A COMPARATIVE STUDY OF "FAIR USE" IN JAPANESE, CANADIAN AND US COPYRIGHT LAW

BY SUSAN WILSON & CAMERON HUTCHISON[1]

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1. INTRODUCTION

Exceptions to copyright protection permit uses of protected works which would otherwise amount to an infringement of the owner's copyright. They perform an integral function in copyright systems of the world by enabling authors to build upon the works of prior authors so as to create new, socially beneficial works, without having to obtain permission. In many situations, a requirement to obtain permission would be prohibitive due to high user transaction costs, i. e. searching out author(s), negotiation(s), and valuation problems, or the unwillingness of an over-protective author. Accordingly, exceptions are used to counteract the stifling effects which may result from granting copyright owners exclusive control over the use of their work. However, removing too much of this control might lead to an unwillingness to create, or disclose, works in the first place. Therefore, it is important for national copyright laws to strike

1 The authors gratefully acknowledge financial funding for this project by *Borden, Ladner & Gervais LLP*. Susan Wilson is a second year law student at the University of Alberta and may be contacted at sw24@ualberta.ca Cameron Hutchison is an Assistant Professor at the University of Alberta Faculty of Law and may be contacted at chutchison@law.ualberta.ca

a balance between the interests of copyright owners and the interests of copyright users which promotes the maximum dissemination of knowledge and creativity.

A key element to this balance is the doctrine of fair use (or dealing)[2] in copyright law. Pursuant to this doctrine, permission-free use of a copyrighted work may be permitted, so long as such use is "fair". This paper explores the commonalities and differences between Canadian, American and Japanese approaches to fair use and, in particular, focuses on the latitude offered under each system for parodies of copyrighted works. We argue that users in the United States are granted considerable freedom to create parodies as a result of the broadly worded copyright legislation[3] combined with the accommodating approach taken by American courts. The Japanese legislation also provides a potentially broad exception.[4] However latitude for Japanese parodists is narrowed considerably because of the refusal of courts to tolerate an infringement of moral rights. The statutory exception in the Canadian legislation is the narrowest of the three,[5] and courts originally read it strictly when dealing with parodists. However, recent cases raise the possibility that Canadian courts may now take a more lenient approach.

Before undertaking an analysis of the individual national laws, it is important to first note the minimum requirements of various multilateral treaties on copyright. Accordingly, part 2 of this paper briefly sets out the international law background under which

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2 While each country uses different terminology (Canada: fair dealing; US: fair use; Japan: statutory exceptions), collectively these provisions will be referenced as "fair use".

3 *Copyright Act of 1976*, 17 U.S.C. § 107 (2006) [*U.S. Act*].

4 *Copyright Act* (*Act No.48 of 1970*), *arts*. 30-49, trans. by the Government of Japan, online: Cabinet Secretariat <http://www.cas.go.jp/jp/seisaku/hourei/data 2.html> [*Japanese Act*]. All references to the *Japanese Act* are to this translated version and not to the official Japanese text.

5 *Copyright Act, R.S.C*. 1985, c. C-42, ss. 29, 29.1, 29.2 [*Canadian Act*].

national copyright laws in Canada, the United States and Japan operate. Part 3 then explores the statutory exceptions to copyright provided in the national copyright legislation of each country with a focus on fair use exceptions. Part 4 compares and contrasts the judicial application of the fair use exceptions in each country through an analysis of the leading cases of parody as a defence to copyright infringement. Finally, part 5 considers the relationship between fair use and moral rights in all three jurisdictions.

2. THE INTERNATIONAL INFLUENCE ON COPYRIGHT

An analysis of the copyright laws of Canada, the United States and Japan reveals many similarities due to the fact that all three countries are signatories to the *Berne Convention*[6] and the *TRIPS Agreement*,[7] which establish minimum standards of copyright protection.[8] As such, the respective national laws differ little in fields such as the types of works which are to be protected,[9] the types of

6 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221 [*Berne Convention*]. The convention has been revised on a number of occasions. All references to the *Berne Convention* are to the most recent revision which took place in 1971 in Paris. Text of the current Berne Convention can be found online: World Intellectual Property Organization <http://www.wipo.int/clea/docs_new/pdf/en/wo/wo 001 en.pdf.>.

7 *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [*TRIPs Agreement*]. The *TRIPs Agreement* was appended to the *World Trade Organization Agreement of 1994*. Text of the *TRIPs Agreement* can be found online: World Trade Organization<http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

8 These treaties also require signatory countries to provide the same standard of copyright protection for works of authors from other signatory countries as they do for works of their own nationals (national treatment rule).

9 For example, all three countries protect literary and artistic works, derivative works and collections of works in compliance with Article 2 of the *Berne Convention*.

rights granted to copyright owners,[10] and the duration of copyright protection.[11]

It is of particular interest that, with respect to the area of exceptions to copyright protection, the copyright treaties are relatively permissive. While there are general *limitations* placed upon the type and extent of allowable exceptions, there is a notable lack of *requirements* placed upon countries to permit exceptions to the rights of copyright owners. For example, Article 9(2) of the *Berne Convention*, taken in conjunction with Article 13 of the *TRIPs Agreement*, directs countries to confine exceptions according to certain requirements.[12] These requirements, commonly known as the "three part" test, mandate that exceptions must be limited to "certain special cases" and must not result in a conflict with the "normal exploitation of the work", nor "unreasonably prejudice" the right holder's "legitimate interests".[13] Therefore, if a member country chooses to limit the exclusive rights granted to copyright owners, it must refrain from doing so in a way that undermines those rights to an unjustifiable extent. There are no comparable requirements placed on a country to limit an owner's copyright with the notable exception

10 All three countries recognize both economic and moral rights of the owner (however see part III below for the United States' restrictive position on moral rights). See Articles 8, 9, 11 *bis*, 11 *ter*, 12 and 14 of the *Berne Convention* for the protection of various economic rights and Article 6 *bis* for moral rights.

11 The general rule in all three countries is that copyright lasts for the life of the author plus 50 years after his or her death. This is in compliance with Article 7(1) of the *Berne Convention*.

12 Although the rule in Article 9(2) of the *Berne Convention* applies only to exceptions to the "reproduction" right of authors, Article 13 of the *TRIPs Agreement* provides the same rule, but without restricting the applicability to a specific type of right. This has been taken to mean that all of the exceptions permitted under the *Berne Convention* are subject to this rule, not merely exceptions to the reproduction right.

13 *Berne Agreement, supra* note 5, art. 9(1); *TRIPs Agreement, supra* note 6, art. 13.

of Article 10(1) of the *Berne Convention*. Under this article, a member country must permit "quotations" from works already made available to the public so long as "their making is compatible with fair practice, and their extent does not exceed that justified by the purpose". However, Article 10(1) does not provide guidance on the size of the quotation permitted, a description of what type of use would constitute "fair practice", or even a description of what "quotation" means. Importantly, though, Article 10(3) requires that, where a work is quoted from under Article 10(1), "mention shall be made of the source, and of the name of the author if it appears thereon". So, while Article 10(1) provides some guidance as to what type of use of a copyright protected work may be allowed, it falls far short of establishing a well-defined international standard for exceptions. National legislatures are left with much discretion to implement the terms of these treaties in a manner which addresses their country's unique economic, social and cultural needs.

