

PARODY IN TRADEMARKS AND COPYRIGHT: HAS HUMOUR GONE TOO FAR?

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ABSTRACT

When approaching the topic of parody, questions usually arise as to the boundaries between parody and the original work, namely in the context of copyright. The legislative technique for settling those boundaries within the copyright context is not uniform throughout Europe. In particular, difficulties can be detected at the primary level, concerning issues such as the nature of parody. Despite the uncertainties that surround the subject of parody in the field of copyright, parody is no longer confined to that domain and has in fact found its way into area of trademarks. Other unresolved problems also exist. In particular, whereas a common rationale concerning parody can be established for both copyright and trademarks, that rationale represents merely a starting point when it comes to ascertaining the limits of parody. The weighing of interests at stake and other relevant criteria are considered in this article with the intention of clarifying this matter. A comparative study of three chosen jurisdictions is also undertaken in order to shed light on this issue. The primary goal of this article, then, is to establish common standards in the specific context of admissible parody, thereby providing some guidelines for future disputes.

I. INTRODUCTION

Parody has traditionally been a haven for a certain kind of creator who needs to get inspiration from pre-existing works protected by copyright. This activity is socially and legally acceptable, perhaps because there is a trade off between the advantage of resorting to the parody exception and the benefit deriving from the creation of an additional piece of work. Alternatively, one can also allege that this exception to the author's exclusive rights finds its rationale in the need to protect fundamental rights such as freedom of expression. The flow of information and the will to express one's views on current and up-to-date issues have helped to develop a general acceptance that proprietary rights must give in whenever a parody is involved. Bearing this context in mind, one must question whether humour is crossing the proverbial line. The intrusion of parody into the area of trademarks has called the attention of jurisprudence to a grey area, where parody is not purely cultural and altruistic, and the intellectual property rights are more limited or at least have different contours. It is submitted that doctrine must make an effort to lay down some standards that can set out where parody ends and infringement begins; both trademarks and copyright are areas that should be covered by these standards. To that end, this article analyses the harmonised European regime as well as the national systems of Germany, France and Spain, each of which put forth a different regime for parody, both at a jurisprudential and legal level. The objective of this article is twofold: (i) to determine whether parody has indeed gone too far; and (ii) to put forth criteria that can help judges to answer that controversial question in future cases.

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II. EUROPEAN LAW

A. Copyright

According to Article 5(3)(k) of Directive 2001/29/CE (“the Directive”), the parody exception in the context of copyright is posited as an exception to the exclusive rights of reproduction, communication to the public, and making available to the public.

1. *Reproduction right*

The first striking difficulty regarding the concept of “reproduction right” is its scope. It is not clear whether this exclusive right includes the *ius prohibendi* concerning acts that do not imply an exact copy of the work, for instance plagiarism.¹ It is submitted that one should understand reproduction as the exact repetition of a work. Plagiarism and similar practices extract the essence of a work, but that is conceptually distinct from an act of reproduction. In addition, a different approach would imperil legal certainty. The heterogeneous concept of reproduction which, *inter alia*, considers as reproduction the repetition of the essential elements of a work should be rejected: every reproduction outside the sphere of a homogenous act of copying shall remain free in relation to the reproduction right, unless the law expressly indicates otherwise. It is to be noted that this view is consistent with international conventions, as no definition of “reproduction” is provided by such sources of law. One tends to see the reproduction right as merely instrumental in relation to the exploitation of the work. Reproduction is reserved to the author because it logically and chronologically precedes that exploitation. The relevant act for the author is the destination of the copies, although it is the act of reproduction that will allow those subsequent uses of the work.² Furthermore, some acts of temporary reproduction are exempted under Article 5(1) of the Directive. One can safely assume that the field of application of parody as an exception to the exclusive right of reproduction is very narrow, especially if one bears in mind that typically a parody involves a heterogenic reproduction.

2. *Right of communication and right of making available*

In contrast to the reproduction right, the scope of the right of communication to the public and of the right of making available may have closer connections with the subject matter under analysis. Unlike the reproduction right, these rights are not instrumental. Rather, they involve an actual exploitation of a work; no subsequent act is implied. Everything that goes beyond an intangible exploitation³ of the work occurring within a private sphere will be deemed a public communication. It is worth recalling the French tradition on this issue, which resorts to the notion of family circle (*cercle de famille*),⁴ although

¹ This activity entails an appropriation of someone else’s creativity, in the form of exteriorising that creativity as one’s own product of one’s work. For a distinction between copy and plagiarism, see A. Agúndez Fernández, *Estudio Jurídico del Plagio Literario* (Granada 2005), pp. 59-60.

² In this sense, see H. Wistrand, *Les Exceptions Apportées aux Droits d’Auteur sur ses Œuvres* (Paris 1968), pp. 313 ff. The author admits that reproduction is frequently a preparatory act, leading to the dissemination of the work.

³ An expression that is used to define communication to the public in P. Goldstein, *International Intellectual Property Law: Cases and Materials* (New York 2001), p.200.

⁴ Cf. Article 122-5, para. 1 of the French Code of Intellectual Property.

the concept has some flexibility (essentially given by doctrine and jurisprudence⁵). Hence, we can define the private sphere as an intimate environment which typically exists at one's home, in an incorporeal or immaterial sense (thus including close friends and family); anything outside of that ambit is necessarily public. It is to be noted that the criterion here is the addressees' identity, independently of where the communication or the making available physically takes place.⁶ This is a natural consequence of the fact that the public can access works from "a place and time individually chosen by them" (*vide* Directive, Article 3 paragraph 2 *proem in fine*). Consequently, it will be a private communication where, for example, members of a close circle of friends and/or family, who are in different places, view a cinematographic work online via a server.

3. *The state of the art in copyright*

One can draw a preliminary conclusion concerning the abovementioned exclusive rights: the only type of parody that is completely free of restraint – because it is outside the very system of copyright – is the one completed within a private sphere. Beyond that, either the parodist complies with the legal requirements of the parody exception (set out by each Member State) or he has to be authorised by the copyright owner. Importantly, there is no harmonisation regarding adaptation or transformation of the work, which is the economic right that is highly likely to be jeopardised by parody. It is true that many cases will be covered by the rights of communication to the public and making available, and therefore adaptation can also be regarded as instrumental in that sense. However, if any instrumental right should be of concern here it would be adaptation, and not reproduction – reasons to justify the legislative choice are the dangerous closeness of that right to the moral rights (which are expressly set aside by the Directive, see Recital 19) and the fact that the adaptation right has too many different facets throughout the Member States,⁷ making it a hard subject matter to approach in terms of harmonisation. In the end, it is another issue to be considered at the Member States' sole discretion.

