e-ISSN 2582-4570

PARODY, PASTICHE AND SATIRE: A COMPARATIVE STUDY OF COPYRIGHT LAW IN US, UK, AND INDIA

Dr. Parikshet Sirohi[*]

ABSTRACT

The advent of the printing press in the fifteenth century made wide dissemination of ideas and creations possible, and thus, artistic creations began to acquire a significant economic value. Since every author is desirous of clearly defining and demarcating the legal interest in his creation, the widespread dissemination of an author's work began to pose a serious challenge to copyright pundits the world over. Modern society has seen the introduction of digital technology, and this challenge has been further intensified. Today, creative arts are seen as big business opportunities, and avenues to achieve a higher degree of economic return. Thus, it can be said that economics rather than patronage, is the driving factor behind arts in the digital era.This Paper has been written with four major objectives in mind, and each of these have been dealt with separately. The first objective is to define and elaborate the concept of parody, and to understand how it is different from other analogous works such as pastiche and satire. The author has attempted to critically analyze the parody exceptions under the copyright regime prevailing in three major areas of the world *viz.*, the United States (US), the United Kingdom (UK) and India. Thirdly, this Paper attempts to evaluate the essential incompatibility between authors' moral rights and the idea of parody. Lastly, an attempt has been made to examine how modern-day technology has changed the way creative works are viewed, perceived, and consumed, and what changes are required in the legal framework to satisfy these new expectations.

I. Introduction

Parody can be seen everywhere in contemporary culture – whether we look at theatre, literature, television, cinema, Over The Top (OTT)[1], advertisements, memes, or for that matter, even everyday

[*] Assistant Professor (Sr. Scale), Law Centre-II, Faculty of Law, University of Delhi.

[1] Television and film content which is broadcasted using a high-speed internet connection instead of cable connection or satellite service. The available that is available is not free, and the user is required to pay a certain amount to be able to watch the content for a specific period. For example, Amazon Prime Video, Netflix, iTunes, Hotstar and HBO Now are various OTT platforms. Available at: https://www.javatpoint.com/ott-full-

speech[2]. It is also at the heart of contemporary digital revolution. Before delving deep into the issues around the practice of parody in modern digital culture, we must first understand the meaning of the term 'parody', and how it differs from other often analogous terms like 'pastiche' and 'satire'.

When we consider Greek and Latin usage, the word *parodia* signifies a specific form of mock poetry or ode, which used the manner and diction of the high forms and applied them to a trivial topic. However, it also denoted a more widespread and more neutral practice of quotation and allusion[3]. In the neoclassical usage of the seventeenth and eighteenth centuries, the term 'parody' could not have meant anything more than an extended allusion to another writer's work in a subsequent longer work[4]. However, with the efflux of time, the term parody attained a very restrictive meaning, and in the predominant modern usage, it is used to denote a critique of an existing work with humor as an essential component of it. Today, the word 'parody' may bring to mind several YouTube or TikTok videos which have been made in the style of a popular song, which certain changes made to the lyrics or the tune, or comedy scenes or sketches which draw inspiration from cinema, television, or other forms of popular culture.

To make it more explicit, and to reduce confusion around the definition and meaning of the term 'parody' to the minimum, it should be understood in the following sense: "A parody is a work of art, whose central theme revolves around an existing work of authorship, and its main purpose is to criticize the latter in a humorous and mocking manner"[5].

On the basis of the above discussion, we can deduce that there are two essential features of a parody – firstly, it is a work which is based upon an existing work, and secondly, the purpose of it is to criticize that work, albeit in a humorous manner. Pastiche, on the other hand, is a work of art which imitates the central theme, characters, scenes, and situations of the original work, but the dominant purpose of pastiche is not to criticize or mock the original work, but only to create an association between the two works. For this very reason, Jameson has defined 'pastiche' as a blank parody without any political or personal comments[6].

A true satire not only criticizes, but also makes the reader/viewer laugh. This places satire very close to parodies. However, satire is not necessarily based upon any particular work of authorship, which is the case in both parody and pastiche; rather, it offers criticism and commentary about the world in

---

form#:~:text=OTT%20%3A%20Over%20the%20Top,cable%20connection%20or%20satellite%20service (last visited on Aug. 19, 2023).

2 "The Parody Defense to Copyright Infringement: Productive Fair Use after 'Betamax'" 97(6) *Harvard Law Review* 1395-1413 (1984), *available at*: https://doi.org/10.2307/1340971 (last visited on Aug. 19, 2023).

3 Simon Dentith, *Parody: The New Critical Idiom* 9 (Routledge, 2000, 1st edn.).

4 *Id.* at 10.

