

Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions

Submission on behalf of the *Intellectual Property Foresight Forum*

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I. INTRODUCTION

The Second Consultation document urged interested parties to direct their comments to the legislative proposals presented within the consultation document, and in particular to the questions set out in Annex B (p.7, para.35). This submission does not seek to address those legislative proposals. Rather, it considers the decision on the part of the Intellectual Property Office not to recommend the introduction of an exception for parody (p.3, para.19, and p.46, para.330).

As the main issue arising out of the first consultation process was not how an exception for parody should be constructed, but whether or not an exception should be introduced at all (p.45, para.324), the principal focus of this submission will be to address that same question. This response is divided into three sections: (i) the first will assess the provision for parodic use under the current regime; (ii) the second will address various objections to the introduction of an exception articulated within the Second Consultation document; (iii) the third will set out a number of arguments favouring the introduction of an exception for parody. It invites the Intellectual Property Office to reconsider its decision not to recommend the introduction of a specific exception for parody within the UK copyright regime.

Before continuing, some brief comments about the nature and definition of parody are warranted. As we shall see one of the arguments against the introduction of an exception for parody relates to the fact that parody is already prevalent within popular culture and that, in this regard, the lack of an exception has not posed any serious problem to date. While that is true to a certain extent, it is important to acknowledge that parody is multivalent; it speaks to and embraces a range of different cultural practices such as allusion, burlesque, caricature, irony, mimesis, pastiche, persiflage, satire, skit, spoof, travesty, and so on. This response will in no way attempt to articulate a definitive classification of these various related cultural forms. Such an exercise is beyond the expertise of the author, and

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is, in any event, probably impossible to achieve with any degree of academic or popular consensus.¹

With that in mind, however, this submission proceeds upon the basis of two simple propositions. First: that while in some situations successful parody will not require any direct copying of an underlying work, in other situations successful parody will require that the parodist borrow directly from an underlying work. Second: that it is not possible to make any claim in the abstract about the relative merits of a parody that does not borrow directly from an underlying work as opposed to one that does. Much will depend upon the facts of each individual case, upon the aims of the parodist, the target of the parody, and the medium deployed in pursuing the same. It is only when parody requires that the parodist borrow directly from an underlying work that the copyright question bites. As such, the observations that follow are not concerned with parody *per se*, but only with parody that involves some measure of direct copying of an underlying work in order to function successfully.

II. THAT THE CURRENT REGIME ALLOWS FOR PARODY

The Second Consultation document sets out that “[a]lthough the current regime does not go as far as many would like to see, it does afford some basis for permitting parodies, etc to be created for example by taking parts from underlying works which are not considered substantial or by using parts of works under the fair dealing exception for criticism or by seeking permission, through licensing, to use the underlying work” (p.46, para.329). The Second Consultation document also places reliance upon the availability of a general public interest defence as an important consideration when determining the need for a bespoke exception for parody.² Let us consider each of these purportedly ameliorating factors in turn.

1. Use of an insubstantial part of the copyright work (s.16(3)(a))

The First Consultation document implicitly acknowledged the importance of audience recognition of an underlying work within a parody.³ Not only must an

¹ See: S. Dentith, *Parody* (Routledge: London and New York), 6 (“[B]ecause of the antiquity of the word parody ... because of the range of different practices to which it alludes, and because of differing national usages, no classification [of parody] can ever hope to be securely held in place”); and, L. Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms*, 2nd ed (University of Illinois Press, 2000), 10 (“there are probably no transhistorical definitions of parody possible”).

² For example, in rejecting the argument that an exception for parody was necessary for the *Copyright Designs and Patents Act* 1988 (hereafter: the CDPA) to be compliant with A.10 of the European Convention on Human Rights (hereafter: the ECHR), the Second Consultation document set out that: “[t]he existing exemption for fair dealing and the statutory limitation on enforcement of copyright where it is not in the public interest are sufficient to prevent or restrict the enforcement of copyright in circumstances where the interest in freedom of expression overrides the interest of the copyright owner” (p.45, para.323).

³ *Taking Forward the Gowers Review of Intellectual Property: Proposed changes to copyright exceptions* (UK IPO, 2008), 41, para.205 (“To be recognisable as a parody, a new work relies to some extent on the knowledge of its audience of the original work”).

audience be familiar with the underlying work, but they must also recognise the use of that work within the parody. Without audience recognition of the underlying work – which will often require the use of a substantial part of that work – any intended parody will be rendered ineffective. As one commentator puts it, “[p]arody requires *substantial* copying”.⁴

There is relatively little caselaw within the UK that specifically addresses the issue of parody and its place within the copyright regime. In *Glyn v. Weston Feature Film Company* [1915] the allegation of copyright infringement concerned a cinematograph film that drew upon the plaintiff’s novel.⁵ The defendants argued that there was no similarity between the two works in that the plaintiff’s novel purported to be “a psychological study” whereas their film was “a screaming farce”.⁶ Although Younger J considered whether, in principle, a burlesque or a caricature of “a serious work” would (or should) amount to copyright infringement, the issue was not decisive to the resolution of the case. Rather, he concluded that the defendants’ film did not copy the underlying work.⁷

In *Joy Music Ltd v. Sunday Pictorial Newspapers (1920) Ltd* [1960], McNair J observed that when determining whether a parody of a literary work constituted an infringement of the underlying work the test to be considered was whether the defendant had bestowed such mental labour on what he had taken and subjected it to such revision and alteration as to produce an original work. Applying that test to the case before him, he concluded that the defendant’s work was not a reproduction, but a new original work, and as such did not reproduce a substantial part of the underlying work.⁸

McNair J’s judgment in *Joy Music* has attracted some adverse comment. On one reading, his reasoning appears to suggest that, when considering explicitly derivative works (such as parodies), greater borrowing from the underlying work should be tolerated before the substantiality threshold will be triggered. That is, because the user is producing a new and original work he is entitled to copy more than would otherwise be permitted with a situation of direct copying (or, non-transformative use). In *Twentieth Century Fox Film Corp v. Anglo-Amalgamated Film Distributors* (1965) Plowman J doubted whether McNair J’s approach should be

⁴ A.P. Winslow, “Rapping on a Revolving Door: An Economic Analysis of Parody and *Campbell v. Acuff-Rose Music, Inc.*” (1995-1996) *S. Cal. L. Rev.*, 767-825, 769.

⁵ *Glyn v. Weston Feature Film Company* [1915] 1 Ch 261.

⁶ *Ibid.*, 263.

⁷ “The great bulk of the film is taken up with happenings which have no counterpart in the novel; a great part of the novel is taken up with other incidents which have no counterpart in the film; and on the whole, after a careful consideration of both ... I have arrived at the conclusion of fact that the film does not constitute any infringement of the plaintiff’s copyright in the novel”; *ibid.*, 268. Elsewhere, Younger J commented that “if, in considering whether such a literary work as a novel has been infringed by such a thing as a cinematograph film, the true inquiry is, as I think it must be, whether, keeping in view the idea and general effect created by a perusal of the novel, such a degree of similarity is attained as would lead one to say that the film is a reproduction of incidents described in the novel or of a substantial part thereof, then in my opinion the answer in the present case must be in the negative”; *ibid.*, 269.

⁸ *Joy Music Ltd v. Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60, 70-71.

applied to artistic works as well as literary works.⁹ More significantly, in *Schweppes Ltd. v. Wellingtons Ltd.* [1984], McNair J's approach was explicitly rejected. Falconer J was clear to point out that the test to consider in such cases is *not* whether the defendant has bestowed such labour upon the underlying work as to produce an original work:

[W]ith all due respect, I do not think that a correct statement of the law. The sole test is whether the defendant's work has reproduced a substantial part of the plaintiff's *ex hypothesi* copyright work. The fact that the defendant in reproducing his work may have himself employed labour and produced something original, or some part of his work which is original, is beside the point if none the less the resulting defendant's work reproduces without the licence of the plaintiff a substantial part of the plaintiff's work.¹⁰

In *Schweppes* Falconer J concluded that there had been substantial borrowing.¹¹ Moreover, since *Schweppes*, the experience of UK case law is such that contested parodies have all been found to involve the use of a substantial part of the underlying work.¹²

Given the relatively small number of cases on the issue it is difficult to draw any definitive conclusions as to whether the courts have in recent times become less

⁹ *Twentieth Century Fox Film Corp v. Anglo-Amalgamated Film Distributors* (1965) *The Times* (21 January 1965), p.23b. In this case the defendant produced a film poster for its film (*Carry on Cleo*) using an image based upon the poster which the plaintiff had used to advertise its film (*Cleopatra*). Even adopting McNair J's approach, Plowman J considered that the use of the underlying work amounted to copyright infringement as "on a visual comparison ... the defendant's poster did reproduce a material part of the plaintiff's poster"; *ibid.*

¹⁰ *Schweppes Ltd. v. Wellingtons Ltd.* [1984] FSR 210, 212. Falconer J continued: "[I]t appears from his judgment that [McNair J] was in fact holding that what had been reproduced was an original work in the sense, as I understand it, that there had been no reproduction of any substantial part of the plaintiff's work. If the case is to be explained on any other basis then I think it was wrongly decided"; *ibid.*, 213. See also: G. Dworkin, "Moral rights in English law – the shape of things to come" (1986) *European Intellectual Property Review*, 329-36, 334 ("the degree of work and skill which goes into a defendant's work is really a separate issue from the main question of whether or not there has been a reproduction of the whole or a substantial part of the plaintiff's work"); and, K. Garnett, G. Davies, and G. Harbottle, *Copinger and Skone James on Copyright*, 15th ed. (London: Sweet & Maxwell, 2005), 391 ("[t]he fact that a defendant's work may be a parody or burlesque of the claimant's is not a relevant consideration when considering the issue of substantial part").

¹¹ *Schweppes Ltd. v. Wellingtons Ltd.*, 211 ("I think one only has to look at the two side by side to see that there is no possibility of any other conclusion than that a very substantial part has been reproduced").

