UNIVERSITY OF KWAZULU-NATAL

FACULTY OF LAW

Student Name:	**Zama Nombuso Buthelezi**
Student Number:	**208518086**
Degree:	**Masters in Business Law**
Title:	**A critical examination of the defence of parody to a claim of copyright infringement, with particular reference to South African copyright law.**
School:	**Law school of Postgraduate Studies**
Supervisor:	**Prof Tanya Woker**

TABLE OF CONTENTS

1. INTRODUCTION

Parody is a form of expression which involves the creation of a new work by using an existing work as its basis or platform.[1] Parody may be humorous, serious or critical, depending on the intention of the parodist.[2]In order for a work to be successful as a parody, the audience of that new work must be able to recognise the underlying work.[3]Thus by its very nature, parody depends on the original work. One of the main reasons why parody is important in today's society is because of the expression that parody allows parodists to make and therefore the messages which parody often conveys.[4] The expression or message conveyed may be one that is critical and thus the public are encouraged to look at society through a more critical lense,[5] or it may be merely humorous, thus bringing a sense of fun and laughter into society.[6] Original works are however protected by copyright law.[7] This law seeks to protect a copyrighted work from the unauthorised use of that work by another. This is the very reason that parody comes into conflict with copyright law. Owners of original works enjoy copyright protection over their works, therefore when parodists use their work without their permission, copyright owners may feel that their rights have been infringed. This issue is further complicated by the fact that because, parodists often mock or ridicule or

[1]Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement: Productive Fair Use After Betamax' (1984) 97 *Harvard LR* at 1395 available at http://www.jstor.org/stable/1340971 (accessed on 21 May 2012).See also L Hutcheon *A Theory of Parody: The Teachings of Twentieth Century Art Forms* (1985) 32.

[2] MA Rose *Parody//Meta-fiction: An Analysis of Parody as a Critical Mirror to Writing and Reception of Fiction* (1979) 17.

[3]Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' 1395. See also S Dentith 'Parody' (2000) 4: Dentith point out that parody involves "imitation". See also R Saha & S Mukherjee 'Not So Funny Now Is It? The Serious Issue of Parody in Intellectual Property Law' at 1, available at http://www.nalsar.ac.in/IJIPL/Files/Archives/Volume%201/4.pdf(accessed on 2 August 2012).

[4] S16 of the Constitution of the Republic of South Africa,1996 (Constitution).

[5] As pointed out by G Reynolds 'Necessarily Critical? : The Adoption of a parody Defence to Copyright Infringement in Canada' at 4, available at http://robsonhall.ca/mlj/images/Articles/33v2/reynolds.pdf (accessed on 21 June 2012): "critical parodies can promote public participation…"

[6]In *Laugh It Off Promotions v South African Breweries International (Finance) B.V. t/a Sabmark International* 2006 (1) SA 144 (CC) 109 Sachs J noted that "humour is one of the great solvents of democracy"(herein afterthis case isreferred to as the 'Laugh It Off' case).

[7] Copyright Act 98 of 1978.

make fun of the original work, copyright owners are seldom likely to give consent for their original work to be parodied.

The issue of parody has not been extensively examined in South Africa. The only time it has been discussed is in the case of *Laugh It Off Promotions v South African Breweries International (Finance) B.V. t/a Sabmark International* [8] where Sachs J, in a separate judgment points towards the dangers of living in a society that takes itself too seriously'.[9] Here the learned judge encourages society to let go of its seriousness and laugh.[10] The judge however does not ignore the problem that this laughter may bring with it a conflict between the parodist's expression and the interests of the original author of the concerned work.[11] Unlike in South Africa, other jurisdictions such as the United States of America, Canada and the United Kingdom have had many opportunities to determine the issue of parody within the copyright regime. This dissertation accordingly critically analyses foreign case law and principles in order to determine whether South Africa may learn any lessons from the issues which they have grappled with.

The purpose of this dissertation is to consider parody in light of the law of copyright, to determine how the two interact and conflict, and finally, to make recommendations for a way going forward for South Africa. The three main issues that this paper seeks to address are the following:

- Whether parody has a value in society and if so should it be granted protection within the law,
- How parody conflicts with copyright, and
- Whether it is possible for copyright law to adequately accommodate parody as the law stands currently and if not, whether the existing copyright law can and should be amended in order to accommodate parody.

[8] 2006 (1) SA 144 (CC).

[9] The main judgment by Moseneke J focused on the issue of trademark infringement and dilution, however Sachs J wrote a separate judgment in which he dealt with the issue of parody.

[10] *Laugh It Off* (note 6 above) 109.

[11] Ibid 74.

This dissertation will commence with a brief analysis on what is parody and a discussion of the purpose that it serves in society. In order to capture how parody conflicts with an author's copyright I will also give a brief description of copyright and will thereafter examine the law on the issue of parody in the three different jurisdictions that I have mentioned above. This will be necessary in order to ascertain whether there are any lessons to be learnt from these jurisdictions. I will discuss how parodies are currently treated in South Africa and will conclude with certain recommendations regarding how parodies should be treated together with making some recommendations regarding amendments to the law.

2. UNDERSTANDING PARODY

2.1 A short history

The term parody has been in existence for centuries.[12] The word parody (*parodia*) was used by Aristotle to mean "a narrative poem of modern length in the metre and vocabulary of epic poems; but treating a light; satirical, or mock-heroic subject".[13]From this description, it appears that parody was used specifically for subject matters which were not regarded as serious, in order to poke fun at certain issues. The meaning of parody has however evolved from this early description and has developed as an art form. Over time there have been many different definitions. Hutcheon states that parody can have a narrow meaning, such as the use of another's work for the intent of mocking (the meaning given by Aristotle), and it can have a broader meaning; that is the parodist can aim to do something other than to ridicule. For example, the parodist can aim to "recontexualize" a work or repeat it with a completely different and novel meaning.[14] Rose considers the various ways in which parody has been defined and concludes that "it is due to [its] long history that the meaning of the term has become the subject of so much argument".[15]

---

[12] Hutcheon *A Theory of Parody* 1. See also Rose Parody*//Meta-fiction* 18.

[13] Dentith *Parody* 10.

[14] Hutcheon *A Theory of Parody* 32.

[15] Rose *Parody//Meta-fiction* 17-18: Rose notes that parody has been defined according to its etymology, its usage in comedy, the attitude of the parodist to the work parodied or to the reader, the effect of the parody on the reader and the structure of texts in which parody is not just a specific technique but the mode of the work itself.

Despite these different definitions, it is not easy to ascertain exactly what parody is. According to Dentith,[16] parody describes "a related group of forms that all intervene in different ways in the dialogues, conversations and dissentions that make up human discourse". Dentith goes further to submit that there can never be a settled meaning of parody because parody is widely used by a vast number of persons in a variety of ways.[17] Hutcheon agrees with Dentith and states that parody should not be limited to a single concept.[18]

2.2 The modern definition of parody

From the above, it is evident that there is no single conception of parody. Since a complete evaluation of all the conceptions of parody is beyond the scope of this paper, this discussion will be limited to three modern concepts of parody, namely target parody, weapon parody and comic parody.

2.2.1 Target parody

Target parody is a type of parody that targets the original work itself.[19] Kennedy J stated that parody "must target the original"; it cannot merely target the society as a whole, or the general style of the author, although it may target these alongside the original work.[20]An example of such a parody can be found in the case of *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994) where the court had to deal with a parody of a song written by Roy Orbison and William Dee.[21]In this case, the court was of the opinion that the parody concerned criticised the original song for being oblivious to the harsh realities of this world.[22]

---

[16] Dentith *Parody* preface.

[17] Dentith *Parody* 6.

[18] Hutcheon *A Theory of Parody* 52.

[19]*Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994) 597:.Note that the court considered target parody to be protectable under fair dealing because the target on the original work by the parodist, was seen to demand borrowing from the original.

[20]Ibid 597.

[21]*Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994) (herein after this case is referred to as the 'Campbell' case) this case is discussed in more detail below in 5.1.3.1.

[22]*Campbell* (note 20 above) 582: This is demonstrated where Souter J quotes Judge Nelson stating that the 2 Live Crew members sing the song "with no hint of wine and roses".

2.2.2 Weapon parody

Weapon parody refers to parodies that use the original work as a platform to comment on something other than the original work itself.[23] Weapon parody is therefore different to target parody as it does not comment on the original work. An example of such a parody can be found in T. S Eliot's *The Waste Land*[24] a poem which according to Posner uses the works of various famous authors, such as Shakespeare, in order to criticise the "sordidness and spiritual emptiness of modern life".[25]

In *Campbell*, the court considered weapon parody to be equivalent to satire.[26]. The court described satire as a work "in which prevalent follies or vices are assailed with ridicule".[27]Satire, unlike parody is aimed at commenting on anything other than the original work[28] and the court in *Campbell* stated that if a secondary work does not comment on the original then the claim to fair use "diminishes accordingly".[29]The court reasoned that this is because satire does not require the use of another's work as it "can stand on its own two feet".[30]The difficulty with weapon parody and its connection to satire is that the courts have in the past only accepted target parody as being entitled to copyright exemption under the defence of fair use.[31]However it seems that the distinction between weapon and target parody

[23]Ibid 581. See also A Spies 'Revering Irreverence: A Fair Dealing Exception for Both Weapon And Target Parodies' (2011) 34 *UN SW LJ* 1122, 1122: weapon parodies are often referred to as 'satire' in the United States.

[24]T.S .Eliot 'The Waste land New York: Horace Liver light' at 1922, available at www.bartleby.com/201/1.html (accessed on 21 December 2012).

[25] RA Posner 'When Is Parody Fair Use?' (1992) 21 *The Journal of Legal Studies* 67, 71.

[26] Spies 'Revering Irreverence' (2011) *UN SW LJ* 1122.

[27] Campbell (note 20 above) 581: The court quotes this definition from the Oxford English Dictionary at 500 (2ed 1989).

[28]*Dr. Seuss enterprises, L.P., v. Penguin books USA, Inc*.109 F.3d 1394(9th Cir. 1997) 1400: satire uses copyrighted work only as "...a vehicle to poke fun at another target".

[29]*Campbell* (note 20 above) 580.

[30] Ibid 581. Ultimately, the court only considered target parody to be exempt under fair use.

[31]The defence of fair use will be discussed in 3.6.1 below.

is becoming less significant as the courts are moving towards the protection of weapon parodies as well.[32]

From the above descriptions it seems that both weapon and target parodies are used in instances where the parodist wishes to comment or criticize. It shall later become evident that the use of parody for purposes of 'comment and criticism'[33] does not pose a problem for parodists, and that these two types of parody can be accommodated within existing copyright law rules.[34]However, despite this, there still appears to be a problem with weapon parody because although the parodist is seeking to criticise or make a comment on society, he or she is using a protected work where there is no need to do so.[35]Nonetheless, it may be that protecting weapon parody against a claim of copyright infringement is easier to argue because it involves the making of a social comment, which is protected under copyright exceptions. This will be discussed further below. The making of a social comment distinguishes weapon parody from comic parody which creates problems when it comes to convincing courts that the parodist is deserving of protection.

2.2.3 Comic parody

It has been recognized that parody does not have to criticize its underlying work but instead a work may be used for a completely different purpose.[36] Comic parody has been identified by Rose as being a "specific parody (having a) comic function".[37] The definition of parody through this function has caused some to assume that parody is only limited to this function.[38]

[32] Spies 'Revering Irreverence' (2011) *UN SW LJ* 1122. For criticism of this see Posner 'When Is Parody Fair Use?' (1992) *The Journal of Legal Studies* 67. Posner argues that the parody defence should not be expanded to cases where a parody criticizes something other than the original work.

[33]Note that s12 (1) of the South African Copyright Act 98 of 1978 refers to the purpose of 'criticism' only, whilst s107 of the American Copyright Act 1976 refers to both 'comment and criticism'. This is discussed in more detail below.

[34]This is because copyright law has an exception for infringement in such instances. For example see 12(1) of the South African Copyright of 1978 which deals with fair dealing for the purpose of criticism and s107 of the American Copyright Act 1976 which deals withfair use for the purposes of criticism and comment.

[35]*Campbell* (note 20 above) 581: the court noted that because satire (or weapon parody) does not make a comment in relation to the original work, it "requires justification for the very act of borrowing".

[36] Rose *Parody//Meta-fiction* 34.

[37] Rose *Parody//Meta-fiction* 17-19.

[38] Rose *Parody//Meta-fiction* 21.See also Hutcheon *A Theory of Paro*dy 52 where he aargues that parody has other functions besides that of its comic function, for example irony.

Comic parody, which may be characterized by its intention to make fun of or ridicule, therefore differs from target and weapon parody which does not seek as its ultimate aim, to be humorous.

This type of parody is particularly relevant for comedians who create parodies with the intention of making people laugh and for no other real purpose such as criticism or commenting on society. An example of such a parodist is the well-known South African comedian Trevor Noah. Given the present state of South African copyright law it seems that comedy parodist do not enjoy protection from the law, and may well be exposed to claims of copyright infringement. Currently in South Africa, comedians have no defence to copyright infringement actions against them, unless they can argue that the work was parodied for criticism or comment. Therefore if a parody only projects pure humour as opposed to any criticism and comment, the parodist is probably unprotected and in all probability the parodist will be committing an act of copyright infringement.[39]

2.3 Why parody is important

Before it can be argued that parodists are entitled to protection from an accusation of copyright infringement it is necessary to evaluate the benefits of parody for society. It is also necessary to consider the criticisms of parody in order to evaluate whether these criticisms outweigh the benefits and therefore a defence of parody should not be allowed in law. It is suggested that there are two main benefits to parody namely: parody's political role and parody's role in entertainment.

2.3.1 Parody's political role

According to Reynolds, both critical[40] and non-critical[41] parodies can be seen as promoting the constitutional right of freedom of expression.[42]

Dworkin identifies two justifications for the importance of free speech, one being that allowing people to say what they want to say "will produce good effects for the rest of us"[43].

[39] The word 'probably' is used here because there have been no decided cases in South Africa however, given the state of copyright law at present, it is highly likely that should a comic parodist be accused of copyright infringement he or she will be unlikely to have a defence.

[40] 'Weapon' and 'target' parodies.

[41] 'Comic' parodies.

[42] Reynolds 'Necessarily Critical?' 4.

Dworkin draws from Holmes, who justified freedom of speech by saying that if political debate is uncensored then politics is "more likely to discover truth and eliminate error or to produce good rather than bad policies".[44] The other justification given by Dworkin for freedom of speech is that it is valuable because it is an important and "constitutive feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents".[45] This second justification means that the government must trust and respect its people enough to allow them to express their opinions and to hear the opinions of others.[46]

Deazley states that parody has a meaningful role in promoting the right of freedom of speech and therefore argues that parody should be "meaningfully and unambiguously accommodated within the copyright regime".[47]Furthermore, it is argued that denying parody a place within copyright law would be to deny the right of free speech, since free speech forms the foundation of parody.[48]

In its political role, critical parody may be used to ridicule politicians, political parties and even speeches delivered by politicians, whilst exposing the faults in their statements, views or ideas.[49] In doing so, parodies give citizens the opportunity to critically evaluate politics, politicians and their understanding of political matters, and also to assess whether they agree or disagree with the issues, views and policies of the government.[50] Critical and non-critical parodies may also encourage and motivate "public participation in the democratic process" by bringing the ideas or views of the parodist to the attention of the public.[51]When important

---

[43] R Dworkin *Freedom's Law* (1996) 200.

[44]Ibid

[45]Ibid.

[46]Ibid. Dworkin describes his position as follows: "We retain our dignity, as individuals, only by insisting that no one…has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it." Also see generally T Woker *Advertising Law* (1999) Ch 14 on the importance of freedom of expression in the new democracy.

