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The digital evolution of parody. The purpose of online parody in copyright law and freedom of expression.

Presentata da: Jacopo Menghini

Coordinatore Dottorato

Monica Palmirani

Supervisore

Massimo Durante

Co-Supervisore

Jörg Gerkrath

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Abstract

The thesis aims to focus on parody which has always been tied to art, marked by stinging irony. This form of artistic expression is gaining significant relevance on today's internet, where, thanks to technological development, it actively facilitates peoples' participation in the information society. The legal debate on parody has often focused on the appropriation of copyrighted works of art, transforming their content for comedic purposes. But parody has been also recognized as freedom of expression and protected thanks to the intention of making someone laugh; a human need that guarantees progress in society and determines its level of democracy. The advent of digital technology has renewed the ancient parodic technique, so that the online parody is perfectly embedded in today's society, with a great many sectors using messages that are based on parodic rhetoric. Online parody thus presents peculiarities of online interactions, such as the speed and nature of online artistic productions, and problems that cannot always be engaged with using traditional legal theories and categories. The thesis will explore the new opportunities and the new challenges for the purpose of online parody in copyright law and freedom of expression. The background of the legal analysis is thus divided into private and public interests. The dissertation will present the reconstruction of parody exception within European Directives on Copyright law. This part of the thesis will study how and when the law has predicted some kind of protection for parody and what are the differences for the regulation of this art form between a well-known model in the offline world and a still unsure model in the online world. In this regard, online parody will be described as a symbol for a shared digital economy of the creativity, aligning with the necessary rethinking of copyright law (Copyright 2.0). The thesis will also dedicate on the study of the critical spirit inside the Internet. Freedom of parody will be pointing out the public interest, the relevant fundamental rights and the necessary limitations to which any expression is subject. The outline will include the analysis of the content-sharing providers and their role in regulating user-generated parody; the social media are get used to intervene in online parody through policies aimed both at contrasting hate speech and fake news and at maintaining a free and democratic platform.

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The study of online parody has been a part of my daily life for the past few years, and I hope that by completing this thesis I have contributed to the understanding of an ever-changing artistic technique that is as complex as it is human.

INDEX

INTRODUCTION

Parody is perfectly embedded in today's society, with a great many sectors using messages that are based on parodic rhetoric. In this sense, we can cite newspapers, advertisements, certain brands and the mass media, which tend to distort titles, formulas and quotations with the intention of attracting the attention of a public that perceives a mixture of the familiar and the unusual. In fact, parody always plays within the bounds of corresponding to, and yet contrasting, its reference. A person might find a well-known formula in parody, and, at the same time, the absence of the corresponding content. This clash between form and content lies at the core of the technique.

Parody is defined as the re-elaboration of a well-known work with comic intent, with the reworking usually modifying a serious work. Parody must retain the *vis manifesta* (i.e. the main subjects and original work), but, at the same time, it must overturn the events, in order to provoke laughter through *vis comica*. The comic effect depends on a continuous comparison and relationship between the serious work and the parodic transformation. The peculiar transformative character of parody fits perfectly into today’s debate on, and criticism of, the information society; the re-elaboration of our common reality, mediated by the Internet, is technically much easier to perform that it once was.

My thesis will focus on these two features of parody: on the one hand, being a transformative work and, on the other hand, being a technique of critical reflection. These two intrinsic aspects of parody have led to a debate within the academic community about copyright and the freedom of expression.

This thesis focuses on the concept of parody, an artistic technique that reinterprets and transforms an existing and popular work of art. Parody is an ancient and illustrious literary genre, one of the first example of which is the *Batrachomyomachia* by Homer. Parody can also become an act of rebellion against the potentate, a game that everyone can play or even a fierce condemnation of the dominant. These components are found almost indiscriminately in expressions of parody and, as Hutcheon underlines, critical ridicule remains the most usual purpose

of parody. An introductory example can be found in medieval folklore, which accompanied religious processions and mocked God and the church. Although parody has been peacefully accepted as artistic expression, albeit with the notion remaining a subject of debate in the legal sphere, a minority of jurists have assigned it the marginal meaning of servile imitation, a form of parasitic speech.

This work will trace the perimeters of parody and investigate the evolution of its legal qualification. A study of the legal implications of parody and the significant issues surrounding it begins with conflict between opposing interests; on the one hand, the inspirer of parody and, on the other, the creator of the parody, who expresses the need to mock and criticize. The balancing of these opposing interests depends on the relevance that each legal system decides to grant to parody in a general sense, as well as the method of protection pursued.

The decision to take in hand the concept of parody arose from the relevance that it is attaining on the Web 2.0, where it actively allows users to participate in the information society via ICT. I will observe how parody has developed online and which relevant aesthetic issues arise and how they compare with traditional canons. Indeed, parody permits people to become "active users" in most modern social media, where anyone can produce their own creative content.

The structure of the thesis starts with an extensive introduction on the genesis of parody. The first chapter is founded on the various scholarly positions as to the analysis, definition and taxonomy of parody. I will analyse the most relevant studies, from a linguistic point of view, from the contributions of Yury Tynyanov, Michail Bakhtin and Linda Hutcheon to those of Gèrard Genette. In this section, parody will be analysed as a technique of literary evolution. Parody will be also presented from a philosophical point of view, as an everyday act, to echo Vladimir Propp. Parody may perform a social function, and, in this sense, I will turn to the theories of Henri Bergson, the first author to deal with comedy from a social point of view. This clarification will distinguish two basic functions of parody: the comic and the satirical. The comic function will be introduced through some important texts by Sigmund Freud and Helmut Plessner. The satirical function assumes more relevance in legal discourse; in this regard, parodies that display satirical function have been defined and regulated thanks to legal scholars and case law.

The reconstruction of parody and the analysis of its functions will reveal a very wide and heterogeneous range of definitions which embrace various disciplines in human sciences, such as sociology, psychology, folklore. These findings are the necessary incipit that will then allow me to continue the research and show how parody has spread online and why it is important to talk about its digital evolution that opens up to potential new legal issues.

The second chapter will continue the study of parody by examining the use of this techniques in art by illustrious artists over the centuries, such as the appropriation art. The transmigration in the online world has not stopped artists adopting parodic technique, and I will analyse the rise of these new artists and how they have integrated parody into digital experiences, such as Net.Art. Outside the artistic world, parody will be described as one of the most common techniques of communication and information within the so-called Web 2.0, which allows users greater participation in the so-called information society. I will argue that Web 2.0 is the ideal place to express creativity through parody, and I will present empirical research that shows how parody has developed during this technological revolution. The finding that parody shares common features with related techniques (such as quotation, criticism, review, caricature and pastiche) will lead to question of legal qualification in positive law. I will also explain how these techniques are often associated with so-called user-generated content, which, although different from a literary point of view, could raise similar legal issues when expressed online. I will therefore argue for the new category of user-generated content, legitimised as a new practice of mass communication on the Internet, which will serve as a catalyst for the reunification of all related techniques. The thesis goes on to some necessary reflections for legal informatics, the protection of online copyright and the freedom of expression and communication. I will therefore highlight how technological development has reserved a legal qualification for online parody.

The third chapter will frame parody within copyright law, where it is recognized as autonomous and original work, characterized by non-competitive parasitism, since there is no evidence that parody causes economic harm via the substitution of the original work. This chapter will illustrate: *i*) a more systematic framework for parody; *ii*) the most significant scholarly contributions on the subject;

iii) copyright as legal area of implementation and regulation of parody as an artistic instrument. The phenomenon of online parody has just recently found specific regulation within Directive on the harmonisation of certain aspects of copyright and related rights in the information society 2001/29/EC – InfoSoc. The digital evolution of parody, adapted to the new online context, requires the jurist to confront a series of legal questions inherent to European copyright law which is used to included parody in the exception and limitation regime. I will analyse an important case, *Deckmyn v. Vrijheidsfonds* (C-201/13) as the Court of Justice of the Eruopean Union (CJ) sheds light on both the definition of parody and the concrete scope of the exception. The decision will show a more equitable application, taking into account two aspects: 1) the purpose of the parody exception; 2) the fair balance between conflicting interests. I will also include the legal scholars' criticisms of CJ's ruling on *Deckmyn* with regard to the inappropriate qualification of parody exception: in particular, the missed harmonization of the concept of parody across Europe; the lack of flexibility in interpreting the concept of humour; the unclear interpretation of the principle of proportionality on the fair balance between intellectual property rights and other personal rights; the vague definition of discriminatory messages. These findings will partly confirm previous analyses on the difficulty of reaching a harmonised definition of parody in the EU territory, which is predominantly inhabited by peoples with folkloric and humorous traditions deeply rooted in national, or rather regional, borders. The chapter will then continue with a comparative approach, taking into consideration a territory that is larger than Europe but less heterogeneous, such as the US. I will therefore take a comparative approach, and specifically analyse the North American system’s take on the subject of the so-called parody defence. I will approach this section via the most emblematic court cases, which have sketched the boundaries that separate the different national experiences on the subject. In this context, the protection of parody has developed within the Fair Use doctrine, and I will show how, in recent years, legal scholars and case law from Europe have somewhat followed the US model, which places parody within section 107 of the US Copyright Act. The US Fair Use doctrine will be a perfect example of how parody has evolved over the years. In fact, the analysis of the four statutory factors will provide an important example of US legislation on parody. Fair use initially limited parodic exercise, but after *Acuff-Rose Music Inc v. Campbell*

has favourably recognised the right of citizenship among the works permitted as expressions of public interest. I will point out that this openness of the law is the result of technological developments that have made it increasingly easy over the years to appropriate other people's content. The analysis in this chapter will therefore allow me to highlight two approaches to parody, the European and the American. If the European approach will be closer to the French tradition by adopting a specific exception for parody, the American model will be able to operate in a broader context, not by distinguishing between related techniques (the French and European tradition), which could lead to confusion in the new online environment, but by adapting the appropriation of protected material to different copyright objectives: the protection of technological development, the need to safeguard private artistic expression and the recognition of the public interest in parodic expression.

The fourth chapter will analyse the protection of the various manifestations of comic thought, which have remote historical origins, united by the intention to make people laugh; a human need that guarantees the progress of society and determines its level of democracy. In this sense, I will analyse critical spirit, seen as an opportunity for society and a counterbalance to political power, according to the configuration of parody, which has evolved in such a particular manner on the Internet. I will expose how parody has been considered an exercising of freedom of expression by analysing international treaties, such as the European Convention of Human Rights, which guarantees and protects freedom of expression in Art. 10. I also will investigate the limits to freedom of parody that must not interfere with other fundamental rights. These limits represent the unavoidable conditions that authors must respect to avoid interfering with the rights of others, upon which a degenerate form of parody may impede.

I will emphasise that while a parody cannot be prohibited solely on the basis of the disapproval of the original author, it should be restricted if it conveys a message that is fundamentally at odds with the core values of the European public sphere on which society is based. The chapter will also emphasize another aspect: parody often falls within the scope of various freedom of expression rights, including the right to criticism and the right to review. The protection of these rights will be shown to be crucial in a democratic state. An examination of the right to satire, as

interpreted in the case law of certain national courts, will illustrate how the freedom of comical expression has been interpreted by analogy. This finding will lead to a consideration of parody beyond the mere scope of copyright and will introduce an evaluation of parody more related to the corrective function of comic expression within a democratic society. If the limitations imposed by the exclusive right do not involve the parody exception, the limitations imposed to the freedom of expression must apply to parody, especially in the digital environment, where the good to be protected is the public interest in accessing, sharing and communicating information. I will evaluate the social control that humour exercises over constituted power; in this sense, any person that is invested by the community and rises to public office must, necessarily, bear the weight of closer judgment and evaluation. The freedom of parody will also introduce new legal instances in the age of "Onlife" (Floridi), where anyone can be exposed to comment, criticism, offence and insult. As part of the evaluation of online parody, I will also look at limitations outside the legal areas of copyright or freedom of expression. Indeed, parody not only needs to comply with positive law, but it must also align with humour theories and cognitive research. The peculiarities of online parody, such as the speed and nature of communication and information technologies (ICT), pose problems that cannot always be dealt with traditional legal theories and categories. The emergence of the digital community introduces a new scenario, pluralistic and open to new types of actors. Online parody raises new legal issues and involves new players, particularly: the platforms that disseminate parodic works; and the online user entertained by the parody. I will assess the role of the new players for addressing the new challenges in copyright and freedom of expression for the purpose of parody. The contribution of large providers in remedying or preventing cases of the degenerated parodies that may occur on their platforms is an essential legal and technological aspect. Most of the time, the victims of degenerated parody on social media are not aware of the mechanisms by which they can react, nor do they grasp the internal policies that establish the timing and methods of intervention by the social media's technical staff. Therefore, the issues of conflicting interests must be enlarged to these new subjects.

In the fifth chapter, at the outcome of the analysis conducted on the evolution of the concept of parody and the different solutions adopted by legal systems, I will deal with the different technical-legal problems connected to social media. I will

make some considerations as to the liability of social media companies in the regulation of online parody by analysing the relevant European Directives (DSM 2019/790 and E-Commerce 2000/31/EC). These new agents are involved in the enforcement of illegal activities and can have a great effect on the governance of the parodic phenomenon, as they can permit or delete it if the parody does not respect internal policy; in a nutshell, social media regulate and control both the qualification and the assessment of when parody may be considered fair use. I will thus analyse Article 17 DSM and the concerns that accompanied its introduction in 2019, regarding the potential censorship for parody. I will analyse most contentious clauses of Art. 17, notably the prohibition of general monitoring and the complaint and redress mechanism for user; these clauses could become a potential threat to the freedom of parody. The chapter will assess the social media's ability both to identify online parody and to settle the complaint mechanism in case of violations of intellectual property rights or other personal rights. The findings will indicate that it may be difficult for parties involved in online parody to reach a negotiated settlement. Finally, I will examine the role of social media in regulating online parody, given that the User-Generated Content (UGC) on these platforms now constitutes a primary technique of mass communication. Additionally, certain risks associated with the Internet infrastructure will be explored, as it can impact parody both as a creative technique and direct attack.

The last chapter will introduce the concept of user-(de)generated parody, with reference to the ways in which parody may breach personal rights and copyright interests. I will focus on the most current worries reported on the web: fake news and hate speech. The relationship between comic expression and possible degenerations will be highlighted in various definitions by legal scholars and case law. The notion of user-generated parody no longer aims at artistic creation or free communication, but simply wants to attack, insult and damage another online user. Furthermore, these degenerations will be linked to the online environment that could trigger hateful sentiments and fake news. From a legal perspective, it is crucial to draw a clear and relevant distinction in order to avoid confusion between parody and hate speech or fake news. As a result, I will examine how legal experts and case law have distinguished comical expression from mere insults or the intent to spread misinformation. The discussion of hate speech will begin with the most recent

definitions provided by legal scholars and case law. I will also assess the issue of social media platforms' management of certain types of hate speech, which may exploit the protection offered by the parody exception. In addition, I will explore how social media platforms have chosen to regulate parody through policies aimed at maintaining a free and democratic platform. This last finding will lead to draw conclusions on online parody, which has retained its centrality in the information society. The digital evolution of parody reaffirms the importance of this form of creative expression.

Methodology for research on parody

The methodology of this thesis is based on discussing the main legal issues surrounding parody by considering several different legal areas. The first examines the framing of parody within copyright law, which recognizes it as intellectual property. This investigation is descriptive and: *i*) presents a more systematic approach; *ii*) presents the most significant doctrinal contributions on the subject; and, *iii*) is the main discipline for the implementation and regulation of parody as an artistic instrument. Parody is specifically regulated by the Directive 2001/29/EC[1] and the Directive 2019/790[2], which fall in the field of exceptions and limitations to authors' rights. The significantly context-sensitive issue may be summarized as follows: does the exception of parody respect freedom of expression and effectively stimulate online creativity?

A comparative approach will also be used in which North American systems are analysed; I will examine the Fair Use doctrine, in order to incorporate different perspectives on parody that have emerged over the past century as parody has gained prominence within copyright law. The chronological comparison of two different approaches within the American system will provide insights into the reforms in regulating parody and facilitate a deeper examination of copyright in the digital age, particularly with regard to exclusive right. In this way, I attempt to outline the boundaries that separate the range of national experiences of parody.

The methodology assembles knowledge on the freedom of critical spirit, summarizing scholars' ideas on parody as a personal right, and highlights the widest constitutional protection and its limits. In this area, the methodology is analytic as it compares different perspectives; it tries to define the connections between the different doctrines to create a different picture of the genre. Parody must not interfere with other important constitutional rights, such as human dignity, which could be affected by a degeneration of this expressive form. This method of analysis focuses

[1] Art. 5.3 letter *k)* InfoSoc Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

[2] Art. 17 par. 7 letter *b)* Directive (EU) on Copyright and related rights in the Digital Single Market 2019/790.

on the coincident and precise identification of how much freedom and legal protection are guaranteed to parody and how far a parodist may go.

I will show how this commonplace behaviour can be corrupted by the web, both leading to dangerous situations when the context seems peaceful and violating other personal rights or copyright's interests. In the case of degeneration of parody, the highly context-sensitive issue is: does the internet contribute to increasing degenerated parodies? How can a fair balance between the freedom of parody and a model to control possible violations be achieved?

The methodology also involves an exploration of parody within different domain knowledge. I will look outside the legal field and examine the origins and development of parody in literary, psychological and sociological contexts. This approach will facilitate the establishment of a comprehensive definition of parody that will prove valuable in the subsequent analysis. Certainly, an understanding of humour theory is a prerequisite for any subsequent discussion of parody. The legal examination could undoubtedly gain insights from other fields and alternative approaches to the same issues: the appropriation of a work created by others, the limits of comedic expression, the framework of responsibility for parody and, finally, the degenerations in parody brought about by digital evolution.

The methodology in the study of the legal implications and significant problems surrounding parody thus starts from emphasizing the conflict between opposing subjects and interests. Traditionally, the questions about parody posed to the legal scholars highlight how conflicting interests emerge. I list them below, introducing which subjects (as individual and entity objects of study) and which related rights are of interest in my dissertation.

1. The parodist: the creator of parody

The initial interest here lies with the author of parody. Critical spirit is expressed in appropriating and taking inspiration from another work. Firstly, the parodist has an interest in expressing their own comic and critical thought (freedom of expression). Secondly, they are interested in the freedom of artistic expression via the recognition of originality, autonomy and independence under copyright law. The

considerable relevance of today's internet allows the parodist to actively participate in the information society. The digital single market provides intriguing tools of appropriation that enable user-creators to express artistic vanity. The parodist can be seen as an "active user"; one who produces and disseminates their own creative content online.

2. The rightsholder: the inspirer of parody

The rightsholder may oppose parodic transformation as they have an interest in not seeing their "serious" work being transformed into quite the opposite, into its comic or satirical antithesis, thus betraying its original spirit. A minor doctrine suggests that the parodist must obtain authorization for the parodic transformation from the rightsholder[3]; this provision is not accepted unanimously. The balance of these two opposing interests depends on the importance that each legal system decides to grant to parody in a general sense, and on the method of protection pursued.

Emerging technologies have posed challenges for new artists in the digital single market, where they had to seek protection against changes that have altered the traditional dynamic between artists and their audiences on numerous occasions. One legal and technological aspect that is essential in this context is the attempts made by large internet providers to remedy or prevent cases of degenerated parodies that occur on their platforms. Most of the time, the victims of a degenerated parody, on social media, do not know via what channels they can react or what internal policies may exist to establish the timing and methods of intervention by social media technical staff. Therefore, the scope of these conflicting interests must be widened to include two other figures: social media and users.

[3] At the beginning of the twentieth century there was a debate over parody protection. The authors who opposed to formal recognition were used to consider necessary two conditions of parodic lawfulness: *a)* whoever wants to publish a parody must obtain the rightsholder's previous consent; *b)* the rightsholder is entitled to share in the profits of the parody he has authorized. *See* Alberto MUSATTI, *La parodia e il diritto d'autore*, in Riv. dir. comm, 1909, I.

3. Social media: the new service providers and website owners

The interests of social media are firstly found in the opportunity to host new creative content on their platform for new artistic expression. Web platforms claim freedom to conduct business (art. 16 ECFR), and parody plays a role because: "comedy is big business".

Secondly, their interests lie in liability for third-party activities, specifically in the case of a degenerated parody created by "active users", or a parody that violates copyright. The evolving landscape of the digital single market has not singularly favored any particular subject. Within this context, intermediaries have faced a rising threat of being held accountable for third parties content uploaded on their platforms. Discussions about the extent of liability for the activities they facilitate have prompted enhanced cooperation in online enforcement efforts aimed at combating piracy and potentially harmful content[4].

4. Users: those entertained by parody

The last subject implicated in parodic activity is the user who is entertained by the parody. The focus here is on an attentive audience; users who join social media for individual and social reasons[5]. In recent years, the digital single market has been expanding the offer of providing users with new services for content creation and consumption. Within this context, the parodist can be described as an user-creator or active-user, while the user-consumer is more of a passive recipient who simply enjoys comedic content. The growing crackdown on online appropriation appears to be both out of step with historical trends and with no sufficient justification in terms of safeguarding distinct and equivalent rights. The interests of this party are connected to information and communication rights. Users may also be

[4] The service provider has been often compared to the press organ or editor, for example, or it has been modelled on the business activity performed. However, such a fault comparison has drawn sharp criticism and must be refuted.

[5] As Sartor underlines, there are two different approaches: a) user who create content; b) user who host third pard content. Therefore, a user can perform the role of hosting provider at the second level, in the case the user hosts, in his or her public profile, a third part content. *See* Giovanni SARTOR, *Social networks e responsabilità del provider*, AIDA, 2011, p. 39.

attracted to shaping their own online identity via parody, but face a conflict between entertaining their followers and their own privacy, which can provoke legal issues, such as defamation.

Principal research questions and objectives

Turning to the objectives of the project, I will explore the new parodic production and its impact on the digital environment. New, recently born forms of media allow new approaches to online critical spirit to grow in a new and highly varied scenario; varied in terms of both the quality of expression and quantity of content produced. The media themselves have their own peculiarities: the speed and nature of online-art productions present problems that cannot always be dealt with using traditional legal theories and categories. This analysis of the acknowledged lawfulness of parody starts from an examination of the recurring elements, until a precise identification can be achieved for the digital context.

The first part of the dissertation will examine parody in a broader context. The research will look at the origins of parody, attempting to establish when it first appeared and the reasons for its growing popularity. It will also explore whether parody can be seen as a distinct entity that has evolved over time, adapting its functions and communicative intentions.

An outline of the current debate over parody embraces several distinct legal areas. The main research questions focus on the new challenges in copyright and freedom of expression, as parody has raised concerns in both areas of law. It is thus necessary that we proceed with its correct qualification within the copyright system and to a legal justification of the freedom of parody.

A. Copyright

The legal debate on parody has often focused on the appropriation of copyrighted works of art, transforming their content for comedic purposes. The

reference work is therefore the indispensable antecedent of parody[6]. The legal debate on parody also includes conflicting opinions on some relevant statements: is it mere imitation or re-elaboration, art or mere mockery, parasitic or sublime genius, noble expression or violent defamation?

Traditionally, the legal questions surrounding parody have been defined with an eye to copyright law and the private interests of the rightsholder: might parody be considered a work of authorship? What protection is there for parody under copyright? What are its limits and why is parody often associated with parasitism? Can the rightsholder oppose any parodic transformation? Is the consensus of the rightsholder necessary? [7] Is online parody a valid criticism of the tradition of exclusive rights? Does it favour a necessary re-thinking of copyright law that may reform property rights in view of a modern technological evolution?

Copyright represents the starting point of this analysis. Most legal scholars and case law define parody as an autonomous and original work that is characterized by non-competitive parasitism, since there is no evidence that parody causes economic harm via substitution (if it does not affect the patrimonial and moral rights of the rightsholder). On the contrary, parody can act as gateway to the original work for those who did not yet know it. The main discourse on the subject in the field of copyright focuses on the beliefs that parody may be: *a)* an autonomous work (original and independent); or, *b)* a mere reworking (a derivative work). From this point of view, I can question whether parody possesses enough creativity and originality to be protected, by copyright, as an autonomous work of art. Will two identical forms, but with different meanings, produce two different copyrighted works? Should we qualify parody as a mere reworking of a pre-existing work, since it appropriates elements of that copyrighted work? [8]

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[6] *See* Carlo Emanuele MAYR, *Critica, parodia, satira,* in AIDA, 2003, cit. p. 278.

[7] Such questions can be found in Mario FABIANI, *La protezione giuridica della parodia con particolare riferimento a recenti orientamenti di giuristi stranieri*, in Il Diritto di autore, 1985, fasc. 4, p. 464.

[8] *See* Giorgio SPEDICATO, *Opere dell'arte appropriativa e diritto d'autore*, Giurisprudenza Commerciale, 2013, n. 40: 118/II-131/II, p. 122.

These elements are fundamental to the stimulation of the circulation of information, and are able to create a new market, which is usually referred to as user-generated content. The focus here is on whether parody, as transformative use, involves a violation of exclusivity, in what contexts, and for what infringement. Why are some parodic uses allowed, while others are prohibited? The practical problem of online parody under copyright law poses several risks for the Digital Single Market. Could this practice represent a significant consumer activity? Could parody be described as a creative contribution to other users? What are the implications of online parody for the Digital Single Market?

It is possible to arrive at a correct definition of parody by limiting the scope of research to the proper application of the parody exception, as set at the community level (Art. 5 Infosoc Directive 2001/29/EC and art. 17 DSM Directive 2019/790). This research question highlights transformative use, which guarantees the lawfulness of parody, in the digital scenario. Does parody exception grant transformative use a certain degree of openness in the digital environment? As Ricolfi underlines, an analysis of copyright, as we know, "may no longer be an appropriate tool for the needs of the creator and society in a digital environment"[9].

B. Freedom of expression

Freedom of expression provides protection to various comical manifestations that have the intention of making someone laugh; a human need that guarantees progress in society and determines its level of democracy. The freedom of parodic expression must be linked to protecting public interests, like the development of culture, artistic heritage and the freedom of all artistic forms. In this context, parody has been presented as the free expression of comic, humorous and satirical thought, while shining a light on constitutional protection and the legal limits on art. At the same time, such forms of artistic expression, like satire or parody, may have a negative impact upon important personal rights, such as honour, reputation and personal identity. Art is not *legibus soluta.*

[9] *See* Marco RICOLFI, *Making Copyright Fit fort he Digital Agenda*, 12th EIPIN Congress 2011, cit. p. 1.

> A work's use for the purpose of parody constitute a focal point in the context of freedom of expression[10].

The focus will be on the critical spirit of parody, seen as an opportunity for society and a counterbalance to political power, which is expressed through an art form that has undergone a peculiar evolution on the internet. In particular, I will analyse freedom of expression and freedom of the arts in the field of the most modern intellectual works produced in the digital environment.

The Web 2.0 has now also become the principal place where communication, freedom of expression and social relationships take place. Franceschelli [11] has underlined the social function of the web as being an instrument for spreading opinion and content. Moreover, new rights arise thanks to these new opportunities. For instance, the right of access to, and fruition of, content. The challenge, for the legal scholar is that of finding a balance between opposing interests; freedom of communication and artistic expression on the web. How does this choice affect the free manifestation of critical spirit online, which is today increasingly expressed through such transformative uses?

The conceptual problem of online parody raises concerns about the risk of a lack of freedom of expression in the digital space. Could this practice be subject to new censorship in the information society? Furthermore, we need to examine whether a parody that enters the online environment can be corrupted by uses and expressions that no longer aim at pure artistic creation or communicative intention, but simply want to cause harm by feeding hatred against someone? Is it possible to trace this widespread behaviour in parodic expression? Does online parody trigger further restrictions in the concrete application of freedom of comic expression?

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[10] Martin SENFTLEBEN, *Copyright, Limitations and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law.* The Hague: Kluwer Law International, (2004), cit. p. 28.

[11] *See* Vincenzo FRANCESCHELLI, *Sul controllo preventivo del contenuto dei video immessi in rete e i provider. A proposito del caso Google/ViviDown*, Rivista di diritto industriale, 2010 Parte II, p. 347.

C. Online parody

Answering these questions will lead to questions about the new online parody and how the principles of copyright and freedom of expression are being applied in the digital realm by innovative content management and sharing platforms. Who decides about parody in the digital environment? If the impact of technology is changing who has the power of decision, can the heart of parody also change? Is the law keeping up with online parody? What concerns are raised by taking user-generated parody online?

Firstly, I should examine the implications for copyright and freedom of expression that follow UGC for the purpose of online parody. The parodic content uploaded in a social network, where users express their own individual personality, may violate both limits to freedom of expression (e.g. defamation) and the guarantees of copyright law (economic and moral rights of the rightsholder).

Would it be fair to share the liability between the creator and social media for such violations? Two different doctrinal perspectives may be present: *i*) someone might think that stricter control on the web is worthwhile, especially if the responsibility for that control falls upon the internet service provider - the more the liability falls upon the provider, the more of a responsible place the Web would be; *ii*) some may oppose strict control and defend internet freedom. The regulation of parody is therefore a choice between these two viewpoints.

Accordingly, the last research question would pose whether the obligation to monitor and seek the illegal activities might interfere negatively with: right of property, the freedom of expression, information and communication, the freedom to conduct a business.

Chapter 1
Reconstruction of parody and analysis of its functions

1.1 Introduction

Parody has always been tied to art. This genre traditionally represents one of the most subtle forms of artistic expression. Several authors have been involved in this issue in the literary and artistic fields, and they all agree on the ancient Greek genesis of the word παρα - ᾠδή, which is interpreted as an antithesis[12], and literally means counter-song. I shall start with the etymology:

> *ode*, that is the chant; *para*, "along", "beside". *Parodein*, whence *parodia*, would (therefore?) mean singing beside: that is, singing off key; or singing in another voice – in counterpoint; or again, singing in another key – deforming, therefore, or *transposing* a melody[13].

The etymology here makes reference to the combination of proximity and distance; both are at the heart of parody.

However, this definition is only one of the several possible, as many authors have discussed this topic, which is still the focus of doctrinal disputes today. Aristotle was one of the first philosophers to deal with parody when he mentioned it in the second chapter of his *Poetics*. He classifies literary genres according to two types of action - noble or lowly, better or worse - and according to their mode of enunciation - narrative or dramatic representation. The sum constitutes the Aristotelian system of poetic genres[14]:

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[12] One of the most famous parodies is the *Batracomiomachy* by Homer, an antithesis of the heroic epic poem *Iliad*.

[13] Gèrard GENETTE, *Palimpsests: literature in the second degree*, (1982), University of Nebraska Press, 1997, cit. p.10.

[14] "High action in the dramatic mode corresponds to tragedy; high action in the narrative mode to epic; low action in the dramatic mode to comedy. As for low action in the narrative world, it is illustrated only by allusive references to works more or less directly designated by the term parody" *Ivi* p. 13.

> The first use of *parodia*, dated at 335 BCE, is attributed to Aristotle in his poems referring to Hegemon. In this literary context, *parodia* refers to a moderate length narrative poem which uses the meter and vocabulary of the then well-established form of epic poems. *Parodia* of this type are satirical, addressing mock-heroic topics and intended to create a comic effect. However, parodic forms were not confined to poetry and featured in plays, including the works of Aristophanes[15].

Parody thus arose in Greece as a response to the pain caused by the epic or tragic poems. Aristotle's Poetics deals extensively with tragedy, reserving two chapters for the epic, while leaving out the analysis of comedy and the "fourth world"[16], which includes parody. Both genres were supposed to occupy another book, which either never came to light because Aristotle never wrote it, or because it disappeared over the centuries. Aristotle's theory on the scheme of genres therefore presents parody in the last category. Daniel Sangsue[17] attempts to discern, albeit in an explicitly conjectural manner due to the textual lacuna, Aristotle's intentions starting from the references provided. According to the French author, the "fourth world" could be expressed in two different ways; the first would be a subversion of a well-known text (anti-Iliad), and the second would be a representation of worse and lowly characters[18].

From this reconstruction, parody has been regarded as a genre that is not entirely attributable to a single literary technique. In the first case, the presence of a reference text to be re-elaborated is recognised; the parody must recreate a subverted version. In the second case, on the other hand, the parodic artist is not chained to a specific previous text, but can express their artistic creativity, free from any readaptation, and focus on a different and broader contestation, attacking the styles, languages and ideologies of a precise historical period. Under this double guise, parody, intended to exalt the beautiful by contrast, tends to assume a greater

[15] Sabine JACQUES *Exception of parody* cit. p. 2.

[16] *Ivi* p. 14.

[17] Daniel SANGSUE. *La relation parodique*. Paris, Corti, Les Essais, 2007.

[18] *Ivi* p. 20.

extension than mere imitation, displaying several more 'minute' attitudes and more complex phenomena:

The chosen subject, which had to be grandiose and renowned, was certainly a common denominator in ancient times, and thus a parody would model its style on that of a famous and sublime work[19].

1.2 Analysis and definition of parody

This section will examine the numerous analyses and definitions of parody over the centuries. The study will consider parody in an artistic and philosophical framework and contemplate the most eloquent and illustrious theoretical reconstructions on the subject.

Parody is a transformation by which a serious, noble or elevated work of art is reworked into different form and content, inducing laughter and critical reflection. It is an act of mockery; the tragic event becoming comical. It is also a narrative expedient; a reinterpretation of an existing and popular work of art that is often characterized by strong irony.

Parody spans numerous disciplines, as it is not only an ancient and illustrious literary genre, but can turn into an act of rebellion against constituted power, into a game of the masses or even into a fierce condemnation of established dominant thought.

1.2.1 Parody as literary evolution

My analysis of parody starts with the school of Russian formalists, who, during the 1920s, were interested in "literary evolution" as the interaction between different works, and argued that all literary forms change.

[19] In support of this thesis, Joseph LUSTIG *La parodia nel diritto e nell'arte. Causa d'Annunzio-Scarpetta*. Napoli: Detken et Rocholl, 1908, points out that no poem was more parodied than the Iliad, no philosopher more so than Socrates. According to the author, any modern analysis of the parodic genre must be based on a faithful reconstruction of its genesis.

> The function of the dominant in the service of literary evolution included the replacement of canonical forms and genres by new forms, which in turn would become canonized and, likewise, replaced by still newer forms[20].

Yury Tynyanov, one of the most important formalists, defines parody as an act of belligerence, a battle that deconstructs and reconstructs the old elements[21]. This destruction, therefore, leads to a renewal, a replacement of out-dated forms. In this sense, parody is an act of rebellion against old, worn-out and conventional artistic forms. In transcending the specific work, it looks at and attacks a wider artistic movement.

> A parody is a work, in verse or prose, which is directed at some serious creation. The treatment is humorous, being achieved via certain alterations or perversion of its essential purpose into something which is amusing[22].

However, Tynyanov goes further, exposing how parodic rewriting corresponds to "stylisation" rather than imitation or outright destruction. This stylising procedure is described as a game, a combination of various elements characterised by almost excessive ostentation; parody appears when stylisation has comic motivation [23]. Ultimately, parody leads to renewal. It transcends mere imitation, rupture, destruction and, in order to replace out-dated forms, makes possible what the Russian author calls "literary evolution".

The comical effect within the parodic genre is obtained through what Tynyanov calls the "mechanisation" of the procedure. Here, the parodic process is carried out in two stages: first, the mechanisation of an already defined procedure; second, the organisation of the old procedure mechanised in a new form. One good example of mechanisation is the "parodic refrain" in "The Frogs" by Aristophanes. In

[20] Nasrullah MAMBROL *Russian Formalism*, Literary Theory and Criticism, October 19, 2020. Online https://literariness.org/2020/10/19/russian-formalism/.

[21] Yury TYNYANOV, *Destruction, parodie*, (1921), ″Change″, 2, 1969 (cit. SANGSUE p. 38).

[22] Yury TYNYANOV, "*'O parodii', in his Poetika. lstorija literatury. Kino*" (Moscow, 1977), pp 284.

[23] TYNYANOV *'O parodii'* p. 68.

this famous comedy, Aeschylus ridicules Euripides' prologues, which are incongruous, full of repetitions and so predictable that they can always end with the expression "he broke the bottle". In doing so, the text creates a purely comic refrain and changes the meaning of the courtly verses, relegating them to crude speech:

> EURIPIDES Nonsense; I say my prologues are first rate.
> AESCHYLUS Nay then, by Zeus, no longer line by line
> I'll maul your phrases: but with heaven to aid
> I'll smash your prologues with a bottle of oil.
> EURIPIDES You mine with a bottle of oil?
> AESCHYLUS With only one.
> You frame your prologues so that each and all
> Fit in with a "bottle of oil," or "coverlet-skin,"
> Or "reticule-bag." I'll prove it here, and now.
> EURIPIDES You'll prove it? You?
> AESCHYLUS I will.
> DIONYSUS Well then, begin.
> EURIPIDES "Aegyptus, sailing with his fifty sons,
> As ancient legends mostly tell the tale,
> Touching at Argos"
> AESCHYLUS Lost his bottle of oil.
> EURIPIDES Hang it, what's that? Confound that bottle of oil!
> Give him another: let him try again.
> EURIPIDES "Bacchus, who, clad in fawnskins, leaps and bounds
> torch and thyrsus in the choral dance along Parnassus"
> AESCHYLUS Lost his bottle of oil.
> DIONYSUS Ah me, we are stricken-with that bottle again!
> Pooh, pooh, that's nothing. I've a prologue
> He'll never tack his bottle of oil to this:
> "No man is blest in every single thing.
> One is of noble birth, but lacking means.
> Another, baseborn,"
> AESCHYLUS Lost his bottle of oil.
> DIONYSUS Euripides!
> EURIPIDES Well?
> DIONYSUS Lower your sails, my boy;

This bottle of is going to blow a gale.

EURIPIDES O, by Demeter, I care one bit;

Now from his hands I'll strike that bottle of oil.

DIONYSUS Go on then, go: but ware the bottle of oil.

EURIPIDES "Once Cadmus, quitting the Sidonian town, Agenor's

offspring"

AESCHYLUS Lost his bottle of oil.

DIONYSUS O pray, my man, buy off that bottle of oil,

Or else he'll smash our prologues all to bits[24].

What makes Tynyanov's thinking original is the fact that he denied the simple and common idea of defining parody as a writer making fun of another writer. Tynyanov broadens the analysis of parody and considers the parodist a representative of a specific trend in literary evolution.

The author is not interested in the struggle between individual authors. He prefers to bring parody back to literary systems. Parody, thus, transcends the comic and becomes an indispensable feature of literary evolution:

> All methods of parody, without exception, consist of the alteration of a literary work or feature, uniting a series of works (an author, journal, or almanac) or series of literary creations (genre) as systems. There is a translation into another system. Properly speaking, every utilization of a work in a different environment or context is a partial shift in meaning[25].

As pointed out by some scholars of the Russian author, two noteworthy innovations on this study might be highlighted here:

> Tynyanov, then, understands the problem as follows. First, a new conception of parody must be developed which places it back into the

[24] ARISTOPHANES, "*The Frogs*". Translated by E.D.A. Morshead

[25] Yury TYNYANOV, "*O parodii*" (Moscow, 1977), pp 294. "Parody, argues Tynyanov in the above, is best perceived when done on a series of works with a clearly recognized set of literary values. The more definite these values, the greater will be the clash between the two literary systems. Tynyanov calls this leap from system to system a translation" cit. Michael Richard SOSA, *Yury Tynyanov: Method and theory*, Ph.D. The University of Wisconsin - Madison, 1987. p. 175

> heart of study of literary evolution. Second, parody should cease to be viewed in psychological terms[26].

The first point has been highlighted in this section, while the second, namely the view of parody in psychological terms, will be dealt with below, when Freud's theory is presented.

1.2.2 Parodic consciousness

Another Russian literary critic who was interested in parody was Mikhail Bakhtin. Bakhtin focused on the meaning and relevant use of the term in accordance with the theories of the Russian Formalists on 'parodic stylisation'.

Parody is therefore analysed here not as a mere imitation or drastic destruction of stylistic models, but rather as something capable of manifesting profound implications within the terrain in which it is cultivated. The most original contribution of Bakhtin's study, which distinguishes it from the approach of the Russian formalists, is therefore the attention to the value of parody in the world; the vision it gives to those who read it, and the cultural and ideological implications underlying its use. Its value is identified with the highlighting of the comic aspect. In fact, ludic purpose has always been extremely important in literary history.

Parodic forms, thus, create a kind of comic universe. Bakhtin believes that every parodic author, regardless of the genre reworked or the technique used, is driven by a common purpose, which is the creation of a comical and critical point of view, a corrective to styles and genres that intends to unveil another reality[27]. From his analysis of the parodic common purpose, Bakhtin thus theorises the existence of a "parodic consciousness", capable of identifying the boundaries and comic features of serious direct discourse. The author who possesses and refines such a consciousness will learn to adopt a different perspective; a relativisation of stereotypes and an alternative to the mainstream tendency of noble discourses, which over the course of

[26] Michael Richard SOSA, *Yury Tynyanov: Method and theory*, Ph.D. The University of Wisconsin - Madison, 1987. Cit. p. 179.

[27] Michail BAKHTIN, *Estetica e romanzo,* (1975), Einaudi, Torino, 1997, cit. p. 423.

time become limited, incomplete and sclerotized[28]. The importance of parody within literature is unexpected. Indeed, any serious genre or direct word (from the artistic, philosophic, religious or every-day worlds) has been corrupted by a parodic version or a comic transformation. The frequency of such transformative uses has permitted a consecration of parody within the literary tradition, making it as good as the serious direct genres[29]. The Russian author also tries to distinguish some uses of parody:

- Caricatural imitation: the most general use of the term. It is exaggeration relating to both narrative *escamotage* and literary genres. Here, the parodic is confused with the comic, the ironic or the humorous;
- Parodic stylisation: the polemical recreation of a particular language represented and "unmasked" within parody;
- Rhetorical parody: the most negative meaning, it represents nothing more than the destruction of another person's speech, a typical case in modern parody;
- Parody in the strictest sense: a simple disguise. Here, parody reproduces the styles and forms of the serious reference[30].

1.2.3 Everyday parody

Parody cannot only be confined to the artistic or literary sphere, as it has a deep connection with everyday life. According to Daniel Sangsue, every time we quote a sentence by someone else and change the intonation, omitting or adding a few words, we are parodying that person. Vladimir Propp, a Russian linguist, devoted considerable attention to the issue. In fact, according to the author, the object of parody can be any outward appearances of life.

> Parody consists in the imitation of external characteristics of any phenomenon in our life (a person's manners, expressions, etc.) that completely overshadows or negates the inner meaning of what is being

[28] SANGSUE p. 50

[29] BAKHTIN p. 418.

[30] A clear example offered by Bakhtin is the Lucian's *Tragodopodagra*. Here, Lucian presents a parody of the usual termination of a Greek tragedy: «Let every gouty man submit to mockery and ridicule, for such is his fate».

parodied. Everything can be parodied: a person's mannerisms and actions, his gestures, gait, facial expressions, speech, professional habits, and professional jargon. Not only can humans be parodied, but so can the material things they create. Parody attempts to show that there is emptiness behind the external forms that express the mental side of individuals. Imitation of the female circus rider's graceful movements by a clown always causes laughter: there is the semblance of elegance and grace but ultimately only clumsiness that is quite the opposite. Thus, parody is *a device for revealing an inner flaw* in the person parodied. The clown's parody does not, however, expose the emptiness of the subject parodied but rather the absence of positive qualities of the individual imitated.

Chekhov in 'A Night before a Trial' describes a medical prescription that can easily be considered a parody. A man pretending to be a doctor spends the night at a postal station next door to a pretty woman who is ill, examines her, and then writes the following prescription:

> Rx.
> Sic transit 0.05
> Gloria mundi 10
> Aquae destillatae 0.1
> A tablespoon every two hours.
> To Ms Syelova
> Dr Zaitses. (1971-83, III:122)

This has all the semblance of a prescription; it contains all the proper external features: the requisite symbol Rx. (i.e., 'recipe - take'), Latin terms and decimal numbers standing for the quantity and proportions, the dosage, and the instruction that the medicine should be dissolved in a certain amount of distilled water. The person for whom it has been prescribed is mentioned along with the one who has written it. All the same, the most important thing is missing, the one that constitutes the very content of any prescription: medication[31].

Therefore, the parodic reference is not always linked to a specific work of art. According to Propp, many literary currents originate with the precise aim of parodying previous experiences. This has almost always happened and has been very

[31] Vladimir PROPP, *On the Comic and Laughter* (University of Toronto Press, 2009), p. 60-61.

successful, without targeting any specific work: "when any literary genre starts to be parodied, this means it is becoming out dated"[32]. This is a common practice in literary art, some artistic masterpieces were born precisely thanks to a parodic destruction of previous artistic references (*Don Quixote* by Miguel de Cervantes). However, as was noted previously in the section on Bakhtin, this destruction must be followed by renewal, in the form of an innovative replacement.

1.2.5 Defining parody

One of the latest studies on parody was conducted by Linda Hutcheon, who concentrates on the most recent forms of cultural production. This intensive literary research focuses on the relationship between parody and other different expressions of common speech (such as satire, irony, pastiche, burlesque, plagiarism). Hutcheon presents her own definition, starting from an overview of the similarities and differences between each of the above terms. Hutcheon's belief regarding parody is something new in contemporary art; the ways in which parody has been used by several artists permit us to declare it as one of the main means of creating.

A first definition by Hutcheon is presented below:

> In the background will stand another text against which the new creation is implicitly to be both measured and understood[33].

This is close to the literal definition, which always exposes a duplex view of parody; the creation of a new work (ᾠδή) and the encounter-clash relation with another (παρα).

Hutcheon, moreover, clashes with the Russian formalists, who define parody as an act of belligerence[34]. To her, parody does not mean renewal, evolution or change.

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[32] *Ivi* p. 62.

[33] Linda HUTCHEON, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms*, Methuen, 1985, cit. p. 31.

[34] Yury Jurij TYNJANOV, *Destruction, parodie*, (1921), "«Change"», 2, 1969 "«a battle, the destruction of the old whole and a new construction of the old element"» (cit. SANGSUE p. 38).

> If a new parodic form does not develop when an old one becomes insufficiently "motivated" (to use the formalists' term) through overuse, that old form might degenerate into pure convention [..] In a more general perspective, however, this view implies a concept of literary evolution as improvement that I find hard to accept. The forms of art change, but do they really evolve or get better in any way? Again, my definition of parody as imitation with critical difference prevents any endorsement of the ameliorative implications of the formalists' theory, while it obviously allows agreement with the general idea of parody as the inscription of continuity and change. My attempt to find a more neutral definition that would account for the particular kind of parody displayed by the art forms of this century has an interesting antecedent[35].

Hutcheon offers another definition of parody:

> a form of repetition with ironic critical distance, marking difference rather than similarity[36].

I wish to emphasise two terms in this new definition; repetition and distance. Hutcheon repeatedly highlights the contradictory substance of parody. On the one hand, it can represent a conservative power as it reproduces the most authoritative models, via repetition. On the other, it may be a revolutionary force, when it transforms the same models, via distance.

1.2.4 Hypertextuality

Gèrard Genette pursued a study on parody in his essay "Palimpsests", where he specifies:

> *Parody*: today this term is the site of a perhaps inevitable confusion, one that apparently wasn't born yesterday[37].

[35] HUTCHEON, *A Theory of Parody*.

[36] HUTCHEON p.xii.

[37] GENETTE p. 10.

Even if the term is familiar to many of us, Genette reveals a false transparency in it. Long debates and entire volumes have unsuccessfully attempted to theorise regarding parody. Genette defines it as one of the most significant hypertextual practices.

Hypertextuality is introduced, in the first chapter of Palimpsests, as one of the five different types of transtextuality[38] of text. This category is the main subject of Palimpsests and is defined, right from the subtitle, as: "literature in the second degree". The other different domains of transtextuality, listed by Genette, are: intertextuality[39], paratextuality[40], metatextuality[41], architextuality[42].

> I mean any relationship uniting a text B (which I shall call the *hypertext*) to an earlier text A (I shall, of course, call it the *hypotext*), upon which it is grafted in a manner that is not that of commentary [..] The *Aeneid* and *Ulysses* are no doubt, to varying degrees and certainly on different grounds, two hypertexts (among others) of the same hypotext: the *Odyssey*, of course[43].

[38] "Everything that puts [a text] in relation, overt or covert, with other texts" GENETTE p. 2.

[39] "Relationship of copresence between two texts or among several texts: that is to say, identically and typically as the actual presence of one text within another. In its most explicit and literal form, it is the traditional practice of *quoting* (with quotation marks, with or without specific references). In another less explicit and canonical form, it is the practice of *plagiarism* (in Lautrèamont, for instance), which is an undeclared but still literal borrowing. Again, in still less explicit and less literal guise, it is the practice of *allusion*: that is, an enunciation whose full meaning presupposes the perception of a relationship between it and another text, to which it necessarily refers by some inflections that would otherwise remain unintelligible" GENETTE p. 2.

[40] "The generally less explicit and more distant relationship that binds the text properly speaking, taken within the totality of the literary work [..] a title, a subtitle, intertitles; prefaces, postface, notice, forewords, etc. (the example mentioned by Genette of Joyce's Ulysses is interesting: Joyce, indeed, eliminated the subtitles, present in the pre-publication of the novel; for instance, "The Sirens", "Nausicaa", "Penelope". Genette wonders whether or not these subtitles are part of the text)" GENETTE p. 3.

[41] "The relationship most often labelled 'commentary'. It unites a given text to another, of which it speaks without summoning it, in fact sometimes even without naming it. Thus does Hegel, in *The Phenomenology of the Mind*, allusively and almost silently evoke Denise Diderot's *Neveu de Rameau*. This is *critical* relationship par excellence" GENETTE p. 4.

[42] "The most abstract and most implicit of all [..] It involves a relationship that is completely silent". *Ibidem*

[43] GENETTE p. 8.

According to Genette, a parodic text is a literary text of the second degree, insofar as it presupposes a model text (a text of the first degree). Genette constructs, in order to clarify the role of parody, a grid of possible manifestations of hypertextuality, which is defined as the "general scheme of hypertextual practices". The French author, however, specifies that those six categories must be considered permeable:

> The choices are inevitably arbitrary, and happily so, much more complex than the species to which they are affixed[44].

HYPERTEXTUAL POSSIBILITIES			
	Playful	Satirical	Serious
Transformation	PARODY	TRAVESTY	TRANSPOSITION
Imitation	PASTICHE	CARICATURE	FORGERY

Table 1 - General outline of hypertext practices[45].

The definitions of the different categories of hypertextual practices are dealt with in a very exhaustive manner in Genette's work, which may act as interesting further study for the reader. I summarise them as follows:

> Parody: semantic diversion of a text achieved through minimal transformation;

- Travesty: stylistic transformation with a degrading function;
- Transposition: serious transformation carried out on works of vast dimensions, such as Ulysses, whose textual breadth and aesthetic and/or ideological ambition go so far as to mask or make one forget its hypertextual character.

[44] GENETTE p. 18.

[45] *Ibidem*

Pastiche, caricature and forgery proceed only from functional modulations made to a single practice (imitation), are relatively complex and almost entirely prescribed by the nature of the model.

- Pastiche: imitation of a style without satirical function. It cannot remain neutral and can only choose between mockery and admiration - with the possibility of mixing them in an ambiguous regime;
- Caricature: satirical procedure consisting of describing the imitated style;
- Forgery: serious imitation.

The practice of parody translates into a "playful transformation of a specific text"[46]. Parody has in its immediacy its most effective feature; it works perfectly on short, but well-known, texts, on idioms, alterations of proverbs or poetry classics. In this sense, Genette highlights a few effective examples:

The proverb *Le temps est un grand maître* was transformed by Balzac into *Le temps est un grand maigre*[47]; *Paris n'a pas été bâti en un jour* becomes *Paris n'a pas été bâti en un four*[48]; or *L'ennui naquit un jour de l'uniformité*[49] transformed into *L'ennui naquit un jour de l'Université*[50]. Elegantly, Prevert proposes a spoonerism: *Martyr, c'est pourrir un peu*, starting with the proverb *Partir, c'est mourir un peu*. Caesar's heroic motto *Veni, vidi, vici* is distorted by Hugo in the poem *Veni, vidi, vixi*[51]. Shakespeare's most famous line *To be, or not to be* is changed by Dumas into *Tibi or not to be*.

Returning to the general scheme of hypertextual practices, it can be seen that there are two fundamental relations of derivation. The first is *transformation*, which always takes aim at a single text; namely, "playful transformation" since it transforms, or re-elaborates, a text (e.g. Joyce's *Ulysses* in relation to Homer's *Odyssey*). The second relationship is *imitation*, which merely reproduces a style. The

[46] GENETTE p. 148.

[47] Honorè De BALZAC, *Un début dans la vie*, Pléiade, Gallimard, Paris 1976, I, p. 771.

[48] De BALZAC.

[49] Antoine Houdar De La MOTTE, *Les Amis trop d'accord*, Fables nouvelles 1719.

[50] cit. De BALZAC.

[51] Victor HUGO, *Les Contemplations*, Nelson, Paris, 1911, p. 251.

playful counterpart of parody is here represented by pastiche, which merely imitates in a playful manner. The distinction between transformation and imitation is thus fundamental to understanding the essence of parody. Genette often takes up this difference:

> It is impossible to imitate a text directly; it can be imitated only indirectly, by practicing its style in another text. A parody or a travesty [..] can be defined in no circumstance as imitations but rather as transformations – limited or systematic – imposed upon texts. A parody or a travesty always takes on one (or several) individual text(s), never a genre. The notion, so commonly found, of a "parody of genre" is a pure chimera, unless one sees it explicitly or implicitly as a parody in the sense of satirical imitation. One can parody only particular texts, one can imitate only a genre (a corpus, no matter how narrow, that is treated as a genre) – for the simple reason, which has been clear to all from the start, that to imitate is to generalize[52].

Genette, who identifies a clear and impermeable distinction between the two types of relations (transformation and imitation), recognises, however, that his tripartition of regimes (playful, satirical and serious) is "extremely rudimentary":

> Still, it would be rather naïve to imagine that it is possible to draw a clear boundary between these great diatheses in the sociopsychological operation of the hypertext. I have therefore used dotted vertical lines to account for the possible nuances between pastiche and caricature, travesty and transposition, and so on. Furthermore, there is an insuperable difficulty inherent in the diagrammatic representation: it suggests that the satirical occupies a fundamentally intermediate position separating inevitably and as if naturally, the playful from the serious. This certainly is not the case, and many works in fact straddle the boundary between the serious and the playful, a boundary impossible to illustrate here […] I do not doubt that the tripartition of the moods would be too crude (a bit like the separation of the three "fundamental" colors, blue, yellow, and red), and one could easily refine it by introducing three more gradations into the spectrum. Between the playful and the satirical,

[52] GENETTE pp. 84.

I would readily place the *ironic* […] Between the satirical and the serious divisions, I see the *polemical* […] Between the playful and the serious I would add the *humorous*[53].

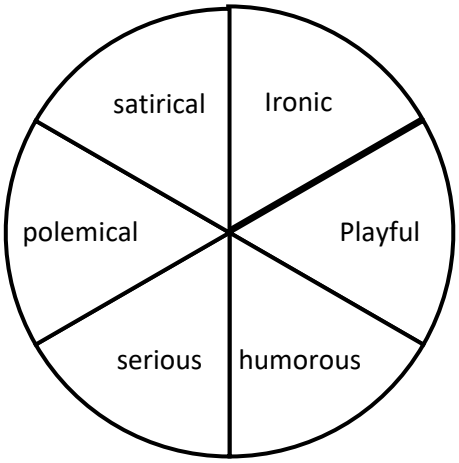

Table 2 Graph of Regimes

1.3 Taxonomy. Parody on the basis of its function

A taxonomy of parody is not easy to elaborate. My methodological choice is based on the function that parodic transformation plays. The grid of regimes proposed by Genette comes to our aid, and can be compressed into two distinct criteria: *a)* the comic, which includes ironic, playful and serious; and, *b)* the satirical, which includes polemical and humorous. This split is useful in tracing the normative elements raised by parody.

A criterion that is accepted by most of the studies is that parody must overturn the facts, the situations and the characters of a reference work. Moreover, parody must convey a comical or satirical effect to the public, deforming the previous and serious one, "*pour faire rire*"[54].

[53] GENETTE p. 29.

[54] Mario FABIANI, *La protezione giuridica della parodia con particolare riferimento a recenti orientamenti di giuristi stranieri*, in Il Diritto di autore, 1985, fasc. 4, cit. p. 462. The final motto "pour faire rire" is a quotation from: Robert PLAISANT, *Juris Classeur*, Propriété littéraire er artistique, Parigi, 1982, fasc. 303, parag. 42.

The investigation into comical and satirical function will show how the perception of parody may mutate with context.

1.3.1 The comic function

Laughing is a human need. It is described as a liberating physiological process that says a great deal about human nature. The ability to realise that something is funny is a universal and necessary human experience, as no culture lacks it. Human beings are at the forefront of evolutionary theories very much thanks to our ability to laugh. We have, in fact, been defined as an animal that can laugh[55], and, according to Henri Bergson, we could, just as well, have been defined as "an animal which is laughed at":

> As muscular phenomenon, laughter is easy to describe. It consists of spasmodic contractions of the large and small zygomatic (facial) muscles and sudden relaxation of the diaphragm accompanied by contractions of the larynx and epiglottis. Laugher differs from smiling simply in that the smile does not interrupt breathing[56].

Laugher finds its most appropriate and relevant expression in comedy. This clarification is useful in addressing the issue at hand; parody plays on comedy, which is a trigger for laughter. Parody is a comic subgenre and one of the most vilified forms of aesthetic language.

The debate on comedy has concerned various fields of human knowledge, including philosophy, aesthetics and psychology: what is comedy and what does it do to human beings? This inescapable question seeks to establish the essence of

[55] Cfr. Peter L. BERGER, *Redeeming laughter: the comic dimension of human experience* - 2. ed Berlin: De Gruyter, 2014.

[56] Definition by Norman HOLLAND, *Laughing: A Psychology of Humor*, Ithaca, N.Y., Cornell University Press, 1982 (in BERGER p. 42). Moreover, Berger highlights the importance of studying the laugh, by which it would be possible to deeply know the dilemma body-mind in a human being: "If one fully understood the phenomenon of laughter, one would have understood the central mystery of human nature. That mystery is how human nature is constituted by a body that is part and parcel of biological evolution, and by that elusive entity variously called mind, soul, or spirit. [..] Laugher clearly is a phenomenon that involves both body and mind. It thus points to the curious relationship of human subjectivity and its embodiment", BERGER p. 42-43.

comedy. Whereas considerations regarding comedy in the eighteenth and nineteenth centuries were mainly limited to aesthetic aspects, during the twentieth century, a few inspiring works emerged and marked a significant turning point in the approach to the problem. Nowadays, comedy is perceived as funny and omnipresent, a phenomenon that permeates everyday experience: "*homme comique moyen*"[57]. This phenomenon is recognisable when encountered, it exists as a sector of perceived reality because it can trigger laughter as the most appropriate reaction. Even if it is easy to recognise, it is almost impossible to stop.

A study of comedy can be subdivided according to the different methodological perspectives pursued by authors over the 20th century. Alfredo Civita identifies three fundamental points: the first assumes comedy to be a social factor; in the second, it is a psychological one; in the third, linguistic[58]. I have decided to deal only with the first two; social and psychological. An examination of

[57] Berger offers a hypothetical family joke in order to describe the relevance of the *homme comique moyen*: "We are stuck by one overwhelming evident fact: *The comic is ubiquitous in ordinary, everyday life*. Not all the time, of course, but weaving in and out of ordinary experience. And it is not the virtuosi of the comic that we have in mind here, but quite ordinary people – specimens, if you will, of *l'homme comique moyen*. Let us visualize a day in the life of such people - we will call them John and Jane Everyperson, an ordinary American couple. They wake up in the morning. John is one of those people who wake up instantly, jump out of bed, and are ready to go. Jane is of the other kind, the one who wakes up slowly, reluctantly, not out of laziness but because waking reality seems quite implausible as she reencounters it. She wakes up, sees John prancing about (perhaps he does morning push-ups, or perhaps he is just purposefully going about his *toilette* and the serious task of getting dressed), and the sight seems quite ludicrous. Perhaps she laughs, or perhaps she suppresses laughter out of marital delicacy (after all, this absurdly active individual has just emerged from *her* bed and is *her* husband), but the fact is that the first conscious thought in her mind that day is a perception of the comic. John, let us assume, comes to the comic a little more slowly (activists usually do). But he does make a joke at breakfast, perhaps about the toast he has just burned, or about the couple in the adjacent apartment (the walls are thin) who can once again be heard making love in the early morning. Then the Everypersons' young children come in, pretending to be the monsters they saw on a television show last night, and now everyone is laughing. Then John and Jane read the newspaper; he laughs at a cartoon; she makes a sarcastic comment about the latest folly of the government. All these expressions of the comic - and, mind you, they haven't even finished breakfast yet! It would not be difficult to pursue them in equal detail throughout the day. John's boss engages in heavy, sadistic irony in berating a subordinate at a staff meeting; in revenge, John and his colleagues enact a parody of the boss safely while he is away during lunch", BERGER p. 4-5.

[58] Alfredo CIVITA, *Teorie del comico*. Edizione digitale per "Spazio Filosofico", 2004, p. 7. Henri Bergson presents an essentially social theory of laughter; Freud's theory, on the other hand, is inseparable from a psychoanalytical view of the comic. On the other hand, Todorov focuses his attention solely on the forms of comic language, disassociating them from psychological motivations. The artistic or aesthetic factor is missed in the list because it is omnipresent. In fact, laugher, according to Civita, is always tied to imagination, on one hand, and to reality, on the other.

the theories will show that there is a common intention to consider laughter as a "symptom"[59] of comedy, and will dwell on definitions for the examination of its production and recognition in order to arrive at a functioning model of the genre and relate it to the parodic subgenre.

Laura Little explains humour theory by showing three stances which might be linked to the parodic functions. The theories have obtained mainstream status: the superiority, the incongruity, and the release theory. The superiority theory comes from Greek ancient philosophers, like Plato. In this ancient theory humour is associated with aggression; jokes are a way of disparaging others in order to obtain a sense of wellbeing[60]. The incongruity theory was developed by Immanuel Kant and Arthur Schopenhauer and it is based on the "juxtaposition of two incongruous or inconsistent phenomena". Later on, Henri Bergson referred to the incongruity as a form of "inversion"[61]. The release theory is often connected to Freud philosophy who thinks that humour could express taboo desires[62].

These theories are employed to ascertain what constitutes comedy, and legal scholars often adopt them as a crucial contribution in resolving disputes concerning

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[59] "Society cannot intervene at this stage by material repression, since it is not affected in a material fashion. It is confronted with something that makes it uneasy, but only as a *symptom* - scarcely a threat, at the very most a gesture. A gesture, therefore, will be its reply. Laughter must be something of this kind, a sort of SOCIAL GESTURE", Henri BERGSON *Laughter an essay on the meaning of the comic*, 1900, p. 8b/9a.

[60] "Plato, for example, argued that weak individuals deploy humor only where they are unlikely to face counterattack. Echoing this disdainful tone, Socrates admonished that society must tightly control laughter, particularly laughter that mocks authority as well as philosophical notions of truth and beauty" Laura E. LITTLE, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235-1253 (2009), cit. p. 1245.

[61] "Picture to yourself certain characters in a certain situation: if you reverse the situation and invert the roles, you obtain a comic scene" BERGSON cit. p. 30b. Bergson makes clear this component of laugher by an example: "A man, running along the street, stumbles and falls; the passers-by burst out laughing. They would not laugh at him, I imagine, could they suppose that the whim had suddenly seized him to sit down on the ground. They laugh because his sitting down is involuntary. Consequently, it is not his sudden change of attitude that raises a laugh, but rather the involuntary element in this change, - his clumsiness, in fact. Perhaps there was a stone on the road. He should have altered his pace or avoided the obstacle. Instead of that, through lack of elasticity, through absentmindedness and a kind of physical obstinacy, as a result, in fact, of rigidity or of momentum, the muscles continued to perform the same movement when the circumstances of the case called for something else. That is the reason of the man's fall, and also of the people's laughter" p. 5b.

[62] "Freud's humor theory influenced other scholars enormously. His notion that jokes serve as a vehicle for release, however, has had the greatest lasting impact. In fact, scholars have expanded the idea that jokes release sexual tensions into other taboo or sensitive subjects, such as excretion and death" LITTLE cit. p. 1250.

parody[63]. We should now introduce the ideas of certain philosophers who have contributed to shaping the concept of comedy and parody.

1.3.1.2 Sigmund Freud

Freud presents a description of the distinctive elements of comedy. In his extensive essay on wit, the author devotes the last chapter to the intrinsic features of comedy, which arise from a sudden jest during the social relations between human beings. Freud analyses the various causes that may produce comical situations:

Firstly, comedy can arise "from human social relations":

> As an unintended discovery derived from human social relations. It is found in people - in their movements, forms, actions and traits of character"[64].

In this sense, one can make comical one's own person, another person or even animals[65] and inanimate objects.

Secondly, other means of making people laugh can be found:

> At the same time, the comic is capable of being detached from people, in so far as we recognise the conditions under which a person seems comic. In this way the comic of situation comes about, and this recognition affords the possibility of making a person comic at one's will by putting

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[63] Richard Wiseman showed ability to include all these theories into a simple joke: "Two hunters are out in the woods when one of them collapses. He doesn't seem to be breathing and his eyes are glazed. The other guy whips out his phone and calls the emergency services. He gasps, 'My friend is dead! What can I do?'. The operator says 'Calm down. I can help. First, let's make sure he's dead.' There is a silence, then a shot is heard. Back on the phone, the guy says 'OK, now what?" http://www.laughlab.co.uk/. On the meaning of this joke, Little explains how the three theories may operate simultaneously "the listener and joke teller feel superior to the stupid hunter, the hunter's misunderstanding of the operator is incongruous, and the joke enables laughter about an uncomfortable subject, death" LITTLE cit. p. 1252

[64] Sigmund FREUD, *Jokes and their relation to the unconscious*, (1905) Free eBook sigmundfreud.net p. 135.

[65] For instance, according to Genette, "the fable being almost entirely [..] 'parodic' in its very principle, since it attributes, as does the *Batrachomyomachia*, human speech and behavior to animals" GENETTE p. 72.

> him in situations in which his actions are subject to these comic conditions[66].

Freud identifies parody as existing among these means. More specifically, parody is one of the means that human beings use to intentionally provoke comedy:

> The methods that serve to make people comic are: putting them in a comic situation, mimicry, disguise, unmasking, caricature, parody, travesty and so on[67].

Parody unveils its comic function in its clash with authority:

> Caricature, parody and travesty (as well as their practical counterpart, unmasking) are directed against people and objects which lay claim to authority and respect, which are in some sense sublime [..] *Parody* and *travesty* achieve the degradation of something exalted [..] by destroying the unity that exists between people's characters as we know them and their speeches and actions[68].

Parody is inherently a struggling relationship that produces normative effects and thus requires a resolution. From this point of view, parody coincides perfectly with the comical function, achieved by contrast. Nevertheless, this contrast is not enough to provoke comic pleasure. Freud then identifies certain conditions that he considers favourable to the emergence of comic pleasure:

1. First and foremost, a cheerful state of mind prone to laughter: "In a toxic mood of cheerfulness almost everything seems comic, probably by comparison with the expenditure in a normal state"[69]. One can accept this first condition if we start from the consideration that foolishness leans toward laughter much more than intelligence[70]: *risus abundat in ore stultorum*;

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[66] FREUD, *Jokes and their relation to the unconscious*, p. 136.

[67] *Ibidem*

[68] FREUD *Jokes and their relation to the unconscious* p. 143.

[69] FREUD *jokes and their relation to the unconscious* p. 158.

[70] Helmuth PLESSNER, *Il riso e il pianto. Una ricerca sui limiti del comportamento umano* (1982), Bompiani, Milano, 2000, p. 145.

2. Another favourable effect is expectation; this attitude is fundamental to establishing a kind of agreement with comic pleasure. For instance, the paying spectator for a comic movie will go to the cinema with the intention of laughing[71]. This condition fits perfectly with parody, which is based on a direct and comic comparison with the reference work. Whoever is about to watch a parody will have the intention of laughing.
3. The spectator's mental activity affects laughter; it can be favourable or unfavourable: "Imaginative or intellectual work that pursues serious aims interferes with the capacity of the cathexes for discharge"[72].
4. Another condition that contrasts with the opportunity for the liberation of comic pleasure is the comparison of a movement or function, from which comedy might arise, with a serious and clear model in mind[73]. Thus, the author of any intellectual work, and even more those that love the artist passionately, will find it difficult to honestly and freely enjoy a parodic reproduction that transforms that serious intellectual work. Many authors take themselves too seriously and those who love the author do likewise with their favourite works. It is therefore unthinkable for them to give consent for a parodic transformation of their own work[74]. This narcissistic attitude is certainly not conducive to the birth and development of parody. Moreover, the very survival of such a genre would be in serious doubt if authorisation to proceed

[71] *Ibidem*

[72] FREUD p. 158.

[73] "Thus, the examiner does not find the comic nonsense which the candidate produces in his ignorance; he is bored by it, while the candidate's fellow students, who are far more interested in what luck he will have than in how much he knows, laugh heartily at the same nonsense. A gymnastic or dancing instructor seldom has an eye for the comic in his pupils' movements; and a clergyman entirely overlooks the comic in the human weaknesses which the writer of comedies can bring to light so effectively" FREUD p. 159.

[74] This aspect is crucial within copyright law, which we will analyse further ahead. Luigi Carlo UBERTAZZI (*Digesto delle discipline privatistiche. Sezione commerciale,* IV, Torino, 1989, p. 409, footnote 279) lists some legal scholars who have pointed out the difficulty of obtaining the consent of the author of the parodied work: Claude COLOMBET, *Propriété littéraire*, cit. p. 243; Henri DESBOIS, *Le droit d'auteur*, cit. 322-323 and Giorgia JARACH, *Manuale*, cit. 314.

with parody was determined by law[75] for those intellectual works not yet fallen into the public domain:

5. Absolute comedy does not exist, but it is present or absent from the point of view of the perceiver, so it will be easier to develop in a context of indifference, where moods and interests are not involved: "Comedy is greatly impaired if the situation from which it is supposed to be developed at the same time releases a great deal of affection"[76]. This is the case with the mockery of disabled, where compassion, common sense or "distressing affects" prevail. In such cases, it is necessary, in order to produce the maximum comic effect, "the comic demands something like a momentary anaesthesia of the heart"[77].

1.3.1.2 Henri Bergson

Bergson's theory studies comedy from a social point of view: "it must have a SOCIAL signification"[78]. From this point of view, laughter fulfils an important social function, and the manifested comic pleasure is used for a collective need. When dealing with the subject of comedy, it is therefore necessary to dress up as an anthropologist, since what seems to be funny varies enormously from one society to another and from one era to another[79].

[75] UBERTAZZI p. 409.

[76] FREUD p. 226 nota 19.

[77] BERGSON p. 4b.

[78] BERGSON p. 5b.

[79] The field of humor theory is frequently delineated along national lines, as distinct comedic archetypes are ingrained in cultures through traditions, myths, or legends. Illustratively, we have Jewish jokes, English humor, Italian comedy, and more, each capitalizing on widely recognized and prevalent stereotypes. This phenomenon is applicable across diverse societies and could be regarded as cultural heritage in the public domain. For an overview on humorists across the world *see* Attilio BERTOLUCCI *Umoristi dell'Ottocento* e *Umoristi del Novecento*, Milano, Garzanti, 1959-1960, who show how humor has evolved during the centuries and in different countries such as Italy, England, Germany, USA etc.

> How often has the remark been made that many comic effects are incapable of translation from one language to another, because they refer to the customs and ideas of a particular social group[80]!

Comedy is therefore a historically relative anthropological constant. The most significant analysis within the framework of philosophical anthropology is that provided by Plessner; he agrees with Bergson that: "the comical does not exist outside the pale of what is strictly HUMAN"[81]. For example, we laugh at an animal or an inanimate object only insofar as they remind us of one of our fellow human beings:

> A landscape may be beautiful, charming and sublime, or insignificant and ugly; it will never be laughable. You may laugh at an animal, but only because you have detected in it some human attitude or expression. You may laugh at a hat, but what you are making fun of, in this case, is not the piece of felt or straw, but the shape that men have given it - the human caprice whose mould it has assumed[82].

Comedy thus arises as a contrast to the data of human experience that, through caricature or imitation, renders the very nature of things laughable. From this point of view, it is still the human who is at the centre of the comic scene. The human being masks or disguises nature in order to provoke laughter. Bergson gives some examples:

> You laugh at a dog that is half-clipped, at a bed of artificially coloured flowers, at a wood in which the trees are plastered over with election addresses, etc.[83].

In this case, then, nature is not comical, nor humanised, but plays a role that contrasts with its own essence. It performs a function that usually only belongs to human beings[84].

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[80] BERGSON p. 5a.

[81] BERGSON p. 4a.

[82] *Ibidem*

[83] BERGSON p. 15b.

> Put differently, what is laughed at and when one may appropriately laugh are socially relative, but the underlying incongruity of the comic experience is grounded in an anthropological reality that transcends all social variations. As such, of course, it is universal (or, if one prefers, is a cross-cultural constant)[85].

1.3.1.3 Helmuth Plessner

Picking up on Bergson's discussion of laughter, Helmuth Plessner points out that anyone can also laugh at an animal, regardless of "a nature that is mechanically tampered with"[86], by the human being (a real process of humanisation). For example, the hippopotamus and the elephant are comical in themselves, they seem to be caricatures as they are exaggerated and grotesque in our eyes. What is it to consider these animals, and others, comical? It is a comparison with an ideal or a general scheme. This incongruity seems to be provocative in our eyes, and that is why we find them comical[87].

This digression into the animal sphere allows the philosopher to better frame the comic conflict and to detach it from the human sphere. According to Plessner, any comical actions arise from a broken norm[88]:

> In short, if incongruity is necessary to cause laughter, it is nevertheless insufficient. This fact is important for explaining laughter. Yet it is not the only relevant consideration. When a child is confronted by an incongruity, she stops whatever else she was doing and adopts what is called an "orienting response," characterized by "orientation of the

[84] According to BERGSON the comic motif can also be found in some jokes that are accompanied by sincere naivety: "Take, as an instance, the remark made by a lady whom Cassini, the astronomer, had invited to see an eclipse of the moon. Arriving too late, she said, 'M. De Cassini, I know, will have the goodness to begin it all over again, to please me.' Or, take again the exclamation of one of Gondiinet's characters on arriving in a town and learning that there is an extinct volcano in the neighbourhood, 'They had a volcano, and they have let it go out!'" p. 16a.

[85] BERGER p. 45.

[86] BERGSON p. 15b.

[87] PLESSNER p. 138.

[88] PLESSNER p. 139.

> sensory receptors, muscular quieting, heart rate deceleration, [and] increased blood flow to the brain" – in a word, "tension." This tension is necessary for laughter's release[89].

The comic effect, on one hand, is born and grows within the human sphere, because only the human being can control itself, as the recipient of norms. On the other hand, the comic essence is independent of the human sphere. The comic essence is not a social product, but a reaction to a normative model of a given phenomenon. Faced with this normative model, any human being is forced to accept or reject it, to feel attracted to it (and laugh) or disgusted by it. In a condition of indecision, therefore, they do not take it seriously[90].

> According to Plessner, laughter is neither a form of speech, nor a gesture, nor strictly an expressive movement like the exultations of joy or contortions of rage. To be sure, like the exultations of joy or contortions of rage, typically at least laughter is "immediate, involuntary, and intrinsically unrelated to others, that is, without purposeful character, even if the presence of others is necessary for the release of the expression"[91].

For a general sense of the discourse within the theme, we can examine a poem whose protagonist is a donkey. The donkey is the best example of the comical essence of a parodic animal, since this living being is always compared, often in a malicious way, to the more illustrious and useful horse. Its comedy derives precisely from this contrast, and from the fact that, although it resembles the horse, it does not respect the norm that man prescribes for that kind of quadruped; the donkey should be and would like to be, but is not:

The Donkey

When fishes flew and forests walked

[89] Bernard G. PRUSAK *The science of laughter: Helmuth Plessner's Laughing and Crying* Villanova University, Pennsylvania, U.S.A. Springer 2006, cit. p. 46.

[90] PLESSNER p. 141.

[91] PRUSAK cit. p. 58.

And figs grew upon thorn,
Some moment when the moon was blood
Then surely I was born;

With monstrous head and sickening cry
And ears like errant wings,
The devil's walking *parody*
On all four-footed things.

The tattered outlaw of the earth,
Of ancient crooked will;
Starve, scourge, deride me: I am dumb,
I keep my secret still.

Fools! For I also had my hour;
One far fierce hour and sweet:
There was a shout about my ears,
And palms before my feet.[92]

1.3.2 The satiric function

The process used by parody to counter the sublime is *Herabsetzung*, i.e. degradation. Freud describes the degradation carried out by parody in these words:

> By destroying the unity that exists between people's characters as we know them and their speeches and actions, by replacing either the exalted figures or their utterances by inferior ones[93].

Freud, in another essay, also analyses humour, defining it as: "Humour is a means of obtaining pleasure in spite of the distressing affects that interfere with it; it acts as a

[92] Gilbert K. CHESTERTON, *The Donkey*, poem published in *The Wild Knight*, page 16 by London: J. M. Dent & Sons, 1914 (emphasis of the word *parody* is added).

