

Copyright Protection and its Relation to Parodies

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ABSTRACT

The paper opens with the brief facts and judgement of Campbell v. Acuff-Rose Music, Inc. The case is vital to introduce copyright law and its extension to parodies. The author has divided the paper into five parts, inclusive of the introduction and conclusion. The first part lays the foundation for the paper. The second part deals with copyright protection and gives a detailed analysis of its requirements – originality of works and expression of thoughts. In the third part, the author has provided an insight into one of the defences of copyright infringement. This part focuses on both fair use, as is prevalent in the United States, and the doctrine of fair dealing that is followed in the United Kingdom and India. The author elaborates upon the four factors of fair use. The fourth part looks at parodies and gives a justification about why they are protected from the accusation of infringement. In this part, the author has also distinguished between parodies and satire. The author hopes that the paper will provide clarity of concept, and promises not to file a suit in case a parody is made.

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INTRODUCTION

In 1993, Acuff-Rose Music, Inc. filed a suit against the members of the rap group 2 Live Crew. The allegation was that 2 Live Crew's song "*Pretty Woman*" infringed the former's copyright in Roy Orbison's rock ballad "*Oh, Pretty Woman*". The District Court while granting summary judgement for 2 Live Crew held that the song was a parody that made fair use of the original song. The Court of Appeals reversed and remanded, and held that the commercial nature of the parody rendered it presumptively unfair. The Supreme Court found that the Sixth Circuit had erred in its judgement and reversing it, upheld the decision given by the District Court, protecting 2 Live Crew's parody under §107 of the Copyright Act¹.

The case mentioned above of *Campbell v. Acuff-Rose Music, Inc.*² forms the foundation of the existing parody laws in the United States. This case laid down the most comprehensive test for determining what fell under the protection of fair use by providing a four-factor test. To truly determine whether the work was protected under the section, it was necessary to look at all the factors collectively and not in isolation from one another. According to the Court, the true nature of the work could be understood by its transformative character, i.e. whether it altered the message, meaning or expression of the original.³

Though the Court relied on the statute, it is imperative to note that the law developed from the 19th-century case of *Folsom v. Marsh*.⁴ Judge Joseph Story wrote the opinion and set down the four factors that were ultimately codified by the Congress in the Act of 1976. According to him, the case was based on sheer poor reasoning and non-application of law. This case is regarded as establishing the principle of copyright law in the United States of America.

¹ Copyright Act 1976, 17 U.S.C. §107

² *Campbell v Acuff-Rose Music, Inc.* 510 US 569 (1994)

³ *Id.*, at 581.

⁴ *Folsom v Marsh* 9 F. Cas. 342 (CCD Mass. 1841)

COPYRIGHT PROTECTION

The intellectual right acquired by an author over his creative work, which is a result of his intellectual labour is known as copyright.⁵ The law of copyrights is considered to be the “*Cinderella of Intellectual Property Right laws*”.⁶ These rights are also known as “exclusive rights” and have a moral character attached to them in addition to an economic aspect. Copyright law deals with the rights of intellectual creators.⁷ Copyrights protect only the form of expression of ideas, and not the ideas themselves. Copyright protection promotes and encourages a nation’s cultural heritage by giving the people a secure platform to display their literary and artistic works. The creativity of the people directly contributes to the social and economic development of the country. If drafted and appropriately implemented, copyright law could serve help in proper and efficient dissemination of knowledge in an organised manner.

a. Originality of work

Copyright protection finds its justification in fair play.⁸ It extends to original literary works, dramatic works, musical works, artistic works, pictorial and graphical works, sculptures, sound recordings, architectural works, and choreographic works, to name a few. Common law countries stress the originality and tangibility of such work to gain protection under the law. To be original, the work must originate from the author and not be copied from some other work.⁹ The author must have expended sufficient independent skill, labour and judgement to justify copyright protection.¹⁰ The US Supreme Court touched upon the question of originality in artistic works through its decision in *Bleistein v. Donaldson Lithographing Co.* and held that the threshold for originality for such works was low.¹¹ The test laid down in the *Bleistein* judgement was subsequently followed in the case of *Alfred Bell & Co. v Catalda Fine Arts, Inc.*¹², which also dealt with copyright protection in fine arts.

