

Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada

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INTRODUCTION

The creation and distribution of parodies promote the fundamental values underlying the constitutionally protected right to freedom of expression. Through parodies, individuals can progress in their “search for political, artistic and scientific truth”, protect their autonomy and self-development, and promote “public participation in the democratic process”.¹ Recognizing the importance of parody to political, social, and cultural life, governments in various jurisdictions have adopted or proposed parody defences to copyright infringement.² The Canadian *Copyright Act*,³ however, does not contain an explicit parody defence to copyright infringement. Furthermore, no Canadian court has accepted a defence of parody to a claim of copyright infringement.⁴

Some commentators have argued that the fair dealing defence, set out in sections 29-29.2 of the Canadian *Copyright Act*, can be interpreted in such a manner as to provide protection for parody.⁵ The fair dealing defence

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¹ See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 72.

² In Australia, the *Copyright Act 1968* (Cth.) was amended in 2006 to include a provision for fair dealing for the purpose of parody or satire. Section 41A states that “[a] fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire”. Parodies are also permitted under Brazilian copyright law, though, as noted in Pedro Nicoletti Mizukami *et al.*, “Exceptions and Limitations to Copyright in Brazil: A Call for Reform” in Lea Shaver, ed., *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (New Haven: Information Society Project, 2008) 67 at 85, the law “severely restricts the range of legal parody.” In the EU, the EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] O.J. L 167/10 at 17, art. 5(3)(k) states that Member States may permit the use of copyright-protected works “for the purpose of caricature, parody or pastiche”. EU Member States that have adopted Article 5(3)(k) into their copyright legislation include Spain: see *Copyright, Law (Consolidation)*, 12/04/1996 (06/03/1998), No. 1 (No. 5); France: see *Loi No 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle*, J.O., 3 July 1992, 8801, art. L. 122-5(4); and the Netherlands: see Copyright Act 1912, art. 18b. Both the United Kingdom and New Zealand have proposed the adoption of a parody defence to copyright infringement. In Andrew Gowers, *Gowers Review of Intellectual Property* (London: HM Treasury, 2006) at 6, the author recommended the creation of an “exception to copyright infringement for the purpose of caricature, parody or pastiche” for the United Kingdom. In 2008, the New Zealand Government announced “the commencement of a review on whether there should be a copyright exception for the purpose of parody and satire”: See “Parody and satire copyright exception to be considered”, online: Copyright Council of New Zealand <<http://www.copyright.org.nz/viewNews.php?news=488>>. In the U.S., the Supreme Court in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994) [*Campbell*], suggests that parodies may be protected under the doctrine of fair use.

³ *Copyright Act*, RSC 1985, c. C-42.

⁴ See e.g. *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (1996), 71 C.P.R. (3d) 348 [*Michelin*]. The argument that the fair dealing category of criticism encompasses parody was rejected by Teitelbaum J.

⁵ See Emir Aly Crowne Mohammed, “Parody as fair dealing in Canada: a guide for lawyers and judges”, (2009) 4 Journal of Intellectual Property Law & Practice 468 at 468. The author argues that “the Supreme Court’s decision in *CCH Canadian Ltd. v. Law Society of Upper Canada* should signal an acceptance of parody as a statutorily valid form of criticism under the fair dealing provisions of the Act”. See also Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K Fair Dealing and U.S. Fair Use” (2008) 53 McGill L.J. 309 at 338. The author suggests that *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH et al.*] “arguably has expanded the allowable purposes enough to render possible the future inclusion of a parody right”.

states that works containing a substantial amount of copyright-protected material and created without the consent of the copyright owner will not infringe copyright if they have been created for the purpose of research, private study, criticism, review, or news reporting; if the copyright-protected work has been dealt with “fairly”; and if certain attribution criteria are satisfied.⁶ Commentators who take the position that the fair dealing defence likely provides protection for parody maintain that the fair dealing category of criticism is broad enough to encompass parody.⁷

The argument that the fair dealing category of criticism encompasses parody, however, is based on the assumption that parodies are necessarily critical.⁸ This article will challenge this assumption. Although parody is popularly conceived of as “a specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous”,⁹ this conception is not definitive. Other conceptions of parody exist. Some have adopted the view that the object of criticism can be something other than the work being parodied. Others do not insist upon criticism at all.

This article takes the position that given the importance of parody to Canadian society, the Government of Canada should create a parody defence to copyright infringement. This defence, however, should not be embedded within the fair dealing category of criticism. Incorporating the parody defence within the fair dealing category of criticism would result in the protection of a restrictive, limited conception of parody. Under this approach, only critical parodies will be protected from a claim of copyright infringement. Non-critical parodies will be denied protection.

Rather than protecting parody within the fair dealing category of criticism, this article argues for the creation of a separate parody defence, capable of encompassing all of the various conceptions of parody. This defence could be incorporated within fair dealing as a new category.¹⁰ Incorporating the parody defence within the fair dealing defence would help ensure that any encroachment on the rights of copyright owners due to the creation of this new user’s right will be limited to situations which are “fair”.

This article will proceed in three parts. First, it will introduce parody, describing its various conceptions and discussing its importance to Canadian society. Second, it will describe the historical treatment of parody in Canadian copyright jurisprudence and analyze whether contemporary Canadian courts are likely to find that parodies infringe copyright. Third, this article will discuss the creation of a parody defence to copyright infringement.