[93] FREUD *Jokes and their relation to the unconscious* p. 144.

substitute for the generation of these affects, it puts itself in their place"[94]. Freud emphasises some peculiarities of humour; it achieves laughter through intellectual activity and expresses grandiosity and nobility. Those elements are not found in simple comedy. A well-fitting example is *Galgenhumor* ("the crudest case of humour"):

> In Victor Hugo's Hernani, the bandit who has become involved in a conspiracy against his King, Charles I of Spain (the Emperor Charles V), has fallen into the hands of this powerful enemy. He foresees that, convicted of high treason, it is his fate to lose his head. But this fore-knowledge does not prevent his letting himself be known as a Hereditary Grandee of Spain and declaring that he has no intention of renouncing any of the privileges that are his due. A Grandee of Spain might cover his head in the presence of his royal master. Very well, then:
>
> Nos têtes ont le droit
> De tomber couvertes devant de toi[95].

According to Freud, human beings deny the cruelty of reality through humour to elevate pleasure to philosophy. Moreover, humour would also have a didactic function; by recognising and evading torment, it acts like the father who reassures or admonishes his child[96].

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[94] FREUD, *Jokes and their relation to the unconscious* p. 165. Previously, we have said that Freud considers the "distressing affects" as the main obstacle to the liberation of comic pleasure: "We have seen that the release of distressing affects is the greatest obstacle to the emergence of the comic".

[95] [Our heads have the right to fall before you covered]. FREUD p. 166-167.

[96] The sense of the analogy could be better understood by a very popular Jewish joke with black humour in the final gag. Here a father wants to warn his son about the danger of trust: "there is a Jewish story, an ordinary Jewish joke. A father was teaching his little son to be less afraid, to have more courage, by having him jump down the stairs. He put his son on the second stair and said, 'Jump, and I'll catch you,' and then on the third stair and said, 'Jump, and I'll catch you'. And the little boy was afraid, but he trusted his father and did what he was told and jumped into his arms. The father put him on the next step, and then the next, each time telling him, 'Jump, and I'll catch you.' Then the boy jumped from a very high step, but this time the father stepped back, and the boy fell flat on his face. He picked himself up, bleeding and crying, and the father said to him, 'That'll teach you". Never trust a Jew. The joke has been present by BERGER op. cit. in the dedicated chapter: *Interlude: Brief Reflections on Jewish Humor* pp. 82-93.

The subject of humour has captured scholars' attention which has allowed the theory of humour to emerge. Theory of humour can be used as a scientific basis for distinguishing the lawfulness of humoristic communications.

> One remarkable quality of all the humour-regulating opinions is their faithful (yet tacit) tracking of humour theory espoused by nonlegal thinkers. Humour theory provides a scholarly grounding for the dichotomy between humorous communications that avoid liability and those that do not. In particular, cases evaluating whether a particular communication is a joke that should avoid liability focus on what humour scholars denominate "incongruity" humour. By contrast, those cases regulating apparent jest-even if all were to agree that the jest is funny-concern communications that hew more closely to what scholars call "superiority" and "release" humour. Courts are more likely to protect humour based on incongruity than humour tied to superiority or release: incongruous humour thus tends to avoid law's grip, while superiority humour or release humour triggers legal control. As with any generality of this sort, the case law does not sort perfectly[97].

This description of humour serves to underline the differences with the comic and introduce the satirical function, which takes up the concept of degradation expressed by Freud.

Abbé Sallier, a nineteenth-century French author, links the origin of parody to aesthetic motivations and its use to ethical motivations; especially under the latter approach, parody is translated into an "ingenious fiction" endowed with "ingenious concealment", whose ultimate aim is a utilitarian mission, capable of both combining the useful with the pleasant and of correcting customs by laughing at them (*castigat redendo mores*)[98]. This definition perfectly explains the satiric function, which, in my view, deserves more attention, and for which legal guarantees are most present.

[97] LITTLE cit. p. 1239.

[98] SANGSUE: "parody should aim at the delightful and the useful, like all other genres of poetry. I may regard it as an ingenious fiction, under the veil of which some truth is unveiled. It endeavours now to expose to daily light the ridiculous in the conduct of men, now to reveal the false beauties of a work, and to open the eyes to author blinded by self-love" cit. p. 25 (my own translation from italian).

Satire aims to stimulate public laughter and a comical effect through a clash between different "codes of rules"[99]. According to Peron, satire would thus have a hybrid nature, it would be a "chimera"; the laughter aroused by satire would not be liberating, but would contain within it a strong charge of hostility. Satire would be an "aggressive gesture", which aims to achieve change by shocking the well-meaning[100]. To sum up, one could say that "satire is the deliberate use of comedy for the purposes of attack"[101]. It can then be found as much in humorous manifestation as in comic language.

1.3.2.1 Etymology

It is not easy to find a unanimous consensus among scholars regarding the etymology of the term "satire". A first interpretation, commonly accepted by most up until the 17th century, claims that it derives from the ancient Greek σάτυρος; this was the name of a mythical figure with a crazy, aggressive and desecrating character, a being, half human and half beast, a goat or a horse, who had minor importance in Greek mythology, but a central role in the Dionysian cult. Over the course of time, this traditional representation clashed with institutionalized clerical doctrine, which led to its negative and obscene connotations being broadened, exorcising it as a typical *imago diaboli*. The etymological association between the satirical genre and the Greek satyr was finally refuted by Isaac Casaubon in 1605[102].

[99] This structure is similar to the comical one: "it is the sudden clash between these two mutually exclusive codes of rules - or associative contexts - that produces the comic effect. It compels the listener to perceive the situation in two self-consistent but incompatible frames of reference at the same time; the mind has to operate simultaneously on two different wavelengths. While this unusual condition lasts, the event is not only, as is normally the case, associated with a single frame of reference, but 'bisociated' with two", Robert L. LATTA, *Arthur Koestler's Theory of Humor* (https://archives.bukkyo-u.ac.jp/rp-contents/JB/0017/JB00170L001.pdf).

[100] Sabrina PERON, *I limiti della satira*, in Responsabilità Civile e Previdenza, fasc. 5, 2014, p. 1556.

[101] BERGER p. 146.

[102] Attilio BRILLI, *La satira. Storia, tecniche e ideologie della rappresentazione*, Dedalo libri, Bari, 1979.

Another possible interpretation is that the term derives from the Latin *satura*[103]; a comic-parody composition used by the Romans to mock human weaknesses. The great popularity of the genre in the Roman world led to the claim that it was a Roman, not a Greek, creation. The famous Latin motto contributed to this belief: *Satura tota nostra est*[104]. Whatever the derivation, it is in any case possible, through the study of satirical use in Roman literature, to enucleate the formal characteristics of this practice "*sans genre*"[105], which mixes styles by using parody[106].

According to Berger, the two different etymologies outlined above are not necessarily opposed: "one may point out that the two etymologies are not necessarily contradictory. After all, the Roman Bacchus stood in a sort of apostolic succession from the Greek Dionysus, as did his cult"[107].

Finally, a third interpretation sees satire as being derived from the god Saturn; an astrological reference that is intended to give the satirical author a misanthropic and malevolent character. Satirists were often connected to Saturn, considered the most malignant planet due to its ability to spread incurable diseases[108].

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[103] The term is polysemous in the Latin language: "it is practically certain that our word is derived from the adjective *satur* - 'full.' According to the traditional explanation it is a feminine adjective with *lanx* or *lex*, or some other word, to be supplied". *Lanx satura* would be a mixed dish; *lex per saturam*, a legal term. B. L. ULLMAN, *Satura and Satire*, Classical Philology, Apr., 1913, Vol. 8, No. 2 (Apr., 1913), The University of Chicago Press, pp. 172-194.

[104] QUINTILLIANO, *Institutio oratoria*, X, 1, 93.

[105] BRILLI p. 11.

[106] The mixture of stiles is essentially what distinguishes parody from satire: "Another important factor distinguishing parody from satire [..] is 'intertextuality'. Unlike a satire [..] a parody overlaps with the text serving as its object. This overlap, which allows the audience to recognize the original text within the parody, can take the form of expressive style, characteristics of a particular genre (e.g., science fiction, fairy tale, folk song), or a specific text (e.g., *Star Tr*ek or *Snow White*)" LITTLE cit. p. 1244.

[107] BERGER p. 147.

[108] BRILLI p. 157. The Italian author recalls Thomas DRANT, (*A Medicinable Morall*, London, 1566), who presented such interpretation of the term: "Satyre of writhled waspyshe Saturne may be namde | The Satyrist must be a wasper in moode, | Testie and wrothe with vice and hers, to see bothe blamde | But courteous and frendly to the good. | As Saturne cuttes of tymes with equall sythe: | So this man cuttes downe synne, to coy and blythe".

1.3.2.2 The satiric author

Satire has been defined as a corrector of others' conduct. It is a judge who does not seek justice and does not operate with fairness, but who uses the canons of exaggeration to describe and criticise the reality that surrounds us. It would be wrong to expect to find justice in any satirical works; on the contrary, one should not be surprised if satire can be found in contempt, cruelty, in "a momentary anaesthesia of the heart"[109]. Therefore, satire does not aim to exalt innocence, no positives may be found in it. Satire is something evil. It diminishes targets, degrading them, criticising their feelings, parodying their intentions. In this sense, satire is highly desecrating and blasphemous[110].

> Parody is one of the strongest means of social satire, and folklore provides striking examples. Many parodies of church services, of the Catechism, and of prayers are found in Russian and world folklore. Again, parody is ridiculous only when it exposes the inner weakness being parodied[111].

Not even religion is spared from satire. This is especially true in any countries inspired by secularism, where the only limit can be found in vilification. Freedom of religion thus goes hand-in-hand with freedom of speech and allows those who profess different orientations (or none at all) to express value judgments on religious matters, even using the weapon of satire[112].

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[109] BERGSON, P. 4b

[110] PERON *I limiti* p. 1556.

[111] PROPP p. 62.

[112] Luigi BALESTRA, *La satira come forma di manifestazione del pensiero,* Giuffrè, Milano, 1998. On this point, Berger quotes an Italian joke to highlight the aversion to clerical institutions by the population of this country: ″Aggression against institutions (this one is from Italy where, possibly by dint of long familiarity, respect for the Roman Catholic church and its dignitaries has not been very high for a long time): This happened around the turn of the century, when moral standards were still quite intact. An unmarried young woman, just before going into labour, said to the attending physician: 'please, you must help me. If I come home to my village with this baby, my father will kill me'. The doctor told her not to worry. It so happened that in the same hospital the Archbishop of Bologna was undergoing an appendectomy. When he came out of anaesthesia the doctor sat at his bedside and told him, 'your eminence, a miracle has occurred. You have given birth to a son'. The archbishop is appalled, denies the possibility. The doctor keeps insisting, says that the archbishop, as a prince of the church, cannot deny the possibility of miracles. Finally, the archbishop gives in and

The satiric author always aims to provoke shock, and the spectator is thus invited to reflect on privileged institutions and crystallised forms of the dominant culture. Satire aspires to achieve transgressive reflection and the overturning of values: "the inversion of reality, which is the reason for any satire"[113]. Satire facilitates a process of reshaping for those who have obtained a predominant position in the public sphere[114].

Satire, as such, does not follow canons of expressive rationality and does not obey abstract parameters of adequacy. Its essential characteristic is that it comes into being through a sequence of fictitious, irrational and exaggerated elements, all with the sole purpose of mocking the historical potentate of the moment, who finds themselves faced with two choices: tolerating it, giving the citizens a semblance of freedom from authoritative social control; or, alternatively, repressing it, or at least attempting to do so, through the authoritative use of their own power. It is easy for those who believe in democratic values to know which path is preferable. Bergson, who repeatedly emphasises the "useful function"[115] of laughter in society, provides an interesting thought:

> Laughter is, above all, a corrective. Being intended to humiliate, it must make a painful impression on the person against whom it is directed. By laughter, society avenges itself for the liberties taken with it. It would fail in its object if it bore the stamp of sympathy or kindness. Shall we be told that the motive, at all events, may be a good one, that we often punish because we love, and that laughter, by checking the outer manifestations of certain failings, thus causes the person laughed at to correct these failings and thereby improve himself inwardly? Much might be said on

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accepts the baby. The baby grows up in the archiepiscopal palace, turns out to be a sturdy lad. On his eighteenth birthday the archbishop calls him in and addresses him as follows: "my son, today you come of age and it is time that you know about your origins. You grew up in the belief that I am your father. That belief is mistaken. I am your mother. Your father is the Archbishop of Pisa", BERGER p. 49.

[113] Luigi PIRANDELLO & Teresa NOVEL, (1966). *On Humor.* The Tulane Drama Review, 10(3), 46-59.

[114] Marco Orlando MANTOVANI, *Profili penalistici del diritto di satira*, in Dir. Inf., 1992.

[115] BERGSON "To understand laughter, we must put it back into its natural environment, which is society, and above all must we determine the utility of its function, which is a social one" cit. p. 5b.

> this point. As a general rule, and speaking roughly, laughter doubtless exercises a useful function. Indeed, the whole of our analysis points to this fact. But it does not therefore follow that laughter always hits the mark or is invariably inspired by sentiments of kindness or even of justice[116].

1.3.2.3 Distinctive elements of satire

Let us now move on to the study of the distinctive elements of satire. Generally speaking, three can be identified: the language, or rather, the expressive techniques used by the satirical author; the topics dealt with and the targets; and, the aims pursued:

1. The expressive techniques used vary greatly. Satire may go from poems to parodies, from sculptures to drawings, using transgression and obscene language. Satire is the result of exaggeration and it introduces itself as intolerant towards old-established rules[117]. These modes of expression aim to achieve a grotesque alteration of the model; to be effective, the author will therefore insist on certain qualities of the model, exaggerating them for the purposes of criticism and comedy[118].

2. The topics addressed and the targets represent the second element of satire. In this sense, however, it would be difficult and pointless to identify the victims; satire is ephemeral and transitory in nature, and can aim at every human activity (such as political power, customs and clichés). In order to fully understand the arguments of satire, it is necessary to contextualise the contingent moment of its manifestation. This aspect is correctly highlighted by Berger, who notes that satire is always linked to its social context, much more than other humorous manifestations. This characteristic makes it take on a

[116] BERGSON p. 60a/b.

[117] Mirella CHIAROLLA, *Satira e tutela della persona: il pretore e la «musa infetta»*, Il Foro italiano, Vol. 113, parte prima: giurisprudenza costituzionale e civile, 1990, cit. p. 3040.

[118] For example, the narrative device of anti-climax allows the most burning issues with sarcasm to be addressed by drawing inspiration from the reality and seriousness of the society, transforming the cliché, idols and values using satire, parody and, more generally, irony. *See* CHIAROLLA.

decidedly precarious aspect, since, with the passing of the years, the wit and incisiveness of certain jokes will inexorably be lost with the arrival of new generations:

> Satire, more than other expressions of the comic, is bound by its social context, and this fact gives it a distinctly fugitive character. A great effort, indeed an exercise in scholarly exegesis, is required if a modern reader is to understand the satire of Aristophanes or of Rabelais. But an American listening in the 1990s to a 1950s recording of Mort Sahl, even if he is old enough to have been an adult at the time, will miss a good many cues. If satire, then, is time-bound, at its best it leads beyond the particular historical moment[119].

3. Finally, there are the aims pursued by satire. This last element is certainly the most important, capable of characterising the role of the satirical author within society. In other words, the author aims to be a moralizer through comedy, which constitutes on the one hand, the arrival point of irony, and on the other, the starting point of critical reflection. Satire presents numerous affinities with comedy and would lead the scholar to confuse them, yet a clear distinction must be made; laugher is an end within itself, in connection with comedy, but it aims to achieve a further goal, in connection with satire. At the end, satire provokes a sense of rebellion to the human condition, it can be named: a social struggle[120].

1.4 Conclusions

The various considerations above reveal a very wide and heterogeneous range of definitions for parody. In summing up the authors' pivotal thoughts, it is now necessary to convey a final formula.

The Russian formalists consider parody as a means to literary evolution. They endow this artistic technique with an intrinsic factor of renewal.

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[119] BERGER p. 147

[120] BALESTRA p. 9 footnote 25. A similar interpretation is also proposed by Brilli, who claimed that satire condemns vice. *See* BRILLI p. 17.

Bakhtin, reflecting on deeper implications, such as "parodic consciousness" and "comic universality," opens up the debate to a more philosophical perspective.

Propp explains how parody has its own independent nature, separate from the world of art; a parodic phenomenon that constantly occurs in our everyday lives.

Hutcheon, who limits parody to the realm of aesthetics, offers a dual antithetical matrix: on the one hand, parody is evolution insofar as it is artistic creation; on the other, parody is also conservatism insofar as it is tied to old artistic models.

Genette is credited with providing rigorous and restrictive definitions in his monumental study "Palimpsests", in which parody is defined as hypertextual practice. Moreover, the French author better clarifies the concept of parody by eliminating the recurrent confusion in the relationships between different genres (parody/transformation and pastiche/imitation) and by expanding the function of parody to the six regimes: playful, satirical, serious, ironic, humorous and polemical.

The chapter went on to explore a taxonomy centred on the functions of parody. I chose to focus on the comic and satirical functions. The comic function was highlighted because of its immediate and intrinsic connection to parody, while the satirical aspect adds a crucial element of controversy that is essential to grasping the essence of the technique. Under the comic function, I delved into the reflections of important philosophers who first explored the nature of comedy and its interplay with society. Notable thinkers such as Freud, Bergson and Plessner portrayed comedy as an instinctive human response that evolved with social progress. Conversely, satire emerged as an ancient rhetorical device, adept at critiquing and ridiculing authority figures across the ages. Parody fits seamlessly into these dual functions. It can serve a straightforward comedic purpose by borrowing from another author's work, or it can mask a more covert critique of government, societal norms or customs.

Parody is deeply linked to the society in which it manifests. Parodic transformation may attack facts, artistic works or any human attitude, and depends on the importance assigned to the models and on the possibility of renewal.

It is possible to arrive at a more inclusive and operative definition, which will be restated during the thesis: parody is a renewing transformation; it can be presented as an everyday act, or as an artistic form; parody also expresses deeper implications through distinctive regimes.

The section has provided a cross-analysis of linguistic and literary research on parody which should assist doctrine and case law in the interpretation of comical cases.

Chapter 2

Parodic expression - from offline to online

2.1 Introduction

Parody encompasses the most disparate works; a parody may belong to the genres of literature, theatre, music, cinema and art in general. This form of artistic expression is gaining significant relevance on today's internet, where, thanks to technological development, it actively facilitates peoples' participation in the information society:

> Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy. Comedy is big business[121].

The main elements of differentiation between offline and online parody must be sought in the study of the medium; the internet. The advent of digital technology has played a significant role in the classification of offline and online parodies. To understand this classification, it is necessary to start from the characteristics and properties that differentiate the digital experience:

a) *technological reproducibility*. Digital technology has made possible the perfect fixation of infinite copies of a specific medium (physical or digital) in an unlimited quantity.
b) *digital elaboration*. The elaboration and modification of digital works has been made extremely simple and immediate thanks to digital-editing techniques. Moreover, the concept fits perfectly with parodic transformation[122].

[121] Ian HARGREAVES, *Digital Opportunity, Review of Intellectual Property and Growth*, Independent Report, 2011, 5:35, cit. p. 50.

[122] Paradigmatic example is the so-called *sampling*.

c) *global dissemination*. The reworked material can be made available to anyone via the internet. This is certainly an element that lies at the heart of online parody. Anything online can be reworked via this type of parodic filter by anyone, and the parodic transformation can be disseminated on the internet.

d) *independence*. An author of online parodies (and every author, in general) is detached from a professional intermediary market. This allows anyone to become part of the market for digital ideas, whether an amateur or professional. Moreover, this independence blurs the traditional distinction between communicators and receivers; the authors that create, the intermediaries that disseminate, and the public that passively receive[123].

To better understand how parody has evolved as a changing medium, transmigrating from offline to online expression, without losing creative and critical form, it is surely useful to examine examples of two different artistic movements that both use parody as a form of expression.

2.1.1 An example of parodic evolution: appropriation art

Appropriation art is a movement that is part of so-called "conceptual art" and has been defined as: "getting the hand out of art and putting the brain in"[124]. The term "appropriation", which emerged in the 1980s, indicates a clear intention to transgress the rules of art. Appropriation art is characterized by deliberately appropriating previous creations, to then modify and rework them with variations to achieve a principal purpose: conveying a message that expresses different content and meaning than that evoked by the original work:

[123] *See* Paolo AUTERI, *Il paradigma tradizionale del diritto d'autore e le nuove tecnologie*, in Proprietà digitale. Diritti d'autore, nuove tecnologie e digital rights management - Borghi, Maurizio - Montagnani, Maria Lillà - Ebook - EPUB con DRM | IBS.

[124] William M. LANDES, *Copyright, Borrowed images and appropriation art: an economic approach*, Chicago Law & Economic Working Paper No. 113, The Social Science Research Network Electronic Paper Collection (2000): 1-21, p. 1.

> Appropriation art borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art[125].

Appropriation art has experienced increasing prominence in the post-modern sphere[126], and especially in the last decades of the twentieth century[127], although it is undisputed that the concept of appropriation was inherent in art throughout the entirety of the twentieth century[128]. Moreover, appropriation art often has the intention of criticizing certain behaviour in modern society. This is the case of the "ready-made" *32 Campbell's Soup Cans* by Andy Warhol, who did not take inspiration from a work of art, but made a primary good, tomato soup, artistic:

[125] *Ivi* p. 2.

[126] Cfr. Kenly AMES, *Beyond Rogers V Koons: A Fair Use Standard For Appropriation*, Columbia Law Review, Vol. 93, No. 6 (Oct., 1993), cit. p. 1478: ″The postmodernists challenge the foundations of modernist theory by questioning whether art can ever be original, whether it can be meaningful, and whether art is really any different or any "better" than popular culture… Postmodernists are distinguished by their frequent quotation of previously existing works and styles, often taken from popular culture, in their search to uncover meaning in the processes by which contempo- rary society functions″.

[127] In recent decades, appreciation for this technique has grown exponentially. It was well described by the artist Rubenstein: ″Whenever people's response is 'how dare you!' I consider that a high compliment. First of all, taking from other artists is not illegal in the art world, as it is in the music industry, and second, it is a direct acknowledgment of how we work in painting. Everything you do is based on what came before and what is happening concurrently. I don't see history as monolithic. I feel very free to take and change whatever I want, and that includes borrowing from my contemporaries. If some people are upset because my work has similarities to what they're doing, that's their problem. And if they take from me, that's great! I don't respect these artificial boundaries that artists and people around artists erect to keep you in certain category″, LANDES p. 2, who cites Richard Rubenstein, *Abstraction in a Changing Environment*, 82 ART IN AM. 102, Oct. 1994 (quoting the artist Richmond Burton at 103).

[128] *See* Niels SCHAUMANN, *Fair Use and Appropriation Art*, Cybaris®: Vol. 6: Iss. 1, 2015, Article 5, which recalls how already Picasso, in 1957, had appropriated the work of Diego Velazquez, reinterpreting the famous painting Las Meninas, in a series of fifty-eight different paintings. Even before Picasso there was Manet, who shocked the art world with the work Olympia, an evocation of a classical nude but with the features of a courtesan: ″Aesthetic vocabulary changes with the times. Voluptuous female nudes are no longer a common subject of painters; neither are religious allegories. Art today is more openly critical of the culture in which it arises, and it does so in many cases by referring explicitly to that culture″ cit. p. 114.

Figure 1 "32 Campbell's Soup Can"

> Appropriation thus criticizes the most fundamental perceptions, both literal and symbolic, on which society is based. Because our everyday world is dominated by images associated with consumption, the works that appropriate those images also comment, usually critically, on the consumer values fostered by the all-pervasiveness of popular images. It is on these grounds, drawn from semiotics, that appropriation is distinguishable from plagiarism. Appropriation is not mere recycling; the meaning of the original image has necessarily been altered by removing it from its usual context and forcing the viewing audience to "see" it differently. For appropriation to function, the artist must take an image that already exists as a recognizable part of collective culture, challenging ideas about ownership and originality in the process[129].

The age of mechanical reproduction, theorized by the philosopher Walter Benjamin in his essay "The Work of Art in the Age of Mechanical Reproduction" in 1935, has allowed appropriative practices to grow exponentially, affecting the entire world of art, including entertainment, and raising new legal issues. While the legal issues related to appropriation art will be addressed in the next chapter on copyright and Fair Use doctrine, emblematic examples of appropriation art, in relation to law,

[129] AMES, cit. p. 1482.

are revealed below. Indeed, scholars can analyse and interpret Damien Hirst's statues (like *Mickey*) and Pietro Manzoni's cans labelled *Artist's shit*[130], in terms of parody.

L.H.O.O.Q. by Marchel Duchamp represents Da Vinci's Mona Lisa, depicted with a moustache. The painting is charged with humour and vulgarity, and the pronunciation of the title (*L.H.O.O.Q.*) recalls to the French sentence "*Elle a chaud au cul*." Duchamp's desecrating critique, however, is not only directed against Leonardo, but more generally against the Renaissance artistic period of which Leonardo is the best-known representative[131]. Duchamp was part of the Dadaist movement, which used: "anarchy and outrage in opposition to established means and values... as a useful tool in their mission to assault the complacency of the bourgeoisie"[132]. Legally speaking, Leonardo Da Vinci's Mona Lisa did not possess any protection, despite being the most hypnotic and famous painting in the entire history of art, as the Italian artist had died centuries before the ingenious reworking.

Figure 2 "L.H.O.O.Q"

[130] *See* Geremia CASABURI, *Originalità, creatività, elaborazione creativa, citazione e plagio: profili evolutivi,* in Il Foro it., 2017, fasc. 12.

[131] *See* Giorgio SPEDICATO (2013) *Opere dell'arte appropriativa e diritto d'autore*, Giurisprudenza Commerciale n. 40: 118/II-131/II, p. 128.

[132] AMES p. 1479.

Over the years, there have been many legal conflicts related to parody and appropriation art in America; almost all of which have been settled out of court. This is also the case for *Flowers* by Andy Warhol, who reproduced a painting, taking inspiration from a copyrighted photo by Patricia Caulfield.

> The original photograph used in Warhol's screens was the work of yet another author, Patricia Caulfield, who instituted a lawsuit against Warhol for infringing on her copyright in the photograph, which he had taken from a magazine. Caulfield discovered the use of her photograph in 1965, not long after Warhol began the series, when she saw a poster of Warhol's work in the window of a New York bookstore. While Warhol may have established himself as the author of the tremendously successful series of silkscreen paintings entitled *Flowers*, Caulfield could claim legal authorship, and therefore ownership, of the underlying photograph[133].

Figure 3 "Flowers"

In "*Hymn*" (*"*the first key work of British art for the 21st century*"*[134]) Damien Hirst reproduced the anatomical model *"Young Scientist Anatomy Set"* by Norman

[133] Cfr. Martha BUSKIRK, *The Contingent Object of Contemporary Art*, 2003, Cambridge, Massachusetts: MIT Press, cit. pp. 84-85.

[134] Clare DYER, *Hirst pays up for Hymn that wasn't his*, pubblicato su The Guardian il 19 maggio 2000 (https://www.theguardian.com/uk/2000/may/19/claredyer118-03-2019)

Emms in a bronze sculpture. Warhol and Hirst apparently violated the right to reproduce held by the rightsholder; both cases were settled out of court[135].

> It is futile to pursue costly earnings of artists. It appears that artists only face legal actions once they have gained sufficient stature or notoriety to appeal to a broader audience. Even then, most cases are settle out of court before a decision is handed down a judge[136].

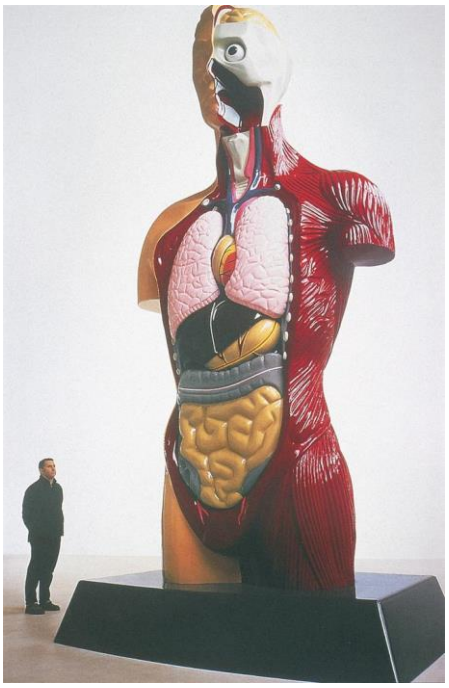

Figure 4 "Hymn"

[135] BUSKIRK: ″Ultimately the case was settled out of court, with Warhol agreeing to give Caulfield and her attorney two of the *Flowers* paintings, and also to give Caulfield a royalty for future use of the image″ p. 85. DYER: ″None of the parties would reveal the size of the settlement, but the designer, Norman Emms, said the "goodwill payment" was less than he had hoped for [..] Damien Hirst said: 'I'm delighted that this matter is settled to the satisfaction of all parties concerned'″.

[136] Matthew RIMMEL, *Four Stories About Copyright And Appropriation Art*, Media and Arts Law Review, Vol.3, No.4, 1998, cit. p. 180. Given these premises, artists often prefer to threaten legal action, seeking an out of court settlement: ″Notable instance of threats of suit include Patricia Caulfield's dealings with Andy Warhol. Caulfield was the copyright holder of the photograph Warhol appropriated in making his Flowers paintings. She negotiated a settlement with Warhol in which she dropped her threats to sue in exchange for $6000 and royalties on the print edition of Flowers″ AMES cit. p. 1484.

2.1.2 Net.Art.

Net.Art describes a peculiar artistic movement that arose in the mid-1990s thanks to the spread of new information and communication technologies (ICT). Net.Art refers explicitly to the avant-garde movements of the last century and its meaning can be traced back to both *internet art*[137] and *network art*[138].

The avant-garde is also highlighted in the parodic relationship that these new artistic movements display with other artworks. In the same way as in appropriation art, net.artists use and appropriate the medium they wish to criticise in order to offer a different perspective on the world. An emblematic example can be found in so-called *browser art*[139], which takes up the avant-garde practice of criticising a new medium by pushing its limits. *Riot*[140], the first multi-user browser, is proof of this

[137] A clear definition of the term has made available on Tate Museum website: ″*Internet art* is art that is made on and for the internet, also known as net art. It encompasses various sub-genres of computer-based art including browser art and software art. The term is used to describe a process of making art using a computer in some form or other, whether to download imagery that is then exhibited online, or to build programs that create the artwork. Net art emerged in the 1990s when artists found that the internet was a useful tool to promote their art uninhibited by political, social or cultural constraints. For this reason it has been heralded as subversive, deftly transcending geographical and cultural boundaries and defiantly targeting nepotism, materialism and aesthetic conformity. Sites like MySpace and YouTube have become forums for art, enabling artists to exhibit their work without the endorsement of an institution″, <https://www.tate.org.uk/art/art-terms/i/internet-art>.

[138] Network art affects the medium through which it develops. This is the ability to network, which can exist independently of the Net/Internet. Similarly, the Web Art: "Web artists facilitate meaningful human-to-human and human to-machine interactions. Web artists also tend to appropriate, merge, and recontextualize visual culture media such as video games, computer graphics and animation, sound, and photography. However, Web art represents a break from these media by calling attention to the uniqueness of the Internet experience, such as lags in transmission time, busy signals, computer crashes, and corrupted code", Alison COLMAN *Visual Arts Research*, Intersections of Technology with Art Education, 2005, Vol. 31, No. 1, p. 13.

[139] ″A sub-genre of internet art, browser art is a renegade artwork made as part of a URL that uses the computer as raw material, transforming the codes, the structure of the websites and the links between servers into visual material. Some browser artworks automatically connect to the internet and then proceed to mangle the web pages by reading the computer's 'code' the wrong way. The duo Joan Hermskerk and Dirk Paesmans, known as Jodi, have devised a program which the net art writer Tilman Baumgärtel has described as transforming a PC 'into an unpredictable, terrifying machine that seems to have a life of its own'. Other artists, like the British based duo Tom Corby and Gavin Baily, reduce image-rich web pages to stark white text. While the American artist Maciej Wisniewski has developed a browser that transforms the interactive experience of surfing the net into a passive activity, staring at floating images and texts″ <https://www.tate.org.uk/art/art-terms/i/internet-art>.

[140] ″This artwork is about the line where human nature meets technology. The internet introduces us to a world where property is defined by hardware and software, data and instructions. Information can be

very exercise. Its developer, Mark Napier, net.artist who criticises the text-reproduction methods adopted by the main commercial browsers, questioning both solipsistic navigation and content homogeneity. His first work, *The Distorted Barbie*, provoked the reaction of Mattel for appropriation of the intellectual property. The site designed by Napier deformed the popular Barbie, giving her the appearance of an anorexic or obese woman. The feminine ideal represented by the toy was therefore being parodied through a social satire against the models of mass culture.

Just like with appropriation art, Net.art aims for a specific target. Where Duchamp critiqued the conventions of art with his ready-mades, Riot critiques the conventions of the Internet using mash-up[141].

> The foregoing short history demonstrates that the practice of appropriating objects and images from the world surrounding the artist has a distinguished and lengthy pedigree. So common is appropriation in the art world that a 2010 exhibition at the New Museum in New York, entitled *Free*, was built "partly around the very idea of the borrowing culture."[142].

Net.artists have also used parody as a tool for sabotaging major companies on the web. Since directly hacking the server of a target is a criminal and highly perilous activity, the alternative method is parodying a web site, creating a so-called para-site, which appears at first glance to be entirely the same, but whose content is different and often provocatively critical of the policies of the reference[143]. One of the most

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recycled and reproduced in seemingly endless ways and distributed in ever-shifting contexts; the alternative space of the Net resists our traditional, physical model of ownership, copyright, and branding″, <http://www.potatoland.org/riot/about.html>

[141] *See* Marco DESERIIS, Giuseppe MARANO, *Net.art. L'arte della connessione*, Shake, 2008, p. 104-106.

[142] SCHAUMANN cit. p. 120.

[143] This was the case of ″TM Clubcard″ by Rachel Baker: ″TM Clubcard (1997) was a 'para-site', which Baker set up on the Web to mimic and comment on corporate loyalty card programs, such as the Tesco Clubcard, which was put out in 1995 by the major UK supermarket chain. Baker offered participants who registered online a TM clubcard, which 'contained direct lifts of logos and layouts from the real Tesco Plc'. Users would input their PIN on 'TM Clubcard' sites, to earn reward points and be tracked in Baker's database. Tesco's lawyers eventually forced the shutdown of the site, and subsequent versions of it were similarly shutdown. By mimicking corporate processes, 'TM Clubcard' created a fuller understanding of how a participatory relationship with a corporation is also panoptic

famous Net.artists to create satirical websites is The Yes Men, who have targeted various companies (Down Chemical[144], Monsanto etc.) and intergovernmental organisations, such as the WTO[145].

Net.art plays with the features that I have highlighted above: the technical reproducibility of an online work of art (such as with any software); new techniques of intervention allow anything to be digitally elaborated online; online dissemination guarantees that every user in the world can take part, and claim independence in doing so. Net.art shows how the Internet in the 1990s was a place in which the traditional rules of art could be evaded, thus guaranteeing independence from the art system. Disintermediation, which had influenced entrepreneurial interest in the network, also affected the new artistic current.

The intervention of the user, who is not a mere spectator, as in the case of appropriative art, but who can take control of the work of art, is also what distinguishes Net.art. The traditional relationship of trust turns into an exchange of roles; the unilateral unwritten agreement between artist and audience is broken. Net.art therefore transforms users into co-authors of a work that, however, never comes to an end, as it changes as soon as a new user intervenes[146]. Riot allows the reference work (usually a piece of software) to be reworked and remixed by any online user, making a personal choice of deciding which sites to interface. Riot has

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and how, moreover, corporations will go to extreme lengths to protect their ongoing privatization of the public sphere", http://www.medienkunstnetz.de/.

[144] "'It has been described so many times as an elaborate hoax, but it was not so elaborate', muses Bonanno. 'The actual mechanics were so simple and straightforward'. He and fellow American Bichlbaum, who call themselves the Yes Men, were able to pull it off after a BBC producer in search of a Dow spokesman stumbled across a website created by the Yes Men which carefully mimics the company's official site. Contrary to what has been reported, the Yes Men did not hack into the Dow Chemicals website. Instead they set up Dowethics.com, in which they posed as the multinational, telling the truth about the company as they see it, and (disastrously for the BBC) offered an email address for media inquiries. But that was two years ago. Bichlbaum and Bonanno had all but forgotten about the site when the BBC producer got in touch out of the blue" Vincent GRAFF, *Meet the Yes Men who hoax the world*, The Guardian, 13 Dec 2004.

[145] A list of the fake websites made by the Yes Men is online: https://theyesmen.org/hijinks-all?view=fake_websites_embed_block

[146] "Web art also dissolves the boundaries between production (who is the work's creator? the artist, users, or both?), distribution (where is the work seen?), consumption (viewing and interaction), and critique (reflection upon the work)" COLMAN p. 15.

been interpreted as a battle for artistic freedom online and against the commodification of the internet[147].

These two artistic movements are very different in terms of techniques, motivation and criticism. Yet, both aim to take over something that existed before and disseminate it to the public, undressing it from common clothes and giving it new life. Creativity lies in the conceptual ability to represent that same image from a different point of view, and thus radically change its meaning. Both abandon achieving a new form to further corroborate the artistic idea and action.

> The process whereby artists borrow images from other sources and incorporate them into new work to comment critically upon the original work and political and economic system that created it[148].

Figure 5 Riot: a mix of https://www.greenpeace.org/international/ and https://www.nato.int/

2.2 Web 2.0 and parody

The Internet is traditionally a great medium for innovation and Web 2.0 represented a revolution in economic terms; the evolution of the internet allowed the computer industry to develop and led to improvements in platforms, which are now

[147] DESERIIS MARANO p. 13.

[148] RIMMEL cit. p. 180.

able to exploit the massive use of the network by the public[149]. Web 2.0, which grants users greater participation in the so-called information society via the use of web-applications, has also been the ideal place to express creativity, fostering the development of online parody. Since the beginning of this technological revolution, the genre of parody has satisfied some of the primary needs of the internet; that of a single person being an active user, producer and content creator all in one[150]. This important figure guarantees the survival and success of virtual communities.

> Parody has likewise been a constitutive practice on the platform since its inception; indeed, one of the first viral video successes on the YouTube service, which communicated its unique selling proposition clearly to a base of early adopters, was a music video parody[151].

[149] *See* Gianluigi COGO, *Cittadinanza digitale. Nuove opportunità tra diritti e doveri*, Edizioni della Sera, Roma, 2010, p. 61. A more coherent and precise definition of Web 2.0 is possible to find in Tim O'REILLY, *What Is Web 2.0*. 2005, https://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html.

[150] On this issue, we can recall Jakob Nielsen's rule: ″User participation often more or less follows a 90–9–1 rule: 90% of users are lurkers (i.e., read or observe, but don't contribute). 9% of users contribute from time to time, but other priorities dominate their time. 1% of users participate a lot and account for most contributions: it can seem as if they don't have lives because they often post just minutes after whatever event they're commenting on occurs″. Clay Shirky's theory, known as the "End of audience", delves into the concept that contemporary audience is transforming into content creators. The theory delves into the sociological aspects of social media. Shirky contends that the traditional passive users have shifted significantly into creators due to the dynamics of social media. *See* Clay SHIRKY *The end of audience* (chapter 19) in *Media Theory for A Level. The Essential Revision Guide* By Mark DIXON, Routledge, London, 1st Edition 2019.

[151] Kris ERICKSON, Martin KRETSCHMER and Dinusha MENDIS, *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube*, Indipendent Project Report - Parody and Pastiche. Study I. Newport - UK: Intellectual Property Office (IPO), January 2013, cit. p. 6. ″The clip Lazy Sunday, produced in 2005 by sketch comedy group The Lonely Island and originally broadcast on NBC's Saturday Night Live, was a send-up of combative themes in hip hop music. After initially airing during the televised broadcast of Saturday Night Live, the clip was quickly uploaded to nascent online video sharing platforms including YouTube (Itzkoff, 2005). NBC immediately notified YouTube of the presence of infringing material and requested that it was taken down. YouTube complied within 48 hours of the clip being uploaded, however within that time the video was able to amass more than 5 million views, making it one of the early ambassadors for a new kind of short-format clip culture and an example of the powerful dynamics of viral fan communities on the Internet″, *Ibidem*

As far as online parody is concerned, the most important innovation is the category of User Generated Content (UGC), which has allowed parody to become an activity that lies at the heart of the digital creative scene[152].

An unofficial definition of the term UGC was presented by the OECD in 2007. The term used in this definition (user created content – UCC) is simply a broader category of UGC. The requirements are as follows[153]:

- Publication requirement: i.e. user content can be defined as UCC/UGC only if made publicly available on the internet.

> While theoretically UCC could be made by a user and never actually be published online or elsewhere, we focus here on the work that is published in some context, be it on a publicly accessible website or on a page on a social networking site only accessible to a select group of people (i.e. fellow university students)[154].

- Creative effort: the content created/generated by users must reflect a certain amount of creative effort[155].

> This implies that a certain amount of creative effort was put into creating the work or adapting existing works to construct a new one; i.e. users must add their own value to the work […] If a user uploads his/her photographs, however, expresses his/her thoughts in a blog, or creates a new music video this could be considered UCC. Yet the minimum amount of creative effort is hard to define and depends on the context[156].

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[152] "The increase in creation of UGC over the past decade mirrors the technological advances in Internet usage and efficiency, spawning a variety of media and social networking platforms that allow UGC creation", Lindsay LARSON, Jordan SALVADOR, *Unsanctioned user-generated content: student perceptions of academic brand parody*, Corporate Communications: An International Journal, Volume 26, Number 2, 2021, pp. 365-381, cit. p. 367.

[153] *See* Beatrice CUNEGATTI, *Contenuti autoprodotti dagli utenti*, in Diritto dell'informatica, (a cura di) FINOCCHIARO e DELFINI, Milano, 2014.

[154] OECD (Organisation for Economic Co-operation and Development Publishing), *Participative Web: User-Created Content*, OECD Publishing, 2007, cit. p. 8. oecd.org/sti/38393115.pdf.

[155] The legal scholar excludes from UGC analysis uploading of copyrighted content on the internet with no creative effort and without any alteration or transformation. This situation does not pose any further copyright concerns, apart from the requirement to identify the author who possesses the exclusive right.

[156] OECD (Organisation for Economic Co-operation and Development Publishing), *Participative*

- Creation outside of professional routines and practises: finally, user-created content must be outside of a professional activity or task[157].

> User-created content is generally created outside of professional routines and practices. It often does not have an institutional or a commercial market context. In the extreme, UCC may be produced by non-professionals without the expectation of profit or remuneration. Motivating factors include: connecting with peers, achieving a certain level of fame, notoriety, or prestige, and the desire to express oneself[158].

2.2.1 Spread and rate of parody on Web 2.0

The Intellectual Property Office (IPO) commissioned a study to explore the extent of online parody-content production on YouTube[159], the most popular video-sharing platform.

> Because YouTube hosts both commercial and user-generated content, and makes public information about the size of the audience for both, it is deemed to provide an ideal site for this research[160].

Web: User-Created Content, OECD Publishing, 2007, cit. p. 8.

[157] The so-called rise of the amateur creators into the participative web 2.0: "The rise of user created content (UCC) (French: contenu auto créé) or the so-called rise of the amateur creators is one of the main features of the so-called participative web. This comprises various forms of media and creative works (written, audio, visual, and combined) [..] online content that is produced by users i.e. non media professionals (i.e. ordinary people) as opposed to traditional media producers such as broadcasters and production companies" *Ibidem*

[158] *Ibidem*

[159] ″Launched in 2005 by three former employees of online payment service PayPal, YouTube was among a handful of other companies seeking to capture a dominant position in the emerging online video market [..] By providing low-bandwidth video playback with minimal demands on system resources, YouTube was able to capture significant market share in a period when broadband penetration was still at a relatively low 53% of households in the UK and 51% in the USA (Ofcom, 2007). An additional technical advantage of YouTube's platform was the implementation of a progressive download feature, which enabled playback to begin before an entire video file was downloaded to the client's computer. The company was acquired by Google Inc. in 2006 for $1.65 billion which provided YouTube with additional investment in server infrastructure″ ERICKSON *Evaluating* cit. p. 6.

[160] ERICKSON, *Evaluating* p. 11.

YouTube can be also defined as a "primary network"[161], because it is based on bonds, such as friendship, and people use it to share personal photos and videos. The objective of the research was to assess the impact of online parody within creative social media.

> The YouTube platform was chosen for its dominance in the emerging online video market and for the opportunity it provided to observe user-generated production in an online marketplace where original licensed music videos and parodies exist next to each other [...] YouTube is the world's most popular online video sharing service, with over 800 million unique visitors per month, accessing 4 billion videos per day[162].

The IPO research focused solely on the production of online musical parodies[163]. Starting from an analysis of 343 commercial musical videos (*commercial content*)[164], the researchers identified 8,299 parodies that had been created and uploaded by users onto the platform (user-generated content), thus obtaining a production rate of 24:1.

[161] COGO p. 32.

[162] Kris ERICKSON, Martin KRETSCHMER e Dinusha MENDIS. *Copyright and the Economic Effects of Parody: An empirical study of music videos on the YouTube platform, and an assessment of regulatory options*. Indipendent Project Report - Parody and Pastiche. Study III. January 2013. Newport - UK: Intellectual Property Office (IPO), cit. p. 6-7.

[163] ″In fact, the most extensively exploited commercial product on the platform is the music video, being well suited to the short length of the YouTube format, and enabled through advertising revenue share partnerships with music labels. Because viewership data is publicly available, it enabled researchers to evaluate the possible effects of parody content on the fortunes of commercially licensed works″ (cit. ERICKSON, KRETSCHMER, MENDIS *Copyright* p. 7). ″The study is therefore focused on the online music video market, with the unit of analysis being the individual music video, comprised of several copyright-attracting elements: the original sound recording, the video recording, the lyrics and the musical composition″ (cit. ERICKSON, *Evaluating* p. 11).

[164] ″While it is well known as a platform for amateur user-generated video content, YouTube also hosts commercial content on channels such as Vevo, a partnership between Google, EMI, Sony Music and others. In fact, the most extensively exploited commercial product on the platform is the music video, being well suited to the short length of the YouTube format, and enabled through advertising revenue share partnerships with music labels″ ERICKSON, KRETSCHMER, MENDIS *Copyright* p. 7.

Territory	Original works	Parody videos	Rate of parody	Parody audience (% of original)	Average Views per Parody
USA	145	7,259	50.1	7.5	86,549
UK	168	929	5.5	1.3	21,427
EU	30	111	3.7	1.5	68,757
Total:	343	8,299	24.2	6.3	79,022

The IPO table on the production of online musical parodies on YouTube.

This enormous amount of creative material illustrates the spread of the genre; the comparison between online and offline production shows that this new digital media genre has become increasingly popular among users[165].

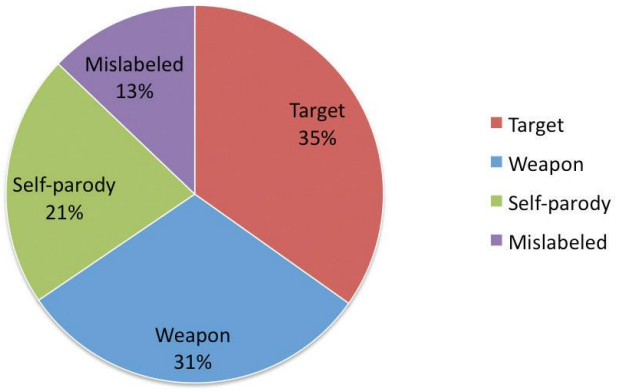
2.2.2 Communicative intention: target and weapon parodies

Communicative intention is another important element in the IPO study. Whereas rate of parody is a quantitative analysis, the main focus here is on qualitative analysis, qualifying parody according to its aim. This qualification is a useful way of categorizing online parody, which makes up most of the production samples examined on YouTube. IPO highlighted several peculiar typologies in the digital environment: *target, weapon, self and mislabelled parodies*[166].

[165] ″One digital media genre that has become increasingly popular in the past few years is the YouTube video parody″, Tom BALLARD, *YouTube Video Parodies and the Video Ideograph*, Rocky Mountain Review, Vol. 70, No. 1 (SPRING 2016), cit. p. 10. Since IPO study occurred almost ten years ago, the numbers have surely increased.

[166] Target parody is linked to the underlying work while weapon parody is directed at other things than the underlying work. Self parody and mislabelled parody are more connected to digital evolution of parody. An example of *self parodies* is *mukbang*: ″is an internet fad that finds viewers watching mukbangers binge eating copious amounts of food. This strange trend began in Korea in 2011. The term 'mukbang' comes from a mix of two Korean words, 'muk-ja'' (eating) and 'bang-song' (broadcasting)″. An example of *mislabelled parodies* is *YTP* ″stands for Youtube Poop. Taking sources from franchises, videos, memes, photos, and music then mashing them together with a video-editing software″. Definitions by UrbanDictionary.com.

Target parodies, directed at the original artist or work, accounted for 35% of the total sample. Weapon parody, which takes as its focus a critique of a third party issue or phenomenon, made up a further 31% of the works observed. Within the weapon category, we observed a wide range of social and political expression, ranging from comments about race, gender and religion, to satirical commentary on the intellectual paucity of mass media, the commercialisation of the internet, and the causes of the recent banking crisis. In addition to those traditional definitions, the researchers encountered a third type of parody, which accounted for 21.6% of the total sample and which we termed ″self parody″. In these videos the uploader turned the critical eye on themselves, rather than the original artist or a third party. Finally, the researchers discovered a range of other amateur performances, labelled as parody, which did not contain any discernible target of critique and therefore could not be easily defined. They include a range of communicative acts, such as karaoke, choreography, remix, mashup or machinima[167]. We have termed these videos ″mislabelled/other″, and they account for 12.9% of the observed sample[168].



Type of parody for a sample of 1845 parody videos on YouTube, derived from a primary sample of 343 top-charting music videos for 2011[169].

[167] *Machinima*: ″The art of using a pre-rendered gaming engine and making it into a film. The word is derived from: Machine and Cinema″, Urbandictionary.com

[168] ERICKSON, KRETSCHMER, MENDIS *Copyright* p. 9.

[169] ERICKSON, *Evaluating* p. 27.

It is common, especially in Anglo-Saxon tradition, to distinguish parody in terms of its aim, and to investigate its relationship with the reference work. In this way, different types of parody can be envisaged:

> Specific parodies, which are built on a particular text, or general parodies which are built on whole artistic traditions, style or genres. In addition to this we have target parodies which are intended to comment on the text or its creator and weapon parodies involve using that text to comment on something quite different[170].

Other disciplines have welcomed these distinctions as a clear means to interpret the communicative intentions of an artist; this type of clarification may be useful in arts competitions (for instance, for an art critic in their analysis of a work of art) and in legal contests (for instance, for a judge during a trial)[171]. However, this distinction is not always efficient in determining the precise type of parody:

> Parodies can operate at several levels. They can criticise a single work and, at the same time, target the work's moral, a tendency in an arts form or contemporary values [...] The answer is not black and white, but a question of degree. One possible solution would be to look at the primary target. But again, this will be an aesthetic decision and, often, far from being clear[172].

A famous episode of parody on YouTube, and one that achieved worldwide resonance because of its satirical attack, was the campaign that Greenpeace launched against *The Force* (2011), which was a commercial produced and broadcast on YouTube by Volkswagen[173]. Another was *Innocence of Muslims* a blasphemous

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[170] Sangwani Patrick NG'AMBI, *Parody: A defence for the Defenceless Satirist,* 41 Zam. L.J. 1 (2010), cit. p. 2.

[171] In *Gies-Adler*, Case No. I ZR 117/00, 20 March 2003, GRUR (2003)), the German Federal Supreme Court "pointed out that it did not matter that the parody did not target the work itself, but its thematic environment" JONGSMA cit. p. 662.

[172] Christian RÜTZ, *Parody: a Missed Opportunity?,* [2004] I.P.Q.: No 3, cit. p. 297.

[173] The Greenpeace's parody has been studied by several legal scholars due to the worldwide resonance and the legal consequences which involved copyright and freedom of expression within the newborn platform YouTube: ″The success of 'The Force' campaign was used by Greenpeace to design

parody against the Prophet Mohammed. Millions of viewers watched a trailer for *Innocence of Muslims* soon after it was uploaded to YouTube, provoking violence in the Middle East[174].

These two videos may be included in the category of weapon parodies. Moreover, they demonstrate how parody always creates a legal discussion involving the opposing interests involved. Specifically, in the case of Greenpeace, parody raised legal issues regarding copyright law, whereas, in the case of Innocence of Muslims, the legal debate was about freedom of expression and limits[175].

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an anti-advertising campaign in protest at the German company's behaviour. It created the website www.vwdarkside.com and designed a video mimicking the original advert, which was uploaded to Greenpeace's YouTube account. The new Passat was replaced with old condition. And in front of the little Darth Vader stand a little Skywalker, Princess Leia, Yoda, Chewbacca, C3PO and R2D2. They all face Darth Vader and watch as spaceships take off from the Death Star, designed with the logo of the German brand. The video ends with the message 'VW is threatening our planet by opposing cuts to CO2 emissions. Join the rebellion'. In a second video, the story continues and a banner is displayed from the Death Star which reads: 'Save your Planet! Greenpeace'. It ends with a fun dance by all the characters. Furthermore, the environmental group performed several street marketing actions and in several printed press channels changed the company's logo 'Das Auto' to 'Das problem'. The initial video, published on 27 June, spread quickly on the social media, and its viral success was of the level seen for Volkswagen's advertisement. The social impact of the protest could be considered a battle won by the environmental activists [..] '526,000 Greenpeace supporters across the planet have forced VW to change its policy and its cars [..] after more than half a million people stood against them, a parody of their Star Wars advert went viral across the internet, thousands of activists dressed as storm troopers protested at their dealerships and on the streets, and direct actions at car shows across Europe, VW have caved in to pressure from across the globe and announced they will meet and support climate targets. This victory couldn't have happened without you. Back in June 2011 when we started this campaign, VW preferred to remove our videos from YouTube rather than about the efficiency of its cars or how it was lobbying against strong EU climate laws'″ Antonio CHAMORRO-MERA, *Greenpeace: The Threat of the Dark Side of Volkswagen*, in Case Studies on Social Marketing. A Global Perspective, di Helena M. ALVES, Springer, Cham, 2019, p. 18.

[174] ″Almost a year after the casting call, in June 2012, Youssef uploaded a 13-minute-and-51-second trailer of Innocence of Muslims to YouTube, the video-sharing website owned by Google, Inc., which boasts a global audience of more than one billion visitors per month. After it was translated into Arabic, the film fomented outrage across the Middle East, and media reports linked it to numerous violent protests. The film also has been a subject of political controversy over its purported connection to the September 11, 2012, attack on the United States Consulate in Benghazi, Libya. Shortly after the Benghazi attack, an Egyptian cleric issued a fatwa against anyone associated with Innocence of Muslims, calling upon the 'Muslim Youth in America and Europe' to 'kill the director, the producer[,] and the actors and everyone who helped and promoted this film'″ U.S. Court of appeals for the ninth circuit *Cindy Lee Garcia, v. Google Inc*., 786 F.3d 733, 114 U.S.P.Q.2d 1607 (9th Cir. 2015) No. 12-57302, at 783.

[175] The scandal had international relevance; the reader may refer to Wikipedia here: en.wikipedia.org/wiki/International_response_to_Innocence_of_Muslims_protests.

2.2.3 Meme

A meme is defined as the imitation of an "idea, behaviour, or style that spreads from person to person within or across cultures"[176]. The use of memes as a form of communication is highly prevalent online and their rapid spread has exacerbated the imitation effect. This feature is so integral to memes that some legal scholars argue that memes only really exist when they move from one screen to another.

> Memes are spread from person to person by observation and social learning – either face to face or through media of communication like writing, television, or the Internet. Through observation and social learning, and these become part of their cultural software. In this way, memes are communicated from mint to mind, are adapted into our cultural software, and become a part of us. Culture is a system of inheritance: we inherit our cultural software from the people around us, and we pass it on to those whom we in turn communicate with[177].

Memes have been characterized as mutualism, commensalism, or parasitism[178]. The parasitic category seems most relevant to parody, as parodists have historically been seen as appropriators or thieves. In reality, parody can have various effects on the original work, including increasing its popularity, having no effect, or even working against it[179]. For instance, numerous online parodies of popular songs

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[176] Roy CHRISTOPHER *The Meme is Dead, Long Live the Meme* p. 33. "In our switch from television screens to computer screens and on to mobile screens, we fundamentally changed the infrastructure by which memes spread" *Ivi* p. 38.

[177] Jack BALKIN, *Cultural Software. A theory of ideology*, New Haven: Yale University Press, 2003, cit. p. 43.

[178] In the first case, mutualism, guest and host benefit from each other; in the case of commensalism, one benefits and the other derives neither benefit nor harm; lastly, in the parasitism, the guest benefits at the expense of the host.

[179] "Some of people's existing cultural software helps to shape and constitute their interests, and this helps determine that is harmful or helpful. For example, memes that lead a person to watch a lot of television may be mutualist for a person who is a television critic but commensal or even parasitic for a person who is a law student. In addition, it is often difficult to separate the interests of memes from the interests of the persons whom they constitute [..] Important features of our personality and important choices in our lives may be the result of the cultural software we possess; they may be inextricably linked to our personal identities and our sense of ourselves" BALKIN *Cultural Software* p. 63.

can simultaneously maintain high levels of audience interest in both works. Furthermore, memes have found a place in the contemporary art market[180].

The meme can sometimes push the boundaries of the legal constraints that apply to various forms of expressive communication. However, like parody and humour in general, memes thrive on irony and exaggeration, often subverting reality for the sake of humour. What distinguishes memes is the tendency to take an original image, typically from popular videos, and add a caption intended to provoke a comedic response[181]. Memes are not an exclusive creation of the Internet but rather a cultural phenomenon that has been significantly amplified by online platforms.

The full extent of their impact only recently became apparent during the 2016 US presidential election. During this time, many journalists began to reflect on the influence of this user-generated content, distributed via the internet, on Americans' voting decisions. Concerns arose over the association of memes with fake news, which some believe contributed to Donald Trump's victory[182].

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[180] I recall the case of Disaster Girl which was sold for half million recently. *See* Marie FAZIO *The World Knows Her as 'Disaster Girl.' She Just Made $500,000 Off the Meme*, the New York Times, 1° May 2021. https://www.nytimes.com/2021/04/29/arts/disaster-girl-meme-nft.html

[181] "Memes play in the virtuosic realm of free association and a deferred kind of jouissance. The jouissance does not come from making the best fit between word and image, but the most esoteric. The index of a successful meme is the elided pleasure of forcing a conceptual mismatch and the confusion this would cause to the uninitiated" BIANCHINO p. 378.

[182] The fear was confirmed by the associations of memes with fake news, which triggered Trump election: "The term 'fake news' appeared out of next-to-nowhere in November 2016" (Jay OWENS, *The Age of Post-Authenticity and the Ironic Truths of Meme Culture*, 11 April 2018; "For years memes were perceived as a negligible artefact until meme magic elected Trump" Bogna M. KONIOR, *Apocalypse Memes for the Anthropocene God: Mediating Crisis and the Memetic Body Politic* (in BOWN Alfie, BRISTOW Dan, *Post Memes. Seizing the Memes of Production*, Punctum Books. 2019), cit. p. 50. Legal scholars have coined the term "apocalyptic memes" to describe memes that have had adverse impacts on online audiences. These memes, which celebrated Donald Trump's election, appeared to be designed to expedite the dismantling of the "elites" symbolized by Hillary Clinton. These concerns appear to have been justified, as the events that unfolded at Capitol Hill a few years later seem to indicate: "This genre is decisively about asserting control rather than relinquishing the centrality of human agency, yet its interest in destruction and its unintended connection to accelerated media modernity, where humans exist as mere carriers of an unstoppable force, make it a part of a larger apocalyptic tendency in memes, or, as some would argue, in the Internet at large" *Ivi* p. 55.

2.3 Relationships between parody and related techniques

Parody can be classified according to its function (comic or satirical), according to its aim (target or weapon), and according to the medium of expression that transmits it (offline or online).

The first classification entails the comic, which we have described as liberating physiological process for any human being. Comedy is therefore a historically relative anthropological constant. Oppositely, the laughter would not be liberating in satire, but strong charge of hostility. Satire has been described as an "aggressive gesture", which aims to achieve change by shocking the well-meaning. The comic is unleashed with a simple gesture; satire requires a bolder intervention towards society and how it lives and thrives. A second point of view is to be found in the audience. If the audience does not expect what the comic effect created by the artist will be produced toward, in the case of satire the audience already knows what customs and habits, what politicians and what society will be criticized.

The second classification is very interesting because it perfectly frames the two essential aims of parody. The first is the target parody, which is directed at the original artist or work. The second is the weapon parody, which takes as its focus a critique. Within these categories, we may add a wide range of different expressions, ranging from mislabelled, which are more like pastiche than parody, and self-parody. This category emanates from American case law but it has entered in Europe as well[183].

The third classification does not consider anything internal to parody, but only the medium of transmission. This distinction is crucial to the discussion of this thesis, as ICT changes the relationship between the subjects involved in parody, which I will analyse shortly.

Before we continue the debate on parodic expression, it is fitting that the different artistic forms that share some common features with parody should be listed. I wish to approach a comparison of the numerous techniques that can be placed side-by-side with parody by examining the EU Directive on copyright and

[183] *See* Tribunal of Milan, ord. 13/07/2011 - *Foundation Giacometti v. Fondazione Prada, Prada Spa and John Baldessari.*

related rights in the Digital Single Market. This Directive outlines specific purposes that guarantee a certain amount of freedom for users.

> Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche[184].

An analysis of the Directive will be presented in the following chapters. For the moment, I will focus on the artistic relationship between the different techniques that are cited and prescribed in the Directive and that must be interpreted in a way that is consistent with the common-usage terms for them. These techniques can be assimilated into the concept of parody, and, as such, parody can contain each of them. This is confirmed by court judgements, which have often referred to the limits imposed on quotation, review and criticism in their judgments on the lawfulness of parody.

We have already observed in the first chapter how the distinction of these categories is literally relevant[185] but it is not always actionable. Moreover, it is not primary for a jurist to list the different features and purposes. A person of letters might be entitled to examine the intimate expressions that appear in a quotation or a criticism with parodic intent. In this sense, parody is certainly the most changeable expression, as we might well define parody as a critical and caricatured quotation of a notorious fact.

Parody in Web 2.0 is included in a list of similar techniques. Quotation, criticism, caricature and parody are literary, journalistic or artistic techniques that have intervened prominently in the digital evolution. They have legitimised practices of mass communication on the Internet, namely the user-generated content disseminated on social media, which are entitled to the protection of freedom of expression, communication and art.

InfoSoc 2001/29/EC and DSM 2019/790 Directives do not include any definition of the terms parody, caricature or pastiche; CJ has just ruled on parody so

[184] Recital n. 70 of Directive (EU) on copyright and related rights in the Digital Single Market.

[185] *See* Genette on hypertextuality in Chapter 1.

far (see Deckmyn). Hence, it must be stated that there are currently no mandatory European legal specifications for the interpretation of those terms[186]. Despite that, InfoSoc 2001/29/EC and the DSM 2019/790 provide for strict list of exceptions and limitations. a strict listing of free uses is clear evidence of favoritism for intellectual property, since the list would not be susceptible to analogical applications. Most likely, the free uses are merely exceptional.

A common character of all these expressions are the legal consequences for illegitimate use. Parody pastiche and caricature present the same legal remedies. Quotation, criticism and review have certain aspects of differentiation, such as: the element of creative character; remuneration for creative effort, not provided on platforms for quotations but provided for parody; the duty to cite the source.

2.3.1 Quotation

The first purpose listed by the Directive is quotation, which brings to mind Genette's study on parody:

> The most rigorous form of parody, or *minimal parody*, consists, then, of taking up a familiar text literally and giving it a new meaning, while playing, if possible and as needed, on the words[187].

A simple quotation may thus become a parody if it creates a deviation, even minimal, between the original context and the target one. Parody in the form of quotation may also be called "parodic distortion"[188]. In support of Genette, Margaret Rose defined parody as: "the critical quotation of performed literary language with

[186] Till KREUTZER, *The Pastiche in Copyright Law*. Expert opinion on a copyright-specific definition of pastiche according to sec. 51a german copyright act (urhg). Gesellschaft für Freiheitsrechte V., 5 September 2022, cit. p. 14.

[187] GENETTE p. 16.

[188] GENETTE p. 36: ″The most conspicuous and most effective form of allusion is the parodic distortion. This form is particularly suited to contemporary journalistic production, which is always eager for headlines″.

comic effect"[189]. The comic effect is thus the only element that can distinguish parody from a serious quotation:

> In parody, the comic incongruity created in the parody may contrast the original text with its new form or context by the comic means of contrasting the serious with the absurd as well as the 'high' with the 'low', or the ancient with the modern, the pious with the impious, and so on[190].

This distortion of the original serious context is exemplified in a line from *The School for Wives* by Moliere: *Je suis maître, je parle; allez, obéissez*. This is a typical "critical attitude on the part of the parodist"[191], which is a quotation from Corneille's tragedy *Sertorius*. The original text undergoes no change, and the comic effect is enhanced by a parodic distortion of the context:

> The most elegant parody, since it is the most economical, is then merely a quote deflected from its meaning or simply from its context, or demoted from its dignified status [...]
>
> Witnessing a suicide by dagger, a pedantic observer might quote Théophile de Viau:
>
> > Le voilà donc, ce fer qui du sang son maître
> >
> > s'est souillé lâchement. Il en rougit, le trâitre[192].
>
> This quotation would be more or less out of place, but it is not really, or perceptibly, parodic. If I were to take up these same two lines in reference to the iron in a horseshoe, or better still a clothes or a soldering iron, that would be the start of the pathetic but real parody, thanks to the play on the word *fer* (iron). When Cyrano, in the *tirade des nez* (nose tirade), applies to himself the famous paraphrase, he obviously has good grounds to call this application a parody – which he does as follows:

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[189] Margaret ROSE, *Parody/Meta-Fiction. An Analysis of Parody as a Critical Mirror to the Writing and Reception of Fiction*, London, Croom Helm, 1979, p. 59.

[190] *Ivi* p. 33.

[191] *Ivi* p. 79.

[192] Théophile de Viau, *Les Amours tragiques de Pyrame et Thisbê*, 1621 ("There is then, this iron blade, which in ist master's blood Did in cowardice sully itself. See it turn crimson, the traitor").

Enfin, parodiant Pyrame en un sanglot:

Le voilà donc, ce nez qui des traits de son maître

A détruit l'harmonie. Il en rougit, le traître[193].

The relationship between parody and quotation has also been studied by Hutcheon. The author highlights how quotation is structurally and pragmatically close to parody, and confirms that quotation can become a form of parody, especially in modern art[194]. However, Hutcheon also concentrates on the difference in intent that is the distinctive criteria between the two forms:

> But is it legitimate to [..] claim that all parody is therefore quotation? I think not, despite the fact that there are convincing arguments being mounted these days for making quotation the model for all writing. "Trans-contextualized" repetition is certainly a feature of parody, but the critical distancing that defines parody is not necessarily implicit in the idea of quotation: to refer to a text as a parody is not the same as to refer to it as a quotation, even if parody has been voided of any defining characteristic suggesting ridicule[195].

If parody is considered work of art, those who merely quotes are not consider artists. A further distinction from quotation can be made in economic terms. The advent of digitalization has enabled the communication and sharing of information on the internet. Dissemination is often via social media, where there may be foreseen the author appropriate remuneration for the content shared on the platforms. This applies to parodies and pastiches, but it is not the case for mere quotation, which is not subject to remuneration[196].

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[193] Edmond Rostand, *Cyrano de Bergerac*, 1897 (Last, to parody Pyramus in a sob: | Here is the nose that of its master's face | Destroyed the harmony. See it turn crimson, the traitor). GENETTE p. 17 / 20.

[194] ″In the visual arts, semioticians like René Payant are tempted to postulate that all painting quote other paintings. This argument would be not unlike the Russian formalist insistence on the conventionality of literature. Both are reactions to a realist aesthetic that values the representational in art. Many of these citational paintings are, as we have seen, parodic. The same is true in music's use of quoting in order to effect contrast. For critics hampered by a ridicule-laden definition of parody, such quotation is often not considered at all parodic″ HUTCHEON p. 42.

[195] HUTCHEON p. 41.

[196] This is stated, for instance, in sec. 5 (2) Urhdag: "Service providers must pay the author appropriate

2.3.2 Criticism

There are many legal scholars who consider parody to be a *sui generis* form of criticism, and who wish to see the limits imposed on criticism also imposed on parody[197]. This viewpoint clashes with that of those who, on the other hand, consider parody to be merely playful and not serious enough to be considered criticism[198].

The commonality between parody and criticism is found in the aim pursued. In both cases, in fact, the final purpose of the message is to make people reflect and criticise human facts and events from a moral and social point of view.

What is unique about parody, differentiating it from criticism, is the artistic means of expression used to achieve the aim. Thus, parody is ambivalent in character; on the one hand, its critical side is based in reality, whereas its artistic nature requires a touch of the unreal. This ambivalent character, which both brings parody closer to criticism and distances itself from it, was pre-empted by the philosopher Bergson, who pointed out the equivocal character of the comic in these terms:

> Hence the equivocal nature of the comic. It belongs neither altogether to art nor altogether to life. On the one hand, characters in real life would never make us laugh were we not capable of watching their vagaries in the same way as we look down at a play from our seat in a box; they are only comic in our eyes because they perform a kind of comedy before us. But, on the other hand, the pleasure caused by laughter, even on the stage, is not an unadulterated enjoyment; it is not a pleasure that is exclusively aesthetic or altogether disinterested. It always implies a secret or unconscious intent, if not of each one of us, at all events of society as a whole. In laughter we always find an unavowed intention to humiliate, and consequently to correct our neighbour, if not in his will, at

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remuneration for the communication to the public pursuant to subsection (1) no. 2 (caricatures, parodies and pastiches in accordance with section 51a of the Copyright Act)".

[197] *See* ex multis: Fumo; Lopez; Polvani.

[198] *See* ex multis: Metafora; Mayr.

> least in his deed. This is the reason a comedy is far more like real life than a drama is[199].

The multifaceted nature of parody means that it can be likened to an artistic form of criticism. The peculiarity of the parodic message consists precisely in its permanent contact with reality, with the events of everyday life. It is precisely this link, sufficiently intense and effectively conveyed, that is the main source of amusement.

2.3.3 Review

Parody can also be approached as a means of review or news reporting. As seen above, parody is a form of criticism. However, in order to criticise a fact or public figure, parody must also report on that fact or figure. This perceivable feature allows the parodic exercise to take on connotations ascribable to the exercise of review[200].

Some scholars have judged the relationship between parody and review, and have pointed out that information can indeed be disseminated in parodic or satirical form. This assumption therefore entails legal consequences. If parody is to be seen in this way, then the rules and limits applicable to review and criticism should be broadened to parody. Moreover, if a comic narrates an event or mocks a public figure, they are reporting or criticizing and must respect the limits for review and criticism[201].

A discussion of these rules and the relationships that can exist between reporting, criticism and parody will be adequately analysed later. For now, I only wish to draw the reader's attention to how parody is not exempt from interpretations analogous to those of the other techniques listed in the law. Other scholars, on the other hand, believe that parody deserves a sort of autonomy from the legal rules drawn up on the concepts of criticism and review. The justification for such

[199] BERGSON cit. p. 42a-42b.

[200] *See* Michele POLVANI, *La diffamazione a mezzo stampa*, CEDAM, Padova, 1998, p. 217.

[201] *See* Marco Orlando MANTOVANI, *Profili penalistici del diritto di satira*, in Dir. Inf., 1992, p. 302.

statements is as follows: if parody informs, it does so through a mixture of true and plausible facts that are created *ad hoc* to induce laughter. It is creativity, then, that distinguishes parody from both criticism and review; a necessary and fundamental component for the reworking of news in a humorous key and for provoking laughter, amusement and satirical reflection[202].

In this sense, some authors believe that parody cannot answer the duty of providing information, precisely because of this creative component, meaning that any judgement as to rationality, which is clearly fundamental to fair reporting and criticism[203], can be excluded.


PAESE SERA
notte
ARRESTATO UGO TOGNAZZI
E' il capo delle BR
Quando la comicità diventa eversione
«Mi dichiaro prigioniero politico»

Figure 6 "Il Male", Italian satirical magazine

[202] *See* Maria Gabriella LODATO, *Diritto di sorridere e finalità informativa della vignetta satirica,* in Dir. inf., 1995, p. 622.

[203] *See* Luigi WEISS, *Diritto costituzionale di satira o diritto di pettegolezzo?* in Dir. famiglia, 1994, p. 192.

2.3.4 Caricature and Pastiche

These two terms are next to parody in the European directive. They have already been mentioned in the section dedicated to Genette[204], who placed them in his graph on hypertextuality, and I remarked on the difference between parody, which is a playful transformation, and caricature and pastiche, which are mere imitation. Pastiche and caricature only derive from a single practice (imitation); although it can be relatively complex, it is entirely defined by the characteristics of these two models[205]. Caricature and pastiche are sometimes also used as synonyms for parody; specifically, parody is used for the adaptation of musical works, pastiche for literary works and caricature for figurative art. However, caricature and pastiche are less critical of the original work than parody which often involves a struggle between expressive forms, styles and content.

Caricature is more connected to a technique, whereas parody is a well-defined genre. The most important shared element is comic intent:

> A caricaturist will always exaggerate, in an obvious and extreme way, that one salient feature in his subject which tends towards the grotesque, for example, De Gaulle's nose. In the case of the caricaturist, the exaggeration is usually gross and extreme[206].

Genette defined this term as a satirical procedure that consists of describing the imitated style[207]. An example of caricature can be found in a poem by the Italian poet Tommaso Stigliani, who, in order to criticise the rhetoric of his contemporaries, constructed a poetic caricature of 17th-century texts, which he used to draw attention to and mock the most common rhetorical figures of the time, such as paronomasia and anaphora[208].

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[204] The definitions of the different categories of hypertextual practices are dealt with in a very exhaustive manner and include: parody; pastiche; travesty; transposition; caricature; forgery. *See* on chapter 1 *Hypertextuality*.

[205] GENETTE p. 18

[206] G D KIREMIDJIAN, '*The aesthetics of parody'* (1969) 28(2) *The Journal of Aesthetics and Art Criticism* 231– 42, cit. p. 235.

[207] GENETTE p. 18

[208] Tommaso STIGLIANI, idillio IV *L'amante disperato*, vv. 152-164 e vv. 266-272 (*Il Canzoniero*);

> In sum, both parody and caricature [...] utilize irony as a tool, although they use it differently to achieve their aim: caricature (like satire) focuses on the pragmatic function, while parody focuses on the semantic function of irony[209].

The term pastiche refers to "a distinct cultural and/or communicative artifact that borrows from and recognizably adopts the individual creative elements of published third-party works"[210]. It is broader than the concepts of caricature and parody. Pastiche may be defined as imitating a style with ludic function, and can stand between mocking and admiring the reference style, with the possibility of mixing the two in an ambiguous regime[211]. What makes pastiche more similar to parody, compared to caricature, is: "that both signal their borrowing from the original work"[212].

It is also possible to highlight differences between parody and pastiche. According to Hutcheon: "pastiche usually has to remain within the same genre as its model, whereas parody allows for adaptation"[213]. The main difference here is that pastiche operates by imitation, similarity and correspondence to the reference, while parody always seeks to differentiate itself from the previous model[214].

Pastiche and caricature are imitative procedures, and the difference between them therefore lies entirely in their intent being comical or satirical. Where pastiche

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Ottavio BESOMI's treatise, *Tommaso Stigliani: tra parodia e critica* (1972) in Studi Secenteschi, 13, 3, cit. p. 14-15. *See* Mario MENGHINI, *Tommaso Stigliani: contributo alla storia letteraria del secolo XVII*, in Giornale linguistico, Modena, 1890.

[209] Sabine JACQUES, *The Parody Exception in Copyright Law*, Oxford University Press, 2019, cit. p. 10.

[210] Till KREUTZER, *The Pastiche in Copyright Law*. Expert opinion on a copyright-specific definition of pastiche according to sec. 51a german copyright act (urhg). Gesellschaft für Freiheitsrechte V., 5 September 2022, cit. p. 1.

[211] GENETTE p. 18

[212] JACQUES cit. p. 11.

[213] HUTCHEON p. 39.

[214] Pastiche has been recently defined as "laudatory and non-critical imitation, such as creating a new work in the style of another artist or genre, and making a new work from a compilation or assembly of pre-existing works. Pastiche therefore includes "anti-twist" uses, ie, those where there is no attempt to ridicule, lampoon or satirise that work, or comment critically on that work or other themes" Emily HUDSON, *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?* Intellectual Property Quarterly, 2017 (4), 346-368, cit. p. 347.

only has ludic intent, caricature entails the satirical and appears as a clear criticism of a fact, a style etc.