¹² *Williamson Music Ltd. v. The Pearson Partnership Ltd.* [1987] FSR 97 (in which, on an application for an interlocutory injunction, Paul Baker QC concluded that it was arguable that a substantial part of the underlying work was present in the parody); *Ludlow Music Inc v. Robbie Williams et al* [2001] EMLR 7, 162 ("the extent of the copying is substantial, although not by much", per Strauss QC); *Scottish and Universal Newspapers Ltd v. Paul Mack* [2003] ECDR 32, para.14 ("there is no question but that the respondent deliberately copied the petitioners' masthead. He reproduced, if not the entirety, a very substantial part of it", per Lord Eassie). Note that in relation to *Scottish and Universal Newspapers Ltd* the argument that the infringing work might be regarded as a parody was not initially raised by the counsel for the respondent, but rather by Lord Eassie the presiding judge; *ibid.*, para.15.

tolerant of borrowing for the purposes of parody (*Twentieth Century Fox Film Corp, Schweppes, Williamson Music, Ludlow Music*) than was previously the case (*Glyn, Joy Music*).¹³ However, it is worth noting that the extent to which the substantiality threshold functions as an effective shield against an allegation of copyright infringement has appeared to diminish of late. Professors Bently and Sherman, for example, have detected “a discernible shift” in recent jurisprudence “towards allowing a copyright owner to control ever-smaller uses and re-uses of their works”.¹⁴ This shift is perhaps best captured by Lord Bingham’s assertion in *Designers Guild v. Russell Williams* [2001] that: “realistically realizing that no real injury is done to the copyright owner *if no more than an insignificant part of the copyright work is copied*, section 16(3) of the Copyright Act 1988 provides that, to infringe, an act must be done “in relation to the work as a whole or any substantial part of it””.¹⁵

In light of Lord Bingham’s comments, it is arguable that, under s.16(3)(a) of the *Copyright Designs and Patents Act 1988* (hereafter: the CDPA), only trivial or insignificant aspects of a copyright work are now beyond the control of the copyright owner.¹⁶ In this regard, successful parody will almost invariably require the copying of more than a trivial or insignificant part of the underlying work such that audience recognition of the work is assured. Otherwise, the attempt at parody is unlikely to function as a parody. As the US Supreme Court noted in *Campbell v. Acuff-Rose* (1994): “When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original’s most distinctive features, which the parodist can be sure the audience will know”.¹⁷

Reliance upon the principle of insubstantial use will afford little – if any – meaningful scope for successful parody.

2. Section 30(1): Fair Dealing for the Purpose of Criticism or Review

It has been suggested that parodic use of a work might fall under the existing exception relating to fair dealing with a work for the purpose of criticism or

¹³ See however: L. Bently, “Parody and Copyright in the Common Law World”, in *Copyright and Freedom of Expression: ALAI 2006 Barcelona* (Huygens Editorial/ALAI, 2008), 360-69 (who recounts that, while “case-law did for some time provide leeway for parodies through the application of the substantial part requirement”, a new approach to parody was signalled by the decision in *Schweppes*); and, R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005), 264-66 (who write that, while for many years “it was thought that parodies already enjoyed a special status in the United Kingdom, such that a finding of copyright infringement would be unusual ... it now seems reasonable to conclude that a nascent exception for parodies has been killed off by [the decisions in *Schweppes* and *Williamson*]”).

¹⁴ L. Bently and B. Sherman, *Intellectual Property Law*, 3rd ed., (Oxford: Oxford University Press, 2008), 185. See also Bently, “Parody and Copyright”, 360-69.

¹⁵ *Designers Guild v. Russell Williams* [2001] FSR 11, 116; (emphasis added).

¹⁶ Bently and Sherman, 186.

¹⁷ *Campbell v. Acuff-Rose* 510 US 569, 588 (1994).

review of a copyright-protected work (CDPA, s.30(1)).¹⁸ There are two obvious limitations to this approach that are not adequately articulated within the Second Consultation document.

First, while it is widely accepted that the concept of criticism and review under s.30(1) should receive a liberal interpretation by the courts,¹⁹ in general any parodic use of an underlying work as might fall within s.30(1) will need to be tethered to the underlying work, the thought or philosophy underpinning the work,²⁰ or the wider social or moral implications of that particular type of work.²¹ This form of critique is typically referred to as *target parody*. Section 30(1) does allow for fair dealing with an underlying work for the purpose of criticising “another work, or of a performance of a work” which, naturally, extends the opportunities for use beyond target parody *visz a vizz* the underlying work. Nevertheless, the requirement that the critical use of a work be directed at a particular work – whether the underlying work, or another work – curtails the possibility of using a work to parody wider social mores and values, unconnected with the underlying work or its author (so-called *weapon parody*). Moreover, while the academic literature lacks consensus as to whether an exception for parody should cater for *weapon parody*,²² as the Second Consultation document notes, of those respondents to the first consultation that favoured the introduction of a parody exception, “[m]ost believed that there should be no reference to the underlying work, so as to permit parodies to be created for wider social commentary” (p.45, para.320). This, it was suggested, “reflected [the] historical use of parody” (p.45, para.320).

¹⁸ *Williamson v. Pearson*, 103 (“[T]he parodist may be indulging in literary criticism or a review of the original work”). Bently writes that while this possibility “was mooted in *Williamson* ... cases elsewhere suggest that the role for the exception might be quite limited”; Bently, “Parody and Copyright”, 370.

¹⁹ *ProSieben Media v. Carlton UK Television Ltd* [1999] 1 WLR 605 (CA), 614 (““Criticism or review” and “reporting current events” are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally”).

²⁰ *Hubbard v. Vosper* [1972] 2 QB 84 (criticism of the Church of Scientology); *Time Warner Entertainments v. Channel Four Television Corp* [1994] EMLR 1 (criticism of Stanley Kubrick’s decision to withdraw *A Clockwork Orange* from circulation within the UK).

²¹ *ProSieben Media* (criticism of the phenomenon of ‘chequebook journalism’); *Fraser-Woodward v. BBC* [2005] EMLR 22 (criticism of tabloid journalism as a genre).

²² Compare, for example, the opinions of R.A. Posner, “When is parody fair use?”, *Journal of Legal Studies* (1992) 67-78, W.F. Patry and S. Perlmutter, “Fair use misconstrued: profit, presumptions, and parody”, *Cardozo Arts & Ent. L.J.* (1992) 667-719, and M. Spence, “Intellectual property and the problem of parody”, *Law Quarterly Review* (1998) 594-620 (who argue that if the parody has nothing at all to do with the underlying work it should not be accommodated within the copyright regime) with those of S.N. Light, “Parody, burlesque, and the economic rationale for copyright”, *Connecticut Law Review* (1978-79) 615-36, S.L. Burr, “Artistic parody: A theoretical construct”, *Cardozo Arts & Ent. L.J.* (1996) 65-78, C. Rutz, “Parody: a missed opportunity?”, *Intellectual Property Quarterly* (2004) 284-315, and L.K. Treiger-Bar-Am, “Author’s Right as Limit to Copyright Control”, in *New Directions in Copyright Law, Volume 6*, ed by F. Macmillan (Cheltenham: Edward Elgar Publishing, 2007), 359-76 (who argue for a much more broadly defined exception that would embrace both target and weapon parody).

Second, and more problematic, is the requirement within s.30(1) that use of a work for the purpose of criticism or review must be “accompanied by a sufficient acknowledgement”. In accordance with s.178 “sufficient acknowledgement” requires “an acknowledgement identifying the work in question by its title or other description, and identifying the author”.²³ It has been accepted that the identification of an author need not be express,²⁴ and need not involve the use of an author’s actual name;²⁵ rather, what is required is that the identity of the author is indicated – by wording or otherwise – to “a reasonably alert member of the relevant audience”.²⁶ Despite this fairly generous reading of the sufficient acknowledgement requirement, in the opinion of the Reverend Dr Michael Spence, an intellectual property theorist and the current Vice-Chancellor and Principal of the University of Sydney, it remains an open question as to “whether many parodies would contain “sufficient acknowledgement” to qualify for protection under the section”.²⁷

We would suggest that any requirement of sufficient acknowledgement will invariably hamper the work of many parodists. Depending upon the medium and the nature of the parody in question, the opportunity for sufficient acknowledgement will not always be available. Neither will adhering to the sufficient acknowledgement requirement always be appropriate. As a number of the respondents to the first consultation pointed out, parody will often fail in its inherent purpose if the inspiration for the work has to be explicitly identified (p.44, para.315).²⁸ It is also worth recalling that A.5(3)(k) of the *Information Society Directive* does not impose any identification requirement in relation to the availability of an exception for parody as it does, for example, in relation to the use of quotations for the purposes of criticism or review,²⁹ or with respect to the use of political speeches and extracts from public lectures for informational purposes.³⁰

²³ CDPA, s.178; this is subject to a number of exceptions set out within s.178.

²⁴ *Fraser-Woodward v. BBC*, para.72.

²⁵ *ProSieben Media v. Carlton UK Television Ltd* [1997] EMLR 509 (HC), 521.

²⁶ *Ibid.*, 521-22.

²⁷ Spence, 597-98.

²⁸ See also: Bently, “Copyright and Parody”, 377 (who writes that in many types of parody “an explicit reference of this sort [that is, sufficient acknowledgement] might seem inappropriate, even an admission of failure”); and, Burrell and Coleman, 61 (who write that while in most situations it would be possible to acknowledge the work underlying a parody, “this does not accord with ordinary publishing practice and would impose an artificial obligation on the parodist, since one of the benchmarks against which a parody can be judged is its success in making a connection with the work being parodied without any form of express reference”).

²⁹ A.5(3)(d) allows “quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”.

³⁰ A.5(3)(f) allows “use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by informatory purpose and provided that the source, including the author’s name, is indicated, except where this turns out to be impossible”.

Current provision under s.30(1) does not allow for the creation of parodies concerned with social commentary extending beyond a particular work. Moreover, the requirement that the parodic use incorporate a “sufficient acknowledgement” of the underlying work is inappropriate to the genre, and is likely to seriously inhibit the production of both *target* and *weapon* parodies alike.

3. Licensing for parody and the economic exploitation of the underlying work

3.1. The market for licensed parodies

The Second Consultation document places considerable emphasis upon the argument that providing an exception for parody might remove an existing avenue for rightsholders to seek licensing revenue and so reduce their ability to retain some level of economic control over their works (p.46, para.328).

It is axiomatic that the introduction of any new exception will, in theory, impact negatively upon the opportunity for rightsholders to generate licensing revenue from their work. So it is with the existing exceptions concerning non-commercial research (s.29), criticism and review (s.30(1)), and reporting current events (s.30(2)). Indeed, any statutorily-defined permitted use that renders redundant the prior authorisation of the rightsholder implicitly anticipates the loss of a potential revenue stream for the rightsholder. That in itself is not an argument for refusing to introduce the exception. The copyright regime has never been – nor should it be – solely concerned with securing any and all potential revenue streams for rightsholders. When determining the circumstances in which copyright-protected material might be used without the need for authorisation, it is paramount that government policy is shaped by what is considered to be in the public interest broadly defined, rather than what is in the best financial interests of the rightsholder. Securing financial remuneration for the rightsholder to the extent that it might incentivise the creation and dissemination of new work is an important factor to bear in mind (when determining what is in the public interest) but it should not be regarded as the determinative factor. Other relevant considerations will include, for example, the extent to which an exception for parody might allow for and incentivize the creation of new work, the free speech interests of the parodist, and so on.