[47]R Deazley 'Copyright and Parody: Taking Backward the Gowers Review?' (2010) 73 *The Modern LR* 785,806.

[48] Ibid.

[49] Reynolds 'Necessarily Critical?' 4.

[50]Ibid.

[51]Ibid.

issues are presented in a humorous manner, people may be far more inclined to listen and engage, thereby encouraging people to participate in political debate.[52]

2.3.2 Parody as entertainment

Parody can simply be pure entertainment and can encourage the production of new works.[53]According to Bollier, many great works are those of authors and artists who take from prior existing works.[54] Parody by nature builds on what already exists; therefore if parodists put enough labour and skill into their works, irrespective of their works being based on prior existing works, they contribute to the growth of creative works.[55]

Deazley also argues that parody allows for the creation of new art forms in that "as a cultural practice [it] can contribute to the evolution and development of literary styles, genres and tastes".[56] Similarly, Rose states that parody has "transformed literary history" by taking original works and continuing to transform them so that its function differs every time.[57]Dentith summarizes this view by stating that "all utterances are part of a chain".[58]By this, Dentith is referring to the chain of creativity; meaning that all creative works are linked to one another as they appropriate from previous creative works to make new ones.

There appears to be consensus amongst scholars that are in favour of recognising the role of parody in society that it increases creativity and entertainment. A study of their works reveals that they are of the view that parody has a vital role to play in contributing to the entertainment industry and in stimulating creativity.

---

[52] As pointed out by Reynolds 'Necessarily Critical' 4, parody can bring certain "ideas to the broader section of the population".

[53] Deazley 'Copyright and Parody' (2010) *The Modern LR 802*. See also Rose *Parody//Meta-fiction* 158: Rose notes that parody has the potential to add something new to its underlying work.

[54] D Bollier *Brand Name Bullies* (2005) Ch 3.

[55]Bollier *Brand Name Bullies*60-61: In the chapter entitled 'Vaudeville Comedy: Appropriation is the seed of originality', Bollier argues that many artists initially use existing works prior to coming up with works of their own.

[56] Deazley 'Copyright and Parody' (2010) *The Modern LR* 803.

[57] Rose *Parody//Meta-fiction* 158.

[58] Dentith *Parody* 3.

The *Laugh It Off* case is a Constitutional Court decision and can, in my view, be regarded as the leading South African case concerning parody. This is said because of the judgement of Sachs J. In this judgement he recognises that entertainment is one of the goals of parody.

Briefly the facts are as follows: South African Breweries (SAB) sued Justin Nurse from Laugh it off Enterprises for making and selling t-shirts with an altered form of a trademark which appeared on its Black Label beer. Nurse used the same colour and design of the SAB trademark except that he wrote "Black labour white guilt" where there should have been the words "Black Label" as well as certain other alterations. The High Court was of the opinion that the altered mark constituted hate speech[59] and Supreme Court of Appeal was of the opinion that the message of the mark was "unwholesome, unsavoury or degrading".[60]However the Constitutional Court found otherwise. For the purposes of this paper, it is not necessary to discuss the entire decision and the judgment of the majority as the majority did not deal with parody and found for Nurse on other grounds. As stated above, and for the purposes of this paper, the most relevant comments in the Constitutional Court are those of Sachs J who dealt specifically with parody and who was ultimately of the view that there is a need to provide latitude for parody, and freedom of expression. This decision is important as it highlights the role of parody in society.

Sachs J describes parody as something that is "paradoxical". This is because it is both creative and derivative at the same time.[61] The judge points out that the success of parody depends on the ability of the audience to recognize the underlying work.[62] Sachs J also distinguishes a plagiarist from a parodist and points out that a plagiarist's intention is to deceive the audience into thinking that he or she is the original author of the work, whilst the parodist needs the audience to recognize that the source of his work is not his or her own.[63] Of significance, Sachs J lists various motivations for a parodist's work, namely, to "entertain", to make "social commentary" and for "duplicitous commercial aspirations".[64]

[59]*Laugh It Off* (note 6 above) 15.

[60] Ibid 21.

[61] Ibid 77.

[62] Ibid 78.

[63] Ibid.

[64]Ibid.

Comic parodies, as discussed above, are a form of entertainment .Thus, the lack of a defence of parody means that the people who entertain in this manner are not free to produce their comedies in a way that they wish to, for fear of possible claims of infringement by copyright owners. This is problematic as it inevitably curtails the quality of work produced by comedians, therefore affecting the quality of entertainment that the public receives.[65] Accordingly, only the copyright holder benefit's from the lack of a defence of parody.

2.4 Criticisms of recognising parody

Whilst there are some important benefits to the art of parody (as discussed above), there are also some criticisms against introducing a defence of parody. These criticisms are closely linked to the conflict between copyright law and parody. For this reason, a discussion of the criticisms is essential for an understanding of the tensions that exist between the rights of the parodist and the rights of the copyright owner. The introduction of a defence of parody has been criticised for the following reasons:

- It would discourage demands for the original work.[66]When a parodist criticises an underlying work it could make it appear less attractive to the audience.[67]
- It may open up the 'floodgates' to people who try to wrongly justify the taking of copyrighted work, and therefore cause the opportunities for abuse to increase.[68]Determining when an original work is being used in a legitimate or illegitimate manner may be confusing and thus the distinction between the legitimate and illegitimate use of parody would end up 'blurred'.[69]
- It would not be useful to introduce a specific defence of parody because parodists often do not have the financial means to go to the courts for a declaration or determination of their rights.[70]

[65] Saha & Mukherjee 'Not So Funny Now Is It' 9.

[66]Deazley 'Copyright and Parody' (2010) *The Modern LR* 802.

[67]Ibid.

[68]Taking Forward the Gower's Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions (Intellectual Property Office, 2009) at 43, available athttp://www.ipo.gov.uk/consult-gowers2.pdf (accessed on 20 November 2012).

[69]Ibid.

[70]Taking Forward the Gower's Review of Intellectual Property: Second Stage Consultation 44.

- It could potentially infringe on the moral rights of the author.[71] Moral rights allow for the original author to "object to derogatory treatment" of his or her work.[72]As mentioned above, a critical parody could have negative effects on the original work, which in turn could affect the moral rights of the author.
- Parody has also been criticised as being an "enemy of creativity".[73] As it has been mentioned above, parody requires the use of an original work in order to come into existence. Therefore because a parody cannot be a wholly creative work, it can be seen as a short cut to creating works since it helps avoid the trouble of having to work up something new.[74]
- Finally, one of the reasons why the UK Intellectual Property Office rejected a recommendation for the introduction of a specific defence of parody is because the fact that there had been no parody defence had never caused concern or problems in the past.[75]

2.5 A critical evaluation of the criticisms of parody

As discussed above, the introduction of a defence of parody has been criticised for numerous reasons, however, it is important to critically evaluate whether these criticisms are so valid that they outweigh the benefit of having a specific defence. Deazley has dealt with each of these criticisms and he points out the following:

- Firstly, Deazley argues that parodies that are "critical or unflattering" also have the ability to increase the demand for the original work through exposure.[76]
- Secondly, Deazley admits that it is not easy to determine the difference between a legitimate use and an illegitimate use. Nonetheless, the difficulty in drawing a distinction between the legitimate and illegitimate use of parody is not a justification

[71]Ibid.

[72] See 3.7 below for a discussion of moral rights.

[73] Hutcheon *A Theory of Parody* 3.

[74] In *Campbell* (note 20 above) 598, Kennedy J states that fair use should not be extended to "profiteers who do no more than add a few silly words to someone else's song…"

[75]Taking Forward the Gower's Review of Intellectual Property: Second Stage Consultation 44.

[76] Deazley 'Copyright and Parody' (2010) *The Modern LR* 802.

for the denial of an introduction of a defence of parody as difficult decision making is part of the judicial responsibilities.[77]

- Thirdly, Deazley argues that the lack of financial means is not a fitting consideration when determining whether a parody defence should be introduced. This consideration is irrelevant as what is at issue is "the substance of the copyright regime" not the "operation of the civil justice system".[78] Therefore, it does not make sense to consider that some individuals would be unable to afford to go to court, when considering a substantial copyright law issue such as parody.
- Fourthly, Deazley argues that the rules concerning moral rights should accommodate parody because moral rights should not be used by authors of underlying works as a "shield" against the negative or critical effects of parody.[79]
- Fifthly, Deazley argues that although parody is not a completely novel creation, however it is a "form of continuity" in that in builds onto past works so as to bring these works to the attention of the public,[80] whilst creating something new. In this way, parody is a form of creativity in itself.
- Lastly, Deazley states that the claim that parody has not caused any problems in the past should be determined not by the number of parody cases which have come to court but by the reasons why people choose not to litigate.[81] This is an important consideration as a general claim that parody has not posed as a problem in the past cannot be made without looking at all the relevant factors such as the cost and uncertainty that comes with litigation of such matters. Smaller firms or individuals lack the adequate financial means to litigate.[82] Also some rights holders are indifferent to parody and therefore do not litigate against it, whilst some rights holders are of the misconception that parody is not an infringement of copyright law.[83] These are all discouraging factors towards litigation. Deazley concludes this observation by stating that "complacency should not determine copyright policy".[84]Therefore, just because

[77] Ibid 796.

[78] Ibid 797.

[79] Ibid 798.

[80] Hutcheon *A Theory of Parody* 3.

[81] Deazley 'Copyright and Parody' (2010) *The Modern LR* 799-800.

[82] Ibid 800.

[83] Ibid.

[84] Ibid.

there seems to have been no complaints or issues with parody in copyright law, this does not mean we should not cater for the possible issues that can arise in this respect.

2.6 Concluding remarks regarding parody

From the discussion above, it is clear that there is no single conception of parody. However three modern conceptions of the term have been identified, that is weapon, target and comic parody. As will be discussed later, weapon and target parody are capable of protection under the fair use doctrine as criticism and/or comment, but comic parody is not. Comic parody is particularly relevant for comedians whose sole aim in creating a parody is to make their audience laugh. It is submitted that in recognizing comic parody as a form of parody, the issue of its protection (and of the protection of parody in general) must be analysed. It has been submitted that parody is founded on the right to freedom of expression which is a constitutional right of all persons and therefore parody deserves protection as a valid form of expression. Various benefits of parody have been recognized, including the role parody plays in politics, in entertainment and in the society in general. However parody has also been criticized for various reasons, one being that it is overly reliant on an innovative work and therefore it is harmful to creativity.[85]

Hutcheon argues that parody needs people to defend it against attack[86] and therefore despite the criticisms' against a defence of parody, the positive impacts of parody in society should not be forgotten or ignored. By the same token, the constitutional right to free expression should not be undervalued.

Having established that parody does have a positive role to play in society, it is now necessary to examine why there might be problems with parody from a legal perspective. The law which may conflict with parody is copyright law and so this law will now be examined.

3. THE LAW OF COPYRIGHT

As mentioned above, parody has the potential to come into conflict with copyright law. Copyright protection accrues to copyright holders, and if parodists use copyrighted works,

---

[85]Hutcheon *A Theory of Parody* 3: parody has been described as being "parasitic".

[86]Ibid.

there could be some conflicts. Hence the law of copyright and how parody comes into conflict with the rights to the copyright holder needs to be carefully considered.

3.1 An explanation of copyright

Copyright in general terms, means the rights granted for the protection of various types of works that come into existence as a result of an author's intellectual creativity.[87] Copyright is essentially concerned with the "negative right of preventing the copying of physical material".[88] Klopper states that copyright is not just about copying, but it also includes "the right to publish, perform, adapt, translate, and transmit work".[89] For the purposes of this dissertation, however, copyright is simply about giving a person who has created a new work a limited monopoly over that work. Because the law protects copyright, creators can prevent other people from making use of their work without their permission.

In order to keep up with the technological growth, copyright law has been extended in its scope from initially being concerned with literature and the arts to now giving protection to other fields such as "literary, dramatic, musical and artistic works, sound recordings, films, broadcasts, cable programmes and the typographical arrangements of published editions".[90]

Copyright developed as a result of the development of printing in the 15thcentury. At this stage the aim of copyright was to protect the printer and not the author.[91] However, the British Act of 1710 changed this by being the first law to consider the right of the authors themselves to control the printing of their works.[92] Thereafter, the United States of America (USA) adopted this system in its first Copyright Act of 1790. Then both jurisdictions began to extend the rights of authors in various ways by, for example, including protection for authors to perform their works in public.[93] The British system forms the foundation of

---

[87] JAL Sterling *World Copyright Law* 2 ed (2003) 4: These types of works are "literary, dramatic, musical and artistic works".

[88] EPS James et al *Copinger and Skone James on Copyright* 13 ed (1991) 1.

[89] H B Klopper *Law of Intellectual Property in South Africa* (2011) 145.

[90] James et al *Copyright* 1.

[91] James et al *Copyright* 3. See also Sterling *World Copyright Law* 5. See also G Dutfield & U Suthersanen *Global intellectual Property Law* (2008) 67.

[92] Sterling *World Copyright Law* 5.

[93] Ibid.

copyright law in the Commonwealth, but USA copyright law has diverged from British copyright law in some aspects.[94]

Klopper summarises the unique characteristics of copyright as follows:

- It grants exclusive negative rights to authors;
- It protects the material expression of ideas and not the ideas in themselves;
- Protection is for a limited period of time,
- Protection is subject to some exceptions and limitations.[95]

3.2 Why copyright is protected.

The purpose of copyright is to grant rights of control to creators.[96] These rights allow a creator to control how his or her work may be used.[97]The right to control is referred to as an exclusive right (monopoly). By granting an exclusive right to an author, the author is encouraged to create new works and this results in more creativity.[98] Copyright can thus be said to be an incentive that is designed to drive creativity.[99]

Copyright law protects copyrighted work from being used by the public without authorization of the copyright owner. Obtaining authorization however is a hurdle in itself.[100] The authorization process is problematic and research, scientific progress and overall creativity can be badly affected where authorization cannot be obtained in time or where the copyright owner refuses authorization.[101]Obtaining authorisation also means that one has to know who

---

[94] Ibid.

[95] Klopper *Law of Intellectual Property in South Africa* 145.

[96] OH Dean *Handbook Of South African Copyright Law (*2012) 1-1.

[97]Ibid.

[98] Bollier *Brand Name Bullies* 12.

[99] Ibid.

[100] Van Der Merwe Law *of Intellectual Property in South Africa* 211. See also Gowers Review of Intellectual Property at 45, available at http://hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm (accessed on 20 November 2012): In his review, Gowers states that people refrain from using a work where they cannot obtain permission from the copyright holder, because they fear litigation.

[101] Van Der Merwe *Law of Intellectual Property in South Africa* 211.

the copyright owner is[102] and that the copyright owner is contactable. From this it can be seen that obtaining authorization is not always possible.

Copyright law does not only seek to protect copyright owners. Certain copyrighted works have such great value in society that monopoly rights in the work may be detrimental to the larger public good. For example, schools and universities require academic works to further education and research and tight copyright controls over such works make it difficult to achieve this goal.[103] This is the reason why the law of copyright tries to create a balance between the rights of the copyright owner and the public interest. The law of copyright has thus been described as, “one balancing trick”.[104] Groves quotes from Landes and Posner and points out that, “Striking the correct balance between access and incentives is the central problem in copyright law”.[105] Copyright law recognizes the need to achieve this balance and provides three main ways to achieve such a balance. Firstly; copyright law grants copyright owners a limited monopoly, that is, after a certain period of time the work falls into the public domain. Secondly, copyright does not protect ideas; it only protects the material expression of those ideas. This means that the public is allowed to make use of the ideas behind a work. Thirdly; and the law makes provision for certain defences, the most important one being, for the purpose of this paper, the right to make fair use of a copyright work.[106] The question which this paper seeks to answer is whether copyright law, as it presently exists, accommodates parody as a defence and if not, whether it should accommodate parody and how this can be done.