> I have not yet differentiated between these two states [...] Such a distinction may not be possible; the same mimotext might after all produce, depending on the pragmatic situations and contexts in which it occurs, wither the comic effect of the pastiche or the satiric effect of the caricature. But it might also be the case that caricature is characterized (sometimes in the most clear-cut cases) by an additional degree of exaggeration, inducing a sort of tilting into the absurd. [...] The specifically textual distinction between pastiche and caricature thus remains very risky or subjective. [...] The nature of the opposition between these two practices is thus essentially pragmatic (related to situation rather than to performance), metatextual, and ideological[215].

Parody differs from mere imitation in that it consists of a playful remake. It is a creation that is unequivocally linked to another work of art. Parody does not just draw inspiration from the reference work, but must represent and, at the same time, distort several elements (such as conceptual content, external form, extrinsic elements) for comic and/or satirical purpose.

Parody, pastiche and caricature exceptions serve to legitimize those new communication practices on social media. Generally, those exceptions serve to protect the fundamental users' rights: freedom of expression and communication, freedom of information, freedom of art. The central feature of those artifacts is the independence from the reference work. The distinction occurs by "inner distance"[216] (when the artifact creates a distinct semantic content) and by "external distance"[217] (when the artifacts come through a different overall intention.) Despite parody,

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[215] GENETTE p. 88.

[216] "Inner distance is created, for example, when the message is changed (antithematic, e.g. satirical uses), by insertion into a different context of meaning (e.g. mash-ups), or by recontextualization (as in the case of memes)", cit. KREUTZER p. 5.

[217] "External distance, on the other hand, lies in the design, i.e. in the fact that the borrowed material is edited to a greater or lesser extent. This is the case when a work is transformed into a different style or type of work (e.g. remix or fan fiction), when a number of different elements are put together (as in collages or mash-ups), or when very small elements are incorporated into much larger original works (as in sampling, for example)", *Ibidem*

caricature and pastiche borrow something, their intellectual-aesthetic effect always differs from the source.

2.4 Conclusions

Chapter two was an exploration of the transmigration of parody in the digital sphere. As I have analysed and defined parody in the first chapter, my aim here was to highlight the digital evolution of this ancient technique. Some contemporary artists have often used parody as a legal defence to justify the appropriation of a work of art. In particular, art is currently evolving through the technological revolution, giving rise to a new artistic movement known as net.art, which uses the new digital medium to appropriate other works of art that it wishes to criticise.

Similarly, the comic and satirical expressions have also undergone significant changes within the online community. The communicative intention adapts to the medium and evolves along with the changing agents involved in the dissemination of the content. In this context, parody, traditionally divided into target parody and weapon parody, has taken on new forms, manifesting itself through different modes of communication. I have explored new varieties of online parody, such as mislabeling and self-parody, alongside the widely recognised category of memes. Researchers have termed these "amateur performances" due to the lack of identifiable targets of criticism. They typically encapsulate multiple communicative intentions and are becoming more prevalent and widespread on the Web.

I have also highlighted how the term parody is often linked with other related techniques, whether artistic or journalistic. My point was that it's not always easy to make a clear distinction between one and the other, especially in the case of parody, which by its very nature often reveals its intention through the purposes of reporting and criticism. Although the law, particularly the European Directives that I will discuss in the next chapters, groups these techniques under the free uses, outside the control of the copyright holder, I will see that certain aspects related to freedom of expression come into play in the case of parody. These aspects must be dealt with entirely separately from, albeit important alongside, copyright.

The study of online parody involves an analysis which is not limited to the artistic evolution but also encompasses the communicative intentions and informational aspects. Alongside the important doctrine of copyright law, which initially dealt with the legitimacy of parody as work of art, there's a growing awareness on the web that parody can be used purely as a tool of communication, devoid of artistic aspirations or proprietary legitimacy.

Chapter 3
Regulation of Parody in copyright law

3.1 Introduction: evolution over time

The study of parody within copyright law starts with an investigation of the recognition of parody as a work of authorship. Any work of authorship may be parodied, and so parody embraces all categories of works of authorship in copyright law.[218]

This section will concentrate on how parody has been incorporated into copyright law and the prerequisites needed to answer a few questions: is the protection of parody under copyright convenient? Might parody be protected as a work of authorship? What would be the limits to this, and why is parody often considered a form of parasitism? Can the reference author oppose any parodic transformation? Is the consensus of the reference author necessary[219]?

Parody was very popular during the Middle Ages, when many artists created transformative alternatives to mainstream masterpieces. During that time and up to the modern age, parody was a genre welcomed by a great many aspiring artists; one clear example of this is *Don Quijote de la Mancha* by Cervantes. Animosity towards the genre grew at the end of the 18th century, when the time came to protect intellectual work via a recognized right granted to artists and their heirs.[220] In fact,

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[218] Literally, everything may be parodied: a prose; a novel; a poem; a musical work; a choreographic work; a sculpture or a painting etc. This list undoubtedly has a residual character, as we have seen in the first chapter, indeed, any expression of reality may be parodied.

[219] Such questions appear in Mario FABIANI, *La protezione giuridica della parodia con particolare riferimento a recenti orientamenti di giuristi stranieri*, in Il Diritto di autore, 1985, fasc. 4, p. 464.

[220] Luigi Carlo Ubertazzi recalls how the first national copyright laws came into force during the 18th century, describing them as prodromes for the introduction of the modern copyright. The exclusive right of reproduction and exploitation were recognised for the first time by a written law; the first Copyright Act: Queen Anne's Statute, Act 8 issued in 1709 by Anne of England "[An act] for the encouragement of learning, by vesting the copies for printed books in the authors or purchasers of such copies during the themes therein mentioned". The Statute therefore represented a legislative reaction, favoured by public opinion, aimed at recognising the existence of a right to the creation of intellectual works. The Statue foreseen an exclusive right of printing the published intellectual works. This right was recognized for a period of twenty-one years. Another exclusive right included the

the authors of creative works had had no protection in, and since, antiquity. This legislative gap persisted throughout the Middle Ages and long after the invention of the printing press; the instrument that made the global dissemination of intellectual works possible. The law remained silent on the recognition of exclusive rights for the authors of intellectual works for many centuries[221].

Hatred against parody increased once the recognition of authors' rights was declared[222], and the practice was opposed and degraded by most illustrious artists, as they felt that comical and satirical transformation would have ruined the reference work. The rising animosity towards parody led to it being considered plagiarism[223]; a theft, a parasite that worked at the expense of the reference author. For instance, Voltaire and d'Alembert[224] labelled parody as mere hate and envy, able to ruin the

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power of first publication (in case of unpublished) for a period of fourteen years (increased to twenty-eight years by a new law introduced in 1776). Such modern exclusive rights overcame the practice of the privileges, following and respecting the signs of the Industrial Revolution. The author's economic interest was put at the centre of the exclusive right, opposing the printers' interests which had obtained privileges during the 16th century for printing and selling original intellectual works without the authors' consent. In this regard, Daniele BONAMORE, *Il plagio del titolo delle «opere dell'ingegno» nella dogmatica del diritto d'autore*, Giuffrè, Milano, 2011, recalls how the Statue initially inflicted a mere confiscation of the illegally printed copies and a fine; evidently, as such sanctions were not sufficiently afflictive, a new law was promulgated in 1777 granting to the authors a real action for damages. The prevalence of the authors' exclusive rights (the former subordinate class) over publishers or printers (the former dominant class) would therefore have marked an inversion of power relations.

[221] The favours and offers made by patrons in Greece and Rome to the authors of plays performed at public festivals might be consider a first legal protection. Later, during the Middle-Ages, there are proofs of privileges grant by public authority. Such privileges, anyway, did not recognize the right of creatorship, but they just punish the violation of specific rights, such as the right to print: ″The Senate of Venice issued an order, in 1469, that John of Spira should have the exclusive right for five years to print the epistles of Cicero and of Pliny. This privilege was plainly an exceptional exercise of the power of the sovereign state to protect the exceptional merit of a worthy citizen; it gave but a limited protection; it guarded but two books, for a brief period only, and only within the narrow limits of one commonwealth. But, at least, it established a precedent - a precedent which has broadened down the centuries until now, four hundred years later, any book published in Venice is, by international conventions, protected from pillage for a period of at least fifty years, through a territory which includes almost every important country of continental Europe″, Brander MATTHEWS, *The Evolution of Copyright*, in Political Science Quarterly, Vol. 5, No. 4 (Dec., 1890), cit. p. 588..

[222] "The elevation of intellectual property to the status of fundamental right is the end result of a long process which started post-World War II with the inclusion of 'protection of the [author's] moral and material interests' in the Universal Declaration of Human Rights of 1948, a principle subsequently reiterated in the International Covenant on Economic, Social and Cultural Rights of 1976" BORGHI cit. p. 9.

[223] A brief description of this contempt for parody can be found on the article by Claude ABASTADO, *Situation de la parodie*, ″Cahiers du XX^{e} siècle″, 6, 1976, pp. 11-12.

[224] Jean-Paul Sartre shared a similar opinion during an interview on «*Les Lettres Françaises*» 19th nov. 1953 (SANGSUE p.16). This testimony is a proof of how, nowadays, parody is discredited as a mere pastime, victim of reprobation, similarly to the 18th century. Therefore, we can be honestly

intellectual works of others. The common idea was that parody was just the product of incapable artists who are not able to create independently[225]. The reasons for such hatred against parody may be found, in history, in the cult of genius[226], and, in law, in the legal recognition of intellectual property[227]. Despite this animosity, copyright has dealt with parody more than any other discipline, and has shaped the principles of the regulation and realisation of the practice:

> With the Enlightenment, parody gained an increasingly negative reputation as being mediocre, derivative, and parasitical owing to the emerging 'genius' cult attributed to creative works. The fact that parody might even constitute a criminal offence could explain its decrease in popularity during that period. The British culture of the time provides a good illustration. The popular works Gulliver's Travels and Robinson Crusoe both include limited parody or satire. This is seen as demonstrating the authors' reluctance to rely upon these techniques because they were perceived to be an obstacle to creativity. While

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incredulous of parody's longevity in front of all these contrasts. Lustig highlights how such contraposition represents one of the most important elements for the recognition of parody by law: ″It is unquestionable, however, that this criticism, more minute, more plastic, and, sometimes, more pungent than all the others, cannot always go towards the authors of the works parodied, and those who of reverberation have an interest in not having their success exploited, because of an erroneous criterion of competition. Such reason drove Mr. Voltaire and the impresarios of the Parisian dramatic theatres to the ban, but for a short time, since satire, whatever its form and whatever the times, either by reason of art or politics or gossipy curiosity, found sympathetic and constant echoes in the peoples' consciousness. Nor, after all, can such an echo ever cease from its pleasant repercussions, since parody is in life, as ridicule is in the very nature, which gives the mask of the comic and the grotesque in shaping innumerable human creatures″ LUSTIG p. 46 (my own translation).

[225] SANGSUE pp. 15-16.

[226] The idea of "art" as an intuition of the absolute and as a form of genius was introduced mainly by Schelling. *See* Friedrich Wilhelm Joseph VON SCHELLING, *System of Transcendental Idealism (1800)*, Charlottesville: University Press of Virginia, 1978 (*Introduction* by Michael VATER): ″Schelling cautiously suggests that philosophy as a systematic totality and a metascience can be completed, with a philosophy of art serving as an approach to a pure identity-theory. For art, as Schelling sees it, is a symbolic and necessarily asymptotic approach to the Identity underlying all consciousness. The work of art is a concrete intuition of identity-in-difference, of multiple and inexhaustible meanings packed into one meaning; thus it accomplishes symbolically what philosophy attempts to do discursively-present the totality, exhibit the Absolute. Art thus becomes the sole concrete analogue of intellectual intuition, the one place where producing and intuiting fully coincide″ cit. p. xxiv.

[227] "Courts have usually automatically taken the position that an original author's creation is superior to that of a secondary author and therefore is deserving of more legal solicitude. Even if original works were always more artistically valuable than secondary works, this attitude ignores the fact that progress in artistic creation and in knowledge generally is cumulative [..] Parody has a noble history as a valuable independent literary genre, and parodies may be significantly more important artistically than the original works on which they are based" Richard A. BERNSTEIN, *Parody and Fair Use in Copyright Law*, 31 Copyright L. Symp. 1 (1981), cit. p. 37.

> parodies were considered derivative and unoriginal, satire was seen as creative and diverse. Most of the famous authors of the eighteenth century adopted satire as the literary tool of choice to reveal the social, political and religious conflicts of the time[228].

In the present day, after a long debate in doctrine and case law, parody is considered an autonomous and independent work of authorship for whom the law recognizes *pleno jure* protection, even when the product is of modest creativity[229].

3.1.1 The recognition of works of authorship

In recent years, there has been a striking need to declare the constitutional basis of the system that protects works of authorship, whose legal recognition first appeared barely more than a hundred years ago. The Latin-Germanic tradition places the relationship between the author and the work at the centre of copyright issues; the essential features are especially expressed in the recognition of the creation as the constitutive act within copyright law. Furthermore, this tradition protects only a few of the author's rights (especially patrimonial and moral rights), but restrictively interprets the exceptions and limitations to these very rights[230].

The civil law system that has emerged in the European Union has adopted a natural-law concept of copyright[231]; it provides for constitutional recognition in accordance with the construction of a modern subjective right created during the

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[228] JACQUES cit. p. 5. The recent American court case trend shows little difference and degrades the creative element in parody. The court in *Burnett v. Twentieth Century Fox Film Corp.* 491 F. Supp. 2d 962 (C.D. Cal. 2007) has regarded parody as a technique that requires less creative talent: "it takes far more creative talent to create a character such as the 'Charwoman' than to use such characters in a crude parody" cit. conclusion.

[229] This modern definition passed through a debate among scholars and judges; there was no consensus about the definition of parody as autonomous and independent work of art, but it was degraded to mere elaboration, forgery, and criminal act (if the consensus of the reference author was missed).

[230] Luigi Carlo UBERTAZZI, *Digesto delle discipline privatistiche. Sezione commerciale*, IV, Torino, 1989, cit. p. 368.

[231] In contrast JACQUES: ″Copyright law in common law countries (UK, US, Australia, and Canada) traditionally relies upon utilitarian justifications, granting exclusive rights to those who invest in creating and disseminating creative works because society at large benefits from having access to such works″, cit. p. 41.

legal age of Enlightenment[232]. The main exponent was Hugo Grotius, who saw natural law as a complex of ethical precepts[233].

Grotius pursues his study of human relations via the identification of five precepts of general scope: the *primum verum* is *aliena abstinentia*, which means the recognition of spheres of autonomy, which can include freedom of speech, ownership of the product of labour, the affirmation of the free movement of people and goods and the delegitimisation of monopolies[234]. The denial of such precepts would thus deny the existence of the subjective sphere of others, and this would be contrary to the social and rational nature of human beings[235].

The method of identifying self-evident truths, introduced by Grotius, has been continued by John Locke, who reached a few similar conclusions. According to the philosopher, *primum verum* may be synthesized through the concept of: "property in his own person". After identifying a modern subjective right, Locke affirmed the Inherent rights[236], on the one hand, and the fundamental rights of human beings on the other[237]. Both categories are specifications of the *primum verum*[238].

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[232] Cfr. Alberto DONATI, *La fondazione giusnaturalistica del diritto sulle opere dell'ingegno*, AIDA, 1997.

[233] Hugo GROTIUS, *De jure belli ac pacis*, Lib. I, Cap. I, §. X.1.

[234] DONATI p. 409.

[235] Moreover, the identification of *aliena abstinentia* allows for the achievement of: *a)* A systematic view of law as science (the precept *"pacta sunt servanda"* is true only when placed in relation to *aliena abstinentia*); *b)* The principle of completeness of the system, capable of resolving any subjective dispute; *c)* Legal certainty (from a formal point of view, the pre-existence of a binding rule in relation to a lawful relationship; from a substantive point of view, the principle of justice applied by the court for settling any dispute); *d)* The subjection of the judge to law.

[236] Freedom of consciousness: *Constitution of New Hampshire*, 1784, art. 4 ″Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the *Rights of Conscience*". Freedom of opinion (or press): *Virginia Bill of Rights*, 1776, Sez. 12, ″That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments″. Freedom of religious: *Virginia Bill of Rights*, 1776, Sez. 16, ″That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity toward each other″.

[237] These rights were positivized by the Declaration of the Rights of Man and of the Citizen in 1793 at Art. 2: ″The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression″.

[238] Locke then identifies three "fundamental attributes" of the right of Property in his own person: universality, it pertains to man as such and is the patrimony of everyone, according to the principle of

For the purposes of copyright, it is the combination of property and freedom that deserves special attention; the right of "property in his own person" justifies a modern formulation of property law that is independent of the State (according to the modern enlightenment concept of State sovereignty), and to which is delegated the simple function of protecting this above-mentioned property-freedom.

3.1.2 The natural right to parody in copyright

The civil-law tradition founded copyright law upon natural-law principles as well as upon the relationship between the author and their labour, which becomes the primary source of property rights. Thus, a person would obtain the acquisition of a good (tangible or intangible) through their labour[239]. The ownership of labour, extended to the result of that activity, descends from *primum verum*[240], and, thus, the value of the good produced is related to the labour[241]. Copyright law, based on the principles of *aliena abstinentia* and property in his own person, can thus find its foundation in labour.

> There being no property more peculiarly a man's own than that which is produced by the labour of his mind[242].

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aliena abstinentia; absoluteness of the sovereignty-liberty, the ordering value of intersubjective relations; imprescriptibly, which ensures the imperishable presence of the first two attributes; finally, inalienability is a further necessary attribute of the right of Property in his own person.

[239] ″Locke’s theory where resources are free and abundant in the world (just like ideas) and if a person combines the resources with his personal efforts (his creativity), the result is something that he owns property in (copyright is a property right). The protection is acquired by the sole creation of the work and the law simply recognizes the property right in the work″ JACQUES cit. p. 41 footnote n. 25.

[240] Property is also ascribed the attributes of inviolability and intangibility by the Declaration of the rights of man and of the citizen (1789) at the Art.17: ″Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid″.

[241] ″Nor is it so strange as, perhaps, before consideration, it may appear, that the property of labour should be able to overbalance the community of land, for it is labour indeed that puts the difference of value on everything; and let any one consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labour makes the far greater part of the value″ John LOCKE, *Two Treatises of Government*, Cap. V., § 40.

[242] *The Massachusetts Copyright Act*, 1783, in Finkelstein, *La loi américaine de 1790 sur le droit d'auteur, Revue internat. Du droit d'auteur*, 1963, p. 80. Similarly, ″Le Chapelier did declare that 'the most sacred, the most legitimate, the most unassailable, and ... the most personal of all properties, is the work which is the fruit of a writer's thoughts'″, excerpt from the reports to the revolutionary parliaments of Le Chapelier on the French Literary and Artistic Property Act, Paris (1793), in Jane C.

An analysis of the regulations provided for exclusive rights highlights some characteristics that confirm the link between the right of property in his own person and the ownership of the result. In particular, the absoluteness of exclusive right presents some critical aspects since economic use is limited in time and space. Therefore, intellectual property rights are natural rights that affect intangible goods, but that do not have the attribute of absoluteness, which means that they do not entail unlimited exploitation of the work and its utilities. Different protection is provided by the positive law on intellectual works; (limited) exclusive rights.

In any case, the study of *primum verum* confirms the conformity of the positive law approach to natural law, since the exercise of the right of ″property in his own person″ must never amount to a violation of another's subjective rights; the application of the precept is to be implemented in an anti-monopolistic view. Any monopoly that establishes a privilege violates *aliena abstinentia* and is therefore illegitimate[243]. An unlimited exclusive right (more generally, an unlimited economic use of an intellectual work) would not respect *primum verum* and would become a monopoly that is incompatible with *aliena abstinentia* and with the principle of equality[244]. It would turn into an unfair privilege, into a compression of creativity and labour.

The provision of a limited exclusive right is therefore the legal consequence of a modern and anti-monopolistic vision of copyright. This is also confirmed by the provision of limiting rules (exceptions and limitations) to *jus excludendi omnes alios*, which permit the paralyzing effects in the development and encouragement of culture, art and science to be avoided[245]. Moreover, the previsions of exception and limitation have the purpose of fostering the full expression of creativity.

The method of study in this work outlines the appropriate systematic framework for parody in the context of copyright law. The requirements of labour

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GINSBURG, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990), cit. p. 1008.

[243] DONATI p. 422.

[244] DONATI p. 422. The delegitimization, therefore, does not conflict with natural rights theory, but is an application of those theories affirmed by Enlightenment natural law.

[245] Vincenzo METAFORA, *Satira, opera satirica e diritto d'autore*, Contratto e Impresa n. 2, a. 17 (Maggio-Agosto 2001), p. 773.

and creativity are also imposed on parody, in relation to the recognition of exclusive rights. The current legal regulations on parody fit within this method as parody is recognized worldwide and protected as a work of authorship when it provides sufficient originality and creativity. Moreover, parody has recently been regulated in legislation and EU Directives as one of those exceptions to exclusives right in anti-monopolistic manner.

3.1.3 The new challenges posed by online parody

The peculiarities of the new digital world bring copyright law into question. In particular, the speed and nature of online productions present issues that cannot be addressed using the old theories and legal categories for copyright. New technologies change the ways in which people create, while everyone is now able to duplicate and transmit online any copyrighted work to an immeasurable audience via download, upload and peer-to-peer functions, for example[246]. This is the main feature of the so-called Web 2.0 which enables users to generate content by extrapolate perfect copies, modify them through creativity and, finally, disseminate them into the network[247]. While this possibility maximizes the dissemination of creations throughout the web, allowing them to become part of globalized artistic multimedia production, at the same time, it represents a risk to the protection of the rightsholders' interests.

The evolution of digital technologies, such as sampling, computer graphics and other editing and remixing programs, enables the creation of new works from a pre-existing one. However, such appropriation is not always permissible, meaning that online piracy has grown enormously[248]. Furthermore, this new piracy has

[246] Peer-to-peer technology substantially changed the ways in which someone acquire a work of authorship. The distribution of such creations may effect the proliferation of illegal appropriation or unauthorized products. *See* Nicola LUCCHI, *Tecnologie dell'informazione e della comunicazione*, (a cura di) Massimo DURANTE e Ugo PAGALLO, UTET giuridica, Torino, 2014, cit. p. 8.

[247] Such technological evolution is comparable with the movable type, which opened the reading and the writing to everyone. *See* LTA, *Arte, avanguardia e nuovi media*, Menabò, in Tecnologie didattiche, n.3, 2010.

[248] Auteri highlights two kinds of piracy; Commercial piracy: The case in which the dissemination of intellectual works on the Web occurs by content or service providers without title. Amateur piracy: The hypothesis in which the dissemination of intellectual works on the Web occurs by a private for non-profit. *See* Paolo AUTERI, *Internet e il contenuto del diritto d'autore*, AIDA, 1996.

changed traditional relationships in the entertainment industry; if the traditional copyright system aims to grant an exclusive right to the author at the expense of their competitors, online copyright is becoming a means of protecting rightsholders from their customers[249].

Thanks to this digital revolution, appropriation is a worldwide phenomenon. The purposes are not traceable in rational expression and the legal consequences involve many legal areas. We come across online creations that result from the appropriation of copyrighted works on a daily basis; memes[250], mash-ups[251], remix[252], fan art[253], sampling[254], recuts, literal videos and so on; these forms of social communication are what make the internet so appealing to many. Parody has acquired a leading role in the legal regulation of these new types of artistic expression. In this sense, parody may be understood broadly and an appropriate legal qualification may lead to the development of a better information society[255]. In this new scenario, therefore, the scholarly dispute over the qualification and regulation of parody within copyright law must take note of the current outcomes of technical evolution, which in practice preclude any consideration as to the protection of exclusive rights. This conclusion does not derive from a freedom of thought or

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[249] *See* Maurizio BORGHI, *Il diritto d'autore tra regime proprietario e "interesse pubblico"*, in *Proprietà Digitale*, (a cura di) Maria Lillà MONTAGNANI e Maurizio BORGHI, Egea, Milano, 2006, cit. p. 18.

[250] "Combining someone else's image and your own text into a meme or GIF often creates an antithematic reference, which establishes distinction", cit. KREUTZER p. 5.

[251] "Mash-ups, as video or music collages, will in any case have sufficient distinction if they are composed from a plurality of sources. […] As a rule, these forms of transformative use do not replace the consumption of the source material and do not interfere with primary exploitation, but rather encourage its use" *Ibidem*

[252] "Remixes in which a single piece of music is completely transferred into a different style or a different key will usually lack sufficient distinction" *Ibidem*

[253] "Fan art or fan fiction created by users will often be clearly recognizable as such, since independent content is created from the composition of existing elements. As a rule, this will have a rather positive economic effect on the exploitation opportunities of the source material" *Ibidem*

[254] "Sampling will generally fall under the pastiche term. Samples are mostly very short excerpts that are integrated into pieces of music with an independent expression. They do not diminish the sales opportunities of the source material" *Ibidem*

[255] A similar analogy has been presented with reference to pastiche: "The term pastiche can clearly extend to mash-up, fan fiction, music sampling, appropriation art and other forms of homages and compilation", HUDSON cit. p. 348.

conception, but rather from the realities in which parody operates; namely Web 2.0, which has rendered control over the spread of copyrighted work utterly impossible:

> For the generation that I spend my days with, there's not even any ideological baggage that comes along with appropriation anymore. They feel that once an image goes into a shared digital space, it's just there for them to change, to elaborate on, to add to, to improve, to do whatever they want with it. They don't see this as a subversive act. They see the Internet as a collaborative community and everything on it as raw material[256].

These new phenomena should not be considered a virus that is capable of threatening artistic expression. In this regard, it is worth noting that, as the years have passed and new technologies have evolved, even amateur productions have found a place in the art market[257]. The on-going information technology revolution can profoundly transform our society, and there have been several changes in the way information is transmitted and works are created. The technological revolution has also hastened the necessary re-evaluation of exclusive rights, which are no longer fit for purpose as a means for the effective protection of a rightsholder, without being an unbearable obstacle to freedom of expression. International treaties therefore play a crucial role in this scenario as they can intervene transnationally to regulate and challenge global networks:

> Intellectual property and human rights must learn to live together. Traditionally, there have been, as Paul Torremans points out, two dominant views of this "cohabitation," namely a conflict view, which emphasizes the negative impacts of intellectual property on rights such as freedom of expression or the right to health and security, and a

[256] Randy KENNEDY *Apropos Appropriation*, The New York Times, 28 December 2011. Quotation by Stephen Frailey.

[257] This is the case of a famous meme, Disaster Girl which was sold for half million recently. *See* Marie FAZIO, *The World Knows Her as 'Disaster Girl.' She Just Made $500,000 Off the Meme*, the New York Times, 1° May 2021. https://www.nytimes.com/2021/04/29/arts/disaster-girl-meme-nft.html

compatibility model, which emphasizes that both sets of rights strive towards the same fundamental equilibrium[258].

3.2 The Parody Exception - EU Legislation

The foundation of copyright law was made possible thanks to international agreement and consensus at the highest political level. There have been several laws over the last century; the first treaty that defined a work of authorship was the Berne Convention (CUB)[259], which had the aim of providing international legislation to copyright.

The CUB also introduced a legislative framework that has been used for the regulation of parody over the years; this is called the three-step test, which can be found in several provisions of international copyright law[260]. The formulation proposed by the United Kingdom was chosen as the political compromise adopted in the Berne Convention. It is therefore not surprising that the three-step test adopts broad formulations that are very similar to the fair-dealing model[261].

3.2.1 European Three-Step Test criteria

The international conventions that include the three-step test have exercised an important (and indirect) influence on European institutions, and a few exceptions and limitations to exclusive rights have subsequently been transposed into European legislation: free use for purposes of public information; freedom of expression

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[258] Daniel J GERVAIS *Intellectual Property and Human Rights: Learning to Live Together,* Paul L. C. Torremans, ed., Kluwer, 2008.

[259] ″Berne Convention is based on the principle of national treatment and ensures authors merely a minimum standard off protection by recognising a number of minimum rights″, SENFTLEBEN, *Copyright, Limitations* cit. p. 43.

[260] ″At the 1967 Stockholm Conference for the revision of the Berne Convention, the test was introduced to pave the way for the formal acknowledgement of the general right of reproduction. In 1994, it reappeared in the TRIPS Agreement. The 1996 WIPO 'Internet' Treaties comprise the three-step test as well. Not surprisingly, its ambit of operation is no longer confined to the right of reproduction. Nowadays, it can be perceived as a clause generally preventing all kinds of copyright limitations from encroaching on the rights of authors″ *Ibidem*

[261] Along the lines of fair dealing, sect. no. 30 CDPA, 1988.

through discussion or criticism; dissemination; and teaching. The three-step test has been incorporated into European legislation in the InfoSoc 2001/29/EC, Article 5 (5):

> The exceptions and limitations [...] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder[262].

The main difference between the three-step test at the international level and the one at the European level is fundamentally their flexibility. InfoSoc is more restrictive and has a closed list of limitations and exceptions (L&Es). The possibility of inserting new kinds of L&Es must be coherent with technological evolution. Nevertheless, the clauses are designed to be broad, ensuring adaptation to technological evolution and new means of exploitation[263]. The three-step test is therefore an essential parameter via which Member States (MS) can subordinate the introduction of new L&Es to intellectual property.

The three-step test is evidence of how parody has been regulated and included in copyright exceptions and juxtaposes the exclusive rights to free use and freedom of expression. For this reason, it is useful to recall Art. 9.2 (as amended by the Stockholm revision in 1967) in the Berne Convention, which permits reproduction, if it respects certain criteria:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author[264].

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[262] InfoSoc Directive 2001/29/EC Art. 5 (5).

[263] *See* Jonathan GRIFFITHS, *The "Three-Step Test" in European Copyright Law - Problems and Solutions,* Queen Mary University of London, School of Law Legal Studies Research Paper No. 31/2009.

[264] The same discipline can be found in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994 at Art. 13 and in the World Intellectual Property Organization Copyright Treaty (WIPO) 1996 at Art. 10.2: ″Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author″.

1. *Certain special cases*: the first criterion requires that limitations are specified with reference to the quantitative and qualitative aspects of parody[265]. The level of specification required is not an exhaustive list, but is intended to give specific definitions of the scope of operation. This fact, as rightly indicated in academia, allows the interpreter to have a legitimate margin of appreciation[266]. Reasonably, parody constitutes one of the "certain special cases", that satisfy this first step:

> The first step of the three-step test requires that exceptions to exclusive rights remain confined to certain special cases. The wording suggests that the step has two aspects. Firstly, it seems to require that national legislators ensure that any exception is directed to a limited number of situations only, i.e. a quantitative limit. Secondly, there is a qualitative aspect: the 'special' purpose of an exception must be determined in advance[267].

2. *Conflict with normal exploitation of the work*: the second criterion states that the uses permitted by the exceptions must be not in conflict with the normal exploitation of the work, and must avoid any competitive relationship. However, legal scholars have indicated that this criterion is not preclusive; economic utility does not establish the conformity of an exception with the entire system[268].

3. *Prejudice legitimate interests*: finally, the third criterion takes into consideration unreasonable prejudice to legitimate interests, especially economic ones[269]. An analysis of this criterion better explains what constitutes normal exploitation and also facilitates a better understanding of the previous ones; cases

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[265] Giuseppe MAZZIOTTI, *Il Copyright digitale*, in *Manuale di informatica giuridica e diritto delle nuove tecnologie*, (a cura di) Massimo DURANTE e Ugo PAGALLO, UTET giuridica, Torino, 2014, p. 188.

[266] Francesco MEZZANOTTE, *Le «eccezioni e limitazioni» al diritto d'autore UE*, AIDA, 2016, p. 519.

[267] JACQUES cit. p. 51.

[268] MEZZANOTTE, *Le «eccezioni e limitazioni»* p. 520.

[269] MAZZIOTTI p. 188.

where an exception to copyright does not cause any prejudice[270].

If parody simply distorts the source material, it may be declared unlawful in certain special cases; for instance, whenever the patrimonial and moral rights of the author are harmed. The parody must not interfere with normal exploitation of the reference work/source material. The three-step test under European law (art. 5.5 InfoSoc 2001/29/EC) foresees that the application of exceptions does not lead to prejudice legitimate interests of the rightsholder by unreasonable restrictions do not provide by the law.

3.2.2 Directive on the harmonisation of certain aspects of copyright and related rights in the information society 2001/29/EC – InfoSoc

Traditionally, exceptions and limitations include activities of particular social utility. The European Union has tried to tackle the difficult issue of online production in the field of copyright, and align the profiles of the different European traditions with the new reality of the so-called Information Society, whose transnational implications require coherent and widespread regulation at the highest legislative level. One important attempt to qualify online parody was therefore undertaken within the framework of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society 2001/29/EC - InfoSoc, which provides for parody in Art. 5.3 (k), in the section on exceptions and limitations. The InfoSoc Directive presents an extensive list of exceptions and limitations to the rights of reproduction and communication to the public (arts. 2 and 3), that the Member States must transpose into national law. InfoSoc openly mentions the term parody for the first time here, thus granting it citizenship within European law

The InfoSoc 2001/29/EC specifies how the list must be subject to restrictive application, implemented through the so-called three-step test. The discretion of the Member States is very restricted, since free use constitutes a derogation to the general rule established by InfoSoc as to the protection of an author's exclusive rights. This list is discretionary and, at the same time, exhaustive. Art. 5 para 3

[270] MEZZANOTTE, *Le «eccezioni e limitazioni»* p. 520.

presents fifteen limitation regimes that are applied to the rights of reproduction and communication to the public (the latter including parody)[271]. The Court of Justice has commented on the scope of Article 5 in several judgments:

> This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future[272].

The digital environment structurally alters the relationship between the rightsholder and online users; this new relationship entails an overall rethinking of the reasons for free use. While exclusive rights have undergone significant regulatory changes with the advent of digital technology, the same commitment and legislative dynamism has been slow to emerge in terms of exceptions and limitations. However, the numerous and different possibilities of exploitation have given rise to a relevant debate on the subject, followed by a necessary interpretation of the regime, which must be consistent with the digital reality.

Free use has become the perfect playground for two completely different perspectives on regulating the digital environment; these two opposing cultural orientations are part of a broader reshaping of copyright. On one hand, there are those who consider unquestionable the predominance of exclusive rights and aim to guarantee the highest protection. In this sense, exceptions and limitations must have

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[271] Article 5 has been structured as follows: Paragraph 1 contains the only formally binding exception ″Temporary acts of reproduction referred to in Article 2, which are transient or incidental″. Then, at para 2, five possible exception regimes are listed, concerning the reproduction and distribution right (paras. 2 and 4).

[272] C-467/08 *Padawan v SGAE*, 21 October 2010. The Court of Justice also emphasises the distinction between the exception and limitation regimes ″In Article 5, the European Union legislature, in the very title of that article, makes a distinction between, first, exceptions and, secondly, limitations to the exclusive right of rightsholders to authorise or prohibit the reproduction of their protected works or other subject-matter. Accordingly, that exclusive right may, depending on the circumstances, be either, as an exception, totally excluded, or merely limited. It is conceivable that such a limitation may include, depending on the particular situations that it governs, in part an exclusion, a restriction, or even the retention of that right. That distinction in the legislation should therefore be given effect″, CJ in Joined Cases from C-457/11 to C-460/11, 27 June 2013.

the character of being derogatory to the exclusive right, and, above all, must be described and listed precisely and punctually by the legislator. On the other hand, there is the theory that sees, in the advent of the digital environment, the occasion for a different classification of exceptions and limitations; no longer mere derogations, but rules capable of reshaping the structure of exclusive rights[273].

The willingness to re-examine exceptions and limitations in the light of the new online sphere has been highlighted by InfoSoc 2001/29/EC in recital 31[274]. The notion of parody at the European level may be treated by considering each of these fundamental aspects:

> The most important copyright limitations are therefore those which permit quotations and exempt the use of copyrighted material for transformative purposes such as caricature, parody and pastiche[275].

The EU's choice to place parody in the list of exceptions has been criticized by some scholars, who have denounced its "improper qualification"[276]. Different opinions on the regulation of parody have been constructed, as the absence of clarification in the positive law on the relationship between parody and the exclusive right has, over the years, prompted theories that include parody among derivative works, and therefore as needing authorization from the rightsholder[277]. These

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[273] According to Mezzanotte, the online exploitation of the copyrighted work would be functional to a greater guarantee of freedom of expression, freedom of criticism and freedom of creativity. Moreover, it would have a positive effect on free movement of goods (Art. 28 ff. TFEU), based on the European single market.

[274] Infosoc Directive 2001/29/EC, Recital 31 ″A fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market″.

[275] SENFTLEBEN, *Copyright, Limitations* cit. p. 39.

[276] *See* Alberto MUSSO, *Del diritto di autore sulle opere dell'ingegno letterarie e artistiche art. 2575-2583*. A cura di Commentario del codice civile Scialoja - Branca (a cura di Francesco Galgano). Vol. Libro quinto - del Lavoro. Bologna - Roma: Zanichelli Editore - soc. ed. del Foro Italiano, 2008, cit. p. 268.

[277] *See* Alberto MUSATTI, *La parodia e il diritto d'autore,* in Riv. dir. comm, 1909. The inclusion of

theories do not seem suitable for such a specific transformative genre; if parody has to seek authorization from the rightsholder that it targets, the genre will disappear since few artists would authorize mockery of themselves:

Intellectual property involves a limited monopoly, as the author does not possess complete control over derivative works derived from the original. Parody serves as a prime example: while parody can be regarded as a derivative work, it is highly unlikely that the inspirer of the parody would willingly endorse an absurd portray of his original work[278].

Finally, it should be noted that the list in Art. 5.3 (k) InfoSoc 2001/29/EC is not exhaustive. It is possible to include other artistic techniques, as discussed in the first chapter. In fact, Genette has constructed general scheme of hypertextual practices that include parody, caricature and pastiche; furthermore, the author has introduced additional hypertextual techniques, such as travesty and transposition[279]. Of course, from a legal point of view, the reference to one technique does not necessarily exclude the application of exception safeguard to other techniques.

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parody among derivative works would mean to consider it unlawful whenever it does not obtain authorization from the rightsholder: "Treating parodies as infringements would simply force parodists to use the money they earn to buy the necessary rights from authors. In turn, this would increase authors' financial incentives to create new material" Alfred C. YEN, *When authors won't sell: parody, fair use, and efficiency in copyright law*, University of Colorado Law Review, 8 September 2022, 79-108, cit. p. 86. The author underlines how the courts have not implemented this doctrine, which does not comprehend the heart of parody and the social benefit it provides. Moreover, empirical studies have demonstrated how money are not enough to satisfy the inspirer of parody's grievances: "Do authors subjectively prefer a certain sum of money to freedom from the emotional stress caused by parodies? Unfortunately for efficiency theorists, intuition and empirical evidence strongly suggest-that the answer is "No." [..] Authors, like all individuals, do not like to be ridiculed [..] they did not consider money damages an adequate remedy for the harm they had suffered. 72.9% stated that an apology or a retraction would suffice, while another 20% indicated that nothing at all would suffice [..] These statistics shed a good deal of light on the possibility of using efficiency to explain parody's fair use treatment [..] The statistics show that [..] authors might never be subjectively compensated for the losses they suffer at the hands of parodists " YEN cit. p. 104 and 106. Instead, the courts have evaluated parody based on the presence of criticism and the conjure up test.

[278] Parody serves as a prime example of the limited control that rightsholders have over derivative works. In particular, the use of licensing as a mechanism for control is not well-suited for handling parodies: "When a dealing ridicules or lampoons a work, there may be sound normative arguments for not relying on licensing as a mechanism for controlling access to the derivative market. In sum, the justification for treating a dealing as fair is not, or not merely, that the dealing can be described in a particular way, or that such a dealing, so described, is socially desirable. Assuming that a tenable claim might be made that a particular use is within one of the fair dealing purposes, the question should be whether, in respect of this otherwise-infringing use, it is inappropriate to rely on copyright's usual method for coordinating access" AUSTIN cit. p. 709.

[279] Genette cites also forgery as "serious imitation"; even if the forgery is illegal within copyright law, it is important to underline its literary recognition.

However, when discussing user communication or artistic freedom, it is essential to be as inclusive as possible in considering various approaches and possibilities. This is particularly true in the current debate on online parody, where new technologies have made it possible to create content using new digital transformation techniques such as mashup, remix, etc.

3.3 Implementation of the parody exception in Member States

The implementation of the parody exception in MS has been criticized as being excessively heterogeneous. European legislation has been criticized, in general, by legal scholars because of the optional list of exceptions and limitations that were adopted to ensure effective harmonization; for some, the choice seems to represent an element of inadequacy[280].

The harmonisation of the parody exception reflects the challenges of regulating comedy, which by its very nature has regional characteristics and varies significantly from country to country. This challenge naturally has an impact on copyright regulation, which tends to be more accommodating in regions where comedy is of significant importance.

Infosoc 2001/29/EC did not point out two key aspects for the harmonization of the parody exception in the European Union. The first point, on which Infosoc fails to provide clarity, is "to what extent parodies are covered by the exclusive rights harmonized by that directive"; the second regards the role of the MS: "to what extent Member States can determine the scope of the harmonized parody exception"[281].

The heterogeneity of implementation in Member States can be briefly described as follows: a few EU countries already had a parody exception in their copyright acts before the InfoSoc 2001/29/EC; a few EU countries associated parody within other existing exceptions (for instance, caricature); while others still fastened the legitimacy of parody to general principles and fundamental rights (for instance,

[280] MEZZANOTTE, *Le «eccezioni e limitazioni»* p. 496.

[281] JONGSMA cit. p. 667. The New Directive on the Single Market changes such approach and dictates full harmonization in EU.

freedom of communication). Furthermore, national court cases have applied different criteria to resolve conflicts related to parodies. The criteria used in these courts do not offer a clear distinction of what can be considered parody, as the elements involved are often interconnected and draw from other disciplines, such as art, literature, social custom[282], laws of the genre[283].

3.3.1 Pre-existing parody exception

The pre-existing parody exception presented cumulative conditions that were quite similar to those imposed by InfoSoc 2001/29/EC: taking from a pre-existing work; the character of originality; the purpose of criticism; humorous intent; not being the cause of confusion; not being for commercial purposes. For this reason, Malta maintained the pre-existing exception during implementation. Spain did the same, as parody appeared in the text of the *Ley de Propiedad Intelectual* (1996), which allows an author to object to parody if it causes confusion with the original. Even Belgium maintained its pre-existing exception, which existed since the first Belgian Copyright Act (1886), in which it is defined as honest practice[284]. The Dutch Copyright Act (2004) had already recognised works as being in the context of parody, even if it was "hesitant to invoke freedom of expression for the purposes of parody. Under the new section, the test is that the parody should normally be sanctioned under rules of social custom″[285]. Even if the Dutch courts consider parody

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[282] On this regard, social customs or social norms on comedy, *see* Dotan OLIAR and Christopher SPRIGMAN, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,* Virginia Law Review, Dec., 2008, Vol. 94, No. 8 (Dec., 2008).

[283] A comprehensive examination of national case law and a comparative analysis of parody exception in four European countries has been presented in Daniel JONGSMA, *Parody after Deckmyn. A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands*. (December 22, 2016). 48 International Review of Intellectual Property and Competition Law 652-682 (2017).

[284] Honest practice foresees that parody must use no more than necessary. This criterion is only applied in Belgium. S*ee* JONGSMA cit. p. 660.

[285] ERICKSON *Copyright* cit. p. 26. "The cases of *Miffy* and *Darfurnica* challenged the test, but in both cases the Court held in favour of the parodist. [...] Dutch case law appears to suggest that the concept of social custom is able to respond to new attitudes and practices, such as the sudden arrival of digital technologies enabling parodic appropriation, editing, remixing and representation" cit. p. 21 and 26.

may violate social custom, "it appears to have left parodists a lot of freedom"[286]. France enacted law No. 57-298 on March 11, 1957, on literary and artistic property, and the text had not been changed when the European Directive was implemented in art. L122-5[287]. French case law requires a minimum standard on risk of confusion in the case of parody[288].

> The Information Society Directive follows the French example: it allows member states to provide for exceptions and limitations to authors' reproduction and public communication rights where their works are used for the purpose of caricature, parody, or pastiche[289].

3.3.2 Parody associated within other existing exceptions

The legitimacy of parody has been fastened into general principles in Sweden, Luxembourg[290] and Austria, which included parody within the freedom to make caricatures, safeguarded under general principles of copyright law[291].

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[286] JONGSMA cit. p. 663.

[287] Art. L122-5: "Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire: [...] 4° La parodie, le pastiche et la caricature, compte tenu des lois du genre". By saying *compte tenu des lois du genre*, the French legislator wanted to recognize parodies that comply with general rules, which were noted in the first chapter, primarily the fact that the parody must provoke laughter. *See* UBERTAZZI, *Digesto* p. 409.

[288] *See* Court of Appeal of Paris, 1st Chamber, 15 October 1985 – *Douces Transes*, RIDA 1986-3 (No. 129): "In a 1988 decision, the French Supreme Court confirmed a decision by the Court of Appeal of Paris that the song *'Douces trances'* was a lawful parody of the song *'Douce France'*, even though only the lyrics had been changed and not the musical composition. The Court held that 'to reproduce the original music so that the parodied work is immediately identified while the travestying of merely the lyrics is sufficient to create a travesty of the work as a whole and prevent any confusion' was allowed" JONGSMA cit. p. 658.

[289] Coenraad VISSER, *The location of the parody defence in copyright law: some comparative perspectives*, The Comparative and International Law Journal of Southern Africa, Vol. 38, No. 3 (NOVEMBER 2005), pp. 321.

[290] In Luxemburg: "The Copyright Act allows caricatures aimed at mocking the parodied work provided that they are in accordance with fair practice and that they only use elements strictly necessary for the parody and do not disparage the work. It is worth noting that the initial intention of the legislator to allow any parody or caricature without any further condition was not retained. Commentators insist that the purpose must be to “make fun” of the parodied work", TRIAILLE p. 479.

[291] TRIAILLE p. 476.

3.3.3 Parody fastened to general principles

In Germany, parody was connected to the general concept of *freie Benutzung* (c.d. free use)[292]. Generally, the reproduction and communication to the public of a published work for the purpose of caricature, parody and pastiche is permitted[293]. The free use occurs whenever the new work maintains "inner distance"[294]; if parody displays sufficient inner distance from the reference work, it can be considered an autonomous and independent work within german copyright law. In 2016, the Bundesgerichtshof (BGH), the Federal Court of Justice in Germany, issued a

[292] Art. 24(1) UrhG. Parody did not fall under the chapter on exceptions and limitations, but under the chapter about the content of copyright (Inhalt des Urheberrechts): ″The courts have increasingly interpreted §24(1) 'free use' in the light of constitutional guarantees Art. 5(1): freedom of expression, Art. 5(3): freedom of art, science, research and education. The threshold is one of ‘necessity’ to borrow from the original work. A clear inner distance between the original and the parody must be expressed, generally through 'anti-thematic' treatment. §24(2) UrhG does not permit musical parodies as 'free use' where a melody has been recognizably borrowed from the work and used as a basis for a new work", ERICKSON *Copyright* p. 19. Today art. 24 has been repealed, and parody appears at the article 51a UrhG (Division 6 - Limitations on copyright through uses permitted by law).

[293] Nonetheless, some legal scholars highlight potential areas of overlap among various techniques, especially in the case of the quotation exception which entails distinct legal consequences, such as the prohibition of alteration and the obligation to acknowledge the source. *See* Till KREUTZER, *The Pastiche in Copyright Law*: "The right to quotation and the exceptions under sec. 51a are also not completely distinct. In principle, they differ in that quotations are used unaltered and with clear reference to the cited work. In contrast, the borrowing uses in caricatures, parodies or pastiche must be perceptibly different from the source material. However, since the difference can also be due to contextual changes and/or antithematic uses if an unchanged work or excerpt of a work, overlaps between sec. 51 and sec. 51a are possible", cit. p. 33. Recently, Aplin and Bently propose considering overlaps between different techniques and related norms to establish a broader concept of quotation that can encompass parody: "One objection to legal recognition of a broad notion of quotation that extends beyond literal reproduction is the overlap that this would create with other exceptions, such as that relating to parody caricature and pastiche [..] we think it is better to acknowledge that ‘pastiche’ is a subgenre of quotation: pastiche involves quotation, but not all quotation is pastiche [..] Our view is that this does not come close to being a fatal objection to the broad notion of quotation. This is for the reasons [..] that (formally at least) the EU and national elaborations of the circumstances in which parody is permissible do not merely add conditions: they also clarify that parody is permissible even in the absence of attribution [which is mandatory for quotation]. This implies that there might be situations in which the quotation exception will not exempt a reuse that would be permissible under the parody defence. In other words, that defence is not rendered redundant. The second reason is that we think the parody exceptions in national and eu law ought, in fact, to be thought of as a sub-set of particular cases that do fall within the quotation right. That is, we think parody is precisely and example of a practice that is ordinarily described as quotation. [..] National and regional elaborations of a specific parody exception represent national understandings of fair practice and clarify that formal attribution is in practice unnecessary in the cases of parody caricature and pastiche" APLIN pp. 123-124.

[294] "In Germany avoidance of confusion seems only an indirect consideration. There, it is asserted in legal scholarship that an author in principle cannot object to a successful parody on the ground that his personality rights are infringed because the public will not ascribe that parody to him when the parody constitutes an anti-thematic treatment of the original work" JONGSMA cit. p. 658.

decision regarding the exception of parody[295]. The ruling was influenced by the CJ's Deckmyn ruling, and the German judges reiterated the importance of striking an appropriate balance between the rights and interests of authors and users, as previously clarified by the CJ. The BGH clarified that where the court interprets exceptions and limitations, such as parody which falls under the protection of freedom of expression, there is no need to extend the application of the balance of interests beyond the scope of copyright regulations[296].

> In the interest of the freedom of expression, which is virtually constitutive for the common good and is brought to bear to a particular extent by the privilege for parody provided for by the EU legislator, the balancing of interests must not be misunderstood in the sense of a general 'political correctness check'. Hence, not every infringement of legally protected interests caused by the parody is of significance in the balancing to be undertaken. Rather, it depends on whether the rights of third parties are infringed by the changes to the work that fulfill the concept of parody and whether the author has an interest worthy of protection in ensuring that his work is not associated with such an infringement[297].

While moral rights are seldom seen as relevant in assessing the lawfulness of parodies, the German Federal Supreme Court has incorporated them as part of the fair balance. This interest is recognized in avoiding any association with the parody that might harm the rights of third parties. Nonetheless, the Court clarified that "the fair balance assessment should not devolve into a political-correctness control"[298]. In

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[295] The German Federal Supreme Court has adopted a standard to define the inner distance which should be noticeable by a person "who is familiar with the work and who has the intellectual capacities to appreciate the parody" JONGSMA cit. p. 673. Examples of court cases are in the footnotes: the Federal German Supreme Court (BGH), 26 March 1971, Case No. I ZR 77/69, GRUR (1971), pp. 588, 589 - *Disney-Parodie* and Federal Supreme Court, 20 March 2003, Case No. I ZR 117/00, GRUR (2003), pp. 956, 958 - *Gies-Adler*.

[296] The BGH wanted to reaffirm the principle of separation of powers and, at the same time, the primacy of EU legislative decision-making on the resolution of these conflicting interests: "A balancing of fundamental rights by the courts detached from the interpretation and application of the copyright provisions would interfere with the relationship between copyright and the exceptions and limitations already provided for by the EU legislator within the scope of its legislative freedom" *See* BHG - *Afghanistan Papiere II*, (in KREUTZER cit. p. 26).

[297] KREUTZER p. 25.

[298] JONGSMA cit. p. 677.

Germany, moral rights considerations are taken into account when assessing the parody exception, particularly with regards to risk of confusion and the intention to harm the inspirer of the parody. Generally, the German courts allow a significant degree of freedom for parody within the framework of copyright law[299].

In Cyprus, it is safeguarded as freedom of communication or press. Romania, Slovenia and Hungary[300] did not implement the parody exception. While Italy[301], Czech Republic[302], Greece[303], Finland[304], Denmark[305] and Bulgaria did not introduce the exception when implementing the Directive.

Ireland and the UK adopt fair dealing, the Regulatory System that inspired the three-step test; fair dealing identifies limitations precisely on the basis of their purpose (criticism, news reporting, parody etc.), and their interpretation is flexible enough to be able to encompass new forms of use that may derive from technological evolutions[306].

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[299] "Were an author allowed to invoke moral rights outside the purview of the parody exception, then this would frustrate the purpose of the exception: to allow certain humorous distortions of an author's work. The author will have to tolerate such distortions to some extent" JONGSMA cit. p. 663.

[300]″Even though no explicit provision exists under the Copyright Act, legal literature and practice accept the exception provided that the use must correspond to the conditions of the quotation exception or (yet this view is not shared by all, all the more so if one considers that exceptions must be interpreted narrowly) consist in a humoristic-critical imitation of a given author's style″, TRIAILLE cit. p. 478.

[301] I will describe the Italian model for the protection of parody later. In this country, parody has traditionally been associated with the right to satire, which is protected as freedom of expression; for this reason, it must respect limitations outside the scope of copyright. For this reason, I have preferred to include the analysis in the chapter on the freedom of parody.

[302] ″The parody exception does not seem to have been introduced″, TRIAILLE cit.p. 476.

[303] ″The parody exception does not exist as such under Greek law and was not introduced when implementing the Copyright Directive. In theory, some commentators consider that it would fall under the freedom of communication or of the press, but there does not seem to exist any case-law confirming or infirming such view″, TRIAILLE cit. p. 477.

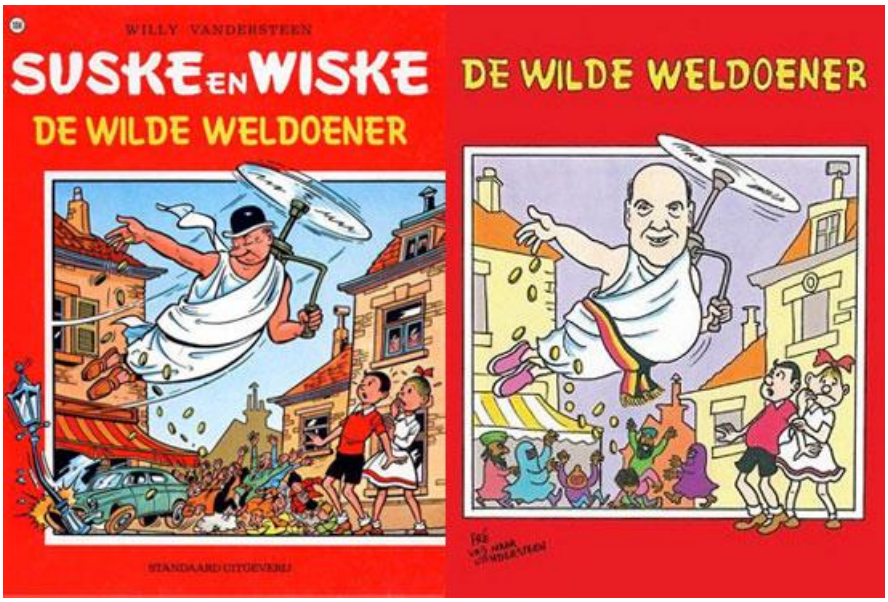
[304] ″The caricature exception was not introduced explicitly when implementing the Copyright Directive (contrary to most exceptions of the catalogue), but it is admitted that parodies may be made, on the basis that ideas may not be protected, and with this limit that the parody may not be an adaptation of the pre-existing work (in which case it requires a licence). Some commentators add that parody is recognised as a general principle of Finnish copyright law″ *Ibidem*

[305] ″The parody exception was not introduced when implementing the Copyright Directive. However, caricatures will often be deemed new and independent works of art under Section 4 (2) of the Copyright Act and thus fall outside of the copyright protection of the pre-existing work″ *Ibidem*

[306] ″Fair dealing [...] may allow narrow 'target' parodies but does not accommodate parodies drawing on a work as part of a critique or comment directed at third parties ('weapon' parodies)″, Dinusha

> One sees, then, that the traditional English outlook is quite accepting of parody and is unlikely to find that such a secondary use is an infringement of the work it parodies[307].

3.4 Court of Justice C-201/13 - Deckmyn vs Vrijheidsfonds



On the left, "Suske en Wiske". On the right, Deckmyn parody

The Deckmyn vs Vrijheidsfonds (C-201/13) represents the first CJ's ruling that considered the scope of parody in relation to EU Directives. As has been mentioned, parody falls under the European regime of exceptions and limitations, which are subject to a restrictive interpretation. Nevertheless, the Court of Justice

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MENDIS and Martin KRETSCHMER, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles*. *Parody and Pastiche*, Published by The Intellectual Property Office 8th January 2013, cit. p. 5.

[307] BERNSTEIN cit. p. 14. An important aspect to consider regarding the parody exception in UK is the Hargreaves Review of 2011. The British Parliament endorsed the expansion of the fair dealing doctrine to encompass certain uses like parody and pastiche. This expansion aimed to encourage the creative endeavors of comedians and digital users. Proposed review also sought to prevent any modification to the exception and limitation regime through contract; thereby, it will be ensuring that free uses of copyrighted works remain accessible: "The Government has accepted the Review's recommendation and intends to introduce an exception for parody. It is consulting on the most appropriate scope and safeguards for this exception" *Hargreaves Review of Intellectual Property* cit. p. 10.

(CJ) implemented a less strict approach in the case of parody, since it is one of the few exceptions that would grant a certain degree of openness to transformative use in the digital environment. The CJ decided on a more equitable application that takes into consideration two nullifying aspects[308]:

- the purpose pursued by the exception itself;
- the fair balance between the interests of the rightsholder and the freedom of expression of the parodist.

The Deckmyn ruling was able to shed light on the definition and qualification of the parody exception. The ruling was welcomed by the scientific community as concrete jurisprudential activism on exceptions and limitations in the European context[309]. The European Copyright Society (ECS) emphasized how the intervention is also a useful model for the sphere of online intellectual property:

> A more comprehensively harmonized legislative framework would be advantageous for authors and right holders (including the copyright industry). It would enable increased lawful cross-border online exploitation of works. Users would also benefit from clear, simple, and accessible rules clarifying the situations in which a work can be used without infringement[310].

One criticism from scholars concerns the fact that the CJ did not refer to the three-step test in applying the parody exception[311]. According to AG Villalòn, the application of the test falls under the tasks of national courts who should determine the conditions for the lawfulness of the parody exception[312].

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[308] CJ recalls the trend by various decisions which apply the proportionality principle to resolve the contrast between copyright and freedom of expression: C-314/12, *Telekabel* 2014; C-70/10, *Scarlet Extended* 2011; C-360/10, *Netlog* 2012.

[309] Eleonora ROSATI, *Just a matter of laugh? Why the CJEU decision in Deckmyn is broader than parody*, Common Market Law Review, 2015, 52 (2): ″This decision is topical to EU debate on copyright exceptions and limitations in Article 5 of the InfoSoc Directive, as well discourse around activism – rather than mere activity – of the CJEU in this area of the law″ cit. p. 1

[310] Jonathan GRIFFITHS et al., *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union - "Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn"*, The European Copyright Society's, para 7.

[311] *See* ex multis Ottolia; Senftleben.

[312] ″Nor, in the second place, has the referring court asked the Court about the possible scope in the

The implications of this decision are useful in the debate over online parody, since the exception can foster online transformative use and guarantee freedom of expression at the same time. Moreover, in the case of parody, the balance must include both freedom of expression and freedom of creativity.

3.4.1 Criteria for the existence of the parody exception: The Autonomous concept

The Court of Justice was called upon, for the first time, to rule on the notion of parody within EU law in Deckmyn C-201/13. After the Brussels Court of Appeal stayed the proceedings, it was decided that a request for a preliminary ruling by the Court of Justice would be relayed for the correct interpretation of Article 5(3)(k) of the Directive 2001/29/EC. The questions for the preliminary ruling are as follows:

1. Is the concept of "parody" an autonomous concept in EU law?
2. If so, must a parody satisfy the following conditions or conform to the following characteristics:
    - display original character of its own (originality);
    - display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;
    - seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;
    - mention the source of the parodied work?

present case of the 'threefold condition' (also known as the 'three-stage test'), provided for in general terms in Article 5(5) of the Directive, according to which the parody exception is to be applied 'in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder'. The determination of whether or not each of those conditions is satisfied in the present case is a matter which, again, will fall to the national court″ para 29, Opinion of Advocate General Cruz VILLALÓN Delivered On 22 May 2014.

3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?[313]

The CJ then established a certain boundary and a uniform interpretation within the territory of the European Union via the sharing of a common definition of the parody exception. The CJ declared that parody must be regarded as an autonomous concept in EU law and interpreted uniformly throughout the European Union:

> On a consistent number of occasions the CJEU has stated that the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the EU[314].

3.4.1.1 Context of the provision

Since the term in the provision on the parody exception does not refer to the MS for the purpose of determining "meaning and scope"[315], the CJ intervened, giving it a place as an autonomous concept that required uniform application throughout the European Union:

> Although the meanings of parody, pastiche, caricature, and satire may vary greatly from one dictionary to another, the legal definition should be

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[313] *Deckmyn* C-201/13 para 13.

[314] ROSATI: p. 3. *See Deckmyn* C-201/13, which recalls *Padawan* C-467/08: ″32 In such circumstances, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation″ para 14.

[315] The CJ approach to the interpretation of parody exception: "It should be noted that, since Directive 2001/29 gives no definition at all of the concept of parody, the meaning and scope of that term must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part" *Deckmyn* C-201/13 para 19.

> shaped having regard to the purpose and context of the exception within the copyright paradigm. The legislator's intent should serve two purposes: it should act as guidance to ensure consistency and stability while allowing for a certain degree of flexibility to adapt to new circumstances. Otherwise, at a time when technological advancement enables numerous ways to rework previous copyright works, it may become tempting to stretch the meaning of the terms beyond what was intended[316].

The CJ ruling has been integrated into the doctrine of pre-emption, which theorizes upon the effects of EU legislation[317]. This pre-emption has been built, by the CJ's judgments[318], on the relationship between the jurisdiction areas of the European Union and its Member States. Pre-emption should define the boundaries for the European legislation, and limit national interventions. The CJ finds the basis for its area of jurisdiction in clarifying the criteria of interpretation in the field of parody, and does so in articles 114 and 115 TFEU on the "approximation of laws" in different MS[319].

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[316] Sabine JACQUES *Exception of parody* cit. p. 16.

[317] Amedeo ARENA *The Doctrine of Union Pre-emption in the EU Single Market: Between Sein and Sollen* Jean Monnet Working Paper 03/10 ″The central feature of the competence-based definitions of pre-emption, is that the displacement of national legislation associated with the notion of pre-emption is linked to the existence of an EU competence in a certain area, rather than (or in addition) to its exercise through the adoption of EU legislation″. cit. p. 6.

[318] The interpretative criterion of pre-emption is traced back to the Court of Justice directions that have emerged in recent years: *i*) *Padawan* C-467/08 ″The objective of Directive 2001/29, based, in particular, on Article 95 EC and intended to harmonise certain aspects of the law on copyright and related rights in the information society and to ensure competition in the internal market is not distorted as a result of Member States' different legislation […] requires the elaboration of autonomous concepts of European Union law. [...] Therefore, although it is open to the Member States [..] to introduce [...] exception to the author's exclusive reproduction right [...] An interpretation according to which Member States which have introduced an identical exception [...] are free to determine the limits in an inconsistent and un-harmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive, as set out in the preceding paragraph″ para 35. *ii*) *TV2 Danmark* C-510/10: ″Consequently, although it is open to the Member States, ... to introduce an exception in respect of ephemeral recordings into their domestic law, an interpretation according to which Member States which, exercising that option afforded to them by European Union law, have introduced an exception of that kind, are free to determine, in an un-harmonised manner, the limits [...] would be contrary to the objective of that directive [...] inasmuch as the limits of that exception could vary from one Member State to another and would therefore give rise to potential inconsistencies″ para 36.

[319] "The CJEU has concluded so in two paramount cases dealing with the limitations of quotation (*Painer*) and parody (*Deckmyn*). In both cases, national laws had stricter requirements than those envisioned in Art. 5(3)(d) and (k), respectively; the Court expressly set aside the national laws and

3.4.1.2 Objectives pursued

The doctrine "welcomes the Court's commitment to the uniform application of EU law by considering parody an autonomous concept across the EU"[320]. The autonomous concept of parody embraces the InfoSoc Directive's objectives:

> That interpretation is not invalidated by the optional nature of the exception mentioned in Article 5(3)(k) of Directive 2001/29. An interpretation according to which Member States that have introduced that exception are free to determine the limits in an un-harmonised manner, which may vary from one Member State to another, would be incompatible with the objective of that directive[321].

The CJ's intervention aims to determine the correct and uniform free exercise of parody at the EU level, as required by the InfoSoc 2001/29/EC. Indeed, exception and limitation play a fundamental role in the function of the Digital Single Market. The CJ, however, has allowed for the possibility that a MS may adopt more stringent requirements within the boundaries marked by InfoSoc.

3.4.2 Humorous character

In the second ruling, the CJ investigated copyright issues in parody, which must evoke an existing work, while being noticeably different from it, and must be an expression of humour or mockery. These two elements establish parodic expression:

> By requiring all parodies to have a humorous character and evoke an existing work while being noticeably different from it, the CJEU

applied the harmonized scope of the limitations as designed in Art. 5" Raquel XALABARDER, *The role of the CJEU in harmonizing EU copyright law*. IIC 47, (2016): 635-639, cit. p. 638.

[320] GRIFFITHS par. 8.

[321] *Deckmyn* C-201/13 para 16.

> provides the over-arching criteria, thus permitting the exception to apply in 'certain special cases[322].

The CJ did not particularly deeply analyse the humorous character of the matter, thus preventing a debate on the different legislations and traditions. Indeed, humour differs from one state to another. The CJ merely affirms that freedom of parody is a personal right in accordance with freedom of expression[323].

Some scholars have criticized this absence of an intervention and denounced the sentence as a missed opportunity to harmonize and qualify parody over Europe; broader flexibility in the interpretation of the concept of humour would have aided the applicability of the parody exception and would have achieved a better harmonization [324]. But the CJ avoided any judgement as to the artistic nature of parody, which should tie into the rules of that genre, as the definitions given by the theorists, seen in previous chapters, have indicated.

3.4.3 Originality

The CJ requires that parody must be simply determined by considering the "usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part"[325]. A search for originality is not necessary for the application of the parody exception which must simply display "noticeable differences" to the reference work.

> According to statutory interpretation rules and practices, the ordinary meaning of the terms is typically the starting point when trying to

[322] JACQUES p. 59.

[323] Luca BOGGIO, *L'opera parodistica tra proprietà intellettuale e diritti della personalità*, in Giurisprudenza Italiana, 2015, p. 1141.

[324] *See* Francesco BANTERLE, *L'umorismo è il miglior strumento di difesa: la nozione comunitaria di parodia per la Corte di Giustizia*, in Rivista di diritto industriale 1/2 (2016), p. 85.

[325] *Deckmyn* para 45.

> understand the legal meaning of any terms which the legal instrument does not itself define. This is the case with the parody exception[326].

The CJ aims to affirm the lawfulness of parody in relation to the freedom of expression, and thus avoid any consideration as to the existence of an exclusive right for the parodist. This interpretation contrasts with the tradition in copyright law, which plainly protects works endowed with creativity and originality:

> The concept of parody is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work[327].

AG Villalon also came to the same conclusion in stressing the importance of parody not creating confusion with the original. However, originality should not be taken too much into account when qualifying the parody exception from the perspective of Union law:

> Certainly, a parody must ″… display ... an original character of its own″, to use the words of the referring court, which means that, reasonably, it will not be confused with the original. In addition to this, and in line with the Commission's submissions, I believe that none of the structural criteria proposed by the referring court satisfies the condition that they should be elements necessary or essential to the definition of the concept from the perspective of Union law[328].

On the other hand, the CJ holds that parody does not have to seek the consensus of, or even cite, the author as a source of inspiration. This interpretation is in line with the protection of copyright law provided for original works. The doctrine justifies the decision as follows:

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[326] JACQUES cit. p. 16.

[327] *Deckmyn* C-201/13 para 33. The decision could be interpreted in term of idea/expression dichotomy: "While copyright prohibits the use of expression that is "substantially similar" to a protected work, it does not prevent a later author from appropriating the ideas conveyed by a protected work" OLIAR p. 1822.

[328] AG VILLALON para 57.

> The directive does not require the indication of the source in the exception of parody (probably because in a parody the source is well known - or the parody risks to remain unnoticed)[329].

Finally, The CJ considers parody to be licit when directed at the original work, its author and the artistic context (so-called target parody), as well as when it is directed at third parties and uses the copyrighted work as a mere vehicle to express satirical criticism (weapon parody).

The two criteria, namely the humorous intention and the substantial difference from the original work, are not sufficient on their own to determine if parody is lawful. The parody exception must be evaluated in its capability to preserve the fair balance between conflicting interests.

3.4.4 Fair balance

The CJ emphasises two different points in the applicability of the parody exception. Firstly, it stresses the necessity to conform to a finalistic interpretation, freedom of critical expression:

> The interpretation of the concept of parody must, in any event, enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed. […] It is not disputed that parody is an appropriate way to express an opinion[330].

Secondly, it highlights fair balance between the intellectual-property interests of the rightsholder and the freedom of expression of the user. This provision is coherent with the CJ's tendency to adopt the principle of proportionality[331]. In this

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[329] TRIAILLE cit. p. 463.

[330] *Deckmyn* C-201/13 para 23.

[331] CJ does not adopt a restrictive interpretation of Article 5 Infosoc Directive 2001/29/EC, giving recognition to specific rights accorded to the exception of parody. The ECS appreciated such decision: ″The desirability of adopting a purposive, rather than a systematically restrictive, interpretation of exceptions and limitations [...] the Court's move away from the narrow interpretation of limitations in favour of an interpretation that promotes the effectiveness of an exception in the light of its purpose and the principle of proportionality is to be welcomed″ GRIFFITHS par. 15.

regard, intellectual property rights need to be balanced with other fundamental rights, such as freedom of expression.

> The case-law of the ECHR and the CJEU so far has only produced a few indications how to reach and justify a fair balance without ending up in a very vague unpredictable legal uncertainty on where to draw the line of copyright enforcement when interfering with the right to freedom of expression and information[332].

The CJ outlines the role of fair balance in the evaluation of parodic transformation in the light of three distinct subjects, which have different interests; the rightsholder, the parodist and potentially discriminated persons[333].

3.4.4.1 The rightsholder

InfoSoc 2001/29/EC concretely grants the so-called exclusive right as a guarantee of the patrimonial and moral rights of the rightsholder[334]. The exclusive right ensures both the development of the rightsholder's personality and an increase in wealth. Moreover, if parody is defamatory (e.g. in making a discriminatory comment, as in the case of Deckmyn), fair balance should also take into account the rightsholder's interest in not being associated with the discriminatory message[335]. The CJ decrees that the rightsholder may prohibit a parody that has the sole aim of conveying hate speech, and thus breach personal rights:

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[332] VOORHOOF cit. p. 350.

[333] Firstly, exception of parody must strike a fair balance between the interests of the rightsholder, referred to in Articles 2 and 3 of InfoSoc Directive 2001/29/EC, and the freedom of expression of the user, meaning of Article 5(3)(k). C-201/13 *Deckmyn* ″The application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k). In order to determine whether, in a particular case, the application of the exception for parody within the meaning of Article 5(3)(k) of Directive 2001/29 preserves that fair balance, all the circumstances of the case must be taken into account″ p. 73. CJ has also considered that the search for the Fair balance between opposing interests should also take into account the protection for the individual criticized by parody.

[334] BOGGIO p. 1140. *See* also JONGSMA on the requirement of respect moral rights: "However, courts are reluctant to forbid a parody on the basis of moral rights infringement alone" cit. p. 663.

[335] *Deckmyn* C-201/13: ″[Rightsholder has] a legitimate interest in ensuring that the work protected by copyright is not associated with such a message″ para 31. Thereby, the association of the original work with a discriminatory message may fall outside the parody exception.

> In so far as the original work, through such manipulation, has become a means of conveying a political message with which the holders of copyright in the work are fully entitled not to agree and in fact do not agree, the question arises whether the court seized of the proceedings must include the *subject-matter* of that political message in its assessment of the parody exception[336].

The commercial nature of parody may sometimes create competition with the original work, and this aspect rarely preserves fair balance. However, parody embodies artistic freedom, and therefore, it may demand broader protection. For example, the German Federal Constitutional Court in the "*Metall auf Metall*" acknowledged sampling as an essential characteristic of the creative process[337].

The emerging digital alterations frequently clash with the moral rights of the original author. The inspirers hardly appreciate a parody of their work, but, as elucidated in the *Deckmyn*, they may have valid interests in not being associated with the discriminatory message.

3.4.4.2 The parodist

InfoSoc 2001/29/EC protects the exclusive rights but subjects them to functional limits in terms of general interest for cultural improvement, and the dissemination of knowledge, ideas and opinions[338]. In this sense, InfoSoc guarantees the free use of copyrighted works via the exceptions and limitations list, which includes parody. Moreover, exclusivity can never affect the freedom of expression guaranteed by national constitutions or international treaties (e.g. article 10 ECHR[339]). At the same time, the CJ poses limits to such freedom of expression when it borders on unacceptable infringements. The parodist must be aware of such limits,

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[336] AG VILLALÒN para 72.

[337] *See* Federal German Constitutional Court, 31 May 2016, 1 BvR 1585/13 – *Metall auf Metall*.

[338] BOGGIO p. 1140.

[339] ″The fundamental guarantee of freedom of expression thus played a crucial role in […] the Deckmyn [...] in order to secure compatibility with Art. 11 of the EU Charter of Fundamental Rights and Art. 10 of the ECHR, the Court adopted an interpretation that was broader than might have been appropriate in the case of an E&L without a comparably strong grounding in freedom of expression″ GRIFFITHS par. 27.

since art is not *legibus soluta*[340]. The same conclusions have been pointed out by Elena Rosati, who affirms:

> Freedom of expression is not unlimited, as also clarified by Article 10 (2) of the European Convention on Human Rights (ECHR), and other rights – including copyright protection – might interfere with its exercise. Although a parody cannot be forbidden just because the author of the parodied work does not approve of it, parodies that transmit a message that is radically contrary to the deepest, fundamental, values of the society upon which the European public space is built should be prohibited[341].

3.4.4.3 The discriminated person

InfoSoc 2001/29/EC aims to regulate copyright in the information society, and thus does not concern itself with the interests of a discriminated person. In Deckmyn, the CJ did not take a clear position on the level of protection to be offered, as its main focus is on balancing intellectual property with freedom of expression. Some scholars have criticized this choice, which leaves the resolution of the dispute over alleged violations of the rightsholder's moral rights and alleged racial discrimination to national courts[342]. On this point, AG Villalòn considers it worthwhile to note that national civil courts "cannot be unaware" that fundamental values, enshrined by existing Charters (e.g., the prohibition of discrimination based on race or religion - Article 21 Nice Charter), may come into conflict with IP law or freedom of expression[343]:

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[340] Maria Gabriella LODATO, *Diritto di sorridere e finalità informativa della vignetta satirica,* in Dir. inf., 1995, cit. p. 623.

[341] ROSATI cit. p. 4. Similarly, REDA "From Article 10 (2) ECHR follows that the freedom of expression is subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, and are, in particular, proportionate to the legitimate aim pursued" cit. p. 25.

[342] ″Similarly to what has happened in relation to other aspects of copyright, e.g. the originality requirement and the notion of work – also in this case the Court might have pursued some sort of de facto harmonization, notably with regard to moral rights″ ROSATI cit. p.1

[343] The parody's struggle with fundamental rights has been deeply discussed by AG VILLALÒN

> It must be pointed out straightaway that freedom of expression is never quite 'unlimited' in a democratic society. […] In that regard, suffice it to recall the wording of Article 10 (2) of the European Convention on Human Rights. This is also why the Charter encompasses not only freedom of expression but also other rights that may occasionally compete with it: human dignity (Article 1), first, together with another series of rights and freedoms, in particular the prohibition of discrimination on grounds of race or religion (Article 21)[344].

In conclusion, fair balance is sought, in Deckmyn, via the corollary that the rightsholder's exercising of their rights cannot unreasonably preclude the user's exercising of theirs to create parodies. The exhaustion of the rightsholder's interests intervenes in the face of the user's interest. Both (exclusive right and freedom of expression) are exhausted in the face of third-party interests if they deserve greater protection (e.g. racial discrimination)[345]:

> At all events, that is how the original interpretation of fundamental rights in the context of the Union, as a category included in the general principles of EU law, has enabled those rights to be relied on as a general criterion for the interpretation of EU law. It should thus be no surprise either that the settled case-law pursuant to which European Union secondary law must be interpreted in conformity with primary law, including the Charter, also has a bearing when a provision of secondary

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within the Deckmyn case law: ″In secondary law, those beliefs found particular expression in the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. It is clear that a civil court seized of a case concerning intellectual property rights is not required primarily to give effect to such limits, which are part of criminal law, in a dispute between individuals. Civil courts are in no circumstances required to replace criminal courts in the suppression of such conduct. However, at the same time, it should be observed that civil courts in giving their interpretation cannot be unaware that 'the Charter exists'; that is to say, that it has a certain virtual existence, even in the context of civil proceedings″ para 83 and 84.

