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# The Natural Right To Parody: Assessing The (Potential) Parody/Satire Dichotomies In American And Canadian Copyright Laws

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Résumé de l'article

L'auteur de cet article affirme que le droit de s'exprimer par des parodies devrait faire partie intégrante de la liberté d'expression fondamentale d'un régime normatif de droit d'auteur. En s'appuyant sur les théories juridiques du droit naturel, l'article propose une définition juridique de parodie qui aiderait à harmoniser davantage la jurisprudence d'un ressort en matière de droit d'auteur avec sa tradition de liberté de parole. Il soutient qu'une définition large de « parodie », qui englobe une grande variété d'œuvres d'expression ne faisant pas concurrence à l'original et à ses dérivés sur le marché, est préférable à une définition étroite. L'article explique ensuite pourquoi le moyen de défense de parodie en droit américain et l'exception fondée sur la parodie dans la loi canadienne sur le droit d'auteur devraient suivre la définition proposée de parodie, ce qui assurerait un juste équilibre entre les droits des titulaires de droits d'auteur et ceux des utilisateurs.

# The Natural Right To Parody: Assessing The (Potential) Parody/Satire Dichotomies In American And Canadian Copyright Laws

**Amy Lai***

*This paper argues that the right to expressing oneself through parodies should constitute part of the core freedom of expression of a normative copyright regime. By drawing upon natural law legal theories, the paper proposes a legal definition of parody that would help to bring the copyright jurisprudence of a jurisdiction more in line with its free speech tradition. It argues that a broad parody definition, one that encompasses a great variety of expressive works but would not compete with the original and its derivatives in the market, is preferable to a narrow one. The paper then explains why the parody defence in American law and the parody exception in the Canadian copyright statute should follow the proposed parody definition, which would properly balance the rights of copyright owners with those of users.*

*L'auteur de cet article affirme que le droit de s'exprimer par des parodies devrait faire partie intégrante de la liberté d'expression fondamentale d'un régime normatif de droit d'auteur. En s'appuyant sur les théories juridiques du droit naturel, l'article propose une définition juridique de parodie qui aiderait à harmoniser davantage la jurisprudence d'un ressort en matière de droit d'auteur avec sa tradition de liberté de parole. Il soutient qu'une définition large de « parodie », qui englobe une grande variété d'œuvres d'expression ne faisant pas concurrence à l'original et à ses dérivés sur le marché, est préférable à une définition étroite. L'article explique ensuite pourquoi le moyen de défense de parodie en droit américain et l'exception fondée sur la parodie dans la loi canadienne sur le droit d'auteur devraient suivre la définition proposée de parodie, ce qui assurerait un juste équilibre entre les droits des titulaires de droits d'auteur et ceux des utilisateurs.*

## I. INTRODUCTION

Over the past decades, an increasing number of Western jurisdictions have recognized "parody" as a fair use/fair dealing defence or exception in their copyright laws, either through their courts, which determined that parody is protected within existing defences, or through their legislatures, which have explicitly added exceptions or fair dealing categories to their copyright laws. In 1994, for instance, the United States Supreme Court recognized parody as fair use in its landmark decision *Campbell v. Acuff-Rose Music, Inc*.[1] In Canada, *the Copyright Modernization Act* of 2012 expands the fair dealing doctrine by permitting the

* PhD, Peter A. Allard School of Law, University of British Columbia. I acknowledge my supervisors Prof. Graham Reynolds, Prof. Joost Blom, and Prof. Jon Festinger, for their kind help.

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

use of copyrighted materials to create a parody or satire, provided that the dealing is "fair."[2] This is hardly surprising, considering that parody is a common phenomenon in everyday life, including the digital world. The prevalence of parodies in everyday life and the increasing recognition of parody as a fair use/fair dealing defence or exception in copyright jurisprudences lead to the question of whether creating parodies of copyrighted works should be regarded more affirmatively as a right, rather than an exception, something to be exempted from copyright protection. Scholars who advocate for a parody defence/exception generally emphasize the significance of parody as a form of cultural expression and as a potential source of innovation and growth.[3] This paper aims to adopt a more affirmative stance that creating parodies of copyrighted works is a right—hence "the right to parody"—that should constitute part of the core freedom of expression of a normative copyright regime.

How should parody be defined by copyright law? This paper seeks to propose a legal definition of parody in copyright law that would serve to bring the copyright jurisprudence of a jurisdiction more in line with its free speech tradition. Sections II to IV, which constitute its theoretical framework, define the proper scope of the right to parody through natural law legal theories. Section II will draw upon the writings of natural law philosophers to illuminate that the right to free speech, or freedom of expression, is a natural right that should be recognized in all jurisdictions. Expressing oneself through parodies is an exercise of this right. Section III will show that the right to parody is also a natural right in the copyright context. It will contend that while copyright can be considered a natural right, this right arguably accommodates appropriations of copyrighted works through parodies. Section IV will compare the relative significances of the right to free speech and the right to property to evaluate the scope of the right to parody. It argues that a broad definition of parody—one encompassing parodic works that target the originals as well as those that criticize or comment or something else—is preferable to a narrow one because it accommodates more speech. However, due to the fundamental nature of property rights, parodies must not adversely impact the interests of copyright owners by competing with the originals and their derivatives in the market.

Sections V and VI will study how the parody defences and exceptions in American and Canadian copyright laws measure up to the standard proposed in this paper. Due to the general lack of empirical evidence, they will rely upon legal analyses to explain how the proposed definition, informed by the importance of free speech and accommodating a great variety of expressions, would serve to bring copyright jurisprudence more in line with free speech traditions than a narrow definition would. Section IV will argue that the U.S. Supreme Court created a parody/satire dichotomy that has unfairly led American courts to rule that works that do not fall within the parody category are infringements. Despite the liberalization of the fair use standard over the past decade, the parody definition has continued to exert its influences in American fair use jurisprudence, and a broadened parody definition would facilitate more speech-friendly decisions.

Section VI will evaluate the recently-added parody and satire exceptions in Canadian copyright law. It will explain how courts may consider "satire" to be inferior to parody as a fair dealing category, due to

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2 *Copyright Modernization Act*, SC 2012, c20, § 21.

3 See e.g., Kris Erickson, Martin Kretschmer & Dinusha Mendis, "Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options," (1 January 2013) Intellectual Property Office Research Paper No 2013/24; Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth," (May 2011) United Kingdom Intellectual Property Office No 5.37.

the dictionary meaning of the word "satire," which does not require imitation of a prior work, the possible influence of the parody/satire dichotomy in American law, and the structure of the fair dealing analysis. Hence, works that fall within the "satire" category may not pass the second-stage fairness analysis. This section will contend that the proposed parody definition would help to reduce any influence of a propertized notion of fair dealing—one that equates intellectual property with physical property and prioritizes authors' and owners' rights over users and that may be adhered to by Canadian court, and that may lead courts to unfairly rule out "satires" as fair dealings. Hence, the broad parody exception would more properly balance the rights of copyright owners with users.

## II. THE NATURAL RIGHT TO PARODY

This paper justifies the legal right to free speech through natural law legal theories,[4] according to which the act of positing law is one that can and should be guided by higher principles that are universal and immutable, discoverable by reason, and that offer yardsticks against which to measure positive law.[5] The right to free speech has generally been recognized as a universal right under natural law principles. Early Enlightenment thinker John Locke, for example, contends that individual rights are not granted by any superior authority, but are inalienable rights with which people are naturally endowed.[6] In *A Letter Concerning Toleration*, Locke asserts that the liberty of conscience is an inalienable right, and that the power of the government "consists only in outward force" and cannot compel moral behavior, which "consists in the inward persuasion of the mind."[7] In *An Essay Concerning Human Understanding*, Locke asserts that without reason, people's opinions were "but the effects of chance and hazard, of a mind

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4 Natural law legal theory is to be distinguished (though not independent) from natural law moral theory, according to which "the moral standards that govern human behavior are, in some sense, objectively derived from the nature of human beings and the nature of the world." According to natural law legal theory, "the authority of legal standards necessarily derives, at least in part, from considerations having to do with the moral merit of those standards." Kenneth Einar Himma, "Natural Law" in *Internet Encyclopedia of Philosophy*, online: <http://www.iep.utm.edu/natlaw/>. For instance, John Finnis' naturalism is both an ethical theory and a theory of law, according to which the purpose of moral principles is to give ethical structure to the pursuit of equally valuable basic goods, and that of the law is to facilitate "the common good" of a community through authoritative rules that solve coordination problems arising in connection with the pursuit of these basic goods. *Ibid*; see originally John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 276.

5 *Ibid*; Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, 2nd ed (Oxford: Oxford University Press, 2009) at 15, 22.

6 Susan Ford Wiltshire, *Greece, Rome, and the Bill of Rights* (Norman: University of Oklahoma Press, 1992) at 76, 79. Locke's works were crucial to the establishment of the English Bill of Rights, which secured freedom of speech and of elections for members of Parliament. In addition, many trace the phrase "Life, Liberty, and the pursuit of Happiness" in the American Declaration of Independence to Locke's assertion that every person has a natural right to defend his "Life, Health, Liberty, or Possessions." Robert Hargreaves, *The First Freedom: A History of Free Speech* (Stroud: Sutton, 2003) at 110.

7 John Locke, *A Letter Concerning Toleration* (1689), translated by William Popple, online: <https://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/toleration.pdf> at 7.

floating at all adventures without choice, and without direction."[8] Political and religious leaders, who are in no superior position to grasp the truth than ordinary people, have no right to force their opinions on them.[9] The right to speak freely is implied in the freedom from coercion and the liberty to reason and to pursue the truth.[10] To a lesser extent, Locke's espousal of free speech is also implied in his *Two Treatises on Government*, which espouses a limited government contracted by its people to preserve their natural rights to life, liberty and property. Freedom of speech, along with the freedom of action, would be necessary to check the government's conduct to ensure that it serves the welfare of those who have contracted together to create it.[11]

If the pursuit of truth is central to Locke's ideas of freedom of conscience/speech, then the idea of democratic governance is essential in twentieth-century philosopher John Rawls' writings. Rawls takes up the Lockean idea of social contract in his book *A Theory of Justice*, by setting up a hypothetical situation, called the "original position," in which "free and equal" persons come together to agree on the moral principles of justice that regulate their social and political relations.[12] He regards "freedom of speech and assembly" as one of the "basic liberties" under his first principle, the "Principle of Equal Liberty."[13] Rawls further identifies "the equal liberty of conscience," which he defines as "religious and moral freedom" as the only principle that people in the original position can adopt to regulate the liberties of citizens in regard to their religious, moral, and philosophical interests.[14] Freedom of conscience and freedom of speech and assembly are subsumed under the "Principle of (equal) participation," which requires that all citizens have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws of their society.[15]

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8 John Locke, *An Essay Concerning Human Understanding* (1689), online: Enlightenment <http://enlightenment.supersaturated.com/johnlocke/BOOKIVChapterXVII.html> Book IV, Chapter XVII pinpoint at para 2.

