *Ng Kung Siu* case to point out that the exercise of freedom of expression ought to be subject to the overriding principles of “one country, two systems” and national unity, and given the lack of local legislation expressly prohibiting or criminalizing the advocacy of Hong Kong independence, time is ripe for Hong Kong to reconsider enacting relevant legislation under Article 23 of the Basic Law.²³⁴

²³¹ *HKSAR v. Ng Kung Siu & Another* [1999] HKCFA 10 (C.F.A.). Flag desecration was legal in colonial Hong Kong. The Chinese law banning flag desecration was incorporated into Hong Kong law as the National Flag and National Emblem Ordinance in 1997 as required by Annex III of the Basic Law. In addition, the Regional Flag and Regional Emblem Ordinance, also enacted in 1997, bans the desecration of the Hong Kong flag.

²³² Some “localist” groups seek greater political and cultural autonomy from China. Some demand outright independence and the formation of a city-state. Joshua Wong, a prominent leader of the Umbrella Movement, says self-determination is the only solution for Hong Kong: “Hong Kongers should not only focus on universal suffrage, but also fight for the city’s right to self-determination.” Alissa Greenberg, *A Year after the Umbrella Revolution, Calls for More Autonomy, Even Independence, Grow in Hong Kong*, CNN (Sep. 27, 2015), <http://time.com/4049700/hong-kong-independence-occupy-umbrella-localist/> (last visited Oct. 10, 2017).

²³³ Suzanne Pepper, *Treason or Free speech? Talk of Independence Touches a Sensitive Spot*, H.K. FREE P. (May 9, 2016), <https://www.hongkongfp.com/2016/05/09/treason-free-speech-talk-independence-touches-sensitive-spot/> (last visited Oct. 10, 2017).

²³⁴ *E.g., id.*; Eliza Chan, *Hong Kong Should Reconsider Enacting Article 23 Legislation to Nip Support for Independence in the Bud*, S. CHINA MORNING POST (Apr. 18, 2016), available at

Section I has already described Article 23, the dangerously broad and vague terms in its proposals and bill, and the large-scale protests in 2003 that led to the shelving of the bill. Due to the civil disobedience movement in 2014 and the rise of “localist” groups, national security legislation once again emerged as an important topic in the 2017 Chief Executive Election. Carrie Lam, the new Chief Executive, vowed to take “a leading and proactive role” in passing the legislation, although the government must create the right social conditions for legislation.²³⁵ In fact, only a day after she pledged to unite a divided society as the city’s new Chief Executive, the Department of Justice ordered the arrests and charges of the leaders and key participants in the 2014 protests.²³⁶ While the Department of Justice issued a statement denying any political consideration in its action, scholars attributed the timing of the arrests to the former Chief Executive’s (or Beijing’s) attempt to burden the new Chief Executive to adopt a hardline approach towards current and future protests.²³⁷ Therefore, Lam may very well coordinate with the PRC government to create an increasingly suppressive environment, whether the national security legislation will be enacted or not.

<http://www.scmp.com/comment/insight-opinion/article/1936888/hong-kong-should-reconsider-enacting-article-23-legislation#comments> (last visited Oct. 10, 2017).

²³⁵ Carrie Lam, *We Connect: Connecting for Consensus and a Better Future (Manifesto for Chief Executive Election 2017)*, at 7, http://wpadmin2017.carrielam2017.hk/media/my/2017/01/Manifesto_e_v2.pdf (last visited Oct. 10, 2017). Kang-Chung Ng & Jeffie Lam, *Hong Kong Leader Carrie Lam Calls for National Security Law Push, but No Clear Time Frame*, S. CHINA MORNING POST (Jul. 3, 2017), available at <http://www.scmp.com/news/hong-kong/politics/article/2101093/hong-kong-leader-carrie-lam-calls-national-security-law-push> (last visited Oct. 10, 2017).

²³⁶ Chris Lau & Joyce Ng, *Occupy Leaders Arrested and Charged a Day after Carrie Lam Wins Hong Kong Chief Executive Election*, S. CHINA MORNING POST (Mar. 27, 2017), available at <http://www.scmp.com/news/hong-kong/politics/article/2082375/occupy-leaders-told-they-face-prosecution-day-after-carrie> (last visited Oct. 10, 2017).