Peterson, J. while delivering the judgement of *University Of London Press, Limited V. University Tutorial Press, Limited*¹³ laid down what constitutes originality of work. This case

⁵ *Danik Bhaskar v Madhusudhan Bhaskar* AIR1991 MP 162.

⁶ Sanchit Srivastava and Amol Khanna, “Institute for Inner Studies v. Charlotte Anderson [MIPR (2014) 1 129]: A Critique on the Copyright Eligibility of Exercise Techniques” (2015) 2 KIIT Student L. Re. 151.

⁷ WIPO, *WIPO Intellectual Property Handbook* (2nd edn , WIPO Publication 489 (E) 2004).

⁸ *Eastern Book Company & Ors. v D. B. Modak & Ors.* (2008) 1 SCC 1.

⁹ *CCH Canadian Ltd v Law Society of Upper Canada* (2004) 1 SCR 339.

¹⁰ *Kelly v Morris* (1866) L. R. 1 Eq. 697.

¹¹ *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 (1903).

¹² *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951).

¹³ *University of London Press, Limited v University Tutorial Press, Limited* [1916] 2 Ch. 601.

propounded the famous “*sweat and bow*” doctrine. According to this doctrine, the author of the works gains rights, not because of the creativity as shown by him, but merely because he has put in considerable effort and expenses in the creation of the work. The acquisition of such intellectual property rights is through the simple due diligence of the work.¹⁴ It is the skill and labour of the author, along with the investment of capital that is given weight over the actual application of creativity. The case *Walter v Lane*¹⁵ was said to have set the originality threshold with its approach towards the sweat and brow doctrine. In this case, the court found the process of creation of reports to have involved significant judgement, skill and labour and therefore made the reporter and author, protected under the copyright law. This judgement was affirmed in *Express Newspaper v News*¹⁶ and *Sawkins v Hyperion*.¹⁷ India also followed the “sweat and brow” doctrine for a considerably extended period.

There has now been a shift from the sweat and bow doctrine to the “*modicum of creativity*” standard which was laid down by the Supreme Court of United States of America in the case *Feist Publication Inc. v. Rural Telephone Service*.¹⁸ By negating the “sweat and brow” doctrine, the court held that the work must exhibit a “modicum of creativity” to be called original. This doctrine stipulates that there must be a minimum level of creativity and judgement for copyright protection. The Supreme Court of India shifted from the “sweat and brow” doctrine to “modicum of creativity” approach in *Eastern Book Company & Ors. v D. B. Modak & Others*.¹⁹ The author must exercise his skill and judgement with a flavour of creativity so that it is not a product of mere mechanical exercise.²⁰ The court covered an editor’s work within the ambit of copyright protection because there was the application of legal knowledge, skill and judgement.

¹⁴ Suchi Mehta, “Analysis Of Doctrines: ‘Sweat Of The Brow’ & ‘Modicum Of Creativity’ Vis-A-Vis Originality In Copyright Law” (*Indian Law*, 9 January 2015) <http://www.indialaw.in/blog/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/> accessed 9 August 2018.

¹⁵ *Walter v Lane* [1900] A. C. 539.

¹⁶ *Express Newspapers v News* [1990] FSR 359.

¹⁷ *Sawkins v Hyperion* [2005] EWCA Civ 565.

¹⁸ *Feist Publication Inc. v. Rural Telephone Service* 499 U.S. 340, 342 (1991).

¹⁹ *Supra* note 8.

²⁰ *Id.*

b. Expression of Thoughts

Copyright Acts are not concerned with the originality of ideas, rather the expression of opinions. Copyright does not protect ideas, but rather only its expression.²¹ By limiting copyright only to the expression of ideas, other authors may use similar forms to express their views without overlapping each other's thoughts. The work must be reduced to a material form. Copyright extends to expression and not to ideas, procedures or methods.²² It is not a right in the novelty of ideas.²³ Though ideas are intellectual, it is their fixation in a material form, which gains protection.²⁴ The United States Court of Appeals in the case of *Whelan Associates Inc. v Jaslow Dental Laboratory Inc.*²⁵ laid down a test to differentiate between ideas and expression. The Court held that the line between idea and expression might be drawn concerning the end sought to be achieved by the work in question. While delivering this judgement, the Court heavily relied on the case of *Baker v. Selden*, which is considered a landmark judgement in the world of idea-expression dichotomy. The essence of teachings, rules and ideas lies in their statements, and it is only such statements which are secured by copyright.²⁶ Copyright subsists in original published and unpublished works in tangible form. There is no copyright on ideas or schemes; it is confined to their expression; if the expression is not copied, then the copyright is not infringed.²⁷ This view was also taken by Farwell, J. in the case *Donoghue v Allied Newspapers*.²⁸