[344] AG VILLALON para 82.

[345] BOGGIO p. 1141. The fair balance must also include in its evaluation the rights of third parties (economic and personality rights or others). In this sense, the normativity of the parody genre is reaffirmed: ″Humoristic, and 'substantial transformation/ modification of a copyright work' devoid of the intention to harm the legitimate author (financially or morally). Can be commercial use. The parodied work should not exploit the fame of the original work in order to reach its audience. Parody defences were denied by the courts if the use was just commentary (Jamel Debouze), intended as an advertisement (Marcel Pagnol), or if the point could have been made by using different images (Greenpeace)″, Kris ERICKSON e a., *Copyright and the Economic Effects of Parody: An empirical study of music videos on the YouTube platform, and an assessment of regulatory options*, Project Report - Intellectual Property Office (IPO), 2013, p. 18.

> law applies as between individuals. In particular, the Court has stressed the importance of striking a fair balance between the various fundamental rights applicable in cases in which they may be in competition. In the concise but expressive words of the Court, ″situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable″[346].

The Deckmyn ruling was welcomed by the academic community[347]. A minority talked about "missed balance" as the CJ did not take a position on the fair balance between intellectual property rights and freedom of expression, remanding it to national courts and, thus, not following the practice of providing a solution upstream of them[348]. The CJ specifies the qualification and implementation of the parody exception, but the distinguishing criteria have only partially been resolved. The CJ does not dwell on the concept of parody and abstains from making any comments on originality and humour. What the CJ mostly emphasized is conflict resolution and the fair balance of opposing interests, which should grant protection to alleged victims who suffer for mockery:

> Formulating any parody exception within copyright law presents two potentially significant challenges: defining parody and regulating the balance between copyright holders and parodist. […] There are powerful arguments that society should allow or even positively encourage parody of copyright works - at least in principle. Parodies are often funny. They are themselves new works. Parody does not usually harm the copyright holder in an economic sense, and it is not the job of the copyright to

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[346] AG VILLALON para 78 and 79.

[347] ″In Deckmyn, it can be suggested that the Court has gone further in stating explicitly that the application of an exception in a particular case must also strike a "fair balance" between competing rights and interests. Thus, the controlling concept applies not only to the Court's delimitation of the contours of the listed provisions, but also to the application of exceptions and limitations in specific cases by national courts. Gradually, the apparently skeletal list of optional provisions set out in Art 5 is being converted into an organised and viable code of exceptions and limitations over which the Court has ultimate control″, GRIFFITHS *Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn*, cit. p. 3.

[348] "It is finally for the national court to determine, in the light of all the circumstances of a concrete case, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance between the copyright of the right holders on the one hand, and the right to freedom of expression of the parodist on the other hand" VOORHOOF cit. p. 346.

> insulate copyright holders against criticism or teasing. It is good general wellbeing to allow parodists to take a poke at things that people consider conspicuous targets. It would not be good for society if copyright holders were allowed to prevent parodies, because that would allow a form censorship which is not considered acceptable or defensible in an age freedom of expression, which carries considerably more weight than it once used to. Furthermore, there is less deference to the author's sense of 'ownership' in the post-modern era. These considerations have led to more positivity towards parody being expressed, in legal and other contexts. However, parodies cannot be left entirely uninhibited, as this would leave their targets vulnerable to abuse, and other important rights would be left unacknowledged[349].

Legal scholars who have commented on Deckmyn case law point out that the CJ did not provide a clear definition of discriminatory messages. Although there is a general prohibition against discrimination, it is essential to comprehend and qualify the meaning and potential impact conveyed by any humorous parodies. Additionally, the judgment of discrimination should be entrusted to the courts rather than private individuals. For instance, if the law would have left the inspirer of the parody the title to contest unwanted associations due to hypothesized presence of discriminatory messages, it "may narrow the scope of the parody exception enormously"[350]. The potential risk of private censorship has consequently resulted challenging the application of copyright regulations to the parody exception, especially when it involves content that could be deemed discriminatory.

> The strength and salience of particular justifications for the intervention of a defence or exception might change over time, and be examined differently in different social contexts. For example, the CJEU's concern for a copyright owner's interest in not having a work associated with a discriminatory message might not be so pressing elsewhere. [..] More generally, conceptions of the dignity of the author might shape the

[349] Catherine SEVILLE, *The space needed for parody within copyright law: reflections following Deckmyn*, National Law School of India Review, Vol. 27, No. 1 (2015), p. 16.

[350] JONGSMA cit. p. 666. Jongsma also emphasizes, on the one hand, the risk for private censorship and, on the other hand, that "copyright is not the most suitable means to address xenophobic and discriminatory expressions, and that protection against unwanted associations is traditionally more the domain of moral rights, an area of law that has not been harmonized" *Ibidem*

analysis, informed by the idea that moral rights do not sufficiently capture all relevant concerns. Technological development, and changes in business models, might also affect the analysis of the need for legal intervention[351].

3.5 Fair Use: the American tradition

Fair use is a principle based on the free use of copyrighted works, and is envisaged by the North American mechanism, which allows limitations in viewing in order to maximise innovation, the main goal of copyright[352]. The fair use defence is based on the advantages it offers to the public, which include receiving two works of art instead of just one in the present, as well as the potential for greater long-term artistic creation. Copyright has traditionally aimed to encourage the advancement of science and arts, in line with the constitutional objective. For this reason, the scope of copyright protection entails four major qualifications:

- The duration of the protection is limited to the life of the author plus a period which varies by countries;
- The authorship must follow a certain standard for determining who may receive protection as author. Usually, if the work of art shows originality, it is considered an independent creation[353];
- The distinction between ideas and expressions. Traditionally, copyright law protects the expression, while the ideas are not copyrightable[354]. Parody can thus

[351] AUSTIN cit. p. 712.

[352] Andrea OTTOLIA, *L'interferenza permanente fra proprietà intellettuale e libertà di espressione nel diritto dell'Unione Europea: una proposta di bilanciamento*, AIDA, 2016, p. 186. Such approach is a bit different from the previous one (the majority of EU MS adopt a civil law tradition), since common law grants limited exclusive rights in view of fostering the free uses of copyrighted works; it would bring more benefit to society rather than maintaining the full control onto the rightsholder. This is also confirmed by recent US court case which reaffirm such objective of Fair Use doctrine. In *Cambridge Univ. Press v. Patton* 769 F.3d 1232 (11th Cir. 2014) "the grant to an author of copyright in a work is predicated upon a reciprocal grant to the public by the work's author of an implied license for fair use of the work" para 1257.

[353] "Originality itself must exhibit a modicum of intellectual labor in order to constitute the product of an author. Still, such intellectual labor may be of a very minimal degree and yet be sufficient to establish authorship", 1 Melville NIMMER, *Nimmer on Copyright* (1980), at sec. 1.06.

[354] "The particular ordering and arrangement of words and images that form the means of expressing those ideas are [copyrightable]", BERNSTEIN cit. p. 7. The author says further that the fictional

be the result of a free inspiration linked to common elements which belong to the cultural experience of humanity, and, for this reason, appropriable by anyone. Particularly interesting, it is a ruling on a hypothesis of plagiarism of the Court of Naples, which revealed that the appropriation of any inspirational motif which belongs to the common cultural heritage is always lawful[355].

- Any substantial appropriations may be considered lawful whenever the borrowing may be included in fair use doctrine and so defeat a cause of action for plagiarism or infringement. Fair use is troublesome for courts which are entitled to determining when appropriation is undoubtedly fair[356].

Fair Use may appear to prioritize the quantity of art created rather than its quality. However, within the legal system, the responsibility of determining the application of fair use lies with judges who are tasked with resolving copyright disputes[357]. Assessing the quality of art is a highly subjective matter, and it would not

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characters are not copyrightable as well: "This copyright issue arises particularly in the context of fictional characters, which are not generally copyrightable since it is the rare characterization that is sufficiently concrete to be treated as more than an idea. Such characters usually are protected only under state principles of unfair competition", *Ibidem*

[355] The case inspected the fictional character "*Lo Scugnizzo*" by Trib. Napoli, 28 November 1986, DA, 1987, 529: "*Lo Scugnizzo* is a symbolic and emblematic character of Naples [...] It is not plagiarism to depict a Punchinello, beaten and starving, or a Harlequin, servile and cunning, with master and servant, just as it is not plagiarism to depict cinematographically and tell in literary form the story of a *Scugnizzo*, poor but intelligent, who commits illegal acts only out of hunger and family need and finds the strength to redeem himself, since such a strand is an integral part of Neapolitan popular tradition [...]. The setting, the situations and the behaviour of all the characters in the variation on the theme, as part of the tradition, constitute cultural heritage in the public domain." Vittorio DE SANCTIS, *La protezione delle opere dell'ingegno. Le opere letterarie e scientifiche, le opere musicali e le opere informatiche*, Giuffrè, Milano, 2003, p. 189, (my own translation).

[356] Fair use has been defined "as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." By Horace G. Ball, *Law of Copyright and Literary Property* 16-17, sec. 3 (1944), at 260 (in BERNSTEIN cit. p. 8). This is not always true, as the legal scholars have rightly underline: "Normally, allowing individuals to borrow freely from copyrighted works erodes the incentives for the creation of new original material. For example, if television producers were allowed to tum novels into sitcoms for no charge, the number of novels written would presumably decrease, thereby harming the public interest. Copyright law avoids this result by forcing producers to use the money raised through advertising to pay novelists for the rights to use their works. These payments stimulate further writings" YEN cit. p. 92-93. However, this is not the case of parodies for a simple and intuitive reason we have already pointed out: "the sale of parody rights is vastly different from the sale of other derivative rights. Authors anxious to avoid being humiliated will seldom, if ever, voluntarily expose their own work to a critical parody" *Ibidem*

[357] "We may take it as a given, then, that judges have no special ability to judge the quality of art. But they do have extensive training and experience in economics, and it is therefore reasonable to ask them to make determinations of economic harm. Ultimately, the weighing of economic disincentives to creation may not be perfectly congruent with the ideal constitutional directive. Yet we may expect that even with our neutral conception of 'artistic value' - anything that meets the threshold originality

be in the public's best interest to rely solely on one individual's judgment to define what constitutes art[358].

Fair use serves to protect the public interest rather than private interests. Furthermore, fair use does not provide a definition of what constitutes art that can be protected, nor does it place limits on the extent of appropriation. The conjure up test is sufficient for fair use to apply[359]. Fair use guidelines are challenging to define precisely through legal doctrine and case law. Consequently, some legal scholars have begun developing a more comprehensive fair use doctrine that eliminates the distinctions between original and secondary works based on assumptions of artistic value. Ultimately, this evolution aims to simplify fair use into a single rule: "Any secondary work that, in the long run, enhances the overall production of art, is considered a fair use"[360]. Courts recognized the significance of this practice for parody and consequently implemented it to distinguish between parody and non-parody.

The Copyright Act codified fair use in Title 17, section 107: limitations to exclusive rights. The U.S. Congress conceived it to have an elastic and flexible formula in order to work in heterogeneous and unpredictable applications; this choice adheres with the US Constitution[361], and with the utilitarian view of Copyright in the Common Law system, where greater openness is encouraged as an instrument to stimulate creation, dissemination of knowledge and achieve a general enrichment of society and culture, through limited private monopolies. The specific statutory

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test-judicial results will be generally satisfactory, while avoiding unacceptable judicial subjectivity in regard to merit" BERNSTEIN p. 42.

[358] Even because Fair Use does not protect quantity per se, but "the fair use doctrine [..] allows a court to excuse a use that technically infringes upon the owner's copyright if the use is socially beneficial" HECKE cit. p. 470.

[359] The conjure up test aims to evaluate the amount and substantiality of the use. If the parodist has copied too much, the use can harm the inspirer's interests. In *Elsmere Music, Inc. v. National Broadcasting Co* "the court expanded the conjure up test, stating vaguely that a parody should "at least" be able to conjure up the original so long as the parody "builds upon the original" and "contribute[s] something new for humorous effect or commentary" HECKE cit. p. 476.

[360] BERNSTEIN p. 44.

[361] ″The Congress shall have Power To [...] promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries″, US Constitution art. 1, section 8, clause 8.

definition of fair use is restricted to purposes such as parody, criticism, comment, news reporting etc.:

> The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defence in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples […] give some idea of the sort of activities the courts might regard as fair use under the circumstances: [...] "use in a parody of some of the content of the work parodied"[362].

Fair use is therefore a normative balancing of conflicting interests, and the fact that it counters unlimited monopoly, interfering with the fullness of exclusive rights, meets the principles of copyright. Indeed, if an artist reproduces a substantial part of copyrighted work without consent, economic damage could occur[363]. If the use of a copyrighted work is attributed to the wrong person or if the use involved damage to the integrity of the copyrighted work, moral damage can occur. Fair-Use doctrine intervenes to resolve such disputes and permits a few uses for distinct purposes.

The simple recognition of exclusive rights is thus granted for a limited period of time and space, since it is subject to a conflicting interest, such as freedom of expression. This balance between copyright and freedom of expression should guarantee benefits for the present and the future alike, as it takes into account the effects of an economic analysis of law and involves the concrete circumstances of the variables[364].

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[362] U.S. Code – Title 17 – Copyright.

[363] ″For appropriationist art, there is much greater potential for copyright infringement than for trademark infringement, since the creation of the secondary artwork is enough to constitute infringement of the copyright holder's exclusive right to license derivative works and reproductions″ Kenly AMES, *Beyond Rogers V Koons: A Fair Use Standard For Appropriation*, Columbia Law Review, Vol. 93, No. 6 (Oct., 1993), p. 1475.

[364] On this regard, the balance takes into consideration the concrete circumstances of the variables and

> Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright's objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. One must assess each of the issues that arise in considering a fair use defence in the light of the governing purpose of copyright law[365].

Constitutional provisions on copyright are primarily focused on public interests. Notwithstanding, the copyright legislation has been built on protection of author's right to control his or her work of art. The exclusive right serves to maximize artistic production, the monetary reward for the author complies with the public interest as much as the private interest do not inhibit promotion for creations and art more generally.

Traditionally, courts have focused on dispute between private interests; on the one hand, the inspirer of the parody seeks protection for the original author's creation; on the other hand, the parodist needs to legal recognition for his or her secondary creation. Although courts and legal scholars have taken the position of the inspirer of the parody for a certain period of time, the progress in art and in knowledge could benefit from a legal protection of secondary author. There is no reason for legal preference; indeed, parody can gain valuable recognition within the artistic world[366].

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the resulting effect. In settling emerging conflicts between copyright and freedom of expression, the balance should ensure, for example, the greatest benefit of users. *See* OTTOLIA, pp. 182-183.

[365] Pierre N. LEVAL, *Toward a Fair Use Standard*, Harvard Law Review, Vol. 103, No. 5 (Mar., 1990), pp. 1105-1136, cit. p. 1110.

[366] This is the case, for example, with "Frankenstein Junior"; the worldwide popularity and acknowledgement of this movie surpassed all serious ones made before and since.

3.5.1 Parody and fair use

The so-called "parody defence"[367] has a privileged status in U.S. copyright law. This artistic genre is worthy of protection as it has shown artistic value, to act as a stimulus for creation and freedom of expression, which is perfectly in line with the main goals of copyright. Fair use for the purposes of parody is also considered a remedy for market failure:

> Fair use protection for direct[368] parodies is justified as a remedy for market failure. The market failure theory of fair use rests on the proposition that, when the market is functioning properly, authors seeking to utilize a copyrighted work will be able to negotiate a mutually acceptable payment for use of the work. However, when a potential author seeks to utilize the copyrighted work for an unbecoming purpose, the copyright owner may withhold permission at any price. Market failure occurs when an author's refusal to license a copyrighted work conflicts with the public benefit rationale underlying copyright law[369].

The inclusion of parody in sec. 107 of the fair-use doctrine was proffered by the courts after a long-lasting debate in the United States which can be divided in two periods: the first, the more traditional, "the conservative years: 1976-1993"[370]; while the second provided a less stringent interpretation: "1994 and beyond: A relaxed approach to parodied content"[371]:

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[367] ″The parody defence is a specialized area of fair use doctrine that accords broader protection to works where the purpose of the appropriation was to create a parody of the original work ″ AMES nota 13.

[368] Target and Direct are used as synonyms.

[369] Lisa Moloff KAPLAN, *Parody and the Fair Use Defence to Copyright Infringement: Appropriate Purpose and Object of Humor,* 26 Ariz. St. L.J., 1994, 855-876, cit. pp. 869-870. In *Kienitz*, the US court affirmed that parody would be an example of market failure if fair use doctrine might not be invoked by parodist: "The fair-use privilege under § 107 is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors. (Many copyright owners would block all parodies, for example, and the administrative costs of finding and obtaining consent from copyright holders would frustrate many academic uses.)" para 759.

[370] MENDIS and KRETSCHMER p. 35.

[371] *Ivi* p. 37

> Over time, the fair use doctrine has developed to allow judges to protect the incentive of an artist to create a work by guaranteeing the protection of her investment in and expected returns from her work, while respecting the need of those who come after her to use her work as part of the process of creating their own. Typically, the fair use doctrine applies to the use of copyrighted material in scholarly and/or critical works[372].

Our analysis of parody in the light of fair use shall start from any copyright infringements that may occur. Via an analysis of a few rulings, we will be able to observe the evolution of American case law, which has gradually leant towards boarder qualifications and has expanded legal protection for the parodic technique.

3.5.2 A conservative approach to parody

The first case law to have interpreted parody under Section 107 of the Copyright Act of 1976 was *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc* - 479 F. Supp. 351 (U.S. Dist. 1979) [373]:

> This was the first case to marshall the new statutory fair use doctrine in defence of parody. […] The District Court […] held that the defendant's three-hour, three-act play titled *Scarlett-Fever* was neither a parody nor a satire, and infringed the copyright of the plaintiff's novel *Gone with the Wind*[374].

The American judges justified their decision with a criticism of parody, saying that it did not possess enough originality for the application of fair use to be

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[372] AMES p. 1486.

[373] The first case law to recognize parody under fair use was *Berlin v. E.C. Publications, Inc.* in 1964. A ruling issued prior to the enactment of the Copyright Act of 1976: ″As a general proposition, we believe that parody and satire *are* deserving of substantial freedom — both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels," or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper″ *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

[374] MENDIS and KRETSCHMER p. 35

affirmed. The Court recognized, in a general sense, the cutting social value of parody, but the specific play was not creative enough to be protected under the Fair-Use doctrine. The common-law system indeed requires a "test of originality: 'Skill, judgment and labour'[375]. These are the hallmarks of the test of originality for the subsistence of copyright"[376]. This interpretation reflects the worries of possible exploitation being connected to parody transformation, and this was then superseded in the Acuff-Rose ruling:

> The underlying rationale for applying the "fair use" doctrine to parody and satire is that these art forms involve the type of original critical comment meant to be protected by §107 of the Copyright Act of 1976. Parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected, removing the "fair" aspect of the "fair use" doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others[377].

Rogers vs. Koons[378] is one of the most famous court cases regarding art appropriation and parody defence. The U.S. judges issued a decision that was

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[375] In addition to conjure up test, on this time, the courts predominantly embraced cost-benefit analysis for parody as fair use which include the following threshold requirements: "The traditional cost-benefit reasoning that supports parody's fair use status involved the intuitive evaluation of three items. On one hand, the courts considered the 'gains' associated with parody's value as entertainment and as criticism ['*Metro-Goldwyn-Mayer, Inc.* noting that defendant's parody was not critical commentary on the underlying original work and refusing to apply fair use defense' footnote 67]. On the other hand, the courts considered any 'losses' inflicted by parodists on authors by reason of lost sales of the authors' works [The reasons for ignoring this consequence seem intuitive (..) 'we must accept the harsh truth that parody may quite legitimately aim at garrotting the original' footnote 56]. The courts then made sure that the gains outweighed the losses by allowing fair use only when parody's value as entertainment and criticism were high and the authors' lost sales were low" YEN cit. p. 102.

[376] Susy FRANKEL, *The Copyright and Privacy Nexus*, Victoria University of Wellington Law Review, 2005, p. 517.

[377] *MGM v Showcase Atlanta* para 375.

[378] Jeff Koons, one of the most prominent exponents of appropriative art, faced a considerable number of conflicts: "[He] took images from popular culture, recreating them in sculpture, painting, and collage. He was sued for copyright infringement three times in the late 1980s, and lost each case. In 2006, Koons finally won a case, based on his 'transformation' of the appropriated work" Niels SCHAUMANN, *Fair Use and Appropriation Art*, Cybaris®: Vol. 6: Iss. 1, 2015, Article 5, p. 119. Koons lost a few rulings: *Art Rogers v. Jeff Koons*, 960 F.2d 301 (2d Cir. 1992); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, No. 91 Civ. 6055,

unfavourable to Koons, ruling, in both levels of judgment[379], that his work, *String of Puppies*, was a mere counterfeit of Art Rogers' photograph *Puppies*[380]. This stemmed from the consideration that, in general, artists do not enjoy special privileges when it comes to borrowing copyrighted images. Jeff Koons made a sculpture that took inspiration from a black-and-white photograph by Art Rogers, the rightsholder. The photograph inspired Koons, who saw in it an opportunity to represent the banality[381] of American culture:

> In a famous case, Jeff Koons' ″String of Puppies″ adapted a black-and-white photograph entitled ″Puppies″ by Art Rogers from a heart-warming note card into the form of a three-dimensional wooden painted sculpture that was similar to, but thanks to considerable irony, different from Rogers' image. In the process Koons made these changes: the people have a distinctly vacant look and have flowers in their hair, and the puppies are blue. And, of course, he showed this piece in the context of his *Banality* series. Not having asked permission argument based on appropriation with critical purpose though the concept of fair use. The court proceedings kept the art as well as the legal world buzzing for years, as the decision favoured first one side and then the other[382].

Koons' defence was predominantly based on making the U.S. judges believe that his sculpture was a parodic transformation, intended as harshly and satirically

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1993 WL 97381, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993). Finally, he won a case law: *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006). More recently, we report other contention instead concerns the sculpture Fait d'Hiver (1988), a work that aims to satirically reinterpret a clothing brand advertisement (Naf-Naf) del 1985. ″A Paris court of appeals has found pop artist Jeff Koons guilty of copyright infringement. Koons' 1988 Fait d'hiver sculpture copies a photo for a French clothing manufacturer's ad campaign, and Koons is to pay damages to the advertising designer for the unauthorized imitation, according to the court″ Matthias BECKONERT, *Jeff Koons, plagiarism and art*, DW made for minds, 02/26/221.

[379] *Art Rogers v. Jeff Koons*, 751 F. Supp. 474, 480 (S.D.N.Y. 1990), aff'd 960 F.2d 301 (2d Cir. 1992), cert. denied, 506 U.S. 934, 113 S. Ct. 365, 121 L.Ed.2d 278 (1992).

[380] ″[Koons] believed it to be typical, commonplace and familiar. The notecard was also similar to other images of people holding animals that Koons had collected. Thus, he viewed the picture as part of the mass culture 'resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people'″ *Art Rogers v. Jeff Koons* 960 F.2d 301 (2d Cir. 1992), at 305.

[381] ″When it was finished, '*String of Puppies*' was displayed at the Sonnabend Gallery, which opened the Banality Show on November 19, 1988. Three of the four copies made were sold to collectors for a total of $367,000; the fourth or artist's copy was kept by Koons″ *Art Rogers v. Jeff Koons* 960 at 305.

[382] Linda HUTCHEON *A theory of Adaptation,* Routledge, 2011, cit. p. 90-91.

criticising the "deterioration in the quality of society"[383]. According to the court, there were several reasons for not considering Koon's work of art as fair use[384]. Firstly, *String of Puppies* was not considered original enough[385]. Secondly was the absence of awareness; an attentive audience must be fully aware of the purpose of parody; such awareness may derive: *a)* from the reference work itself, if it is well-known to the audience (for instance, *Gioconda*, reworked by Marcel Duchamp, is obviously well-known by everyone); *b)* it also possible the public is fully aware of the parodist himself, who can directly cite the reference work[386]:

> In *Rogers v Koons* the Court of Appeals for the Second Circuit noted that parody and satire are valued and encouraged as forms of criticism, but that in this case the creator's intent was not to comment on or criticise the original and, therefore, his work would not constitute a parody. [...] The Court of Appeals did not accept this as a parody deserving protection under the US fair use doctrine, as it lacked legitimate social and artistic comment. The Court also emphasised the "bad faith" and "profit-making motives" of the defendant[387].

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[383] ″Koons argues that his sculpture is a satire or parody of society at large. He insists that "String of Puppies" is a fair social criticism and asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it. These themes, Koons states, draw upon the artistic movements of Cubism and Dadaism, with particular influence attributed to Marcel Duchamp, who in 1913 became the first to incorporate manufactured objects (readymades) into a work of art, directly influencing Koons' work and the work of other contemporary American artists″, *Koons*; 960 F.2d, at 309.

[384] "The circumstances of this case indicate that Koons' copying of the photograph 'Puppies' was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work" *Koons*, 960 F.2d, at 310.

[385] "Here, the essence of Rogers' photograph was copied nearly in toto, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work. [...] In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy. Moreover, because we have already determined that 'String of Puppies' is not a parody of Rogers' work, appellants cannot avail themselves of this heightened tolerance under a parody defense [...] We find that no reasonable jury could conclude that Koons did not exceed a permissible level of copying under the fair use doctrine″ *Koons*, 960 F.2d, at 311.

[386] This was the case of *The Giacometti Variations* by John Baldessari. *See* Trib. Milano ord. 13/07/2011 - Foundation Giacometti v. Fondazione Prada, Prada Spa and John Baldessari.

[387] Christian RÜTZ, *Parody: a Missed Opportunity?*, [2004] I.P.Q.: No 3, p. 294. The court also focused on the damage on the potential market that Rogers allegedly suffered from Koons's unauthorized work: "The focus, in other words, is upon potential markets. In the case at bar, Rogers

This ruling was criticized by some scholars because of the judge's inability to interpret Koons' art[388]. The art community furnished highly negative comments[389], as it: "feared that the decision would cripple appropriation art, undermine artistic freedom and retard innovation"[390]:

As was pointed out in the previous chapter, the Anglo-Saxon legal tradition usually distinguishes parody according to its communicative intention (target and weapon parody): 1) target parody is directed at the original work, which uses its criticism only against the reference. This kind of parody is declared completely lawful in fair-use doctrine; 2) weapon parody criticizes a third-party. It uses the copyrighted work only to convey a critical message, usually towards society. This kind of parody must respect the peculiar factors of fair use in Section 107, 17 U.S. Code (2016)[391].

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has shown through the affidavits of competent experts that photographers may earn additional income through the sale of 'art rendering' rights, namely, creating an artwork based on the photograph in a medium other than photography" *Koons*, 751 F, at 480. ″Defendants could take and sell photos of "String of Puppies", which would prejudice Rogers' potential market for the sale of the 'Puppies' notecards [...] It is obviously not implausible that another artist, who would be willing to purchase the rights from Rogers, would want to produce a sculpture like Rogers' photo and, with Koons' work extant, such market is reduced" *Koons*, 960 F.2da at 312.

[388] Apart from fair-use Doctrine, according to a part of the doctrine, appropriation art should always be allowed within the First Amendment of the Constitution. ″A First Amendment defense to infringement actions involving the "appropriation" of copyrighted images would guarantee the free dissemination of ideas conveyed through visual media″ Marlin H. SMITH, *Limits of Copyright: Property, Parody, and the Public Domain*, 42 Duke L.J. (1993), cit. p. 1233. Cfr. Patricia KRIEG *Copyright, Free Speech, and the Visual Arts, 93 Yale L. J.*, 1984: ″This Note will argue for an expansion of First Amendment interpretation to protect art works that appropriate visual images″ p. 1565

[389] ″*String of Puppies* is not an exact reproduction of Rogers's photograph, although the two works are undeniably very similar. In addition to the change in medium from photograph to sculpture, Koons made changes in the image. These include adding bright and non-realistic colour (for example, Koons's puppies are blue), placing daisies in the woman's hair, and altering the couple's facial expressions. While these changes are not sufficient to convince many viewers that no infringement has occurred, some critics and commentators have found the difference in the impression that a viewer forms from seeing each work to be dramatic. As one commentator explained, String of Puppies 'depicts a couple with clown faces painted in garish colours with daisies in their hair. They are embracing eight gigantic blue puppies sporting bulbous noses.... Gone is the charming and cuddly warmth of Rogers's photograph, and in its place is a garish, perhaps horrifying, perhaps hilarious image″ AMES cit. p. 1473 footnote 1 (citing A. GREENBERG, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 Cardozo Arts & Ent. L. Rev. 1, 26-27 (1992)).

[390] William M. LANDES, *Copyright, Borrowed images and appropriation art: an economic approach*, Chicago Law & Economic Working Paper No. 113, 12/5/2000, p. 15.

[391] On a different opinion, Richard A. POSNER, *When Is Parody Fair Use*, 21 J. Legal Stud. (1992), ″[The] objection, which has greatest force against my proposal to exclude from the fair use doctrine all parodies in which the parodied work is a weapon, whether of social, political, or aesthetic criticism, rather than a target, is that freedom of expression will be curtailed if the creation of parodies

> Within the weapon category, we observed a wide range of social and political expression, ranging from comments about race, gender and religion, to satirical commentary on the intellectual paucity of mass media, the commercialization of the Internet[392].

This distinction was useful in qualifying Jeff Koons's parody as unfair. The North American approach therefore is wont to draw a clear distinction between satire and parody; only the latter may be included in the fair-use defence. The Fair Use doctrine appears to be more benevolent with parodies but less so with satire. Parody inherently involves taking from a different work, while satire shall be capable of creating an original work without borrowing copyrighted material[393].

> Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing[394].

Legal scholars have criticized the courts' approach to parody under the fair use doctrine, as they failed to acknowledge the social and creative benefits of this technique. The critique was directed at the courts' tendency to determine the

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is burdened by the costs of transacting with and paying royalties to copyright holders. But, as we do not suppose that writers should be allowed to steal paper and pencils in order to reduce the cost of satire, neither is there a compelling reason to subsidize social criticism by allowing writers to use copyrighted materials without compensating the copyright holder [...] The point is not that parodies in which the parodied work is a weapon rather than a target lack social value [...] The point is that there is no obstruction to letting the market make the tradeoff. There is an obstruction when the parodied work is a target of the parodist's criticism, for it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work″ pp. 73-74.

[392] ERICKSON *Copyright* p. 9.

[393] This conservative approach appears outdated, as American commentators propose a broad approach that encompasses both parody and satire: "Other commentators drew on literary theory to demonstrate that parody and satire encompass a wide range of expressive practices, including dealings that ridicule the infringed material, or that ridicule other people, groups or events. Commentators also advanced normative arguments that were focused on perceived allocative inefficiencies and distributional problems: broad parody and satire fair dealing defences would lower the legal and transactional barriers that impede the satisfaction of the seemingly insatiable appetite that exists for amusing, but otherwise infringing, downstream uses of copyright-protected material. A broad approach would have the additional benefit of constraining copyright owners' power to veto downstream uses. Thus, a broad approach would enhance expressive freedoms. Thus, a broad approach would enhance expressive freedoms" Graeme W. AUSTIN, *EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire* (August 1, 2016). UNSW Law Journal, Volume 39(2), Victoria University of Wellington Legal Research Paper No. 4/2019.

[394] *Campbell v. Acuff-Rose Music*, Inc., 510 U.S. 569 (1994).

lawfulness of parodies based on the fourth statutory factor and the conjure up test. However, this trend changed a few years later when parodies were granted broader protection[395].

Art Rogers - Puppies - © Art Rogers - Point Royes

[395] "Several recent cases demonstrate that courts are willing to consider the economic effect of a parody on the original in determining fair use. At the same time, however, courts still devote considerable attention to the substantiality of the taking under the conjure up test. They also continue to emphasize such disparate elements as the commercial use of the parody, the good faith or reasonableness of the parodist and, explicitly or not, disapproval of the parody's content. At best, the results are inconsistent. At worst, inconsistency degenerates into judicial censorship" HECKE cit. p. 484.

Jeff Koons, String of Puppies, 1988, Polychromed wood, 42 X 62 X 31 ins. © 1988 Jeff Koons

3.5.3 A broader application of the parody defence

Over the years, a more extensive interpretation of parody was laid out by the U.S. courts, as in the case of 2 Live Crew:

> The ensuing case consisted of an extensive debate on the first and fourth factors of the fair use doctrine, namely, the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; and the effect of the use upon the potential market for the value of the copyrighted work[396].

"*Pretty Woman*" by popular American rapper 2 Live Crew was a musical parody of the well-known song "*Oh Pretty Woman*" by Roy Orbison. After the huge success achieved by the single, with nearly one million copies sold, the Acuff-Rose Music company sued 2 Live Crew for copyright infringement[397]. 2 Live Crew's parody was made possible within fair use by a new interpretation of the four statutory factors. In their analysis, we can achieve knowledge of the regulation of parody within US legislation:

> The right to parody is recognised under the *doctrine of fair use* under section 107 Copyright Act 1976. Under the fair use doctrine, factors to consider include the purpose and character (commercial/non-profit educational use), substantiality of the portion used, and the effect of the use upon the potential market. The case of *Campbell* established that the key test is to determine the *transformative nature* of the parodied work.

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[396] ″The parody version used the characteristic opening bass riff and the first line of the lyrics; thereafter, it departed markedly from the original. Although 2 Live Crew had offered to afford credit for owernship and authorship of the original song to Acuff-Rose and to pay a fee for its use, Acuff-Rose declined to grant permission. In its lawsuit, Acuff-Rose argued that the parody's lyrics were either inconsistent with good taste or would disparage the future value of its copyright- 2 Live Crew abandoned its plans to pay and claimed that its parody was a fair use of the original. A federal district court granted summary judgment for 2 Live Crew. The Sixth Circuit Court of Appeal reversed, granting judgment for Acuff-Rose. The Supreme Court held the Sixth Circuit erred when it concluded that the commercial nature of 2 Live Crew's rap parody rendered it presumably unfair. The Court remanded the case for consideration whether 2 Live Crew's parody harmed the market for a rap version of the original″, MENDIS and KRETSCHMER p. 37

[397] RÜTZ p. 294.

> Does it add "something new, with a further purpose or different character, altering the first with new expression, meaning or message"[398]?

Despite the boarder application of the parody defence within the fair-use doctrine has finally emerged, a few American courts have continued to adopt the conservative criteria, outlined above. In particular, the distinction between parody and satire has been repeatedly emphasized, with the broadest protection only being granted to the former; the so-called parody defence[399]. The doctrine disagrees with this tendency and outlines a different approach, which recalls the distinction between comic and satirical parodies (target and weapon parodies). The latter should be protected more broadly since it often provides substantial benefit to a democratic society[400].

> Viewed from our vantage point, the Supreme Court got it backward in Campbell. Under our test, it is political satires that should most obviously be considered prima facie fair, whereas it is less obvious that parodies and other types of works that function primarily as criticisms of the original should receive solicitous treatment. Political parodies […] are clearly political speech and play a central role in democratic self-governance. Parodies that make light of the original work, like book reviews other critical works, may also fall within the scope of fair use,

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[398] ERICKSON *Copyright* p. 20.

[399] As the US Supreme Court has stated in *Campbell v. Acuff-Rose Music*, the taking in case of weapon parody is harder to defend: "the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh" at 580. Similarly, in *LP v Penguin Books USA, Inc*: ″Consider the case of *Dr. Seuss Enterprises.* Writing under the pen name 'Dr. Juice', Alan Katz authored a book called *The Cat Not in the Hat! A Parody by Dr. Juice*, which, as the district court noted, mimicked the distinctive style of the Dr. Seuss family of works in rhyme, illustration, and packaging. The district court rejected Katz's claim that his book was a parody of Dr. Seuss's works that could copy from the Dr. Seuss books under the rubric of fair use. Instead, the court found Katz's book to be an unprotected satire that made 'no […] attempt to comment upon the text or themes of *The Cat in the Hat*' and other Dr. Seuss books. Indeed, said the Court of Appeals, the use of Dr. Seuss's work was 'pure shtick' intended merely to retell the story of O.J. Simpson's murder trial″ Abraham BELL and Gideon PARCHOMOVSKY *The Dual-Grant Theory of Fair Use* The University of Chicago Law Review, Vol. 83, No. 3 (Summer 2016), pp. 1051-1118: cit. p. 1102.

[400] This was also confirmed in a recent case law, *Katz v. Google Inc.* where the appropriation of protected material for satirical purpose has been considered protectable within Fair Use: "Courts often find such uses [of faithfully reproduced works] transformative by emphasizing the altered purpose or context of the work, as evidenced by the surrounding commentary or criticism" *Katz v. Google Inc*. 802 F.3d 1178 (2015). The court noted that all four statutory factors weigh in favor of fair use in this case. The use was considered uncommercial and transformative; moreover, the original work was already published and it did not possess creativity nature. The third and fourth factors were considered not important.

but their demand for the protection of fair use is less pressing. Many parodies, however, serve non-political purposes and thus do not provide as substantial a follow-on benefit to society[401].

3.5.4 The four statutory factors

The determination of fair use is carried out using four statutory factors that are expressly stated by law[402]. Nevertheless, scholars do not describe the list as being exhaustive[403], and parody is therefore deemed worthy of protection under fair use. This inclusion has been peacefully accepted thanks to a rich contribution from academia[404] and case law[405]. The resolution of any dispute regarding fair use proceeds via a set of factors that are outlined in copyright law as guidance to weigh up what kind of use is fair, or acceptable by society[406].

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[401] BELL PARCHOMOVSKY cit. p. 1102-1103.

[402] In addition to the four statutory factors, it is necessary to remember the equitable doctrine or equitable rule of reason, the overriding fair-use principle. ″The statute instructs that a fair use analysis ″include″ an analysis of four statutory factors, but it is not limited to them. With emerging technologies, it is important to remember that other fair-use principles play a role. These principles are (1) that fair use is to be used to adapt the law to technological change, (2) that the overarching fair-use principle is the "equitable rule of reason," and (3) that public benefits be considered. In addition, courts have made clear that the four factors are not exclusive, and that the overriding fair-use principle is an ″equitable rule of reason″ Mary E. MACDONALD, *How effective are "fair use best practices"? ...and some helpful fair use principles*, University of California Oakland, CA - Hot topics in copyright, June 27-30, 2010.

[403] 17 U.S. Code (2016), Section 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include". By considering the choice of the auxiliar ″shall″, the list must be interpreted as non-exhaustive. On the nature of the list, also AMES ″These statutory factors are not exclusive, as is apparent from the language of the section, and courts may consider other factors they believe are relevant to determining fair use″ cit. p. 1488. Notwithstanding, ″most courts structure their analysis of fair use claims around an evaluation of each factor in turn, rarely going beyond the ones enumerated″ AMES p. 1490.

[404] ″The fair-use doctrine sometimes permits the appropriation of parts of a copyrighted work, and we must consider whether parody might, always or sometimes, be fair use″, POSNER cit. p. 69.

[405] ″We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107″ *Acuff Rose Inc., v Campbell*, 510 US 569 (1994).

[406] Alfred Yen analysed the tendency of courts in finding fair use or infringements of parody; the courts used to consider the copyright's promotion of social welfare and the cost-benefit associated with parody: "Construction of such an analysis requires the assessment and comparison of three consequences associated with the fair use treatment of parody. First, the public would gain access to a popular form of humor. Second, the public would benefit from the critical perspectives of the parodist. Third, authors would lose the opportunity to commercially exploit their works through parody [..] A fourth consequence has been identified and consistently ignored [..] parodies sometimes harm an

3.5.4.1 The first factor

The purpose and character of use, including whether such use is of a commercial nature or for non-profit. Preliminarily focusing on the character of the use, the preamble of sec. 107 indicates a non-exclusive list of lawful uses. Any investigation of the character of use must evaluate the extension of the transformation. The first factor's analysis will focus on the realisation of a new work or at least on the conveying of a new message[407]:

> There must be real, substantial condensation of the materials, and intellectual labour and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work[408].

The incentive to create is also a factor to be considered, as is whether the parody can be justified by the goals of copyright; stimulating creation and culture. The more a transformative use carries social benefits, the less the final evaluation will take into account the subsequent factors (e.g., use for profit) [409].

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author's emotions or reputation. Authors understandably resent being ridiculed, especially through the twisting of their own work [..] Three plausible reasons for ignoring this harm come to mind. First, since copyright generally works through the provision of financial incentives it would seem that protecting the author's emotional loss bears no relationship to encouraging creative activity [..] Second, the first amendment may well require that copyright not stifle the expression of a critical opinion [..] Finally, one might contend that any harm suffered by authors at the hands of parodists is a fair consequence of their fame" YEN cit. p. 89 and footnote 56.

[407] OTTOLIA p. 186 nota 124.

[408] *Folsom v. Marsh*, 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841). This represents the initial court case that acknowledged the concept of Fair use. The court identified principles that form the basis of the current fair use doctrine, stating that: "In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work". Safeguarding the appropriation and the use of copyrighted work aims to foster and inspire individual expressions.

[409] A recent US court case introduced a different perspective on the transformative nature as the sole element capable of triggering the Fair Use doctrine. The criticism highlights that tendency to equate "transformative" with "fair" could jeopardize the exclusive right f the original author to make derivative works: In *Kienitz v. Sconnie Nation LLC,* 766 F.3d 756 (7th Cir. 2014) "We're skeptical [..] because asking exclusively whether something is “transformative” not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). [predecessors] do no explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights" para 758.

In Campbell case, the inquiry was focused on whether, and to what extent, the parody may be considered transformative, through new expression, new meaning or a new message:

> Based on a comparison of the two songs and the affidavits provided to the Court, it is apparent that 2 Live Crew has created a comic parody of ″Oh, Pretty Woman″. The theme, content and style of the new version are different than the original. [...] In sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them[410].

Finally, American case law embraced the instances of academia according to which the commercial character "does not necessarily negate a fair use determination"[411]. Thus, the previous orientation that considered any commercial use of protected works to be unlawful was overcome. Parody is thus considered to be a clear example of a transformative use that makes a positive contribution to society as a whole. The rap parody does not unfairly diminish the economic value of the original track. This was also confirmed by the Supreme Court in Acuff-Rose and, in particular, by Justice Souter, who addresses the transformative nature and the social benefits of parody:

> Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. […] Suffice it to say now that parody has an obvious claim to transformative value; as

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[410] *Acuff-Rose Music, Inc. v. Campbell* 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991). On the same opinion, the Supreme Court: ″2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair-use protection as transformative works″ *Acuff Rose Inc,* 510 US 569 (1994).

[411] *Campbell* 754 F. Supp (cit. 3 NIMMER, *Nimmer on Copyright,* § 13.05[A] at 13-70 (1990)).

> Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107[412].

Once judges have assessed the parodic nature of the work, further examination of its commercial purpose becomes unnecessary. In fact, the commercial aspect may be inherent to parody when it is considered a work of art. However, when parody takes the form of online communication, such scrutiny becomes entirely unnecessary. Memes, for instance, do not serve a commercial purpose but rather an informational and communicational one.

> The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.[413]

3.5.4.2 The second factor

US scholars and case law adopted two interpretations of the nature of a copyrighted work: 1) whether a work is published or unpublished; and 2) whether it is creative or informational. U.S. courts grant greater protection to unpublished works as the transformative use of an unpublished work may erode its potential market[414]. Greater protection is also reserved for creativity. In conservative approach, transformative uses that are based on another's creativity may negatively affect the overall evaluation of the fair-use doctrine[415]. In Campbell case, the second factor was

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[412] *Acuff Rose Inc*, 510 US 569 (1994)

[413] *Campbell*, 510 US 569 (1994) at 582.

[414] ″Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use″ *Harper & Row, Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 562 (1985).

[415] ″The scope of fair use is greater when informational type works, as opposed to more creative products, are involved [...] If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted″ *Universal City Studios, Inc. v. Sony Corp*., 659 F.2d 963, 972 (9th Cir. 1981).

found not to be determinative as direct reference to a well-known published creative work is unavoidable in any parody[416]:

> This [second] fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works[417].

Moreover, creativity could be taken into consideration only if this element is lacking in the parody:

> Parody routinely sets its sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire are deserving of substantial freedom" (*Berlin*, 329 F.2d at 545), it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia[418].

3.5.4.3 The third factor

The third factor is the amount and substantiality of the used portion in relation to the copyrighted work as a whole, with both qualitative and quantitative assessments of the portion that undergoes transformative use being required. In the

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[416] The second factor was favourable to plaintiff Acuff-Rose by the first instance court: "Since 'Oh, Pretty Woman' is a published work, with creative roots, this factor weighs in favour of the plaintiff" *Campbell* 754 F. Supp. 1150. The court of appeal, however, reconsiders in favor of the defendant: ″That the original song had long since been published is a factor which works in favour of the 2 Live Crew defendants. See *Harper & Row*, 471 U.S. at 564, 105 S.Ct. at 2232, where the Supreme Court declared that 'the scope of fair use is narrower with respect to unpublished works'″ *Campbell* 972 F. 2d 1429.

[417] *Acuff Rose Inc*, 510 US 569 (1994). More recently, on the same opinion, *Davis v. Gap, Inc*., 246 F.3d 152 (2d Cir. 2001): ″The second statutory factor, the nature of the copyrighted work is rarely found to be determinative″ at 175.

[418] *Acuff-Rose Music Inc v. R Campbell* 972 F. 2d 1429 (6th Circuit, 1992). The court also emphasized the transformative character of parody and satire which entails creativity in itself: "The court explained that 'transformative' for purposes of a fair use finding means a use that comments on or provides information about the original work rather than a use that 'transforms' an original work into a different format, as in the case of a 'derivative work'. In other words, a would-be fair use must have 'justification for the taking', such as that the fair user intends to comment on, or publish a parody of, the underlying work" Jonathan T. RUBENS *Copyrights in Cyberspace: Fair Use, Takedown Notices, and the Sixth Triennial Section 1201 Rulemaking*, The Business Lawyer, Vol. 72, No. 1 (WINTER 2016-2017), 265-274: cit. p. 267.

quantitative assessment, the greater the portion seized the less its use will be deemed permissible [419]. In the qualitative assessment, the investigation focuses on the appropriation of the "heart of" the copyrighted work[420].

> In some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm. A work whose overriding purpose and character is parodic and whose borrowing is slight in relation to its parody will be far less likely to cause cognizable harm than a work with little parodic content and much copying[421].

It is important to underline that the investigation of the third factor must always be related to the first factor (the purpose and character of use). This clarification may be of use at the heart of the parody defence, where the amount and substantiality of the portion used, in relation to the entire copyrighted work, is determinative. The "conjure up test" seems to exclude an assessment of the third factor in the case of parody, which, here, only responds to the first factor. A few criticisms of this solution have been raised[422].

In Campbell case, the so-called "conjure up test"[423] was carried out for the assessment of the parodic transformation[424]. The third factor received more attention

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[419] ″The larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use″ LEVAL p. 1122

[420] ″A finding that the borrower copied the "heart of" or the "essence of" a work militates against finding fair use″ AMES p. 1492.

[421] *Campbell* 510 U.S. at 593.

[422] ″The parodist should not be allowed to take so large a fraction (somehow computed) of the copyrighted features of the original work as to make the parody a substitute for that work. Otherwise, he could reproduce an entire copyrighted work with impunity simply by giving the characters funny names or having them speak in comical accents. By doing this he would entice the silly or vulgar members of the audience of the original work-and they may be a substantial fraction of the potential audience […] The parodist should be entitled to take from the original no more than is necessary to make the parody effective. I admit this is a vague criterion″ POSNER cit. p. 71-72.

[423] ″Parody, in order to achieve its rhetorical effect, by necessity appropriates those elements of a work necessary to conjure up the original in the minds of its audience, which under many legal definitions of copyright can constitute an infringement. While parody may have a clear public interest justification as political speech, its potential interference with the economic exploitation of creativity and the fundamental economic rationale for intellectual property right, is a cause for concern″, ERICKSON, KRETSCHMER and MENDIS cit. p. 4.

[424] ″When parody takes aim at a particular original work, the parody must be able to 'conjure up' at

from the court, which considered the parody consistent with its purpose[425]. In addition, it was pointed out that musical parody requires, by its very nature, a special and greater margin of freedom in borrowing elements of copyrighted work[426]:

> In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose[427].

The Supreme Court found 2 Live Crew's parody[428] to be effectively comic and considered the use of relevant elements to be legitimate as a function of parodic transformative use[429]. A judgment on permissible appropriation must be evaluated only in such functional terms[430]:

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least enough of that original to make the object of its critical wit recognizable″ *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994).

[425] "No one disputes that 2 Live Crew copied 'Oh, Pretty Woman'. But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used. It is a settled aspect of copyright law that parodists have the right to conjure up the object of the parody" *Campbell* 754 F. Supp. 1150.

[426] In *Fisher v. Dees,* the Court acknowledged the commercial nature of the parodic song, nonetheless the extent of taking was minimal and there was no economic harm to the rightsholders. These factors favored the lawfulness of the parody. "Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This 'special need for accuracy', provides some license for «closer» parody. To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in this original expression" *Fisher v. Dees* 794 F.2d 432 (9th Cir. 1986).

[427] *Campbell* 754 F. Supp. 1150.

[428] ″As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below″, *Acuff Rose Inc*, 510 US 569 (1994). On this point, Alvin DEUTSCH, *The Piracy of Parody*, Entertainment and Sports Lawyer, Vol. 12, No. 3, 1994, ″The U.S. Supreme Court, in its first decision in the field, 17 has ostensibly created a *démarche* by holding that while *2 Live Crew* created a parody, the Court was required to remand the case for further review to determine whether the parodic version exceeded the third and fourth factors of fair use″ cit. p. 18.

[429] *Acuff Rose Inc*, 510 US 569 (1994): ″Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use [...] We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled 2 Live Crew's use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken

> The extent of permissible copying varies with the purpose and character of the use. [...] Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. 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[431].

3.5.4.4 The fourth factor

The effect of transformative use upon the potential market value of the copyrighted work is the fourth factor, and, before Campbell vs. Acuss Rose, it was considered central to the evaluation of fair use[432]. This factor states that potential damage subsists whenever the original work is debased, if the use made by the third party unduly prejudices the interests of the rightsholder:

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was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through″.

[430] ″The Sixth Circuit rejected the district court's view of prior decisions that parody is consistent with a 'taking of the heart' of the original″ Alvin DEUTSCH, *The Piracy of Parody*, Entertainment and Sports Lawyer, Vol. 12, No. 3, 1994, cit. p. 17. Court of Appeal maintains a more conservative stance on this third factor "The song is built upon the recognizable bass or guitar riff of the original by repeating that riff eight times. Acuff-Rose's musicologist stated that the riff was probably sampled from the original, that is, simply recorded verbatim and then mixed with 2 Live Crew's additions [...] taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original. The facts as developed under this factor, ″the amount and substantiality of the portion used in relation to the copyrighted work as a whole″ cannot be used in any way to support a finding of fair use" *Campbell* 972 F. 2d 1429.

[431] *Acuff Rose Inc*, 510 US 569 (1994): ″We think the Court of Appeals correctly suggested that "no more was taken than necessary" (972 F. 2d, at 1438), but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's heart″.

[432] "The fourth factor is the "most important, and indeed, central fair use factor" cit. *Stewart v. Abend, 495 U.S. 207 (1990)*at 1769 (quoting David NIMMER, 3 *Nimmer on Copyright* § 13.05[A], at 13-81); *Harper & Row, Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 562 (1985). In *Harper & Row* "the Court again emphasized the utilitarian nature of copyright and the importance of the economic harm prong of the fair use test. [..] the Court stressed that the commercial nature of a use is significant. It defined commercial use [..] as a taking in which 'the user stands to profit from exploitation of the copyrighted material without paying the customary price'" HECKE p. 473. In *Tin Pan Apple, Inc. v. Miller Brewing Co.* the court adopted a more restrictive approach to the fourth factor. The court indicated that "a profit motive *precludes* a finding of fair use" *Ivi* p. 481.

> Potential harm has been interpreted quite broadly, to include harm to "an immediate or a delayed market and includes harm to derivative works (*Cable/Home Communication Corp. v. Network Prods., Inc*., 902 F.2d 829, 845 (11th Cir. 1990))", such as the copyright owner's right to license the use of a short story for the purpose of making a movie from it[433].

The potential harm may be shaped as follows:

- Actual present harm to the value of the copyrighted work. From this first point of view, American case law has considered some meaningful likelihood of future harm to be relevant to the application of fair use[434].
- Damage to the market for potential derivative uses. American case law holds that effective damage can only be imparted on the derivative market that a rightsholder may develop, or permit someone to develop[435].

The American intervention focused on the commercial and non-commercial nature of parody, which are relevant for the burden of proof[436]. If the secondary work

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[433] AMES p. 1493. In the past, the courts followed a conservative approach where they deemed a parody as unlawful if it could potentially serve as substitute or reduce the potential market for the original work. However, they changed mind after *Campbell*, when the first factor became the most relevant one. Notwithstanding, some examples can contradict this conservative approach. For instance, movies like *Scary Movie*, a horror comedy that includes numerous parodic transformations of serious horror films, demonstrate otherwise. Despite both products competing in the same movie entertainment market, *Scary Movie* did not diminish the potential market for the referenced horror movies. Instead, it contributed to their popularity and increased their appeal. On contrary opinion, Yen concerns on availability of parodies without generous fair use treatment: "If the parody is successful, the author's reputation does not grow. Instead, the author and his work become the target of the parodist's humor. This result makes it highly unlikely that an author will sell parody rights to his work at any price. As an initial matter, parodists who inquire about the availability of parody rights generally meet the reply that the rights are simply not for sale. Furthermore, authors who sue parodists often seem as concerned with stopping unflattering references to their work as they are with any financial loss. The general refusal of authors to sell their parody rights makes it highly likely that parodies would be rare without fair use treatment", YEN cit. p. 90.

[434] ″Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists″ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

[435] ″The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop″ *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994). ″A movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights″ John Henry MERRYMAN, Stephen K. URICE, Albert E. ELSEN, *Law, Ethics And The Visual Arts*, 5th Edition, Kluwer Law International, 2007, cit. p. 563.

[436] ″The focus here is on whether defendants are offering a market substitute for the original. In

is commercial, the harm to the market of the original can simply be presumed; the burden of proving fair use falls on the user[437]. If the secondary work is non-commercial in nature, the burden of proof falls on the rightsholder of the reference work[438].

> Only the owner of copyright in a work has the right to prepare, or to authorize someone else to create, an adaptation of that work. [...] In any case where a copyrighted work is used without the permission of the copyright owner, copyright protection will not extend [...] The unauthorized adaptation of a work may constitute copyright infringement[439].

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considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work″ *Nxivm Corporation v. The Ross Institute*, 364 F. 3d 471 (2004).

[437] This analysis has been criticized by a few legal scholars who consider that copyright law might not be always the best way to rely on different interests: "At some level, the benefits of uncompensated uses can be taken as a given. [..] Furthermore, derivative creators would be wealthier if they did not have to factor licensing costs into their bottom lines. More useful, it is suggested, is an analysis that evaluates the reason for the dealing in the light of the prerogatives of the copyright owner – that is, a contextualised analysis that engages with both the needs of users and the rights of the copyright owner and the reasons why we sometimes cannot rely on the copyright system to navigate between these interests". AUSTIN p. 713.

[438] ″The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit. Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful or that, if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated″ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) 450-451.

[439] Circular 14-0720, United States Copyright Office, *Copyright in Derivative Works and Compilations*, cit. p. 2. *See* also U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 101 (3d ed. 2021) ″Copyright protection provides exclusive rights to the author and/or owner of the copyrighted work. One of those exclusive rights is the right to create derivative works. Generally, if the author of the derivative work is not the copyright owner of the pre-existing work, and the pre-existing work is still under copyright protection, the author of the derivative work may not use the pre-existing copyrighted work as the basis for a new work, unless a copyright exception applies″ cit. 801.8. Those theories, therefore, do not accept parody as exception to the exclusive right.

2 Live Crew's parody was allowed to fall under Section 107 - Fair Use. Thus, both the commercial character (the first statutory factor) and harm to the potential market (the fourth statutory factor) were not taken into consideration:

> The case was significant as dicta in previous Supreme Court decisions had led the lower courts to rule against commercial use and focus extensively on the fourth factor dealing with potential market impact. In Campbell, the Supreme Court offered a different direction[440].

The infringement occurs when the secondary work creates confusion and deceives consumers[441]. For this reason, a creative parody such as *Pretty Woman*, even if considered a commercial secondary work, never usurps the original's potential market, nor can it replace it[442]. The Supreme Court ruled that no direct harm was inflicted on the potential market for *Pretty Woman*: since 2 Live Crew's parody targets a different market[443], and does not stand as a substitute[444]. Justice Souter rejected any possible harm to the derivative market of the copyrighted work:

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[440] MENDIS and KRETSCHMER p. 39. During the conservative approach, the courts and the legal scholars emphasized the relevance of "market substitution test" for parody. When assessing the economic loss or competition, the relevant question revolves around whether a parody serves as a market substitute. Indeed, mere imitation could infringe copyright law and be punished as plagiarism. The "market substitution test" has been used to assess both the potential market for derivative works based on the original and the parodist's liability for reputational damage: "By focusing on the potential for market substitution, courts will be better able to balance the interests of parodists, authors and society. At the same time, they will bring much-needed consistency to parody case law" HECKE cit. p. 494.

[441] AMES p. 1475. ″Appropriation of commercial images that are subject to trademark protection. Artists who choose to work with imagery culled from commercial sources can quite easily end up using trademarked images, often to the displeasure of the owner of the trademark. For instance, Andy Warhol experienced difficulties because of his use of the trademarked Campbell's soup can. Although Campbell's had made no objection to Warhol's use of the image under very limited circumstances, when Warhol's work was reproduced in large quantities to publicize a Warhol exhibition, Campbell's wrote a letter of complaint. See John Carlin, Culture Vultures: Artistic Appropriation and Intellectual Property Law, 13 Colum.-VLA J.L. & Arts 103, 130 n. 108 (1988)″ AMES p. 1475 nota 12.

[442] ″Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable″ *Fisher v. Dees* 794 F.2d 432 (9th Cir. 1986).

[443] ″Here Souter J stated that parody would not act as a substitute for the original because the two works appealed to two totally different markets. Therefore the Supreme Court held that there was no copyright infringement″ Sangwani Patrick NG'AMBI, *Parody: A defence for the Defenceless Satirist*, 41 Zam. L.J. 1 (2010), p. 12.

[444] *Acuff Rose Inc*, 510 US 569 (1994): ″Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it [...] This is so because the parody and the original usually serve different

> The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask [...] for criticism, but they only want praise". [...] Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of "Oh, Pretty Woman", the court erred[445].

3.6 Conclusions

The analysis of the Court of Justice in Deckmyn and the Fair Use doctrine have shown new approaches and legal principles of copyright law to parody which have influenced the settle of disputes related to such technique[446]. The court may judge both on quantity and quality of the used material. The determination of

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market functions». RÜTZ: ″Certain types of market harm are not cognisable under copyright law: if a critical review of a theatre piece, whether as parody or not, kills the demand for the original, it does not produce a harm cognisable under the copyright act. The test has to focus on market substitution, on whether the second work will displace sales of the first work. Potentially remediable displacement will constitute infringement, irremediable disparagement will not″ pp. 295-296.

[445] *Acuff Rose Inc*, 510 US 569 (1994). The new direction of jurisprudence on parody is summarized by Neil Weinstock NETANEL, *Making Sense of Fair Use*, in Lewis & Clark Law Review, 2011: ″In case after case decided since *Campbell*, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different purpose than that for which the copyrighted work was created. It can help if the defendant modifies or adds new expressive form or content as well, but different expressive purpose, not new expressive content, is almost always the key [...] a startling number of recent cases have held that the use was transformative when the defendant copied the plaintiff's work in its entirety without modification, but for a different expressive purpose″ cit. p. 747 e 748.

[446] Recently, a broader protection for parody has been affirmed within Fair Use doctrine: ″On June 7, 2012, Judge Cudahy [...] affirmed the ruling [...] in granting South Park's motion to dismiss before even beginning the discovery process. [...] Thanks to the ruling of *Brownmark Films v. Comedy Partners*, future defendants will not have to endure expensive litigation costs after the discovery stage in order to defend their fair use, thus encouraging the creative expression the public gains from parodies. The *Brownmark Films v. Comedy Partners* ruling provides the protection needed to those who wish to tackle the challenge of creating such parodies in the future″ Kristen CHIGER, *South Park & the Law,* (September 19, 2012). University of Texas Review of Entertainment & Sports Law, Vol. 14, Fall 2012, cit. p. 12.

substantial similarity has made most of the time by the courts that apply the "ordinary observer test"[447], without any reference to experts on art and in literary.

In Giacometti v. Baldessari, the query about lawfulness of Baldessarri's appropriative artwork (Giacometti Variations) was held through a clear reference to parody defence within Fair Use. This operation questions the nature of the use of the work and investigates the extension of the transformation; only those works that parasitically replace the reference work are considered unlawful. The U.S. case law that arose after the Acuff-Rose v. Campbell, which held that the transformative element should be taken into consideration for a judgment consistent with parody technique[448], is thus reproposed within the Italian court case. The Italian judges focused their attention on the transformative use made by Baldessari, and agree that he had demonstrated his intent to make a "parodic quotation"[449] of Giacometti's female sculptures in an ironic and sarcastic key.

Another recent Italian court case held in the light of Deckmyn in order to apply parody exception with regard to a fictional character (″Rango″) accused of plagiarism. Although the Court found there was no plagiarism, since Rango was considered as homage to western movies and to Clint Eastwood, the defendant's request to the application of parody exception was rejected, since the fictional character did not unveil any humoristic character. These two court cases are significant because both authors made a homage, but only Baldessarri obtained the recognition as a parody, even if the American artist is not famous to being a comedian.

The impact of U.S. doctrine on the regulation of parody is also confirmed by the explicit reference some European courts make to fair use in legal disputes. The judges referred to the fair-use doctrine and the four statutory factors during Acuff-

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[447] *See* BERNSTEIN: "the question of whether the allegedly infringing work would be recognizable to the ordinary observer as having been appropriated from a copyrighted source" cit. p. 6.

[448] "The phrase 'transformative use' has surged into prominence in fair use jurisprudence ever since the US Supreme Court in 1994 embraced transformativeness as the cynosure of fair use" D. TAN p. 330.

[449] *See* Trib. Milano ord. 13/07/2011 - Foundation Giacometti v. Fondazione Prada, Prada Spa and John Baldessari. The Italian court appeared to contradict the doctrine which typically permits the use of protected elements only when the transformation has the character of "target" parody rather than "weapon". A further investigation on the treatment of parodies has been presented in MENDIS and KRETSCHMER, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 2013.

Rose v. Campbell. In particular, the transformative character of parody becomes the most important to take into consideration in its legal recognition, and fair-use disputes in general[450]. Accordingly, legal scholars have voiced criticism on the rigid application of the European three-step test, particularly in cases where two conflicting rights must be balanced, such as copyright and freedom of expression. Furthermore, the optional and restricted list of exceptions and limitations outlined in the InfoSoc Directive 2001/29/EC may not adequately cover innovative online communications. It must also be mentioned that scholars have made a proposal to adopt a general clause, such as fair use, within European Law. The introduction of the Fair Use doctrine into EU law could offer a more comprehensive approach[451].

> In sum, we have seen that, when courts find that a work is a parody, generally, none of the fair use factors has much impact. The first factor is typically used to determine whether a parody exists, and an affirmative determination informs all of the other factors to such a large degree that they become irrelevant. Factors two, three, and four all depend upon a determination of the first factor[452].

[450] Over the years, the threshold requirements for parody have evolved. Even before *Campbell* (1994), legal scholars have established that parody must both criticize the original work and not act as a substitute. In such instances, Fair use can be seen as an expression of social benefit and a means to preserve copyright incentives: "The threshold requirement that a parody must criticize the underlying original makes sure that parody's Fair use treatment reaps a unique and positive benefit for the public in return for any possible harm to copyright's system of financial incentives. Similarly, the requirement that parodies not serve as substitutes for originals ensures that those incentives are not seriously harmed by the Fair use doctrine. In situations where both of these conditions have been met, it seems clear that society has much to gain and little to lose from granting parodists special permission to borrow from copyrighted works. Thus, courts allow parodists whose works pass the threshold conditions to borrow whatever amount is 'reasonably necessary to conjure up the original'" YEN (1991) p. 94.

[451] *See* P. Bernt HUGENHOLTZ, *Law and Technology Fair Use in Europe*, in Communication of the ACM, May 2013, vol 56, no. 5; P. Bernt HUGENHOLTZ, M. SENFTLEBEN, *Fair Use in Europe: In Search of Flexibilities*, 2012, Amsterdam Law School Research Paper No. 2012-39, Institute for Information Law Research Paper No. 2012-33; Dirk VOORHOOF, *Freedom of expression and the right to information: Implications for copyright*, Research Handbook on Human Rights and Intellectual Property. In Research handbooks (2015).

[452] SIMON cit. p. 830

Chapter 4
Freedom of Parody

4.1 Introduction

Freedom of expression provides protection to the various manifestations of comic speech including parody, which has long-reaching historical origins, with all of the manifestations being united by the shared intention of making someone laugh; a human need that guarantees the progress of society and establishes the extent of a democracy. Parody can thus be seen as an artist exercising their right to freedom of expression, which is a natural right that has constitutional relevance[453]. In general, comedy is one of the most effective ways through which a person can express their opinions. In this sense, parody is often linked to its specific function of satire. The lawfulness of parody in this field is linked to the recognition of freedom of expression within the legal system, itself defined as the cornerstone of democratic order[454]. Indeed, this freedom is automatically limited or withdrawn whenever an involution of the democratic system occurs, and, consequently, the authors of parodies may become victims of dictatorial governments that control free speech through censorship[455]. Animosity towards parody is thus not just limited to the property rights to intellectual works (a legal dispute between private subjects, the authors), as was indicated in the previous chapter on copyright law, but is confirmed in the struggle, between private individuals and authorities, to control freedom of expression.

Although so rooted in time, this form of communication has only recently been granted citizenship in the legal debate. According to legal scholars and case

[453] ″If the right to free speech is a natural right, then expressing oneself through parodies is an exercise of this right″, Amy LAI, *The Natural Right to Parody: Assessing the (Potential) Parody/Satire Dichotomies in American and Canadian Copyright Laws*, 35 Windsor Yearbook of Access to Justice, 35(1): 69-98, cit. p. 73.

[454] The definition «cornerstone of the democratic order» is taken from Corte Costituzionale Italiana, 2 aprile 1969, n. 84, in Giur. Cost., 1969, p. 1175.

[455] LAI offers a concrete example of such animosity: ″In Nazi Germany, Werner Finck, a famous cabaret actor and author with a gift for parody and satire, was imprisoned in a concentration camp for six weeks for attempting to make party and State institutions ridiculous″ cit. p. 74.

law, parody can satisfy the collective need to mock the potentate, using laughter as a bloodless weapon. Moreover, the exercise of communication through *vis comica* encourages debate on society as a whole, prevents physical violence and contends with mainstream speech[456]. The need to grant protection to this form of expression creates the new right to parody, which stems from the natural right of freedom of expression[457].

The recognition of a new right is certainly brought about by careful consideration on the part of legal scholars and case law. The latter, in particular, has recently considered parody as a means of manifesting thought and as a mass-produced good that is present in the most varied of contexts in several legal controversies. As was illustrated in the Deckmyn ruling, the CJ had the delicate task of elaborating a notion of parody within EU law; the judges identified the legal limits to the exercise of parody, and weighed up opposing interests in order to strike a fair balance, since parody may, by its very nature, conflict with other fundamental rights.

Freedom of parody has also been associated with the development of culture and the freedom of all artistic forms, which guarantees two additional constitutional protections. This clear evidence of legal favouritism towards the freedom of parody adopts a broad notion of culture that is not confined to an artistic elite. While it seems easier to justify the application of freedom of culture, since the protection of a broad notion of parody certainly embraces folklore and popular culture, of which parody is often a product, it is certainly more difficult to justify the applicability of freedom of art. Indeed, some authors doubt that parody is automatically artistic, and deserving of the relevant protection[458]. In any case, a screening of artistic quality does not seem to fall within the remit of the Courts[459]. Thus, the reference to artistic creation is not intended to only give prominence to erudite parody as a similar

[456] Giovanni BOGGERO, *La satira come libertà ad "autonomia ridotta" nello Stato costituzionale dei doveri*, in *Nomos Le attualità nel diritto*, 1, 2020, p. 6.

[457] Amy LAI, *The Right to Parody: Comparative Analysis of Copyright and Free Speech*, Cambridge University Press, Cambridge 2019: "The right to parody, like the right to free speech, therefore is a natural right" cit. p. 32.

[458] The copyright dispute values the artistic quality giving a qualitative judgement of a work of art, the connected exclusive rights and the connected crime (such as plagiarism).

[459] Cristiana VIGLI, *Il diritto di satira tra licenza e censura*, in Dir. inf., 1992, p. 69.

decision would restrict protection to professionals, lending itself to an elitist conception of art that favours privileged categories, and, ultimately, this decision would counteract the main objective of parody; mockery of the potentate[460]. The clear risk of such an interpretation is that of only recognizing the protection of successful artists, thus excluding those who do not belong to the professional categories (e.g. cartoonists, stand-up comedians etc.). This type of protection would deny freedom of humorous thought, which, quite to the contrary, belongs to everyone[461]. Thus, in a democratic society, artistic freedom must be interpreted as a fundamental opportunity to create and distribute works of art, and to take part in public exchanges of opinion, ideas and content. The effective exercising of the right grants protection, via absolute individual freedom to practice artistic expression[462].

The protection of parody may also link freedom of expression to the principle of equality, since the need to mock belongs to everyone. This connection is particularly significant in today's society, where parody is becoming part and parcel of online communication between users. Indeed, via parodic transformation, everyone can mock contemporary customs and downplay their importance through irony. In this sense, parody is also suitable for eliminating limitations to the principle of equality, since it is functional in achieving the objectives set forth in this principle[463].

According to legal scholars and case law, parody represents the exercising of freedom of expression both in a functional manner (the affirmation of the democratic state) and in an individualistic one (as human rights recognised for everyone)[464]. However, some legal scholars criticize the creation of this new right[465], and they see

[460] BALESTRA pp. 14-17.

[461] Cfr. Michele POLVANI, *La diffamazione a mezzo stampa*, CEDAM, Padova, 1998, cit. p. 217.

[462] Cristiana VIGLI, *Il diritto di satira tra licenza e censura*, in Dir. inf., 1992, p. 70.

[463] *See* MANTOVANI cit. p. 309-310; Michele POLVANI, *La diffamazione a mezzo stampa*, CEDAM, Padova, 1998, p. 217.

[464] The Italian Supreme Court has intervened on the relationship between satire and freedom of expression in several case laws: Cass. Civ. Sez. III, sent. 8/11/2007, n. 23314 *Forattini c. Caselli*.; Cass. civ., sez. III, 28/11/2008, sent. n. 28411/08.

[465] *See* Note a Trib. Roma, 13 febbraio 1992, Carrisi c. Arbore: Massimo DOGLIOTTI, *Al Bano, Romina, Arbore, D'Agostino: satira, privacy e mass media,* in Diritto di famiglia e delle persone, 1994,

this tendency as a mistake, the only result of which would be to cause the proliferation of new personal rights. They see the right to parody to be unnecessary as it is already included within freedom of expression. To fragment these rights would benefit neither free humorous expression nor the other personal rights connected to parody, and, consequently, the new right (to parody) would simply become an unnecessary duplication[466].

4.2 European Convention of Human Rights

The recognition of freedom of expression is found throughout the major international conventions; its inclusion testifies to the fundamental nature of the right and its pregnant significance to democratic society. The European Convention of Human Rights guarantees the right to freedom of expression in article 10(1)[467]:

> The Court has consistently treated freedom of expression as a fundamental human right, emphasising its importance not only directly, but also as a core underpinning of democracy and other human rights. This is reflected in the quote above about freedom of expression being an essential foundation of a democratic society[468].

Article 10 intends to protect separate interests; on the one hand, to promote the widest concept of freedom of expression to everyone, and, on the other, to guarantee complete information through participation in a democratic state. One of the objectives of freedom of expression is the right to communicate. In this sense, the ability to laugh and to make people laugh fits perfectly into the exercising of such a right, which contributes to the progress of society, especially for our current ever-

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p. 171; Luigi WEISS, *Diritto costituzionale di satira o diritto di pettegolezzo?* in Dir. famiglia, 1994, 181; Ettore LOPEZ, *Sui limiti di liceità del diritto di satira*, in Dir. fam., 1994.

[466] *See* Trib. Roma, 23 maggio 1988, in Dir. inf. 1989, p. 919, consequently, denied such right.

[467] Art. 10(1) ″Everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers″.

[468] Toby MENDEL *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Executive Director Centre for Law and Democracy, cit. p. 5.

more-automated society. The fact that parody may be seen as a degrading form of communication does not exclude it from protection. Parody has been therefore recognised as an "irrepressible human need"[469].

> International courts have agreed in principle that freedom of expression must be guaranteed not only for the dissemination of expressions, information, and ideas that are favourably received or considered inoffensive or indifferent, but also for those that shock, disturb, or offend the state or any members of the population[470].

The initial section of Article 10 outlines the scope of freedom of expression, which, as per the Court's interpretation, encompasses not only the dissemination of information and ideas, but also expressions that might be offensive or provocative, such as parodies or satirical works[471].

In this sense, there is a dual approach; freedom of expression has been described as a negative freedom, linked to the relationship between the individual and the State, while considerable attention must also be paid to the correct exercise of the freedom, in order to prevent harm and discrimination, as the law must protect the personal rights of the dignity, decorum and reputation of the recipient of the message. The correct and fair exercise of freedom of expression must thus meet a few limitations in its exercise, in order to respect fundamental rights with the same relevance in a democratic state[472].

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[469] Trib. Napoli 27 maggio 1908, *D'annunzio c. Scarpetta*, in Giur. It. 1909 II. 1. The Tribunal made a decision concerning whether the parodic trasformation, *Il figlio di Iorio* by Scarpetta, was a crime of plagiarism of *La figlia di Iorio* by Gabriele D'annunzio.

[470] LAI p. 27.

[471] *See* ECHR *Handyside v. United Kingdom* (Application no. 5493/72) 7 December 1976: "Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society. This means, amongst other things, that every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued" para 49.

[472] This is also confirmed by another International Treaty, ICCPR (International Covenant on Civil and Political Rights) at art. 19, clause 3: ″The exercise of the rights provided for [freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals″.

The exploration of freedom of expression in relation to parody begins with an examination of significant European court cases. I have discussed *Deckmyn* C-201/13 case in detail in the previous chapter and will now analyse other cases. The judges of Europe's two highest courts - the Court of Justice and the Court of Human Rights - have been actively involved and have become central figures in recent legal assessments of parody and comedy in general. The interests in parody and comedy involve constitutional issues of freedom of expression. European jurisprudence has established the public importance of recognising a degree of freedom to laugh and to make others laugh in a democratic society. In this legislative context, there's a shift towards a more tangible protection of parody. It is no longer merely a work of art protected by copyright law, but the practical exercise of a right holding constitutional importance. The previous emphasis on the author of satirical or parodic works, as discussed in the third chapter, has given way to a broader assessment of the intended audience of the parody. This shift was confirmed following *Deckmyn* judgment (C-201/13), in which the Court of Justice rightly emphasised the need to consider the effect of the parody on the audience when balancing conflicting interests. In particular, attention should be paid to potential offence and discrimination within the work.

The European Court of Human Rights has had the occasion to consider a number of disputes connected to the freedom of humorous artistic expression. An exhaustive case-law list has recently been presented in an article in which the authors identify a corpus of ten ECHR cases; each involved an accusation of hate speech in an expression that was described as evoking irony, humour and satire[473]. In this

[473] ″Most of the cases listed above comply with the usual definition of hate speech as abusive expression targeting protected characteristics such as ethnicity, religion or sexual orientation″, A. GODIOLI, J. YOUNG, B.M. FIORI, *Laughing Matters: Humor, Free Speech and Hate Speech at the European Court of Human Rights*, Int J Semiot Law 35, 2241–2265 (2022), p. 2246. The identified cases are the follow: 1) *Seurot v. France* (Application no. 57383/00, 18 May 2004). 2) *Leroy v. France* (Application No 36109/03, 2 October 2008). 3) *Féret v. Belgium* (Application No 15615/07, 16 July 2009). 4) *M'Bala M'Bala v. France* (Application no. 25239/13, 20 October 2015). 5) *Sousa Goucha v. Portugal* (Application no. 70434/12, 22 March 2016). 6) *Le Pen v. France* (Application No 45416/16, 28 February 2017). 7) *Kaboğlu and Oran v. Turkey* (Applications no. 1759/08, 50,766/10 and 50,782/10, 30 October 2018). 8) *Z.B. v. France* (Application No 46883/15, 2 September 2021). 9) *Bonnet v. France* (Application No 35364/19, 25 January 2022). 10) *Ogurtsov v. Russia* (Application No 61449/19, communicated on 9 March 2021). Another case law which concerns humor and hate speech is *Eon v. France* (Application No. 26118/10, 14 March 2013).

sense, the Strasburg Court has analysed, on several occasions, a few of the characteristics of satirical expression:

> The Court has observed on several occasions that satire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate[474].