9 "For there being but one truth … what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors and to the religion which either ignorance, ambition, or superstition had chanced to establish in the countries where they were born?" Locke, *supra* note 7 at 8.

10 Hargreaves, *supra* note 6 at 109.

11 Arlene Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge: Cambridge University Press, 2006) at 22.

12 John Rawls, *Theory of Justice* (Cambridge: Harvard University Press, 1971) at 11-12 [Rawls, *Theory of Justice*].

13 *Ibid* at 61.

14 *Ibid* at 205-06.

15 *Ibid* at 221.

Immanuel Kant, a moral theorist, is considered by some to be an exponent of natural law[16] as he identifies objectively justifiable moral principles that must apply in the same way to all rational beings.[17] Kant goes further than both Locke and Rawls by emphasizing that free speech is essential to personal development as much as to democratic society. A free press, as he argues in *Theory and Practice*, enables people to speak out against unjust laws, whereas a press that outlaws free speech denies the ruler the vital information that he needs to act as the representative of the people.[18] Yet enlightenment takes place on both the personal and the state levels. In *What is Enlightenment?*, he notes that for "enlightenment," or "a human being's emergence from his self-incurred immaturity," to take place, it is necessary "to make public use of one's reason in all matters," and "ecclesiastical dignitaries, notwithstanding their official duties, may in their capacity as scholars freely and publicly submit to the judgement of the world their verdicts and opinions, even if these deviate here and there from orthodox doctrine."[19] Outlawing free speech thus makes enlightenment impossible and violates the right of humanity.[20]

If the right to free speech is a natural right, then expressing oneself through parodies is an exercise of this right. The *Oxford English Dictionary* 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 as a way as to make them appear ridiculous."[21] The *American Heritage Dictionary* defines it as a "literary or artistic

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16 Kant is deemed "the most forceful exponent of natural law theory in modern days." AP d'Entrèves, *Natural Law: An Introduction to Legal Philosophy*, 2nd ed (Transaction Publishers, 1970) at 110. It should be noted, however, that Kant's writings do not completely adhere to what is known as the "paradigmatic natural law view," according to which "(1) the natural law is given by God; (2) it is naturally authoritative over all human beings; and (3) it is naturally knowable by all human beings… 4) the good is prior to the right, that (5) right action is action that responds nondefectively to the good." According to the *Stanford Encyclopedia of Philosophy*, the views of many writers are easily called natural law views, even though they do not share all of these paradigmatic positions, and there is "no clear answer to the question of when a view ceases to be a natural law theory, though a nonparadigmatic one, and becomes no natural law theory at all." Mark Murphy, "The Natural Law Tradition in Ethics", *Stanford Encyclopedia of Philosophy* (2011), online: <https://plato.stanford.edu/entries/natural-law-ethics/>.

17 John Ladd, "Introduction" in Immanuel Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, 2nd ed, translated by John Ladd (Indianapolis: Hackett, 1999) at xviii. A prime example is his "Categorical Imperative." Kant's first formulation of the Categorical Imperative rests upon a principle of universality: "The first principle of morality is, therefore, act according to a maxim which can, at the same time, be valid as universal law.—Any maxim which does not so qualify is contrary to morality." Immanuel Kant, *Grounding For The Metaphysics Of Morals: With On A Supposed Right To Lie Because Of Philanthropic Concerns*, translated by James *Ellington, 3rd ed (*Indianapolis: Hackett, *1993) at 30.* His second formulation of the Categorical Imperative bears the most relevance to his theory of rights and justice, and it reads as follows: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." *Ibid at 36.*

18 "[F]reedom of the pen", Kant writes, is "the sole palladium of the people's rights. For to want to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter – whose will gives order to the subjects as citizens only by representing the general will of the people – all knowledge of matters that he himself would change if he knew about them and to put him in contradiction with himself…." Immanuel Kant, *Theory of Practice*, 1793, online: Sussex University <http://users.sussex.ac.uk/~sefd0/tx/tp2.htm>.

19 Immanuel Kant, "An Answer to the Question: What is Enlightenment? (1798)"in Mary Gregor, ed, Practical Philosophy translated by Mary Gregor (Cambridge: Cambridge University Press, 1996) 17.

20 *Ibid.*

21 *The Oxford English Dictionary*, 2nd ed (1991) *sub verbo* "parody".

work that imitates the characteristic style of an author or a work for comic effect or ridicule."[22] These two definitions do not agree on whether a parody may only use the original and its characteristic style as the target, or may mimic the original in order to criticize or comment on something else. Yet they both identify the imitation of the original work as the essential characteristic of parody.

The right to parody, which stems from the right to freedom of expression, fulfils the functions of free speech and is essential to democracy. Unsurprisingly, authors of parodies and satires often fell victims to dictatorial or authoritarian governments throughout history. For instance, the "Bishops' Ban" in Elizabethan England prohibited the printing of satires and demanded that the published works of authors including John Marston, Gabriel Harvey and Thomas Nashe, many of which made abundant uses of parodies to critique society, be burned.[23] 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."[24] Nobel Prize-winning Italian playwright and actor Dario Fo, who frequently employed the parodic method to criticize his government as well as the Catholic Church, was censored, banned from television, and briefly jailed by the government for his subversive messages.[25] Censorships of parodies throughout history, nevertheless, have tacitly acknowledged the potential power of the parodic form in bringing social change.[26]

## III. THE RIGHT TO PARODY COPYRIGHTED WORKS

While saying that the right to freedom of expression and to parody is a natural right may sound intuitive, the idea that making parodies of copyrighted works is also a natural right may sound perplexing. Parodying copyrighted works leads to conflicts between copyright and free speech. This section and the next will nonetheless argue that the right to parody is a natural right also in the copyright context and will define the scope of this right.

Assume that copyright, or the owner's right in his or her work, is a natural right. Locke's labour theory of acquisition can be interpreted to endorse not only authors' rights in their works, but also users' right to parody others' copyrighted works. In his *Second Treatise of Government*, he holds that people have a natural right of property in their bodies and so own the labour of their bodies and the fruits of that labour.[27] Annexing or mixing one's labour with resources found in the common gives rise to property rights or

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22 *The American Heritage Dictionary of the English Language*, 5th ed, *sub verbo* "parody", online: <https://ahdictionary.com/word/search.html?q=parody>.

23 Debora Shuger, "Civility and Censorship in Early Modern England," in Robert C Post, ed, *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: Getty Research Institute for the History of Art and the Humanities, 1998) at 89.

24 VC Clinton-Baddeley, *The Burlesque Tradition in the English Theatre After 1660* (New York: Barnes & Noble Books, 1952) 12.

25 Chris Jones, "Nobel-winning Playwright Dario Fo, Who Mocked Politics, Religion, Dies", *Chicago Tribune* (13 October 2016), online: <http://www.chicagotribune.com/entertainment/theater/ct-dario-fo-dead-20161013-story.html>.

26 Margaret Rose, *Parody/Meta-fiction* (Croom Helm, 1979) at 133-34.

27 "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person." "The labour of his body, and the work of his hands, we may say, are properly his." Locke, *Second Treatise of Government*, (1689) Chapter 5, § 27, online: <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html> [Locke, *Second Treatise*].

legitimate claims to ownership, as long as "there is enough and as good left for others."[28] Legal scholars build upon this logic to extend Locke's labour theory to include the right to one's intellectual labour and its creations.[29] Locke's labour theory arguably applies equally well, or even better, to intellectual property than to physical property, given the similarities between the Lockean state of nature and the public domain from which authors draw their resources.[30] Indeed, by describing his own writing as "labour," Locke impliedly recognizes that one has a labour-based property claim to the product of writing.[31]

Should copyright be considered a natural right, this right is not absolute and accommodates the public's right to appropriate the copyrighted work for parodic purposes.[32] Locke's acquisition theory accommodates the parody of copyrighted works. According to the Charity Proviso in his *First Treatise of Government*, all properties are given by God for the maintenance and development of the human race and are not a source of absolute power.[33] Hence, the destitute have title to assets that they need to survive, including assets legitimately held by other owners.[34] If intellectual property rights get in the way of "survival and sustenance," then such rights have to give way to the destitute.[35] One may argue that those in "cultural destitution" do not have a strong claim on the property for facilitating cultural development.[36] Yet human flourishing goes beyond pure "survival and sustenance." Just as Lockean labour can be physical or intellectual, Locke arguably puts equal weight on economical, moral, and intellectual values.[37] Locke's writings thus indicate not only that authors have a property right in the fruits of their intellectual labour, but that such a right should also accommodate the appropriations of copyrighted works for the sake of human flourishing. Parodies would be one example.

That copyright should accommodate the right to parody is implied by Locke's two other provisos. According to the Sufficiency Proviso, individuals have a right to homestead private property from nature by working on it, but they can do so only "...at least where there is enough, and as good, left in common

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28 *Ibid*.

29 Alfred C Yen, "Restoring the Natural Law: Copyright as Labor and Possession" (1990) 51 Ohio St LJ 517 at 523.

30 Robert Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) at 32. Merges argues that "fresh appropriation from a background of unowned or widely shared material" is much more common today in the world of IP than in the world of tangible assets. *Ibid.*

31 *Ibid* at 33.

32 Thus, this paper takes a different approach than Carys J Craig's who argues that the Lockean approach necessarily prioritizes the authors' rights over the public's. See Carys J Craig, "Locke, Labour, and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law," (2002) 28:1 Queen's LJ 1.

33 Merges, *supra* note 30 at 61-63. "God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot be justly denied him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the life of another, by right of property in Land or Possessions; since 'twould always be a Sin in any Man of Estate, to let his Brother perish for want of affording him Relief out of his Plenty. As Justice gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise..." *Ibid* at 61, citing Locke, *First Treatise of Government* § 42 (1689).

34 *Ibid.*

35 Examples include cases where IP rights intersect with issues of human health, such as patents for AIDS drugs.

36 *Ibid* at 64-65.

37 Adam Mossoff, "Saving Lock from Marx: The Labor Theory of Value in Intellectual Property" (2012) 29 Soc Phil & Pol'y 283 at 309-16.

for others."[38] This proviso can be interpreted in an "individualized" way to mean that a latecomer on the cultural scene should be at liberty to use an existing creation owned by the author, as long as prohibiting the use would make the latecomer worse off individually than he or she would have been if the original creator had not produced the intangible work at issue.[39] Therefore, with the exception of free-riders whose sole aim is to take advantage of the author, parodists guaranteed "enough, and as good" should be allowed to parody copyrighted works. According to Locke's No-Spoilage Proviso, people were given the world "for their benefit and the greatest conveniences of life they were capable to draw from it," and so must strive for the optimal, "best" use of the resources.[40] Intellectual property can promote the "wasteful overappropriation,"[41] because the creation of an intangible good produces "an unlimited number of intangible units" and labourers would not be able or willing to convert all units into money whenever any of them are produced.[42] Thus, justified taking can be seen as a good way to police waste prohibition.[43] Admittedly, it may be difficult to identify the point where waste begins to occur. One may argue that as long as someone gets some use out of the intellectual production, it has not been wasted.[44] Lockean waste nonetheless can be defined more broadly as something that occurs where "a unit of a product of labor is not put to any use."[45] Because intangible goods are non-rivalrous and "divisible without limit,"[46] to ensure the most productive use of intangible copyrighted resources and to avoid waste, people should be allowed to parody copyrighted resources to benefit society.