In any event, the Second Consultation document clearly anticipates the existence of a significant market for licensed parodies,³¹ but how robust is that presumption? In our opinion, the existence of such a market may well be overstated. To lay stress upon possible revenue streams concerning the parodic use of a copyright-protected work is to ignore the obvious point that parodies are often extremely critical of, or offensive to, the underlying work, or to the opinions and sensibilities of the author (or the rightsholder) of that work, and that the

³¹ Particular reference was made to one respondent’s estimate that an exception for parody might compromise 10-15% of music publishing income (estimated at more than £58 million in 2005) (p.44, para.310).

author (or the rightsholder) may not be interested in licensing the use of the work for parodic purposes.

For example, consider the evidence presented on behalf of the plaintiff in *Williamson v. Pearson* to the effect that “it has always been Williamson’s policy that permission will not in any circumstances be granted for the making of parodies of either the words or the music of Rodgers and Hammerstein compositions”.³² As Paul Baker QC observed in his judgment: “I have no reason to doubt that ... permission, if sought, would not have been granted at any price”.³³ Similarly, in the US Supreme Court decision of *Campbell v. Acuff-Rose Music*,³⁴ the 2 Live Crew had initially approached Acuff-Rose to licence the use of *Oh, Pretty Woman* making clear that a parody was intended and that the popularity of 2 Live Crew ensured substantial sales.³⁵ Gerald Tiefer of Opryland Music Group (of which Acuff-Rose was a part) rejected the request outright: “[W]e cannot permit the use of a parody of ‘Oh, Pretty Woman’”.³⁶ And again, in the US Court of Appeals (9th Cir.) case of *Fisher v. Dees*, a request to licence the use of the song *When Sunny Gets Blue* in a parodic version of the same (*When Sonny Sniffs Glue*) was simply refused by the copyright holder of the original.³⁷ In holding in favour of the parodist in *Fisher*, Sneed J observed that “[p]arodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee ... The parody defence to copyright infringement exists precisely to make possible a use that generally cannot be bought”.³⁸

Without doubt, decisions on the part of rightsholders about whether to licence for parody are often (perhaps more often than not) dictated by non-economic concerns, and typically end in refusal. Indeed, rightsholders may be motivated to actively censor the creation of the parody.³⁹ From an economist’s point of view, this leads to a situation of market failure (or, a failure of desirable consensual exchange) in that opportunities for licensing are rendered unavailable in an

³² *Williamson v. Pearson*, 100.

³³ *Ibid.*, 101.

³⁴ *Campbell v. Acuff-Rose, Inc.*, 114 S.Ct. 1164 (1994).

³⁵ Indeed, the request for a licence stressed that the proposed parody was very similar “to what Weird Al Yankovic and other satirical artists are doing”; *Acuff-Rose v. Campbell*, 972 F2d 1429, 1432 (6th Cir., 1992).

³⁶ *Ibid.*, 1432.

³⁷ *Fisher v. Dees*, 794 F2d 432, 434 (9th Cir., 1986).

³⁸ *Ibid.*, 437.

³⁹ Drawing parallels with the pre-history of copyright in seventeenth century Britain, Knapp writes that “[i]f copyright holders are able to use their rights to keep expression out of public discourse solely because it is critical of their work, this will be a means of censorship as effective, if less wide ranging, as was the English Stationers’ Guild”; J.C. Knapp, “Laugh, and the Whole World ... Scowls at You?: A Defense of the United States’ Fair Use Exception for Parody under TRIPs”, *Dem. J. Int’l L. & Pol’y* (2004-2005) 347-66, 360. See also: Patry and Perlmutter, 688 (“As a derivative work, parody could be viewed as potential market available for licensing. Because it is almost unheard of for a copyright owner to welcome or even willingly tolerate mockery, however, allowing him or her to retain a veto over such uses raises a real threat of censorship”).

otherwise consensual market.⁴⁰ Put another way, it is inherently problematic to simply assume – as the Second Consultation document appears to do – that rightsholders will routinely licence the use of their work for parodic purposes (whether *target* or *weapon*).⁴¹

It is also worth noting in this regard that for those who maintain that one of the copyright regime's principle *raison d'être*s is to incentivize the creation and dissemination of new work the possibility of licensing for parody will rarely, if ever, perform this incentivising function. That is, just as the decisions on the part of rightsholders about whether to licence existing work for parody are often dictated by non-economic concerns, similarly, it is unlikely that an author or an artist will ever be incentivised to create new work by the possibility that they may, at some future date, be presented with the opportunity of having that work subjected to a parodic treatment (albeit for a fee). Put another way, the commodification of work by way of parody does not ordinarily fall within what might be regarded as the normal exploitation of copyright-protected work.⁴²

That said, there is some evidence that – depending on the nature of the parody in question – some rightsholders are willing to licence a parodic treatment of their

⁴⁰ See however the comments of Spence, 604 (“To identify that a refusal to license a parody represents a market failure is not to identify the user in whose hands the text has the most value. The market failure argument gives us no firmer reason to allow the parody than to disallow it”).

⁴¹ In general, see W. Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors”, *Columbia Law Review* 82 (1982) 1600-57. In discussing the impact of “antidissemation motives” upon the operation of a perfect market, Gordon (at 1633) comments as follows: “Even if money were offered, the owner of a play is unlikely to licence a hostile review or a parody of his own drama; a publicity-shy tycoon who owns the copyright on magazine articles discussing his life is unlikely to licence a biographer to use these articles; a candidate for governor is unlikely to licence his copyrighted campaign music to be utilized in his opponent’s televised advertisement; and the publisher of a periodical is unlikely to licence his competitor to use his copyrighted magazine covers in comparative advertising”. See also the empirical research on libel cases carried out by Profs Bezanson, Soloski and Cranberg, referred to by A.C. Yen, “When authors won’t sell: parody, fair use, and efficiency in copyright law”, *U. Colo. L. Rev.* (1991) 79-108. In brief, this research suggested that when plaintiffs claimed that they had been harmed by libel very few considered that money damages would provide an adequate remedy for the harm that they had suffered (while 79.2% of those interviewed stated that an apology or a retraction in relation to the libel would suffice, and 20% indicated that no satisfactory remedy existed whatsoever, only 0.8% of plaintiffs requested money damages). Given the similarities between libel and target parody (in that both publicly portray the victim in an unflattering light), Yen conjectures that the existing research on libel cases “suggests that authors might never be subjectively compensated for the losses they suffer at the hands of parodists”. In general, see Yen, 104-06.

⁴² In his analysis of the three-step test in international and EC law, Senftleben argues that parody should not be regarded as conflicting with the “normal exploitation” of copyright-protected material. He continues: “[A]uthors will most often refrain from developing or licensing others to develop a market for criticism or parody. It can therefore be concluded that there is simply no market – let alone one of considerable economic or practical importance. Even if authors were to license the utilisation of their works for purposes such as criticism and parody, this market would not ... be counted as being part of the economic core of copyright. It cannot be expected to typically become a major source of royalty revenue. Its exemption does not cause a substantial market impairment”; M. Senftleben, *Copyright, Limitations and the Three-Step Test* (The Hague: Kluwer Law International, 2004), 195.

work (and this is so even when the parody specifically targets the underlying work). The Gowers Review makes reference to the success of the musician Weird Al Yankovic in this regard.⁴³ Interestingly, certain of the respondents to the First Consultation document who opposed the introduction of a parody exception also made reference to Yankovic but in support of the premise that, in the absence of an exception for parody, the creation of parodies is often catered for by licensing (p.43, para.307).

This, however, rather misses the point. Yankovic licences the use of underlying works not because he is *required* to do so under US law, but because he *chooses* to do so. As Yankovic himself makes clear on his website: “Al does get permission from the original writers of the songs that he parodies. While the law supports his ability to parody without permission, he feels it’s important to maintain the relationships that he’s built with artists and writers over the years”.⁴⁴ Indeed, as with the example of Yankovic, US case law in this area suggests that, even within the context of a copyright regime that allows for parody, opportunities to license for the purposes of parody are not rendered obsolete. Given the scope for reasonable disagreement as to what may or may not constitute a (lawful) parody, as well as the unpredictable nature of copyright litigation, parodists may simply prefer to secure a licence in relation to the use of the underlying work – even when the legislative regime allows for parody without the need for permission from the rightsholder – rather than run the risk of an allegation of copyright infringement. It should be remembered that had the rightsholders in both *Campbell* and *Fisher* been minded to do so they could have licensed the use of their respective works; both had received a request to licence and both rejected the request.

The absence of an exception for parody provides no guarantee of a significant market in licensed parodies, and neither is the existence of an exception for parody necessarily antithetical to the licensing of parodies by rightsholders.

3.2. Interference with the economic exploitation of the underlying work

Leaving to one side the issue of licensed parodies, another possible objection to the introduction of an exception for parody is that the existence of a parody might otherwise interfere with the successful economic exploitation of the underlying work. There are two principle aspects to this argument: that the parody might operate as a substitute for the underlying work; and, that the parody might otherwise negatively impact upon the market for the underlying work.

The Second Consultation document notes some concern on the part of rightsholders that allowing for parody might result “in competition between the underlying work and its parody” (p.45, para.320). It seems unlikely, however, that

⁴³ The Gowers Review states: “As well as reducing transaction costs across Europe, an exception to enable parody can create value. Weird Al Yankovic has received 25 gold and platinum albums, four gold-certified home videos and two GRAMMYs® by parodying other songs”; *Gowers Review of Intellectual Property* (London: HMSO, 2006), 68.

