**HOW HUMORISTIC IS YOUR JUDGE? THE PARODY EXCEPTION\*\***

T

he Berne Convention (BC) as last amended by the Paris Act of 1979 counts limitations and exceptions to copyright among its provisions under Articles 2bis, 10 and 10bis. Quotations, illustrations for teaching and news/current event reproduction are the exceptions, the first two of which are only available if they are used fairly and the third if not expressly reserved. They allow for someone to use a copyrighted work without the owner’s consent. Save for the limitations and exceptions, anyone who uses all or a substantial part of the work necessitates the author’s consent.

States have added few more exceptions and one such exception which the author advocates is significant for today’s media players is the “parody exception”. The latter exception is not a Berne exception per se but flows from a central principle of the Convention under Article 9(2) in that signatories may at their discretion introduce exceptions to the right of reproduction where such reproduction “*does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author*”. With the blessing of legality in Europe and the intensification of the digital age[[1]](#endnote-1), parodied TV programmes are distributed, communicated and broadcast. And there is a significant risk if the parody exception is not present in a jurisdiction it may breach the copyright law in that particular jurisdiction. An original work is protected under the national treatment principle under Article 3 BC, however an exception is not. An exception under Article 9(2) BC, applies only to a specific jurisdiction only.[[2]](#endnote-2) The formulation of Article 5(2) BC supports this proposition.

The UK brought in new exceptions (parody, caricature and pastiche and quotations) in its laws on the 1st October 2014 implementing the EU Copyright Directive 2001 in an information society. Prior to 2014, there were only three non-commercial exceptions viz. research and private study, criticism and review; and news reporting. The backgrounds for the introduction of parody are the recommendations made to different British Governments in 2006 and 2011 by A. Gowers and Professor Hargreaves respectively. It was felt that its introduction will bring cultural and economic benefits to the UK, it will encourage literacy in multimedia expression in ways that are increasingly essential to the skills based economy and it will create value and reduce transactions costs across Europe. Some parodists have argued that the parody exception will create an explosion of creativity because of the ability to share it over the internet. Many comedy writers felt that the time has come to give them legal protection for their work as they were in legal limbos which sometimes proved problematic to acquire the proper rights. Also as suggested in Laddie, Prescott and Vitoria[[3]](#endnote-3) “*it would be a pompous copyright law indeed which permitted parody but solemnly insisted on express identification of the intended target.*”[[4]](#endnote-4)

Parody is a form of satire which is itself a particular genre of literature and performing arts in which establishments and individuals may be ridiculed. Satire englobe many different types and forms such as parody, exaggeration, sarcasm, analogy, irony, burlesque, pastiche or spoof. Satire can be considered as the umbrella holding the other types and forms of humoristic genres. The difference between a satire and a parody is that a satire uses the original work to comment, whereas the parodist creates a work based on the original work. A parody is a transformative work which furthers the creation of copyright in science and arts as held by the US Supreme Court in *Campbell vs. Acuff-Rose Music*[[5]](#endnote-5). This difference is fundamental.

On the 3rd September 2014, the European Court of Justice (ECJ) handed down a judgment in the case of *Deckmyn vs. Vandersteen*[[6]](#endnote-6), a Belgium case, in which it clarified two main issues. First the scope of harmonization of the parody exception in Europe and secondly, what gauges to take when applying this exception. Suffice is to say here the court found on the first limb, that the parody exception is largely harmonized across Europe.

The case concerned the publication of a calendar using as cover a popular Belgian comic magazine. The late rightsholder’s heirs averred that the use infringed their copyright title and the first instance court acceded to this submission. Mr Deckmyn appealed claiming on the parody exception, while the Respondent cross-appealed questioning the (non-) existence of elements of the exception. The modified drawing had some xenophobic connotation, by depicting the mayor of the town as lavishly distributing public money on targeted immigrants.



 **Original Work Parody work**

On the second limb the court held that there are two (conjunctly) essential characteristics of parody, firstly to evoke an existing work while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The Court considered that it was not necessary that the parody exception should display an original character of its own[[7]](#endnote-7). Fundamentally, the copied work therefore does not fall under Article 2 BC as an adaptation work.

