Introduction

By the time I'm in the studio recording my parody,
10,000 parodies of that song are on YouTube.[1]

Over the past decades, an increasing number of Western jurisdictions have recognized "parody" as a fair use/fair dealing defense or exception in their copyright laws. They have done so either through their courts, which determined that parody is protected within existing defenses, 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*.[2] In Canada, the Copyright Modernization Act of 2012 expands the fair dealing doctrine by permitting the use of copyrighted materials to create a parody or satire, provided that the use is "fair."[3] The Copyright Directive of the European Union, enacted in 2001 to implement the WIPO Copyright Treaty and to harmonize aspects of copyright law across Europe, provides that Member States might exempt from copyright a "use" of a protected element "for the purpose of caricature, parody or pastiche."[4] In late 2014, the United Kingdom finally took up the "caricature, parody or pastiche" exception through legislative reform.[5]

[1] Gary Graff, *Weird Al Ponders Lady Gaga Parody*, REUTERS (June 23, 2010), https://uk.reuters.com/article/music-us-weirdal/weird-al-ponders-lady-gaga-parody-idUKTRE65M0LQ20100623 (last visited Oct. 10, 2017).

[2] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[3] *See* Copyright Modernization Act, S.C. 2012, c. 20, s. 21 (Can.).

[4] Article 5(3) of the Copyright Directive allows Member States to establish copyright exceptions to the art. 2 reproduction right and the art. 3 right of communication to the public "for the purpose of caricature, parody or pastiche," among others. The Copyright Directive 2001/29/EC (2001), arts. 3, 5(3).

[5] Clive Coleman, *Parody Copyright Laws Set to Come into Effect*, BBC NEWS (Oct. 20, 2014), www.bbc.com/news/entertainment-arts-29408121 (last visited Oct. 10, 2017); Copyright, Designs and Patents Act, 1988, s. 30A (U.K.).

To date, few Asian jurisdictions have recognized a fair use or fair dealing exception in the form of parody, but things may change in the future.[6] In response to an upsurge of parodic works on the Internet since the beginning of the twenty-first century, the Hong Kong government introduced the Copyright (Amendment) Bill 2011 that criminalized the communication of copyrighted works on the Internet but did not provide for a parody exception.[7] Due to vehement opposition from the public, Bill 2011 was withdrawn, and the revised Bill, introduced in 2014, was shelved after further opposition from the public and some members of the legislature.[8]

The prevalence of parodies in the media and in everyday life and the increasing recognition of parody as a fair use/fair dealing defense or exception in copyright jurisprudences raise the question of whether parodying copyrighted works should be regarded more affirmatively as a right, rather than an exception or something to be exempted from copyright protection. The affirmation of creating parodies as a right leads to further questions concerning the nature and scope of this right and how it should be protected – whether through copyright law's internal mechanisms, or with the help of a solution external to the copyright regime. As the number of jurisdictions exempting parody from copyright protection has continued to increase, while others are proposing to include it in their laws, discussion of these issues is overdue.

This book aims to examine several questions. First, should the right to parody constitute part of the core freedom of expression of a normative copyright regime? Scholars who advocate a parody defense or exception generally emphasize the significance of parody as a form of cultural expression and as a potential source of innovation and growth.[9] This book will adopt a far more affirmative stance, by arguing that parody is a right in both the free speech and the copyright contexts. Second, if parodying copyrighted works is a right, what should be the scope of this right, and how should the law accommodate and protect it? This book will propose that a broad legal definition of parody should be adopted by statutes and courts. It will also argue that courts should look beyond the copyright regime for an

[6] In India, the Kerala High Court coined the term "counter drama" to describe a parodic work that criticized the original, and holding it as fair use in *Civic Chandran v. Ammini Amma* (1996). Japan has not recognized such an exception, but advocates have been pushing for change. Latitude for Japanese parodists is nonetheless narrowed considerably due to the refusal of courts to tolerate infringements of moral rights. Susan Wilson & Cameron J. Hutchison, *A Comparative Study of "Fair Use" in Japanese, Canadian and US Copyright Law*, 41 Hosei Riron 224, 251–52, 276–78 (2009).

[7] *E.g.*, Koon-Ho Justin Lam, *Copyright (Amendment) Bill 2014 – The Return of Creativity Suppression?* Hong Kong Law Blog (Oct. 15, 2014), http://hklawblog.com/2014/10/15/copyright-amendment-bill-2014-the-return-of-creativity-suppression/ (last visited Oct. 10, 2017).