[102] S 21 Copyright Act 98 of 1978 sets out who owns copyright.

[103] Farzana Rasool ‘Copyright Laws stifle education’. http://www.itweb.co.za/index.php?option=com_content&view=article&id=35188 (accessed on 17 January 2013):According to a study conducted by the African Copyright and Access to knowledge(ACA2K) Project, one way in which copyright laws in South Africa stifles education is because it does not provide for adaptations to be made to materials for use be “sensory-disabled people”.

[104] P Groves *Copyright and Designs Law: A Question of Balance* (1991) 1.

[105] Ibid.

[106]Each of these mechanisms will be discussed in more detail below.

3.3 Works eligible for copyright protection

The Act contains a list of works which are eligible for copyright protection. Therefore before an author can claim copyright protection he or she must show that his or her work falls within the ambit of the Act.[107]These are as follows:

- Literary works;[108]
- Musical works;[109]
- Artistic works;[110]
- Cinematograph films;[111]
- Sound recordings;[112]
- Broadcasts;[113]
- Programme –carrying signals;[114]
- Published editions;[115]
- Computer programs[116]

From this it can be seen that virtually any work which could be the subject of a parody is covered by the Act, including books,[117] plays,[118] songs,[119]trademarks and logos,[120] television

[107]S 2 of the Copyright Act 98 of 1978.

[108] Ibid s 2(1) (a).

[109] Ibid s2 (1) (b).

[110] Ibid s2 (1) (c).

[111] Ibid s2 (1) (d).

[112] Ibid s2 (1) (e).

[113] Ibid s2 (1) (f).

[114] Ibid s2 (1) (g).

[115] Ibid s2 (1) (h).

[116] Ibid s2 (1) (i).

[117]See *Suntrust v Houghton Mifflin Co.*, 252F. 3d1165 (11th Cir. 2001) a case which involved a parody of the well-known book *Gone with the Wind* by Margaret Mitchell. This is discussed further below.

[118]See William Boardman 'Lawyers Crush Off- Broadway Play, Broadway Claims Fair Use' available at http://ivn.us/2012/07/28/lawyers-crush-off-broadway-play-broadway-claims-fair-use/ (accessed on 19 January

programmes and movies[121].However, certain requirements have to be met for a work to qualify for copyright protection. These requirements will be discussed below.

3.4 Requirements for copyright protection

The requirements for copyright protection are as follows:

- The work must be original;[122]
- The work must be in material form;[123]
- The author must be a qualified person[124] or the manufacture of the work must have taken place in South Africa.[125]

Although one of the requirements for copyright to exist is that the work must be original, the word originality has a special meaning in copyright law. In copyright law "originality refers to original skill and labour in execution, not to original thought or expression of thought".[126] Therefore creativity in the form of a completely new work is not a requirement for

---

2013: David Amji (a play writer) was served with a cease and desist letter claiming that his play infringed on the 1970's television show (Three's Company).

[119]See the *Campbell* case; a case which involved a parody of the song entitled "Oh, Pretty Woman" written by Roy Orbison and William Dee. This will be discussed further below.

[120]See the *Laugh It Off case*; a case which involved a parody of South African Breweries Black Label trademark .The facts of the case have been discussed above and will be discussed in more detail below.

[121] See *Walt Disney Productions v. Mature Pictures Corp*. 389 F. Supp. 1397 (S.D.N.Y 1975), a case which involved a parody of a certain theme of a Mickey Mouse television programme. For an example of a movie that was parodied see *New Line Cinema Corp. v .Bertlesmann Music Group, Inc.* , 693 F. Supp. 1517 (S.D.N.Y 1988).

[122] S2 Copyright Act 98 of 1978.

[123] Ibid s2 (2). The requirement that the work be in a material form supports the notion that only expressions of ideas are protected by copyright and not the idea as itself. Requiring that work be in a material form indicates how essential it is that an idea be translated into an expression (which is necessarily in material form) for that work to qualify for copyright protection. This will be discussed in greater detail below.

[124] Ibid s3 (1): A qualified person in this section means that if the author(s) is an individual they must be domicile or resident in the Republic, and if the author(s) is a juristic person, they need to be incorporated under South African laws.

[125] Ibid. s37 read together with GN 1558 in Government Gazette 17517 of 1 November 1996.

[126]P Ramsden *A Guide to Intellectual Property Law* 2 ed (2012) 26.

originality.[127] The requirement of originality therefore simply requires that the work emanate from the author, not that the work needs to be a new thought or expression.[128]

The final point to note is that copyright need not be registered. Copyright is conferred automatically upon works mentioned in s2 once the abovementioned requirements have been met. From all of this it can be seen, that most works (as discussed in 3.3 above) are likely to be protected by copyright and as already pointed out most works on which the parodist will rely for his or her art, will be protected by copyright. Hence it is highly likely that the parodist will at some time or other face a claim of copyright infringement.

3.5 Copyright infringement

When parodists use original works that are protected by copyright, there is a possibility that they may trample on the exclusive rights of copyright holders. This situation brings the rights of parodists and the rights of copyright owners into conflict. The cases have demonstrated, as it will be seen later, that this conflict is the cause for litigation on grounds of copyright infringement in cases of parody. The object of this section therefore is to give a brief analysis of when copyright infringement will occur and what constitutes such infringement.

Copyright owners have certain exclusive rights in their work, and when someone who is not a copyright owner and who has not obtained the requisite permission from the copyright owner, does anything that only the copyright owner is allowed to do, then that person is committing an act of infringement against the copyright owner.[129]In very simple terms, infringement of copyright is concerned with the unauthorised copying of another's work. However it is not just any amount of unauthorised copying that will result in infringement of copyright; the copying must be substantial. The rule that a substantial part of the work must be copied stems from the common law maxim that the law does not concern itself with trivialities.[130]As discussed above, a parodists has to bring the original work to the audience's attention, in doing so, a parodist needs to use a sufficient amount of the original work for the audience to be able to recognise it. Due to the fact that many cases of parody involve taking substantial parts of the underlying work in order to invoke the audience to recognise a parody, the issue

[127] Ibid.

[128] Ibid.

[129] Ramsden A *Guide to Intellectual Property Law* 57.

[130] Dean *Handbook Of South African Copyright Law* 1-66: Dean notes that what is taken from the original work cannot be "de minimis".

of copyright infringement is most likely to arise. Therefore the substantial taking of an original work for purposes of parody can be seen as a form of copyright infringement.

3.6 Defences

As stated above it is a very important principle of copyright law that there needs to be a balance between the rights of the copyright owner and the public. For this reason certain defences to copyright infringement are built into copyright law thus allowing other persons to make use of a copyright work without first obtaining the permission of the owner. The most important defence to copyright infringement is the right to make fair use of a work.

3.6.1 Fair use

On an international level, the Berne Convention for the Protection of Literary and Artistic works (Berne Convention)[131] and the Agreement on the Trade Related Aspect of Intellectual Property (TRIPS)[132] gives guidance as to how the defences for copyright infringement should be formulated by the member countries.[133] This guidance is given in the form of a standard three-step test which is designed to limit the monopoly granted to copyright owners. The three-step test was first applied under Article 9 (2) of the Berne Convention and it was then later adopted in the TRIPS agreement.[134] For purposes of this dissertation the most relevant version of the three-step test is set out in TRIPS. This test allows countries to formulate their own defence to copyright infringement provided that three conditions are met: "it must be limited to specific cases; it must not conflict with the normal exploitation of the work; and it

---

[131] See World Trade Organisation 'Glossary' available at http://www.wto.org/english/the wto_e/glossary_e/berne_convention_e.htm (accessed on 29 January 2013): The Berne Convention is described as "a treaty, administered by the World Trade Organisation, for the protection of the right's of authors in their literary and artistic works".

[132] See World Trade Organisation 'TRIPS' http://www.wto.org/english/tratop_e/trips_e?intel2_e.htm (accessed on 29 January): Trips covers various areas of intellectual property law, for example copyright and related rights, trademarks, geographical indications, industrial designs etc. TRIPS sets out minimum standards which each member country must comply.

[133] There are other international treaties that apply the three step test, for example the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, however for the purposes of this dissertation the Berne Convention and TRIPS will be discussed in further detail.

[134] The three-step test is contained in Article 13 of TRIPS and it reads as follows: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not unreasonably prejudice the legitimate interests of the rights holder".

must not unreasonably prejudice the legitimate interests of the author".[135]Countries which are signatories to the TRIPS agreement may apply the three step test in any manner provided these three conditions are met.[136] However, according to Dutfield and Suthersanen different countries should ensure that when they apply the three step test, they do so in a manner that is consistent with their individual economic and social circumstances.[137]The defences created by each country must therefore be tailored in accordance with the varying needs of each country. Various countries have built the three-step test into their domestic laws in the form of fair dealing and fair use.[138]

The concepts of fair use and fair dealing are relatively similar concepts except that fair dealing is limited to a specified list of when unauthorised use of a particular work may occur, whereas the fair use defence is more general in nature.[139] The USA (discussed further below) has been recognized as being the "most eminent representative of a fair use doctrine".[140]

3.6.2 The idea expression dichotomy

The idea/expression dichotomy is not a defence per se in the Copyright Act, however it will be discussed here as it is a major principle of copyright law. The basic principle is that it is not the idea or fact which is protected but it is the manner in which the idea or fact is expressed that is protected.[141]This means that someone is entitled to use another person's idea or fact, without infringing someone else's copyright, provided that they express it in their own way. For example in *Baigent and Leigh v Random House Group Ltd*,[142] a case where the authors of the book *The Holy Blood and The Holy Grail* brought a copyright infringement action against the publishers of the book *Di Vinci Code*, claiming that the author, Dan Brown,

---

[135]Duffield & Suthersanen *Global intellectual Property Law* 94.

[136]Specific jurisdictions and how they have interpreted the TRIPS three-step test will be discussed under their various headings.

[137]Dutfield & Suthersanen *Global intellectual Property Law* 94.

[138]Fair dealing is used in Canada, the UK and South Africa; whilst fair use is used in the USA.

[139]Gowers Review of Intellectual Property, 45.

[140]M Brenncke 'Is "fair use" an option For U.K copyright legislation?' at 5, available at www.wirthshaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft71.pdf (accessed on 21 June 2012).

[141]AC Yen 'A First Amendment Perspective on the idea/expression dichotomy and copyright in a work's Total concept and feel' (1989) 38 *Emory LJ* 393,395.

[142] [2007] EWCA Civ 247.

of the *Da Vinci Code* had copied substantial parts of their book. In deciding that there had been no copyright infringement, the court stated that facts and ideas were not protectable, only the material expression of those facts and ideas. Therefore, Dan Brown was entitled to use certain facts in his fictional book, which had first been presented by the authors of *Holy Blood*. A similar situation arose in the South African case of *Galago Publishers (Pty) Ltd v Erasmus.* [143] However, in this case, the court found that the author of the secondary work had used more than just the general idea of the original work and has also used the material expression found in the first work. Therefore the Appellate Division (as it then was) found that there was copyright infringement.

3.7 Moral rights of the copyright owner

Moral rights are rights which belong to the author of copyrighted work even if the author no longer owns the copyright.[144] These rights confer upon the author the protection of his or her "honour or reputation" and they allow the author to claim "authorship" over his or her work.[145] Moral rights belong with the author of the work and may not be transferred, even if the copyright owner transfers their copyright to someone else.[146] These rights therefore lie exclusively with the copyright owner. Dean describes moral rights as being similar to personality rights.[147]

Moral rights are composed of two rights, namely "paternity rights" and "integrity rights".[148] Paternity rights allow the author to claim that he or she is the author of a works.[149]Integrity rights on the other hand, are the "right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or

[143]1989 (1) SA 276 the AD.

[144] S20 Copyright Act 98 of 1978.

[145] Ibid.

[146] Ramsden *A Guide to Intellectual Property Law* 49. See also Dean *Handbook Of South African Copyright Law* 1-110.

[147] Dean *Handbook Of South African Copyright Law* 1-110.

[148] Ibid. See also Klopper *Law of Intellectual Property in South Africa* 191.

[149] Dean *Handbook Of South African Copyright Law* 1-110. See also Klopper *Law of Intellectual Property in South Africa* 191.

reputation of the author".[150] Together, the paternity right and the integrity right, result in moral rights.

Moral rights are separate, yet they are complementary to copyright in a person's work.[151] .It is therefore possible that a situation could arise where there is a simultaneous claim of copyright infringement and moral rights infringement.[152] Dean illustrates this situation by giving an example where work is substantially reproduced without permission of copyright holder, and that work is claimed to be the work of another person.[153] In this situation, Dean notes that there is both an infringement of copyright and infringement of paternity rights. On the other hand there are also situations that could arise where there would be no copyright infringement, but there would be an infringement of the moral rights of an author.[154] An example of this could be in a situation where an adaptation of the work is done with the copyright holder's permission, but the modifications made are harmful to the honour and reputation of the author.[155] In this case, there would be no copyright infringement since the approval of the copyright holder would have been obtained; however a claim for moral rights infringement could be made, under the violation of integrity rights.

The term of moral rights is not stated by the Copyright Act. However, Dean submits that moral rights are comparable to personality rights which last until the death of the individual; and submits that moral rights therefore expire upon the death of the individual.[156]The impact of moral rights on issues of parody will be discussed in further detail below.

---

[150] Dean *Handbook of South African Copyright Law* 1-110 .See also Klopper *Law of Intellectual Property in South Africa* 191: Integrity rights allow for authors to object to any "derogatory treatment" of their work.

[151] Dean *Handbook of South African Copyright Law* 1-110 ; 1-111.

[152] Dean *Handbook of South African Copyright Law* 1-111.

[153] Ibid.

[154] Ibid.

[155] Ibid.

[156]Ibid.

4. THE COPYRIGHT OWNER VS THE PARODIST

This section seeks to analyse the two parties involved in parody cases where there is a claim of copyright infringement. The parties involved are the copyright owner, who claims that his or her rights have been infringed by the parodist; and the parodist, who seeks to use parody as a defence so as to escape liability for the alleged infringement. The question here is therefore, how and where do the two parties come into conflict?

The copyright owner has economic rights and moral rights to his or her works. As it has been indicated above, there can be a distinction between the copyright owner and the author of the work. Thus ownership of copyright and ownership of moral rights may vest in different individuals. However for the purposes of this dissertation (and because of space constraints) this dissertation will assume that the owner is also the author. In order to secure these rights, the Copyright Act makes provision for the copyright owner to have and exercise certain exclusive rights when it comes to their works. Parodists, on the other hand, take works belonging to others, and use elements of those works to create new and independent works. For a parodist to use copyrighted works (provided that it is a substantial part of their works, as the law does not deal with trivialities) without obtaining permission from the copyright owner is to infringe the copyright owners' exclusive rights. It is therefore clear as to how parodists and copyright owners may come into conflict.

Reynolds recognizes that a many works of parody come into conflict with copyright law because parody usually involves reproducing certain portions of the original work.[157]Reproduction is an exclusive right of a copyright owner. Because parody is only successful when the audience recognise the original work, it is necessary that a parodist reproduce the original work in sufficient detail so that the audience can recognize it. This in essence is how the conflict between the two parties arises.

Many academics agree with the nature and cause of the tension between the copyright owner and the parodist. It has been stated that parodists must "recall" the original work to the audience. Aggarwal agrees with this and states that there must be a "close relation" between

[157] Reynolds 'Necessarily Critical?' 5.

parody and the original work.[158] This is of course necessary in order for the audience to recall the original work, thus resulting in a successful parody. The Harvard Law Review Association[159] points out that the extensive use made of the original work by some parodists brings parodies into conflict with copyright law.