²³⁷ *Id.*

Freedom of speech in Hong Kong has not been threatened merely by the prospect of a national security law under Article 23, but also by the Hong Kong government's consideration to amend the current discrimination law to prohibit "discriminatory" speech targeting Mainlanders, after a series of "anti-locusts" street protests in Hong Kong's tourist districts in early 2014.²³⁸ The Race Discrimination Ordinance, discussed in Section I, prohibits discrimination on the basis of "the race, colour, descent, national or ethnic origin of the person."²³⁹ Because the Equal Opportunities Commission takes the position that Mainlanders and Hongkongers should not be differentiated by race and nationality, it is currently reviewing the Ordinance and seeking to address what it considers to be discrimination within the same racial and national group.²⁴⁰ Yet the locust metaphor, though rude, is not hate speech or an ethnic slur, because it targets the behaviors and manners of some Mainlanders rather than Mainlanders as a demographic group.²⁴¹ A renowned scholar and social commentator aptly compares this metaphor to "Wall Street Crooks," used to describe Wall Street bankers who profit illegally and at the expense of their clients, arguing

²³⁸ Jennifer Ngo, *Hong Kong May Amend Its Race Hate Law to Protect Mainland Visitors*, S. CHINA MORNING POST (Feb. 20, 2014), available at <http://www.scmp.com/news/hong-kong/article/1432229/hong-kong-may-amend-its-race-hate-law-protect-mainland-visitors> (last visited Oct. 10, 2017).

²³⁹ Race Discrimination Ordinance, s. 8(1)(a).

²⁴⁰ Ngo, *supra* note 238.

²⁴¹ At an open consultation by the EOC, a representative of Local Press, an internet media outlet, pointed out that condemning something wrong is a "moral right": "If a Hongkonger shouted 'locust' in the face of a mainlander after seeing him poo, would he be subjected to punishment?" Amy Nip, *Should It Be Illegal to Call Someone 'Locust'? Protection for Mainlanders Dominates Law Debate*, S. CHINA MORNING POST (Aug. 10, 2014), available at <http://www.scmp.com/news/hong-kong/article/1570269/it-discrimination-say-locust-protection-mainlanders-dominates-debate> (last visited Oct. 10, 2017).

that both are condemnatory but not discriminatory.²⁴² Rather than outlawing the metaphor, the government therefore should discourage rude behaviors from both Mainlanders and Hongkongers. Its desire to amend the law to protect the feelings of Mainlanders reveals that it privileges a harmonious Hong Kong-China relationship over Hongkongers' right to free speech, and is ready to chip away at this core, cherished freedom in the former colony to maintain a superficial, fragile harmony.

2. An Unreliable Doctrine and a Judiciary under Attack

Enacting a national security law to prohibit discussions of “localism” and other opinions that are disfavored by the Chinese government but do not threaten national security would violate the right to freedom of expression enshrined in the Basic Law. Likewise, amending the Race Discrimination Law to prohibit expressions that are hurtful but not discriminatory would go against this right. Parodists who mock China's Presidents, Hong Kong's Chief Executives, and Mainlanders could be criminally liable under these laws. If courts could not find parodists criminally liable for their “subversive” or “discriminatory” speech, copyright holders who want to have the speech suppressed may bring copyright claims, hoping that courts would issue injunctions to ban the parodies.

As freedom of expression has been continually eroded and will continue to shrink in post-handover Hong Kong, it would become an unreliable doctrine for safeguarding parodists' freedom of expression even if a parody fair dealing exception is introduced. When judges determine whether “Locusts World” and parodies satirizing China's President and

²⁴² Joseph Lien 練乙錚, *Discrimination against “Locusts”* (「蝗蟲」歧視 · Mao 神 · WhatsApp 的「1%」) (Feb. 24, 2014), available at <https://forum.hkej.com/node/110482> (last visited Oct. 10, 2017).

Hong Kong's Chief Executives have infringed owners' copyrights, the freedom of expression doctrine, in the current (and future) political climate(s), might not offer any safeguard for these controversial opinions in the form of parodies. In 2014, Beijing issued a white paper on the "one country, two systems" formula stating that Hong Kong judges have a "basic political requirement" to love the country.²⁴³ This "patriotism" requirement was widely interpreted to mean being "supportive of and cooperating with" the Beijing and Hong Kong governments, which would erode Hong Kong's judicial independence.²⁴⁴ Although this requirement is not yet imposed on Hong Kong judges, the freedom of speech doctrine could not be relied upon in a jurisdiction where this very freedom is constantly threatened to safeguard its people's right to parody like it would in the other jurisdictions examined.

B. Moral Rights Exemptions and Breathing Space

Because freedom of expression is under continual erosion in Hong Kong, where the judiciary may not be immune to corruption, internalizing the freedom of expression doctrine by having courts place a heavier emphasis on the nature of the defendant's dealing factor, a solution suggested in the last chapter, also would not help. However, amending the moral rights provisions in the Copyright Ordinance would be a good internal mechanism to provide more room for free speech by shielding parodists from moral rights claims by authors. Yu suggests that if a fair dealing exception is to be introduced to exempt parodies from both civil and criminal liabilities for copyright infringements, corresponding changes should also be

²⁴³ E.g., Peter So, *Judges Don't Need to Be Patriots, Says Former Top Judge Andrew Li*, S. CHINA MORNING Post (Aug. 15, 2014), available at <http://www.scmp.com/news/hong-kong/article/1573867/judges-dont-need-be-patriots-andrew-li?page=all> (last visited Oct. 10, 2017).