⁴⁴ See: www.weirdal.com/faq.htm (accessed: 23 March 2010).

a parody of a work might ever function as a market substitute for the underlying work. American jurisprudence is instructive on this point. Courts in the US have routinely found that a parody will rarely supplant the demand for the underlying work. To take one example, in *Elsmere Music, Inc. v. National Broadcasting Company, Inc.* (1980) the rightsholder of a successful advertising jingle, “I Love New York”, alleged copyright infringement when “I Love Sodom” – sung to the tune of “I Love New York” – was broadcast on *Saturday Night Live* (a popular television comedy sketch show). Goettel J observed: “The song has not affected the value of the copyrighted work. Neither has it had nor could it have the effect of fulfilling the demand for the original.”⁴⁵

As for the second argument: that a critical or unflattering parody might otherwise negatively influence the demand for the underlying work; well, so be it. It is not for the copyright regime to insulate authors or rightsholders from such unwelcome criticism (whether parodic or otherwise) as might impact upon the popular demand for their work.⁴⁶ In this regard, injury to the underlying work through criticism should not be confused or conflated with injury by dint of competition with the underlying work.⁴⁷ As Prof Kaplan put it: “[W]e must accept

⁴⁵ *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (SDNY, 1980) (internal quotation marks removed). See also: *Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2nd Cir.), 379 US 822 (1964) (no claim was made that the defendant’s lyrics would fulfil the demand for plaintiff’s song, and the plaintiff had not indicated with any degree of particularity how it was injured); *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 USPQ (BNA) 124 (ND Ga. 1981) (the plaintiff could offer no evidence of actual harm based on the defendant’s use of Pillsbury doughboy in sexual postures); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (consumers interested in a romantic, nostalgic ballad would not purchase the defendant’s parody instead); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) (the defendant’s distribution of erotic parody to Moral Majority and Old Time Gospel members in arguing against pornography probably would not substitute for sales of Hustler’s magazine); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (ND Ill. 1991) (the defendant’s parody of the Eveready battery bunny could not supplant the market for the plaintiff’s bunny); *Cardtoons, LC v. Major League Baseball Players Ass’n*, 868 F. Supp. 1266 (ND Okla. 1994) (the plaintiff’s baseball cards with caricature images and editorial comments on reverse side could not substitute for the defendant’s cards); *Campbell v. Acuff-Rose*, 592 (“It is more likely that the [parody] will not affect the market for the original in any way cognizable under [the fourth fair use factor], that is, by acting as a substitute for it (superseding its objects). This is so because the parody and the original usually serve different market functions.”); *Liebovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (SDNY, 1996) (that it was unlikely that a consumer who was in the market for an image such as Liebovitz’s iconic photograph of a pregnant Demi Moore would have his or her demand satisfied by a photograph showing the body of Demi Moore but with the face of the comic actor Leslie Nielsen); *World Wrestling Federation Entertainment Inc. v. Big Dog Holdings, Inc.* (2003) 280 F.Supp 2d 413 (WD Penn. 2003) (that t-shirts and other related merchandise sporting anthropomorphised (or, ‘dogified’) caricatures of professional wrestling characters, phrases and logos, would not effect the potential market for the plaintiffs copyright-protected work). For a number of these references, see Winslow, 783, n.77.

⁴⁶ See for example Patry and Perlmutter, 692 (“[W]hile the use of expression to criticize or ridicule the copyrighted work may indeed diminish consumers’ desire to purchase it, that is a risk inherent in making the work public, and not the kind of harm to its value that lessens the likelihood of fair use”).

⁴⁷ In general, see Knapp, “Laugh and the Whole World ... Scowls at You?”

the harsh truth that parody may quite legitimately aim at garrotting the original, destroying it commercially as well as artistically”.⁴⁸

A parody is rarely, if ever, likely to act as a market substitute for the underlying work, nor is it relevant to consider whether a parody might otherwise negatively impact upon the successful commercial exploitation of the underlying work.

4. Freedom of expression and the public interest defence (s.171(3))

The Second Consultation document explicitly rejected the suggestion that an exception for parody might be necessary to ensure that the CDPA was compliant with A.10 (the right to freedom of expression) of the ECHR. It continued that: “[t]he existing exemption for fair dealing and the statutory limitation on enforcement of copyright where it is not in the public interest are sufficient to prevent or restrict the enforcement of copyright in circumstances where the interest in freedom of expression overrides the interests of the copyright owner” (p.45, para.323). Reliance, in this regard, is placed upon the Court of Appeal decision in *Ashdown v. Telegraph Group* (2001).⁴⁹

True, the decision in *Ashdown* formally affirmed the availability of a general public interest defence in the “rare circumstances” that the existing copyright regime fails to adequately accommodate an individual’s right to freely express themselves, or to receive and impart information and ideas.⁵⁰ However, Phillips MR made clear that the decision would not “lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright”.⁵¹ Similarly, he stressed that “[f]reedom of expression should not normally carry with it the right to make free use of another’s work”.⁵² Comments such as these, and the factual resolution of the *Ashdown* case, have led a number of academics to criticize *Ashdown* for its inherent conservatism (and correctly, in our opinion).⁵³ Indeed, in the intervening

⁴⁸ B. Kaplan, *An Unhurried View of Copyright* (New York and London: Columbia University Press, 1967), 69. See also: Gordon, 1633 (“If a criticism reveals a work’s flaws, it is appropriate that demand for the work should decrease”); and, the observations of the US Supreme Court in *Fisher v. Dees*, 438 (“when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act”).

⁴⁹ *Ashdown v. Telegraph Group* [2002] Ch 149.

⁵⁰ Phillips MR accepted that copyright protection *per se* amounted to a restriction on the exercise of individuals to freely express themselves, but continued that, in general, the operation of the idea/expression dichotomy, in combination with the existing permitted acts set out within the legislation, would ordinarily accommodate the principle of freedom of expression under A.10 of the ECHR.

⁵¹ Phillips MR continued: “It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches”; *Ashdown v. Telegraph Group*, 170.

⁵² *Ibid.*, 167.

⁵³ See, for example: J. Griffiths, “Copyright Law after *Ashdown* – Time to deal fairly with the public?”, *Intellectual Property Quarterly* (2002) 240-64; M. Birnhack, “Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act”, *Entertainment Law Review* (2003) 24-34; E. Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford university Press, 2005), 256-57.

period, the public interest defence has yet to be invoked successfully before the courts.⁵⁴ We will, however, return to the free speech implications of parody in due course.

While in theory the public interest defence may provide some scope for the parodic use of copyright-protected work, in practice the courts have demonstrated a considerable reluctance to entertain arguments based on s.171(3). As with the principle of insubstantial use, the public interest defence is likely to afford little scope for successful, lawful parody.

III. OTHER OBJECTIONS TO THE INTRODUCTION OF AN EXCEPTION FOR PARODY

As with the suggestion that the current copyright regime already makes provision for some lawful parody, a number of additional objections to the introduction of a specific exception for parody were articulated within the Second Consultation document. Some of these arguments warrant more substantive consideration than others, but in general they concern: (i) that a new exception would present problems in distinguishing between lawful and unlawful use; (ii) that a new exception would result in greater abuse of copyright-protected work; (iii) that individual creators typically lack the financial means to test the extent to which a parody is lawful or not in legal proceedings; (iv) the uncertain interplay between an exception for parody and the moral rights regime; and, (v) that the lack of an exception within the UK has not, thus far, posed much of a problem.

1. That a new exception would present problems in distinguishing between lawful and unlawful use

The consultation document makes reference to the objection that “[d]rawing a distinction between an original (legitimate) parody and infringing use [is] likely to be extremely difficult for all concerned” (p.43, para.308). There is no doubt that, in certain circumstances, assessing whether a work is for the purpose of parody will not be straightforward, but that in itself presents no meaningful objection to the introduction of an exception for parody *per se*. Judges are routinely required to make difficult determinations in this regard. Within the context of the copyright regime, there is no reason to believe that such decision-making will be any more challenging than assessing whether the use of a copyright-protected work is fair dealing, or where the distinction between protected expression and unprotected ideas lies, or whether a work of craftsmanship is artistic or not. Similarly, consider the law of charitable trusts, in which courts are required to determine whether a particular trust is for educational purposes, for the advancement of religion, or for the advancement of the arts, culture, heritage or science.⁵⁵ In relation to the latter,

⁵⁴ See: *HRH Prince of Wales v. Associated Newspapers* [2006] EWHC 522 (Ch); *Grisbrook v. MGN Ltd* [2009] EWHC 2520.

⁵⁵ *Charities Act* 2006 c.50, ss.2(2)(b)(c)(f).

judges are often called upon to form opinions as to the literary and artistic nature, merit and worth of the underlying purposes of such trusts.⁵⁶

That distinguishing between lawful and unlawful parody might sometimes prove difficult presents no meaningful objection to the introduction of an exception for parody *per se*.

2. That a new exception would lead to greater abuse of copyright-protected work

Related to the first objection, this concern is articulated in various ways in the Second Consultation document. Respondents, for example, were worried that a new exception would make the enforcement of rights more difficult (p.43, para.307), that “potential users would use a new exception to justify the taking of copyright works” (p.44, para.310), and, that a new exception was “likely to create uncertainty and increased opportunities for abuse”, for example, by “blurring the lines between parody and plagiarism” (p.43, para.308).

With respect, concerns such as these, while no doubt genuinely felt, are either misplaced or simply amount to a restatement of the same basic question under consideration: should an exception for parody be introduced or not? For instance, the introduction of a new exception would not, of itself, make the enforcement of rights more difficult. While it would impact upon the nature and substance of the rights a rightsholder enjoys under the copyright regime, it has no particular bearing upon the enforcement of those rights.

Moreover, that potential users might rely upon the new exception to justify the *use* (rather than the *taking*) of copyright works without the need for authorisation on the part of the rightsholder is entirely the point; that is, this is exactly what the exception *should* enable users to do. Naturally, in determining whether or not a new exception should be introduced at all, it is important to consider the extent to which an exception might impact upon the opportunities for economically exploiting underlying works. However, as was suggested above, arguments concerning the market for licensed parodies and whether the parody might otherwise interfere with the economic exploitation of the underlying work are not particularly compelling, and certainly should not be regarded as determinative of the issue.

Also, reference to blurring the lines between parody and plagiarism is both inappropriate and misleading. Parody and plagiarism are distinct practices that set out to achieve two very different ends. The former specifically relies upon audience knowledge and recognition of a pre-existing underlying work to ensure that the parody functions successfully. By contrast, plagiarism involves an attempt to disguise from the audience the source and authorship of the work in question. That is, the plagiarist succeeds when his or her audience fails to recognise or

⁵⁶ For example, in *In Re Pinion, Dec'd* [1965] Ch 85, 107, the testator sought to establish a trust to endow his studio as a museum for the display of his collection of furniture and *objets d'art*; the Court of Appeal denied the trust charitable status, Harman LJ commenting that there was “no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value”. See also, *In re Shaw, dec'd* [1957] 1 WLR 729.

identify the explicit use of the underlying work. Conflating parody with plagiarism in this way is not only inappropriate but it runs the risk of tarnishing and diminishing the importance and value of parody by association with a practice that typically attracts widespread criticism and condemnation – morally, intellectually, and commercially.⁵⁷ Put another way, drawing a parallel between parody and plagiarism might be mistaken for no more than intellectual mud-slinging; as such, it is best avoided.

While the introduction of an exception for parody may result in greater *use* of copyright-protected work without the need for permission from the rightsholder, there is no reason to believe that the introduction of an exception will in itself result in the greater *abuse* of copyright-protected work.

