Denver Journal of International Law & Policy

Volume 33
Number 2 *Spring*

Article 6

January 2005

Laugh, and the Whole World...Scowls at You: A Defense of the United States' Fair Use Exception for Parody under TRIPs

John C. Knapp

Laugh, and the Whole World...Scowls at You: A Defense of the United States' Fair Use Exception for Parody under TRIPs

Keywords
States, Music, Parody, Copyright

LAUGH, AND THE WHOLE WORLD . . . SCOWLS AT YOU?: A DEFENSE OF THE UNITED STATES' FAIR USE EXCEPTION FOR PARODY UNDER TRIPS

JOHN C. KNAPP*

INTRODUCTION

Though copyright protection in the United States is derived from the First Article of the Constitution and is governed by statutes enacted by Congress under that grant of power,[1] its limitations have more ambiguous origins. Often dichotomized as internal and external,[2] copyright limitations attempt to craft a compromise between the financial incentive to create, which is secured by granting authors the exclusive right to profit from their work, and the First Amendment free speech rights of others to comment on, disseminate, and otherwise use these copyrighted works.[3] Internal limitations, such as the idea-expression dichotomy and the requirement that works be original and in a fixed medium, derive from the Copyright Clause itself and define what can be protected.[4] External limitations, including those incorporated into copyright legislation, are imposed by other areas of law and policy and immunize from liability uses that would otherwise be considered infringements.[5]

---

* B.A., Loyola College in Maryland (1997); M.A. (Philosophy), Katholieke Universiteit Leuven (2001); J.D., Brooklyn Law School (2004). This Article was awarded first prize at Brooklyn Law School in the 65th Annual Nathan Burkan Memorial Copyright Competition sponsored by the American Society of Composers, Authors, and Publishers (ASCAP). The Author would like to extend special thanks to Professor Sammuel Murumba of Brooklyn Law School for his comments and suggestions on the research and drafting of this Article.

1. U.S. CONST. art. I, § 8, cl. 8; The Copyright Act, 17 U.S.C. § 101, *et seq.*

2. For a discussion of the "internal" and "external" restraints on copyright and their relation to the First Amendment, see generally Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

3. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). *See also* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192-93 (1970); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 240 (2001).

4. 17 U.S.C. § 102(b) (2004) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

5. *See* Michael J. Meurer, *Vertical Restraints and Intellectual Property Law: Beyond Antitrust*, 87 MINN. L. REV. 1871, 1911 n.232 (2003).

One such external limitation is the fair use doctrine. In the United States, fair use is attributed to free speech principles found in the First Amendment[6] and, despite its recent codification in the Copyright Act, remains a common law equitable doctrine that judges apply on a fact-specific, case-by-case basis.[7] Consequently, the types of uses protected are not specifically named or enumerated, but are instead determined by considering several factors. While some types of fair use are rather well recognized, others remain controversial.[8] Recently, the status of parody as a fair use has been the subject of much controversy, both domestically and abroad.[9]

The European Community ("EC") has, on at least two occasions, expressed concern that the United States' fair use doctrine immunizes from liability uses that unjustifiably infringe authors' rights.[10] The EC has specifically argued that the exception made for parodies under the fair use doctrine is not confined to "special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder,"[11] as required by international agreements on copyright law.[12] While the United States has defended the fair use doctrine and its protection of parodies as complying with such agreements, some commentators have noted that, in doing so, the United States has relied on a "less than accurate depiction of the fair use doctrine and how it operates in domestic courts."[13] Commentators have further concluded that the fair use

---

6. U.S. CONST. amend. I. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (holding that "copyright law contains built-in First Amendment accommodations," including the fair use doctrine). It should be noted that the fact that the fair use doctrine is said to derive from the First Amendment and stands as an external limitation to copyright throws into question the oft-quoted remark, questioned further *infra* at Part III, that copyright is the "engine of free speech." If this were really so, then all the free speech protection necessary would be built in to the Copyright Clause itself and fair use would be a superfluous doctrine. As this Article attempts to show, far from superfluous, fair use is indispensable.

7. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) (noting that "fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act" and further, that even after the passage of the 1976 Act, "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). *See also* Copyright Act, 17 U.S.C. § 107 (2004).

8. *See e.g.*, Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49, 51 (1993) ("Fair use has historically served as a flexible and adaptable mechanism for balancing the interests of copyright owners, their competitors or potential competitors, and the public to fulfill the larger purposes of copyright law which have traditionally been understood to be promoting the production and dissemination of knowledge.").

9. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 116-17 (2000).

10. *See* Council for TRIPs, Review of Legislation on Copyright and Related Rights – Replies to Questions Posed to the United States by Brazil, the European Communities and Their Member States, Australia and Korea, Oct. 30, 1996, WTO Doc. IP/Q/USA/1 [hereinafter Review of Legislation].

11. *Id.* § IV, Replies to Questions Posed by the European Communities and Their Member States, Question 1.

12. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods 33 I.L.M. 81, Dec. 15, 1993, art. 13 [hereinafter TRIPs].

13. Okediji, *supra* note 9, at 117.

protections afforded to parodies in the United States would not survive a direct challenge under Article 13 of the General Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs").[14]

This Article argues that while there is certainly some variance between the exceptions to copyright protection recognized in the United States and those recognized by the international community, the particular charges the EC has leveled at the United States are unwarranted and their concerns misplaced. This Article further argues that, at least as it has been enunciated by the United States Supreme Court ("Supreme Court"), the fair use doctrine regarding parodic uses does not conflict with the legitimate interests enshrined in TRIPs. What it does provide, and what may seem foreign to some in the international community, is traditional free speech protections. These protections prohibit copyright owners from removing from the public discourse speech that adversely affects the value of their property only to the extent that it is critical of that property. Such protection is necessary to ensure that the "marketplace of ideas" remains open and competitive, that copyright law continues to balance the financial incentives of authors to create and the rights of others to comment, and that copyright does not revert to its nefarious origins as a form of censorship.[15]

Part I will survey the current state of fair use in the United States, with particular attention to exceptions made for parodic works. Part II will explore the treatment of copyright exceptions under TRIPs. It will also review the specific criticisms the EC has raised concerning the United States' fair use doctrine, particularly with regard to parody, and evaluate the defenses the United States has offered in response. This section will also suggest that the United States' responses were unnecessarily evasive, and that the protection of parodic works could have been defended on the merits.