Though taking of a general idea is not an infringement, reproduction of the full expression is. The similarity in works does not amount to infringement if it can be shown that such works were produced independently of each other. Unlike patents and industrial designs, copyright is not a monopoly.²⁹ It does not provide an absolute right. To constitute infringement, there must be sufficient resemblance between the original work and the copied work, but there is no

²¹ *Mazer v. Stein* 347 U.S. 201, 217-18 (1954); *Dellar v Samuel Goldwyn, Inc.* 150 F.2d 612 (1945); *Dymon v. Bolton* 11 F.2d 690 (1926).

²² Article 9(2), Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299

²³ P. Narayanan, *Law of Copyright and Industrial Design* (4th edn, Eastern Law House 2007)

²⁴ The Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) 1161 U.N.T.S. 3.

²⁵ *Whelan Associates Inc. v Jaslow Dental Laboratory Inc* 797 F.2d 1222.

²⁶ *Baker v Selden* 101 U.S. 99, 104 (1879).

²⁷ *Harman Pictures, N. V. v Osborne & Ors* [1967] 1 WLR 723.

²⁸ *Donoghue v Allied Newspapers* 1937 (3) All ER 503.

²⁹ *Jefferys v. Boosey* (1855) 4 H.L.C. 815.

copyright in an idea.³⁰ Fazal Ali, J. has held a similar opinion in the case of *R. G. Anand v M/s Delux Films* wherein he reiterated,

*“There can be no copyright in an idea, principle, subject-matter, theme, plot or historical background. Violation of copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.”*³¹

The Supreme Court, in this case, also held that a resemblance with the original work in a substantial manner was sufficient to amount to infringement. It was not necessary to show that there was a verbatim reproduction of the work.

FAIR USE AND FAIR DEALING

Reproduction of copyrighted material is an infringement. Among the several defences available to the infringer, fair use and fair dealing are a continually evolving defence and the subject matter of this segment. A cause of action for infringement can be defeated if it falls within the exception of fair use or fair dealing. The fundamental belief on which these doctrines rest is that copying should not be entirely banned, particularly if it deals with criticism, review or research.

Fair dealing allows using copyrighted material without the prior permission of the creator of such work. Fair dealing is an exception to copyright infringement; fair use is a limitation on exclusive rights. Fair use, unlike fair dealing, is more flexible in its approach, which caters to the evolving practices in society. Fair dealing is merely fair use with restrictions. The doctrines are used in case of potential copyright infringement. They are broadly similar concepts with minor differences.

a. What is Fair Use?

The USA is the champion of the most flexible copyright law.³² The American Copyright Act merely provides for a list of four factors that help determine whether the defence of fair use shall protect the work. These factors are – the purpose and character of the work, its nature, the substantiality of the use, and its effect on the potential market for or value of the copyright.

³⁰ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273; [1964] 1 All ER 465.

³¹ *R. G. Anand v M/s Delux Films* AIR 1978 SC 1613.

³² Giuseppina D’Agostino, ‘Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use’ [2008] 53 McGill L. J. 309, 344.

i) Purpose of the Work

The doctrine of fair use can be invoked if the likelihood of economic detriment is little or negligible. Furthermore, the social utility of the borrowing must be great to justify such detriment. The crux of the profit/non-profit distinction was not determined by looking at whether the sole motive of the use was monetary gain rather whether the user is making a profit by exploiting the copyrighted material without paying any customary price.³³ Each case is determined separately based on facts and circumstances. Fair use allows the courts to travel beyond the factors enumerated in the statute. Before the Campbell³⁴ case, the court in *Sony Corp. of America v Universal City Studios*³⁵ had established that every commercial use was presumptively unfair; an approach widely embraced by other courts in the country. Post the Campbell judgement commercial use is not considered presumptively unfair, though it does weigh in favour of the plaintiff.