B. *Trademarks*

1. *In general*

Trademark has a drastically different profile than copyright as regards the parody exception: there is no legislative instrument expressly positing it.⁸ As to the scope of trademark protection, the right holder has an exclusive right and the exceptions to this right are limited and allegedly exhaustive. At a European

⁵ See, for instance, E. Bianco, *Le Droit d'Auteur et ses Limites* (Lausanne 1951), p. 128 and X. Bellefonds, *Droits d'Auteur et Droits Voisins*, 2nd ed. (Paris 2004), pp. 220-221; as to jurisprudence, see *Ministère Public, FNDE, SEV, Twentieth Century Fox et autres v. Aurélien D.* [2005] CA Montpellier, available at <http://www.juriscom.net/documents/camontpellier20050315.pdf>, last accessed 3 January 2009. Here, the Court confirmed that some friends of the beneficiary would still qualify as being part of a family circle (decision).

⁶ This means that there can be a communication to the public in a private place or a private communication in a public place, although it has been correctly pointed out that usually the place and qualification of the use as private or public tend to coincide: R. Pinto, "Obras Não Protegidas, Uso Privado e Utilizações Livres: Contributo para o Estudo do seu Regime" (1991/1992) 16/17 *Revista Jurídica da AAFDL* 16/17, pp. 47-48.

⁷ P. Goldstein, see note 3 above, p. 233.

⁸ Although the TRIPS Agreement set the basis for parody *ex vi* its Article 17.

level, there is both Council Regulation 40/94/EC (“CTMR”) and Council Directive 89/104/EEC (“TMD”). The former creates a community right, which is valid within the entire European Union – the Community trademark; the latter sets out a protection to be adopted by each Member State – the national trademark. They therefore represent two different kinds of harmonisation.⁹ As for the CTMR, the relevant provision is Article 9(1)(b). In relation to the TMD, the relevant article is Article 5(1)(b). This article possesses quite a similar wording to Article (9)(1)(b) of the CTMR, and consequently the analysis conducted concerning the latter article should be considered to apply to it. In both cases, the exclusive right bestows upon the right holder the power to prevent any third party from using in the course of trade an identical or similar sign in relation to identical or similar goods or services when such use is likely to cause confusion on the part of the public.¹⁰

We can outline the parodies that will remain free in view of these provisions. Here, the permissible parody will be non-commercial, *i.e.*, not used in the course of trade. That can leave quite a narrow margin to the parodist depending on the interpretation of the concept of “the course of trade”. One possible interpretation is that the relevant use must concern use as a trademark. This interpretation would certainly leave some room for parody. However, this view was expressly set aside by the ECJ in 2002,¹¹ when this court gave a broad meaning to the relevant expression.¹² Hence, it will be more accurate to construe the legal terminology in the sense of use of the trademark in the context of an economic activity, independently of its use, *ipso iure*, as a trademark. This conclusion will pose a grave obstacle to parody, in that it is hard to devise a purely non-commercial form of parody.

Despite that fact, parody can still be admitted. Indeed, subject to one exception,¹³ a similarity of signs and goods or services is needed for the trademark owner to exercise his exclusive right. Usually a parody will use a similar sign to the parodied mark, especially if one bears in mind the broad interpretation adopted by the ECJ on this matter: the similarity of signs will be a result of a visual, phonetic or conceptual comparison, but only one of these elements is enough to establish similarity.¹⁴ In addition, one can follow the opinion¹⁵ that the normative similarity should be appreciated by the factual similarities and not by the differences between the signs, insomuch as the consumer will not often have the chance to make a direct comparison, thus having to rely on the “imperfect picture of them that he has kept in his mind”.¹⁶ In that situation, the similarities will play a more decisive role than the differences, since the consumer will be more likely to identify the former than the latter. However, a considerable number of parodies are based on the different nature of the goods or services and frequently rely on such differences to fulfil the parodistic aim. If that should be the case, there is nothing the trademark owner can do.

⁹ For a thorough explanation on the difference between a directive and a regulation and its legal consequences, see P. Craig and G. de Búrca, *EU Law. Text, Cases and Materials*, 3rd ed. (Oxford 2003), pp. 112-115.

¹⁰ It is noteworthy that this wording is similar to article 16 of the TRIPS Agreement.

¹¹ C-206/01, *Arsenal Football Club plc v. Mathew Reed* [2002] E.C.R. I-10273.

¹² This wide-ranging interpretation seems to have been confirmed by the ECJ in a more recent case. In fact, in *Adam Opel AG v. Autec AG* [2007] E.T.M.R. 33 (ECJ), the Court acknowledged that the trademark proprietor is entitled to prevent a use which affects or is liable to affect the functions of the trademark. Depending on one's views about what these might be, it is possible to defend the argument that the Court's opinion is also protecting the advertising functions of the trademark.

¹³ This relates to marks with a reputation. In fact, such marks are protected expressly against dilution and hence infringement can arise even if the goods are not similar.

¹⁴ See C-342/97, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV* [1997] E.C.R. I-3819.

¹⁵ Expressed by P. Mathély, *Le Droit Français des Signes Distinctifs* (Paris 1984), p. 533.

¹⁶ See C-342/97, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV* [1997] E.C.R. I-3819.

Even if similarity has been established, the proprietor's exclusive right would provide him no protection where there is no likelihood of confusion. Undeniably, the touchstone for infringement is the likelihood of confusion. In this regard, it might be argued that parody finds its ultimate haven therein, inasmuch as one of its main traits is to be recognisable and thus to thwart any confusion with the parodied target. Conversely, it is possible that parody causes the public to associate it with the trademark. Nonetheless, association without confusion is immaterial.¹⁷ One eventually risks vouching that if there is a likelihood of confusion then there is no parody as such at all. The likelihood of confusion has been assessed in a number of cases by the ECJ, including in the so-called *Canon* case:¹⁸ when evaluating the similarity of goods or services for the purposes of determining whether there is likelihood of confusion, all relevant factors must be taken into account, "*inter alia*, their nature, their end users [should be read intended purpose], and their method of use and whether they are in competition with each other or are complementary".¹⁹

As one can easily acknowledge, the setting forth of these factors will help parody not to perish in the context of trademarks. The intended purpose and the competition requirements will seldom be fulfilled; it is also difficult to see the other features coinciding. In short, as regards the general regime of trademarks, the area of freedom outside of the scope of the exclusive right – *i.e.*, where parody can find its place – is somewhere beyond the principle of speciality and the course of trade. In other words, a parody will be admissible where no economic activity is concerned or in any case for dissimilar goods. More importantly, parody can still be allowed, even in the context of an economic activity and for purposes of its use in relation to similar goods or services, if there is no likelihood of confusion on the part of the public.