²⁴⁴ *Id.*

made to the moral rights provisions in the Ordinance.²⁴⁵ At present, s. 91(4) of the Ordinance provides exceptions to the author's (or director's) (attribution) right to be identified as the author or director of the copyrighted work,²⁴⁶ whereas s. 93 further includes exceptions to the author's (or director's) (integrity) right to object to derogatory treatment of the work.²⁴⁷ The

²⁴⁵ Yu, *supra* note 126, at 19—21.

²⁴⁶ “Section 91 Exceptions to Right (1) The right conferred by section 89 (right to be identified as author or director) is subject to the following exceptions. ...

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe copyright in the work—

- (a) section 39 (fair dealing for certain purposes), so far as it relates to the reporting of current events by means of a sound recording, film, broadcast or cable programme;
- (b) section 40 (incidental inclusion of work in an artistic work, sound recording, film, broadcast or cable programme);
- (c) section 41(3) (examination questions);
- (d) section 54 (Legislative Council and judicial proceedings);
- (e) section 55(1) or (2) (statutory inquiries);
- (f) section 66 or 75 (acts permitted on assumptions as to expiry of copyright, etc.).” Copyright Ordinance, 1997, c. 528, s. 91(4).

²⁴⁷ “Section 93 Exceptions to Right (1) The right conferred by section 92 (right to object to derogatory treatment of work) is subject to the following exceptions.

(2) The right does not apply to a computer program or to any computer-generated work.

(3) The right does not apply in relation to any work made for the purpose of reporting current events.

(4) The right does not apply in relation to the publication in—

(a) a newspaper, magazine or similar periodical; or

(b) an encyclopaedia, dictionary, yearbook or other collective work of reference, of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the consent of the author for the purposes of such publication. Nor does the right apply in relation to any subsequent exploitation elsewhere of such a work without any modification of the published version.

(5) The right is not infringed by an act which by virtue of section 66 or 75 (acts permitted on assumptions as to expiry of copyright, etc.) would not infringe copyright.

Ordinance should be amended to include corresponding parody exceptions, so that the author would give up the right to be identified as the author/director of the original work in the parody, and the right to object to derogatory treatment of that work in the form of parody.²⁴⁸ Yu justifies the former exception by pointing out the challenge of including sufficient acknowledgements in certain parodies.²⁴⁹ He also explains that the latter exception would help to protect parodists from legal action by disgruntled authors who feel that the parodies have caused them embarrassment, emotional pain, or loss of “face.”²⁵⁰

Interestingly, Bill 2014 only introduced a corresponding exception to the attribution right to be identified as the author or director of the copyrighted work.²⁵¹ Because it did not include an exception to the author’s or director’s integrity right to object to derogatory treatment of the work in the form of parody, parodists’ anxieties over potential integrity right claims could chill their speech. The question is whether providing for an exception to the author’s integrity right to object to derogatory treatment of the work in the form of parody would upset the balance of rights between parodists and authors. Would a narrowly-defined

(6) Subject to subsection (7), the right is not infringed by anything done for the purpose of—

(a) avoiding the commission of an offence; or

(b) complying with a duty imposed by or under an enactment.

(7) Where the author or director is identified at the time of the relevant act under subsection (6) or has previously been identified in or on published copies of the work, subsection (6) has effect only if there is a sufficient disclaimer.” *Id.* s. 93.

²⁴⁸ Yu, *supra* note 126, at 20—21.

²⁴⁹ *Id.* at 20.

²⁵⁰ *Id.*

²⁵¹ Copyright (Amendment) Bill 2014, cl. 51.

“derogatory treatment” better attain this balance? Arguably, because a narrow definition of “derogatory treatment” of the original work would hinge on whether the parody defames the author or causes the author emotional distress, the author’s integrity right could be addressed by related laws and the integrity right provision could be eliminated altogether.

When threats to free speech are looming and the external doctrine of freedom of expression could not be relied upon to safeguard the right to parody, an internal solution in the form of an exception to the author’s (or director’s) integrity right to object to derogatory treatment of the work in the form of parody would create breathing space for parodists to exercise their right to freedom of expression. Parodists could express their opinions about politicians or others with the assurance that they would be shielded from moral rights claims alleging that they have subjected copyrighted works to derogatory treatments through their parodies. Examples from the earlier discussion include appropriating the Chief Executive Carrie Lam’s image and the Christian art picture in a parody to condemn her arrogance, and parodying politician Regina Ip’s election logo to express contempt for her. Each of these examples constituted a “fair comment in a matter of public interest” and defamed neither the target nor the author.²⁵² If the parody defames the author—who may also be the target—of the parody, the author could bring a defamation suit against the parodist. Whereas Chief Executives may not sue citizens for defamation in their public capacity, if a parody mocking a politician asserts a false statement of fact or opinion that shows “malice,” then the politician or the author of the parody would be able to sue the parodist for defamation.²⁵³ Hence, providing for exceptions to the author’s moral rights, especially the integrity right to

²⁵² See Section IA, n.17.