5 Christina Bohannan, "Reclaiming Copyright" 23 *Cardozo Arts & Entertainment Law Journal* 609 (2006).

6 Fredric Jameson, *Postmodernism, Or, the Cultural Logic of Late Capitalism* 16 (Duke University Press, Durham, 1992).

general[7]. Having now understood the term parody in general, it will now be appropriate to look at the legal aspects around the concept of parody in the next part of this Paper.

II. Parody and National Copyright Laws

Like all other intellectual property laws, copyright law is also territorial in nature, with very few elements of extra-territoriality[8]. Since it is generally agreed that in principle, copyright laws are territorial in nature, the author shall proceed to discuss the various approaches which have been adopted in three major copyright regimes across the world, under the following headings.

The U.S. Approach

US copyright law is based on the Intellectual Property Clause in the US Constitution, which grants to Congress, the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[9]. The purpose of this constitutional grant is to promote science and useful arts, and it is generally accepted that the securing of exclusive rights to authors and creators is a means to an end, and not an end in itself[10]. This approach of the US copyright law has made the Congress and the courts quite receptive of the practice of parody[11]. Parodies are therefore not seen as a threat to authors' rights, rather they have been viewed as an independent form of art capable of generating a separate market for themselves.

The Doctrine of Fair Use

When a parodist decides to make a parody based on any previously published work, it is quite natural that (s)he will be inclined to take material out of it, either verbatim or with a few alterations. This practice may give rise to an action for infringement, from the original author. Most of the infringement actions concerning derivative works involve lifting of an idea, sequence, or story, rather than verbatim copying. Since there is no copyright in an idea, howsoever brilliant it may be, and since cases involving verbatim copying are rather rare, courts have traditionally required 'substantial' copying of the physical expression of the copyrighted work as the principal element in any action for infringement. There may be a case however, and this is happening more frequently in the case of

---

7 Sotiris Petridis, "Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche" 32(8)*Quarterly Review of Film and Video*728-736 (2015).

8 Donald S. Chisum, "Normative and Empirical Territoriality in Intellectual Property: Lessons from Patent Law"37 *Virginia Journal of International Law*603, 605 (1997).

9 U.S. Const., art. 1, § 8, cl. 8.

10 R. Anthony Reese, "The Story of *Folsom v. Marsh*: Distinguishing Between Infringing and Legitimate Uses" in Jane C. Ginsburg and Rochelle Cooper Dreyfuss (eds.), *Intellectual Property Stories*267 (Foundation Press, New York, 2006).

11 A. Hunter Farrell, "Fair Use of Copyrighted Material in Advertisement Parodies" 92(6) *Columbia Law Review*1550-1591 (1992), *available at*: https://doi.org/10.2307/1123001 (last visited on Aug. 30, 2023).

digital parodies, that the court finds that there has been substantial copying of the original work. In such situations, the doctrine of fair use may serve as the only fall back for parodists.

The doctrine of fair use has proved to be rather flexible[12], and despite recurring attempts, it has not been possible to provide a universal definition which would cover its entire reach and extent[13]. Justice Story[14]in thecase of *Folsom* v. *Marsh*[15] attempted to define the term fair use as "a use which will not seriously discourage the progress of science and useful arts, and its social value greatly outweighs any detriment to the artist whose work is borrowed". This case is widely regarded having established the principle of fair use in US copyright law. While delivering the judgment in this matter, the learned judgedesigned what later came to be known as the 'four-factor test': "Look to the nature and objects of the selections made, the quantity and value of the materials used, the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work"[16]. Later, this four-factor test was adopted by Congress, and incorporated into § 107 of the US copyright law[17].

Folsom and certain other cases decided by Justice Story began to transform the discourse of the traditional legal and intellectual framework in the US[18]. The importance of the judgment in *Folsom* also rests on the fact that the works which were at the root cause of this litigation were no ordinary books, rather they were the letters of George Washington, thus creating a rather dramatic clash between private property rights guaranteed by copyright law and public accessibility of materials which were deemed to be of public, cultural and national importance[19]. In order to understand the doctrine of fair use and its implication for parodies, the author shall discuss one of the most celebrated cases on this subject, namely that of *Campbell* v. *Acuff-Rose Music, Inc.*[20]. In 1964, Roy Orbison[21] and William Dees[22] wrote and recorded the song *Oh Pretty Woman*[23], and the rights in the song were

---

12 Sidney Ditzion, "The District School Library, 1835-55" 10 *Library Quarterly*545, 549, 565 (1940).

13 Richard A. Posner, "When is Parody Fair Use" 21(1) *The Journal of Legal Studies* 67-78 (1992),*available at*: http://www.jstor.org/stable/724401 (last visited on Aug. 29, 2023).

14 American lawyer, jurist, and politician who served as an associate justice of the US Supreme Court from 1812 to 1845. He is most remembered for his landmark decisions in *Martin* v. *Hunter's Lessee* and *United States* v. *The Amistad*, and for his *Commentaries on the Constitution of the United States*, first published in 1833. Available at: https://www.supremecourt.gov/about/members_text.aspx (last visited on July 31, 2023).