2. Trademarks with a reputation

All of the abovementioned considerations cease to be valid when the trademark at stake has a reputation. Importantly, it is exactly this class of trademarks which will be the preferred target of parodists, since the public can more easily understand a parody whenever a known mark is involved. Regarding these trademarks, the relevant provisions are Article 5(2) of the TMD and Article 9(1)(c) of the CTMR.²⁰ The provision is optional in the case of the TMD; Member States are free not to implement it. With this exception, the wording of both articles is once again similar, and accordingly one can treat both articles together.

The ECJ has already held that the mark must be known to a significant part of the relevant public, in

¹⁷ As decided in C-251/95, *Sabel v. Puma* [1997] E.C.R. I-6191. It was also decided by the ECJ that the reputation of a mark does not necessarily entail likelihood of confusion simply because there is likelihood of association (see C-425/98, *Marca Mode CV v. Adidas AG and Adidas Benelux BV* [2000] E.C.R. I-4861).

¹⁸ C-39/97, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.* [1998] E.C.R. I-5507.

¹⁹ See paragraph 23 of the decision.

²⁰ Nevertheless, there are similar provisions in the Paris Convention (Article 6 *bis*, which grants protection against misappropriation to foreign well-known marks, derogating from the territoriality principle) and in the TRIPS Agreement (Article 16, paragraphs 2 and 3, the latter extending Article 6*bis* protection to dissimilar goods if there is an indication of a connection between the good and the right holder). However, these provisions relate to "well-known marks" and this term is not interchangeable with the one of "mark having a reputation". In fact, a trademark can be well-known without having a reputation, the concept of reputation being much narrower. As the goal of this article is to focus on the substantive regime adopted in the continental European system, reference will be made only to Community instruments which are more directly linked to the questions raised herein.

furtherance of the definition of the legal notion.²¹ So apparently “niche fame”²² is admitted as a criterion to qualify a mark as being one with a reputation. If a trademark shall be considered to have a reputation in the abovementioned sense, then its owner can prevent third parties from using in the course of trade any identical or similar sign in relation to dissimilar goods or services (*i.e.*, regardless of the principle of speciality).²³ The similarity test is somehow different when applied to marks with a reputation – as the protection afforded to these marks is wider, a link between both the sign and the mark suffices for similarity to be found, with no need to show likelihood of confusion.²⁴ However, the trademark proprietor must further establish that the third party (*i.e.*, the parodist) has, “without due cause”, used a mark in such a way as to take “unfair advantage of” the proprietor’s trademark or be “detrimental to the distinctive character or the repute of” the proprietor’s trademark.

Two problems arise from the legal drafting as far as parody is concerned. First, there is no definition of what “due cause” might be. It may be a reference to a justification inherent to the action taken by the third party²⁵ or a more general appeal to the assessment of good faith. Another interpretation is possible: that the “due cause” condition alludes to the rationale of the use and to the assessment as to whether it concerns the justification that should be its underlying core. The main rationale of parody is freedom of expression, which is a right generally having a constitutional dimension. Accordingly, if, in the first instance, the parody in question can be considered as a consequence of that basic freedom, and, in the second instance, the same parody is found to be consentaneous with that rationale, in the sense that it is proportionate, then it is submitted that the use made by the parodist should be seen as a “due cause”. Thus, a balancing exercise is needed, and to that end the interpreter shall make use of the widely recognised principle of proportionality: on the one hand, the parody shall be suitable and necessary to attain its goal, and on the other hand it cannot impose an excessive burden on the owner of the trademark.²⁶

Second, one should determine the scope of both “taking unfair advantage” and “being detrimental”. It is worth recalling the opinion of Advocate General Jacobs delivered on 10 July 2003.²⁷ There, it is posited that Article 5(2) of the TMD²⁸ protects the right holder against four types of use: use which takes unfair advantage of the mark’s distinctive character (free riding); use which takes unfair advantage of its repute (also free riding); use which is detrimental to the mark’s distinctive character (dilution); and use which is detrimental to its repute (tarnishment). As far as parody is concerned, it should first be acknowledged that parody implies a criticism which is in principle detrimental to the trademark. In consequence, the detriment caused must be evaluated *cum grano salis*. Again, a balancing exercise is needed, and the exclusive right cannot be understood in such a fashion as to impair each and every criticism. The rationales of both underlying rights have to be weighed on a case-by-case basis. Moreover,

²¹ C-375/97, *General Motors Corporation v. Yplon SA* [1999] E.C.R. I-5421.

²² One uses this expression not in the sense of the mark being famous, but of it having a reputation in a niche market.

²³ Naturally, following an argument *a maiori ad minus*, the right holder will also be able to prevent the use of a similar sign in relation to similar goods: see C-292/00, *Davidoff & Cie SA and Zino Davidoff SA v. Gofkid Ltd* [2003] E.C.R. I-389.

²⁴ As decided by the ECJ in C-408/01, *Adidas-Salomon AG and Adidas Benelux BV v. Fitnessworld Trading Ltd.* [2003] E.C.R. I-12537.

²⁵ L. Gonçalves, *Direito de Marcas* (Coimbra 2000), pp. 161-162, provides the example of the mark with a reputation consisting partly of descriptive signs. In this case, a third party could lawfully – *i.e.*, with due cause – use a sign composed of that specific part, even if such use is detrimental to the owner of the previous mark.

²⁶ On the principle of proportionality, see L. Gormley (ed.), *Introduction to the Law of the European Communities: From Maastricht to Amsterdam*, 3rd ed. (London 1998), pp. 146 ff., and J. Hanlon, *European Community Law*, 2nd ed. (London 2000), pp. 62 ff.

²⁷ Apropos C-408/01, *Adidas v. Fitness World* [2003] E.C.R. I-12537 at [36].

²⁸ And for that matter the same can be said, *mutatis mutandis*, about the corresponding provision of the CTMR.

the prohibition of free riding on the mark's distinctive character or repute will not constitute a *prima facie* hindrance to parody. Its essence is indeed to take advantage of such assets in order to criticise them. However, there must be an element of unfairness to it so as to trigger the legal proviso. And unfairness, it is submitted, must be valued with regard to honest commercial practices; that will provide the necessary tool to enable one to balance the antagonistic interests.