Both copyright and the right to create parodies of copyrighted works can be derived from Rawls' theory of distributive justice. According to Rawls, the "personal property" in his first principle, which constitutes an essential part of individual liberty, only includes the minimum sufficient for personal independence and self-respect.[47] However, the Rawlsian concept of property as basic liberty arguably includes

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38 "Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same." Locke, *Second Treatise*, *supra* note 27 at ch 5 § 33.

39 Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 Yale LJ 1533 at 1570.

40 "The same law of nature that does by this means give us property does also bound that property, too. 'God has given us all things richly' (I Tim. 6.17), is the voice of reason confirmed by inspiration. But how far has he given it to us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much may he by his labor fix a property in; whatever is beyond this is more than his share and belongs to others. Nothing was made by God for man to spoil or destroy." Locke, *Second Treatise*, *supra*, note 27 at ch 5 § 31.

41 Merges, *supra* note 30 at 56.

42 Benjamin G Damstedt, "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine**"** (2003) 112 Yale LJ 1179 at 1183.

43 *Ibid* at 1196.

44 Merges, *supra* note 30 at 58.

45 Damstedt, *supra* note 42 at 1194-95.

46 *Ibid* at 1195.

47 See e.g. Samuel Freeman, *Rawls* (Abingdon: Routledge, 2007) at 50 [Freeman, *Rawls*]; Samuel Freeman, *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003) at 67[Freeman, *Companion to Rawls*]. In *Political Liberalism*, Rawls gives a detailed account of "personal property": "For example, among the basic liberties

intellectual property, because ideas and creative works are more personal than many types of property, and private property fosters individual autonomy that is indispensable to a well-ordered society.[48] In addition, Rawls' second principle justifies social and economic inequalities to the extent that they are both "(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[49] Reasonable people would agree to the potential income inequalities created by an intellectual property system, so long as opportunities to participate in the intellectual property system as creative professionals are open and equal to all, and their productions would better the lives of other people in the Rawlsian distributive scheme.[50] Yet intellectual property, if recognized as a basic liberty, would not be absolute in the Rawlsian framework.[51] Fair use, which allows access to and use of copyrighted works, would constitute one form of "redistribution" in the Rawlsian scheme.[52]

The Kantian theory of property also justifies the right to parody copyrighted works. Kant contends that although land and, by extension all properties, was originally possessed in common,[53] it would be a violation of people's freedom to deprive them of the right to acquire objects in rational pursuit of their goals.[54] The need to control objects thus leads to the concept of property.[55] The Kantian vision of individuals exerting durable claims of property to these objects for the sake of self-actualization and expanding one's autonomy arguably applies to authors expressing themselves through their works and claiming property rights to these works.[56] According to Kant's "Universal Principle of Right," the

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of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers." Rawls, *Political Liberalism*, 3rd ed (New York: Columbia University Press, 2005) at 298.

48 Merges, *supra* note 30 at 364.

49 Rawls, *Theory of Justice*, *supra* note 12 at 302.

50 Merges, *supra* note 30 at 111, 128.

51 Robert Merges argues that every IP right can be divided into an "inviolable individual contribution" or "deserving core" of the work, which represents "the act of individual will" deserving protection, and the "periphery," which owes its origins to social forces and situational advantages and which society can claim by way of redistributive policies. *Ibid.* at 121—22.

52 In fact, Merges identifies three stages of redistribution: "1) the initial grant of rights; (2) the deployment stage of works covered by IP rights; and (3) the time period after profits have been earned from sale of IP-covered works." In stage 1, limits based on the needs of others, of third parties, form part of the grant of rights; after the author's right expires, the right passes into the periphery, and the public at large has free access to the work. An example of a stage 2 issue is the set of rules that permit third-party use of and access to a creative work, including fair use in copyright law, experimental use in patent law, and nominative or nontrademark use in trademark law. In stage 3, profits earned from the sale of IP-protected works may be taxed, just like other economic activities. *Ibid* at 128 -129.

53 Paul Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000) citing Immanuel Kant, *The Metaphysics Of Morals, Part I, Doctrine Of Right*, § 13, 6: 262 (1797), which states that the original possession of land can only be "possession in common because the spherical surface of the earth unites all the places on its surface." at 273 "The schematism of external property rests on the agreement of all to universal a priori principles for the distribution of things in space within which property takes place: consequently it presupposes an original common possession." Ibid citing Immanuel Kant, *Preliminary Works to the Doctrine of Right* § 23: 273 (1797).

54 *Guyer, supra note at 53,* at 279.

55 *Ibid* at 236.

56 Merges, *supra* note 30 at 71.

expression of an individual's freedom of choice nonetheless must coexist with the expressions of freedom by other people.[57] Because property rights granted to enhance human freedom must not be so broad as to interfere with other's freedom, Kant does not deny other people the freedom to appropriate copyrighted objects to express themselves. Creative acts like writing parodies can be regarded as examples of self-actualization. According to Kant's logic, parodists are therefore entitled to parody copyrighted works and to claim these works as their own properties.

## IV. PROPOSING A BROAD "PARODY" EXCEPTION AND PRIORITIZING THE MARKET SUBSTITUTION FACTOR

Assuming copyright is a natural right, the right to parody copyrighted works is also justified from natural law perspectives. What should be the scope of this right? The fundamental nature of free speech indicates that parody should be broadly defined by the law, because a broad parody defence/exception would accommodate a greater variety of expressions and more speech than a narrow one would.

Locke's writings suggest that free speech and property rights are equally important. His endorsement of a limited government to preserve people's natural rights to "Life, Health, Liberty, or Possessions" in *Two Treatises on Government* indicates both liberty and possessions are inalienable rights with which people are naturally endowed. Rawls, however, contends that free speech is more fundamental than property rights. Freedom of speech is one of the basic liberties under his first principle. Although the right to "personal property" constitutes an essential part of individual liberty, an absolute right to unlimited private property is excluded from the first principle.[58] Property rights are restrained by justice as fairness in three ways. They enable citizens to act from the principles of political justice and to pursue their own conception of the good.[59] Private property is further subject to the restrictions of the difference principle, which demands, under certain circumstances, redistribution.[60] In addition, the idea of a property-owning democracy mandates a widespread dispersal of property in the form of productive resources against a background of fair equality of opportunity.[61]

Kant also considers freedom of expression to be more fundamental than property rights. Freedom of speech, which is crucial to the enlightenments of both society and individual, is an "innate" right, "that which belongs to everyone by nature, independently of any act that would establish a right."[62] It is therefore distinguished from an "acquired" right, "for which such an act is required," and of which a

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57 "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with universal law." *The Metaphysical of Morals* § 6 at 230. The universal law of right is "to act externally so that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law." *The Metaphysical of Morals* § 6: 231, found in Guyer, *supra* note 53 at 240, 241.

58 See e.g. Freeman, *Rawls*, *supra* note 47 at 50; Freeman, *Companion to Rawls*, *supra* note 47 at 67.

59 Freeman, *Rawls*, *supra* note 47 at 19.

60 Rawls, *Theory of Justice*, *supra* note 12 at 67, 164.

61 Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press 2001) at 66, 176; Rawls, *Theory of Justice*, *supra* note 12 at 302.

62 Immanuel Kant, *The Metaphysics of Morals*, translated and edited by Mary J Gregor (New York: Cambridge University Press 1991) at 63, § 6: 237.

property right is an example.[63] His 1785 essay further exemplifies how the author's personal right in his or her work should give way to a speech right where conflicts occur.[64] Conceiving of a published book as the vehicle of its author's speech, and a communication from publisher to public in the name of the author, he contends that if the new work "is indeed so altered that it would be wrong to attribute it to the author, it can rightfully be published in the modifier's name."[65] It follows that the original author's right in his or her work should not prevent the public from parodying the new work, as long as the new author alters the old work sufficiently to make it a new work. Arguably, the new author need not criticize the old work, but can direct his or her criticism or commentary towards something else.

The fundamental nature of the right to free speech indicates that "parody" should be broadly defined by the law to accommodate more speech. Not only works that target the originals, but also those that criticize or comment on something else, should be exempted from liabilities. It does not follow however, that all works falling within a broad parody category are automatically fair uses/dealings. Where, then, should the boundary be set?

As fundamental as the right to free speech is, the importance of property rights means that any parodic productions must not harm the authors' interests by superseding their original works, and by extension, the derivatives of the originals. The Lockean provisos, which indicate a right to parody copyrighted works, also impliedly carry the condition that the authors' interests may not be affected. The same condition is implied in Rawls' principles of equal liberty and difference, according to which property is a fundamental liberty, and impingements on author's property rights may disincentivize creative professionals who create to benefit themselves as well as society more generally. Kant offers even more insights into this matter by contending that a new work can "rightfully be published in the modifier's name" if altered to such an extent that it can no longer be attributed to the author.[66] In order that the author's inalienable bond to his or her work would be protected, a parody must be sufficiently different from the original. It follows that this new work also would not displace the original. Hence, even though a parody may reduce the author's earnings in various ways, such as by casting the original work in a negative light and reducing its sales, it must not harm the author's interests by competing with or replacing the original or its derivatives in the market.

## V. THE PARODY/SATIRE DICHOTOMY IN AMERICAN COPYRIGHT LAW

The free speech tradition in the U.S. has a natural law foundation. The First Amendment of its Constitution, which states that "Congress shall make no law … abridging the freedom of speech, or of the press,"[67] serves as the guarantor of free speech. The Founding Fathers of America agreed that free speech was one aspect of the freedom stemming from the inalienable rights to "Life, Liberty and the Pursuit of

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63 *Ibid.*

64 Immanuel Kant, "On the Wrongfulness of Unauthorized Publication of Books" (1785), in Mary J Gregor, ed, *Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1998) at 29-35, § 8:79-87).

65 *Ibid* at 35, § 8:86-7.