Reference to the term "satire" (one of the functions of parody, as I underlined in the first chapter) makes it clear how weighty humorous speech is within society. The peculiarity of satirical function, which is proof of the extent of democracy, is that it should respect the objectives of art. 10 (1) and, at the same time, the limits imposed on the exercise of such freedom (2):

> Accordingly, any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care[475].

The ECHR cited a further other two terms in the ruling, "exaggeration" and "distortion of reality", which are described as inherent features of satirical expression. As was pointed out in the first chapter, satire always aims to provoke shock and aspires to achieve transgressive reflection and the overturning of values and reality. If such features are essential to the nature of satire, and more generally to the nature of any humorous speech, there is the risk that they will clash with other fundamental rights (e.g. reputation, honour, etc.), which are protected under the same art. 10 (2). Article 10 (2) asserts that freedom of expression is not absolute, and constraints are applied to its correct exercise. When the Court assesses these constraints, it must take into account three factors: 1) whether the restriction is clearly stipulated by law, 2) whether the restriction serves a valid objective, and 3) whether the restriction is indispensable in a democratic society. If deemed necessary, the limitation must adhere to the principle of proportionality.

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[474] *Eon v. France,* 14 March 2013, Application No. 26118/10, para 60; *Ziembinski v. Poland (No. 2)*, 5 July 2016, App. No. 1799/07, para 60; *Vereinigung Bildender Künstler v. Austria* 25 January 2007 (Application no. 68354/01).

[475] *Eon v. France,* 14 March 2013, Application No. 26118/10, para 60.

This is the so-called "triple test" which should reduce the interferences with right to expression and information[476]. The ECHR grants domestic margin of appreciation to MS in order to evaluate the lawfulness of the expression[477].

In citing this article, I may paraphrase that the exercise of humorous expression: "since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society"[478]. My legal analysis may then consider these features to be the alarm bells for the lawfulness of humorous expression.

4.2.1 Application of art. 10 ECHR

The inherent features mentioned above were found to be illegal by the ECHR in a famous case; M'bala M'bala v. France[479]. The comedian Dieudonné M'Bala M'Bala was convicted by the French court of first instant in Paris to a fine for public insult against Jews. The comedian filed an application to the ECHR and argued that the French judgment violated his right to freedom of expression under Article 10 of the Convention. The French Government requested that the ECHR found the application inadmissible pursuant to art. 17 (prohibition of abuse of rights) of the Convention[480]. The Strasburg Court judged that the applicant's defence was to deflect

[476] The "triple test" must be distinguished by the "three-step test" I have described in the section dedicated to InfoSoc Directive 2001/29/EC on copyright law. "The dynamic interpretation by the European Court of what is to be considered 'necessary' in a democratic society' together eith the limitation of the 'margi of appreciation' by the Member State has been crucial for the practical and effective impact of Article 10 on the protection of freedom of expression in Europe" VOORHOOF cit. p. 333.

[477] Paolo LOBBA, *Il negazionismo come abuso della libertà di espressione: la giurisprudenza della Corte di Strasburgo,* Rivista italiana di diritto e procedura penale, Vol. 57, Nº 4, 2014, 1815-1853: cit. p. 1823. The legal scholar underlines how the ECHR has outlined two indicators of human dignity infringement: 1) an intention to revise history and diminish criminal accountability; and 2) the purpose to minimize the gravity of the tragic occurrence, p. 1842.

[478] Art. 10 (2) ECHR.

[479] ″In December 2008, French comedian Dieudonné M'Bala M'Bala hosted a show in which he invited Robert Faurisson, an academic who had denied the existence of gas chambers in concentration camps. At the end of the show, M'Bala M'Bala gave a prize to Faurisson by an actor wearing a garment that resembled the clothing worn by Jewish deportees. The prize named for 'unfrequentability and insolence', was a three-branched candlestick with an apple crowning each branch". Global Freedom of Expression, Columbia University.

[480] While art. 10 (2) is an internal limit on the free expression of expression, art. 17, on the other hand,

Art. 10 and to evoke freedom of expression for purposes at odds with the fundamental values enshrined in the Convention: "accordingly, ECHR finds that pursuant to Article 17 of the Convention the applicant cannot enjoy the protection of Article 10"[481]. Indeed, M'bala M'bala's statements during his show were considered to be exaggerated in a democratic society, as they aimed to distort the tragedy of Nazi concentration camps[482]. The show was not considered to be comical at all, on the contrary, the ECHR declared that: "it took on the nature of a rally and was no longer a form of entertainment". The reason for this interpretation was based on the presence on stage of Robert Faurisson, a popular Holocaust denier, who was awarded by an actor playing the role of a Jewish inmate:

> It is unable to accept that the expression of an ideology which is at odds with the basic values of the Convention, as expressed in its Preamble, namely justice and peace, can be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10 of the Convention[483].

Scholars agreed with the ECHR decision as M'Bala M'Bala clearly violated the Convention in that it protects fundamental rights and prevents any form of discrimination. The application of art. 17 of the Convention thus prevailed over the exercising of art. 10, which usually protects fair satirical expression. In this specific case, however, M'Bala M'Bala's "*glissage de quenelle*" could not be considered an authentic satire as the comedian betrayed the primary function of the genre; that of

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represents an external one: "Article 17, in turn, removes from the protection of the Convention any activity aimed at destroying any of the rights set forth therein. Expressions considered to fall under this provision are categorically excluded from the subject-matter scope of the ECHR, in what has been styled as the «guillotine effect» of the abuse clause" Paolo LOBBA *Testing the "uniqueness": Denial of the holocaust vs denial of other crimes before the european court of human rights*, Diritto Penale Contemporaneo, 2016, cit. p. 4. According to ECHR, the general purpose of Article 17 is to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention, *see Witzsch v. Germany* 13 December 2005 (Appl. No. 7485:03) para 3.

[481] *Dieudonné M'bala M'bala against France* Application no. 25239/13 para 42.

[482] ″Statement [M'bala M'bala] had made ('Jews, they're a sect, a fraud. It's one of the most serious because it was the first') did not fall within the free criticism of religion contributing to a debate of general interest, but constituted an insult, targeting a group of people on account of their origin, the prohibition of which was a necessary restriction on freedom of expression in a democratic society″ para 26.

[483] *Dieudonné M'bala M'bala against France* para 39.

mocking the historical potentate[484]. Rather, the comedian acted cruelty against a tragedy[485]. Although the ECHR usually grants wider protection to freedom of satire, the vulgarity and repugnance in this dispute were just impossible to consider permissible[486]:

> The ECHR explicitly acknowledged that hate speech is often "disguised as a humorous appearance which, precisely for that reason, may prove to be as dangerous as direct speech" - a finding that is largely confirmed by scholarly work on humour's "cloaking" or normalizing effect on hate speech[487].

More recently, the ECHR confirmed the tendency to refer to art. 17 in a legal dispute about freedom of expression. In Bonnet v. France[488], the director of the website *Égalité et Réconciliation* was convicted of racial insult against Jews and Holocaust denial because of uploaded content that parodied the popular satirical magazine Charlie Hebdo[489]. The applicant complained of violation of art. 10, but the

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[484] *See* Sergey TROITSKIY *Is parody dangerous?*, The European Journal of Humour Research 9 (2), 2021, 92–111 ″In several regions, parody is banned for political reasons in the context of state or social security, personal or national reputation. However, all these cases demonstrate the intention to preserve the status quo, the existing system of notions and relationships between elements, what could be entitled 'order'″ cit. p. 93.

[485] ″The defendant's intention was thus to undermine the 'foundation' of the Jewish people – the real target of his so-called 'glissage de quenelle' – when he welcomed on stage an individual known to the public solely for his negationist views, while introducing him as the hero of positive values and having him presented with an award, in the form of a debased emblem of that community, by a character casting ridicule on the Jewish victims of the very crimes that the person thus honoured had denied″ *Dieudonné M'bala M'bala against France* para 16.

[486] *See* Giuseppe PUGLISI, *La "satira" negazionista al vaglio dei giudici di Strasburgo: alcune considerazioni in «rime sparse» sulla negazione dell'olocausto.* Nota a C. edu, sent. 20 ottobre 2015, Dieudonné M'bala M'bala c. Francia, Diritto Penale Contemporaneo, 2016, cit. p. 9-10. ECHR contribution has been thus significant in the implementation of the contrast against hate speech ″Court of Human Rights has adopted a decidedly restrictive approach towards hate speech, thus becoming an international 'centre of gravity' with regard to the implementation of hate speech bans″ GODIOLI, YOUNG, FIORI, *Laughing Matters* cit. p. 2242

[487] GODIOLI, YOUNG, FIORI, *Laughing Matters* cit. p. 2242.

[488] *Bonnet v. France,* Application No 35364/19, 25 January 2022.

[489] ″The Charlie Hebdo original depicted Belgian singer Stromae and alluded to his song 'Papaoutai' [Dad, where are you?] as a darkly humorous commentary on the 2016 terrorist attacks in Brussels. The website illustration was entitled Chutzpah Hebdo (chutzpah being an Yiddish insult) and was accompanied by text reading 'Attacks [:] the Zionists are in the square', 'Report[:] how the Mossad

ECHR found the applicant's complaint manifestly ill-founded as interference with their freedom of expression was considered necessary for the wellbeing of democracy.

The European Union has also aimed to establish a comprehensive denialism definition and a minimum standard for criminal action to be uniformly applied across member states[490]. ECHR in *Vajnai v. Hungary* has established that protection under Article 10 may be excluded for denialism if it is driven by totalitarian or antidemocratic motives. However, when it comes to mere opinions on historical denialism, the freedom of expression might be applicable.

> The Court [..] observes [..] that the justification of Nazi-like politics was at stake. Consequently, the finding of an abuse under Article 17 lay in the fact that Article 10 had been relied on by groups with totalitarian motives[491].

The Court's consideration revolves around the underlying intent and purpose of the expression, particularly focusing on political propaganda by anti-democratic groups. Consequently, if the comic intent and entertainment purpose of the parodist can be demonstrated, a joke on the Holocaust could still fall within the scope of Article 10 ECHR.

Legal scholars have raised questions about the classification of denialism as a criminal offense. In a previous phase, the ECHR revisited the interpretation of the "guillotine effect" under Article 17 ECHR and clarified that this clause can be applicable to specific forms of historical denialism regardless of the intent and

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makes Molenbeek'. The illustration also included a reference to 'disoriented historians' and a drawing of Charlie Chaplin (instead of Stromae) in front of a Star of David, under the title 'Shoah où t'es?' [Shoah where are you?], surrounded by speech bubbles from drawings of soap, a lampshade, a shoe and a wig replying 'here', 'there' and 'and there too'", GODIOLI, YOUNG, FIORI, *Laughing Matters* cit. p. 2246.

[490] Framework Decision on Combating Racism and Xenophobia 2008/913/JHA on 28 November 2008. Even if denialism is subject to varying legal consequences across different legal jurisdictions, with some treating it as a criminal offense and others not categorizing it as such, *See* LOBBA p. 1818. The ECHR case law affirmed that denialism of historical facts may be subject under art. 17 and so it does not obtain protection under art. 10. *See Lehideux and Isorni v. France* 23 September 1998 (Applications no. 24662/94): "[the case] does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17" para 47.

[491] *Vajnai v. Hungary* 8 July 2008, App. No(s). 33629/06, para 24.

purpose[492]. Legal scholar highlight, though, that indeterminate list of European values could potentially overly limit freedom of expression under the guise of a vague European morality[493].

More recently, the court stated that Article 17 ECHR should not be interpreted as content-based restriction, but rather, it is essential to exclusively assess the gravity which is evaluated based on: i) the intent, the content must be unmistakably aimed at denying the tragic event[494]; ii) the direct or indirect nature of the activity, in the sense that it gives rise to acts of hatred[495]; iii) the presence of conflicting interests safeguarded by Article 10[496].

The online medium was also taken into consideration by the ECHR, which found that Internet content was much more likely to infringe fundamental rights. In particular, information and communication technologies (ICT) have the ability to store and disseminate infringing content to an unlimited audience, and, here, this capability becomes relevant in the debate over humorous expression. The ECHR considered the audience's reactions to be of considerable importance in M'bala M'bala, and this was an element in favour of the violation of art. 17[497]. The decision

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[492] In *Witzsch v. Germany* on December 13, 2005 (Application No. 7485:03) for Holocaust denialism: "The applicant's statement [..] showed the applicant's disdain towards the victims of the Holocaust. The Court finds that the views expressed by the applicant ran counter to the text and the spirit of the Convention" para 3; in *Mark Anthony Norwood v. the United Kingdom* 16 November 2004, (App. No. 23131/03) for Islamophobia: "General, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination [..] constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 ".

[493] LOBBA p. 1850.

[494] *See* ECHR *Leroy v. France* where ECHR found that the satirical drawing was likely to have an impact on public order.

[495] *See* ECHR *Lehideux and Isorni v. France* "Such a distortion is, however, insufficient, because too indirect or remote, to constitute an "activity or [..] act aimed at the destruction of any of the rights and freedoms set forth" in the Convention, within the meaning of its Article 17" para 6.

[496] LOBBA p. 1843-1844. The minimun standard by ECHR aims to confine art. 17 to certain special cases: "The Court reiterates [..] Article 17 [..] is applicable only on an exceptional basis and in extreme cases" *Paksas v. Lithuania* 6 January 2011 (Application no. 34932/04) para 87. On application of art. 17 ECHR *see* also ECHR *Le Pen v. France* "Mr Le Pen's comments had certainly presented the 'Muslim community' as a whole in a disturbing light likely to give rise to feelings of rejection and hostility" cit. press release on case law available online hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3117124-3455760&filename=003-3117124-3455760.pdf.

[497] "The Court would also observe that the reactions of members of the audience showed that the

is more intuitive when the alleged jokes are performed live, while the reactions are more difficult to interpret in digital media, since a hypothetical reasonable public is mediated by the Internet[498].

4.3 Limits to freedom of comical expression

The affirmation of freedom of parody necessitates that we question the safeguarding of fundamental rights that may be affected by the illegal exercise of such a freedom. In order to determine the legal boundaries, authoritative legal scholars and case law have drawn on the background the limits of two similar rights; the right to review and the right to criticism[499]. According to this approach, any humorous expression (such as parody or satire) would be subject to the following limits; truthfulness, restraint, relevance. The application of these limits does not imply that such expression is immune from analogous interpretations[500].

The right to review is identified within the freedom of research and information, and its purpose is to implement the community's interest in being informed. When the right to review enters into conflict with some fundamental rights, a fair balance between opposite interests must be maintained. The limit established for the right to review is truthfulness, which is the prerequisite for the legitimate existence of such a right. In this sense, the narration of a fact must be complete and exhaustive. The majority of legal scholars and case law agree that comedy does not fulfil the purpose of providing information. Indeed, even if it

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antiSemitic and revisionist significance of the sketch was perceived by them (or at least some of them), as it then was by the domestic courts, the remark 'Faurisson is right' in particular having been shouted out" *M'bala M'bala against France* para 37.

[498] Nowadays, amused online reactions are actually detected by users' reactions on some social media, like Facebook. Reading comments can also be a useful indicator of the audience's amusement.

[499] Some legal scholars argue that among parody, criticism, and news reporting, the highest level of protection should be afforded to news reporting when it comes to using copyrighted works without compensation: "News is crucial to political speech, and, by helping citizens to be informed, it enhances democratic participation [..] it is because people will be called upon to vote that they 'need novels and dramas and paintings and poems' (cit. Alexander Meiklejohn, *The First Amendment is an Absolute*, Supreme Court Review, 1961, p. 263)" AUSTIN cit. p. 711.

[500] *See* Carlo Emanuele MAYR, *Critica, parodia, satira,* in AIDA, 2003, p. 288.

conveys news, it does not contribute to public opinion[501]. Scholars maintain that review should be a mere narration of facts, without personal evaluation, and, for this reason, review and comedy should have no common features.

The right to criticism is more coherent with comic purpose, as both aim to offer a personal interpretation of reality. The right of criticism expresses a public interest in the dissemination of debate, discussion and opinions. The limits established to the right to criticism are restraint and relevance, which benefit from a broader assessment than truth. This assessment must be connected to two purposes, public interest and the modality of expression used. By analysing such limits, which are the parameters for the fair exercise of review and criticism, it is possible to circumscribe the lawful exercise of parody.

4.3.1 The limit of truthfulness

At first glance, truthfulness does not appear to suit any comical expression that does not aim to inform. On the contrary, a comedian usually takes well-known news and turns it into mockery; the information is thus transmitted through a mixture of unrealistic facts to induce laugher. It cannot therefore be claimed that comical intent corresponds to the limit of truthfulness, since no desire to provide correct information, despite a natural connection with reality, can be observed in any ironic action. Moreover, what distinguishes parody from review is its creative element, which, by its very nature, entails irrationality[502]. If review can be considered a statement of fact, comic artistic expression, on the other hand, is a value judgement, which should never meet the limit of truthfulness. The ECHR has recently confirmed this assumption by distinguishing between statements of facts and value

[501] According to jurisprudence, comedy, indeed, does not constitute an informational communication and it has no connection to the limit of truth; moreover, it never obeys to a balanced form of communication (the limit of restraint). *See* Trib. Roma, 13/02/1992, p. 844. A more comprehensive communication theory could include various phenomena such as fake news, news satire or news parody, but legal scholars emphasise that their aim is to mislead or criticise, not to inform: "[news satire/parody] includes news that is intentionally false, mostly regarding public figures and controversial issues, created to become viral and mislead the public" CORBU cit. p. 697.

[502] On the relationship between parody, information and creativity: Maria Gabriella LODATO, *Diritto di sorridere e finalità informativa della vignetta satirica*, in Dir. inf., 1995, p. 622 and WEISS p. 192.

judgments[503]. The ECHR has also had the occasion to reaffirm this assessment in a legal dispute regarding an article that was intended to be humorous:

> The article at issue was a satirical and farcical essay on a subject of public interest. Stefan Eberharter was mentioned as the representative of all other ski-racing competitors who had no chance against the overpowering Hermann Maier. The wish put in Eberharter's mouth, to the effect that Hermann Maier should break his other leg too so that he could at last win something, was a humorous, exaggerated and furthermore comprehensible reaction. The humorous nature of the article was already evident from its headline, strapline and first paragraphs. Furthermore, the applicant company regularly published the first applicant's columns, whose satirical and humorous nature was therefore well-known to readers[504].

Despite this clarification, some legal scholars have invoked the criterion of truthfulness, in a number of occasions, in resolving conflicts concerning comic artistic expression, which, in their opinion, should still make reference to truthful facts, or, at least, should not invent new ones. The comedian may report a fact for the purpose of making someone laugh, as long as the fact is true[505]. Comedy inevitably ends up clashing with privacy, the sacrifice of which must be permitted exclusively on the conditions that the fact disclosed is true and there lies public interest in learning that fact. When a comedian cites true facts by means of parody, he or she is transmitting information to the public, in so far as the facts must be described adequately and must be coherent with reality, even if the comical purpose aims to

[503] ″In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10″, *Dichand and others v. Austria*, 26 February 2002, Application no. 29271/95, para 42.

[504] *Nikowitz and Verlagsgruppe News GmbH v. Austria*, 22 February 2007, Application no. 5266/03, para 10.

[505] On the relationship between parody, satire and the limit of truthfulness, inter multis: Michele POLVANI, *La diffamazione a mezzo stampa*, CEDAM, Padova, 1998; Luigi WEISS, *Diritto costituzionale di satira o diritto di pettegolezzo?* in Dir. famiglia, 1994; Marco Orlando MANTOVANI, *Profili penalistici del diritto di satira*, in Dir. Inf., 1992.

distort that same reality. Somehow, according to this interpretation, the Latin locution is still valid: *quid vetat ridentem dicere verum?*[506].

The limit of truthfulness may limit free comical expression in cases of gross human rights violations, as was declared by the ECHR in M'bala M'bala; the distortion of that particular reality (the tragedy of the Holocaust) was considered unacceptable[507].

In a related issue, the CJ has recently intervened in the balance between user freedom of communication and the protection of privacy; particular attention was dedicated to a particular platform's activity in de-indexing allegedly inaccurate content that is automatically uploaded and to the associated right to be forgotten (art. 17 GDPR). The CJ recalled the limit of truthfulness, as the case entailed relevant criteria, such as the parody contributing to a debate of public interest and the veracity of information[508].

4.3.2 The limit of restraint

The limit of restraint is especially inherent to the right of criticism. It stipulates that forms of expression are to be civilised and not violate the minimum

[506] On the relationship between the comical expression and the limit of truth, we can cite a famous case law by Italian jurisprudence: Cass. Civ. Sez. III, sent. 8 novembre 2007, n. 23314 *Forattini c. Caselli*.

[507] *See* Marloes VAN NOORLOOS, *A Critical Reflection on the Right to the Truth about Gross Human Rights Violations* Human Rights Law Review, 2021, 21, 874–898 ″The right to the truth about gross human rights violations is becoming more firmly entrenched in international human rights law. In the past decade, the European Court of Human Rights (ECtHR) has also explicitly acknowledged the right to the truth. As it has gradually been developed by a diverse set of actors - in treaties, case law, and soft-law documents - the content and contours of the right to the truth are subject to ongoing controversies″ cit. p. 874.

[508] Court of Justice C-460/20 8 December 2022 *Google*: ″It is apparent from the case-law of the European Court of Human Rights that, as regards the publication of data, for the purposes of striking a balance between the right to respect for private life and the right of freedom of expression and information, a number of relevant criteria must be taken into consideration, such as contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, the form and consequences of the publication, the manner and circumstances in which the information was obtained as well and its veracity″ para 60. These considerations were developed by ECHR in *Couderc and Hachette Filipacchi Associés v. France*, 10 November 2015 Application n. 40454/07, when the Court ruled that right to privacy and right to control own image could not be regarded as sufficient to justify the interference with freedom of expression.

level of dignity to which any human being is entitled. Naturally, this limit clashes with humour, which often turns into exaggeration and frequently dives into taboo[509].

The correct exercise of the right to criticism requires formal accuracy in the presenting of a fact, which must not be disproportionately communicated through completely unnecessary expression, and must not overstep the purpose of the right to information. According to this limit, a comedian must also respect the dignity of the criticized human being and not confuse laughter with insult. A relation with the previous limit may also be found since it is never possible to invoke the truth of a fact as an exemption for offense and defamation. Comical expression must not expose a person to ridicule and contempt.

Some scholars accept that the limit of restraint may be applied to comedy, according to the characteristics inherent to the right to criticism. Nevertheless, the usual standard of fair expression, seen as obedience to the canons of rationality, should be excluded from any judgement on comedy. A legal analysis of the limit of restraint encapsulates a fundamental attribute of comic artistic expression; aggressiveness[510]. It is worth noting how the ECHR has admitted its use in order to transmit irony. Comical expression has been described by the ECHR, in several rulings, as an artistic and legitimate way to convey a message, via satire, comic strips and any other humoristic image, to voice criticism[511]. The intention must be always clear to an attentive audience[512].

The ECHR also assesses the degree of tolerance expected from criticism in

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[509] This is confirmed by the doctrine, which declares how the denigrating feature comes to an end in front of *vis comica*, *see* LODATO p. 623.

[510] As noted in the first chapter, satire can be defined as use of humor for aggressive purposes, *see* Sabrina PERON, The Limits of Satire, in Civil Liability and Pensions, fasc. 5, 2014.

[511] *See* ECHR *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application no. 21980/93; *Bergens Tidende and others v. Norway*, 2 May 2000, Application no. 26132/95. The terms ″to convey a particular message″ and ″to voice criticism″ recall the use of different forms of communication, such as review and criticism, which may be transmitted by comical messages.

[512] ″The entirety of the second applicant's text being humorous in content and published under the newspaper's 'Amusement' column, cannot, in the Court's view, but be understood as a joke rather than a direct statement maliciously aimed at offending S.K.'s dignity″ *Bodrožić and Vujin v. Serbia,* 23 June 2009, Application no. 38435/05, para 33.

relation to satirical expression. In this sense, satire may recourse to a degree of exaggeration, provocation and even immoderate statements as it is a matter of public interest[513]. Even very strong language does not fall outside the boundaries of protection established in art. 10, as long as it is justified by the form of communication[514].

4.3.3 The limit of relevance

Relevance encompasses the notoriety of the facts presented and the popularity of the persons targeted. This limit is certainly interesting, primarily because it can be relevant to comedy when it intervenes more aggressively against public figures (politicians, primarily) who are, thanks to their notoriety, no longer entitled to demand broader protection against criticism, in the form of irony, expressed by a comedian or simple citizens. Therefore, the greater the social relevance of a fact or a person, the less protection is served to that fact or person.

Relevance also involves current and public interest in the knowledge of facts, and, in doing so, aims to prevent mere gossip. The public-interest requirement is thus identified in the notoriety of the person targeted and in content of the message being coherent with the role of that person[515]. Comical content must thus respect another two limits; notoriety and coherence.

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[513] ″A degree of exaggeration or even provocation is permitted; in other words, a degree of immoderation is allowed″ *Ziembinski v. Poland (No. 2)*, 5 July 2016, App. No. 1799/07 para 44.

[514] ″Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed″, *Dichand and others v. Austria*, 2002, para 41. In another case law, ECHR admitted the use of aggressiveness by poetry: ″The Court observes, however, that the applicant is a private individual who expressed his views through poetry [..] Thus, even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation″ *Karatas v. Turkey,* 8 July 1999, App. No. 23168/94, para 52. The ECHR affirmed that the comical expression may go beyond the limits of restraint in a recent case law *Ziembinski v. Poland (No. 2)*, 5 July 2016, App. No. 1799/07 ″The present case raises a truly general concern. Abusive speech hurts, and it may even kill. It is necessary to strike the correct balance between freedom of expression and the other fundamental rights and values which may conflict with it, including personality rights″ para 44.

[515] POLVANI p. 219.

Specifically, well-known people cannot always claim protection against comical expression. Notoriety is thus a highly relevant criterion for assessing public interest[516]. Indeed, on the one hand, the violation of personal rights (such as reputation) may have a higher impact on well-known people, rather than on ordinary persons, and they may seek broader protection for this reason. However, on the other, this protection would enter into conflict with the community's need for information, especially in the case of politicians. Public figures (especially if they obtain public power) are forced to endure intrusions into their private life, and this intrusiveness appears to be justified by the point that politicians belong to society, meaning that the voters can demand the sacrifice of a politician's privacy[517]. According to other legal scholars, however, notoriety should relate only to the targeted fact and not to the person. In such a way, the mockery of unknown people who have engaged in socially relevant behaviour, would also be considered permissible[518].

Coherence is concerned with the depiction of well-known people as part of a tacit agreement between the comedian and an attentive audience. This kind of comic manifestation is worthy of protection as it is based on notoriety and allusions created via creativity[519]. The proper application of coherence must therefore be assessed in terms of the objectives of the message and be related to the social relevance of the fact. Legal scholars would generally prefer to exclude the adoption of rigid criteria of coherence, since there is a risk that judges would intervene and use excessive

[516] Conversely, ECHR has stepped in to address situations where the parodist's actions lack significant public interest, since the preservation of an individual's reputation must be safeguarded under Article 8 of the Convention (Right to respect for private and family life): "Mr Eberharter's interest in protection against statements which seriously affected his image as a sportsman had outweighed the applicants' interest in embellishing their article, which was of no particular public interest, by means of the impugned statement" in *Nikowitz* para 19.

[517] *See* DOGLIOTTI p. 172; Alberto Maria BENEDETTI, *«Il diritto di satira fra libertà di espressione e tutela dei valori della persona»*, nota di commento a Trib. Roma 26 maggio 1994.» *Nuova giur. civ. comm.* (1996): 337-341, p. 340 and Emilio ONDEI, *I diritti di libertà: l'arte, la cronaca e la storiografia*, Milano, Giuffrè, 1955, p. 31. On the relationship between public figure and the limit of truthfulness has also intervened US Supreme Court "When a statement concerns a public figure, the Court held, it is not enough to show that it is false for the press to be liable for libel. Instead, the target of the statement must show that it was made with knowledge of or reckless disregard for its falsity", cit. "New York Times Company v. Sullivan." Oyez, in oyez.org/cases/1963/39. Accessed 22 Aug. 2023.

[518] Giuseppe CORASANITI, *Libertà di sorriso*, in Dir. inf., 1989, p. 540.

[519] CORASANITI p. 537.

discretion in comedy and make inconsistent judgments on public interest and creativity[520]. The relationship between comedy and the protection of a criticized person has been dealt with in case law through a search for balance, typical in a modern state, whereby each person's rights end where the other's rights begin. By its very nature, comedy communicates reality in a distorted, altered and exaggerated way that can only be legitimate if the presented activities and facts are of public knowledge, and if they cannot be abused to emphasize a person's private life, making them the object of ridicule. While satire enjoys a high level of protection, it's important to note that verbal assaults or actions that violate human dignity cannot be deemed permissible, even in the case of politicians.

> Political satire should not be protected when it amounts only to insulting speech directed against an individual. If, say, a magazine feature attributes words to a celebrity, or uses a computerized image to portray her naked, it should make no difference that the feature was intended as a parody of an interview she had given. It should be regarded as a verbal assault on the individual's right to dignity, rather than a contribution to political or artistic debate protected under the free speech (or freedom of the arts) clauses of the Constitution[521].

To sum up the relationship of parody to review and criticism, we can list three different parodic expressions. News parody: it can report and mock facts if they are true. Critical parody: it can judge and evaluate facts according to relevance and restraint. Satire: it can make harsher and even offensive claims against public or private potentates. Furthermore, there is also the case of total absence of freedom of parody: someone or something that cannot be parodied by law. For example, if the inspiring work is unpublished or if the parody clearly infringes the personal rights or the public interest.

Finally, the relationship between parody and the use of someone's image is of particular interest. Unauthorized publication or use is inadmissible when the

[520] METAFORA p. 771.

[521] Eric BARENDT, *Freedom of Speech*, 2nd ed., Oxford, Oxford University Press, 2005, cit. p. 230. "For an Italian case on the point, see the decision of the Corte di Cassazione, Penal Section, of 20 Oct. 1998, reported in (1999) Il Diritto dell'Informazione e dell'Informatica 369, rejecting appeal of author of a newspaper article which included a cartoon implying that a woman senator fellated Berlusconi. Satire is not protected if does not respect personality rights" *Ibidem*.

dissemination of the image is mainly for commercial profit and not for the public interest; if the use of the image leads to injury to the person's honour or reputation. In this sense, the protection of personal identity is more broadly safeguarded when the person is well-known[522].

Here, I ask the reader to recall the first chapter where it was pointed out that satire is a correction, a blunt weapon, an exercise of control over power. However, it is certainly not an art form that can be formally adopted by a central State to combat discrimination[523]. Comedy cannot replace the role of the State in combating discrimination; public measures against forms of hate speech must be substantiated in laws bearing either corrective or compensatory function. Moreover, any person that is invested by the community and rises to public office must, necessarily, bear the weight of closer judgment and evaluation than a *quisque de populo* (a person who has no public dimension). As I emphasised in the previous chapter, traditional copyright law has broadly protected parody (or target parody) through fair use, while

[522] The connection with the right to one own's image is established in a few European countries. For instance, according to Italian scholars, the criteria could be found in Articles 96 and 97 l.a., concerning ″portrait rights″[522]. According to BOGGIO pp. 1147, in case of parody, especially Art. 97 intervenes ″the portrait may not, be displayed or commercially distributed when its display or commercial distribution would prejudice the honour, reputation or dignity of the person portrayed″. No doubt, those articles draw a balance, but the norms must be adapted to the many different forms that parody can play, not necessarily related to one own's image. Another peculiar defense is settled in Spain, based on the satirical nature of one own's image use: ″Article 8.2 (b) of the Organic Law provides a defense for 'the use of a caricature of a person who is a public official or public figure, consist ently with social convention'. There appears to be little authority and little agreement in Spanish law, in either the jurisprudence or the commentary, on the scope of this 'caricature' defense. The meaning of the Spanish word 'caricatura', however, is not limited to pictorial representations, but includes literary and other forms - any 'graphic or literary representation that exaggerates certain features with a comic or satirical intent', Stephen R. BARNETT *"The Right to One's Own Image": Publicity and Privacy Rights in the United States and Spain*, The American Journal of Comparative Law, 1999, Vol. 47, No. 4, pp. 555-581, cit. p. 578. For a focus on U.S. case law *see* ″For instance, in Altbach v Kulon, the Third Department held that an artist's publication of a town justice's photograph, along with a painting of the justice that caricatured him by portraying him as a devil with a horn and a tail, was constitutionally protected as a work of art (302 AD2d at 657-658). In Altbach, the defendant distributed flyers with the caricature and a photo of the justice to promote the opening of his art gallery. Preliminarily, the court found that the "similarity of poses between the photograph and the painting, together with the content of the advertising copy identifying plaintiff as an experienced attorney, attest[ed] to the accuracy of [the] defendant's portrayal of [the] plaintiff's face and posture, while emphasizing "that the painting is a caricature and parody of the public image″ *Foster v. Svenson* 128 A.D.3d 150 (2015) cit. in law.justia.com/.

[523] BALESTRA p. 16.

satire (or weapon parody) has been subject to careful analysis of the four statutory factors. On the contrary, satire should prevail in the debate on freedom of expression because it is relevant to the weighting of freedom of expression and because it is a necessary counterweight to constituted power. Thus, comedy becomes an instrument for social control[524]. These legal instances are of particular interest in the age of ″Onlife″, with popularity increasingly becoming a double-edged sword that exposes one to comment, criticism, offence and insult.

4.3.4 Other relevant limits: the fair balance between copyright and freedom of expression

The fundamental rights must always be balanced by norms of equal degree, in the name of the principle of proportionality. In the case of parody, freedom of expression needs to be balanced with the intellectual property rights. The protection of the freedom of expression stands on an equal footing with the protection of intellectual property; indeed, neither should be deemed precedence over the other[525]. Accordingly, the protection of the rightsholder is not diminished in the face of the exercise of the critical spirit.

> On several occasions the [ECHR] has emphasized that overbroad, non-pertinent or disproportionate restrictive interferences with the right to freedom of expression risk to have a chilling effect, which in itself is detriment for a democratic society[526].

Seeing as parody is a transformation by which a serious, noble or elevated work of art is reworked into different form and content, inducing laughter and critical

[524] MANTOVANI p. 309.

[525] "The president of the European Court of Human right (ECHR) observed in 2012 that the ECHR's case law on the issue of copyright and freedom of expression was scant. [..] On two occasions [..] the ECHR has significantly elaborated on the issue. Most importantly, the Court made clear that the application and enforcement of copyright law has to respect the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights" Dirk VOORHOOF, *Freedom of expression and the right to information: Implications for copyright*, Research Handbook on Human Rights and Intellectual Property. In *Research handbooks* (2015) cit. p. 331.

[526] Dirk VOORHOOF, *Freedom of expression and the right to information: Implications for copyright*, Research Handbook on Human Rights and Intellectual Property. In *Research handbooks* (2015) cit. p.333.

reflection, it constitutes a humorous imitation of someone else's work by its very nature[527]. Thus, within copyright law and originality test, imperceptible differences should be deemed sufficient, as long as they are capable of arousing laughter. The EU exception of parody firstly aims for the protection of the freedom of expression, which may be restricted by copyright holder just in the case the parody:

- It prejudices legitimate interests of the rightsholder by unreasonable restrictions do not provide by the law (for example, when competition with economic use can be proved);
- It prejudices the patrimonial and moral rights of the author or prejudices other personal rights, such as the protection of honor, reputation, etc.

The analysis of which limits the freedom of parody is subject to in the face of copyright law has been helped by a court case law; recently, the Italian Supreme Court enunciated a number of inherent principles connected to the freedom of parody and indicated the limits that parody should never cross to be lawful[528].

> Parody must respect a fair balance between, on the one hand, the intellectual property right of the copyright holder on the work and, on the other hand, the freedom of expression of the author of the parody; in this sense, the reproduction of protected work may be justified within the limits inherent in the parodistic purpose and provided that the parody does not prejudice the interests of the owner of the original work, as is the case when it competes with the economic use of original work[529].

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[527] *See* Alberto MUSATTI, *La parodia e il diritto d'autore,* in Riv. dir. comm, 1909, I, cit. p. 164.

[528] The Supreme Court in the order No. 38165 of Dec. 30th, 2022 enunciated a number of principles of law, inherent to the legal discourse we have been conducting so far and intervened on parody's permissibility when it explicitly quotes someone else's work or any characters created by another artist. Previously, the Court of appeal of Rome declared in 2018 that the use of a fictional character, known to be related to literary and artistic works held by an exclusive right, well may constitute an infringement of copyright in the presence of a servile imitation, which cannot be considered lawful. The judges of the Court of Rome did not consider that the parody in question had a character of originality such as to present a recognizable creative contribution. Despite this, according to the judges, trademark infringement, unfair competition by confusion, appropriation or violation of professional fairness should still be ruled out in the case of parody.

[529] Italian Supreme Court, Order n. 38165 30 December 2022; cit. Roberto CASO *"Copyright vs parody: the fair balance doctrine in front of the Italian Supreme Court",* Kluwer Copyright Blog, 29/03/2023.

copyrightblog.kluweriplaw.com/2023/03/29/copyright-vs-parody-the-fair-balance-doctrine-in-front-

The Italian Supreme Court underlines that parody is primarily a manifestation of thought[530] and recalls EU law and the legal statements from the Court of Justice in Deckmyn ruling, when parody was defined as an art form which needed a fair balance between fundamental rights, namely, the freedom of expression (art. 10 ECHR and art. 11 CFR) and intellectual property (art. 17 CFR). Legal scholars have queried about the possibility that "the EU-style fair balance doctrine officially becomes part of the interpretative and argumentative techniques of the Italian Supreme Court"[531].

The decision provided the opportunity to inspect the supposed prevalence of freedom of parody over private interests of copyright holder. Parody must be studied outside the traditional criterions of copyright, such as the originality/creative character and the economic use. Notwithstanding, copyright law also aims to ensure freedom of expression, freedom of communication and information[532].

The Supreme Court reaffirmed the general EU principle[533] that intellectual property does not relish absolute protection. Moreover, it is undisputed that "absolute protection for every original work, however, would decrease, rather than increase, the free flow of knowledge"[534] and the right to criticize for parodic purposes is consistently considered positive incentive to this flow. The remaining concern is whether the parody could lead to unfair competition. If there is unjustifiable harm, it will be deemed unlawful (CJ C-476/17).

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of-the-italian-supreme-court/

[530] The Italian Supreme Court's definition of parody: "it is a reworking implemented through a caricature imitation carried out for satirical, humorous, or otherwise critical purposes. Parody is always distinguished from the work of reference; whoever performs a parody does not implement a mere reproduction (in this case plagiarism or counterfeiting could occur), but reinterprets the work and conveys a new message to the public. This is enough to consider parody an autonomous work and protected as such by Italian copyright law. The parody must be able to distort the meaning of a work from which it takes its cue, without necessarily departing from the expressive form, such as the case of someone who mocks a piece of music but does not change the score" (my own translation).

[531] CASO *Copyright vs parody.*

[532] The InfoSoc Directive 2001/29/EC Recital 3: "The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest".

[533] CJEU *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, C-314/12, (27 March 2014) and CJEU *Pelham et Haas v. Hitter et Schneider-Esleben*, C-476/17 (29July 2019).

[534] Van HECKE, Beth WARNKEN, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, (1992), Minnesota Law Review. 897, cit. p. 468.

> On the subject of copyright law, parody constitutes a humorous or mocking act that is characterized by evoking a work, or even a fictional character and does not require its own original character, other than the presence of perceptible differences from the work or character being parodied.[535]

4.3.4.1 The Italian implementation of parody exception

The Italian Supreme Court has recently declaimed parody is primarily a manifestation of thought, and the implementation of the European parody exception may be assimilated to the right of quotation and the right of criticism. The legal basis has been connected to art. 70 Italian Copyright Statue[536] which would already tacitly include the purpose of parody[537]. We use "tacitly" since the Italian legislature has struggled to include the term parody among the exceptions and limitations to the exclusive right, as we have seen in the third chapter[538]. Finally, parody has been included in the Italian intellectual property code on Art. 102 (nonies)[539] referred to

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[535] Italian Supreme Court, Order n. 38165 30 December 2022, my own translation.

[536] Art. 70 Italian Copyright Statute (i.c.s). Law for the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941): "The abridgment, quotation or reproduction of fragments or parts of a work and their communication to the public for the purpose of criticism or discussion, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work; if they are made for teaching or research, the use must have the sole purpose of illustration, and non-commercial purposes".

[537] The main diatribe on the subject in the field of copyright is focused on the belief that parody can be an autonomous work or a mere reworking. From a first point of view, parody would be an expression of creativity and would have enough originality to be protected by articles 1 and 2 of the copyright Law 22 April 1941 n. 633 (Italy). A second point of view, however, qualifies parody which appropriates elements of a third-part work as a mere derivative work, protected by art. 4 Italian copyright law.

[538] *See* Stefania ERCOLANI, *Il diritto d'autore e i diritti connessi. La legge n. 633/1941 dopo l'attuazione della direttiva n. 2001/29/CE*, Giappichelli, Torino, 2004, p. 242. There is no reference to the term "parody" nor other related categories (such as caricature and pastiche). The exception to the right of reproduction and communication to the public implemented for the purpose of parody provided by Article 5 InfoSoc has not been implemented in the Italian legal system. To visualize all copyright flexibilities in MS: http://www.copyrightflexibilities.eu/#/search

[539] Article 102-nonies: "2. When uploading and making available content which they have generated through an online content sharing service provider, users can benefit of the following exceptions or limitations to copyright and related rights: [...] b) use for the purposes of caricature, parody or pastiche. 3. Providers of online content-sharing services inform their users, through the communication of their terms and conditions of service, of the possibility of using works and other subject matter benefiting from the exceptions or limitations to copyright and related rights". The entire structure of art. 17 DSM

rights and obligations of the user. It is the transposition of art. 17 DSM which includes the term parody among the free uses of protected content by online sharing providers. The provision of Art. 17 DSM sets up parody exception as a users' right[540].

Notwithstanding, the Supreme Court recalls Art. 70 i.c.s. as norm for understanding the permissibility of parody within European copyright law. Art. 70 imposes two limits: a) Parodic purpose must be pursued [541]; b) Absence of competitive relationship.

The art. 70 is built on three pivotal points:

> 1) "summary and quotation...are free" if: a) they are justified by their purpose (i.e., they maintain their nature in the use of the work of reference); b) they operate in the absence of competition to the work of reference.
>
> 2) Free publication on the Internet is always granted, provided that: a) the copies are of low quality or otherwise degraded from the original; b) no profit motive.
>
> 3) The source is always required to be reported.

2019/790 has been transposed and implemented by Italian legislator through five separate provisions (from Art. 102*sexies* to art. 102*decies*).

[540] The DSM 2019/790 explicitly references the impact of the Article 17 on user's right, notably freedom of expression and information. Recital 70: "The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property".

[541] A few legal scholars considers that the art. 70 l.aut. would permit any parody which respects its purpose since it respects the right of paternity, with no further considerations on the economic use. The study of parody within copyright law overcomes the traditional distinction between form and content as separate individual entities. The form (in its expressive purpose) is the main element to be protected by copyright law. Parody can appropriate such expressive form just once it adds something new: a humorous critic content. In the absence of a new and humoristic content, parody, that just appropriates the form, makes a parasitically exploitation and could infringe the rightsholder interests. *See* SPEDICATO *Opere dell'arte appropriativa* p. 126. The new elements presented in parody may be considered as bringing different functions due to a different context (humoristic). Such interpretation complies with EU Court of Justice ruling which declares trademarks law protection not for the mere form (the mere sign) but just for peculiar function of trademark's form. *See* Greenpeace v. Enel.

It is worth noting that parody hardly meets these limits. Indeed, on the one hand, the heart of parody is difficult to detect. Parody carries out for different functions, as we have seen in the previous chapters. It carries out for the mere use of criticism, but it can also transcend into slavish imitations, veiled references. The absence of competition and the no profit motive do not comply with parody as well[542]. The fair balance in cases of parody always should lean toward the prevalence of freedom of expression by providing protection to parody that competes in the same market. Parody can compete in the same market, very often it does (*See* for example Rogers vs Koons; Campbell vs. Acuff-Rose)[543]. The last pivotal point of Article 70 i.c.s. is then the most paradoxical for parody (acknowledgement of sources). While this is a fundamental requirement when it comes to mere quotation, since it is good that someone's words are always reported correctly; when parody is enacted, the need to know the source of reference is only transient, useful but not necessary to enjoy the parody.

Although the ruling may be welcomed as a first interpretation on parody within the new DSM, the legal scholar criticized the fair balance test as interpreted by the Italian Supreme Court since the decision seems to weigh in favour of intellectual property at the expense of freedom of parody[544].

> In this perspective, the analysis of the parody-copyright conflict cannot be trapped in a criterion based on formal parameters (the abstract distinction between idea and expression) or merely economic ones (competition with the economic use of the original work) that disregard the purpose of the parody[545].

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[542] This characteristic of parody was underlined by the Trib. Napoli 27 may 1908. Even if the parody benefits from the goodwill of the original work, it does not deprive it of a potential market; on the contrary, it can serve as a *réclame*. *See* Alberto MUSATTI, *La parodia e il diritto d'autore,* in Riv. dir. comm, 1909, I, p. 167). "It seems quite possible that those who see *Stardust Memories* will become curious enough about its source to want to spend their next movie dollars to view *8$^{1/2}$*" BERNSTEIN cit. p. 41.

[543] A few national courts have denied application of parody exception if it was considered to have been used to "attract attention [..] These cases are characterized by the use of a parody for the purpose of advertising or commercializing something else. Commercializing a parody in and of itself, however, does not necessarily always stand in the way of application of the exception" JONGSMA cit. p. 657.

[544] *See* CASO *Copyright vs parody.*

[545] CASO *Copyright vs parody*.

The Italian Supreme Court ruling reference to art. 70 i.c.s. seems to embrace the protection of intellectual property by placing a barrier in defense of the exclusive right. The use of a portion of a work is limited from being potentially harmful, or likely to cause undue prejudice to the legitimate interests of the original author[546].

A few perplexities on the application of art. 70 to parody has been criticized by De Sanctis[547] who goes through a parallelism with the right to satire. Since the existence of economic parameters (competition with the economic use of the original work) is not required for the lawfulness of satire, then for parody, for its lawfulness, neither must compliance with the requirement under Art. 70 l.a. (free reproduction of protected works for the purpose of criticism and quotation) be required, it being instead sufficient that, both satire and parody must pursue their purposes, so as to receive protection from norms 9, 21, 33 Const. which guarantee the freedom of expression. According to this perspective, the effectively application of freedom of expression may be invoked in support of copyright claims[548]. Legal scholars emphasize that recent ECHR case-law does not provide clear guidelines on whether the unauthorized use of copyrighted material can be protected under art. 10 of the European Convention on Human Rights. This protection has typically been extended to forms of political expressions, which may include satire and parody.

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[546] *See* Paola GELATO, *Limiti alle libere utilizzazioni di brani o di opere altrui*, in Giurisprudenza italiana, 1998, fasc. 6, (1192-1193). For example, if parody contained discriminatory content, the Court must balance the author's interest in not having any association with that harmful message. Another evidence of favouritism for intellectual property may lie in the strict listing of free uses; the listed purposes would come to assume the character of being susceptible to analogical applications. Most likely, the listed free uses are merely exceptions and limitations. Marco Ricolfi points out that free uses doctrine is a purely civil law tradition; in contrast, the common law tradition considers them to be expressions of a broad principle of balancing the private interest and the public interest in the dissemination of creation. Notably, North American law, at Sec. 107 of 17 U.S.C., adopts the elastic provision of the Fair Use doctrine. *See* Marco RICOLFI, *Il diritto d'autore*, ne *Il diritto industriale*, N. ABRIANI, G. COTTINO, M. RICOLFI, CEDAM, Pavoda, 2001 p. 460.

[547] DE SANCTIS, Lorenzo. *Il diritto di satira all'esame della pretura di Roma; ipotesi di riferibilità alla problematica della parodia dell'opera dell'ingegno*. Il Diritto d'Autore Vol. 61 (1990): 146-153.

[548] Legal scholars have invoked ECHR case law intervention: "Article 10 [ECHR] protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. This show that Article 10 itself can also be invoked to help to support claims in which ideas and information are expressed. The ECHR has not effectively applied this aspect of the protection of freedom of expression yet in support of copyright claims and also earlier case-law shows only a (very) weak impact of Article 10 in support of copyright protection of artistic, cultural or creative material" VOORHOOF cit. p. 336.

> Especially when the application of copyright hinders the participation in public debate [..] restricts transformative use of works of art, prohibits or sanctions satire or parody, stifles cultural or artistic expression [..] or risks having a chilling effect on political, social or cultural expression, both national courts and finally also the ECHR should strictly scrutinize the justification of the necessity of the enforcement of copyright in the terms of Article 10[549].

A few legal scholars argue on this theory which embraces freedom of expression as main anchor to support and protect parody. The direct reference to freedom of expression does not exclude a fair balance test upon copyright's interests: the constitutional norm on freedom of expression (art. 21 Italian Constituion) must be balanced by intellectual property rights (L. 633/1941). Copyright infringements cannot be justified on behalf of freedom of expression. Freedom of expression is constitutionally guaranteed in the legal system, but it shall not prevail indiscriminately over exclusive right which protects the inspirer of the parody[550]. The recognition of parody as mere freedom of expression (and, accordingly, the only imposition of limits connected to such freedom) would not provide answer to relevant copyright law issue on protection of parody as a product of original creativity (and not merely derivative). Those legal scholars opposed the thesis that parody would always be a) derivative work which would be admitted without consensus of the inspirer; b) licit within the limits of freedom of expression. This thesis does not consider those countries where such freedom does not exist and therefore parody would be always infringing copyright law, since the technique could not benefit of the constitutional protection. In such scenario, the exclusive right of the inspirer would always prevail over the parodist and a new form of private censorship could occur at the expense of parody[551]. In conclusion, the creativity should always be present in parody and the originality test should always be taken into consideration for the legal recognition within copyright law. This is the only test

[549] VOORHOOF cit. p. 350.

[550] *See* Paolo GALLI, *Art. 4 l.a.* UBERTAZZI. *Commetario breve alle leggi su Proprietà Intellettuale e Concorrenza*. Ed. 4°. Padova: Cedam, 2007. 1508-1512 and SPEDICATO *Opere dell'arte appropriativa* p. 124.

[551] *See* MUSSO p. 44 nota 19.

to differ a real parody from mere imitation, "pseudo-parodies" which consist solely of reproductions of the work or of circumventions of the authors' rights, or even mere insults covered by humours intent[552].

4.3.5 Limits outside the legal area

The limits to freedom of comical expression have been examined primarily within the framework of legal constraints related to free speech and copyright law. However, over time, parody has established a peculiar and unique treatment by delving into the realms of humor theories, cognitive research, and audience perception capabilities, outside the realms of copyright or freedom of expression. Consequently, the courts have started to refer not solely to positive law but also to philosophers and sociologists to resolve conflicts surrounding parody. Some of these theories derived from various humanities were previously analyzed in the first chapter, and now we will take a closer look at how courts have used them to place the boundaries to the freedom of parody.

4.3.5.1 Reasonable perception test

The approach to parody has undergone changes over time, and legal scholars have consistently provided commentary on court rulings regarding its permissibility. David Simon has primarily focused on the concept of reasonable perception, which pertains to the ability to effectively convey a humorous message to an audience. The legal scholar introduces the Reasonable Perception Test (RPT), which courts have used to determine whether a work qualifies as parody based on how it is perceived[553].

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[552] Trib. Milano, 1° febbraio 2001. "Originality as applied in this context would mirror the sort of requirement that now exists for copyright protection to adhere to primary works-an undemanding finding of independent creation" BERNSTEIN cit. p. 39.

[553] The legar scholar listed the court cases which have determined the reasonable perception test for parody. David A. SIMON, "*Reasonable Perception and Parody in Copyright Law*" (March 12, 2010). Utah Law Review, Vol. 2010, p. 779-858, 2010, appendix C at page 853.

Simon observed that any court decision regarding parody fails to consider the reasonable perceivers or what can be perceived[554]. Through the examination of various approaches taken by courts in relation to RPT, six distinct indicia have emerged, which judges evaluate in their opinions. These factors include:

- *The court as reasonable perceiver*; In *Campbell*, the US Court stated that judges do not have authority to decide what is artistic merit and they cannot decide on parody by a subjective inquiry[555]. The potential for misjudgment arises when decisions are influenced by one's subjective sense of humor[556].
- *The author's intent*; It may also involve considering the author's intent which many courts examined in order to determine the existence of parody and its

[554] In *Nikowitz v. Austria*, ECHR have introduced the criterion of reasonable perceiver in a casa involging satire "The court noted that the offending passage was to be understood in the way it would be perceived by an average reader" para 9, but it devolves a wide margin of appreciation to MS when dealing with comic and humorous content: "The Court reiterates in this regard that the test of 'necessity in a democratic society' requires it to determine whether the interference complained of corresponded to a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision which covers both the legislation and the decision applying it, even one given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10" para 21.

[555] A different approach envisioned that the judges themselves could be regarded as the reasonable perceivers. This potential was associated with the evaluation of the fourth statutory factor: the effect of transformative use upon the potential market value of the copyrighted work. Judges had used this approach in *Abilene Music, Inc. v. Sony Entertainment; WWE v. Big Dog Holdings; Columbia Pictures Industries v. Miramax Films Corp. and MasterCard; International Inc. v. Nader 2000 Primary Committee, Inc.* "Because some courts have held that parody is a question of law, this approach might not seem problematic, but it is. If the test is merely whether a court finds that the work has a parodic character, courts are judging the artistic quality of a work, and are doing so in a disingenuous manner" David A. SIMON, "*Reasonable Perception and Parody in Copyright Law*" (March 12, 2010). Utah Law Review, Vol. 2010, p. 779-858, 2010, cit. p. 802. Legal scholars have criticised subjective evaluation of the courts as influenced by judicial disapproval. For example, "*MCA, Inc. v. Wilson and DC Comics, Inc. v. Unlimited Monkey Business*, both involving off-color parodies, indicate the role that judicial disapproval plays in fair use [..] the court assumed, without more, that, because the works were both in "the entertainment field," they were in direct competition. Because of this competition, the court reasoned, the parody harmed the market for the original. [..] The real reason for the MCA decision, however, almost certainly was the court's intense disapproval of the parody, which it dismissed as 'dirty lyrics'" HECKE cit. p. 482.

[556] The BGH arrived at a similar conclusion in 2016, emphasizing the primacy of legislative authority in defining the scope of exceptions and limitations. The court believed that conducting further evaluation in each individual cases would increase the risk of subjective evaluations and errors in assessing the freedom of parody: "In addition, such a 'cross-check' would open the door to subjective valuations in the application of the law. In this way, all kinds of extraneous considerations could be introduced (e.g. in legal disputes) in the form of personal valuations and subjective assessments, for example in moral, political, ethical or economic terms or simply on the basis of personal preferences" KREUTZER p.27.

reasonable perception[557]. A few courts have used author's intent to determine the existence of parody under Fair Use[558]. Notwithstanding, the courts might rule misjudgements even when the author's intent in creating a parody is reasonable perceived[559].

- *Individual testimony and survey evidence*; At times, the court considered various types of testimony with differing importance. For instance, in the case of *World Wrestling Fed'n Entm't (WWE) v. Big Dog Holdings*, the court considered the statements of individuals who portrayed the characters that inspired the parody. Similarly, in the case of *Henley v. Devore*, the court considered the perspectives of both the plaintiff and the defendant (even if, at the end, the court rejected any reliance). Conversely, in *Mattel Inc. v. Walking Mountain Prods.*, the court disregarded survey evidence as a means of determining whether something qualifies as parody. The RPT should exclude personal opinions and the reactions of the general public when assessing a parody[560]. Simon holds a contrasting

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[557] "A Belgian court, for instance, asserted that a pornographic adaptation of a popular comic 'might display a humorous character to a certain group of readers', although it ruled out the exception on other grounds. A French court recognized that the review by the court must be limited to the genre and the intention of the defendant, 'irrespective of the result, which is embodied in the manifestation of laughter or smiles, both of which are subject to the talent of the artist and diverse sensitivities of the public, two parameters beyond the grasp of the court'', JONGSMA cit. p. 656. The author refers to Court of Appeal of Antwerp, 8th Chamber, 11 October 2000, A&M (2001) and Court of First Instance of Paris, 3rd Chamber, 14 May 1992 - *Michel SARDOU et autres c. Andre´ LAMY et autres*, RIDA 1992-4 (No. 154).

[558] See *Suntrust Bank v. Houghton Mifflin Co.; Mattel Inc. v. Walking Mountain Prods; Columbia Pictures Industries v. Miramax Films Corp. and MasterCard; MasterCard Int'l Inc. v. Nader 2000 Primary Comm; Bourne v. Twentieth Century Fox Film Corp.*

[559] "Author intent, however, has only partial relevance to reasonable perception. Courts discuss author intent to determine whether the work has parodic content. Part of the motivation in doing so, it seems, is a desire to prevent excluding from the parody doctrine 'inside' or failed jokes. To avoid doing this, courts focus on whether the author intended the work to be a parody. That analysis, however, can in some cases neglect the reasonable perception inquiry: What an individual reasonably perceives depends upon how that person confronts the work, not solely upon what the author may have intended. Author intent becomes relevant only if the individual can reasonably perceive what the author intended, and what is perceived bears on the parody determination" SIMON cit. p. 809. For this reason, according to Simon, "RPT should incorporate the author's intent only where (1) it can reasonably be perceived and (2) is relevant to determining whether a parody can reasonably be perceived" p. 810.

[560] In *Walking Mountain*, the author intent was taken into consideration " He explains that he chose to parody Barbie in his photographs because he believes that 'Barbie is the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture'. Forsythe claims that, throughout his series of photographs, he attempts to communicate, through artistic expression, his serious message with an element of humor" *Mattel Inc. v. Walking Mountain* para 796. Conversely, survey evidence was offered to the court, but it was dismissed ("We decline to consider Mattel's survey in assessing whether Forsythe's work can be reasonably perceived as a

viewpoint, as he believes that surveys should be given due consideration instead of being dismissed, if they are "directed at the types of people we think should evaluate what can reasonably be perceived from the work"[561].

- *Associated relationship*; Given that a parody is expected to distort the meaning of the original work while it may maintain its expressive form, the courts frequently considered how the parodist utilized and mocked the meaning associated with the inspirer work. The RPT for assessing parody can incorporate any connections made by a reasonable perceivers. This factor is particularly relevant when considering target parodies and weapon parodies. In the case of a target parody, the associated relationship is easily detectable as it directly comments on the original work. On the other hand, the associated relationship in a weapon parody involves using the original work to comment on something unrelated. Consequently, the association may appear less apparent to individuals unfamiliar with the author's work. Nevertheless, in both cases, the parodist establishes connections derived from the original work, and thus the RPT should take into account the associated relationship [562].
- *Mainstream reviews or commentary discussing the meaning of the work*; In *Abilene Music, Inc., v. Sony Entm't, Inc*., the court demonstrated the parodic nature by referencing reviews of the work. Simon emphasized that courts should refrain from utilizing expert media reviews and renowned criticism as indicators.

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parody" at 801). The court considered that the survey proposed could have determined the power of majority in determining what parody is; this finding could go against Fair Use doctrine and artistic creativity. "The plaintiff 'offered into evidence a survey' showing the reactions of the 'general public' to the defendant's work [..] Whether a majority of people perceive a parody does not answer the question of whether a parody can reasonably be perceived" SIMON cit. p. 813.

[561] *Ibidem*. Furthermore, the author argues that survey evidence might be more reliable than testimony, which the courts has taken into account thus far: "The parodic nature of the work will depend upon the ability of the reasonable perceiver to discern an attempt to comment on the underlying work. Thus, survey evidence is not necessarily incompatible with the RPT, and it may be appropriate if it targets individuals who are familiar with the underlying work. Indeed, survey evidence probably is more reliable than general testimony from individuals deposed in the case. That is why the *Henley* court correctly rejected the plaintiff's testimony—and why the *WWE* court erred when it relied on testimony from two individuals to bolster its conclusion that the works could reasonably be perceived as parodies. There is no doctrinal basis for deeming these two individuals reasonable perceivers. Therefore, when courts consider whether a work can reasonably be perceived as a parody, they may consult survey evidence. The individuals surveyed, however, must be familiar with the underlying work. In other words, the reasonable perceiver should be a person sufficiently familiar with the underlying work. This kind of individual could aid the court in determining whether a work can reasonably be perceived as a parody" SIMON cit. p. 814

[562] *See Bourne* and *Walking Man* where the courts found that the parodic comment on the original works could reasonably be perceived.

Any assessments stemming from reviews of the parody should not be included in the analysis of the reasonable perception test (RPT)[563].

- *The Internet.* The new tool has the potential to assess the reasonable perception of a parody. In *Bourne*, the court acknowledged that reasonable perception can be influenced by online content. The widespread dissemination of user-generated parodies can provide an indication of what people reasonably believe[564]. However, Simon raises concerns about the challenges involved in establishing effective filtering mechanisms and the possibility of errors occurring within them[565].

According to Simon, only three of these indicia should be considered into RPT: Author Intent[566]; survey evidence[567]; associated relationships[568]. In contrast, the other three indices should not enter into the final evaluation: court perspective; critics' review[569]; testimony[570]; Internet[571]. The judge must consider the three indicia

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[563] "The mainstream reviews or commentary discussing the meaning of the work [..] The fact that critics consider a work to be a parody does not answer the question of whether that work can reasonably be perceived as a parody - it merely defers judgment from courts to the critics. Parody does not depend on whether a critic thinks the work adequately comments on the original work. The term 'reasonably' must mean something more than a randomly selected critic deems the work parodic" SIMON cit. p. 811.

[564] "Essentially, the court in *Bourne* decided that the results yielded by Google search—the variables of which included a Google-search index, keyword advertising, an algorithm, the information on the Internet that the search retrieves, and the court's randomly selected search terms - are reliable indicators of reasonable perception. These variables, however, make searches unreliable as a form of evidence for reasonable perception. Therefore, a newly defined RPT should not incorporate these searches or their results", SIMON cit. p. 818.

[565] "It may be possible to structure search criteria and filtering mechanisms to weed out unreliable sources. That, however, is a difficult task that will not necessarily tell us anything about the reasonably perceived character of the work", SIMON cit. p. 818 (footnote 219).

[566] "Author intent can be relevant to the question of reasonable perception, but only if the inquiry focuses on whether the author's intent can reasonably be perceived" SIMON cit. p. 820.

[567] "Courts should allow survey evidence of individuals who are familiar with the underlying work that view the parodic work in context" *Ivi* p. 821.

[568] "The underlying work might have various meanings and messages by virtue of its relationship with other works or cultural products. The fact that a parody targets those associations would be relevant to determining whether a parody can reasonably be perceived" *Ibidem*

[569] "When courts start looking to critics' opinions of works, they lose sight of the "reasonable" component of reasonable perception [..] Thus, although they do contain a desirable quality, which is familiarity with the underlying work, critics' reviews do not necessarily represent a reasonable perception of the work, and courts should avoid using critics' reviews to make such a finding" SIMON cit. p. 820.

[570] "It merely states the opinion of one particular individual. Tempting as it may be for courts to take

when evaluating parody; notwithstanding, they are not meant to be comprehensive. Parody should also be determined by other factors that provide a clear indication of its perception and legitimacy.

4.3.5.2 Humor theory

To determine the legality of a parody, the analysis may incorporate humour theories, as discussed in the first chapter, specifically by reference to Laura Little and the three stances associated with parodic functions: the superiority, the incongruity, and the release theory. These theories can aid in distinguishing between target and weapon parodies by offering additional insights[572].

Additionally, in the third chapter, we observed that when judges assess the Fair Use statutory factors, once they confirm the transformative parody (first factor), the other three factors become irrelevant. Therefore, there is a current need to comprehend what humor is and how it operates. A more rational criterion for evaluating parody could be proposed by integrating elements from literary research (Genette) or social and cognitive science (Bergson and Freud). It appears to be a conflict between humor theory and the current practice of licensing the use of original works for parodic purposes, as interpreted by the courts[573].

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admissions from opposing parties as evidence of reasonable perception, they should refrain from doing so" *Ibidem*

[571] "It represents the viewpoints of random individuals, whose identity is unknown and whose viewpoint may be both unreliable and difficult to assess" *Ibidem*

[572] The inquiry on the distinction between target and weapon parodies is: "Can the work reasonably be perceived as commenting on the original and not use the original merely as a vehicle to comment on society?". If we include the humour theories analysed (superiority, incongruity and release. *See 1.3 Parody on the basis of its function*) to the RPT, the new inquiry presents a further focusing on new elements: "Can the work reasonably be perceived as commenting (or attempting to comment) on the original by (i) diminishing others or making oneself feel good; (ii) juxtaposing two different phenomena; or (iii) tapping into sexuality or taboo subjects? These three components allow courts to evaluate whether a work is parodic with reference to objective, guiding principles. Additionally, these components tie the parody inquiry to relevant research, thereby adjusting the parody inquiry to reflect our conception of humour" SIMON cit. p. 838.

[573] In the case of *DC Comics, Inc.*, the Court asserted that parody should only be granted protection when it creates something new. Parody is not to be protected when the mere purpose is to dismantle the old work. This court's interpretation contrasts with the humor theory and the parodic function we analyzed in the first chapter, where parody has been described as an act of deconstructing the old elements. *See* Yury TYNYANOV, *Destruction, parodie*, (1921), ″Change″, 2, 1969.

4.3.5.3 Cognitive research

Courts have become accustomed to applying the parody test on critical spirit which involves commentary, critique, and potential mockery of a prior work[574]; in this case, the parodist does not need of permission, and it is also free of charge. However, the use of copyrighted works may be restricted in cases the parody merely conveys satirical jokes to society or seek attention through such appropriation[575].

> The difficulty, however, of locating a precise point of view in ambiguous creative works creates an uncertain standard that chills potential speakers and discourages investment in satirical works. Small-scale users are especially disadvantaged because they generally lack the resources to bargain for licenses or defend potential lawsuits[576].

The acknowledgment of copyright rights concerning information and communication has faced several criticisms. The digital technology revolution has amplified the alteration and dissemination of copyrighted content over the internet, primarily for information and communication objectives. This category of "ephemeral material," like memes, websites, and remixes, is utilized by online audiences for their private conversations, such as chats among a few friends.

Cognitive research has demonstrated that "certain uses of copyrighted materials are unlikely to harm materially an owner's investment in, or a consumer's ability to, distinguish a specific message or identity in a given informational work"[577].

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[574] "Under the current parody regime, determination of whether a given use is fair can only be made after distribution and the filing of a lawsuit" BRADFORD cit. p. 711.

[575] We have already explained this tendency by US courts in *Roger vs Koons*. Although the courts adopted a different stance in the later case of *Campbell*, the distinction between target and weapon parodies remains prominent in the legal resolution of conflicts over parodies.

[576] Laura R. BRADFORD, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C.L. Rev. 705 (2005) cit. p. 709.

[577] BRADFORD cit. p. 711.

Laura Bradford prescribes that other indicia should inform the law and she proposes four well-established doctrines of relevance to secondary use which regulates "intangible entitlements and audience reuse rights"[578].

The first doctrine refers to resistance. Parody reflects a conservative mindset as it capitalizes on deeply attitudes that people seldom alter. Parody can employ its comedic effect by challenging and opposing new societal changes. Resistance is essential part on parody's evaluation since it plays on strong attitudes and it aims to subvert what people resist changing. The intention of parody is to evoke laughter from those who hold a resistant attitude. This character may present a risk: according to cognitive science, indeed, "The more familiar and rote a perception or belief is, the less likely we are to alter it either consciously or unconsciously through new information"[579]; Parody can influence newer works that are not yet well-known; when the audience's memory and attitudes are not fully established, they are "more vulnerable to change." In such cases, the goal of parody might not be laughter but rather to create a misleading effect.[580]

The second is the source effect in parody, where the humor derives from a specific source. The greater the popularity and recognition of this source, the more powerful the humorous impact will be (Mbala Mbala). The laughter effect of parody arises when the audience is capable of contextualizing the reworking of the source material. In such cases, there is no involuntary impact on the audience's behalf[581].

> The source of a work (or message) influences how its recipient perceives it. [..] In other words, the source (or the source's reputation) makes it

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[578] BRADFORD cit. p. 760.

[579] BRADFORD p. 761.

[580] Laura Bradford considers relevant the resistance element on parody and suggests a stronger copyright protection on newer works: "Information to which we are frequently exposed and of which we are often reminded is less susceptible to distortion [..] The newer works deserve greater protection than more established ones. Perhaps owners deserve an absolute protection from unlicensed commercial derivatives for one year following publication, for example, with wider use permitted later" BRADFORD p. 762.

[581] Such as the misleading in the Resistance element above. According to Bradford, "Users seem not to mind unauthorized re-workings of popular texts in the form of fan fiction or parody so long as one 'orthodox' version exists [..] Thus, works clearly identified as emanating from an unauthorized source, either in a labeled "parody" work such as the Yiddish with Dick and Jane book, or in the context of a sketch comedy show, for example, should be expected to have less involuntary impact on consumer attitudes than confusing or ambiguous secondary uses." BRADFORD cit. p. 764.

> more likely the work can reasonably be perceived as a parody - and the opposite also holds true[582].

Certainly, the source of the parody must possess credibility, trustworthiness, and a certain level of influence over the audience. However, this credibility does not necessarily imply that the source always tells the truth; even a comedic show or satirical paper can hold a reliable status and be well-known among its audience[583]. The source effect shall be considered in the RPT on parody[584].

The third doctrine involves misleading perception as well. This involuntary impact on the audience may be caused by the frequency effect of exposure to a parody which may lead to "involuntary changes in perception"[585]. Whenever parody may distort perception, the rightsholder of the original work shall retain strong property boundaries. The injunction should demonstrate the potential to distort audience attitude and it could aim to pop-ups aid or websites parodies[586].

Bradford suggests that copyright should pay attention to "low-involvement processing works"[587]. This could be the case of meme, capable of misleading and distorting the perception of an original work. This is because memes often gain widespread visibility and low-involvement processing, which can potentially undermine the audience's perception of the original content.

> We use low-involvement processing for messages that seem unimportant, trivial or when we lack sufficient attention or expertise to logically evaluate the subject matter. In low-involvement processing, we use cues

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[582] SIMON p. 841 and 842.

[583] "For example, Saturday Night Live (SNL) produces a commercial, its status as a comedic show indicates that it is not a trustworthy source for real news. People, therefore, are more likely to perceive an SNL commercial as a joke than a commercial appearing during the nightly news" SIMON p. 841.

[584] "The court should identify the “dominant” source using the RPT: the dominant source is the one most likely to be reasonably perceived by someone familiar with the underlying work" SIMON p. 843.

[585] Bradford borrows from consumer research which "demonstrated that greater exposure to similar commercials decreased liking and positive feelings both for the commercials and the products advertised". BRADFORD cit. p. 764.

[586] An example of website parody which just wanted to mislead consumers was *Associazione Investici c. Trenitalia s.p.a.*, Tribunal of Milan, 7 September 2004.

[587] "If we want to provide maximum protection to copyright owners, then we would want to be more concerned with likely low-involvement processing works than with dramatic or literary works that demand more sustained cognitive attention" BRADFORD cit. p. 767.

> such as source or familiarity to determine our attitude toward the communication and we tend to ignore the details of precise information contained in the message. For this reason, low involvement messages can actually have greater unconscious impact on our attitudes. Although we have not consciously evaluated the truth or credibility of such messages, they remain stored in memory and may unconsciously impact our opinions and desires the next time we consider a topic related to that message[588].

We can emphasize that the appropriate classification of those low involvement content (such as memes, and in general the User-Generated Content - UGC) under copyright law should encompass the creative endeavors that are deemed original and eligible for exclusive protection. Conversely, an overly extensive protection could pose a threat to the entire intellectual property system[589]. This scenario is also known as the "Tragedy of the anti-commons"[590], where increased protection of property rights for UGC to encourage innovation might discourage new artistic expression due to conflicting third-party interests[591].

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[588] BRADFORD cit. p. 766.

[589] On this point, we can recall the contrary doctrine to wide encourage of unauthorized appropriation for humorous purpose: "The most obvious link between parody and the public interest is parody's humor. The public generally consumes parodies because they generate a good laugh. Humor is certainly an important part of society, and it provides some reason to encourage the creation of parodies. However, parody's link to humor is not, in and of itself, a terribly good reason to encourage its creation. If nothing else, there is the danger that fair use treatment for humorous use could become an invitation to open ended misappropriation of copyrighted material. Too much unauthorized borrowing might erode the financial incentives that presently encourage the authors of original source material and offset whatever public benefits stem from parody's humor. Moreover, since good sources of humor would exist with or without parody, one might argue that parody's fair use treatment gives society relatively little in return for putting copyright's basic structure at risk" YEN cit. p. 91.

[590] On *Tragedy of the anti-commons*, *See* Michael HELLER, *The Tragedy of the anti-commons*, 111 Harvard Law Review, 1998, p. 621 ss. and Ugo MATTEI, *La proprietà*, UTET giuridica, 2015, p. 8 ss.

[591] See Carmine DI BENEDETTO, *La Cassazione, l'originalità dell'opera musicale e il giudizio di plagio-contraffazione: una questione di "genere"?*, commento a Cassazione Civile, Sez.I, 8 settembre 2015, n.17795, in Il diritto industriale, 2016. According to other legal scholars, private interests contrast "The Tragedy of the commons": "In this view, common ownership of resources is inefficient because each individual stakeholder has little incentive to maintain or improve the resource but instead will overuse it. Private ownership, on the other hand, provides incentives to improve and maintain the property and allows for full internalization of the costs of different choices. Applying this analysis to intellectual property frames all unauthorized secondary users as trespassers and their secondary works as stealing [..] Under the tragedy of the commons model, in the absence of private property rights, users will overexploit [..] each individual user's best interest is to "overgraze" or take as much [..] as possible [..] Private ownership, by contrast, allows for consideration of the costs and benefits of different uses of a resource. [..] Private ownership will induce investment in improving the

Bradford encourages the adoption of an analysis based on cognitive research, economy and consumer choice for parody. This choice denies the artistic evaluation upon the courts[592]. Bradford does not consider restrictions on dissemination of intellectual property a disadvantage for the public; if the secondary works, such as parody, are allowed indiscriminately, the personal creativity could suffer of originality. Bradford advocates for utilizing an analysis grounded in cognitive research, economic considerations, and consumer choice when dealing with parody. This approach avoids relying solely on subjective artistic evaluations by the courts and would also remove the need for European qualification of parody as exception. Bradford does not view restrictions on the dissemination of intellectual property as harmful to the public and to copyright main goal. The decision to allow secondary works, like parody, may potentially hinder personal creativity and originality.

> Acknowledgement of copyright's conceptual underpinnings thus allows for compromise between the competing economic and free speech models of secondary use[593].

Simon integrates elements from humour theory and cognitive research into the RPT to achieve a more consistent legal classification of parody[594]. This aids courts in assessing and deciding cases regarding freedom of parody more accurately and consistently[595].

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property because owners know they will be able to capture the return on their investment" BRADFORD cit. p. 713

[592] "The virtue of adopting an analysis based on consumer choice is to remove analysis of artistic meaning from the judicial sphere and to provide clearer rules to secondary users and to owners. Judges are not well-equipped by training or experience to arbitrate over the objective meaning of cultural works" BRADFORD cit. p. 768.

[593] BRADFORD cit. p. 770.

[594] "The end product of all this analysis is a reformulated parody test. The test retains the key doctrinal elements articulated by the Supreme Court and jettisons those that are unnecessary or not useful. Additionally, the test adopts a set of indicia to aid courts in determining what can reasonably be perceived as parodic. It also describes a reasonable perceiver - a perspective from which courts can analyze whether a work is a parody. Finally, elements of humor theory and cognitive research were incorporated into this new test. These efforts create a more coherent legal definition of a parody, which, in turn, allows for a more coherent judicial analysis. This test should allow courts to more accurately and consistently decide cases where the parody doctrine is invoked. Where the work fails the test, hand-wringers need not worry too much, as the fair use test still applies", SIMON cit. p. 848.

[595] These elements could be incorporated into the previously mentioned criteria for evaluating parody. On this point, Simon holds a different opinion on some elements from cognitive research. According to him, the RPT should solely focus on the source effect. It should not incorporate resistance,

APPENDIX A: PARODY STATUTE

An Act to Amend to the Copyright Act of 1976 with respect to parody as fair use.

SECTION 1. SHORT TITLE.

(a) Short Title – This Act may be cited as the "Parody Act of 2010."

SECTION 2. DEFINITIONS

(a) PARODIC WORK. A "parodic work" means a work that can reasonably be perceived as a parody.

(b) REASONABLY BE PERCEIVED. A work "can reasonably be perceived as a parody" when—viewed in the context where a person familiar with the underlying work would confront it—the person familiar with the work can reasonably perceive that:

(1) the work comments—or attempts to comment—at least in part, on the underlying work's content, message, or style by:

(A) diminishing others or making oneself feel good;

(B) juxtaposing two different phenomena;

(C) tapping into sexuality or taboo subjects; or

(D) some other similar method; and

(2) the work does not use the underlying work merely as a vehicle to comment only on society generally.