Finally, one must make a reference to Article 5(5) of the TMD. This rule appears to leave the door open to the admissibility of infringement in the case where a sign is not used to distinguish goods or services²⁹. However, it is for each Member State to decide how it approaches this issue. Subsequently, it is possible that some Member States will recognise an exclusive right in an economic context – *i.e.*, to distinguish goods or services – but not in absolute terms. This being the case, a Member State can exclude from the scope of trademark protection the use of a trademark in the ambit of social criticism or other non-commercial use.³⁰

III. NATIONAL REGIMES

A. Germany

1. Copyright

As far as copyright is concerned, there is no parody exception as such in the German Copyright Law, and the state of the art did not change with the adoption of the Directive. Thus, at first glance, parody would come under the adaptation right (Section 23 of the German Copyright Law). This means that parodying a work would be necessarily subject to the consent of the author. However, moved mainly by considerations about freedom of expression and of the arts as rights with a constitutional dimension, the majority of German doctrine³¹ stands for the qualification of parody as a free use within the meaning of Section 24 of the said law. It is noteworthy that Section 24 is not included in the chapter dedicated to limitations on copyright, but rather in the one dealing with the scope of copyright. It is submitted that this has a very precise meaning – the acts that can be subsumed therein are not exempted from the exclusive domain of the author; they are simply the negative part of his right, as they draw its inner boundaries. The wording of Section 24 provides some indication as to the criteria that a use – parody included – should comply with in order to qualify as free. It has to be underlined, however, that the scope of Section 24 is broader than the one of parody.³² First, parody should be contained in an independent work. It is submitted that one should turn to the notions of individuality and originality in order to assess whether the parody can be so considered. Second, parody should amount to a free use of

²⁹ More precisely, Article 5(5) of the TMD states that “paragraphs 1 to 4 shall not affect provisions in any Member State relating to the protection against the use of a sign other than for the purposes of distinguishing goods or services, where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark”.

³⁰ In practice, though, there is only one case where Article 5(5) comes into force: the Benelux Convention on Intellectual Property, in its Article 2.20(1)(d).

³¹ See, *e.g.*, C. Heath, “Parodies Lost”, in P. Ganea, C. Heath and G. Schriker (eds.), *Urheberrecht Gestern – Heute – Morgen. Festschrift für Adolf Dietz zum 65. Geburtstag* (2001), pp. 402-403; C. Rutz, “Germany: Copyright – Caricature as Fair Use” (2004) 26 E.I.P.R. 6, 90; and C. Rutz, “Parody: A Missed Opportunity” (2004) I.P.Q. 3, 304-305.

³² C. Rutz, “Parody: A Missed Opportunity” (2004) I.P.Q. 3, 304, notes that “a ‘parody’ needs to be anti-thematic (target parody), but the scope of protection under §24 UrhG is wider than just parody in that sense”.

the previous work. Some authors³³ interpret this term as “inspiration”. However, I do not share the same opinion: the very rationale of the system of copyright, and particularly the well-known idea/expression dichotomy,³⁴ leads one to believe that inspiration is free. The ideas are *res nullius*, and to get inspiration, through someone else’s work, from that someone else’s underlying idea, is natural and licit, at least from the legal point of view. One thereupon concludes that there is a middle lane, right above inspiration and way below the exclusive adaptation right, which constitutes the admissible parody as far as this specific issue is concerned. Nonetheless, Section 24 does not apply to the free use – and, for that matter, parody – of musical works, where a melody has been recognisably borrowed (see paragraph 2 of the provision).

German courts have also played a decisive role in the shaping of the subject matter. Indeed, there was a 1958 decision³⁵ that represented a drawback in the recognition of parody as free use of the work: the Court established that, in order to be admissible, a parody should have such individual characteristics that the features of the parodied work would “fade away” in the new work. As one can easily acknowledge, this controversial view almost extinguished the field of admissible parody, since one of the goals of the exception is to allow its addressees to recognise an underlying work so the critic and humour – *i.e.*, the essence of the parody – can be perceived. Plus, it is hard to acknowledge the line between such kind of “parody” and plagiarism, which in turn is exactly an appropriation where one is not supposed to identify the previous work. More recent jurisprudence has deviated from this line of thought. A decision dated from 2003³⁶ stated that the prior understanding had to be subject to a broad interpretation. According to this new opinion, as long as the parody would keep enough of an “inner distance” from the previous work, it would not be considered an infringing use of it. That is to say, parody ought to have a sufficient amount of individuality.

Therefore, although it does not have a parody exception *qua tale*, Germany can still ensure that parody is given a safe harbour: by evaluating the kind of use made of a work in concrete situations, and by weighing the interests at stake there, courts can manage to force parody’s way through the exclusivity sphere.

2. Trademarks

There is no parody exception posited in German trademark law and, concomitantly, parodies in that field have to rely on jurisprudential activity – especially since, following the path of the TMD, there is not even a general clause of “free use”. The Federal Supreme Court does not seem to have such a strict – or rather, consistent – standard in what concerns trademark parody. In a case relating to the use of the trademark Mars in an advertisement for condoms,³⁷ the Court was of the opinion that such use was detrimental to the trademark’s reputation. On the other hand, the same Court found the use of the word “Mordoro” in a calendar,³⁸ alluding to the advertisement made by the trademark Marlboro, to be

³³ Namely, *eiusdem, ibidem*, p. 300, seems to point in this direction by stating: “a creator of a new work shall not be prohibited from getting inspiration from a copyright work”.

³⁴ On this issue see J. Ascensão, *Estilos de Arte e Direito de Autor: Parecer* (unpublished) and R. Garcia Sanz, *El Derecho de Autor en Internet* (Madrid 2005), pp. 27 ff.

³⁵ BGH, decision of 4 February 1958, *apud* Heath 2001 p. 402.

³⁶ BGH, decision of 20 March 2003, *apud* Rutz 2004 *passim*.

³⁷ *Markenverunglimpfung I* [1992] B.G.H. I ZR 79/92 IIC 1995 26, 282.

³⁸ “Mordor” means murder in German.

non-infringing.³⁹ Similarly, the use of the expression “*Bild Dir Keine Meinung*” (which can be translated to “do not form your own opinion”), parodying the slogan used by the newspaper Bild (“*Bild Dir Deine Meinung*”, equivalent to “form your own opinion”), was held to be a lawful parody to the trademark by the Court of Appeals of Hamburg.⁴⁰

The rationale seems to amount to some kind of social justice or concern: in fact, whereas in the *Mars* case the underlying reason for the use of the trademark was egoistical, because it was mainly business-oriented, in the *Marlboro* and *Bild* decisions there is some sort of concern for social welfare. In the first case, there is an altruistic motive – calling the public’s attention to the fact that smoking is bad for one’s health. In the second case, there is a cultural motivation – calling the public’s attention to the low quality of a newspaper. Another aspect common to the abovementioned cases is also noteworthy: there is no (classic) trademark use, in that the parody is not used to identify the source of goods or services. The pattern of the weighing of conflicting interests is thus readjusted; both the right of the parodist to freedom of expression and the interests of the trademark owner are to be considered. But German jurisprudence apparently calls into play the interests of third parties as well, *rectius*, the public interest.