[8] *Id.*

[9] *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*, Create Working Paper No. 4 (Jan. 1, 2013), www.create.ac.uk/publications/copyright-and-the-economic-effects-of-parody/ (last visited Oct. 10, 2017); Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, United Kingdom Intellectual Property Office (May 2011), at 5.37, http://orca.cf.ac.uk/30988/1/1_Hargreaves_Digital%20Opportunity.pdf (last visited Oct. 10, 2017).

external solution to safeguard the right to parody, by drawing upon the free speech or the freedom of expression doctrine as they apply the parody defense or exception.

The book will combine philosophical inquiries with legal analyses in its examination of the rights to free speech and parody. Regarding the first question, it will draw upon natural law theories to argue that the right to free speech is a universal right, and expressing oneself through parodies is an exercise of this right. It will then discuss the nature of copyright from both natural rights and utilitarian perspectives, to illuminate how the right to parody copyrighted works, like the right to parody in the free speech context, is also a universal right that should be accommodated by copyright law.

Regarding the second question, the book will draw upon natural rights and utilitarian perspectives to define the scope of the right to parody. It will contend that the right to free speech is more fundamental than copyright. A broad legal definition of parody, which includes works targeting the originals as well as those that direct their criticism or commentary towards something else, accommodates more speech and is preferable to narrow definitions. However, parodies must not adversely impact the interests of rights-holders by serving as market substitutes for the original works or their derivatives. Although it is often appropriate for a legislature to take the responsibility to guarantee rights and to define these rights by statute, rather than calling on courts to assert their own judgments based entirely on notions of higher law, this chapter will argue that courts can and should also apply the parody defense or exception with reference to the free speech doctrine, to ensure that lawful speech would not be suppressed for the sake or under the pretext of copyright protection.

The book will then employ five case studies – the United States, Canada, the United Kingdom, France, and Hong Kong – to elucidate its arguments for a broad definition of parody and for courts to apply the parody defense or exception with reference to the free speech/freedom of expression doctrine. It will study how the free speech jurisprudences of these jurisdictions have been informed by the natural law, and how the proposed parody defense or exception would serve to bring their copyright jurisprudences, which have been influenced by utilitarianism, and/or a narrow conception of natural rights privileging the authors' over the users' rights, more in line with their free speech jurisprudences. Studies of these jurisdictions will also reveal the usefulness of the free speech/freedom of expression doctrine as an external mechanism in safeguarding parodists' speech freedom. If this external solution should be insufficient to protect free speech, then internal solutions, such as amending the moral rights provisions in relation to parody in copyright statutes, would serve to create the needed breathing space for free speech.

Undoubtedly, there exists a substantial body of research on the parody defense or exception. Examples include Richard Posner's papers that explain the right to parody from a law and economics perspective,[10] and Carys Craig's papers that

[10] Richard Posner, *When Is Parody Fair Use?* 21 J. Legal Stud. 67 (1992).

advocate for the expansion of the fair use/fair dealing doctrine to accommodate more derivative works through the lenses of feminist legal criticism.[11] Posner endorses only a very narrow definition of parody, whereas Craig neither discusses parody and satire, nor explains whether they both should be considered fair use/fair dealing. Further, the endorsement of relatively broad definitions of parody by most, if not all, scholars has been informed by instrumentalism and/or practical considerations. The novelty of this book lies in its employment of natural law theories, along with utilitarian perspectives, to explore the right to parody. It was deeply inspired by Robert Merges' book, *Justifying Intellectual Property*, which is described as a "landmark" and "a new Bible" in intellectual property law, and which draws upon Locke, Rawls, and Kant to argue that IP rights are based on a solid ethical foundation and are property rights, not incentives or conventions.[12] While Merges' pioneering book does not examine the right to parody, this book does.

Although there are works examining the relationship between copyright and free speech, including Jonathan Griffiths' and Uma Suthersanen's *Copyright and Free Speech: Comparative and International Analyses* (2005),[13] and that between free speech and parody, such as Joseph Liu's article *Copyright and Breathing Space*,[14] this will be the first book-length study of copyright, parody, and free speech.

One may wonder why this book targets the significance of the parody defense or exception in the context of copyright law, while this defense is equally, if not more, important in protecting free speech in other areas of law, one example being defamation law. Examining the parody defense or exception in copyright law by no means diminishes its significance in other areas of law. Defamation laws, by protecting the right to express opinions, also safeguard the right to express opinions through parodies. In contrast, copyright laws that do not accommodate the right to parody copyrighted works may allow valuable ideas to be suppressed for the sake or under the pretext of copyright protection. Not only would free speech be suppressed, but parody as a long-standing art form and a popular form of expression would decline. The book nevertheless by no means shuts out defamation laws from its legal analyses. Given that an examination of the free speech jurisprudence of each jurisdiction will constitute a significant part of its thesis, defamation laws, along with other speech restrictions, will be brought into the discussion to the extent that they are relevant to the arguments.