(3) In determining whether a work is reasonably perceived as a parody, the court should use all of the following factors:

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frequency effect, or hierarchy of processing "Resistance - which concerns an individual's perceptual inclinations based on previous exposure to certain objects of perception - does not really add anything to the RPT. The familiarity component captures the perceptual entrenchment that may exist. To start factoring in resistance would complicate matters without much added benefit" SIMON cit. p. 842.

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(A) *Survey Evidence*. Surveys of individuals familiar with the underlying work can be used to determine whether the parodic message of the work can reasonably be perceived.

(B) *Associated Relationships*. As part of survey evidence, as part of the court's legal inquiry, or both, courts should account for any associations with the underlying work.

(C) *Limited Author Intent*. Where an author's intent can reasonably be perceived and is relevant to the parody question, it should be considered by the court.

(D) *The Work's Source*. Courts should look to the predominant entity, organization, or individual - from the standpoint of a reasonable perceiver - from which the work originates and is distributed[596].

4.4 Freedom of parody in the digital age

Parody is present in everyday life, as was pointed out in the first chapter, and this is certainly just as valid for the digital world, where this transformative practice has obtained great importance. The development of parodic phenomena inside Web 2.0 facilitates wide-spread participation and creation by users of the so-called Information Society thanks to web-applications[597]. New technological tools satisfy the primary need of a user to act as an "active author"[598], as a producer of creative

[596] SIMON p. 849.

[597] *See* David TAN, *Parody, Satire, Caricature, and Pastiche: Fair Dealing Is No Laughing Matter*. In S. Balganesh, N. Wee Loon, & H. Sun (Eds.), The Cambridge Handbook of Copyright Limitations and Exceptions, 324-343 (2021): "The ready availability of video editing software, video hosting websites, and social media platforms makes it much easier today than ever before for individuals to engage in the production and dissemination of multimedia works, but it is still open for the trier of fact to differentiate legitimate parodies from illegitimate rip-offs" cit. p. 329.

[598] *See* Gianluigi COGO (2010) *Cittadinanza digitale. Nuove opportunità tra diritti e doveri*. Roma: Edizioni della Sera, 33. The active author figure can be deduced from the theory formulated by Jakob Nielsen in October 2006: "1-9-90" rule, according to it 90% of the participants of a web-community just view content; 9% edit previous content and just 1% actively create new content. For sure, these percentages have been overturned since 2006; more recent data (2012) estimated that 52% of Internet users created UGC. *See* Pinar YILDIRIM, Esther GAL-OR and Tansev GEYLANI, *User-Generated Content and Bias in News Media*, Management Science, December 2013, Vol. 59, No. 12 (December 2013), p. 2655. This is also confirmed by the registered amount of Internet traffic: "It is also important

content. The "active user" can often feel that they are the protagonist in a new method of communication, while guaranteeing the survival and success of virtual communities[599].

A user normally joins social media for individual or social reasons. Two different approaches can be noted: a) a user who creates content, with parody being a way to become an "active user" inside most modern social media where everyone can produce their own creative content; b) a user who hosts third-party content. As Sartor[600] underlines, a user can perform the role of hosting provider at the second level, where the user hosts third party content in their public profile.

In this sense, parody is proof of the social function of Web 2.0, which is an instrument for spreading opinions and content. New, recently-born media allow online critical spirit to arise into a new and varied scenario, in terms of quality of expression and quantity of content produced. The peculiarities of online interactions, such as the speed and nature of online artistic productions, present problems that cannot always be engaged with using traditional legal theories and categories. Nowadays, Web 2.0 is the main home for freedom of communication and social relationships. Moreover, new rights arise thanks to these new opportunities; for instance, the right of access to, and fruition of, content. The new challenge, for present legal scholar, is finding a balance between old and new rights.

The nuance of parody has facilitated the advent of amateur creators. Creators of User Generated Content (UGC) are currently the most significant subjects to make use of online parody, which has already become a viral practice at the centre of the digital scenario. Moreover, the traditional relationship with rightsholders has been changed by this new form of appropriation, abetted by new subjects that have

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to highlight the potential reach of UGC, as it drives a tremendous amount of Internet; for example, monthly active users on a site like Twitter have grown from approximately 70 million in 2011 to nearly 330 million in 2017" LARSON cit. p. 367.

[599] *See* Gianluigi COGO, *Cittadinanza digitale. Nuove opportunità tra diritti e doveri*, Edizioni della Sera, Roma, 2010, p. 34.

[600] Giovanni SARTOR, *Social networks e responsabilità del provider*, AIDA, 2011, p. 39.

emerged; social networks and social media that today command new information and communication technologies via their policies[601].

> UGC certainly has empowered (or has at least given greater power than before to) two new actors in the realm of copyright, apart from the rightsholders who have long been there: on one hand, the users, who have also been there from the beginning of the history of copyright but who had remained up until not so long ago almost unnoticed (actually, users became copyright actors when they acquired the means of mass individual copying, first through the audio recorder and then through video recording devices); and on the other hand, the platforms, which have become new major (if not yet the most important) actors and stakeholders in copyright law[602].

Balkin presents two different schools in the regulation of freedom of expression. The old-school is the traditional one, in which the subjects are the State and the speakers, including the individual, the press, the mass media etc. In this scenario, the State controls and punishes any speech that falls outside legitimate exercise and infringes the above-mentioned limits. This is a dualistic system of regulation that embodies freedom of speech in the offline world.

The advent of the digital environment has required a different approach, which Balkin calls the new-school. This new scenario is pluralistic and brings new types of players to the regulation of freedom of expression; those working on internet infrastructure (social media, OCSSP etc). This aspect brings Balkin to label this new form of freedom of expression a triangle:

> This is the new structure of speech regulation in the early twenty-first century, and debates about the rights of online free expression must grapple with that structure[603].

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[601] ″Repurposing, updating, or upgrading contents need not be expressions of mere plagiarism or sloppy morality. They may be ways of appropriating and appreciating the malleable nature of informational objects″, Luciano FLORIDI *The fourth revolution*. *How the Infosphere is Reshaping Human Reality*, Oxford University Press, 2014, p. 52.

[602] Jean-Paul TRIAILLE et a. *Study On The Application Of Directive 2001/29/Ec...* European Union: De Wolf & Partners (in collaboration with CRIDS), 2013, p. 455.

[603] Jack M. BALKIN, *Free speech is a triangle*, Columbia Law Review, Vol. 118, 2012:2011-2056cit. p. 2015.

The new-school regulation of freedom of expression is thus directed at internet infrastructure, where new private players have a significant role in the governance of this freedom:

> In the early twenty-first century, freedom of speech increasingly depends on a third group of players: a privately owned infrastructure of digital communication composed of firms that support and govern the digital public sphere that people use to communicate[604].

The advent of the new structure also masks the identity of a few speakers at the very bottom of the pyramid, as Balkin highlights. For instance, the author cites "trolls"[605], which are inherent to the internet and may have a few features in common with the idea of parody being a degeneration of the system, which I will analyse further[606].

Parody may thus be included in this evolution; its regulation has been recognized both as exception in copyright law and as exercise of a fundamental right (freedom of expression), but the transmigration of parody, from offline to online, raises new legal issues and may be inserted into Balkin's perspective. Indeed, the new players (in particular, social media) play a significant role in the licit use of online parody. The transmigration of parody also changes the role of the first player, the State. If it was the main controller of comic artistic expression in the old

[604] BALKIN, *Free spech is a triangle*, cit. p. 2012.

[605] ″On the third corner of the triangle, at the very bottom, we have speakers and legacy media, including mass-media organizations, protesters, civil-society organizations, hackers, and trolls. Although both states and infrastructure owners regulate their speech, they are sometimes able to influence states and infrastructure owners through social activism and protest″ BALKIN cit. p. p. 2018.

[606] Trolling has been studied within copyright law, particularly in relation to Fair Use doctrine in an article by Brad A. GREENBERG *Copyright trolls and presumptively fair uses* University of Colorado Law Review, Vol. 85, 2014, ″under traditional fair use analysis for three reasons: (1) the troll has no market to be harmed; (2) the secondary use is for a different purpose and thus transformative; and (3) courts may excuse copyright infringements in troll-related matters because enforcement would not support the objectives of copyright law. Additionally, trolls have shown a propensity for acting in bad faith, and when that occurs it weighs in favor of fair use″ cit. p. 57.

tradition, it has now lost this role to social media, since they are the only actors capable of controlling this content[607].

Another aspect that stands out in the transmigration of parody is the fact that, in the off-line world, a parodist is usually an artist who creates for a defined audience and who must justify the publication of an intellectual work by convincing professional intermediaries, whose aesthetic judgments represent the first obstacle. In the online world, on the other hand, anyone can rework another person's creation using digital technology and disseminate the new content online in the Internet's decentralized environment and through peer-to-peer programs. The efficient and qualitative role of intermediaries is thus drastically limited, if not entirely absent. The online circulation of content disregards any judgement by a professional intermediary as to the quality of a parody. Somehow, the distinction between the author who creates the parody, the company that distributes it and the audience who benefits from it has been abolished[608].

The new scenario, in which parody performs its function as UGC, may thus reform the tradition of copyright law and force a necessary rethinking of the exclusive right. Parody has maintained a long-standing tradition of being considered an exception to the exclusive right within Fair Use doctrine; the application of "parody defence" could be integrated within Copyright law 2.0[609]. On one hand, the

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[607] *See* MENGHINI *Libertà di satira*, where I suggest a different role for the State; not controller anymore, but guarantor of comical expression. An analysis about the role of the State connected to the freedom of comical expression is Giuseppe CASSANO *Manifesto per la satira e per i comici a proposito dello sketch politicamente (s)corretto dei comici Pio ed Amedeo*, Diritto di Internet, fasc. 3 2021.

[608] Paolo AUTERI, *Internet e il contenuto del diritto d'autore*, AIDA, 1996, p. 86.

[609] Copyright 2.0 and the new exclusive right fits for the Digital Agenda would give creators just the right to attribution. The rightsholders' exclusive right could also be effective against specified non authorized uses (especially in case of subsequent commercial uses): ″ the new system would have four basic features. Old copyright, or Copyright 1.0, would still be available; but it would have to be claimed for by the creator at the onset, e.g. by inserting the old copyright notice, ©, as the US did in the past, before accessing the Berne Convention.18 If no notice was given, Copyright 2.0 would apply; and this would give creators just one right, the right to attribution. The notice could also be added after creation, but then it would only have the effect of giving exclusivity against specified non authorized uses (in particular: subsequent commercial uses). The Copyright 1.0 protection given by the original notice could be withdrawn, and may be it should be deemed withdrawn after a specified period of time (e.g. the 14 years of the original copyright protection), unless an extension period (of another 14 years) is specifically requested″ RICOLFI *Making Copyright Fit* p.6. In this sense, parody always respects the right to attribution and, even if it can evaluate as a subsequent commercial use, it

need for professional intermediaries is no longer fundamental for artists, who can be in direct contact with the public, while, on the other, the advent of digital evolution dramatically changes the role of subjects involved on both the production side (everyone may create UGC using very cheap software) and the distribution side (by using file-sharing). The emerging forms of communication and information dissemination by online users have the potential to impact how copyright law governs the fair use of cultural works. Rightsholders seek to control specific types of utilization of their intellectual property, which may need adjustments depending on the information medium. The proper assessment of copyright's purpose should be reevaluated, especially concerning informational content that circulates on the internet[610].

> The time has come for us to finally become aware that in our post-post-industrial age, the long route which used to lead the work from its creator to the public by passing through different categories of businesses is gradually being replaced by a short route, which puts in direct contact creators and the public[611].

There is therefore a double risk in this scenario; firstly, the lack of *ex-ante* control by professional intermediaries may affect the quality of parody in terms of creativity, and, secondly, the victim of a parody is barely able to take legal action at all, because they may not know about the violation and because it is very difficult to judicially attack the parodist.

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does not harm the potential market (*see Acuff-Rose Music Inc v. R Campbell*). Copyright 2.0 (or the derogatory treatment) seems to be inherent with parody: ″If simply distorting a work amounts to derogatory treatment, almost any parody could amount to derogatory treatment″ Ed BADEN-POWELL and Ed WEIDMAN, *Whose line is it anyway? – New exceptions for parody and private copying*, Entertainment Law Review, 2013, ct. P. 3/6.

[610] "Digital technology exacerbates the tension between audience and owner in two ways. First, it facilitates copying, alteration, and distribution of copyrighted works. Second, it makes tangible informal communication and social interaction through email, websites and other forms of electronic communication, and so pulls relatively private speech into the reach of the copyright laws" Laura R. BRADFORD, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C.L. Rev. 705 (2005), cit. p. 708.

[611] Marco RICOLFI, *Making Copyright Fit fort he Digital Agenda*, 12th EIPIN Congress 2011, cit. p. 2. The advent of digital technology represents an opportunity to reform copyright law also according to various legal scholars. *See* Aura BERTONI and Maria Lillà MONTAGNANI *La modernizzazione del diritto d'autore e il ruolo degli intermediari internet quali propulsori delle attività creative in rete*, in Diritto dell'informazione e dell'informatica, Vol. 31, Nº. 1, 2015, 111-149.

The role of social media in regulating online parody is thus increasingly significant. The creation of so-called User-Generated Content (UGC) on these social-media platforms is now the real medium of mass communication[612]. This evolution is due to the use of parody on the web. Indeed, parody stops being just an artistic form of expression by which the individual affirms both creative labour for the recognition of connected copyright interests and also freedom of expression in a democratic society. Today, an active user that spreads parodic content mostly expresses the will of free participation and communication inside Web 2.0:

> User-generated content as form of content is a very wide notion and difficult to define, and a legal definition does not exist. It is rather a collective term that includes a large variety of content. A description that does not run the risk to exclude certain activities would define UGC as all content that is created by private individuals primarily for non-commercial reasons as part of an interactive act of communication[613].

Nevertheless, there is a risk that the power to control user-generated parody may be ineffective, and that this content may then violate copyright[614] and some fundamental rights. In this regard, the New Copyright Directive 2019/790 for the Digital Single Market (DSM) has been recently issued at the European level with the aim of harmonizing the qualification and regulation of this new digital content; social-media platforms are charged with filtering and moderating unlawful content, as they are the only agents that are practically capable of tracking it. This assumption is based on network architecture and has been confirmed by the DSM. The intervention of private agents in the regulation of online parody raises new ethical issues that may have a concrete effect "on the meaning of the comic". In this sense,

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[612] *See* Jacopo MENGHINI, *Libertà di satira: una sfida per i social media*, Forum di Quaderni Costituzionali, 2022.

[613] Bernd Justin JÜTTE, *Reconstructing European Copyright law for the Digital Single Market. Between old paradigms and Digital challenges*, Luxemburg Legal Studies, Nomos/Hart, 2017, cit. p. 263.

[614] In a recent study on UGCs has been highlighted the widespread copyright infringement by amateur users: ″when analysing concrete UGC cases and wondering whether there is a potential copyright infringement, there are, in our opinion, much more instances where the answer may clearly be "yes" than cases where the answer will be "no" or will be uncertain″ Jean-Paul TRIAILLE, *User Generated Content (UGC) – First Part*, De Wolf & Partners, in collaboration with CRIDS, 2013, cit. p. 510.

social media may govern through *de-facto* power and may ignore the traditional limits for conflict resolution that have been used thus far[615].

4.5 Conclusions

I've assessed in this chapter the freedom of parody based on the principles of academic legal studies that link the legitimacy to the unrestricted expression of ideas. This moves away from the discussion based solely on copyright law and whether the inspirer of parody could intervene at the defence of his or her interests. Instead, it introduces the idea of enabling audiences access to content without hindering or discouraging discourse, cultural evolution and artistic development. The parody has been here judged licit as long as its impact on the community is acceptable; thus parody must be outlined within the established limitations of freedom of expression.

This theory has been considered acceptable in its aims, which, as I've emphasised throughout this chapter, are primarily to ensure the greatest possible freedom of parody. However, there is a counter-argument about the approach it takes to achieve these aims. There's no constitutional principle that justifies the infringement of copyright law. The debate between freedom of expression and copyright law has never conclusively favoured one over the other. Particularly in the case of parody, the creator cannot claim freedom of expression if it also pertains copyright infringement. The exclusive rights granted to the original creator under copyright law prevent others from using the work arbitrarily[616]. The freedom of parody cannot be sanctioned without calling into question the legal status of the work. The encouragement of freedom of expression must go hand in hand with the

[615] In this context, the ECHR has underscored that Member States have a proactive duty to intervene when private persons or organizations encroach upon freedom of expression and information: "Article 10 ECHR also includes the right to freedom of artistic expression which affords the opportunity to take part in the 'exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions, an exchange that is essential for a democratic society'. Hence the obligation for the authorities, or private persons or organizations, applying or claiming copyright protection, not to encroach unduly on the freedom of artistic expression" VOORHOOF cit. p. 336 (citing ECHR *Vereinigung v. Austria*). The ECHR views this duty as a positive obligation. Simultaneously, national authorities also have a negative obligation: they must abstain from interfering with the mentioned rights.

[616] *See* SPEDICATO *Opere dell'arte appropriativa* p. 124.

protection of the result of creative work. In this sense, the recognition of the constitutional relevance of the exceptions and limitations regime, the rules which limit the *jus excludendi alios* of the original author, is primarily justified by the freedom of expression and the development of art.

Granting legitimacy to parody solely through freedom of expression would further worsen its impact on the creators of the original works. Additionally, this approach wouldn't safeguard parody in nations where there is no freedom of expression. Hence, it remains essential to examine parody within the framework of copyright laws, as they are the only means to ascertain the originality and non-derivative nature of the work.

Finally, I delved into the realm of online parody, which presents unique challenges in the digital sphere. The emergence of new social media capable of determining the legitimacy of parody raises questions about the authority of these private entities over parody. In this context, a European directive focused on the single digital market has intervened to include parody as an exception to exclusive rights, as I will explore shortly in the next chapter. This directive aims to exempt social media platforms from the obligation to make a purely private assessment of parody, thereby bypassing the need to assess the originality of the work. The aim of the online parody exception is to relieve social media of the onerous task of determining whether a parody infringes a third party's copyright, as the work resulting from exceptions and limitations to exclusive rights remains beyond the control of the original author. However, the inclusion of online parodies within the exceptions and limitations doesn't exclude the possibility of legal scrutiny if it infringes the interests of third parties. Defamation or discrimination are torts that anyone who feels offended by a parody can legitimately claim, regardless of its scrutiny under copyright law.

Chapter 5
Parody in the Digital Age

5.1 Introduction to the EU Directive on copyright and related rights in the Digital Single Market 2019/790 - DSM

Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM) was introduced in 2019. Its objectives are in line with the previous InfoSoc Directive 2001/29/EC, which mainly emphasised industrial policy objectives. The rapid growth of the multimedia market in recent years requires a new and comprehensive legal framework that can effectively protect investments in creative activities. In the age of the information society, EU policy instruments must promote innovation and competitiveness while preventing copyright infringements in the digital environment.

> Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content[617].

Another objective of the DSM 2019/790 is to achieve a coherent and far-reaching harmonisation of copyright rules across the European Union, which can ensure a well-functioning internal market, avoid regulatory disparities and increase trade and circulation of protected content. Harmonisation therefore aims to unify divergent legislation and should be pursued consistently by Member States through the transposition of the DSM into national legal systems. The advent of the digital age further justifies the need for European harmonisation efforts, as uncertain legislation on the effective scope of permissible exploitation could have a negative impact on online users.

[617] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 9134/18 cit. p. 3.

The importance of harmonisation has been highlighted in the proposed EU Directive on copyright in the Digital Single Market, particularly in relation to the exceptions and limitations regime, where parody has once again been included[618].

> Since exceptions and limitations to copyright and related rights are harmonised at EU level, the margin of manoeuvre of Member States in creating or adapting them is limited. In addition, intervention at national level would not be sufficient in view of the cross-border nature of the identified issues[619].

The best way to ensure uniform protection for European online users would be a mandatory list of exceptions and limitations. The objective is explicitly stated in the DSM in recital 70.

> That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union[620].

Exemptions, and limitations in particular, are notable examples of harmonisation efforts within the EU, given the historical diversity of Member States' legal systems in this area. As discussed in Chapter 3, the implementation of the parody exception, for example, has varied from one Member State to another, and the DSM Directive 2019/790 provides a solution to this heterogeneity by requiring Member States to transpose the exceptions listed in Article 17 into national law. This is particularly important given the global reach of the internet and the unpredictability of certain events. As explained above, the effects of parody can be

[618] *See* JÜTTE "Limitations and exceptions relate to uses of works or other protected subject-matter that are permitted without prior authorization and play a pivotal role in every copyright system. They are designed to strike a fair balance between the interests of rightsholders and the interests of the general public by permitting the use of protected material in certain 'specific' situations" cit. p. 231.

[619] Proposal for a Directive on copyright in the Digital Single Market cit. p. 5.

[620] Recital n. 70, UE Directive 2019/790.

far-reaching: it has the potential to affect a range of parties, such as the rightholder and individuals who may feel targeted. Mandatory uniform application of the exception would help to avoid divergent rulings by multiple national courts on the same parodic content. DSM 2019/790 thus introduces "certain provisions that represent, qualitatively more than quantitatively, a significant expansion of the scope of exceptions and limitations in EU"[621].

Finally, another aim of the DSM is to establish a stronger EU competence in the field of culture, a concept already enshrined in the Maastricht Treaty. The protection of culture, especially in the digital age, is inextricably linked to the primary purpose of copyright: the online access and dissemination of out-of-commerce works.

> Despite the fact that digital technologies should facilitate cross-border access to works and other subject-matter, obstacles remain, in particular for uses and works where clearance of rights is complex. This is the case for cultural heritage institutions wanting to provide online access, including across borders, to out-of-commerce works contained in their catalogues. As a consequence of these obstacles European citizens miss opportunities to access cultural heritage. The proposal addresses these problems by introducing a specific mechanism to facilitate the conclusion of licences for the dissemination of out-of-commerce works by cultural heritage institutions[622].

The protection of culture also requires an effective policy to combat online piracy, which can have a negative impact on the digital market from an industrial point of view and is seen as an obstacle to the widespread dissemination of culture[623].

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[621] BORGHI cit. p. 12.

[622] Proposal DSM 2019/790 cit. p. 2.

[623] The objective was already enshrined from a few Recitals by Infosoc Directive 2001/29/EC: ″(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action. (14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching. (22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works″. The DSM 2019/790 confirmed such objective, shed light on the role of the OCSSP in such illegal practice: ″(62) Finally, in order to ensure

Copyright enforcement is therefore the new strategy that seeks to involve intermediaries in the fight against piracy. Excessive rigidity in copyright enforcement could, in turn, discourage the dissemination of culture. Exclusive rights are gradually becoming less important for online users of protected material. The framework of exceptions and limitations thus facilitates the expansion of uses that are perceived as fair by the online community[624].

5.2 Parody a right of users

The new digital single market may reform and harmonise the copyright principles regime on exceptions and limitations which could be constructed as a user's right[625]. The reform of copyright exceptions is in line with the ongoing discussion on parody. The legality of parody often revolves around an individual's exercise of freedom of expression that serves the public interest, particularly in the case of satire that seeks to criticise established powers and uphold democratic values, and which can be protected as a superior interest of a community rather than an individual private interest of the copyright holder.

> Entitlements to certain permitted uses can equally be construed as 'rights' on the ground of the superior interests that they represent. The argument in this case would not be that the act in question is beyond the scope of authorial entitlements, but that it is, so to speak, above them[626].

The CJ has recently made a statement regarding Article 17 (2) of the EU Charter relating to intellectual property[627] and has consistently taken a different

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a high level of copyright protection, the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy″.

[624] *See* BERTONI MONTAGNANI p. 115.

[625] "If construed as users' rights, exceptions would not only function as affirmative defences against copyright infringement, but would impose certain duties not to interfere or to take actions that restrict users' entitlements over certain uses of works" Maurizio BORGHI, *Exceptions as users' rights in EU copyright law.* CIPPM / Jean Monnet Working Paper No. 06-2020. October 2020, cit. p. 1.

[626] BORGHI cit. p. 4.

[627] In the case of *Scarlet Extended v SABAM,* the CJ interpreted property rights as not being absolute: "there is nothing whatsoever in the wording of Article 17 (2) of the Charter or in the court's case law

approach to exceptions by interpreting them as mere derogations from exclusive rights. This shift in the CJ approach began with the *Padawan* case and was further consolidated in the *Technische* case for the recognition of a statutory exception regime as an "autonomous source of rights"[628], which hold significance equal to the exclusive rights.

In this perspective, the parody exception would be interpreted either as an internal limitation of the inspirer's right (for example, the inspirer could claim damages for the exclusive right since the parody acts as a substitute) and as an exercise of the parodist's freedom of humour. In this context, the application of the principle of proportionality can balance the impairment of the subjects[629].

The right to property, as enshrined in Article 17 of the EU Charter, has two main components. First, it includes a general prohibition of expropriation, which applies to the exclusive rights of the rightsholder, unless there is an overriding public interest justification[630]. Secondly, it includes the power of the central state to control property, which can only be exercised in the pursuit of a general interest. Parody is a form of deprivation of property, as the inspirer cannot challenge the specific exception[631]. In this scenario, the protection of the free use of copyrighted content for humorous purposes and the protection of comic expression would take precedence. Consequently, parody could not be considered as a user's right if: it constitutes a significant infringement through a disproportionate application of the exception; it

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to suggest that the intellectual property rights enshrined in that article are inviolable and must for that reason be protected as absolute rights" para 43.

[628] BORGHI p. 5. In Case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG,* 11 September 2014.

[629] "When interpreting the scope of application of copyright exceptions, proportionality takes on the meaning of an assessment, on balance, of the impairment of the copyright owner's property right by effect of the exercise of the users' freedom of expression, vis-à-vis the reciprocal impairment suffered by the users' rights by effect of the exercise of the property right of the owner" BORGHI pp. 8-9.

[630] "For example, in 2014 the UK government introduced a narrowly construed exception for private copying without any mechanism for compensating copyright holders. [..] While the court did not consider it necessary to refer the question to the CJEU, it could be reasonably assumed that EU law would preclude a non-compensated private copying exception. This may in fact be considered a disproportionate interference in the rights protected by Article 17 (2)" BORGHI cit. p. 12.

[631] Borghi, on the contrary, considers that DSM 2019/790 exceptions "should be better understood as justified 'control' of the use of property, rather than forms of 'dispossession' in the public interest" p. 16. For example, art. 8 DSM (Use of out-of-commerce works and other subject matter by cultural heritage institutions) introduces the new principle of extinction of exclusive right for "non-use" within copyright doctrine.

lacks humorous character and unreasonably restricts the interests of the rightsholders or other personal rights.

5.3 Art. 17 DSM and the new parody exception

The EU Directive on copyright and related rights in the Digital Single Market incorporates parody under Article 17, clause (7), let. (b). The list remains unchanged from the InfoSoc Directive 2001/29/EC, in which parody is associated with caricature and pastiche within the regime of exceptions and limitations to the exclusive right[632]. Parody (and the other terms present in the list) should be considered as autonomous concepts of EU law, to be interpreted in accordance with case law of the CJ. The existence of exceptions and limitations in the digital single market enables new activities with significant economic impact. This benefit goes beyond quantitative production and includes qualitative aspects, as the wide dissemination of intellectual works promotes social and cultural values. In this context, the parody exception can be described as a win-win operation, as it encourages the creation and distribution of online content; moreover, it stimulates the circulation of information and communication between active and passive user[633]. These characteristics hold significance for public interest and align with the main

[632] As mentioned, criticism and review are the specific purposes covered by the exception and limitation list of the DSM 2019/790 as well. In such cases, the use of copyrighted works would be permissible if it serves the cited purposes. The resemblance between parody, criticism and news reporting has led legal scholars to emphasize that a licensing mechanism, commonly employed for derivative works, might not be well-suited for them: "With news reporting, timing is likely to be an especially relevant issue: news cycles are typically fast, and there may not be time to secure a licence. Some types of news reporting would not occur if licences needed to be negotiated. Many ‘scoops’ would be impossible, for instance, if the person or entity breaking the story had to negotiate a copyright licence. [..] There will doubtless be other context-sensitive reasons that will sometimes make it impossible to rely on the mechanisms for organising access to speech created and sustained by the copyright system" AUSTIN cit. pp. 710-711.

[633] Clay Shirky's theory, known as the "End of audience", delves into the concept that contemporary audience is transforming into content creators. The theory delves into the sociological aspects of social media. Shirky contends that the traditional passive users have shifted significantly into creators due to the dynamics of social media. *See* Clay SHIRKY *The end of audience* (chapter 19) in *Media Theory for A Level. The Essential Revision Guide* By Mark DIXON, Routledge, London, 1st Edition 2019.

objectives of the DSM. Therefore, parody represents both highly significant consumer activity[634] and high degree of creative input[635].

> The EU Commission also understands Art. 17 Par. 7 DSM Directive and Art. 5 Par. 3 lit. k) InfoSoc Directive to be of great importance for the legitimization of user-generated content. A website with questions and answers on the DSM Directive states: "Will the Copyright Directive prevent users from expressing themselves in the same way as now? Will memes and GIFs be banned? No. Uploading memes and other content generated by users for purposes of quotation, criticism, review, caricature, parody and pastiche (like GIFs or similar) will be specifically allowed. Users will be able to continue to upload such content online, but the new rules will bring clarity in this respect and will apply in all EU Member States".[636]

The online parody (as well as other forms of free use) requires a comprehensive re-evaluation in several areas of law which include the framework for exceptions and limitations, the implementation of collective and open licences[637], the liability model for intermediaries, and an appropriate regulation of emerging online

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[634] The highly significant consumer activity has been already discussed in the second chapter at section ″Rate of parodies″. The enormous amount of creative material illustrates the spread of online parody and shows that this new digital media genre has become increasingly popular among users. *See* Kris ERICKSON, Martin KRETSCHMER e Dinusha MENDIS. *Copyright and the Economic Effects of Parody: An empirical study of music videos on the YouTube platform, and an assessment of regulatory options*. Indipendent Project Report - Parody and Pastiche. Study III. January 2013. Newport - UK: Intellectual Property Office (IPO), cit. p. 7.

[635] The high degree of creative input has been confirmed by ERICKSON, KRETSCHMER, MENDIS: ″We observed a significant amount of new creative input in the parody videos studied. The majority of music video parodists on YouTube (77%) copied the original sound recording in their work; however, some 50% of the sample added new original lyrics to the parody, while 86% of creators added a new original video recording. This pattern of creativity is consonant with the broader emphasis of YouTube on video sharing and on 'broadcasting oneself'. In 78% of all cases, the parodist appeared on camera, which highlights the presence of creative labour while also diminishing the possibility of confusion in the minds of viewers between parody content and original works″, cit. p. 11.

[636] KREUTZER p.13

[637] Licensing mechanisms designed to secure access to copyrighted materials are often costly and lead to a closed copyright system. This approach results in users that share content illegally. In this context, copyright enforcement becomes challenging due to difficulties in identifying online users and discrepancies between the author of the work and the rightsholder. While global licenses for free file-sharing on platforms have been proposed, they lack endorsement from rightsholders. Regrettably, legislative efforts have primarily concentrated on combating unauthorized use of works, rather than on overtaking the impediments to obtain the authorization, s*ee* BERTONI MONTAGNANI p. 118.

communications [638] . These legal reforms should serve as a stimulus for the widespread dissemination of culture.

In addition, the DSM 2019/790 requires the mandatory implementation of the list of exceptions and limitations in the national legislation of all Member States. This is not just an obligation to formally implement exceptions and limitations but also to effectively ensure them in the context of content uploaded on content-sharing providers. The provision marks a notable shift from the InfoSoc Directive 2001/29/EC and resolves the heterogeneity in the implementation of the parody exception that we observed in Chapter 3.

> Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:
>
> a) quotation, criticism, review;
>
> b) use for the purpose of caricature, parody or pastiche.

The decision is of particular importance given the widespread use of online parody. The exceptions and limitations regime can justify a wide range of transformative uses in the digital single market, particularly in relation to freedom of expression[639].

> Some L&E do not only serve to enable uses that are in the interest of users as consumers, e.g. uses that relate to the enjoyment of a work or other protected subject-matter. Some uses serve even higher purposes, not in the spiritual sense, but in the sense that they enable users of works and other protected subject-matter to exercise fundamental rights. The

[638] Online communication propagates among two vertices: one end represents the provider who enables content access, while the other end represents the user who receives and stores the content on the personal computer. These two activities are distinct and self-directed; nevertheless, it's important to note that the user's illicit actions cannot occur without the prior provider's activity. For this reason, the provider may be liable for complicity in users' crimes or for civil damages for users' illegal activities. *See* Stefano LONGHINI, Alessandro IZZO, T*utela del diritto d'autore e Internet,* Il diritto di autore, III, 2012, 299-318.

[639] BANTERLE p. 77.

fundamental right that first comes to mind is the right to freedom of expression protected under Article 10 ECHR[640].

5.3.1 Criticism of the parody exception

The European Union's decision to classify parody as an exception to copyright has been criticised by legal scholars, who consider it an "improper qualification"[641]. This criticism seeks to reinforce the link between parody and freedom of expression; it also asserts that the legality of parody should be protected as an exercise of a fundamental right (freedom of speech). According to this perspective, other considerations within copyright law, such as creativity, humour and the absence of exploitation, should be disregarded, as highlighted in *Deckmyn*[642]. Domestic case law[643] also supports this view, stating that the creative character is not a necessary condition for the existence of the parody exception. Even if a parody merely quotes a copyrighted work and incorporates it into a larger composition, it would still be considered lawful. This clarification is particularly important for the

[640] JÜTTE cit. p. 257.

[641] MUSSO p. 268. The approach follows the Italian tradition on parody; in this sense, the Italian doctrine has suggested to resolve legal disputes on parody just taking into consideration the overarching principles: ″Established case law sufficiently protects parodists and the legislator should refrain from promulgating a specific exception on the matter. According to this view, an express exception would relegate parody from an overarching principle to a mere exception, which is something to avoid as a matter of principle. There are also pragmatic considerations behind this stance. Commentators fear that the exception approach could open the door towards a restrictive judicial practice, which normally permeates the application of exceptions to IPRs. Likewise, enacting a parody exception would mean subjecting it to the infamous three-step tests, pursuant to Article 5(5) InfoSoc″ Gabriele Spina ALÌ, *The (Missing) Parody Exception in Italy and its Inconsistency with EU Law*, JIPITEC, 12 (2021), 414 para1: cit. p. 420.

[642] *Deckmyn* C-201/13 para 33.

[643] ″Some courts have admitted such untransformed use of a work for parodic purposes, as in the case of communication of a whole poem during a comedy radio program or a photograph reproduced in a parodic collage″ Maxime LAMBRECHT, *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive*, 11 J. Intell. Prop. Info. Tech. & Elec. Com. L. 68 (2020), cit. p. 86. *See* Court of Appeal of Brussels, (29 July 2010) A&M 547. Cf. J. Cabay, M. Lambrecht (2015); Court of Appeal of Ghent, (13 May 2013) A&M 352. Cf. J. Cabay, M. Lambrecht (2015).

recognition of differing forms of parody, not only transformative parody but also quotative parody[644].

This conclusion could thus extend the protection guaranteed by *Acuff-Rose v. Campbell*, which considered transformative character as the most important factor in the assessment of parody. In this way, parody would be analysed as an exception in favour of online users and as an exercise of freedom of communication on the internet.

This is also confirmed by the Advocate General in *YouTube* and *Cyando* (C-682/18 and C-683/18), who emphasises that any copyright injunction should be specific enough to target illegal uploads, while not restricting the freedom to make lawful use of the content protected by the exceptions and limitations regime[645].

Finally, the structure of Article 17 clearly highlights the multilateral relationship in the digital single market: the content-sharing platform, the online user, the rightsholder. According to legal scholars, Art. 17 DSM does not achieve a fair balance between these subjects and interests in the digital single market[646]. This may also have an impact on various issues related to the regulation of online parody,

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[644] "Parody should be 'noticeably different' from the original work. So, there should be more than merely technical, indiscernible alterations. Here we should distinguish between two possibilities: either the original expression which was borrowed has itself been transformed, so that the borrowed expression is noticeably different (let us call it a 'transformative parody'), or it has been integrated without transformation in a larger work, and it is this larger work that is noticeably different from the original work ('quotative parody')" LAMBRECHT cit. p. 86 para 92.

[645] Advocate General Saugmandsgaard Øe (*YouTube* and *Cyando* - C-682/18 and C-683/18): "In particular, the purpose or effect of an obligation to block cannot, to my mind, be to prevent users of a platform from uploading legal content and, in particular, legally using the work concerned." para 222.

[646] "Art. 17 of the DSM radically overhauls the relationship between content-hosting intermediaries and rightsholders and, through requiring MS to treat online content-sharing service providers as communicating to the public where matter uploaded by its users, the hope is to facilitate licensing agreements. The concern that is sought to be addressed in Art. 17.7 DSM is that, either as a result of entering into licensing agreements or because of the need to show 'best effort' to ensure the unavailability of works, platforms might use filters or other technical measures that impede the ability of internet users to rely on certain copyright exceptions. As a result, MS are obliged to ensure that users on online content-sharing services can rely on certain exceptions, in particular quotation and parody, although how they are to ensure this is unclear" Tanya APLIN & Lionel BENTLY, *Global Mandatory Fair Use. The Nature and Scope of the Right to Quote Copyright Works*, Cambridge University Press., Cambridge Intellectual Property and Information Law, 2020, cit. p. 42. *See* also Julia REDA, Joschka SELINGER & Michael SERVATIUS, *Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment*, Gesellschaft für Freiheitsrechte (GFF), Berlin, 2020.

including rightsholders' interests (intellectual property rights protected by art. 17 CFR); users' interests (freedom of expression and communication as stated in art. 11 CFR); and platforms' interests (freedom to conduct a business, as protected by art. 16 CFR).

5.4 Application of Art. 17 to online parodies

Under the DSM, users have the right to rely on the parody exception when uploading UGC to online content sharing services. This defence provides a safe harbour against any restrictions, such as notice and take-down measures, implemented by social media platforms to filter and moderate infringing content[647].

> Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive) reiterated that users shall be able to rely on the parody exception when uploading and making available user-generated content on online content-sharing services. In other words, users must be able invoke parody as a defence against takedown measures targeting their derivative content published on online platforms. Marking an important shift from the InfoSoc Directive, the wording of the provision and its context make parody a mandatory exception but only for the online activities falling within the scope of the provision[648].

5.4.1 Users' safeguards

Art. 17 DSM model[649] of the directive introduces safeguards for users that can be classified into two categories.

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[647] Legal scholars noted the differences of restrictions between art. 17 (4) and 17 (7): "If taken literally, any restriction of availability would be prejudicial in relation to Article 17 (7) CDSMD. Such an understanding is supported by the systematic argument that Article 17 (7) CDSMD is formulated as an abstract, objectively defined obligation. In contrast, Article 17 (4) CDSMD is based on the 'best efforts' of the operators and thus seems to introduce a more subjective obligation. From this a comparatively user-friendly interpretation can be derived, according to which providers must let a disputed upload be available in cases of doubt" REDA cit. p. 8.

[648] ALÌ cit. p. 415.

[649] Article 17 contains the following mechanisms. Specific safeguards: "*a)* The necessity of complaint and redress mechanism for users in the event of disputes (Article 17 (9) CDSMD); *b)* The need for a

The specific safeguards set out in art. 17 (9) DSM, focus on the complaints and redress mechanism. Art. 17 (9)[650] DSM ensures that MS shall provide an effective and expeditious complaint and redress mechanism for users in case of disputes. Users have a right of *ex post* recourse against the removal in case of legitimate uses under exception and limitation, which are at the heart of the protection of freedom of expression.

> If copyrighted materials were once available unless proven to be infringing, today materials that are detected by algorithms are removed from public circulation unless explicitly authorized by the right holder[651].

This mechanism serves as an *ex-post* recourse, coming into play after the content has already been uploaded. This approach appears to favor the interests of copyright holders, as lawful content might be automatically blocked at the request by the rightsholder, and at a later time users can seek redress. This provision could lead social media platforms to be overly cautious and inclined towards over-enforcement to avoid liability. In addition, social media platforms may make mistakes due to the complexity of determining the legal status of exceptions such as parody. As a result, this regulation and the subsequent mechanisms may increase the risk of over-blocking, limiting users' access to certain content.

The general safeguards would make mandatory certain exceptions and limitations that are central to the protection of freedom of expression. They are designed to ensure access for lawful uses that do not infringe copyright or related

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justification of rightsholders' requests and the timely processing of complaints through humans (Article17 (9) CDSMD); *c)* The necessity of out-of-court redress mechanisms as well as efficient judicial remedies (Article 17 (9) CDSMD); *d)* The rendering obligatory of certain exceptions and limitations that are central to the protection of freedom of expression (Article 17 (7) CDSMD)". While the general safeguards: "*e)* The relevance of the principle of proportionality for the determination of the obligations under Article17 (4) CDSMD and the flexibility of the obligations (Article17 (5) CDSMD); *f)* The goal that the application of the provision shall not restrict access to the content uploaded by users which do not infringe copyright or related rights and shall not otherwise affect legitimate uses (Article17 (7) and (9) CDSMD), *g)* The requirement that the provision may not lead to any general monitoring obligation (Article 17 (8) CDSMD) and *h)* The necessity of compliance with data protection legislation (Article17 (9) CDSMD)". *See* HUSOVEC, *Invisible Speech Harms of Delegated Enforcement: When is the EU Legislator Responsible?* Forthcoming (in REDA p. 38).

[650] Art, 17 (9): "Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them"

[651] Elkin-Koren, *Fair Use by Design*, UCLA Law Review 64 (2017), p. 1093.

rights. However, there is criticism that Art. 17 DSM does not clarify the practical implications of the general safeguards, such as the determination of the obligations imposed on the OCSSP; the relevance of the principle of proportionality, which should determine the flexibility of the obligations; the prohibition of the general monitoring obligation under Art. 17 (8); the lack of guidance for the OCSSP on the liability model.

In addition, Member States have not received adequate guidance from the EU institutions on how to interpret and comply with the substantive requirements of Art. 17 DSM. As we noted in the third chapter, there is already considerable heterogeneity among Member States in the implementation of the former parody exception under Art. 5 of the InfoSoc Directive. According to legal scholars, this heterogeneity is unlikely to come to an end with the current provision[652].

Art. 17 (7) DSM provides for cooperation between two subjects: the rightsholder and the OCSSP. At first glance, this cooperation seems to favour the interests of the creator, while leaving the parodist out of the cooperation. Some legal scholars argue that Article 17 (7) DSM holds only "secondary importance at best"[653] due to the different approaches taken by Member States in its implementation. This is primarily due to two main reasons: first, the term "best efforts"[654] mentioned in Article 17 (4) DSM has been interpreted by Member States as an objective obligation rather than a subjective one. Secondly, Article 17 (9) DSM sets out in detail a transparent complaint and redress mechanism in the event of content being

[652] "The general safeguards are not suitable to mitigate the interferences with the fundamental rights of users. They do not provide 'sufficient guarantees to effectively protect' their rights from the prior restraint imposed by the Article 17-mechanism. The only ex-ante protection for the users' fundamental rights is laid down in general provisions that lack concretization and enforceability. This blind spot of the directive is especially problematic given the fact that it may be economically advantageous for platforms to over-comply with their obligations under Article 17 (4) CDSMD. Against this background, the provisions fail to properly mitigate the risks for users' fundamental rights" REDA cit. p. 40.

[653] REDA cit. p. 9.

[654] However, the legal scholars underlined the unlikeliness of all-encompassing licensing agreements and have limited the scope of this obligation. In theory, every user who creates something new could demand copyright recognition and protection. Even large content-sharing companies would not be able to enter into licence agreements with a so vast user base; for this reason, Art. 17 (4) only imposes a "best efforts" obligation on the OCSSP to obtain authorisations. *See* LAMBRECHT p. 71.

blocked[655]. These provisions suggest that Article 17 (7) DSM does not require additional or independent implementation.

5.4.2 Complaint mechanism

Article 17 (9) of the DSM also requires an effective and expeditious complaint procedure at the expense of content-sharing platform in the event of an infringement of the rightsholders' interests[656]. Rightsholders must "duly justify" requests to disable access to content on the platform. In order to avoid liability, platforms would have no choice but to use content-detection technologies (upload filters) and to demonstrate "best efforts" to automatically block the use of protected works in order to comply with rights holders' requests. The complaint procedure must meet two criteria: it must avoid undue delays and include human review. The latter is crucial given the semantic nature of parody[657]. Moreover, in the case of parody, the potential copyright infringements relate only to the moral rights of the creator and the potential harm of substitution[658]. The only beneficiary of the blocking and filtering system is the rightsholder, who could benefit of a narrow definition of parody exception in order to secure copyright interests; in this sense, the economic interest is limited and does not justify significant protection, as the fair use doctrine has shown. The benefits of protection must always be weighed against its costs in intellectual property policy. Ultimately, these private interests should not prevail to the detriment of parody when it is used as an instrument of critical reflection and artistic development. Interpretation of the parody exception in the light of users' interests should tend towards a broad definition.

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[655] "A transparent complaint and redress procedure is necessary to enable: (i) the respect for and effectiveness of the mandatory E&Ls in Article 17 (7); (ii) that subsequent out-of-court disputes are “settled impartially” and do not deprive users [..] the possibility to have recourse to efficient judicial remedies to assert the use of an applicable E&L" QUINTAIS p. 5.

[656] Art. 17 (9) DSM ″Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review″.

[657] Legal scholars stress that these specifications do not affect the substance of the exceptions and limitations provisions of copyright law, but they do "confer upon users a subjective right to enforce" them (cit. REDA p. 9).

[658] "Moral rights might allow an author to object to derogatory treatment of a work, or to a false attribution of the authorship of the parody to themselves" SEVILLE cit. p. 2.

Art. 17 (9) DSM also mandates that users have access to specific safeguards, including: in-platform procedures, counter-notice, out-of-court redress mechanisms, judicial remedies, or "concise, transparent, intelligible"[659] declaration confirming that the content falls within the exception in art. 17 (7) DSM. In any event, the rarity of user declarations or appeals against takedown decisions shows that Art. 17 (9) DSM is likely to remain ineffective.

The path to sanctioning online parodies for copyright violations or other personal rights infringements has been outlined in previous chapters, and the complaints mechanism should adapt its procedures accordingly. However, identifying online parodies that infringe intellectual property rights or personal rights can be a challenge, particularly on the Internet where there may be a large number of user-generated parodies. Once these parodies are identified, the process for resolving such disputes becomes complicated; activating the complaint mechanism and seeking a negotiated settlement often proves impractical due to the sheer volume of content and users around the world. Furthermore, in cases involving parody, it may be difficult for the parties to reach an amicable settlement, especially if the parody has the potential to damage the reputation of the original author[660]. The refusal to deal due to the attack on reputation can be an insurmountable obstacle, particularly in the social media sphere. Enforcement is also a motif of concern, as it usually involves significant social sanctions which might harm users' freedom, like the removal of the entire user profile responsible for the infringement. For these reasons, in the event of a dispute between a parodist and the inspirer, social media should encourage, to some extent, in-platform negotiations, as they may be quicker and perceived as more legitimate by the community.

In addition, the costs associated with the complaint and redress mechanism, which allows users to challenge abusive automated claims, should be taken into

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[659] QUINTAIS et al. cit. p. 5. "If a user provides such a declaration, the same should automatically qualify as a 'complaint' under Article 17 (9), triggering the mechanism set forth therein. The OCSSP must then inform the relevant rightsholder of this complaint. If the rightsholder wishes to remove or disable access to the content at issue it must duly justify its request, i.e. it must explain not only why the use in question is prima facie an infringement but also why it is not covered by an E&L and, in particular, the E&L invoked by the user" *Ibidem*

[660] "One of copyright's objectives is often stated to be stimulating the creation and dissemination of works. Yet the owner of rights in a work may well refuse to licence it if it is to be parodied, and thus may actively inhibit the creation of further works", SEVILLE cit. p. 3.

account in the assessment of the freedom to conduct a business as required by art. 17 (9) DSM. Indeed, the cross-border nature of the Internet may also lead to conflicts between different jurisdictions with regard to parody, as humour has social significance and may vary from one culture to another[661]. While Europe may strive for a common understanding of humour, social media platforms operate globally, and the *Innocence of Muslim* case highlights the challenges of dealing with humorous parodies. What is considered funny and legal in one country may be considered socially unacceptable or even criminal in another. In addition to providing users with access to specific safeguards, content providers may wish to take into account social customs or norms that have developed alongside copyright law in the comedic entertainment field and that have regulated appropriation among comedians. This development has been facilitated by the technological revolution, which has simultaneously increased the prevalence and "value of property rights in jokes" and reduced the costs of monitoring and enforcing intellectual property rights. In this context, copyright law has proved inadequate for comedy and social norms have gradually shifted away from the protection of property[662]. Legal scholars have argued that social norms might better regulate the appropriation of humorous works and the relationship between comedians[663]. Certainly, social norms are more likely to

[661] The possibility of reaching a common understanding of humour across Europe could potentially restrict the freedom of parody too much. Sense of humour varies greatly from country to country in Europe and around the world. Defending a common standard of humour would not lead to innovation in the information society, as protecting national and regional humour is protecting culture: "Humans do not think or create alone, so cultivating many people all trained to the best standard will simply result in teams of people with overlapping and redundant skill sets instead of the diverse cognitive toolsets necessary for innovation" Joshua FAIRFIELD, *Runaway Technology: Can Law Keep Up?* Cambridge: Cambridge University Press, 2021, cit. p. 41.

[662] "Formally, jokes and comedic routines can enjoy copyright protection. Jokes are literary works, which constitute a protected category under copyright law. Particular jokes and routines are protected if they are original and fixed in a tangible medium. In practice, however, copyright law does not play a significant role" OLIAR p. 1798.

[663] *See* Dotan OLIAR and Christopher SPRIGMAN, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,* Virginia Law Review, Dec., 2008, Vol. 94, No. 8 (Dec., 2008): "In stand-up comedy, social norms substitute for intellectual property law [..] the norms deviate from copyright law's defaults: for example, whereas copyright protects expression but not ideas, comedians' norms protect expression as well as ideas. Or take the issue of authorship: under copyright law, two individuals who cooperate in creating a work are considered joint authors and owners of the work. In contrast, if one comedian comes up with a joke's premise and another thinks up the punchline, under comedians' norms of ownership, the first owns the joke and the latter has nothing", cit. p. 1790.

develop within a small and homogeneous like that one of comedians[664], but legislators or platforms making IP policy in relation to comedy should be aware of their existence[665].

> In short, policymakers would be wise to keep in mind that a norms-based system regulating the ownership and exchange of creative material may be superior to one that is exclusively law based. It is especially important to understand how social norms may act to limit appropriation in light of the existing research suggesting that in some cases, the introduction of legal protections and sanctions reduces the probability that individuals will impose and abide by social norms[666].

5.4.3 Prohibition of general monitoring

Legal scholars have analyzed Article 17 DSM and have considered that it goes beyond the scope of monitoring and filtering adopted by CJ so far[667].

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[664] In addition, legal scholars have evaluated several other components that have triggered the adoption of social norms "The important components that seem to have played a role in comedians' social norms are the lack of effective legal ordering, effective monitoring (of comedians' acts by peers), and a reasonably good flow of information about copying among creators and fans" OLIAR p. 1794. Legal scholars underline two reasons for copyright enforcement failure in disputes regarding comedy: *i)* the high cost of enforcing the formal law (the cost of lawsuit is often greater than the expected compentation) and *ii)* the uncertainty over appropriation of comic expressions (in particular, the transformative use evaluation). Notwithstanding, the comedians' norm system has been described as more rigid in certain specific cases, for example, the appropriation of some extent of protected material is permitted under exception and limitations regime, while the comedians' norms may exceed the scope of copyright law: "comedians' norms system is less receptive than formal copyright law to the appropriation of even relatively high-level comedic ideas" *Ivi* p. 1823.

[665] "Legislatures should examine how the ratcheting up of legal protections is likely to interact with, strengthen, or perhaps (and more worrisomely) weaken existing social norms governing appropriation - or, indeed, how legal protections might either encourage or interfere with potential future emergence of new social norms favoring or disfavoring appropriation" *Ivi* p. 1834.

[666] *Ivi* p. 1835. The authors cites in the footnote (99) a list of studies which demonstrate such assumption: "Richard Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 41-70 (2002); Stephan Panther, Non-Legal Sanctions, in 1 Encyclopedia of Law and Economics 999, 1014-15 (Bouckaert & De Geest eds., 2000), describing an experiment in which the introduction of legal sanctions was shown to lessen reciprocity and performance between buyers and sellers". However, according to the Oliar et al., the opposite might be true as well, and "the tendency of formal copyright law toward overprotection may even be exacerbated under the norms system" *Ibidem*

[667] In particular, CJ stated the scope of filtering in *McFadden vs Sony* (C-484/14), which concerns a single work and where "The Court’s ruling in *McFadden* makes it clear that even an injunction requiring the blocking of all infringements of a single work constitutes an impermissible general

The mechanism prescribed by art. 17 (4) DSM[668] could lead to harsh interference with other fundamental rights since a direct liability of the provider just "(i) incentivizes over-blocking and (ii) leads to an ex-ante restriction of the users' freedom of expression and information"[669]. This aspect has led legal scholars to define art. 17 (4) as an indirect monitoring and filtering obligation.

> Thereby, the DSMD attempts to balance between (automated) copyright protection on the one hand and a guarantee of limitations and freedom of expression on the other hand, especially with regard to the EU Charter of Fundamental Rights (Recital 70 DSMD). Thus, the measures are not intended to prevent copyright-free works or those subject to restrictions from being available[670].

The prohibition of general monitoring aligns with intellectual property law because a particular use of content may be deemed unlawful in one context while lawful in another, especially when it benefits from an exception or limitation. For this reason, the filtering mechanism must be specific regarding the work and the infringer[671].

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monitoring obligation" REDA cit. p. 14.

[668] Mechanism prescribed by art. 17 (4) requires content-sharing providers to satisfy three conditions: "(a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)".

[669] REDA cit. p. 26.

[670] Gerald SPINDLER, *The Liability System of Art. 17 DSMD and National Implementation: Contravening Prohibition of General Monitoring Duties*, 10 J. Intell. Prop. Info. Tech. & Elec. Com. L. 344 (2019), cit. p. 352.

[671] This solution has not been welcomed by the rightsholders who criticize the simple "notice-and-take-down" while pursuing "notice-and-stay-down" agenda: Martin HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 COLUM. J.L. & ARTS 53-84 (2018): "Almost 200 artists who recently urged the U.S. Congress to revisit the existing notice and takedown (NTD) policy in its copyright law" The petition signed by artists emphasises that: "Small independent film makers spend their time not making movies, but sending out 50,000 take down notices in a vain attempt to sweep aside the tide of recurrent copyright infringement [..] Thereafter it should be the duty of the website to prevent the reposting of the same material" cit. p. 54.

However, the same conclusion does not apply to violations of other fundamental rights. In *Glawischnig-Piesczek*[672] case law, the CJ acknowledged the recourse of preventive measures, such as automated filtering and blocking systems, to put an end and prevent illegal defamatory content, as well as any other identical and equivalent that essentially conveys essentially the same message, even if slightly different from the original illegal content[673]. The judicial obligation imposed on the content sharing provider would be to apply NSD[674] system under art. 17 (4) DSM to "identical or equivalent" content. The CJ limited the scope of the provision to certain special cases where the differences "must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content"[675]. For this reason, legal scholars have proposed a compromise solution to apply this ruling in case of quotative parodies[676].

I would like to emphasise that the assessment of infringing parodies may differ from one jurisdiction to another. A parody may comply with copyright law but

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[672] "In *Glawischnig-Piesczek*, the court found an injunction permissible that requires the blocking of material that has previously been deemed illegal by a court, irrespective of who requested the storage of that information [..] the Court deemed monitoring obligations to be permissible only to the extent that a court had determined the defamatory nature of a particular statement and issued an injunction requiring the hosting service provider to block future uploads of the same statement" REDA cit. p. 16 and 17.

[673] *Glawischnig-Piesczek vs Facebook,* 3 October 2019, C-18/18*:* "In those circumstances, an obligation such as the one described [..] on the one hand - in so far as it also extends to information with equivalent content - appears to be sufficiently effective for ensuring that the person targeted by the defamatory statements is protected. On the other hand, that protection is not provided by means of an excessive obligation being imposed on the host provider, in so far as the monitoring of and search for information which it requires are limited to information containing the elements specified in the injunction, and its defamatory content of an equivalent nature does not require the host provider to carry out an independent assessment, since the latter has recourse to automated search tools and technologies" para 45-46.

[674] Notice-and-stay-down obligation imposes the content-sharing provider to prevent the infringing content toward all user-base. Accordingly, notice-and-stay-down (NST) "does not limit preventive obligation to the same perpetrator. Depending on the scope of preventive 'staydown' obligation, it might require an intermediary to protect from re-infringing only (1) in the same form (e.g. reuploading of an identical file with a full copyrighted work), or (2) in any other form (e.g. re-uploading a part of the work)" HUSOVEC p. 57.

[675] *Glawischnig-Piesczek vs Facebook,* 3 October 2019, C-18/18 para 45.

[676] Quotative parodies may be protected by the "flagging" mechanism ("the users must be provided with procedural mechanisms in order to flag relevant contents so that automated tools cannot be applied" SPINDLER cit. p. 360). The mandatory adoption of this technology for content-sharing providers could ensure the exclusion of quotative parodies from automatic filtering pursuant to art. 17 (4) (b). *See* LAMBRECHT "This solution could prove a reasonable way to accommodate such parodies, without impeding too much on the effective detection of infringing use" p. 91 para 111.

still be considered illegal because it violates human rights. While the offence of defamation may be obvious, the assessment of copyright rules may be more challenging [677], due to the context-sensitivity of copyright law, as rightly demonstrated in the join cases *YouTube* and *Cyando* - C-682/18 and C-683/18[678].

The DSM 2019/790 requires that infringing copyright content uploaded to the platform and notified to the provider must be promptly removed or blocked from access by third parties. The platform must also prevent the users from reuploading the infringing content (known as the notice-and-take/stay-down measure). In addition, intermediaries must comply with high industry standards of professional diligence to comply with preventive obligations under art. 17 (4) (b) and (c) DSM[679]. Article 17 (4) DSM would impose a twofold obligation on content-sharing providers: to prevent the communication of unauthorised works, while at the same time allowing the communication of works falling within the exceptions and limitations regime. These preventive measures may require the need for intermediaries to mandatory implement automated filtering tools [680]. Indeed, providers must demonstrate "best efforts" in carrying out these activities in order to avoid liability[681].

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[677] As we have noted in the third chapter, it is not easy to draw a line between legitimate use and infringements on copyright law. It may depend on the context of the new work; on the purpose of the person who borrows etc.: "There is only very limited room for blocking injunctions against hosting service providers regarding publicly accessible" REDA cit. p. 19.

[678] Advocate General Saugmandsgaard Øe (*Frank Peterson vs YouTube* and *Elsevier vs Cyando* - C-682/18 and C-683/18): "While the illegal nature of some information is immediately obvious, that is not the case with copyright as a rule. The assessment of the infringing character of a file requires a number of contextual elements and may call for thorough legal analysis. For example, in order to establish whether a video uploaded on a platform such as YouTube infringes copyright it is necessary, in principle, to determine whether, first, the video contains a work, second, the complaining third party holds rights to that work, and third, the use made of the work infringes his or her rights, the latter point requiring an evaluation whether, in the first place, the use was made with his or her authorisation, and, in the second place, an exception is applicable. The analysis is further complicated by the fact that any rights and licences for the work are likely to vary from one Member State to another, as are the exceptions, according to what law is applicable" para. 188.

[679] "Preventive measures should only be allowed and applied if they: (i) meet the proportionality requirements in paragraph (5); (ii) enable the recognition of the mandatory E&Ls in paragraph (7), including their contextual and dynamic aspects; (iii) in no way affect legitimate uses, as mandated in paragraph (9)" QUINTAIS p. 5.

[680] Moreover, this provision has been interpreted as incompatible with art. 17 (8) which should ensure no general monitoring obligation. The authors underlines that these provisions reflect a fundamental shift in copyright since it reverses the default treatment of potentially legal content: "While the mere fact that Article 17 (4) (b) and (c) CDSMD require to some extent the use of algorithmic filtering tools may seem to be a technical matter, it reflects a fundamental shift in the balance of copyright law. The possibility of ex-ante automated blocking or removal of content reverses the default treatment of

Article 17 of the DSM addresses the significant role played by content-sharing platforms. There are concerns in the legal community about the impact on freedom of expression of an indirect filtering obligation under Art. 17 (4) DSM[682]; the use of filtering technologies could give rise to general monitoring and surveillance obligation established by algorithmic filtering systems[683]. The adoption of automatic filters could pose a risk of over-blocking legitimate uses within the exceptions and limitations, such as parody[684]. This concern is well-founded given the

potentially legal content" REDA cit. p. 28.

[681] This provision is also confirmed in the recital number 66 of the Directive: ″Where no authorisation has been granted to service providers, they should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightsholders″. Best efforts obligations has been criticized as mechanism that may infringe freedom to conduct a business since it imposes to provider list of criteria in order to avoid strict liability: "When determining what OCSSPs have to do to comply with the best efforts obligations under Article 17 (4) CDSMD, a non-exhaustive list of criteria laid down in Article 17 (5) CDSMD, including the 'the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service' as well as 'the availability of suitable and effective means and their cost' have to be taken into account" REDA cit. p. 44.

[682] There have been concerns about DSM 2019/790 because the restrictions on freedom of expression should be provided for by law, as confirmed by ICCPR art. 19, clause 3: "Such uncertainty would also raise pressure on content sharing providers to err on the side of caution and implement intrusive content recognition technologies that monitor and filter user-generated content at the point of upload. I am concerned that the restriction of user-generated content before its publication subjects users to restrictions on freedom of expression without prior judicial review of the legality, necessity and proportionality of such restrictions" David KAYE, *Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (13 June 2018) OL 0TH 41/2018, p. 7.

[683] Concerns were raised within the online community following the initially DSM proposal, especially regarding the current Article 17 and the mandated content monitoring system. Online platforms feared economic repercussions if they were compelled to adhere to the costly obligation outlined in Article 17(4). This had the potential to negatively impact the online sharing of caricatures, parodies, and pastiches, which often incorporate elements from third-party works without the original author's approval. In response to these concerns, the European Commission spokesperson answered: "The idea behind our copyright proposals is that people should be able to make a living from their creative ideas. The proposals to modernise EU copyright provisions will not harm freedom of expression on the internet. They take into account technological developments that have already been introduced by some of the major players and which help in two ways. Firstly, they help to inform authors when their works are used online and to prevent that these works are used by major online platforms without their author's consent. Secondly, such technological developments help to ensure the author's fair remuneration for their work". Online Article, Sky News, June 9, 2018, *Memes 'Will be Banned' under New EU Copyright Law, Warn Campaigners*. If we interpret the European Commission's declaration as the rightsholder right to make money from parody, it is addressing a wrong interpretation of the parody itself.

[684] "These tools do not understand the contents of the patterns they detect, hence they are unlikely to perform the qualitative assessments required to determine the presence of humour, or criticism, which are necessary to determine whether a use falls under an exception or limitation. Advanced filtering technologies are capable of making quantitative distinctions regarding the amount of protected

widespread presence of parodic content online, such as memes, which are an essential part of internet communication and allow users to express themselves freely. The introduction of AI technologies raises issues that could potentially affect fundamental rights related to the freedom of parody.

> Article 17 CDSMD does not provide the users with the possibility to challenge the legitimacy of the filtering system implemented under Article 17 (4) CDSMD as such. The redress mechanisms are confined to specific instances of unjustified removal of lawful content. Users therefore have to rely on the ex-post redress mechanism that is not sufficient to safeguard the freedom of expression and information on the Internet. If a lawful criticism or parody can only be made public after having undergone a complaint and redress procedure, the decisive moment for the affected quotation or parody may already have passed. Especially in the context of political speech, a delay in the exercise of the fundamental right to freedom of expression and information can be tantamount to a prevention of the exercise of that right[685].

The main concern raised by legal experts is the issue of over-blocking, which results from inadequate safeguards for users' rights when content providers comply with copyright holders' notice-and-takedown requests. Many online users may not be aware of takedown requests or may be unwilling to engage in costly litigation. As a result, the algorithmic systems that some social media platforms have already implemented, while effective in identifying copyright infringement, fall short of protecting the legitimate uses permitted under the exceptions and limitations framework. Furthermore, automated filtering systems are unable to identify certain crucial aspects of copyright, such as the difference between derivative works and fair use. The only data available is the information provided by the alleged rights holder, which may be false[686].

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material that is used, at least with regard to some types of protected works and other subject-matter. However, these quantitative distinctions fail to align with the legal realities of copyright law. On the one hand, the use of an extremely short extract of a work can constitute an infringement, whereas, on the other hand, the use of an entire work may be permissible, for example in the context of a quotation" REDA cit. p. 27.

[685] REDA, SELINGER SERVATIUS cit. p. 41.

[686] "The experience with existing automated filtering systems that some large platforms have been

A different point of view has recently been taken by other legal scholars, who have interpreted the introduction of algorithmic filters as a protection for parody. Indeed, parody can be described as a user's right that falls under the exceptions and limitations regime and, thus, it is therefore crucial to ensure that the preventive measures outlined in Article 17 (4) DSM do not hinder parodic transformation, which is protected as a user's right under Article 17 (7) DSM. Legal scholars have proposed the concept of "free speech by design"[687], suggesting that incorporating freedom of expression into the design of the algorithmic copyright system implemented by the content provider could effectively strike a fair balance between these conflicting provisions and fundamental rights. The direct consequence of free speech by design in the algorithmic copyright system would be the removal of both ex ante restrictions on exceptions (such as parody) and ex post remedies for user complaints.

> Indeed, the prevention principle should apply to both rightsholders against infringement of their rights and users against interference in their freedom speech. A free speech by design approach implies that algorithmic systems used for compliance with art. 17 (4) should be designed not merely for detecting potentially infringing works, but also for minimizing the interference with potentially legitimate uses by users covered by an exception or limitation. In other words, algorithms should protect exceptions and limitations by default[688].

The content-sharing provider should exert its "best efforts" not only to prevent the unauthorized distribution of content on the platform in accordance with

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using on a voluntary basis has provided empirical evidence for both collateral overblocking and overclaiming by negligent rightsholders. This problem is exacerbated by rightsholders increasingly automating the provision of information about their repertoires to platforms. Those automated schemes are based on the assumption that those rightsholders hold exclusive rights in all parts of their repertoires, routinely leading to erroneous requests for the removal of content that is in the public domain or for which rightsholders only hold a non-exclusive usage license" REDA cit. p. 27.

[687] "Respecting the effectiveness of the exceptions and limitations which are a condition of the effective exercise of fundamental rights, such as the exception for quotation and for parody [..] we argue that national implementations of the DSM directive, as well as the Commission guidance for its application, should ensure that such balance is effectively achieved in the design of their algorithmic decision systems, by requiring OCSSP to follow a 'Free speech by design' approach", Maxime LAMBRECHT, *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive*, 11 J. Intell. Prop. Info. Tech. & Elec. Com. L. 68 (2020), cit. p. 77.

[688] LAMBRECHT p. 77 para 36-37.

Article 17 (4), but also to enable the availability of the exception and limitation as per Article 17 (7). AI could be designed more effectively as a tool for maintaining exceptions and limitations, rather than simply automatically identifying copyright-infringing content with the risk of over-blocking legitimate uses.

5.5 Social media intervention in online parody

Online parody often takes the shape of User Generated Content (UGC) hosted on social media platforms. UGCs represent a significant innovation in transformative uses in the digital age and have contributed to the success of virtual communities. UGCs have played a crucial role in transforming parody into a viral and transnational practice [689] . Furthermore, user-generated parody has changed the traditional relationship between rights holders and the rights of the parodist, driven by a new form of appropriation facilitated by web platforms such as social networks and social media.

> The impact of the online medium on network users (i.e. interactivity and participation) and cultural diversity through availability of online technologies opens up possibilities for new content created by network users[690].

The inclusion of provider liability in the discourse on parody is apt, as the innovation of digital culture depends on the implementation of policies that support both the widespread dissemination of knowledge and the effective protection of emerging cultural industries[691]. The category of social media platform plays a central

[689] ″The Internet - especially so-called “social media” - can be viewed as a planetary proliferation chamber, or global meme machine, communicating micro- and macro-enthusiasms on a scale and speed never seen before (and cancelling earlier enthusiasms in the process). Memes are an idea, behavior, or style that spreads from person to person within or across cultures″ Dominic PETTMAN, *Memetic Desire: Twenty Theses on Posthumanism, Political Affect, and Proliferation* in Alfie BOWN, Dan BRISTOW, *Post Memes. Seizing the Memes of Production*, Punctum Books. 2019, cit. p. 27.

[690] OECD (Organisation for Economic Co-operation and Development Publishing, 15/06/2005) *Digital Broadband Content: Music*, Working Party on the Information Economy, Paris, cit. p. 83.

[691] In this sense, we can refer to concepts of: 1) "knowledge economy" stands as a highly valuable economic asset in the realm of the information and communication society. The Internet has significantly reduced various transactional costs and serves as the principal platform for accessing,

role in the discussion on the regulation of UGC which can serve commercial or non-commercial purposes. In particular, user-generated parody on social media platforms may violate both the protections offered by copyright law (economic and moral rights of rightsholders) and the limits of freedom of expression (e.g., defamation).

> UGC that is original and is based entirely on a user's own creativity is unproblematic from a licensing perspective, it becomes problematic when such content relies on other content, which has been created by someone else, disregarding whether this content itself is user-generated content, or whether this content is commercial content[692].

From one perspective, providers' liability is part of the broader issue of regulation and accountability on the Internet. From another perspective, there are some examples of addressing unforeseeable harm to rights holders, such as the

sharing, and generating knowledge. Consequently, legal frameworks should be designed to promote the flourishing technology market. and 2) "knowledge society" holds the potential to empower society at large. Culture isn't solely a matter of economic advantage or disadvantage; it stands as a fundamental element of democracy. Internet regulations should be oriented toward fostering innovation and culture through a citizen-centered model (which diverges from the previous business-oriented approach). While legislative considerations might focus on one of these two distinctive perspectives, the overarching direction should consistently align with the common goal of fostering innovation. *See* BERTONI MONTAGNANI p. 112.

[692] JÜTTE cit. p. 263.

Visual Artists Rights Act (VARA)[693], which protects the moral rights of visual artists, including the right to integrity[694], in the context of the new digital scenario[695].

The European Directives, primarily, regulate the scope of providers' lawful activities and, only secondarily. Social media platforms have been defined as providing three specific technological affordances: *i)* facilitating the intermediation of user-generated content (UGC); *ii)* enabling user interaction and engagement with content; *iii)* enabling individuals to establish network connections with other online users[696]. The issue of provider liability for third party activities becomes sensitive when dealing with "degenerate" parodies created by active users.

The evolving landscape of the Digital Single Market has favoured one particular entity: social media platforms. They were the first to seize the opportunity to host new creative content on their platforms. Today, these emerging actors can

[693] U.S. VARA ″In the United States, moral rights are protected by the law embodied in the Visual Artists Rights Act of 1990 (VARA), which applies only to the visual arts. According to VARA, a creator has the right to prevent revision, modification, or distortion of his or her work. The visual arts protected by VARA include: paintings, drawings, prints, sculptures, and photographs taken to be shown at an exhibition. VARA protects works only of 'recognized stature'. VARA gives an author two basic rights: the right of attribution and the right of integrity. The right of attribution protects an author's work from being attributed to someone else. The right of integrity bars distortion or alteration that might impair the author's reputation or stature as an artist″ SPINELLO cit. p. 130. On the protection of Visual Artists, I also recall *″Code of Best Practices in Fair Use for the Visual Arts college art association″* Funded by the Andrew W. Mellon Foundation, February 2015, ″The Code of Best Practices in Fair Use was created with and for the visual arts community. Copyright protects artworks of all kinds, audiovisual materials, photographs, and texts (among other things) against unauthorized use by others, but it is subject to a number of exceptions designed to assure space for future creativity. Of these, fair use is the most important and the most flexible. The Code describes common situations in which there is a consensus within the visual arts community about practices to which this copyright doctrine should apply and provides a practical and reliable way of applying it″ cit. p. 5.

[694] "The attribution and made available to the public requirements are a way of promoting consistency with moral rights, although practically speaking, unpublished works are unlikely to be parodied or satirised, and the plurality of norms informing 'fair practice' are also likely to promote a more coordinated approach with the right of integrity" APLIN cit. p. 222.

[695] An interesting dispute about VARA involved *Mettel v. Mark Napier*, the net.artists, and his ″Distorted Barbie″: ″Barbie's 'owner,' the Mattel toy company, was not convinced by any of this 'poetry'. It strongly protested and demanded that this distorted Barbie be immediately removed form Napier's Web site, called Interport. Mattel and its lawyers have invoked the moral rights defense. *Moral rights*, a translation of the French term *droit moral*, bestows on an author control over the fate of his or her works″ SPINELLO cit. p. 130.

[696] Corinne TAN, *Regulating Content on Social Media*, UCLPress, 2018, p. 3.

have a major impact on the management of exceptions and limitations, and on the qualification and assessment of new forms of online communication, such as online parody. This is particularly true as social media are now involved in law enforcement, as required by Article 17 DSM, especially in the case of illegal activities.

Article 17 of the DSM is designed to address the "value gap", which refers to the concern that social media platforms are generating revenue from access to copyrighted works without adequately compensating rightsholders[697]. The DSM aims to "bridge the gap"[698] by introducing Article 17, which establishes a mechanism for cooperation between rights holders and intermediaries. Certain online platforms (online content-sharing service providers) that enable the public communication or availability of copyrighted works should be authorized by the rightsholders. If the platforms do not have such authorization, they can be held directly liable for users' infringements[699], unless a compliance with art. 17 (4) mechanism can be proven.

In this context, it is crucial to interpret the DSM 2019/790 in accordance with the European Directive 2000/31/EC, also known as the E-commerce Directive 2000/31/EC, which regulates the liability of internet service providers.

[697] The denounce born from worldwide artists' petition on the necessary revisit of copyright enforcement in the digital area: "Small independent film makers spend their time not making movies, but sending out 50,000 take down notices in a vain attempt to sweep aside the tide of recurrent copyright infringement [..] Thereafter it should be the duty of the website to prevent the reposting of the same material" Martin HUSOVEC, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 COLUM. J.L. & ARTS 53-84 (2018): cit. p. 54.

[698] "Under today's prevailing model of intermediary liability, right holders and intermediaries are both involved in the enforcement of exclusive rights on the Internet. While right holders are expected to identify and notify the infringing content that they wish to remove, the intermediaries have to react by assessing the received notices and taking appropriate action, including taking the information "down" from the service in case it is infringing" HUSOVEC cit. p. 56.

[699] The authorization permits the intermediary to avoid liability and it can be obtained by "direct licensing", "statutory licensing" or "collective licensing mechanism". *See* QUINTAIS, João Pedro and FROSIO, Giancarlo and VAN GOMPEL, Stef and HUGENHOLTZ, P. Bernt and HUSOVEC, Martin and JÜTTE, Bernd Justin and SENFTLEBEN, Martin, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive*: Recommendations From European Academics (November 11, 2019): "in the European compromise, licensing is the method chosen to achieve the authorization goal under this provision" cit. p. 1.

5.5.1 Directive on certain legal aspects of information society services 2000/31/EC – The E-Commerce Directive.

The issue of provider liability for the activities of third parties is a complex and sensitive one in the field of legal informatics. Both the E-Commerce Directive 2000/31/EC and the European Commission's new proposal for a regulation on a single market for digital services (Digital Services Act - DSA)[700] classify Internet Service Providers (ISPs) and regulate their liability on the basis of their functions[701]. Specifically, Articles 12, 13, and 14 of the E-Commerce Directive[702] outline the conditions under which providers are exempt from liability[703]. The article 14.3 (E-

[700] The proposal has turned into the Regulation (EU) 2022/2065 on a Single Market For Digital Services (Digital service act), 19 October 2022 (Digital Services Act - DSA).

[701] Therefore, before dealing with the liability of the providers, we have to highlight the functions completed by the different providers. We can classify them as follow, according to the classification made by EU Directive 2000/31/EC: *Mere conduit*: an information society service consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network (art.12). *Caching provider*: the automatic, intermediate and temporary storage of the information provided by a recipient of the service performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request (art.13). *Hosting provider*: the storage of information provided by a recipient of the service (art.14).

[702] We have to complete the applicability of the liability of ISP, for a wider view, with other important EU Directives: Directive 2001/29 (InfoSoc) and Directive 2004/48/EC for the copyright and intellectual property rights; EU Directive 95/46/EC and Regulation 679/2016 (GDPR) for data protection and rights of the personality.