B. France

1. Copyright

As far as copyright is concerned, the French Code of Intellectual Property has expressly exempted parody, pastiche and caricature from the exclusive rights bestowed upon the author (see Article 122-5(4), which remained unchanged after the adoption of the Directive). Notably, the French legislator did not link the exception to any exclusive right; instead, he gave it the broadest scope, by stating that the author cannot prevent it once the work has been divulged. Yet, by failing to define it, the legislator left the interpretation of parody to the courts. The legislator simply indicates that parody shall be allowed where due account is taken of the rules of the genre (*lois du genre*). This legal limit aims at preventing parodies lacking a humorous intent.⁴¹ Specifically, the reference made to the *lois du genre* means that parody must be distinctive, in the sense that the public must be able to identify the previous work and the new one as two separate objects.⁴² In addition, the subjective element – the intention of the parodist – is a distinguishing feature. That intention must amount, again, to a humorous one (although some level of criticism is desirable and allowed⁴³). Based on this legal condition, the majority of the doctrine⁴⁴ established two requirements which must be met in order for a parody to be permissible: intention to be humorous and absence of risk of confusion with the previous work. However, these do not necessarily preclude parodies of a commercial nature.⁴⁵

The two requirements are often highlighted in the jurisprudence of the French courts. In fact, the

³⁹ *Mordoro* [1984] B.G.H. VI ZR 246/82 GRUR 1984, 684.

⁴⁰ [1999] O.L.G. Hamburg GRUR-RR, 1060/1061.

⁴¹ H. Desbois, *Le Droit d’Auteur en France*, 2nd ed. (Paris 1966), p. 189.

⁴² F. Delfour, *L’Imitation Créative* (Lille 2000), pp. 77ff.

⁴³ *Eiusdem, ibidem*.

⁴⁴ See *inter alia* P-Y. Gautier, *Propriété Littéraire et Artistique*, 5th ed. (Paris 2004), pp. 397-398, and A. Bertrand, *Le Droit d’Auteur et les Droits Voisins* (Paris 1991), p. 205.

⁴⁵ P-Y. Gautier, see note 44 above, pp. 397-398, and A. Lucas and H-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, 3rd ed. (Paris 2006), p. 320.

courts have built around the exception enshrined in the aforementioned article. In particular, since there is no legal definition of the concept of parody, courts have used the requirement relating to the *lois du genre* to shape, as precisely as possible, the parody exception. A paradigmatic example is the one given by a decision of 13 February 2001:⁴⁶ the Paris Court of First Instance expressly set out that parodies have to have the intention of amusing the public, without harming the author of the parodied work or the work itself, which was absent from the defendant's conduct. The defendant's actions had a commercial purpose, specifically the promotion of a product. The same decision underlined that there could be no risk of confusion between the original work and the alleged parody. Again, that was not the case – the defendant reproduced integrally the copyrighted work, without any modification or addition of his own. Both criteria have been applied rather strictly.⁴⁷ Nevertheless, the Paris Court of Appeal, reversing a decision of the Court of First Instance, admitted a hardly humorous homage as a non-infringing use,⁴⁸ the reason being that the parodist clearly separated his work from the parodied one by identifying both authors. Hence, it is probable that the objective requirement of lack of confusion, without totally erasing it, supersedes the subjective one (humorous intention).

2. Trademarks

As for trademark parody, and as with German law, there is no parody exception to the right bestowed upon the trademark owner. Nevertheless, we find within French jurisprudence some benchmark cases. In a decision dated 30 April 2003,⁴⁹ and following some previous cases,⁵⁰ the Paris Court of Appeal was of the opinion that a parody criticising Danone's employment policy was lawful and justified. Concretely, the defendant had registered a website under the domain name "jeboycottedanone.com", where he wrote "*les êtres humains ne sont pas des yaourts*" ("human beings are not yoghurts"), pleading for a general boycott of Danone's products and reproducing Danone's logo with a different colour (black instead of red). The Court held that the intention of the defendant was not one of promoting products or services, his aim being purely to criticise certain practices of the plaintiff, and concluded that the defendant's conduct could amount to a result of his right to freedom of expression. The Court further underlined that there was no risk of confusion or tarnishment. Approximately one year earlier, on 22 May 2002, the same Court found a parody to the trademark "Camel", depicting a dying camel, to be admissible in the context of an anti-smoking campaign.⁵¹ However, this decision was annulled by the French Supreme Court.⁵² This court reasoned that the advertising campaign, no matter how noble its motives might have been, was detrimental to the trademark's reputation. The Court further stated that the right to freedom

⁴⁶ Case *SNC Prisma Presse et EURL Femme v. Charles V. et association Apodeline* [2001] T.G.I. Paris, available at <http://www.juriscom.net/txt/jurifir/da/tgiparis20010213.pdf>, last accessed 3 January 2009.

⁴⁷ See X. Bellefonds, note 5 above, pp. 215-217, for examples of cases showing this strictness.

⁴⁸ See *Sté Sebdo et Jacques Faizant v. Editions Enoch* [1993] CA Paris RIDA 157 [2003], p. 340.

⁴⁹ *Olivier Malnuit v. Société Groupe Danone* [2003] CA Paris, available at <http://www.foruminternet.org/telechargement/documents/ca-par20030430.pdf>, last accessed 3 January 2009.

⁵⁰ See, e.g., *Esso v. Greenpeace* [2003] CA Paris, available at http://www.foruminternet.org/telechargement/documents/ca-par20030226_2.pdf, last accessed 3 January 2009.

⁵¹ *Association Comité National contre les Maladies Respiratoires v. Société JT International GmbH* [2002] CA Paris, available at http://www.lexinter.net/JPTXT/reprise_d'une_image_publicitaire_et_marque.htm, last accessed 3 January 2009.

