



Study Guidelines

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2024 – Study Question

Defence of parody in copyright

Introduction

- 1) Exceptions to copyrights seek to establish a balance between the interests of the creators and copyright owners in enjoying and exploiting the exclusive rights over a creative work and those of the public in general, seeking to have access to knowledge and culture, as well as developing these social aspects, and preserving fundamental rights, such as freedom of speech.
- 2) While most jurisdictions recognize the need for such balances, different legal approaches have been adopted in national and regional laws, as well as in International Treaties, for the circumstances in which a person may use a copyrighted work without the authorization of the copyright owner and without being held liable for copyright infringement.
- 3) Over the past years, AIPPI has studied some specific exceptions to copyrights. This Study Question concerns the issue of to what extent and in which circumstances a parody may be considered a valid defence against copyright infringement claims, and how broad the concept of parody should be.

Why AIPPI considers this an important area of study

- 4) As recognized under the TRIPS Agreement, the protection and enforcement of intellectual rights should contribute to the promotion and dissemination of technology, in a manner conducive to social and economic welfare and to a balance of rights and obligations.

- 5) In the case of copyrights, access to knowledge and culture, as well as their development, is of significant importance, but may not be achieved without the recognition and protection of creators and copyright owners.
- 6) Furthermore, the development of technology and social media platforms has amplified the creation of original copyrightable content by users, having also facilitated the monetization of such content.
- 7) Achieving such a balance of interests is not an easy task. Not surprisingly, different jurisdictions differ as to the recognition, implementation and criteria to evaluate exceptions to copyrights, in particular on what concerns the exception of parody.
- 8) Therefore, reviewing this subject and whether there might be room for harmonization on the topic of parody exceptions to copyrights will be the main challenge for this Study Question.

Relevant treaty provisions

- 9) The Berne Convention of 1886, on the Protection of Literary and Artistic Works, provides for certain exceptions to copyrights. In article 9(2), the Berne Convention establishes that national legislations may permit the non-authorized reproduction of protected works under certain standards, namely, *“in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the interests of the author.”*
- 10) Such standards are commonly known as the Three-Step Test, according to which a copyrighted work may be reproduced if certain criteria are met:
 - a. in certain special cases;
 - b. when the reproduction does not conflict with a normal exploitation of the work;
and
 - c. when the reproduction does not unreasonably prejudice the legitimate interests of the author.
- 11) The concept of the Three-Step Test is also embedded in TRIPS Agreement (Article 13) and has also been incorporated to Article 10 of the WIPO Copyright Treaty (WCT).

Scope of this Study Question

- 12) The present question seeks to study whether third parties should be authorised, without permission from the author of an underlying work, to use such copyrighted work to create a parody and under which conditions, without being liable for

infringement. All types of copyright protected works are within the scope of this Study Question.

- 13) For the purpose of this Study Question, the term “parody” is used to encompass the imitation, adaptation or use of an underlying original work, such as literature, music or artwork, often for humour or criticism. Satire does not necessarily involve copying another work. However, it is a related concept and is included within the scope of the Study Question together with the other related concepts of caricature and pastiche.
- 14) The use of parodies in the domain of trade marks, designs and any other intellectual property rights is out of the scope of this Study Question.
- 15) This Study Question is limited to civil (private) law issues. Criminal law issues are outside the scope of this Study Question. This Study Question does not address international private law issues.

Previous work of AIPPI

- 16) In the past, AIPPI studied very specific exceptions to copyright. However, the Association has not yet addressed the issue of parody *per se*.
- 17) Resolution Q216 (Paris, 2010) relating to Exceptions to Copyright Protection and the Permitted Uses of Copyright Works in the Hi-Tech and Digital Sectors establishes that *“For limitations and exceptions to copyright protection in the digital environment, the Three Step Test referred to above sets the generally-accepted standard. In this regard, national laws should be harmonised relying on the Three-Step Test.”*
- 18) Resolution Q216B (Hyderabad, 2011), retaking the topic of Exceptions to Copyright Protection and the Permitted Uses of Copyright Works in the Hi-Tech and Digital Sectors, states the following:

“In respect of limitations and exceptions to copyright protection, national laws should be harmonized relying on the Three-Step Test. Due to cultural differences amongst states, a full harmonization may be very difficult to achieve. Harmonization should at least be achieved for some of the limitations and exceptions applicable for Internet uses adopting the following guidelines:

- a) The system of limitations and exceptions should be sufficiently flexible to treat new technologies and emerging business models.*
- b) The system must provide for adequate legal certainty in the application of the limitations or exceptions.*

c) The system should have minimum standards for compliance, for example a non-exhaustive list of specific Internet-related limitations and exceptions, in particular as set out below.”