3. THE LEGISLATIVE CONTEXT

Canada and the United States both have general statutory provisions permitting fair use of copyrighted works. In contrast, Japanese judges have explicitly refused to recognize that Japanese law contains a general fair use exception.[14] Instead, only those uses which fall within the detailed requirements of one of the specifically enumerated statutory exemptions in the *Japanese Act* are free from copyright infringement.[15]

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14 See Peter Ganea & Christopher Heath, "Economic Rights and Limitations" in Peter Ganea, Christopher Heath & Hiroshi Saitô, eds., *Japanese Copyright Law : Writings in Honour of Gerhard Schricker* (The Hague : Kluwer Law International, 2005) 51 at 58, n. 17. Accord Teruo Doi, "Japan" in Paul Edward Geller & Melville B. Nimmer, eds., *International Copyright Law and Practice* (Newark, N.J. : Matthew Bender & Company, 2007) JAP-i at §8 [2] [a], n. 43.

15 It is should be pointed out that the fair use exceptions in the *Canadian*

3.1 "Fair Use" in the *U.S. Act*

"Fair use" in the *U.S. Act* is found in section 107 which allows using a work fairly for purposes "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research". The second part of the section mandates the consideration of four specific factors in determining the fairness of a use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

Act and the *U.S. Act* are also supplemented by a number of specific statutory exceptions which do not involve a fairness assessment. They generally apply to uses which may involve public dissemination of the copyrighted work but only threaten an insubstantial encroachment upon the original's market, while at the same time serving valuable societal ends. They are roughly analogous to some of the specific exceptions also contained in the Japanese Act. For example, exceptions are made in all three countries for uses of copyrighted works by libraries (*U.S. Act*, § 108; *Canadian Act*, ss. 30.1-30.2; *Japanese Act*, art. 31), ephemeral recordings for broadcasting (*U.S. Act*, § 112; *Canadian Act*, s. 30.8; *Japanese Act*, art. 44), photographs of architectural works in public view (*U.S. Act*, § 120 (a); *Canadian Act*, s. 32.2(1)(b); *Japanese Act*,, art. 47), and reproduction for persons with perceptual disabilities (*U.S. Act*, § 121; *Canadian Act*, s. 32(1); *Japanese Act*, arts. 37-37 *bis*). While there may be some subtle differences in detail, the above exceptions are roughly analogous in the three countries and are not explored further in this paper. The fair use exception is the focus of this paper because it has the most potential to impact the copyright balance between owners and users. A very broad fair use exception could potentially permit a large variety of uses of copyrighted work, thereby shifting the balance considerably in favour of users. In contrast, users in a country which does not provide a fair use exception are limited to conforming with the specific exceptions set out in the legislation.

(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.

The fair use section concludes with the qualification that, if a use is found to be fair, it shall not be barred simply because the work copied was unpublished.[16] Upon a literal reading of the legislation, a user in the United States appears to face only one hurdle: their use must be "fair" based upon an assessment of at least the four statutorily entrenched factors.

3.2 "Fair Dealing" in the *Canadian Act*

Pursuant to the "fair dealing" provisions of the *Canadian Act*, a user who deals fairly with a copyrighted work for research or private study is exempt from liability. A user who deals fairly with a work for criticism, review or news reporting is also not liable; however, for the three latter purposes, the user must fulfill certain citation requirements. They must acknowledge the source of the material, along with the name of the author, performer, sound recording maker or broadcaster, if it is given in the source.[17] The *Canadian Act*, as drafted, appears to require the fulfilment of a three part test in order to excuse copyright infringement on the basis of fair dealing. First, the dealing must be fair. Second, the use seeking to be excused must be for research, private study, criticism, review or news reporting.[18] Finally, the citation requirements must be fulfilled if such purpose is anything other than research or private study.

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16 *U.S. Act*, *supra* note 2, § 107.

17 *Supra* note 4, s. 29, 29.1-29.2.

18 Since the *Canadian Act* contains no indication that the specified purposes are merely examples of permitted uses, they are presumed to comprise an exhaustive list.

3. 3 The "Quotation Exception" in the *Japanese Act*

Since Japanese courts have expressly stated that Japanese copyright law does not include a broad fair use defence, users must look to the specifically enumerated limitations on copyright categorically set out in Articles 30 through 49 of the *Japanese Act*. Article 32(1) of the *Japanese Act* bears remarkable similarities to the fair use and fair dealing provisions of American and Canadian law. This provision exempts from liability the making of quotations from published works, provided that such use conforms with a fair practice and the extent of the quotation "does not exceed that justified by purposes such as news reporting, criticism or research."[19] This exception is governed by Articles 48(1) and 48(2) which mandate clear indication of the source of the reproduced work in a manner "deemed reasonable by the form of the reproduction or exploitation", along with the name of the author of the quoted work if it appears on the work.[20]

It appears Article 32(1) of the *Japanese Act* was drafted with the intention of complying with the quotation requirements of the similarly worded Article 10(1) of the *Berne Convention*. However, "quotation" in the *Japanese Act* is apparently intended to encompass more than just the copying of written words. In a famous 1980 decision, the Supreme Court of Japan took no issue with being asked to assess whether the use of a copyrighted photograph could be exempted under Article 32(1).[21] The discussion surrounded, not whether photographs were a type of work which could be "quoted" from, but rather, whether the use was fair.[22] If we presume that

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19 *Supra* note 3, art. 32(1) [the "quotation exception"].

20 *Ibid*., arts. 48(1)-(2).

21 Case number 1976 (O) No. 923, translated by Sir Ernest Satow, Chair of Japanese Law, University of London, online: Supreme Court of Japan <http://www.courts.go.jp/english/judgments/text/1980.03.28-1976.-O-.No.923.html> [*Parody case*].

22 See part 4 below for a more thorough discussion of the *Parody case*.

quotation applies to any "work" (the Japanese definition of which is "a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain"),[23] the exception does not appear too different from Canadian fair dealing and American fair use. Furthermore, since, like in the *U.S. Act*, the list of purposes is preceded by the words "such as", a literal reading implies that news reporting, criticism and research are not the only purposes which might be able to fall under this exception. This appears to conflict with the Japanese courts' denial of a broad fair use exception. In summary, the *Japanese Act* appears to create a four part test for a fair use exemption. First, the quoted work must not be unpublished. Second, the use must be fair. Third, the extent of the work used must be justified by a purpose such as (but not limited to) criticism, news reporting or research. Finally, citation requirements must be fulfilled for all uses, regardless of purpose.

3.4 Comparison of the Statutory Exemptions

Perhaps the most notable difference is in the potential scope of uses which may fall under the fair use exceptions in the respective countries. The *Canadian Act* provides that if a use does not meet one of the five purposes specified in the Act, it is automatically liable for copyright infringement.[24] In the *U.S. Act*, however, the purpose of the use is merely among one of the factors to be considered in assessing fairness. The quotation exception in the *Japanese Act*, like Canadian fair dealing, also requires that a use be justified by a worthy purpose. However, the wording of the *Japanese Act* leaves open the possibility for a court to expand the scope of permissible uses beyond those suggested. The Canadian fair use exception is

23 *Supra* note 3, art. 2(1)(i).