Saha and Mukherjee agree that the copyright owner and parodists have some conflicts.[160] The authors identify three specific areas of intellectual property that conflict with parody.[161] The first conflict is that of parody against the author's right over duplication and distribution of their works. The second conflict is between parody and a public figures right of publicity, in that parody can violate a public figures right of publicity by holding him up to ridicule. The third conflict is that of parody against the moral right of authors by modifying an author's work in a manner that injures an author's integrity. Parody has often been seen as infringing moral rights and has thus been criticized in this regard.[162]As mentioned above, the impact of moral rights on parody will be evaluated. This will be done in order to determine whether the issue of moral rights and the infringement thereof, is so severe as to validly prevent a defence of parody from being enacted.

Scholars who have written about the impact of parody on moral rights seem to agree that moral rights should not be a bar to the enactment of a defence of parody. According to Aggarwal, a true parody does not infringe an author's paternity rights.[163] This is because an author of a "true parody" does not try to disguise a work as if it is his or her own. [164]"Since parody is aimed at the author's modes of expression and characteristic turns of thought or phrase, it is principally an attack upon the author's personality manifested in his or her creation".[165] In cases of true parody therefore, the relevant moral right at issue is the right of

---

[158] Chhavi Aggarwal '"Miss Scarlett's License Done Gone" "Harry Potter's License Gone: Barry Trotter Attending Hogwash School For Wizardry and Witchcrap" What's Fair Game For Parodists: An Analysis into the Copyright Law' at 2, available at http://www.ijcl.co.in/uploads/8/7/5/1/8751632/ijcl_vol.1_1_-_article_by_chhavi.pdf (accessed on 21 May 2012).

[159] Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' 1395.

[160] R Saha & S Mukherjee 'Not So Funny Now Is It?' 1.

[161]Ibid.

[162] See 2.4 (Criticisms of parody) above.

[163]Chhavi Aggarwal '"Miss Scarlett's License Done Gone"' 18.

[164]Ibid: Aggarwal points out that a true parody, according to Aggarwal, is "an independent work that lampoons the original".

[165]Ibid.

integrity. In light of these observations Aggarwal argues that it makes no sense to put parody within the context of moral rights to integrity to begin with, due to the fact that parody by its definition, is a mechanism used "to distort the original authors work and to treat it irreverently and comically".[166]Saha and Muckerjee[167] agree with Aggarwal. The authors argue that parody "does not constitute a mutilation, distortion or modification of an existing work"; instead parody is the creation of an entirely new work that uses an underlying work to do so. By the same token, Deazley[168] argues that "just as we should tolerate the fact that a critical or unflattering parody might negatively influence the commercial prospects of the underlying work, so too should we ensure that the moral rights regime is not invoked by authors as a shield to against unwelcomed criticism".

4.1 Is there a need to accommodate both the copyright owner and the parodist within the law?

It is argued that there is a need to protect parody because parody has social value. The social value of parody has been discussed in detail above. In addition, some of the criticisms of parody have been discussed followed by the arguments by Deazley refuting all such criticisms, thus indicating that these criticisms are not strong enough to bar an introduction of a defence of parody. Parody has been commended for its function in promoting democracy by being a form of freedom of expression, for promoting creativity, inspiring and promoting political debate and political scrutiny, introducing and promoting the development of new culture and works.[169] It is also important to consider that a parody may enhance a copyright owner's economic return on his or her work, because parody may increase exposure and thus a demand for the original work.[170]In light of the above mentioned, parody is therefore clearly beneficial to society and it is suggested therefore that its benefits and importance cannot be ignored.

As has been discussed previously, copyright law needs to balance the needs of the copyright owner and the needs of the public and as discussed previously; copyright owners have a right to remuneration from their creativity as this is vital as an incentive to encourage creativity. The major concern with the issue of balance however is how far intellectual property

[166]Ibid.

[167] Saha & Muckerjee 'Not So Funny Now Is It?' 8.

[168] Deazley 'Copyright and Parody' (2010) *The Modern LR* 798-790.

[169] See benefits of parody 2.3 above.

[170]See benefits of parody 2.3 above.

protection should extend and how to establish a proper balance between the rights of copyright owners and the public interest. Bollier is of the view that copyright protection is "seriously out of whack".[171] This means that intellectual property has gone beyond reasonable boundaries and that the extensive protection that is now granted to copyright owners is reducing creativity.[172] Therefore as much as the positive effects of copyright law are recognized, the major one being to encourage creativity, the negative impacts are also rising (that is creativity may be being suppressed). The failure to protect parody is an indication of how the rights of the copyright owner are being emphasised to the detriment of the public interest therefore pointing to an imbalance of the rights of the respective parties.

From the above, it can be seen that both the copyright owner and the parodist have vital functions to perform in society. This is because both the copyright owner and the parodists contribute to society making them both a valuable asset to the world. To exclude any one of them in law would be to deprive society of worthy creations. It is therefore necessary that both the copyright owners and the parodists of our societies be accommodated within the law. This then raises the issue of how this should be done.

4.2 Accommodating competing interests

Since it has been clearly established that both the copyright owner and the parodist are needed in society, despite the apparent conflicts that exist in between both these parties; the next question which needs to be considered is how to accommodate both the interests of the parodists and the copyright owners. As this is an area of the law which has not been developed in South Africa several other jurisdictions will be considered in order to establish how they have accommodated these conflicting interests.

[171] Bollier *Brand Name Bullies* 12.

[172] Ibid.

5. A COMPARATIVE STUDY

As pointed out in the introduction, the issue of conflict between the parodist and the copyright owner has been subject to a number of court decisions and academic writings in several other jurisdictions. Several writings and court decisions from three jurisdictions will now be considered in order to ascertain whether there are any lessons that South Africa can learn.

The jurisdictions to be considered are the following:

- The United States of America (USA)
- Canada; and
- The United Kingdom (UK)

5.1 The United States of America

Unlike South Africa, the USA courts have had the opportunity to deal with issues of parody on many occasions. The USA has therefore developed a whole body of law relating to parody from which South Africa can learn. A discussion of copyright law in the United States will follow, together with an analysis of the treatment of parody by USA courts.

5.1.1 The law of copyright

Copyright law in the USA is based upon the legislation of Congress.[173] Congress was granted legislative powers in the Constitution of March 4, 1789, to make copyright laws.[174] In this regard, the Constitution authorizes Congress "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".[175]

The USA copyright system is based on "the fundamental premise that vindication of the economic interests of authors will ultimately maximize the information available to the public".[176] Therefore the goal of American copyright law is "utilitarian" that is, to maximize

[173] James et al *Copyright* 629.

[174] US Constitution Article 1 section 8. See also MB Nimmer *Copyright* 3 ed (1985) 14; James et al *Copyright* 629.

[175] US Constitution Article 1 section 8.

[176] Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' 1398.

the public's access to information, through providing economic gain as an incentive to stimulate more creation.[177]

The first copyright statute in the USA was passed in 1790.[178] Several revisions of the Act took place until the passing of the Copyright Act of 1909.[179] Thereafter, there were further revisions, until 1976, at which time the current Copyright Act was passed, that is the Copyright Act of 1976.[180]Copyright law in the USA can thus be divided into two parts. That is, copyright law prior to 1976 and copyright law after 1976.

Prior to the introduction of the 1976 Copyright Act, copyright law was governed by both common law and statute.[181] Under this regime, unpublished works were protected automatically by common law, and this protection accrued at the moment of creation of the work.[182] If the work was subsequently published, the common law protection was extinguished, and protection by statute would then accrue.[183] Therefore the common law of copyright and the copyright statute existed alongside one another. However after the introduction of the Copyright Act of 1976, the common law method of protecting copyright was terminated and only statutory protection became available as a means of protecting copyright.[184] Therefore, both published and unpublished works are now protected under the 1976 statute.

One of the defences to a claim of copyright infringement under USA copyright law is the defence of fair use.

The USA Copyright 'fair dealing' provision provides as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for purposes such as criticism, comment,

---

[177] F Tabatabai 'A tale of Two Countries: Canada's Response to the Peer-to- Peer Crisis and What it Means for the United States' (2005) 73 *Fordham LR* 2321, 2326.

[178] James et al *Copyright* 629.

[179] Ibid.

[180] Ibid.

[181] Nimmer *Copyright* 32.

[182] Ibid.

[183] Ibid.

[184] Ibid.

news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The four factors listed in s107 of the American Copyright Act of 1976 first arose from the case of *Folsom v Marsh*[185]. This case first listed these factors as criteria used to determine fair use. These factors were then later codified in s107.[186]

The concept of fair use has been described as "the most troublesome in the whole of copyright law".[187] This could possibly be due to the failure of the legislature to define fair use.[188] The factors listed in s107 Copyright Act 1976, are not aimed or intended to define fair use.[189] Instead, they were merely intended to be "guidelines".[190] Furthermore, the factors listed in s107 are not exhaustive; instead they are simply illustrative of what may be considered to be fair use.[191]The factors are defined in general terms in order to leave courts

[185][1841] 9 Fed. Cas. at 348.

[186] R Saha & S Mukherjee 'Not So Funny Now Is It?'.

[187]*Dellar v Samuel Goldwyn, Inc.*, 104F.2d 661 (2d Cir. 1939).

[188]US H.R. Rep. No. 94-1476 (1976) 65: states that "no generally applicable definition [of fair use] is possible".

[189]Nimmer *Copyright* 368 .

[190] TG Newby 'What's Fair Use Here Is Not Fair Use Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?' (1999) 51 *Stanford Law Review* 1633, 1639.

[191] Nimmer *Copyright* 368.

with discretion as to the application of the factors.[192] It is also important to note in this regard that the Act does not give courts any guidance as to how much weight should be attached to each of the factors.[193] The weight attached to each factor would thus depend on the particular circumstances of the case.[194] The use of the words "include" and "including" in s107 indicates that the statute was intended to be used in a flexible manner and strict application is not what is required.[195] In interpreting s107, the courts seem to have realised that Congress intentionally intended that the fair use doctrine be flexible so as to continuously develop as a common law doctrine.[196]

5.1.2 Approach to parody

Parody is not specifically listed as a purpose falling under the fair use doctrine in the USA. The purposes that are listed are those of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship and research.[197]However, legislative history (as evidenced by the House Report No. 94-1476) shows that parody is included as an example "of the sort of activities the courts might regard as fair use".[198] It may be arguable that inclusion of parody as an example of fair use in the House Report mentioned above demonstrates that the legislatures had recognised parody as being able to pass the four factors listed in s107.In turn, this may be illustrative of the intention of Congress to leave the doctrine of fair use to apply flexibly, as mentioned above.

According to Banko, because parody was never listed as a purpose falling under fair use in the Act, it necessarily follows that a defence of parody must be considered individually, in

[192] Newby 'What's Fair Use Here Is Not Fair Use Everywhere' (1999) *Stanford Law Review* 1639. See also Nimmer *Copyright* 368.

[193] L M Babiskin 'Oh Pretty Parody: Campbell v Acuff-Rose Music, Inc.' (1994) 8 *Harvard Journal of Law and Technology*193, 195.

[194]US H.R. Rep. No. 94-1476 (1976) 65.See also Babiskin 'Oh Pretty Parody' (1994) *Harvard Journal of Law and Technology* 195.

[195] Babiskin 'Oh Pretty Parody' (1994) Harvard *Journal of Law and Technology* 195.See also Newby 'What's Fair Use Here Is Not Fair Use Everywhere' (1999) *Stanford Law Review* 1639: The use of the word 'shall' is indicative of the liberty the courts have when determining whether a particular use of a work is fair.

[196]Babiskin 'Oh Pretty Parody' (1994) *Harvard Journal of Law and Technology* 195.

[197]S107 Copyright Act of 1976.

[198]US H.R. Rep. No. 94-1476 (1976) 65. A study of the cases below will also show that American courts have accepted parody as a legitimate form of fair use.

light of the statutory factors, reason, and experience and also in consideration of principles generated by precedent.[199]

A study of the cases reveals that there are two models which the courts use to determine whether there has been fair use. These two models are the economic model and the reasonableness model.[200]Under the economic model of fair use, fair use is determined by the social value of the work and the commercial harm to the original works that is, whether it competes with the market of the original work.[201] It therefore seems that the economic model turns on the determination of whether the secondary work (of the parodist) has substituted the market of the original work.[202] On the other hand, the reasonableness model determines fair use according to the amount of work that has been taken from the original work.[203]

The Harvard Law Review Publishing Association argues that parody cases have been influenced more by the reasonableness model.[204] The problem with using the reasonableness model is that the focus on the amount taken is not in line with promoting the utilitarian purpose of copyright law in America, namely, to increase public access to information.[205] For example, a parody building onto a prior work yet not substituting the prior work commercially, would qualify for protection according to the economic model; but under the reasonableness model the same parody may be regarded as unfair due to the fact that the parodists have relied on substantial portions of the original works when making their

[199] J R Banko 'Schlurppes Tonic Bubble Bath: In Defense Of Parody' (1990) 11:3 *U. Pa. J. Int'l Bus. L.* 627, 640.

[200]Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' (1984) *Harvard LR* 1398.

[201] Ibid.

[202] See *Harper & Row Publishers Inc. v Nation Enterprises*, 471 U.S. 539 (1985) where economic harm was considered a fundamental factor when considering the fairness of a use. See also *Sony Corp. of America v Unit City Studios* 464 U.S. 417 (1984).

[203] Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' (1984) *Harvard LR* 1400: The "amount taken" factor is important here, it determines whether the use is reasonable, and accordingly whether it is fair.

[204]Ibid. For example see *Quinto v Legal Times of Washington, Inc*, 506 F. Supp. 554(D.C.C 1981) where the court determined fairness in accordance with the amount taken.

[205] Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' (1984) *Harvard LR* 1401.

parodies.[206]Accordingly, the reasonableness model does not help towards the goal of increasing public access to knowledge and creativity.[207]

According to Banko, the USA's copyright regime in dealing with parody establishes three things: first, the parody defence is consistent with the provisions of the American Copyright Act. Second, the parody defence allows for freedom of expression for the producer of the parody, the public and the consumer and thirdly the parody defence does not prevent those whose works have been infringed for purely commercial reasons from being protected from harm.[208] Accordingly Banko holds that parody is a legitimate, fair use of copyrighted material even where the parody has commercial value-as long as there is no injury in terms of commercial harm that is caused by the work of parody to the copyright holder.[209] In the opinion of Banko, where there is no direct competition between an original and a secondary work, the social value of parody will outweigh the copyright holder's interests in preventing his or her work from use by a parodist.[210]As it will be seen below, this in essence has been the approach of the USA courts in cases concerning parody.

5.1.3 Case Law

The leading case in America is *Campbell v Acuff-Rose, Inc* 510 US 569 (1994) where the American Supreme Court examined the four factors for fair use in great detail and applied them to the issue of parody. The principles established in this case were then later relied upon in *Suntrust Bank v Houghton*[211] and in *Salinger v Colting*[212].

5.1.3.1 Campbell v Acuff-Rose

As pointed out above this is the leading case dealing with fair use and parody in the USA. The facts of the case are as follows. The respondents (Acuff-Rose) were the copyright owners of a song written by Roy Orbison and William Dee. The song was entitled "Oh, Pretty Woman". A rock band called "2 Live Crew" wrote a song entitled "Pretty Woman". The

---

[206] Harvard Law Review Publishing Association 'The Parody Defense To Copyright Infringement' (1984) *Harvard LR* 1400.

[207] Ibid.