PART I : INTRODUCTION TO PARODY

A. Defining parody

Parody, a term derived from the Greek word “*parodia*”, has an ancient heritage.¹¹ The first reference to *parodia* is found in Aristotle’s *Poetics*,¹² where the term was used to refer to a “narrative poem, of moderate length, in the

⁶ Attribution is only necessary with respect to works created for the purpose of criticism, review or news reporting. See *Copyright Act*, supra note 2, ss. 29-29.2.

⁷ See D’Agostino, supra note 5 at 359; Mohammed, supra note 5 at 468; James Zegers, “Parody and Fair Use in Canada After *Campbell v. Acuff-Rose*” (1994) 11 C.I.P.R. 205 at 209. See also, *CCH et al.*, supra note 5 at para. 51 in which McLachlin C.J., held that the fair dealing categories must be given a “large and liberal interpretation in order to ensure that users’ rights are not unduly constrained”; See also, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 at para 48. Binnie J. stated for the court that “the law must accommodate commentators such as the satirist or the cartoonist who...exercise a democratic right to poke fun at those who huff and puff in the public arena”.

⁸ See Mohammed, supra note 5 at 468 where the author states that the “central feature of any parody is the use of humour or ridicule to point out some particular feature or ‘peculiarity’ of the original work. A parody, whether for humour or ridicule, is therefore inherently critical in nature. If so, it is clearly a form of ‘criticism’ under the Act if one accepts that there is no parody that does not (implicitly or explicitly) criticize the underlying work, or some feature(s) of it”. Also, Zegers, supra note 7 at 209 states that “parody is, by definition, a form of criticism”.

⁹ Ellen Gredley & Spyros Maniatis, “Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright” (1997) 19 Eur. I.P. Rev. 339 at 341.

¹⁰ See Howard Knopf, “The Copyright Clearance Culture and Canadian Documentaries”, online: Moffat & Co., Macera & Jarzyna LLP <http://www.macerajarzyna.com/pages/publications/HPK_white_paper.pdf> at 3. Knopf suggests that “explicit provision should be made for fair dealing for the purpose of satire and parody”.

¹¹ Margaret A. Rose, *Parody: Ancient, Modern, and Post-Modern* (New York: Cambridge University Press, 1993), at 5.

¹² Simon Dentith, *Parody* (New York: Routledge, 2000) at 10.

metre and vocabulary of epic poems, but treating a light, satirical, or mock-heroic subject”.¹³ Over time, the meaning of parody changed. Later Greek and Roman writers used the term parody “to refer to a more widespread practice of quotation, not necessarily humorous, in which both writers and speakers introduce allusions to previous texts”.¹⁴

The struggle to define parody was not resolved by the Greeks or the Romans. Even today, “the discussion of parody is bedevilled by disputes over definition”.¹⁵ As Simon Dentith states,

because of the antiquity of the word parody (it is one of the small but important group of literary-critical terms to have descended from the ancient Greeks), because of the range of different practices to which it alludes, and because of differing national usages, no classification can ever hope to be securely held in place.¹⁶

Margaret A. Rose, in her book *Parody: Ancient, Modern, and Post-Modern*, identifies thirty-seven conceptions of parody, crafted by authors such as Aristotle, Ben Jonson, Friedrich Nietzsche, Mikhail Bakhtin, Susan Sontag, Michel Foucault, Jacques Derrida, Martin Amis, and Umberto Eco.¹⁷

These conceptions of parody can be divided into various groups. The “popular perception of parody and the standard dictionary definition” conceives of parody as a “specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous”.¹⁸ This conception, which has been referred to as a “target”¹⁹ parody, has been frequently cited by courts in Canada and the United States as the definition of parody.²⁰

Some conceptions of parody, however, do not insist upon the critique being performed at the “expense of the parodied text.”²¹ Instead, the parodist can use the parodied text to critique something other than the work itself. Parodies that “involve the use of [a] text to comment upon something quite different,” such as “artistic traditions, styles...genres” or society, have been referred to as “weapon”²² parodies.

Lastly, many definitions of parody do not insist upon criticism at all. Margaret A. Rose defines parody as the “comic refunctioning of performed linguistic or artistic material.”²³ Tracing the history of parody, Rose notes that the “comic” side of parody has been a characteristic of the form since its earliest introduction in ancient Greece:

The majority of works to which words for parody are attached by the ancients, and which are still known to us in whole or in part, suggest that parody was understood as being humorous in the sense of producing effects characteristic of the comic, and that if aspects of ridicule or mockery were present these were additional to its other functions and were co-existent with the parody’s ambivalent renewal of its target or targets.²⁴

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Supra*, note 11 at 280-283.

¹⁸ Gredley & Maniatis, *supra* note 9 at 341.

¹⁹ Michael Spence, “Intellectual Property and the Problem of Parody” (1998) 114 Law Q. Rev. 594 at 594.