66 *Ibid.*

67 US Const amend I.

Happiness" to which all human beings are entitled according to the Declaration of Independence.[68] James Madison, one of the founders who later became the Fourth President of the U.S., asserted that speech was one of the "natural rights, retained," in contrast with government-created rights, when writing his speech to introduce the Bill of Rights to the first Congress.[69] The Fourteenth Amendment requires states to respect freedoms of speech, press, religion and assembly articulated in the First Amendment.[70] Thus, the "government has no power to restrict expression because of its message, ideas, subject matter, or content" under the First Amendment. Any law that inhibits freedom of speech must have an important and compelling interest to do so and must be narrowly tailored to serve that interest.[71]

American copyright law, on the other hand, has been chiefly driven by utilitarianism. From its first enactments of the copyright law beginning in 1790 to the current federal *Copyright Act* of 1976, Congress has consistently rewarded the creative activities of authors so as to provide an economic incentive to stimulate artistic creativity for the general public good. Fair use developed as a common-law doctrine to help achieve the Constitutional goal "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors the exclusive Right to their Writings."[72] Under Section 102 of the *Copyright Act*, copyright protection extends to "original works of authorship fixed in any tangible medium of expression."[73] The exclusive rights to copyright holders, as defined in Section 106, include the rights "to reproduce the copyrighted work[,]" to prepare derivative works of the original, and to distribute its copies to the public by various means,[74] which generally expire seventy years after the author's death.[75]

Section 107 of the *Act* imposes limitations on section 106, providing that the "fair use" of a copyrighted work does not constitute infringement.[76] While fair use explicitly applies to such uses as criticism, news reporting, teaching or research, the fair use defense is by no means limited to these areas.[77] This doctrine further requires a court to balance four factors in determining whether the defendant has made fair use of an original work: "the purpose and character of the use,"[78] "the nature of the copyrighted work,"[79] "the amount and substantiality of the portion used in relation to the copyrighted work as a whole,"[80] and "the effect of the use upon the market or potential market for or value of the copyrighted work."[81]

### A. The *Campbell* Court's Parody Definition

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68 Thomas West defines this period as roughly between 1765 and 1820. Thomas West, "Free Speech in the American Founding and in Modern Liberalism" (2004) 21 Soc Phil & Pol'y 310 at 314-315.

69 *Ibid* at 320.

70 *Gitlow v NY*, 268 US 652 (1925).

71 *Police Dept of Chicago v Mosley*, 408 US 92 (1972) at 95-96.

72 US Const art I, § 8, cl 8.

73 *Copyright Act*, 17 USC § 102(a) (2006).

74 *Ibid* at § 106.

75 *Ibid* at § 302(a).

76 *Ibid* at § 107.

77 *Ibid.*

78 *Ibid* at § 107(1).

79 *Ibid* at § 107(2); see e.g. *Universal City Studios, Inc v Sony Corp of Am*, 659 F2d 963, 972 (9th Cir 1981), rev'd on other grounds, 464 US 417 (1984).

80 *Copyright Act*, *supra* note 73 at § 107(3).

81 *Ibid* at § 107(4).

The legal definition of "parody" in American copyright law was determined by the Supreme Court's 1994 decision in *Campbell v. Acuff-Rose Music, Inc.*,[82] which concerns 2 Live Crew's unauthorized parody of a popular song called "Oh, Pretty Woman," co-authored in 1964 with its publication rights assigned to Acuff-Rose Music. After Acuff-Rose Music refused to grant permission to 2 Live Crew to use the song, the latter released a rap version parody of "Oh, Pretty Woman" entitled "Pretty Woman" as part of a commercial album, while acknowledging the authors and publisher. The lyrics of the first stanza closely parallel those of the original, but are different for the rest of the song. The music of the parody, closely paralleling the original's, is punctuated with laughter and scraper noises. The parody also directly copies the original's famous bass riff. In June 1990, Acuff-Rose sued 2 Live Crew and Luke Skywalker Records in the District Court for the Middle District of Tennessee for copyright infringement, alleging that the music of the parody and lyrics of the first stanza were too substantially similar to the original. Claiming that their use fell within the fair use exception of Section 107 of the *Copyright Act*, 2 Live Crew moved for summary judgment.

The Supreme Court reversed the judgment of the Court of Appeals after determining that it erred in its fair-use analysis.[83] Led by Justice Souter, the Court determined that a commercial parody can be fair use. Thus, "the Court of Appeals properly assumed that 2 Live Crew's song contains parody commenting on and criticizing the original work, but erred in giving virtually dispositive weight to the commercial nature of that parody by way of a presumption, […] that every commercial use of copyrighted material is presumptively...unfair." The first factor of the fair-use test, which concerns the purpose and character of the use, inquires whether the new work supersedes the original or transforms it: "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."[84] Recognizing the social benefits of parody and its "obvious claim to transformative value," the Court identified parody by holding that: "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

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[82] 510 US 569 (1994)[*Campbell*] . The first time the Supreme Court reviewed a parody case in the context of fair use was in its 1958 opinion, *Columbia Broadcasting System, Inc v Loew's Inc*, where it affirmed without opinion the Ninth Circuit's holding that CBS's TV burlesque of Loew's film adaptation of the play *Gaslight* infringed Loew's copyright. 356 US 43 (1958). On the defendants' argument that parody should be protected under the doctrine of fair use as a form of literary criticism or comment, the District Court for the Southern District of California decided, and the Court of Appeals for the Ninth Circuit and the Supreme Court agreed, that the parody in question did not constitute fair use. The Ninth Circuit based its holding upon the principle that "a parodized or burlesque taking is to be treated no differently from any other appropriation." *Benny v Loew's, Inc,* 239 F2d 532, 537 (9th Cir 1956). This decision nonetheless did not prevent lower courts from holding for parodists in subsequent decisions. In *Berlin v EC Publications, Inc*, for example, the Second Circuit found *Mad*'s book of parodic lyrics non-infringing because there was no substantial similarity between these lyrics and the original popular songs. 329 F2d 541 (2d Cir, cert denied, 379 US 822 (1964). The District Court for the Southern District of New York in *Elsmere Music, Inc v National Broadcasting Co* found that NBC's Saturday Night Live parody of the "I Love New York" advertising campaign was fair use by citing *Berlin* to allow parodists to use the copyrighted works as a means of criticizing something or someone external to them, and the Second Circuit affirmed. 482 F Supp 741 (SDNY 1980); 623 F 2d 252 (2d Cir 1980).

[83] The District Court for the Middle District of Tennessee found 2 Live Crew's song to be a parody which constituted fair use of the original, and granted summary judgment for the defendants. The plaintiffs appealed to the Sixth Circuit, which reversed the district court's decision on the grounds that 2 Live Crew's use of the copyrighted work was "wholly commercial," and would bring "a likelihood of future harm" to the market for both the original and derivative works.

[84] *Campbell*, *supra* note 82 at 579.

least in part, comments on that author's works."[85] It added that if the new work "has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh," then other fair use factors, such as whether the new work was sold commercially, loom larger.[86] The Court also distinguished "parody" from "satire," explaining that while a parody targets and mimics the original work, a satire uses the work to criticize something else, "can stand on its own two feet and so requires justification for the very act of borrowing."[87] Apparently favoring parody and devaluing satire, the Court nonetheless tempered its position in a footnote, by stating that if a parody's "wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives," then "it is more incumbent on one claiming fair use to establish the extent of transformation and the parody's critical relationship to the original."[88]

On the other hand:

> when there is little or no risk of market substitution, whether because of the large extent of transformation of the original work, the new work's minimal distribution in the market, the small extent to which it borrows from the original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.[89]

In his concurring opinion, Justice Kennedy took a more dichotomized position by stating that the parody "must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole," a prerequisite that "confines fair use protection to works whose very subject is the original composition and so necessitates some borrowing from it [the original]."[90] He also cautioned courts to be wary of *post hoc* rationalization of just any commercial takeoff as a parody.[91]

The rest of the *Campbell* decision revolves around parody in addressing other factors of the fair-use test. The Court determined that the second factor regarding the nature of the copyrighted work, was "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."[92] The third factor regarding the amount and substantiality of the use turns on both the quantitative and qualitative nature of the copying, and a parody "must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable," while leaving the exact application of this test to future cases.[93] Concerning the fourth factor, the Court must consider "whether

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85 *Ibid* at 580.
86 *Ibid.*
87 *Ibid* at 581.
88 *Ibid* at 581 fn 14.
89 *Ibid.*
90 *Ibid* at 597.
91 *Ibid* at 600.
92 *Ibid* at 586.
93 *Ibid* at 588. It directed lower courts to inquire what else the parodist did besides going to the heart of the original. If a substantial portion of the alleged parody was copied verbatim from the original, and the parodic element added by the defendant is "insubstantial, as compared to the copying," then the third factor will weigh heavily against the defendant.

unrestricted and widespread conduct of the sort engaged in by the defendant … would result in a substantially adverse impact on the potential market" for the original and licensed derivatives of the original.[94] Thus, a parody may legitimately suppress demand for the original through its critical function, and only fails this factor when it usurps demand for the original or its derivative works.[95] Because neither 2 Live Crew, nor Acuff-Rose put forth evidence to address the potential effect of the defendant's work on the market for non-parody rap derivatives of the original, the lower court made an "erroneous presumption" that the new song would harm the market.[96] In addition, although 2 Live Crew's song copied what may be perceived as the "heart" of the original, it was not excessive in relation to its parodic purpose.[97] Regarding the lyrics, "the copying was not excessive in relation to the song's parodic purpose." Holding no opinion on whether repetition of the bass riff is excessive copying, the Court remanded the case to the lower court "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."[98]

**B. The Need to Broaden *Campbell*'s Parody Definition**

Although the *Campbell* decision preserved the flexible, case-by-case analysis intended by Congress and did not rule out "satire" as fair use, it created a parody/satire dichotomy by treating them as distinct categories. According to John Tehranian, the Court's requirement that the parody targets, at least in part, the original belies a "propertized" vision of fair use—equating intellectual property with physical property, reducing fair use to a test about necessity and casting it as a privilege and not a right.[99] This conceptualization of fair use thus goes against the utilitarian principle on which American copyright law is based. By treating intellectual property as a physical property and prioritizing authors' rights over the public's, it also diverges from the natural rights perspectives towards copyright as explained in Section II, according to which copyright accommodates the right to parody.

Over the past decade, courts have, in some instances, developed an increasingly liberal fair use standard by downplaying the importance of parody. One example is *Blanch v. Koons* (2006), in which the Second Circuit downplayed the significance of the parody defence: though suggesting that Koons' work "may better be characterized […] as a satire" because its message appears to target the genre of which Blanch's original work is typical rather than Blanch's work itself.[100] It emphasized that "[t]he question is whether Koons had a genuine creative rationale for borrowing Blanch's image, rather than using it merely 'to get attention or to avoid the drudgery in working up something fresh.'"[101] Another example is *Cariou v. Prince*, in which the Second Circuit stated that it did not "analyze satire or parody differently from any

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But if the parodist has merely copied some "distinctive or memorable features" in order to "conjure up" the original, and has "thereafter departed markedly from the [original] for its own ends," the copying cannot be said to be "excessive in relation to its parodic purpose." *Ibid.*

94 *Ibid* at 590-91.

95 *Ibid* at 591-92.

96 *Ibid* at 593.

97 *Ibid* at 589.

98 *Ibid.*

99 *Ibid.*

100 *Blanch v Koons*, 467 F 3d 244 (2d Cir 2006).