15 9. F. Cas. 342 (C.C.D. Mass. 1841).

16 *Ibid*.

17 17 U.S.C., § 107 (2022).

18 *Gray* v. *Russell*, 10 F. Cases 1035 (C.C.D. Mass. 1839), *Emerson* v. *Davies*, 8 F. Cases 615 (C.C.D. Mass. 1845). *See* also Joseph Story, *Commentaries on Equity Jurisprudence; As Administered in England and America*930-943 (C.C. Little and J. Brown, Boston, 3rd edn.1843).

19 Meredith L. McGill, "Copyright and Intellectual Property: The State of the Discipline" 16 *Book History*387-427 (2013), *available at*: http://www.jstor.org/stable/42705793 (last visited on Aug. 27, 2023).

20 *Campbell* v. *Acuff-Rose*, 510 U.S. 569 (1994).

21 American singer, songwriter, and musician who is famous for his impassioned singing style, complex song structures, and dark, emotional ballads. *See* Jeff Slate, Alex Orbison, Roy Orbison and Wesley Orbison, *The Authorized Roy Orbison*27 (Center Street, New York, 1st edn., 2017).

22 Began his career as a singer but enjoyed his most fruitful period as Orbison's friend, collaborator, and bandmate. His song *Oh Pretty Woman* topped the charts in 1964, and went on to inspire the title of Julia

assigned to Acuff-Rose Music Inc. The song had achieved a significant degree of popularity amongst the public, when in 1989, Luther Campbell, lead vocalist and song writer for an obscure band called *2 Live Crew*, rewrote the famous song by substituting some of its lyrics with ones which were alleged to be obscene and offending. Later, Campbell's music company, Luke Records released an album which included the parody. The credits in the album recognized Orbison and Dees as the writer, and Acuff-Rose as the publisher of the original song. The district court found in favor of Campbell, and held the use to be fair. However, the Sixth Circuit relying upon the decision in the case of *Corporation of America* v. *Universal Studios*[24], held that the song was not a fair use and constituted infringement of the original work because the blatantly commercial purpose of the derivative work prevented the latter work from qualifying as fair use[25]. Finally, the US Supreme Court ended the controversy, and held the song to be fair use of the original work.

The Supreme Court rejected the decision of the Sixth Circuit that all commercial parodies are presumptively unfair, and held that every parody must pass the fair use test as enunciated under § 107 of the Copyright Act. The Court defined parody as "the use of some elements of a prior author's composition to create a new one, which, at least in part, comments on that author's work"[26]. The court laid down that what was relevant was to find out as to what extent the subsequent work was transformative, *i.e.* to what extent the new work altered the original, and gave it a new expression and message. The court further noted that market substitution was rather unlikely, since the original work and the parody served two completely different markets[27]. This doctrine has found favour in several other jurisdictions including India.

The decision of the Supreme Court in *Campbell* received support from all contours of society, and has been hailed as a significant victory for parodists. In the subsequent cases of *Dr. Seuss*[28], *Leibovitz*[29] and *Suntrust Bank*[30], the principles enunciated in *Campbell* have been upheld, and scrupulously followed. Hence, we can summarize that the copyright regime in the US has been rather supportive of creators of derivative works such as parody, and it has successfully shielded them, and provided them required support so that they could foster their creative activities.

Roberts' hit 1990 movie. *See* BBC News, "Bill Dees, US songwriter, dies aged 73", *available at*: https://www.bbc.com/news/entertainment-arts-20165752 (last visited on Aug. 12, 2023).

[23] Song written by Roy Orbison and William Dees, and recorded by Orbison. After its release as a single in August 1964, it spent three weeks at number one on the *BillboardHot 100* from September 26, 1964, and was the second and final single by Orbison to top the US charts. It was also Orbison's third single to top the *UK Singles Chart*, for a total of three weeks. *See* Jo Rice, *The Guinness Book of 500 Number One Hits*85 (Guinness Superlatives Ltd., Enfield, 1st edn., 1982).

[24] *Sony Corporation of America* v. *Universal Studios*, 464 U.S. 417, 451 (1984).

[25] *Campbell* v. *Acuff-Rose Music, Inc*., 972 F.2d 1429, 1439 (6th Cir. 1992).

[26] *Supra* note 20.

[27] *Ibid*.

[28] *Dr. Seuss Enterprises* v. *Penguin Books USA Inc.,* 109 F.3d 1394 (9th Cir. 1997).

[29] *Leibovitz* v. *Paramount Pictures Corp.*,137 F.3d 109 (2d Cir. 1998).