²⁰ See *Michelin*, *supra* note 4. Teitelbaum J. adopts the definition of parody set out in *The Collins Dictionary of the English Language*, 2d ed., s.v. “parody” where parody is defined as “a musical, literary or other composition that mimics the style of another composer, author, etc. in a humorous or satirical way”. In *Productions Avanti Ciné-Vidéo Inc. c. Favreau* (1999), 177 D.L.R. (4th) 129 leave to appeal to S.C.C. refused, 27527 (May 25, 2000) at para. 10 Rothman J. defines parody as “normally [involving] the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment”. In *Rogers v. Koons*, 960 F. 2d 301 (2d. Cir. 1992) the United States Court of Appeals, Second Circuit, defines parody as “when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original”. See also *Campbell*, *supra* note 2 at 580, where the US Supreme Court cites two dictionaries which adopt this conception of parody: *The American Heritage Dictionary*, 3d ed., s.v. “parody”, defines parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule”; and *The Oxford English Dictionary*, 2d. ed., s.v. “parody” which defines parody as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous”. The court then crafted its own definition: “[f]or the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”

²¹ Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (London: Methuen, Inc., 1985) at 6.

²² Spence, *supra* note 19 at 594.

²³ *Supra* note 11 at 52 [emphasis in original].

²⁴ *Ibid.* at 25.

Linda Hutcheon is another “of a number of theorists who believe that the continuing and unwarranted inclusion of ridicule in its definition has trivialised the form.”²⁵ Hutcheon defines parody as a “form of imitation...characterized by ironic inversion, not always at the expense of the parodied text”, suggesting that “what is remarkable about modern parody is its range of intent – from the ironic and playful to the scornful and ridiculing.”²⁶ Under this view of parody, neither critique nor comic intent is necessary. Instead, parodies may be characterized by “admiration and reverence ... as exemplified by the *Star Wars* films, which parody the much-loved film *The Wizard of Oz*.”²⁷

B. Importance of parody to Canadian society

Parody has been derided by some as parasitical;²⁸ critiqued by others as being “broadly conservative in the way that it constantly monitors and ridicules the formally innovative”;²⁹ and condemned by nineteenth century English novelist George Eliot for “[debasing] the moral currency... and recklessly threaten[ing] the very fabric of civilisation by ridiculing the precious cultural safeguards which are its highest achievements in art and literature.”³⁰

However, both critical and non-critical parodies can be seen as promoting the fundamental values underlying the constitutionally protected right to freedom of expression, “including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.”³¹ As a result, both critical and non-critical parodies provide significant social benefits to Canadian society.

Critical parodies can be used to mock, among other political targets, politicians, policy positions, speeches, and political parties. Through ridicule, the faults in these targets can be exposed, giving individuals the opportunity to re-evaluate their political beliefs and assumptions. Non-critical parodies, however, can also serve in the search for political truth. A parody characterized by admiration of the specific policy ideas of a politician, for instance, can bring those ideas to the attention of a broader section of the population. This gives individuals the opportunity to evaluate and engage with these policy ideas, and potentially adopt them as part of their political ethos. As well, the presentation, through parody, of a political figure’s laudable characteristics (for instance the ability to act in a bipartisan manner) conveys the impression that those characteristics are highly valued and should be adopted by other figures in the political world. A reverential parody can also convey the impression that a certain politician should be the model upon which other public figures strive to mold themselves.

The search for artistic truth can also be advanced through non-critical parodies. Critical parodies can aid in this search by ridiculing or tearing down certain commonly accepted artistic conventions, figures, or works, thereby creating opportunities for new artists to produce their works unencumbered by the weight of the past. Non-critical parodies, on the other hand, can aid in the search for artistic truth by emphasizing a work’s admirable and praiseworthy characteristics, an artist’s unique style, or the appeal of a certain movement, helping create a beacon to which other artists can direct their efforts.

Sociolinguist Mary Louise Pratt identifies parody as one of the “arts of the contact zone,” a social space “where cultures meet, clash, and grapple with each other, often in contexts of highly asymmetrical relations of power, such as colonialism, slavery, or their aftermaths as they are lived out in many parts of the world today.”³² Through parodies, marginalised groups appropriate and adapt “pieces of the representational repertoire of the invaders.”³³ In so doing, parody acts as a tool of self-development, helping marginalised or oppressed groups achieve autonomy from more empowered cultures. This imitation or ironic inversion need not be couched in the form of criticism.

Critical parodies can promote public participation in the democratic process. For instance, a parody which ridicules a work or an individual could spur the public, through anger or dismay, to engage in the democratic process

²⁵ Gredley & Maniatis, *supra* note 9 at 339.

²⁶ Hutcheon, *supra* note 21 at 6.

²⁷ Gredley & Maniatis, *supra* note 9 at 340.

²⁸ Rose, *supra* note 11 at 281.

²⁹ Dentith, *supra* note 12 at 27.

³⁰ *Ibid.* at 188.

³¹ *RJR Macdonald*, *supra* note 1 at para. 72.

³² Mary Louise Pratt, “Arts of the Contact Zone” (1991) 91 *Profession* 33 at 33.

³³ *Ibid.* at 34.

in order to create opposition to that work or individual. However, non-critical parodies can also promote this value. Parodies of individuals, works, or social movements characterized by admiration and reverence could inspire the population to engage in the democratic process in order to provide support to those individuals, works, or social movements.