- 19) Resolution Q246 (Rio de Janeiro, 2015), on the Exceptions and limitations to copyright protection for libraries, archives and educational and research institutions, dealt with this very specific topic, and did not address the matter of parody.
- 20) Finally, Resolution Q282 (San Francisco, 2022) on Moral Rights resolved that *“Moral rights should be subject to exceptions and limitations, including, but not limited to: (...) use for the purposes of criticism, comment, teaching, research, scholarship, parody and news-reporting.”* The Resolution however does not define the scope, extension or nature of such limitations in case of parodies.

Discussion

- 21) One may argue that protection of Copyrights is fairly well harmonized at international level, based on widely adopted international treaties, such as Berne Convention for the Protection of Literary and Artistic Works, TRIPS Agreement and WCT.
- 22) However, this is typically not true for exceptions to copyrights and, in particular, with regard to parody.
- 23) The European Union adopted in 2001 the Information Society Directive (InfoSoc Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society), which recognizes parody as an optional exception to be implemented in EU countries:

“Article 5.:

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: ...

(k) use for the purpose of caricature, parody or pastiche;”

- 24) Not all members of the EU have adopted such optional exception in their national laws, and the directive does not describe the meaning, definition or extension of each of these exceptions (caricature, parody or pastiche).

- 25) A key decision issued by the Court of Justice of the European Union (CJEU), referenced in multiple works about parody in the region, is the one in the framework of the matter *Deckmyn v. Vandersteen*¹.
- 26) Deckmyn, a member of the right-wing party in Belgium issued a calendar issued a calendar based on an alleged parody of a comic book produced in 1961 by Willy Vandersteen, a Belgian creator of comic books. The head of one of the characters was replaced by the face of the mayor of the city of Ghent, while ethnic minorities were depicted in the background. Deckmyn claimed that the purpose was to criticise the mayor²:



The original work by Vandersteen



The disputed work

- 27) When requested to assess the nature and meaning of “parody”, CJEU held that (1) parody is an autonomous concept of EU Law, and therefore the concept must be applied uniformly in Member States, and that (2) “parody” should be understood according to its usual meaning in everyday language, and should have only two essential characteristics:

“[M]eaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of ‘parody’, within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work

¹Case C-201/13. Judgment of the Court (Grand Chamber), 3 September 2014

² From the article Parody in European copyright law and the two sides of the coin, by Ana-Maria Barbu, available at https://stockholmiplawreview.com/wp-content/uploads/2019/01/Parody-in-European-copyright-law-IP_nr-2_2018.pdf

itself; that it should relate to the original work itself or mention the source of the parodied work.”

- 28) On the other hand, CJEU also held that if the parody conveys a discriminatory message with the effect of associating the protected work with such a message, the author could have a “legitimate interest” to ensure that the work protected by copyright is not associated with such a message. Nonetheless, the Court also found that “parody is an appropriate way to express an opinion”.
- 29) It is notable that the ‘target’ of the parody in Deckmyn was the mayor of Ghent, and not the author of the comic book or the comic book itself. The comic book was merely the vehicle for the parody, and was arguably more a satire rather than a parody.
- 30) In 2014, while still in the EU, the UK amended its Copyright, Designs and Patents Act, and allowed fair dealing with a copyright work for the purpose of caricature, parody or pastiche. France had already had a statutory exception relating to parody for several years.
- 31) Curiously, the key case in Europe in parody would perhaps not be considered a “parody” under US case law. In the US parody defences may be covered by Fair Use defences as well as free speech principles incorporated in the First Amendment to the US Constitution.
- 32) Fair Use is codified in US copyright Law (17 USC § 107), and is determined on a case by case basis, according to four factors established in the relevant legal section:
 - (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
 - (2) *the nature of the copyrighted work;*
 - (3) *the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
 - (4) *the effect of the use upon the potential market for or value of the copyrighted work.*
- 33) In a widely cited case by US Supreme Court (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)), the Court defined parody as “*the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.*” The Court also held that there should not be a presumption that the commercial nature of the parody should render it unfair.