⁵² *Association Comité National contre les Maladies Respiratoires v. Société JT International GmbH* [2006] CC Paris, available at http://www.courdecassation.fr/jurisprudence/2/deuxieme_chambre_civile/570/arret_no_9432.html, last accessed 3 January 2009.

of expression could not prejudice the legitimate rights of third parties (*i.e.*, the plaintiff's trademark right). Therefore, although the expression "right to humour" is arguably accurate when it comes to French parody, in the trademark field at least a limit has been expressly set by Courts: the freedom of the parodist to criticise or to ridicule exists so long as there is no unreasonable damage to the right holder. Importantly, by its own nature, this limit is capable of being extended to copyright cases.

One final comment ought to be submitted concerning a case where the Court was obliged to rule on the lawfulness of a parody which affected both trademark rights and copyright. In a decision of 13 September 2005,⁵³ the Paris Court of Appeal took the view that the use of the characters of the comic *Tintin* on postcards, depicted in a different background (daily situations instead of fictitious adventures), was an infringing one. It must be noted why both copyright and trademark infringement were at issue here: first, original stories were concerned, which were copyright protected; and second, the plaintiff had registered the figurative trademarks of *Tintin* and *Milou*. In relation to copyright infringement, the conclusion of the Court was based on the number of elements borrowed from the original stories. Concerning trademark infringement, the Court found that, as the defendant was using the trademark to present the products that depicted the character, there was a likelihood of confusion on the part of the public. Importantly, the Court held that no parody exception applied, due to the absence of humorous intention and to the fact that the parody was likely to be confused with the parodied work, because it did not keep enough distance from it. By dealing with copyright and trademarks in parallel, the French Court has enabled a convergence of standards of admissible parody that can set the basis for a common test of lawfulness in the future.

C. Spain

Like France, Spain has a parody exception in its copyright law: Article 39 of the Spanish Copyright Law. However, parody is considered an exception to the exclusive right of adaptation, and it is permitted under certain conditions: the original work must have been divulged, there can be no risk of confusion with the parodied work, and no harm can be done to it or to its author.

However, although the drafting of the provision stresses strict limits to parody, case law has clearly stretched them. A decision of the Madrid Court of First Instance set the basis for such enlargement.⁵⁴ Under analysis was a famous Spanish song which was parodied by another band that changed the lyrics and slightly re-arranged the musical composition. The right holders sued for infringement of their exclusive adaptation right. The Court found the parody to be lawful, and therefore rejected the plaintiffs' claim for infringement. There are several reasons for the final findings, the main being: first, the popularity of the original work; second, the distance between both the type of performers and the lyrics of the two works; third, the modernisation of the musical composition; and fourth, the considerably shorter length of the parody as compared to the original song. It is submitted that there is some merit in the reasoning adopted by the Spanish Court: the distance requirement of as many elements as possible and the popularity of the original work as a means of reaching that distance are important considerations that must be taken into account. However, the Court's view on the relevance of the parody's length

⁵³ *Paul B. v. Moulinsart et autres* [2005] CA Paris, available at http://www.legalis.net/jurisprudence-decision.php?id_article=1781, last accessed 3 January 2009.

⁵⁴ Decision of 9 May 1996, commented in L. Gimeno, "Parody of Songs: A Spanish Case and an International Perspective" (1997) 8 Ent. L.R. 1, 18-22.

should be rejected, as quantity should not play a role in this framework.⁵⁵

IV. QUINTESSENCE

Hitherto attention was dedicated to the continental European system concerning parody. As a consequence, one can postulate that, more than humour having gone too far, it has been the object of various (and sometimes contradictory) views which give it a heterogenic texture. In fact, the criteria applied to determine the lawfulness of parody differ not only from country to country but also within the same national jurisdiction. The doctrinal views range from one side of the spectrum of strictness to the other, as do the jurisprudential ones. Independent of one's opinion as to what the relevant criteria should amount to, it is probably safe to assume that, if there are cases where parody has been confined to a limited field, there are others where the parody exception has been interpreted too broadly. It appears, however, that the immediate problem is not necessarily based on a general exceeding of the limits of admissible parody, but instead on a lack of knowledge of what those limits are. Accordingly, exegesis calls for a proposition of some common standards for the future, while examining whether criteria used in trademark and in copyright to determine the lawfulness of parody are interchangeable. Such an exercise will help the judge to assess whether a given parody is admissible; it will enable one to evaluate in concrete cases whether humour has, in fact, gone too far.

V. CONTRIBUTION FOR A HARMONIZATION OF STANDARDS: ASSESSING THE "ADMISSIBLE PARODY"

A. Non-Commercial Use – The Problem of Free Riding

Economically, free riding is the obtaining of more benefits than one's fair share at the expense of others.⁵⁶ Free riding occurs when dealing with public goods (and, to the same extent, with semi-public goods such as intellectual property). Since it is not possible to exclude others from enjoying public goods, there is no rational incentive to create them. The potential creator knows that other people will be parasites of his labour, freely enjoying the results of it without bearing its costs ("incorporeal" cost of creation included), and so he has no incentive to create or to put the good on the market. It has already been stated that intellectual goods, creations of the mind, are semi-public goods. The legislative will to avoid the problems of public goods, which have a tendency to be underproduced, is present in many legal provisions. This reasoning is understandable in the copyright context. But as far as trademarks are concerned, what is the good the legislature aims at protecting and/or developing? Ultimately, it is the reliance and trust "in the course of trade" that enables a rational market. It can be argued that the owner of a trademark has a *sui generis* property right, which only assumes its "proprietary" plenitude in the course of trade.⁵⁷ In order to avoid free riding, and hence the hindering of the production of intellectual

⁵⁵ Also adopting this view, see L. Gimeno, note 54 above, at p. 21.

⁵⁶ F. Araújo, *Introdução à Economia*, 3rd ed. (Coimbra 2005), pp. 585-590.

⁵⁷ J. Ascensão, "As Funções da Marca e os Descritores (*Metatags*) na Internet", in APDI (ed.), *Direito Industrial – Vol. 3* (2003), underlines the inaccuracy of this view, alleging that there is an exclusive right but not a property right. Although an in-depth analysis of the nature and rationale of trademarks cannot take place here, it is worth referring to the main arguments supporting this opinion. The author points out that there is an exclusivity granted only within the performance of certain activities (*i.e.*, in the course of trade), which is incompatible with the *erga omnes* nature of a true property right. Moreover, he asserts that the theory of property rights is incompatible with the principle of speciality, which gives an exclusive right only in relation to certain

goods (in copyright) and the reliance upon the functioning of the market (in trademarks), one could postulate a general right of the right holder to prevent others from free-riding on his objects of property. For present purposes one must decide how this axiom is revealed in the context of parody.