PART II : PARODY AND COPYRIGHT IN CANADA

A. Do parodies infringe copyright in Canada?

In Canada, one infringes copyright by doing, without the consent of the copyright owner, anything that only the copyright owner has the exclusive right to do.³⁴ The exclusive rights of the copyright owner with respect to works are set out in section 3 of the *Copyright Act*. Various rights of the copyright owner are likely infringed through the creation and distribution of parodies. First, in many cases, the creation of parodies likely infringes the copyright owner's right to reproduce their work. This right is infringed either where a person reproduces an entire work or a substantial part of a work. The question of whether the portion of the work that has been taken is substantial "must be assessed from both a quantitative and qualitative perspective."³⁵ That is to say, even taking a small portion of a work can infringe copyright if that portion is deemed to be a substantial part, in a qualitative sense, of the original work.

Effective parodies immediately evoke, in the mind of the viewer/reader, the original cultural work or practice upon which they are commenting. In order to do so, parodies usually reproduce elements drawn from the core of the original work or practice. As noted by the United States Supreme Court in *Campbell v. Acuff-Rose*, the leading American decision on parody and fair use:

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...What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know.³⁶

As parodies quote from the work's "most distinctive or memorable features,"³⁷ it is likely that they would be considered to reproduce, in a qualitative sense, a substantial part of the original, copyright-protected work, thus infringing the copyright owner's right to reproduce the work.

The distribution of a parody may also infringe the rights of the copyright owner. For instance, if a parody which reproduces a substantial portion of the copyright-protected work is posted online and subsequently downloaded by one or more users, the copyright owner's rights to communicate the work to the public by telecommunication, to reproduce the work, and to authorize the reproduction of the work may be infringed.³⁸

B. Canadian courts' treatment of parody and copyright

Few Canadian cases have dealt with the intersection of parody and copyright infringement. Of those few, only one has entertained the thought that parody could serve as a defence to copyright infringement. The first Canadian case dealing with parody and copyright infringement is *Ludlow Music Inc. v. Canint Music Corp.*,³⁹ a case in which a parody of the famous Woody Guthrie song "This Land is Your Land" was alleged to infringe copyright in the original work. The defendants, writing at the time of Canada's centennial, a period when "Canada went 'nation-crazy',"⁴⁰ replaced Guthrie's lyrics with lyrics "which gently chid[ed] the Canadian Government and the Canadian people for

³⁴ *Copyright Act*, *supra* note 3, s. 27.

³⁵ *Hager v. ECW Press Ltd.*, [1999] 2 F.C. 287.

³⁶ *Supra* note 2 at 588.

³⁷ *Ibid.*

³⁸ The leading Canadian case to interpret the right to communicate the work to the public by telecommunication is *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427. The leading Canadian case to interpret the authorization right is *CCH et al.*, *supra* note 5.

³⁹ [1967] 2 Ex. C.R. 109, 51 C.P.R. 278 [*Ludlow* cited to Ex. C.R.].

⁴⁰ Douglas Coupland, *Souvenir of Canada* (Vancouver: Douglas & McIntyre, 2002) at 75.

their alleged feelings of inferiority.”⁴¹ Jackett P., of the Exchequer Court of Canada, granted an injunction restraining the defendants from selling their parody, deeming it a “proper exercise of judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright against what appears to be piracy.”⁴²

Nine years later, in *MCA Canada Ltd. v. Gilberry & Hawke Advertising Agency Ltd.*,⁴³ the question of whether a parody constitutes copyright infringement was again canvassed. In this case, the defendant advertising agency had created a parody of the song “Downtown” (composed by Tony Hatch and made famous by Petula Clark) in the attempt to draw Ottawa-area patrons to Lewis Mercury, a car dealership. As noted by Dubé J. of the Federal Court of Canada, Trial Division, “[t]he final stanza brings it all together in one irresistible invitation: Lewis Mercury is Downtown. They have a car for you Downtown. They are just waiting to help you Downtown.”⁴⁴ Dubé J. granted an injunction restraining the defendants from further infringement of “Downtown”, and awarded infringement, punitive and exemplary damages.⁴⁵ The fact that the work was a parody was not considered to be a defence to copyright infringement.

The next case involving parody and copyright, *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd. et al.*, was decided in 1982.⁴⁶ The defendants had written the song “Constitution”, a parody of “Revolution”, a Beatles song composed by John Lennon and Paul McCartney, as a “commentary on the events preceding the proclamation of the *Constitution Act*.”⁴⁷ Van Camp J., of the Ontario High Court of Justice, granted a motion for an interlocutory injunction preventing Rogers Radio Broadcasting Ltd. *et al.* from infringing ATV Music Publishing of Canada Ltd.’s copyright.