101 *Ibid*.

other transformative use," and that fair use requires not that the work comment on the original, but only that it alter the underlying work with "new expression, meaning, or message" to the "reasonable observer."[102] The Ninth Circuit in *Seltzer v. Green Day* (2013) held that the rock band's use of the illustrator and street artist's screaming face icon was fair use because it constituted new creative expression and content about religion, even though it made few physical changes to the original and did not comment on it.[103] Yet the right to parody has been a significant part of the American free speech tradition,[104] and parody should have a place in copyright law, so as to affirm the speech rights of the public and to remind users that expressing oneself through parodies is not the same as appropriating the copyrighted works for other purposes. Practically speaking, the parody tradition should be retained also because courts have continued to reference the *Campbell* decision in recent years.[105] For example, in *Bourne Co. v. Twentieth Century Fox Film Corp.* (2009), the District Court for the Southern District of New York held that the defendants' song, intended in part to poke fun at Walt Disney's purported anti-Semitism, was fair use.[106] In *Henley v. DeVore* (2010), the court held that the senatorial candidate's use of the author's songs in his campaign to target the author's viewpoints more generally was not fair use because it created satire, not parody.[107] Should courts follow the *Campbell* Court's definition of parody, rather than the liberalized fair use standard created by these recent decisions, they would likely hold that a work that does not comment on the original is not fair use.

Indeed, numerous scholars have pointed out that the *Campbell* Court's distinction between "parody" and "satire," while not theoretically impossible, is practically unfeasible. In addition, Judges, who generally are not well-equipped to make any artistic distinction between different genres, should not be given the discretion to do so. Bruce P. Keller and Rebecca Tushnet, for instance, remind their readers that distinguishing "parody" from "satire" requires precisely the kind of aesthetic and literary judgment that copyright law generally instructs courts not to pass.[108] Sherri L. Burr proposes a more workable

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[102] *Cariou v Prince,* 714 F 3d 694 (2d Cir 2013) at 705 - 706.

[103] *Seltzer v Green Day*, 725 F 3d 1170 (9th Cir 2013)

[104] Indeed, parodies are commonly found in American culture and society, a fact that both manifests and reinforces the right to create parodies in the U.S. One example is nineteenth-century poet Edgar Allen Poe, who parodied earlier genres and authors, and whose works became the popular targets of imitation by later writers. Harry Ransom Centre, University of Texas at Austin, "Parodying Poe", online: <http://www.hrc.utexas.edu/educator/modules/poe/parodying/>. As a literary and cultural form, parody was also encouraged in the early twentieth century by such periodicals as *The New Yorker*. Kathleen Kuiper, *Prose: Literary Terms and Concepts* (Rosen Education Service, 2012) at 178. Over the past few decades, the parodic form has been employed in postmodern American literature to question and problematize the realist/modernist notions of the self and reality, and frequently used as a political counter-discourse by African American writers. Gene Andrew Jarrett, *Representing the Race: A New Political History of African American Literature* (New York: New York University Press, 2011) at 127-159.

[105] Some other examples include *Mattel, Inc v Walking Mountain Productions*, where the court held that the artist's producing and distributing photographs containing the famous "Barbie" doll was fair use, 353 F 3d 792 (9th Cir 2003); and *Burnett v Twentieth Century Fox Film Corp*, 491 F Supp 2d 962 (CD Cal 2007), where the court accepted the defendants' parody-of-the-author argument that their use of the author's character ridiculed the author's wholesome image and was fair use.

[106] *Bourne Co v Twentieth Century Fox Film Corp*, 602 F Supp 2d 499, 507 (SDNY 2009).

[107] *Henley v DeVore*, F Supp 2d 1144 (CD Cal 2010).

[108] Bruce P Keller & Rebecca Tushnet, "Even More Parodic than the Real Thing: Parody Lawsuits Revisited" (2004) 94 Trademark Rep 979 at 987-88 *citing Bleistein v Donaldson Lithographing Co,* 188 US 239, 300 (1903) ("It would be a

conception of parody that would relieve judges of the difficult task of making artistic judgments and comport with First Amendment principles. She argues that parody should be broadly defined as "a work created by one author or group of authors using the work of another with the intent to transform the original work," which "must either educate about, comment on, criticize, ridicule, or make humorous the original work or a social condition."[109] Burr's broad definition, which does not confine the parody's target to the original text, is very similar to the one in this paper.

**C. Substituting a Broad Parody Defence for the Parody/Satire Dichotomy**

The proposed parody definition, informed by the fundamental nature of the right to free speech, should replace the parody/satire dichotomy in American law because it would help to bring its copyright jurisprudence more in line with its free speech tradition by facilitating speech-friendly decisions. One decision that shows the potential adverse impact of a parody/satire dichotomy is *Suntrust Bank v. Houghton Mifflin* (2001), where the estate of Margaret Mitchell sued to enjoin publication of Alice Randall's *The Wind Done Gone* on the grounds that it constituted an unauthorized derivative work based on *Gone with the Wind*.[110] While the story of *Gone with the Wind* focuses on the life of a wealthy slave owner during the American Civil War, *The Wind Done Gone* retells the story from the point of view of the African-American slaves and mulattos during the same time period.[111] The District Court for the Northern District of Georgia initially enjoined publication.[112] It characterized the novel as a sequel or a satire, the overall purpose of which being to "provide a social commentary on the antebellum South."[113] Hence, the Court concluded that it was nothing more than an effort to free ride off of the copyrighted work.[114] The Eleventh Circuit, holding that *The Wind Done Gone* was protected by the fair use doctrine and the First Amendment, reversed the District Court's injunction.[115] It described Randall's novel, written from the perspective of a different narrator, as "a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *Gone with the Wind*."[116] Though making a speech-friendly decision, it pigeon-holed the work by labeling it as a parody and overlooking what would be known as its "satirical" elements.[117]

Because *The Wind Done Gone* combines both "parodic" and "satirical" elements, one may attribute the defendants' victory to the sound judgment by the Eleventh Circuit. Should the parody be redefined to include both "parodic" and "satirical" works, the correct verdict could have been reached more readily

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dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation ... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.") (Holmes, J).

109 Sherri L Burr, "Artistic Parody: A Theoretical Construct" (1996) 14 Cardozo J Arts & Ent L 65 at 75.

110 *Suntrust Bank*, 268 F 3d at 1259 [*Suntrust Bank*].

111 *Suntrust Bank v Houghton Mifflin, Co*, 136 F. Supp 2d 1357, 1367 (ND Ga 2001), *vacated*, 268 F 3d 1257 (11th Cir 2001).

112 *Ibid* at 1385.

113 *Ibid* at 1378.

114 *Ibid.*

115 *Suntrust Bank*, *supra* note 109 at 1277.

116 *Ibid* at 1296.

117 See *ibid* at 1269.

and predictably. Rather than relying exclusively on how Randall's work targeted slavery and racism in *Gone with the Wind*, the Court would have taken a more holistic view towards its commentaries on these issues both within and outside the original text. Once the Court had decided that the new work was transformative enough to fall within a broad parody definition, it likely would have put much less weight on, or even ignored completely, the ill-defined third factor.[118] Instead, it could have moved quickly on to the fourth prong of the test to look at whether this parody would supplant the market demand for the original or its licensed derivatives. Because plaintiffs failed to show sufficient evidence on market substitution,[119] the Court would have asked whether it was likely for Suntrust Bank to license a work similar to Randall's, which criticizes the romanticized portrait in Mitchell's original or, more broadly, such issues as racism. The answer would have been no.

A decision that more directly shows the adverse impact of the parody/satire dichotomy is *Salinger v. Colting*. This lawsuit originated from Swedish American author Fredrik Colting's allegedly unauthorized sequel of J.D. Salinger's only novel *The Catcher in the Rye*, which Colting wrote under the pseudonym John David California. Colting's work describes the adventures of a 76-year-old Holden Caulfield (thinly disguised as "Mr. C"), including his encounter with Salinger, which has been transformed into a character in the book.[120] Salinger sought an injunction restraining publication of the new work on the grounds that it infringed his copyright. The defendant objected, claiming fair use and First Amendment protection. The District Court of the Southern District of New York issued an injunction to enjoin the publication and distribution of the book after finding Salinger was likely to prevail on the merits of the case.[121] On appeal, the Second Circuit affirmed.[122]

Here, the District Court's finding that the disputed work did not fall within a narrow parody definition played a key role in its holding against the defendants, such that other factors became unimportant. It rejected defendants' claims that the new work was a parody of Caulfield and Salinger and concluded that such contentions were "post-hoc rationalizations."[123] In particular, the narrow definition of parody, namely that it must target the original novel and its characters, made the Court reject the defendants' argument that the book draws a parody of Salinger's reclusive nature and his alleged desire to exercise "iron-clad control over his intellectual property."[124] It also held that defendants had taken well more from *Catcher,* in both substance and style, than was necessary for the alleged transformative purpose of

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118 The Eleventh Circuit could not make a conclusion on whether Randall had taken too much from Mitchell's novel in the course of writing her parody. It noted that very little reference was required to conjure up the original, and by taking whole scenes, characters, and even copying some text verbatim, Randall had seemingly taken more than necessary to write her parody. However, quoting language from *Campbell*, the Court noted that a parodist must be able to conjure up at least enough of the original to make the objects of critical wit recognizable, which would leave open the possibility that Randall could still take more than the bare minimum necessary to create her parody and still be within the bounds of fair use. *Suntrust Bank*, supra note 109 at 1271-1274.

119 *Ibid.* at 1275, 1281-1282.

120 Amy Lai, "The Death of the Author: Reconceptualizing 60 Years: Coming Through the Rye as Metafiction" (2010) 15 IPL Bull 9 at 25-27; analysis based upon John David California, *60 Years Later: Coming Through the Rye* (Windupbird, 2009).

121 *Salinger v Colting*, 641 F Supp 2d 250, 254 (SDNY 2009).

122 *Salinger v Colting*, 607 F 3d 68, 83-84 (2d Cir 2010).

123 *Ibid* at 258.

124 *Ibid* at 261.

criticizing Salinger and his attitudes and behaviour.[125] Thereafter, the Court relied on a simplistic argument that the new book, which was sold for profit, served a commercial purpose, which weighed against a finding of fair use.[126] In an equally simplistic manner, it held that publishing the new work could substantially harm the market for a *Catcher* sequel, but without taking into account the unlikelihood of this market—that Salinger had categorically refused to publish anything for the last half century of his life and had never showed any interest in publishing or licensing a sequel to his work so as to participate in any potential derivative market.[127]

If the Court had adopted a broad definition of parody, it would have had to recognize the new work as a parody. Further, the Court, in full appreciation of the transformativeness of the new work, which targeted both the protagonist and the author-turned-character, would have more readily concluded that it had not taken more from *Catcher* in both substance and style than was necessary for its transformative purpose of commenting on both the protagonist and Salinger. Most importantly, it would have conducted a more careful inquiry than it did, by asking whether the new work would likely compete in the market with *Catcher* and its authorized licensees. Because Salinger had never shown any interest in publishing or licensing a sequel to his work so as to participate in any potential derivative market, the answer could only have been negative.