ii) Nature of the work

To determine the nature of the work, the court inspects whether it is factual or fictional, published or unpublished. When a biographer quoted merely 1% of Richard Wright's six unpublished and ten published journal entries, the court granted the defence of fair use because it was for informational purposes.³⁶ In the case of *Harper & Row Publishers v. Nation Enterprises*,³⁷ the court held that it was the author's first choice whether the work should be published, including when, where, and in what form. The lower courts followed this approach and developed a presumption against fair use for unpublished works. This judgment was later overruled.

iii) Amount and Substantiality

To determine the amount and substantiality of the portion used, the courts look at the quality of copied work and not the quantity. This analysis varies from case to case. In the *Harper & Row* case, the court looked at both the quantity and quality, whereas in *Basic Books v. Kinko's Graphics Corp*,³⁸ the court negated both quantitative and qualitative aspects. The case of *Harper & Row* was noteworthy as it emphasised the last factor as the most important one.

³³ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

³⁴ *Supra* note 300.

³⁵ *Sony Corp. of America v. Universal City Studios* 464 U.S. 417 (1984).

³⁶ *Wright v. Warner Books, Inc.* 953 F.2d 731 (1991).

³⁷ *Supra* note 33, at 546.

³⁸ *Basic Books v. Kinko's Graphics Corp* 758 F. Supp. 1522, 1531.

iv) Market Substitution

Market substitution is a significant factor in both the United States as well as the United Kingdom. All the four criteria mentioned above must be analysed in each case and vary with facts and circumstances.

The Courts have taken a liberal approach. Fair use allows the courts to travel beyond the factors enumerated in the statute. Besides the four factors enumerated above, the court considered two more factors in the case *Basic Books v. Kinko's Graphics Corp*³⁹. The defendant may be able to prove fair use if he can show that the plaintiff was engaged in monopolistic practices. The defendant would also have a strong case if he were able to prove adherence to the policies within fair use.

b. What is Fair Dealing?

Fair use is a concept more widely followed in the United States. Canada, the UK and India, on the other hand, have adopted the doctrine of fair dealing. The stark difference between the provisions of the Indian and American laws is that the former is more restrictive than the latter.

The doctrine of fair dealing finds its origin as early as the 19th century when it was introduced in the British Parliament for debate in 1842.⁴⁰ Since then, there has been considerable evolution in the acceptance of fair dealing as a means to accelerate the diffusion of literature. It is no longer believed to be inconsistent with the general public interest. The doctrine first appeared in the Copyright Act of 1911. The law in the UK provides an exhaustive list of defined exceptions to enumerate what is categorised as fair dealing.⁴¹ For this reason, the law is regarded as highly restrictive in its approach. The case of *Gyles v Wilcox*⁴² case established the doctrine of fair abridgement which stated that abridgements could not be copyright violations if they displayed a fair amount of labour on the part of the editor, that differed from the original published work in a significant way. This case played a significant role in the development of the Copyright Law in England.

Despite its evolution and growth, it is not possible to create a watertight jacket that provides a non-controversial and satisfactory definition of “fair dealing.” In the case *Super Cassettes*

³⁹ *Id.*

⁴⁰ *Supra* note 32.

⁴¹ Copyright, Designs and Patents Act 1988, § 29 – 30.

⁴² *Gyles v Wilcox* (1740) 26 ER 489.

*Industries Ltd. v. Hamar Television Network Pvt. Ltd & Anr*⁴³, the Delhi High Court laid down thirteen broad guidelines on fair dealing. The Court in the case of *Kartar Singh Giani v Ladha Singh*⁴⁴ laid down two points that constituted unfair dealing. These were – “(i) the presence of an intention to compete and derive profit from such competition, and (ii) the presence of an unfair motive.”

The Indian law is similar to its British counterpart, which also provides a high level of rigidity. The Indian Copyright Act provides a list of acts that are categorised as fair dealing though the term has not been expressly mentioned anywhere in the statute. The purpose of allowing certain exceptions to copyright infringement is to maintain a balance between the works of the creator and the interests of the public at large.