Part III will show that the use of copyright to "horizontally" censor works—that is, to remove from the public discourse works that are critical of the copyright holder's property—is not a "normal exploitation" and does not protect a "legitimate interest," as those terms are defined under TRIPs.[16] This argument will be further buttressed by reviewing two United States Court of Appeals copyright cases decided since the Supreme Court's most recent pronouncement on the status of parody under the fair use doctrine. Part IV will conclude by observing that recent developments in EC copyright law suggest that something like a free speech exception to copyright may be emerging. While it is too early to know what form such an exception will take, it would be surprising if it did not protect uses that harm the original only by criticizing it, just as the fair use doctrine in the United States does today.

---

14. *See, e.g.*, Okediji, *supra* note 9, at 117; Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1183 (2003).

15. Okediji, *supra* note 9, at 82.

16. *See* TRIPs, *supra* note 12, art. 13.

I. FAIR USE AND PARODY IN THE UNITED STATES

In *Campbell v. Acuff-Rose*, the Supreme Court was asked to determine whether a rap parody of Roy Orbison's song "Pretty Woman" was an infringement of the copyright in that song.[17] The defendants conceded that their use of the song was an infringement; however, they argued that the use was a parody and therefore, protected as a fair use of the original.[18] To decide if the rap version was in fact such a fair use, the Court looked to the four factors which the Copyright Act requires be considered in determining fair use.[19] However, the Court also made clear that these factors should not be treated as establishing bright-line rules; indeed, despite its codification in the Copyright Act, fair use essentially remains an equitable doctrine, informed by free speech principles and decided on a case-by-case basis.[20] Consequently, the Court emphatically rejected the analysis of the Court of Appeals for the Sixth Circuit, which had held that a finding under the first factor, ("purpose and character") that the use was commercial in nature was nearly dispositive in its determination that the parody was not a fair use.[21] The Court of Appeals relied on language in the Supreme Court's previous decision in *Sony Corp. of America v. Universal City Studios, Inc.*, indicating that "every commercial use of copyrighted material is presumptively . . . unfair . . . ."[22] Observing that such a presumption would "swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107" of the Copyright Act,[23] the Supreme Court reiterated that no such presumption was created by *Sony*; a work's commercial nature is only one element of the first factor inquiry into the use's purpose and character.[24]

The Court of Appeals' erroneous prioritization of the commercial nature inquiry also affected its analysis of the fourth statutory factor, "the effect of the use upon the potential market for or value of the copyrighted work."[25] The Court of Appeals relied on the Supreme Court's decision in *Harper & Row v. Nation Enterprises* to conclude that the fourth factor was "undoubtedly the single most important element of fair use."[26] The Court of Appeals went on to reason that because the use was wholly commercial, they could "presume that a likelihood of future harm to Acuff-Rose exist[ed]."[27]

---

17. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571-72 (1994).

18. *Id.* at 574.

19. 17 U.S.C. § 107 (2004) ("(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

20. *Acuff-Rose*, 510 U.S. at 577.

21. *Id.* at 584.

22. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 451 (1984).

23. *Acuff-Rose*, 510 U.S. at 584.

24. *Id.*

25. 17 U.S.C. § 107(4) (2004).

26. Acuff-Rose Music v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

27. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (citing Acuff-Rose Music v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992)).

The Supreme Court noted that the language from *Sony* on which the Court of Appeals relied concerned commercial uses that were *verbatim duplications* of the original.[28] In such circumstances, it is reasonable to presume that this duplicative use will act as a market replacement for the original, and thus will harm the market for the original. However, this is not the case where, as in *Acuff-Rose*, the use is transformative.[29] "The central purpose of [the first factor inquiry] is to see . . . whether the new work merely 'supersede[s] the objects . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[30] In the latter case, "the parody and the original usually serve different market functions," and so harm must be proven, not presumed.[31] The Court was clear that this does not mean that parody will never harm the market for the original (or, as is more likely, for derivative works); indeed, the Court remanded the case for further evidence to be heard specifically on whether the market for derivative works had been harmed by the parody.[32]

This distinction is extremely important for the present discussion. The Court's holding excluded from consideration under the fourth factor any harm to the market caused merely by the parodic work's critical nature. It likened such harm to that which might be inflicted by a scathing book review or other criticism of a work.[33] Indeed, the distinction between "potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism."[34] Such critical uses unquestionably fall under the fair use exception. To hold otherwise would be to allow copyright holders to use their property rights to quell criticism and unfavorable commentary about their works.

Equally important for this discussion is the Court's treatment of its previous determination in *Harper & Row* that the fourth factor was "undoubtedly the single most important element of fair use."[35] While the Court, in *Acuff-Rose*, quoted this language in its procedural history of the case,[36] it never evaluated this position in its specific discussion of the fourth factor.[37] This silence left open the question of whether the fourth factor actually took priority over the others. Commentary has suggested that the Court's analysis in *Acuff-Rose* actually elevated the first factor, the purpose and character of the use, over the others and diminished the importance of the fourth factor, the degree to which the use harms the market for

28. *Id.*

29. *Id.*

30. *Id.* at 579 (internal citations omitted).

31. *Id.* at 591 (citing Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act*, in ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 34, p. 23 (1987)).

32. *Id.* at 594.

33. *Id.* at 591-92.

34. *Id.* at 592.

35. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

36. Campbell v. Acuff-Rose, 510 U.S. 569, 574 (1994).

37. *Id.* at 590-94.

the original.[38] Evidence for this theory can be found in the degree to which the Court diminished the role of market harm, in the Court's insistence that this factor be considered along with and balanced against the other factors,[39] and the Court's treatment of the transformative nature of the use as counterbalancing the commercial nature of the use.[40] While it is true that the transformative nature of the use did affect the Court's determination that market harm needed to be proven, the claim that this elevated the first element above the others goes too far. Had the use been a verbatim commercial use, market harm would have been presumed, giving rise to the appearance that the fourth, not the first, factor had carried the day. Instead, it seems fair to say that no one of the factors enjoys dispositive or even controlling power in all cases. True to the Supreme Court's repeated insistence that fair use be determined on a "case-by-case" basis,[41] the factor that proves most important will depend on the type of use in question.