At the outset one must observe that “we stand on the shoulders of giants”. A total absence of free riding is unrealistic, inasmuch as every creator is inspired by the previous ones’ works. One option is to reserve all commercial uses to the right holder. However, this does not seem to meet one’s purpose. First, there are “public exceptions” to both trademark right and copyright, *i.e.*, situations where, although a use is performed publicly or in the course of trade, the right holder’s consent is dispensed with, which indicates that there are other rationales that must be taken into account. Second, if we apply that reasoning to parodies – and to an important part of the right to freedom of expression along with them – they would most likely disappear, since right holders would not easily authorise a parody on their work or on their trademark.

It is submitted that one must put forward a standard of non-commercial use of the parody, and that this standard should be interpreted broadly. As already mentioned, a parody can rarely be non-commercial. It is a genre in itself and the parodist will probably want to profit from his “gift”, just as a musician aims at profiting from his musical skills. Further, the touchstone ought to be defined by reference to the principles of unfair competition: the parody must not unfairly compete with the parodied work or trademark. As to the latter, this obligation will be tantamount to a non-commercial use in many cases. But there will be others where there is a commercial, yet lawful, use of the trademark in a parody. These situations will basically come down to cases of totally separate markets and of some benefit to the public interest that might arise from the parodistic use (without, of course, leaving aside the condition of causing no damage to third parties’ rights, which shall be a separate standard). Hence, the criterion of non-commercial use must be readjusted so as to meet the broad interpretation advocated and to avoid illicit free riding. The parody shall be deemed lawful when done in the context of a non-commercial use (interpreted broadly) or, if commercial, when such use is not unlawfully competing with the use performed by the right holder.

B. Principle of Proportionality (Lato Sensu)

The application of the principle of proportionality involves the evaluation of two factors: the suitability of the use for the attainment of its goal; and the necessity of it (in the sense that there is no option causing less harm to the other party’s interests). This two-step test is the mechanism through which the interpreter, first, inquires what the relevant interests are, and second, weighs those interests in order to perform a balancing operation. By applying the general guidelines provided by the principle of proportionality, one moves from the abstract level to the real and concrete one, in that the weighing of the rationale of the conflicting interests is also going to be assessed on a case-by-case basis.

In the context of parody, be it in trademarks or in copyright, there are not two sides of the scale to

products or services. From his point of view, a different opinion would amount, first, to admitting a “relative” property right, which does not exist, and, second, to bestowing upon individuals a monopoly over mere words, which is not desirable. Without deciding on the merits or demerits of this view, the author of this article follows the more or less generally accepted theory that classifies trademarks as *sui generis* rights. It is also noticeable that the CTMR stated in its Recitals that “a Community trademark is to be regarded as an object of property which exists separately from the undertakings whose goods or services are designated by it (...). It must also be capable of being charged as security in favour of a third party and of being the subject matter of licences”.

consider, but three. The relevant interests are not the classical ones of two contending parties, namely right holder and user, or plaintiff and defendant. The specific nature of the parody rationale, which allows for cultural considerations, calls for the weighing of a third interest: the public interest, particularly the public interest in culture and in the access to freely created (in the sense of being free from censorship) intellectual goods. The public interest in health (*e.g.*, see the case of anti-tobacco campaigns parodying cigarette trademarks) or in other fundamental rights may also be relevant. The principle of proportionality *lato sensu* forces us then to perform a balancing of three fundamental interests: the interest of the right holder, the interest of the parodist, and the (relatively broad) public interest.

C. Principle of Proportionality Stricto Sensu: No Unreasonable Damage Caused to Third Parties' Rights

When applying the principle of proportionality in a concrete case one needs to determine and weigh the actual fundamental interests at stake. In other words, the courts ought to evaluate the causes – the rationales – behind each right or interest and weigh them against each other. However, when doing so, one must also look at the consequences or externalities of each one of the actions supported by a protected interest. If before the balancing exercise came down to the different rationales, now it is time to weigh the consequences of the actions taken under the aegis of such protected interests.

It might happen – and in practice it is even likely to happen – that the interests to be considered are of equal weight when applied to the facts of a case. In the abstract, the principles are obviously equally weighted, forasmuch as they are all recognised as fundamental (be it at a national level, in the great majority of the European constitutions, or at supranational level, usually by means of an international convention). When it comes to the individual situation or case, they can continue to be considered equal if each one of the beneficiaries of those principles exercises his right within its scope. Should such a dead-lock arise, there must be a resource one can use to effectively reach a conclusion that can turn the scales towards one of the interested parties. That decisive factor is, it is submitted, the consequences of the actions taken by those parties. It is possible that the same action causes little or no harm in one situation whereas in another, because mainly of the collision with someone else's right, it has drastic results.

Applying this reasoning to parody, it is not necessary that a parody causes no harm to the right holder. If there is a sharp criticism involved, it will most probably damage some part of the right holder's sphere. Or, conversely, it can favour him as well. A parody, by its own nature, seldom causes feelings of indifference on the part of the targeted public, and to prevent that from happening would be to deny the lawfulness of parody altogether. That unavoidable fact is recognised generally by both trademark and copyright laws: when recognising exceptions to exclusive rights, the legislator acknowledges that some loss might thereby arise. This is especially true in copyright law, and it is an express reason for the existence of the mechanism of equitable compensation.

Subsequently, the interpreter must look not for the existence of a damage or harm, but for an unreasonable amount of it. This assertion is also concomitant with the need for the parodistic use to attain its goal, in that there can be no less harmful option. This standard can be a difficult one to apply, in view of the fact that intellectual goods are not fungible. Indeed, it is not always easy to acknowledge how a creator – the parodist – could have created differently and still get his message through. Nonetheless, the parody cannot surpass the limit of unreasonableness, regardless of whether there is an equally effective way of communicating the message; the simple fact that there is a less harmful way of doing so should be a *iuris tantum* presumption that the parodistic use is unreasonably prejudicing the interests of third parties (*i.e.*, the right holder). Moreover, this standard can be said to be linked to the intention or intended purpose of parody: if the intention behind the parodistic action is clearly a *mala fides* one,

then the damage caused is more likely to be found to be unreasonable.