[703] These conditions change according to the service; the providers are not liable for user-generated/created content they transmit or store if: *Mere conduit*: - Does not initiate the transmission; – Does not select the receiver of the transmission; - Does not select or modify the information contained in the transmission. *Caching provider*: - Does not modify the information; - Does comply with rules regarding updating of information; - Does not interfere with lawful use of technology; - Does obtain actual knowledge that a court or an administrative authority has ordered such removal or disablement. *Hosting provider*: - Does not have actual knowledge of illegal activities; - the hosting provider is aware of a content which is not blatantly unlawful; - Does expeditiously remove or disable access to information, upon obtaining actual knowledge or awareness; - the hosting provider shall remove the content upon knowledge of Court or administrative notice. Moreover, the hosting provider should inform the competent authority about allied illegal activities and information and provide the users' identify. Moreover, legal scholars have proposed liability model associated with categorizing providers: *i)* access providers, who provide Internet access to users; *ii)* service providers, who offer communication and information technology services; *iii)* content providers, who curate and select content on platforms. Only the last category would be held accountable for failing to monitor infringing content. The liability of the content provider is accumulated with that of the editor, who has a duty to check the legitimacy of content published even by third-party authors. *See* PIERUCCI p. 158 and BELLI p. 696.

Commerce Directive)[704] does not exclude the possibility of requiring the provider to monitor and remove illegal content. This allows national courts and Member States to require the provider to take appropriate measures to prevent users from infringing the law, even in the case of future infringements[705]. As a result, once a provider becomes aware of infringements, it is obliged to remove the infringing content without delay and to take all reasonable actions to prevent future harm, including monitoring the network.

However, this obligation clashes with the limitation of Article 15 of the E-commerce Directive 2000/31/EC[706], according to which the activity cannot be equated to a general obligation to monitor all network traffic or to search for all illegal activities[707]; such activity could negatively affect fundamental rights: the freedom of expression, information and communication, on the part of the user, protected by Art. 11 of the Charter of Fundamental Rights of the European Union (CFR); the freedom to carry on a business, on the part of the provider, protected by Art. 16 CFR; and the right of service users to the protection of their personal data, protected by art. 8 CFR[708]. The monitoring burden can only be justified if it is limited to individual and specific cases (as also stated in Recital 47 2000/31/EC)[709]. In

[704] Article 14.3 E-Comm.: ″Not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement″.

[705] Such provision must be read in accordance with art. 8.3 of the InfoSoc Directive 2001/29/EC and art. 11 of the Enforcement Directive, also in the light of the general clause for the protection of intellectual property contained in art. 17.2 CFR.

[706] Article Art.15 E-Comm.: ″Nothing in this Regulation should be construed as an imposition of a general monitoring obligation or active fact-finding obligation, or as a general obligation for providers to take proactive measures to relation to illegal content″.

[707] The combined analysis of art. 14 and 15 Dir. 00/31 has clarified there is no obligation of surveillance or of researching the illegal activities and information. At the contrary, a general obligation to monitor and seek the illegal activities might interfere negatively with the freedom of information and communication and data protection: *See* Fabrizio PIRAINO, *Spunti per una rilettura della disciplina giuridica degli internet service provider*, AIDA, 2017, p. 477.

[708] "CJEU has grounded the ban on general monitoring in fundamental rights law [..] because a filtering system would fail to strike a fair balance between the right to intellectual property on the one hand and the competing fundamental rights of service providers and users on the other hand" REDA cit. p. 13.

[709] "When determining whether a monitoring obligation is general or specific, the Court does not merely consider whether the work for which a service provider is monitoring is specified, but also whether the obligation requires the service provider to monitor 'all of the information transmitted' for a

accordance with the principle of proportionality, an order to intervene against a hosting provider must be proportionate, effective, fair, not unnecessarily complicated or costly, and carried out within a reasonable period of time.

The CJ has intervened to decide whether this exclusion of the general obligation to monitor is sufficient for the purposes of European law; the Court has confirmed that national courts may issue orders and injunctions to OCSSP to cease unlawful conduct, especially in the case of infringement of intellectual property rights. Such injunctions may include filtering obligations to prevent future infringements. However, there are two limits: a) an inherent limit, which requires compliance with the principles of proportionality and effectiveness; b) an extrinsic limit, which means that filtering systems cannot be transformed into a general monitoring obligation. These two limits were established by the CJ in *SABAM vs. Netlog* C-360/10[710].

> [The] injunction could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another[711].

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possible match with the known protected work" REDA cit. p. 15.

[710] SABAM (the actor in the case law) is a Belgian society who represented the authors and the editors within the musical market in Belgium. Netlog (defendant), owner of a popular online social networking platform, a hosting provider due to its function: ″the storage of information provided by a recipient of the service″ (art. 14 2000/31/EC, E-Commerce Directive). Netlog allowed its users to share several video files protected by copyright law, among which SABAM's clients' ones, without any authorisation from SABAM and without any remuneration paid by Netlog. SABAM approached Netlog to agree on a fee for the use of the protected content. Not having received a positive response by Netlog about the fee and having verified its content still available on the platform, SABAM brought an action in the Court of First Insance in Brussels in June 2009 against Netlog. The SABAM request concerned Netlog's obligation to introduce a system for filtering information stored on its platform, in order to prevent availability of content which infringes SABAM copyright interests. The filtering system was not compatible with the prohibition on general monitoring and SABAM request was found inadmissible.

[711] *SABAM v. Netlog* C-360/10, para 50. The Court ruling was contrary to the injunction as general monitoring of all communications by the users. This measure would have been preventive, "unlimited in time and at the sole expense of the service provider". Critically, legal scholar underline how the

Nevertheless, the DSM 2019/790 provision[712] makes it clear that Art. 14 of the E-Commerce Directive 2000/31/EC, which states that "the service provider is not liable for the information stored" and provides a liability privilege, ″shall not apply″ in peculiar circumstances. Thus, Article 17 of the DSM changes the liability model for a specific group of hosting service providers: the online content sharing service providers (OCSSPs).[713]. In this sense, the mechanism prescribed by Article 17 (4), where the filtering obligations extend to works that rightsholders notify to social media platforms with relevant and necessary information[714], may lead to a significant infringement of users' rights[715].

Court evaluation "did not consider whether the burden would be on the service provider to find out whether the works in question were indeed part of SABAM's repertoire" REDA cit. p. 14.

[712] Art. 17 (3) DSM ″When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article″. Nevertheless, the scientific community has raised potential collisions with other sources of law: "For example, Article 17 (3) CDSMD excludes OCSSPs from the hosting safe harbour enshrined in Article 14 (1) ECD, although the EU has committed itself to maintaining those safe harbours through numerous international trade agreements" REDA cit. p. 11.

[713] The exemptions from liability (art. 14 E-Comm) are still for certain subset of providers, described in the Recital 42 of the E-Commerce Directive: "[The exemptions] cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored".

[714] "It is reasonable to expect that the holders of rights in large repertoires of protected works and other subject-matter who are not interested in conducting a license agreement with an OCSSP will provide that OCSSP with reference files in order to block their entire repertoire of content on the service" REDA cit. p. 15.

[715] The new automated content filtering mechanism outlined in Article 17(4) seems to contradict the two limits held by CJ in *SABAM vs. Netlog*, when the Belgian company requested the imposition of a filtering system that would prevent making available its clients work without permission. Netlog's monitoring of SABAM's repertoire was deemed unfair, disproportionate, and excessively costly by CJ. *See SABAM vs. Netlog*: "Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other" para 51. We can cite other important case law which have underlined the same principle: C-314/12, *Telekabel* 27/03/2014; C-70/10, *Scarlet Extended* 24/11/2011.

5.5.2 Content-sharing provider liability model

The jurists raise questions about the nature of the liability of OCSSPs under Art. 17. Should the OCSSP only be liable if it has expressly assumed the duty of supervision (liability for negligence) or, conversely, should there be a direct duty of supervision and, consequently, strict liability for failure to supervise?[716]

In this context, two different perspectives emerge: the first suggests that the provider should constantly monitor the content of the platform; the second suggests that the provider should only be liable if there is a specific obligation to monitor, such as an obligation imposed by a court decision or an administrative order.

The decision on liability could potentially conflict with the established framework of copyright law, as traditionally the rights holder is the only one to supervise and protect the artistic work. Assigning control and monitoring duties to the provider would mean that the provider would have to intervene when there are acts or circumstances that infringe the exclusive rights.

The liability model must encompass a range of actions to be taken by the service provider. This includes the dissuasive aspect, such as complying with the copyright holder's request to remove the infringing content. It also includes the restorative duty: restoring the content following a user's objection in the case of a false positive. In addition, the compensatory element comes into play when significant economic damage is caused to both the originator (as the copyright holder) and the parodist (as an active user)[717].

In order to establish a suitable control model for user-generated parodies, it is essential to falsify inappropriate liabilities that may harm the freedom of parody.

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[716] *See* SPOLIDORO p. 77-78.

[717] *See* MAGNI SPOLIDORO p. 74. On the issue of the liability for social media and the supplementary measures to consider for its prevention, legal scholars propose the exam of the size of the platform: "As a general matter, when establishing these usage limits, platforms would be ranked according to their level of social risk. Smaller online spaces, such as long-established community forums and small hobbyist or academic groups, would be subject to minimal regulation and liability for hosted content. On the other hand, large, 'Wild West'-style plat-forms like Facebook and Twitter, which have a significant—and largely negative—impact on public opinion and behavior, would require more robust oversight" David INMAN and Oliver Lee BATEMAN *Anti-Social Media: A Modest Proposal for Significant Restraint*, American Affairs Volume VII, Number 2 (Summer 2023): 171–91.

5.5.2.1 The strict liability

Strict liability does not seem to be the optimal solution, especially when the provider hosts user-generated/created content[718]. If the liable provider has no direct interest in the distribution of such material, it may be inclined to remove all potentially harmful content. This approach is likely to result in false positives, which would have a negative impact on the creativity of the network and restrict the freedom of communication between users.

Under strict liability, social media would likely choose to remove any content that is not clearly illegal in order to avoid liability for damages. This choice is understandable, as it is economically more advantageous to censor user-generated content than to face the risk of repeated liability for copyright infringement. Strict liability is not well suited to providers in the context of parody, as it is heavily tilted in favour of copyright holders or those who inspire the parody. Moreover, this liability could stifle both the user creativity that parody has thrived on in Web 2.0 and the broader framework of online communication that relies on transformative content.

The strict liability of the provider has often been likened to that of press organisations or editors, and is often based on the nature of the business. However, this approach has been strongly criticised by legal scholars, especially during the recent implementation of the DSM Directive 2019/790, which introduces liability for providers who do not implement automated monitoring systems. A different model should seek to balance two conflicting interests. On the one hand, there is a need to clarify when a provider is liable for failing to protect the rights of users to obtain redress in the event of damage. On the other hand, the imposition of excessive preventive obligations should be avoided in order to preserve the freedom to conduct business[719].

[718] Other authors agree with the exclusion of a strict liability upon the provider: ″It is crucial to understand however, that in the event intermediaries are considered as strictly liable, this would unreasonably and negatively affect legitimate information dissemination. This may in turn jeopardise the free flow of information and innovation″ cit. p 191 para 26.

[719] *See* PIERUCCI p. 164.

Alternatively, social media platforms could use automatic content recognition technology to avoid direct liability, but this approach could lead to infringements of fundamental rights, in particular users' freedom of expression and access to information[720]. Moreover, it is difficult to argue that current automated technology is capable of identifying and removing every piece of unlawful content posted on the Internet. To do so manually would be too expensive and probably impractical.[721].

These findings have led legal experts to characterise Article 17 as imposing direct liability on content providers, particularly in light of the ambiguity surrounding the "best efforts" obligation. They highlight the possibility that, due to the power imbalance between rights holders and users, content providers may be incentivised to set up AI systems that automatically block all unauthorised uses of copyrighted works notified by rights holders under Article 17(4), without regard to whether such uses fall within the scope of an exception or limitation[722].

5.5.2.2 The liability for negligence

Another form of liability that may be imposed on the provider is liability for negligence. In this case, the provider may be held liable for failing to take reasonable technical measures to prevent the distribution of unlawful content. If the provider is aware of the presence of unlawful content but fails to remove it immediately, it could be held liable for negligence. However, this model has been criticised as unfair because it places the onus on the provider to monitor and prevent illegal activity, even if the provider has limited resources or ability to do so effectively.

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[720] This danger has been underlined by João Pedro QUINTAIS, *The New Copyright in the Digital Single Market Directive: A Critical Look*, European Intellectual Property Review 2020: "Despite the directive explicitly rejecting this outcome in Article 17 (8), it is hard to see how these obligations will not lead to the adoption of (re-)upload filters and, ultimately, result in general monitoring" cit. p. 19.

[721] The widespread of parody has been emphasized in the Web 2.0. The already mentioned study from IPO pointed out that it is possible to find a huge quantitative of parodies upon a very popular platform such as YouTube. The study declared how a popular music video can be statistically victim of 24 different parodic transformations. *See* ERICKSON, KRETSCHMER, MENDIS *Copyright and the Economic Effects of Parody* p. 6-7.

[722] *See* LAMBRECHT p. 76

The costs of adopting technological measures to prevent illegal content must therefore also be weighed against the benefits of taking it down. Some experts argue that an uncompromising liability model is likely to drive smaller and less powerful providers out of the market, as they may not be able to afford both an expensive automatic prevention model and compensation costs[723]. This economic analysis could potentially lead to an oligopoly within the internet, which should be avoided through rational legislation. It is essential to recognise the critical role that providers play in the functioning of the network and in the development of online interactions that emphasise the social function of social media.

5.5.2.3 The safe harbour for parody

A proposal to determine the level of liability for the hosting provider has been presented by Sartor[724]. The author proposes a safe harbour in three specific cases:

1) The provider would be exempt from liability if it could prove that it had no knowledge of the illegal content on its platform. Even if the provider becomes aware of the content, it would still be exempt from liability while there is uncertainty as to its legality. However, this first exemption would not apply if the provider had received a warning about the illegal content. Finally, if the provider cooperates with the authorities as required, a second exemption from liability would arise.

2) The hosting provider would be required to notify the relevant authorities. If the authorities request removal, the provider must comply by removing the unlawful content and identifying the user responsible for the infringement. In addition, if the provider suspects that certain content may be unlawful but is uncertain, it must still inform the competent authority.

3) The final exception is where the provider removes the content immediately. However, in this scenario, the user who generated/created the content may

[723] An example of uncompromising liability's model: 1) the strict liability which automatically impute a specific kind of damages, just because the provider could invest to preventing them. 2) The liability for negligence and consequent duty to search unlawful information and content.

[724] Giovanni SARTOR, *Social networks e responsabilità del provider*, AIDA, 2011, p. 39

protest against an unfair removal. The provider would invoke this exception if there is a breach of the established policy for "content management" (which includes the collection, organisation, delivery, retrieval and management of content).

This solution seems appropriate in cases where parody violates fundamental rights, as the provider would act quickly. While infringements of intellectual property rights can be sued out of court and easily detected by an automatic filtering system, infringements of personal rights require a more careful assessment. Moreover, the provider should only inform the authorities in the case of infringements of personal rights and not in the case of infringements of copyright. In such cases, proactive cooperation between platforms and rights holders, especially large companies that own most intellectual works, is already established and aims at immediate removal of content in case of copyright infringement. Dealing with infringements of personal rights, on the other hand, is more challenging. Furthermore, while cooperation between social media and rights holders can ensure the implementation of policies within the framework of copyright law, the central state should intervene to nullify the regulatory platform that may jeopardise users' rights. Therefore, in-depth research on the regulation platform is necessary.

> While decision accuracy and false positives remain problems, rightsowners and platforms work increasingly together to define criteria that help platforms in risk profiling for the application of automated tools. However, platforms note that these measures are resource-intensive and would need to remain proportionate and reasonable. Meanwhile, the use of brand protection programs by platforms is on the rise. It is endorsed by and large by platforms and rightsowners as an effective means to identify counterfeits[725].

[725] ULLRICH cit. p. 373.

5.5.2.4 Court of Justice: active and passive hosting providers

The Court of Justice has recently addressed the liability of content-sharing platforms in joined cases, C-682/18 and C-683/18. According to the new Digital Single Market Directive (DSM), art. 17 applies specifically to "online content sharing service providers," as defined in art. 2 n. 6 DSM[726]. This directive mandates the application of art. 14 of Directive 2000/31 in the case of "active" hosting providers. The Court of Justice has recently clarified that art. 14 of Directive 2000/31 only applies where the hosting provider plays a "neutral" (or ″passive″) role. In such cases, the provider's conduct is expected to be merely technical, automatic and passive; a conduct that implies a lack of knowledge or control over the illegal activities. Conversely, the immunity regime does not apply if the provider takes an active role in acquiring knowledge or exercising control over the content. In addition, the Court has held that the automatic indexing of uploaded content by the platform is not sufficient to constitute an active role. This allows us to distinguish between passive and active providers:

A passive hosting provider carries out purely technical activities; it passively and automatically hosts user-generated content and stores this information. The provisions outlined in art. 14 of the EU Directive 2000/31/EC apply to such providers[727].

An active hosting provider, on the other hand, is not only technically active[728]. This type of provider shows a certain level of involvement in the management and organisation of content, and the storage and presentation of this

[726] Art. 2 n. 6 DSM ″Online content-sharing service provider means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes″.

[727] See The Italian Supreme Court, 7708/2019.

[728] The concept of an active provider is apparent in specific instances as elucidated by Italian courts (*see* Tribunal of Milan, 7 June 2011. *RTI v. Italia On Line* and Tribunal of Milan, 9 September 2011. *RTI v. Yahoo! Italia s.r.l.*) These criteria encompass various elements, including the organization of content management by users on the platform, the presence of contractual arrangements with users, a mechanism for receiving user notifications and complaints, the offer of a service for "related videos"; content indexing and selection; engagement in profit-oriented entrepreneurial activities through content dissemination; the provision of advertising space to users for financial backing. In such cases, the provider would be obligated to engage in monitoring and proactively seek out illegal activities. *See* Stefano LONGHINI, Alessandro IZZO, T*utela del diritto d'autore e Internet,* Il diritto di autore, III, 2012, p. 305-307.

content serves as a financial source for the platforms through advertising revenue. An active hosting provider does not qualify for the application of Article 14 of EU Directive 2000/31/EC. Nevertheless, the liability of the active hosting provider is not determined solely by its activities; the mere knowledge of the unlawful content and the status of an active hosting provider entail additional responsibilities and control measures. Failure to remove unlawful content immediately makes the active provider liable for violations of personal rights, while it is less liable for violations of property rights.

Finally, the CJEU confirmed that the rightsholder can only obtain an injunction against the content-sharing provider whose service has been used by a third party for illegal activities without the right holder's knowledge if the content provider has been given prior notice and has nevertheless failed to take immediate steps both to remove or block access to the content and to ensure that further infringements are not repeated before the start of legal proceedings[729].

5.6 The risk of over-blocking parody

EU legislation should be cautious about automatic copyright enforcement, especially in the context of unauthorised uses such as parody, as a mandatory upload filter could disrupt social communication. User-generated parodies in the Web 2.0 age often involve the appropriation of copyrighted works, not necessarily to create something new, but rather as a new means of expression in online communication.

> In order to protect these fundamental rights in light of the intensification of copyright enforcement, European legislators introduced new rights of

[729] *Peterson v YouTube Inc* (C-682/18) and *Elsevier Inc. v Cyando AG* (C-683/18) ″Copyright holder or the holder of a related right may not obtain an injunction against an intermediary whose service has been used by a third party to infringe his or her right, that intermediary having had no knowledge or awareness of that infringement, within the meaning of Article 14(1)(a) of Directive 2000/31, unless, before court proceedings are commenced, that infringement has first been notified to that intermediary and the latter has failed to intervene expeditiously in order to remove the content in question or to block access to it and to ensure that such infringements do not recur. It is, however, for the national courts to satisfy themselves, when applying such a condition, that that condition does not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder″ para 145 n. 3.

> use in parallel with upload filters: In addition to citation, criticism, and review, the use of copyrighted works for caricature, parody, and pastiche was legalized across Europe. This was the European Union's response to calls from civil society to "save the meme"[730].

The imposition of direct liability or liability for negligence to the provider for unlawful parodies could determine the so-called "digital prior restraint"[731]. This means that parodic content could be filtered and over-blocked without juridical determination[732] that aligns with the limits of filtering obligations we have discussed above[733]. Prior restraint has been identified as the most problematic in the area of users' rights[734]. Such actions taken by private companies would raise ethical concerns and potentially hinder the exercise of comic expressions in the realm of digital communication and information[735].

> Given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by over-censoring potentially illegal content. Lack

[730] https://freiheitsrechte.org/en/themen/demokratie/expert-opinion-on-pastiche

[731] ″Imposing liability on infrastructure providers unless they surveil and block speech, or remove speech that others complain about, has many features of a prior restraint″ BALKIN cit. p. 2017.

[732] "This blocking or removal occurs without any judicial determination of whether their speech is protected or unprotected, without any Bill of Rights protections, without any due process rights to a hearing before the action is taken, or indeed, without any obligation to consider and resolve end-user objections promptly" BALKIN cit. p. 2018.

[733] In *SABAM v. Netlog*, CJ established a) an inherent limit, on the one hand, which implies a compliance with principles of proportionate and effectiveness; b) an extrinsic limit, on the other, which impose that the filtering systems cannot turn into a general obligation to monitor.

[734] "Such technically enforced prior restraint is the most extreme and problematic restriction on speech, as it avoids the public scrutiny incurred by standard judicial procedures, and shifts the burden of inaction on the speaker, as no communication can occur until permission is granted. For some creators on UGC platforms, the blocking of their content during a month-long appeal process can have a substantial impact on their income" LAMBRECHT p. 76 para 28.

[735] "Moreover, although the statutory NTD regime requires complainants to include in their takedown request an affidavit validating their copyright ownership, voluntary mechanisms occasionally restrict content without any sufficient legal ground. For instance, in a recent complaint filed against YouTube under its terms of use, the plaintiff alleged that Content ID removed his parody of the film *The Girl With the Dragon Tattoo*, which Content ID designated as being owned by Pirateria, although Pirateria is not the owner of the rights to this film. The plaintiff further argued that when he posted, under fair use, a critique of the 2014 remake of *Teenage Mutant Ninja Turtles*, a Content ID claim was made with YouTube on behalf of Viacom, although Viacom is not the true copyright owner" Maayan PEREL and Niva ELKIN-KOREN, *Accountability in Algorithmic Copyright Enforcement* (February 21, 2016). 19 Stan. Tech. L. Rev. 473 (2016), cit. p. 509.

> of transparency in the intermediaries' decision-making process also often obscures discriminatory practices or political pressure affecting the companies' decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences[736].

In the current context, social media platforms must carefully consider the fair balance between fundamental rights. In particular, the use of automated systems may raise questions as to whether this choice affects: the right to property of the creator of the parody; the artistic freedom of the parodist; the rights of users (freedom of communication and information); and the freedom of social media to do business.

AI tools, by their nature, do not provide definitive answers, as the preference to protect a particular subject depends on how it is programmed[737]. However, on the face of it, over-blocking may interfere with the interests of the parodist or the rights of users, and it may undermine the freedom to operate of social media if the tool becomes too costly or in the case of direct liability[738]. Article 17 could lead to an

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[736] VOORHOOF cit. p. 340.

[737] Some research suggests that AI is now capable of generating humorous content. For instance, there are a lot of AI comments and meme generators on Twitter: "Twitter's meme culture, for example, is created by humans and bots alike [..] A recent joint study at the Center for Complex Networks and Systems Research at the University of Indiana and the Information Sciences Institute at the University of Southern California estimates that up to 15% (around 50 million) of Twitter accounts are not human" CHRISTOPHER p. 51 (citing the joint study: Onur Varol et al., *Online Human-Bot Interactions: Detection, Estimation, and Characterization*, arXiv, 2017, https://arxiv.org/abs/1703.03107). The question is whether it's useful and appropriate for us to have AI judge humour. While I don't wish to restrict technological progress, it brings to mind the cautionary words of Stephen Hawking regarding the ultimate judgment and the warnings that "accelerated technological progress will bring about an artificial intelligence singularity and a de facto end of the human species once the ai realizes how immoral or inefficient humans are" (Bogna M. KONIOR, *Apocalypse Memes for the Anthropocene God: Mediating Crisis and the Memetic Body Politic* p. 46). What if AI realize we are unfunny. On the relationship between humor and AI *see* Davide BACCIU, Vincenzo GERVASI and Giuseppe PRENCIPE, *LOL: An Investigation into Cybernetic Humor, or: Can Machines Laugh?*, in E. D. Demaine and F. Grandoni, (2016), 8th International Conference on Fun with Algorithms, Schloss Dagstuhl-Leibniz-Zentrumfuer Informatik.

[738] The EU Commission showed its contrary to this assumption in Commission Staff Working Document. *Executive Summary of the Impact Assessment on the modernisation of EU copyright rules*, SWD(2016) 301 final (1/3): "At the same time, the level of this impact is expected to be limited due to the fact that the obligation is imposed on services giving access to large amounts of protected content only, that the option builds on existing voluntary practices and that technologies are increasingly available in the market which makes the implementation of the technology obligation easier for the services. This impact is further limited by the fact that the proportionality in the choice and in the deployment of effective content identification technologies will allow to take into account the size and

increase in the cost of implementing these technologies, as social media platforms have already generally adopted voluntary filtering systems which may differ from the provisions set out in Article 17[739].

> Third-party providers of filtering software are likely to drastically increase the price of their offerings not only due to increased demand, but also to account for the need to constantly update their reference databases to include reference files provided by a potentially boundless circle of rightsholders. The addition of large numbers of rightsholders to existing voluntary filtering mechanisms would also increase the incidence of overblocking caused by an increase in the total number of false claims[740].

In the context of parody, these technologies should take into account not only the original material but the user-generated content of the parodists who may seek *i)* recognition of the transformative content as an independent work; *ii)* protection by the same filtering mechanism. As a result, the filtering system should include both works of art and be able to distinguish between them.

> Algorithmic systems used for copyright enforcement should be designed so as to protect exceptions and limitations by default. In other words, algorithmic systems should be designed to detect not only infringing uses, but also uses that should be considered as covered by an exception or limitation, and exclude them from any automated flagging or takedown[741].

The operation of a filtering system entails various costs, including human review, which is crucial for distinguishing parody. The difficulties in assessing the legitimacy of parodic transformations and striking a fair balance between the different subjects involved could lead to a real risk of collateral over-blocking. This

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the nature of the individual services. Overall, this option is considered to strike the necessary balance between copyright and other fundamental freedoms" cit. p. 154.

[739] The voluntary filtering efforts are subject to criticism since "the fairness of these requirements that are currently unilaterally imposed by platform operators on rightsholders can of course rightfully be called into question. In fact, the very legality of these voluntary filtering efforts under Article 22 GDPR is questionable, insofar as they can create detrimental effects on data subjects solely on the basis of automated decision-making" REDA p. 46.

[740] *Ibidem* (REDA p. 46).

[741] LAMBRECHT p. 79 para 43.

is commonly referred to as "collateral censorship":[742] a new form of authoritarianism that manifests in the new-school regulation of freedom of expression.

> Collateral overblocking, meaning the over-removal of lawful content, because the content was either falsely blocked for technical reasons or because of overcompliance with copyright laws, is inherent to the context-blindness of filtering systems. State of the art filtering technologies are not suitable to assess the lawfulness of user-generated content. Automated tools are unable to distinguish between lawful and unlawful content, because they cannot judge the context in which content appears. Especially in the field of copyright, context is crucial to determine whether a particular use of a protected work is lawful. Not all uses of copyrighted works are legally actionable, the use of protected material in user-generated content can be lawful under limitations and exceptions to copyright, such as parody[743].

Over-blocking results in the inaccessibility of significant amounts of content, significantly restricts users' rights and leads to collateral censorship. Both European courts emphasise how automated filtering systems can lead to over-blocking and cause significant harm to the respect of fundamental rights on the Internet[744].

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[742] "Collateral censorship occurs when the state targets entity A to control the speech of another entity, B. The state tells A: Locate and block or censor B, or else we will punish or fine you. In effect, collateral censorship attempts to harness a private organization to regulate speech on the state's behalf" BALKIN cit. p. 2016. The author explains how collateral censorship occurs when A and B are not in the same relationship: ″When A is part of the internet infrastructure and B is one of the countless number of people who use A's services to communicate with others [..] In these cases, A's incentives are somewhat different. Told by the state that it must censor or block speakers like B, A will err on the side of caution. It will tend to overblock or overfilter content, discarding the wheat with the chaff. In addition, A will be more likely to take down speech that anyone objects to or that it fears someone might object to. Because there are so many speakers (and because A wants to make the vast majority of its end users feel comfortable), denying access to a very small number of speakers will not damage A's business model, whereas repeated imposition of government liability for the speech of total strangers might seriously hinder its ability to do business″ BALKIN cit. p. 2017.

[743] REDA cit. p. 26.

[744] CJ *SABAM v. Netlog* C-360/10: "The injunction requiring installation of the contested filtering system [..] could potentially undermine freedom of information" para 49 and 50. ECHR *Ahmet Yildirim V. Turkey* 3111/10 "A measure of that nature, blocking access to such a quantity of information for an indeterminate period, was analogous to prior restraint as it prevented Internet users from accessing the blocked content for an indeterminate period. Such restrictions posed significant dangers and therefore required the most careful scrutiny by the Court" para 43. This jurisprudence has been considered incompatible with art. 17 DSM since it does not contain sufficient procedural

5.6.1 AI struggle to detect parody

Lambrecht raises questions about the development of AI and its ability to identify online parodies. The legal scholar argues that if AI can effectively identify all types of content and comply with Article 17 (4), it should also be able to exclude parody exception under Article 17 (7). Conversely, if AI struggles to identify content comprehensively, then the "best efforts" requirement should be narrowed in scope and should not include the parody exception. In identifying a parody, Lambrecht refers the conditions for the existence of parody as outlined by the CJ: a) it must evoke an existing work; b) itmust be noticeably different; c) it must embody an expression of humour. While AI can readily recognise the first two criteria, the last one is highly controversial, as current accademic research suggests that AI cannot understand what constitutes an act of humour and, consequently, cannot grant digital citizenship to user-generated parodies.

> In general, distinguishing a humorous from a serious statement is currently 'way beyond the capabilities' of machines. [..] Since the current state of the art of machine learning algorithm does not allow to reliably identify parodies, preventive measures resulting from art. 17(4) b. and c. are highly likely to lead to systematic interference with the freedom of speech of creators of transformative works covered by the parody exception[745].

A particular problem with parodic content is that while AI technology may be able to identify content that is reminiscent of an existing work while being noticeably different from it, human review is mandatory because AI cannot identify the parodic context due to its semantic nature[746]. What makes parody effective in this context is

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safeguards to mitigate the interference with the users' right: "Both courts regard the collateral blocking of lawful content as a severe interference with the users' fundamental right to freedom of expression and information. They have found that filtering or blocking systems that lead to arbitrary blocking of lawful content violate Article 11 CFR and Article 10 ECHR respectively [..] In the ECtHR's case law on website blocking, it is well established that ex-ante restrictions of the freedom of expression and information on the internet can only be justified in exceptional circumstances and require a precise and specific legal framework. As will be shown below, Article 17 CDSMD fails to meet this standard" REDA cit. p. 32.

[745] LAMBRECHT cit. p. 88 para 100.

[746] This crucial aspect has been highlighted recently by content-sharing providers and commentators which consider algorithmic system is unable to apply context-dependent exception of parody:

the concept of "networked trust". This refers to the fundamental trust that exists between the parties involved in the parodic context. Indeed, parody can be described as a circuit in which different parties need to understand and comprehend each other in order to create the parodic context. Algorithms have difficulty in identifying a purely humorous context and are therefore unable to determine what content may fall within the parody exception[747]. In addition, legal experts have pointed out that AI tools cannot identify which content, such as parody, may be protected by the fair use doctrine[748]. Consequently, an ineffective *ex ante* prediction would pose risks to: *i)* fundamental rights, as parody is ascribable to the exercise of freedom of expression; *ii)* copyright's objective of promoting creativity and culture; *iii)* platforms' freedom

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"Copyright exceptions require a high degree of intellectual judgment and an understanding and appreciation of context. We do not represent that any technology can solve this problem in an automated fashion. Ultimately these types of determinations must be handled by human judgment" LAMBRECHT p. 70 para 101. YouTube explicitly declare its algorithmic filter cannot track parodies: ″Since Content ID can't identify context (like 'educational use' or 'parody'), we give partners the tools to use length and match proportion as a proxy. That's why two videos - one of a baby dancing to one minute of a pop song, and another using the exact same audio clip in a videotaped University lecture about copyright law - might be treated identically by Content ID and taken down by the rights holder, even though one may be fair use and the other may not. Rights holders are the only ones in a position to know what is and is not an authorized use of their content, and we require them to enforce their policies in a manner that complies with the law″ https://blog.youtube/news-and-events/content-id-and-fair-use/.

[747] "This criterion poses a much greater difficulty for algorithmic assessment. There is no apparent way to simplify this criterion into a bright-line rule since it is essentially a standard whose appreciation cannot easily be formalized. Of course, humor is a complex cognitive, emotional and social phenomenon, which defies most theoretical attempts at defining and reducing it. Therefore, it seems that if algorithms must assess if a use constitutes 'an expression of humour or mockery', it must be through a general assessment of such standard" LAMBRECHT p. 87 para 93.

[748] ″Restriction of content due to copyright infringement yields nothing about how the algorithm has effectively applied the four-factor test of fair use. [...] Has it identified the nature of use? Its purpose? What if the algorithm has only considered what portion of the protected work was takes, while ignoring the other qualitative factors – is it possible to unveil such a distorted application of the fair use doctrine by simply observing a given outcome of content restriction? The answer is 'maybe'. Unfortunately, it is unclear how online mechanisms of algorithmic copyright enforcement exercise their power″. Maayan PEREL & Niva ELKIN-KOREN, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, (2017) 69 Fla. L. Rev., cit. p. 197. On this point, also Carsten ULLRICH *Unlawful Content Online Towards a New Regulatory Framework for Online Platforms*, Nomos, 2021″Automated systems are (still) notoriously imperfect in detecting these often context-sensitive scenarios. Artificial intelligence and predictive analysis, although used for hate speech and terrorist content, and heavily researched, are not yet developed enough to make these decisions with a high level of accuracy in the area of copyright″ cit. p. 340.

to conduct business, as pre-emptive interventions could raise costs for private initiatives[749].

Legal scholars have theorized the protection of parody by default, as a counterbalance to the potential over-blocking tendencies of AI. There are two key reasons for the by default stance: The first reason relates to the significant presence of comedy on online platforms. If comedians can create parodies of protected content without authorization, content-sharing providers should not be burdened with licensing or compensation requirements[750]. The second reason relates to liability concerns. Content-sharing providers should be subject to oversight by authority to ensure that AI systems adhere to liberal and democratic principles[751].

Furthermore, establishing protection for parody by default would signify a departure from the copyright criteria traditionally employed for this technique. While this approach might not be the most suitable for creative parody, which can be identified as original by these criteria, it could present an intriguing advancement for online parody.

Parody can be described as a renewed technique still governed by framework designed for offline parody[752]. This is evident through the mention of the term "parody" in the European Directives (InfoSoc 2001/29/EC and DSM), where falls within the exceptions and limitations regime that assesses the impact of

[749] *See* Luca BELLI and Cristiana SAPPA, *The Intermediary Conundrum: Cyber-Regulators, Cyber-Police or Both?*, 8 (2017) JIPITEC: ″The implementation of *ex ante* filtering seems to be inefficient. It imposes higher costs, while at the same time conflicting with the principle of proportionality. In fact, *ex ante* limitations to the circulation of information may be imbalanced, protecting specific interests while simultaneously discouraging user expression, participation, and innovation. It may additionally have the effect of hampering the freedom to conduct a business, by raising the costs for private economic initiatives″ cit. p. 184 para 3.

[750] "It may be that effective protection of exceptions and limitations could require states to introduce, in their national implementation of the directive, independent supervision and penalties if OCSSPs fail to implement their obligations under art. 17(4) in a way that prevents systematic interference with the right to freedom of speech, and notably the exercise of the right to quotation and to parody" LAMBRECHT p. 92 para 117.

[751] "Too often, algorithmic regulations or other technical decisions that affect the public are made in private fora, without much (if any) public accountability" LAMBRECHT p. 92 para 119.

[752] "Is there a way that law can keep pace with innovation while protecting and preserving the freedoms that create the necessary context for innovation? If law is to do this, it must not only change, but embrace the concept of ongoing change, interweaving flexibility and resilience with the more established concepts of order upon which society is built" FAIRFIELD cit. p. 4.

transformation on the private interests of the rightsholder. This finding raises questions about whether the law can keep up with the digital evolution of parody, in line with arguments presented by Joshua Fairfield[753].

Although copyright law has been the legal source for the recognition of parody as an original work, the choice to regulate online parody based on the same criteria may not be the most suitable approach today. There are two primary reasons for this. First, online parody predominantly serves as technique of communication among users who do not intend to create intellectual property. Second, legal scholars and case law have illustrated that parody does not raise issues in terms of private copyright interests, while it does raise significant concerns regarding public interests, especially in the realm hate speech and fake news.

5.6.2 The European Court of Human Rights

The European Court of Human Rights has also interpreted the over-blocking as a form of prior restraint in the absence of a judicial decision on the content. This risk of prior restraint is particularly acute on the Internet, where new forms of censorship can easily be imposed through social media. However, the ECHR does not completely rule out the use of prior restraint, but cautions judges that the blocking order must be justified only in exceptional circumstances[754]. Indeed, it is clear that measures such as notice and take down have significantly restricted the rights of Internet users and have had a significant collateral over-blocking effect by making large amounts of information inaccessible[755]. An empirical study has shown

[753] The author stresses that we must avoid believing that the law cannot keep up with technological development "The statement that 'law can't keep up' is not a fact, but an argument, and except in very limited circumstances, is a fairly silly and self-serving assertion that has failed over and over again" FAIRFIELD cit. p. 54.

[754] ECHR, *Ahmet Yildirim vs Turkey* (application no. 3111/10): "The Court reiterates that Article 10 does not prohibit prior restraints on publication as such. This is borne out not only by the words 'conditions', 'restrictions', 'preventing' and 'prevention' which appear in that provision, but also by the Court's judgment [..] On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger also applies to publications other than periodicals that deal with a topical issue" para 47.

[755] It should be emphasized that the ECHR admits also prior restraint as a blocking measure applied to

that the automated technical measures (NTD or NST) can have a "chilling effect" and a "negative impact" on users' freedom of expression[756].

> Notice-and-take-down' proceedings as actions against alleged copyright infringement can have a detrimental impact on freedom of expression and are developing into a kind of private censorship. Interferences of this kind by intermediaries on request of copyright holders, risk becoming overbroad and are often not necessary in a democratic society. [..] Service providers should not risk liability for not taking remedial action, unless they have been ordered to do so by a court or a judge, with all guarantees of a fair trial[757].

The ECHR thus requires that the measure be strictly targeted at the illegal content and that safeguards be put in place to protect users' rights[758]. The ECHR thus allows the adoption of a prior restraint as necessary within the meaning of the Convention, as long as the authority has taken into account the effects of the ban; the disadvantage is justified by the general interest of security; and there is no possibility of avoiding undesirable side-effects by other restrictive measures[759]. In this case, the

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a single and individual content before a judicial decision has been made regarding its legality. *See* ECHR *Kablis v. Russia* (applications nos. 48310/16 and 59663/17) para 90.

[756] U.S. Copyright Office Library of Congress Washington, D.C. *Notice of Inquiry. Technical Measures: Public Consultations* Lab, Department of Communication, Cornell University February 4, 2022: "The automation of the DMCA notice-and-take-down system, leading to literally tens of millions of these notices sent by technical measures like algorithms, bots, and automated programs, magnify these chilling effects concerns significantly, raising the possibility of chilling effect sat mass scale" cit. p. 4.

[757] VOORHOOF cit. p. 352.

[758] ECHR, *Kharitonov v Russia* (application no. 10795/14, 23 June 2020): "The Court reiterates that it is incompatible with the rule of law if the legal framework fails to establish safeguards capable of protecting individuals from excessive and arbitrary effects of blocking measures [..] When exceptional circumstances justify the blocking of illegal content, a State agency making the blocking order must ensure that the measure strictly targets the illegal content" para 46.

[759] " The Court reiterates in this connection that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case [..] However, a general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures. In this connection, the authority must take into account the effect of a ban on demonstrations which do not by themselves constitute a danger to public order. Only if the disadvantage of such demonstrations being caught by the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope in terms of territorial application and duration, can the ban be regarded as being necessary within the meaning of the Convention" *Kablis v. Russia* para 54.

ECHR has held that failure to remove unlawful content immediately renders the provider liable for infringements, even without prior notice to the alleged victim[760].

> ECHR found that website blocking schemes violated Article 10 ECHR for not including the following safeguards: (i) an impact assessment of the blocking measure prior to its implementation, (ii) an obligation to proactively notify and educate those who might be impacted by overblocking, (iii) the blocking measures had not been sanctioned by a court or other independent adjucatory body, (iv) they lacked effective transparency with respect to grounds and possibilities to challenge already implemented blocking measures, (v) and did not provide for judicial recourse for the parties[761].

Only some of these points are of interest to the parody. The assessment of impact is subjective and depends on the importance of the original work and the artist involved. Some forms of censorship are clearly unacceptable, especially when motivated by censorship or political repression. The third point (and the fifth) may be difficult to enforce, as most disputes relating to parody are settled out of court. Therefore, judicial sanctions may not be necessary and resolution between the private parties involved would suffice. However, the fourth point is important because the recourse of the parodist, and possibly the recourse of the associated audience, could serve as evidence of acceptance, at least within that particular platform.

> All in all, the recent case-law of the ECHR does not contain clear or instructive guidelines to predict what the outcome will be in other circumstances of breaches of copyright law, e.g. [..] parody, satire, transformative use or in cases of reproduction or public communication of copyright protected material related to issues of public interest,

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[760] *See* ECHR *Delfi AS v. Estonia* (application n. 64569/09, 16 June 2015). However, the same Court did not endorse pre-publication restraint (or "censorship prior to publication", as the court said) and it was clearly explained in the appendix: " We trust that this is not the beginning (or the reinforcement and speeding up) of another chapter of silencing and that it will not restrict the democracy-enhancing potential of the new media. New technologies often overcome the most astute and stubborn politically or judicially imposed barriers. But history offers discouraging examples of censorial regulation of intermediaries with lasting effects" *Ivi* p. 83.

[761] REDA cit. p. 34. In the decisions of *Kharitonov v Russia, OOO Flavus v Russia* and *Engels v Russia.*

political expression or social action, nor when enforcement of copyright takes the form of blocking, filtering or removing websites or users' access to the Internet[762].

5.6.3 CJ intervention: Poland vs. EU Parliament and Council

The CJEU has addressed the issue of automatic copyright enforcement in the context of freedom of expression. The CJ states that Article 17 of the DSM should include provisions to protect caricature, parody and pastiche as users' rights, especially in cases where upload filters are implemented by social media. The DSM 2019/790 explicitly refers to the impact of Article 17 on users' rights, in particular freedom of expression and information[763]. In this context, the need for flexibility in copyright law is so obvious that some legal scholars have proposed the introduction of a specific UGC exception in EU law[764]. Specifically, when UGC falls under an exception and limitation, such as parody, rights holders and social media should not block uploading.

In the case law case C-401/19 (*Poland v Parliament and Council*), Poland argued that art. 17 DSM may not respect the prohibition of general monitoring obligations upon content-sharing providers; as the provision would oblige them to implement automated content detection. Poland therefore seeks the annulment of

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[762] VOORHOOF cit. p. 349.

[763] DSM 2019/790 Recital 70.

[764] "Another area where a need for flexibility in copyright is evident is user-generated content. Whereas the social media have in recent years become essential tools of social and cultural communication, copyright law in most EU Member States leaves little or no room for sharing user generated content that builds upon pre-existing works. For example, a spoof video composed of materials taken from broadcast television and uploaded to YouTube or Facebook would be exempted only in the rare case that it would qualify as a quotation providing critical commentary, or as a parody or pastiche. As the European Commission already recognized in its 2008 Green Paper on Copyright in the Knowledge Economy, the absence in European copyright laws of an exemption permitting user-generated content 'can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated'. The Commission's suggestion to introduce a special user-generated content exception in EU copyright law has however as yet not materialized", P. Bernt HUGENHOLTZ, *Fair use in Europe: Examining the mismatch between copyright law and technology-influenced evolving social norms in the European Union*. Communication of the ACM, May 2013 Vol. 56 no. 5, cit. p. 28.

Article 17(4)(b) and (c) on the grounds that the provision violates the freedom of expression and information of users, since content-sharing providers should proactively stop all content that may infringe the interests of copyright holders in order to avoid liability. The mandatory provision would impose strict liability, which could potentially undermine the freedom of expression and information online as guaranteed by the Charter of Fundamental Rights (Article 11).

The CJEU considers that preventive control of unauthorised uses of copyrighted material can hardly be applied without prejudice. If technological advances make it possible to monitor and control every use of copyrighted material by third parties, the legitimate practice of unauthorised use, such as parody, could be jeopardised. Such a scenario would be detrimental to all online users. Furthermore, the CJEU emphasises that it is not the provider's responsibility to assess creativity or to determine whether a work qualifies as such; such assessments must be left to the court[765].

> Specifically, in order to "safeguard the effectiveness" of those exceptions and limitations, it is important, in my view, to ensure that the preventive measures taken pursuant to the contested provisions do not undermine systematically the right of users to make use of them. If, in the digital environment, rightholders have options for monitoring their protected subject matter which have no equivalent in the 'real world' – since content recognition tools give them the virtual means to prevent all uses of that subject matter, including uses not covered by their monopoly, such as parody – those exceptions and limitations must also be protected. The danger in that regard is that maximum protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for society[766].

The CJ emphasised the importance of striking a fair balance between the fundamental rights of intellectual property and freedom of expression and

[765] *Republic of Poland v European Parliament, Council of the European Union* (C-401/19) 15 July 2021: "It is not for those providers to decide on the limits of online creativity, for example by examining themselves whether the content a user intends to upload meets the requirements of parody. Such delegation would give rise to an unacceptable risk of 'over-blocking'. Those questions must be left to the court" Opinion of Advocate General Saugmandsgaard Øe, para 203.

[766] Opinion of Advocate General Saugmandsgaard Øe on *Poland v European Parliament* C-401/19, para 190.

communication. However, as in the *Deckmyn* case, the CJEU did not provide a definitive solution to the conflict between these fundamental rights. It reiterated that intellectual property protection is not absolute and must always safeguard the public interest. The evaluation is conducted on a case-by-case basis, "considering the effects of the disputed mechanisms and weighing up the consequences for all parties involved"[767].

Legal scholars have criticized the mechanism of the art. 17 DSM since it would not reach a fair balance between conflicting interests, as intended by Recital 70 DSM in the case of exception and limitation[768].

5.7 Conclusions

The chapter has introduced the special rules for online parody, which is a proof of the control of artistic expressions in the digital single market. I have highlighted how the technique continues to be included under the exceptions and limitations regime, in line with the previous European Directive. The objectives of DSM Directive can be seen as being in line with the previous InfoSoc Directive, which had an industrial policy focus. The main difference has been noted that DSM 2019/790 requires the mandatory implementation of the list of exceptions and limitations in the national legislation of all Member States; this is important since the rapid expansion of the multimedia market in recent decades requires a regulatory framework that is clear, consistent and capable of safeguarding investment in creative activities. In this new context, I have also explored the overlapping and diverging interests outlined in the two European Directives. I then have examined the structure of the Article 17 DSM and its practical implementation, which clearly highlights the multilateral relationship in the digital single market. In this section, I

[767] REDA cit. p. 12.

[768] "Article 17 CDSMD interferes with the freedom of expression and information of the individual users as well as the general public. It prevents the upload of lawful content that falls under copyright exceptions and limitations, thus restricting the dissemination of content to other users. While Article 17 CDSMD serves the legitimate purpose of protecting the right to intellectual property of rightsholders enshrined in Article 17 (2) CFR [..] the proposed mechanism is (i) not proportionate to this aim and (ii) the EU legislator did not comply with its primary obligation to design minimal procedural safeguards for the users' right to freedom of expression and information" REDA cit. p. 24.

have first interpreted the theory of several legal scholars in order to recognise parody as a right for the protection of online users, outside the strict exception and limitation regime. In this way, the parody exception would be interpreted either as an internal limitation of the inspirer's right and as an exercise of the parodist's freedom of humour. The approach of the DSM seems to confirm this interpretation, as the Directive emphasises the protection of digital users in the Recital and provides a safe harbour through the art. 17 DSM against any restrictions, such as notice and take-down measures, implemented by social media platforms to filter and moderate infringing content. However, the procedure for the complaint mechanism, content monitoring and control has been controversial in that it has been criticised by prominent legal scholars and has created unwarranted fears of censorship within the online community.

The DSM Directive 2019/790, unlike InfoSoc 2001/29 EC, charges a new agent with handling complaints and monitoring mechanism or with the supervision of the online content. As a result, social media platforms assume a central role in the protection and monitoring of online parody. Although the Directive defines parody as an exception to exclusive rights, thus placing it beyond the control of the original creator, social media platforms bear the responsibility for distributing and monitoring such content.

There is thus a risk of ineffectiveness of the power of control over user-generated parodies which may violate, on the one hand, copyright and, on the other hand, fundamental rights. I have analysed the role of social media in regulating the online parody, which is increasingly significant, given the enormous proliferation and virality of such contents.

However, the implementation of these mechanisms, which are increasingly supported by artificial intelligence technologies, is challenging in practice: as a result, parody often falls victim to censorship, being mislabelled as false positive.

The risk of over-blocking parody echoes the longstanding resistance to this artistic technique, which, regardless of technological advances over the centuries, has always provoked objections from those who, for various reasons, consider parody a

danger. Nowadays, the original creators and the social media platforms seek to control the new digital reproductions and techniques; the legal basis of these two subjects differ from discrediting the autonomous work to censorship due to public interest. While copyright law has effectively dealt with conflicts concerning the private interests of parody creators through exceptions and limitations to exclusive rights, European courts have been less definitive in interpreting private interventions (most likely by social media) in the regulation of online parody (and the consequent restriction of freedom of expression) due to the public interest. The forthcoming final chapter will focus on this latter aspect of parody, outlining the significant potential for degradation. This includes concerns such as hate speech and the spread of fake news.

The extensive blocking of online parody can have a negative impact both on freedom of expression and on the promotion of creativity protected by copyright law. The DSM ensures to protect online rights, entrusted to the OCSSP; in the area of constitutional rights, this is central to maintaining a secure digital environment. As we've seen, parody can interfere with certain rights and interests. However, in recent years, social media interventions have been more active in preserving the exclusive right of the original creator. Conversely, restrictions on the freedom of online parody, especially when it comes to ridicule and insult, haven't received consistent attention from social media platforms. Online parody has often provided fertile ground for the proliferation of online hate speech, raising concerns and questions about internet itself.

Gli interventi delle Corti Europee

Chapter 6
User-Degenerated parody

6.1 Introduction

The Internet is often criticised as a dangerous place where hate speech, disinformation, fraudulent activity and violence proliferate. Challenges in identifying wrongdoers and holding them accountable have led to comparisons with the "new Wild West" [769]. These circumstances lead legal scholars to question the Internet's ability to ensure freedom of expression in civil law and to effectively punish individuals who violate criminal law.

The affirmation of freedom of expression in a democratic society implies the raising of legal questions about the exercise of this freedom, which is not unrestricted and cannot be inconsistent with respect for other personal rights (such as reputation). The relationship between comic expression and possible degenerations has been highlighted in previous ECHR judgments; it is therefore necessary at this point to introduce the degenerations into which parody may fall. In fact, once parody enters the online environment, it can be corrupted by transformative uses that no longer aim at pure artistic creation or free communication, but simply want to excessively attack and damage a third party. It is possible to trace such widespread behaviours in the relationship between parody and two other degenerations that show peculiar characteristics once they spread online: hate speech and fake news.

Such investigation on online parody's transmigration allows to question what makes people laugh today, or what can be laughed at today. Every society rearticulates the meaning on comedy and reshapes it as one of the main forms of critical and artistic expression. For that reason, online parody represents an essential aspect of the so-called *"Onlife"*[770]. Digitalisation changes the heart of parody and raises new moral and legal questions that challenge old certainties about the

[769] MAGNI SPOLIDORO cit. p. 69.

[770] FLORIDI, *The Fourth Revolution*.

transformative genre. Comedy is an ambivalent experience; what makes people laugh varies greatly from one society to another, as pointed out in the first chapter. This is even more evident in the information society, where users and providers interact.

One author, James Moor, has wondered about the transformative effects of computer technology and its impact on reality. According to Moor, computer technology is changing the world quantitatively and qualitatively, affecting the very nature of activity[771].

> What I mean by 'transformed' is that the basic nature or purpose of an activity or institution is changed. This is marked by the kinds of questions that are asked. During the introduction stage computers are understood as tools for doing standard jobs. A typical question for this stage is 'How well does a computer do such and such an activity?' Later, during the permeation stage, computers become an integral part of the activity. Atypical question for this stage is 'What is the nature and value of such and such an activity?' In our society there is already some evidence of the transforming effect of computerization as marked by the kind of questions being asked.[772]

The emergence of conflicts related to parody in the digital age is an example of "distributed morality"[773], a concept introduced by Luciano Floridi[774], according to which a behaviour becomes morally relevant when it involves multiple agents in its regulation. In this sense, the virality of online parody, which is made possible by ICT, can raise new complex legal issues and trigger phenomena that have been interpreted as expressions of hate, disinformation, and even violent acts (such as,

[771] M. DURANTE, *il futuro del web. Etica, diritto, decentramento. Dalla sussidiarietà digitale all'economia dell'informazione in rete*, Giappichelli Editore, Torino 2007, cit. p. 27.

[772] J.-H. MOOR, *What Is Computer Ethics?* In T. W. Bynum (Ed.), *Computers and Ethics*, Blackwell, (1985), cit. p. 269.

[773] *See* MENGHINI, DURANTE. The further example connected to ″distributed morality″ may be fake news, which depends on an amplification of effects within social media; the problem, in fact, would be so harmful because of the new context. On this point, *see* DURANTE, *Potere computazionale. L'impatto delle ICT su diritto, società, sapere*, Meltemi, Milano 2019, p. 338.

[774] Luciano FLORIDI, *Distributed Morality in an Information Society*. Sci Eng Ethics 19, 727–743 (2013).

cyberbullying), involving new agents in their regulation, such as social media[775]. Parody may be a clear example of such a transformative effect in the digital age. Indeed, the Internet may profoundly change the nature and purpose of this technique.

Parody is thus regulated by hard and soft law, with reference to so-called UGC. Social media, new players in the data-driven economy, tend to regulate forms of online communication between users. The owners of the main communication platforms have a real influence on the regulation of free speech. The terms of service (ToS) to be signed include policies that also regulate online parody and the related degenerations, namely hate speech and fake news. Users can only operate and communicate within the limits set by the platforms which express their unilateral control. Legal scholars have intervened to criticize such model of control which excludes any negotiation between different parties[776].

Certainly, when parody becomes user-generated content, its intimate expression is degraded; sometimes it triggers negative sides and produces legal consequences. Online parodies may therefore be more likely to be the subject of takedown requests. The first party with grounds to take down a user-created parody is usually the author, who may assert authorship rights (in cases of mere imitation) or moral rights. In addition, if the author has transferred copyright ownership to a third party, such as a collective of authors, that third party may issue a takedown notice if it believes its exclusive rights have been infringed. The intermediary, if the online parody violates the policy, is another entity that can intervene to remove the online parody. Finally, users can also request the removal of content if it violates other fundamental rights, for example if the user-generated parody defames a minority.

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[775] *See* Jacopo MENGHINI, Massimo DURANTE, *Non c'è niente da ridere. L'effetto trasformativo delle tecnologie online*, Etica & Tecnica, 2022.

[776] ″Over the past few years, this type of contract has become the object of numerous critique. The critique ranges from the unilateral provisions, the almost entire absence of negotiation between the parties, and the quasi-inexistence of the bargaining power of one party that is required to adhere to the terms. Internet users' mere adherence to the ToS imposed by the intermediaries gives rise to a situation where consumers mechanically 'assent' to pre-established contractual regulation. According to the same ToS, the intermediaries may continue to modify the ToS unilaterally″ Luca BELLI and Cristiana SAPPA, *The Intermediary Conundrum: Cyber-Regulators, Cyber-Police or Both?*, 8 (2017) JIPITEC, cit. p. 184 para 4.

6.2 Hatred parodies

General Policy Recommendation No. 15 on combating hate speech, adopted by ECRI in December 2015, provides valuable insights into the relationship between hate speech and humorous expression.

> The Recommendation specifically excludes from the definition of hate speech any form of expression – such as satire or objectively based news reporting and analysis - that merely offends, hurts or distresses. In doing so, the Recommendation reflects the protection for such expression which the European Court of Human Rights has found is required under Article 10 of the European Convention on Human Rights[777].

However, it's important to note that the ECHR has recognised certain forms of comic expression as incitement to hatred when used irresponsibly, as the ECHR case law in Chapter Four shows. These various expressions of hatred, even when presented as humorous, fall within the scope of the Recommendation's definition if they are unnecessarily offensive and discriminatory.

6.2.1 Definition of hate speech

A legal scholar has offered a precise definition of hate speech based on three criteria for identifying an actual violation of fundamental rights: a) a clear intent and purpose to incite hatred through communication; b) a proven incitement that is likely to lead to violence against specific individuals or groups; c) the occurrence of acts of violence or discrimination, or the risk of such occurrences[778].

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[777] Recommendation no. 15 on combating hate speech (ECRI general policy) adopted on 8 December 2015, para 13.

[778] Giovanni ZICCARDI, *L'odio online. Violenza verbale e ossessioni in rete*, Raffaello Cortina Editore, 2016, p. 21. A first normative reference is the International Covenant on Civil and Political Rights: ″Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law″ Art. 20. There is also a more recent definition into the recommendation n. 20 by the Council of Europe 30/10/1997, according to which: ″The term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin″. The

The regulation of hate speech has a long history and represents a contrast between American and European traditions. This difference is based on the prohibition of specific instances of hate speech. US constitutional law tends to protect hate speech in the interests of pluralism and democracy, while EU law takes a critical stance on prohibiting hate speech and tends to be more sensitive to violations of fundamental rights. The European model is based on striking a fair balance between conflicting fundamental rights. In many cases, freedom of expression gives way to potential violations of personal rights, such as the right to reputation and the right to non-discrimination. By contrast, the US model is less restrictive, generally allowing hate speech, but only making it unlawful if it is shown to infringe other personal rights. The ongoing debate appears to have no easy resolution and underlines the paradox of tolerance famously introduced by Karl Popper[779]. Legal scholars have also categorized hate speech into two distinct qualities:

- Private hate speech: This form of hate speech is directed at individuals on a personal level, with the sole aim of offending and targeting a specific person. This was the case with *Il figlio di Jorio*, an Italian parody by Eduardo Scarpetta that made fun of the famous tragic play *La figlia di Jorio* by Gabriele D'Annunzio. D'Annunzio, in fact, sued the Neapolitan comedian for forgery and, when the comedy was finally shown, the audience obstructed its staging. Therefore, I can describe parody as being capable of generating a certain type of

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doctrine finds this last definition more specific and modern, especially in the words ″promote or justify″ a few of concerns about xenophobia, antisemitism, and minority's rights.

[779] ″Less well known is the *paradox of tolerance*: Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise. But we should claim the right even to suppress them, for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to anything as deceptive as rational argument, and teach them to answer arguments by the use of their fists. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law, and we should consider incitement to intolerance and persecution as criminal, exactly as we should consider incitement to murder, or to kidnapping; or as we should consider incitement to the revival of the slave trade″ Karl POPPER *The open society and its enemies. The spell of Plato,* London, George Routledge & Sons, Ltd., 1945, cit. p. 226, footnote 4.

hate, not only in the mocked authors, but also in their attached public. The advent of the Internet has amplified the harmful effects of this type of hate speech, giving rise to new manifestations such as cyberbullying, cyberstalking, trolling and flaming.

- Public hate speech: This type of hate speech is directed at a particular aspect of society and has a polemical tone; it aims to strongly criticise a particular facet of society. It doesn't usually target a single individual, but often has a negative impact on marginalised groups or minorities. *Deckmyn*'s parody, for example, could be described as such[780]. Parody, by its very nature, addresses an audience.

There is a consensus on the need to regulate hate speech on Internet. The difference between hate speech and parody is inherently clear by definition[781]. However, it is important to look at how parody has evolved to sometimes convey hateful intentions online, which requires further examination.

6.2.2 Hate 2.0

Hate 2.0 can be defined as hate sentiments that are spread online and become overly public. Indeed, digital technology makes it easier for hate to appear online and can exacerbate its negative effects. Social media are traditionally a form of mass communication that is collective and accessible to everyone. However, in this context of interaction, the sense of individuality and responsibility tend to diminish; users often achieve anonymity and feel free to engage without considering the potential consequences[782]. Hate attacks on social media are often referred to as online

[780] Giovanni ZICCARDI, *L'odio e la rete: un'introduzione e alcune possibili linee di ricerca*, in Ciberspazio e diritto, vol. 16, n. 54 (3-2015), cit. p. 255.

[781] Hate speech has been defined and analysed by several legal scholars; I would like to add another contribution to this broad topic: "eight traits indicative of hate speech: (1) the speech targets a group, or individual as a member of a group; (2) the content in the message expresses hatred; (3) the speech causes harm; (4) the speaker intends harm; (5) the speech incites harmful acts beyond the speech itself; (6) the speech is either public or directed at a member of the group; (7) the context makes a violent response possible; and (8) the speech has no redeeming purpose" Richard A. WILSON, and Molly LAND, *Hate Speech on Social Media: Content Moderation in Context*, 2021, Faculty Articles and Papers. 535, cit. p. 1037. This definition is more in line with the US tradition, as it excludes merely offensive speech and considers actual hate as incitement or threat.

[782] In this context, legal scholars propose the necessity of legal intervention in regulating Internet access. Legal requirements for user identification could enhance users' sense of self-accountability, ensuring they maintain awareness of their responsibilities in the virtual reality. On this point, *see*

firestorms, emphasising that it is the rapid spread of this content that contributes to the heightened concern[783].

> In our current age, toxic [..] discourses are moving from backstage to front stage, a transition facilitated by the [..] use of new media and ironic or satiric communicative styles[784].

The limits of the legal discourse on online hate speech are expressed by irreconcilable positions. On the one hand, some scholars argue that the Internet is the primary driver of contemporary expressions of hate. They claim that the infrastructure of social media encourages users to engage in such behaviour[785]. The Internet is not neutral; rather, it acts as a shield that emboldens various users, providing them with a sense of safety and an unrestrained environment that can lead even peaceful individuals to engage in hateful conduct[786]. Online hate speech would be the product of an uncontrolled role of social media and information technologies [787] . Hate speech can be endlessly disseminated through online information systems; in this way, the harmful effects can multiply uncontrollably. In

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Giuseppe CASSANO, *La diffamazione online*, Ciberspazio e Diritto, 2001, Vol. 2, n. 2, pp. 165-182.

[783] Alessandro SPENA, *La parola(-)odio. Sovraesposizione, criminalizzazione e interpretazione dello hate speech*, Criminalia, 2017, 577-607: p. 581.

[784] Viveca S. GREENE, *"Deplorable" Satire: Alt-Right Memes, White Genocide Tweets, and Redpilling Normies* Penn State University Press, Studies in American Humor, Vol. 5, No. 1, Satire Today (2019), pp. 31-69, cit. p. 36.

[785] A recent study showed that users with extreme opinions are more likely to share UGC online, while moderate opinions remain offline: "We assume that customers who have extreme political beliefs are likely to be attracted to the greater capa- bilities offered by the online version to express these beliefs. [..] Those who have more moderate opinions choose the print version, since they do not plan to engage in UGC, and those who have extreme opinions choose the online version, since they value the UGC feature of this medium" YILDIRIM p. 2656.

[786] ZICCARDI, *L'odio e la rete* p. 260.

[787] Allegations directed at the Internet are categorized into several factors that identify the network as "best theatre" for hate speech: the Internet's capacity to amplify content' negative effect; the nature of online information (linked to the concept of the right to be forgotten); the feeling of protection behind the computer screen; anonymity as an additional safeguard; the Deep Web; technologies enables hate speech through creative content; hate 2.0 as it aligns with mass media and various cultures; challenges in safeguarding privacy; the global nature of the network; the obsessive behaviors; an ideal environment for extremist political activities and terrorism. For further details, *see* Giovanni ZICCARDI, *Internet e le espressioni d'odio: influenza della tecnologia e strategie di contrasto*. Ciberspazio e diritto vol. 16, n. 54 (2015) pp. 389-394. Degenerated parody can be certainly described as a new creative form of online hate speech.

this sense, mass media communication technology facilitates similar actions by increasing anonymity and impunity[788].

On the other hand, some scholars are convinced that Internet is not dangerous *per se*, but that it only accentuates the hate that already exists in the society[789]. The internet is not seen as a new medium for spreading hate, and the rapid spread of hateful content doesn't necessarily mean that social media is inherently conducive to a climate of hate. The internet serves as an ideal theatre for nurturing relationships and upholding democracy[790]. This different view is supported by the following arguments: The Internet functions as a modern stronghold of democracy, ensuring freedom of expression, facilitating the exchange of information and promoting economic growth. Moreover, the Internet has introduced the concept of digital and networked citizenship, allowing users to freely cultivate their critical spirit. The potential danger of hate fuelled by the Internet is countered by its decentralised, open and distributed structure, which inherently allows for diversity and dialogue. In addition, the technology itself offers automated control mechanisms to counteract hate, both in terms of mitigating the psychological impact of certain content on human reviewers, and in terms of effectively addressing the problem[791].

The challenge of protecting victims of hate speech stems from the absence of a global agreement on the definition of hate speech and on the protection of

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[788] ″Regarding recent actual events of a mass and violent nature, Mark Follman at Mother Jones writes: When I asked threat assessment experts what might explain the recent rise in gun rampages, I heard the same two words over and over: social media. Although there is no definitive research yet, widespread anecdotal evidence suggests that the speed at which social media bombards us with memes and images exacerbates the copycat effect. As Meloy and his colleagues noted earlier this year in the journal Behavioral Sciences and the Law, 'Cultural scripts are now spread globally [..] within seconds'″ BOWN, BRISTOW cit. p. 33.

[789] This viewpoint frequently reference John Perry Barlow and his manifesto titled *A Declaration of the Independence of Cyberspace*. This perspective opposes the regulation of the Internet, particularly through conventional legal frameworks. According to this stance, cyberspace is considered neutral where individuals can freely engage without facing discrimination based on factors such as race, power, or economic status.

[790] Internet as a tool plays an important role in the exercise of freedom of expression and information. ECHR affirmed the right to access in *Ahmet Yildirim vs Turkey* when significant limitations on Internet were imposed on users: "Such wholesale blocking had rendered large amounts of information inaccessible, thus substantially restricting the rights of Internet users and having a significant collateral effect. The interference had therefore not been foreseeable and had not afforded the applicant the degree of protection to which he was entitled by the rule of law in a democratic society".

[791] ZICCARDI *Internet* pp. 394-400.

individuals. Recently, some political initiatives have emerged to combat online hate speech and to categorize the main online forms of hate. For example, the Italian Parliament established the "Committee on Hate, Intolerance, Xenophobia, and Racism," also known as the "Jo Cox Committee," in memory of the British Member of Parliament who was tragically killed. The final report definition of hate speech aligns with ECRI[792], while the classification takes the form of a pyramid[793] and the role of social media in this report is particularly noteworthy.

> Evaluate the possibility of: 1) demanding self-regulation by internet platforms for the removal of online hate speech; 2) making internet providers and social network platforms collectively liable under law, and compelling them to take down without delay any content that has been flagged as offensive by users. Require social network platforms to set up offices with adequate human resources to receive complaints and promptly remove hate speech, to activate an alert function on webpages by which users can flag such material, and to set up helplines[794].

The European Parliament has adopted a resolution on EU strategic communication to counter third party propaganda. Member States are urged to work with social media platforms to combat the spread of hate speech.

> Expresses concern at the use of social media and online platforms for criminal hate speech and incitement to violence, and encourages the Member States to adapt and update legislation to address ongoing developments, or to fully implement and enforce existing legislation on hate speech, both offline and online; argues that greater collaboration is

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[792] ECRI - Council of Europe definition of hate speech: "Advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of 'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status″.

[793] The pyramid's structure consists of different levels. At the base are "stereotypes and misrepresentation", followed by "discrimination", "hate speech", and at the pinnacle, "hate crimes".

[794] *See* The pyramid of hate speech in Italy. The ″Jo Cox″ Committee on hate, intolerance, xenophobia and racism.

needed with online platforms and with leading internet and media companies[795].

Additionally, the EU Commission has introduced a code of conduct that has been endorsed by major social media platforms such as Facebook, Twitter, YouTube, and Microsoft. This code aims to combat the dissemination of illegal hate speech online, but some legal scholars have criticized this "soft law" approach. First, they argue that social media companies are private entities and they may have interests in conflict with the rights to be protected; entrusting them with a public function for the sake of public interest could undermine the effectiveness of such interventions. Secondly, the code of conduct doesn't outline specific sanctions for social media platforms in case of negligence. Third, it lacks an explicit definition and classification of hate speech. Finally, the code doesn't provide for effective and expeditious complaint procedure or intervention mechanism by social media[796].

5.8.2.1 Cyber-bulling: Google vs. Vividown

The above-mentioned joined cases C-682/18 and C-683/18 are to be welcomed as national courts have shown a tendency in recent years to take a tougher stance on the liability of social media and the possibility of holding them accountable for the online dissemination of hate, which has reached alarming levels, as demonstrated by two incidents that occurred in Italy a few years ago.

The first case, Google vs. Vividown, took place at the Tribunal of Milan in 2010 and concerns a shameful episode of cyberbullying. Some teenagers made a video mocking and insulting a disabled classmate and an association (ViviDown Onlus). They also uploaded the video to Google's platform. In the first instance, the Tribunal held Google, the hosting provider, responsible for failing to proactively monitor the video[797]. The Tribunal stated that providers must verify the identity of

[795] European Parliament resolution on EU strategic communication to counteract anti-EU propaganda by third parties 2016/2030(INI), 23/11/2016, para 47.

[796] Such criticisms are exhaustively expressed by Guido ALPA, *Autonomia privata, diritti fondamentali e "linguaggio dell'odio"*, Contratto e impresa, Vol. 34, 2018, 45-80.

[797] For a more complete vision of the facts, we have to underline that Google received the competent

users in order to protect minors and also monitor content in order to alert users to potential risks that may affect the sensibilities of minors[798].

This decision caused controversy among legal scholars who argued that it could potentially shift liability from those who create and distribute unlawful content to the providers[799]; the judges failed to understand the actual role of the provider in Web 2.0.

There must be a legal requirement to hold a provider liable for negligence. Furthermore, there are situations in which obligations to prevent the harmful event through monitoring and filtering activities may be practically impossible, especially in the case of a large amount of content or when the preventive obligations risk negative consequences for the provider's activity. It's important to stress that the liability of a provider should not be equated with that of the press or professional intermediaries, as they serve different functions and contexts[800].

5.8.2.2 Revenge porn: Facebook vs. Cantone

The second legal case, Facebook vs. Cantone, took place at the Tribunal of Naples in 2016 and concerns revenge porn that ended in tragedy. In this case, the Tribunal ordered Facebook to immediately remove all unauthorised images (including photos and videos) and disrespectful, denigrating or mocking comments

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authority's notice about this video just one month later of the uploading, and after that, Google removed the video in just seven hours.

[798] The Italian Supreme Court absolved Google. It's worth noting that parents can also be held responsible if they fail to monitor their minor children's online activities. This concept, known as *culpa in vigilando* and *culpa in educando*, is particularly applicable when a minor uploads unlawful content online. *See* Guido BELLI, *La responsabilità civile dei service providers.* La responsabilità civile (10), 2011, pp. 693-697.

[799] *See* Vincenzo FRANCESCHELLI, *Sul controllo preventivo del contenuto dei video immessi in rete e i provider. A proposito del caso Google/ViviDown*, Rivista di diritto industriale, 2010 Parte II, p. 347. On the specific court case, *see* POLLICINO, APA *Modeling the liability of internet service providers: google vs. vivi down a constitutional perspective* EGEA, 2013.

[800] *See* Rossella IMPERADORI *La responsabilità dell'Internet Service Provider per violazione del diritto d'autore: un'analisi comparata,* Trento Law and Technology Research Group Student Paper n. 21, 2014.

about the defendant, Tiziana Cantone[801]. The aim of the ruling was to establish a legal basis for the obligation of a hosting provider to remove content, even without an order from the competent authorities, in cases of violation of human dignity[802]. Therefore, the provider assumes the role of the primary "judge" (or ″sentinel of the Web″[803]) that must protect the personal rights [804]. The Tribunal of Naples highlighted three controversial issues related to the liability of hosting providers:

The exclusion of liability for hosting providers is ineffective if it is based solely on the lack of actual knowledge of illegal content. Even in the absence of a duty to actively seek out unlawful content, passive knowledge can still be obtained. For example, a provider may become aware of illegal content through users' notices. A provider may also become aware of illegal activity spontaneously. In such cases, recitals 40 and 46 of EU Directive 2000/31/EC impose an obligation to act upon spontaneous knowledge. This provision requires proactive action regardless of any administrative notice.

The decision to act spontaneously depends on a careful assessment of the interests at stake. The Tribunal seems to establish *action finium regundorum* for situations where the provider should become aware of the need to act[805]. In the case of parody, the provider should refrain from taking action where there are issues relating to property rights, such as copyright infringement. Conversely, the provider should intervene proactively when the violation concerns human dignity.

A similar outcome occurred when a US court held a service provider directly liable for implementing content guidelines and automated software screening on the platform to remove defamatory content. This decision was based on the fact that the provider had adopted the expensive software as if it were an actual editor and was

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[801] I also talk about it in MENGHINI *Libertà di satira*

[802] *See* Roberto BOCCHINI, *La responsabilità di Facebook per la mancata rimozione di contenuti illeciti*, Giurisprudenza italiana, 2017.

[803] *See* PIRAINO p. 512.

[804] *See* BOCCHINI p. 632.

[805] The Tribunal of Naples also places significant emphasis on the balance between conflicting interests as cardinal factor in the decision-making. On one hand, it recognizes the importance of users' freedom of communication, and on the other, it underscores the need to protect other rights within the platform (e.g. copyright)

therefore liable for the defamatory messages posted by subscribers[806]. The provider's liability for damages depends on the specific role it plays in the relationship between users and the Web 2.0 platform. In this context, the reform of the attribution of liability to the provider is based on the degree of fault and aims to protect all online users by providing them with remedies for any harm suffered. Similarly, in *Religious Technology Center v. Netcom – Online Communication Service INC.*, the court ruled that a provider could be held direct liable for the actions of its subscribers if the provider fails to remove the content promptly after receiving notice of infringement[807].

6.2.3 Social media policy on hate speech

Nowadays, internet service providers (OCSSP) are involved in the enforcement of law in the case of illegal activities. For instance, the cooperation between rightsholders and OCSSP is becoming increasingly commonplace; voluntary agreements to use content protected by copyright law are frequently made and the parties cooperate in reacting to unlawful use by third parties[808].

> The fast development of social networking and social media sites which rely on the creation and upload/distribution of online content by end-users raises a certain number of questions in terms of copyright. These

[806] In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 at *5 (N.Y. Supr. Ct. May 23, 1995): "Prodigy, an online service which advertised itself as family friendly and engaged in extensive filtering of inappropriate material, was held on summary judgment in a libel case to have taken on the role of a 'publisher' and therefore was strictly liable for any defamatory user content, whether it knew about the content or not" *Dawn L. Hassell and Hassell Law Group, P.C. V. Yelp, Inc.*, Reply in support of petition for writ of certiorari, cit. p. 7. Prodigy's liability emerged from its engagement in content monitoring, which was facilitated by policy and provided by automated system, in order to remove any unlawful content. Paradoxically, liability was established due to the implementation of innovative systems and high industry standards of professional diligence. In this perspective, even if Prodigy's policy could be described as adhering to new art. 17 (4) (b) and (c) DSM, at that time the provider was considered direct liable. *See* Alessandra PIERUCCI, *La responsabilità del provider per i contenuti illeciti della Rete*, in Rivista critica del diritto privato, 2003, 143-165.

[807] This case has sparked debate among legal scholars regarding the application of vicarious liability. Vicariously liable for the actions of "primary infringer where the defendant (1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement" *Religious Tech. Center v. Netcom On-Line Comm.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

[808] *See* CJEU *Telekabel v. Constantin Film* 24 march 2014, C-314/12.

> new applications enable users to generate new content and new practices for media and artistic expressions have emerged[809].

These new figures, the OCSSP, can have a great effect on the governance of parody, and, actually, these new subjects control qualification and judgment; "when parody is fair use", they can permit it, or, if it does not respect their agreement policy, they can delete it.

> In the early twenty-first century, freedom of speech increasingly depends on a third group of players: a privately owned infrastructure of digital communication composed of firms that support and govern the digital public sphere that people use to communicate[810].

Social media companies are new subjects that control qualification and judgment; "when parody is fair", they can permit it, or it can be deleted if it does not respect their agreement policy.