For parodic works, however, it does appear that the analysis will center on the fourth factor. If a parody usurps the market for the original or derivatives thereof, that parody is less likely to be deemed a fair use.[42] If the parody does not usurp the market, but harms the original only by lampooning it, the use will likely be considered fair. The failure to make this essential distinction is at the root of the EC's discontent with the United States' fair use exception for parodies; it is to this discontent that we now turn.[43]

II. THE INTERNATIONAL RECEPTION OF THE UNITED STATES FAIR USE DOCTRINE

Article 13 of TRIPs provides that "Members shall confine limitations or exceptions to exclusive rights to certain *special cases* which do not conflict with a *normal exploitation* of the work and do not unreasonably prejudice the *legitimate interests* of the right holder."[44] This provision has been construed to incorporate

38. *See generally* Elizabeth Troup Timkovich, *The New Significance of the Four Fair Use Factors as Applied to Parody: Interpreting the Court's Analysis in Campbell v. Acuff-Rose Music, Inc.*, 5 TUL. J. TECH. & INTELL. PROP. 61 (2003).

39. *Id.* at 69 (noting that the fourth factor "varies with the strength of the other factors").

40. *Acuff-Rose*, 510 U.S. at 591.

41. *Id.* at 581.

42. *Id.* at 592.

43. It should also be noted that the second factor, the nature of the work, is rarely given much attention, especially in parody cases, and is likewise largely ignored in the present Article. *See, e.g., Acuff-Rose*, 510 U.S. at 1175 (spending only one paragraph on the factor and noting that this factor is not likely to be much help in "separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."). *See also* Dr. Suess Enters., L.P. v. Penguin Books USA, Inc., 109 F. 3d 1394, 1402 (9th Cir. 1997) (analyzing the factor in only one paragraph and observing, "While this factor typically has not been terribly significant in the overall fair use balancing, the creativity, imagination and originality embodied in the [copyrighted work at issue] and its central character tilts the scales against fair use."). We will return to the decision in *Dr. Suess* below, *infra* Part III. On the other hand, the third factor, the "amount and substantiality of the portion used in relation to the copyrighted work as a whole," has played an important role in fair use decisions. However, it is also largely ignored in the present discussion, as it is subsumed in the discussion of market competition, i.e., whether the parody competes with the copyrighted work.

44. TRIPs, *supra* note 12, art. 13 (emphasis added).

and subsume the exceptions granted in the Berne Convention,[45] and therefore represents the controlling language for disputes regarding exceptions under international copyright law.[46] This discussion of the United States' fair use doctrine will, therefore, focus on U.S. conformity with these provisions.

There have been two major challenges to the United States' fair use doctrine under international copyright law. In 1996, the World Trade Organization ("WTO") submitted the copyright laws of the United States to a Review of Legislation on Copyright and Related Rights ("Review of Legislation") in order to ensure that they were compliant with TRIPs.[47] While many of the questions presented to the United States concerned recent amendments to the United States Copyright Act (the "Copyright Act") affecting the right of performance, the EC questioned how treatment of parody as a fair use exception to copyright (as the Supreme Court had done in *Acuff-Rose*) could be squared with Article 13 of TRIPs.[48] Then, in 2000, a Panel was convened by the Dispute Settlement Body of the WTO to hear a complaint brought by the EC against the United States regarding Section 106 of the Copyright Act.[49] While that Section does not address parody, the dispute did give the Panel the opportunity to interpret for the first time the terms of Article 13, which governs exceptions to copyright protection. The WTO Panel discussion will, therefore, be useful in predicting how such a panel would decide an outright challenge to the fair use exception for parody.

A. The Review of Legislation

While other nations posed questions regarding various aspects of recent amendments to the Copyright Act, the EC asked the United States how the fair use doctrine, codified at Section 107 of the Act, complies with the provisions of TRIPs Article 13, particularly with regard to "a 'parody' that diminishes the value of a work."[50] The EC's question seems to imply that *any* use that would diminish the value of the work for *any* reason would be impermissible under TRIPs. This, however, is not the case. Article 13 provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain *special cases* which do not conflict with a *normal exploitation* of the work and do not unreasonably prejudice the *legitimate interests* of the right holder."[51] Thus, there may be cases which do diminish the value of the work but which do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder. The specific meaning of the terms of Article 13, and how it would treat such cases, will be addressed below with respect to the Panel Report.

In response to the EC's question, the United States argued that fair use

45. WTO Dispute Panel Report on United States—Section 110(5) of the U.S. Copyright Act, WT/DS160/R (June 15, 2000), paras. 6.92-6.96, *available at* http://www.wto.org [hereinafter WTO Panel Report].

46. *Id.*

47. Review of Legislation, *supra* note 10.

48. *Id.* § IV.

49. WTO Panel Report, *supra* note 45.

50. Review of Legislation, *supra* note 10, § IV.

51. TRIPs, *supra* note 12, art. 13 (emphasis added).

"embodies essentially the same goals as Article 13" and that the doctrine protects only "those types of uses which do not interfere with the copyright owner's normal exploitation of the work or unreasonably prejudice his or her rights."[52] Echoing the Supreme Court's decision in *Acuff-Rose*, the United States offered the example of a scathing book review, which certainly may diminish the value of the work, but would not infringe the copyright unless it "substitute[d]' for purchases of the book in the marketplace."[53] After delineating the four factors that courts will consider in determining a fair use, the United States asserted that "[t]he Supreme Court has stated that the fourth factor, which specifically focuses on the impact of potential market exploitation of the work, is the most important" and cited to the Court's decision in *Harper & Row*.[54] It went on to note that other factors may be considered as well, allowing for flexibility and case-by-case analyses.[55]