## VI. THE POTENTIAL PARODY/SATIRE DICHOTOMY IN CANADIAN COPYRIGHT LAW

As in the U.S., freedom of expression in Canada, upheld as a central value of liberal democracy, has a natural law foundation. Under section 2(b) of the *Canadian Charter of Rights and Freedoms* (1982) (*Charter*), which applies to both the national and provincial governments, everyone has the fundamental freedoms of "thought, belief, opinion and expression, including freedom of the press and other media of communication."[128] Other related freedoms just as fundamental are "freedom of conscience and religion," "freedom of peaceful assembly," and "freedom of association."[129] The influences of natural law on this freedom are apparent in both the *Charter* and in decisions by the Supreme Court of Canada. The Preamble of the *Charter* states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law," while the *Charter* was inspired by international human rights documents such as the Universal Declaration of Human Rights.[130] Like Locke and Rawls, the SCC justified the protection of freedom of expression by describing it as an essential component of democratic self-government.[131] In

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125 *Ibid* at 263-67.

126 *Ibid* at 267-68.

127 John Tehranian, "Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality," in Matthew David & Debora Halbert, eds, *The Sage Handbook of Intellectual Property* (Sage, 2014) 12, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462029>.

128 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s 2b.

129 *Ibid*, s. 2(a)(c)(d).

130 Chief Justice Dickson, in *Reference Re Public Service Employees Relations Act (Alberta)*, commented that international instruments should be persuasive sources for interpretation and observed that the "Charter conforms to the spirit of the contemporary international human rights movement." [1987] 38 DLR (4th) 161, 182 (SCC).

131 In *RWDSU v Dolphin Delivery Ltd* Justice McIntyre, writing for the majority, held that "Representative democracy…which is in great part the product of free expression and discussion of varying ideas, depends upon its

addition, its endorsement of "the pursuit of truth," "self-fulfillment and human flourishing" as important social values that justify the protection of freedom of expression[132] are reminiscent of Locke and Kant. Historically, Canadian copyright statutes and courts have given strong emphases to authors/owners' rights. Pursuant to the *Copyright Act 1921*,[133] copyright in Canada was defined as "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof."[134] Its section 16(1)(i), which duplicated section 2(1)(i) of the *Copyright Act 1911* of the United Kingdom, provided that "[a]ny fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" shall not constitute an infringement of copyright.[135] The fair dealing provisions of the Copyright Act 1997, encoded in its section 29-29.2, only provide exceptions for the purposes of research, private study, criticism, review, and news reporting.[136] It was the Copyright Modernization Act, 2012 that first introduced "parody" and "satire" as fair dealing categories.[137]

Not only did Canada's previous copyright statutes fail to provide for a parody exception, but Canadian courts did not recognize parody to be a defence to copyright infringement under these statutes. In 1997, the Federal Court addressed the issue of whether the fair dealing defence protects parody in *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)*. Here, a union organizing campaign at CGEM Michelin Canada's Nova Scotia plants distributed leaflets parodying CGEM Michelin's corporate logo in the form of the Bibendum figure.[138] When the plaintiff sued CAW for copyright infringement and trademark infringement, CAW argued that their version of Bibendum was a parody. Justice Teitelbaum nevertheless rejected the union's argument as a "radical interpretation" of the Copyright Act, which would be "creating a new exception to…copyright infringement, a step that only Parliament [has] the jurisdiction to do."[139] He also held that specific provisions of the *Copyright Act* did not infringe the right to freedom of expression as protected under the *Charter*, and that these provisions could be justified under section 1 of the *Charter* even if they did.[140]

Yet the utilitarian aspects of copyright have been given more attention in recent years. In 2002 and 2004, the SCC handed down two landmark decisions that affirmed the limited nature of authors' rights in their works, which need to be balanced against the public's interests in using them. The SCC in *Galerie d'Art du Petit Champlain Inc. et al. v. Théberge*, in interpreting the meaning of "reproduction" within the

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maintenance and protection." and "The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy." [1986] 33 DLR (4th) 174, 176 (SCC) para 12 and para 14.

132 See the majority opinion in *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 25 CPR (3d) 417 (SCC).

133 The first *Canadian Copyright Act, 1868*, came into force after Confederation in 1867.

134 *The Copyright Act*, SC 1921, C-24, s 3(1).

135 *Ibid* s 16(1)(i).

136 *The Copyright Act*, SC 1997, C-24, s 29-29.2.

137 *Copyright Modernization Act*, *supra* note 2, s 29.

138 *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, (1996) 71 CPR (3d) 348, 372 [*Michelin*].

139 *Ibid* at 377, 381.

140 *Ibid* at 401-03.

*Copyright Act*, held that it is important to recognize the creator's rights while "giving due weight to their limited nature."[141] Therefore, "[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[142] In *CCH Canadian Ltd v Law Society of Upper Canada (CCH et al.)* (2004), the SCC dramatically shifted the way that copyright defences should be interpreted. Prior to this case, defences to copyright infringement, fair dealing included, were seen as limitations on the copyright holder's exclusive rights and generally interpreted restrictively. Here, Chief Justice McLachlin emphasized the importance of balancing "the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[143] She also clarified that "fair dealing" does not provide "simply a defense" to copyright infringement which removes liability, but defines the outer boundaries of copyright and is a "user right."[144]

Despite these holdings, a 2008 decision in British Columbia shows the pervasive influence of *Michelin*. In *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.* (2008), a media company brought an action against defendants for trademark infringement, and copyright infringement after they had created a parody edition of *Vancouver Sun*, a newspaper owned by the company, and dropped copies of the "fake Sun" in *Vancouver Sun* vending machines.[145] The plaintiff motioned to strike paragraphs from the defendant's statement of defence arguing that parody is a defence to copyright infringement.[146] Master Donaldson allowed the motion, citing Justice Teitelbaum's opinion in *Michelin* that parody is not a fair dealing exception to infringement and does not constitute a defence.[147]

### A. How Canadian Courts May Interpret the Parody and Satire Exceptions

Under the *Copyright Modernization Act*, "[F]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright", as long as it is "fair."[148] Neither the previous nor the new copyright statute defines what is "fair." According to the SSC in *CCH et al.*, whether a dealing is fair is a question of fact. The Court thus identified six non-exhaustive factors to determine whether a dealing is fair, which are: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.[149] Doug Murray predicts that courts will provide "satire" a sufficiently broad interpretation to include those works that may not be considered fair use by American courts.[150] Michael Geist feels less uncertain about this.

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141 *Galerie d'Art du Petit Champlain Inc et al v Théberge* [2002] 17 CPR (4th) 161 at para, 176 (SCC) [*Théberge*].
142 *Ibid.*
143 *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339, 349, 355, 356 [CCH].
144 *Ibid* at 24.
145 *Canwest Mediaworks Publications Inc v Horizon Publications Ltd*, [2008] BCSC 1609 at para 1-7 [*Canwest*].
146 *Ibid* at para 7.
147 *Ibid* at para 13-15.
148 *Copyright Modernization Act*, *supra* note 2, s 29.
149 *CCH*, *supra* note 143 at 26-29.
150 Doug Murray, "The Funny Thing About Satire, Part II – Changes to Canadian Copyright**",** *Broadcaster Magazine* (October 2013), online: <http://www.broadcastermagazine.com/broadcasting/the-funny-thing-about-satire-part-ii-changes-to-canadian-copyright/1002717448/>.

He predicts that as the number of fair dealing purposes has grown, the first stage test should be very easy to meet.[151] However, even though a broader range of activities will be captured by the enumerated fair dealing purposes, a far more rigorous second-stage fairness assessment means that not everything that falls into these purposes will be allowed under the law.[152]

As "parody" and "satire" are not defined in the statute, Canadian courts will likely look to other jurisprudences for guidance. In fact, in the era of globalization, national governments frequently look to one another,[153] while judges cite or rely on foreign law and decisions for argumentation and for enriching their legal reasoning.[154] The U.S. Supreme Court, which almost never quotes other courts, is the most quoted among the foreign courts.[155] The drafters of the *Charter*, foreseeing that foreign sources would play a pivotal role in the development of its jurisprudence, included specific provisions dealing with international and foreign laws.[156] In addition, statistics show that Canadian judges have consistently displayed an interest in American law even if English law continues to be more influential.[157] Basil Markesinis and Jörg Fedtke note that regarding the reception of American law in Canada, there is "no slavish adoption of its solutions nor, indeed, the opposite, that is, a closing of the eyes towards the large

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151 In *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Bell Canada*, one of the five cases in the Copyright Pentalogy, the SCC held that the Court in *CCH et al.* created "a relatively low threshold for the first step" of the fair dealing analysis, so that "the analytical heavy-hitting is done in determining whether the dealing was fair" in the second step of the test. 2012 SCC 36 at para 27, 2 SCR 326. Geist describes other factors that have made the first stage test easy: the expansive approach articulated by the Courts; the SOCAN Court's expressly stating that the first part of the fair dealing test involves a low threshold; and its consideration of the copying purposes of not only the actual copier, but also the intended recipient. Michael Geist, "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use," in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 171 at 176-80.

152 *Ibid*.

153 See e.g. Ralf Michaels, "Globalization and Law: Law Beyond the State", in Reza Banakar & Max Travers, eds, *Law and Society Theory* (Hart Publishing, 2013) 300.

154 Marta Cartabia & Sabino Cassese, "How Judges Think in a Globalised World?: European and American Perspectives" (2013), Global Governance Programme of Robert Schuman Centre for Advanced Studies/European University Institute Policy Brief No 2314-9698 at 3.

155 *Ibid*.

156 Justice Kathryn Neilson, "'Judicial Globalization'—What Impact in Canada?" (Presentation delivered at the Hutcheon Dinner, 21 October 2009) at 12, 19, online: <https://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf>. Justice Neilson cited Justice Beverly McLachlin, current Chief Justice of the SCC, among other Justices: "This is the Canadian experience—one that has, from the beginning, accepted foreign law as capable of providing useful insights and perspectives. Foreign law is used selectively, where it is relevant to and useful to resolving disputes." *Ibid* at 20, citing Beverley McLachlin, "Canada and the United States: A Comparative View of the Use of Foreign Law" The American College of Trial Lawyers Northwest Regional Conference, Alberta (8 August 2009).

157 Statistics show that the SCC has cited American case law almost forty times as often as the US Supreme Court has cited Canadian case law. An analysis of the reserved decisions issued by the SCC since 2000 shows that "[o]ne in every five … uses American citations, and two-thirds of those (or one in seven) involve the use of one or more citations to the [United States Supreme Court]." Peter McCormick, *American Citations and the McLachlin Court: An Empirical Study* (2009) 47 Osgoode Hall LJ 83 at 93, online: <http://ohlj.ca/english/documents/0347_1_McCormick_PSS_090607.pdf>.