3. That individual creators would not actually have the means to test the extent of those limits in legal proceedings

With respect, that some individual creators might lack the financial means to test the legality of an alleged parody before the courts is not a relevant consideration to take into account when determining whether the copyright regime should incorporate an exception for parody. Indeed, it is entirely irrelevant. Clear distinctions must be maintained between considerations as to the nature of the copyright regime, and the system of litigation that underpins the operation of that regime. In his recent *Review of Civil Litigation* Lord Jackson set out that “[t]he background to any IP regime must be a civil justice system which enables parties to assert or defend their IP rights”;⁵⁸ we would agree entirely. However, the substance of the copyright regime and the operation of civil justice system are different (albeit related) concerns, and should remain as such.⁵⁹

While considerations about access to justice for individual creators are important, they are irrelevant to the current enquiry.

4. That an exception for parody might interfere with, or diminish, the moral rights of the author of an underlying work

The interface between successful parody and the moral rights connected with the underlying work is an issue that obviously requires consideration. At present, the

⁵⁷ For a recent defence of plagiarism, however, see: D. Shields, *Reality Hunger: a manifesto* (London: Hamish Hamilton, 2010).

⁵⁸ Lord Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (London: TSO, 2010), 248. He continues: “Such a civil justice system must deliver correct judgments at affordable cost in the complex field of IP. This is no easy task”; *ibid.*

⁵⁹ Acknowledging that the cost of resolving intellectual property disputes can be significant, Lord Jackson recommended that the Patents County Court be reformed to provide a cost-effective environment for intellectual property disputes. In particular, he recommended that there should be a small claims track in the PCC for intellectual property claims with a monetary value of less than £5,000, and that there should be a fast track for claims with a monetary value of between £5,000 and £25,000 (in which a trial can be concluded in one day). In general, see Jackson, 248-57.

parodist must be wary of liability for breach of the right to object to derogatory treatment of the work (s.80(1)), and of the right to object to false attribution of authorship (s.84(1)). Given that liability under s.84 requires an actual false attribution of authorship (as opposed to evidence of confusion about the authorship of the parody), the situations in which s.84 may be of relevance will be limited. That is, it will not often be the case that a parodist seeks to present a parody to the public as if it were the work of the author of the underlying work. A notable exception in this regard is *Clark v. Associated Newspapers* [1998].⁶⁰

In theory, of greater importance is the relationship between the parody of an underlying work, and the right to object to the derogatory treatment of that underlying work. It seems relatively uncontroversial to suggest that a parodic treatment of an underlying work might be considered ‘derogatory’ (as the term is currently defined within the CDPA);⁶¹ not all parodies will be derogatory, but some might well be.⁶²

In determining when a parody may or may not infringe under s.80, Spence observes that a British court “would be unlikely to find assistance in the more developed law of the other jurisdictions of the European Union ... because in those jurisdictions whether or not a parody infringes copyright is often used to determine whether it infringes an author’s moral rights as well”.⁶³ True, the UK courts may derive little assistance from civil law jurisprudence as to the current operation and application of s.80(1); however, that other civil jurisdictions routinely resolve the question of derogatory treatment in favour of the parodist when there is no finding of copyright infringement is instructive from a more general policy perspective (and particularly so, given that these jurisdictions have a much stronger tradition of moral rights protection than is the case within the UK).⁶⁴

⁶⁰ In *Clark v. Associated Newspapers* [1998] 1 WLR 1558 the defendant published a series of articles parodying the plaintiff’s political diaries. The title of each article was attributed it to the plaintiff (and was accompanied by a photograph of the plaintiff), whereas the first paragraph of each article set out the name of the real author and words to the effect that the author was imagining how the plaintiff would record the day’s events. The court held that since the articles contained a clear and unequivocal false statement attributing their authorship to the plaintiff, and since the effect of the false statement was not neutralised by an express contradiction as precise and compelling as the false statement, the plaintiff was entitled to relief in respect of a breach of s.84(1).

⁶¹ Section 80(2)(b) provides that “the treatment of a work is derogatory if it amounts to a distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director”.

⁶² See Dworkin, 335 (“the creation of an express integrity right reinforces the author’s armoury against the parodist”). It has, however, been argued that s.80(1) is of “no general relevance to the topic of parody” in that a parody “ought not *per se* to be regarded as reflecting on [an author’s] honour or reputation”; H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs*, 3rd ed, (London: Butterworths, 2000), 1: 99.

⁶³ See Spence, 598 (and his examples set out at 598, n.24). See also Rutz, 306 (who considers the position in Germany, and concludes that the majority view of writers is that a parody that does not infringe copyright will not be regarded as infringing any moral rights in the underlying work).

⁶⁴ However, consider the recent decision of the Swedish Supreme Court (*Gunilla Berström v. SVT (Alfons Aberg)*) NJA 2005, p.905 in which a radio broadcast spliced together readings from a

The protection afforded to authors under the moral rights regime within the UK is far from absolute, and, if the case for a bespoke exception for parody *viz a viz* copyright infringement is made out, then there is no reason why the moral rights regime should not also accommodate that exception;⁶⁵ indeed, to hold otherwise would be somewhat counterintuitive. 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 against unwelcome criticism.⁶⁶

If the case for a bespoke exception for parody *viz a viz* copyright infringement is made out, there is no reason why the moral rights regime should not also accommodate that exception.

5. That the lack of an exception has not posed a serious problem in the past

The Second Consultation document sets out that “many [respondents] voiced the opinion that the lack of an exception had not created tremendous problems for potential users”, that “there was a ‘rich tradition’ of such creativity in the UK, which had existed for a considerable period”, and that in any event “there was no shortage of parodies” (p.43, para.307). In many respects, this presents one of the more compelling arguments for preferring the status quo over the introduction of a new exception.

Without doubt there is a rich tradition of parody and satire within the UK, and this is a tradition of long-standing. Parody pervades the comedies of Shakespeare, the poetry of Swift, Pope and the other Scriblerians, the novels of Henry Fielding and Jane Austen, and the operas of Gilbert and Sullivan. Moreover, it remains prevalent within popular culture and popular entertainment. We can track it in the work of contemporary novelists such as A.S. Byatt, Jonathan Coe, and Peter

children’s book about a boy called Alfons with excerpts from a Danish film (*Pusher*) portraying Alfons as taking part in drug dealing and in a fight (‘Alfons’ means ‘pimp’ in Danish). The author claimed that the broadcast was a violation of her literary and artistic reputation and her individuality. The court held that the broadcast amounted to a parody of the children’s book character; as such – in accordance with Swedish copyright law – the broadcast was considered to be an independent work of art which did not infringe the copyright in the underlying work. The court made clear that even if a parody was an original work – and so did not infringe the copyright in the underlying work – it might nevertheless violate the moral rights of the underlying work (although this did not apply in the current case). See: M.S. Nielsen, ed., *Scandinavian IP Law Review: A review of the development within Danish, Norwegian and Swedish intellectual property law in 2005* (Zacco Legal, 2006), 10 (see: zacco.com/uploads/Scandinavian%20IP%20Law%20Review/Scandinavian%20IP%20Law%20Review%202005.pdf); *Copyright and Freedom of Expression*, ALAI Study Days, Barcelona 2006, Answers of the Swedish Group of ALAI, 5-6.

⁶⁵ See A. Waisman, “Rethinking the moral right to integrity”, *Intellectual Property Quarterly* (2008) 268-85, 281 (“[I]t does not seem that the author of a parody should be exposed to legal suits that rely on integrity infringement charge ... [I]f the reason to afford protection to parody is external to the principles of copyright [for example, freedom of expression] and the way to exempt parody from copyright infringement is to introduce an exception to those principles, then the exemption of parody from *integrity* infringement would also be exceptional”).

⁶⁶ See, for example, Spence, 613 (who has suggested that s.80 “arguably ought not to catch harm to a creator’s reputation caused by unfair criticism, rather than appropriation and alteration”).

Carey; in the poetry of T.S. Eliot and Wendy Cope; in the artwork of Rene Magritte and the graffiti artist Banksy; in the numerous comedic iterations of da Vinci's *Mona Lisa*; in the architecture of Paolo Portoghesi and Charles Willard Moore; in the films of Peter Greenaway and Woody Allen; in television programs such as *The Simpsons*, *Bremner Bird and Fortune*, and *The Office*; and, in the pages of *Private Eye* and the political cartoons of Chris Riddell and Steve Bell.⁶⁷

As was suggested in the introduction, much of this can be explained by the fact that parody takes various forms many of which, by their very nature, will not necessarily trigger any copyright concerns. As such, the existence or not of an exception for parody within the copyright regime will have no bearing on the continued prevalence of these particular instances of parody. But again, it is at the point that parody involves direct borrowing from an underlying work that consideration of the appropriateness of an exception arises. And again, it is important to hold in mind that no general claim can be made as to the relative merits, worth or importance of parody that does not borrow directly from an underlying work as opposed to parody that does. Context is all important in this regard.

However, even in relation to parody that draws directly upon underlying work, let us presume that a robust tradition of this type of parody prevails within contemporary culture. That is, let us suppose that the norms of copying for the purposes of parody bear little correlation to the existing legal norms set out within the copyright regime. How might we account for this disjuncture? What factors (other than the licensing of work for parody) might be considered relevant? They could be many, and varied. A lack of litigation might be explained by the trouble, cost and uncertainty of litigation itself,⁶⁸ by whether the rightsholder is an individual or a firm (and by whether the firm is small, medium or large in size),⁶⁹ by the admiration, tolerance or general indifference of the rightsholder towards the parody, by a misconception on the part of the rightsholder that parody does not amount to copyright infringement within the UK,⁷⁰ and so on. Understanding

⁶⁷ For many of these examples, as well as many more, see in general: Dentith, *Parody*; Hutcheon, *A Theory of Parody*; R. Mack, *The Genius of Parody: Imitation and Originality in Seventeenth and Eighteenth-Century English Literature* (London: Palgrave Macmillan, 2007); and, M.A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge: Cambridge University Press, 1993).

⁶⁸ For a recent literature review on the costs of intellectual property enforcement in general, see: K. Weatherall, E. Webster and L. Bently, *IP Enforcement in the UK and Beyond: A Literature Review* (London: SABIP, 2009), 40-50.

⁶⁹ For a study of copyright litigation across a sample of large UK firms working in copyright-related industries, see: Y. Mazeh and M. Rogers, "The economic significance and extent copyright cases: an analysis of large UK firms", *Intellectual Property Quarterly* (2006) 404-20 (suggesting that the larger firms (that is, firms with greater than £1bn sales *per annum*) are much more likely to be involved in copyright disputes than smaller firms, and that the number of copyright disputes being litigated is increasing over time). Within the context of patent litigation, Somaya has also concluded that the relative size of companies impacts upon the likelihood of a company becoming involved in litigation; D. Somaya, "Strategic Determinants of Decision not to settle Patent Litigation" (2003) *Strategic Management Journal*, 17-38. In addition, see: Weatherall et al, 33-34.