24 However, as noted in part 4 below, a recent court decision has given rise to the argument by some that courts may now opt for a much more liberal interpretation of the statute which may permit uses additional to those specified.

therefore a considerably narrower defence than its counterparts in the United States, and even Japan.[25]

In the United States, citation is not a precondition to fair use. Accordingly, a use of a copyrighted work may still fall within the fair use exception even if sources and authors are not cited. The *Canadian Act* and *Japanese Act* make it clear that such use, in most cases, would not be exempted without at least proper attribution of source. While neither the *Canadian Act* nor the *Japanese Act* requires citation for private study (which, in Japan, would presumably fall

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25 Having a broad fair use exception does not necessarily benefit users. It may simply mean that fair use is being employed to deal with uses which might be more effectively dealt with by a specific exception. The benefit to users of specific exceptions is that the requirements are clearly set out in the legislation and a user is therefore afforded greater certainty in knowing from the outset whether their use is legal. For instance, copying made for educational purposes in the United States must fall within the requirements of the fair use doctrine ("teaching" and "scholarship" are two of the six exemplary purposes cited by U.S. Act as worthy of fair use) since the *U.S. Act* provides no specific exception in this respect. In contrast, the *Canadian Act* and the *Japanese Act* both contain specific exceptions for educational purposes (*Canadian Act, supra* note 4, s. 29.4-29.7 ; *Japanese Act, supra* note 3, arts. 33, 33 *bis*, 34-36). This stands in stark contrast to subjecting uses to abstract notions of fairness contained in fair use exceptions. Further clarity is provided in Japan with respect to private copying, where it does not fall under the quotation exemption. Instead, it is covered by a separate article which permits personal copying for use within a family or similarly limited circle, provided such copies are not made by "automatic reproducing machines" (*Japanese Act*, art. 30). While the latter proviso may have the effect of limiting the breadth of this exception somewhat, the Japanese user is at least certain that if he or she follows the rules set out in the exception, their copying is legal. Contrastingly, in the *U.S. Act* and *Canadian Act* there is no specific legislation that sets forth the rules for private copying, other than for copying of musical works (See Part VIII of the *Canadian Act* and Chapter 10 of the *U.S. Act*.) Therefore, the majority of private copying must fall within the fair use provisions in Canada and the United States.

under the private copying exemption noted above), the *Canadian Act* appears to be a little less strict in the sense that research in Canada may also be exempted without providing sources. While the Canadian and Japanese citation requirements might be easily observed in the print media when literature or art is reviewed or criticized, it may pose an insurmountable problem for other types of users, such as parodists.[26] This point of comparison, therefore, further highlights the comparative breadth of the American fair use exception and its proclivity to favour users over owners.

Finally, there is a distinct lack of statutory guidance in application of Canadian and Japanese fair use. Once citation and purpose requirements have been filled, it appears to be left completely to the courts' discretion to decide which factors are worthy of consideration in assessing the fairness of the use. While the *U.S. Act* by no means provides a concrete definition of "fairness", it does provide four factors for the courts to consider.[27] However, uncertainty still remains as to whether the factors are to be weighted equally, or, since the list is non-exhaustive, whether the court will consider additional factors.

In summary of the forgoing analysis, there are some substantial differences in the fair use exceptions. However, there are enough similarities in substance between the Japanese quotation exception and Canadian and American fair dealing and fair use to support an assertion that the *Japanese Act* does, indeed, contain a potentially broad fair use exception (contrary to the interpretation offered by Japanese courts). In any event, it is clear that the defendant's chance of success in raising a fair use exception in all three countries is not easily determined from a mere reading of the legislation. Much depends on judicial interpretation.

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26 See part 4 below for a more detailed discussion regarding parody and citation requirements.

27 *Supra* note 15 and accompanying text.

4. THE JURISPRUDENTIAL CONTEXT: PARODY

Parody, by definition, involves imitating the work of another for the purpose of ridicule.[28] Not unexpectedly, it poses some copyright difficulties for artists wishing to use this form of work since, by its very nature, it necessitates using part of another person's work in order to make its point. One option for the user is to obtain permission from the copyright holder. However, this avenue is of little practical use to a parodist as it is unlikely that a copyright owner would willingly permit the ridicule of her work. "The very principle of the theory of parody is that the parodist may indulge in his art without need to obtain authorization from the author of the parodied work."[29] Some countries, such as France and Spain, provide a specific exception for parody in their copyright legislation.[30] However, this is not the case in the United States, Canada, or Japan. Parodists in these countries, therefore, must rely upon an exception to copyright which allows use of a work even when permission is not granted.

Courts in the United States, Canada, and Japan have all been called upon to deal with the issue of whether, and to what extent, parody can be excused under the fair use exceptions provided in the legislation. The decisions reveal varying results. While the differences in the respective laws, as noted above, undoubtedly form part of the reason for the difference, much has depended upon judicial interpretation. For example, how the court chooses to define parody

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28 *The Oxford English Dictionary*, 2 d. ed., *s.v.* "parody" : "[a]composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous, especially by applying them to ludicrously inappropriate subjects; an imitation of a work more or less closely modelled on the original, but so turned as to produce a ridiculous effect."

29 Paul Goldstein, *International Copyright: Principles, Law and Practice* (New York: Oxford University Press, 2001) at 300.

30 *Ibid.*

for the purposes of copyright is paramount: users will benefit if the court decides to equate parody with criticism, since criticism is expressly mentioned as an acceptable purpose in the fair dealing exceptions of all three countries. In the following section, the leading parody cases in each country are described and contrasted along with a discussion of any subsequent jurisprudential changes to fair use which may affect the outcome of a future parody case.

4.1 Parody in the United States

In the case of *Campbell v. Acuff-Rose Music, Inc*., the United States Supreme Court was faced with the decision of whether a parody could fit within the scope of the fair use defence.[31] The question surrounded a rap version of the classic rock ballad "Oh, Pretty Woman". The music group 2 Live Crew had taken the characteristic bass riff and opening line of the original Roy Orbison song, but added new rap lyrics as well as "distinctive sounds".[32] The group had previously attempted to purchase a license to use the song from the music publisher, Acuff-Rose, but their proposition was rejected. Nevertheless, the group released the song in various recording formats. Even though clear attribution was given to the original song's author and publisher on each recording, Acuff-Rose claimed that the use amounted to copyright infringement and sued the members of the group and its record company. In defence, the group claimed that the comical lyrics of their song were intended to satirize the romantic fantasy embodied in the Orbison song and, as such, amounted to much more than a mere imitation of the original. Instead, it should qualify for exemption as criticism or comment under the fair use doctrine.

At trial, the District Court found in favour of 2 Live Crew, holding that the rap song was a fair use of the original. However, the Court

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31 510 U.S. 569 (1994) (WLeC) [*Campbell*].