[30] *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

The Position in the United Kingdom

The road for the parody exception under UK copyright law, has been somewhat long and bumpy. Until 2014, when Parliament introduced an exception for the purposes of "caricature, parody or pastiche", there was no explicit provision in the law relating to parody[31]. Scholars had questioned the application of the 'substantial use' test, which was the law applied in infringement cases prior to the 2014 amendment, by arguing that even though a successful parody may copy a 'substantial' amount of the original work, it would still deserve protection against infringement[32].

The earliest English case which implicitly involved parody defense was *Hanfstaengl* v. *Empire Palace.*[33] This case involved paintings of a well-known artist, which were represented by the Empire Theatre in the form of tableaux vivant. Two British newspapers, namely *Daily Graphic*[34] and *Westminster Budget*[35] printed sketches of the tableaux vivant in their copies without the permission of the theatre. The House of Lords did not address the question as to whether, the sketches offered any possible criticism of the original work, and decided in favor of the defendants. It was held that "the rough sketches were made for a very different purpose, that purpose being not to give an impression of the plaintiff's pictures but to give a rough idea of what is to be seen at the Empire theatre"[36]. Thus, while reaching the desired conclusion, the court applied the 'dominant purpose' and 'market substitution' test. In the more recent decision of *Allen* v. *Redshaw*[37], the court applied the substantial copying test to determine the question of infringement[38] Thus, it will be seen that in cases prior to 2014, 'substantial taking' and 'market substitution' remained the tests which were repeatedly applied by the courts interchangeably, depending upon the facts and circumstances of the case at hand. The courts applied either or both tests in isolation, and no general protection of fair dealing provision was granted to parodies[39].

---

31 Copyright, Designs and Patents Act 1988, s. 30A.

32 James Richard Banko, "Schlurppes Tonic Bubble Bath":In Defense of Parody" 11 *University of Pennsylvania Journal of International Law.* 627, 652-54 (1990).

33 (1894) 2 Ch. 109 (H.L.).

34 Illustrated weekly newspaper published in the UK in the late 19th and early 20th centuries, whose influence within the art world was immense, and its many admirers included Vincent van Gogh and Bavarian-born British painter Hubert von Herkomer. Available at: https://onlinebooks.library.upenn.edu/webbin/serial?id=graphicuk1869 (last visited on Aug. 04, 2023).

35 British national newspaper from 1893 to 1904, *available at*:https://web.archive.org/web/20140308220310/http://www.bl.uk/reshelp/findhelprestype/news/diffnews/ (last visited on Aug.04, 2023).

36 Amy Lai, *The Right to Parody: Comparative Analysis of Copyright and Free Speech*130-162 (Cambridge University Press, Cambridge, 2019).

37 [2013] 2013 WL 2110623 (P.C.C.).

38 *Supra*note 36 at 147-149.

39 *Ibid*.

In 2006, the Gowers Review of Intellectual Property[40] recommended that the UK should also interpret 'parody' on the lines of the European Union Copyright Directive[41], and provide for a separate clause providing for the parody exception. In the absence of such a clause, the country was missing out on economic and social benefits which could be derived from this transformative creativity[42]. These recommendations provided fuel to the ongoing demands for a broad-based explicit exception for parody, culminating in the insertion of section 30A in the Copyright, Designs and Patents Act (CDPA) 1988, proving for "fair dealing with a work for the purposes of caricature, parody or pastiche"[43]. Although 'fair dealing' has not been substituted by the American idiom of 'fair use', several new factors have taken over the 'substantial use' test with the insertion of this provision.

Even as parodists and transformationalists were celebrating the 2014 amendment, it soon became apparent that the Legislature, while inducing the amendment, did not define terms such as 'parody', 'caricature' and 'pastiche', and it was left to the courts to determine their meaning and extent in future cases. This lack of explicit definitions in the statute proved to be a double-edged weapon for litigants. On the one hand, courts now have a free hand to decide the question as to what is a parody or pastiche, and there are no explicit requirements which must be satisfied, in order to fall under the umbrella of this amendment, but on the other hand, this has led to confusions among the creators of parodies. They have no guideline as to how they should design their work or what precautions they are required to take, so as not to be left unprotected. In such a situation, the case of *Deckmyn*v. *Vandersteen*[44] serves as a guiding light to the courts across the country.

The Deckmyn Case

Coincidently, around the same time that the parody exception came in to force, the European Court of Justice (ECJ)[45] got the opportunity to analyze and answer certain questions pertaining to the parody exception provided under the EU Copyright Directive 2001/29/EC in the case of *Deckmyn*[46] *supra*. In this case, an infringement action was brought against a far-right politician Johan Deckmyn[47] who had

---

40 Independent review of UK intellectual property (IP) focusing on UK copyright law, published in December 2006, *available at:* https://www.gov.uk/government/organisations/gowers-review-of-intellectual-property (last visited on July 29, 2023).