[208] Banko 'Schlurppes Tonic Bubble Bath: In Defense Of Parody' (1990) *U. Pa. J. Int'l Bus. L.* 630.

[209] Ibid.

[210] Ibid.

[211]*Suntrust v Houghton Mifflin Co.*, 252F. 3d1165 (11th Cir. 2001).

[212]607 F.3d 68 (2d Cir. 2010).

manager of the band informed Acuff-Rose that the song “Pretty Woman” was a parody of “Oh Pretty Woman” and that they were willing to give credit to Acuff-Rose, Dees and Orbison for the authorship and ownership of the song. The manager also informed them that they were willing to pay a fee to make use of the song. Acuff-Rose refused the permission for the use of the song. Nonetheless, 2 Live Crew released the song, whilst acknowledging Dees and Orbison as the authors and Acuff-Rose as publisher of the song. Nearly a year after the release of Pretty Woman Acuff-Rose, and its recording company Luke Skyywalker Records, instituted an action for copyright infringement.

The District Court found that the band had made fair use of the original song.[213] This court found that the commercial purpose of the parody did not mean that a defence of fair use could not succeed and granted summary judgment for 2 Live Crew.[214]

The case went on to be heard in the Court of Appeals for the Sixth Circuit, where the decision of the district court was reversed and remanded.[215] The Court of Appeals stated that the District court did not take proper consideration of the fact that all commercial use purposes are presumably unfair.[216] The court then went to hold that the commercial nature of the parody as a consideration in the first of the four factors in s107, weighed against a finding of fair use.[217] The court held that 2 Live Crew had taken the “heart of the original” song and thus had taken substantially from the original work.[218] After noting that commercial harm to the market of the original was established due to the presumption of commercial use of the parody, the court ultimately found that a case for fair use could not succeed.[219]

The matter then proceeded to the Supreme Court where the court again concerned the issue of whether 2 live Crew’s commercial parody could constitute fair use.[220] The Supreme Court analysed each of the fair use factors in s107 to decide on the issue of fairness.

[213] *Campbell* (note 20 above) 573.

[214] Ibid.

[215] Ibid 574.

[216] Ibid.

[217] Ibid.

[218] Ibid.

[219] Ibid.

[220] Ibid 571-571.

In considering the first factor, namely, "the purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes", the court stated that this enquiry may be guided by the examples of purposes for fair use given by the preamble in s107.[221] The purpose of this enquiry, the court noted, was to investigate whether the new work only "supercedes the objects" of the original work or it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message".[222]

The court was also of the view that the commercial or non-profit educational purpose of a work is only one element of the first factor.[223] With regards to commerciality of the use, the court was of the opinion that "if commerciality carried presumptive force against a finding of unfairness then the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of s107…since these activities are generally conducted for profit in this country".[224] The Supreme Court thus explicitly rejected the importance that the issue of commerciality was given by the Court of Appeals.

The next factor that the court analysed was the "nature of the copyrighted work".[225]The court stated that this factor requires recognition that some works are "closer to the core of intended copyright protection than others" and thus fair use is harder to establish when works closer to the core of copyright protection are copied.[226]The court found that this factor was not of much value to this assessment since parodies almost always copy publicly known expressive works.[227] It is submitted that the court's interpretation of this factor is reasonable because if this factor had to be given great consideration it would ultimately destroy nearly all cases of parody, as most cases of parody involve works that are well known by the public.

---

[221] Ibid 578-579 .See also s107 Copyright Act 1976.

[222] Ibid 579: therefore essentially asking whether the new work is "transformative". The court noted that a transformative element is not crucial to a finding of fair use , but it is useful in promoting creativity and therefore the court held that the more transformative the work, the less that other factors will count in finding against fair use.

[223] Ibid 584.

[224] Ibid.

[225] Ibid 586 B.

[226] Ibid.

[227] Ibid.

The third factor that the court analysed was that of “the amount and substantiality of the potion used in regard to copyrighted work as a whole”.[228] The court said that with this factor “attention turns to the persuasiveness of a parodists justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use”.[229] The court was in agreement with the Court of Appeals in that what was to be considered here was the value of the underlying work used, namely the “quantity”, “quality” and “importance” of the work.[230] The court further agreed with the Supreme Court in that the relevant question to ask when considering this factor is whether a “substantial” part was copied from the underlying work.[231] The court noted, in attempting to answering this question that a parody must in any case “conjure up” enough of the original work in order for the audience to identify it.[232] However, the court stated that once enough has been taken to ensure that the audience recognizes the work, the reasonableness of any further appropriation, depends on “the extent to which the songs overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original”.[233]

Furthermore, the court noted that copying does not become substantial merely because the part taken was the “heart” of the underlying work.[234]The court was of the opinion that if a less significant part of the original song had been used for the parody, then it is hard to see how its parodic character would have been recognizable.[235] At the same time however, the court made it known that one would not just get away with taking substantial parts of another’s work. Context was to be considered when determining this.[236]The court ultimately

[228] Ibid 586 C.

[229] Ibid 586 C-587.

[230] Ibid 587.

[231] Ibid.

[232] Ibid 588.

[233] Ibid.

[234] Ibid.

[235] Ibid 588-589.

[236] Ibid 589.

agreed that "no more was taken than necessary", and therefore the court found that the copying was not excessive even though the heart of the original was taken.[237]

The last factor that the court considered was that of "the effect of the use upon the potential market for or value of the copyrighted work".[238] The court noted in this regard that what needed to be considered here was "whether unrestricted and widespread conduct of the sort engaged in by the defendant…would result in a substantially adverse impact on the potential market" of the original.[239] The court stated that this factor also required the consideration of any potential harm to the market of the derivative works of the original.[240] The court was of the opinion that a parody would not disturb the market of the original work as a parody has different functions to the original.[241]The court was of the view that the Court of Appeals erred in finding that there was harm to the market of the original, as there was no evidence showing such harm to the original caused by 2 Live Crew's parody.[242] The court ultimately reversed the Court of Appeals finding. This case was then heavily relied upon in a subsequent decision involving a parody of a well-known book entitled *Gone With The Wind*.

5.1.3.2 Suntrust Bank v Houghton

The facts of the case are as follows. Suntrust is the trustee of Michell Trust which holds copyright in *Gone With The Wind* (GWTW).GWTW is one of the most popular books every written second only to the Bible.[243]This is a story, written by Margaret Mitchell in 1936 about the south in America at the time of the American Civil War. It focuses primarily on a heroine called Scarlett who faces many challenges, one of them being the jealousy she experiences when the man she loves, a character by the name of Ashley, marries her cousin Melanie. In 2001 Alice Randall wrote a novel entitled *The Wind Done Gone* (TWDG) which was written as a criticism of the way in which GWTW had depicted the events of the American civil war. The story was told from the perspective of a slave (Cynara) and presented a very different

---

[237] Ibid: The court noted that the band had departed "for its own ends" in producing some distinct features such as sounds, keys and also in changing its drumbeat.

[238] Ibid 590 D.

[239] Ibid.

[240] Ibid.

[241] Ibid 591.

[242] Ibid 593.

[243]*Suntrust Bank* (note 207 above) 1259.

picture of the highly romanticised version of how slaves were treated in GWTW. Suntrust instituted an action for copyright infringement against Randall, alleging four things:

- that TWDG refers to GWTW in its foreword;
- that TWDG appropriates characters and their traits as well as relationships of GWTW;
- that TWDG copies plots and scenes from GWTW; and
- that TWDG copies verbatim dialogues and descriptions from GWTW.

Houghton-Mifflin (publisher of TWDG) asserted that TWDG was a parody of GWTW and was protectable under the fair use doctrine.

The question to be decided by the court in this case was whether the publication of TWDG (a fictional novel which the author admitted was based on GWTW) ought to be prohibited from publication because of the alleged copyright infringement.[244] In order to answer this question the court focused on the defence of fair use, however, before the court looked into the doctrine of fair use, it made some important observations with regards to copyright law. The court considered the idea/expression dichotomy and stated that this dichotomy incorporates the First Amendments goal of encouraging debate and the free flow of ideas.[245]The court accepted that holding a person liable for copying another's expression does not impede the First Amendment as the public can make free use of ideas. He or she could just not make use of someone else's expression of those ideas.[246]

With regards to parody the court relied heavily on the lessons in the *Campbell* case regarding the issue of fair use.[247]The court reiterated what was said in *Campbell*, namely that all four factors had to be considered and the results from this had to be assessed in light of the purposes of copyright law.[248] Before discussing the four factor test of fair use, the court began with looking at whether a "parodic character may be reasonably conceived".[249] The

[244] Ibid 1259.

[245] Ibid 1263-1264.

[246] Ibid 1264.

[247] Ibid 1268.

[248] Ibid.

[249] Ibid. Note that this question was asked in the case of *Campbell* (note 20) 582.

court noted that the court in *Campbell* had defined parody confusingly as it first seemed to suggest that parody had to have a comic effect, and then later it described parody in wider terms in that it was a commentary on the original work.[250] The court here chose the latter definition of parody and said "we will treat a work as parody if its aim is to comment upon/criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to a scholarly, journalistic work".[251]In the light of this meaning of parody, the court decided that TWDG was a criticism of the depiction of slavery in GWTW and that the way in which Randall chose to convey this criticism meant that the work amounted to a fair use of the original work.[252]

The court then went on to assess each of the four factors in turn. With regards to the first factor the court found that there were two aspects to this enquiry. One was whether TWDG was for commercial or non-profit educational purposes, whilst the other was whether TWDG was transformative.[253] In looking at the former aspect the court stated that TWDG clearly had commercial value.[254] The court stated that the fact that TWDG was intended for profit weighs against a finding of fair use, however in this particular case, TWDG's "profit status is strongly overshadowed and outweighed in view of its highly transformative use".[255]The court followed the *Campbell* reasoning with regards to this aspect, that is, that the other factors weighing against fair use will be less significant if the new work is transformative.[256] In assessing the transformative value of the work, the question to be answered (as was stated in *Campbell*) was whether the new work only supersedes the original or it adds something new.[257]

The court noted that the transformative enquiry was double-sided in this case.[258] This is because in one way, TWDG was transformative in that the story was told from the

[250] Ibid 1268.

[251] Ibid 1268-1269.

[252] Ibid 1269

[253] Ibid.

[254] Ibid.

[255] Ibid.

[256] Ibid. Here the court noted that transformative uses are given leeway as they promote the object of copyright.

[257] Ibid.

[258] Ibid.

perspective of one of the slaves instead of from the perspective of the plantation owners added new meaning to GWTW yet at the same time it also relied heavily on GWTW.[259]

The court described TWDG as being "a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of GWTW".[260] The court found that in the last half of TWDG a completely new story is told and the direct referral to Mitchell's plot and its characters was done so as to criticize GWTW.[261] In light of these factors the court found itself in a position where it could not contend that Randall did not work up something new.[262]

The court, as in the *Campbell* decision, did not look into the nature of the copyrighted work as this factor was found not to carry much weight in cases of parody.[263]

With regards to the "amount and substantiality of the portion used" the court noted that although TWDG had taken extensively from the original, the portions taken were however transformed so as to acquire new significance.[264]

In determining the effect on the market value of the original, the court again referred to *Campbell*, that is, it was not the impairment of the market which caused harm; instead, it was the usurpation of the market.[265]The court ruled that the work was protected by the defence of fair dealing.

5.1.3.3 Salinger v Colting

This is another case which deals with parody. The interesting thing about this case is that although the court relied on the four factors as discussed in the *Campbell* case, the court concluded that the work was not a parody deserving of protection. This is different to the above two cases where the court found that the new works were deserving of protection.

Salinger published *The Catcher in the Rye* which became really successful. 60 years later Colting wrote *60years later: coming through the Rye* (*60 years later*). Colting published *60*

---

[259] Ibid.

[260] Ibid 1270.

[261] Ibid.

[262] Ibid 1271. The court then restated that the use of the original work was acceptable because parody had to use some of the original work to make its point.

[263] Ibid 1271.

[264] Ibid 1272.

[265] Ibid 1274.

years later without seeking and acquiring the permission of Salinger. Salinger then brought an action against Colting because of the extreme similarities between the two works. Salinger also alleged that the defendant tried to market *60 years later* as a sequel to *The Catcher in the Rye* as the back cover of one of its editions described the novel as "a marvellous sequel to one of our most beloved classics".[266]Colting however denied this.

The court in this matter also evaluated the fair use factors. With regards to the first factor, the court held that *60 years later* was not sufficiently transformative.[267] The court was also of the view that the work did not parody the work itself; at most, the work parodied the author of *The Catcher in the Rye*.[268] The court drew from the judgment in *Campbell* in concluding that the comment or criticism must be towards the work itself at the least.[269]

Some of the reasons why the court found that the work was not transformative include the public statements made by the defendant stating that his work was a sequel and the borrowed work as compared to the transformative elements in Catcher were too high to make the entire work a transformative one.[270]The commercial nature of the secondary work also mitigated against a finding of fair use.[271] The second factor of the fair use test was found to be of not much assistance, as it was found in the case of *Campbell* and in *Salinger v Colting*.[272]

When considering the third factor the court found that Colting had taken more than necessary for the supposed purpose of criticizing Salinger.[273]

In evaluating the fourth factor the court found that this factor slightly weighed towards the original author's advantage.[274] This was because even though the secondary work was not likely to have a negative impact on the sales of the original work, an unauthorized sequel could possibly impact on the market for any future authorized sequel.[275]

---

[266]*Salinger* (note 208 above) II.

[267] Ibid III.

[268] Ibid.

[269] Ibid.

[270] Ibid.

[271] Ibid.

[272] Ibid.

[273] Ibid.

[274] Ibid.

[275] Ibid.

The court ultimately found when assessing the four factors as set out in s107 that none of the factors supported a case of fair use and thus the defence of fair use could not succeed.[276]The court granted Salinger a preliminary injunction.

The matter then proceeded to the Court of Appeals. In this court, the court noted that it was difficult to predict whether a defence for fair use was likely to succeed as it depended heavily on the judge's perceptions.[277] The Court of Appeals, although finding that the District court had only considered the first fair use factor, agreed with the District court in that the defendants were unlikely to succeed on their fair use defence.[278]

5.1.4 Concluding remarks regarding the cases

The *Campbell* case set a benchmark for how the four factors in s107 of the Copyright Act were to be applied in cases of parody. This can be seen by the subsequent cases which rely heavily on the reasoning of the court in *Campbell*. Saha and Muckerjee agree that the American courts have "remained scrupulously faithful to the Campbell ratio".[279]Friedman is also in agreement with this opinion and states that the courts have "applied the same analytical framework", however, "the results are not always easy to reconcile".[280] Therefore even though the same rule of law has been applied the conclusion of these cases has not been the same. Friedman states that the outcome of the cases is heavily dependent on how a judge chooses to apply the ratio in *Campbell,* that is, whether the judge's application of the factors is strict or lenient.[281]It seems that the outcome of the first factor is directive of whether the fair use defence will succeed or not and thus the more transformative the work the more likely that it will be regarded as fair use.[282] For example, in *Campbell* the court considered the work to be transformative; in *Suntrust Bank*, the court also considered the parody to be transformative; however in *Salinger* the court did not consider the work to be transformative. The outcome of these cases (that is whether the new work was fair use or not) then followed the question of whether the new work was transformative; thus the transformative works

[276] Ibid A.

[277] Ibid.

[278] Ibid A IV.

[279]Saha & Mukherjee 'Not So Funny Now Is It?'4.

[280]AR Friedman 'Copyright Fair Use: A Comment On the Parody Defense' (2009) 242 *New York LJ* 1, 1.

[281]Friedman 'Copyright Fair Use' (2009) *New York LJ* 2.