32 *Ibid*. at 13.

of Appeal reversed the lower Court's decision based on their findings that the commercial nature of the rap song rendered it presumptively unfair, and that 2 Live Crew had copied excessively from the original song.[33] The case was appealed to the Supreme Court which systematically assessed each of the four mandatory factors set out in the *U.S. Act*. With respect to the first factor (the purpose of the use), the transformative nature of a parody weighed heavily in favour of fair use. A work is considered "transformative" if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." If the extent of the transformation is large, the significance of other factors which might have weighed against a finding of fair use, such as the purely commercial nature of the work, are diminished.[34] In a parody, the new work takes on a purpose of criticism or comment which is quite different from the expressive purpose of the original work and, as such, parody, "like other comment or criticism, may claim fair use".[35] The court defined parody for the purposes of copyright law as "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works" and "needs to mimic the original to make its point". This is in contrast with their definition of satire, which "can stand on its own two feet and so requires justification for the very act of borrowing."[36] In this case, the rap song could reasonably "be perceived as commenting on the original or criticizing it" and, therefore, could be described as a parody.[37]

The Supreme Court also placed considerable weight on the fourth factor of assessment, the effect on the potential market for the original work. Working in the defendant's favour was the unlikelihood that a parody of the song could act as a substitute for

33 *Ibid*. at I.
34 *Ibid*. at 4.
35 *Ibid*. at 5.
36 *Ibid*. at 6.
37 *Ibid*. at 7.

the original song due to the fact that "parody and the original usually serve different market functions."[38] The Court made it clear, however, that this does not mean that a parody can never harm the market for an original work. Fair use leaves room for harsh criticism that may reduce demand for the original. It is only the harm brought about by the appropriation of an original work's market by creating a substitute for the original which is cognizable under the *U.S. Act*.[39] In this case, any effect on the original song's market would fall into the former category, and was therefore not an issue. The Supreme Court held that it was also important to consider whether 2 Live Crew's song would constitute a substitute for any derivative versions of the original song, such as a non-parody rap version. In this respect, there was "no evidence that a potential rap market was harmed in any way".[40]

The approach of the Supreme Court emphasizes their willingness to accommodate new uses. It is clear that the factors were not weighted equally. In fact, some direct concessions were made in certain portions of the test in order to accommodate the distinct nature of parody. In respect of the nature of the copyrighted work (the second factor), the fact that the borrowing was close to the "core of intended copyright protection", might otherwise have weighed against fair use. However, since all parodies generally copy well known, expressive works, the court stated that this factor would be of little use in distinguishing the fair parodies from the unfair and should therefore be given little weight in parody cases.[41] Likewise, the fact that the extent of the original song used by the group was what some might consider the "heart" of the work could potentially work against fair use in an assessment of the third factor (the amount and substantiality of the portion used in relation to the copyrighted work as a whole). However, the court found that, in the

38 *Ibid*. at 15.
39 *Ibid*. at 16.
40 *Ibid*. at 19.
41 *Ibid*. at 10.

case of parodies, the goal is to conjure up the original work, and if the heart of a work is what must be taken to achieve such a goal, then the use of the defendant has not surpassed a justifiable extent.[42] In conclusion of its assessment, the court found that parody could fall within the fair use exception and that the Court of Appeal had erred by giving too much weight to the commercial nature of the song, while affording too little consideration to the nature of parody in assessing the degree of copying.[43] The case was remanded back to the lower court for a new decision consistent with their findings.

This case sets a precedent for a legitimate parody to fall within the fair use exception in the *U.S. Act* and illustrates the flexibility of the United States' doctrine. By minimizing the factors which would have worked against the defendants, it is clear that the American approach is user-oriented. The main concern given to the rights of the owner is in ensuring that the new work does not usurp the original's market in the derivative work. This will be unlikely to occur if the use is transformative, such as a parody. And, if the parody itself infringes on a potential future use (e.g. a rap music version of Pretty Woman in this case), the copyright holder will be required to furnish evidence of intent to exploit the market for the derivative work. The distinction made between *parody*, which targets the copyrighted work and thus fits within fair use, and *satire*, whose target is more generalized than any specific work and which apparently is not eligible for fair use protection is troubling.[44]

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42 *Ibid*. at 12.

43 *Ibid*. at 12.

44 See Annemarie Bridy, "Sheep in Goats' Clothing: Satire and Fair Use after *Campbell v. Acuff Rose Music, Inc*. (2004) 51 Journal of the Copyright Society of the USA 257 at 273. As the author argues, the distinction between parody and satire is not always clear: "But does the artist who parodies an original work in order to satirize the cultural values for which that work stands (i.e. values that exist both in the fictive world of the original work and in the real world beyond the work) necessarily

4.2 Parody in Canada

The leading case on parody in Canada is the 1996 case of *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (*CAW–Canada*).[45] In this case, the Federal Court of Canada was called upon to decide whether parody was a valid exception to copyright under the fair dealing defence. The dispute involved pamphlets distributed by a labour union, CAW Canada, which were designed to encourage employees of a division of the Michelin tire company to become members. The pamphlets incorporated a large caricature of the "Michelin Man", a well known corporate logo of Michelin, depicted in the process of stomping on the head of an unsuspecting and much smaller drawn Michelin worker.[46] One of the assertions made by the plaintiff was that this unauthorized use of its registered logo amounted to copyright infringement.[47] The defence raised by the union in this regard was that its depiction of the Michelin Man in such a threatening pose was intended to parody the "benign, smiling and safe father figure" which the company had made the Michelin Man out to be.[48] The union further claimed that parody is a form of criticism and asked that the court exempt such use under the fair dealing provision of the *Canadian Act* in the same manner that the United States Supreme Court had done in *Campbell*.[49]

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need to borrow less than does the artist who creates a parody with no other motive than to lampoon, for example, the overwrought artistic style of the original work? In both cases, the need to "conjure up" the original exists…"

45 (1996), [1997] 2 F.C. 306, 124 F.T.R. 192 (WLeC) [*Michelin* cited to F. C.].

46 *Ibid*. at 8.

47 The plaintiff also made a trademark infringement claim and challenged the constitutional validity of the relevant provisions in the copyright and trademark statutes. Both claims were unsuccessful.

48 *Supra* note 48 at 67.

49 *Ibid*.

The union met with three major barriers to using this defence. The first was the definition of parody opted for by the court. In a clear shunning of the American approach in *Campbell*, the court refused to equate parody with criticism for the purposes of fair dealing under the *Canadian Act*. While "criticism requires analysis and judgment of a work that sheds light on the original", parody simply mimics another author's style in a manner which is "humorous or satirical".[50] The second barrier related to the court's method of assessing the "fairness" of the use. The test opted for by the court involved an assessment of whether or not the defendant acted in "good faith". Since the defendant had held the plaintiff's logo up to ridicule, the court reasoned, it could not be seen as acting in good faith. Contributing further to the lack of fairness was the fact that the defendant had used a "substantial quantity" of the plaintiffs' work.[51] The third barrier faced by the union was the court's refusal to read the provisions of the *Canadian Act* liberally, particularly with respect to the permissible purposes and citation requirements.

The five enumerated purposes set out in the *Canadian Act* were interpreted as comprising an exhaustive list and since parody was not one of them, allowing such a use would constitute a "reading in" of parody as a form of criticism. This would amount to creating a new exception under fair dealing, which was something the court was not prepared to do.[52] In any event, the court reasoned that even if it were to accept that parody could fall within the fair dealing exception as criticism, the defence would still have failed since the union neglected to explicitly mention the source of the work. In this respect, the defendant argued that a concession should be made for parodies due to their very nature which requires a "conjur[ing] up the heart of the original work" in the minds of the viewer. As a result, the defendant opined that the source is automatically

50 *Ibid*. at 66.
51 *Ibid*. at 75.
52 *Ibid*. at 67.

implicitly acknowledged and no further citation should be required.[53] However, the court refused to accept this argument.

The *Michelin* court took a very restrictive interpretation of the fair dealing defence and a definite owner-oriented approach to copyright, in sharp contrast to the *Campbell* decision. This approach taken renders it extremely difficult for a parodist to find shelter under the Canadian fair dealing exception. While the *Michelin* court may be criticized for failing to characterize parody as criticism, and even more so the equating of fairness with good faith, the attribution requirements for criticism have a clear statutory basis.