41 European Parliament, Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Article 5(3)(k).

42 Andrew Gowers, *Gowers Review of Intellectual Property*66-68 (HMSO, Norwich, 2006).

43 S. 30A inserted (1.10.2014) by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356), regs. 1, 5(1).

44 Case C-201/13, 2014 (ECJ).

45 Headquartered in Luxembourg, this court comprises of one judge from each EU member-country, alongwith 11 advocates general. It ensures uniform implementation of EU law in all member countries, and settles legal disputes between EU institutions and member-countries, *available at:* https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en (last visited on Aug. 17, 2023).

46 *Supra*note 44.

47 Belgian-Flemish politician who belongs to the *VlaamsBelang* party, *available at*: https://www.vlaamsparlement.be/vlaamse-volksvertegenwoordigers/2838 (last visited on July 14, 2023).

distributed calendars with the front page depicting the Mayor of Ghent[48] throwing coins at citizens, who appeared to be from diverse ethnic and religious groups. This front page was apparently inspired by the famous *Suske en Wiske*[49] comic series created by Vandersteen, in which one of the characters throws coin at the residents of the town. When an infringement action was brought by Vandersteen's legal heirs, Deckmyn argued that the case fell under the exception for caricature, parody, or pastiche, under the EU Copyright Directive, as implemented by article 22(1)(6) of the Belgian Copyright Act. In view of the inconsistencies in various legal tests to deal with the parody exception, the Brussels Court of Appeal referred three questions to the ECJ for its decision[50].

The first question was whether the concept of parody was an independent concept under EU Law. The court answered the first question in the affirmative, and propounded that in the interest of uniform application of EU Law, parody should be considered as an autonomous concept, and not in relation to other categories of derivative works[51]. The second question was whether every parody is required to pass the three-tier test of original character, provoking humour, and mentioning of the source. The ECJ confirmed that there were only two essential characteristics of a parody, namely, it must be based upon an existing work whose should be clearly identified, and secondly, the work must be an expression of humour and mockery[52]. The last question was as to whether there were any other conditions or characteristics which the work in question was required to satisfy before it could be classified as a parody[53]. The court did not answer this question, and left it open for national courts to decide on a case-to-case basis.

After *Deckmyn*, the law with regard to the parody exception in the EU, became quite certain. Today, there appears to be a broad consensus in the UK, as in many other countries of the world, that all the elements of free speech in a critical parody should be protected, and actively encouraged, while the rights of owners of copyright should also be respected and honoured[54]. However, with the UK coming out of the EU, a new question has emerged as to whether Brexit[55] would diminish or negate the

---

48 Capital and largest city of the East Flanders province, it is the third largest city in Belgium, after Brussels and Antwerp. *See* Serena Fokschaner, "The adoration of Ghent: art, history and flavours in Flanders"*The Guardian*, Feb. 23, 2020, *available at*: https://www.theguardian.com/travel/2020/feb/23/ghent-fine-art-medieval-belgium-holiday-city-break-beer (last visited on July 30, 2023).

49 Belgian comics series created by comics author Willy Vanderstee. It was first published in the Flemish language newspaper, *De NieuweStandaard* in the year 1945, and became popular thereafter, *available at*: https://suskeenwiske.ophetwww.net/intro/engintro.php (last visited on Aug. 22, 2023).

50 Case C-201/13, paras. 14-33, 2014 (ECJ).

51 Case C-201/13, paras. 14-17, 2014 (ECJ).

52 Case C-201/13, paras. 18-23, 2014 (ECJ).

53 Case C-201/13, paras. 24-33, 2014 (ECJ).

54 Sabine Jacques, "The Scope of the Parody Exception" (Chapter 3) in *The Parody Exception in Copyright Law*70-77 (Oxford University Press, Oxford, 2019).

55 Withdrawal of the UK from the EU, which officially took place at 23:00 GMT on January 31, 2020. Prior to its withdrawal, the UK had been a member country of the EU or its predecessor, the European Economic Community (EC), since January 1, 1973. Following Brexit, EU law and the decisions of the ECJ will no longer enjoy primacy over domestic laws in the UK. The European Union (Withdrawal) Act 2018 retains

influence of *Deckmyn* upon the courts in the UK when they seek to determine how parody would be defined and construed, in the absence of a definition in the statute. The answer to this question probably lies in the fact that the *Deckmyn* principles have now become established norms of law as far as the parody exception is concerned, and even if we were to assume that no caselaw would come up before the courts in the country which would provide them the opportunity to model the UK law on the lines of these principles, the interpretation of the law made by the ECJ in *Deckmyn* will continue to play a guiding role in copyright jurisprudence in the country.