The first Canadian case to address the issue of whether the fair dealing defence protects parody was *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)*.⁴⁸ The CAW, in the context of a union organizing campaign at CGEM Michelin Canada’s Nova Scotia plants, had distributed leaflets depicting CGEM Michelin’s corporate logo, “a beaming marshmallow-like rotund figure composed of tires” called the Michelin Tire Man (or Bibendum):

broadly smiling... arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker. In the same leaflet, another worker safely out of the reach of “Bibendum’s” looming foot has raised a finger of warning and informs his blithe colleague, “Bob, you better move before he squashes you”. Bob, the worker in imminent danger of “Bibendum’s” boot has apparently resisted the blandishments of the union since a caption coming from his mouth reads, “Naw, I’m going to wait and see what happens”. Below the roughly drawn figures of the workers is the following plea in bold letters, “Don’t wait until it’s too late! Because the job you save may be your own. Sign today for a better tomorrow.”⁴⁹

⁴¹ *Ludlow*, *supra* note 39 at 118. Zegers, *supra* note 7 at 208, notes that “[i]n 1958 Ludlow Music published the song ‘This Land is Your Land’ in Canada and the United States and soon thereafter a Canadian version by ‘The Travellers’ was authorized. The Canadian version became well-known throughout Canada, due in no small part to a decision by the 1967 Centennial Commission to publish the song in *Young Canada Sings*. The song book was distributed throughout Canada and soon patriotic youngsters from Bonavista to Vancouver Island were singing along, happily unaware of who owned copyright. No doubt all this centennial activity inspired Canint Music to record a parody of ‘This Land’ wherein the idea that Canada belongs to ‘you’ or ‘me’ is thoroughly mocked”.

⁴² *Ludlow*, *supra* note 39 at 51.

⁴³ (1976), 28 C.P.R. (2d) 52 (F.C.T.D.) [*MCA*].

⁴⁴ *Ibid.* at para. 4.

⁴⁵ *Ibid.* at para. 22.

⁴⁶ (1982), 35 O.R. (2d) 417, 65 C.P.R. (2d) 109 (H.C.J.) [*ATV Music*].

⁴⁷ Zegers, *supra* note 7 at 208. Zegers notes, at 211, that the lyrics of “Constitution” were as follows: “You say you want a constitution/ Well Trudeau/ Will it really change the world/ Provinces you know aren’t certain Alberta’s not the third world/ And when stickin’ the dogs on Clarke/ Better make sure they bite not bark/ Then Trudeau you’re going to be alright”.

⁴⁸ The fair dealing defence was not argued as a defence in *Ludlow*, *MCA*, or *ATV*. In *Ludlow* and *ATV*, the compulsory license defence was argued. Zegers, *supra* note 7 at 208 notes that “[u]nder subs. 19(1) of the Act it was not a breach of copyright in a musical recording to make a record of that work provided that records had previously made with the copyright owner’s consent and provided that proper notice was given to the owner. Section 19(2) limited 19(1) by prohibiting alteration to copyrighted works recorded pursuant to 19(1) unless the alteration was authorized by the owner. Essentially, s. 19 granted, under certain conditions, a license to make recordings of copyrighted work without the copyright owner’s permission.”

⁴⁹ *Michelin*, *supra* note 4 at 353.

After becoming aware of the leaflets, CGEM Michelin sued CAW for copyright infringement and trademark infringement.⁵⁰ CAW argued that their version of Bibendum was a parody, and, as a result, did not infringe copyright. While acknowledging that the Canadian *Copyright Act* does not contain an explicit parody defence to copyright infringement, the CAW argued that parody is protected under the fair dealing defence. Specifically, it argued that the category of criticism should be interpreted in such a manner that would encompass parody.

Describing the union's position as a "radical interpretation"⁵¹ of the *Copyright Act*, Teitelbaum J., of the Federal Court (Trial Division), rejected the argument that he should "give the word 'criticism' such a large meaning that it includes parody."⁵² Teitelbaum J. stated that in interpreting criticism in such a manner that encompasses parody, he would be "creating a new exception to...copyright infringement, a step that only Parliament [has] the jurisdiction to do."⁵³ As a result, Teitelbaum J. rejected the contention that parody is a defence to copyright infringement in Canada.

Two years after *Michelin* was decided, the Quebec Court of Appeal, in *Productions Avanti Ciné-Vidéo Inc. c. Favreau*⁵⁴, dealt with an allegation of copyright infringement in which parody was argued as a defence. Favreau allegedly infringed copyright by creating a pornographic film entitled "La Petite Vite" that "substantially copied the most original and important elements of 'La Petite Vie'...[a] highly original and very well known situation comedy...[which is] probably the most popular series in the history of Quebec television".⁵⁵ In a concurring judgment, Rothman J. addressed Favreau's claim that parody is a defence to copyright infringement. Rather than rejecting the claim outright, as Teitelbaum J. did in *Michelin*, Rothman J. appeared to accept the proposition that a parody could act as a defence to copyright infringement in Canada in certain circumstances:

Respondent's only serious defence of his use of the characters, costumes and decor created in "La Petite Vie" is a defence of fair use of these elements for purposes of parody. With respect, I see nothing in "La Petite Vite" that could possibly be characterized as parody. Clearly, its purpose was not to parody "La Petite Vie" but simply to exploit the popularity of that television series by appropriating its characters, costumes and decor as a mise-en-scene for respondent's video film...Parody normally involves the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment. Appropriation of the work of another writer to exploit its popular success for commercial purposes is quite a different thing. It is no more than commercial opportunism. The line may sometimes be difficult to trace, but courts have a duty to make the proper distinctions in each case having regard to copyright protection as well as freedom of expression. In this case, Respondent was on the wrong side of that line.⁵⁶

Even though Rothman J. hinted at the potential applicability of a defence of parody to a claim of copyright infringement, *Michelin* is currently the only Canadian case to have addressed the particular issue of whether the fair dealing defence (and, particularly, the fair dealing category of criticism) provides protection for parody. The statement, in *Michelin*, that "under the *Copyright Act*, 'criticism' is not synonymous with parody", appears to soundly reject the possibility that parody could act as a defence to copyright infringement.⁵⁷