4.2.1 Comparing *Campbell and Michelin*

A number of factors contributed to the different findings of the American and Canadian Courts. First, it is clear that the American court took a much more liberal interpretation of fair use in *Campbell* than the Canadian court did of fair dealing in *Michelin*. This can be largely attributed to statutory language. It is not surprising that the American court was able to fit parody in to the open ended list of purposes in their broadly drafted fair use provision, while, in contrast, the Canadian court was not willing to read parody in to the exhaustive list of permissible purposes in the *Canadian Act*.

Second, the courts adopted contrasting definitions of parody. In *Campbell*, the American court equated parody with criticism and distinguished it from satire, while in *Michelin*, the Canadian court equated parody with satire and distinguished it from criticism. These contradictory definitions clearly played a role in the differing outcomes for the defendants. Third, the courts offered differing understandings of the objectives of copyright law. In *Michelin* the objective of copyright was defined as "[t]he protection of authors and ensuring that they are recompensed for their creative energies

53 *Ibid*.

and works". The court's lack of mention of the rights or needs of users foreshadows an unwillingness to apply fair dealing generously. In fact, in light of the defined purpose, "a successful fair dealing defence would seem to privilege the wrong party and undermine the owner-oriented objectives of the Act."[54]

Contrast this with the American court's definition of copyright's objective however, and the reasons behind the differing decisions becomes more clear. In Campbell, "copyright's very purpose" was defined as the promotion of "the Progress of Science and useful Arts".[55] In the court's opinion, the fair use doctrine furthers this purpose by "permit[ting] and requir[ing] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[56] A successful defendant from the Campbell court's perspective is, therefore, a "deserving creator in his own right…whose creative activities further the purposes for which copyright exists".[57] It is not surprising, considering this interpretation, that the court would go on to assess fair use generously.

4.2.2 The Changing Situation for Parodies in Canada

A Canadian decision only two years subsequent to *Michelin* suggests that the outlook for parodies in Canada may be changing. In *Productions Avanti Ciné-Vidéo Inc. v. Favreau*, the Quebec Court of Appeal was faced with a parody defence to copyright infringement.[58]

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54 Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A proposal for Legislative Reform" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437 at 451.

55 *Supra* note 32 at II, citing U.S. Const., art I, §8, cl. 8.

56 *Ibid*. at [1], citing *Stewart v. Abend*, 495 U.S. 207 (1990).

57 *Supra* note 57.

58 [1999] R.J.Q. 1939, 177 D.L.R.(4th) 568 (C.A.) [*Productions Avanti* cited to D.L.R.].

The defence was rejected due to the fact that the defendant's pornographic adaptation of the plaintiff's television program could not be found to qualify as a parody. The court declared that a distinction must be drawn between humorous imitation for criticism or comment and appropriation for commercial opportunism. Parody was defined as"the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment."[59] In contrast, the defendant's pornographic video was nothing more than an appropriation of the plaintiff's "characters, costumes and décor" in an attempt to capitalize upon the popularity of the television program.[60] In *obiter*, the court referred to the "defence of fair use for purposes or parody" as a serious defence.[61] The court, then, appears to recognize that the purpose of criticism may include parody of a copyrighted work provided that the new work involves "labour of… literary or artistic creation" and is not merely free riding appropriation.[62]

In dealing with the question of to what extent parody may constitute fair use of a work and an exception to copyright protection, the court noted that there is a lack of precision inherent in terming a work a "parody" since such term can be used properly to refer to types of works which vary in nature from each other. For instance, "parody" is often used interchangeably with the term "burlesque", yet there is a distinction in their meanings. A "[b]urlesque is…sheer travesty or distortion, while in parody the very substance and style of the author is followed closely but is used to apply lofty words of characterization to lowly or inconsequential things."[63] Further, there are numerous different types of parodies,

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59 *Ibid*. at 575.

60 *Ibid*. at 10.

61 *Ibid*. at 574.

62 *Ibid*. at 594. Note that the court here does not distinguish between parody of the work, and parody of things external to the work.

63 *Ibid*. at 590.

each with their own subtle defining characteristics.[64] Notwithstanding such differences, the court confirmed that if a work is classified as a parody or burlesque, it shares the same purpose of criticism by ridicule of a work, situation or persons.[65]

4.2.3 The Changing Situation for Fair Dealing in Canada

An even more recent Canadian case may signify a shift in the judicial approach to fair dealing, in general, away from the restrictive owner-oriented interpretation in *Michelin*, to a broader type of analysis similar to the American fair use doctrine. In its 2004 decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada clarified a number of issues relating to copyright and fair dealing.[66] In this case, the Supreme Court of Canada ruled that the custom photocopy service provided by the Law Society's Great Library was exempted from copyright liability to legal publishers under the fair dealing defence. Although this case dealt specifically with use of another's work for the purpose of research, the court established some important changes to be applied to fair dealing in general. First, the court stated that when considering the purpose of the dealing, the allowable purposes set out in the Canadian Act "should not be given a restrictive interpretation".[67]

The second important change introduced by this case is that the court endorsed a non-exhaustive list of factors to be used in determining whether a use is fair:

(1) The purpose of the dealing. A fair purpose is one which

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64 *Ibid*. at 590-591. For example, the goal of "target" parodies is "to comment upon the text or its creator" while "weapon" parodies use the text to comment on something "quite different."

65 *Ibid*. at 594.

66 [2004] 1 S.C.R. 339, 236 D.L.R.(4th) 395 [*CCH* cited to S.C.R.].

67 *Ibid*. at 54.

falls within the list of allowable purposes in the copyright act (research, private study, criticism, review or news reporting) ; [68]

(2) The character of the dealing. Assessment of this factor involves looking at the number of copies made and what was done with them. Making only a small number of copies, having a "specific legitimate purpose", and destroying the copies afterwards are factors which would lean towards fairness, while the wide distribution of multiple copies would lean away from it ; [69]

(3) The amount of the dealing. While in some cases the larger the quantity of the original work taken, the less fair the use will be, the court notes that there are uses for certain purposes which require the taking of a whole work and, in such cases, this factor should not be determinative of fairness. For example, there may be no "other way to criticize or review certain types of works such as photographs" than to use the whole work ; [70]

(4) Alternatives to the dealing. If an equivalent work could have been used which was not protected by copyright, this would weigh against fairness. Also, the court will look at whether the work could have been as effective if it had been made without reproducing the original ; [71]

(5) The nature of the work. This involves looking at factors such as whether the work was unpublished (which would lean towards fairness) or confidential (which would lean away

68 *Ibid*. at 54.
69 *Ibid*. at 55.
70 *Ibid*. at 56.
71 *Ibid*. at 57.

from fairness) ;[72] and,

(6) The effect of the dealing on the work. In this factor, the court assesses the effect on the market of the copyrighted work. If the new work is likely to compete with the original, then it is less likely to be fair.[73]

4.2.4 Comparing *CCH* with *Michelin*

The most notable difference between *Michelin* and *CCH* is that the latter endorsed a method for assessing fairness which bore no resemblance to the *Michelin* court's abstract notion of "good faith". In *Michelin* the court was completely unreceptive to a suggestion that they follow the lead of the United States and read the statute broadly to accommodate parody. While the court in *CCH* did not explicitly admit a connection with American fair use, the similarities between the "fairness" factors set out in *CCH* and the list of factors statutorily entrenched in the *U.S. Act* are undeniable.[74]

A second important difference is an apparent shift in the court's rationalization for fair dealing. Instead of referring to fair dealing as an *exception* to copyright, the *CCH* court opined that it, along with the other exceptions provided in the *Canadian Act*, are "more properly understood as users' rights".[75] The Court went on to note that these "users rights" are an "integral part of the scheme of copyright law"[76] and mandated that the provisions in the *Canadian Act* be interpreted

72 *Ibid*. at 58.