The Humor requirement and the moral rights

Even after the decision in *Deckmyn*, and the 2014 amendment in the UK copyright law, there remain two significant obstacles in the way of parodists when it comes to suits involving copyright infringement. Even though the ECJ ruled in *Deckmyn* that "a parody must constitute an expression of humour and mockery", there is no trace in the judgment as to what humor or mockery must necessarily entail[56]. Thus, the ECJ has, once again, left it upon the national courts to decide this question on a case-to-case basis, leaving parodists in a not so comfortable position because the law is still uncertain as to what is the standard of humour or mockery which is expected from their works. In this backdrop, how is a court expected to create a scale to measure humour, and are courts really equipped to handle such an exercise? Further, what kind of a test is required to measure the level of humorousness of a work, and whether such a test should be an objective or a subjective one? If the test is required to be subjective in nature, who is the expert whose opinion matters? These are some of the questions which remain unanswered, and there is thus a need for a new reference to the ECJ for clarification on these aspects as and when the opportunity arises.

Taking the argument further, even if the humorous nature of a parody has been successfully established despite the above noted challenges, a parodist may still not get the protection of the exception. The new parody exception is subject to the moral rights of the author of the original work, and if the nature or content of the parody is such that it may pose threat to the reputation of the author or the integrity of his work, it will not qualify for protection[57]. This question has been further developed in Part III of this Paper.

The Indian Scenario

The Copyright Act, 1957 [58] does not contain any explicit exception for parodies, on the lines of the CDPA in the UK, after the 2014 Amendment. The statute provides for the general exception of fair

relevant EU law as domestic law, which the UK can amend or repeal. Available at: https://www.bbc.com/news/uk-politics-32810887 (last visited on Aug. 19, 2023).

56 *Supra* Note 44.

57 *Supra* Note 7 at 733-36.

58 Act No. 14 of 1957.

dealing[59], and this is the only fallback option which is available to parodists seeking to save their artworks. In continuance of the global trend of providing protection to creators of derivative works, the Indian statute was amended in 2012 in order to broaden the purview of the fair dealing provision under section 52 of the Act[60]. The 2012 amendment has extended the fair dealing exception to "any work, not being a computer programme", whereas previously, this exception was limited to only "literary, dramatic, musical or artistic works"[61]. As a result of this amendment, various works of modern origin such as cinematographic films and sound recordings can now be brought within the umbrella of fair dealing[62].

If we take a relook at the definition of parody as discussed in the introductory part of this Paper, we will find that the essence of parodies is to criticize the original work in a humorous and mocking manner. Thus, section 52(1)(a)(ii) which provides for fair dealing for the purposes of criticism and review, is the relevant provision we need to consider. In the *Civic Chandran* case[63], the Kerala High Court had the occasion to thoroughly analyze this provision in the context of parodies. Civic Chandran was a dramatist who wrote a play titled *Ningal Are Communistakki* which was based on a previous play titled *NingalenneCommunistakki*, which was written by the famous Malayalam playwright Thoppil Bhasi[64]. The author of the original play immediately sued the defendant arguing that the defendant's play involved substantial reproduction of the original play, and a case of infringement was made out. It was argued therein that large sections of the populace were emotionally connected with the original play because it had inspired communist sensibilities in the state. The play written by the defendant not only criticized the original work with regard to its theme and plot, but also made certain general mocking comments on the failure of the Communist Party in uplifting the standard of living of the backward classes in the state of Kerala. The Kerala High Court ruled in favor of the defendants, and observed that the 'counter drama' of the defendant was not a whole or substantial copy of the original play, and the underlying idea behind both the works was very different. The court ruled further that the theme and context of both the works in question could not be said to be identical or similar; in fact, the underlying message which both the playwrights sought to convey to the viewing public, was contradiction of each other. Hence, there was no possibility of market substitution of the original work by the counter drama the defendant.

---

59 Copyright Act, 1957 (Act No. 14 of 1957), s. 52.

60 The Copyright Amendment Act, 2012 (Act No. 27 of 2012).

61 *Id.*, s. 32(i) (w.e.f. 21-6-2012).

62 Pranesh Prakash, "Analysis of the Copyright (Amendment) Bill, 2012"*The Centre for Internet and Society*, May 23, 2012, *available at*: http://cis-india.org/a2k/blog/analysis-copyright-amendment-bill-2012 (last visited on Aug. 25, 2023).

63 *Civic Chandran* v. *Ammini Amma*, 1996 PTR 142 (Ker).

64 Malayalam-language playwright, screenwriter, and film director, who was associated with the communist movement in Kerala. His play *NingalenneCommunistakki* (*You Made Me a Communist*) is widely perceived as a groundbreaking event in the history of Malayalam theatre, *available at:* https://www.imdb.com/name/nm0080270/ (last visited on Aug. 22, 2023).