As noted above, the *Acuff-Rose* Court did not address whether the fourth factor was in fact the most important.[56] While the United States' representation of this issue is therefore not exactly inaccurate, it could be considered misleading, especially if one follows either the argument that in *Acuff-Rose* it was the first factor that carried the day or that no factor is controlling in all cases.[57] Instead of being evasive, the United States could have argued that TRIPs, by the plain language of Article 13, does not forbid any exception that would "diminish the value of the work," but instead lays out a three-part test for deciding if a use is impermissible.[58] While the fourth factor addresses market harm, the other factors, and particularly the first factor's consideration of whether the use is transformative, act to guard against such unreasonable market uses. Were Article 13 to forbid all value-diminishing uses, as the EC would have it, this would serve to quell all but "flattering commentary or benign parody," as the United States did eventually retort.[59]

Regarding parody specifically, the United States asserted that not all parodies are protected by fair use; only "true parody" which targets and comments on the copyrighted work (as opposed to satire, which only uses the copyrighted work as a vehicle to comment on some other target[60]) will be afforded this protection.[61] Further, even a true parody will not be deemed to be a fair use if the fourth factor weighs against it, that is, if the parody "replaces any desire to exploit the copyright work."[62] The EC was less than satisfied with this response, fearing that because a parody could use a greater part of a copyrighted work than a simple review; such a

52. Review of Legislation, *supra* note 10, § IV.
53. *Id.*
54. *Id.*
55. *Id.*
56. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590-94 (1994).
57. *See* Timkovich, *supra* note 38, at 68; *see* discussion Part I, *supra*.
58. Review of Legislation, *supra* note 10, § IV.
59. *Id.*
60. *Acuff-Rose*, 510 U.S. at 580 n.14.
61. Review of Legislation, *supra* note 10, § IV.
62. *Id.*

use could conflict with the "normal exploitation of the work."[63] The United States' reply was, again, simply that the fourth factor would weigh against such a use.[64]

Inexplicably, although the United States addressed both sides of the harm issue, it never explicitly made the distinction made in *Acuff-Rose* between harming the market for the copyrighted work (or derivatives thereof) by simply criticizing the work and harming the market by usurping it.[65] Indeed, the United States adopted the language first used by the EC as to whether a parody would "replace any desire to exploit the copyright work."[66] This language is not used anywhere in Article 13 and serves only to conflate this important distinction. Indeed, the scathing book review would certainly quell, if not extinguish, the "desire to exploit," but this use would fall within Article 13. The United States' response therefore appeared evasive and less truthful than it could have been had it made this distinction, one that the Supreme Court had already made in *Acuff-Rose* and that the WTO Panel itself would make just four years later.

B. The Panel Report

In 2000, the WTO Dispute Settlement Body convened a Panel to hear a complaint brought by the EC against the United States regarding Section 106 of the Copyright Act.[67] Recent amendments had created exceptions to the exclusive right of performance to allow certain businesses to perform copyrighted works publicly. The United States argued in response to the complaint that such uses are, in fact, covered under the exceptions of TRIPs Article 13. While the use at issue was not one of parody, the Panel Report is the only occasion the WTO has had thus far to construe the meaning of Article 13. By reviewing the arguments and decision in this dispute, one can glean some indication as to how the WTO would settle a dispute concerning parodic fair use, such as was the subject of the Review of Legislation.

The Panel broke the Article 13 provisions into three distinct tests: the exception must (1) be confined to certain special cases; (2) not conflict with a normal exploitation of the work; and (3) not unreasonably prejudice the legitimate interests of the right holder.[68] We will deal with each condition in turn.

1. *"Confined to certain special cases"*

Regarding the first condition, the Panel concluded that for an exception to be "confined to certain special cases," it should be "clearly defined" and "narrow in its scope and reach."[69] In so finding, the Panel rejected arguments put forth by the EC that the "certain special cases" should also serve a "special purpose."[70] The Panel agreed with the U.S. response that TRIPs does not require or even allow the

63. *Id.*
64. *Id.*
65. *See Acuff-Rose*, 510 U.S. at 591-92.
66. Review of Legislation, *supra* note 10, § IV.
67. WTO Panel Report, *supra* note 45, paras. 1.1-1.8.
68. *Id.* para. 6.97.
69. *Id.* paras. 6.112-13.
70. *Id.* paras. 6.102,6.105.

Panel to pass judgment on the legitimacy of domestic policy objectives "in light of [each country's] own history and national priorities."[71] Further, the Panel found that although the exception must be "clearly defined," there is "no need to identify explicitly each and every possible situation to which the exception could apply."[72]

Considering what these findings would mean for a challenge to the United States' fair use exceptions for parodic works, two main points overlap. First, it should be comforting to the United States that the Panel will not pass judgment on the legitimacy of the policy underlying the exception. Fair use generally, and parody in particular, rely on free speech principles, and it would be unfortunate indeed if the United States was called upon to justify free speech to the Panel and other member states that do not have such a tradition in their domestic laws.

However, one could argue that when judges review a particular use, the more attenuated the relationship between the parody and the targeted work, the stronger the likelihood of an infringement.[73] In *Acuff-Rose*, the Court defined parody as a "commentary" on the targeted work and found that the use at issue there "reasonably could be perceived as commenting on the original or criticizing it, to some degree."[74] The determination of whether a use does comment or criticize enough to be considered a parody thus appears to be an almost aesthetic and potentially political judgment. This alone may cause worry regarding the potential for censorship.[75] However, if this judgment were then reviewable by a WTO Panel which could further determine if the work was "critical enough," the specter of international censorship would be hard to avoid.[76]

Second, it is important to evaluate the argument that parody is not "clearly defined" enough to comport with the first condition. The Court in *Acuff-Rose* implied that a parody, which targets the original work, could be protected under fair use while a satire, which uses the work as a vehicle to criticize some other work, genre or society at large, would not be protected.[77] While this distinction between use as a "target" and use as a "weapon" creates the illusion of a clear definition of what parodies would be protected, it is a dubious distinction at best. Though satire does tend to use the original work as a weapon to criticize some other target, the weapon rarely survives unscathed; it too will be lampooned, if only by association.[78] A further justification offered for this distinction is that

71. *Id.* paras. 6.106, 6.112.

72. *Id.* para. 6.108.