⁷⁰ As the Open Rights Group argued in their response to the First Consultation: "Because of its long history of cultural importance, many in the UK would be surprised to discover that there is

why rightsholders choose not to litigate is always likely to prove more elusive in this regard than understanding why they do.

But in any event, given the existence of a rich tradition of parody within the UK, which tradition is generally agreed to be a valuable social, cultural, and political phenomenon, should we not formalise its place within the copyright regime to ensure that the copyright regime does not positively inhibit that cultural practice? What if, for example, Lord Jackson's proposals for improving access to the courts on intellectual property matters are adopted?⁷¹ Should we anticipate an increased willingness on the part of rightsholders to litigate when they might not have done so before? Arguably, yes.⁷² Will a more accessible and affordable civil justice system instigate a re-alignment between the legal norms of the copyright regime and existing social norms of copying for the purposes of parody, such that the production of parody that draws directly upon an underlying work might diminish in the future? It is impossible to predict with any certainty whether the changes envisaged by Lord Jackson would have any meaningful impact upon the prevalence of parody within the UK, but simply deferring to a legally uncertain status quo will not do. Complacency should not determine copyright policy. If we value the role that parody plays, and has played, within the political and cultural life of the UK then we should formally acknowledge and inscribe that role within the copyright regime.

To the extent that a rich tradition of parody already exists within the UK, this practice should be formally acknowledged and legitimised within the copyright regime.

IV. ARGUMENTS FAVOURING THE INTRODUCTION OF AN EXCEPTION FOR PARODY

Underpinning the recommendation in the Second Consultation document that an exception for parody should not be introduced is the conclusion, on the part of the Intellectual Property Office, that despite the “many uncertainties surrounding the possibility of changing the law”:

[I]t is *likely* that there would be a potentially significant change in the balance between the creators and rights holders of underlying works and those who seek to use them – by removing existing avenues for rights holders to seek licensing revenue, and by reducing their ability to retain some level of control over their works through their economic and moral rights (p.46, para.328; emphasis added).

currently no exception for parody, caricature, and pastiche in UK copyright law”; *Taking Forward the Gowers Review of Intellectual Property: proposed changes to copyright exceptions. Response of the Open Rights Group*, 9 (see: www.openrightsgroup.org/uploads/080408_ukipo_gowers_exceptions.pdf).

⁷¹ *Supra* n.58.

⁷² See: D. Harhoff, “Challenges Affecting the Use and Enforcement of Intellectual Property Rights”, in *The Economic Value of Intellectual Property: An Agenda for Policy-Relevant Research* (London: IPO/SABIP, 2009), 112-13 (who notes that there is “strong empirical evidence” suggesting that patent litigation becomes more prevalent when the costs of litigation decrease, when the stakes involved in litigation are high, and when there exists uncertainty and asymmetric information); and, Wetherall et al, 29 (“more cases will get to court as the costs of litigation decrease”).

By definition, the balance between the rightsholder and the user would change, but would this really be a significant change?, and, more importantly, from the point of view of the wider public interest, would it be an unwelcome change?

The Second Consultation document notes that it is “clearly difficult for robust data to be supplied about the possible benefits of an exemption”, and at the same time acknowledges that the possible costs to rightsholders have proven “difficult to estimate” (p.46, para.327). So, upon what basis was this determination of likelihood arrived at? What evidence, if any, supports this conclusion? Is it based upon anything more than an intellectual hunch? And if so, is that hunch intuitively aligned with the interests of rightsholders and with the general perception that stronger intellectual property rights are, by definition, a good thing (for both the individual and for society at large)?

The simple fact remains that there is a dearth of evidence as to the relationship between copyright and creativity, or as to the actual value of the copyright regime in contributing to the success of the creative economy.⁷³ No definitive evidence exists, for example, to indicate that stronger intellectual property regimes result in greater levels of creativity or innovation.⁷⁴ Most of the existing literature in this area has tended to focus upon the patent regime, and such conclusions as can be drawn from that literature – about the relationship between a strong patent regime and innovation or economic growth – are ambiguous at best.

In relation to copyright law the situation is even less clear (or, more overtly contested). For example, two recent economic analyses of the appropriate duration of protection for copyright-protected works arrived at widely divergent conclusions: one proposed a term of no more than two or three years,⁷⁵ whereas the other proposed a term that was perpetually renewable.⁷⁶ In general, capturing reliable data about the operation of the copyright regime is also more problematic than is the case for patents, trademarks, or design rights, given the lack of a registration requirement for copyright.⁷⁷ Moreover, in this particular instance, it would seem that there was little in the way of meaningful or objective data to

⁷³ Industry focussed studies do provide data upon the contribution that copyright-based industries make to national and regional economies (see, for example, John C. Gordon and H. Beilby-Orrin, *International Measurement of the Economic and Social Importance of Culture* (Paris: OECD, 2007)), however, as Wetherall et al point out, such studies “do not measure the impact (or benefit) of copyright law as such”; 55. See also: D. Gantchev, “The WIPO Guide on Surveying the Economic Contribution of the Copyright Industries” (2004) *Review of Economic Research on Copyright Issues* 5-16.

⁷⁴ For example, see: J. Lerner, “The Intellectual Property Rights System and its role in Innovation and Economic Performance”, in *The Economic Value of Intellectual Property: An Agenda for Policy-Relevant Research* (London: IPO/SABIP, 2009), 130-53.

⁷⁵ M. Boldrin and D. Levine, *Growth and Intellectual Property* (NBER Working Paper Series, 2005) (see: www.nber.org/papers/w12768.pdf).

⁷⁶ W.M. Landes and R.A. Posner, “Indefinitely Renewable Copyright” (2003) *University of Chicago Law Review*, 471-518.

⁷⁷ As Wetherall et al point out (at 54) the lack of a registration requirement in copyright law means that, unlike patent, trade mark, or design, there is “no database of issued copyright ‘rights’ which can be mined for information on which firms use copyright, how they use it, or what it is worth”.

compel the rejection of the proposal for an exception for parody. Indeed, given the difficulties involved in trying to assess the relative economic and social merits of a deeply ambivalent and complex cultural phenomenon such as parody, one wonders whether a definitive or conclusive evidence base might ever be drawn.

The general lack of a robust evidence base about the operation and performance of copyright law in general, and about parody in particular, prompts two considerations. First: that more work can and should be done in attempting to capture further information as to the fitness for purpose of the copyright regime. On this point, the current research agenda of the Strategic Advisory Board for Intellectual Property Policy is to be welcomed.⁷⁸ But second: that a lack of reliable data should not necessarily lead to inactivity or to conservatism on the part of the legislature. In the absence of any compelling empirical economic evidence, arguments drawn from theory, from history, from culture, from comparative legal analysis, or from the discourse of human rights might (or perhaps should) otherwise be regarded as persuasive.⁷⁹

With that in mind, we now consider some of the arguments that favour the introduction of an exception for parody. In turn, these concern: (i) the contribution that an exception might make to the production of new cultural content, to the creative economy in general, and to the cultural politics and the interests of society more broadly defined; (ii) the relative merits of regional and international harmonisation; and, (iii) the fact that an exception for parody would play a meaningful role in securing important free speech interests, as well as greater public respect for the copyright regime.

1. New cultural content, the creative economy, and cultural politics

The benefits of an exception for parody might take many forms. With respect to the underlying work, a critical or unflattering parody might negatively influence the demand for that work, but equally, the reverse might be true: a parody may compound or enhance the visibility or notoriety of the underlying work such that the underlying work derives an economic or reputational benefit from the parody itself. We would not, however, seek to press this argument too far.

More important is that the existence of an exception for parody may well encourage and facilitate the production of new work that might not otherwise have been created but that might otherwise contribute to the overall success of the creative economy within the UK. That is, while the market for licensed parodies might not be as significant as the Second Consultation document appears to presume, the contribution that unlicensed parody makes to the creative economy

⁷⁸ *Strategic Priorities for Copyright* (London: SABIP, 2009) (see: www.sabip.org.uk/copyright-100309.pdf).

⁷⁹ One might, of course, go much further than this. One might suggest that – even in the face of reliable empirical evidence to the effect that the commercial interests of rightsholders might be negatively impacted by the introduction of an exception for parody – there are other more important considerations that should prevail over these economic interests. This is not, however, the time for a more wide-ranging critique of the extent to which neo-liberal economic theory has come to dominate contemporary copyright policy.

should neither be overlooked nor underestimated. Arts Council England, for example, in its response to the original Gowers consultation, favoured the introduction of an exception relating to “parody, comedy and pastiche” upon the basis that these were “particularly strong creative areas in the UK”.⁸⁰ Clearly, parody can function as a powerful creative (and economic) force in this regard.

But parody does more than enable the creation of new work; it can also play a significant role in the emergence of new cultural forms. That is, parody as a cultural practice can contribute to the evolution and development of literary styles, genres, and tastes. So, for example: parody was central to the evolution of nonsense poetry in seventeenth century English verse;⁸¹ it was influential in establishing the credentials of the novel as a genre;⁸² and, the decline of heroic tragedy on the eighteenth century stage was in part attributable to the manner in which burlesque theatre parodied that particular dramatic form.⁸³ In short, parody has a significant role to play in the cultural politics of any and every society. This remains as true today – in our postmodern, media-savvy, and media-saturated world – as it ever was.⁸⁴

Not only might an exception for parody encourage the creation of new work and facilitate the development of new markets, but parody has an important role to play in shaping the cultural politics of contemporary Britain.

2. Regional harmonisation

There are many jurisdictions both within and outwith Europe that make provision for the unauthorised parodic use of copyright-protected material. In the Nordic countries, there is no need for a specific exception for parody in that legitimate parody is not regarded as amounting to copyright infringement. In Denmark, for example, a parody will be regarded as a new and independent work and as such is “not subject to the copyright in the original work”.⁸⁵ Similar considerations apply

⁸⁰ *Arts Council England’s submission to the Gowers review of intellectual property*, 5 (see: www.hm-treasury.gov.uk/d/arts_council_england_476_37kb.pdf).

⁸¹ Dentith, 92, 96-122.

⁸² *Ibid.*, 55-74.

⁸³ *Ibid.*, 134-44.

⁸⁴ In relation to the importance of parody in contemporary culture, see Bently, “Copyright and Parody”, 383-84 (“As part of the project of rejection of grand narratives, postmodern theory and practice has sought to destabilize and subvert traditional hierarchies between high and low art, to reinsert the historical into the present, to deconstruct and decentre the subject, to take account of heterogeneity and difference and to endorse eclecticism. As part of the project of decentring the subject, literary theory emphasises the inevitable linkages between texts (so-called intertextuality). Parody is, at least for some commentators, exemplary of postmodern practices. Parody subverts the authority of the author and contests authorial ownership of a text. Parody may revive the historical in the present, and contest [the] hierarchisation of high and low art. As such, it is not hard to see parody, and indeed pastiche, as essentially “postmodern” practices.”).