When we compare *Civic Chandran* with *Campbell*[65], the major differences between the reasoning of both these cases becomes evident. Firstly, one of the major setbacks of the *Campbell* case was that the court while holding parody to be criticism of the original work greatly emphasized upon the fact that parody had to necessarily target the original work, whereas in *Chandran*, the court was more receptive of the idea that a parody may have a broader scope of not only targeting the original work, but also a general political ideology. Secondly, while *Campbell* was decided after taking into account, the transformative nature of the subsequent work, in *Civic Chandran*, it was the intended character of the work which proved to be the determining factor[66]. In other words, *Campbell* was decided more from the author/authorship perspective, whereas the decision in *Chandran* is inspired more by the general consideration of freedom of speech and expression[67].

Despite the worldwide wave of modernization of copyright laws to suit the needs of technology driven economies, the copyright regime in India has been slow to recognize and grant protection to derivative works, such as parodies. We have, so far, not been able to keep pace with our foreign counterparts because even after the 2012 amendment, the protection accorded to parodists, has been fairly limited. Indian lawmakers have, in the absence of explicit definitions and exceptions, left it entirely to the courts to devise the scale and methods which are required to bring these new categories of works within the purview of section 52, on a case-to-case basis. Uniformity of law is the very essence of every legal system, and it can only be guaranteed through a legislative enactment. Thus, the time is ripe for the Indian Parliament to introduce an amendment in the Indian copyright law to provide for explicit provisions to deal with derivative works involving artforms like satire, parody, and pastiche.

III. Parody and Moral Rights

Every work of art is considered to be the brainchild of its creator, and an extension of the personality of the original author. Under the moral rights regime, certain rights have been granted to original authors of the work to protect and control their work even after assignment of rights in the work[68]. These rights include the right to claim paternity, and the right to ensure integrity of the work. In the ensuing paragraphs, the author has attempted to understand how these moral rights have become relevant for creators of parodies.

The emergence of derivative works such as parodies has created a dichotomy wherein between two basic principles of the copyright system appear to be working at cross purposes. On the one hand, we have the principle to incentivize creators of the works, and give them a sense of control over their

---

65 *Supra*note 20.
66 Lawrence Liang, "Fair Use of Cinematograph Films and Sound Recordings: Finding the Solution in the Amendment"5 *NUJS Law Review*687 (2012).
67 *Id*. at 691, 693.
68 *Supra* note 59, s. 57.

creations which would inspire them to create more; and on the other, we have to open the doors of law for new entrants in various creative fields, by recognizing and promoting new categories of work. The common aim of both these principles is to ensure that more and more citizens enter the arena of creative arts, which, in turn, would lead to the creation of a wide variety of works, leading to growth of the nation's economy, and improvement in the cultural image of the country. No modern system of copyright protection can survive until and unless it balances these two, often opposing, considerations.

Of the three countries which have been studied in the previous section, the US has adopted a very progressive approach. By virtue of the wordings of § 107 of the US copyright law, moral rights provided under § 106A have been made subservient to the doctrine of fair use[69], and therefore, the US law has tilted more towards the second principle when it comes to promoting unconventional art. Such a provision has made the life of parodists easy, as can be seen in the case of *Shostakovich* v. *Twentieth Century-Fox Film Corp*[70] where the New York district court rejected the claims of the plaintiff that the use of his music in an anti-Soviet movie violated his moral rights in his music. The court observed that there was no evidence to show that the composition of the original music was, in any manner, altered or distorted by its use in the subsequent production, or that the original music was not faithfully reproduced in the movie. The court observed that "with reference to works which are in public domain, a conflict arises between the moral rights of the creator, and the rights of others to use such works. As far as the use is fair and is not accompanied by malice, the use of such works should not be restricted"[71].

However, when we see the situation in countries like UK and India, we see that the legal position with regard to moral rights in both these nations, is still very restrictive. The protection granted by the parody exception and the fair dealing provision is conditional on the fact that they do not hinge upon the moral rights of original creator. This is not a very satisfying position of law, especially in the present times when the requirements of 'originality' as a prerequisite for protection of copyright are being relaxed, the world over. Lawmakers must understand that the arena of copyright law is no longer limited only to conventional works such as books, plays, paintings and sculptures which may be required to have some kind of an essence of originality. The invention of digital technology and social media has given birth to new forms of creative works which are mostly derivative in nature[72]. The reason for this boom in the creation of derivative works is that the duration of demand and relevancy of a particular work has been greatly shortened by the rapid speed and global access of the

---

69 *Supra*note 16.

70 *Shostakovich* v. *Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948).

71 *Ibid*.