73 *Ibid*. at 59.

74 While the purpose, character, amount, alternatives and effect of the dealing (*CCH* factors 1, 2, 3, 4, 6; U.S. Act factors 1, 3, 4) are similar in both jurisdictions, the nature of the work (*CCH* factor 5; U.S. Act factor 2) differs. Pursuant to the *U.S. Act*, if a work is unpublished it weighs against fair dealing. Whereas the *CCH* court pronounced the opposite: if a work is unpublished it weighs in favour of fair dealing.

75 *Supra* note 69 at 12.

76 *Ibid*. at 49.

in a way that balances the rights of copyright holders with those of users.[77] According to some scholars, this is the result of a "larger theoretical shift in the rationalization of copyright as a whole…away from the author's rights and towards the public interest."[78]

4.2.5 The Current Situation for Parody in Canada

It is now appropriate to reassess the situation for parodists in Canada in light of the above changes. While it remains to be seen whether a court would now permit parody as a defence to infringement, in the aftermath of the *CCH* and *Theberge* decisions of the Supreme Court of Canada, it does appear that some of the previous barriers may be lifting. It is now likely that parody would qualify as criticism for the purposes of fair dealing[79] and that the critique need not be fair.[80] However, it remains to be seen whether the attribution requirements would be read down in a future case. The lack of legislative response to the judicial changes pronounced in *CCH*, however, has left some scholars less confident. They reason that, if the legislation was intended to protect forms of expression such as parody, this issue would have been addressed in subsequent government proposals dealing with copyright.[81] Instead, the legislation

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77 *Ibid*. at 10.

78 Craig, *supra* note 57 at 449.

79 See Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use" (2007) 03:05 Comparative Research in Law and Political Economy (CLPE) Research Paper Series, at 51.

80 In *CCH*, *supra* note 69, the court stated that the fair dealing exceptions should be ready broadly, and enumerated a number of factors to be considered in assessing fair dealing, none of which include good faith treatment of the work. In *Théberge v. Galerie d'Art du Petit Champlain inc*., 2002 SCC 34, [2002] 2 S.C.R. 336, the majority made a clear distinction between economic rights, on the one hand, and moral rights affecting the reputation of the author, on the other. Good faith treatment of a work seems to be in the realm of moral rights.

81 Jane Bailey, "Deflating the Michelin Man: Protecting Users' Rights in

respecting fair dealing reads the same today as it did prior to *CCH*, notwithstanding two proposed amendments to the Act over the past decade.[82] Accordingly there is now a disjunction between the narrowly drawn provisions of the *Canadian Act* and the Supreme Court's emphasis on the need for a broad interpretation. This leads scholars to question whether lower courts will actually implement the changes asked for by the Supreme Court. The strict wording of the act appears to give lower courts an "easy route by which to refuse the defence."[83]

Furthermore, even if Canadian courts did follow the lead of *CCH* and interpret the purposes broadly so that parody is included as a permissible purpose, the citation requirements would likely still pose an insurmountable barrier for parodists seeking to have their work excused under fair dealing.[84] In conclusion, parodists in Canada at the moment are in a very uncertain position with respect to the legality of their work.

4.3 Parody in Japan

In 1980, a parody case before the Supreme Court of Japan provided an opportunity for the Supreme Court to clarify the meaning of the limitation found in what is now Article 32(1) of the *Japanese Act*.[85] This case involved a colour photograph taken by the plaintiff which depicted a snowy mountain scene with six skiers traveling down the slope. The skiers' tracks were visible in the snow behind them, resembling the tracks left by a car tire. The plaintiff had obtained a copyright over this photograph and published it in a calendar. The

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the Canadian Copyright Reform Process" in Geist, *supra* note 44, at 144-155, n. 90.

82 Bill C-61 (2004); amendment proposed earlier this month.

83 Craig, *supra* note 57 at 457.

84 The Court in CCH had no reason to re-examine citation requirements since research is a use which does not require attribution of source.

85 *Parody case*, *supra* note 21.

defendant created a modified version of this photograph by trimming one edge of the plaintiff's photograph, affixing to it a large image of a car tire, and reproducing the work in black and white montage. The tire was positioned such that it gave the appearance of rolling down the slope behind the skiers, threatening to crush them at any moment. According to the court of original instance, this new work was intended to criticize the original and "to make a satire of various aspects of life".[86] The defendant published this work in a book and a periodical, a use which, in the plaintiff's opinion, infringed his copyright in the photograph. In defence, the defendant argued that his use should be excused under the quotation exception.

The lower court held that since the defendant needed to cite part of the original in order to criticize it in his own form of artistic expression, his use was captured by the quotation exception. In addition, the moral rights of the plaintiff were not infringed since partial modification of the original was necessary and appropriate in the situation and not "in excess of the level which the…original author…should tolerate."[87] Furthermore, the defendant was not required to cite the author's name since the plaintiff's name did not appear on the calendar, the source from which the original photograph had been taken.[88] On appeal, however, the Supreme Court quashed this judgement and remanded the case back to the lower court. In its reasons, the court explained the requirements for the quotation exception to apply. First, there must be a clear distinction between the original work cited and the new work which makes use of it. Second, the use of the original work must be subordinate in relation to the new work, the latter of which must be the main work. Third, the quotation must not infringe the moral

86 *Ibid*. at 1(2)(c). This comment reflects the duality of purpose (parody and satire) that may flow from a dealing of a work, as discussed by Bridy *supra* note 47.

87 *Ibid*.

88 *Ibid*. at 1(3).

rights of the owner.[89] The Supreme Court found that the defendant's use of the plaintiff's photograph did not pass this test. Even though the defendant's additions may have resulted in a new expression, since all of the essential characteristics of the original photograph were still directly perceptible in the new work from only a glance, the use of the original photograph could not be considered to be subordinate to the new work.[90] Furthermore, the only way in which the modification of the photograph could not be considered an infringement of the author's moral rights in the work would be if he had provided his consent. Since no such consent was provided, the defendant's work constituted an infringement.[91]

This outcome of the Japanese test as applied in this case is not favourable for future parodists. As the United States Supreme Court noted in *Campbell*, the nature of a parody is that it needs to mimic the original, at least to the extent the audience can perceive the original expression.[92] However, if the original expression must be made imperceptible in order to qualify for exemption, as a logical consequence there is no way a parody can be legally created in Japan. This paradox apparently did not go unnoticed by the court in the *Parody case* as a supplementary opinion addressing the issue was attached to the judgment. In the supplementary opinion, Justice Tamaki Shoichi posited the goal of copyright law as: "…to strike a balance between the requirement of the protection of copyright as a private right of the author and the social needs based upon the aspect of copyrighted works as a public property." Justice Tamaki Shoichi acknowledged the significance and value of a parody, but also stated that, if the only way a parody can be created is to infringe upon an author's moral rights, it can never be justifiable and explicitly recognized the fact that "the expression known as

89 *Ibid*. at 2. See part 5. 3, below, for more on the topic of moral rights in Japan and a discussion of the role they played in this case.