A bare reading of the statute enumerates the three instances when fair dealing does not constitute copyright infringement. These acts are –

“(i) private or personal use, including research; (ii) criticism or review, whether of that work or of any other work; (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.”⁴⁵

The Delhi High Court in the case *Syndicate Press of University of Cambridge v. Kasturi Lal & Sons*⁴⁶ had observed that while the law should encourage enterprise, copyright was a form of protection and not a barrier against research and scholarship. Copyright could not be used to close all the avenues of research.⁴⁷ What must be noted is that the section allows for research which is personal or private, and not commercial research. However, it is difficult to determine what is non-commercial. Factors to be taken into consideration include the amount taken, the availability of the work, and the effect on the market.⁴⁸ Private work is one which does not involve any publication.⁴⁹ The use of the words “private or personal” gives a restricted meaning to research. For dealing to fit into the category of criticism or review, the work must have been

⁴³ *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd & Anr* 2011 (45) PTC 70.

⁴⁴ *Kartar Singh Giani v Ladha Singh* AIR 1934 Lah. 777.

⁴⁵ The Copyright Act 1957, § 52.

⁴⁶ *Syndicate Press of University of Cambridge v. Kasturi Lal & Sons* (2006) 32 PTC 487.

⁴⁷ *Kartar Singh v Ladha Singh* AIR 1934 Lahore 777.

⁴⁸ Lionel Bently & Brad Sherman, *Intellectual Property Law* (2nd edn, Oxford University Press 2004).

⁴⁹ *M/S Blackwood & Sons Ltd. v A. N. Parasumaran & Ors.* AIR 1959 Mad 410.

previously available to the public be fair dealing, and have sufficient acknowledgement of its source.⁵⁰

*Hubbard v Vosper*⁵¹ set the primary test to determine what the meaning of fair was. The Court held that fair dealing was a question of degree. First, the number and extent of the quotations and extracts must be considered, and then the use made of them. Finally, the proportions must be considered. After all is said and done, it must be a matter of impression.⁵²

c. Why is it Justified?

As stated above, the two essential elements of fair dealing are the absence of any intention of the alleged infringer to compete with the works of the original owner and to avoid improper use of the copyrighted work.⁵³ The exceptions in copyright law are necessary to maintain a balance between the interests of the modern society, and the proprietary interests of the creator of the original work. It also encourages research and study. The Canadian court elevated fair dealing from an exception to a user right in the case of *CCH Canadian Ltd v Law Society of Upper Canada*⁵⁴.

Justice Bhatt in the case *The Chancellor Masters and Scholars of the University of Oxford v Narendera Publishing House and Ors*⁵⁵ held that fair dealing is an essential part of copyright law. The Single Bench also stated that the interpretation of the doctrine must be made in a manner, which balances the rights of the copyright holder and the often-enriching interest of the public domain. The Kerala High Court in the case *Civic Chandran v Ammini Amma*⁵⁶ held that since copying had been done specifically for criticism of the drama, the themes, the ideas and the events dealt with therein, it did not amount to an unfair appropriation of the original work. Stolen work is less likely to be fair.⁵⁷

PARODIES

Parody as an infringement to copyright is a significant concern. Criticism, parody, research and satire are integral parts of fair use and fair dealing. They are justified because they promote

⁵⁰ *Supra* note 32.

⁵¹ *Hubbard v Vosper* 1972 (1) All ER1023.

⁵² *Id.*, at 1027.

⁵³ *Supra* note 49.

⁵⁴ *Supra* note 9.

⁵⁵ *The Chancellor Masters and Scholars of the University of Oxford v Narendera Publishing House and Ors.* 2008 (38) PTC 385 (Del).

⁵⁶ *Civic Chandran v Ammini Amma* (1996) 1 KLJ 454.