In 2004, however, in *CCH et al.*, the Supreme Court of Canada (SCC) signaled a dramatic shift in the way that copyright defences should be interpreted. Prior to *CCH et al.*, defences to copyright infringement, such as fair dealing, were seen as limitations on the copyright holder's exclusive rights, and were generally interpreted restrictively.⁵⁸ In *CCH et al.*, it was accepted that defences to copyright infringement should instead be seen as users' rights. As noted by McLachlin C.J.:

In order to maintain the proper balance between the rights of a copyright owner and users' interests, [the fair dealing defence] must not be interpreted restrictively. As Professor Vaver...has explained..."User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation".⁵⁹

⁵⁰ This article will not address the allegation of trademark infringement; the issue of parody and trademark infringement in Canada is the topic for another article.

⁵¹ *Michelin*, *supra* note 4 at 377.

⁵² *Ibid.* at 381.

⁵³ *Ibid.*

⁵⁴ *Supra* note 20.

⁵⁵ *Ibid.* at 574.

⁵⁶ *Ibid.* at 574-575.

⁵⁷ *Supra* note 4 at 378.

⁵⁸ See e.g. *Robertson v. Thomson Corp.* (2004), 72 O.R. (3d) 481 (C.A.) at para. 36; *Michelin*, *supra* note 4; *Boudreau v. Lin* (1997), 150 D.L.R. (4th) 324 (Ont. Ct. J. (Gen. Div.)) at para. 48 [Boudreau]. Cf. *Allen v. Toronto Star Newspapers Ltd.* (1997), 36 O.R. (3d) 201 (Ct. J. (Gen. Div.) Div. Ct.), a case, pre-*CCH et al.*, which took a liberal approach to the fair dealing defence.

⁵⁹ *Boudreau*, *ibid.* at para. 48.

As a result of the SCC's decision in *CCH et al.*, some commentators have suggested that Canadian courts may now find that parody is protected under the fair dealing defence. For instance, Professor Giuseppina D'Agostino notes that "[p]ost CCH's liberal interpretation of the enumerated grounds, it could be argued that 'criticism' could now encompass parody."⁶⁰ As well, in an article entitled "Parody as fair dealing in Canada: a guide for lawyers and judges", Professor Emir A.C. Mohammed states that "[s]imply put, copyright law in Canada now recognizes a defence of parody."⁶¹

It is not certain, however, that courts will move in this direction. A recent case heard in British Columbia illustrates the risk in relying on litigation as the means through which a parody defence to copyright infringement can be created.⁶² In the 2008 case of *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.*,⁶³ Canwest Mediaworks Publications Inc. brought an action against Gordon Murray, Carel Moiseiwitsch, and four unnamed individuals for passing off, trademark infringement, and copyright infringement after the defendants created a parody edition of the Canwest-owned Vancouver Sun. The parody edition reproduced the masthead of the Vancouver Sun and contained articles criticizing, "amongst other things, Israel's policy with respect to the Palestinians...[and] the plaintiff's reporting of Middle East issues".⁶⁴ The articles were dropped off in Vancouver Sun vending machines.⁶⁵

A motion was brought by the plaintiff to strike various elements from the defendant's statement of defence, including those paragraphs which argued that parody is a defence to copyright infringement under the fair dealing defence. Master Donaldson allowed the motion and struck the paragraphs from the statement of claim, noting that:

In the statement of defence, the defendant seems to assert that the fake *Sun* is a parody, and therefore it does not infringe the *Copyright Act* due to the "fair use" exception for criticism in s. 29.1. However, Teitelbaum J held clearly in *Michelin* at Para. 63 that parody is not an exception to copyright infringement under the *Copyright Act*, and therefore does not constitute a defence. As parody is not a defence to a copyright claim, the defendant's allegations cannot be necessary to prove it.⁶⁶

This motion, argued eleven years after *Michelin* was decided and four years after the SCC's decision in *CCH et al.*, is an indication that relying on litigation to ensure the protection of parody is a risky proposition. Notwithstanding the SCC's decision in *CCH et al.*, the spectre of *Michelin* still looms large over the parodist in Canada.

PART III: TOWARDS THE CREATION OF A PARODY DEFENCE TO COPYRIGHT INFRINGEMENT

It has been suggested that as a result of the SCC's decision in *CCH et al.*, parody will likely receive protection under the fair dealing category of criticism.⁶⁷ The argument that the category of criticism encompasses parody, however, is based on the assumption that parodies are necessarily critical.⁶⁸ As demonstrated in Part I, this assumption can be challenged. Though many conceptions of parody do insist upon criticism, either of the imitated work or of something else, other conceptions of parody do not.

Given the manner in which parody has evolved since its introduction in ancient Greece,⁶⁹ and the recognition that today, "[n]o stable understanding of the term 'parody' exists",⁷⁰ it is inadvisable to limit the notion of parody

⁶⁰ D'Agostino, *supra* note 5 at 359.

⁶¹ Mohammed, *supra* note 5 at 469.