90 *Ibid*. at 2.

91 *Ibid*. at 3.

92 *Supra* note 32 at 6.

parody using a photograph…has fatal limits in relation to the author's moral rights".

It is surprising, therefore, that the supplement ends with the denial that Japanese copyright law completely prohibits parodic expression of the sort attempted by the defendant. Justice Tamaki Shoichi notes the court's decision does not rule out the option of the defendant taking his own photograph which imitates the expressive form of the plaintiff's original, and then adding his own parodic elements to it. This option is likely of little practical appeal to parodists such as the defendant who would likely have been unwilling to incur the time and expense of flying to a mountain range, hiring a group of professional skiers, and attempting to photograph them in the same way as a professional photographer, merely to create a parody of the scene. In sum, the current state of parody in Japan appears to favour the moral rights of owners completely over users, with the effect that practically any attempt at parody by a user will be an inexcusable infringement.

4.4 Comparing the *Parody case* with the Canadian and American Case Law

While the Japanese statutory quotation exception bears similarities with its Canadian and American counterparts, its judicial application differs greatly. The transformative nature of a parody, which ranked so highly in the American court's decision in *Campbell*, did not even form a part of the Japanese court's test. Even though the Japanese court acknowledged that the purpose of the defendant's work was to criticize the original work, they explicitly stated that this did not affect their decision.[93] Another element which did not form part of the Japanese test, nor was it even mentioned, was the effect on the market for the original work. In contrast, the market effect was clearly a key point of the American court's analysis in *Campbell* and

93 *Ibid*. at 2.

one of 6 factors to consider which were outlined by the Canadian court in *CCH*.

Unlike the fair dealing situation in Canada, the Japanese jurisprudence shows no signs of changing, at least with respect to parody.[94] In 1999, the case of *Konami, K.K. v. Ichiro Komami* involved the claim that the defendant infringed the plaintiff's copyright by publishing a pornographic adaptation of a popular video game character developed by the plaintiff corporation.[95] These facts appear substantively quite similar to the facts before the Quebec Court of Appeal in *Productions Avanti*. Both cases deal with the defendant's use of familiar elements of the plaintiff's well known work in their own pornographic work in order to exploit the popularity the plaintiff has garnered in his work. Yet, in *Konami*, parody and the quotation exception were not raised as a defence, nor even mentioned by the Court, even though the defendant was described as a parodist.[96] This suggests that the stifling effect of the Supreme Court of Japan's decision in the *Parody case* is still influential.[97] The court ultimately found in the plaintiff's favour that the defendant had infringed its copyright and its moral right of integrity in the work.

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94 See Ganea & Heath, *supra* note 11 (referring to the *Parody* case as the leading case of parody in Japan at 69).

95 1696 Hanrei Jiho 145 (Tokyo Dist. Ct., Aug. 30, 1999), translated in, Kenneth L. Port, *Japanese Intellectual Property Law in Translation : Representative Cases and Commentary*, 34 Vand. J. Transnat'l L. 847 (2001), reprinted in Kenneth L. Port & Gerald Paul McAlinn, C*omparative Law : Law and the Legal Process in Japan* 2 d ed.(Durham, North Carolina : Carolina Academic Press, 2003) at 677 [*Konami*].

96 *Ibid*. at A(1).

97 However, a recent online newspaper report claims that the situation may be changing in Japan as the government department responsible for intellectual property has planned a"fair use"stipulation to be included into the copyright law "as early as next year". Yasukazu Akada, "Fair use' stipulation planned for intellectual property" Asahi Shimbun (25 May 2008), online : Asahi <http : / / www.asahi.com / english / Herald-asahi / TKY

5. MORAL RIGHTS

The analysis in this section discusses the legislative treatment of moral rights and how they interact with fair use. Rights under copyright legislation may be classified under the headings of "moral rights" and "economic rights". Moral rights are those which relate to the protection of the personhood rights of the author. They include the author's right to object to their work being altered (integrity right), the right to be associated with the work by name (attribution right), the right to prevent a work being made public (disclosure), and the right to withdraw a work even after they have transferred the exploitation rights over it to another person (retraction).[98] Moral rights exist independently of the author's economic rights, the latter of which include production and reproduction of a work and other methods of control over the commercial exploitation of the work. The value a country places on moral rights of authors can have a substantial effect upon the outcome of cases involving fair use exceptions.

5.1 Moral Rights in U.S. Law

The *U.S. Act* acknowledges two basic moral rights, attribution and integrity, which are afforded only to authors who have created a work of visual art. Although these rights may not be transferred by the author, they are not well protected: this section explicitly states that moral rights are subject to the application of section 107.[99] Accordingly, a finding of fair use will override both economic and moral rights of authors in the United States. Since the work at issue in *Campbell* was a musical composition, not a work of visual art, moral rights were not raised as an issue.

200805280068.html>.

98 Henry Hansmann & Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26: 1 J. Legal Stud. 95 at 95-96.

99 *Supra* note 2, § 106 A.

5. 2 Moral Rights in Canadian law

The *Canadian Act* also protects two moral rights of authors: attribution and integrity.[100] Unlike the *U.S. Act*, however, moral rights apply to authors of all works, not just those which are considered visual.[101] However, the *Canadian Act* is ambiguous as to whether moral rights are subject to infringement by the fair dealing exceptions. From a strict literal interpretation, it appears that they are not. The fair dealing sections do not make any mention of moral rights. They merely provide that fair dealing "does not infringe *copyright*" (emphasis added).[102] Since moral rights are not encompassed by the term "copyright" anywhere else in the act, it is unlikely that they are here. Presumably, if moral rights were intended to be included, it would be done explicitly. Further, with respect to infringement of moral rights, the *Canadian Act* states that "*[a]ny* act or omission that is contrary to any of the moral rights…is, in the absence of consent by the author, an infringement" (emphasis added).[103] Consequently, fair dealing appears to apply only to economic rights and moral rights may be infringed only with consent of the author.[104]

If a parodist ridicules a work, would this violate the author's moral rights? There is no jurisprudence on this issue. Leaving aside the attribution requirement,[105] the question is whether a given parody

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100 *Supra* note 4, s. 14.1(1). As in the US, these moral rights reside with the author and are not transferable.

101 However, moral rights do not extend to performers, sound-recording makers, and broadcasters since they are not considered "authors", nor do they create "works". David Vaver, *Essentials of Canadian Law: Copyright Law* (Toronto: Irwin Law Inc., 2000) at 158, n.2.

102 *Supra* note 11, s. s. 29, 29.1-29.2 [emphasis added].

103 *Ibid*., s. 28.1 [emphasis added].