72 Axel Hunda, Heinz-Theo Wagnera, Daniel Beimbornb and Tim Weitzel, "Digital innovation: Review and novel perspective" 30(6) *Journal of Strategic Information Systems*(Dec., 2021), *available at*: https://www.sciencedirect.com/science/article/pii/S0963868721000421?via%3Dihub (last visited on June 29, 2023).

world wide web. Taking the example of memes, we see that various memes are created based on pre-existing works, and such works may, in some cases, have extremely short lifetimes of even a day or two. However, this does not mean that these works are, in any way, less deserving of copyright protection. In fact, the easy availability of these works over the internet, makes it easier for others to commit piracy of such works. Again going back to the discussion in the previous part of this section, the author recommends that UK and Indian copyright law needs to accommodate the second principle as well, in order to properly balance both these principles to provide unhindered support to creative activity, whatever be its nature.

IV. The Digital Threat

One of the most striking features of the present era has been the rise of digital technologies. The traditional modes communication such as print and electronic media have been forced to share space with digital and social media as far as the general public, especially the younger generation, is concerned[73]. Today, more and more people are opting for other modern ways such as social media websites and content streaming platforms for not only obtaining and sharing information, but also to express their opinions and contribute towards important discussions on socio-political issues. This development has converted a major chunk of passive content recipients to active content creators. In this new digital landscape, forms of political speech have also changed. We see that periodic elections are no longer the only means for people to express their political stand.The development of modern digital and communication technologies has provided a channel to the general public to express their stand on diverse topics of national interest, and writing a post on social media may not be the only manner to do so. Parodies and satire have become a new, and increasingly important, medium of government critique, especially in the case of countries with a high amount of internet penetration. Since India is amongst the fastest growing internet markets in the world[74], the importance of parodies is only going to increase further, in the years ahead.

The use of parodies in the commercial sector to mock and criticize rival products, or a well-known brand in general, is also not uncommon. The case of *Tata Sons* v. *Greenpeace International*[75] presents a good example of this new trend. This case centered around the use by the defendants of the trademark of the plaintiff company, namely "T" enclosed by a circle, in an online game called 'Turtle vs. Tata', without the authorization of the plaintiffs. The plaintiffs alleged that their trademark was used in a malignant way which resulted in a loss of reputation for them[76]. On the other hand, the case of the defendant was that their use of the logo was protected under the Trade Marks Act, 1999 as the use of trade mark was for the purpose of criticism, fair comment, and parody.

---

[73] Esteban Ortiz-Ospina, "The rise of social media" (2019), *available at*: https://ourworldindata.org/rise-of-social-media (last visited on July 19, 2023).

[74] "India among fastest growing Internet market: Study"*The Economic Times*, July 14, 2023.

[75] *Tata Sons* v. *Greenpeace International*, 178 DLT 705 (2011).

[76] Trade Marks Act, 1999 (Act No. 47 of 1999), s. 29(4).

The court decided in favor of the defendants, and laid down the concept of 'paradox of parody', whereby the closer the object of the parody was to the parody itself, the more intense would the paradox itself be. The court noted that "a good parody is both original and parasitic as well as creative and derivative. A parodist may have various motivations for a making a parody. He may be making it for the purposes of entertainment or for political and social commentary or simply for making money out of it and there is no established rule of law that if commercial propriety is one of the driving factors, the parodist will be left defenseless"[77].

V. Conclusion

It is no doubt true that the protection of authors' rights has been the primary aim of copyright laws since their very inception. That being the case, it should not be forgotten that the reason behind providing these specific rights to authors of creative works was to further promote and foster creative activity in the society. With the advent of parody in its various forms, a rather piquant situation has often arisen when the law itself has begun to challenge the very reason for its existence. This is the challenge which confronts all major copyright realms in the present times, and it may therefore be a good time to reconsider the various theories and arguments behind the rights of authors, in order to properly accommodate the concerns of authors of various derivative works.

As far as the law on parody is concerned, it is still far from clarity and universality. The three jurisdictions of US, UK and India which have been studied by the present author, have taken three rather different routes to deal with the issue of parodies. While the US has been at the forefront of embracing new art even in the absence of an explicit provision for parodies, the position of law is not very satisfactory in the case of both the UK and India. The time is there ripe for the World Intellectual Property Organisation (WIPO)[78] to come forward and propose a uniform law with minimum protections which could be provided to makers of parodies. Such an intervention by WIPO will not only remove various complications which arise in the application of general doctrines of fair use and fair dealing to parodies, but will also provide a clear and stable law on the subject matter, which will ensure the unhindered creation of parodies within the confines of law.

---

[77] *Supra* note 75. (Discussing the *Laugh It Off Promotions* v. *South African Breweries* case, wherein the Constitutional Court of South Africa held that, "…it should not make any difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights").

[78] Headquartered in Geneva, it is one of the fifteen specialized agencies of the United Nations (UN), and was created to promote and protect intellectual property (IP) across the world by cooperating with countries as well as international organizations. Available at: https://www.wipo.int/portal/en/index.html (last visited on Aug.03, 2023).