⁶² In "Why Canada Needs Parody Parity and Comedy Comity" (2008) 20 C.P.I. 717, Howard Knopf argues that legislative intervention is necessary to provide protection for parody in Canada. Noting that "[i]t is primarily the responsibility of Parliament, and not individual litigants, to take the necessary steps to provide clear and predictable laws in Canada", Knopf sets out various reasons why relying on litigation to provide protection for parody is flawed at 741. Like the author of this article, Knopf argues that the answer is to amend s. 29 of the *Copyright Act* to include parody (and satire).

⁶³ 2008 BCSC 1609 [*Canwest* - decision by Master Donaldson], aff'd 2009 BCSC 391 [*Canwest* - decision by Myers J.].

⁶⁴ *Canwest* - decision by Myers J., *supra* note 63 at para. 2.

⁶⁵ *Ibid.*

⁶⁶ *Canwest* - decision by Master Donaldson, *supra* note 63 at paras. 14-15. On appeal, in *Canwest* - decision by Myers J., *supra* note 63, the motion for an order striking various paragraphs from the statement of claim was allowed. The issue of whether parody is a defence to copyright infringement was not addressed by E.M. Myers J. in any depth.

⁶⁷ See D'Agostino, *supra* note 5 at 324; Mohammed, *supra* note 5 at 468.

⁶⁸ See Mohammed, *supra* note 5 at 469; Zegers, *supra* note 7 at 209.

⁶⁹ In Rose, *supra* note 11 at 280-283, the author sets out 37 conceptions and definitions of parody.

within the *Copyright Act* to any one conception. Protecting parody under the fair dealing category of criticism, a move arguably made possible by the SCC in *CCH et al.*, would do just that. This article takes the position that if parody is to be protected as a defence to copyright infringement, it should receive protection as a separate defence, rather than under the fair dealing category of criticism. Protecting parody as a separate defence would allow for the protection of both critical and non-critical parodies.

One objection to the adoption of a separate parody defence to copyright infringement is that it has the potential to encompass too many dealings with copyright-protected works, encroaching on the exclusive rights of copyright owners to an unacceptable degree. This objection is not without merit. Any new defence must maintain the “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”.⁷¹

A response to this objection, however, would be to embed the proposed parody defence within the fair dealing defence. Parody would then constitute the sixth acceptable fair dealing category, joining research, private study, criticism, review, and news reporting. Under this approach, individuals would have the right to use a substantial amount of copyright-protected material without the consent of the copyright owner for the purpose of parody, as long as their dealing is “fair” and certain criteria with respect to attribution are satisfied. The fairness analysis would limit the extent to which parodies are protected, helping ensure that a balance is maintained between the copyright owner’s rights and the rights of the parodist.

The term “fair” is not defined in the *Copyright Act*. Rather, it is a question of fact which must be determined in each case.⁷² In *CCH et al.*, the SCC set out a series of factors⁷³ in the attempt to provide a “useful analytical framework to govern determinations of fairness in future cases.”⁷⁴ These factors include the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the original work, and the effect of the dealing on the original work.⁷⁵ The two factors which are particularly relevant in seeking to ensure that the fair dealing category of parody does not upset the balance between owners’ rights and the public interest are the factor which addresses alternatives to the dealing and the factor which addresses the effect of the dealing on the work.

The factor which addresses alternatives to the dealing could be used to deny protection to parodies that could, with the same degree of success, use a non-infringing work, such as a work which is no longer protected by copyright or an original work. In discussing this factor, the SCC, in *CCH et al.*, noted that:

[I]t will...be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.⁷⁶

Parodies which imitate a work in order to critique it will likely tend to fairness under this factor. Though it may not be “necessary” to reproduce a work in order to achieve the ultimate purpose of critiquing it, it may be argued that it is “reasonably necessary” to do so. In many cases, such a critique, if it did not reproduce the original work, would not be equally effective. As Professor Mohammed notes, “‘plain’ criticism, couched in the tempered language familiar to academics and editors, will not be as effective as a well-executed parody (especially in relation to political affairs, social commentary, or labour disputes).”⁷⁷

Some weapon parodies, those that use the parodied work to criticize something other than the work itself, would also tend to fairness under this factor. Certain works have secondary significations – they are intimately associated in the mind of the public with something other than the work itself. For instance, a song may be associated with a specific era, figure, or political movement. In these situations, it could be argued that a critique of that era, figure, or political movement would not be equally effective if it did not use the work associated with that subject as a vehicle

⁷⁰ Spence, *supra* note 19 at 594.

⁷¹ *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 at para. 30.

⁷² *CCH et al.*, *supra* note 5 at para. 52.

⁷³ These factors were crafted by Linden J.A. in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 drawing from the decision of Lord Denning in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) and the U.S. doctrine of fair use.

⁷⁴ *CCH et al.*, *supra* note 5 at para. 53.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at para. 57.

⁷⁷ Mohammed, *supra* note 5 at 471.

for such criticism. Therefore, the use of the copyright-protected work in the service of such a critique would likely be seen as “reasonably necessary”. However, in some cases, equally effective alternatives to the use of the copyright-protected work could be found in seeking to critique something other than the work itself. In those cases, this factor would tend to unfairness.