73. Ellen Gredley & Spyros Maniatis, *Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright*, 19 EUR. INTELL. PROP. REV. 339, 343 (1997).

74. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583 (1994).

75. This topic will be discussed in greater detail below, see *infra* at Part III.

76. Furthermore, unfavorable treatment by the WTO with regard to such deeply-held values could increase the risk of "regime-shifting," that is, the United States' moving the issue into an institution where a more favorable result is more likely. *See, e.g.*, Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 724 n.139 (2003) (discussing "regime shifting").

77. *Acuff-Rose*, 510 U.S. at 581, nn.14-15. *See also* Michael Rushton, *Copyright and Freedom of Expression: An Economic Analysis*, *in* COPYRIGHT IN THE CULTURAL INDUSTRIES 58 (Ruth Towse ed., 2002).

78. Jason M. Vogel, *The Cat in the Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the*

while the parodist can justify his or her use of the original work (it being necessary to conjure up the work in order to criticize it), the satirist uses the work merely as a weapon. It is thus argued that because the satirist chooses this weapon from amongst many possible others, there is no justification for using this one in particular.[79]

This argument is unsustainable for at least three reasons. First, there may be cases where there is simply no other satisfactory weapon.[80] To imply otherwise, that is, to suggest that the artist should use some other work, is to dictate the creative process to the artist, a practice in which neither judges nor plaintiffs should involve themselves.[81] Second, if every owner of a potential 'weapon' has this excuse, no satire will ever be authored.[82] Finally, because the proposed use will almost invariably reflect poorly on the 'weapon' as well, it is unlikely that any copyright owner would allow for it.[83]

The discretion afforded to judges in deciding what qualifies as a parody is therefore of some concern in relation to parodic fair uses under Article 13.[84] However, this concern only follows from the belief that we have a "fair use regime based on the parody/satire dichotomy."[85] In fact, this is an entirely false dichotomy. The mere categorization of a work as a parody does not automatically qualify it as a fair use.[86] The *Acuff-Rose* Court specifically held that "parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."[87]

Therefore, the only point of concern in deciding whether parody is "clearly defined" for the purposes of Article 13 will be the fact that there is no real way to predict how judges will interpret the specific facts of each and every case. However, the Panel explicitly held that there was "no need to identify explicitly each and every possible situation to which the exception could apply."[88] Further, the unpredictability of judges is inherent in the judicial process, and though it may be a point of concern, it is certainly no basis for ruling that this particular doctrine fails to comport with the "clearly defined" standard. It is therefore suggested that the fair use exception for parody ought to survive the first standard.

Parody Defense to Copyright Infringement in Dr. Suess Enterprises v. Penguin Books USA, Inc., 20 CARDOZO L. REV. 287, 313 (1998).

79. Gredley & Maniatis, *supra* note 73, at 343.

80. *Id.*

81. Vogel, *supra* note 78, at 312-313.

82. *Id.* at 313.

83. *Id.* at 314.

84. *Id.* at 313 ("Thus, an essential weakness of the a fair use regime based on the parody/satire dichotomy is that, by defining parody broadly or narrowly, courts can subjectively accord or deny fair use to an alleged parodic work.").

85. *Id.*

86. *Id.* at 288-290.

87. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994).

88. WTO Panel Report, *supra* note 45, para. 6.108.

2. *"Not conflict with a normal exploitation of the work"*

The Panel next interpreted what constitutes "normal exploitation" for purposes of the second standard of Article 13. The Panel first noted that the "normal exploitation" of a work could not mean the full use of all exclusive rights conferred, since this would leave Article 13 "devoid of meaning."[89] Thus, the Panel decided that "normal" use is not full use but instead has an empirical aspect and a normative (or dynamic) aspect.[90] Regarding the empirical aspect, the Panel accepted the United States' suggestion that the inquiry look to "whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exemption."[91] Regarding the normative or dynamic aspect, the Panel suggested a forward-looking formulation that should consider "forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."[92]

However, the Panel also made clear that "not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with a normal exploitation of that work."[93] All together, the Panel thus held that a use conflicts with a normal exploitation of a copyrighted work if it "enter[s] into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and *thereby* deprive[s] them of significant or tangible commercial gains."[94] It is important to note that the deprivation of commercial gains must be a *consequence* of the challenged work *competing* with the copyrighted work. This explicitly rejects the EC's position in the Review of Legislation that any use which "replace[s] any desire to exploit the copyright work" violates Article 13.[95] The Panel's language indicates that not every use that would replace the desire to exploit (and therefore deprive the owner of significant or tangible commercial gains) would violate Article 13, but only those which do so through competition. Mirroring the observation in *Acuff-Rose* that "parody and the original usually serve different market functions,"[96] the Panel seems to have concluded that only when the parody usurps the market for the original work would there be a conflict with this provision of Article 13. Indeed, *ceteris paribus*, it is also only in such a case that it would run afoul of fair use in the United States.

89. *Id.* para. 6.167.

90. *Id.* para. 6.166.

91. *Id.* paras. 6.177, 6.178.

92. *Id.* para. 6.180.

93. *Id.* para. 6.182.

94. *Id.* para. 6.183 (emphasis added).

95. Review of Legislation, *supra* note 10, § IV.

96. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (citing Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act*, COPYRIGHT L. SYMP. (ASCAP), No. 34, p. 23 (1987)).