⁵⁷ *Beloff v. Pressdram Ltd.* 1973 (1) All ER 241, 264.

freedom of speech and expression. Commentaries and criticism use the text of copyrighted material and provide a review.⁵⁸

A criticism discusses the merits and demerits of work.⁵⁹ It is not limited only to the literary style, but also the doctrine, philosophies and ideals. Parodies fall within the broader framework of criticisms.⁶⁰ A parody is a humorous piece of writing or drama, which imitates the writing style of a particular artist. It critically comments on existing work to expose its flaws. Parody criticises an individual piece of work; satire is a critique of society. There is a fine line between the two. The *Campbell* case highlighted the difference between the two:

*“Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s... imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”*⁶¹

The legality of parodies is subject to scrutiny. The doctrine of fair use protects even the parodies that have commercial value or a profit motive. Merely borrowing elements from the original copyrighted work without engaging in meaningful comments and critique is not a parody, and cannot be protected under this ambit.⁶² In the case, *Elsmere Music Inc v. National Broadcasting Co*⁶³ the comedy show Saturday Night Live portrayed a parody of the song ‘I love New York’ which did not infringe copyright because it did not compete with or detract from the original song.

Similarly, when merely 29 seconds of music was borrowed from the song “When Sunny Gets Blue”, the Court held that it was a parody protected by the defence of fair use.⁶⁴ In the case *Leibowitz v. Paramount Pictures*⁶⁵, the Court granted the defence of fair use to a film company who parodied Annie Leibowitz’s famous photo of pregnant Demi Moore. The photo was a parody using similar lighting and body positioning.

⁵⁸ William Patry, *The Fair Use Privilege in Copyright Law* (2nd edn, BNA Books, 1985).

⁵⁹ *Ramesh Chaudhary v Ali Mohd.* AIR 1965 J&K 101

⁶⁰ *Fisher v Dees* 794 F.2d 432 (1986) ; *Elsmere Music, Inc v National Broadcasting Co.* 623 F.2d 252 (1980)

⁶¹ *Supra* note 2, at 580.

⁶² *Steinberg v Columbia Pictures Industries, Inc.* 663 F.Supp 706, 715 (1987).

⁶³ *Elsmere Music Inc v. National Broadcasting Co* 482 F. Supp. 741 (1980).

⁶⁴ *Fisher v. Dees*, 794 F.2d 432 (1986).

⁶⁵ *Leibovitz v. Paramount Pictures Corporation* 137 F.3d 109 (1998).

Parodies are allowed to use a significant portion of the original work to ensure that the latter is easily recognisable.⁶⁶ The Supreme Court of USA in the case *Hustler Magazine v. Jerry Falwell*⁶⁷ restricted public figures from recovering damages when parodies and caricatures about them were published. The court held that since public figures were subject to higher levels of scrutiny, even the presence of malice in the publication did not invite the demand for damages. Even in the case of *L.L. Bean v. Drake Publishers*⁶⁸ recognised that parodies deserved freedom in society even if they were offensive in nature. The court recognised parodies as criticism and also as modes of entertainment.⁶⁹

POSITION IN INDIA

Parody as a means of political commentary has existed in India since the inception of an opposition press during the British rule.⁷⁰ Parodies involve a large number of rights. To determine whether the parody is legally allowed or not, the rights of the resulting work and those in the separate underlying works have to be considered. For example, the parody of a song involves the rights in the music and the lyrics. Similarly, the rights in a script of a film or book would have to be considered. About these aspects, attention is drawn to Section 13(4) of the Copyright Act. Section 57 of the Act⁷¹ recognises the authors' moral rights. Parodies remain safe from the attack of this section as they do not distort, mutilate or modify the existing work. A parody is a new creation that only borrows some aspects from the original piece.

In India, parodies are neither expressly allowed nor disallowed under the Copyright Act. However, Section 52 of the Indian Copyright Act⁷² protects parodies under the defence of "fair dealing". This section provides specific acts, which would not classify as an infringement of copyright. In the absence of these exceptions, reproduction of or use of such copyrighted works would amount to infringement.⁷³ A liberal interpretation of Section 52 is necessary to achieve the objective of copyright law.⁷⁴ The court linked section 52(1) with Article 19(1) of the Indian

⁶⁶ Kim J Landsman 'Does *Cariou v Prince* Represent the Apogee or Burn-Out of Transformative Use in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach' (2014) 24 *Fordham Intell. Prop. Media & Ent. L. J.* 321, 362.

⁶⁷ *Hustler Magazine v Jerry Falwell* 485 U.S. 46 (1988).

⁶⁸ *L.L. Bean v Drake Publishers* 811 F.2d 26 (1987).