Many non-critical parodies would also tend to fairness under this factor. For example, if the ultimate purpose of the dealing is to construct a respectful or admiring parody of a certain work, it is difficult to argue that such a parody would be equally effective if it did not reproduce a sufficient amount of the work to evoke that work in the minds of the reader/listener/viewer. In this situation, as well, the use of the copyright-protected work would be “reasonably necessary to achieve the ultimate purpose”.⁷⁸

Some parodies, however, could tend to unfairness under this factor. For instance, in situations such as *MCA*, which involved the creation of a parody of the hit song “Downtown” in order to draw consumers to a car dealership in downtown Ottawa, there is a strong possibility that the dealing would not be found to be “reasonably necessary” to achieve the ultimate purpose, which was to bring people to Lewis Mercury. Equally effective alternatives could have been utilized which would not have involved the use of a copyright-protected work.

The second factor which is particularly relevant in seeking to ensure that the fair dealing category of parody does not upset the balance between owners’ rights and the public interest is the factor which addresses the effect of the dealing on the work. The SCC, in *CCH et al.*, stated that “[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.”⁷⁹ In most cases, parodies do not compete with the market for the original work. For instance, 2 Live Crew’s parody of “Pretty Woman”, which “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”, cannot be seen as competing with the market for Roy Orbison’s classic song “Pretty Woman”.⁸⁰ An individual seeking to purchase Orbison’s song will not intentionally purchase 2 Live Crew’s parody instead. Certain parodies created out of respect or admiration for the original work could, perhaps, compete with the market of the original work. In those cases, this factor will tend to unfairness. In many cases, however, this factor will tend to fairness.

In seeking to incorporate a parody defence within fair dealing, another question which must be addressed is whether works created for the purpose of parody must satisfy the attribution requirements set out in the *Copyright Act*. Works created for the purposes of criticism, review, and news reporting must satisfy various attribution requirements if they are to be protected by the fair dealing defence.⁸¹ These works must mention the source of the work and, if given in the source, the name of the author, performer, maker, or broadcaster.⁸² These attribution requirements are not required for works created for the purpose of research or private study.⁸³

In the case of parodies, it can be argued that it is unnecessary to require parodists to explicitly mention the source of the work and the name of the author, on the basis that in many cases the source and author are evident from the parody itself. For instance, though the CAW’s parodic version of Bibendum was different from Michelin’s beloved corporate icon, individuals who saw the CAW leaflet and were familiar with Bibendum would recognize it within the parody. As noted by the United States Supreme Court in *Campbell v. Acuff-Rose*, “there is no reason to require parody to state the obvious, (or even the reasonably perceived).”⁸⁴ However, what of those parodies that fail to evoke the original work in the mind of the viewer? If there is no attribution requirement associated with parody as a category of fair dealing, then the creation and distribution of these parodies could result in public confusion and potential damage to the original creator or the current copyright-owner.

This article proposes incorporating parody within section 29.1 of the *Copyright Act*, the section which protects criticism and review. After this amendment, section 29.1 would state that fair dealing for the purpose of parody, criticism, or review does not infringe copyright if the attribution requirements are satisfied. However, a point of clarification could be added stating that in the case of parody, the attribution requirements will be satisfied if the

⁷⁸ *CCH et al.*, *supra* note 5 at para. 57.

⁷⁹ *CCH et al.*, *supra* note 5 at para. 59.

⁸⁰ *Campbell*, *supra* note 2, at 583.

⁸¹ *Copyright Act*, *supra* note 3, ss. 29.1-29.2.

⁸² *Ibid.*, s. 29.1.

⁸³ *Ibid.*, ss. 29-29.2.

⁸⁴ *Campbell*, *supra* note 2 at 583.

source and author of the work are evident from the parody itself. This point of clarification would ensure that parodies do not have to state the obvious, an act which could have the effect of detracting from the overall impact created by the parody without providing any benefit to the original author or the owner of copyright in the parodied work.

CONCLUSION

This article has taken the position that, given the benefits to Canadian society which result from the creation and distribution of parodies, the Government of Canada should create a parody defence to copyright infringement. This defence, however, should not be embedded within the fair dealing category of criticism. Statements by commentators that the fair dealing category of criticism is capable of encompassing parody are based on the assumption that parodies are necessarily critical. This article has challenged this assumption. Though many conceptions of parody insist upon some element of criticism, other conceptions of parody do not.

Rather than protecting parody within the fair dealing category of criticism, this article has advocated for the creation of a separate parody defence. In order to ensure that this new user's right does not encroach to an unacceptable degree on the rights of copyright owners, this article has suggested incorporating the parody defence within fair dealing as a new fair dealing category. Individuals would then have the right to use a substantial amount of copyright-protected expression without the consent of the copyright owner for the purpose of creating a parody, provided that the original work is dealt with "fairly" and various attribution requirements are satisfied.

The creation of such a defence will ensure that all parodies are capable of being protected under the *Copyright Act*, and not simply those parodies which can be seen as critical. Both critical and non-critical parodies advance the values underlying the *Charter*⁸⁵ right to freedom of expression, namely the "search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process."⁸⁶ If the impetus behind the development of a parody defence to copyright infringement is the desire to recognize and preserve the social benefits which arise from the creation and distribution of parodies, then any parody defence should be flexible enough to encompass both critical and non-critical parodies. This article advocates for the creation of such a defence.

⁸⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸⁶ *RJR Macdonald*, *supra* note 1 at para. 72.