⁸⁵ Copyright Act 1995 (as amended), s.4(2): “Copyright in a new and independent work created through the free use of another work, shall not be subject to the copyright in the original work”.

in Sweden,⁸⁶ Norway,⁸⁷ and Finland.⁸⁸ In other jurisdictions, such as Austria,⁸⁹ Germany,⁹⁰ and Portugal,⁹¹ parody falls within a more broadly articulated concept of free use. In the US, of course, legitimate parody is regarded as “fair use”. More often than not, however, an exception for parody is explicitly inscribed within the

In this regard, the provision for parodic use within Denmark is not a limitation to copyright as such but rather an activity that falls outside of the scope of copyright protection *per se*.

⁸⁶ A.4 of the Swedish Copyright Act 1960 (as amended) provides that “If a person, in free connection with another work, has created a new and independent work, his copyright shall not be subject to the right in the original work”. Westkamp notes that it is settled case law that use for parody does not amount to copyright infringement; G. Westkamp, *Country Reports on the Implementation of Directive 2001/29/EC in the Members States* (Report to the European Commission, 2007), 434 (see: www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf). In particular, see the recent decision of the Swedish Supreme Court (23 December 2005) in which the court found that a radio program using a children’s book character amounted to parody or travesty and so should be considered an independent work (*Gunilla Berström v. SVT (Alfons Aberg)* NJA 2005, p.905). Obiter, the court did stress, however, that even of a parody or travesty was an original work, it might nevertheless violate the moral rights of the underlying work, although this did not apply in the case before the court.

⁸⁷ In Norway, although there is no explicit statutory provision concerning parody, Westkamp writes (at 373) that parodic use “is clearly recognised in the doctrine as a non-statutory limitation of the exclusive rights”. In particular, s.4 of the Norwegian Copyright Act 1961 (as amended) provides as follows: “The author may not object to other persons using his scientific, literary or artistic work in such a manner that new and independent works are created. The copyright in the new and independent work shall not be subject to the copyright in the work that has been used”.

⁸⁸ A.4 of the Finnish Copyright Act 1961 (as amended) provides that “If a person has drawn freely on a work to create a new and independent work, his copyright shall not be subject to the right in the original work”. In Finland use for the purpose of parody and caricature has been recognized as a general principle of Finnish copyright law; Westkamp, 197.

⁸⁹ Westkamp (at 113) notes that while no specific limitation exists for caricature and parody within the Austrian Copyright Act 1936 (as amended), nevertheless the freedom to make caricatures, and so on, is safeguarded under general principles of copyright law and will seldom amount to an infringing reproduction or adaptation (A.5(2) provides that “[u]se made of a work in creating another work shall not make that other work an adaptation, provided such work constitutes an independent new work in relation to the work used”).

⁹⁰ In Germany parodies and caricatures are covered by §24 UrhG – read in conjunction with A.5 of the Grundgesetz (the Basic Law) (concerning freedom of expression and freedom of the arts) – permitting the use of an independent work created by the free use of another work (“An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work”). Traditionally for a parody to qualify as free use, the critique had to be directed towards the parodied work and not against the author or third parties (“Case Comment: Asterix parodies”, *IIC* [1994] 610-16). This however was changed by the decision in *Gies-Adler* [2004] EIPR N-89; decisive now is the transformative “inner distance” (“innerer Abstand”) between the original and the parody. See also: Rutz, 299-307.

⁹¹ A.2(1)(n) of the Copyright Code 1985 (as amended) defines “original works” as follows: “Intellectual works in literary, scientific and artistic fields, whatever their type, form of expression, merits, mode of communication or objective, include, in particular ... (n) parodies and other literary or musical compositions, even if inspired by the theme or subject of another work”.

copyright regime. Examples include: Armenia,⁹² Australia,⁹³ Belgium,⁹⁴ Croatia,⁹⁵ France,⁹⁶ Lithuania,⁹⁷ Luxembourg,⁹⁸ Malta,⁹⁹ the Netherlands,¹⁰⁰ Romania,¹⁰¹ Slovenia,¹⁰² Spain,¹⁰³ Switzerland,¹⁰⁴ and Peru.¹⁰⁵

⁹² Law on Copyright and Related Rights 2006, A.22(2)(j)(ii) (“The following free uses shall be permitted: (j) transformation of a work made public (ii) if the work is transformed into a parody or caricature, provided this does not create confusion as to the source of the work”).

⁹³ Copyright Act 1968 (as amended), s.41A (“A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is not for the purpose of parody or satire”).

⁹⁴ Copyright, Law (Consolidation) 1994 (as amended), Art 22(1)(6) (“Once a work has been lawfully published, its author may not prohibit ... caricature, parody and pastiche, observing fair practice”).

⁹⁵ Copyright and Related Rights Act 2003 (as amended), A.94 (“It shall be permitted to transform the work into a parody or caricature to the extent necessary for the purpose thereof, by indicating the work being transformed and its author”).

⁹⁶ Law on the Intellectual Property Code 1992, Art L122-5 (“Once a work has been disclosed, the author may not prohibit: (4) parody, pastiche and caricature, observing the rules of the genre”).

⁹⁷ Law Amending the Law on Copyright and Related Rights 2003 (5 March 2003 No.IX-1355), A.25 (“It shall be permissible, without the authorisation of an author or any other owner of copyright, and without compensation, to use a work for the purpose of caricature or parody”).

⁹⁸ Law on Author’s Rights, Related Rights and Databases 2004, A.10(6) (“Lorsque l’œuvre a été licitement rendue accessible au public, l’auteur ne peut interdire: ... (6) la caricature, la parodie ou le pastiche qui a pour but de railler l’œuvre parodiée, à la condition qu’ils répondent aux bons usages en la matière et notamment qu’ils n’empruntent que les éléments strictement nécessaires à la caricature et ne dénigrent pas l’œuvre.”); see Westkamp, 327.

⁹⁹ Copyright Act 2000 (as amended), s.9(1)(s) (“Copyright in an audiovisual work, a database, a literary work other than in the case of a computer programme, a musical or artistic work shall not include the right to authorise or prohibit ... the reproduction or communication to the public of a work by way of caricature, pastiche or parody”).

¹⁰⁰ Copyright Act 1912 (as amended), A.18b (“Publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche will not be regarded as an infringement of copyright in that work, provided the use in accordance with what would normally be sanctioned under the rules of social custom”). See also Related Rights Act 1993, A.10i (“The following shall not be regarded as infringements of rights defined in Articles 2, 6, 7a and 8: a caricature, parody or pastiche, provided that the use is in accordance with the rules of what would normally be sanctioned under the rules of social custom”).

¹⁰¹ Law No. 8 of 14 March 1996 on Copyright and Neighboring Rights, A.35(b) (“The alteration of a work shall be permissible without the author’s consent and without payment of remuneration in the following cases ... if the result of the alteration is a parody or caricature, provided that the said result does not cause confusion with the original work and the author thereof”).

¹⁰² Copyright and Related Rights Act (Consolidated Text) 1995 (as amended), A.53(2) (“Transformation of a disclosed work is permissible ... if the work is transformed into a parody or caricature, provided this does not, or is not likely to, create confusion as to the source of the work”).

¹⁰³ Royal Legislative Decree 1/1996 (of 12 April 1996): Revised Law on Intellectual Property (TRLIP), s.39 (“The parody of a disclosed work shall not be considered a transformation that requires the consent of the author, provided that it involves no risk of confusion with that work and does no harm to the original work or its author”).

Of course, harmonisation as an end in itself provides no compelling argument for adopting an exception for parody within the UK. Indeed, arguments about copyright policy that draw upon the logic of harmonisation are to be regarded with some scepticism. The process of regional and international harmonisation has almost always tended to shift the balance of interests between rightsholder and user in favour of rightsholders.¹⁰⁶ Within the UK, for example, the *Information Society Directive* resulted in the imposition of a number of additional conditions on many of the existing copyright exceptions within the CDPA. At the same time, the UK government choose not to introduce any new exceptions within the copyright regime that were otherwise allowed for under A.5 of the Directive.¹⁰⁷ But, as Prof Bently points out, “there is nothing intrinsic to harmonisation that requires it to lead to copyright *expansion*”,¹⁰⁸ and adopting an exception for parody within the UK would certainly be a case in point in this regard.

Suffice to note, perhaps, that the UK is out of step with the majority of members of the European Union on the issue of parody,¹⁰⁹ that greater harmonisation of

¹⁰⁴ Federal Law on Copyright and Neighbouring Rights (Federal Copyright Law) 1992, A.11(3) (“It shall be permissible to use existing works for the creation of parodies or other comparable variations on the work”).

¹⁰⁵ Copyright, Legislative Decree, 23/04/1996, No.822, A.49 (“A parody of a disclosed work shall not be considered a transformation requiring authorization by the author where it does not involve a risk of confusion therewith or risk damaging the original work or its author, without prejudice to the remuneration accruing to him for such use”).

¹⁰⁶ See for example: L. Bently, “R v. *The Author*: From Death Penalty to Community Service” (2008) *Columbia Journal of Law and the Arts*, 1-109, 52-57.

¹⁰⁷ See: *EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society: Consultation Paper on Implementation of the Directive in the United Kingdom* (Patent Office, August 2002), 57 (“[I]t has always been the Government’s intention to maintain as far as possible the existing exceptions regime in UK law, and thereby continue the present balance in the law between the interests of all the key stakeholders. No new exceptions permitted by the Directive have therefore been proposed”).

¹⁰⁸ Bently, “R v. *The Author*”, 54.

¹⁰⁹ For a useful summary of copyright exceptions within the European Union see: Westkamp, *Country Reports on the Implementation of Directive 2001/29/EC* (note however that this work does not incorporate information about the post-2007 accession states). Other than the UK, the Member States of the European Union that make no specific allowance for parody within their copyright regimes would appear to be Bulgaria, the Czech Republic, Estonia, Greece, Hungary, Ireland, Latvia, Poland, and the Slovak Republic.