[282]Friedman 'Copyright Fair Use (2009) *New York LJ* 1.

(*Campbell* and *Suntrust Bank*) were considered to be fair use and the non-transformative work (*Salinger*) was not considered as fair use.

5.2 The United Kingdom (UK)

The UK provision on fair dealing is similar to the South African fair dealing provision. Until recently, the UK and South African law on fair dealing was very similar but there have been some development in the UK which have not occurred in South Africa.

5.2.1 The Law of Copyright

In the UK, copyright protection is provided for in the Copyright, Designs and Patents Act 1988 (herein after referred to as the CDPA). The CDPA repealed and replaced the Copyright Act of 1956.[283] The reason for this was that the 1956 Act was "both complicated and badly structured".[284] Another issue which indicated that there was a need for a new Act was the fast development of technology and the need for copyright law to keep up with these new developments.[285]

The fair dealing doctrine in the UK is said to be rooted in the doctrine of "fair abridgement".[286] Fair abridgment was first introduced in *Gyles* v. *Wilcox, Barrow, and Nutt* (1741) 2 Atk. 141.[287] The court explained that a "real and fair abridgment . . . may with great

[283]Groves *Copyright and Designs Law* 2.

[284]Ibid.

[285]See Groves *Copyright and Designs Law* 17-18 for some examples of such technological changes namely, the video cassette recorder and the invention of the computer. Groves explains that the video cassette recorder brought quantitative changes due to technology, in that it caused more people to watch films. However, it also brought about time shifting which is a qualitative change due to technological changes. The invention of the computer was also a technological development that necessitated an adaptation of copyright laws as its creation resulted in new ways of exploiting copyrighted works. These examples demonstrated the need for copyright laws to adapt to both "qualitative and quantitative" changes.

[286] S H Song 'Reevaluating Fair Use in China- A Comparative Copyright Analysis of Chinese Fair Use Legislation, The US Fair Doctrine, And The European Fair Dealing Model' (2011) 51 *IDEA* 453, 468.

[287] R Deazley 'Commentary on Gyles v Wilcox (1741)' in Primary Sources of Copyright ed L.Bentley & M.Kretschmer at 1450-1900 available at http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_uk_1741 (accessed on 5 January 2013).

propriety be called a new book, because the invention, learning, and judgment of the author are shown in it, and in many cases abridgments are extremely useful".[288]

Chapter III of the CDPA allows for certain acts that would normally constitute an infringement to copyrighted works, to be exempt as such. Fair dealing, which is codified in ss29 and 30 of the CDPA in the UK, is one such exception to copyright infringement. It allows for certain specified acts to be done without there being infringement of copyright-provided that the dealing is fair. Fair dealing is permitted for the following purposes: research or private study, criticism or review and news reporting.[289] It is thus irrelevant whether the use is fair in general or is fair for purposes beyond the enumerated purposes.[290] In each of these purposes, however, fair dealing is the overriding requirement.[291] This means that once a specific purpose is found, fairness of the use still needs to be established. Fair dealing is not defined by the Act. It has been submitted however that it is a question of "degree and impression".[292] Guidance as to what factors may be used to determine what is fair may be obtained from case law.[293] Some of these factors are that of quantity and quality of the copyrighted work that was used, the use that was made of the work (particularly whether the secondary work is competing commercially with the copyrighted work, and the motive of the alleged infringer.[294]

The defence of fair dealing is available only to acts that comply or fit the listed purposes within the fair dealing provision. The limited purposes are the very reason that the fair dealing doctrine has been under attack.[295] The doctrine of fair dealing in the UK, as will be discussed later, is therefore very similar to the South African fair dealing defence.

---

[288] As quoted in M Sagg 'The pre-history of fair use: English Copyright from 1710 to 1828' (2011) 76 *Brooklyn LR*1, 17.

[289] S29-30 Copyright Designs and Patents Act 1988.

[290]Brenncke 'Is "fair use" an option for U.K copyright legislation' at 7.

[291]Ibid.

[292]Ibid.

[293]*Hubbard v Vosper* (1972) 2 QB 84; Newspaper *Licensing Agency v Marks & Spencer* (1999) E.C.C. (Ch.) 425; *Hyde Park v Yelland* (2001) Ch. 143.

[294] Ibid.

[295] Brennecke 'Is "fair use" an option for U.K copyright legislation?' at 9; C Craig 'The Changing Face of Fair Dealing in Canadian Copyright Law' at 443, available at http://www.irwinlaw.com/content/assets/content-commons/120/Three_01_Craig.pdf (accessed on 21 June 2012). See also Tabatabai 'A tale of Two Countries' (2005) *Fordham LR* 2328-2329.

However, Brenncke is of the opinion that with regards to whether the dealing is fair, the UK copyright system is similar to that of the US fair use factors as the factors that were developed by the English courts to determine fairness resemble the four factors listed in s107 of the Copyright Act of 1976.[296]The difference here is that US courts are permitted to consider any other factor they consider is relevant to the case at hand, even if it is not specifically mentioned in the section. Accordingly, it has been suggested by Brenncke that if the fair use test were to replace fair dealing in the CDPA, then there would be no need to integrate the four factors into the copyright legislation.[297]The provision could simply contain a list of the purposes for which fair dealing may be claimed and the determination of fairness could then be left to the factors that were developed by the English courts.[298]

To claim fair dealing in UK copyright law, 3 things have to be shown by the alleged infringer: firstly, that the use falls within one of the listed purposes within the Act; secondly, that the dealing was fair and thirdly, that in the case of criticism, review and news reporting there must be sufficient acknowledgment of the original work.[299]

5.2.2 Approach to parody

In 2005 Andrew Gowers (who has been part of the Head of Communications in Lehman Brothers since 2006 and prior to that an editor of the Financial Times) was asked to review the UK Intellectual Property system to establish whether the system was fit for purpose in an era of globalisation, digitisation and increasing economic specialisation and to make recommendations.[300] Gowers found that the current fair dealing provisions were overly stringent[301]and recommended that more permitted purposes, such as parody should be incorporated as a permitted purpose so as to increase the flexibility of the current fair dealing provisions.[302]It must be noted however that Gower did not recommend that the UK introduce a fair use doctrine similar to that found in the USA.

---

[296] Brenncke ' Is "fair use" an option For U.K copyright legislation?' at 8.

[297]Ibid.

[298]Ibid.

[299] Song 'Reevaluating Fair Use in China' (2011) *IDEA* 469. These factors mirror the factors used to determine fair dealing under the Canadian Copyright Act 1985(see 5.3 below).

[300]Gowers Review of Intellectual Property, at foreword.

[301]Gowers Review of Intellectual Property, at 49.

[302]Gowers Review of Intellectual Property, at 68.

Unfortunately, however the Intellectual Property Office's (IPO), in its second stage consultation document rejected Gower's recommendation for the introduction of a new parody exception within copyright law.[303]The basis for its rejection was that the Copyright Act of 1988 was well equipped to accommodate parody as it currently stands and therefore a specific defence for parody is not needed.[304] The IPO stated that parody under the current regime is accommodated in three circumstances: If firstly, the parodist uses an insubstantial amount or parts of the underlying work[305]; or secondly, if parodist used the copyrighted work for purposes of criticism[306]; or thirdly, the parodist obtains a license and is granted permission to use the work in the intended manner.[307]

Deazley refutes all three of the IPO's reasons as to why a defence for parody is not needed. The author submits that the first reason for the rejection of a parody defence cannot be relied upon by parodists because parody often requires that a substantial part of the underlying work be taken in order to conjure up the original.[308] With regards to the second situation, the author states that parody that is not critical (such as when it is just comical) will not be protected and so the parodist cannot rely on this defence.[309] Lastly, the author notes that the third situation for lawful parody cannot be relied upon since copyright owners are often not willing to license critical and or offensive parodies.[310]

In May 2011, Ian Hargreaves[311]submitted a review of the UK's intellectual property laws.[312] The aim of the review was to adapt the intellectual property framework in the UK so as to

---

[303] Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions (Intellectual property Office, 2008) 45:"We do not accept that an exemption for parody is necessary".

[304]Ibid.

[305] s16 (3) (a) CDPA.

[306] s30 (1) CDPA.

[307]Taking Forward the Gowers Review of Intellectual Property; Second Stage Consultation on Copyright Exceptions 42-45 .Seel also Deazley 'Copyright and Parody' (2010) *The Modern LR* 786.

[308]Deazley 'Copyright and Parody' (2010) *The Modern LR* 788.

[309]Deazley 'Copyright and Parody' (2010) *The Modern LR* 791.

[310]Ibid 792. See also Campbell (note 20 above) 592.

[311] See biography of Ian Hargreaves available at http://www.cardiff.ac.uk/jomec/contactsandpeople/profiles/hargreaves-ian.html: Professor Hargreaves studied journalism and held various positions including being a reporter for the Financial Times and being a director of BBC News. In 2008 he was the director of Strategic Communications at the Foreign and Commonwealth Office.

promote greater innovation and growth of the UK economy.[313]The Hargreaves Review also recommended that a copyright exception for parody should be included in the legislation.[314]A few months later, the UK government announced that it did intend to introduce an exception for parody.[315]This announcement has been welcomed as a positive change for parodists and is also seen as a sign that the role of parody in society is being recognised.[316]

5.2.3 Case Law

Although there is very little case law addressing the issue of parody with regard to copyright law in the UK there are some important decisions which illustrate how the courts have interpreted the problem. The first one was *Glyn v Weston Feature Film Company*.[317] This was then followed by *Joy music v Sunday Pictorial* (1920) Ltd[318]and finally there was *Schweppes v Wellingtons*.[319]These cases highlight the problems that parodists face in attempting to defend their works and thus demonstrate that if parody is recognized as having a valid place in society there is a need to ensure that copyright law accommodates it appropriately.

5.2.3.1 Glyn v Weston Feature Film Company

In this case, the plaintiff, Glyn, was the author of a novel entitled *Three Weeks*. The defendant, Weston Feature Film Company (the Company) was responsible for a parodic film entitled "Pimple's Three Week's (Without the Option)". Glyn alleged that the Company's

---

[312]I Hargreaves 'Digital Opportunity: A Review of Intellectual Property and Growth' available at http://www.ipo.gov.uk/ipreview-finalreport.pdf(accessed on 19 November 2012).

[313]Hargreaves 'Digital Opportunity: A Review of Intellectual Property and Growth' at 1.

[314]Hargreaves 'Digital Opportunity: A Review of Intellectual Property and Growth' at 8: under recommendation 5: "limits on copyright".

[315] Intellectual Property Office, 'Sweeping intellectual property reforms to boost growth and add billions to the UK economy' available at http://www.ipo.gov.uk/about/press/press-release/press-release-2011/press-release-20110803.htm(accessed on 19 November 2011).

[316]See generally Spies 'Revering irreverence' UNSW LJ 1122.

[317] [1915] 1Ch 261 (hereinafter 'Glyn').

[318] [1960] 2 QB 60 (hereinafter 'Joy Music').

[319][1984] FSR 210 (hereinafter 'Schweppes'). There are other cases in the UK which dealt with the issue of parody, for example see *Hanfstaengl v Empire Palace* [1894] 3 Ch. 109 and *Tate v. Fulbrook* 98 L.T.R 706 (C.A. 1908) . However the cases which will be specifically discussed in this section are important as they show how the courts became more concern with the amount taken from an underlying work.

film reproduced substantial portions of his novel and asked the court for an injunction to restrain the Company from selling or authorizing public exhibition of these films or for further infringing his copyright.

The Company claimed that their works were original works and denied that there were similarities between the two works.[320]It also argued that if one work is a serious work and the other is a parody of it, then the parody is not an infringement of the former. Rather it is a separate and new work distinct from the former.[321]

The court expressed its distaste of certain episodes in Glyn's novel and described it as "grossly immoral" and as "nothing more or less than a sensual adulterous intrigue".[322] For this reason the court was of the view that the novel should be debarred entirely from obtaining protection from the court.[323] The court warned however that their distaste of the novel was not to be a decisive issue to the resolution of the case.[324]Ultimately the court found that large parts of the film were works that were not involving the novel and vice versa.[325] After these considerations the court decided that the film does not infringe copyright in the novel.[326] The court also stated that a "burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity".[327]

5.2.3.2 Joy Music v Sunday Pictorial (1920) Ltd

This particular case involved a newspaper article which contained a parody of a popular song entitled "Rock-a-Billy". The parody was related to the subject matter of the article. The parody of the song was described as the writer's version of the song and the writer acknowledged the music publishers as copyright holders of the song. The similarity that was alleged between the parody and the original song was that the parody contained the words

[320]*Glyn* (note 313 above) 263.

[321] Ibid.

[322] Ibid 269.

[323] Ibid.

[324] Ibid.

[325] Ibid 267.

[326] Ibid 268.

[327] Ibid.

"Rock-a Phillip, rock" whereas the chorus of the original work (the song) used the words "Rock-a-Billy, rock".

The plaintiff (Joy Music Ltd.) was the copyright owner of the song "Rock-a-Billy, rock", sought to restrain the parody from being published on the grounds that the parody was a reproduction of a substantial part of the original work and therefore was an infringement of copyright.

The court relied on the dictum in *Glyn v Weston* which was "whether the 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".[328].

The court asked whether the defendant had reproduced a "substantial part of the work", in order to answer the question of mental labour.[329]According to the court, this was a matter to be determined by fact.[330]

Ultimately the court held that the article was a new work that was derived from the underlying work (Rock-a-Billy),[331] but that there was "sufficient independent new work by Paul Boyle" so as to make it a new original.[332] It was held, therefore, that there was no copyright infringement in this case.

5.2.3.3 Schweppes v Wellingtons

This case represents a departure from the previous case. In this case, the court completely rejected McNair J's approach in the *Joy Music* case.

In this case the plaintiff (Schweppes) claimed copyright infringement because they argued that the defendant (Wellingtons) was using labels which were very similar to their labels. The plaintiff's labels had the trademark "Schweppes" as a label and the Wellingtons used a similar trademark but changed the word Schweppes to "Schlurppes". The defendants' claimed that their label was made with the purpose of being a parody of the plaintiff's label.

[328]*Joy Music* (note 314 above) 21.

[329] Ibid 25.

[330] Ibid 28.

[331] Ibid 34-35.

[332] Ibid.

On the issue of infringement, the court asked the question whether the defendant's label is similar so as to be a "reproduction of a substantial part of the plaintiffs" work.[333]The court suggested that to make this determination, both labels should be looked at, at the same time.[334] The court noted in this regard that artistically, the layout of the labels were "virtually identical".[335] The judge noted that there was no doubt that the defendants work had been a reproduction of a very substantial part of the plaintiffs work.[336]

The defence relied on McNair J's decision in *Joy Music*, and tried to convince the courts that the appropriate test was whether the author invested enough "mental labour" on the work so as to produce an original.[337]

Falconer however did not agree with this test. He suggested that "the test every time, is, as the statute makes perfectly plain: has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work."[338] The judge explained that the fact that a defendant has invested labour so as to produce something original is an irrelevant consideration if ultimately that work results in a reproduction of a substantial part of the plaintiffs work.[339]

In order to find a basis of the test employed by McNair J in *Joys Music*, Falconer J evaluated the reasoning of McNair J and the test used by McNair J to make his decision.[340] Falconer concluded that McNair had employed the "mental labour' test because he had found no reproduction of a substantial part of the plaintiff's work in the first place, and therefore when he employed the "mental labour" test he meant that what had been reproduced was original work in that there was no reproduction of any substantial part of the plaintiffs work.[341] Falconer stated that if this was not the reason behind the "mental labour" then the decision in *Joy Music* was wrong.[342]Falconer J found ultimately that the defendant had no defence to a claim for copyright infringement.[343]

---

[333]*Schweppes* (note 315 above) 211.