104 Moral rights may be waived by the author: s. 14.1(2).

105 Which in any event is mirrored in the attribution requirements of s. 29.1.

modifies the work "to the prejudice of the honour or reputation of the author."[106] This wording is susceptible to different interpretations. At its most expansive, any ridiculing of a work may injure the reputation of the author, as establishing on an objective and subjective basis.[107] A narrower reading of this provision may exempt parody from moral rights liability on the basis that no one would perceive the parody to be the actual work of the author, and thus the reputation of the author in connection with her artistic works is preserved. The perception that the modified work is the work of the author has been an element to right of integrity case law thus far in Canada.[108]

5.3 Moral Rights in Japanese Law

Article 50 of the *Japanese Act* contains an important limitation to the application of the quotation exception of Article 32. It provides that Articles 30 through 49 "shall not be construed as affecting the moral rights of an author."[109] In addition to the moral rights of attribution and integrity,[110] Japanese authors are also granted the disclosure right to make a work public.[111] Furthermore, the Japanese Act provides for a modified integrity right: the protection of honour and reputation, in Article 113(5). This Article, apparently, is intended to capture uses of works which can not fall under Article 20 because they do not modify or distort the original work, yet they "present the unaltered work in a context which is prejudicial to the honour of the author".[112]

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106 *Canadian Act*, supra note 4, at 28.2

107 *Snow v. Eaton Centre Ltd* (1982), 70 C.P.R.(2 d) 105 (Ont. H.C.) stands for the proposition that harm to reputation must be subjectively felt by the author as well as objectively verified by (presumably) like artists.

108 See *Theberge, supra* note 84 and *Snow v. Eaton Centre, ibid*.

109 *Supra* note 3, art. 50.

110 *Ibid*., arts. 19 and 20, respectively.

111 *Ibid*. art. 18.

112 Tatsuhiro Ueno, "Moral Rights" in Ganea, Heath & Saitô, supra note

One of the key issues in the *Parody case* surrounded the author's moral right of integrity.[113] The protective approach of the Japanese court in this respect renders moral rights automatically infringed by parodies which take the form of a montage photograph. The court recognized that such an art form has "fatal limits in relation to the author's…right to maintain the [integrity] of the work".[114] Justice Tamaki Shoichi outlines the problem: for a parody to be effective, it must use enough of the original work so that its inclusion in the subsequent work is recognizable to viewers. "[U]sing parts of the original which are so fragmented that the identity of the [o]riginal… is completely lost" will make a parody ineffective since the audience must recognize the original work which the subsequent author is criticizing. Accordingly, in order to make a photograph identifiable to the viewer, the subsequent user would have to include a significant part of it in a "completely identical manner".

However, if the original is included in a large scale, it "cannot be immune from the criticism that it damages the completeness of the [o]riginal" since "parody inevitably accompanies modification". Even though the court recognized that the goal of copyright law calls for the author's rights to be balanced against the needs of society, this

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12, 41 at 47-48. The counterpart in the Canadian Act would be Section 228. 2(1)(b). In addition to the above moral rights of authors, Japan also grants specific moral rights to performers. Article 90-2 provides performers with the moral right to be named in context with their performance, while Article 90-3 protects the right to preserve the integrity of their performance.

113 It should be noted that the text of this case refers to the author's right of "identity" rather than "integrity". However, since the reason for infringement does not involve the author's right to attribution by name, but rather appears to center around the author's right to maintain the completeness of the work, an issue which would more properly be termed the right of integrity, we have proceeded under the assumption that incorrect nomenclature to describe this right was used in the translation of the case.

114 *Supra* note 21, at supplementary opinion of Justice Tamaki Shoichi.

apparently is not the case when a it involves moral rights. It remains to be seen whether this reasoning would produce the same result when applied to parodies of other art forms such as written or musical. It is also worth noting that the *Konami* case was decided in the plaintiff's favour, in large part, on the basis of a moral rights infringement. This is interesting because moral rights are rights which are personal to the author of a work in Japan, just like they are in Canada and the United States. As such they could not be alienated, nor assigned to a corporate plaintiff such as Konami, K.K. This lends further support to the assertion that moral rights have unusual importance in Japanese copyright law.

It is clear that moral rights of authors play a prominent role in Japanese copyright legislation. The larger number of moral rights granted, along with the express protection from limitations makes moral rights easier to infringe and an infringement more difficult to excuse. In complete contrast, the *U.S. Act* does not go beyond (and perhaps does not even meet) the minimum requirements required of it by the *Berne Convention*[115] and explicitly reserves the right to override the moral rights it does grant by way of the fair use exception. The *Canadian Act*, although uncertain as to limitations on moral rights, appears to represent somewhat of a middle ground.

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115 The *Berne Convention*, *supra* note 2, art. 6*bis* requires protection of the moral rights of attribution and integrity and it does not state that a country may limit the application of those rights to a specific type of author, in the manner that the United States had limited protection to authors of visual works. This has led scholars to question whether the United States is in violation of it's international treaty requirements. For a discussion on this see Tyler G. Newby, "What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?" (1999) 51: 6 Stan. L. Rev. 1633.

CONCLUSION

This paper has explored the similarities and differences between fair use and parody in American, Canadian and Japanese copyright law. The irresistible conclusion is that American law is much more permissive in this respect than either Japanese or Canadian law. Unresolved questions remain however. In future cases, American courts will be forced to more clearly delineate the nature of parody from other forms of humour which are not protected under fair use, i.e. satire. Moreover, less "transformative" parodies or ones that compete with an anticipated market for the original work may fall outside the protection afforded under fair use. Canadian law faces the challenge of reconciling restrictive statutory language with a judicial propensity to expand fair dealing doctrine in general. Moreover, the question of whether moral rights are implicated by parody remains unanswered. On the Japanese front, there appears little room for parody under the restrictive interpretations of the courts in connection with both moral rights and dominant-subordinate distinction.

Appendix

Berne Convention

Article 9
Right of Reproduction :
1.Generally ; 2.Possible exceptions ; 3.Sound and visual recordings

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a

normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10
Certain Free Uses of Works:
1.Quotations; 2.Illustrations for teaching; 3.Indication of source and author

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

TRIPs Agreement

Article 13
Limitations and Exceptions

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.

Canadian Act

MORAL RIGHTS INFRINGEMENT

Infringement generally

28. 1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

Nature of right of integrity

28. 2(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified; or

(b) used in association with a product, service, cause or institution.

Where prejudice deemed

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

When work not distorted, etc.

(3) For the purposes of this section,

(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or

(b) steps taken in good faith to restore or preserve the work shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

EXCEPTIONS

Fair Dealing

Research or private study

29. Fair dealing for the purpose of research or private study does not infringe copyright.

Criticism or review

29. 1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

News reporting

29. 2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

U.S. Act

§ 106 A. Rights of certain authors to attribution and integrity

(a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—
  (1) shall have the right—
    (A) to claim authorship of that work, and
    (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
  (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
  (3) subject to the limitations set forth in section 113 (d), shall have the right—
    (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
    (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106 A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Japanese Act

Article 32.(Quotations)
(1) It shall be permissible to quote from and thereby exploit a work already made public, provided that such quotation is compatible with fair practice and to the extent justified by the purpose of the quotation, such as news reporting, critique or research.

(2) It shall also be permissible to reproduce, as explanatory materials, in newspapers, magazines and other publications informational materials, public relations materials, statistical materials, reports and other similar works which have been prepared by organs of the State or local public entities or incorporated administrative agencies or local incorporated administrative agencies for the purpose of general public dissemination and made public under their authorship; provided, however, that the foregoing shall not apply where there is an express indication [on the work] that such reproduction has been expressly prohibited.

Article 50.(Relationship with moral rights of author)
The provisions of this Subsection shall not be construed as affecting the moral rights of an author.