[11] Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 Am. U. J. Gender Soc. Pol'y & L. 207 (2007); Carys Craig, *Locke, Labour, and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law*, 28 Queen's L.J. 1 (2002).

[12] Robert Merges, Justifying Intellectual Property (2012). *See* reviews by Harvard law professor Henry E. Smith and Dennis Crouch of PatentlyO.com, which can be found on the Harvard University Press website: www.hup.harvard.edu/catalog.php?isbn=9780674049482 (last visited Oct. 10, 2017).

[13] Jonathan Griffiths & Uma Suthersanen (eds.) Copyright and Free Speech: Comparative and International Analyses (2005).

[14] Joseph Liu, *Copyright and Breathing Space*, 30 Colum. J. Arts & L. 101 (2007).

One may also query the choice of jurisdictions in this comparative study. The jurisdictions in this book were carefully chosen with a view to engage the theoretical core in a meaningful manner. The United States has a long history of judicial decisions holding that parody is a defense to copyright infringement. On the other hand, the parody exceptions were not included in Canadian and British statutes until recently. A similar exception has yet to be included in Hong Kong's copyright law due to strong opposition from the public. The parody exception has been recognized in French copyright jurisprudence since 1957, long before the EU Copyright Directive took effect, although the author's moral right is also greatly valued in this civil law jurisdiction. The different free speech and moral rights traditions have/will strongly influence(d) the interpretations and applications of the parody exceptions in these jurisdictions.

Finally, one may also query whether the right to parody is truly a natural right, given that the right to free speech is hardly enjoyed in all jurisdictions over the world. Clearly, this book aims to explain what laws on free speech and parody should be like, rather than describe what these laws currently are. Hence, the mere fact that the right to free speech is severely restricted in some authoritarian nations by no means invalidates or diminishes the force of the argument that the right to parody is natural and inherent in all people. In fact, the enshrinement of freedom of expression in many national constitutions testifies to its being a value to which every nation aspires or at least pays lip services. In addition, because this work aims to propose a normative standard safeguarding the right to parody, it relies heavily upon natural law theory, despite the fact that copyright laws of the selected jurisdictions seem to be driven more by utilitarianism than by natural rights. Regardless of the changes that the copyright laws of these (or any other) jurisdictions will undergo in the future, the proposed model will continue to serve as a yardstick against which new laws should be measured.

OUTLINE

The book is divided into two parts. Part I, which forms its theoretical core, will argue that the right to parody should constitute part of the core freedom of expression of a normative copyright regime. Chapter 1 will describe the ancient origins of free speech and its significance in the development of Western democracies. The chapter will then draw upon writings by John Milton, John Locke, John Rawls, and Immanuel Kant to examine the right to free speech or freedom of expression as a natural, universal right subject to restrictions necessary for the respect of the rights or reputations of others and the protection of national security and public order. From ancient times, people have exercised this natural right by expressing themselves through parodies. Controls on parody in authoritarian and dictatorial regimes are tacit acknowledgment of its important role in democracies and its power in bringing social change.

Chapter 2 will explain why parodying copyrighted works is also a natural, universal right, and describe the extent to which copyright law should accommodate and protect the right to parody. It will study the nature of copyright from both natural law and utilitarian perspectives. Whether copyright is a natural right or a conventional right, it should give way to the more fundamental right to free speech when conflicts between them arise. The relative importance of these two rights justifies a broad legal definition of parody encompassing works that target the original works and those that criticize or comment on something else, as long as they would not likely serve as market substitutes for their original works or their derivatives. The public's right to parody, moreover, should not conflict with the author's moral rights. Given the fundamental nature of speech freedom, courts should also apply the parody defense or exception, which is internal to copyright law, with reference to the free speech doctrine, a mechanism external to the copyright regime, to ensure that lawful speech would not be suppressed for the sake/under the pretext of copyright protection.

Part II will examine each of the selected jurisdictions to further the argument that the proposed parody defense or exception would serve to properly balance rights-holders' and parodists' interests. Each of its five chapters will roughly follow the same structure. First, they will examine how the jurisdiction's free speech tradition has been informed by the natural law tradition and how the right to parody is a natural right. A subsequent section will then explain how the copyright jurisprudence of the jurisdiction has been informed by utilitarianism and/or a propertized conception of copyright. The same section will then illuminate how the proposed exception would help to bring its copyright system in line with its free speech tradition. A final section will then employ hypothetical example(s) to explain that courts should ideally apply the parody defense or exception with reference to the free speech or freedom of expression doctrine. Failing that, courts should seek internal solutions to safeguard the right to parody.