[334] Ibid.

[335] Ibid.

[336] Ibid.

[337] Ibid 212.

[338] Ibid.

[339] Ibid

[340] Ibid 213.

[341] Ibid.

[342] Ibid.

5.2.4 Concluding remarks regarding the cases

In the *Glyn* and *Joy Music* case the courts recognised the ultimate test for infringement to be that of substantiality; however the courts used the mental labour test in order to answer the issue of substantiality.[344] Falconer J, in the *Schweppes* decision, did not follow the mental labour test and stated that the only test to be applied was the substantiality test. The substantiality test in the UK is problematic as it is unclear what constitutes a substantial part; therefore the position in English law has been described as being "unclear".[345] Further, a more critical problem with the use of the substantiality test is that because parody almost always requires extensive takings from an underlying work, it would always be likely to be in breach of this test.[346]Due to this, it is not practical to test parody according to the amount taken from the underlying work.

According to Deazley, the reasoning of the court in *Joy Music* seems to suggest that when considering "explicitly derivative works", for example parodies, then larger amounts of borrowing from the original is allowed before the threshold for substantiality is triggered.[347]This is because a user producing original works is allowed to copy more extensively than in a situation that involves direct copying such as copying for non-transformative use.[348] This is a positive indication as it shows that the courts recognise the role that parody has to play in society by allowing greater leeway to parodists before the issue of substantiality can be invoked.

5.3 Canada

Canada's fair dealing provision is similar to the South African fair dealing provision in that it specifically lists the types of purposes which may be exempted from copyright infringement as fair dealing. However, like the UK, there have been some extremely important changes to how parody is regulated in Canada.

---

343 Ibid.

344 Chhavi Aggarwal '"Miss Scarlett's License Done Gone"' 4.

345Ibid.

346Deazley 'Copyright and Parody' (2010) *The Modern LR* 788.

347Deazley 'Copyright and Parody' (2010) *The Modern* LR 787.

348Ibid.

5.3.1 The Law of copyright

Copyright in Canada is regulated by the Canadian Copyright Act of 1985 (herein after referred to as the CCA).Fair dealing in the CCA was first introduced to the CCA of 1921.[349] At this stage the fair dealing provision was virtually a “duplicate” of s2 (1) (i) of the Copyright Act of the United Kingdom.[350]This provision provided simply that copyright would not to be infringed by fair dealing of any work for the purposes of private study, research, criticism, review or newspaper summary.[351]

Under the CCA of 1985, the purposes listed under fair dealing were divided into two parts (i.e. research and private study on one hand and criticism, review and news reporting on the other) and were also treated differently.[352]One difference between the two is that for the purposes of criticism, review, and news reporting; certain acknowledgments are required to be made regarding the author of the original work.

The Canadian fair dealing provisions limit fair dealing to these especially listed purposes.[353] Thus the Canadian fair dealing provisions, like the South African fair dealing provisions, do not provide an open ended defence which is capable of adapting to any purpose of fair dealing.

For the defence of fair dealing to succeed under the CCA of 1985, three things had to be established: first, the purpose of the dealing must be listed in the Act; then the dealing must be fair and finally acknowledgment requirements must be satisfied where they are

[349]G D’Agostino ‘Healing Fair Dealing? A comparative Copyright’s Analysis of Canada’s Fair Dealing to UK Fair Dealing and U.S Fair use’ (2010) 53 *McGill LR* 309, 317.

[350]Ibid.

[351]D’Agostino ‘Healing Fair Dealing?’ (2010) *McGill LR* 317-318.

[352] See s29.1 on ‘research or private study’ and s29.2 on ‘criticism, review and news reporting’.

[353] Craig ‘The Changing Face of Fair Dealing in Canadian Copyright Law’ at 439.

required.[354] These factors, which are described as "triple-tiered" approach, stand at an opposite end to the American fair use approach.[355]

The Canadian approach, prior to the recent developments to fair dealing was clearly similar to, if not exactly the same as, the UK fair dealing approach.[356]

5.3.2 Approach to parody

Prior to the recent amendments, the CCA did not contain a specific defence for parody.[357] During this period, some commentators had argued that fair dealing purposes (especially the purpose of criticism) could be interpreted so as to encompass a protection for parody.[358] Reynolds disagreed with this argument; he stated that the view that parody can be accommodated within the purpose of criticism is based on an assumption that all parodies are "necessarily critical".[359]As discussed under the meaning of parody, there are many conceptions of parody; whilst some parodies are critical (such as weapon and target parodies) others are not (for example comic parodies). Therefore Reynolds was of the view that parody was not well accommodated by the provisions of fair dealing, and a defence for parody should be included in the Copyright Act.[360]

---

[354]D'Agostino 'Healing Fair Dealing?' (2010) *McGill LR* 318; see also C Craig 'The Changing Face of Fair Dealing in Canadian Copyright Law' at 440; Song 'Re-evaluating Fair Use in China' (2011) *IDEA* 473.

[355]Craig 'The Changing Face of Fair Dealing in Canadian Copyright Law' at 440. See also Tabatabai 'A tale of Two Countries' (2005) *Fordham LR* 2328:who points out that whilst the Canadian fair dealing provisions "delimits fair dealing to certain purposes", fair use in America does not.

[356]Song 'Reevaluating Fair Use in China' (2011) *IDEA* 473. See also Craig 'The Changing Face of Fair Dealing in Canadian Copyright Law' at 440.

[357] G Reynolds 'Necessarily Critical?' at 1.

[358] The CCH decision was construed by some scholars to mean that the listed purposes of fair dealing, prior to the recent amendments, must be interpreted liberally so that parody may be included, this can be seen by comments made in D'Agostino 'Healing Fair Dealing?' (2010) *McGill LR* 338. See also EA Mohammed 'Parody as fair dealing in Canada; A guide for lawyers and judges' (2009) 4 *Journal of Intellectual Property and Practice* 468,468: author stated that the case of CCH shows that freedom of expression was being upheld by the courts and that parody was being accepted as "a valid form of criticism" under the CCA.

[359]G Reynolds 'Necessarily Critical?' at 2.

[360]Ibid.

In September 2011, the Canadian Government re- proposed that the provision of fair dealing be expanded so as to accommodate parody and satire.[361]In doing so the Copyright Modernization Act (Bill C-11)[362] which proposed changes to s29 of the Canadian Copyright Act of 1985 was introduced[363]. On November 7 2012, some of the provisions of the Bill C-11 were proclaimed and became immediately effective, the most relevant section being section 21 (which includes parody as a purpose for which fair use may be claimed).[364]This development for Canada means that parodists now have a specific defence for their works and may rely on the Copyright Act and not the courts for a finding of fair use.

Generally, the Canadian copyright regime was in favour of the protection of copyright owner's rights and was less concerned about the protection of user's rights.[365]However, even prior to the coming into effect of the Copyright Modernization Act, the copyright regime in Canada had started to become more aware of the rights of user's in copyright issues.[366]This will be illustrated through a discussion of the case law.

5.3.3 Case Law

The cases discussed below were decided before the amendment and serve to highlight the difficulties faced by the parodist and therefore the need for a specific defence of parody. The first case that is discussed is the case of *Compagnie Generale des Etablissements Michelin-Michelin v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada.).*[367] Although this case was not the first case to deal with the issue of parody, it is particularly important as it was the first case to deal with parody in relation to the fair dealing defence.[368]This case was followed by *CCH Canadian Ltd v Law society of Upper*

---

[361] Initially proposed in the Bill C-32, *An Act to Amend the Copyright Act*, 3rd Session, 40th Parliament,(first reading version, 2 June 2010).

[362] Copyright Amendment Act, Chapter 20 of the Statutes of Canada, 2012.

[363] Section 21 of the Bill C-11 states that "fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright".

[364]*Order Fixing Various Dates as the Dates on which Certain Provisions of the Act come into Force* Vol.146, No.23 of 7 November 2012 (Registration SI/2012-85).

[365]Tabatabai 'A tale of Two Countries' (2005) *Fordham LR* 2325.

[366]Ibid.

[367] (1996) 71 C.P.R (3d) 348 (Herein after this case is referred to as 'Michelin v National Automobile').

[368]Parody cases prior to Michelin did not consider the defence of fair dealing. See for example *Ludlow Music Inc. v. Canint Music Corp* (1967) 2 Ex. C.R. 109 and *MCA Canada Ltd. v. Gilberry & Hawke Advertising*

Canada[369] in which the court, although not dealing with the issue of parody, laid down some important rules regarding how the fair dealing defence should be interpreted. Subsequently, in the case of *CanWest Media Works Publications Inc. v Horizons Publications Ltd*[370], where parody was at issue, the court adopted the reasoning in Michelin.

5.3.3.1 Michelin v National Automobile

The plaintiff, Michelin, held certain trademarks and copyright in the term “Michelin” and in the “Bibendum” design. In 1994, the defendant, CAW, tried to unionize the employees of Michelin, and during a campaign, the CAW distributed pamphlets and information sheets that reproduced the word “Michelin” and that displayed Michelin’s corporate logo (the “Bibendum” design or the Michelin Tire Man).

Michelin sought damages on grounds that their intellectual property rights were infringed by the defendants and sought a permanent injunction to restrain CAW from using any of its trademarks and copyrighted work in the future. The defendant claimed that they had the right to freedom of expression. On the issue of copyright infringement, the defendants argued that their work was a parody and therefore did not infringe copyright.[371]

Teitelbaum J evaluated the meaning of parody and found that the term ‘parody’ does not mean the same as ‘criticism’.[372]The defendants urged the court to consider the decision of *Campbell* in the American Supreme Court.[373] However Teitelbaum J was of the opinion that Canadian law was a “different legal regime”[374]to American law and thus even though the Campbell decision was “fascinating”, it was not persuasive in the Canadian courts.[375] Teitelbaum J ultimately rejected the defence of parody, holding that “I cannot accept that I should give the word "criticism" such a large meaning that it includes parody. In doing so, I

Agency Ltd (1976) C.P.R. (2d) 52, where the courts were only considered with whether parody was an infringement of copyright and did not make reference to the fair dealing defence.

[369][2004] 1 S.C.R. 339 (here in after called CCH).

[370] 2008 BCSC 1609 (here in after called Canwest).

[371]*Michelin* (note 363 above) 11.

[372] Ibid 27.

[373] Ibid.

[374] Ibid 28.

[375] Ibid.

would be creating a new exception to the copyright infringement, a step that only Parliament would have the jurisdiction to do".[376]

5.3.3.2 CCH Canadian Ltd v Law society of Upper Canada

As pointed out above, this case does not deal with parody; however it deals extensively with the fair dealing defence and so it is an important case to consider when dealing with any matter where fair dealing is argued. Furthermore, it is important to note that in this case, the court makes reference to American law whereas in the previous decision, the court held that Canadian law was different to American law.

In this case the respondents instituted copyright infringement action against the Law Society in 1993 alleging that the law society infringed copyright when the Great library reproduced copies of the respondents work. The law society denied liability for this claim ,alleging that copyright is not infringed when "a single copy of a reported decision ,case summary ,statute ,regulation or a limited selection of text from a treatise is made by the Great Library staff, or one of its patrons on a self-service copier, for the purpose of research".[377]

The Appellant (Law Society of Upper Canada) had operated the Great Library. The Great Library provided a request-based photocopy service for the members of the law society, the judiciary and authorized researchers. The respondents are publishers of legal material.

The relevant issue was whether the "law society's dealings with the publishers works fell to be excluded under fair dealing s29 Copyright Act…?"[378].In answering this issue the court stated that the Copyright Act has a dual role, that is the "encouragement and dissemination of the arts and intellect and obtaining a just reward for the creator" and it advised that courts should always strive to maintain a balance between these two.[379]

Regarding the issue of fair dealing, the court asked whether the custom photocopying service (where the library staff photocopies extracts from legal material and sends it to the requestor)

[376] Ibid 29.

[377]*CCH* (note 365 above) 3.

[378] Ibid 4.

[379] Ibid 10.

may be protected under fair dealing, which provides a defence against copyright infringement for purposes such as research, or private study.[380]

The court stated that the exception of fair dealing is a "user's right".[381] The court advised that when balancing the two objects of copyright law (copyright owner's interests to a just reward and the user's interest in the dissemination of information) in order to ensure that proper balancing be achieved, fair dealing "must not be interpreted restrictively".[382] The court quoted Professor Vaver, who explained that "users' rights are not just loopholes" and therefore both the owner and the user should be given a "fair and balanced reading" of their rights.[383]

The court stated that s29 of the Copyright Act requires proof that copyrighted works were being used for the purposes of research or private study.[384] The court then went on to suggest that the purpose of research must be given a "large and liberal interpretation in order to ensure that user's rights are not unduly constrained".[385]

The court agreed with the Federal Court of Appeal[386] in that research for purposes of "advising clients, giving opinions, arguing cases, preparing briefs and factums" is still research.[387] The court thus concluded that when lawyers are carrying on their business for a profit, they conduct research.[388]

On the question of fairness, the court stated that fairness depends on the facts of the case at all times.[389]The court referred to Lord Denning in *Hubbard v Vosper*[390] where fairness was

---

[380] Ibid 47.

[381] Ibid 48.

[382] Ibid.

[383]Ibid.

[384] Copyright Act, RSC 1985, cC-42. (Hereinafter 'Canadian Copyright Act').

[385]*CCH* (note 365 above) 51.

[386]*CCH* was first heard in the Federal Court Trial Division; it was then appealed to the Federal Court of Appeal before it came to be heard in the Supreme Court. Note that reference to the Court of Appeal is made to this case when it was heard in the Federal Court of Appeal.

[387]*CCH* (note 365 above) 51.

[388] Ibid.

[389] Ibid 52.

[390] [1972] 1 ALL E.R. 1023 (herein after referred to as the 'Hubbard' case).

said to be a “question of degree”[391]. In this case, the issue was whether the defendant (Vosper) had infringed upon the plaintiff’s (Hubbard) copyright by relying on Hubbard’s book to produce his work.

In the Court of Appeal, Linden JA set out a list of factors to assist in determining whether dealing is fair.[392] These factors were drawn from a combination of the principles from Hubbard and the doctrine of fair use in the USA. The factors to be considered were recommended as follows:

1) The purpose of the dealing
2) The character of the dealing
3) The amount of the dealing
4) Alternatives to the dealing
5) The nature of the work and the effect of the dealing on the work.[393]

With regards to the first factor the court pointed out that in Canada, a work can only be fair if it first fits into any one or more of the listed purposes of fair dealing (research, private study, criticism, review or news reporting).[394] The court stated that to avoid giving the listed purposes a restrictive interpretation, “courts should attempt to make an objective assessment of the user or defendant’s real purpose or motive in using the copyrighted work”.[395]

Court concluded that the photocopying service of the Law Society is an acceptable purpose under s29 of the Copyright Act.[396] The court was of the view that the dealings were fair in consideration of the factors determining fairness.[397]

5.3.3.3 CanWest MediaWorks Publications Inc. v Horizons Publications Ltd

This case is a departure from the reasoning in *CCH.* As discussed above, *CCH* did not deal with parody but it dealt with how fair dealing should be interpreted. The Supreme Court in *CCH* stated that fair dealing was a user’s right and therefore it had to be interpreted liberally

[391]Ibid 1027.

[392]*CCH* (note 365 above) 54.

[393] Ibid.

[394] Ibid.

[395] Ibid.

[396] Ibid 64.

[397] Ibid 73.

in order to give effect to the user's interest. This reasoning, although made in a case where the purpose of research was at issue, was therefore not specifically limited to such a purpose. The court in CanWest did not adhere to the suggestions of the *CCH* decision; instead the judge followed the reasoning of the court in Michelin.