3. *"Not unreasonably prejudice the legitimate interests of the right holder"*

The Panel then set to interpreting the final standard of Article 13. Since the parties and the Panel agreed that a copyright owner exercising his or her rights for economic gain would be a "legitimate interest," the Panel centered its investigation on the question of what degree of prejudice would be unreasonable.[97] Considering the importance of this factor, the Panel gave it comparably short shrift.[98] It rather summarily concluded that "prejudice to the legitimate interests of the right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[99] In so doing, it left open several issues, not the least of which was when a loss of income becomes unreasonable. Essentially, the Panel reduced "legitimate interest" to "income," which in itself raises questions,[100] and shifted the "reasonableness" standard from the prejudice to the loss of income. In fact, the Panel's analysis of the controversy in front of it did little to answer this question. It only decided that it would consider the present and potential market conditions that may affect the copyright holder's income.[101] A parody's effect on the market for the original will be considered, but it is difficult to predict what level of effect would be necessary to find an infringement.[102]

To summarize the holdings of the Panel Report, a use will fall within the exceptions of Article 13 if the use falls within a clearly defined category, does not enter into competition with the copyrighted work, and does not cause unreasonable loss of income to the owner of the copyrighted work.[103] It should be noted that that the latter two clauses could become redundant with regard to parody. If an infringing parodic work does not compete with the copyrighted work, no loss of income, however great, could be considered unreasonable. This conclusion is borne out by the familiar "scathing book review" standard: it is possible that a review could be so devastating that income would drop off to nothing. Yet, this would not, under the second factor, be an infringement. Therefore, the three standards collapse into two, at least for parody. The exception must be clearly defined and it must not protect uses that cause unreasonable loss of income to the owner of the copyrighted work through competition. Thus phrased, the central

97. WTO Panel Report, *supra* note 45, para. 6.226.

98. *Id.* paras. 6.226, 6.227.

99. *Id.* para. 6.229.

100. For example, is the Panel implying that an author's interests in her work are solely financial and do not include reputational or moral rights, and thereby embracing the American utilitarian view of copyright instead of the European natural rights view? These competing views are discussed *infra* at Part IV, but whether the Panel is in fact making such a choice is an open question outside the scope of the present article but properly and hopefully the subject of further scholarship.

101. WTO Panel Report, *supra* note 45, paras. 6.236, 6.249.

102. *Id.* It might also be observed that interpretations of what is "reasonable," which would depend greatly on the facts of particular disputes, including, *e.g.*, the type of works in question and relevant market conditions, would cause no less uncertainty or unpredictability than would the determination of whether a parody is a fair use in the United States. It is therefore doubtful that this reasonableness standard would survive the Panel's own "clearly defined" standard if the four-part fair use inquiry in the United States would not, as the EC had suggested. *See* discussion, *supra* at II.B.1.

103. *Id.* para. 7.1.

question becomes: When is a use competition and when is it criticism? The answer would be decisive in a Panel review of the U.S. fair use doctrine. It is to that question we now turn.

III. HORIZONTAL EFFECT, PRIVATE CENSORSHIP AND FREE SPEECH

The relationship between copyright law and free speech in the United States has been the subject of much scholarly debate for many years.[104] While the official position has been that the two live together harmoniously, with copyright being the "engine of free expression,"[105] many have noted that there is often more tension than the official "no-conflict narrative" admits.[106] Considering copyright's origin as a means of censorship,[107] there has been concern that the disturbing phenomenon known as the "horizontal effect"[108] is really a new means of censorship, albeit in a privately administered form.[109] If copyright holders are able to use their rights to keep expression out of the public discourse solely because it is critical of their work, this will be a means of censorship as effective, if less wide ranging, as was the English Stationer's Guild.[110]

For example, in the case of *SunTrust Bank v. Houghton Mifflin Co.*, the holder of the copyright in the novel and movie *Gone With The Wind* sued to enjoin the publication of a novel titled, *The Wind Done Gone*, which was a parody based on and using many of the characters, plot, and setting of the original work.[111] The Court of Appeals for the Eleventh Circuit refused to issue an injunction, finding that any harm could be addressed by monetary damages and that "it appear[ed] a viable fair use defense [was] available."[112] In so doing, the court had occasion to review the four fair use factors provided in Section 107 of the Copyright Act. Regarding market harm, the court was persuaded by evidence proffered that "demonstrate[d] why [*The Wind Done Gone* was] unlikely to displace sales of [*Gone With the Wind*]."[113] Essential in coming to this conclusion was the court's reiteration of the *Acuff-Rose* Court's observation that:

---

104. For a history of this relationship and an argument that there is less harmony in the relationship than is traditionally found, *see*Pamela Samuelson, *Copyright, Commodification, and Censorship: Past as Prologue – But to What Future?*, *in* THE COMMODIFICATION OF INFORMATION 63 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002). *See also* Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA 233 (2003).

105. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

106. Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1280 (2003) (noting recent challenges to the "no-conflict narrative").

107. Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM.-VLA J.L. & ARTS 193, 236 (1993).

108. Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression under the Human Rights Act*, 14 ENT. L.R. 2003, 24 [hereinafter, Birnhack, *Acknowledging the Conflict*] (questioning the horizontal effect in the context of private rights of action under the United Kingdom's Human Rights Act of 1998 and the European Convention on Human Rights of 1950).

109. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001).

110. *See* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 323 (2003).

111. *SunTrust Bank*, 268 F.3d at 1259.

112. *Id.* at 1277.

113. *Id.* at 1275.

> [t]he only harm to [derivative markets] that need concern us . . . is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.[114]

Interestingly, in determining that the derivative market would not likely be harmed, the court noted that while the owners of the *Gone With the Wind* copyright forbade licensees from making any reference to homosexuality, *The Wind Done Gone* cast Rhett Butler, one of the main characters, as a homosexual.[115] This made it certain that the parody and any licensed derivatives of the original would "serve different market functions."[116] In a speech given shortly after the decision in *SunTrust*, Joseph Beck, lead counsel for the parodist, noted that the copyright holder had not objected to dozens of other parodies made of *Gone With the Wind*, because those had been flattering and had "reinforce[d] the iconographic stature of Gone With the Wind. [*The Wind Done Gone*] does not reinforce the iconographic stature of *Gone With the Wind*, and that is why it was attacked."[117]

This case points out the danger that copyright, rather than being the "engine of free expression," could revert to a means of private censorship. Copyright owners could use their exclusive rights to silence voices that are critical of their work. Both the Supreme Court and the WTO Panel have decided to guard against such abuse by allowing fair use of copyrighted material without permission so long as that use does not cause harm to the market for the original or derivatives thereof through competition.[118]

However, the formulation of permissible exceptions that the EC presented in the Review of Legislation and in front of the WTO Panel, which would forbid any use that "replace[s] any desire to exploit the copyright work," would not be able to discriminate between prohibited harm through competition and immunized harm through criticism.[119] In the case of *The Wind Done Gone*, profits from sales and derivatives of *Gone With the Wind* would be diminished if the parody created a popular backlash against the latter's glorification of Southern plantation society. However, this should not be the type of harm against which copyright can be used to protect an author. To do so would be to allow the private censorship that copyright is supposed to avoid.[120]

A good example of how the failure to make this distinction can result in private censorship is *Dr. Seuss Enterprises, L.P. v. Penguin Book USA, Inc.*[121] The owners of the copyright in *The Cat in the Hat* sued to enjoin the publication of *The Cat NOT in the Hat!*, a book which retold the story of the O.J. Simpson double

---

114. *Id.* at 1274 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994)).