Chapter 3 will study the parody defense in American copyright law. It will trace the history of the parody fair use defense and study the flawed parody/satire dichotomy created by the U.S. Supreme Court, according to which works not directing at least part of their criticisms or commentaries against the originals do not qualify as fair use. The chapter will then justify the parody definition encompassing both "parody" and "satire" and the prioritization of the "market substitution" factor over the other three factors in the fair-use analysis. It will also look at cases in which courts erroneously found "satirical" works to be unfair, and illuminate how the proposed parody definition would have enabled courts to properly balance the interests of different parties. The chapter will then turn to the importance of the First Amendment doctrine in ensuring that copyright law would not become less protective of free speech than defamation law, and that rights-holders who aim to use copyright law to suppress lawful speech – including those who have lost defamation suits involving parodies of copyrighted materials – would not likely succeed.

Chapter 4 will study the "parody" and "satire" fair dealing exceptions in Canada's Copyright Modernization Act. It will argue that a propertized conception of fair dealing, the influence of American case law, and the very meaning of "satire" itself may work together to influence how Canadian courts define the scope of protection offered by these exceptions. Hence, courts may find that "satirical" works do not pass the second-stage fairness analysis and are unfair dealings even though they would not harm the owners' interests. A broad parody exception would better serve to balance the interests of both parties by reducing any influence of a propertized conception of fair dealing and by leading courts to focus on the market substitution factor. Although the Supreme Court of Canada held that courts can interpret provisions of the Copyright Act in light of Charter values only in circumstances of "genuine ambiguity," a broadened parody exception might create circumstances of "genuine ambiguity," which would entitle courts to apply the exception by engaging with the Charter to balance freedom of expression with the Act's objectives.

Chapter 5 will study the parody exception introduced into British copyright law in 2014. It will argue that "parody" in the new exemption "for the purpose of caricature, parody or pastiche" will be broad enough to cover a wide range of works, and its "humor" requirement will not be difficult to fulfill. Hence, this parody exception promises to align the British copyright jurisprudence with its freedom of expression jurisprudence. Yet the moral rights provisions in the statute present a potential hindrance to free speech, while the public interest doctrine, narrowly circumscribed in *Ashdown v. Telegraph Group Ltd.*, will prevent courts from applying the parody exception in a way that best serves the public's interests. Nonetheless, courts could enhance the protection of artistic and political speech through an internal solution – emphasizing the nature of the defendant's use factor. Furthermore, should *Ashdown* be overruled, or the European Court of Justice's decision in *Deckmyn v. Vandersteen* be followed, courts could apply the parody exception with reference to a broadened public interest doctrine to enable parodies to survive moral rights challenges.

Chapter 6 will look at France, the only civil law jurisdiction in this book, whose copyright system is considered to be more oriented towards the protection of authorial property than their counterparts in other jurisdictions. While its Intellectual Property Code does not have the equivalent of the American fair-use or Canadian/British fair-dealing doctrines, it provides for a parody exception. Despite potential moral right challenges in a copyright jurisprudence oriented towards the protection of authors' rights, this parody exception, as interpreted by French courts, is generally in keeping with the freedom of expression tradition. Further, because France is a Member State of the EU, courts there can draw upon the freedom of expression doctrine in both domestic and European laws to safeguard the right to parody. Should domestic courts deny parody exceptions for works that would not harm the author's moral rights and commercial interests, parodists can appeal to the European Court of Human Rights, which would then apply art. 10 of

the European Convention to provide more room for free expressions in the form of parodies.

Chapter 7 will look at the parody exception in Hong Kong's Copyright (Amendment) Bill 2014. After offering a socio-political account for the upsurge of parodic works in Hong Kong's social media since year 2000, it will explain how a parody exception would help to foster its creative industries and promote a critical political culture. However, neither the "parody, satire, caricature, and pastiche" exception in the Bill, nor a scholar's suggestion that the law should not distinguish between these genres, would best serve these purposes. Furthering Part I's argument, the chapter will contend that a broad parody exception should replace "parody" and "satire," but be distinguished from both "caricature" and "pastiche," which, unlike parody, need not contain any criticism or commentary. As free speech continues to decline in Hong Kong, this doctrine could not be relied upon as an external safeguard for the parodist's right to expression. An internal solution – providing an exception to the author's integrity right to object to derogatory treatment in the form of parody – would serve to provide more space for free speech.

WHAT'S IN A NAME?

The concluding chapter will ask: Can "parody" be called by any other name and still serve its function? On a related note, if the most vital factor that determines the fairness of the use or dealing is whether the new work would harm the interests of the rights-holder by substituting for the underlying work in the market, is the "parody" exception or defense even necessary in copyright law? By reiterating its ancient origins, its presences in different cultures throughout the centuries, and the significant role that it has played in fostering criticisms and commentaries, this book will conclude that "parody" should not be called by any other name as its serves its legal function to safeguard this important right. After all, names carry tremendous power.