- 34) On the other hand, US Courts differentiate parodies from satire, in which “*the copyrighted work is merely a vehicle to poke fun at another target*”³. Under Campbell, the burden placed on the satirist is greater than that placed on the parodist to justify the borrowing: the parodist must justify only the amount that he or she has borrowed (and it assumed that in order to parody the underlying work will be borrowed), but the satirist must “justify the very act of borrowing” because it is assumed that satire need not necessarily borrow from the work it has borrowed – in the words of the *Campbell* court, a satire can “stand on its own two feet”.
- 35) Under the approach adopted in the US, while both parodies and satires can benefit from fair use defences, the standards for justifying them are not the same.
- 36) In Brazil, Copyright Law provides for the freedom for parody creation, as long as the new work is not a mere reproduction of the original work or bring it into disrepute (Article 47). Based on such legal provision, Superior Court of Justice decided that a parody of the lyrics of the famous song “Girl from Ipanema” in an advertisement piece of a supermarket chain, which used a “play-on-words” involving the word “cabbage” did not constitute copyright infringement. The Court highlighted that lawfulness of parodies should be assessed based on the factual circumstances of the actual case, and needs a certain degree of mockery, originality/transformation nature, and should not disparage the original work.
- 37) When one looks at other jurisdictions, one may visualize quite different scenarios, which include the absence of any provisions relating to parodies, as it occurs in Japan, mentions of protecting authorship of parodies only if the author of the original work authorizes the parody, as it occurs in Argentina, a wide variety of unharmonized approaches in court rulings, as it is reported to happen in China, as well as jurisdictions with provisions that explicitly cite parodies as exceptions to copyrights, such as Mexico and Australia.

You are invited to submit a Report addressing the questions below. Please refer to the 'Protocol for the preparation of Reports'.

³ Dr. Seuss Enterprises, L.P., v. Penguin Books USA, INC. - 109 F3rd 1394 (9th Cir. 1997)

Questions

I) Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

1. Does your law or case law provide for exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)? Please explain.
2. Does your law or case law define parody or any of the other similar exceptions mentioned in the above question? Please explain.
3. Must the parody comply with the three-step test provided for in article 9(2) of the Berne Convention?
4. Are there any other special conditions or requirements for a parodist to benefit from this exception?
 - a) Parody must constitute an expression of humour or mockery;
 - b) Parody must be transformative or add some significant new creation to the original work;
 - c) Parody must have a critical intent;
 - d) Parody must be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?
 - e) Parody must be non-commercial;
 - f) Parody must not disparage or discredit the original work;
 - g) Other - please explain.
5. Do freedom of speech principles play any role when assessing lawfulness of a Parody?
6. Are all types of copyright works subject to parody exceptions?
7. Does your law or case law provide for any exceptions or limitations to moral rights associated with parodies? Please explain.

II) Policy considerations and proposals for improvements of your Group's current law

8. Could your Group's current law or practice relating to parody defences to copyright claims be improved? If yes, please explain.
9. Could any of the following aspects of your Group's current law relating to parody defences be improved? Please explain:
 - (a) Definition of Parody or of other similar exceptions;
 - (b) Requirements for benefiting from such exceptions;
 - (c) The interplay between parody exceptions and moral rights;
 - (d) The types of work that may benefit from such exceptions;
10. In your Group's view, what policy objective (such as free speech, or another objective) would a defence of parody promote and help accomplish? Does the policy objective drive the types of expression that should be allowed under a parody defence?
11. Are there any policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

III) Proposals for harmonisation

12. Do you believe that there should be harmonisation in relation to exceptions and defences based on parody?

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.
13. Should there exist exceptions or limitations to copyright protection for the purpose of parody or any other similar exceptions (e.g. satire, caricature, pastiche)?

If YES, please explain.
14. Should parodies comply with the three-step test provided for in article 9(2) of the Berne Convention in order to benefit from the exception?
15. Should there be any other special conditions or requirements for a parodist to benefit from this exception?



- a) Parody should constitute an expression of humour or mockery;
 - b) Parody should be transformative or add some significant new creation to the original work;
 - c) Parody should have a critical intent;
 - d) Parody should be directed at the original work (instead of targeting at society or other aspects unrelated to the original work)?
 - e) Parody should be non-commercial;
 - f) Parody should not disparage or discredit the original work;
 - g) Other - please explain.
16. Should freedom of speech principles (or any other policy objective) play any roles when assessing lawfulness of a Parody?
17. Should all types of works be subject to parody exceptions?
18. Should there be any exceptions or limitations to moral rights associated with parodies? If YES, please explain.
19. Please comment on any additional issues concerning exceptions and limitations to copyright protection related to parody you consider relevant to this Study Question.
20. Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.