(and sometimes menacing) Southern neighbour, but an opportunity for a genuine dialogue in search for inspiration."[158]

Because English courts have not had a chance to interpret and apply the parody exception added to its *Copyright, Designs and Patents Act* in 2014, and this statute does not contain a satire exception,[159] Canadian courts may turn to American courts for guidance. The SCC cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the "fundamental differences" in the respective legislative schemes.[160] Yet Canadian courts have referenced American case law either to clarify Canadian law or lend support to their arguments. One good example is found in *CCH et al.*, where the SCC drew references to Justice O'Connor's concern in *Feist Publications, Inc., v. Rural Telephone Service Co.*, a 1991 decision by the U.S. Supreme Court, according to which the "sweat of the brow" or "industriousness" standard of originality would violate the tenet of copyright law in protecting expressions but not ideas.[161] Although many Canadian courts have adopted a low standard of originality by requiring only "industriousness" on the part of the author, the SCC held that mere labour could not ground a finding of originality, and contributions in terms of skills and judgments are necessary for a work to be "original" enough for copyright protection.[162] In *Society of Composers, Authors and Music Publishers of Canada* (*SOCAN*) *v Bell Canada* (*Bell Canada*), the SCC made good use of the U.S. Supreme Court's decision in *Campbell* to reject SOCAN's argument that the definition of "research" should require the creation of something new. It pointed out that it was not clear whether transformative use was "absolutely necessary" even for a finding of fair use in American law.[163] Hence, the parody/satire dichotomy in American copyright law may exert an impact on Canadian courts' interpretations of parody and satire.

Besides American law, Canadian courts will likely reference dictionaries for the meanings of "parody" and "satire." Assuming that American law would not heavily influence Canadian courts on this matter, Canadian courts may consider "satire" to be an inferior fair dealing category. As mentioned, the *Oxford English Dictionary* and the *American Heritage Dictionary* state that a parody imitates a prior work, but do not agree on whether a parody may only use the original and its characteristic style as the target, or may imitate the original in order to criticize or comment on something else. Regarding satire, although the *Campbell* Court's definitions and dichotomization of parody and satire are flawed, its description of "satire" as being able to "stand on its own two feet" is accurate, because satire does not depend upon a prior work for its existence. The *Oxford English Dictionary* defines satire as "a poem or a novel, film, or other work of art which uses humor, irony, exaggeration, or ridicule to expose and criticize prevailing immorality or foolishness, especially as a form of social or political commentary."[164] While literary scholar Charles A. Knight, in *The Literature of Satire*, describes the tendency of satires to parody or imitate

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158 Sir Basil Markesinis & Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiratio*n? (London: University College London, 2006) at 84-85.

159 See *Copyright, Designs and Patents Act* 1988, C-48, s 30A.

160 *Compo Co v Blue Crest Music Inc* [1980] 1 SCR 357, 367.

161 *CCH*, *supra* note 143 at 351-52.

162 *Ibid* at 352.

163 SOCAN v Bell Canada [2012] 102 CPR (4th) 249 - 250 (SCC), [*Bell*] citing *Campbell*, *supra* note 82.

164 *Oxford English Dictionary*, *sub verbo* "Satire", online: <http://www.oed.com/search?searchType=dictionary&q=satire&_searchBtn=Search>.

other genres or literary models, leading to the overlapping of forms, imitation is not an essential characteristic of satires.[165] Therefore, categorizing works as "satires" may make their dealings of the original works appear less fair than if they are categorized as "parodies."

Works falling within either "parody" or "satire" category will pass the first-step purpose analysis. Yet for two reasons, the potential parody/satire dichotomy means that "satires" may not pass the second-step fairness assessment even if they would not otherwise displace the underlying works or harm their authors. In both *Théberge* and *CCH Canadian Ltd.*, the SCC affirmed the limited nature of authors' rights.[166] Nonetheless, a propertized conception of fair dealing continued to run through many parody cases. The *Michelin* Court, holding that the plaintiff's "private property" could not be used as "a *location* or forum for expression" by the defendant, employed a physical analogue to obviate the differences between physical property and intellectual property.[167] In fact, the propertized conception of copyright was by no means adopted by the *Michelin* Court alone. Semblances of this physical analogue can be found in earlier parody cases. The Court in *Ludlow Music Inc. v. Canint Music Corp.* (1967) issued an injunction against defendants' parodic song to protect plaintiff's "property rights against encroachment" by the song.[168] The Court in *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd. et al* (1982) held that the "intruding" words of defendants' song caused "irreparable harm" to the plaintiff.[169] These physical analogues led up to the *Michelin* Court's holding. Despite both *Théberge* and *CCH Canadian Ltd*., *Canwest Mediaworks Publications Inc*., a more recent case, showed the pervasive influence of *Michelin*, by relying on Justice Teitelbaum's opinion to hold that parody does not constitute a defence to copyright infringement.[170] Furthermore, even assuming that this recent parody case is a mere outlier, and courts will no longer adhere to a propertized conception of copyright, the fact that satire need not imitate a preexisting work may still lead Canadian courts to consider a dealing in the form of satire to be less fair than parody. Hence, courts may use the second-stage fairness assessment to hold that the "satires" are not fair dealings of the original works. Four of the fair dealing factors mentioned in *CCH Canadian Ltd.* are particularly important in illuminating the adverse impacts of a satire category.[171] For the purpose of the dealing, courts will "make an objective assessment of the user/defendant's real purpose or motive" in using the copyrighted work.[172] "Research done for commercial purposes," the SCC stated, "may not be as fair as research done for charitable purposes."[173] On the amount of the dealing, the quantity of the work taken "will not be determinative of fairness, but it can help in the determination."[174] In *Bell Canada* and *Alberta* (*Minister of Education*) *v. Canadian Copyright Licensing Agency* (*Access Copyright*), the SCC assessed

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165 Charles A. Knight, *The Literature of Satire* (Cambridge: Cambridge University Press, 2004) at 207.
166 *Théberge*, *supra* note 141 at 176; *CCH*, *supra* note 143 at 25.
167 *Michelin*, *supra* note 138 at 391.
168 *Ludlow Music Inc.*, 51 CPR at 301 [*Ludlow*].
169 *ATV Music*, 65 CPR (2d) at 114.
170 *Canwest*, *supra* note 145 at paras. 13—14.
171 The four factors studied in this paragraph are the ones identified as useful to highlighting the shortcomings of a satire category and the necessity for replacing parody and satire categories by a broad parody category. The character of the dealing and the nature of the work factors are not useful in fleshing out the adverse effect of categorizing a work as satire.
172 *CCH*, *supra* note 143 at 27.
173 *Ibid.*
174 *Ibid.*

the proportions of the originals copied in relation to the whole works.[175] Considering the alternatives to the dealing, courts will determine whether the use of the originals are "reasonably necessary" to achieve the purpose of the satire, and whether there was an "equally effective" alternative as opposed to simply another alternative.[176] Finally, concerning the effect of the dealing on the work, courts will consider whether the dealing will compete with the work.[177] The SCC emphasized that "it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair."[178]

Even assuming that the propertized conception of fair dealing, considered to have informed the *Campbell* decision, now has minimal influence on Canadian courts, the fact that satires need not rely on the imitation of pre-exsiting works may still persuade courts to consider fair dealings in the form of "satire" as unfair. On the first factor, although courts will find that fair dealing for the purpose of satire is the "real motive," the commercial nature of some satires may lead courts to hold that the creators are riding the coattails of the originals, thus tipping the scales towards finding that their dealings are unfair.[179] On the second factor, courts may be influenced by the argument in *Campbell* that the satirical nature of the works—that they target something other than the originals—do not justify extensive copying of the originals.[180] On the third factor, courts may cite *Campbell* to hold that the uses of the originals are not "reasonably necessary" because satire can "stand on its own two feet" and other alternatives would be "equally effective."[181] Therefore, even if courts find that the satires will not likely compete with the original works, the other factors may lead courts to hold that their dealings are unfair.

Here, one should also note that the broadened fair dealing in *Bell Canada* and *Alberta* (*Minister of Education*), two cases of the Copyright Pentalogy of 2012, may not bring any advantages to parodists. In *Bell Canada*, the SCC determined that online music service providers allowing consumers to listen to free 30–90 second previews for musical works before making purchases constitutes fair dealing under the *Copyright Act*.[182] Justice Abella explained that the decision was based upon the principle of technological neutrality, which "seeks to have the *Copyright Act* applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication."[183] If anything, advances in technology have arguably facilitated access to a greater pool of works from which parodists could choose, and the increased availability of alternatives could weaken the fair dealing defence by making the parodying of copyrighted works less justifiable. In *Alberta (Minister of Education)*, the SCC determined that it was practically unrealistic for schools to purchase multiple copies of original textbooks, hence reasonable for them to copy excerpts of textbooks to the students. It may be far more difficult for parodists to prove that

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175 *Bell*, *supra* note 163; *Alberta* (*Minister of Education*), 102 CPR (4th) 255, 272—73.
176 *CCH*, *supra* note 143 at 28.
177 *Ibid*.
178 *Ibid.*
179 See *CCH, supra* note 143 at 28.
180 See Campbell *supra* note 82 at 580—81; Salinger v Colting, 641 F Supp. 2d 250, 263-267 (SDNY 2009).
181 See *Campbell*, *supra* note 82 at 580—81; *CCH*, *supra* note 143 at 28.
182 *Ibid* at 245.
183 *Bell*, *supra* note 163 at 253; Carys J Craig, Technological Neutrality: (Pre)Serving the Purposes of Copyright Law, in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 282 at 282.

they have had no reasonable available alternatives if the works they parodied are not even the targets of their criticisms or commentaries.

**B. *United Airlines, Inc. v. Cooperstock***

Interestingly enough, the Federal Court provided a broad definition of "parody" in *United Airlines, Inc. v. Cooperstock* (2017), the first decision to consider the scope of the "parody" category of fair dealing since the legislative amendments in 2012. In 1997, Jeremy Cooperstock registered the domain name "UNTIED.com" to set up a parody of the official website of United Airlines after the airline company disregarded his serious, polite complaint about its services.[184] Apart from mocking the design and logo on United's actual website, Cooperstock's work reflected public opinions about the company through its complaints page.[185] In 2012, United brought proceedings against Cooperstock in the Superior Court of Quebec and the Federal Court of Canada, the former petitioning to have some senior airline employees' contact information removed from his parody,[186] and the latter alleging copyright and trademark infringements.[187] Cooperstock's motions to dismiss the application for an injunction by United were denied by the Superior Court in 2014 and 2016, and the Court of Appeal of Quebec upheld the injunction in early 2017.[188] On June 23, 2017, the Federal Court ruled that the parody website infringed United's copyright and trademarks.[189]

The Federal Court, in seeking to find the meaning of "parody" in Canadian copyright law, determined that the words of the legislation must be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[190] It then referenced *CCH et al.*, in which the SCC emphasized the importance to balance the rights of authors with those of users and the definition of parody by the *Concise Canadian Oxford Dictionary*.[191] It also drew upon the *Campbell* Court's narrow definition of parody, emphasizing the need to use it "cautiously considering the differences between fair use in the United States and fair dealing in Canada."[192] It determined that the definition of parody used by the European Court of Justice in *Deckmyn v Vandersteen* (2014) "is consistent with the ordinary meaning of the term, the purpose and scheme of the fair dealing provisions in the *Copyright Act*, and the intention of Parliament."[193] Hence, it held that parody should

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184 Ellen Roseman, "United Airlines Fights Legal Battle with Untied Website", *The Toronto Star* (30 November 2012), online: <https://www.thestar.com/business/personal_finance/spending_saving/2012/11/30/united_airlines_fights_legal_battle_with_untied_website.html>.