The court further held that there should be a balancing exercise between the freedom of speech and the right of protection. It is an objective test. The substantiality of the copied portions is another element which the court considered. How much is substantial will depend on the facts of the case and will be a matter for the trial judge. Thirdly, the commercial and economic harms that the parodied work infringes on the original work are yet other determining factors. Lastly, and I believe the crucial factor is the substance of the parody. It is a factual analysis of the case which the trial judge has to make. How funny the work is depends ultimately on how understandingly humoristic is the judge!

Inherently the tests aforementioned are litigious in nature, and ambiguous and a legal minefield for small-time parodists. For instance the court held the work should be noticeably different – how much is noticeable? For artists, litigation or a declarative judgment as is the situation in a fair dealing case, means money and finance, and in that sense the best advice for them is to ask for permission from the rightsholder. This is without denying the existence of practical difficulties in obtaining the permission which may sometime be composite works. It also defeats the purpose of the parodist if it were to seek permission to mock the targeted work in the first place or in many instances the author is not the one who is the rightsowner anymore, but some long term licencee.

At this juncture it is vital to state that the UK legislation brings a noteworthy element in that any contracts which prevents or restricts the making of parodies are unenforceable in law. A right-holder cannot contract out of the parody exception. So there are some hopes for the artists in this regards. Another legal conundrum worth exploring is the right of reproduction under Article 9(2) BC. It is limitative and does not speak of right to communicate. By stating a parody work not being a derivative work, is there a right to communicate?

In countries like India there are no exceptions of parody as such and at best a parody can fall into the category of criticism and review under Section 52(1) of the Indian Copyright Act. There is no clear cut demarcation that parody can be considered as criticism and review, a legal vacuum subsists similar to pre-2014 UK[[8]](#endnote-8). If the work is new and it does not make use of a substantial part of the original work it can be protected as a new derivative work a suggestion endorsed by the Indian Supreme Court’s pronouncement in *RG Anand vs. M/s Deluxe Films[[9]](#endnote-9)* in 1978. A contradistinction from the jurisprudence of the European court, which suggests that a parody needs not have an element of originality (see *supra*). The Indian and U.S reasoning protect the parodied work outside its country of origin as an adaptation work under Article 2(3) BC.

The author of the original work also has a moral right (right of integrity) under Article 6bis BC. Any derogatory treatment, similar in the Belgium case *supra,* the court has the power to prevent a parody work which *inter alia* modifies, mutilates or distorts the work in a manner prejudicial to the author’s honour, reputation and credibility. What is derogatory and what are the criteria that the courts will apply is not clear from the ECJ judgment. Is the derogation subjective to the rightsholder or an objective test of the common man? This is also a question that ultimately the trial court will have to decide. How funny is the parody work will depend ultimately how humoristic is the judge. A parody can also breach the criminal law on defamation if it is considered libellous. However the courts have tended to side with parodist on this score and are more willing to see the rights to speech as an overriding principle when applying the beyond reasonable doubt standard in criminal defamation. Again this will depend on ultimately how humoristic is the judge.

The parodist might have won the fight in Europe, but the war is yet over. The sword of the Damocles on the parodied work being in breach of the original work in non-existent parody exception jurisdiction is nonetheless apparent and omnipresent. It is suggested that those who acquire such programmes thread with caution.

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 Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options (Kris Erickson, Martin Kretschmer and Dinusha Mendis, IPOUK) 2013 [↑](#endnote-ref-1)
2. Article 5(2): “*…the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.*” [↑](#endnote-ref-2)
3. The Modern Law of Copyright and Designs Volume 1 [↑](#endnote-ref-3)
4. However it should be noted that the parody work can also target third parties not necessarily the original work. [↑](#endnote-ref-4)
5. Campbell v. Acuff-Rose Music, Inc, 510 U 569 (1994) (Parody exists under the Fair Use exception and not as specific category) [↑](#endnote-ref-5)
6. *Deckmyn and* *another v. Vandersteen and others*(C-201/13) [↑](#endnote-ref-6)
7. See *contra.* Glyn v Weston Feature Film in 1916 (UK), it was held that a burlesque parody – an art form “as old as Aristophanes” – could escape copyright infringement if sufficiently original. [↑](#endnote-ref-7)
8. The UK seems to have abandoned/narrowed the parody exception since 1965 which was under the criticism exception. (vide note 1 above) [↑](#endnote-ref-8)
9. 1978 AIR 1613, 1979 SCR (1) 218 [↑](#endnote-ref-9)