115. *Id.* at 1271 n.26.

116. *Acuff-Rose*, 510 U.S. at 591.

117. Joseph Beck, *Flexibility in Parody of Copyrighted Material*, 10 MEDIA L. & POL'Y 3, 13 (2002).

118. *See Acuff-Rose*, 510 U.S. at 590; Review of Legislation, *supra* note 10, § IV..

119. Review of Legislation, *supra* note 10, § IV.

120. *SunTrust*, 268 F.3d at 1263.

121. *Dr. Suess Enter., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

homicide trial using the style of the copyrighted work.[122] Working its way through the Section 107 factors, the court found that the use was not a protected fair use, and therefore allowed the injunction.[123]

Regarding the first factor, the court found that the work was not sufficiently transformative because it adopted the copyrighted work's style only "'to get attention' and maybe even 'to avoid the drudgery in working up something fresh.'"[124] Furthermore, the court found that the use was not in fact a parody, but only a satire, using the copyrighted work as a weapon against an external target: the O.J. Simpson trial.[125] Because the court found that the commentary had no "critical bearing on the substance or style" of the copyrighted work,[126] under the distinction made in *Acuff-Rose*, this would indeed appear to be a satire. The book uses the comical and farcical setting of *The Cat In The Hat* to imply that the O. J. Simpson trial was also comical and farcical. It is true that *The Cat In The Hat* was not targeted, but was rather used as a weapon. It is also true that "the good will" of *The Cat In The Hat* may suffer from the association with the double homicide. However, being cast in a less-than-appealing light is no basis for claiming copyright infringement: it was not sufficient in *Harper & Row* and it should not have been sufficient here. This is apparent in light of the court's fourth factor analysis.

The court observed that in weighing the fourth factor they should consider both "the extent of market harm caused by the publication and distribution of *The Cat NOT in the Hat!* and whether its unrestricted and widespread dissemination would hurt the potential market for the original and derivatives of *The Cat In The Hat.*"[127] Instead of relying on the Supreme Court's decision in *Acuff-Rose,* where the distinction between harm by usurpation and harm by criticism was made explicit,[128] the Ninth Circuit inexplicably chose to rely on language from a non-binding, pre-*Acuff-Rose*, Second Circuit decision which characterized the fourth factor inquiry as:

> [Striking a balance] between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.[129]

This analysis not only flies in the face of the binding, subsequent Supreme Court decision in *Acuff-Rose*, it also substantially echoes the position of the EC in

122. *Id.* at 1396.

123. *Id.* at 1403.

124. *Id.* at 1401 (citing *Acuff-Rose*, 510 U.S. at 580).

125. *Id.*

126. *Id.*

127. *Id.* at 1403.

128. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) (upholding the "distinction between potentially remediable displacement and unremediable disparagement").

129. *Dr. Suess Enters., L.P., 109 F.3d* at 1403 (citing MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981)).

the Review of Legislation and Panel Report. Specifically, the discussion is only of the "adverse effect" on the copyright owner's "expected gain," without any distinction made as to how this adverse effect comes about.[130] To return to our tired example of the scathing book review, this analysis would find infringement if the review caused sales to drop off unless the review had some overwhelming public benefit. While the merits of such a policy could be debated, it is enough to observe that this balancing test appears nowhere in the Supreme Court's decisions on fair use and does not represent the applicable law on the issue.

Further, it is from this analysis and without any evidence of actual market conditions that the court summarily concluded that because the use was "nontransformative, and admittedly commercial . . . market substitution is at least more certain, and market harm may be more readily inferred."[131] However, the court's own analysis seems contradictory. First, if the only harm is to the "good will and reputation," and this harm stems from the bad light in which the work is cast, this would be no grounds for denying fair use.[132] The harm would have to come from competition with the original, and so we can assume that the "adverse effect" mentioned above[133] must derive from that competition. However, if the parodic use is such that it would harm the original merely by association, how could it also be maintained that the parody would compete with the original or derivatives thereof? Would not this be a case where the parody and the original almost certainly "serve different market functions?"[134] Further, if the use is so harmful to the original, can we be expected to believe there is a derivative market for it that the copyright holder would have exploited but which is being usurped by the parody? Certainly, a court should at least require evidence of such a rare situation should one be alleged to exist.

In sum, the Ninth Circuit's analysis flies in the face of the Supreme Court's decision in *Acuff-Rose*, undercuts the very policy behind the fair use protection of parody, and has not gone uncriticized.[135] In fact, it has not been followed or cited as controlling authority by a single court in the six years since it was decided. For our purposes, it is important as an illustration of the EC's vision of what exceptions would be allowed under Article 13. By conflating injury through competition with injury through criticism, the court, as would the EC, allows copyright holders to censor unfavorable uses of their work solely because they are unfavorable. While the Ninth Circuit's decision can be dismissed as an improper exercise of judicial power, the EC's contention is more perplexing, especially in light of recent developments in the EC and scholarship about its own copyright laws.

---

130. *Dr. Seuss*, 109 F.3d at 1403.

131. *Id.*

132. *Compare id. with* Campbell v. Acuff-Rose, 510 U.S. 569, 592 (1994) (upholding the "distinction between potentially remediable displacement and unremediable disparagement").

133. *Dr. Suess*, 109 F.3d at 1403.

134. *Acuff-Rose*, 510 U.S. at 591.

135. *See, e.g.*, Vogel, *supra* note 78, at 318.