185 *Ibid.*

186 *United Airlines Inc v Cooperstock* [2014] 2014 QCCS 2430 (QCCS); *United Airlines Inc v Cooperstock*, 2016 QCCS 4645 (QCCS 2016), *aff'd* [2017] 2017 QCCA 44 (QCCA).

187 *United Airlines Inc v Cooperstock* [2017] 147 CPR (4th) 251 (FC) [*Cooperstock*, Federal Court].

188 *Cooperstock v United Airlines Inc* [2017] 2017 QCCA 44 (QCCA).

189 *Cooperstock*, Federal Court, *supra* note 186 at 295.

190 *Ibid.* at 285.

191 *Ibid.* at 284—85, 286, 288—93.

192 *Ibid*. at 287.

193 *Ibid.* at 288.

have two basic elements: "the evocation of an existing work while exhibiting noticeable differences" and "the expression of mockery or humour."[194] Phelan J. contended that:

> In addition, in my view, parody does not require that the expression of mockery or humour to be directed at the exact thing being parodied. It is possible, for example, for a parody to evoke a work such as a logo while expressing mockery of the source company, or to evoke a well-known song while expressing mockery of another entity entirely.[195]

Although the *Cooperstock* Court's definition of parody will very likely be followed by other judges of the Federal Court, it may get appealed and/or not be followed by other courts in the future. Rights holders may appeal the Federal Court's decision, including its definition of "parody," by bringing it to the Federal Court of Appeal. In such scenarios, the Federal Court of Appeal may look at the definitions of parody in different jurisdictions to determine whether to narrow the scope of the "parody" exception. Should it adopt a narrower definition, it will examine whether the allegedly infringing works still pass both stages of the test and are fair dealings of the works parodied. In addition, decisions by the Federal Court are not binding on provincial and territorial courts. Hence, even though these courts will reference the *Cooperstock* decision, they may nonetheless choose to adopt different definitions, and may determine that parody must direct its part of its criticism or commentary at the original work.

One must also note that whether or not the law requires the expression of mockery or humor to be directed at the parodied work would hardly have changed the court's determination of whether Cooperstock's parody website, which targeted United Airlines, constituted parody under the law. In fact, the broad definition adopted by the Federal Court makes the "satire" exception redundant. In future cases, if the parodic works target something other than the originals or what they represent, the Court may reconsider whether to adopt an inclusive definition of parody and may categorize the works as "satires." Even if the future Federal Court followed the definition in *Cooperstock* stating that parody need not target "the *exact* thing being parodied" and can express mockery of "another entity entirely," the ambiguity in the definition means that it might not prevent the Court from requiring that the parody's target and the parodied work be connected. *Ludlow Music Inc.*, in which defendants parodied "This Land is Your Land," an American song, to describe Canadian people is an example of how a song targeting something else can still have a connection to the original. Although this song targeted Canadian people and not the Americans, the "exact thing being parodied," its mockery of Canada's usurpation of the Aboriginal peoples' lands[196] may be seen as a subtle criticism of the colonialist subtext in the American version

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194 *Ibid.*

195 *Ibid.*

196 "The early French had great persistence,
Despite the Indians' combined resistance;
With righteous feeling, they started stealing,
This land that's made for you and me....
This land is your land, this land is my land,
This voyageur and fleur-de-lis-land;
So populate it, then separate it,
This land is made for you and me.

(treating "this land" that originally belonged to the Indian Americans as "your"—the white settlers'—land). For other examples, whether this connection exists might be difficult to judge. Where the Court perceives no connection, it may categorize the work as "satire."

**C. When a Broad Parody Exception Would Likely Make a Difference**

A broad parody fair dealing exception should substitute for both the "parody" and "satire" exceptions under the current law. This broad category, modelled on the one proposed in Section III and encompassing works that target the originals and those that criticize or comment on something else, will serve to reduce any influence of a propertized conception of fair dealing and possible biases against "satires," and further align the Canadian copyright jurisprudence with its freedom of expression jurisprudence. As a result, courts would be less inclined to hold that parodies are unfair if they otherwise would not compete with the originals. Hence, a reformed exception will more likely protect the freedom of expression of users and properly balance the interests of authors and rights holders with those of users.

The current parody and satire exceptions will not likely lead to a suppression of freedom of expression in cases where the originals serve as clear targets of commentaries or criticisms. One example is *Michelin*, in which CAW's parody appropriated the entire Michelin Tire Man or the Bibendum figure in the CGEM Michelin's corporate logo. After determining that the new work, which criticized the company represented by the logo, served the purpose of parody, the court would have determined that the parody did not appropriate too much of the original, because the Bibendum figure was necessary for CAW to express its criticism, and it formed only part of the new work, which contained not only the Bibendum figure but also two Michelin workers. Regarding the alternatives to the dealing factor, the court would have ruled that the Bibendum figure was "reasonably necessary" to achieve the purpose of the parody that had the company as its target of criticism. Finally, on the effect of the dealing on the original work, the court would have found that the parody, though criticizing the company, did not serve to compete with or replace its services.

In some cases, the more inclusive parody exception would serve to promote freedom of expression by reducing any possible influences of the propertized conception of fair dealing on courts' decisions and/or potential biases against "satires." Good examples would be *Ludlow Music Inc.*, in which defendants parodied "This Land is Your Land" to create a new song about Canadian people,[197] and *ATV Music Publishing of Canada Ltd.*, in which defendants parodied the Beatles' song "Revolution" and turned it into a "commentary on the events preceding the proclamation of the Constitution Act" of Canada.[198] As discussed, the former arguably mocked the American version's colonialist assumptions as much as it critiqued Canada of its treatment of First Nations peoples. The latter, which directly commented on Canadian affairs, can be interpreted as an oblique critique of America. If courts have found that they do not clearly target the originals and put them in the "satire" category, they may have easily used the

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Then came the English and assorted henchmen,
Who started fighting with all those Frenchmen;
All through this bother, they told each other,
This land is made for you and me...." *Ludlow*, *supra* note 168 at 295.

197 *Ibid* at 290-291.

198 Graham Reynolds, "Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada", (2009) 33:2 Man LJ 243 at 248 citing James Zegers, "Parody and Fair Use in Canada After Campbell v. Acuff - Rose" (1994) 11 CIPR 205 at 209.

alternatives to the dealing factor to tip the scale against findings of fair dealings. In addition, considering that both songs had used the entire tunes of the originals to serve both commercial and commentary purposes, the court may have held that they were not fair dealings. Contrarily, if a broad parody exception replaces the parody and satire exceptions, the new songs would have fallen squarely within the "parody" category. Courts would more likely have held that these new works, though commercial in nature, served the purpose of parody by providing commentaries. Whether or not other reasonable alternatives may have been available to the parodists, their works would not likely harm their markets. Hence, courts would more likely have considered these "parodies" as fair dealings than if they had been categorized as "satires."

**D. The Misapplication of Two Fairness Factors in *Cooperstock***

The broad parody exception will not prevent courts from holding that parodies are unfair dealings even if they would not compete with the parodied originals or the services they represent. This is indicated by the Federal Court's decision that Cooperstock's website, which it categorized as "parody," infringed the copyright of the airline company. Nonetheless, the Court's erroneous decision did not diminish the superiority of a broad parody exception, because the decision was caused by its misapplication of two important factors in the second stage fairness analysis.

On the purpose of the dealing factor, the Court determined that Cooperstock's "real purpose or motive" was to "embarrass," "punish," even "defame" United Airlines for its perceived wrongdoings rather than to engage in parody, because his website "extended too far" the humor and mockery required of parody.[199] Yet Cooperstock's transposition of two of the letters in the word "United" to make "Untied" the title of his parody website, which suggests disorder and chaos in the company's services, presented sufficient evidence of his humorous intent to pass any "objective assessment" by the Court.[200] Regarding Cooperstock's "real purpose or motive," the Court did not specify at what point the element of humor or mockery is "extended too far" so that what was humorous became embarrassing or punitive.[201] Arguably, intents for humor or mockery often go along with other intents in parodies, and they do not cancel out one another. Hence, any embarrassment or even punishment caused by Cooperstock's parody website did not make his humorous or mockery intent or motive less real.

Having wrongly determined that Cooperstock's real purpose or intent was to embarrass, punish, even to defame the airline company, the Court continued to misapply the effects of the dealing factor, holding that Cooperstock's substantial copying of the original website and logo had a harmful impact on United Airlines by defaming it.[202] As the Court argued, the parody made customers believe that they were interacting with United Airlines when they were actually interacting with UNTIED.com, and that United Airlines was unprofessional or that it did not respond to complaints.[203] Admittedly, the parody, by invoking the original, may have caused slight confusion at first glance. Yet a reasonable person would soon notice that UNTIED.com was a complaints website that took the form of a parody upon finding, for

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199 *Cooperstock*, Federal Court, *supra* note 187 at 289.
200 See *ibid.*
201 See *ibid.*
202 See *ibid* at 292.
203 *Ibid.*

example, a "complaints database" and disclaimers indicating that it was not the website of United.[204] Regarding the question of whether the parody had any harmful impact on United's original website, the Federal Court should have followed *CCH Canadian Ltd.*, and asked: did the parody website harm United by competing with it in the airline services market?[205] Although UNTIED.com had been around for 20 years, it existed merely to mock and to criticize, rather than to compete.[206] If the Court had correctly applied these two factors in conducting the fair dealing analysis, then it would likely have held that it was fair dealing.

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The right to express oneself through parodies, therefore, is a natural right in both the freedom of expression and the copyright contexts. As this paper has argued, a broad legal definition of parody, which accommodates more speech and which encompasses works targeting the originals and those criticizing or commenting on something else, is preferable to a narrow one, as it would help to align the copyright jurisprudences of jurisdictions with their free speech traditions. The parody/satire dichotomy in American copyright law, which has tended to unfairly prejudice works falling in the "satire" category, should be replaced by a broadened parody defence that would guide courts to make fair, speech-friendly decisions. The "satire" exception newly added to Canadian copyright law may be interpreted as a category inferior to "parody," due to the possible influences of American law, the dictionary meaning of the word "satire," and the structure of the fair dealing analysis. Hence, a broad parody exception replacing both parody and satire categories would help to reduce any possible influence of a propertized notion of fair dealing and more properly balance the interests of rights owners with those of users.

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[204] *Ibid* at 270—71.
[205] See *CCH*, *supra* note 143 at 28.
[206] See *Cooperstock*, Federal Court, *supra* note 187 at 289.