⁶⁹ *L.L. Bean v Drake Publishers* 811 F.2d 26, 33 (1987).

⁷⁰ Geoffrey Baym and Jeffrey P. Jones (eds), *News Parody and Political Satire Across the Globe* (Routledge 2013).

⁷¹ *Supra* note 45.

⁷² *Id.*

⁷³ *S. K. Dutt v Law Book Co. & Ors* AIR 1954 All 570

⁷⁴ *The Chancellor Masters and Scholars of the University of Oxford v Narendera Publishing House and Ors.* 2008 (38) PTC 385.

Constitution in the case *Whiley Eastern Ltd and Ors v. Indian Institute of Management*.⁷⁵ The Court held,

*“The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India-so that research, private study, criticism or review or reporting of current events could be protected.”*⁷⁶

In addition to the doctrine of fair dealing, the legality of parodies is determined by the “Substantiality Test”, which is a derivative of Section 14.⁷⁷ This section allows insubstantial works to be used without the consent of the owners.

The most famous case dealing with parodies in India is the *Civic Chandran* case⁷⁸, a brief mention of which has been made earlier in the paper. In 1952, the famous playwright Thoppil Bhasi wrote a drama titled *Ningal Enne Communistakki*. The drama gained a widespread appreciation and was staged several times. The rights vested with Thoppil Bhasi and were transferred to his legal heirs after his demise. In 1995, the defendant wrote a counter drama titled *Ningal Are Communistakki*. It was published in the Malayalam edition of India Today. The plaintiff alleged that the counter drama contained substantial portions of the drama and reproduction of the characters, thereby filing a suit for copyright infringement. The Court heavily relied on the case *Hubbard v Vosper*⁷⁹ and laid down the following three guidelines to determine whether taking from the source amounted to infringement or was protected by fair dealing:

*“(1) the quantum and value of the matter taken in relation to the comments or criticism; (2) the purpose for which it is taken; (3) the likelihood of competition between the two works.”*⁸⁰

The Court did a scene-by-scene analysis and held that there was no substantial borrowing of the scenes and characters. The purpose of the counter-drama was not misappropriation of the theme, dialogues or techniques. The real aim was not to imitate the drama, but to criticise its ideology. There was enough material to show that the Defendant has used skill and judgement

⁷⁵ *Whiley Eastern Ltd and Ors v Indian Institute of Management* (1996) 61 DLT 281.

⁷⁶ *Whiley Eastern Ltd and Ors v Indian Institute of Management* (1995) 15 PTC 375.

⁷⁷ Nandita Saikia, ‘The Legality of Parodies under Indian Law (Part I)’ (24 January 2013) <http://copyright.lawmatters.in/2013/01/the-legality-of-parodies-under-indian.html> accessed 17 August 2018

⁷⁸ *Supra* note 56.

⁷⁹ *Hubbard v Vosper* 1972 (1) All ER1023.

⁸⁰ *Supra* note 56.

of his own and hence there was no prima facie case against the Defendants to accuse them of copyright infringement. This case is considered a landmark judgement in copyright law in India.

CONCLUSION

Parts II to IV of this paper show that parodies are not an infringement of copyright. They are innovative creations which have been fixed in material form and are protected by the defences of fair use and fair dealing in USA and India respectively. The author has tried to establish the need for maintaining a balance between the rights of the author and the interests of the society. This equilibrium can be maintained by providing protection to parodies and not shielding original works that should instead be open to scrutiny. Parodies promote creativity and growth of ideas, while also providing the fundamental freedom of speech and expression. They are merely a humorous piece of criticism. Furthermore, parodies do not take away the profit of the author as it operates in a separate market with a different purpose. Contrarily, they are socially desirable for artistic creations.

The purpose of granting protection to intellectual property is to repay the authors for the skill and labour employed by them in their works.⁸¹ This, in turn, motivates for authors to engage in productive labour.⁸² The mass dissemination of ideas gives artistic products their actual economic value. To limit copyrighted works from criticism or review would mean putting a halt on the birth of opinions, which would prevent the society from progressing.

⁸¹ B. W. Van Hecke, 'But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use', (1999) 77 *Minnesota Law Review* 465, 467.

⁸² W. M. Landes and R. A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003).