²⁵³ See *id.*

object to derogatory treatment of the work in the form of parody, would make room for freedom of speech without sacrificing the rights of copyright owners or authors.

In both U.K. and Hong Kong, the free speech doctrine could not be relied upon as an external mechanism to safeguard the right to parody. In the U.K., courts can rely upon the nature of the defendant's use factor to provide more room for political and artistic expressions, while the moral rights provisions will enable authors to curb free expressions in the form of parodies. Should the parody exception be introduced into Hong Kong's copyright law, the freedom of expression doctrine, or emphasizing the nature of the defendant's use factor, would not help to protect the right to parody. Eliminating the author's integrity right to object to derogatory treatment of the work in the form of parody, nonetheless, would provide breathing space for parodists as this freedom continues to decline.

CONCLUSION

If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success.¹

This dissertation has shown that the right to parody is a natural right in both the free speech and the copyright contexts. It has also addressed the scope of protection that copyright law should provide to this right. Whether copyright is considered a natural right like speech freedom, or a conventional right established to incentivize the production of creative works, it should give way to the right to parody copyrighted works, provided that the parodies would not harm the interests of right holders by displacing market demands for their works. The fundamental nature of free speech calls for a broad parody exception in copyright law and the prioritization of the market substitution factor. Not only would the broad parody exception not harm the interests of rights holders, but it also would not conflict with authors' moral rights.

The previous chapters have discussed how the proposed parody exception would help to bring the copyright systems of the four subject jurisdictions, driven by utilitarianism and/or a narrow conception of natural rights prioritizing the rights of copyright owners, in line with their free speech jurisprudences. This broad definition should replace the narrow

¹ CONFUCIUS, ANALECTS, bk. XIII, ch. 3, verses 4—7 (translated by JAMES LEGGE, *CONFUCIAN ANALECTS: THE GREAT LEARNING, AND THE DOCTRINE OF THE MEAN* 263—264 (1971)).

defence set up by the U.S. Supreme Court, which has been used by lower courts to suppress valuable parodic works that would not likely compete with the copyrighted originals. This broad exception should also replace the parody and satire fair dealing exceptions in Canada's copyright statute, as it would help to diminish any impact of a propertized conception of fair dealing and properly balance the interests of rights holders and users.

Compared to the other jurisdictions, the parody exception in British copyright law encompasses a broader range of works regardless of their targets. Nonetheless, the moral rights provisions in the statute potentially stifle free speech, while a narrowly-circumscribed public interest doctrine will prevent courts from applying the exception in ways that best serve the public's speech interests. Lastly, the dissertation has examined the parody exception in Hong Kong's Copyright (Amendment) Bill 2014. The last chapter has explained that a broad parody exception should replace "parody" and "satire," but be distinguished from "pastiche" and "caricature" in the bill. A broad and properly-defined parody exception, together with an exception to the author's integrity right to object to derogatory treatment of the work in the form of parody, can help to facilitate the role of parody in the former British colony, where free speech has been continually eroded since its handover to China.

The much-cited, perhaps clichéd, saying by Shakespeare goes: "What's in a name? that which we call a rose/ By any other name would smell as sweet."² Names could be arbitrary and their relationships with the things that they represent could be tenuous and even non-existent. Would parody serve its legal function if it were known by any other name? On

² WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, Act 2, Scene 2, 46—47 (1597), *available at* <http://www.folgerdigitaltexts.org/html/Rom.html#line-2.2.0> (last visited Oct. 10, 2017).

a related note, if the most crucial factor that determines the fairness of the use or dealing is whether it would substitute for the underlying work or its derivatives in the market and harm the interests of the rights holder, is the “parody” exception or defence truly necessary in copyright law? From a practical standpoint, a parody exception would be necessary for jurisdictions in which fair dealing tests are adopted, because a work must fall within an exception before it can proceed to the fairness analysis. Further, the dissertation has described the ancient origins of parody, its long traditions in different cultures, and its significant role in delivering criticisms and commentaries vital for the pursuit of truth, democratic governance, and self-realization. So much is carried in the word “parody.” Hence, the exception or defence should be known by no other name than “parody,” to educate the public about the role of parody and to foster the parodic tradition. Names, after all, carry tremendous power.

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