Finally, one must assess the kind of rights involved. Are they economic rights, moral rights, or personality rights? Economic rights will certainly be involved. The primary essence of the attribution of property rights in intellectual goods is to give the right holder an opportunity to recoup his investment – in creation, in the case of copyright, and in goodwill, in the case of trademarks. Regarding moral rights, one must recall that they can only be considered as far as copyright is concerned. And, in that field, it is submitted that they are not and should not be absolute. In that sense they are somehow limited by parody. In fact, if the system is conceived as a whole, it would make no sense if the economic and non-economic rights were not coordinated. However, moral rights can definitely act as a limit in case of *abuse* of parody, since that can cause an unreasonable damage not only to the economic rights of the right holder but also to his moral rights. Should that be the situation, the “moral damages” should also be computed if they are unreasonable. Personality rights are a related, yet separate, concept. A parody unreasonably prejudicing personality rights (of the author or of the trademark owner) must have a corresponding remedy within a branch of law other than copyright or trademarks (*e.g.*, criminal or civil law). Hence, the unreasonable damage caused to personality rights of the right holder cannot be taken into consideration when determining the amount or reasonableness of the total harm. That infringement ought to find its own remedy in a more appropriated instance.

In conclusion, the standard advocated above enables the limitation of parody to uses that do not unreasonably cause damage to third parties’ rights. The damage will be *prima facie* considered unreasonable when there is a less harmful way to reach the aim of the parodistic use. The right holder’s rights that should be taken into account shall concern economic rights and (in case of copyright) moral rights – with the latter, only to the extent that there was an abuse of parody.

D. Intended Purpose of Parody

One of the common standards of admissible parody should be its intended purpose. There is no such thing as unintentional parodies, insofar as the parodist will have an intention to produce it; indeed, absent that intention, one cannot really speak of parody. That would amount to a contradiction in its own terms. Yet it is desirable to analyse what is the meaning of “intention to make a parody” or “intention of parodying”. One might say that if freedom of expression is the main rationale of parody, then parody must aim at expressing the parodist’s views on something. Communication of the parodist’s views is made in a quite particular way, however (or it must be done for its work to be considered a parody). Indeed, when expressing himself, the parodist must criticise and, at the same time, add something to the previous work or trademark. In other words, the purpose of the parodist must be to criticise through creation.

The most effective way to achieve this goal is to adopt an antithetic method, which normally results in a comic or entertaining work. But this natural consequence should not be confused with an *ex ante* mandatory requirement. The application of the law should not be dependent on such subjective tests. Moreover, while an intention to criticise can be traceable, an intention to entertain is not so self-evident, because it relies on the character and personality of each individual. What might be comic relief for one person may be a serious act for another. In opposition, the intention to criticise is more noticeable. Hence, in relation to both copyright and trademarks, the parodist must have the intention of criticising while creating something of his own. However, he is not required to have the specific intention to be humorous or to entertain.

E. Individuality/Originality

Finally and importantly, the parody must have individuality. It must be original or independent, thus keeping a distance from the parodied work or trademark. This mandatory distance can be accomplished in myriad ways. Necessarily, a parody must add something to the original work or trademark, in that it cannot consist of plagiarism (in copyright) or parasitism (in trademarks).

In relation to copyright, the idea/expression dichotomy is of some relevance to this subject, and can provide a safe basis to evaluate the originality of a parody (although it is not always easy to draw the line between a work and the idea embodied therein). In fact, the act of parodying a previous work can go further than mere inspiration, but must not go so far as to turn a lawful parody into an act of plagiarism. If parody is not a result of an act of creation on the part of the parodist, it will not be original and thus it will not be independent of the parodied work. Similarly, it is not enough to criticise by stating the flaws of the previous work, even if the parodist does it in a humorous way. Criticism or humour alone do not amount to parody; the two elements must merge with some intellectual activity of the parodist.

In relation to trademarks, the parody must have such individuality that it can cause no likelihood of confusion on the part of the public. A convergence between copyright's originality and trademarks' individuality is needed in this context. To that end, it is worth recalling the jurisprudence of German courts: the parody must keep an "inner distance" from the parodied work. Hence, in copyright as well as in trademarks the parody has to keep enough distance from the parodied work or trademark. However, a question must be asked: what distance is sufficient? The answer to this question is not easily found, but it is submitted that it can come down to the absence of likelihood of confusion. If the parody is sufficiently far away from the parodied work or trademark, then there will be no likelihood of confusion on the part of the targeted public. Conversely, if there is likelihood of confusion on the part of the targeted public, then the parody will not have kept enough of a distance to make it an admissible one. Furthermore, that confusion ought to be a misunderstanding as to the source or origin of the parody. The targeted public will necessarily be the public that effectively understands a parody, both because: (i) it is familiar with the parodied work or trademark, and (ii) it has the intellectual capacity to do so (*i.e.*, to immediately recognise that that particular use or activity is a parody).

Finally, the source or origin of a copyrighted work or trademark will be, respectively, the author or the trademark owner. The targeted public must acknowledge that the parody and the parodied work or trademark come from different sources. It is thus possible to postulate a general principle that can touch upon parodies in trademarks and in copyright: parody must keep enough distance from the parodied work or trademark. The requirement of "enough distance" is to be measured by the likelihood of confusion on the part of the targeted public.

VI. CONCLUSIONS

One of the main goals of this article was to assess whether parody has gone too far. By considering some national systems, and especially by giving some attention to the various judicatures' views, one can conclude that a single answer to such a query can not be given. A number of criteria were set out which would be of some help in the assessment of a lawful parody. It should be underlined, nonetheless, that the aforementioned standards provide merely a basis to help the interpreter to determine whether parody has accomplished its mission or whether it has, *ipso iure*, gone too far. Other criteria will be needed as the intellectual property boundaries become more and more ductile in the face of the development of the information society and of public awareness of cultural diversity.

One should also note that the merging of copyright and trademark rights in some cases of parody suggests that common standards are required in order to draw the line between a lawful and unlawful parody. This task is rendered difficult for three main reasons: first, the different legal frameworks concerning copyright and trademarks; second, the different nature of the rights involved and their corresponding exceptions; and third, the lack of uniformity across national legal systems.

Nevertheless, it is submitted that both in the copyright and trademark realms an admissible parody will be the one which:

- (a) Amounts to a non-commercial use (interpreted broadly) of the copyrighted work or trademark (if there is a commercial use of it, the parody shall not unlawfully compete with the use performed by the right holder);
- (b) Surpasses or is at least no less significant than the interest of the right holder in not having his work or trademark parodied, and, at the same time, is supported by a public interest in the balancing exercise of the three interests (parodist, right holder, public);
- (c) Does not unreasonably cause damage to third parties' rights – namely, reaching its goal through a way which is not deemed to be the less harmful one;
- (d) Has the intention to criticise while displaying some creativity on the part of the parodist; and
- (e) Is distant enough from the parodied work or trademark, with distance measured by the likelihood of confusion on the part of its targeted public.