The plaintiff (Canwest Mediaworks Publications) claimed that the defendant (Horizon Publications) had, inter alia, breached their copyright because they had authored, printed and distributed an alleged parody of the "Vancouver Sun" on the 7th of June 2007.[398]The defendant invoked the defence of parody to this claim. However, when assessing the defendant's claim of parody, the court stated that "Teitelbaum J held clearly in Michelin at para 63 that parody is not an exception to copyright infringement under the Copyright Act, and therefore does not constitute a defence".[399]

5.3.4 Concluding remarks regarding the cases

The Canadian courts have consistently held that parody is not exempt as fair use. However a decision that caused much excitement was that of *CCH*. Here, although the court did not make direct references to parody, the decision of the court was wide enough to be interpreted as making changes for parodists.[400] In *CCH* the court stated that the defence of fair dealing should be interpreted liberally, thus leading some academics such as Craig, to view the Canadian Copyright Act of 1985 as being 'restrictive".[401] Furthermore the inconsistency between the way the statute is written and the interpretation that was proposed by the *CCH* case has caused scholars to commend the reliance on litigation.[402]

---

[398]*Canwest* (note 366 above) 1.

[399] Ibid 14.

[400] For example, scholars such as D'Agostino 'Healing Fair Dealing?' (2010) *McGill LR* 359 argued that criticism was wide enough to encompass parody.

[401]Craig 'The Changing Face of Fair Dealing in Canadian Copyright Law' at 438-439. At 453, Craig argues that the CCH case regards the public as an important "beneficiary of the copyright system".

[402]Reynolds 'Necessarily Critical?': The Adoption of a parody Defence to Copyright Infringement in Canada' at 8 : Reynolds argues that the diverging court opinions in *CCH* and *Canwest* show that "relying on litigation to ensure the protection of parody is a risky proposition" and therefore an explicit defence for parody should be enacted .See also Craig 'The changing face of fair dealing in Canadian copyright law' at 438: argues that the Canadian legislature must amend the fair dealing provisions so that these provisions are in line with *CCH* and that the *CCH* decision will be disregarded by lower courts, if it is not reflected in the statute.

According to Spies although the new Canadian Copyright Act has not defined the meanings of parody and satire, the courts are likely to give the terms broad meanings in line with the reasoning of the *CCH* case.[403]

6. LESSONS TO BE LEARNT FROM OTHER JURISDICTIONS

South African copyright law currently regulates fair dealing in s12.[404] In South Africa, fair dealing is only allowed for the following purposes: research or private study, personal or private use; criticism or review and reporting. As can be seen from this and as it has been pointed out on a number of occasions above, this is similar to the approach in the UK and Canada. Although it has been argued that the aim of the fair use doctrine in American law is the same as the South African fair dealing provision and in this regard Dean notes that the two terms 'fair use' and 'fair dealing' are "synonymous".[405] However, as discussed above, the concepts of fair dealing in the USA Copyright Act differs from fair dealing in the UK, Canadian and South African Copyright Acts in that the USA Copyright Act lists four criteria for assessing what is fair use (this is an open-ended approach) whereas the UK, Canadian and South African Copyright Act have specific purposes of fair use (a limited approach). From this it can be deduced that a South African parodist will have to bring his or her defence within the four corners of the statute and as has been shown in other jurisdictions, this is not an easy thing to do.

If it is accepted that parody has a role to play in society, as I am arguing, then there is a need to revisit the defences in section 12 of the South African Copyright Act in order to ensure that there is an appropriate defence for the parodist. At present the approaches to parody is similar

[403] Spies 'Revering Irreverence' (2011) *UN SW LJ* 1133.

[404] Copyright Act 98 of 1978.

[405] Dean *Handbook Of South African Copyright Law* 1-93.

to that in the UK and in Canada before amendments were made to their laws. These fair dealing provisions specify those circumstances in which it will be fair use to make use of a work without the permission of the author. Therefore the purposes of fair use are listed clearly in the statute. The advantage of such an approach is that users can know upfront whether they will be protected by a fair use defence or not, that is if a type of purpose is not listed in the statute then that use is not allowed as fair dealing. However, a study of the cases has shown that it is quite difficult then to protect parody because parody is not listed as a purpose of fair dealing. An alternative option is to follow the American approach and ensure that the defence of fair dealing is not limited to the situations set out in section 12 but is rather based on the four principles enunciated by the American courts.

The advantage of following the American approach is that the American's have a fairly open ended approach to fair dealing. The courts are required to consider the four factors and then decide whether the copyright infringement complained of deserves to be protected or not. This means that the courts are free to develop the law without being confined to a strictly worded statute. However, the downside to such an approach is that the artist who creates a parodic work can never be sure whether he is going to be found guilty of copyright infringement at a later stage. From a legal perspective and from a perspective of the a development of the law, such an open-ended approach is desirable however, at the same time such an approach is seriously problematic from a parodists perspective because he never knows whether he is protected by fair use or not and given the costs involved in litigation, an artist may chose not to engage in such artistic works and society is then deprived of a powerful form of entertainment.

It can safely be argued that the status quo regarding section 12 should not remain as it is if the rights of the parodists are to be protected. There are therefore two options. One option would be to amend the Copyright Act to make it more open-ended such as is found in the USA. The other is to introduce a specific defence of parody into section 12.

7. CONCLUSION AND RECOMMENDATION

As pointed out above, it is difficult to remain with the current position because firstly; case law demonstrated that this is not successful and secondly; litigation is an expensive task in itself.[406] In light of these factors, we can learn from the American open- ended approach. However as pointed out above, this approach is risky because parodists do not really know whether they are protected or not, and similarly to fair dealing, fair use may involve large costs of litigation. The shortfall in the open-ended approach has therefore led to the suggestion that copyright law needs to be amended in order to create a specific defence for parody.

This paper has considered the issue of parody and its importance in society. I have argued that there is a place for different forms of parody in society including comic parody. However, such parody brings the parodist into conflict with copyright owners. I have also argued that there is a need to accommodate both the interests of the parodist and copyright owners and that the law as it exists in SA today does not do this. Therefore, in my view, there is a need for the legislature to rethink the defences in section 12 and it is my recommendation that a specific defence for parody be introduced and that it is not left to the courts to decide when a particular parodist is engaging in fair use or not.

[406] For example in the *Laugh It Off* case: attorney's bill amounted to R500 000 and advocate's bill at R990 000 – from defendant in Laugh It Off (Correspondence received from Justin Nurse on 21 Nov 2012).

BIBLIOGRAPHY

Books

Baldwin R & Cave M Understanding Regulation Theory, Strategy, and Practice (New York : Oxford, 1999)

Bollier D Brand Name Bullies: the quest to own and control culture (Hoboken, NJ : John Wiley, 2005)

Copinger WA et al Copinger and Skone James on copyright, including international copyright: with the statutes, orders, conventions, and agreements thereto relating: and precedents and court forms, also related forms of protection (London : Sweet & Maxwell, 1991)

Dean OH Handbook of South African Copyright Law (Kenwyn : Juta, 1987)

Dentith S Parody (London : Routledge, 2000)

Dutfield G & Suthersanen U Global Intellectual Property law (Cheltenham : Edward Elgar,2008)

Dworkin R Freedom's Law: The moral reading of the American constitution (United States: Oxford Uni.press, 1996)

Groves P Copyright and Designs Law: A Question of balance the Copyright, Designs and Patents Act 1988 (London ; Boston: Graham & Trotman, 1991)

Hutcheon L A Theory of parody : the teachings of twentieth-century art forms (New York : Methuen, 1985)

Nimmer MB Cases and materials on copyright and other aspects of entertainment litigation, including unfair competition, defamation, privacy, illustrated (St. Paul, Minn.: West Publishing Co., 1985)

Ramsden PA A Guide to Intellectual Property Law (Cape Town : Juta Law, 2011)

Rose MA Parody//meta-fiction : an analysis of parody as a critical mirror to the writing and reception of fiction (London : Croom Helm, 1979)

Sterling JAL World Copyright Law: protection of authors' works performances, phonograms, films, video broadcasts and published editions in national, international and regional law (London: Sweet & Maxwell, 2003).

Van Der Merwe A Law of Intellectual Property in South Africa (Durban : LexisNexis, 2011)

Woker T Advertising Law in South Africa (Kenwyn :Juta & Co Ltd, 1999)

Journal Articles

Banko J Schlurppes Tonic Bubble Bath: In Defence Of Parody (1990) University of Pennsylvania Journal of International Law 627

Bibiskin L Oh Pretty Parody: Campbell v Acuff-Rose Music, Inc (1994) Harvard Journal of Law and Technology 193

D'Agastino G Healing Fair Dealing? A comparative Copyright's Analysis of Canada's Fair Dealing to UK Fair Dealing and U.S Fair Use (2010) McGill 309

Deazley R Copyright and Parody: Taking Backward the Gower's Review (2010) The Modern Law Review 785

Friedman A Copyright Fair Use: A comment On the Parody Defence (2009) New York Law Journal 1

Mohammed EA Parody as fair dealing in Canada: a guide for lawyers and judges (2009) Journal of Intellectual Property Law & Practice 468

Newby TG What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law? (1999) Stanford Law Review 1633

Posner RA When is Parody Fair Use? (1992) The Journal of Legal Studies 67

Sagg M The Pre-history of fair use: English copyright from 1710 to 1828 (2011) Brooklyn Law Review 1

Songs S Re-evaluating Fair Use in China- A comparative Copyright Analysis of Chinese Fair use Legislation , The Fair Use Doctrine, And The European Fair Dealing Model (2011) IDEA 453

Spies A Revering Irreverence: A Fair Dealing Exception for both Weapon and Target Parodies (2011) United Nations Society of Writers Law Journal 1122

Tabatabai F A Tale of Two Countries: Canada's Response to the Peer-To-Peer Crisis and What it Means for the United States (2005) Fordham Law Review 2321

Yen AC a First Amendment perspective on the idea/ expression dichotomy in a works Total concept and feel (1989) Emory Law Journal 393

<u>Cases</u>

Baigent and Leigh v Random House Group Ltd[2007] EWCA Civ 247

Campbell v Acuff-Rose Music, Inc. 510 US 569 (1994) 597

Canwest Mediaworks Publications Inc. v Horizons Publications Ltd 2008 BCSC 1609

CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 S.C.R 339

Compagnie Generale des Establissements Michelin-Michelin v National Automobile, Aerospace, Transportation and General Workers Union of Canada (1996) 71 C.P.R (3d) 348

Dellar v Samuel Goldwyn, Inc., 104 F.2d 661 (2d Cir.1939)

Dr. Seuss enterprises, L.P., v. Penguin books USA, Inc.109 F.3d 1394(9th Cir. 1997)

Galago Publishers (Pty) Ltd v Erasmus 1989 (1) SA 276

Glyn v Weston Feature Film Company [1915] 1Ch 261

Gyles v Wilcox, Barrow, and Nutt (1741) 2 Atk. 141

Hanfstaengl v Empire Palace [1894] 3 Ch. 109

Harper & Row Publishers Inc. v Nation Enterprises 471 U.S. 539 (1985)

Hubbard v Vosper (1972) s QB 84

Hyde Park v Yelland (2000) EMLR 363

Joy Music v Sunday Pictorial (1920) Ltd [1960] 2 QB 60

Laugh It Off Promotions v South African Breweries International (Finance) B.V. t/a Sabmark International 2006 (1) SA 144 (CC)

Ludlow Music Inc. v. Canint Music Corp (1967) 2 Ex. C.R. 109

MCA Canada Ltd. v. Gilberry & Hawke Advertising Agency Ltd (1976) C.P.R. (2d) 52

Newspaper Licensing Agency v Marky and Spencer (2001) Ch 257

New Line Cinema Corp. v Bertlesmann Music Group, Inc. 693 F. Supp 1517 (S.D.N.Y 1988)

Quinto v Legal Times of Washington, Inc, 506 F. Supp. 554 (D.C.C 1981)

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

Schweppes v Wellingtons [1984] FSR 210

Sony Corp. of America v Unit City Studios 464 U.S. 417 (1984)

Suntrust v Houghton Mifflin Co. 252 F. 3D1165 (11TH Cir.2001)

Tate v. Fulbrook 98 L.T.R 706 (C.A. 1908)

Walt Disney Productions v Mature Pictures Corp. 389 F. Supp. 1397 (S.D.N.Y 1975)

Legislation:

South Africa

Constitution of the Republic of South Africa, 1996.

Copyright Act 98 of 1978

United States of America

Constitution of United States of America.

Copyright Act of 1976.

House Report No.94-1476 (1976)

United Kingdom

Copyright Designs and Patents Act of 1988

Canada

Bill C-32 An Act to Amend the Copyright Act,3rd Session, 40th Parliament (2010)

Bill C-11 An Act to Amend the Copyright Act, 1st Session, 41st Parliament (2011)

Copyright Amendment Act, Chapter 20 of the Statutes of Canada, 2012.

Copyright Act, RSC 1985, cC-42

Order Fixing Various Dates as the Dates on which Certain Provisions of the Act come into Force vol.146, No.23 of 7 November 2012.

Websites

Aggarwal C - "Miss Scarlett's license done gone" "Harry Potter's license gone: Barry Trotter attending hogwash school for wizardry and witchcrap" what's fair game for parodists: an analysis into The Copyright Law

http://www.ijcl.co.in/uploads/8/7/5/1/8751632/ijcl_vol.1_1_-_article_by_cchavi.pdf

Brenncke - Is "Fair Use" an option for U.K copyright legislation?

http://www.wirtshaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft71.pdf

Boardman - Lawyers Crush Off- Broadway Play, Broadway Claims Fair Use

http://ivn.us/2012/07/28/lawyers-crush-off-broadway-play-broadway-claims-fair-use/

Craig - The Changing Face of Fair Dealing in Canadian Copyright Law

http://www.irwinlaw.com/content/assets/content-commons/120/Three_01_Craig.pdf

Deazley - Commentary on Gyles v Wilcox (1741) in Primary Sources of Copyright

http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_uk_1741

Eliot – The Waste Land New York: Horace Liver Light http://www.bartleby.com/201/1.html

Hargreaves – Biography

http://www.cardiff.ac.uk/jomec/contactsandpeople/profiles/hargreaves-ian.html

JSTOR - The Parody Defence to Copyright Infringement: Productive Fair Use After Betamax

http://www.jstor.org/stable/1340971

Rasool - Copyright Laws Stifle Education

http://www.itweb.co.za/index.php?option=com_content&view=article&id=35188

Reynolds - Necessarily Critical?: The Adoption of a Parody Defence to Copyright Infringement in Canada http://robonsonhall.ca/mlj/images/Articles/33v2/reynolds.pdf

Saha & Mackerjee – Not So Funny Now Is It? The Serious Issue of Parody in Intellectual Property Law http://www.nalsar.ac.in/IJIPL/Files/Archives/Volume%201/4.pdf

The Guardian - Canadian government collapses in no confidence vote http://www.gaurdian.co.uk/world/2011/mar/26/canadian-government-no-confidence-vote.

World Trade Organisation – Glossary http://www.wto.org/english/the wto_e/glossary_e/berne_convention_e.htm

World Trade Organisation – TRIPS http://www.wto.org/english/tratop_e/trips_e?intel2_e.htm

<u>Other documents</u>

Hargreaves I Digital Opportunity: A Review of Intellectual Property and Growth (2011)

Intellectual Property Office Taking Forward the Gower's Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions (2009)

Intellectual Property Office: Sweeping Intellectual Property reforms to boost growth and add billions to the UK economy (2011)

Intellectual Property Office Government Response to the Hargreaves Review of Intellectual Property and Growth (2011)