> Today, lawyers at Google, YouTube, Facebook, and Twitter have more power over who can speak and who can be heard than any president, judge, or monarch[811].

The fact that a new business for UGC has been created and justified by exceptions and limitations (such as parody), by connecting people and by stimulating the sharing of information and the creation of a new market could implicate a conflict-of-interest for decision makers.

It's crucial to examine online platforms' policies on hate speech. An insightful analysis by Jeffrey Rosen examines the different approaches taken by major social media platforms. Rosen begins with Google, which shows a disconnect between stated policy and actual operational procedures when dealing with unlawful content.

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[809] Jean-Paul TRIAILLE (2013) *"User Generated Content (UGC) – First Part"* TRIAILLE, Jean-Paul et a. Study On The Application Of Directive 2001/29/EC on Copyright and Related Rights In The Information Society (The "Infosoc Directive") European Union: De Wolf & Partners (in collaboration with CRIDS), cit. p. 450.

[810] Jack M. BALKIN, *Free speech is a triangle*, Columbia Law Review, Vol. 118, 2012, 2011-2056, cit. p. 2012.

[811] Jeffrey ROSEN, *Who Decides - Civility v. Hate Speech on the Internet*, 13 Insights on L. & Soc'y, (2013), 32:32, cit. p. 37.

For example, Rosen identifies the former Twitter (now X) as having the most North American approach to hate speech[812]. Similarly, YouTube, a platform owned by Google, allows users to report violations, after which Google staff assess the potential action to be taken[813].

Conversely, Facebook is taking a more European approach[814] through a more proactive stance on the issue. Recently, Facebook launched a competition called the Hateful Memes Dataset and Challenge, with a $100,000 prize, with the aim of programming a more effective AI tool to detect hate speech[815]. As part of this challenge, a definition of hate speech was also provided, which reflects elements of international norms on the subject and includes direct attacks on ethnicity, race, nationality, immigration status and religion[816].

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[812] "Finally, consider Twitter, which has the most American definition of free speech. Unlike Google and Facebook, Twitter does not explicitly address hate speech, but it says in its rule book that 'users are allowed to post content, including potentially inflammatory content, provided they do not violate the Twitter Terms of Service and Rules'. Those include a prohibition against 'direct, specific threats of violence against others'. Twitter bans particular tweets that are illegal in individual countries but refuses to remove entire hash tags on the grounds that they might offend the dignity of a group" ROSEN p. 36.

[813] This approach appears to adopt American standards on hate speech. ″On YouTube, Google's policy is to remove [YouTube] content only if it is hate speech, violating its terms of service, or if it is responding to valid court orders or government requests. Under YouTube's terms of service, hate speech is speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity. Sometimes there is a fine line between what is and what is not considered hate speech. For instance, it is generally okay to criticize a nation, but not okay to make insulting generalizations about people of a particular nationality″ Jeffrey ROSEN, *Who Decides - Civility v. Hate Speech on the Internet*, 13 Insights on L. & Soc'y, (2013), p. 33.

[814] ″Facebook also bans "hate speech", which it defines as to attack a person based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or medical condition. Facebook "do[es], however, allow clear attempts at humor or satire that might otherwise be considered a possible threat or attack. This includes content that many people may find to be in bad taste". That sounds more European″ ROSEN p. 35.

[815] ″The Hateful Memes dataset consists of more than 10,000 newly created examples of multimodal content. The memes were selected in such a way that strictly unimodal classifiers would struggle to classify them correctly. We also designed the dataset specifically to overcome common challenges in AI research, such as the lack of examples to help machines learn to avoid false positives. It covers a wide variety of both the types of attacks and the groups and categories targeted″ Facebook research on Hateful Memes Challenge and dataset for research on harmful multimodal content. https://ai.facebook.com/blog/hateful-memes-challenge-and-data-set/

[816] The risk of ″internal″ definitions about such sensitive issues has been underlined on a Public

> Malicious content cannot be tackled by having humans inspect every data point. Consequently, machine learning and artificial intelligence play an ever more important role in mitigating important societal problems, such as the prevalence of hate speech[817].

The Facebook challenge illustrates how effective platform regulation of hate speech can be reconciled with economic necessity. First, there is an economic rationale for tackling online hate speech on a web platform; effective platform regulation could lead to positive economic outcomes. Conversely, an unregulated platform can deter and drive away online users[818]. The lack of regulation of hate speech can therefore have a direct economic impact on perception and reputation. The lack of control can lead to a significant loss of users and customers. At the same time, implementing regulation and control measures can be financially burdensome for the platform, and sometimes it may be economically preferable to turn a blind eye, as the recent "Facebook Papers" scandal has shown[819].

The introduction of efficient AI tools to detect online hate speech, especially when it takes the form of parody, raises several questions about the complexity of algorithmic assessment. Humour carries social meaning and can vary from culture to

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Comment by UN Special Rapporteur on Freedom of Opinion and Expression Irene Khan on Facebook Oversight Board Case no. 2021-009 ″The updated Community Standard also continues to define Dangerous Individuals and Organisations based on Facebook's own definition without reference to any external standard, and without disclosing Facebook's internal list of designated individuals and organisations. This is problematic for a number of reasons: First, it is unclear how Facebook interprets and applies the term 'dangerous [...] Second, the use of a secret list prevents public comment [...]Third, the decision to designate organisations is privately made [...] Fourth, Facebook has withheld the necessary information for users to understand the limits of permissible speech. Fifth, in many instances users are not provided with any granularity regarding the reason for their content's removal, which can result in downranking of content by the newsfeed algorithms and/or the automatic suspension or revocation of their user access and privileges. Finally, it should be noted that Facebook's policy is at risk of being applied in a way that disproportionately restricts political speech″ cit. p. 4.

[817] Douwe KIELA et al, *The Hateful Memes Challenge: Detecting Hate Speech in Multimodal Memes*, Facebook AI, 2020.

[818] ZICCARDI *L'odio online* p. 214.

[819] ″Zuckerberg testified last year before Congress that the company removes 94 percent of the hate speech it finds before a human reports it. But in internal documents, researchers estimated that the company was removing less than 5 percent of all hate speech on Facebook″ Washingtonpost 26/10/2021 https://www.washingtonpost.com/technology/2021/10/25/what-are-the-facebook-papers/

culture. It is debatable whether machine learning algorithms can effectively identify such content, given the current state of the art.

> AI may be indispensable for moderating content at scale, but what is lost is the context of usage that confers meaning, including physical signals, cultural particularity, and the social or political situation. Algorithmic identification is imprecise and unlikely to allow for contextual cues that might be necessary to distinguish extremist speech from parody[820].

6.2.4 An example of hatred parody on social media

The degeneration of online parody could be caused by the use of Internet, in line with the previous theory on the liability of Internet for hate speech. Historically, before the advent of the Internet, parody was an artistic technique limited to an exclusive literary circle. Nowadays, anyone can become a parodist simply by using digital technology and distributing the new content online in the decentralised environment of the Internet and through peer-to-peer programmes. The Internet has thus facilitated an excessive and unrestrained use of this technique. Online parody has evolved beyond its original artistic intention and is now used by users for communication purposes and to gain popularity through association with a pre-existing and well-known product. Parody has always created contrasts between artists, and many court cases can be traced back to this artistic technique. However, the advent of digital technology has significantly increased the use of this technique for exclusive, criminal, defamatory and hateful purposes. The Internet has certainly expanded user-generated parody.

The current issue of user-degenerated parodies on social media can be illustrated by a well-known video posted on YouTube entitled *Innocence of Muslims*. This video was eventually censored because it was deemed to promote discrimination against a religious community, despite the author's repeated claims of the satirical intent.

[820] Richard A. WILSON, and Molly LAND, *Hate Speech on Social Media: Content Moderation in Context*, 2021, Faculty Articles and Papers. 535, cit. p. 1066.

The video insulted the Prophet Mohammed and provoked riots in Libya and Egypt, where the American ambassador was killed. The US government asked Google, which owns YouTube, to remove the video, but Google initially refused, saying the film did not violate its internal policies. This sparked a major political debate at the United Nations, with both the US and Egyptian presidents defending their respective views on hate speech. The former argued that hate speech should only be banned when it directly incites violence, while the latter argued that freedom of expression should be restricted when it disrespects religious beliefs[821]. Google decided to blur the video, but only in Libya and Egypt, where the violent incidents took place.

Innocence of Muslim serves as a remarkable illustration of how modern online platforms operate against hate speech. These platforms, such as YouTube, essentially act as the primary arbiters in deciding whether to remove hateful content. Somehow, social media has taken on the role of judging which content should be taken down and which victims need protection[822].

6.3 Fake parodies

Disinformation is a major threat to democracy, and the Internet has greatly exacerbated this problem to an unprecedented degree. In the offline era, the central State had the primary authority to combat disinformation through injunctions and censorship measures against the press. In today's digital age, the State must collaborate with online platforms to achieve the same goals: monitoring, removing, and blocking any content aimed at jeopardizing public information. Legal scholars have begun to focus on media trust as a new subject to monitor and moderate fake news. The rise of news consumption on social media has triggered the dangers of

[821] *See* Giovanni ZICCARDI, *L'odio online*, p. 74.

[822] "One example is the takedown of the controversial movie *Innocence of the Muslims* which sparked violent protests across the Middle East, following a court order by the Ninth Circuit in the case of Garcia v. Google, Inc. Here the plaintiff, an actress who played in the film, asked the court to order removal of the film from YouTube claiming copyright infringement. [the Garcia case] demonstrates the way in which copyright law could be used to invoke censorship and how the notice and takedown regime could be applied to promote it" Niva ELKIN-KOREN, *Fair Use by Design*, UCLA Law Review 64 (2017), pp. 1090-1091.

fake news and public disinformation. Online users are increasingly encouraged to "fat-check"[823], as social media platforms can't monitor the vast network of news within the platforms.

The European Commission has established a high-level group of experts focused on fight against fake news and online disinformation.

> Report addresses all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not deal with issues arising from the creation and dissemination online of illegal content, which are subject to regulatory remedies under EU or national laws, nor with other forms of deliberate but not misleading distortions of facts such as satire and parody[824].

The analysis presented in this Report explicitly distinguishes satire and parody from the definition of disinformation. According to the HLEG (High-Level Expert Group), satire and parody are considered to be ″forms of deliberate but not misleading distortions of facts″. This clarification is acceptable as the primary purpose of parody is not to provide information. Issues arising from the creation and distribution of illegal content online with the intent to defame or incite violence are not covered in the report. Therefore, disinformation is characterized as ″forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit″[825]. According to this approach, parody and satire would be more similar to misinformation, "which refers to the spreading of inaccurate information without malevolent intent"[826].

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[823] Similarly, there are other recommended actions in order to avoid misinformation on social media, such as verify the domain names and check reliability of sources or images on Internet.

[824] It must be pointed out that, according to the HLEG (High-Level Expert Group), disinformation must not be confused with parody. *See* Final Report of the High Level Expert Group on Fake News and Online Disinformation, *A multi-dimensional approach to disinformation*, 12 March 2018, cit. p. 11. https://digital-strategy.ec.europa.eu/en/library/final-report-high-level-expert-group-fake-news-and-online-disinformation.

[825] *Ibidem*

[826] CORBU p. 698. "Misinformation can include accidental mistakes in reporting, rumors that originate outside the content, conspiracy theories, entertaining materials that are unlikely to be taken for facts, statements or reports that are misleading but not outright false" *Ibidem*

Some authors have different views on these definitions. Gambino, for example, argues that online parody should be subject to stricter regulation than offline parody. This is because the potential for confusion is greater and potentially more dangerous in the online context. Online users are more likely to be misled; online, the original work is more likely to be confused with the transformative work. What's more, it is widely recognised that parodists sometimes take advantage of this network effect and deliberately use confusion as a tool of criticism[827].

In the digital age, there is a time gap between a user's search for a particular work and the actual acquisition of that work. Online parodists take advantage of this time gap, which can be seen as a form of competitive parasitism[828]. They may distract a user looking for work A by offering work B; the parodist relies on the user not realising the mistake until later. Online redirection of this kind is facilitated by techniques such as the use of metatags.

A recent article offers an analytical perspective on the EU report, highlighting distinctions between different forms of disinformation based on three parameters: "The content's factual truth; the intent and strategic goals associated with the content's generation and initial sharing; the harm caused by the content's release into the public sphere"[829]. While it may be difficult to apply these factors directly to parody, they can still provide some insights into the relationship with disinformation.

- The first factor, as discussed earlier in the section on the limits of truth, relates to the fact that parody doesn't aim to provide accurate

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[827] *See* Alberto Maria GAMBINO, *Le utilizzazioni libere: cronaca, critica e parodia*, in AIDA, 2002, cit. p. 133. According to this interpretation, the evaluation of the parody defence within the Fair Use doctrine should re-emphasise the fourth statutory factor, which was overridden after *Acuff Rose*.

[828] On the meaning of this term, I would like to stress that parody is better described as characterised by ontological parasitism, since it derives its raison d'être from a pre-existing work of art. *See* Tribunal of Milan: ordinanza 29 gennaio 1996.» *Il Foro Italiano* Vol. 119.No. 4 (1996), cit. p. 1430. On this point, *see* also AUSTIN "Even if the parasitic character of parodies renders the original authors' claims superior, some uses of the original creative work 'must' be placed beyond the copyright owner's control" cit. p. 699. On the contrary, plagiarism is usually regarded as inexcusable artistic parasitism, regulated as a crime by law.

[829] Oreste POLLICINO, Giovanni DE GREGORIO, Laura SOMAINI, *The European Regulatory Conundrum to Face the Rise and Amplification of False Content Online*. 19(1) The Global Community Yearbook of International Law and Jurisprudence 319 (2020), cit. p. 3. Available at SSRN: https://ssrn.com/abstract=3725528 or http://dx.doi.org/10.2139/ssrn.3725528.

information. Although parody, by its very nature, is related to reality, its inherent creative element often deviates from judgments about the canons of rationality. That's why parody does not usually turn into disinformation, because it does not intend to deceive with false information.

- The second factor is more interesting because it introduces the notion of intention and purpose. Parody usually has an ironic intent, but in the information society it can sometimes take the form of so-called 'sensational news', which involves media strategies designed to attract audience attention and potentially distract consumers. In such cases, the parodic intention may not only be to laugh, but also to distract.
- The third factor assesses the harm caused by the publication of the content. As a form of information dissemination, parody often appears to have more advantages than disadvantages. Digital information and communication technologies (ICTs) offer significant opportunities for creativity and dissemination, as no single entity can claim a monopoly on the dissemination or interpretation of information in the digital age.

6.3.1 Definition of fake parody

Sometimes online parody is included in the realm of *fake news*[830]; the case of fake parodies may be an example of degeneracy of the Web, that I have called User (de)Generated Content.

In a recent empirical study[831], legal scholars underline that online satire and parody news might have certain characteristics that historically have been linked to fake news:

[830] ″A study […] examined 34 academic articles that used the term '*fake news*' between 2003 and 2017. The authors noted that the term has been used to describe a number of different phenomena over the past 15 years: news satire, news parody″, Claire WARDLE, PhD and Hossein DERAKHSHAN with research support from Anne Burns and Nic Dias, *Information Disorder Toward an interdisciplinary framework for research and policymaking*, Published by the Council of Europe, September 27, 2017, cit. p. 16. At the same conclusions also Edson C. TANDOC Jr., Zheng WEI LIM & Richard LING, *Defining "Fake News",* Digital Journalism, (2018), 6:2, 137-153, "A review of previous studies that have used the term fake news reveals six types of definition: (1) news satire, (2) news parody [etc.]" p. 147.

- *facticity or misinformation*: "Facticity, refers to the degree to which fake news relies on facts. For example, satire relies on facts but presents it in a diverting format, while parodies and fabricated news take a broad social context upon which it fashions fictitious accounts"[832];
- *the intention to deceive*: Thanks to social media, online satire and parody news are emerging and legal scholars have measured them according to the content's intention to deceive: "misleading content (by selectively disclosing facts or information); imposer content (genuine sources are impersonated); fabricated content (entirely false), false connection (intentionally associating visuals, headlines, or captions that are not in line with the content); manipulated content (genuine information or imagery is manipulated to create a false picture)"[833];
- *the potential to persuade the audience*: Legal scholars have emphasized that online satire or parody news can distort the audience's perception, particularly during political elections: "In democracies, people's political positions are dependent on their tendency to be persuaded, and citizens are influenced by information filtered through the news media, the social context, and group affiliation"[834];
- *the viralization effect*: The susceptibility to believe in fake news is linked to the viralization effect that can be achieved on social media. The study discusses "what extent people should fear that misleading political content could become viral or have the potential to persuade people into supporting political parties"[835]. Interestingly, in the current social media context, "bad news' potential of going viral is more important than the good news' one"[836]. On the contrary, it has been showed that parody and satire do not have this effect.

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[831] *See* Nicoleta CORBU, Raluca BUTUROIU, Alina BÂRGĂOANU & Oana ȘTEFĂNIȚĂ, *Does fake news lead to more engaging effects on social media? Evidence from Romania*, Communications 2020, 45 (s1):694-717

[832] TANDOC cit. p. 147.

[833] CORBU p. 697.

[834] CORBU p. 700.

[835] CORBU p. 709.

[836] *Ibidem*

> The lack of effects of satire and parody could be explained by people might not seeing that content as 'news'. Even though ironic content usually has a high potential to be shared and is more prone to lead to political trust, it is probably often perceived as another type of content than 'news'[837].

In this context, education level, government approval and political knowledge play a crucial role in how online satire and parody news may be perceived by the audience. These empirical findings support most legal scholars and jurisprudence that comedy does not serve the purpose of information. Susceptibility to being misled by this type of content is strongly associated with individuals with lower levels of education, limited political engagement and lower levels of digital literacy. Active political engagement is crucial for recognising biased satirical arguments[838].

Finally, the empirical study showed that humorous content has neither the potential to persuade audiences nor the potential to make viral politically biased news[839]. While the intention to deceive (for comic or satirical purposes) is usually low, a certain degree of facticity can be observed in satire[840].

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[837] *Ibidem*. Karine Nahon and Jeff Hemsley, in their work "*Going Viral*," define virality as a form of "social information flow process." It's worth noting that in today's context, achieving virality is a crucial factor in the creation and distribution of online culture: "A lot of Internet culture is premised around the possibility of sharing content as widely as possible [..] Many Internet critics hold obscurantists and esotericists to the standards of virality, either supposing that they should create the product that has the greatest possible dissemination, or that the Internet is a marketplace of ideas in which only the most viral can survive. This virality would certainly have to take linguistic and moral responsibility very seriously in order to succeed in its aims" Giacomo BIANCHINO, *Simulation and Dissimulation: Esoteric Memes Pages at the Limits of Irony* cit. p. 376.

[838] *See* CORBU p. 704.

[839] CORBU p. 710.

[840] In this empirical study, satire and parody news are seen as having a low intention to deceive. Satire is associated with a high degree of facticity, whereas parody is characterized by a lower level. Both are viewed as having a negative valence. Interestingly, the research results revealed that neither satire nor parody had an impact on people's willingness to share the news "provided that there is a general appeal for memes and political jokes, especially among young people". The negative manipulation of news is the one which "increase the probability that people share the respective news. Thus, the viralization potential is enhanced by a negative framing. [..] people's willingness to share a news story on economic and political subject is not high in general, but chances increase in the negatively manipulated case" CORBU p. 702

6.3.2 Reliability of parody

Legal scholars' criticism is not in line with the case law, which emphasises that there is no likelihood of confusion if the content is genuinely parodic. In such cases, the attentive public is unlikely to be misled. In this context, parody prompts reflection on epistemic trust in terms of the reliability of statements and the ability to assess trustworthy reality[841]. Online parody can be seen as a form of "building cooperation upon trust"[842] that involves different subjects in the realm of epistemic trust:

a) The trustor: the one who trusts, whether the direct or indirect recipient of the message. In the context of online parody, trustors are the online users who find parody amusing[843];

b) The trustee: the one who issues the message and must possess a degree of reliability. This role is often fulfilled by the parodist or creator[844].

c) The context: it encompasses where the message is generated, communicated, and received. These different contexts can align or differ. Social

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[841] *See* Dan SPERBER et al., *Epistemic Vigilance,* Mind and Language 25 (4):359-393 (2010) ″There are situations where communicators would not stand to benefit from misleading their audience, for instance when teaching their own children or coordinating joint action. However, humans communicate in a much wider variety of situations, with interlocutors whose interests quite often diverge from their own. People stand to gain immensely from communication with others, but this leaves them open to the risk of being accidentally or intentionally misinformed, which may reduce, cancel, or even reverse these gains. The fact that communication is so pervasive despite this risk suggests that people are able to calibrate their trust well enough to make it advantageous on average to both communicator and audience. For this to happen, the abilities for overt intentional communication and epistemic vigilance must have evolved together, and must also develop together and be put to use together″ cit. p. 360.

[842] The conditions to follow for building cooperation upon trust are: role of expectation; lack of certainty; inherent risk. *See* DURANTE, *What Is the Model of Trust for Multi-agent Systems? Whether or Not E-Trust Applies to Autonomous Agents*. Know Techn Pol 23, 347–366 (2010).

[843] ″The decision to trust is a clear-cut decision: when the trustor is ultimately faced with the possibility of trusting, he decides either to trust or not to trust. This is the crucial aspect of trust: the decision to trust stems from a rational cognitive calculation but it is not a calculation in itself. The decision to trust affects the trustors' status in their integrity, which is not a scaling or relative concept. The clear-cut dimension of the decision to trust is an inherent character of a trust relationship (whatever be the agent)″ DURANTE, *What Is the Model of Trust* cit. p. 7.

[844] ″The level of trust is dependent on various conditions and factors; such as the trustee's reliability, the evaluation of external conditions, the probability of the trustee's action and success etc″. *Ibidem*

media platforms both control content and serve as the medium for dissemination[845];

d) Epistemic responsibility: it refers to the duty of the trustee (the parodist) to convey a trustworthy message. Similarity, it also encompasses the responsibility of the trustor (online user) to verify the trustworthiness of the message.

e) Regulation of the context: it relates to the type of norms and principles in the context of interaction and communication[846].

The primary distinctions between online parody and online fake news can be linked to two key concepts: relevance and reliability. Reliability is more closely associated with fake news; it focuses on the trustworthiness of information. Conversely, relevance refers to the ability to achieve or enable someone to achieve the parodic purpose. It's therefore crucial to determine the extent to which the trustee can discern whether the trustor shares similar communicative intentions. This loop or agreement of intentions typically diverges in the case of fake news but should consistently align in the case of online parody[847].

6.3.3 Examples of fake parody on social media

Social media platforms have a crucial role in regulating online parody, particularly when it's used to manipulate and spread false information[848] that betrays its intended comical purpose.

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[845] ″The context (i.e. the informational environment) must also be taken into account, where the trustor enters into relation with the trustee, and which affects the evaluation, prediction and decision to trust, and where the trustee is meant to produce the desired goal, which affects the possibility of success″ DURANTE, *What Is the Model of Trust* cit. p. 5.

[846] For instance, legal scholars underline the existence of "social norms" which better govern the relationship between comedians. "Having conducted a series of lengthy interviews with comics, we offer an answer: in stand-up comedy, social norms substitute for intellectual property law", Dotan OLIAR and Christopher SPRIGMAN, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,* Virginia Law Review, Dec., 2008, Vol. 94, No. 8 (Dec., 2008), cit. p. 1790.

[847] ″The domain of trusting networked cooperation [...] is more likely to be effectively achieved when the agents share: A common knowledge and understanding of the epistemic structure of the task to be performed [...] A common goal to be achieved [...] A common concern for the goal to be achieved″ DURANTE, *What Is the Model of Trust* cit. p. 8-9.

[848] *See* Nicola LUCCHI, *Tecnologie dell'informazione e della comunicazione*, (a cura di) Massimo

> Therefore, with respect to disinformation, the essential questions on its limitability encompass firstly, whether and to what extent falsehood may be granted protection under freedom of expression, and secondly, whether dissemination of falsehood with an intent to harm identified targets or society at large may be restricted or subject to sanctions[849].

It becomes imperative to analyse social media policy, where parody has been employed to convey disinformation or manipulate facts.

6.3.3.1 Parody account

Twitter has adopted a unique policy regarding parody accounts. It requires a declaration of intent to operate a "parody account" in both the account's biography and name[850]. Parody is quite common on Twitter, with many fake profiles satirizing various famous and popular celebrities. Typically, a "parody account" will use the

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DURANTE e Ugo PAGALLO, UTET giuridica, Torino, 2014, p. 9. This is valid both in the case of parody convey a information and when parody aims to insult or defame; in the second case parody would be treated as form of hate speech, which I have analysed above and which can often be satisfactorily addressed through existing laws (e.g., defamation laws)″ POLLICINO, DE GREGORIO, SOMAINI cit. p. 3.

[849] POLLICINO, DE GREGORIO, SOMAINI cit. p. 10. The evaluation on risk of confusion and intent to harm has been inspected also in French case law: "In *'Douces transes'* the Supreme Court ruled that a parody or caricature like the one at issue should be allowed if, in addition to its avoiding confusion, it did not mock with insolence in a dishonest way the person who was imitated" JONGSMA cit. p. 658-659.

[850] Twitter (now X) describes the terms "parody" and "satire" as forms of misinformation without intent to cause harm but to with the potential to fool. So the platform chooses to intervene in both to provide quality content and to help people assess the accuracy of the information. "Users are allowed to create parody on Twitter, provided that the accounts follow the requirements below. Bio: The bio should clearly indicate that the user is not affiliated with the subject of the account. Non-affiliation can be indicated by incorporating, for example, words such as (but not limited to) 'parody', 'fake', 'fan', or 'commentary'. Non-affiliation should be stated in a way that can be understood by the intended audience. Account name: The account name (note: this is separate from the username, or @handle) should clearly indicate that the user is not affiliated with the subject of the account. Non-affiliation can be indicated by incorporating, for example, words such as (but not limited to) 'parody', 'fake', 'fan', or 'commentary'. Non-affiliation should be stated in a way that can be understood by the intended audience". Twitter.com (Help center) – Rules and policies - Parody, newsfeed, commentary, and fan account policy (the "policy").

same profile photo of the celebrity; this behaviour may mislead unsuspecting users[851].

An incident on Twitter may justify the policy. JD Wetherspoon, a UK-based pub chain, made the bad decision to deactivate its official Twitter profile[852]. A parody account seized this opportunity and created a "parody account" named @Wetherspoon__UK. The new account began posting satirical content on behalf of the real pub chain. The parody account quickly gained 45,000 followers since it was the only account representing the pub chain on the platform.

The new parody account had a detrimental effect on JD Wetherspoon pub chain. The "fake" tweets damaged both its reputation and its market position. Two specific incidents were illustrated Lawyer Hirst[853]. As a result, Twitter suspended the

[851] Among most famous Twitter accounts, we can cite Barack Obama, his profile has 133 million followers and has gotten a certification. The parodic equivalent, named Barack Obama Commentary (account name: @ThePresObama; Bio: ″The 44th President of The United States of America. The most famous black man alive. Parody, NOT @BarackObama. That account is run by Carrot Top″, 117.000 followers). The US president, Donald J. Trump (@realDonaldTrump), very active on Twitter before his permanent ban, can count 87 million followers. There are a lot of parody accounts mocking the former US President. One of these is PresidentialTrump (account name: @MatureTrumpTwts, Bio: ″Occasional, hopefully humorous observations by Barry″, 92.000 followers); another one was Donald J. Trump (account name: @realDonadTrump; Bio: ″45th President of the United States of America″). The latter does not respect Twitter policy on parody, because he did not declare the parodic purpose. This profile has been reported and banned for spreading fake news: *See* Jane LYTVYNENKO, *A fake Donald Trump Twitter account is spreading election falsehood (and a link to "2 girls, 1 cup")*, BuzzFednews. Finally, there is an interesting case about an Italian politician on Twitter. Gianni Cuperlo, a ″left-wing″ member, who is followed by 43.00 users. His parody account Gianni Kuperlo – Parody (account name: @GianniCuperIoPD, Bio: ″God is dead, Marx is dead, and Renzi has trounced me for good. A fake Intellectual from PD. Parody account″ my own translation) counts 60.000 followers. A rare case in which parody overtakes the reference.

[852] JD Wetherspoon account was quite popular, it could count 44.000 followers on Twitter. The warning by a creative director Matthew PINK, who wrote an article with the title *JD Wetherspoon closing its social account is just peeing in the wind*, Campaign, 2018, was quite prophetic.

[853] The first one is a sarcastic tweet published during the semi-final of the World Cup between England and Croatia: ″As it is England's first World Cup semi-final since 1990, it looks like Gareth Southgate won't be the only one wearing a waistcoat on Waistcoat Wednesday. Anyone wearing a waistcoat in ANY of our pubs will receive one free drink during the England-Croatia match″. The second episode is even more sarcastic, displaying a satiric intent. The tweet involved a funding campaign on the memory of the First World War's British victims, so called Poppy Appeal, the Royal British Legion's biggest fundraising campaign. ″Due to the ever-expanding multiculturalism of our clientele we will be taking no part in this year's poppy appeal campaign and no staff will be permitted to wear a poppy or any other political paraphernalia while working. We appreciate your understanding and continued support″. Such reference provoked the indignation of the citizenship. ″JD Wetherspoon's barrister David Hirst said that tweet led to a man attending the company's annual

parody account and complied with the court order to reveal the identity of the user[854]. Interestingly, Twitter's decision to suspend the account appeared to contradict its own policy, as the anonymous user had complied with the formal requirements (the declaration of intent to operate a "parody account" in both the account's biography and name)[855].

The case of JD Wetherspoon's parody account on Twitter serves as a clear example of how social media platforms can unilaterally manage content, both in accordance with their Terms of Service (ToS) and in disagreement when this becomes inconvenient. As a result, platforms such as Twitter wield considerable authority over the recognition of creativity, the protection of freedom of expression and compliance with their own policies through the implementation of "voluntary measures"[856].

In the JD Wetherspoon case, Twitter voluntarily took responsibility for censoring the parody account. However, it is questionable whether the lack of account control by the platform could have implied direct liability. On the contrary, the imposition of an additional monitoring obligation on the provider could be considered unreasonable, as it would involve the maintenance of user logs to prevent instances of misleading.

Twitter's policy on parody requires the disclosure of the parodic intent; it does not alter the content itself but rather its form of expression. This policy appears to

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general meeting (AGM) and asking 'very heated questions'. Mr Hirst said 'This stuff goes around [the internet] like wildfire'″ cit. Alex HERN, *Twitter ordered to reveal user behind parody JD Wetherspoon account*, The Guardian, 2018.

[854] ″At a hearing in London on Thursday, Master Victoria McCloud ordered that Twitter - which did not oppose JD Wetherspoon's application - disclose information relating to the identity of the operator of the fake account by mid-January″ Gareth DAVIES, *Wetherspoons wins court battle to reveal person behind 'abusive' parody account on Twitter*, The Telegraph, 13 December 2018. See also Alex HERN, *Twitter ordered to reveal user behind parody JD Wetherspoon account*, The Guardian, 13 December 2018.

[855] The parody account indeed made clear the ironic intent in the Bio in such a way: ″PARODY! Not associated with @jdwtweet or JD Wetherspoon!".

[856] *See* BELLI, SAPPA who report how ″Intermediaries may enjoy far reaching powers on the cyberspaces under their control, while the current legislative tendencies seem to encourage the adoption of 'voluntary measures', that strengthen the intermediaries' position of 'points of control', rather than reducing it″ cit. p. 185 para 5.

embrace the concept of Poe's Law[857], which serves as a unique example of user-generated content for the regulation of parody[858].

Twitter decision to regulate parody within its platform shows one of the effects of technology: the ability to change the allocation of the existing power[859]. This shift on who decides when parody is fair demonstrates that the different allocation of power caused by technology may also change the form of expression of an artistic technique.

6.3.3.2 Parody website

The Human Rights Committee has reaffirmed the limited power to censor websites and has underlined the importance of freedom of expression and information in the digital sphere, particularly in the case of criticism of the government or the political and social system. Accordingly, freedom of expression on the Internet should be better protected in the case of conflicts with copyright; therefore, blocking measures or the removal of online content must be carried out in accordance with the principle of proportionality.

> Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of

[857] ″Without a winking smiley or other blatant display of humor, it is uttrerly impossible to parody a Creationist in such a way that someone won't mistake for the genuine article″ by Nathan Poe in christianforums.com. *See* Scott F. AIKIN, *Poe's Law, group polarization, and argumentative failure in religious and political discourse*, Social Semiotics, 2012 ″Invoking Poe's Law is a mainstay of discussion of religion on the web. Poe's Law is roughly that online parodies of religious views are indistinguishable from sincere expression of religious views. Nathan Poe is widely credited for formulating the law, hence the law's eponymity. Poe first noted this particular difficulty in an entry on a Christianforums.com chat page regarding creationism″ cit. p. 1.

[858] On this point, *see* BOGGERO p.39. The author considers that Poe's law might also be used for particular parody content, such as ″parody account″ or the ″deepfake″ technology. I have also discussed on this in MENGHINI *Libertà di satira* p. 101.

[859] *See* DURANTE, *Potere Computazionale* p. 63.

> certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government[860].

These cases highlight the importance of domain name appropriation. The inherent characteristic of these unique identifiers helps to identify the owner, even though legal scholars do not classify them as trademarks. Instead, they are considered to be descriptive symbols, similar to email addresses. Despite this formal distinction, the act of registering a domain name is capable of challenging the registration of a new trademark with an identical or similar sign. These concerns relate to public law aspects linked to the accurate identification of different companies. I have already cited the famous case of The Yes Men, net.artists who target various companies and organisations by creating satirical parody website[861].

In 2007, the Italian Court of Milan[862] dealt with a case concerning an online parody with explicit satirical intent directed at Trenitalia S.p.A. The parody was created by an anonymous user and hosted by a provider called Associazione Inevestici. The main aim of the parody website was to criticise Trenitalia in a humorous way for its decision to transport arms to Iraq.

Trenitalia was concerned that the parody website was very similar to its official site, Trenitalia.it, which could potentially mislead unsuspecting consumers who were searching for the legitimate Trenitalia website. Furthermore, the parody website had achieved a higher ranking and greater visibility on the Internet, partly due to the use of meta tags[863]. Consequently, it was argued that this could have

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[860] Human Right Committee, *General Comment no. 34* on Article 19: Freedoms of opinion and expression, Geneva, 11-29 July 2011, CCPR/C/GC/34, para 43. Legal scholars point out that art. 19 (2) creates a guarantee for freedom of expression in the online environment: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

[861] A list of the fake websites created by the Yes Men is available online at theyesmen.org/hijinks-all?view=fake_websites_embed_block.

[862] Tribunal of Milan, *Associazione Investici c. Trenitalia s.p.a.*, 7 September 2004.

[863] *See* Andrea Aurelio DI TODARO, *Responsabilità del provider per fatto altrui e diritto di satira:*

caused economic damage in the form of substitution. This situation is known on the Internet as "domain grabbing"[864].

The hosting provider, Associazione Investici, denied any liability, arguing that there was no general obligation to actively monitor and filter the entire network. In addition, they argued that the user-generated content on the site was not blatantly illegal, even if Trenitalia claimed defamation. Finally, the court recognised the legal behaviour of the hosting provider and interpreted the website as a targeted parody with a clear intention to criticise Trenitalia's involvement in the Iraq war.

Importantly, the court recognised the parody website as an original creation under Italian copyright law. As a result, Trenitalia could not claim economic damage to the potential market. Furthermore, the Court emphasised that blocking the parody website would constitute an unacceptable form of censorship; this decision could potentially infringe the freedom of expression of users in the concrete exercise of the right to criticise[865].

Interestingly, US courts have also held that the service provider is not directly liable because its responsibilities are not directly equivalent to those of an editor who must supervise all published or uploaded content. In *Cubby Inc. v. CompuServe*[866], it

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un'ordinanza…sui giusti binari? Giurisprudenza Costituzionale, Giuffrè, Milano, 2005, p. 2194.

[864] The Trenitalia case bears a resemblance to an incident occurred to Josh Quittner, who wrote a satirical article on the phenomenon of "domain name grabbing" or domain-name squatting. In his article, he pointed out the existence of available domains that companies like McDonald's Corp. might find valuable and the journalist questioned the value of these domains. Quittner declined to transfer the domain name until McDonald's consented to offer high-speed Internet to a public school in Brooklyn.

[865] The Trenitalia case bears similarities to Kaplan case, wherein the Princeton Review acquired the domain name of its rival, Stanley Kaplan Educational Centers Ltd (these are test prep companies who offer services for students on MCAT). This "domain grabbing" led internet users, who were seeking information about Kaplan, to encounter the competitor's website instead. The site praised its own services while undermining Kaplan's. Similar to the Trenitalia scenario, this situation resulted in user confusion and raised allegations of unfair competition. Notably, in the Kaplan case, the unfair competition is more pronounced as the website was established by a direct competitor. *See* Sabrina MAGNI, Marco S. SPOLIDORO, *La responsabilità degli operatori in Internet: profili interni e internazionali*, dir. Inf. 1997, 61-87.

[866] *Cubby, Inc. v. CompuServe Inc*., 776 F. Supp. 135 (S.D.N.Y. 1991) "While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. [..] CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so".

was emphasised that even if the service provider had the technical ability to monitor all content, liability could only be imposed in cases of gross negligence[867].

6.4 Benefit of online parody

6.4.1 Sharing creativity

UGC offers users the opportunity to actively participate in the information society. Both social media and news media have embraced community sections where their readers or subscribers can contribute content to the digital platform. The decision to include UGC is crucial to maintaining engagement on these platforms. In the information society, it's not enough to simply consume or critique information. Platforms thrive when their audience is actively engaged in the process of communicating and sharing information, which in turn leads to growth in their subscriber base[868].

While some might argue that YouTube should support rightsholders by censoring parodic resembled videos, it's important to note that YouTube's popularity is largely based on these transformations. The platform is free and allows users to access music and share content free of charge. In addition, YouTube rewards amateur creators who generate significant views and attract a high volume of advertising traffic. These economic incentives make YouTube the primary social media platform for the creation of online parodies[869]. As a result, some talented

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[867] Different outcome occurred when a service provider was deemed direct liable by US court for having implemented content guidelines and automated software screening on the platform to remove defamatory content *see Stratton Oakmont, Inc. v. Prodigy Services Co*.

[868] Legal scholars have conducted an analysis on the technological advancements which enable greater capabilities for the readers. The article assumed that online version can incorporate more engagement effect on audience, such as comments, photos and UGC in general. *See* Pinar YILDIRIM, Esther GAL-OR and Tansev GEYLANI, *User-Generated Content and Bias in News Media*, Management Science, December 2013, Vol. 59, No. 12 (December 2013).

[869] The creativity on YouTube has been analysed in Camilla VASQUEZ, *Language, creativity and humor online*, Routledge, 2019. The particular importance on dissemination of creative works has been recognized to YouTube even by EU institutions as it was stated by Advocate General Saugmandsgaard Øe (*YouTube* and *Cyando* - C-682/18 and C-683/18): "More specifically, the latter court has held that YouTube is an important means by which individuals exercise that freedom. That is also the case for freedom of the arts, which is guaranteed by Article 13 of the Charter and is closely linked to freedom of expression, given the large number of people using online platforms such as

YouTubers have gone from being mere amateurs remixing and parodying other people's work to professionals running content production companies thanks to their popularity and ongoing engagement with their audiences[870].

> Digitized artistic works are inherently plastic and easily manipulated. Users can transform and recreate digital images that they encounter on the Internet and to retransmit those images throughout cyberspace. They can digitally edit photographs, videos, or even online art works[871].

The virality of parody on social media platforms can potentially harm the interests of copyright holders and lead to economic harm for substitution. This concern is justified by the significant transformations that popular videos undergo on platforms such as YouTube, where parody ″capitalizes on an already widely recognized video, repurposes that video either through slight alteration or by filming an entirely new yet closely resembled video, and broadcasts this video to the public at large for a rhetorical purpose″[872]. YouTube's important role in the dissemination of creative content is recognised by the EU institutions[873] and has attracted the attention of legal scholars who have examined the economic harm of substituting the potential market for original works. The inquiry into harm to the potential market is one of the

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YouTube to share their creations online" para 241.

[870] *See* Alberto BRODESCO, *YouTube come medium generazionale. Figure, pratiche, casi*, Schermi. Storie e culture del cinema e dei media in Italia, V. 3 N. 6 (2019), cit. p. 104. The most famous YouTubers attracts the attention of private agencies of entertainment, which hire successful YouTubers and guarantee social media service. These new intermediaries offer services such as audience development, content programming, management of the complex network marketing, collaborations with other creators etc. These agencies also involve YouTubers in other entertaining activities (e.g. movies, books, conferences etc.); they act as 'the new majors' in representing the 'new stars': YouTubers. BRODESCO p. 106.

[871] Richard A. SPINELLO, *CyberEthic: morality and law in cyberspace*, Jones and Bartlett Publishers, Sudbury, 2nd edition, 2003, cit. p. 129.

[872] Tom BALLARD *YouTube Video Parodies and the Video Ideograph*, Rocky Mountain Review, Vol. 70, No. 1 (SPRING 2016), pp. 10-22: cit. p. 15.

[873] This is recently confirmed by AG Saugmandsgaard Øe (*YouTube* and *Cyando* - C-682/18 and C-683/18): "More specifically, the latter court has held that YouTube is an important means by which individuals exercise that freedom. That is also the case for freedom of the arts, which is guaranteed by Article 13 of the Charter and is closely linked to freedom of expression, given the large number of people using online platforms such as YouTube to share their creations online" para 241.

fourth statutory factor to be considered under the fair use doctrine[874]. According to IPO research, the risk of harm to the potential market is considered inconsistent.

> A doctrinal but empirically untested view is that parody may harm the market for an original work by acting as a substitute and siphoning audience away from the original. The results of this study suggest that no such dynamic is present for music videos on YouTube. In fact, the presence of parody is positively correlated with size of audience for commercial music videos. Statistical analysis suggests that while minimal, the positive impact of parody is most significant for works that are not commercially successful before appearing on YouTube. These 'minor hits' appear to be most susceptible to a lift provided by publicity and awareness generated by a large number of parody videos available elsewhere on the platform[875].

YouTube has been classified as a "neutral" hosting provider and its activity falls within the scope of Art. 14 (E-Commerce Directive 2000/31/EC), as YouTube does not directly intervene in the creation of content or in the selection of uploads. It also refrains from monitoring content before it is automatically uploaded. YouTube also provides transparent terms of service and community guidelines that alert users to potential violations and the possibility of account restrictions or suspensions[876].

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[874] This investigation aligns with the fourth statutory factors of Fair Use doctrine. On the possible application of Fair Use on UGC *See* Edward LEE *Warming up to user-generated content* University of Illinois Law Review, Vol. 2008, No. 5, 2008 ″Fan fiction is one of the oldest and most popular types of user generated, 'fan' material. Fan fiction dates back well before the Internet, at least to the 1860s when fans wrote parodies and sequels of beloved Lewis Carroll works, such as Alice in Wonderland. The Internet has made fan fiction more popular and prominent by enabling people to share their fan fiction with others, in easy-to-search databases […] The Wind Done Gone case, involving a published sequel to Gone With the Wind written from the perspective of a slave, provides support for fan fiction, although the case involved a strong parody or criticism of the original work that may be absent in much fan fiction, and regardless, other courts might be less receptive to reuses of copyrighted characters ″, cit. p. 1530-1531.

[875] ERICKSON *Copyright* p. 10.

[876] On this regard, it is interesting the read of Product Manager Shenaz Zack on ContentID about parody detection ″Since Content ID can't identify context (like 'educational use' or 'parody'), we give partners the tools to use length and match proportion as a proxy. Of course, it's not a perfect system. That's why two videos - one of a baby dancing to one minute of a pop song, and another using the exact same audio clip in a videotaped University lecture about copyright law - might be treated identically by Content ID and taken down by the rights holder, even though one may be fair use and the other may not. Rights holders are the only ones in a position to know what is and is not an

The Court of Justice has recognized the effective implementation of technological measures (such as "ContentID", "YouTube Audio ID" and "YouTube Video ID") which aimed at preventing infringements, especially in the context of copyright[877]. On this regard, the term "parody" is explicitly mentioned in the "Rules and Policies" section related to copyright, citing Article 17 of the DSM Directive[878].

ContentID is a system that allows copyright owners to manage user-uploaded content on the platform. This mechanism stores an original copy of a video on the server and then compares it to the copies uploaded by users. If a match is found between the reference file and the user-uploaded file, the copyright owner can ask YouTube to take specific actions: monetize the video by placing ads against the UGC, block the video, disable the audio, or track the video's viewing statistics[879].

6.4.2 Revenue opportunities and engaging effect

YouTube Poops are a distinct form of user-generated parodies primarily found on YouTube. These videos are typically created by amateurs who widely

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authorized use of their content, and we require them to enforce their policies in a manner that complies with the law″ https://blog.youtube/news-and-events/content-id-and-fair-use/.

[877] ″Such as, inter alia, a notification button and a special alert procedure for reporting and arranging for illegal content to be removed, as well as a content verification program for checking content and content recognition software for facilitating the identification and designation of such content″ *Frank Peterson v Google LLC, YouTube Inc.*, C-682/18 para 94.

[878] ″In some civil law countries, including many in the EU, more limited exceptions are recognized where the reuse must fall within specific categories, instead of having factors that are weighed. The categories set out in Article 17 of the EU Digital Single Market copyright directive are quotation, criticism, review, caricature, parody, and pastiche. These words have their usual meaning in everyday language, but are also enacted into law by each member state and interpreted by both national courts and the Court of Justice of the European Union (CJEU). It is also important to consider the context of the use, and the purpose of such copyright exceptions, one of which is to balance creators' freedom of expression, and rightsholders' copyright″, YouTube ″Rules and Policies" – ″Copyright and Exceptions″. youtube.com/intl/en_us/howyoutubeworks/policies/copyright/#copyright-exceptions.

[879] *See* Giovanni MERUZZI, *Internet service providers, impresa di gruppo e responsabilità delle controllate,* AIDA, 2014, pp. 349-385. For a fuller explanation of the system available on YouTube, visit the YouTube Help forum: *How ContendID works* "Videos uploaded to YouTube are scanned against a database of audio and visual content that's been submitted to YouTube by copyright owners. When Content ID finds a match, it applies a Content ID claim to the matching video. A Content ID claim results in one of the following actions, depending on the copyright owner's Content ID settings: Blocks a video from being viewed; Monetizes the video by running ads against it and sometimes sharing revenue with the uploader; Tracks the video's viewership statistics". support.google.com/youtube/answer/2797370?hl=en

shared the self-produced content within the platform. They often fall into the category of "poor images"[880], which are characterized by visually unattractive, low-quality, and childish nature[881]. YouTube Poops take popular and mainstream videos and remix them in a way that's intentionally comical and visually chaotic. This emerging form of entertainment represents a new frontier in the realm of parody expression; YTP possesses an inherent technical component that sets it apart and makes it instantly recognizable on the platform. This characteristic significantly impacts the relationship between aesthetics and technology[882] and it may be included in the category of mashup[883], remix or ″textual poaching″.

> It allows us a vivid illustration of the political implications of textual poaching, the ways readers' attempts to reclaim media materials for their own purposes necessarily transform those "borrowed terms" in the process of reproducing them[884].

The concept of reuse can be connected to Marxian terminology; in this context, YTPs possess an exchange value that exceeds their use value[885]. YTPs

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[880] Hito STEYERL, *The Wretched of the Screen*, Sternberg Press, Berlin, 2012: ″Poor images are thus popular images—images that can be made and seen by the many. They express all the contradictions of the contemporary crowd: its opportunism, narcissism, desire for autonomy and creation, its inability to focus or make up its mind, its constant readiness for transgression and simultaneous submission″ cit. p. 41.

[881] Alberto BRODESCO, *Montare cacca: intorno al fenomeno "YouTube Poop"*, in Cinergie, 2017, cit. p. 19 (https://cinergie.unibo.it/index).

[882] ″There is an exact correspondence between the cut-and-paste tools and the collage and juxtapositional rhetoric of twentieth-century vanguard poetics″ Dan BRISTOW *Introproduction* in Alfie BOWN, Dan BRISTOW, *Post Memes. Seizing the Memes of Production*, Punctum Books. 2019, cit. p. 18. On this regard, Cfr. LTA, *Arte, avanguardia e nuovi media*, Menabò, in Tecnologie didattiche, n.3, 2010, cit. p. 5.

[883] ″Each mashup trailer can also be considered parody fair use, since they make fun of the original movies whose scenes are reconfigured with a contrarian twist″ Edward LEE *Warming up to user-generated content* University of Illinois Law Review, Vol. 2008, No. 5, 2008, cit. p. 1530.

[884] Cfr. Henry JENKINS, *Textual Poachers: Television Fans and Participatory Culture*, Routledge, New York-London 2012.

[885] ″Frequently, YouTube is discussed through a distinction between two logics of cultural production that contribute to its complex cultural fabric: 'professional' (i.e. traditional media) and 'amateur' (i.e. independent individuals). Music videos supposedly illustrate this dynamic. Demonstrating a professional-commercial use, corporate music labels upload music videos to YouTube in order to promote their artists. This sets the stage for YouTube's vernacular creativity: individual amateurs who

openly critique conventional copyright laws and can be viewed as part of a neo-Dadaist movement due to their appropriation of third-party content[886].

Social media like YouTube prominently emphasize their interactivity, where users can directly engage with protected material uploaded on the platform. They can leave comments, offer critiques, cite passages, or even transform and satirize the entire content by mocking and placing it within a different context, like any parody. The attraction for social media such as YouTube is the financial model which is based on advertising revenue; in fact, YouTube generates revenue primarily through advertisements associated with the content uploaded on its platform. This applies to individual users who upload their own content as well as to copyright holders who have negotiated private revenue-sharing agreements with YouTube.

Additionally, YouTube employs algorithms to arrange search results and categorize content; AI then facilitates the organization and promotion of videos in a more efficient manner[887]. Even YTPs stand to gain from these algorithms. For example, YouTube offers registered users personalized recommendations based on their search preferences. This digital strategy relies on algorithms and user activity data to match information with consumer preferences. As a result, the content that users are most likely to consume will be displayed more frequently. This mechanism is known as the "filter bubble"[888] and it could result in YTPs being more prominently featured alongside the original videos. This inherent potential for misleading in YTPs is thus amplified by the algorithmic mechanisms employed by social media platforms.

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create their own versions of the polished music video […] The platform introduces an entrepreneurial ethos for amateur content creators even if few achieve financial success″ Lillian BOXMAN-SHABTAI *The practice of parodying: YouTube as a hybrid field of cultural production*, School of Communication, Northwestern Media, Culture & Society 2019, Vol. 41(1) 3– 20, cit. p. 5.

[886] Alberto BRODESCO, *Montare cacca: intorno al fenomeno "YouTube Poop"*, in Cinergie, 2017, p. 21.

[887] Even YTPs stand to gain from these algorithms. For instance, YouTube provides registered users with personalized recommendations based on their preferences; this mechanism could ensure that YTPs are more prominently featured alongside the original videos.

[888] "The phenomenon of polarization on social media, which results from algorithms that provide users with information that matches their consumer behavior so that they are offered content they are likely to consume again. [..] The filter bubble refers to the algorithmic process of information filtering" CORBU p. 699.

YTPs initially emerge as a genuine form of annoyance and employ techniques like "ear-raping" or "flashing images". For this reason, while YTPs generally don't have a significant impact on copyright interests, as they are quite distinct from the source material, there have been instances where YTPs could be seen as a form of hate speech. Notably, the British poet Michael Rosen fell victim of YTPs that created antisemitic videos by the unauthorized appropriation. Thereby, the poet raised concerns about how these YTPs exploited his work to spread racist sentiments[889]. From a merely economic perspective, however, the IPO research on YouTube parodies has indicated a benefit for commercial and popular videos even in the case of negative parodies[890].

YTPs also aim to confuse or sabotage YouTube's algorithm by hijacking online users' choices who "step in poop" when they click on a YTP video instead of the one they intended to watch. From this standpoint, YTPs indiscriminately target popular YouTubers and mainstream content; they want to challenge the platform and to mislead the passive user[891]. YTPs can be seen as a contemporary and innovative form of parody aimed at rebelling against regulation platform from within the platform itself.

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[889] The poet has reported his concern in his official Twitter account: Twitter: @MichaelRosenYes - 9/01/2020: ″I tried reporting the antisemitic YTP vids to the Campaign Against antisemitism but they lost interest, even though they have had thousands of ″views″ worldwide″. I also want to remember the Italian YouTuber ″YouTuboAncheIo″ who was harshly attacked by such content.

[890] YTPs tend to be frequently associated with the original videos; this aspect can thus increase the visibility also for the original videos. ″While 35% of parodies observed in this study contained a critique aimed at the original work, only 4.4% of those (or 1.5% of all parodies sampled) took an explicitly negative stance discouraging viewers from commercially supporting the original. Within this broad category of target parody, a much larger proportion (53%) referenced the original in a light hearted or respectful way. Two music videos which attracted a disproportionately negative response from parodists, Cher Lloyd's Swagger Jagger and Rebecca Black's Friday, performed within the expected (95% confidence interval [for the predicted distribution of commercial audience viewership]) range for all commercial videos with a similar number of parodies, suggesting that even concentrated, highly negative parodic treatments did not harm the original work. In other words, it appears to be more advantageous for a commercial video on YouTube to attract parodies, even if highly negative, than to have no parodies at all″ ERICKSON *Copyright* p. 11.

[891] BRODESCO *Montare cacca* p. 23.

6.4.3 Other benefit

A number of empirical studies have looked at the positive effects of online parody in a variety of contexts. It has been found that parody can be a stimulus for political activism. As I've discussed in previous chapters, parody and satire serve as litmus test for assessing the degree of democracy in a nation. In this respect, user-generated parodies have the potential to influence preferences, as every user can be considered a potential voter. Interestingly, digital platforms have taken advantage of this insight by dictating the communication of certain content while censoring others based on their political orientation. The filtering and monitoring system can, therefore, be shaped by the ideological inclinations of the platform. A recent example of this dynamic was the temporary suspension of Donald Trump from the Twitter platform by Capitol Hill. However, the Trump account was quickly reinstated following Elon Musk's recent social media takeover. Additionally, platforms can intervene directly by producing content themselves, known as media-generated content (MGC). Recent research has conducted a comparative analysis between media-generated parody and user-generated parody. One notable finding has been that, contrary to expectations, user-generated parodies paradoxically exhibit higher persuasive power than media-generated parodies. Surprisingly, the former seems to be more detrimental to politicians[892]. MGC are perceived as less objective than UGC; online users do not have a direct economic interest in endorsing a candidate, or if they do, they cannot censor the counterpart. Social media, on the other hand, can.

UGC is seen as authentic, altruistic and trustworthy because the individual is seen as less corruptible by lobbying. Consequently, "UGC will leads to more positive parody attitude and to a higher perceived influence"[893].

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[892] "The conventional wisdom would be that the persuasiveness of MGP, as a more expert source of information, could be much higher than that of UGP [..] We argue the opposite [..] Media-Generated Parodies raised criticism against a politician made by perceived biased media inclined to cater to audiences of particular political orientations [..] MGP will be associated with more manipulative intent, less positive parody attitude and, in turn, less persuasiveness [..] UGP is more effective in developing positive attitude toward the parody and greater perceived influence" Nadr El HANA, and Ouidade SABRI, *Expressing one's opinions freely on politicians using parodies: effect of the sources of political parodies (user- vs. media-generated parodies)*, Psychology & Amp; Marketing, 38 (10), 2021, 1670-1685, cit. p. 1671.

[893] HANA p. 1673.

The amateur nature of UGC is also a source of affirmation of freedom of expression. On the contrary, the media is driven firstly by conduct a business; their intent is more likely to persuade and manipulate the audience, rather than inform objectively.

Finally, the research highlights media skepticism ("defined as a person's disposition to trust or distrust the media"[894]). This is linked to the ongoing crisis of the press and the media in general. The information society has certainly increased the number of sceptical citizens who do not trust mainstream news and consider it to be manipulated as a mere instrument of political propaganda.

> In the case of exposure to a political parody, viewers highly skeptical of the media will infer more manipulative intent when the parody comes from MGC than when it originates from UGC, leading to stronger negative impacts on the attitude toward the parody and its perceived influence[895].

The findings are represented by a conceptual model which shows a more overall positive attitude and greater influence of user-generated parodies.

UGP can also be described as more relevant and efficient than MGP, due to the trust between users[896]. Parody also yields a positive effect in stimulating the 'participatory culture' of the Internet, as seen in Net.art. Online parody, especially user-generated parody (UGP), functions as a mean of communication and entertainment. Engaging with UGC has the potential to foster group affiliation and brand community, as demonstrated by recent research findings[897].

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[894] HANA p. 1674.

[895] *Ibidem*

[896] "Consumer-to-consumer communication such as UGC accounts within social media platforms have vast potential to influence consumer sentiment regarding a brand, they can positively affect brand equity and are now seen as a viable alternative to information communicated directly from a brand. This means that marketing initiatives produced by various institutions (including institutions of higher education) may actually be less efficient and less relevant than messaging coming from accounts made by a brand own consumer", LARSON p. 367.

[897] Lindsay LARSON, Jordan SALVADOR, *Unsanctioned user-generated content: student perceptions of academic brand parody,* Corporate Communications: An International Journal, Volume 26, Number 2, 2021, pp. 365-381.

Many studies have documented the adverse impact of exposition on social media. The negative effects of idealized bodies often impact on the teenager's mental state[898].

Finally, I would like to come to an end about the inspection on online parody, noting how it can also display benefit. A recent study, in fact, has demonstrated broad psychological benefits of parody images against influencers in relation with teenagers' idealization[899]. In the study, online parody is associated with the opportunity to reduce negative mood in young online users[900]. The exposure to idealize bodies of celebrities on social media may affect the personal identity of the young teenagers, who are sometimes obsessed with the appearance-based comparisons by likes and comments.

The study shows the good influence of exposure to parody images, which may also include the parody of self[901]. Online parody might underscore the absurdity of some popular posts "by highlighting the unrealistic and generally unattainable nature of such images. In this way, they might be considered a form of media

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[898] The literature provides evidence that exposure to thin bodies on social media can have an impact on the development of eating disorders (*see* T. F. CASH, K. A. PHILLIPS, M. T. SANTOS and J. I. HRABOSKY*, Measuring "negative body image": validation of the Body Image Disturbance Questionnaire in a nonclinical population.* Body Image, 2004, 1(4), 363–372. "Negative body image implies negative feelings and thoughts about the body that are represented by poor body self-esteem, body shame, and body dissatisfaction. Negative body image is often associated with body concerns such as excessive weight preoccupation and eating disorders" Fabio FASOLI, Jane OGDEN and Susie JOHNSON (2023) *Body Positivity or Humorous Parody? The Impact of Instagram Imagery on Body Image Concerns,* The Journal of Psychology, 157:5, 273-296, cit. p. 274.

[899] SLATER, A., COLE, N., & FARDOULY, J. (2019). *The effect of exposure to parodies of thin-ideal images on young women's body image and mood*, Body Image, 29, 82-89 ″The overall aim of the current study was to examine the influence of exposure to Celeste Barber's parody images of thin-ideal celebrity Instagram posts on women's body satisfaction and mood compared to exposure to the thin-ideal celebrity posts alone […] exposure to parody images of thin-ideal celebrity images might plausibly interrupt usual processing (internalisation of the thin ideal), and allow one to shift perspective (appreciate the unrealistic and unattainable nature of thin-ideal images).″ cit. p. 84.

[900] ″To date, a handful of experimental studies have examined the effect of exposure to particular types of Instagram images on young women's body image, mood, and exercise behaviour. Tiggemann and Zaccardo (2015) showed that brief exposure to 'fitspiration' images on Instagram (generally thin and toned women in exercise attire) led to increased negative mood and body dissatisfaction in young women compared to exposure to neutral, Instagram travel images, findings that have been replicatedwith exposure to both celebrity and peer Instagram images″ SLATER *The effect of exposure to parodies* cit. p. 83.

[901] The well-being produced by humour has been studied and demonstrated in various research: "Humor can moderate stress because humor's new perspective encourages people to cast a congenial light on stressful situations. Similarly, pleasurable emotions associated with humor may reduce stress-related emotions and accompanying physiological changes" LITTLE cit. p. 1253.

literacy, which aims to enhance critical thinking and scepticism about media in an attempt to reduce its persuasive influence"[902].

At the end, online parody must be pursued as a technique for the well-being.

6.5 Conclusions

In this chapter, I've explored online parody in the evolving digital world, where this artistic method is being transformed into user-generated content. While the artistic essence of parody may be diminishing, its social impact continues to grow. Today, user-generated content has become a new tool for freedom, which allows anyone to share their thoughts online without filters, expert judgement or the need for publisher approval. However, the freedom to publish any content requires a certain degree of responsibility on the part of certain actors. While individual responsibility is a basic principle of criminal law, the digital environment requires the involvement of a third party capable of navigating a vast sea of content in order to stop any digital aggression. This new agent must take responsibility for censorship when UGC violates protected individual rights.

I have then described social media as the main actors who today control the mass communication by making internet collective and accessible to everyone. The social media govern online parody by the adoption of Term of Service in which they can delete any ludic transformation, if it does not respect the agreement policy.

I also emphasised how online parody is often generated by users without any artistic or expressive ambition but takes on a new guise of online hate or fake news. In this sense, I have adopted the term of user-degenerated content, in order to describe when online parody is corrupted by form of hate 2.0, a form of aggression made easier by digital technology. The interactions in social media exacerbate negative effects of user-degenerated content since the sense of individuality and responsibility tend to diminish online; an online parodist often achieves anonymity and feels free to engage without considering the potential consequences.

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[902] SLATER *The effect of exposure to parodies* cit. p. 83.

I highlighted how parody can also fall under the definition of fake news. Starting with the definition of fake news provided, I first distinguished between disinformation and misinformation, Anglo-Saxon terms that help us to understand when content becomes truly harmful. In this section I have also analysed an empirical study that has demonstrated that humorous content has neither the potential to persuade audiences nor the potential to make viral politically biased news. Finally, I have terminated with some examples of parodies spread on social media that have triggered misinformation or disinformation. Once again, social media platforms are at the centre of defining and combating fake news through their policies, their monitoring obligations and the interventions prescribed by the DSM Directive.

At the end, I outlined the benefits of online parody, which presents significant advantages in terms of shared creativity among web users. The reworking of others' works of art has historically been perpetuated through parody over the centuries; what changes in the digital age is that the reworked product is not intended to become art, but rather evolves into something different, a user-generated content which primarily aims to communication and information. Indeed, web users can actively participate in the information society through the reuse of these kind of contents; moreover, platforms such as YouTube reward amateur creators who generate a high volume of views through their UGC by attracting advertising traffic.

CONCLUSIONS

This thesis has analysed parody by examining distinct legal areas in order to reach the correct legal qualification. Here, I briefly summarize the arguments and proceed to a conclusion.

The first chapter introduced the debate over parody in the art world and espoused some leading scholarly lines of reasoning in order to arrive at more inclusive definitions, analysis and taxonomy. My examination of these theories has demonstrated that there exist both broad definitions of parody (such as Bachtin's), and strict ones (such as Genette's composition of the six regimes). The main result of this section is that of emphasising the clear distinction between transformation and imitation; a fundamental starting point that lies at the heart of parody. Genette's study presented several regimes (satirical, humorous, ironical etc.) that have certainly become important reference points for our study, highlighting how parodic transformation can differentially express itself in satirical, ironic, playful, humorous, serious and polemical intent. I then categorised them into two main functions; the comic and satirical. The former, which can include the playful and ironic, has been analysed via the philosophical and social studies of Bergson, among others, with the author revealing how laughter is an uncontrollable human need. The satirical function, which can include the humorous and polemical, on the other hand, shows characteristics inherent to an aggressive criticism of the potentate. The structure I have assembled, starting from Genette’s regime, has been useful in tracing the juridical elements raised by parody in the successive chapters, in accordance with the customs of jurists and case law, which distinguish between target and weapon parody; the first directed at the original artist, while the second involves using a third-party work to comment on something quite different.

Ultimately, I have formulated a conclusive definition of parody as a renewing transformation that manifests itself in everyday practices and has the potential to be an artistic expression. Furthermore, the cross-analysis of literary research has provided valuable insights for both legal scholars and case law in the interpretation of humorous legal cases. In particular, the dual functions of parody, comical and

satirical, have been instrumental in distinguishing between two categories of parodies: target and weapon parodies. This distinction has been of particular importance further ahead, in the third chapter, within the American tradition of Fair Use and, more specifically, in the context of the "parody defence".

The second chapter has presented examples of the digital evolution of parody with reference to two artistic currents, appropriation art and net.art, which have repeatedly adopted parody as a means of expression and legal defence. I have addressed the production of parody on the Web 2.0, which has become an unprecedented scenario in terms of the quality and quantity of parodic content. In fact, the possibilities offered by digital technology facilitate new types of utilization that are extremely different from those considered traditional. Appropriation becomes a phenomenon that does not follow a well-defined artistic current; in the off-line world, the parodist is usually an artist, whereas, in the online world, it appears that anyone can become a parodist.

The concept of Web 2.0 was fundamental in framing the context in which online parody operates. In this sense, I have presented the IPO's research on the dissemination of parody on the YouTube platform. The study equates online parody with User-Generated Content which has specific characteristics, such as technological reproducibility, digital elaboration, global dissemination, publication requirement, creative effort, creation outside professional routines and practices. The IPO finding focused on the production of online musical parodies starting from an analysis of commercial musical videos, the researchers identified production rate of 24:1 of parodies created and uploaded by users onto the platform (the user-generated parodies). It was also interesting to examine the intentions behind these user-generated parodies. In particular, the presence of "self-parodies" (when the user turned the critical eye on themselves, rather than the original artist) and "mislabelled parodies" (when parody did not contain any discernible target of critique), which are understood more as communicative acts generated simply to affirm the user's presence on that specific platform. This study has therefore empirically demonstrated that the production of parodies on certain digital platforms is a factor of enormous importance. In this new context, users adopt parody not only for artistic purposes, but also and above all for communicative purposes. These user-generated parodies

therefore could not display an original character and copyright enforcement should take this finding into account. Finally, the application of the parody exception under European Directives may be understood broadly so that it could extend to new digital communicative or artistic techniques (like meme or mash-up) if the comical or satirical intent is proven. For example, quotation and parody have been often justified on the same basis, as both are linked to freedom of expression. As Benedetto Croce emphasized in *D'Annunzio v. Scarpetta*, the comedian creates a parody simply by quoting the poem. Currently, new imitative and transformative contents can fall within these exceptions, even if the evaluation often depends on a subjective interpretation of the single content.

The third chapter traced the notion of parody within copyright law; initially, parodies were rejected by mocked artists who frequently sought legal action against any parodic transformation of their work, reporting it to the courts as plagiarism, forgery or defamation. This was the case with Gabriele D'Annunzio who sued for forgery Eduardo Scarpetta as author of the Neapolitan parody *Il figlio di Jorio*. From an elitist point of view, indeed, parody is irrefutable evidence of a historical period of flattened artistic and cultural inspiration. Despite the animosity, I have shown how copyright has dealt with parody and shaped the principles of the regulation and actualization of this transformation within the exception and limitation regime, which traditionally includes activities of particular social utility. In this sense, the framework of the European Directive (InfoSoc 2001/29/EC), which provides for parody in Art. 5.3 (k), is the most important attempt to qualify online parody. In this regard, the InfoSoc directive possesses transnational relevance and appears to be the most coherent in facing new global networks. In order to clarify the scope of the parody exception, I have analysed an important judgment by the Court of Justice (Deckmyn); this ruling ruled on the autonomous notion of parody within EU law, for the first time, and established a uniform interpretation throughout the territory of the European Union. The CJ then found fundamental importance in listing, again, the main characteristics that parody must display to, firstly, exist and, secondly, to be considered lawful. I have also taken a comparative approach in examining the North American doctrine of Fair Use, established with a set of four statutory factors that were outlined as a guide to understanding which kind of use is acceptable by society. This thesis' analysis of the application of the four statutory factors in some

emblematic court cases finally highlighted how parody enjoys privileged status within US copyright law; this artistic genre has been considered worthy of protection both because of its artistic value (as a stimulus for creation) and its prominence in terms of freedom of speech. The recognition of parody within copyright law has shown evolution in its tendency towards wider protection over the years. From being considered mere plagiarism, when animosity was at its highest, parody has been seen as derivative work that is not a crime but still requires the consensus of the rightsholder, and now, finally, the InfoSoc Directive 2001/29/EC has included parody in the exceptions of the exclusive right, in view of its transformative purpose. The conclusion reached in this chapter is that the current scholarly debate over the necessary rethinking of the exclusive right in the digital age could open the possibility to the widest right to parody being obtained.

The fourth chapter analysed the protection of parody as exercise of freedom of expression. Here, the focus was on the analysis of the most relevant court cases on the topic, especially those brought before the ECHR. After analysing the recurring elements set forth in the judgments, I subsequently framed parody as being connected to the development of culture and the freedom of all artistic forms; this inclusion would guarantee two additional protections. After affirming freedom of parody, I questioned the safeguarding of the personal rights that may be affected by the illegal exercise of this freedom.

The analysis of the ECHR case law showed a partial openness to the freedom of parody. In particular, the judges of the Strasbourg Court applied Article 17 of the Charter in situations where the comic expression concealed a racist or antisemitic purpose. *Mbala Mbala*, for example, could not be considered an authentic satire because as comedian betrayed the primary function of the genre: that of mocking the historical potentate. Rather, the comedian acted cruelty against the Holocaust tragedy. The extensive protection granted in Europe to the memory of Jewish victims in concentration camps has strengthened the application of Article 17 and condemned the comedian. ECHR established a comprehensive denialism definition and a minimum standard for criminal action to be uniformly applied across Member States; the denialism is excluded by the protection under art. 10 if it is driven by totalitarian or antidemocratic motives. The court also took into consideration the

author's intent and the role of the Internet, two of the factors that recur in the Reasonable Perception Test (RPT). The author's intent, even if ironic, must not become political propaganda and must not incite anti-democratic acts; hate speech cannot be hidden behind the shield of parody. On the contrary, if the comic intent and entertainment purpose of the parodist can be demonstrated, a denialist parody related to the Holocaust could still fall within the scope of Article 10 ECHR. In my opinion, this could also be the case of *Deckmyn*.

Here, the interpretation proceeded through an analogy to the limits of two similar rights; the right to review and the right to criticism. After a fashion, the established limits to these rights may be considered the prerequisites for the legitimate exercise of parody; in particular, the limit of truthfulness, the limit of restraint and the limit of relevance. Via an analysis of these limits, it was possible to circumscribe the lawful exercise of the freedom of parody.

I have then introduced the freedom of online parody, which should be more safeguarded as the Web 2.0 facilitates wide-spread participation and creation by users of the so-called Information Society. Web 2.0 is the main home for freedom of communication and social relationships. The finding that parody performs its function as UGC in the online environment may thus reform the tradition of copyright law and force a necessary rethinking of the exclusive right. In the online world, anyone can rework another person’s creation using digital technology and disseminate the new content online in the Internet’s decentralized environment and through peer-to-peer programs. The digital evolution of parody has posed new challenges in copyright and freedom of expression; accordingly, the law should be adapted to new forms of communication and information; in particular, parody as user's right has the potential to influence an overall rethinking of free uses.

My analysis of online parody then shifted the focus from the rightsholder and parodist to two new subjects in the legal discourse; social media and online user, which are increasingly at the centre of the digital scenario and have enabled parody to become viral, a truly everyday parody (recalling Propp). Furthermore, the advent of digital technology has structurally altered the relationship between the author and the audience. Finding a fair balance between the conflicting interests in online

parody without considering these two new subjects may result in an ineffective outcome.

The new relationship in online parody was outlined in the fifth chapter, starting from an examination of the parody exception as outlined in the New Directive on Copyright in the Digital Single Market. This Directive concerns the regulation of the new platforms that govern the free communication of online users, often including parodic content such as memes. In this new regulation, social media are charged with filtering and moderating unlawful content, since they are the only agents capable of tracking it. The liability of providers for third-party activity has been presented as a relevant issue in the field of legal informatics. In this regard, I have provided an analysis of the E-commerce Directive 2000/31/EC, which classifies OCSSP and regulates their liability according to function. I have also recalled a few studies in order to understand what types of service provider liability may be suitable in parody.

The Directive (EU) on copyright and related rights in the Digital Single Market has incorporated parody under Article 17, clause (7), let. (b). I have underlined as the decision faced critics by legal scholars who defined improper to classify parody as exception, avoiding any considerations on protection of parody as exercise of freedom of expression.

I have then investigated two provisions of art. 17 DSM which pose a risk of over-blocking parody. Article 17 (9) of the DSM that requires an effective and expeditious complaint procedure in the event of an infringement of the rightsholders' interests. The finding that parody poses few potential copyright infringements (related to moral rights and harm of substitution) implies that the notice-and-take-down mechanism should be allowed in certain specific cases and after human review, given the semantic nature of parody. I have then argued that the applicability of this article is limited in the case of parody, as negotiated settlements are often impossible due to the sheer volume of UGC and the refusal of the parties to negotiate in the case of parodies that attack reputation. The rightsholder could thus become the only beneficiary of the art. 17 (9), even if there is no economic interest in censor parody. Finally, I highlighted the costs associated with the complaint and redress mechanism and the possibility of conflicts between different jurisdictions in Europe, given the

social significance of humour that varies from one country to another, the contexts in which parody occurs and the purposes of the rules of which it is part.

The second clause I have investigated is the Art. 17 (4) DSM which has been described as an indirect monitoring and filtering obligation. This finding may have a severe impact on online parody, as it creates incentives for over-blocking and ex ante restriction of users' freedom of parody. In addition, the article requires social media to demonstrate "best efforts" to meet high industry standards of professional diligence; this provision could lead social media to adopt algorithmic filtering systems that could lead to false positives in the case of online parody. AI is not currently capable of identifying parody since it cannot understand what constitutes an act of humour. Notice-and-take-down and notice-and-stay-down measures restrict users' rights and have a significant collateral over-blocking effect by making large amounts of information inaccessible. The finding could be detrimental to online parody and, consequently, to the freedom of expression claimed by online users. Moreover, I have underlined as an ineffective AI prediction in case of parody poses real risks to the four subjects involved in parody (parodist, inspirer, social media and user). However, I have also underscored that ECHR has allowed the adoption of filtering system if the censor is justified by public interest and the authority has taken into account the effects of the ban, even without prior notice to the alleged victim. Finally, I reported that AI technologies could be more effectively designed as a tool to protect parody by default.

In the last chapter, I have exposed a few degenerations that may be connected to parody, such as hate speech and fake news. Regulation platforms, which are the new players in the data-driven economy and tend to govern forms of online communication between users through policy, lie at the heart of this last section. Parody can thus operate only within limits that are pre-determined and defined by platforms that express one-side control. I have assumed that social media have taken charge of online parody; they are the new agents that may affect the analysis, definition and taxonomy of the phenomenon. To this end, I have analysed a few social media policies to unveil the incongruities that lie between them and the above-mentioned qualifications, and sometimes within the policies themselves. The digital evolution of parody cannot, therefore, not be considered complete.

I have also compared online of parody with the transformative effect of computer technology, which has changed the heart of parody, quantitatively and qualitatively. In this sense, I have reported on how online parody raises new complex legal issues related to hate speech and disinformation on the Internet. The finding has dismissed the traditional legal issues on the appropriation of a copyrighted work; the new legal concerns on online parody are connected to the protection of personal rights and to the safeguard of the public interest. In this sense, online parody has been regulated by limiting both its potential to harshly offense someone and to mislead the audience. This is why I adopted the term "user-degenerated parody", which underscore the side effects of this technique in the information society.

The limits of the freedom of online parody have been related to the evaluation of the Internet as the primary driver of these behaviours, which have been encouraged by current mass media communication and information technology, as they have increased the sense of anonymity and impunity due to the Internet infrastructure and the role of social media in monitoring and filtering user-degenerated content. The finding stemmed from court rulings that had sanctioned the social media for failing to filter and monitor content posted on the network by users who offended the honour and reputation of the victims. This obligation was allegedly derived from an unspecified obligation to monitor the entire network, even in the absence of a request from the authorities. In this sense, I recalled some recent proactive stances taken by social media against hate speech. This insight allowed me to observe the latest technological developments in the field of automated monitoring and filtering of hate speech.

Lastly, online parody has been connected to the fake news which is one of the major threat to democracy, exacerbated by Internet. Most concerns about online parody have focused on its relationship to fake news. The parodist exploits the medium of the Internet and its infrastructure; parody is therefore often associated with a misleading purpose that may go beyond comic, satirical or humorous functions. In this sense, I have listed a series of cases in which parody has displayed a misleading purpose toward the online audience or to a specific community. Parody has been linked to the issue of disinformation and has therefore been regulated in order to reduce the confusion displayed online. I have also cited the consideration

that online parody should be subject to stricter regulation because the potential for confusion is greater and potentially more dangerous. In some situations, in fact, online users were more likely to be misled by parodies and the parodists exploited the network effect to deliberately spread disinformation. At the end, I have mentioned the light side of parody, which brings benefits to the online community thanks to its capability of sharing creativity. Social media also benefit from online parody by increasing revenue opportunities. Finally, online parody can also bring psychological benefits to young users.

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