IV. COPYRIGHT IN THE EC: A MOVEMENT TOWARD FREE EXPRESSION?

In the United Kingdom, courts are unlikely to decide that a work infringes a copyright unless a substantial part of the work was used and the injury is to more than the owner's *amour propre* (i.e., there is economic injury).[136] Spanish law explicitly exempts parody from infringement so long as there is no risk of confusion and it "does not harm the original work or its author."[137] Likewise, the Netherlands allows parody when its aim is "humour and not competition."[138] In France, where authors' rights are historically strongest,[139] parody, pastiche, and caricature are put together in one exception that applies so long as the work is humorous, does not cause confusion with the original, and does not aim to injure or degrade the original author.[140]

This brief survey shows that some degree of protection for parodic uses is already fairly common in EC member states. However, these protections are based exclusively on internal limitations in copyright law, that is, specific statutory limitations written into the copyright laws themselves;[141] no external limits to copyright have traditionally been recognized. This is in sharp contrast to the United States where internal limitations are provided by statute but external limitations, such as the fair use exception for parody, even when codified are essentially left to the courts to shape.[142] Of course the resistance to external exceptions in Europe is fairly unsurprising. Europeans have historically considered copyright an "unrestricted natural right"[143] which codified the "sacred bond" between the author and his or her work.[144] The primacy given to authors' rights (also called moral rights) has kept them above the fray and without external limitation. However, recent developments suggest this may be changing.

In order to implement the copyright exception provisions of TRIPs, a European Directive was recently issued which aimed to harmonize the copyright laws of the various EC member states.[145] The Directive explicitly allows those states to provide for exceptions to copyright for "caricature, parody or pastiche."[146] In addition, recent scholarship demonstrates that European courts have begun entertaining (if not yet allowing) citizens' invocation of the free expression

136. Gredley & Maniatis,, *supra* note 73, at 341-42.

137. *Id.* at 144 (citing L. Gimeno, *A Parody of Songs*, [1997] ENT. LR 18).

138. Rowling v. Uitgeverij Byblos BV, [2003] E.C.D.R. 23, 2003 WL 21729296 at *250.

139. P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe, in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 343, 357 (Rochelle Cooper Dreyfuss et al. eds., 2001).

140. *Id.* (citing M. ROSE, PARODY: ANCIENT, MODERN AND POST-MODERN 92 (1993)).

141. *Id.*, at 352.

142. *Id.* at 352-53.

143. *Id.* at 344.

144. *Id.* This is in sharp contrast to the "utilitarian" approach taken in the United States (and other common law jurisdictions), where copyright is explicitly protected "to promote science and the useful arts." U.S. Const. art. I, § 8, cl. 8. *See also id.* at 352.

145. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5(3)(a), 2001 O.J. (L167).

146. *Id.* art. 5(3)(k).

provisions of the European Convention on Human Rights of 1950[147] ("ECHR") as defenses to copyright infringement.[148] Although EC courts have not traditionally recognized the horizontal application of fundamental rights,[149] this would allow citizens to invoke such rights as defenses against the actions of other citizens as well as those of the state.[150] Such invocations would allow parodists and other would-be infringers an external defense to infringement.[151]

After studying several recent ECHR and EC member state court decisions, P. Bernt Hugenholtz has suggested that:

> [In the future,] freedom of expression arguments are likely to succeed against copyright claims aimed at preventing political discourse, curtailing journalistic or artistic freedoms, suppressing publication of government-produced information or impeding other forms of 'public speech' . . . The [European] Court might also be willing to find national copyright laws in direct contravention of Article 10 [of the ECHR] if they fail to provide exceptions for uses such as *parody*.[152]

No case has yet been presented that has required an EC court to squarely decide the status of parody under the ECHR, but if these predictions are accurate and the general trend toward recognizing external limitations on copyright in the EC continues, it would be surprising if the EC did not find some free speech protections for parodic use. It would be even more surprising if, in so finding, the EC did not adopt a doctrine not unlike the U.S. fair use doctrine, which they had attacked under TRIPs. In fact, in light of the Panel's interpretation of the copyright exception provisions of TRIPs, were the EC to refuse to allow for exceptions for non-competitive parodies, it may well be the EC's laws that are challenged under the same provisions. Further, in light of the historical resistance to external limitations in the EC, codifying (that is, making into an internal exception) the distinction between market harm by criticism and market harm by competition may well be a good first step toward implementing free speech exceptions to copyright in the EC.

CONCLUSION

As an illustration of the dangers involved in allowing copyright owners to use their rights to quiet those that would be critical of their work, one copyright scholar offers the case of the successful "international copyright campaign of the Church of Scientology."[153] Suits brought in various jurisdictions worldwide attempted to stop former members of the "Church" from disseminating its writings in an effort to discredit it.[154] While each challenged use consisted of verbatim reproductions of

147. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

148. *See* Birnhack, *Acknowledging the Conflict*, *supra* note 108, at 30.

149. Hugenholtz, *supra* note 140, at 345.

150. *Id.*

151. *See* Birnhack, *Acknowledging the Conflict*, *supra* note 108, at 30.

152. Hugenholtz, *supra* note 140, at 362 (emphasis added).

153. Birnhack, *Acknowledging the Conflict*, *supra* note 108, at 30.

154. *See, e.g.*, New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1990).

the works, the question of how the courts of various jurisdictions would have decided the dispute had less of the work been used, though still in a manner which was critical and aimed solely to discredit the "Church," remains unresolved. In such cases, where free speech and copyright collide, recourse to or avoidance of the competition/criticism dichotomy could be decisive.[155] Copyright is meant to protect the authors' and artists' economic interests in their works. However, this policy is not furthered by allowing authors and artists to silence voices that are critical of their works solely because such dissent may affect the popularity of those works; quite to the contrary, in such a case, rather than being the engine of free speech, copyright becomes, again, a tool of censorship.

155. *See, e.g.*, Hubbard v. Vosper, 2 Q.B. 84, 94 (C.A. 1971) (Lord Denning, M.R.) (reasoning that an injunction on the publication of a critical work that used passages of Scientology literature should be removed by suggesting that in considering whether a use is an infringement or a "fair dealing," judges should consider, *et al*, "the use made of [the original and the quoting work]. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair.").