In Italy, although there is no specific exception for parody within the copyright legislation, the parodic use of copyright-protected materials is a well established principle within copyright jurisprudence. There are a number of approaches that account for this: first, under A.4 of the Copyright Law a parody is regarded as legitimate if it amounts to a new, original work (*Tamaro v. Luttazzi*, Trib Milano (29 January 1996); A.4 provides that “[w]ithout prejudice to the rights subsisting in the original work, works of a creative character derived from any such work, such as translations into another language, transformations into any other literary or artistic form, modifications and additions constituting a substantial remodelling of the original work, adaptations, arrangements, abridgements and variations which do not constitute an original work, shall also be protected”); second, parody is regarded as legitimate insofar as it does not economically compete with the underlying work; third, the legitimacy of parody is considered to be grounded in A.21 of the Constitution (recognising the importance of the individual’s freedom of expression, and that the press should not be subject to authorisation or censorship); and

copyright exceptions within Europe would assist in reducing the general transaction costs imposed upon business in licensing the use of copyright-protected material,¹¹⁰ and that while the US and Germany remain two of the leading global exporters of creative goods and services¹¹¹ they do so while specifically accommodating parody within their respective copyright regimes.¹¹²

While harmonisation *per se* does not provide a compelling argument for adopting an exception for parody, greater harmonisation of copyright exceptions within Europe may prove beneficial to the creative economy within the UK.

3. Parody and free speech

At the heart of the question as to whether or not the legislature should introduce an exception for parody lie considerations of free speech and freedom of expression. The UK courts have acknowledged that copyright is “antithetical to freedom of expression”,¹¹³ or, as Prof Barendt puts it, “that copyright infringers

fourth, parody is permitted within A.70 of the Copyright Law (quotation for the purpose of criticism or review). To this end, when Italy was implementing the *Information Society Directive*, that A.5(2)(k) was not specifically implemented had less to do with the legislature’s unwillingness to introduce a bespoke exception for parody than it had to do with the fact that parody was already sufficiently provided for within the Italian copyright regime. (Thanks to Dr Maurizio Borghi for this analysis.)

In Cyprus, while there is no express limitation concerning the use of a work for parodic purposes, limitations are recognized under the non-statutory limitations of freedom of communication or press as are safeguarded by the Constitution of 1960 (see: Westkamp, 143).

¹¹⁰ See, for example, the response of the BBC to the original Gowers consultation which stressed that greater harmonisation of copyright exceptions across EU member states “would facilitate the broadcast and sale of programmes”; *The Gowers Review of Intellectual Property Call for Evidence: The BBC’s Response*, 13 (see: webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/C/5/bbc_and_bbc_worldwide_ltd_142_83kb.pdf). In this regard, the BBC made specific reference to the fact that “there is no exception to cover parody in the UK”; *ibid.* See also the *Gowers Report*, 24 (“Globalisation ... raises the problem of jurisdiction – the harmonisation of national IP laws has lagged behind the integration of markets. While technology allows firms to market products globally, licensing the IP rights separately in every national jurisdiction imposes significant costs on business in applying for, licensing and enforcing IP rights”).

¹¹¹ UNCTAD, *Creative Economy Report 2008. The Challenge of Assessing the Creative Economy: towards Informed Policy-making* (UNCTAD, 2008), Statistical Annex, 238 (see: www.unctad.org/en/docs/ditc20082cer_en.pdf). See also the international comparative data in Gordon and Beilby-Orrin, *International Measurement of the Economic and Social Importance of Culture*.

¹¹² See also the submission of *Antenna Audio* (the world leader in audio and audio-visual productions for the museum, cultural and heritage sector) to the original Gowers Consultation commenting that the “[c]urrent exceptions in UK copyright law are unreasonably narrow”, and recommending that the UK legislature revisit the list of optional exceptions set out in the *Information Society Directive*. The submission continued: “[W]hen the reform of current exceptions is considered, some credit must be given to the fact that these exceptions are standard legitimate practices in certain EU countries, without causing great detriment to their respective creative industries”. *Submission to the Gowers Review – Call for Evidence: Antenna Audio*, 7 (see: www.hm-treasury.gov.uk/d/antenna_audio_limited_017_650kb.pdf).

¹¹³ *Ashdown v. Telegraph Group*, 163.

may have free speech rights”.¹¹⁴ Not all infringing uses of copyright-protected material will trigger free speech concerns, but parody certainly does.¹¹⁵

We have already noted that the Second Consultation document explicitly rejected the suggestion that an exception for parody was “necessary” to ensure that the CDPA was compliant with A.10 of the ECHR (p.45, para.323). This claim, when couched in terms of *necessity*, is at least plausible. That is, the availability of a general public interest defence under s.171(3) of the CDPA does theoretically undercut the need for a bespoke parody exception to the extent that a court – should it find that a parodist’s rights under A.10 are not adequately accommodated by the existing copyright regime – can rely upon the ‘safety valve’ of the public interest defence to guarantee the protection of those free speech interests.

However, the extent to which s.171(3) sufficiently accommodates a parodist’s free speech rights under A.10 may prove to be more illusory than real. We have argued that neither s.16(3) nor s.30(1) of the CDPA allow meaningful scope for successful parody that draws explicitly upon an underlying copyright-protected work. Bearing that in mind, when one takes into consideration the cost and uncertainty of copyright litigation, the potential costs that a defendant might bear in losing an infringement claim, the extent to which the Court of Appeal in *Ashdown* has been criticised for its failure to fully take into account the substantive demands of the right to freedom of expression,¹¹⁶ and the fact that, since *Ashdown*, the public interest defence has yet to be invoked successfully before the courts,¹¹⁷ it would be a brave parodist indeed who would be willing to gamble upon s.171(3) of the CDPA to defend his right to create and disseminate what might otherwise be a copyright-infringing parody. The extent to which this might unreasonably chill political and artistic speech must be acknowledged.

We would suggest that reliance upon the uncertain nature and availability of the public interest defence runs too great a risk of discouraging the production of parody that enables the self-fulfilment of parodists, that enhances and encourages the public’s understanding of, and relationship with, literature and the arts, or that otherwise engages in significant political and cultural critique. The minimalist

¹¹⁴ Barendt, 258.

¹¹⁵ Barendt (at 256) argues that the case for the free speech interests of copyright infringers is “strongest when the infringement is a work of satire or a parody or reproduces information or images of political or social importance”, but “much weaker, or non-existent, in straightforward commercial piracy, when the copies aim solely to exploit the artistic skills of others for financial advantage”.

¹¹⁶ For example: J. Griffiths, “Copyright Law, Article 10, and Media Freedom”, in *Media Freedom under the Human Rights Act*, by H. Fenwick & G. Phillipson (Oxford: Oxford University Press, 2006), 882-918, 918 (who remarks that “[i]t seems likely that copyright law will remain relatively, and unjustifiably, immune from serious challenge from free speech norms until judges summon up the courage to depart more substantially from existing doctrine”); and, Barendt, 257 (who is critical of Lord Phillips MR’s reasoning for failing to sufficiently account for the fact that “social critics, satirists, and political commentators have legitimate free speech interests of their own, which they may exercise by incorporating substantial extracts from the speeches of politicians and others on whose work they are commenting”).

¹¹⁷ *Supra* n.54.

approach to compliance with the Convention advocated within the Second Consultation document is to be avoided. The question of actual compliance has yet to be tested,¹¹⁸ and while the Strasbourg Court has not yet specifically addressed the relationship between copyright and freedom of expression it has vindicated the free speech interests of a satirist when they conflicted with the image and reputation rights set out within the Austrian copyright regime.¹¹⁹ Given the importance of the free speech interests that underpin the place of parody within our political and cultural landscape, the introduction of an exception for parody must surely be regarded as a more appropriate mechanism for securing those interests.

Parody engages substantial free speech interests; as such it should be meaningfully and unambiguously accommodated within the copyright regime.

V. CONCLUSION and RESTATEMENT OF BASIC PROPOSITIONS

There exists a rich tradition of parody and satire within the UK, which tradition is one of long-standing. That tradition should be formally acknowledged and unambiguously accommodated within the copyright regime. For the following reasons, we invite the Intellectual Property Office to reconsider its decision not to recommend the introduction of a specific exception for parody within the UK:

- (i) Reliance upon the principle of insubstantial use will afford little – if any – meaningful scope for successful parody.
- (ii) Current provision under s.30(1) of the CDPA does not allow for the creation of parodies concerned with social commentary extending beyond a particular work. Moreover, the requirement that the parodic use incorporate a “sufficient acknowledgement” of the underlying work is inappropriate to the genre, and is likely to seriously inhibit the production of both *target* and *weapon* parodies alike.
- (iii) The absence of an exception for parody provides no guarantee of a significant market in licensed parodies, and neither is the existence of an exception for parody necessarily antithetical to the licensing of parodies by rightsholders.
- (iv) A parody is rarely, if ever, likely to act as a market substitute for the underlying work, nor is it relevant to consider whether a parody might otherwise

¹¹⁸ Prof Hugenholtz has suggested that the European Court of Human Rights might be willing to find national copyright laws in direct contravention of A.10 “if they fail to provide exceptions for uses such as parody”; P.B. Hugenholtz, “Copyright and Freedom of Expression in Europe”, in *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, ed by R. Dreyfuss, D.L. Zimmerman, H. First (Oxford: Oxford University Press, 2001), 343-63.

¹¹⁹ *Vereinigung Bildender Künstler v. Austria* [2007] ECDR 7 (concerning the parodic and satirical use of a politician’s image in the painting *Apocalypse* by the artist Otto Mühl). Section 78 of the Austrian Copyright Act provides that: “Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the portrayed persons or, in the event that they have died without having authorised or ordered publication, those of a close relative”.

negatively impact upon the successful commercial exploitation of the underlying work.

(v) While in theory the public interest defence may provide some scope for the parodic use of copyright-protected work, in practice the courts have demonstrated a considerable reluctance to entertain arguments based on s.171(3). As with the principle of insubstantial use, the public interest defence is likely to afford little scope for successful, lawful parody.

(vi) That distinguishing between lawful and unlawful parody might sometimes prove difficult presents no meaningful objection to the introduction of an exception for parody *per se*.

(vii) While the introduction of an exception for parody may result in greater *use* of copyright-protected work without the need for permission from the rightsholder, there is no reason to believe that the introduction of an exception will in itself result in the greater *abuse* of copyright-protected work.

(viii) While considerations about access to justice for individual creators are important, they are irrelevant to the current enquiry.

(ix) If the case for a bespoke exception for parody *vis à vis* copyright infringement is made out, there is no reason why the moral rights regime should not also accommodate that exception.

(x) To the extent that a rich tradition of parody already exists within the UK, this practice should be formally acknowledged and legitimised within the copyright regime.

(xi) Not only might an exception for parody encourage the creation of new work and facilitate the development of new markets, but parody has an important role to play in shaping the cultural politics of contemporary Britain.

(xii) While harmonisation *per se* does not provide a compelling argument for adopting an exception for parody, greater harmonisation of copyright exceptions within Europe may prove beneficial to the creative economy within the UK.

(xiii) Parody engages substantial free speech interests; as such it should be meaningfully and unambiguously accommodated within the copyright regime.

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